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# The Language of Record: Finding and Remedying Prejudicial Violations of Limited English Proficient Individuals' Due Process Rights in Immigration Proceedings

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## Note

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ANNA C. EVERETT



*In immigration court proceedings, court interpreters interpret only those statements made directly to and by the limited English proficient ("LEP") party. Thus, LEP individuals can only understand what is being spoken* to *them, not what is being asserted* about *them. In asylum interviews, applicants must provide their own interpreter, and failure to do so may result in an applicant-caused delay and, ultimately, a denial of work authorization. In immigration proceedings, the LEP party's livelihood, family unity, and freedom from persecution and death are at stake. The message that the U.S. legal system makes clear is that it does not value clear communication with LEP noncitizens. Instead, LEP noncitizens' fates will be decided without their informed input.*

*This Note argues that procedural due process is insufficient if LEP noncitizens, in removal proceedings and asylum interviews, do not have a right to speak and be spoken to via capable interpretation. Procedural due process in immigration proceedings should be expanded to guarantee competent, clear, and complete interpretation for LEP noncitizens. Further, when such interpretation is incomplete, unclear, or incompetent, noncitizens must have access to judicial review by asserting that they were prejudiced by this violation of procedural due process. Congress should shift the burden of proving that the noncitizen's right to procedural due process was upheld to the government.*

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# The Language of Record: Finding and Remedying Prejudicial Violations of Limited English Proficient Individuals' Due Process Rights in Immigration Proceedings

ANNA C. EVERETT *

## I. INTRODUCTION: PROCEDURAL DUE PROCESS IN IMMIGRATION COURT

Noncitizens have limited procedural due process rights to hear and be heard in U.S. immigration matters.[1] First, immigration proceedings are exclusively conducted in English, and the majority of the respondents to these proceedings are limited English proficient ("LEP"),[2] requiring the use

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[1] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[The U.S. Supreme] Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("[W]e wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe."); Ekiu v. United States, 142 U.S. 651, 663–64 (1892) ("The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act."). *See also* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 217 (1990) ("[A]ccess to bilingual transcripts of proceedings is the only accurate way to assess whether the questions of attorneys and judges, and the answers of witnesses or defendants, have been interpreted with high fidelity. Appellate criteria that are currently in use fall woefully short of the mark in this regard.").

[2] Over 85% of individuals in Immigration Court proceedings were LEP as of 2009. Laura Abel, *Language Access in Immigration Courts*, BRENNAN CTR. FOR JUST. 1 (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf. Further, DOJ guidance provides that its agencies shall employ a four-factor test to avoid discriminating against LEP individuals, the first factor of which is, "The number or proportion of

of a court interpreter. Second, as Part I will discuss below, interpretation services are limited when they are provided in these proceedings, and they are not always provided. Standards for the quality of interpretation services in immigration courts are hampered by the fact that the Executive Office of Immigration Review ("EOIR") does not require its interpreters to be certified[3] and contracts out to SOS International, which reportedly underpays its employees.[4] In the case of asylum interviews, the United States Citizenship and Immigration Services ("USCIS") requires that the asylum applicant bring his or her own interpreter, and that the interpreter meet minimal qualifications.[5]

Asylum proceedings present a stark example of what is at stake if courts do not provide adequate interpretation, or the asylum applicant is not able to obtain a competent interpreter: the LEP party's livelihood, family unity, freedom from persecution, and even their own life.[6] As we will see in Part II, due to the plenary power doctrine,[7] if court interpretation is erroneous, access to judicial review is also limited. Therefore, a noncitizen's procedural due process rights in immigration proceedings are negligible. U.S. courts communicate to noncitizens—even those fleeing to the U.S. from persecution and death—that admission to the U.S. is a "privilege" not a "right."[8]

The message that our U.S. legal system makes clear is that we do not value what people without citizenship have to say, nor does it matter if they understand the proceedings happening around them that will dictate their fates. Instead, noncitizens' fates will be decided without their input.

This Note argues that to meet the minimum requirements of procedural due process, all noncitizens in immigration proceedings should have a right

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LEP persons eligible to be served or likely to be encountered . . ." DOJ LEP Guidance, 67 Fed. Reg. 41305, 41459 (June 2002).

[3] Laura Abel, *supra* note 2, at 6. The EOIR is the arm of the Department of Justice that conducts removal proceedings in Immigration Courts. U.S. DEP'T. OF JUST., https://www.justice.gov/eoir.

[4] Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. ON MIGR AND HUM. SOC'Y 207, 216 (2021) ("When SOSi took over interpretation responsibilities for the court, it cut interpreter pay by nearly half, reducing rates from $65/hour to $35/hour.").

[5] *See infra* note 15. Note that the new interim asylum rules at *infra* note 111 will change this.

[6] State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974) (remanding to the trial court to determine whether defendant's right to an interpreter was violated reasoning that "[i]t is axiomatic that an indigent defendant who is unable to speak and understand the English language should be afforded the right to have the trial proceedings translated into his native language in order to participate effectively in his own defenseA defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of a waiver . . . . It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy."). *Id.*

[7] STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW & POLICY 151 (7th ed. 2019).

[8] U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. at 542 ("[W]e wish to point out that an alien who seeks admission to this country may not do so under any claim of right.").

to speak and be spoken to via competent, clear, and complete interpretation. Further, when such interpretation is inadequate, Congress should ensure that noncitizens have access to judicial review by creating a presumption that they were prejudiced by this violation of procedural due process.

## II. LANGUAGE ACCESS IN IMMIGRATION PROCEEDINGS

Despite the fact that many noncitizens are LEP, it is standard practice for interpreters to translate immigration court proceedings only partially, as the following case study shows.

In December 2021, I observed a defensive asylum hearing in the Hartford Immigration Court. The individual charged with removability[9] from the United States responded to these charges by asserting that they were fleeing from persecution in their home country and as such, were pursuing asylum, a form of relief from removal. The asylum applicant was LEP and required the services of a Spanish interpreter, which the court provided. However, the interpreter interpreted only the statements that the immigration judge ("IJ") made directly to the asylum applicant and the applicant's responses to the IJ and interpreted no other parts of the proceedings.

When the Immigration and Customs Enforcement ("ICE") trial attorney, the opposing party in these adversarial proceedings, asked for a continuance and explained that he had not received certain documents that were necessary in order to proceed with the hearing, the interpreter did not convey this to the applicant. Only once the IJ had gone off the record and left the room to review his calendar did the asylum applicant's attorney, who was fluent in Spanish, have the opportunity to communicate with her client in Spanish. She explained that there would be a continuance in the case and why. The stakes were high—this client was at risk of being removed—but if the client did not have an attorney who was fluent in Spanish, they would likely have been given the continued court date and asked to return to court without explanation. No one would have told them the reason for the continuance or what to expect at the next hearing.

Unfortunately, partial interpretation is standard practice in immigration

[9] Since 1996, the word "remove" replaced the words "deport" or "exclude," per the Illegal Immigration Reform and Immigrant Responsibility Act. *See* 8 U.S.C. § 1101 (d)(2) (2012) ("[A]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation").

courts.[10] Further, unlike in federal civil and criminal courts,[11] immigration courts do not require that court interpreters meet any level of professional certification,[12] which increases the risk of errors in interpretation. This, in turn, makes it more likely that LEP individuals in immigration proceedings will not comprehend what is happening in their own hearings.[13]

Further, under standard practice, affirmative asylum applicants are not provided with an interpreter at all and instead must bring their own interpreter to their asylum interview.[14] In an affirmative asylum case, the applicant goes to an Asylum Office to be interviewed by an Asylum Officer, who adjudicates the claim and decides whether to grant asylum.[15] The Asylum Office requires that the applicant-provided interpreter meets relatively modest qualifications, including fluency in the source language

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[10] Abel, *supra* note 2, at 5 ("[M]any Immigration Courts routinely provide interpretation only for portions of their proceedings, leaving LEP respondents unable to understand the other portions. Specifically, interpretation is generally provided only for the statements of non-English-speaking respondents and witnesses, and for questions or statements addressed directly to them by the court or attorneys. As a result, LEP individuals may not be able to comprehend the testimony of English-speaking witnesses and exchanges between the Immigration Judge, DHS Trial Attorney and defense counsel. The many respondents who appear pro se, and so cannot even rely on their attorneys to tell them what is occurring, may leave the proceeding with no idea what has just occurred, and may be unable to respond to testimony presented by other witnesses.").

