

# ENSURING THAT FLORIDA'S LANGUAGE MINORITIES HAVE ACCESS TO THE BALLOT

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## I. INTRODUCTION

The unique and diverse nature of Florida's population, as well as its recent history, makes attending to the needs of non-English-proficient language minorities in the voting process especially important. During the latter half of the twentieth century, Florida experienced enormous changes in the relative size, geographical distribution, and composition of its population.<sup>1</sup> Some, but not all, of these changes can be attributed to national trends in population migration to the Sunbelt.<sup>2</sup> Other changes can be explained by an increase in Hispanic or Latino population, again a national trend.<sup>3</sup> Still other changes are the direct result of political changes in the Caribbean basin into which the peninsula of

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1. See U.S. Census Bureau, Press Release, *Census Analysis Tracks 100 Years of Change* (Washington, D.C., Dec. 17, 2002) (available at <http://www.census.gov/Press-Release/www/2002/cb02cn173.html>) [hereinafter *Census Analysis*] (noting that between 1900 and 2000, Florida skyrocketed from 33rd to 4th place in state population rankings).

2. See Charles F. Longino, Jr., *Geographical Distribution and Migration*, "Patterns of Migration," <http://www.wfu.edu/gerontology/longino-press.htm> (accessed Nov. 2, 2006) (explaining patterns of migration to the Sunbelt States); Carl Haub, *Global and U.S. National Population Trends, Table 4*, <http://www.gcio.org/CONSEQUENCES/summer95/table4.html> (updated Nov. 11, 2004) (illustrating the drastic change in the population of the southern states).

3. *Census Analysis*, *supra* n. 1; Stanley K. Smith, *Florida Population Growth: Past, Present and Future* 10–11, <http://www.bebr.ufl.edu/Articles/FloridaPop2005.pdf> (accessed Nov. 2, 2006).

Florida extends, and United States' policies that respond to those changes.<sup>4</sup>

Whatever the reason, the population of Florida today is markedly different from the population of Florida of one hundred, fifty, or even twenty years ago.<sup>5</sup> Florida's population is now much larger and much more heavily concentrated in the southern and central regions of the state.<sup>6</sup> There is a much larger and more diverse Hispanic population, as well as a sizable and growing Haitian-American population.<sup>7</sup> Consequently, more Floridians than ever before live in linguistically isolated households where there is no English-proficient member.<sup>8</sup> All of these changes strongly support the need to adopt an approach to language-minority ballot access that adequately addresses the needs of Florida's growing language-minority population.

In certain instances, the Voting Rights Act of 1965,<sup>9</sup> as it enters its fifth decade,<sup>10</sup> provides some protections and requires some assistance for some language minorities.<sup>11</sup> This Article illustrates the importance of strict compliance with the requirements of the Voting Rights Act for language minorities in Florida. However, as this Article demonstrates, there are also sizeable gaps in

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4. See U.S. Immig. Support, *History of Cuban Immigration to the United States*, <http://www.usimmigrationsupport.org/cubanimmigration.html> (accessed Nov. 2, 2006) (explaining that the dissolution of the Soviet Union and Cuba's resultant economic problems caused large numbers of Cubans to immigrate to the United States in the summer of 1994, which in turn spurred the United States to severely curtail Cuban immigration); Kathleen Newland & Elizabeth Grieco, *Spotlight on Haitians in the United States*, <http://www.migrationinformation.org/USFocus/display.cfm?ID=214> (Apr. 1, 2004) (explaining that Haitian immigration to the United States has decreased since the early 1990s, due to the United States' policy of intercepting and returning Haitians at sea).

5. Smith, *supra* n. 3, at 2.

6. *Id.* at 2–4.

7. *Id.* at 10–11; see generally Newland & Grieco, *supra* n. 4 (examining trends in Haitian migration to the United States).

8. See Robin Benedick, *Poll: More Diversity Doesn't Make [South] Florida a Better Place to Live*, S. Fla. Sun-Sentinel 1A (May 9, 2003) (noting that forty-five percent of South Florida residents speak a language other than English at home); see also Jose Cardenas, *The Struggle to Graduate*, St. Pete. Times 1B (Nov. 9, 2005) (explaining that some Hispanic children do not speak English at home for fear of forgetting their native culture).

9. *Voting Rights Act of 1965*, 42 U.S.C. §§ 1973–1973bb1 (2000).

10. In 2006, the Act was extended, amended, and reauthorized by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. Pub. L. No. 109-246, 120 Stat. 577 (2006). The statute extends the Voting Rights Act's language-minority provisions, among others, for another twenty-five years. *Id.*

11. 120 Stat. at 577.

the scope of the Act's protections for language minorities.<sup>12</sup> After analysis, this Article proposes practical solutions that elections officials can use to fill in the gaps where the Voting Rights Act falls short of ensuring equal access to the ballot for all of Florida's citizens.

## II. FLORIDA'S CHANGING DEMOGRAPHICS

In 1900, Florida was a relatively sparsely populated state, ranking thirty-second of the fifty-one states and territories in the union, with less than one percent of the country's total population.<sup>13</sup> With the exception of Hillsborough County, Florida's primary population centers were in the northern portions of the state, in Duval, Alachua, and Escambia Counties.<sup>14</sup> In contrast, fewer than 5,000 people lived in Dade County.<sup>15</sup> By mid-century, however, the geographic distribution of Florida's population was beginning to change. By 1960, Dade County had become the most populous county in Florida, while Duval and Hillsborough counties were the second and third most populated.<sup>16</sup> The state's ethnic makeup was overwhelmingly non-Hispanic white with a sizeable African-American minority.<sup>17</sup>

Within only a few years, events in the Caribbean began to impact both the geographical distribution and ethnic makeup of Florida's population.<sup>18</sup> In the twenty-year period from 1959 to

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12. For a more comprehensive discussion of all the Voting Rights Act's antidiscrimination protections impacting language minorities, as well as their relative shortcomings, see generally Angelo Ancheta, *Language Accommodation and the Voting Rights Act* (Santa Clara U. Leg. Stud. Research Paper No. 06-21, 2006) (available at <http://ssrn.com/Abstract=953155>) (focusing on the explicit language of Sections 203 and 4(f)(4) of the Act).

13. See Smith, *supra* n. 3, at 2 (reporting that Florida's population barely reached the half-million mark in 1900); Frank Hobbs & Nicole Stoops, *Demographic Trends in the 20th Century*, app. A-1 (U.S. Census Bureau Nov. 2002) (available at <http://www.census.gov/prod/2002pubs/censr-4.pdf>) (reporting Florida's population at 528,542 people in 1900).

14. U.S. Census Bureau, *Florida Population of Counties by Decennial Census: 1900 to 1990*, <http://www.census.gov/population/cencounts/fl190090.txt> (Mar. 27, 2005).

15. *Id.*

16. *Id.*

17. Thomas D. Boswell, *Implications of Demographic Changes in Florida's Public School Population*, "Demographic Changes from 1960 to 1995," <http://www.ncela.gwu.edu/pubs/florida/workforce99/demographic.htm> (accessed Nov. 3, 2006) (noting that in the early 1960s, more than eighty percent of Florida's population was non-Hispanic white, blacks constituted seventeen percent of the total population, and Hispanics made up less than two percent of the population).

18. *Id.*; see e.g. U.S. Immig. Support, *supra* n. 4 (correlating trends in Cuban migration

1979, almost one million Cuban refugees arrived in Florida after fleeing the Castro regime.<sup>19</sup> Haitian migration to the United States (primarily New York and the greater Miami area) began to increase in roughly the same time period, soon after Francois “Papa Doc” Duvalier assumed the presidency of Haiti in 1957.<sup>20</sup> Haitian migration to Florida escalated in the 1970s and 1980s and continues to the present day; in fact, Haitians “have been steadily pouring onto the [s]outhern Florida shores since the early 1970s.”<sup>21</sup>

The dramatic nature of these increases in immigration, particularly the resultant demographic changes in South Florida, is illustrated by events that occurred within a matter of only a few months in 1980. At that time, approximately 125,000 Cubans departed from the Port of Mariel and arrived in South Florida. At around the same time, approximately 25,000 Haitian refugees also arrived on Florida’s shores.<sup>22</sup> The sheer volume of this influx overwhelmed governmental programs and services in South Florida, prompting President Carter to declare a state of emergency.<sup>23</sup> The Federal Emergency Management Agency (FEMA) was then called into action, and a Cuban/Haitian Task Force was appointed to assist in “resettlement efforts.”<sup>24</sup>

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to the United States with political and economic conditions in Cuba); Newland & Grieco, *supra* n. 4 (detailing trends in Haitian migration to the United States).

19. Exec. Off. Gov. & Fla. Advisory Council on Intergovernmental Rels., *The Unfair Burden: Immigration’s Impact on Florida* 7 (Exec. Off. Gov. Mar. 1994) [hereinafter *The Unfair Burden*]; Pew Hispanic Ctr., *Cubans in the United States* 10 (Pew Hispanic Ctr. Aug. 25, 2006) (available at <http://pewhispanic.org/files/factsheets/23.pdf>).

20. Flore Zéphir, *A Tale of Two Cities: The Sociolinguistic Transformation of New York and Miami* by Haitian Immigrants 1, <http://www.utexas.edu/cola/insts/france-ut/archives/Fall2003/ConFLangImmigration/zephir.pdf> (accessed Nov. 2, 2006).

21. *Id.* at 4.

22. Carlos Maza, *Monitoring the Vital Signs of a Changing America* ¶ 5, Fla. Intl. U. Mag. (Spring 2000) (available at [http://news.fiu.edu/fiumag/spring\\_00/monitor.html](http://news.fiu.edu/fiumag/spring_00/monitor.html)).

23. U.S. Natl. Archives & Recs. Administration, *Department of Health and Human Services: Cuban-Haitian Task Force*, “Administrative History Notes,” [http://www.arcweb.archives.gov/arc/org\\_details.jsp?&sub=1130626&st=b](http://www.arcweb.archives.gov/arc/org_details.jsp?&sub=1130626&st=b) (accessed Nov. 4, 2006) [hereinafter *Task Force*]; PBS, *Timeline: The Events and Policies Which Have Shaped the 40-Year U.S.-Cuba Confrontation*, “May 1980,” [www.pbs.org/wgbh/pages/frontline/shows/elian/etc/cron.html](http://www.pbs.org/wgbh/pages/frontline/shows/elian/etc/cron.html) (Nov. 3, 2006).

