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# Making It Official: A Constitutional Analysis of Oklahoma's Official English Amendment

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# MAKING IT "OFFICIAL": A CONSTITUTIONAL ANALYSIS OF OKLAHOMA'S OFFICIAL ENGLISH AMENDMENT

## INTRODUCTION

The Great Seal of the State of Oklahoma represents the height of Oklahoma state action, used to authenticate official acts of the Governor.[1] Misuse of the Seal by any party other than the State or its political subdivisions can result in a misdemeanor charge for the offender in some situations.[2] That being said, in light of the passage of State Question No. 751 during the November 2010 elections,[3] the measure may prohibit the State of Oklahoma from using its own seal. The Seal includes the Latin phrase *Labor Omnia Vincit*, meaning "Labor Conquers All Things."[4] State Question No. 751 amended the state's constitution to include Article XXX, a provision prescribing English as Oklahoma's official language and mandating its use in the government's "official actions."[5] Since the Oklahoma Constitution requires affixation of the Seal to "official actions" of the Governor, the Seal and its Latin phraseology seem to fall within the amendment's scope, presumably requiring the State to translate the Latin phrase into English in order to comply with Article XXX.[6]

Although specific to Oklahoma, Article XXX reflects a growing national movement toward official English, often as a result of anxiety concerning immigration.[7] Consequently, Article XXX immediately garnered national attention, both positive and negative.[8] Apart from the amendment's political underpinnings and effects, however,

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1. OKLA. CONST. art. VI, § 18. The Constitution excepts the Governor's approval of laws from the seal requirement. *Id.*

2. OKLA. STAT. tit. 21, § 1550.41 (2008).

3. *Summary Results: General Election – November 2, 2010*, OKLA. STATE ELECTION BD. (Nov. 2, 2010), http://www.ok.gov/elections/support/10gen.html. The measure passed by the largest margin of any state question on the ballot, with 75.54% of Oklahoma voters voting for the measure and 24.46% voting against. *Id.*

4. *State Seal*, OKLA. SEC. OF STATE, http://www.sos.state.ok.us/general/seal.htm (last visited Nov. 24, 2009).

5. OKLA. CONST. art. XXX.

6. *Id. See also* OKLA. CONST. art. VI, § 18.

7. *See generally Why is Official English Necessary?*, U.S. ENGLISH, http://www.us-english.org/view/10 (last visited Nov. 18, 2009); *Why Official English?*, PROENGLISH, http://www.proenglish.org/issues/offeng/index.html (last visited Nov. 18, 2009).

8. *See* Letter from Loretta King, Acting Asst. Atty. Gen., U.S. Dept. Just., to Hon. W.A. Drew Edmonson, Okla. Atty. Gen., *House Joint Resolution 1042* (Apr. 14, 2009). The Department of Justice's letter represents a negative reaction to Article XXX. *Id.* The letter suggested that Article XXX might constitute discrimination in violation of Title VI and result in the loss of federal funding. *Id.* However, the Department of Justice recently determined that a loss of federal funding would not result from the amendment's passage. Chris Casteel, *Feds Won't Oppose English Plan*, DAILY OKLAHOMAN, Oct. 10, 2009, at 4A. However, other groups presented more positive responses to the amendment. *See National Experts Endorse House Official English Bill*, OKLA. H.R., http://www2.okhouse.gov/OkhouseMedia/PrintStory.aspx?NewsID=3073 (Apr. 1, 2009). Both ProEnglish and

Article XXX presents constitutional questions that both proponents and opponents of the measure must confront before the amendment's legitimacy may be established. By narrowing the application of Oklahoma's Article XXX to "official actions" of the government, proponents of the amendment cured some of the constitutional defects of previous official English measures. Specifically, the language will most likely prevent a reviewing court from finding the amendment unconstitutionally overbroad. However, Article XXX may still be open to constitutional challenge for infringement of free-speech rights guaranteed by the United States Constitution's First Amendment.

This Comment provides a preliminary constitutional analysis of Article XXX. The histories of previous official English measures in Oklahoma, as well as judicial analysis of similar measures in other jurisdictions, inform the examination of each possible constitutional challenge. Part II examines Oklahoma's first attempt to pass official English legislation via voter initiative as well as a discussion of Article XXX's language as passed by Oklahoma voters. Part II also discusses the treatment of similar measures in other jurisdictions. Part III considers Article XXX in light of the closely related overbreadth and vagueness doctrines. Part IV seeks to characterize Article XXX as a content-neutral or content-based regulation, arguing in favor of classifying the measure as a content-based restriction. Part V analyzes Article XXX pursuant to both the strict scrutiny required for content-based restrictions as well as the intermediate scrutiny applied to content-neutral regulations.

## STATE LAWMAKERS ACROSS THE NATION DECIDE TO MAKE IT (ENGLISH) OFFICIAL

### *The Official English Movement's Contemporary Beginnings in Oklahoma*

Although Oklahoma passed and subsequently repealed an official English measure in the early twentieth century,[9] the contemporary Oklahoma official English movement did not begin until 2000 with the circulation of Initiative Petition No. 366 ("Petition No. 366").[10] Petition No. 366 sought to enact a statute through a ballot initiative declaring English the official language of the State of Oklahoma and its government "[i]n order to "encourage every citizen of [the] state to become more proficient in the English language, thereby facilitating participation in the economic, political, and cultural activities of [the] state . . . ."[11] As the language of the government, the petition required that "[a]ll official documents, transactions, proceedings, meetings, or publications issued, which [were] conducted or regulated by, on behalf of, or representing the state and all of its political subdivisions" be in English.[12] The petition provided for exceptions as required by the United States and Oklahoma Constitutions, as well as federal laws and

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English First, national political organizations that promote official English measures across the country, endorsed House Joint Resolution 1042, calling it a "carefully crafted measure." *Id.*

9. *See* Edda Bilger, *The Oklahoma Vorwäts: The Voice of German-Americans in Oklahoma During World War I*, 54 CHRON. OKLA. 245, 255 (1976). In the wake of World War I and as a reaction to the anti-German sentiment prevalent at the time, the Oklahoma Legislature enacted a statute designating English as the official language of Oklahoma and making it a criminal offense for schools to teach any other language before the eighth grade. *Id.* The Oklahoma Legislature rescinded the statute in 1949. *Id.*

10. In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002).

11. *Id.* at appendix A.

12. *Id.*

regulations.[13]

Pursuant to precedential authority, the Oklahoma Supreme Court reviewed the petition prior to its placement on the ballot for approval by Oklahoma voters.[14] The court concluded that Petition No. 366 unconstitutionally infringed the right to free speech, the right to petition the government, and the legislature's policy-making function in contravention of the Oklahoma Constitution.[15] Petition No. 366 also proved unconstitutionally vague.[16] Although the court found the statute unconstitutionally vague against the Oklahoma Constitution, the court applied United States Supreme Court precedent in its reasoning.[17] Citing *Grayned v. City of Rockford*,[18] the court reasoned that the measure would deter citizens from engaging in constitutionally protected conduct.[19] Thus, the court declared Petition No. 366 "legally insufficient for submission to a vote of the people of Oklahoma."[20] However, the decision did not touch on the propriety of official English laws or require the government to provide services in languages other than English.[21]

*The Official English Movement Across the United States*

While Oklahoma lawmakers regrouped, the official English movement continued in various forms across the nation.[22] By the year 2009, thirty states instituted official English measures,[23] either by legislative enactment or by ballot initiative.[24] These

13. *Id.*

14. *Id.* at 125. *See also* In re Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 8 (Okla. 1992) ("[A] determination on a constitutional question as to the legality of a measure proposed to be enacted into law by the people will be reached by this Court when raised by a party if, in the Court's opinion, reaching the issue may prevent the holding of a costly and unnecessary election.").

15. *In re Initiative Petition No. 366*, 46 P.3d at 129. In so ruling, the court noted "that the Oklahoma Constitution "is more protective of free speech than is the United States Constitution." *Id.* at 126. The court reasoned that the statute would "prohibit all governmental communications, both written and oral, by government employees, elected officials, and citizens, of all words, even those which are of common usage, in any language other than English when conducting state business." *Id.* at 127. It is unclear to what extent the Oklahoma Constitution proves more protective of free speech than the United States Constitution. For the Oklahoma Supreme Court's most extended discussion of the issue, see Gaylord Entm't Co. v. Thompson, 958 P.2d 128 (Okla. 1998).

16. *In re Initiative Petition No. 366*, 46 P.3d at 128.

17. *Id.*

18. *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).

19. *In re Initiative Petition No. 366*, 46 P.3d at 128.

20. *Id.* at 129.

21. *Id.*

22. *See* ARIZ. CONST. art. XXVIII; IDAHO CODE ANN. § 73-121 (2007); IOWA CODE ANN. § 1.18 (West 2002); KAN. STAT. ANN. §§ 73-2801–2807 (2007); UTAH CODE ANN. § 63G-1-201 (West 2008) (formerly cited UTAH CODE ANN. § 63-13-1.5), passed in the interim. *See also* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007), decided in the interim.

23. ALA. CONST. art. I, § 36.01 (alternatively cited ALA. CONST. amend. 509); ALASKA STAT. §§ 44.12.300–390 (West 1998); ARIZ. CONST. art. XXVIII; ARK. CODE ANN. § 1-4-117 (West 1987); CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; GA. CODE ANN. § 50-3-100 (West 1996); HAW. CONST. art. XV, § 4 (also designating Hawai'ian as the official language, but only for public acts and transactions as provided by law); IDAHO CODE ANN. § 73-121; 5 ILL. COMP. STAT. ANN. 460/20 (West 1991); IND. CODE ANN. § 1-2-10-1 (West 1984) (As of 2009, a proposed constitutional amendment with more specific provisions than required by the statute faced voter approval in 2010.); IOWA CODE ANN. § 1.18; KAN. STAT. ANN. §§ 73-2801–2807; KY. REV. STAT. ANN. § 2.013 (West 1984); MISS. CODE ANN. § 3-3-31 (West 1987); MO. CONST. art. I, § 34; MONT. CODE ANN. § 1-1-510 (1995); NEB. CONST. art. I, § 27; N.H. REV. STAT. ANN. §§ 3-C:1–C:4 (1995); N.C. GEN. STAT. ANN. § 145-12 ( West 1987); N.D. CENT. CODE § 54-02-13

measures generally fell into three categories, each category representing an increasing degree of restrictiveness: symbolic, intermediary, and obligatory.[25] Symbolic official English measures, primarily implemented during the 1970s and 1980s, declared English the official language in much the same way that a particular bird species would be designated as the state bird and had little, if any, legal effect.[26] Intermediary measures moved beyond the symbolic, imposing more requirements on the state, but providing for numerous exceptions.[27] Obligatory measures, the most restrictive, required that English be the language used in official government actions and documents.[28] Few states successfully passed obligatory official English measures.[29] Those that have provide instruction for interpreting Oklahoma's current official English measure.[30]

Prior to Oklahoma's Petition No. 366, Arizona amended its state constitution via ballot initiative, adding an official English provision in November 1988.[31] The amendment became Article XXVIII of the state constitution after a majority of Arizona voters cast their ballots in favor of the measure.[32] Article XXVIII stated that "[t]he English language is the official language of the State of Arizona" and, as the official language, "the English language is the language of the ballot, the public schools and all government functions and actions."[33] The provision provided that, with limited exceptions, "[t]his State and all political subdivisions of this State shall act in English and no other language."[34] The enumerated exceptions, which permitted a political subdivision to act in a language other than English, included compliance with federal laws, protection of public health or safety, and safeguarding the rights of criminal defendants.[35]

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(1987); S.C. CODE ANN. § 1-1-696 (1987); S.D. CODIFIED LAWS §§ 1-27-20–1-27-26 (1995); TENN. CODE ANN. § 4-1-404 (West 1984); UTAH CODE ANN. § 63G-1-201 (West 2008); VA. CODE ANN. § 1-511 (West 2005) (formerly cited VA. CODE ANN. § 7.1-42); WYO. STAT. ANN. § 8-6-101 (West 1977).

24. *Why Official English?*, *supra* note 7.

25. Josh Hill, Devin Ross & Brad Serafine, Comment, *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 673–74 (2009).

