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**SUPREME COURT OF NEW YORK,
NEW YORK COUNTY**

People v. Molina¹
(decided June 29, 2009)

On January 29, 2009, a jury convicted Jose Molina “of Reckless Driving² and Driving While Ability Impaired by Alcohol.”³ Following his conviction, Molina moved to set aside the verdict⁴ arguing that his equal protection and due process rights guaranteed by both federal⁵ and state⁶ constitutions were violated when the New York City Police Department (“NYPD”), pursuant to a departmental policy, failed to provide him with a physical coordination test because he did not understand the English language.⁷ Ultimately, the court granted his motion and dismissed the charges, finding that the NYPD procedure violated his constitutional rights.⁸

¹ 887 N.Y.S.2d 784 (Sup. Ct. N.Y. County 2009).

² N.Y. VEH. & TRAF. LAW § 1212 (McKinney 1988) provides, in pertinent part: “Reckless driving shall mean driving . . . in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway.”

³ *Molina*, 887 N.Y.S.2d at 787. See also N.Y. VEH. & TRAF. LAW § 1192 (1) (McKinney 2009) (“No person shall operate a motor vehicle while the person’s ability to operate such motor vehicle is impaired by . . . alcohol.”).

⁴ N.Y. CRIM. PROC. LAW § 330.30 (1) (McKinney 1970) provides, in pertinent part:

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon . . . [a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

⁵ U.S. CONST. amend. XIV, § 1, states, in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁶ N.Y. CONST. art. I, § 11, states, in pertinent part: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”; N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

⁷ *Molina*, 887 N.Y.S.2d at 788.

⁸ *Id.* at 797.

Shortly before ten o'clock on the night of December 2, 2007, police officer Edward Aiken was patrolling the Bronx-Whitestone Bridge toll plaza when he observed Molina driving erratically from E-Z Pass lane eleven to nine.⁹ Aiken became suspicious and walked over to lane nine, stood in front of Molina's car, put his hand out, and signaled for him to stop.¹⁰

During the course of the traffic stop, Aiken asked Molina a few questions,¹¹ noticed his bloodshot eyes, and detected a strong odor of alcohol on his breath.¹² Although Molina responded to Aiken's questions, Aiken could not determine whether his speech was slurred because of Molina's heavy Spanish accent.¹³ Aiken ordered Molina out of the vehicle so that he could conduct "a field sobriety coordination test."¹⁴ However, Aiken did not administer the test in the interest of Molina's safety because he "was unsteady on his feet."¹⁵ Molina was then arrested and transported to the police station.¹⁶ At the police station, police officer Michael Sharpe administered a Breathalyzer test to Molina after he explained the procedure in English.¹⁷ However, Sharpe did not administer a physical coordination test because of a "language barrier."¹⁸

At Molina's trial the government called Aiken and Sharpe as witnesses.¹⁹ Aiken testified to the events that occurred at the toll-booth plaza,²⁰ while Sharpe "unequivocally testified that when encountering a Spanish speaking suspect he has never administered the physical coordination test due to language barriers."²¹ Molina was

⁹ *Id.* at 787.

¹⁰ *Id.*

¹¹ Officer Aiken asked Molina if he was okay, to which he did not respond. *Id.* He also asked him if he had been drinking, to which he initially responded no, but when asked again, he said he had consumed three beers. *Molina*, 887 N.Y.S.2d at 787.

¹² *Id.*

¹³ *Id.*

¹⁴ This is a series of tests "consist[ing] of horizontal gaze and nystagmus which involves the defendant following an object with his eyes. One leg stand and counting to a prescribed number, and heel to toe walking back and forth." *Id.* at 788 n.2.

¹⁵ *Id.* at 788.

¹⁶ *Molina*, 887 N.Y.S.2d at 787.

¹⁷ *Id.* at 788.

¹⁸ *Id.* (internal quotations omitted).

¹⁹ *Id.* at 787.

²⁰ *See id.* at 787-88.

²¹ *Molina*, 887 N.Y.S.2d at 788 (citations omitted).

then convicted on two charges,²² and he subsequently filed a post-trial motion to set aside the verdict on the grounds that his conviction violated his equal protection and due process rights under the United States Constitution²³ and the New York Constitution.²⁴ More specifically, Molina argued that his rights were violated because “the police department[] fail[ed] to administer a physical coordination test . . . because [he] spoke Spanish.”²⁵ In opposition, the government argued that the purpose in not administering the test was to “avoid[] confusion and complications due to any language barrier, as the police simply do not administer field sobriety tests to non-English speaking defendants.”²⁶

On the issue of equal protection, the court recognized that section 1192 of the Vehicle and Traffic Law (“VTL”) is not discriminatory on its face, but that the NYPD’s enforcement of the statute created a discriminatory result.²⁷ When challenging a law on equal protection grounds, a court must first determine what level of scrutiny to apply.²⁸

The trial court record revealed that the NYPD employed a procedure of providing two videotaped tests in English, but only one videotaped test in Spanish.²⁹ The court determined that this procedure is not rationally related to the purpose of avoiding confusion or complications.³⁰ In addition, although Molina is of Hispanic origin

²² N.Y. VEH. & TRAF. LAW § 1212; N.Y. VEH. & TRAF. LAW § 1192 (1).

