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# ENGLISH-ONLY POLICIES: THE NEED FOR AND BENEFITS OF THE EMPLOYMENT LANGUAGE FAIRNESS ACT

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## I. INTRODUCTION

“How’s the family doing?” said one worker to the other.  
“Oh, everyone is doing really well! You?”  
“Oh, same old, same old.”

Every day, coworkers interact with each other, building social relationships, more effectively accomplishing the day’s goals, and engaging in the commonplace chatter that is integral to the cooperative environment found in many workplaces today. Picture, however, the above conversation between two non-English speakers. The first coworker could say, “¿Cómo está tu familia?” or “Comment va votre famille?” The conversation could occur in any one of the hundreds of languages spoken in the United States. However, had this commonplace conversation continued in any language other than English, it may not have received the same treatment as the English version. In fact, the non-English conversation may have been limited — or even outright banned — because of workplace policies that mandate workers use English. These mandates, which require employees to speak English while at work, effectively deem one conversational language superior to another; such a hierarchy fosters feelings of inferiority, isolation, and intimidation. The non-English speakers feel isolated. Their linguistic communities breakdown because of the workplace pressures to assimilate. Diversity suffers, as does the average American’s competitiveness in a global market, due to lack of second-language acquisition.

Even though these policies have negative effects, they are everywhere.<sup>1</sup>

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<sup>1</sup> See Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1698-99 (2006). In discussing the breadth of these policies, Rodríguez points out that there are policies

They can be broadly restrictive, outright declaring English the official language of the workplace (or at times, even the government),<sup>2</sup> or narrowly-targeted, simply mandating that English be used during “business-related” communications.<sup>3</sup>

Regardless of the breadth or range of these policies, they are problematic for two reasons. First, these policies cause a wide array of social and economic detriments; the reach of these detriments is not limited to the discriminated-against non-English speaking employee. Not only do these policies create tense work environments, foster the breakdown of sociolinguistic groups, and breed xenophobia, but they also decrease the United States’ competitiveness in an ever-globalizing marketplace. Second, beyond the negative effects of these policies, the court system has provided inadequate redress. The current law is inconsistent, unfair, and unsettled,<sup>4</sup> with the judicial branch and the executive branch often standing in conflict.<sup>5</sup> This sort of “mixed bag” of legal rulings and regulations creates a “problematic area of law.”<sup>6</sup> In this disarray, employers are unaware of how far their policies can go before rising to a Title VII violation, whereas employees are unaware at what point they may have a discrimination claim against their employer.<sup>7</sup>

To the non-English speaker, the discrimination these policies embody seems impossible to combat. Not only is the non-English speaker already at a disadvantage as a linguistic stranger to the heavily English-speaking United States, but the non-English speaker is also without any clear method of legal recourse. Many people take for granted the fact that when an “injury” occurs — whether financial, personal, or physical — the law,

in hotels in New York City, casinos in Colorado, hair salons in Chicago, banks in Virginia, and Dunkin’ Donuts in Yonkers. These policies affect workers in the radio industry, the healthcare industry, and the clergy. They simply are everywhere.

<sup>2</sup> See generally Madeline Zavodny, *The Effects of Official English Laws on Limited-English-Proficient Workers*, 18 *J. LABOR & ECON.* 427 (2000). That article discusses generally English-Only laws in the United States. Between 1979 and 1996, 22 states adopted official English-Only laws, with more than 10 states in the process of adopting these laws as of 1997.

<sup>3</sup> Rodríguez, *supra* note 1, at 1699.

<sup>4</sup> See Gregory C. Parliman & Rosalie J. Shoeman, *National Origin Discrimination or Employer Prerogative? An Analysis of Language Rights in the Workplace*, 19 *EMP. RELATIONS L. J.* 551, 558 (1994). “Today, it is unclear whether English-only rules are entitled to presumptive invalidity as the EEOC suggests, or whether these rules will be subjected to the business necessity test.”

<sup>5</sup> See, e.g., Robyn S. Stoter, *Discrimination & (and) Deference: Making a Case for the EEOC’s Expertise with English-Only Rules*, 53 *VILL. L. REV.* 621 (2008) (discussing how, although “the courts should give the [Equal Employment Opportunity Commission’s] guidelines ‘great deference’ . . . the majority of courts . . . have not deferred to the EEOC guidelines”).

<sup>6</sup> Frank J. Cavico et al., *Language diversity and discrimination in the American workplace: legal, ethical, and practical considerations for management*, 7 *J. INT’L BUS. & CULTURAL STUD.* 1, 22 (2013).

<sup>7</sup> *Id.* at 22-24 (discussing the conflict among EEOC guidelines, Title VII, *Garcia v. Spun Steak Co.*, and *Garcia v. Gloor*).

more often than not, provides (or attempts to provide) a remedy. In this situation, however, the current legal regime is so obfuscated that non-English speakers are left victimized by English-only policies that effectively deem them second-class citizens. There is simply no clear method to rectify their injuries. This sort of legal system is shockingly unjust and must be changed, not only to redress the individual, social, and economic effects of these policies, but also because “concern for certainty is ubiquitous in the law.”<sup>8</sup>

This Note proposes a solution to both problems: the Employment Language Fairness Act (ELFA). The ELFA will serve as an amendment to Title VII to extend protections to language.<sup>9</sup> As it stands today, Title VII does not specify that language is a protected characteristic. Aggrieved employees must force a language discrimination claim into the framework that currently exists for national origin claims. This system of forcing one claim into an inadequate framework has left many of the language discrimination claims unresolved. By specifically including language as a Title VII protected characteristic, a separate claim will exist for language discrimination. Beyond expanding Title VII to include language, the ELFA will also set up a different framework of analysis for language claims, which will ease the employee’s burden of proof and put the onus on the employer to demonstrate that the policies are justified by business necessity. This statutory solution is necessary because the judicial system has generally refused to enforce the Equal Employment Opportunity Commission (EEOC) guidelines that deem the policies presumptively invalid.<sup>10</sup>

This Note will begin by discussing these English-only policies generally by highlighting their social and economic effects. Some special focus will

<sup>8</sup> Kelly Casey Mullally, *Legal (Un)certainty, Legal Process, and Patent Law*, 43 *LOY. L.A. L. REV.* 1109, 1112 (2010).

<sup>9</sup> 42 U.S.C.A. § 2000e-2 (West 1964). The pertinent section of Title VII, § 2000e-2(a), on its face, prohibits an employer from failing or refusing to hire or discharging any individual or otherwise discriminating against, segregating, classifying, or denying employment opportunities to 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. 42 U.S.C. § 2000e-2(a)(1)-(2) (1964) (emphasis added). Conspicuously absent from the five enumerated characteristics -- race, color, religion, sex, or national origin -- is language, which is the crux of this problem. Absent an enumeration of language as a protected characteristic, employees claiming discrimination have had to argue that English-only policies discriminate against them on the basis of national origin. This type of argument requires employees claiming language discrimination to take an extra step and prove that their language is intimately tied to their national origin, an argument that has generally not been successful in the courtroom. Thus, under the current scheme, Title VII leaves little redress for employees asserting language discrimination.

<sup>10</sup> See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (explicitly rejecting the EEOC’s English-only guidelines).

be given to generally dangerous trends, not just adverse effects to the individual, aggrieved employee. After demonstrating how detrimental these policies are to individuals and American society as a whole, this Note will illustrate how the legal system has tried — and failed — to adequately redress these language discrimination claims. Finally, after examining both the effects of English-only policies and the legal system’s inability to redress the injuries stemming from these policies, this Note will (1) describe in detail the provisions of the ELFA, (2) explain why the ELFA is the best solution, and finally, (3) address counterarguments. By the end of this Note, it will be clear that the non-English speaker, currently suffering under the yoke of linguistic discrimination caused by English-only workplace policies, needs an adequate legal method of redressing his injuries. The ELFA will amend Title VII to give the discriminated-against non-English speaker that right of redress he deserves.

## II. THE NEGATIVE EFFECTS OF ENGLISH-ONLY POLICIES

As a general matter, an English-only policy is a workplace rule that entirely or partially restricts employee speech at work to the English language.<sup>11</sup> While there are many reasons advanced for the proliferation of these workplace rules, a major constitutional issue with the proliferation of these policies is that private institutions are permitted to “use direct mandate” to suppress other languages where the First Amendment would otherwise prohibit the government from doing the same.<sup>12</sup>

The clear and immediate negative effects of these English-only policies impact the discriminated-against employee; that is, the employee is no longer permitted to converse freely in the language of his or her choice because of the existence of an English-only policy in his or her workplace.<sup>13</sup> Nevertheless, beyond this individualized detriment, which

<sup>11</sup> 29 C.F.R. § 1606.7 (1980) (defining Speak-English-Only rules and examining their validity).

<sup>12</sup> Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Speech*, 84 *CORNELL L. REV.* 595, 617 (1999). The two major reasons advanced in support for English-only policies are (1) that foreign-language speech is considered a threat to linguistic homogeneity, and (2) that multiple languages result in added costs for the economy. *Id.* at 599, 620. Other scholars blame the proliferation of these policies on the fact that there is an “inevitable clash in the contact zone” and thus the majority group seeks to “declar[e] that the workplace belongs to one particular speech community.” Rodriguez, *supra* note 1, at 1709. Many proponents also tout how offensive it is for English-speakers to be exposed to others speaking a language they do not understand. *See Id.* at 1713.