26. *Id.* at 674.

27. *Id.*

28. *Id.* at 673.

29. *Id.* at 674. The recent failure of several states' attempts to strengthen the existing official English measures and provide for more stringent enforcement reinforce the difficulty of passing obligatory English measures. *See generally* H.R. 3771, 118th Leg., 1st Sess. (S.C. 2009); H.R. 55, 2009 Assemb., Reg. Sess. (Va. 2007).

30. *See Alaskans for a Common Language, Inc.*,, 170 P.3d at 188; Ruiz v. Hull, 957 P.2d 984, 987 (Ariz. 1998).

31. *Hull*, 957 P.2d at 987. The amendment passed by a slim one percent margin, with 50.5% of voters casting their ballots for the measure. *Id.*

32. *Id.*

33. *Id.* at 1003.

34. *Id.* at 1004. Article XXVIII included a broad definition of "political subdivision" for purposes of the amendment. *Id.* Section 1(3)(b) provided that "the phrase, 'This State and all political subdivisions of this State' shall include every entity, person, action, or item described in this Section, as appropriate to the circumstances." *Id.* at 1003. Entities provided for in Section 1 were:

> the legislative, executive, and judicial branches of government;all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities[;]all statutes, ordinances, rules, orders, programs, and policies[; and]all government officials and employees during the performance of government business.

*Id.*

35. *Id.* at 1004.

Article XXVIII faced its first challenge in federal court.[36] Two days after its passage,[37] Maria-Kelley F. Yniguez, an employee of the Arizona Department of Administration, filed suit against the State of Arizona in the Federal District Court of Arizona.[38] Yniguez claimed that the amendment violated the First and Fourteenth Amendments of the United States Constitution by imposing negative sanctions on her decision to speak Spanish at work, leading her to cease speaking Spanish on the job.[39] The district court found Article XXVIII facially overbroad in violation of the First Amendment,[40] a decision subsequently appealed to the Ninth Circuit Court of Appeals.[41]

The Ninth Circuit first considered the proper construction of Article XXVIII.[42] The court rejected the Arizona Attorney General's offered narrowing construction, which limited the article's application to "official acts" of the State.[43] The court reasoned that the limiting construction was "completely at odds with Article XXVIII's plain language"[44] and the amendment's enumeration of narrow exceptions to the English language requirement "belie[d] the conveniently flexible approach that the Attorney General ha[d] adopted . . . ."[45] Furthermore, from the narrow interpretation followed a conclusion that the statute meant to exclude acts that were clearly unofficial and only meant to facilitate the day-to-day operations of the government.[46] However, the statute included several clearly unofficial acts as enumerated exceptions.[47] The inclusion of unofficial enumerated exceptions, as well as the specific enumeration of obviously official acts, rendered portions of the amendment superfluous and ran "directly contrary to its structure, scope, and purpose," if the narrowing interpretation was given effect.[48] The court went on to find the amendment unconstitutionally overbroad.[49]

In so holding, the court considered the amendment's impact on the free-speech rights of public employees through a balancing approach, evaluating the government's justifications for the measure in light of the First Amendment interests of public employees.[50] Finding that the government's goals and concerns were, at most, indirectly

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36. Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

37. *Hull*, 957 P.2d at 987.

38. *Mofford*, 730 F. Supp. at 310-11. Yniguez's original complaint named only the State of Arizona, but Yniguez amended her petition that same day to include Arizona state officials serving at the time, including Rose Mofford, Governor; Robert Corbin, Attorney General; and Catherine Eden, Director of the Department of Administration, in order to avoid dismissal pursuant to Arizona's claim of Eleventh Amendment immunity. *Id.* at 311.

39. *Id.* at 310.

40. *Id.* at 316–17.

41. Yniguez v. Arizonans for Official English, 69 F.3d 920, 925-26 (9th Cir. 1995). Following the district court's initial ruling, Governor Mofford declined to appeal the judgment. *Id.* at 926. However, Arizonans for Official English filed a successful motion to intervene and filed notice of appeal in December 1992. *Id.*

42. *Id.* at 928–31.

43. *Id.* at 931.

44. *Id.* at 929.

45. *Id.* at 930.

46. *Arizonans for Official English*, 69 F.3d at 930.

47. *Id.* at 929–30.

48. *Id.* at 930.

49. *Id.* at 947.

50. *Id.* at 944. The balancing approach could best be analogized to that of the majority in *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995). *Id.* However, the court noted that the result would be the same under any other balancing approach: the State's alleged interest would not justify the infringement on the

related to the means implemented by the amendment, the court concluded that the government's desire for efficiency could not outweigh the substantial infringement of the speech rights of public employees and the Arizona public they served.[51] However, the United States Supreme Court granted certiorari and vacated the Ninth Circuit's judgment as moot due to Yniguez's resignation from her employment with the State of Arizona.[52] Although the Supreme Court did not consider the amendment on its merits, some postulate that, in dicta, the Court suggested it would be open to a limiting interpretation of the amendment in order to preserve its constitutionality.[53]

In vacating the Ninth Circuit's decision, the Supreme Court noted the ongoing litigation concerning the amendment in the Arizona state court system in the form of *Ruiz v. Symington*[54] and encouraged the Arizona Supreme Court to definitively rule on the amendment's proper construction in that case.[55] In *Ruiz v. Symington*,[56] ten bilingual plaintiffs brought suit claiming that Article XXVIII violated the First, Ninth, and Fourteenth Amendments of the United States Constitution.[57] The trial court found the amendment constitutional, which the appellate court reversed in part and affirmed in part.[58] On appeal, the Arizona Supreme Court began its discussion by noting, "in our diverse society, the importance of establishing common bonds and a common language between citizens is clear."[59] However, the court also realized that "[t]he American tradition of tolerance 'recognizes a critical difference between encouraging the use of English and repressing the use of other languages.' "[60] With these considerations in mind, the court turned to the constitutionality of the amendment.[61] Like the federal courts before it,[62] the Arizona Supreme Court rejected the Attorney General's

First Amendment rights of those affected. *Id.*

51. *Arizonans for Official English*, 69 F.3d at 947. The court noted the adverse impact of Article XXVIII was "especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities." *Id.*

52. Arizonans for Official English v. Arizona, 520 U.S. 43, 74-80 (1997).

53. *See* Amy Mackin, Comment, *Lost Without Translation: The Official English Movement and the First Amendment*, 6 FIRST AMEND. L. REV. 341, 350 (2008) (The Court's statement that the lower courts' decisions that the amendment "was unconstitutional on its face was " 'all the more puzzling in view of the [limiting construction] the initiative sponsors advanced' " expressed a willingness to consider the limiting instruction and save the law.) (footnote omitted).

54. Ruiz v. Symington, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. Ct. App. June 11, 1996), *vacated sub nom.* Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998). Although the case was styled *Ruiz v. Symington* at the time of the United States Supreme Court's decision, the case was styled *Ruiz v. Hull* at the time of its adjudication before the Arizona Supreme Court. Over the course of the litigation, Governor J. Fife Symington resigned and was replaced by Governor Jane Dee Hull, who was substituted as a party pursuant to Arizona Rules of Civil Appellate Procedure 27(c)(1); thus, the change in style. Todd S. Purdum, *Arizona Governor Convicted of Fraud and Will Step Down*, N.Y. TIMES, Sept. 3, 1997, at A1; ARIZ. R. CIV. APP. P. 27(c)(1).

55. *Arizonans for Official English*, 520 U.S. at 80. The Court did so in accordance with its decision in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court."). *Id.* at 79.

56. *Symington*, 1996 WL 309512.

57. *Hull*, 957 P.2d at 988–89. The ten plaintiffs were four elected officials, five state employees, and one public school teacher. *Id.*

58. *Id.* at 989.

59. *Id.* at 990.

60. *Id.* at 991 (quoting *Arizonans for Official English*, 69 F.3d at 923).

61. *Id.*

62. *See generally* the decisions of the Ninth Circuit Court of Appeals in *Arizonans for Official English*, 69

construction of the amendment — that it applied only to "official actions" of the government.[63] Such a narrow interpretation worked against the plain meaning of the amendment's wording, conflicted with the intent of the amendment's drafters, and resulted in an untenably ambiguous amendment.[64] Although the court did not address the plaintiffs' claims that the amendment was unconstitutionally vague, the court did note that the Attorney General's narrowing construction, if adopted, would "undoubtedly add weight to the plaintiffs' vagueness argument."[65]

The court went on to review the broadly construed language of Article XXVIII in light of the First Amendment.[66] The court rejected the argument that the provision was a permissible content-neutral regulation of speech, reasoning the amendment served as an effective bar to communication, and content-neutral restrictions by definition require alternative forms of communication.[67] Additionally, Article XXVIII violated the purpose of the First Amendment — protecting the free discussion of political affairs.[68] Article XXVIII unconstitutionally deprived non-English speaking persons access to information about the government, as well as violated the First Amendment rights of elected officials to communicate with their constituents.[69] The amendment also violated the right to participate in government, which the court found constitutionally protected through the First Amendment's right to petition the government.[70] In addition to the First Amendment problems, the court determined that the amendment violated the Fourteenth Amendment's guarantee of equal protection.[71] Despite the Arizona Attorney General's urging, the court declined to sever the amendment to preserve its constitutionality.[72] Thus, the court declared the entire amendment unconstitutional.[73]

In 2006, Arizona voters passed a second official English constitutional amendment through ballot initiative.[74] Also dubbed Article XXVIII, the second amendment differed in many important respects from Arizona's first official English amendment.[75] The new

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F.3d at 927-30 and the Arizona District Court in *Mofford*, 730 F. Supp. at 313–16.

63. *Hull*, 957 P.2d at 992.

64. *Id.* In finding that a narrow construction would be against the plain meaning of the amendment, the court specifically declined to decide whether the government could constitutionally require official acts to be conducted in English only. *Id.* For a more detailed discussion of the court's reasoning in declining to adopt the narrowing construction, see *infra* notes 150-56 and accompanying text.

65. *Hull*, 957 P.2d at 994 n.7.

66. *Id.* at 996–1000.

67. *Id.* at 998.

68. *Id.* at 996 (quoting Landmark Comm's., Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (citation omitted)).

69. *Id.* at 997.

70. *Hull*, 957 P.2d at 997. *See also* U.S. CONST. amend. I.

71. *Hull*, 957 P.2d at 1000–02. *See also* U.S. CONST. amend. XIV, § 1.

72. *Hull*, 957 P.2d at 1002.

73. *Id.* In so holding, the court declined to address the plaintiffs' overbreadth argument, reasoning overbreadth should only be addressed when its effect would be "more than salutary" and since the provision was unconstitutional pursuant to the First and Fourteenth Amendments an overbreadth analysis would be superfluous. *Id.* at 999 n.11.

74. ARIZ. CONST. art. XXVIII. *See also* Eric Pfeffier, *Arizona Makes English Official: 74 Percent OK State Language Ballot Initiative*, WASH. TIMES, Nov. 9, 2006, at A12. Unlike Arizona's first official English amendment, Proposition 103 overwhelmingly passed, garnering 74% of Arizona voters' support. *Id.*

75. ARIZ. CONST. art. XXVIII, § 5. *See also* Mackin, *supra* note 53, at 351.

amendment included more specific exceptions and a rule of construction ensuring elected officials the ability to communicate in languages other than English in some situations.[76] Most significantly, the second amendment provided that "[o]fficial actions shall be conducted in English," and contained an explicit definition of official action as "the performance of any function or action on behalf of this state or a political subdivision of this state or required by state law that appears to present the views, position or imprimatur of the state or political subdivision or that binds or commits the state or political subdivision."[77] Although the new amendment has not faced the same judicial challenges as the previous amendment, it faced criticism within Arizona as being ineffective, leaving Arizona susceptible to further legislative action.[78]

In 1998, while the first Arizona official English amendment proceeded through the court system, Alaska voters approved a ballot initiative adopting an official English statute, codified the following year as Alaska Stat. §§ 44.12.300 to .390 ("Alaska provision").[79] In addition to codifying English as the official language of the State of Alaska, the original statutory language provided that "[t]he "English language is the language to be used by all public agencies in all government functions and actions. The English language shall be used in the preparation of all official public documents and records . . . ."[80] The Alaska provision also included extensive exceptions when necessity mandated the use of a language other than English, including exceptions for public officials already proficient in another language and as necessary to comply with federal law.[81] Unlike the Arizona and first Oklahoma official English provisions, the Alaska provision included a severability clause.[82] Shortly following the initiative's passage, two separate groups filed suits seeking injunctions against enforcement of the Alaska provision; the cases were consolidated in 1999.[83] After the trial court found the provision violated Alaska's free-speech safeguard,[84] the Alaska Supreme Court took up the

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76. ARIZ. CONST. art. XXVIII, § 5. *See also* Mackin, *supra* note 53, at 351.