[11] Under the Federal Court Interpreters Act, LEP individuals have a right to a certified court interpreter, or at least a competent interpreter, in both criminal and civil actions. 28 U.S.C. § 1827 (2022). In state courts, access to an interpreter is not guaranteed. *See* Laura Abel, *Language Access in State Courts*, BRENNAN CTR. FOR JUST., 62–73 (July 4, 2009) https://www.brennancenter.org/our-work/research-reports/language-access-state-courts (indicating the states in which providing a court interpreter in civil cases is discretionary versus the states in which it is discretionary as well as indicating the states that require the LEP party to pay for interpretation versus the states in which courts pay for it).

[12] 8 C.F.R. § 1003.22 (1992) (requiring only that "[a]ny person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.").

[13] Barak, *supra* note 4, at 216 ("Lower interpreter certification and training standards in immigration courts than in other federal courts may result in an under-qualified pool of interpreters who, as a group, are more likely to commit errors than their counterparts.").

[14] U.S. CITIZENSHIP AND IMMIGR. SERVS., REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE – OFFICER TRAINING PROGRAM 11 (last accessed June 12, 2022), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf ("USCIS does not provide interpreters for non-English speaking interviewees at affirmative asylum interviews. Accordingly, interviewees are required to bring their own interpreter to the interview."). However, due to the COVID-19 pandemic and until March 16, 2023, USCIS has temporarily deviated from requiring LEP parties to bring their own interpreters for the purposes of limiting the number of people in the room and limiting the spread of the virus: "USCIS will continue requiring asylum applicants who are unable to proceed with the interview in English to use government-provided telephonic contract interpreters if the applicants speak one of the 47 languages found on the Required Languages for Interpreter Services Blanket Purchase Agreement/ U.S. General Services Administration Language Schedule . . . . Once this rule is no longer in effect, asylum applicants unable to proceed with an interview in English before a USCIS asylum officer will be required to provide their own interpreters under 8 CFR 208.9(g)." Asylum Interview Interpreter Requirement Modification Due to COVID-19, 87 Fed. Reg. 14757, 14759, 14762.

[15] U.S. CITIZENSHIP AND IMMIGR. SERVS., – TYPES OF ASYLUM DECISIONS (last accessed Mar. 20, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-asylum-decisions.

and English, being eighteen years of age or older, and not being the legal representative of the applicant.[16] The Refugee, Asylum, and International Operations Directorate – Officer Training Program does not specify what level of language proficiency qualifies as fluent.[17] Notably, the Asylum Office does provide an interpreter monitor who observes the interpretation telephonically to ensure the quality of the interpretation.[18] This raises the question of why the Asylum Office cannot provide full-service interpretation at the outset as well.[19]

If the applicant-provided interpreter does not meet the guidelines above, rather than allowing the applicant to find a different interpreter, federal law states that such "[f]ailure . . . may be considered a failure to appear for the interview for the purposes of [8 C.F.R.] § 208,"[20] which constitutes applicant-caused delay and can negatively affect an applicant's ability to access employment authorization in the future.[21] In practice, the official might let the applicant try to find an interpreter, but this will likely still be considered an applicant-caused delay.

Both the immigration court and the Asylum Office interpretation issues described above have troubling implications for LEP individuals' procedural due process rights to fundamentally fair proceedings. In theory, noncitizens have due process rights under the Fifth and Fourteenth Amendments,[22] and

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[16] U.S. CITIZENSHIP AND IMMIGR. SERVS., REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE – OFFICER TRAINING PROGRAM: INTERVIEWING—WORKING WITH AN INTERPRETER, 42 (last accessed June 12, 2022), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf. Even so, for an asylum applicant, finding an interpreter who meets these qualifications may constitute an insurmountable barrier. Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENV. L. REV. 707, 707 (2020) ("Asylum seekers, especially those who are low income or speak rare languages, face significant challenges in finding suitable interpreters.").

[17] U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 16.

[18] U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 16, at 11–12. Professor Dadhania asserts that "[t]he failure to provide interpreters at asylum interviews is one example of the weaponization of language access, designed to erect barriers to protection in the United States and subordinate certain categories of migrants." Dadhania, *supra* note 16, at 707.

[19] 87 Fed. Reg., *supra* note 14, at 14759.

[20] U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 16, at 41.

[21] Asylum applicants can generally obtain employment authorization 365 days after filing their asylum application. However, employment authorization will be denied if the Asylum Officer finds that the applicant caused a delay (such as by failing to appear for an interview), for which there is no demonstrated "good cause," if the delay is not remedied by the time that the employment authorization document is filed. 8 C.F.R. § 208.7 (2021).

[22] Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."). *But see* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020) ("While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause." (citing Ekiu 142 U.S. at 660)). *See also* Shaughnessy v. U.S. ex rel. Mezei, 345

when navigating the U.S. immigration system, they also have a right to meaningfully access the above-mentioned federal agency services, which may require that oral proceedings be interpreted and written materials be translated.[23] In practice, LEP individuals are often not able to meaningfully access immigration proceedings.[24]

Meaningful access to proceedings matters because noncitizens have a right to procedural due process.[25] Procedural due process is measured by the Supreme Court's *Mathews v. Eldridge* test, which balances an individual's property interests with the feasibility of the government protecting those interests. A court must consider

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.[26]

Here, noncitizens have a significant interest in the property right of their presence in the U.S., which the government should protect with the procedural safeguard of capable interpretation that allows the noncitizen to understand their own immigration proceedings.

Scholars have investigated the risk of due process violations resulting from LEP individuals' lack of access to competent, clear, and complete interpretation in immigration court,[27] asylum interviews,[28] plea deals,[29] and

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U.S. 206, 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing."). *But see* Dadhania, *supra* note 16, at 729 ("Noncitizens arriving at the U.S. border and seeking admission into the United States, termed 'arriving aliens,' have virtually no procedural due process rights.").

[23] As administrative adjudicators for the Executive Office of Immigration Review, BIA judges and IJs must comply with Executive Order 13166, which requires each federal agency to "develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency." Exec. Order No. 13166, 3 C.F.R. 13166 (2000).

[24] U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. at 542 ("At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.").

[25] Mathews v. Diaz, 426 U.S. at 77.

[26] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

[27] Barak, *supra* note 4, at 208.

[28] Dadhania, *supra* note 16, at 742 (finding that the current system of requiring applicants for asylum to bring their own interpreters to their affirmative asylum interviews constitutes a violation of procedural due process).

[29] Donna Ackermann, Note, *A Matter of Interpretation: How the Language Barrier and the Trend of Criminalizing Illegal Immigration Caused a Deprivation of Due Process Following the*

criminal trials,[30] the latter two of which have much higher due process standards than those of the former two.[31] This Note will focus on the effect that barriers to meaningful access to immigration proceedings (including affirmative proceedings like asylum interviews as well as defensive proceedings like immigration court hearings) have on LEP individuals and remedies that should be put in place to address these barriers.

Due process in immigration adjudications, such as removal proceedings, matters because noncitizens who are removed may be deprived of land, work, family unity, and in the case of asylum applicants, freedom from persecution and even freedom from death.[32] Courts see procedural due process in immigration court as an issue dictated by the plenary power doctrine. Under the plenary power doctrine, the judicial branch must defer to the legislative and executive branches to decide issues regarding foreign policy issues, including who will be welcomed into the United States, with a pathway to citizenship, and who will not be.[33] However, this Note argues that the plenary power doctrine does not justify violations of noncitizens' procedural due process rights.[34] Further, this Note suggests proactive and reactive remedies for noncitizens to seek judicial review based on violation of their procedural due process rights regarding interpretation.

