

# VOTING RIGHTS IN NEW YORK CITY: 1982–2006

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## I. INTRODUCTION TO THE VOTING RIGHTS ACT

At the time of the 1982 amendments to the Voting Rights Act (VRA) and the continuation of Section 5 coverage to three counties in New York City, the city was at a major crossroads regarding faithful compliance with the mandates of the Act. Just one year earlier in the largest city in the United States, the largest municipal election apparatus in the country was brought to a screeching halt when the federal courts enjoined the September mayoral primaries—two days before Election Day—because the city failed to obtain preclearance of new (and discriminatory) city council lines and election district changes.<sup>1</sup> The cost of closing down the election was enormous, and a lesson was painfully learned: minority voters knew how to get back to court, the courts would not stand by idly in the face of obvious Section 5 noncompliance and business-as-usual politics would no longer be the same. Weeks later, the Department of Justice (DOJ) would not only officially deny preclearance to the city council plan, but would find that its egregious disregard of the burgeoning African-American and Latino voting strength in the city had a discriminatory purpose and a discriminatory effect.<sup>2</sup>

In this context, the 1982 extension of Section 5 to parts of New York City should not have seemed so anomalous to a country that continued to

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<sup>1</sup> *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981).

<sup>2</sup> *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 U.S. Dist. LEXIS 11481, at \*7 (S.D.N.Y. Aug. 3, 1992).

harbor stereotypes about how voter discrimination was a monopoly of the Deep South. For racial and language minorities in New York City, the truth was otherwise. New York's history was replete with numerous examples in which the color of one's skin, the foreignness of one's ancestry and the difficulty with which one brokered the English language all worked to deny the franchise to its citizens. Similar to the 1970 coverage of the New York, Kings and Bronx counties under Section 5,<sup>3</sup> the official pronouncement that New York City continued to require special vigilance when it came to the ballot box was not surprising to its African-American, Puerto Rican and Chinese-American residents. Indeed, in a related context, the city itself would agree when it conceded in 1992 that its failures in the past to comply with the VRA required special, remedial measures to fully integrate racial and language minorities into decision-making bodies.<sup>4</sup>

Section 5 coverage in 1970, and again in 1982, was necessary, as was the coverage of the language assistance provisions of Section 4(f)(4) and Section 203 of the Act. The latter was particularly relevant since New York City's Puerto Rican community was instrumental in showing the country that bilingual election systems could work—and in the country's largest city at that.<sup>5</sup>

Three counties in New York City—Bronx, Kings and New York—are covered under Section 5, requiring preclearance of all election changes.<sup>6</sup> Bronx and Kings Counties are also covered under Section 4(f)(4) of the Act, which requires preclearance for certain language minority citizens.<sup>7</sup> At present, seven counties in the state are covered under Section 203 of the Act, requiring language assistance in voting for certain language minority citizens: Spanish-language assistance in Bronx, Nassau, Kings, New York, Queens, Suffolk and Westchester Counties; Chinese-language assistance in Kings, New York and Queens Counties; and Korean-language assistance in Queens County.<sup>8</sup> Finally, the VRA's federal observer provisions have been implemented in New York City on multiple occasions as well to prevent violations of the VRA against racial and language minority groups.<sup>9</sup>

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<sup>3</sup> See Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 207–08 (2005).

<sup>4</sup> *Ravitch*, 1992 U.S. Dist. LEXIS 11481 at \*16. See Appendix C.

<sup>5</sup> Cartagena, *supra* note 3, at 209–10.

<sup>6</sup> See 28 C.F.R. 51 app. (2007).

<sup>7</sup> See 28 C.F.R. 55 app. (2007).

<sup>8</sup> See *id.*

<sup>9</sup> See generally *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12–21 (2005) [hereinafter *Fung Testimony*] (testimony of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund).

New York is unique in the way the Voting Rights Act operates on multiple levels and on such a large scale. The complexities and breadth of the coverage of the temporary provisions of the VRA are significant in New York City: approximately 6106 election districts with 7780 voting machines and over 30,000 poll workers are in operation in a city of 8 million residents.<sup>10</sup> And yet, as will be explained in this report, the interconnection between the requirements of the VRA is an important element in the VRA's reach in the city. Federal observers—deployed under the authority of the VRA—provide information that is then used by the U.S. Attorney General in assessing the fairness of election changes for language minority voters.<sup>11</sup> Litigation under Section 2 of the Act is used to bolster denials of preclearance under Section 5.<sup>12</sup> And Section 203 compliance issues become the focus of Section 5 inquiries by the DOJ.<sup>13</sup> Thus, despite its coverage of only a few counties in New York, the temporary provisions of the VRA, in tandem with litigation filed outside of Section 5 and Section 203, have addressed a breadth of voting rights issues in the city.

This report and its appendices document the state of New York voting rights from the end of 1982 through the present, as part of a larger attempt to provide Congress a full record with which to consider the reauthorization of certain provisions of the VRA, which are set to expire in 2007.<sup>14</sup> This period in New York City electoral politics—the nearly twenty-five years from 1982 through the present—is a fascinating one in its own right. It contains a series of unprecedented, but in reality, long-overdue, and bitter-sweet firsts: the first and only African-American mayor (David Dinkins);<sup>15</sup> the first and only Latino candidate to finally capture the nomination for mayor of one of the two major parties (Fernando Ferrer);<sup>16</sup> the first and

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<sup>10</sup> Telephone Interview with Valerie Vasquez-Rivera, Press Agent, New York City Board of Elections (Jan. 4, 2008).

<sup>11</sup> See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Kathy King, Gen. Counsel, Bd. of Elections (May 13, 1994) (on file with author) (discussing Submission No. 93-4733).

<sup>12</sup> *Chinatown Voter Educ. Alliance v. Ravitz*, Civ. No. 06-0913 (S.D.N.Y. Feb. 6, 2006).

<sup>13</sup> See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Blaise Parascandola, Acting Gen. Counsel, Bd. of Elections (Aug. 9, 1993) (on file with author) (discussing Submission Nos. 92-4334, 92-4790, 93-1522 and 93-0057).

<sup>14</sup> After this report was written and submitted to Congress, the minority language and preclearance provisions of the VRA were renewed. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

<sup>15</sup> See R.W. Apple, Jr., *The 1989 Elections; Black Success with Measured Approach*, N.Y. TIMES, Nov. 8, 1989, at A1.

<sup>16</sup> See Adam Nagourney, *Ferrer's Choice: Appeal to Pride, or Embrace All*, N.Y. TIMES, Sept. 27, 2001, at D1.

only Asian-American to finally win a city council seat (John Liu);<sup>17</sup> and the first and only African-American to win a statewide office (Carl McCall).<sup>18</sup> But the period also includes a number of debates and challenges that forced the city to look to its unfortunate, racially-based past in the area of voting rights—such as the racist attitudes of New York’s Constitutional Conventions of the 1800s—and to look to its future—such as the pending court challenge to force full language assistance for Asian-American voters.<sup>19</sup>

Effectively, the political empowerment of racial and language minorities in New York City since the 1982 amendments to the VRA has made great strides, while also leaving much more work to be done to eliminate discrimination in the area of voting. Election Day practices that impede the full participation of racial and language minorities, unfair redistricting plans and inadequate language assistance are repetitive barriers to the full enfranchisement of the protected classes under the VRA. The preclearance process under Section 5 of the VRA has been particularly successful in blocking discriminatory changes outright, and equally important, in preventing unfair changes in election law and practice from ever coming to light. The result, we posit, is that New York City, overall, still needs the protections of Section 5, the promise of Section 203 and the vigilance required in the federal observer provisions.

## II. SECTION 5 PRECLEARANCE ACTIVITY BY THE U.S. ATTORNEY GENERAL IN NEW YORK CITY: OBJECTIONS AND MORE INFORMATION REQUESTS

Since 1982,<sup>20</sup> Section 5 preclearance requests in New York City have been almost exclusively lodged with the DOJ. Throughout the period, with only one exception related to the creation of elected judgeships in 1994,<sup>21</sup> New York City has consistently availed itself of the administrative pre-

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<sup>17</sup> Jonathan P. Hicks, *The 2001 Elections: The Council; New Look Shaped by the Primary Comes into Focus*, N.Y. TIMES, Nov. 7, 2001, at D6.

<sup>18</sup> Salim Muwakkil, *Blacks on the Ballot: More African Americans are Running for Governor than Ever Before*, IN THESE TIMES, Mar. 1, 2002, available at <http://www.inthesetimes.com/article/1427>.

<sup>19</sup> *Chinatown Voter Educ. Alliance v. Ravitz*, Civ. No. 06-0913 (S.D.N.Y. Feb. 6, 2006). See *infra* Part IV.

<sup>20</sup> Section 5 preclearance activity for New York’s three covered counties started in 1974, after litigation that temporarily exempted New York from coverage and then reopened the matter once again to Section 5 review.

<sup>21</sup> See Letter from Loretta King, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to G. Oliver Koppell, Attorney Gen., State of N.Y., Dep’t of Law (Dec. 5, 1994) (discussing Submission No. 93-0672); see also Department of Justice, Section 5 Objection Determinations: New York, [http://www.usdoj.gov/crt/voting/sec\\_5/ny\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm) (last visited Apr. 5, 2008).

clearance process, instead of seeking preclearance in the U.S. District Court for the District of Columbia.<sup>22</sup> The administrative response by the DOJ to requests for preclearance involves the grant or denial of preclearance requests and/or the issuance of More Information Request letters to the submitting jurisdiction.<sup>23</sup> In the period from 1990 to 2005 alone, a total of 2611 changes affecting New York's three covered counties (Bronx, Brooklyn and New York Counties—all located in New York City) were submitted to the DOJ.<sup>24</sup> While the overall number of objections is relatively low compared to other Section 5 jurisdictions,<sup>25</sup> the variety of changes that have resulted in denials of preclearance is telling. Methods of elections in community school board contests, packing and fracturing of minority communities in redistricting plans, changes from elected positions to appointed positions, language assistance barriers and judicial elections have all been subject to objections preventing their implementation under Section 5. These proposed objections, along with the role of More Information Requests from the DOJ, are discussed below.

#### A. SECTION 5 OBJECTIONS POST-1982

Since 1982, the U.S. Attorney General has interposed fourteen objections under Section 5 in seven separate letters.<sup>26</sup> Indeed, two-thirds of all the objections ever interposed by the Attorney General in New York City were made after 1982.<sup>27</sup>

*July 19, 1991 Objection: New York City Council Redistricting Plan Discriminates Against Latino Voters:* Following a pattern developed with the 1970s and 1980s redistricting efforts,<sup>28</sup> New York once again could not

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<sup>22</sup> Luis Ricardo Fraga & Maria Lizet Ocampo, The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests 1 (Feb. 9, 2006) (paper presented at the symposium Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law, and the Institute for Governmental Studies, University of California, Berkeley, Washington, D.C.), available at [http://www.ucdc.edu/faculty/Voting\\_Rights/Papers/5%20-%20Fraga%20&%20Ocampo.pdf](http://www.ucdc.edu/faculty/Voting_Rights/Papers/5%20-%20Fraga%20&%20Ocampo.pdf).

<sup>23</sup> See *id.* at 4–5.

<sup>24</sup> *Id.* at 22 tbl.2. We have yet to analyze data regarding the total number of submissions for preclearance submitted in the period from 1983 through 1989, inclusive. What is clear, however, is that there are no Section 5 objections on file from 1983 through 1989.

<sup>25</sup> See *id.*

<sup>26</sup> See Department of Justice, *supra* note 21.

<sup>27</sup> See *id.*

<sup>28</sup> Submission No. V6107 for preclearance of congressional, state assembly and state senate redistricting plans was the subject of an Attorney General objection in April 1974; Submission No. 81-1901 regarding the New York City Council redistricting plan met with an objection in October 1981;

prove the absence of discrimination in the adoption of state and city redistricting plans after the 1990 Census, resulting in a Section 5 objection by the Attorney General.<sup>29</sup> At issue in the city council redistricting effort was the creation of a new paradigm of fifty-one councilmanic districts, created by voter referendum after the U.S. Supreme Court ruled in *Board of Estimate v. Morris* that the city's Board of Estimate was unconstitutionally devised in violation of the "one person, one vote" principle of the Equal Protection Clause.<sup>30</sup> The task, in the opinion of the DOJ, was:

a job of staggering proportions, namely, to divide a city of over seven million people into 51 new council districts while addressing the historical inability of the many minority communities in the city to elect candidates of their choice.<sup>31</sup>

Despite its efforts, the New York City Districting Commission created a plan that had an impermissible, discriminatory effect on Latino voters in at least two separate areas of the city: Williamsburg/Bushwick in Kings County and East Harlem/Bronx in New York and Bronx Counties.<sup>32</sup> The DOJ objected to the unnecessary packing of Latino voters in the Williamsburg district and the denial of a fair chance of electing candidates of choice in the adjacent Bushwick district.<sup>33</sup> In East Harlem, the objection centered on the failure to create a district that crossed county lines that would give Latino voters a chance to elect candidates of choice.<sup>34</sup>

*June 24, 1992 Objection: New York State Assembly Redistricting Plan Discriminates Against Latino Voters:* Faced with an identifiable, compact community of Latino voters, many of them from the Dominican Republic, in Washington Heights in Northern Manhattan, New York state authorities were stopped from fracturing the community between two assembly districts: District 71, represented by an African-American, Herman Farrell,

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and the Attorney General interposed an objection to the congressional, state senate and state assembly redistricting plans in June 1982 (Submission No. 82-2462). See Department of Justice, *supra* note 21.

<sup>29</sup> Submission No. 91-1902 for the New York City Council resulted in an objection; Submission No. 92-2184 for the state assembly redistricting plan also resulted in a Section 5 objection. See Department of Justice, *supra* note 21.

<sup>30</sup> 489 U.S. 688 (1989).

<sup>31</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Judith Reed, N.Y. City Districting Comm'n, at 2 (July 19, 1991) (on file with author) (discussing Submission No. 91-1902) (emphasis added).

<sup>32</sup> *Id.* at 2-3.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 2-3. The DOJ also went out of its way to comment on the districting of Queens County, despite the fact that the county is not covered under Section 5 of the VRA. The concern in Queens centered on the plan's overall effects on Latino representation in the new fifty-one-member city council. Specifically, District 21 in Queens did not present, in the Attorney General's view, an equal opportunity for Latinos in that borough to participate in the political process. *Id.* at 3.

and District 72, represented by a non-Hispanic white, John Brian Murtagh.<sup>35</sup> The objection letter highlighted the existence of Racially Polarized Voting in that area. It also found that New York knowingly proceeded to fracture the Latino community and reduce its ability to elect candidates of choice:

The proposed district boundary lines appear to minimize Hispanic voting strength in light of prevailing patterns of polarized voting. Moreover, the state was *aware* of this consequence given its own estimates of likely voter turnout in Districts 71 and 72.<sup>36</sup>

In 1996, Adriano Espaillat won the election in Assembly District 72, becoming the first Dominican ever elected to the New York legislature.<sup>37</sup>

*August 9, 1993 Objection: New York City Board of Elections Discriminates Against Chinese-American Voters by Failing to Provide Appropriate Language Assistance:* A proposed Board of Elections Chinese-language targeting program, intended to serve Chinese-American citizens who were limited-English proficient and in need of information in their native language, was categorically rejected by the DOJ under Section 5.<sup>38</sup> The Board's plan failed to translate the actual ballot on its voting machines, failed to include any measures for quality control over the accuracy or completeness of any translations provided, failed to acknowledge the presence of different dialects of the Chinese language among its voters, failed to train Chinese translators or interpreters, failed to allocate available translators to election districts according to need (one translator would be assigned to one election district whether it had 261 Chinese-speaking voters or 2629 such voters) and failed to appropriately target language assistance in either New York, Kings or Queens Counties.<sup>39</sup> Specifically, since polling sites in New York City regularly contain multiple election districts, the Board's proposed targeting plan of limiting Chinese-language information to districts that had 200 or more Chinese eligible voters would, in the opinion of the DOJ, severely underserve Chinese voters throughout the three Section 203-covered counties.<sup>40</sup> For Kings and New York Counties, the

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<sup>35</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Honorable Dean G. Skelos & Honorable David F. Gantt, Legislative Task Force on Demographic Research & Reapportionment, at 2-3 (June 24, 1992) (discussing Submission No. 92-2184); *see also* Department of Justice, *supra* note 21.

<sup>36</sup> Letter from James P. Turner, *supra* note 35, at 2-3 (emphasis added).

<sup>37</sup> Jonathan P. Hicks, *Rivals Renew Contest for Dominican Vote*, N.Y. TIMES, Apr. 6, 1998, at B4.

<sup>38</sup> Letter from James P. Turner, *supra* note 13, at 1-3; *see also* Department of Justice, *supra* note 21.

<sup>39</sup> Letter from James P. Turner, *supra* note 13, at 1-3.

<sup>40</sup> *Id.* at 2.

plan would have reached only 50% of the 34,000 Chinese-American voters that qualified for assistance.<sup>41</sup> Accordingly, the DOJ objected to each of the four changes submitted in the plan as applied in New York and Kings Counties.<sup>42</sup>

The plan was modified substantially after the denial of preclearance, but is nonetheless the subject of controversy. Indeed, in 2006, Chinese voters sued to enforce the guarantees of Section 203 in *Chinatown Voter Education Alliance v. Ravitz*.<sup>43</sup>

*May 13, 1994 Objection: New York City Board of Elections Discriminates Against Chinese-American Voters by Failing to Translate Candidates' Names and Machine Operating Instructions:* In 1994, the DOJ denied preclearance to Chinese-language election procedures in Kings and New York Counties in two material respects: the failure to translate candidates' names on machine ballots during both primary and general elections and the failure to translate operating instructions for voting machines during general elections.<sup>44</sup> In doing so, the DOJ did not accept various arguments by the Board of Elections that space and/or time limitations prevented it from complying with Section 203 and Section 5, that the translation of candidates' names into Chinese would confuse voters or that the provision of sample ballots on site would solve any problem associated with failing to translate directly on the machines.<sup>45</sup>

Regarding the provision of translations for operating instructions, the DOJ relied in part on the documentation provided by its own federal observers to conclude that "many Chinese-speaking voters have encountered difficulties as a direct result of the Board's failure to translate these instructions."<sup>46</sup> However, with respect to the Board's refusal to translate candidates' names, even where space on the ballot existed, Assistant Attorney General Deval L. Patrick was even more explicit in stating the obvious:

Our analysis shows that a candidate's name is one of the most important items of information sought by a voter before casting his or her ballot for a particular candidate. . . . For voters who need Chinese-language materials, the translation of candidates' names is important because Roman

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<sup>41</sup> *Id.* at 1–2. While Queens County is not a Section 5 jurisdiction, the DOJ also noted that in Queens County, where 20,000 voting age Chinese-speaking citizens are limited-English proficient and eligible for language assistance, not one election district would qualify for Chinese voting information under the Board's plan. *Id.* at 3.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> No. 06 Civ. 0913 (S.D.N.Y. Feb. 6, 2006). See *infra* Part IV.

<sup>44</sup> Letter from Deval L. Patrick, *supra* note 11, at 2–3.

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

<sup>46</sup> *Id.* at 3.



characters are completely different from Chinese characters. Consequently, it would be extremely difficult, if not impossible, for these voters to understand names written in English.<sup>47</sup>

The New York City Board of Elections conceded these points and modified its plan accordingly.<sup>48</sup>

*December 5, 1994 Objection: New York's Creation of Additional Elected Judgeships for the New York Supreme Court and Court of Claims Discriminates Against African-American and Latino Voters:* By 1994, the State of New York had continued to run elections for justices to the Supreme Court of New York—New York's court of first instance—as per the mandates of its constitution.<sup>49</sup> Justices are elected by the voters from judicial districts that, in some cases, are coterminous with county boundaries in New York City.<sup>50</sup> On a number of occasions, however, particularly in 1982, the State created additional positions for justices and allocated them among the districts without obtaining the necessary preclearance under Section 5.<sup>51</sup> These positions were filled in the normal course—a process that limits the political party's nominees to a delegate convention conducted by the parties and not an open, competitive primary.<sup>52</sup> Moreover, the State devised a practice of using its appointment power to select judges to the New York Court of Claims that were then transferred to the supreme court, thus circumventing the election process.<sup>53</sup> These issues and others came to the forefront in 1994 when the State finally sought preclearance, retroactively, for some changes, and prospectively, for a number of proposed changes in the manner of electing justices to the supreme court.<sup>54</sup> Specifically, the State sought retroactive preclearance to the creation of additional judgeships in the supreme court and the court of claims that dated back to 1982 and 1994, respectively.<sup>55</sup> It also sought preclearance of legislation in 1994 that established new procedures designating candidates to particular supreme court positions and the creation of one additional supreme court judgeship.<sup>56</sup> The DOJ denied preclearance to each of the five changes.<sup>57</sup>

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> Fung Testimony, *supra* note 9, at 19.

<sup>49</sup> See Letter from Loretta King, *supra* note 21, at 1.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2–3.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.* at 2, 3.

<sup>57</sup> *Id.* at 4.

The DOJ completed an encompassing analysis of the closed door process of nominating judges for the supreme court through political party nominating conventions, a process “dominated by a relative handful of political leaders” and attacked repeatedly as being “racially discriminatory.”<sup>58</sup> Effectively, party delegates, controlled by the party leaders, monopolized the selection of the candidates for the Democratic Party primaries, which, in a city like New York, was tantamount to securing victory in the general election.<sup>59</sup> The practice shut out voter participation in the primaries and hindered competition among potential judicial candidates.<sup>60</sup>

In this instance, the DOJ made a number of important findings to support its objection under Section 5: (1) that “[t]he legislature was aware of the racially discriminatory nature of the election system” that was well-documented before its 1994 proposed legislation;<sup>61</sup> (2) that racial minorities were the majority of the voting age population in both the Second Judicial District (Kings and Richmond Counties) and the Twelfth Judicial District (Bronx County);<sup>62</sup> (3) that New York created and maintained fourteen “unprecleared judgeships” in the Second Judicial District that produced “disproportionate results disfavoring minority voters”;<sup>63</sup> (4) that patterns of Racially Polarized Voting in the Section 5-covered counties of New York contributed to these election results;<sup>64</sup> (5) that “[t]he slating process used to nominate judicial candidates to the supreme court prevents minority voters from having an equal opportunity to elect candidates of their choice”;<sup>65</sup> (6) that minority voters have less access to the slating process than white voters;<sup>66</sup> (7) that under the present system, minority voters would have to wait “until well into the next century”<sup>67</sup> to have an equal opportunity to elect candidates of their choice because of the “long judicial terms of the office and the ingrained tradition of renominating incumbent judges, most of whom are white”;<sup>68</sup> (8) that the 1994 procedure that designated specific

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<sup>58</sup> *Id.* at 2.

