

NLWJC- Kagan

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English only

THE WHITE HOUSE
WASHINGTON

Jack + Katly -

I assume you have this.

But here's a copy just in case you don't.

My own view is that

(1) you are right and Walter is wrong;

(2) you should let Walter know you still think he's wrong; but

(3) you should let Walter have his way. →

Let me know if you want to talk.

Elena

No. 95-974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH, ET AL., PETITIONERS

v.

STATE OF ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether petitioners have standing under Article III to pursue appellate review.

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INTEREST OF THE UNITED STATES

The United States has an interest in ensuring that disputes over the constitutionality of state and federal laws are resolved by federal courts only when they are presented in the context of an Article III "case" or "controversy." The United States has a particular interest in ensuring that, when the government declines to appeal a judgment that prevents the government from enforcing one of its laws, private individuals without Article III standing are not permitted to appeal. The resolution of the question whether petitioners have standing to seek appellate review implicates those interests.

STATEMENT

1. Article XXVIII of the Arizona Constitution declares English to be the "official language" of Arizona and "the language of * * * all government functions and actions." Ariz. Const. art. XXVIII, § 1(1)-(2). It further provides that, with certain specified exceptions, "this State and all political subdivisions of this State shall act in English and in no other language." Id. §§ 1(3)(a), 3(1)(a). The duty to "act in English" applies to "the legislative, executive, and judicial branches of government," and to "all government officials and employees during the performance of government business." Id. § 1(3). Article XXVIII contains exceptions that permit languages other than English to be used: (1) to assist students who are not proficient in English to the extent required by federal law; (2) to comply with other federal laws; (3) to teach foreign languages; (4) to protect public health or safety; and (5) to protect the rights of criminal defendants or victims of crime. Id. § 3(2). Article XXVIII also vests any person who resides in or does business in Arizona with standing to bring suit in state court to enforce Article XXVIII. Id. § 4. Article XXVIII was adopted by Arizona voters in November 1988 through a ballot initiative. Pet. App. 4a, 97a; see generally Ariz. Const. Art. IV, § 1 (initiative and referendum); Ariz. Rev. Stat. 19-101 et seq. (same).

At the time that Article XXVIII was adopted, respondent Maria-Kelley Yniguez was employed by Arizona to process medical

malpractice claims asserted against the State. Pet. App. 5a. In the course of her official duties, Yniguez spoke Spanish to claimants who spoke only Spanish and Spanish and English to claimants who were bilingual. Ibid. Believing that she could be disciplined for such conduct on the basis of Article XXVIII, Yniguez ceased speaking Spanish. Ibid. Yniguez then filed suit in federal district court under 42 U.S.C. 1983 against the State of Arizona, its Governor, its Attorney General, and its Director of Administration. Yniguez claimed that Article XXVIII is facially invalid under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. Pet. App. 5a-6a, 97a. She requested a declaratory judgment, an injunction, and "all other relief that the Court deems just and proper." Id. at 6a, 95a n.1.¹

In February 1990, the district court dismissed all defendants other than the Governor. It dismissed the State of Arizona on Eleventh Amendment grounds; it dismissed the Attorney General on the ground that he had no authority to enforce Article XXVIII against Yniguez; and it dismissed the Director of Administration on the ground that she had not threatened to enforce Article XXVIII against Yniguez. Pet. App. 100a-104a. The court determined that there was an Article III case or controversy between Yniguez and the Governor, because the

¹ A State legislator, Jaime Gutierrez, subsequently joined Yniguez as a plaintiff. The district court dismissed Gutierrez (Pet. App. 112a), and he did not pursue an appeal.

Governor had stated that she expected all civil service employees to comply with Article XXVIII, and because, under Yniguez's interpretation of Article XXVIII, disciplinary sanctions could be imposed against Yniguez if she continued to speak Spanish during the course of her official duties. Id. at 102a-103a.

The court then held that Article XXVIII is facially invalid under the First Amendment. Pet. App. 105a-109a. The court granted Yniguez's request for declaratory relief, but denied her request for an injunction. Id. at 111a-113a. The Governor decided not to appeal.

2. Petitioners Arizonans for Official English (AOE) and Robert D. Park then moved to intervene as defendants in order to pursue an appeal. J.A. 142. AOE is an association that sponsored the ballot initiative that led to the adoption of Article XXVIII; Park is AOE's chairman. Ibid. The Attorney General of Arizona also sought to intervene in order to appeal. Id. at 141. In April 1990, the district court denied the motions to intervene. J.A. 138-149.

In July 1991, the Ninth Circuit reversed the denial of petitioners' intervention motion, J.A. 157-184, holding that AOE and Park had standing under Article III to appeal the district court's declaratory judgment. Id. at 162-171. With respect to AOE, the court reasoned that state legislatures have standing to defend the constitutionality of state statutes and that AOE, as "the principal sponsor" of Article XXVIII, "stands in an analogous position to a state legislature." Id. at 166-167. With respect to

Park, the court reasoned that Park could sue Yniguez in state court under Section 4 of Article XXVIII, and that the likelihood that he would do so was sufficiently great to create a live controversy between Park and Yniguez for Article III purposes. Id. at 169-171.

The court of appeals also held that the district court had correctly refused to permit the Attorney General to reenter the case as a party. The court determined that, because the Attorney General had succeeded in having the case against him dismissed, he was estopped from reentering the case as a party. J.A. 179-181. The court nonetheless permitted the Attorney General to intervene in petitioners' appeal for the limited purpose of arguing in support of the constitutionality of Article XXVIII. Id. at 181-183.

3. Following the court of appeals' decision on intervention, the State notified the court that Yniguez had left her State job in April 1990, and it suggested that the case might therefore be moot. J.A. 187. The court of appeals held that the change in Yniguez's status did not render the case moot, because Yniguez could pursue a claim against the Governor for nominal damages. Pet. App. 94a-95a. Although Yniguez had not expressly requested nominal damages in her complaint, the court concluded that her request for "all other relief that the [District] Court deems just and proper" was sufficient. Id. at 95a. Yniguez had not appealed from the district court judgment insofar as it failed to award nominal damages, but the court of appeals ruled that petitioners had to file another notice of appeal and that Yniguez could file a timely

cross-appeal within 14 days thereafter. Ibid. In December 1992, petitioners filed a notice of appeal from the district court's declaratory judgment and Yniguez filed a cross-appeal regarding nominal damages.²

4. In December 1994, a panel of the Ninth Circuit affirmed the district court's declaratory judgment and reversed the district court's failure to award Yniguez nominal damages. Yniguez v. Arizonans for Official English, 43 F.3d 1217 (9th Cir. 1995). The court of appeals agreed to rehear the case en banc. Pet. App. 4a. In October 1995, the en banc court of appeals reinstated the panel opinion with minor alterations. Ibid. By a 6-5 vote, the en banc court held that Article XXVIII is facially unconstitutional because it violates the First Amendment rights of state employees. Id. at 21a-59a.

SUMMARY OF ARGUMENT

[To be added]

² During the pendency of the appeal, the court of appeals granted a motion by respondents Arizonans against Constitutional Tampering (ACT) and its chairman, respondent Thomas Espinosa, to intervene as appellees in support of Yniguez. Pet. App. 10a-11a. ACT was the principal opponent of the ballot initiative. Ibid. The court of appeals did not reach the question whether ACT and Espinosa have standing under Article III to defend the district court's award of declaratory relief to Yniguez. Id. at 11a.

ARGUMENT

PETITIONERS DO NOT HAVE STANDING TO PURSUE APPELLATE REVIEW

A. Private Individuals Do Not Have Standing To Seek Appellate Review Of A Judgment Whose Sole Effect Is To Prevent A State From Enforcing One Of Its Laws Against Another Person

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies." One aspect of the case or controversy requirement is that a party who invokes the jurisdiction of a federal court must have standing to sue. Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 663 (1993). To establish Article III standing, a party must show "as an 'irreducible minimum' that there [is] (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996) (Local 751). The injury in fact requirement refers to "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A generalized interest in the proper application of the Constitution and laws does not satisfy the injury in fact requirement. Id. at 573-576.

The requirement that a party who invokes the court's jurisdiction must have Article III standing applies to those who seek appellate review as well as those who initiate litigation. Diamond v. Charles, 476 U.S. 54, 62 (1986). "[T]he decision to seek appellate review, like the decision to initiate litigation

["must be placed in the hands of those who have a direct stake in the outcome.) * * * It is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" Ibid. Because the decisions below do not invade any "legally protected interest" held by petitioners, they do not have Article III standing to seek appellate review of those decisions.

The district court issued a declaratory judgment that Article XXVIII of the Arizona Constitution violates the First Amendment, and that judgment runs solely in favor of Yniguez and solely against the Governor of Arizona. Because Yniguez did not obtain class certification, and because the Governor of Arizona was the only defendant, the sole effect of the district court's judgment is to prevent the State of Arizona from enforcing Article XXVIII against Yniguez. The State had standing to seek appellate review of the judgment. Diamond, 476 U.S. at 62. But the State through its Governor decided not to appeal. The State also did not seek review of the court of appeals' decision affirming the district court's declaratory judgment. Private parties do not have standing to supplant a State's deliberate decision not to appeal from a judgment, when the sole effect of that judgment is to prevent the State from enforcing one of its laws against another person. Id. at 64-65.³

³ After the Governor declined to appeal the district court's decision, the State's Attorney General sought to intervene as a party in order to appeal. The district court denied intervention, the court of appeals affirmed the denial, except that it permitted the Attorney General to intervene as a non-party in petitioners'

This Court's decision in Diamond is controlling on that point. In that case, physicians brought suit against Illinois state officials to enjoin a State law governing abortions. After defending the law in the district court and the court of appeals, the State failed to appeal to this Court, and a private physician opposed to abortions who had intervened in the district court sought to appeal for the purpose of defending the law. The Court dismissed the appeal for lack of jurisdiction. The Court held that "an intervenor's right to continue a suit in the absence of the party on whose side intervention is permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III," id. at 63, and that the physician had failed to show that he had standing under Article III to appeal from the decision below. Id. at 63-68. The Court reasoned that "concerns for state autonomy" preclude private individuals from continuing litigation in defense of a state law after the State has decided not to appeal. Id. at 65. The Court concluded that "only the State has the kind of 'direct stake' identified in Sierra Club v. Martin, 405 U.S., at 740, in defending the standards embodied in a [legal] code." Diamond, 476 U.S. at 65.

The holding in Diamond is supported by strong practical and

appeal, and the Attorney General did not seek review of that ruling. Neither the State nor any state official sought review of the court of appeals' decision affirming the district court's judgment declaring Article XXVIII unconstitutional. Accordingly, for present purposes, it must be assumed that the State acquiesced in both the district court's judgment declaring Article XXVIII unconstitutional and the court of appeals' decision affirming that judgment.

institutional considerations. States are in the best position to decide whether there should be appellate review of a decision that prevents the State from enforcing one of its laws, and principles of federalism require that a federal court respect that decision. A State may have a wide variety of reasons for declining to appeal such a decision. For example, the decision might have a limited impact; the State might wish to await a case that presents the legal question in a more appealing factual context; or the decision might not interfere with a particular administration's enforcement priorities. See United States v. Mendoza, 464 U.S. 154, 160-162 (1984). Factors such as those could well have affected the Governor's decision not to seek appellate review in this case. The decision applies to only a single individual, and Arizona's Attorney General has interpreted Article XXVIII not to prevent individuals such as Yniguez from providing assistance to persons in a languages other than English "where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers." J.A. 71-72. In such circumstances, the State could reasonably decide that an appeal would not be in the State's interest. Private parties should not be permitted to override such decisions.

Consistent with the understanding of Article III set forth in Diamond, this Court has summarily rejected an effort by sponsors of a ballot initiative to appeal from a court of appeals decision holding the initiative unconstitutional. The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust

Co., 460 U.S. 1077 (1983). In that case, the court of appeals held that an initiative that interfered with the State's contractual obligation to finance three nuclear power plants violated the Contract Clause. Continental Ill. Nat. Bank v. State of Wash., 696 F.2d 692 (9th Cir. 1983). The State defended the initiative in the district court and the court of appeals, but decided not to appeal from the court of appeals' decision. See Motion of Appellee the United States of America to Dismiss or Affirm, at 22-23, 26 (No. 82-1445). The sponsor of the initiative had intervened in the district court, and it sought to appeal the court of appeals' decision to this Court. This Court summarily dismissed the appeal for want of jurisdiction, "it appearing appellant lacks standing to bring this appeal." 460 U.S. at 1077.

The court of appeals in this case acknowledged the relevance of the analysis in Diamond, but concluded that "AOE's and Park's interest in Article XXVIII is qualitatively different from the physician's interest in the Illinois abortion law at issue in Diamond." J.A. 165. For reasons that follow, that conclusion is incorrect. There is no relevant distinction between this case and Diamond, and petitioners therefore lack standing to seek appellate review.

B. AOE Does Not Have Standing To Appeal Based On Legislative Standing, Representational Standing, Or Its Effort In Sponsoring The Initiative

1. The court of appeals permitted AOE to appeal from the district court's judgment by invoking the concept of "legislative standing." J.A. 165. The court concluded that a legislature has

standing to defend a statute it enacts. J.A. 165-167. It then reasoned that AOE occupies the same position with respect to Article XXVIII that a state legislature occupies with respect to a state statute. Ibid. That reasoning is seriously flawed.

a. To begin with, legislatures do not automatically have standing to defend the laws they enact. In the federal system, separation of powers principles would preclude Congress from appealing a decision holding a federal statute unconstitutional if the Executive branch decided not to appeal. See Lewis v. Casey, No. 94-1511, slip op. 8 n.3 (June 24, 1996) (standing doctrine "has a separation of powers component which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not"). The Constitution gives the President alone the responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, and that responsibility includes the authority to conduct litigation on behalf of the United States in the federal courts. Buckley v. Valeo, 424 U.S. 1, 138-139 (1976). The Constitution gives Congress only "legislative Powers," Art. 1, § 1, and the "power to seek judicial relief cannot possibly be regarded as merely in aid of the legislative function." Buckley, 424 U.S. at 138. Congress may, at times, disagree with an Executive branch decision not to appeal. Under the Constitution, however, it does not have authority to override such a decision. Just as Congress cannot overrule Executive action directly by means of a legislative veto, INS v. Chadha, 462 U.S. 919 (1983), Congress cannot accomplish the same result indirectly by invoking the

assistance of the federal courts to prosecute its disagreement with the Executive branch.

The question whether a state legislature has standing to appeal after the state's executive branch acquiesces in a decision holding a statute unconstitutional depends on how the State allocates power among its branches of government. See Dryer v. Illinois, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State"). In States that follow the federal model of separation of powers, the legislature would not have standing to appeal. For example, States commonly give their Attorney Generals exclusive authority to represent the State's interest in litigation. 7A C.J.S. § 11(c) (citing cases); see also Mountain States Legal Found. v. Costle, 630 F.2d 754, 771 (10th Cir. 1980). In such States, if the Attorney General acquiesces in a judicial decision holding a state law unconstitutional, a state legislature would not have standing to appeal. Only if State law authorizes the legislature to represent the State's interest in litigation would a legislature have standing to appeal. Karcher v. May, 484 U.S. 72, 82 (1987).

Thus, if AOE were analogized to a state legislature, it would have standing to appeal only if State law authorized it to represent the State's interest in litigation. Article XXVIII does

not itself authorize AOE to represent the State's interest in litigation challenging that provision. As petitioners note (Br. 46), Arizona law gives sponsors of ballot initiatives certain "specific rights and duties." But those rights and duties are confined to the initiative process itself, and they end as soon as that process comes to a close. See generally Ariz. Rev. Stat. 19-101 et seq. Petitioners have not cited any provision of Arizona law that authorizes the sponsor of an initiative to represent the State's interest in litigation challenging the initiative. For that reason, even assuming the court of appeals correctly analogized AOE to a state legislature, the court erred in concluding that AOE has standing to appeal in order to defend Article XXVIII.

b. In holding that a legislature automatically has standing to appeal when the executive branch declines to do so, the court of appeals relied (J.A. 165-166 & n.2) on this Court's decisions in Karcher, Coleman v. Miller, 307 U.S. 433 (1939), and INS v. Chadha, 462 U.S. 919, 940 (1983). Those decisions do not establish such a rule.

In Karcher, the President of the New Jersey Senate and the Speaker of the General Assembly intervened on behalf of the state legislature to defend a state statute against a constitutional challenge. This Court dismissed the two legislators' appeal, because they had lost their positions prior to the appeal and therefore ceased to be "parties" for purposes of the Court's jurisdiction under 28 U.S.C. 1254. 484 U.S. at 77-81. The Court

S. 4
elaborate
enough.

also held that the New Jersey legislature and the two legislators were proper parties in the court of appeals. Id. at 81-82. But that was because the New Jersey Supreme Court had authoritatively construed state law to authorize the state legislature and its leaders to represent the State's interest in court. Ibid. Karcher therefore does not hold that a state legislature always has a legally protected interest in defending the constitutionality of legislation that it has passed. Karcher stands for the more limited proposition that a state legislature has Article III standing to defend its laws when state law authorizes the legislature to represent the State's interest in court.

In Coleman, state legislators brought a mandamus action in state court to contest the participation of the State's Lieutenant Governor in a vote of the state senate on the ratification of a proposed amendment to the United States Constitution. 307 U.S. at 435-436.⁴ The Court held that the legislators had standing to appeal from an adverse decision by the Kansas Supreme Court because the legislators' interest "in maintaining the effectiveness of their votes" (id. at 438) had been "treated by the state court as a basis for entertaining a deciding the federal questions" (id. at 446). Coleman therefore holds only that state law may give a legislator an interest in the effectiveness of his vote within the

⁴ Article V of the Constitution provides that a constitutional amendment, duly proposed, shall be valid "when ratified by the Legislatures of three fourths of the several States." The state senators contended that, for purposes of Article V, the Lieutenant Governor should not be regarded as part of the state "Legislatur[e]."

legislative process that is sufficient to give this Court jurisdiction over an appeal from a state court decision that affects that interest. Coleman does not suggest that the legislators would have had standing to initiate litigation in federal court. Barnes v. Kline, 759 F.2d 21, 62-63 (D.C. Cir. 1986) (Bork, J., dissenting), vacated as moot, 470 U.S. 361 (1987). It does not suggest that a legislator's interest in an effective vote exists independent of state law. And it does not suggest that such an interest would be implicated in a case in which the vote on legislation is counted correctly, and the legislation is subsequently challenged on substantive constitutional grounds. Coleman is therefore inapposite here.

In Chadha, one House of Congress "vetoed" the suspension of an alien's deportation pursuant to a legislative veto statute. Although the INS agreed with the alien that the statute was unconstitutional, the INS nonetheless sought to comply with the statute by deporting the alien, and it appealed to this Court from a judgment that prohibited it from doing so. 462 U.S. at 929-931. Because the INS was seeking to deport the alien, there was a "case or controversy" under Article III between the INS and the alien. Id. at 939-940. The Court noted in Chadha that "Congress is the proper party to defend the validity of a statute when an agency of the government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." Id. at 940. That statement does not suggest, however, that Congress would have had authority to appeal if the Executive branch

had declined to do so. Rather, that statement simply means that, when there is already a case or controversy before the Court, and the Executive branch agrees with the other party that the statute is unconstitutional, Congress is the appropriate entity to offer a defense of the statute. This Court often invites someone to argue as amicus curiae in support of the judgment when the United States adopts the same view as its opposing party on an issue before the Court, even though the person invited to participate as amicus obviously would not have Article III standing to participate as a party. E.g. Ornelas v. United States, 116 S. Ct. 1657, 1661 n.4 (1996) (noting that a member of the bar of this Court had been invited to argue as amicus curiae in support of the judgment). Congress's role in Chadha is consistent with that practice.⁵

c. Even if it is assumed that legislatures always have Article III standing to defend the constitutionality of statutes, the Ninth Circuit's analogy between AOE and a legislature is misconceived. The fundamental attributes of a legislature are that its members are elected by the people and it is vested with the "authority to make laws." Buckley, 424 U.S. at 139 (quoting

⁵ The Court in Chadha cited two decisions as authority for Congress's role in that case. 462 U.S. at 940. Those decisions, Cheng Fan Kwok v. INS, 392 U.S. 206, 210 n.9 (1968), and United States v. Lovett, 328 U.S. 303, 304 (1946), support the understanding of Chadha discussed above. In Cheng Fan Kwok, the Court invited a member of the Bar of the Court to appear as amicus curiae in support of the judgment on a statutory issue after the INS aligned itself with the petitioner on the question before the Court. 392 U.S. at 210 n.9. In Lovett, the Solicitor General petitioned on behalf of the United States, but agreed with respondents that a federal statute was unconstitutional. 328 U.S. at 306. By special leave of Court, Congress appeared as amicus curiae to defend the statute. Id. at 304, 306.

Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)). AOE does not have either of those attributes.

AOE is an unincorporated association (Pet. i). AOE is not elected by the people, and the individual citizens who voted in favor of Article XXVIII in the referendum did not thereby select AOE to be their representative. Indeed, many supporters of the referendum might not have been supporters of AOE, and thus voted for the referendum despite their disapproval of AOE.

Although AOE proposed the initiative that led to the enactment of Article XXVIII, AOE itself did not enact the amendment, nor could it. Under the Arizona Constitution, the power to enact laws and constitutional amendments through the initiative process is vested in the people of Arizona. Ariz. Const. art. IV. Arizona voters, not AOE, enacted Article XXVIII by casting ballots at the polls. And the voters, not AOE, have the power to amend or repeal Article XXVIII in the future.

AOE's drafting of Article XXVIII does not warrant treating AOE like a legislature. Legislation is often drafted by legislative staff members or even lobbyists. The performance of that task cannot transform an unelected association without the power to enact laws into the functional equivalent of a legislature.⁶

⁶ Because AOE cannot vote, it also could not be analogized to an individual legislator. Moreover, even if a legislature has standing to defend the constitutionality of its enactments, individual legislators do not, for the interest that they would be asserting is one that belongs to the legislature as a collective body rather than to individual members. See Bender v. Williamsport Area School District, 475 U.S. 534, 544 (1986) (appellant's status

2. Relying on Local 751, AOE asserts (Br. 42-43) that it has "representational standing" to defend Article XXVIII on behalf of "the people of Arizona." Nothing in Local 751, however, suggests that AOE enjoys representational standing.

As Local 751 reaffirms, one requirement for representational standing is that the persons represented must have standing in their own right. 116 S. Ct. at 1534-1535. That requirement is not satisfied here. The only harm suffered by the people of Arizona as a result of the decisions below is the generalized one of not having one of the State's laws enforced. That generalized injury is insufficient to satisfy Article III. Lujan, 504 U.S. at 573-574. 2-477

Local 751 also makes clear that representational standing is confined to relationships "recognized either by common-law tradition or by statute" that "rebut the background presumption * * * that litigants may not assert the rights of absent third parties." 116 S. Ct. at 1536. AOE does not identify any "common-law tradition or * * * statute" that permits an unincorporated association to sue or be sued on behalf of the entire population of a State. AOE is effectively asserting a variation on parens patriae standing, and the right to act as parens patriae belongs exclusively to the State itself. See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1986).

as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.").

3. AOE also argues (Br. 46) that it has suffered concrete Article III injury because it devoted time and money to sponsoring the ballot initiative. The time and money that AOE devoted to the initiative effort were not incurred because of the decisions below, however, and they would not be recouped if those decisions were reversed. As a result, there is no "causal relationship" (Local 751, 116 S. Ct. at 1533) between the costs that AOE has incurred and the judicial decisions about which it complains.

4. AOE contends that, because state officials cannot be counted on to defend initiatives, the sponsors of the initiative should have standing to defend them. Pet. 42, 45. AOE does not cite any evidence, however, that state officials are less willing to defend initiatives than other state laws. Even if they were, however, it would not warrant assigning to private individuals or entities the task of representing the State's interests in court.

If persons within the State believe that responsible state officials have unwisely failed to appeal a decision, their remedy is a political one. "[O]ur system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow citizens that their elected representatives are delinquent in performing duties committed to them." United States v. Richardson, 418 U.S. 166, 179 (1974). The voters in Arizona are not without such a remedy here. See Ariz. Const. art. VIII, pt. 1 (any public official holding public office is subject to recall by the qualified electorate).

C. Park's Standing To Enforce Article XXVIII In State Court Does Not Give Him Standing To Seek Appellate Review In Federal Court

The court of appeals predicated Park's standing on Section 4 of Article XXVIII, which provides that any "person who resides in or does business in" Arizona "shall have standing to bring suit to enforce" Article XXVIII in state court. J.A. 169-171. The existence of Section 4, however, does not establish that the decisions below impose an injury in fact on Park.

States may create interests, the invasion of which create standing. Diamond, 476 U.S. at 65 n.17. In such cases, however, the requirements of Article III must still be met. Ibid. A State resident's generalized interest in the enforcement of a law is insufficient to satisfy Article III, and that interest cannot be converted into a particularized injury simply because state law denominates it as such. Lujan, 504 U.S. at 571-578. The provision conferring standing on Park to enforce Article XXVIII in state court therefore does not relieve him from the requirement of demonstrating that he would suffer personal and individualized harm from the decisions below. Ibid. Park has not made such a showing. In particular, he has not identified any way in which he would suffer personal harm if Yniguez were permitted to Speak spanish while working for the State.

In addition, as already discussed, the sole effect of the district court's judgment is to prevent the State from enforcing Article XXVIII against Yniguez. That judgment does not prevent Park from exercising his right under Section 4 to enforce Article

but
also

XXVIII in state court. In such a suit, the state courts would be free to exercise their own independent judgment concerning whether Article XXVIII satisfies constitutional standards; they would not be bound by the decisions below in this case. Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("state courts * * * possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decision that rest on their own interpretation of federal law"); Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992) (Supremacy Clause does not obligate state court to follow precedents of federal court of appeals regarding federal constitutional issues). Thus, the district court's decision in this case does not affect Park's right under Section 4 to enforce Article XXVIII in state court.