### A. *Standards for Interpretation in Immigration Hearings*

Immigration courts provide interpreters, but the interpreters do not need

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*Agriprocessors, Inc. Raids*, 43 COLUM. J.L. & SOC. PROBS. 363, 365 (2010) (arguing that when defendants spoke indigenous South American languages but were provided with an interpreter who spoke Spanish, this inappropriate interpretation was a violation of their right to due process).

[30] Lisa Santaniello, Comment*, If an Interpreter Mistranslates in a Courtroom and There Is No Recording, Does Anyone Care?: The Case for Protecting LEP Defendants' Constitutional Rights*, 14 NW. J.L. & SOC. POL'Y 91, 120 (2018) ("Since errors in interpretation can affect defendants' due process right, the right to effective assistance of counsel, the right to present a defense, and the right to testify on their own behalf, they are constitutional errors.").

[31] *See, e.g.*, U.S. CONST. amend. VI (providing defendants in criminal cases with the right to be represented, the right to cross-examine witnesses against them, and the right to a speedy and impartial trial by jury).

[32] Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.").

[33] STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW & POLICY 154 (7th ed. 2019).

[34] *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 259 ("The one partial exception to the absolute character of Congress's power over immigration concerns procedural due process. Despite a leading early decision to the contrary, it is now accepted that aliens undergoing deportation proceedings are entitled to procedural due process. The same principle seems to extend to those exclusion proceedings in which the aliens are returning residents, although again the cases are in conflict."). *But see id.* at 259–60 (noting that people who are in the U.S. without admission, or who attempt to enter without being admitted, have fewer procedural due process rights).

to be certified.[35] Per the immigration court rules of procedure, the interpretation must only be "accurate."[36] As a federal agency, the EOIR must comply with Executive Order 13166, which directs federal agencies to "develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency."[37] However, as we have seen, immigration agencies do not always follow this directive.

Unlike immigration judges, asylum officers may use their discretion to decide to conduct asylum interviews in the applicant's source language if they are fluent in it, though this is not required.[38] Immigration judges do not conduct removal proceedings in the source language, but it is beneficial if they have some understanding of the source language and thus can detect errors in interpretation as they occur.[39] The question of whether multilingual judges and advocates actually do choose to intervene when they notice an error in interpretation is another issue, which is beyond the scope of this article.

### B. *The Role of the Court Interpreter*

English language fluency[40] is not a prerequisite for an individual to be heard in immigration court and to be able to understand the proceedings occurring surrounding their claim. Interpreters play a crucial role in "mediating"[41] between LEP individuals and courts and administrative agencies. The court interpreter is supposed to be as unobtrusive as possible, refraining from adding their thoughts or opinions to what they communicate

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[35] 8 C.F.R. § 1003.22 (2008).

[36] *Id.* ("Any person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.").

[37] *Supra* note 23; *see also* Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 159, 50124–25 (Aug. 16, 2000) (Federal agencies that "fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations. . . . In some cases, 'meaningful opportunity' to benefit from the program requires the recipient to take steps to assure that translation services are promptly available. In some circumstances, instead of translating all of its written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning written translations on reasonable request. It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.").

[38] U.S. CITIZENSHIP AND IMMIGR. SERVICES, *supra* note 16, at 12.

[39] BERK-SELIGSON, *supra* note 1, at 214 ("Only a bilingual attorney or judge would notice such discrepancies" as "regularly occurring pragmatic alterations that interpreters make in court").

[40] In 2019, an estimated 8.2%, or 25,464,167, people five years of age and older in the United States spoke English less than "very well." U.S. CENSUS, *Language Spoken at Home*, https://data.census.gov/cedsci/table?q=language%20use&tid=ACSST1Y2019.S1601 (last visited June 12, 2022).

[41] *See supra* note 4, at 212.

between the LEP party and the court.[42] The court interpreter's job is to interpret exactly the words that an LEP party says from the source language into English for the court's benefit and exactly the words that are said from English into the source language for the LEP party's benefit, nothing more and nothing less.[43]

Although litigants without lawyers may see the court interpreter as their advocate when they are unclear on the role that the interpreter should play, the interpreter cannot provide legal advice or information.[44] However, this proscribed role of mirroring exactly what has been said in one language into another language is not as simple as it sounds. Errors in interpretation are common,[45] which is why both proactive and reactive remedies are essential.[46]

## III. IMMIGRATION COURTS HAVE FAILED TO PROTECT LEP INDIVIDUALS' RIGHTS TO MEANINGFUL LANGUAGE ACCESS

Lack of access to interpretation in immigration courts starts with inadequate legislation providing for qualified court interpreters in immigration court. However, problems in language access are not just due to lack of affirmative legislation, but rather also due to policies that decrease access to quality interpretation. Under the Trump administration, access to interpreters for immigrants to the United States decreased.[47] Under the Obama administration, court interpreters' wages decreased,[48] which likely negatively impacted the working conditions of interpreters, the availability of interpreters, and the quality of their work. Immigration courts often

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[42] Joanne I. Moore and Judge Ron A. Mamiya, *Interpreters in Court Proceedings*, in IMMIGRANTS IN COURTS 37 (Joanne I. Moore and Margaret E. Fisher, eds., 1999).

[43] ROSEANN DUEÑAS GONZÁLEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE 16 (1991) (emphasis in original) ("Court interpreters are primarily charged with delivering to the court and to a non-English-speaking defendant the linguistic equivalent of all spoken and written communications . . . . The interpreter is required to render in a **verbatim manner** the form and content of the linguistic and paralinguistic elements of a discourse, including all of the pauses, hedges, self-corrections, hesitations, and emotion as they are conveyed through tone of voice, word choice, and intonation.").

[44] *Supra* note 41.

[45] ALICIA B. EDWARDS, THE PRACTICE OF COURT INTERPRETING, 91 (1995). Attorneys can contribute to interpretation errors as well by asking overly complicated questions or addressing the witness in the third person, for example. *Id.* at 93.

[46] *Infra* Sections IV and V.

[47] For example, one immigration judge reported that under the new, faster-paced case flow system in immigration courts, asylum seekers who spoke indigenous languages had less access to interpretation: "'If you speed up their case, it just doesn't give them as much time to find various resources, like people who can help them with language, and then find counsel, and get the documentation they need from their village.'" Rachel Nolan, *A Translation Crisis at the Border*, NEW YORKER (Dec. 30, 2019), https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border.

[48] Dadhania, *supra* note 17, at 710. Under the new contract with SOS International interpretation services, immigration court interpreters, who had previously made $65 an hour, were paid $35 an hour. *Supra* note 5, at 215–16.

provide LEP speakers of indigenous Latin American languages with Spanish interpreters, assuming that they speak a language they may speak very little or not at all.[49]

Lack of access to appropriate interpretation services is an issue in immigrant detention centers as well.[50] Although these are known issues, anti-immigrant policies have reinforced rather than combated these disparities in due process.[51] For example, the Department of Justice has restricted language access for noncitizens by replacing in-person interpretation services with phone and video interpretation, lessening the likelihood that the interpretation will be comprehensive and understood by the noncitizen and the adjudicator.[52] Additionally, immigration courts do not screen noncitizens to see if they speak an indigenous language for which they require an interpreter.[53]

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[49] *See* BLAKE GENTRY, AMA CONSULTANTS, EXCLUSION OF INDIGENOUS LANGUAGE SPEAKING IMMIGRANT IN THE U.S. IMMIGRATION SYSTEM, A TECHNICAL REVIEW 48 (2015) ("Given, the historic case level overload of some 445,607 backlogged cases reported federal immigration court in April of 2015, indigenous language speaking immigrants often experience longer waits than the general immigrant population due to non-compliance with Limited English Proficiency Program mandates to identify and provide access in the language of the detainee. Mistaken Spanish language capacity among speakers of indigenous languages in court is prevalent. An indigenous language immigrant with low or no literacy is an indication that only their primary language should be used to communicate with them in immigration court.").

