

The Role of Labor Law in Challenging English-Only Policies

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I. INTRODUCTION

On January 16, 1996, Edgar Lira, Maria Lira, Marcella Mendez, Lauren Peralta, Ruth Torres, and Lupe Torres were fired because they refused to comply with their employer's English-only policy and continued to occasionally speak Spanish, their native language, at work.¹ Perversely, their employer had initially hired them as telephone operators precisely because their

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¹ EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1069 (N.D. Tex. 2000).

Spanish fluency allowed them to assist Spanish-speaking customers.² However, during the course of their employment, their employer adopted an English-only policy that required employees to refrain from speaking Spanish at all times while at the workplace—including during lunch breaks, in the employee break room, while making personal phone calls, and even before or after work hours.³ The policy was so far-reaching that a husband and wife caught uttering a single word of Spanish in the lunchroom would be subject to termination.⁴ The only time that the employer permitted the employees to speak a language other than English was when an employee was on a call with a customer.⁵

Strangely enough, notice of the English-only policy contained a preface that prohibited possession of guns, knives, or weapons in the workplace.⁶ According to the district court that ultimately heard the case, this odd warning implied “a combined concern about the conduct of those persons who speak a language other than English, Hispanic employees in this case, and set[] the scene for stigmatization of those to whom the policy is directed.”⁷ When the company president discovered Ms. Mendez speaking to a co-worker in Spanish in the lunchroom, he yelled: “Wetbacks, I wish you would speak where I can understand you.”⁸

English-only policies routinely stigmatize and isolate non-English-speaking workers.⁹ The policies “run the gamut from formal to informal,” coming in the form of corporate policies; “mini-workplace codes, or En-

² *Id.* at 1068.

³ *Id.* at 1069.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The employer’s linkage of speaking Spanish and possessing weapons demonstrates how individuals often make racial categorizations that rely on identifying one characteristic associated with a particular group of people and then expect “other traits and behaviors to follow.” See Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63, 118 (2002).

⁷ *Premier Operator Servs.*, 113 *F. Supp. 2d* at 1069.

⁸ *Id.* at 1071. *Premier Operator Services* presents an instance in which the link between the English-only policy and intentional discrimination on the basis of national origin is unmistakable. The Premier Operator Services employees were legally lucky because their employer made explicit what other employers hide so well—that it adopted an English-only policy because of prejudice against non-English speakers. The employees in *Premier Operator Services* ultimately succeeded on their Title VII retaliation claim. *Id.* at 1072. The blanket application of the English-only policy in the workplace at all times constituted direct evidence of discriminatory treatment and the racist statements of the employer demonstrated discriminatory intent to support a finding of an unlawful employment practice. *Id.* at 1071. The employees were also able to provide direct evidence of retaliatory termination because the employer immediately ordered the employees discharged upon learning that they had filed charges with the Equal Employment Opportunity Commission (“EEOC”). *Id.* at 1071–72.

⁹ For the sake of clarity, I will use “non-English-speaking” or “non-English speakers” to refer to all non-native English speakers. Of course, as Cristina Rodriguez has correctly pointed out, “it is reductive to talk about language diversity in the workplace in terms of a dichotomy between monolinguals and bilinguals,” because “[l]anguage ability exists on a spectrum.” Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 *Nw. U. L. REV.* 1689, 1707 (2006).

glish-only edicts” from supervisors; or informal “reprimands” from co-workers and supervisors to “speak English, please.”¹⁰ They exist in myriad industries and apply to many types of workers, but they tend to emerge most commonly in relatively small businesses where “employees interact with the public in some way.”¹¹ The policies differ in the restraint they impose: Zero-tolerance English-only policies prohibit employees from speaking any language other than English at all times on the job; others permit employees to speak a foreign language during breaks or mealtimes, but require that they speak English during working hours; and others allow employees to use a foreign language to conduct all nonwork-related conversations at the workplace regardless of whether they are on the clock.¹² Some English-only policies have exceptions for workers who do not speak any English.¹³

All of these policies disadvantage non-English-speaking workers by depriving them of the ability to communicate in the language they speak most comfortably—a privilege that all native English speakers in the United States enjoy. Zero-tolerance English-only policies do not provide any margin of error for non-English speakers who may be sincerely attempting to speak English, but who occasionally lapse into a foreign language either by force of habit or because they do not know how to communicate a particular idea in English.

Although antidiscrimination law has made some strides toward preventing national origin discrimination, it fails to protect adequately non-English speakers. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice “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.”¹⁴ Title VII does not define the parameters of national origin discrimination, but the Equal Employment Opportunity Commission (“EEOC”) has issued guidelines interpreting national origin to include “linguistic characteristics.”¹⁵ Those guidelines render presumptively invalid English-only policies that apply at all times in the workplace:

A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the lan-

¹⁰ *Id.* at 1698. See generally *id.* at 1728–38 (offering an overview of different kinds of English-only policies).

¹¹ *Id.* at 1698.

¹² *Id.* at 1699.

¹³ *Id.*

¹⁴ 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁵ 29 C.F.R. § 1606.1 (2010).

guage they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin.¹⁶

Employers may overcome this presumption by demonstrating that the policy serves a legitimate business purpose.¹⁷ Conversely, the guidelines render presumptively valid English-only policies that apply at certain times in the workplace when the policy is tied to a reasonable business justification.¹⁸

Title VII challenges to English-only policies typically allege that a policy is the result of discriminatory disparate treatment of foreign language speakers, or that the policy has a discriminatory disparate impact on non-English speakers. Title VII's prohibition on disparate treatment protects speaking a foreign language in the workplace in the very limited circumstances when an employee can demonstrate that her employer adopted the policy "for the purpose of discriminating against employees based on national origin or another protected category."¹⁹ Title VII's disparate impact provisions prohibit policies that tend to harm a protected group more than non-members of that group and are unrelated to a legitimate business purpose.²⁰ Title VII often leaves employees unprotected from English-only policies because courts generally do not rigorously question an employer's business justification defense and often decline to defer to the EEOC guidelines, which protect employees from linguistic discrimination.

However, labor law's protections of employees' right to communicate offer more robust protections against English-only policies. The right to organize one's fellow employees²¹ forms the very core of the National Labor Relations Act ("NLRA").²² To protect employees' organizational rights, the NLRA protects the right of workers to engage in "concerted activities for

¹⁶ 29 C.F.R. § 1606.7 (2010).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Reed Russell, Legal Counsel, EEOC, Statement of EEOC Legal Counsel Reed Russell on English-Only Policies to U.S. Civil Rights Commission December 12, 2008 1 (Dec. 12, 2008) (transcript available at <http://www.usccr.gov/statements/Statement%20of%20Reed%20Russell%20re%20English-Only%20Briefing.pdf>).

²⁰ *Id.*

²¹ Importantly, the National Labor Relations Act ("NLRA") definition of "employee" includes unionized and nonunionized laborers alike, as well as undocumented workers. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) ("The Board has consistently held that undocumented aliens are employees within the meaning of § 2(3) of the Act. That provision broadly provides that the term employee shall include any employee, subject only to certain specifically enumerated exceptions.") (internal citations, alterations, and quotation marks omitted); *see also* Robert M. Worster III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1074 (2004). Although undocumented workers are considered employees for the purposes of Section Seven of the NLRA, back pay remedies are unavailable to them under § 10(c). *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002). However, cease and desist orders, posting notice of statutory rights, and contempt sanctions are nonetheless available to compensate for violations of undocumented workers' Section Seven rights. *Id.* at 152.

²² *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

. . . mutual aid or protection.”²³ It is well established that this right is meaningless unless workers are free to communicate with one another at the workplace about terms and conditions of employment.²⁴ The Supreme Court acknowledged the importance of worker communication in *Republic Aviation Corporation v. NLRB*.²⁵ There, the Court unequivocally established that the NLRA protects the rights of workers to discuss terms and conditions of employment and solicit on behalf of a union at the workplace during non-work hours.²⁶

Policies requiring that employees speak only English in the workplace severely burden this right. These policies deprive employees who do not speak English of their ability to communicate at the workplace about terms and conditions of employment. Employees who speak little English are similarly burdened. English-only policies stifle even bilingual employees’ right to communicate by denying them the ability to express themselves in the language of their preference and by penalizing even inadvertent slips into a foreign language.²⁷ The silencing effects of English-only policies therefore threaten communication at the workplace, which is essential to union organizing and federal labor policy generally. Worse yet, these silencing effects disproportionately affect immigrant and undocumented workers and contribute to the disempowerment of this already vulnerable class.

This Article will first discuss the burdens that English-only policies place on employees’ collective and individual efficacy in union organizing. Then, it will discuss legal challenges to English-only policies under Title VII, with particular attention to the business justification analysis central to both disparate treatment and disparate impact challenges. This discussion will highlight the weaknesses of Title VII challenges with particular focus on the ease with which employers can rebut allegations of discriminatory animus, and the absence of explicit protection for language and communication in Title VII’s text. The Article will then explain the contours of the right to communicate at the workplace under the NLRA Section Seven and argue

²³ 29 U.S.C. § 157 (2006) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”); see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

²⁴ See *Republic Aviation*, 324 U.S. at 805; see also Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 385 n.149 (1995).