24. *The Unfair Burden*, *supra* n. 19, at 7; *Task Force*, *supra* n. 23, at “Administrative History Notes.” In 1980 alone, almost 200,000 Cubans and Haitians arrived in Florida. Anthony P. Maingot, *Immigration from the Caribbean Basin*, in *Miami Now!: Immigration, Ethnicity and Social Change* 18, 34 (Guillermo J. Grenier & Alex Stepick, III eds., U. Press Fla. 1993).

The latter half of the twentieth century also saw a marked increase in migration to Florida from other parts of the United States and the Caribbean.<sup>25</sup> Although perhaps less dramatic than the manner and volume of the Cuban and Haitian arrivals, these other groups have been no less significant in the overall effect on Florida's population.<sup>26</sup> Particularly notable for the purposes of this Article is the migration of United States nationals from Puerto Rico to Central Florida, which began in the late 1960s.<sup>27</sup> Today, Orange and Osceola Counties are the two leading destinations for Puerto Rican migrants to the mainland, surpassing counties in New York, New Jersey, Pennsylvania, and Illinois.<sup>28</sup>

In addition to the ethnic changes to Florida's population, the geographic concentration of Floridians has also changed significantly since the middle of the last century. Some of that change is undoubtedly attributable to the settlement patterns of recent arrivals. Indeed, some sources have suggested that Florida's overall population growth has been largely attributable to the increasing numbers of immigrants arriving in the State.<sup>29</sup> By 2004, the most densely populated counties in Florida were the southern and central counties of Miami-Dade, Broward, Palm Beach, Hillsborough, Orange, and Pinellas.<sup>30</sup> Many of these counties have a correspondingly high rate of immigration.<sup>31</sup> For example, the 2000 census

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25. Smith, *supra* n. 3, at 2–11.

26. Florida's Caribbean immigrants include Spanish speakers from, among other places, Cuba and the Dominican Republic; Creole speakers from Haiti; and immigrants from English-speaking countries such as Jamaica and Trinidad. See U.S. Census Bureau, *Coming from the Americas: A Profile of the Nation's Foreign-Born Population from Latin America* 1, <http://www.census.gov/prod/2002pubs/cenbr01-2.pdf> (Jan. 2002) [hereinafter *Coming from the Americas*] (reporting that Caribbean immigrants to the United States number in the hundreds of thousands).

27. Jorge Duany & Félix Matos-Rodriguez, *Puerto Ricans in Orlando and Central Florida* 3, [http://www.hispanicchamber.net/images/pdf/puerto\\_ricans-orl.pdf](http://www.hispanicchamber.net/images/pdf/puerto_ricans-orl.pdf) (accessed Nov. 4, 2006).

28. *Id.* at 29, tbl. 3.

29. *The Unfair Burden*, *supra* n. 19, at 7.

30. U.S. Census Bureau, *Table 1: Annual Estimates of the Population for Counties of Florida: April 1, 2000 to July 1, 2004*, <http://www.census.gov/popest/counties/tables/CO-EST2004-01-12.xls> (accessed Sept. 13, 2006).

31. In 1998, when considering a voting-rights case in Dade County, federal judge Kenneth Ryskamp remarked:

... Dade County presents a dynamic, evolving community. Over the last fifteen years Dade County has experienced a tremendous influx of people from other countries and other states, and the frequency of immigration among the former group

reported that the Miami metropolitan area was one of the five leading destinations for the foreign-born population coming to the United States.<sup>32</sup> Florida presently has the fourth largest foreign-born population in the United States, behind California, New York, and Texas.<sup>33</sup> Present census projections predict that Florida will become the third largest state by 2010, moving ahead of New York.<sup>34</sup> Contributing to this population increase is a high growth rate that includes continued immigration and migration into the state.<sup>35</sup>

#### A. Florida's Hispanic Population

The relative size of Florida's Hispanic population skyrocketed with the increase in immigration and migration to Florida. Between 1980 and 2000, the Hispanic population in Florida nearly doubled, increasing from 8.8 percent of the State's total population to 16.8 percent.<sup>36</sup> In some areas, the growth rate was even more marked. For example, Osceola County, one of the central Florida counties impacted by high Puerto Rican migration rates, saw its Hispanic population increase from merely 1.6 percent (fewer than 1,000 persons) in 1980<sup>37</sup> to 29.4 percent of the total population in 2000—nearly one-third of Osceola County's total

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has become exceptional during the [1980s] . . . . Dade County has truly become a microcosm of the Western Hemisphere . . . .

*Meek v. Metro. Dade County*, No. 86-1820-CIV-RYSKAMP, slip op. at 14. (S.D. Fla. Oct. 5, 1988). The foreign-born populations of Broward and Palm Beach Counties also fall above the state average. See U.S. Census Bureau, *State and County QuickFacts, Palm Beach County, Florida*, <http://quickfacts.census.gov/qfd/states/12/12099.html> (accessed May 5, 2007) (reporting Palm Beach County's foreign-born population at 17.4 percent, compared to the state average of 16.7 percent); U.S. Census Bureau, *State and County QuickFacts, Broward County, Florida*, <http://quickfacts.census.gov/qfd/states/12/12011.html> (accessed May 5, 2007) (reporting Broward County's foreign-born population at 25.3 percent, compared to the state average of 16.7 percent).

32. *Coming from the Americas*, *supra* n. 26, at 2.

33. *Id.* at 3.

34. Smith, *supra* n. 3, at 16.

35. U.S. Census Bureau, Press Release, *Florida, California and Texas to Dominate Future Population Growth* (Washington, D.C., Apr. 24, 2005) (available at <http://www.census.gov/Press-Release/www/releases/archives/population/004704.html>).

36. Off. Econ. & Demographic Research, *Florida Demographic Summary 2*, <http://edr.state.fl.us/population/popsummary.pdf> (accessed Jan. 6, 2007); *Fla. County Perspectives* 91 (Nat'l. Data Consultants 1992).

37. *Fla. County Perspectives*, *supra* n. 36, at 91.

population.<sup>38</sup> Current population estimates show that Florida's Hispanic population has grown to almost twenty percent of the State's total population.<sup>39</sup>

According to the 2000 census, there are thirty-three Florida counties where the Hispanic population is five percent or greater,<sup>40</sup> and twelve in which it exceeds fifteen percent.<sup>41</sup> Many of those counties are among the most populous and fastest-growing in the State.<sup>42</sup> Almost one-third of Florida's Hispanic population reported during the 2000 census that they could either not speak English "at all" (269,785 persons), or that they did not speak English "well" (432,977 persons).<sup>43</sup> Population projections indicate at least twelve Florida counties will have a Hispanic population of fifteen percent or greater by 2010.<sup>44</sup>

### B. Florida's Haitian Population

Haitian-Americans are also a growing segment of Florida's population. Over 233,000 Haitian-Americans now live in Florida.<sup>45</sup> The primary language spoken by Haitian immigrants is

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38. U.S. Census Bureau, *Hispanic or Latino by Type: 2000*, <http://factfinder.census.gov; search> Osceola, Florida, *select* 2000 (accessed Jan. 7, 2006).

39. See U.S. Census Bureau, *Estimates of the Population by Race Alone or in Combination and Hispanic or Latino Origin for the United States and States; July 1, 2005*, <http://www.census.gov/Press-Release/www/2006/cb0-123table1.xls> (Aug. 4, 2006) (noting that Florida's total population as of July 1, 2005 was approximately 17.7 million, while Florida's Hispanic population was approximately 3.5 million).

40. See U.S. Census Bureau, *Florida Counties, QT-P3 Race and Hispanic or Latino: 2000*, <http://factfinder.census.gov; select> state: Florida, *select* Fact Sheet for a Race, Ethnic or Ancestry Group, *select* Hispanic or Latino (any race), *search* (county) (accessed Nov. 7, 2006) [hereinafter *QT-P3*] (providing a searchable database of racial and ethnic population figures by county).

41. *Id.*

42. More than thirty-six percent of Florida's population lives in Miami-Dade, Broward, Orange, and Hillsborough counties alone. *Id.* Osceola County, which had one of the highest growth rates in the State between the last two censuses, also had the highest Hispanic growth rate. See *Fla. County Perspectives*, *supra* n. 36, at 91 (reporting the growth of Osceola County's Hispanic population at 1219.6 percent between 1980 and 1990).

43. U.S. Census Bureau, *QT-P17 Ability to Speak English: 2000*, <http://factfinder.census.gov; select> Data Sets, *select* Census 2000 Summary File 3, *select* Enter a table number, *search* QT-P17, *select* United States (accessed Nov. 7, 2006) [hereinafter *QT-P17*].

44. Those counties are Broward, Collier, De Soto, Glades, Hardee, Hendry, Hillsborough, Miami-Dade, Monroe, Orange, Osceola, and Palm Beach. See Stanley K. Smith & Stefan Rayer, *Population Projections by Age, Sex, Race, and Hispanic Origin for Florida and Its Counties, 2003-2030*, 37 *Fla. Population Stud.* 3, 12 (July 2004) (projecting the total and Hispanic populations for every Florida county in 2010).

45. U.S. Census Bureau, *QT-P13 Ancestry: 2000, Florida*, <http://factfinder.census.gov; search>

Haitian Creole.<sup>46</sup> Haitian Creole is the only language spoken by the *entire* Haitian immigrant population, irrespective of social class in Haiti.<sup>47</sup> Although South Florida is home to many middle-class Haitian-Americans, “Miami is considered the city that received (and continues to receive) the largest segment of lower-class Haitians . . . .”<sup>48</sup> Because these Haitian immigrants are often illiterate, the literacy rate and ability to speak English of many of Miami’s Haitian-American citizens are significantly below that of native-born Americans and even other immigrant groups.<sup>49</sup> As a result, many Haitian-American citizens require Haitian Creole assistance in order to vote.<sup>50</sup>

The majority of Florida’s Haitian-American population is concentrated in the three most populous southern counties. Almost half (over 95,000) of the state’s Haitian-American population lives in Miami-Dade County,<sup>51</sup> while most of the remaining Haitian-Americans in Florida live in Palm Beach (over 30,000) and Broward Counties (over 62,000).<sup>52</sup>

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*select* Data Sets, *select* Census 2000 Summary File 3, *select* Enter a table number, *search* QT-P13, *select* State, *select* Florida (accessed Nov. 7, 2006).

46. U.S. Dept. St., Bureau W. Hemisphere Affairs, *Background Note: Haiti*, “People,” <http://www.state.gov/r/pa/ei/bgn/1982.htm> (June 2006).

47. *Zépher*, *supra* n. 20, at 6–7. *Zépher* notes that only five to twenty-five percent of the Haitian population speaks French. *Id.*

48. *Id.* at 5.

