

Constitutional Law—Tenth Circuit Decides an English-Only Policy Enacted By a Government Employer Does Not Violate Free Speech of Public Employees—*Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006)

The First Amendment of the United States Constitution prohibits Congress from interfering with an individual's right to free speech and free exercise of religion.¹

While acknowledging that freedom of speech occupies a “preferred position” in constitutional jurisprudence, the United States Supreme Court subjects this freedom to governmental limitations.² In particular, Congress places substantial limitations on speech in the government workplace, where public employee speech receives little First Amendment protection.³ In *Maldonado v. City of Altus*,⁴ the Tenth Circuit Court of Appeals considered whether an English-only policy violated Spanish-speaking Hispanic employees' First Amendment rights.⁵ The court held that the English-only policy did not violate the employees' First Amendment rights because the ability to speak a certain language did not rise to a matter of public concern.⁶

In spring of 2002, the elected commissioner of the City of Altus' Street Maintenance Department (City), Holmes Willis, received a complaint from a employee who did not speak Spanish.⁷ He complained, for himself and others, about not understanding what Hispanic employees, who were speaking Spanish, said to each other over the City's radio communication device.⁸ In

1. U.S. CONST. amend. I. The First Amendment provides in pertinent part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” *Id.*; see James Fife, *The Legal Framework for Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 336-43 (2005) (examining constitutional protections of language rights).

2. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (explaining limitations on freedom of speech); see also *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-50 (1961) (determining First Amendment rights not absolute).

3. See *Connick v. Myers*, 461 U.S. 138, 147 (1983) (narrowing scope of First Amendment protection for public employees by requiring speech of public concern); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (allowing employer to prevail even if plaintiff can prove speech as public concern); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (recognizing public speech of government employee protected by First Amendment); Jonathan Alen Marks, Comment, *Connick v. Myers: Narrowing the Scope of Protected Speech for Public Employees*, 5 U. BRIDGEPORT L. REV. 337, 350 (1984) (arguing Court misapplied *Pickering* when deciding *Connick*). See generally R.T. Biskup, Note, *A Question of Free Speech for Public Employees*, 30 WAYNE L. REV. 1309 (1984) (discussing how requirement of public concern narrows public employees protected speech).

4. 433 F.3d 1294 (10th Cir. 2006).

5. *Id.* at 1305 (questioning whether English-only policy on Hispanic workers creates abusive work environment).

6. *Id.* at 1310-11 (balancing whether ethnic pride constitutes public concern).

7. *Id.* at 1298 (setting forth history of complaint).

8. 433 F.3d at 1298-99 (discussing complaint of non-Spanish speaking employee).

response, Holmes Willis informed the employees that they were no longer permitted to speak Spanish at work and the City would be enacting a speak-English-only policy.⁹ On June 18, 2002, Tommy Sanchez wrote a letter to the director of Human Resources and the City Administrator, Michael Nettles, officially serving the City with a discrimination complaint.¹⁰ In the letter, Sanchez complained about the new English-only policy, stating he expresses pride in his heritage through speaking Spanish.¹¹ At the end of the letter, he requested that the City investigate the charges and produce a report within two weeks.¹² Despite these proceedings, in July 2002, Michael Nettles signed an official policy restricting all business communications to English.¹³

The policy restricted employee communications to English during work hours and while conducting business.¹⁴ It made an exception for situations that are “necessary or prudent to communicate with a citizen . . . in his or her native language due to the person or entity’s limited English language skills.”¹⁵ The policy, however, specifically did not “apply to strictly private communications between co-workers while they are on approved lunch hours or breaks or before or after work hours while the employees are still on City property [T]his policy does not apply to strictly private communication between an employee and a family member.”¹⁶ The City explained that it adopted the English-only policy to facilitate communication between all city employees, to prevent non-Spanish speakers from feeling excluded, and address potential safety concerns.¹⁷ Although the City claimed that they relaxed the policy rules for

9. *Id.* at 1298-99 (discussing Holmes’ actions after receiving complaint). Willis first went to the Director of Human Resources, Candy Richardson, and informed her of the problem. *Id.* She gave him the option of instructing employees to speak only English while using the City’s radio communication devices. *Id.* Instead, he instructed employees to restrict *all* conversations at work to English. *Id.*

10. *Id.* at 1299 (recounting history of employees’ complaint).

