No. 18–1045

IN THE

Court of Appeals for the Ames Circuit

CARLA ESPINOSA AND BOBBY SIMONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

CITY OF AMES AND COMMISSIONER ROBERT "BOB" KELSO,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

BRIEF FOR DEFENDANTS-APPELLANTS

The Grace Murray Hopper Memorial Team

MAX GOTTSCHALL
ERIKA HERRERA
BENJAMIN LEWIS
CATHERINE MCCAFFREY
ELIZA MCDUFFIE
JACQUELINE SAHLBERG

Counsel for Defendants-Appellants

March 19, 2018
Ames Courtroom
Harvard Law School

Oral Argument

QUESTIONS PRESENTED

1. Whether the Ames Police Department's English-only policy has a disparate impact in violation of Title VII.

2. Whether the Ames Police Department's English-only policy was motivated by discriminatory intent in violation of Title VII and the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This case is about what police units need to serve the public. Police are different. They are public servants; crisis intervenors; first responders. On a daily basis, they confront danger. They are entrusted with our safety at all times. When a police officer puts on her uniform, she accepts certain restrictions. In the City of Ames, those restrictions include a requirement to speak English while on duty.

Commissioner Robert Kelso independently determined that the Ames Police Department should have this policy. In his thirty years of experience, he had seen it work. To protect the City of Ames, this Court should defer to his judgment.

OPINION BELOW

The opinion of the United States District Court for the District of Ames is reproduced at page 2 of the Joint Appendix. The Court's original order is reproduced at page 10 of the Joint Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 and § 1294. The District Court for the District of Ames had jurisdiction over this action under 28 U.S.C. § 1331 (2012). That Court entered final judgment on December 4, 2017. J.A. at 10. The City of Ames and Commissioner Kelso timely appealed on December 18, 2017, J.A. at 12; Ms. Espinosa and Mr. Simone cross-appealed on the same day, J.A. at 11.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves U.S. Const. amend. XIV, 42 U.S.C. § 1983 (2012), 42 U.S.C. § 2000e-2(k) (2012), and 29 C.F.R. § 1606.7 (2018). All relevant provisions are reproduced in the Appendix.

STANDARD OF REVIEW

On appeal, federal courts review cross-motions for summary judgment de novo, "view[ing] each motion separately, in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in that party's favor." *United States v. Supreme Court of New*

Mexico, 839 F.3d 888, 906–07 (10th Cir. 2017). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

STATEMENT OF THE CASE

When Commissioner Robert Kelso took command of the Ames Police Department ("APD"), he set out to make Ames safer. To that end, he implemented a policy requiring on-duty officers to speak English unless otherwise necessary to perform their duties. J.A. at 26. Two officers — Carla Espinosa and Bobby Simone — defied the policy and were demoted. In response, they filed suit against Commissioner Kelso and the City of Ames.

On cross-motions for summary judgment, the District Court found that the policy (1) imposed an unlawful disparate impact under Title VII of the Civil Rights Act of 1964, but (2) did not constitute disparate treatment under Title VII and the Fourteenth Amendment. Both parties appealed. J.A. at 25.

***

A Seasoned Commissioner

When Commissioner Kelso implemented the English-only policy for the APD, he relied on thirty years of "experience with similar policies" in other major police departments. *Id*.

Kelso began his career in Tucson, where he spent twenty-three years as an officer serving Arizona's most dangerous city.[1] During this

[11] Craig Thomas, Study: *Tucson Is Most Dangerous City in Arizona*, Tucson News Now, Mar. 30, 2016, http://www.tucsonnewsnow.com /story/31132536/study-tucson-is-most-dangerous-city-in-arizona.

time, the Tucson Police Department required "that its employees speak Spanish when necessary, and at the level of proficiency that they possess[ed]."[2] He eventually became Police Commissioner. J.A. at 28. Under his leadership, the city experienced a substantial decrease in violent crime.[3]

Kelso then joined the New York Police Department ("NYPD") as Deputy Commissioner of Operations, *id.*, where he managed "the largest and most diverse police force in the nation," J.A. at 53.[4] At the time, the NYPD required all officers to speak English while on duty. *Id.* This rule was defended at the highest levels of city government; Mayor Michael Bloomberg called it a matter of "life and death." *Id.* Kelso later testified that the New York policy had "added a degree of professionalism, put everyone on the same page, [and] made people safer." J.A. at 35. During his tenure, the city maintained record lows of violent crime.[5]

A Political Newcomer

Kelso came to the City of Ames in January 2015 after being hired by the newly elected mayor, former doctor Perry Cox. J.A. at 24. Cox's controversial campaign "focus[ed] on economic growth and public

---

[2] *Cota v. Tucson Police Department*, 783 F.Supp 458, 461 (D. Ariz. 1992).
[3] City of Tucson, Arizona Crime Rate, https://www.tucsonaz.gov/files/police/pt1_16_VIO_ra-te_0.pdf
[4] http://nymag.com/daily/intelligencer/2014/12/nycs-crimes-rates-hit-record-lows.html
[5] *Id.*

safety." J.A. at 51. Two of his more provocative statements generated substantial media coverage. J.A. at 30.

At a campaign event in May 2014, then-Candidate Cox expressed his concern with the APD's performance:

> Do you know why crime is rising? It's because Ames' finest aren't the best and the brightest any more. The last twenty years, they have no rules, no regulations, no standards in the APD: you can wear whatever you want, don't have to cut your hair, don't have to look nice, don't even have to speak English on the job! Let me tell you, when I get into office, that changes. We are gonna clean house, and only the best and brightest will be left standing, just like it should be.

J.A. at 31–32. Commissioner Kelso later testified that he liked Cox's focus on "law and order and supporting law enforcement." J.A. at 32. He did not "recall noticing or thinking about" the comment regarding officers speaking English. J.A. at 32–33.

At a campaign event in October 2014, then-Candidate Cox voiced his belief that Spanish-speaking immigrants should learn English:

> Latinos, if they come here, they need to learn English or they need to go back to Mexico or Havana or wherever they came from. If they're not smart enough to learn our language, they're not smart enough to live here, work here, or get any government benefits here.

J.A. at 30. Commissioner Kelso later testified that he did not recall this statement specifically. *Id.* Although he "agree[d] with the general principle of come to America, learn English," J.A. at 31, he "wouldn't have phrased it in terms of being 'smart,' because language learning is difficult." *Id.*

In late 2014, the people of Ames elected Perry Cox as their mayor. Upon taking office, Mayor Cox hired Kelso to run the APD.

A Diverse Department

Like the city it serves, J.A. at 51, the APD is diverse. Out of 1800 officers, 216 are Hispanic and 21 are Asian. J.A. at 38. Throughout the force, officers speak various languages other than English, including Spanish, Vietnamese, Creole, and Portuguese. J.A. at 40, 46.

Though the APD had been largely successful at managing the city's crime rate, J.A. at 51, the Department was not perfect. In particular, officers admitted to mocking their coworkers in a foreign language. J.A. 42–43. For example, two male officers were formally disciplined for harassing a secretary about her clothing choices and weekend activities. J.A. 48–50.

A Unifying Policy

After taking command of the APD, Commissioner Kelso conducted a thorough review of the Department's policies. J.A. at 16. After a seven-month audit, he decided the APD needed a policy that would improve safety, foster community, increase professionalism, and prevent harassment. JA. at 35. Based on his experience with similar policies, he determined that an English-only policy was needed. J.A. at 35.

In August 2015, Kelso informed Mayor Cox of his decision. J.A. 24–25. Four days later, he sent a detailed message to the Department

describing the policy, explaining its rationale, and inviting officers to voice any questions or concerns. *Id*. The message notified the officers that if they violated this policy, they would face discipline and potential termination, just like with "any other Department rule." J.A. at 25.

