Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin

Lisa L. Behm

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PROTECTING LINGUISTIC MINORITIES UNDER TITLE VII: THE NEED FOR JUDICIAL DEFERENCE TO THE EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

I. INTRODUCTION

On January 3, 1997, Ricardo Guerra, an employee at a Milwaukee fast food restaurant, was conversing with a fellow employee in Spanish when the manager of the restaurant warned Guerra that she would terminate him if he ever spoke Spanish on the job again. When the manager subsequently asked Guerra to sign a notice of this reprimand, Guerra refused, stating, "This offends me personally.... My parents taught me Spanish and I learned English in school, so I speak both. I am an American and raised here. It's not my fault I was raised with two languages. I just want my respect."  

Unfortunately, Guerra's story is not an isolated incident. As the number of non-Language speaking and bilingual individuals in the United States increases, the trend to preserve the use of the English language has grown. This movement has invaded many facets of American life, but none so pervasively as the American workplace. In response to the

2. Id. at B2.
3. According to the 1990 U.S. Census, more than 31.8 million people in the United States speak languages other than English. This statistic represents a dramatic rise since the 1980 Census, which revealed 23.1 million non-English speakers. In order of frequency, Spanish, at 17.3 million, was the most common non-English language spoken, followed by French at 1.7 million, German at 1.5 million, Italian at 1.3 million, and Chinese at 1.2 million. Gregory C. Parliman & Rosalie J. Shoeman, National Origin Discrimination or Employer Prerogative? An Analysis of Language Rights in the Workplace, 19 EMPLOYEE REL. L.J. 551 (1994).
growing number of non-English speaking and bilingual individuals in the workplace, many employers have implemented English-only workplace rules, which prohibit or restrict the use of any language other than English during working hours.

Employers have cited numerous reasons for implementing these rules, and although some of these reasons are valid, many are nothing more than a smokescreen for discrimination. For this reason, opponents of English-only rules have challenged the rules as discriminatory under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”

Although Congress has never expressly defined the term “national origin,” the Equal Employment Opportunity Commission (“EEOC”), which is responsible for enforcing Title VII, has interpreted the con-

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5. According to projections by the Department of Labor, white males will make up only 39% of the total workforce by the year 2000, which is a decrease from the 1991 figure of 46%. These projections estimate that Hispanics are the fastest growing ethnic minority group in the United States, and the number of Hispanics in the workforce will increase from 7% to 10% by the year 2000. Also, the number of Asians will increase from 3% to 4%, and the number of blacks will increase from 11% to 12%. Steven I. Locke, Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII, 27 TEx. TECH L. REV. 33, 44 (1996).

6. Id. at 35.


   (a) It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

10. Id.

11. See Adams, supra note 8, at 877-78.

12. 42 U.S.C. § 2000e-4. Initially, the EEOC was only authorized to receive and investigate discrimination charges, and it could only resolve those charges through mediation. Id. § 2000e-4(g). In 1972, however, Congress amended Title VII to allow the EEOC to file civil court actions. Id. § 2000e-5(f). Also, under § 2000e-4(g)(6), the EEOC, as a “quasi-judicial
Thus, the EEOC has attempted to protect the language rights of non-English speaking and bilingual employees under Title VII. In doing so, the EEOC has issued guidelines that allow employers to impose English-only rules only if they can demonstrate a business necessity for their implementation. The EEOC’s policy is entitled to “great deference” in the absence of “compelling indications” that its regulations are “wrong.” However, the EEOC’s policy does not constitute binding authority.

That being the case, some courts have freely rejected the EEOC’s hard-line approach to English-only workplace rules. These courts have essentially held that (1) Title VII does not protect an individual’s primary language from national origin discrimination and (2) English-only rules do not have a discriminatory impact on bilingual employees because these employees are able to comply with English-only rules.

The conflict between the EEOC’s policy and federal appellate court decisions over the analysis of English-only rules has put both employers and non-English speaking and bilingual employees in a precarious situation. Employers are faced with confusion in attempting to implement legitimate English-only policies or in determining whether their existing policies are valid under Title VII. At the same time, non-English speaking and bilingual employees are left without an appropriate safe

agency with enforcement power to implement the national policy of Title VII,” Adams, supra note 8, at 878, may “intervene in a civil action brought under section 2000e-5 by an aggrieved party against a respondent . . . .” 42 U.S.C. § 2000e-4(g)(6). Furthermore, Congress gave the EEOC the authority to issue procedural guidelines. Id. § 2000e-12(a).

13. 29 C.F.R. § 1606.7(a) (1996) (“The primary language of an individual is often an essential national origin characteristic.”).
14. See generally id. § 1606.7.
15. Id. § 1606.7(b).
17. Id.
18. See generally Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980). Although the Fifth Circuit decided Garc
cia v. Gloor prior to the promulgation of the EEOC Guidelines regarding English-only rules, other courts have relied on this case in rejecting the Guidelines. See infra notes 19-20.
19. See, e.g., Spun Steak, 998 F.2d at 1487 (“Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace.”) (citing Gloor, 618 F.2d at 269).
20. See, e.g., Jurado, 813 F.2d at 1411 (“An employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as ‘a matter of individual preference.’”) (citing Gloor, 618 F.2d at 270).
guard against invalid policies.

This Comment suggests that the resolution of this conflict lies in judicial deference to the EEOC Guidelines. Part II compares and contrasts the interpretation of the national origin concept under Title VII by the legislative and judicial branches and the EEOC, focusing on the EEOC's application of this concept to the analysis of English-only rules. Part III discusses the judicial analysis of workplace English-only rules with respect to the EEOC Guidelines. Part IV suggests that the conflict between the courts and the EEOC should be resolved by judicial deference to the EEOC Guidelines. Finally, Part V proposes that Congress facilitate judicial deference to the EEOC Guidelines by amending Title VII to prohibit employment practices that discriminate against individuals on the basis of language.

II. NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 is a federal law that forbids employment discrimination on the basis of an "individual's race, color, religion, sex, or national origin." Title VII prohibits discriminatory practices—both overt and covert—in hiring, firing, payment of wages, and terms and conditions of employment, and it applies to all employers and labor organizations that have fifteen or more employees or members. These employers may lawfully discriminate in their employment practices only upon sufficiently demonstrating that an employment qualification or a legitimate business necessity justifies such discrimination.

The EEOC has traditionally analyzed employment discrimination based on English-only rules within the context of national origin dis-

22. Id. § 2000e-2(a)(1).
23. Originally, Title VII prohibited only overt discriminatory employment practices, but Congress expanded Title VII to include covert discriminatory practices. See S. REP. NO. 1137, 91st Cong., 2d Sess. (1970).
25. Id. § 2000e(b)-(d).
26. Section 2000e-2(e)(1) provides that:
   It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

   Id. § 2000e-2(e)(1).
crimination under Title VII. This view persists despite the fact that Congress, in failing to define the term "national origin" in Title VII, has not explicitly recognized an individual's primary language as an element of national origin. Therefore, the debate continues over whether Title VII protects an individual's right to speak his or her primary language in the workplace.

A. Legislative and Judicial Interpretation of National Origin

The legislative history of Title VII provides only limited assistance in determining the definition of national origin. Only a few representatives attempted to define the term national origin during the congressional debates preceding the enactment of Title VII. One such representative was Representative Roosevelt (D. Cal.), who stated, "May I just make very clear that 'national origin' means national. It means the country which you or your forbearers came from...." Representative Dent (D. Pa.) elaborated on this definition: "National origin, of course, has nothing to do with color, religion, or the race of the individual. A man may have migrated here from Great Britain and still be a colored person." Despite these valiant attempts at defining national origin, Congress has never mentioned the specific characteristics that it would recognize as elements of national origin. Therefore, the question of whether Congress intended to include language as an element of national origin remains unanswered.

With little guidance from the legislature, the courts have broadly construed the term national origin. In doing so, the courts have equated the concept of national origin with characteristics that are commonly associated with national origin, such as foreign accent and

28. See Adams, supra note 8, at 877-78.
30. See Adams, supra note 8, at 877-78.
31. See id. at 877.
32. See id. at 878.
33. See Perea, supra note 7, at 274.
34. See, e.g., Fragrante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989) (holding that discrimination based on foreign accent is unlawful unless the accent materially interferes with an employee's performance); Bell v. Home Life Ins. Co., 596 F. Supp. 1549 (M.D.N.C. 1984) (holding that discrimination based on foreign accent may constitute national origin discrimination).
Several courts have also recognized an individual's primary language as such a characteristic. 

B. The EEOC's Interpretation of National Origin

The EEOC has also broadly construed the concept of national origin. In 1970, the EEOC, in interpreting the Civil Rights Act of 1964, promulgated and published the first Guidelines on Discrimination Because of National Origin (the "1970 Guidelines"). The 1970 Guidelines broadly interpreted national origin discrimination to include employment discrimination based on an individual's place of origin or the "physical, cultural, or linguistic characteristics of a national origin group." The EEOC also recognized that "[t]he primary language of an individual is often an essential national origin characteristic," and that an English-only rule "may ... create an atmosphere of inferiority, isolation, and intimidation." Accordingly, a number of EEOC decisions have held that employers that prohibit their employees from speaking a language other than English in the workplace have violated Title VII by discriminating on the basis of national origin. In response to the EEOC's Guidelines and decisions recognizing language as a national origin characteristic, several commentators have opined that an individual's primary language should be protected under Title VII as a characteristic of national origin.

