WHAT RECENT COURT CASES INDICATE ABOUT ENGLISH-ONLY RULES IN THE WORKPLACE: A CRITICAL LOOK AT THE NEED FOR A SUPREME COURT RULING ON THE ISSUE

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I. INTRODUCTION

With the number of linguistic minorities and bilingual citizens on the rise,¹ so too are tensions regarding the use of languages other than English in the workplace. There is a great divide among academics, employers and the courts regarding the validity of English-only workplace rules under Title VII of the Civil Rights Act of 1964. Recent cases dealing with English-only workplace rules indicate the need for a Supreme Court ruling with respect to various issues, as circuit splits exist in numerous areas. Two of these controversial and closely related issues will be examined in this comment. First, there is a circuit split regarding the proper deference to be given to the Equal Employment Opportunity Commission guidelines regarding Title VII. Second, there is a split of authority regarding whether, for purposes of the Civil Rights Act of 1964, particularly Title VII, classification or discrimination on the basis of language equates with national origin discrimination. In other words, does language implicate

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¹ As of the 1990 U.S. Census, 31,844,979 U.S. citizens spoke a language other than English at home. Of them, 4,826,958 spoke English “not well” and 1,845,243 did not speak English at all. The largest linguistic population was Spanish speakers with 17,339,172 people speaking Spanish in the home. See Table 5, Detailed Language Spoken at Home and Ability to Speak English for Person, United States 1990, available at http://www.census.gov/population/socdemo/language/table5.txt (Dec. 28, 2000).
national origin? Based on recent psycho-linguistic studies, at least one court has found that various phenomena such as code switching and the most recently spoken language phenomenon, psycho-linguistic concepts that will be discussed more fully later, subject members of different national origins to anxieties and discomfort that native English speakers do not experience, such that language should be equated with national origin. This is a recent trend, however, as many, if not most, courts find that language is simply not the same thing as national origin.

Title VII of the Civil Rights Act of 1964 provides that it is unlawful to discriminate in the terms or conditions of employment based on one's race, religion, sex or national origin. There are two ways a plaintiff can prevail. Either the plaintiff can prove disparate treatment, meaning the employer intentionally discriminated on the basis of one of the protected grounds, or disparate impact, meaning a seemingly neutral employment practice puts an undue burden on members of a protected class. While some English-only policies have been challenged on disparate treatment grounds, the EEOC regulations are directed toward disparate impact claims and this


3. E.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (holding that bilingual employees did not make out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule), cert. denied, 512 U.S. 1228 (1994); Kania v. Archdiocese of Philadelphia, 14 F. Supp. 2d 730 (E.D. Pa. 1998) (holding that the church’s English-only rule did not amount to national origin discrimination under Title VII); Prado v. Luria, 975 F. Supp. 1349 (S.D. Fla. 1997) (holding that an English-only workplace policy did not amount to national origin discrimination); Long v. First Union Corp. of Va., 894 F. Supp. 933 (E.D. Va. 1995) (holding that an English-only workplace policy did not constitute national origin discrimination against employees of Hispanic origin), aff’d without opinion 86 F.3d 1151 (4th Cir. 1996) reported in full at 1996 U.S. App. LEXIS 12431 (4th Cir. 1996).

4. 42 U.S.C. § 2000e-2 (2001). The relevant text of Title VII provides as follows:

(a) Employer practices. It shall be an unlawful employment practice for an employer

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

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

§2000e-2.

5. E.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581 (1978) (Marshall, J., concurring) (noting that “it is well established under Title VII that claims of employment discrimination because of race may arise in two different ways”).

6. E.g., Gutierrez v. Mun. Court, 838 F.2d 1031 (9th Cir. 1988) (challenging English only policy on both disparate treatment and disparate impact grounds).
paper will focus on that type of challenge. The disparate impact analysis was first set out by the Supreme Court in *Griggs v. Duke Power Co.* 7 From that case and the decisions of various courts interpreting the holding, a burden shifting analysis has emerged. There are three steps to the analysis. 8 First, the plaintiff must establish that the policy in question has a disparate impact on a protected class. 9 Next the employer must defend the policy by proffering a legitimate business purpose for it. Last, the plaintiff can still prevail if it shows there is a less discriminatory method by which the legitimate business goal can be obtained. 10

Consistent with the *Griggs* test, in order to prevail under 42 U.S.C. § 2000e-2(k)(1)(A)(i), the plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." Congress has given the EEOC the power to interpret, administer, and enforce Title VII. 11 Pursuant to that authority, and in order to assist the plaintiff in making out a prima facie case, the EEOC has established guidelines with respect to English-only policies that provide for an inference of disparate impact once the existence of such a policy has been shown. 12 As a result of this presumption, the burden of proof shifts to the defendant to show a legitimate business justification for the policy. This burden-shifting is the central importance of the rule because it makes it much easier for a plaintiff to survive a motion for summary judgment and actually reach a trial on the merits in the case where an employer has not yet proffered a legitimate business reason for the policy. If there is such a reason, the employer can show that reason at trial and still successfully defend the policy.