<sup>13</sup> The detriment to the discriminated-against employee, in my opinion, is facially obvious. If not, the cases discussed below will flesh out court discussions of the various plaintiffs’ asserted detriments. Much academic text has been devoted to discussing and analyzing the detriment to the employee who can no longer speak the language of his choice. *See, e.g.,* Rodriguez, *supra* note 1; Maritza Pena, *English-Only Laws and the Fourteenth Amendment: Dealing with Pluralism in a Nation Divided by*

includes feelings of inferiority, isolation, and intimidation,<sup>14</sup> there are far greater effects to the workplace and the United States as a whole. Socially, these policies cause the breakdown of communities and xenophobia;<sup>15</sup> they also discourage free association and social bonding, making the workplace as a whole tense and uncomfortable.<sup>16</sup> Economically, these policies place unfair cost burdens on the non-English speaking employee, who is often the least able to bear that cost.<sup>17</sup> These increased costs are reflected in low language acquisition rates<sup>18</sup> and political impotence.<sup>19</sup> On a much greater scale, however, these policies have penumbral effects of discouraging native English speakers from becoming proficient in a second language, ultimately decreasing Americans' competitiveness in an ever-global market.<sup>20</sup> All of these negative effects, coupled with the unfair inconsistencies in the law, illustrate that something must be done to rectify the problems these English-only policies create and perpetuate.

### A. *Social Effects*

The social effects of these policies are rampant and escalating in their severity as part of a vicious circle that further encourages the promulgation of these policies. Ethnic and racial tension develops when a discriminated-against employee feels inferior and intimidated. With this tension, there is less social interaction between cultures, ethnicities, and language groups. This diminished social interaction is especially troubling when the communities of the non-English speakers breakdown due to these social pressures. As social interaction decreases and communities fall apart, xenophobia emerges. Xenophobia leads to more English-only policies,

Xenophobia, 29 U. MIAMI INTER-AM. L. REV. 349 (1997); Sid Smolen, English-Only Rules in the Workplace: Employer Prerogative or Prima Facie Discrimination, 23 W. ST. U. L. REV. 159 (1995) (discussing general adverse effects on these policies). Further in-depth discussion of this highly-individualized negative effect of English-only policies is beyond the scope of this note; however, a small discussion is dedicated to the basic feelings of inferiority, isolation, and intimidation in Part III(1)(A).

<sup>14</sup> See Smolen, *supra* note 13, at 159 (discussing how the more "liberal" courts in Gutierrez and the Spun Steak dissent tend to focus on the "feelings of isolation [and] inferiority" in striking down these policies).

<sup>15</sup> See generally Pena, *supra* note 13.

<sup>16</sup> Rodríguez, *supra* note 1, at 1691-92.

<sup>17</sup> See generally Cornell & Bratton, *supra* note 12.

<sup>18</sup> See Juan F. Perea, English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U MICH. J.L. REFORM 265, 282-85 (1990).

<sup>19</sup> See generally Paul Conor Hale, Official, National, Common, or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Human Rights?, 36 GA. J. INT'L & COMP. L. 221 (Fall 2007).

<sup>20</sup> See generally Richard Fry & B. Lindsay Lowell, The Value of Bilingualism in the U.S. Labor Market, 57 INDUS. & LAB. REL. REV. 128 (2003).

intimidation, and racial tension, beginning the cycle anew. If the breadth of policies is curtailed, this vicious cycle can be broken.

### 1. Inferiority, Isolation, and Intimidation

The legal suppression of language is, arguably, the “functional equivalent of Jim Crow”<sup>21</sup> because both governmental “Official English” laws — which mandate English be the official state language — and workplace English-only policies essentially segregate between groups of people. One group, the English speakers, is allowed to speak its native language freely while another group, the non-English speakers, is prohibited from speaking its native language freely or, at times, at all. Granted, there are some individuals who speak two or more languages, but they too naturally prefer one language over another.<sup>22</sup> Nonetheless, despite the natural preference for the language they are most comfortable speaking, use of that language is often prohibited.

When an employee’s own language is essentially banned from his or her workplace, “a critical site of public participation in social life,”<sup>23</sup> the employee feels isolated. This isolation causes low self-esteem and stunted socialization.<sup>24</sup> Beyond stunting socialization, a ban on language also quashes any expression of ethnicity, community, or culture because of the deep connection between language and national origin.<sup>25</sup> Without the ability to express one’s heritage or culture, the feeling of isolation is further exacerbated. Isolation also breeds inferiority as non-English speakers realize that a ban on their language represents “discrimination by the majority.”<sup>26</sup> Discrimination, in itself, causes a “feeling of inferiority” in the non-English speakers’ “hearts and minds in a way unlikely ever to be

<sup>21</sup> Cornell & Bratton, *supra* note 12, at 659 (demonstrating that while the parallel is not exact, a broad definition of Jim Crow laws like “an American social and economic system created to subjugate African Americans to second-class citizenship” demonstrates that the Jim Crow regime was similar to the current system of English-only policies); See e.g. L. Darnell Weeden, *The Black Eye of Hurricane Katrina’s Post Jim Crow Syndrome Is a Basic Human Dignity Challenge for America*, 37 *CAP. U.L. REV.* 93, 96 (2008) (explaining that while English-only policies may lack the same “systematic political, legal, and social repression” that African-Americans felt under Jim Crow, some repression does occur with English-only policies and thus aggrieved employees may feel similar emotions as African-Americans who suffered under Jim Crow laws).

<sup>22</sup> See Rodríguez, *supra* note 1, at 1707 (“the ability to speak English . . . does not always signify preference for or comfort in English”); *Accord Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (“Neither [Title VII] nor common understanding equates national origin [or its protections] with the language that one chooses to speak”).

<sup>23</sup> Rodríguez, *supra* note 1, at 1703.

<sup>24</sup> See Rodríguez, *supra* note 1, at 1710 (“Low self-esteem . . . emerges . . . when the process of socialization takes place under social and cultural conditions hostile to bilingualism and biculturalism”).

<sup>25</sup> See Cavico et al., *supra* note 6, at 6.

<sup>26</sup> Rodríguez, *supra* note 1, at 1711.

undone.”<sup>27</sup>

These feelings of inferiority and isolation, which may never “be undone,” lead to intimidation. This continuum is best evidenced in the comparison between two workplaces: the Kayem Foods plant in Chelsea, Massachusetts and the municipal offices of the City of Altus, Oklahoma. At Kayem Foods’ meat processing and packaging plant, about 70 percent of the workers speak English as a second language.<sup>28</sup> Despite this huge dearth of English proficiency, Kayem Foods did not promulgate an English-only policy but rather took a progressive approach to language diversity. The company posted “work notices and announcements . . . in English, Spanish, and Polish,” offered classes in English for workers, and encouraged supervisors to engage with their employees in the employees’ language, better fostering communication and understanding.<sup>29</sup> Ultimately, these practices enhanced the company’s ability to manufacture its products efficiently and, more importantly, made employees “feel that the company care[d] about their wellbeing.”<sup>30</sup> The absence of an English-only policy, coupled with Kayem Foods’ progressive attitude toward assimilation (as opposed to isolation), demonstrates how employers can accommodate non-English speakers within a workplace adequately, fairly, and to the benefit of all parties involved — without the need to isolate.

The story of the City of Altus stands in dramatic contrast to the story of Kayem Foods. The City of Altus had an English-only policy that mandated city employees speak English at all times except during breaks.<sup>31</sup> In the testimony during the non-English speaking plaintiffs’ ultimate suit against the City, the plaintiffs insisted that the English-only policy made them feel “burdened, threatened, and demeaned.”<sup>32</sup> The policy served as a reminder that the plaintiffs were “second-class and [thus] subjected to rules for [their] employment that Anglo employees [were] not subjecte[d] to.”<sup>33</sup> In addition, the English speakers, realizing that their employer deemed them superior to non-English speakers, began to ethnically taunt, tease, and

<sup>27</sup> *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 494 (1954). Again, while the plight of non-English speakers suffering under English-only policies is not nearly as dire as 1950s African-American schoolchildren suffering under the yoke of segregation and Jim Crow, the parallel is apt. See Cornell & Bratton, *supra* note 12, at 659. Similar feelings of inferiority and isolation that emerged under segregation emerge from language discrimination. See sources cited *supra* note 21.

<sup>28</sup> Adalberto Aguirre, Jr., *Linguistic Diversity in the Workforce: Understanding Social Relations in the Workplace*, 36 *SOCIOLOGICAL FOCUS* 65, 75 (Feb. 2003).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 75-76.

<sup>31</sup> *Maldonado v. City of Altus*, 433 F.3d 1294, 1300 (10th Cir. 2006).

<sup>32</sup> *Id.* at 1301.

<sup>33</sup> *Id.*

harass the non-English speakers, even resorting to describing “the Spanish language as ‘garbage.’”<sup>34</sup>

These two antithetical stories help illustrate the feelings of inferiority, isolation, and intimidation that arise from English-only policies in the workplace. These policies degrade people because of their linguistic descent, becoming “tools of segregationists.”<sup>35</sup> These tools simply must be restrained.

## 2. Breakdown of Language and Linguistic Communities

Similar to the way they lead to feelings of isolation, inferiority, and intimidation, English-only policies lead to the breakdown of language and linguistic communities. Some of this breakdown stems from the overflow of tension from the workplace into the community. The feelings of inferiority, isolation, and intimidation that pervade the workplace leech into the employees’ home communities. This leeching causes the destruction of community by stamping out language identity, a crucial component to culture. Without language identity, the unity of a community as expressed through a collective culture is diminished. This community breakdown as caused by English-only policies is very detrimental to society.<sup>36</sup>

If the breakdown of a linguistic community seems unfathomable, then the breakdown of an entire language seems purely impossible. How is it that an entire language can just die out? Unfortunately, language “death” is much more common than it would appear, especially in the United States. The United States, uniquely, is a “veritable cemetery of foreign languages.”<sup>37</sup> In this “cemetery”, the immigrant generation arrives knowing nothing but their native language.<sup>38</sup>

As the immigrant generation assimilates, the native language begins to disappear,<sup>39</sup> in no small part thanks to English-only policies in the

<sup>34</sup> *Id.* There was some dispute in the testimony as to whether the individual taunting employee (the Mayor of Altus, ironically) used the word “garble” or “garbage.”

