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Robyn S. Stoter

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DISCRIMINATION & DEFERENCE: MAKING A CASE FOR THE EEOC'S EXPERTISE WITH ENGLISH-ONLY RULES

I. INTRODUCTION

In famous footnote four of *United States v. Carolene Products*,¹ the Supreme Court asserted its unfettered devotion to preventing “prejudice against discrete and insular minorities.”² Somehow, a mere sixty years later, courts seem to have forgotten their integral role as protector of minority rights.³ When faced with questions regarding English-only rules in the workplace, the majority of circuit courts have upheld English-only rules.⁴ Instead of conducting a “more searching judicial inquiry,” courts frequently dismiss cases by finding that plaintiff employees failed to make out a prima facie case of national origin discrimination.⁵ The Equal Employment Opportunity Commission (EEOC) guidelines, however, direct courts to closely scrutinize English-only rules because they are inherently discriminatory.⁶

Inasmuch as the United States is a nation of immigrants, the United States does not have an official declared language.⁷ Nevertheless, thirty

1. 304 U.S. 144 (1938).

2. See *id.* at 152 n.4 (calling for stricter review of cases involving “prejudice against discrete and insular minorities”).

3. See generally *Garcia v. Spun Steak*, 998 F.2d 1480, 1490 (9th Cir. 1993) (deciding against plaintiff employee); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (finding radio station did not discriminate against bilingual employee); *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980) (determining that plaintiff employee was not entitled to exercise his language preference); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995) (dismissing plaintiff employee’s case); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991), *aff’d*, 985 F.2d 578 (11th Cir. 1993) (affirming decision against employee without written opinion), *cert. denied*, 508 U.S. 910 (1993).

4. See *Jurado*, 813 F.2d at 1410 (explaining that Arbitron market ratings were valid business reasons for implementing English-only rule); *Gloor*, 618 F.2d at 267-68 (implying that Gloor advanced valid business reasons that defeated employee’s claim of discrimination); *Long*, 894 F. Supp. at 942 (detailing customer and employee complaints to conclude that workplace hostility necessitated English-only rule); *Gonzalez*, 1991 WL 11009376, at *2-3 (finding poor workplace morale justified implementation of English-only rule).

5. See *Carolene*, 304 U.S. at 152 n.4 (calling on courts to employ more searching judicial inquiry when considering cases involving discrete and insular minorities).

6. See *Speak-English-only Rules*, 29 C.F.R. § 1606.7 (2008) (“[T]he Commission will presume that such a rule violates [T]itle VII and will closely scrutinize it.”).

7. See *English Language Unity Act of 2007*, H.R.J. Res. 997, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-997> (attempting to declare English official language of United States). On January 18, 2007, Colorado Congressman Tom Tancredo introduced a joint resolution pro-

states have amended their constitution or adopted legislation to declare English their official language.⁸ Likewise, businesses have begun implementing English-only rules to declare English the official language of their workplace.⁹ Even though some of these rules can be supported by legiti-

posing to make English the official language of the United States. *See id.* (introducing bill to make English official language of United States). To date, this bill has not been approved. *See* U.S. English, Inc., Legislative History: Legislation (2005), <http://www.usenglish.org/inc/legislation/history/legislation.asp> (last visited Apr. 14, 2008) (providing extensive legislative history of official English legislation). Since 1981, House representatives have futilely proposed over fifty similar amendments without success. *See id.* (listing numerous attempts to make English official language of United States). *See generally* William Lynch, *A Nation Established by Immigrants Sanctions Employers for Requiring English to be Spoken at Work: English-Only Work Rules and National Origin Discrimination*, 16 TEMP. POL. & CIV. RTS. L. REV. 65, 67 (2006) (finding it “ironic that a nation established by immigrants would restrict . . . [immigrants] from speaking their primary tongue”).

8. *See* ALA. CONST. art. I, § 36.01 (making English official language of state); COLO. CONST. art. II, §30a (same); FLA. CONST. art. II, § 9 (same); HAW. CONST. art. XV, § 4 (same); NEB. CONST. art. I, § 27 (same); ALASKA STAT. ANN. § 44.12.300 (1998) (same); ARK. CODE ANN. § 1-4-117 (West 1987) (same); GA. CODE ANN. § 50-3-100 (West 1996) (same); IDAHO CODE ANN. § 73-121 (2007) (same); 5 ILL. COMP. STAT. ANN. 460/20 (West 1991) (same); IND. CODE § 1-2-10-1 (1984) (same); IOWA CODE ANN. § 1.18 (West 2002) (same); MISS. CODE ANN. § 3-3-31 (West 1987) (same); MO. ANN. STAT. §1.028 (West 1998) (same); MONT. CODE ANN. § 1-1-510 (1995) (same); N.H. REV. STAT. ANN. §3-C:1 (1995) (same); N.C. GEN. STAT. ANN. § 145-12 (West 1987) (same); N.D. CENT. CODE § 54-02-13 (1987) (same); S.C. CODE ANN. § 1-1-696 (1987) (same); TENN. CODE ANN. § 4-1-404 (West 1984) (same); UTAH CODE ANN. § 63-13-1.5 (West 2000) (same); VA. CODE ANN. § 1-511 (West 2005) (same); WYO. STAT. ANN. § 8-6-101 (1996) (same); *see also* Rob Toonkel, *Governor's Signature Makes English the Official Language of Kansas* (May 11, 2007), <http://www.us-english.org/inc/news/preleases/viewRelease.asp?ID=252> (last visited Apr. 14, 2008) (noting that Kansas passed legislation in May 2007 making English official language). While many of the initial declarations were merely symbolic, the more recent declarations appear to be a byproduct of the growing anti-immigration sentiment within the United States. *Compare* Gutierrez v. Mun. Ct. of S.E. Jud. Dist., 848 F.2d 1031 (9th Cir. 1988); *Oklahoma High Court: English-Only Plan is Unconstitutional*, ASSOCIATED PRESS, Apr. 3, 2002, <http://www.freedomforum.org/templates/document.asp?documentID=15998> (“[T]wenty-two other states have laws adopting English as the official language but are non-prohibitive, brief and symbolic.”), *Arizona High Court Finds English-Only Law Unconstitutional*, ASSOCIATED PRESS, Apr. 29, 1998, <http://www.freedomforum.org/templates/document.asp?> (“[M]ost [official English declarations] are largely symbolic”), *with* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (noting that initiative to pass state constitution amendment was created by interest group, not legislature), and *ACLU Fails to Stop English-Only Law* (Sept. 6, 2001), <http://newsmax.com/archives/articles/2001/9/5/200046.shtml> (discussing voter approved English-only policy in Utah).

9. *See generally* Christopher D. R. Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 262-64 (1998) (discussing English-only rules in workplace); James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 58-61 (2004) (explaining popularity growth of English-only rules in business setting); Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*,

mate business necessity or safety concerns, arguably many English-only rules are linked to the building xenophobia within the nation.¹⁰ Therefore, courts should be inherently suspicious of English-only rules because of their propensity to act as a cloak for discrimination.¹¹

In recent decades, anti-immigration sentiments have been increasing.¹² Consequently, it is unsurprising that private business owners and states have enacted rules to make English the official language of their respective workplaces and states.¹³ History frequently repeats itself.¹⁴ En-

27 TEX. TECH L. REV. 33, 63-71 (1996) (considering role of English-only rules in workplace).

10. See Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 849-50 (1995) (arguing English-only rules are product of xenophobia); Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG. 7-8, Aug. 5, 2007, available at <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t./html?> (highlighting how Hispanic neighbors believed their town debate on illegal immigration felt more like condemnation of Hispanic culture); Manuel Munoz, *Leave Your Name at the Border*, N.Y. TIMES, Aug. 1, 2007, at A19 ("Spanish was and still is viewed with suspicion: always the language of the vilified illegal immigrant."); Anthony Stitt, *English-only Rule: Safety Issue or Discrimination?*, COURIER TIMES, Mar. 20, 2000, available at <http://www.englishfirst.org/workplace/workplaceestee-lauder.htm> (statement of Marielena Hincapie, civil rights lawyer in San Francisco) ("English-only rules are due to xenophobia People are afraid of other languages being spoken. They are afraid other nationalities are taking over the work force. That fear leads us to creating rules like this.").

11. See Locke, *supra* note 9, at 53-62 (recounting body of English-only case law where courts uphold rules as business necessity).

12. See Adams, *supra* note 10, at 849-50 (noting rise in enactment of English-only rules and EEOC law suits); Kotlowitz, *supra* note 10, at 1 (recounting how "the texture of the town changed significantly" during 1990s); Munoz, *supra* note 10, at A19 (discussing American public's racial animus and Hispanic efforts to assimilate).

13. For further discussion of America's anti-immigration sentiments, see *supra* note 10 and accompanying text.

14. See U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2003 1 (2004) (noting Latin Americans comprise 53.3% of foreign born immigrants); U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2000 2 (2003) ("Between 1990 and 2000, the foreign-born population increased by 57 percent, from 19.8 million to 31.1 million, compared with an increase of 9.3 percent for the native population and 13 percent for the total U.S. population."); U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN BORN POPULATION IN THE UNITED STATES: 1997 13, tbl. 3-1 (1997); Antoinette Sedillo Lopez, Symposium, *Latinas in Legal Education Through the Doors of Opportunity: Assimilation, Marginalization, Cooperation or Transformation?*, 13 AM. U. J. GENDER SOC. POL'Y & L. 109, 119 (2005) (refuting notion that Latino immigration wave differs from prior waves because Latinos pose threat to American values); EllisIslandRecords.org, The Peopling of America, http://ellislandrecords.org/immex/weix_5_3.asp? (last visited Aug. 25, 2007) (providing historical background and statistics); Paul Lombardo, Image Archive on the American Eugenics Movement, *Eugenics Laws Restricting Immigration*, <http://www.eugenicsarchive.org/html/eugenics/essay9text.html> (last visited Aug. 25, 2007) ("The resulting law, the Immigration Act of 1924, was designed consciously to halt the immigration of supposedly 'dysgenic' Italians and eastern European Jews, whose numbers had mushroomed during the period from 1900 to 1920."); US English, Inc., <http://www.us-english.org> (last visited Aug. 25, 2007) (arguing English should be official language of United States and explaining that learning English is first step towards

English-only rules seem to be the natural response to the growing uneasiness many Americans feel about the recent flux of immigrants.¹⁵

assimilation). At the turn of the twentieth century, the United States experienced an immigration wave not unlike today's immigration wave. See U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2003, *supra*, at 1 (noting today's immigration wave seems to be predominately composed of Latinos). Between 1890 and 1930, 4.6 million Italians immigrated to the United States, making Italians by far the largest immigrant population. See U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN BORN POPULATION IN THE UNITED STATES: 1997, *supra* (providing statistics of United States immigration). Upon arrival, many Italians chose not to learn English, or never had to learn English because they stayed within their own cultural enclaves. See GENE P. VERONESI, ITALIAN-AMERICANS & THEIR COMMUNITIES OF CLEVELAND 139 (Cleveland State University Library 1977), available at <http://www.clevelandmemory.org/italians/partii.html> (last visited Aug. 25, 2007) (blaming 1924 Immigration quota partially on Italians' failure to assimilate). The flux of immigrants resisting assimilation—coupled with the outbreak of World War I—caused the American peoples' view on immigration to shift from one of open doors to one of nationalist sentiment. See EllisIslandRecords.org, *supra* (noting outbreak of World War I caused rise in nationalism and suspicion of immigrants).

Today's situation is not much different. See U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2002 (2003) (providing statistics of Latin American immigration that mirror Italian immigrant wave). The important discrepancy between the turn of the twentieth and twenty-first centuries is which groups are immigrating, being that Americans tend to direct anti-immigration sentiments at the most visible migrant group. See Lombardo, *supra*, (emphasizing that Americans are concerned with polluting American population with "inferior stock," regardless of nationality). From 1850 to 1970, Irish, Germans and Italians respectively comprised the largest percentage of immigrants. See U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN BORN POPULATION IN THE UNITED STATES: 1997, *supra*, at 13, tbl. 3-1 (providing statistics of largest immigrant populations per decade). Since the 1980s, Mexicans and Latin Americans have continuously comprised the largest immigrant group, and like their Italian predecessors, Latin Americans strive to retain their culture. U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2003, *supra*, at 1 (reporting that Latin Americans comprised 53.3% of 2003 immigration population). Either way, as one scholar noted, "change can be quite threatening and the 'browning of America' has been met with some alarm." Lopez, *supra*, at 119.

15. See Leonard, *supra* note 9, at 58 (citing fact that one in five homes speaks different language as contributing factor to rise in English-only rules); see also Kotlowitz, *supra* note 10 ("[W]hile illegal aliens are looking for their dreams, the American people are losing theirs."); Ellis Island Foundation, Inc., The Peopling of America, http://www.ellisland.org/immex/wseix_5_5.asp? (last visited Aug. 25, 2007) (noting that economic recession in early 1990s caused resurgence of anti-immigration sentiments because Americans believed that large immigration wave stunted economic growth). At the turn of the twentieth century, skyrocketing immigration numbers scared many Americans, resulting in a call for restricting the number of immigrants. See Lombardo, *supra* note 14 (stating number of immigrants troubled Americans, leading to eugenics movement). Propelled by a growing concern about the increasing competition from cheap foreign labor, Americans turned to eugenics to make biological arguments for restricting choice immigrant groups. See *id.* (explaining that Americans turned to biological and scientific arguments to restrict immigration). In 1924, after being convinced by eugenics professionals that "the American gene pool was being polluted by a rising tide of intellectually and morally defective people," Congress passed the Immigration Restriction Act of 1924, which scaled down the number of immigrants based on their present percentage of the United States population according to the 1890s. See *id.* (discussing passage of 1924 Act).

In the business realm, alarmed employers responded by enacting English-only rules.¹⁶ Cloaked in terms like “business necessity” and “workplace harmony,” English-only rules commonly pass judicial scrutiny, arguably because many courts refuse to apply the EEOC guidelines.¹⁷ Only the Tenth Circuit, in *Maldonado v. City of Atlas*,¹⁸ recognized the inherently discriminatory nature of the English-only rules, a proposition the EEOC propounded for years.¹⁹

16. See, e.g., *EEOC v. Wynell, Inc.*, 91 F.3d 138 (5th Cir. 1996) (recognizing that employer had enacted English-only rule to prevent Hispanic employees from communicating); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993) (describing how employer had enacted English-only rule to prohibit employees from speaking Spanish on job); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980) (illustrating how English-only rules are directed at prohibiting use of Spanish on job); *Gonzalo v. All Island Transp.*, No. CV-04-3452, 2007 WL 642959, at *1 (E.D.N.Y. Feb. 26, 2007) (summarizing employer's attempt to prohibit Spanish); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 411 (S.D.N.Y. 2005) (reporting how English-only rule was designed to prevent workers from communicating in Spanish); *EEOC v. Beauty Enter.*, No. 3:01CV378 (AHN), 2005 WL 2764822, at *1 (D. Conn. Oct. 25, 2005) (noting employees alleged that English-only rules are “enforced more frequently and more aggressively against Hispanics”); *Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000) (describing rule as “no-Spanish” rule instead of English-only rule); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 232 (N.D.N.Y. 1999) (analyzing employee's claim that she was discriminated against in part because of her Hispanic heritage); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995) (explaining that employer's English-only rule was implemented in response to complaints); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *1 (M.D. Fla. June 3, 1991) (noting English-only rule prevented bilingual employees from communicating in Spanish); see also EEOC, *EEOC Litigation Settlements: July 2003*, Jan. 9, 2004, <http://www.eeoc.gov/litigation/settlements/settlement07-03.html> (highlighting \$1.5 million settlement agreement for Hispanic housekeeping staff subjected to blanket English-only rules at Colorado Central Station Casino, Inc.).

17. See *Spun Steak*, 998 F.2d at 1487 (holding that employers have undeniable right to limit employee conversations during work hours); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987) (holding that demographic and marketing concerns constituted valid business necessity for implementing English-only rule); *Gloor*, 618 F.2d at 267 (holding that employer's enactment of English-only rule to better serve customers was legitimate business necessity); *Gonzalo*, 2007 WL 642959, at *2 (holding that English-only rule was business necessity to prevent miscommunication between taxi dispatchers and drivers); *Sephora*, 419 F. Supp. 2d at 416-17 (determining that English-only rule met business necessity requirement because customers preferred English speaking sales representatives); *Roman*, 53 F. Supp. 2d at 237 (explaining that English-only rule was necessary to alleviate interpersonal, racial tensions); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (deciding that English-only rule was justified by need to improve interpersonal relations among Church employees); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1357 (S.D. Fla. 1997) (concluding that supervisory need to understand employees constituted business necessity); *Long*, 894 F. Supp. at 940 (holding that English-only rule justifiable to alleviate tensions between Spanish and non-Spanish speaking employees).