[50] Melissa Wallace and Carlos Iván Hernández, *Language Access for Asylum Seekers in Borderland Detention Centers in Texas*, 68 J. LANGUAGE & L. 143, 146 (2017) ("In a memorandum from the U.S. Department of Homeland Security to Asylum Office Directors, it was acknowledged that neither of the two language service providers with whom Asylum Headquarters contracts has interpreters available for the Guatemalan language Ixil, and that interpreters of other languages such as Mam are very limited. . . . CARA Project [family detention along border pending credible fear interviews] staff report that Customs and Border Protection agents routinely misidentify indigenous women's primary language as Spanish and incorrectly report that indigenous women understood interrogations conducted in Spanish. . . . when, in fact, they did not. These communication barriers have resulted in women and children of indigenous languages living in virtual solitary confinement, sometimes even resulting in the erroneous deportation of families seeking protection in the United States.").

[51] Dadhania, *supra* note 17, at 709 ("The Trump Administration's trampling on language access occurs on the back of a long-standing history of linguistic abuse by the government in the immigration context. Since at least the inception of the modern system of asylum in the United States in 1980, the federal government has used language access to subordinate disfavored groups of asylum seekers.").

[52] *Id.* at n. 8. *See also* Barak, *supra* note 5, at 210–11 (citations omitted) ("By 2010, 12 percent of all immigration court hearings were conducted via video conference. Today, video conferencing is used in place of physical transporting detainees to court for hearings in about 1/3 of all detained cases. . . . Nonlinguistic and paralinguistic cues, including intonation and physical gestures, are fundamental aspects of communication. Telephone and video equipment lack technical capabilities court interpretation requires, compromising quality. . . . Video conferencing inhibits accurate transmissions of communication and immigrants' comprehension of hearing dialog, altering voice tones and changing meaning, making some words inaudible, and impairing immigrants' abilities to accurately understand nonverbal cues from interpreters and others.").

[53] Blake Gentry, *O'Odham Niok? In Indigenous Languages, U.S. "Jurisprudence" Means Nothing*, 37 CHICANO-LATINO L. REV. 29, 34 (2020) ("While there are standards for interpreters in court, there is no indigenous language screening mechanism by government attorneys, by attorneys defending their clients, nor the court itself to assess language need. It is up to the judge or magistrate to discern if interpretation is required.").

## IV. THE PLENARY POWER DOCTRINE LIMITS JUDICIAL REVIEW

Judicial review of immigration adjudications is restricted both by statute and by the plenary power doctrine.[54] Under the plenary power doctrine, courts reason that admitting and removing immigrants to the United States pertains to national security and thus is not a judicial question, and thus the Judicial Branch must defer the political branches of government.[55] As the case below will illustrate, the plenary power doctrine sometimes conflicts with the procedural due process interests of noncitizens to have meaningful access to the process of adjudicating their fate in the U.S., to hear and be heard competently, clearly, and completely.[56]

For a troubling example of judicial deference given to government officials vested with power to make immigration decisions, consider *Yamataya v. Fisher*. Here, the Supreme Court considered an immigration inspector's determination (outside of immigration court) that the appellant was a public charge and thus should be deported.[57] The appellant stated that "she did not understand the English language, and did not know at the time that such investigation was with a view to her deportation from the country" and during the investigation "she did not understand the nature and import of the questions propounded to her."[58]

The Court framed the issue in this case as being one of due process of

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[54] 8 U.S.C. § 1252 ("[N]o court shall have jurisdiction to review—except as provided in section (e) [providing that courts may enter declaratory, injunctive, or equitable relief in actions pertaining to orders to exclude noncitizens] any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal"); *supra* note 8.

[55] Plyler v. Doe, 457 U.S. at 202, 225 (1982) ("The Constitution grants Congress the power to 'establish an uniform Rule of Naturalization.' Art. I., § 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. . . . The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field."); Shaugnessy v. U.S. ex rel. Mezei, 345 U.S. at 206, 210 (1953) ("[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). *See also* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018) ("Historically, the U.S. Supreme Court has deferred to Congress in determining applicability of constitutional protections in the realm of immigration law. The Court's reluctance to recognize constitutional protections for noncitizens has also been attributed to exceptional deference to the political branches pursuant to the plenary power doctrine.").

[56] *See, e.g.*, Shaugnessy, *supra* note 53, at 225, 228 (J. Jackson, dissenting) (asserting that "[t]his is at the root of our holdings that the resident [noncitizen] must be given a fair hearing to test an official claim that he is one of a deportable class. . . . Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.").

[57] *Yamataya v. Fisher,* 189 U.S. at 86, 87 (1903).

[58] *Id.* at 88, 101.

law under the Constitution.[59] The central question was whether the appellant was able to be heard. Nonetheless, based on the facts before it, the Court concluded that it could not and would not intervene because the appellant should have instead appealed "to the Secretary from the decision of the immigration inspector."[60]

The appellant would have been hard-pressed to seek judicial review of the outcome of the investigation to the Secretary because she did not understand that there was an investigation in the first place. However, the Court dismissed the appellant's argument that since she did not speak English she did not receive notice of the proceedings against her: "[i]f the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court."[61] The Court thus concluded that there was no ground "for the contention that due process of law was denied to appellant."[62] However, since the appellant did not know that there was an ongoing investigation, she could not have received notice of, nor respond to, the charges of illegal presence in the United States. She could not hear nor be heard. Thus, there was no procedural due process afforded to the appellant in this case, but sadly, it is still cited approvingly by some courts.[63]

## V. IMPLICATIONS OF BARRIERS TO EFFECTIVE INTERPRETATION IN THE IMMIGRATION CONTEXT

Immigration courts continue to treat noncitizens as less deserving of procedural due process. The case cited above is still good law. Lack of access to quality interpretation violates noncitizens' procedural due process rights under the Constitution because the standards of evidence in immigration proceedings rely heavily on the consistency of language, both that of the applicant and that of corroborating witnesses.[64]

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[59] *Id.* at 100 ("Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified. Those acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right.").

[60] *Id.* at 102.

[61] *Id.*

[62] *Id.*

[63] *See, e.g.*, F.L.B. v. Lynch, 180 F. Supp. 3d 811, 819 (W.D. Wash. 2016), reconsideration denied, No. C14-1026 TSZ, 2016 WL 4533608 (using *Yamataya* to define a low bar of "the constitutional minimum" of due process rights for noncitizens without admission into the United States).

[64] 8 U.S.C. § 1158 (b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that

### A. *Language as Credibility*

Asylum seekers fleeing persecution in their countries of origin must communicate their story in a consistent manner, even if they are using an interpreter. They do not have control over how their statements will be interpreted and then recorded and potentially cited later on. Even though no recording is made during affirmative asylum interviews in front of an asylum officer, if the applicant is denied asylum, the asylum officer's notes may be referred to later on when the case is referred to immigration court: "the consequences of incorrect interpretation can fester beyond the asylum interview. Namely, the Department of Homeland Security attorney opposing an asylum application in immigration court may introduce into evidence an asylum officer's notes to impeach the asylum seeker's credibility."[65] Because asylum seekers often cannot provide direct evidence of their persecution, such as an affidavit from their persecutor, their own credible testimony is all they have to prove their status as a refugee.[66] Thus, there are serious consequences to inconsistencies in an applicant's story.[67] If an asylum applicant cannot participate in the telling of their own story, which is the basis of the adjudicator's resulting credibility finding, the consequences are dire. An asylum applicant with a meritorious claim may nonetheless be denied asylum if they are not found to have a credible story of past persecution or a well-founded fear of persecution in the future.[68]

One example of an asylum case where the asylum applicant's statements regarding the persecution she had faced were interpreted erroneously is the pivotal, precedent-making gender-based violence asylum case, *Hernandez-*

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the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

[65] Dadhania, *supra* note 18, at 708 ("For example, two indigenous migrant children recently died in the custody of the U.S. Border Patrol potentially due to a language barrier that prevented communication about medical care.").