Like many presumptions, the EEOC guidelines place the burden of production on the party most able to bear it, in this case the employer, because of the party's greater access to information. The federal regulation provides that an English-only policy applied at all times is presumed to be a burdensome term or condition of employment and thus constitutes national origin discrimination. 13 This guideline has the effect of shifting the burden under *Griggs* to the employer to proffer a legitimate business purpose for the policy. Nonetheless, many courts have rejected this guideline and have forced the plaintiff to provide other extrinsic evidence of a disparate

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8. *Furnco Constr.*, 438 U.S. at 583 (discussing the burden shifting analysis for disparate impact claims).
9. *Id.*
10. *Id.*
11. 42 U.S.C. § 2000e-12(a) (2001) (giving the EEOC "authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter").
12. 29 C.F.R. § 1606.7 (2000).
13. *Id.*
impact. While this obviously makes it much more difficult for a plaintiff to survive summary judgment, let alone prevail in a trial on the merits, recent psycho-linguistic expert testimony has helped plaintiffs to do just that in at least one case.

In *EEOC v. Premier Operator*, a case that will be examined in greater detail in Part III, a district court in the Fifth Circuit, a circuit which had traditionally rejected the theory of language as implicating national origin, relied heavily on such expert testimony to find that the English-only policy did disparately impact non-English native speakers in violation of Title VII. This conflict underscores the need for a Supreme Court ruling on the proper deference to be given to EEOC guidelines in general and to the guidelines governing English-only policies in particular. Such a ruling would clarify the jurisprudence by resolving the question of whether Title VII envisions language as implicating national origin.

II. DEFERENCE TO EEOC GUIDELINES?

As discussed above, the EEOC guidelines aid the plaintiff in making out a prima facie case of disparate impact. Therefore, an important issue in the debate over English-only workplace rules is whether the EEOC guidelines dealing with such policies are entitled to deference. The proper standard for deference to the EEOC's Title VII guidelines was established in *General Electric Co. v. Gilbert*. The Court held that *Albemarle Paper Co. v. Moody* established that, although Congress did not confer upon the EEOC the authority to promulgate rules or regulations pursuant to Title VII, the Commission's guidelines are entitled to some deference. The Court cited approvingly to the reasoning of *Skidmore v. Swift & Co.*, where it characterized the import of such interpretive rulings as follows:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the

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16. *Id.*
17. *E.g.*, Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (provided a holding decided before the promulgation of 29 C.F.R. § 1606.7).
18. While some English-only cases have been argued on both disparate treatment grounds, *e.g.* Gutierrez v. Mun. Court, 838 F.2d 1031 (9th Cir. 1988), this paper focuses on disparate impact claims as the EEOC guidelines in question address that theory.
22. *Id.*
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. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.\(^\text{24}\)

The Court adopted the “power to persuade” approach and analyzed the EEOC guideline in question accordingly.\(^\text{25}\)

Most recently, the Court dealt with the issue of deference to agency guidelines that do not have the force of law in *Christensen v. Harris County.*\(^\text{26}\) The Court noted that interpretations contained in opinion letters, policy statements, agency manuals, or enforcement guidelines all lack the force of law and do not warrant so-called “Chevron-style” deference.\(^\text{27}\) In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,\(^\text{28}\) addressing an Environmental Protection Agency regulation implementing permit requirements under the Clean Air Act of 1977, the Supreme Court reversed the Court of Appeals for the District of Columbia, which had set aside the EPA standard. The Court held:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.\(^\text{29}\)

While *Chevron* style deference to substantive statutory interpretations by the EEOC under Title VII is not appropriate, some EEOC guidelines are entitled to a certain amount of deference. What is unclear and subject to much debate, however, is whether the particular EEOC guidelines relating to English-only workplace rules, namely 29 C.F.R. § 1606.7, are entitled to any deference. Logically it seems that, in line with the reasoning from *Skidmore*, the guidelines should be given deference as they were promulgated by an agency with vast experience after a notice and comment period in which the agency received approximately 250 comments.\(^\text{30}\)

The EEOC guidelines regarding English-only policies in the workplace that are applied at all times provide that such policies create a presumption of discrimination, such that the plaintiff can establish a prima

\(^{24}\) Id. at 140.

\(^{25}\) *Gilbert*, 429 U.S. at 140-46.


\(^{27}\) Id.


\(^{29}\) Id. at 843-44.

facie case of disparate impact without proof beyond the existence and implementation of such policies. Once the plaintiff introduces evidence of such a policy affecting him or her, the burden then shifts to the defendant employer to supply a legitimate business necessity for the English-only policy. Then, for disparate impact claims, the plaintiff may show that other less discriminatory methods of attaining the same legitimate business goal existed. While some courts give the administrative guidelines great deference, other courts substitute their own reasoning and reject the EEOC guidelines.

Courts that reject the EEOC guidelines place the initial burden on the plaintiff to prove the English-only policy actually created a disparate impact for her and other similarly situated employees. Until recently, many plaintiffs were unable to convince courts that English-only policies create more of a hardship for them than for monolingual English speakers because many courts held that language use is a deliberate choice. Recent psycho-linguistic evidence, which will be discussed further in Part III, indicates that language use is not always a deliberate choice. The EEOC seems to have been aware of this fact when it promulgated 29 C.F.R. § 1606.7, which was likely based on its vast experience in the area, even if the science was not there to back it up in 1980. The EEOC notes in the guideline: "It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language." If courts would defer to the EEOC guideline, this same psycho-linguistic evidence would not have to be presented over and over again. Instead, the plaintiff would be able to survive summary judgment, forcing the employer to show the legitimate business reasons for the policy, a showing that should be easy for him to make if such a legitimate purpose truly exists. As Judge Reinhardt points out in his dissent from the Ninth Circuit's denial of en banc review of the Spun Steak opinion, presumptions are often used in employment discrimination cases as a way for the courts to take notice of findings by agencies with much greater expertise in the areas involved than the courts themselves and to avoid presentation of the same proof over and over again.