11. *Id.* (outlining details of Tommy Sanchez’s letter to City Administrator, Michael Nettles, and Candy Richardson). Sanchez expressed several concerns in his letter to Holmes. *Id.* He was concerned that the City’s administration did not follow required procedures to implement the policy because employees did not receive proper notice. *Id.* The administration should have informed Sanchez of the potential policy, but instead Sanchez learned through two of his subordinates that the City planned to impose an English-only policy. *Id.* Sanchez expressed concern about the real purpose of the English-only policy: to discriminate against Hispanic employees. *Id.* Sanchez also discussed a conversation he had with Willis, during which Willis asserted that the reason Hispanics speak Spanish “is because [of] . . . insecurities;” to which Sanchez responded, “it is a natural reaction for us to speak Spanish to someone that we know speaks Spanish.” *Sanchez v. City of Altus*, No. CIV-03-336-R, 2004 U.S. Dist. LEXIS 3252, at *5, *10 n.5 (W.D. Okla. Feb. 20, 2004) (excerpting letter from Sanchez).

12. 433 F.3d at 1299 (discussing Sanchez’s request for City to investigate discrimination charges).

13. *Id.* at 1299-1300 (outlining City’s promulgation of policy without any apparent investigation of Sanchez’s complaint).

14. *Id.* at 1299 (setting forth terms of policy).

15. *Id.* (italicized in original) (excerpting exception to speak English-only policy).

16. 433 F.3d at 1299 (italicized in original) (defining adopted English-only policy).

17. *See id.* at 1300 (outlining City’s reasons for implementing English-only policy). The district court found no records documenting complaints from employers regarding Spanish speakers, nor did it find that city officials expressed safety concerns over people speaking a non-English language. *Id.* The district court,

Spanish speakers, the plaintiffs presented evidence that the restrictions went beyond the written policy, prohibiting all use of Spanish if a non-Spanish speaker was present, regardless of the time of day or circumstance.¹⁸

The plaintiffs each filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), claiming that the English-only policy amounted to national origin discrimination.¹⁹ After investigating, the EEOC determined that the City had violated Title VII of the Civil Rights Act of 1964 by instituting its discriminatory and overly broad English-only policy.²⁰ Unable to resolve the dispute informally, the plaintiffs commenced litigation in district court claiming the City violated their Equal Protection and First Amendment claims under 42 U.S.C. § 1983.²¹ The district court granted summary judgment on all the claims in favor of the City.²² On appeal, the Tenth Circuit Court of Appeals affirmed and held that the English-only rule did not limit communication on matters of public concern.²³

Until 1968, the United States Supreme Court did not recognize the free speech of public employees, instead deferring to government restrictions.²⁴ In

however, accepted evidence from Willis's deposition that employees complained to him regarding Spanish speakers and accepted the City's claim of safety concerns because a few plaintiffs were aware "that employee safety was one reason for [adopting] the policy." *Maldonado v. City of Altus*, No. CIV-03-336-R, slip op. at 6-7 (W.D. Okla. Feb. 20, 2004) (noting lack of specific examples of problems).

18. See 433 F.3d 1294 at 1300-01 (describing restrictive impact of English-only policy). Plaintiffs showed how, contrary to the written policy, even when workers were on lunch or during breaks, they were prohibited from speaking Spanish. *Id.* at 1300. The only time they were permitted to speak Spanish was when everyone present understood it. *Id.* If at anytime a non-Spanish speaker was present or even walked by, they had to stop speaking in Spanish because "it would offend whoever [walked] by." *Id.* (quoting R. Vol. II at 631). The policy's practice extended to phone conversations with family members, so that Spanish speakers had to switch to English if a non-Spanish speaker was present. *Id.*

19. *Id.* at 1301 (noting some plaintiffs also filed retaliation claims); see Mark Colón, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 227-28 (2002) (highlighting increase of complaints to EEOC over past five years).