²³ U.S. CONST. amend. XIV, § 1, states, in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²⁴ N.Y. CONST. art. I, § 11, states, in pertinent part: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”; N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

²⁵ *Molina*, 887 N.Y.S.2d at 788 (internal quotations omitted).

²⁶ *Id.* at 789 (internal quotations omitted).

²⁷ *Id.* at 794.

²⁸ *Id.* at 793. Strict scrutiny is applied “where governmental action disadvantages a suspect class or burdens a fundamental right.” *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983). Such classification “will be upheld only if the government can establish a compelling justification for the action.” *Id.* However, “where a suspect class or a fundamental right is not implicated, the challenged action need only be rationally related to a legitimate governmental purpose.” *Id.*

²⁹ *Molina*, 887 N.Y.S.2d at 794.

³⁰ *Id.*

and speaks with a heavy accent, he still “speaks and understands English.”³¹ Furthermore, Sharpe’s testimony that there was a language barrier was flawed; the videotaped procedure at the police station showed a controlled environment with no indication of confusion or complications.³² Based on these facts the court concluded that this was a clear case of discrimination against a man of Hispanic origin, “because of an alleged language barrier and not because of a desire to avoid confusion and/or complications.”³³

In reaching its conclusion, the court applied strict scrutiny and held that the NYPD’s enforcement of section 1192 of the VTL violated the Equal Protection Clause.³⁴ The enforcement of section 1192 by the NYPD discriminated against Spanish-speaking individuals because it created a classification based on national origin and the “inability to speak and/or understand . . . English.”³⁵ Furthermore, when classifications like this occur, the police must make reasonable efforts to ensure that Spanish-speaking defendant’s rights are protected in the same manner as English speakers’ rights are protected.³⁶

Despite Molina’s ability to speak and understand English, Sharpe still denied him the opportunity to take a physical coordination test.³⁷ Also, Sharpe did not take reasonable steps to protect Molina’s rights; he made no attempt to locate a translator or anyone who could have communicated with Molina, and he failed to show an explanatory videotape in Spanish.³⁸ The court made clear that the NYPD’s procedure “has no compelling justification for its application[,] and is inherently discriminatory against non-English speaking individuals of Hispanic origin and ethnicity.”³⁹ Furthermore, if both the chemical breath and physical coordination tests were provided, there would not have been any issue of a language barrier; no barrier

³¹ *Id.*

³² *Id.*

³³ *Id.* (internal quotations omitted).

³⁴ *Molina*, 887 N.Y.S.2d at 795.

³⁵ *Id.* at 794.

³⁶ *Id.* See also *People v. Niedzwiecki*, 487 N.Y.S.2d 694, 696 (N.Y. City Crim. Ct. 1985) (“[The defendant] must reach a threshold point of understanding the choice presented to him, so he may at least be able to make a decision as to the course of conduct he will take.”).

³⁷ *Molina*, 887 N.Y.S.2d at 794-95.

³⁸ *Id.* at 795.

³⁹ *Id.*

existed because Molina spoke English despite a heavy accent. Even if there was an issue of a language barrier, the police could have asked anyone who spoke Spanish to explain the procedure to Molina, which would have effectively eliminated any discrimination.⁴⁰

Next, the court turned to Molina's due process claim. Although the New York standard was briefly mentioned,⁴¹ the court followed the United States Supreme Court's three-part test.⁴² The court stated that the private interests affected by the discriminatory procedure include Molina's guilt or innocence, his driving privileges, loss of liberty, financial interests, and reputation in the community or at work.⁴³ There is a high risk of a wrongful deprivation of these interests through the procedures used, which include possible incarceration, fines, and loss of driving privileges.⁴⁴ These risks could have been avoided if the NYPD implemented alternative procedures for non-English speaking defendants.⁴⁵ Although the government has a paramount interest in highway safety, the NYPD's procedure did not advance that interest.⁴⁶ The use of an interpreter to explain the physical coordination test better serves both parties, and is not an insurmountable burden "when weighed against the defendant's right to a fair trial, [his] opportunity to defend against the state's accusations, and [his] access to potentially exculpatory evidence."⁴⁷

⁴⁰ *Id.* at 795.