31. 29 C.F.R. § 1606.7 (2000).
32. E.g., EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that the EEOC guideline, providing that the employer's English-only rule violates Title VII unless the employer can establish a business necessity for the rule, comports with requirements for a viable Title VII claim).
33. E.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993).
35. E.g., Spun Steak, 998 F.2d at 1480.
36. 29 C.F.R. § 1606.7 (c) (emphasis added).
Reinhardt describes what he calls the majority’s “most incomprehensible" interpretation of this common practice:

In effect, the majority holds that the agency is without authority to determine that English-only rules and similar discriminatory practices are invalid generally. The majority apparently believes that the question of the validity of a widespread discriminatory practice must be decided over and over again on a case by case basis in a private lawsuit each time a new employer adopts it. The majority’s remarkably narrow view of the EEOC’s authority is reminiscent of courts of the 1930s which refused to accept agency findings regarding labor and food standards.

The majority completely ignores the fact that courts often rely upon the EEOC, as well as other agencies like it, because of its extensive experience with discriminatory employment practices. As Judge Reinhardt notes, the EEOC guidelines exist precisely so that issues such as whether an English-only policy disparately impacts groups of employees based upon their national origin do not have to be litigated time and time again. Despite the common evidentiary practice of using presumptions to shift the burden of proof, numerous courts have nonetheless rejected this particular presumption because they feel it relieves the plaintiff of her burden of proof in the disparate impact analysis. Hence, a ruling by the Supreme Court upholding the EEOC guidelines because of the EEOC’s expertise and authority in this area would clarify the burden scheme for all such disparate impact Title VII claims based on English-only policies and would create consistency in our nation’s courts regarding this highly controversial issue.

There is also an unresolved issue regarding interpretation of 29 C.F.R. § 1606.7. The EEOC guidelines were issued in response to the Fifth Circuit’s holding in Garcia v. Gloor, finding that an English-only policy that prohibited the employees from speaking Spanish at all times unless dealing with a Spanish-speaking customer did not have a disparate impact on the basis of national origin. Under 29 C.F.R. § 1606.7, an English-only workplace rule creates a presumption of disparate impact on the basis of national origin. A sub-issue of interpretation is whether 29 C.F.R. § 1606.7(b), in addition to § 1606.7(a), also carries with it a presumption that, in the absence of other proof, the existence of an English-only policy

38. Id. at 299.
39. Id. at 300 (footnotes omitted).
40. Id.
41. See, e.g., Garcia v. Spun Steak, 998 F.2d 1480, 1490 (9th Cir. 1993) (relying partly on the fact that the plaintiff bears the burden of proof in disparate impact cases to reject the EEOC guidelines).
42. Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980).
establishes a prima facie case of disparate impact. Subsection (b) refers to English-only policies that are not implemented at all times, such as on lunch breaks, but are implemented only at certain times, such as when performing work-related tasks. Some courts have treated the EEOC guidelines as not carrying such a presumption with respect to English-only policies that fall under subsection (b). Other courts, however, seem to treat both sections of the EEOC guideline as creating a presumption of disparate impact once an English-only policy is shown to exist.

As stated above, while the EEOC does have rule-making authority, it does not make law. Therefore, while EEOC guidelines, as well as the guidelines of other administrative agencies, are entitled to considerable deference, they need not be followed by the courts if there are compelling reasons to believe that the guidelines are wrong. Most courts that have dealt with the issue of English-only policies in the workplace have declined to give any deference to the EEOC guideline. These courts have instead required the plaintiff to prove a disparate impact before the analysis is moved to the second stage in which the defendant employer must proffer a legitimate business necessity for the English-only policy. For example, the court in Garcia v. Spun Steak declined to adhere to the EEOC guideline on the basis of its belief that the EEOC overstepped its authority in adopting guidelines that the court found to be inconsistent with the plain language of

43. See Tran v. Standard Motor, 10 F. Supp. 2d 1199, 1210 n.17 (D. Kan. 1998) (declining to consider whether deference to the EEOC guidelines should be given as “there is no evidence . . . that defendant Standard’s purported English-only policy was applied at all times”). See also Long v. First Union Corp., 894 F. Supp. 933, 938 (E.D. Va. 1995), aff’d, 86 F.3d 1151 (4th Cir. 1996) (noting that the EEOC “presumes that an employer’s English-only rule is national origin discrimination if the rule is enforced at all times, but permits such a rule provided that it is enforced only at certain times, is justified by business necessity and adequate notice is provided”).

44. See EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 913 n.7 (N.D. Ill. 1999) (noting that the court will consider the English-only policy under subsection (b) of the EEOC regulation, but still finding that the existence of an English-only policy creates a presumption of disparate impact). See also Garcia v. Spun Steak Co., 998 F.2d 1489, 1490 (9th Cir. 1993) (citing the dissenting opinion to 29 C.F.R. § 1606.7(b) for support of the proposition that the EEOC guidelines shift the burden to the defendant once an English-only policy is shown to exist).


46. Espinoza, 414 U.S. at 94.

§ 703(a) of Title VII found in 42 U.S.C. § 2000e-2(a). The section provides that it is an unlawful employment practice to discriminate in the terms and conditions of employment on the basis of race, color, religion, sex or national origin. This is the section of Title VII that has been read to give rise to the disparate impact claim. Further, the court in Spun Steak believed the guidelines were inconsistent with some of the legislative history of Title VII, which indicates that Congress intended to strike a balance between eliminating discrimination and preserving private control of business when it passed Title VII.