<sup>59</sup> *See id.* at 2–3. Years later, these same findings were the basis of a successful constitutional challenge to the candidate selection process for these same primaries in *López Torres v. New York State Board of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). For a full discussion of *López Torres*, see Appendix C.

<sup>60</sup> Letter from Loretta King, *supra* note 21, at 2–3.

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.* at 1.

<sup>63</sup> *Id.* at 2.

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

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.* A remarkably prescient observation in light of the *López Torres* decision in 2006. See Appendix C.

<sup>68</sup> Letter from Loretta King, *supra* note 21, at 3.

candidates to particular positions on the court had no basis in state law and was intended instead to put minority candidates, not white candidates, at risk by designating them to unprecleared positions;<sup>69</sup> and (9) that the State, in 1982 and 1990, created fictitious court of claims judgeships, appointed by the governor, of judges “who never sit on the court of claims” and are effectively transferred to the supreme court in violation of the New York Constitution, thus changing “the method of selecting a class of supreme court judges from election to appointment.”<sup>70</sup>

The U.S. Attorney General concluded that New York was clearly unable to meet its burden of showing that the previously unprecleared and currently proposed changes to judges’ elections were made without a discriminatory purpose or with the absence of a discriminatory effect against racial and language minorities.<sup>71</sup>

*November 15, 1996 Objection: New York City Discriminates Against African-American and Latino Voters by Replacing Elected Community School Board Members with Appointed Trustees:* New York City ran its public schools under a dual system of local control<sup>72</sup> and a central authority that resided in an appointed board of education.<sup>73</sup> The mayor and each of the five borough presidents appointed members of the central board of education, and they in turn appointed a chancellor.<sup>74</sup> Community school boards had the authority to appoint the superintendent of their respective community school district.<sup>75</sup> In 1996, the Chancellor advised the elected members of Community School District 12 in Bronx County that they would be relieved of their duties, replaced temporarily by three appointed trustees and then replaced by five appointed trustees, who would assume their duties until the next scheduled election.<sup>76</sup> The DOJ interposed an objection under Section 5 to the substitution of elected officials with appointed officials.<sup>77</sup>

The DOJ found that Latinos comprised 54% of the electorate in School District 12 and that African-Americans comprised 36% of the elec-

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<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.* at 3–4.

<sup>72</sup> This dual system is referred to as decentralization and is embodied in thirty-two community school districts, each led by a nine-member, elected community school board.

<sup>73</sup> See N.Y. EDUC. LAW § 2590-b (McKinney 2007).

<sup>74</sup> Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Judith Kay, First Deputy Counsel to the Chancellor, Office of Legal Servs., N.Y. City Bd. of Educ., at 2 (Nov. 15, 1996) (on file with author) (discussing Submission No. 96-3759).

<sup>75</sup> See *id.* at 3.

<sup>76</sup> *Id.* at 1, 2.

<sup>77</sup> *Id.* at 3–4.

torate.<sup>78</sup> There were over 46,000 parent voters in Community School District 12.<sup>79</sup> The DOJ also noted that all nine school district members elected in May 1996 (to a three-year term) and replaced by the Chancellor were either Latino (7) or African-American (2).<sup>80</sup> Comparatively, the DOJ found that African-Americans and Latinos comprised 49% of the city's population, according to the 1990 Census.<sup>81</sup> This distinction was telling in the DOJ's Section 5 analysis since African-American and Latino voters could only exert influence on the chancellor through their collective voting strength in the five boroughs and in the city as a whole, since the mayor and the borough presidents appoint the chancellor:

Thus, it appears that Hispanic and black voters will have considerably less influence over the selection of CSB 12 board members through the choices of the appointing authority than they have under the direct-election system currently in place for CSB 12.<sup>82</sup>

Coupled with the finding that African-American and Latino voters had either "literally no input" or no "meaningful input" into the appointment of the temporary or permanent trustees, respectively,<sup>83</sup> the DOJ noted that the city failed to meet its burden under Section 5.<sup>84</sup>

*February 4, 1999 Objection: New York State Discriminates Against African-American, Latino and Asian-American Voters by Switching the Method of Election of Community School Boards from Single Transferable Votes to Limited Voting:* The decentralization of the city's board of education into thirty-two community school districts established a proportional representation system for election to community school boards.<sup>85</sup> The system used by the city since the inception of community school boards is choice voting, or the Single Transferable Votes (STV) method.<sup>86</sup> It allows voters to rank in order their preferred candidates anywhere from one to nine.<sup>87</sup> Votes are then tallied in the order of the first-preference candidate; once that candidate receives the threshold number sufficient for election to the board, all remaining votes exhibiting a first-preference for that candidate are tallied in favor of the second-preference candidate on that ballot.<sup>88</sup>

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<sup>78</sup> *Id.* at 1–2.

<sup>79</sup> *Id.* at 1.

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 3.

<sup>85</sup> See N.Y. EDUC. LAW § 2590-c(8)(e)(7) (McKinney 2007).

<sup>86</sup> *Id.* § 2590-c(8)(e)(7)(10).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 2590-c(8)(e)(7)(13).

This process continues until all nine members are elected.<sup>89</sup> Under this system, minority voters<sup>90</sup> need to constitute only 10% of the electorate to elect candidates of choice because the threshold for representation for one seat is 10%, and every 10% jump in a voting group's share provides an opportunity to win another seat.<sup>91</sup> In 1998, New York State passed a series of measures ostensibly to increase voter turnout in New York City school board elections.<sup>92</sup> As the DOJ noted in its letter, most of the measures that would reasonably lead to higher turnout rates were precleared.<sup>93</sup> However, the DOJ was unconvinced that a switch from STV to Limited Voting, another form of proportional representation, would increase turnout.<sup>94</sup>

More importantly, the DOJ concluded that the switch would actually diminish minority voting strength in violation of its non-retrogression standard.<sup>95</sup> Limited Voting provides for fair representation of minority voting blocs (be they racial minorities or otherwise) because each voter has fewer votes than the total number of seats to be filled in a legislative body.<sup>96</sup> Voters may combine their votes in favor of one or more candidates, but they will always have fewer votes than seats to be filled. In this instance, the State proposed a Limited Voting system with four votes per voter in a nine-member school board.<sup>97</sup> The DOJ calculated that the minority threshold for electability is 10% under the STV method and 31% under the Limited Voting method.<sup>98</sup> It then found that there were eighteen school districts where the minority groups' share of the voting age population was more than 10%, but less than 31%, thus putting at risk their ability to elect candidates of choice if Limited Voting with four votes was instituted.<sup>99</sup>

While this comparison alone would have justified an objection, the DOJ made a more important related finding: voting in community school board elections was racially polarized.<sup>100</sup> Citing two VRA cases decided in

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<sup>89</sup> *Id.* § 2590-c(8)(e)(7)(21).

<sup>90</sup> For Section 5 purposes, we refer to racial and language minorities, but STV allows for any other minority bloc to successfully elect their candidates.

<sup>91</sup> FairVote: The Center for Voting and Democracy, Limited Voting, Cumulative Voting and Choice Voting: A Comparison, <http://www.fairvote.org/?page=409> (last visited Jan. 21, 2008).

<sup>92</sup> Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Eric Proshansky, Assistant Corp. Counsel, City of N.Y., Law Dep't, at 2 (Feb. 4, 1999), available at [http://www.usdoj.gov/crt/voting/sec\\_5/ltr/l\\_020499.pdf](http://www.usdoj.gov/crt/voting/sec_5/ltr/l_020499.pdf) (discussing Submission No. 98-3193).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* at 1.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

New York,<sup>101</sup> and relying on its own analysis of election returns provided by the State, the DOJ concluded:

[T]he information we have indicates that the degree of racial bloc voting in Community School Board elections, in the covered counties and throughout the city, is such that the ability of minority voters to elect their candidates of choice will be considerably reduced under the submitted change in voting method.<sup>102</sup>

#### B. POST 1982 DOJ MORE INFORMATION REQUESTS

Rigorous analysis of the impact of More Information Requests in the context of assessing the effectiveness of Section 5 for protecting racial and language minorities is of recent vintage. In one of the few projects of its type, research conducted in 2005 by Luis Ricardo Fraga and Maria Lizet Ocampo at Stanford University set forth a number of objective factors that can document the full, deterrent effect of Section 5 on covered jurisdictions.<sup>103</sup> Simply put, the number of actual objections interposed in the Section 5 process does not fully explain the reach of the VRA in preventing voting rights abuses. More Information Requests by the DOJ provide another way to measure the impact of Section 5 as well as the episodes of discriminatory conduct that jurisdictions were prepared to implement, but have decided to forego.<sup>104</sup> In other words, any analysis of Section 5 activity that does not account for More Information Requests does not fully analyze the deterrent, prophylactic effect of the VRA.

More Information Requests (MIRs) are requests for additional data or information that allow the DOJ to make a final decision on a preclearance request.<sup>105</sup> A submitting authority can decide to provide the information, withdraw the request, supersede the request to preclear a change with another proposed change or simply refuse to respond.<sup>106</sup> Since changes that are not precleared are, by definition, inoperable and illegal, the effect of withdrawal, a superseded change or a lack of response are equivalent to denials of preclearance.<sup>107</sup> “The purpose of an MIR is to make sure that the DOJ has the information it needs to comprehensively review a proposed

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<sup>101</sup> *Puerto Rican Legal Def. and Educ. Fund v. Gantt*, 796 F. Supp. 681, 796 F. Supp. 698 (E.D.N.Y. 1992) (mem.); *Butts v. City of New York*, 614 F. Supp. 1527 (S.D.N.Y. 1985), *rev'd*, 779 F.2d 141 (2d Cir. 1985). For a discussion of both of these cases, see Part VI *infra* and Appendix A.

<sup>102</sup> Letter from Bill Lann Lee, *supra* note 92, at 2.

<sup>103</sup> See Fraga & Ocampo, *supra* note 22.

<sup>104</sup> *Id.* at 4–5.

<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.* at 8.

<sup>107</sup> *Id.*

change. In doing so, it can also send signals to submitting jurisdictions about the assessment of their proposed change.”<sup>108</sup>

This significant deterrent effect of Justice Department activity is supported by the views of former DOJ officials, like Joseph D. Rich, former Acting Chief, then Chief, of the Department’s Voting Section from 1999 to 2005 and a thirty-six-year veteran of the Department’s Civil Rights Division. In testimony he provided to the National Commission on the Voting Rights Act in June 2005 in New York City, Rich noted that:

[O]n many occasions the department has deterred potential voting changes with discriminatory impact or purpose by sending letters seeking further information – letters which usually signal department concern with the law under review. These letters often result in abandonment of, or changes in, the proposed law in order to remove any discriminatory impact or purpose.<sup>109</sup>

Fraga and Ocampo analyzed data from 1990 to 2005, including the Department’s Submission Tracking and Processing System, and created statistical reports for the first time, in or out of the DOJ, that analyzed and coded everything that happened with a submitted change that received an MIR.<sup>110</sup> The data was coded by state, by type of change and by outcomes, including withdrawals, superseding changes and no responses.<sup>111</sup> They concluded that MIRs play a critical role in the enforcement of Section 5: MIRs are issued at much higher rates than objections to preclearance; MIRs effectively double the number of changes that are prevented by the DOJ; and MIRs have a separate impact on preventing illegal changes, separate from whether objections are issued.<sup>112</sup> The conclusions reached by Fraga and Ocampo thus far—that MIRs *double* the number of illegal changes that are reached directly by objection letters—point toward a strong deterrent effect upon submitting jurisdictions that has yet to be fully realized by Congress and the VRA’s protected classes:

A total of 792 objections were made to proposed changes during 1990–2005, however only 365 of these objections contained the issuance of a MIR at some point in the process of review. However, the sum of the outcomes of withdrawals, superseded changes, and no responses, resulting from an MIR, is 855. This means that MIRs have resulted in directly

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<sup>108</sup> *Id.* at 4.

<sup>109</sup> Joseph D. Rich, Dir., Hous. & Cmty. Dev., Lawyers’ Comm. for Civil Rights Under Law, Statement of Joseph D. Rich Before the National Commission on the Voting Rights Act 2 (June 14, 2005), available at [http://www.votingrightsact.org/hearings/pdfs/rich\\_joseph.pdf](http://www.votingrightsact.org/hearings/pdfs/rich_joseph.pdf).

<sup>110</sup> Fraga & Ocampo, *supra* note 22, at 10–12.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 18–19.

affecting 855 additional changes, making their implementation illegal, in addition to the 792 changes that resulted in objections. MIRs increased the impact of the DOJ on submitted changes by 110%, i.e., doubling the number of changes that were not precleared by the DOJ.<sup>113</sup>

In New York, between 1990 and 2005, the effect of MIRs was considerable.<sup>114</sup> New York's three covered counties, collectively, ranked sixth out of the nineteen jurisdictions studied by Fraga and Ocampo, with the highest number of changes prevented by MIRs—even when the jurisdictions analyzed included whole states, like Louisiana and Texas.<sup>115</sup> A total of 113 MIRs were issued to New York in the relevant time period, of which twenty-eight resulted in no objections, four resulted in an objection each and fifty-three resulted in outcomes that were the equivalent of interposing an objection: withdrawals, superceding changes or no responses.<sup>116</sup>

Thus, in New York, effectively, from 1990 to 2005, we can add fifty-three voting changes to the fourteen voting changes that were subject to an objection, for a total of sixty-seven changes that were thwarted by the Section 5 preclearance process.

### III. DEPLOYMENT OF FEDERAL OBSERVERS POST-1982

The DOJ has the authority under Section 8 of the VRA to assign federal observers to monitor elections.<sup>117</sup> The decision to deploy federal observers is not taken lightly by the DOJ. Indeed, the decision reflects “evidence of potential voting rights act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions.”<sup>118</sup> In the view of former DOJ officials, like Joseph D. Rich, the “presence of federal observers serves an important deterrent—in this case to discriminatory actions during an election.”<sup>119</sup>

In New York, federal observers and monitors have been deployed since 1985 precisely for these reasons.<sup>120</sup> A review of the instances from November 1985 to November 2004, when observers and monitors have

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<sup>113</sup> *Id.* at 15–16.

<sup>114</sup> *Id.* at 17, 29 tbl.9. We have been unable to review MIRs issued to New York City between 1982 and 1989.

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 29 tbl.9. The remainder received a follow-up letter from the DOJ again seeking additional documentation.

<sup>117</sup> Rich, *supra* note 109, at 2.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 2–3.

<sup>120</sup> See ELISSA DOYLE ET AL., REPORT TO THE COMMISSIONERS: NORTHEAST REGIONAL HEARING OF THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT 26 (2005) (on file with author).



been dispatched to document potential violations of Section 5 and Section 203, and otherwise deter potential violations, reveals that a total of 881 observers or monitors were dispatched in New York counties—175 in Bronx County, 286 in Kings County, 353 in New York County, 12 in Queens/Suffolk Counties (2002) and 55 in Suffolk County (2004).<sup>121</sup>

Access to the reports and/or recommendations of any of the federal observers within the DOJ is not available to the public. However, the DOJ has relied on their observer coverage to gather information it reviews in the Section 5 preclearance process in New York.<sup>122</sup> Finally, the deployment of observers on such a large scale—881 in nineteen years<sup>123</sup>—is another indication of the state of voting rights in New York and the need to continue to provide vigilance and redress.

Data available on the deployment of federal observers to elections in New York City do not include findings, reports or final observations made by the DOJ election observers. However, in limited situations, the reasons underlying the assignment of observers to specific elections in specific counties are described in advance. On those limited occasions from 1985 to 2004, the data show that DOJ concerns over compliance with the language assistance mandates of Section 203 for Chinese voters led to the presence of federal observers on ten occasions in various elections and counties, concerns over Section 203 compliance for both Chinese-language and Spanish-language voters resulted in observers dispatched on seven occasions and concerns for the treatment of Korean-language and Spanish-language voters led to assignment of observers on two occasions.<sup>124</sup>

On the remaining occasions when federal observers were used to monitor elections—twenty-five occasions in all—no information was available to indicate the reason for the deployment.<sup>125</sup> In effect, any potential violation of the VRA would have justified the order to send federal observers. Moreover, the inability to fully comply with Section 203 requirements for Latino voters resulted in the assignment of federal observers in a number of elections since the 1992 amendments to Section 203.<sup>126</sup> Of the multiple times federal observers were present, the following elections were identified specifically because of concerns over Latino voters and bilingual

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<sup>121</sup> *Id.* at 26–29.

<sup>122</sup> See Letter from Deval L. Patrick, *supra* note 11, at 2–3.

<sup>123</sup> DOYLE ET AL., *supra* note 120, at 26–29.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See, e.g., *United States v. Berks County*, 277 F. Supp. 2d 570, 581–83 (E.D. Pa. 2003).

assistance: September 2001 (Kings and New York Counties); October 2001 (Bronx County); and September 2004 (Queens County).<sup>127</sup>

#### IV. LANGUAGE ASSISTANCE LITIGATION AND COMPLIANCE ISSUES POST-1982

Language assistance for citizens who have yet to master the English language has been a feature of New York City elections since the adoption in 1965 of Section 4(e) of the VRA.<sup>128</sup> Section 4(e) was aimed specifically at remedying the discriminatory election practices that prevented Puerto Ricans in New York City from voting because of their inability to pass an English literacy requirement as a prerequisite for voter registration.<sup>129</sup> Litigation under Section 4(e) of the VRA established meaningful access to the political process by creating a full system of language assistance for Puerto Ricans, who, by operation of law, were already U.S. citizens.<sup>130</sup> Indeed, these early Section 4(e) cases<sup>131</sup> led to the universally applicable pronouncement by the court in *Torres v. Sachs* that “Plaintiffs cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself.”<sup>132</sup>

The language assistance provisions of the VRA, enacted nationally in 1975, relied in part on this model in New York City, especially since it reached close to 813,000 resident Puerto Ricans, in addition to thousands of other citizens who needed and used Spanish-language assistance in voting, clearly demonstrating to Congress that language assistance could work on a very large scale.<sup>133</sup> In New York City, language assistance was provided to Spanish-language voters in Bronx, Kings, New York and Queens Counties, then to Chinese-language voters in New York, Kings and Queens Counties

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<sup>127</sup> *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 148 (2005) [hereinafter *Cartagena Testimony*] (testimony of Juan Cartagena, General Counsel, Community Service Society).

<sup>128</sup> 42 U.S.C. § 1973b(e) (2006).

<sup>129</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

<sup>130</sup> In 1917, Congress declared Puerto Ricans citizens of the United States. This status was recodified in 8 U.S.C. § 1402 (2006).

<sup>131</sup> *E.g.*, *Coal. for Educ. in Dist. One v. Bd. of Elections*, 370 F. Supp. 42, 44–45 (S.D.N.Y. 1974), *aff’d*, 495 F.2d 1090 (2d Cir. 1974) (citing *Lopez v. Dinkins*, No. 73 Civ. 0695 (S.D.N.Y. Feb. 14, 1973)).

<sup>132</sup> 381 F. Supp. 309, 312 (S.D.N.Y. 1974).

<sup>133</sup> In 1975, the House Committee on the Judiciary noted: “The provision of bilingual materials is certainly not a radical step. . . . Courts in New York have ordered complete bilingual election assistance, from dissemination of registration information through bilingual media to use of bilingual election inspectors.” H.R. REP. NO. 94-196, at 24–25 (1975); *see also* Cartagena, *supra* note 3, at 209–10.

and then to Korean voters in Queens County.<sup>134</sup> Outside of New York City, Section 203 eventually required Westchester, Nassau and Suffolk Counties to provide language assistance in Spanish to Latino voters.<sup>135</sup>

Recent research conducted in six Section 203-covered New York counties points to the salutary effects of providing language assistance for both Latino and Asian-American voters, namely, the positive correlation that exists between providing Section 203 language assistance and increased voter registration.<sup>136</sup> One such study for New York concludes that after controlling for other factors that affect registration, such as education levels, nativity and residential mobility, the use of ballots and registration materials in the covered language was significantly correlated to increased registration levels at both the city and county level, and for both Spanish- and Chinese-speaking voters.<sup>137</sup>

Nonetheless, the language assistance provisions of the VRA have never fully been implemented in New York City, and the problems with compliance have been especially detrimental to the Asian-American community. Since 1988, a comprehensive election-monitoring program created by the Asian American Legal Defense and Education Fund (AALDEF) has documented a litany of recurrent problems, abuse, errors and direct evidence of intimidation and discrimination visited upon Asian-American voters in need of language assistance in New York City.<sup>138</sup> The AALDEF

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<sup>134</sup> See Voting Rights Act Amendment of 1975, Determinations Under Title III, 40 Fed. Reg. 41,827 (Sept. 3, 1975); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

<sup>135</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. at 48,872; Voting Rights Act Amendments of 1992, Determinations Under Section 203, 57 Fed. Reg. 43,213 (Sept. 18, 1992).

<sup>136</sup> See Michael Jones-Correa & Karthick Ramakrishnan, *Studying the Effects of Language Provisions Under the Voting Rights Act* (Mar. 11–13, 2004) (paper presented at the Western Political Science Association Meeting, Portland, Oregon, on file with author).

<sup>137</sup> *Id.* at 17.