⁴¹ See N.Y. CONST. art. I, § 6. See also *People v. Torres*, 772 N.Y.S.2d 125, 126 (App. Div. 3d Dep't 2004) ("It is a well-established precept of due process that non-English speaking defendants in criminal actions are entitled to an interpreter." (quoting *People v. Rodriguez*, 633 N.Y.S.2d 680, 681 (App. Div. 3d Dep't 1995))); *Yellen v. Baez*, 676 N.Y.S.2d 724, 725 (Civ. Ct. N.Y. City 1997) (noting that due process requires an interpretation of judicial proceedings when a defendant does not understand English).

⁴² *Molina*, 887 N.Y.S.2d at 795-97. In *Mathews v. Eldridge*, the United States Supreme Court articulated a three-part test to evaluate due process claims:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

⁴³ *Molina*, 887 N.Y.S.2d at 796.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 797.

⁴⁷ *Id.* (internal quotations omitted).

After evaluating Molina's claim, it was clear that the NYPD procedure violated his equal protection and due process rights because it discriminated against a Spanish-speaking defendant on the basis of national origin and ethnicity. The police procedure failed strict scrutiny and violated Molina's right to due process. Therefore, the court set aside Molina's conviction and dismissed the charges against him.⁴⁸

The United States Constitution guarantees to its citizens that states cannot deprive them of the equal protection of the laws.⁴⁹ It protects against discrimination that occurs in the express terms of a statute or in the statute's execution.⁵⁰ A statute may be nondiscriminatory on its face, yet when executed it may produce a grossly discriminatory result.⁵¹ The threshold question is "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants."⁵²

In analyzing the principal question, courts must be cognizant of the standard of review on an equal protection challenge. Strict scrutiny is appropriate when a suspect class is disadvantaged or where a fundamental right is burdened by governmental action.⁵³ There is also intermediate scrutiny, where a law will be upheld if it is substantially related to an important governmental purpose.⁵⁴ Intermediate scrutiny is appropriate when the classification is based on gender.⁵⁵ Rational basis scrutiny is the lowest standard, and govern-

⁴⁸ *Molina*, 887 N.Y.S.2d at 797.

⁴⁹ See U.S. CONST. amend. XIV, § 1.

⁵⁰ *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). See also *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) ("The purpose of the equal protection clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918))). See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating state law limiting jury service to white men).

⁵¹ *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956).

⁵² *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

⁵³ See *Heller v. Doe*, 509 U.S. 312, 319 (1993). See also *Soberal-Perez*, 717 F.2d at 41 (noting that strict scrutiny requires the government to show a compelling state interest).

⁵⁴ See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a New York law that allowed unmarried mothers but not unmarried fathers to veto adoption of a child by withholding consent); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (invalidating Oklahoma law that prohibited the sale of "nonintoxicating" beer to males under the age of twenty-one and females under the age of eighteen).

⁵⁵ *Craig*, 429 U.S. at 197.

ment action will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”⁵⁶

The New York Constitution and a subsequent Civil Rights Law passed by the New York State Legislature (“Legislature”) have been interpreted to approach equal protection claims slightly different than the United States Constitution.⁵⁷ The New York Court of Appeals has stated that the issue is determined by “the similarity or dissimilarity of rights differentiated by a statute; and the reasonableness of classification when different methods are used to affect different classes.”⁵⁸ Reasonable efforts must be made to protect a person’s rights when a statute is discriminatory, especially when there is a lack of understanding of English.⁵⁹ A person must understand the choices presented to make an informed decision of how to proceed, especially when their decision can result in *prima facie* evidence for criminal proceedings.⁶⁰

The same constitutional issue that was presented in *Molina* was raised in *People v. Garcia-Cepero*.⁶¹ In that case a police officer pulled Garcia-Cepero over after he observed him driving erratically.⁶² When the officer approached the vehicle to speak with Garcia-Cepero, there was a strong alcoholic smell on his breath, his eyes were bloodshot, and when he got out of the car he “was unsteady on his feet.”⁶³ Garcia-Cepero slurred his speech and made a statement in Spanish to the officer that did not have a literal translation.⁶⁴ After the officer determined that Garcia-Cepero was intoxicated, he placed him under arrest and transported him to the police station.⁶⁵ At the

⁵⁶ *Heller*, 509 U.S. at 320.

⁵⁷ N.Y. CONST. art. I, § 11. *See also* N.Y. CIV. RIGHTS LAW § 40-c (2) (McKinney 2003) (“No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights . . .”).

⁵⁸ 8200 Realty Corp. v. Lindsay, 261 N.E.2d 647, 653 (N.Y. 1970).

⁵⁹ *See Niedzwiecki*, 487 N.Y.S.2d at 696.