20. 433 F.3d at 1301-02 (finding violation under Title VII for employment discrimination). *But see* Rosanna McCalips, Comment, *What Recent Court Cases Indicate about English-Only Rules in the Workplace: A Critical Look at the Need for a Supreme Court Ruling on the Issue*, 4 U. PA. J. LAB. & EMP. L. 417, 418 (2002) (questioning whether language implicates national origin).

21. 433 F.3d at 1301 (setting forth plaintiffs' claims). The plaintiffs also claimed that the City violated Title VI under the disparate-impact theory. Under disparate impact, the plaintiffs did not have to prove that the City created the policy with discriminatory intent; rather, they had to show that the "facially neutral" policy was "discriminatory in operation." *Id.* at 1303-04. Under the plaintiffs' First Amendment claim, they argued that speaking Spanish was a matter of public concern, claiming that language was an expression of their pride in being Hispanic. Brief of Plaintiffs-Appellants at 57, *Maldonado v. City of Altus*, No. CIV-03-336-R (10th Cir. July 8, 2004). The plaintiffs also distinguished between private and public speech, asserting that the speech precluded by the English-only policy was a matter of public speech because it affected the Spanish-speaking community as a whole. 433 F.3d at 1310-11.

22. See *Maldonado v. City of Altus*, No. CIV-03-336-R, slip op. at 33 (W.D. Okla. Feb. 20, 2004) (granting summary judgment for City on all claims).

23. 433 F.3d at 1312 (declining to evaluate constitutionality of First Amendment claims because speech not matter of public concern). The appellate court did not think that the plaintiffs' daily speech was intended to "communicate ethnic pride or opposition to discrimination." *Id.*

24. See *Connick v. Myers*, 461 U.S. 138, 143-44 (1983) (discussing historical jurisprudence of restriction

Pickering v. Board of Education,²⁵ the Court held that the termination of a school teacher's employment was an impermissible infringement on his protected speech and rejected the notion that public employees relinquish First Amendment rights while employed by the government.²⁶ Instead, the Court established an analytical framework balancing the employee's interest in speaking on matters of public concern with the government employer's interest in suppressing that speech in order to maintain an efficient workplace.²⁷ The Court, in *Mount Healthy City School District Board of Education v. Doyle*,²⁸ determined that even if a government employer terminated an employee based primarily on the constitutionally protected public concern speech, the employer may still prevail if it is able to prove the employee would have been reprimanded regardless of the speech.²⁹

The *Pickering* and *Mount Healthy* decisions involved employers who took adverse action against employees' specific past speech.³⁰ The Court in *United States v. National Treasury Employees Union* (NTEU)³¹ addressed a congressional ban on future employee speech.³² The Court determined that when a government employer enacts a prophylactic measure imposing restrictions on employee speech, the government has a burden to prove that

on public employees' First Amendment rights); see also *McAuliff v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892) (holding ordinance preventing officers from soliciting money for political purpose not violative of First Amendment). Justice Holmes wrote that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," and therefore, "[he] cannot complain as he takes the employment on the terms which are offered to him." *McAuliff v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892). See generally, Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988) (contending public employee speech analysis more confusing than helpful because of inconsistent application in state courts); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) (discussing theoretically troubling nature of public concern analysis).

25. 391 U.S. 563 (1968).

26. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (preserving First Amendment rights of public school teachers).

27. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (establishing balancing test used in future litigation). The Court stated that the proper inquiry is to balance the "interests of the teacher, 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." *Id.*

28. 429 U.S. 274 (1977).

29. *Mt. Healthy Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (creating another prong of public employee speech test); see also James G. Fahey, Note & Comment, *United States v. National Treasury Employees Union: Restrictions on Free Speech of Government Employees and the Re-balancing of Pickering*, 15 ST. LOUIS U. PUB. L. REV. 555, 562-64 (1996) (analyzing *Mt. Healthy* within context of other public speech cases). See generally Michael S. Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L. J. 385 (1980) (providing thorough review of *Mount Healthy*).

30. See Fahey, *supra* note 29, at 563 (noting *Mount Healthy* dealt with employer action on past speech activities); see also Wolly, *supra* note 29, at 386 (discussing Supreme Court's focus on cases prior to *Mount Healthy*).

31. 513 U.S. 454 (1995).

32. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 467-68 (1995) (discussing greater burden of government imposed honoraria ban); see Ethics in Government Act 1978, 5 U.S.C. App. § 501(b) (2000) (prohibiting government employees from being compensated for giving speeches or writing articles).

“the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression [were] outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.”³³

The central and more difficult determination of the *Pickering-Mount Healthy* test is what constitutes a public concern.³⁴ In *Connick v. Myers*,³⁵ the Court established that whether a statement is a matter of public concern must be determined by “the content, form, and context of a given statement, as revealed by the whole record.”³⁶ The Court has addressed the issue of public concern with regard to the content of the speech and has addressed the role of language in fostering community and heritage.³⁷ The courts have, however, not resolved the issue with regard to choosing a language of speech in relation to public

33. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (deciding Congress’s statutory provision did not comport with First Amendment) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 581 (1968)). The Court stated, “Unlike *Pickering* and its progeny, this case does not involve a post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities.” *Id.* at 466-67; *see also Latino Officers Ass’n v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999) (deciding *NTEU* applicable because city imposed prior restraint on employees). The court rejected the City of New York’s argument that prohibiting Latino employees from wearing police uniforms while marching in an ethnic pride parade was not a “classic prior restraint” case and applied the stricter standard established in *NTEU*. *Latino Officers Ass’n v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999) (internal quotations omitted); *see also Fahey*, *supra* note 29, at 590 (hypothesizing possible *NTEU* analysis applicable even to post hoc employee discipline cases); *Federal Employees-Bans on Honoria*, 109 HARV. L. REV. 200, 205-08 (1995) (asserting *NTEU* Court improved worst aspect of *Pickering* analysis by applying additional burden on government).

34. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (expanding *Pickering* analysis to include public concern threshold test); *see also* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 27 (1987) (stating Court “has not defined ‘matter of public concern’ with any specificity”); *Fahey*, *supra* note 29, at 569 (noting *Pickering* balance test last hurdle when evaluating public employees’ speech). Massaro highlights three problems with the term “public concern”: the definition of “public concern” can be too subjectively determined, the categorization is too narrow, and the court contradicts its own definitions and defenses. Massaro, *supra*, at 27-29.

35. 461 U.S. 138, 146 (1983)

36. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (explaining totality of circumstances required in analysis); *see also* Massaro, *supra* note 34, at 31 (discussing dangers of “public concern test” because its ambiguity allows different definitions within different contexts).

37. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991) (addressing plaintiff’s argument contending language has power to convey special meaning); *see also Latino Officers Ass’n v. City of New York*, 196 F.3d 458, 466 (2d Cir. 1999) (contending Hispanics’ interest in expressing ethnic pride not necessarily matter of private concern); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486-87 (9th Cir. 1993) (acknowledging language as link to person’s ethnic culture and identity). Dissenting from the majority’s denial of rehearing en banc of *Garcia v. Spun Steak Co.*, Judge Reinhardt wrote, “[l]anguage is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as ‘inconvenience’ to the affected employees” *Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting); *see also Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (holding ban of religious speech unconstitutional because of deeply felt religious identity); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 557-60 (W.D. Pa. 2003) (holding ban of religious jewelry in workplace unconstitutional because religious identity inherently personal). The court recognized that the expression addressed matters of public concern because, while religious belief and viewpoints are inherently personal, the awareness of the community, especially in the face of controversy, created these issues that fell under the umbrella of public concern. *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 557-60 (W.D. Pa. 2003).

concern.³⁸

In *Maldonado v. City of Altus*, the Tenth Circuit Court of Appeals examined whether the City unconstitutionally instituted an English-only policy restricting Hispanic employees from speaking Spanish at work.³⁹ The court's analysis focused on the type of speech at issue and determined the plaintiffs failed to show that the English-only policy prohibited communications on matters of public concern.⁴⁰ The court reasoned that the speech at issue consisted of words or statements the plaintiffs would have uttered regardless of the policy, thus concluding the statements were "essentially mundane, quotidian conversation."⁴¹ The decision to speak Spanish was not speech that constituted a matter of public concern.⁴²