77. ARIZ. CONST. art. XXVIII, § 1.

78. *See generally* Editorial, *Minimal Impact: Prop 103's Mandated Use of English Hasn't Prompted Lawsuits, nor Has It Seriously Altered Government Communications*, TRIB. (Mesa, Ariz.), Dec. 11, 2007, *available at* 2007 WLNR 24455559; Ernesto Portillo, Jr., *English Language Provision Is Ignored*, ARIZ. DAILY STAR, Jan. 5, 2007, at B1,*available at* 2007 WLNR 1461152.

79. ALASKA STAT. §§ 44.12.300–390 (West 1998). *See also* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 187 (Alaska 2007).

80. ALASKA STAT. § 44.12.320 (declared unconstitutional in part 2007). *See also Alaskans for a Common Language, Inc.*, 170 P.3d at 191.

81. ALASKA STAT. § 44.12.340. The provision also includes numerous exceptions to promote judicial efficiency and safeguards. These exceptions are as follows:

(5) to protect the constitutional and legal rights of criminal defendants;(6) to serve the needs of the judicial system in civil and criminal cases in compliance with court rules and orders; [and](7) to investigate criminal activity and protect the rights of crime victims.

*Id. See also Alaskans for a Common Language, Inc.*, 170 P.3d at 191.

82. ALASKA STAT. § 44.12.390. *See also Alaskans for a Common Language, Inc.*, 170 P.3d at 192. A severability clause is "[a] provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or unconstitutional." BLACK'S LAW DICTIONARY 1498 (9th ed. 2009).

83. *Alaskans for a Common Language, Inc.*, 170 P.3d at 187-88. The first plaintiff group consisted primarily of bilingual public officials. *Id.* at 187. The second group consisted of either bilingual residents or citizens proficient only in native languages. *Id.* at 187.

84. ALASKA CONST. art. I, § 5.

constitutionality of the official English statute on appeal.[85]

Much like the Arizona Attorney General, Alaskans for a Common Language argued that the statute should be narrowly construed, applying only to "official acts" of the State.[86] Although the Alaska Supreme Court rejected this argument in regard to the first sentence of section .320 (pertaining to government actions),[87] the second section of .320 (concerning government documents) proved susceptible to a narrow reading.[88] The court reasoned "[t]he text of the second sentence include[d] the word 'official,' thus 'plainly contemplat[ing]' . . . a category of informal, unofficial written documents outside the reach of the [statute]."[89] The court construed the second sentence to mean that multilingual official documents were not prohibited as long as the State also published the required English-language version.[90] However, since the first sentence of section .320 required a broad construction, it infringed on constitutionally protected speech of private citizens, government employees, and elected officials.[91]

Analogizing the Alaska statute to Arizona's first Article XXVIII, the court found the Alaska provision likewise "bar[red] communication itself" making the statute a content-based, rather than content-neutral, regulation of speech rights.[92] The court reasoned that the statute "define[d] a broad category of speech — speech in languages other than English — and simply forb[ade] it . . . . Such a requirement harm[ed] 'society as a whole, which [was] deprived of an uninhibited marketplace of ideas.' "[93] As a content-based restriction, the provision was subject to a strict-scrutiny analysis.[94] Although the court found compelling state interests in the statute,[95] it ultimately concluded that the statute was not sufficiently tailored to achieve its ends, and, thus, unconstitutional against both the United States and Alaska Constitutions.[96] However, the

85. *Alaskans for a Common Language, Inc.*, 170 P.3d at 189. The court's analysis reflects the statute's validity in light of both the United States and Alaska Constitutions. *Id.*

86. *Id.* at 194.

87. *Id.* at 195. "The English language is the language to be used by all public agencies in all government functions and actions." *Id.* at 191.

88. ALASKA STAT. ANN. § 44.12.320 (West 1998) ("The English language shall be used in the preparation of all official public documents and records, including all documents officially compiled, published or recorded by the government.").

89. *Alaskans for a Common Language, Inc.*, 170 P.3d at 196. The Court also provided a non-exhaustive list of possible unofficial documents which would be outside of the scope of the official English statute, including: a note from a public school teacher to a parent, a letter from a public health employee offering medical advice, or an invoice prepared by a city mechanic. *Id.* at 197.

90. *Id.*

91. *Id.* at 197-98. The court rejected Alaskans for a Common Language's argument that the provision regulated only government speech, finding that such an interpretation would expand the scope of the government-as-speaker doctrine well beyond the narrow construction applied by the Supreme Court. *Id.* at 198–99. *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (specific government program regarding legal representation for welfare clients); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (specifying universities); and Rust v. Sullivan, 500 U.S. 173 (1991) (specifying funding grantees with narrow message).

92. *Alaskans for a Common Language, Inc.*, 170 P.3d at 206.

93. *Id.* (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

94. *Id.*

95. *Id.* at 207. Compelling state interests noted by the court included preserving and strengthening the English language, as well as increasing the efficiency of state government. *Id.*

96. *Id.* at 208–10. For a discussion of alternatives suggested by the court that would be less restrictive, see *infra* notes 272–75.

court found the unconstitutional first sentence severable from the constitutional second sentence of section .320, ultimately preserving English as the language of official documents.[97]

*Current State of the Oklahoma Official English Movement*

Nearly ten years after Petition No. 366, Oklahoma took up the official English issue again with the introduction of State Question 751.[98] In the years since Petition No. 366, Oklahoma's population changed, a phenomenon reflected in language demographics.[99] In 2000, the year of the petition, when questioned about language preferences, 92.6% of Oklahoma citizens identified themselves as speaking only English in the home.[100] The remaining 7.4% of the population primarily spoke a language other than English in the home, with the majority speaking Spanish.[101] The Census also identified the percentage of non-primary English speakers who spoke English *less than very well*.[102] National Census data reflected a much higher percentage of people speaking languages other than English in the home.[103] In 2000, approximately 18% of the country's total population indicated that they spoke a language other than English within the home, with the majority speaking Spanish.[104] Interestingly, on both the national and state level, the Asian language group possessed the highest percentage of its speaking population that spoke English *less than very well*.[105]

In the American Community Survey reflecting Oklahoma's 2008 population statistics, 91.6% of Oklahoma's population indicated that they spoke English only in the home,[106] a full percentage point decrease from 2000.[107] Unlike the 2000 Census data,

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97. *Alaskans for a Common Language, Inc.*, 170 P.3d at 215. In so holding, the court mandated that the surviving statute be narrowly construed to avoid unconstitutionality. *Id.*

98. *See* text accompanying *infra* notes 115-20.

99. *Compare Census 2000 Data for the State of Oklahoma, Profile of General Demographic Characteristics*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US40&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-redoLog=false (last visitedOct. 3, 2009) *with American Community Survey, Oklahoma Data Profile, Selected Social Characteristics*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-context=adp&-qr_name=ACS_2008_1YR_G00_DP2&-ds_name=ACS_2008_1YR_G00_&-tree_id=308&-redoLog=true&-_caller=geoselect&-geo_id=04000US40&-format=&-_lang=en (last visited Oct. 3, 2009). For a graphical representation of population changes in regards to language preferences, see appendix A and appendix C of this Comment.

100. *Census 2000 Data for the State of Oklahoma, Profile of Selected Social Characteristics*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US40&-qr_name=DEC_2000_SF3_U_DP2&-ds_name=DEC_2000_SF3_U&-redoLog=false (last visited Oct. 3, 2009).

101. *Id. See* appendix A of this Comment for a breakdown of the various languages apart from English primarily spoken in Oklahoma homes.

102. *Id. See* appendix A of this Comment for a graphical representation of the percentage of each language group speaking English *less than very well*.

103. *See generally Language Use and English-Speaking Ability: 2000*, Census 2000 Br., (U.S. Dept. Commerce, U.S. Census Bureau (Oct. 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

104. *Id.* at 1-2. The 18% of the population indicating they spoke a language other than English in the home represented approximately forty-seven million people. *Id.* at 2. For a graphical representation of language preference in terms of specific languages spoken, see appendix B of this Comment.

105. *See generally* appendix A and appendix B.

106. *Oklahoma Data Profile, Selected Social Characteristics*, *supra* note 99. That is, in 2008, 118,074 more people spoke a language other than English in the home. *Id.*; *Census 2000 Data for the State of Oklahoma, Selected Social Characteristics*, *supra* note 100.

2008 demographic estimates included the percentage of Oklahoma's population that spoke "all other languages," apart from the designated language groups of Spanish, Indo-European, or Asian languages.[108] Presumably, Native American languages fell into this "other" category.[109] Regardless of the inclusion of the new "other" language group, as in 2000, the majority of non-English speakers spoke Spanish.[110] Although the percentage of those speaking English *less than very well* increased slightly overall, percentages of *less than very well* speakers decreased in each individual language group.[111] Oklahoma's 2008 demographics in many respects reflected those nationwide.[112] Nationally, 80.3% of respondents indicated that they spoke English only in the home, and the majority of non-English speakers preferred Spanish.[113] As was the case in Oklahoma, each language group saw a decrease in the percentages of those speaking English *less than very well*.[114]

As the Oklahoma population continued to change, Oklahoma Representatives Michael Christian, George Faught, and Randy Terrill, and Senator Anthony Sykes authored and introduced House Joint Resolution 1042 ("HJR 1042") in February 2009.[115] The Resolution eventually passed both houses of the Oklahoma Legislature in May 2009.[116] As passed, the Resolution directed the Secretary of State to place on the

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107. I calculated this percentage by subtracting the English speaking population in 2008 from the English speaking population in 2000. *See Census 2000 Data for the State of Oklahoma, Selected Social Characteristics, supra* note 100 and *Oklahoma Data Profile, Selected Social Characteristics, supra* note 99.

108. *Compare Oklahoma Data Profile, Selected Social Characteristics, supra* note 99, *with Census 2000 Data for the State of Oklahoma, Selected Social Characteristics, supra* note 100.

109. Not only is this a reasonable inference because Native American languages do not clearly qualify as any other language group, but a Census 2000 brief classified Native American languages as such, although the 2000 Census itself did not include an "other language" category. *See Language Use and English-Speaking Ability:2000, supra* note 103, at 3.

110. *Oklahoma Data Profile, Selected Social Characteristics, supra* note 99. For a graphical representation of the percentage of population represented by various language groups, see appendix C.

111. *See generally Oklahoma Data Profile, Selected Social Characteristics, supra* note 99; *Census 2000 Data for the State of Oklahoma, Selected Social Characteristics, supra* note 100. For a graphical representation of the percentage of the Oklahoma population speaking English *less than very well* in each language group, see appendix C.

112. *See* U.S. Census Bureau, *American Community Survey, United States Data Profile, Selected Social Characteristics*, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_1YR_G00_DP2&-ds_name=ACS_2008_1YR_G00_&-_lang=en&-redoLog=false&-format= (last visited Oct. 3, 2009).

113. *Id.*

114. *Id. See also* appendix D for a graphical representation.

115. H.J. Res. 1042, 52d Leg., 1st Reg. Sess. (Okla. 2009). *See also* Michael McNutt, *2 Bills Will Get a Second Chance: English-Only Policy Would Apply Only to Activities of Government*, Daily Oklahoman, Jan. 15, 2009, at 9A.

