

# Mistaken Heritage: How a Statutory Misreading Has Denied Congress' Intended Beneficiaries Protection for Half a Century

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## Other Views:

- LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993), available at <https://casetext.com/case/league-united-latin-amer-citizens-v-clements>.
- Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355 (2019), available at <https://www.jstor.org/stable/26650741>.
- Scotty Schenck, *Why Bartlett is not the End of Aggregated Minority Group Claims Under the Voting Rights Act*, 70 DUKE L.J. 1883 (2021), available at <https://dlj.law.duke.edu/article/why-bartlett-is-not-the-end-of-aggregated-minority-group-claims-under-the-voting-rights-act-schenck-vol70-iss8/>.
- Meaghan Field, *Voting Equality and Educational Equality: Is the Former Possible Without the Latter and Are Bilingual Ballots a Sensible Response to Education Discrimination*, 17 WASH. & LEE CIVIL RTS. & SOC. JUST. 385 (2011), available at <https://law2.wlu.edu/deptimages/journal%20of%20civil%20rights%20and%20social%20justice/Field.pdf>.

When the Voting Rights Act (VRA) came up for renewal of its pre-clearance mechanism for the second time in 1975, Congress didn't just update its coverage formula and leave the statute in place. It amended the core provisions of the VRA. Previously, the VRA had established that

in any State or political subdivision [where a] court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of the test and devices . . . as the court shall determine is appropriate and for such period as it deems necessary.<sup>1</sup>

In the 1975 amendments, Congress added provisions guaranteeing the same protections and remedies to members of language minorities.<sup>2</sup> Congress simultaneously defined that term for these purposes: "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."<sup>3</sup>

This definition is odd. It lists three groups of people described in parallel language emphasizing ethnicity ("persons who are American Indian, Asian American, [or] Alaskan Natives"), and then protects a final group through the roundabout, non-parallel locution "of Spanish heritage."<sup>4</sup> What did that differing word choice signify to the original interpretive community of ordinary speakers of American English in 1975?

This is not a merely academic question. A modern interpreter of this legal text—say, a judge applying it in a voting rights case—should begin her analysis with such a question. And indeed, the question yields a clear answer upon consideration of the historical context, the text itself (supported by contemporaneous usage), Congress's enacted legislative findings, and the relevant legislative history. The law's protection of the voting rights of language minorities—specifically those "of Spanish heritage"—protects those whose native language is Spanish, a disadvantaged group that is not identical with all Hispanics.

And yet, the courts have never applied this clear answer. The statute has never been applied to protect these core, targeted beneficiaries. The population Congress sought to protect through the 1975 amendments still largely suffers from the same problems Congress enacted those amendments to address. Instead, a misreading of the language of the amendments has yielded irrelevant relief to other groups for generations.

1 The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, § 3(b) (1965) (amended 1975) (current version at 52 U.S.C. § 10301).

2 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400, §§ 203, 206 (1975) (current version at 52 U.S.C. § 10301).

3 *Id.* at § 207.

4 *Id.*

I. HISTORICAL CONTEXT FOR THE 1975 AMENDMENTS

When Congress amended the VRA in 1975, there was a lot going on in the voting rights arena of American politics. For one thing, the VRA had been on the books for a decade, and its emergency preclearance mechanism had expired and been renewed once before, in 1970, for five additional years, which meant it was up for renewal again.

President Gerald Ford had been in office for less than a year, and his predecessor Richard Nixon had by then been disgraced by the Watergate scandal. Early in the Nixon presidency, administration officials had essentially conjured the new term “Hispanic” into the English language on the advice of an Ad Hoc Committee.<sup>5</sup> That committee had initially been established by Secretary of Health, Education, and Welfare Caspar Weinberger, before later expanding to include representatives from the Census Bureau and the Office of Management and Budget. At its inception, the new term was applied to all those whose “origin or descent” was “Mexican,” “Puerto Rican,” “Cuban,” “Central or South American,” or “Other Spanish.”<sup>6</sup> By 1975, the term Hispanic had spread into common usage, with organizations using it in their names cropping up widely.<sup>7</sup> Therefore, at the time of the 1975 amendments, there was an accepted term for those whose “origin or descent” was in or from such Spanish-speaking lands.