<sup>138</sup> See, e.g., ASIAN AM. LEGAL DEF. & EDUC. FUND, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT (2000) [hereinafter AALDEF, 2000 Report] (discussing 1998 and 1999 elections in New York City); ASIAN AM. LEGAL DEF. & EDUC. FUND, ACCESS TO DEMOCRACY DENIED: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT, SECTION 203, IN THE 2000 ELECTIONS (2001) [hereinafter AALDEF, 2001 Report]; ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE NYC 2001 ELECTIONS: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2002) [hereinafter AALDEF, 2002 Report]; ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2002 ELECTIONS IN NYC: AN ASSESSMENT OF NEW YORK CITY COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2003) [hereinafter AALDEF, 2003 Report]; ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE

project is the only one of its kind in New York City, and it provides a wealth of valuable information. The breadth and scope of the documentation provided by the AALDEF reports lead to only one conclusion: New York has consistently failed to address the widespread nature of voter discrimination suffered by the Asian-American community. In 2006, the AALDEF filed, on behalf of Chinese-language and Korean-language voters, one of the few Section 203 challenges in New York in *Chinatown Voter Education Alliance v. Ravitz*.<sup>139</sup>

The AALDEF reports, which were published beginning in 1998, document a number of categories of non-compliance with Section 203. What follows is a summary of selected highlights.

*Erroneous or Ineffective Translations:* In Queens County, for the general election of 2000, the Democratic candidates for Congress, state senate and assembly, justices of the supreme court and judges for civil court were listed under erroneously translated party headings and misidentified as Republicans.<sup>140</sup> Likewise, the Republican candidates were listed under the mistranslated heading as Democrats.<sup>141</sup> Although the Board of Elections was notified of this major error by 9:45 a.m., election officials from the central board would not arrive to correct the mistake until 4:00 p.m., 5:30 p.m. and, in one case, 6:55 p.m.<sup>142</sup> In addition, paper ballots for justices of the supreme court erroneously translated the phrase “vote for any three” as “vote for any five.”<sup>143</sup> For the 2002 primary and general elections, of the more than 3000 voters surveyed, 27% of Chinese voters and 30% of Korean voters reported having difficulty reading the ballot because of the small typeset used by the Board of Elections.<sup>144</sup> Magnifying sheets issued by the Board of Elections ostensibly to solve this problem were not available at all sites, and in Queens, one inspector was reported to have hidden the device to avoid its use.<sup>145</sup> Transliteration of candidates’ names surfaced as a problem again: “Mary O’Donohue” was translated as “Mary

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PROVISIONS OF THE VOTING RIGHTS ACT (2004) [hereinafter AALDEF, 2004 Report]; ASIAN AM. LEGAL DEF. & EDUC. FUND, THE ASIAN AMERICAN VOTE 2004: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION (2005) [hereinafter AALDEF, 2005 Report].

<sup>139</sup> Civ. No. 06-0913 (S.D.N.Y. Feb. 6, 2006). The case includes claims under Section 203 of the VRA and under Section 208 of the VRA, the assistor provision of the Act.

<sup>140</sup> AALDEF, 2001 Report, *supra* note 138, at IV(a)(I).

<sup>141</sup> This glaring mistake was observed in Queens at PS 22, JHS 189, JHS 185, PS 20, IS 145 and Senior Center.

<sup>142</sup> AALDEF, 2001 Report, *supra* note 138, at IV(a)(I).

<sup>143</sup> *Id.*

<sup>144</sup> AALDEF, 2003 Report, *supra* note 138, at 10.

<sup>145</sup> *Id.*

O'Party," and the Korean transliteration of John Liu's name was not what he submitted to the Board or what he used in Korean media.<sup>146</sup>

*Racial Epithets and Hostile Remarks:* During the 2001 elections monitored by the AALDEF, the following episode was documented: at IS 228, a polling site coordinator reacted in extreme fashion to thwart interpreters from performing their duties, yelling out, "You f\*\*\*ing Chinese, there's too many of you!"<sup>147</sup> In their monitoring project for the 2002 elections, the AALDEF documented other incidents: at PS 82 and at Botanical Gardens, some of the comments made to Asian-American voters included calling South Asian voters "terrorists" and mocking the physical features of Asian eyes while stating, "I can tell the difference between a Chinese and a Japanese by their chinky eyes."<sup>148</sup> Further, in 2003, the project reported that at PS 126 in Manhattan's Chinatown, poll inspectors ridiculed a voter's surname ("Ho"); at PS 115 in Queens, disparaging remarks were directed at South Asian voters, with one coordinator continuously referring to herself as a "U.S. citizen" and that she, unlike them, was "born here" and that the other workers needed to "keep an eye" on all South Asian voters; and at Flushing Bland Center in Queens, the site coordinator complained that Asian-American voters "should learn to speak English."<sup>149</sup>

*Written Language Materials:* The unavailability of written materials in the appropriate Asian languages, or the deliberate efforts to avoid displaying them, has been consistently documented in the AALDEF reports. For example, during the elections of 2002, survey results documented that 37% of Chinese voters and 43% of Korean voters needed the assistance of translated materials.<sup>150</sup> However, voter rights flyers, voter registration forms, affidavit ballots and envelopes in Chinese were routinely missing.<sup>151</sup> In Queens, Korean-language materials were kept in their supply packets and consistently unavailable.<sup>152</sup> In 2003, 49% of the Chinese voters surveyed and 47% of the Korean voters surveyed required the assistance of translated written materials.<sup>153</sup> Yet, no ballots were translated for Chinese voters at PS 250 in Williamsburg, despite its designation as a targeted site by the Board of Elections.<sup>154</sup> As a result, voters were observed having difficulty

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<sup>146</sup> *Id.* at 10–11.

<sup>147</sup> AALDEF, 2002 Report, *supra* note 138, at 9.

<sup>148</sup> AALDEF, 2003 Report, *supra* note 138, at 19.

<sup>149</sup> AALDEF, 2004 Report, *supra* note 138, at 7.

<sup>150</sup> AALDEF, 2003 Report, *supra* note 138, at 11.

<sup>151</sup> *Id.* at 13.

<sup>152</sup> *Id.*

<sup>153</sup> AALDEF, 2004 Report, *supra* note 138, at 8.

<sup>154</sup> *Id.* at 7.

casting their ballots.<sup>155</sup> Translated voter registration forms and affidavit ballot envelopes were frequently missing, and once again, the requisite materials were found unopened and in their original containers.<sup>156</sup> Polling inspectors routinely would refuse to display the available materials, insisting that they were only required to do so if requested by a voter, with some remarking that they needed to keep their tables “clean” and others remarking that their manual required them to keep their tables free of “clutter.”<sup>157</sup>

*Oral Language Assistance:* The shortage of available interpreters is another constant problem in this area, as are the efforts of some poll workers to impede the work of the interpreters who are available. In 2002, the AALDEF noted that 33% of Chinese voters surveyed and 46% of Korean voters reported needing the assistance of interpreters.<sup>158</sup> Interpreters were in short supply in Queens and in Manhattan.<sup>159</sup> In the 2003 elections, 36% of Chinese voters and 42% of Korean voters reported that they required the assistance of interpreters.<sup>160</sup> Once again, the supply of interpreters could not meet the need.<sup>161</sup> The monitoring revealed that, overall, one out of three interpreters assigned to the polling sites did not show up to work.<sup>162</sup> And in 2004, after surveying slightly more than 7200 Asian-American voters in New York City, the AALDEF reported that for Chinese voters in New York, Kings and Queens Counties, 37% needed an interpreter and 36% needed translated written materials to effectuate their right to vote.<sup>163</sup>

The problems with complying with the language assistance guarantees of the VRA in the city were not limited to Asian-American voters. After the 2000 general elections, the New York State Attorney General investigated “serious” allegations regarding the failure of the New York City Board of Elections to provide appropriate language assistance to both Latino and Asian-American voters.<sup>164</sup> His office also investigated allegations that Latino voters were harassed, intimidated and intentionally misinformed about voter registration laws and procedures in the city.<sup>165</sup> Documenting future complaints and evaluating “flaws in election administration that may

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

<sup>156</sup> *Id.* at 8.

<sup>157</sup> *Id.* at 9.

<sup>158</sup> AALDEF, 2003 Report, *supra* note 138, at 15.

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

<sup>160</sup> AALDEF, 2004 Report, *supra* note 138, at 9–10.

<sup>161</sup> *Id.* at 10.

<sup>162</sup> *Id.*

<sup>163</sup> AALDEF, 2005 Report, *supra* note 138, at 14.

<sup>164</sup> OFFICE OF ATT’Y GEN. ELIOT SPITZER, VOTING MATTERS IN NEW YORK: PARTICIPATION, CHOICE, ACTION, INTEGRITY 35 (2001).

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

affect disparately voters on the basis of race or ethnicity” were among the Attorney General’s recommendations.<sup>166</sup>

Major problems in securing oral assistance in Spanish at the polls continued to plague New York City elections. In 2001, the Board was short 3371 poll inspectors—15% of the total needed.<sup>167</sup> It was also short 33% of the total number of Spanish interpreters needed for that election.<sup>168</sup> Even considering the longevity of the Latino population in the city—especially its Puerto Rican community—the prevalence of Spanish language use at home and the corresponding lower proficiency in English is clearly a continuing phenomenon in New York City.<sup>169</sup> For Latinos nationally, the percentage of persons who speak English less than “very well” and who report that Spanish is spoken in their homes is 40.6%.<sup>170</sup> In New York City, 51% of Latinos who speak Spanish at home report lower proficiency levels in English.<sup>171</sup> It is important to note here that the measure of speaking English less than “very well” is the measure used by the Census Bureau, along with other indicia, to certify Section 203 coverage. Family literacy centers in New York City—indeed, all places where adults can try to learn English—are in very short supply, with demand far exceeding available resources.<sup>172</sup> As noted above in Part III, the inability to fully comply with Section 203 requirements for Latino voters resulted in the assignment of federal observers in a number of elections since the 1992 amendments to Section 203.<sup>173</sup>

New York City continues to have the largest number of Puerto Rican residents of any U.S. city; with a sizeable force of over 789,000, Puerto Ricans are the city’s largest ethnic group and the largest national origin group among the city’s 2.2 million Latino residents.<sup>174</sup> The conditions that led to their ability to gain access to New York’s political process through Span-

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<sup>166</sup> *Id.* at 35–36.

<sup>167</sup> RONALD HAYDUK, *GATEKEEPERS TO THE FRANCHISE: SHAPING ELECTION ADMINISTRATION IN NEW YORK 190* (2005).

<sup>168</sup> *Id.*

<sup>169</sup> See Nina Bernstein, *Proficiency in English Decreases Over a Decade*, N.Y. TIMES, Jan. 19, 2005, at B1, B7.

<sup>170</sup> ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, *WE THE PEOPLE: HISPANICS IN THE UNITED STATES: CENSUS 2000 SPECIAL REPORTS 10* (2004). National data are derived from the U.S. Census Bureau.

<sup>171</sup> Bernstein, *supra* note 169, at B7. New York City data come from the 2000 Census, as analyzed by the Queens College Department of Sociology.

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

<sup>173</sup> See *supra* notes 126–127 and accompanying text.

<sup>174</sup> Angelo Falcón, *De’tras Pa’lante: Explorations on the Future History of Puerto Ricans in New York City*, in *BORICUAS IN GOTHAM: PUERTO RICANS IN THE MAKING OF MODERN NEW YORK CITY* 147, 153, 168 tbl.4 (Gabriel Haslip-Viera et al. eds., 2005).

ish-language assistance, including their strong ties to the Spanish language, the circular migration between Puerto Rico and New York City and the juridical foundation of the unique relationship between the United States and Puerto Rico, have not undergone any appreciable change, thus making their need for language assistance in elections today as viable as it was in the 1960s and 1970s.<sup>175</sup>

#### A. LANGUAGE ASSISTANCE LITIGATION AND COMPLIANCE ISSUES OUTSIDE OF NEW YORK CITY

Section 203 compliance problems are not limited to the four covered counties in New York City. Westchester, Suffolk and Nassau Counties are required to provide Spanish-language assistance to Latino voters.<sup>176</sup> On-site compliance monitoring in 2005 by Cornell University students revealed that in Nassau and Suffolk Counties, there were failures in providing voter registration materials in Spanish.<sup>177</sup> This research also evidenced less than full compliance in providing personnel capable of handling requests in Spanish.<sup>178</sup>

Compliance problems with Section 203 generally led to suits against Suffolk and Westchester Counties, filed by the DOJ in 2004 and 2005, respectively. Each of the suits resulted in settlements that improved the language assistance programs in each of the two covered counties. In *United States v. Suffolk County*,<sup>179</sup> Suffolk County eventually agreed to a Consent Decree to create an improved Spanish-language assistance plan that would increase the number of Spanish-speaking election officials, increase the availability of Spanish-language written materials, improve the training of poll workers and end the hostile treatment directed at Latino voters. The Consent Decree also allowed the DOJ to deploy federal observers in future elections.<sup>180</sup> In *United States v. Westchester County*,<sup>181</sup> the allegations

<sup>175</sup> Cartagena Testimony, *supra* note 127, at 150–52.

<sup>176</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 57 Fed. Reg. 43,213 (Sept. 18, 1992).

<sup>177</sup> Michael Jones-Correa & Israel Waismel-Manor, Verifying Implementation of Language Provisions in the Voting Rights Act 10–12 (Feb. 9, 2005) (paper presented at the symposium, Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law, and the Institute for Governmental Studies, University of California, Berkeley, in Washington D.C.); E-mail from Michael Jones-Correa, Assoc. Professor of Gov't, Cornell Univ., to author (Feb. 11, 2006, 17:34 EST) (on file with author).

<sup>178</sup> Jones-Correa & Waismel-Manor, *supra* note 177, at 12–13 & tbl.4.

<sup>179</sup> Consent Decree, *United States v. Suffolk County*, Civ. No. 04-2698 (E.D.N.Y. June 29, 2004), available at [http://www.usdoj.gov/crt/voting/sec\\_203/documents/suffolk\\_cd.pdf](http://www.usdoj.gov/crt/voting/sec_203/documents/suffolk_cd.pdf).

<sup>180</sup> *Id.* at 13.



similarly addressed the failure to provide adequate Spanish-language assistance to Latino voters, including the county's failure to post Spanish-language information at targeted polling sites under both Section 203 and the Help America Vote Act. A Consent Decree was entered in 2005 that improved the county's language assistance program considerably.<sup>182</sup>

An additional Section 203 case was filed by the DOJ in Suffolk County against the Brentwood Union Free School District.<sup>183</sup> The school district's failure to provide adequate oral and written language assistance in Spanish, including the failure to properly train personnel and the inability to curb hostilities against Latino voters, was the subject of a comprehensive Consent Decree that runs through January 2007.<sup>184</sup>

## V. VOTING RIGHTS LITIGATION POST-1982

Litigation under the VRA in New York City has had limited success in the nearly twenty-five years that have elapsed since the continuation of Section 5 coverage to New York's three covered counties. It must be assessed alongside litigation filed under the Constitution and under the National Voter Registration Act.

With respect to the VRA, however, it is important to differentiate between Section 5 and Section 2 litigation in this regard. In New York, Section 5 litigation is characterized by actions instituted by private litigants against election authorities of the state. These lawsuits are, by their nature, limited to seeking court orders to stop the implementation of election changes that have not been precleared. Once preclearance is granted, the suit is effectively terminated, since only a subsequent challenge on racial discrimination grounds (e.g., a Section 2 case) can reach the merits. In addition, because Section 5 of the VRA exists to protect the rights of racial and language minorities to equal participation in the political process, Section 5 lawsuits that fail to raise issues of race add little to the focus contained in this report: the state of racial and language minority equality in the political process in New York since 1982.

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<sup>181</sup> Complaint, *United States v. Westchester County*, Civ. No. 05-0650 (S.D.N.Y. July 19, 2005), available at [http://www.usdoj.gov/crt/voting/hava/westchester\\_comp.htm](http://www.usdoj.gov/crt/voting/hava/westchester_comp.htm).

<sup>182</sup> Consent Decree, *United States v. Westchester County*, Civ. No. 05-0650 (S.D.N.Y. July 19, 2005), available at [http://www.usdoj.gov/crt/voting/sec\\_203/documents/westchester\\_cd.htm](http://www.usdoj.gov/crt/voting/sec_203/documents/westchester_cd.htm).

<sup>183</sup> Complaint, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003).

<sup>184</sup> Press Release, Dep't of Justice, Justice Department Announces Resolution of Voting Law Violations in New York (June 4, 2003), available at [http://www.usdoj.gov/opa/pr/2003/June/03\\_crt\\_335.htm](http://www.usdoj.gov/opa/pr/2003/June/03_crt_335.htm).

Approximately six cases filed since 1982 raised Section 5 claims directly.<sup>185</sup> In four of these cases, the U.S. Attorney General issued preclearance before the decision was issued, effectively rendering the lawsuits moot.<sup>186</sup> In two of these four cases, no issues were presented about the effect that such unprecleared election changes had, if any, on the city's racial and language minorities.<sup>187</sup> The remaining two unsuccessful decisions sought to extend the scope of Section 5 coverage. The first case, *Merced v. Koch*, raised legitimate questions about the applicability of Section 5 to elections to "Area Policy Boards" in low-income neighborhoods that play a decisive role in the distribution of anti-poverty funds to community-based organizations;<sup>188</sup> the second case, *African American Legal Defense Fund, Inc. v. New York State Department of Education*, presented a vague challenge to the composition of both the central and community boards of education that the court deemed too amorphous to consider without reinterpreting the allegations under the rubric of the VRA.<sup>189</sup> Moreover, the plaintiffs' challenge to the discriminatory nature of the composition of community school boards—considered one of the most racially diverse entities in city history since 1969—was inexplicable.<sup>190</sup> In effect, the Section 5 lawsuits, in spite of their results, have not enhanced or diminished the record of voting discrimination in New York in any meaningful way.

Section 2 litigation in New York City is also an important marker for potential voter-related discrimination in the relevant jurisdiction. While the standards of proof are different than those in Section 5 litigation, the evidence of potential voter dilution, or in some cases, discriminatory vote denial practices, do lend themselves to the assessment we make in this report. The Section 2 lawsuits summarized below run the gamut from challenges to structural impediments that potentially lead to vote dilution, such as re-districting plans, primary runoff requirements and nonvoting purges, to straightforward vote denial claims, such as those involving felon disenfranchisement.

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<sup>185</sup> *Kaloshi v. N.Y. City Bd. of Elections*, No. 02 Civ. 4762, 2002 U.S. Dist. LEXIS 17803 (E.D.N.Y. Sept. 6, 2002), *vacated sub nom. Kaloshi v. Spitzer*, No. 02-9075, 2003 U.S. App. LEXIS 13423 (2d Cir. July 1, 2003); *African Am. Legal Def. Fund, Inc. v. N.Y. State Dep't of Educ.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998); *Rogers v. N.Y. City Bd. of Elections*, 988 F. Supp. 409 (S.D.N.Y. 1997); *Dobbs v. Crew*, No. 96 Civ. 3240, No. 96 Civ. 3399, No. 96 Civ. 3400, 1996 U.S. Dist. LEXIS 20129 (E.D.N.Y. Aug. 23, 1996); *E. Flatbush Election Comm. v. Cuomo*, 643 F. Supp. 260 (E.D.N.Y. 1986); *Merced v. Koch*, 574 F. Supp. 498 (S.D.N.Y. 1983). *See* Appendix A.

<sup>186</sup> *Kaloshi*, 2002 U.S. Dist. LEXIS 17803; *Rogers*, 988 F. Supp. 409; *Dobbs*, 1996 U.S. Dist. LEXIS 20129; *E. Flatbush*, 643 F. Supp. 260.

<sup>187</sup> *Kaloshi*, 2002 U.S. Dist. LEXIS 17803; *Rogers*, 988 F. Supp. 409.

<sup>188</sup> *Merced*, 574 F. Supp. at 498–99.

<sup>189</sup> *African Am. Legal*, 8 F. Supp. 2d at 333–34, 340.

<sup>190</sup> *See id.* at 339–40.

Fourteen cases raising Section 2 claims have been identified.<sup>191</sup> Cases that appeared to raise incontrovertible proof of unlawful discriminatory effects against racial and language minorities were settled, a not surprising result in this field.<sup>192</sup> These settled cases are significant in their own right. In *United Parents Associations v. Board of Elections*, proof of discriminatory effects upon African-American and Latino voters stopped the implementation of two successive legislative enactments to institute—and then re-institute—the discriminatory nonvoting purge law.<sup>193</sup> At risk were hundreds of thousands of voter registrations. In *Ashe v. Board of Elections*, the Board of Elections was forced to begin a series of reviews and assessments regarding the training of its personnel and the deployment of adequately functioning machines.<sup>194</sup> The settlement in *Ashe* was but the tip of the iceberg of recurring problems that faulty election administration had on racial and language minority voters. And in *Campaign for a Progressive Bronx v. Black*, language assistance for Latino voters in the most clearly identifiable Latino county in the state had to be forced once again on an election apparatus that could not implement the most basic of voting guarantees for language minority citizens.<sup>195</sup>

Other cases that alleged constitutional infirmities (or statutory violations) against election practices with decades or centuries of tradition were forced to judgment—some dismissed for lack of jurisdiction and others upholding the State's position.<sup>196</sup> The bulk of the remaining cases were standard redistricting challenges where African-American and Latino voters sought to expand their opportunities above and beyond what they achieved

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<sup>191</sup> The fourteen cases are summarized in Appendix A. The only case that defies categorization in part, is *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992), which was brought to enjoin the congressional elections of 1992 unless the districts were redrawn to meet the “one person, one vote” and VRA guarantees. The case was subsequently dismissed as moot once the legislature passed a last-minute redistricting plan that received preclearance just before the court's deadline. See *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 698 (E.D.N.Y. 1992).

<sup>192</sup> See Consent Decree, *United Parents Ass'ns v. Bd. of Elections*, No. 89 Civ. 0612 (E.D.N.Y. May 6, 1993); *Ashe v. Bd. of Elections*, No. 88 Civ. 1566, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. Sept. 6, 1988); *Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975 (S.D.N.Y. 1986).

