LANGUAGE ACCESS AND DUE PROCESS IN ASYLUM INTERVIEWS

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ABSTRACT

The Department of Homeland Security does not provide interpreters to asylum applicants during their asylum interviews, instead requiring them to supply their own. This Article challenges this deprivation of language access as a procedural due process violation because it denies limited English proficient asylum seekers meaningful access to the statutorily created affirmative asylum process. The Department of Homeland Security's failure to provide interpreters can silence limited English proficient asylum seekers by depriving them of the opportunity to meaningfully present their claims. Asylum seekers, especially those who are low income or speak rare languages, face significant challenges in finding suitable interpreters. Many are forced to use nonprofessional interpreters who are not qualified to interpret in complex legal settings. Inaccurate interpretation can have severe ramifications, like unwarranted denials of asylum applications, which could result in asylum applicants being removed to countries where they face persecution. The 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. Only by challenging and changing these procedures will limited English proficient asylum seekers have equal access to the asylum system.

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INTRODUCTION

Language access—the ability of persons with limited English proficiency to meaningfully access government services and programs—can mean the difference between life and death for asylum seekers.[1] 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.[2] Limiting language access is also a powerful weapon used to close the doors of the United States to limited English proficient asylum seekers who are fleeing persecution in their home countries.[3] Without suitable language access, the asylum process is meaningless for applicants with limited English proficiency and may deny them protection to which they may be entitled under domestic and international law.[4]

Language access is a core civil right.[5] Deprivation of language access is insidious—it affects whether a noncitizen with limited English proficiency can even access the process for seeking relief and benefits. In that way, the failure to provide adequate language access can be as consequential as many of the more publicized shortcomings of the immigra-

1. Language access includes both interpretation, which is orally rendering from one language to another, and translation, which is written. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 569 (2012) ("[T]he ordinary or common meaning of 'interpreter' does not include those who translate writings. Instead, we find that an interpreter is normally understood as one who translates orally from one language to another.").

2. *See* Tom Jawetz & Scott Schuchart, *Language Access Has Life-or-Death Consequences for Migrants*, CTR. AM. PROGRESS (Feb. 20, 2019, 9:05 AM), https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/; 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.

3. Limited English proficient individuals are defined as "[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English." *Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals*, LEP, https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf (last updated Apr. 2011).

4. *See infra* text accompanying notes 164–66 (describing obligations under the 1967 Protocol Relating to the Status of Refugees and the Refugee Act).

5. *See infra* text accompanying notes 114–19.

tion system.[6] However, language access remains an understudied issue, especially in the civil context.[7] Recently though, the media has increasingly been reporting on the Trump Administration's use of linguistic abuse to subordinate migrants. For example, the Administration has repeatedly denied language access to indigenous language speakers, ordered immigration judges to increasingly use telephonic interpretation, and replaced interpreters with videos for portions of master calendar hearings.[8]

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.[9] Some examples of linguistic abuse by earlier administra-

6. *See, e.g.*, Gustavo Solis, *Remain in Mexico has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION-TRIB. (Dec. 15, 2019, 4:52 AM), https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate.

7. *See* United States v. Mosquera, 816 F. Supp. 168, 176 (E.D.N.Y. 1993) ("Injustice is doubtless being done from time to time in communities thronged with [noncitizens], through failure of the judges to insist on a supply of competent interpreters. The subject is one upon [which] the profession are in general too callous[.]" (quoting 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1393 (James H. Chadbourn rev. ed. 1974) (footnotes omitted))). However, some scholars have called for increased language access in the civil context. *See, e.g.*, Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593, 637 (2013); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1943 (2000).

8. *See* Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, MARSHALL PROJECT (Mar. 20, 2019, 6:00 AM), https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation ("The head of the immigration-court system emailed judges [on] Dec. 11 [2018], telling them to use phone interpreters for languages except Spanish, according to leaders of the National Association of Immigration Judges."); Aisha Maniar, *Trump Administration Builds a Language Wall to Further Thwart Migrant Rights*, TRUTHOUT (Aug. 23, 2019), https://truthout.org/articles/trump-administration-building-a-language-wall-to-further-thwart-migrant-rights/; Nolan, *supra* note 2 (describing instances of the government's failure to provide language access to indigenous language speakers that led to family separation, criminal prosecution, extended detention, and deportation); Mary Retta, *Lawyers Are Furious That Immigration Courts Are Getting Rid of Interpreters*, VICE (July 25, 2019, 10:13 AM), https://www.vice.com/en_us/article/43jj9j/immigration-courts-getting-rid-of-interpreters. Other policies enacted by the Trump Administration indirectly impact language access, including the increased use of video teleconference hearings. *See* Nicole Narea, *House Democrats Say Migrants Aren't Getting Fair Hearings at Tent Courts on the Border*, VOX (Oct. 18, 2019, 10:30 AM), https://www.vox.com/policy-and-politics/2019/10/18/20920000/house-democrats-investigation-tent-courts-border-port (describing the use of video teleconference hearings at port courts, which are temporary immigration courts along the U.S.–Mexico border).

9. *See* BLAKE GENTRY, AMA CONSULTANTS, EXCLUSION OF INDIGENOUS LANGUAGE SPEAKING IMMIGRANTS IN THE U.S. IMMIGRATION SYSTEM, A TECHNICAL REVIEW 24 (2015) ("One immediate result of [Customs and Border Protection's] language exclusion is a rise in violations of due process."); Robert F. Barsky, *Activist Translation in an Era of Fictional Law*, *in* 18 TRADUCTION, TERMINOLOGIE, REDACTION 17, 29–39 (2005) (describing linguistic abuses that can result in the criminalization of migrants and their subsequent removal from the United States); *see generally* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1030–31 (2007) ("[T]he intersections of limited English proficiency, immigration status, and race necessitates attention to language as one dimension of the broader systems of subordination that exist today."); Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Lan-*

tions include the failure to provide adequate interpretation for Haitian asylum seekers[10] and indigenous language speakers.[11] Prior administrations have also cut budgets for interpretation, resulting in lower quality interpretation for all limited English proficient asylum applicants.[12]

Another long-standing deprivation of language access, which is the focus of this Article, is the failure to provide interpreters to limited English proficient asylum seekers at their asylum interviews. Asylum seekers, who are often indigent and have recently arrived in the United States after fleeing persecution in their home countries, must bring their own interpreter or risk losing their right to an asylum interview.[13] Because limited English proficient asylum seekers do not have a right to a gov-

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guage Rights Under the Civil Rights Act of 1964, 6 ALA. CIV. RTS & CIV. LIB. L. REV. 167, 170 (2015) (describing how "[l]anguage-based restrictions have long been a tool used to subordinate Latinos.").