The U.S. Commission on Civil Rights had recently released a series of relevant reports and memoranda, including a “Survey of Preliminary Research on the Problems of Participation by Spanish Speaking Voters in the Electoral Process”<sup>8</sup> and *The Excluded Student, Mexican American Education Study, Report III*.<sup>9</sup> These reports identified barriers to voting faced by “non-English speaking persons”<sup>10</sup> and a related “systematic failure of the educational process” that had generated comparatively “high illiteracy rates” and high-school dropout rates above 50% among that population.<sup>11</sup> And contemporaneous research backed up these conclusions: The Lyndon B. Johnson School of Public Affairs

spent 1975-1976 investigating conditions in Texas’s “colonias,” which it defined as “poor, rural unincorporated communit[ies] with] no formal ties with the governments of cities and towns,” and which therefore lacked “the kinds of services and amenities offered in urban areas such as piped water, treated sewerage [sic], and street maintenance.”<sup>12</sup> It concluded that residents were “almost exclusively Mexican-American”<sup>13</sup> and “the poorest of the poor.”<sup>14</sup> While the LBJ School appears to have assumed and therefore not mentioned it, in 1975, colonia residents (like the residents of the entire border region) were overwhelmingly Spanish speakers.<sup>15</sup> Recognizing that “the problems facing colonia residents . . . are many,” it “focus[ed] on water-related problems, including access to clean drinking water and sanitary sewage disposal,” as these were “some of the most immediate, tangible concerns of colonia residents.”<sup>16</sup>

The 94th “Watergate” Congress was among the least balanced by party in modern history, with Democratic majorities totaling 61 seats in the Senate and approximately 290 seats in the House (66%).<sup>17</sup> The congressional majority was able to pass anything it could agree on without fear of filibuster; with only a few Republican votes, it could even overcome any potential presidential veto.

It was in this context that the Ford Administration sent Assistant Attorney General Stanley Pottinger to Congress in March 1975 to explain “President Ford’s recommended bill[s],” which “propose[d] . . . changes [that] should be made in the Act.”<sup>18</sup> When he did so, Pottinger noted expressly that:

The proponents of additional legislation have suggested two major legislative needs in this area. First, they point

5 VOXXI, *How the Federal Government Settled on Calling Us ‘Hispanic,’* THE HUFFINGTON POST (Sep. 23, 2013), [https://www.huffpost.com/entry/latino-or-hispanic\\_n\\_3956350](https://www.huffpost.com/entry/latino-or-hispanic_n_3956350).

6 *Measuring Race and Ethnicity Across the Decades: 1790-2010: Mapped to 1997 U.S. Office of Mgt. and Budget Classification Standards*, U.S. Census Bureau (2015), [https://www.census.gov/data-tools/demo/race/MREAD\\_1790\\_2010.html](https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html).

7 See Hispanic Scholarship Fund, <https://www.hsf.net/about-hsf/>; Hispanic Organization of Latin Actors, <https://www.holaofficial.org/our-mission/>; The Association of Hispanic Arts, [https://web.archive.org/web/20051218072115/http://www.latinoarts.org/about\\_aha.html](https://web.archive.org/web/20051218072115/http://www.latinoarts.org/about_aha.html) (all founded in 1975). See also The Hispanic Congressional Caucus, <https://chc.house.gov/about> (founded 1976).

8 S. Rep. No. 94-295, at 26 (1975), reprinted in U.S.C.C.A.N. 774, 792 (citing to U.S. Comm’n on C.R. Staff Memorandum, at 997 (Apr. 23, 1975)).

9 *The Excluded Student - Report III: Educational Practices Affecting Mexican Americans in the Southwest*, Dr. Hector P. Garcia papers (1972), available at [http://archivesspace.tamucc.edu/repositories/4/archival\\_objects/4917](http://archivesspace.tamucc.edu/repositories/4/archival_objects/4917) (Special Collections and Archives, Mary and Jeff Bell Library, Texas A&M University-Corpus Christi) (last accessed July 5, 2021).