²⁵ 324 U.S. 793 (1945).

²⁶ Story, *supra* note 24.

²⁷ See *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1069–71 (N.D. Tex. 2000) (summarizing expert testimony explaining that it is often impossible for bilingual employees to refrain from “code switching,” switching from the dominant language to one’s language of origin, when speaking with other individuals with the same language of origin).

that English-only policies violate this right by depriving a class of workers their right to communicate in the workplace.

Finally, the Article will address the limitations of the NLRA, particularly the law's lack of a private right of action and its weak remedial regime. This discussion will demonstrate that, although the NLRA is not a panacea for those employees seeking to challenge English-only policies, it nonetheless provides a promising avenue for pursuing such challenges and avoids some of the difficulties that accompany challenges to English-only policies under Title VII. While employees seeking to challenge English-only policies need not abandon Title VII challenges altogether, pursuing an additional NLRA challenge could provide an alternate route for achieving the goal of securing workplaces where non-English-speaking employees do not risk losing their jobs for speaking their native tongues.

II. THE BURDENS OF ENGLISH-ONLY POLICIES ON UNION ORGANIZING

When Congress passed the Wagner Act in 1935, it “declared an affirmative national policy in favor of collective bargaining.”²⁸ Section Seven of the Act, which recognizes “the statutory rights of workers . . . to associate, to discuss their grievances, to form a union, and to bargain collectively over terms and conditions of employment” forms the “core” of this national policy.²⁹ In 1947, Congress passed the Taft-Hartley Act to restrain unions—which had allegedly abused their power in the decade following the passage of the Wagner Act—by replacing the national policy in favor of collective bargaining with one favoring “employee free choice” on the union question.³⁰ But Taft-Hartley preserved the right to communicate as the bedrock of labor law.³¹ Although criticized as an ossified statute,³² the NLRA would be entirely obsolete without its essential protections, specifically protection of “[t]he statutory rights of workers under section 7 of the Act to associate [and] to discuss their grievances.”³³

Communication in the workplace is essential to union organizing because, as Cynthia Estlund has recognized, the decision to join a union “is unlike a simple decision whether to purchase a pair of pants,” given that it “may have serious immediate consequences for an employee’s wages, benefits, and daily job conditions.”³⁴ Accordingly, face-to-face contact at the workplace—the only place where all employees are necessarily gathered as a group—is essential for employees or union organizers attempting to en-

²⁸ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533 (2002).

²⁹ *Id.* at 1536; *see also id.* at 1533.

³⁰ *Id.* at 1534.

³¹ *See id.*

³² *See infra* Part IV.C.

³³ *See* Estlund, *supra* note 28, at 1536.

³⁴ Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 331 (1994).

courage union membership within a bargaining unit.³⁵ This contact is futile if an English-only policy prohibits meaningful communication at the workplace about the benefits and disadvantages of union membership. It was this view of the workplace as a unique site for organizing that animated the Supreme Court's decision in *Republic Aviation* to protect communication at the workplace.³⁶

English-only policies prevent both union organizers and employees from communicating with non-English speakers about joining a labor union, collective bargaining, and terms and conditions of employment. These policies therefore undermine the bedrock of the NLRA: free communication about terms and conditions of employment and unionization. Union organizing drives in predominantly Spanish-speaking workplaces demonstrate the importance of communication in a foreign language to effectuating the organizational rights that the NLRA grants all workers.³⁷ For example, the AFL-CIO has relied on the Labor Council on Latin American Advancement to assist in union organizing drives because the AFL-CIO itself lacked Spanish-speaking organizers.³⁸ Without the ability to communicate in Spanish, the AFL-CIO organizers would have been entirely unable to explain how union representation functions and what collective bargaining through a union representative could help employees achieve, leaving employees uninformed about unionization. Similarly fellow employees seeking to discuss collective bargaining and union representation would be hindered in their union solicitation endeavors if operating under an English-only policy.³⁹

A. *Undermining Group Solidarity by Stifling Expression of Cultural Identity*

Language is constitutive of identity. Individuals use language to express central elements of their identity.⁴⁰ Because “the speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearer, and what sort of speech event she considers herself to be engaged in,” language reveals important information about an individual's heritage and affiliations.⁴¹ More than any other trait, language serves as a powerful symbol of ethnic identity: “Language is the recorder of paternity, the expressor of patrimony and the carrier

³⁵ See *id.* at 331–32.

³⁶ See *id.* at 332.

³⁷ See generally Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79 (2002).

³⁸ *Id.* at 107–08.

³⁹ Although an NLRA challenge to an English-only policy would give effect to the employees' rights to communicate at the workplace, it would not alter existing law regarding when nonemployee union organizers may access the workplace to solicit union support. See generally *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁴⁰ See generally RALPH FASOLD, *THE SOCIOLINGUISTICS OF SOCIETY* (1984).

⁴¹ *Id.* at ix.

of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious in and of itself.”⁴²

Apart from the obvious obstacles that they pose to union organizing in workplaces employing non-English speakers, English-only policies also deprive foreign language speakers of an important component of their identity that provides a basis for breeding solidarity among employees. Intergroup solidarity is essential for employees seeking to change terms and conditions of their employment because it provides a wellspring of support for addressing problems employees face as a group.⁴³ As psychologist Albert Bandura has explained, “[m]any of the challenges and difficulties [people] face reflect group problems requiring sustained collective effort to produce any significant change.”⁴⁴ Workers involved in union organizing often face such challenges.⁴⁵ Indeed, the steady decline in the number of union workers in the American workforce is due to the “skyrocketing use of coercive and illegal tactics—discriminatory discharges in particular—by employers determined to prevent unionization.”⁴⁶

Recognition of the importance of language is not limited to sociolinguistics and psychology; the law also recognizes the importance of language to individual and group identities. When Nebraska sought to prohibit the instruction of any language other than English in its schools, the Supreme Court found that the state law violated the Due Process Clause of the Fourteenth Amendment and described the right to speak one’s native tongue as “fundamental.”⁴⁷ It announced that the “protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”⁴⁸ In *Hernandez v. New York*,⁴⁹ the Court again noted the central role that language plays in individual and group identity formation, observing: “Language permits an individual both to express a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer.”⁵⁰

⁴² Joshua A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 25 (Howard Giles ed., 1977).

⁴³ See Zatz, *supra* note 6, at 70–73.

⁴⁴ Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 AM. PSYCHOL. 122, 143 (1982).

⁴⁵ See generally Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

⁴⁶ *Id.* at 1769–70.

⁴⁷ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

⁴⁸ *Id.* at 401.

⁴⁹ 500 U.S. 352 (1991).

⁵⁰ *Id.* at 370 (plurality opinion); see also *Gutierrez v. Mun. Court of Se. Judicial Dist., Cnty. of L.A.*, 838 F.2d 1031, 1038 (9th Cir. 1988) (“The cultural identity of certain minority groups is tied to the use of their primary tongue. The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin. Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic

When a group of individuals share a language, its identity-creating functions become more pronounced. Using language as a symbol of their shared beliefs and history, language communities develop a sense of distinctiveness and solidarity.⁵¹ Language can therefore provide an important unifying feature that promotes the intergroup solidarity integral to union organizing.⁵² The bond that a shared language creates between individuals is particularly important in the labor context because unions rely on worker solidarity to achieve an effective collective bargaining process.⁵³ The kind of bond that individuals forge over a common native language can “form the basis of workplace conversations [and] friendships . . . that profoundly influence interactions as workers.”⁵⁴ Discovering commonalities and bonding with coworkers over “extraworkplace” characteristics or behaviors can determine whether an individual will find a community or remain isolated at work, which in turn influences the likelihood that she will succeed in achieving workplace goals.⁵⁵

Prohibitions on speaking one’s native language engender feelings of alienation and powerlessness in foreign language speakers.⁵⁶ These feelings of powerlessness and isolation are linked to the identity-affirming aspects of speaking one’s native language.⁵⁷ If speaking one’s native language affirms a central component of one’s identity, it follows that the inability to speak that language will weaken that same sense of identity. If employees who share a common native language are prohibited from speaking it at work, they may develop feelings of inefficacy and isolation.

culture and identity. The primary language not only conveys certain concepts, but is itself an affirmation of that culture.” (internal citations omitted), *vacated as moot*, 490 U.S. 1016 (1989).

⁵¹ N. CONKLIN & M. LOURIE, *A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES* 279 (1983); see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994). Moreover, “evidence exists suggesting that choice of language may implicate different aspects of one’s personality; i.e., it may well be the case that bilinguals present themselves differently in different contexts to emphasize different sides of themselves.” Rodriguez, *supra* note 9, at 1708. Cristina Rodriguez has thus posited that “regulation of bilingualism is tantamount to the regulation of personality.” *Id.*

⁵² Cristina Rodriguez also argues that English-only rules “interfere with important associative dynamics in the workplace itself, or the process of social bonding that takes place among workers.” Rodriguez, *supra* note 9, at 1692. However, she distinguishes her use of “association” and “solidarity” from the process of solidarity-building essential to union formation or collective bargaining. Instead, she focuses on the harm English-only policies inflict on the “process of forming social ties, friendships, and esprit de corps among employees.” *Id.* at 1692 n.5.