The policy requires that all officers speak English when on-duty, "unless speaking a foreign language is a necessary component to performing their duties and responsibilities." J.A. at 24–25. Under the policy, speaking a foreign language is considered necessary when interacting with non-English speaking civilians, when translating materials, when ordered by a court or supervisor, and when necessary "to preserve the life or health of any person or animal." J.A. at 4–5. Otherwise, the policy applies at all times, including brief breaks, regardless of the nature of the officer's job. J.A. at 25.

Kelso provided the following rationale for the policy:

> The APD faces many emergency situations, and it is critical that every officer feel comfortable communicating with everyone else in English in the event of a life-threatening emergency. Speaking English also furthers cooperation, fosters good will in the community, and reduces the potential for harassment of both employees and members of the public.

J.A. at 24–25.

Sitting for deposition eight months later, Commissioner Kelso reiterated: "[t]he policy is about safety. It's about community. It's about professionalism. It's about preventing harassment." J.A. at 35.

1794 officers complied with the policy; six Spanish-speaking officers did not. Consistent with the policy, the six were disciplined. Two of these six — Carla Espinosa and Bobby Simone — violated the policy repeatedly. J.A. at 25–26. Espinosa and Simone are bilingual, having immigrated to the United States as children. J.A. at 23–24. Though both are fluent in English, they regularly communicated in Spanish with other detectives and continued to do so after the policy's enactment. J.A. at 42, 44–45. After being observed speaking Spanish several times, they were suspended for a week without pay. J.A. at 25. Upon their return, they continued to flout the policy. J.A. at 26. After their second violation, they were again suspended, and, for the repeat offense, demoted. *Id*. They resigned. *Id*.

This Litigation

Ms. Espinosa and Mr. Simone brought suit in the United States District Court for the District of Ames, alleging two claims. First, they alleged that the English-only policy "disparately impact[ed] employees who are not white and who are from a country where English is not the native language" in violation of Title VII. J.A. at 19. Second, they alleged that the City of Ames and Police Commissioner Kelso intentionally discriminated on the basis of race and national origin in violation of Title VII and the Fourteenth Amendment. *Id*.

The parties filed cross-motions for summary judgment on both claims. J.A. at 21, 22. The lower court granted summary judgment for Espinosa and Simone on the disparate impact claim, and granted summary judgment for the City of Ames and Commissioner Kelso on the disparate treatment claim. J.A. at 2. This appeal followed.

SUMMARY OF THE ARGUMENT

I. A. Summary judgment is appropriate for the City of Ames because, as a matter of law, the English-only policy is a business necessity for the APD, and Espinosa and Simone have presented no reasonable alternative.

Commissioner Kelso wanted to make Ames the "safest big city in the country." J.A. at 25. Drawing upon thirty years of experience, he determined that implementing an English-only policy was necessary to achieve this goal. Title VII allows him to do so.

Title VII permits workplace rules that are "consistent . . . with business necessity," even where such rules disparately burden a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). Under that standard, this Court need only decide whether the APD's English-only policy has a manifest relationship to a legitimate business goal. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). As a matter of law, it does.

Because Commissioner Kelso oversees a department charged with protecting the public, his judgment that the policy is necessary deserves considerable deference. *See Davis v. City of Dallas*, 777 F.2d 205, 213 (5th Cir. 1985). A single miscommunication between officers can be fatal. And fissures in unit cohesion can impair effective emergency response. The English-only policy protects against these dangers. It ensures that in emergencies, officers will always speak in the language everyone can understand. It also empowers all supervisors and coworkers to prevent harassment and foster department solidarity.

Espinosa and Simone have presented no alternative that will serve these goals. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii). As such, this Court should direct summary judgment for the City of Ames. It need not go further.

B. In the alternative, if this Court finds that no business necessity exists here as a matter of law, this Court should nonetheless reverse the District Court's grant of summary judgment for Espinosa and Simone. There is a genuine issue of material fact as to whether the record supports a prima facie showing of disparate impact.

Espinosa and Simone rely on EEOC guideline § 1606.7 to establish their prima facie case. J.A. at 19. But that reliance is misplaced because the guideline lacks the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). First, the guideline contravenes the

text of Title VII. Under any interpretation of the guideline, it allows plaintiffs to shortcut Title VII's carefully crafted burden-shifting framework. Second, the guideline is ambiguous. Its vague instructions have yielded divergent interpretations, illustrating that the directive provides no meaningful guidance. Third, the guideline is internally inconsistent. It draws an arbitrary line between broad and narrow rules that is not supported by a categorical difference in harm to employees. This Court should afford it no deference; Espinosa and Simone must demonstrate a prima facie case on this record.

Properly evaluated de novo, there is a genuine issue of material fact as to whether compliance with the policy is significantly burdensome for protected employees. On the evidence offered by Espinosa and Simone, reasonable minds could disagree about whether APD officers have substantial difficulty speaking English while on duty. And Espinosa and Simone have not shown that the policy requires them to suppress their identity any more than do typical police restrictions. Accordingly, there remains a genuine issue of material fact.

Therefore, if this Court does not grant summary judgment to the City on grounds of business necessity, it should nonetheless reverse and remand for further proceedings.

II. Summary judgment for Commissioner Kelso and the City of Ames was appropriate on the disparate treatment claim, because there is insufficient evidence for a reasonable factfinder to conclude that discriminatory intent motivated Commissioner Kelso to adopt the English-only policy.

Commissioner Kelso brought the policy to Ames because his experience with similar policies in other diverse cities convinced him that it would protect his officers and the people of Ames. Though the policy applies broadly, that alone does not suggest its designer intended to discriminate. As noted above, the policy's scope is a business necessity, and its justifications apply at all times. The record does not undermine these legitimate justifications.

Kelso's offhand deposition remark does not evince bias towards Hispanics. His comment implying that officers who "speak Spanish" also "eat guacamole" and "play soccer" at home is not disparaging — at most, it was a clumsy overgeneralization. Moreover, even if a factfinder could rely on this single comment as proof of discriminatory intent, the statement came too late after the policy's enactment to have much probative value. *See Ansell v. Green Acres Constr. Co.*, 347 F.3d 515, 524 (3d Cir. 2003).

As Kelso was plainly not motivated by discriminatory intent, Espinosa and Simone rely on the intent of a different actor: Mayor Cox.

But Mayor Cox's intent is legally irrelevant to the question in this case. Commissioner Kelso made the decision to implement the policy on his own, without direction from the Mayor or his staff. The law recognizes two exceptions to the rule that statements by a non-decisionmaker cannot "establish that a decision was tainted by discriminatory animus." *Cuenca v. University of Kansas*, 101 F. App'x 782, 788 (10th Cir. 2004). Neither applies here.

First, the Mayor did not "exercise[] a significant degree of influence over the contested decision." *Sun v. Bd. Of Trustees of Univ. of Il.*, 473 F.3d 799, 813 (7th Cir. 2007). Kelso informed the Mayor of the policy only four days before announcing it. J.A. at 34. His decision had already been made. Second, Kelso did not act as legal "rubber stamp." *See Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011). He "based his decision [to implement the policy] on his own independent investigation," thereby breaking the necessary causal link between his choice and Cox's alleged discriminatory intent. *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996).

Even if Mayor Cox's intent is relevant, this Court should entirely disregard any statement he made as a political candidate. Relying on such statements as evidence of motive is fraught with danger.

First, it would unacceptably chill campaign speech. That concern is especially pertinent here, where Cox's stated views on immigration policy are both widely-held and related to an ongoing public debate.

Second, to prevent Cox's past statements from impermissibly "forever taint[ing]" his future action, *McCreary Cty., Ky v. American Civil Liberties Union of Ky*, 545 U.S. 844, 874 (2005), a jury would have to examine his inner mind and conclude that the once-present animus had dissipated. The Supreme Court forbids such "judicial psychoanalysis" of public officials. *Id.* at 862.

Third, the use of such statements poses a significant risk of error. Unfortunately, political candidates do not always say what they mean: they speak in vague generalities and occasionally lie outright. And they make thousands of statements over many months from which litigants can easily "cherry pick." *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009). In fact, Espinosa and Simone have done precisely this.

