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The Honorable Robert B. Usdane
President of the Senate
State Capitol - Senate Wing
Phoenix, Arizona 85007

Re: I89-009 (R88-136)

Dear Senator Usdane:

We have been asked a number of general and specific questions concerning the constitutionality and effect of Proposition 106 on the delivery of governmental services and on some governmental activities. We conclude that Proposition 106, which adds to the Arizona Constitution article XXVIII, entitled English as the Official Language, is constitutional and will not greatly change the way government operates presently.

It is our duty to give Proposition 106 a construction that is compatible with the United States Constitution and federal laws. See Ariz. Const. art. II, § 3 ("The Constitution of the United States is the supreme law of the land."); State v. Ramos, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); Schechter v. Killingsworth, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963). We must also interpret this amendment to the Constitution as a whole and in harmony with the other portions of the Arizona Constitution. State ex rel. Nelson v. Jordan, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); State ex rel. Jones v. Lockhart, 76 Ariz. 390, 398, 265 P.2d 447, 453 (1953). Guided by these principles, we conclude that the language of Proposition 106 does not prohibit the use of a language other than English to facilitate the delivery of governmental services. Additionally, Proposition 106 specifies in subsection 3(2)(b) that the "State may act in a language other than English . . . to comply with other federal laws."

Consequently, we do not conclude that Proposition 106 requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be inconsistent with applicable federal law and the Arizona and United States Constitutions.

Turning now to the language of the Proposition itself, it suggests that the purpose of the amendment is to require that official acts of government be expressed in English as the state's official language. It does not prohibit the use of other languages when they are reasonably required in the day-to-day operation of government.

Proposition 106 contains four sections. Section 1 states that "The English language is the official language of the State of Arizona," and goes on to provide that "As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." (Emphasis added.) The remainder of section 1 makes clear that this status of English as the official language applies to all branches and levels of government, to all official documents, and to all officials and employees.

Section 2 provides that "This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." Neither section 1 nor section 2 contain any language prohibiting the use of any language other than English.

Section 3 does, however, contain terms which prohibit governmental acts in a language other than English. After providing for certain exceptions, subsection 3(a) states: "This State and all political subdivisions of this State shall act in English and in no other language." (Emphasis added.) Subsection 3(b) prohibits governmental entities from requiring the use of a language other than English, and 3(c) states that governmental documents must be in English to be valid and enforceable. The exceptions to the requirement that governmental entities act in English are (in accurate paraphrase): (a) to assist in English-as-a-second-language instruction; (b) to comply with federal laws; (c) to teach a foreign language; (d) to protect public health or safety; and (e) to protect the rights of criminal defendants or victims of crime.

Section 4 provides for a private cause of action to enforce the article.

Most of the concerns raised in the opinion request involve the use of a language other than English in the delivery of governmental services. Therefore subsection 3(1)(a), which

contains the words "shall act in English and in no other language," is the applicable subsection that will be primarily discussed. (Emphasis added.)

If use of a language other than English is reasonably needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group, the use of that language by the deliverer of governmental services is required by federal laws. The federal laws most closely relevant are Titles VI and VII of the Civil Rights Act of 1964, as interpreted by their implementing regulations and by the courts.^{1/}

Section 601 of Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, defines "program or activity" very broadly as

a department, agency or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; or . . . a public system of higher education; or a local educational agency . . . or other school system

^{1/}Title VI: 42 U.S.C. § 2000d to 2000d-7; Title VII: 42 U.S.C. § 2000e to 2000e-17; for a survey of the Title VI implementing regulations, see Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 618-621 (1983). For the discussion of Title VII interpretations, see infra pp. 7,9.

If an entity receives no federal financial assistance, its duty to provide services (if fairness and effectiveness so require) in a language other than English is, as discussed infra at pp. 6-8, nonetheless not precluded by Proposition 106. We reach this conclusion because of our interpretation that the English-only requirement applies only to official acts of government, and not to every act of every government official or employee. Further, a contrary conclusion would raise serious questions under the equal protection clauses of the United States and Arizona Constitutions.

If a governmental entity is covered by Title VI and appropriate regulations, proof of intentional discrimination (including discrimination based on ethnicity) is not necessary to prove a violation of this federal law. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983). All that is needed is a showing that the entity applies a rule, even if fair on its face, which has an adverse impact on an ethnic minority, and is not justified by a business necessity.^{2/}

Linguistic groups are ethnic groups, and non-English speakers in Arizona and the United States meet the criteria of ethnic minorities.^{3/} If the words in subsection 3(1)(a),

^{2/}This result follows from the language and construction of Title VI and its implementing regulations. At least forty federal agencies have adopted regulations implementing Title VI and applying the disparate impact standard. See Guardians, 463 U.S. at 619, and nn.6-7. Funding provided by these agencies affects a very broad range of governmental services. See also Alexander v. Choate, 469 U.S. 287 (1985) (state policy having disparate impact on handicapped persons would be prohibited by regulations implementing section 504 of the Rehabilitation Act of 1973 if "meaningful access" to benefits not provided; Title VI regulations referred to as providing guidance for standard).