[66] 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

[67] *Supra* note 49.

[68] 8 U.S.C. § 1101(a)(42)(A) ("The term 'refugee' means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.").

*Chacon v. Barr*.[69] Here, the threats that a gang member made toward Hernandez Chacon were a key piece of evidence. The applicant used these threats to show that the harm her persecutor had perpetrated toward her had risen to the level of persecution based on her political opinion, one of the elements required to establish status as a refugee in the United States.[70] In this case, the Second Circuit cited to the record from the proceedings below, in which the Spanish phrase *por las buenas o por las malas* had been translated as "'since she [Hernandez-Chacon] didn't want to do this with him [a gang member] in a good way, it was going to happen in a bad way.'"[71] This phrase translates approximately to "by hook or by crook" or "by fair means or foul,"[72] but this translation fails to include the more threatening connotation that the phrase has in the context of gangs in Honduran society. The Second Circuit's understanding of this phrase's meaning downplayed the severity of the threat made against the applicant. In context, *por las buenas o por las malas* more likely means that the gang member would force Hernandez-Chacon to have sex him whether she consented to it or not.[73] This threat of sexual violence was thus excluded from the court's reasoning in finding that the applicant's past harm rose to the level of persecution, weakening the strength of this case's precedential value for future gender-based violence and sexual violence asylum cases.

Luckily for Hernandez-Chacon, despite this inadequate translation of the gang member's threat the Second Circuit granted her petition for review on the basis of past persecution due to her feminist political opinion, which she argued was the gang member's motivation for targeting her.[74] This binding judicial opinion is oft-cited for its treatment of the petitioner's "resistance to male domination in Salvadoran society" as evidence of a feminist political opinion for which an asylum seeker could be persecuted and thus seek refugee status.[75] Thus, this case has served as important precedent in gender-based violence and political opinion asylum cases. However, this mistranslation undermined the Second Circuit's evaluation of the gender-based violence that the applicant had suffered and would continue to suffer if removed back to Honduras. If the translation had been

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[69] Hernandez-Chacon v. Barr, 948 F.3d 94, 94 (2d Cir. 2020).

[70] *Supra* note 66.

[71] *Hernandez-Chacon*, 948 F.3d at 98.

[72] Translation into English *Por Las Buenas o Por Las Malas*, REVERSOCONTEXT https://context.reverso.net/translation/spanish-english/buenas+o+por+las+malas (last visited Sept. 7, 2022), English Translation *Por Las Buenas o Las Malas*, TR-EX, https://tr-ex.me/translation/spanish-english/por+las+buenas+o+las+malas#gref (last visited Aug. 30, 2022); Dictionary Spanish-English *Por Las Buenas o Por Las Malas*, LINGUEE, https://www.linguee.com/spanish-english/translation/por+las+buenas+o+por+las+malas.html (last visited Aug. 30, 2022).

[73] My client, in the University of Connecticut Asylum and Human Rights Clinic, explained to me that "*por las buenas o por las malas*" has this connotation of sexual and gender-based violence when used by male gang members in Honduras.

[74] *Hernandez-Chacon*, 948 F.3d at 99.

[75] *Id.* at 99, 105.

correct in the first place, or if the applicant had argued that her claim was prejudiced by mistranslation and been granted judicial review, this case might be even more analogous to other similar asylum cases, like my client's current defensive asylum case.

My client in the Asylum & Human Rights Clinic, whose claim for asylum is also based on gender-based violence and gang violence, has used the exact same phrase, "*por las buenas o por las malas*", to describe how a gang member who desires a woman sees that woman as his property—regardless of whether or not she is willing to be his girlfriend and have sex with him. Published Second Circuit decisions are binding on the Hartford Immigration Court, where my client is in removal proceedings. *Hernandez-Chacon* would be more persuasive and analogous for the purpose of arguing my client's case if the court record had contained a more precise translation of this phrase, which is commonly used when describing gangs' *machista* attitudes toward women in Honduras. If the Second Circuit had a more accurate translation of this phrase, it might have included that piece of evidence in its reasoning for finding past persecution based on political opinion, and since gang members that my client has interacted with have used this same phrase as a threat, this would have made my client's case more analogous to *Hernandez-Chacon* and more likely to be decided in my client's favor.

### B. *Violations of Procedural Due Process Rights and the Prejudice Requirement*

As mentioned above, evaluating an asylum applicant's credibility constitutes the crux of an adjudicator's determination of whether to grant asylum. In *Augustin v. Sava*, after an interpreter mistranslated the asylum applicant's statement that he "fled Haiti for fear of arrest because his uncle had a 'disease,'" the applicant's asylum claim was denied due to failing to establish a well-founded fear of persecution based on a protected ground.[76] The Second Circuit identified this mistranslation after reviewing the applicant's affidavit.[77] The court reasoned that "translation services must be

[76] Augustin v. Sava, 735 F.2d at 32, 34–35 (2d Cir. 1984).

[77] *Id.* at 34. Note that this case was decided before the REAL ID Act of 2005, and under this Act, there is no longer a requirement that evidence be material in a credibility finding in asylum cases. REAL ID Act, 119 Stat. 303 (2005) (codified at 8 U.S.C. § 1158). *See, e.g.*, Morina v. Holder, 606 F. App'x. 599, 601 (2d Cir. 2015) (reasoning that "[f]or applications like Morina's, governed by the REAL ID Act, the agency may, '[c]onsidering the totality of the circumstances', base a credibility finding on an applicant's 'demeanor, candor, or responsiveness,' the plausibility of his account, and inconsistencies in his statements, 'without regard to whether' they go 'to the heart of the applicant's claim,' so long as they reasonably support an inference that the applicant is not credible."); *see also id.* at 603 ("Although translation errors may provide a basis for remand, see *Augustin v. Sava*, 735 F.2d 32, 38 (2d Cir. 1984) (considering errors in translation of testimony), remand is not required if an alien 'has failed to identify any translation errors that significantly alter the meaning of his testimony,' *Guo Qi Wang v. Holder,* 583

sufficient to enable the applicant to place his claim before the judge. . . . The very essence of due process is a 'meaningful opportunity to be heard.'"[78] Further, the Second Circuit held that the "appellant was denied procedural rights protected by statute and INS [now USCIS, ICE, and Customs and Border Protection] regulations and very likely by due process as well where the translation of the asylum application was nonsensical."[79] This appeal based on procedural due process was successful because the applicant was able to show the specific part of his claim that was prejudiced by the interpreter's error and why that error was so important to the strength of his case.

In order to access judicial review, noncitizens in removal proceedings need to be able to show that errors in interpretation prejudiced their rights to meaningfully and fairly be heard.[80] Unlike Augustin, the asylum applicants in *Acewicz v. U.S. I.N.S.* were unable to show that they had been prejudiced by the inadequate interpretation they received in immigration court.[81] These asylum applicants alleged that they had been denied due process due to faulty interpretation during their removal proceedings, "each cit[ing] isolated passages of garbled testimony." However, the court reasoned that the applicants were required to, and failed to, "show that a better translation would have made a difference in the outcome of the hearing."[82] Further, despite the record only being available in English, the court held that "[t]he record reveals a complete and adequate translation."[83] Instead of reviewing the parts of the testimony that the asylum applicants had highlighted as having been erroneous and therefore prejudicial violations of their due process rights, the court simply reviewed the record in English and (unsurprisingly) found no issues. The court was not persuaded that translation would have made a difference in the outcome of the case, but since the record was only in English, and the asylum applicants did not speak English, it would have been difficult for the asylum applicants to make this showing without at least being provided with a bilingual transcript of the proceedings below.