18. 433 F.3d 1294 (10th Cir. 2006), *overruled in part by Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

19. See *id.* at 1306 (acknowledging EEOC guidelines' burden-shifting argument that employers should bear burden of showing why English-only rule is necessary).

This Note discusses the current circuit split over English-only rules and the proper role of the EEOC guidelines.²⁰ Part II discusses the various litigation theories plaintiffs utilize to challenge English-only rules and the integral role of the EEOC guidelines with these claims.²¹ Part III provides a detailed analysis of how these claims played out in conjunction with the EEOC guidelines and concludes that courts should follow the *Gutierrez v. Municipal Court of Southeast Judicial District., Los Angeles*²² and *Maldonado* court approaches, in particular, their deference to the EEOC guidelines and acknowledgement that English-only rules may be discriminatory in nature.²³

Part IV provides an analysis of the problems with the current governing circuit court case law.²⁴ Finally, Part V offers alternative solutions for addressing language problems in the workplace or, at least, how to properly tailor English-only rules to minimize or prevent discrimination.²⁵ This Note ultimately concludes that although there are real business necessities that justify English-only rules, the present case law does not provide employees with adequate protection against employers' anti-immigration and discriminatory motives for implementing English-only rules.²⁶ To this end, courts have failed to conduct a "more searching judicial inquiry," which is necessary to shield non-English and bilingual speakers against the inherently discriminatory nature of English-only rules.²⁷

20. For further discussion of the EEOC guidelines' proper role, see *infra* notes 153-200 and accompanying text.

21. For further discussion of the various litigation theories available for employees to challenge English-only rules, see *infra* notes 28-68 and accompanying text.

22. 848 F.2d 1031 (9th Cir. 1988).

23. For further discussion of how courts have approached English-only rules, either upholding or striking the rules down, see *infra* notes 69-152 and accompanying text.

24. For further discussion of problems with current case law, see *infra* notes 153-217 and accompanying text. Overall, the majority approach to the EEOC guidelines, business necessity, workplace hostility and adherence to the characterization of language usage as merely a preference, permits employers to use these factors as justification to uphold what are often discriminatory English-only rules. For a further discussion of courts' justifications for allowing English-only rules and refusing to adopt the EEOC guidelines, see *infra* notes 108-140 and accompanying text.

25. For further discussion of alternative methods employers could use in lieu of English-only rules to resolve business problems and necessity, see *infra* notes 229-31 and accompanying text.

26. For further discussion of the notions that English-only rules are inherently discriminatory and that case law does not adequately address the discriminatory danger of these rules, see *infra* notes 153-234 and accompanying text.

27. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining that cases of minority discrimination should be subject to stricter review).

II. LITIGATION THEORIES: PICKING A STRATEGY FOR BATTLE

A garden variety of litigation theories exist for employees to challenge their employers who implement English-only rules.²⁸ Claims brought under Title VII of the 1964 Civil Rights Act (Title VII) are arguably the most common litigation theories presented; however, the success of these suits usually rests on the court's approach to the EEOC guidelines.²⁹ Additionally, employees may initiate claims under the Civil Rights Act of 1966—generally referred to as Section 1981 and Section 1983 claims—against employers, depending on whether their employers are private or public employers.³⁰ Finally, employees may pursue actions against public employers based on First Amendment claims.³¹

A. Title VII Claims: A Brief History

By enacting Title VII, Congress sought to eradicate employment practices that appear neutral on their face, but discriminate in application.³² The passage of Title VII created the EEOC, an administrative agency that was supposed to be the enforcement mechanism of Title VII.³³ Because

28. See U.S. CONST. amend. I (protecting speech); 42 U.S.C. §§ 1981, 1983 (1996) (providing private and public employee discrimination suits); 42 U.S.C. § 2000e (1964) (providing employment discrimination actions).

29. See Lynch, *supra* note 7, at 78-80 (summarizing courts' approaches to disparate impact versus treatment cases and constitutional claims).

30. See 42 U.S.C. §§ 1981, 1983 (1996) (permitting suits against private and public employers).

31. See U.S. CONST. amend. I (protecting freedom of speech).

32. See Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (recounting how employer "regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons"); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress . . . [was to remove] tests neutral on their face, and even neutral in terms of intent . . . [but] 'freeze' the status quo of prior discriminatory employment practices."); see also 42 U.S.C. § 2000e-2 (1964) (prohibiting discrimination based on race, religion and national origin). Title VII provides in pertinent part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2.

33. See 21 AM. JUR. *Trials* §4, at 1 (2007) (recounting history of Title VII of 1964 Civil Rights Act and birth of EEOC). During the creation of the 1964 Civil Rights Act (1964 Act), parties divided over Title VII and the EEOC's power, resulting in a filibuster. See *id.* (theorizing that disagreement over whether to give EEOC full executive administrative agency powers caused 1964 filibuster). To save the 1964 Act, members of Congress agreed to the Dirksen-Mansfield Compromise, which stripped the EEOC of its enforcement powers to compel compliance with

Title VII only allowed the EEOC to bring causes of action against employers who engaged in a “pattern or practice” of discrimination, Title VII’s private right of action became instrumental in employment discrimination suits.³⁴

Both disparate treatment and disparate impact claims may be brought under Title VII.³⁵ These litigation theories are not mutually exclusive.³⁶ Therefore, employees commonly pursue both claims because each theory contains weaknesses.³⁷

1. Title VII Disparate Treatment Claims: Intentional Discrimination Theory

Under a disparate treatment claim, employees advance an intentional discrimination claim that entails a three step burden-shifting formula.³⁸ To succeed, plaintiff employee must first make out a prima facie case that the employer intentionally discriminated against the employee based on national origin.³⁹ If plaintiff employee succeeds in establishing a prima

Title VII. *See id.* (agreeing to shift burden onto private party bringing suit). Subsequently, the EEOC could only seek voluntary resolution of disputes or initiate employment suits where the employer engaged in a “pattern or practice” of discrimination. *See* 42 U.S.C. § 2000e-6 (describing limited conditions under which attorney general may act). Thus, the private right of action granted under Title VII became imperative to employees. *See* 42 U.S.C. § 2000e-5 (permitting employee to file private suit).

34. *See* 42 U.S.C. § 2000e-5 (creating private right of action); 42 U.S.C. § 2000e-6 (granting EEOC limited authority to bring suits). Title VII’s private right of action does not allow employees to run out and file discrimination claims on a whim. *See* 42 U.S.C. § 2000e-5 (describing requirements for suit). Employees must achieve administrative exhaustion first. *See Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 832 (1976) (stressing that exhaustion of administrative remedies is required before employees may file private action); *Briones v. Runyon*, 101 F.3d 287, 289 (2d Cir. 1996) (requiring administrative exhaustion before initiating private claim) (citations omitted); *Francis v. Brown*, 58 F.3d 191, 192 (5th Cir. 1995) (same) (citing *Brown*, 425 U.S. 820); *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 413 (9th Cir. 1985) (citing *Brown*, 425 U.S. 820) (same). Only after the EEOC investigates the employee’s allegations may an employee pursue a Title VII claim. *See* 42 U.S.C. § 2000e-8(a) (requiring employee to continue cooperating with EEOC even after administrative exhaustion).

35. *See generally* 42 U.S.C. §§ 2000e (laying out all of Title VII).

36. *See* HENRY H. PERRITT, JR., *CIVIL RIGHTS IN THE WORKPLACE* 85-86 (John Wiley & Sons, Inc. 2d ed. 1995) (explaining that 42 U.S.C. § 1981(a)(1) distinguishes between two theories and that Supreme Court acknowledged they are functionally equivalent but nonetheless may be asserted as alternative theories).

37. *See id.* (same).

38. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-05 (1973) (establishing three-step burden-shifting analysis for private, non-class action employment discrimination case); *see also Lynch, supra* note 7, at 72-74 (emphasizing difficulty of success under disparate treatment due to requirement of proving intent and burden of persuasion remaining with plaintiff at all times).

39. *See McDonnell Douglas*, 411 U.S. at 802 (placing initial burden of proof on plaintiff to establish prima facie case of discrimination). In *McDonnell Douglas*, the Supreme Court set out the necessary requirements to make out a prima facie case of discrimination. *See id.* (requiring plaintiff prove that discrimination suffered was due to minority status). Accordingly, an employee must provide evidence that

facie case of intentional discrimination, then the burden shifts to defendant employer to articulate a “legitimate, nondiscriminatory [business] reason” for implementing the business practice.⁴⁰ Finally, if defendant employer proves business necessity warranted his or her actions, then the burden shifts back to plaintiff employee to prove, by a preponderance of the evidence, that defendant employer’s practice nevertheless amounts to discrimination.⁴¹

2. Title VII Disparate Impact Claims: Unintentional Discrimination Theory

In 1971, upon handing down *Griggs v. Duke Power*,⁴² the Supreme Court created the disparate impact claim.⁴³ Like a disparate treatment

(1) the employee is a member of a racial minority; (2) the employee applied for an open position for which the employee is qualified; (3) the employee was denied the position; and (4) the employer continued to seek applicants of similar qualifications as the plaintiff. *See id.* (listing requirements). Nevertheless, the required prima facie showing does not appear to be as outcome determinative as whether the court will defer to the EEOC guidelines. *See id.* (noting there are other burdens of proof that may persuade court to find against plaintiff). If the court will defer to the EEOC’s policy guidelines, issued after the 1991 Civil Rights Act, then plaintiff will not be required to prove employer’s intent using direct evidence. *See EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 8 Lab. Rel. Rep. (BNA) No. 859, 405:6915 (July 7, 1992) (explaining that existence of English-only rule is sufficient to satisfy plaintiff employee’s prima facie burden). Rather, the court will infer the discriminatory intent of an employer based on the inherently discriminatory nature of English-only rules. *See id.* (emphasizing discriminatory nature of English-only rules).

40. *See McDonnell Douglas*, 411 U.S. at 803 (establishing business owner’s burden of proof).

41. *See id.* at 1824-25 (noting that lower court ignored this prong after determining employer presented legitimate business reason); *see also*, *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (holding that after employer satisfied employer’s burden of proof, burden shifted back to employee). After the burden shifts back to the plaintiff, then plaintiff “ultimately ha[s] to prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure.” *See Int’l Bd. of Teamsters*, 431 U.S. at 336 (describing plaintiff’s burden of proof).

42. 401 U.S. 424 (1971).

43. *See id.* at 433-36 (creating disparate impact claim). Interestingly, even though Congress implicitly recognized the Supreme Court’s creation of the disparate impact claim during the drafting of the 1972 amendments to the Civil Rights Act of 1964, Congress did not actually codify the disparate claim until the Civil Rights Act of 1991 (1991 Act). *See Note, The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 899-903 (1993) (recounting enactment of 1991 Act as means to overrule *Wards Cove* decision). With the 1991 Act, Congress acted in response to growing discord between courts, business employers and employees over the definition of “business necessity.” *See id.* at 897 (addressing dispute over definition of “business necessity” generated by conflicting court rulings). Additionally, the 1991 Act sought to resolve issues regarding the required burden-shifting analysis. *See id.* (noting how some courts would ignore burden-shifting analysis). Congress firmly rejected the Court’s approach in *Wards Cove* that many employers advocated because it increased the level of specificity required to make out a prima facie case, reduced the employer’s burden when proving business ne-

claim, the court engages in the burden-shifting analysis.⁴⁴ A disparate impact claim, however, is markedly more favorable to plaintiff employees because this claim does not require employees to prove that the employer intentionally discriminated.⁴⁵ Thus, employees are more likely to meet their initial burden of proof if they pursue a disparate impact claim.⁴⁶ If the employee succeeds in establishing a prima facie case, then the burden shifts to the employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”⁴⁷

B. Section 1981: Intentional Discrimination Theory

Although Section 1981 does not expressly prohibit national origin discrimination, in *Saint Francis College v. Al-Khazraji*,⁴⁸ the Supreme Court interpreted the statute’s prohibitions to extend to national origin discrimination.⁴⁹ Like a Title VII disparate treatment claim, Section 1981 aims to prohibit intentional discrimination in the public and private workplace by ensuring equal enforcement of contracts.⁵⁰ Section 1981 claims

necessity and watered down the business necessity standard. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645, 657-58 (1989) (holding that plaintiffs must make affirmative showing to meet their prima facie burden and relaxing business justification requirements); see also *The Civil Rights Act of 1991: The Business Necessity Standard*, *supra*, at 897-901 (highlighting that Congress’s disapproval of *Wards Cove* propelled proposal to codify *Griggs* standard). Thus, as a direct result of the 1991 Act, the burden-shifting analysis that requires businesses to prove business necessity when faced with a prima facie charge of employment discrimination remains intact today. See *id.* at 910 (emphasizing that courts cannot use *Wards Cove* despite any ambiguities in 1991 Act’s language).

44. See *Griggs*, 401 U.S. at 429-30 (applying burden-shifting analysis after concluding plaintiffs had met their prima facie burden).

45. Compare *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasizing prima facie disparate impact claim does not require specific circumstantial or direct evidence), with *Long v. First Union*, 86 F.3d 1151, 1151 (4th Cir. 1996) (unpublished table decision) (agreeing that prima facie case does not require specific circumstantial or direct evidence, but, nevertheless, required plaintiff to meet stringent requirements to make out prima facie case of discrimination).

46. See *The Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 43, at 897 (explaining how plaintiffs can meet their initial burden of proof).

47. 42 U.S.C. § 2000e-(2)(k)(1)(A).

48. 481 U.S. 604 (1987).

49. See *id.* at 613 (“Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”).

50. See 42 U.S.C. § 1981(a)-(c) (1991) (stating everyone is entitled to equal rights including “making, performance, modification, and termination of contracts”); see also PERRITT, *supra* note 36, at 113 (explaining application of Section 1981). Section 1981 expressly seeks to protect employees “against impairment by nongovernmental discrimination and impairment under color of State law.” 42 U.S.C. § 1981(c). While these sections initially allowed employees to bring claims against both public and private employers, their scope remained limited until the 1991 Civil Rights Act. See PERRITT, *supra* note 36, at 107-113 (explaining how 1991

require employees to survive the *McDonnell Douglas Corp. v. Green*⁵¹ burden-shifting analysis.⁵² First, the *McDonnell Douglas* analysis requires plaintiffs to carry the initial burden of proof by “establishing a prima facie case of racial discrimination.”⁵³ Second, if plaintiff employee makes this showing, the burden of proof shifts to defendant employer to prove that the business practice was developed out of business necessity.⁵⁴ Finally, the burden shifts back to plaintiff employee to prove that despite the apparent business necessity, defendant employer still discriminated against plaintiff employee on account of the employee’s national origin.⁵⁵ Even though both intentional discrimination claims seem identical, they are not mutually exclusive.⁵⁶ Nevertheless, employees may favor a Section 1981 litigation theory because Section 1981 claims do not require administrative exhaustion, but do allow for jury trials and compensatory and punitive damages.⁵⁷

C. Section 1983 Claims: Deprivation of Constitutional Rights

In addition to Title VII, Section 1983 is another means of bringing an intentional discrimination action.⁵⁸ Section 1983 claims, however, differ from Title VII and Section 1981 claims because Section 1983 claims are

Amendments overruled *Lorance v. AT&T Technologies, Inc.* to preserve disparate impact claim). In 1991, Congress amended Section 1981, adding section (b), which redefined “mak[ing] and enforce[ment]” of contracts to include “making performance, modification, and termination of contracts, and the enjoyments of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981 (b). By extending the scope of Section 1981, Congress enabled employees to assert claims challenging English-only rules. See PERRITT, *supra* note 36, at 97 (citing *Von Zuckerman v. Argonne Nat’l Lab.*, 984 F.2d 1467, 1472 n.2 (7th Cir. 1993)) (arguing that “make and enforce contracts” should be broadly defined).

51. 411 U.S. 792 (1973).

52. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (utilizing burden-shifting approach and requiring plaintiff to meet initial burden); *McDonnell Douglas Corp.*, 411 U.S. at 792 (setting forth burden-shifting analysis for evaluation of Title VII claims); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 726 (3d Cir. 1988) (employing burden-shifting approach); *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 817-18 (5th Cir. 1982) (using burden-shifting approach).

53. *McDonnell Douglas*, 411 U.S. at 802 (establishing requirement for Title VII plaintiffs to carry initial burden of proof).

54. See *id.* (“The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason . . .”).

55. See *id.* at 803-805 (shifting burden of proof back to plaintiff if defendant satisfactorily proves practices are nondiscriminatory).

56. See *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459 (1975) (affirming that “the aggrieved individual clearly is not deprived of other remedies he possesses”); see also *Lynch, supra* note 7, at 74-75 (explaining Title VII and Section 1981 claims are not mutually exclusive, but Section 1981 litigants may only proceed on purposeful discrimination theory).

57. See PERRITT, *supra* note 36, at 85 (exploring alternative of proceeding under disparate treatment theory rather than disparate impact theory).