49. See *QT-P17*, *supra* n. 43 (reporting that approximately fifty-one percent of American Spanish speakers speak English “very well”; sixty-six percent of other Indo-European language speakers and forty-eight percent of Asian and Pacific Island language speakers reported the same competency); Alex Stepick & Carol Duton Stepick, *What’s in It for Me? What’s in It for You? Ethnographic Research on the Possible Undercount of Haitians in Miami* 34, <http://www.census.gov/srd/papers/pdf/ex90-11.pdf> (July 1990) (noting that a previous survey conducted by the authors revealed that over fifty percent of Haitian immigrants in Miami are illiterate, while less than twenty percent speak English competently); see also Antonio Delgado, *Better Spanish, Better English: Native Language Literacy and Adult Education* 14, [http://coeweb.fiu.edu/research\\_conference/SUIE\\_2006/Delgado\\_COERC\\_2006.pdf](http://coeweb.fiu.edu/research_conference/SUIE_2006/Delgado_COERC_2006.pdf) (accessed Nov. 4, 2006) (noting that nearly sixty-eight percent of Miami-Dade residents speak a language other than English at home, while statewide, 1.5 million Florida residents speak little or no English).

50. See Consent Ord. at ¶ 3, *U.S. v. Miami-Dade County*, No. 02-21698 (S.D. Fla. June 17, 2002) [hereinafter *Miami-Dade Consent Order*] (recognizing “unique difficulties encountered by Creole-speaking voters” who require language assistance for their “effective participation in the voting process”).

51. See U.S. Census Bureau, *QT-P13 Ancestry: 2000, Miami-Dade County, Florida*, <http://factfinder.census.gov>; *select* Data Sets, *select* Census 2000 Summary File 3, *select* Enter a table number, *search* QT-P13, *select* County, *select* Florida, *select* Miami-Dade County (accessed Jan. 10, 2007) (reporting ethnic ancestry for Miami-Dade County).

52. *Id.*

### C. Implications of Florida's Demographic Changes for Elections Officials

The fact that a significant portion of Florida's large immigrant population comes from countries in the Caribbean (such as Cuba and Haiti) has several implications for the State's elections officials. First, many Caribbean immigrants who obtain citizenship will require language assistance in order to vote effectively.<sup>53</sup> Because Caribbean immigrants often have lower education levels than Florida's native-born population,<sup>54</sup> they are far less likely to be proficient in English than native-born citizens.<sup>55</sup>

Second, Caribbean immigrants have a relatively high rate of United States citizenship when compared with other immigrant groups from Latin America.<sup>56</sup> Roughly half of the foreign-born Caribbean population has United States citizenship, compared with twenty-eight percent for other Latin American immigrants.<sup>57</sup> Therefore, Florida's Caribbean immigrants are more likely to be eligible to vote than other immigrant groups. Florida's foreign-born population also has a higher-than-average rate of naturalization than foreign-born populations of other states<sup>58</sup> and is therefore more likely to be eligible to vote than other immigrant populations.<sup>59</sup>

Some elections officials are dismissive of the needs of naturalized immigrants for bilingual materials and assistance at the

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53. *Coming from the Americas*, *supra* n. 26, at 1–4. Florida's Caribbean immigrants include Spanish, Creole, and English speakers.

54. *Id.* at 2.

55. A survey of Haitian entrants in 1983, for example, revealed that “[o]n average, none had advanced beyond the fifth or sixth grade, and about four-fifths spoke little or no English.” Alejandro Portes & Alex Stepick, *City on the Edge: The Transformation of Miami* 56 (U. Cal. Press 1994).

56. *Coming from the Americas*, *supra* n. 26, at 3 (noting that Caribbean immigrants to the United States have a citizenship rate of forty-seven percent, whereas Latin American immigrants have a citizenship rate of twenty-eight percent).

57. *Id.*

58. Nolan Malone et. al., *The Foreign-Born Population: 2000* at 3 (U.S. Census Bureau Dec. 2003) (available at <http://purl.access.gpo.gov/GPO/LPS47197>).

59. U.S. Census Bureau, *Table 4a: Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004*, <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls> (accessed Feb. 21, 2006). The higher voter eligibility rates for Florida's non-English-proficient population results not only from higher naturalization rates among Caribbean immigrants, but also from the large number of Puerto Rican islanders who migrate to central Florida. *Infra* nn. 65–66 and accompanying text.

polls, claiming that since naturalized immigrants must pass an English citizenship test, they must be capable of voting in English only.<sup>60</sup> This view, however, ignores several salient points. First, while most naturalized citizens have demonstrated some basic English proficiency in the naturalization process, more than basic English proficiency is required to understand complex ballot questions and constitutional amendments that appear on almost every Florida ballot. Second, not all immigrants are required to demonstrate English proficiency in order to naturalize. For example, older immigrants who have lived in the United States for many years are specifically exempted from the English-proficiency requirements for naturalization.<sup>61</sup> Similarly, disabled immigrants may also be exempted if their disability prevents them from learning English.<sup>62</sup> Florida's population, including its immigrant population, is older on average than the population of the United States as a whole,<sup>63</sup> increasing the probability that many of Florida's naturalized citizens will not be fluent in English. It is no accident that Florida was the jurisdiction in which a class action was filed and successfully litigated on behalf of thousands of older and disabled naturalization applicants who sought a waiver of the English-language requirement from immigration officials.<sup>64</sup>

Moreover, Florida has a sizeable native-born population (consisting primarily of voters of Puerto Rican and Native American ancestry) that is likely to require language assistance. For example, sixty percent of Osceola County's Hispanic population is of Puerto Rican origin.<sup>65</sup> Although those voters are native-born

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60. See e.g. H.R. Subcomm. on the Const. of the Jud. Comm., *Hearing on H.R. 9: The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II)*, 109th Cong. 14 (May 4, 2006) (reporting the House testimony of the Orange County, California Supervisor of Elections); H.R. Rpt. 102-655 at 21 (July 8, 1992) (suggesting, in dissent, that it is appropriate to require English competency to cast a ballot because prospective citizens must demonstrate English competency to be naturalized).

61. 8 U.S.C. § 1423(b)(2) (2000).

62. *Id.* at § 1423(b)(1).

63. U.S. Census Bureau, *QT-P1: Age Groups and Sex: 2000*, <http://factfinder.census.gov>; select Data Sets, select Decennial Census, select Census 2000 Summary File 1, select Enter a table number, enter QT-P1, select Nation, select United States, select Add, select Show Result (accessed Feb. 9, 2007).

64. *Campos v. INS*, 188 F.R.D. 656, 658–659, 659 n. 1 (S.D. Fla. 1999).

65. U.S. Census Bureau, *QT-P9 Hispanic or Latino by Type: 2000, Osceola County*,

United States citizens with a constitutional right to vote, Puerto Ricans who migrate to Florida from Puerto Rico are likely to have been educated in “American-flag schools in which the predominant classroom language was [Spanish].”<sup>66</sup> There is also a significant Native American population entitled to language assistance.<sup>67</sup> Portions of Florida’s Seminole population, particularly the elderly still living on reservations, rely on the oral interpretation required by the language provisions of the Voting Rights Act in order to vote effectively.<sup>68</sup> As the United States Commission on Civil Rights observed when it investigated voting irregularities in Florida, “[t]he majority of non-English-speaking Americans are native-born citizens constitutionally entitled to vote.”<sup>69</sup>

It is extremely important that language assistance be available to enable all eligible Florida voters to cast a ballot. As shown below, adherence to the provisions of the Voting Rights Act fulfills some, but not all, of the demonstrated need to provide language assistance in Florida.

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*Florida*, <http://factfinder.census.gov>; *select* Data Sets, *select* Census 2000 Summary File 3, *select* Enter a table number, *enter* QT-P9, *select* County, *select* Florida, *select* Osceola County (accessed Feb. 9, 2007).

66. See 42 U.S.C. § 1973b(e)(1) (outlawing application of “English-only” elections to Puerto Ricans living on the mainland).

67. *The Voting Rights Act Amendments of 1992*, 67 Fed. Reg. 48871, 48873 (July 26, 2002) (designating Broward, Collier, and Glades Counties as Section 203-covered jurisdictions with respect to the Seminole population).

68. Interview with Holly Whiddon, Supervisor of Elections for Glades County (Jan. 25, 2007).

69. U.S. Commn. Civ. Rights, *Voting Irregularities in Florida during the 2000 Presidential Election* ch. 6 (U.S. Commn. Civ. Rights 2001) (available at <http://www.usccr.gov/pubs/vote2000/report/main.htm>); see Rodolfo de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation after Seventeen Years of Voting Rights Act Coverage*, 71 Tex. L. Rev. 1479, 1518 (1993) (noting that “[m]any native-born Mexican[-]Americans . . . [were discriminatorily denied] education in English . . . Further, many Puerto Ricans, especially those raised in Puerto Rico who migrated to the United States as adults, are not functional in English. Their right to participate as U.S. citizens is abridged unless they have access to election materials in the language of their state-provided education.”).

*III. A BRIEF OVERVIEW OF THE LANGUAGE-MINORITY ASSISTANCE REQUIREMENTS OF THE VOTING RIGHTS ACT*

The Voting Rights Act of 1965<sup>70</sup> has been described as “the most effective civil rights statute enacted by Congress.”<sup>71</sup> Explicit requirements that elections officials provide assistance for language minorities can be found in Sections 203 and 4(f)(4).<sup>72</sup> Additional provisions that protect language minorities can be found in Section 2, Section 5, and Section 208.<sup>73</sup>

A. Section 203

Section 203 applies only to jurisdictions that have been designated as “covered” for the purpose of Section 203.<sup>74</sup> Designations are made following each decennial census based on a formula for determining whether more than five percent of the voting-age citizen population in a jurisdiction belongs to a single language-minority community and has limited English proficiency; *or* that more than 10,000 voting-age citizens in a jurisdiction belong to a single language-minority community, *and* have limited English proficiency, *and* the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate.<sup>75</sup> Section 203 requires that covered jurisdictions make all election materials and information that are available in English available in the minority language as well. Presently, ten Florida counties are covered under Section 203.<sup>76</sup>

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70. 42 U.S.C. §§ 1973–1973bb1.

71. U.S. Dept. Just., Civ. Rights Div., *Voting Section Homepage, The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (accessed Feb. 27, 2006).

72. 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a.

73. *Id.* at § 1973c; Pub. L. No. 94-73, § 208, 89 Stat. 400 (1975).

74. *Id.* at § 1973aa-1a.

75. *Id.* The Voting Rights Act Reauthorization and Amendments Act of 2006 updated this formula, and its changes are slated to take effect in 2010. 120 Stat. at 577.