⁵³ See David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1339 (1988).

⁵⁴ Zatz, *supra* note 6, at 77.

⁵⁵ See *id.*

⁵⁶ Cf. William M. O’Barr, *Boundaries, Strategies, and Power Relations: Political Anthropology and Language*, in *LANGUAGE AND POLITICS* 414 (William M. O’Barr & Jean F. O’Barr eds., 1977) (discussing this phenomenon in the context of court proceedings).

⁵⁷ See generally FASOLD, *supra* note 40; Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 356 (1986).

Those feelings can, in turn, affect the amount of effort that employees devote to certain tasks, such as union organizing. As Bandura has explained: “When beset with difficulties people who entertain serious doubts about their capabilities slacken their efforts or give up altogether, whereas those who have a strong sense of efficacy exert greater effort to master the challenges. High perseverance usually produces high performance attainments.”⁵⁸ Accordingly, allowing individuals to express themselves through their native language at work can affirm group ties and facilitate both individual and collective efficacy.

The emergence of constituency groups as labor organizers demonstrates the important role that shared identity plays in labor organizing. The Labor Council on Latin American Advancement, the Asian Pacific American Labor Alliance, and the Latino caucuses within the Amalgamated Transit Union, the Service Employees International Union, and the Teamsters appeal to national and ethnic identity to build solidarity among workers and encourage workers to engage in concerted activity to improve their terms and conditions of employment.⁵⁹ These constituency groups aim to “bring people of different cultures together,”⁶⁰ and they have served as an important tool for recruiting union members.⁶¹

As Miriam Wells’s study of union organizing among San Francisco hotel workers demonstrates, organizing around cultural and national commonalities can promote solidarity essential to union organizing.⁶² She observed that in the housekeeping sector, where relationships between workers tend to center around common language or ethnic background, organizers have identified leaders within the ethnic subgroup to facilitate communication between the union and the employees.⁶³ They have thus succeeded in encouraging leaders to identify the shared concerns of the group.⁶⁴ The demonstrated success of organizing workers around linguistic commonalities illustrates the harm that English-only policies can inflict on organizing efforts.

B. Diminished Individual Efficacy

In addition to depriving organizers of an important solidarity-building tool, English-only policies can engender feelings of inadequacy in non-English-speaking workers that lead them to perceive themselves as generally

⁵⁸ Bandura, *supra* note 44, at 123.

⁵⁹ Garcia, *supra* note 37, at 106–11.

⁶⁰ Edgar Sandoval, *LANTA’s Latino Caucus Aims to Lead; More Community, Union Participation is Key*, MORNING CALL, Dec. 28, 2000, at B4.

⁶¹ *Id.*

⁶² See Miriam Wells, *Immigration and Unionization in the San Francisco Hotel Industry*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 109, 122–23 (Ruth Milkman ed., 2000).

⁶³ *Id.* at 123.

⁶⁴ *Id.* at 124.

inefficacious. Employees who seek to communicate about the possibility of joining a union or engaging in any other form of concerted activity for mutual aid or protection may become frustrated if they are prohibited from communicating in their native language either because they lack the vocabulary to discuss the issues in English or because they already feel rejected and disempowered by the effects of English-only policies. This frustration may result in stress that can “impair performance by diverting attention from how best to proceed with the undertaking”—concerted activity or union organizing—“to concerns over failings and mishaps,” the employee’s inability to speak English well, or at all.⁶⁵

These effects are not limited to employees who speak no English. Bilingual employees also suffer under English-only policies because deciding what language to speak at any given moment may not be a fully volitional process.⁶⁶ Many bilingual workers engage in “code switching”—unconscious shifting between English and their native language.⁶⁷ Bilingual speakers who have grown up in communities where code switching is commonplace are particularly susceptible to unintentional lapses into their non-English language.⁶⁸ These lapses become much more likely when an individual has recently spoken her native language.⁶⁹ For example, the employees of Premier Operator Services, who were required to speak Spanish with Spanish-speaking callers as a condition of employment, were primed to code switch—and therefore primed to violate the English-only policy.⁷⁰

Unintentional lapses into one’s native language may cause doubts about one’s ability to conform to an English-only policy. This skepticism over workers’ own “ability to exercise adequate control over their actions tend[s] to undermine their efforts in situations that tax capabilities.”⁷¹ Accordingly, perceived failures in self-regulation may result in decreased effort and increased frustration, which decrease performance overall and make it much

⁶⁵ See Bandura, *supra* note 44, at 123.

⁶⁶ See *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1069–70 (N.D. Tex. 2000) (“Dr. Susan Berk-Seligson, a professor of linguistics and Hispanic language and culture at the University of Pittsburgh, testified consistent with the findings in her report, and based on extensive research in the field of linguistics that adhering to an English-only requirement is not simply a matter of preference for Hispanics, or other persons who are bilingual speakers, but that such restraint can be virtually impossible in many cases. Bilinguals 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. This switching back and forth, formally known as ‘code switching’ can occur in conversation even within a sentence or between sentences.”); cf. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)) (explaining that noncompliance with English-Only rules can be merely “a matter of individual preference”).

⁶⁷ See Mark Colón, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 *YALE L. & POL’Y REV.* 227, 251 (2002).

⁶⁸ *Id.* at 251 n.186.

⁶⁹ *Id.*

⁷⁰ *Premier Operator Servs.*, 113 F. Supp. 2d at 1070.

⁷¹ Bandura, *supra* note 44, at 129.

more difficult to achieve one's immediate goals.⁷² A negative perception of one's own capabilities can therefore result in diminished individual performance.

C. *Diminished Collective Efficacy*

"[C]ollective efficacy is rooted in self-efficacy."⁷³ Therefore, the perception of decreased self-efficacy may affect a group's sense of collective efficacy, and the experience of a single employee in this cycle of effort and failure can then spill over into the larger group because "observing others who are perceived to be of similar competence fail despite high effort lowers observers' judgments of their own capabilities."⁷⁴ In the context of English-only policies, an employee who observes her colleague fail to abide by the employer's policy, either because of inability to communicate in English or because of code switching, is then likely to determine that she too is unable to comply.

Diminished collective efficacy is particularly problematic for groups of workers seeking to rely on their group strength to achieve their goals because the strength of such groups lies "in people's sense of collective efficacy that they can solve their problems and improve their lives through concerted effort."⁷⁵ If groups come to understand themselves as inefficacious generally, they become more likely to abandon concerted activity aimed at achieving a specific goal.

The feelings of isolation, rejection, and inefficacy that English-only policies can engender threaten the foundation and primary strength of labor law: the protections of workers' concerted activities for mutual aid or protection contained in Section Seven. These protections more directly address the concern with maintaining worker solidarity than Title VII.

III. THE LIMITS OF TITLE VII CHALLENGES TO ENGLISH-ONLY POLICIES

Employees who challenge English-only policies typically bring claims under Title VII of the Civil Rights Act,⁷⁶ invoking its prohibition on national

⁷² *See id.*

⁷³ *Id.* at 143.

⁷⁴ *Id.* at 127.

⁷⁵ *Id.* at 143.

⁷⁶ 42 U.S.C. § 2000e (2006). Title VII is not the only legal protection against English-only policies. However, Fourteenth Amendment Equal Protection challenges are likely to fail because the Supreme Court has declined to recognize language minorities as a protected class. *See Hernandez v. New York*, 500 U.S. 352, 370 (1991) (plurality opinion). Challenges under the First Amendment also have failed because courts have rejected the claim that speaking Spanish constitutes protected communication on matters of public concern. *See, e.g., Maldonado v. City of Altus*, 433 F.3d 1294, 1310–12 (10th Cir. 2006), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65–66 (2006); *cf. Sisneros v. Nix*, 884 F. Supp. 2d 1313, 1329 (N.D. Iowa 1995) (finding that an English-only policy in prison was not a First Amendment violation because it permitted alternate means of communication

origin discrimination in the workplace.⁷⁷ Although Title VII does not define “national origin,” the EEOC has interpreted national origin discrimination to include “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”⁷⁸ National origin challenges to English-only policies can fail if: (i) employees are unable to prove that an English-only policy was intentionally discriminatory or unjustified by business necessity; or (ii) courts decline to defer to EEOC guidelines, which provide more robust protections against English-only policies than the text of Title VII alone.