10 *Id.* at 26.

11 *Id.* at 28.

12 MARK ESTES, KINGSLEY E. HAYNES & JARED E. HAZLETON, *COLONIAS IN THE LOWER RIO GRANDE VALLEY OF SOUTH TEXAS: A SUMMARY REPORT* (1977).

13 *Id.*

14 *Id.*

15 The published data from the 1970 Census obscures this fact by combining “persons of Spanish Language” and those with “Spanish Surnames” into a single reported category. See *Persons of Spanish Language or Spanish Surname* (1970), [https://legacy.lib.utexas.edu/maps/atlas\\_texas/pop\\_spanish\\_lang\\_1970.jpg](https://legacy.lib.utexas.edu/maps/atlas_texas/pop_spanish_lang_1970.jpg). But the 1980 Census separately reported the number of respondents speaking Spanish at home, and its data reflects that Cameron County, Hidalgo County, Willacy County, and Starr County—the four counties of the Rio Grande Valley that today participate in the Rio Grande Valley Partnership—were overwhelmingly Spanish speaking five years after 1975. See *Characteristics of the Population: General Social and Economic Characteristics – Texas*, U.S. Department of Commerce, Bureau of the Census (1980), Table 172 “Nativity and Language for Counties: 1980” (showing that 78.85% of these counties’ residents aged 5 or above spoke Spanish at home).

16 Estes et al., *supra* note 12.

17 See *Congressional Profiles*, U.S. House of Representatives, <https://history.house.gov/Congressional-Overview/Profiles/94th/>; Party Division, U.S. SENATE: PARTY DIVISION (2021), <https://www.senate.gov/history/partydiv.htm>. The numbers shifted over the Congress due to deaths, resignations, and one member’s change of caucus.

18 *The Extension of the Voting Rights Act: Hearing Before the Subcommittee on Civil Rights and Constitutional Rights of the H. Judiciary Comm.*, 94th Cong. at 1-2 (1975) (statement by J. Stanley Pottinger, Asst. A.G., Civil Rights Division).

out that some states in which large numbers of non-English speaking Puerto Ricans, Mexican Americans or Native Americans reside conduct English-only elections, despite the existence of some court rulings that such minorities are entitled to bilingual elections. Second, they have alleged that other forms of discrimination against these minorities are sufficiently prevalent in some non-covered states to warrant expanding the special coverage provisions [for pre-clearance] to cover such states.<sup>19</sup>

These bills were eventually incorporated into and enacted as the VRA amendments of 1975.

## II. TEXT: “PERSONS WHO ARE . . . OF SPANISH HERITAGE”

What did the phrase “of Spanish heritage” mean to an ordinary English speaker in 1975?<sup>20</sup> Given that the statute uses the phrase in its definition of “language minority,” it seems clear that it must have to do with the use of the Spanish language. In the mid-1970s, “heritage” would have been understood by readers to be that which one received from one’s family. Then-current dictionaries defined the word to mean “property that descends to an heir,”<sup>21</sup> “something transmitted by or acquired from a predecessor,”<sup>22</sup> “that which comes or belongs to one by reason of birth,”<sup>23</sup> and, in legal usage, “that which has been or may be inherited by legal descent or succession” or “any property . . . that devolves by right of inheritance.”<sup>24</sup> And the inheritance in question is specified in the statute: “Spanish.” Given a natural reading and contemporary dictionary evidence, the phrase “persons who are . . . of Spanish heritage” seems to mean those who inherited the Spanish language from their forbearers—those for whom it is a “mother tongue,” a native language “learned on a mother’s knee.”

Notice that for this last sub-category of “language minority,” unlike the prior three, the legislative language focuses on linguistic inheritance, not on ethnic descent. Congress’s language protects “American Indian[s], Asian American[s], [and] Alaskan Natives” regardless of what language they may speak; for these groups, Congress focused on immutable characteristics of demography. But for the last (“persons who are . . . of Spanish heritage”), Congress avoided this construction, just after the U.S. government had coined an applicable term of art—“Hispanic”—perfectly capturing its content. Instead, Congress chose the enacted phraseology, which focuses protection on those who inherited the Spanish language, rather than those of Hispanic ethnic descent.