In 1980, the EEOC published a second set of Guidelines on Dis-
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Because of National Origin (the "1980 Guidelines"), and in 1987, the EEOC supplemented these Guidelines to specifically characterize certain English-only rules as national origin discrimination. Unlike the 1970 Guidelines, the 1980 Guidelines directly addressed the issue of English-only rules in relation to national origin discrimination. In issuing and supplementing the 1980 Guidelines, the EEOC distinguished "blanket" English-only rules, which require English to be spoken at all times, from more limited rules, which require that English be spoken only at certain times and under certain circumstances of employment.

Based on this distinction, the EEOC determined that the former blanket rules were "a burdensome term and condition of employment" that presumably violated Title VII and that the latter, more limited rules were permissible provided that an employer could demonstrate a business necessity for implementing such rules. With regard to limited English-only rules, the EEOC also stated that employers must provide full and fair notice—including the consequences of violating the rule—to their employees prior to implementation. If the employer fails to provide such notice, the EEOC will assume that a negative employment decision based on the violation of the rule constitutes discrimination based on national origin.

46. Id.
47. Compare § 1606.7(a) (English-only rules applied at all times) with § 1606.7(b) (English-only rules applied only at certain times). See infra notes 48-49 (providing the text of § 1606.7(a) & (b), respectively).
48. Id. § 1606.7(a). This provision states:
A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. 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.
49. § 1606.7(b). This provision states: "An employer may have a rule requiring that employees speak only English at certain times where the employer can show that the rule is justified by business necessity." Id.
50. § 1606.7(c).
51. Id. § 1606.7(c) (1996).
In order to assist employers in complying with the Guidelines, the EEOC published a compliance manual in 1984.\textsuperscript{52} This manual analyzes English-only rules under the two theories by which an employee may show national origin discrimination under Title VII—the disparate treatment theory\textsuperscript{53} and the disparate impact theory.\textsuperscript{54}

\textbf{C. Theories of Proving National Origin Discrimination}

1. Disparate Treatment Theory

The disparate treatment standard, established by the United States Supreme Court in 	extit{McDonnell Douglas Corp. v. Green},\textsuperscript{55} requires that an employee alleging discrimination based on disparate treatment prove that his or her employer intentionally discriminated against a class that is protected by Title VII (\textit{i.e.} a race, gender, religious, or national origin class).\textsuperscript{56} In order to establish a prima facie case of disparate treatment, the employee must prove that he or she experienced different—or disparate—treatment with regard to "compensation, terms, conditions, or privileges of employment"\textsuperscript{57} based on his or her race, sex, religion, or national origin.\textsuperscript{58} When the employee has established a prima facie case of disparate treatment, the employer must overcome the inference that it acted in a discriminatory manner by proving that it had a nondiscriminatory basis for the employment practice in question.\textsuperscript{59}

Employment discrimination through disparate treatment, however, is uncommon—particularly with respect to English-only rules.\textsuperscript{60} As one commentator has noted, an English-only rule could really only discriminate through disparate treatment by "requiring members of one national origin group to speak English while allowing members of another national origin group to speak another language or languages; or on paper requiring all employees to speak English, but in practice enforcing the rule against only certain national origin groups."\textsuperscript{61} Since this

\begin{itemize}
\item \textsuperscript{52} 2 EEOC Compl. Man. (BNA), Speak-English-only Rules and Other Language Policies § 623 (1993) [hereinafter EEOC Compliance Manual].
\item \textsuperscript{53} \textit{Id.} § 623.3.
\item \textsuperscript{54} \textit{Id.} § 623.6.
\item \textsuperscript{55} 411 U.S. 792 (1973).
\item \textsuperscript{56} \textit{Id.} at 802-06.
\item \textsuperscript{58} EEOC Compl. Man., \textit{supra} note 52, at § 623.3.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} See Wiley, \textit{supra} note 27, at 549.
\item \textsuperscript{61} \textit{Id.} at 549.
\end{itemize}
practice is uncommon, most employees who have complained about English-only rules have alleged that they have suffered discrimination under the disparate impact theory.  

2. Disparate Impact Theory

The disparate impact standard, which the United States Supreme Court established in Griggs v. Duke Power Co., requires that the employee alleging discrimination based on disparate impact demonstrate that a facially neutral employment practice results in disproportionate discrimination against a protected class. Under the Griggs disparate impact analysis, once the plaintiff proves that a particular employment practice has a significant adverse effect (disparate impact) on individuals protected under Title VII, the burden of proof shifts to the employer to prove that the employment practice in question was justified by business necessity. Even if the employer is able to establish business necessity, however, the plaintiff may still prevail by demonstrating that a nondiscriminatory alternative employment practice would equally serve the employer's business necessity.

In Wards Cove Packing Co. v. Atonio, the United States Supreme Court changed the burden of proof standards it had set out in Griggs. First, the Court held that the plaintiff could establish a prima facie case of disparate impact by (1) establishing that the employer's practice has

62. See id. at 549.
64. 401 U.S. 424 (1971). This case dealt with employee selection devices that had a disparate impact on the basis of race. The employer in this case failed to prove that the high school equivalency requirement was correlated with satisfactory job performance because employees who had not finished high school had performed their jobs satisfactorily. Id. at 431.
65. Id.
66. Id. at 431-32. Courts have recognized that the Griggs disparate impact theory required plaintiffs to meet a very high burden of proof. See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 136-40 (1976); Lynch v. Freeman, 817 F.2d 380, 383 (6th Cir. 1987).
68. 490 U.S. 642 (1989). In this case, an Alaskan cannery separated jobs into "cannery" and "noncannery" jobs. The noncannery jobs were filled predominately by whites and the cannery jobs were filled predominately by nonwhites. A class of nonwhite cannery workers sued under Title VII, claiming that the employer's practice of separating the jobs caused racial stratification and denied them noncannery jobs based on their race. Id. at 646-48. The Supreme Court held that the petitioners failed to establish a prima facie case of disparate impact. Id. at 655.
69. Id. at 656-60.
a disparate impact on a protected group,\(^70\) (2) demonstrating that the practice in question caused the disparity,\(^71\) and (3) demonstrating that the practice has a "significantly disparate impact" on employment opportunities.\(^72\) Once the plaintiff establishes a prima facie case of disparate impact, the employer only has the burden of production—not the burden of persuasion—in justifying a particular employment practice.\(^73\) Under this standard, the employer no longer has to establish an affirmative defense of business necessity.\(^74\) Since the burden of persuasion rests with the plaintiff at all times,\(^75\) the employer need only demonstrate that the employment practice in question serves the employer’s legitimate employment goals.\(^76\)

Through the Civil Rights Act of 1991 (the Act),\(^77\) Congress codified the Ward’s Cove standard regarding the employee’s establishment of a prima facie case of disparate impact.\(^78\) At the same time, the Act reinstated the Griggs standard regarding the burden of proof on the employer. Thus, once the employee has established a prima facie case of disparate impact, the burdens of both proof and persuasion rest on the employer to establish sufficient business necessity.\(^79\) Under this standard, the employer must do more than merely assert a convenience or

\(^{70}\) Id. at 656.
\(^{71}\) Id.
\(^{72}\) Id. at 657.
\(^{73}\) Id. at 658-60.
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id. at 659.

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;

(ii) or the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

\(^{78}\) Id. § 2000e-2(k)(1)(A).
\(^{79}\) See Wiley, supra note 27, at n.74.
preference to establish a legitimate business necessity. Furthermore, if the complaining employee can prove that a less discriminatory alternative to the employer's proffered business justification exists, the employee will still prevail. In summary, under the current standard, the plaintiff bears the initial burden of proof in establishing disparate impact, and then the burden of proof shifts to the employer to establish business necessity.

The EEOC Compliance Manual states that this disparate impact analysis applies to challenges to English-only rules in situations where (1) the employer has a policy requiring English to be spoken in the workplace, (2) the rule is facially neutral (i.e. the rule is applicable to all employees regardless of race, color, national origin, sex, or religion), and (3) the rule allegedly affects one of the classes protected under Title VII disproportionately.

The EEOC Compliance Manual also sets forth the parameters for proving business necessity in a disparate impact challenge to an English-only rule: "An employer may prove business necessity if it can show [that] a practice is necessary to safe and efficient job performance or to safe and efficient operation of its business." The most commonly cited employer justifications for implementing English-only rules include: reducing racial tension, reducing disruptions, improving employees' English proficiency, enhancing the effectiveness of employee supervision, and promoting safety and efficiency in the workplace.

III. JUDICIAL ANALYSIS OF WORKPLACE ENGLISH-ONLY RULES: THE LEADING CASES

In applying the disparate impact analysis to challenges against

80. See United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971) (holding that "management convenience and business necessity are not synonymous").
84. Id. at 552.
85. See Perea, supra note 7, at 300-16 (criticizing the most common employer business justifications for implementing English-only rules); see also infra note 277 and accompanying text (discussing nondiscriminatory alternatives to English-only rules).
86. See Gutierrez v. Municipal Court, 838 F.2d 1031, 1042 (9th Cir. 1988) (holding that the reduction of racially-motivated fear and suspicion does not constitute a sufficient business necessity), vacated as moot, 490 U.S. 1016 (1989).
87. See EEOC Compl. Man., supra note 52, at § 623.6(d)(4).
88. Id. § 623.6(d)(1)(iii).
89. Id. § 623.6(d).
workplace English-only rules, the courts have had a mixed reaction to the EEOC Guidelines. Although the Guidelines have received some deference, federal appellate courts have been reluctant to adopt the EEOC’s hard-line approach to workplace English-only rules. Because neither the Supreme Court nor the legislature has addressed the legality of workplace English-only rules under Title VII, courts have exercised broad discretion in deciding this issue.


