Ensuring Equitable Automatic Voter Registration

By: Niyati Shah, Director of Litigation

Asian Americans Advancing Justice | AAJC
Introduction

Automatic Voter Registration (AVR) is generating considerable interest on the part of voting rights advocates, voter modernization proponents, and policymakers as a possible means of improving and increasing voter participation, particularly among those least likely to participate. Although there is no agreed-upon definition of the concept, AVR generally entails a statutory system whereby information about an individual’s voter eligibility that already exists within government databases is then used to register qualified individuals to vote without the individuals themselves needing to take action. Most commonly, AVR takes place during transactions at motor vehicle offices, but some states have also enacted laws for AVR implementation at other government agencies, such as public assistance offices.¹

The momentum to develop AVR comes more than 25 years after the passage of the previous initiative to reduce the barriers to voter registration: The National Voter Registration Act of 1993 (NVRA).² The NVRA predominantly regulates voter registration for federal elections and requires, inter alia, certain government agencies to provide voter registration services. It is law in 44 states. It is imperative that AVR proposals build upon, rather than reverse, the voter registration improvements envisioned and achieved by the NVRA.

The NVRA envisioned a voter registration system to inform and register to vote eligible citizens. Despite the NVRA’s stated purpose to increase access to voter registration, disparities in voter registration rates persisted in communities of color who have large numbers of limited English speakers and who are recently naturalized. AVR also implicates these important competing interests to voter registration such as language access and immigration consequences. These interests are no less important than improving access to voter registration if AVR is to be equitable and reduce the disparities in voter registration rates in these communities.

This paper discusses first, the current models of AVR generally and how they interact with the NVRA. And next, this paper sets forth important policy considerations for AVR, including equal access by language minority and immigrant communities.

I. Current AVR Systems

AVR refers to the process whereby the government registers citizens to vote using relevant eligibility information already maintained by government agencies without any duplicative data collection and additional steps by potential registrants. By reducing the steps and actions required on the voter’s part to register, AVR should result in fewer voters facing registration barriers to voting and allow citizens to better participate in the democratic process.

¹ See e.g. Illinois, 10 ILCS 5/1A-16.1.
² 52 U.S.C. § 20501 et seq.
AVR regimes contemplate government agencies electronically providing election officials information, including the name, age, residence, electronic signature and citizenship status of persons who are likely eligible to register to vote. The default of AVR systems is to register to vote those assumed eligible, unless the individual declines. Currently there are two main types of AVR systems used to provide individuals an opportunity to decline voter registration:

- Individuals are allowed to decline automatic voter registration during the transaction with the government agency (referred to herein as “Front-End Declination”);  

or 

- The government sends individuals a mailer days or weeks after their agency transaction informing them that they have been registered to vote and that they can decline the voter registration by mailing or otherwise contacting election officials (referred to herein as “Back-End Declination”).

The Front-End Declination system requires the government to inform individuals during their government transaction that their information will be used for voter registration, and as discussed in detail below, provide them with voter eligibility information. This allows individuals who are not eligible to vote (i.e., because they are not a U.S. citizen, have a mental incapacity, etc.) to decline voter registration right then and there. Moreover, also as discussed in detail below, if an individual has limited English proficiency (LEP), they will either have brought a language assistant with them or have been provided in-language materials by covered jurisdiction pursuant to Section 203 of the Voting Rights Act.

However, the Back-End Declination system puts the onus on individuals to decline voter registration if they are ineligible days or weeks after their interaction with the government. By that time, an individual may not even know how or why they are receiving a notice about voter registration. Also, by the time they receive the mailer, an LEP individual may no longer have someone with them that can help them understand the mailer, or voter eligibility information if it is even included in the mailer. Thus, these individuals may remain inadvertently registered to vote, even if they are not eligible.

---

3 To date, the only AVR systems are at the state level. Nineteen states and the District of Columbia have enacted AVR laws. See Brennan Center for Justice, Policy Differences of Automatic Voter Registration, available at https://www.brennancenter.org/our-work/research-reports/policy-differences-automatic-voter-registration?ga=2.18546426.2117781582.1615417552-367247733.1572881406.

4 See e.g. California, Cal. Elec. Code § 2260 et seq.; Illinois, 10 ILCS 5/1A-16.1; and New York, N.Y. Elec. Laws § 5-900 et seq.