⁶⁰ *Id.*

⁶¹ *See* 874 N.Y.S.2d 689, 692 (Sup. Ct. Bronx County 2008).

⁶² *Id.* at 691.

⁶³ *Id.*

⁶⁴ *Id.* Garcia-Cepero uttered the phrase “un pequetas,” which “has no Spanish translation.” *Id.* at 691 n.1 (internal quotations omitted).

⁶⁵ *Garcia-Cepero*, 874 N.Y.S.2d at 692.

police station Garcia-Cepero was shown a video in Spanish explaining the procedure for a chemical breath test and the consequences of refusal.⁶⁶ In response to whether Garcia-Cepero consented to a chemical breath test, he replied “no drogas, no drogas,” which, when translated into English, means “no drugs, no drugs.”⁶⁷ The officers in the station understood his response as a refusal to submit to the chemical breath test.⁶⁸ At no time while he was in police custody did Garcia-Cepero take or have the opportunity to take a physical coordination test.⁶⁹

In evaluating Garcia-Cepero’s equal protection claim, the Supreme Court, Bronx County, followed the standard established by the New York Court of Appeals in *8200 Realty Corp. v. Lindsay*.⁷⁰ The court found that the NYPD procedure “creates a classification predicated upon a person’s ability to speak and understand . . . English[,] . . . and therefore discriminates against non-English speaking individuals.”⁷¹ Therefore, the police were required to make reasonable efforts to protect Garcia-Cepero’s rights.⁷² However, the police failed to make any effort to locate a translator to assist Garcia-Cepero and, as a result, the police procedure “differentiates between two classes,” has no rational basis, “and is inherently discriminatory.”⁷³

The court suggested that the use of a translator could have remedied the discriminatory procedure.⁷⁴ More significantly, the court recognized that the physical coordination test administered to English speakers “is *never* presented to non-English speaking defendants.”⁷⁵ Based on this, the most troubling result is that a non-English speaking defendant is denied any opportunity to present

⁶⁶ *Id.*

⁶⁷ *Id.* (internal quotations omitted).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Garcia-Cepero*, 874 N.Y.S.2d at 695. See also *8200 Realty Corp.*, 261 N.E.2d at 653 (“The question of equal protection turns ultimately on the similarity or dissimilarity of rights differentiated by a statute and the reasonableness of classification when different methods are used to affect different classes.”).

⁷¹ *Garcia-Cepero*, 874 N.Y.S.2d at 695.

⁷² *Id.* (“[W]hen a person does not speak or understand English, extra efforts must be made to insure that person’s rights are protected the same as English speaking defendants.”).

⁷³ *Id.* at 695-96.

⁷⁴ *Id.* at 696.

⁷⁵ *Id.*

possible exculpatory evidence at trial.⁷⁶ In drunk driving cases, the most relevant evidence to the defendant's guilt or innocence is the chemical breath test and physical coordination test results.⁷⁷ Excluding this evidence on the basis that the defendant does not understand English is inherently discriminatory and clearly violates the Equal Protection Clause.⁷⁸

The same NYPD procedure was challenged again in *People v Burnet*.⁷⁹ In that case Burnet was pulled over for being suspected of driving under the influence of alcohol.⁸⁰ He was subsequently arrested and taken to the police station where he watched a video in Spanish, which provided him with the opportunity to take a chemical breath test.⁸¹

At the suppression hearing, Burnet argued that his equal protection and due process rights were violated because the NYPD did not provide him with an interpreter during the chemical test to explain the procedure and the consequences of refusing.⁸² He further argued that providing an English-speaking individual both a chemical breath test and a physical coordination test, while only providing the chemical test to non-English speaking defendants, creates a disparate practice and is subject to strict scrutiny.⁸³

The *Burnet* court disagreed and noted that neither the United States Constitution nor the New York Constitution recognizes non-English speaking individuals as a suspect class; therefore, strict scrutiny is not applicable.⁸⁴ In making this determination, the court recognized that Burnet did not make the requisite showing that non-English speaking individuals, as a class, have been discriminated against because of race, nationality, or ethnicity.⁸⁵ The only evidence

⁷⁶ *Garcia-Cepero*, 874 N.Y.S.2d at 696 ("In many cases, this evidence is crucial in determining . . . guilt or innocence. Unfortunately, these tests are automatically excluded for non-English speaking defendants for reasons that do not show impracticability or impossibility.").

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 882 N.Y.S.2d 835 (Sup. Ct. Bronx County 2009).

⁸⁰ *Id.* at 839.

⁸¹ *Id.*

⁸² *Id.* at 842.

⁸³ *Id.*

⁸⁴ *Burnet*, 882 N.Y.S.2d at 842-43.