10. *See* Augustin v. Sava, 735 F.2d 32, 33–35 (2d Cir. 1984) (describing the government's failure to provide adequate language access, even when "promised," for Haitian asylum seekers in the 1980s); Jean v. Nelson, 711 F.2d 1455, 1463 (11th Cir. 1983) ("Overwhelming evidence established that Creole [interpreters] were so inadequate that Haitians could not understand the proceedings nor be informed of their rights."); *see also* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1030 (5th Cir. 1982) (examining an Immigration and Naturalization Service (INS) report that characterized Haitians "in absolute terms" as "'economic' and not political refugees" and INS measures to deter the migration of Haitians); *see generally* Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841, 897–98 (1994) (discussing how the INS "intentionally discriminated against Haitians on the basis of race [and] national origin" in the 1980s). *Yamataya v. Fisher* describes an early example of the failure to provide adequate language access to a noncitizen from another disfavored nationality. 189 U.S. 86, 87 (1903) (alleging that the immigration inspector proceeded in English when the Japanese national "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"); *see generally* Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 65 (2018) (describing laws in the early 1900s designed to prevent the immigration of Japanese women).

11. *See* Melissa Wallace & Carlos Iván Hernández, *Language Access for Asylum Seekers in Borderland Detention Centers in Texas*, 68 J. Language & L. 143, 146 (2017) (describing a memorandum from the Department of Homeland Security to Asylum Office Directors acknowledging the unavailability of interpreters for the Guatemalan language Ixil and the dearth of interpreters for Mam); *id.* (explaining that "Customs and Border Protection agents routinely misidentify indigenous women's primary language as Spanish . . . .").

12. Nina Agrawal, *Interpreters Play a Vital Role in Immigration Courts—But Their Rights Are Being Violated, Labor Board Says*, L.A. TIMES (June 1, 2017, 1:20 PM), https://www.latimes.com/business/la-fi-immigration-interpreters-20170601-story.html (describing how many qualified interpreters left the immigration courts after the government awarded the contract to SOSi in 2015); David Noriega & Adolfo Flores, *Immigration Courts Could Lose a Third of Their Interpreters*, BUZZFEED NEWS (Oct. 5, 2015, 2:19 PM), https://www.buzzfeednews.com/article/davidnoriega/immigration-courts-could-lose-a-third-of-their-interpreters (describing the Obama Administration's switch to a new contractor that paid interpreters at lower rates, resulting in the declining quality of interpretation in immigration court). Another example of language access deprivation is the longstanding failure to provide adequate language access in immigration detention. *See* Katherine L. Beck, *Interpreting Injustice: The Department of Homeland Security's Failure to Comply with Federal Language Access Requirements in Immigration Detention*, 20 HARV. LATINX L. REV. 15, 34 (2017).

13. *See infra* text accompanying notes 51, 70–71 (describing the requirement that noncitizens bring their own interpreters to asylum interviews and the ramifications of failing to do so).

ernment-provided interpreter in their asylum interviews, they currently do not have meaningful access to the full asylum process.[14]

This Article explores how the government's failure to provide interpreters at asylum interviews is a violation of the procedural due process rights of limited English proficient asylum seekers. This Article advances a constitutional argument for a more robust mooring of language access in asylum interviews to promote equal access to the affirmative asylum process for limited English proficient asylum seekers. Part I provides an overview of regulations and practices concerning language access in asylum interviews and describes the problems with the use of nonprofessional interpreters in this setting. Part II shows why a constitutional remedy is needed given that other potential avenues for promoting language access—Title VI of the Civil Rights Act and Executive Order 13166—have significant shortcomings.[15] Finally, Part III proposes a constitutional remedy grounded in procedural due process that supports a right to government-provided interpreters in asylum interviews.

I. OVERVIEW OF LANGUAGE ACCESS IN ASYLUM INTERVIEWS

There are two principal ways to apply for asylum, the affirmative and defensive processes. Which process a noncitizen uses is dependent on how they entered the United States and came to the attention of the immigration authorities. Under the affirmative process, certain asylum seekers may apply directly with the Department of Homeland Security under a self-initiated process.[16] Under the defensive process, asylum seekers who have been apprehended by the Department of Homeland Security at the border or in the interior of the United States may apply for asylum in immigration court as a defense to removal.[17] Only the affirmative asylum process includes a nonadversarial asylum interview, whereas the defensive process is adversarial and takes place in immigration court. Because the government does not provide interpreters at asylum interviews, limited English proficient asylum seekers are required to bring

14. *See infra* text accompanying notes 94–109 (explaining how the failure of the government to provide interpreters at the asylum interview impacts noncitizens' ability to fully access this stage of the affirmative asylum process).

15. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1 to -7 (2018); Improving Access to Services for Persons With Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000) [hereinafter Exec. Order 13166].

16. *See infra* text accompanying notes 18–38 (describing the affirmative asylum application process).

17. 8 C.F.R. § 208.2(b) (2020) (vesting exclusive jurisdiction with the immigration courts in adjudicating asylum applications filed by noncitizens whom the Department of Homeland Security has served with charging documents); *see generally* Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1190–92 (describing the defensive asylum process). Noncitizens at ports of entry and some who are within the United States are subject to expedited removal, which requires them to express a fear of return and then demonstrate a "significant possibility" that they will establish asylum eligibility in a credible fear interview before they are permitted to access the immigration courts. Immigration & Nationality Act (INA) § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (2018); *see generally* Harris, *supra*, at 1190–91.

their own interpreters, limiting equal and meaningful access to this first step of the affirmative asylum process.

A. Overview of Affirmative Asylum Adjudication

Asylum seekers are individuals who seek refuge abroad from persecution in their countries of origin.[18] To be granted asylum in the United States, individuals must be outside of their country of nationality and must demonstrate that they are "unable or unwilling to return to, and [are] unable or unwilling to avail [themselves] 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[.]"[19]

Asylum determinations are bifurcated between the Department of Homeland Security and the Department of Justice.[20] The Immigration and Nationality Act and relevant regulations delineate the processes for applying for asylum.[21] This Article focuses on the affirmative asylum process because only affirmative asylum applicants are entitled to an asylum interview, and because the government provides limited English proficient noncitizens in removal proceedings with interpreters.[22]

The Department of Homeland Security adjudicates affirmative asylum applications.[23] To apply affirmatively for asylum, a noncitizen physically present in the United States voluntarily files an application with U.S. Citizenship and Immigration Services (USCIS), housed within the Department of Homeland Security.[24] Noncitizens may be physically present in the United States in a variety of ways: entering the United States without authorization, entering the United States on a nonimmigrant visa that has since expired, or entering the United States on a nonimmigrant visa that has not yet expired.

After filing the application, the first stage of the affirmative process is an interview at an asylum office.[25] The asylum offices are a component

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18. INA §§ 101(a)(42), 208(b), 8 U.S.C. §§ 1101(a)(42), 1158(b).

19. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

20. *See* 8 C.F.R. § 208.2 (describing the jurisdiction of the immigration courts over asylum applications); *id.* § 208.9 (outlining the jurisdiction of USCIS over asylum applications).

21. *See* INA § 208(d)(1), 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a).").

22. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 64 (2020) [hereinafter DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL] ("Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings.").