5 See e.g. Oregon, Or. Rev. Stat. § 247.017.

6 See infra Section II at 3.

7 See infra Section II.A at 9.
And, as discussed below, the consequences for ineligible non-U.S. citizens are extreme and can include deportation. Also, it is unclear who will bear the costs of these mailers. Certainly, the initial mailing will cost the government, but who will pay for an individual to return the mailer? Finally, research shows that most Americans don’t respond to mail campaigns, particularly election mailings. For example, in June 2017, the Wisconsin Elections Commission mailed approximately 380,000 Notices of Suspension to voters, and only 28,169 people—less than 8%—returned the postcard. And, in Oregon, the Oregon Elections Division sent Back-End Declination mailings to 304,227 people who were registered to vote through its AVR system, and only 57,542—less than 20%—returned the card. Combined with language barriers, a Back-End Declination system seems more inefficient, costly, and dangerous.

II. Impact of the NVRA

The NVRA was enacted with the express purpose to “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” As discussed below, it is important to understand how the NVRA provided and expanded voter registration for eligible citizens and to ensure that the protections of the NVRA are not diluted going forward as new AVR laws are contemplated and enacted by state and federal governments. And, also as discussed below, the NVRA creates additional requirements for states.

A. Voter Registration Under the NVRA

Any new AVR system must not conflict with or short-change the protections in the NVRA. The NVRA requires state motor vehicle offices, in Section 5, and public assistance agencies, in Section 7, to affirmatively offer voter registration services in a manner that ensures only eligible citizens register to vote. Although both types of government agencies are required to affirmatively provide voter registration, the requirements of Section 5 and Section 7 of the NVRA are quite different. The requirements of the NVRA cannot be modified or ignored by state AVR systems regardless of what AVR system is established – even if the proposed system may result in more voter registrations. And many NVRA protections should remain in place regardless of what the federal government enacts.

8 See infra Section II.B at 13.
10 Rob Griffin, WHO VOTES WITH AUTOMATIC VOTER REGISTRATION? IMPACT ANALYSIS OF OREGON’S FIRST-IN-THE-NATION PROGRAM, CENTER FOR AMERICAN PROGRESS (June 7, 2017), available at https://goo.gl/1z5xAD.
12 The NVRA offered a time limited incentive for states to become exempt from its requirements if certain policy changes were enacted by August 1994: the only states exempted from the NVRA are states that had no voter registration requirements or that offered voters the opportunity to register to vote at the polling
This is particularly pertinent with respect to state-based AVR systems. Indeed, the Supreme Court has made clear the NVRA preempts state law where the state law conflicts with the NVRA. “Over the past two decades, Congress has erected a complex superstructure of federal regulation atop state voter-registration systems . . . . The [NVRA] requires each State to permit prospective voters to register to vote in elections for federal office by any of three methods, [including] simultaneously with a driver’s license application.” Because the NVRA was enacted pursuant to the Elections Clause of the Constitution, it cannot be replaced or preempted by a state’s AVR law to the extent it conflicts with the NVRA. This does not, however, mean that AVR cannot coexist with or complement the NVRA.

Below follows a discussion about the requirements of the NVRA and how AVR systems can be in compliance with the NVRA.

1. Requirements of Motor Vehicle Voter Registration Under the NVRA

Specifically, Section 5 of the NVRA requires that an initial (or new) and a renewal application for a driver’s license must (1) serve, simultaneously, as an application for voter registration, whether the transaction occurs in person at a driver’s license office or online; (2) not request duplicative information for voter registration purposes, other than a signature; (3) request additional information necessary only to (i) prevent duplicate voter registrations and enable state officials to assess the eligibility of the applicant, and (ii) to administer the election process (this includes, for example, information such as party affiliation); (4) state each eligibility requirement for voter place in federal general elections by August 1, 1994 and have continuously had maintained this processes since. See 52 U.S.C. § 20503. The only states that qualify for this exemption are: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin and Wyoming.

13 Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2251 (2013) (internal citations omitted).

14 The Elections Clause of the Constitution, ART. I, § 4, CL. 1, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of [choosing] [sic] Senators.”