⁸⁵ *Id.* at 843.

he offered was that non-English speaking defendants are denied the opportunity to take a physical coordination test “to avoid confusion and complications due to any language barrier.”⁸⁶ Under rational basis scrutiny, the court concluded that the NYPD’s procedure of foregoing the physical coordination test is rationally related to the purpose of avoiding confusion.⁸⁷

Molina also challenged his conviction under the Due Process Clause of both the United States Constitution and New York Constitution.⁸⁸ The United States Supreme Court has stated that a due process claim is judged on a case-by-case inquiry,⁸⁹ because due process “ ‘is not a technical conception with a fixed content unrelated to time, place and circumstances.’ ”⁹⁰ As a result, the Court has utilized a three-part test when considering due process inquiries:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹¹

It is well established that New York courts protect a non-English speaking defendant’s due process rights by affording an interpreter at judicial proceedings in order for the defendant to understand and participate in his defense.⁹² Although the right to an interpreter is not found in the United States Constitution or New York

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ U.S. CONST. amend. XIV, § 1, states, in pertinent part: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law”; N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

⁸⁹ *Mathews*, 424 U.S. at 334.

⁹⁰ *Id.* (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

⁹¹ *Id.* at 335.

⁹² *People v. Ramos (Ramos II)*, 258 N.E.2d 197, 198 (N.Y. 1970). *See also Torres*, 772 N.Y.S.2d at 126 (“ ‘It is a well-established precept of due process that non-English speaking defendants in criminal actions are entitled to an interpreter.’ ” (quoting *Rodriguez*, 633 N.Y.S.2d at 681))).

Constitution, the failure to provide one when needed violates a defendant's right to due process.⁹³ In fact, there is statutory authority that describes the procedure for appointing interpreters during court proceedings, which was enacted to "protect fundamental rights and facilitate access to the legal process."⁹⁴ However, the statutory requirement for appointing interpreters only extends to judicial proceedings.⁹⁵

At his *Mapp* hearing⁹⁶ Garcia-Cepero similarly argued that the NYPD procedure violated his due process rights.⁹⁷ In evaluating his claim, the court focused solely on the United States Supreme Court's three-part test from *Mathews*.⁹⁸ As to the first part of the test—the private interest affected by the official action—Garcia-Cepero's guilt or innocence and driving privileges were clearly affected by the discriminatory police procedure.⁹⁹

With regard to the second part of the test, Garcia-Cepero was charged with Driving While Intoxicated¹⁰⁰ and, because he refused the chemical breath test, there were possible consequences under another statute.¹⁰¹ He could have been imprisoned for up to one year,

⁹³ *Yellen*, 676 N.Y.S.2d at 725-26 ("It is a fundamental axiom of our system of jurisprudence that due process of law includes the right to have an adequate interpretation of the proceedings.").

⁹⁴ *Id.* at 726. See also N.Y. JUDICIARY LAW § 386 (McKinney 2009) ("The county judge and the district attorney of the county may appoint one interpreter, who shall act as . . . the court interpreter for such county."). The burden is on the party that needs an interpreter to notify the court that he/she does not understand the proceedings. See *People v. Ramos (Ramos I)*, 269 N.Y.S.2d 309, 310 (App. Div. 3d Dep't 1966). The party should either make a complaint to the court or notify represented counsel for the need of an interpreter. *Id.* The failure to make such a notification when the defendant is able to will not overturn an unfavorable verdict against him on appeal. *Id.*

⁹⁵ *Ramos II*, 258 N.E.2d at 198 ("[A] defendant who cannot understand English is entitled to have the trial testimony interpreted to him in a language which he understands."); *Torres*, 772 N.Y.S.2d at 126. See also *Burnet*, 882 N.Y.S.2d at 843 ("[T]his court is unaware of any federal or state constitutional right to have interpretation services in . . . extra-judicial proceedings, . . . [but] the failure to provide a qualified interpreter in court proceedings would indeed be a denial of due process of the law.").

⁹⁶ The court held a *Mapp* hearing to decide whether there was probable cause for the traffic stop and arrest, and whether Garcia-Cepero refused the breathalyzer. *Garcia-Cepero*, 874 N.Y.S.2d at 691.

⁹⁷ *Id.* at 692.

⁹⁸ *Id.* at 696-97.

⁹⁹ *Id.* at 697.

¹⁰⁰ N.Y. VEH. & TRAF. LAW § 1192 (1), (3).