Challenges to English-only policies under Title VII may proceed on either a disparate treatment or a disparate impact theory of discrimination.⁷⁹ A disparate treatment claim requires that a plaintiff show that her employer took an adverse employment action due to her membership in a protected category.⁸⁰ Disparate impact claims allow an employee to challenge a policy adopted for neutral purposes as “discriminatory in operation” and unjustified by business necessity.⁸¹ Disparate treatment claims are less common than disparate impact claims because it is difficult to prove intent to discriminate. Even when plaintiffs can make out a prima facie case of disparate treatment, employers may nonetheless prevail by establishing a business justification for the disparate treatment. Accordingly, this part of the Article will focus primarily on disparate impact claims and the business justification analysis relevant to both disparate treatment and disparate impact claims.

A. *Disparate Treatment Claims*

A plaintiff bringing a disparate treatment claim must make a prima facie showing of discrimination through either direct or circumstantial evidence.⁸² Direct evidence “in and of itself suggests that the person or persons

among inmates). Moreover, courts have been wary of enmeshing the First Amendment in labor speech. See James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 193 (1983). First Amendment and Equal Protection challenges are therefore beyond the scope of this article, which focuses exclusively on Title VII and the NLRA.

⁷⁷ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993) (upholding an English-only policy providing that “only English will be spoken in connection with work. During lunch, breaks, and employees’ own time, they are obviously free to speak Spanish if they wish.”); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980) (finding that “a rule prohibiting [bilingual] employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers” did not violate Title VII).

⁷⁸ Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (2010).

⁷⁹ *Spun Steak*, 998 F.2d at 1484–85 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1987)).

⁸⁰ *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997).

⁸¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also 42 U.S.C. § 2000e–2(k)(1)(A)(i) (2006).

⁸² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

with the power to hire, fire, promote and demote the plaintiff were animated by an illegal employment criterion.”⁸³ For example, “I won’t hire you because you’re a woman” or “I’m firing you because you’re not a Christian” constitute direct evidence of discrimination.⁸⁴ In the national origin context, a remark like “Wetbacks, I wish you would speak where I can understand you”⁸⁵ would likely constitute direct evidence.⁸⁶

Because most employers are savvy enough not to make explicitly discriminatory comments, many employees are left to make a prima facie case using circumstantial evidence of discriminatory intent. Circumstantial evidence is evidence sufficient to support “an inference of unlawful discrimination.”⁸⁷ Such evidence typically consists of circumstances in which the employer treated the aggrieved employee worse than other employees. For example, in *Roman v. Cornell University*,⁸⁸ a plaintiff challenged her firing for “gross insubordination” as pretextual by pointing to three circumstances indicating disparate treatment: First, her employer had enacted an English-only policy in response to her coworkers’ complaints that she spoke Spanish in the office to exclude them; second, she was punished more harshly than her fellow employees for using profanity in the office; and third, she, unlike other employees, was denied mediation for grievances.⁸⁹

If a plaintiff presents a prima facie case through either direct or circumstantial evidence, the burden then shifts to her employer to supply a legitimate, nondiscriminatory reason for the adverse employment action in order to rebut the presumptively discriminatory treatment. Determining whether an employment action was pretextual requires analysis that mirrors courts’ treatment of business justification in the disparate impact context.⁹⁰

B. *Disparate Impact Claims and Business Justification Doctrine*

In a disparate impact claim, a plaintiff must establish a prima facie case of discrimination by demonstrating that an employment practice caused an actual disparate impact on a protected group; it is insufficient to rest a disparate impact claim on an inference of disparate impact.⁹¹ If the plaintiff makes out the prima facie case, the employer may rebut by making a show-

⁸³ *Venters*, 123 F.3d at 972.

⁸⁴ *Id.* at 973.

⁸⁵ *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1071 (N.D. Tex. 2000).

⁸⁶ *See Venters*, 123 F.3d at 973 (“Still, remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality.”).

⁸⁷ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

⁸⁸ 53 F. Supp. 2d 223 (N.D.N.Y. 1999).

⁸⁹ *Id.* at 236–37.

⁹⁰ *See, e.g., id.*

⁹¹ *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

ing of legitimate business necessity.⁹² As in the disparate treatment context, the employer need only offer a reasonable business justification to survive this initial inquiry.⁹³ Then, the employee may rebut the business necessity argument by suggesting an alternative policy that would have served the employer's business interest without the discriminatory effect.⁹⁴ Establishing an alternative method of achieving the business interest thus demonstrates that the challenged action or policy is simply a pretext for discrimination.⁹⁵

Employers can easily supply a business justification because courts are exceedingly deferential to employer interests. In *Wards Cove v. Atonio*,⁹⁶ the Supreme Court explicitly rejected a stringent test for business necessity.⁹⁷ It suggested that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative [business practice] in response to a Title VII suit," reasoning that "[c]ourts are generally less competent than employers to restructure business practices."⁹⁸ The Supreme Court declined to require that employers demonstrate that a policy is an "essential or indispensable practice," because "this degree of scrutiny would be almost impossible for most employers to meet."⁹⁹ Instead, the Court opted for a relatively lax reasonableness standard that employers can easily satisfy.¹⁰⁰

After an employer makes a showing of business justification, the plaintiff then bears the heavy burden of disproving the employer's assertions and persuading the court that the policy in question was enacted for discriminatory purposes.¹⁰¹ *Wards Cove*, therefore, established a deferential standard for evaluating business justification. This standard erects a nearly insurmountable obstacle to employees seeking to challenge English-only policies under Title VII.¹⁰²

⁹² 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); see *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1312 (10th Cir. 1999), *overruled on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

⁹³ See *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

⁹⁴ *Albemarle*, 422 U.S. at 425.

⁹⁵ *Id.*

⁹⁶ 490 U.S. 664 (1989).

⁹⁷ *Id.* at 661.

⁹⁸ *Id.*

⁹⁹ *Id.* at 659 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)) (internal quotation marks omitted).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 659-60.

¹⁰² The one court to apply a less deferential analysis of business justification in an English-only case applied the law prior to *Wards Cove*. When the Los Angeles Municipal Court enacted a rule forbidding employees from speaking any foreign language at the workplace, except during breaks or lunch time and when serving as a translator, the Ninth Circuit determined that English-only policies generally "have an adverse impact on protected groups and . . . should be closely scrutinized" because they "create an atmosphere of inferiority, isolation, and intimidation" and "readily mask an intent to discriminate on the basis of national origin." *Gutierrez v. Mun. Court of the Se. Judicial Dist., Cnty. of L.A.*, 838 F.2d 1031, 1040 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). The court determined that to overcome a finding of disparate impact an employer must demonstrate that the practice causing the dispa-

The Court's holding in *Wards Cove*, allowing an employer to prove business necessity by demonstrating that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer,"¹⁰³ was later abrogated by Congress in the Civil Rights Act of 1991.¹⁰⁴ The 1991 Act allows an employer to defeat a disparate impact claim upon showing that "the challenged practice is job related for the position in question and consistent with business necessity."¹⁰⁵ In its interpreting memorandum, Congress explained that the Civil Rights Act of 1991 is "intended to reflect the concepts enunciated by the Supreme Court . . . prior to *Wards Cove Packing Co. v. Atonio*."¹⁰⁶ However, it remains disputed among scholars whether *Wards Cove* in fact signaled a retreat from earlier cases interpreting business necessity.¹⁰⁷

Empirical analysis demonstrates that, despite the Civil Rights Act of 1991, the business justification analysis announced in *Wards Cove* continues to render disparate impact challenges nearly impossible to maintain. Before *Wards Cove*, the plaintiff success rate in disparate impact cases was 32.7%.¹⁰⁸ After *Wards Cove* and the Civil Rights Act of 1991, the success rate fell to 6.7%.¹⁰⁹

One reason for the 1991 Act's failure to establish a more rigorous business justification test is that the changes "ignored the grave practical and analytical problems . . . associated with applying disparate impact theory in subjective practice cases."¹¹⁰ The Civil Rights Act of 1991 failed to provide

rate impact was "essential" to serve a compelling purpose. *Id.* at 1042 (quoting *Williams v. Colo. Springs Sch. Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981)). It therefore rejected the five business justifications the employer offered by finding that the policy was unnecessary to achieving valid business goals. *Id.*

¹⁰³ *Wards Cove*, 490 U.S. at 659.

¹⁰⁴ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 41 n.218 (2006) (describing the interaction between the Civil Rights Act of 1991 and *Wards Cove*).

¹⁰⁵ 42 U.S.C. § 2000e-2 (k)(1)(A)(i) (2006).

¹⁰⁶ 137 CONG. REC. 28680 (1991) (internal citations omitted); see also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666 (2001). The interpreting memorandum further directs courts to rely upon *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* interpreted business justification as requiring an employer to demonstrate that a challenged policy or practice has "a manifest relationship to the employment in question," or a "demonstrable relationship to successful performance." 401 U.S. at 431-32. The Supreme Court later determined that a plaintiff may nonetheless challenge business justification by demonstrating that a policy was simply pretext for discrimination even if reasonably tied to successful job performance. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

¹⁰⁷ Jolls, *supra* note 106, at 665-66.

¹⁰⁸ Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 256 (2005).