15 See Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2257 (2013) (holding that the presumption against preemption of state law by federal law doesn’t apply in the NVRA context “[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.”). See also, Ex parte Siebold, 100 U.S. 371, 392 (1880) (“The power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”).


registration (including citizenship);\(^{19}\) (5) require an attestation that the applicant meets each such requirement under penalty of perjury;\(^{20}\) (6) state the specific penalties for submission of a false voter registration application;\(^{21}\) and (7) state that a declination to register to vote will be confidential.\(^{22}\)

All changes of addresses are required to serve, simultaneously, as a notification of change of address for voter registration unless the client states affirmatively on the form that the change of address is not for voter registration purposes.\(^{23}\) This is often accomplished through an opt-out check box on the change of address form.

Finally, completed voter registration applications must be submitted to state election officials within ten (10) days of acceptance or within five (5) days if accepted within five (5) days prior to the voter registration deadline.\(^{24}\)

Upon transfer of voter registration applications (or the portion of the driver’s license application and renewals containing relevant voter registration information) to the election official by the motor vehicle department, election officials must enter voter registration data, unless it is electronically transferred. Then, state election officials must determine if the voter registration applicant is eligible to register to vote in that state. Each state sets forth its own eligibility requirements for voter registration. While all states have residency, citizenship, and age requirements, many states also have eligibility requirements about an individual’s felony status and mental capacity. In order to register to vote, an individual must meet the eligibility requirements of their state. Providing false information as part of a voter registration application or registering to vote when ineligible carries stiff penalties.\(^{25}\) If an individual is eligible to register to vote, the person must be added to the state’s voter rolls. Election officials must notify each applicant of the disposition of the voter registration application, i.e., whether the application has been accepted, deemed incomplete, or rejected.\(^{26}\)

\(^{19}\) See 52 U.S.C. § 20504(c)(2)(C)(i).


\(^{23}\) See 52 U.S.C. § 20504(d).

\(^{24}\) See 52 U.S.C. § 20504(e).

\(^{25}\) See, e.g., 52 U.S.C. § 20511 (making it a federal crime to knowingly procure or submit false, fictitious, or fraudulent voter registration applications, punishable by fine or imprisonment up to five years, or both); see also 18 U.S.C. § 1015(f); 25 PA. CONS. STAT. § 1703 (2002) (making it a misdemeanor for an ineligible individual to apply for registration, punishable by a fine of up to $10,000 or imprisonment up to 5 years, or both, and a loss of suffrage); N.J. STAT. ANN. § 19:34-1 (West 2005) (making it a crime of the third degree for an ineligible person to register to vote, or to violate any other election law provisions); ALA. CODE § 17-17-46 (making it a Class A misdemeanor to provide false information to register to vote).

\(^{26}\) See 52 U.S.C. § 20507(a)(2) (“. . . each State shall [ ] require the appropriate State election official to send notice to each applicant of the disposition of the [registration] application.”)
It is important to note that Section 5 of the NVRA does not explicitly require or provide for an opportunity to decline to register to vote on the driver’s license or renewal application. However, Section 5 of the NVRA does require that the voter registration portion of the driver’s license application include the voter eligibility requirements and have the applicant attest under penalty of perjury that they meet these requirements. This necessarily means that an individual who does not meet the voter eligibility requirements of a particular state must have a mechanism to decline the voter registration proffer when it is made. Currently some states provide a specific question about voter registration with “yes” or “no” checkboxes, while other states require a second signature solely for the purpose of voter registration. Thus, an individual can decline to register to vote by either failing to answer the voter registration question, checking the “no” box, or merely failing to execute the second signature related to voter registration. This means that in many cases, though the individual completes the license transaction, the person does not take action specific to voter registration, and the individual remains unregistered to vote.

2. Requirements of Public Assistance Voter Registration Under the NVRA

In addition to Section 5 of the NVRA, there is an equally important but less well-known provision of the NVRA requiring states to affirmatively offer voter registration opportunities to clients of public assistance programs. Section 7 of the NVRA governs voter registration by public assistance offices. Programs covered by the NVRA include but are not limited to, Food Stamps (now known as the Supplemental Nutrition Assistance Program or SNAP), Temporary Assistance for Needy Families (TANF), Medicaid, and the Children’s Health Insurance Program (CHIP).