And, even if this Court chooses to consider then-Candidate Cox's campaign statements, they do not support a reasonable inference of discrimination. These statements, without more, do not show animus. Nor do they connect any alleged impermissible motive to the English-only policy. Moreover, they were made many months before Commissioner

Kelso promulgated the policy. Thus, like Kelso's deposition remark, they are too removed to be probative.

The record does not support a disparate treatment claim. Summary judgment for Commissioner Kelso and the City of Ames was appropriate.

ARGUMENT

I. The Ames Police Department's English-only policy has no disparate impact.

A. This Court should direct summary judgment for the City of Ames on the disparate impact claim.

When Congress enacted Title VII, it "intended a balance to be struck in preventing discrimination and preserving the independence of the employer." *Garcia v. Spun Steak*, 998 F.2d 1480, 1490 (9th Cir. 1993). For disparate impact claims, this legislative compromise is reflected in the mandatory burden-shifting scheme set forth in 42 U.S.C. § 2000e-2(k) (2012). This scheme has three steps. First, the employee has the burden to establish that an employment practice caused a disparate impact on a protected class. *Id.* § 2000e-2(k)(1). On that showing, the burden then shifts to the employer to demonstrate that the practice "is job related for the position in question and consistent with business necessity." *Id*. Finally, once the employer offers a business justification, the burden shifts back to the employee to present "an alternative employment practice" that the employer "refuses to adopt." *Id*.

Here, the Court need only consider business necessity and the existence of alternatives to direct summary judgment for the City of Ames. As a matter of law, Commissioner Kelso has a clear business justification for the English-only policy: all officers must understand each other at all times to ensure civilian and officer safety. Espinosa and Simone have presented no reasonable alternative to rebut this showing.

In the alternative, this Court should overturn the District Court's grant of summary judgment for Espinosa and Simone because there is a genuine issue of material fact as to whether they have established a prima facie case of disparate impact. Viewed in the light most favorable to the City of Ames, reasonable minds could differ about whether compliance with the policy significantly burdens officers. Therefore, if this Court does not direct summary judgment for the City on grounds of business necessity, it should nonetheless find a genuine issue of material fact as to the prima facie showing, and accordingly reverse.

1. The English-only policy has a manifest relationship to public safety.

Employment practices that are "job related" and "consistent with business necessity" do not violate Title VII. 42 U.S.C. § 2000e-2(k)(1)(A)(i). To withstand legal challenge, the English-only policy need not be "perfectly tailored" to the legitimate goals of the City of Ames. *El v. Se. Pa. Trans. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007). If the policy has a "manifest relationship" to these goals, and if there is no reasonable

alternative, it may not be invalidated on disparate impact grounds, regardless of any burden it may impose on officers. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

Safety is a legitimate business goal as a matter of law. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 (1979) (upholding city's rule, stating it "serve[d] the general objectives of safety and efficiency"); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993) (deeming "protecting employees from workplace hazards" a legitimate business goal as a matter of law).

This English-only policy has a manifest relationship to the APD's core goal of safety. It promotes two necessary prerequisites for police officers to effectively protect the public: communication and cohesion. First, all officers must be able to understand each other at all times. Any communication failure, however fleeting, risks grave harm to both officers and civilians. Second, all officers must understand the language being spoken around them, again at all times, to maintain the mutual trust and respect required for a cohesive police force. Because a single breakdown in communication or cohesion could threaten public safety, the policy must apply at all times.

Especially when evaluated with appropriate deference, the English-only policy has a manifest relationship to the APD's central objective. Thus, it is justified by business necessity as a matter of law and

withstands Title VII scrutiny. This Court should reverse the lower court and direct summary judgment for the City of Ames.

a. This Court should afford the City of Ames deference on matters of public safety.

Courts afford deference to employers when evaluating business necessity. Courts are "generally less competent to restructure business practices, and unless mandated to do so by Congress, they should not attempt it." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 999 (1988). This lack of competence is pronounced, and hence the deference owed is even greater, when courts assess what is required for employers who manage those in "safety-sensitive" positions. *Beazer*, 440 U.S. at 587; *see Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (establishing "lighter burden" to demonstrate business necessity when human lives are at risk); *see also Johnson v. City of Memphis*, 770 F.3d 464, 478 (6th Cir. 2014); *El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232, 243 (3d Cir. 2007).

Here, Commissioner Kelso based his business judgment on three decades of experience in a position "entrusted with the lives and well-being of citizens." *Davis v. City of Dallas*, 777 F.2d 205, 213 (5th Cir. 1985). Thus, the decision to enact this policy deserves considerable deference.

b. The English-only policy ensures the clearest possible communication within the APD, which is necessary to public safety.

The English-only policy has a manifest relationship to the safety of Ames because "police officers must obviously, as a matter of public safety, be able to communicate quickly and clearly." *Jean-Francois v. Anderson*, No. CIV.A.5:07–CV–34, 2008 WL 5272864 at *6 (M.D. Ga. Dec. 18, 2008). As Commissioner Kelso explained: "it is critical that every officer feel comfortable communicating with everyone else in English in the event of a life-threatening emergency." J.A. at 4. Whether patrolling the streets or providing support from the office, the essence of policing is emergency response. Police are "crisis intervenor[s]," *Davis*, 777 F.2d at 213, and this role demands perfect communication.

The English-only policy brings the APD closer to this ideal by decreasing the likelihood of inadvertent miscommunication. *See Tran v. Standard Motor Prod., Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998). In this linguistically diverse police force, J.A. at 40, English remains the least common denominator. Speaking English ensures all officers understand each other at all times. When Espinosa and Simone elect to speak Spanish, they may prevent other officers from receiving crucial information. And for police, such breakdowns in communication can be matters of "life and death." J.A. at 53 (Mayor Bloomberg statement).

Only a broad policy can prevent these breakdowns. Without a policy that applies at all times, there is no guarantee that officers will immediately speak English when the job requires. If speaking Spanish while on duty is a "habit," J.A. at 44 (Espinosa deposition), then the English-only policy trains officers to change this habit. *See Prado v. Luria & Sons, Inc.*, 975 F. Supp. 1349, 1354 (S. D. Fla. 1997) (finding English-only policy would "facilitate the practice of approaching customers first in English"). "The chances that workers will instinctively respond to a statement or question in [another language] are lower if work rules require English." James Leonard, *Bilingualism and Equality*, 38 U. Mich. J.L. Reform 57 (2004). The policy trains officers in the APD's language of emergency response: English.

Courts have consistently upheld English-only policies to ensure "clear and precise communications" between professionals in safety-sensitive positions. *See Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1171 (10th Cir. 2007); *Tran,* 10 F. Supp. 2d at 1210 (upholding policy to "prevent injuries through effective communication on the production floor").

In *Montes*, the Tenth Circuit upheld a limited English-only policy that applied, even to cleaning staff, in a hospital's operating department because communication was essential among employees entrusted with preserving life. 497 F.3d at 1162. The same rationale applies here with more force. Unlike surgeons, on-duty police officers are responsible for

the safety of others at all times and in all locations. Furthermore, on-duty officers face a constant threat of personal danger for which they must always be prepared. *See* FBI, U.S. Dep't of Justice, Uniform Crime Reports, tbl. 1 (2015)[6] (noting that almost ten percent of officers were assaulted in 2015). Police are not surgeons; there is no scheduled time for emergencies. Courts have found that a need for communication justifies English-only policies when life is on the line. For on-duty officers, this is always the case. The APD's English-only policy must apply at all times.

c. This policy promotes cohesion within the APD, which is necessary to public safety.

Police units are different from other professional environments. The teamwork required to ensure public safety demands utmost trust between officers. Indeed, "[a] sense of solidarity or brotherhood among police officers provides reassurance that colleagues will defend and back each other up in dangerous situations." A.L. Workman-Stark, *Understanding Police Culture* 21 (2017). For a private employer, the disintegration of workplace harmony is problematic. For a police department, fissures in unity can be fatal.