In fact, since the adoption of the EEOC guidelines shortly after the decision in Garcia v. Gloor, no federal Court of Appeals has yet adopted them, while various ones have declined to defer to them. In the past two years, however, at least two district courts have deferred to the EEOC guidelines and have rejected the defendant employer’s motion for summary judgment on the grounds that the plaintiff had not stated a prima facie case of disparate impact on the basis of national origin. In EEOC v. Synchro-Start Products, Inc., EEOC v. Premier Operator Services, Inc., and Roman v. Cornell University, the courts deferred to the EEOC guidelines. While the parties in Synchro-Start and Roman have since settled, such that there will be no review of the case by the Seventh or Second Circuit Courts of Appeal, if Premier is reviewed and affirmed on appeal by the Fifth Circuit, that would create a circuit split between two of the circuits with large minority populations, the Fifth Circuit and the Ninth Circuit, as well as between the Fifth Circuit and the Fourth Circuit. Further, it would be in opposition to the holdings in various district courts in other circuits such as the Third and the Eleventh.

Even without the affirmation of an appeals court, the courts of this nation are clearly divided as to the deference they are to give to the EEOC guidelines regarding English-only rules in the workplace. A ruling from the Supreme Court on this highly controversial issue could greatly streamline the review of cases such as these where English-only policies are challenged. The Supreme Court should clarify whether the EEOC

48. Spun Steak, 998 F.2d at 1489 (stating that “[n]othing in the plain language of section 703(a)(1) supports EEOC’s English-only rule Guideline”).
49. Id. at 1490.
50. Long v. First Union Corp., 86 F.3d 1151 (4th Cir. 1996); Garcia v. Spun Steak Co., 998 F.2d at 1490; Kania, 14 F. Supp. 2d at 730; Prado, 975 F. Supp. at 1349.
51. 29 F. Supp. 2d 911 (N.D. Ill 1999).
52. 113 F. Supp. 2d 1066 (N.D. Tex. 2000).
54. Spun Steak, 998 F.2d at 1489 (concluding that the courts are “not bound by the guidelines”).
55. Long, 86 F.3d at 1151.
acted within or went beyond the scope of the power conferred upon it by Congress when it enacted 29 C.F.R. § 1606.7, which declares that English-only policies create a presumption of a disparate impact based on national origin.

The benefit of a ruling declaring that the EEOC guidelines are proper, and thus should be followed, would be to relieve the plaintiff of the difficult burden of presenting evidence to prove disparate impact. As with other evidentiary burdens that have been given the benefit of a presumption, the evidence necessary to sustain such a burden might otherwise be extremely difficult for the plaintiff to provide. As Judge Boochever wrote in his dissent from the majority's rejection of the EEOC guidelines in *Spun Steak*, "proof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists." The EEOC was clearly aware of this problem and therefore provided a remedy in the form of a rebuttable presumption. While this presumption is not conclusive proof of a Title VII violation, it at least gets the plaintiff before the jury with the triable issue of fact, for example the validity of the employer's proffered business justification. If the employer did indeed implement the English-only policy out of business necessity rather than out of animosity for a certain ethnic or linguistic group, then there will be no Title VII violation. The existence of a presumption that satisfies the plaintiff's need to establish a prima facie case does not change this fact. In fact, the primary purpose of any evidentiary presumption is to aid the party with the burden in carrying that burden, as Judge Reinhardt pointed out in *Spun Steak*. Then, instead of wasting judicial resources litigating the same issue with the same expert testimony over and over again, the courts could move quickly to the dispositive and case-specific issue of whether or not the employer has a legitimate business necessity for the policy.

The basis for a ruling that the EEOC guidelines should be followed could well come from recent psycho-linguistic studies that have established the link between language and national origin. By crediting these experts through embracing the EEOC guideline that has as its premise the belief that language implicates national origin, the Supreme Court would remove the need to cover the same psychological and linguistic ground in every single case. Instead of forcing plaintiffs to bring in experts to show the link between language and national origin every time they allege national origin discrimination on the basis of an English-only policy, the EEOC guidelines

58. *Spun Steak*, 998 F.2d 1489 at 1490.

would do away with this phase of the trial and would focus the fact-finding on the legitimacy of the employer's proffered business justification. Various recent district court cases suggest that the courts are coming to this conclusion on their own based on expert testimony.\textsuperscript{60} Whereas former courts have rejected the link between language and national origin based on the "axiomatic" principle that language use is a preference, a volitional choice that breaks the link to national origin,\textsuperscript{61} more recently courts have benefited from the testimony of psycho-linguistic experts who have shown that this is simply not the case. Part III addresses this issue and the findings that, as of late, have convinced at least two circuit courts to defer to the EEOC guidelines, which provide that language does indeed implicate national origin.

III. DOES LANGUAGE IMPLICATE NATIONAL ORIGIN?

Inherent in the EEOC guidelines is the belief that Title VII envisions language as implicating national origin. Nonetheless, courts that have rejected the EEOC guidelines have tended to also reject the theory that discrimination based on language is the same thing as national origin discrimination and have largely upheld English-only policies as not violating Title VII. While scholars can debate whether language is an important part of one's identity, psycho-linguists have made findings that suggest that the language one speaks can subject him or her to disparate conditions in the workplace, such that, for Title VII purposes, language discrimination does indeed result in disparate impact along national origin lines. Historically, most courts have rejected the link between language and national origin.\textsuperscript{62} In at least one case, however, the court has placed great weight on these studies and upheld the link.\textsuperscript{63} In the early 1990's the courts that considered the link between language and national origin rejected it based on their belief that the language one spoke was a choice.\textsuperscript{64}


\textsuperscript{61} E.g., Spun Steak, 998 F.2d at 1487 (stating that "it is axiomatic that an employee must sacrifice self-expression during work hours"); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (stating that "there is no disparate impact if the rule is one that affected employees can readily observe and non-observance is a matter of personal preference").


