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“MY ENGLISH IS GOOD ENOUGH” FOR SAN LUIS: ADOPTING A TWO-PRONGED APPROACH FOR ARIZONA’S ENGLISH FLUENCY REQUIREMENTS FOR CANDIDATES FOR PUBLIC OFFICE

*Maeve Callagy**

INTRODUCTION

Some citizens believe that the rapid growth in the United States of the Latino population and a substantial minority of Spanish speakers threaten the “American way of life,” and will lead to the loss of American jobs.¹ This fear manifests itself in state-level laws that either declare English as the official state language, known generally as “English Only” laws, or create English fluency requirements for its public officials.² Although the tension between state governments and non-English speakers appears in many areas throughout the United States, it is especially apparent in Arizona, whose shared border with Mexico makes it a hub of immigration.³ It was under this contentious context that Alejandrina Cabrera ran

* J.D. Candidate, Brooklyn Law School, 2014; B.A., Fordham University, 2010. I would like to thank my friends and family for their support throughout the writing and editing process, especially my mother, Anne Callagy, for her edits and insights, and Andrew Radespiel, whose constant encouragement and humor was a gift. I would also like to thank the entire staff of the *Journal of Law and Policy* for their patience and invaluable suggestions.

¹ See, e.g., Thomas E. Lehman, *Coming to America: The Benefits of Open Immigration*, THE FREEMAN (Dec. 1, 1995), http://www.fee.org/the_freeman/detail/coming-to-america-the-benefits-of-open-immigration.

² See Yvonne A. Tamayo, “Official Language” Legislation: *Literal Silencing/Silenciando La Lengua*, 13 HARV. BLACKLETTER L. J. 107, 115–17 (1997).

³ See Kris W. Kobach, Op-Ed., *Why Arizona Drew a Line*, N.Y. TIMES (Apr. 28, 2010), <http://www.nytimes.com/2010/04/29/opinion/29kobach.html> (“[A]rizona is the ground zero [for] illegal immigration.”).

for city council in her small border town of San Luis, Arizona.⁴ Well before the election, however, the Mayor of San Luis filed a special action in state court and thereby removed her from the ballot for her lack of fluency in English.⁵ The resulting case, *Escamilla v. Cuello*,⁶ frames the issue that many Spanish speakers—especially those with limited English proficiency—face in twenty-first century United States. Even though everyday life in San Luis is conducted in Spanish,⁷ given that the town is mere steps from Mexico, the English fluency requirement applies to all Arizona public officials statewide.⁸ Thus, a candidate must be equally fluent in English whether she is running for office in San Luis or Scottsdale.⁹

There is a sharp disconnect when the law of a state fails to reflect the realities of life for each community within its border. In towns like San Luis, this disconnect ensures that all government officials are at the same level of fluency in English, regardless of the need for that level of fluency. Thus, candidates who are less fluent but are nevertheless competent to serve as public officials in their area are disqualified based on a requirement that does not enhance their effectiveness in office. In order to bridge the gap between the law and reality, Arizona should adopt a sliding scale of English requirements. The level of English fluency required should be determined based on the demographics of the candidate's potential constituency. This will allow all candidates who have the requisite level of English fluency needed for their

⁴ *Escamilla v. Cuello*, 282 P.3d 403 (Ariz. 2012).

⁵ *Id.* at 404.

⁶ *Id.* at 407.

⁷ See Marc Lacey, *Arizona Candidate Challenged Over English Skills*, N.Y. TIMES (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/us/arizona-candidates-english-under-challenge.html>.

⁸ ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

⁹ As the data indicates, Scottsdale is a relatively wealthy, white suburb in Arizona. *Compare San Luis (city), Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/0463470.html> (last updated June 27, 2013) [hereinafter *San Luis Census*], with *Scottsdale (city), Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/0465000.html> (last updated June 27, 2013) [hereinafter *Arizona Census*]; *Scottsdale, AZ Demographics*, AREAVIBES, <http://www.areavibes.com/Scottsdale-az/demographics/> (last visited Oct. 19, 2013).

region to be eligible for public office.

Part I of this Note details the history and circumstances in Arizona giving rise to *Escamilla v. Cuello*. Part II examines the *Escamilla* decision, describing the parties and background of the case, as well as analyzing the Arizona Supreme Court’s reasoning. Part III examines why the decision in *Escamilla* is problematic, using *Alaskans for a Common Language v. Kritz*¹⁰ and the Texas case *Bullock v. Carter*¹¹ to shed light on the broader issues of (1) the freedom to use one’s language as an important expression of self and (2) the problems inherent in limiting ballot access. Additionally, Part III discusses the Texas precedent for government in multiple languages. Finally, Part IV proposes a two-pronged solution to the problem highlighted in *Escamilla*: (1) making the English proficiency law more narrowly tailored to state interests, and (2) adopting a sliding scale of English fluency for public officials.

I. BACKGROUND AND HISTORY

Throughout the history of the United States, there have been various movements toward establishing the dominance of English through legislation.¹² In 1981, California Senator S. I. Hayakawa proposed a Constitutional amendment that would have established English as the official language of the United States.¹³ Senator

¹⁰ *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007).

¹¹ *Bullock v. Carter*, 405 U.S. 134 (1972).

¹² See, e.g., Josh Hill, et al, Survey, *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 674 (2009); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 341–50 (1992) (describing the “official English movement” developed in the 1980s); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 132–33 (1988) (detailing how the First World War led to prejudice against foreign-born populations in America and the restriction of teaching foreign languages in public schools).

¹³ S.J. Res. 72, 97th Cong. (1981). The proposed amendment was introduced on April 27, 1981. *Id.*; see also 127 Cong. Rec. S3998-99 (daily ed. Apr. 27, 1981) [hereinafter Hayakawa Statement] (statement of Sen. S. I. Hayakawa).

Hayakawa advocated for English as the official language so that immigrants would understand that learning English is expected and necessary upon arriving in the United States, saying “I am proposing this amendment because I believe that we are being dishonest with the linguistic minority groups if we tell them they can take full part in American life without learning the English language.”¹⁴ During the course of his presentation, Senator Hayakawa pointed to foreign countries in turmoil due to competing languages, and proclaimed that “[a] common language can unify; separate languages can fracture and fragment a society.”¹⁵ The amendment failed to pass,¹⁶ as have any further attempts at the national level.¹⁷ To this day, the United States remains without an official language, but as recently as 2006, the Senate approved the “Inhofe Amendment,” which purported to make English “the official language of the United States,” though the House of Representatives did not approve it.¹⁸

Since the federal government has not passed Official English or English Only legislation,¹⁹ thirty-one states have enacted laws declaring English as the official language within their borders.²⁰

¹⁴ See Hayakawa Statement, *supra* note 13; see also John Edwards, *Social Purposes of Bilingual Education: U.S. English, the ELA, and Other Matters*, in *LEARNING IN TWO LANGUAGES: FROM CONFLICT TO CONSENSUS IN THE REORGANIZATION OF SCHOOLS* 39, 50 (Gary Imhoff ed., 1990); *Why is Official English Necessary?*, U.S. ENGLISH, <http://www.usenglish.org/view/10> (last visited Oct. 4, 2013).

¹⁵ Hayakawa Statement, *supra* note 13. Senator Hayakawa mentioned Canada, with its “paranoid” population of French speakers, as well as Sri Lanka (Ceylon) to see the potential problems with rival languages. See *Sen. Hayakawa’s Speech*, LEGISLATION, U.S. ENGLISH, <http://www.us-english.org/view/26> (last visited Oct. 20, 2013).

¹⁶ *Language Legislation Archives*, LANGUAGE POLICY, <http://www.languagepolicy.net/archives/leg-arc.htm> (last visited Oct. 19, 2013).

¹⁷ The “English Language Unity Act” of 2009, 2011, and 2013 have all been introduced in the U.S. House of Representatives, but as yet none have passed. See *Federal Legislation*, U.S. ENGLISH, <http://www.us-english.org/view/310> (last visited Oct. 20, 2013).

¹⁸ Hill, *supra* note 12, at 673, 675.

¹⁹ While both English Only and Official English laws seek to give English legal primacy, English Only laws are more restrictive on the use of other languages. *Id.* at 673.

²⁰ As of October 4, 2013, thirty-one states have passed “Official-English”

These statutes range from laws requiring that English be the only language used in “government documents, meetings, and all other official actions,”²¹ to establishing English as the official language of the state in a more symbolic way, “similar to the way a state may declare a state bird, fish, or song.”²² While proposed and passed under the guise of increasing the use of English, these statutes have often been prompted partially by an influx of immigrants and a resulting impulse to assert the dominance of English.²³ Arizona is a prime example of this trend. The state’s population, due to its location on the border of Mexico, has a substantial minority of Spanish speakers²⁴ who conceivably could assert a significant influence over the state government.