[6]https://ucr.fbi.gov/leoka/2015/tables/table_70_leos_asltd_region_and_geographic_division_2015.xls

The English-only policy is necessary to promote solidarity within the diverse APD. The Supreme Court has noted that while "shared language can serve to foster community, language differences can be a source of division." *Hernandez v. New York*, 500 U.S. 352, 371 (1991). The record confirms the existence of such intra-office divisions in the APD. *See* J.A. at 43 (discussing Espinosa "pok[ing] fun" of non-Spanish speakers). The policy would ameliorate such intra-office divisions by putting all officers on the same page, promoting workplace harmony and improving relationships between employees. *See, e.g.*, *Kania v. Archdiocese of Phil.*, 14 F. Supp. 2d 730, 736 (E.D. Pa.1998) (upholding broad English-only policy partly because it improved interpersonal office relationships). As such, even small talk during brief breaks must be in a language common to all employees to enable the unit cohesion that is necessary for public safety.

The English-only policy fosters this essential solidarity by enabling all officers and supervisors to prevent harassment. Without it, monolingual supervisors cannot intervene when bilingual officers antagonize others in a language the supervisor does not understand. The English-only policy changes this, enabling the police to police the police. Courts have upheld English-only policies as necessary to prevent harassment and enable managers to effectively supervise employees. *See Gonzalez v. Salvation Army,* No. 89–1679–CIV–T–17 (M.D.Fla.1991),

aff'd, 985 F.2d 578 (11th Cir. 1993) (upholding English-only policy which enabled managers to supervise employees and allowed non-Spanish speakers to understand coworkers); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005) (upholding English-only policy aimed at reducing intra-office hostility).

In a police force, the need is even more pressing because the divisive consequences of harassment jeopardize public safety. This is because workplace harassment threatens essential department unity. *Cf.* Brenda L. Moore, *Effects of Sexual Harassment on Job Satisfaction, Retention, Cohesion, Commitment and Unit Effectiveness* 19 (2010)[7] (noting that harassment in Air Force impairs unit cohesion). Prior to the English-only policy, the APD's rules failed to protect employees. *See* J.A. at 48. Someone heard and reported Simone's harassment. J.A. at 49. But notably, Espinosa has faced no consequences, though she admitted to mocking fellow employees in Spanish. J.A. at 43. The English-only policy increases the likelihood that these instances will be overheard and reported. By expanding the pool of officers who can understand communications, the policy better protects employees and ensures the department collaboration imperative to public safety.

[7] http://www.dtic.mil/dtic/tr/fulltext/u2/1044614.pdf

2. Espinosa and Simone have identified no alternative policy and cannot do so for the first time now.

The final step of the three-part disparate impact framework requires Espinosa and Simone to furnish an "alternative employment practice" that the defendant "refuses to adopt." 42 U.S.C. § 2000e-2(k)(1)(A)(ii). They must demonstrate that this reasonable alternative is "available, equally valid and less discriminatory" than the identified policy. *Allen v. City of Chicago,* 351 F.3d 306, 313 (7th Cir. 2003). Significantly, the statute requires that defendants be given "an opportunity to adopt it." *Adams v. City of Chicago*, 469 F.3d 609, 613 (7th Cir. 2006); *see also Jones v. City of Boston*, 845 F.3d 28, 34 (1st Cir. 2016).

Espinosa and Simone cannot carry this burden. At no point have they put forward any alternative to the English-only policy. Concerns for both judicial efficiency and fairness to defendants caution against this Court allowing Espinosa and Simone to — for the first time in almost two years of litigation — introduce an alternative that Ames has had no opportunity to "refuse[]." 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also Jones*, 845 F.3d at 38 (refusing to consider alternatives introduced in appellate briefing because no evidence suggested defendant had refused to adopt them); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993) (refusing to consider alternative introduced on appeal).

Here, there is no evidence that any alternative policy was proposed at any time, nor that the department has ever refused a proffered

alternative. As such, there is no genuine issue of material fact and summary judgment is appropriate.

B. Alternatively, this Court should reverse the lower court's grant of summary judgment for Espinosa and Simone; whether they have made a prima facie showing of disparate impact is a genuine question of material fact.

1. This Court should not defer to the EEOC.

Rather than obligating Espinosa and Simone to satisfy Title VII's prima facie requirements, the District Court allowed them to use EEOC guideline § 1606.7 as a shortcut. But the EEOC's legal and factual determinations about English-only policies deserve no deference.

a. The legal determinations within section 1606.7(a) deserve no deference.

EEOC guideline § 1606.7(a) proclaims broad English-only policies presumptively invalid:

> A rule requiring employees to speak only English at all times in the workplace . . . may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

29 C.F.R. § 1606.7(a) (2018).

This guideline lacks the force of law, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991), because Title VII assigns the EEOC only the authority to create procedural regulations, 42 U.S.C.A. § 2000e-12. Thus, for forty years, the Supreme Court has considered EEOC

guidelines and enforcement guidance under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Arabian*, 499 U.S. at 257; *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

Under *Skidmore*, deference to an agency's interpretation depends upon "all those factors which give it the power to persuade." 323 U.S. 134, 140 (1944); *see Christensen v. Harris Cty.*, 529 U.S. 576, 577 (2000). Power to persuade "is a necessary precondition to deference under *Skidmore*." *Nassar*, 133 S. Ct. at 2521. Section 1606.7 lacks that force because it is atextual, ambiguous, and internally inconsistent. Accordingly, this Court should give it no weight.

i. Section 1606.7(a) contravenes the explicit requirements of Title VII.

"Deference is not owed to an agency view, however consistently held, that from the start has been premised on legal error." *Barber v. Thomas*, 560 U.S. 474, 503 (2010). Courts have interpreted § 1606.7(a) in three ways. Each interpretation contravenes Title VII's unambiguous burden-shifting framework.

The lower court's opinion illustrates one interpretation: that the guideline presents "a strong, perhaps conclusive, presumption" of liability. J.A. at 7. This interpretation, however, contravenes the text because it impermissibly collapses Title VII's carefully crafted burden-shifting scheme from three steps to one. It would permit employees to

establish liability merely by identifying a broad English-only policy. But Congress expressly mandated that employers have the opportunity to justify a practice with a business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Another court has identified — and rejected — a second interpretation: that the guideline satisfies the prima facie burden. *Spun Steak*, 998 F.2d at 1489. But this interpretation also conflicts with Title VII because it declares that the identification of a policy alone would move the case to business necessity. The statute, however, requires employees to show that a policy "cause[s]" "a disparate impact on the basis of race . . . or national origin" before moving to the second step. 42 U.S.C. § 2000e-2(k)(1)(A). Further, this interpretation eliminates an employer's chance to "demonstrate[] that a specific employment practice does not cause the disparate impact," *id.* § 2000e-2(k)(1)(B), an opportunity expressly granted by Congress.

Still another court has provided a third interpretation — equally atextual. *EEOC v. Synchro-Start Prod., Inc.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999). That court interpreted the guideline as creating a rebuttable presumption that the employee satisfied their prima facie burden. *Id.* In utilizing the guideline as an "evidentiary tiebreaker," this interpretation again relaxes the requirements for a prima facie showing.

Id. It also contravenes the text, because it reassigns the burden of persuasion to the employer at the prima facie stage; Congress expressly placed both the burdens of production and persuasion on the employee. 42 U.S.C. § 2000e-2(k).

Title VII expressly requires employees to make a series of showings. No interpretation of the EEOC guideline's legal determinations comports with this requirement. As such, this Court should afford the guideline no deference.

ii. Section 1606.7(a) is ambiguous.