In *Saucedo v. Brother’s Well Service, Inc.* the first federal court decision addressing a workplace English-only rule, the U.S. District Court of the Southern District of Texas held that English-only rules have a disparate impact on members of language minority groups. Brother’s Well Service was a family-owned business that operated “workover rigs” (rigs placed over declining oil wells for the purpose of reclaiming as much oil as possible). About 50% of the company’s employees were Mexican-American, including the plaintiff, John Saucedo. On one occasion while Saucedo was employed at Brother’s, a shop supervisor told him that the company did not allow any “Mesican talk.” The supervisor did not, however, inform Saucedo that the company had an English-only policy or that violation of the rule was cause for termination. At a later date, the same supervisor terminated Saucedo because he spoke two words of Spanish when he brought a part to a co-worker and asked the co-worker where he should place the part. When the

90. See Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988) (adopting the EEOC Guidelines), vacated as moot, 490 U.S. 1016 (1989).
91. See Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (expressly rejecting the EEOC Guidelines), cert. denied, 114 S. Ct. 2746 (1994); Gonzalez v. Salvation Army, 985 F.2d 578 (11th Cir. 1993), cert. denied, 113 S. Ct. 2342 (1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (holding that an English-only rule did not violate Title VII prior to the promulgation of the 1980 EEOC Guidelines).
92. The United States Supreme Court has consistently avoided ruling on this issue. See supra notes 90-91. The Court has recently granted certiorari in one English-only case, but only to address the constitutionality of English-only laws under the First Amendment. See Yniguez v. Arizonans for Official English, 69 F.3d 920, 935-36 (9th Cir. 1994), cert. granted, 116 S. Ct. 1316 (1996), vacated as moot and remanded, 117 S. Ct. 1055 (1997).
94. Id.
95. Id. at 920.
96. Id.
97. Id. at 921.
98. Id.
99. Id. at 921-22.
co-worker subsequently challenged Saucedo's termination, the supervi-
sor assaulted the co-worker. 109

Because neither the shop supervisor nor the co-worker were repri-
manded for fighting and Saucedo's termination remained intact, the
court found that Saucedo's employer had discriminatorily discharged
him for violating an unwritten rule without knowledge of the conse-
quences of its violation. 110 Although the court did not decide the case
under the disparate impact analysis of discrimination, the court offered
influential dicta with regard to the disparate impact of English-only
rules in the workplace:

A rule that Spanish cannot be spoken on the job obviously has a
disparate impact upon Mexican-American employees. Most
Anglo-Americans obviously have no desire and no ability to
speak foreign languages on or off the job. The question in a case
of this nature therefore becomes whether or not the employer
can prove by a preponderance of the evidence that his "rule" re-
quiring only English to be spoken on the job is [a] result of busi-
ness necessity. 112

B. Garcia v. Gloor

Acting contrary to the Saucedo court's holding, the Fifth Circuit
Court of Appeals, in Garcia v. Gloor, 103 became the first federal appel-
late court to uphold an employer's English-only rule. 104 The plaintiff
Hector Garcia was a native-born American of Mexican descent who
worked as a salesman at Gloor Lumber & Supply, Inc. 105 Gloor, the
owner of the company, had implemented a rule that prohibited employ-
ees from speaking Spanish unless it was necessary for communication
with Spanish-speaking customers. 106 Gloor promulgated this rule be-
cause he believed that customers who did not speak Spanish would be
offended by communications they did not understand. 107 Gloor also felt
that the rule would improve his employees' English proficiency and that
this would allow for improved employee supervision. 108 On these

100. Id. at 922.
101. Id. at 920-23.
102. Id. at 922.
104. Id.
105. Id. at 266.
106. Id. The rule did not apply to employees who worked outside in the lumber yard,
and it did not apply during employee breaks. Id.
107. Id. at 267.
108. Id.
grounds, Gloor enforced the rule by terminating Garcia when Garcia addressed a fellow salesman in Spanish.109

Subsequent to his termination, Garcia claimed that the English-only rule constituted national origin discrimination under Title VII.110 The Fifth Circuit, in rejecting Garcia's claim, held that national origin is not equated with the language one chooses to speak and that Title VII does not grant an employee the right to speak a particular language at work.111 According to the court, discrimination occurs when the company-imposed prohibitions are "beyond the victim's power to alter."112 Thus, the court reasoned that if an employee is capable of speaking two or more languages, the employee may change the language he or she speaks to the one preferred by the employer.113

Garcia also claimed that the English-only rule had a discriminatory impact on a protected class of employees.114 In response to this claim, the court stated:

The EEO 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.115

Thus, the court conceded to the possibility that an English-only rule might constitute national origin discrimination if an employee could only proficiently speak his or her native tongue.116 However, the court

109. Id. at 266.
110. Id. at 267.
111. Id. at 268.
112. Id. at 269. The court applied the "mutable-immutable characteristics rationale," which it had established in Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535 (5th Cir. 1973), rev'd, 507 F.2d 1084 (5th Cir. 1975) (en banc). Under this rationale, Title VII protects only those characteristics that an individual cannot change. Willingham, 507 F.2d at 1091. As one commentator has pointed out, however, the use of this rationale in a national origin discrimination case was incorrect because the Willingham court intended the rationale to apply only to "sex-plus" discrimination (discrimination based on the sex of the employee plus some other apparently neutral hiring criteria, such as grooming). Aileen Maria Ugalde, Comment, "No Se Habla Espanol": English-Only Rules in the Workplace, 44 U. MIAMI L. REV. 1209, 1236 (1990) (citing Willingham, 507 F.2d at 1092).
113. Gloor, 618 F.2d at 270.
114. Id.
115. Id.
116. Id.
refused to make the same concession for bilingual employees.\textsuperscript{117}

\textbf{C. Jurado v. Eleven-Fifty Corp.}

The next relevant case, which the U.S. Court of Appeals for the Ninth Circuit decided after the promulgation of the 1980 EEOC Guidelines, was \textit{Jurado v. Eleven-Fifty Corp.}\textsuperscript{118} The plaintiff, Valentine Jurado, was a bilingual disk-jockey who, at the direction of his program director, began to use some "street" Spanish words and phrases on the air in order to attract Hispanic listeners.\textsuperscript{119} When this strategy failed to attract listeners, Jurado’s program director ordered Jurado to stop speaking Spanish on the air.\textsuperscript{120} When Jurado failed to comply with this order, the radio station terminated him.\textsuperscript{121} In response to his termination, Jurado sued the station, claiming that it had discriminated against him based on his national origin and that the station’s English-only rule served as evidence of this discrimination.\textsuperscript{122}

When the radio station moved for summary judgment, claiming that it discharged Jurado for failure to comply with the order, the trial court granted the motion and the Ninth Circuit affirmed.\textsuperscript{123} Relying on Garcia \textit{v. Gloor}, the Ninth Circuit stated, "\textit{[A]n employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as 'a matter of individual preference.'"}\textsuperscript{124} Thus, the Jurado court, like the Gloor court, held that if an employee is capable of complying with an English-only rule, enforcement of the rule against that employee does not constitute discrimination under Title VII.\textsuperscript{125}

\textbf{D. Gutierrez v. Municipal Court}

Soon after rendering its decision in Jurado, the Ninth Circuit drastically changed its position regarding workplace English-only rules in the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} Id. at 270-71. In light of later EEOC developments, the impact of the \textit{Gloor} decision is questionable. Wiley, \textit{supra} note 27, at 557.
\item \textsuperscript{118} 813 F.2d 1406 (9th Cir. 1987).
\item \textsuperscript{119} Id. at 1408.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 1409.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id. at 1411 (citing Garcia \textit{v. Gloor}, 618 F.2d 264, 270 (5th Cir. 1980).
\item \textsuperscript{125} Id.
\end{itemize}
\end{footnotesize}
case of Gutierrez v. Municipal Court. This case involved an English-only rule that the Municipal Court of the Southeast Judicial District, County of Los Angeles, adopted after a black employee complained about employees who were speaking Spanish. This rule prohibited all employees from speaking any language other than English except when necessary to translate for the non-English speaking public. The rule did not apply during the employees' breaks or lunchtime. The plaintiff, Alva Gutierrez, who worked as a deputy court clerk, filed suit in federal district court, alleging that the English-only rule constituted national origin discrimination in violation of Title VII.

The trial court granted a preliminary injunction against the Municipal Court's application of the rule, and the Ninth Circuit affirmed this decision based on the plaintiff's disparate impact claim. The Ninth Circuit, in deferring to the EEOC Guidelines, stated,

We agree that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can “create an atmosphere of inferiority, isolation, and intimidation.” Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin.

The court also recognized that “language is an important aspect of national origin” and that “[t]he cultural identity of certain minority groups is tied to the use of their primary tongue.” The court further stated that an individual’s “primary language remains an important link to his ethnic culture and identity.” Thus, the court reasoned that “[t]he mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is de-

126. 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989).
127. Id. at 1036.
128. Id.
129. Id.
130. Id.
131. Id. at 1037-38.
132. Id at 1040.
133. Id. (quoting the EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7(a) (1996)).
134. Id.
135. Id. at 1039 (citing the EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7(a)).
136. Id.
137. Id.
rived from his national origin." On these grounds, the court applied the EEOC Guidelines in determining that the Municipal Court’s English-only rule discriminated on the basis of national origin and was therefore a violation of Title VII.