Arizona’s history, by virtue of its geography and status as a border state, is rife with bloody clashes among diverse groups.²⁵ Located in the southwestern United States, Arizona shares a border with California, Nevada, Utah, New Mexico, and Mexico. Arizona’s location has led to countless groups passing through the state for a host of different reasons. These have included Native American tribes establishing villages throughout the territory, Spanish explorers looking for fabled cities rich in gold and silver, and beaver trappers migrating west from the eastern United States.²⁶ Struggles and tenuous agreements among diverse groups, who often fought for control, have forged Arizona and gave it the identity of a “contested” land.²⁷

The U.S. government obtained Arizona from Mexico in 1853 when President James Buchanan purchased it as part of a deal with Mexican President Antonio Lopez de Santa Anna.²⁸ The deal

laws. See *U.S. States with Official English Laws*, U.S. ENGLISH, <http://www.us-english.org/view/13> (last visited Oct. 4, 2013).

²¹ Hill, *supra* note 12, at 673–74.

²² *Id.*

²³ Ryan Holeywell, *How Language Fits into the Immigration Issue*, GOVERNING (Jan. 2012), <http://www.governing.com/topics/publicworkforce/gov-how-language-fits-into-the-immigration-issue.html>.

²⁴ San Luis Census, *supra* note 9.

²⁵ THOMAS E. SHERIDAN, *ARIZONA: A HISTORY* xv (1995).

²⁶ See *id.* at xiv.

²⁷ *Id.* at xv.

²⁸ *Gadsden Purchase 1853–1854*, U.S. DEP’T OF STATE OFFICE OF THE

included two parts: the region north of the Gila River in 1848 under the Treaty of Guadalupe-Hidalgo, and the region south of the Gila River.²⁹ In 1863, President Abraham Lincoln signed a law declaring Arizona a U.S. territory,³⁰ and in 1912, Arizona became the forty-eighth state under President William Taft.³¹ In 1875, when Arizona had been a territory for almost twenty years, its population was “estimated at fifty thousand Indians and twenty-five thousand whites,”³² demonstrating that the European-American³³ presence had already been established, but was not yet dominant in the area. Once Arizona became a state, though, it had a majority of European-American settlers.³⁴

As of 2012, Arizona’s population consisted of a majority of “non-Hispanic white persons,” at 57.41%, and a minority of people “of Hispanic or Latino origin” at 30.2%.³⁵ Although a substantial minority of Arizona’s population is of “Hispanic or Latino origin,”

HISTORIAN, <http://history.state.gov/milestones/1830-1860/GadsdenPurchase> (last visited Oct. 20, 2013).

²⁹ SHERIDAN, *supra* note 25, at 52–53, 56.

³⁰ John Stanley, *Top Moments Before Statehood: 1. Territory of Arizona Established*, AZCENTRAL, <http://www.azcentral.com/centennial/news/articles/2012/02/09/20120209arizona-centennial-moments.html> (last visited Oct. 19, 2013).

³¹ *Arizona Timeline*, ARIZ. 100 YEARS, <http://www.az100years.org/az-experience/arizona-timeline/> (last visited Oct. 20, 2013).

³² Charles Debrille Poston, *History of the Arizona Territory*, SHARLOT HALL MUSEUM, <http://www.sharlot.org/library-archives/days-past/history-of-the-arizona-territory/> (last visited Oct. 4, 2013).

³³ Some of the literature regarding settlers in the early United States relies on the term “Anglo-American” as politically correct, but I wish to include settlers not of Anglo descent, and so have settled on “European-American” to describe that group. *See* SHERIDAN, *supra* note 25, at 46.

³⁴ According to the 1910 Census, Arizona’s racial composition was 83.9% White, 14.3% American Indian, 1% Black, and 0.8% Asian. *See Arizona – Race and Hispanic Origin: 1860 to 1990*, U.S. CENSUS BUREAU (Sept. 13, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/tab17.pdf>.

³⁵ *Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04000.html> (last visited Nov. 2, 2013). The remainder of the population was comprised of: 4.5% black persons, 5.3% American Indian and Alaskan native persons, 3.1% Asian persons, 0.3% Native Hawaiian and other Pacific Islander persons, and 2.5% persons reporting two or more races. *Id.*

the state constitution³⁶ mandates that all government activity be conducted in English, with some limited exceptions,³⁷ and that government officials work to promote English.³⁸ The choice of words in the Arizona Constitution is telling. Although English is clearly the dominant language in Arizona, the state constitution’s use of the phrase “representatives of government shall preserve, protect, and enhance the role of English” illustrates that there is some perceived threat to English that must be guarded against.³⁹ This perceived threat to English highlights that these laws are passed at least partly out of fear, rather than concerns about unity or governmental efficiency.⁴⁰

A. History of English Only Movement in Arizona

Even before Arizona became a state, its territorial code had a law requiring persons who would hold “any territorial, county, precinct or district office” to speak English.⁴¹ Today this English fluency requirement persists in Arizona statute Section 38-

³⁶ ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

³⁷ Article 28, Section 3(2) goes on to enumerate some exceptions to the English Only law:

- (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; or
- (e) To protect the rights of criminal defendants or victims of crime.

ARIZ. CONST. art. XXVIII sec. 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Publicity Pamphlet of 1988 – Proposition 106*, ARIZ. DEP’T. OF STATE, available at <http://www.azsos.gov/election/1988/Info/PubPamphlet/PubPam88.pdf>.

⁴¹ *Escamilla v. Cuello*, 282 P.3d 403, 405 (Ariz. 2012) (quoting Ariz. Civ. Code 1901, tit. 1, Ch. 14, § 199).

201(C).⁴² In addition to requiring English fluency for those in public office, on November 8, 1988, Arizonans voted to add Article 28 (“the Article”), “English as the Official Language” to the state constitution.⁴³ This was the culmination of an effort that began in October 1987 by a group called Arizonans for Official English.⁴⁴ The Article covers official actions by government representatives.⁴⁵ It provides, among other things, that those representatives must “protect[] the rights of persons in [Arizona] who use English,” and “avoid[] any official actions that ignore, harm, or diminish the role of English as the language of government.”⁴⁶ As part of the broader Official English movement that is largely seen as hostile to non-English speakers,⁴⁷ the Article has been subject to legal challenges but remains in force today.

In the wake of the passage of Arizona’s English Only amendment, then-state employee Maria-Kelley F. Yniguez filed suit in the U.S. District Court of Arizona. In *Yniguez v. Arizonans for Official English*, she claimed that the law was unconstitutional and violated federal civil rights laws.⁴⁸ Ms. Yniguez was an employee of the Arizona Department of Administration and dealt with “medical malpractice claims asserted against the state.”⁴⁹ She was fluent in both Spanish and English, and up until the passage of the Article in 1988, she had communicated effectively in both languages with claimants who either only spoke Spanish or who spoke both Spanish and English.⁵⁰ Once the Article amended the Arizona Constitution, Ms. Yniguez feared punishment for using

⁴² ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

⁴³ ARIZ. CONST. art. XXVIII; *Yniguez v. Mofford*, 730 F.Supp 309, 310 (D. Ariz. 1990), *vacating as moot*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁴⁴ *Yniguez v. Mofford*, 730 F. Supp. 309, 310 (1990).

⁴⁵ ARIZ. CONST. art. XXVIII.

⁴⁶ *Id.*

⁴⁷ *English Only Defined*, INTERCULTURAL DEV. RESEARCH ASS’N., http://www.idra.org/IDRA_Newsletter/January_1996_English_Plus_Not_English_Only/%22English_Only%22_Defined/ (last visited Oct. 24, 2013).

⁴⁸ *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1222 (9th Cir. 1994).

⁴⁹ *Id.* at 1221.

⁵⁰ *Mofford*, 730 F. Supp. at 310.