58. See 42 U.S.C. § 1983 (1993) (creating public cause of action for deprivation of rights).

limited to public employers.⁵⁹ Section 1983 allows state and federal government employees to bring suits against employers for deprivations of “any rights, privileges, or immunities secured by the Constitutions and laws.”⁶⁰ In short, the provision protects federal rights.⁶¹ Accordingly, courts interpret Section 1983 to extend to disparate treatment claims.⁶² Like Section 1981 and Title VII claims, Section 1983 claims are intentional discrimination suits; therefore, the same burden-shifting formula utilized in Title VII claims also applies to the adjudication of Section 1983 claims.⁶³

When pursuing Section 1983 claims, plaintiff employees may assert various litigation theories, including deprivation of one’s equal protection rights preserved in the Fifth and Fourteenth Amendments and deprivation of free speech rights contained in the First Amendment.⁶⁴ Even though the assertion that English-only rules deprive employees of their freedom of speech may seem like the most obvious claim for plaintiff employees, courts have not uniformly accepted or rejected this litigation theory.⁶⁵ The success of First Amendment claims appears to turn on the

59. See *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971) (specifying deprivation of right must occur under color of state law); *Poolaw v. City of Anadarko*, 660 F.2d 459, 462 (10th Cir. 1981), *cert. denied*, 469 U.S. 1108 (1985) (holding Section 1983 suits are limited to discriminatory employment practices involving state action).

60. See 42 U.S.C. § 1983 (defining scope of statute); see also *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1228-33 (9th Cir. 1994) (discussing employee’s alleged First Amendment deprivation); *Lynch*, *supra* note 7, at 76 (explaining employees have pursued claims alleging deprivation of Equal Protection Clause of Fifth and Fourteenth Amendments).

61. See 42 U.S.C. § 1983 (defining scope of statute).

62. See *Daniels v. Bd. of Educ. of Ravenna City Sch. Dist.*, 805 F.2d 203, 207 (6th Cir. 1986) (“Like disparate treatment under Title VII, sections 1981 and 1983 require proof of purposeful discrimination. Thus, the order and allocation of proof, applicable in a disparate treatment case under Title VII, may be utilized in adjudicating race discrimination claims arising under sections 1981 and 1983.”) (internal citations omitted).

63. See *id.* at 207 (asserting Title VII burden-shifting approach should also apply to Sections 1981 and 1983); *Poolaw*, 660 F.2d at 462 (holding that burden-shifting applies to Section 1983 claims).

64. See U.S. CONST. amend. I, V, XIV (granting equal protection and free speech rights); see also *Maldonado v. City of Altus*, 433 F.3d 1294, 1309 (10th Cir. 2006) (discussing whether city’s English-only policy violated city employees’ free speech rights); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 931-44 (9th Cir. 1995) (en banc), *vacated as moot*, 520 U.S. 43 (1997) (discussing whether Arizona’s recently added Article XXVII, which made English official language of Arizona, violated public employee’s free speech rights); *Gutierrez v. Mun. Ct. of S.E. Jud. Dist.*, 838 F.2d 1031, 1049 (9th Cir. 1988) (discussing employees’ argument that English-only rules violate Fourteenth Amendment Equal Protection Clause because they intentionally discriminate against employees based on national origin).

65. Compare *Yniguez*, 69 F.3d at 942 (holding that language limitation is public concern because it prevents those with language limitations from obtaining important government information), with *Maldonado*, 433 F.3d at 1310-11 (holding that language limitation is not public concern because employees’ speech in question was not protected speech).

court's characterization of the claim.⁶⁶ Claims focusing on the public's right to receive information from the government seem to be more successful than claims that argue English-only rules deprive employees of their freedom of speech.⁶⁷ Nevertheless, as one scholar has argued, employee claims that assert English-only rules deprive them of their First Amendment rights could be successful.⁶⁸ In sum, constitutional argu-

66. Compare *Yniguez*, 69 F.3d at 934-35 (characterizing issue as one where state is impinging on pure speech rights), with *Maldonado*, 433 F.3d at 1310 (portraying issue as one where state may permissibly limit speech because limits only apply to state government employees).

67. See *Yniguez*, 69 F.3d at 934-35 (concluding prohibition of state government employees from speaking other languages deprived public of right to information). In *Yniguez*, the court ruled that restricting public employees to "act" only in English violated the First Amendment. See *id.* at 928 (recognizing that although state can limit government employee speech, it had unconstitutionally threatened free speech of third parties). Nevertheless, the court's focus emphasized "the many thousands of Arizonans who would be precluded from receiving essential information from their state and local governments" rather than the employees' right to freedom of expression. See *id.* at 923 (explaining concern grounded in rights of listeners, not employee's freedom of speech). Importantly, the court also highlighted that a body of constitutional law, dating back to the 1920s, supported its finding that the government cannot use its regulatory powers to restrict speech. See *id.* at 945 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)) (stating court's concern about creating "an enlightened American citizenship"). Although the court's decision noted that the intention of Article XXVIII, which made English the official language of Arizona, had a desirable end—to unite all Arizonans by mandating everyone communicate in one language—the court ultimately concluded that Article XXVIII was contrary to "our diverse and pluralistic society." See *id.* at 923 (finding official English amendment unconstitutional).

68. See Leah Bhimani, *First Amendment—Government Employees—The Tenth Circuit Determines That Speaking Spanish is Not an Issue of Public Concern and Misapplies the Mount Healthy Test to a Prior Restraint Claim*, 60 SMU L. REV. 275, 275 (2007) (arguing *Maldonado* court incorrectly decided case). Bhimani argued that the Tenth Circuit's recent decision in *Maldonado*—which held that a municipality's enactment of English-only rules did not violate employees' First Amendment rights—applied an incorrect test to assess the employees claim, thereby potentially jeopardizing future employee First Amendment claims. See *id.* at 275-76 (arguing court incorrectly determined whether speech was matter of public concern). In *Maldonado*, the court applied the *Pickering-Mount Healthy* test to determine whether the city's English-only rule violated the First Amendment. See *id.* at 278 (asserting *Pickering-Mount Healthy* test should not have been applied). This four prong test requires that:

(1) The court determine whether the speech touches on a matter of public concern. (2) If it does, the court must balance the interest of the employee in making the statement and the public employer's interest in effectively providing public services. (3) If the preceding requirements are met, the employee must show that the protected speech was a motivating factor in the detrimental employment decision. (4) The employer then has the opportunity to demonstrate that it would have made the same employment decision in the absence of the protected speech.

Id. at 277-78 (outlining appropriate test). Applying this test, the *Maldonado* court concluded that the employees' claim failed both the first and third prongs of the *Pickering-Mount Healthy* test because they had not shown the English-only rule prohibited speech of public concern nor that the rule limited communication of matters of public concern. See *id.* at 278 (summarizing court's findings). On the

ments have not been particularly successful litigation methods for plaintiff employees.⁶⁹

III. ENGLISH-ONLY CASE LAW: THE COURTS DUKE IT OUT OVER EMPLOYMENT SPEECH ISSUES

A. *The Courts Take Their First Swing at English-Only Rules*

In *Saucedo v. Brothers Well Service*,⁷⁰ the District Court of the Southern District of Texas analyzed English-only rules for the first time.⁷¹ There, well drilling company Brothers Well discharged Saucedo, a bilingual Mexican-American employee, after he uttered two words of Spanish to ask where he should place a heavy metal pipe.⁷² In its defense, Brothers Well contended that well-drilling is a “demanding, dangerous [job] and requires considerable teamwork.”⁷³ Therefore, according to Brothers Well its English-only rule was not discriminatory, but rather was a necessary business precaution for employee safety.⁷⁴ While the court accepted that

contrary, Bhimani argued that the *Maldonado* court not only applied the incorrect test, but also that the employees’ speech was protected and therefore, the court never should have advanced to considering the third prong of the *Pickering-Mount Healthy* test. *See id.* (concluding that court applied incorrect analysis).

Bhimani argued the court’s failure to characterize English-only rules as an ex ante restriction on speech caused its misapplication of the *Pickering-Mount Healthy* test. *See id.* at 275. (emphasizing that English-only rules are ex ante speech restrictions). As the dissent suggested, the court should instead have applied the *United States v. National Treasury Employees Union* test (*NTEU* test). *See id.* at 278 (explaining that *NTEU* court dealt with ex ante speech restrictions). Whereas the *NTEU* test examines ex ante restrictions on protected speech, the *Pickering-Mount Healthy* test examines ex post restrictions on speech. *See id.* (highlighting difference between ex post and ex ante restrictions). Because English-only rules act as a prior restraint—and therefore chill potentially protected speech—a more serious judicial inquiry should apply. *See id.* at 278-79 (same). Overall, Bhimani argued, by applying the *Pickering-Mount Healthy* approach, which is designed to examine ex post restrictions on speech, the court denied the employees the requisite protection their speech deserved. *See id.* at 279 (stressing need to provide more protection with ex ante test).

69. *See Yniguez*, 69 F.3d at 931-32 (holding English-only amendment was unconstitutional for reasons unrelated to employee’s First Amendment claims); *Maldonado*, 433 F.3d at 1309 (asserting municipality’s English-only rule did not violate First Amendment because speech was not of public concern).

70. 464 F. Supp. 919 (9th Cir. 1979).

71. *Compare id.* at 921 (referring to “company rule”), with *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (describing rules as “English-only rules”). The Ninth Circuit decided *Saucedo* before “English-only rule” was coined as a phrase. *See Lynch, supra* note 7, at 76 (recounting how *Saucedo* spawned judicial debate about English-only rules).

72. *See Saucedo*, 464 F. Supp. at 921 (recounting how Saucedo asked another Mexican-American shopworker question in Spanish).

73. *See id.* at 920 (recounting defendant’s argument).

74. *See id.* at 921 (summarizing defendant’s argument about why company rule was necessary safety and business rule). Additionally, Brothers Well provided the court with company statistics to refute the allegation that the English-only rule was discriminatory. *See id.* at 920 (taking notice that Brothers Well never adopted

well-drilling is an inherently dangerous job, the court found that Saucedo was not engaged in well-drilling at the time he spoke Spanish and therefore Brothers Well's argument was irrelevant.⁷⁵ Hence, the court held that Saucedo's discharge was the result of "racial animus."⁷⁶

Despite the Ninth Circuit's unequivocal characterization of English-only rules as inherently discriminatory, the *Saucedo* court's opinion lacked the necessary legal reasoning and precedence to withstand future counterarguments posed by other circuit courts.⁷⁷ Consequently, when the Fifth Circuit, in *Garcia v. Gloor*,⁷⁸ considered whether English-only rules amounted to discrimination, the court held in favor of English-only rules.⁷⁹ Most notably, the court asserted that when bilingual employees speak in their native tongue, they are merely exercising a linguistic preference; their ability to comply with English-only rules precludes any claims of national origin discrimination.⁸⁰

In 1980, just one year after the Ninth Circuit wrestled with English-only rules in *Saucedo*, Hector Garcia, a twenty-four year old bilingual Mexican-American, challenged his discharge from work for violating his employer's English-only rule.⁸¹ In *Gloor*, the Fifth Circuit noted that Garcia's employer limited the English-only rule to conversations at work, except when conversing with Spanish-speaking customers or during break

policy of discrimination against Mexican-Americans). Approximately fifty percent of Brothers Well employees were Mexican-Americans and the business operated in an area where approximately thirty percent of the population was Mexican-American. *See id.* (noting demographic statistics). Moreover, Brothers Well stressed, the actions in question were not taken by the business owners, but by supervisors in the field. *See id.* (recognizing Brothers Well's argument, but noting that owners "permitted and impliedly approved of the conduct of [the] foreman"). While the court took note of the nondiscriminatory hiring practices employed by Brothers Well, the court concluded the employers must be held responsible for the supervisor's discriminatory actions taken against Saucedo. *See id.* at 922 (holding in favor of plaintiff). In particular, the court noted the difficulty in finding good well workers to conclude the business owners probably tolerated whatever discriminatory practices their supervisors employed to maintain steady employees. *See id.* at 920 (understanding but not approving of Brothers Well's explanation for tolerating foreman's discriminatory methods).

75. *See id.* at 921 (emphasizing that Saucedo was not engaged in well-drilling when he spoke in English because drill he worked on was being repaired).

76. *See id.* at 920 ("The court merely holds that on the facts presented, it is apparent to this court that John Saucedo was discharged because of racial animus.").

77. *See Lynch, supra* note 7, at 77 ("Judge Cowan did not provide a very thorough legal analysis of the issue as only one case was cited in the opinion[.].").

78. 618 F.2d 264 (5th Cir. 1980).

79. *See Lynch, supra* note 7, at 77 (drawing attention to court's argument that language is merely preference for bilingual employees).

80. *See Gloor*, 618 F.2d at 270 ("[T]here is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.").

81. *See id.* at 266 (summarizing facts of case and basis of Garcia's claim).

hours.⁸² The incident precipitating Garcia's discharge occurred when another Spanish-speaking employee inquired about a customer's item request.⁸³ When Garcia responded in Spanish, Gloor terminated him.⁸⁴

In addressing Garcia's claim, the court set forth a comprehensive and convincing rationale explaining why English-only rules are not discriminatory.⁸⁵ First, the court gave credence to the numerous business necessity reasons advanced by Garcia's employer for implementing his English-only rule.⁸⁶ Hiding behind the business judgment rule, the Fifth Circuit refused to make employers accomplish their business goals through "less restrictive" means.⁸⁷ Second, the court asserted that language and national

82. *See id.* (stating facts of case); *cf.* *Saucedo v. Bros. Well Serv.*, 464 F. Supp. 919, 921 (9th Cir. 1979) (implying that Brothers Well's English-only rule was blanket prohibition).

83. *See Gloor*, 618 F.2d at 266 (explaining event precipitating Garcia's dismissal).

84. *See Gloor*, 618 F.2d at 266 ("[Garcia] testified that on June 10, 1975 he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish."). Garcia's employer, Mr. Gloor, testified that Garcia's violation of the English-only rule was not the only reason for his discharge. *See id.* (taking note of evidence presented to show that Garcia was not satisfactory employee). Garcia was discharged for "failure to keep his inventory current, failure to replenish the stock on display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands—as well as for violation of the English-only rule." *See id.* (explaining reasons for discharge). On the other hand, Garcia had received regular compliments on his work and a \$250 bonus in May 1975. *See id.* (explaining that management bestowed compliments and provided year-end bonuses to encourage work performance). In light of the fact that both sides presented conflicting evidence about Garcia's work performance, the court decided to hone in on the single issue involving Garcia's discharge for violation of Gloor's English-only rule. *See id.* at 266-67 (recognizing Gloor's argument that Garcia violated English-only rule frequently); *cf. also Saucedo*, 464 F. Supp. at 921 (discussing how casual exchange between Spanish-speaking employees did not jeopardize anyone's safety). Similar to *Saucedo*, the situation precipitating Garcia's discharge involved a situation where neither business necessity nor workplace safety were viable reasons to object to Garcia's use of Spanish. *See Gloor*, 618 F.2d at 266 (recounting that Garcia was answering question asked by another Mexican-American employee concerning customer request).

85. *See Gloor*, 618 F.2d at 266-71 (explaining why English-only rules are not discriminatory).

86. *See id.* at 267 (summarizing one of Mr. Gloor's arguments for why English-only rule was necessary and justified).

Mr. Gloor testified that there were business reasons for the language policy: English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates.

Id.

87. *See id.* at 271 (noting that judges, who do not have business experience, should not try to preempt business owner's judgments or decisions). Being that

origin cannot be equated because language is not an immutable characteristic such as national origin.⁸⁸ Drawing a distinction between monolingual and bilingual employees, the court concluded that “there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.”⁸⁹ As a result of the *Saucedo* and *Gloor* courts’ contradicting stances on English-only rules, the EEOC intervened to provide guidance as to how these employment practices should be treated under Title VII.⁹⁰

B. EEOC Guidelines: The EEOC Enters the Ring

The EEOC crafted its guidelines in direct response to the holdings in *Saucedo* and *Gloor*.⁹¹ In 1980, the EEOC promulgated its guidelines setting forth how courts should approach Title VII claims of national origin discrimination based on English-only rules.⁹² Because Title VII created the

Gloor was the business owner, the court deferred to his decision and accepted his litany of business necessity reasons. *See id.* (finding no evidence of discrimination, court explained it could not preempt business employer’s decision). By accepting *Gloor*’s business necessity arguments, the court provided future business owners with numerous business necessity reasons to justify implementing English-only rules. *See id.* (accepting argument that bilingual employees merely exercise preference and that employee preferences are not protected rights).