The court went on to distinguish Jurado from the present case. The court reasoned that in Jurado, the radio station had a business necessity for implementing an English-only rule because the rule “pertained only to on-the-air broadcasting—the product the employer was offering to sell.” Furthermore, the rule in Jurado applied to only one employee. The court contrasted the situation in Jurado from this case because, in this case, the rule applied to intra-employee conversations and did not have any impact on the operation of the court. Unlike the employer in Jurado, the Municipal Court could not demonstrate a business necessity for implementing an English-only rule. The court found that the justifications offered in this case—precluding possible insubordinate remarks and reducing racial tension—did not satisfy the business necessity standard. The court also found unpersuasive the Municipal Court’s argument that the English-only rule would enhance the supervision of court employees.

E. Garcia v. Spun Steak Co.

In deciding Garcia v. Spun Steak Co., the next case addressing the legality of a workplace English-only rule, the Ninth Circuit did yet another turnabout in its position regarding English-only rules. Spun Steak Company, a producer of meat and poultry products in the San Francisco area, employed thirty-three workers, twenty-four of whom were Spanish-speaking, but bilingual, two who spoke no English, and

139. Id. at 1040-41.
140. Id. at 1041.
141. Id.
142. Id.
143. Id.
144. Id. at 1041.
145. Id. at 1041-44.
146. Id. at 1043.
147. Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993).
148. Id. The Garcia court concluded, inter alia, that Gutierrez had no precedential value because the United States Supreme Court had vacated the case as moot. Id. at 1487 n.1.
others with varying degrees of English proficiency. In 1990, Spun Steak instituted an English-only rule. The company instituted the rule after receiving complaints from non-Spanish speaking employees, who claimed that certain Spanish-speaking employees were harassing them in a language they could not understand and that this harassment made it difficult for them to concentrate on their work.

When the company enforced the rule against the plaintiffs Priscilla Garcia and Marciela Buitrago, Garcia and Buitrago filed suit, alleging that Spun Steak’s English-only rule violated Title VII because it had a disparate impact on the company’s Hispanic employees. The plaintiffs argued that the rule had discriminatorily impacted them in three ways. First, the rule denied them their right to express their cultural heritage in the workplace. Second, the rule denied the plaintiffs a privilege that monolingual English-speaking employees had. Third, the rule, in violation of the EEOC guidelines, created “an atmosphere of inferiority, isolation, and intimidation.”

The Ninth Circuit rejected all three of the plaintiffs’ arguments. First, the court found that the employees had no right to express their cultural heritage in the workplace. The court stated:

Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace... It is axiomatic that an employee must often sacrifice individual expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.

Second, the court determined that Spun Steak’s English-only rule did not discriminate by denying a privilege to Spanish-speaking employees while granting the same privilege to native English-speaking

149. Id. at 1483.
150. Id. The rule stated:
It is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees’ own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your Spanish fluency in a fashion which may lead other employees to suffer humiliation.

Id.
151. Id.
152. Id. at 1483-84.
153. Id. at 1487.
154. Id. at 1488.
155. Id. at 1487.
employees. Relying on the ideology it had established in *Jurado*, the court held that no disparate impact existed "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference." The court reasoned that, given the fact that all but two of Spun Steak's Hispanic employees were bilingual, no discrimination existed because the employees could comply with the rule.

Finally, the court rejected the plaintiffs' claim that, contrary to the EEOC Guidelines, Spun Steak's English-only rule created "an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment." Although the court acknowledged that the enforcement of English-only rules might lead to a hostile work environment in some situations, the court dismissed the EEOC Guidelines. Citing *Gloor*, the court stated that because "nothing in the plain language of [Title VII] supports the EEOC's English-only rule Guideline," there are "compelling indications" that the Guidelines are "wrong." The court pointed out that the Guidelines may be "wrong" because they presume that English-only rules have a disparate impact before they require the plaintiff to make an initial showing of disparate impact. On these grounds, the court reversed the lower court's granting of summary judgment, determining that the plaintiffs failed to establish their prima facie case.

In his dissent, Judge Boochever, who agreed with most of the majority's opinion, stated that, given the EEOC's expertise with the issue of employment discrimination and the lack of a "compelling indication" that the EEOC Guidelines were wrong, the court should have upheld the EEOC's regulations. According to Judge Boochever, the absence of express legislative intent with regard to English-only rules was not

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156. *Id.*
157. *Id.* (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).
158. *Id.* at 1487-88.
159. *Id.* at 1489 (29 C.F.R. § 1606.7(a) (1991)).
160. *Id.* The court stated, "We do not foreclose the prospect that in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination." *Id.*
161. *Id.* at 1489-90.
162. *Id.* at 1489.
163. *Id.* at 1490.
164. *Id.* at 1491. With respect to the one affected non-English speaking employee, the court held that "summary judgment was improper because a genuine issue of material fact exist[ed] as to whether she ha[d] been adversely affected by the policy." *Id.* at 1488.
165. *Id.* at 1490 (Boochever, J., dissenting in part).
sufficient to conclude that the EEOC's regulations contravene congres-
sional intent.166 Furthermore, Judge Boochever found the majority's
analysis of English-only rules to be too subjective, stating, "It is hard to
evision how [the adverse effect] would be met other than by conclu-
sory self-serving statements . . . or expert testimony . . ."167

F. Yniguez v. Arizonans for Official English

In the most recent case addressing English-only rules, the Ninth Cir-
cuit, contradicting itself once again, decided the constitutionality of an
Arizona state constitutional amendment which provided that English
was the official language of the state and that all government employees
must "act" in English.168 The plaintiff, a former state employee, claimed
that this amendment violated her First Amendment rights.169 The plain-
tiff, who handled medical malpractice claims against the state, was bi-
lingual and spoke Spanish to monolingual Spanish-speaking claimants
and a combination of English and Spanish to bilingual claimants.

The court, in holding that the state amendment violated free speech
rights, recognized that language is a "close and meaningful proxy for na-
tional origin."170 The court also rejected the appellants' argument that
First Amendment scrutiny should be relaxed because a bilingual plain-
tiff may choose whether to communicate in Spanish or English.171 Con-
trary to its decision in Spun Steak, the court determined that the choice
to speak Spanish or English can represent "solidarity" and
"comfortableness,"172 and it may be necessary so that the speaker can

166. Id. at 1490-91.
167. Id. at 1490. For a criticism of the Garcia v. Spun Steak Co. decision, see Stephanie
L. Kralik, Comment, Civil Rights—The Scope of Title VII Protection For Employees Chal-
 lenging English-Only Rules—Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), 67
TEMP. L. REV. 393 (1994) (arguing that the Garcia court should have followed the modified
disparate impact analysis suggested by the EEOC) and Rodriguez, supra note 43 (arguing
that the Garcia decision was incorrect because the court failed to consider language as a
proxy for national origin and rejected the EEOC Guidelines).
168. Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995), cert.
the holding in this case specifically addresses the First Amendment aspect of English-only
rules, the reasoning behind the court's decision regarding the relationship between language
and national origin is important for the purposes of this Comment.
169. Id. at 925.
170. Id. at 924.
171. Id. at 947.
172. Id. at 934.
173. Id. at 935.
make himself understood. Because the court found that the adverse impact of the amendment fell almost entirely on Hispanics and other national origin minorities, the court struck the amendment down because it was facially overbroad and it constituted a violation of the First Amendment. The appellants appealed this decision to the United States Supreme Court, which granted certiorari. On review, the Court vacated the decision as moot because the plaintiff had resigned from her position with the State of Arizona and remanded the case with directions that it be dismissed by the district court.

IV. THE EEOC GUIDELINES ARE ENTITLED TO SUBSTANTIAL JUDICIAL DEFERENCE

A perusal of the case law reveals a substantial conflict in views between the separate branches of government and the judiciary—and even within the judiciary—regarding the general application of English-only rules. The most viable means of resolving this conflict is through judicial deference to the EEOC Guidelines.

Although the courts do not consider the EEOC's regulations to constitute binding authority, the EEOC is entitled to "great deference" in the absence of "compelling indication[s]" that its regulations are "wrong." Under this analysis, the EEOC Guidelines are entitled to substantial deference by the courts because they are consistent with the congressional intent behind Title VII and there are no "compelling indications" that they are "wrong."

A. The Guidelines Are Consistent with the Congressional Intent Behind Title VII

Congress enacted Title VII to "assure equality of employment opportunities by eliminating those practices and other devices that dis-
criminate on the basis of race, color, religion, sex, or national origin.”\footnote{Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457 (1975) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).} As previously noted, Congress did not address the issue of English-only rules in the context of Title VII and therefore the statute is silent as to this issue.\footnote{See supra notes 30-32 and accompanying text.} However, “[w]hen a statute is silent or ambiguous, courts will generally defer to the interpretation by the agency responsible for enforcing the Act when the interpretation is based on a permissible construction of the statute.”\footnote{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).}

In interpreting Title VII, the EEOC has identified the use of workplace English-only rules as an employment practice that has a tendency to discriminate against individuals on the basis of national origin.\footnote{See infra Part IV(B)(1) (discussing in depth the EEOC’s interpretation of national origin under Title VII).} This interpretation is based on the idea that, because an individual’s primary language is such a fundamental aspect of his or her national origin,\footnote{29 C.F.R. § 1606.7(a)(1996) ("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.").} discrimination based on that language constitutes national origin discrimination.