\textsuperscript{63} Premier, 113 F. Supp. 2d at 1066.

\textsuperscript{64} E.g., Vialez v. N.Y. City Hous. Auth., 783 F. Supp. 109 (S.D.N.Y. 1991) (holding that an English-only policy was fair because of the nation's general reliance upon English, despite plaintiff's evidence that many tenants of the Housing Authority were Hispanic and non-English speaking, and thus suffered hardship under the policy).
While they recognized that selectively enforcing such a policy in order to discriminate against a certain group of people, for example Hispanics, while allowing other employees to speak a language other than English would indeed violate Title VII, they refused to hold that the mere existence of such a policy without explicit discriminatory enforcement constituted national origin discrimination.\textsuperscript{65}

In \textit{Garcia v. Gloor}, the court wrote, “Mr. Garcia was fully bilingual. He chose deliberately to speak Spanish instead of English while actually at work.”\textsuperscript{66} Hence, the court in \textit{Gloor} and other courts have found that because the employees who were bilingual could easily comply with the rule, there was no disparate impact. The court in \textit{Spun-Steak} also rested its decision on this line of reasoning. The court relied on the decision in \textit{Garcia v. Gloor} in holding that the English-only policy in question did not have a disparate impact on bilingual employees. Citing to \textit{Gloor} the court stated, “It is axiomatic that ‘the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.’”\textsuperscript{67} In fact the court stated that “we fail to see the relevance of the assertion” that switching between languages is not fully volitional for bilingual employees and therefore denies them a privilege of employment that monolingual English speakers enjoy.\textsuperscript{68}

These cases have established the precedent in their circuits and have been followed approvingly by district courts in circuits where the appellate court has not yet ruled on the matter. For example, the court in \textit{Kania v. Archdiocese of Philadelphia},\textsuperscript{69} writing on a clean slate in the Third Circuit, cited with approval to \textit{Gloor} and \textit{Spun Steak Co}. in reaching the conclusion that the EEOC guidelines regarding English-only workplace rules should not be followed and that the policy in question did not violate Title VII.\textsuperscript{70} Since the plaintiff in \textit{Kania} was bilingual, the court found as follows: “[b]ecause she could have readily complied with the English-only rule, it did not cause a legally cognizable adverse impact upon the terms and conditions of her employment. Accordingly, Kania has failed to prove that the defendants engaged in national origin discrimination as a matter of law.”\textsuperscript{71} As these cases illustrate, even in the mid to late 1990’s courts still believed that language was a choice and used this rationale to support their holdings that English-only workplace rules did not have a disparate impact on bilingual speakers.

\textsuperscript{65} E.g., \textit{Long}, 86 F.3d at 1151.
\textsuperscript{66} \textit{Gloor}, 618 F.2d at 270.
\textsuperscript{67} \textit{Spun-Steak}, 998 F.2d at 1487 (citing to \textit{Gloor}, 618 F.2d at 270).
\textsuperscript{68} \textit{Id}. at 1488.
\textsuperscript{70} \textit{Id}. at 735-736.
\textsuperscript{71} \textit{Id}. at 736 (internal citations omitted).
Nonetheless, not all courts were adhering to the argument that language was a mutable characteristic. At least one court in the early 1990's recognized the immutable nature of language. *Smothers v. Benitez* involved a suit by an English-speaking teacher in Puerto Rico who challenged the Puerto Rico Department of Education's policy of administering its certification exams only in Spanish. The plaintiff wrote the essay portion of her examination in English. The examination was not graded and it was invalidated as a result. The plaintiff challenged the policy on equal protection grounds. The court, in denying the defendant's motion for summary judgment, found that an issue of fact existed on the question of national origin discrimination. The court did not decide what level of scrutiny the language policy merited. It did however recognize that if language was used to deprive members of a protected class of a fundamental right, it could fall under the category of strict scrutiny. In reaching this conclusion, the court recognized the fact that language had not yet been established as implicating national origin for discrimination purposes: "The difficulty in treating plaintiff's equal protection claim lies in the fact that language use by minority language groups has not yet been situated within the framework of legal standards which control the application of the equal protection clause of the fourteenth amendment." Further, the court recognized the fact that language is not necessarily a choice: "While language can be considered a mutable characteristic, it has immutable aspects. New languages can be learned and old ones forgotten; however, the knowledge of a language, insofar as it is an ethnic characteristic leaves identifiable traces like accents, surnames and behavior patterns." The court even recognized in a footnote that for some people, language is not a mutable characteristic. The court cited to an article that relies on studies that suggest that for some immigrants, language is immutable because they are incapable of learning a new language. The court used this rationale to reach the holding that language could implicate the protected class of national origin and require strict scrutiny for equal protection purposes.