76. Those counties and languages are Broward (Spanish and Seminole), Collier (Seminole), Glades (Seminole), Hardee (Spanish), Hendry (Spanish), Hillsborough (Spanish), Miami-Dade (Spanish), Orange (Spanish), Osceola (Spanish), and Palm Beach (Spanish). 67 Fed. Reg. at 48873.

### B. Section 4(f)(4)

Language minorities in some areas are also protected by Section 4(f)(4) of the Voting Rights Act.<sup>77</sup> This Section utilizes a formula resulting from the 1975 amendments to Sections 4 and 5 of the Act.<sup>78</sup> Under Section 4(f)(4), jurisdictions are covered if (1) over five percent of the voting-age citizens on November 1, 1972, were members of a single language-minority group; (2) the United States Attorney General finds that election materials were provided in English only on November 1, 1972; and (3) the Director of the Census determines that fewer than fifty percent of voting-age citizens were registered to vote on November 1, 1972, or that fewer than fifty percent voted in the November 1972 presidential election.<sup>79</sup> These designations are frozen in time by the 1975 coverage formula and do not change based on current census information. In 1975, application of the 4(f)(4) coverage formula resulted in coverage for five Florida counties: Collier, Hardee, Hendry, Hillsborough, and Monroe.<sup>80</sup> Although the two language-minority assistance provisions appear in different sections of the Act, and in some instances cover different geographic areas, the requirement that covered jurisdictions must provide all election materials and information that are available in English in the minority language is identical under both Sections 203 and 4(f)(4).<sup>81</sup>

### C. Section 5

Section 5 of the Voting Rights Act, like Sections 203 and 4(f)(4), applies only to a limited number of jurisdictions, also referred to as “covered” jurisdictions.<sup>82</sup> Covered jurisdictions are prohibited from changing any election-related procedures until those changes have been “precleared,” i.e., determined by the Attorney General to have neither the intent nor the effect of diluting

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77. 42 U.S.C. § 1973b(f)(4).

78. *Id.* at § 1973c.

79. *Id.* at § 1973b(b).

80. *Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups*, 53 Fed. Reg. 735, 736 (Jan. 12, 1988).

81. 28 C.F.R. § 55.8 (2005).

82. 42 U.S.C. § 1973c.

the voting strength of race- or language-minority groups.<sup>83</sup> Like Section 4(f)(4), the designation of “covered” jurisdictions for the purposes of Section 5 is frozen in time.<sup>84</sup> The last designations were made by the Attorney General in 1975 using then-current census data as well as participation data from the 1972 presidential election.<sup>85</sup> In 1975, the Attorney General designated five of Florida’s sixty-seven counties as covered jurisdictions for the purposes of Section 5: Collier, Hardee, Hendry, Hillsborough, and Monroe.<sup>86</sup> Those jurisdictions are coterminous with the 4(f)(4) designations in Florida, because addressing “severe voter discrimination” against language minorities was the basis for Congress’ 1975 expansion of the Act, which brought portions of Florida within its ambit.<sup>87</sup>

Sections 203, 4(f)(4), and 5 were scheduled to expire in 2007.<sup>88</sup> In 2006 Congress passed, and on July 27, 2006, the President signed, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, which extended coverage under these Sections until 2032.<sup>89</sup> While the 2006 Act acknowledges and incorporates Census Bureau changes that will affect future Section 203 designations, the Act does not alter or update the jurisdictional designations for Sections 5 and 4(f)(4).<sup>90</sup>

#### D. Section 2

Section 2 of the Voting Rights Act is a permanent provision applying to all jurisdictions.<sup>91</sup> It prohibits all voting practices and procedures that can be shown to result in a denial or abridgement of the right to vote on the basis of race, color, or membership in a

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83. *See id.* (referring to “race or color” and incorporating the definition of language minorities found in 42 U.S.C. § 1973b(f)(2)).

84. *Id.*

85. 89 Stat. at 400.

86. 40 Fed. Reg. 43746, 43746 (Sept. 23, 1975) (designating Hardee, Hillsborough, and Monroe Counties); 41 Fed. Reg. 34329, 34329 (Aug. 13, 1976) (designating Collier and Hendry Counties).

87. *See infra* nn. 99–108 and accompanying text.

88. 42 U.S.C. §§ 1973aa-1a(b)(1), 1973b(a)(8).

89. 120 Stat. at 577.

90. *Id.*

91. 42 U.S.C. § 1973.

language-minority group.<sup>92</sup> To prevail on a claim litigated under Section 2, a plaintiff must show that the challenged practice results in either race or language minorities having “an inequality in the opportunities . . . to elect their preferred representatives.”<sup>93</sup> Section 2 may be enforced by either the United States Attorney General, or by affected groups or individuals, by filing lawsuits in the United States District Court where the claim arises.<sup>94</sup> Neither Section 2 nor Section 5 explicitly requires bilingual elections materials or language assistance, although both portions of the Act prohibit discrimination against language minorities in the electoral process.<sup>95</sup>

#### E. Section 208

Section 208 of the Voting Rights Act is also a permanent provision. It provides as follows:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.<sup>96</sup>

Although Section 208 does not contain any explicit mention of language-minority voters, the provision has been used to protect the voting rights of language minorities in some instances.<sup>97</sup>

#### IV. THE 1975 EXPANSION OF THE VOTING RIGHTS ACT

The history of the application of the 1965 Voting Rights Act to Florida shows that attention to the needs of language minorities is crucial to any scheme of civil-rights enforcement in this

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92. Section 2 was amended by Congress in 1982 to provide for an “effects” test to establish a violation of the Act, rather than requiring that a plaintiff establish that the voting practice was enacted for a discriminatory purpose. *Voting Rights Act of 1982*, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982); Sen. Rpt. 97-417 at 27 (May 25, 1982); *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

93. *Thornburg*, 478 U.S. at 47.

94. 42 U.S.C. § 1973c.

95. *Id.* at §§ 1973, 1973c.

96. *Id.* at § 1973aa-6.

97. See *infra* nn. 150–159 and accompanying text (discussing the use of Section 208 to protect non-English speakers).

State. Indeed, it was not until Congress reauthorized the Voting Rights Act in 1975, adding protections for language minorities, that the Act had any significant application to Florida jurisdictions.

During the 1975 reauthorization process, Congress took up the issue of widespread discrimination against language minorities in voting, expanding certain provisions of the Voting Rights Act to address overwhelming evidence of voting discrimination against language minorities.<sup>98</sup> During this process, Congress expanded Section 5 preclearance requirements to geographic areas where significant numbers of language minorities resided,<sup>99</sup> made permanent the temporary ban on the use of literacy tests or similar devices,<sup>100</sup> created the language-minority assistance provisions of Sections 203 and 4(f)(4),<sup>101</sup> and added discrimination against language minorities to the scope of Section 2.<sup>102</sup> It was this process that brought Florida squarely under significant provisions of the Voting Rights Act. Indeed, the primary reason that five counties in Florida have been designated as preclearance counties for purposes of Section 5 since 1975 was the prevalence of language-minority voters in the State.<sup>103</sup> The 1975 expansion of Section 5 to address the unique circumstances of language minorities changed the definition of “test or device” to include the practice of providing election information (including ballots) only in English in

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98. Sen. Rpt. 94-295 at 3 (July 22, 1975). Congress determined that this overwhelming discrimination “most severely affected [p]ersons of Spanish heritage.” *Id.*

99. The accompanying Senate report described the expansion as follows:

The focus of the proposed legislation, in this regard, is to insure that the Act’s temporary remedies are applicable to states and political subdivisions where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) significant concentrations of minorities with native languages other than English reside. The provisions of S. 1279 accomplish this goal by expanding the definition of [“test or device”] to include the conduct of English[-]only elections where large numbers of language minority persons live. In these newly covered areas, where severe voting discrimination was documented, S. 1279 would, for ten years, mandate bilingual elections, make applicable the Section 5 preclearance provisions, and authorize the appointment of Federal examiners and observers by the Attorney General.

*Id.* at 9 (emphasis added).

100. 89 Stat. at 400 (amending 42 U.S.C. § 1973b).

101. *Id.*

102. *Id.*

103. Prior to the 2006 extension, Congress extended Section 5 in 1982 for a period of 25 years, but did not alter or update the formula as it had been codified in 1975. 96 Stat. at 131.

states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age.<sup>104</sup>

The creation of Sections 203 and 4(f)(4) in 1975 also resulted in newly created “covered” jurisdictions in Florida that were required to provide bilingual assistance.<sup>105</sup> The 1975 coverage formula for Section 203 provided that a jurisdiction was covered “if the Director of the Census determined (i) that more than five percent of the citizens of voting age of such [s]tate or political subdivision were members of a single language minority and (ii) that the illiteracy rate of such persons as a group was higher than the national illiteracy rate.”<sup>106</sup> Application of this formula resulted in the coverage of four Florida counties.<sup>107</sup> Following the next three decennial censuses, application of the formula also resulted in a steady increase in the number of Florida jurisdictions covered by Spanish-language requirements under Section 203. In 1984, seven counties were designated covered by Section 203.<sup>108</sup> That number increased in 1994, to nine counties.<sup>109</sup> Present census es-

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104. 89 Stat. at 400. The previous formula, set forth in Section 4 of the Voting Rights Act of 1965, provided that the first element in the formula was that the state or political subdivision of the state maintained on November 1, 1964, a “test or device” restricting the opportunity to register and vote. 42 U.S.C. § 1973(b). The second element of the formula was satisfied if the Director of the Census determined that less than fifty percent of persons of voting age were registered to vote on November 1, 1964, or that less than fifty percent of persons of voting age voted in the 1964 presidential election. *Id.* Application of this formula in 1965 resulted in seven entire states being designated as “covered jurisdictions”: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. In addition, some political subdivisions in four other states (Arizona, Hawaii, Idaho, and North Carolina) were covered. In 1970, Congress updated the coverage formula, which was identical to the original formula except that it referenced November 1968 dates to determine maintenance of a test or device, and levels of voter registration and electoral participation. Application of this formula resulted in the partial coverage of ten states. Florida was not among them.

105. 40 Fed. Reg. at 41827.

106. 89 Stat. at 400 (inserting Title III, Section 203, 42 U.S.C. § 1973aa-1a).

107. 40 Fed. Reg. at 41827.

108. 28 C.F.R. app. § 55 (1984).