Finally, Yniguez's departure from her State job eliminated whatever controversy might otherwise have existed between her and Park by virtue of Section 4. Park could not "enforce" Article XXVIII by bringing suit against Yniguez under Section 4, because Yniguez could not violate Article XXVIII once she ceased to be a State employee.⁷

⁷ In holding Article XXVIII unconstitutional, the court of appeals focused primarily on its effect on non-English speaking members of the public. Pet. App. 41a-43a. As the court interpreted Article XXVIII, it significantly interferes with the ability of non-English speaking members of the public to communicate with and receive information from the government concerning services that the government provides. Ibid. If, contrary to the State Attorney General's interpretation (J.A. 61, 71-72), Article XXVIII were construed in that manner, it would raise serious constitutional concerns. Although the court of appeals analyzed the constitutionality of Article XXVIII under the First Amendment, the provision of the Constitution that would seem most directly to address the harm identified by the court of

CONCLUSION

For the reasons discussed, petitioners do not have standing to seek appellate review.

Respectfully submitted.

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Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
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JULY 1996

appeals is the Equal Protection Clause. See Romer v. Evans, 116 S. Ct. 1620 (1996); Rosenberger v. Rector and Visitors of University of Virginia, 115 S. Ct. 2510, 2518-2519 (1995) (In general, when the government is the speaker it may "say what it wishes," without violating the First Amendment); Houchins v. KOED, Inc., 438 U.S. 1, 14 (1978) (plurality opinion) (The First Amendment does not guarantee a right to receive information from the government). Because petitioners do not have standing, the constitutionality of Article XXVIII is not properly before the Court.

*Supports
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merits*

Political Briefing

THE STATES AND THE ISSUES

Strategy

Republicans Counter Gingrich Scare

Democrats are trying to turn Speaker Newt Gingrich into a scary symbol of the right, but who can be the counterpart symbol for the Republicans? Judging from some recent commercials and news releases, some Republicans are turning to their tried and true standard of liberalism: Senator Edward M. Kennedy of Massachusetts.

In Minnesota, for example, a recent commercial for the National Republican Senatorial Committee asserted that Senator Paul Wellstone "spends more money than Ted Kennedy."

The committee has also begun issuing a "Kennedy index" that ranks Democratic senators on the percentage of times they have voted with the Senator from Massachusetts.

And a new commercial by the Republican National Committee shows President Clinton and Mr. Kennedy as "liberal Democrats" blocking the "common-sense approach" to health care advanced by the Republicans.

Dan McLagan, a spokesman for the National Republican Senatorial Committee, said Mr. Kennedy remained a powerful symbol.

"Just the phrase — more liberal than Ted Kennedy — is powerful when it's true," Mr. McLagan said. "It's like saying richer than Bill Gates and tougher than Arnold Schwarzenegger."

Jeannie Kedas, a spokeswoman for Mr. Kennedy, countered, "They're running away from their record of slashing Medicare, slashing education and trashing the environment, and they'll try anything to change the subject."

Mr. Kennedy, by the way, is not on the ballot this year.

The South

Carolina Poll Reflects Dole's Challenge

A new measure of the challenge facing Bob Dole: A survey in North Carolina, considered something of a bellwether in the South, shows Mr. Dole with just a 2-point margin over President Clinton.

Other statewide polls, notably from California, have shown a substantial Clinton lead. But the North Carolina data may be particularly worrisome for Republicans, because the South is considered the party's base in amassing the 270 electoral votes necessary to win.

The poll, conducted last Thursday through Saturday by Mason-Dixon Political/Media Research, showed Mr. Dole with 46 percent of the vote to Mr. Clinton's 44 percent. Mr. Dole's lead had eroded 13 points since February, according to Mason-Dixon. The latest survey was based on interviews with 812 likely voters and had a margin of sampling error of plus or minus four percentage points.

Whit Ayres, a Republican pollster in Atlanta not connected to the Mason-Dixon poll, argued, "Any Southern states that George Bush won in 1992 ought to be the foundation for a Dole victory in 1996." (Mr. Bush, against an all-Southern Democratic ticket four years ago, carried the South except for Arkansas, Georgia, Louisiana and Tennessee.)

Mr. Ayres maintained that Mr. Dole could stabilize his Southern base easily enough, by naming a

Southern running mate. Coincidentally, the pollster's clients include former Gov. Carroll A. Campbell Jr. of South Carolina, one of the hotter names on the Vice-Presidential list at the moment, at least in the South.

Welfare

Wellstone Stands Alone in Voting

"Welfare Reform" has become a powerful political value, according to many strategists, ranking right up there with a strong defense and a hard-nosed attitude toward crime.

A case study came in the Senate this week when only 24 senators voted against the legislation that was promoted by its backers as a first step toward "reforming" the welfare system, although critics asserted it was punitive to poor children.

Only one of those 24 is running for re-election this year: Senator Paul Wellstone, Democrat of Minnesota, who faces a fierce challenge from the man he defeated six years ago, Rudy Boschwitz.

Mr. Wellstone was already under heavy fire on the welfare issue from his Republican opponents, who had unleashed a wave of angry commercials and press releases on his welfare stand and even erected a billboard across from his Minnesota campaign headquarters, denouncing him as "Senator Welfare."

After the vote, the Boschwitz campaign declared that Mr. Wellstone had "missed the boat on the most comprehensive and reasonable welfare reform bill of a generation."

John Ulliot, a Boschwitz campaign spokesman, said that the vote would "absolutely" hurt the Democratic candidate and asserted, "He's way to the left of President Clinton on this."

Robert Greenstein, director of the Center on Budget and Policy Priorities, a liberal research and advocacy group, said of Mr. Wellstone's vote, "It's this year's outstanding profile in courage." **ROBIN TONER**

House Panel Approves Bill Making English Official Language

By ERIC SCHMITT

WASHINGTON, July 24 — A House committee narrowly approved a bill today making English the official language of the United States.

Republicans and Democrats, in five hours of sharply partisan debate, agreed that English is already the principal language of government, commerce and everyday life in this nation. But they were widely divided on whether to codify that fact in law and, more deeply, over what cultural, moral and language traits defined what it means to be an American.

Republicans, at a hearing of the House Economic and Educational Opportunities Committee, said their bill would halt a worrisome trend toward creating "language ghettos" that are leaving immigrants unprepared for the job market and forcing the Government to accommodate non-English speakers with documents, services and bilingual classes in several other languages.

"I do not want to see the country become ethnic enclaves," said Representative Marge Roukema, a New Jersey Republican.

But Democrats said the bill was unnecessary, unconstitutional and racist. "This is just a guise for a bill that's built on bias and bigotry," said Representative Matthew G. Martinez, a California Democrat.

The vote to send the bill to the House floor, where it will probably be considered in September, was 19 to 17, along party lines. A similar bill is pending in a Senate committee.

The Clinton Administration strongly opposes the bill, which is the latest effort in a decade-long campaign by English-only proponents to declare English the sole language used to make policy and to curb the spread of bilingual education and bilingual ballots. Bob Dole, the apparent Republican Presidential nominee, has supported the idea of making English the country's official language, although it has not yet

become a major campaign issue.

As written, the bill seeks to "help immigrants better assimilate" and "empower" them with new language and literacy skills.

"There are an increasing number of people who can't compete because they don't read, write or speak English," said Representative Randy Cunningham, a California Republican.

But when challenged to document this increase, Mr. Cunningham acknowledged that his assertion was largely based on anecdotal evidence from canvassing people in his district near San Diego.

To attract support from moderate Republicans, the bill's sponsors did not try to eliminate financing for bilingual education. The bill's definition of official business that must be conducted in English also exempts language instruction and documents or policies necessary for national security, public health and safety.

Proponents of the bill say accommodating non-English speakers is costly. In 1994, for example, the Internal Revenue Service printed and distributed 500,000 income-tax forms in Spanish at a cost of \$113,000. Only

718 of the forms were returned.

"America is a diverse country, but when we conduct business it should be in English," said Representative Lindsey Graham, Republican of South Carolina.

But critics of the bill said more than 97 percent of Americans already speak English well, and that 99 percent of all Government documents are published in English. Moreover, Democrats said, the most pressing need is not a English-language law, but more English classes for immigrants. English classes in community colleges in Los Angeles are filled 24 hours a day, and the waiting list for some English classes in New York City is as long as three years, legislators said.

Dueling facts aside, the most impassioned debate focused on what the English language means to this nation of immigrants.

"English language is an important glue for our society," said Representative Tim Hutchinson, Republican of Arkansas.

But many Democrats said there is much more to the United States than a common language. "What binds us together in this country is our freedoms and ideals," said Representative Gene Green, Democrat of Texas. "It's more than a language that makes us American."

THE NEW YORK TIMES

THURSDAY, JULY 25, 1996

By LESLIE WAYNE

WASHINGTON — There was little fanfare this spring when a coalition of liberal and conservative lawmakers unveiled their plan to save the nation's capital with drastic cuts in Federal taxes for all District of Columbia residents.

But by the time Speaker Newt Gingrich took up the cause this month, promoting it in Congress and on television talk shows, new attention had started focusing on how to solve Washington's complicated financial crisis.

"We're looking very seriously at a very dramatic tax change for the city of Washington," Mr. Gingrich said at a forum of Congressional Republicans this week, adding that this measure is "to create an incentive for people to move back into the city."

The cuts, first proposed by Eleanor Holmes Norton, the District's nonvoting Congressional delegate and a Democrat, would put a 15 percent ceiling on Federal taxes paid by city residents to entice the middle class to stay put while Washington digs out of its financial ruin.

"This idea of a flat tax is to keep taxpayers in town. It is not to give D.C. residents a bonus or something to feel good about," she said, adding a now-familiar warning. "This is the capital of the United States. Congress cannot walk away."

While economists disagree about the tax, it is one more sign that business executives, city officials, the Clinton Administration, Congress and ordinary citizens realize the nation's capital needs a new economic plan that works and, discussions have begun about a possible change in its form of government.

To cure what ails the District will require huge cuts in the city's budget and work force, new and different ways to generate more revenue, and proof to Wall Street investors and a skeptical Congress that Washington can, in fact, manage its own affairs and not squander Federal financing.

Other than the 15 percent tax cap, which has also been endorsed by Senator Trent Lott, the majority leader, economic proposals most often discussed include:

¶ Raising the annual Federal payment to Washington to replace the taxes it cannot collect on the 43 percent of city land declared tax exempt by Congress. The city is underpaid each year by some \$400 million.

¶ Having Congress pay for items that, in



Constance B. Newman
Member of Washington's financial control board.

"It would be devastating for this city to move more toward a receivership or a permanent control board."

other city in the country. So far, Congress has blocked every effort by the District to enact a commuter tax; and the city has not devised another way to collect money from its affluent suburban work force.

¶ Attracting new businesses, and overcoming problems of red tape, bureaucratic bungling and a lack of swift governmental response on zoning and business permits that have caused most large businesses to flee to the suburbs.

Far more delicate are questions about how to alter the form of government: whether there should be more Congressional control, greater self-determination, or retrocession, which would carve out the Federal enclave of the White House, the Mall, Congress and other Federal properties, and return the rest of the city to Maryland.

A New Form of Government?

In this city where the term "re-inventing government" is well known, the debate is between those who want a more efficient government and those who fear a decline in democracy for District residents.

"It would be devastating for this city to move more toward a receivership or a permanent control board," said Constance

B. Newman, undersecretary of the Smithsonian Institution, who is on the control board that has been managing the city's finances since April 1995. "With the control board, we may be efficient, but we are not very democratic."

Ms. Norton, the city's Congressional delegate, agreed, "I think that what we are looking at is a different form of government."

Retrocession is the most extreme and least plausible of all options. District citizens are unlikely to voluntarily give up their identity, and Maryland officials have said they do not need the District and its problems. Moreover, city officials wonder why Federal payments could be given to Maryland to take over the District, but not to Washington.

"If the District were given to Maryland, it would be viewed as a race-related issue," Ms. Newman said. "It would be the idea that we can't govern ourselves, so we were sent to Maryland."

One option gaining currency is the city-manager model, considered the best form of a government for mid-size cities like Washington, with its population of 500,000. Charlotte, N.C., San Diego, and Richmond are all run by city managers — professionally trained, nonpolitical administrators hired by an elected mayor and city council to manage daily operations.

This has the advantage of bringing professional management to a city that has too long found its operations mired in politics — either Federal or local.

"City-manager governments are models of effective and responsible municipal management," said William A. Hodges, president of NationsBank of Greater Washington. "It provides an environment for fiscal responsibility and for politicians to hide for cover."

Finding Support in Congress

In the meantime, the control board is cutting deeply in the city's bloated payroll to eliminate the deficit and balance the budget by 1999. Yet there is common understanding, even among the District's biggest Congressional critics, that the financial burdens imposed by Congress under home rule are so great that budget cutting alone will not relieve them.

"We've got to have more money," Ms. Newman said. "Even if we made local gov-

ernment more efficient, we still can't improve the quality of life without more money."

Lawmakers have said they would consider a drastic increase in the Federal payment to the District or taking over some services typically provided by states, if they were convinced city officials were doing a better job.

But with Congress concerned about balancing the national budget, the District has to compete for attention with all the other budgetary issues. And those in Congress who live just outside the city are adamantly opposed to a commuter tax.



Alice M. Rivlin
Vice chairman of the Federal Reserve who headed a 1990 study on the District.

"Most of the country doesn't care about Washington. And the attitude in Congress is largely one of contempt."

about Washington. And the attitude in Congress is largely one of contempt."

Ms. Norton's 15 percent tax proposal, which would lower Federal taxes from the current maximum rate of 39.6 percent, is appealing to District residents, but has left some economists scratching their heads.

The cap could cost the Federal Government \$750 million a year without adding a cent to the city's revenues. With the bulk of the benefit going to taxpayers earning more than \$200,000, economists say this would be an enormous tax break to the rich.

Another problem is the city's low credit rating — it is the only big city whose bonds

are rated as "junk" — it cannot borrow long-term debt in the credit markets in its own name. As a result, the control board has said it plans to borrow up to \$900 million over the next six years to finance the current and future deficits, in the same way that the Municipal Assistance Corporation borrowed money to help bail out New York in 1975.

A plan for this long-term borrowing was submitted by the city to Congress in June.

Shoring Up the Economic Base

Even if the control board borrows the money, the city still needs to strengthen its economic base with new jobs. "You've got a cash crisis, driven by a budget crisis, driven by an underlying economic crisis," said Anthony A. Williams, the city's chief financial officer.

Between March 1992 and March 1996, 175,000 new jobs were created in the Maryland and Virginia suburbs, helping the region become the richest in the nation; by contrast, the District lost 39,500 jobs during the same period.

A business boom has brought high-tech companies like Oracle Systems Corporation and America OnLine Inc. to the Virginia suburbs, and Maryland is home to the Marriott Corporation and the Lockheed Martin Corporation. M.C.I. Communications Corporation remains the only major business headquartered in the District.

But Christopher R. Ludeman, executive vice president at CB Commercial Real Estate Group, who has recently written a study of the city's real estate, said, "It's difficult to do business in the city." He added that the District "has never fashioned a positive economic development program." City officials, he said, "don't do a good job of selling themselves."

Yet, Washington has much to offer. Its economic base, the Federal Government, is not going to move. And even though Government is downsizing, it is still a major employer, along with the businesses that crop up to supply it. "We've got to concentrate on stopping the business outmigration," said Andrew F. Brimmer, chairman of the control board. "Part of it is developing a better attitude towards business and getting rid of a regulatory obstacle course."

THE NEW YORK TIMES

THURSDAY, JULY 25, 1996

Talk Wed aft -
talking earlier Wed in
DOT mtg.
May come over (WD)

- David Strauss - 702-9601

Walter - 514 -

July 26th

2-week extension
only standing issue -
placing at merit

if reach merit, ask

to consider Rumer
below issue

2:00 mtg - Leon /

Maria-Kelley F. YNIGUEZ; Jaime P. Gutierrez, Plaintiffs-Appellees,

and

Arizonans Against Constitutional Tampering, Intervenor-Plaintiffs-Appellees,

and

State of Arizona; Rose Mofford; Robert Corbin, et al., Defendants-Appellees,

v.

ARIZONANS FOR OFFICIAL ENGLISH; Robert D. Parks, Intervenor-Defendants-Appellants.

Maria-Kelley F. YNIGUEZ, Plaintiff-Appellant,

v.

STATE OF ARIZONA; Rose Mofford; Robert Corbin, et al., Defendants-Appellees,

and

Arizonans For Official English; Robert D. Parks, Intervenor-Defendants-Appellants.

Maria-Kelley F. YNIGUEZ, Plaintiff-Appellee,

v.

STATE OF ARIZONA; Rose Mofford; Robert Corbin, et al., Defendants-Appellants.

Nos. 92-17087, 93-15061, 93-15719.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 3, 1994.

Decided Dec. 7, 1994.

Amended Jan. 17, 1995.

Order Granting Rehearing En Banc
May 12, 1995.

Argued and Submitted July 20, 1995.

Decided Oct. 5, 1995.

State employee brought action against state, governor, Attorney General, state sen-

ator, and Director of Department of Administration seeking injunction against enforcement of constitutional article making English the official language. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., 730 F.Supp. 309, found that article was facially overbroad. Sponsor of article intervened and appealed, and employee filed cross-appeal seeking nominal damages. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) provision was overbroad; (2) decision to speak in language other than English is not expressive conduct but, rather, is a decision involving speech alone; (3) state cannot simply prohibit all persons within its borders from speaking in tongue of their choice; and (4) state employee was entitled to nominal damages.

Affirmed in part, reversed in part, and remanded.

Brunetti, Circuit Judge, filed a concurring opinion.

Reinhardt, Circuit Judge, filed a specially concurring opinion.

Fernandez, Circuit Judge, dissented and filed an opinion in which Wallace, Chief Judge, Cynthia Holcomb Hall and Kleinfeld, Circuit Judges, joined.

Wallace, Chief Judge, dissented and filed an opinion.

Kozinski, Circuit Judge, dissented and filed an opinion in which Kleinfeld, Circuit Judge, joined.

Opinion, 42 F.3d 1217, withdrawn.

1. Officers and Public Employees 110

Arizona constitutional article providing that English is official language of state and that state and its political subdivisions must "act" only in English plainly prohibited all governmental officials and employees from speaking languages other than English in performing their official duties, save to the extent that use of non-English languages was permitted pursuant to provision's narrow exceptions section. A.R.S. Const. Art. 28, § 1 et seq.

of Department of Administration against enforcement of article making English the official language. The United States District Court of Arizona, Paul G. Garwood, 730 F.Supp. 309, found the provision facially overbroad. Sponsored and appealed, and en banc appeal seeking nominal damages, Circuit Court of Appeals, Reinhardt, J., held that: (1) provision was facially overbroad; (2) provision is not expressive conduct; (3) decision involving speech cannot simply prohibit all state employees from speaking in their own language; and (4) state employees are entitled to nominal damages.

Part, reversed in part, and

Circuit Judge, filed a concurring opinion.

Circuit Judge, filed a special opinion.

Circuit Judge, dissented and was joined in which Wallace, Chief Justice, and Kleinfeld, Circuit Judge, dissented and was joined.

Chief Judge, dissented and was joined.

Circuit Judge, dissented and was joined in which Kleinfeld, Circuit Judge, dissented and was joined.

F.3d 1217, withdrawn.

Public Employees ⇨110

Constitutional article providing that the official language of state and its political subdivisions must be English plainly prohibited all state officials and employees from performing official duties other than English in the performance of their official duties, save to the extent that the use of non-English languages was necessary. A.R.S. Const. Art. 28, § 1

2. Constitutional Law ⇨48(1)

A limiting construction of statute will not be accepted unless provision to be construed is readily susceptible to such limiting construction.

3. Federal Courts ⇨53, 392

Court of Appeals would neither abstain nor certify question to state courts but had duty to adjudicate constitutionality of article of the Arizona Constitution entitled "English as the Official Language" under First Amendment where article had been challenged on federal constitutional grounds and state's limiting construction of article would have directly clashed with its plain meaning. U.S.C.A. Const.Amend. 1; A.R.S. Const. Art. 28, § 1 et seq.

4. Federal Courts ⇨41, 53

Federal courts should abstain only in exceptional circumstances and should be especially reluctant to do so in First Amendment cases. U.S.C.A. Const.Amend. 1.

5. Federal Courts ⇨53

Abstention pending a narrowing construction of a provision by state courts is inappropriate where provision is justifiably attacked on its face as abridging free expression. U.S.C.A. Const.Amend. 1.

6. Federal Courts ⇨46

Whenever federal constitutional rights are at stake, the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question necessary; rather, abstention is not to be ordered unless statute is of an uncertain nature and is obviously susceptible to limiting construction.

7. Federal Courts ⇨41, 392

Federal court may not abstain and certify a question of statutory interpretation if statute at issue requires a complete rewrite in order to pass constitutional scrutiny.

8. Constitutional Law ⇨42.2(1)

Under the overbreadth doctrine, an individual whose own speech may constitutionally be prohibited under a given provision is permitted to challenge provision's facial validity

because of threat that speech of third parties not before the court will be chilled. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇨90(3)

In order to support a facial overbreadth challenge, there must always be a realistic danger that the challenged provision will significantly compromise the speech rights involved. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇨82(4)

Provision will not be facially invalidated on overbreadth grounds unless its overbreadth is both real and substantial, judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that would cure its constitutional infirmity. U.S.C.A. Const.Amend. 1.

11. Constitutional Law ⇨82(4)

Law will not be facially invalidated simply because it has some conceivably unconstitutional applications; rather, to support finding of overbreadth, there must be substantial number of instances in which the provision will violate the First Amendment. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇨90.1(1)

State employee's challenge to constitutional provision establishing English as state's official language and requiring its use by state and political subdivisions implicated overbreadth analysis and, if unconstitutional, the entire provision would have had to be invalidated to protect First Amendment interest where provision's ban on use of languages other than English broadly applied to government actors serving wide range of work-related contexts that differed significantly from that of state employee who brought challenge, language of provision related to single subject and was based on single premise, provision was integrated whole that sought to achieve specific result, there was no fair reading of article that would permit some language to be divorced from overriding objective, and article contained no severability provision. U.S.C.A. Const.Amend. 1; A.R.S. Const. Art. 28, § 1 et seq.

13. Constitutional Law ⇨90.1(1)

Decision to speak in language other than English was not akin to expressive conduct, but implicated pure speech rights; speech in any language is still speech and decision to speak in another language is a decision involving speech alone. U.S.C.A. Const. Amend. 1.

14. Constitutional Law ⇨90.1(1)

Officers and Public Employees ⇨110

Even if decision to speak in language other than English was akin to expressive conduct, Arizona constitutional article which prohibited all government officials and employees from speaking languages other than English in performing their official duties violated First Amendment where the incidental restriction of alleged First Amendment freedoms was greater than was essential to furtherance to government's interest. U.S.C.A. Const. Amend. 1; A.R.S. Const. Art. 28, § 1 et seq.

15. Constitutional Law ⇨90(3)

Under relatively relaxed test for expressive conduct, government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers important or substantial governmental interest, if the governmental interest is unrelated to suppression of free expression, and if incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. U.S.C.A. Const. Amend. 1; A.R.S. Const. Art. 28, § 1 et seq.

16. Constitutional Law ⇨90(3)

State cannot simply prohibit all persons within its borders from speaking in tongue of their choice. U.S.C.A. Const. Amend. 1.

17. Constitutional Law ⇨90.1(7.2)

Prohibitions on public employee's speech may not be justified by simple assertion that government is the employer. U.S.C.A. Const. Amend. 1.

18. Constitutional Law ⇨90.1(7.2)

Government traditionally has a freer hand in regulating speech of its employees than it does in regulating speech of private citizens. U.S.C.A. Const. Amend. 1.

19. Constitutional Law ⇨90.1(7.2)

In evaluating restrictions on speech of public concern, government interest in efficiency and effectiveness is important but not necessarily determinative; in such cases the content of speech requires that government's concern with efficiency and effectiveness be balanced against public employee's First Amendment interest in speaking. U.S.C.A. Const. Amend. 1.

20. Constitutional Law ⇨90.1(7.2)

Government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters; in such situations, government may have to make a substantial showing that speech is, in fact, likely to be disruptive before it may be punished. U.S.C.A. Const. Amend. 1.

21. Constitutional Law ⇨90.1(7.2)

Officers and Public Employees ⇨110

Arizona constitutional article prohibiting public employees from using non-English languages was constitutionally overbroad and violated First Amendment; article unduly burdened public employee's speech rights as well as speech interest of portion of populace public employees served, article burdened First Amendment rights of state and local officials and officers in executive, legislative, and judicial branches, and Arizona's interest in efficiency and effectiveness of its workforce ran directly counter to article's restrictions on public employee's speech. U.S.C.A. Const. Amend. 1; A.R.S. Const. Art. 28, § 1 et seq.

22. Constitutional Law ⇨90.1(7.2)

In deciding whether to afford constitutional protection to prohibited employee speech, court must consider both the general interest of public servant in speaking freely and the importance to the public of the speech involved. U.S.C.A. Const. Amend. 1.

23. Civil Rights ⇨270

State employee was entitled to nominal damages for prevailing in action challenging Arizona Constitution Article XXVII under § 1983 for the deprivation of First Amendment rights. U.S.C.A. Const. Amend. 1;

A.R.S. Const. Art. 28
U.S.C.A. § 1983.

Robert J. Pohlman (Concurrence on the brief), Rylance, Phoenix, Arizona; Intervenor-plaintiffs-appellants.

Stephen G. Montoya (Concurrence on the brief), Bryan Cave, Intervenor-plaintiffs-appellants.

Grant Woods, Arizona (Rebecca White Bercliff, General, on the brief), Defendants-appellees.