Spanish at work.⁵¹ Ms. Yniguez’s arguments found favor in the Court of Appeals for the Ninth Circuit, which held the Article to be unconstitutionally overbroad and too restrictive in prohibiting the use of languages other than English.⁵² The court held that while the state could establish an official language, and “encourage” citizens to learn English, the complete prohibition of other languages was unconstitutional and seemed to go against the “spirit of tolerance and freedom” at the heart of the Constitution.⁵³ Once the matter reached the U.S. Supreme Court, however, the judgment was vacated for mootness since Ms. Yniguez had resigned before the Ninth Circuit decided the case.⁵⁴ Ms. Yniguez’s vigorous challenge was ultimately rebuffed, leaving Arizona’s English Only law in place.⁵⁵

B. History of Voting Rights in Arizona

Throughout Arizona’s history, Latinos and Native American Arizonans alike have faced dire discrimination that limited their ability to participate in government, both as voters and candidates.⁵⁶ In 1912, Arizona developed its first English Literacy Tests that required all voters to be “able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, unless prevented from doing so by physical disability.”⁵⁷ These literacy tests operated as a filter to keep non-English speakers from being able to vote, either through applying the tests to would-be voters, or as general intimidation tactic that kept them from attempting to vote at all.⁵⁸

In 1970, Congress renewed the Voting Rights Act (“VRA”), which banned all literacy tests for voting purposes. In the case

⁵¹ *Yniguez*, 42 F.3d at 1221.

⁵² *Id.* at 1241, 1242.

⁵³ *Id.* at 1238.

⁵⁴ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48–49 (1997).

⁵⁵ ARIZ. CONST. art. XXVIII, sec. 1.

⁵⁶ James Thomas Tucker, et al, *Voting Rights in Arizona: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 283–85 (2008).

⁵⁷ *Id.* at 285–86.

⁵⁸ *Id.* at 286 (citation omitted).

Oregon v. Mitchell,⁵⁹ Arizona argued that the VRA was unenforceable “to the extent that it is inconsistent with the Arizona’s literacy test requirement.”⁶⁰ The Supreme Court, however, found that the VRA’s complete ban of literacy tests preempted any local Arizona literacy tests under the Supremacy Clause.⁶¹ Therefore, Arizona’s literacy tests were prohibited. In addition, due to its history of discriminating against minorities, Arizona was covered under Section 5 of the VRA⁶² and Section 4(f)(4) of the VRA, known as a Language Minority Provision.⁶³ Language Minority Provisions protect voters’ rights in areas where “more than five percent of voting age citizens . . . were members of a single language minority group,” of which less than half of those citizens were registered to vote or actually did vote.⁶⁴ Upon finding that Arizona fell within that category due to its large population of Spanish speakers, Congress applied Section 4(f)(4), which required Arizona to “provide[] any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots . . . in the language of the applicable language minority group as well as in the English language.”⁶⁵ Thanks in part to this legislation, there has been an enormous growth in the number of Latino representatives in Arizona government: in 1973, there were ninety-five Latino elected representatives, and in 2005, there were 373.⁶⁶ Through the application of the VRA Language Minority Provisions, the federal government has recognized that Arizona’s unique composition of

⁵⁹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁶⁰ *Id.* at 132.

⁶¹ *Id.*

⁶² See Tucker, *supra* note 56, at 288

⁶³ *About Language Minority Voting Rights*, U.S. DEP’T. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_203/activ_203.php (last visited Oct. 4, 2013).

⁶⁴ Tucker, *supra* note 56, at 288. Arizona became covered under the 1975 amendments after the federal government determined that, in the 1972 election, more than five percent of voting-age citizens were members of a single language minority group, election materials were provided in English Only, and fewer than fifty percent of voting-age citizens were registered to vote or did vote. *Id.*; *About Language Minority Voting Rights*, *supra* note 63.

⁶⁵ *About Language Minority Voting Rights*, *supra* note 63.

⁶⁶ Tucker, *supra* note 56, at 292.

citizens requires special consideration and monitoring in the voting context.⁶⁷ In a similar way, Arizona’s linguistic composition requires attention to ensure that all are allowed and encouraged to participate in government, as in running for public office.

II. *ESCAMILLA V. CUELLO*

The history of Arizona’s discrimination towards Latinos has its continuation today and came to a head in *Escamilla v. Cuello*. Given both the history and geography of San Luis and Arizona as a whole, it would have been appropriate for the *Escamilla* court to accommodate the large proportion of Spanish speakers with a relaxed interpretation of the English fluency standard set out in section 38-201(C). Yuma County occupies the southwest corner of Arizona and shares a border with California and Mexico.⁶⁸ This county used to be “the gateway to . . . California,” attracting many who hoped to strike it rich with gold and also served as a railroad hub in the mid-nineteenth century.⁶⁹ On the “southwest corner” of Yuma County sits the city of San Luis, which “is the border town to San Luis, Sonora, Mexico.”⁷⁰ Founded “in 1930, as a U.S. Port of entry into Mexico,”⁷¹ San Luis is the second busiest border crossing in Arizona, which necessitated the construction in 2009 of a second port of entry to accommodate commercial traffic.⁷² The city has the distinction of being the “fastest growing small city in Arizona.”⁷³ Its population as of 2011 was 27,864, up 9.2% from its 2010 population of 25,505.⁷⁴

⁶⁷ *Id.* at 288–89.

⁶⁸ *Arizona Cities and Counties*, ARIZ. GOV’T RES., http://az.gov/government_county_statemap.html (last visited Oct. 20, 2013).

⁶⁹ *About the County*, YUMA CNTY., ARIZ., <http://www.co.yuma.az.us/index.aspx?page=543> (last visited Oct. 4, 2013).

⁷⁰ CITY OF SAN LUIS, <http://www.cityofsanluis.org> (last visited Oct. 4, 2013).

⁷¹ *Id.*

⁷² *San Luis*, ARIZ. OFFICE OF TOURISM, <http://www.arizonaguide.com/places-to-visit/arizona-s-west-coast/san-luis> (last visited Oct. 4, 2013).

⁷³ *Id.*

⁷⁴ San Luis Census, *supra* note 9. The 2011 population is an estimate, as the census is only conducted every ten years.

As the law in Arizona stands now, English is the official state language and the sole language of government.⁷⁵ In order to participate in government, therefore, one must have the ability to speak English and effectively communicate in English.⁷⁶ The relevant English fluency requirement, section 38-201(C), reads:

A person who is unable to speak, write and read the English language is not eligible to hold a state, county, city, town or precinct office in the state, whether elective or appointive, and no certificate of election or commission shall issue to a person so disqualified.⁷⁷

While maintaining effective governmental communication is a legitimate state interest, Arizona's English speaking population is hardly uniform across the state. In particular, San Luis, in Yuma County, has a population consisting of 98.7% Hispanic/Latino persons, 89% of which speak "a language other than English . . . at home."⁷⁸ Compared with Arizona as a whole—of 29.6% of which are Hispanic/Latino persons, with 27.1% of people speaking a language other than English at home⁷⁹—San Luis residents are affected in larger numbers and, to a greater degree, than the rest of Arizona.⁸⁰

This issue came to the forefront in *Escamilla v. Cuello*. In late 2011, in a race for City Council in San Luis, Guillermina Fuentes, a friend-turned-political-rival of Alejandrina Cabrera, raised the issue of removing Ms. Cabrera from the ballot for her alleged lack of proficiency in English.⁸¹ Ignoring any personal reasons behind

⁷⁵ ARIZ. CONST. art. XXVIII.

⁷⁶ *See id.*; ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

⁷⁷ ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

⁷⁸ San Luis Census, *supra* note 9.

⁷⁹ *Id.*

⁸⁰ *See* Lacey, *supra* note 7 (noting that in San Luis, Spanish is used for most everyday interactions, from ordering pizza to seeing a doctor, and even when police officers communicate with residents).

⁸¹ *See* Richard Ruelas, *Politics in San Luis Are Personal*, ARIZ. REPUBLIC (May 19, 2012), <http://www.azcentral.com/arizonarepublic/arizonaliving/articles/2012/05/19/20120519san-luis-politics-personal.html>. Interestingly, Ms. Fuentes once operated as Ms. Cabrera's translator because she knew that Ms. Cabrera was not fluent in English. *Id.*

Ms. Fuentes’ questioning of Ms. Cabrera’s English skills, San Luis Mayor Juan Carlos Escamilla initiated a special action in the Yuma County Superior Court to remove Ms. Cabrera from the ballot.⁸² This allowed Mayor Escamilla to replace Ms. Cabrera with Sonia Cuello, the San Luis City Clerk.⁸³ Following an evidentiary hearing, the court officially removed Ms. Cabrera from the ballot. The court relied on testimony from Dr. William G. Eggington, an expert in linguistics who found that her English skills were insufficient to meet the needs of a City Councilperson, based on her failure to adequately understand and answer English questions posed to her in court.⁸⁴

On appeal, Ms. Cabrera raised some jurisdictional issues, but the court found against her and then examined the proficiency standard itself.⁸⁵ In its ruling, the Arizona Supreme Court first noted that even before Arizona was a state, it had laws requiring English proficiency for those seeking public office, citing the Territorial Code⁸⁶ and the Enabling Act.⁸⁷ The Enabling Act stipulates that the “ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature.”⁸⁸ The trial court had interpreted the current English proficiency requirement, section 38-201(C), as requiring more than “minimal or bare proficiency,” lest the statute be “rendered meaningless.”⁸⁹ After stating that the court would review the trial

⁸² Escamilla v. Cuello, 282 P.3d 403, 404 (Ariz. 2012).