Having identified the use of English-only rules as a practice that may discriminate against individuals whose primary language is not English, the EEOC, consistent with Title VII, has attempted to eliminate the application of these rules as a means of discriminating against non-English speaking and bilingual employees.\footnote{Id. ("The primary language of an individual is often an essential national origin characteristic.").} In doing so, the EEOC has deemed “blanket” English-only rules (rules applied at all times during the workday) to be presumptively discriminatory.\footnote{See id. § 1606.7.} The EEOC has also attempted to restrict the use of the more limited rules to situations where either the rule does not have a disparate impact on a particular class of employees or the employer can demonstrate a legitimate business necessity for implementing the rule.\footnote{See id. § 1606.7(a).} Thus, the EEOC Guidelines clearly further the Title VII objective of “eliminating those practices that discriminate . . . on the basis . . . of national origin.”\footnote{See id. § 1606.7(b).}
Because the EEOC Guidelines are consistent with the plain language of Title VII, Congress has found the EEOC's interpretation of Title VII to be permissible. In 1991, when Congress amended Title VII to clarify the standard for proving disparate impact discrimination, Congress specifically discussed the EEOC Guidelines regarding English-only rules and chose not to alter them. 191 Certainly, if Congress had viewed the EEOC's Guidelines regarding English-only rules as an incorrect interpretation of Title VII, it would have called for their alteration. Since "an agency interpretation is entitled to greater deference when Congress is aware of the interpretation and chooses not to change it when amending the statute in other respects," 192 the EEOC Guidelines regarding workplace English-only laws are entitled to substantial deference by the courts.

B. There Are No "Compelling Indications" That the Guidelines Are "Wrong"

Despite the fact that the EEOC Guidelines are consistent with the congressional intent behind Title VII, courts and commentators continue to reject the EEOC's hard-line approach to workplace English-only rules. 193 The most commonly proffered justifications for rejecting the EEOC's approach have been: (1) that the Guidelines incorrectly recognize discrimination based on language as a form of national origin discrimination, 194 (2) that the Guidelines needlessly protect bilingual in-

191. When the Senate was discussing the possible amendment of Title VII, Senator DeConcini said that a number of his constituents had complained about workplace English-only rules. When Senator DeConcini asked Senator Kennedy, a supporter of the amendment, whether the EEOC Guidelines would remain intact, Senator Kennedy answered that the Guidelines had worked effectively and that the new legislation would not affect them in any way. 137 CONG. REC. S15,489 (daily ed. Oct. 30, 1991).


193. See generally Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (rejecting the ideology upon which the subsequent Guidelines were based). See also Debra Falduto Novack, English-Only Rules in the Workplace—The Need to Prove Disparate Impact, 83 ILL. B.J. 474 (1995) (advocating the rejection of the EEOC Guidelines' presumption favoring plaintiffs with respect to English-only policies); Patrick Wallace, Note, English-Only Rules in the Workplace: Examining the Need to Balance the Burdens of Proof Under Disparate Impact Analysis, 7 DEPAUL BUS. L.J. 223 (1994) (arguing against judicial adoption of the EEOC Guidelines); Wiley, supra note 27, at 543 ("[T]he EEOC's policy establishing English-only rules as having a presumptive disparate impact is improper . . . .").

194. See Spun Steak, 998 F.2d at 1487-90; Gloor, 618 F.2d 264. Although the Fifth Circuit decided Gloor prior to the promulgation of the EEOC Guidelines, the Gloor court rejected the concept that an individual's primary language is an element of his or her national
individuals who are capable of complying with English-only rules, and (3) that the Guidelines defy congressional intent by altering the disparate impact analysis for employee challenges to English-only rules. In spite of these arguments, however, the EEOC's approach to workplace English-only rules under the Guidelines is consistent with Title VII, and courts should adhere to it.

1. The Guidelines Correctly Recognize Discrimination Based on Language as a Form of National Origin Discrimination

The EEOC broadly defines national origin discrimination as including "the denial of equal employment opportunity because of an individual's, or his or her ancestors', place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group." Under this definition, discrimination based on the language a person speaks, which obviously falls within the category of "linguistic characteristics," constitutes national origin discrimination. While some courts have recognized discrimination based on an individual's foreign accent as a form of national origin discrimination, many have refused to do the same with respect to discrimination based on language. The primary reason for this refusal is that courts have failed to acknowledge the crucial bond that exists between an individual's primary language and his or her national origin.

In Garcia v. Gloor, the Fifth Circuit stated that "[n]either [Title VII] nor common understanding equates national origin with the language one chooses to speak." In Jurado v. Eleven-Fifty Corp. and Garcia v. Spun Steak Co., the Ninth Circuit relied on this determination when it rejected the Guidelines equation of language with national origin: "Neither [Title VII] nor common understanding equates national origin with the language that one chooses to speak."
origin. Given the volume of evidence that clearly supports the Guidelines' position, however, the reasoning behind this rejection is clearly erroneous.

Numerous scholars of ethnicity and language have opined that an individual's language is a fundamental aspect of his or her national origin. One distinguished scholar, Joshua Fishman, has stated that ethnicity encompasses "both the sense and the expression of 'collective, inter-generational cultural continuity,' i.e. the sensing and expressing of link's to 'one's own kind (one's own people')." It is through the expression of ethnicity, one's cultural continuity and cultural traits, that 'national origin' accrues significance. With respect to the Hispanic culture in particular, scholars have noted that the Spanish language is imbedded in the culture "in the sense that both their culture and language are derived from the reality in which they live; in turn, the culture and the language shape that reality." Numerous legal commentators have also recognized the strong connection between language and national origin. As one commentator has stated, "Primary language... is closely correlated and inextricably linked with national origin."!

American society in and of itself is evidence that the statements of these scholars and legal commentators are true. The connection between language and national origin pervades every aspect of society, including the media, popular culture, and education:

The continuing vitality of non-English language newspapers, as well as radio and television broadcasts, reflects [the] strong bond

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203. Perea, supra note 7, at 276 (quoting J. Fishman, THE RISE AND FALL OF THE ETHIC RIVAL: PERSPECTIVES ON LANGUAGE AND ETHNICITY 4 (date omitted from original)).

204. Id. at 277. See, e.g., Stephen M. Cutler, Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L.J. 1164, 1165 (1985) ("Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself.") (footnote omitted); James H. Domengueaux, Comment, Native-Born Acadians and the Equality Ideal, 46 LA. L. REV. 1151, 1167 (1986) ("Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity."); Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 351-57 (1986).

205. One commentator's criticism of the current national origin concept states: "At first glance, the current 'national origin' concept appears to be meant to include and protect ethnically different Americans. I believe, however, that true to its origins in the immigration laws, today's 'national origin' concept operates to exclude ethnically different Americans..." Juan F. Perea, Los Olvidados: On the Making of Invisible People, 70 N.Y.U. L. REV. 965, 982 (1995).

206. Perea, supra note 7, at 276 (footnote omitted).
between an individual's native language and cultural identity. The important relationship between and ethnicity is also recognized in the 6600 non-English language schools in the United States, which are "unequivocally committed to the view that their particular language and ethnicity linkage is vital and, hopefully, eternal."^207

Given the many sociological and psychological factors that make language a fundamental aspect of national origin,^208 one can accurately conclude that an individual's primary language is a proxy for his or her national origin. As such, discrimination based on an individual's primary language will inevitably pose a threat to that individual's right under Title VII to be free from national origin discrimination. Thus, since most, if not all, courts interpret Title VII as protecting an individual from discrimination based on national origin, the courts must also interpret Title VII as protecting one of the most fundamental aspects of that individual's national origin—his or her primary language.

2. The Guidelines Properly Protect Bilingual Individuals from National Origin Discrimination Based on Language

The EEOC Guidelines recognize that the inextricable bond between language and national origin exists not only for monolingual non-English speakers, but also for bilingual individuals. Because "[t]he primary language provides bilingual individuals with associations and notions of family, friendship, and intimacy," the fact that these individuals speak English does not alter the status of their primary language as an essential element of their national origin.

The Fifth and Ninth Circuits have attempted to downplay the significance of the connection between a bilingual individual's primary language and national origin by inaccurately viewing a bilingual individual's language as a matter of personal preference. Based on this view, these courts have held that English-only rules do not have a dispa-

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207. Adams, supra note 8, at 905.
208. See supra notes 205-07 and accompanying text.
209. 29 C.F.R. § 1606.7(c). The Guidelines note that it is "common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language." Id.
210. Adams, supra note 8, at 906.
211. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993) ("[T]he language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.") (citing Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987) (same)).
rate impact on bilingual individuals.\textsuperscript{212}

In holding this view, the courts have incorrectly assumed that a bi-
lingual individual is fluent in both English and his or her primary lan-
guage,\textsuperscript{213} and they have disregarded the fact that individuals who are
considered bilingual have varying levels of English proficiency. As one
commentator has explained: "[w]hile bilingualism is often defined as
the ability 'to speak two languages with nearly equal facility,' bilingual-
ism should be considered 'as a spectrum of abilities in a second lan-
guage ranging from minimal ability to communicate in a second lan-
guage to equal facility in two languages.'\textsuperscript{214} Thus, an English-only rule
would be substantially likely to hinder the ability of individuals with
minimal English proficiency to communicate in the workplace.

Bilingual individuals with a higher level of English proficiency
would also experience significant communication problems if an En-
lish-only rule prohibited them from speaking their primary language in
the workplace. This difficulty would arise from the fact that individuals
who have acquired a high level of English proficiency often engage in
"code-switching"—alternating between English and their primary lan-
guage as the circumstances warrant.\textsuperscript{215} Since bilingual individuals usu-
ally engage in code-switching inadvertently,\textsuperscript{216} they may often be subject
to reprimand and adverse employment decisions when attempting to
communicate in an "English-only" workplace. Under these circum-
stances, the bilingual individual's use of his or her primary language is
not a matter of personal preference. Regardless of the bilingual individ-
ual's level of English proficiency, the primary language plays a pivotal
role in his or her ability to communicate in the workplace.