¹⁰¹ *Garcia-Cepero*, 874 N.Y.S.3d at 697. See generally N.Y. VEH. & TRAF. LAW § 1193

subjected to fines of up to five hundred dollars, and had his driving privileges suspended.¹⁰² There is a direct relationship between being deprived of his interests and the privileges to drive, and had the police implemented “additional or substitute procedures” it could have avoided the “deprivation of such interests.”¹⁰³

Finally, as to the third part—the government’s interest—the NYPD’s procedure does anything but “insure that the ends of justice are served—that the guilty be punished and the innocent be set free.”¹⁰⁴ The use of an interpreter would avoid these due process concerns; if an interpreter were provided, the defendant would clearly understand the procedure and could make an informed decision on how to proceed.¹⁰⁵ The court concluded by noting that securing an interpreter for the defendant is not an insurmountable burden, especially when weighed against the fundamental right to a fair trial, to defend against accusations, and to present exculpatory evidence.¹⁰⁶

In *Burnet*, the court rejected the defendant’s due process claim.¹⁰⁷ The court made no reference to *Mathews*, but instead found that *Burnet*’s due process claim failed under the New York standard.¹⁰⁸ Although there is a right to an interpreter at judicial proceedings, this right does not extend to extrajudicial proceedings.¹⁰⁹ Unlike court proceedings, which are clearly judicial, the chemical test phase is an administrative extrajudicial proceeding and is not considered part of a criminal judicial proceeding.¹¹⁰ Thus, the right to an interpreter is not fundamental during this phase and the absence of an interpreter does not violate due process.¹¹¹

In light of the inconsistent equal protection decisions in *Garcia-Cepero* and *Burnet*, *Molina* appears to be a step in the right direction for courts providing equal protection of the laws to non-English

(1) (b) (McKinney 2009).

¹⁰² *Garcia-Cepero*, 874 N.Y.S.3d at 697.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 698.

¹⁰⁷ *Burnet*, 882 N.Y.S.2d at 843.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

speaking defendants. *Garcia-Cepero* and *Burnet* were each decided on two different standards; *Garcia-Cepero* affords more protection under the New York Constitution than *Burnet* does under the United States Constitution.¹¹² *Molina* indicates that *Burnet*'s decision on the question of equal protection was due to a lack of evidence, whereas in *Molina* there was evidence that the so-called language barrier and concern for "confusion and/or complications" did not exist.¹¹³ *Molina* is important because it represents a court's willingness to provide more protection to non-English speaking defendants after *Burnet* removed that protection. A possible reason is that *Molina* is part of a suspect class, a notion that was rejected in *Burnet*; thus, the *Molina* Court applied strict scrutiny rather than rational basis.

But *Molina* does not stop there; the court also notes that Spanish-speaking individuals of Hispanic origin are a suspect class, and government regulations discriminating against them must be reviewed under strict scrutiny.¹¹⁴ To reinforce this finding one needs to look no further than the demographics of New York City which indicate an overwhelming Hispanic population.¹¹⁵ Hispanics account for approximately 27.1% of the population and, in the Bronx alone, where *Garcia-Cepero*, *Burnet*, and *Molina* were decided, the Hispanic population is over fifty-one percent.¹¹⁶ These statistics clearly depict an overwhelming need for greater equal protection of the laws. Therefore, the Legislature and the NYPD should develop procedures

¹¹² Compare *Garcia-Cepero*, 874 N.Y.S.2d at 695 (invalidating the NYPD procedure because it "creates a classification predicated upon a person's ability to speak and understand the English language"), with *Burnet*, 882 N.Y.S.2d at 843 (finding that strict scrutiny is inapplicable because there is no suspect classification when the police employ different procedures for English and non-English speaking defendants, and therefore, any differentiation is constitutional if it satisfies rational basis scrutiny).

¹¹³ *Molina*, 887 N.Y.S.2d at 793-94. In *Burnet* the court stated that simply because non-English speaking individuals are denied a physical coordination test "does not entitle [them] to strict scrutiny." *Burnet*, 882 N.Y.S.2d at 843. However, in *Molina*, the court distinguished the finding in *Burnet* on the ground that the videotaped procedure in the police department showed a controlled environment with little evidence of confusion because of a language barrier. *Molina*, 887 N.Y.S.2d at 794. Based on these facts, the NYPD procedure resulted in discrimination on the basis of national origin and not on the basis of a desire to avoid a language barrier; thus the statute failed strict scrutiny. *Id.*

¹¹⁴ *Id.* at 794.

¹¹⁵ See New York City Dep't of City Planning, <http://www.nyc.gov/html/dcp/html/census/popacs.shtml> (click the "2008" link in the "Hispanic Origin" section of the table to open up the report) (last visited Nov. 22, 2009).

¹¹⁶ *Id.*

to protect non-English speakers' rights. *Burnet*, *Garcia-Cepero*, and *Molina* suggest remedial options to protect a non-English speaker. The remedial procedure would only require that "reasonable efforts . . . be made to ensure that . . . rights are protected."¹¹⁷ The "threshold point of understanding the choice[s]" is not a high standard at all.¹¹⁸ Videotapes in different languages that explain to a non-English speaker his rights or providing a translator in the police department are two suggestions that could resolve the issue. These two options are reasonable efforts that will allow a non-English speaker to understand their choices.