¹⁰⁹ *Id.*

¹¹⁰ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1219 (1995); see also Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 334 (1998) (describing the Civil Rights Act of 1991 as "contribut[ing] significantly to doctrinal confusion"); Songer, *supra* note 108, at 253 (noting that "legitimate business justification" remains "subject to conflicting interpretations by courts").

courts the doctrinal tools necessary to determine whether a subjective practice constitutes unlawful discrimination, which has resulted in “practical uncertainty and analytical disarray.”¹¹¹ Even after the Civil Rights Act of 1991, business justification analysis remains deferential to employer interests despite Congress’s intent.

To satisfy its burden of demonstrating a legitimate business interest in a policy or practice, an employer need not prove that its actual motivation in taking an adverse employment action was nondiscriminatory; rather, it need only offer any nondiscriminatory explanation for its policy or practice.¹¹² Moreover, the burden of persuading the court that an action was taken for a discriminatory purpose ultimately lies with the plaintiff.¹¹³ This heavy burden is often the downfall of disparate impact claims because “in cases where it seems unlikely that the employer’s adoption of a practice with a disparate impact served as a cover for intentional discrimination, judges are hesitant to find liability under the disparate impact doctrine.”¹¹⁴

Both disparate impact and disparate treatment claims are only rarely successful as challenges to English-only policies because of courts’ deference to employers’ benign explanations for adverse employment actions or conditions. For circumstantial cases of discriminatory treatment and disparate impact claims, employers can typically satisfy their burden of demonstrating a legitimate business necessity for an English-only policy by proffering any reasonable business interest the policy could advance.¹¹⁵ It is therefore relatively easy for an employer to overcome a challenge to an English-only policy brought under Title VII.

Courts routinely uphold English-only policies even where employers have hired bilingual employees to serve their own commercial interests.¹¹⁶ In *Garcia v. Gloor*,¹¹⁷ the Fifth Circuit upheld an English-only rule that prohibited employees from speaking Spanish while at work—unless they were

¹¹¹ Krieger, *supra* note 110, at 1219; *see also id.* at 1229 n.313 (noting that Congress “remained silent . . . on the question of precisely what was meant by the term ‘business necessity’”).

¹¹² *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981).

¹¹³ *Id.* at 255–56 (“The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”). However, the burden of proving business necessity lies with the defendant employer. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 522 (2003).

¹¹⁴ Bagenstos, *supra* note 104, at 41.

¹¹⁵ *See* *Washington v. Davis*, 426 U.S. 229, 239–41 (1976); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980).

¹¹⁶ *See, e.g.,* *Martinez v. Labelmaster, Am. Labelmark Co.*, No. 96 C 4189, 1998 WL 786391 (N.D. Ill. Nov. 6, 1998); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349 (S.D. Fla. 1997).

¹¹⁷ 618 F.2d 264 (5th Cir. 1980).

assisting a Spanish-speaking customer.¹¹⁸ When Mr. Garcia responded in Spanish to one of his Mexican American coworkers' questions about the availability of an item, his supervisor fired him for violating the English-only policy.¹¹⁹ Although the EEOC maintained that the policy did constitute national origin discrimination¹²⁰—a position the EEOC would later formalize in promulgating its guidelines on national origin discrimination—the court rejected this contention and found no discrimination.¹²¹ In so holding, it rejected the disparate impact claim based on adverse effects on Latino employees. It also rejected the disparate treatment claim, which was based on the policy's denial of the right to converse in the language one speaks most comfortably—a privilege enjoyed by all native English-speaking employees.¹²²

In *Gloor*, the Fifth Circuit began its analysis by noting that Title VII does not mention language¹²³ and that the legislative history surrounding the meaning of “national origin” was “quite meager.”¹²⁴ It recognized that language discrimination could, under some circumstances, serve as a proxy for national origin discrimination but reasoned that because Mr. Garcia was exercising “a preference” in choosing to speak Spanish there was no discriminatory impact.¹²⁵ Because the court did not find any discrimination, it could have easily avoided considering the business justification rule. Nonetheless, it went on to find a legitimate business interest.¹²⁶ The court applied the following rationale:

English-speaking customers objected to communications between employees that they could not understand . . . so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would

¹¹⁸ *Id.* at 266. The rule in *Gloor* did not prevent employees from speaking Spanish on work breaks. *Id.* at 270. Therefore, the policy would likely be valid under Section Seven of the NLRA as well. See *infra* pp. 323–31. However, the case provides a helpful illustration of the deferential business justification analysis that courts employ under Title VII.

¹¹⁹ *Gloor*, 618 F.2d at 266.

¹²⁰ *Id.*

¹²¹ *Id.* at 272.

¹²² *Id.* at 268.

¹²³ *Id.* (“The statute forbids discrimination in employment on the basis of national origin. Neither the statute nor common understanding equates national origin with the language that one chooses to speak.”).

¹²⁴ *Id.* at 268 n.2 (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973)).

¹²⁵ *Id.* at 270 (“However, there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. Garcia could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice.”).

¹²⁶ *Id.* at 269.

permit supervisors, who did not speak Spanish, better to oversee the work of subordinates.¹²⁷

Expanding a business justification to include English-language skills development allows any English-only policy to survive under Title VII because being forced to communicate in English will necessarily improve one's ability to speak it.¹²⁸ Both business justifications—that an employer has an interest in improving its employees' English skills and that "English-speaking customers objected to communication between employees that they could not understand"¹²⁹—plausibly tie an English-only policy to legitimate business interests. Had its business justification been limited solely to keeping customers from overhearing employees speaking Spanish, such a policy might have failed: A less burdensome policy would be to prohibit speaking English on the sales floor while permitting employees to speak Spanish in employee-only areas such as the break room.

Aside from improving English-speaking ability, courts have accepted "preventing non-foreign language speaking individuals from feeling left out of conversations, and preventing non-foreign language speaking individuals from feeling that they are being talked about in a language they do not understand" as legitimate business reasons justifying an English-only policy.¹³⁰ Even an employer's blithe statement that its policy seeks to promote communication among employees and to ensure that the business runs smoothly and efficiently has served as a valid business justification.¹³¹ Courts have accepted "politeness" as a valid business reason for preventing employees

¹²⁷ *Id.* at 267.

¹²⁸ The deferential nature of the business justification analysis has resulted in a rejection of business necessity only in exceptional cases. For example, in *Saucedo v. Brothers Well Service, Inc.*, an employee was fired for violating an unprinted rule prohibiting "Mesian [sic] talk" on the job. 464 F. Supp. 919, 921 (S.D. Tex. 1979). The plaintiff made a prima facie case of disparate impact because, as the court explained, "[a] rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees . . . Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job." *Id.* at 922. There, the court noted its uncertainty over the existence of an English-only policy because the only evidence of the policy was the supervisor informing the employee about its existence. *Id.* The court further observed that the employer had made no effort to provide a business justification. *Id.* The court, however, went out of its way to explain in dicta that because the employer's business was to drill oil wells, "a duly and officially promulgated, efficiently communicated rule absolutely prohibiting the speaking of a foreign language during the drilling of a well or the reworking of a well, and providing for immediate discharge for violation of the rule, would be a reasonable rule for which a business necessity could be demonstrated." *Id.* at 921.

¹²⁹ *Gloor*, 618 F.2d at 267.

¹³⁰ *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 236–37 (N.D.N.Y. 1999).

¹³¹ *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *see also Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (finding the English-only policy justified by business necessity when the employer adopted it to "prevent Polish-speaking employees from alienating other employees"); *Tran v. Standard Motor Prods., Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998) (finding that "prevent[ing] non-Vietnamese employees from feeling as if they were being talked about by Vietnamese employees" to be a valid business justification for an English-only policy).

from speaking foreign languages within earshot of a customer, even during nonwork hours.¹³² Simply put, to survive a Title VII challenge to an English-only policy, an employer need only proffer that it has a business interest in understanding what its employees are saying. Courts have routinely accepted this assertion without inquiring why employers did not bother to hire a manager who spoke the foreign language that predominated in the workplace or limit the application of their policies to the working floor.¹³³

C. *The EEOC Guidelines*

In response to cases like *Gloor*, the EEOC promulgated guidelines in 1980 establishing that Title VII's protections against national origin discrimination encompass linguistic discrimination.¹³⁴ The EEOC guidelines render presumptively invalid an English-only rule that applies at all times in the workplace as unlawful discrimination on the basis of national origin.¹³⁵ Although they recognize that Title VII's protections against national origin discrimination should encompass a protection for language, the guidelines are unavailing when courts do not grant them deference.¹³⁶

The Supreme Court originally suggested that courts should defer to EEOC guidelines.¹³⁷ It later clarified that EEOC guidelines are "not controlling upon the courts by reason of their authority," but left room for deference explaining that the guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹³⁸ Accordingly, a majority of lower courts to confront the issue

¹³² See, e.g., *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005) ("[P]romoting politeness to customers is a valid business necessity for requiring sales employees to speak English in their presence.").