23. 8 C.F.R. § 208.2(a) (vesting jurisdiction within the Refugee, Asylum, and International Operations (RAIO) of the Department of Homeland Security over asylum applications filed by noncitizens physically present in the United States).

24. *Id.*; s*ee generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 305–08 (2007) (describing the affirmative asylum process).

25. 8 C.F.R. § 208.9 (providing the process for asylum interviews before USCIS).

of USCIS.[26] Asylum officers, who are employees of the Department of Homeland Security, conduct these interviews during which applicants must answer questions related to their past persecution and fears of future persecution.[27] The Department of Homeland Security does not provide limited English proficient asylum seekers with an interpreter at this first stage of the asylum process, but rather requires them to bring their own.[28] After the interview, the asylum officer determines whether the applicant meets the requirements for asylum.[29] If so, the asylum officer can grant asylum.[30]

If the asylum officer believes the applicant does not meet the requirements for asylum and the applicant does not have lawful status in the United States, the asylum officer will refer them to immigration court for removal proceedings, which is the second stage of the affirmative process.[31] In removal proceedings, the applicant will have an additional opportunity to seek asylum before an immigration judge.[32] The immigration courts are housed within the Executive Office for Immigration Review, a component of the Department of Justice.[33] In immigration court, an immigration judge, who is a Department of Justice employee, determines whether a noncitizen has satisfied their burden of proving statutory eligibility for asylum as well as discretionary entitlement to this relief.[34] Unlike asylum interviews, the immigration court process is adversarial, with Department of Homeland Security Immigration and Customs Enforcement attorneys opposing applications for relief.[35] At this stage of the

26. *See USCIS Organizational Chart*, U.S. CITIZENSHIP IMMIGR. SERVS., https://www.uscis.gov/about-us/uscis-organizational-chart (last updated Aug. 6, 2018) (showing RAIO as a division of USCIS).

27. 8 C.F.R. § 208.9 (describing the procedure for asylum interviews); *id.* § 208.13 (providing the requirements for establishing eligibility for asylum).

28. *See infra* text accompanying notes 51–53 (explaining the regulations regarding interpreters at asylum interviews).

29. *See* 8 C.F.R. § 208.9(d) ("Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer . . . ."); *id.* § 208.13 (providing the requirements for establishing eligibility for asylum). The asylum office may also notify the applicant of the decision via mail. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 20 (2016) [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM].

30. 8 C.F.R. § 208.14(b) ("In any case within the jurisdiction of the RAIO, . . . an asylum officer may grant, in the exercise of his or her discretion, asylum to an applicant who qualifies as a refugee under section 101(a)(42) of the [Immigration and Nationality] Act . . . .").

31. *Id.* § 208.14(c) ("If the asylum officer does not grant asylum to an applicant after an interview . . . the asylum officer shall deny, refer, or dismiss the application . . . .").

32. *Id.*

33. Homeland Security Act of 2002 § 1101, 6 U.S.C. § 521 (2018); *Organizational Chart*, U.S. DEP'T JUSTICE, https://www.justice.gov/agencies/chart (last visited May 15, 2020) (showing the Executive Office for Immigration Review as a division of the Department of Justice).

34. 8 C.F.R. § 1001.1(l) ("The term immigration judge means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review . . . ."); *id.* § 1240.1(a)(1) (describing the authority of immigration judges to adjudicate asylum applications).

35. *Id.* § 1240.2 (delineating the role of Department of Homeland Security counsel in removal proceedings).

affirmative asylum process, the Department of Justice provides interpreters for limited English proficient asylum seekers.[36]

If an applicant loses before the immigration court, the immigration judge will enter an order of removal.[37] An immigration judge's decision may be appealed within the Department of Justice to the Board of Immigration Appeals, then to the federal courts of appeals, and finally to the U.S. Supreme Court.[38]

B. Legal Architecture of Language Access in Asylum Interviews

The vast majority of asylum seekers require the use of an interpreter during their immigration proceedings.[39] In Fiscal Year 2018, over ninety percent of all hearings in immigration court required the services of an interpreter.[40] Although the Department of Homeland Security does not publicly disseminate data on how many asylum applicants use interpreters at asylum interviews and for which languages,[41] it releases monthly

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36. *See* DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, *supra* note 22, at 64 ("Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings."); *see also* 8 C.F.R. § 1003.22 ("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."). Although the government provides interpreters in removal proceedings in immigration court, advocates have criticized the quality of the interpretation. *See, e.g.*, LAURA ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN IMMIGRATION COURTS 1 (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf. [hereinafter ABEL, LANGUAGE ACCESS IN IMMIGRATION COURTS].

37. *See* 8 C.F.R. § 208.14(a) ("[A]n immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the [Immigration and Nationality] Act.").

38. INA § 242, 8 U.S.C. § 1252 (2018) (describing judicial review of orders of removal); 8 C.F.R. § 1003.1(b) (describing the appellate jurisdiction of the Board of Immigration Appeals); *id.* § 1003.38(a) ("Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals as authorized by 8 C.F.R. 3.1(b)."); *see generally* Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 233 (1998) (analyzing the "Congressional attempt to eliminate or severely curtail judicial review of immigration decisions").

39. *See* Phoebe Taylor Vuolo et al., *Immigration Court Interpreters Say Video Teleconferencing Makes it Difficult to Do Their Jobs*, GOTHAMIST (July 22, 2019, 4:00 PM), https://gothamist.com/news/immigration-court-interpreters-say-video-teleconferencing-makes-it-difficult-to-do-their-jobs.

40. *Id.* ("This year almost 92 percent of all hearings required an interpreter, according to the Department of Justice's Executive Office of Immigration Review . . . ."). This statistic is not limited to asylum cases in immigration court. *See also* U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK 18 (2018) [hereinafter DEP'T OF JUSTICE, STATISTICS YEARBOOK] (providing additional statistics on the most commonly used languages in immigration court between Fiscal Years 2014 and 2018).

41. It is unclear if the Department of Homeland Security even aggregates this data; however, the USCIS Affirmative Asylum Procedures Manual requires asylum offices to maintain some records, including the language of interpretation and the use of telephonic interpreters to monitor asylum interviews. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 14–15 (requiring asylum offices to maintain a "monitoring call record"). The purpose of the monitoring call record seems to be billing. *See id.* at 15 ("The office liaison will use the call records to compile an office call log, which he or she will compare against biweekly invoices provided via email by the [Contracting Officer's Technical Representative].").

data on the leading nationalities of asylum applicants.[42] Although the statistics vary from month to month, several majority Spanish-speaking countries have regularly appeared on the list of leading nationalities in the past decade, including Mexico, Guatemala, Honduras, and El Salvador.[43] Although these countries are majority Spanish-speaking, many individuals who speak less common indigenous languages also seek asylum from these countries.[44] Mam, an indigenous Mayan language spoken in Guatemala, was the ninth most frequent language used in immigration courts in Fiscal Year 2018.[45] Additionally, Haiti, where most of the population speaks Haitian Creole, appears on the list of leading nationalities of applicants in the affirmative asylum process.[46] China—where Mandarin is the official language, but other languages are widely spoken[47]—and India—where there are twenty-three official languages, including English[48]—are also routinely in the top ten countries of origin for affirmative asylum applicants.[49]

Despite the fact that the vast majority of asylum seekers come from nonmajority English-speaking countries, asylum officers generally conduct asylum interviews in English without a government-provided interpreter.[50] Regulations require that "[a]n applicant unable to proceed with the interview in English must provide, at no expense to the [Department

42. As of the date of publication of this Article, the most recent publicly available data is from September 2019. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM STATISTICS: SEPTEMBER 2019 (2020) [hereinafter AFFIRMATIVE ASYLUM STATISTICS: SEPT. 2019], https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf.

