

# Time to Revive Puerto Rican Voting Rights

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Over one million Stateside Puerto Ricans may be living without the protections of rights guaranteed to them by the Voting Rights Act of 1965 (“VRA”). Section 4(e) of the VRA was enacted specifically to prohibit denial of voting rights of persons born in Puerto Rico based on any inability to read, write, or understand English.<sup>1</sup> The Supreme Court has emphasized that the “practical effect” of Section 4(e) was to prohibit denying the right to vote to large segments of the Puerto Rican community and thereby further the aims of the Equal Protection Clause with regard to the right that is “preservative of all rights.”<sup>2</sup> For Puerto Ricans, there is no requirement to speak English in order to be U.S. Citizens. Thus, the voting rights of many Puerto Ricans with limited English proficiency (“LEP”) are compromised if elections are held only in English.

A series of cases were brought in the 1960s and 70s in New York, Chicago, and Philadelphia, to enforce the Puerto Rican community’s right to access elections in Spanish under Section 4(e). Since then, this section of the VRA has been underutilized, perhaps because under the 1975 VRA amendments, Section 203 has become a more direct means of providing language access. Section 203 requires that a state or political subdivision provide bilingual access to elections if strict population threshold requirements, such as “more than 10,000 . . . or more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient”<sup>3</sup> are met.<sup>4</sup> Section 203 is implemented through the federal Census Bureau’s publication of covered jurisdictions every ten years.<sup>5</sup> Since its enactment, millions of LEP Spanish-speaking voters have been provided with increased access to voting rights.<sup>6</sup>

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1. 42 U.S.C. § 1973(b)(e).

2. *Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3 (1966) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

3. 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(i)(I).

4. 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(i)(I) & (II). Other population threshold requirements that trigger coverage under Section 203 are: “in the case of a political subdivision that contains an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited English proficient.” 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(i)(III). Section 203 also requires that “the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.” 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(ii).

5. *See, e.g.*, U.S. CENSUS BUREAU, VOTING RIGHTS ACT AMENDMENTS OF 1992, DETERMINATIONS UNDER SECTION 203 (July 26, 2002).

6. *Id.* (listing jurisdictions covered for Spanish); *see also* analysis of census data at *infra* Section II.D.

However, in the meantime, another generation of Puerto Ricans have migrated “Stateside,” *i.e.*, to the mainland United States.<sup>7</sup> Many of these recent migrants are not covered under Section 203, as they live outside of the areas meeting Section 203 population threshold requirements.

Over one million Puerto Ricans live in districts where elections are still held only in English. For Puerto Ricans who cannot understand the English-only ballots, the lack of Spanish ballots seriously compromises their voting rights.<sup>8</sup> In 2003, in Reading, Pennsylvania, the United States Department of Justice brought its first case to enforce Section 4(e) since 1965. As will be discussed herein, this case shows that Section 4(e) remains a viable tool for remedying discrimination against Puerto Rican and other Latino voters.

This article analyzes the manners in which past and recent litigation under Section 4(e) has served to remedy language-based discrimination and improve the treatment of Puerto Rican voters. The article also examines how enforcing Section 4(e) can help improve the treatment of other Latinos whose voting rights may be compromised, and demonstrates that Section 4(e) should be revitalized as a tool to protect against the growing tide of discrimination against Latinos in the post-9/11 era. This article follows the chronology of Puerto Rican migration to the U.S. mainland and the issues facing Stateside Puerto Rican voters since the enactment of the 1965 Voting Rights Act.

Part I of this article (covering 1945-1975) briefly examines historical Puerto Rican migration to the U.S. mainland and the discrimination faced by those who arrived during the post-World War II “Great Migration.” Part I then analyzes the first generation Puerto Rican voting rights cases brought after the enactment of Section 4(e) of the VRA in 1965.

Part II of this article (covering 1975-1976) discusses the 1975 VRA amendments expanding its language access provisions to include Section 203, which requires language access based on a population threshold formula. Part II then compares and contrasts Sections 4(e) and 203.

Part III (covering 1976-2008) examines post-1975 migration from Puerto Rico, analyzes the impact of voting rights cases brought under Section 203 benefitting Spanish-speakers in general, and evaluates the recent Section 4(e) case brought to preserve voting rights for Puerto Ricans who have been unprotected by Section 203 coverage.

Finally, Part IV discusses the need for renewed enforcement of Puerto Rican voting rights under Section 4(e) for over one million Stateside Puerto Rican citizens who are living outside of the protections of Section 203 during this current period of time in which Latino voting rights are under siege.

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7. “Stateside” is considered to be the most accurate of various terms describing Puerto Ricans living in the mainland United States. *See, e.g.*, ANGELO FALCÓN, ATLAS OF STATESIDE PUERTO RICANS (Puerto Rican Federal Affairs Administration 2004) at 3 [hereinafter ATLAS].

8. *See* original analysis of census data at *infra* Section II.D.

I. BRIEF HISTORY OF PUERTO RICAN MIGRATION AND 1965-1975 “STATESIDE”  
VOTING RIGHTS CASES

A. *Puerto Ricans and U.S. Citizenship*

Puerto Ricans first fell under United States influence after the 1898 Spanish-American War when the U.S. intervened in Cuba and then occupied the former Spanish territories of Puerto Rico, Guam, and the Philippines.<sup>9</sup> José Cabranes, one of the few legal scholars to have studied the trajectory of U.S. citizenship status of Puerto Ricans, found that when Congress passed the Foraker Bill in 1900, its primary purpose was to assert that Puerto Rico “belongs to the United States of America” and to generate revenue through trade and tariffs.<sup>10</sup> Senator Foraker also proposed granting nominal U.S. citizenship without necessarily conferring any constitutional rights and emphasized that his bill would not confer any voting rights for citizens of the new territories of Puerto Rico and the Philippines.<sup>11</sup> Despite Senator Foraker limiting his concept of U.S. citizenship for Puerto Ricans, House and Senate debates of his bill were “frequently filled with racist rhetoric” regarding any civil or voting rights that could possibly pertain to Puerto Ricans or Pacific Islanders.<sup>12</sup> By the end of the debates, Senator Foraker eliminated U.S. citizenship from his bill and simply incorporated Puerto Rico as a U.S. territory, emphasizing the economic benefits that would accrue.<sup>13</sup>

In 1917 President Woodrow Wilson signed the Jones Act, which provided U.S. citizenship to Puerto Ricans retroactively to the date Puerto Rico became a U.S. territory. The legislative purposes of the Jones Act included permitting Puerto Ricans to serve in World War I and providing cheap labor.<sup>14</sup> The Jones Act clarified that Puerto Ricans are U.S. citizens who may travel inside the U.S. without a passport<sup>15</sup> and serve in the Armed Forces.<sup>16</sup> Soon after the Jones Act became law, hundreds of thousands of Puerto Rican men and women migrated to the continental

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9. José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PENN. L. REV. 391, 392-93 (1979).

10. *Id.* at 427.

11. *Id.* at 427-29.

12. *Id.* at 430.

13. *Id.* at 432-44.

14. *Id.* at 442-62, 471-73 (discussing the basis of perceived racial superiorities).

15. This was also confirmed by the Supreme Court in 1922, which held import tariffs could be charged on Puerto Rican goods, although it was not a “foreign” country, and that only fundamental constitutional rights were conferred upon the people of Puerto Rico. “There was, however, one important exception: as the Court would hold in *Balzac*, Puerto Ricans gained the right ‘to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political.’” José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PENN. L. REV. 391, 440-43 n.220 (1979) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922)). (Until the 1930’s, the United States de-Hispanicized the spelling of Puerto Rico. See EDNA ACOSTA-BELEN & CARLOS E. SANTIAGO, *PUERTO RICANS IN THE UNITED STATES: A CONTEMPORARY PORTRAIT* 40 (2006)).

16. As PROPA noted in its decision enforcing Section 4(e) of the VRA in Chicago in 1972, the 1917 Jones Act was legally retroactive: “Persons born in Puerto Rico after April 10, 1899 are, *ipso jure*, citizens of the United States.” 8 U.S.C. §§ 1101(a)(38), 1401(a), 1402. Being citizens from birth, they are not required to learn English. Puerto Rican Organization for Political Action (“PROPA”) v. Kusper, 350 F. Supp 606, 609 (N.D. Ill. 1972) (citing the provisions of the Immigration & Nationality Act amended by the Jones Act).

United States.<sup>17</sup>

There has never been any requirement that Puerto Ricans speak English in order to become U.S. citizens. Immediately after the 1898 Spanish-American War, the U.S. initiated colonial policies for “Americanization” of Puerto Rico. These included the “implementation of English as the official language of Puerto Rico and its school system, the use of Island schools to inculcate U.S. values and accelerate the adoption of English, [and] the undermining of Puerto Rican history, culture, and the Spanish language.”<sup>18</sup> Through its powers under the Territories Clause of the Constitution, Congress controlled the territorial public school system in Puerto Rico from the passage of the Foraker Act in 1900 until Congress “granted autonomy” to Puerto Rico in 1952.<sup>19</sup> By 1916, the Americanization experiment had failed, as Puerto Rican students became limited in their abilities in Spanish, which was and still is the primary language on the Island.

In 1916, a territorial government study found that “it was ‘unwise to attempt to teach English . . . to Puerto Rican children as if it were their native tongue, without regard to the fact that they live in a non-English environment,’ and to lose the advantages which accrued to the children from linguistic training in their native language.”<sup>20</sup> The U.S.-appointed Commissioner of Education then decided that grades 1-4 would be taught in Spanish, leaving English as the classroom language only in the higher grades.<sup>21</sup> In 1934, another study found that school children were still losing the ability to communicate in Spanish; therefore the U.S.-appointed Commissioner of Education decided that Spanish would be the language of classroom instruction in grades 1-8.<sup>22</sup> In 1947, the first elected Governor of Puerto Rico appointed a new Commissioner of Education. He established Spanish as the language of instruction in Puerto Rican schools, with English to be taught as a language course. By 1965, a federal court had found that “the generation of Puerto Rican students now attaining the age of 21 has been taught in Spanish in all grades.”<sup>23</sup> According to the first available census data regarding Puerto Ricans, in 1980, 58% of Puerto Rico’s population over five years of age spoke no English, and another 28% spoke it only with difficulty. In 2000, 48% spoke no English, and 21% spoke English with difficulty.<sup>24</sup>

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17. ACOSTA-BELEN, *supra* note 15, at 51-52. The authors noted that: It is important to point out that in making Puerto Rico a territorial possession, the United States acquired a county confronting severe conditions of poverty, malnutrition, and unemployment. Politically, the island was just beginning to develop after having been a neglected colony for most of the Spanish colonial period, and then having faced the burden of authoritarian rule throughout the nineteenth century, before finally being granted autonomy by Spain in 1897. *Id.* at 48.

18. *Id.* at 40 (citing Negrón de Montilla & Silva Gotay).

19. *United States v. Monroe Co.*, 248 F. Supp. 316, 318-19 (D.C.N.Y. 1965).

20. *Id.* at 319 (citing GOV’T. OF PUERTO RICO, THE PROBLEM OF TEACHING ENGLISH TO THE PEOPLE OF PUERTO RICO, Bulletin No. 1916, pp. 25-26 (San Juan, 1916) (as quoted on p. 20, brief for U.S.)).

21. *Id.* at 319.

22. *Id.*

23. *Id.*

24. ACOSTA-BELEN, *supra* note 15, at 129 (discussing negative impact on Stateside migrants’ economic mobility).

### B. *The Great Migration*

After the passage of the Jones Act in 1917, thousands of Puerto Ricans migrated to New York City during and after World War I to work in wartime factories that relied on immigrant contract labor. This group included displaced agricultural workers as well as skilled workers, especially female garment industry laborers. During this time, artisans, businessmen, professionals, students, writers, and artists also migrated from Puerto Rico to New York.<sup>25</sup> Puerto Ricans served in even larger numbers in the military in World War II. After World War II a Great Migration to the Northeast occurred as Puerto Ricans were recruited to labor in East Coast factories.<sup>26</sup> The advent of relatively inexpensive air travel also facilitated migration, especially to New York City.<sup>27</sup> This phase of labor migration lasted throughout the 1950s and 1960s and paralleled Puerto Rico's transition from a hacienda-based agricultural economy, which relied on forced labor, to an industrial economy dominated by U.S. capital.<sup>28</sup>

When the *Estado Libre Asociado*, or Commonwealth of Puerto Rico, was established on July 25, 1952, the new government initiated a program of industrialization that relied on policies to reduce population growth in the face of decreasing rates of mortality, increasing rates of fertility, and chronic unemployment and poverty. Due to the influence of the Catholic Church, as well as distrust in U.S. population control policies, "accelerated migration" was selected as Puerto Rico's population reduction strategy.<sup>29</sup> Migration was also a development strategy, in which "industrialization was to be based on the migration of labor from rural to urban parts of the island and subsequently, exportation to the United States."<sup>30</sup> This model is analogous to the current use of migration as a development strategy for Latin America.<sup>31</sup> Latin America is the region that receives the lowest amount of U.S. foreign aid and investment, and while such aid has been decreasing even further in recent years,<sup>32</sup> remittances from Latino immigrants have been used as a "development policy" intended to alleviate extreme poverty in Latin America.<sup>33</sup>

From 1940-1950, 151,000 Puerto Rican men and women migrated to the

25. *Id.* at 56-58.

26. *See, e.g.*, Library of Congress, Puerto Rican/Cuban Migration, Migrating to a New Land, available at [www.loc.gov/learn/features/immig/cuban3html](http://www.loc.gov/learn/features/immig/cuban3html), (last visited Jan. 10, 2008).

27. ACOSTA-BELEN, *supra* note 15, at 77-79.

28. *Id.* at 42.

29. *Id.* at 77-78.

30. *Id.* at 78.

31. *See, e.g.*, DONALD F. TERRY & STEVEN R. WILSON, BEYOND SMALL CHANGE: MAKING MIGRANT REMITTANCES COUNT (2005); *see also* Jesús Cañas, Roberto Coronado & Pia M. Orrenius, *Explaining the Increase in Remittances to Mexico*, SW. ECON., July 2007, 3-7, available at <http://ideas.repec.org/a/fip/feddse/y2007/ijulp3-7n4.html>; Roberto Suro, PEW Hispanic Center, *Remittance Senders and Receivers: Tracking the Transnational Channels* (2003), available at <http://pewhispanic.org/reports/report.php?ReportID=23> (discussing how remittances exceed foreign investment in Latin America. Includes citations and links to studies of related development policies).

32. Also note that over 55% of Latin Americans live in poverty or extreme poverty, and that Latin America has the world's most unequal distribution of wealth worldwide. VICKI GASS, LATIN AMERICAN POLICY RESEARCH GUIDE, WASHINGTON OFFICE ON LATIN AMERICA ("WOLA"), TRADE, HUMAN RIGHTS AND POVERTY, at 5-6 (Spring 2007).

33. *See, e.g.*, Dilip Rathka, Migration Policy Institute, *Leveraging Remittances for Development* (2007), available at [http://www.migrationpolicy.org/pubs/MigDevPB\\_062507.pdf](http://www.migrationpolicy.org/pubs/MigDevPB_062507.pdf).

mainland United States. The Puerto Rican Department of Labor established a Migration Division in 1948, and by the end of the 1950s, it was operating in 115 Stateside locations.<sup>34</sup> From 1950-1960, nearly half a million (470,000) Puerto Ricans emigrated, out of a total population of 2.2 million. This period is appropriately termed the Great Migration, as it “represents a remarkable 21 percent emigration rate, one of the highest in modern times.”<sup>35</sup> Relatively high levels of Stateside migration continued, however, as 214,000 Puerto Ricans emigrated from 1960-1970, and another 65,817 moved to the mainland from 1970-1980. By 1970, 82% of Puerto Rican migrants had moved to the Northeast, while 9% had come to Midwestern urban industrial areas.<sup>36</sup> During the 1940s through the 1960s, the government also encouraged migration of seasonal workers who came to work as non-unionized farm labor in the Northeast.<sup>37</sup>

During the Great Migration, Puerto Rican migrants left conditions of desperate poverty on the Island,<sup>38</sup> only to be confronted by new problems. After this wave of migration,

[t]he conditions faced were deplorable and poverty was rampant. Puerto Ricans in the United States fought against discrimination and economic exploitation. As the numbers grew in the 1950s, they were increasingly portrayed as unwilling to work, welfare leeches, drug addicts and juvenile delinquents. As a consequence of this public view, business and government leaders were able to get away with policies and practices that exploited and demeaned Puerto Ricans in jobs, housing, and education.<sup>39</sup>

Puerto Rican migration includes a fairly unique pattern of “circular migration,” with citizens and families traveling back and forth to the Island.<sup>40</sup> Moreover, close ties to Puerto Rico as well as conditions of segregation have helped maintain a strong sense of identity for Stateside Puerto Ricans, manifested in many speaking Spanish.<sup>41</sup> According to the 2000 U.S. Census, 81.5% of Stateside Puerto Ricans speak Spanish at home, and among U.S. Latinos, the community has the highest percentage of “linguistically-isolated households” defined by everyone in the household over 14 years old speaking English poorly or not very well.<sup>42</sup> Given this context, it is not surprising that Puerto Ricans migrating to the mainland United States encountered discrimination in voting.