88. *See id.* at 270 (asserting that language can only be equated with national origin when person is monolingual, “but [that] case concerns only a requirement that persons capable of speaking English do so while on duty”); *cf.* 29 C.F.R. § 1606.7(a) (2008) (“The primary language of an individual is often an essential national origin characteristic.”). At trial, Garcia brought in an expert witness to testify that the “Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others.” *Gloor*, 619 F.2d at 267 (recounting key testimony). In response, the court asserted that language and national origin cannot be equated. *See id.* at 269 (cautioning that cultural aspects of national origin, like language, cannot be equated to national origin). In particular, “[n]ational origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage[.]” *Id.* at 269 (citations omitted). Additionally, the court highlighted that Title VII’s list of prohibited grounds for discrimination did not equate language with national origin. *See id.* (explaining that Title VII only protects people from being discriminated against on basis of immutable characteristics). Finally, the court argued that Title VII only prohibits employers from engaging in discrimination based on immutable characteristics, and language is a trait that can be changed by merely learning a new language. *See id.* (same).

89. *See id.* at 270 (stating conclusion of court).

90. *See Lynch, supra* note 7, at 76-77 (recognizing that EEOC guidelines were promulgated in response to *Saucedo* and *Gloor*).

91. *See id.* (same); *see also Gloor*, 618 F.2d at 269 (asserting national origin and language cannot be equated); *Saucedo v. Bros. Well Serv.*, 464 F. Supp. 919, 920 (9th Cir. 1979) (holding racial animus was impetus for Brothers Well’s English-only rule); *Cameron, supra* note 9, at 304 (explaining that EEOC guidelines were enacted in reaction to *Gloor*’s holding).

92. *See* 29 C.F.R. §§ 1606.1, 1606.7 (2008) (calling for scrutiny of English-only rules).

EEOC as its administrative agency, the EEOC promulgated English-only guidelines under their delegated agency authority.⁹³

The EEOC began by addressing whether language discrimination is sufficiently related to national origin discrimination to support a Title VII claim.⁹⁴ Answering this question in the affirmative, the EEOC expressly asserted in Section 1606.1 of the EEOC guidelines that “national origin discrimination [is] broadly [defined] as including . . . cultural or linguistic characteristics of a national origin group.”⁹⁵ Next, the EEOC addressed the two different types of English-only rules: blanket prohibitions and tailored rules.⁹⁶

In Section 1606.7(a), the EEOC asserted that blanket prohibitions—prohibitions that are “applied at all times”—are a “burdensome term and condition of employment” because an individual’s primary language usually is an essential characteristic of national origin.⁹⁷ The EEOC guidelines appear to capture the argument Garcia advanced in *Gloor*—namely, that prohibiting use of one’s primary language disadvantages workers on the basis of national origin.⁹⁸ Additionally, the EEOC guidelines noted

93. See 29 C.F.R. § 1606 (citing Title VII as its source of authority); see also 42 U.S.C. § 2000e-12(a) (2008) (“[Granting EEOC] authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter.”). For a further discussion of the EEOC’s role as executing agency of Title VII, see *supra* notes 33-34 and accompanying text.

94. See 29 C.F.R. § 1606.1 (defining what constitutes national origin discrimination); cf. Natalie Prescott, *English Only at Work, Por Favor*, 9 U. PA. J. LAB. & EMP. L. 445, 454 (2007) (“[L]anguage does not implicate national origin [discrimination].”).

95. See 29 C.F.R. § 1606.1 (linking language spoken to national origin); see also *Gutierrez v. Mun. Ct. of S.E. Jud. Dist.*, 838 F.2d 1031, 1039 (9th Cir. 1988) (listing various authorities for its assertion that language is inextricably tied to national origin); EEOC Compl. Man. Vol. II, §§ 623.2(a), 623.3(b) (2006) (“[L]anguage is often an essential national origin characteristic”); Lisa L. Behm, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 573-75 (1998) (arguing that Congress never explicitly defined national origin, that Congress had little discussion over its meaning, that courts routinely associate language with national origin and that EEOC guidelines consider language discrimination to be national origin discrimination).

96. See 29 C.F.R. § 1606.7 (a)–(b) (promulgating stance on blanket and tailored English-only rules).

97. See 29 C.F.R. § 1606.7(a) (emphasizing that because primary language is aspect of one’s national origin, one is disadvantaged and made to feel uncomfortable by prohibitions against using one’s primary language).

98. See *id.* (“Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin.”); see also *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (acknowledging Garcia’s argument that denying employees to speak in language most familiar to them denies them employment privilege enjoyed by employees most comfortable with English); Behm, *supra* note 95, at 599 (arguing English-only rules discriminate because they affect employee’s ability to effectively communicate in workplace, which is necessary element of job performance).

that English-only rules have the propensity to create “an atmosphere of inferiority, isolation and intimidation . . . which could result in a discriminatory working environment.”⁹⁹ For these reasons, the EEOC guidelines established that blanket English-only rules presumptively amount to national origin discrimination.¹⁰⁰

In Section 1606.7(b), the EEOC asserted that tailored English-only rules—prohibitions that apply “only at certain times”—are discriminatory unless employers can present a business necessity that warrants the prohibition.¹⁰¹ As a result of this two-pronged treatment, the EEOC guidelines create a rebuttable presumption of discrimination in the context of English-only rules.¹⁰² Employers may refute discrimination claims by presenting business necessity or workplace safety arguments to justify their English-only rules.¹⁰³ Finally, Section 1606.7(c), which directly responds

99. 29 C.F.R. § 1606.7(a); *see also* Maldonado v. City of Altus, 433 F.3d 1294, 1301 (10th Cir. 2006) (“The English-only policy affects my work environment every day. It reminds me every day that I am second-class and subject to rules for my employment that the Anglo employees are not subject to.”); EEOC v. Anchor Coin, No. 01-B-0564 (D. Colo. July 21, 2003), *explained in* Eeoc Litigation Settlements: July 2003, *available at* <http://www.eeoc.gov/litigation/settlements/settlement07-03.html> (last visited Aug. 12th, 2008) (concluding that blanket English-only rule applied in housekeeping department created hostile working environment); EEOC v. Premier Operator Serv., Inc., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (declaring that English-only rule did not alleviate workplace hostility, but rather exacerbated feelings of “alienation and inadequacy”); Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1, 24 (1991) (asserting that English-only rules inflict injury “of stigmatization, or . . . of stamping non-English speakers with a badge of inferiority”) (citations and internal quotations omitted). *See generally* E.E.O.C. Dec. No. 71-446, 1970 WL 3571 (E.E.O.C. Nov. 5, 1970) (laying foundation for guidelines by holding English-only rule directed at only employees with Spanish surnames created hostile atmosphere).

100. *See* EEOC v. Synchron-Start Prods., Inc., 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) (recognizing that EEOC guidelines say that English-only rules create inference of discrimination); *see also* *Premier*, 113 F. Supp. 2d at 1073 (agreeing with EEOC guidelines’ stance that English-only rules disproportionately burden national origin minorities); Posting of Michael Moore to <http://paemploymentlawblog.com/articles/discrimination/> (July 10, 2007) (“In almost all cases where there is a blanket prohibition on the use of a language other than English Courts have sided with EEOC or employees.”).

101. *See* 29 C.F.R. § 1606.7(b) (“An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.”).

102. *See id.* (presuming English-only rules are discriminatory unless rebutted by showing of business necessity).

103. *See id.* (same); *see also* E.E.O.C. Dec. No. 81-25, 1981 WL 17720, at *2 (E.E.O.C. July 6, 1981) (solidifying interpretation of EEOC guidelines’ requirement that business necessity be legitimate); EEOC Compl. Man. Vol. II, §§ 623.2(a), 623.3(b) (2006) (noting that Title VII will find English-only rules discriminatory, unless backed by business necessity); EEOC New Investigator Training, Participant Man., *Theories of Discrimination*, 41 (2001) [hereinafter EEOC New Investigator Training] (“The EEOC’s policy on speak-English-only rules is that such rules have an *adverse impact* based on national origin and therefore must be justified by a showing of business necessity.”). The EEOC New Investigator Manual

to the *Saucedo* court's concern, requires employers to give employees effective notification of English-only rules and the consequences of violations.¹⁰⁴ In particular, the EEOC emphasized that notice is imperative because bilingual employees may casually revert back to their native language, unknowingly subjecting themselves to cause for termination.¹⁰⁵

While subsection (c) has not received much opposition, many courts appear vehemently opposed to subsections (a) and (b).¹⁰⁶ According to some circuit courts, these subsections create an unfounded presumption of discrimination that unfairly allow plaintiff employees to meet their initial prima facie burden of proof.¹⁰⁷ For this reason, many courts and employers oppose the EEOC guidelines because the guidelines change the

lists several examples of a permissible business necessity such as: (1) when communication with coworkers is imperative because they are performing surgery or working with equipment where dangerous accidents could occur; (2) when speaking with English-speaking customers and (3) when communicating with English-speaking supervisors. See EEOC New Investigator Training, *supra* (providing examples of acceptable business necessities).

104. See 29 C.F.R. § 1606.7(c) (requiring employers provide their employees with notice of English-only rule); see also *Saucedo v. Bros. Well Serv.*, 464 F. Supp. 919, 921 (9th Cir. 1979) (emphasizing that Saucedo was not formally informed about English-only rule or repercussions for failing to comply).

105. See 29 C.F.R. § 1606.7(c) ("It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language."); see also *Premier*, 113 F. Supp. 2d at 1070 (discussing psycho-linguist's expert witness testimony regarding code-switching and problems bilinguals face "turning off" their native language); Behm, *supra* note 95, at 592-96 (explaining many critics fail to consider English proficiency of bilinguals; however, proficiency, or lack thereof, often causes lapses or inadvertent code switching).

106. See 29 C.F.R. § 1606.7 (a)-(b) (instructing blanket prohibitions are to be considered discriminatory and tailored rules only to be allowed if necessary); see also *Long v. First Union Corp. of Virginia*, No. 95-1986, 1996 WL 281954, at *2 (4th Cir. May 29, 1996) (unpublished table opinion) (requiring plaintiff employees to prove prima facie discrimination); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting EEOC guidelines' assertion that English-only rules create inference of discrimination); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993) (affirmed without opinion) (adopting *Gloor's* approach to English-only rules instead of deferring to EEOC's approach); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999) (supporting prior court rulings of Fourth, Fifth, Ninth and Eleventh circuits to conclude English-only rules are not per se discriminatory); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 733 (E.D. Pa. 1998) (agreeing with holdings of Fourth, Fifth, Ninth and Eleventh circuits to conclude English-only rules are not per se discriminatory).

107. See *Long*, 1996 WL 281954, at *2 (finding English-only rules inadequate basis to sustain disparate impact claim); *Spun Steak*, 998 F.2d at 1489 (rejecting EEOC guidelines as "wrong" because English-only rules do not "inexorably lead to an abusive [work] environment"); *Gonzalez*, 1991 WL 11009376, at *3 (holding English-only rule that requires employees to speak in English when in presence of other English speakers is not discriminatory and without more does not constitute discrimination).

existing burden-shifting formula and force employers to bear the initial burden of proof.¹⁰⁸

C. *The Courts Challenge the EEOC Guidelines*

Despite the fact that Title VII created the EEOC as its executing administrative authority, courts analyzing challenges to English-only rules repeatedly refused to defer to the EEOC guidelines.¹⁰⁹ These courts relied on the *Gloor* court's characterization of language usage as merely a preference.¹¹⁰ Because they believed that Mexican-Americans and other ethnicities could control language usage, these courts refused to consider English-only rules as inherently discriminatory.¹¹¹ Thus, the few circuits to hear challenges to English-only rules determined that the EEOC guidelines inappropriately altered Title VII's burden-shifting formula.¹¹² Nevertheless, not all courts have rejected the EEOC guidelines' assertion that English-only rules are inherently discriminatory.¹¹³

1. *Round 1: The Ninth Circuit's Path to Rejecting the EEOC Guidelines*

Following the promulgation of the EEOC guidelines the Ninth Circuit grappled with whether to adopt the EEOC's characterization of English-only rules as presumptively discriminatory in a series of three cases.¹¹⁴ In *Jurado v. Eleven-Fifty*,¹¹⁵ a bilingual Mexican-American radio announcer brought disparate impact and disparate treatment claims

108. See *Spun Steak*, 998 F.2d at 1489 (declining to accept EEOC's assertion that English-only rules "create an atmosphere of inferiority, isolation and intimidation based on national origin" or that they are per se discriminatory).

109. See *id.* (declining to accept EEOC guidelines); *Kania*, 14 F. Supp. 2d at 735 (agreeing with *Spun Steak's* rejection of EEOC guidelines).

110. For a discussion of the courts that relied on *Gloor's* characterization of language usage as merely a preference, see *infra* notes 118-19, 127, 133 and accompanying text.

111. See *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (holding English-only rules are not discriminatory because "the rule is one that the affected [bilingual] employee can readily observe and nonobservance is a matter of preference"). For further discussion of courts relying on *Gloor*, see *infra* notes 119-20, 127, 133 and accompanying text.

112. See *Long*, 1996 WL 281954, at *2 (holding English-only rule alone was inadequate and requiring proof of discrimination, in particular that rule was more severely enforced against plaintiff than against other employees); *Spun Steak*, 998 F.2d at 1489 (rejecting EEOC guidelines because plaintiffs had not met prima facie burden).

113. See generally *Long*, 1996 WL 281954 at *1 (issuing decision without addressing EEOC guidelines); *Gonzalez*, 1991 WL 11009376, at *2-3 (indirectly performing burden-shifting analysis by accepting defendant employer's business necessity arguments as acceptable to uphold English-only rule).

114. See *Spun Steak*, 998 F.2d at 1489 (1993) (rejecting EEOC guidelines); *Gutierrez v. Mun. Ct. of S.E. Jud. Dist.*, 838 F.2d 1031, 1040 (9th Cir. 1988) (adopting EEOC guidelines); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (rejecting EEOC guidelines).

115. 813 F.2d 1406 (9th Cir. 1987).

against KIIS radio station in Los Angeles.¹¹⁶ In reviewing Jurado's claim, the Ninth Circuit conducted the standard burden-shifting analysis.¹¹⁷ The *Jurado* court disregarded the EEOC guidelines, holding that Jurado failed to present a prima facie case of discrimination.¹¹⁸ Most importantly, the Ninth Circuit rested its holding on the *Gloor* court's characterization of language usage as a preference.¹¹⁹ Highlighting that Jurado was a bilingual employee, the court emphasized that he could have easily complied with the English-only order.¹²⁰

Just one year after the Ninth Circuit decided *Jurado*, that circuit court made an about face, holding that the Los Angeles county court's English-only rule discriminated against bilingual court employees in *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*.¹²¹ In *Gutierrez*, the Ninth Circuit adopted the EEOC's assertion that language and national origin were inextricably tied.¹²² The Ninth Circuit struck

116. *See id.* at 1408 (setting forth basic facts of case). At the request of the KIIS, Jurado began using "street" Spanish to attract ethnic listeners. According to Arbitron marketing ratings, however, Jurado's street Spanish did not increase listener ratings among minorities. *See id.* (recounting employer's method to increase listener base). Instead, the street Spanish confused current listeners so KIIS directed Jurado to speak in English only. *See id.* (explaining how plan to use street Spanish backfired). Shortly thereafter, KIIS fired Jurado. *See id.* (narrating conflicting stories of Jurado and radio station about events precipitating Jurado's discharge).

117. *See id.* at 1409 (explaining that for plaintiff to prevail his claim must pass *McDonald Douglas*' burden-shifting analysis and must establish prima facie case of discrimination).

118. *See id.* (concluding Jurado's prima facie claim failed because he did not provide sufficient evidence indicating KIIS fired him for racially motivated reasons). The court concluded that the Arbitron ratings provided a sufficient business necessity to rebut any allegations that KIIS acted out of racial animus. *See id.* (noting that Arbitron ratings showed no increase in target Hispanic audience after use of "street" Spanish); *cf.* 29 C.F.R. § 1606.7 (2008) (asserting that language restrictions disadvantage employees on basis of national origin).

119. *See id.* at 1411 ("An employer can properly enforce a limited, reasonable and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as 'a matter of individual preference.'") (citing *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

120. *See id.* (asserting that employers may enforce English-only rules against bilingual employees because their language usage is "a matter of individual preference") (citing *Gloor*, 618 F.2d at 270).

121. *Compare* *Gutierrez v. Mun. Ct. of S.E. Jud. Dist.*, 838 F.2d 1031, 1041 (9th Cir. 1988) (holding that English-only rule was discriminatory even when enforced against bilingual employees), *with* *Jurado*, 813 F.2d at 1411 (holding that language usage for bilingual employees is matter of preference); *see also* Lynch, *supra* note 7, at 80 (recognizing *Gutierrez* court's retreat from prior holding of *Jurado*).

