

## Yniguez v. Arizonans for Official English: Free Speech May Have Lost the Battle, but in the End It Will Win the War

Jennifer A. Nemec

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## COMMENT

### *YNIGUEZ V. ARIZONANS FOR OFFICIAL ENGLISH:* FREE SPEECH MAY HAVE LOST THE BATTLE, BUT IN THE END IT WILL WIN THE WAR

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## I. INTRODUCTION

The United States currently has the largest percentage of foreign-born residents within its borders since World War II.<sup>1</sup> This exponential population growth began to be reflected in the workplace during the course of the past few years.<sup>2</sup> This influx, however, came at a time when many Americans were unemployed, underemployed, or barely getting by. Although the unemployment rate has gone down recently and the economy is looking up, Americans continue to see themselves, family, and friends squeezed out of the marketplace. Consequently, those same Americans felt and continue to feel that foreigners are to blame. Inevitably, immigrants have become labeled as pariahs responsible for stealing American jobs and causing American families pain. Thus today, governments and courts are forced to deal with the aftermath of constituent, coalition, and legislative-based attacks on foreigners through anti-immigration legislation.<sup>3</sup>

English-only laws are one such form of anti-immigrant legislation. English-only rules make English the official language of a state and, in the most extreme situations, require government employees to act only in English during the performance of government business. In 1988, Ari-

1. See ROBERT FAMIGHETTI, *WORLD ALMANAC* 377 (1997). As of April 1, 1996, the Census Bureau reported that there are 264.6 million people in the United States. Of the reported 23 million foreign born residents: 6.7 million immigrants were from Mexico; 1.2 million from the Philippines; 797,000 were Cuban; 650,000 were from El Salvador; 617,000 were from Great Britain; 509,000 were from the Dominican Republic; 538,000 were Polish; 531,000 were Jamaican; and 816,000 were from China/Taiwan/Hong Kong.

2. This exponential population growth has begun to be reflected in the workplace. In fact, recent studies show that between 1980 and 1987, Hispanic workers accounted for almost a fifth of employment growth in the United States. This extreme increase is anticipated to continue; most projections indicate that by the year 2000, as much as ten percent of the nation's labor force will be Hispanic. See Mark Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 *OR. L. REV.* 849, 849 (1995).

3. *Id.* The workplace has emerged as the primary battleground of the official English movement and the civil rights of language minorities. *Id.* In an effort to curb the use of foreign language in the workplace many employers have established English-only rules whereby employees are required to refrain from speaking languages other than English on the employer's premises. See *Constitutional Law—First Amendment—Ninth Circuit Invalidates Arizona Constitution's Official English Requirement*, 109 *HARV. L. REV.* 1827 (1996). See also *America Needs No Language Law*, *N.Y. TIMES*, Nov. 25, 1995 at A14. See also generally Emily Sanford, *State Flag, Seal, and other Symbols: Designate English as the Official Language of the State of Georgia*, 13 *GA. ST. U. L. REV.* 320 (1996). For example, in 1986 California voters adopted an amendment to their state constitution declaring English the State's official language; and Florida did just the same two years later. See Carol Schmid, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 *N.C. CENT. L.J.* 65 (1992).

zona adopted the latter alternative by amending its state constitution. This severe measure was met with a great deal of opposition and spawned a tremendous amount of litigation. This Comment analyzes one piece of litigation in particular, *Yniguez v. Arizonans for Official English*.<sup>4</sup> The premise of this Comment is that English-only statutes precluding individuals from communicating in languages other than English during the performance of their government jobs are unconstitutional.

This Comment is organized as follows. Part II is an analysis of *Yniguez v. Arizonans for Official English*. The analysis begins by exploring the constitutionality of Article XXVIII of the Arizona Constitution. The constitutionality of the amendment is evaluated against federal civil rights law, specifically Title VII of the 1964 Civil Rights Act, as well as the historical origins of the First Amendment. Article XXVIII is then examined according to the traditional principles of public employee speech. The principles of employee speech include matters of personal concern, matters of public concern, and the *Pickering* Test.

Part III of the Comment looks at the fate of future English-only statutes. The fate of such statutes possibly rests on the interpretation of Article XXVIII in *Ruiz v. Symington*.<sup>5</sup> The constitutionality of English-only statutes will inevitably be decided, even if *Ruiz* fails to settle the controversy, as there are numerous such cases at courts' doors. Following the examination of *Ruiz*, this Comment scrutinizes the U.S. Supreme Court's stance on exclusivist legislation. To illustrate, in 1996 the Court held unconstitutional an amendment to Colorado's constitution which singled out and precluded gays from seeking the basic protections of local government. It is from this holding that legal scholars can analogize the Colorado constitutional amendment to that of Arizona, and thus surmise that Article XXVIII is unconstitutional as well.

Part IV concludes that the Court missed a valuable opportunity to decide the constitutionality of English-only statutes when it held that it need not address the issue as the claim was now moot. In essence, free speech lost the day because the Court declined to tackle the issue. In the end, however, free speech must win the war in light of jurisprudential precedent and recent U.S. Supreme Court trends as related to legislation which denies specific classes of people the protections of government.

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4. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1995); *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995); *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

5. 1996 WL 309512 (Ariz. App., June 11, 1996).

## II. YNIGUEZ V. ARIZONANS FOR OFFICIAL ENGLISH

### A. Background

In October 1987, Arizonans for Official English (AOE) initiated a drive to amend Arizona's constitution.<sup>6</sup> AOE promotes the English-Only Movement. AOE is headed by Robert Park, a retired criminal investigator for the Immigration and Naturalization Service.<sup>7</sup> The AOE sponsored a ballot initiative that eventually became Article XXVIII of Arizona's state constitution. Article XXVIII in part reads:

English is the official language of the State of Arizona . . . [T]his Article applies to: the legislative, executive and judicial branches of government, all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities, all government officials and employees during the performance of government business . . . This State and all political subdivisions of this State shall act in English and no other language . . .<sup>8</sup>

AOE succeeded in placing its proposed constitutional amendment on the November 1988 ballot.<sup>9</sup> The ballot passed with only 50.5% of voting Arizonans casting ballots in favor of the law.<sup>10</sup>

When Article XXVIII was passed, Maria-Kelley Yniguez, a Latina, was working for the Arizona Department of Administration as a medical malpractice claims adjuster.<sup>11</sup> She was bilingual—fluent and literate in both English and Spanish.<sup>12</sup> Before Article XXVIII's passage, she communicated to monolingual Spanish-speaking claimants in Spanish, and in a combination of English and Spanish with bilingual claimants.<sup>13</sup> Following the passage of the state constitutional amendment, state employees who failed to obey the Arizona Constitution became subject to sanctions. For this reason, immediately following the passage of Article XXVIII Yniguez stopped speaking Spanish on the job in fear of being administra-

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6. See Martina Stewart, *English Only Laws, Informational Interests and the Meaning of the First Amendment in Pluralistic Society*, 31 HARV.C.R.- C.L. L. REV. 539, 541 (1996).

7. *Id.*

8. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 949 (9th Cir. 1995).

9. See Stewart, *supra* note 6, at 541.

10. *Id.*

11. *Yniguez*, 69 F.3d at 949.

12. *Id.*

13. *Id.*

tively disciplined.<sup>14</sup> Then in November 1988, Yniguez filed an action in federal district court against the State of Arizona, Governor Mofford, Arizona Attorney General Robert Corbin, and Director of the Arizona Department of Administration Catherine Eden.<sup>15</sup> She sought injunctive relief, counsel fees, and "all other relief that the court deems just and proper under the circumstances."<sup>16</sup>

Yniguez's complaint was later amended to include Jaime Gutierrez, a Hispanic state senator from Arizona, as a plaintiff. Gutierrez declared that prior to the passage of Article XXVIII he spoke Spanish when speaking with his Spanish-speaking constituents and that he continued to do so after the Article's passage. He claimed, however, that he was afraid that doing so made him liable for suit pursuant to Article XXVIII.<sup>17</sup>

The defendants moved for dismissal and the Attorney General issued an opinion regarding Article XXVIII which explained that to avoid conflicts with the U.S. Constitution, the Article included only "the official" acts of the Arizona government.<sup>18</sup> The federal district court decided that "either the Eleventh Amendment or Article III's case-or-controversy requirement, U.S. CONST. art. III, §2, paragraph 1, shielded the other defendants from suit."<sup>19</sup> Governor Mofford, however, was not shielded because Mofford was the only one capable of enforcing the Article against Yniguez, and the only official who threatened to enforce the provision against state employees.<sup>20</sup> The court granted declaratory relief against Mofford, but denied Yniguez's claim for injunctive relief because Mofford did not specifically threaten enforcement of Article XXVIII against Yniguez.<sup>21</sup> Mofford did not appeal.

The federal district court then reached the merits of the case. It read Article XXVIII as barring state officers and employees from using any language other than English in performing their official duties, except to the extent that certain exceptions in the provision are applied.<sup>22</sup> The district court found that Article XXVIII infringed on constitutionally protected speech and the provision was facially overbroad in violation of the

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14. *Id.*

15. *Id.* at 925.

16. *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*4.

17. *Id.*

18. *Id.*

19. *Arizonans For Official English v. Arizona*, 117 S. Ct. 1055 (1997).

20. *Yniguez*, 69 F. 3d at 925.

21. *Id.*

22. *Arizonans For Official English*, 117 S. Ct. at 1057.