The Fifth and Ninth Circuits have denied the existence of this role
by incorrectly assuming that an English-only rule cannot have a dispa-
rate impact on a bilingual individual because a bilingual individual can

\begin{itemize}
  \item \textsuperscript{212} See supra note 211. In Garcia v. Spun Steak Co., however, the Ninth Circuit con-
ceded that workplace English-only rules may have a disparate impact on non-English speak-
ing employees. \textit{Spun Steak}, 998 F.2d at 1488.
  \item \textsuperscript{213} Adams, supra note 8, at 906-907.
  \item \textsuperscript{214} Id. at 906.
  \item \textsuperscript{215} See Alfredo Mirande, "En La Tierra Del Ciego, El Tuerto Es El Rey" ("In the
    Land of the Blind, the One-Eyed Person is King"): Bilingualism as a Disability, 26 N.M. L.
    REV. 75, 94-98 (1996) (discussing in depth the code-switching phenomenon). Mirande says,
    "I propose that the dominant view is based on a conception of language use which treats bi-
    lingual persons as two separate monolingual persons and fails to understand the nuance and
    complexity of the bilingual experience." Id. at 94. See also 29 C.F.R. § 1606.7(b) (1996).
  \item \textsuperscript{216} Mirande, supra note 215, at 94-98.
\end{itemize}
comply with the rule.\textsuperscript{217} Aside from the fact that not all bilingual employees can comply with an English-only rule to the employer's satisfaction, ease of compliance on the part of the employee is irrelevant.\textsuperscript{218}

An English-only rule can have a disparate impact on a particular group regardless of whether the members of that group are able to comply with it. In \textit{Garcia v. Spun Steak Co.}, for example, the bilingual plaintiffs argued that their employer's English-only rule denied them a privilege that the employer gave to native English speakers—the ability to speak in the language with which they felt most comfortable.\textsuperscript{219} In response to this argument, the Ninth Circuit, in upholding the employer's English-only rule, stated that, "A privilege . . . is by definition given at the employer's discretion . . . ."\textsuperscript{220}

The Ninth Circuit's response erroneously focused on the employees' ability to comply with the rule rather than on the possibility that the rule had a disparate impact on that group of employees. Hence, the Ninth Circuit overlooked the possibility that an employment policy that grants the "privilege" to one group of employees to converse in their primary language and denies the same privilege to another group may have a disparate impact on the group to whom the employer has denied the privilege. Regardless of whether the adversely affected employees are capable of complying with the policy, such inequality in the terms and conditions of employment constitutes unlawful discrimination under Title VII.

A bilingual individual's primary language is more than an expression of cultural heritage,\textsuperscript{221} it is a means of communication. Since most bilingual individuals must rely on their primary language in order to effectively communicate, English-only rules may significantly hinder bilingual individuals' ability to communicate in the workplace. Moreover, if these individuals inadvertently speak their primary language during working hours—which is a natural occurrence among bilingual indi-

\textsuperscript{217} See \textit{Spun Steak Co.}, 998 F.2d at 1487 ("'There is no disparate impact' with respect to a privilege of employment 'if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.'") (citing Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987) (holding that an English-only rule did not have a disparate impact "because [the plaintiff] could easily comply with the order."); \textit{Gloor}, 618 F.2d at 270 (same)).


\textsuperscript{219} \textit{Spun Steak}, 998 F.2d at 1487.

\textsuperscript{220} \textit{Id}.

\textsuperscript{221} In \textit{Spun Steak}, the Ninth Circuit held that "Title VII . . . does not protect the ability of workers to express their cultural heritage at the workplace." \textit{Id}. 

viduals—they may be unfairly subjected to adverse employment decisions. Under these circumstances, an English-only rule would have a negative impact on bilingual employees, and, at the same time, have almost no impact on native English-speaking employees (i.e., a disparate impact on the bilingual employees). In light of these circumstances, courts should defer to the EEOC Guidelines and recognize that English-only rules may have a disparate impact on bilingual individuals.

3. The Disparate Impact Analysis Under the Guidelines is Consistent with Title VII

Several commentators have argued that the disparate impact analysis under the EEOC Guidelines contravenes Title VII by presuming that workplace English-only rules have a disparate impact on monolingual non-English speaking and bilingual employees without requiring these employees to prove that these rules have disparately impacted them.222 Despite these arguments, the Guidelines, in distinguishing between English-only rules that are applicable at all times and English-only rules that are applicable only at certain times,223 have established the presumption of disparate impact only with respect to the former rules.224 This presumption is consistent with Title VII. By presuming that English-only rules, when applied at all times, have a disparate impact on employees whose native language is not English, the Guidelines further the Title VII objective of eliminating employment practices that discriminate on the basis of national origin and are not supported by a legitimate business justification.225

222. See Novack, supra note 193; Wallace, supra note 193; Wiley, supra note 27; see also Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (holding that the Guidelines are “wrong” because they presume that English-only rules have a disparate impact without requiring the plaintiff to prove disparate impact).

223. Compare 29 C.F.R. § 1606.7(a) (1996) (“A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment.... Therefore, the Commission will presume that such a rule violates title VII ....”), with C.F.R. § 1606.7(b) (“An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.”).

224. 29 C.F.R. § 1606.7(a).

225. Section 2000e-2(e)(1) of Title VII states in part that:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of ... religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Title VII prohibits the promulgation of overly broad employment policies that discriminate against individuals on the basis of national origin, absent a demonstration of a bona fide occupational qualification. A "blanket" English-only rule—a rule that is applicable at all times—unquestionably fits into this category and should therefore constitute a presumptive violation of Title VII for this as well as for other reasons. First, English-only rules in general are very likely to have a discriminatory, or disparate, impact on non-English speaking and bilingual employees. Second, the employer can only overcome a showing of disparate impact by proving that it has a legitimate business necessity for implementing an English-only rule. An employer most likely will not be able to demonstrate a legitimate business necessity to justify a rule requiring English to be spoken at all times.

a. English-Only Rules Have a Strong Tendency to Discriminate Against Employees Whose Primary Language is Not English

English-only rules—whether applied at all times or only at certain times—have a very strong tendency to discriminate against employees whose primary language is not English. An English-only rule may have a number of adverse effects on non-English speaking and bilingual employees and, at the same time, have no effect on native English-speaking employees. As one commentator has noted, "English-only rules impose both economic and dignitary harms" on individuals whose primary language is not English. Native English-speaking employees, on the other hand, are not likely to suffer from the same harms.

1. English-Only Rules May Impose Economic Harms on Employees Whose Primary Language is Not English

The most obvious harm that English-only rules may impose on non-English speaking and bilingual employees is that these employees are at risk of losing their jobs if they violate English-only rules. Since most of these employees must, to some degree, use their primary language to communicate in the workplace, this risk is significant. Conversely, native English-speaking employees are not likely to be at risk for violating English-only rules. Thus, unlike non-English speaking and bilingual

226. Id.
228. Id. at 894-95.
229. Id. at 894.
employees, native English-speaking employees are not at risk of losing their jobs for violating English-only rules.

English-only rules may also have an adverse effect on the job performance of non-English speaking and bilingual employees. Effective communication in the workplace is an essential—and often necessary—element of acceptable job performance, especially at the training level. As one commentator has noted, an individual's "inability to discuss their training in their native language may make the difference between acceptable progress and termination, or between being seen as especially quick, thus receiving a good initial position, and being seen as a normally capable worker, thus receiving a position of lower responsibility."

Effective communication also plays an integral role in the overall productivity and efficiency of the workplace. Preventing employees from speaking the language with which they are most comfortable may, in some cases, result in decreased productivity and efficiency, allowing employers an excuse to punish non-English speaking and bilingual employees with adverse employment decisions.

Imagine, for example, that X, a bilingual Hispanic-American individual, is working on an assembly line when his machine breaks down. Although he is bilingual, X does not know the English words to tell his co-workers, other bilingual Hispanic-Americans, about the problem with his machine. For fear of violating the company's English-only rule and losing his job, X does nothing. X's fear of communicating in his primary language to rectify the problem places the entire assembly line in a state of disaster, and, as a result, X loses his job. In this situation, the company's English-only rule has operated as a double-edged sword against X by preventing him from doing his job effectively and then firing him because he is unable to do so. Clearly, the rule could not have such an effect on X's native English-speaking co-workers because these employees are allowed to speak their primary language, and therefore language is not an obstacle that they must overcome to perform their jobs effectively.

2. English-Only Rules May Impose Dignitary Harms on Employees Whose Primary Language is Not English

English-only rules are not only capable of imposing economic harms on employees whose native language is not English, but they may also

230. Id. at 895.
231. Id.
impose dignitary harms on these individuals.\textsuperscript{232} Essentially, English-only rules send non-English-speaking and bilingual employees the message that they are somehow less "American" than their native English-speaking counterparts.\textsuperscript{233} As one commentator has observed, "The implicit message to [employees whose primary language is not English] is that if they 'act white,' they can stay, but if not, they can and will be replaced."\textsuperscript{234} Through this message, English-only rules characterize foreign languages as taboo, as something that monolingual English-speakers just don’t want to hear.