Despite a few contrary holdings, the vast majority of courts in the early 1990's, however, continued to hold that use of a particular language

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73. Id. at 301.
74. Id.
75. Id. at 310.
76. Id. at 306.
77. Id. 305 (D.P.R. 1992).
78. Id. at 306.
79. Id. at 306 n.10.
80. Id. at 306.
81. Id. at 308.
was a conscious, mutable choice. Two lines of attack developed in order to undermine this logic. First, some plaintiffs and courts have attacked the "easily comply" rationale as inadequate. The Supreme Court has indicated that with respect to Equal Protection analysis, heightened scrutiny is only appropriate where classification is made based on an immutable characteristic. With respect to Title VII, however, this mutable/immutable distinction breaks down as Congress enumerates religion as a protected class, notwithstanding the fact that religion is clearly mutable. In the English-only context, at least one judge has attacked the mutability argument. Judge Reinhardt wrote in his dissent from the denial of a rehearing en banc for Garcia v. Spun Steak Co. that focusing on the ease with which one can comply with a discriminatory policy simply misses the point of Title VII:

Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionably discriminatory rules are the least obtrusive in terms of one's ability to comply; being required to sit in the back of a bus, for example; or being relegated during one's law school career to a portion of the classroom dedicated to one's exclusive use.

Judge Reinhardt went on in his opinion to present commentary from writers who examined the link between language and cultural identity and found that for many bilinguals, language is a critical part of their identity. Further, recently, psycho-linguistic evidence has come to light indicating language use is not always a deliberate choice. This expert testimony is the second way in which the "easily comply" theory has been attacked.

In the past two years, courts considering challenges to English-only workplace rules have benefited from the testimony of linguistic experts. This testimony makes it impossible to deny that language is not simply a matter of choice but rather it is the result of psychological and linguistic phenomena that make complying with English-only policies burdensome for some bilingual speakers. Because this difficulty in complying subjects bilingual employees to a greater risk of discharge and feelings of inferiority, isolation and discomfort, at least one district court has found

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84. In Fullilove v. Klutznick, for example Justice Powell, in his concurring opinion, agreed with the majority that racial classifications should be assessed under the strict scrutiny and noted that "immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision." 448 U.S. 448, 496 (1980).
that English-only policies do have a disparate impact along national origin lines. 86

In EEOC v. Premier Operator Services, Inc., the court relied heavily on the expert testimony of Dr. Susan Berk-Seligson, professor of linguistics and Hispanic language and culture at the University of Pittsburgh. Dr. Berk-Seligson testified that adhering to an English-only policy is not simply a matter of preference and can be virtually impossible in many cases for bilingual speakers. 87 She testified about two linguistic phenomena known as "code-switching" and the most recently spoken language phenomenon. According to Dr. Berk-Seligson, the code-switching phenomenon was discovered by psycho-linguists in the late 1990's. Code-switching is the phenomenon where "[b]ilinguals whose original language is a language other than English unconsciously switch from English to their original or primary language when speaking informally with fellow members of their cultural group." 88 As Dr. Berk-Seligson noted, this code-switching can occur between sentences or even within sentences. 89

A second phenomenon to which Dr. Berk-Seligson testified is the most recently spoken language phenomenon. According to Dr. Berk-Seligson, bilingual speakers will tend to automatically continue to speak in the language in which they were previously conversing. 90 For example, a bilingual employee who deals with customers in both English and Spanish may continue to speak Spanish with co-workers after servicing a client in Spanish in violation of an English-only rule. This phenomenon further undermines the theory that bilingual employees voluntarily choose to converse in Spanish in violation of the English-only policy. This testimony was particularly apposite in Premier since the occupation in question in that case was that of long-distance telephone operator, the job requirements of which involved regular communication with customers in Spanish. 91

From this expert testimony, the court concluded that as a matter of law the English-only policy disparately impacted bilingual employees because of their national origin. The disparate impact posed by the policy was the

86. Premier, 113 F. Supp. 2d at 1066.
87. Id. at 1070.
88. Id.
89. Id.
90. Id.
91. In fact, it was a job qualification that the applicant be bilingual in English and Spanish: "The recruitment and hiring of the class members was based or conditioned upon their bilingual ability, and in particular, their ability to speak Spanish because of a need for Defendant’s business to service Spanish-speaking customers." Premier, 113 F. Supp. 2d at 1068. This fact exemplifies the irony in many of these cases where employees who are originally hired based on their ability to speak Spanish or another foreign language are later discharged as a result of psycho-linguistic phenomena associated with their bilingual ability.
"very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if such non-compliance was inadvertent." Further, the court found that denying a bilingual employee the ability to alternate between Spanish and English in informal conversations "not only makes the individual feel uncomfortable, but is tantamount to intimidating him or her and being punitive with such constraint." The import of this finding for Title VII purposes is that other employees of different national origin and linguistic backgrounds did not face this same risk. Therefore, the English-only policy created a disparate impact on a class of employees based upon their national origin, which constitutes a violation of Title VII. As the Premier court found, the plaintiff had established a prima facie case and the burden then shifted to the defendant to prove a legitimate business necessity for the policy. The Premier court found that the defendant did not carry its burden on the issue of business necessity and ruled for the plaintiff, awarding $650,000 in compensatory and punitive damages.