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34. ATLAS, *supra* note 7, at 4 (citing Michael Lapp, *Managing Migration: The Migration Division of Puerto Rico and Puerto Ricans in New York City, 1948-1968* (1990) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with author)).

35. ACOSTA-BELEN, *supra* note 15, at 81.

36. *Id.* at 87.

37. *Id.* at 85-86.

38. *Id.* at 59-62.

39. Latino Education Network Service, *The Great Migration*, available at [www.palante.org/History.htm](http://www.palante.org/History.htm) (last visited Nov. 8, 2008).

40. *See, e.g.*, ATLAS, *supra* note 7, at 5.

41. *Id.* at 4-5.

42. *Id.*

C. *First Generation Puerto Rican VRA Cases*

In 1965, Congress enacted the Voting Rights Act (“VRA”).<sup>43</sup> Section 4(e) of the VRA was specifically intended to protect the voting rights of Puerto Rican citizens.<sup>44</sup> Section 4(e) is one of the sections of the VRA enacted to protect voting rights under the Equal Protection Clause of the Fourteenth Amendment,<sup>45</sup> rather than under the Fifteenth Amendment.<sup>46</sup> Section 4(e) provides that:

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy,<sup>47</sup> he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.<sup>48</sup>

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43. *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966).

44. *Id.*

45. The Equal Protection Clause of the Fourteenth Amendment provides that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 provides that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST., amend. XIV, §§ 1, 5. Generally speaking, the Fourteenth Amendment is the basis of the “language minority” provisions of the VRA. *See, e.g.*, *Briscoe v. Bell*, 432 U.S. 404, 405-06 (1977) (discussing Congressional hearings regarding extension of VRA protections to language minorities, based on “overwhelming evidence” of prevalent discriminatory practices used to dilute the voting strength of language minorities).

46. The Fifteenth Amendment provides “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude;” U.S. CONST., amend. XV, § 1; “The Congress shall have power to enforce this article by appropriate legislation.” *Id.* at § 2.

47. The literacy test portion of Section 4(e) was rendered moot with the passage of the Voting Rights Amendments of 1970, expressly prohibiting literacy tests. *See PROPA v. Kuser*, 350 F. Supp. 606, 610 (N.D. Ill. 1972), *infra* note 96.

48. 42 U.S.C. § 1973(b)(e) (1965).

Testimony supporting its enactment included that New York's English literacy test for voter registration was "discriminatory on its face as it applied to Puerto Ricans."<sup>49</sup> Hernan Badillo submitted testimony showing racial animus against Puerto Ricans in the legislative history of the English-language literacy test. For example, a delegate to the New York State legislature had commented during the debate of the English-language literacy tests that "[t]his is not a question of nations, it is a question of races," and expressed a desire to preserve Anglo-Saxon heritage in citizenship.<sup>50</sup> He noted that the first literacy tests were enacted to exclude Irish immigrants from the franchise.<sup>51</sup> Mr. Badillo also testified that in the years preceding the 1965 hearings, of the 730,000 Puerto Ricans in New York City of all ages, 150,000 registered to vote but close to 300,000 were prevented from registering through various discriminatory practices including the literacy test.<sup>52</sup> Section 4(e) was expressly enacted to protect Puerto Rican voting rights in the face of such discrimination.<sup>53</sup>

Just after its enactment in 1965, the constitutionality of Section 4(e) was immediately challenged by the State of New York.<sup>54</sup>

### I. The Case of María López

*United States v. Monroe County* was the first Section 4(e) case. It was brought by former U.S. Attorney General John Doar in 1965 on behalf of María López to enforce Puerto Rican voters' rights to registration despite New York's English-language literacy requirement.<sup>55</sup> Given that over one million Puerto Rican citizens currently live in jurisdictions where registration and voting may be available in English only,<sup>56</sup> this "much-neglected case" merits closer analysis.<sup>57</sup>

On September 30, 1965, María López, a 21-year-old U.S. citizen and resident of New York, approached the election inspectors in Rochester and attempted to register to vote. Ms. López established that she had completed the ninth grade in American-flag schools in Puerto Rico, and that because Spanish had been the predominant classroom language, she could not read or write English to the satisfaction of the election officials; yet they refused her registration for the upcoming statewide general election.<sup>58</sup> Defendant Election Commissioners stated

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49. Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 206 (2005); see also *Voting Rights: Hearings on H.R. Doc. No. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 508-17 (1965) (statement of U.S. Rep. Herman Badillo, Judge Vidal Santaella, and community activist Gilberto Gerena-Valentin).

50. *Voting Rights: Hearings on H.R. Doc. No. 6400*, supra note 49, at 510.

51. *Id.*

52. *Id.*

53. *Id.*; see also *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *infra* note 76.

54. *United States v. County Bd. of Elections of Monroe County*, 248 F. Supp. 316, 320 (W.D.N.Y. 1965).

55. *Id.* at 316-18.

56. See Section II.D *infra* for analysis of census data.

57. The last known scholarly publication discussing this case was in 1984, at which time *United States v. County Bd. of Elections of Monroe County* was already considered a "much-neglected" case that merited revitalization. Juan Cartagena et al., *United States Language Policy: Where Do We Go from Here?*, 18 REV. JUR. U.I.P.R. 527, 531 (1984).

58. *United States v. County Bd. of Elections of Monroe County*, 248 F. Supp. at 318.

that, despite Section 4(e) of the VRA, it was their policy to deny registration to any citizen who could not pass the English language reading and writing test required by the New York Constitution and election law.<sup>59</sup> The Western District of New York approved the U.S. government's application for a temporary restraining order, and ordered Monroe County to register all persons who, by virtue of Section 4(e), could qualify as voters.<sup>60</sup>

A New York federal court then heard the Justice Department's arguments for a permanent injunction and New York's defenses regarding the Tenth Amendment's reservation of voter qualification issues for the states. The court's December 8, 1965 opinion upholding the constitutionality of Section 4(e) eloquently embraced a comprehensive view of civil rights.<sup>61</sup> The New York federal court began by observing that although the VRA was "born out of the civil rights problems currently plaguing the [S]outh . . . this Act . . . was not designed to remedy deprivations of the franchise in only one section of the country. Rather, it was devised to eliminate second-class citizenship wherever present."<sup>62</sup> The court went on to find that Section 4(e) of the VRA was a valid exercise of Congressional powers, and granted the U.S. government's motion for a permanent injunction.<sup>63</sup>

In making its decision, the court reviewed U.S.-Puerto Rican relations and found that "Congressional policies of encouraging the use of Spanish as the native tongue of Puerto Rico and unrestricted travel between mainland United States and Puerto Rico, have caused a very substantial Spanish-speaking population . . . to become residents of New York State."<sup>64</sup> Moreover, the court considered that the "plight" of these citizens who were faced with an English literacy test, was the result of "American policy," and noted that such a test "no doubt excludes many accomplished students of the Puerto Rican school system."<sup>65</sup> The *Monroe* court then reviewed the 1965 legislative history of Section 4(e), noting that it was "enacted out of concern for the Puerto Rican-American's problem in integrating his community into the political lifestream of the nation, and, in particular, the political life of New York State."<sup>66</sup> The court found that, "Congress acted well within its constitutional limits when it legislated to prevent New York from prohibiting, or, at the very least, substantially impeding the integration of Puerto Rican emigrants into its political life through the imposition of an English language requirement for voter registration."<sup>67</sup> This legal standard should not be forgotten, as current English-only elections still "substantially impede" the integration of Puerto Rican emigrants into Stateside political life.

New York raised a defense under Article I, Section 4 and the Tenth Amendment of the Constitution, which reserve qualifications for voting in state or

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59. *Id.*

60. *Id.* at 317.

61. Cartegena, *supra* note 57, at 531.

62. *United States v. County Bd. of Elections of Monroe County*, 248 F. Supp. 316, 317 (W.D.N.Y. 1965).

63. *Id.* at 318.

64. *Id.* at 320.

65. *Id.*

66. *Id.* at 320.

67. *Id.* at 321.

federal elections to the exclusive province of the states.<sup>68</sup> However, the federal court reasoned that the Tenth Amendment “does not diminish Congress’ authority to provide access to the polls for American citizens of Puerto Rican background which would otherwise be denied to them primarily because of Congress’ long history of supervision over the affairs of Puerto Ricans.”<sup>69</sup> Due to such policies resulting in the education of Puerto Rican citizens in Spanish, and pursuant to the Fourteenth Amendment, Congress was “empowered to correct what it reasonably believed to be an arbitrary state-created distinction.”<sup>70</sup> The *Monroe* court concluded that “upgrading the people of the Island of Puerto Rico to full and complete American citizenship” through the enactment of Section 4(e) was a judgment Congress “was superbly suited to make.”<sup>71</sup> Also, the court noted that its decision was contrary to that of the District Court for the District of Columbia, which had heard arguments from a group of registered voters in New York City, and found Section 4(e) to be unconstitutional; the New York federal court simply stated, “[b]ut we are unaware of any precedential authority for its holding.”<sup>72</sup> The *Monroe* court then found that the Supremacy Clause confirmed the validity of Section 4(e) of the VRA. Given the supremacy of federal over state law, to the extent that they prevented Ms. López and other American citizens educated in Spanish-language Puerto Rican schools from registering to vote in violation of Section 4(e), the New York State constitutional and election law provisions requiring English literacy were invalid.<sup>73</sup>

## 2. The 1966 Supreme Court Decisions

In *Katzenbach v. Morgan*, the Supreme Court reversed the District of Columbia District Court’s decision holding Section 4(e) unconstitutional. The district court agreed with arguments by a group of voters in New York City who favored the English literacy test and ruled that Congress had exceeded the limits of its authority, as voting qualifications were the exclusive province of the states.<sup>74</sup> By the time the Justice Department appealed to the Supreme Court, *amici* included the Attorney General of the Commonwealth of Puerto Rico and New York.<sup>75</sup>

In its 1966 opinion by Justice Brennan, the Supreme Court held that although the Tenth Amendment permits states to determine voting qualifications, they cannot do so in violation of the Fourteenth Amendment or any other constitutional provision.<sup>76</sup> Section 5 of the Fourteenth Amendment authorizes

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68. *United States v. County Bd. of Elections of Monroe County*, 248 F. Supp. 316, 321 (W.D.N.Y. 1965).

69. *Id.*

70. *Id.* (citing Section 5 of the Fourteenth Amendment pursuant to which Congress enacted Section 4(e) expressly providing that “the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”).

71. *Id.* at 323.

72. *Id.*

73. *Id.*

74. *Morgan v. Katzenbach*, 247 F. Supp. 196 (D.C.D.C. 1965) (action was commenced pursuant to Section 14(b) of the VRA, designating the D.C. District Court for declaratory judgments or injunctive relief, 28 U.S.C. § 1973).

75. *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966).

76. *Id.*

Congress to enact appropriate legislation to enforce the Equal Protection Clause.<sup>77</sup> The Court found that Section 4(e) was indeed enacted within Congress' discretion to legislate in order to enforce the Equal Protection Clause and thereby ensure nondiscriminatory treatment of the numerous Puerto Rican voters residing in New York City.<sup>78</sup> Referring to the legislative history of the Act, the Brennan Court added that the discriminatory treatment Section 4(e) redressed was not only in the imposition of voting qualifications, but also in the "provision or administration of government services, such as public schools, public housing and law enforcement."<sup>79</sup>

Moreover, although the statutory language of Section 4(e) does not mention Puerto Ricans, the Supreme Court found that Congress specifically intended to protect the voting rights of citizens of Puerto Rican descent through Section 4(e).<sup>80</sup> In the view of the Court, 4(e)'s "practical effect" was to prohibit discriminatory voting practices that disenfranchised large segments of the Puerto Rican community, furthering the aims of the Equal Protection Clause by protecting the right that is "preservative of all rights."<sup>81</sup>

During the same term, in *Cardona v. Power*, the Court held that it could not enforce Section 4(e) for a Puerto Rican plaintiff who had not completed a sixth grade education in Puerto Rico, as required under the language of 4(e)(2).<sup>82</sup> Congress subsequently overturned this standard when it abolished all state minimum literacy and education requirements under the Voting Rights Amendments of 1970.<sup>83</sup>

The practical effect of the 1965 *Monroe* decision and the 1966 Brennan Court upholding the constitutionality of Section 4(e) was to invalidate New York's English literacy requirements for voter registration. Therefore, not only María López, but also more than half a million Puerto Rican citizens residing in New York could no longer be prohibited from registering to vote due to any inability to read, write, or understand English.

These early Section 4(e) cases also provided the legal foundation for banning literacy tests for all voters, including African Americans, whose votes had been suppressed by literacy tests enacted after the Fourteenth and Fifteenth Amendments (the "Civil War Amendments") provided for equal rights to citizenship and voting rights. Prior to *Katzenbach*, the Supreme Court had upheld states' rights to require prospective voters to pass literacy tests. In its 1959 decision in the now-infamous *Lassiter* case, the Supreme Court upheld English literacy test requirements for voter registration in Southern jurisdictions by finding that such requirements were not facially discriminatory despite their harsh effect on African American voters. Although literacy tests for voter registration had been enacted in order to suppress the Black vote after the Civil War, federal courts found that plaintiffs could not prove discriminatory intent. The 1959 Supreme Court reasoned that unless plaintiffs could prove discriminatory intent, literacy tests did not violate the

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77. *Id.* at 648-50 (distinguishing *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959)).

78. *Id.* at 650-51.

79. *Id.* at 652-53.

80. *Id.* at 645.

81. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

82. *Id.* at 672; *Cardona v. Power*, 384 U.S. 672 (1966).

83. *PROPA v. Kusper*, 350 F. Supp. 606, 610 (N.D. Ill. 1972).

Fourteenth or Fifteenth Amendment.<sup>84</sup>

Several decades before the *Lassiter* decision, in 1915, the Supreme Court similarly addressed English literacy requirements. The Court held that an Oklahoma grandfather clause was an unconstitutional form of discrimination because it exempted those who registered to vote before 1910, e.g., White voters, from literacy requirements, and therefore imposed such requirements only on new Black voters, as they were not permitted to register to vote before the Civil War Amendments forced the state to permit Blacks to vote, in 1910. Notwithstanding the Court's invalidation of grandfather clause legislation, the Court determined that literacy tests themselves were not facially or intentionally discriminatory if they were required of all voters.<sup>85</sup>

The 1915 and 1959 Supreme Court decisions finding that literacy tests were not per se discriminatory relied upon states' rights arguments.<sup>86</sup> The 1966 Brennan Court decision distinguished *Katzenbach* from these prior decisions, noting that while Congress did not specifically prohibit literacy tests, it had the express power to enact Section 4(e) as appropriate legislation to enforce the equal protection guarantees of the Fourteenth Amendment.<sup>87</sup> Consequently, rather than standing for the proposition that English literacy requirements violate the Equal Protection Clause, *Katzenbach* stands for the broad authority of Congress under the Fourteenth Amendment to enact appropriate legislation to prohibit discriminatory practices, including literacy tests. Based on its authority under *Katzenbach*, Congress enacted the 1970 Voting Rights Amendments expressly banning literacy as a qualification for voting, thereby eradicating the discriminatory practice.<sup>88</sup>

The authority to legislate set forth in *Katzenbach* has also been used in 1980 and 1997 Supreme Court opinions upholding the constitutionality of Section 5 of the VRA<sup>89</sup> based on Congress's "authority to enact appropriate legislation to enforce" both the Fourteenth as well as the Fifteenth Amendment.<sup>90</sup> This was a critical development because the legislative basis of some sections of the VRA, including Section 5, are the voting rights protections found in the Fifteenth Amendment. The Supreme Court in effect held that the constitutional authority to legislate set forth in *Katzenbach* applies not only to the equal protection guarantees of the Fourteenth Amendment, but also to the voting rights guarantees of the Fifteenth Amendment.<sup>91</sup> The 1966 Supreme Court decision on 4(e) was used to uphold Section 5 of the VRA, which requires that the Department of Justice ("DOJ") review and pre-clear—or object to and prohibit—any changes in voting procedures in certain jurisdictions with

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84. *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50-51 (1959) (discussing North Carolina requirement that any prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language"; the 1959 Douglas Court ruled that "[c]ertainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot").