⁸³ *Id.*

⁸⁴ *Id.* at 406–07.

⁸⁵ *Id.*

⁸⁶ *Id.* at 405. (“The Territorial Code provided that “[n]o person who cannot write and read in the English language shall be eligible to hold any territorial, county, precinct or district office in the Territory of Arizona.”) (citation omitted).

⁸⁷ *Id.* (“The Enabling Act states ‘that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature.’”) (citation omitted).

⁸⁸ Escamilla, 282 P.3d at 405; “Enabling Act”, Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 570.

⁸⁹ Escamilla, 282 P.3d at 406.

court's statutory interpretation de novo, it added that there is a presumption of eligibility for candidates who are running for office.⁹⁰ This was an expansion of the presumption of eligibility, which previously had only applied to those already "elected or appointed to public office."⁹¹

Despite beginning with the presumption of eligibility, the Arizona Supreme Court nevertheless found that Ms. Cabrera lacked sufficient proficiency in English to run for City Council.⁹² The court found that the facts and testimony from the linguistic expert supported the trial court's decision.⁹³ The linguistic expert had previously testified that "speaking proficiency is the strongest marker of overall proficiency."⁹⁴ Thus, Ms. Cabrera's ability to read English at a high-school level was insufficient to qualify her as proficient in English.⁹⁵ Cabrera challenged the expert testimony on the grounds that: (1) Dr. Eggington had not personally witnessed any City Council meetings and failed to establish what the required level of English proficiency would be for a City Councilmember; and (2) Dr. Eggington failed to "account for Cabrera's hearing disability."⁹⁶ Over these objections, the Arizona Supreme Court held that Ms. Cabrera was not proficient in English and therefore her removal from the ballot was justified.⁹⁷

Ms. Cabrera's final argument was that her right to participate in government was unconstitutionally violated.⁹⁸ However, the court held that states can establish more stringent criteria for running for office than for voting.⁹⁹ The court further held that Arizona has a legitimate interest in assuring that its elected

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 406–07.

⁹³ *Id.* at 407–08.

⁹⁴ *Id.* at 407.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 408.

⁹⁹ *Id.* ("[T]here is no general constitutional right to seek or hold public office. The State may require that a citizen meet more strict requirements to hold office than to vote for that office.") (citation and internal quotation marks omitted).

officials will be able to communicate, not only with their constituents, but also with other government officials.¹⁰⁰

Thus, the Arizona Supreme Court upheld both the trial court’s interpretation of section 38-201(C) and its judgment.¹⁰¹ The Arizona Supreme Court agreed that section 38-201(C) requires more than “minimal or bare proficiency at speaking, reading, and writing the English language.”¹⁰² The court further held that, as the Yuma County Superior Court had noted, English proficiency would be judged in relation to “the duties of the office sought,” making it a test of functional fluency.¹⁰³ The court also read into the law the requirement—not explicit in the statute—that a candidate must be able to perform the duties of the relevant office without an interpreter’s help.¹⁰⁴ This may be an accurate reflection of the state’s legislative intent, but it begs the question of what happens if a public official’s duties involve speaking languages other than English?

III. THE PROBLEM WITH ENGLISH FLUENCY REQUIREMENTS AS INTERPRETED IN *ESCAMILLA*

Although the Arizona Supreme Court found the legislative intent to be clear and the test of functional fluency to be reasonable, an unaddressed problem remains: it is very difficult to determine what constitutes functional fluency.¹⁰⁵ Given that there are three dimensions of language fluency—reading, writing, and speaking—and a candidate may have differing degrees of

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 406.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Michael B. Shulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 185 (1993) (discussing the difficulty judges have in determining the fluency of interpreters appointed to non-English speaking defendants). See also Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 18 (2008) (explaining the extensive process for determining fluency beyond simply listening to an individual speak).

proficiency in each of them, the Arizona courts had to prioritize the type of fluency they believed the legislature intended.¹⁰⁶ In this case, the Arizona Supreme Court prioritized the ability to speak, guided in part by expert testimony on the matter.¹⁰⁷ However, judging language proficiency is not an exact science, and the results can depend on what tests are administered.¹⁰⁸ The trial court did not address what level of proficiency is required to carry out the duties of city councilperson presumably because, in the court's view, Ms. Cabrera's level of English proficiency was low enough to satisfy the court that she was not functionally fluent.¹⁰⁹

Ballot access restrictions that are overly broad and infringe on voters' choice to a greater extent than is necessary trigger Fourteenth Amendment protection, and those restrictions are subject to strict scrutiny.¹¹⁰ In Arizona, the requirement that candidates for public office be able to read, write, and speak English fluently limits the choice of voters by narrowing the pool of candidates. This rule does not serve the state's interest in having competent government officials who are able to perform their duties because the rule is overly broad. Furthermore, it has the greatest effect on Latinos, the largest linguistic minority in Arizona.¹¹¹

A. *Bullock v. Carter: The Intersection of Voter Rights and Ballot Access Restrictions*

As the Arizona Supreme Court noted in its opinion in *Escamilla*, "there is no general constitutional right to seek or hold

¹⁰⁶ *Escamilla*, 282 P.3d at 407.

¹⁰⁷ *Id.* (citing testimony of a linguistic expert stating that the ability to speak a language is the greatest indicator of competency).

¹⁰⁸ Kenneth King, Note, *Mandating English Proficiency for College Instructors: States' Responses to "The TA Problem,"* 31 VAND. J. TRANSNAT'L L. 203, 242 (1998) ("There is no general agreement among institutions and specialists on an appropriate method of evaluating English proficiency.").

¹⁰⁹ *Escamilla*, 282 P.3d at 407 (noting that Ms. Cabrera's lack of comfort and proficiency in English made it clear she could not serve as a city councilmember).

¹¹⁰ *Bullock v. Carter*, 405 U.S. 134, 140–44 (1972).

¹¹¹ Arizona Census, *supra* note 9; San Luis Census, *supra* note 9.

public office.”¹¹² But in *Bullock v. Carter*,¹¹³ which dealt with excessive filing fees for candidates in Texas, the U.S. Supreme Court explicitly recognized the relationship between voter and candidate rights, stating:

Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in [*Harper v. Virginia State Board of Elections*],¹¹⁴ that the laws must be ‘closely scrutinized’ and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.¹¹⁵

In *Bullock*, the Court rejected the notion that the Texas ballot fees were in place to limit the field of candidates to those who were “serious.”¹¹⁶ The Court found little evidence to support the purported “relationship between a candidate’s willingness to pay a filing fee and the seriousness with which he takes his candidacy,” noting that the issue was one of inability, rather than unwillingness to pay.¹¹⁷ In addition, the Court found that restrictions on ballot access always affect voters in some way, explicitly noting that there is no “neat separation” between laws that affect candidates and laws that affect voters.¹¹⁸ Thus, the Court found that the filing-fee scheme resulted in an illegitimate limitation on voter rights.¹¹⁹

As in *Bullock*, the effect on voters in *Escamilla* was “neither incidental nor remote.”¹²⁰ Rather than adopt a blanket standard for what constitutes fluency, the Arizona Supreme Court should

¹¹² *Escamilla*, 282 P.3d at 408.

¹¹³ *Bullock*, 405 U.S. at 134.

¹¹⁴ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (finding that the \$1.50 poll tax was an invidious discrimination subject to strict scrutiny).

¹¹⁵ *Bullock*, 405 U.S. at 144.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 145–46.

¹¹⁸ *Id.* at 143, 145 (stating carefully that “not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review”); *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 786–89 (1983).

¹¹⁹ *Bullock*, 405 U.S. at 149.

¹²⁰ *Id.* at 144.

instead have interpreted section 38-201(C) so that the English language requirement for public officials would be narrowly tailored to serve a legitimate governmental interest. Just as the ability to pay filing fees did not determine a candidate's seriousness in *Bullock*, a candidate's incomplete fluency in English does not necessarily affect their ability to effectively represent an area.