116. The measure passed the House with 66 in favor, 32 against, and 2 excused. Okla. H.J. 24, 52d Leg., 1st Reg. Sess. 26 (Mar. 11, 2009). The measure passed the Senate with 44 in favor, 2 against, and 2 excused. Okla. Sen. J. 47, 52d Leg., 1st Reg. Sess. 13 (Apr. 22, 2009). The Senate amended the measure to include numerous authors including: Representatives Leslie Osborn, Mike Reynolds, Rex Duncan, Sally Kern, Sue Tibbs, Marian Cooksey, and Mike Ritze, as well as Senators Cliff Branan, Steve Russell, Clark Jolley, Randy Brogdon, Glenn Coffee, Cliff Aldridge, David Myers, Jim Halligan, Dan Newberry, Jim Reynolds, Bill Brown, Mike Johnson, Don Barrington, Jonathan Nichols, Brian Bingman, Brian Crain, Ron Justice, John Ford, Bryce Marlatt, Gary Stanislawski, and Mike Schulz. Okla. Sen. Amend. H. Jt. Res. 1042, 52d Leg., 1st Reg. Sess. (Apr. 22, 2009). The Resolution with the Senate amendments passed the House by a vote of 89 in favor, 8 against, and 4 excused. Okla. H.J. No. 56, 52d Leg., 1st Reg. Sess. 9 (May 6, 2009). *See also* Michael McNutt, *'Official English' Measure Expected to Appear on 2010 Ballot: Voters Will Get to Voice Decision on State Language*, DAILY OKLAHOMAN, May 7, 2009, at 2A. Prior to its passage, the original language of HJR 1042 was combined with a second official English bill in the Senate. *Id.* The language of HJR 1042 as passed represents a compromise between the two bills. *Id.*

ballot for approval by Oklahoma voters a constitutional amendment creating Article XXX in order to declare English the official language of Oklahoma.[117] The pertinent text of Article XXX, as set out by the Oklahoma Legislature, was as follows:

> As English is the common and unifying language of the State of Oklahoma, all official actions of the state shall be conducted in the English language, except as required by federal law. No person shall have a cause of action against an agency or political subdivision of this state for failure to provide any official government actions in any language other than English. Nothing in this Article shall be construed to diminish or impair the use, study, development, or encouragement of any Native American language in any context or for any purpose. The Legislature shall have the power to implement, enforce, and determine the proper application of this Article by appropriate legislation.[118]

After the Resolution passed both houses, the Legislature directed the Resolution to the Oklahoma Secretary of State, who, with the help of the Attorney General, prepared the measure for the ballot.[119] Article XXX appeared on the November 2010 ballot and passed with 75.54% of Oklahoma voters voting for the measure and 24.46% voting against, the largest margin of victory for any of the state questions during the November 2010 general elections.[120]

Although there may be other statutory or constitutional challenges pertinent to Article XXX, this Comment focuses only on challenges related to the amendment's infringement of speech rights guaranteed by the First Amendment.[121] Early in United

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117. Okla. H. Leg. Br., 52d Leg., 1st Reg. Sess. (May 2009).

118. Okla. H. Jt. Res. 1042, 52d Leg., 1st Reg. Sess. at § 1 (constitutionalized as Okla. Const. art. XXX after the November 2010 general election).

119. Letter from W.A. Drew Edmonson, Okla. Atty. Gen., to Susan Savage, Okla. Sec. of St.; Glenn Coffee, Okla. Sen. Pres. Pro Tempore; and Chris Benge, Okla. H.R. Speaker, *Final Ballot Title for State Question No. 751, Legislative Referendum No. 351* (June 22, 2009) (available at https://www.sos.ok.gov/documents/questions/751.pdf). The measure appeared on the ballot as follows:

> **State Question No. 751 Legislative Referendum No. 351**
> This measure amends the State Constitution. It adds a new article to the Constitution. That article deals with the State's official actions. It dictates the language to be used in taking official State action. It requires that official State actions be in English. Native American languages could also be used. When Federal law requires, other languages could also be used.
>
> These language requirements apply to the State's "official actions." The term "official actions" is not defined. The legislature could pass laws determining the application of the language requirements. The Legislature would also pass laws implementing and enforcing the language requirements.
>
> No lawsuit based on State law could be brought on the basis of a State agency's failure to use a language other than English. Nor could such a lawsuit be brought against political subdivisions of the State.
>
> SHALL THE PROPOSAL BE APPROVED?
> FOR THE PROPOSAL YES ____ AGAINST THE PROPOSAL NO ____

*Id.*

120. Okla. St. Election Bd., *Summary Results: General Election – November 2, 2010*, OKLAHOMA STATE ELECTION BOARD, http://www.ok.gov/elections/support/10gen.html (last visited Dec. 19, 2010).

121. It should be noted that days after the amendment's passage, Tulsa attorney and University of Tulsa Professor of Law James Thomas filed suit against then-Governor Brad Henry, the State of Oklahoma, and the Tulsa County Election Board on behalf of plaintiff Delilah Gentges, arguing that Article XXX violated the U.S. Constitution's protection of free speech in the First Amendment. *See* Michael McNutt, *Oklahoma English-Only Measure Challenged*, DAILY OKLAHOMAN, Nov. 11, 2010, *available at* 2010 WLNR 22514030. The lawsuit,

States Supreme Court constitutional history, the Court ruled that the Bill of Rights and its protections of individual liberties applied only to the federal government.[122] However, the passage of the Fourteenth Amendment and its protection against abridgement of some rights by state action spurred the Court to reconsider the application of the Bill of Rights against the states.[123] In *Twining v. New Jersey*,[124] the Court first acknowledged that, in some situations, the Fourteenth Amendment might incorporate the protections of the Bill of Rights against the states.[125] The Court reasoned that the Due Process Clause of the Fourteenth Amendment required the rights' protection against state action, as well as federal infringement, because a denial of the freedoms protected by the Bill of Rights might amount to a denial of due process of law.[126] Several years later, the Court incorporated the First Amendment's protection of free speech[127] against the states through the Fourteenth Amendment's Due Process Clause.[128] Thus, the First Amendment of the Federal Constitution provides a means of challenging state regulation of speech.[129] Accordingly, this Comment discusses the various First Amendment challenges arguably applicable against Oklahoma's Article XXX as a state regulation of speech.[130]

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seeking declaratory and injunctive relief, was filed in Tulsa County District Court and is styled *Gentges v. Henry*, CV-2010-1324. This Comment expresses no opinion regarding the propriety of that lawsuit or its prospects for success. Although Ms. Gentges makes similar challenges, this Comment is a purely academic exercise, existing in the realm of the theoretical.

122. *See* Barron v. Mayor & City Council of Baltimore, 32 U.S. 243, 250 (1833).

123. Following the Fourteenth Amendment's ratification, a number of the amendment's framers argued that they intended the Fourteenth Amendment to incorporate the protections of the Bill of Rights against the states. For a comprehensive discussion of the debate over the framers' intent and incorporation, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 491–94, 500–03 (3d ed., 2006). *See also* The Slaughter-House Cases, 83 U.S. 36 (1873). The *Slaughter-Houses Cases* represent the Court's first attempt to interpret the Fourteenth Amendment. *Id.* In the cases, several New Orleans butchers challenged the City's grant of a monopoly in the slaughterhouse business to the Crescent City Livestock Landing and Slaughter-House Company. *Id.* at 38. The plaintiff butchers alleged that the monopoly deprived them of their property without due process of law, denied them equal protection of the laws, and abridged their privilege and immunities of citizenship, all in violation of the Fourteenth Amendment. *Id.* at 36–38. Although the Court rejected all of the plaintiff butchers' arguments, the case opened the door to the use of the Fourteenth Amendment as a means of incorporating certain rights against the states. *Id.* at 82–83."""

124. Twining v. New Jersey, 211 U.S. 78 (1908).

125. *Id.* at 99.

126. *Id.*

127. U.S. CONST. amend. I.

128. *See* Gitlow v. New York, 268 U.S. 652 (1925). *See also* U.S. CONST. amend. XIV, § 1.

129. *Gitlow*, 268 U.S. at 666–67. *See also* Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985) (finding that "the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States").

130. Unlike other forms of constitutional analysis, the First Amendment lacks a prescribed order of analysis. *See* CHEMERINSKY, *supra* note 123, at 932. "There is no reason why one question should inherently precede the others." *Id.* Accordingly, my analysis begins with the possibly fatal facial challenges to the amendment – overbreadth and vagueness. My analysis will then consider the appropriate level of scrutiny, based on whether the amendment constitutes a content-based or content-neutral restriction. It should be noted that this Comment only briefly addresses one very important First Amendment challenge — prior restraint. A prior restraint bears a " 'heavy presumption' against its constitutional validity." Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). However, courts reviewing previous official English measures declined to address their respective measures as prior restraints. This Comment likewise declines to analyze Article XXX as such. *See infra* note 314 for an extended discussion of the reasoning behind the doctrine's exclusion.""

## BETWEEN A ROCK AND A HARD PLACE: OKLAHOMA'S NARROW INTERPRETATION AVOIDS OVERBREADTH INVALIDATION, BUT "ADDS WEIGHT" TO A VAGUENESS CHALLENGE

Unlike previous official English measures, the scope of Oklahoma's Article XXX is limited to "official actions of the state."[131] Because of this, a reviewing court will likely find Article XXX subject to narrowing construction and decline application of the overbreadth doctrine to find Article XXX unconstitutionally overbroad.[132] However, the amendment may be open to constitutional challenge pursuant to the closely related vagueness doctrine.[133]

### *The Overbreadth Doctrine Is "Strong Medicine"*

Unconstitutionally overbroad laws regulate substantially more speech than the U.S. Constitution permits.[134] Pursuant to the doctrine, a person not subject to speech protection makes a facial challenge to the allegedly overbroad law, arguing the measure is unconstitutional as applied to third parties.[135] Successful facial challenges invalidate the law in its entirety.[136] The overbreadth doctrine contains two major aspects.[137] First, the court must find substantial overbreadth — that is, the challenged law must regulate significantly more speech than the Constitution permits.[138] Second, a person against whom the law could be constitutionally applied must challenge the law, arguing the law would be unconstitutional as applied to others.[139]

Because the overbreadth doctrine provides a reviewing court the power to invalidate a measure on its face, courts traditionally view overbreadth as "strong medicine,"[140] and only apply the doctrine sparingly, "as a last resort."[141] The Supreme Court declines to articulate an exact standard for the substantial overbreadth necessary to fulfill the first aspect of the overbreadth doctrine.[142] Instead, the Court traditionally balances the number of situations in which the challenged measure may unconstitutionally regulate protected speech against instances in which the measure's application proves constitutional.[143] Put another way, "the overbreadth of a statute must

131. OKLA. CONST. art. XXX.
132. *See infra* notes 162–68 and accompanying text.
133. *See infra* notes 198–213 and accompanying text.
134. CHEMERINSKY, *supra* note 123, at 943.
135. *Id.* at 943–44.
136. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 1247 (3d ed., 2009).
137. CHEMERINSKY, *supra* note 123, at 9443-47.
138. *Id.* at 943-46.
139. *Id.* at 946-47.
140. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).
141. *Id.*
142. Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984) ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition.")."'"
143. *See id.* ("It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."); New York v. Ferber, 458 U.S. 747, 773 (1982) (The Court declined to find a New York statute prohibiting pornography overbroad because the Court doubted that "these arguably impermissible applications of the statute amount to more than a tiny

not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[144] By requiring a "substantial" showing, the doctrine strikes a balance between two competing social costs — infringement on the free exchange of ideas as a result of deterrence of protected speech versus the harmful effects of striking down a law promoting state interests.[145] Reflecting courts' reluctance to apply the doctrine, courts typically refuse application when the challenged measure is susceptible to a limiting construction that cures any constitutional infirmity.[146] However, precedent shows that the Court will only accept a narrowing construction if the challenged measure proves readily susceptible to such a construction in the first place.[147] Thus, reviewing courts often begin an overbreadth analysis by construing the challenged statute.[148]

*The Arizona and Alaska Supreme Courts Declined the "Strong Medicine"*

The reviewing courts of previous official English measures declined application of a narrowing construction, often contributing to findings of invalidity.[149] In construing Arizona's original Article XXVIII, both the Ninth Circuit and Arizona Supreme Court declined adoption of a proposed narrowing construction to limit Article XXVIII's scope to official actions.[150] The Ninth Circuit declined to adopt the proposed construction, concluding that to do so would be "completely at odds" with Article XXVIII's plain language.[151] Likewise, the Arizona Supreme Court rejected the narrowing construction, basing its conclusion on three considerations: the measure's plain meaning, the legislative intent, and avoiding ambiguity.[152] The court reasoned that "[b]y its express terms, the Amendment is not limited to official governmental acts . . . [r]ather, it is plainly written in the broadest possible terms."[153] The court also noted that the legislature intended the measure's widespread application as evidenced by the inclusion of several limited exceptions.[154] None of the enumerated exceptions qualified as an official act, thus, proving unnecessary if the court adopted the limiting construction.[155] Finally, the court concluded that the narrow construction injected unnecessary ambiguity

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fraction of the materials within the statute's reach."); Parker v. Levy, 417 U.S. 733, 760 (1974) ("This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied.").“”“”“”

144. *Broadrick*, 413 U.S. at 615.