<sup>193</sup> See Consent Decree, *United Parents Ass'ns*, No. 89 Civ 0612.

<sup>194</sup> See *Ashe*, 1988 U.S. Dist. LEXIS 10067, at \*4–5.

<sup>195</sup> See *Black*, 631 F. Supp. at 979.

<sup>196</sup> These included challenges to the primary election run-off requirement (*Butts v. City of New York*, 614 F. Supp. 1527 (S.D.N.Y. 1985), *rev'd*, 779 F.2d 141 (2d Cir. 1985)); challenges to judicial elections nestled within the state's constitution (*France v. Pataki*, 71 F. Supp. 2d 317 (S.D.N.Y. 1999)); and the challenges to felon disfranchisement—a feature of New York election law since 1821 (*Hayden v. Pataki*, No. 00 Civ. 8586, 2004 WL 1335921 (S.D.N.Y. June 14, 2004), *aff'd*, 449 F.3d 205 (2d Cir. 2006), and *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), *vacated*, 449 F.3d 371 (2d Cir. 2006)). A pending Section 2 case challenges the creation of a second Surrogate Court seat in Brooklyn (*Maldonado v. Pataki*, No. 05 Civ. 5158, 2005 U.S. Dist. LEXIS 36933 (E.D.N.Y. Dec. 16, 2005)).

through the Section 5 preclearance process—apparently with little success.<sup>197</sup> In many of these cases where plaintiffs were unsuccessful, district courts have ventured a number of opinions on the Senate factors that were used to assess a violation of Section 2 under the totality of circumstances. These opinions lack the guidance of Second Circuit precedent.<sup>198</sup>

Litigation under the National Voter Registration Act of 1993<sup>199</sup> (NVRA) was another significant tool in securing equal political rights for racial and language minorities. The litigation to date is the culmination of years of efforts to establish agency-based voter registration in government agencies that serve low-income populations on a regular basis, and by extension in New York, racial and language minorities. All the cases to date address compliance issues in agencies that provide public benefits (federal means-tested public benefits) and in state agencies that provide for unemployment insurance. The settlements reached in these cases have worked to offer voter registration opportunities to thousands of African-American, Latino and Asian-American voters.

Constitutional litigation in New York City has also opened additional avenues to the full realization of equal opportunity to the political process. The 2006 opinion in *López Torres v. New York State Board of Elections*, if upheld, will provide for competitive primaries for justices to the Supreme Court of the State of New York—a constant battle in New York over the last twenty-five years.<sup>200</sup> Other constitutional cases, while not advancing access for racial and language minorities per se, do contain important findings about Racially Polarized Voting<sup>201</sup> and about the city's historical inability to comply with the mandates of the VRA.<sup>202</sup> They are thus useful for understanding the state of voting rights in New York today.

## VI. RACIALLY POLARIZED VOTING IN NEW YORK

Whether voting is characterized by racial polarization is a critical indicator of discrimination in voting. Racially Polarized Voting (RPV) is an

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<sup>197</sup> See *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997 (2004); *Torres v. Cuomo*, No. 92 Civ. 5811, 1993 U.S. Dist. LEXIS 1165 (S.D.N.Y. Feb. 2, 1993); *Fund for Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662 (1992), *aff'd*, 506 U.S. 1017 (1992).

<sup>198</sup> See Appendix A.

<sup>199</sup> 42 U.S.C. § 1973gg-1 (2006).

<sup>200</sup> 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007).

<sup>201</sup> See, e.g., *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd sub nom. Silver v. Diaz*, 522 U.S. 801 (1997).

<sup>202</sup> See, e.g., *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 U.S. Dist. LEXIS 11481 (S.D.N.Y. Aug. 3, 1992).

indispensable element of voting rights analysis in redistricting cases and others where structural impediments are challenged as preventing full and fair participation of the country's racial and language minorities.<sup>203</sup> The data—a comparison of election returns at the election district level with demographic data at the smallest geographical unit—are analyzed using sophisticated statistical methods to prove the relationships between the race of the voter and the race of the candidate, while controlling for other factors.<sup>204</sup> Two related phenomena are thus analyzed: the level of political cohesion that may exist within the racial or language minority group (i.e., Do minorities tend to support minority candidates? Or are there clearly identifiable minority-preferred candidates, irrespective of race?) and the presence of white bloc voting that tends to defeat minority-preferred candidates.<sup>205</sup>

New York has had numerous episodes where RPV has affected the outcome of its elections. Not all the data have been put to rigorous analysis, but there are enough episodes in and outside of the realm of statistical scrutiny that speak to a continued problem in the city.

One of the earlier documented examples of RPV—under more rigorous regression analyses—was conducted by Professor Richard Engstrom and led to a district court's finding of significant Racially Polarized Voting in the 1985 case, *Butts v. City of New York*.<sup>206</sup> Professor Engstrom analyzed two post-1982 elections: the 1982 Democratic primary for lieutenant governor, where H. Carl McCall, an African-American, ran against white candidates, and the 1984 Democratic presidential primary where Jesse Jackson ran against Walter Mondale and other white candidates.<sup>207</sup> Engstrom, using regression analysis, documented significant cohesion by African-Americans and Latinos for McCall and by African-American voters for Jesse Jackson.<sup>208</sup> White voters,<sup>209</sup> on the other hand, only gave McCall

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<sup>203</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986).

<sup>204</sup> See *id.* at 52–54.

<sup>205</sup> See *id.* at 56.

<sup>206</sup> 614 F. Supp. 1527, 1545 (S.D.N.Y. 1985). The findings of RPV by the district court were left undisturbed by the Second Circuit in its reversal of Judge Brieant's judgment for the plaintiffs in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985). Professor Engstrom's analysis was subsequently cited by Professor James Loewen as one of the earliest, probative examples of RPV in New York City. See James Loewen, *Levels of Political Mobilization and Racial Bloc Voting Among Latinos, Anglos, and African Americans in New York City*, 13 CHICANO-LATINO L. REV. 38, 41 (1993) (citing Richard Engstrom, *Polarized Voting in Citywide Elections in New York: 1977–1984* (unpublished typescript)).

<sup>207</sup> Loewen, *supra* note 206, at 41 (discussing Engstrom's research).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* The Engstrom analysis uses “other” voters to include both white, by far the bulk of this category, and Asian-American voters.

24% of their vote and virtually no support to Jackson in 1984 (4%).<sup>210</sup> Coupled with an analysis of the 1973 run-off election between Herman Badillo (Puerto Rican) and Abraham Beame (white), and even considering the State's expert testimony of coalition voting by all groups in New York, the district court in *Butts* found that "racial and ethnic polarization and bloc voting exists in New York City to a significant degree."<sup>211</sup>

The DOJ has justified, in part, a number of its objections to preclearance under Section 5 in New York City on the basis of the existence of RPV. For example, the 1992 state assembly plan was denied preclearance when it minimized Latino voting strength in Upper Manhattan by fracturing an identifiable community that was already suffering the effects of RPV.<sup>212</sup> While not specifying the evidence at hand, the DOJ recognized the "prevailing patterns of polarized voting" in the area and found that the legislature was well aware of the discriminatory effects of its plan in Upper Manhattan.<sup>213</sup> Similarly, the proposed changes in judicial elections in 1982, 1990 and 1994, during which the State sought retroactive preclearance, were denied, in part, on the existence of RPV.<sup>214</sup> The DOJ found that out of ten judgeships created in 1982 for justices of the New York Supreme Court, not one resulted in the election of a minority judge and concluded:

In the context of the apparent pattern of racially polarized voting which characterizes elections in the covered counties in New York City, we cannot say that like results would flow from a racially fair election system.<sup>215</sup>

In *France v. Pataki*, however, during an unsuccessful Section 2 challenge to the closed nature of primary elections for justices of the Supreme Court of New York, the U.S. District Court for the Southern District accepted evidence of RPV in judicial elections and found that African-Americans and Latinos were politically cohesive in judicial elections in New York City.<sup>216</sup> The court, however, did not find, based on the evidence presented, that there existed white bloc voting in judicial elections in New York City.<sup>217</sup> Part of the reasoning in *France* was the evidence presented on coalition building in creating multi-racial slates of candidates in judicial elections and the role that African-American and Latino leaders within the

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<sup>210</sup> *Id.*

<sup>211</sup> *Butts*, 614 F. Supp. at 1547. See Appendix A.

<sup>212</sup> Letter from James P. Turner, *supra* note 35, at 2-3.

<sup>213</sup> *Id.* at 3.

<sup>214</sup> Letter from Loretta King, *supra* note 21, at 2-4.

<sup>215</sup> *Id.* at 2.

<sup>216</sup> 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999).

<sup>217</sup> *Id.* at 329.

Democratic Party play as gatekeepers to the nomination and selection of justices to the New York Supreme Court.<sup>218</sup> The court relied in part on the testimony of insiders, like Assemblyman Herman Farrell (New York County Chair of the Democratic Party), Assemblyman Clarence Norman (Kings County Chair of the Democratic Party) and Roberto Ramirez (at the time, a significant operative of the Bronx County Democratic Party).<sup>219</sup> Almost six years later, the U.S. District Court for the Eastern District rejected arguments that the same party delegate convention system for choosing judicial candidates for the primaries was necessary to promote racial diversity on the bench, in the face of a system that unconstitutionally stifles voter participation.<sup>220</sup> The focus in *López Torres* was the raw monopolization that the party delegate convention system held over contenders who sought the Democratic primary nod, which operated not only to stifle competitive races among deserving candidates, but also to curtail the right of voters to participate directly in deciding the party's nominee.<sup>221</sup>

The 1991 elections for New York City Council and the 1990 elections for New York State Assembly in districts contained within New York City have been identified as evidence of RPV by at least two federal courts in *Puerto Rican Legal Defense and Education Fund v. Gantt*<sup>222</sup> and *Diaz v. Silver*.<sup>223</sup> The RPV analysis was proffered to support the creation of a third Latino congressional district following the 1990 Census.<sup>224</sup> The court in *PRLDEF* was prepared to order its creation in a constitutional case that challenged the legislature's inability to decide on a new congressional redistricting plan.<sup>225</sup> It found that plaintiffs met their initial burden under the seminal case, *Thornburg v. Gingles*,<sup>226</sup> but eventually dismissed the case as moot once the DOJ precleared the legislature's plan, which created only two majority Latino districts in the city.<sup>227</sup> Years later, in *Diaz*, during the constitutional challenge to the contours of one of the two Latino districts, the court held that District 12 was impermissibly drawn by using race as a

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<sup>218</sup> *Id.*

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

<sup>220</sup> See *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 252–55 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007).

<sup>221</sup> *Id.*

<sup>222</sup> *Puerto Rican Legal Defense and Education Fund (PRLDEF) v. Gantt*, 796 F. Supp. 681, 796 F. Supp. 698 (E.D.N.Y. 1992), are cases addressing the redistricting of New York's congressional districts following the 1990 Census. See Appendix A.

<sup>223</sup> 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997). See Appendix C.

<sup>224</sup> See *PRLDEF*, 796 F. Supp. at 690–91, 696.

<sup>225</sup> *Id.* at 697–98.

<sup>226</sup> 478 U.S. 30 (1986).

<sup>227</sup> *PRLDEF*, 796 F. Supp. at 700.

predominant factor at the expense of traditional criteria for redistricting.<sup>228</sup> In assessing the defendants' and defendant-intervenor's claim that the district was justified as a measure to protect Latinos as a distinct community of interest, the court did not contradict the presence of RPV that was found in *PRLDEF*, but only held that RPV alone does not establish a community of interest sufficient to justify the contours of District 12.<sup>229</sup> The proof of RPV, accepted in both cases, addressed election returns for the 1991 city council and 1990 state assembly, in which at least one Latino candidate ran. The statistical analysis performed by Professor Allan Lichtman found that:

The elections examined thus far show a pattern of polarized voting between Latinos and non-Latinos in elections with Latino and non-Latino candidates. The cohesion of Latino voters is extremely strong: almost invariably a substantial majority of Latino voters united behind Latino candidates. The pattern among non-Latino voters is more mixed given the multi-racial character of the non-Latino vote (blacks, Asians, and non-Hispanic whites). Still, a substantial majority of non-Latino voters typically lined up behind non-Latino candidates, especially in city council contests.<sup>230</sup>

The 2004 case of *Rodriguez v. Pataki*<sup>231</sup> offers a limited analysis of RPV in a portion of Bronx County that challenged, *inter alia*, the alleged packing of New York State Senate districts in the 2000 round of redistricting in violation of Section 2. The court ruled in favor of the defendants, noting that the evidence failed to show a persistent and significant degree of RPV, and even if RPV was present, Latinos in the Bronx were proportionately represented in the State Senate.<sup>232</sup> Despite its conclusion, the court made a number of relevant findings regarding RPV in the city. First, it found that Bronx Latino voters in State Senate Districts 34 and 35 were politically cohesive in 82% to 85% of the endogenous and exogenous elections analyzed when RPV analysis was conducted.<sup>233</sup> The court also concluded that in all endogenous elections studied, white bloc voting defeated the Latino-preferred candidate.<sup>234</sup> While the evidence is limited—and ul-

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<sup>228</sup> 978 F. Supp. at 122.

<sup>229</sup> *Id.* at 123–26.

<sup>230</sup> *Id.* at 101.

<sup>231</sup> 308 F. Supp. 2d 346 (S.D.N.Y. 2004).

<sup>232</sup> *Id.* at 429, 433. See Appendix A.

<sup>233</sup> *Rodriguez*, 308 F. Supp. 2d at 420 & n.116.

<sup>234</sup> *Id.* at 425. Seven elections were at issue, and the Latino voters supported the Latino-preferred candidate with anywhere from 72% to 99% of their votes, while white voters provided anywhere from 27% to 40% of their votes. The elections included State Senate contests from 1996 to 2002 in Districts 34 and 35. *Id.* at 423.



timately the court denied the Section 2 claim—the findings of the court are relevant here.

*Rodriguez* also offers a glimpse of additional evidence of political cohesion within African-American and Latino communities in the city. In rejecting a Section 2 challenge to Congressional District 17, the court ruled that there was insufficient evidence of racial polarization to demonstrate that African-Americans and Latinos, combined, are politically cohesive, and without aggregating both minorities, the *Gingles* precondition that an effective majority in a compact district must be available was unmet.<sup>235</sup> Nonetheless, the elections presented to the court and analyzed by the intervenor's expert, Frank Lewis, were telling. In the 2001 mayoral primary, in which Puerto Rican candidate Fernando Ferrer ran against Mark Green and other white candidates, Latinos and African-Americans coalesced behind Ferrer—the only election cited by the court where there may have been cohesion between the two groups.<sup>236</sup> In other contests, election results demonstrated political cohesion within each of the two minority groups.<sup>237</sup> Thus, African-American voters demonstrated cohesion in the 1997 mayoral primary (63% voting for the Reverend Al Sharpton) and in the 2001 city comptroller race (where William Thompson, an African-American, defeated a white candidate, Harold Berman), but apparently did not coalesce behind Larry Seabrook and rejected the Latino-preferred candidate in the 1994 congressional district primary (Willie Colon) and the 2001 citywide race for public advocate (Willie Colon, again).<sup>238</sup> Similarly, Latino voters showed levels of political cohesion for Puerto Rican candidate Willie Colon on two occasions (the 1994 congressional Democratic primary and the 2001 public advocate race), but rejected the African-American-preferred candidates in the 1997 mayoral primary (Reverend Al Sharpton) and the 2001 city comptroller race (William Thompson).<sup>239</sup>

In the Asian-American community in New York, RPV is exemplified in the very center of its community in the city: Manhattan's Chinatown.<sup>240</sup> The efforts to create an Asian-American presence in the expanded New York City Council focused first on Manhattan's Chinatown community.<sup>241</sup>

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<sup>235</sup> *Id.* at 441–44.

<sup>236</sup> *Id.* at 444.

<sup>237</sup> *Id.* at 443–44.

<sup>238</sup> *Id.* at 443–44 & n.156.

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

<sup>240</sup> See ASIAN AM. LEGAL DEF. & EDUC. FUND, CAN AN ASIAN AMERICAN WIN IN DISTRICT 1? 1–2 (2002) [hereinafter CAN AN ASIAN AMERICAN WIN IN DISTRICT 1?] (on file with author) (outlining New York City Council election results).

<sup>241</sup> See generally *id.*

Faced with redistricting proposals from competing Asian-American groups, the city opted to join Chinatown with communities to its west and north: Battery Park City, Tribeca and SoHo.<sup>242</sup> Reviewing the results in four separate city council races (1991, 1993, 1997 and 2001), the Asian American Legal Defense and Education Fund (AALDEF) concluded that RPV was a persistent feature in all of the elections studied; namely, that election districts with majority-Asian populations voted in large proportions for Asian-American candidates, while majority-white election districts rejected them.<sup>243</sup> Apparently, the conclusions were reached by comparing homogeneous precincts, instead of conducting a regression analysis.<sup>244</sup> Thus, in 1991, Margaret Chin, the sole Asian-American candidate, captured 33% of the Democratic primary vote.<sup>245</sup> In 1993, Chin was the only Asian-American candidate in the primary and was only able to capture 27% of the vote.<sup>246</sup> In 1997, in the same primary, Jennifer Lim replaced Chin as the only candidate from Chinatown and captured 30% of the vote.<sup>247</sup> In the 2001 primary—a race with no incumbent—three Asian-American candidates (Rocky Chin, Kwong Hui and Margaret Chin) amassed only 40% of the vote, while all white candidates combined obtained 60% of the primary vote.<sup>248</sup>

In all these races, Asian American candidates have always lost to white candidates coming from the west side of the district. The winners of the Democratic Primary Elections have always gone on to win the General Elections in District 1.<sup>249</sup>

Although District 1 was created as an “Asian American district” in 1991, Asian-Americans in Lower Manhattan have never had a real chance to influence the elections.<sup>250</sup>

A comprehensive analysis of RPV in New York City was performed in 1991 by Professor James Loewen for the Community Service Society in its Comment under Section 5 to the DOJ regarding the viability of the city

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<sup>242</sup> *Id.* at 1; see also Keith Aoki, Panel 1: Asian Pacific American Electoral and Political Power, *A Tale of Three Cities: Thoughts on Asian-American Electoral and Political Power After 2000*, 8 *ASIAN PAC. AM. L.J.* 1, 27 (2002).

<sup>243</sup> CAN AN ASIAN AMERICAN WIN IN DISTRICT 1?, *supra* note 240, at 1.

<sup>244</sup> See *id.* at 1–2.

<sup>245</sup> *Id.* at 1; see also Aoki, *supra* note 242, at 28.

<sup>246</sup> CAN AN ASIAN AMERICAN WIN IN DISTRICT 1?, *supra* note 240, at 1.

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

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

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 2.

council redistricting plan after the 1990 Census.<sup>251</sup> The study was subsequently expanded and published in 1993.<sup>252</sup> It analyzed a number of elections in the city where a minority candidate ran against a white candidate. Five elections were included:

- (a) The 1985 mayoral race (in which Herman Farrell, an African-American, ran against five white candidates, including the incumbent, Edward Koch);
- (b) The 1985 contest for president of the city council (in which Andrew Stein, the winner, ran against three Latino candidates and one African-American candidate);
- (c) The 1988 presidential Democratic primary (in which Jesse Jackson ran against Walter Mondale and other white candidates);
- (d) The 1989 mayoral race (in which David Dinkins bested the incumbent, Edward Koch, and two other white candidates); and
- (e) The 1989 race for president of the city council (pitting the incumbent Stein, against one Latino candidate, Ralph Mendez).<sup>253</sup>

In presenting the results of voter behavior citywide, election returns were compared to the composition of city council districts. The highlights included two primarily Latino-white races, for the citywide position of president of the city council. In 1985, three Latino candidates faced off against two white candidates (the African-American candidate was not considered a major candidate in the analysis), and there was high cohesion among Latinos for the Latino candidates, and high cohesion by white voters for the white candidates.<sup>254</sup> Using regression analysis, Professor Loewen concluded that in 1989, Stein, the incumbent, captured 90% of the white vote, Ralph Mendez captured 75% of the Latino vote and African-Americans split among the two, but generally supported the white candidate.<sup>255</sup>

The remaining elections included in the Loewen analysis were effectively black-white contests. The 1985 mayoral contest, in which the incumbent, Edward Koch, won, did not produce “legally meaningful” RPV,<sup>256</sup> but it did demonstrate differences between African-American and

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<sup>251</sup> See Loewen, *supra* note 206, at 39 (citing James Loewen, Preliminary Report on Racial Bloc Voting, Political Mobilization, and Redistricting Plans in New York City (July 1991), and Preliminary Report on Racial Bloc Voting and Political Mobilization in New York City, As It Affects Proposed Congressional Districts (May 1992)).

<sup>252</sup> See generally *id.*

<sup>253</sup> *Id.* at 44–45 tbl.2.

<sup>254</sup> *Id.* at 46–47 & tbl.3.

<sup>255</sup> *Id.* at 53–54 & tbl.9.

<sup>256</sup> *Id.* at 56.

white voters. Herman Farrell “was not a major candidate [and] received less than 40% of the African Americans’ votes, virtually no white votes, and perhaps one Latino vote in seven.”<sup>257</sup> Whites bloc-voted overwhelmingly for the white candidates, to the level of 97%.<sup>258</sup> Professor Loewen also analyzed RPV among the “rollon” vote—valid votes that actually counted—in the 1989 mayoral primary election and demonstrated that white voters gave Dinkins 23% of their votes, African-Americans gave him 93% of their votes and Latinos gave him 56% of their votes.<sup>259</sup> Finally, in the 1988 presidential primary, the analysis again showed that New Yorkers voted along racial lines. African-American voters had a higher rollon rate than whites, demonstrating an energized African-American electorate, and gave 92% of their votes to Jesse Jackson.<sup>260</sup> Meanwhile, Latinos gave 49% of their votes to Jackson and the rest to the remaining white candidates, while white voters gave only 9% of their votes to Jackson.<sup>261</sup> The Loewen study had a separate analysis for Asian-American voting behavior in Lower Manhattan, required in part because of the deficient data in the 1980s, which collapsed Asians into the white category.<sup>262</sup>

Professor Loewen also made a number of other important findings. He found that, in general, white voters were the “most polarized group” among the voters he analyzed.<sup>263</sup> For Latino voters, he generally found the presence of RPV in the elections analyzed, both in their cohesion for Latino candidates and in the failure of white voters mostly, and to a much lesser extent, African-American voters, to support Latino candidates.<sup>264</sup> He also found that Latinos were less likely to rollon (cast valid votes) as they go down the ticket to lesser offices.<sup>265</sup> For African-Americans, he noted that they exhibited higher rollon rates than even whites in the 1988 presidential primary and the 1989 mayoral election.<sup>266</sup>

Finally, it is important to note that the Loewen study was completed in advance of the newly expanded city council, which increased to fifty-one seats from thirty-five,<sup>267</sup> an improvement in the opportunities that would be

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<sup>257</sup> *Id.* at 57.