Employers force non-English speaking and bilingual employees to bear the burden of this intolerance by requiring them to abandon their primary language—a fundamental aspect of their national origin\textsuperscript{235}—at the workplace door for eight or more hours every day. Under these circumstances, English-only rules inflict an injury "of stigmatization, or . . . one of stamping non-English speakers with a 'badge of inferiority.'"\textsuperscript{236} Of course, English-only rules inflict no such injury on native English-speaking employees because the primary language of these employees—English—is viewed as the "ideal," "American" language—the language that all employees must speak in order to gain acceptance in the workplace.

Given that workplace English-only rules have a strong tendency to impose both economic and dignitary harms upon employees whose native language is not English, these rules very often discriminate on the basis of national origin. Furthermore, the harms that these rules impose fall almost exclusively on non-English speaking and bilingual employees, causing a disparate impact on this class of employees.

\textbf{b. Employers Are Not Likely to Establish a Legitimate Business Justification For Implementing a Blanket English-Only Rule}

Despite the fact that a particular employment practice, such as an English-only rule, may have a disparate impact on a protected class, Congress has recognized that employers may have a legitimate business

\begin{footnotesize}
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\item \textsuperscript{232} \textit{Id.} at 894 ("English-only rules impose both economic and dignitary harms.").
\item \textsuperscript{233} Wendy Olson, \textit{The Shame of Spanish: Cultural Bias in English First Legislation}, 11 CHICANO-LATINO L. REV. 1, 25 (1991) (describing the Hispanic perception that English-only laws "assign their culture and language to an inferior role").
\item \textsuperscript{234} Kirtner, \textit{supra} note 227, at 896.
\item \textsuperscript{235} \textit{See supra} Part IV(B)(1) (discussing language as a fundamental aspect of national origin).
\item \textsuperscript{236} Olson, \textit{supra} note 233, at 24 (footnote omitted).
\end{itemize}
\end{footnotesize}
necessity for implementing such a practice.\textsuperscript{237} Thus, under the standard disparate impact analysis, once an employee proves that a particular employment practice has a disparate impact on a protected class of employees, the burden shifts to the employer to demonstrate a legitimate business necessity for implementing the practice in question.\textsuperscript{238}

With respect to limited English-only rules, the EEOC Guidelines, recognizing the fact that employers may have a valid business reason for implementing such rules, follow this standard analysis.\textsuperscript{239} The EEOC, however, has refused to apply the standard disparate impact analysis to blanket English-only rules because it views these rules as having a presumptive disparate impact on employees whose primary language is not English.\textsuperscript{240} Thus, the burden shifts automatically to the employer, and the employee does not have to prove disparate impact.\textsuperscript{241}

Despite arguments that this view contravenes Title VII,\textsuperscript{242} the EEOC's approach to blanket English-only rules is consistent with the Title VII objective of eliminating discriminatory employment practices that have no legitimate business justification.\textsuperscript{243} Apparently, the EEOC assumes that employers will rarely be able to establish a business necessity to justify the over breadth of blanket English-only rules. Indeed, the EEOC's assumption is correct given the likelihood that an employer does not have a legitimate business necessity for regulating the language employees speak when they are at lunch, on a break, or in the restroom. Such regulation extends beyond what is necessary for the "normal operation of that particular business or enterprise,"\textsuperscript{244} and encroaches upon the right of non-English speaking and bilingual employ-


\textsuperscript{238} See supra notes 77-83 and accompanying text (discussing the current standard disparate impact analysis).

\textsuperscript{239} See 29 C.F.R. § 1606.7(b) (1996) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.").

\textsuperscript{240} See id. § 1606.7(a)("A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment.\ldots\ Therefore, the Commission will presume that such a rule violates [T]itle VII and will closely scrutinize it.").

\textsuperscript{241} Because English-only rules that are applicable at all times have a presumptive disparate impact under the Guidelines, the disparate impact analysis under the Guidelines does not require the employee to make an initial showing of disparate impact. See id.

\textsuperscript{242} See, e.g., Novack, supra note 193; Wallace, supra note 193; Wiley, supra note 27 (all arguing that the Guidelines contravene the standard Title VII disparate impact analysis by presuming disparate impact without requiring the complaining employee to make an initial showing of disparate impact).


\textsuperscript{244} Id.
ees to express themselves during their own personal time. Certainly, a business will be no less productive because some of its employees speak Spanish, French, Italian, Chinese, or Yiddish in the lunchroom. In the absence of business necessity, an English-only rule that discriminates against individuals based on their primary language—a proxy for their national origin—is unquestionably a violation of Title VII.\(^\text{245}\)

Consistent with Title VII, the EEOC Guidelines attempt to discourage this practice. The Guidelines correctly recognize that if an English-only rule more than likely has no business justification, the need to go through the motions of a standard disparate impact analysis—placing the initial burden on the employee and then shifting the burden to the employer—is obviated.\(^\text{246}\) From a practical standpoint, the EEOC’s approach makes sense. It relieves non-English speaking and bilingual employees, who are clearly burdened by the over breadth of a blanket English-only rule, from having to expend the time and energy proving disparate impact when the employer will inevitably fail at the burden-shifting stage.\(^\text{247}\)

The EEOC’s application of the disparate impact analysis to English-only rules is consistent with Title VII. The Guidelines, recognizing the fact that English-only rules have a strong tendency to discriminate against employees whose primary language is not English, have attempted to discourage employers from imposing blanket English-only rules for which they are not likely to establish a legitimate business justification. This approach furthers the Title VII objective of eliminating overly broad employment practices that discriminate on the basis of national origin and are not supported by a legitimate business justification.\(^\text{248}\)

With respect to more limited English-only rules, the Guidelines are also consistent with Title VII. The Guidelines recognize that an employer may have a legitimate business justification for requiring employees to speak English at certain times during working hours.\(^\text{249}\) Because a limited English-only rule does not have the element of over breadth that a blanket rule has, the Guidelines apply the standard Title VII disparate impact analysis to these types of rules—requiring the plaintiff to prove disparate impact and then allowing the employer to

\(^\text{245}\) See 29 C.F.R. § 1606.7(a).
\(^\text{246}\) See id.
\(^\text{247}\) See id.
\(^\text{249}\) See 29 C.F.R. § 1606.7(b).
demonstrate a legitimate business justification. Because the possibility of a business justification exists with a limited English-only rule, unlike with a blanket rule, requiring the employee to make an initial showing of disparate impact is fair and consistent with Title VII.

In sum, the EEOC Guidelines are generally consistent with Title VII. Congress has found the EEOC's interpretation of Title VII with respect to English-only rules to be a permissible construction of Title VII, and rightfully so. The Guidelines further the Title VII objective of eliminating employment practices that discriminate on the basis of national origin. In accomplishing this objective, the Guidelines regulate in a very fair and even-handed manner, balancing the interest of non-English speaking and bilingual employees to communicate in the workplace with the interest of employers in implementing employment policies that will benefit the regular operation of their businesses. Although courts and other commentators have criticized the Guidelines' approach as incorrect, this Comment has demonstrated that this criticism is unfounded and that the Guidelines are consistent with Title VII. Since the Guidelines are consistent with Title VII and there are no "compelling indications" that they are "wrong," the Guidelines are entitled to substantial judicial deference.

V. FACILITATING JUDICIAL DEFERENCE TO THE EEOC GUIDELINES THROUGH LEGISLATIVE AMENDMENT OF TITLE VII

The EEOC Guidelines are clearly the most viable means of analyzing English-only rules under Title VII. In refusing to defer to the Guidelines, some courts have created confusing and inconsistent case law, which leaves employers "in limbo as to whether their employment policies [are] lawful." The precedent arising from this case law is dangerous because it fails to recognize that Title VII protects an individual's primary language—a fundamental aspect of his or her national origin—from discrimination based on national origin. Furthermore, this precedent disregards the fact that English-only rules may have a disparate impact on bilingual employees who must often rely on their

251. See 29 C.F.R. § 1606.7(b) (1996).
252. See supra note 191 and accompanying text.
255. Locke, supra note 5, at 68.
primary language to communicate in the workplace. The danger from this case law emanates from the possibility that employers will formulate their English-only policies according to this inconsistent—and often erroneous—precedent. Therefore, policies that are discriminatory will fall through the cracks when courts uphold them for one of many unfounded reasons, and non-English speaking and bilingual employees across the country will suffer the consequences.

In light of the inconsistency of the case law addressing English-only rules and the danger that is implicit in this inconsistency, Congress must put “teeth” in the EEOC Guidelines by amending Title VII to prohibit discrimination based on language. As one commentator has noted, such an amendment would be analogous to one that Congress passed almost twenty years ago to prohibit discrimination based on pregnancy.

In 1978, Congress passed the Pregnancy Discrimination Act ("PDA") when it was faced with the same conflict as it currently faces with respect to language discrimination and English-only rules. The EEOC had defined sex discrimination under Title VII as including discrimination on the basis of pregnancy, but the Supreme Court rejected the EEOC's Guidelines and held that Title VII did not protect plaintiffs from discrimination based on pregnancy. In response to this conflict, Congress, sympathetic to the plight of women who had lost their jobs due to pregnancy, amended Title VII through the PDA, which prohibits employment discrimination based on pregnancy.

A. Congress Has Protected the Language Rights of Individuals Whose Primary Language is Not English in Other Aspects of American Life

Congress must protect non-English speaking and bilingual individuals from language discrimination in the same way that it protected women from pregnancy discrimination. Amending Title VII to prohibit language discrimination in the workplace makes perfect sense in light of the fact that Congress has protected the language rights of non-English

256. See supra Part IV (B)(2) for a detailed discussion of these issues.
257. See generally Locke, supra note 5 (advocating the amendment of Title VII to include language discrimination).
258. See Locke, supra note 5, at 67-69.
260. 29 C.F.R. § 1604.10(a).
261. See General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that an employer's disability plan that covered all disabilities except pregnancy was not a violation of Title VII).
speaking and bilingual individuals in other aspects of American life.