The Supreme Court has declined to defer to an EEOC guideline that is "a study in ambiguity." *Vance v. Ball State University*, 133 S. Ct. 2434, 2449 (2013). Like the guideline in *Vance*, EEOC § 1606.7 lacks clarity. For English-only rules that apply "at all times," the guideline announces both that it will "presume that such a rule violates [T]itle VII" and that it will "closely scrutinize" it. 29 C.F.R. § 1606.7(a). The "presum[ption]" of invalidity might be conclusive or rebuttable. And the guideline does not explain how close the "close[] scrutiny" must be. It might involve a typical business justification analysis; it might involve a more stringent inquiry; it might involve a different standard altogether. The directive provides no guidance.

Indeed, this ambiguity has yielded the three different interpretations described above. These divergent interpretations demonstrate

that the guideline has no clear meaning. Accordingly, § 1606.7 lacks persuasive power and deserves no deference from this Court.

iii. Section 1606.7 is internally inconsistent.

Finally, § 1606.7 lacks internal coherence and is therefore unpersuasive. *Cf. Nassar*, 133 S. Ct. at 2533 (declining to defer to guideline because EEOC's rationale was logically flawed). The guideline differentiates between English-only rules that apply "at all times," which are presumptively invalid, 29 C.F.R. § 1606.7(a), and those that apply "at certain times," which can be justified by business necessity, *id.* § 1606.7(b). But this distinction is arbitrary, because there is no categorical difference between the policies in terms of harm to employees. If blanket rules "disadvantage[] an individual's employment opportunities on the basis of national origin," *id.* § 1606.7(a), so too should time-sensitive rules. Similarly, if time-sensitive rules can be "justified by business necessity," *id.* § 1606.7(b), so too should blanket rules. This internal inconsistency confirms that § 1606.7 lacks the power to persuade.

b. The factual determinations within section 1606.7(a) deserve no deference.

Two courts have referenced the EEOC guideline as representing merely a factual, rather than legal, determination. *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006); *Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1164 (D. Neb. 2012). To these courts, the

guideline is "an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees." *Maldonado*, 433 F.3d at 1306. That is, the guideline stands in as non-record evidence of what a jury might think of an English-only policy. Even this watered-down reliance, however, is misplaced.

First, the guideline itself contains no determinate factual conclusions. In § 1606.7(a), the EEOC merely proclaims that broad English-only policies "*may* . . . create an atmosphere of inferiority, isolation, and intimidation based on national origin which *could* result in a discriminatory working environment." 29 C.F.R. § 1606.7(a) (emphasis added). The guideline indicates only that an employee could theoretically establish a prima facie case — nothing more. It does not say that an English-only policy inevitably, or even frequently, creates such a discriminatory atmosphere.

Second, even this view of the guideline requires that an employee demonstrate her case based on specific facts, not the EEOC's determination. The *Maldonado* court relied on the guideline for nothing more than an assessment of how a juror could think. 433 F.3d at 1306. The court ultimately noted that the guideline itself may not be admissible at trial, and based its reversal of summary judgment on an abundance of specific record evidence. *Id.* Espinosa and Simone must similarly rely on the record here to establish their prima facie showing.

In sum, § 1606.7 impermissibly short-circuits the prima facie requirement and ignores the fact that, in some workplaces, an English-only policy would impose no real burden. This Court should give it no weight; Espinosa and Simone must demonstrate the prima facie case on their own.

2. Espinosa and Simone have not otherwise established a prima facie case.

At its core, the prima facie inquiry asks "whether an employment practice has a significant, adverse effect" on a protected class. *Wards Cove Packing v. Antonio*, 490 U.S. 642, 670 (1989); *see Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (requiring a "significantly discriminatory impact"); *Spun Steak*, 998 F.2d at 1486 (requiring "that the adverse effects are significant"). Though courts have not consistently defined what a "significant, adverse effect" entails, they have often focused their inquiry on the burden of compliance placed on the employee. *See Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (upholding restriction on all-braided hairstyle); *Spun Steak*, 998 F.2d at 1486 (upholding English-only policy); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (same).

Espinosa and Simone have failed to establish that complying with the policy was significantly burdensome. Without such evidence, there is a genuine issue of material fact as to whether they have made out a

prima facie case of disparate impact. Thus, summary judgment for Espinosa and Simone was inappropriate.

a. Espinosa and Simone have not shown that bilingual officers are unable to comply with the policy.

"[T]here is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is an individual preference." *Gloor*, 618 F.2d at 270; *see Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S. D. Fla. 1997) (describing speaking Spanish as "a matter of preference"). Courts have found that "the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice." *Gloor*, 618 F.2d at 270; *see Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 941 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996). Indeed, all circuits to address this issue agree: bilingual speakers can comply with English-only policies. *See Spun Steak*, 998 F.2d at 1487 (9th Cir. 1993); *Gonzalez v. Salvation Army,* No. 89–1679–CIV–T–17 (M.D.Fla.1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993); *Gloor*, 618 F.2d at 270. Espinosa and Simone provide no evidence suggesting otherwise.

Espinosa and Simone have not put forth even one person who states that they cannot comply. Simone never alleged that he had any difficulty complying. J.A. at 47–49. And Espinosa's testimony that she

"can't really control" speaking Spanish, J.A. at 44, was couched in qualifiers. She characterized speaking Spanish at work as a "habit." *Id.* And while some habits may be "hard to change," *id.*, Espinosa suggested that she never seriously attempted to comply; she thought the policy was "just a publicity stunt" and "doubted it would be enforced," J.A. at 45.

Given this paucity of record evidence, there is a genuine issue of material fact as to whether compliance with the policy was burdensome. Indeed, "[w]hether a bilingual speaker can control which language is used in a given circumstance is a factual issue that cannot be resolved at the summary judgment stage." *Spun Steak*, 998 F.2d at 1488.

b. Espinosa and Simone have not shown that compliance with the policy meaningfully compromises their identities.

Some dissenting judges have suggested that policies that compromise an employee's identity may also have significant adverse effects. *See Catastrophe Mgmt. Sols.*, 876 F.3d 1273, 1283–84 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing en banc); *Garcia v. Spun Steak*, 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc). For English-only policies, no circuit court has accepted this definition of significance.

But even if this were the relevant inquiry, Espinosa and Simone have not shown that the APD's policy requires them to unduly suppress

their identity. Employees "must often sacrifice individual self-expression during working hours." *Spun Steak*, 998 F.2d at 1487; *see also Catastrophe Mgmt.*, 852 F.3d at 1030 (holding Title VII does not protect "cultural practices"). This is especially true for police officers, whose jobs already require adherence to stringent regulations that limit self-expression. Police departments forbid officers from exercising their freedom of choice in myriad ways: police officers must wear a uniform; they must cover visible tattoos; they must salute the flag. *See, e.g.*, San Antonio Police Dep't, Department General Manual § 310.03 (Sept. 2017); *Kelley v. Johnson*, 425 U.S. 238, 246–47 (1976). For officers in uniform, courts have upheld such requirements against constitutional challenge. *E.g.*, *Kelley*, 425 U.S. at 246 (upholding hair length requirement); *Rathert v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1990) (upholding no-earrings requirement for male officers). The APD's requirement is not atypical.

c. To declare the record evidence sufficient to make out a prima facie case would significantly unbalance Title VII.

Finally, the prima facie burden in a disparate impact case is a critical filter protecting employers as well as employees. *Cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (explaining low prima facie bar for disparate impact liability would encourage reverse discrimination). Weakening that

screen, as affirming summary judgment here would do, would undermine Title VII's carefully crafted compromise between preventing discrimination and "preserving the independence of the employer." *Spun Steak,* 998 F.2d at 1490.

The evidence here shows, at most, that one police officer had some difficulty complying with the policy. Lowering the prima facie bar to this level would imperil the validity of any facially neutral policy upon a single person's testimony that compliance selectively burdened her protected group. These policies might include commonplace police restrictions, such as tattoo policies as applied to Polynesian officers. Honolulu Police Dep't, Policy Manual § 3.22, at 2 (Dec. 2015). For employers of all kinds, declaring such policies prima facie invalid would "effectively bind those employers that are not in a position to risk litigation." United States Commission on Civil Rights, *English Only Policies in the Workplace* 4 (2011) (recommending EEOC withdraw § 1606.7). Rather than litigating business necessity, these employers would simply retract lawful rules. This Court should not disrupt Title VII's deliberate balance in this way.