109. 28 C.F.R. app. § 55 (1994). In 1992, Congress strengthened the language-minority protections contained in Section 203 through the Voting Rights Language Assistance Act of 1992. Pub. L. 102-344, 106 Stat. 921 (Aug. 26, 1992). The coverage formula for Section 203's bilingual-assistance provisions was expanded to require that:

(1)(a) if a jurisdiction has 10,000 or more limited-English proficient voting age citizens of a single language minority or (1)(b) a reservation has [five] percent or more American Indian or Alaskan Native limited-English proficient voting-age citizens and (2) the single language minorities meet the remaining [Section] 203 requirements, then the jurisdiction must provide language assistance.

timates indicate that by 2010, thirty-seven Florida counties could be covered for Spanish-language assistance under Section 203.<sup>110</sup>

Application of the 1975 4(f)(4) coverage formula resulted in the five preclearance counties (Collier, Hardee, Hendry, Hillsborough, and Monroe) being covered for Spanish under Section 4(f)(4).<sup>111</sup> Because the 4(f)(4) coverage formula is static, those counties will remain covered for Spanish-language assistance through 2032.<sup>112</sup>

#### V. FLORIDA'S HISTORY WITH LANGUAGE MINORITIES AND THE VOTING RIGHTS ACT

The history of the Voting Rights Act's application in Florida is, at least partly, a history of language-minority voting rights. Despite their large numbers in Florida, language minorities have been the victims of voter discrimination in Florida based solely on the language they speak. For example, Miami-Dade County has been credited with the dubious distinction of being called "the birthplace of the contemporary English Only movement in the United States."<sup>113</sup> The English Only movement was a direct response by Miami-Dade voters to the dramatic influx of Cuban and Haitian immigrants in 1980 and the perceived "crisis" occasioned by that influx.<sup>114</sup> The English Only referendum passed by Miami-Dade County voters in 1980 required that "all county governmental meetings, hearings, and publications shall be in the English language only."<sup>115</sup> Because Dade County was a Section 203-designated jurisdiction for most of this time period, the English Only provision had little effect on Dade County elections,<sup>116</sup> and

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H.R. Rpt. No. 102-655 at 4 (July 8, 1992).

110. Using Hispanic populations from Smith & Rayer, *supra* n. 44, and assuming, under the Section 203 coverage formula, that the illiteracy rate of such persons as a group is higher than the national illiteracy rate, then thirty-seven counties with a six percent Spanish population and forty-three counties with a five percent Spanish population would be covered.

111. 53 Fed. Reg. at 736.

112. 120 Stat. at 577.

113. Max J. Castro, *The Politics of Language*, in *Miami Now!: Immigration, Ethnicity and Social Change*, *supra* n. 24, at 109, 119.

114. *Id.*

115. *Id.*

116. See *infra* nn. 138–141 and accompanying text (discussing whether a Miami-Dade election pamphlet fell under Section 203).

the County Commission repealed the provision in 1993.<sup>117</sup> In the meantime, however, Florida voters passed a state-wide referendum to amend the Florida Constitution to declare that “English is the official language of the State of Florida.”<sup>118</sup> The constitutional amendment left enforcement authority to future acts of the Florida Legislature. Because the Legislature has not moved to enforce the provision, its effects thus far have been primarily symbolic, sending a message to Spanish and Creole speakers that they are unwelcome.<sup>119</sup> In some ways, this message derives from Florida’s electoral practices and experiences under the Voting Rights Act.<sup>120</sup>

#### A. Sections 5 and 4(f)(4)

As discussed above, Florida’s designation as a partially covered Section 5 jurisdiction is directly attributable to the prevalence of language minorities in the State. That fact is underscored by the history of Department of Justice (DOJ) objections to voting changes in Florida.<sup>121</sup>

The Section 5 provisions require covered jurisdictions to seek preclearance by making a submission to the DOJ or by filing a declaratory judgment action in the United States District Court for the District of Columbia before implementing the proposed changes.<sup>122</sup> In either forum, the burden of proof is on the covered jurisdiction seeking preclearance to establish that the proposed changes do not have a discriminatory purpose or effect.<sup>123</sup> The

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117. Miami-Dade Co. Ordin. (Fla.) § 93-46 (1993).

118. Fla. Const. art. II, § 9.

119. Fred Grimm, *Official English Won't Amount to a Hill of Frijoles*, Miami Herald B1 (July 11, 2006); see Castro, *supra* n. 113, at 122 (citing polling data indicating that the majority of the non-Hispanic white voters who supported the English Only initiative hoped to “make Miami a less attractive place to live for Cubans and other Spanish-speaking people”).

120. See *infra* pt. V(B) (discussing some Florida counties’ failures to comply with the requirements of Sections 203 and 4(f)(4)).

121. See *infra* nn. 128, 135 and accompanying text (citing DOJ complaints to Florida officials regarding elections practices); see *infra* nn. 138, 144, 153, 158 and accompanying text (citing DOJ lawsuits regarding Florida elections practices).

122. 42 U.S.C. § 1973c.

123. As a practical matter, covered jurisdictions almost always seek preclearance through the DOJ as opposed to filing a declaratory judgment action. Mark A. Posner, *The Politicization of Justice Department Decisionmaking under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?* 3–4 (Am. Const. Socy. for L. & Policy

Attorney General is required to review the submissions and take action within sixty days.<sup>124</sup> If the Attorney General concludes that the submitting jurisdiction has not satisfied its burden to show that the proposed changes are free of discrimination, the Attorney General interposes an objection.<sup>125</sup> The covered jurisdiction then has three options—it can forgo or amend the proposed change, request that the DOJ reconsider its objection, or file a declaratory judgment action in the United States District Court for the District of Columbia.<sup>126</sup>

Since Section 5's reenactment in 1982, the DOJ has objected to five voting changes in Florida.<sup>127</sup> One of those objections was explicitly made to protect the rights of language-minority voters.<sup>128</sup> In 1998, the DOJ objected to new Florida election procedures regarding the administration of absentee ballots.<sup>129</sup> The procedures were a part of the Voter Fraud Act, which made sweeping changes to Florida's electoral systems in response to widespread and heavily publicized voter fraud in the City of Miami.<sup>130</sup> The portions of the Act to which the DOJ objected placed a heavy emphasis on literacy skills, the ability to provide a Social Security number, and a witness' signature.<sup>131</sup>

Perhaps most significantly for purposes of this discussion, the DOJ's investigation of the proposed changes revealed that changes to the absentee-ballot system had been unlawfully implemented in preclearance counties.<sup>132</sup> Although Florida later re-

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2006) (available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>).

124. 28 C.F.R. § 51.52(a) (2005).

125. *Id.* at § 52.51(c).

126. *Id.* at §§ 51.10, 51.45.

127. Ltr. from Elizabeth Johnson, Chief, Voting Sec., to Robert A. Butterworth, Atty. Gen., St. of Fla. 4 (Aug. 10, 1998) (copy on file with Author).

128. Ltr. from Bill Lann Lee, Acting Asst. Atty. Gen., to Robert A. Butterworth, Atty. Gen., St. of Fla. 3–5 (Aug. 14, 1998) (copy on file with Author).

129. *Id.* at 5.

130. Ltr. from Mike Cochran, Asst. Gen. Counsel, Fla. Dept. St., to Elizabeth Johnson, Chief, Voting Sec., U.S. Dept. Just. 1 (Aug. 6, 1998) (copy on file with Author).

131. Ltr., *supra* n. 127, at 4.

132. Prior to preclearance, Florida elections officials implemented the 1998 changes throughout the State for a brief period before the September 1998 primary. On August 10, 1998, the DOJ advised Florida that the Voting Rights Act prohibits non-precleared changes from being implemented in the five preclearance counties. *Id.* Thereafter, the Division of Elections instructed Florida elections officials that non-precleared changes should not be implemented in any Florida counties. Fla. Div. Elections Op. 98-13, 5–7 (1998) (available at <http://election.dos.state.fl.us/opinions/new/1998/de9813.pdf>).

treated from the implementation of the objected-to changes, a significant number of absentee-ballot mailings to voters in advance of the September primary included changes that had not been precleared.<sup>133</sup> These changes provided the DOJ a set of data with which to analyze any discriminatory effects of the change, allowing the DOJ to base their objections on actual data showing that the changes disproportionately impacted minority voters, including language minorities. The DOJ's analysis showed that minority voters were significantly more likely than white non-Hispanic voters to be unable to comply with the new absentee-ballot requirements, and that their absentee ballots were more likely to be rejected as "illegal."<sup>134</sup> The DOJ attributed this disparity to a number of factors distinguishing minority voters from non-Hispanic white voters, including lower literacy rates and a failure to provide required Spanish-language translations.<sup>135</sup> The DOJ also found that despite the clear bilingual election requirements of Section 4(f)(4), two of Florida's five preclearance counties had not even made the new absentee-voter certificate available in Spanish.<sup>136</sup>

#### B. Sections 203 and 4(f)(4)

Despite the clear requirements under the Section 4(f)(4) and 203 bilingual-assistance provisions that all "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots"<sup>137</sup> be provided in

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133. Ltr., *supra* n. 127, at 4.

134. *Id.*

135. The DOJ noted that "in two covered counties[,] the Spanish[-]language translation of the voter certificate is inserted in the absentee voting packet rather than appearing on the envelope as part of the absentee voter certificate itself[,] and in two covered counties *there is no Spanish language translation of the certificate at all.*" *Id.* (emphasis in original).

136. *Id.* In 2002, the DOJ objected to the 2002 redistricting plan for the Florida House of Representatives. Although that objection was intended to preserve Hispanic voting strength, because it involved discrimination on the basis of membership in a language-minority group, it is worth mentioning in this discussion. The Attorney General's letter stated that the plan reduced "the ability of Collier County Hispanic voters to elect their candidate of choice [and] the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue to do so." Ltr. from Ralph F. Boyd, Jr., Asst. Atty. Gen., to John M. McKay, Pres. Of Fla. Sen. & Tom Feeney, Speaker Fla. H.R. 1 (July 1, 2002) (copy on file with Author). As a result of the DOJ objection, the State ultimately preserved the Hispanic minority-majority district in Collier County. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1288 (S.D. Fla. 2002).

137. 42 U.S.C. § 1973aa-1a(c).

the minority language as well as English in covered jurisdictions, some covered jurisdictions in Florida have historically failed to comply with this requirement.

The first instance of litigation related to noncompliance with the clear mandates of Section 203 occurred in Miami-Dade County in 1993.<sup>138</sup> In that case, elections officials had prepared a detailed pamphlet that explained changes in the County's new single-member district election system and listed new precincts.<sup>139</sup> County officials determined that the pamphlet did not fall under Section 203, and therefore, the County was prohibited by the 1980 English Only law from publishing and disseminating the proposed pamphlet in Spanish.<sup>140</sup> After the DOJ filed suit, the district court concluded that the County's failure to publish the pamphlet in Spanish violated Section 203 and entered a temporary injunction requiring the County to undertake remedial ac-

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138. *U.S. v. Metro. Dade County*, 815 F. Supp. 1475, 1478–1479 (S.D. Fla. 1993).