85. *Guinn v. United States*, 238 U.S. 347, 358-60 (1915) (discussing the Fifteenth Amendment).

86. *Id.* at 362-64; *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50-53 (1959).

87. *Katzenbach*, 384 U.S. at 649 (citing *Lassiter*, 360 U.S. 45).

88. *See, e.g.*, *Cartagena*, *supra* note 49, at 203-07.

89. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *City of Rome v. United States*, 446 U.S. 156, 176 (1980) (quoting *Katzenbach*, 384 U.S. 641).

90. U.S. CONST. amends. XIV, XV, *supra* notes 45-46.

91. *Id.*

a history of discrimination against minority voters.<sup>92</sup> Section 5 also permits private parties to bring federal lawsuits to block voting changes that have a discriminatory purpose or impact.<sup>93</sup> It has been used to ensure against discriminatory procedures in the deep South, the Southwest, and in New York City, on behalf of millions of African American, Latino, Asian, and Native American voters.<sup>94</sup>

Since the 1965 Supreme Court decision upholding the constitutionality of Section 4(e), more recent Supreme Court cases effectively set an additional standard for constitutionality of VRA provisions by requiring that the legislation be proportionate and congruent to the discrimination it is intended to remedy. These recent cases have also noted that Section 4(e) passes this test and cite 4(e) as a model for Congress's proportional and congruent use of its power to legislate against voting discrimination. In practical terms, this means that not only Section 4(e), but also the subsequent amendments to the VRA providing for the rights of "members of language minority groups," enacted in 1975 and 1992 and discussed herein in chronological order, should meet the "congruent and proportional" standard and pass constitutional muster.

As discussed in Section II herein, these original 4(e) cases lay the foundation for proving the constitutionality of the VRA and banning literacy tests and were also seminal insofar as they were the first cases providing for access to voting rights for LEP citizens. In sum, the original 4(e) cases provided legal foundation for banning of literacy tests, for defending the constitutionality of Section 5 of the VRA, and for future amendments to protect the voting rights of "members of language minority groups." Considering the historical background of resistance to providing equal access to voting rights, these cases show that Section 4(e) is a powerful tool to remedy discrimination.

### 3. The 1970s Urban Population Decisions

After this first series of cases enforcing individual Puerto Rican citizens' rights to register to vote without any English-language literacy requirements, Puerto Rican leaders turned to enforcing Section 4(e) on a broader and more collective basis.<sup>95</sup> In 1972, in *Puerto Rican Organization for Political Action ("PROPA") v. Kusper*, a federal court held that despite the Illinois constitutional provision that made English the official state language, Chicago must provide Spanish-language access to elections for its large Puerto Rican population.<sup>96</sup> The district court heard the case of four individual plaintiffs who had been born in Puerto Rico but resided in Chicago, and PROPA, a non-profit organization. PROPA represented a class consisting of eligible voters of Puerto Rican descent in Chicago who did not understand enough English to be able to vote effectively unless they had written or verbal instructions in Spanish.<sup>97</sup> After reviewing the historical record, the *PROPA* court concluded that "Puerto Rico is bilingual, but the primary language of its people

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92. 42 U.S.C. § 1973(c).

93. *Id.*

94. *See, e.g.*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2(b)(1) 120 Stat. 577 (2006).

95. *See, e.g.*, Cartagena, *supra* note 57, at 530-32.

96. *PROPA v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972).

97. *Id.* at 608.

and the predominant language of its schools is Spanish . . . [t]herefore, many persons born and educated in Puerto Rico are unable to speak, understand or read English.”<sup>98</sup> The court further recognized that “[p]ersons born in Puerto Rico after April 10, 1899 are, *ipso jure*, citizens of the United States. Being citizens from birth, they are not required to learn English.”<sup>99</sup> The *PROPA* court also found that the Voting Rights Amendments of 1970 rendered the sixth grade education requirements of 4(e)(2) moot.<sup>100</sup> Specifically, the *PROPA* court explained that:

When Congress abolished all state minimum education and literacy requirements . . . in the Voting Rights Amendments of 1970 (42 U.S.C. §§ 1973aa(a) and (b)), what was left of Section 4(e) was its prohibition against denying any persons educated in Puerto Rico, whatever the extent of his education, “the right to vote in any Federal, State, or local election because of . . . inability to read, write, understand, or interpret any matter in the English language.” The prohibition protects the voting rights of the plaintiffs in this class.<sup>101</sup>

The federal court then reasoned that the right to vote encompasses meaningful and effective access to voting rights. It relied on the *Garza v. Smith* case in which a federal court in Texas rejected policies that denied assistance to illiterate voters and found that the “right to vote” included not merely pulling the lever but also understanding the ballot.<sup>102</sup> The *Garza* court had commented that making a mark on a ballot was the physical act, but went on to clarify that “[w]e decide, however, that the ‘right to vote’ additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter’s political choice.”<sup>103</sup> The *PROPA* court also relied on the 1970 Supreme Court decision upholding Louisiana’s provision of assistance for illiterate voters, since such assistance was logically required in order to make their votes meaningful.<sup>104</sup> The *PROPA* court found that this was analogous to Section 4(e)’s requirement that “persons in the plaintiff class, notwithstanding their ‘inability to read, write, understand, or interpret’ English, be permitted to vote, *i.e.*, to effectively register their political choice.”<sup>105</sup> The district court ruling was clear and logical:

If voting instructions and ballots or ballot labels on voting

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98. *Id.* at 609.

99. *Id.* at 610 (citing relevant provisions of the Immigration & Nationality Act, 8 U.S.C. §§ 1101(a)(3), 1401(a), 1402, that implement the Jones Act).

100. *Id.*

101. *Id.* This ruling also clarified that, since the Voting Rights Amendments of 1970, any person born in Puerto Rico whose voting rights were compromised by any inability to read or understand English could fall under the statutory protections of Section 4(e), without having to show that they had completed a sixth grade education in Puerto Rico, as the 1966 Cardona Supreme Court decision had required. See *Cardona v. Power*, 384 U.S. 672.

102. *PROPA v. Kusper*, 350 F. Supp. 606, 610 (N.D. Ill. 1972).

103. *Id.*

104. *Id.* (discussing *United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966), *aff’d*, 386 U.S. 270 (1970)).

105. *Id.*

machines are printed only in English, the ability of the citizen who understands only Spanish to vote effectively is seriously impaired. It follows that the members of the [Chicago Puerto Rican] plaintiff class are entitled to such assistance as may be required to enable them to vote effectively.<sup>106</sup>

Therefore, Spanish-language voting materials and assistance were required in every polling place in which voters needed such assistance.<sup>107</sup> This line of reasoning helped establish the American legal rule that the right to vote encompasses the right to vote an “effective and informed” ballot, rather than just simply pulling a lever.

The *PROPA* district court decision was contested by the Chicago City Board of Election Commissioners and affirmed upon appeal by the Seventh Circuit. The Seventh Circuit ruled that:

United States policy towards persons born in Puerto Rico is to make them U.S. citizens, to allow them to conduct their schools in Spanish, and to permit them unrestricted migration to the mainland. As a result, thousands of Puerto Ricans have come to live in New York, Chicago, and other urban areas; they are eligible, as residents and U.S. citizens, to vote in elections conducted in a language many of them do not understand. Puerto Ricans are not required, as are immigrants from foreign countries,<sup>108</sup> to learn English before they may exercise their rights to vote as United States citizens.<sup>109</sup>

Because of the *PROPA* decision, thousands of Puerto Ricans who continued to move to Chicago were not disenfranchised through lack of meaningful access due to language. At the time of the *PROPA* decision, 6.68% of Stateside Puerto Ricans lived in Illinois, mostly in Chicago.<sup>110</sup> By 1980, when the census first counted Puerto Ricans residing in the U.S., 112,074 Puerto Ricans were living in Chicago.<sup>111</sup> As more than half were recent migrants and educated in Puerto Rico,<sup>112</sup> these voters

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106. *Id.*

107. *Id.* at 611-12.

108. This is technically incorrect, as older applicants may not be required to learn English to become U.S. citizens and exercise their voting rights. The following classes of applicants fall under the exemption to the English proficiency requirements of the naturalization exam: (1) persons over 50 years of age who have been a legal permanent resident (LPR) for at least 20 years; (2) persons over 55 years of age who have been LPR for at least 15 years; and (3) persons over 65 years of age who have been LPR for at least 20 years. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, A GUIDE TO NATURALIZATION, M-476 (rev. Oct. 2008), available at <http://www.uscis.gov/files/article/M-476.pdf>.

109. *PROPA v. Kusper*, 490 F.2d 575, 578 (7th Cir. 1973).

110. ACOSTA-BELEN, *supra* note 15, at 90, Figure 4.4, *Distribution of the Puerto Rican Population by State, 1970 and 2000*; *id.* at 86, 92-93 (concentration in Chicago).

111. *Id.* at 94, Table 4.6, *U.S. Cities with Largest Concentrations of Puerto Ricans, 1980-2000*.

112. During the 1970's, over half (53.9%) of Stateside Puerto Ricans were born elsewhere. *Id.* at 83, Table 4.4, *Puerto Rican Population in the Continental United States and Percentage Born Elsewhere, 1910-2000* (citing U.S. CENSUS OF POPULATION AND HOUSING, PUERTO RICANS IN THE UNITED STATES).

were likely unable to vote in English-only elections because their ability to vote “an effective and informed” ballot would be seriously impaired.<sup>113</sup> In sum, several thousand voters benefited from the *PROPA* injunctive requirement that Chicago provide access to elections in Spanish for Puerto Rican voters who needed it.

On March 25, 1974, the Puerto Rican Legal Defense Fund (“PRLDEF”) brought *Arroyo v. Tucker*, a class action lawsuit to enforce Section 4(e) on behalf of Philadelphia voters born in Puerto Rico who “neither read, write, speak or comprehend English, the sole language in which Philadelphia conducts its election process.”<sup>114</sup> As in the *PROPA* case, the Pennsylvania federal court reasoned that Puerto Ricans born and educated in Puerto Rico could not cast an “informed and effective vote” if Philadelphia held elections only in English.<sup>115</sup> The *Arroyo* court therefore ordered that for every election district touching a census tract in which more than 5% of the population were of Puerto Rican descent, according to the last census: (1) all election materials (including ballots and all other voting and election materials) be provided in Spanish, (2) that bilingual poll workers be available for assistance, and (3) that defendants “publicize elections in all media proportionately in a way that reflects the language characteristics of plaintiffs [Puerto Rican voters in Philadelphia County].”<sup>116</sup> By the time of the 1980 Census, 46,587 Puerto Ricans were living in Philadelphia, and by 2000, their numbers had increased to 91,527.<sup>117</sup> Considering that in the 1970s and 1980s, over half of Stateside Puerto Ricans were born on the Island and likely faced difficulty voting in English-only elections,<sup>118</sup> the *Arroyo* decision impacted many thousands of citizens in Philadelphia by protecting their voting rights under Section 4(e) of the VRA.

On July 25, 1974, in *Torres v. Sachs*, also litigated by PRLDEF, the District Court of New York made similar findings regarding violations of Section 4(e) and ordered similar remedies for Puerto Ricans in New York City.<sup>119</sup> PRLDEF had already litigated two other 4(e) cases in New York City, winning language assistance in school board and mayoral elections.<sup>120</sup> The landmark *Torres* case further expanded the court-ordered protections under Section 4(e) for Puerto Ricans in New York City. As in *PROPA* and *Arroyo*, the *Torres* federal court required that the city provide effective access to voting for citizens born in Puerto Rico, through Spanish-language ballots and voting instructions, bilingual poll workers, and election information and publicity in Spanish-language media.<sup>121</sup> Whereas the *PROPA* court required these remedies in every election district in which they were needed,<sup>122</sup> the

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113. *PROPA v. Kusper*, 490 F.2d at 579-80.

114. *Arroyo v. Tucker*, 372 F. Supp. 764, 766 (D.C. Pa. 1974).

115. *Id.* at 767.

116. *Id.* at 768.

117. ACOSTA-BELEN, *supra* note 15, at 94, Table 4.6.

118. *Id.* at 83, Table 4.4.

119. *Torres v. Sachs*, 381 F. Supp. 309 (D.C.N.Y. 1974).

120. See *Cartagena*, *supra* note 49, at 208 (discussing *López v. Dinkins*, No. 73 Civ. 695 (S.D.N.Y., Feb. 14, 1973)) (Spanish and Chinese assistance required at the polls); *Coal. for Educ. in Dist. One v. Bd. Elections*, 370 F. Supp. 42, 44-45 (S.D.N.Y. 1974) (overturning school board election based in part on failure to provide bilingual ballots).

121. See *PROPA v. Kusper*, 490 F.2d 575, 578, 611-612 (7th Cir. 1973); *Arroyo v. Tucker*, 372 F. Supp. 764, 768 (D.C. Pa. 1974); *Torres*, 381 F. Supp. at 313.

122. See *PROPA v. Kusper*, 490 F.2d 575, 578, 611-612 (7th Cir. 1973); *Arroyo v. Tucker*, 372 F. Supp. 764, 768 (D.C. Pa. 1974); *Torres*, 381 F. Supp. at 313.

*Torres* and *Arroyo* courts ordered them in every election district that touched on any census tract in which more than 5% of the population were Puerto Rican, according to the most recent decennial census.

In terms of cities with the largest concentrations of Puerto Ricans, New York City has always been first, Chicago second, and Philadelphia third.<sup>123</sup> New York City has always been by far the most popular point of entry. In 1980, 860,552 Puerto Ricans resided in New York City,<sup>124</sup> and hundreds of thousands were presumably assisted by the federal court order that the city must provide access to elections in Spanish.<sup>125</sup> In the *PROPA* case, the Seventh Circuit commented that: “thousands of Puerto Ricans have come to live in New York, Chicago, and other urban areas; they are eligible, as residents and U.S. residents, to vote in elections conducted in a language many of them do not understand.”<sup>126</sup> In reality, according to census data, *hundreds of thousands* of Puerto Ricans had migrated to these three cities alone in the Great Migration that began just after World War II. As these hundreds of thousands of Puerto Ricans had moved from the Island, where the primary language of public education was Spanish, they became “eligible . . . to vote in elections conducted in a language many of them do not understand.”<sup>127</sup>

The *PROPA*, *Arroyo* and *Torres* cases were classic forms of impact litigation in that the remedies won under the federal courts’ interpretation of Section 4(e) were designed to provide access to elections in Spanish for nearly all the hundreds of thousands of Puerto Ricans who had come to reside in Chicago, Philadelphia, and New York. Not coincidentally, during the 1970s, these three cities were where the greatest number and percentage of Stateside Puerto Ricans came to reside. By 1980, the number of Puerto Ricans impacted by these three cases totaled over one million.<sup>128</sup>

The *Torres* case was also utilized to prove that New York, Bronx, and Kings Counties warranted ongoing scrutiny by the DOJ under Section 5 of the 1965 Voting Rights Act. Section 5 provides for a high level of scrutiny—it requires that the DOJ conduct an advance review of any proposed changes in voting procedures to determine if they would have a discriminatory impact. Section 5 covers jurisdictions through findings of a history of racial discrimination in voting through the use of discriminatory tests or devices.<sup>129</sup> Although the great majority of Section 5 jurisdictions are in the South, due to the southern history of voting discrimination, certain counties in New York were also covered under the 1965 VRA. However, those New York counties that were subject to Section 5 had “bailed out” through a showing that they were no longer discriminating.<sup>130</sup> In 1974, the DOJ successfully moved to recover these New York counties and continue to require them to submit any changes in voting procedures under Section 5 of the VRA.<sup>131</sup> The DOJ argued

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123. ACOSTA-BELEN, *supra* note 15, at 94, Table 4.6.