***

This Court should direct summary judgment for the City of Ames on this disparate impact claim. The APD has a valid business justification to enact the English-only policy, and Espinosa and Simone have

identified no reasonable alternatives. At minimum, because there is a genuine issue of material fact as to whether Espinosa and Simone have made out their prima facie case, this Court should reverse the lower court's grant of summary judgment to Espinosa and Simone.

II. The Ames Police Department's English-only policy was not motivated by discriminatory intent.

To succeed on a disparate treatment claim, an employee must show that "race, color, religion, sex, or national origin was a motivating factor for an employment practice." 42 U.S.C. § 2000e-2(m) (2012). Courts have articulated multiple frameworks to evaluate these claims. But no matter how this Court proceeds in this case, the core inquiry is the same: Espinosa and Simone must demonstrate that discriminatory animus was a motivating factor behind the English-only policy. To overturn summary judgment, this Court must find that the record contains sufficient evidence for a reasonable factfinder to conclude that Commissioner Kelso intended to discriminate. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

The record does not permit this finding. Commissioner Kelso adopted the policy for several legitimate, non-discriminatory reasons. Espinosa and Simone have not undercut these reasons, nor have they provided evidence sufficient to raise a reasonable inference that Commissioner Kelso had an impermissible motive when he made the policy.

Neither the policy's breadth nor Commissioner Kelso's later testimony can establish this motive.

Nor can the two sound-bites from then-Candidate Cox's mayoral campaign. Mayor Cox did not enact the English-only policy, and he did not significantly influence its adoption. Furthermore, to protect political discourse, courts should not rely on campaign speech to prove motive, especially where, as here, the statements are isolated from the policy's implementation. Even so, Cox's statements do not show that discriminatory animus motivated his desire for an English-only policy.

This Court should therefore affirm summary judgment for Commissioner Kelso and the City of Ames.

A. The issue for this Court is whether Commissioner Kelso's decision to implement the English-only policy was motivated by discrimination.

Courts have articulated multiple causal and evidentiary frameworks to evaluate disparate treatment claims. But no matter which framework this Court follows, the legal question is the same.

First, courts evaluate single-motive claims differently than mixed-motive claims. *E.g.*, *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 396 (6th Cir. 2008). Employees bringing a single-motive claim must establish that discrimination was the employer's sole motivating factor for the employment practice. *E.g.*, *Quigg v. Thomas Cnty. Sch. Dist.*,

814 F.3d 1227, 1235 (11th Cir. 2016). Employees bringing a mixed-motive claim must establish only that discriminatory intent was one of several motivating factors. *Id*. Ultimately, the distinction is irrelevant to this Court's task. Where, as here, employees cannot show that intent to discriminate was a motivating factor, no disparate treatment exists under either framework.

Separately, to meet their evidentiary burden, employees may offer direct evidence or instead rely on *McDonnell Douglas Corp v. Green*'s three-step burden-shifting framework, 411 U.S. 792 (1973). *McDonnell Douglas* requires: (1) an employee to make a prima facie showing; (2) an employer to present a legitimate non-discriminatory reason for the practice; and (3) the employee to establish "*both* that the [employer's posited] reason was false*, and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). The first two steps of this framework are "minimal burden[s]." *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 610 (S.D.N.Y. 2009).

Thus, the core inquiry in a *McDonnell Douglas* analysis comes down to the third step, which asks essentially the same question as the direct-evidence method. Either way, at summary judgment the "ultimate issue [is] whether the plaintiff [has] presented evidence from which a reasonable jury could find that, more likely than not, the employer's decision was motivated at least in part by discrimination." Hon.

Denny Chin, *Summary Judgment in Employment Discrimination Cases*, 57 N.Y. L. Sch. L. Rev. 671, 677 (2012/2013).

B. There is insufficient evidence to find that Commissioner Kelso was motivated by discriminatory animus when he enacted the English-only rule.

Commissioner Kelso testified that he implemented the English-only policy because he had seen that such policies "made people safer." J.A. at 35. From over three decades of experience, he understood that "the key to a safe city is discipline and professionalism in the police force." J.A. at 29. For Kelso, "[t]he policy is about safety. It's about community. It's about professionalism. It's about preventing harassment." J.A. at 35. No evidence in the record indicates otherwise.

1. The policy's breadth is not probative of discrimination.

At most, a policy's breadth can demonstrate just one element of a plaintiff's prima facie case. *Barber v. Lovelace Sandia Health Systems*, 409 F. Supp. 2d 1313, 1337 (D.N.M. 2005). But breadth has evidentiary value only insofar as it creates a rebuttable inference that the policy extends beyond what business reasons could justify. *Id.*; *see also Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 940 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996).

Here, the policy's business justifications preclude such an inference. Given the "exceedingly light" burden for an employer to assert a

legitimate, non-discriminatory reason in the disparate treatment context, *Montes*, 497 F.3d at 1173, safety and harassment more than suffice. S*ee supra* Section I.A (demonstrating the policy's breadth was justified by business necessity).

2. Commissioner Kelso's deposition testimony is not probative of discrimination. At most, its evidentiary weight is minimal.

Ten months after Commissioner Kelso implemented the English-only policy, he testified:

> The very last thing I want to do is discriminate against any officers, white, Latino, Asian, whatever. You want to speak Spanish at home, speak it. Cook tacos. Eat guacamole. Play soccer. Celebrate your culture. I couldn't care less. Just don't speak Spanish while you're on the clock for the APD. Simple.

J.A. at 35–36. This remark does not display animus. But even if a fact-finder could conclude that it does, the statement should carry minimal evidentiary weight in the Court's analysis of whether the policy was motivated by discriminatory intent. The remark was made long after the implementation of the policy and was simply too divorced from the decisionmaking process.

a. The remark's content does not give rise to a reasonable inference of discriminatory intent.

A comment that overgeneralizes but "carries with it no disparaging undertones" does not create an inference of bias. *Birkbeck v. Marvel Lighting Corp.,* 30 F.3d 507, 512 (4th Cir. 1994). And even a comment that reflects general bias is relevant to intent only if it "[tends] to show

that the decision-maker was motivated by assumptions or attitudes relating to [a] protected class." *Tomassi v. Insignia Fin. Group*, 478 F.3d 111, 116 (2d Cir. 2006).

The Commissioner's statement does not suggest animus. Although admittedly an overgeneralization, it expresses no prejudice. And even if Commissioner Kelso had animus, Espinosa and Simone have not established that such animus motivated Kelso's decision. "Some causal relationship is necessary" to connect statements to intentional discrimination. *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995). Even callous and repulsive comments, without that connection, are not enough. *See Yates v. Douglas*, 255 F.3d 546, 549 (8th Cir. 2001) (finding evidence that employer used a racial epithet to refer to an employee insufficient to establish discriminatory intent behind firing of that employee).

The record does not establish that connection. Commissioner Kelso asserted, under oath, that had he believed the policy were discriminatory, he would have rescinded it in New York, and never would have brought it to Ames. J.A. at 35–36. Indeed, he testified that he designed the English-only policy to prevent discrimination by supervisors. J.A. at 35, 37. At worst, Commissioner Kelso's statements reflect general bias disconnected from the policy. They do not suggest that he implemented it for discriminatory reasons.

b. The remark was too disconnected from the policy's enactment to carry anything more than minimal evidentiary weight.

"[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination." *Tomassi*, 478 F.3d at 115. Later-in-time remarks are even less probative, because their logical relationship to the employer's decision is attenuated. *Ansell v. Green Acres Constr. Co.*, 347 F.3d 515, 524 (3d Cir. 2003). The Commissioner's comment is both remote and subsequent, as it was made ten months after he implemented the policy. J.A. at 4, 27. Thus, even if this Court finds it probative, the statement should receive little, if any, weight.