In analyzing the ballot access restriction presented by Arizona section 38-201(C), it is instructive to see the parallel between candidates' inability to pay filing fees and candidates' inability to speak English fluently. While lack of funds and lack of English skills are not obviously related, they both point to a candidate that is already at a disadvantage but is still attempting to participate in government. The filing fees in *Bullock* became a restriction on the ballot that was insufficiently related to a legitimate government interest, because the burden on candidates, especially candidates for local office, was out of proportion.¹²¹ Asking local candidates to pay as much as \$8,900 operated as a complete bar to many, especially considering the high cost of campaigning in addition to such fees.¹²² This excessive burden was relatively simple to identify and strike down. When it comes to language requirements, though, the path is less clear. Despite the increased difficulty in determining the reasonableness of a language requirement, though, a uniform English fluency requirement is no less burdensome on candidates like Mrs. Cabrera, and still bears little relation to a candidate's ability to hold public office. It is more difficult to assess language fluency than it is to determine a candidate's financial means, but it is also more vital, since language skills are connected with personal identity, culture, and often times, prejudice.

B. *Alaskans for a Common Language, Inc. v. Kritz: Value in Communicating in One's Native Tongue*

The English Only movement and restrictions on the use of languages other than English in government is not confined to

¹²¹ *Id.* at 147.

¹²² *Id.* at 136-37, 145.

Arizona, or even the southwestern United States. Alaska approved of the Official English Initiative (“OEI”) in November 1998.¹²³ Its stated goals were to “‘promot[e], preserv[e] and strengthen[]’ . . . English as Alaska’s common language and . . . reduc[e] the costs of conducting government business in multiple languages”¹²⁴

The actual text of the law was as follows:

The English language is the language to be used by all public agencies in all government functions and actions. The English language shall be used in the preparation of all official public documents and records, including all documents officially compiled, published or recorded by the government.¹²⁵

After the OEI was passed, a group of plaintiffs filed suit, among them were: Moses Kritz, Mayor of Togiak; Stanley Active, City Councilmember of Togiak; Henry Alakayak, school board and City Council member in Manokotak; and other community members, many of whom use both English and another language in their daily lives.¹²⁶ Notably, City Councilmember Active is only fluent in Yup’ik,¹²⁷ a native Alaskan language.¹²⁸ These plaintiffs claimed that the OEI infringed on their freedom of speech, specifically that it would affect “bi- or multi-lingual government officials or employees, or citizens who rely on such individuals to communicate with or participate in local and state government.”¹²⁹

¹²³ *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 187 (Alaska 2007).

¹²⁴ *Id.* at 188; Alaska has significant linguistic minorities, from multiple native languages, to many Spanish and Tagalong speaking immigrants, among others. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last updated June 27, 2013).

¹²⁵ ARIZ. REV. STAT. § 44.12.320 (LexisNexis 2013).

¹²⁶ *Alaskans for a Common Language*, 170 P.3d at 188; *Kritz v. State*, Nos. 3DI-99-12 CI, 3AN-99-4488 CI, 1999 WL 34793395 (Alaska Super. Mar. 1, 1999), *rev’d*, 170 P.3d 183 (Alaska 2007).

¹²⁷ *Alaskans for a Common Language*, 170 P.3d at 187.

¹²⁸ *Central Alaskan Yu’pik*, ALASKA NATIVE LANGUAGE CTR., <http://www.uaf.edu/anlc/languages/cy/> (last visited Oct. 7, 2013) (“Central Alaskan Yup’ik is the largest of the state languages, both in the size of its population and the number of speakers.”).

¹²⁹ *Alaskans for a Common Language*, 170 P.3d at 187–88, 190.

Like Arizona, Alaska is a state that has many languages spoken within its borders, as Judge Fred Torrisi explained in the superior court decision striking down the OEI.¹³⁰ Mayor Kritz and City Councilor Active represent Togiak, a small town in southwestern Alaska on the coast of the Bering Sea. Togiak is not unlike San Luis, as “there [are] a significant number of people . . . who do not speak English, or who speak it only superficially.”¹³¹ In the town of Togiak, the government essentially operates in two languages: Yup’ik and English. Government officials and employees translate,¹³² similar to San Luis city council meetings, where the question-and-answer sessions are often in Spanish, or police patrols where officers “communicate over the radio in English, but interact with residents in Spanish.”¹³³ In Togiak, English is not a requirement for being on the ballot or being a public official, and there are in fact many community leaders who cannot speak English at all.¹³⁴

The Alaska Supreme Court held that the OEI “violates the federal and Alaska constitutional rights to free speech and to petition the government” and thus found it “unconstitutional as enacted;” however, the second sentence of the OEI remains in force because it was severable from the offending portions.¹³⁵ What is left in the OEI now reads “the English language shall be used in the preparation of all official public documents and records, including all documents officially compiled, published or recorded by the government,” which is constitutional because it affects governmental communications without overly burdening citizens’ rights to petition the government.¹³⁶ In the course of its

¹³⁰ See Kritz, 1999 WL 34793395, at *12 (noting that there are a diverse range of immigrants in Alaska who have not attained English proficiency); Alaska, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last updated June 27, 2013) (showing that 16.2% of the population spoke a language other than English at home from 2007 to 2011).

¹³¹ Kritz, 1999 WL 34793395, at *11.

¹³² See *id.* (noting that council members and public employees in Togiak regularly translate documents).

¹³³ Lacey, *supra* note 7.

¹³⁴ *Alaskans for a Common Language*, 170 P.3d at 187.

¹³⁵ *Id.*

¹³⁶ *Id.* at 215.

decision, the court noted that once English is mandatory for all government-related communications, “some voices will be silenced, some ideas will remain unspoken, and some ideas will remain unchallenged.”¹³⁷ Ultimately, therefore, the Alaska Supreme Court held that stifling native Alaskan culture and its distinct perspective, as well as the other languages and cultures within Alaska, was impermissible.¹³⁸ Arizona should recognize, as Alaska did, that while governmental efficiency and state-wide standards may demand a uniform level of English fluency, such policies exclude candidates with unique ideas and passion for representing their communities.

Today, there are twenty native Alaskan languages spoken in Alaska, although only two, Siberian Yupik and Central Yupik, are taught to children as their first language at home.¹³⁹ Groups such as the Alaska Native Language Center (“ANLC”) have created initiatives dedicated to the preservation of native Alaskan languages.¹⁴⁰ Established in 1972, the ANLC’s stated mission is to “research and document[. . .] . . . the twenty Native languages of Alaska.”¹⁴¹ The ANLC also helps teach native languages at schools throughout the state, and informs the public of the current problem of native “language loss.” The ANLC believes that “like every language in the world, each of those twenty is of inestimable human value and is worthy of preservation.”¹⁴² The “human value” is partly that each language is unique and represents a particular group of people, and perhaps more important, that an individual’s native language is an element of his or her identity.¹⁴³ In order to

¹³⁷ *Id.* at 206.

¹³⁸ *Id.*

¹³⁹ *University of Alaska Fairbanks*, ALASKA NATIVE LANGUAGE CTR., <http://www.uaf.edu/anlc/mission/> (last visited Oct. 7, 2013).

¹⁴⁰ Mike Dunham, *UAA Works to Preserve Alaska Native Languages*, ANCHORAGE DAILY NEWS (Sept. 22, 2012), <http://www.adn.com/2012/09/22/2635775/uaa-works-to-preserve-alaska-native.html>; *University of Alaska Fairbanks*, *supra* note 139.

¹⁴¹ *University of Alaska Fairbanks*, *supra* note 139.

¹⁴² *Id.*

¹⁴³ See Kari Gibson, *English Only Court Cases Involving the U.S. Workplace: The Myths of Language Use and the Homogenization of Bilingual Workers’ Identities*, 22 SECOND LANGUAGE STUD., 1 (2004).

understand the full impact of the loss of a language, it is necessary to recognize that language goes beyond simply using certain words, and instead implicates an entire culture, mentality, and way of seeing the world.¹⁴⁴ Languages imbue their speakers with a certain worldview that comes through in the phrasing used, as well as the words themselves.¹⁴⁵ Even among English speakers in the United States, speech patterns, accents, and colloquialisms indicate different cultural experiences and places of origin.¹⁴⁶ Thus, the difference in self-identification between English speakers and speakers of other languages is even starker.¹⁴⁷

A popular example of this is found in Australia. Members of the Aboriginal community use the cardinal directions—North, South, East, and West—when describing locations or giving directions, while English speakers use the auto referent left, right, behind, in front.¹⁴⁸ More notable than the simple use of these terms to describe location is that the Aboriginals are aware of where North is at all times, arguably because their language demands it of them.¹⁴⁹ This phenomenon is a striking example of a language influencing how its speakers describe their world, but such effects are not confined to the Aboriginal people. Speakers of languages with feminine and masculine nouns, such as German, Spanish, or French, while understanding that objects do not have a gender, are

¹⁴⁴ *Language, Culture & Identity*, ARCTIC INDIGENOUS LANGUAGE, http://www.arcticlanguages.com/language_culture_and_identity.html (last visited Oct. 7, 2013); see also Dunham, *supra* note 140 (showing the difference between the Alaskan concept of knowing and the English, as seen in their languages). See generally *University of Alaska Fairbanks*, *supra* note 139 (emphasizing the importance of retaining one's native language).