<sup>19</sup> *Id.* at 45.

<sup>20</sup> 1975 Amendments, *supra* note 2.

<sup>21</sup> Definition of “heritage,” in WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1967).

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

<sup>23</sup> Definition of “heritage,” in THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE: THE UNABRIDGED EDITION (1973).

<sup>24</sup> The Oxford English Dictionary further supports this reading, defining “heritage” as having a primary meaning dating back to 1225 of “[t]hat which has been or may be inherited” and related usages as “that which comes from the circumstances of birth; an inherited lot or portion; the condition or state transmitted from ancestors” dating to 1621. See Definition of “heritage,” in OXFORD ENGLISH DICTIONARY (2019 ed.).

## III. CLARIFICATION THROUGH WHOLE ENACTMENT: RELEVANCE OF CONGRESS’S LEGISLATIVE FINDINGS

Congress’s enacted legislative findings both prove that this was the meaning of “persons who are . . . of Spanish heritage” in the statute and explain why it was the congressional focus. Congress found “that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English.”<sup>25</sup> It found that English-language-only elections “excluded from participating in the electoral process” “language minority citizens.”<sup>26</sup> As codified, the prohibition of denials or abridgements of the right to vote because of language minority group status immediately follows these findings.<sup>27</sup>

Congress’s focus in creating a new protected class was entirely on the ability of communities of Americans “from environments in which the dominant language is other than English”<sup>28</sup> to participate in the larger political discussion and electoral process. It was not concerned about English-speaking Hispanics, who by that time had played central roles in American law, politics, and history for generations.<sup>29</sup> Perhaps recognizing this history, and seeing how it differed from the histories of the three other newly protected groups, the findings underscored that the 1975 amendments sought to protect not Hispanics as Hispanics, but only those Hispanics whose linguistic heritage prevented them from participating in politics and society in similar ways, whatever their personal, ethnic background.<sup>30</sup>

## IV. CONSISTENCY OF LEGISLATIVE HISTORY

The legislative history further underscores both the original understanding of the phrase and Congress’s reasoning for adopting

<sup>25</sup> 1975 Amendments, *supra* note 2, at § 203(f)(1).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at § 203(f)(2).

<sup>28</sup> *Id.* at § 203(f)(1).

<sup>29</sup> Among other Americans who would have fallen into the Hispanic category coined in the 1970s, who were English-speaking and fully capable of successfully participating in American political life long before enactment of the 1975 Amendment, prominent examples include: Supreme Court Justice Benjamin Cardozo, who proudly traced his family history to Spain, but “confessed in 1937 that his family preserved neither the Spanish language nor Iberian cultural traditions.” AVIVA BEN-UR, SEPHARDIC JEWS IN AMERICA: A DIASPORIC HISTORY 86 (2012); Senator Charles Dominique Joseph Bouligny, elected from Louisiana in the 1820s; and Octaviano Ambrosio Larrazolo, who was born in Chihuahua, before serving New Mexico as both Governor and Senator in the early 1900s. *Larrazolo, Octaviano Ambrosio*, U.S. House of Representatives: History, Art & Archives, <https://history.house.gov/People/Detail/15032401304>.

<sup>30</sup> This is not to say that English-speaking individuals who are Hispanic are never protected by the VRA. When they are part of a recognized racial group (a minority in a given state or locality), such individuals would be entitled to the same potential protections as any other English-speaking racial minority. See Pottinger statement, *supra* note 18, at 2 (“In my view . . . the Voting Rights Act, in its various protections against discrimination on account of race or color, does to some extent already cover Mexican-Americans and Puerto Ricans.”); *Rice v. Cavetano*, 528 U.S. 495, 512 (2000) (holding that the term “race” was expansive and covers each ethnic and racial group, separately); *Or v. Mitchell*, 400 U.S.

it. The relevant legislative history includes both President Ford's signing statement and the Senate Judiciary Committee's Report on the 1975 amendments.