<sup>35</sup> Cornell & Bratton, *supra* note 12, at 621.

<sup>36</sup> See Rodríguez, *supra* note 1, at 1724. Rodríguez notes that “ridding the workplace of . . . multilingualism creates a structural mismatch between the workplace and the community in which it is located . . . [b]y not allowing speakers of non-English to use their language in the workplace setting.” *Id.* These intolerant employers make it that much more difficult for communities in which non-English is spoken to sustain the linguistic ties that give them their particular character. See *Id.* While some see benefit in this assimilation, Rodríguez stresses that “the existence of vital linguistic sub-communities and bilingual individuals who can<sup>37</sup> engage in outreach “is important.” *Id.* Loss of these communities is detrimental overall because these communities “enrich the lives of their members” and general society. See *Id.*

<sup>37</sup> Fry & Lowell, *supra* note 20, at 130.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

workplace. By the third generation, English is used almost exclusively and “the foreign language has died.”<sup>40</sup> While some “nativists” may celebrate this language holocaust,<sup>41</sup> they do not recognize the danger inherent in the United States becoming monolingual. Not only does monolingualism hurt Americans’ competitiveness abroad,<sup>42</sup> but it also “enclose[s us] in our [own] culture.”<sup>43</sup>

Despite the nativists’ advocacy for monolingualism and monoculturalism, diversity is a commendable goal. Without diversity, society is unable to take advantage of different perspectives and talents that “increase the likelihood of solving complex problems”<sup>44</sup> and are important to social interaction. Language is important to diversity both because of its inextricable link to culture, but also because language, in and of itself, is a manifestation of “social and cultural symbols used by [individuals] to build positive [social] experiences.”<sup>45</sup> Greater exposure to these basic sociocultural symbols, such as particular words that wedge themselves into positions that are both linguistically and culturally important,<sup>46</sup> increases diversity and thus increases talent and knowledge.<sup>47</sup> Simply put, a worker who is discouraged from (or even penalized for) speaking his native language will slowly lose (or even reject) that language over time. This language will be lost and one more piece of the diverse “melting pot” that the United States claims to be will disappear, in part because of these detrimental English-only policies in the workplace.

Beyond the breakdown of language and the loss of diversity, by not allowing non-English speakers to use their language in the workplace setting, employers make it difficult for members of the non-English community to sustain linguistic ties that give them their unique character.<sup>48</sup> This difficulty stems from the fact that language and culture are

<sup>40</sup> *Id.*

<sup>41</sup> Cornell & Bratton, *supra* note 12, at 599, 612 (“Nativists have been characterizing foreign-language speech as a threat for as long as non-English speakers have been settling in this country”).

<sup>42</sup> See *infra*, Part 2(b).

<sup>43</sup> Cornell & Bratton, *supra* note 12, at 681.

<sup>44</sup> *Id.* at 625.

<sup>45</sup> Aguirre, *supra* note 28, at 77.

<sup>46</sup> An example of this phenomenon that I can think of from my own study abroad experiences is the word “gringo.” At a definitional level, the Spanish word “gringo” means a white person or an Anglo-Saxon. Culturally, however, this word has come to mean anything from “dirty foreigner” to “non-Latino friend.” It can be a term of endearment or deep-seeded hatred. Furthermore, exposure to the term “gringo” through linguistic and cultural confluence has allowed the word to be subsumed into the English language. Now both cultures can relate to the meaning of the term and understand the sociolinguistic importance of the word.

<sup>47</sup> Cavico et al., *supra* note 6, at 33.

<sup>48</sup> Rodríguez, *supra* note 1, at 1724.

“inextricably linked” and form the individual’s “basic orientation toward . . . any given person or social group.”<sup>49</sup>

This link between language and culture is especially pronounced for Spanish-speakers, who view their language as “an intractable part of Latino culture.”<sup>50</sup> The Spanish language, perhaps more than any other language, “represent[s] one of the ties of Spanish-speaking persons to their ancestors or their own place of origin.”<sup>51</sup> Without ties to their language and ancestry, the cultural ties that bond Latinos communities simply fall apart.<sup>52</sup> This detriment is especially disconcerting considering that from April 1, 2000 to July 1, 2009, the Hispanic population of the United States increased by over 25 million people.<sup>53</sup> Because of workplace English-only policies, these 25 million people who use their language as the thread between their community and their culture will lose touch with their heritage and their community.

While the Latino example is highly compelling, the same phenomenon occurs no matter the culture or language. By abolishing non-English speakers’ ties to their own communities, English-speakers essentially mandate the assimilation of non-English speakers.<sup>54</sup> This forced assimilation not only deprives non-English speakers of “the freedom to make sense of [their] basic identifications,”<sup>55</sup> such as language, but also deprives American society as a whole of important diverse characteristics that “enrich the lives of” individuals and general society.<sup>56</sup> These English-only policies are dangerous because, by driving out cosmopolitanism<sup>57</sup> and diversity, the policies relegate the United States to monolingualism and monoculturalism, two characteristics anathema to the progressive goals that the country strives to achieve.

<sup>49</sup> Perea, *supra* note 18, at 276-77.

<sup>50</sup> Braden Beard, *No Mere ‘Matter of Choice:’ The Harm of Accent Preferences and English-Only Rules*, 91 *TEX. L. REV.* 1495, 1513 (2013).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1513 (There is particularly strong scholarship linking the Spanish language to Latino cultural identity) (citing Christian A. Garza, *Case Note: Measuring Language Rights Along a Spectrum*, 110 *YALE L.J.* 379, 382 (2000)). Without this cultural tie, non-English speakers must assimilate and thus abandon most, if not all, of their ties to their community. See Rodríguez, *supra* note 1, at 1724.

<sup>53</sup> Cavico et al., *supra* note 6, at 3 (citing data from the U.S. Census Bureau).

<sup>54</sup> Rodríguez, *supra* note 1, at 1724.

<sup>55</sup> Cornell & Bratton, *supra* note 12, at 683.

<sup>56</sup> Rodríguez, *supra* note 1, at 1724.

<sup>57</sup> Cornell & Bratton, *supra* note 12, at 683.

### 3. Discouragement of Free Association and Bonding

Social interaction is omnipotent in modern society; whether the interaction involves social media or in-person conversation, this interaction, more often than not, requires language use.<sup>58</sup> Unfortunately, English-only policies discourage the very interaction upon which modern discourse depends. Part of this discouragement is evidenced in the feelings of isolation and inferiority that these policies promote; another part is seen in the breakdown of community ties and language. Both of these effects of the policies discourage free association and bonding; the very nature of the workplace exacerbates the negative consequences of English-only policies.

As mentioned, the workplace is a “critical site of public participation in social life.”<sup>59</sup> The workplace is often a fixture of the community and a forum where “individuals and communities engage in self-definition.”<sup>60</sup> Many workers become friends with their coworkers, build relationships with customers and clients, and, hopefully, develop a rapport with their bosses and supervisors. Coworkers and clients can ultimately become good friends and/or business contacts. Unfortunately, because of an English-only policy, conversations between a diverse set of coworkers cease. The non-English speaking worker or the bilingual worker, more comfortable in a non-English language, may restrict how much or how often he speaks. He will more likely, however, restrict whom he converses with, often choosing to interact with someone who also speaks his non-English language, mostly because of the hostile work environment English-only policies create.<sup>61</sup>

Thus, in accomplishing the goal of “declaring that the workplace belongs to one particular speech community,”<sup>62</sup> these policies inevitably discourage normal social interaction and leave many employees on the fringes of the “one speech community.” Outside this “community,” the non-English speaking employees only interact with those similar to them; they cannot freely associate with whom they want for fear of speaking a non-English language and being reprimanded. These English-only policies discourage free association and disincentivize socialization and are thus dangerous to

<sup>58</sup> See e.g. Douglas Maynard & Anssi Peräkylä *Language and Social Interaction*, in *HANDBOOK SOC. PSYCHOL.* 233, 233 (J. Delamater Ed., 2003).

<sup>59</sup> Rodríguez, *supra* note 1, at 1703.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Roget Clegg, *Tongue-Tied, LAB & EMP. NEWS* (Winter 1998) (discussing EEOC findings that English-only policies “create a hostile atmosphere based on national origin which could result in a discriminatory working environment” (internal quotations omitted), reprinted in U.S. COMM’N ON CIVIL RIGHTS, *English Only Policies in the Workplace* 69 (July 2011).

<sup>62</sup> Rodríguez, *supra* note 1, at 1709-10.

American society.

#### 4. Xenophobia

Feelings of isolation, inferiority, and intimidation, the breakdown of one's cultural and linguistic identity, and particularly the discouragement of free association and social bonding all converge to create a dangerous societal phenomenon: xenophobia.<sup>63</sup> Unfortunately, xenophobia is often a synonym for racism.<sup>64</sup> Racism then connotes all of its negative effects: discrimination, prejudice, social unrest, and societal tension.<sup>65</sup> Xenophobia and racism together serve to essentially prevent the respect or recognition of an ethnic, social, or linguistic group.<sup>66</sup> This group is portrayed as "the other" and consequentially, rejected. This rejection further divides a culture already divided by language. The history of xenophobia<sup>67</sup> should be cause enough to restrict the use of English-only policies and rectify this deep divide in American society.