<sup>258</sup> *Id.* at 57 tbl.13.

<sup>259</sup> *Id.* at 50 tbl.5.

<sup>260</sup> *Id.* at 55–56 tbls.11, 61.

<sup>261</sup> *Id.*

<sup>262</sup> *See id.* at 65–67.

<sup>263</sup> *Id.* at 48.

<sup>264</sup> *Id.* at 46–47 & tbl.3.

<sup>265</sup> *Id.* at 62.

<sup>266</sup> *Id.* at 61.

<sup>267</sup> Alan Finder, *New York City Charter Revision Approved by Justice Department*, N.Y. TIMES, Dec. 14, 1989, at A1.

afforded to the city's growing racial and language minorities. The study concluded with the admonition that "[l]evels of political mobilization and racial bloc voting in New York City change constantly, due to registration drives, new candidacies, and changes in the underlying age structure and citizenship rate in the city's various ethnic and racial groups."<sup>268</sup>

## VII. CONCLUSION

New York still has its fair share of voting rights abuses, impediments and practices that have yet to be fully eradicated in the nearly twenty-five years covered by this report. This is evident in the numerous ways that racial and language minorities must still avail themselves of the preventative features of Section 5 review to stop administratively what they lack in political strength to stop outright. Recent denials of preclearance addressing methods of election or access to the voting booth for language minority citizens continue to raise the specter of increased and necessary screening.

Equally important, the racial tensions that surface when emerging communities start growing in the city and seeking their place in the halls of legislative bodies are manifested in stark ways even today. Yelling at South Asian voters and labeling them "terrorists" or intimidating the burgeoning community of Chinese-American citizens with epithets, like "You f\*\*\*ing Chinese, there's too many of you," puts in context the consistently documented concerns of the city's Asian-American citizens.<sup>269</sup> For them, forcing compliance in New York City for language assistance through the courts, like the litigation outside of the city for Spanish-language voters, is still required today.

In many ways, New York has made great strides in electing candidates of their choice; but in a city with such a large proportion of African-American, Latino and Asian-American voters, the accomplishments of a number of important "firsts" do little today to counter an imbalance between electoral outcomes and the active and growing minority electorate from these communities. Much of this, albeit not all, is placed in the manifestation of the phenomenon of Racially Polarized Voting. In that regard, New York City, like so many jurisdictions benefiting from the protections of Section 5, Section 203 and Section 8, has a long road ahead to overcome the episodic, but still critically important and debilitating episodes of polarized voting today.

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<sup>268</sup> Loewen, *supra* note 206, at 72.

<sup>269</sup> See *supra* notes 147–148 and accompanying text.

Equally significant, recent trends regarding election administration in New York City portend additional problems for racial and language minorities. The recently published research of Professor Ronald Hayduk<sup>270</sup> documents in great detail the level of misinformation, faulty voting machines and mismanagement that are disproportionately found in minority polling sites in this very decade. Indeed, with New York's inability to resolve political stalemates, federal funds under HAVA have yet to make a dent in the real-life experiences on Election Day in African-American, Latino and Asian-American communities. New York State has recently been sued by the DOJ for failing to comply with these HAVA mandates, which may potentially result in forfeiting over \$49 million in federal funds for machine upgrades.<sup>271</sup> In recent elections, Hayduk documents that the Board of Elections in 2001 was short 25% of the Chinese interpreters it needed, 33% of the Spanish interpreters it needed and 59% of the Korean interpreters it needed.<sup>272</sup> Documented "undervotes"—the number of votes lost when voters go to the polls, but do not cast a vote—caused primarily by the deactivation of a special latch on the forty-year old voting machines resulted in New York City having a higher proportion of undervotes in 2000 than all of Florida.<sup>273</sup> The pattern of "undervotes" in New York City was racially skewed to a degree beyond that found in Florida in 2000, with the Bronx having a rate of 4.7%, to Staten Island's 1.6%.<sup>274</sup> Using multiple regression analysis on the presence of poll site, administrative and voting machine problems, Hayduk found that African-Americans and Latinos had a higher proportion of election machine problems.<sup>275</sup> Finally, the Hayduk study focused on the 1993 mayoral election (Dinkins-Giuliani) and concluded that the pattern of excessive challenges to eligible voters, disruptions and an unusually high incidence of the use of affidavit ballots (signifying a greater possibility of administrative error and correspondingly higher rate of disfranchisement) occurred in neighborhoods where predominately low-income and minority voters reside.<sup>276</sup> This is not surprising to the cadre of voting rights advocates in New York.

This report documents not only what has occurred since 1982 with respect to the promise of an open, fair and equitable democracy in the city. It also points to what could have happened if the temporary provisions of the

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<sup>270</sup> See HAYDUK, *supra* note 167.

<sup>271</sup> Complaint at 7, *United States v. N.Y. State Bd. of Elections*, No. 06 Civ. 0263 (N.D.N.Y. Mar. 1, 2006), available at [http://www.usdoj.gov/crt/voting/hava/ny\\_hava.pdf](http://www.usdoj.gov/crt/voting/hava/ny_hava.pdf).

<sup>272</sup> HAYDUK, *supra* note 167, at 190.

<sup>273</sup> *Id.* at 182–83, 184–86. The latch problem was not fixed until 2004.

<sup>274</sup> *Id.* at 183.

<sup>275</sup> *Id.* at 181–82.

<sup>276</sup> *Id.* at 166–69.

VRA were not in place; if every discriminatory change stopped in its tracks would have been implemented, nonetheless; if 881 federal observers were not dispatched to the beacon of urban America that is New York; if cavalier decisions about not translating candidates' names in Chinese were allowed to reach fruition; and if the deterrence embodied in Section 5 was never there to help the small handful of voting rights advocates in their quest to monitor 30,000 poll workers, 7000-plus outdated and faulty voting machines, roughly 6000 election districts, millions of voters and another million or more eligible, but not registered, voters, in the biggest city in America.

It is hard to imagine what an election in this part of the country would be like without the protections of the Voting Rights Act. But it is easier to imagine a future where its tools would be put to full use to eradicate what is left of a history of exclusion.

## APPENDIX A: SECTION 2 AND SECTION 5 LITIGATION POST 1982

This appendix gathers reported and unreported decisions from 1982 to the present in which violations of Section 5 or Section 2 were alleged. Focus is on litigation affecting New York City, with one exception: *Fund for Accurate & Informed Representation (FAIR) v. Weprin*.<sup>1</sup> This focus also is dictated by the exploration of discriminatory practices in voting in New York City's Section 5- and Section 203-covered counties, and in practices targeted at the Latino populations of the three Section 203-covered counties outside New York City (Westchester, Nassau and Suffolk Counties). Critically important cases like *Goosby v. Town Board of the Town of Hempstead*<sup>2</sup> are not included, despite falling within our geographic area of focus (Nassau County), because they do not address discrimination against the minority group that engendered Section 203 coverage in the first place. We urge the reader to explore independently the *Goosby* opinion for an excellent summary of how African-Americans have had to overcome voter discrimination against that town's government.

I. AFRICAN AMERICAN LEGAL DEFENSE FUND V. NEW YORK STATE DEPARTMENT OF EDUCATION<sup>3</sup>

*African American Legal Defense Fund v. New York State Department of Education* was an unsuccessful, generalized VRA challenge to the composition of the central Board of Education and the manner of electing Community School Board members.<sup>4</sup> The suit combined a constitutional and statutory challenge to the financing mechanisms of New York City's public schools.<sup>5</sup> The court dismissed all claims related to the public financing of the schools.<sup>6</sup> The general VRA challenge to the composition of the appointed central Board of Education was interpreted by the court to be a challenge under Section 5.<sup>7</sup> Such a claim was dismissed in the absence of allegations that the city switched from an elective body to an appointed body.<sup>8</sup> To the extent that the complaint set forth a Section 2 dilution claim to the composition of the Board of Education, the court rejected that as well since the central Board is composed of appointees, not persons directly

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<sup>1</sup> 796 F. Supp. 662 (N.D.N.Y. 1992).

<sup>2</sup> 180 F.3d 476 (2d Cir. 1999).

<sup>3</sup> 8 F. Supp. 2d 330 (S.D.N.Y. 1998) (Owen, J.).

<sup>4</sup> See *id.* at 334.

<sup>5</sup> See *id.* at 333-34.

<sup>6</sup> See *id.* at 334-39.

<sup>7</sup> See *id.* at 339.

<sup>8</sup> See *id.*



elected to office.<sup>9</sup> Another Section 2 dilution claim was made to the method of election for community school boards in the City.<sup>10</sup> This claim was dismissed as well since there were no allegations made concerning the basic elements of a dilution claim under *Thornburg v. Gingles*,<sup>11</sup> especially any allegations of racially polarized voting.<sup>12</sup>

## II. ASHE V. BOARD OF ELECTIONS<sup>13</sup>

Settled in 1993, this successful Section 2 case challenged the Board of Elections's failure to: (1) train Poll Inspectors; (2) process affidavit ballots correctly; (3) assign Poll Coordinators; (4) provide language assistance in Spanish and Chinese in the completion of voter registration forms; (5) inspect and certify operable voting machines; and (6) ensure that repairs of inoperable machines in African-American and Latino communities were completed expeditiously.<sup>14</sup> The settlement included increased training requirements for Poll Inspectors, Translators and other personnel, requirements for the designation of Poll Coordinators and Information Clerks, signage requirements, outreach to African-American and Latino communities, modifications to the voter registration forms and requirements for the use of certified voting machines.<sup>15</sup>

## III. BAKER V. CUOMO (BAKER V. PATAKI)<sup>16</sup>

This was an unsuccessful Section 2 and constitutional law challenge to New York's felon disfranchisement law.<sup>17</sup> Plaintiffs' claims were dismissed by the District court.<sup>18</sup> The District court made no findings under Section 2's totality of circumstances, except to say that the "[d]isproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination."<sup>19</sup> The Second Circuit reversed on the Section 2 claim, then granted a rehearing *en banc* limited to the Sec-

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<sup>9</sup> See *id.* at 339 n.14.

<sup>10</sup> See *id.* at 339-40.

<sup>11</sup> 478 U.S. 30 (1986).

<sup>12</sup> *African American Legal Defense Fund*, 8 F. Supp. 2d at 340.

<sup>13</sup> No. Civ. 88-1566, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. Sept. 6, 1988).

<sup>14</sup> *Ashe v. Bd. of Elections*, 124 F.R.D. 45, 46 (E.D.N.Y. 1988).

<sup>15</sup> See Stipulation of Settlement, *Ashe v. Bd. of Elections*, 88 Civ. 1566 (E.D.N.Y. May 7, 1993) (on file with author).

<sup>16</sup> 842 F. Supp. 718 (S.D.N.Y. 1993), *aff'd sub nom.* *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

<sup>17</sup> N.Y. ELEC. LAW § 5-106 (McKinney 2007).

<sup>18</sup> See *Baker*, 842 F. Supp. at 723.

<sup>19</sup> *Id.* at 722.

tion 2 claim.<sup>20</sup> The sole issue addressed in the 1996 divided opinion was whether a Section 2 claim lies against a state's felon disfranchisement law in the face of proof of discriminatory results only.<sup>21</sup> The Second Circuit, *en banc*, was evenly split, five to five, on this issue.<sup>22</sup> Accordingly, the decision of the district court dismissing the claims was affirmed with Second Circuit noting *per curiam* that its decisions were without precedential effect.<sup>23</sup>

#### IV. BUTTS V. CITY OF NEW YORK<sup>24</sup>

The imposition of the primary run-off law in 1972<sup>25</sup>—requiring that in primary elections for New York City's three city-wide offices, a primary run-off is required if no candidate obtains at least 40% of the primary vote—was the subject of this constitutional and Section 2 challenge by African-American and Latino voters.<sup>26</sup> The district court held that the law was passed with a discriminatory purpose to make it more difficult for African-American and Latino voters to win citywide contests.<sup>27</sup> The court credited evidence that the New York Legislature sought to cure the “Badillo scare”—the 1969 Democratic Primary when Herman Badillo, a Puerto Rican candidate, nearly captured the mayoral nomination.<sup>28</sup> The court also found that the law violated Section 2 because it had both a discriminatory purpose and discriminatory effects.<sup>29</sup> The Second Circuit reversed on appeal and upheld the legality of the election law.<sup>30</sup> The appellate court credited the New York Legislature with other, nondiscriminatory motives for passing the primary run-off law.<sup>31</sup> On the VRA claim, the court clearly noted that Section 2 could not apply to the electoral mechanism challenged in this case; applying Section 2 jurisprudence based on access to multimember legislative bodies cannot be reconciled with notions of equal political opportunity in elections for single-member offices.<sup>32</sup> “There can be no equal opportunity for representation within an office

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<sup>20</sup> Baker v. Pataki, 85 F.3d 919, 920–21 (2d Cir. 1996).

<sup>21</sup> *Id.* at 920.

<sup>22</sup> *Id.* at 921.

<sup>23</sup> *Id.* at 921 & n.2.

<sup>24</sup> 614 F. Supp. 1527 (S.D.N.Y. 1985), *rev'd*, 779 F.2d 141 (2d Cir. 1985).

<sup>25</sup> See N.Y. ELEC. LAW § 6-162 (McKinney 2007).

<sup>26</sup> *Butts*, 614 F. Supp. at 1528.

<sup>27</sup> *Id.* at 1554.

<sup>28</sup> See *id.* at 1530.

<sup>29</sup> See *id.* at 1548.

<sup>30</sup> *Butts v. City of New York*, 779 F.2d 141, 151 (2d Cir. 1985).

<sup>31</sup> See *id.* at 147.

<sup>32</sup> See *id.* at 148.

filled by one person.”<sup>33</sup> Despite this threshold conclusion, the Second Circuit went on, in dicta,<sup>34</sup> to counter a number of findings made by the district court regarding the Senate Factors.<sup>35</sup> It observed that the proof presented to the district court could not support a finding of a history of official discrimination in voting rights, episodes of racial appeals in campaigns or a lack of success by minorities in securing elected positions.<sup>36</sup> The Second Circuit, however, left undisturbed all the findings of Racially Polarized Voting made by the district court in certain elections from 1973 to 1984.<sup>37</sup>

Years later in 2001, the primary run-off law would force Fernando Ferrer, a Puerto Rican candidate who came in first in the mayoral primary but had less than 40% of the vote, into a primary run-off with Mark Green. Green won the primary then lost the general election.<sup>38</sup> The primary run-off law is still part of New York’s election law.

#### V. CAMPAIGN FOR A PROGRESSIVE BRONX V. BLACK<sup>39</sup>

*Campaign for a Progressive Bronx v. Black* was a successful Section 2 challenge by Latino voters to the Board of Elections’ failure to assign adequate and properly trained bilingual election inspectors and polling clerks in Bronx County.<sup>40</sup> Injunctive relief was stipulated to by the parties in September 1985, requiring an educational campaign in Spanish to advise voters that voter identification cards provided by the Board of Elections were not required to cast a ballot; requiring notice to the plaintiffs of the election districts targeted for language assistance; and requiring cooperation with the plaintiffs to secure an adequate number of bilingual election inspectors.<sup>41</sup>

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

<sup>34</sup> The court first noted that by applying the correct standard for determining Section 2’s applicability as a threshold matter, an analysis of the Section 2’s objective factors was not even triggered and was, indeed, “immaterial.” *Id.* at 149–50. The court went on to analyze them nonetheless. *See id.* at 150–51.

<sup>35</sup> *Id.* at 146–47.

<sup>36</sup> *Id.* at 150–51.

<sup>37</sup> *See id.* at 153 (Oakes, J., dissenting).

<sup>38</sup> *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 441–44 (S.D.N.Y. 2004), *aff’d*, 543 U.S. 997 (2004).

<sup>39</sup> 631 F. Supp. 975 (S.D.N.Y. 1986).

<sup>40</sup> *See id.* at 976.

<sup>41</sup> *Id.* at 978–79.

VI. DENIS V. NEW YORK CITY BOARD OF ELECTIONS<sup>42</sup>

*Dennis v. New York City Board of Elections* was an unsuccessful Section 2 and constitutional challenge to a series of irregularities, including broken lights, unsealed polling booths and machine malfunctions, in the conduct of the 1994 primary election for State Assembly in the 68th District in East Harlem.<sup>43</sup> Plaintiffs' Equal Protection Clause and Due Process Clause claims were dismissed.<sup>44</sup> Plaintiffs brought a Section 2 vote dilution claim premised in large part on allegations that the irregularities they experienced in minority neighborhoods of the 68th Assembly District were not present in the white neighborhoods of the district.<sup>45</sup> Their motion for preliminary injunction was denied when the court ruled that they were unlikely to succeed on the merits.<sup>46</sup> Plaintiffs conceded a lack of Racially Polarized Voting in the 68th District and, in the court's opinion, failed to substantiate any of the Section 2 Senate Factors that would lead to a finding of a Section 2 violation.<sup>47</sup>

VII. DOBBS V. CREW<sup>48</sup>

These were consolidated cases that unsuccessfully challenged under Section 5 the suspension of elected Community School District Board members in Boards 17, 9 and 7 without obtaining preclearance.<sup>49</sup> The court denied the motion for preliminary injunction on mootness grounds after the Department of Justice granted preclearance.<sup>50</sup> The court noted that the preclearance granted by the Attorney General was limited to the suspensions at hand, and that any future suspensions or removal required preclearance anew.<sup>51</sup> This position is consistent with the November 15, 1996 objection to preclearance issued by the Attorney General regarding the removal of the entire board of Community School District 12.<sup>52</sup> For a related case, see *Green v. Crew*, below.

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<sup>42</sup> No. 94 Civ. 7077, 1994 U.S. Dist. LEXIS 15819 (S.D.N.Y. Nov. 7, 1994).

<sup>43</sup> *Id.* at \*1, 7.

<sup>44</sup> *Id.* at \*11.

<sup>45</sup> *See id.* at \*5.

<sup>46</sup> *Id.* at \*25.

<sup>47</sup> *Id.* at \*21, 25.

<sup>48</sup> No. Civ. 96-3240, No. Civ. 96-3399, No. Civ. 96-3400, 1996 U.S. Dist. LEXIS 20129 (E.D.N.Y. Aug. 23, 1996).

<sup>49</sup> *Id.* at \*1-5.

<sup>50</sup> *Id.* at \*13.

<sup>51</sup> *Id.* at \*9.

<sup>52</sup> *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Judith Kay, First Deputy Counsel to the Chancellor, Office of Legal Servs., N.Y. City Bd. of Educ. (Nov. 15, 1996) (on file with author).

VIII. EAST FLATBUSH ELECTION COMMITTEE V. CUOMO<sup>53</sup>

This was a Section 5 challenge to changes in a number of polling places and the modification of the schedule to submit specifications to substantiate nominating petitions from six to three days in advance of a Community School Board election.<sup>54</sup> Plaintiffs sought injunctive relief to order a new school board election.<sup>55</sup> The court denied the request for injunctive relief, holding that the polling site changes were “retroactively” precleared eventually by the Department of Justice and that such practice, while a concern to the court, did not violate Section 5.<sup>56</sup> The court also delayed any issuance of a court order regarding the modification of the candidate challenge schedule until the Department of Justice could finish its Section 5 review of the change upon resubmission.<sup>57</sup>

IX. FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC. (FAIR) V. WEPRIN<sup>58</sup>

This was a general constitutional and Section 2 challenge to a 1990s Assembly redistricting plan in which the plaintiffs alleged unlawful packing and fracturing of minority communities throughout the state, as well as general “one person, one vote” claims applicable to the entire state.<sup>59</sup> The court denied all Section 2 claims, holding that there was no unlawful fracturing of minority communities in the Assembly plan for Monroe, Nassau, Erie or Westchester Counties.<sup>60</sup> The court acknowledged the U.S. Attorney General’s denial of preclearance in June 1992 to two Assembly districts (A.D. 71 & 72) in Manhattan and merely ordered a Special Master to redraw those districts alone to bring them in compliance with the VRA.<sup>61</sup> All other claims were likewise dismissed.

X. FRANCE V. PATAKI<sup>62</sup>

Filed on behalf of African-American and Latino plaintiffs, *France v. Pataki* was a Section 2 challenge to the selection, nomination and election

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<sup>53</sup> 643 F. Supp. 260 (E.D.N.Y. 1986).

<sup>54</sup> *Id.* at 261–62.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* at 266.

<sup>57</sup> *Id.*

<sup>58</sup> 796 F. Supp. 662 (N.D.N.Y. 1992).

<sup>59</sup> *Id.* at 666–67.

<sup>60</sup> *Id.* at 672.