139. *Id.*

140. *Id.* at 1476. The question of how County officials could have determined that the pamphlet fell outside the scope of Section 203 is puzzling. The district court described the pamphlet as follows:

The pamphlet describes the new system of electing county commissioners in Dade County and provides answers to the following twelve questions about the special elections:

- (a) Why are there [thirteen] districts instead of the previous nine member Board of County Commissioners?;
- (b) How many county commissioners will I be voting for?;
- (c) Will I be voting for a mayor?;
- (d) Didn't Dade County voters recently approve an executive mayor form of government?;
- (e) Will there be a runoff election after the March 16 vote?;
- (f) When will the new system take effect?;
- (g) How long will the terms of office be for the newly elected Board of County Commissioners?;
- (h) Have county commission elections been permanently changed to March and April?;
- (i) Can I still register to vote for this special election?;
- (j) I'm registered as an independent. Will I be able to vote for a district commissioner?;
- (k) How do I know what county commission district I'm in?;
- (l) Are there any other countywide issues on the March 16 special election ballot?

The pamphlet provides brief answers to each of these questions, and it also provides a chart listing the precincts that fall under each new district.

*Id.* at 1476–1477.

tion to accommodate Spanish-speaking voters before the election.<sup>141</sup> Additionally, following the 2000 presidential election, the United States Commission on Civil Rights found that some central Florida counties subject to Section 203 had failed to provide Spanish-speaking voters with the required bilingual assistance.<sup>142</sup> The Commission found that “[t]his failure to provide proper language support led to widespread voter disenfranchisement of possibly several thousand Spanish-speaking voters in central Florida.”<sup>143</sup>

After the investigation, the DOJ sued Orange County for failing to furnish “in the Spanish language, the information and assistance necessary to comply with Section 203 of the Voting Rights Act.”<sup>144</sup> In particular, the DOJ accused Orange County of failing to “recruit, appoint, train and maintain an adequate pool of bilingual poll officials capable of providing Hispanic citizens with limited English proficiency with effective language assistance” and failing to translate election-related information into Spanish, both at polling places and in communications disseminated from the registrar’s office.<sup>145</sup> The DOJ further alleged that “Orange County did not permit poll watchers to provide assistance to [Hispanic voters in need of language assistance] at the November 2000 election, and they did not receive assistance from other persons,” in violation of Section 208 of the Voting Rights Act.<sup>146</sup>

Central to the lawsuit were allegations that Orange County poll workers were hostile toward Spanish-speaking voters.<sup>147</sup> The case was settled by a consent decree requiring compliance with Section 203, including, inter alia, the dissemination of all information concerning elections in English *and* Spanish; the creation of Spanish Language Assistance Coordinators; the provision of bilingual poll workers; consultation with Orange County’s His-

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141. *Id.*

142. U.S. Commn. Civil Rights, *supra* n. 69, at ch. 9.

143. *Id.*

144. Compl. at ¶ 7, *U.S. v. Orange County*, No. 6:02-CV-737-ORL-22JGG (M.D. Fla. 2002).

145. *Id.*

146. *Id.* at ¶¶ 8, 14.

147. Consent Order ¶ 10, *U.S. v. Orange County*, No. 6:02-CV-00737-ORL-22JGG (Oct. 9, 2002).

panic community; and federal monitoring.<sup>148</sup> The consent decree also required Orange County elections officials to investigate allegations of poll worker hostility toward Spanish-speaking or Hispanic voters, and to remove any poll worker found to have “engaged in inappropriate treatment of Spanish-speaking and/or Hispanic voters.”<sup>149</sup>

### C. Jurisdictions Not Covered under Sections 203 or 4(f)(4)

Concerning jurisdictions and languages not covered by Sections 203 or 4(f)(4), investigations by governmental agencies have revealed that “even when volunteers were available to provide language assistance, the volunteers or precinct workers were prevented from providing language assistance.”<sup>150</sup> Additionally, “[i]n some instances, bilingual poll workers were directed not to provide language assistance to voters who were in need of that assistance.”<sup>151</sup> In essence, language-minority voters have been denied access to the ballot.<sup>152</sup>

For example, even though it was not covered by Section 203 in 2000, Osceola County’s voting discrimination against Hispanic voters was so pronounced that the DOJ filed suit against county officials for their conduct in the 2000 election under Section 208.<sup>153</sup> The DOJ alleged widespread violations of minority-voting rights, including poll workers making hostile remarks to Spanish-speaking voters to discourage them from voting; the failure of poll officials to communicate effectively with Spanish-speaking voters, which prevented them from voting; the failure to staff polling places with bilingual poll officials; and the failure to translate ballots and other elections materials into Spanish.<sup>154</sup> Ultimately, the parties entered into a consent decree requiring Osceola County to undertake a number of remedial actions.<sup>155</sup> The decree

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148. *Id.* at ¶¶ 1, 2, 4, 6, 15.

149. *Id.* at ¶ 10.

150. U.S. Commn. Civil Rights, *supra* n. 69, at ch. 6.

151. *Id.*

152. *Id.*

153. Compl. at ¶ 7, *U.S. v. Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002) [hereinafter *Osceola Complaint*].

154. *Id.*

155. Consent Decree, *U.S. v. Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002) [hereinafter *Osceola Consent Decree*].

2007] *Access to the Ballot for Florida's Language Minorities* 353

called for the creation of a Spanish Language Coordinator position, the hiring of bilingual poll workers, the availability of all elections materials and ballots in Spanish, and future monitoring by the DOJ to ensure compliance.<sup>156</sup>

Similarly, although Haitian Creole is not a Section 203-covered language, during the 2000 election, “[m]any Haitian[-] American voters were, in effect, turned away from their polling places without the opportunity to vote” in Miami-Dade County.<sup>157</sup> The DOJ sued Miami-Dade County for violating Section 208 of the Voting Rights Act by preventing Creole-speaking Haitian-American voters in Miami-Dade County from securing assistance at the polls.<sup>158</sup> This case was also settled by consent order requiring Miami-Dade County to take a number of steps to “redress” the harm caused to its sizeable Haitian-American population in the 2000 presidential election.<sup>159</sup>

#### VI. THE SHORTCOMINGS OF THE VOTING RIGHTS ACT IN ADDRESSING THE NEEDS OF FLORIDA'S LANGUAGE-MINORITY POPULATION

The Voting Rights Act falls short of protecting the rights of all Floridians who need language assistance in at least three substantial ways. First, the Act does not cover one of the languages (Haitian Creole) spoken by a large and growing segment of Florida's population. Second, the designations for coverage under the Act do not change quickly enough to keep up with Florida's rapidly growing non-English-speaking population. Lastly, because the Act is a twentieth-century creation, it does not address or encompass the twenty-first century technology that is increasingly being used and debated. The first two of these shortcomings have been discussed above<sup>160</sup> and will only be summarized in this section, while the last will be discussed in greater detail.

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156. *Id.*

157. U.S. Commn. Civil Rights, *supra* n. 69, at ch. 6. Additionally, “many Haitian[-] American voters were denied the opportunity to vote.” *Id.* at ch. 9, “Findings and Recommendations.”

158. Compl. at ¶ 6, *U.S. v. Miami-Dade County*, No. 02-21698 (S.D. Fla. 2002) [hereinafter *Miami-Dade Complaint*].

159. *Miami-Dade Consent Order*, *supra* n. 50, at ¶ 3.

160. *Supra* nn. 76, 110–112, 150–159 and accompanying text.

As mentioned previously, the DOJ filed Section 208 suits against two counties (Miami-Dade and Osceola) in an effort to remedy the lack of assistance for language minorities in those two counties.<sup>161</sup> In Miami-Dade County, the DOJ brought the action on behalf of Haitian-American voters, and in Osceola County, on behalf of Hispanic voters.<sup>162</sup> The two cases illustrate the shortcomings of the Voting Rights Act in addressing the critical needs of Florida's language minorities.

Not only is Section 208 the only section of the Voting Rights Act that has been used to address the needs of language minorities for interpretation services, but it is the only section that applies to *all* jurisdictions. However, Section 208 does not offer protections on the basis of language per se, nor does it require that a jurisdiction provide interpretation services, bilingual ballots or other election materials. Instead, Congress created Section 208 to protect voters who are disabled, blind, or illiterate.<sup>163</sup> It is the "illiterate" provision of Section 208 that has been used to address language-minority needs. But the statute only provides that an voter is entitled to have assistance by a person of the voter's choice if necessary to vote.<sup>164</sup> Because of the limitations inherent in Section 208, the relief required under the Act is not as comprehensive or as helpful to language-minority populations as are the bilingual ballots, assistance, and elections materials required by Sections 203 and 4(f)(4). To comply with Section 208, jurisdictions need only permit voters with demonstrated limited English proficiency to be able to bring their own interpreters to the polls, or to secure help from those persons in completing an absentee ballot.<sup>165</sup> At best, Section 208 offers an incomplete remedy for minority-language voters in need of interpretation services.

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161. *Supra* nn. 153–158 and accompanying text.

162. *Miami-Dade Complaint*, *supra* n. 158, at ¶ 6; *Osceola Complaint*, *supra* n. 153, at ¶ 5.

163. 42 U.S.C. § 1973aa-6.

164. *Id.*

165. *See e.g. Miami-Dade Consent Order*, *supra* n. 50, at ¶ 2 (stating that in order to ensure compliance with Section 208, Haitian-American language minorities must be given assistance by an individual of the voter's choice).

### A. Lack of Adequate Voting Rights Act Coverage for Haitian Creole Speakers

The fact that the DOJ was forced to rely on Section 208 to protect the rights of Haitian-American voters in Miami-Dade County illustrates another gap in the Voting Rights Act's protection of language minorities that is critical for Florida—the omission of Haitian Creole as a “covered language.” When Congress passed the Voting Rights Act amendments in 1975, creating Sections 203 and 4(f)(4), the Act specified that the only protected “language minorities” were “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>166</sup> Haitian Creole speakers are not recognized as “language minorities” by the Act.<sup>167</sup> This omission is undoubtedly attributable to the fact that when the language-minority protections were originally considered and enacted in 1975, Creole speakers were—at best—a negligible portion of the voting-eligible population.<sup>168</sup>

When Congress considered renewing portions of the Voting Rights Act in 2006, some commentators called for expanding the designated minority languages to include additional languages, such as Haitian Creole.<sup>169</sup> However, the definition of “language minority” in Section 203 of the Act was not expanded. Local action

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166. 42 U.S.C. § 1973aa-1a(e).