#### *B. Economic Effects*

The litany of negative social effects that stems from English-only policies in the workplace fully illustrates how dangerous and detrimental these policies are to American society. Unfortunately, the consequences are not only social. English-only policies are also detrimental economically. They unfairly allocate costs, especially linguistically and politically. These

<sup>63</sup> Xenophobia is generally defined as "the fear and hatred of strangers or foreigners or of anything that is strange or foreign." MERRIAM WEBSTER, *Xenophobia*, <http://www.merriam-webster.com/dictionary/xenophobia> (last visited Sept. 25, 2015). While entire articles could and have been written on xenophobia, for the purposes of this Note, xenophobia will only be briefly mentioned and discussed because it is consequential to all the social effects of English-only policies hence discussed. Many articles focus on the inherent connection between racism and xenophobia, with many of the same concluding that racism and xenophobia "exist in virtually every society in the world." See Mark C. Rogers, *The Asylum Process in Ireland: A Reflection of Racist and Xenophobic Sentiments?*, 23 *SUFFOLK TRANSNAT'L L. REV.* 539, 553-54 (2000) (citing Jacqueline Bhabha & Geoffrey Coll, *Asylum Law & Practice in Europe and North America*, 111-13 (1992)). See also Elina Leviyeva, *Note: The Changing Face of Russian Democracy: Racism and Xenophobia in Russia - Foreign Students Under Attack in Russia and U.S.*, 7 *RUTGERS RACE & L. REV.* 229 (2005).

<sup>64</sup> See Gonzalo Herranz de Rafael, *Xenofobia: Un Estudio Comparativo en Barrios y Municipios Almerienses*, 121 *REVISTA ESPAÑOLA DE INVESTIGACIONES SOCIOLOGICAS* 107, 112 (Jan. 2008) (translated from Spanish). See also Rogers, *supra* note 63, at 539 (describing the "coinciding rise" of racism and xenophobia).

<sup>65</sup> See David Alan Sklansky, *Developments in the Law Immigration: Policy and the Rights of Aliens* (Part 2 of 2), 96 *HARV. L. REV.* 1286, 1408 (1983) (authors struggle to conceptually distinguish the two terms: "Again, racism and xenophobia are conceptually difficult to separate").

<sup>66</sup> Herranz de Rafael, *supra* note 64, at 112.

<sup>67</sup> See Karen Brodtkin, *Xenophobia, the State, and Capitalism*, 32 *AMERICAN ETHNOLOGIST* 519 (2005). Brodtkin states that xenophobia has historically been evinced through anti-Semitism but is today evinced through Islamophobia. As to anti-Semitism, Brodtkin alludes to the past consequences of anti-Semitism, e.g., the Holocaust; this reference shows how dangerous linguistic xenophobia can be.

costs often fall upon the non-English speaking employee who typically lacks the ability to bear these costs and, without adequate ability to bear these costs, the negative effects spiral out of control. The poorly allocated costs lead to lower language acquisition rates and higher rates of disenfranchisement – two very dangerous consequences of these policies. All of these costs, coupled with the social problems stemming from these policies, ultimately diminish the United States’ competitiveness abroad, injuring both English speakers and non-English speakers alike.

### 1. Unfair Cost Allocations

The costs of English-only policies are allocated in two ways: a language acquisition cost and a political cost. Both of these costs are borne disproportionately by the less-financially-able, non-English speaking immigrant. Such a cost-allocation system is grossly unfair. By deeming English-only policies presumptively invalid, the ELFA will help equalize cost allocation.

#### i. Language Acquisition Costs

In their article on the economic effects of English-only policies and laws, Drucilla Cornell and William W. Bratton thoroughly examine the various economic costs that these policies place on non-English speakers.<sup>68</sup> While the authors recognize that “multiple languages do result in added costs for a given economy,” they caution that the added costs fall disproportionately and most heavily on the “minority-language speakers themselves.”<sup>69</sup> While nativists argue that this burden should fall upon non-English speakers,<sup>70</sup> this cost allocation is unfair and unjustifiable.

First, one would surmise, and nativists argue, that the burden of language acquisition will serve as an “incentive” to learn English.<sup>71</sup> However, that premise is not supported by data. In fact, statistics suggest the contrary. Despite a large “incentive” to learn English, over two-thirds (74.3 percent) of non-English speaking men who received instruction in English had “gained essentially no knowledge of English or only minimal English

<sup>68</sup> See generally Cornell & Bratton, *supra* note 12.

<sup>69</sup> *Id.* at 620.

<sup>70</sup> Rodríguez, *supra* note 1, at 1718 (“The English-only rule places the communicative burden entirely on one party” because, “naturally, the non-English speaker should attempt to learn English”).

<sup>71</sup> Cornell & Bratton, *supra* note 12, at 612 (“Assimilationists argue that Latinos/as, instead of complaining about their rights, should take the path to equal status by extinguishing their Latino/a identities and becoming fully American”).

skills.”<sup>72</sup> This staggering number shows that despite English-only policies in the workplace and Official English mandates in the government, language acquisition rates have not increased. Thus, the nativist argument that English-only policies will encourage language acquisition is greatly flawed.

Part of the flaw in the nativist argument is economic. The burden of language acquisition becomes in itself an “entry cost” to the market.<sup>73</sup> This cost is what nativists believe will encourage immigrant non-English speakers to acquire English skills. However, because nativists allocate the entry cost to the group least able to bear the cost (often the poor minority), their own argument fails, as the statistics above demonstrate. The nativists allocate the acquisition costs to the linguistic minority who statistically earn less than their white majority counterparts. For instance, Latinos/as consistently earn less than whites—23 percent less.<sup>74</sup> While language barriers and other educational and skill differentials partially explain these discrepancies,<sup>75</sup> it seems senseless to have the Latino/a immigrants, who earn three-quarters of what their English-speaking counterparts earn, bear the costs of language acquisition. Essentially, English-speakers get a “free ride”,<sup>76</sup> whereas non-English speakers, seeking to “access the benefits of participation in the national economy”<sup>77</sup> suffer from a high entry cost — language.

## ii. Political Costs

Along with unfairly allocating language acquisition costs to the non-English speaker, English-only policies also unfairly allocate political costs to linguistic minorities. Again, these minorities are not able to bear these costs and thus suffer unjustly. English-only policies are politically costly to non-English speakers because they are often intrinsically connected to Official English laws.<sup>78</sup>

<sup>72</sup> Perea, *supra* note 18, at 280.

<sup>73</sup> Cornell & Bratton, *supra* note 12, at 622.

<sup>74</sup> See U.S. Bureau of Labor Statistics, “Earnings and employment by occupation, race, ethnicity, and sex, 2010”, available at [http://www.bls.gov/opub/ted/2011/ted\\_20110914\\_data.htm#chart1](http://www.bls.gov/opub/ted/2011/ted_20110914_data.htm#chart1) (calculations made by author). See also Cornell & Bratton, *supra* note 12, at 636 (discussing the wage discrepancy between whites and Latinos). Cornell and Bratton cite statistics from 1973 and 1987. *Id.* In 1973, the average family income of Latinos was 30.8% less than that of whites. *Id.* The gap had widened further by 1987 to 37.1%, but has since improved. *Id.* Despite the improvement, the discrepancy is still unacceptable.

<sup>75</sup> Cornell & Bratton, *supra* note 12, at 636.

<sup>76</sup> *Id.* at 621.

<sup>77</sup> *Id.* at 622.

<sup>78</sup> See, e.g., *id.* at 690 (“Official English clearly degrades people because of their linguistic

As to Official English, these rules and laws were originally touted as a way to build national unity.<sup>79</sup> The idea was, at least governmentally, that by “preserv[ing] and enhanc[ing] the role of English as the national language of the United States,” the Nation would unify around a linguistic identity.<sup>80</sup> However, this “ponderous rhetoric”<sup>81</sup> was and is deeply flawed, considering that 20.7 percent of Americans speak a language other than English at home.<sup>82</sup> This number has increased dramatically, from 11 percent in 1980 to 20.7 percent in 2010.<sup>83</sup> The percentage of Americans who spoke Spanish in the home, more shockingly, rose 232.8 percent in the thirty years between 1980 and 2010.<sup>84</sup> Thus, the idea that Americans — native or not — would all coalesce around a concrete, uniform “linguistic identity” via governmental mandate to speak English could not have been more flawed.

This “common identity” is perhaps becoming less attainable with each passing year. As these statistics illustrate, the number of non-English speakers in the United States has increased dramatically since 1980. Currently, nearly a quarter—or almost 65 million Americans—do not speak English in the home.<sup>85</sup> A further 16 million people reported in the 2010 census that they spoke English “not well” or “not at all.”<sup>86</sup>

In the face of these statistics, the political cost emerges because these 65 million people are greatly disenfranchised simply because their language is a barrier to their participation in the political marketplace of ideas. Because “official languages . . . symbolize the political hegemony of the dominant language,”<sup>87</sup> official languages create a quasi-caste system.<sup>88</sup> Thus, being

descent.”) Such degradation by the government is a direct parallel to the same degradation by employers; thus, Official English and English-only policies go hand-in-hand.

<sup>79</sup> Rodríguez, *supra* note 1, at 1754. Workplace English-only policies seek to build workplace unity — another parallel between the two forms of speech restriction.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Camille Ryan, *Language Use in the United States: 2011*, U.S. CENSUS BUREAU. Available at <https://www.census.gov/prod/2013pubs/acs-22.pdf>. These percentages were calculated by dividing the number of people who spoke a language other than English at home (60,577,020 in 2011 under Table 1 for 2011 and 23,060,040 in 1980 under Table 2) by the total U.S. population 5 years and over (291,524,091 in 2011 under Table 1 and 210,247,455 in 1980 under Table 2), and then multiplying by 100.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Even more shockingly, the number of people who spoke Vietnamese in the home rose nearly 600% in the 30 years.

<sup>85</sup> *Id.* (based on a current U.S. population of 313.9 million people).

<sup>86</sup> *Id.*

<sup>87</sup> Hale, *supra* note 19, at 225.