43. *See, e.g.*, *id.* at 3; U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM STATISTICS: NOVEMBER 2009–JANUARY 2010 3, 9, 15 (2010) [hereinafter AFFIRMATIVE ASYLUM STATISTICS: NOV. 2009–JAN. 2010], https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asylum%20Workload%20Nov%202009%20-%20Jan%202010.pdf.

44. *See* GENTRY, *supra* note 9, at 17–18, 24 (describing indigenous languages in Central America and Mexico, and encounters between Customs and Border Protection and indigenous language speakers at the U.S.–Mexico border).

45. DEP'T OF JUSTICE, STATISTICS YEARBOOK, *supra* note 40, at 18 tbl.9 (showing Mam as the ninth most common language in Fiscal Year 2018 for initial case completions in removal proceedings). Central American indigenous languages were four of the top twenty-five languages used in immigration court. *See id.* (showing Mam, Quiche, Konjobal, and Konjobal, Western (Akateko) in the top twenty-five languages used in immigration court).

46. *See* AFFIRMATIVE ASYLUM STATISTICS: SEPT. 2019, *supra* note 42; AFFIRMATIVE ASYLUM STATISTICS: NOV. 2009–JAN. 2010, *supra* note 43; *see also* Albert Valdman, *Creole: The National Language of Haiti*, 2 FOOTSTEPS 36, 36 (2002).

47. *See* Matt Schiavenza, *On Saving China's Dying Languages*, ATLANTIC (June 18, 2013), https://www.theatlantic.com/china/archive/2013/06/on-saving-chinas-dying-languages/276971/; *see also* He v. Ashcroft, 328 F.3d 593, 602–03 (9th Cir. 2003) (reversing an adverse credibility finding where the interpreter only spoke Mandarin, a language in which the applicant was not fluent).

48. *See The World Factbook: India, Languages*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/402.html#IN (last visited May 15, 2020).

49. *See* AFFIRMATIVE ASYLUM STATISTICS: SEPT. 2019, *supra* note 42; AFFIRMATIVE ASYLUM STATISTICS: NOV. 2009–JAN. 2010, *supra* note 43.

50. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 18 ("Each Asylum Office has a local policy on whether an [asylum officer] may conduct an asylum interview in a language other than English . . . .").

of Homeland Security], a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent."[51]

This regulation has been in effect since 1994, but even prior, the legacy Immigration and Naturalization Service (INS) required noncitizens to provide their own interpreters under an "operations policy."[52] In 2000, INS considered providing interpreters in asylum interviews, "recogniz[ing] that Service-appointed interpreters could benefit applicants and the program."[53] It declined to take any immediate action, however, explaining that the issue of interpretation would be addressed in the context of agency compliance with an executive order that directed agencies to establish language access policies.[54] The INS made no subsequent changes, and in 2007, USCIS again considered changing the regulation.[55] The rationale for proposing government-provided interpreters was that it "is necessary to help prevent misunderstanding of genuine asylum seekers' claims due to poor translation."[56] Despite this proposal thirteen years ago, there has been no change in the regulation related to interpretation.[57]

There are no exceptions in the regulation that requires asylum seekers to provide their own interpreters in asylum interviews.[58] There is an exception, however, in the USCIS Affirmative Asylum Procedures Manual for hearing-impaired asylum applicants, for whom the Department of Homeland Security will supply in-person professional sign language interpreters as a disability-related accommodation.[59] The Manual also allows asylum officers in their discretion to provide telephonic interpretation for unaccompanied minors who cannot bring their own interpret-

51. 8 C.F.R. § 208.9(g) (2020).

52. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284-01, 62,293 (Dec. 5, 1994) (to be codified at 8 C.F.R. § 208.9(g)); *see also* Rules and Procedures for Adjudication of Applications for Asylum and Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14,779-01, 14,781–83 (March 30, 1994) (to be codified at 8 C.F.R. § 208.9(g)) ("The rule also clarifies the responsibilities of the asylum applicant to provide a competent interpreter at an interview with an Asylum Officer.").

53. Asylum Procedures, 65 Fed. Reg. 76,121-01, 76,125 (Dec. 6, 2000).

54. *Id.*

55. Unified Agenda, 72 Fed. Reg. 22,596, 22,601 (Apr. 30, 2007); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-935, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 50–51 (2008) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM] ("USCIS plans to issue a rule that would require the Asylum Division to provide professional interpreters. According to Asylum Division officials, the Asylum Division has prepared a request for a multiple-award contract for interpreter services and expects to have the contract in place by the end of September 2008.").

56. 72 Fed. Reg. at 22,601.

57. A 2016 Department of Homeland Security document also contemplates the possibility of a change in the regulation. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13 ("Until the promulgation of regulations requiring USCIS to provide interpretation at affirmative asylum interviews, Asylum Offices will use contract interpreters to monitor affirmative asylum interviews . . . .").

58. 8 C.F.R. § 208.9(g) (2020).

59. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13.

ers.[60] There are no other specifically enumerated exceptions, although the Affirmative Asylum Procedures Manual does allow "qualified Asylum Office personnel to conduct or assist in the conducting of an interview in the applicant's preferred language . . . if there are extraordinary circumstances for doing so."[61] The Manual provides one example of what may constitute "extraordinary circumstances"—"the disqualification of an interpreter through no fault of the applicant combined with the applicant's having traveled a very long distance for the interview . . . ."[62]

The Affirmative Asylum Procedures Manual also permits asylum offices to allow their officers to conduct interviews in languages other than English if the officer is certified by the Department of State.[63] However, asylum applicants generally do not receive advance notice of the language abilities of the asylum officer and thus must still bring an interpreter.[64] In these situations, applicants can use their interpreter if they do not agree to proceeding with the asylum interview in a non-English language.[65] Applicants represented by attorneys who are not bilingual may

60. *Id.* at 34; *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., LANGUAGE ACCESS PLAN 2 (2019) [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS., LANGUAGE ACCESS PLAN] ("[T]he Asylum Division provides telephonic interpretation services . . . for asylum interviews related to applications filed by Unaccompanied Alien Children (UAC)."). A recent study of interpretation at asylum interviews found asylum officers inconsistently provided interpreters to unaccompanied minors. Hillary A. Mellinger, Access to Justice at the Asylum Office 116, 137–42 (Apr. 7, 2020) (unpublished Ph.D. dissertation, American University) (on file with author).