124. *Id.*

125. Over half were born and educated in Puerto Rico, in Spanish. *Id.* at 83, Table 4.4.

126. *PROPA*, 490 F. 2d at 578 [emphasis added].

127. *Id.*

128. See, e.g., ACOSTA-BELEN, *supra* note 15, at 94, Table 4.4 (in 1980: New York City 860,552; Chicago 112,074; Philadelphia 46,587; totaling 1,109,213).

129. 42 U.S.C. § 1973(c).

130. 42 U.S.C. § 1973(b)(a)(1).

131. Voting Rights Act of 1965-Extension, S. REP. NO. 94-295, at n.33 (1975), *reprinted in*

that the monolingual elections criticized in the *Torres* case constituted discriminatory “tests or devices,” and thereby succeeded in bringing New York jurisdictions back under the advanced scrutiny procedures of Section 5.<sup>132</sup>

In addition to the large urban Puerto Rican communities discussed above, many thousand Puerto Ricans also came to reside throughout New York State,<sup>133</sup> where elections were held in English. Despite the 1965 decision in *United States v. Monroe County* on behalf of María López and similarly situated voters, some counties continued to enforce various forms of English literacy requirements. On July 10, 1975, in *Ortiz v. New York State Board of Elections*, the Western District of New York court heard a class action claim brought on behalf of LEP Puerto Rican voters statewide. The *Ortiz* court ordered bilingual access to elections for all persons of Puerto Rican descent eligible to vote who read, write, and understand Spanish, but who speak, read, and write English with severe difficulty or not at all.<sup>134</sup> The plaintiff class consisted of Puerto Ricans meeting these criteria across New York State, except New York City (due to the concurrent *Torres* litigation) and any counties, cities, villages, and towns with 10% or less than 10% of persons of Puerto Rican descent pursuant to the most recent census data.<sup>135</sup> Not only was competency in English prohibited as a registration requirement for this class of voters, but also: (1) bilingual ballots and election materials were ordered in any election district falling in any census tract that contains persons of Puerto Rican birth or descent, (2) the bilingual ballot had to be posted inside the voting machine, (3) election and registration materials were to be publicized in all media proportionately in a way that reflects the language characteristics of the plaintiffs, (4) bilingual poll workers were ordered across the state, but (5) any county, city, town, or village which had 10% or less than 10% persons of Puerto Rican birth or descent were exempted from the order.<sup>136</sup>

In sum, more than one million Puerto Ricans in New York City, Chicago, and Philadelphia benefitted from the 1970s urban area decisions analyzed in this section. In addition, about 30,000 other Puerto Ricans in New York benefitted from the *Ortiz* decision. These Section 4(e) enforcement actions helped remedy disenfranchisement of Puerto Rican voters and facilitated the political empowerment of the Stateside Puerto Rican community, particularly in New York City.<sup>137</sup> Furthermore, as these cases required Spanish-language access to elections in districts with significant Puerto Rican populations, they also served to assist thousands of other (non-Puerto Rican) LEP Spanish-speaking voters residing in jurisdictions

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1975 U.S.C.C.A.N. 774, 791-95 (discussing *New York v. United States*, Civ. No. 2419-71 (D.D.C., Orders of Jan. 10, 1974 and April 30, 1974), *aff'd*, 419 U.S. 888 (1974) (*per curiam*)) [hereinafter *Voting Rights Act of 1965 Extension*].

132. *Id.*

133. Statewide census data is not available; however, by 2000, 1,050,293 Puerto Ricans lived in New York State, and during the same year, 789,172 lived in New York City. By 2000, 261,121 (24.86% of total, 33% of total in NYC) lived outside of New York City in New York State. If this situation existed in 1980, then about 30,000 Puerto Ricans would have lived in New York State, outside of New York City.

134. *Ortiz v. New York State Bd. of Elections*, 75 Civ. 455 (W.D.N.Y. July 10, 1975).

135. *Id.*

136. *Id.*

137. See Cartagena, *supra* note 49, at 203-07.

where 4(e) remedies were won.<sup>138</sup>

Even today, Spanish-language ballots are not always provided in New York cities with significant Puerto Rican populations.<sup>139</sup> Part of the reason may be that with the enactment of Section 203 of the VRA in 1975, Section 4(e) has been neglected and unenforced in cities that do not qualify for Section 203 coverage despite their large Puerto Rican populations. Many of these jurisdictions do not provide access to elections in Spanish to the significant detriment of many voters born and educated in Puerto Rico who cannot fully understand the English-only voting process.

## II. 1975 VOTING RIGHTS ACT AMENDMENTS & 1976 THRESHOLD CASE

### A. *Expanded Section 5 Scrutiny for Latinos*

As previously noted, the *Torres* case was used as proof of ongoing discrimination in voting and a legal basis for the DOJ to recover New York, Bronx, and Kings Counties, under the advanced scrutiny procedures of Section 5 of the VRA. The *PROPA*, *Arroyo*, and *Torres* decisions also provided support for the 1975 VRA amendments expanding Section 5 coverage to include “minority language” jurisdictions.<sup>140</sup> These amendments clarified that in jurisdictions in which 5% of voting-age citizens are “members of a single language minority,” English-only elections constitute discriminatory “tests or devices,” triggering Section 5 coverage.<sup>141</sup> Texas, New Mexico, and Arizona were brought under the advanced scrutiny procedures of Section 5 based on the number of Spanish-speakers meeting the new formula. Therefore, in addition to 1965 Section 5 coverage based on a history of discrimination in voting against African Americans, the 1975 expanded coverage included the Bronx, Kings, and New York counties, as well as states in the Southwest such as Texas, where there was a history of discrimination against Hispanic voters.<sup>142</sup> Wilma Martínez of the Mexican American Legal Defense and Educational Fund (“MALDEF”) submitted particularly compelling testimony about the history of discrimination against Latino voters in the Southwest through districting schemes diluting their vote, intimidation, and discriminatory treatment at the polls, as well as other practices.<sup>143</sup>

Although the expansion of Section 5 of the VRA to New York and the Southwest was based on the term “minority language group,” the Congressional record shows that the term “minority language group” applied not only to Spanish-speaking Latinos, but also Latinos in general whose rights had been compromised by a wide range of discriminatory voting practices, particularly in New York City and the Southwest.<sup>144</sup> The expanded Section 5 coverage required review of every voting

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138. *Id.*

139. *See infra* at notes 223-27.

140. Voting Rights Act of 1965-Extension, *supra* note 131.

141. 42 U.S.C. § 1973(b)(f)(3).

142. JUAN A. SEPÚLVEDA, JR., *THE LIFE AND TIMES OF WILLIE VELÁSQUEZ: SU VOTO ES SU VOZ* 176 (2003).

143. Voting Rights Act of 1965-Extension, *supra* note 131; *see* Cartagena, *supra* note 49, at n.56-58.

144. *Id.*

change, including redistricting and other practices that had been used to dilute the Latino vote, not just those involving language, to determine whether such changes would have a discriminatory impact.<sup>145</sup>

The new concept describing Latino voters as a “language minority group” also served to clarify that the critical protections of Section 2 of the VRA apply to Latinos. Whereas Section 5 is limited to certain jurisdictions where Congress found a history of discrimination, Section 2 of the VRA contains a general prohibition against racial discrimination in voting across the country. During the 1975 amendments, Congress clarified that Section 2 of the VRA did not require a showing of intent.<sup>146</sup> Congress thereby prohibited the imposition or application of any voting practice or procedure “in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title . . . .”<sup>147</sup> The new Section 1973b(f)(2) provided that:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.<sup>148</sup>

Describing Latino voters as a “language minority group” is awkward at best, because most Latinos in the United States are not LEP and many do not even speak Spanish.<sup>149</sup> Despite this, the 1975 amendments based on Section 4(e) on behalf of “language minority citizens” effectively expanded the protections of the VRA beyond language rights and paved the way for lawsuits to remedy race/ethnic discrimination.<sup>150</sup> Under this new language, Latino voters could bring suits to

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145. 42 U.S.C. § 1973(c).

146. 42 U.S.C. § 1973, amended by Pub. L. No. 94-73, § 206, 89 Stat. 402 (1975).

147. *Id.*

148. *Id.* at § (d).

149. See, e.g., Pew Hispanic Center, *English Usage Among Hispanics in the United States* (Nov. 2007), available at [www.pewhispanic.org/files/reports/82.pdf](http://www.pewhispanic.org/files/reports/82.pdf); Pew Hispanic Center, *Factsheet on Bilingualism* (Mar. 2004), available at <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=12>.

150. Generally speaking, U.S. law has termed being Hispanic an “ethnicity.” According to U.S. Census Bureau, people who identify with the terms “Hispanic” or “Latino” are those who classify themselves in one of the specific Hispanic or Latino categories listed on the Census 2000--“Mexican,” “Puerto Rican,” or “Cuban”--as well as those who indicate that they are “other Spanish, Hispanic, or Latino.” People who identify their origin as Spanish, Hispanic or Latino may be of any race. See, e.g., ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN, CENSUS 2000 BRIEF (March 2001), available at [www.census.gov/prod/2001pubs/c2kbr01-1.pdf](http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf). Note that the term “Latino” is used throughout this article to describe the U.S. Latino community unless when citing to a source that utilizes the term “Hispanic.” The term “ethnicity” was intended to ensure greater inclusion because it encompasses Latinos of various races, e.g., Black, White, Asian and/or Native American Latinos. However, the type of discrimination experienced by Latinos is also racial, as “race” is a social construct and the experience of Latinos includes stereotypes about persons of color, due to the intersectionality of race and ethnic discrimination. See, e.g., Celina Romany & K. Culliton, *The U.N. World Conference Against Racism: A Race-Ethnic & Gender Perspective*, 9 No. 2 HUM. RTS. BRIEF 14 (2002), available at <http://www.wcl.american.edu/hrbrief/09/2racism.cfm>. Therefore, rather than describing discriminatory treatment as racial or ethnic, it is more accurate to state the issue as race/ethnic discrimination. This term

challenge discriminatory practices anywhere in the United States under Section 2 of the VRA, and since 1975, many such cases have been won.<sup>151</sup>

In sum, Section 4(e) of the 1965 VRA, and the cases brought to enforce Section 4(e) in the 1970s, served as the legal basis for significant expansion of VRA coverage on behalf of Latino voters.

*B. The New Language Minority Provisions—Sections 4(f)(4) and 203*

As discussed above, many Latinos are not LEP and many do not even speak Spanish, yet the rights of those Latino voters whose English is limited may be significantly compromised if they cannot fully understand English-language election materials. As the *PROPA* case established, the right to vote encompasses the right to vote an “informed and effective” ballot. For these reasons, the 1975 VRA amendments also included a new Section 4(f)(4), requiring that any “minority language” jurisdiction covered according to the new formula triggering Section 5 coverage must provide bilingual voting materials and election assistance.<sup>152</sup> As discussed above, the 1975 amendments defined “language minority citizens” or “language minority groups” as American Indian, Asian American, Alaskan Natives, or of Spanish heritage.<sup>153</sup> Moreover, such language assistance was required to be provided predominantly in oral form if the predominant “minority language” is historically unwritten, as in the case of Alaskan Natives and American Indians.<sup>154</sup> Section 4(f)(4) applies to Texas and Arizona for Spanish, as well as to 19 political subdivisions across the nation.<sup>155</sup>

Section 203 was the centerpiece of the new language minority provisions adopted during the 1975 VRA amendments. It created a powerful remedy by automatically requiring bilingual election materials and assistance in any jurisdiction falling under its coverage according to set population threshold formulas. For a jurisdiction to be covered under Section 203, the number of LEP citizens of a single language minority group must exceed 10,000, or more than 5% of all voting age citizens in the jurisdiction, or more than 5% of American Indians of one “minority language” group residing on an Indian reservation.<sup>156</sup> Based on this formula,<sup>157</sup> more than 500 jurisdictions have become covered under Section 203 of the VRA.<sup>157</sup> This powerful remedy has assisted millions who previously experienced language-based discrimination in their voting rights.<sup>158</sup>

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also serves to illustrate that hostility towards speaking Spanish may be a sign of more intransigent forms and bases of discrimination.

151. See, e.g., *LULAC v. Perry*, 548 U.S. 399 (2006) (holding Texas redistricting scheme diluted Latino vote in violation of Section 2; example of a vote dilution case); *United States v. Berks County*, 277 F. Supp. 2d 570, 580-81 (E.D.Pa. 2003) (discussing how hostile, disparate treatment of Hispanic voters at the polls constitutes a Section 2 violation) (citing cases).

152. 42 U.S.C. § 1973(b)(f)(4).

153. 42 U.S.C. § 1973(aa)-(1)(a)(e).

154. *Id.*

155. See, e.g., James Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163 (2007).

156. 42 U.S.C. § 1973(aa)-(1)(a)(b)(2).

157. Tucker, *supra* note 155, at 169 (Figure 1).

158. For example, since the enactment of Sections 203 and 4(f)(4) of the VRA in 1975, Hispanic voter registration has nearly doubled. *Id.* at n.381 (citing *Continuing Need for Section 203 of the Voting Rights Act, Hearing on S.R. 2703 Before the Senate Comm. on the Judiciary*, 109th Cong. (2006)

Both Sections 4(f)(4) and 203 apply only to the four “language minority groups” that Congress found had experienced discrimination in voting.<sup>159</sup> Specifically, Congress found that educational discrimination had led to higher illiteracy rates and that therefore, English-only elections created discriminatory barriers to their voting rights. Congress originally focused on “Spanish-language minorities,” who had suffered a well-documented history of voting discrimination, and then considered evidence of widespread discrimination against Alaskan Natives, American Indians, and Asian Americans.<sup>160</sup> Currently, the States of California, New Mexico, and Texas, along with six counties in Arizona, eight counties in Colorado, seven towns in Connecticut, eight Florida counties, two Illinois counties, six Kansas counties, one Maryland county, six Massachusetts cities, one Nebraska county, one Nevada county, seven New Jersey counties, six New York counties, two Oklahoma counties, one Pennsylvania county, two Rhode Island counties, and three Washington State counties are covered under 203 for Spanish.<sup>161</sup>

Section 4(e) and the *Torres, Arroyo*, and *PROPA* cases were an important part of the legal foundation for Sections 203 and 4(f)(4).<sup>162</sup> However, as will be discussed below, since the 1975 VRA amendments, Sections 203 and 4(f)(4) have sometimes incorrectly been considered as “the [only] minority language provisions of the VRA.”<sup>163</sup> In the meantime, Section 4(e) has fallen into relative obscurity.

### C. Questions Arising Regarding Section 4(e) in the Post-203 Era

One question arising about Section 4(e) in this era was whether it was still applicable after the 1975 VRA amendments. This question was answered immediately after the enactment of Section 203 through the 1976 *Márquez v. Falcey* litigation. *Márquez* was brought on behalf of Puerto Ricans across New Jersey to enforce their rights to vote in Spanish under Section 4(e) of the VRA.<sup>164</sup> According to the new Section 203 population threshold formulas, only six New Jersey counties would be covered for Spanish-speakers under Section 203 and thereby required to provide access to elections in Spanish.<sup>165</sup> These counties did not include Mercer

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(statement of John Trasviña, Mexican American Legal Defense and Educational Fund (“MALDEF”)).