Barnaby W. Zall, Washington, DC (Jarvis Scult, Lazarus, French, & Zall, on the brief), Defendants-appellants.

Appeals from the United States District Court for the District of Arizona.

Before: WALLACE, PREGERSON, REINHARDT, WIGGINS, BRUNETT, FERNANDEZ, KLEINFELDER, HAWKINS, Circuit Judges.

Opinion by Judge REINHARDT.
Concurrence by Judge PREGERSON.
Concurrence by Judge WIGGINS.
Dissent by Judge FERNANDEZ.
Concurrence to Dissent by Judge WALLACE; Dissent by Judge REINHARDT.

REINHARDT, Circuit Judge.

These consolidated appeals present an important question of federal law, rarely reexamined since the 1920s in which the Supreme Court struck down laws restricting the use of English languages. See *Eng v. Trinidad*, 271 U.S. 390, 43 S.Ct. 628, 67 L.Ed. 1070 (1926); *Bartels v. Iowa*, 271 U.S. 284, 47 S.Ct. 284, 67 L.Ed. 284 (1926). Here, once again

1. All further references to

A.R.S. Const. Art. 28, § 1 et seq.; 42 U.S.C.A. § 1983.

Robert J. Pohlman (Catherine Bergin Yalung, on the brief), Ryley, Carlock & Applewhite, Phoenix, Arizona, for plaintiff-appellee-cross-appellant.

Stephen G. Montoya (George Vice III, on the brief), Bryan Cave, Phoenix, Arizona, for intervenors-plaintiffs-appellees.

Grant Woods, Arizona Attorney General (Rebecca White Berch, Arizona Solicitor General, on the brief), Phoenix, Arizona, for defendants-appellees.

Barnaby W. Zall, Williams & Jensen, Washington, DC (James F. Henderson, Scult, Lazarus, French, et. al., Phoenix, Arizona, on the brief), for intervenors-defendants-appellants.

Appeals from the United States District Court for the District of Arizona.

Before: WALLACE, Chief Judge, HUG, PREGERSON, REINHARDT, HALL, WIGGINS, BRUNETTI, KOZINSKI, FERNANDEZ, KLEINFELD, and HAWKINS, Circuit Judges.

Opinion by Judge REINHARDT;
Concurrence by Judge BRUNETTI; Special Concurrence by Judge REINHARDT;
Dissent by Judge FERNANDEZ;
Concurrence to Dissent by Chief Judge WALLACE; Dissent by Judge KOZINSKI.

REINHARDT, Circuit Judge:

These consolidated appeals require us to consider an important area of constitutional law, rarely reexamined since a series of cases in the 1920s in which the Supreme Court struck down laws restricting the use of non-English languages. See *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); *Farrington v. Tokushige*, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646 (1927). Here, once again, the state has cho-

sen to use its regulatory powers to try to require the exclusive use of the English language.

Specifically at issue in this case is the constitutionality of Article XXVIII of the Arizona Constitution. Article XXVIII provides, *inter alia*, that English is the official language of the state of Arizona, and that the state and its political subdivisions—including all government officials and employees performing government business—must “act” only in English. Arizonans for Official English and its spokesman Robert D. Parks¹ appeal the district court’s declaratory judgment that Article XXVIII is facially overbroad in violation of the First Amendment. Maria-Kelly Yniguez, a former Arizona state employee who brought the present action, appeals the district court’s denial of nominal damages.

This case raises troubling questions regarding the constitutional status of language rights and, conversely, the state’s power to restrict such rights. There are valid concerns on both sides. In our diverse and pluralistic society, the importance of establishing common bonds and a common language between citizens is clear. See *Guadalupe Organization, Inc. v. Tempe Elementary School Dist.*, 587 F.2d 1022, 1027 (9th Cir.1978). Equally important, however, is the American tradition of tolerance, a tradition that recognizes a critical difference between encouraging the use of English and repressing the use of other languages. Arizona’s rejection of that tradition has severe consequences not only for its public officials and employees, but for the many thousands of Arizonans who would be precluded from receiving essential information from their state and local governments if the drastic prohibition contained in the provision were to be implemented. In deciding this case, therefore, we are guided by what the Supreme Court wrote in *Meyer*:

The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of

English also include by implication Parks.

1. All further references to Arizonans for Official

our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

262 U.S. at 401, 43 S.Ct. at 627.

We conclude that Article XXVIII constitutes a prohibited means of promoting the English language and affirm the district court's ruling that it violates the First Amendment.²

A three-judge panel of this court issued an opinion reaching this same conclusion last year. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir.1994). We then decided to reconsider the question en banc. 53 F.3d 1084 (9th Cir.1995). Having done so, we conclude that our opinion was correct. Because the opinion was withdrawn when we went en banc, we re-publish it now, with only a few changes that discuss the applicability of intervening Supreme Court cases or expand on points that warrant further explanation. In almost all respects, however, our en banc opinion is identical to the opinion issued by the three-judge panel.³

I.

Factual Background

In October 1987, Arizonans for Official English initiated a petition drive to amend Arizona's constitution to prohibit the government's use of languages other than English. The drive culminated in the 1988 passage by ballot initiative of Article XXVIII of the Ari-

zona Constitution, entitled "English as the Official Language." The measure passed by a margin of one percentage point, drawing the affirmative votes of 50.5% of Arizonans casting ballots in the election. Under Article XXVIII, English is "the official language of the State of Arizona": "the language of . . . all government functions and actions." §§ 1(1) & 1(2) (see appendix). The provision declares that the "State and all [of its] political subdivisions"—defined as including "all government officials and employees during the performance of government business"—"shall act in English and no other language." §§ 1(3)(a)(iv) & 3(1)(a).

At the time of the passage of the article, Yniguez, a Latina, was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. She was bilingual—fluent and literate in both Spanish and English.⁴ Prior to the article's passage, Yniguez communicated in Spanish with monolingual Spanish-speaking claimants, and in a combination of English and Spanish with bilingual claimants.

State employees who fail to obey the Arizona Constitution are subject to employment sanctions. For this reason, immediately upon passage of Article XXVIII, Yniguez ceased speaking Spanish on the job. She feared that because of Article XXVIII her use of Spanish made her vulnerable to discipline.

2. We also hold that Yniguez is entitled to nominal damages. Given our affirmance on the merits, we need not rule upon the state defendants' claim that, in the event of a reversal, the plaintiff's attorney's fees award should be vacated.
3. Judge Thomas Tang of Arizona was a member of the three-judge panel and the en banc court. He died on July 18, 1995, two days before the en banc oral argument. He was replaced on the en banc court by Judge Kozinski. Because the decision of the en banc court is essentially identical to the panel opinion, it is important to note that Judge Tang contributed greatly to that earlier opinion. Many of the ideas and much of the language was his. Although he was unable to participate in the deliberations of the en banc court, this decision reflects his views and his wise understanding of the Constitution.

4. It should be noted that the bulk of the underlying facts in this case were stipulated to by Yniguez and the state defendants. Arizonans for Official English, however, makes certain factual allegations in its briefs on appeal that are unsupported or even contradicted by the record. Compare Opening Brief at 24 (Yniguez' use of Spanish "would interfere with the government's substantial interest in the efficiency of its workforce") with Stipulated Facts at 5 (Yniguez' use of Spanish "contributes to the efficient operation of the State"). Nonetheless, the organization made no effort to supplement the record on appeal or to seek a remand. Rather, it explicitly states in its brief that there are no material facts in dispute. At any rate, the facts stipulated to by Yniguez and the state defendants are in the main self-evident. Accordingly, our legal conclusions are based on the record as stipulated to by the original parties.

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5. Yniguez' origi . . . 10, 1988, name . . . defendant. She . . . plaint including . . .
6. In particular, i . . . "Mofford has off . . . comply with Ar . . . service employe . . .

In November 1988, Yniguez filed an action against the State of Arizona, Governor Rose Mofford, Arizona Attorney General Robert Corbin, and Director of the Arizona Department of Administration Catherine Eden, in federal district court.⁵ She sought an injunction against state enforcement of Article XXVIII and a declaration that the provision violated the First and Fourteenth Amendments of the Constitution, as well as federal civil rights laws.

Yniguez's complaint was subsequently amended to include Jaime Gutierrez, a Hispanic state senator from Arizona, as a plaintiff. Gutierrez stated that, prior to the passage of Article XXVIII, he spoke Spanish when communicating with his Spanish-speaking constituents and that he continued to do so even after the article's passage. He claimed, however, that he feared that in doing so he was liable to be sued pursuant to Article XXVIII's enforcement provision.

The state defendants all moved for dismissal, asserting various jurisdictional bars to the action. While these motions were pending, the plaintiffs conducted discovery and compiled the defendants' admissions to interrogatories into a Statement of Stipulated Facts, filed with the district court in February 1989. Also filed with the court was the Arizona Attorney General's opinion regarding the interpretation of Article XXVIII, which explained that, "to avoid possible conflicts with the federal . . . constitution []," the Attorney General had concluded that the Article only covered the "official acts" of the Arizona government. Finally, the court heard testimony from Yniguez, Senator Gutierrez, and Jane Hill, a linguistic anthropologist, about the adverse impact of Article XXVIII on their speech rights, and the speech rights of the Hispanic population of Arizona.

Yniguez' original complaint, filed November 10, 1988, named only the State of Arizona as a defendant. She later filed an amended complaint including the other defendants.

In particular, the court relied on the fact that Mofford has officially stated that she intends to comply with Article XXVIII and expects state service employees, of which Yniguez is one, to

The district court issued its judgment and opinion on February 6, 1990. *Yniguez v. Mofford*, 730 F.Supp. 309 (D.Ariz.1990). First, the district court resolved the defendants' jurisdictional objections. The court reiterated a previous ruling that the Eleventh Amendment protects the State of Arizona from suit, and then ruled that Gutierrez's claims were barred as to all of the defendants. *Id.* at 311. It reasoned that because state executive branch officials lack authority to prosecute members of the legislative branch, none of the defendants had enforcement power against Gutierrez sufficient to satisfy the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In addition, the court held that *Ex parte Young* barred Yniguez's claim against the Attorney General because he had no specific authority to enforce Article XXVIII. Although the court found that Director Eden had authority to enforce Article XXVIII against Yniguez, it nonetheless held that, because Eden had not threatened to do so, she too should be dismissed as a defendant. The court did find, however, that Governor Mofford both had the authority to enforce Article XXVIII against Yniguez, and had sufficiently threatened to do so for Yniguez to maintain an action against her in accordance with *Ex parte Young*.⁶

The district court then reached the merits of Yniguez's claim. 730 F.Supp. at 313. It read Article XXVIII as barring state officers and employees from using any language other than English in performing their official duties, except to the extent that certain limited exceptions described in the provision applied. Finding that Article XXVIII, thus construed, infringed on constitutionally protected speech, the district court ruled that the provision was facially overbroad in violation of the First Amendment.⁷ While granting declaratory relief, the court denied injunctive relief because no enforcement action

comply with Article XXVIII." *Yniguez*, 730 F.Supp. at 312.

7. Because the district court found that Article XXVIII violated the First Amendment, it did not reach the other constitutional and statutory grounds that Yniguez asserted for invalidating the provision.

"English as the measure passed by the point, drawing 15% of Arizonans on. Under Article official language of the language of . . . ns and actions." dix). The provision and all [of its] politi- ed as including "all d employees during ernment business"— d no other language."

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was pending. Notwithstanding the district court's holding that a provision of the Arizona Constitution was unconstitutional under the United States Constitution, Governor Mofford—an outspoken critic of Article XXVIII—decided not to appeal the judgment. Senator Gutierrez, being satisfied with the constitutional determination, did not appeal the ruling that his claim was barred by *Ex Parte Young*.

In response to the state's decision not to appeal, Arizonans for Official English moved to intervene post-judgment pursuant to Fed. R.Civ.P. 24(a), for the purpose of pursuing an appeal of the district court's order. Immediately thereafter, the Arizona Attorney General sought to intervene pursuant to 28 U.S.C. § 2403(b) for the same purpose. The Attorney General also asked that the district court amend the judgment because it did not contain a ruling on the defendants' prior motion to certify to state court the question of Article XXVIII's proper interpretation. The district court denied all three motions. See *Yniguez v. Mofford*, 130 F.R.D. 410 (D.Ariz.1990) (holding, *inter alia*, that denial of certification was implicit in previous judgment, and that certification was inappropriate because Article XXVIII is not susceptible of a narrowing construction).

On July 19, 1991, we reversed the district court's denial of the intervention motion of Arizonans for Official English. *Yniguez v. Arizona*, 939 F.2d 727, 740 (9th Cir.1991) ("*Yniguez I*"). We ruled that because the organization was the principal sponsor of the ballot initiative codified as Article XXVIII,

8. Asking this court to revisit issues already decided in *Yniguez II*, the cross-appellee state defendants assert that Yniguez's request for nominal damages is untimely because such damages were not specifically requested at trial, and their denial was not specifically appealed at that time. However, as we held in *Yniguez II*, Yniguez's blanket request for "all other relief that the Court deems just and proper under the circumstances," encompasses a request for nominal damages. 975 F.2d at 647. In addition, as to her appeal of the district court's denial of such damages, Yniguez has precisely followed the steps we described in that opinion. See *id.* at 647 & n. 2 (stating that Yniguez "may raise the issue of nominal damages in a future cross-appeal").

Similarly, Yniguez suggests that the appeal of Arizonans for Official English is untimely be-

cause its notice of appeal was not filed within thirty days of the date that our order permitting intervention was entered on the district court's docket. However, we retained jurisdiction over the case during that period in reviewing the suggestion of mootness filed by the state. We did not relinquish jurisdiction until after September 16, 1992, when we filed our opinion rejecting the mootness suggestion. In that opinion, we specifically explained that "[t]he district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions." *Yniguez II*, 975 F.2d at 648. Although for some reason no mandate issued thereafter, the district court received the case back on November 5, 1992, and Arizonans for Official English timely filed its notice of appeal within thirty days of that date.

its relationship to the provision was analogous to the relationship of a state legislature to a state statute. Specifically, we found that, as the initiative's sponsor, the group had "a strong interest in the vitality of a provision of the state constitution which [it had] proposed and for which [it had] vigorously campaigned." *Id.* at 733. Consequently, we held that Arizonans for Official English satisfied both the requirements of Rule 24(a) and the standing requirements of Article III, and could thus intervene for purposes of appeal. *Id.* at 740. In the same opinion, we affirmed the district court's denial of the Attorney General's motion to intervene insofar as he sought to be reinstated as a party to the appeal, but permitted his intervention pursuant to 28 U.S.C. § 2403(b) for the limited purpose of arguing the constitutionality of Article XXVIII. *Id.*

After we issued our opinion regarding intervention, the state filed a suggestion of mootness based on Yniguez's resignation from the Arizona Department of Administration in April 1990. In our second opinion in this case, *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir.1992) ("*Yniguez II*"), we rejected the state's mootness suggestion, reasoning that Yniguez had the right to appeal the district court's failure to award her nominal damages. *Id.* On December 15, 1992, after Arizonans for Official English filed its notice of appeal in the district court, Yniguez filed her notice of cross-appeal requesting nominal damages.⁸

The district court subsequently granted Yniguez's motion for an award of attorney's

cause its notice of appeal was not filed within thirty days of the date that our order permitting intervention was entered on the district court's docket. However, we retained jurisdiction over the case during that period in reviewing the suggestion of mootness filed by the state. We did not relinquish jurisdiction until after September 16, 1992, when we filed our opinion rejecting the mootness suggestion. In that opinion, we specifically explained that "[t]he district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions." *Yniguez II*, 975 F.2d at 648. Although for some reason no mandate issued thereafter, the district court received the case back on November 5, 1992, and Arizonans for Official English timely filed its notice of appeal within thirty days of that date.

fees, and the state defendants conditionally appealed that ruling. Their appeal was consolidated with the original appeal on the merits filed by Arizonans for Official English and Yniguez's cross-appeal for nominal damages. All three appeals are now before us, although we do not reach the one relating to attorney's fees. See note 2, *supra*. To round out the procedural framework, we note that in 1994 we granted the motion of Arizonans Against Constitutional Tampering and its chairman Thomas Espinosa⁹ to intervene as plaintiffs-appellees in the case. Arizonans Against Constitutional Tampering was the principal opponent of the ballot initiative that became Article XXVIII, had campaigned against it, and, like Arizonans for Official English, had submitted an argument regarding the initiative's merits which appeared in the official Arizona Publicity Pamphlet. Cf. *Yniguez I*, 939 F.2d at 733 (noting that sponsors of a ballot initiative have a strong interest in defending provision they campaigned for, so that there is a "virtual *per se* rule" that they

9. All further references to Arizonans Against Constitutional Tampering include by implication Espinosa.

10. The federal government of the United States has never recognized English as the "official language," either under the Constitution or federal law. See generally Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 Minn. L.Rev. 269, 271-81 (1992) (noting that Continental Congress issued official publications in German and French, as well as English, and that the Framers purposely gave no special designation to English). As one academic commentator has explained, "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." Heath, *Language and Politics in the United States*, in *Linguistics and Anthropology* 267, 270 (1977). Recent efforts to establish English as the official national language have not succeeded. See H.R.J.Res. 81, 101st Cong., 1st Sess. (1989); S.J.Res. 13, 100th Cong., 1st Sess. (1987); see also Comment, *The Proposed English Language Amendment: Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519 (1985); *Harris v. Rivera Cruz*, 710 F.Supp. 29, 31 (D.P.R.1989) (stating that "[i]n the United States, there is no official language, and if prudence and wisdom (and possibly the Constitution) prevail, there never shall be"). But cf. *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir.1983) (asserting that "English is the national language of the United States"), cert. denied, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984);

may intervene in litigation involving it). However, in reaching our decision, which provides all the relief that Arizonans Against Constitutional Tampering seeks, we need not rely on that group's standing as a party. Yniguez's standing and that of the other parties and intervenors is sufficient to support the determination that we make here.

II.

The Proper Construction of Article XXVIII

A.

The District Court's Construction

[1] Although eighteen states have adopted "official-English" laws,¹⁰ Arizona's Article XXVIII is "by far the most restrictively worded official-English law to date." Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol. 325, 337 (1991).¹¹ Besides declaring English "the

DaLomba v. Director, 369 Mass. 92, 337 N.E.2d 687, 689 (1975) (stating that "English is the official language of this country").

11. Besides Arizona, the states that have adopted such provisions are: Alabama, Ala. Const. amend. 509; Arkansas, Ark.Code Ann. § 1-4-117; California, Cal. Const. art. III § 6; Colorado, Colo. Const. Art. II § 30a; Florida, Florida Const. art. II § 9; Georgia, Ga. L. 1986, p. 529; Hawaii, Haw. Const. art. XV § 4; Illinois, Ill. Code 5 § 460/20; Indiana, Ind.Code Ann. § 1-2-10-1; Kentucky, Ky.Rev.Stat. Ann. § 2.013; Mississippi, Miss.Code Ann. § 3-3-31; Nebraska, Neb. Const. art. 1 § 27; North Carolina, N.C.Gen.Stat. § 145-12; North Dakota, N.D.Cent.Code § 54-02-13; South Carolina, S.C.Code Ann. § 1-1-696; Tennessee, Tenn.Code Ann. § 4-1-404; and Virginia, Va.Code Ann. § 22.1-212.1. Compare *Meyer*, 262 U.S. at 395, 43 S.Ct. 625 (stating that "twenty-one States besides Nebraska have enacted similar foreign language laws") (argument of defendant).

Two of these states—California and Hawaii—are in our circuit. The "official-English" provisions in these states, like those of other states besides Arizona, appear to be primarily symbolic. See, e.g., *Puerto Rican Org. for Political Action v. Kasper*, 490 F.2d 575, 577 (7th Cir.1973) (noting that official-English law appears with laws naming state bird and state song, and does not restrict use of non-English languages by state and city agencies). Article III, section 6 of the California Constitution merely establishes English as the official language of the state of California; it

official language of the State of Arizona," Article XXVIII states that English is "the language of . . . all government functions and actions." §§ 1(1), 1(2). The article further specifies that the state and its subdivisions—defined as encompassing "all government officials and employees during the performance of government business"—"shall act in English and no other language." §§ 1(3)(a)(iv), 3(1)(a). Its broad coverage is punctuated by several exceptions permitting, for example, the use of non-English languages as required by federal law, § 3(2)(a), and in order to protect the rights of criminal defendants and victims of crime, § 3(2)(e).

The district court, interpreting what it found to be the "sweeping language" of Article XXVIII, determined that the provision prohibits:

the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties, save to the extent that they may be allowed to use a foreign language by the limited exceptions contained in § 3(2) of Article XXVIII.

Yniguez, 730 F.Supp. at 314.

For reasons we explain below, we agree with the district court's construction of the article.

imposes no prohibition on other languages and does not affect their use in the functioning of state government. Hawaii's provision is unlike California's in that it recognizes both English and Hawaiian as official state languages, but it too appears to have little practical effect. Given the extent to which the California and Hawaii provisions differ from Article XXVIII, our opinion in this case should not be construed as expressing any view regarding their constitutionality.

12. At the oral argument before the panel, Arizonans for Official English partially endorsed the Attorney General's reading of Article XXVIII. While purporting to agree with the Attorney General that the provision's mandate that the state and its subdivisions "shall act in English" covered only official governmental acts, the organization nonetheless suggested vaguely that its interpretation of the provision was broader than that of the Attorney General, and that it might, for example, construe the provision as prohibiting state employees from speaking another language in the performance of their duties when unnecessary to do so.

B.

The Attorney General's Construction

The Arizona Attorney General proffers a highly limited reading of Article XXVIII under which it applies only to "official acts" of state governmental entities.¹² According to this construction of the provision, which the Attorney General has memorialized in a written opinion, the provision "does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government." Op. Atty. Gen. Az. No. I89-009 (1989).

[2] The Supreme Court has, in the past, looked to the narrowing construction given a provision by the State's Attorney General as a guide to evaluating the provision's scope. *Broadrick v. Oklahoma*, 413 U.S. 601, 618, 93 S.Ct. 2908, 2919, 37 L.Ed.2d 830 (1973). For two reasons, however, we do not adopt the Attorney General's construction of Article XXVIII in this case. First, the Attorney General's opinion is not binding on the Arizona courts, *Marston's Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94, 644 P.2d 244, 248 (1982), and is therefore not binding on this court. Compare *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S.Ct. 636, 644, 98 L.Ed.2d 782 (1988) (refusing to accept as authoritative a non-

The organization's briefs to the panel were even less clear in indicating its position regarding Article XXVIII's proper scope. The briefs were, first of all, quite reticent on the question. However, the arguments asserted in support of the provision were quite sweeping, and seemed most appropriate to an extremely broad prohibition on the use of non-English languages by government officials and employees. Although we would, even absent these briefs, be entirely unconvinced by the proffered limiting construction (see below), we find "[t]hat construction even less plausible in light of the broad purposes that [the appellants] insist[] underlie the [provision]." *Lind v. Grimmer*, 30 F.3d 1115, 1123 n. 8 (9th Cir. 1994) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975)).

Before the en banc court, Arizonans for Official English's and the Attorney General's explanations as to the initiative's scope were confused and self-contradictory. At best, they shed little light on how the amendment could rationally be construed in a limiting manner and at worst they helped make it clear that it could not be.

binding attorney general . . . by *v. Schultz*, 487 U.S. . . 2495, 2501, 101 L.Ed.2d 4: . . . city's binding narrow in . . . ond, we cannot adopt the . . . limiting construction beca . . . at odds with Article XXVI . . . The Supreme Court has . . . limiting construction will . . . less the provision to be co . . . susceptible" to it. *Am . . . Ass'n*, 484 U.S. at 397, . . . Here, Article XXVIII's cl . . . ply not "readily suscepti . . . straits that the Attorne . . . to place on them.

The Attorney General's XXVIII focuses on § 3(1) with limited exceptions, t all political subdivisions of in English and in no § 3(1)(a). The Attorney word "act" from § 3(1)(a) it the word "official," fou proclamation of English guage of Arizona. In th Article only applies to th the state, he also relies on of the noun "act," defin determination of a sover council, or a court of just: Az. No. I89-009, at 21 *International Dictionary* bridged, 1976) (third ser: doing so, however, he igr "act," when used as a v XXVIII, does not include ings this limited one.¹³ M: such a meaning somehow: phrases were examined o contradicted by the rema: sion.

[3] Section 1(3)(a)(iv) that the rule that Arizona

13. Similarly, Article XXVII glish as the language of "i: tions and actions." § 1(2). either "functions" or "ac: words limited to official act: 499 U.S. 400, 111 S.Ct. 13: (1991) (finding state action: empty challenges of pro: bers). We note also that:

binding attorney general opinion), *with Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988) (accepting city's binding narrow interpretation). Second, we cannot adopt the Attorney General's limiting construction because it is completely at odds with Article XXVIII's plain language. The Supreme Court has made clear that a limiting construction will not be accepted unless the provision to be construed is "readily susceptible" to it. *American Booksellers Ass'n*, 484 U.S. at 397, 108 S.Ct. at 645. Here, Article XXVIII's clear terms are simply not "readily susceptible" to the constraints that the Attorney General attempts to place on them.

The Attorney General's reading of Article XXVIII focuses on § 3(1)(a), which provides, with limited exceptions, that the "State and all political subdivisions of this State shall act in English and in no other language." § 3(1)(a). The Attorney General takes the word "act" from § 3(1)(a) and engrafts onto it the word "official," found in the Article's proclamation of English as the official language of Arizona. In thus urging that the Article only applies to the "official acts" of the state, he also relies on a limited meaning of the noun "act," defined as a "decision or determination of a sovereign, a legislative council, or a court of justice." Op. Atty. Gen. Az. No. 189-009, at 21 (quoting *Webster's International Dictionary* 20 (3d ed., unabridged, 1976) (third sense of "act")). In doing so, however, he ignores the fact that "act," when used as a verb as in Article XXVIII, does not include among its meanings this limited one.¹³ Moreover, even were such a meaning somehow plausible if the two phrases were examined out of context, it is contradicted by the remainder of the provision.