145. United States v. Williams, 553 U.S. 285, 292 (2008).

146. *Broadrick*, 413 U.S. at 613 (The consequence of applying the overbreadth doctrine is "that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."). *See also* Osborne v. Ohio, 495 U.S. 103 (1990) (Court adopted a narrowing construction of nudity in a child pornography statute in order to avoid finding the statute unconstitutionally overbroad).

147. Virginia v. Am. Booksellers Assn., Inc., 484 U.S. 383, 397 (1988).

148. *Williams*, 553 U.S. at 293.

149. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007); Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998).

150. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 931 (9th Cir. 1995); *Hull*, 957 P.2d at 994.

151. *Arizonans for Official English*, 69 F.3d at 929. For a more detailed discussion of the court's reasoning, see *supra* notes 42-48 and accompanying text.

152. *Hull*, 957 P.2d at 992–94.

153. *Id.* at 993.

154. *Id.*

155. *Id.*

into the statute, reasoning an average reader could not conclude they possessed the freedom to use a language other than English while performing unofficial acts.[156]

The Alaska Supreme Court also found portions of Alaska's official English provision unconstitutional.[157] However, unlike Arizona, Alaska's statute contained a severability clause allowing the court to preserve a large portion of the measure.[158] Although the court concluded that limiting the statute's application to "official acts" contradicted the plain language of section .320's first sentence,[159] the Court found the second sentence included the word "official," thus, " 'plainly contemplating . . . a category of informal, unofficial documents'" outside [the measure's] reach . . . ."[160]

*Article XXX's Reviewing Court Will Likewise Decline the "Medicine"*

Article XXX's limited application to "official actions of the state" serves to make the measure susceptible to a narrowing construction and, thus, protected against a finding of facial invalidity pursuant to the overbreadth doctrine.[161] Unlike Arizona's first Article XXVIII, the plain language of Oklahoma's amendment clearly supports a narrowing construction.[162] By its express terms, the measure *is* limited to official government acts.[163] By requiring that people conduct all "official actions" in English, the amendment clearly contemplates a category of informal, unofficial actions not subject to the requirement, much like Alaska's section .320.[164] The amendment does not include enumerated exceptions suggestive of any contrary legislative intent.[165] Thus, Article XXX contains none of the characteristics that prevented narrow construction of previous official English measures.[166] Instead, the language of Article XXX proves readily susceptible to a narrowing construction, much like that which might have saved Arizona's first Article XXVIII.[167] Since Article XXX is so susceptible, a reviewing court will likely decline to apply the "strong medicine" of the overbreadth doctrine to find the measure facially unconstitutional.[168]

*Vagueness — When Men of Common Intelligence Must Guess at Meaning*

However, the same the narrowing construction that saves the amendment from overbreadth makes Article XXX susceptible to a vagueness challenge.[169] Overbreadth

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156. *Id.* at 994.
157. Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 196, 209 (Alaska 2007).
158. *Id.* at 209.
159. *Id.* at 196.
160. *Id.* For a more detailed discussion of the Alaska statute's application and language, see *supra* notes 86–91 and accompanying text.
161. See generally OKLA. CONST. art. XXX.
162. *Compare supra* notes 150–56 and accompanying text.
163. *Compare supra* note 153 and accompanying text.
164. *Compare supra* notes 159–60 and accompanying text.
165. *Compare supra* note 155 and accompanying text.
166. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 196 (Alaska 2007); Ruiz v. Hull, 957 P.2d 984, 993-94 (Ariz. 1998).
167. *See* Mackin, *supra* note 53, at 350. *See also* Virginia v. Am. Booksellers Assn., Inc., 484 U.S. 397 (1988).
168. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973).
169. *See Hull*, 957 P.2d at 994 n.7. *See also* In re Initiative Petition No. 366, 46 P.3d 123, 128 (Okla. 2002).

and vagueness are "closely related" doctrines.[170] Like overbreadth, a finding of unconstitutional vagueness invalidates the challenged measure on its face.[171] Opponents of a particular measure may challenge it on both overbreadth and vagueness grounds.[172] However, a reviewing court may uphold a law against an overbreadth challenge but find the same measure unconstitutionally vague, or vice versa.[173] To find a law unconstitutionally vague, a court must find that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[174] That is, a law proves impermissibly vague unless ordinary people can understand what conduct is prohibited and what conduct is not.[175] This requirement serves to protect the innocent from entrapment by providing fair warning, as well as to prevent arbitrary and discriminatory enforcement.[176] Despite the doctrine's general applicability to all kinds of measures,[177] the Supreme Court requires stricter standards of permissible vagueness to laws affecting and regulating the exercise of speech rights.[178] The Court reasons, "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[179]

Oklahoma previously found an official English measure void for vagueness.[180] The Oklahoma Supreme Court labeled Petition No. 366 a "classic example" of an unconstitutionally vague statute, reasoning that its prohibitions would deter citizens from exercising their constitutional right to freedom of speech.[181] The court feared the measure would force citizens to avoid lawful conduct in order to avoid entering "the forbidden zone."[182] The court also expressed concern that the statute's prohibitions would only become clear after " 'courts . . . proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage.' "[183] Neither the Arizona[184] nor the Alaska Supreme Court[185] specifically addressed vagueness, finding

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170. CHEMERINSKY, *supra* note 123, at 948-49. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972).

171. CHEMERINSKY, *supra* note 136, at 1247.

172. CHEMERINSKY, *supra* note 123, at 948.

173. *Id.*

174. Connally v. Gen. Construction Co., 269 U.S. 385, 391 (1926).

175. *Id. See also* Kolender v. Lawson, 461 U.S. 352, 357 (1983); Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966); Baggett v. Bullitt, 377 U.S. 360, 366–67 (1964).

176. *See Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

177. *See* City of Chicago v. Morales, 527 U.S. 41 (1999) (application to gang loitering ordinance); *Kolender*, 461 U.S. 352 (loitering ordinance); Papachristou v. Jacksonville, 405 U.S. 156 (1972) (application to vagrancy law).

178. Smith v. California, 361 U.S. 147, 151 (1959).

179. NAACP v. Button, 371 U.S. 415, 433 (1963). The Court also noted that First Amendment rights need "breathing space to survive," thus justifying the narrow specificity. *Id.*

180. In re Initiative Petition No. 366, 46 P.3d 123, 128 (Okla. 2002). For a discussion of Petition No. 366's language, see *supra* notes 10–21 and accompanying text.

181. *In re Initiative Petition No. 366*, 46 P.3d at 128.

182. *Id.*

183. *Id.* (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 516 (1964)).

184. Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998).

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

their respective state measures unconstitutional on other grounds.[186] However, the Arizona Supreme Court noted that adopting the Attorney General's proposed limiting construction (narrowing Article XXVIII's application to official actions) "would undoubtedly add weight to the plaintiffs' vagueness argument."[187]

Apart from official English measures, the Supreme Court invalidated on vagueness grounds other measures restricting the speech of public employees.[188] In *Baggett v. Bullitt*,[189] the Supreme Court invalidated two Washington state statutes requiring public employees to take loyalty oaths as a condition of public employment.[190] The Court struck down the statutes as unconstitutionally vague, reasoning that the oath's indefinite language failed to differentiate prohibited conduct sufficiently.[191] The Court noted that employees "avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."[192]

Likewise, the Supreme Court, pursuant to the vagueness doctrine, struck down portions of a New York scheme aimed at prohibiting public employment of so called "subversive persons."[193] The policy incorporated portions of the New York State Code (requiring termination for treasonous or seditious utterances or actions) into employee contracts.[194] The Court reasoned that the statutes did not clearly define either "treasonous" or "seditious," leaving employees without a clear delineation between permissible and impermissible utterances.[195] Since the contracts incorporated three

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186. *See supra* notes 59–73 and *supra* notes 86–97 and accompanying text.

187. *Hull*, 957 P.2d at 994 n.7.

188. *See* Keyishian v. Bd. of Regents of U. of State of N. Y., 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961) (invalidating an oath requiring public employees to swear that they never aided the Communist Party, reasoning the oath failed to inform what conduct was prohibited).

189. *Baggett*, 377 U.S. 360.

190. The first oath, applicable only to teachers, required the employee to state:

> I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States.

*Id.* at 361–62.The second oath, applicable to all state employees, required employees to affirm that they were not members of any subversive organization, defined as any organization which engages in "or advocates . . . or teaches [activities] intended to overthrow, destroy or alter . . . the constitutional form of the government of the United States, or of the state of Washington." *Id.* at 362. The oath also included a stipulation that the "subversive party" distinction included the Communist Party, thus prohibiting oathtakers from membership in the Communist Party. *Id.*

191. *Id.* at 372.

192. *Id.*

193. *See Keyishian*, 385 U.S. at 597–605.

194. *Id.* at 596–97. The majority of the plaintiffs in the suit were actually terminated for their failure to sign the so-called 'Feinberg Certificate,' which required the employee to attest that they did not claim membership in the Communist Party. *Id.* at 596. The Certificate also required the employee to disclose to the University's president if the employee ever previously counted themselves as a member the Communist Party. *Id.* at 592. However, during the course of the litigation, the State rescinded the Feinberg Certificate. *Id.* at 596. Instead, the State informed employees that several New York statutes constituted part of their contract. *Id.* This included N.Y. Educ. Law § 3021 (McKinney 1947) and N.Y. Civ. Serv. § 105 (McKinney 1958), calling for termination due to treasonable or seditious actions or utterances, which this case considered. Interestingly, both of these measures remain on New York's books. *Id.*''''

195. *Keyishian*, 385 U.S. at 598–99.

separate statutes, as well as administrative enforcement measures, the Court also concluded that the "[v]agueness of wording [was] aggravated by proxlixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."[196] Essentially, the Court questioned whether "treasonous" and "seditious" required identical interpretation in each statute, and if such a reading was required, if the various provisions that an employee must refer to for a definition supported such a reading.[197]

*Men of Common Intelligence Will Guess at the Meaning of Article XXX*

The Oklahoma Legislature's failure to explicitly define "official actions" could result in Article XXX's ultimate invalidation as unconstitutionally vague.[198] Rather than defining official actions, the amendment instead provides that "[t]he Legislature shall have the power to implement, enforce, and determine the proper application of [Article XXX] by appropriate legislation."[199] The official ballot language also addressed this portion of Article XXX's language, explaining, "[t]he term 'official actions' is not defined. The Legislature could pass laws determining the application of the language requirements."[200] However, as of the time of this writing, the legislature failed to act in order to define "official actions," leaving the Oklahoma government subject to the English-language requirement without the necessary corollary definitions.[201] Oklahoma citizens must "guess at its meaning" and will likely "differ to its application," a hallmark of unconstitutionally vague measures.[202] Such ambiguity does not meet the stricter standards applied to laws affecting speech rights.[203] Citizens may refrain from exercising speech rights for fear of entering into the "forbidden zone," a concern that ultimately contributed to the Oklahoma Supreme Court's invalidation of Petition No. 366.[204] Public employees in particular may refrain from exercising their complete speech rights in an effort to avoid the risk of loss of employment and profession, a concern expounded on in *Baggett*.[205] The lack of exceptions in the article only highlights this concern, providing no guidance to public employees about when their 'official actions' end, and 'unofficial actions' begin.[206] As in *Baggett*, "[f]ree speech may not be so inhibited."[207]

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196. *Id.* at 604.