159. Recently, the federal district court of Puerto Rico found that failure to provide an English-language ballot for non-Spanish speakers in Puerto Rico violated the minority language provisions of the VRA, *Diffenderfer v. Gómez-Colón*, No. 08-1918, 2008 U.S. Dist. LEXIS 95603, at 8-11 (D.P.R. Sept. 2, 2008); however, this portion of the decision is subject to appeal as “minority language groups” are specifically defined in the VRA as “American Indian, Asian American, Alaskan Natives, or of Spanish heritage.” 42 U.S.C. § 1973(aa)-(1)(a)(e). Other portions of the U.S. District Court of Puerto Rico’s decision requiring English-language ballots, based on Equal Protection and First Amendment arguments. *Diffenderfer v. Gómez-Colón*, No. 08-1918 at 12-22.

160. Tucker, *supra* note 155, at 165.

161. Voting Rights Acts Amendments of 1992, Determinations Under Section 203, Vol. 67, No. 144 Fed. Reg. 48871, 48874 (July 26, 2002) [hereinafter 203 Determinations].

162. Cartagena, *supra* note 57, at 538-39 (discussing legislative history of 1975 VRA).

163. See, e.g., Cartagena, *supra* note 49 (critiquing Tucker, *supra* note 154, who provides examples of this terminology).

164. See *Márquez v. Falcey*, Consent Order, Civ. No. 1447-73 (D.N.J., June 29, 1976) [hereinafter *Márquez* Consent order] (on file with journal).

165. By the time of the most recent Census Bureau Determinations, Bergen, Cumberland, Essex, Hudson, Middlesex, Passaic, and Union Counties were covered for Spanish. Dept. of Commerce, Bureau of the Census, Voting Rights Acts Amendments of 1992, Determinations Under Section 203, Vol. 67, No. 144 Fed. Reg. 48871, 48874 (July 26, 2002).

County, where the lead plaintiff resided (in Trenton).<sup>166</sup> Moreover, in 1974, New Jersey adopted a state law requiring Spanish-language access to elections in each election district in which the primary language of 10% or more registered voters was Spanish.<sup>167</sup> As to whether Section 4(e) still applied, in 1976, the New Jersey District Court ordered that, in addition to Section 203 and any state law requirements, Section 4(e) still applied to fill in any gaps in Spanish-language access to elections needed by voters born in Puerto Rico.

The 1976 *Márquez* federal court ordered that, *in addition to* providing bilingual election assistance, each election district in which the primary language of 10% or more registered voters was Spanish, as required under New Jersey law, state and county officials were also required to provide bilingual access to Puerto Rican voters residing outside of such districts.<sup>168</sup> For example, Defendants were required to ask on mail-in registration forms, “Check here if you were born in Puerto Rico and wish to receive Spanish language election materials,” and to provide such bilingual access when requested, as well as other remedies under Section 4(e).<sup>169</sup> The State of New Jersey had argued that it already provided bilingual access under its own law and that “Section 4(e) of the Voting Rights Act of 1965 [did] not provide bilingual elections to all voters born in Puerto Rico who have difficulty with the English language.”<sup>170</sup> Defendants also argued that Section 203 limited any bilingual election requirements to those areas covered according to the Section 203 population threshold, to the exclusion of any further application of Section 4(e).<sup>171</sup> New Jersey alleged that DOJ interim guidelines “indicate that the requirements concerning elections in languages in addition to English are contained in Section 4(f)(4) and Section 203(c), and no other sections are cited as requiring bi-lingual elections.”<sup>172</sup> The DOJ had left out mention of Section 4(e) in the minority language guidelines it issued in 1975, following the enactment of Section 203.

In the 1976 *Márquez* order, however, the federal court ordered that New Jersey send a notice asking every registered voter in the state—regardless of whether the voter resided outside the Section 203 covered jurisdictions—whether they needed Spanish-language election assistance.<sup>173</sup> This decision impacted tens of thousands of Puerto Ricans living outside of Section 203 jurisdictions in New Jersey and clearly illustrated the continued application of Section 4(e) after the enactment of 203.<sup>174</sup>

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166. See, e.g., N.J.A.G., *Brief on Behalf of Defendants in Support of Cross-Motion for Summary Judgment*, *Márquez v. Falcey*, Civ. No. 1447-73, at 6-7.

167. N.J.S.A. § 19:14-21 (1974).

168. *Márquez* Consent Order, *supra* note 164, at ¶1.

169. *Id.* at ¶1(a).

170. *Supra* note 166, at 9.

171. *Id.* at 4-8.

172. *Id.* at 7.

173. *Márquez v. Falcey* Consent Order, *supra* note 164, at ¶1.

174. In 1970, 10.38% of Stateside Puerto Ricans lived in New Jersey. ACOSTA-BELEN, *supra* note 15, at 90 (Figure 4.4.). By 2000, 366,788 Puerto Ricans lived in the State, with 245,391 living in counties covered by Section 203, leaving 121,397 Puerto Ricans in New Jersey outside of 203 covered jurisdictions. See U.S. CENSUS BUREAU, HISPANIC OR LATINO BY SPECIFIC ORIGIN [31]: UNIVERSE: TOTAL POPULATION, CENSUS 2000 (2000) [hereinafter Census Data], available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-state=dt&-context=dt&-ds\\_name=DEC\\_2000\\_SF1\\_U&-geoSkip=0&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_PCT011&-tree\\_id=4001&-skip=0&-redoLog=false&-all\\_geo\\_types=N&-geo\\_id=04000US34&-geo\\_id=05000US34001&-geo\\_id=05000US34003&-geo\\_id=05000US34005&-geo\\_id=05000US34007&-geo\\_id=05000US34009&-](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U&-geoSkip=0&-mt_name=DEC_2000_SF1_U_PCT011&-tree_id=4001&-skip=0&-redoLog=false&-all_geo_types=N&-geo_id=04000US34&-geo_id=05000US34001&-geo_id=05000US34003&-geo_id=05000US34005&-geo_id=05000US34007&-geo_id=05000US34009&-)

Unfortunately, the *Márquez* decision provided only one-time remedies; in subsequent elections, many New Jersey jurisdictions with significant Puerto Rican populations that should be protected under Section 4(e) have not provided Spanish-language election materials or access to bilingual assistance at the polls. The current situation of those Puerto Rican voters will be discussed in Part III, *infra*.

Another issue that arose after Section 203 was enacted in 1975 was the relative neglect of Section 4(e). The next DOJ enforcement action under Section 4(e) would not be until 2003.<sup>175</sup> This is probably because Section 203 is a more direct remedy, as it automatically applies to “minority language” voters through its population coverage thresholds in numerous jurisdictions,<sup>176</sup> whereas Section 4(e) does not depend on bright-line population threshold formulas.<sup>177</sup> Because Section 203 relies on easily ascertainable numbers, it is easier to make a case under it than by the more amorphous Section 4(e) standards. Even Latino voting rights advocates have sometimes neglected to mention Section 4(e) in their post-203 analyses of language access issues.<sup>178</sup> With the exception of its mention in a ballot-access case in 1981,<sup>179</sup> there is no known community-based 4(e) litigation since the 1970s *Torres*, *Arroyo*, and *PROPA* decisions discussed in the previous section of this article.

#### D. Over Two Million Protected by Section 203 & Over One Million Left Out

As discussed above, Section 203 of the VRA uses population threshold formulas measured through Census Bureau “determinations” regarding the number of LEP minority language citizens to proscribe which jurisdictions must provide access to elections in the “minority language.” Analysis of 2000 Census data shows that 2,136,060 Stateside Puerto Ricans lived in jurisdictions “covered” under Section 203.<sup>180</sup> Because these jurisdictions have notice of the Census Bureau

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175. See *United States v. Berks County*, 277 F. Supp. 2d 570, 580-81 (E.D.Pa. 2003).

176. See discussion of 203 Determinations, II.B, *supra* note 161 (203 jurisdictions covered for Spanish).

177. See, e.g., 42 U.S.C. § 1973(b)(e) (statutory language of 4(e) in individual, personal tense); see generally *United States v. County Bd. of Elections of Monroe Co.*, 248 F. Supp. at 320 (discussing Section 4(e) litigation on behalf of María López); Cf. 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(i) at n.3-4 (statutory language of 203 relies on population thresholds).

178. Cartagena, *supra* note 49, at 207 (discussing “various commentators who erroneously conclude” that expansion of Section 5 coverage to Latinos and 203 bilingual assistance provisions “are the Act’s first targeted provisions to assist Latino voters”).

179. See *Gerena-Valentín v. Koch*, 523 F. Supp. 176 (S.D.N.Y. 1981) (discussed further *infra* note 187).

180. 2000 Census, SF1, PCT11 (original research analyzing census data from 203 jurisdictions) (on file with *Berkeley La Raza Law Journal*); Dept. of Commerce, Bureau of the Census, *Voting Rights Acts Amendments of 1992, Determinations Under Section 203*, Vol. 67, No. 144 Fed. Reg. 48871 (July 26, 2002) (listing all 203 jurisdictions).

“determinations” implementing Section 203, they are explicitly and indisputably required to provide access to elections in Spanish.<sup>181</sup> Nonetheless, Section 203 jurisdictions have not evenly complied with requirements to provide access to elections in Spanish, and significant DOJ and community-based litigation and advocacy have been needed to force compliance over the years.<sup>182</sup> However, compared to Section 4(e), Section 203 has been much more aggressively enforced.<sup>183</sup>

In 2000, over one million (1,270,118) Stateside Puerto Ricans lived in jurisdictions that were not covered under Section 203, and with the exception of a few, these jurisdictions are unlikely to provide access to elections in Spanish.<sup>184</sup> Approximately 40% of Stateside Puerto Ricans are LEP.<sup>185</sup> Over one million (1,296,548), or 38.09%, were born in Puerto Rico.<sup>186</sup> Accordingly, it is likely that about 40% of the 1,270,118 Stateside Puerto Ricans living outside of 203 jurisdictions have their voting rights compromised in violation of Section 4(e) of the VRA.

### III. 1980-2008 STATESIDE PUERTO RICAN VOTING RIGHTS ISSUES

#### A. *The 1981 Gerena-Valentín Litigation*

In 1981, PRLDEF brought a new VRA case on behalf of former city council candidate Gilberto Gerena-Valentín, who opposed a New York City redistricting plan and was subsequently removed from the ballot,<sup>187</sup> and similarly situated Puerto Rican voters.<sup>188</sup> PRLDEF brought litigation challenging the redistricting plan under Section 5 of the VRA. PRLDEF and Gerena-Valentín also sued under Section 4(e) of the VRA, as the petition process for candidacy was not available in Spanish.<sup>189</sup> PRLDEF also included claims of discrimination under Section 1983 of the Civil Rights Act and alleged violations of the First and Fourteenth Amendments.<sup>190</sup> As required under the VRA, a three-judge panel convened to decide the Section 5 claim.<sup>191</sup> The panel found that New York City had not obtained preclearance for its redistricting plan, although Section 5 required it to submit any proposed changes in voting procedures in order to determine whether they would be discriminatory;<sup>192</sup> therefore, the panel enjoined elections until the DOJ determined that it did not object to the change in voting practices and procedures.<sup>193</sup> The finding of a Section 5 violation and an order of review of the New York City

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181. See, e.g., *United States v. Bernadillo County*, Civ. No. CV-98-156 BB/LCS (D.N.M. 1988).

182. See, e.g., Tucker, *supra* note 155.

183. See, e.g., [www.usdoj.gov/crt/voting/litigation/caselist.htm](http://www.usdoj.gov/crt/voting/litigation/caselist.htm) (last visited Apr. 8, 2008).

184. See 2000 Census, *supra* note 180, at n.146.

185. See, e.g., Tucker, *supra* note 155, at 169.

186. 2000 Census, SF4, PCT 43, Sex by Place of Birth by Citizenship Status [31], Racial or Ethnic Grouping: Puerto Rican (on file with *Berkeley La Raza Law Journal*).

187. *Gerena-Valentín v. Koch*, 523 F. Supp. 176 (S.D.N.Y. 1981).

188. *Herron v. Koch*, 523 F. Supp. 167 (E. & S.D.N.Y. 1981).

189. *Gerena-Valentín*, 523 F. Supp. 176.

190. *Id.*

191. 42 U.S.C. § 1973(c).

192. *Gerena-Valentín*, 523 F. Supp. 167 at 173-75.

193. *Id.*

redistricting plan was a critical victory for the Puerto Rican community.<sup>194</sup>

The remainder of the litigation in this case showed the potential limits of Section 4(e), in terms of proof needed to show a violation. In *Gerena-Valentín v. Koch*, Judge Duffy of the Southern District of New York ruled that Section 4(e) of the VRA was not violated by failure to provide bilingual access to the ballot petition process because the City of New York was providing bilingual election materials, notices, and poll workers.<sup>195</sup> Judge Duffy found that there was “no showing that the defendants failed to adequately provide bilingual assistance in the ballot petition process.”<sup>196</sup> He reasoned that plaintiffs had not shown that they themselves had provided any bilingual access to potential petition signers, or to translate the petition, hinting at a requirement to prove a need for Spanish-language access in the Section 4(e) claim. After all, if the Puerto Rican electorate had become proficient in English, the failure to provide Spanish-language access would not be discriminatory. It may be that Puerto Rican voters in New York did not fully understand the English-language ballot petition, but plaintiffs did not bring sufficient proof to convince the federal judge of that fact. In his two-page decision, the federal judge ruled that:

Under the circumstances, I do not believe that plaintiffs have substantiated a case of discrimination. Defendants provide the essential services for the exercise of Hispanic voters’ franchises. The failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote, particularly where as here the plaintiffs have not made any effort on their own to provide the bilingual aid they now request.<sup>197</sup>

While dismissing the constitutional claims, the judge also dismissed the 4(e) claim.<sup>198</sup> This 1982 decision includes several distinctive perspectives. First, the *Gerena-Valentín* decision speaks of “Hispanic voters’ franchises,” rather than focusing on Puerto Rican voters, despite the language of Section 4(e) limiting it to Puerto Ricans. The discussion of “Hispanic voters’ franchises” is because of the Section 1983 and Equal Protection claims brought with the 4(e) claim.<sup>199</sup> If the 4(e) claim were brought alone, then the analysis would be limited to those Puerto Rican voters who have difficulty understanding election materials in English rather than all Latinos. Secondly, the decision implies that evidence of voting rights organizations, political campaigns, or individuals providing Spanish-language translation of election materials may serve as proof of a Section 4(e) violation. After all, if the jurisdiction were providing access in Spanish, there would be no need for community translation. Finally, this short judicial decision also implies that providing Spanish-language access may help to show that such translation is needed for Puerto Rican voters to participate effectively in the electoral process.

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194. See Cartagena, *supra* note 49 (discussing Mr. Gerena-Valentín’s role as lead plaintiff in *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981)).

195. *Gerena-Valentín*, 523 F. Supp. 176.

196. *Id.* at 177.

197. *Id.*

198. *Id.*

199. *Id.*

After the 1981 *Gerena-Valentín* litigation, no known Section 4(e) cases were brought for 20 years. Puerto Ricans living in jurisdictions covered under Section 203, adopted during the 1975 VRA amendments and implemented after the 1980 Census, began to have access to elections in Spanish. However, despite the significant advancements made under Section 203, more than one million Stateside Puerto Ricans were left out of Section 203 coverage.<sup>200</sup> As discussed below, Puerto Rican migration not only continued during this era, but also new waves of Puerto Rican migrants came from the Island to settle in new areas on the mainland.

### B. Puerto Rican Migration 1980-2000

The period between 1980-2000 is characterized by an upsurge in Puerto Rican migration bringing new waves of migration to new areas.<sup>201</sup> During this time, Puerto Ricans began to migrate from cities to the suburbs in search of better schools and living conditions.<sup>202</sup> Economic changes in cities like Philadelphia, which continued to experience both high levels of immigration and increasing scarcity of industrial jobs, likewise catalyzed Puerto Rican migration to the suburbs. Some Puerto Rican labor migrants, displaced by economic restructuring during this era in the Northeast, moved to be closer to suburban service sector jobs.<sup>203</sup> Although New York City continued to have the highest Stateside Puerto Rican population, the overall population of Puerto Ricans in New York declined from 860,000 in 1980 to 789,172 by 2,000.<sup>204</sup> At the same time, a similar phenomenon occurred in Chicago.<sup>205</sup> The dispersion of Puerto Rican migrants was partially characterized by upward mobility but more so by the poor and low-wage workers moving into marginal neighborhoods.<sup>206</sup> As Stateside Puerto Ricans moved from the large urban areas to the suburbs, they moved outside of the urban-area protections of *PROPA*, *Arroyo*, and *Torres*.