¹³³ See, e.g., *Long*, 894 F. Supp. at 942; see also *Kania*, 14 F. Supp. 2d at 736; *Tran*, 10 F. Supp. 2d at 1210; *Gonzalez v. Salvation Army*, No. 89-1679-CV-T-17, 1991 WL 11009376 (M.D. Fla. June 3, 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993).

¹³⁴ Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (2010).

¹³⁵ 29 C.F.R. § 1606.7(a) (2010) ("A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.").

¹³⁶ See e.g. *Gonzalez v. Salvation Army*, 985 F.2d 578, 578 (11th Cir. 1993) (deciding without mentioning EEOC guidelines); *Cosme v. Salvation Army*, 284 F. Supp. 2d 229 (D. Mass. 2003) (same).

¹³⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.").

¹³⁸ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (internal quotation marks omitted)); see also *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006).

have found that they are not bound by the EEOC guidelines on English-only policies.¹³⁹ These courts have reasoned that the EEOC guidelines on English-only policies are incompatible with the requirement of Title VII that a plaintiff prove that an employer took an adverse employment action “because of” a protected status, because the guidelines replace this requirement with a presumption that implementation of an English-only policy is per se discrimination on the basis of national origin.¹⁴⁰

In the most prominent case to follow this line of reasoning, *Garcia v. Spun Steak Co.*,¹⁴¹ the Ninth Circuit held that the EEOC guidelines were “wrong” and inconsistent with the burdens of proof in Title VII.¹⁴² Although it acknowledged the difficulties Spanish-speaking employees might face because “switching from one language to another is not fully volitional,” the court rejected the proposition that such a burden had a “significant impact” on employees.¹⁴³ Contrary to the EEOC guidelines, the Ninth Circuit determined that “[t]he fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity.”¹⁴⁴ The court rejected the contention that a significant adverse effect of the policy was to deprive Spanish speakers of the ability to express their cultural heritage at work, finding that “[i]t is axiomatic that an employee must often sacrifice individual self-expression during working hours.”¹⁴⁵ It also rejected the argument that the rule deprived Spanish-speaking employees of the ability to communicate “in the language with which they feel most comfortable”—a privilege naturally afforded to English-speaking employees.¹⁴⁶ The court therefore determined that the employer had reasonably, albeit narrowly, defined the contours of the privilege of workplace communication by adopting an English-only policy that permitted bilingual employees to communicate at the workplace but required that they choose to speak English.¹⁴⁷

The Ninth Circuit’s interpretation of Title VII led two-thirds of the courts confronting the issue similarly to decline to defer to the EEOC guidelines.¹⁴⁸ Without deference to the guidelines, employees challenging En-

¹³⁹ Two courts have deferred to the EEOC English-only guidelines. Both determined that a guideline squarely within the agency’s expertise deserved deference. *See* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000); EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 911, 914 (N.D. Ill. 1999).

¹⁴⁰ *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993); *Velasquez v. Goldwater Memorial Hosp.*, 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 735 (E.D. Pa. 1998); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 940 (E.D. Va. 1995).

¹⁴¹ 998 F.2d 1480 (9th Cir. 1993).

¹⁴² *Id.* at 1489.

¹⁴³ *Id.* at 1488.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1487.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.*, EEOC v. Beauty Enterprises, Inc., No. 01-CV-378, 2005 WL 2764822, at *5 (D. Conn. Oct. 25, 2005) (following the Ninth Circuit and three out of five district courts in

English-only policies must carry the heavy burden of proving discrimination and overcoming the business justification defense. However, even if a court defers to the EEOC guidelines, the presumption of discrimination that the guidelines create may still give way to a legitimate business necessity.¹⁴⁹ Although defendants must offer a more persuasive business justification when courts defer to the EEOC guidelines, employers nonetheless have an escape route from the presumption of discrimination that the guidelines establish.

Scholars have come to acknowledge the inadequacy of Title VII for protecting workers from English-only policies. Cristina Rodriguez has recognized that Title VII is a “lamentable” legal framework for challenging English-only policies.¹⁵⁰ It is nearly impossible for an employee to prove that her employer enacted an English-only policy with the intent to discriminate. Employers can easily conjure a reasonable business justification for their English-only policies, and courts are loath to defer to EEOC guidelines. These defects render almost all challenges to English-only policies under Title VII unlikely to succeed.

Due to the weaknesses of Title VII’s protections against English-only policies, and to wavering deference to EEOC guidelines, scholars have called for amending Title VII to explicitly cover language discrimination.¹⁵¹ Others have called for recognition of language as a protected legal category like race or gender.¹⁵² The consensus is that the current legal regime is inadequate to protect employees from English-only policies.

IV. CHALLENGING ENGLISH-ONLY POLICIES UNDER THE NLRA

Section Seven of the NLRA provides employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

declining to give deference to the EEOC guidelines); *Velasquez v. Goldwater Memorial Hosp.*, 88 F. Supp. 2d 257, 262 & n.4 (S.D.N.Y. 2000); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (agreeing with Ninth Circuit that the EEOC guidelines must be disregarded); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 940 (E.D. Va. 1993). *But see* *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 911, 915 (N.D. Ill. 1999) (internal citation omitted) (“[T]he analysis by the panel majority (like the proverbial Emperor) is revealed to have no clothes when that analysis of the EEOC’s Guideline and its prima facie approach are subjected to careful scrutiny. For the reasons stated earlier, this Court credits the EEOC Guideline . . .”).

¹⁴⁹ 29 C.F.R. § 1606.7(b) (2010) (“An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.”).

¹⁵⁰ Rodriguez, *supra* note 9, at 1692.

¹⁵¹ *E.g.*, Lisa L. Behm, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 603 (1997); Paul K. Hentzen, *EEOC v. Synchro-Start Products: The New Face of Disparate Impact Challenges to English-Only Workplace Rules*, 69 U. MO. KAN. CITY L. REV. 439, 452 (2000).

¹⁵² *E.g.*, Cristina Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 136 (2001).

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”¹⁵³ The Supreme Court has interpreted the right to engage in concerted activity for mutual aid or protection as necessarily including the right to communicate effectively about self-organization at the workplace.¹⁵⁴ Under *Republic Aviation Corporation v. NLRB* and its progeny, employer policies that restrain employees’ right “effectively to communicate with one another regarding self-organization at the jobsite” are presumptively invalid.¹⁵⁵ An employer may overcome this presumption, however, by demonstrating “special circumstances” related to the maintenance of production and discipline at the worksite.¹⁵⁶

Because the Supreme Court has required that policies restricting employee communication at the workplace be no more intrusive towards Section Seven rights than necessary to achieve the employer’s legitimate interest in maintaining discipline and production,¹⁵⁷ courts have been less deferential to employer interests under the NLRA than in the Title VII business justification context. The National Labor Relations Board (“NLRB”) has found invalid no-solicitation policies that regulate nonworking hours, and federal courts have affirmed those findings. While rules that regulate “working time”—the period of time an employee spends on the jobsite performing work-related tasks—are lawful, rules regulating “working hours”—the period of time an employee spends on the jobsite generally, including breaks—

¹⁵³ 29 U.S.C. § 157 (2010).

¹⁵⁴ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (“The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as [s]he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.”).

¹⁵⁵ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

¹⁵⁶ *See id.* at 492; *Republic Aviation Corp.*, 324 U.S. at 797–98.

¹⁵⁷ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (“This is not a problem of always open or always closed doors for union organization on company property Accommodation between [organizational rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.”); *see also* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (clarifying *Babcock* by explaining that union access to workplaces is required only when “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them”) (quoting *Babcock*, 351 U.S. at 112).

violate Section Seven because a reasonable employee could interpret “working hours” to include nonworking time, i.e. lunchtime.¹⁵⁸

Circuit courts have also been attentive to this chilling effect, finding overbroad and invalid policies prohibiting solicitation “on the [c]ompany’s time,”¹⁵⁹ “during company working hours,”¹⁶⁰ or during “paid working hours.”¹⁶¹ No-solicitation rules that reach nonwork rooms traditionally used during working hours—such as break rooms, restrooms, or lunchrooms—are presumptively invalid because, “[a]bsent special circumstances, time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as [s]he wishes without unreasonable restraint, even though the employee is on company property.”¹⁶² Section Seven of the NLRA thus recognizes that the workplace is a unique site for organizing. Since all employees must report to the jobsite, coordination costs are low.

English-only policies, however, can interfere with the NLRA’s goals of facilitating employee organizing at the workplace. Communicating about union organizing may often require speaking a foreign language. For example, in a predominantly Latino workplace, it would be impossible to communicate effectively about the complexities of collective bargaining without the occasional lapse into Spanish. Without a clear understanding that the English-only policy is not in force during nonwork time, employees seeking to discuss terms and conditions of employment or engage in union organizing would likely be deterred from engaging in those protected activities. Accordingly, even an English-only policy in effect only during working hours can still have a chilling effect and interfere with the right to communicate that Section Seven protects.