[3] Section 1(3)(a)(iv) broadly declares that the rule that Arizona "act in English and

13. Similarly, Article XXVIII also describes English as the language of "all government functions and actions." § 1(2). Under no sense of either "functions" or "actions", are the two words limited to official acts. Cf. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (finding state action in prosecutor's peremptory challenges of prospective jury members). We note also that the initiative's ballot

in no other language" applies to *all government officials and employees during the performance of government business*. (This prohibition on the use of foreign languages when conducting government business supplements the Article's listing of "statutes, ordinances, rules, orders, programs and policies," an enumeration of presumably official acts on which the Attorney General relies heavily. § 1(3)(a)(iii). Thus, not only is the Attorney General's narrow reading of Article XXVIII contradicted by the provision's expansive language, his reading would render a sizeable portion of the Article superfluous, "violating the settled rule that a [provision] must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992) (emphasis added); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 & n. 11, 108 S.Ct. 2182, 2189 & n. 11, 100 L.Ed.2d 836 (1988). Here, of course, it is not simply certain words that would, under the Attorney General's reading, become redundant; instead, entire subsections of the provisions would be rendered unnecessary and repetitive.

Indeed, the district court's broader construction of Article XXVIII is the only way to give effect to any of the exceptions contained in § 3(2). If, for example, public teachers in the regular course of their teaching duties would not otherwise be covered by the provision, then there would be no reason to include specific exceptions for *some* of their duties. See § 3(2)(a) & (c). Moreover, the provision's clear and specific exclusion of some of the functions of public teachers indicates that the measure on its face applies to other "government employees" performing other types of governmental duties that are not specifically excluded—employees such as clerks at the Department of Motor Vehicles or receptionists at state welfare offices, and

materials and publicity pamphlets do not support the Attorney General's post-hoc construction of Article XXVIII. Instead, they described the "meaning and purpose" of the initiative to the voters in far broader terms. See *Bussanich v. Douglas*, 152 Ariz. 447, 450, 733 P.2d 644, 647 (App. 1986) (examining ballot materials and publicity pamphlets in construing an initiative).

other state employees who deliver services to the public. Public teachers' duties do not constitute "official acts" of the state any more or any less than do the duties of these other categories of employees.

Certainly, there is no justification in the text of Article XXVIII for the Attorney General's ingenious suggestion that languages other than English may be used whenever such use would reasonably "facilitate the day-to-day operation of government"—that, in other words, the provision's plain and unequivocal prohibition on the use of other languages may be ignored if it is expedient to do so. To read such a broad and general exception into Article XXVIII would run directly contrary to its structure, scope, and purpose, and would effectively nullify the bulk of its coverage. Article XXVIII plainly does not set forth an innocuous, pragmatic rule that tolerates the use of languages other than English whenever beneficial to the public welfare. Its mandate is precisely the opposite. The use of languages other than English is banned except when expressly permitted. Indeed, the narrow exceptions that set forth the limited circumstances under which non-English languages may be spoken directly belie the conveniently flexible approach that the Attorney General has adopted for purposes of attempting to resurrect a facially unconstitutional measure.

C.

Abstention and Certification

The Attorney General argues, alternatively, that because the Arizona state courts have not had an opportunity to interpret Article XXVIII, we should abstain from deciding this case and certify the question of the proper interpretation of Article XXVIII to the Arizona Supreme Court. *See* Ariz.Rev. Stat. Ann. § 12-1861 (permitting federal courts to certify questions of state law to Arizona Supreme Court).

[4-7] First, we note that a federal court should abstain only in exceptional circumstances, *Lind*, 30 F.3d at 1121 (citing *Houston v. Hill*, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512, 96 L.Ed.2d 398 (1987)), and should be especially reluctant to abstain in First

Amendment cases, *Ripplinger v. Collins*, 868 F.2d 1043, 1056 (9th Cir.1989). Abstention pending a narrowing construction of a provision by the state courts is inappropriate where the provision is "justifiably attacked on [its] face as abridging free expression." *Id.* at 1048 (citations and quotations omitted). In fact, the Supreme Court has made it clear that whenever federal constitutional rights are at stake "the relevant inquiry is not whether there is a bare, though unlikely possibility that the state courts *might* render adjudication of the federal question unnecessary." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984) (emphasis in original). "Rather," the Court continued, "we have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Id.* (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 & n. 14, 88 S.Ct. 391, 397 & n. 14, 19 L.Ed.2d 444.). It follows that a court may not abstain and certify a question of statutory interpretation if the statute at issue requires "a complete rewrite" in order to pass constitutional scrutiny. *Lind*, 30 F.3d at 1121 (citing *Houston*, 482 U.S. at 470-71, 107 S.Ct. at 2514-15).

To be sure, the Supreme Court in *American Booksellers* did opt to certify the question of the proper interpretation of a statute to the Virginia Supreme Court. 484 U.S. at 386, 108 S.Ct. at 639. However, *American Booksellers* presented the Court with a "unique factual and procedural setting." *Id.* In that case, the plaintiffs had filed a pre-enforcement challenge to a state obscenity statute that the State Attorney General *conceded* would be unconstitutional if construed as the plaintiffs contended it should be. *Id.* at 393 & n. 8, 108 S.Ct. at 643 & n. 8 (quoting state counsel as saying that if the plaintiffs' interpretation of the statute were correct, then the state "should lose the case"). Moreover, there were no non-governmental defendants such as Arizonans for Official English in the case, no state court had ever had the opportunity to interpret the pertinent statutory language, and both levels of lower federal courts had made critically flawed assessments of the statute's coverage because

they had relied on 395-97, 108 S.

The Attorney has never constitutionally asserted its proper least one Arizona opportunity to has done not State, No. CV posing of Fi three paragraphs *Booksellers*, stances in the certification. (declining to interpretation: sion that law the plaintiff's must proceed ity of Article

We agree construction of plain language ment officials: languages of their official the use of no ted pursuant tions. General's nar cle and his su tification. W court ever t Article XXVI lar to that pr al, it would plastic surge sion)." *Shu ham*, 394 U.S. L.Ed.2d 162 provision has stitutional gr struction of clash with it ther abstain

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they had relied on invalid evidence. *Id.* at 395-97, 108 S.Ct. at 644-45.

The Attorney General here, in contrast, has never conceded that the statute would be unconstitutional if construed as Yniguez asserts it properly should be.¹⁴ Moreover, at least one Arizona state court has had the opportunity to construe Article XXVIII, and has done nothing to narrow it. *See Ruiz v. State*, No. CV 92-19603 (Jan. 24, 1994) (disposing of First Amendment challenge in three paragraphs). Thus, unlike in *Virginia Booksellers*, there are no unique circumstances in this case militating in favor of certification. *See Lind*, 30 F.3d at 1122 n. 7 (declining to certify question of state law interpretation in the absence of state concession that law would be unconstitutional on the plaintiff's construction). Accordingly, we must proceed to determine the constitutionality of Article XXVIII.

D.

Conclusion

We agree with the district court's construction of Article XXVIII. The article's plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section. We reject both the Attorney General's narrowing construction of the article and his suggestion of abstention and certification. We conclude that were an Arizona court ever to give the broad language of Article XXVIII a limiting construction similar to that proffered by the Attorney General, it would constitute a "remarkable job of plastic surgery upon the face of the [provision]." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 940, 22 L.Ed.2d 162 (1969). Where, as here, a state provision has been challenged on federal constitutional grounds and a state's limiting construction of that provision would directly clash with its plain meaning, we should neither abstain nor certify the question to the

14. The Attorney General has only stated that a narrow construction "may ... be necessary to avoid conflict" with the federal constitution, and

state courts. Rather, under such circumstances, it is our duty to adjudicate the constitutional question without delay.

III.

Article XXVIII and The First Amendment

A.

Overbreadth

[8, 9] After construing Article XXVIII, the district court ruled that it was unconstitutionally overbroad. Under the overbreadth doctrine, an individual whose own speech may constitutionally be prohibited under a given provision is permitted to challenge its facial validity because of the threat that the speech of third parties not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987). Moreover, a party may challenge a law as facially overbroad that would be unconstitutional as applied to him so long as it would also chill the speech of absent third parties. *Lind*, 30 F.3d at 1122-23 (finding statute unconstitutionally overbroad as well as unconstitutional as applied to plaintiff). The facial invalidation that overbreadth permits is necessary to protect the First Amendment rights of speakers who may fear to challenge the provision on their own. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). However, in order to support a facial overbreadth challenge, there must always be a "realistic danger" that the provision will significantly compromise the speech rights involved. *Board of Airport Comm'rs*, 482 U.S. at 574, 107 S.Ct. at 2572.

[10, 11] A provision will not be facially invalidated on overbreadth grounds unless its overbreadth is both real and substantial judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that would cure its constitutional infirmity. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S.Ct.

his analysis on the point was based on the Equal Protection Clause of the Fourteenth Amendment rather than the First Amendment.

2908, 2916, 2917, 37 L.Ed.2d 830 (1973); *United States v. Austin*, 902 F.2d 743, 744 (9th Cir.1990), cert. denied, 498 U.S. 874, 111 S.Ct. 200, 112 L.Ed.2d 161 (1990). Accordingly, a law will not be facially invalidated simply because it has some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). Rather, to support a finding of overbreadth, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1 (1988).

Yniguez contends that Article XXVIII unlawfully prevented her from speaking Spanish with the Spanish-speaking claimants that came to her Department of Administration office. Yniguez, however, challenges far more than Article XXVIII's ban on her own use of Spanish in the performance of her own particular job. She also contends that the speech rights of innumerable employees, officials, and officers in all departments and at all levels of Arizona's state and local governments are chilled by Article XXVIII's expansive reach. At least as important, she contends that the interests of many thousands of non-English-speaking Arizonans in receiving vital information would be drastically and unlawfully limited. For those reasons, she challenges Article XXVIII as overbroad on its face and invalid in its entirety.

[12] Article XXVIII's ban on the use of languages other than English by persons in government service could hardly be more inclusive. The provision plainly states that it applies to "the legislative, executive, and judicial branches" of both state and local gov-

15. The district court held that the Eleventh Amendment barred State Senator Gutierrez from suing state officials in federal court to challenge Article XXVIII's application to legislators. The district court concluded that these state officials lacked the power to enforce Article XXVIII against him and thus could not be proper federal defendants under *Ex Parte Young*. See *Yniguez*, 730 F.Supp. at 311. This ruling is not before us on appeal and we intimate no opinion as to its merits. However, it is important to note that the court's ruling does not mean that Article XXVIII's broad reach imposes no chilling effect upon

ernment, and to "all government officials and employees during the performance of government business." §§ 1(3)(a)(i), (ii) & (iv). This broad language means that Article XXVIII on its face applies to speech in a seemingly limitless variety of governmental settings, from ministerial statements by civil servants at the office to teachers speaking in the classroom, from town-hall discussions between constituents and their representatives to the translation of judicial proceedings in the courtroom.¹⁵ Under the article, the Arizona state universities would be barred from issuing diplomas in Latin, and judges performing weddings would be prohibited from saying "Mazel Tov" as part of the official marriage ceremony. Accordingly, it is self-evident that Article XXVIII's sweeping English-only mandate limits the speech of governmental actors serving in a wide range of work-related contexts that differ significantly from that in which Yniguez performed her daily tasks. The speech rights of all of Arizona's state and local employees, officials, and officers are thus adversely affected in a potentially unconstitutional manner by the breadth of Article XXVIII's ban on non-English governmental speech. Similarly, the interests of non-English-speaking Arizonans in receiving all kinds of essential information are severely burdened. For these reasons, we cannot say that the provision's "only unconstitutional application is the one directed at a party before the court. . . ." *Lind*, 30 F.3d at 1122. Therefore, Yniguez's challenge to Article XXVIII properly implicates overbreadth analysis and, if unconstitutional, "the entire [provision] may be invalidated to protect First Amendment interests." *Id.*

Facial invalidation is also appropriate here because the broad language employed throughout Article XXVIII relates to a single

the speech of legislators. Even if it were true that state officials have no authority to punish a legislator who violates Article XXVIII, it remains the case that legislators are required to comply with the state constitution and that harmful consequences may flow from violation of its provisions, including the possibility of civil liability as a result of the initiative's enforcement provision. Thus, whatever Gutierrez's particular power to bring this suit in federal court, the First Amendment interests of state legislators are properly considered as part of an inquiry into Article XXVIII's overbreadth.

subject and is based which, as we will discuss, is constitutionally flawed. This, where the provision's applications . . . operate on a facially mistaken premise, is not limited to *Maryland v. Joseph*, 497 U.S. 947, 966, 104 S.Ct. 2852, 104 L.Ed.2d 786 (1984), but also to *Id.* at 966, 2852 n. 13. Rather, to strike down the provision "[w]here the defect in the means chosen to achieve the objectives are too imprudent, the [provision] is not subject to a case-by-case basis." *Id.* at 966-68, 104 S.Ct. at 2852.

Moreover, the nature of Article XXVIII is such that to be unconstitutional, it must invalidate the entire provision, not simply some of its sections. The reading of Article XXVIII's provision is an inquiry into whether it seeks to achieve a specific objective in all oral and written communications by persons connected with government of all words and phrases other than English. The reading of the article that seeks to achieve this objective of its language to be an overriding objective.

Equally important, the severability provision of any clause or section within the article, if other parts were held unconstitutional, is not a factor. *Brockett*, 472 U.S. at 115 (citing a statute's severability clause as an important factor favoring facial invalidation), and the court have never treated anything other than a statute's severability clause as a stand or fall as a whole. The court have always presented

16. The Court's recent decision in *National Treasury Employees Union v. Von No*, 115 S.Ct. 1003, 135 L.Ed.2d 1003, is entirely consistent with

subject and is based on a single premise, which, as we will discuss subsequently, is constitutionally flawed. In cases such as this, where the provision in question "in all its applications . . . operates on a fundamentally mistaken premise," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966, 104 S.Ct. 2839, 2852, 81 L.Ed.2d 786 (1984), the Supreme Court "has not limited itself to refining the law by preventing improper applications on a case-by-case basis." *Id.* at 965 n. 13, 104 S.Ct. at 2852 n. 13. Rather, the Court will simply strike down the provision on its face. "[W]here the defect in the [provision] is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the [provision] creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Id.* at 967-68, 104 S.Ct. at 2852-53.

Moreover, the nature and structure of Article XXVIII is such that if we determine it to be unconstitutionally overbroad, then we must invalidate the entire article and not simply some of its sections. Even a cursory reading of Article XXVIII demonstrates that the provision is an integrated whole that seeks to achieve a specific result: to prohibit the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English. There is no fair reading of the article that would permit some of its language to be divorced from this overriding objective.

Equally important, the article contains no severability provision that would suggest that any clause or section was intended to survive if other parts were held unconstitutional, *cf. Brockett*, 472 U.S. at 506, 105 S.Ct. at 2803 (citing a statute's severability clause as an important factor favoring partial rather than facial invalidation), and the parties before the court have never treated Article XXVIII as anything other than a single entity that must stand or fall as a whole. Indeed, appellees have always presented Article XXVIII as an

16. The Court's recent decision in *United States v. National Treasury Employees Union*, — U.S. —, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), is entirely consistent with our conclusion that if we

integrated provision that is designed to eliminate all non-English words from governmental speech, although they have pressed for an artificially narrow construction of what constitutes such speech. Thus, if the article's specific restrictions on the use of languages other than English are unconstitutionally overbroad, then the language and structure of the amendment makes facial invalidation of the entire article the only appropriate remedy.

As we noted at the outset of this section, however, Article XXVIII will only be unconstitutionally overbroad if it violates the First Amendment in a substantial number of instances. *New York State Club Ass'n*, 487 U.S. at 13, 108 S.Ct. at 2234. To determine whether Article XXVIII's restrictions unconstitutionally impose on the speech rights of a substantial number of persons in government service in a substantial number of instances, we need only consider the article's impact on Arizona's numerous state and local public employees. In sheer number, these employees represent the most substantial target of Article XXVIII's restrictions on speech in languages other than English as they constitute the most common source of communications between the government and the public that it serves. In addition, a determination that Article XXVIII unconstitutionally infringes on the First Amendment rights of these employees will necessarily result in the conclusion that the article also unlawfully chills the speech of many others who serve in government, such as judges and legislators. The same restrictions that are unconstitutional as to the routine speech often engaged in by civil servants will *a fortiori* be unconstitutional as to the various kinds of speech engaged in by a substantial number of other persons who work in government and are therefore affected by the article's unusually broad reach. See *Yniguez*, 730 F.Supp. at 314; *Cf. Bond v. Floyd*, 385 U.S. 116, 132-33, 87 S.Ct. 339, 347-48, 17 L.Ed.2d 235 (1966) (a state may not impose stricter First Amendment standards on legislators).¹⁶

find Article XXVIII to be unconstitutional, we must invalidate it on its face. In *National Treasury Employees Union*, the Court considered a challenge to a part of a statute that restricted the

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Yniguez's challenge to Article XXVIII thus presents us with a clear issue. If we determine that Article XXVIII's impact on the speech rights of public employees is unconstitutional, we will be compelled to invalidate Article XXVIII on its face and in its entirety. Before turning directly to the article's impact on the First Amendment rights of public employees, however, we must first address two preliminary arguments that are raised by the appellants and that could affect our analysis. First, Arizonans for Official English contends that Article XXVIII interferes only with expressive conduct and not pure speech. Second, the group contends that the state may not be compelled to provide information to all members of the public in a language that they can comprehend. For the reasons that we explain below, the two arguments do not affect the ultimate conclusions that we reach.

B.

Speech v. Expressive Conduct

[13-15] Arizonans for Official English argues vehemently that First Amendment scrutiny should be relaxed in this case because the decision to speak a non-English language does not implicate pure speech rights. Rather, the group suggests, "choice of language . . . is a mode of conduct"—a "nonverbal expressive activity." Opening

ability of persons in all three branches of the federal government to receive honoraria for making speeches or publishing articles. Although the Court upheld the constitutional challenge filed on behalf of "rank-and-file" civil servants in the executive branch, it offered three reasons for not also invalidating the provision as to senior officials in that branch, a group that was not before the Court. First, the Court explained that the senior officials received a 25 percent salary increase that was intended in part to offset the financial loss that the honoraria ban might cause. *Id.* at ———, 115 S.Ct. at 1018-19. Second, it concluded that different justifications might support applying the ban to senior officials than to rank-and-file members. *Id.* at ———, 115 S.Ct. at 1019. Finally, it concluded that relief could not be afforded in the manner ordered by the Court of Appeals without "tampering with the text of the statute[.]" *Id.*

None of these factors is present here. First, all public officers and employees are treated identically under Article XXVIII. None received any compensating benefits. Second, if the article is

Brief at 15, 18 (emphasis added) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385, 112 S.Ct. 2538, 2544, 120 L.Ed.2d 305 (1992)). Accordingly, it compares this case to those involving only "expressive conduct" or "symbolic speech." *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (burning American flag for expressive reasons); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing arm band for expressive reasons); *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (burning draft card for expressive reasons). In such cases, the government generally has a wider latitude in regulating the conduct involved, but only when the regulation is not directed at the communicative nature of that conduct. *Johnson*, 491 U.S. at 406, 109 S.Ct. at 2540.

We find the analysis employed in the above cases to be inapplicable here, as we are entirely unpersuaded by the comparison between speaking languages other than English and burning flags.¹⁷ Of course, speech in any language consists of the "expressive conduct" of vibrating one's vocal chords, moving one's mouth and thereby making sounds, or of putting pen to paper, or hand to keyboard. Yet the fact that such "conduct" is shaped by a language—that is, a sophisticated and complex system of understood

unconstitutional as to civil servants, it is necessarily unconstitutional as to officers and elected officials. *See Yniguez*, 730 F.Supp. at 314; *cf. Bond*, 385 U.S. at 132-33, 87 S.Ct. at 347-48. Finally, unlike in *National Treasury Employees Union*, here the relief we afford is simple and requires no tampering with the text of the measure.

17. We have no doubt, however, that even under the relatively relaxed test for expressive conduct set out in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), Article XXVIII would be unconstitutional. Under *O'Brien*, "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S.Ct. at 1679. Article XXVIII fails at least the final prong. *See* discussion, *infra* at §§ IID(4) and IID(6).

meanings—is what language is by definition: the choice of any language is speech.

A bilingual person has an expressive choice of one language rather than another. Yniguez explained, her choice of language is not "clarity" or "comfort" but "clarity" or "comfortless, this expressive choice of language to be as posited by Arizona. Instead, it exemplifies that one's use of language. For example, even when the choice of specific words may critically affect the message. Such variables—language, tone of voice—are not but are simply among the elements of speech. To use a given language based on a pragmatic consideration to someone's understanding. That is the choice involved in the we consider here.

The Supreme Court's Amendment status is somewhat different from that ratified a speaker's "draft" rather than "draft." *Cohen v. Co*, 391 U.S. 1780, 29 L.Ed.2d 1780, 88 S.Ct. 1780, 29 L.Ed.2d 1780 (1968) (conviction under "conduct" law). Like the Amendment, the state's Cohen's choice of language

18. The paradoxical nature of language as conduct is scoring the weakness of the distinction. As the language illustrates, physical conduct—vocal sounds or specific language when they have a function in grammatical to allow them to convey a sufficient degree of meaning. *U.S. v. O'Brien*, 391 U.S. at 404, 109 S.Ct. at 2540 (whether particular First Amendment, as conveyed a particular and [whether] the l.

debate" of unpopular words, rings even truer. *Id.* at 24-25, 91 S.Ct. at 1787-88. While Arizonans for Official English complains of the "Babel" of many languages, the Court in *Cohen* responds that this "verbal cacophony is . . . not a sign of weakness but of strength." *Id.* at 25, 91 S.Ct. at 1788; see also *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, 1085 (Wilentz, C.J. dissenting) (arguing that notice should be given in the language of the claimant and stating that to do so would show that "we are strong enough to give meaning to our fundamental rights when they are possessed by non-English speaking people in our midst"), *cert. denied*, 459 U.S. 806, 103 S.Ct. 30, 74 L.Ed.2d 45 (1982).

As we have noted, it is frequently the need to convey information to members of the public that dictates the decision to speak in a different tongue. If all state and local officials and employees are prohibited from doing so, Arizonans who do not speak English will be unable to receive much essential information concerning their daily needs and lives. To call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of "mode of expression" is to miss entirely the basic point of First Amendment protections.²¹

In sum, we most emphatically reject the suggestion that the decision to speak in a language other than English does not implicate pure speech concerns, but is instead akin to expressive conduct. Speech in any language is still speech, and the decision to speak in another language is a decision involving speech alone.

21. We would only add that to ignore the substance of speech and to look solely to form when analyzing the impact of a prohibition on speech is to be wholly mechanical and artificial. That approach to constitutional analysis ill serves the purpose of the Bill of Rights and denigrates the judicial function. When the effect of banning a form of speech is to prevent receipt of the message by the intended audience, it cannot seriously be argued that the ban is innocuous because it applies only to the mode of speech.

Moreover, notwithstanding Chief Judge Wallace's assertion, see Wallace, concurring in dis-

C.

Affirmative Versus Negative Rights

Arizonans for Official English next contends, incorrectly, that Yniguez seeks an affirmative right to have government operations conducted in foreign tongues. Because the organization misconceives Yniguez's argument, it relies on a series of cases in which non-English-speaking plaintiffs have unsuccessfully tried to require the government to provide them with services in their own language. See *Guadalupe Org. Inc.*, 587 F.2d at 1024 (no right to bilingual education); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (no right to unemployment notices in Spanish); *Toure v. United States*, 24 F.3d 444 (2d Cir.1994) (no right to notice of administrative seizure in French); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir.1983) (no right to Social Security notices and services in Spanish), *cert. denied*, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (no right to civil service exam in Spanish). These cases, however, hold only that (at least under the circumstances there involved) non-English speakers have no affirmative right to compel state government to provide information in a language that they can comprehend. The cases are inapplicable here.

In the case before us, there is no claim of an affirmative right to compel the state to provide multilingual information, but instead only a claim of a negative right: that the state cannot, consistent with the First Amendment, gag the employees currently providing members of the public with information and thereby effectively preclude large numbers of persons from receiving informa-

sent at 959, the Court has found modes of speech to be protected by the First Amendment. For example, the Court has repeatedly protected a speaker's right to deliver his message *anonymously*. *McIntyre v. Ohio Elections Com'n.* — U.S. —, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960). In those cases, the Court did not hold that the speaker *could* not deliver an identical message without anonymity, rather that the speaker *might* not do so. Here, prohibiting delivery of all messages in languages other than English ensures that many Arizonans will not receive certain messages at all.

tion that they have previous: *Board of Educ., Island T₁ School Dist. No. 26 v. Pic* 866-67, 102 S.Ct. 2799, 2807 435 (1982).²² Such a claim within the confines of tradition doctrine, and is in no way finding of an affirmative duty to the state.

The clearest example of the distinction between affirmative and negative rights is seen in the case of a state legislator who seeks office and be elected in his ability to speak with his family in their native languages. No one has such an official to speak Spanish. Neither, however, can the state or his staff from transmit information regarding official state business to a resident in his district in which he deems to be in the best interests. He was elected to serve.

The cases relied on by the state's sponsors are inapplicable because they involve claims of affirmative rights because they neither consider the First Amendment. Rather, the plaintiffs sought to justify their right to compel the state to provide information and services in their own language. Because mandating compliance with the plaintiffs' requests would impose an affirmative burden on the state to supply a bilingual speaker with the necessary affirmative costs—the courts reject the state's argument. See, e.g., *Frontera*, 522 F.2d 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 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2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 292

tion that they have previously received. Cf. *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67, 102 S.Ct. 2799, 2807-08, 73 L.Ed.2d 435 (1982).²² Such a claim falls squarely within the confines of traditional free speech doctrine, and is in no way dependent on a finding of an affirmative duty on the part of the state.