¹⁴⁵ Lera Boroditsky, *How Language Shapes Thought*, SCIENTIFIC AM., Feb. 2011, at 63, 65, available at <http://psych.stanford.edu/~lera/papers/sci-am-2011.pdf>.

¹⁴⁶ John Fought, *American Varieties: Rful Southern*, PBS, <http://www.pbs.org/speak/seatosea/americanvarieties/southern/> (last visited Oct. 19, 2013).

¹⁴⁷ See Deborah Sontag, *Oy Gevalt! New Yawkese An Endangered Dialect?*, N.Y. TIMES (Feb. 14, 1993), <http://www.nytimes.com/1993/02/14/nyregion/oy-gevalt-new-yawkese-an-endangered-dialect.html>.

¹⁴⁸ Boroditsky, *supra* note 145, at 63–64; Guy Deutscher, *Does Your Language Shape How You Think?*, N.Y. TIMES MAG. (Aug. 29, 2010), <http://www.nytimes.com/2010/08/29/magazine/29language-t.html>.

¹⁴⁹ Boroditsky, *supra* note 145, at 64.

more inclined to describe nouns, when asked, in terms that emphasize one gender over another.¹⁵⁰

Different languages do not only have different words, but also different conversational norms. Some speakers are accustomed to expressing themselves in a certain pattern, such as either allowing silence or chattering to fill it up.¹⁵¹ With such a complex web of culture and language woven into our personal identities, creating a symbolic official language, or forbidding the use of other languages within government altogether, erodes the culture of native speakers. This erosion alienates people from their native cultures, and can be harmful on a deep level.¹⁵²

Although accommodating a multiplicity of languages can cause the government to incur substantial economic costs, attempting to legislate other languages away can violate an extremely personal attribute and have high social costs.¹⁵³ Furthermore, convenience or governmental efficiency cannot justify English Only legislation since the movement itself, at least in Arizona, began as a defensive response to immigrants. Since one’s native language is so tied to the way in which one thinks about the world, and ultimately, oneself, passing legislation like English Only laws conveys that those who speak other languages are not welcome.¹⁵⁴ Such legislation may encourage monolingual pockets within cities and

¹⁵⁰ Deutscher, *supra* note 148. Spanish speakers and German speakers were asked to describe bridges, clocks, and violins in a study, which revealed that the participants chose more “manly” attributes for masculine nouns, and chose the opposite for feminine nouns. *Id.*

¹⁵¹ See Lisa Jaeger, *A Few Differences Between Alaska and Lower 48 Tribes*, at 6–7, available at <http://alaskaindigenous.files.wordpress.com/2012/07/jaeger-2004.pdf>.

¹⁵² Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 660 (1999).

¹⁵³ See Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 506 (1998) (arguing that U.S. immigration policies and language laws work to make many Latinos feel that they “do not fully belong”); see also Cornell & Bratton, *supra* note 152, at 680 (noting that “language differentiation is inseparable from the lived experience of ethnicity, national conflict, and racism,” so that laws regarding the legal status of a particular language impact those experiences as well).

¹⁵⁴ Murray, *supra* note 153, at 506.

states in which languages other than English dominate—such as Chinatown in New York City,¹⁵⁵ or cities like San Luis¹⁵⁶—to become more inward-looking, furthering the cycle of alienation from the greater population.¹⁵⁷

C. Multilingual Government: The Possibility of Total Inclusion as Seen in the Republic of Texas

In the United States, government is run almost entirely in English. Some believe that the debate about whether English should be the official language essentially boils down to “immigrants should learn English, this is America.”¹⁵⁸ But in the not-too-distant past, in response to practical concerns about the diversity of its population, the Republic of Texas ran its government in multiple languages so that all government officials and citizens could communicate with each other.¹⁵⁹ Texas, like Arizona, began as part of Mexico and slowly became dominated by European-American settlers on the frontier of the United States.¹⁶⁰ Once Mexico fought for and won its independence from Spain in 1821, the Mexican government asked European-American settlers to “fill in the empty spaces” in Texas and invited them to the region.¹⁶¹ Soon thereafter, those settlers outnumbered the Mexican inhabitants by a staggering ten-to-one margin, and in 1835, a group of rebel settlers successfully wrested the territory

¹⁵⁵ See, e.g., Kirk Semple, *In Chinatown, Sound of the Future is Mandarin*, N.Y. TIMES (Oct. 22, 2009), <http://www.nytimes.com/2009/10/22/nyregion/22chinese.html>.

¹⁵⁶ San Luis Census, *supra* note 9.

¹⁵⁷ Cornell & Bratton, *supra* note 152, at 609–10 (noting that the tendency to settle in monolingual communities is due to the fact that there are insufficient incentives for monolingual speakers of non-English languages to learn English and branch out).

¹⁵⁸ See, e.g., Stephanie Condon, *Alabama Gov. Candidate Tim James: “We Speak English. If You Want to Live Here, Learn It,”* CBS NEWS (Apr. 27, 2010), http://www.cbsnews.com/8301-503544_162-20003524-503544.html.

¹⁵⁹ See Jose Roberto Juarez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a “Known Tongue,”* 13 LAW & INEQUALITY 443, 459 (1995).

¹⁶⁰ SHERIDAN, *supra* note 25, at 54–55.

¹⁶¹ *Id.* at 50.

from Mexican hands.¹⁶²

Interestingly though, before Texas became independent from Mexico, the wave of European-American immigrants to Mexican Texas in the 1820s and 1830s caused the Mexican government to “add[] English as a language of government.”¹⁶³ Since English was the only language that “virtually all of the immigrants” understood, the Mexican government and the immigrants were in agreement that the “local government within the [European-American] settlements could be conducted in English.”¹⁶⁴ Since documents going to and from the central government of Mexico had to be in Spanish, municipalities set aside money in their budgets to provide for translators.¹⁶⁵ Despite this accommodation, one of the stated reasons by Texans for declaring independence from Mexico was that government business took place in an “unknown tongue.”¹⁶⁶ The Texans’ demand for government to be in a language they spoke fluently was reasonable, yet in the contemporary context, proponents of English Only legislation, among others, see it as catering to illegal immigrants.¹⁶⁷

Once Texas became independent from Mexico, English overtook Spanish as the dominant language of the region. However, the Republic of Texas, as it was then known, retained the sense that its citizens had a right to understand the language of government and provided government services in Spanish, German, Norwegian, Czech, Polish, and Wendish¹⁶⁸ during the late nineteenth century.¹⁶⁹ Rather than declare English the official

¹⁶² *Id.*

¹⁶³ Juarez, *supra* note 159, at 458.

¹⁶⁴ *Id.* at 478.

¹⁶⁵ *Id.* at 479.

¹⁶⁶ *Id.* at 503 (internal quotation marks omitted).

¹⁶⁷ Daneen G. Peterson, *Using Bilingual to Subvert America*, STOP THE NORTH AM. UNION (Oct 15, 2007), <http://www.stopthenorthamericanunion.com/Subversion.html> (arguing that “bilingualism is the antithesis of our national motto: *E Pluribus Unum*: Out of many, ONE!”).

¹⁶⁸ Wendish is the language spoken by “Slavic immigrants from Lusatia, an area in eastern Germany,” now known as Sorbs. TEX. WENDISH HERITAGE SOC’Y, <http://www.texaswendish.org/Pages/Museum.aspx> (last visited Oct. 8, 2013).

¹⁶⁹ Juarez, *supra* note 159, at 459.

language, the fresh memory of being excluded from government led the Republic of Texas to have a bilingual government.¹⁷⁰ Texas currently has no official language, though a few initiatives within the states have attempted to establish English as its official language.¹⁷¹

Today, the dominant narrative that English is the only language that should apply in the United States overshadows the possibility that a government can operate in multiple languages. A look at the European-American immigrants to Mexican Texas and their struggle for full representation and inclusion parallel the situation in modern day Arizona. Despite the history of demands for government to be provided to citizens in a language they understand,¹⁷² and the recognition of language's inherent value in places like Alaska,¹⁷³ English Only laws and the English fluency requirements implemented by Arizona remain lawful.