61. *See* 8 C.F.R. § 208.9(g); U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 18. Although the Affirmative Asylum Procedures Manual focuses on conducting interviews in a non-English language in extraordinary circumstances, in practice, asylum officers often use telephonic interpreters. *See* Mellinger, *supra* note 60, at 143–44.

62. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 18. Mellinger's recent survey of interpretation at the asylum office revealed the following examples of "extraordinary circumstances":

> [T]he asylum interview was unusually long (over seven hours), which caused the asylum applicant's interpreter to become exhausted; the asylum applicant's interpreter had an unforeseen emergency (such as being in a car accident); the asylum applicant's interpreter cancelled last-minute; the asylum applicant spoke an extremely rare language; the asylum applicant travelled an exceptionally long distance to attend the asylum interview; and the asylum applicant needed a sign language interpreter.

Mellinger, *supra* note 60, at 143. In most of these situations, the asylum officer used a telephonic interpreter, but in one case, an asylum officer conducted the interview in the applicant's native language. *Id.* at 143–44.

63. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 18 ("If the local policy allows an [asylum officer] to conduct interviews in a language other than English, the [asylum officer] must be certified by the Department of State (DOS) . . . ."); *see also* DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 669–70 (8th ed. 2019) (describing the policy of allowing asylum officers to conduct interviews in a non-English language).

64. *See* Mellinger, *supra* note 60, at 144–45 (finding that an asylum officer's offer to conduct the asylum interview in the applicant's preferred language "was a service that was proactively offered by an asylum officer on the day of the interview").

65. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 18 ("Depending upon local policy and with the asylum applicant's approval, the [asylum officer] can either conduct the interview in the applicant's language, if the applicant agrees, or use the services of the [applicant's] interpreter.").

be reluctant to proceed with the interview in a non-English language because the attorney will not be able to understand the proceedings.[66]

The regulation does not delineate who is qualified to serve as an interpreter beyond mandating that the interpreter be "fluent in both English and the applicant's native language or any other language in which the applicant is fluent."[67] Thus, the regulation permits nonprofessional interpreters, including family members.[68] The regulation only prohibits the following persons from serving as interpreters: those under eighteen years of age, the applicant's attorney or representative, witnesses testifying on behalf of the applicant, and representatives or employees of the applicant's country of nationality.[69]

An applicant's failure to bring an interpreter can result in harsh consequences. If an applicant fails to supply an interpreter without showing "good cause," the applicant can be treated as failing to appear for the interview, which can result in a dismissal of the asylum application or waiver of the right to an asylum interview.[70] The asylum interview will be rescheduled for a later date only if an applicant can show good cause.[71]

Although USCIS does not provide interpreters at asylum interviews, it has been using contract telephonic interpreters since 2006 to monitor the accuracy of an applicant's interpreter.[72] The role of the monitor is

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66. *See* Mellinger, *supra* note 60, at 144–45 ("As these three attorneys explained, they were not bilingual, and thus they would not have been able to follow the proceedings of the asylum interview had it not been interpreted back into English.").

67. 8 C.F.R. § 208.9(g) (2020). In addition to the requirements outlined by the regulations, interpreters should have lawful immigration status because asylum officers regularly ask interpreters to present government-issued identification. *See* COLLOPY, *supra* note 63, at 667. Although interpreters are not required to present identity documents, asylum officers nevertheless have the authority to verify the identity of an interpreter by asking for identity documents. 8 C.F.R. § 208.9(c) ("The asylum officer shall have authority to . . . verify the identity of any interpreter . . . ."); U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13.

> Regulations give an [asylum officer] the authority to verify the identity of the interpreter, which is best accomplished through the review of identity documents. However, an [asylum officer] may not terminate or reschedule an interview if the interpreter is lacking identity documents, or presents identity documents that the [asylum officer] does not wish to accept.

Id.

68. *See* 8 C.F.R. § 208.9(g).

69. *Id.*

70. *Id.* ("Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 208.10."); *id.* § 208.10 ("Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an interview.").

71. *See id.* § 208.9(g). The USCIS Affirmative Asylum Procedures Manual defines "good cause" as a "reasonable excuse" and counsels that "[w]hat may be a reasonable excuse for one applicant may not be reasonable when looking at the circumstances of another applicant." U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 58.

72. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13–14; U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM, *supra* note 55, at 50.

> In an effort to combat the Asylum Division's concern regarding fraud and quality of interpretation among some of the interpreters that non-English speaking applicants are re-

only to ensure that the applicant's interpreter is providing adequate and correct interpretation.[73] The monitor may interject if they determine that an applicant's interpreter "fails to provide adequate, accurate, and neutral interpretation."[74] However, the monitor cannot serve as the primary interpreter if the applicant's interpreter is deemed inadequate.[75] The monitor is limited to "translat[ing] a word or two, but not a sentence or more."[76]

If, based on information provided by the monitor, the asylum officer and the asylum officer's supervisor determine that the applicant's interpreter is "not competent to interpret" or has "abused" their role, the asylum officer should terminate the asylum interview.[77] The interview must then be rescheduled "at the fault of the applicant," resulting in a delay in adjudication and a potential delay in work authorization.[78] The applicant must bring a different interpreter to the rescheduled hearing.[79] If the applicant fails to do so without good cause, they risk having their application dismissed or waiving their right to an asylum interview.[80]

It is challenging to review the quality of interpretation after the interview. The Department of Homeland Security does not record the asylum interview, unlike immigration court proceedings, which are audio

quired to bring to the interview, the Asylum Division began phasing in the use of contracted telephonic interpreter monitors in the first half of 2006.

Id. Although the monitors are generally telephonic, the Asylum Office Director may provide in-person monitors. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 14 ("Such situations may include interviews requiring sign-language interpreters, interviews of minors, or interviews of asylum applicants who are mentally incompetent or physically incapacitated."). The asylum interview may proceed without a monitor if the asylum officer cannot connect to a monitor within ten minutes or there are no monitors available who have cleared the requisite security background checks. *Id.* at 13.

73. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 14 ("In general, the role of the contract interpreter is limited to monitoring interpretation by an interpreter provided by the applicant.").

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id. But see* U.S. CITIZENSHIP & IMMIGRATION SERVS., LANGUAGE ACCESS PLAN, *supra* note 60, at 11 ("If the monitor alerts the officer that the interpreter is not competent to interpret accurately, the officer may use a telephonic interpreter to complete the interview or may reschedule the interview and require the applicant bring a competent interpreter.").

78. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 14.

79. U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13. ("[T]he applicant must reappear with a different interpreter who is competent and who has not previously been found to have abused his or her role as an interpreter.").