^{3/} See, e.g., Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (Philippine law prohibiting keeping of account books in any language other than English, Spanish or a local dialect violates equal protection and due process rights of Chinese, in spite of defense that law was needed to facilitate tax collection); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition of teaching children in any language other than English which was directed at persons of German descent violates due process clause); Bartels v. Iowa, 262 U.S. 404 (1923) ("Official English" statute directed at persons of German descent violates due process).

"act in English and in no other language" were to be construed to mean that needed governmental services could not be delivered in a language other than English no matter what the needs of fairness and effectiveness, there would be an adverse impact on non-English speakers. Such a construction would result in a violation of federal law. Moreover, the practice of delivery of services in a language other than English (where reasonably needed) would be an exception provided for by subsection 3(2)(b).^{4/}

Thus, if the words of section 3(1)(a), "This State . . . shall act in English and in no other language" were to be construed to mean "shall deliver services in English and in no other language," the subsection 3(2)(b) exception (compliance with federal laws), would almost entirely swallow up the rule. Examining the language of Proposition 106, in context, we do not believe this was what was intended. Although Proposition 106 does not define "act," section 1 gives some guidance, providing, in pertinent part, as follows:

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

^{4/}See generally, Note, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 Harv. L. Rev. 1345 (1987). See also Lau v. Nichols, 414 U.S. 563 (1974). In Lau, the Court noted that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. For the application of the disparate impact standard (as opposed to requiring proof of intentional discrimination) to "English-only" rules in an employment context, see, Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988); 29 C.F.R. § 1606.7(b)-(c) (1987); E.E.O.C. Decision 83-7, 31 F.E.P. 1861 (1983). See also Civil Rights Division of the Arizona Department of Law v. Amphitheater Unified School District, 140 Ariz. 83, 680 P.2d 517 (App. 1983) (recognizing disparate impact analysis appropriate to establish a violation of the Arizona Civil Rights Act, and establishing "business necessity" as the proper standard of defense).

(3)(a) This Article applies to:

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

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

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

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

(Emphasis added.) Because of the broad introductory language of subsection 1(2), clearly stating that English shall be used for ballots, public schools, and "all government functions and actions," we do not perceive subsection 1(3)(a)(iii) to be an exclusive list, but rather examples of the types of official acts that are contemplated to be covered by Proposition 106.^{5/} We also look to the dictionary for a common meaning of the word "act." The most clearly applicable common meaning of "act" used as a noun is "a decision or determination of a sovereign, a legislative council, or a court of justice." Webster's International Dictionary 20 (3d ed., unabridged, 1976).

We therefore construe "act" in this context to mean an official act of the government.

Such a construction may also be necessary to avoid conflict with the equal protection clauses of the fourteenth amendment to the federal constitution and article II, section 13

^{5/}Enumeration of a list of items in a constitution generally expresses the intent to exclude items not included in the list. Whitney v. Bolin, 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958). However, this principle will not be applied to contradict the apparent intent of a provision. Forsythe v. Paschall, 34 Ariz. 380, 383, 271 P. 865, 866 (1928).

of the Arizona Constitution.^{6/} Classifications based on ethnicity will be closely scrutinized, and will violate the equal protection clause unless the government can justify them by establishing a compelling interest. Hernandez v. Texas, 347 U.S. 475 (1954); Graham v. Richardson, 403 U.S. 365 (1971) (alienage). Classifications based on language are not in themselves considered, for equal protection purposes, to be invidiously discriminatory classifications based on ethnicity. Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973). Where an intent to discriminate on the basis of ethnicity can be shown as a purpose of the language classification, however, an intent to discriminate invidiously may be inferred. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031, 1039 and n.6 (9th Cir. 1988) (approving the reasoning of Olaques v. Russoniello, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc), vacated as moot, ___ U.S. ___, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987) (language a proxy for intentional discrimination on basis of ethnicity where ethnic group thus identified carries a history of mistreatment, political exclusion, and historically long-term use of language identified with ethnicity)). Discrimination based on linguistic characteristics has also been directly held to constitute intentional ethnic discrimination in an employment law (Title VII) context. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Department of Public Welfare, 30 F.E.P. 387 (S.D. Ohio 1978), aff'd, 628 F.2d 980 (6th Cir. 1980) (per curiam).

Intentional discrimination has been inferred where actions by the majority were seen to give governmental effect to private biases. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984). Intent has been inferred at least three times by the United States Supreme Court where voters approved popular referendum measures which, although facially fair, had the

^{6/}Article II, section 13 provides:

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

"The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 554, 159 P.2d 292, 299 (1945).

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effect of overturning legislative enactments which legitimately served the needs of minorities. In Reitman v. Mulkey, the California legislature had prohibited racial discrimination in housing. By the passage of Proposition 63, the voters amended the state constitution to overturn and prevent the reenactment of those laws. The Court voided the Proposition as violative of the equal protection clause because it gave effect to private biases in attempting to take away protections already given to minorities. 387 U.S. 369 (1967). The Court followed the same principle in voiding "voter approval" and "voter initiative" measures which purported to reverse antidiscrimination laws enacted by a legislative body. Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).^{7/}

We do not interpret Proposition 106 as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. If this were required, the Proposition could be found to give governmental effect to private biases by taking away protections legitimately offered to those entitled to them, and thus would be voided as a violation, not only of Title VI,^{8/} but also of the federal and state equal protection clauses.^{8/}

To avoid possible conflicts with the federal and state constitutions and federal laws, we therefore conclude that Proposition 106 cannot interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers.