122. *See* *Gutierrez*, 838 F.2d at 1038-39 (agreeing with EEOC guidelines that language restrictions implicate national origin discrimination). The Ninth Circuit emphasized that "[a]lthough an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity." *Id.* at 1039. Furthermore, America has long drawn its strength from being a multicultural society; commentators agree that language is a large factor that allows individuals to maintain their cultural identities. *Cf. id.* (emphasizing that "[t]he mere fact that an employee is bilingual does not eliminate

down the English-only rule, expressly adopting the EEOC guidelines' conclusion that English-only rule were inherently discriminatory, thus allowing plaintiff employees to satisfy their prima facie burden.¹²³ Nonetheless, the Ninth Circuit's adoption of the EEOC guidelines lingered for a only fleeting moment.¹²⁴

In 1993, the Ninth Circuit reverted to its holding in *Jurado*, rejecting the EEOC guidelines and requiring plaintiff employees to clearly establish a prima facie case of discrimination in order to advance a Title VII or any other disparate treatment claim.¹²⁵ In *Garcia v. Spun Steak Co.*,¹²⁶ two bilingual, Mexican-American employees working at a wholesale meat and poultry factory sued their employer, Spun Steak, claiming that Spun Steak's English-only rule discriminated against them based upon their national origin.¹²⁷ Rather than adopting the EEOC guidelines' assertion that language restrictions undoubtedly discriminate against ethnic employees, the court reverted to the *Gloor* court's characterization of language usage as a mere preference.¹²⁸ Under that analysis, the court not only required plaintiff employees to establish a prima facie case of discrimination, but also required plaintiff employees to prove that the discrimination was adverse and that the adverse impact was significant.¹²⁹ The Ninth Circuit's holding in *Spun Steak* solidified its decision to reject the EEOC guidelines.¹³⁰ Accordingly, *Gutierrez* became an obsolete decision in the Ninth Circuit.¹³¹

the relationship between his primary language and the culture that is derived from his national origin") (citation omitted).

123. See *id.* at 1040 (agreeing with and adopting EEOC guidelines).

124. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (overruling *Gutierrez's* adoption of EEOC guidelines).

125. See *id.* at 1487 (finding its holding consistent with *Jurado* holding); see also *Jurado*, 813 F.2d at 1411 (rejecting EEOC guidelines and adopting *Gloor's* analysis of English-only rules).

126. 998 F.2d 1480 (9th Cir. 1993).

127. See *id.* at 1483 (describing nature of case).

128. See *id.* at 1487 (arguing that language is privilege and that employers do not have to allow employees to speak in their preferential language).

129. See *id.* at 1486 ("The crux of the dispute between Spun Steak and the Spanish-speaking employees, however, is not over whether Hispanic workers will disproportionately bear any adverse effects of the policy; rather, the dispute centers on whether the policy causes any adverse effects at all, and if it does, whether the effects are significant.").

130. See *Lynch, supra* note 7, at 83-84 (focusing on Ninth Circuit's decision to revert back to *Jurado* approach and its continued reliance on *Gloor* approach to English-only rules).

131. See *Spun Steak*, 998 F.2d at 1487-88 (holding its current decision to be consistent with *Jurado* and reaffirming adoption of *Gloor* approach to English-only rules).

2. Round 2: The Eleventh Circuit's Job

Prior to *Spun Steak*, in *Gonzalez v. Salvation Army*,¹³² the Eleventh Circuit affirmed a lower court's decision regarding a bilingual employee's claim that her employer, the Salvation Army, discriminated against her on account of her national origin by implementing an English-only rule.¹³³ Without mentioning the EEOC guidelines or the requisite burden-shifting analysis, the district court cited *Gloor* and held that English-only rules are not discriminatory where the employee "has the ability to speak English."¹³⁴ Moreover, the *Gonzalez* court reasoned that the Salvation Army did not enact its English-only rule with the intent to discriminate; rather, the rule served a legitimate business purpose, namely to quell complaints of non Spanish-speaking employees and customers.¹³⁵ Once again, the court glossed over the EEOC guidelines and further entrenched the courts' deference to *Gloor*.¹³⁶

3. Round 3: The Fourth Circuit Follows Suit

In *Long v. First Union Corp.*,¹³⁷ the Fourth Circuit struck down a disparate treatment claim filed by two bilingual Hispanic employees.¹³⁸ The employer was a bank that had enacted an English-only rule in response to complaints from customers and employees.¹³⁹ Without mentioning the EEOC guidelines, the *Long* court applied the burden-shifting analysis to conclude that the employees failed to meet their initial prima facie burden of proof.¹⁴⁰ Thus, the Fourth Circuit implicitly rejected the EEOC guidelines' presumption that English-only rules are inherently discrimina-

132. 1991 WL 11009376 (M.D. Fla. June 3, 1991) *aff'd without opinion*, 985 F.2d 578 (11th Cir. 1993) (unpublished table decision).

133. *See Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991) (describing facts of case).

134. *See id.* (citing *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980)) (relying on *Gloor's* characterization of English-only rules as applied to bilingual employees as matter of preference).

135. *See id.* (justifying decision in part upon recognized business necessity exception).

136. *See id.* (adhering to *Gloor* approach by requiring bilingual employee to provide more evidence than English-only rule in order to demonstrate prima facie case of discrimination) (citing *Garcia v. Gloor*, 618 F.2d 264, 264 (5th Cir. 1980)).

137. 86 F.3d 1151 (4th Cir. 1996) (unpublished table decision).

138. *See id.* (describing nature of case).

139. *See id.* (recounting that employees did not contest defendant employer's reason for enacting English-only rule, but instead contested that English-only rule was discriminatorily enforced against Hispanic employees).

140. *See id.* at 1151-52 (explaining that plaintiff employees failed to establish prima facie burden of discrimination because employees could not prove that employer bank enforced English-only rule exclusively against Spanish-speaking employees and not employees of other nationalities).

tory and did not allow plaintiff employees to automatically satisfy their initial burden of proof.¹⁴¹

D. *Case Law Enters a Clinch: The EEOC Guidelines' Gradual Comeback*

After four circuits rejected the EEOC guidelines and held that English-only rules are nondiscriminatory business practices, case law surrounding English-only rules appeared settled.¹⁴² Employees needed to show blatant discrimination in order to satisfy their prima facie burden and to subsequently survive business necessity justifications.¹⁴³ The case law overwhelmingly seemed to favor employers; however, the Tenth Circuit broke from this seemingly uniform national precedence in 2006.¹⁴⁴

In *Maldonado v. City of Altus*, city employees alleged that the city's English-only rule discriminated against many bilingual Hispanic employees on the basis of their national origin.¹⁴⁵ The Tenth Circuit in *Maldonado* rejected the district court's conclusion that the plaintiff employees had

141. See *id.* (requiring that plaintiff employees make further evidentiary showing rather than finding English-only rules per se discriminatory); see also Prescott, *supra* note 94, at 451 (noting that Fourth Circuit upheld English-only rule as valid).

142. See generally *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (holding that plaintiff employee had not met burden of proof because English-only rules are not presumptively discriminatory when applied to bilingual employees); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (relying on *Gloor's* reasoning to hold that English-only rule was not discriminatory); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991) (concluding that English-only rule alone was not sufficient evidence of discrimination to make out disparate impact claim); *Long*, 86 F.3d 1151 (asserting that English-only rule without more was insufficient to make out disparate treatment claim); see also Prescott, *supra* note 94, at 449-50 (noting that three out of four circuits upheld English-only rules as valid business practices).

143. See *Long*, 86 F.3d at 1151-52 (explaining that employees needed to show English-only rule discriminated against Hispanic employees in particular).

144. See *Maldonado v. City of Altus*, 433 F.3d 1294, 1302-03 (10th Cir. 2006), *overruled on different point of law by Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006) (finding that English-only rules provide plaintiff employee with enough evidence of discrimination in workplace to survive summary judgment on Title VII claim). The court noted that the scope of Title VII claims is not limited to economic and tangible discrimination; it also encompasses the workplace environment. See *id.* at 1303 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002)). When conditions of discrimination in the workplace become "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," plaintiff employees have sufficient evidence of discrimination to bring a Title VII claim. See *id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Because English-only rules fall more heavily on bilingual employees than on other groups—and can thus create a hostile work environment—those employees may bring Title VII claims challenging English-only rules. See *id.* (explaining that businesses must employ neutral business practices and that when businesses fail to treat employees equally, employees may bring Title VII claims challenging employer's business practices, even if employer did not intentionally discriminate against employees) (citations omitted).

145. See *id.* at 1298 (describing nature of claim).

failed to satisfy their prima facie burden.¹⁴⁶ Instead, the Tenth Circuit recognized that English-only rules could in fact be construed as inherently discriminatory.¹⁴⁷ Although the court expressly stated it was not adopting the EEOC guidelines, the court nevertheless asserted that the proper question was whether a rational juror could find that the impact of the English-only rule on employees was sufficiently severe or pervasive such that it constituted discrimination.¹⁴⁸ The Supreme Court has stated that discrimination in the workplace becomes sufficiently severe or pervasive “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’” such that the workplace becomes an abusive environment.¹⁴⁹ The *Maldonado* court stated that the EEOC guidelines support the conclusion that a rational juror could find English-only rules discriminatory.¹⁵⁰ Based on those assertions, the Tenth Circuit remanded the case to the trial

146. See *id.* at 1304 (rejecting district court’s prior holding). Relying on *Spun Steak*—presumably to characterize language usage as a preference—the district court upheld the city’s English-only rule; however, the Tenth Circuit rejected that holding. See *id.* (disagreeing with district court’s finding that English-only rules do not impose significant adverse effects rising to level of discrimination necessary to make out prima facie claim). According to the court, *Spun Steak* did not hold that English-only rules are always permissible. See *id.* (“Even under *Spun Steak*, however, English-only policies are not always permissible; each case turns on its facts.”) (citing *Spun Steak*, 998 F.2d at 1489). Rather, the *Maldonado* court held that courts should make determinations on an ad hoc basis. See *id.* (same). Accordingly, plaintiff employees should be able to present evidence of discrimination and have their claims reviewed in light of the EEOC guidelines. See *id.* at 1305-06 (recognizing that although EEOC guidelines are not binding on courts, “it is enough that the EEOC, based on its expertise and experience, has consistently concluded that an English-only policy . . . is likely in itself to ‘create an atmosphere of inferiority, isolation, and intimidation’”) (citing 29 C.F.R. 1606.7 (2008)).

147. See *id.* at 1306 (finding that presumption of discrimination arises when English-only rules are not grounded in some business purpose).

148. See *id.* at 1305 (characterizing issue as “whether a rational juror could find on this record that the impact of the English-only policy on Hispanic workers was ‘sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive working environment’”) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

149. See *Harris*, 510 U.S. at 21 (“When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986)).

150. See *Maldonado*, 433 F.3d at 1306 (deferring to EEOC guidelines). The *Maldonado* court directed that the EEOC’s experience and expertise warranted respect and deference. The court “believe[d] that these conclusions are entitled to respect, not as interpretations of governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference.” *Id.* Therefore, the court concluded that it would not be unreasonable for a juror to find English-only rules discriminatory. See *id.* (stating that reasonable juror could find that City’s English-only rule created hostile and discriminatory work environment for Hispanic employees).

court; the Tenth Circuit had thus created a circuit split.¹⁵¹ Currently, the circuits disagree over both the proper amount of deference to accord the EEOC guidelines and whether English-only rules create an inference of discrimination.¹⁵²

IV. MAKING A CASE FOR DEFERENCE

The courts should give the EEOC guidelines “great deference”; however, the majority of courts considering challenges to English-only rules have not deferred to the EEOC guidelines.¹⁵³ Since 1984, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵⁴ and its progeny have dictated how much deference should be granted to a governmental agency’s statutory interpretation.¹⁵⁵ Nevertheless, courts have resisted deferring to the EEOC guidelines, using three prominent arguments.¹⁵⁶ First, courts contend that national origin does not implicate primary language protection.¹⁵⁷ Second, courts assert that Congress does not approve of the

151. *See id.* (reversing district court’s grant of summary judgment in favor of City on disparate impact and treatment claims, intentional discrimination claim and denial of equal protection claim); *see also* Prescott, *supra* note 94, at 449 (noting that *Maldonado* created circuit split, thereby increasing likelihood that Supreme Court grant certiorari to future English-only cases).

152. *See* Prescott, *supra* note 94, at 449 (reporting that three of four circuits to have considered English-only rules have held that English-only rules alone will not satisfy Title VII claims).

153. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (explaining that the EEOC guidelines “do constitute ‘(t)he administrative interpretation of the Act by the enforcing agency,’ and consequently they are ‘entitled to great deference’”) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971)); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973) (refusing to defer to EEOC guidelines because EEOC has flip-flopped on definition of “national origin”); *see also* *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) (recognizing that enforcing agency’s interpretation may be entitled to special deference if its interpretation is consistent and does not conflict with statutory language); *Leonard*, *supra* note 9, at 110-11 (discussing *Albemarle’s* argument for judicial deference to EEOC guidelines).

154. 467 U.S. 837 (1984).

155. *See generally* Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002) (explaining *Chevron* deference and historical implications of *Chevron* holding upon agency statutory interpretation).

156. *See, e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (calling for deference to agency statutory interpretations); *Griggs*, 401 U.S. at 433-34 (declaring agency interpretation entitled to “great deference”); *Espinoza*, 414 U.S. at 94 (following *Griggs* to accord agency interpretation “great deference”); *Albemarle*, 422 U.S. at 431 (according EEOC guidelines “great deference”); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (implying that EEOC guidelines are entitled to some weight, even though it may be less weight than other rulemaking agencies); *Gilardi v. Schroeder*, 833 F.2d 1226, 1232 (7th Cir. 1987) (following *Albemarle* and according EEOC guidelines “great deference”).

157. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) (agreeing with *Gloor’s* finding that language is preference, not immutable characteristic like national origin); *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (advising that national origin should “not be confused with ethnic of sociocultural

EEOC guidelines.¹⁵⁸ Third, courts maintain that the guidelines improperly alter the *Griggs* burden-shifting analysis.¹⁵⁹ Although one scholar asserts that none of these reasons provide sufficient justification for refusing to defer to the EEOC guidelines, courts nevertheless continue to reject the EEOC's approach to English-only rules.¹⁶⁰

A. *Proper Level of Deference: Chevron and Its Progeny*

In *Chevron*, the Supreme Court firmly asserted that courts are not the sole interpreters of the law.¹⁶¹ The *Chevron* Court explained that administrative agencies may interpret the law and that these interpretations are entitled to judicial deference.¹⁶² Further, *Chevron* required judicial deference to agency interpretations only if the agency had rulemaking author-

traits" like language (citing *Espinoza*, 414 U.S. at 94)); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 733 (E.D. Pa. 1998) (following *Gloor* and *Spun Steak* by holding that language restrictions do not have disparate impact on national origin).

158. Compare *Spun Steak*, 998 F.2d at 1490 (stressing that Congress intended plaintiffs to prove discrimination before burden of proof shifts and intimating that English-only rules are insufficient proof of discrimination); *Long v. First Union Corp.*, 894 F. Supp. 933, 940 (E.D.Va. 1995) (agreeing with *Spun Steak*'s assertion that EEOC guidelines do not comport with Congress's intent); *Kania*, 14 F. Supp. 2d at 735 (noting *Long* argument that EEOC guideline's burden-shifting formula appeared to contradict congressionally enacted framework in Title VII), with 29 C.F.R. 1606.7 (2008) (asserting that English-only rules are per se discriminatory when blanketly enforced or when rules are not supported by business necessity).

159. See *Spun Steak*, 998 F.2d at 1484, 1489 (noting *Griggs* analysis applies, but refusing to apply EEOC guidelines because English-only rules alone are insufficient evidence to satisfy plaintiff's initial burden) *Long*, 894 F. Supp. at 940 (holding plaintiffs cannot satisfy first step of *Griggs* analysis solely based on existence of English-only rule as the EEOC guidelines indicate); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9th Cir. 1987) (refusing to follow EEOC guideline and allow English-only rule to establish employer's intent to discriminate). See also Prescott, *supra* note 94, at 454-56 (asserting "national origin" does not include protection for primary language preferences); David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 574-77 (1995) (emphasizing Congress did not intend "national origin" to implicate language protections and guidelines conflict with congressional intent); Cameron, *supra* note 9, at 301, (stating Congress did not intend to protect primary language preferences with national origin and therefore guidelines conflict with congressionally adopted *Griggs*' burden-shifting analysis).

160. See Behm, *supra* note 95, at 592-94 (dispelling traditional arguments for rejecting EEOC guidelines).

161. See *Chevron*, 467 U.S. at 843-45 (directing courts to apply reasonable agency statutory interpretations before conducting their own judicial interpretation); see also Lynch, *supra* note 7, at 92 (urging courts to recognize that *Chevron* deference allows administrative agencies to issue interpretations) (citing *Chevron*, 467 U.S. at 843).

162. See *Chevron*, 467 U.S. at 838; see also Lynch, *supra* note 7, at 92 (explaining that agency's daily, on-going working relationship with Title VII should entitle agency to "first crack" at interpretation).

ity, Congress had not specifically addressed the issue and the agency's interpretation was reasonable.¹⁶³

As several courts noted, the EEOC guidelines are not entitled to *Chevron's* level of deference because Congress did not grant the EEOC rulemaking authority.¹⁶⁴ Nevertheless, as the administrative body charged with interpreting, administering and enforcing Title VII, the EEOC and its guidelines are entitled to "great deference."¹⁶⁵ Several courts have em-

163. See *Chevron*, 467 U.S. at 843-45 (explaining agency interpretations deserve deference).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43

The court further notes that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

164. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (Boochever, J., dissenting) ("EEOC regulations are entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority.") (citations omitted); see also *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) ("[I]t should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title.") (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)). For further discussion of why the EEOC did not receive rulemaking authority, see *supra* notes 33-34 and accompanying text.

165. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1975) ("The administrative interpretation of the [1965 Civil Rights] Act by the enforcing agency is entitled to great deference."); see also *Albemarle*, 422 U.S. at 431 (recounting *Griggs's* deference and adopting that court's deferential approach); *Gilardi v. Schroeder*, 833 F.2d 1226, 1232 (7th Cir. 1987) (deferring, like *Griggs* court, to agency's interpretation); *EEOC v. Start Products, Inc.* 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999) (following *Albemarle's* declaration that EEOC guidelines are entitled to "great deference"). But see *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (agreeing that EEOC's interpretation is entitled to "great deference," but noting that there are limits to that deference). The *Espinoza* Court noted that:

The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are "compelling indications that it is wrong."

Id. (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969)); see also *Zuber v. Allen*, 396 U.S. 168, 192-93 (1969) (explaining that agency interpretation should carry great weight except in instances where agency interpretation runs contrary to congressional intent); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261,

phasized that the EEOC's interpretation of Title VII ought to guide judicial analysis because the guidelines "constitute a body of experience and informed judgment."¹⁶⁶ The difference between *Chevron* deference and the deference courts should accord to the EEOC guidelines is measured by the weight of authority.¹⁶⁷ Undoubtedly, the EEOC guidelines carry less weight than an agency with rulemaking authority, but this does not free courts to completely side-step the EEOC guidelines.¹⁶⁸ Rather, the EEOC guidelines are entitled to some judicial deference.¹⁶⁹

272 (1968) (stating that agency interpretations of statutes deserve deference but qualifying that "courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubber-stamp'" administrative interpretations that courts deem inconsistent with congressional intent) (quoting *NLRB v. Brown* 380 U.S. 278, 291 (1965)).

166. *E.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that an agency experience with particular acts continues to warrant substantial deference to agency's interpretations, even where agency does not have advisory powers); *see also Meritor Sav. Bank, FSB v. Vinson* 477 U.S. 57, 65 (1986) ("[A]s an 'administrative interpretation of the Act by the enforcing agency, these Guidelines . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) and *Gen. Elec. Co.*, 429 U.S. at 141-42); *Spun Steak*, 998 F.2d. at 1489 (explaining court did not lightly reject EEOC guidelines because guidelines constitute body of experience). *But see Leonard*, *supra* note 9, at 110-11 (arguing for *Skidmore* deference to EEOC guidelines). One commentator argues that the EEOC guidelines are not entitled to the same amount of deference as rulemaking agencies. *See id.* at 110-12 (explaining that EEOC was granted only power to make procedural rules and not true rulemaking authority). Nevertheless, that commentator concedes that an agency's interpretation is entitled to a certain amount of deference based on its "experience and expertise." *See id.* at 110 (directing courts to consider the "'thoroughness evident in [the agency's] consideration, the validity of its reasoning, and its consistency'" (citations omitted). Ultimately, the commentator concludes that the EEOC guidelines are not entitled to "great deference" on account of the agency's experience with Title VII because the EEOC guidelines are in clear conflict with congressional intent. *See id.* at 111-12. (advocating Judge O'Scannlain's approach, from *Spun Steak*, that EEOC guidelines appear to be in direct conflict with congressional intent in enacting Title VII).

167. *Cf. Chevron*, 467 U.S. 837, 865 (1984) (holding that deference should be granted to agency interpretations if agency has rulemaking authority); *see also Gen. Elec. Co.*, 429 U.S. at 142 (recommending manner for determining weight given to agency interpretation and implying that each factor will contribute to agency's persuasive power). In *General Electric*, the Court noted that "[t]he weight [given] . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.*; *see also Synchro-Start*, 29 F. Supp. 2d at 913-14 (implying that EEOC guidelines are not entitled to same deference as rulemaking authorities).

168. *See Wiley*, *supra* note 159, at 570 (arguing that case precedent clearly establishes that guidelines promulgated by agencies without rule making authority do not deserve same deference as administrative regulations); *see also Leonard*, *supra* note 9, at 110 (recognizing that because EEOC does not have rulemaking authority, its guidelines carry less weight).

169. *See Behm*, *supra* note 95, at 589 ("The most viable means of resolving this conflict is through judicial deference to the EEOC guidelines."); *Lynch*, *supra* note

B. *Ancestral Ties Between Language and National Origin*

Some courts assert—perhaps mistakenly—that the EEOC guidelines are contrary to Congress’s definition of the term “national origin.”¹⁷⁰ Although Title VII does not expressly provide language protection within the definition of national origin, that term arguably prohibits the use of language as a form of national origin discrimination.¹⁷¹ Overall, Congress has provided little insight into the definition of national origin as it applies to Title VII.¹⁷²

Critics of the EEOC guidelines argue that Congress did not intend to give national origin a broad reading and that national origin refers solely to ancestry.¹⁷³ It is important to consider, however, that Congress drafted Title VII during a time when the United States was predominately a “black and white society.”¹⁷⁴ As such, the court should not limit statutory inter-

7, at 91-97 (arguing that courts should give EEOC’s interpretation of Title VII substantial deference).

170. For a discussion of how courts incorrectly assert that the EEOC guidelines are contrary to Congress’s definition of national origin, see *infra* notes 171-72 and accompanying text.

171. *Cf.* Behm, *supra* note 95, at 589-90 (arguing that language is immutable characteristic); *cf. also* Prescott, *supra* note 94, at 446, 456-57 (asserting that Title VII does not provide right to speak one’s preferred language at work and that plain meaning of Title VII does not grant language protection).

172. See Locke, *supra* note 9, at 50 (“Congress has offered remarkably little aid in defining the term [national origin].”); Leonard, *supra* note 9, at 101 (noting that language is not mentioned and there is no evidence that Congress even considered likelihood of language discrimination when they drafted Title VII).

173. See, e.g., Cameron, *supra* note 9, at 300-01 (describing legislative history of national origin definition). When Congress drafted Title VII, they initially included “ancestry” within Title VII. See *id.* at 300 (explaining that when Congress deleted “ancestry” from Title VII it did not view change as material, and noting that that fact suggests that Congress saw “national origin” and “ancestry” as synonymous). Congress ultimately concluded that including both “national origin” and “ancestry” within Title VII was redundant. See *id.* (same) (citing 110 CONG. REC. 2549 (1964) (statement of Sen. Roosevelt) (defining national origin during congressional debate). Senator Roosevelt’s comment is one of the only insights into Congress’ perceived definition of national origin. *Cf.* Cameron, *supra* note 9, at 300-01 (recounting historical background of “national origin”). During a floor debate, Senator Roosevelt described national origin to mean “the country from which you or your forebears came You may come from Poland, Czechoslovakia, England, France, or any other country.” *Id.* at 300 (citing 110 CONG. REC. 2549 (1964) (statement of Sen. Roosevelt)); see also Leonard, *supra* note 9, at 101-02 (giving account of how Congress deleted “ancestry” from Title VII and Senator Roosevelt’s comments); Prescott, *supra* note 94, at 455 (explaining that legislative history surrounding enactment of Civil Rights Act of 1964 indicates that national origin was meant to be narrowly defined).

174. See Leonard, *supra* note 9, at 102 (recounting historical backdrop of United States at time of drafting); see also Wiley, *supra* note 159, at 574-77 (recognizing that Congress did not intend for definition of national origin to extend to language protection). One scholar notes that at the time Congress drafted Title VII, Congress was focused on eradicating racial problems between blacks and whites. See Leonard, *supra* note 9, at 102 (explaining that Congress’s “prime motivation” for forbidding employment discrimination was to protect African-Ameri-

pretation to its historical context.¹⁷⁵ Sometimes, necessity demands that statutory interpretations extend to matters unanticipated by Congress.¹⁷⁶ Nevertheless, such interpretations are not per se contrary to Congress's intent, and should not necessarily be disregarded.¹⁷⁷ Likewise, even though Congress may not have anticipated how the next immigration

cans). At the time, Congress had not lifted the immigration quotas. *See id.* at 102-03 (recalling that Congress had not yet lifted immigration quotas and using that fact to help explain that Congress was concerned about African-Americans but was not yet concerned about Latin American immigrants). These quotas kept out many Latin American immigrants who have been the main proponents of interpreting language discrimination as part of national origin. *See id.* (clarifying that language did not move to forefront of employment discrimination until Latin American immigration occurred because African-Americans' primary language was usually English).

175. *Cf.* Leonard, *supra* note 9, at 104 (stating that legislation periodically "reaches situations that its framers never contemplated"). One commentator uses *Oncale v. Sundowner Offshore Services, Inc.* as an example of legislation reaching situations unanticipated by its drafters. *See id.* at 104 (same) (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)). In *Oncale*, the Supreme Court considered whether Title VII's definition of sexual harassment should extend to cases involving male-on-male harassment. *See Oncale*, 523 U.S. at 75 (finding that "sex" discrimination does not protect only women or harassment from opposite sex). The Court noted that Congress likely did not anticipate that its legislation would extend to same-sex claims, but the court nevertheless permitted the instant action to stand. *See* Leonard, *supra* note 9, at 104-05 (narrating facts surrounding *Oncale* decision); *see also Oncale*, 523 U.S. at 78 (holding that Title VII protection does not only extend to "'terms' and 'conditions' in the narrow contractual sense, but 'evinces congressional intent to strike at the entire spectrum'" of discrimination) (citations omitted). Likewise, although Congress may not have anticipated that national origin discrimination claims would extend to language discrimination claims, courts should expand the definition of national origin with the changing American landscape. *Cf.* Leonard, *supra* note 9, at 104 (conceding that language may eventually fall under national origin because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils") (quoting *Oncale*, 523 U.S. at 79).

176. *Cf.* Leonard, *supra* note 9, at 104 (maintaining that national origin may be read broadly to include language protection).

177. *See* Locke, *supra* note 9, at 66 (concluding that Congressional failure to adopt or reject EEOC guidelines is not dispositive but cannot be viewed as sign of approval). One scholar argues that Congressional inaction mostly likely means that Congress does not believe that national origin implicates language protection. *See id.* ("Such inaction can hardly be read as affirmance of the EEOC policy."). That scholar highlights that when Congress wanted to protect language rights, it would historically take affirmative steps to do so. *See id.* at 66-67 (highlighting historical examples of Congress taking action to protect particular rights and emphasizing Congress's inaction with respect to language rights). One example of such action is legislation that mandates the issuance of voting ballots in various languages. *See id.* at 47, 66-67 (using Voting Rights Act as example of affirmative congressional acts done to protect language rights). Ultimately, the scholar concludes that Congress could not have anticipated that litigants would attempt to extend national origin to implicate language protections and that as such, consulting congressional history does not resolve the issue. *See id.* at 66 ("[A]t the time of the Civil Rights Act was passed, Congress [had not] even contemplated the unprecedented future controversies resulting from employers' language conflicts with their employees.").

wave would subsequently result in the rise of language discrimination cases, national origin should not necessarily be rigidly interpreted.¹⁷⁸

Scholars and courts alike recognize that a person's primary language is inextricably tied to their national origin.¹⁷⁹ Some commentators even argue that language is an immutable characteristic like race, religion or national origin.¹⁸⁰ The fact that Congress has yet to formally adopt or reject this interpretation of national origin is inconclusive.¹⁸¹ Congress's inaction may be viewed as implied approval of the EEOC's consistent policy of interpreting national origin as providing primary language protection.¹⁸² Therefore, courts have wrongly rejected the EEOC guidelines,

178. See *id.* (explaining that Congress had not anticipated language problems based on demographics and immigration statistics at time of drafting); see also Leonard, *supra* note 9, at 102-03 (noting lack of evidence in legislative history to Civil Rights Act evincing that Congress was concerned with language discrimination).

179. See *Gutierrez v. Mun. Ct. of Se. Jud. Dist.*, 848 F.2d 1031, 1039 (9th Cir. 1988) (“[P]rimary language remains an important link to . . . ethnic culture and identity.”); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (acknowledging “importance of a person’s language preference or other aspects of his national, ethnic or racial self-identification”); Locke, *supra* note 9, at 50 (noting that many scholars agree that language ought to be included and thus protected under “penumbra of national origin discrimination”); JOSHUA A. FISHMAN, *Language and Ethnicity, LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS* 15, 25 (Howard Giles ed., Academic Press 1977) (describing nationality as encompassing cultural expression and noting that such cultural expression includes language); Wiley, *supra* note 159, at 546 (noting that “most courts” associate “person’s primary language with national origin”).

180. See, e.g., Juan F. Perea, *English-Only Rules and the Right to Speak One’s Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 274 (1990) (arguing that primary language is “practically immutable” characteristic); Beth H. Storper, Comment, *English-Only Policies in the Workplace as Title VII National Origin Discrimination: Garcia v. Spun Steak*, 8 GEO. IMMIGR. L.J. 603, 605 (1994) (“[There is an] immutable and unmistakable link between an individual’s language and their cultural or ethnic heritage. . . .”); cf. also Prescott, *supra* note 94, at 454 (arguing that language, unlike skin color, place of birth or sex, “can be obtained, improved, and changed, which demonstrates that [language] is not an ‘immutable’ characteristic aimed to be protected by Title VII”).

181. Cf. Leonard, *supra* note 9, at 104-07 (noting that Supreme Court has avoided defining national origin in *Alexander v. Sandoval*). In *Alexander*, the Supreme Court had the opportunity to resolve the judicial debate surrounding the definition of national origin as it pertained to Title VII. See 532 U.S. 275, 279, 293 (2001) (holding that plaintiffs did not have private cause of action thereby avoiding defining “national origin”). Instead, the Court held that the plaintiffs did not have such a claim. See *id.* at 293 (same). The Court has alternately avoided ruling on the validity of English-only rules by denying cert to prior cases. See generally *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), cert denied 512 U.S. 1228 (1994) (dealing with discrimination challenge to English-only rule). Likewise, Congress may be avoiding the task of defining national origin. Cf. Leonard, *supra* note 9, at 104-07 (highlighting fact that connection between language and national origin has not played decisive role in resolution of Title VII challenges to English-only rules). For further discussion of why Congressional inaction is inconclusive, see *supra* note 177 and accompanying text.

182. See Locke, *supra* note 9, at 51 (noting that “the EEOC’s prohibition against English-only rules received congressional support during the discussions regarding the Civil Rights Act of 1991”). Cf. *General Elec. Co. v. Gilbert*, 429 U.S.

because including language within the definition of national origin is not contrary to Congress's intent or to Title VII.¹⁸³

C. *Both in Step: EEOC Guidelines and Congressional Intent*

A handful of courts have relied on *Chevron*—perhaps erroneously—to reject the EEOC guidelines by claiming that the guidelines are “contrary to clear congressional intent.”¹⁸⁴ In light of Congress's silence, however, the EEOC guidelines do not diverge from Congress's intent.¹⁸⁵ Congress did not address language discrimination, because it could not have anticipated that language would become an issue.¹⁸⁶ Therefore, the EEOC—acting in its capacity as the designated enforcing agency—promulgated the EEOC guidelines in accordance with *Chevron*.¹⁸⁷ Moreover, Congress's purpose for enacting Title VII was “to assure the equality of oppor-

125, 141 (1976) (explaining that EEOC guidelines are not entitled to deference when guidelines espouse policy inconsistent with prior agency interpretation); Cameron, *supra* note 9, at 304 (highlighting Judge O'Scannlain's assertion in *Garcia* that EEOC abandoned its longstanding position when it promulgated its guidelines).

183. See Storper, *supra* note 180, at 604 (arguing that courts should follow EEOC guidelines); *cf. also Spun Steak*, 998 F.2d at 1489 (9th Cir. 1993) (concluding that language is preference rather than characteristic of national origin); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9th Cir. 1987) (concluding that language is not protected under Title VII); Behm, *supra* note 95, at 573 (emphasizing that Congress never explicitly defined national origin); Prescott, *supra* note 94, at 454 (arguing that plain language and legislative history of Title VII prohibits courts from including language protection within national origin protections); *see also Espinoza v. Farah Mfg. Co. Inc.*, 414 U.S. 86, 88-89 (1973) (finding that Congress did not intend national origin to embrace citizenship).

184. See *Spun Steak*, 998 F.2d at 1489 (rejecting EEOC guidelines); *EEOC v. Beauty Ent., Inc.*, No. 3:01CV378, 2005 WL 2764822, at *2 (D. Conn. Oct. 25, 2005) (declaring that EEOC guidelines are contrary to Title VII); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 735 (E.D. Pa. 1998) (agreeing with *Spun Steak*'s rejection of EEOC guidelines); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (rejecting EEOC guidelines' presumption of invalidity of blanket English-only rules).