167. *Id.*

168. The Senate Report accompanying the 1975 expansion of the Voting Rights Act to protect language minorities states:

The definition of those groups included in ‘language minorities’ was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices, while the documentation concerning Asian Americans, American Indians and Alaskan Natives was substantial.

No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 [p]residential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish[,] 79.8 percent; and Russian, 85.7 percent.

Sen. Rpt. No. 94-295 at 31.

169. See e.g. JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 Miami L. Rev. 1, 35 (2006) (arguing for expansion of the term “language minority” to include Haitian Creole); see generally Jocelyn Friedrichs Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act* (Wayne St. U. L. School Research Paper No. 07-01, 2007) (available at <http://ssrn.com/abstract=958626>) (arguing that Congress should consider Arabic for inclusion within the definition of the term “language minority”).

by Florida state and county officials in impacted areas is therefore necessary to ensure that Creole-speaking Haitian-Americans are able to cast their ballots on an equal basis with other language minorities whose languages are covered under the Act.

### B. Section 203 Designations Lag behind Reality

The fact that the DOJ had to rely on Section 208 to protect the rights of Spanish-language minorities in Osceola County in 2002—a county that was approximately one-third Hispanic according to the 2000 census—illustrates an even larger loophole in the Voting Rights Act's language-minority protections. When the DOJ filed its lawsuit against Osceola County in 2002, Osceola was not a Section 203-designated county. The Hispanic population had grown so rapidly since the designations had last been made in 1992 that the new designations had not yet caught up with the population demographics.<sup>170</sup> Osceola was designated as covered under Section 203, based on data from the 2000 census, within days of the consent decree.<sup>171</sup> This example illustrates the fact that Section 203 designations often lag far behind Florida's demographic realities, as does Section 4(f)(4), which has not been updated since 1975.

### C. The Voting Rights Act Does Not Adequately Address New Technologies

In the wake of the 2000 presidential election and the confusion created by Florida's then-existing punch-card ballot system, states began considering changes to election technology to avoid confusion over ballot counting.<sup>172</sup> Congress encouraged these ef-

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170. *Osceola Complaint*, *supra* n. 153, at ¶ 1; U.S. Census Bureau, *GCT-PL Race and Hispanic or Latino: 2000*, <http://factfinder.census.gov>; *select Search, search GCT-PL Florida County, select Florida by County-GCT-PL. Race and Hispanic or Latino: 2000* [hereinafter *GCT-PL*].

171. 67 Fed. Reg. 48871, 48873 (July 26, 2002).

172. *See e.g.* Jeff Parrott, *County's New Electronic Voting Equipment Unveiled*, *Journal & Courier* (Lafayette, Ind.) 1B (Nov. 30, 2001) (recounting the unveiling of Indiana's first electronic voting machines); Nikki Middlebrooks, *Public Likes New Electronic Voting*, *Chattanooga Times Free Press* B3 (Dec. 4, 2001) (detailing some Georgia cities' experiments with touch-screen voting); Aaron Faust, *Voting to Go Digital by 2006: State to Replace Lever Machines*, *Hartford Courant* B1 (Dec. 16, 2002) (describing a Connecticut initiative to replace lever-style voting machines with electronic touch-screen voting).

forts by enacting the Help America Vote Act of 2002,<sup>173</sup> which provided funding to states to assist them in replacing punch-card voting systems.<sup>174</sup> As new, technologically advanced voting machines began appearing in Florida and throughout the rest of the country, new debates unfolded about that technology. Much of this debate has focused on the comparative advantages and pitfalls of one technology over another, and has centered on three technologies: touch-screen voting (also known as “direct recording electronic” or DRE); optical-scan technology, with which the voter marks a paper ballot that is read by a machine; and DRE voting that includes some form of “voter-verified paper trails.”<sup>175</sup>

A disappointingly brief portion of this debate has focused on language minority issues. This is likely attributable to the fact that the Act focuses on the provision of *written materials* and *oral interpretations* to voters—the primary media of communication with voters in the previous century.<sup>176</sup> Some voting-rights groups have struggled with understanding what exactly is required by the Voting Rights Act in terms of new technologies. For example, if DRE voting machines can be equipped with printers that provide voter-verified paper trails, is it possible to print those paper trails in multiple languages? How does this affect language-minority voters who need oral interpretation services? If a jurisdiction adopts optical-scan technology, how does this affect illiterate language-minority voters?<sup>177</sup> One prominent national Latino rights group, the National Council of La Raza, has taken a position in favor of DRE, claiming that optical-scan systems cannot provide comparable “multilingual capacity.”<sup>178</sup>

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173. Pub. L. 107-252, 116 Stat. 1666 (Oct. 29, 2002).

174. *Id.*; Election Assistance Commn., *Mission Statement*, [http://www.eac.gov/mission\\_statement.asp?format=none](http://www.eac.gov/mission_statement.asp?format=none) (accessed Mar. 10, 2007).

175. Adam Cohen, *The Good News (Really) About Voting Machines*, N.Y. Times Select (Jan. 10, 2007) (available at <http://www.truevotemd.org/content/view/541/139>); David Card & Enrico Moretti, *Does Voting Technology Affect Voting Outcomes? Touch-Screen Voting and the 2004 Presidential Election* (U. Cal. Berkeley 2006) (available at <http://emlab.berkeley.edu/~moretti/dre.pdf>).

176. 42 U.S.C. § 1973aa-1a(b).

177. See Miami-Dade Election Reform Commn., *2007 Position Paper on Florida Voting Systems*, [http://www.votetrustusa.org/index.php?option=com\\_content&task=view&id=2129&Itemid=1213](http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2129&Itemid=1213) (Dec. 18, 2006) (noting that Florida optical-scan technology does not provide feedback regarding ballot problems in more than one language).

178. Angela M. Arboleda, Testimony, *Voting Technology and Language Minority Voters* 5 (U.S. Election Assistance Commn. May 5, 2004) (available at <http://www.nclr.org/>

The Voting Rights Act, while providing valuable assistance for language minorities in many instances, is an incomplete remedy. Possible solutions to the shortcomings of the Voting Rights Act, necessary to provide fully equal access to the ballot for Florida's language-minority voters, are discussed below.

*VII. BEYOND THE VOTING RIGHTS ACT—  
SUGGESTIONS FOR IMPROVING LANGUAGE-  
MINORITY ACCESS TO THE BALLOT*

A sizeable portion of Florida's large and growing Hispanic population is limited in its English proficiency.<sup>179</sup> Full compliance with applicable Voting Rights Act requirements under Sections 203 and 4(f)(4) is an important first step in ensuring ballot access for a large segment of the Spanish-speaking population. While most, but not all, covered counties are aware of their obligations, and appear to make every effort to comply with the requirements,<sup>180</sup> recent litigation filed against Miami-Dade and Orange Counties reveals that even large counties with sizeable Hispanic constituencies can run afoul of meeting their obligations under the Act. Zealous attention to the requirements and enforcement of those requirements remains necessary in each of the covered

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content/publications/download/1419).

179. See *supra* nn. 43–44, 48–50 and accompanying text (discussing the English-language proficiency of Florida's Hispanic and Haitian populations).

180. The Supervisor of Elections' websites for eight of the ten Florida counties required by Section 203 or 4(f)(4) to provide Spanish-language assistance show that some of their forms and materials, at least as posted on the websites, are available in Spanish as well as English (Broward, Hardee, Hendry, Hillsborough, Miami-Dade, Orange, Osceola, and Palm Beach Counties). Broward Co., *Broward County Florida Supervisor of Elections*, <http://browardsoe.org> (accessed Nov. 3, 2006); Hardee Co., *Supervisor of Elections*, <http://hardeecountyelections.com> (accessed Nov. 3, 2006); Hillsborough Co., *Hillsborough County Supervisor of Elections*, <http://votehillsborough.org> (accessed Nov. 3, 2006); Miami-Dade Co., *Voters with Special Needs*, <http://elections.co.miami-dade.fl.us/ada.asp> (accessed Nov. 3, 2006); Orange Co., *Supervisor of Elections*, <http://www.osceola.org/index.cfm?lsFuses=department/SupervisorofElections> (accessed Nov. 3, 2006); Palm Beach Co., *Supervisor of Elections*, <http://pbcelections.org> (accessed Nov. 3, 2006). Many of these websites (including Miami-Dade's), however, lack a truly bilingual interface. Monroe County claims to make bilingual forms available. Three counties (Broward, Collier, and Glades) are covered for the American Indian Seminole language. This is an oral rather than written language, and jurisdictions satisfy their obligation with respect to American Indian languages by providing oral interpretation services at reservation polling places. U.S. Dept. Just., *Minority Language Citizens: Section 203 of the Voting Rights Act*, "What Information Must Be Provided in the Minority Language?" [http://www.usdoj.gov/crt/voting\\_sec\\_203/203\\_brochure.htm](http://www.usdoj.gov/crt/voting_sec_203/203_brochure.htm) (accessed Mar. 15, 2007).

counties. Moreover, the Act provides that *every* political subdivision within a covered county must also comply with bilingual election requirements.<sup>181</sup> A recent scientific study cited by the National Commission on the Voting Rights Act determined that approximately one out of five jurisdictions covered by Sections 203 or 4(f)(4) “was in total noncompliance” with the basic Voting Rights Act requirements of providing written materials and oral assistance in the minority language.<sup>182</sup> The study also uncovered pockets of disturbingly high levels of noncompliance with regard to other aspects of the Act’s requirements for language-minority assistance.<sup>183</sup> For example, only thirty-nine percent of covered jurisdictions provided telephone assistance in the covered languages.<sup>184</sup> Scrupulous review of compliance with the bilingual requirements in affected jurisdictions, and particularly in municipalities, remains necessary to bring Florida into full compliance with the language-minority provisions of the Voting Rights Act.

However, full access to the ballot for Spanish-speaking language-minority voters calls for more than merely meeting the requirements of the Voting Rights Act. Florida’s population is predicted to be nineteen percent Hispanic by 2010.<sup>185</sup> Twenty counties will be more than ten percent Hispanic<sup>186</sup>—twice the percentage necessary to trigger a Section 203 inquiry for determining whether the language-minority requirements should be applied.<sup>187</sup> Some counties, notably Duval, Lee, Levy, and Sarasota,

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181. “Where a political subdivision (e.g., a county) is determined to be subject to [S]ection 4(f)(4) or [S]ection 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.” 28 C.F.R. § 55.9.

182. Natl. Commn. Voting Rights Act, *Protecting the Minority Voters: The Voting Rights Act at Work, 1982–2005*, at 68 (Law. Comm. Civ. Rights under L. 2006) (available at <http://www.votingrightsact.org/report/finalreport.pdf>).