It is interesting that the government in *Molina* argued that the NYPD forego the physical coordination test because of a language barrier, yet that language barrier was non-existent during the videotaped procedure of the chemical test.¹¹⁹ Is it because there is a statutory requirement to offer a chemical breath test and explain the consequences of refusal, and no corresponding requirement for a physical coordination test?¹²⁰ Is it because the explanation of a chemical breath test and the consequences of refusal in Spanish are any less confusing than the explanation of a physical coordination test in Spanish? The latter possibility is not plausible; *Molina* explains that the simple instructions of a physical coordination test in English include "touch your nose with your forefinger[,] . . . [w]alk in a straight line[,] . . . [and] [r]aise your right leg."¹²¹ These simple phrases cannot be anymore confusing in Spanish than explaining the chemical test procedure and consequences of refusal in Spanish.¹²²

¹¹⁷ *Molina*, 887 N.Y.S.2d at 794.

¹¹⁸ *Niedzwiecki*, 487 N.Y.S.2d at 696.

¹¹⁹ See *Molina*, 887 N.Y.S.2d at 789.

¹²⁰ See N.Y. VEH. & TRAF. LAW § 1194 (2) (a) (1) (McKinney 2006) which states, in pertinent part:

Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test . . . at the direction of the police officer having reasonable grounds to believe such person to have been operating in violation of any subdivision of section [1192] of this article and within two hours after such person has been placed under arrest for any such violation.

¹²¹ *Molina*, 887 N.Y.S.2d at 797 (internal quotations omitted).

¹²² *Burnet* provided excerpts from the notice of charges, requests for the defendant to take a chemical breath test, and the consequences of refusal to a non-English speaking defendant:

You have been arrested for driving a vehicle under the influence of alcohol or drugs. I would like you to take a chemical exam of your breath.

Garcia-Cepero, *Burnet*, and *Molina* all made references to how the use of interpreters could avoid the discriminatory result, but after *Molina* an interpreter is not the *only* reasonable method to protect non-English speaking individuals, let alone the most reasonable method. The NYPD should create videotaped procedures for both the chemical breath test and physical coordination test for the most commonly spoken languages.¹²³ This would be a better attempt at guaranteeing equal protection than the one that is currently employed. But how expansive should the collection of videos for different languages be? As of 2000, there are approximately thirty-eight different languages spoken in New York:¹²⁴ 45,767 people speak Tagalog, 19,895 people speak Serbo-Croatian, 25,015 speak Hindi, and 38,489 people speak Urdu.¹²⁵ These few examples make clear that the use of interpreters is an issue the NYPD needs to address. Because of this issue, courts will continue to struggle with the far-reaching implications of *Molina*. Unfortunately, the *Molina* court did not give any indication of going beyond the Hispanic classification it declared was suspect. Whether people who speak the languages referenced above will be declared a suspect class remains to be decided by future courts. There have been efforts to declare English the official language of the United States,¹²⁶ but this should not obviate the need for efforts to be made to protect non-English speaking individuals so long as they are a citizens of the United States. How far will the courts go in protecting non-English speaking defendants? Right now

Do you want to take the test, yes or no? . . . [If you refuse] . . . this will result in the immediate suspension and the subsequent revocation of your driver's license, or driving privileges, whether or not you are found guilty of the charges for which you have been arrested. Also, if you refuse to submit to a chemical test or whatever part of the same, this could be presented as evidence against you in any trial, proceeding, or hearing as a result of the arrest.

Burnet, 882 N.Y.S.2d at 839-40.

¹²³ *Molina*, 887 N.Y.S.2d at 796-97.

¹²⁴ See Languages Spoken at Home and Ancestry, The Weissman Center for International Business, Baruch College, http://www.baruch.edu/nycdata/chapter01_files/sheet011.htm (last visited January 23, 2009) (listing the different languages spoken in New York City and the population of people who speak it).

¹²⁵ *Id.*

¹²⁶ See Sen. Inhofe Introduces English Language Unity Act, U.S. FED. NEWS, May 16, 2009 (discussing the English Language Unity Act of 2009, which would "declare English as the official language of the United States") (internal quotations omitted).

it is unknown, but it is certainly an issue that needs to be resolved.