Section 7 requires public assistance agencies to offer voter registration services each time a client applies for benefits, renews/recertifies benefits, or submits a change of address (collectively, “covered transactions”) by: (1) distributing a voter registration application to individuals who do not decline voter registration in writing; (2) distributing a voter information form with appropriate disclosures and the question, “If you are not registered to vote where you live now, would you like to apply to register to vote here today?” (this is often called the “voter preference question”); (3) providing the same degree of

31 Id. See also, Valdez v. Squier, 676 F.3d 935 (10th Cir. 2012).
32 52 U.S.C. § 20506(a)(6)(B). The following disclosures must be provided:
Voter registration services must be provided whether covered transactions occur in-person at the public assistance office or remotely (via mail, telephone, or the internet). Voter registration by public assistance agencies is not required to be as streamlined as the process set forth in Section 5 of the NVRA. Rather than incorporating voter registration into the public agency systems and transactions in a non-duplicative fashion, public assistance agencies leave the completion of voter registration applications to individual clients. In fact, in addition to the agencies’ own forms (whether on paper or online), many states provide a separate voter information form and almost all states provide a separate voter registration application form to individuals who do not decline to register to vote in writing. Thus, individuals must go through several different documents or hop through different online portals in order to register to vote. Consequently, many public assistance clients never complete and submit a voter registration application. With AVR, public assistance agencies can shift the burden of voter registration from the individual to the government in a manner that is efficient for both the public assistance agency and the individual.

3. AVR Compliance with the NVRA

In adopting AVR systems under the current NVRA structure, there are two options for states: (1) keep intact current NVRA-compliant procedures for offering voter registration services through government agencies and as part of an unrelated process use data from

(1) “Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.”

(2) “If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.”

(3) “If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with [name, address, and telephone number of appropriate official to whom a complaint should be addressed].”

See id.


35 See Ga. State Conf. of the NAACP v. Kemp, 841 F. Supp. 2d 1320 (N.D. Ga. 2012) (holding that voter registrations must be provided during remote transactions); see also THE NATIONAL VOTER REGISTRATION ACT OF 1993 (NVRA): QUESTIONS AND ANSWERS, CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE, Q&A 24 (June 2010), available at https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (“Many Section 7 designated agencies/offices routinely provide services/assistance such as application for, or renewal of, services or change-of-address notification through the internet, by telephone, or by mail. States should ensure the availability of voter-registration opportunities to individuals using such remote service/assistance opportunities from designated agencies.”).
government agencies (such as motor vehicle departments) to separately and automatically register voters; or (2) create a framework whereby automatic voter registration is integrated with NVRA requirements. As long as all the requirements of the NVRA are followed by the relevant agencies, the NVRA does not prevent or preempt the registration of voters through an automatic transfer of the relevant data from these agencies. However, this is neither a best practice nor even one that is efficient. First, using data from agencies to automatically register voters without obtaining an attestation from the individual that they are eligible to register to vote may result in the registration of ineligible voters. Second, data from government agencies may be incomplete, erroneous, or outdated, resulting both in ineligible individuals registering to vote and newly eligible voters being disenfranchised. Third, because adding AVR does not eliminate the requirement to proffer voter registration pursuant to the NVRA, this option merely creates additional and duplicative work for government agencies.

Most states implementing AVR systems have found that the best way to comply with the NVRA is by adopting the Front-End Declination system. The Back-End Declination system only creates additional work and expense for state agencies because it does not eliminate the voter registration requirements of the NVRA during covered transactions with government agencies.

III. Policy Considerations

While there are numerous policy considerations for any AVR system, this document focuses specifically on two inter-related concerns:

• Language Access;

and

• Immigration Consequences.