Satellite cities to large urban areas also attracted large number of Puerto Ricans during this period. However, these satellite cities and towns with large Puerto Rican populations, such as Camden, New Jersey,<sup>207</sup> and Wilmington, Delaware,<sup>208</sup> outside of Philadelphia, and Haverstraw,<sup>209</sup> just north of New York

200. See original analysis of census data, *supra* Section II.D.

201. ACOSTA-BELEN, *supra* note 15, at 85-92.

202. *Id.* at 95-96.

203. CARMEN TERESA WHALEN, FROM PUERTO RICO TO PHILADELPHIA: PUERTO RICAN WORKERS AND POSTWAR ECONOMIES 218-27 (2001).

204. ACOSTA-BELEN, *supra* note 15, at 94.

205. *Id.* at 93-97.

206. ATLAS, *supra* note 7, at 8-9.

207. 23,051 Puerto Ricans, comprising 28.84% of the total population (79,904) resided in Camden in 2000. See Census Data, *supra* note 174.

208. 4,328 Puerto Ricans, comprising 5.96% of the population (72,664) resided in Wilmington in 2000. See Census Data, *supra* note 174, available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-state=dt&-context=dt&-ds\\_name=DEC\\_2000\\_SF1\\_U&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_PCT011&-tree\\_id=4001&-keyword=wilmington&-all\\_geo\\_types=N&-redoLog=true&-\\_caller=geoselect&-geo\\_id=16000US1077580&-search\\_results=04000US36&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_PCT011&-tree_id=4001&-keyword=wilmington&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=16000US1077580&-search_results=04000US36&-format=&-_lang=en) (last visited Dec. 5, 2008).

209. According to the 2000 Census, 3,812 Puerto Ricans, comprising 11.27% of the total population (33,811) resided in Haverstraw, New York. Census Data, *supra* note 174 (for Haverstraw), available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-state=dt&-context=dt&-](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-)

City, were also less likely to be covered under Section 203. At the same time, Puerto Ricans also settled in many medium-size cities, not all of which were covered for Spanish-language access under Section 203.<sup>210</sup>

In the states with the highest Stateside Puerto Rican populations, many citizens became “covered” under Section 203, but many others settled outside of the larger cities that fell under the 203 population threshold formulas. This occurred in states like New Jersey, which is third in terms of total Stateside Puerto Rican population. In 1970, 10.38% of Stateside Puerto Ricans lived in New Jersey, and in 2000, 12.41% lived there. These percentages are eclipsed only by the Stateside Puerto Rican population of New York (35.54%) and Florida (16.31%).<sup>211</sup>

New Jersey includes important metropolitan areas where Puerto Ricans settled,<sup>212</sup> as well as farms where Puerto Ricans were recruited to work during the Great Migration, in abysmal conditions of exploitation.<sup>213</sup> New Jersey was the main destination for Puerto Rican farm workers,<sup>214</sup> who encountered discrimination in many sectors of life.<sup>215</sup> Despite difficult socioeconomic conditions, Puerto Rican migration to New Jersey continued from 1980-2000, with 76,593 newcomers arriving from 1980-1990, and 46,655 arriving from 1990-2000.<sup>216</sup> During this time, six New Jersey counties became covered for Spanish under the population threshold formulas for Section 203 of the 1975 VRA.<sup>217</sup> According to 2000 Census data, a total of 245,391 Puerto Ricans lived in those counties.<sup>218</sup> Of the total 366,788 Puerto Ricans in New Jersey in 2000, the remaining 121,397 had come to live in jurisdictions that did not fall under the protections of Section 203, and may not have had access to elections in Spanish.

Massachusetts is also a state with high Puerto Rican migration. In 2000, the U.S. Census identified 199,207 Puerto Rican residents in Massachusetts.<sup>219</sup> This represents a dramatic increase in the state’s Puerto Rican population. In 1970, only 1.82% of Stateside Puerto Ricans lived in Massachusetts.<sup>220</sup> By 2000, 6.74% lived there, and the Commonwealth had the fifth highest number of Puerto Rican residents.<sup>221</sup> Puerto Ricans contributed to 26.8% of the state’s growth from 1980-1990 and 14.4% of the state’s population increased from 1990-2000.<sup>222</sup> During this

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ds\_name=DEC\_2000\_SF1\_U&-mt\_name=DEC\_2000\_SF1\_U\_PCT011&-tree\_id=4001&-keyword=haverstraw&-all\_geo\_types=N&-redoLog=false&-\_caller=geoselect&-geo\_id=06000US3608732765&-search\_results=16000US1077580&-format=&-\_lang=en (last visited Dec. 5, 2008).

210. ACOSTA-BELEN, *supra* note 15, at Table 4.8, *Puerto Rican Presence in Midsize U.S. Cities with Greatest Concentrations, 1980-2000*; Cf. 203 Determinations, *supra* note 161.

211. ACOSTA-BELEN, *supra* note 15, at 90 (citing U.S. Census data).

212. *Id.* at 89-97.

213. WHALEN, *supra* note 202, at 74-79, 123-26, 153-58.

214. *Id.* at 74.

215. *Id.* at 76 (discussing findings of statewide discrimination against Puerto Ricans, worse in South Jersey, the location of farm workers, by 1955 New Jersey Dept. Ed. Div. Against Discrimination).

216. ACOSTA-BELEN, *supra* note 15, at 91 (citing U.S. Census data).

217. 203 Determinations, *supra* note 161, at 48874 (listing 6 N.J. counties).

218. Census Data, *supra* note 174 (58,312 Puerto Ricans resided in Hudson County, 53,015 in Essex, 41,324 in Passaic, 34,676 in Middlesex, 18,520 in Cumberland, and 17,290 in Bergen).

219. *Id.*

220. ACOSTA-BELEN, *supra* note 15, at 90 (citing U.S. Census data).

221. *Id.*

222. *Id.* at 91.

time, six Massachusetts jurisdictions became covered for Spanish under Section 203 of the VRA.<sup>223</sup> The 2000 Census data shows that a total of 101,123 Puerto Ricans lived in these Massachusetts jurisdictions that were covered for Spanish under Section 203.<sup>224</sup> However, of the 199,207 total Puerto Ricans in Massachusetts, the remaining 98,084 live outside of the protections of Section 203 and may have not had access to the ballot in Spanish.

Even in New York, many Puerto Ricans reside outside of the protections of Section 203. According to the 2000 Census, Buffalo was home to 17,250 Puerto Ricans, comprising 5.89% of the total population, and 21,897 Puerto Ricans lived in Rochester, comprising 9.96% of the total population.<sup>225</sup> Despite the 1965 *Ortiz* decision,<sup>226</sup> as these cities are not covered under Section 203,<sup>227</sup> they may have neglected to provide Spanish-language access to elections as required under Section 4(e).<sup>228</sup> In all of New York ], by 2000, 835,440 Puerto Ricans lived in jurisdictions covered for Spanish under Section 203, but of the 1,050,293 in the state, another 214,853 lived outside of the protections of Section 203.<sup>229</sup>

During this era in the Northeast, unfortunately, Puerto Ricans fell to the bottom of the socioeconomic ladder. While many individual Puerto Ricans became successful and political leadership and community organizations blossomed, millions fell into poverty.<sup>230</sup> Northeastern Puerto Ricans had the lowest levels of income, education, and home ownership, and the highest levels of poverty assistance compared to any other racial or ethnic group.<sup>231</sup>

In contrast, an important new wave occurred among more fortunate Puerto Ricans who migrated to Florida, either directly from the Island or from New York.<sup>232</sup> In 1970, only 2.2% of Stateside Puerto Ricans lived in Florida, but by 2000, Florida was the second most common destination for Puerto Ricans and by 2000, 16.31% of Stateside Puerto Ricans lived in Florida.<sup>233</sup> The great majority came to settle in Central Florida, and the new Puerto Rican presence changed the composite of the

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223. 203 Determinations, *supra* note 161, at 48874 (listing 6 Mass. cities). Note that jurisdictions become “covered” under Section 203 when the U.S. Census Bureau determines that the number or percent of LEP voting age citizens exceeds the population thresholds set forth in Section 203.

224. Census Data, *supra* note 174 (27,442 Puerto Ricans lived in Boston, 35,251 in Springfield, 15,816 in Lawrence, 14,539 in Holyoke, 5,363 in Chelsea, and 2,712 in Southfield, totaling 101,123).

225. *Id.*

226. See *supra* notes 134 to 137 & accompanying text for a discussion of *Ortiz v. N.Y. State Bd. Elections*, 75 Civ. 455 (W.D.N.Y. July 10, 1975).

227. 203 Determinations, *supra* note 161, at 48875 (listing Bronx, Kings, Nassau, New York, Queens, Suffolk and Westchester County as covered for Spanish).

228. See, e.g., [www.election.state.ny.us](http://www.election.state.ny.us) (with links to Erie County (regarding Buffalo) & Monroe County (regarding Rochester) websites with election materials in English-only, except one link to Spanish-language state voter registration form in Monroe County) (last visited Feb. 16, 2009).

229. *Id.*; see Census Data, *supra* note 174 (319,240 Puerto Ricans in Bronx County, 213,025 in Kings, 23,540 in Nassau, 119,718 in New York, 108,661 in Queens, and 51,256 in Suffolk County).

230. See, e.g., ATLAS, *supra* note 7, at 11-15; ACOSTA-BELEN, *supra* note 15, at 107-45.

231. 2002-2003 federal data showed that 88.5 percent of Stateside Puerto Ricans receiving public assistance lived in the Northeast corridor. They also had the lowest income average household income (\$42,032) of any major race/ethnic group in the region, and the lowest home ownership rate (31.9%). ATLAS, *supra* note 7, at 10-11 (discussing “Segmentation”).

232. ACOSTA-BELEN, *supra* note 15, at 100-01.

233. *Id.* at 90 (citing U.S. Census data).

Spanish-speaking electorate in the state.<sup>234</sup> By 2000, a total of 194,443 Puerto Ricans lived in Florida. During this time, eight Florida counties have become covered for Spanish under Section 203 of the VRA.<sup>235</sup> As the overall Spanish-speaking population triggering Section 203 coverage increased dramatically in recent years, some of these areas did not become covered until after the 2000 Census. For example, Osceola County did not meet the population threshold triggers for Spanish under Section 203 until the issuance of the post-decennial Census Bureau determinations on July 26, 2002.<sup>236</sup> The DOJ had filed a complaint and the jurisdiction entered into a consent decree to remedy discriminatory treatment and failure to communicate effectively with Spanish-speaking voters under Section 2 of the VRA on July 22, 2002,<sup>237</sup> before it was required to provide Spanish-language access to elections under Section 203. By 2000, 30,728 Puerto Ricans had come to live in Osceola County, with 17,029 in Orlando, comprising 9.16% of the total population, and another 11,312 in Kissimmee, comprising 23.66% of the total population.<sup>238</sup> Yet despite the requirements of Section 4(e), until VRA litigation and subsequent coverage under Section 203, Puerto Ricans in Osceola County were not permitted access to the ballot in Spanish.

According to the 2000 Census, a total of 331,410 Puerto Ricans live in the eight Florida counties covered for Spanish under Section 203 of the VRA. However, the remaining 150,617 live in counties in which Section 203 does not yet apply.<sup>239</sup>

During this era, the Puerto Rican population grew in many other jurisdictions that have not provided Spanish-language access to the ballot. For example, according to the 2000 Census data, 20,251 Puerto Ricans in Maryland lived outside of the one county covered for Spanish under Section 203.<sup>240</sup> In 2000, tens of thousands of Puerto Ricans lived in Cleveland and Milwaukee,<sup>241</sup> which are not covered under Section 203. Many Puerto Ricans had been recruited to work in agriculture in Hawaii during the Great Migration,<sup>242</sup> and migration continued such that by the 2000 Census, 30,005 Puerto Ricans lived in Hawaii,<sup>243</sup> which is not covered under Section 203 for Spanish.<sup>244</sup> The 2000 Census also showed that over

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234. ATLAS, *supra* note 7, at 8 (increasing Puerto Rican population in Central Florida); Pew Hispanic Center, The Hispanic Electorate in Florida, *available at* <http://pewhispanic.org/files/factsheets/9.pdf> (distinguishing Cuban and non-Cuban Hispanic voters) (last visited Feb. 16, 2009).

235. 203 Determinations, *supra* note 161, at 48873 (listing Broward, Hardee, Hendry, Hillsborough, Miami-Dade, Orange, Osceola and Palm Beach County as covered for Spanish).

236. *Id.*

237. United States v. Osceola County, Civ. No. 6:02-CV-738-ORL-22JGG (M.D. Fla., July 22, 2002).

238. Census Data, *supra* note 174.

239. *Id.* (54,938 Puerto Ricans lived in Broward, 283 in Hardee, 813 in Hendry, 52,568 in Hillsborough, 80,327 in Miami-Dade, 86,583 in Orange, 30,728 in Osceola, and 25,170 in Palm Beach County; this totals 331,410 of 482,027 Puerto Ricans in Florida, leaving 150,617 outside of these 203 jurisdictions).

240. 203 Determinations, *supra* note 161, at 48874 (listing only Montgomery County (determination for Hispanics)); Census Data, *supra* note 174 (25,570 Puerto Ricans in Maryland & 5,319 in Montgomery County).

241. *Id.* (25,385 Puerto Ricans in Cleveland & 16,613 in Milwaukee).

242. ACOSTA-BELEN, *supra* note 15, at 52-59.

243. Census Data, *supra* note 174 (for Hawaii).

244. 203 Determinations, *supra* note 161, at 48873-74 (Honolulu covered for Filipino and

40% were born in Puerto Rico and therefore were likely to have been educated in Puerto Rico and fall under the protections of Section 4(e).<sup>245</sup>

By 2003, Stateside Puerto Rican population had even surpassed the total population of Puerto Rico.<sup>246</sup> During this era, circular migration and strong ties with Puerto Rico, including the use of Spanish as a primary language, continued.<sup>247</sup> Continued migration is predicted, and there are many indicators that ties to Puerto Rico will remain strong and new migrants will continue to use Spanish as their primary language.<sup>248</sup> The most recent decennial census data bears this out—the 2000 Census indicated high LEP among voting-age Puerto Ricans in Florida (31.50%), Massachusetts (38.99%), New Jersey (32.54%), and New York (30.63%).<sup>249</sup> This measure is important because, if citizens are LEP, the VRA considers that their voting rights are compromised unless they are provided with access to elections in the “minority language.”<sup>250</sup> As the LEP rate among voting-age Puerto Ricans on the Island was 71.04%,<sup>251</sup> presumably, those who were born on the Island and more recently migrated stateside would have even higher LEP rates than those cited above.

Finally, during this era, as more research became available, a dramatic drop in Puerto Rican voter participation was found upon migration to the mainland.<sup>252</sup> Puerto Rico has one of the highest voter registration and participation rates in the United States.<sup>253</sup> In Puerto Rico, voter turnout is at over 80%, higher than most of the United States. Upon migration, however, voter turnout reduces to 30% of the citizen voting age population.<sup>254</sup> Stateside Puerto Ricans have significantly lower voter registration and turnout levels than non-Hispanic Whites.<sup>255</sup> This is likely due in part to the barriers to voting associated with race and ethnicity that Puerto Ricans encounter after migration from the Island.<sup>256</sup> Due to discriminatory election practices and structural barriers, Latinos in general have the lowest rates of voter participation in the U.S.<sup>257</sup> Given this context, it is not surprising that challenges to Latino voting rights have negatively affected Stateside Puerto Ricans.

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Japanese; Maui covered for Filipino).

245. Census Data, *supra* note 174 (for Puerto Ricans in Hawaii) (of 30,859 surveyed, 1,246 (40.38%) were born in Puerto Rico); *see also Reading* (regarding analogous census data).