<sup>88</sup> Perea, *supra* note 18, at 276 (discussing how Anglo-Saxon culture and language dominated the Colonial Era and continue to do so today). Essentially, with a dominant language comes political and social dominance, especially when language is used as a “political instrument.” *Id.*

part of the subordinate language group that is at times unable to participate in the democratic-representative process ultimately leads to greater disenfranchisement for non-English speakers.

One case, *Yniguez v. Arizona*,<sup>89</sup> aptly demonstrates how disenfranchisement and political subordination emerge from a linguistic hierarchy. While analyzing the validity of an amendment to the Constitution of Arizona mandating English as “official language of the State of Arizona,”<sup>90</sup> the court recognized that such a requirement “effectively preclude[s] large numbers of persons from receiving information” from the government.<sup>91</sup> The court also noted that the Official English essentially prohibited a legislator from adequately representing his bilingual or non-English speaking constituents. This inadequacy of representation neither served “the best interest[s] of those [the legislator] was elected to serve,”<sup>92</sup> nor helped government run effectively. For this reason, and others, the Ninth Circuit struck down the Official English amendment.<sup>93</sup>

*Yniguez* demonstrates how dangerous an Official English law can be: It adversely affects a non-English speaker’s right to access to the government and to political representation. Without access or representation, these non-English speakers are effectively disenfranchised. This sort of forced political impotence — a direct result of both Official English laws and English-only workplace rules — is unfair and must be remedied. While a different route must be taken to dismantle the Official English regimes in numerous states and local governments, the important connection between Official English laws and English-only rules helps illustrate that, perhaps, remedying one evil (English-only) will diminish the effects of the other evil (Official English). If workers are able to speak their language freely in the workplace, any governmental restriction will be all that more anathema. Thus, the ELFA, by declaring these policies in the workplace presumptively invalid, would help remedy some of this political disenfranchisement.<sup>94</sup>

<sup>89</sup> 69 F.3d 920 (9th Cir. 1995), vacated sub nom. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

<sup>90</sup> *Id.* at 924.

<sup>91</sup> *Id.* at 936-37.

<sup>92</sup> *Id.* at 937.

<sup>93</sup> *Id.* at 949.

<sup>94</sup> Beyond the scope of this Note, a separate solution must redress governmental Official English policies.

## 2. Detriment to United States' Competitiveness

Beyond allocating costs to non-English speakers both economically and politically, English-only policies also come at a cost to the United States as a whole. While the costs may seem to incentivize non-English speakers to learn English, these “incentives” are very dangerous to English speakers. The danger lies in the fact that English-only policies create a strong disincentive for native English speakers to learn another language.

With a disincentive to become proficient in a language other than English, many Americans remain monolingual. In fact, only 18 percent of Americans report speaking a language other than English.<sup>95</sup> Not only is this incredibly low statistic dangerous to our national security,<sup>96</sup> but it is also startling because the country “need[s] diplomats, intelligence and foreign policy experts, politician, military leaders, business leaders, scientists, physicians, entrepreneurs, managers, technicians, historians, artists, and writers who are proficient in languages other than English.”<sup>97</sup> This dearth of bilingualism — encouraged by English-only workplaces — threatens Americans’ success in a “highly competitive, tightly interconnected world.”<sup>98</sup>

In fact, a recent article about the “New American Workplace” illustrates just how important bilingualism is in this modern, global economy.<sup>99</sup> The article reports that “the Army, NYPD, and [the] State Department” simply cannot “get enough workers with” a particular job skill.<sup>100</sup> That skill is “fluency in a foreign language.”<sup>101</sup> The fact that “roughly 12,000 jobs posted on [the job-finding website] Indeed.com included the word ‘bilingual’” shows the market’s insatiable appetite for bilingual and multilingual employees.<sup>102</sup>

Bilingual employees are coveted because they offer special and valuable skills and knowledge to an employer that can attract new customers and clients, develop new markets, and better and more fully improve communication between global departments and divisions, and accordingly

<sup>95</sup> David Skorton & Glenn Altschuler, *America’s Foreign Language Deficit*, FORBES (Aug. 27, 2012), <http://www.forbes.com/sites/collegeprose/2012/08/27/americas-foreign-language-deficit/>.

<sup>96</sup> *Id.* (“In a shrinking world [lack of language study] constitutes a threat to our national security”).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See Annalyn Kurtz, *The Hottest Job Skill Is...*, CNN MONEY (Oct. 30, 2013), <http://money.cnn.com/2013/10/30/news/economy/job-skills-foreign-language/>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

materially enhance a business.<sup>103</sup> Bilingual employees simply promote business success.<sup>104</sup>

Despite the benefits of bilingualism, the United States retains a low rate of language fluency, which contributes to the United States' inability to compete in a global marketplace.<sup>105</sup> The low fluency rate is certainly attributable to many factors, including the education system and geographic location, but English-only policies do serve to further the problem. Because the majority of American workplaces mandate that English be spoken at work, there is no incentive or requirement that an English-speaking American learn a foreign language.<sup>106</sup>

### III. THE LAW TODAY: CONFUSING, INCONSISTENT, AND UNFAIR

Beyond all of the above-mentioned negative effects of English-only policies in the workplace, another problem lurks in the judicial system. In grappling with these cases — language discrimination cases arising from English-only policies — the judicial system has only created a quagmire in this field of law. The current judicial regime is inconsistent, unfair, and unsettled.

The main problem plaguing the law governing the validity of English-only policies is that the field is, essentially, a nexus: The EEOC and federal courts clash with each other in interpreting Title VII,<sup>107</sup> breeding confusion. The First and Fourteenth Amendments are added to the mix as well, at least when governmental English-only policies or Official English policies are at issue.<sup>108</sup> Examining the main sources of law<sup>109</sup> in this field

<sup>103</sup> Cavico et al., *supra* note 6, at 29.

<sup>104</sup> *Id.* at 33-34 (discussing how bilingual employees allow businesses to attract a broader customer base, increasing profits).

<sup>105</sup> Skorton & Altschuler, *supra* note 95.

<sup>106</sup> In other words, the workplace mentality of “English Only” does nothing to encourage Americans to learn a foreign language. The average American can presumably secure an average job with little to no requirement of proficiency in a foreign language.

<sup>107</sup> See Cavico et al., *supra* note 6, at 6.

<sup>108</sup> See, e.g., *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (striking down Arizona’s “Official English” law on First Amendment and Fourteenth Amendment grounds).

<sup>109</sup> These sources include one administrative agency and three Federal Court of Appeals cases. Another Court of Appeals has spoken, albeit briefly, on this issue as well, affirming a lower court decision. In *Gonzalez v. Salvation Army*, the Middle District of Florida dismissed employees’ claims of discrimination on the basis of language under Title VII by ignoring the EEOC guidelines and essentially deferring to *Spun Steak*, *infra* note 109. *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376 at 1 (M.D. Fla. June 3, 1991), *aff’d*, 985 F.2d 578 (11th Cir. 1993), cert. denied, 508 U.S. 910 (1993). The Eleventh Circuit affirmed without opinion. Thus, while there is a fourth circuit statement on this issue, the lack of an opinion from the circuit yields no precedential authority worth discussing.

— *Garcia v. Gloor*,<sup>110</sup> the EEOC regulations contained in 29 C.F.R. § 1606, *Gutierrez v. Municipal Court*,<sup>111</sup> *Garcia v. Spun Steak Co.*,<sup>112</sup> and *Maldonado v. City of Altus*<sup>113</sup> — demonstrates that the courts are unable to adequately redress language discrimination under Title VII without a statutory solution.

Before delving into discussion of case law, which analyzes English-only policies under the framework of Title VII, it is important to briefly discuss Title VII.<sup>114</sup> Enacted in 1964 as part of the Civil Rights Act,<sup>115</sup> one of the main purposes of Title VII was to “ensure basic equality of economic opportunity for all by prohibiting employers from discriminating against members of a particular socially salient group.”<sup>116</sup> Title VII sought to protect equality of opportunity by prohibiting certain employer actions based on race, color, religion, sex, or national origin.<sup>117</sup> Despite the apparent breadth of protected classes, Congress still “intended a balance to be struck in eliminating discrimination and preserving the independence of the employer.”<sup>118</sup> That balance is evidenced through the two theories of liability for Title VII discrimination claims, both of which require the plaintiff proffer certain evidence “before the burden shifts to the employer.”<sup>119</sup>

The two theories of liability for Title VII discrimination are disparate treatment and disparate impact.<sup>120</sup> Disparate treatment theory requires proof of discriminatory intent while disparate impact theory does not.<sup>121</sup> Instead of requiring discriminatory intent, a disparate impact theory requires “a practice or policy that has a significant adverse impact on the terms, conditions, or privileges of the employment of a protected group” under Title VII.<sup>122</sup> Under this analysis, aggrieved employees must establish

<sup>110</sup> 618 F.2d 264 (5th Cir. 1980).

<sup>111</sup> 838 F.2d 1031 (9th Cir. 1988), judgment vacated as moot, *Gutierrez v. Municipal Court of Southeast Judicial Dist., Los Angeles County*, 490 U.S. 1016 (1989). While *Gutierrez* cannot be considered “precedential” or a “source of authority,” its reasoning is important in illustrating the contrast between the Ninth Circuit’s initial adherence to (and almost celebration of) the EEOC guidelines in *Gutierrez* and the Circuit’s later outright rejection of these same guidelines in *Spun Steak*.

<sup>112</sup> 998 F.2d 1480 (9th Cir. 1993).

<sup>113</sup> 433 F.3d 1294 (10th Cir. 2006).

<sup>114</sup> See 42 U.S.C.A. § 2000e-16a.