First Amendment.<sup>23</sup> Because the court found that the Article violated the First Amendment, the court decided it need not reach the other constitutional and statutory grounds that Yniguez asserted.<sup>24</sup>

When AOE learned that the State had decided not to appeal the decision, it moved to intervene post-judgment pursuant to Federal Rule of Civil Procedure 24(a), for the purpose of pursuing an appeal of the federal district court's order.<sup>25</sup> Then the Attorney General moved to intervene because the court rejected its interpretation of Article XXVIII and refused to certify to state court the question of Article XXVIII's proper interpretation. The district court denied AOE as well as the Attorney General the right to intervene.<sup>26</sup> It also denied the request to have the state court determine Article XXVIII's proper interpretation.<sup>27</sup>

The case then was appealed to the United States Court of Appeals for the Ninth Circuit. The court of appeals reversed the judgements to AOE and permitted it to intervene as a party to the appeal.<sup>28</sup> The Ninth Circuit said that AOE's role as the principal sponsor of the ballot initiative meant that it had a strong interest in upholding the Article, especially since the State, through Governor Mofford, failed to defend the law.<sup>29</sup> The Ninth Circuit also permitted the Arizona Attorney General to intervene not as a party, but only to defend the constitutionality of Arti-

23. Yniguez v. Arizonans for Official English, 69 F.3d 920, 925 (9th Cir. 1995).

24. *Id.* at 926.

25. *Id.*

26. *Id.* See Yniguez v. Mofford, 130 F.R.D. 410 (1990). The district court denied the Attorney General the ability to intervene under 28 U.S.C. § 2403(b) because that statute authorizes intervention by a state attorney general only in actions to which the State or any agency, officer or employee is not a party. *Id.* at 412. In the instant case, the Governor was still a party defendant, and the attorney general as well as Department of Administration Director Eden were formerly party defendants. *Id.* Moreover, the attorney general was already permitted to argue the constitutionality of Article XXVIII. *Id.*

The district court also denied AOE the right to intervene. First, AOE failed to comply with Federal Rule of Civil Procedure 24(c)'s requirement that its motion to intervene be accompanied by a pleading setting forth the claim for which intervention is sought. *Id.* at 413. Second, the Committee as an unincorporated association without capacity to sue or be sued did not have legal capacity to intervene. *Id.* at 413-14. Third, the Committee lacked the ability to establish that any of its members would have the standing necessary to have an appealable interest in this action. *Id.* at 415.

27. *Id.* at 412. Given the district court's decision that Article XXVIII was not susceptible to a construction that would eliminate its unconstitutional overbreadth, any certification of a narrowing construction would be improper. To narrow its scope would be as inappropriate as asking a state court to rewrite a statute.

28. *Id.*

29. *Arizonans For Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 135.

cle XXVIII and only as long as AOE maintained an appeal.<sup>30</sup>

Arizona's Attorney General then argued that Yniguez's departure from her job as a state employee made her claims moot.<sup>31</sup> Yniguez, a state employee at the time when she filed her complaint, however, voluntarily left the State to get a job in the private sector in 1990.<sup>32</sup> But the Ninth Circuit ruled that Yniguez's claim was not moot because she was still appealing the federal district court's refusal to award her nominal damages.<sup>33</sup> In a subsequent decision, a three-judge panel of the Court of Appeals for the Ninth Circuit affirmed the federal district court's ruling that the Article infringed on the First Amendment.<sup>34</sup> The Ninth Circuit then vacated that ruling and decided to hear the matter en banc. The en banc Ninth Circuit in a six-to-five vote affirmed the federal district court's finding that Article XXVIII violated the First Amendment.<sup>35</sup>

The en banc Ninth Circuit majority opinion agreed that Article XXVIII was facially overbroad.<sup>36</sup> The majority stated that the Article prevented state legislators and other government officials from being able to speak on political matters with their non-English-speaking constituents.<sup>37</sup> These constituents were prevented from receiving valuable information about government services. The court also reasoned that Article XXVIII was so broad that it extended to Arizona's public universities, which under the provision would be prevented from issuing diplomas in Latin.<sup>38</sup> It also would bar Arizona judges who perform weddings from saying "mazel tov."<sup>39</sup>

In addition, the Ninth Circuit also repudiated the Arizona Attorney General's recommendation that Article XXVIII be given a narrower interpretation so that it would not restrict constitutionally protected speech to such a great degree.<sup>40</sup> The court felt that a narrow interpretation would clash with the plain meaning of the provision.<sup>41</sup>

The Ninth Circuit rejected the following First Amendment arguments from AOE as well: 1) that Article XXVIII only infringed on un-

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30. *Id.*

31. *Id.*

32. *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*4.

33. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 926 (9th Cir. 1995).

34. *Arizonans For Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 135.

35. *Id.*

36. *Arizonans For Official English*, 117 S. Ct. 1055, 1067 (1997).

37. *Yniguez*, 69 F.3d at 931.

38. *Id.* at 932.

39. *Id.*

40. *Arizonans For Official English*, 117 S. Ct. at 1067.

41. *Yniguez*, 69 F.3d at 930.



protected modes of speech; 2) that Yniguez's speech while performing her job could be substantially regulated because she was functioning as a government employee; and 3) that the benefits to Arizonans from Article XXVIII (i.e. governmental efficiency) were strong enough to support its constitutionality.<sup>42</sup> Finally, the court awarded Yniguez nominal damages because it held that her constitutional rights were violated.<sup>43</sup>

The Ninth Circuit's decision then went before the U.S. Supreme Court which granted the petition for a writ of certiorari. The Court in a unanimous opinion held that Ms. Yniguez, who filed her claim as an individual and not a class representative, had a viable claim at the outset of the suit.<sup>44</sup> But the Court noted that her claim then became moot with her voluntary departure for a position in the private sector. Therefore, the case lost the essential elements of a justifiable controversy and should not have been retained for adjudication on the merits by the court of appeals.<sup>45</sup> To qualify as a case fit for federal court adjudication, an actual controversy must exist at all stages of review, not solely at the time the complaint is filed.<sup>46</sup>

Thus, the Court was compelled to vacate the Ninth Circuit judgment, and remand the case to the court of appeals with the instructions that the action be dismissed by the district court.<sup>47</sup> Consequently, the Court never reached the substantive issues of the case: whether the interpretation of Article XXVIII was correct and whether the measure was constitutional.<sup>48</sup>

In addition, the Court stated that it did not have to definitively resolve the issue of whether AOE or its chairman, Robert Park, had standing to defend the constitutionality of Article XXVIII.<sup>49</sup> But the Court did announce that state legislators had standing to oppose a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.<sup>50</sup> In other words, because legislators are elected representatives of the people, as public officials, they can defend initiatives which become the law of the state. Although AOE and its members were initiative sponsors they were not elected officials. Consequently, the

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42. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 136.

43. *Id.*

44. *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*13.

45. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 1071 (9th Cir. 1995).

46. *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*2. *See also* *Preiser v. Newkirk*, 422 U.S. 395 (1975).

47. *Arizonans For Official English*, 1997 WL 84990, at \*2.

48. *Id.*

49. *Id.* at \*13.

50. *Id.* *See also* *Karcher v. May*, 484 U.S. 72, 82 (1987).

Court held that because Arizona had not enacted a state law which appointed initiative sponsors as agents of the people of Arizona to defend in lieu of public officials, AOE and Park did not have constitutional standing to enter the suit.<sup>51</sup>

Also, AOE asserted representational or associational standing. An association has standing to sue or defend only if its members would have standing in their own right.<sup>52</sup> Moreover, the requisite concrete injury to AOE members was not apparent.<sup>53</sup> As nonparties in the federal district court, AOE members were not bound by the judgement for Yniguez. Thus, the Court had great doubts as to whether AOE and Park had standing under Article III to pursue appellate review.<sup>54</sup>

### B. Case Analysis

The Court elected not to entertain the case on jurisprudential grounds. The Court held that Ms. Yniguez's claim was moot because she no longer worked for the State of Arizona.<sup>55</sup> Some might argue that the Court was trying to avoid tackling the volatile constitutionality issues latent in English-only laws. Others might propose that the basic notions of federalism fueled the Court's decision. In essence, the Court attempted to say that it was more appropriate for a state's high court to declare a state statute unconstitutional rather than for a federal court to so hold. However, a more likely explanation is that the Court was waiting for the right case. In other words, the Court was less interested in the role of a state's high court and was more concerned about granting certiorari to a case with issues of questionable mootness. The Court wanted to address the constitutional issues latent in English-only laws, but not at the expense of challenges from the legal community declaring that the Court had no business entertaining a moot case. The Court probably anticipated that the losing party in *Ruiz v. Symington*,<sup>56</sup> a Ninth Circuit case with the same constitutional issues, would likely petition the Court for certiorari. The Court could address the constitutional issues in *Ruiz* without fear of backlash from the legal community because the claim is still viable as all plaintiffs still work for the State of Arizona. Moreover, because the Court granted certiorari in *Yniguez* there is a strong possibility that it will do the same in *Ruiz*. One could logically assume that when the Court

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51. *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*13.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at \*14.

56. *Ruiz v. Symington*, 1996 WL 309512 (Ariz. App. Div.1) (1996).

granted certiorari in *Yniguez*, it was sending a message that the constitutional issues in *Yniguez* were worthy of clarification.