IV. TWO-PRONGED SOLUTION TO *ESCAMILLA*

In the absence of entirely abolishing English fluency requirements for running for public office, Arizona should follow the Republic of Texas' example of pragmatic language inclusion. To that end, I propose a two-pronged solution to make the English fluency requirement more concrete and specific and to ensure that it is related to a legitimate state purpose. The first prong addresses the unconstitutional vagueness of section 38-201(C) by specifying what level of proficiency is required on a particular test. The second prong creates a sliding scale that will adapt these proficiency requirements based on the demographics of the area each candidate would represent in office.

¹⁷⁰ *Id.* at 517–18.

¹⁷¹ Cristina Costantini, *Bilingual Border Cities Challenge Movement to Make English the Official Language*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/02/02/english-official-language-border-bilingual_n_1249307.html (last visited Oct. 19, 2013).

¹⁷² Juarez, *supra* note 159, at 494.

¹⁷³ *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193–94 (Alaska 2007).

A. Vagueness

The current phrasing of the Arizona statute rejects all candidates who are unable “to speak, write, and read the English language.”¹⁷⁴ This law, while clearly favoring candidates who are completely fluent in English, is too vague by not establishing a floor for candidates of what constitutes English proficiency. The standard “able to speak, write, and read”¹⁷⁵ does not give guidance to whether a candidate must be equally proficient in speaking, writing, and reading, or if there is one measure of fluency that is more important than the others. Thus, the law is improperly vague and must change.

The theory of unconstitutional vagueness arose in the context of penal laws. There was a fear that some individuals might break the law without realizing it and thus be deprived of their due process rights.¹⁷⁶ Generally, a statute must be able to be understood by a person of “ordinary intelligence,” and it must not encourage “arbitrary and discriminatory enforcement.”¹⁷⁷ Courts have held that when a law is vague and fails to alert those who might break it unknowingly, or leads to various interpretations by enforcement agencies, it violates due process.¹⁷⁸ The English fluency laws, then, must have requirements that are comprehensible to a person of normal intelligence and give a clear indication as to what level of fluency and what form, or forms, of fluency are required for each position.¹⁷⁹ The law must also include an objective testing mechanism, so that individual judges or linguistic experts cannot impose a particular favorite test. This will allow for uniform application of the law and remove some of the court’s discretion, which will in turn provide more consistent and predictable

¹⁷⁴ ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in The Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 286 (2003).

¹⁷⁷ *Id.*

¹⁷⁸ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *State v. Brown*, 85 P.3d 109, 115 (Ariz. Ct. App. 2004).

¹⁷⁹ King, *supra* note 108, at 238–39. Many states specify what type of proficiency is necessary, and some, like Florida, specify what test is to be used to judge proficiency. *Id.*

outcomes.

According to San Luis residents, some of whom spoke out in the wake of Ms. Cabrera's removal from the ballot, the city operates primarily in Spanish—from its local commerce to entire portions of City Council meetings. One resident even commented that “it's strange to speak English” in the city.¹⁸⁰ Based on San Luis's demographics and the population's use of Spanish,¹⁸¹ the reasonable candidate might conclude that a working knowledge of Spanish and some proficiency in the language should be required in order to adequately represent its residents.¹⁸² The test for language fluency is too ambiguous¹⁸³ for a San Luis candidate of “ordinary intelligence”¹⁸⁴ to articulate the English fluency level required to run for office. Thus, candidates are unable to know if they are violating the law since they do not know if it applies to them. It is also inefficient to force candidates like Ms. Cabrera to waste time resources on a truncated campaign.¹⁸⁵

Section 38-201(C) lacks an articulated standard by which to judge proficiency and a concrete level of proficiency that must be achieved. The law determines English fluency by whether the candidate is able to “speak, write, and read the English language.”¹⁸⁶ This could conceivably lead a San Luis candidate of normal intelligence to various understandings of what the law requires. It is not clear if a candidate needs total fluency in

¹⁸⁰ Lacey, *supra* note 7.

¹⁸¹ See San Luis Census, *supra* note 9.

¹⁸² Lacey, *supra* note 7. “To accommodate those who are not bilingual, an interpreter is on hand and headphones are available” during City Council meetings' public comment periods. *Id.*

¹⁸³ See, e.g., King, *supra* note 108, at 213, 217 (arguing that often when teachers are judged not proficient in English, it is because they do not understand the cultural norms for teachers in the United States, and students who listened to an Asian professor speaking English judged them as more heavily accented); Romero, *supra* note 105 (noting that there are myriad factors that determine an individual's bilingual ability, as well as the difficulty of determining fluency without “a battery of tests”).

¹⁸⁴ *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 671 (S.D. W.Va. 2011) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

¹⁸⁵ *Id.* (quoting *Grayned*, 408 U.S. at 108).

¹⁸⁶ ARIZ. REV. STAT. § 38-201(C) (LexisNexis 2013).

speaking, writing, and reading English or merely enough English to “get by.”¹⁸⁷ Ms. Cabrera is a perfect example of what can occur when the candidate believes they meet that second, more relaxed interpretation of section 38-201(C).¹⁸⁸

While professionals and those who have extensive knowledge of linguistics are certainly useful, each fluency assessor is likely to have a slightly different opinion on a would-be candidate’s English proficiency. In order to combat this natural variation among experts, an objective test of language skills would be preferable. The *Escamilla* decision used a linguistic expert to determine Mrs. Cabrera’s fluency in English.¹⁸⁹ In the course of his questioning of Ms. Cabrera, the expert concluded that Ms. Cabrera could read English at a ninth or tenth grade level but could not speak or maintain a conversation beyond “certain courtesy requirements.”¹⁹⁰ The Arizona Supreme Court repeatedly noted that section 38-201(C) simply asks that a candidate be proficient enough in English to perform his or her official duties without an interpreter, but fails to determine what level is necessary, the very essence of the question at hand.¹⁹¹ Although Ms. Cabrera fell short of what the court considered functionally fluent for the position of City Council member, her case reveals how difficult it is to draw an exact line to allow future candidates to know what level of proficiency is required.¹⁹²

To remedy this, the Arizona statute could specify what numerical score on a particular proficiency exam is sufficient for various offices. This will allow candidates to know what level they need to achieve and what methods will be used to measure their ability. There are a variety of tests already in use for the purpose of

¹⁸⁷ Lacey, *supra* note 7. Many of the already elected officials in San Luis who admit they do not have “perfect English” and yet are still qualified for office fit into this second category, such as Mayor Escamilla and former Mayor Guillermina Fuentes. *Id.*

¹⁸⁸ *Id.* Ms. Cabrera’s counsel argued that the statute does not require “some degree of English fluency in addition to the statutorily required ability to read, write, and speak English.” *Escamilla v. Cuello*, 282 P.3d 403, 406 (Ariz. 2012).

¹⁸⁹ *Escamilla*, 282 P.3d at 407.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

testing English proficiency;¹⁹³ two of the most popular, the TOEFL and academic IELTS tests, are geared toward testing non-native English speakers who wish to attend English-speaking colleges or universities.¹⁹⁴ However, since the Arizona law emphasizes functional fluency in the environment of a particular public office, an academic proficiency exam would be overly rigorous and not well-tailored. Instead a test such as the non-academic IELTS or the MTELP, both of which “test the non-native English speaker’s effectiveness in the *working* world,”¹⁹⁵ may be better suited to the purposes of Arizona’s English proficiency law. These tests encompass reading, writing, speaking, and listening skills, and the Arizona legislature could choose which to emphasize, as many colleges and universities do.

By standardizing the proficiency test and score needed to be considered functionally fluent, Arizona will avoid the type of subjective conclusions which occurred in *Escamilla*. This will allow candidates the ability to judge their own knowledge of English and whether or not to proceed with a campaign. This approach will be more efficient, as well as eliminate the vagueness present in section 38-201(C).

B. Sliding Scale

In order to set the appropriate level of English fluency needed for each area in Arizona, a sliding scale will take into account the linguistic composition of each political subdivision. In the past, candidates who challenged requirements that kept them off the

¹⁹³ See *English Proficiency Test Options*, UNIV. LANGUAGE SERVS., <http://www.universitylanguage.com/guides/english-proficiency-test/> (last visited Oct. 8, 2013).