The court explained that the plaintiff's use of Spanish was not intended to communicate a message to any supervisor and, although the court did not doubt the plaintiff's ethnic pride, it found the mere act of speaking is not "in itself intended to communicate that one takes pride."⁴³ The court also determined

38. See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc), *vacated as moot*, 520 U.S. 43 (1997) (holding state constitution's English-only provision unconstitutional under First Amendment); see also Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1353-54 (1997) (explaining Spanish language central part of Latino identity); Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1426-37 (2004) (arguing language inseparable from race when assessing discrimination). There are crucial ways in which language is central to Latino identity. Cameron, *supra*, at 1365. Historically, however, society discriminated against Latinos because of their Spanish-speaking ability. *Id.* The author argues that courts, judges, and employers report and analyze the issues causing them to "oversimplify and diminish Latinos' claims." *Id.* at 1356.

39. 433 F.3d at 1309 (stating *Maldonado's* First Amendment issue).

40. *Id.* at 1310-11 (determining plaintiff's claim failed first prong and possibly third prong of analysis). The court applied a four-part test derived mainly from *Pickering* and *Mount Healthy*. *Id.* at 1309-10. The test first examined whether the speech at issue related to a matter of public concern. *Id.* at 1309. If it is a matter of public concern, the court must next balance the employee's interest "in making the statement against the employer's interest in promoting the efficiency of the public services it performs through its employees." *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). If the interest of the employee outweighs the interests of the employer, the speech is protected. *Id.* at 1309. In order to succeed in a claim, the plaintiff must show that the speech was a motivating factor in the detrimental employment decision. *Id.* (citing *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)). The court stated "if the plaintiff sustains this burden, the employer can still prevail if it shows by a preponderance of the evidence that it would have made the same decision regardless of the protected speech." *Id.* at 1309.

41. *Id.* at 1310. (determining content of plaintiff's conversation not matters of public concern). *But see id.* at 1325 (Seymour, J., dissenting) (examining expression of ethnic pride in use of speech not by actual words spoken); Perea, *supra* note 38, at 1427 (arguing Spanish language "carrier and vessel of culture"). "It is a gross oversimplification to consider language as merely a utilitarian means of communication." Perea, *supra* note 38, at 1427.

42. See 433 F.3d at 1310 (explaining speech's purpose to communicate amongst one another and not to communicate message to outsiders).

43. See *id.* at 1311 (distinguishing between taking pride and expressing pride). The court found that although a person may take pride in an act, performance of the act does not necessarily communicate such pride. *Id.* The court provided an analogy of "a football player [who] takes pride in scoring a touchdown but not until he performs a victory dance in the end zone can we say he is *expressing* pride in his prowess." *Id.*

that ethnic pride was not a matter of public concern because the plaintiffs had not meant to “communicate ethnic pride or opposition to discrimination.”⁴⁴ The majority reasoned that their choice of language was not made in a public forum nor did it pertain to anyone other than employees of the City.⁴⁵ Even if the City had violated the plaintiffs’ First Amendment rights and the plaintiffs had communicated matters of public concern, the court held that the City did not intend to suppress such communication because the City was unaware that an English-only policy would have a suppressive effect.⁴⁶

In *Maldonado v. City of Altus*, the two judge majority incorrectly determined that the City’s English-only policy was constitutional by applying the wrong legal test and incorrectly categorizing the speech as a private concern.⁴⁷ The City’s English-only policy was a preemptive attempt to restrict Hispanics from speaking Spanish, thus restricting speech before it occurred.⁴⁸ Therefore, the court should have applied the NTEU analysis, not the *Pickering-Mount Healthy* analysis, which applies to post hoc speech restrictions.⁴⁹

The majority also incorrectly decided that the speech was not a matter of public concern by assuming that the suppressed speech was merely everyday conversation.⁵⁰ By exclusively focusing on the speech’s “content,” the court ignored the “form” and “context” of the speech. The Hispanic employees chose the form of Spanish in the context of a predominantly white, English cultured atmosphere.⁵¹ Although they recognized that communication of ethnic

44. See 433 F.3d at 1311 (noting plaintiffs never chose to communicate to supervisors). The majority cited the letter plaintiffs wrote to Mr. Nettle deciding that although Mr. Sanchez stated he and other employees were proud of their heritage, such statements did not equate any intent to communicate public concern to an outsider. *Id.* But see *id.* at 1326 (Seymour, J., dissenting) (disagreeing with majority’s assertion that plaintiffs must convey message to policymaker or public). The dissent asserted “for purposes of *Pickering* analysis” the speech at issue “need not be communicated to a policymaker or addressed to the public . . . to be . . . a matter of public concern.” *Id.* (Seymour, J., dissenting) (citing *Rankin v. McPherson*, 483 U.S. 378, 386 (1987)).