Understood in this way, the Section Seven right reaches the same employer conduct that the EEOC guidelines prohibit. Just as the EEOC guidelines render presumptively invalid English-only policies that apply at all times in the workplace, Section Seven renders presumptively invalid no-solicitation policies that apply at all times in the workplace. However, unlike the EEOC guidelines, the Section Seven right to communicate in the workplace derives authority from the Supreme Court’s adoption of well-established NLRB precedent regarding no-solicitation policies. The NLRA, therefore, provides more certain protection against English-only policies than Title VII.

¹⁵⁸ *BJ’s Wholesale Club*, 297 N.L.R.B. 611, 615 (1990); *see Essex Int’l Inc.*, 211 N.L.R.B. 749, 750 (1974), *overruled on other grounds by NLRB v. Trailways, Inc.*, 729 F.2d 1013 (5th Cir. 1984).

¹⁵⁹ *Fla. Steel Corp. v. NLRB*, 529 F.2d 1225, 1230 (5th Cir. 1976).

¹⁶⁰ *Campbell Soup Co. v. NLRB*, 380 F.2d 372, 372 (5th Cir. 1967) (per curiam).

¹⁶¹ *NLRB v. Daylin Inc.*, 496 F.2d 484, 486 (6th Cir. 1974).

¹⁶² *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249 (5th Cir. 1992) (invalidating a no-solicitation rule prohibiting solicitation during break times in smoking areas and restrooms).

Even when courts do defer to the EEOC guidelines, employers can easily rebut a *prima facie* case of national origin discrimination by offering a reasonable business justification. The employer need not demonstrate that the policy is necessary to effectuate the business interest, but must only provide some logical link between the two. The employee retains the burden of persuading the court that the policy is not justified by business necessity. None of these obstacles exist under Section Seven of the NLRA.

A. *Rigorous Business Justification Analysis*

Although employers can overcome the *Republic Aviation* presumptions by demonstrating that a no-solicitation policy effectuates an interest in maintaining production or discipline, this analysis is much less deferential than the business justification analysis under Title VII. The Supreme Court has established a sort of strict scrutiny¹⁶³ for no-solicitation rules that violate the *Republic Aviation* presumptions: (i) A rule must be necessary to the maintenance of production or discipline, and (ii) it must be no more restrictive than necessary to achieve that legitimate interest.¹⁶⁴ This stringent inquiry renders an employer far less likely to succeed in establishing “special circumstances” justifying a broad English-only rule than the employer would be in offering a reasonable business justification for the rule under Title VII.

The requirement that a restriction on employee communication during nonworking hours be “necessary to maintain production or discipline”¹⁶⁵ facilitates challenges to policies that interfere with the Section Seven right. In sales establishments and public restaurants, for example, it is lawful to prohibit solicitation on the selling floor because of a legitimate interest in preventing sales interruptions.¹⁶⁶ However, the presence of customers alone is not dispositive. Prohibitions on solicitation in cafeterias that serve both employees and customers have been held unlawful, “despite the fact that the area is a sales area,” because cafeterias are sites where employees most commonly congregate—and thus sites where they would most commonly discuss employment conditions—while at the workplace and on break.¹⁶⁷

The hospital cases demonstrate how rigorously business justification analysis is applied under the NLRA. Even in the special circumstances pre-

¹⁶³ Of course, the Supreme Court has not described the test as “strict scrutiny,” but the analysis remains remarkably similar to that of restrictions on protected speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (applying strict scrutiny to laws criminalizing flag burning).

¹⁶⁴ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 510 (1978) (Powell, J., concurring) (explaining *Republic Aviation* presumptions).

¹⁶⁵ *NLRB v. Babcock Wilcox Co.*, 351 U.S. 105, 113 (1956).

¹⁶⁶ *Beth Israel Hosp.*, 437 U.S. at 506; *see, e.g.*, *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 (6th Cir. 1965) (upholding no-solicitation rule during nonworking hours on selling floor); *NLRB v. May Dept. Stores Co.*, 154 F.2d 533, 536–37 (8th Cir. 1946) (upholding no-solicitation rule in a retail store in the presence of customers).

¹⁶⁷ *See, e.g.*, *Marriott Corp. (Children’s Inn)*, 223 N.L.R.B. 978, 981 (1976).

sent in hospitals—such as the requirement that they provide a calm, restful environment for recuperating patients—no-solicitation policies must nonetheless be narrowly tailored so as not to infringe unduly upon workers’ Section Seven right to communicate at the workplace. Thus, in *St. John’s Hospital and School of Nursing, Inc.*,¹⁶⁸ the NLRB found that maintaining a “tranquil atmosphere” is essential to the patient-care function hospitals provide.¹⁶⁹ Accordingly, it determined that hospitals warrant “more stringent prohibitions on solicitation” and can lawfully prohibit solicitation, even during nonworking time, in “strictly patient care areas.”¹⁷⁰ Those areas include “the patients’ rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas.”¹⁷¹

In a similar case, however—despite the weighty interest in patient care—the Supreme Court affirmed the invalidation of a no-solicitation rule¹⁷² that prohibited solicitation and distribution of literature in any areas that patients could access.¹⁷³ Prohibiting union solicitation beyond strictly patient care areas in “lobbies, [the] cafeteria and coffee shop, corridors, elevators, [and the] gift shop” constituted an unlawful employment practice in violation of Section Seven.¹⁷⁴

Whereas Title VII places the burden on an employee to disprove a business justification, the NLRA places the burden on an employer to prove the necessity of a rule restricting the Section Seven right to communicate effectively at the workplace.¹⁷⁵ If an employee demonstrates that her employer’s policy actually restricts, or could reasonably be interpreted to restrict, effective communication at the workplace between employees during nonworking hours, the *Republic Aviation* presumption then places the burden on the employer to demonstrate that the policy is necessary to a production or disciplinary interest.¹⁷⁶

¹⁶⁸ 222 N.L.R.B. 1150 (1976).

¹⁶⁹ *Id.* This trend has persisted in modern cases. See, e.g., *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 346 (D.C. Cir. 2003).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² The policy provided as follows:

There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B. I. employees may be done by other B. I. employees, when neither individual is on his or her working time, in employee-only areas—employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital including patient-care and all other work areas, and areas open to the public such as lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no-solicitation nor distribution of literature.

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 487 (1978).

¹⁷³ *Id.* at 507–08.

¹⁷⁴ *Id.* at 508.

¹⁷⁵ See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781 (1979) (“The Board’s presumption, of course, does no more than place on the Hospital the burden of proving, with respect to areas to which it applies, that union solicitation may adversely affect patients.”).

¹⁷⁶ *Id.*

When an employer offers evidence of a legitimate interest justifying its rule, it remains in the NLRB's discretion to assess whether the evidence supports the employer's purported interest.¹⁷⁷ For example, when a hospital offered uncontroverted testimony from administrators that solicitation in non-patient care areas disrupted patient recovery by giving patients and their families the psychologically disquieting idea that hospital staff had let their minds wander beyond the patients' interests, the Board nonetheless found the no-solicitation policy valid only as it pertains strictly to patient care areas.¹⁷⁸ As the Court later explained, those patients well enough to go beyond strictly patient care areas could withstand overhearing a discussion of terms and conditions of employment.¹⁷⁹ The employer had failed to prove that the policy was necessary outside the strictly patient care areas.

B. Using the NLRA to Re-Examine Challenges to English-Only Policies

Aside from the effects English-only policies have on collective efficacy and organization, they can function as no-solicitation rules when the workplace contains employees who do not speak English or do not speak English well enough to communicate about joining a union. English-only rules, by definition, restrict the ability of non-English-speaking employees to communicate with one another at the workplace. These policies therefore hinder union organizing by stifling discussion of terms and conditions of employment. Challenges to English-only policies brought under the NLRA would benefit from the *Republic Aviation* presumptions, which could invalidate many of the English-only policies considered under Title VII.

Policies that reach beyond working hours, like the policy in *Premier Operator Services* restricting the use of foreign languages during breaks and lunchtime, are presumptively invalid under the *Republic Aviation* rule because they violate the principle that "working time is for work . . . [and] time spent outside working hours . . . is an employee's time to use as [s]he wishes without unreasonable restraint."¹⁸⁰ Similarly, a policy like the one challenged in *EEOC v. Beauty Enterprises, Inc.*,¹⁸¹ which required that all employees speak only English while in the warehouse, would be unlawful.¹⁸² The plaintiffs challenged the policy, alleging that it was applied in an "abusive, hostile, and humiliating manner"; that the employer most frequently enforced it against Hispanic employees; and that it denied the many monolingual foreign language speakers that the company employed the "opportu-

¹⁷⁷ *See id.*

¹⁷⁸ *Id.* at 783.

¹⁷⁹ *Id.* at 786–87.

¹⁸⁰ *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (quoting Payton Packing Co., 49 N.L.R.B. 828, 843–44 (1943)).

¹⁸¹ *EEOC v. Beauty Enterprises, Inc.*, No. 01-CV-378, 2005 WL 2764822, at *1 (D. Conn. Oct. 25, 2005).