¹⁹⁴ See *Taking the TOEFL*, UNIV. LANGUAGE SERV., <http://www.universitylanguage.com/guides/taking-the-toefl/> (last visited Oct. 8, 2013). TOEFL stands for Test of English as a Foreign Language, and IELTS stands for the International English Language Testing System. *Id.*; see also *IELTS Test for U.S. Colleges*, UNIV. LANGUAGE SERV., <http://www.universitylanguage.com/guides/ielts-test/> (last visited Oct. 8, 2013).

¹⁹⁵ *English Proficiency Test Options*, UNIV. LANGUAGE SERVS., <http://www.universitylanguage.com/guides/english-proficiency-test/> (emphasis added) (last visited Oct. 8, 2013). MTELP stands for the Michigan Test of English Language Proficiency. *Id.*

ballot tended to call for respect for voters’ rights, which would allow a higher level of scrutiny than for candidates’ rights alone.¹⁹⁶ By their operation, specific requirements for candidacy limit the pool of candidates from which voters may choose for elected office. This has led courts to hold that there is no clear separation between the right to run for office and the right to vote, though the latter remains more fundamental.¹⁹⁷ Given the link between voter rights and the right to run for political office, the U.S. Supreme Court has held that the restrictions on who may run must be “reasonably necessary to accomplish legitimate state” goals.¹⁹⁸

Nevertheless, certain ballot access restrictions are necessary. If there are too many candidates on the ballot for any given office the voter could become confused or overwhelmed.¹⁹⁹ Necessary ballot restrictions reasonably limit the number of names and platforms, allowing the state to ensure that every candidate who appears on the ballot is “serious[] . . . and motivat[ed]”²⁰⁰ The seriousness and motivation question often manifests itself through a requirement that a candidate gather a certain number of signatures in order to have his or her name on the ballot. This is to show that there is real support among voters, and that the candidate is willing and able to perform the groundwork necessary to be on the ballot.²⁰¹ However, courts have held that ballot access restrictions that bear no relation to the state interest it purports to serve are illegitimate and must be voided.²⁰²

The requirement set out in Arizona’s Section 38-201(C), as interpreted by the Arizona Supreme Court in *Escamilla*, is insufficiently related to the legislative intent that only candidates who are able to perform their duties without the help of an interpreter are eligible.²⁰³ The *Escamilla* court’s interpretation of

¹⁹⁶ See James S. Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290, 302–03 (1974).

¹⁹⁷ *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

¹⁹⁸ *Id.* at 143–44; Jardine, *supra* note 196, at 295–99.

¹⁹⁹ *Bullock*, 405 U.S. at 145.

²⁰⁰ Leonard P. Stark, *You Gotta Be On It To Be In It: State Ballot Access Laws and Presidential Primaries*, 5 GEO. MASON L. REV. 137, 140 (1997).

²⁰¹ *Id.*

²⁰² See *Bullock*, 405 U.S. at 146.

²⁰³ *Escamilla v. Cuello*, 282 F.3d 403, 406 (Ariz. 2012).

the law is overly burdensome and will ultimately disqualify candidates who could be effective representatives despite being less than fluent in English. Adopting a sliding scale²⁰⁴ of English requirements could remedy this problem. A sliding scale for judging proficiency can be based on a formula that calculates factors like the number and concentration of speakers of a particular language to assess the necessary proficiency for a public official in that area. It could look at a particular town or Congressional district and determine the prevalence of English and of other languages in the relevant area, and thus be more specifically tailored to the language composition there.²⁰⁵ Using that data, each district would set the required reading, speaking, listening, and writing comprehension level that each candidate should achieve on a particular English competency exam. The *Escamilla* court said that a candidate only needed sufficient fluency in English but subsequently failed to describe what constitutes “sufficient fluency.”²⁰⁶ The court actually did mention, however, that Mrs. Cabrera could “read[] at a ninth or tenth grade reading level,” which would satisfy the fluency requirement, had it only taken reading comprehension into account.²⁰⁷ In this way, a sliding scale based on the demographics of a particular area would comport with the Arizona Supreme Court’s own rationale in *Escamilla* by setting a sufficient level for each aspect of fluency. This would yield a language proficiency standard for candidates that reflected the area they would represent and be reasonably related to the goal of having competent elected officials.

Currently, candidates in San Luis are not required to have complete fluency in English, unlike candidates for the U.S. Senate or governor of Arizona, and this is largely *because* of the demographics of San Luis.²⁰⁸ Running for local office in a city like

²⁰⁴ See Yuval Merin, *The Case Against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT’L & COMP. L. 1, 45–46 (1999).

²⁰⁵ *Id.* at 46–47.

²⁰⁶ See *Escamilla*, 282 F.3d at 407.

²⁰⁷ See *Id.*

²⁰⁸ See Lacey, *supra* note 7 (noting that a former Mayor of San Luis admitted “his own English was far from perfect.”); see also Richard Ruelas, *Politics in San Luis Are Personal*, ARIZ. REPUBLIC (May 19, 2012),

San Luis, where the vast majority of the population speaks Spanish²⁰⁹ in its daily interactions,²¹⁰ is a far cry from running for local office in a city like Scottsdale, Arizona, where less than ten percent of the population is of “Hispanic or Latino origin.”²¹¹ The Arizona Supreme Court has already recognized that English proficiency is only tied to the level necessary for a particular office.²¹² Since that level is demonstrably lower in places like San Luis, due to the large Spanish speaking population, a sliding scale would be an effective way to adjust the English requirement to elucidate the standard the court set forth in *Escamilla*. This sliding scale would ensure that candidates in Arizona would know what level of proficiency is required for public office.

CONCLUSION

The Arizona Supreme Court’s decision in *Escamilla* highlights a growing problem for Arizona—and the United States as a whole—as minority populations grow and become more politically assertive.²¹³ English is Arizona’s de facto dominant language, as well as its official language,²¹⁴ but this dominance belies the reality of a far more linguistically diverse state.²¹⁵ Arizona’s history shows a trend of barriers erected to keep non-English speakers out of the government, both as voters and candidates. Arizona has used literacy tests and intimidation, and now English fluency

<http://www.azcentral.com/arizonarepublic/arizonaliving/articles/2012/05/19/20120519san-luis-politics-personal.html> (“San Luis is 98.7 percent Latino.”).

²⁰⁹ San Luis Census, *supra* note 9.

²¹⁰ Lacey, *supra* note 7 (noting that most “orders are taken in Spanish” at a local San Luis pizza shop).

²¹¹ *Scottsdale, AZ Demographics*, *supra* note 9.

²¹² See *Escamilla*, 282 F.3d at 405.

²¹³ See Glenn Llopis, *Big Data Shows the Growing Influence of Hispanics Will Change Business Models*, FORBES (Dec. 5, 2012), <http://www.forbes.com/sites/glennllopis/2012/12/05/big-data-shows-the-growing-influence-of-hispanics-will-change-business-models/>.

²¹⁴ ARIZ. CONST. art. XXVIII.

²¹⁵ Arizona Census, *supra* note 9; *Voters Make English the Official Language of Arizona*, U.S. ENGLISH, <http://www.usenglish.org/view/228> (last visited Oct. 24, 2013).

requirements, in its state law and the constitution.²¹⁶ In the past, fear of losing cultural dominance prevented non-English speakers from participating in government, and legislative action, like the VRA, sought to remove the obstacles non-English speakers face.²¹⁷ Now, the Arizona legislature must respond to the issue of minority—specifically Latino—exclusion in its present form: the English fluency requirement.

Absent a complete repeal of the requirement that public officials be fluent in English, the Arizona legislature must further refine the law. This will ensure that the law is not unconstitutionally vague and is narrowly tailored to serve a legitimate government purpose. Arizona can further its legitimate government purpose of promoting a functioning government through two measures. First, choosing a specific means of testing English fluency, and second, assigning a target score through demographic-based calculations operating on a sliding scale. Such changes to the law will make potential candidates aware of how it applies to them and will remove the infringement of their rights. Arizona is in a unique position to celebrate its linguistic and cultural diversity, in light of its history of many groups coming together to form a vibrant patchwork. The English fluency requirement of section 38-201(C)—along with the broader English Only amendment to Arizona’s constitution—only serve to alienate and undermine those citizens who are not native English speakers or whose culture is tied to another language such as Spanish. Adapting this English fluency requirement with the sliding scale as described will be a step towards cultural openness that can only enhance its government, as a greater range of opinions and ideas will be accepted.

²¹⁶ See *supra* Part I.

²¹⁷ *Id.*