The decision, in a narrow sense, precludes the State of Arizona and its citizens from learning the answers to the substantive issues of the *Yniguez* case, which were as follows: 1) the constitutionality of Article XXVIII of the Arizona State Constitution and, more specifically, whether the plaintiffs' First Amendment freedoms were trampled; and 2) the legal meaning of Article XXVIII. In a much broader sense, the country as a whole is left to guess at whether statutes forbidding the performance of government acts in languages other than English infringe on state and federal employees' First Amendment freedoms. If the Court rules that federal and state English-only statutes precluding government employees from "acting in languages other than English during performance of their official duties" are unconstitutional, then English-only statutes must be overturned.

*Ruiz v. Symington* involved ten plaintiffs that brought an action in superior court against the Governor and Attorney General of Arizona.<sup>57</sup> All plaintiffs were bilingual and regularly communicated in Spanish and English as private citizens and during the performance of government business.<sup>58</sup> They sought a declaratory judgment that Article XXVIII violated the First, Ninth, and Fourteenth Amendments to the United States Constitution.<sup>59</sup> The plaintiffs included four state elected officials, five state employees, and one private citizen. The defendants included Fife Symington, Governor of Arizona, the Arizona State Attorney General, AOE and its chairman, Robert Park.<sup>60</sup>

Most importantly, *Ruiz* will provide the courts an opportunity to tackle English-only laws, in particular, Article XXVIII of Arizona's constitution. In light of the fact that the constitutionality of Article XXVIII will inevitably undergo judicial scrutiny, it is appropriate to now turn to an in-depth examination of this issue.

### 1. Constitutionality of Article XXVIII

Article XXVIII raises serious questions about the authority of the government to restrict the free speech of its employees. One line of U.S. Supreme Court cases has vehemently affirmed the free speech rights of government employees, speaking on matters of public importance,<sup>61</sup> while

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57. *Id.* at \*1.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See* Pickering v. Board of Educ. Of Township High School District, 391 U.S.

another line has given the government tremendous discretion to restrict public employee speech, particularly personal speech.<sup>62</sup> So which line of cases is the proper one to follow? The answer is a complicated one because Yniguez's use of Spanish does not fit the classic definition of constitutionally protected speech on matters of public importance; yet, her use of Spanish does not seem like personal speech on the job which the government has wide latitude to regulate.<sup>63</sup>

As this Comment will demonstrate, it is clear that Ms. Yniguez's speech should be protected. The first step in defending this thesis is an examination of the federal civil rights law. Title VII of the 1964 Civil Rights Act is a logical beginning for this analysis because its focus is discrimination in the workplace.

*a. Title VII of the 1964 Civil Rights Act*<sup>64</sup>

*1.) The Purpose of Title VII*

Title VII outlaws employment discrimination based on race, color, religion, sex, or national origin.<sup>65</sup> "Title VII makes it unlawful to refuse to hire, discharge, or 'otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.'"<sup>66</sup> Moreover, employers are prohibited from limiting, segregating, or classifying employees or job applicants for employment in any way which would deprive or tend to deprive any person of job opportunities or otherwise adversely affect his status as an employee on the basis of prohibited criteria.<sup>67</sup>

While Title VII does not expressly forbid discrimination on the basis of language, the Equal Employment Opportunity Commission ("EEOC") has promulgated broad guidelines defining national origin discrimination.<sup>68</sup> These regulations include discrimination based on an " 'individual's or his ancestor's place of origin,' or because an 'individual has the

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563 (1968); *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995).

62. *See Connick v. Myers*, 461 U.S. 138 (1983).

63. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 136.

64. 42 U.S.C. § 2000(e)(2) (1994).

65. *Id.*

66. *See Schmid, supra* note 3, at 76 (*citing* 42 U.S.C. § 2000(e)(2)(1) (1981 & Supp. 1990)).

67. *Id.*

68. *Id.* *See* EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1-7 (1997).

physical, cultural or linguistic characteristics of a national origin group.'"<sup>69</sup> The EEOC Guidelines specifically assert that an individual's mother tongue or primary language is an important aspect of national origin.<sup>70</sup> Moreover, by the end of the Carter administration, the EEOC rendered its "Speak-English-Only Guidelines," which state that an English-only rule may be an encumbrance on the terms and conditions of employment.<sup>71</sup> Moreover, Section 1606.7 of the Guidelines on National Discrimination Because of National Origin provides as follows:

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. It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.<sup>72</sup>

It must also be noted that the EEOC, however, does presume that English-only rules applied only at certain times are permissible when justified by business necessity.<sup>73</sup>

## 2.) Cases involving Title VII

The major cases addressing English-only laws in the private workplace, *Garcia v. Gloor*,<sup>74</sup> *Jurado v. Eleven-Fifty Corp.*<sup>75</sup>, and *Garcia v. Spun Steak Co.*,<sup>76</sup> set the stage for *Yniguez v. Arizonans for Official English*.<sup>77</sup> They are some of the first cases attacking limitations on work-

69. Schmid, *supra* note 3, at 76. See also 29 C.F.R. § 1606.1-.7 (1997).

70. See Schmid, *supra* note 3, at 82-83.

71. See Dan Clawson, *Garcia v. Spun Steak Co. The Ninth Circuit Requires that Title VII Plaintiffs Prove the Adverse Effect of a Challenged English-Only Workplace Rule*, 17 U. PUGET SOUND L. REV. 473, 480 (1994).

72. 29 C.F.R. § 1606.1-.7 (1990).

73. 29 C.F.R. § 1606.7.

74. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

75. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987).

76. *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726 (1994).

77. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1995); *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995); *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

place communications in languages other than English. These cases use Title VII (National Origin Discrimination) as the preferred weapon for attacking English-only rules.

Although the holdings of *Jurado*, *Gloor*, and *Spun Steak* do not directly support the Ninth Circuit's rejection of the argument, in *Yniguez*, that English-only laws are a proxy for national origin discrimination),<sup>78</sup> they are useful in understanding the historical background of case law challenging English-only rules in the workplace. The pre-*Yniguez* cases provide prospective plaintiffs the opportunity to see the mistakes of previous litigants in English-only cases. Thus, Ms. Yniguez and future plaintiffs learn from the following cases that a case must be grounded in a theory other than Title VII, such as a First Amendment violation, to succeed.

a.) *Garcia v. Gloor*

In *Garcia v. Gloor*, the plaintiff was a Hispanic, capable of speaking English and Spanish, who contested his workplace rule which prohibited employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers.<sup>79</sup> The court held that the English-only rule in *Gloor* did not forbid cultural expression to persons for whom compliance with it might impose hardship.<sup>80</sup> While Title VII prohibits the imposition of burdensome terms and conditions of employment as well as those that create an atmosphere heavy with racial and ethnic oppression, the evidence did not support a finding that the rule had this effect on the plaintiff.<sup>81</sup>

The Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice.<sup>82</sup>

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78. See Mark Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 885, 891-92 (1995).

79. *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).

80. *Id.* at 270.

81. *Id.*

82. *Id.*

Thus, it can be argued that Ms. Yniguez, like Mr. Garcia who is bilingual, is not injured by an English-only law because her decision to speak in a particular language is merely a matter of choice. That this rule prevents some employees like Garcia and Yniguez from exercising a preference to speak in Spanish does not convert it into discrimination based on national origin.<sup>83</sup>

b.) *Jurado v. Eleven-Fifty Corp.*

*Jurado v. Eleven-Fifty Corp.*<sup>84</sup> is another example of a case which fails under a Title VII theory. As the following discussion reveals *Jurado* is a text book illustration of what a plaintiff should not argue when attacking English-only work place laws.

The Ninth Circuit in *Jurado* followed the earlier *Gloor* decision.<sup>85</sup> In *Jurado*, a bilingual disc jockey performing on California radio station KIIS as Val Valentine was fired when he refused to follow an English-only format on the air.<sup>86</sup> Jurado on numerous occasions spoke Spanish on his program at the request of his employer's program director, but was told to stop after a drop in ratings thought to be a result of confusion caused by the bilingual format.<sup>87</sup> Jurado then brought a Title VII action against KIIS alleging disparate impact and disparate treatment.<sup>88</sup>

To prevail on a disparate treatment theory, Jurado had to prove that KIIS intended to discriminate against him in his dismissal.<sup>89</sup> To establish a prima facie case of disparate treatment, the employee must offer evidence that indicates an influence of unlawful discrimination.<sup>90</sup> Jurado's prima facie disparate treatment case failed because there was insufficient evidence that KIIS discharged him for discriminatory motives.<sup>91</sup>

A disparate impact case involves a facially neutral employment practice that disproportionately disadvantages one group against another.<sup>92</sup> To establish a prima facie case, the employee must identify an employment practice which significantly injures a protected group, but need not show that the employer aimed to discriminate.<sup>93</sup> The district court found

83. *Id.*

84. 813 F.2d 1406 (9th Cir. 1987).

85. *Id.*

86. See Clawson, *supra* note 71, at 484.

87. *Jurado*, 813 F.2d at 1409.

88. *Id.* at 1408-12.