185. *Cf. Lynch*, *supra* note 7, at 93-95 (arguing that EEOC correctly chose to promulgate guidelines because Title VII does not directly speak on matter of English-only rules and guidance was needed to clear up ambiguity); *see also Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984) (permitting agencies to interpret statutes when Congress is silent on issue); Behm, *supra* note 95, at 573-75 (recognizing that EEOC—as enforcing agency of Title VII—acted within its authority when it promulgated EEOC guidelines because Civil Rights Act of 1964 did not address English-only rules).

186. For a further discussion of why Congress did not address English-only rules in Title VII, *see supra* notes 174-77 and accompanying text.

187. See *Chevron*, 467 U.S. at 843-45 (allowing agencies to consider statutory interpretation if Congress has not already clarified statute); *see also Lynch*, *supra* note 7, at 92 (explaining that agencies may interpret statutes in absence of clear congressional stance on issue). For a further discussion of agency authority to interpret statutes, *see supra* note 93 and accompanying text. *Cf. Spun Steak*, 998 F.2d at 1489 (declaring EEOC acted outside scope of their authority); *Kania*, 14 F. Supp. 2d at 735 (refusing to defer to EEOC guidelines because they “exceed the authority of the statute they purport to interpret”); Prescott, *supra* note 94, at 450

tunities by eliminating those practices and other devices that discriminate on the basis of race, color, religion, sex, or national origin.”¹⁸⁸ Some argue that inasmuch as language and national origin are inextricably tied, the EEOC undoubtedly crafted its guidelines in accordance with the purpose of Title VII.¹⁸⁹ Therefore, courts should not characterize the EEOC guidelines as incongruent with congressional intent.¹⁹⁰

Additionally, Congress has approved of the EEOC guidelines.¹⁹¹ In the wake of several congressionally opposed court rulings, Congress passed the Civil Rights Act of 1991 (1991 Act).¹⁹² If Congress opposed the

(claiming EEOC “overstepped its authority” when agency promulgated EEOC guidelines).

188. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 457 (1975) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)); *see also* Behm, *supra* note 95, at 590 (indicating that EEOC guidelines were promulgated in accordance with congressional purpose of Civil Rights Act of 1964).

189. *See* Behm, *supra* note 95, at 590 (asserting that because language is fundamental aspect of national origin, EEOC guidelines are in accord with Title VII). For a further discussion of how national origin implicates language protections, *see supra* notes 178-80 and accompanying text.

190. *See* *EEOC v. Synchron-Start Products, Inc.*, 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999) (reiterating that “Congress . . . charged EEOC with the interpretation, administration and enforcement of Title VII”); *Gutierrez v. Mun. Ct. of Se. Jud. Dist.*, 838 F.2d 1031, 1039-40 (9th Cir. 1988) (finding EEOC guidelines to be consistent with congressional intent and Title VII because guidelines seek to protect persons being discriminated against based upon their national origin); Behm, *supra* note 95, at 590-91 (stating that EEOC acted in accordance with Title VII’s purpose because guidelines aim at eliminating English-only rules enacted with intent to discriminate); Lynch, *supra* note 7, at 92-97 (explaining why EEOC guidelines advance purpose of providing protection to special classes designated in Title VII). *Cf.* Leonard, *supra* note 9, at 112 (arguing that EEOC guidelines directly conflict with Congress’s approach to workplace equality under Title VII).

191. *See* Locke, *supra* note 9, at 51-53 (noting that EEOC guidelines received support during congressional debate on Civil rights Act of 1991); *see also* *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1074 (N.D. Tex. 2000) (highlighting exchange between Senators Deconcini and Kennedy and noting that both Senators ultimately concluded 1991 Act would not affect application of EEOC guidelines); Leonard, *supra* note 9, at 105-106 (recounting floor debate between Senators).

192. *See The Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 43, at 896 & n.1 (citing five 1989 Supreme Court decisions that Congress found inconsistent with Title VII); Leonard, *supra* note 9, at 107 (explaining that Congress wrote 1991 Act in reaction to unfavorable court decisions); *see also* *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80 (1989) (restricting Section 1981 to conduct during contract formation, thus preventing Section 1981 from reaching discriminatory working conditions); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905-06 (1989) (requiring plaintiffs to bring challenges to seniority systems when system is adopted instead of when system causes plaintiff discriminatory harm); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (allowing interested parties that did not participate in creation of consent decrees to challenge those decrees); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989) (lessening business necessity requirements and thereby decreasing plaintiff’s ability to prevail in disparate impact cases); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (permitting defendants to rebut Title VII discrimination claims by proving that defendant would have made same business decision even absent any discriminatory motive).

EEOC guidelines, they most likely would have amended the EEOC guidelines within the 1991 Act.¹⁹³ Instead, Congress chose not mention or alter the EEOC guidelines.¹⁹⁴ That silence may be viewed as a form of tacit acceptance.¹⁹⁵ Furthermore, an exchange between Senators DeConcini and Kennedy revealed Congress's approval of the EEOC guidelines.¹⁹⁶ Notably, the Senators expressed concern about the 1991 Act altering the EEOC guidelines; however, the two legislators ultimately determined that the 1991 Act would not vary the guidelines' application.¹⁹⁷ That concern illustrates Congress's approval of the EEOC guidelines.¹⁹⁸ In conclusion, the EEOC guidelines invariably reflect Congress's intent to protect minor-

193. See *Premier*, 113 F. Supp. 2d at 1074 ("An agency interpretation is entitled to greater deference when Congress is aware of the interpretation and chooses not to change it when amending the statute in other respects.") (quoting *United States v. Rutherford*, 442 U.S. 544, 554 (1979)); Behm, *supra* note 95, at 591 (maintaining that Congress implicitly approved of EEOC guidelines when they passed 1991 Act). The 1991 Act amended Title VII. See *id.* (recounting how Congress discussed EEOC guidelines when drafting 1991 Amendment and chose not to alter them). One scholar interprets the amendment by arguing "[c]ertainly, if Congress had viewed the EEOC's guidelines . . . as an incorrect interpretation of Title VII, it would have called for their alteration." *Id.* That scholar argues that accordingly, Congress implicitly found the EEOC guidelines to comport with the congressional intent embodied in Title VII. See *id.* (emphasizing Congressional choice not to alter EEOC guidelines when opportunity presented itself).

194. See Behm, *supra* note 95, at 591 (same); cf. also Leonard, *supra* note 9, at 106-107 (arguing that Congressional failure to adopt EEOC guidelines when Congress was already engaged in adopting another branch's interpretation of Title VII indicates Congress did not approve of EEOC guidelines' interpretation of Title VII). For further discussion of how Congress's silence may be viewed as tacit approval, see *supra* note 177 and accompanying text.

195. See Behm, *supra* note 95, at 591 (contending that if Congress had disagreed with EEOC guidelines, Congress would have taken advantage of opportunity to change guidelines).

196. See Locke, *supra* note 9, at 51-53 (quoting exchange between Senators). Mr. DeConcini: Many of my constituents have brought to my attention an increasing problem with nonjob related discipline and termination of people for speaking languages other than English in the workplace. Is the Senator aware of the EEOC regulations dealing with this problem.

Mr. Kennedy: Yes, the EEOC promulgated such regulations in 1980.

Mr. DeConcini: These regulations reflect the fact that the primary language of an individual is often an essential national origin characteristic. Does the Senator agree that these regulations found in 29 CFR 16067.7 [sic] provide a sound and effective method for dealing with this problem?

Mr. Kennedy: Yes, I agree that this regulation has worked well during the past 11 years it has been in effect.

...

Mr. DeConcini: Therefore, if S. 1745 [1991 Amendment] is passed and signed into law by the President, the EEOC regulations would be consistent with [T]itle VII as amended by S. 1745.

Id. (same); cf. also Leonard, *supra* note 9, at 106-07 (asserting statements between senators are not indicative of legislative intent or will).

197. See Locke, *supra* note 9, at 51-53 (providing verbatim exchange between Senators DeConcini and Kennedy).

198. For further discussion of whether Congress approved of EEOC guidelines when enacting 1991 Act, see *supra* notes 184-98 and accompanying text.

ity groups from discrimination; that intent led to the enactment of both the 1964 and the 1991 Civil Rights Acts.¹⁹⁹ Accordingly, courts ought to defer to the EEOC guidelines.²⁰⁰

D. *Spun Steak's Criticism: The Court's Biggest Attack on the EEOC Guidelines*

In *Spun Steak*, the Ninth Circuit criticized the EEOC guidelines for altering the *Griggs* burden-shifting analysis.²⁰¹ Noting that Congress codified that analysis in the 1991 Act, the *Spun Steak* court contended that the

199. See *EEOC v. Synchron-Start Products, Inc.*, 29 F. Supp. 2d 911, 914-15 (N.D. Ill. 1999) (concluding that EEOC guidelines comport with Congress's intent); Lynch, *supra* note 7, at 92-93 (maintaining that Congress's awareness entitles EEOC guidelines to deference); Behm, *supra* note 95, at 589-91 (contending that EEOC guidelines comport with purpose of Civil Rights Act of 1964 and that Congress validated that assertion by not altering EEOC guidelines in 1991 Act); cf. also Leonard, *supra* note 9, at 106-07 (questioning whether congressional debate during 1991 Act amounts to approval or disapproval of EEOC guidelines); Locke, *supra* note 9, at 51-67 (discussing Congressional inaction regarding EEOC guidelines and considering whether such inaction should be interpreted as silent approval or sign of disapproval); Prescott, *supra* note 94, at 461 (characterizing Congressional inaction towards EEOC guidelines as sign that most courts have correctly chosen to side-step or ignore EEOC guidelines).

200. See *Chevron v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (advocating deference to agency interpretations promulgated in absence of congressional action). In *Chevron*, the Court stated that agencies receive an express delegation of authority to interpret statutes when Congress has deliberately left a gap. See *id.* at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency. . . ."). Reasoning that the agency could draw upon its experience, the *Chevron* Court permitted agencies to adopt reasonable policies. See *id.* (cautioning that interpretations that appear "arbitrary, capricious, or manifestly contrary to the statute" will likely be overturned). The Court in *Chevron* directed lower courts to defer to the agency's interpretation so long as the interpretation represents "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" or that its interpretation is not one that runs contrary to legislative history or Congressional intent. See *id.* at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

201. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting EEOC guidelines). The *Spun Steak* court asserted that it would "not defer to 'an administrative construction of a statute where there are compelling indications that it is wrong.'" *Id.* (citations omitted). The court maintained that the EEOC guidelines were "wrong" because the guidelines altered Title VII's burden-shifting analysis. See *id.* (arguing that existence of English-only rule should not permit employees to meet initial prima facie burden). In particular, the court in *Spun Steak* held that English-only rules do not always create hostile work environments; however, the EEOC guidelines presume that all English-only rules discriminate against non-English-speakers and require businesses to provide business justification for enacting such rules. See *id.* (contending that workplace dynamics are complex and therefore one factor—such as whether employer instated English-only rule—should not be dispositive evidence of discrimination). Based on its position of requiring all businesses to advance business justifications for enacting English-only rules, the *Spun Steak* court rejected the EEOC guidelines as contrary to Title VII. See *id.* (finding that "nothing in the plain language" of statute supports EEOC guideline's stance on English-only rules).

EEOC guidelines ran contrary to congressional intent and were therefore not entitled to deference.²⁰² In particular, the court faulted the EEOC guidelines for automatically shifting the burden of proof merely because defendant employers instated an English-only rule.²⁰³ The *Spun Steak* court did not consider the existence of an English-only rule as sufficient evidence of discrimination to allow plaintiff employees to forego satisfying their initial burden of proof.²⁰⁴ Today, numerous courts use *Spun Steak's* rejection of the EEOC guidelines as a basis for dismissing English-only claims; nevertheless, many regard that reliance as fundamentally flawed.²⁰⁵

In *Spun Steak*, the Ninth Circuit concluded that English-only policies do not inevitably lead to an abusive work environment.²⁰⁶ In contrast, the

202. See *Spun Steak*, 998 F.2d at 1486-89 (laying out burden-shifting analysis presented in *Griggs*); see also *Chevron*, 467 U.S. at 843-45 (declaring that any agency interpretation contrary to congressional or legislative intent does not deserve deference); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 (1973) (determining that courts need not defer to agency interpretations that are clearly "wrong").

203. See *Spun Steak*, 998 F.2d at 1489 (criticizing EEOC guidelines for disposing of plaintiff's initial burden of proof).

204. See *id.* (criticizing EEOC guidelines for disposing of plaintiff's initial burden of proof).

205. See *Synchron-Start*, 29 F. Supp. 2d at 914 (emphasizing that EEOC guidelines correctly create inference of discrimination); *Gutierrez v. Mun. Ct. of Se. Jud. Dist.*, 838 F.2d 1031, 1040 (9th Cir. 1988) (agreeing that English-only rules adversely impact non-English-speaking employees); *Lynch*, *supra* note 7, at 66-68 (maintaining that nature of English-only rules is discriminatory). Although *Spun Steak's* arguments are among the most often cited justifications for upholding English-only rules, courts should not have relied on *Spun Steak*. Cf. *Gutierrez*, 838 F.2d 1031, 1043-46 (holding that English-only rules discriminate against bilingual speakers). Instead, courts ought to look to the *Gutierrez* court's analysis of English-only rules. Cf. *Cameron*, *supra* note 9, at 303-04 (faulting *Spun Steak* for declining to follow *Gutierrez* and for relying on *Gloor*). The *Gutierrez* court concluded that English-only rules adversely affect protected groups and should be subject to close scrutiny. See *Gutierrez*, 838 F.2d at 1040 (concluding that "English-only rules . . . have an adverse impact on protected groups and that they should be closely scrutinized"); see also *Lynch*, *supra* note 7, at 94-95 (agreeing with language in EEOC guidelines that English-only rules create atmosphere of intimidation). Many believe that the *Spun Steak* court should have instead followed *Gutierrez*. See, e.g., *Cameron*, *supra* note 9, at 303-04 (implying that *Spun Steak* court had obligation to follow *Gutierrez* because *Gutierrez* was only vacated as moot). Because *Gutierrez* resigned from her job at the Los Angeles Municipal Court, the Supreme Court vacated the *Gutierrez* court decision as moot; accordingly, the *Spun Steak* court easily dispensed with the *Gutierrez* precedent with a simple footnote. See *id.* at 303-04 (recounting history of *Gutierrez* case).

206. See *Spun Steak*, 998 F.2d at 1489 (concluding that English-only rules do not "inexorably lead to an abusive environment for those whose primary language is not English"). But see 29 C.F.R. § 1606.7(a) (2008) (concluding that English-only rules "create an atmosphere of inferiority, isolation and intimidation based on national origin"). *Spun Steak's* rejection of the EEOC guidelines and refusal to follow *Gutierrez* is perhaps unsurprising. Cf. Note, *supra* note 192, at 897 (prophesizing that "[t]he majority of courts . . . will likely take advantage of the ambiguity [contained in the 1991 Act] and follow their former doctrinal [approaches]"). Because the 1991 Act became "water[ed] down" as a result of con-

EEOC guidelines characterize English-only rules as inherently discriminatory.²⁰⁷ Employers use English-only rules to discriminate against their employees in numerous ways.²⁰⁸ By enacting English-only rules, employers prevent employees from effectively communicating, which is an essential element of job performance.²⁰⁹ Also, English-only rules may be used as a means of denying promotion or may even be the basis for termination.²¹⁰ Moreover, English-only rules cause “dignitary harms” by making non-English speaking employees feel less American.²¹¹ Invariably, English-only

gressional animus, courts remained free to employ their own approach to English-only rules. *See id.* at 896 (noting two-year delay caused by political disagreements). Therefore, the *Spun Steak* court’s decision to ignore the *Gutierrez* court precedent was perhaps predicable. *Cf. id.* at 897 (emphasizing that result of bill becoming “water[ed] down” was that it was ambiguous and that courts were “likely to take advantage of the ambiguity and follow their former doctrinal [patterns]”).

207. *See* 29 C.F.R. § 1606.7(a) (2008) (declaring that English-only rules are “a burdensome term and condition of employment . . . [t]herefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it”). The EEOC guidelines are not a wholesale rejection of English-only rules. *See* 29 C.F.R. § 1606.7(b) (2008) (noting that some English-only rules are not inherently discriminatory). For instance, the guidelines distinguish between blanket and tailored English-only rules, noting that only blanket prohibitions are per se discriminatory. *Compare* 29 C.F.R. § 1606.7(a) (2008) (finding blanket English-only rules to be inherently discriminatory), *with* 29 C.F.R. § 1606.7(b) (2008) (requiring businesses to advance legitimate business necessity reasons for enacting tailored English-only rules). Additionally, the EEOC guidelines do not assert that English-only rules are always discriminatory. *See Synchron-Start*, 29 F. Supp. 2d at 914 (emphasizing that EEOC guidelines do not automatically place burden of persuasion on employer, the guidelines direct that English-only rules create an inference of discrimination). The guidelines merely assert that English-only rules create an inference of discrimination, which may be rebutted with adequate business necessity. *See id.* (same); *see also* 29 C.F.R. § 1606.7 (2008) (asserting that English-only rules “could result in a discriminatory working environment”) (emphasis added).