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F.3d at 86, 89 n.1 (2d Cir. 2009). Moreover, resolution of the inconsistency regarding the report does not overcome the numerous other inconsistencies and implausibilities [sic] underlying the adverse credibility determination, and is therefore unlikely to alter the result of the case.").

[78] *Supra* note 76, at 37. This language also calls to mind Exec. Order 13166, which requires each federal agency to "develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency." Exec. Order 13166, *supra* note 22, at 290.

[79] *Augustin*, 735 F.2d at 38.

[80] *Infra* note 108.

[81] Acewicz v. U.S. I.N.S., 984 F.2d 1056, 1056, 1063 (9th Cir. 1993).

[82] *Id.*

[83] *Id.*

## VI. PROACTIVE VERSUS REACTIVE SOLUTIONS TO VIOLATIONS OF DUE PROCESS RIGHTS

Of course, the right to adequate interpretation and the ability to show that there has been prejudice (and therefore to access judicial review) are separate issues. The first falls into the category of proactive ways to minimize prejudicial violations of LEP parties' procedural due process rights. The second is a reactive, and crucial, remedy for the inevitable issues in interpretation that arise. Not all interpretation problems will be significant enough to rise to the level of prejudice. Nonetheless, parties whose livelihoods, family unity, and right to live free of persecution depend on understanding and being understood in court have a right to a greater degree of judicial review than they are currently provided.

## VII. PROACTIVE REMEDIES

As we have seen, there are many barriers to competent, clear, and complete interpretation in the first place.

### A. *Certifying Court Interpreters*

One of the proactive remedies that lawyers and judges have proposed for minimizing errors in court interpretation is ensuring that the interpreters that courts retain meet certain standards of qualification and, ideally, certification.[84] Interpreter certification sets a very high bar for the level of understanding of both the source language and English.[85] Many states have statutes and regulations providing that civil and criminal (but not necessarily administrative) court interpreters may obtain some level of certification, although few require that court interpreters obtain certification.[86] Immigration courts do not require that interpreters be certified.[87]

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[84] Moore, *supra* note 42, at 30 (arguing that interpreter education is a necessary step to improve the quality of court interpretation). For a list of proactive reforms for addressing barriers to language access in immigration court including certifying immigration court interpreters, *see* Abel, *supra* note 2, at 10–14.

[85] In 1990, there was a "96 percent failure rate among test-takers" of the federal certification exam. BERK-SELIGSON, *supra* note 1, at 216.

[86] *See, e.g.*, ARK. CODE ANN. § 16-10-1103 (2013) ("A person with limited English proficiency who is a party to or a witness in a court proceeding is entitled to a qualified interpreter to interpret for the person throughout the court proceeding . . . The Supreme Court shall administer an interpreter program to appoint and use interpreters in court proceedings and to ensure interpreter certification, continued proficiency, and discipline."). *But see* CAL. GOV'T CODE § 68561 (2014) ("(a) Except for good cause as provided in subdivision (c), a person who interprets in a court proceeding using a language designated by the Judicial Council pursuant to subdivision (a) of Section 68562 shall be a certified court interpreter, as defined in Section 68566, for the language used. . . . (c) A court may for good cause appoint an interpreter for a language designated by the Judicial Council who does not hold a court interpreter certificate. The court shall follow the good cause and qualification procedures and guidelines adopted by the Judicial Council.").

[87] 8 C.F.R. § 1003.22 (1992).

For a non-immigration court example, in order to become a court interpreter in the Connecticut Judicial Branch, one needs to pass a written examination administered by the National Center for State Courts and an oral screening that is administered internally.[88] However, not all court interpreters in the State of Connecticut need to be certified. In order to become a certified court interpreter, one must also pass an oral examination not administered by the National Center for State Courts.[89] As of the time of this writing, the Connecticut Judicial Branch only provides for certification as a court interpreter in the languages of Spanish, Portuguese, and Polish.[90] For those looking to become a court interpreter without pursuing certification, the court offers exams in "Spanish, Portuguese, Polish, Albanian, Chinese Cantonese, Korean, Haitian Creole, Chinese Mandarin, Russian, and Vietnamese; but it will continue to offer qualifying examinations to interpreter candidates for all languages."[91] The Connecticut state courts, therefore, provide another example of legal proceedings where there is a differential in access to competent interpretation depending on how dominant the LEP individual's language has become in the state where they are seeking an interpreter.[92] Immigration courts similarly need to close the gap between the access that English speaking noncitizens and LEP noncitizens have to immigration proceedings.

### B. *Immigration Courts Must Provide Full Rather than Partial Interpretation*

A respondent's participation in an adversarial proceeding depends on the statements that the respondent's attorney, the prosecuting attorney, the witnesses, and the IJ make during the course of that proceeding about the respondent, not just directly toward the respondent. Nonetheless, in "many Immigration Courts . . . interpretation is generally provided only for the statements of non-English-speaking respondents and witnesses, and for questions or statements addressed directly to them by the court or attorneys."[93]

Interpretation in immigration courts currently seems to be a one-way street, benefiting only the people in the proceeding who do not understand the LEP party's source language, and not providing meaningful access for the LEP party to the proceedings. Immigration courts must require that interpreters interpret all parts of court proceedings in order to improve LEP

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[88] *Interpreter and Translator Services Unit (ITS)*, STATE OF CONN. JUD. BRANCH, https://jud.ct.gov/external/news/jobs/interpreter.htm (last visited Sept. 1, 2022).

[89] *Id.*

[90] *Interpreter and Translator Services Unit*, *supra* note 88.

[91] *Id.*

[92] Barak frames this issue as one of "double marginalization" for "immigrants with LEP *and* limited proficiency in a colonizing language," such as Spanish or Portuguese. Barak, *supra* note 4, at 216.

[93] Abel, *supra* note 2, at 5.

parties' ability to meaningfully access the process in compliance with Executive Order 13166.[94]

### C. *The Factfinder's Role in Addressing Interpretation Errors*

As we have seen, courts have developed tests to assess whether interpretation errors in immigration courts constitute a violation of the LEP party's right to competent interpretation based on the record.[95] Courts must consider both whether there was incompetent interpretation and also whether the incompetent interpretation was prejudicial to the party's claims and the final determination of the court below.[96] However, as in the case of *Hernandez Chacon* above, there are instances in which problematic translation goes unquestioned and affects binding precedential case law.

The impetus is on courts to control for quality of interpretation by seeking and selecting court interpreters before they need them, in advance of a hearing.[97] Judges should also monitor the quality of interpretation by looking for signs that the LEP party is not understanding what is being said, such as confused facial expressions and requests to repeat the question.[98]

## VIII. REACTIVE REMEDIES

What remedy is there after the fact for interpretation that falls short? Recourse for parties to removal proceedings whose words have been interpreted incorrectly is limited by the fact that court proceedings are

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[94] Abel, *supra* note 2, at 6 ("The failure to interpret the entire proceeding is a clear violation of Executive Order 13166.").

[95] Perez-Lastor v. I.N.S., 208 F.3d 773, 778 (9th Cir. 2000) (finding that the following three types of evidence may be used to prove that translation was incompetent: incorrectly translated words, unresponsive answers, and expression of difficulty); Amadou v. I.N.S., 226 F.3d 724, 726–28 (6th Cir. 2000) (finding that an asylum applicant was prejudiced and denied due process because the record showed the interpreter's lack of knowledge of vocabulary in the source language, failure to translate certain statements, and refusal to interpret statements as they were spoken, among other factors).