197. *Id.* at 597–603.

198. *See* OKLA. CONST. art. XXX. Oklahoma's amendment stands in contrast to Arizona's current Article XXVIII, which expressly defines "official action." *See supra* notes 74–78 and accompanying text for a more detailed discussion of Arizona's current Article XXVIII.

199. OKLA. CONST. art. XXX.

200. Letter, *supra* note 119. *See also supra* note 119 (setting forth State Question 751 as it appeared on the November 2010 general election ballot).

201. The legislature took no action to define the term prior to the amendment's passage in November 2010. The next legislative session after the election did not convene until the first Monday in February 2011. At a minimum, this resulted in three months of the amendment being part of the Oklahoma Constitution without a legislative definition of "official action."

202. *See* Connally v. Gen. Construction Co., 269 U.S. 385, 391 (1926).

203. NAACP v. Button, 371 U.S. 415, 433 (1963); Smith v. California, 361 U.S. 147, 151 (1959).

204. *See* In re Initiative Petition No. 366, 46 P.3d 123, 128 (Okla. 2002).

205. Baggett v. Bullitt, 377 U.S. 360, 272 (1964). *See also* Keyishian v. Bd. of Regents of U. of State of N. Y., 385 U.S. 589, 597-603 (1967).

206. Article XXX contains only one exception, compliance with federal law. *See* OKLA. CONST. art. XXX. Outside of this, the amendment provides no guidance as to what actions are excepted from its reach. *Id.* A

The methods of defining "official actions" likewise present problems pursuant to the vagueness doctrine.[208] Until the Legislature defines "official actions," judicial review of alleged violations on a case-by-case basis provides the only means to separate prohibited from not prohibited conduct, as well as define the scope of the amendment's application.[209] Both the United States and Oklahoma Supreme Court previously expressed displeasure with such case-by-case adjudication of constitutional questions.[210] However, the Legislature's ultimate definition may likewise pose problems, only working to aggravate the vagueness of wording rather than providing clarity or scope.[211] The Legislature will presumably define "official actions" through resolutions creating statutory law.[212] Although arguably not to the same extent, the necessity of cross-referencing statutory law with Article XXX, as well as any future administrative regulations, serves only to aggravate the vagueness issue in a manner similar to New York's policy against hiring "subversive persons."[213]

Thus, although Article XXX's limitation to "official actions" likely protects the amendment from unconstitutional overbreadth, the very same limitation opens the amendment up to challenge pursuant to the vagueness doctrine.[214] Additionally, the legislative scheme provided for in Article XXX and presented to the citizens on the ballot, rather than remedying the vagueness, likely serves only to aggravate the ambiguity.[215]

### MAKING THE CHOICE - DOES ARTICLE XXX CONSTITUTE A CONTENT-BASED OR CONTENT-NEUTRAL SPEECH REGULATION?

Despite Article XXX's narrow construction, a reviewing court may still classify the amendment as a blanket bar of speech due to the unavailability of alternative means of communication.[216] Additionally, the court may find the amendment unjustified without reference to the speech's content, which, combined with the lack of alternatives

hypothetical fact scenario helps to illustrate potential problems resulting from this. A primarily Vietnamese speaking couple goes to the Tulsa County Courthouse in order to apply for a marriage license. It seems clear that the marriage license itself must be in English as an official document of the State of Oklahoma. However, to what extent must the court clerk's office employee's conversation with the couple be in English? Presumably, directions as to how to fill out the license must be in English. Can the employee make idle small talk with the couple in Vietnamese if the employee has proficiency in the language, or does the entire transaction qualify as an official action?

207. 377 U.S. at 372.

208. *See Keyishian*, 385 U.S. at 604; *In re Initiative Petition No. 366*, 46 P.3d at 128.

209. *See In re Initiative Petition No. 366*, 46 P.3d at 128.

210. *See* Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964); *In re Initiative Petition No. 366*, 46 P.3d at 128.

211. *See Keyishian*, 385 U.S. at 604.

212. *See* Letter, *supra* note 119. It is unlikely that the Legislature would attempt to amend the Oklahoma Constitution each time it wishes to revise its definition of "official action" due to the extensive procedure in order to do so. *See* OKLA. CONST. art. XXIV.

213. *See Keyishian*, 385 U.S. at 597-604. *See also supra* notes 193–97 and accompanying text.

214. *See* Ruiz v. Hull, 957 P.2d 984, 994 n.7 (Ariz. 1998). *See also In re Initiative Petition No. 366*, 46 P.3d at 128; *supra* notes 198-207 and accompanying text.

215. *See Keyishian*, 385 U.S. at 604; *Aptheker*, 378 U.S. at 515; *In re Initiative Petition No. 366*, 46 P.3d at 128. *See also supra* notes 208–13 and accompanying text.

216. *See infra* notes 250–55 and accompanying text.

for communication, must prompt a court to classify Article XXX as a content-based restriction.[217]

*Content-Based Restrictions Regulate and Judge Speech*

Although the original intent of the Constitution's framers remains a topic of debate, scholars postulate several theories for continued protection of free speech in American society.[218] Possible justifications for speech protection include discovering truth through a "marketplace of ideas,"[219] advancing autonomy by protecting self-expression,[220] and encouraging tolerance.[221] In light of these considerations, the Supreme Court declared that at the core of the First Amendment lies the idea that the government cannot regulate speech based on its content.[222] That is, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[223] Thus, in order to be content-neutral, the regulation in question must be both viewpoint and subject matter neutral.[224]

The Supreme Court declared content-based measures presumptively invalid.[225] In order to pass constitutional muster, content-based speech restrictions must meet strict scrutiny.[226] Pursuant to a strict scrutiny analysis, the government bears the burden of proving the law in question is narrowly tailored to serve a *compelling* government interest.[227] In contrast, the Court subjects content-neutral speech restrictions to an intermediate level of scrutiny.[228] A regulation passes intermediate scrutiny provided the regulation is justified without reference to the content of the regulated speech, is narrowly tailored to serve a *significant* governmental interest, and leaves open ample

217. *See infra* notes 256–62 and accompanying text.

218. *See* CHEMERINSKY, *supra* note 123, at 925-30. Chemerinsky notes that the framers definitely intended the First Amendment to prohibit licensing restraints on publication and punishment for libel which frequently occurred in England. *Id.* at 922–24. However, beyond that, the historical record remains inconclusive, particularly in light of several of the framers' participation in adopting the Alien and Sedition Acts of 1798. *Id.*

219. *Id.* at 926-27. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Homes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

220. CHEMERINSKY, *supra* note 123, at 929-30. *See also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."); Procunier v. Martinez, 416 U.S. 396, 427–28 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.") (footnote omitted).

221. *Id.* at 930.

222. *See* CHEMERINSKY, *supra* note 136, at 1214.

223. Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

224. *See* CHEMERINSKY, *supra* note 136, at 1214.

225. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). *See also* CHEMERINSKY, *supra* note 136, at 1214.

226. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

227. *Mosley*, 408 U.S. at 101.

228. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

alternative channels for communication of the information.[229] The Court traditionally views the government's purpose in adopting the regulation as the controlling consideration in classifying a regulation as content neutral or content based.[230] In other words, "the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.' "[231]

*Arizona and Alaska Regulated Speech Based on Content*

Both the Alaska and Arizona Supreme Courts concluded that their state's respective official English measures constituted a content-based, rather than content-neutral, speech restriction.[232] In regard to Arizona's first Article XXVIII, proponents of the amendment argued the measure only regulated modes of communication, as opposed to pure speech rights.[233] Thus, proponents contended, the Arizona Supreme Court must properly classify the amendment as a content-neutral regulation and apply intermediate scrutiny.[234] The court rejected this interpretation, however, reasoning that Article XXVIII effectively barred communication between the Arizona government and its citizens with limited English speaking abilities, without providing non-English speaking persons an alternative means through which to communicate with the government.[235] This blanket bar failed to qualify as a restriction on the mode of communication because content-neutral restrictions, "by definition, assume and require the availability of alternative means of communication."[236]

In another effort to claim that Article XXVIII did not reach pure speech, proponents analogized the decision to speak another language to expressive conduct.[237] Courts traditionally afford the government wider latitude in regulating expressive conduct,[238] requiring the application of relaxed scrutiny.[239] In language adopted by the Arizona Supreme Court, the Ninth Circuit rejected this argument, reasoning, "[s]peech in any language is still speech, and the decision to speak in another language is a decision

229. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Although the regulation must be narrowly tailored to serve a significant governmental interest, the regulation need not be the least restrictive means pursuant to intermediate scrutiny. *See also* Hill v. Colorado, 530 U.S. 703, 725-26 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

230. *Ward*, 491 U.S. at 791.

231. *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791).

232. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 205-06 (Alaska 2007); Ruiz v. Hull, 957 P.2d 984, 998-1000 (Ariz. 1998).

233. *Hull*, 957 P.2d at 998.

234. *Id.*

235. *Id.* at 997–98.

236. *Id.* at 998.

237. *Id.* at 999. Although the Arizona Supreme Court took up the expressive conduct issue, the Court dismissed the claim with minimal discussion. *Id.* Instead, the court adopted the Ninth's Circuit reasoning in also rejecting the claim. *Id.* For the Ninth Circuit's extended discussion, see Yniguez v. Arizonans for Official English, 69 F.3d 920, 934-36 (9th Cir. 1995).

238. *Arizonans for Official English*, 69 F.3d at 934 (citing Texas v. Johnson, 491 U.S. 397 (1989) (burning American flag for expressive reasons); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (wearing arm band for expressive reasons); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card for expressive reasons).

239. *Arizonans for Official English*, 69 F.3d at 934.

involving speech alone."[240] The Ninth Circuit also noted "[w]hen the effect of banning a form of speech is to prevent receipt of the message by the intended audience, it cannot seriously be argued that the ban is innocuous because it applies only to the mode of speech."[241] Thus, the court found considering only the speech's form "wholly mechanical and artificial" and "ill serv[ing] the purpose of the Bill of Rights and denigrat[ing] the judicial function."[242] Because the Arizona Supreme Court employed this reasoning to reject arguments for decreased scrutiny, it applied strict scrutiny to conclude Article XXVIII violated the First Amendment.[243]

The Alaska Supreme Court likewise classified the Alaska provision as content-based and applied strict scrutiny, finding the measure unconstitutional.[244] It agreed with and adopted the language of the Ninth Circuit and Arizona Supreme Court in rejecting the measure as a regulation of expressive conduct,[245] as well as the classifying the provision as a content-based restriction because of the lack of alternative means of communication.[246] In so holding, the court emphasized the restrictive nature of complete speech bans, expressing concern that "some voices will be silenced, some ideas will remain unspoken, and some ideas will remain unchallenged."[247]

*Article XXX Likewise Regulates Speech Based on Content*

A reviewing court in a constitutional challenge will likely classify Oklahoma's Article XXX as a content-based restriction and apply strict scrutiny.[248] Article XXX's narrow construction does not affect a reviewing court's consideration of whether the amendment regulates speech itself.[249] Thus, a court will likely adopt the reasoning of the Ninth Circuit and its predecessors and decline to classify Article XXX as a regulation of expressive conduct.[250]

The narrowing construction may affect a court's analysis of alternative means of communication, though.[251] Despite Article XXX's narrow construction, the amendment fails to provide an alternative means of *official* access to the government for non-English

240. *Id.* at 936. *See also Hull*, 957 P.2d at 999.

241. *Arizonans for Official English*, 69 F.3d at 936 n.21.

242. *Id.*

243. *Hull*, 957 P.2d at 1000. The court also noted that Article XXVIII failed even intermediate scrutiny for its broad infringement of speech rights. *Id.*

244. Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 206 (Alaska 2007).

245. *Id.* at 205 (quoting *Arizonans for Official English*, 69 F.3d at 936 ("Speech in any language is still speech, and the decision to speak in another language is a decision involving speech alone.")). For an extended discussion of the Ninth Circuit's reasoning, also adopted by the Arizona Supreme Court, see *supra* notes 237–43 and accompanying text.

246. *Alaskans for a Common Language, Inc.*, 170 P.3d at 206. For a complete articulation of the Arizona Supreme Court's reasoning on which the Alaska Supreme Court relied, see *supra* notes 232–36 and accompanying text.