The clearest example of the distinction between affirmative and negative rights may be seen in the case of a state legislator who may seek office and be elected in part because of his ability to speak with his constituents in their native languages. No one could order such an official to speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his district in whatever language he deems to be in the best interest of those he was elected to serve.

The cases relied on by the amendment's sponsors are inapplicable not only because they involve claims of affirmative rights but because they neither consider nor discuss the First Amendment. Rather, in all those cases the plaintiffs sought to justify the alleged right to compel the state to provide bilingual information and services by reference to equal protection and due process principles. Because mandating compliance with the plaintiffs' requests would have placed an affirmative burden on state and local agencies to supply a bilingual speaker—creating affirmative costs—the courts rejected the claims. See, e.g., *Frontera*, 522 F.2d at 1219 (emphasizing that the cost of bilingual civil service examinations "would ultimately be saddled upon the harried taxpayers of Cleveland");

22. The distinction between affirmative and negative rights, though its legitimacy has been much disputed in academic circles, continues to find favor with the Supreme Court. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989) (rejecting the view that the Constitution imposes "affirmative obligations" on the state). In some instances, the line separating the affirmative from the negative is hard to draw—even though it may be critical to the outcome of a case. Compare *Union Free School Dist. No. 26*, 457 U.S. at 855-56, 102 S.Ct. at 2802 (asking "whether the First Amendment imposes limitations [upon the school

Toure, 24 F.3d at 446 (requirement of notice in language of plaintiff would "impose a patently unreasonable burden upon the government").

Accordingly, the argument of the amendment's sponsor is irrelevant to the right we consider in this case. For while the state may not be under any obligation to provide multilingual services and information, it is an entirely different matter when it deliberately sets out to prohibit the languages customarily employed by public employees. In this connection, we note that here, unlike in the affirmative right cases, there is no contention that "harried taxpayers" will be "saddled" with additional costs, or that the state will be subjected to a "patently unreasonable burden." All that the state must do to comply with the Constitution in this case is to refrain from terminating normal and cost-free services for reasons that are invidious, discriminatory, or, at the very least, wholly insufficient.

D.

Public Employee Speech

1.

General Principles

[16] If this case involved a statewide ban on all uses of languages other than English within the geographical jurisdiction of the state of Arizona, the constitutional outcome would be clear. A state cannot simply prohibit all persons within its borders from speaking in the tongue of their choice. Such a restriction on private speech obviously could not stand. *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S.Ct. 625, 627, 67 L.Ed.

board's power] to remove library books from high school and junior high school libraries") (plurality opinion) (emphasis added), and *id.* at 878, 102 S.Ct. at 2813 (stating that the right at issue does not involve "any affirmative obligation to provide students with information or ideas") (Blackmun, J., concurring) (emphasis added), with *id.* at 886, 102 S.Ct. at 2817 (complaining that "the plurality suggests that there is a new First Amendment 'entitlement' to have access to particular books in a school library") (Burger, C.J., dissenting) (emphasis added). In the present case, however, there can be no doubt that Article XXVIII represents a prohibition on non-English speech, not simply a failure to provide it.

1042 (1923). However, Article XXVIII's restraint on speech is of more limited scope. Its ban is restricted to speech by persons performing services for the government. Thus, we must look beyond first principles of First Amendment doctrine and consider the question of what limitations may constitutionally be placed on the speech of government servants.

[17] For nearly half-a-century, it has been axiomatic in constitutional law that government employees do not simply forfeit their First Amendment rights upon entering the public workplace. In 1972, the Supreme Court elaborated on this principle in upholding a constitutional challenge to a state college's refusal to renew the contract of a teacher who had criticized its policies. See *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.... [M]ost often, we have applied this principle to denials of public employment." *Id.* Only four years ago, the Supreme Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72, 110 S.Ct. 2729, 2736, 111 L.Ed.2d 52 (1990), reaffirmed this principle and reiterated these same words from *Perry* in upholding a First Amendment challenge to a governmental infringement on public employee rights. Thus, the Supreme Court has made it abundantly clear that prohibitions on speech may not be justified by the simple assertion that the government is the employee's employer.

2.

Regulation of Traditional Types of Public Employee Speech

[18] Arizonans for Official English acknowledges that public employee speech is entitled to First Amendment protection. The group then correctly points out that the

Supreme Court has held in a series of cases that the government traditionally has a freer hand in regulating the speech of its employees than it does in regulating the speech of private citizens. See *Waters v. Churchill*, — U.S. —, —, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994) (plurality opinion); *Ran-kin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). As the Court in *Waters* explained, "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." — U.S. at —, 114 S.Ct. at 1886. Notably, the *Waters* Court stated that the *Cohen* rule mandating toleration of choice of language would be inapplicable to the government workplace and made it clear that, in fact, a government employer might appropriately bar its employees from using rude or vulgar language in the workplace. *Id.*; see also *Martin v. Parrish*, 805 F.2d 583, 584 (5th Cir.1986).

Elaborating on concepts previously expressed in *Pickering* and *Connick*, the *Waters* Court examined the reasons that less stringent scrutiny is ordinarily justified in reviewing restrictions on public employee speech. The Court found, in particular, that "the extra power the government has in this area comes from the nature of the government's mission as employer," *id.* at —, 114 S.Ct. at 1887, and it ultimately concluded that:

[t]he key to First Amendment analysis of government employment decisions ... is this: The government's interest in achieving its goals as *effectively and efficiently* as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of *efficiency*. But where the government is employing someone for the very purpose of *effectively* achieving its

goals, such restriction is appropriate.

Id. at —, 114 S.Ct. at 1886 (added); see also *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

Thus, the Court held that the government's interference with its employees' First Amendment rights in performing their public duties is not unconstitutional where the government's interest in achieving its goals as *effectively and efficiently* as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of *efficiency*. But where the government is employing someone for the very purpose of *effectively* achieving its goals, such restriction is appropriate. *Id.* at —, 114 S.Ct. at 1886 (added); see also *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). As the Court in *Waters* explained, "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." — U.S. at —, 114 S.Ct. at 1886. Notably, the *Waters* Court stated that the *Cohen* rule mandating toleration of choice of language would be inapplicable to the government workplace and made it clear that, in fact, a government employer might appropriately bar its employees from using rude or vulgar language in the workplace. *Id.*; see also *Martin v. Parrish*, 805 F.2d 583, 584 (5th Cir.1986).

[19, 20] The *Waters* Court established, however, that public employee speech deserves far more protection than the employee is entitled to in an employment matter: "The government's interest in achieving its goals as *effectively and efficiently* as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of *efficiency*. But where the government is employing someone for the very purpose of *effectively* achieving its goals, such restriction is appropriate." *Id.* at —, 114 S.Ct. at 1887, and it ultimately concluded that:

23. The dissent's statement that the *Waters* case cannot be easily reconciled with traditional legal principles is not persuasive. We conclude, for the reasons stated in the majority opinion, that the First Amendment of Article XXVIII of the Arizona Constitution does not resemble public employee speech.

Chief Judge Walter J. ... the speech of public

a series of cases nally has a freer h of its employ- ing the speech of rs v. Churchill, .. 1878, 1886, 128 opinion); Ran- s. 378, 384, 107 315 (1987); Con- s, 147, 103 S.Ct. 1983); Pickering hip High School S.Ct. 1731, 1734, s the Court in ny of the most First Amend- easonably be ap- nment employ- 4 S.Ct. at 1886. stated that the tion of choice of ble to the gov- it clear that, in might appropri- a using rude or place. *Id.*; see 5 F.2d 583, 584

previously ex- mnick, the Wa- asons that less rily justified in ublic employee particular, that ment has in this of the govern- id. at —, 114 ately concluded

ent analysis of ecisions ... is erest in achiev- and efficiently m a relatively it acts as sover- when it acts as ent cannot re- lic at large just But where the omeone for the y achieving its

goals, such restrictions may well be appropriate.

Id. at —, 114 S.Ct. at 1888 (emphases added); see also *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734; *Connick*, 461 U.S. at 146–47, 103 S.Ct. at 1689–90; *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899.

Thus, the Court has made it clear that it is the government's interest in performing its functions efficiently and effectively that underlies its right to exercise greater control over the speech of public employees. Even before *Waters*, the Court's concern for efficiency and effectiveness led it to conclude that when a public employee speaks "as an employee upon matters only of personal interest," then, "absent the most unusual circumstances," the challenged speech restriction will be upheld. *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690; *Rankin*, 483 U.S. at 385 n. 13, 107 S.Ct. at 2899 n. 13. Concerned that "government offices could not function if every employment decision became a constitutional matter," the Court ruled that mere "employee grievances," (*Connick*, 461 U.S. at 146, 103 S.Ct. at 1690)—involving speech, for example, about "internal working conditions, affecting only the speaker and co-workers," (*O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir.1993))—should rarely be protected by the federal courts.

[19, 20] The *Waters/Pickering* cases also establish, however, that public employee speech deserves far greater protection when the employee is speaking not simply upon employment matters of personal or internal interest but instead "as a citizen upon matters of public concern". *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690. In evaluating restrictions on speech of "public concern," the governmental interest in efficiency and effectiveness is important but not necessarily determinative. In such cases, the content of the

23. The dissent's statement that the speech in this case cannot be easily pigeonholed into one of the traditional legal categories is fully consistent with our analysis. However, unlike the dissent, we conclude, for the reasons discussed *infra* at 940–42, that the speech prohibited by Article XXVIII of the Arizona Constitution more closely resembles public concern than private concern speech.

Chief Judge Wallace's attempt to distinguish the speech of public employees who communi-

speech requires that the government's concern with efficiency and effectiveness be balanced against the public employee's first amendment interest in speaking as emphasized in *Perry* and *Rutan*. See *Waters*, — U.S. at —, 114 S.Ct. at 1887; *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir.1989). As the Court said in *Waters*, "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations, the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." — U.S. at —, 114 S.Ct. at 1887.

3.

The Interests Favoring Protection of the Prohibited Speech

[21] Here the speech does not fit easily into any of the categories previously established in the case law. It is clear that the speech at issue cannot be dismissed as merely speech involving "employee grievances" or "internal working conditions"—speech that is ordinarily of little concern to the general public. Nor is it precisely the same as the speech generally denominated in past cases as "speech on matters of public concern," in part because here the employee is not simply commenting on a public issue but in speaking is actually performing his official duties.²³

This case does not, however, require us to attempt to resolve any broad, general questions regarding the scope of government's authority to regulate speech that occurs as part of an employee's official duties. In many instances, the governmental interest in regulation will be at its height in such cases. For example, the government would have an indisputable right to prohibit its employees from using profanity or abusive language

cate information relating to governmental functions in languages other than English from off-the-job-speech in which public employees communicate their personal opinions relating to governmental matters only serves to prove our point conclusively. If the latter, as Judge Wallace correctly says constitutes speech of public concern, see Wallace, concurring in dissent at 940, *in a fortiori*, must the former.

while conducting official business. See *Waters*, — U.S. at —, 114 S.Ct. at 1886 (noting that government might prohibit its employees "from being 'rude to customers'") (citation omitted). Similarly, the government would ordinarily have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public. On the other hand, there are few First Amendment precedents in this area, and in at least one case involving a school teacher, we employed a traditional balancing test. See, e.g., *Nicholson v. Board of Educ.*, 682 F.2d 858, 865 (9th Cir.1982) (applying *Pickering* balancing test to job performance speech). For present purposes, it is enough to note that the fact that the speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome. The context in which the speech occurs must be weighed along with the other relevant factors when we balance the conflicting interests. Here, the context actually militates in favor of protecting the speech involved.²⁴

[22] In deciding whether to afford constitutional protection to prohibited employee

24. The Court's statements concerning the state's authority to make content-based distinctions when it is the speaker are not to the contrary. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, — U.S. —, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). In both cases, the Court granted the government broad, but not unlimited, power to regulate government-subsidized speech of private parties. *Rosenberger* involved government subsidization of speech by private parties pursuing their own goals, *Rust* government subsidization of speech by private parties carrying out a government program.

Neither *Rosenberger* nor *Rust* concerned the authority of the state to penalize the speech of its public employees, let alone to adopt a general prohibitory rule of sweeping applicability regarding such speech. We do not believe that isolated statements in these cases were meant to rewrite the Court's public employee speech doctrine. Nor do we believe that words used in cases dealing with wholly different issues should be wrenched from their context and applied mechanically to entirely different circumstances. While *Rosenberger* is of very recent origin, *Rust* has been with us for over four years. *Rust* has been cited more than 50 times by circuit courts, yet not once has it been applied in the context of

speech, we must consider both the general interest of the public servant in speaking freely, as described in *Perry* and *Rutan*, and the importance to the public of the speech involved. See *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (considering the public's interest in the speech in determining whether to protect it); *Pickering*, 391 U.S. at 571-72, 88 S.Ct. at 1736 (same). The employee speech banned by Article XXVIII is unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits. The speech at issue is speech that members of the public desire to hear. Indeed, it is most often the recipient, rather than the public employee, who initiates the dialogue in a language other than English. See *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (judging whether speech is of "public concern" by assessing whether it would convey information of use to the public); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1079-80 (4th Cir.1987) (quoting *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir.1985) (citations omitted), *cert. de-*

a restriction on the speech of public employees. *Rust* is simply irrelevant here. In any event, we note that both cases demonstrate there are limitations on the restrictions that the state may impose.

It is rare that governmental power is absolute, and constitutional limitations are wholly inapplicable. While government may certainly regulate or control speech when it is the speaker, it does not have unlimited power to regulate such speech; here, as elsewhere, it must act within constitutional constraints. The government could not, for example, force all public employees to wear pro-life lapel pins or deliver a pro-life message whenever in the performance of their work they communicate with members of the public, any more than it could require delivery of a pro-choice message under similar circumstances. To say that in most circumstances the government may regulate content by compelling or prohibiting on-the-job delivery of a particular message is a truism. However, pronouncing that truism does not resolve the question before us. It merely helps us reach the central issue of this case: Is the particular regulation—here, one that drastically affects not only public employees but also countless Arizonans who need desperately to communicate with their government—constitutional?

nied, 487 U.S. 1206, L.Ed.2d 885 (1988) (st: "public concern" based wants to hear it)).

The practical effects *facto* bar on communic erment employees a ied. For example, speaking residents of tent with the article, c with employees of a office about a landlo: of a rental deposit, n clerks of the state where to file small cl: They cannot obtain i variety of state and adequately inform th: governmental emplo performing their dut government itself is or honestly. Those of English will face c in obtaining or pro: Cf. *Garcia v. Spun*: 1488 (9th Cir.) (eff: ployment rule var workplace; in som: tively may deny em: ficiency in English cate on the job, and as applied to them). F.3d 296 (1993), ce: 114 S.Ct. 2726, 1 Moreover, as we s: strictions that Art: verely limit the ab: communicate with: ing official matters sion would preclud: from convening o: tioning a tribal lea: concerning the pr

25. We note that i: 838 F.2d 1031 (9: 490 U.S. 1016, 10: (1989), while strik: applicable to the: Municipal Courts: it violated Title: constitutional que: rule were to forb: with the non-En: 1044 n. 19.

Cite as 69 F.3d 920 (9th Cir. 1995)

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denied, 487 U.S. 1206, 108 S.Ct. 2847, 101 L.Ed.2d 885 (1988) (stating that speech is of "public concern" based on whether the public wants to hear it)).

The practical effects of Article XXVIII's *de facto* bar on communications by or with government employees are numerous and varied. For example, monolingual Spanish-speaking residents of Arizona cannot, consistent with the article, communicate effectively with employees of a state or local housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how and where to file small claims court complaints.²⁵ They cannot obtain information regarding a variety of state and local social services, or adequately inform the service-givers that the governmental employees involved are not performing their duties properly or that the government itself is not operating effectively or honestly. Those with a limited command of English will face commensurate difficulties in obtaining or providing such information. *Cf. Garcia v. Spun Steak*, 998 F.2d 1480, 1488 (9th Cir.) (effect of English-only employment rule varies from workplace to workplace; in some circumstances it effectively may deny employees with limited proficiency in English the capacity to communicate on the job, and may therefore be invalid as applied to them), *reh'g en banc denied*, 13 F.3d 296 (1993), *cert. denied*, — U.S. —, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994). Moreover, as we suggested earlier, the restrictions that Article XXVIII imposes severely limit the ability of state legislators to communicate with their constituents concerning official matters. For example, the provision would preclude a legislative committee from convening on a reservation and questioning a tribal leader in his native language concerning the problems of his community.

25. We note that in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir.1988), *vacated as moot*, 490 U.S. 1016, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989), while striking down an English-only rule applicable to the private speech of Los Angeles Municipal Courts employees on the ground that it violated Title VII, we explained that serious constitutional questions would arise if such a rule were to forbid communication in Spanish with the non-English-speaking public. *Id.* at 1044 n. 19.

A state senator of Navajo extraction would be precluded from inquiring directly of his Navajo-speaking constituents regarding problems they sought to bring to his attention. So would his staff. The legislative fact-finding function would, in short, be directly affected.

Because Article XXVIII bars or significantly restricts communications by and with government officials and employees, it significantly interferes with the ability of the non-English-speaking populace of Arizona "to receive information and ideas." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972)). As the Court explained in *Virginia Citizens*, "freedom of speech 'necessarily protects the right to receive.'" *Id.*; see also *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-68, 102 S.Ct. 2799, 2807-09, 73 L.Ed.2d 435 (1982); *Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 1808-09, 40 L.Ed.2d 224 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08, 85 S.Ct. 1493, 1496-97, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (invalidating statute prohibiting teaching of foreign languages in part because it interfered "with the opportunities of pupils to acquire knowledge"). Although *Virginia Citizens* is not controlling here because it involved a restriction on the speech of a private entity that willingly provided information to the public,²⁶ the "right to receive" articulated in *Virginia Citizens* and related cases is clearly relevant in public employee

26. In *Virginia Citizens*, the Court struck down a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs, holding that the statute violated the First Amendment. Specifically, it found that the government's suppression of the flow of prescription drug price information violated consumers' right to receive the information. *Id.* at 770, 96 S.Ct. at 1829.

speech cases. Any doubt concerning this point was removed in the *National Treasury Employees Union* case. There, the Court expressly invoked *Virginia Citizens* in striking down a public employee speech restriction.

The large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757, 96 S.Ct. 1817, 1822-1823, 48 L.Ed.2d 346 (1976). We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.

National Treasury Employees Union, — U.S. at —, 115 S.Ct. at 1015 (footnote omitted). Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving. See *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691; *Pickering*, 391 U.S. at 571-72, 88 S.Ct. at 1736; *Piver*, 835 F.2d at 1079-80. In applying these principles, we note that the speech at issue here, mundane though it may be, is of far more direct significance to the public than was the speech referred to in *National Treasury Employees Union*.

Article XXVIII obstructs the free flow of information and adversely affects the rights of many private persons by requiring the incomprehensible to replace the intelligible. Under its provisions, bilingual public employees will be aware that in many instances the only speech they may lawfully offer may be of no value. The article effectively requires that these employees remain mute before members of the non-English speaking public who seek their assistance. At such moments of awkward silence between government employees and those they serve, it will be strikingly clear to all concerned that vital speech

that individuals desire both to provide and to hear has been stifled by the state.

4.

The Absence of Any State Interest In Efficiency and Effectiveness

In light of the interests of both public employees and members of the public in the prohibited speech, a decision as to the constitutionality of Article XXVIII's restrictions involves at a minimum a weighing and balancing process similar to that conducted in the more traditional cases involving public employee speech of "public concern".²⁷ Here, the efficiency and effectiveness considerations that constitute the fundamental governmental interest in the usual "public concern" cases—and that provide the justification against which the employee's First Amendment interests must be weighed—are wholly absent. Indeed, as the parties acknowledged in the stipulation of uncontested facts, Arizona's interest in the efficiency and effectiveness of its workforce runs directly counter to Article XXVIII's restriction on public employee speech. See note 4, *supra*.

Specifically, the facts of this case unequivocally establish that Yniguez's use of Spanish in the course of her official duties contributed to the efficient and effective administration of the State. See Statement of Stipulated Facts at 5-6. More generally, the facts of this case, as well as elementary reason, tell us that government offices are more efficient and effective when state and local employees are permitted to communicate in languages other than English with consumers of government services who are not proficient in that language. *Id.* (stating that use of non-English languages promotes the "efficient administration of the State"); *Cota v. Tucson Police Dept.*, 783 F.Supp. 458, 462 (D.Ariz. 1992) (emphasizing that "the availability of Spanish-speaking personnel is necessary for effective performance of [the Tucson Police Department's] mission").

Additionally, as we explained earlier, if the purpose of Article XXVIII were to promote efficiency, it would not impose a total ban but would provide that languages other than En-

glish may be used only when they facilitate communication, not when they hinder it. This plainly does not maintain the *supra*, at 928-29.

On this point, we Official English's as: inefficiency and "cha- cle XXVIII's invalid: contrary to the stipu- cated upon a wholly - to the nature of Yni- contends that appe- speak another langu- less of whether the i- speech primarily spe- even able to compre- a "right" would be - than the right at is- show, Yniguez spoke - speaking claimants - glish-speaking claim- any right to "choose - claimants who would - would this or any oth- right. Accordingly, - ty, we emphasize tha- cannot unreasonably - English languages, w- state is therefore for- ate or burdensome li- we do not suggest th- a "right" to speak in- to do so would hinde - *Jurado v. Eleven-Fig* (9th Cir.1987) (Title - station's firing of an- follow programming - speaking in Spanish) - here the lawfulness - other than English t- traditional interest in- ness.

The Propriety of Justifications of Efficiency and Effectiveness

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27. The alternative is, of course, to apply the strict scrutiny test. See *Rutan*, 497 U.S. at 70 & n. 4.

110 S.Ct. at 2735 & n. 4. See also discussion *infra* at 941-42.

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glish may be used in government business only when they facilitate such business and not when they hinder it. Article XXVIII plainly does not make this distinction. See, *supra*, at 928–29.

On this point, we note that Arizonans for Official English's assertion that government inefficiency and "chaos" will result from Article XXVIII's invalidation is not only directly contrary to the stipulated facts but is predicated upon a wholly erroneous assumption as to the nature of Yniguez's claim. The group contends that appellees seek the right to speak another language at will and regardless of whether the intended recipient of the speech primarily speaks that language or is even able to comprehend it. However, such a "right" would be of a far different order than the right at issue here. As the facts show, Yniguez spoke Spanish with Spanish-speaking claimants and English with English-speaking claimants. She does not claim any right to "choose" to speak Spanish with claimants who would not understand her, nor would this or any other court uphold such a right. Accordingly, in the interests of clarity, we emphasize that by ruling that the state cannot unreasonably limit the use of non-English languages, we do not imply that the state is therefore forced to allow inappropriate or burdensome language uses. In short, we do not suggest that a public employee has a "right" to speak in another language when to do so would hinder job performance. Cf. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir.1987) (Title VII not violated by radio station's firing of announcer who refuses to follow programming format and insists on speaking in Spanish). We merely consider here the lawfulness of speech in languages other than English that *further*s the state's traditional interest in efficiency and effectiveness.

5.

The Propriety of Considering State Justifications Other Than Efficiency and Effectiveness

Because the speech at issue here does not adversely affect the state's interest in efficiency and effectiveness, and because the *Waters/Pickering* line of cases limits consid-

eration of the governmental interest to these concerns, were we to apply the traditional *Waters/Pickering* balancing test, Arizonans for Official English would lose by default. There would be nothing on the non-free speech side of the scale. There have, however, been a number of other cases in which the Court (though sometimes giving *some* weight to efficiency and effectiveness concerns) has considered primarily the government's argument that a broader set of justifications supports a particular restriction on the First Amendment rights of public employees.

Most of the cases in which the government has relied on justifications other than efficiency and effectiveness have involved patronage practices, although some have involved restrictions on public employees' political activities. See, e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70–76 & n. 4, 110 S.Ct. 2729, 2735–37 & n. 4, 111 L.Ed.2d 52 (1990) (citing, *inter alia*, interest in preventing excessive political fragmentation and strengthening party system); *Elrod v. Burns*, 427 U.S. 347, 364–69, 96 S.Ct. 2673, 2685–88, 49 L.Ed.2d 547 (1976) (citing, *inter alia*, interest in preserving the democratic process); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973) (citing, *inter alia*, interest in preventing development of a powerful and corrupt political machine). In those cases, the government has relied on the broader concerns that "the government might have in the structure and functioning of society as a whole." *Rutan*, 497 U.S. at 70 n. 4, 110 S.Ct. at 2735 n. 4. In other words, the concerns on which the government has relied do not relate to ensuring an efficient workplace but instead involve more general societal interests. In such cases, there is no substantial nexus between the alleged governmental interest and job performance.

In a recent Supreme Court case in which the government sought to justify a limitation on public employee First Amendment rights on the basis of broad governmental interests rather than on traditional efficiency and effectiveness concerns, the majority applied a strict scrutiny test and rejected the challenged governmental practices. The majori-

ty concluded that because the government's interests in the regulations were not "employment-related," there was no reason to relax the strict scrutiny ordinarily applied to restrictions on speech. *Rutan*, 497 U.S. at 70 n. 4, 110 S.Ct. at 2735 n. 4. By contrast, the dissenters applied a more permissive balancing test, asking: "can the governmental advantages of this employment practice reasonably be deemed to outweigh its 'coercive' effects?" Compare *Rutan*, 479 U.S. at 70-74 & n. 4, 110 S.Ct. at 2735-36 & n. 4 with *id.* at 96-104 & n. 3, 110 S.Ct. at 2749-52 & n. 3 (Scalia, J., dissenting). The dissenters adopted the premise that broader governmental interests were due no less deference than the governmental interest in efficiency and effectiveness.²⁸ Accordingly, the dissenters' approach essentially mimicked the *Waters/Pickering* balancing test; it simply broadened the scope of that test to account for interests other than efficiency and effectiveness.