89. *Id.* at 1409.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

Jurado's only basis for a disparate impact claim was that the English-only order somehow disproportionately hurt Hispanics.<sup>94</sup> The court found this theory meritless because Jurado was bilingual and could easily comply with the order.<sup>95</sup> The United States District Court for the Central District of California granted summary judgement for KIIS on both allegations, and Jurado appealed to the U.S. Court of Appeals for the Ninth Circuit.<sup>96</sup>

The Ninth Circuit affirmed the summary judgment decision against Jurado.<sup>97</sup> The court refused to accept Jurado's allegation that the programming decision emanated from racial animus.<sup>98</sup> The mere fact that a station adopts a format to attract a target audience does not tend to show racial animus in employment.<sup>99</sup> Moreover, the English-only order itself was not discriminatory against a bilingual person such as Jurado.<sup>100</sup> Employers 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 result of individual preference.<sup>101</sup>

c.) *Garcia v. Spun Steak Co.*

In *Garcia v. Spun Steak Co.*,<sup>102</sup> the Ninth Circuit explicitly rejected the presumption that English-only rules are per se discriminatory.<sup>103</sup> The court instead espoused a standard requiring proof of adverse impact for English-only rules as well as for other allegedly discriminatory practices.<sup>104</sup>

The defendant, Spun Steak Co., produced meat products in California. At the time of the action, its workforce consisted mostly of bilingual Hispanics as well as two employees who spoke only Spanish.<sup>105</sup> After receiving numerous complaints that two bilingual Hispanics were constantly harassing African American and Chinese workers with derogatory

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94. *Id.*

95. *Id.*

96. *Id.* at 1409.

97. *Id.* at 1408.

98. *Id.* at 1410.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

103. *Id.* at 1487 n.1.

104. *See Clawson*, *supra* note 71, at 487.

105. *Spun Steak*, 998 F.2d at 1483.



and racist comments, Spun Steak passed an English-only rule in the attempt of achieving racial harmony.<sup>106</sup> In response to the rule, the employees brought suit.

The employees first argued that the English-only rule denied them the ability to speak Spanish on the job and had a discriminatory impact on them because it imposed a burdensome term or condition of employment exclusively upon Hispanic workers. It denied them a privilege of employment that non-Spanish speaking workers enjoy — the ability to converse on the job in a language they feel most comfortable. They next argued that the English-only rule denied them the ability to culturally express themselves. Lastly, they argued the policy created an atmosphere of inferiority.<sup>107</sup> The court stated, however, that despite the plaintiffs assertions, Title VII did not protect their ability to express their cultural heritage in the workplace.<sup>108</sup>

The court also stated that the ability to converse, especially to make small-talk, was a privilege of employment.<sup>109</sup> The employees in *Spun Steak* attempted to define the privilege as the ability to speak in the language of their choice. The court rejected the employees' notion and stated that privileges are given at the employer's discretion and the employer has the right to define its contours.<sup>110</sup> In *Spun Steak*, the employer defined the privilege narrowly.<sup>111</sup> The employer allowed employees to speak in the language of their choice only during lunch, breaks, and the employee's own time.<sup>112</sup> Because the privilege was defined at its narrowest, as merely the ability to speak on the job, the court refused to conclude that those employees fluent in both Spanish and English were adversely affected by the policy.<sup>113</sup>

Moreover, the *Spun Steak* court concluded that Title VII was not intended to apply against rules that merely inconvenience employees, even if the inconvenience falls consistently on a protected class.<sup>114</sup> Rather, Title VII protects against only those policies that have a tremendous impact; the fact that an employee may have to catch himself or herself from

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106. *Id.* The restrictions in *Spun Steak* read as follows: "[I]t is hereafter the policy of this Company that only English will be spoken in connection with work." This rule is little different than Arizona's Article XXVIII which requires all employees to act only in English.

107. *Id.* at 1485-88.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1488.

periodically slipping into Spanish does not inflict a burden great enough to amount to the denial of equal opportunity.<sup>115</sup>

The above discussion provided a context for English-only statutes. Historically, plaintiffs have attempted, but to no avail, to overturn English-only statutes under a Title VII theory. Consequently, courts, in essence, have forced plaintiffs to pursue other theories in their efforts to defeat them. A First Amendment analysis is a potential viable theory upon which a plaintiff can proceed. Accordingly, a detailed look at the First Amendment follows.

## 2. Historical Background of the First Amendment

When evaluating issues arising under the United States Constitution, it is often helpful to first look at the original intent of the Framers who drafted the Constitution. It would be a mistake to analyze the First Amendment in total disregard of the forefathers' intent. If one evaluates the First Amendment from only the point of view of a Twenty-First-Century man, one risks distorting the meaning of the Amendment's language. Thomas Jefferson in a letter to William Johnson wrote that on every question of construction, we should carry ourselves back to the time when the Constitution was ratified; recollect the spirit manifested in the debates; and instead of trying to find what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.<sup>116</sup> For these reasons, it is necessary to lay out the historical background on the First Amendment. More importantly, glancing at the intent of the Constitution's framers leads to the conclusion that English-only laws are in direct opposition to the underpinnings of the United States Constitution. This historical perspective provides Ms. Yniguez with more ammunition for her First Amendment claim.

The colonists brought many languages and cultures to a fledgling America which was already initially populated by Native Americans who themselves had more than 200 languages and dialects.<sup>117</sup> Although English has been the de facto primary language in the United States, the Constitution never mentions it as the official language of the nation.<sup>118</sup> The *Yniguez* case deals with two forms of communication which are being restricted; first, communications in languages other than English between employees and the public (the *Jurado* scenario); and second, com-

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115. *Id.*

116. See *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1530 (1995).

117. See *Adams*, *supra* note 2, at 852.

118. *Id.* See also Antonio Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. CR.-C.L. L. REV. 293, 303 (1989).

munications between employees in languages other than English (the *Gloor* scenario). In *Yniguez*, the court invalidated Article XXVIII of Arizona's Constitution enforcing an English-only rule barring an employee's use of foreign language with the public.<sup>119</sup> Moreover, Article XXVIII not only limits communications between employees and the public, it strangles the ability of employees to communicate amongst themselves in the language of their choice.<sup>120</sup>

Perhaps because of this nation's great tradition of linguistic diversity, the Constitution fails to mention an official language.<sup>121</sup> The Framers specifically refused to give special recognition to English due to the connection between language and liberty.<sup>122</sup> In fact, the Continental Congress issued official publications, including the Articles of Confederation, in French, German, and English during the Revolutionary War era.<sup>123</sup>

In a debate in the House of Representatives, James Madison remarked that if we avert to the true nature of Republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.<sup>124</sup> His premise was that the Constitution created a form of government under which the people, not the government, possess the absolute sovereignty. Thus, the right of free discussion was and is a fundamental principle of the American form of government.<sup>125</sup> The First Amendment as a constitutional safeguard for freedom of expression was fashioned to assure the unfettered interchange of ideas.<sup>126</sup>

Maintaining the opportunity for free political discussion so that government is responsive to the will of the people and changes in policy may be achieved by lawful means, is a fundamental principal of our Republic.<sup>127</sup> It is a treasured American privilege to speak one's mind, al-

119. *Id.*

120. *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir 1980), *cert. denied*, 449 U.S. 1113 (1981); *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994). *Gloor* and *Spun Steak* sustained this notion.

121. *See Adams*, *supra* note 2, at 852.

122. *Id.* *See also* Juan Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 274 (1992); SHIRLEY BRICE HEATH, *LANGUAGE AND POLITICS IN THE UNITED STATES IN LINGUISTICS AND ANTHROPOLOGY* 267, 270 (Muriel Saville-Troike ed., 1977); David Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 INT'L J. SOC. LANG. 7, 10-11 (1986).

123. *See Adams*, *supra* note 2, at 852.

124. *See N.Y. Times v. L.B. Sullivan*, 376 U.S. 254, 274 (1964).

125. *Id.*

126. *Id.* at 268.

127. *Id.* *See also Stromberg v. California*, 283 U.S. 359, 369 (1931).

though not always with perfect good taste, on all public institutions.<sup>128</sup> This opportunity should be afforded vigorous advocacy no less than abstract discussion.<sup>129</sup> In addition, Judge Learned Hand declared that the First Amendment presupposes that correct conclusions are more likely to be "gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."<sup>130</sup>

In looking at the origins of the First Amendment, it is clear that this Nation's forefathers intended to foster unfettered speech in any language. Ms. Yniguez's argument gains strength from the original intent of the forefathers in their creation of the United States Constitution. Not only does Ms. Yniguez's argument succeed under the original intent of the forefathers, it also succeeds under the overbreadth doctrine. The next section discusses the overbreadth doctrine, a doctrine which allows people to challenge a statute on its face because it threatens third parties not before the court. This doctrine is crucial to the *Yniguez* case because Article XXVIII of Arizona's Constitution is overbroad. In proving that Article XXVII is overbroad, Ms. Yniguez as well as future plaintiffs gain additional ammunition to succeed in convincing the court to declare the amendment unconstitutional.

### 3. Unconstitutionality of Article XXVIII

#### *a. General Principles of Overbreadth Doctrine*

The First Amendment overbreadth doctrine allows people to challenge a statute on its face because it threatens third parties not before the court.<sup>131</sup> This doctrine either: 1) protects those who want to engage in legally protected expression but who may stop engaging in it because they fear prosecution; or 2) protects those who refrain from engaging in it rather than going through the hassle of having the law declared invalid.<sup>132</sup>

#### *b. Application of the Overbreadth Doctrine to the Instant Case*

Article XXVIII is overbroad and violative of the United States Con-

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128. See *N.Y. Times*, 376 U.S. at 268; see also *Birdges v. California*, 314 U.S. 252, 270 (1941).