208. *Cf. Behm*, *supra* note 95, at 592-603 (declaring that English-only rules unquestionably constitute discrimination based on national origin).

209. *See id.* at 598-99 (“[E]ffective communication in the workplace is an essential—and often necessary—element of acceptable job performance, especially at the training level.”).

210. *See id.* at 598 (citing job loss as most obvious harm produced by English-only rules).

211. *See id.* at 599-600 (explaining how English-only rules cause employees to suffer “dignitary harms”); *see also* Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 896 (1995) (“The implicit message to [employees whose primary language is not English] is that if they ‘act white’ they can stay, but if not, they can and will be replaced.”); Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1, 24 (1991) (English-only rules inflict an injury “of stigmatization, or . . . one of stamping non-English speakers with a ‘badge of inferiority’” (citation omitted)); Anthony Stitt, *English-only Rule: Safety Issue or Discrimination?*, COURIER TIMES, March 20, 2000, available at <http://www.englishfirst.org/workplace/workplaceestee- lauder.htm> (last visited Feb. 10, 2008) (quoting bilingual employees who felt “offended” by Estee Lauder’s implementation of English-only policy in their assembly factory).

rules are discriminatory in nature.²¹² By merely proving that their employers enacted such policies, plaintiff employees can adequately make out a prima facie case of discrimination.²¹³ Therefore, the EEOC guidelines do not run afoul of congressional intent or the *Griggs*' burden-shifting analysis.²¹⁴

Courts and scholars alike charge that *Spun Steak* wrongly concluded that the EEOC guidelines alter the *Griggs* burden-shifting analysis.²¹⁵ The discriminatory nature of English-only rules creates an inference of discrimination.²¹⁶ Therefore, the guidelines do not conflict with congressional intent and courts should not use *Spun Steak* as a basis for rejecting the EEOC guidelines.²¹⁷

212. For discussion of whether English-only rules are inherently discriminatory, see *supra* notes 207-11 and accompanying text.

213. See 29 C.F.R. § 1606.7(a)-(b) (2008) (stating that blanket English-only rules are presumed discriminatory but that tailored English-only rules may be rebutted by business necessity showing); *Gutierrez v. Mun. Ct. of Se. Jud. Dist.*, 838 F.2d 1031, 1040 (9th Cir. 1988) (asserting that English-only rules "generally have an adverse impact . . . [and] can readily mask an intent to discriminate on the basis of national origin," and that as such, merely proving that employer has enacted English-only rule is sufficient for initial burden of proof); *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006) (concluding that existence of English-only rule may aid jury in determining whether employer acted with discriminatory intentions). Cf. *Garcia v. Spun Steak*, 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting EEOC guidelines because they do not follow *Griggs*' analysis); *Prescott*, *supra* note 94, at 452 (distinguishing *Maldonado*'s holding from EEOC guidelines and arguing that *Maldonado* court did not explicitly state that English-only rules are discriminatory).

214. See *EEOC v. Synchron-Start Products, Inc.*, 29 F. Supp. 2d 911, 913-14 (N.D. Ill. 1999) (summarizing requirements for agency interpretation to receive deference and concluding that EEOC guidelines merely create inference of discrimination and that such an inference does not run afoul of legislative intent).

215. Cf. *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1074-75 (N.D. Tex. 2000) (disapproving of *Spun Steak*); *Synchron-Start*, 29 F. Supp. 2d at 913-14 (finding fault with *Spun Steak*); see also *Cameron*, *supra* note 9, at 305 (rejecting *Spun Steak*'s approach).

216. See *Gutierrez*, 838 F.2d at 1040 (agreeing with EEOC guidelines that English-only rules create discriminatory work environment); *Lynch*, *supra* note 7, at 92-93 (asserting that discriminatory nature of English-only rules is sufficient to satisfy prima facie case of discrimination); *Behm*, *supra* note 95, at 573 (emphasizing that Congress never expressly defined national origin or addressed English-only rules).

217. See *Locke*, *supra* note 9, at 63 (arguing that *Spun Steak* applied wrong standard of review to EEOC regulations). One scholar argued that the Ninth Circuit wrongly rejected the EEOC guidelines by applying a stringent standard of review. See *id.* (faulting court for not using more deferential standard of review). The *Spun Steak* court rejected the EEOC guidelines because it could not find clear congressional or textual support within Title VII to support the guidelines; that scholar nevertheless contends that "this standard is too high." See *id.* (maintaining that EEOC guidelines were not inconsistent with congressional intent). Rather, the scholar claims that the EEOC guidelines should only be rejected if the guidelines are "inconsistent with congressional intent." See *id.*; see also *The Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 43, at 896-902 (emphasizing that Congressional changes to Title VII were plaintiff friendly); *Lynch*, *supra* note 7, at

V. CONCLUSION

Judicial refusal to defer to the EEOC guidelines perpetuates national origin discrimination.²¹⁸ Without proper deference to the EEOC guidelines, workplaces remain hostile environments for bilingual American and immigrant workers.²¹⁹ Alarming, that lack of deference ignores overwhelming research concerning code-switching.²²⁰ Bilingual employees

94 (noting that EEOC guidelines comport with congressional intent because they do not disrupt burden-shifting analysis). Congress's rationale for drafting the 1991 Act was to undo prior court holdings and mandate a more pro-plaintiff approach to Title VII claims. See *The Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 43, at 897 (explaining Congressional motive behind 1991 Amendment). Even though the final version of the 1991 Act was considered by some to be "water[ed] down," Congress sufficiently accomplished its intent. See *id.* (noting that 1991 Act "still contains a sufficiently clear statement of congressional intent" to overrule *Wards Cove*). Likewise, the EEOC guidelines are pro-plaintiff and thus arguably further Congressional intent. See *Gutierrez*, 838 F.2d at 1039-40 & n.7 (describing EEOC guidelines' pro-plaintiff burden-shifting analysis and noting that guidelines are entitled to deference so long as they comport with congressional intent).

218. See *Gutierrez*, 838 F.2d at 1040 (noting that few courts had addressed English-only rules, that such English-only rules often "mask" discrimination and that courts should carefully scrutinize such rules to eradicate discrimination).

219. See 29 C.F.R. 1606.7(a) (2008) (declaring that English-only rules may "create an atmosphere of inferiority, isolation and intimidation"); see also *Premier*, 113 F. Supp. 2d at 1070 (describing how English-only rules make employees feel uncomfortable and intimidated); Toby Costas, *Court Speaks: English-only Rule Unlawful; Awards EEOC \$700,000 for Hispanic Workers* (Sept. 19, 2000), available at <http://www.eeoc.gov/press/9-19-00.html> (last visited Feb. 10, 2008) ("[T]he policy served to create a disruption in the workplace and feelings of alienation and inadequacy.") (quoting former employee of Premier Operator Services); Stitt, *supra* note 211, at 1 (describing how English-only rule alienated bilingual employees). Cf. *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 731 (E.D. Pa. 1998) (recounting explanation that English-only rule aimed to alleviate workplace hostility); *Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954, at *1 (4th Cir. 1996) (unpublished table decision) (explaining that English-only rule implemented in response to customer and employee complaints); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *2 (M.D. Fla. June 3, 1991) (reporting that employer enacted English-only rule to alleviate workplace hostility), *aff'd* 985 F.2d 578 (11th Cir. 1993) (affirmed without opinion); Eric Matusewitch, *English-Only Rules Come Under Fire: Edict Forcing 'Workplace Necessity' Pass Court Muster*, LEGAL INTELLIGENCER, Dec. 30, 1998, at 7 (summarizing Father's argument in *Kania* that speaking other languages is "offensive and derisive" to those who do not understand).

220. See *Premier*, 113 F. Supp. 2d at 1069-71 (describing code-switching and explaining why bilingual speakers are often incapable of restraining primary language usage); Behm, *supra* note 95, at 596-97 (emphasizing that code-switching is prevalent problem among bilinguals). At least one court has criticized the *Spun Steak* court for its reliance on *Gloor* pointing out that the *Gloor* decision was made prior to the publication of code switching research, which dispelled the long-held belief that language usage is merely a preference. See *Premier*, 113 F. Supp. 2d at 1074 (noting that *Gloor* court handed down decision prior to publication of extensive research on code-switching). Code-switching proves that many bilingual people are not always capable of controlling their language usage. Compare *Premier*, 113 F. Supp. 2d at 1074 (noting that *Gloor* court handed down decision prior to publication of extensive research on code-switching), and *Cameron*, *supra* note 9,

should not be punished for casual language usage or slips, because usage is not entirely within their control.²²¹ Furthermore, English-only rules do not remedy workplace hostility problems.²²² Instead, the rules create a deeper divide between coworkers.²²³

Moreover, by not deferring to the EEOC guidelines, courts leave bilingual employees without proper recourse.²²⁴ More often than not, courts that refuse to defer to the EEOC guidelines effectively disregard employee challenges to English-only rules, by finding that employees have not met their initial prima facie showing of discrimination.²²⁵ Many com-

at 305 (urging courts not to follow *Gloor* because that decision predated code-switching research), and Behm, *supra* note 95, at 596 (arguing that *Gloor's* analysis is flawed because that analysis did not consider problems presented by code-switching), with *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (claiming that English-only rules do not discriminate against bilingual employees because bilingual employees can choose which language to speak), and *Garcia v. Spun Steak*, 998 F.2d 1480, 1487-88 (9th Cir. 1993) (relying on *Gloor* and *Jurado* to characterize language usage as "self expression" and "matter of preference") (citations omitted).

221. See generally *Premier*, 113 F. Supp. 2d at 1066-71 (reporting Dr. Berk-Seligson's testimony). Dr. Susan Berk-Seligson testified in court as an expert witness; her testimony directly attacked the long-held belief—originating from *Gloor*—that bilingual employees have control over their language usage. See *id.* (recalling testimony of expert witness). Dr. Berk-Seligman testified instead that many bilingual people have difficulty with code-switching and are unable to control lapses into their primary language. See *id.* (same); cf. also Behm, *supra* note 95, at 596, 598-99 (arguing that English-only rules unfairly punish bilingual employees often resulting in fewer promotions or even termination).

222. See Behm, *supra* note 95, at 600 (finding that English-only rules contribute to workplace hostility); see also *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 87-88 (8th Cir. 1977) (holding that ethnic slurs about Italian-Americans made by plaintiff's supervisor were part of casual conversation and were not so excessive and disgraceful as to rise to level of Title VII violation); *St. J. Enriquez v. Transit Mixed Concrete Co.*, 492 F. Supp. 390, 393 (C.D. Cal. 1980) (concluding that Mexican-American plaintiff failed to prove national origin discrimination where plaintiff was harassed by coworkers but such harassment was never brought to the attention of employer or supervisors); *Morales v. Dain, Kalman and Quail, Inc.*, 467 F. Supp. 1031, 1036, 1039 (D. Minn. 1979) (holding that Cuban plaintiff was not harassed when supervisor made comments concerning "fast-thinking Latin-Americans"); *Fakete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186 (W.D. Pa. 1973) (explaining that isolated incidents of coworker harassment were not based on plaintiff's Hungarian national origin because even if harassment was based on plaintiff's national origin, employer would not have been liable where employer took preventative measures and corrective steps with regard to those incidents of which employer's administrative and supervisory personnel were aware); EEOC Compl. Man. § 13-IV (2006) (listing several cases to illustrate extent of workplace hostility).

223. For further discussion of workplace hostility, see *supra* note 222 and accompanying text.

224. Cf. *Spun Steak*, 998 F.2d at 1490 (Boochever, J., dissenting) (noting difficulty of presenting prima facie case of discrimination if EEOC guidelines are not accepted).

225. See, e.g., *Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954, at *2 (4th Cir. May 29, 1996) (unpublished table decision) (concluding that plaintiff employees could not sustain prima facie case); *Spun Steak*, 998 F.2d at 1489-90 (holding that bilingual employees did not make out prima facie discrimination

mentators point to the EEOC's court backlog to argue that the EEOC guidelines make initiating suits too easy for employees; nevertheless, the backlog also illustrates how pervasive and widespread national origin discrimination has become.²²⁶

In response, some scholars call for Congressional action.²²⁷ Drawing on examples of successful prior actions, some scholars recommend that Congress either explicitly support the EEOC guidelines or amend Title VII.²²⁸ In the meantime, employers can take remedial steps towards alleviating the discriminatory effects of English-only rules.²²⁹ For example, employers can employ bilingual supervisors, conduct racial seminars and distribute multilingual materials that describe workplace safety standards and procedures; such actions are all viable alternatives to enacting English-only rules.²³⁰ Indeed, for those employers who truly enact English-only rules out of business necessity, a reasonable alternative exists.²³¹

case); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987) (asserting that plaintiff presented insufficient evidence to make out prima facie case); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 732 (E.D. Pa. 1998) (deciding that plaintiff failed to state prima facie case); *Cf. Maldonado v. City of Altus*, 433 F.3d 1294, 1303 (10th Cir. 2006) (holding that English-only rule provided sufficient evidence of discrimination to withstand summary judgment motion); *Premier*, 113 F. Supp. 2d at 1073 (finding that English-only rule constituted disparate treatment of Hispanic employees); *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) (declaring court persuaded by EEOC guidelines that English-only rules are presumptively discriminatory).

226. See John O. Cunningham, *Commentary: "English-only" Complaints on the Rise*, LAWYERS WEEKLY USA, Jan. 30, 2006 (noting that EEOC takes dim view of English-only rules and that that view helps employees to obtain large settlements).

227. See Behm, *supra* note 95, at 604 (encouraging Congress to put some "teeth" into EEOC guidelines); Locke, *supra* note 9, at 71-72 (calling on Congress to amend Title VII).

228. See, e.g., Behm, *supra* note 95, at 604 (encouraging Congress to react in similar manner as it did to *General Electric*). In *General Electric*, the Court held that pregnant women were not a protected class defined within Title VII. See *id.* at 604 n.261 (holding that Title VII sex discrimination does not protect pregnant women). In response, Congress enacted the Pregnancy Discrimination Act. See *id.* at 604 (describing Congressional displeasure towards and reaction to *General Electric*). Behm argues that Congress should react similarly and add language protection to Title VII. See *id.* (calling on Congress to put "teeth" into EEOC guidelines by amending Title VII).

229. *Cf.* EEOC Compl. Man. § 13-IV (suggesting alternatives to English-only rules); Behm, *supra* note 95, at 608 (making suggestions for nondiscriminatory alternatives to English-only rules).

230. See *Gutierrez v. Mun. Ct. of S.E. Jud. Dist.*, 838 F.2d 1031, 1043 (9th Cir. 1988) (recommending bilingual supervisors); EEOC Compl. Man. § 13-IV (explaining policies that employer can invoke in order to prevent liability). *Accord* Behm, *supra* note 95, at 608 (suggesting racial tension seminars, bilingual supervisors and multilingual emergency procedures); Cunningham, *supra* note 226 (suggesting that employers use nonverbal emergency procedures); Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG., Aug. 5, 2007, at 34.

231. For a discussion of the employers who truly enact English-only rules out of business necessity and the reasonable alternatives that exist, see *supra* note 230 and accompanying text.

In conclusion, the EEOC guidelines properly address the problems created by employers who enact English-only rules.²³² Although the EEOC does not have rulemaking authority, the EEOC guidelines reflect the agency's experience with national origin discrimination; therefore, courts ought to accord the guidelines some judicial deference.²³³ As the American cultural landscape morphs, it is essential that employers remain tolerant and refrain from discrimination.²³⁴ The United States is, after all, a nation predominately comprised of immigrants.²³⁵

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232. See *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006) (determining that EEOC guidelines are helpful for determining discriminatory intent); *Gutierrez*, 838 F.2d at 1040 (adopting EEOC guidelines); *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (deferring to EEOC guidelines); *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) (accepting EEOC guidelines). *Accord* Behm, *supra* note 95, at 590-604 (arguing for deference to EEOC guidelines); Lynch, *supra* note 7, at 92-94 (defending EEOC guidelines as consistent with congressional intent); Locke, *supra* note 9, at 51-68 (calling for legislative action against English-only rules).

233. For a discussion of how the EEOC guidelines reflect the agency's experience with national origin discrimination and how courts ought to accord the guidelines some level of judicial deference, see *supra* notes 153-217 and accompanying text.

234. For a discussion of the changing American cultural response to immigration waves, see *supra* notes 7-19 and accompanying text.

235. See Lynch, *supra* note 7, at 67 ("It is ironic that a nation established by immigrants would restrict the practices of other similarly situated, but temporarily disadvantaged immigrants.").