¹⁸² *Id.*

nity to talk at work for either business or social purposes.”¹⁸³ The employer responded by explaining that “it ha[d] not extended a privilege to its employees to engage in social conversations or small talk while they are on the clock, and that its employees have little time while they are at work to engage in nonwork-related conversation.”¹⁸⁴ The *Republic Aviation* presumptions explicitly reject this line of argument: An employer need not grant employees the right to communicate with each other during nonwork time at the workplace because the NLRA already conveys that right.

Policies like those in *Gloor* that prohibit employees from speaking Spanish “on the job”¹⁸⁵ would also likely be invalid under the NLRA. Like the no-solicitation rules confronted by the Fifth and Sixth Circuits that prohibited “on the job” solicitation without specifying that “on the job” excluded lunch time and breaks, English-only policies that are reasonably understood as effective at all times at the workplace violate the Section Seven right to communicate with coworkers at one’s place of employment.

C. Remedies Under the NLRA

The “Achilles’ heel” of the NLRA is its inadequate remedies.¹⁸⁶ Section Ten of the NLRA provides the NLRB broad remedial power to issue cease-and-desist orders in response to unfair labor practices “and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.”¹⁸⁷ However, the Supreme Court has consistently limited those remedies. In *Consolidated Edison v. NLRB*,¹⁸⁸ the Court interpreted the Board’s authority to issue remedies under Section Ten as “remedial, not punitive.”¹⁸⁹ Accordingly, any remedy must aim to “restrain violations . . . as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.”¹⁹⁰ Even if the best way to effectuate the policies of the Act would be to order punitive damages, the Court has precluded such a remedy, finding that “this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose.”¹⁹¹

“[E]mployees’ section 7 rights are notoriously underenforced”¹⁹² because NLRA remedies are limited to cease-and-desist orders, posting notice

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980); *see also Saucedo v. Brothers Well Serv. Inc.*, 464 F. Supp. 919, 921 (S.D. Tex. 1979).

¹⁸⁶ Estlund, *supra* note 28, at 1554.

¹⁸⁷ 29 U.S.C. § 160(c) (2006).

¹⁸⁸ 305 U.S. 197 (1938).

¹⁸⁹ *Id.* at 236.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 235–36.

¹⁹² Estlund, *supra* note 28, at 1554.

of statutory rights, reinstatement, compensatory back pay, contempt sanctions, and bargaining orders.¹⁹³ Cease-and-desist orders allow the NLRB to direct an employer not to commit the same unfair labor practice again, but alone they cannot serve as a deterrent.¹⁹⁴ Notice remedies are designed to make employees “individually aware of [their] statutory rights and that [their] exercise of such rights will be respected.”¹⁹⁵ However, they neither compensate employees for violations of their Section Seven rights nor deter future violations.¹⁹⁶ Reinstatement remedies can compensate employees for violations, but “chronic delay” in NLRB bureaucratic processes can render this remedy ineffectual.¹⁹⁷ This long delay in reinstatement can work a “chilling effect . . . on the group impulse toward collective bargaining,” which allows employers to succeed in undermining union organizing drives.¹⁹⁸

Back pay orders suffer from similar delays and are often “seen as a minor cost of doing business by an employer committed to avoiding unionization.”¹⁹⁹ Moreover, paying back pay can be economically efficient given that disrupting a union organizing drive can allow an employer to avoid wage increases that will cost more than the eventual back pay order.²⁰⁰ The back pay order is typically small because employees have a duty to mitigate damages by seeking other employment; the wages earned from the substitute employment are then subtracted from the wages due the wrongfully discharged employee.²⁰¹ The mitigation requirement “removes most of the deterrent effect that a back pay award” can have on future violations.²⁰² Contempt sanctions are “a powerful weapon,” but courts issue them only infrequently, because “good faith” compliance with an order has been permissively interpreted.²⁰³

Bargaining orders provide a promising remedy for NLRA violations during an organizing drive. When “the employer has committed unfair labor practices so serious that they render a fair and free election impossible, the Board may order the employer to bargain with the union even though the union has not won a secret ballot election.”²⁰⁴ This remedy “is specifically designed to repair the harm done to the group rights promised by section 7

¹⁹³ Worster, *supra* note 21, at 1078–88.

¹⁹⁴ *Id.* at 1078.

¹⁹⁵ Three Sisters Sportswear, 312 N.L.R.B. 853, 880 (1993).

¹⁹⁶ Worster, *supra* note 21, at 1077–78.

¹⁹⁷ See Estlund, *supra* note 28, at 1567.

¹⁹⁸ Weiler, *supra* note 45, at 1793.

¹⁹⁹ Estlund, *supra* note 28, at 1537.

²⁰⁰ James Gray Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 MICH. L. REV. 518, 534 (2004).

²⁰¹ Weiler, *supra* note 45, at 1789.

²⁰² *Id.* at 1790.

²⁰³ Worster, *supra* note 21, at 1087.

²⁰⁴ Weiler, *supra* note 45, at 1793; see generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

of the NLRA.”²⁰⁵ It vindicates Section Seven rights by appointing a union bargaining representative for employees with whom the employer is obligated to bargain. A bargaining order can deter future violations by employers seeking to avoid a unionized workplace.²⁰⁶

While the availability of punitive damages and a private right of action under Title VII tend to make it a more appealing avenue for combating workplace mistreatment than the NLRA, any advantage of litigating under Title VII is of course illusory if an employee cannot prove her claim. Moreover, punitive damages may not deter discriminatory employer actions because courts rarely order them—even when a trier of fact has determined that the employer violated Title VII.²⁰⁷ Although perhaps not as effective as punitive damages as a deterrent, the remedies available under the NLRA could compensate the aggrieved employees with back pay, remove the English-only policy pursuant to a cease-and-desist order, and require that the employer engage in collective bargaining with the employees.

An order requiring the employer to engage in collective bargaining may allow employees to improve their terms and conditions of employment generally.²⁰⁸ To merit a bargaining order, the employer’s unfair labor practices must be “so serious that they render a fair and free election impossible.”²⁰⁹ Because of this restrictive language, the NLRB will not issue a bargaining order if it determines that a free election remained possible despite the alleged unfair labor practices. The issuance of a bargaining order is, therefore, far from guaranteed. However, the deprivation of the ability to communicate with one’s fellow employees at the workplace should merit such an order because communication lies at the very core of the organizing process envisioned in the NLRA. If an English-only policy prevents discussion of union organizing altogether because, for example, the employees uniformly do not speak English, then a bargaining order may be the only appropriate remedy. The bargaining order would have the further benefit of allowing employees to achieve changes in their workplaces that otherwise would be impossible, while simultaneously eliminating a discriminatory workplace policy.

V. CONCLUSION

English-only policies have long been the subject of litigation under Title VII, but the history of that litigation demonstrates the weaknesses of Title

²⁰⁵ Weiler, *supra* note 45, at 1793.

²⁰⁶ *See id.* at 1794.

²⁰⁷ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350–51 (2003) (“[P]unitive damages are awarded in a relatively small percentage of all civil trial cases (both jury and bench).”).

²⁰⁸ Employers are required to bargain pursuant to a *Gissel* bargaining order, but they are not required to make any concessions. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

²⁰⁹ NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 575 (1969).

VII challenges. Employees seeking to challenge English-only policies should focus on new protections and new avenues for litigation. The NLRA's protections of workplace communication provide a new framework for challenging English-only policies. By building upon the recognized right to communicate at the workplace, employees challenging English-only policies under the NLRA benefit from the strong doctrinal support for a robust workplace communication right.

Admittedly, importing that doctrine into the context of English-only policies may generate some resistance; however, even in the event that the failures of the NLRA render challenges to English-only policies ineffectual, pursuing such challenges may nonetheless effectuate worker solidarity and promote collective bargaining.²¹⁰ Challenging English-only policies will require workers to organize around racial or national identities, which can breed solidarity.²¹¹ Organizing around narrow goals, moreover, can foster a group ethic that encourages workers to attempt to achieve broader goals as a group.²¹²

Although the benefits of organizing around opposition to an English-only policy will be most pronounced in workplaces consisting primarily of non-English speakers, even a heterogeneous workplace with both English and foreign language speakers could benefit from such organizing. By empowering the foreign language speakers and granting them a concession by opposing an English-only policy, English speakers can strengthen their union organizing effort. Concerted efforts to improve terms and conditions of employment allow employees to pool their resources and pursue various strategies to achieve their goals, therefore enhancing their efficacy and, in turn, increasing their level of effort and providing better outcomes.²¹³ Organizing around opposition to an English-only policy can increase the number of workers with a vested interest in the success of union organizing. NLRA challenges to English-only policies can therefore help workers achieve both the narrow goal of eliminating a discriminatory workplace policy and the broad goal of building a wellspring of support for labor organizing.

²¹⁰ See Estlund, *supra* note 28, at 1534.

²¹¹ See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2729 (2008).

²¹² See *id.*

²¹³ See Bandura, *supra* note 44, at 143.