When President Ford signed the amendments into law on August 6, 1975, he was brief and to the point, and he left no doubt as to the intention of the amendments. "The bill I will sign today . . . broadens the provisions [of the VRA] to bar discrimination against *Spanish-speaking Americans*."<sup>31</sup>

The Senate Report, at far greater length, makes the same point. The Report clarifies that the "focus" of the amendment "is to insure that the Act's special 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*."<sup>32</sup> Indeed, the Senate Judiciary Committee's Subcommittee on Constitutional Rights crafted the amendment as a result of "7 days of hearings and testimony from 29 witnesses . . . document[ing] 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*."<sup>33</sup> The Report went on:

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 . . . . No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential 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.<sup>34</sup>

The Committee even postulated a potential reason for these differences:

the historical experience of these groups is far different from the European immigrants who came to North American

[sic] and eventually became part of the Great Melting Pot. For the most part, the Spanish-heritage, American Indian and Alaskan Native groups were living on territory suddenly annexed by the United States; in most cases their ancestors had been living on the same land for centuries. These groups stayed on their original lands after the annexation, and while mobility certainly existed within their own cultures, opportunity for mobility within the European-dominated American culture was often denied them, most frequently by poor educational institutions and unresponsive political institutions.<sup>35</sup>

Accordingly, the Report reflects that Congress crafted the amended language to directly address "the problems of 'language minority groups,' that is, racial minorities whose dominant language is frequently other than English."<sup>36</sup> The Report diagnoses that "[t]he central problem documented is that of dilution of the vote—arrangements by which the votes of minority electors are made to count less than the votes of the majority."<sup>37</sup> It flatly states that "Language minority group as defined in this title, means minority persons who have a native language other than English,"<sup>38</sup> then it explains that under the amendments, "[a]ll of the special remedies of the Voting Rights Act are extended to citizens of language minority groups" based on Congress's finding "that these minority citizens are from environments in which the dominant language is other than English."<sup>39</sup>

The Report also establishes that Congress chose this language knowing full well that it had other alternatives. It describes one such potential alternative definition in footnote 14, citing a letter from Meyer Zitter, the Population Division Chief at the Census Bureau, to the House Judiciary Committee, dated April 29, 1975, in which he argued for a definition of "Persons of Spanish heritage" encompassing: "(a) 'persons of Spanish language' in 42 States and the District of Columbia; (b) 'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico and Texas; and (c) 'persons of Puerto Rican birth or parentage in New Jersey, New York and Pennsylvania.'"<sup>40</sup> But this alternative definition not only didn't make it into the text of the *statute*, it didn't even make it into the text of the *Committee Report*. The footnote definition reflects a road not taken, rather than contradictory evidence.

The legislative history makes plain what the legislative context and legislative findings made nearly certain. Congress knew how to define a protected class by descent, birth, or parentage. It had available the newly coined governmental term "Hispanic" to capture that alternative. And it chose instead to protect "persons who are . . . of Spanish heritage"—not all those

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112, 147 (1970) (recognizing before the 1975 Amendments that the VRA protected "not only Negroes but Americans of Mexican ancestry"); *Harding v. Co. of Dallas*, 948 F.3d 302, 308-15 (5th Cir. 2020) (holding that non-Hispanic whites in a "majority-minority" locality share same protections under the VRA as any other racial minority and applying same legal standards to their Section 2 claim that were developed in cases brought by other racial minorities). However, one cannot conclude from these sources that *all* Hispanics share a race, a facially untrue statement both under the modern usage of the term (compare racial descriptions of a Dominican and a Chilean) and the understanding of race at the 1965 enactment of the original VRA (in 1960, the Census Bureau reclassified perceived Mexican-Americans as "White," but did not do the same for perceived Puerto Ricans).

31 Remarks of the President at the Signing of the Voting Rights Act, The Rose Garden (Aug. 6, 1975) (digitized from Box 14 of the White House Press Releases at the Gerald R. Ford Presidential Library) (emphasis added).

32 S. Rep. No. 94-295, at 9 (1975), *reprinted in* U.S.C.C.A.N. 774, 775 (emphasis added).

33 *Id.* at 24 (emphasis added).

34 *Id.* at 31.

35 *Id.* at 38-39.

36 *Id.* at 38.