<sup>115</sup> Ann Wooster, *Title VII Sex Discrimination in Employment - Supreme Court Cases*, 170 A.L.R. FED. 219 (2001).

<sup>116</sup> *Rodríguez*, supra note 1, at 1705.

<sup>117</sup> 42 U.S.C. § 2000e-2(a)(1)-(2).

<sup>118</sup> *Spun Steak*, 998 F.2d at 1490.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1484 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1485-86.

the practice and its impact on a protected group.<sup>123</sup> If established, the burden shifts to the employer to demonstrate the practice is “job related for the position . . . and consistent with business necessity.”<sup>124</sup> If the employer can demonstrate the business necessity outweighs the disparate impact, then the workplace policy is valid.

The issue many courts have grappled is the fact that language is not per se protected under Title VII.<sup>125</sup> Thus, employees bringing a Title VII claim attacking English-only policies are forced to connect their language to their national origin, which is a protected class under Title VII.<sup>126</sup> However, meritorious claims have not succeeded because courts have not agreed with employees that language is inherently related to national origin. For this reason, Title VII must be amended to include language as a protected characteristic.

#### A. *Garcia v. Gloor*

The earliest case to grapple with an employer’s English-only policy, *Garcia v. Gloor*, is, in its own way, an outlier because it was decided before the EEOC issued any rulings about English-only policies. Yet, *Gloor* is important because it was essentially “the first” case in this field.

In *Gloor*, Hector Garcia, an American of Mexican descent, worked at *Gloor Lumber*.<sup>127</sup> He was bilingual and native-born.<sup>128</sup> Garcia failed to comply with *Gloor*’s rule “prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers.”<sup>129</sup> The rule did not apply to employees who could not speak English, nor did it apply to conversations while on break.<sup>130</sup> Because Spanish was Garcia’s primary language, he found the English-only rule difficult to follow.<sup>131</sup> After one conversation in Spanish with another Mexican-American was overheard by Alton *Gloor*, an officer of the company, Garcia was discharged.<sup>132</sup> Upon his termination, Mr. Garcia

<sup>123</sup> *Spun Steak*, 998 F.2d at 1486.

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., *id.*, *Maldonado*, 433 F.3d at 1924, and *Gloor*, 618 F.2d at 264.

<sup>126</sup> E.g., *id.*

<sup>127</sup> *Gloor*, 618 F.2d at 265.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* *Gloor Lumber* employed some non-English-speaking employees in its lumber yard.

<sup>131</sup> *Id.*

<sup>132</sup> *Gloor*, 618 F.2d at 265. There was some dispute as to how many times Garcia had violated the policy, and as to whether or not Garcia was actually fired because of his non-compliance. *Gloor* testified that Garcia was discharged for “failure to keep his inventory current, failure to replenish the stock . . . , and failure to keep his area clean[,] and failure to respond to numerous reprimands.”

brought suit against Gloor Lumber “challeng[ing] as discriminatory” Gloor’s “rule that prohibit[ed] employees engaged in sales work from speaking Spanish on the job.”<sup>133</sup> The district court held that Gloor’s discharge of Garcia was lawful.<sup>134</sup>

On appeal, the Fifth Circuit analyzed Garcia’s case in the framework of Title VII, 42 U.S.C. § 2000e-(2)(a).<sup>135</sup> Because the statute only prohibits discrimination on the basis of “race, color, religion, sex, or national origin,” the court held that language was not protected.<sup>136</sup> Further, the court opined, because Garcia was bilingual, he could have fully complied with Gloor’s policy but “chose deliberately to speak Spanish instead of English while actually at work.”<sup>137</sup> Title VII, the court stated, confers neither a right nor a privilege on an employee to “use the language of his personal preference.”<sup>138</sup> The court went on to discuss “the discriminations on which the Act focuses its laser of prohibition,” claiming Title VII focuses on traits that are “beyond the victim’s power to alter.”<sup>139</sup> Garcia’s language preference, in the court’s view, was alterable, and therefore, the English-only policy did not amount to discrimination when applied to him, a bilingual Mexican-American.<sup>140</sup> In closing, the court reiterated that the Equal Opportunity Act (42 U.S.C. § 2000e-(2)(a)) simply does not support an interpretation that equates the language an employee prefers to use with his national origin.<sup>141</sup>

### B. *The EEOC Guidelines: 29 C.F.R. § 1606*

In the same year that Gloor was decided,<sup>142</sup> the EEOC promulgated its regulations on language discrimination, 29 C.F.R. § 1606.<sup>143</sup> Three

Somehow, Garcia managed to repeatedly fail to comply with various company policies beyond the English-only rule yet still “receive compliments from management on his work” and “receive a bonus of \$250.” The antithetical nature of Garcia’s purported poor work ethic and his repeated commendations suggests the English-only rule may have had more bearing on Garcia’s termination than the court suggests.

<sup>133</sup> *Id.* at 266.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 268.

<sup>136</sup> *Id.* (“Neither the statute nor common understanding equates national origin with the language that one chooses to speak”).

<sup>137</sup> Gloor, 618 F.2d at 268.

<sup>138</sup> *Id.* at 269.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 270.

<sup>142</sup> Gloor was decided on May 22, 1980. The EEOC’s guidelines were promulgated December 29, 1980.

<sup>143</sup> See *E.E.O.C. v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999) (“Congress has charged EEOC with the interpretation, administration, and enforcement of Title VII”). *See also*

subsections of § 1606 address the language discrimination issue that arose in Gloor.

First, instead of defining national origin narrowly to not include protections for language, the EEOC proclaimed that, in its interpretation, the definition of “national origin” is broad and thus Title VII prohibits discrimination “because an individual has the physical, cultural, or linguistic characteristics of a national origin group.”<sup>144</sup>

Second, the EEOC stated that the Commission found “fluency-in-English requirements, such as denying employment opportunities because of an individual’s foreign accent, or inability to communicate well in English . . . discriminatory on the basis of national origin.”<sup>145</sup>

Finally, the EEOC promulgated rules directly aimed at English-only policies.<sup>146</sup> There, the EEOC deemed “a rule requiring employees to speak only English at all times in the workplace” a “burdensome term.”<sup>147</sup> Because “the primary language of an individual is often an essential national origin characteristic,” the EEOC claimed, the Commission will presume that such blanket rules violate Title VII.<sup>148</sup> As to rules that apply only at certain times, the EEOC requires an employer to “show the rule is justified by business necessity”<sup>149</sup> and “inform its employees of the general circumstances when speaking only English is required and the consequences of violating the rule.”<sup>150</sup>

The EEOC seems to take a more progressive approach than the court in Gloor in terms of protecting language under Title VII as part of national origin. Unfortunately for non-English speaking employees, even though “Congress has charged the EEOC with the interpretation, administration, and enforcement of Title VII,”<sup>151</sup> the EEOC “does not have the authority to render final legal judgment on the merits of a case or to impose financial or other sanctions on behalf of aggrieved employees.”<sup>152</sup> Thus, the EEOC’s guidelines lack the necessary “teeth” to protect language as part of national

Mohasco Corp. v. Silver, 447 U.S. 807, 824 (1980) (the EEOC is “the agency charged with the responsibility for [the Act’s] enforcement”).

<sup>144</sup> 29 C.F.R. § 1606.1(1) (1980) (emphasis added).

<sup>145</sup> 29 C.F.R. § 1606.6(b)(1) (1980).

<sup>146</sup> 29 C.F.R. § 1606.7 (1980).

<sup>147</sup> 29 C.F.R. § 1606.7(a) (1980).

<sup>148</sup> *Id.*

<sup>149</sup> 29 C.F.R. § 1606.7(b) (1980).

<sup>150</sup> 29 C.F.R. § 1606.7(c) (1980).

<sup>151</sup> *E.E.O.C. v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999); See also *Mohasco Corp. v. Silver*, 447 U.S. 807, 824 (1980) (noting that the EEOC is “the agency charged with the responsibility for [the Act’s] enforcement”).

<sup>152</sup> Cavico et al., *supra* note 6, at 12.

origin. Without enforcement power, the regulations can be (and, with respect to § 1606.7, were) outright rejected or simply not followed.<sup>153</sup> Thus, to the aggrieved employee, as idealistic and protective as the EEOC's guidelines are, they fall short of providing non-English speakers with full legal protection.

### C. *The Forgotten Case: Gutierrez v. Municipal Court*

The Ninth Circuit was the first Court of Appeals to consider English-only policies in light of the new EEOC guidelines, albeit in a forgotten and often-overlooked case, *Gutierrez v. Municipal Court*.<sup>154</sup> There, much like in *Gloor*<sup>155</sup>, a bilingual employee faced discrimination because of her language. *Gutierrez* worked for the Municipal Court of the Southeast District of Los Angeles County, where her job required her to help translate court documents and forms from English to Spanish to aid the non-English speaking public.<sup>156</sup> Although it was important that *Gutierrez* speak Spanish, the court promulgated a new personnel rule that prohibited employees from speaking any language other than English except when acting as translators, on break, or on lunch.<sup>157</sup> While she was not terminated for violations of the rule, *Gutierrez* lodged a complaint with the EEOC in 1984 claiming the court's rule amounted to racial and national origin discrimination.<sup>158</sup> The district court issued a preliminary injunction against the enforcement of the rule and denied the judges' motion for summary judgment.<sup>159</sup> The judges appealed to the Ninth Circuit.

In a drastically different opinion from that in *Gloor*, the Ninth Circuit liberally cited § 1606.7 and held that, "because the cultural identity of certain minority groups is tied to the use of their primary tongue,"<sup>160</sup> the district court correctly denied the judges' summary judgment motion.<sup>161</sup>

<sup>153</sup> For instance, in *Spun Steak*, the Ninth Circuit expressly held that it did not have to adhere to the EEOC guidelines on English-only policies in the workplace because there were compelling reasons that the regulations were wrong. 998 F.2d at 1489.