<sup>61</sup> *Id.*

<sup>62</sup> 71 F. Supp. 2d 317 (S.D.N.Y. 1999) (Sprizzo, J.).

of New York State Supreme Court Justices.<sup>63</sup> Plaintiffs sought the creation of single-member subdistricts of each Judicial District in New York City.<sup>64</sup> The court rejected the Section 2 challenge, holding that proof on the first *Gingles* precondition was lacking because the plans proposed by the plaintiffs were primarily driven by considerations of race and, thus, did not survive strict scrutiny; had failed to meet the equal population criteria of the “one person, one vote” standard; did not abide by traditional criteria used in redistricting; and failed to account for citizenship voting age population.<sup>65</sup> The court did find that the second *Gingles* precondition was satisfied in that African-American and Latino voters were politically cohesive.<sup>66</sup> However, the court failed to find sufficient proof of the third *Gingles* precondition: that white-bloc voting usually defeats the minority-preferred candidate.<sup>67</sup> The court noted that defendants’ expert report on the lack of white bloc voting in New York State Supreme Court elections went unchallenged.<sup>68</sup> Finally, the court found that under the “totality of circumstances” rubric of Section 2, African-Americans and Latinos were not deprived of an equal opportunity to participate in the political process of electing New York State Supreme Court Justices.<sup>69</sup>

#### XI. GREEN V. CREW<sup>70</sup>

*Green v. Crew* was an unsuccessful Section 2 and Equal Protection Challenge to the removal, continued suspension and replacement of elected Community School Board members from District 17 in Kings County with appointed trustees.<sup>71</sup> The court ruled that a Section 2 challenge may be raised in conjunction with the removal and replacement of elected officials and relied in part on the Department of Justice’s interpretation that such removals were a voting practice subject to preclearance under Section 5.<sup>72</sup> However, the court denied the plaintiffs’ motion for a preliminary injunction because of a failure to show that they were likely to succeed on the merits of their Section 2 dilution claim absent evidence of political cohesion by racial minority voters or racially polarized voting by white voters.<sup>73</sup>

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<sup>63</sup> *Id.* at 319.

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

<sup>65</sup> *Id.* at 324–27.

<sup>66</sup> *Id.* at 327.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 328–29.

<sup>69</sup> *Id.* at 334.

<sup>70</sup> No. 96 Civ. 3367, 1996 U.S. Dist. LEXIS 20227 (E.D.N.Y. Sept. 10, 1996) (Sifton, J.).

<sup>71</sup> *Id.* at \*6–7, 12–13.

<sup>72</sup> *See id.* at \*29.

<sup>73</sup> *Id.* at \*31–33.

The court, however, did allow the Equal Protection Clause claim to go forward on the showing that the Chancellor lifted the suspension of some, but not all School Board members.<sup>74</sup>

## XII. HAYDEN V. PATAKI<sup>75</sup>

*Hayden v. Pataki* was a Section 2 and constitutional law challenge to New York's felon disfranchisement law.<sup>76</sup> Plaintiffs alleged that New York Election Law section 5-106 was discriminatory in purpose and effect.<sup>77</sup> Plaintiffs' discriminatory impact allegations centered on their assertions that African-Americans and Latinos were "prosecuted, convicted, and sentenced to terms of incarceration at a much higher rate than whites" in the State of New York.<sup>78</sup> The district court ruled that the complaint failed to state a claim under the various theories advanced by the plaintiffs.<sup>79</sup> As to the Section 2 claims, however, the court refused to reach them and relied on the lower court opinion in *Muntaqim v. Coombe* to dismiss them in their entirety.<sup>80</sup>

## XIII. KALOSHI V. NEW YORK CITY BOARD OF ELECTIONS<sup>81</sup>

Plaintiffs in *Kaloshi v. New York City Board of Elections* alleged that the modification of a candidate petitioning period in June 2002, without preclearance, was in violation of Section 5.<sup>82</sup> The court dismissed the Section 5 claim upon a showing that the Department of Justice had precleared the changes without objection, on June 7, 2002.<sup>83</sup> The case raised no issues of discriminatory purpose or discriminatory effect against racial and language minorities in New York City.

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<sup>74</sup> *Id.* at \*42–44.

<sup>75</sup> No. 00 Civ. 8586, 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (McKenna, J.), *aff'd*, 449 F.3d 305 (2d Cir. 2006).

<sup>76</sup> *Id.* at \*1. *Hayden* was consolidated on appeal for Section 2 purposes with *Muntaqim v. Coombe*. See *Hayden v. Pataki*, 449 F.3d 305, 309 (2d Cir. 2006). *Muntaqim* is discussed below.

<sup>77</sup> *Hayden*, 2004 WL 1335921, at \*3–4.

<sup>78</sup> *Id.* at \*4 n.4.

<sup>79</sup> See *id.* at \*8.

<sup>80</sup> See *id.* at \*5.

<sup>81</sup> No. 02 Civ. 4762, 2002 U.S. Dist. LEXIS 17803 (E.D.N.Y. Sept. 13, 2002), *vacated sub nom.* *Kaloshi v. Spitzer*, 69 Fed. App'x 17 (2d Cir. 2003).

<sup>82</sup> *Id.* at \*26.

<sup>83</sup> *Id.*

XIV. MALDONADO V. PATAKI<sup>84</sup>

*Maldonado v. Pataki* is a pending challenge under Section 2 to the creation of a new King's County Surrogate Court position in 2005.<sup>85</sup> The New York State Legislature fashioned the law's effective date after the first day of circulating nominating petitions, thus avoiding holding a primary election in Kings County for the new Surrogate's seat and, instead, enabling the Kings County Democratic Party to select its nominee directly.<sup>86</sup> In the 2005 general election, Frank Seddio, a Caucasian male, won election to a fourteen-year term as a Kings County Surrogate.<sup>87</sup> African-American and Latino registered Democratic voters in Brooklyn brought suit alleging that Section 2 afforded them a right to a primary election under these circumstances and sought a preliminary injunction to stop the certification of the election results.<sup>88</sup> No proof was presented to the court to demonstrate that there would have been Racially Polarized Voting had the primary election been held.<sup>89</sup> The court denied the motion holding that plaintiffs failed to prove a likelihood of success on the merits.<sup>90</sup> Effectively, the court ruled that plaintiffs failed to show that the application of the State's election code deprived them of an equal opportunity to participate in the political process since all voters in Brooklyn, irrespective of race, were denied the a primary election.<sup>91</sup> The court also rejected the argument that plaintiffs had a statutory right to a primary election.<sup>92</sup> The case is still pending in the Eastern District.

XV. MUNTAQIM V. COOMBE<sup>93</sup>

*Muntaqim* was a Section 2 challenge to New York's felon disfranchisement law, subsequently consolidated on appeal with *Hayden* in the Second Circuit.<sup>94</sup> The first panel in *Muntaqim* ruled that Section 2 did not apply to New York's felon disfranchisement statute and indicated that, under the circumstances of felon disfranchisement, some causal connection between purposeful discrimination and the discriminatory effects of the

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<sup>84</sup> No. 05 Civ. 5158, 2005 U.S. Dist. LEXIS 36933 (E.D.N.Y. Dec. 16, 2005) (Townes, J.)

<sup>85</sup> *Id.* at \*1-2.

<sup>86</sup> *See id.* at \*1-3, 11-12.

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.* at \*4-5.

<sup>89</sup> *Id.* at \*4.

<sup>90</sup> *Id.* at \*17.

<sup>91</sup> *See id.* at \*11.

<sup>92</sup> *Id.* at \*12-16.

<sup>93</sup> 366 F.3d 102 (2d Cir. 2004).

<sup>94</sup> *See id.* at 103-04; *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).



challenge rule would be necessary.<sup>95</sup> It deliberately did not address the type or quantum of statistical evidence needed to assert a Section 2 claim in the context of felon disfranchisement: “We also do not purport to decide what type of statistical evidence might be sufficient to support an inference that racial bias exists at any given state in the criminal process.”<sup>96</sup> Nor would it opine on the relevance of any of the Senate Factors that accompanied the 1982 amendments to the treatment of felon disfranchisement under Section 2.<sup>97</sup> Since Muntaqim did allege racial disparities in the sentencing of felons in New York courts, the panel concluded that if Section 2 did apply to felon disfranchisement, the plaintiff stated a valid initial claim.<sup>98</sup> In the Second Circuit’s order granting rehearing *en banc*, however, the Circuit requested briefing on a number of issues directly relating to the alleged discriminatory effects of the criminal justice system in New York and its effect on the political participation of African-American and Latino voters.<sup>99</sup> The court also asked for briefing on the Section 2 vote dilution claim raised in *Hayden*.<sup>100</sup> A decision on those issues, plus the constitutional issues raised by the original panel regarding applying Section 2 to felon disfranchisement, was rendered in 2006.<sup>101</sup>

#### XVI. MERCED V. KOCH<sup>102</sup>

*Merced v. Koch* was a Section 5 action to enjoin Area Policy Board elections, which determined how anti-poverty funds would be distributed within Neighborhood Development Areas administered by the New York City’s Community Development Agency, for failure to obtain preclearance of changes in the method of election.<sup>103</sup> Plaintiffs alleged that changes in the composition of each Area Policy Board would have a discriminatory impact on African-American and Latino voters.<sup>104</sup> The court denied the injunction and questioned whether these Area Policy Board elections were

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<sup>95</sup> *Muntaqim*, 366 F.3d at 115, 118.

<sup>96</sup> *Id.* at 118 n.17.

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

<sup>98</sup> *Id.* at 118.

<sup>99</sup> *Muntaqim v. Coombe*, 396 F.3d 95, 96 (2d Cir. 2004) (specifically asking the parties to brief what kind of data demonstrating racial bias in conviction and sentencing, statistical and otherwise, should a court rely upon if the case were remanded).

<sup>100</sup> *See id.* at 95.

<sup>101</sup> *See Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).

<sup>102</sup> 574 F. Supp. 498 (S.D.N.Y. 1983).

<sup>103</sup> *Id.* at 499.

<sup>104</sup> *Id.*

elections covered under Section 5 of the VRA.<sup>105</sup> The complaint was subsequently withdrawn.

XVII. PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND,  
INC. (PRLDEF) V. GANTT LITIGATION<sup>106</sup>

The *PRLDEF* litigation addressed a legislative stalemate to redistrict New York's congressional districts into thirty-one, rather than thirty-four, districts following population shifts documented by the 1990 Census.<sup>107</sup> In its June 1992 decision the court conditionally adopted the proposed plan of a Special Master it commissioned to devise a thirty-one-seat congressional plan.<sup>108</sup> Ultimately, the Special Master's plan was unnecessary once the Department of Justice precleared the New York Legislature's last-minute congressional plan.<sup>109</sup> For Latino and African-American voters in New York City, there was a marked difference between the Special Master's plan and the Legislature's plan: the Master's plan created three majority-Latino districts and four majority-African American districts, while the Legislature's plan maintained the current, two majority-Latino districts and created five majority-African-American districts.<sup>110</sup> Plaintiffs in the *PRLDEF* litigation sought to raise a Section 2 challenge to 1990s congressional redistricting plan finally adopted by the Legislature. The court, however, denied that request in its July 1992 decision and dismissed the suit as moot once preclearance was issued.<sup>111</sup> Nonetheless, the court did recognize that the Special Master's plan it adopted satisfied Section 2 and found that "groups purporting to represent the African-American and Latino voters have established their initial burden under *Gingles*."<sup>112</sup> The *Gingles* preconditions are the existence of a compact district that is composed of a majority of minority group members, the existence of political cohesion within that minority group and the existence of white bloc voting that tends to defeat the minority-preferred candidate.<sup>113</sup>

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<sup>105</sup> *Id.* at 500 & n.2.

<sup>106</sup> *PRLDEF v. Gantt (PRLDEF I)*, 796 F. Supp. 677 (E.D.N.Y. 1992); *PRLDEF v. Gantt (PRLDEF II)*, 796 F. Supp. 681 (E.D.N.Y. 1992); *PRLDEF v. Gantt (PRLDEF III)*, 796 F. Supp. 698 (E.D.N.Y. 1992).

<sup>107</sup> *PRLDEF I*, 796 F. Supp. at 678.

<sup>108</sup> *PRLDEF II*, 796 F. Supp. at 698.

<sup>109</sup> *See PRLDEF III*, 796 F. Supp. at 699–700.

<sup>110</sup> *See PRLDEF II*, 796 F. Supp. at 694 (discussing Special Master's plan).

<sup>111</sup> *See PRLDEF III*, 796 F. Supp. at 699–700.

<sup>112</sup> *PRLDEF II*, 796 F. Supp. at 693.

<sup>113</sup> *See id.*

XVIII. RODRIGUEZ V. PATAKI<sup>114</sup>

*Rodriguez v. Pataki* was an unsuccessful Section 2 and constitutional challenge to a 2002 State Senate and congressional redistricting plan as it applied to Bronx, Suffolk and Nassau Counties.<sup>115</sup> A three-judge district court granted summary judgment to the defendants on some counts, and granted judgment after trial to defendants on all other counts.<sup>116</sup> The court rejected the plaintiffs' constitutional challenge under "one person, one vote" principles grounded in the Equal Protection Clause.<sup>117</sup> The court noted that the plan, overall, was within the maximum population deviation allowed by law and was still legal even if the State Senate created overpopulated districts "downstate" and more under-populated districts upstate.<sup>118</sup>

The court also rejected Section 2 claims against the State Senate districts in Nassau and Suffolk Counties.<sup>119</sup> In the challenge to Nassau County Senate Districts 6 through 9, the court ruled that the plaintiffs failed to show the existence of an alternative plan where African-Americans in Nassau County would constitute the majority in a compact Senatorial district, thus failing to satisfy the first *Gingles* precondition.<sup>120</sup> The attempt to prove intentional discrimination in the Legislature's deliberate failure to create a black majority district in Suffolk County was rejected as well; at best, the court ruled, the plaintiffs demonstrated that the Legislature was aware of the racial effect the final plan would have.<sup>121</sup> In the court's words, "consciousness of minority groups is not evidence of intentional discrimination."<sup>122</sup> The remaining Section 2 challenges to the Senate Districts in Bronx County were rejected after a trial.<sup>123</sup> The Bronx County challenge was ultimately unsuccessful because under the "totality of circumstances" test under Section 2, the court found that Bronx Latinos were proportionately represented in the Senate.<sup>124</sup> The court also rejected a Section 2 challenge to Senate District 31 (New York and Bronx Counties) filed by Latino intervenors in the case primarily because of the failure to present

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<sup>114</sup> 308 F. Supp. 2d 346 (S.D.N.Y. 2004).

<sup>115</sup> *Id.* at 351, 460–61.

<sup>116</sup> *Id.* at 360–61.

<sup>117</sup> *Id.* at 370–71.

<sup>118</sup> *See id.* at 370–71.

<sup>119</sup> *See id.* at 381, 403.

<sup>120</sup> *See id.* at 376–77.

<sup>121</sup> *See id.* at 381.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 437.

<sup>124</sup> *See id.* at 436–37.

evidence that white voters voted as a bloc to defeat minority preferred candidates, the third *Gingles* precondition.<sup>125</sup> Finally, the court rejected a Section 2 challenge to Congressional District 17 (Bronx, Westchester and Rockland Counties) asserted by African-American intervenors.<sup>126</sup> It ruled that the first *Gingles* precondition could not be met when the intervenors sought to combine African-American and Latino voters to create an effective majority-minority congressional district because the intervenors to prove that African-Americans and Latinos combined in District 17 are politically cohesive.<sup>127</sup>

#### XIX. ROGERS V. NEW YORK CITY BOARD OF DIRECTORS<sup>128</sup>

Plaintiff, a mayoral candidate in 1997, brought this Section 5 case but failed to allege any discriminatory purpose or discriminatory effect that emanated from the imposition, without preclearance, of a firm deadline for applications for matching public funds from the New York City Campaign Finance Board.<sup>129</sup> The court dismissed the Section 5 claim because the case did not allege that race or color had anything to do with the imposition, administration or effect of the Campaign Finance Board's deadline.<sup>130</sup>

#### XX. TORRES V. CUOMO<sup>131</sup>

*Torres v. Cuomo* was an unsuccessful Section 2, 14th Amendment and 15th Amendment challenge to the 1992 New York Congressional District plan, which plaintiff alleged failed to include a third Latino-majority district as per the recommendations of the Special Master appointed by the court in the *PRLDEF* litigation.<sup>132</sup> The court denied motions to dismiss the claims on the grounds that Latino voters were precluded from litigating the challenge anew since they participated in previous court cases to assert their rights to create majority-Latino congressional districts.<sup>133</sup> Ultimately, however, the court rejected the statutory and constitutional claims to create a third Latino congressional district in New York.

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<sup>125</sup> See *id.* at 438, 440–41.

<sup>126</sup> See *id.* at 444.

<sup>127</sup> See *id.* at 443–45.

<sup>128</sup> 988 F. Supp. 409 (S.D.N.Y. 1997) (Scheidlin, J.).

<sup>129</sup> *Id.* at 411–12.

<sup>130</sup> See *id.*

<sup>131</sup> 92 Civ. 5811, 1993 U.S. Dist. LEXIS 1165 (S.D.N.Y. Feb. 3, 1993).

<sup>132</sup> See *id.* at \*2–3.

<sup>133</sup> *Id.* at \*5–8.

XXI. UNITED PARENTS ASSOCIATION V. NEW YORK CITY  
BOARD OF ELECTIONS<sup>134</sup>

*United Parents Association v. New York City Board of Elections* was a successful Section 2 challenge to Election Law section 5-406, New York's nonvoting purge law. The law allowed the Board of Elections to cancel the voter registration of any voter who failed to vote in four years. Plaintiffs submitted expert testimony indicating that law's application had an unlawful, racially discriminatory effect, as African-American and Latino voters were 32% more likely to be purged for non-voting than whites. In 1989 the court preliminarily enjoined the Board of Elections from continuing its nonvoting purge. The State Legislature amended its nonvoting purge law to allow for the cancellation of a voter's registration for failure to vote in all elections in a period covering two successive presidential elections. In 1992, plaintiffs secured another court order prohibiting the implementation of the new purge law upon a statistical analysis that it too had a racially discriminatory effect under Section 2. With the passage of National Voter Registration Act of 1993 looming, the parties agreed to a Consent Decree, upheld by court order, that permanently enjoined purging in New York for nonvoting in any stated period.<sup>135</sup>

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<sup>134</sup> 89 Civ. 0612 (E.D.N.Y. 1989) (Sifton, J.) (court and litigation documents on file with author).

<sup>135</sup> Consent Decree, *United Parents Ass'n v. N.Y. City Bd. of Elections*, 89 Civ. 0612 (E.D.N.Y. May 6, 1993) (on file with author).

APPENDIX B: NVRA LITIGATION AND RACIAL AND LANGUAGE  
MINORITY VOTERS

The passage of the National Voter Registration Act of 1993<sup>1</sup> (NVRA) presented racial and language minorities in New York City with an opportunity to push government agencies to actively register the large number of eligible, but unregistered, voters among poor populations in the City.<sup>2</sup> The NVRA, made effective in 1995, created agency-based voter registration requirements for certain state agencies,<sup>3</sup> eliminated the requirements for in-person registration by mandating mail-in voter registration throughout the country<sup>4</sup> and placed curbs on a number of list maintenance policies that purged voters from state voter lists.<sup>5</sup>

The NVRA requires agencies that provide public benefits (e.g., Temporary Aid to Needy Families, Medicaid, and Food Stamps) to offer voter registration opportunities to all persons applying for benefits or reinstatements.<sup>6</sup> Given the relatively low socio-economic status of racial and language minorities in the New York City, NVRA registrations have the potential of closing the gap in political participation between poor racial and language minority communities and the rest of the electorate. In New York City, NVRA litigation, initiated exclusively to force compliance with these mandates, forced a reticent and indifferent agency apparatus to provide access to voter registration in agencies processing Medicaid, “welfare” and, as a result of a state designation, unemployment insurance benefits.

In *National Congress for Puerto Rican Rights v. Sweeney*,<sup>7</sup> Latino voters and others forced the New York State Department of Labor to offer voter registration at Unemployment Insurance Offices reaching 80,000 ap-

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<sup>1</sup> Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg-1973gg-10 (2006)).

<sup>2</sup> In 1990, voters and advocates sued in state court to enforce the Governor’s Executive Order 136, which required facilitation of agency-based voter registration throughout the state, particularly in agencies serving poor communities in New York City. *See* 100% VOTE v. Bd. of Elections, Index No. 21920/1990 (N.Y. Sup. Ct. Feb. 21, 1991) (order granting petitioners’ writ of mandamus). On February 21, 1991, Justice Santaella granted petitioners a writ of mandamus to force compliance with the executive order. *See id.* In 1995, another suit in state court sought to fully implement voter registration in New York City mayoral agencies. *See* Disabled in Action of Metro. N.Y. v. Giuliani, Index No. 110646/1995 (N.Y. Sup. Ct. Oct. 19, 1995) (Freidman, J.). The courts only upheld the right of the Commissioner of the New York City Voter Assistance Commission to obtain annual reports on compliance. *See id.*

<sup>3</sup> 42 U.S.C. § 1973gg-5 (2006).

<sup>4</sup> *See id.* § 1973gg-4.

<sup>5</sup> *See id.* § 1973gg-6.

<sup>6</sup> *See id.* § 1973gg-5.

<sup>7</sup> 95 Civ. 8742 (S.D.N.Y. Jan. 22, 1996) (consent judgment).

plicants per year, as required by New York's NVRA enabling and enforcement statute.<sup>8</sup> The court entered a Consent Judgment in January 1996 that established a comprehensive mechanism for integrating voter registration opportunities in the intake procedures for new applicants.<sup>9</sup>

In *Disabled in Action of Metropolitan New York v. Hammons*,<sup>10</sup> disabled litigants sought to increase the reach of the NVRA by seeking full NVRA compliance in every setting where Medicaid applications were processed. The State had effectively delegated the responsibilities of accepting Medicaid applications in a number of settings, including those in the private sector.<sup>11</sup> As a means-tested benefit program, full compliance, as envisioned by the plaintiffs, would have captured thousands of eligible racial and language minority registrants. Instead, the court rejected the full sweep of the relief plaintiffs sought and ruled that NVRA obligations could only be extended to public hospitals.<sup>12</sup> In 2000, the parties settled the case along the lines of the Second Circuit's opinion.

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<sup>8</sup> See *id.* (discussing N.Y. ELEC. LAW § 5-211).