AVR implicates both, and a failure to address this will result in severe inequities for the LEP and immigrant communities, further exacerbating the disparities in voter registration and voter participation rates in these communities. The requirement of registering to vote before being able to cast a ballot has been integral to how our democracy functions and provides both barriers and opportunities to voter participation, particularly for communities of color. For example, just slightly over half of eligible Asian Americans and Latinos were registered to vote in the last two federal elections; and there remains a persistent gap as compared to White voters, with Asian Americans and Latinos registered to vote and turnout by a gap of 15-20%.
Table 1. Voter Participation Rates and Gaps of those Eligible by Race and Ethnicity

<table>
<thead>
<tr>
<th></th>
<th>Percent Registered of Those Eligible</th>
<th>Gap in Voter Registration Rate (compared to White)</th>
<th>Percent Voted of Those Eligible</th>
<th>Gap in Voter Turnout Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>November 2016 Election</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>73.9%</td>
<td>N/A</td>
<td>65.3%</td>
<td>N/A</td>
</tr>
<tr>
<td>African American</td>
<td>69.4%</td>
<td>-4.5%</td>
<td>59.4%</td>
<td>-5.9%</td>
</tr>
<tr>
<td>Asian American</td>
<td>56.3%</td>
<td>-17.6%</td>
<td>49.0%</td>
<td>-16.3%</td>
</tr>
<tr>
<td>Latino</td>
<td>57.3%</td>
<td>-16.6%</td>
<td>47.6%</td>
<td>-17.7%</td>
</tr>
<tr>
<td><strong>November 2018 Election</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>71.0%</td>
<td>N/A</td>
<td>57.5%</td>
<td>N/A</td>
</tr>
<tr>
<td>African American</td>
<td>63.9%</td>
<td>-7.1%</td>
<td>51.1%</td>
<td>-6.4%</td>
</tr>
<tr>
<td>Asian American</td>
<td>53.0%</td>
<td>-18.0%</td>
<td>40.6%</td>
<td>-16.9%</td>
</tr>
<tr>
<td>Latino</td>
<td>53.7%</td>
<td>-17.3%</td>
<td>40.4%</td>
<td>-17.1%</td>
</tr>
</tbody>
</table>

Therefore, voter modernization efforts such as AVR need to consider and account for the impact on these communities to ensure that their needs are accounted for and the disparity in their voter registration rates are not exacerbated.

A. Language Access

Of the almost 309 million people in the United States over the age of five, almost 68 million people, or 22%, speak a language other than English at home. Among those other languages, two of the top three categories are Spanish and Asian and Pacific

---


Islander languages, at 41.8 million and 10.8 million people, respectively. And over a third of the population that speaks a language other than English at home is LEP, i.e., they have some difficulty with the English language. Voting can be intimidating and complex, even for native English speakers. It becomes that much more difficult for citizens whose first language is not English. Voting materials, including voter registration forms are written for a twelfth-grade level of comprehension, which is much greater than that required for purposes of naturalization, making voter registration more challenging for citizens with language barriers.

LEP U.S. citizens are predominantly Asian American and Latino. LEP individuals also make up a high percentage of non-U.S. citizens. Thus, when it comes to AVR, many LEP citizens will not have equal access to its benefits as do their English-speaking counterparts. Providing in-language assistance at government agencies is not commonplace, and many LEP individuals know to bring someone to help them navigate their interactions. Therefore, it is more likely that an LEP individual will have someone to help them understand voter registration during a government agency transaction than after. But unless an individual brings a translator to help them navigate the transaction, their ability to understand fully the benefits of AVR or to avoid drastic pitfalls if they are ineligible will be hampered. And, while LEP voters face barriers even in a Front-End Declination system, they face higher risks in the Back-End Declination system. Nationwide, 21% of Latino households, 24% of Asian and Pacific Islander households, and 15% of Indo-European households are limited English speaking households – i.e., one in which “all members 14 years old and over have at least some difficulty with English.” These linguistically isolated individuals do not have assistance readily

38 The U.S. Census Bureau does not include Hindi, Gujarati, Urdu, Bengali, and Other Indic Languages in its classification of Asian and Pacific Island Languages. See U.S. CENSUS BUREAU, ABOUT LANGUAGE USE IN THE U.S. POPULATION, available at https://www.census.gov/topics/population/language-use/about.html. Thus the number of persons who speak an Asian or Pacific Island language is even greater than 10.8 million.


40 Id.

41 The current definition of LEP is persons who speak English less than “very well.” The Census Bureau has determined that most respondents overestimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP. See H.R. REP. No. 102-655, at 8 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 772.


43 See supra footnote 39, Indo-European languages include, inter alia, Asian Indian languages such as Hindi, Gujarati, and Bengali.