On this record, a reasonable factfinder would not infer that Commissioner Kelso enacted the English-only policy with discriminatory intent.

C. Mayor Cox's statements are irrelevant to the intent inquiry.

1. Mayor Cox's alleged animus cannot be imputed to Commissioner Kelso.

"In general, statements by a non-decisionmaker . . . cannot be used to establish that a decision was tainted by discriminatory animus." *Cuenca v. University of Kansas*, 101 F. App'x 782, 788 (10th Cir. 2004). Commissioner Kelso — not Mayor Cox — was indisputably the actual

decisionmaker behind the English-only policy. Under Title VII, employees seeking to impute a non-decisionmaker's intent to the employer may do so in two ways: (1) by demonstrating the non-decisionmaker had significant influence over the decisionmaking process, or (2) by showing that an unwitting actual decisionmaker rubber-stamped a biased non-decisionmaker's proposed action. Here, the record supports neither path. Commissioner Kelso's decision to implement the policy was not significantly influenced by Mayor Cox, and Commissioner Kelso did not rubber stamp Mayor Cox's discriminatory desire. Thus, Espinosa and Simone cannot use the Mayor to transform a legitimate policy into a discriminatory one.

a. Commissioner Kelso's decision was not significantly influenced by Mayor Cox.

A non-decisionmaker's intent is relevant if "that individual exercised a significant degree of influence over the contested decision." *Sun v. Bd. of Trustees of Univ. of IL,* 473 F.3d 799, 813 (7th Cir. 2007); *see also Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (relying on statements of non-decisionmaker who had "enormous influence in the decision-making process").

The record is void of evidence indicating that Mayor Cox was involved in the decision to implement the English-only policy. Commissioner Kelso testified that neither the Mayor nor any of his staff directed him to do so. J.A. at 34–35. Indeed, Commissioner Kelso did not inform

Mayor Cox of his decision to adopt the policy until August 1 — only four days before it became official. Commissioner Kelso did not ask for approval or advice; the decision had already been made. *See* J.A. at 34 (Kelso deposition) (testifying that he "told [Cox] that [he] was going to implement the policy"). Nothing in the record indicates the conversation was anything more than a heads-up.

Similarly, a factfinder could not reasonably conclude that Mayor Cox substantially influenced Commissioner Kelso's seven-month decisionmaking-process. The Commissioner had seen the English-only policy work well in New York, and he conducted an independent review before deciding the policy made sense for the APD. J.A. at 16.

Kelso's testimony that Cox's desires "could have been" in the back of his mind as he weighed potential changes to the APD's operations, J.A. at 33, is insufficient to establish significant influence. *See Campion, Barrow & Assocs., Inc. v. City of Springfield, Ill.*, 559 F.3d 765, 770 (7th Cir. 2009) (refusing to impute alleged discriminatory motives of mayor to city council without evidence of influence); *cf. Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652–53 (7th Cir. 2000) (imputing intent from mayor to city council because mayor routinely recommended specific employment actions to the council). All this testimony communicates is that Kelso was aware he had a boss; no subordinate can credibly claim to make work-related decisions without the views of her boss entering

her mind at all. If such a thin connection were the standard, then the intent of every manager would be categorically imputable to every subordinate. Mayors do not exercise significant influence over employment decisions merely by appointing the actual decisionmaker.

b. Commissioner Kelso did not rubber stamp Mayor Cox's alleged discriminatory design.

Separately, a non-decisionmaker's intent may be probative if she manipulated an unwitting decisionmaker into acting as her rubber stamp. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011). Under this approach, plaintiffs must show that (1) a non-decisionmaker "perform[ed] an act motivated by [discriminatory] animus"; (2) the act was "intended by the [non-decisionmaker] to cause an adverse employment action"; and (3) "that act [was] a proximate cause of the ultimate employment action." *Morris v. McCarthy*, 825 F.3d 658, 668 (D.C. Cir. 2016) (quoting *Staub*, 562 U.S. at 422).

There is no evidence that Commissioner Kelso was Mayor Cox's rubber stamp. Cox's only relevant act was hiring Kelso, and the record does not suggest that he did so to cause discrimination by means of implementing an English-only policy. Moreover, Kelso's hiring was not the proximate cause of the English-only policy's enactment. Any causal connection was severed by Kelso's extensive internal review and independent decisionmaking process. *See Woods v. City of Berwyn*, 803 F.3d 865,

869 (7th Cir. 2015) (holding causal chain broken when actual decisionmaker "determines whether the adverse action is entirely justified apart from the [non-decisionmaker's] recommendation"); *see also Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) ("If [the decisionmaker] based his decision on his own independent investigation, the causal link . . . would be broken.").

2. Regardless of whether Mayor Cox's intent is legally relevant, this Court should decline to examine then-Candidate Cox's campaign statements as evidence of discrimination.

Espinosa and Simone have offered two of then-Candidate Cox's statements as evidence of his alleged animus toward Latinos and ethnic minorities. *See* J.A. at 15–16.

Relying on campaign statements to show discriminatory intent is fraught with danger. First, doing so would chill core political speech because candidates for public office would fear that their words would later be used against them. Additionally, it would prevent elected officials from implementing their legitimate policy preferences by indefinitely shackling entire administrations to a sound-bite. Finally, it invites error, because campaign statements are especially unreliable indicators of the speaker's true intentions. Accordingly, this Court should entirely disregard then-Candidate Cox's campaign statements.

a. Relying on campaign statements would impermissibly chill core political speech.

"It is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later to support the inference of some nefarious intent when official actions are inevitably subject to legal challenges." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 651 (4th Cir. 2017) (Niemeyer, J., dissenting); *see Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995) (explaining that consideration of campaign statements "chill[s] political debate").

This chill is dangerous. "[U]ninhibited, robust, and wide-open" public debate is critical to a healthy democracy. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). These First Amendment principles have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014). Chilling the free exchange of ideas by those seeking election threatens the fundamental discourse of democracy.

This is especially true here, because then-Candidate Cox's statements, however unrefined, reflect mainstream political ideas. The vast majority of Americans agree that immigrants should learn English. Jeffrey M. Jones, *Most in U.S. Say It's Essential That Immigrants Learn*

English, Gallup (Aug. 9, 2013)[8] (finding 72% of respondents considered it "essential" that immigrants learn English).

Indeed, this statement closely resembles comments made by national politicians from both political parties. In 2006, then-candidate Barack Obama wrote: "When I see Mexican flags waved at pro-immigration demonstrations, I sometimes feel a flush of patriotic resentment. When I'm forced to use a translator to communicate with the guy fixing my car, I feel a certain frustration." Barack Obama, *The Audacity of Hope* 266 (2006). During a 2016 presidential debate, then-candidate Lindsay Graham bluntly told undocumented immigrants "you can stay, but you've got to learn our language." CNN, *Lindsay Graham: Immigrants should speak English*, YouTube (Sept. 16, 2015).[9]

This Court must avoid inhibiting vigorous debate, especially on the campaign trail. It should not use then-Candidate Cox's statements.

b. Relying on campaign statements would disable an elected government from implementing its legitimate policy preferences.

A candidate's "past actions cannot 'forever taint' his future actions." *Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413, at *16 (4th Cir. Feb. 15, 2018) (quoting *McCreary Cty., Ky v. American Civil Liberties Union of Ky*, 545 U.S. 844, 874 (2005)).

[8] http://news.gallup.com/poll/163895/say-essential-immigrants-learn-english.aspx
[9] https://www.youtube.com/watch?v=0pd1PkG9jLg

Here, Espinosa and Simone would ask the factfinder to infer, based on two campaign statements alone, that Mayor Cox harbored general animus toward a protected class. J.A. at 15. They argue by implication that this animus infected the City's adoption of the policy, which occurred seven months after Mayor Cox took office. The unavoidable consequence of relying on campaign statements in this way is that "the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate." *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting).