129. See *id.* at 268; see also *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963).

130. See *id.* at 268; see also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.) (1943).

131. *Id.*

132. See *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987).

stitution.<sup>133</sup> This argument is supported by the 1987 U.S. Supreme Court case of *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*<sup>134</sup> In *Board of Airport Commissioners*, the Court held that in public forums or public forums of government designation, First Amendment protections are subject to heightened scrutiny.<sup>135</sup> The Court went on to say:

For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . . . The State may also enforce regulations of the time, place, and manner or expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>136</sup>

The quote first addresses the government's ability to monitor the content of speech and subsequently addresses the government's ability to monitor the expression of that speech. AOE claimed that Yniguez's mode of speaking while at work was being restricted, not the substance of her message. Moreover, AOE claimed that it was within the power of the government to monitor the manner of its employees' speech.<sup>137</sup>

In contrast, *Yniguez* asserts that Article XXVIII restricts socially valuable speech by government workers based on the content of the speech.<sup>138</sup> Regardless of whether it is the content or mode of speech that is being regulated in the case at bar, the reality is that the regulation of Yniguez's speech was not narrowly tailored to achieve a compelling state interest, such as efficiency and effectiveness of its workforce.<sup>139</sup> Simple reason dictates that government offices are more efficient and effective when employees can speak in languages other than English with consumers of government services who cannot speak or read English very well.<sup>140</sup> Therefore Article XXVIII most likely fails under the above articulated standard in the U.S. Supreme Court case of *Board of Airport Commissioners v. Jews for Jesus, Inc.*<sup>141</sup>

133. *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995).

134. 482 U.S. 569 (1987).

135. *Id.* at 572.

136. *Id.*

137. *See Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 138

138. *Id.*

139. *Yniguez*, 69 F.3d at 942.

140. *Id.*

141. 482 U.S. 569 (1987).

The regulation of speech required by Article XXVIII has not been narrowly tailored because the language provision is broad and sweeping. The Amendment plainly states that it applies to the legislative, executive, and judicial branches of both state and local government, and to all government officials and employees during the performance of government business.<sup>142</sup> The rule also reads that all employees were required to act only in English.<sup>143</sup> This broad language on its face means that it reaches a "limitless variety of governmental settings."<sup>144</sup> The Attorney General in the *Yniguez* case tried to persuade the trial and appellate courts that the plain meaning of the law was not to be read in such severe terms.<sup>145</sup> The Attorney General wrote in Attorney General Opinion No. I 89-009 (1989) that Article XXVIII does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operations of government.<sup>146</sup> The court of appeals, however, disagreed with the Attorney General's reading. The Attorney General's reading is contradicted by the provision's broad language as well as the fact that this reading would render a sizeable portion of the Article superfluous.<sup>147</sup> If a large portion of the Article is meaningless then this violates the rule of statutory construction that a provision must be construed in such a way that every word has some operative effect.<sup>148</sup>

In order for a finding of overbreadth to be substantiated, there must be numerous instances in which the provision will or would obstruct constitutional rights.<sup>149</sup> For example, in *New York State Club Assn. v. New York City*, the City of New York passed an act which required private clubs to admit women and minority groups.<sup>150</sup> The City Council felt that the public interest in equal opportunities outweighed the interest in private association asserted by club members.<sup>151</sup> The U.S. Supreme Court stated that clubs for whom the antidiscrimination provisions would impair their ability to associate together or advocate public or private viewpoints were not named.<sup>152</sup> Nor was the Court informed of the characteristics of any particular clubs, and therefore it could not conclude that the law

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142. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 932 (9th Cir. 1995).

143. *Id.* at 928.

144. *Id.* at 932.

145. *Id.*

146. *Id.* at 928.

147. *Id.* at 929.

148. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

149. *Id.* *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

150. *Id.* at 5.

151. *Id.* at 6.

152. *Id.* at 14.

threatened to undermine the associational or expressive purposes of any club, let alone a substantial number of them.<sup>153</sup>

In the *Yniguez* case, Article XXVIII violates a substantial number of state employees' and officials' First Amendment rights. The amendment prevented Ms. Yniguez, as well as many other bilingual employees and state officials, from speaking Spanish with the Spanish-speaking consumers of government services.<sup>154</sup> Furthermore, the interest of many thousands of non-English speaking Arizonans in receiving vital information was severely limited.<sup>155</sup> Moreover, under Article XXVIII, Arizona's public schools and universities would be prohibited from issuing diplomas in Latin, and judges performing weddings would be prohibited from uttering "mazel tov" as part of the official wedding ceremony.<sup>156</sup> The Amendment's broad language also applies to a limitless array of governmental settings, from ministerial statements by civil servants at the office to teachers speaking in the classroom, and from translation of judicial proceedings in the courtroom to town-hall discussions between constituents and their representatives.<sup>157</sup>

The ramifications that Article XXVIII will have on elected officials, like State Senator Gutierrez, is particularly alarming.<sup>158</sup> Freedom of speech is the bedrock of our democratic heritage, and the language restrictions of Arizona's constitutional amendment strangulate the advocacy of elected officials as well as their informative inquiry. The emasculation of the power of open communication of ideas between elected officials and their constituents threatens our republican society with extinction.

To illustrate, Article XXVIII obstructs the ability of candidates up for re-election to speak with voters.<sup>159</sup> Only incumbents, not unelected candidates, are burdened; this is because the amendment is applicable only to elected officials.<sup>160</sup> When one analyzes this scenario, it becomes

153. *Id.* As the Court stated, "No record was made in this respect, we are not informed of the characteristics of any particular clubs, and hence we cannot conclude that the Law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them." *Id.*

154. *Yniguez v. Arizonans for Official English*, 69 F. 3d 920, 931 (9th Cir. 1995).

155. *Id.*

156. *Id.* at 932.

157. *Id.* at 931.

158. *Id.* at 950. Article XXVIII, in prohibiting all government officials and employees during the performance of government business from speaking any language other than English offends the First Amendment not only because it attempts to regulate ordinary political speech, but also because it manipulates the political process by regulating the speech of elected public servants.

159. *Id.* (Brunetti, J., concurring).

160. *Id.* at 950. (Brunetti, J., concurring ) "A candidate must be able to communi-

evident that elected officials lose their First Amendment protection of free speech merely by the fact that they are government officials. On the other hand, nonincumbent candidates retain their constitutional rights by the mere fact that they have not yet come to serve the government in an official capacity. The illogic present in this scenario offends not only common sense, it misconstrues the rights guaranteed every United States citizen, regardless of their employment capacity.

A candidate must be able to communicate with voters in order for voters to make an intelligent decision about whether to vote for a particular candidate. The First Amendment affords the most liberal protection to such political expression in order to guarantee the interchange of ideas for the bringing about of political and social changes wished for by the people.<sup>161</sup> Furthermore, there is a practically universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs, including the discussions of candidates.<sup>162</sup> This process is thwarted, however, if politicians are prohibited from speaking with constituents who may or may not be able to understand English.

Moreover, the Court has stated that legislators have a duty to take positions on controversial political questions so that the public can be completely informed by them to be better able to evaluate their qualifications for office, and so that the public may be represented in governmental debates by the person they have elected to represent them.<sup>163</sup> In fact, discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government created by the Constitution. Embedded in the Constitution is this nation's commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.<sup>164</sup>

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cate with voters in order for voters to make an informed decision about whether to cast their ballot for that candidate." Indeed the Supreme Court has said:

Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

*Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). Communications between candidates and voters is at the core of political action. The First Amendment prevents the disenfranchisement that results when candidates for re-election are disabled from communicating with any certain group.

161. *Id.*

162. *See McIntyre v. Ohio Elections Commission*, 115 S. Ct 1511 (1995); *Winters v. New York*, 33 U.S. 507 (1948).

163. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 950 (9th Cir. 1995); *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966).

164. *See McIntyre*, 115 S. Ct at 1518.



In the *Yniguez* case, political servants did not enjoy uninhibited debate because they have been denied their right to communicate with their constituencies in languages other than English. As a result, Arizona's law burdens core political speech. When a law burdens core political speech, it is examined under exacting scrutiny and can be upheld only if it is narrowly tailored to serve an overriding state interest.<sup>165</sup> When entire classes of United States citizens and their representatives are barred from the political system through the execution of a state law, it is clear that this law is not narrowly tailored and consequently is unconstitutional.

Moreover, Article XXVIII not only adversely affects voters' abilities to assess candidates, it also interferes with officials' abilities to represent their voters once they are elected.<sup>166</sup> Public servants cannot adequately serve their constituents if they are prohibited from expressing their views and learning the views of those constituents.<sup>167</sup> The First Amendment prevents a successful electoral majority from restricting political communications with a certain segment of the electorate.<sup>168</sup>

In addition to obstructing voting and political representation, Article XXVIII attempts to redesign the political landscape.<sup>169</sup> It attempts to create the appearance of a citizenry void of cultural ties and ethnic diversity. Citizens are forced to give up one language for another one which is more palatable to anti-immigrant coalitions. To impose political conformity, by mandating that the same language be used for all political and government dialogue, conflicts with the principles of liberty and freedom. It snubs the crucial realization that language lies at the heart of ethnic diversity in our democratic and political process, and that both are inextricably linked.<sup>170</sup>

Consequently, the speech rights of all Arizonan state and local employees, officials and officers, as well as non-English speaking Arizonans, are adversely affected by the enforcement of Article XXVIII. The nature and structure of the amendment demonstrates that, as an integrated whole, the provision seeks to proscribe the use of any words or phrases in a language other than English in all oral and written communications by persons connected with the government.<sup>171</sup> "There is no fair reading of the amendment which would permit some of its language to

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165. *Id.*

166. *Yniguez*, 69 F.3d at 950.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 932.

be divorced from this overriding objective."<sup>172</sup>

*c. Affirmative versus Negative Rights*

Ms. Yniguez did not seek an affirmative right to have government operations conducted in foreign tongues. Instead, she sought to enforce a negative right: that the state cannot, consistent with the First Amendment, gag employees currently providing members of the public with information and thereby effectively prevent large numbers of individuals from receiving information that they had earlier received.<sup>173</sup> Ms. Yniguez's decision to provide services in Spanish does not conflict with U.S. Supreme Court precedent. The Court has consistently held that it is not a public right to receive information from the government in languages other than English.<sup>174</sup> In other words, non-English speaking people have no affirmative right to force governments to provide information in the language they can understand. In the instant case, Ms. Yniguez was not requiring the government to offer services in Spanish. Instead, she argued that if she was capable of offering the services in Spanish she should not be precluded from doing so.