37 *Id.* at 27.

38 *Id.* at 46.

39 *Id.*

40 *Id.* at 24.

in the Hispanic minority, but only those “minority persons who have a native language other than English.”<sup>41</sup>

#### V. HISTORY OF CASES MISAPPLYING THIS PROVISION

Despite this evidence for the original meaning of the statutory text, I have found *no* cases litigated under either Section 2 or Section 5 of the Voting Rights Act since 1975 which interpret the protected class of “persons who are . . . of Spanish heritage” to include precisely and only those Hispanics whose native language is Spanish. I have found *no* cases in which any plaintiff (neither a private plaintiff, nor the Department of Justice) has sought relief from any court for, specifically, a population of Spanish-speaking Hispanics *as* Spanish speakers. I have found *no* cases where any state or local government or any public official sued in an official capacity has argued that the phrase protects specifically Spanish-speaking Hispanics, rather than Hispanics in general.

Instead, in case after case spanning 46 years, the voting rights bar has treated the phrase as a synonym for “Hispanic.”<sup>42</sup> As a result, no court has yet had the opportunity to consider, specifically, the rights of the Spanish-speaking Hispanic population under the VRA or whether those rights are served by the relief that has typically been sought and obtained by the self-appointed, English-speaking spokesperson for Hispanics as a whole. To date, every redistricting case ostensibly affording relief to “persons who are . . . of Spanish heritage” has instead afforded relief to “Hispanics”—a group Congress chose *not* to protect in the 1975 amendments addressing language minorities.

#### VI. STATUS OF PROTECTED CLASS TODAY

The class of “persons who are of . . . Spanish heritage” does not include all Hispanics, but only those Hispanics “who have a native language other than English.”<sup>43</sup> *They* were the American citizens Congress found to have consistently been diluted into districts with a majority they could not understand, who did not know of or care about their specific needs and left them with “poor

educational institutions and unresponsive political institutions.”<sup>44</sup> Residents of the colonias, living without clean water or sewage services, epitomized the plight of this group.

The difference remains material, as approximately 83% of Hispanic Census respondents now speak English “well” or better.<sup>45</sup> Indeed, today, 46 years later, the conditions of the average Hispanic person in America look markedly different, and better, than they did in 1975. For example, the middle quintile of American Hispanic households has gone from a Census-estimated mean income of \$38,222 (in 2019 dollars) to \$56,285 in 2019—a 46.9% increase;<sup>46</sup> for comparison, the same period saw the mean income for the middle quintile of White, non-Hispanic Americans go from \$53,910 (in 2019 dollars) to \$76,252 in 2019—a 37.8% increase.<sup>47</sup> The same period saw the overall Hispanic household median and mean incomes rise from \$51,124 and \$59,698, respectively, to \$68,703 (up 34.4%) and \$98,088 (up 64.3%), respectively.<sup>48</sup> Within this period, the twenty years spanning from 2000 to 2020 saw the share of American “Hispanics with a bachelor’s degree or higher nearly double.”<sup>49</sup>

But it does not appear that the same can be said of America’s native-Spanish-speaking citizens. To return to an emblematic example, the colonias still exist. Texas defines a colonia as a

neighborhood or community [in] a geographic area located within 150 miles of the Texas-Mexico border that has a majority population composed of individuals and families of low and very low income[, who] lack safe, sanitary and sound housing and are without basic services such as potable water, adequate sewage systems, drainage, utilities, and paved roads.<sup>50</sup>

More than 400,000 Americans continue to live in such isolated poverty.<sup>51</sup> “Almost 55 percent of colonia residents do not graduate from high school”<sup>52</sup>—a statistic unmoved from the mid-1970s.

41 *Id.* at 46.