246. ACOSTA-BELEN, *supra* note 15, at 83-84 (citing Falcón’s analysis of 2002-2003 Census data).

247. *Id.* at 101-02.

248. ATLAS, *supra* note 7, at 21-23; *Id.* at 129-30.

249. Original analysis of LEP data for Puerto Ricans over 18 in these states (on file with the author).

250. 42 U.S.C. § 1973(aa)-(1)(a)(b)(2)(A)(i).

251. Original analysis of LEP data for persons over 18 in Puerto Rico (on file with the author).

252. ATLAS, *supra* note 7, at 16-18.

253. *Id.*

254. *See, e.g., id.* at 17-18.

255. *See, e.g.,* LUIS RAÚL CAMARA-FUERTES, THE PHENOMENON OF PUERTO RICAN VOTING (2004) (citing federal census & election data).

256. *Id.* 73-75; *see also* PROPÁ v. Kusper, 350 F. Supp 606, 608-10 (N.D. Ill. 1972); Torres v. Sachs, 381 F. Supp. 309, 311-13 (D.C.N.Y. 1974); Arroyo v. Tucker, 372 F. Supp. 764, 766-68 (D.C. Pa. 1974).

257. *See, e.g.,* VERBA, SCHLOZMAN, & BRADY, VOICE AND EQUALITY (1995), Ch. 8; Nat’l. Ass’n. of Latino Elected & Appointed Officials (“NALEO”) Educ. Fund, *I Was Asked If I Was a Citizen: Latino Elected Officials Speak Out on the Voting Rights Act* (Sept. 2006) available at [http://www.naleo.org/downloads/NALEO\\_VRA\\_Report.pdf](http://www.naleo.org/downloads/NALEO_VRA_Report.pdf).

C. 2003 Department of Justice 4(e) Litigation in Reading, Pennsylvania

After the 1981 PRLDEF litigation around the Gerena-Valentín candidacy, it was not until 2003 that another 4(e) case was brought to remedy the lack of Spanish-language access for Puerto Rican voters. This time, the litigation was brought by the DOJ in Reading, Pennsylvania. Pennsylvania, home to 228,557 Puerto Ricans, has the second-highest level of Puerto Rican migration.<sup>258</sup> Only Philadelphia County (with 91,527 Puerto Ricans) has been covered for Spanish under Section 203.<sup>259</sup> Reading was home to 19,054 Puerto Rican citizens in 2000,<sup>260</sup> a significant portion of whom were born and educated on the Island, where the primary language of education continues to be Spanish.<sup>261</sup> As elections in Reading were English-only, Puerto Rican voters were forced to attempt to vote in English and their voting rights were compromised.<sup>262</sup> The DOJ sued Berks County, Pennsylvania, which was the county responsible for running elections in Reading. In response, defendants raised the issue of whether Section 4(e) was still enforceable. On March 18, 2003, the Eastern District of Pennsylvania issued a memorandum opinion clarifying that:

Although there have been three [sic] prior judicial decisions enforcing this law in cases brought by private parties, the US acknowledges that this is the first case it has filed under Section 4(e). However, that fact is legally irrelevant. The Court has the obligation to follow Congress' mandates if the facts warrant granting the relief which the Government seeks.<sup>263</sup>

The opinion noted that “[v]oting without understanding the ballot is like attending a concert without being able to hear,” and proceeded to enforce full access to voting in Spanish for Puerto Ricans under Section 4(e).<sup>264</sup> Significantly, the court rejected the argument that Section 203 was an adoption of population threshold criteria that should apply to and replace Section 4(e).<sup>265</sup> The court also dismissed defendants’ “suggestion” that enforcement of Section 4(e) (post-203) “could lead to the eventual result that bilingual ballots and voting materials be provided in every voting precinct in the country with even a single limited-English proficient voter of Puerto Rican descent, educated in Spanish in an American-flag school in Puerto Rico.”<sup>266</sup> The court reasoned that the injunctive relief requested—bilingual access in every election district in which 5% or more of registered voters had Hispanic surnames—belied this argument. Furthermore the court reasoned:

Although it is unlikely that the Defendants’ envisioned scenario

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258. Census Data, *supra* note 174.

259. *Id.*; see also 203 Determinations, *supra* note 161, at 48875.

260. Census Data, *supra* note 174.

261. United States v. Berks County, 277 F. Supp. 2d 570 (E.D.Pa. 2003), complaint at ¶¶7-9.

262. *Id.*

263. *Id.*; United States v. Berks County, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (Memorandum Opinion of Mar. 18, 2003).

264. *Id.*

265. *Id.* at 537-38.

266. *Id.* at 538.

would occur, the Government does have wide discretion to bring test cases and enforce federal statutes in any jurisdiction that it believes to be in violation of federal law. The instant action is not frivolous or *de minimus*,<sup>267</sup> and the Court is guided by the plain language of Section 4(e).<sup>267</sup> The Court finds the statutory language to be clear, and therefore the words must be interpreted in accordance with their ordinary meaning.<sup>268</sup>

The federal court then granted plaintiff's motion for preliminary injunctive relief based on findings of Section 4(e) violations.<sup>269</sup>

On August 20, 2003, the federal court issued a permanent injunction against English-only elections and required bilingual poll workers and Spanish-language translation of all election materials and information in Reading. The permanent injunction noted that "[t]he plain language of Section 4(e) is clear and unambiguous, and has been interpreted broadly by federal courts to prohibit *both* the explicit conditioning of the right to vote on the ability to speak English, *and* the conduct of English-only elections."<sup>270</sup> This litigation showed that the enforcement of Section 4(e) had developed from the initial case of María López, an individual Puerto Rican citizen denied the right to register by New York literacy tests in 1965.<sup>271</sup> It now clearly encompasses class-action litigation, community-wide remedies, and any conditioning of Puerto Rican's voting rights on the ability to read or understand English in not only registration, but also in most aspects of the voting process. By using the language of "both" and "and," the Reading court made clear that Section 4(e) was not limited to a specific and narrow interpretation of the statutory language. Therefore, under Section 4(e), one could enforce *both* individual *and* collective rights, to *both* not be prohibited from voting due to an inability to speak English, *and* not to be prejudiced by English-only elections. Although Section 4(e) had not been the subject of an enforcement action for over 20 years and Section 203 covered many

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267. It may be difficult for a court to define a 4(e) claim as *de minimus*, because the statute is written in the singular tense and therefore protects individual Puerto Rican voters. See 42 U.S.C. § 1973(b)(e) at n.48:

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of *persons* educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such *persons* on ability to read, write, understand, or interpret any matter in the English language. (2) No *person* . . . [educated in] . . . the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any federal, state, or local election because of *his* inability to read, write, understand, or interpret any matter in the English language.

Logically, it would be more difficult to show that Section 4(e) requires translation into Spanish of the full panoply of election materials for a singular LEP voter who was educated in Puerto Rico; however, even a single voter is protected under the statutory language of Section 4(e) and his or her voting rights may not be conditioned on any ability to speak, read, write or understand any matter in the English language. Therefore, some type of Spanish-language assistance, such as a bilingual poll worker or access to another source of translation of the ballot and election materials, should be provided in jurisdictions with even small numbers of LEP voters who were educated in Puerto Rico.

268. *United States v. Berks Co.*, 277 F. Supp. 2d 570, 537-38 (E.D.Pa. 2003) (citing cases).

269. *Id.* at 538.

270. *Id.* (citing *Arroyo, PROPA, Torres, and Katzenbach*).

271. See *United States v. Monroe Co.*, 248 F. Supp. 316, 318-19 (D.C.N.Y. 1965).

Puerto Rican voters, the case demonstrated that Section 4(e) remained enforceable.

The Reading litigation also included claims of discrimination under Section 2 of the VRA, illustrating that other forms of race/ethnic discrimination often accompany violation of a “minority language provision” of the VRA. Section 2 of the VRA provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>272</sup> Section 2 thereby prohibits not only intentional discrimination, but also any application of voting practices or procedures that result in a discriminatory impact.<sup>273</sup> In various “language minority” cases federal courts have held that discriminatory treatment of Latino voters in the polls violates Section 2 of the VRA.<sup>274</sup> In Reading, the federal court found that failure to provide Spanish-language access, hostile remarks by poll workers toward Latino voters, and asking Latinos for more identification than non-Hispanic White voters violated Section 2 of the VRA.<sup>275</sup> The Reading case therefore illustrates that non-compliance with Section 4(e) may be accompanied by other forms of race/ethnic discrimination impacting not only Spanish-speaking Puerto Ricans but other communities as well. These communities include all other Latinos, as well as English-speaking Puerto Ricans who have been negatively and disparately impacted by questionable voting procedures. This case also indicates that in language discrimination cases federal courts may also redress hostility and mistreatment of Latino voters at the polls by requiring remedies under Section 2 of the VRA to protect against continued discriminatory treatment.<sup>276</sup>

Finally, the 2003 Reading case demonstrates that Section 4(e) can be utilized to enforce the rights of Puerto Rican born voters outside of major urban areas. While the *PROPA*, *Arroyo*, and *Torres* decisions addressed the needs of highly concentrated, highly urban populations,<sup>277</sup> the Reading decision addressed a less concentrated, less urban population.<sup>278</sup> As discussed above, this generation of Puerto Rican migration is much more dispersed and less urban than that of the post-World War II Great Migration.<sup>279</sup> The Reading precedent may be useful for future Section 4(e) enforcement measures that reach beyond the urban metropolises of the first generation.

#### D. 2006 Voting Rights Act Reauthorization Reconfirms Validity of Section

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272. 42 U.S.C. § 1973.

273. *United States v. Osceola County*, No. 6:05-cv-1053-Orl-31DAB, Memorandum Op. at 12 (M.D. Fla., Oct. 18, 2006) (“Osceola II”) (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)).

274. *See, e.g., Hernández v. Woodard*, 714 F. Supp. 963, 967 (N.D. Ill. 1989) (Section 2 violations based upon failure to provide language assistance); *United States v. Osceola County*, Consent Decree in Civ. No. 6:02-CV-738-ORL-22JGG (M.D. Fla., July 22, 2002) (“Osceola I”) (Section 2 violations based on failure to provide Spanish-language access and hostile treatment); *United States v. City of Boston*, Order Attaching Memorandum of Agreement & Settlement, Civ. No. 05-11598-EGY (D. Mass., Oct. 18, 2005) (Section 2 violations based on failure to provide Spanish-, Chinese- and Vietnamese-language access as required by Section 203).

275. *United States v. Berks Co.*, 277 F. Supp. 2d 570, 580-82 (E.D.Pa. 2003).

276. *Id.* at 583-85.

277. *See supra* I.B.3.

278. *United States v. Berks Co.*, 277 F. Supp. 2d 570 (E.D.Pa. 2003) (discussing census data).

279. *See, e.g., ATLAS, supra* note 7, at 5-7 (Growth) & 7-9 (Dispersion).

## 4(e)

The DOJ enforcement action of Section 4(e) of the 1965 VRA through the Reading litigation was explicitly recognized as a basis for the most recent reauthorization of the statute. The VRA has been up for reauthorization several times, and its language access provisions have been among some of the most contentious provisions in the most recent reauthorization debates.<sup>280</sup> Section 4(e) was part of the original Voting Rights Act of 1965,<sup>281</sup> which was extended in 1970 for five years, in 1975 for seven years, and in 1982 for 25 years. Section 5 of the VRA, requiring DOJ pre-clearance of any voting changes in jurisdictions that Congress deems to require such scrutiny due to their history of discrimination, was added in 1970 and extended in 1975.<sup>282</sup> As discussed above, Section 4(e) and the PRLDEF victory in the *Torres* litigation provided the legal foundation for the expansion of the VRA in 1975 to include new “minority language” provisions, e.g., Sections 203 and 4(f)(4),<sup>283</sup> and the extension of Section 5 advanced scrutiny requirements to states with a history of discrimination against Latino voters.<sup>284</sup> These provisions were all reauthorized in the 25-year extension passed in 1982.<sup>285</sup> Moreover, the 1992 Voting Rights Language Assistance Act provided for increased coverage through modifications of the population threshold formulas under Section 203 for 15 years.<sup>286</sup>

Many of the VRA provisions were set to expire in 2007. In 2006, Congress reauthorized the VRA through the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments of 2006 (“2006 VRA Reauthorization Act”). The Act was sponsored by the Chair of the House Judiciary Committee, Representative Sensenbrenner and signed into law on July 27, 2006.<sup>287</sup> Even in the conservative 109th Congress, the vote was overwhelmingly in favor of reauthorization.<sup>288</sup> This 2006 VRA Reauthorization Act included language specifically recognizing the continued validity and enforceability of Section 4(e). In particular, the Congressional “Findings” of the 2006 VRA Reauthorization Act provided that:

(1) Significant progress has been made in eliminating first generation barriers experienced by minority voters, including

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280. See, e.g., House Jud. Comm., *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcommittee on the Constitution*, No. 109-103, 109th Cong., 2nd Session (March 8, 2006) (Congressional inquiries & testimony regarding Section 203 renewal).

281. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

282. See, e.g., Nat’l. Comm. on the Voting Rights Act, Voting Rights Act Information, [www.votingrightsact.org](http://www.votingrightsact.org) (last visited Nov. 30, 2008); 42 U.S.C. § 1973(c).

283. See *supra* II.B (citing *Cartagena*, *supra* note 49).

284. *Id.* at II.A.

285. See, e.g., African American Voices in Congress, Voting Rights Act, Timeline, [www.avoiceline.org/voting/timeline.html](http://www.avoiceline.org/voting/timeline.html) (last visited Nov. 30, 2008).

286. *Id.*

287. White House Press Secretary, President Bush Signed Voting Rights Act Reauthorization and Amendments of 2006 (July 26, 2006), *available at* [www.whitehouse.gov/news/releases/2006/07/20060727.html](http://www.whitehouse.gov/news/releases/2006/07/20060727.html).

288. The House vote was 390-33 to renew the expiring provisions of the VRA. African-American Voices in Congress, *supra* note 284.

increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.

(2) However, *vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.*

(3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.

(4) *Evidence of continued discrimination includes—*

(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

(C) the continued filing of section 2 cases that originated in covered jurisdictions; and

(D) the *litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.*<sup>289</sup>

Based on this record, the bilingual election requirements under Section 203 of the VRA were reauthorized until 2032,<sup>290</sup> and Section 5 and other provisions for special scrutiny that had been due to expire were extended another 25 years.<sup>291</sup> In sum, the language in the Congressional Findings of the 2006 VRA Reauthorization included an express recognition of DOJ enforcement of Section 4(e) “since 1982” as the legal foundation for the extension of the VRA, and in particular, its “language minority” provisions.<sup>292</sup> The 2006 VRA Reauthorization Act should put to rest any doubt that Section 4(e), which had not been the subject of DOJ litigation since 1965, is still necessary and enforceable law.

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289. 2006 VRA Reauthorization Act, H.R. 9, 109th Cong. § 2 (2006).

290. *Id.* at § 7.

291. *Id.* at § 4.

292. *Id.* at §§ 2(b)(D), 2(b)(D)(8), 2(b)(D)(9), 2(b)(A), 2(b)(D), 2(b)(D)(5).

*E. Need for Future Enforcement of Section 4(e)—From Now Until Next Decennial Census and Beyond*

Puerto Rican migration and the need to enforce Section 4(e) of the VRA will continue from now until the foreseeable future. By 2003, an estimated 3,855,608 Puerto Ricans were living in the mainland United States, or Stateside.<sup>293</sup> According to the government of Puerto Rico, this was the first time that the number of Stateside Puerto Ricans exceeded the population of the Island.<sup>294</sup> As discussed above, the LEP rate among voting age citizens on the Island is over 70%. At over the 30%, the LEP rate among voting age Puerto Rican citizens in key Stateside jurisdictions is also higher than the national average for Latinos.<sup>295</sup> The national LEP rate for Stateside Puerto Ricans averages over 40%.<sup>296</sup> For those who have recently arrived from the Island, the LEP rate—and the concurrent unequal access to the election process in English—would logically be even higher. Under Section 4(e), Puerto Ricans born and educated on the Island must not have their voting rights conditioned on the inability to speak, read, or understand English in any manner.<sup>297</sup>

Despite the requirements of Section 4(e), many Puerto Rican migrants may be living in jurisdictions that do not provide access to elections in Spanish. As discussed above, over two million (2,136,060) Stateside Puerto Ricans are protected under Section 203 of the VRA.<sup>298</sup> However, over one million (1,270,118) live outside the protections of Section 203 as they live in jurisdictions that do not fall under its population threshold formulas.<sup>299</sup> Due to resistance to providing access to elections in Spanish, this pattern of exclusion is likely to continue until the next decennial census in 2010 and thereafter.