With respect to due process, there are inconsistencies among *Garcia-Cepero*, *Burnet*, and *Molina*. *Garcia-Cepero* and *Molina* followed *Mathews*, while *Burnet* followed the reasoning of *Rodriguez* and *Ramos*.¹²⁷ There is no dispute that after these three decisions, *Mathews* provides greater protection than *Rodriguez* and *Ramos*. *Rodriguez* and *Ramos* focus on aspects of time and location, whereas *Mathews* does not consider those factors. This distinction seems at odds with the Supreme Court's statements that "Due Process, 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,'"¹²⁸ and that "[D]ue [P]rocess is flexible and calls for such procedural protections as the particular situation demands."¹²⁹

The three decisions discussed represent New York's struggle to determine whether it should follow *Rodriguez* and *Ramos*, or *Mathews*. Because New York has failed to extend the use of an interpreter to extrajudicial proceedings, *Rodriguez* and *Ramos* fail to take into account the unique circumstances of a DWI case, where the only relevant evidence is collected within two hours of the arrest.¹³⁰ Since the holdings of *Rodriguez* and *Ramos* are limited to judicial proceedings and the chemical test procedure is purely administrative, non-English speaking defendants do not have their due process rights preserved at the same stage that English speaking defendants' rights are protected.

Therefore, New York courts should follow the *Mathews* standard. This was applied in *Garcia-Cepero* and *Molina*, and provides a better analytical framework than *Rodriguez* and *Ramos*, taking into account the competing interests of the accused and the government. It considers the unique circumstances of this type of criminal case

¹²⁷ Compare *Garcia-Cepero*, 874 N.Y.S.2d at 697-98 (following the *Mathews* test), and *Molina*, 887 N.Y.S.2d at 796 ("In following the United States Supreme Court's analyses . . ."), with *Burnet*, 882 N.Y.S.2d at 843 ("The chemical test proceeding . . . is neither judicial nor criminal; it is administrative. Accordingly, there is no fundamental right to an interpreter during a chemical test process."), and *Ramos II*, 258 N.E.2d at 198 ("[A] defendant . . . is entitled to have the trial testimony interpreted to him in a language which he understands.").

¹²⁸ *Cafeteria & Rest. Workers*, 367 U.S. at 895 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)).

¹²⁹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹³⁰ See N.Y. VEH. & TRAF. LAW § 1194 (2) (a) (1).

because a videotape of the physical coordination test will provide objective evidence to assist both the prosecution and defense, and the use of an interpreter will provide non-English speaking defendants the choice of whether to proceed with the test.¹³¹ Without this evidence, a defendant's right to a complete defense is limited, and possible exculpatory evidence is unavailable to a non-English speaking defendant while an English-speaking defendant is entitled to that same type of evidence.¹³²

The distinction between *Rodriguez* and *Ramos* on the one hand, and *Matthew* on the other begs the question—which standard is more desirable for courts? Following *Rodriguez* and *Ramos*, non-English speaking defendants will have their due process rights significantly burdened at the same stage that an English speaking defendant will have them protected. If New York follows *Mathews*, it will provide more protection to defendants because their constitutional rights trump the government's interest in roadway safety and protecting the public against drunk drivers.¹³³

With three inconsistent decisions in over a year, it seems that the courts will continue struggling to strike the balance between *Rodriguez* and *Ramos* on the one hand and *Mathews* on the other, because providing interpreters at extrajudicial proceedings will become unduly burdensome for the government when trying to locate an interpreter for every possible language that is spoken. At the same time, future courts will have to be cautious and consider what is at stake here—the concern for protecting the constitutional rights of a criminal defendant that date back to the time when the framers

¹³¹ *Molina*, 887 N.Y.S.2d at 796-97.

¹³² See *California v. Trombetta*, 467 U.S. 479, 485 (1984). The Court stated that: Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

Id. (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

¹³³ *Molina*, 887 N.Y.S.2d at 797.

drafted the Constitution. Criminal defendants' equal protection and due process rights should never come second to any governmental interest. However, the question still stands—will all languages be treated equally? How can the NYPD account for every type of language they might encounter? *Molina* provides little guidance as the holding is specifically limited to Spanish-speaking individuals. Unfortunately, it is likely that the courts will have to wait until the same issue is presented by a defendant who speaks a different language and who did not have the assistance of a translator. If it becomes a repetitive issue for the courts, then the Legislature should consider legislation to remedy this issue.

The NYPD's inherently discriminatory procedure of not affording a physical coordination test to non-English speaking defendants completely disregards their constitutional rights. Until proponents of *Rodriguez* and *Ramos* recognize that a case-by-case inquiry is necessary to account for unique circumstances, the bright line rule of only affording an interpreter at judicial proceedings will continue to disadvantage non-English speaking individuals. Therefore, New York should continue to adhere to *Mathews* because of its flexibility, unlike *Rodriguez* and *Ramos*' rigid standard that discriminates against non-English speaking defendants at the critical stage of a DWI case—the first two hours.¹³⁴

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¹³⁴ See N.Y. VEH. & TRAF. LAW § 1194 (2) (a) (1).