44 See U.S. CENSUS BUREAU, 2019 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, LIMITED ENGLISH SPEAKING HOUSEHOLDS, available at:
available at home to explain election-related mailings, including the mailers sent in a Back-End Declination system. Therefore, unless an AVR system fully considers the impact on LEP citizens and non-citizens alike, the gaps in voter registration in these communities will remain unabated and potentially result in severe immigration consequences.

Sections 203 of the Voting Rights Act has been one of the most critical provisions in ensuring LEP voters are able to cast their ballot. It was enacted during the 1975 reauthorization of the Voting Rights Act because Congress recognized that certain minority citizens, due to limited English-speaking abilities, experienced historical discrimination and disenfranchisement. Congress documented a “systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English,” and an “extensive evidentiary record demonstrating the prevalence of voting discrimination and high illiteracy rates among language minorities.” Congress singled out Latinos, Asian Americans, American Indians, and Alaskan Natives for protection under Section 203 of the Voting Rights Act due to its finding that:

[T]hrough the use of various practices and procedures, citizens of [the four covered groups] have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation.

Section 203 of the Voting Rights Act was enacted to remedy racial discrimination in the voting process that results in the disenfranchisement of language minorities from the four covered language groups.45

But Section 203 of the Voting Rights Act applies only to jurisdictions where more than five percent or more than 10,000 citizens of the voting age population belong to a single-language minority group and are LEP. If a jurisdiction does not have a sufficient concentration of LEP voters who speak a single covered language, Section 203 of the Voting Rights Act does not apply, and voter registration materials do not have to be provided in-language.


45 Congress limited Section 203 protections to these four language groups because it continually found that they have faced and continued to face significant voting discrimination because of their race and ethnicity. Other language groups were not included because Congress did not find evidence that it experienced similar sustained difficulties because of their race and ethnicity in voting when they enacted the provision. See BILINGUAL ELECTION REQUIREMENTS, 52 U.S.C. § 10503; S. REP. NO. 94-295, at 31 (1975). Section 2 helps to provide protections for language minority groups that fall outside of the four covered groups as discussed later in the chapter.
Based on the 2010-2014 American Community Survey data, the Census Bureau released an updated list of Section 203 jurisdictions in 2016.\(^\text{46}\) Currently there are 29 states that have at least one jurisdiction (i.e. a county or city) that has coverage pursuant to Section 203 of the Voting Rights Act.\(^\text{47}\) And only three states have statewide coverage (for Spanish) under Section 203 of the Voting Rights Act: California, Florida, and Texas.\(^\text{48}\) These covered jurisdictions must provide LEP voters with translated voting materials in the covered language, including but not limited to, voter registration materials, ballots, voter guides, and websites maintained by election officials.\(^\text{49}\) As such, when a jurisdiction covered by Section 203 of the Voting Rights Act provides voter registration, including through any AVR system, all voter registration materials and services must be provided in the covered language.

Currently, 19 states and the District of Columbia have adopted some version of AVR.\(^\text{50}\) Of these 19 states, 15 states have at least one jurisdiction covered by Section 203 of the Voting Rights Act.\(^\text{51}\) These states are required to provide AVR in the covered language in those jurisdictions.

But Section 203 of the Voting Rights Act does not cover all jurisdictions where AVR is currently available. As such, as AVR becomes more prevalent, it is imperative that LEP individuals, particularly those who don’t live in jurisdictions covered by Section 203 of the Voting Rights Act, are able to register to vote with the same ease as their White, English-speaking counterparts; and if they are not eligible to vote, understand the eligibility requirements and decline voter registration.

At minimum then, AVR laws should reaffirm that voter registration information be provided in all languages mandated by Section 203 of the Voting Rights Act. But that is not enough; proponents of AVR should ensure that LEP individuals outside jurisdictions covered by Section 203 of the Voting Rights Act are also protected. This means that they should reduce instances requiring interaction with government officials where they will be at a linguistic disadvantage, such as a Back-End Declination. And instead, there

\(^{46}\) 81 Fed. Reg. 87532.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) 52 U.S.C. § 10503(b)(3)(A) and (c). See also United States v. Metro. Dade Cty., 815 F.Supp. 1475, 1478 (S.D. Fla. 1993) (holding that Section 203 “should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matter of elections, and the absentee voting process”).