IV. THE SUPREME COURT'S JURISPRUDENCE WITH RESPECT TO LANGUAGE AS IMPLICATING NATIONAL ORIGIN.

The Supreme Court has never ruled on whether language implicates national origin. The Court has, however, considered the issue in dictum on a few occasions. The Eleventh Circuit's opinion in Sandoval points out dicta from various cases suggesting that the Court recognizes the close link between language and national origin. One example is Hernandez v. New York where, although the parties briefed the issue and the Court discussed it, the Court declined to rule on the issue. Hernandez involved peremptory challenges to jurors based on the prosecutor's belief that the potential jurors would have trouble crediting the official translation of testimony in Spanish because the jurors were fluent in Spanish and would understand the original testimony when given in Spanish. The Court held that the peremptory challenges were Constitutional because the prosecutor based his challenges on conduct during voir dire that led him to believe the witness would have trouble crediting the official translation of Spanish language testimony. The Court found that this was not a violation of the

92. Id.
93. Id.
94. For purposes of Title VII, national origin refers to the country "where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (emphasis added).
95. Premier at 1077.
96. Id. at 1078.
Equal Protection Clause: "Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate removal does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause." 99

The Supreme Court also dealt briefly with a case that specifically involved English-only workplace rules. The Court, vacating as moot the order of the Ninth Circuit in *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, which adopted the EEOC guidelines, found an English-only workplace rule to have a disparate impact and issued a preliminary injunction preventing the defendant employer from requiring its employees to communicate only in English. 100 Some courts and the amicus curiae in the *Sandoval* case rely on this as support for their holdings or assertions that language as implicating national origin has no support in judicial precedent. 101 This reliance is ill-conceived, however, because the decision in *Gutierrez* was vacated because the employee petitioner had switched jobs, and therefore, the injunction issued by the Ninth Circuit was no longer necessary. Thus, the Supreme Court's order is not relevant to the underlying question concerning the EEOC's guideline on whether English-only rules create a disparate impact based on national origin.

The Court's most recent foray into this area came when it granted certiorari in *Alexander v. Sandoval*, 102 a case from the Eleventh Circuit regarding English-only policies of state government agencies. This case could have resolved the issue of whether language implicates national origin. The Court, however, decided the case on a different ground, holding that there is no private cause of action under Title VI. 103 The Court never reached the issue of whether language implicates national origin for purposes of the Civil Rights Act. While the case did not resolve the question, it highlights some of the important issues and interests at stake and underscores the need for a ruling on the issue of whether language implicates national origin for purposes of the Civil Rights Act. *Alexander v. Sandoval* was a Title VI case involving a state agency that receives federal funding. 104 In this case, the Alabama Department of Public Safety

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99. *Id.* at 361.
100. 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).
101. *See*, e.g., *Alexander*, 121 S. Ct. at 1511 (outlining various cases that have rejected the EEOC guidelines that equate language with national origins); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 n.1 (9th Cir. 1993) (stating that *Gutierrez* had no precedent authority, for it was vacated as moot); Brief of Pro-English at *3 n.2.
103. *Id.* at 1523.
104. *Id.* at 1515.
curtailed its policy of providing Driver's License exams in various languages after the state adopted English as the official language of the state.\textsuperscript{105} The plaintiff alleged that this policy of administering the exams in English alone violated Title VI of the Civil Rights Act of 1964, the Equal Protection Clause, and 42 U.S.C. § 1981 and § 1983.\textsuperscript{106} The district court issued a preliminary injunction finding the plaintiff had shown a likelihood of success on the merits as well as irreparable harm.\textsuperscript{107} The Eleventh Circuit Court of Appeals affirmed, specifically equating language with national origin for purposes of the Civil Rights Act of 1964: "Title VI flatly prohibits discrimination on the basis of national origin and, in turn, English language policies that cause a disparate impact on the basis of national origin."\textsuperscript{108}

The Supreme Court granted certiorari solely on the issue of whether there is a private right of action under Title VI.\textsuperscript{109} Nonetheless, various amici curiae requested the court to consider the issue of whether language implicates national origin for purposes of the Civil Rights Act of 1964. These organizations feel that the issue presented to the Court in \textit{Alexander v. Sandoval} necessarily implicated the issue of whether language discrimination equates with national origin discrimination. The logic is that if language does not implicate national origin, then there is no cause of action in the first place. The petitioner, however, did not appeal from the ruling of the lower courts that equates language with national origin for purposes of the Civil Rights Act of 1964. Therefore, the Supreme Court did not rule on the issue. \textit{Alexander v. Sandoval} presented an opportunity for the Court, at least in dicta, to shed substantial light upon how language should be treated under the Civil Rights Act of 1964, including Title VII.

Recognizing the potential import of this case for the private employment sector, various groups submitted amicus curiae briefs urging the Court to reject the EEOC guidelines that equate language with national origin. For example, a small company called Beauty Enterprises, Inc., filed an amicus curiae brief. As stated in their brief, the company employs approximately 325 employees, with a significant proportion of immigrants and bilinguals.\textsuperscript{110} The company has had an English-only workplace rule in place for more than twenty years.\textsuperscript{111} Beauty Enterprises underscores the potential ramifications of this case for the private sector: "[A]ny acknowledgment by this Court that language can and should be equated

\begin{thebibliography}{11}
\bibitem{105} Id.
\bibitem{106} Sandoval v. Hagan, 197 F.3d 484, 487 (11th Cir. 1999).
\bibitem{107} Id.
\bibitem{108} Id. at 495.
\bibitem{109} Alexander, 121 S. Ct. at 1515.
\bibitem{110} Brief for Beauty Enters., Inc. at *2. \textit{See also Alexander}, 121 S. Ct. at 1511 (No. 99-1908).
\bibitem{111} Brief for Beauty Enters, Inc. at *8.
\end{thebibliography}
with ‘national origin’ will substantively affect ‘the law’ to which Beauty Enterprises and other American companies will have to conform their workplace practices.”