247. *Alaskans for a Common Language, Inc.*, 170 P.3d at 206.

248. *See generally* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

249. The Ninth Circuit's assertion that "[s]peech in any language is still speech, and the decision to speak in another language is a decision involving speech alone" proves applicable regardless of the amendment's scope. *Arizonans for Official English*, 69 F.3d at 936.

250. *See supra* notes 237–43 and accompanying text.

251. *See supra* notes 232–36 and accompanying text for a discussion of the importance of alternative means of communication.

speakers.[252] Thus, like Arizona's first Article XXVIII, Article XXX effectively bars non-English speakers from communication, albeit only official, with the government.[253] However, Article XXX presumably leaves available *unofficial* means of communication with the government.[254] A reviewing court must determine if unofficial means of communication provide sufficient options for non-English speakers to constitute the alternative means of communication necessary for classification as a content-neutral regulation.[255]

Regardless of whether unofficial communication constitutes a sufficient alternative means of communication, a reviewing court will likely classify Article XXX as a content-based restriction because the amendment cannot be justified without reference to the content of the restricted speech.[256] Official English measures regulate pure speech rather than modes of communication, thus implicitly finding the chosen language a part of the speech's content.[257] Representative Randy Terrill, one of the primary House authors of HJR 1042, stated three purposes for Article XXX: preventing people from demanding taxpayer-funded services in a language other than English, eliminating the costs of bilingualism, and avoiding the divisive effects of bilingualism.[258] These purposes cannot be justified without reference to the content of the regulated speech, particularly the desire to avoid the divisive effects of bilingualism.[259] By concluding that bilingualism creates divisiveness, the State implicitly makes a judgment of agreement or disagreement with the message that the speech conveys.[260] Likewise, the State's purported justification of preventing people from demanding taxpayer-funded services has *everything* to do with content.[261] Excluding the use of other languages during the performance of taxpayer-funded services, presumably official actions, raises the concern that "some voices will be silenced, some ideas will remain unspoken, and some ideas will remain unchallenged."[262]

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252. *See supra* notes 234–36 and accompanying text.

253. OKLA. CONST. art. XXX. *See also supra* note 235 and accompanying text.

254. *See* OKLA. CONST. art. XXX.

255. *See supra* notes 229, 234–36, as well as the accompanying text.

256. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-93 (1989).

257. *See supra* notes 232–44. *See also* Yniguez v. Arizonans for Official English, 69 F.3d 920, 936 n.21 (9th Cir. 1995).

258. Interview by Oklahoma House of Representatives Press with Rep. Randy Terrill, Okla. H.R. (Mar. 11, 2009). The Supreme Court expressed willingness to consider legislative history in order to determine the governmental interest meant to be promoted by a statute. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991). Thus, as one of the primary House authors, Rep. Terrill's insight will likely prove probative to a reviewing court. *See id.* Additionally, the three primary rationales that he cites in support of the amendment are those frequently cited by national organizations in official English movements across the country. *See Why Is Official English Necessary?*, U.S. ENGLISH, http://www.us-english.org/view/10 (last visited Dec. 18, 2010).'

259. *See Ward*, 491 U.S. at 791-93.

260. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (quoting *Ward*, 491 U.S. at 791).

261. *Compare Ward*, 491 U.S. at 792 (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)). The Court found the sound-amplification guidelines in question applied to all performers at the bandshell venue, without regard to the type of music played, and were justified by the City's desire to avoid undue intrusion into the area's sedate character. *Id.* at 803. Thus, the Court found that the sound-amplification guidelines in questions "ha[d] nothing to do with content." *Id.* at 792. Conversely, Article XXX does not apply without regard to the type of language used. Instead, it specifically exempts English as well as Native American languages. Analogizing Article XXX to *Ward*, it is as if the sound-amplification guidelines applied to all music except jazz. Because of this, Article XXX clearly has *something* to do with content.

262. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 206 (Alaska 2007).

Thus, Article XXX reflects a legislative judgment of disagreement with the affected speech — official communication in a language other than English.[263] Although Article XXX seemingly allows unofficial means of communication with the government, such communication may provide an insufficient alternative in light of the important constitutional rights implicated.[264] Because of these considerations, a reviewing court will likely classify Article XXX as a content-based restriction.[265]

FACING THE CONSEQUENCES — APPLYING STRICT AND INTERMEDIATE SCRUTINY TO ARTICLE XXX TO DETERMINE CONSTITUTIONALITY

Assuming that Article XXX qualifies as a content-based restriction, a reviewing court must apply strict scrutiny in a constitutional challenge.[266] Due to the availability of less restrictive means, Article XXX will likely fail a strict scrutiny analysis.[267] However, should a reviewing court decline to classify Article XXX as a content-based restriction, and, instead, define the amendment as content-neutral, the court must apply intermediate scrutiny, a relaxed standard of review pursuant to which Article XXX will likely pass constitutional muster.[268]

Strict Scrutiny Requires a Compelling Interest and Narrow Tailoring

Strict scrutiny requires that the challenged measure be narrowly tailored to achieve a compelling government interest.[269] Narrow tailoring requires that the means chosen constitute the least restrictive means of accomplishing the State's purposes.[270]

*Alaska and Arizona Failed to Narrowly Tailor*

Alaska's official English provision did not represent the least restrictive means of accomplishing the State's purposes, leading the Alaska Supreme Court to ultimately declare portions of the provision unconstitutional.[271] First considering the provision's purported goal of "promoting, preserving, and strengthening the use of English,"[272] the court noted the availability of numerous alternatives through which to accomplish the objective.[273] Thus, the Alaska provision did not constitute the least restrictive means of promoting and strengthening the English language.[274] The court next considered the State's fiscal interest in an efficient government and likewise identified reasonable

263. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791). *See also supra* notes 256–62.

264. *See Alaskans for a Common Language, Inc.*, 170 P.3d at 205-06. *See also supra* notes 246–51.

265. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642.

266. *Id.*

267. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000). *See also infra* notes 294–308.

268. *Turner Broad. Sys., Inc.*, 512 U.S. at 642. *See also infra* notes 323-34.

269. Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 101 (1972).

270. *Playboy Entm't Group, Inc.*, 529 U.S. at 813. *See also* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 208 (Alaska 2007).

271. *See Alaskans for a Common Language, Inc.*, 170 P.3d at 207-09.

272. *Id.* at 208. *See also* ALASKA STAT. § 44.13.300.

273. *Alaskans for a Common Language, Inc.*, 170 P.3d at 208. The court suggested creating and funding programs to teach English to non-English speakers. *Id.*

274. *Id.*

alternatives, again preventing the Alaska provision from constituting the least restrictive means.[275] By using more restrictive means than necessary, the Alaska provision attempted to "coerce its lawful objectives by methods that conflict with the core protections of the United States... Constitution,"[276] rendering the provision unconstitutional.[277]

The Arizona Supreme Court likewise concluded that the State failed to narrowly tailor the first Article XXVIII to its purposes.[278] However, unlike the Alaska Supreme Court, the Arizona Supreme Court declined to find a compelling state interest.[279] The State's failure to articulate a compelling interest mattered little in the end because the court noted that even if they found a compelling interest, Article XXVIII failed the narrow specificity requirement.[280] Although the court acknowledged the State's ability to regulate speech in some circumstances,[281] Article XXVIII constituted a "general prohibition" of speech rather than a regulation.[282] Reasoning that the amendment's goal of promoting English did not require such a blanket restriction, the court concluded that Article XXVIII could not constitute the least restrictive means due to its failure to narrowly regulate speech and, thus, failed strict scrutiny analysis.[283] The court expressed particular concern that the amendment deprived elected officials and public employees of the ability to communicate with members of the public with limited English speaking abilities.[284] Article XXVIII "went too far," beyond permissible language policies, and "effectively [cut] off governmental communication with thousands of limited-English-proficient and non-English speaking persons. . . ."[285] Article XXVIII's broad application particularly troubled the court for its failure to make some consideration for public employees and officials with the ability and desire to communicate in a language other than English.[286] This failure infringed on a "core value"[287] of the First Amendment, the free discussion of political affairs, and it contributed to 'Article XXVIII's first ultimate invalidation as unconstitutional.[288]

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275. *Id.* The court suggested the state legislature promulgate legislation clearly relieving the Alaska government of responsibility for providing services in languages other than English.

276. *Id.* at 209.

277. *Id.*

278. Ruiz v. Hull, 957 P.2d 984, 1001 (Ariz. 1998).

279. *Id.*

280. *Id.*

281. *Id.* The court referenced Kovacs v. Cooper, 336 U.S. 77 (1949) (permitting regulation of time, place, and manner restrictions under the First Amendment). *Id.*

282. *Hull*, 957 P.2d at 1001.

283. *Id.*

284. *Id.* at 997.

285. *Id.*

286. *Id.* at 997–98. Specifically, the court noted that in some instances, communicating in the primary language of a person proficient in English as a second language proved more efficient. *Id.* at 998. However, the amendment made this more efficient method illegal, belying any possible state interest in efficient government. *Id.*

287. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

288. *Hull*, 957 P.2d at 998.

*Article XXX Is Not Narrowly Tailored, Despite a Compelling Interest*

Proponents of Oklahoma's Article XXX identify purposes similar to those of Alaska and Arizona as the foundation of the amendment.[289] Article XXX supporters first allege that the amendment serves to prevent Oklahoma residents from requesting taxpayer-funded services in a language other than English.[290] As additional protection against multilingual government services, Article XXX specifically provides that "[n]o person shall have a cause of action against an agency or political subdivision of this state for failure to provide any official government actions in any language other than English."[291] Supporters allege that prohibiting multilingualism in official government services and actions promotes fiscal, as well as administrative, efficiency.[292] Rep. Terrill, one of the amendment's primary House authors, cites the case of an Iranian couple who requested a driver's license exam in Farsi and subsequently filed suit against Oklahoma upon the request's denial to support his claim that multilingualism burdens the State.[293]

However, a reviewing court will likely conclude less restrictive means equally promote fiscal and administrative efficiency.[294] As the Alaska Supreme Court suggested, legislation clearly relieving the state of responsibility for providing "official" services in languages other than English promotes fiscal efficiency, but only narrowly infringes speech.[295] Rep. Terrill's example, meant to illustrate the burdens of multilingualism, also provides an apt example of the propriety of legislating the use of English in government services, rather than constitutionalizing its use.[296] Presumably, Oklahoma may constitutionally limit the administration of driver's license exams to the English language.[297] Although some authority exists in other jurisdictions suggesting such a policy violates the Civil Rights Act of 1964,[298] neither the Tenth Circuit nor the United

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289. *See supra* notes 272–75 and accompanying text. *See also* OKLA. CONST. art. XXX.

290. Interview, *supra* note 258.

291. OKLA. CONST. art. XXX.

292. Interview, *supra* note 258.

293. *Id.* Although just one example, Rep. Terrill alleges that this "demand" to accommodate other languages has "really gotten out of hand." *Id.* Rep. Terrill alleges that since institution of the suit by the Iranian couple, several other people have requested driver's licenses in other languages. *Id.*

294. *See supra* notes 272–77 and accompanying text. *See also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

295. *See supra* note 275 and accompanying text.

296. *See* Interview, *supra* note 258.

297. *See* OKLA. CONST. art. 5, § 36 ("The authority of the Legislature shall extend to all rightful subjects of legislation . . . ."). *See also* OKLA. STAT. ANN. tit. 47, § 6-101 (West 2009).