\(^{51}\) These 15 states are Alaska, California, Colorado, Connecticut, Georgia, Illinois, Massachusetts, Maryland, Michigan, Nevada, New Jersey, New York, Rhode Island, Utah, Virginia, and Washington.
should be mechanisms in place to help LEP communities in jurisdictions not covered by Section 203 of the Voting Rights Act. Suggested mechanisms include:

- **Materials and services in languages covered by state and local laws.** Many states and localities have their own laws requiring governmental services be provided in minority languages. New AVR laws should require that voter registration materials and services, including government transactions that obtain information for automatic voter registration, must be provided in the minority languages covered by state and local laws.

- **In-language materials must be vetted for comprehension.** New AVR laws should ensure that in-language AVR materials are reviewed and tested by community stakeholders and language experts for comprehension. It is not enough to just use Google translate or other such translation services that are error-prone and create confusion.

- **Clear, tested instructions.** AVR systems must be designed to minimize any potential confusion about the voter registration process, including clear notice about eligibility requirements and instructions for opting out.

- **Funding education of the public and agency personnel.** AVR changes the way voter registration works. New AVR laws must provide sufficient funding for public education about the new system, including culturally and linguistically appropriate outreach to immigrant and other impacted communities, as well as hiring bilingual agency works and sufficient training for agency workers.

B. Immigration Consequences

AVR must be designed to protect both non-citizens and citizens who are ineligible to vote. Federal and state laws generally prohibit non-citizens from voting, registering to vote, or claiming to be a citizen for purposes of voting. These laws are often enforced inflexibly, and as a result, even innocent mistakes can lead to severe consequences, including criminal prosecution and deportation.

The federal government, for example, deported a Peruvian national residing in Illinois for voting in the 2006 election, even though she presented her green card and Peruvian passport to the DMV desk clerk who processed her voter registration. In the face of this documentation, the clerk asked the applicant whether she wanted to register to vote and when the applicant asked whether she was supposed to, said: “It’s up to you.” More recently, in 2018, federal prosecutors in North Carolina charged nine immigrants with falsely claiming citizenship in order to register to vote, even though reports indicate that they may not have understood that they were ineligible.

These incidents occurred in non-AVR systems (North Carolina does not have AVR and Illinois is only now in the process of implementing it). AVR systems, however, pose similar risks. AVR sets registering to vote as the default, so a person must affirmatively decline registration. Accordingly, when ineligible persons interact with
government agencies that offer AVR, they must be given notice of voter eligibility rules and a clear opportunity to decline voter registration.

As such, AVR systems offering the Front-End Declination rather than a Back-End Declination better mitigates the risk of inadvertent voter registration. While some argue that there is less intent on the part of the ineligible voter to register to vote in a Back-End Declination system, presenting evidence to show a lack of intent is costly and will more than likely require professional legal assistance. Rather, an AVR system that ensures linguistically comprehensible Front-End Declination that sets forth eligibility requirements respects an individuals’ autonomy and reduces the chance that an ineligible voter will inadvertently get registered in the first instance.

Moreover, AVR laws must, to the fullest extent possible, protect non-U.S. citizens who are inadvertently registered through AVR. A federal AVR system should provide protections and/or update its immigration code to prevent negative consequences for automatic registration. And, although state law cannot preempt or override federal immigration laws and regulations, non-U.S. citizens who are inadvertently registered to vote through automatic voter registration should at least be given protections by state law so that persons who inadvertently become registered cannot be deemed to have committed a state crime. Furthermore, state laws should be modified so that they do not consider automatic voter registration as evidence of criminal conduct or unfitness of character if it occurs as a result of a mistake or inaction on the part of the individual.

**Conclusion**

AVR has the power to help make our democracy more open, fair, and representative. But AVR only represents an improvement over the status quo if it is implemented responsibly. Lawmakers, advocates, and citizens must demand an AVR system that protects all the people who interact with it. Especially those communities who are underrepresented in our electorate, such as LEP individuals and New Americans. For these underrepresented communities, AVR systems that have a Front-End Declination, language access, and protection from immigration consequences are essential. An AVR system designed with serious consideration of their needs will indeed go a long way in improving the disparities in voter participation.