AOE argued that the First Amendment does not grant private citizens a right to receive any particular information from the government in any particular way.<sup>175</sup> AOE's analysis is flawed from the beginning because Ms. Yniguez never once asserted that citizens are guaranteed the right to receive government services in languages other than English (affirmative right). Instead, she simply argued that government employees capable of providing a government service in a language other than English should be permitted to continue to do so (negative right). A person should be allowed to continue the activity which he/she has in the past been permitted to do.<sup>176</sup>

Under a negative right theory, Ms. Yniguez argued that she should not be prohibited from doing what the government has already permitted her to do—deliver services in English and Spanish to consumers of government services.<sup>177</sup> So long as government is not harmed by Ms. Yniguez's activity, the public's interest outweighs the government's interest in not permitting the employee to do so. More importantly, in no way

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172. *Id.*

173. *Id.* at 936.

174. *Id.*

175. See *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 138; see also *International Soc'y For Krishna Consciousness v. Lee*, 505 U.S. 672, 695 (1992).

176. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995).

177. *Id.*

does Ms. Yniguez equate a public employee's ability to communicate in a foreign tongue with a mandatory duty to provide this service to non-English speaking individuals.<sup>178</sup>

#### *d. Public Employee Speech*

##### *1.) General Principles*

For nearly the last fifty years, it has been axiomatic that government employees do not forfeit their First Amendment rights upon entering the public workplace.<sup>179</sup> It has been settled that a state cannot condition public employment on a basis that infringes upon the employee's constitutionally protected interest in freedom of expression.<sup>180</sup> And a state constitution cannot violate federally protected rights including the right of free speech.<sup>181</sup> Although the government, whether federal, state, or local, has been endowed with much power, this nation's forefathers never granted the government the power to suffocate its citizens, no matter whether they are government employees or not.

##### *2. Regulating Traditional Types of Public Employee Speech*

###### *a.) Matters of Personal Concern*

The government, as a general rule, must guarantee First Amendment protection of public employees' speech. Nevertheless, the U.S. Supreme Court has also held that there are limits to government employees' speech when compared to the speech of ordinary private citizens.<sup>182</sup> Concerned that government offices could not function properly if every government employee was given unbridled power to speak out on matters of personal concern during performance of their official duties, the court decided to uphold certain speech restrictions.<sup>183</sup>

Absent the most unusual circumstances, therefore, a challenged speech restriction will be upheld if an employee speaks on a matter solely of personal interest.<sup>184</sup> Employee grievances and complaints about internal working conditions affecting only the speaker and co-workers

178. *Id.*

179. *Id.* at 937.

180. *See Connick v. Myers*, 461 U.S. 138, 141 (1983).

181. *See DANIEL FARBER ET AL., CONSTITUTIONAL LAW* 168 (1993); *see also State v. Russel*, 477 N.W.2d 886 (Minn. 1991).

182. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 938 (9th Cir. 1995).

183. *Id.* at 939.

184. *Connick*, 461 U.S. at 147.

should rarely be protected by federal courts.<sup>185</sup> In addition, the ban on employee speech is extended to include prohibiting employees from using rude or vulgar language in the workplace.<sup>186</sup>

In the *Yniguez* case, Ms. Yniguez's speech was neither rude nor vulgar, nor was it confined to conditions affecting only Ms. Yniguez or her co-workers. Ms. Yniguez's speech was not a matter of personal concern at all. Her speech focused on matters of public concern, and this does not fit the exception in which the government may limit employees' speech on matters of personal concern. Accordingly, Arizona's ban implicated the rights of the Arizonan public. By barring Ms. Yniguez and public employees from using languages other than English during their official activities, many non-English speaking citizens stand to lose valuable information and services.<sup>187</sup>

Ms. Yniguez's speech was not disruptive, rather it was the antithesis of disruptive; it facilitated the delivery of government services to its employees. The Ninth Circuit in its en banc decision even stated that Yniguez's ability to speak Spanish was analogous to speech on matters of public importance because she was providing a valuable service to the public.<sup>188</sup> Accordingly, Ms. Yniguez's use of Spanish on the job must be accorded full First Amendment protection.<sup>189</sup>

#### *b.) Matters of Public Concern*

As stated above, Ms. Yniguez's speech was not a matter of personal concern. Instead, it falls within the category of matters of public concern. As a general rule, government employees, when speaking on matters of public concern, are guaranteed First Amendment protection.<sup>190</sup> Even though Ms. Yniguez and other government employees work for the government, they have not relinquished "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."<sup>191</sup> When a court is required to determine the validity of the government's restraint on job-related speech of public employees, it uses the *Pickering* balancing test.<sup>192</sup>

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185. *Yniguez*, 69 F.3d at 939.

186. See *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) (plurality).

187. *Yniguez*, 69 F.3d at 940.

188. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 138; *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 942-43 (9th Cir. 1995).

189. *United States v. Nat'l Treasury Employees Union*, 115 S. Ct. 1003 (1995).

190. *Connick v. Myer*, 461 U.S. 138, 147 (1983).

191. *Nat'l Treasury Employees Union*, 115 S. Ct. at 1012.

192. *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 568

The *Pickering* test requires that the government's concern with the efficiency and effectiveness of public services be balanced against the interest of the public employee, as a citizen, in commenting upon matters of public concern.<sup>193</sup> To illustrate, private speech involving little more than a complaint about a change in the employee's duties is not constitutionally protected as a matter of public concern because it focuses on an individual not the group.<sup>194</sup> However, if the speech does pertain to a matter of public concern, the government bears the burden of justifying the adverse employment action.<sup>195</sup>

### c.) *Pickering Test*

In applying the *Pickering* test, it is necessary to determine the interests of the employee, as a citizen, speaking upon matters of public concern.<sup>196</sup> The speech banned by Article XXVIII is undoubtedly of public concern. It is related to the delivery of government services and information. Unless the speech is delivered in a form that the intended recipients can understand, they are likely to be cheated of greatly needed data as well as significant private and public benefits.<sup>197</sup> The heart of the instant debate concerns speech that members of the public have an interest in hearing. In addition, more often than not it is the public, not the public employee, who initiates dialogue in languages other than English.<sup>198</sup> If the premise is accepted that speech is of public concern if the public wants to hear it,<sup>199</sup> it logically follows when non-English speaking people communicate to public employees in a language other than English, they then would like the content of the government's message to be in the foreign language they understand. This correlates with the *Yniguez* case be-

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(1968). The *Pickering* balancing test arose from a 1968 Supreme Court case involving a teacher who wrote and published a letter in the newspaper criticizing the Board of Education's allocation of school funds between educational and athletic programs, and the Board's and superintendent's methods of preventing the school district's taxpayers from learning why additional tax revenues were being sought for schools.

193. *Id.* at 568.

194. *Id.*

195. *Id.*

196. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995). This is one side of the balancing equation.

197. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 940 (9th Cir. 1995). Again, *Yniguez* does not argue citizens are guaranteed delivery of services in a form of speech that the recipients can receive, but, if it is available, the employee should not be precluded from giving it.

198. *See id.*; see also *Connick v. Myer*, 461 U.S. 138, 149 (1983).

199. *See Yniguez*, 69 F.3d at 940; *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985).

cause Ms. Yniguez had a significant number of claimants who spoke to her in Spanish and who best understood Spanish.<sup>200</sup>

The practical effects of Article XXVIII's de facto bar on communications by or with government employees are numerous. For example, monolingual Spanish-speaking residents of Arizona cannot communicate effectively with employees of a state or housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court where and how to file court complaints.<sup>201</sup> Moreover, they are helpless in gathering information about state or local social services, or adequately informing government agencies that their employees are not doing their jobs properly, or that the government itself is running inefficiently or dishonestly.<sup>202</sup> Those handicapped by a limited command of English will face commensurate difficulties in obtaining or providing such information.<sup>203</sup>

Furthermore, as previously discussed, Article XXVIII greatly restricts the ability of state officials and legislators to communicate with the electorate concerning official matters. The amendment prohibits a legislative committee from gathering on a reservation and questioning a tribal leader in his native language in the hope of trying to learn what the problems of his community might be.<sup>204</sup> A state delegate of Navajo ancestry, as well as her staff, would be prevented from discovering directly from her Navajo-speaking constituents about dilemmas they desired to bring to her attention.<sup>205</sup> Ultimately, the legislative fact-finding function would be directly affected.<sup>206</sup>

Because the amendment to Arizona's Constitution significantly restricts if not completely bars communications by and with government employees and officials, it ultimately injures the ability of non-English speaking citizens to "receive information and ideas."<sup>207</sup> As the Court stated in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>208</sup> the freedom of speech "necessarily protects the right to receive."<sup>209</sup> Thus, a state may not suppress dissemination of concededly

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200. *Yniguez*, 69 F.3d at 940-42.