298. In the last decade, this issue perplexed the Alabama state court system as well as the Eleventh Circuit. In 1990, Alabama ratified an amendment to the state constitution making English the official language of the state and providing that state officials shall "take all steps necessary to insure that the role of English as the common language . . . is preserved and enhanced." ALA. CONST. art. I §, 36.01. Following the amendment's passage, the Alabama Department of Public Safety promulgated an official policy of administering its driver's exam only in the English language. Martha Sandoval filed suit on behalf of the citizens of Alabama with limited English proficiency, alleging the policy was unlawful and unconstitutional. Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1244 (M.D. Ala. 1998). Both the Middle District of Alabama and Eleventh Circuit concluded that the policy constituted a disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964. *See* Sandoval v. Hagan, 197 F.3d 484, 511 (11th Cir. 1999); Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1315 (M.D. Ala. 1998). The United States Supreme Court reversed on the grounds that Title VI did not provide for private causes of action, without reaching the propriety of the department's policy. Alexander v. Sandoval, 532 U.S. 275, 293 (2001). However, after the Eleventh Circuit's ruling, the Department of Public

States Supreme Court reached this issue, leaving Oklahoma free to promulgate an official English policy in licensing exams and other government services.[299] Because legislation relieving the government of responsibility to provide official services in languages other than English also serves the State's interest in government efficiency, Article XXX does not constitute the least restrictive means of promoting this interest and cannot withstand strict scrutiny.[300]

Proponents of Article XXX also seek to justify the amendment by alleging that the measure serves a compelling interest in preventing the divisive effects of bilingualism.[301] Although phrased differently, this interest essentially equates to the interests of the citizens of Alaska in promoting English as a common language.[302] As in Alaska, less restrictive means equally promote this purpose.[303] The Oklahoma Legislature possesses the power of appropriation[304] and, thus, the ability to allocate funds to programs promoting the English language.[305] For example, the Legislature could fund an adult-education program designed to teach English to adults with limited English proficiency or allocate more resources to public schools to promote the English language among children.[306] However, Article XXX fails to do so.[307] Instead, the amendment generally prohibits official communications between the government and persons with limited English proficiency.[308] Thus, although narrower in application than

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Safety changed the policy and began to administer driver's exams in languages other than English. As a result of the policy change, several members of a pro-official English group filed suit, alleging that the new policy violated Alabama's official English amendment. Defendants, various Alabama officials, alleged that because the Supreme Court reversed the Eleventh Circuit's decision on procedural grounds, the Circuit's decision that the policy violated Title VI remained binding precedent. The Alabama Supreme Court found that the plaintiffs failed to adequately allege a genuine issue of material fact concerning the new multilingualism policy's impact on the preservation of English in the State, and, thus, the plaintiffs' claim could not survive summary judgment. Cole v. Riley, 989 So. 2d 1001, 1005 (Ala. 2007). In so holding, the court specifically declined to address the precedential value of the Eleventh Circuit's decision in *Sandoval v. Hagan*, 197 F.3d 484. *Id.* Thus, the propriety of driver's exams given only in English remains at issue, leaving Oklahoma free to implement such a policy.

299. *See Alexander*, 532 U.S. at 279.

300. *See Playboy Entm't Group, Inc.*, 529 U.S. at 813. *See also* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 208 (Alaska 2007).

301. Interview, *supra* note 258. Rep. Terrill cites Quebec, the Canadian province, as an example of the "inherently divisive" effects of multilingualism. *Id.* Rep. Terrill alleges that the citizens of Quebec, as a linguistic minority, are actively seeking to secede from Canada, and that an "increasing number" of Americans are becoming concerned a similar situation may arise in this country. *Id.*

302. The text of Article XXX supports such a reading, calling English the "common and unifying language" of the State of Oklahoma. OKLA. CONST. art. XXX. *See also* ALASKA STAT. § 44.12.300; *Alaskans for a Common Language, Inc.*, 170 P.3d at 208.

303. *See Alaskans for a Common Language, Inc.*, 170 P.3d at 208.

304. *See* OKLA. CONST. art. 5, § 36.

305. *See* OKLA. CONST. art. 5, § 55.

306. *Id.* The authority to allocate funds to public schools stems from OKLA. CONST. art. 13, § 1(a). In *Meyer v. Nebraska*, the Supreme Court acknowledged that the states possessed a legitimate interest in promoting American ideals and preparing students for civic duties. 262 U.S. 390 (1923). Although this interest did not justify the Nebraska statute at issue (a complete ban on teaching any language other than English to children not yet in the eighth grade), the Court's reasoning justifies programs that promote civic development without doing so by prohibited means and at the cost of infringement of other, more fundamental, rights. *Id.*

307. In fact, the amendment fails to provide any means through which to accomplish its objectives. OKLA. CONST. art. XXX. Instead, Article XXX provides that the Oklahoma Legislature will determine the amendment's "proper application" later. *See id.*

308. *Id.* (providing "all official actions of the State shall be conducted in the English language"). *See also* Ruiz v. Hull, 957 P.2d 984, 1001 (Ariz. 1998).

Arizona's first Article XXVIII,[309] Article XXX may implicate some of the same concerns that prompted the Arizona Supreme Court to invalidate its state's amendment.[310] In the name of unity, Article XXX effectively cuts off limited-English proficient and non-English speaking persons in Oklahoma from *official* governmental communication.[311] A reviewing court must decide if this prohibition on official government communication also "goes too far" and poses a significant threat to a core value of the First Amendment — protection of political speech.[312]

Thus, despite the narrowing interpretation, a reviewing court may still conclude that Article XXX constitutes a blanket restriction of speech[313] and an attempt to coerce its objectives by means in conflict with the First Amendment.[314] If so, a reviewing court will not find Article XXX sufficiently narrowly tailored to pass constitutional strict scrutiny.[315]

*Intermediate Scrutiny Permits Substantial Interests Achieved Less Effectively Absent the Regulation*

Despite the aforementioned arguments in support of classifying Article XXX as a content-based restriction, a reviewing court might conclude that Article XXX proves justified without reference to the speech's content and classify the regulation as content-neutral.[316] Should the court classify Article XXX as a content-neutral restriction, the reviewing court must apply intermediate scrutiny in any constitutional challenge to the amendment.[317] Under this relaxed level of scrutiny, the amendment must prove narrowly tailored to serve a *significant* governmental interest in order to pass constitutional muster.[318] Pursuant to intermediate scrutiny, the challenged measure need not represent the least restrictive means of achieving the government's purposes.[319] In other words, a reviewing court need not invalidate a content-neutral speech regulation simply because "

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309. *See supra* notes 42–48 and notes 63–65 for a discussion of the broad interpretation of Arizona's first Article XXVIII. *See also supra* notes 162–68 for a discussion of a discussion of a narrow construction's applicability to Article XXX.

310. *See supra* notes 282–88 and accompanying text.

311. *See Hull*, 957 P.2d at 998; OKLA. CONST. art. XXX.

312. *Hull*, 957 P.2d at 998. *See also Mills.*, 384 U.S. at 218.

313. *See Hull*, 957 P.2d at 1001.

314. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 209 (Alaska 2007). Because the Alaska Supreme Court found the Alaska provision was an unconstitutional content-based restriction, the court declined to consider whether the provision also constituted a prior restraint. *Id.* at 206 n.127. Due to the lack of persuasive precedent regarding the issue, a court reviewing Article XXX may likewise follow suit, assuming the court also classified the amendment as an unconstitutional content-based regulation. *See supra* note 130.

315. *See generally* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); *Hull*, 957 P.2d at 997-98, 1001.

316. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

317. *Id.*

318. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). In order to pass intermediate scrutiny, the measure must also be justified without reference to the content of the regulated speech and leave open alternative methods of communication. However, assuming the reviewing court classifies Article XXX as a content-neutral regulation, the court must have already found these elements. For a more detailed discussion of why a finding of content-neutrality for Article XXX specifically requires that a reviewing court previously found these elements, refer to *supra* notes 235–36 and 251–62 as well as accompanying text.

319. *See* Hill v. Colorado, 530 U.S. 703, 725-26 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

'there is some imaginable alternative that might be less burdensome on speech.' "[320] However, this does not permit a state to regulate substantially more speech than necessary to achieve its interests.[321] In short, a speech restriction passes intermediate scrutiny if "the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[322]

*Absent Article XXX, Substantial Interests May Be Achieved Less Effectively*

Article XXX would likely pass a constitutional review pursuant to intermediate scrutiny. Even if a reviewing court did not find the State's purported justifications *compelling*, the court would likely find *significant* interests in fiscal efficiency and promoting English as a common language.[323] Due to Article XXX's narrow construction, the court may likewise find the amendment sufficiently narrowly tailored to achieve those ends.[324] Article XXX regulates only official actions, perhaps reaching only those actions necessary to avoid providing taxpayer-funded services in languages other than English, a purpose of the amendment.[325] Thus, the amendment's narrow scope arguably prevents Article XXX from regulating substantially more speech than necessary to achieve its purpose.[326]

The amendment also purports to promote English as a common language, a purpose relatively unaffected by the narrow construction.[327] Alaska and Arizona found their respective official English measures not narrowly tailored to this purpose due to the availability of other, less restrictive means.[328] However, pursuant to intermediate scrutiny, the availability of less restrictive means does not require a finding of unconstitutionality.[329] Thus, the imaginable alternatives available to promote English as Oklahoma's common language do not automatically invalidate Article XXX.[330] In fact, the alternative ends might provide support to a court ultimately finding the amendment constitutional.[331] Due to the diversity of languages spoken in Oklahoma,[332] the court

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320. *Ward*, 491 U.S. at 797 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

321. *Id.* at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech restrictive alternative.").

322. *Id.* at 799 (quoting *Albertini*, 472 U.S. at 689).

323. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 206-07 (Alaska 2007) (finding a compelling state interest in strengthening the English language and increasing efficiency in government). *See also* Ruiz v. Hull, 957 P.2d 984, 990 (Ariz. 1998) (recognizing the importance of establishing a common language, although not finding it to be a compelling state interest).

324. *See supra* notes 162–68 for discussion of the narrowing interpretation of Oklahoma's Article XXX. *See also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

325. OKLA. CONST. art. XXX. *See also* Interview, *supra* note 258.

326. *See Ward*, 491 U.S. at 799–800.

327. Interview, *supra* note 258.

328. *See generally Alaskans for a Common Language, Inc.*, 170 P.3d at 207-09; *Hull*, 957 P.2d at 996-1002.

329. Hill v. Colorado, 530 U.S. 703, 725-26 (2000). *See also Ward*, 491 U.S. at 798.

330. *Ward*, 491 U.S. at 798. For a discussion of possible alternative means to accomplish the State's purposes, see *supra* notes 294–307 and accompanying text.

331. *See generally Ward*, 491 U.S. at 799-801; United States v. Albertini, 472 U.S. 675, 688-89 (1985).

332. *See Oklahoma Data Profile, Selected Social Characteristics*, *supra* note 99. For a more detailed discussion of the Oklahoma's demographics, please refer to *supra* notes 100-114 and accompanying text, as well as the appendices to this Comment.

could find that the Legislature concluded that alternative methods, like individual legislation or appropriation, would achieve their purposes less effectively than Article XXX due to their reactive, rather than proactive, nature.[333] The Supreme Court consistently declines to substitute judicial judgment of proper methods for that of the legislature in content-neutral restrictions, and a reviewing court would likely follow suit.[334]

Thus, a reviewing court could conclude that Article XXX narrowly promotes a substantial government interest that would be achieved less effectively absent the amendment.[335] If so, the reviewing court must find Article XXX constitutional as a content-neutral restriction.[336]

## CONCLUSION

In November 2010, Oklahoma voters made the decision to adopt State Question 751 and amend the Oklahoma Constitution, a decision presumably informed by the amendment's test in the crucible of state politics during the election cycle.[337] However, Article XXX will likely face a more restrained and calculated test through the judicial system.[338] Article XXX's narrow application to "official actions" resolves many of the problems of previous official English measures. Specifically, the limitation will likely save Article XXX from invalidation pursuant to the overbreadth doctrine. However, that same narrow construction lends strength to a vagueness challenge. Article XXX's narrow scope may also influence a court's decision to classify the amendment as a content-based or content-neutral restriction, a decision that will likely prove determinative of Article XXX's constitutionality. Only time and judicial review will tell if Oklahoma truly can "make it official."[339]

*-Mariann M. Atkins*

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333. *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689).

334. *See generally Ward*, 491 U.S. at 800; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984).

335. *See Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689).

336. *Id.*

337. *See* Letter, *supra* note119.

338. *See generally* In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002). *See also* Gentges v. Henry, CV-2010-1324 (Tulsa Cnty. Dist. Ct. Nov. 16, 2010).

339. *See generally* OKLA. CONST. art. XXX.