Consistent with this conclusion, we reiterate that the provision of Section 3(1)(a), "This state and all political

^{7/}See also Plyler v. Doe, 457 U.S. 202, 219 (1982) (creation of ethnic "underclass" by excluding minor children of undocumented resident aliens present within the United States from public school system violates equal protection clause).

^{8/}See also cases cited in n.3, supra.

subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the State's official language. It does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government. With these general conclusions in mind, we are now able to answer the specific questions presented to us.

We have been asked if any restrictions on the use of a language other than English need to be made in any of the following situations:

- a. The interaction of state lottery officials with non-English speaking persons . . . either as employees or agents, or as lottery contestants?

A requirement that an employee speak only English on the job, or a requirement that all employees be able to speak English would be a violation of Title VII of the Civil Rights Act of 1964 unless those requirements are bona fide occupational qualifications reasonably necessary to the operation of governmental business. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988). A state "Official English" law cannot be used to establish a bona fide occupational qualification. Id. at 1044. The ability to speak English could be a bona fide occupational qualification for an employee if regular contact with the English-speaking public is part of the job requirements, or if an employee would be required, for instance, to interpret official English documents or transmit directions delivered in English. If it is not "reasonably necessary" for all employees of the state lottery to be English proficient in order to perform certain jobs for the lottery, it would be permissible for supervisors to communicate with employees who do not speak English in, or through, another language. Lottery contestants who do not speak English may be communicated with in a language other than English in the day-to-day delivery of services, on the general principles discussed above.

- b. The printing of motor vehicle division pamphlets or oral explanation of licensing procedures to applicants for driver and vehicle licensing in languages other than English?

The provision of non-English assistance, whether written or oral, is permissible, and is required if it is necessary to reasonably provide fair and effective services. The nature and extent of the requirement depends on what is both reasonable and necessary for the purpose. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974). What is required also depends on whether or not there are any applicable federal regulations. Moreover, the exemption set out in subsection 3(2)(d) permits use of a language other than English "to protect public health or safety."

- c. The naming or designation of highways, streets, bridges, or towns in languages other than English?

The name itself is not an act of government, as we have interpreted the word "act." We perceive a distinction between the use of a word for purposes of identification and the use of language for the purpose of communication of ideas. Further, we recognize that words from other languages historically have been and continue to be absorbed into and become a part of the English language. What Proposition 106 requires is that the governmental acts which create and perpetuate the name be articulated in English. It does not prohibit the use of a non-English name as a street name.

- d. The handling of customer inquiries or complaints involving state or local government services, such as ADOT relocation services, child support enforcement, or city water billings, in languages other than English. Is general communication between elected officials and all other governmental employees with the public at large permissible in other than . . . English?

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles.

In addition, an elected official may have a federal first amendment right to communicate with constituents in the language of choice. See Garrison v. State of Louisiana, 379

U.S. 64 (1964) (elected official has first amendment protection for statements made in the conduct of his office); Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) (first amendment right of expression includes right to communicate by most effective means).

- e. Discussing professional or business licensing requirements, or accepting license applications, in languages other than English?

Discussions may be in a language other than English, and interpretation services may be provided, but the official application acted upon and the official license issued must be in English.

- f. Providing information on state parks services or programs in languages other than English?

On the same principles, such translations, and direct provision of services in languages other than English are permissible. Since the state parks provide services to visitors from around the world, this question represents a good example of why "shall act" in the Proposition must mean "shall act officially as the government" and not "shall provide services." Moreover, the exemption of subsection 3(2)(d) would permit use of a language other than English if deemed necessary for health and safety reasons in the discretion of those responsible for the parks.

- g. Providing information on services or programs offered at common schools or universities in languages other than English?

Again, providing such services and information is permissible and may be required. In particular, educational institutions subject to Title VI should refer to the federal regulations applicable to their agency.

- h. The practice of the Governor, employees of the Commerce Department, and other state or local officials or employees visiting with non-English speaking foreign government officials or business representatives of foreign corporations to conduct trade missions and related promotional activities on behalf of Arizona?

Such discussions are permissible, as are translations of any official documents which may result, but the official

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documents as they are to be acted upon by governments in Arizona must be in English.

- i. [W]ith respect to each of the above questions . . . would the answers given change if the non-English speaking persons involved are native Americans?

Our answers would be not be different because the persons involved are native Americans.

In summary, we conclude that Proposition 106 requires official acts of government to be in English. It does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. Proposition 106, therefore, is constitutional, under both the Arizona and United States Constitutions, and compatible with applicable federal law.

Sincerely,



BOB CORBIN
Attorney General

BC:HAS:bl

cc: Senator Peter Kay