After each decennial census, the Census Bureau is required to issue new determinations regarding which jurisdictions will be covered for Spanish under Section 203 according to its population threshold requirements.<sup>300</sup> Section 203 will be determined to apply in every state or political subdivision<sup>301</sup> in which over 10,000 or 5% of voting age citizens in the “minority population group” are LEP.<sup>302</sup> As the Latino population is booming, Section 203 coverage will likely extend to many new jurisdictions after the new determinations are issued in 2012 or 2013.<sup>303</sup> Even so,

293. ATLAS, *supra* note 7, at 2 (discussing 2003 Current Population Survey).

294. *Id.*

295. *See supra* notes 248-50 & accompanying text.

296. *See supra* note 185 & accompanying text.

297. 42 U.S.C. §1973(b)(e).

298. *See supra* part II.D; *see also supra* note 166.

299. *See supra* part II.D; *see also supra* note 184.

300. Under the 2006 VRA Reauthorization, Section 203 determinations may also be updated after the mid-decade American Community Survey (ACS). 2006 VRA Reauthorization, *supra* note 289, at § 8.

301. These are typically counties, but in a few states, cities are considered to be political subdivisions for purposes of Section 203. *See* analysis of 203 Determinations for Spanish, *supra* section II.D.

302. 42 U.S.C. §§ 1973(aa)-(1a)(b)(2)(A)(i)(I) & (II).

303. Jeffrey Passel and D'Vera Cohn, PEW Research Center, *U.S. Population Projections: 2005-2050* (Feb. 11, 2008) (Hispanics will make up 29% of the population in 2050, compared to 14% in 2005; a smaller proportion will be foreign-born than is the case now) *available at* <http://pewresearch.org/pubs/729/united-states-population-projections>.

those Stateside Puerto Ricans living outside of the expanded Section 203 zone of coverage will not have the benefit of its relatively automatic requirement that jurisdictions provide access to elections in Spanish. Those who were born on the Island and are LEP may have difficulty voting in English, and unless Section 4(e) is enforced, their fundamental voting rights may be violated.

Puerto Rican migration is expected to continue for the foreseeable future, as is circular migration, which reinforces the predominance of the Spanish language.<sup>304</sup> Puerto Rican dispersion away from the traditional urban destinations, which are more likely to be covered under Section 203, is also predicted to continue.<sup>305</sup> For all these reasons, the need for enforcement of Puerto Rican voting rights under Section 4(e) will continue from now and beyond the next decennial census.

Furthermore, this generation of Stateside Puerto Ricans is living in a challenging time for Latino civil and voting rights. Since 9/11, hate crimes against Latinos have increased by 25%.<sup>306</sup> At the same time, the renewed “immigration debate” has led to increased racial profiling of Latino immigrants and citizens alike by government officials—a phenomenon that has also negatively affected Puerto Ricans.<sup>307</sup> This climate has also negatively influenced election practices as more and more Latino voters are having their citizenship questioned and being made to produce identification.<sup>308</sup> In addition, the English-only movement has made election officials and voting jurisdictions more resistant to providing access to elections in Spanish.<sup>309</sup> In this context, Stateside Puerto Ricans may encounter difficulties in obtaining access to elections in Spanish. Those born in Puerto Rico are likely to experience violations of their fundamental rights guaranteed by Section 4(e) of the VRA. Violations of Section 2 of the VRA due to concurrent race/ethnic discrimination manifested through hostile treatment in the polls are also likely in this context.

#### IV. CONCLUSIONS & RECOMMENDATIONS

Over one million Stateside Puerto Ricans may be living without the

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304. ATLAS, *supra* note 7, at 20-21.

305. *Id.*

306. MALDEF, *FBI Report Documents Hate Crimes Against Latinos at Record Level* (Nov. 19, 2007) available at <http://www.maldef.org/news/press.cfm?ID=444>.

307. NHLA, *How the Latino Community's Agenda on Immigration Reform and Enforcement Has Suffered Since 9/11*, at 7-23 (June 2004), available at <http://www.nclr.org/content/resources/detail/26073/>.

308. *See, e.g.*, NALEO, *supra* note 257; *see also* United States v. Salem County & Penns Grove, NJ, CIVIL ACTION NO. 1:08-cv-03276-JHR-AMD (D.N.J. 2007), Complaint at 16c; Settlement Agreement at 3-4 (note that this recent court-ordered settlement includes a Section 4(e) claim & appropriate remedies); United States v. Long County, GA, Case No. CV206-040 (S.D. Ga. 2006), Complaint at 9, Consent Decree at 1-9; United States v. Berks County, CIVIL ACTION No. 03-CV-1030 (E.D. Pa. 2003), Permanent Injunction at 14.

309. *See, e.g.*, Center for American Progress, *After Delay, House Renews VRA* (July 13, 2006), available at [www.americanprogress.org/issues/2006/07/b1849833.html](http://www.americanprogress.org/issues/2006/07/b1849833.html); Statement of Karen K. Narasaki, President and Executive Director, Asian American Justice Center, Asian American Justice Center, before Committee on the Judiciary, House of Representatives, Joint Oversight Hearing to Prepare for the General 2008 Election (Sept. 24, 2008), available at [www.advancingequality.org/attachments/files/126/2008\\_Elections\\_Written.pdf](http://www.advancingequality.org/attachments/files/126/2008_Elections_Written.pdf) (discussing problems faced by LEP voters in current climate of xenophobia, including discussion of MALDEF Truth In Immigration report).

protections of rights guaranteed to them under Section 4(e) of the 1965 Voting Rights Act, which prohibits the conditioning of voting rights for Puerto Ricans born and educated on the Island on any ability to read, write, understand, or interpret any matter in English. Although enforcement of Section 4(e) on behalf of Stateside Puerto Ricans has been neglected since the 1970s, an analysis of the history of Puerto Rican migration and VRA cases proves the ongoing need for and viability of Section 4(e) enforcement actions.

Part I of this article reviewed the period from 1917-1976. First, the legal and political foundations of Puerto Rican citizenship in the 1917 Jones Act were analyzed, and thereafter, the idea of American citizenship independent of English proficiency for an island whose inhabitants predominantly speak Spanish were explored. Part I then examined the “Great Migration” of Puerto Ricans to the mainland following World War II and through the 1970s. The conditions of discrimination Puerto Ricans encountered, particularly in Northeast factories and other workplaces, provoked further discrimination in voting.

The chronological analysis then examined the legislative history and constitutional underpinnings of Section 4(e) of the 1965 VRA, which were immediately challenged by New York and New York City. As discussed above, Section 4(e) survived constitutional challenges in New York and the District of Columbia federal courts. In 1966, the Brennan Supreme Court confirmed its constitutionality as a valid exercise of Congress’ power to implement the Equal Protection Clause of the Fourteenth Amendment. This article also demonstrated how the Court’s decision in *Katzenbach v. Morgan* also served as the legal foundation for the ban on literacy tests through the 1970 Voting Rights Act Amendments.<sup>310</sup>

During the 1960s, Puerto Ricans living in New York who were experiencing severe discrimination in voting began to enforce and benefit from the protections of Section 4(e). In 1965 Attorney General John Doar brought a case on behalf of 21-year-old María López, who had recently migrated from Puerto Rico and who was prohibited from voting in Rochester due to the New York registration requirements that she pass an English-language literacy test. In *United States v. Monroe County*, a federal court ordered that New York no longer require English literacy tests as a condition for voter registration for Ms. López and other Puerto Ricans born and educated on the Island and therefore falling under the protections of Section 4(e). New York then appealed to the Supreme Court, where the constitutionality of Section 4(e) was upheld in the 1966 *Katzenbach* decision.

During the 1970s, Puerto Rican community groups won class action enforcement actions in several key decisions protecting urban populations in Chicago, Philadelphia, and New York City. In the 1972 *PROPA* victory in Chicago, an Illinois federal court reasoned that the right to vote encompassed more than entering the voting booth; it also encompassed the right to cast an “informed and effective” ballot.<sup>311</sup> Accordingly, the district court ruled that urban communities of Puerto Rican migrants must be provided with access to the ballot in Spanish. This case also involved a state constitutional mandate that English was the official language, but upon appeal, the Seventh Circuit found that Section 4(e) of the VRA guaranteed fundamental rights under the Equal Protection Clause, and therefore

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310. See *supra* section I.C.2 (1966 US Supreme Court Decisions).

311. See *supra* section I.C.3 (1970s Urban Population Decisions).

trumped conflicting state law.

On March 25, 1974, PRLDEF won a significant victory on behalf of Puerto Rican migrants in Philadelphia in the *Arroyo* case, in which a Pennsylvania federal court agreed with the *PROPA* court that voting without understanding the ballot made it impossible for many citizens born in Puerto Rico to cast an “informed and effective” vote. The *Arroyo* court ordered Spanish-language election materials and information as well as bilingual poll workers in every election district touching on any census district in which more than 5% of the population was Puerto Rican. On July 25, 1974, PRLDEF won similar remedies for the New York City Puerto Rican community in the *Torres* case. Analysis of migration and census data demonstrated that over one million Puerto Ricans were provided with Spanish-language access to the ballot through the 1970s urban population decisions.

Part II of this article analyzed how the 1975 VRA amendments impacted Stateside Puerto Rican voting rights. Specifically, Part II reviewed and analyzed the expansion of the advanced scrutiny requirements under Section 5 of the VRA to include states with a history of discrimination against Latino voters, and the enactment of new “language minority provisions,” Sections 203 and 4(f)(4). The analysis noted such expansions that cover more Latino voters were based upon the legal foundations of Section 4(e) and the *Torres* line of cases. In addition, the analysis demonstrated that Sections 4(e) and 203 are fundamentally different in that Section 4(e) provides for both individual and community-wide voting rights, whereas Section 203 depends on bright-line population threshold formulas.

The question of whether the Section 203 population threshold formulas limited the application of Section 4(e), thereby requiring Spanish-language access only in jurisdictions determined to be covered by Section 203, arose immediately after the 1975 VRA amendments enacting Section 203. In a little-known case, *Márquez v. Falcey*, the New Jersey federal court resolved this matter by ordering the state to provide Spanish-language access to elections to all New Jersey voters who were born in Puerto Rico including those jurisdictions outside of the six New Jersey counties that became covered under Section 203. The 1976 *Márquez* order demonstrated that Section 4(e) continued to provide legal protections for Puerto Rican migrants living in jurisdictions that did not fall under the population threshold formulas for Section 203.

Part III of this article analyzed the period from 1976-2008. Analysis of federal census data and academic resources regarding Puerto Rican migration from 1980-2000 demonstrated the continued need for enforcement of Section 4(e). While over two-million Stateside Puerto Ricans live in jurisdictions that are clearly obliged to provide Spanish-language access to elections under Section 203, over one million Puerto Ricans have been left unaided by Section 203. This section also discussed the growing surge of Puerto Rican migration in the 1980s and 1990s, their dispersion to new areas, the continued circular migration and the reliance on Spanish resulting in high LEP rates among the voting age population. States with high levels of Puerto Rican migration during this era were examined more closely. Analysis of census data demonstrated that even in states in which many Puerto Rican-born voters lived in jurisdictions that were automatically required to provide access to elections in Spanish under Section 203, many others lived outside of such protections. The chronological analysis included the 1981 *Gerena-Valentin* litigation, in which the court found no Section 4(e) violation, where the plaintiffs failed to show that LEP

Puerto Rican voters were harmed by the failure to translate a ballot petition, and when the City was translating the ballot and other voting materials, and providing bilingual poll workers.

Although the next Section 4(e) case was not brought until 2003, it was victorious. In 2003, the DOJ enforced Section 4(e) on behalf of 19,054 Puerto Ricans in Reading, Pennsylvania, a significant number of whom were born on the Island and whose voting rights were compromised by English-only elections. Defendants argued that because they did not fall under the population threshold formula of Section 203, they were not obliged to provide access to elections in Spanish. They also argued that the DOJ had never filed a case under Section 4(e), and that Section 4(e) had not been enforced since the 1975 amendments. As this article shows, the argument was factually incorrect, as the DOJ had brought the first Section 4(e) enforcement action in 1965 on behalf of Ms. López and similarly situated Puerto Rican citizens in New York. Further, Section 4(e) had been enforced through the 1976 *Márquez* case. More importantly, the *United States v. Berks County* federal court decision regarding Reading, Pennsylvania, held that despite any hiatus in enforcement, and despite the enactment of Section 203's population threshold formulas, Section 4(e) was still part of the VRA and still enforceable. This seminal case paved the way for continued enforcement of Section 4(e) on behalf of the one million Stateside Puerto Ricans currently living outside the protections of Section 203. The *Berks County* court also sanctioned other forms of racial or ethnic discrimination, such as hostile and disparate treatment of Latino voters, under Section 2 of the VRA. As this article discussed, Section 2 claims are an important remedy to add to "minority language" claims as Latino citizens are experiencing increasing challenges to their voting rights.

Finally, Part IV of this article discussed the future. Part IV demonstrated that Puerto Rican migration to the mainland United States is likely to continue, and that enforcement of the community's rights under Section 4(e) is critically important, as many Puerto Rican-born voters will be living outside the protections of Section 203 and in jurisdictions that are resistant to providing access to elections in Spanish. Moreover, this generation of Puerto Rican migrants is living in an era in which Latino civil rights and voting rights are being challenged; such that enforcement of Sections 2, 4(e), and 203 as well as other relevant VRA provisions, will be critical to ensuring equal access to the most fundamental of all the rights guaranteed by the U.S. Constitution.<sup>312</sup>

The 1970s Puerto Rican community litigation to enforce Section 4(e) helped establish the American legal rule that the right to vote an effective and informed ballot, rather than just simply pulling a lever, is a fundamental right. Although decades passed before another federal court addressed the community's rights under Section 4(e), in the 2003 Reading litigation, a Pennsylvania federal court eloquently reiterated that voting without understanding the ballot is like attending a concert without being able to hear the music. In this current generation of Stateside Puerto Rican voters, some are LEP and vote without fully understanding

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312. Since this article was drafted, two Section 4(e) cases were settled. See *United States v. Salem County & Penns Grove, NJ, NJ*, CIVIL ACTION NO. 1:08-cv-03276-JHR-AMD (D.N.J. 2007), Complaint at 16c; Settlement Agreement (federal court-ordered settlement agreement); *United States & Commonwealth of Massachusetts*, Memorandum of Understanding regarding the City of Worcester (Sept. 22, 2008), available at [www.usdoj.gov/crt/voting/whatsnew.htm](http://www.usdoj.gov/crt/voting/whatsnew.htm) (last visited Nov. 30, 2008).

English-only ballots. The severe drop in voter turnout upon migration from the Island shows that some Puerto Ricans are staying away from the concert altogether. As this article demonstrates, LEP Puerto Rican voters may be discouraged from trying to exercise their voting rights in a language they do not fully understand. The very high rate of voter participation in Puerto Rico shows that this situation could be remedied, as the voters themselves are eager to exercise their fundamental rights as citizens.

For all these reasons, community members, attorneys, and other voting rights advocates should work to enforce the rights of United States citizens born in Puerto Rico to vote in Spanish whenever this is needed. Puerto Ricans are not required to learn English in order to be United States citizens and the statutory language and federal cases discussed in this article show that election officials are obliged to provide LEP voters who were born in Puerto Rico with access to elections in Spanish. Although Section 4(e) was enacted in 1965, in 2008, its enforcement is still needed by over a million Puerto Rican migrants whose voting rights must not be compromised.