201. *Id.* at 940.

202. *Id.*

203. *Id.* See also *Garcia v. Spun Steak*, 998 F.2d 1480, 1488 (9th Cir. 1993), cert. denied, 114 S. Ct. 2726 (1994).

204. *Yniguez*, 69 F.3d at 940.

205. *Id.*

206. *Id.*

207. *Id.*

208. 425 U.S. 748 (1976).

209. *Id.* at 756 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

truthful information about an entirely lawful activity.<sup>210</sup> The dissemination of ideas can achieve nothing if otherwise willing addressees are not free to receive and consider those ideas.<sup>211</sup> It would be a barren marketplace of ideas that had only sellers and no buyers.<sup>212</sup>

In addition, the fact that Article XXVIII straight-jackets government employees' speech will ultimately manifest itself by inhibiting the public's right to read and hear what the employees would have otherwise written or said.<sup>213</sup> There is no way to calculate the price of that burden, but it cannot be ignored. The Court wrote in *Virginia State Bd. of Pharmacy* that freedom of speech presupposes a willing speaker.<sup>214</sup> In *Virginia State Bd. of Pharmacy*, the willing speaker was a licensed pharmacist who violated Section 54-524.-35 of the Virginia Annotated Code (1994) when he advertised the price of prescription drugs.<sup>215</sup> In the *Yniguez* case, the willing speaker was a bilingual employee who of her own free will responded to questions posed to her by non-English speaking constituents about their medical claims. Where a speaker exists, as in the case at bar and *Virginia State Bd. of Pharmacy*, "protection afforded is to the communication, to its source and to its recipients both."<sup>216</sup>

Even if one were not to agree with the majority in *Virginia State Bd. of Pharmacy*, the above speech would still be protected under the threshold test of the dissent. The dissent endorsed the principle that there is a right to receive information when there is no other way to obtain the sought after data.<sup>217</sup> In the *Yniguez* case, there was no other way for the public to gain the information needed from the government other than to speak with its employees. Despite the fact that Yniguez voluntarily offered her services in a language other than English, her speech still directly impacted the public. By speaking Spanish, Ms. Yniguez was able to facilitate the process through which some Arizona citizens filed medical claims.

Article XXVIII obstructs the free flow of information and adversely affects the rights of many private individuals. "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of

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210. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

211. See *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965).

212. See *Board of Educ. Island Trees Union Free School District No.26 v. Pico*, 457 U.S. 853, 867 (1982); see also *Lamont v. Post Master General*, 381 U.S. 301, 308 (1965).

213. *Virginia State Bd. of Pharmacy*, 425 U.S. at 756.

214. *Id.*

215. *Id.* at 749-50.

216. *Id.* at 756.

217. *Id.* at 757.

her own rights of speech, press, and political freedom."<sup>218</sup>

A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>219</sup>

It is counterintuitive to suggest that Arizona is better off because obstacles are put in the way of its citizens, and consequently they are hindered from collecting those services owed them as taxpayers. Moreover, there is no utility in an amendment which gags the communication between government officials and citizens, and which necessarily culminates in the prevention of citizens gaining access to their state government.

*d.) Government's Purported Interest in Efficiency*

Despite the countless ways in which Article XXVIII interferes with the rights of state employees and the public, Arizona argues that its attempt to foster government efficiency outweighs the gagging of employee speech, and that the government will be more efficient if all its employees perform their official duties in English. Arizona buttressed its argument with the fact that Yniguez's supervisor did not speak Spanish and allegedly could not monitor her statements when she spoke in Spanish.<sup>220</sup>

The facts of the case, however, contradict the assertion that efficiency of the state government will be impeded if Yniguez speaks in a language other than English.<sup>221</sup> First, Yniguez facilitated government efficiency when she communicated in a language other than English with recipients of government services who are not proficient in English.<sup>222</sup> In fact, it makes little or no sense for Ms. Yniguez or any state employee to spend an immeasurable amount of time conveying to non-English speakers what it is that they must do in order for the government to deliver its services, particularly when it can be accomplished in much less time if the employee simply speaks in a foreign tongue.

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218. Board of Educ. Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 867 (1982).

219. *Id.* (quoting 9 Writings of James Madison 103 (G. Hunt ed., 1910)).

220. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 138.

221. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 942 (9th Cir. 1995).

222. *Id.*



e.) *How the Balance Tips after Applying the Pickering Balance Test*

In light of Ms. Yniguez's interest in speech as a matter of public concern and the State's interest in efficiency, the balance ultimately tips in favor of protecting the speech rights of state officers and employees. The court would not say that the interests of the employee, as a citizen, in commenting upon matters of public concern, is outweighed by the State, as employer, in promoting the efficiency of the public services it performs through its employees. This conclusion is supported by common sense, the Constitution, and the case law.<sup>223</sup> The *Yniguez* case closely resembles *United States v. National Treasury Employees Union*.<sup>224</sup>

In *National Treasury Employees Union*, employees of the executive branch brought an action challenging the constitutionality of the Ethics in Government Act prohibiting the receipt of honoraria by government employees.<sup>225</sup> The Court wrote that even though the respondents work for the government, they had not relinquished the First Amendment rights they otherwise possessed as citizens to comment on public matters.<sup>226</sup> And if the speech involves a matter of public concern, the government bears the burden of justifying its adverse employment action.<sup>227</sup> The government must show that the interests of both potential audiences and a large group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on government's actual operation.<sup>228</sup>

The statute in question in *National Treasury Employees Union* had serious unconstitutional implications. Although it did not prohibit any speech, the ban did impose a serious burden on expressive activity.<sup>229</sup> By denying federal employees (including lawyers, union officials, civil servants, and the like) compensation for their time, the ban would more likely than not begin to curtail their speeches and formal publications.<sup>230</sup> The *Yniguez* case essentially mirrors *National Treasury Employees Union*, but is more serious because the ban in question is broader and ultimately prohibits speech not merely discourages it.

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223. See *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); see also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

224. 513 U.S. 454 (1995).

225. *Id.*

226. *Id.*

227. *Id.* at 466.

228. *Id.* at 468.

229. *Id.*

230. *Id.*

In *National Treasury Employees Union*, as well as in *Yniguez*, the statutes will inevitably diminish the expressive output of non-policy-making employees. The massive disincentive of government employees' expression also places a significant burden on the public's right to read and hear what the employees would have otherwise communicated.<sup>231</sup> Deferring to the government's speculation about the harmful effects of thousands of communications yet to be written or delivered would intrude unacceptably on the First Amendment's protections.<sup>232</sup> As Justice Brandeis reminded the bench, a "'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms."<sup>233</sup>

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women . . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.<sup>234</sup>

Consequently, the government failed to persuade the Court that the ban was a reasonable response to possible harms. "Although operational efficiency is undoubtedly a vital governmental interest,"<sup>235</sup> several features of the bans "cast serious doubt on the Government's submission that Congress thought of honoraria as so threatening to the efficiency of the entire federal service as to render the ban a reasonable response to the threat."<sup>236</sup> Likewise, the sweeping egregious ramifications of Article XXVIII cast doubt on Arizona's argument that it thought state employees and officials communicating to the public in a language other than English during official business was so threatening to the efficiency of the entire state service as to render the ban a reasonable response to the threat.<sup>237</sup>

The foregoing discussions show that Ms. Yniguez's interest, as well as future plaintiffs' interests, in speech as a matter of public concern outweighs the State's interest in efficiency. In light of previously discussed case law and federal constitutional principles, Article XXVII should be

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231. *Id.* at 470.

232. *Id.* at 475.

233. *Id.*

234. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927)).

235. *Id.* at 1016.

236. *Id.* at 1016; see also *Waters v. Churchill*, 114 S. Ct. 1878, 1888-89 (1994).

237. See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 944 (9th Cir. 1995).

overturned as unconstitutional. However, since the Supreme Court declined to rule on the merits of the case, the country must guess at whether Article XXVIII and similar English-only rules are unconstitutional.

Part III discusses generally the future of English-only statutes as they relate to recent case law addressing exclusivist legislation—legislation which singles out and prevents a specified class of people from seeking the basic protections offered by the government. The Comment then proceeds to discuss *Ruiz v. Symington*, a Ninth Circuit case which most likely will be appealed to the Supreme Court.

### III. THE FATE OF “ENGLISH-ONLY” STATUTES

#### A. *General Indications of the Supreme Court's Stance on Exclusivist Legislation*

The Supreme Court throughout its history has consistently struck down legislation that precludes an isolated group of people from enjoying the safeguards of government.<sup>238</sup> Recently, the Court, again, declared exclusivist legislation unconstitutional.<sup>239</sup> The Court in *Romer v. Evans*<sup>240</sup> made it clear that it did not support legislation favoring homogeneity in American society when it held “unconstitutional a Colorado state initiative prohibiting Colorado municipalities from enacting antidiscrimination laws protecting bisexual and homosexual residents.”<sup>241</sup>

*Romer* is closely related to *Yniguez* because both deal with a similar substantive issue: legislation which is exclusivist and hostile to outsider groups. The *Romer* Court stated that one century ago, Justice Harland admonished the Court that the Constitution “neither knows nor tolerates classes among citizens.”<sup>242</sup> Therefore, the Court held that the amendment

238. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996).