42 There are many precedents following this pattern. *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (discussing throughout the rights of “Hispanics” and “Latinos” under § 2 of the VRA, without analysis of *which* provision of § 2 was applicable); *LULAC v. Perry*, 548 U.S. 399, 425, 427 (2006) (describing VRA’s requirement that “members of [a racial group not] . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,” before then assessing opportunities of “Latinos” through an extensive discussion of Census data on Hispanics); *Rodriguez v. Bexar County*, 385 F.3d 853, 859-71 (5th Cir. 2004) (describing VRA claims that map “diluted the influence of Hispanic votes” and then addressing the merits by reference to Hispanic Census data); *LULAC v. Clements*, 999 F.2d 831, 838 (5th Cir. 1993) (describing how “Plaintiffs contend that electing trial judges . . . violates § 2 of the [VRA] by . . . diluting the voting power of Hispanics and blacks” by “proceed[ing] on behalf of language and ethnic minorities in different combinations in different counties”); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 371, 443, 373-74 (S.D.N.Y. 2004) (citing statutory language and definition at n.28 and Supreme Court’s “instruct[ion], when voting rights claims are based on a combination of distinct ethnic and language minority groups,” but then analyzing “persons of . . . Spanish heritage” entirely by reference to Hispanic Census data).

43 1975 Amendments, *supra* note 2.

44 *Id.*

45 *English proficiency among Hispanics U.S. 2019*, STATISTA (2021), <https://www.statista.com/statistics/639745/us-hispanic-english-proficiency/>. This figure is for all Hispanic respondents, including non-citizens. Taking into account that it takes time for immigrants to learn English, it is likely that the figure for American citizens who are Hispanic is considerably higher.

46 *Historical Income Tables: Households*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>.

47 *Id.*

48 *Id.*

49 DON BEYER, *THE ECONOMIC STATE OF THE HISPANIC COMMUNITY IN AMERICA: KEYS TO BUILDING A BETTER ECONOMY AFTER COVID-19* (2020), <https://www.jec.senate.gov/public/cache/files/23062796-f531-43cf-bbc1-d68a0e7c3244/hhm2020-economicstateofthehispaniccommunityinamerica-final.pdf>.

50 *Background on the Colonias*, Texas Department of Housing & Community Affairs, <http://www.tdhca.state.tx.us/oci/background.htm>.

51 *Colonia in Texas*, <https://people.uwec.edu/ivogeler/w188/border/coloniastx.htm>. But note that this source recognizes that at least some colonias have acquired basic services in the interim.

52 Patrick Strickland, *Living on the edges: Life in the colonias of Texas Elections*, AL JAZEERA (2016), <https://www.aljazeera.com/features/2016/11/5/>

More generally, where Spanish-speaking Hispanics comprise the majority, educational institutions consistently underperform as compared to other areas, just as they did in 1975.<sup>53</sup> I invite the reader to draw reasonable inferences on the responsiveness of the relevant political institutions.

## VII. CONCLUSION

For 46 years, courts have compelled the drawing of districts affording America's Hispanic population the opportunity to elect its preferred candidates in nominal reliance on the language of the 1975 VRA amendments. But America's native-Spanish-speaking citizen population has neither disappeared, nor seen the drawing of districts where it comprises a majority. Native-Spanish-speaking Hispanics today remain subject to dilution among a larger, English-speaking population, even if judicial interventions have required that that majority in which they are diluted look slightly more like them.

That was not the end sought by Congress, and it is indefensible under the enacted statute. The native-Spanish-speaking beneficiaries whom Congress sought to protect have yet to even *begin* to receive the protection enacted almost five decades ago. The relief granted in their name has totally missed the mark, instead sweeping into its ambit others whom Congress chose not to include in the new protected class and further racializing America's politics.

Not only have we not completed the work set for us by Congress in 1975; arguably, we have not yet begun it.

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[living-on-the-edges-life-in-the-colonias-of-texas](#).

<sup>53</sup> For example, drawing from the most recent information made available by the Texas Education Agency, Texas has 10 Independent School Districts whose student populations are at least 80% Hispanic that also have a majority of students enrolled in bilingual or English-language-learner programs. *2018–19 Texas Academic Performance Reports*, Texas Education Agency, <https://rptsrv1.tea.texas.gov/perfreport/tapr/2019/index.html>. Eight have lower percentages of students registering STAAR scores at grade level than the state average. Excluding the ISD with insufficient test-takers to disclose data, all nine have average ACT scores below the state norm, and six have average SAT scores below the state norm.