<sup>154</sup> 838 F.2d 1031, 1036 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989); See *Parlman & Shoeman*, *supra* note 4, at 555.

<sup>155</sup> 618 F.2d 264 (5th Cir. 1980).

<sup>156</sup> See *Gutierrez*, 838 F.2d at 1036.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* Presumably, the difference between *Gutierrez*'s seeking an administrative remedy here and *Garcia*'s failure to do so in *Gloor* rested on the fact that the EEOC had promulgated § 1606.7 after *Garcia*'s filing suit.

<sup>159</sup> *Id.* at 1036-37.

<sup>160</sup> *Id.* at 1039.

<sup>161</sup> *Id.* at 1045 ("[T]he district court correctly determined that *Gutierrez* established a likelihood of success on the merits of her adverse impact claim").

The Gutierrez opinion is antithetical to Gloor: The Ninth Circuit recognized “an individual’s primary language remains an important link to his or her ethnic culture and identity,” and that “language . . . is itself an affirmation of culture.”<sup>162</sup> The court “agree[d] with the EEOC and its guidelines in holding that English-only rules generally have adverse impact on protected groups and they should be closely scrutinized.”<sup>163</sup> Such rules, ultimately, “mask an intent to discriminate on the basis of national origin.”<sup>164</sup>

Despite what seemed to be a triumphant moment for employees suffering language discrimination, Gutierrez was vacated as moot with little to no discussion.<sup>165</sup> As the same circuit later pronounced in *Spun Steak*, Gutierrez “has no precedential authority . . . because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.”<sup>166</sup> Thus, despite Gutierrez’s huge departure from the narrow interpretations of Gloor, Gutierrez was relegated to an unfortunate judicial grave.

#### D. *Garcia v. Spun Steak Co.*

*Spun Steak* put the nail in the coffin for the EEOC’s guidelines and for Gutierrez.<sup>167</sup> There, after receiving complaints that some of its Spanish-speaking and bilingual Hispanic employees were using their language capabilities “to harass and insult other workers in a language they could not understand,” *Spun Steak* promulgated an English-only policy that mandated English “be spoken in connection with work.”<sup>168</sup> The policy specifically excluded lunches, breaks, and free time.<sup>169</sup> Two employees, Garcia and Buitrago, received warning letters for speaking Spanish during work hours; they later filed a complaint with the EEOC.<sup>170</sup> The EEOC investigated and determined “there is reasonable cause to believe *Spun Steak* violated Title VII” with its English-only policy.<sup>171</sup> The Spanish-

<sup>162</sup> *Id.* at 1039.

<sup>163</sup> *Id.* at 1040.

<sup>164</sup> *Id.*

<sup>165</sup> Gutierrez, 490 U.S. at 1016 (1989) (citing *United States v. Musingwear, Inc.*, 340 U.S. 36, 40-41 (1950) (The Court’s “supervisory power over the judgments of lower courts is a broad one . . . [and] is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences”).

<sup>166</sup> *Spun Steak*, 998 F.2d at 1487, n.1.

<sup>167</sup> Ironically, *Spun Steak* and Gutierrez were decided by the same circuit.

<sup>168</sup> *Spun Steak*, 998 F.2d at 1483.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1483-84.

speaking employees then filed suit, alleging discrimination under Title VII.<sup>172</sup> The district court granted the employees' motion for summary judgment and Spun Steak appealed.<sup>173</sup>

On appeal, the Ninth Circuit concluded that the employees here did not advance a disparate treatment argument.<sup>174</sup> Thus, the court analyzed the employees' claims under a theory of disparate impact, which requires "a practice or policy that has a significant adverse impact on the terms, conditions, or privileges of the employment of a protected group" under Title VII.<sup>175</sup>

To demonstrate adverse impact, the employees claimed that the English-only policy (1) denied them the ability to express their cultural heritage on the job, (2) denied them a privilege of employment enjoyed by monolingual speakers of English, and (3) created an atmosphere of inferiority, isolation, and intimidation.<sup>176</sup> In addressing each of these claims, the court referred to Gloor (not Gutierrez).

Because Title VII "does not protect the ability of workers to express their cultural heritage at the workplace," the court rejected the employees' first contention.<sup>177</sup> As to the second contention, the court again cited Gloor and stated that, because the bilingual employees can readily comply with the policy, they suffered no adverse impact.<sup>178</sup> Further, on the employees' claims of a detrimental work environment, the court declined to "adopt a per se rule that English-only policies always infect the working environment to such a degree as to amount to a hostile or abusive work environment."<sup>179</sup>

In ultimately rejecting the employees' claims, the court concluded by

<sup>172</sup> Id. at 1484.

<sup>173</sup> Id.

<sup>174</sup> Id. at 1485. The ELFA, as aforementioned, would only require an employee show the existence of an English-only policy before the burden shifted to the employer to demonstrate business necessity. The first prong of the burden-shifting test would automatically be satisfied by the presence of an English-only policy.

<sup>175</sup> Id. at 1485-86.

<sup>176</sup> Id. at 1486-87.

<sup>177</sup> Id. at 1487 (citing Gloor, 618 F.2d at 269).

<sup>178</sup> Spun Steak, 998 F.2d at 1487 (citing *Jurado v. Eleven-Fifty Corporation*, 813 F.2d 1406, 1412 (9th Cir. 1987)). In *Jurado*, the Ninth Circuit again adhered to the Fifth Circuit's reasoning in *Gloor* and held that a bilingual employee could not suffer an adverse impact from an English-only policy because he could readily comply. This Note discusses Spun Steak as a seminal case instead of *Jurado* because in Spun Steak the Ninth Circuit explicitly and emphatically rejects the EEOC's regulations in 29 C.F.R. § 1606.7.

<sup>179</sup> Id. at 1489. The idea of a hostile work environment amounting to discrimination was advanced in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). There, the Supreme Court held that an abusive work environment may, in some circumstances, amount to a condition of employment violative of Title VII. Here, though, the Ninth Circuit does not see "feelings of inferiority, isolation, and intimidation" as violative under *Vinson*.

discussing the EEOC's regulations, namely 29 C.F.R. § 1606.7(a) and (b). Under the EEOC's guidelines, "an employer must always provide a business justification for" an English-only rule.<sup>180</sup> However, the court held it was "not bound by these guidelines,"<sup>181</sup> expressly rejected their use,<sup>182</sup> and reversed the district court's grant of summary judgment to the employees.<sup>183</sup> Thus, after *Spun Steak*, the protections promulgated by the EEOC for language as part of national origin seem worthless.

### *E. Maldonado v. City of Altus*

The most recent Court of Appeals case, *Maldonado*, is very different from the decision in *Spun Steak*. Similar to the other cases discussed, the employer (here, the City of Altus, Oklahoma), enacted an English-only policy that required City employees to use English in "all work related and business communications during the work day," except when "it is necessary or prudent to communicate with a citizen . . . in his or her native language."<sup>184</sup> While the City had not disciplined anyone for violating the policy,<sup>185</sup> the plaintiffs filed a complaint with the EEOC.<sup>186</sup> The EEOC investigated and, as in *Spun Steak*, determined the City had "committed a per se violation of" Title VII with the English-only policy.<sup>187</sup> The Spanish-speaking bilingual employees brought suit claiming, among other things, disparate treatment and disparate impact under Title VII.<sup>188</sup> The district court granted summary judgment for the defendant on all claims and the employees appealed.<sup>189</sup>

On appeal, the Tenth Circuit quickly cited *Spun Steak*, although perhaps cautiously. Even though *Spun Steak* seemed to heavily approve of English-

<sup>180</sup> *Spun Steak*, 988 F.2d at 1489. See also 29 C.F.R. § 1606.7(b) (1980).

<sup>181</sup> *Spun Steak*, 998 F.2d at 1489 (citing *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 (1973) (holding that a court does not have to defer to an administrative construction of a statute where there are compelling indications that [the administration's construction] is wrong"). Because "nothing in the plain language of [Title VII] supports [the] EEOC's English-only rule guideline," the court in *Spun Steak* deemed the guideline "wrong" under *Espinoza* and rejected it, adhering instead to "Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in *Garcia*."

<sup>182</sup> *Id.* See also *Parlaman & Shoeman*, supra note 4, at 555 (discussing how, although the same circuit as *Gutierrez*, the *Spun Steak* court adopted a "diametrically opposed view of the EEOC" guidelines and "expressly rejected their use").

<sup>183</sup> *Spun Steak*, 988 F.2d at 1490.

<sup>184</sup> *Maldonado*, 433 F.3d at 1299 (10th Cir. 2006).

<sup>185</sup> *Id.* at 1300.

<sup>186</sup> *Id.* at 1301.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* The employees also brought claims against the City under Title VI, but the merits of those claims are beyond the scope of this Note.

<sup>189</sup> *Id.* at 1302.

only policies, the court in Maldonado recognized that English-only policies are not always permissible; each case turns on its facts.<sup>190</sup> One such fact the Tenth Circuit teased out was that the City “would forbid Hispanics from using their preferred language,” and therefore it could reasonably be inferred that the City sought to “express . . . hostility to Hispanics.”<sup>191</sup> Because it was deciding the validity of a summary judgment motion, the court needed only to decide whether or not a reasonable juror could deduce a finding of hostility.<sup>192</sup>

In this summary judgment context, the court examined the EEOC guidelines. Because the EEOC possesses “expertise and experience,” its guidelines are “an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees.”<sup>193</sup> Because these guidelines are informative and can be considered by a juror, the district court’s grant of summary judgment was unwarranted.<sup>194</sup> Thus, the Tenth Circuit reversed and remanded the district court’s dismissal of the employees’ claims.<sup>195</sup> That Circuit was more inclined than the court in Spun Steak to consult the EEOC guidelines as useful. Further, unlike the court in Spun Steak, the court in Maldonado did not outright disregard the EEOC guidelines.