In an even more recent case, the Court invalidated a restriction on public employee speech without discussing the question of the applicable test, although it employed a balancing approach. See *United States v. National Treasury Employees Union*, — U.S. —, —, —, 115 S.Ct. 1003, 1015-1018, 130 L.Ed.2d 964 (1995). In doing so, the Court did not even mention *Rutan*. Nor did it refer to or identify a specific level of scrutiny to be applied. Instead, it deemed it sufficient to evaluate the particular burdens imposed by the statute in light of the particular interests affected. Rather than fixing on superficially precise legal labels or formulae that are easily manipulated by sophisticated lawyers and judges, the Court conducted a thorough and judicious examination of the practical impact of the legislation involved, both positive and negative, and its effect on constitutionally protected interests. It then carefully weighed and balanced the various factors and reached its conclusion in a reasoned and measured manner. In doing so, it ably performed the quintessential function of

28. The dissenters concluded that it is wholly irrelevant whether the restrictions at issue are justified on the basis of the "employer" interests of efficiency and effectiveness, or broader interests. See *id.* at 100, 110 S.Ct. at 2751 n. 3. In

judicial decision-making: the exercise of judgment.

The Court's approach in *National Treasury Employees Union* is consistent with the method of analysis we undertake. In any event, we need not decide what level of scrutiny or what approach to balancing is applicable here. Whether we apply strict scrutiny as suggested by *Rutan*, whether we use a form of balancing test similar to that advocated by the *Rutan* dissenters and modelled on the approach traditionally employed in the *Waters/Pickering* line of cases, or whether we follow the course chosen by the Court in *National Treasury Employees Union*, the result is the same: The restrictions on free speech are not justified by the alleged state interests.

6.

Evaluating the Alleged State Justifications

Arizonans for Official English claims, as it and others did when the initiative was on the ballot, that Article XXVIII promotes significant state interests. The organization enumerates these interests as: protecting democracy by encouraging "unity and political stability"; encouraging a common language; and protecting public confidence.

We note at the outset that the sweeping nature of Article XXVIII's restriction on public employee speech weighs significantly in our evaluation of the state's alleged interests. In *National Treasury Employees Union*, the Court explained that when the government seeks to defend a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," — U.S. at —, 115 S.Ct. at 1013, its burden is heavier than when it attempts to defend an isolated disciplinary action. *Id.* Thus, we must examine the state's asserted justifications with particular care.

There is no basis in the record to support the proponents' assertion that any of the broad societal interests on which they rely

their view, there is "no reason in policy or principle" why the government should not be free to further even its broader interests through appropriate restrictions on employee speech. *Id.*

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approach in *National Treasury Union* is consistent with the analysis we undertake. In any event, we do not decide what level of scrutiny to apply. Our approach to balancing is applicable whether we apply strict scrutiny or intermediate scrutiny. As in *Rutan*, whether we use a strict test similar to that advocated by the dissenters and modeled after the approach traditionally employed in the *Turner* line of cases, or whether we use the more relaxed course chosen by the Court in *National Treasury Employees Union*, the result is the same: The restrictions on free speech are justified by the alleged state

6.

Alleged State Justifications
The Arizona Official English claims, as it was when the initiative was on the ballot, that Article XXVIII promotes significant state interests. The organization enumerates these interests as: protecting and promoting the public confidence in the government; encouraging a common language; and protecting the public confidence.

At the outset that the sweeping restriction on speech in Article XXVIII's restriction on speech weighs significantly in favor of the state's alleged interests. *National Treasury Employees Union* explained that when the government attempts to defend a "wholesale deterrent" category of expression by a "burden" on potential speakers, "the government's burden is heavy when it attempts to defend an arbitrary action." *Id.* Thus, we give the state's asserted justifications particular care.

The basis in the record to support the state's assertion that any of the interests on which they rely

is "no reason in policy or principle why government should not be free to regulate broader interests through appropriate restrictions on employee speech." *Id.*

are served by the provisions of Article XXVIII. We also note that the article itself contains no statement of findings that would suggest that it would serve the interests asserted by the appellants. The absence of any evidence to this effect is of particular significance given that the deference normally accorded legislative findings does not apply with the same force when "First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S.Ct. 1535, 1542, 56 L.Ed.2d 1 (1978). It is equally significant for a second reason—Article XXVIII is a ballot initiative and thus was subjected to neither extensive hearings nor considered legislative analysis before passage. *Cf. United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. at 565–567, 93 S.Ct. at 2890–91 (noting the extensive legislative findings that supported the Hatch Act).

In plain fact, Arizonans for Official English offer us nothing more than "assertion and conjecture to support its claim" that Article XXVIII's restrictions on speech would serve the alleged state interests. *Landmark*, 435 U.S. at 841, 98 S.Ct. at 1542; *National Treasury Employees Union*, — U.S. at —, 115 S.Ct. at 1017 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. —, —, 114 S.Ct. 2445, 2450, 129 L.Ed.2d 497 (1994)). Accordingly, the appellants have not demonstrated that the benefits to be obtained outweigh the burdens imposed on First Amendment rights, particularly given the all-encompassing scope of the restriction they seek to defend. *See National Treasury Employees Union*, — U.S. at —, 115 S.Ct. at 1014 (explaining that the government's "burden is greater" in such cases).

We also reject the justifications for even more basic reasons. Our conclusions are influenced primarily by two Supreme Court cases from the 1920s in which nearly identical justifications were asserted in support of laws restricting language rights. *See Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67

29. The fact that the Supreme Court, deciding these cases in the 1920s, struck down the language restrictions in *Meyer* and *Tokushige* as violative of due process does not lessen their relevance. Substantive due process was the doc-

L.Ed. 1042 (1923); *Farrington v. Tokushige*, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646 (1927). *Meyer* involved a Nebraska statute that prohibited the teaching of non-English languages to children under the eighth grade level; *Tokushige*, similarly, involved a Hawaii statute that singled out "foreign language schools," such as those in which Japanese was taught, for stringent government control.

In defending the statute at issue in *Meyer*, the state of Nebraska explained that "[t]he object of the legislation . . . [is] to create an enlightened American citizenship in sympathy with the principles and ideals of this country." 262 U.S. at 393, 43 S.Ct. 625; *see also id.* at 398, 43 S.Ct. at 626 (asserting that purpose of law was to prevent children from having "inculcate[d] in them the ideas and sentiments foreign to the best interests of this country"); *id.* at 390, 43 S.Ct. 625 (noting that law was designed "to promote civic development," and inhibit the acquisition of "foreign . . . ideals"). More recently, the Court explicitly characterized the language restriction in *Meyer* as designed "to promote civic cohesiveness by encouraging the learning of English." *Epperson v. Arkansas*, 393 U.S. 97, 105, 89 S.Ct. 266, 271, 21 L.Ed.2d 228 (1968). Despite these worthy goals, the Court ruled that the repressive means adopted to further them were "arbitrary" and invalid. *Meyer*, 262 U.S. at 403, 43 S.Ct. at 628.

Similarly, the provision at issue in *Tokushige* had the specific purpose of regulating language instruction "in order that the Americanism of the students may be promoted." 273 U.S. at 293, 47 S.Ct. at 407. As in *Meyer*, the *Tokushige* Court recognized the validity of the interests asserted in defense of the statute. 273 U.S. at 299, 47 S.Ct. at 409. Nonetheless, citing *Meyer*'s invalidation of the Nebraska law, it found that the statute's promotion of these interests was insufficient to justify infringing on the constitutionally protected right to educate one's children to become proficient in one's mother tongue.²⁹

trine of choice for the protection of fundamental rights during the first part of this century, although it has now largely been replaced by other constitutional doctrines. *See, e.g., Hales v. Nebraska*, 205 U.S. 34, 42, 27 S.Ct. 419, 422, 51

Meyer and *Tokushige* also demonstrate the weakness of the second justification for Article XXVIII proffered by Arizonans for Official English: that of encouraging a common language. In *Meyer*, the statute reflected the belief that "the English language should be and become the mother tongue of all children reared in this state." 262 U.S. at 398, 43 S.Ct. at 626. The statute in *Tokushige* would have similarly inhibited the spread of the Japanese language, presumably in favor of English. 273 U.S. at 298, 47 S.Ct. at 408. Although there is probably no more effective way of encouraging the uniform use of English than to ensure that children grow up speaking it,³⁰ both statutes were struck down on the ground that these interests were insufficient to warrant such restrictions on the use of foreign languages.

Like the Court in *Meyer* and *Tokushige*, we recognize the importance of (1) promoting democracy and national unity and (2) encouraging a common language as a means of encouraging such unity. See *Guadalupe Organization, Inc., supra*.³¹ The two primary justifications relied on by the article's proponents are indeed closely linked. We cannot agree, however, that Article XXVIII is in any

L.Ed. 696 (1907) (similarly framing free speech claim in terms of property rights). It should therefore be clear that the Court's formal labeling of the right as falling under the rubric of substantive due process does not control our consideration of it—and, in fact, the Court subsequently explicitly recharacterized *Meyer* as protecting First Amendment freedoms. See *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); see also *Epperson*, 393 U.S. at 105-06, 89 S.Ct. at 270-71 (First Amendment case considering *Meyer* as relevant but noting that it "was decided before the Court expressly applied the specific prohibitions of the First Amendment to the States"); Yassky, *Eras of the First Amendment*, 91 Col.L.Rev. 1699, 1733 (1991) (describing *Meyer* as First Amendment case); Tribe, *American Constitutional Law* 1319-20 (2d ed. 1988) (noting that Justice McReynolds wrote *Meyer* "[u]sing the tools of his time," but that it has been reinterpreted as embodying First Amendment principles).

30. The dissent in *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923), which applied equally to *Meyer*, strongly emphasized this point. 262 U.S. at 412, 43 S.Ct. at 630. The majority, however, remained unpersuaded that these concerns outweighed the fundamental rights at issue.

way a fair, effective, or appropriate means of promoting those interests, or that even under a more deferential analysis its severely flawed effort to advance those goals outweighs its substantial adverse effect on first amendment rights. As we have learned time and again in our history, the state cannot achieve unity by prescribing orthodoxy. See *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Meyer*, 262 U.S. 390, 392, 43 S.Ct. 625 (argument of plaintiff) (forced "Americanization" violates American tradition of liberty and toleration). Notwithstanding this lesson, the provision at issue here "promotes" English only by means of proscribing other languages and is, thus, wholly coercive. Moreover, the goals of protecting democracy and encouraging unity and stability are at most indirectly related to the repressive means selected to achieve them. Next, the measure inhibits rather than advances the state's interest in the efficient and effective performance of its duties. Finally, the direct effect of the provision is not only to restrict the rights of all state and local government servants in Arizona, but also to severely im-

31. The dissent treats *Guadalupe Organization*, a case that does not even discuss the First Amendment and which focused on the right to be instructed in a foreign language about a foreign culture, as the touchstone for deciding this First Amendment challenge. We agree with *Guadalupe Organization* to the extent that it sets forth the advantages that accrue from encouraging those living in this nation to learn English and to share in our use of a common language. At the same time we recognize that cultural diversity and tolerance of differences are among our nation's greatest strengths, as is our unwillingness to impose uniformity or orthodoxy by fiat. This court's position regarding linguistic and cultural diversity and the constitutionally-permissible means for promotion of our growth as a unified nation are the ones expressed in this majority opinion and the concurrence of Judge Brunetti whose separate statements on this point we fully endorse. We disapprove, however, the part of *Guadalupe Organization* on which the dissent relies and which it quotes at pages 958-59. By doing so, we do not intend to unsettle the holding of our earlier decision; the question resolved in *Guadalupe Organization* is not before us, and we do not consider the part of the opinion we disapprove essential to the conclusion the *Guadalupe Organization* court reached.

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pair the free speech interests of a portion of the populace they serve.

We should add that we are entirely unmoved by the third justification—that allowing government employees to speak languages other than English when serving the public would undermine public confidence and lead to “disillusionment and concern.” To begin with, it is clear that the non-English speaking public of Arizona would feel even greater disillusionment and concern if their communications with public employees and, effectively, their access to many government services, were to be barred by Article XXVIII. Moreover, numerous cases support the notion that the interest in avoiding public hostility does not justify infringements upon constitutional rights. See *e.g.*, *Buchanan v. Warley*, 245 U.S. 60, 79–81, 38 S.Ct. 16, 20, 62 L.Ed. 149 (1917) (possibility of race conflict does not justify housing segregation); *Palmore v. Sidoti*, 466 U.S. 429, 433–34, 104 S.Ct. 1879, 1882–83, 80 L.Ed.2d 421 (1984) (society’s racial animus not legitimate factor to consider in awarding custody of child). In short, the “concern” that some members of the Arizona public may feel over the use of non-English languages provides no basis for prohibiting their use no matter the degree of scrutiny we apply.

Here, the full costs of banning the dissemination of critical information to non-English speaking Arizonans cannot readily be calculated. There would undoubtedly be severe adverse consequences which even the sponsors of Article XXVIII neither foresaw nor intended. The range of potential injuries to the public is vast. Much of the information about essential governmental services that, but for the initiative, would be communicated in a manner that non-English speaking Arizonans could comprehend may not be susceptible to timely transmission by other means. By comparison, the benefits that the initiative purports to offer are minimal, especially in light of the state’s concession that its interests in “efficiency” and “effectiveness” are not served by the Article. Thus, under a balancing test, whether identified as a *Walters/Pickering* type of test, a test modelled

32. Cf. *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 1872, 114 L.Ed.2d 395 (1991)

after that standard, as employed by the dissenters in *Rutan*, or the *National Treasury Employees Union* approach to balancing, Article XXVIII must be held unconstitutional. *A fortiori*, the article could not survive a traditional strict scrutiny test. We reach our conclusions only after giving full consideration to the governmental interest in controlling the content and manner of the speech of its employees in the performance of their work assignments. Here, however, that interest, when balanced against the considerations we have examined, cannot outweigh the free speech interests impaired by Article XXVIII.

E.

Conclusion

To conclude, Article XXVIII is not a valid regulation of the speech of public employees and is unconstitutionally overbroad. By prohibiting public employees from using non-English languages in performing their duties, the article unduly burdens their speech rights as well as the speech interests of a portion of the populace they serve. The article similarly burdens the First Amendment rights of state and local officials and officers in the executive, legislative, and judicial branches.

We note that the adverse impact of Article XXVIII’s over-breadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities. Cf. *Spun Steak*, 998 F.2d at 1486 (English-only rule in the workplace may disproportionately affect Hispanic employees); see generally *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir.1984) (holding, in case involving restriction on NAACP march against racist police practices, that courts “must examine restrictions on speech with particular care when their effects fall unevenly on different . . . groups in society”); *Tribe, supra*, at 970. “Since language is a close and meaningful proxy for national origin,³² restrictions on the use of languages

(noting that in some contexts proficiency in particular languages might be treated as a surrogate for national origin.)

may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment. See, e.g., *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528, 46 S.Ct. 619, 626, 70 L.Ed. 1059 (1926) (statute prohibiting keeping of account books in any language other than English or Spanish denies equal protection of law to Chinese merchants); *Lau v. Nichols*, 414 U.S. 563, 566-69, 94 S.Ct. 786, 788-90, 39 L.Ed.2d 1 (1974) (recognizing right under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, of non-English-speaking Chinese students to receive bilingual compensatory education, because "students who do not understand English are effectively foreclosed from any meaningful education"); *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328, 1332 (C.D.Cal.1989) (law restricting use of non-English alphabetical characters discriminates on basis of national origin); *Hernandez v. Erlenbusch*, 368 F.Supp. 752, 755-56 (D.Or.1973) (tavern's English-only rule constitutes illegal discrimination against Mexican-American patrons); Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L.L.Rev. 293, 325, 328 n. 225 (1989); Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 Yale L.J. 1164, 1165 & n. 5 (1985). In light of these considerations, the equal protection ramifications of Article XXVIII's restrictive impact strongly support our holding, as well.³³

As President Franklin D. Roosevelt once remarked, "all of our people all over the

gate for race"); but cf. *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983), cert. denied, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984).

33. We note, once again, a strong similarity between this case and *Meyer*. Because they invalidated Nebraska statute to a large extent targeted the substantial German-American community in that state (and was enacted in the wake of World War I), *Meyer* has been viewed as a precursor to modern equal protection doctrine. Tribe, *supra*, at 1320 n. 13; *Hernandez*, 500 U.S. at 371, 111 S.Ct. at 1873. This reading of *Meyer* is strengthened by the fact that one of the laws struck down in *Bartels v. State of Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923), its companion case, specifically singled out the German language for repression. See *Bartels*, 262 U.S. at 410 n. 2, 43

country, all except the pure-blooded Indians, are immigrants or descendants of immigrants, including those who came over on the Mayflower." N.Y. Times, Nov. 5, 1944, at 38. Many and perhaps most immigrants arrived in the United States speaking a language other than English. Nonetheless, this country has historically prided itself on welcoming immigrants with a spirit of tolerance and freedom—and it is this spirit, embodied in the Constitution, which, when it flags on occasion, courts must be vigilant to protect.

In closing, we note that tolerance of difference—whether difference in language, religion, or culture more generally—does not ultimately exact a cost. To the contrary, the diverse and multicultural character of our society is widely recognized as being among our greatest strengths. Recognizing this, we have not, except for rare repressive statutes such as those struck down in *Meyer*, *Bartels*, *Yu Cong Eng*, and *Farrington*, tried to compel immigrants to give up their native language; instead, we have encouraged them to learn English. The Arizona restriction on language provides no encouragement, however, only compulsion: as such, it is unconstitutional.

IV.

Nominal Damages

Finally, we must consider the question of Yniguez's right to nominal damages. The State of Arizona expressly waived its right to

S.Ct. at 629 n. 2 (statute allowed teaching of non-English languages as elementary school subjects, "provided that the German language shall not be taught"). Even Justice Holmes, who otherwise dissented from the majority opinion, agreed that that statute was unconstitutional. *Bartels*, 262 U.S. at 413, 43 S.Ct. at 630 (Holmes, J., dissenting).

The speech of unpopular groups, of course, often meets with hostility and repression, though it is more commonly the message that is targeted than the language in which it is communicated. Given the link between unpopular speech and unpopular groups, it is not surprising that even some of our most venerable First Amendment precedents have an (albeit implicit) equal protection component. See, e.g., *Barnette*, *supra* (Jehovah's Witnesses); *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (black civil rights activists).

assert the Eleventh Amendment to the award of nominal damages. *Piphus*, 435 U.S. 247, 261, 1042, 1053-54, 55 L.Ed.2d 2 leading case on this issue, Court held that plaintiffs in a were entitled to nominal damages deprivation of their due process without proof of actual injury, explained that:

[c]ommon-law courts traditionally indicated deprivations of certain rights that are not shown to be actual injury through the award of a nominal sum of money. By the award of such rights actions for damages without proof of actual injury law recognizes the importance of society that those rights be observed.

Id.; see also *Lokey v. Richardson*, 1265, 1266 (9th Cir.1979), cert. denied, 450 U.S. 884, 101 S.Ct. 238, 66 (1980).

[23] The right of free speech and due process of law, must be protected. Indeed, the protection of First Amendment rights is central to our society's capacity for democracy. See Meiklejohn, *Free Speech: A Social Theory*, *New York Times v. Sullivan*, 376 U.S. 70, 84 S.Ct. 710, 720-21, 11 L.Ed.2d 686 (1964). Thus, even without proof of actual injury, Yniguez is entitled to nominal damages for prevailing in an action under 42 U.S.C. § 1983 for the deprivation of First Amendment rights. See *Nalbandian*, 635 F.Supp. 1362, 1364 n. 5 (D.C. Cal. 1986).

V.

Conclusion

We affirm the district court's judgment that Article XXVIII of the Arizona Constitution is facially overbroad under the First Amendment, and that it is unconstitutional in its entirety.

34. Indeed, an award of nominal damages is a recognition of society's interest in the protection of a disputed right is singularly appropriate. First Amendment overbreadth cases are successful plaintiff in an overbroad

assert the Eleventh Amendment as a defense to the award of nominal damages. In *Carey v. Phipps*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978), the leading case on this issue, the Supreme Court held that plaintiffs in a § 1983 action were entitled to nominal damages for the deprivation of their due process rights even without proof of actual injury. The Court explained that:

[c]ommon-law courts traditionally have vindicated deprivations of certain absolute rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

Id.; see also *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir.1979), cert. denied, 449 U.S. 884, 101 S.Ct. 238, 66 L.Ed.2d 110 (1980).

[23] The right of free speech, like that of due process of law, must be vigorously defended. Indeed, the protection of First Amendment rights is central to guaranteeing society's capacity for democratic self-government. See Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948); *New York Times v. Sullivan*, 376 U.S. 254, 269-70, 84 S.Ct. 710, 720-21, 11 L.Ed.2d 686 (1964). Thus, even without proof of actual injury, Yniguez is entitled to nominal damages for prevailing in an action under 42 U.S.C. § 1983 for the deprivation of First Amendment rights. See *Nakao v. Rushen*, 635 F.Supp. 1362, 1364 n. 5 (N.D.Cal.1986).³⁴

V.

Conclusion

We affirm the district court's judgment that Article XXVIII of the Arizona Constitution is facially overbroad and violates the First Amendment, and that the article is unconstitutional in its entirety. We reverse

³⁴ Indeed, an award of nominal damages in recognition of society's interest in vindicating the disputed right is singularly appropriate in First Amendment overbreadth cases such as this, for a successful plaintiff in an overbreadth case has

and remand the district court judgment insofar as it denies Yniguez an award of nominal damages.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies,

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This state and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. *Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

convinced the court to strike down a law that would, if left standing, chill the constitutionally protected speech of large numbers of other members of society.

APPENDIX—Continued

3. *Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. *Enforcement; Standing.*

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

BRUNETTI, Circuit Judge, concurring:

I agree that Article XXVIII of the Arizona Constitution is facially invalid and I join in the majority opinion. I write separately to emphasize that the article's unconstitutional effect on Arizona's elected officials would

alone be sufficient reason to strike the provision down.

I.

As indicated in the majority opinion, the government employees affected by the article's unconstitutional limitations outnumber the elected officials affected. However, the extent of the damage caused by Article XXVIII's restrictions on elected officials is not diminished by the fact that their population is smaller than that of government employees.

Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary political speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article XXVIII stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article XXVIII threatens the very survival of our democratic society.

To begin with, Article XXVIII interferes with the ability of candidates for re-election to communicate with voters. These First Amendment protections are equally applicable to all candidates, not simply those running for re-election. However, I address specifically candidates running for re-election because Article XXVIII only affects elected officials.

A candidate must be able to communicate with voters in order for voters to make an informed decision about whether to cast their ballot for that candidate. Indeed, the Supreme Court has said:

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

Bond v. Floyd, 385 U.S. 116, 136-37, 87 S.Ct. 339, 349-50, 17 L.Ed.2d 235 (1966). Communication between candidates and voters is at

the core of all political process. Article XXVIII prevents that results when candidates are disabled from communicating with certain groups.

Article XXVIII not only interferes with a voter's ability to assess their constituents on "The manifest function of a representative legislature is to require that legislators have latitude to express their views of, their constituents if they fully expressing those views of, those constituents. Amendment precludes majority from restrictions with a certain ate.

In addition to interfering with political representation, Article XXVIII attempts to reconfigure language is at the foundation of our political and ethnic diversity in political processes, and Article XXVIII imposes political conformity on the same language by and governmental decisions. Council Arguments 106, at 26 (describing the trend" of "language discourse in English

It does not take much of an assumption[.]” *Br* 413 U.S. 601, 612, 9th L.Ed.2d 830 (1973), to Article XXVIII impermissibly speech. Under prior standing in the First guez's overbreadth claim to examine Article XXVIII ed officials. *See id.* from such unconstitutional the democratic process can be struck down. Accordingly, I would hold Article XXVIII's unconstitutional r

the core of all political action. The First Amendment prevents the disenfranchisement that results when candidates for re-election are disabled from communicating with any certain group.

Article XXVIII not only interferes with a voter's ability to assess candidates, but it also interferes with officials' ability to represent their constituents once they are elected. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135-36, 87 S.Ct. at 349. Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes a successful electoral majority from restricting political communications with a certain segment of the electorate.

In addition to interfering with voting and political representation, Article XXVIII attempts to reconfigure the political landscape. Language is at the foundation of the cultural and ethnic diversity in our democratic and political processes, and is inextricably intertwined therein. Article XXVIII attempts to impose political conformity by requiring that the same language be used for all political and governmental dialogue. *See* Legislative Council Arguments Favoring Proposition 106, at 26 (describing the need to "reverse the trend" of "language rivalries" by requiring discourse in English only).

It does not take much "judicial prediction or assumption[.]" *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), to conclude that Article XXVIII impermissibly chills elected officials' speech. Under principles of third-party standing in the First Amendment area, Yniguez's overbreadth claim permits this panel to examine Article XXVIII's impact on elected officials. *See id.* The harm to society from such unconstitutional interference with the democratic process requires that the article be struck down as facially overbroad. Accordingly, I would hold that Article XXVIII's unconstitutional restriction on elected of-

ficials' speech is sufficient to find facial overbreadth.

II.

That being said, I agree with the other members of the majority that the article is also unconstitutional and facially overbroad for the independent reason that it restricts the speech of government employees, such as Yniguez. While I feel there may be some tension between the public interest in receiving Yniguez's public services in Spanish as described by the majority, and our prior cases which hold that there is no right to receive government services in a language other than English, our holding today does not conflict with those prior cases. *See, e.g., Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973) (no right to unemployment notice in Spanish); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41-43 (2d Cir.1983) (no right to Social Security notices and services in Spanish), *cert. denied*, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984).