To avoid this untenable result, a factfinder must at some indeterminate point cleanse Mayor Cox and his government of the stain of his previous statements. This would require examining the inner workings of Mayor Cox's mind in order to ensure that his once-present animus had dissipated. But the Supreme Court explicitly forbids this "judicial psychoanalysis." *McCreary*, 545 U.S. at 862.

c. Relying on campaign statements would place inappropriate weight on categorically unreliable indicators of the speaker's true purpose.

The unreliability of campaign statements further counsels against their use as evidence. When courts evaluate whether an official adopted a policy in order to discriminate, "the stakes are sufficiently high for [courts] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Relying on statements from the campaign trail

poses a significant risk of misleading factfinders. As such, these statements should be disregarded.

"[C]ampaign promises are — by long democratic tradition — the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Candidates say a wide range of ambiguous and contradictory things. *See Int'l Refugee Assistance Project*, 857 F.3d at 650 (Niemeyer, J., dissenting). They frequently "evolve" on issues over the course of a campaign. And they tend to make promises they have little or no intention of keeping. Indeed, "there can be no doubt that false [statements] are . . . common in political campaigns." *Rickert v. State*, 168 P.3d 826, 832 (Wash. 2007).

Moreover, opening up consideration of campaign statements would invite courts to "cherry pick," despite the Supreme Court's clear instruction not to do so. *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009) (citing *McCreary*, 545 U.S. at 861). Due to their vague and inconsistent nature, campaign statements represent a vast trove of data for challengers to comb through, searching for statements that might — isolated from context — give rise to an inference of animus. Such cherry-picking is precisely what Espinosa and Simone do here.

For the foregoing three reasons, federal courts are reluctant to use campaign rhetoric as evidence of intent in cases concerning subsequent policies. *E.g.*, *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir. 1995). The only federal court to place significant weight on such statements — the Fourth Circuit in *International Refugee Assistance Project v. Trump* — justified doing so by reference to the case's "highly unique" circumstances. 857 F.3d at 599 (2017). For that court, then-candidate Trump's "sheer number of [anti-Muslim] statements" were so "directly relevant and probative" of the discriminatory intent behind his challenged executive order that to exclude them would have been to "shut [the court's] eyes to evidence . . . star[ing] [it] in the face." *Id.* In contrast, this record contains only two statements by then-Candidate Cox, and only one arguably pertains to a protected class.

Given the profound concerns at issue, this Court should disregard Cox's campaign statements.

3. Even if considered as evidence, then-Candidate Cox's statements are not probative of discrimination. At most, their evidentiary weight is minimal.

Even if this Court were to examine the campaign statements, the evidence remains insufficient to conclude that animus was a motivating factor behind Cox's support for an English-only policy. The Complaint claims that then-Candidate Cox ran a "racist and discriminatory campaign in which he repeatedly expressed animus." J.A. at 15. Yet they

provide just two sound-bites — only one of which even mentions a protected group. J.A. at 15–16.

That one remark is not enough, in itself, to show that then-Candidate Cox harbored bias toward Hispanics. But even if it were, no reasonable factfinder could connect the motivations allegedly displayed in that remark with Cox's earlier call for changes to the APD's operating procedures. Finally, any such connection between Cox's two campaign statements would be only weakly probative, given the many months that passed before Commissioner Kelso implemented the policy.

a. The content of then-Candidate Cox's statements does not illustrate intent to discriminate.

Espinosa and Simone seek to establish discriminatory intent using two distinct statements pulled from Mayor Cox's campaign. But these statements are insufficient to establish even general animus, much less specific intent to discriminate.

Considered in isolation, neither statement gives rise to a reasonable inference of general animus. Then-Candidate Cox's first statement, made in May 2014, is facially race-neutral; it speaks only to his concerns with the lack of discipline and professionalism within the APD. Considered on its own, the statement's only connection to this litigation is that then-Candidate Cox advocated for the English-only policy. The statement does not mention, let alone stereotype or disparage, any protected group.

Nor does Cox's second statement, on its own, give rise to a reasonable inference that he harbors general animus. As noted above, the statement expressed views on language and immigration policy that are well within the mainstream of an emotion-laden political debate. And its admittedly unvarnished tone expressed the same sentiments that many, from ordinary citizens to then-candidate Obama, have signaled.

Even if a factfinder were to consider this single statement probative of general animus, it could not reasonably conclude that this alleged sentiment motivated then-Candidate Cox's support for an English-only policy. *See Tomassi*, 478 F.3d at 111. The statement in itself bears no connection to the APD, its officers, or its policies. And though Espinosa and Simone have tried to intimate otherwise, the two statements they pluck from Candidate Cox's many-months-long campaign are too disconnected to inform one another. In their Complaint, Espinosa and Simone presented the two statements in reverse chronological order: the October 4 statement concerning Hispanics is mentioned before the May 25 statement criticizing the lack of an English-only policy for the APD. But this is misleading; the two remarks were not said in this order. Moreover, the statements were made over four months apart from one another. It would be the height of "judicial psychoanalysis," *McCreary*, 545 U.S. at 862, to infer that these cherry-picked statements in particular bore some hidden connection in Candidate Cox's mind.

b. Cox's statements were too temporally distant from the challenged action to be probative.

As discussed above, the more temporally distant a statement, the less probative it is of discriminatory intent. *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001). At a certain point, a prior act "becomes so remote in time from the alleged discriminatory act at issue, that the former cannot, as a matter of law, be relevant to intent." *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 524 (3rd Cir. 2003).

Espinosa and Simone seek to infer Mayor Cox's intent entirely from statements he made while on the campaign trail. But the campaign took place too long before the policy's enactment to be given much — if any — probative weight by this Court. Then-Candidate Cox's statements were made fourteen and ten months, respectively, before Commissioner Kelso implemented the English-only policy. Courts have consistently declared such interludes lengthy enough to render the statements at issue irrelevant to the intent analysis. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1026 (6th Cir. 2010) (entirely disregarding statements made "nearly a year before the layoff"); *Schuster v. Lucent Techs., Inc.*, 327 F.3d 569, 575–76 (7th Cir. 2003) (affirming district court's disregard of remark made five months before employment decision). At a minimum, then, this Court should significantly discount the probative weight of Cox's statements.

* * *

Viewing the record as a whole, Espinosa and Simone lack sufficient evidence to establish a discriminatory motive behind the APD's adoption of an English-only policy. The record contains ample evidence that Commissioner Kelso implemented the policy for legitimate, business-related reasons. No record evidence — not the breadth of the policy, not Commissioner Kelso's isolated deposition remark, not then-Candidate Cox's statements — reasonably supports a contrary conclusion. Even viewing these unconnected pieces of evidence in light of one another, they do not suggest that the APD's English-only policy was implemented with the intent to discriminate.

No reasonable factfinder could unearth discriminatory intent from the evidence provided. The District Court appropriately granted summary judgment below on the disparate treatment claim, and this Court should affirm.

CONCLUSION

In three decades of practice, Commissioner Kelso had learned that police units require unity; that first responders need immediate responses; that communication is a matter of life and death. He had seen English-only policies work, and he had no reason to reinvent the wheel. This Court should not invalidate his decision based on sound-bites alone.

On the disparate impact claim, this Court should reverse the lower court and direct summary judgment for the City of Ames. In the alternative, this Court should reverse and remand for further proceedings. On the intentional discrimination claim, this Court should affirm summary judgment for the City and Commissioner Kelso.

February 19, 2018 Respectfully submitted,

The Grace Murray Hopper Memorial Team

_____
Max Gottschall

_____
Erika Herrera

_____
Benjamin Lewis

_____
Catherine McCaffrey

_____
Eliza McDuffie

_____
Jacqueline Sahlberg

APPENDIX

United States Constitution

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2(k). Unlawful employment practices.

(selected provisions)

(k) Burden of proof in disparate impact cases

> **(1) (A)** An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > **(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) **(i)** With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Equal Employment Opportunity Commission Guideline

29 C.F.R. § 1606.7. Speak-English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[7] Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.