183. *Id.*

184. *Id.*

185. Smith & Rayer, *supra* n. 44, at 74.

186. *Id.* Those counties are Broward (twenty-one percent), Collier (twenty-two percent), DeSoto (thirty-one percent), Glades (eighteen percent), Hardee (forty percent), Hendry (forty-six percent), Highlands (fifteen percent), Hillsborough (twenty-one percent), Lafayette (twelve percent), Lee (twelve percent), Manatee (twelve percent), Miami-Dade (sixty-three percent), Monroe (seventeen percent), Okeechobee (twenty-two percent), Orange (twenty-four percent), Osceola (thirty-seven percent), Palm Beach (fifteen percent), Polk (twelve percent), Seminole (fourteen percent), and St. Lucie (ten percent).

187. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I).

have undertaken to provide some Spanish-language assistance even in the absence of Voting Rights Act requirements.<sup>188</sup>

However, much remains to be done, as the vast majority of counties in Florida with a high Hispanic and limited English-proficient population do not voluntarily choose to provide bilingual ballot access. One model available for consideration is the approach taken by Los Angeles County, California. There, elections officials provide bilingual materials and oral assistance in areas that are not covered by Voting Rights Act designations based on four considerations: census data;<sup>189</sup> twenty or more requests from voters in a particular precinct prior to election day that minority-language materials be sent to them;<sup>190</sup> information from community-based organizations that language assistance is needed in a particular precinct;<sup>191</sup> and information from poll workers from prior elections that minority-language assistance was requested at the precinct.<sup>192</sup> Utilization of such a formula in Florida would undoubtedly yield an increase in the number of areas requiring Spanish-language assistance.

In addition to minority languages (such as Spanish and Asian) covered by the Voting Rights Act, Los Angeles County also provides language assistance to voters who require electoral assistance in other languages, such as Russian and Armenian.<sup>193</sup> In contrast, only two Florida counties (Miami-Dade and Palm Beach) currently go above and beyond the requirements of the Act by providing language assistance to Haitian Creole speakers,<sup>194</sup> de-

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188. Levy Co., *Supervisor of Elections*, <http://www.votelevy.com> (accessed May 4, 2007) (linking to a Google translation of the website into Spanish); Sarasota Co., *Supervisor of Elections*, [http://Srqelections.com/menu\\_spanish.htm](http://Srqelections.com/menu_spanish.htm) (accessed May 4, 2007); Duval Co., *Supervisor of Elections, Bienvenido*, <http://duvalelections.com/default.aspx?language=spanish> (accessed Nov. 3, 2006); Lee Co., *Lee County Supervisor of Elections*, <http://www.leeelections.com>; *select Spanish Version of Website* (accessed Apr. 18, 2006). Duval also provides Spanish-language ballots on referendum questions. Telephone Interview with Jean Bedeni, Voter Admin. Mgr., Duval Co. (Apr. 13, 2007). Lee County provides both bilingual ballots and Spanish-language assistance. Telephone Interview with Joanne Beaumont, Exec. Admin. Asst., Supervisor of Elections, Lee Co. (Apr. 13, 2007).

189. Deborah Wright, Testimony, *Examining the Need for Voting Rights Act Section 203's Provisions Regarding Bilingual Election Materials* (S. Comm. Jud. June 13, 2006) (available at [http://judiciary.senate.gov/testimony.cfm?id=1930&wit\\_id=5413](http://judiciary.senate.gov/testimony.cfm?id=1930&wit_id=5413)).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. See e.g. *infra* nn. 196, 203 and accompanying text (detailing steps taken by Miami-

spite significant concentrations of Haitian-Americans in other counties, most notably Broward.<sup>195</sup>

Miami-Dade County has also implemented a series of measures designed to ensure equal access to the ballot for Haitian-American voters. In 1999, the Miami-Dade Board of County Commissioners adopted an ordinance requiring Creole translations to be posted in voting booths.<sup>196</sup> The local ordinance provides for the following:

- (a) In those precincts in which the Supervisor of Elections determines that a significant portion of the electorate is Haitian-American, the Supervisor of Elections shall provide voting booths containing Creole translations in addition to booths containing Spanish translations.
- (b) In those elections in which the Supervisor of Elections determines that it is appropriate to provide ballots in Creole, those ballots shall be advertised in a Creole[-] language newspaper selected by the Supervisor of Elections.
- (c) The provisions of this ordinance shall apply only to ballots provided at voting booths in the precincts described in subsection (a) hereof and shall apply only to county-wide elections and other appropriate elections as determined by resolution of the Board of County Commissioners.
- (d) The provisions of this section shall become operative only upon a written finding provided to this Board by the Supervisor of Elections that a certified Creole

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Dade County to ensure ballot access for Haitian Creole voters); Palm Beach Co., *Supervisor of Elections, Sample Ballot*, <https://www.pbcelections.org/items.aspx?id=3> (accessed Apr. 18, 2007) (providing sample municipal run-off ballots in English, Spanish, and Creole).

195. U.S. Census Bureau, *Fact Sheet: Palm Beach County, Florida*, <http://factfinder.census.gov>; *search* Palm Beach County, Florida, *select* Fact Sheet for a Race, Ethnic or Ancestry Group, *select* Haitian (accessed Mar. 10, 2007) (reporting that there were 30,958 persons of Haitian ancestry in Palm Beach County in 2000); U.S. Census Bureau, *Fact Sheet: Broward County, Florida*, <http://factfinder.census.gov>; *search* Broward County, Florida, *select* Fact Sheet for a Race, Ethnic or Ancestry Group, *select* Haitian (accessed Mar. 10, 2007) (reporting that there were 62,342 persons of Haitian ancestry in Broward County in 2000).

196. Miami-Dade Co. Ordin. (Fla.) § 12-16 (2002).

translator exists who can perform the translations mandated by this section.<sup>197</sup>

There are, however, some obvious flaws in this scheme. The ordinance vests a great deal of discretion in the Supervisor of Elections to determine which precincts include a significant number of Haitian-American voters.<sup>198</sup> In applying the local law, the Miami-Dade Supervisor of Elections originally used place-of-birth information, which had been collected as a part of voter registration in Miami-Dade County until 1994, to determine which precincts had Haitian-American concentrations.<sup>199</sup> However, since the County stopped collecting this information in 1994, the data was out of date by 2000, resulting in a potential undercount of precincts in need of Haitian Creole translations.<sup>200</sup>

Many of these flaws have been remedied since the ordinance was passed in 1999. In 2002, after being sued by the DOJ, Miami-Dade County agreed to make its “best efforts” to work with current census data in making future precinct designations.<sup>201</sup> As a result of the lawsuit, the County also agreed to make its “best efforts” to assign bilingual English-Creole poll workers to assist Haitian Creole-speaking voters in the designated precincts.<sup>202</sup> The Supervisor of Elections office also made a policy decision, beginning in 2002, to make trilingual (English, Spanish, and Creole) ballots available at every polling place in the County.<sup>203</sup>

The present methodologies utilized by Miami-Dade and Los Angeles Counties for providing ballot access to their electors in need of language assistance, with language-specific adaptations, should serve as a model for other Florida counties to address the needs of their language-minority electorate. Much like the Miami-Dade and Los Angeles systems, Angelo Ancheta has argued for “an array of measures short of full interpreter services and ballot

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197. *Id.*

198. *Id.*

199. *Miami-Dade Consent Order*, *supra* n. 50, at n. 1.

200. *Id.*

201. *Id.*

202. *Id.* at ¶ 3(c).

203. Miami-Dade Co., *Supervisor of Elections—How to Vote*, [http://elections.co-miami-dade.fl.us/voting\\_how\\_to.asp](http://elections.co-miami-dade.fl.us/voting_how_to.asp) (accessed Nov. 3, 2006); Miami-Dade Co. Off. Inspector Gen., *Final Report: Voting Systems Contract RFP326*, 10–11 (2003).

translations . . . to language-minority groups that fall below the statistical benchmarks of Section 203.”<sup>204</sup>

At present, only one of several Florida counties with a Hispanic population of greater than five percent that is not covered by Sections 203 or 4(f)(4)<sup>205</sup> provides bilingual ballots and basic voting instructions in English and Spanish,<sup>206</sup> though this practice should be the norm rather than the exception. Furthermore, those counties with a Hispanic population of greater than 10,000 should also offer bilingual materials to Spanish-speaking voters.<sup>207</sup> Two of the three counties “covered” under this formula, Duval and Sarasota, already appear to provide this assistance.<sup>208</sup> One county in Florida, Levy, with a Hispanic population of 3.9 percent (1,339 total) has taken the salutary step of making Spanish-language elections materials available.<sup>209</sup> Any county “covered” by the formulas set forth above should additionally ensure that at any precinct where the Hispanic population exceeds fifteen percent of the total, bilingual poll workers are available.

In addition to the census-based formulas, Los Angeles County’s positive experiences with keeping track of requests for language assistance in order to provide that assistance after demonstrated need, as well as its strong working relationship with, and receipt of guidance from, community-based organizations regarding where language assistance is needed, should be emulated by Florida jurisdictions.<sup>210</sup> And both Broward and Palm Beach counties should follow Miami-Dade’s lead and explicitly address the needs of their Haitian-American voters.

Finally, real language-minority access to the ballot will depend on equality of opportunity, regardless of which type of voting technology is implemented. Additional study should be conducted,

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204. Ancheta, *supra* n. 12, at 23.

205. Based on the 2000 census, this would include the following counties (in addition to the ten Florida counties already required to provide Spanish-language assistance under Sections 203 or 4(f)(4)): Alachua, DeSoto, Flagler, Gadsden, Hamilton, Highlands, Indian River, Lafayette, Lake, Lee, Manatee, Marion, Martin, Okeechobee, Pasco, Polk, Putnam, St. Lucie, Seminole, Sumter, and Volusia. *QT-P3*, *supra* n. 40.

206. Lee Co., *supra* n. 188.

207. Based on the 2000 census, this formula would include (in addition to those counties listed above) Brevard, Duval, and Sarasota Counties. *GCT-PL*, *supra* n. 170.

208. Duval County, *supra* n. 188; Sarasota County, *supra* n. 188.

209. Levy County, *supra* n. 188; *GCT-PL*, *supra* n. 170.

210. Natl. Commn. Voting Rights Act, *supra* n. 182, at 71.

and attention must be paid to which technologies can accommodate Florida's rapidly changing language demographics. Only those technologies able to accommodate with equal treatment more than two languages should be considered for purchase by Florida elections officials.

### *VIII. CONCLUSION*

The reforms suggested herein, though modest, will ensure that Florida makes a smooth transition into the twenty-first century and makes democracy available to the broadest number of electors possible.