<sup>9</sup> See *id.*

<sup>10</sup> 202 F.3d 110 (2d Cir. 2000). On appeal before the Second Circuit, *Disabled in Action* was consolidated with *United States v. New York*, a case brought by the federal government to force adequate and consistent NVRA compliance in public assistance agencies and in state agencies that primarily serve the disabled. See *United States v. New York*, 3 F. Supp. 2d 298 (E.D.N.Y. 1998).

<sup>11</sup> See *id.* at 115–16.

<sup>12</sup> See *id.* at 120.

APPENDIX C: CONSTITUTIONAL LITIGATION RELATED TO  
VOTING BY RACIAL AND LANGUAGE MINORITIESI. RAVITCH V. CITY OF NEW YORK<sup>1</sup>

In a 1992 case challenging the composition of the New York City Districting Commission, the City defended racial and language minority diversity on the Commission and conceded that it engaged in a “history of discrimination specific to voting rights in New York City and its earlier districting and council bodies.”<sup>2</sup> At issue was a City Charter provision adopted by referendum in 1989 that required that subsequent City Council redistricting commissions reflect the City’s racial and language minorities protected by the Voting Rights Act, “in proportion, as close as practicable, to their population in the City.”<sup>3</sup> After the provision, § 50(b)(1), was pre-cleared by the Department of Justice, the plaintiffs in *Ravitch v. City of New York* challenged its constitutionality, alleging that the provision created an impermissible race-based criterion for participation in the Districting Commission.<sup>4</sup> The City of New York vigorously defended the constitutionality of § 50(b)(1) by convincing the court that it was required to take all necessary steps to remedy its prior violations of the Voting Rights Act.<sup>5</sup> In particular, the City was forced to adopt remedies for prior intentional discrimination against African-American and Latino voters in the City Council redistricting plan that was adopted after the 1980 Census.<sup>6</sup> In addressing the concerns confronting the Charter Commission that recommended § 50(b)(1), the district court found that:

[T]he defendants did, in fact, have a firm and substantial basis for believing that remedial action was warranted. The [Charter] Commission was faced with the task of making substantial changes to the structure of New York City’s government, which had been found to discriminate in a variety of ways over the previous twenty years.<sup>7</sup>

The court accepted the defense that the City had a compelling governmental interest in adopting remedial legislation to counter-act the official voting discrimination that existed against the VRA’s protected minori-

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<sup>1</sup> *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 U.S. Dist. LEXIS 11481 (S.D.N.Y. Aug. 3, 1992).

<sup>2</sup> *Id.* at \*16.

<sup>3</sup> *Id.* at \*12, 20.

<sup>4</sup> *See id.* at \*12–13.

<sup>5</sup> *See id.* at \*16–18.

<sup>6</sup> *See id.* at \*17.

<sup>7</sup> *Id.* at \*16 (emphasis added).



ties, but eventually ruled that § 50(b)(1) was not narrowly tailored to pass strict scrutiny under the Equal Protection Clause.<sup>8</sup>

## II. DIAZ V. SILVER<sup>9</sup>

*Diaz v. Silver* was a successful *Shaw*<sup>10</sup> challenge to New York's 12th Congressional District, represented by Congresswoman Nydia Velázquez, the first and only Puerto Rican woman elected to Congress.<sup>11</sup> The three-judge district court upheld the Equal Protection Clause challenge, holding that the creation of the 12th Congressional District, covering portions of three counties, was significantly motivated by race to the detriment of other traditional criteria for redistricting and could not withstand strict scrutiny analysis.<sup>12</sup> The court rejected the defense that the 12th Congressional District was created to preserve a Latino community of interest and inferred that Asian-Americans in the district were a community of interest.<sup>13</sup> Defendants and defendant-intervenors presented proof of racially polarized voting between Latinos and non-Latinos in the 12th Congressional District, but the court ruled that polarized voting, by itself, would not establish a community of interest that would justify the contours of 12<sup>th</sup> Congressional District.<sup>14</sup> The court found the 12th Congressional District to be unconstitutional, as configured, and ordered the State to redistrict the District and other affected congressional districts.<sup>15</sup> The State Legislature subsequently passed a new redistricting plan reconfiguring the 12th Congressional District and its neighboring districts.

## III. LÓPEZ TORRES V. NEW YORK STATE BOARD OF ELECTIONS<sup>16</sup>

In a recent case in which plaintiffs alleged violations of both the First Amendment and the Equal Protection Clause, a federal court found that the delegate convention system of selecting candidates for elected New York

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<sup>8</sup> See *id.* at \*18.

<sup>9</sup> 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997).

<sup>10</sup> *Shaw v. Reno*, 509 U.S. 630 (1993). A *Shaw* challenge is based on the Equal Protection Clause and alleges that race was a dominant factor in the creation of majority-minority districts at the expense of other traditional criteria for redistricting.

<sup>11</sup> *Diaz*, 978 F. Supp. at 98, 131; Congresswoman Nydia M. Velazquez, About Nydia Velazquez: Biography, <http://www.house.gov/velazquez/about/bio.html> (last visited Apr. 14, 2008).

<sup>12</sup> *Diaz*, 978 F. Supp. at 122.

<sup>13</sup> *Id.* at 123–26.

<sup>14</sup> *Id.* at 124.

<sup>15</sup> *Id.* at 131.

<sup>16</sup> 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *rev'd*, 128 S. Ct. 791 (2008).

Supreme Court Justices unconstitutionally deprived voters of the right to choose their parties' judicial candidates and hindered competitive primaries.<sup>17</sup> The case represents the culmination of previous, unsuccessful attempts to allege VRA violations in the delegate selection process for these same judicial positions.<sup>18</sup> Racial fairness in the system challenged in *López Torres* was raised directly by the defendants who argued that the delegate convention system of nominating judges to primaries serves the goal of racial and ethnic diversity, a legitimate goal of the state.<sup>19</sup> The court ultimately ruled that the delegate convention system was not narrowly tailored to meet the state's interest in racial diversity<sup>20</sup> and, specifically, that the challenged system severely curtailed voter participation in the primaries.<sup>21</sup> The court also recognized the existence of proportional representation methods of election that would allow minority voters to exercise their collective voting strength to their advantage.<sup>22</sup> Finally, the court recognized that alterations in the judicial district lines might also serve to protect minority voters' interests.<sup>23</sup>

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<sup>17</sup> See *id.* at 214, 256.

<sup>18</sup> See, e.g., *France v. Pataki*, 71 F. Supp. 2d 317 (S.D.N.Y. 1999).

<sup>19</sup> See *López Torres*, 411 F. Supp. 2d at 250.

<sup>20</sup> *Id.* at 252.

<sup>21</sup> See *id.* at 248–50.

<sup>22</sup> See *id.* at 251–53.

<sup>23</sup> See *id.*

APPENDIX D: MINORITY ELECTED OFFICIALS IN NEW YORK  
POST 1982<sup>1</sup>

New York City's racial and language minorities have enjoyed sporadic success in achieving direct representation in the numerous available elected offices in the City. Among these sporadic successes, four distinct episodes stand out: (1) the short-lived tenure of New York's first African-American mayor, David Dinkins; (2) the statewide election of New York's first African-American Comptroller, H. Carl McCall; (3) the 2005 mayoral election, where the first Latino candidate to capture the Democratic primary election for Mayor, Fernando Ferrer, ran and lost; and (4) the shattering of the glass ceiling on Asian-American representation with the 2001 election of John Liu to one of fifty-one seats on the New York City Council in a city that is just 10% Asian-American.<sup>2</sup>

## I. DAVID DINKINS

The 1989 election of the New York City's first African-American mayor, an historic event in its own right, should be assessed in the context of the success of African-American mayoral candidates in other municipalities. At the time Dinkins secured the mayoralty, New York City was the largest city in the country that had never elected an African-American or Latino mayor. By contrast, cities like Los Angeles, Chicago, Philadelphia, Detroit, Washington, D.C., Atlanta, Cleveland, New Orleans, Newark and Birmingham had elected African-American mayors, while other major cities, like San Antonio, Denver and Miami, had elected Latino mayors. Under these circumstances, with a majority of New York City comprised of racial and language minorities, the election of any minority member to lead the City was a long time coming.

Dinkins secured the mayoralty after beating the incumbent, Edward Koch, in the Democratic primary. Mayor Koch had not consistently enjoyed the support of the majority of African-American voters, despite incredibly wide overall margins of victory in his mayoral bids. Previously, Dinkins had won the 1985 election for Manhattan Borough President—the same year that then Puerto Rican State Senator José Serrano lost to a white, incumbent Bronx Borough President, and that African-American State As-

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<sup>1</sup> Unless otherwise indicated, the information in this appendix is derived from author interviews, correspondence, on-site examination of records in New York City and the author's personal knowledge.

<sup>2</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Apr. 14, 2008).

semblyman, Al Vann, came in third, behind two white candidates, for Brooklyn Borough President. It took African-Americans and Latinos years to replicate the string of victories in the Borough Presidencies that were made decades earlier with the election of an African-American candidate, Percy Sutton, in Manhattan and Puerto Rican candidate, Herman Badillo, in the Bronx.

After Dinkins secured the Manhattan Borough Presidency, an African-American female, C. Virginia Fields, was elected to two consecutive terms that ended in 2005. This position is no longer held by a racial or language minority member. Decades later in the Bronx, voters returned another Puerto Rican candidate, Fernando Ferrer, to the Bronx Borough Presidency for multiple terms. Another Puerto Rican Bronx Borough President, Adolfo Carrion, now occupies the seat.

In Brooklyn, no Latino or African-American has ever won the Borough Presidency. But in Queens, Helen Marshall, an African-American candidate, secured the Borough Presidency in 2001 and was reelected in 2005. Marshall's 2001 bid was significant in that she had captured 53% of the vote against two prominent Democrats in the primary (Carol Gresser and Sheldon Leffler), and then went on to win the general election with 68% of the vote. In Staten Island, no Latino or African-American has ever captured the Borough Presidency; indeed, as of 1991 there were only two African-American elected officials in Staten Island, and both were members of Community School Board 31.

Dinkins was voted out of office after one term, as the overwhelmingly Democratic city jumped parties to elect Rudolph Giuliani, a Republican in 1993 whom Dinkins defeated in the general election of 1989. The defeat for Dinkins was the first time an incumbent mayor in the City of New York had failed to secure reelection after only one term. Giuliani was the first Republican to gain the mayor's seat since John Lindsay in the 1960s, who ran on both Republican and Liberal Party lines. Indeed, prior to the 1993 general election, Republican U.S. Senator Alfonso D'Amato captured only 38% of the City's vote in 1992, Republican President George H. Bush captured only 23% of the City's vote in 1992 and "GOP candidates for president, senator, governor or mayor who weren't incumbents frequently garnered less than a fifth of the city's vote."<sup>3</sup> The results of the 1993 vote for Mayor revealed a divided and racially polarized city:

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<sup>3</sup> WAYNE BARRETT, RUDY!: AN INVESTIGATIVE BIOGRAPHY OF RUDOLPH GIULIANI 265-66 (2000).

How could a mere lawyer who'd never been elected to any public office, and whose last public service ended almost five years before the 1993 election, expect to [beat Dinkins]? What besides race could explain why, according to exit polls, 64 percent of the city's white Democrats and 77 percent of all white voters would vote for him?<sup>4</sup>

Professor John Mollenkopf studied the election returns of the 1993 mayor's race as part of his research on the makings of the Koch Coalition.<sup>5</sup> With respect to the Dinkins-Giuliani race in 1993, he concluded:

To the extent that Dinkins's weaknesses among his core constituencies contributed to his defeat, his greatest failure was among his strongest supporters. The outcome of the election, however, was not decided within constituencies that had favored Dinkins in 1989, but among those that had opposed him.

....

As a result, the 1993 mayoral electorate was slightly more white and less black and Latino than in 1989 and its preferences were also slightly more racially polarized. The higher the percentage of registered voters who were white, the less likely an ED was to experience a vote decline between 1989 and 1993 and the more likely it was to shift toward Rudolph Giuliani.<sup>6</sup>

According to some exit polls, Latino voters strongly supported Dinkins, giving him anywhere from 65% to 73% of their vote in 1989 and 60% of their vote in 1993.<sup>7</sup>

The Democratic Party nomination for mayor would not go to another African-American or Latino candidate until 2005 with the contest between Fernando Ferrer and Michael Bloomberg.

## II. H. CARL MCCALL

H. Carl McCall was appointed New York State Comptroller in 1993 to fill an unexpired term. In 1994, he became the first of New York's racial and language minorities to capture the nomination of any of the two major parties to run for this statewide office and the first African-American to win a statewide office. It has been noted by one court that this 1994 elec-

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<sup>4</sup> *Id.* at 266.

<sup>5</sup> See JOHN HULL MOLLENKOPF, *A PHOENIX IN THE ASHES: THE RISE AND FALL OF THE KOCH COALITION IN NEW YORK CITY POLITICS* (1992).

<sup>6</sup> *Id.* at 212.

<sup>7</sup> Doug Muzzio, *The Hispanic Vote; Also, New Charter Commission for Non-Partisan Elections*, *GOTHAM GAZETTE* (N.Y.), Mar. 26, 2003, available at <http://www.gothamgazette.com/article/voting/20030328/17/331>.

tion had one of the lowest levels of racially polarized voting in some time.<sup>8</sup> Before McCall's run in 1994, only Puerto Rican candidate Herman Badillo captured the nomination of any of the two major parties for statewide office. Badillo, running for Comptroller on the Democratic Party line, lost in 1986 to Edward Regan, the incumbent. McCall won his reelection bid in 1998, garnering 2.9 million votes statewide—more than any other statewide candidate. Indeed, since his election as Comptroller, and his subsequent failed bid to oust Governor George Pataki on the Democratic Party line in 2002, there has only been one other minority candidate for statewide office on either the Republican or Democrat line: Puerto Rican candidate Dora Irizarry, who ran for Attorney General on the Republican ticket, becoming the first Latina woman to run for statewide office in New York. She lost convincingly to the incumbent, Eliot Spitzer by a margin of 66% to 30%. With only four statewide offices in New York (Governor, Lieutenant Governor, Comptroller and Attorney General), the opportunities to run on that scale on a major party line are limited, making McCall's election all the more extraordinary.

### III. FERNANDO FERRER

Former Puerto Rican Bronx Borough President Fernando Ferrer launched two credible campaigns for mayor this decade, becoming the first serious Latino candidate for mayor since Herman Badillo thirty years before. In the Democratic primary of 2001, Ferrer came in first, but failed to secure the nomination outright. Latino voters, according to exit polls, came out in record numbers, representing 23% of the votes cast and supporting Ferrer with 72% of their vote.<sup>9</sup> Mark Green forced a runoff election, won the nomination and then lost to Michael Bloomberg. Four years later, Ferrer captured the nomination and become the first Latino candidate ever to win the nomination of a major political party in New York in his unsuccessful quest to become the first Latino mayor in New York City. Although he captured close to 80% of the Latino vote,<sup>10</sup> Ferrer lost to the incumbent Michael Bloomberg in 2005. In many ways, the 2005 Ferrer candidacy revealed other fissures in the City's electorate: once again, white voters abandoned the Democratic Party and voted for the Republican incumbent at just shy of 90%. African-American voters gave Ferrer only 46% of their vote and Asian-Americans gave him 22% of their vote.<sup>11</sup> In-

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<sup>8</sup> See *France v. Pataki*, 71 F. Supp. 2d 317, 327–29 (S.D.N.Y. 1999).

<sup>9</sup> Muzzio, *supra* note 7.

<sup>10</sup> Andrew Beveridge, *Hispanics and the Ferrer Candidacy*, GOTHAM GAZETTE (N.Y.), Dec. 22, 2005, available at <http://www.gothamgazette.com/article/demographics/20051222/5/1688>.

<sup>11</sup> *Id.*

cumbency, obviously, is a major factor in electability in New York City mayoral politics, except, ironically and tellingly, in the re-election bid of David Dinkins.

#### IV. ASIAN-AMERICANS

The limited success of electoral bids by Asian-Americans to positions in New York City must be viewed in light of the fact that (1) New York City enjoys the largest number of Asian residents of any city in the country and (2) that it was not until 2001, when they composed 10% of the population, that the first Asian-American was elected to the fifty-one member New York City Council. Structural impediments, manifested by council district formations and Racially Polarized Voting explain, in large part, the absence of direct Asian-American representation in the 1980s and 1990s.

The Asian-American population in New York City more than doubled between 1980 and 1990 (from 3% to 7%). During the same period, the City's Chinatown in New York County remained divided among multiple assembly districts, school districts and community board districts. Each of these districts has a smaller population than a New York City Council district and could have provided the spawning ground for higher office if the historic epicenter of the Asian community was not fractured in two. In Flushing, Queens, Chinese and Korean neighborhoods were also experiencing rapid growth during this period.

An expansion to fifty-one councilmanic districts around the time of the publication of the 1990 Census allowed the City another opportunity to create districts that would fairly reflect the growing voting strength of the Asian-American community. Competing and conflicting proposals to the Districting Commission from Asian-American advocates over the Chinatown district alternated between adjoining it to the Latino, working class neighborhoods of the Lower East Side or to the white, more affluent neighborhoods of Battery Park City, Tribeca and SoHo. The Districting Commission opted for a Chinatown district that expanded west to encompass Battery Park, Tribeca and SoHo, and was 39% Asian-American, 37% white, 17 % Latino and 6% African-American.<sup>12</sup> Whites, however, had a decided advantage in the registered voter pool, and Margaret Chin, an elected Democratic Party delegate from Chinatown, garnered only 33% of the 1991 Democratic primary vote and only 25% of the general election tal-

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<sup>12</sup> For an account of the fate of Asian-American candidates in New York City in the 1980s and 1990s, see Keith Aoki, Panel 1: Asian Pacific American Electoral and Political Power, *A Tale of Three Cities: Thoughts on Asian-American Electoral and Political Power After 2000*, 8 ASIAN PAC. AM. L.J. 1, 27 (2002).

lies. Kathryn Freed, on the other hand, gained 53% of the vote, while another Asian-American, Republican candidate Fred Teng, came in third with 23%. Subsequently, in the 1993 Democratic primary, Chin was again the sole Asian-American candidate, but was only able to garner 27% of primary vote.<sup>13</sup> In the 1997 Democratic primary, Jennifer Lim was the sole Asian-American candidate, but received only 30% of the primary vote, and in the 2001 Democratic primary, three Asian-American candidates collectively received only 40% of the primary vote.<sup>14</sup>

To date, Chinatown has yet to elect an Asian-American to the City Council. The Asian American Legal Defense and Education Fund (AALDEF) attributes the failure to elect an Asian-American in what was purportedly an "Asian American district" to the existence of Racially Polarized Voting and to the combination of Chinatown with the more affluent areas of Lower Manhattan which do not vote along the same patterns.<sup>15</sup>

In Flushing, Queens, however, Asian-Americans finally were able to secure a seat on the City Council with the historic 2001 election of Korean-American candidate John Liu. The 1990 Districting Commission created a councilmanic district (District 20) that was 31% Asian-American and 40% white. In 1991, the incumbent, Julia Harrison, defeated Pauline Chu in the Democratic primary and Chun Soo Pyun, a Republican, in the general election. In 1995, the Asian-American primary vote was split between Pauline Chu and John Liu, allowing Harrison to win again, and to again defeat Soo Pyun in the general election. Harrison was noted for making a number of anti-Asian and anti-immigrant remarks in this period; at one time describing the arrival of Asians to Flushing as an "invasion, not an assimilation."<sup>16</sup> In 2001, with Harrison no longer eligible because of term limits, Liu defeated Ethel Chen in the Democratic primary and went on to win the general election. Liu credited the VRA with allowing Asian-American voters to access the political process in Queens: "I would never be standing before you as the first Asian elected official if it were not for the bilingual provisions of the Voting Rights Act," he noted in 2005.<sup>17</sup>

In 2004, Jimmy Meng made history when he was elected as the first Asian-American to serve in the New York State Assembly. He represents the 22nd Assembly District in Queens.

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<sup>13</sup> ASIAN AM. LEGAL DEF. & EDUC. FUND, CAN AN ASIAN AMERICAN WIN IN DISTRICT 1? 1-2 (2002) (on file with author).

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> Aoki, *supra* note 12, at 30 (quoting Julia Harrison).

<sup>17</sup> Gerson Borrero, *Lo Que Sabe un Chino Sobre el VRA* [What the Asian Knows About the VRA], EL DIARIO, LA PRENSA, Aug. 5, 2005 (on file with author) (translation provided).



Asian-Americans had also obtained a measure of success at the community school board level until the dismantling of that system in the late 1990s. As noted above, community school board elections used a form of proportional representation known as choice voting,<sup>18</sup> which allowed voters to rank order their preferences for candidates. The AALDEF reported that in the 1996 school board elections, eleven out of fifteen Asian-American candidates for community school boards were elected under this system.<sup>19</sup>

## V. JUDICIAL ELECTIONS

As previously noted, questions about the fairness of the current system of electing judges in New York have surfaced repeatedly in the last twenty-five years in various forums: the 1994 denial of preclearance to various changes for elections to the supreme court; the 1999 decision by Judge Sprizzo in *France v. Pataki*; and the 2006 decision by Judge Gleeson in *López Torres v. New York State Board of Elections*.

Historically, integrating the bench in New York State has never been easy. On numerous occasions the judicial branch itself has commented on the need to increase diversity and fairness within its ranks. In New York, these efforts have coalesced in the Franklin H. Williams Judicial Commission on Minorities, an important component of the New York State judiciary that seeks, *inter alia*, to review the processes of appointments and elections to the bench to determine how greater minority representation could be achieved. Created in 1988, the Williams Judicial Commission has issued a number of reports and has documented, in part, the inroads that have been made by African-American, Latino and Asian-American lawyers in the judiciary.

Judges in two courts in New York are subject to elections administered by the election boards of the state and county governments: justices to the supreme court, elected to fourteen-year terms, and judges to the New York City Civil Court, elected to ten-year terms. The ability to elect minority judges has not been as easy as it would seem, given the large share of the electorate and the populace that minorities have held in the last twenty-five years. Through the work of the Williams Judicial Commission we have learned<sup>20</sup> that in New York City, African-American judges first secured positions on the bench via appointments. One of the earliest jus-

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<sup>18</sup> The form of representation was also known as Single Transferable Votes.