80. *See id.* (describing the consequences of an applicant's failure to bring an interpreter absent good cause).

recorded.[81] The only record of the asylum interview is informal notes taken by the asylum officer.[82]

These notes can be used in subsequent asylum proceedings, which is highly problematic if the quality of interpretation is poor. 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.[83] These notes can serve as a basis to impugn the credibility of an asylum seeker.[84] The notes are not automatically provided to the asylum applicant but may be requested via a Freedom of Information Act request.[85]

C. Critique of Current Language Access in Asylum Interviews

The purpose of an interpreter in legal proceedings is to ensure that a limited English proficient individual has comparable access to the proceedings as someone who speaks English.[86] Professional interpreters are essential to giving limited English proficient asylum applicants equivalent access to the asylum interview. The government's failure to provide interpreters at asylum interviews significantly disadvantages those asylum seekers who are unable to retain professional interpreters.

Interpretation is a specialized skill, especially in the legal context. The "starting point" for adequate interpretation is bilingualism, but bilingualism does not automatically guarantee interpreter adequacy.[87] Bilin-

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81. SARAH IGNATIUS, NAT'L ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 12–13 (Deborah Anker ed., 1993); *see* 8 C.F.R. § 1240.9 (2020) ("The hearing [before the immigration judge] shall be recorded verbatim except for statements made off the record with the permission of the immigration judge.").

82. *See* COLLOPY, *supra* note 63, at 677 (citing U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: INTERVIEWING PART II: NOTE-TAKING (2009)) (explaining that the notes asylum officers take during the asylum interview "become part of the administrative record and are meant to be an informal transcript of what is said during the course of the asylum interview").

83. *See id.* at 550, 769 (describing the practice by Department of Homeland Security attorneys of introducing into evidence in removal proceedings the notes and assessments prepared in conjunction with affirmative asylum interviews).

84. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2018) (explaining that adjudicators may consider inconsistencies between the applicant's written and oral statements when making a credibility determination).

85. *See* Letter from Alan D. Hughes, Assoc. Counsel, U.S. Citizen & Immigration Servs., to Honorable Laurel Beeler, U.S. Dist. Court for the N. Dist. of Cal. (Feb. 18, 2014) (on file with author) (acknowledging USCIS's compliance with a Settlement Agreement in *Martins v. USCIS*, under which USCIS agreed to provide asylum officer notes in response to Freedom of Information Act requests).

86. *See* CODE OF PROF'L RESP. FOR INTERPRETERS IN THE MINN. ST. CT. SYS., Canon 1, cmt. 2 (1996) (explaining the duty of an interpreter as "plac[ing] the non-English speaking person on an equal footing with those who understand English").

87. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,461 (June 18, 2002) ("Competency requires more than self-identification as bilingual."); Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 258, 317–18 (1996) (evaluating pass

gualism is insufficient because interpretation is an art and not simply a mechanical skill. Accurate interpretation does not necessarily mean a machinelike, literal interpretation, which frequently does not convey the entire meaning of a statement.[88] At the same time, interpreters need to provide "complete and accurate interpretation . . . without altering, omitting, or adding anything to the meaning of what is stated . . . and without explanation."[89] Strict guidelines establish best practices for interpreters to ensure preservation of the meaning of what is said in legal proceedings.[90]

rate statistics on interpreter certification and screening tests to dispel the "misconception" that a bilingual individual is qualified to interpret legal proceedings).

88. For example, when an asylum seeker was testifying about six men who gang raped her, she stated in Spanish that one of the men said, "Vamos a hacerla picadillo," which in English means "Let's beat her to a pulp." However, the interpreter in immigration court interpreted the word "picadillo" literally as "ground beef." Noriega & Flores, *supra* note 12; *see also* Holly Mickkelson, *Evolving Views of the Court Interpreter's Role*, *in* CROSSING BORDERS IN COMMUNITY INTERPRETING: DEFINITIONS AND DILEMMAS 81, 82–83 (Carmen Valero-Garcés & Anne Martin eds., 2008) (exploring the challenges and tensions between literal interpretation and preserving the meaning of what is said).

> Court and legal personnel have traditionally viewed the interpreter as a "machine" or "conduit," who will provide literal word for word interpretation, which courts often perceive as the most accurate interpretation. However, interpreters that conceptualize the task of interpreting from a bilingual and cultural context, view their work very differently, and this has led to considerable challenges in legal settings.

Debra Russell, *Court/Legal Interpreting*, *in* 3 HANDBOOK OF TRANSLATION STUDIES 17, 17 (Yves Gambier & Luc Van Doorslaer eds., 2012).

89. CODE OF PROF'L RESP. FOR INTERPRETERS IN THE MINN. ST. CT. SYS., *supra* note 86, Canon 1; *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., RAIO DIRECTORATE – OFFICER TRAINING, INTERVIEWING – WORKING WITH AN INTERPRETER 14–16 (2019) [hereinafter RAIO DIRECTORATE – OFFICER TRAINING] (listing "Interpreter Ground Rules[,]" including that an interpreter "[i]nterpret verbatim (word for word) as much as possible"); Grabau & Gibbons, *supra* note 87, at 283–84 (explaining that interpreters should not simplify questions even when the limited English proficient individual may not understand the language level of the speaker and should not correct errors in questions or testimony). *But see* Barsky, *supra* note 9, at 17–18 (advocating for interpreters to be "involved, engaged, over and above [the] act of substituting one lexical item for another" to play a positive role to support noncitizens in the immigration system, which is "so deeply rooted in discretionary practices as to not deserve anything evoking a normative sense of judicial practice"); Mickkelson, *supra* note 88, at 81–94.

90. *See, e.g.*, WILLIAM E. HEWITT, STATE JUSTICE INST., COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 195–210 (1995) (delineating a model code of professional responsibility for interpreters in the judiciary); RAIO DIRECTORATE – OFFICER TRAINING, *supra* note 89, at 14–16 (listing "Interpreter Ground Rules"); *see also* Grabau & Gibbons, *supra* note 87, at 241–44, 310 (describing best practices for interpreters). *But see* Sandra Hale, *Controversies Over the Role of the Court Interpreter*, *in* CROSSING BORDERS IN COMMUNITY INTERPRETING: DEFINITIONS AND DILEMMAS, *supra* note 88, at 99, 101 ("The majority of the views proposed on the interpreter's role are based solely on personal preferences and ideologies, some on descriptive studies of the current state of affairs, but very few on research that looks at the consequences of each of the roles proposed."). Most court systems in the United States, including the administrative immigration system, do not have formal educational requirements to be an interpreter. Grabau & Gibbons, *supra* note 87, at 255–57 (explaining the widespread lack of formal qualifications for interpreters). Some states, like California, distinguish between certified and noncertified interpreters, with the former obtaining some form of certification from an approved entity. *See, e.g.*, CAL. GOV. CODE §§ 68561, 68566 (West 2015) (describing the use of certified and noncertified interpreters in California state courts). The federal courts have a program to "facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States." 28 U.S.C. § 1827(a) (2018); *see also* U.S. COURTS, GUIDE TO JUDICIARY POLICY, vol. 5, ch. 1–5 (2017), https://www.uscourts.gov/sites/default/files/guide_vol05.pdf (providing the federal courts' policies on interpreters); SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT

Interpreters must be familiar with not only colloquial expressions but also technical legal vocabulary in both the target and source languages.[91] Beyond language skills, interpretation requires other abilities including speed, impartiality, cross-cultural awareness, and interpersonal skills.[92] Moreover, there are also different modes of interpretation, including simultaneous and consecutive interpreting, that each have their benefits and shortcomings.[93]

Quality interpretation is especially essential in asylum interviews given the importance of credibility in asylum determinations.[94] If the adjudicator finds that an applicant is not credible, they can deny the asylum application.[95] Seemingly insignificant inconsistencies that are the result of inaccurate interpretation, including those that do not relate to an applicant's asylum claim, can result in an adverse credibility determination.[96] Moreover, 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.[97]

Despite the need for high quality interpretation, many asylum seekers do not have the financial resources to afford professional interpreters.[98] And many, if not most, nonprofessional interpreters at asylum interviews do not have the requisite technical skills to act as interpreters in legal proceedings.[99] Although public statistics on interpreters in asylum

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INTERPRETERS IN THE JUDICIAL PROCESS 32–39 (2d ed. 2017) (describing the Court Interpreters Act and the federal court interpreters examination).

91. *See* Grabau & Gibbons, *supra* note 87, at 259.

92. *See id.* at 258–59 (describing the myriad skills required for successful interpretation beyond bilingualism).

93. *See id.* at 244–47, 281–84 (describing different modes of interpretation).

94. *See* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2018) ("In determining whether the applicant has met the applicant's burden [for asylum], the trier of fact may weigh the credible testimony along with other evidence of record."); INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (describing the factors a trier of fact may consider when making a credibility determination).

95. *See* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

96. When making a credibility determination, a trier of fact may consider:

> [T]he consistency between the applicant's . . . written and oral statements . . . the internal consistency of each such statement, [and] the consistency of such statements with other evidence of record . . . without regard to whether an inconsistency . . . goes to the heart of the applicant's claim when making a credibility determination.

INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); *see* Agrawal, *supra* note 12 ("If things are said in different ways at different times, that can be an interpreter's fault, and yet, it makes the person look not credible." (quoting Immigration Judge Dana Marks)).

97. *See supra* notes 25–36, 83–84 (describing the two-step affirmative asylum process and the Department of Homeland Security's use of asylum officer notes to impeach credibility during removal proceedings).

98. *See* Mellinger, *supra* note 60, at 145–46 (finding that "asylum seekers often do not have the financial means to bring a professional interpreter with them to their asylum interviews").

99. *See* Hale, *supra* note 90, at 100 (explaining that "not all who practice as interpreters (including family and friends) have received the same preparation and training, leading to a discrepancy in performance and greater confusion for those who use their services").

interviews are unavailable, a study of asylum interviews from the early 1990s found that interpreters "are frequently family members or friends."[100] This study found that nonprofessional interpreters "frequently confused the testimony at the asylum interview."[101] Other interpretation problems identified by the study included incomplete interpretation of applicants' testimony and summarizing or adding to the testimony.[102] A more recent study found that inadequate interpreters can "frustrate[] the dynamics of asylum interviews," and have resulted in asylum officers becoming "irritable" during the interviews as well as rescheduling interviews.[103]

Aside from the lack of technical skills, using family members or friends as interpreters adds another layer of complication because an asylum seeker may be unwilling to reveal sensitive information in their presence. For example, an asylum seeker during the asylum interview may be reluctant to discuss their sexual orientation or a past sexual assault because doing so could have negative societal ramifications, including an increased risk of harm. An asylum seeker may also hesitate to disclose the severity of abuse out of a desire to protect the interpreter. Interpreters who know the asylum seeker may also be more likely to subconsciously soften the language they use when interpreting in an effort to protect asylum seekers from hostile questioning or perceived negative comments from the asylum officer.[104]

The lack of government-provided interpreters especially harms unrepresented asylum applicants, who are often lower-income individuals. Unrepresented asylum seekers have increased challenges finding and affording qualified interpreters. First, a fundamental challenge for a limited English proficient asylum seeker is gauging the English language ability of a potential interpreter. The requirement that noncitizens provide their own interpreters in asylum interviews sets up a flawed system because noncitizens are held responsible for the language skills of interpreters that they have no ability to assess. Second, it can be difficult for someone who has recently arrived in the United States—especially if they do not have a preexisting network or if they speak a less common

100. IGNATIUS, *supra* note 81, at 22–23, 89 (finding that in 39% of the asylum interviews reviewed, applicants "relied on a friend or relative without formal experience"). It is unclear if the Department of Homeland Security collects information on who interpreters are, beyond basic identity data. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 12 (requiring an interpreter to sign the Record of Applicant and Interpreter Oath); Mellinger, *supra* note 60, at 131 ("[T]wo of the immigration attorneys who participated in this study were former asylum officers, and they were able to confirm that, to their knowledge, the Asylum Office collected only a minimal amount of data in regard to interpretation and phone monitors.").

101. IGNATIUS, *supra* note 81, at 78.

102. *Id.* at 89.

103. Mellinger, *supra* note 60, at 146–48.

104. "[I]nterpreters are unconsciously aware of the implications involved in the use of active and passive grammatical forms, and manipulate these forms for a variety of psychological reasons." BERK-SELIGSON, *supra* note 90, at 115–16.

language—to find an interpreter.[105] For example, indigenous language speakers from Central America and Mexico are often forced to try to communicate in Spanish, a language that many do not speak fluently, due to the challenge of finding indigenous language interpreters.[106]

The difficulties of finding interpreters are compounded by the change in asylum processing in January 2018 to a "last in, first out" system, whereby the most recently filed asylum applications receive interviews first.[107] USCIS is attempting to schedule newly filed asylum applications for interviews within twenty-one days, requiring asylum seekers to find interpreters on an expedited timeline.[108] And, asylum seekers may lack the resources to hire an interpreter because they are not entitled to work authorization immediately after filing their applications.[109]

Although the government has cited "undue financial burden" to justify the failure to provide interpreters at asylum interviews, the reasons for this policy go beyond the issue of cost.[110] It is disingenuous to characterize the costs of interpretation as "undue" when the purpose of the asylum system is to allow noncitizens from other countries to seek protection in the United States. The provision of interpreters is an obvious necessity for a government agency that is tasked with adjudicating the claims of asylum seekers from foreign countries.

Moreover, the Department of Homeland Security has a massive and ballooning budget.[111] However, the Department of Homeland Security's priority is enforcement rather than the provision of services, including interpretation.[112] Not only is the provision of interpreters not a priority, it

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105. *See* Jennifer Medina, *Anyone Speak K'iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, N.Y TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html (describing the challenges that immigration courts and lawyers face in finding indigenous language interpreters). Even the Department of Homeland Security has difficulty finding indigenous language interpreters. *See* Wallace & Hernández, *supra* note 11, at 146 ("[N]either of the two language service providers with whom Asylum Headquarters contracts has interpreters available for the Guatemalan language Ixil, and . . . interpreters of other languages such as Mam are very limited . . . .").