As the majority carefully describes, we are only considering the *interest* of the public in receiving speech when government employees exercise *their right* to utter such speech, and we do not create an independently enforceable public *right* to receive information in another language. Our consideration of the public's interest in receiving Yniguez's speech is dictated by the *Waters/Pickering* test. Under the *Waters/Pickering* test, we must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *United States v. National Treasury Employees Union*, — U.S. —, —, 115 S.Ct. 1003, 1012, 130 L.Ed.2d 964 (1995) (quoting *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968)) (alteration in original). The public's interest in receiving Yniguez's speech weighs in on both sides of the test.

Speech touches a matter of public concern if the community that constitutes the speaker's audience has an interest in receiving that speech. *Cf. Connick v. Myers*, 461 U.S. 138,

148, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) (finding that certain speech was not a matter of public concern because “[speaker] did not seek to inform the public”); *id.* at 148, 103 S.Ct. at 1690 (relying on this country’s “demonstrated interest” regarding the subject matter of other speech to conclude that the subject matter was one of public concern). When determining whether an employee’s speech addresses a matter of public concern, we look to “the content, form, and context of a given statement, as revealed by the record as a whole.” *Id.* at 147–48, 103 S.Ct. at 1690. In this case, the parties stipulated that Yniguez communicates the Risk Management Division’s dispositions of malpractice claims in Spanish to persons who are only able to speak in Spanish, persons whose English is not well-developed, and persons who are unable to understand the English language to comprehend the legal import of the document they are signing. Those claimants clearly have an interest in receiving information about their claims in Spanish since they would not otherwise be able to understand the information. Therefore, Yniguez’s Spanish language communications touch matters of public concern.

On the efficiency side of the *Waters/Pickering* balance, the public’s interest in receiving Yniguez’s communications is once again an important factor. If a recipient of Yniguez’s information did not have an interest in receiving the information in Spanish, it would not be efficient for Yniguez to communicate with that person in Spanish. For example, if Yniguez’s audience was a mono-lingual English-speaker, undeniably it would be inefficient for her to talk to that person in Spanish. But that is not the situation here. The parties in this case stipulated that Yniguez only speaks Spanish to mono-lingual Spanish-speakers, or people whose “English language [skills] were not sufficiently well-developed to understand all of the English language expressions and ideas which [Yniguez] desired to communicate.” Use of Spanish under these circumstances, as the parties stipulated, “contributes to the efficient operation of the State.”

Under the facts of this case, the public interest in Yniguez’s use of Spanish is a

necessary consideration under the *Waters/Pickering* test. Consideration of the public’s interest in receiving Yniguez’s Spanish language communications is only for the purpose of establishing *her* right to speak, not of establishing the *public’s* right to receive. Yniguez’s Spanish-speaking audience has an *interest* in listening to her Spanish-language speech, and that interest helps define her right to speak in Spanish. Nowhere is it implied that her audience has a *right* to hear her, or any other government employee, speak in Spanish.

REINHARDT, Circuit Judge, concurring specially:

Judge Kozinski’s separate dissent requires separate comment. In the latest chapter of his crusade against the use of languages other than English in public, it is what Judge Kozinski does *not* say that is most revealing. My learned colleague, who is surely expert in these matters by now, ignores completely the constitutional interests of the numerous non-English speakers. There is nothing novel about the fact that the interests of the *audience* as well as of the speaker are protected by the First Amendment. Yet Judge Kozinski does not even mention, let alone discuss *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), or *United States v. National Treasury Employees Union*, — U.S. —, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), decisions that make it clear that in dealing with First Amendment questions we *must* consider the needs of the audience. In fact, the constitutional interests of the public are at their height when its members seek information of vital importance from the government. In the end, then, it is the interests of non-English speaking persons, often poor and uneducated, that are so compelling here.

If Judge Kozinski had his way, bilingual government clerks would not be able to advise persons who can speak only Spanish—or Chinese or Navajo—how to apply for food stamps, or aid for their children, or unemployment or disability benefits. Public employees would be prohibited from helping non-English speaking residents file com-

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plaints against those who mistreat them or who violate their rights or even from helping them secure driver's licenses or permits to open small businesses. Bilingual traffic officers would not be able to give directions to nearby medical clinics or schools. Migrant farm workers who cannot speak English would find themselves cut off from almost all government assistance by an impenetrable language barrier. Recent immigrants in general, including many who fled persecution, would find their lives in their adopted land unduly harsh and bewildering. Yet, not a word of concern for the less fortunate among us finds its way into Judge Kozinski's constitutional analysis.

At the same time that Judge Kozinski callously ignores the interests of *people*, he stretches eagerly to place the powers of the government, in its role as speaker, beyond the reach of the Constitution. Indeed, it is the rights of the *government* that Judge Kozinski stresses at every opportunity. If Judge Kozinski had his druthers, public employees would be stripped of all First Amendment rights while performing their governmental functions.¹ There would be nothing that Government—from the tiniest municipality on up—could not compel its employees to say, no matter how racist or abhorrent, and nothing that Government could not fire its employees for saying, no matter how innocuous. His would be an Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War, and public employees would be helpless to object. It would not matter whether government had a legitimate purpose or even whether it had a purpose at all.

The difference between the majority's view and Judge Kozinski's is simple. The majority says that under the First Amendment there are limits to what the government can force its employees or officials to say in the course of performing their official duties while Judge Kozinski says that there are

1. I do not mean to suggest that my worthy colleague would discriminate against public employees. They would fare no worse in his regime than private employees. Judge Kozinski would strip the latter of the fruits of the basic job protection provisions that they fought for so long

none. To me, unlimited government power in any form is a foreign notion indeed.

Judge Kozinski does Abraham Lincoln no honor by seeking to enlist his words in support of a mean-spirited, nativist measure—a measure that would create so much division and ill will and that would so severely penalize those among us who are unable to communicate in English. The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he—people who are neither able to write for nor read the Wall Street Journal, and indeed would have little cause to do either.

Nor does Judge Kozinski advance his cause by disingenuously suggesting that his argument is a limited one, that the Arizona initiative might be unlawful for other reasons—just not on First Amendment grounds. Judge Kozinski has previously argued that languages other than English should be banished from the public arena. He openly favors conformity over diversity and would “preserv[e] native tongues and dialects for private and family gatherings.” *Gutierrez v. Mun. Ct. Of S.E. Judicial Dist.*, 861 F.2d 1187, 1193 (9th Cir.1988) (Kozinski, dissenting). Judge Kozinski's view of the rights of non-English speaking persons would make the Statue of Liberty weep. The divided house that Judge Kozinski fears is a world in which Spanish, Chinese, or Navajo is heard in public, a world in which individual liberty rather than government-mandated orthodoxy thrives.

Judge Kozinski trots out a parade of horrors that he insists will come to haunt us if we do not accept his absolutist, authoritarian view. All his examples are absurd. No court in this country would protect a government employee who adopted one of the outlandish stances that Judge Kozinski so caustically suggests. Were we to withhold rights from individuals because clever judges could conjure up hypothetical examples of frivolous law suits, there would soon be no

and so bitterly. See Judge Kozinski's dissent in *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 204 (9th Cir.1990), in which Judge Kozinski advocated upholding permanent discharges of employees on the basis of mere suspicion, notwithstanding a just-cause-for-discharge clause.

assume, without deciding, that Article XXVI-II is just as broad as it appears on its face and that it will, indeed, preclude Yniguez and other employees and officers of the State from speaking in a language other than English when performing state business, unless one of the special exceptions applies.

There can be no doubt that a public employee, like Yniguez, does not have a full panoply of freedoms to do what she likes when she is performing her job. On the contrary, the State can place numerous restrictions upon its employees. The very nature of the employment relationship allows that. For example, even were it assumed that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance," an employee may be restricted unless the regulation "is so irrational that it may be branded 'arbitrary.'" *Kelley v. Johnson*, 425 U.S. 238, 244, 248, 96 S.Ct. 1440, 1444, 1446, 47 L.Ed.2d 708 (1976). Similarly, a citizen's Fourth Amendment privacy rights may be limited at his place of work. See *O'Connor v. Ortega*, 480 U.S. 709, 724-25, 107 S.Ct. 1492, 1501, 94 L.Ed.2d 714 (1987). And even restrictions that reach beyond the job itself to activities outside the workplace may be proper. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-65, 93 S.Ct. 2880, 2886-90, 37 L.Ed.2d 796 (1973) (political campaigning or officeholding); cf. *United States v. National Treasury Employees Union*, — U.S. —, ———, 115 S.Ct. 1003, 1013-15, 130 L.Ed.2d 964 (1995) (at least persons who are not senior executive officers, members of Congress, or judges cannot be subjected to a blanket ban on honoraria when they address "a public audience . . . outside the workplace, and [the] content [is] largely unrelated to their government employment").

those damages. See *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir.1981) (declining to consider plaintiff's request for nominal damages raised for the first time on appeal). As to AACT, we have no evidence before us to indicate that it meets the requirements of the traditional standing doctrine. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). However, we have declared a special rule that public interest group sponsors and supporters of initia-

It is true that we have come some way since Holmes, then a Justice of the Supreme Court of Massachusetts, wrote that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517 (1892). Still and all, as demonstrated by our continued restrictions on political action, we have not entirely abandoned even that concept. It is also true that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967); see also *Wieman v. Updegraff*, 344 U.S. 183, 191-92, 73 S.Ct. 215, 218-19, 97 L.Ed. 216 (1952) (oath regarding joining a revolutionary political party). But none of this is helpful to Yniguez, for the erosion of the restrictions upon employees has taken place in the area of their activities while they are not performing government functions. Membership in a political party or engaging in nongovernmental writing or other private activities is not the performance of a government function.

The distinction cuts closer to the bone when the Supreme Court's treatment of public versus private speech is considered. I will not go through the extensive history of that jurisprudence because its details have little to do with this case. The law in that area keys on the content of the speech itself. That is, was the speech on a matter of public concern or was it on a matter of private concern? See, e.g., *Waters v. Churchill*, — U.S. —, —, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994). Here, the issue involves the language used, not the public or private concern content of the language. An employee might well speak out on a matter of

pressive measures have standing as of right. See *United States v. City of Oakland*, 958 F.2d 300, 301 (9th Cir.1992); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir.1983), *aff'd*, 790 F.2d 760 (9th Cir.1986); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). The same rule must apply to public interest group opponents of initiative measures. Thus, I press on.

public concern in any language, or might simply engage in private-concern grumbling or disruption in any language. The language does not, in the sense used here, change the content at all.

What is important, however, is the Supreme Court's description of the strength of the government's interests and the scope of a government employee's First Amendment rights. If the matter involved is not one of public concern, the court has left the matter almost entirely in the hands of the employing authority. As the Court said in *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983):

[I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

The Court went on to say that not "all matters which transpire within a government office are of public concern. . . ." *Id.* at 149, 103 S.Ct. at 1691. See also *Waters*, — U.S. at —, 114 S.Ct. at 1886-87 (1994).

It is worthy of note that even if the speech is of public concern, the employee does not have all of the freedom of speech of a private citizen. The government can still discipline the employee in the name of efficiency and the like if the government's interests in promoting those other concerns outweigh the employee's interest in speaking out. See, e.g., *id.* at — — —, 114 S.Ct. at 1887-88; *Connick*, 461 U.S. at 149-54, 103 S.Ct. at 1691-93; *Pickering v. Board of Educ.*, 391 U.S. 563, 568-71, 88 S.Ct. 1731, 1734-36, 20 L.Ed.2d 811 (1968). It is from this public concern balancing that Yniguez seeks to draw substantial support because the State has conceded that her speaking in a language other than English would often be more efficient. But efficiency is not the point because this is not a public concern speaking-out case. Nor, as I have said, do I think it is exactly a private concern case. In fact, none of the Supreme Court decisions regarding public or private concern speech involved an employee who was hired to speak for the government and who performed that function in a manner contrary to her instructions.

However, if I were forced to place this case in one pigeonhole or the other, I would say that it is more like a case of private concern speech. The simple fact is that the State, through its constitution, has determined that its work will be done in English, and Yniguez, for her own private reasons, does not wish to obey that determination. At any rate, unless one is thoroughly committed to the economic theory of law, which I am not, one must agree that more than efficiency drives the policies of government. Indeed, as most dictators seem to believe, freedom itself can be very very inefficient.

Yniguez nevertheless argues that her use of a language of her choice to perform the State's business cannot be restricted. It can be said that each language has a content of its own and that languages are a mode of expressing ideas. Yniguez argues that because words are the skins of ideas, the con-

tent of what is said changes from one language to another. It is true, but true to a limited extent, that sometimes difficult enough to understand in a single language. This difficulty can be multiplied when one attempts to translate that language. However, we should place more weight on the difficulties that languages are not so easily understood. We cannot recognize ideas in one language and will assume (along with the content) does change to another when the State's rules, regulations, and messages are changed into another language, even if the language is not the same.

If that is true, it is a violation of Article XXVIII of the Constitution that the State has the right to control what it is paying for in its behalf. As the Supreme Court said in *Rosenberger v. Rector of Va.*, — U.S. —, — 2510, 2518-19, 132 L.Ed.

[W]hen the State is the speaker, it may make content-based decisions. If a University determines the content of the education it provides, it may regulate the content of the speaking, and we have no objection to government regulation of that content. If the speaker is not the government or is not expressed through the government or when it enlists private individuals to deliver its own message. In *Rust v. Sullivan* [500 U.S. 1759, 114 L.Ed.2d 233], the government's prohibition on related advice applied to federal funds for family counseling. There, the government's program to encourage family planning instead used private speakers to deliver specific information about the program. We recognize that the government's program to promote a particular program is entitled to say what it wants. 500 U.S. 1759 [111 S.Ct. at 1772]. The government may disburse public funds to convey a government message. It may take legitimate action to ensure that its message is not blurred nor distorted by

tent of what is said changes as one moves from one language to another. I think that it is true, but true to a limited extent. It is sometimes difficult enough to make oneself understood in a single language, and the difficulty can be multiplied when one attempts to translate that language into another. However, we should not put too much weight on the difficulties, for it is pellucid that languages are not so protean that we cannot recognize ideas in translation. Yet, I will assume (along with Yniguez) that the content does change to a measurable extent when the State's rules, regulations, and messages are changed into a different language, even if language is not pure content.

If that is true, it is a powerful reason to uphold Article XXVIII. It is well settled that the State has the right to control the content of what it is paying for; it can control what is said by those who are acting on its behalf. As the Supreme Court put it in *Rosenberger v. Rector and Visitors of Univ. of Va.*, — U.S. —, ———, 115 S.Ct. 2510, 2518–19, 132 L.Ed.2d 700 (1995):

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan* [500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)] we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S. at 194 [111 S.Ct. at 1772]. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Cf. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir.) (private employers may preclude speaking of a language other than English on the job—"an employee must often sacrifice individual self-expression during working hours"), *reh'g en banc denied*, 13 F.3d 296 (1993), *cert. denied*, — U.S. —, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410–12 (9th Cir.1987) (private radio broadcaster may insist that its employees broadcast in English); *Garcia*, 13 F.3d at 302 ("No reasonable person would suggest that Title VII requires the operator of an English language radio station to permit a hired broadcaster to broadcast . . . in another language. . . .") (Reinhardt, J., dissenting from denial of rehearing en banc); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1041 (9th Cir.), *reh'g en banc denied*, 861 F.2d 1187 (1988), *vacated as moot*, 490 U.S. 1016, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989).

Thus, to the extent that language involves content, the State may choose to direct what that content must be. Moreover, it can hardly be doubted that the State can even choose to foster a particular language to some extent. As the Supreme Court said in *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 S.Ct. 625, 628, 67 L.Ed. 1042 (1923) (emphasis added): "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." Certainly, if the State can require teaching in a particular language, it can itself choose to use a particular language to express the content of what it has to say.

To the extent that a language involves a mode of expressing ideas which themselves could be expressed in different languages, Yniguez's argument fares no better. It is most difficult to see why the State cannot constitutionally require its employees to use one mode of expression—one language—just as it can require that its employees use a particular mode of performing the rest of their duties. Surely, for example, the State can direct that its ditches be dug and that its contracts be let in particular ways, even if an

employee correctly thinks that another mode of performance would be more efficient. Any good employer will listen to its employees' suggestions about how a job may best be done, but employers are not required to follow those suggestions. Nor does the First Amendment change that. Cf. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465, 99 S.Ct. 1826, 1828, 60 L.Ed.2d 360 (1979) (per curiam).

When a mode of expression attracts First Amendment scrutiny, it is because it implicates ideas themselves. There is nothing sacrosanct about the mode. It, as a mode, could be regulated if the regulation only be rational. But where the mode becomes laden with content, the mode itself may be scrutinized so that any protected content will not be injured. As the Supreme Court said in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), in reference to sound trucks and fighting words: "[e]ach ... is a 'mode of speech' ...; both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment." *Id.* at 386, 112 S.Ct. at 2545. See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95, 104 S.Ct. 3065, 3068-69, 82 L.Ed.2d 221 (1984) (assuming—not deciding—that overnight camping is expressive conduct, it can still be regulated); *United States v. O'Brien*, 391 U.S. 367, 375, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). The point is underscored by *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). There, even though the mode of showing contempt was the highly expressive and content-laden act of burning the flag, only a bare majority of the Court was willing to find constitutional protection for the defendant's activities. *Id.* at 420, 109 S.Ct. at 2548.

Thus, Yniguez cannot seek First Amendment protection of the pure mode element of a language. The mode must itself seek shelter under the wing that protects the expressive or content element. However, as al-

ready indicated, the content element cannot help her here.

Of course, none of this means that the State can preclude the general public from learning or speaking a particular language. The State cannot do that. See *Farrington v. Tokushige*, 273 U.S. 284, 299, 47 S.Ct. 406, 409, 71 L.Ed. 646 (1927); *Bartels v. Iowa*, 262 U.S. 404, 411, 43 S.Ct. 628, 630, 67 L.Ed. 1047 (1923); *Meyer*, 262 U.S. at 400-03, 43 S.Ct. at 627-28; cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). It does mean that any protection must be sought in a place other than the First Amendment, or for something other than the mode itself.

The penultimate line needed to sketch the path out of Yniguez's thicket can be drawn by considering the fact that individual citizens have no constitutional right to require that state services be performed in any particular language. When plaintiffs asserted that they had a constitutional right to have the State supply Spanish-speaking employees and notices in Spanish, we turned that claim aside. See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973). And when a demand for bilingual education was made, we also turned that aside. *Guadalupe Org., Inc. v. Tempe Elementary Sch., Dist. No. 3*, 587 F.2d 1022, 1026-27 (9th Cir.1978). As we saw it, that was a question of a high political order and was one for the people themselves to decide. *Id.* at 1027. The people of Arizona decided the question here, for good or ill.

This case, then, presents a confluence of lines of argument. Employees of the State are subject to numerous restrictions upon their freedoms, their actions, and their speech, which the government could not impose upon the general public. The State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language. In the face of all of that, it is well nigh unintelligible to say that individual officers and employees of the State can perform state business in a language of their own choice, despite the State's direction that they shall use a particular language.

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Of course, I recognize that a State's restrictions upon its employees must not be so irrational that they may be branded arbitrary. See *Kelley*, 425 U.S. at 248, 96 S.Ct. at 1446. Can this Article of the Arizona Constitution be so branded if we believe it to be ill-conceived? I think the answer lies in *Guadalupe Organization*, 587 F.2d at 1027 (citation omitted):

Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity. Effective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent culture and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state's government wanes.

Syncretism retards, and sometimes even reverses, the shrinkage of the compact caused by linguistic and cultural diversity. But it would be incautious to strengthen diversity in language and culture repeatedly trusting only in the syncretic processes to preserve the social compact. In the language of eighteenth century philosophy, the century in which our Constitution was written, the social compact depends on the force of benevolence which springs naturally from the hearts of all men but which attenuates as it crosses linguistic and cultural lines. Multiple linguistic and cultural centers impede both the egress of each center's own and the ingress of all others. Benevolence, moreover, spends much of its force within each center and, to reinforce affection toward insiders, hostility toward outsiders develops.

The fundamental nature of these tendencies makes clear that their scope varies from generation to generation and is fixed by the political process in its highest sense. The Constitution, aside from guaranteeing to individuals certain basic rights, privileges, powers, and immunities, does not speak to such matters; it merely evidences a compact whose scope and strength cannot be mandated by the courts but must be

determined by the people acting upon the urgings of their hearts. The decision of the appellees to provide a predominantly monocultural and monolingual educational system was a rational response to a quintessentially "legitimate" state interest. The same perforce would be said were the appellees to adopt the appellants' demands and be challenged by an English-speaking child and his parents whose ancestors were Pilgrims.

Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, . . . [their validity] cannot be determined by reference to the Constitution.

In fine, the people of the State of Arizona did not violate the First Amendment when they adopted Article XXVIII. For good or ill, it was a question "for the people to decide." *Id.*

Therefore, I respectfully dissent.

WALLACE, Chief Judge, concurring:

I fully join Judge Fernandez's dissent. I add the following:

Yniguez's claim that the Article regulates speech, not merely the expressive mode of speech, is dubious. The difficulties of Yniguez's claim become apparent when one tries to identify exactly what speech or message the Article suppresses. If Yniguez is able to identify to us in English the messages that the Article suppresses, she would thereby communicate those messages which she claims only Spanish can convey. In other words, by stating in English the speech or message which the Article restricts, Yniguez undermines her claim that her message can only be expressed in Spanish. Saddled with this problem, the majority, therefore, never identifies the content of the speech which the Article suppresses and writes vaguely about the Article's restrictions.

It is untenable for the majority to hold that the Article restricts pure speech yet fail to identify suppressed messages. This difficulty strengthens the undeniable conclusion that the Article regulates the mode of speech, not pure speech. This conclusion

should end the matter, for mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs.

The majority's failure to identify clearly the meaning conveyed by using one language rather than another confuses its evaluation of the interests favoring First Amendment protection. Building on recent Supreme Court decisions, the majority considers the public's right to "receive information and ideas" in order to determine whether Yniguez's speech is protected. Yet, the majority can point to no bit of information about medical malpractice claims which can only be communicated in a non-English language—and which Article XXVIII would thereby restrict Yniguez from communicating and the public from receiving. The majority is simply unable to show the public's interest in the unique content and meaning which Yniguez can only convey in the Spanish language. Instead, it points to the interests members of the public have in receiving Yniguez's message in a manner and language they can easily understand. In effect, the majority asserts that many Arizonans would prefer Yniguez speak in a mode which they can easily understand—no doubt a true observation, but the public's interest in a civil servant's particular mode of communication does not warrant First Amendment protection.

Also, the majority's view that when Yniguez speaks in a language other than English, she comments as a citizen on a matter of public concern ignores the cases which define "matter of public concern." These cases look to the content of public employees' speech to see whether it contributes to public debate. See *United States v. National Treasury Employees Union*, — U.S. —, —, 115 S.Ct. 1003, 1015, 130 L.Ed.2d 964 (1995) (matter of public concern were speeches and articles for which government employees received payment); *Rankin v. McPherson*, 483 U.S. 378, 386, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987) (matter of public concern was employee's highly negative opinion of President's policies); *Connick v. Myers*, 461 U.S. 138, 148, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) (questions about pressure

on government lawyers to participate on political campaigns did not constitute speech on matter of public concern); *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 569, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811 (1968) (matter of public concern was letter to editor discussing school budget).

Contrary to precedent, the majority rules that if members of the public would like to receive public employees' speech in a certain way, that desire constitutes a matter of public concern. Such reasoning ignores the difference between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps members of the public understanding what he says. The most recent Supreme Court case on point found that speech is of public concern when it "addresse[s] a public audience, [is] made outside the workplace, and involve[s] content largely unrelated to . . . government employment." *National Treasury Employees*, — U.S. at —, 115 S.Ct. at 1013. The purportedly suppressed speech here does not fit this description.

KOZINSKI, Circuit Judge, with whom Judge KLEINFELD joins, dissenting:

A house divided against itself cannot stand.—Abraham Lincoln

Government has no mouth, it has no hands or feet; it speaks and acts through people. Government employees must do what the state can't do for itself because it lacks corporeal existence; in a real sense, they are the state. This case is about whether state employees may arrest the gears of government by refusing to say or do what the state chooses to have said or done.

The majority says yes. Or, to be precise, it says the employees may force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable. This is an extraordinary ruling with explosive and far-reaching consequences. Almost everything government does involves a communication of some sort and those charged with carrying out government functions sometimes disagree

with what they are ordered to do. Before today, however, it was not that government employees had a stake in what they say in employment because that speech was the government's, not theirs.

Today's decision renders that understanding of how government operates giving bureaucrats the right to give policy disagreement into a matter of public concern. Maria-Kelly Yniguez was hired by the state of Arizona to perform various duties connected with processing medical claims. The people of Arizona are her ultimate superiors—then she performs her duties: They charged her to communicate in English by using only that language in official business. The people of Arizona warned that this might discourage them from making government employees. See *Arizona Publicity Campaign*, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 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with what they are ordered to say or do. Before today, however, it was understood that government employees have no personal stake in what they say in the course of employment because that speech is the government's, not theirs.

Today's decision rends this fundamental understanding of how government works by giving bureaucrats the right to turn every policy disagreement into a federal lawsuit. Maria-Kelly Yniguez was hired by the State of Arizona to perform various functions connected with processing medical malpractice claims. The people of Arizona—Yniguez's ultimate superiors—then augmented her duties: They charged her with promoting English by using only that language for official business. The people of Arizona were warned that this might disrupt services and make government employees less efficient. See Arizona Publicity Pamphlet 32-33 (General Election, Nov. 8, 1988) (arguments against Proposition 106 by Rose Mofford, Governor; Morris K. Udall, U.S. Representative; Jesus "Chuy" Higuera, Arizona State Senator). Arizonans nevertheless chose to make this tradeoff. Since they were paying Yniguez's salary, I had assumed it was their call whether Yniguez spent her work-time processing claims, promoting English or twiddling her thumbs.