[96] Asican v. Holder, 345 F. App'x 230, 231 (9th Cir. 2009) ("At most, the record established that the interpreter made two mistakes . . . . Asican has not shown that the translator was incompetent or that a better translation may have resulted in a discretionary grant of cancellation of removal."); Cheo v. I.N.S., 162 F.3d 1227, 1230 (9th Cir. 1998) (finding no violation of due process where there was no evidence to support the argument that the interpretation errors "influenced the outcome"); Kotasz v. I.N.S., 31 F.3d 847, 850 n.2 (9th Cir. 1994) ("Here, while claiming that their words were not translated correctly, the Kotaszes have not specified which, if any, words would have been translated differently, given a more competent interpreter. Moreover, the record in this case demonstrates that, despite some disagreement over the translation of specific phrases, the Kotaszes were given a fair opportunity to relate their version of events. Clarification or repetition was at times required, but in each instance the misunderstanding was rectified to the apparent satisfaction of the parties. Accordingly, we cannot find that faulty translation influenced the outcome of the proceedings.").

[97] Moore, *supra* note 42, at 34.

[98] *Id.* at 37.

transcribed in English, not the source language.[99] The written record only captures the erroneous translation, not the LEP party's utterance in the source language nor the interpreter's mis-interpreted statement to the LEP party, also in the source language.[100] This underscores the importance of consecutive, rather than simultaneous interpretation, so that the audio recording of immigration court proceedings captures errors, which can be transcribed[101] in both languages for the purposes of judicial review.[102]

### A. *Improving the Completeness of the Record Would Increase Access to Judicial Review*

Where there is evidence in the record of "faulty translation" in the proceedings below, an appellate court can more easily find that there was prejudice to the outcome of the case.[103] In *Amadou v. I.N.S.*, after the Immigration Court had made an adverse credibility determination against an asylum applicant and the Board of Immigration Appeals had affirmed it, the Sixth Circuit found the court interpretation to be prejudicial based on the English record.[104] The record showed the interpreter's clunky phrases in

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[99] *See, e.g.*, Augustin v. Sava, 735 F.2d 32, 35 n.6 (2d Cir. 1984) ("To compound our difficulty, we are unable to verify the accuracy of the translations because apparently there are no tapes or Creole transcriptions."). Note, however, that asylum interviews are not recorded nor transcribed; therefore, Asylum Officers are instructed to take "accurate notes that provide a full picture of the interview" since the notes constitute the basis for review afterwards. U.S. CITIZENSHIP & IMMIGR. SERVS., *Refugee, Asylum, and International Operations Directorate – Officer Training: RAIO Combined Training Program Note-Taking* 9 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Note_Taking_LP_RAIO.pdf. *But see infra* note 112.

[100] BERK-SELIGSON, *supra* note **Error! Bookmark not defined.**, at 200 ("[U]sually the appellant c annot provide concrete evidence of poor quality interpreter performance. This is so because proceedings conducted with the aid of a court interpreter are transcribed in the court record in English alone, as if they were monolingually conducted in English. In other words, because foreign language testimony is not entered into the court record in the source language, there is no way that alleged errors of interpretation can be directly verified or discounted on appeal."); Annabel R. Chang, Note, *Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants*, 86 WASH. U. L. REV. 445, 463–64 (2008) ("Since the court reporter records only what the interpreter says, there is no true record of what is stated by the non-English-speaking defendant during the courtroom proceedings."); *see also* Barak, *supra* note 4, at 208 ("English is the language of record in immigration court.").

[101] Notably, there is room for error in transcribing audio recordings of the proceedings in the source language and translating that into English, just as there is room for error in interpreting from the source language into English in the moment. EDWARDS, *supra* note 45, at 135 (noting that "[t]he original tape has on it what was said. The transcription is the transcriber's version of what was said, and the translation is the translator's idea of what the transcription means in English.").

[102] BERK-SELIGSON, *supra* note **Error! Bookmark not defined.**, at 217 ("For the purposes of a ppeals, only bilingual recordings and bilingual transcripts can provide sufficient evidence as to whether or not there is in fact a basis for appeal. Providing lawyers with such bilingual transcripts is one test of the seriousness of the commitment of the American legal system to due process for the non-English-speaking.").

[103] *Amadou*, 226 F.3d at 727 ("The record indicates that the interpreter's faulty translation likely played a significant part in the judge's credibility determination.").

[104] *Id.*

English and included the interpreter's statements such as "'[t]he interpreter doesn't understand' and 'The interpreter is having some problems here with some semantics' . . . . [and] '[w]e're having problems here with the—with the vocabulary here.'"[105] The Sixth Circuit found that the interpreter spoke a dialect of Fulani from Sierra Leone, while the applicant spoke a dialect of Fulani from Mauritania.[106] The court held that the applicant "was denied his right to a full and fair hearing because the interpreter's questionable translations formed the basis of the Board's decision to deny his applications" and ordered that he "be provided a new hearing within a reasonable amount of time and with the assistance of an interpreter who speaks his Fulani dialect."[107] Importantly, the court found that the respondent had met his burden of showing not only that there were errors in translation but also that such errors prejudiced the applicant.[108]

This case is an anomaly because its facts are so clear-cut—the record itself, even though it was not in the source language of Fulani, made clear that the interpreter was having trouble understanding the source language.[109] A bilingual transcript would have shown even more clearly the problematic interpretation here.

Unfortunately, *Amadou* has since been applied narrowly, and courts rarely find that interpretation is deficient enough to constitute prejudice toward the LEP party.[110] Still, this case provides a helpful model for envisioning what procedural due process rights for noncitizens could look like if access to judicial review in removal hearings were more expansive. In order to achieve this goal, immigration courts should require full, rather than partial, interpretation so that LEP parties can understand not just what is being spoken *to* them but also what is being asserted *about* them.

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[105] *Id.*

[106] *Id.* at 725.

[107] *Id.* at 728.

[108] *Id.* at 727. The Sixth Circuit held that "the interpreter's faulty translation directly prejudiced Amadou because the judge and Board denied his application based on the testimony at the hearing," reasoning that the court's adverse credibility finding was due to inconsistencies in Amadou's statements due to the interpreter mistranslating such statements. *Id.*

[109] *Id.*

[110] Popovych v. Holder, 470 F. App'x 446, 453 (6th Cir. 2012) (citations omitted) ("Even had Popovych shown errors in translation, he has failed to show that he was prejudiced by any alleged translation errors. Proof of prejudice is necessary to establish a due process violation in an immigration hearing. The IJ found Popovych to be credible, and denied his application for an independent reason, namely, his failure to demonstrate a well-founded fear of future persecution based on a protected ground. There is little potential that a translation error affected her finding. This case is similar to *Daneshvar v. Ashcroft*, 355 F.3d 615, 622 (6th Cir. 2004), in which we stated that inadequate translation was irrelevant because the BIA rejected an application for failure to demonstrate a well-founded fear of persecution. Because the case did not hinge on an adverse-credibility determination, any inadequate translation was not prejudicial. This case is again distinguishable from *Amadou* . . . ."); *accord* Domingo-Mateo v. Garland, 861 F. App'x 649, 651, 652 (6th Cir. 2021) ("To demonstrate that the interpreter was incompetent, the petitioners must show both inadequacy in the translation and that this inadequacy resulted in prejudice."). *See also supra* notes 76–78 and accompanying text.

Notably, although asylum interviews do constitute adjudicatory proceedings, the results of which include a grant of asylum or a referral to the immigration court for removal proceedings, the "record" of this adjudication consists merely of the asylum officer's notes.[111] There is no complete recording or transcript of asylum interviews, which makes it much harder for an individual who is denied asylum to point to errors that have occurred during their interview.[112] This is arguably an egregious violation of procedural due process under Executive Order 13166's mandate that agencies, including USCIS, provide LEP individuals with meaningful access to their services.[113] Asylum offices should provide a more robust and accurate record of the proceedings based upon which asylum was granted or denied. Thus, just as immigration court proceedings are recorded, so, too, should asylum interviews, so that a bilingual transcription can be created if the applicant ends up in immigration court, where their statements from the interview may be cited against them. Finally, asylum applicants should automatically be provided with these records if they land in removal proceedings. As of now, asylum applicants must affirmatively request the notes, while DHS is automatically provided with the records of the asylum interview, which puts the applicant at a disadvantage and a deficit of information.[114]

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[111] U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 99; *see also* Dadhania, *supra* note 16, at 720 ("The only record of the asylum interview is informal notes taken by the asylum officer. These notes can be used in subsequent asylum proceedings, which is highly problematic if the quality of interpretation is poor.").