In 1975, Congress amended the Voting Rights Act to include linguistic minorities, requiring states to provide voting materials, instructions, and ballots "in the language of the applicable language minority group as well as in the English language." Congress enacted this amendment because "voting discrimination against citizens of language minorities [was] pervasive and national in scope" and because "[s]uch minority citizens are from environments in which the dominant language is other than English."

Subsequently, Congress enacted the Bilingual Education Act, which funds bilingual education projects that help non-English speaking and bilingual individuals with limited English proficiency. In enacting this legislation, Congress noted that "there are large and growing numbers of children of limited English proficiency[,] . . . many of [whom] . . . have a cultural heritage which differs from that of English proficient persons."

Congress must follow its own trend and extend the protection of language rights to language minorities in the workplace, where discrimination against language minorities is just as "pervasive and national in scope" as it is in any other aspect of American society. By amending Title VII to prohibit discrimination based on language, Congress would take a significant step in eliminating discrimination of this nature from yet another facet of American life.

B. Congress Must Enact a "Language Discrimination Act" to Amend Title VII

Since language is such a fundamental aspect of national origin, Congress must protect it by passing a Language Discrimination Act ("LDA") as an amendment to Title VII. This LDA would prohibit employment practices that discriminate against non-English speaking and bilingual individuals without a legitimate business necessity for doing

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266. Id. § 3282(a)(1)-(2).
268. See supra Part IV(B)(1) (discussing language as a fundamental aspect of national origin).
269. The LDA should expressly protect bilingual individuals because the primary language is also a fundamental aspect of a bilingual individual's national origin. See supra Part
so. Because discrimination based on language is a form of national origin discrimination, the LDA would be consistent with Title VII.

C. The Amendment of Title VII Through the LDA Would Encourage Courts to Adopt the EEOC's Cautious Approach to Workplace English-Only Rules

Although Congress created the EEOC to enforce Title VII, the EEOC's actual enforcement powers are rather weak in the eyes of the judiciary. Courts have often ignored the EEOC's regulations in rendering Title VII decisions because the EEOC regulations do not constitute binding authority. By enacting the LDA, which would constitute binding authority, Congress would put an end to this unfortunate trend in the area of language discrimination by encouraging courts to follow the EEOC's cautious evaluation of employment policies that may discriminate on the basis of language. The LDA would force courts to recognize that English-only rules—which are the most likely employment practices to discriminate on the basis of language—may have a discriminatory effect on non-English speaking and bilingual employees. Thus, the courts would be more likely to adopt the EEOC's cautious approach to English-only rules, and these rules would receive the high level of judicial scrutiny they deserve.

D. Congress Should Grant the EEOC Authority to Enforce the LDA Through Preventative Measures

The benefit of judicial deference to the EEOC Guidelines to non-English speaking and bilingual employees goes without saying. However, judicial deference to the Guidelines would also benefit employers by eliminating the confusion that they currently face regarding workplace English-only rules. Most of this confusion has arisen from the conflicting authorities that employers must presently consider when implementing English-only rules or when determining the validity of their existing rules under Title VII. Judicial deference to the Guidelines through the LDA would create an acquiescence of authority, thereby providing employers with a clear, consistent framework for imple-
menting and evaluating their own workplace English-only rules.

Congress could make the LDA even more employer-friendly by allowing the EEOC, in enforcing the LDA, to take preventative measures to ensure employer compliance with Title VII. Such measures would spare employers the cost of future litigation and other problems associated with invalid English-only policies, and, at the same time, they would act as a safeguard to protect non-English speaking and bilingual employees from possible discrimination.

1. Preventative Measures That the EEOC May Take to Ensure Employer Compliance with the LDA

As part of the LDA, Congress should amend the EEOC’s duties to include reviewing specific employment policies that may discriminate on the basis of language and determining whether these policies comply with the Title VII. For example, if an employer were to consider implementing a workplace English-only rule, that employer, under the newly amended Title VII, would have the option of sending a draft of the proposed rule to the nearest regional office of the EEOC for approval. “Along with this draft, the employer would include information that would assist the EEOC in determining the validity of the proposed rule, such as the percentage of non-English speaking and bilingual individuals that are employed at the employer’s company, the estimated range of English proficiency among these individuals, the specific occupational duties of these individuals, and the employer’s reasons for proposing the rule. Employers who have already implemented English-only rules would be able to determine the validity of their existing English-only rules in the same manner.

If the EEOC determines that a particular employer’s English-only rule is acceptable, the EEOC may subsequently conduct an on-site investigation of the workplace subsequent to the implementation of the rule. This on-site investigation may include interviewing company employees who are affected by the English-only rule to determine whether the company’s rule has a discriminatory effect on non-English speaking and bilingual employees.

2. The EEOC Should Encourage Nondiscriminatory Alternatives to Workplace English-Only Rules

Whether the EEOC determines that an employer’s English-only rule is valid or invalid, it should encourage employers to utilize nondiscriminatory alternatives to workplace English-only rules. As one commentator has correctly noted, employers should institute English-only
rules "[o]nly in workplaces in which language is critical to effective op-
eration of the business."\textsuperscript{273}

By utilizing nondiscriminatory alternatives to English-only rules, employers would be able to achieve most of the same goals that they sought to achieve by implementing English-only rules. The following chart lists some of the most commonly proffered business justifications that employers have cited for implementing English-only rules along with a nondiscriminatory alternative that the EEOC may encourage employers to utilize in order to meet their particular business needs:\textsuperscript{274}

<table>
<thead>
<tr>
<th>Business Justification:</th>
<th>Nondiscriminatory Alternative:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Reducing racial tension in the workplace</td>
<td>1. Conduct special race relations seminars</td>
</tr>
<tr>
<td>2. Difficulty in supervising employees who speak another language</td>
<td>2. Employ bilingual supervisors</td>
</tr>
<tr>
<td>3. Increase employees' English proficiency</td>
<td>3. Sponsor English classes non-English speaking bilingual employees</td>
</tr>
<tr>
<td>4. Workplace Safety</td>
<td>4. Distribute multilingual material describing hazards and procedures</td>
</tr>
</tbody>
</table>

If Congress granted the EEOC the authority to implement preventative procedures such as those mentioned in this Comment, Title VII would become more effective in eliminating employment practices that discriminate on the basis of national origin. These procedures would stop discriminatory practices before they start, benefiting employers and non-English speaking and bilingual employees alike. Furthermore, if Congress allowed the EEOC to take a more active role in the enforcement of Title VII, the courts would be more likely to appreciate the EEOC's expertise in the area of employment discrimination, and

\textsuperscript{273} Rodriguez, supra note 43, at 80.

\textsuperscript{274} See id. (discussing nondiscriminatory alternatives to English-only rules). Employers should utilize these nondiscriminatory alternatives whenever possible. If an employee were to prove that the employer's English-only policy had a disparate impact on non-English speaking and bilingual employees, and the employer countered this with a business justification, the employee would still prevail by demonstrating that a less discriminatory alternative to the English-only rule exists. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (1994). Thus, the employer would prevent future problems by utilizing the less discriminatory alternative in the first place.
therefore the courts would lend more credence to the EEOC's regulations.

VI. CONCLUSION

As the number of non-English speaking and bilingual individuals in the United States increases, the face of the workforce will change accordingly, and more and more employees will be communicating in languages other than English in the workplace. In response to this trend, employers are increasingly likely to implement workplace English-only policies. Many of these policies will have a discriminatory effect on employees whose primary language is not English.

Thus, in addressing the problems that are likely to arise from the increased usage of English-only rules, courts must establish an appropriate and consistent framework for analyzing these rules. The most viable framework for analyzing English-only rules to date is that which the EEOC has formulated in its Guidelines.

Courts should use the Guidelines as a framework primarily because the Guidelines are consistent with Title VII. In accordance with the Title VII mandate, the Guidelines prohibit employment practices that unjustifiably discriminate against individuals on the basis of their primary language.275

Moreover, the Guidelines appropriately balance the interests of both employers and non-English speaking and bilingual employees. On one hand, the Guidelines protect non-English speaking and bilingual employees from discrimination based on their primary language. On the other hand, the Guidelines benefit employers by affording them the opportunity to counter their employees' allegations of discrimination by demonstrating a legitimate business necessity.276 Furthermore, the Guidelines' Compliance Manual provides employers with a clear, consistent framework for implementing valid English-only policies and evaluating the validity of existing policies under Title VII.277

Although the EEOC's Guidelines constitute a fair and effective means of addressing the problems associated with language discrimination, many courts have refused to respect the EEOC's expertise in this area. In furtherance of Title VII, Congress must facilitate judicial deference to the EEOC Guidelines by passing a Language Discrimination Act as an amendment to Title VII. By prohibiting employment dis-

275. See generally 29 C.F.R. § 1606.7 (1996).
276. See id. § 1606.7(b).
277. See generally EEOC Compl. Man., supra note 52.
A cautious approach to English-only rules on the part of the judiciary is an important and necessary step toward eliminating all forms of discrimination from the workplace and from American society as a whole. America has always prided itself on being a country that is built on a foundation of racial, ethnic, and religious diversity. Such diversity must not be forsaken in the workplace or in any other place that calls itself American.

LISA L. BEHM

* This Comment is dedicated to my family, especially Alex, Nancy, and Angela Behm, whose love and support have made all things possible.