Not so, says the majority. Because the law in question requires Yniguez to *speak*, she acquires First Amendment rights in the content and manner of that speech. Majority Op. at 939-42. What Yniguez says, and in what tongue, is thus no longer a business judgment by her employer; it's a constitutional question. If Yniguez disagrees, she can haul her employer into federal court and force it to prove that the law's advantages outweigh her right to say what she pleases. Nor is this pro forma, rationality review. As the interminable majority opinion demonstrates, this is high-octane review involving all sorts of substantive judgments about the wisdom and efficacy of the law in question. Majority Op. at 942-47.

Such scrutiny is highly intrusive, as well as costly and time-consuming. We must ask ourselves, therefore, whether similar challenges could be raised by other government

employees with qualms about the laws they're hired to enforce. The alarming truth is that there's nothing unique about Yniguez's situation, nothing unusual about her claim. The same sort of challenge could be raised by just about every disgruntled government employee.

Consider the following example: A Deputy Attorney General develops doubts about whether the death penalty is constitutional; he files a brief urging the state supreme court to vacate a death sentence. Can the Attorney General discipline him? Not anymore. Like Yniguez, the Deputy can claim the brief is *his* speech (after all, it carries his name) and he has First Amendment rights not to say things that chafe his conscience and offend the Constitution. He can argue, as does Yniguez, that the law in question serves no legitimate purpose; he can show, like Yniguez, that abandoning the law would make him more efficient.

How can the state meet such a challenge? How can it hope to establish, to the demanding standard erected by the majority, that its interest in pursuing the death penalty outweighs the Deputy's First Amendment right to espouse a contrary view? Whether the death penalty deters violent crime or serves other legitimate ends are questions about which reasonable minds differ; there are many—including some of my colleagues, *see, e.g.,* Stephen Reinhardt, "The Supreme Court, The Death Penalty, and the Harris Case," 102 *Yale L.J.* 205, 216 (1992) ("[T]he courts may be functionally incapable of handling death penalty cases fairly and judicially.")—who believe the death penalty is a cruel anachronism. The state couldn't demur that the Deputy's superiors had made the policy judgment and merely assigned him the task of implementing it. Yniguez's superiors had decided to promote the use of English and merely assigned *her* the job of implementing *that* policy. Like Yniguez, the prosecutor would be entitled to argue that the federal court should change his job description.

So too would zillions of other government employees, like the following:

- City adopts bilingual policy to give non-Anglophone residents better access to

government services, but employee claims a First Amendment right to speak only English. In his view, use of other languages denies minority groups a fair opportunity to assimilate.

- * Social worker disagrees with county's policy of encouraging single mothers to enter the workforce and tells mother to stay home with her baby.
- * Public school teacher disagrees with school district's policy of teaching evolution and tells students that man sprang into being from the tears of the Egyptian god Ra-Atum.
- * Deputy sheriff thinks *Miranda* warning is silly and tells suspects, "Lawyers are slimeballs. 'Fess up, and the judge'll go easy on you.'"
- * Recruiter for public university disagrees with state's affirmative action policy and tells minority applicants not to "expect any favors."

Most cases may, after much litigation, be resolved in favor of the government. But there would be no way to keep them out of court. And in no case would the state be entitled to say, "We chose policy X because we had a hunch it might work, but we haven't any proof." No, indeed. When confronted with what will come to be known as a Yniguez challenge, states, cities, counties, even the federal government, will have to prove that their laws are worth the candle; courts will routinely make judgments traditionally reserved for the legislature and the people themselves. By comparison, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), will seem like a paean to judicial restraint.

This problem cannot be solved by tinkering with the fine points of the rule announced today. The fault lies in the rule's central premise—the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them.

The majority masks the enormity of its departure by pretending this is just another

employee-speech case like *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), or *Waters v. Churchill*, — U.S. —, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). But the question in those cases was whether employees could be disciplined for what they said as *private citizens*. In such circumstances, the Court explained, "[t]he problem . . . is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35 (emphasis added). Yniguez's case has nothing in common with *Pickering* because the speech here belongs to the government; there's nothing to balance.

Under *Pickering* and *Waters*, Yniguez can try to change the law through the political process; she can speak out against Article XXVIII on her own time, and in any language she pleases; she can campaign for its repeal. This is much different from the right the majority creates for her—the right to block government policy because she happens to disagree with it.

Twice in recent years has the Supreme Court relied on the pivotal distinction the majority ignores. In *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), federally-funded medical clinics were prohibited from counseling about abortion; the clinics argued that this prohibition violated the free speech rights of their employees. The Supreme Court shrugged: Those who work in clinics that take federal money must conform their on-the-job speech to federal law. This doesn't offend the First Amendment because "[t]he employees remain free . . . to pursue abortion-related activities when they are . . . acting as private individuals." *Id.* at 198-99, 111 S.Ct. at 1775.

The Court again addressed the issue in *Rosenberger v. University of Virginia*, — U.S. —, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). The question in *Rosenberger* was whether the state could deny funding to a student publication based on its content. The Court said no, because the speech at issue wasn't the government's. In reaching

this conclusion, it distinguished *Widmar v. Vincent*, 454 U.S. 269, 70 L.Ed.2d 440 (1981), the proposition that "when it speaks, it may make choices." — U.S. at —, 1 —. The Court went on to explain "permitted the government content of what is or is not expressed *is the speaker or when it enlists private entities to convey its own message*" (emphasis added).

Confronted with recent cases that cut the heart from majority responds with . . . majority Op. at 940 n. 24. And as best one can tell, the majority and *Rosenberger* as applying government uses a private private its message, not through its own employees. pretty good argument, were things: the Supreme Court common sense. As for language look no farther than the passage *berger* underscored above. It holds that government may tent of speech both where "it and where "it enlists private convey its own message." *R* U.S. at —, 115 S.Ct. at 2: ernment "is the speaker" c employees, *Rust* and *Rosenb* compass Yniguez's situation. these cases as dealing with ent circumstances," the ma what the Court in fact said

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this conclusion, it distinguished *Rust* and *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), as standing for the proposition that "when the State is the speaker, it may make content-based choices." — U.S. at —, 115 S.Ct. at 2518. The Court went on to explain that it has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Id.* (emphasis added).

Confronted with recent Supreme Court cases that cut the heart from its analysis, the majority responds with . . . a footnote. Majority Op. at 940 n. 24. And what a footnote! As best one can tell, the majority reads *Rust* and *Rosenberger* as applying only where the government uses a private party to disseminate its message, not where it speaks through its own employees. This would be a pretty good argument, were it not for two things: the Supreme Court's language and common sense. As for language, one need look no farther than the passage from *Rosenberger* underscored above. The Court there holds that government may control the content of speech both where "it is the speaker" and where "it enlists private entities to convey its own message." *Rosenberger*, — U.S. at —, 115 S.Ct. at 2512. Since government "is the speaker" only through its employees, *Rust* and *Rosenberger* clearly encompass Yniguez's situation. In dismissing these cases as dealing with "entirely different circumstances," the majority overlooks what the Court in fact said.

But put language aside and consider the logic of the situation: What earthly reason would there be to give employees of government-subsidized entities fewer First Amendment rights than public employees? Does the majority think the government could refuse to fund an otherwise qualified private group because its employees speak out against the government? Or belong to the wrong political party? Or practice an unpopular religion? Surely not. *Pickering, Waters* and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), protect employees of private entities vying for government funding no less than public employees. The reason *Rust* and *Rosenberger* saw no First Amendment problem when govern-

ment controls the speech of those who carry its message is that this is perfectly consistent with *Pickering*. *Rust* and *Rosenberger* stand squarely for the proposition that the government may write the script when it is the speaker.

This is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVI-II makes it harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No court has yet considered these arguments, which go more directly to the heart of this dispute. But to give Yniguez the right to decide what she will say when she is the state's agent opens the courthouse door to countless other employees who disagree with some expressive aspect of their jobs. While I understand my colleagues' eagerness to do away with a law they see as misguided and divisive, the price they pay is too high. No rational society can afford it.



Cedric Roshawn HARMON,
Petitioner-Appellee,

v.

Charles D. MARSHALL, Warden of Pelican Bay State Prison; Daniel E. Lungren, Attorney General of the State of California, Respondents-Appellants.

No. 94-55733.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 9, 1995.

Decided June 9, 1995.

Amended Opinion Oct. 24, 1995.

Prisoner petitioned for habeas corpus. The United States District Court for the

THE WHITE HOUSE

WASHINGTON

June 26, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: ENGLISH-ONLY BRIEF

Another day, another newsflash from Justice on the English-only brief. Today, Walter ~~W~~ indicated (1) that he would like to make the decision and (2) that he would like to file a brief dealing only with the issue of standing. (That issue is whether Arizonans for Official English, the sponsor of the English-only ballot initiative codified in the Arizona Constitution, had standing to take an appeal after the district court ruled that the provision was unconstitutional and the State declined to appeal that judgment.)

I'm not sure whether Walter's approach -- entering the case on the side of English-only opponents, but only on jurisdictional grounds -- would be the best or the worst of both worlds. On one view, we would get whatever credit attaches to entering the case on that side, without the danger of saying anything that will get us into trouble. On another view, we would get whatever blame attaches to entering the case on that side, without the benefit of taking a principled stand on the issue.

In any event, the situation at Justice still seems very fluid. As I noted this morning, the brief would be due July 12. We should try to figure out what we want by early next week at the latest.

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In any event, the situation at Justice still seems very fluid. As I noted this morning, the brief would be due July 12. We should try to figure out what we want by early next week at the latest.

THE WHITE HOUSE

WASHINGTON

June 20, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: YNIGUEZ V. ARIZONA (ENGLISH-ONLY CASE)

Scratch my last memo on this subject. One of the parties asked for an extension of time, so the SG actually has until July 12 to decide whether to file. According to Mike Small of John Schmidt's office, the current inclination at the SG's office is not to file; he is checking into this matter further and will get back to me if he learns something different.



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MEMORANDUM FOR JACK QUINN
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FROM: ELENA KAGAN *EK*

SUBJECT: YNIGUEZ V. ARIZONA (ENGLISH-ONLY CASE)

Just a reminder that the Justice Department has until June 24 to file a brief in the Supreme Court supporting the Ninth Circuit's decision in Yniguez. I'm assuming, Jack, that you haven't said anything further about this because you decided DOJ should not file such a brief. Let me know ASAP if I'm wrong. The SG's office is supposed to make a decision on this matter today; the expectation is that the office will choose not to file.

THE WHITE HOUSE

WASHINGTON
June 5, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: YNIGEZ V. ARIZONA (ENGLISH-ONLY CASE)

It turns out I misunderstood the status of this case: the Supreme Court granted cert already and the question is whether DOJ will file an amicus brief on the merits. I don't think this should change our judgment: both the legal and the political considerations seem to me the same.

I'm awfully sorry about the confusion here. Do you agree we should stay out of the matter?

THE WHITE HOUSE
WASHINGTON

To Elena,

JD agrees and everyone
he consulted at 7:30 mtg.
seemed OK with it. It's
imperative that we hear
from DOT if they ~~are~~
are thinking of doing something
other than ~~no~~ "nothing".

EW

To: JQ, Elena

THE WHITE HOUSE

WASHINGTON
June 4, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: YNIGUEZ V. ARIZONA (ENGLISH-ONLY CASE)

Agree. JQ, do we need to talk to Leon? Harold? George? Rahm? KW

The Justice Department has until June 24 to file an amicus brief in the Supreme Court opposing a grant of cert in Yniguez v. Arizona. John Schmidt asked for our views on the matter. The emerging consensus within the Justice Department is not to file a brief. That view coincides with the leanings of DPC staffers working on the English-only issue. I therefore recommend we leave this one alone, effectively letting the Justice Department decide not to file any brief.

In Yniguez, an en banc Ninth Circuit held that Article XXVIII of the Arizona Constitution, which declared English the official language of the State and prohibited governmental officials from acting in any other language, violated the First Amendment. The Court, in an opinion authored by Judge Reinhardt, reasoned that this Article infringed the free speech rights of public employees, as well as burdening the interests of the public in receiving information. Arizona has petitioned the Supreme Court to grant cert in the case and reverse the Ninth Circuit's ruling.

9th Cir. = uncan. to prohibit use of other lang.

The (Civil Rights Division) has urged the Solicitor General's Office to file an amicus brief opposing the grant of cert. The Civil Division has recommended not filing any brief at all. John Schmidt and the deputy in Jamie's office who handles such matters (David Ogden) agree with the Civil Division. So too (or so I have heard) do the line attorneys in the SG's office. The general reluctance to file a brief is based principally on the view that the Ninth Circuit opinion is extremely expansive and very possibly wrong. Even those who like the result don't really want to defend the opinion before the Supreme Court.

Steve Warnath, who is heading the DPC-led group on the English-only issue, leans strongly toward not filing a brief at this juncture. (He consulted with Carol Rasco before giving me his views.) Warnath said that the Administration wants to confine itself to the action necessary to fight off federal English-only legislation; there is no desire to take a higher profile on the issue. Although the Attorney General has received a letter from the Congressional Hispanic Caucus urging the DOJ to oppose the granting of cert, Warnath told me that Hispanic groups have not lobbied the White House on this issue.

All in all, it seems that the best course here is to do nothing. From a political standpoint, we don't want to highlight this issue. From a legal standpoint, we don't want to defend the Ninth Circuit's decision. Perhaps the calculus will change if the Court indeed grants cert, but for now I'd just go along with the Justice Department's inclination not to participate.

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I'm awfully sorry about the confusion here. Do you agree we should stay out of the matter?

*To JJ, Elena ✓
From what Jack reported of
Leon's reaction, this well might
be different. I think Jack may
want to raise it again.
KW*

THE WHITE HOUSE

WASHINGTON
June 4, 1996

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To: JQ, Elena

THE WHITE HOUSE

WASHINGTON
June 4, 1996

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English only

Bruch down

Push agenda?
involved in fed leg?
involved in ct case
w/ state legislative

~~File brief~~ May 9

~~16 opp~~ June 10

to rock court

May 24
June 24

Any leads now?

Steve Warrath

Civ. Rts - Yes

Civil - NO

DOT - just hasn't coalesced

Reach - DOT has ways to go.

Make free

then we'll react

Not why lots of
statements

inside or when

we need to be

legislating

won't wait to

be highlighting

circumstances -

hasn't said anything

abt this case

Ash DOT

View of Deputy
Assoc

2) we shouldn't
SG's office - not inclined.

Schmidt/Ogden

lawyers in SG's office

9th Cir prob. wrong -

vt of pub EE to ph
in private language.
may be a T. here

OLC doesn't think he's vt.

More interesting: = protection
discrim in provision
of services

Cir 7's div memo: says opposite.

Mar 22 - New Hispanic Caucus

urged AG to file amicus.

only one sent to us.

To Elena
cc: my file

THE WHITE HOUSE
WASHINGTON

April 19, 1996

TO: HAROLD ICKES
JACK QUINN
JOHN HILLEY

FROM: CAROL H. RASCO *CHR*

CC: Stephen C. Warnath

Subject: English-only

*Ken
will take this issue
out of*

This memorandum summarizes the status of the English-only issue.

Recent Activities in Congress

Several items involving English-only occurred during the past two weeks. First, we learned that Senator Shelby's English-only bill (S.356) would be offered as an amendment to the Senate immigration legislation. Then, when the immigration bill was pulled from floor consideration, it was announced that Shelby's bill would be marked-up on Thursday, April 18th. On April 17th, however, that mark-up was cancelled. We understand that it will be rescheduled for May. When the immigration legislation returns to the Senate floor, we expect that there will be English-only amendments. Finally, a House Judiciary subcommittee held a hearing on a bill yesterday that would end assistance to voters who have limited English proficiency. Deval Patrick testified in opposition, pointing out that this voting rights protection has had strong bipartisan support over the years from Congress and past Presidents.

Interagency Working Group

The DPC convened an interagency group several months ago to address and coordinate our English-only activities. The group consists of approximately 15-20 participants, including Janet Murguia from the Legislative Affairs Office, and Marvin Krislov (prior to his leaving the White House) and Trey Schroeder from Counsel's Office. A number of the participants in this group have substantial experience working on this issue, including: Norma Cantu, John Trasvina, Claire Gonzales, Tony Califa, Juanita Hernandez and Dennis Hayashi.

As a first step, this group reviewed statements that had already been made by the President and Cabinet Secretaries on English-only issues. The statements indicated clear and consistent

opposition to English-only efforts, although most did not comment on specific legislation. [We also are aware of a conversation between the President and Congressman Serrano from which the Congressman concluded that the President had assured him of his opposition to English-only.] The Justice Department also has filed cases that constitute a clear Administration record of support for bilingual education and voting rights.

The group then identified their agencies' specific concerns about English-only and its negative impact on fulfilling agency responsibilities. This work formed the basis of our views letter on the Shelby bill (cleared, but not yet public) and draft talking points.

Leon Panetta Decision Meeting

Last week, Leon held a meeting to address immigration legislation strategy. The Shelby English-only amendment issue was raised and he decided that we would characterize our position as "strong opposition."

Administration Material Created

So far, the following has been produced:

- A thorough DOJ views letter strongly opposing the Shelby bill. The content of this letter was given careful consideration by OLC and the Solicitor's Office due to the Supreme Court's granting cert. in the Arizona English-only case. This has been cleared, but because the mark-up was cancelled and the immigration legislation was pulled from the floor, it has not been forwarded to Congress.
- Deval Patrick's formal written testimony opposing English-only restrictions in the voting rights context.
- A relatively short position letter is being drafted that would oppose an English-only amendment to the immigration bill. It is intended to be signed by the Attorney General, and Secretaries Riley and Shalala.
- In a related matter, the Administration immigration views letter opposes minimum English language proficiency standards as a condition of employment-based legal immigration on the basis that this is a decision that should be left to the individual employer.
- Talking points on the Administration's general English-only position have been drafted.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Apr-1996 12:59pm

TO: Elena Kagan

FROM: Nick B. Kirkhorn
 Office of Legislative Affairs

SUBJECT: Native American Arts Bill

This is a response to an e-mail you sent to Janet Murguia.

HR 3049, a bill to provide for the Continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development, was passed by voice in the House on 4/23.

Please feel free to contact Janet or me if you have any questions.

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

LRM NO: 4187

FILE NO: 1841

4/22/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:**FROM:** James JUKES *Ji* (for) Assistant Director for Legislative Reference**OMB CONTACT:** M. Jill GIBBONS 395-7593 Legislative Assistant's Line: 395-3454
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=GIBBONS, G=MARGARET, I=J
gibbons_m@a1.eop.gov**SUBJECT:** JUSTICE Proposed Report RE: S356. Language of Government Act of 1995HUD
HHS**DEADLINE: 5:00 Tuesday, April 23, 1996**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please note: The attached is a joint letter from Justice, HUD and HHS.

LEGISLATIVE REFERRAL MEMORANDUM
Distribution List

LRM NO: 4187

FILE NO: 1841

SUBJECT: JUSTICE Proposed Report RE: S356, Language of Government Act of 1995**AGENCIES:**

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25-COMMERCE - Michael A. Levitt - 2024823151
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30-EDUCATION - Jack Kristy - 2024018313
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52-HHS - Sondra S. Wallace - 2026907760
54-HUD - Edward J. Murphy, Jr. - 2027081793
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114-STATE - Julia C. Norton - 2026474463
117-TRANSPORTATION - Tom Herlihy - 2023664687
118-TREASURY - Richard S. Carro - 2026221146
129-VETERANS AFFAIRS - Robert Coy - 2022736666
31-Equal Employment Opportunity Comm. - Claire Gonzales - 2026634900

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The Honorable Robert Dole
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Senator Dole:

This letter expresses the Administration's views on S. 356, "The Language of Government Act of 1995." We understand that Senator Shelby will offer this bill as an amendment to S. 1664, the Immigration Control and Financial Responsibility Act of 1996. For the reasons set forth below, the Administration strongly opposes S. 356 and its addition to S. 1664.

S. 356 would declare English the official language of the Government and require the Government to conduct all of its official business in English. S. 356 defines "official business" generally as "governmental actions, documents, or policies which are enforceable with the full weight and authority of the Government." It would eliminate all governmental actions that are conducted in languages other than English, except: (1) teaching foreign languages; (2) actions, documents, or policies not enforceable in the United States; (3) actions, documents, or policies necessary for international relations, trade, or commerce; (4) actions or documents that protect the public health; (5) actions that protect the rights of victims of crimes or criminal defendants; and (6) documents that use terms of art or phrases from languages other than English.

S. 356 proposes to fix a problem that does not exist. As the President has stated, there has never been a dispute that English is the common and primary language of the United States. According to the 1990 Census, 94% of all residents speak English very well and of the 13.8% of residents who speak languages other than English at home, 79% above the age of four speak English "well" or "very well". In fact, there is overwhelming demand for adult English language classes in communities with large, language minority populations. For example, in Los Angeles, the demand for these classes is so great that some schools operate 24 hours per day and 50,000 students are on the waiting lists city-wide. In New York City, an individual can wait up to 18 months for classes.

The overwhelming majority of Federal official business is conducted in English. According to a recent GAO study, only 0.06% of Federal documents are in a language other than English - and these are translations of English documents. These non-

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English documents, such as income tax forms, voting assistance information, decennial census forms, and medical care information, assist taxpaying citizens and residents who have limited English proficiency (LEP) and are subject to the laws of this country. In those very few instances where the Government uses languages other than English, the usage may promote vital interests, such as national security; law enforcement; border enforcement; civil rights; communicating with witnesses, aliens, prisoners or parolees; and informing people of their legal rights and responsibilities.

S. 356 would invite frivolous litigation against the Government. It would create a vague, private cause of action - and allow attorney fees -- for anyone who believed that he or she had been injured by the Government's communication in a language other than English. Actual injury due to a failure to conduct all activities in English is highly conjectural since virtually all of the Government's business is conducted in English. S. 356 would chill Federal agencies performing vital tasks and delivering important information.

Although it is difficult to predict how the Supreme Court ultimately would resolve arguments that S. 356 violates constitutional protections, Yniguez v. Arizona for Official English, 69 F.3d 920 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3625, 3639 (U.S. Mar. 25, 1996) (No. 95-974), a case raising constitutional challenges to a similar State statute, is now pending before the Court. In that case, a divided Ninth Circuit Federal Court of Appeals ruled that the English-only requirements in the Arizona constitution were facially overbroad in violation of the free speech rights of State government employees. Although the dissent's argument in Yniguez is not without force, the existence of the Ninth Circuit's en banc decision raises a concern that the bill is vulnerable to First Amendment challenge.

If S. 356 applied to the legislative franchise of Members of Congress, it would violate the Speech or Debate Clause of the Constitution. If it prevented a Federal legislator, or the President or other Executive branch officials from communicating effectively with the persons he or she represented, a court might conclude that it interfered with a core element of representative government established by the Constitution. Since several ethnic and national origin minority groups in this country include large numbers of LEP people, S. 356 could be challenged under the Equal Protection Clause of the Constitution, which prohibits discrimination on the basis of ethnicity or national origin. S. 356 also would be subject to attack on the ground that it violated the due process rights of non-English speakers who were parties to civil and administrative proceedings, such as deportation proceedings.

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The broad language of S. 356 is at odds with the longstanding principle of government-to-government relations between the Federal government and Indian tribes. If broadly construed, S. 356 could repeal the specific mandates found in the Native American Languages Act, 25 U.S.C. §§2901-2905, and related statutes. Recognizing that Indian languages are an essential aspect of tribal culture, the Native American Languages Act authorizes tribes to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages."

S. 356 would effectively repeal the minority language provisions of the Voting Rights Act (VRA) which require the use of languages other than English in enforcement efforts. The VRA also requires covered jurisdictions to provide election information and voting assistance to minority language citizens in a language they can better understand, to enable them to participate in the electoral process as effectively as English-speaking voters. The VRA helps many Native Americans and some other language minority citizens, especially older individuals, who continue to speak their traditional languages and to be affected by the lack of meaningful educational opportunities during their school years. In addition, over 3.5 million Puerto Ricans born and educated on the island are citizens by birth but often lack full English proficiency.

S. 356 excludes from its application "actions or documents that protect the public health." Section 3 (creating section 165(2)(D)). But "public health" is not defined. Additionally, S. 356 might not cover programs within the Department of Health and Human Services (HHS) that promote the welfare of children and adults where an immediate public health risk does not exist, e.g., older Americans and AFDC recipients.

S. 356's mandate for "English only" would prevent the Government from making particularized judgments about the need to use languages in addition to English. It is in the best interest of the Government as well as its customers -- for the public to understand clearly Government services and processes, and their rights.

S. 356 would hinder law enforcement and other governmental programs, such as tax collection; natural resource conservation; census data collection; and promoting compliance with the law. S. 356 could affect HHS' ability to provide medicaid and medicare interpreter services, or print HIV transmission materials, organ transplantation, food labeling, food safety, safe use of medicines and medical devices, or produce Head Start publications, AFDC/JCBS applications and information, child support collection campaign pamphlets and child abuse prevention campaign pamphlets in non-English languages. S. 356 could hamper

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enforcement of anti-housing discrimination by limiting the ability of the Department of Housing and Urban Development (HUD) to make complaint forms available in Spanish, Vietnamese, and Korean. It could prevent interviews with witnesses in languages other than English. It would limit HUD's ability to provide counseling to low-income and minority families, many of whom speak other languages, including sign language.

S. 356 would promote division and discrimination rather than foster unity in America. It would exacerbate national origin discrimination and intolerance against ethnic minorities who look or sound "foreign" and may not be English proficient. It would keep many Americans from the political and social mainstream. It would undermine efforts like those of the Justice Department's Community Relations Service to ease community and racial conflicts through conciliation and community outreach. Thus, the Administration strongly opposes S. 356.

Sincerely,

Janet Reno
Attorney General

Donna E. Shalala
Secretary of Health
and Human Services

Henry G. Cisneros
Secretary of Housing
and Urban Development

cc: Honorable Thomas A. Daschle
Minority Leader