239. *Id.*

240. *Id.*

241. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 139. See also *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996). The amendment reads:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

242. *Romer*, 116 S. Ct. at 1623.

to Colorado's Constitution unallowably singled out and precluded a specified class of people from seeking the basic protections offered by local governments.<sup>243</sup> Bilingual Arizona state employees and officials as well as non-English speaking residents, much like Colorado gays and bisexuals, have confronted a similar hostile and exclusivist movement. Those non-English or outsider groups have been singled out and receive inadequate constitutional protections when compared to their English-speaking counterparts.<sup>244</sup>

Amendment Two of Colorado's Constitution put homosexuals in a solitary class in both the private and governmental spheres.<sup>245</sup> The amendment withdrew from homosexuals, much like Arizona's Article XXVIII withdraws from bilinguals and non-English speaking residents but no others, specific legal protection from the injuries caused by discrimination.<sup>246</sup> The amendment imposed a special disability upon gays and bilinguals alone. They were forbidden the safeguards that others enjoy or may seek without constraint.<sup>247</sup>

Both amendments fail the rational basis test of the 1993 Supreme Court case of *Heller v. Doe*.<sup>248</sup> *Heller* is important here because this case focused on laws burdening fundamental rights and legislation targeted at a suspect class.<sup>249</sup> According to the Court in *Heller*, if a law neither burdens a fundamental right nor targets a suspect class, the legislative classification will be upheld so long as it bears a rational relation to some legitimate end.<sup>250</sup> In *Yniguez* and *Romer*, the legislation at issue fails even this conventional inquiry for two reasons. First, the amendments have the peculiar property of imposing a broad and undifferentiated disability on a single named group.<sup>251</sup> Second, their breadth is so "discontinuous with the reasons offered for [them] that the amendment[s] seem inexplicable by anything but animus toward the class that [they] affect[]; [they] lack[] a rational relationship to legitimate state interests."<sup>252</sup> Article XXVIII and Amendment Two identify persons by a single trait and then deny them protection across the board; it is not within the country's constitutional

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243. *Arizonans for Official English v. Arizona*, No. 3 PREVIEW U.S. SUP. CT. CAS., Nov. 18, 1996, at 139.

244. *See Romer*, 116 S. Ct. at 1625-26.

245. *Id.*

246. *Id.*

247. *Id.* at 1626.

248. *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). *See Heller v. Doe*, 509 U.S. 312, 312-13, (1993).

249. *Romer*, 116 S. Ct. at 1627.

250. *Id.*

251. *Id.*

252. *Id.*

tradition to enact laws of this sort.<sup>253</sup> “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”<sup>254</sup>

A second and related point is that the laws of the kind now before us create the inevitable inference that the disadvantage imposed rises from animosity toward the class of persons affected.<sup>255</sup> “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest,”<sup>256</sup> no matter whether the group we are speaking of are homosexuals or non-English speaking United States residents. Even laws enacted for broad and ambitious purposes can easily be explained by reference to legitimate public policies which justify the incidental harms they impose on certain individuals.<sup>257</sup> Amendment Two and Article XXVIII, however, in making the announcement that gays and lesbians as well as bilinguals and non-English speaking residents shall not have any particular protections from the law, inflict on them “immediate, continuing, and real injuries that outrun or belie any legitimate justifications that may be claimed for [them].”<sup>258</sup>

The above analysis leads to the inevitable conclusion that the U.S. Supreme Court will declare unconstitutional Article XXVIII as it unfairly discriminates against isolated sects of the population. The *Romer* case provides the courts an additional reason to defeat the amendment. The courts now have three viable bases to declare unconstitutional the English-only law: original intent of the forefathers, First Amendment case law, and Equal Protection case law. While the *Yniguez* case deprived the country of an opportunity to settle the fate of English-only rules, the nation will not have to wait much longer. The future of English-only laws may possibly be decided with the *Ruiz* case. The final portion of this Comment will address what may become this country’s most groundbreaking case in terms of employee speech.

253. *Id.* at 1627-28.

254. *Id.* at 1628.

255. *Id.* at 1627-28.

256. *Id.* at 1628.

257. *Id.*

258. *Id.*

B. *The Future of Ruiz v. Symington Depends on the Interpretation of Article XXVIII*

The true interpretation of Article XXVIII and the constitutionality of the constitutional amendment may ultimately be addressed in *Ruiz v. Symington*.<sup>259</sup> If *Ruiz* is not the case which settles this volatile issue, one need not fear. English-only statutes are being passed at a phenomenal rate.<sup>260</sup> Undoubtedly, this issue will not go away and is bound to come before the U.S. Supreme Court. The decision of the Arizona Supreme Court in *Ruiz*, and if appealed to the United States Supreme Court, the Court's final decision, will bring with it a tidal wave of ramifications. Nation-wide state initiatives and similar proposals before Congress will undergo microscopic examination. The likely result is that federal and state legislation, similar to that of Arizona's Article XXVIII, will become unconstitutional and unenforceable.

The Arizona Supreme Court has the heavy burden of determining the true meaning of Article XXVIII. The Court has two options: 1) it can adopt the State Attorney General's interpretation of the constitutional amendment; or 2) it can reject this post-hoc legal strategy and instead agree with Supreme Court precedent. The court is likely to pick option two since it is consistent with First Amendment case law and jurisprudential precedent regarding exclusivist legislation.

In his last ditch effort to lessen the severity of interpretation of Article XXVIII, the Attorney General of Arizona issued a post-hoc opinion.<sup>261</sup> The Attorney General proffered that Article XXVIII should be read as a whole in line with other portions of the Arizona Constitution, with the United States Constitution, and federal laws.<sup>262</sup> While Article XXVIII compels the performance of official acts of the government in English, the Attorney General argued that government employees remained free to use other languages to foster the delivery of government services.<sup>263</sup>

Construction of the word "act" as used in the amendment to mean more than an "official act of government" would raise questions of compatibility with state and federal guarantees and civil rights legislation.<sup>264</sup> In addition, in addressing the handling of customer inquiries or com-

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259. 1996 WL 309512 (Ariz. App., June 11, 1996).

260. See generally Schmid, *supra* note 3.

261. Op. Att'y Gen. Ariz. No. I 89-009 (1989).

262. See *Arizonans For Official English v. Arizona*, 1997 WL 84990, at \*5.

263. *Id.*

264. *Id.*

plaints involving state or local government services, the Attorney General stated:

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on these same principles.<sup>265</sup>

Public employees and elected officials, on the contrary, argue that the State Attorney General's interpretation of Article XXVIII conflicts not only with the plain meaning of the constitutional amendment, but also with the words and actions of Governor Mofford of Arizona.<sup>266</sup> Article XXVIII reads that the " 'State and all [of its] political subdivisions'— defined as including 'all government officials and employees during the performance of government business'— 'shall act in English and no other language.' "<sup>267</sup> Even a cursory reading of Article XXVIII demonstrates that the provision as an integrated whole seeks to achieve one specific goal: "to prohibit the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English."<sup>268</sup> The court of appeals sitting en banc in *Yniguez* stated that there is no just reading of the Article that would permit some of its language to be divorced from this overriding objective.<sup>269</sup>

The Attorney General's argument that the amendment provided freedom for state employees to deliver services in languages other than English is clearly disingenuous. If the true intention of AOE had been to maintain the integrity of the use of foreign languages during the government acts, the amendment would not have been written in such sweeping generalities. Furthermore, if in fact employees are permitted to speak in foreign tongues during official government business, as the Attorney General and Governor Mofford contended, then the amendment fails to accomplish its goal of having government officials and employees act in English and no other language during the performance of government business. There would be no purpose in having a constitutional referen-

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265. *Id.*

266. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 928-30 (9th Cir. 1995).

267. *Yniguez v. Arizonans For Official English*, 42 F.3d 1217, 1220 (9th Cir. 1995).

268. *Id.* at 1229.

269. *Id.*

dum to amend the Arizona Constitution if the provision was unenforced and rendered mere surplusage. Moreover, Governor Mofford threatened to enforce Article XXVIII against state employees.<sup>270</sup> In particular, the courts relied on the fact that Mofford officially announced that she intended to comply with Article XXVIII and expected state service employees to obey the amendment.<sup>271</sup>

#### IV. CONCLUSION

The Court, as guarantor and gate keeper of the Constitution, has the responsibility of ensuring that every citizen's constitutional liberties are respected. As such, the Court needs no reminder of the huge burden it bares in ending the draconian results which Article XXVIII and similar initiatives require—major portions of this country's populace are gagged and ostracized.

While free speech lost the battle in *Yniguez v. Arizonans for Official English*, it inevitably will win the war. Free speech lost out because the Court refused to hear the merits of *Yniguez*. When the Court refused to entertain the substantive issue of the constitutionality of English-only laws in the public sector, governments around the country were given the chance to continue fostering and enforcing such laws. Although this case has "officially" gone away, it is gone in name only. The substantive issues of this case remain.

In light of the fact that a plethora of English-only laws exist and continue to be proposed on the state and federal level, the Court is bound to tackle this tiger. The Court may have the opportunity to resolve this issue sooner rather than later because *Ruiz v. Symington* may arrive shortly at the Court's door. Without doubt, this issue will hit the Court again even if *Ruiz* fails to make it to the Court, and when it does, free speech will win the war. Free speech will win the war because sufficient judicial precedent grounded in First Amendment and Equal Protection principles exists to defeat English-only laws in the public sector.

*Jennifer A. Nemec*

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270. *Id.* at 1222.

271. *Id.*