[112] Note that as of this writing, there is an interim final rule effective as of May 31, 2022, that would significantly increase the procedural safeguards for affirmative asylum applicants regarding the record and interpreters: "For interviews on asylum applications within the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), except for statements made off the record with the permission of the asylum officer, the interview shall be recorded. A verbatim transcript of the interview shall be prepared and included in the referral package to the immigration judge as described in § 208.14(c)(1), with a copy also provided to the applicant . . . an applicant unable to proceed with the interview in English must provide, at no expense to USCIS, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent . . . for interviews on asylum applications within the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), if the applicant is unable to proceed effectively in English, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview . . . . If a USCIS interpreter is unavailable, USCIS will attribute any resulting delay to USCIS for the purposes of employment authorization pursuant to § 208.7." Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18217 (Mar. 29, 2022) (to be codified at 8 C.F.R. 208.9 (f), (g)).

[113] Exec. Order No. 13166, *supra* note 23.

[114] Dadhania, *supra* note 16, at 720 ("USCIS submits the notes and findings by the asylum officer to the Department of Homeland Security attorney opposing asylum if a noncitizen is referred to immigration court. These notes can serve as a basis to impugn the credibility of an asylum seeker. The notes are not automatically provided to the asylum applicant but may be requested via a Freedom of Information Act request.").

### B. *Congress Should Expand Access to Judicial Review for Respondents to Removal Proceedings*

Because the plenary power doctrine puts removal into the political branches' domain, the best way to make judicial review of removal decisions more accessible to respondents would be for Congress to legislate this change in one of the following ways. It is in Congress's interest to expand the due process rights of noncitizens because, not unlike convictions for people in criminal proceedings,[115] the repercussions of an adverse determination in removal proceedings involve severe deprivations of liberty.[116]

#### 1. *Congress Should Shift the Burden of Proof for a Finding of Prejudice*

Congress should amend the Immigration and Nationality Act so that after a respondent seeks judicial review of an adverse adjudication of removability based on prejudicial interpretation, the burden will be on the government first to prove that the respondent's procedural due process rights were upheld rather than relying on the respondent to prove that they were prejudiced, as immigration courts currently do.[117] The government is in a better position both to understand the non-interpreted portions of proceedings and also to access the necessary records to prove, or disprove, that inadequate interpretation constituted a prejudicial violation of the respondent's due process rights. Meanwhile, LEP respondents are much less likely to be able to make their case regarding why the impact of inadequate

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[115] The many parallels between proceedings against noncitizens and proceedings against people charged with crimes are worth much more exploration and fall outside the scope of this Note. The term "crimmigration" is used to describe the overlaps in the enforcement of criminal laws and immigration laws. César Cuauhtémoc García Hernández*, Creating Crimmigration*, 2013 BYU L. REV. 1457, 1457–58 (2013).

[116] A noncitizen with final order of removal will not only be displaced but also may have a bar to reentry. Under 8 U.S.C. § 1182(a)(9)(A)(i), arriving noncitizens are inadmissible if they have previously been ordered removed within the previous five years. Further, "[a]ny [noncitizens] not described in clause (i) who (I) has been ordered removed under section 1229a of this title or any other provision of law, or (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible." 8 U.S.C. § 1182(a)(9)(A)(ii). *See also* Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (citations omitted) ("We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century."); *accord* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citation omitted) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

[117] *Supra* note 110 and accompanying text.

translation rose to the level of prejudice, especially if they were unsure of what was going on due to problematic interpretation. LEP respondents seeking judicial review based on lack of language access also necessarily cannot directly communicate the specific parts of the interpretation that were faulty as they must speak through the filter of an interpreter in making their case.[118]

Once the ICE trial attorney presents evidence of the adequacy of the interpretation in the proceedings below, and after bilingual transcripts of the proceedings below have been produced for both parties' review, the burden should shift to the respondent to present evidence to counter the government's argument.[119]

### 2. *When a Respondent Seeks Judicial Review Based on Faulty Interpretation, They Should Be Presumed Prejudiced Until Proven Otherwise*

Alternatively, when a respondent appeals based on prejudicial errors in interpretation, Congress could impose a presumption of prejudicial errors in interpretation, which DHS must rebut. This would have the benefit of incentivizing immigration adjudicators to provide more complete, clear, and competent interpretation in the first instance. It might force EOIR to recognize the due process rights of LEP parties so as to avoid the necessity of a judicial review based on inadequate interpretation.[120]

## IX. CONCLUSION

In order to ensure noncitizens' access to effective interpretation, as well as to judicial review of adverse determinations, Congress must require courts to enforce the procedural due process rights to which noncitizens are already entitled under existing law. Procedural due process must include complete, certified, government-provided interpretation in both removal proceedings and asylum interviews.

The remedies outlined herein are not exhaustive. Interpreters' crucial role in immigration proceedings needs to be recognized and valued more

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[118] As we have seen, interpretation is not an infallible mechanism for communication and understanding!

[119] For an example of how Congress has legislated, and the Supreme Court has followed, a particular scheme of burden-shifting, see Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015).

[120] For another potential solution to gaps in access to adequate interpretation in asylum proceedings specifically, see Grace Benton, *"Speak Anglish:" Language Access and Due Process in Asylum Proceedings*, 34 GEO. IMMIGR. L.J. 453, 472 (2020) ("One potential way forward is for courts to recognize interpretation errors in the asylum context as *per se* prejudicial, as has been suggested for scenarios where non-citizens are deprived of counsel in removal proceedings."). Note, however, that Benton does not suggest a strategy by which such errors should be identified, instead stating that "[s]uch an approach merits more scholarly attention and could lend itself to furthering the small but crucial area of scholarship on language access in asylum proceedings." *Id.*

highly.[121] For example, to increase the quality of interpretations, EOIR should also replace SOS International with an interpreting agency that pays its employees adequately.[122]

Undoubtedly, lack of language access constitutes only one of the barriers between noncitizens without attorneys being heard in court, even when there is a qualified interpreter. In particular, individuals in removal proceedings who do not have an attorney are less likely to be able to avoid deportation.[123] Respondents are also less likely to know that they can apply for relief from removal and to apply for such relief without an attorney.[124] Thus, expanding due process to include a court-provided attorney in removal proceedings, especially for LEP noncitizens and detained noncitizens, would help to ensure noncitizens' right to a full and fair hearing. Incentivizing multilingual people, and people with lived experience of immigration, to practice law would go a long way toward improving the quality of legal advocacy for noncitizens.[125]

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[121] Barak, *supra* note 4, at 212 ("Despite wielding little formal power, interpreters may be the most influential actors in immigration court. Consistent with overall immigration court rates, interpreters were used in most hearings in the courts under [this 2021 immigration court] study.").

[122] *Id.* at 216 (citation omitted) ("Exploitative treatment of [SOS International] interpreters is well-known among immigration and interpretation circles, and has caused several labor disputes over wages, employee classification, and union-busting. Such labor struggles are not conducive to quality interpretation.").

[123] INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 19 (2016) ("Depending on custody status, representation was associated with a 19 to 43 percentage point boost in rate of case success.").

[124] *Id.* at 20 ("Immigrants facing removal cannot obtain relief unless they apply for it. Yet the data reveal that immigrants without counsel were also far less likely to pursue relief. And, if they did pursue relief, they were less likely than those with counsel to prevail.").

[125] For an example of this kind of culturally competent lawyering, see Gerald P. López, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2048 (2005). Language access within law offices merits further exploration as well. Requiring that attorneys, who do not speak the language in which their client is most comfortable communicating, use certified interpreters for client interviews, rather than having a client's family member (or a multilingual staff member who is not trained as an interpreter) interpret, would further improve LEP clients' access to due process in legal proceedings.