Beauty Enterprises is particularly concerned with this ruling because a group of fifteen Hispanic employees have filed disparate impact national origin discrimination charges with the EEOC based on the existence of the English-only policy. What Beauty enterprises seems most concerned about is having to initially bear the burden of showing a legitimate business necessity for their English-only policy, because the crux of their argument is that they have a legitimate business purpose for their rule. They go to great lengths in their brief to outline the process the company went through in order to develop the policy. They clearly want to show that they had a problem with morale and productivity and, after thorough investigation, their founder established a policy that he felt was necessary for business reasons. This, however, undermines their argument which is that an employer should not even have to show a legitimate business purpose for such policies.

The following statement is representative of this argument:

Were this Court to affirm the 11th Circuit, employers in BEI’s position—i.e., employers with no intention of doing anything discriminatory and who simply wish to create a workplace that is safe and free of ethnic tension for its diverse workforce—would no longer be able to use a Speak English Only rule to accomplish these objectives, absent business necessity, as determined by some outside agency, either the EEOC and/or a federal district court.

While this statement adequately describes the showing that would be necessary in order to uphold an English-only policy were the EEOC guidelines to be adopted, it also contradicts the employer’s own argument. Beauty Enterprises attempts to justify its own policy by saying it had a legitimate business necessity for its English-only policy, but then argues Sandoval v. Hagan should be overruled because to affirm the holding would be to require it to proffer this same legitimate reason in order to sustain a challenge by an employee or the EEOC.

The last statement of the argument section of Beauty Enterprises’ brief reconciles this apparent conflict. The company seems to be arguing that a business reason as opposed to a business necessity should be enough to defend an English-only workplace policy. Based on the disparate impact

112. Id. at *7.
113. Id. at *11.
114. Id. at *8-11.
115. Id. at *8.
116. Id. at *8, 11-12.
analysis established in *Griggs v. Duke Power Co.*, various courts have held that the plaintiff employee who challenges the English-only policy may provide evidence that there is a less discriminatory method available that would serve the employer's legitimate interest:

The discretion of the district court in determining whether the defendant has carried its burden of establishing justification for acts resulting in discriminatory effects may be guided at the least by the following rough measures: a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

Clearly Beauty Enterprises wishes to avoid this inquiry by having the Court's review end at the first step.

The Court could have determined the question of whether courts and employers should defer to the EEOC's guidelines regarding English-only policies. Although this issue was not among the issues for which Certiorari was sought or granted, amicus curiae raised it in their briefs and it is implicated in the issue of whether Title VI embodies a private cause of action as it goes to the question of whether the plaintiff employee has even asserted a valid cause of action. Beauty Enterprises recognizes the importance of this case for the determination of the validity of the EEOC's guidelines: "Specifically, were this Court to affirm the Eleventh Circuit below, it would effectively ratify the EEOC's Speak English Only rule guidelines and place its imprimatur on the unwarranted presumption of discriminatory impact that those guidelines establish." Another amicus curiae brief also recognizes the potential importance of *Sandoval* for the judicial validity of the EEOC guidelines. In its brief, Pro English urges the Court to reject the EEOC guidelines: "This Court has never reviewed those administrative interpretations, and they do not bind this Court." The brief goes on to outline the various circuit and district court cases that have rejected the EEOC's guideline that equates language with national origin.

Despite the potential for the Court in *Alexander v. Sandoval* to clear up the debate surrounding English-only policies in the workplace, the Court instead decided the issue by holding that there is no private cause of action

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118. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977) (deciding that, in light of *Griggs*, Title VII criteria must develop on a case-by-case basis) (citation omitted).
120. Brief for Pro English at *12; see also Alexander, 121 S. Ct. at 1511 (2001).
121. Brief for Pro English at *12.
under Title VI.\textsuperscript{122} The issue of language as implicating national origin was never mentioned in the opinion. Although anything the Court would have said on the issue would be dicta, the Court's opinion in this case had the potential to shed light on the Justices' views on the issue of language and national origin and could have provided guidance for the courts and future litigants. The Court missed an opportunity to clear up this issue in \textit{Alexander v. Sandoval} and the debate remains to be played out in district courts throughout the country.

V. CONCLUSION

There remains a clear split in United States courts regarding whether language implicates national origin for purposes of the Civil Rights Act and hence whether language policies in the workplace violate Title VII. The trend in recent years seems to be moving toward the use of psycho-linguistic evidence to show that language is not a volitional choice and that, therefore, policies which punish employees for their use of a language other than English impose a disparate impact on them. A definitive ruling on the issue by the Supreme Court, which did not occur in \textit{Alexander v. Sandoval}, would vitiate the need to present the same psycho-linguistic evidence over and over again in order to show that language is not a volitional choice, but is rather the product of one's national origin and a psychological phenomena. By showing that language use does not involve choice, the theory that the volitional choice severs the link between language and national origin—which some courts have relied on to find that language does not implicate national origin—would be invalidated. The result would be that plaintiffs could reach the second stage of the \textit{Griggs} analysis and shift the burden to the defendant to show that there is a legitimate business justification for the rule despite its disparate impact on certain classes of employees based on national origin. Until there is a definitive ruling, however, it seems likely that there will continue to be disagreement among the courts regarding whether or not language implicates national origin. The best hope for plaintiffs would then seem to be psycho-linguistic evidence showing that language is not a deliberate choice and therefore employment practices that punish employees for their use of their native languages while on the job create a disparate impact on the basis of national origin in violation of Title VII.

\textsuperscript{122} \textit{Alexander}, 121 S. Ct. at 1523.