This brief examination of the principal cases and sources of law governing English-only policies demonstrates that courts have been reluctant to extend protections to language, yet this reluctance is not uniform. In fact, because few of the leading appellate cases or federal regulations in this field are uniform or consistent, a statutory solution is needed. That solution is the Employment Language Fairness Act.

#### IV. THE EMPLOYMENT LANGUAGE FAIRNESS ACT (ELFA)

As the detailed illustration of the social and economic effects of English-only policies and the description of the current judicial quandary that surrounds language discrimination cases demonstrates, a solution is necessary. This Note proposes a statutory solution, namely, the Employment Language Fairness Act, or ELFA. The ELFA, an amendment

<sup>190</sup> Maldonado, 433 F.3d at 1304 (citing Spun Steak, 998 F.2d at 1489).

<sup>191</sup> Id. at 1305.

<sup>192</sup> Id.

<sup>193</sup> Id. at 1306 (citing Vinson, 477 U.S. at 65 (The EEOC guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

<sup>194</sup> Id.

<sup>195</sup> Id. at 1316.

to Title VII, would read as follows:

“Congress, recognizing the detrimental effects of English-only policies in the workplace, does hereby enact the Employment Language Fairness Act. Under this Act:

1) The word “language” will be added to 42 U.S.C. § 2000e-2(a)(1) and (2) as a protected characteristic. Thus, §§ 2(a)(1) and (2) will prohibit unlawful employer actions based on an employee’s “race, color, religion, sex, national origin, or language.”

2) Any policy requiring employees to speak English at all times is presumptively invalid.

3) Any other English-only policy in the workplace will be presumptively invalid, and thus:

a)The disparate impact burden of proof requirement in 42 U.S.C. § 2000e-2(k)(1) shall be amended to state that an employer may have a rule requiring that employees speak only in English at certain times where — and only where — the employer can show that the rule is justified by business necessity.<sup>196</sup>

b) The burden of proof requirements for both disparate impact cases and disparate treatment cases shall be altered to require an employee prove only the existence of an English-only policy to demonstrate disparate impact/treatment, at which point the burden of proof shifts to the employer.”

## V. THE BENEFITS OF A STATUTORY SOLUTION

The benefits of a statutory solution like the ELFA are fairly easy to enumerate. First, as common separation of government principles demonstrates, a Congressional statute overrides court decisions.<sup>197</sup> This tactic is used often when courts have been inconsistent in applying a statute or courts’ applications have gone against the intent of Congress in legislating.<sup>198</sup> Thus, and as a second reason, the ELFA will resolve some of the inconsistencies that currently plague the law in this field.

Both problems of inconsistency of application and lack of adherence can

<sup>196</sup> 29 C.F.R. § 1606.7(b).

<sup>197</sup> See U.S. CONST. art. 1, § 8 cl. 1, 18 (“Congress shall have Power . . . to Make all Laws . . .”) (delegating legislative power to Congress, not Courts).

<sup>198</sup> For example, compare *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), with *Lilly Ledbetter Fair Pay Act of 2009*, 42 U.S.C. § 2000e-5 (2009) (overruling court decision by legislative action).

be solved with the same solution. As to inconsistency, examination of current case law demonstrates both circuit splits and administrative-judicial disconnect: Gloor and Spun Steak refused to expand Title VII to protect language, Gutierrez did expand Title VII but was vacated, and Maldonado took a more liberal approach but left the ultimate finding of discrimination to the jury, all while the EEOC continued to stress that English-only rules were presumptively invalid. Thus, inconsistency is rampant and can be adequately remedied by a clear and comprehensive statute—the ELFA—which clarifies once and for all the legality (or illegality) of English-only policies in the workplace.

As mentioned, Title VII was meant to ensure economic opportunity for all by outlawing discrimination targeted at certain groups.<sup>199</sup> By not expanding Title VII to protect against language discrimination, the courts have in effect gone against Congressional intent. A Congressional statute can override these decisions; thus, the ELFA must become law to help rectify judicial deviations from Congress' original goal for Title VII: achieving basic economic opportunity. By not protecting language under Title VII, courts have actually prevented basic economic opportunity.<sup>200</sup> Thus, the ELFA, as a statutory solution, is most apt because it clearly overturns erroneous court interpretations of Title VII and returns the law to what Congress originally intended—that Title VII provide equal economic opportunity for all, no matter the language spoken.

## V. COUNTERARGUMENTS

Two main counterarguments may emerge in reaction to the ELFA. First, businesses may question what exactly the “business necessity” requirement means. Second, these same businesses may assert that the ELFA impermissibly infringes on their rights to regulate their own operations within their workspaces. Both of these counterarguments, however, can be dismissed rather easily.

As to the “business necessity” requirement, some businesses may insist that the ELFA define “business necessity” out of fairness to the employer. A definition, however, is unwarranted and would unduly restrict both the ELFA's ability to be flexible in application and to adjust with changing notions of “business necessity.” Indeed, far too often in Congressional

<sup>199</sup> Rodríguez, *supra* note 1, at 1705.

<sup>200</sup> See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (employee terminated because of use of Spanish); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (same). See also *supra*, Part II(2)(a)(i) (discussing economic disparities between whites and Latinos).

statutes “listing” or “defining” leads to more litigation, especially concerning whether or not the definitions are inclusive or exclusive or subject to expansion.<sup>201</sup> By not including a definition of “business necessity” in the ELFA, Congress will curtail much litigation and avoid rigid application of the law. Without a definition, the ELFA will, like the current Title VII framework, leave “business necessity” determinations in the hands of the EEOC, which can make its recommendations based on its own employment-minded expertise.

In fact, omitting an inclusive list from the ELFA aids the business owners. Because of the flexibility inherent in a non-exclusive list, businesses can advance creative arguments that might not otherwise be considered under a strict statutory definition of “necessity.”

Some courts have already considered the meaning of “business necessity,”<sup>202</sup> and their definitions can be used by businesses as a barometer of the “necessity” of an English-only policy. For instance, “business necessity” can include a need to facilitate communications with customers, coworkers, or supervisors who only speak English,<sup>203</sup> a need to promote safety through a common language,<sup>204</sup> a need to promote efficiency in cooperative work assignments,<sup>205</sup> and a need to enable a supervisor who speaks only English to monitor his employees’ performance of job duties.<sup>206</sup> The EEOC Compliance Manual can further be used to discern what “business necessity” would justify an English-only rule.<sup>207</sup>

As to the validity of the ELFA, businesses will likely look to *Spun Steak*, where the court said “just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires

<sup>201</sup> An apt statutory construction canon is “*expressio unius et exclusio alterius*.” Under this canon, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Kucana v. Holder*, 558 U.S. 233, 249 (2010). The danger of enumerating every type of “business necessity” is inherent in the Latin maxim: legitimate business necessities Congress omits may be construed as not satisfying the test; invalid business necessities Congress omits here but includes elsewhere in Title VII may also become subject to different interpretations due to the omissions in the ELFA. Discussions like this one — what is enumerated, what is not — proliferate litigation. Because the ELFA aims to ease litigation by allowing a cause of action for language discrimination, proliferating litigation with an enumerated list of inclusions/exclusions would undermine the statute’s purpose.

<sup>202</sup> *E.E.O.C. v. Sephora USA, LLC*, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

<sup>203</sup> *Id.* at 417 (citing EEOC’s Business Compliance Manual).

<sup>204</sup> *Id.* (citing EEOC’s Business Compliance Manual’s permissible reasons for an English-only policy, which was ultimately deemed valid).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

an employer to allow employees to express their cultural identity.”<sup>208</sup> The business argument could also feasibly include an agency argument; as principal, the business is able to dictate how its agents behave within the bounds of the law.<sup>209</sup> However, if the law is that a private employer is required to allow an employee to “self-express” via his language, then the “bounds of the law” will mandate an employer not dictate what language his agents can speak. Other constitutional arguments are best handled by the courts.

In the end, though, the constitutional arguments are unlikely to succeed.<sup>210</sup>

## VI. CONCLUSION

Title VII was enacted to provide equal employment opportunities to any person regardless of certain characteristics like race, ethnicity, or national origin. One characteristic unfortunately omitted from Title VII was language, despite language’s intimate connection to an individual’s culture and national origin. Without an enumerated protection, non-English speaking employees are forced to work under conditions hostile to their native language and, consequently, their native culture and heritage. Such hostility toward non-English languages has been proliferated by employer-mandated English-only policies. These policies are socially and economically detrimental to both individuals and the nation as a whole, yet courts have been ineffective in remedying the current hostility toward non-English speakers evinced through English-only policies. These two problems—negative effects and a judicial and administrative array of confusing decisions and regulations—can be remedied by a comprehensive statute, the ELFA. By deeming these English-only policies presumptively invalid and requiring an employer prove the existence of a business necessity in enacting the policy, the ELFA will greatly limit the scope – and therefore the adverse effects – of English-only policies in the United States. This change is important to ensure diversity, continue American productivity and success in a globalizing marketplace, and, most of all, undo an obfuscated legal regime that only serves to undermine individual

<sup>208</sup> 998 F.2d 1480 at 1487.

<sup>209</sup> See *Vital v. Kerr*, 297 F. 959, 969 (2d Cir. 1924) (“Agency presumes a degree of subordination on the part of the agent to the principal. The agent does not dictate to the principal how the work must be done”). A thorough discussion of principal-agency considerations, though, is beyond the scope of this note.

<sup>210</sup> While the constitutional arguments may have merit, in-depth discussion of their merit is beyond the scope of this note.

linguistic rights.