45. See *id.* at 1312 (citing exception within policy allowing Spanish communication with public if necessary). The court distinguished the case in chief from *Yniguez v. Arizonans for Official English* because similar restrictions in that case applied to employees and members of the public who may speak or understand English. *Id.* (citing *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 939-42 (9th Cir. 1995) (en banc), *vacated as moot*, 520 U.S. 43, (1997)).

46. *Id.* at 1313 (determining no evidence of intention to stifle communication with policy); see *supra* notes 23-24 (discussing constitutional implications of restrictions on public employee speech).

47. See 433 F.3d at 1316 (Seymour, J., dissenting) (stating inherent inability to support majority opinion).

48. See *id.* at 1316-18 (Seymour, J., dissenting) (criticizing majority’s analysis of applicable test). Judge Seymour argued that the issue of whether the plaintiff’s speech touched on a matter of public concern should not affect which test to apply. *Id.* at 1318 n.2. Instead, he argued that the determinative factor is whether the court characterizes the case as an ex ante prior restraint case or a post hoc retaliation case. *Id.* For the former, the proper analysis is the NTEU two-part test; for the latter, the applicable test is the stricter four-part *Pickering-Mt. Healthy* test. 433 F.3d at 1318 n.2; see also *supra* notes 34-36 and accompanying text (discussing concerns of Supreme Court with policies restricting speech before it occurs).

49. See 433 F.3d at 1317-18 (Seymour, J., dissenting) (questioning majority’s application of *Pickering-Mount Healthy* test); see also *supra* notes 32-33 and accompanying text (discussing NTEU analysis).

50. See 433 F.3d at 1318-19 (disagreeing with majority’s determination speech not matter of public concern).

51. See *supra* note 40 and accompanying text (discussing court’s analysis of plaintiffs’ speech).

pride was a matter of public concern, the majority rejected the plaintiffs' and dissent's argument that the choice of language was a communication of ethnic pride.⁵² The court missed an opportunity to connect a previous decision recognizing the effect language has on identity and apply it to an English-only policy.⁵³

Finally, the two judge majority failed to analyze the "context" in which the City enacted its English-only policy and instead looked at the policy in a vacuum.⁵⁴ As the dissent highlighted, the record showed that the community, both employees and non-employees, Spanish and non-Spanish speakers, were aware of the policy.⁵⁵ The speech touched upon public concern because of the growing number of English-only policies in the United States.⁵⁶ The majority's narrow construal of community and context in this situation makes it more challenging for future litigants to show how an English-only policy affects more than just the plaintiffs.⁵⁷

In *Maldonado v. City of Altus*, the Tenth Circuit Court of Appeals restricted First Amendment free speech rights of public employees. The court incorrectly applied a strict standard to an overly broad policy. Consequently, by not considering a person's choice of language as matter of public concern, the court overlooked the profound cultural ties that multi-lingual communities in America have to their languages.

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52. See Cameron, *supra* note 38, at 1353-54 (criticizing courts' analysis of Hispanic issues with regard to spoken language).

53. See 433 F.3d at 1319-20 (Seymour, J., dissenting) (referencing cases addressing connection between language and ethnicity).

54. See *id.* at 1320-21 (Seymour, J., dissenting) (discussing situation surrounding policy enactment).

55. See *id.* at 1321 (Seymour, J., dissenting) (showing policy had more widespread impact than majority stated).

56. See *id.* at 1321 (Seymour, J., dissenting) (discussing size of city and impact of policy upon community).

57. See 433 F.3d at 1324 (Seymour, J., dissenting) (noting increasingly divisive nature of English-only policies).