<sup>19</sup> Letter from Margaret Fung, AALDEF, Tito Sinha, AALDEF, to Dep't of Justice (Oct. 8, 1998) (on file with author) (Re: Submission No. 98-3193).

<sup>20</sup> FRANKLIN H. WILLIAMS JUDICIAL COMM'N ON MINORITIES, EQUAL JUSTICE: A WORK IN PROGRESS: FIVE YEAR REPORT, 1991-1996 (1996) (on file with author).

tices to be elected from the African-American community was the Honorable Harold Stevens in 1955. Decades later, the Honorable Edith Miller became the first African-American woman to be elected to a New York Court. Within the last twenty-five years, several additional “firsts” were accomplished: in 1990, Justice Michele Weston Patterson became the first African-American woman elected to the Kings County Supreme Court, and in 1986, the Honorable Yvonne Lewis became the first African-American woman to be elected to the Civil Court of the City of New York.

For Latino judges, the history is much shorter: in 1968, the Honorable Emilio Nuñez became the first Latino elected to the supreme court in New York County. In 1982, the Honorable Carmen Beauchamp Ciparick became the first woman elected to the supreme court.

For Asian-Americans, the history is shorter still: not until 1987 did an Asian-American win a seat on the court with the election of the Honorable Dorothy Chin-Brandt and the Honorable Peter Tom to the New York City Civil Court in New York County.

The 1996 report of the Williams Judicial Commission notes that out of 1163 judges in New York State, elected and appointed, only eighty-seven were African-American (7%), only thirty-seven were Latino (3%) and only eight were Asian-American (0.6%).<sup>21</sup> When judicial elections are analyzed separately, the Commission found that 14.3% of all supreme court justices were minorities.<sup>22</sup> By 2000, the Commission reported that 15.1% (52/344) of the justices of the supreme court, statewide, were minorities. Using 2003 data, the Commission reported in 2005 that, statewide, minorities were 13.2% of the total number of appointed and elected judges.<sup>23</sup>

A comparison of the total number of New York City Civil Court judgeships for 2004 to 2005, as reported by the City for the boroughs of Bronx, Brooklyn, Manhattan and Queens, with the roster of minority elected officials provided below reveals that there are approximately 115 judgeships in that court and that approximately twenty judges from minority backgrounds have been elected to that court, for a proportion of 17%.<sup>24</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at app. A. The data provided for New York City Civil Court in this table did not disaggregate Civil Court judges, who are elected, from Housing Court judges, who are appointed.

<sup>23</sup> FRANKLIN H. WILLIAMS JUDICIAL COMM'N ON MINORITIES, FINDINGS FROM THE LEADERSHIP DEVELOPMENT CONFERENCE: COURTS FOR THE 21ST CENTURY, UPSTATE CONFERENCE (Jan. 2005) (on file with author).

<sup>24</sup> See MICHAEL R. BLOOMBERG, MAYOR, & MARTHA K. HIRST, COMM'R N.Y. DEP'T OF CITYWIDE ADMINISTRATIVE SERVS., THE 2004–2005 GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 366–71 (2004).

VI. POST 1982 ROSTER OF AFRICAN-AMERICAN, LATINO AND ASIAN-AMERICAN ELECTED OFFICIALS<sup>25</sup>

## A. NEW YORK STATEWIDE OFFICES

*H. Carl McCall (B), New York State Comptroller, 1993 to 2002*

## B. NEW YORK CITYWIDE OFFICES

William Thompson (B), New York City Comptroller, 2001 to present

*David Dinkins (B), New York City Mayor, 1989 to 1993*

## C. BOROUGH WIDE OFFICES

Adolfo Carrion (L), Bronx Borough President, 2001 to present

Robert Johnson (B), Bronx District Attorney, 1988 to present

Margarita López Torres (L), Kings County Surrogate Judge, 2005 to present

Helen Marshall (B), Queens Borough President, 2001 to present

*David Dinkins (B), Manhattan Borough President, 1985 to 1989*

*C. Virginia Fields (B), Manhattan Borough President, 1997 to 2005*

*Fernando Ferrer (L), Bronx Borough President, 1987 to 2001*

## D. U.S. CONGRESS

Gregory Meeks (B), District 6, Queens, 1998 to present

Major Owens (B), District 11, Brooklyn, 1982 to present

Charles Rangel (B), District 15, Manhattan, 1970 to present

José E. Serrano (L), District 16, Bronx, 1990 to present

Edolphus Towns (B), District 10, Brooklyn, 1982 to present

Nydia Velázquez (L), District 12, Brooklyn, 1992 to present

*Floyd Flake (B), District 6, Queens, 1986 to 1997*

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<sup>25</sup> Former elected officials are noted in italics. African-American elected officials are designated with the letter, "B"; Latino elected officials are designated with the letter, "L"; and Asian-American elected officials are designated with the letter, "A." Term dates are listed where available and reflect office-holding at the time this report was written and submitted to Congress.

*Robert García (L), District 18, Bronx, 1982 to 1990*

E. NEW YORK STATE SENATE

Carl Andrews (B), District 20, Brooklyn, 2002 to present

Rubén Díaz (L), District 32, Bronx, 2002 to present

Efrain González (L), District 33, Bronx, 1989 to present

Ruth Hassell-Thompson (B), District 36, Bronx/Westchester, 2000 to present

Martin Malave Dilán (L), District 17, Brooklyn, 2002 to present

Velmanette Montgomery (B), District 18, Brooklyn, 1985 to present

Kevin Parker (B), District 21, Brooklyn, 2003 to present

John L. Sampson (B), District 19, Brooklyn, 1996 to present

David Patterson (B), District 30, New York, 1985 to present

José M. Serrano (L), District 28, New York/Bronx, 2005 to present

Ada L. Smith (B), District 10, Queens, 1989 to present

Malcolm A. Smith (B), District 14, Queens, 2000 to present

*Pedro Espada (L), District 32, Bronx, [term unknown]*

*Andrew Jenkins (B), District 10, Queens, 1985 to 1990*

*Joseph Galiber (B), District 33, Bronx, Pre-1982 to 1995*

*Olga Mendez (L), District 28, New York/Bronx, Pre-1982 to 2004*

*David Rosado (L), District 32, Bronx, 1997 to 2002*

*Israel Ruiz (L), District 32, Bronx, Pre-1982 to 1989*

*Nellie Santiago (L), District 17, Brooklyn, 1993 to 2002*

F. NEW YORK STATE ASSEMBLY

Carmen Arroyo (L), District 84, Bronx, 1994 to present

Jeffrion Aubrey (B), District 35, Queens, 1992 to present

Michael Benjamin (B), District 79, Bronx, 2003 to present

William Boyland, Jr. (B), District 55, Brooklyn, 2003 to present

Barbara Clark (B), District 33, Queens, 1986 to present

Vivian Cook (B), District 32, Queens, 1990 to present

Luis Díaz (L), District 86, Bronx, 2000 to present  
Ruben Díaz, Jr. (L), District 85, Bronx, 1997 to present  
Adriano Espaillat (L), District 72, 1996 to present  
Herman Ferrell, Jr. (B), District 71, New York, Pre-1982 to present  
Diane Gordon (B), District 40, Brooklyn, 2000 to present  
Aurelia Greene (B), District 77, Bronx, 1982 to present  
Carl Heastie (B), District 83, Bronx, 2004 to present  
Jimmy Meng (A), District 22, Queens, 2004 to present  
Felix Ortíz (L), District 51, Brooklyn, 1994 to present  
José Peralta (L), District 39, Queens, 2004 to present  
N. Nick Perry (B), District 58, Brooklyn, 1992 to present  
Adam Clayton Powell, IV (L/B), District 68, New York, 2000 to present  
José Rivera (L), District 78, Bronx, 2000 to present, District 77, Bronx, 1982 to 1987  
Naomi Rivera (L), District 80, Bronx, 2005 to present  
Peter Rivera (L), District 76, Bronx, 1992 to present  
Annette Robinson (B), District 56, Brooklyn, 2002 to present  
William Scarborough (B), District 29, Queens, 1994 to present  
Darryl Towns (B), District 54, Brooklyn, 1993 to present  
Keith Wright (B), District 70, New York, 1992 to present  
*Geraldine Daniels (B), District 70, New York, Pre-1982 to 1992*  
*Gloria Davis (B), District 79, Bronx, Pre-1982 to 2003*  
*Angelo Del Toro (L), District 68, New York, 1985 to 1995*  
*Nelson Denis (L), District 68, New York, 1996 to 2000*  
*Francisco Díaz, Jr. (L), District 68, New York, 1995 to 1996*  
*Héctor Díaz (L), District 74, Bronx, 1983 to 1993*  
*Roger Green (B), District 57, Brooklyn, Pre-1982 to 2005*  
*Cynthia Jenkins (B), District 29, Queens, 1983 to 1994*  
*Helen Marshall (B), District 35, Queens, 1982 to 1992*

*Gregory Meeks (B), District 31, Queens, 1992 to 1998*

*Clarence Norman (B), District 43, Brooklyn, 1982 to 2005*

*Roberto Ramirez (L), Districts 77 & 78, Bronx, 1990 to 2000*

*David Rosado (L), Districts 73 & 74, Bronx, 1990 to 1993*

*Larry Seabrook (B), District 82, Bronx, 1984 to 1995*

*José Serrano (L), District 73, Bronx, Pre-1982 to 1990*

*Albert Vann (B), District 56, Brooklyn, Pre-1982 to 2001*

#### G. NEW YORK CITY COUNCIL

*María Del Carmen Arroyo (L), District 17, Bronx, 2005 to present*

*María Baez (L), District 14, Bronx, 2002 to present*

*Charles Barron (B), District 42, Brooklyn, 2002 to present*

*Yvette Clark (B), District 40, Brooklyn, 2002 to present*

*Leroy Comrie (B), District 27, Queens, 2002 to present*

*Inez Dickens (B), District 9, Manhattan, 2006 to present*

*Helen Foster (B), District 16, Bronx, 2002 to present*

*Sarah González (L), District 38, Brooklyn, 2002 to present*

*Robert Jackson (B), District 7, Manhattan, 2002 to present*

*Letitia James (B), District 35, Brooklyn, 2003 to present*

*John Liu (A), District 20, Queens, 2002 to present*

*Melissa Mark Viverito (L), District 8, Manhattan/Bronx, 2006 to present*

*Erik Martin-Dilan (L), District 37, Brooklyn, 2001 to present*

*Miguel Martínez (L), District 10, Manhattan, 2002 to present*

*Darlene Mealy (B), District 41, Brooklyn, 2006 to present*

*Rosie Méndez (L), District 2, Manhattan, 2006 to present*

*Hiram Monserrate (L), District 21, Queens, 2001 to present*

*Annabel Palma (L), District 18, Bronx, 2004 to present*

*Diana Reyna (L), District 34, Brooklyn, 2002 to present*

*Joel Rivera (L), District 15, Bronx, 2002 to present*

*James Sanders (B), District 31, Queens, 2002 to present*

Larry Seabrook (B), District 12, Bronx, 2001 to present  
Kendall Stewart (B), District 45, Brooklyn, 2001 to present  
Albert Vann (B), District 36, Brooklyn, 2002 to present  
Thomas White, Jr. (B), District 28, Queens, 2006 to present  
*Tracy Boyland (B), District 41, Brooklyn, 1997 to 2005*  
*Adolfo Carrion (L), District 14, Bronx, 1997 to 2001*  
*Rafael Castaneira Colón (L), Districts 11 & 17, Bronx, 1983 to 1993*  
*Hilton Clark (B), District 5, Manhattan, 1985 to [term end date unknown]*  
*Una Clarke (B), District 40, Brooklyn, 1991 to 2001*  
*Adam Clayton Powell, IV (L-B), District 8, Manhattan, 1992 to 1997*  
*Lucy Cruz (L), District 18, Bronx, 1992 to 2001*  
*James Davis (B), District 35, Brooklyn, 2001 to 2003*  
*Ruben Díaz (L), District 18, Bronx, 2001 to 2002*  
*Fernando Ferrer (L), District 13, Bronx, 1982 to 1987*  
*C. Virginia Fields (B), District 9, Manhattan, 1989 to 1997*  
*Wendell Foster (B), District 9, Bronx, 1982 to 2001*  
*Pedro Gautier Espada (L), District 17, Bronx, 1997 to 2001*  
*Allan Jennings (B), District 28, Queens, 2001 to 2005*  
*Guillermo Linares (L), District 10, 1991 to 2001*  
*Margarita López (L), District 2, Manhattan, 1997 to 2005*  
*Martin Malave Dilan (L), District 37, Brooklyn, 1992 to 2002*  
*Helen Marshall (B), District 21, Queens, 1991 to 2001*  
*Luis Olmedo (L), District 27, Brooklyn Pre-1982 to 1984*  
*Antonio Pagán (L), District 2, Manhattan, 1992 to 1997*  
*Bill Perkins (B), District 9, Manhattan, 1997 to 2005*  
*Mary Pinkett (B), District 35, Brooklyn, Pre-1982 to 2001*  
*Phillip Reed (B), District 8, Manhattan, 1997 to 2005*  
*José Rivera (L), District 15, Bronx, 1987 to 2000*  
*Annette Robinson (B), District 36, Brooklyn, 1991 to 2002*  
*Victor Robles (L), District 34, Brooklyn, 1985 to 2001*

*Angel Rodríguez (L), District 38, Brooklyn, 1997 to 2001*

*David Rosado (L), District 17, Bronx, 1993 to 1997*

*Frederick Samuel (B), District 5, Manhattan, 1982 to 1985*

*José M. Serrano (L), District 17, Bronx, 2001 to 2004*

*Archie Spigner (B), District 27, Queens, Pre-1982 to 2001*

*Enoch Williams (B), District 26, Brooklyn, 1982 to 1997*

*Priscilla Wooten (B), District 42, Brooklyn, 1982 to 2002*

#### H. JUSTICES OF THE NEW YORK STATE SUPREME COURT

Sheila Abdus-Salaam (B), 1st District, New York, 1993 to present

Rolando Acosta (L), 1st District, New York, 2002 to present

Efrain Alvarado (L), 12th District, Bronx, 1996 to present

Betsy Barros (L), 2nd District, Kings-Richmond, 1996 to present

Bernadette Bayne (B), 2nd District, Kings-Richmond, 2002 to present

Ariel Belen (L), 2nd District, Kings-Richmond, 1995 to present

Peter Benitez (L), 12th District, Bronx, [term start date unknown] to present

Juanita Bing Newton (B), 1st District, New York, 1996 to present

Laura Blackburne (B), 11th District, Queens, 1993 to present

Janice Bowman (B), 12th District, Bronx, 1996 to present

Valerie Brathwaite Nelson (B), 12th District, Bronx, 2002 to present

Mary Ann Brigantti-Hughes (L), 12th District, Bronx, 2005 to present

Bert Bunyan (B), 2nd District, Kings-Richmond, 2002 to present

Gregory Carro (L), 1st District, New York, 2002 to present

John Carter (B), 12th District, Bronx, 2002 to present

Cheryl Chambers, 2nd District, Kings-Richmond, 1998 to present

Gloria Dabiri (B), 2nd District, Kings-Richmond, 1994 to present

Leland DeGrasse (B), 1st District, New York, 2003 to present

Lewis L. Douglass (B), 2nd District, Kings-Richmond, 1982 to present

Deborah Dowling (B), 2nd District, Kings-Richmond, 1996 to present



Luther Dye (B), 11th District, Queens, [term start date unknown] to present

Carol Edmead (B), 1st District, New York, 2003 to present

Randall Eng (A), 11th District, Queens, 1983 to present

Nicholas Figueroa (L), 1st District, New York, 1986 to present

Fern Fisher (B), 1st District, New York, 1993 to present

Yvonne González (L), 12th District, Bronx, 1998 to present

L. Priscilla Hall (B), 2nd District, Kings-Richmond, 1993 to present

Duane Hart (B), 11th District, Queens, 2001 to present

Ronald Hollie (B), 11th District, Queens, 2001 to present

Carol Huff (B), 1st District, New York, 2003 to present

Alexander Hunter, Jr. (B), 12th District, Bronx, 1994 to present

Allen Hurkin-Torres (L), 2nd District, Kings-Richmond, 2001 to present

M. Randolph Jackson (B), 2nd District, Kings-Richmond, 2003 to present

Debra James (B), 1st District, New York, 2004 to present

Diana Johnson (B), 2nd District, Kings-Richmond, 2000 to present

Theodore Jones, Jr., 2nd District, Kings-Richmond, [term start date unknown] to present

Leslie Leach (B), 11th District, Queens, 2002 to present

Daniel Lewis (B), 11th District, Queens, 1995 to present

Yvonne Lewis (B), 2nd District, Kings-Richmond, 1991 to present

Doris Ling-Cohan (A), 2nd District, Kings-Richmond, 2002 to present

Plummer Lott (B), 2nd District, Kings-Richmond, 1994 to present

Richard Lowe, III (B), 1st District, New York, 2003 to present

Nelida Malave (L), 12th District, Bronx, 2005 to present

Sallie Manzanet (L), 12th District, Bronx, 2002 to present

Larry Martin (B), 2nd District, Kings-Richmond, 1993 to present

La Tia Martin (B), 12th District, Bronx, 1994 to present

Donna Mills (B), 1st District, New York, 1998 to present

- Jose Padilla, Jr. (L), 1st District, New York, 2000 to present  
Eduardo Padro (L), 1st District, New York, 2002 to present  
Michelle Weston Patterson (B), 2nd District, Kings-Richmond, 2005 to present  
Kibbie Payne (B), 1st District, New York, 1999 to present  
Charles Ramos (L), 1st District, New York, 1993 to present  
Dianne Renwick (B), 12th District, Bronx, 2001 to present  
Jaime Rios (L), 11th District, Queens, 1994 to present  
Francois Rivera (L), 2nd District, Kings-Richmond, 1996 to present  
Nelson Román (L), 12th District, Bronx, 2002 to present  
Norma Ruiz (L), 12th District, Bronx, 1999 to present  
Patricia Satterfield (B), 11th District, Queens, 1998 to present  
Mark Spires (B), 11th District, Queens, 2005 to present  
James Sullivan (B), 2nd District, Kings-Richmond, 2002 to present  
Janice Taylor (B), 11th District, Queens, 1997 to present  
Charles Tejada (L), 1st District, New York, 1999 to present  
Kenneth Thompson (B), 12th District, Bronx, 1995 to present  
Milton Tingling, Jr. (B), 1st District, New York, 2001 to present  
Analisa Torres (L), 12th District, Bronx, 2005 to present  
Edwin Torres (L), 1st District, New York, 1980 to present  
Robert Torres (L), 12th District, Bronx, 2004 to present  
Alison Tuitt (B), 12th District, Bronx, 2004 to present  
George Villegas (L), 12th District, Bronx, 2004 to present  
Laura Visitacion-Lewis (L), 1st District, New York, 1998 to present  
Lottie Wilkens (B), 1st District, New York, 1991 to present  
Patricia Anne Williams (B), 12th District, Bronx, 1989 to present  
Douglas Wong (A), 11th District, Queens, 2006 to present  
*Carmen Beauchamp Ciparick (L), 1st District, New York, 1982 to 1994*  
*William Davis (B), [district unknown], 1987 to 1996*

*Thomas R. Jones (B), 2nd District, Kings-Richmond, Pre-1982 to 1985*

*Louis Marrero (L), 2nd District, Kings-Richmond, 1990 to 2006*

*Gilbert Ramirez (L), 2nd District, Kings-Richmond, Pre-1982 to 1997*

*Irma Santaella (L), 12th District, Bronx, 1983 to 1994*

*Faviola Soto (L), 1st District, New York, 2002 to 2006*

*Lucindo Suarez (L), 1st District, New York, 1996 to 2002*

*Peter Tom (A), 1st District, New York, 1990 to 1994*

*Frank Torres (L), 12th District, Bronx, 1984 to 1998*

*Bruce Wright (B), 1st District, New York, Pre-1982 to 1994*

#### I. JUDGES OF THE NEW YORK CITY CIVIL COURT

Dorothy Chin Brandt (A), New York, 1987 to present

Raul Cruz (L), Bronx, 2002 to present

Laura Douglas (B), Bronx, [term start date unknown] to present

Genine Edwards (B), Brooklyn, [term start date unknown] to present

Lizbeth Gonzalez (L), Bronx, [term start date unknown] to present

Marguerite Grays (B), Queens, [term start date unknown] to present

Wilma Guzman (L), Bronx, 1998 to present

Kathy King (B), Brooklyn, 2003 to present

Howard Lane (B), Queens, 2003 to present

Manuel Melendez (L), New York, 2003 to present

Jeffrey Oing (A), New York, 2003 to present

Diccia Pineda-Kirwan (L), Queens, 2002 to present

Julia Rodríguez (L), Bronx, 2003 to present

Anil Singh (A), New York, 2002 to present

Fernando Tapia (L), Bronx, 2002 to present

Dolores Thomas (B), Brooklyn, 2002 to present

Dolores Waltrous (B), Brooklyn, 1998 to present

Troy K. Webber (B), New York, 1994 to present

Geoffrey Wright (B), New York, 1997 to present

*Antonio Brandveen (B), [jurisdiction unknown], 1985 to [term end date unknown]*

*Leland DeGrasse (B), [jurisdiction unknown], 1985 to [term end date unknown]*

*Doris Ling-Cohan (A), [jurisdiction unknown], 1995 to 2002*

*Margarita López Torres (L), Kings, 2002 to 2005*

*Milagros Matos (L), New York, 2005 to 2006*

*José Padilla (L), New York, [term start date unknown] to [term end date unknown]*

*Charles Ramos (L), [jurisdiction unknown], 1984 to 1993*

*Peter Tom (A), [jurisdiction unknown], 1987 to 1990*

*Analisa Torres (L), New York, 1999 to [term end date unknown]*

*Robert Torres (L), Bronx, 1996 to [term end date unknown]*

*George Villegas (L), Bronx, 2002 to [term end date unknown]*