106. *See* Wallace & Hernández, *supra* note 11, at 146; Nolan, *supra* note 2.

107. News Release, U.S. Citizenship & Immigration Servs., USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog.

108. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP IMMIGR. SERVS., https://www.uscis.gov/affirmative-asylum-scheduling (last updated Jan. 26, 2018) (stating USCIS's goal "to schedule all new applications for an interview within 21 days").

109. *See* 8 C.F.R. § 208.7(a) (2020).

110. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284-01, 62,293 (Dec. 5, 1994) (to be codified at 8 C.F.R. § 208.9(g)).

111. *See* AM. IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2–3 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

112. *See* Noriega & Flores, *supra* note 12 ("[The] disparity [between funding for enforcement and for interpreters and support staff] shows that the rights and well-being of immigrants themselves are an afterthought in the way the government apportions immigration-related resources."). The

has been weaponized to disadvantage certain groups of noncitizens, for example, Haitian asylum seekers in the 1980s.[113] Regardless of the reasons why the government does not provide interpreters at asylum interviews, the fact remains that the current system significantly disadvantages people who must rely on nonprofessional interpretation.

II. STATUTORY AND EXECUTIVE ORDER AVENUES FOR LANGUAGE ACCESS RIGHTS IN ASYLUM INTERVIEWS

There are two potential nonconstitutional avenues for improving language access in asylum interviews: (1) Title VI of the Civil Rights Act, which prohibits discrimination on the basis of national origin, and (2) Executive Order 13166, which pertains to language access in the federal agencies. Because they fall short in the context of asylum interviews, however, a constitutional solution is necessary.

A. Language Access Under Title VI of the Civil Rights Act

Language access is a civil right codified in Title VI of the Civil Rights Act and is tied to prohibiting discrimination on the basis of national origin.[114] Title VI prohibits federal funding recipients from discriminating against individuals by broadly codifying constitutional antidiscrimination rules.[115] Specifically, it prohibits discrimination on the basis of national origin, stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[116] Failure to provide adequate language access is linked to national origin discrimination because "language is a close and meaningful proxy for national origin[.]"[117]

The U.S. Supreme Court has interpreted national origin discrimination under Title VI to include the failure to provide "meaningful opportunity[,]" including language access, to programs or activities receiving

Trump Administration's creation of a new mission statement for USCIS reveals the enforcement focus of the agency. *See* Richard Gonzales, *America No Longer A 'Nation of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018, 6:18 PM), https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says. The new mission statement declares that USCIS "administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values." *About Us*, U.S. CITIZENSHIP IMMIGR. SERVS., https://www.uscis.gov/about-us (last updated Jan. 28, 2020).

113. *See* sources cited *supra* note 10 (describing the inadequacy of language access for and discrimination against Haitian asylum seekers in the 1980s).

114. *See* 42 U.S.C. § 2000d (2018).

115. *Id.*; *see generally* Beck, *supra* note 12, at 23–24 (describing the statutory scheme of Title VI).

116. 42 U.S.C. § 2000d.

117. Yniguez v. Arizonans for Official English, 69 F.3d 920, 947 (9th Cir. 1995), *vacated sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

federal funding.[118] Thus, recipients of federal funding must take reasonable steps to provide language access for limited English proficient individuals to their programs and activities.[119]

Although an important civil rights statute,[120] there are a few reasons why a statutory remedy under Title VI of the Civil Rights Act is inadequate to address the denial of language access in the asylum interview context. First, this statute does not apply directly to federal agencies like the Department of Homeland Security, but only to their funding recipients.[121] Thus, it does not directly apply to USCIS, the component within the Department of Homeland Security that is responsible for asylum interviews. Second, this statute does not provide a private right of action for disparate impact claims.[122] Given its exclusion of the activities of federal agencies combined with the federal government's ambivalence towards enforcing language access rights within the federal government, Title VI does not provide an avenue for expanding language access rights in asylum interviews.[123]

B. Language Access Under Executive Order 13166

Several decades after the enactment of the Civil Rights Act, President Clinton issued Executive Order 13166 in 2000 to clarify agency obligations concerning language access.[124] Specifically, the Executive Order sought to "improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency[.]"[125] This Executive Order requires each federal agency to "take reasonable steps to ensure meaningful access to [its] programs and activities by [limited English proficient] persons" and to prepare a plan to increase language access to its federally funded programs for limited English proficient individuals.[126] On its face, the Executive Order, which applies to federally con-

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118. Lau v. Nichols, 414 U.S. 563, 566–69 (1974) (holding that school systems receiving federal funding must provide English language instruction to students who do not speak English under the Civil Rights Act).

119. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,463 (June 18, 2002).

120. For example, the Department of Justice has successfully used the Civil Rights Act to increase language access by federal funding recipients such as state courts. *See* ABEL, LANGUAGE ACCESS IN IMMIGRATION COURTS, *supra* note 36, at 1 ("In response to state court failures to provide competent interpreters, [the Department of Justice] has launched investigations and entered into settlement agreements requiring the courts to improve their court interpreting programs.").

121. *See* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, SECTION V 18 (2016) (on file with author) ("Title VI does not apply to the federal government."); *see also* Beck, *supra* note 12, at 24 (explaining to which entities Title VI applies).

122. *See* Alexander v. Sandoval, 532 U.S. 275, 282–93 (2001).

123. *See infra* text accompanying notes 133–36.

124. Exec. Order 13166, *supra* note 15, at 50,121.

125. *Id.*

126. *Id.* ("Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible [limited English proficient] persons.").

ducted programs, seems more promising than Title VI, which is restricted to federally funded programs.[127]

The Executive Order referred agencies to a general guidance document created by the U.S. Department of Justice, which delineated a four-factor test to analyze whether agency programs and activities have taken "reasonable steps" to provide meaningful language access to limited English proficient individuals.[128] To determine whether the provision of language access is meaningful, agencies must balance: (1) the number of people interacting with the program that would benefit from language assistance; (2) the frequency of that contact; (3) the nature and importance of the program; and (4) the program's available resources.[129]

The Executive Order prompted the Department of Homeland Security to create an agency-specific language access plan.[130] Nevertheless, the Executive Order has been of limited utility in the immigration context due to the lack of an enforcement mechanism; it is not enforceable in court by private parties.[131] Rather, the Department of Justice is tasked with the oversight of agency language access plans and, to date, has failed to ensure compliance with the Executive Order.[132] Instead, agencies generally have been left to their own devices to develop and implement language access plans with varying degrees of success.[133] For example, the Department of Homeland Security lagged in creating its language access plan, failing to complete it until 2012, over a decade after the deadline set by Executive Order 13166.[134] The Department of Home-

127. *See id.*

128. *See id.*; 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. 50,123, 50,124–25 (Aug. 16, 2000); *see generally* Beck, *supra* note 12, at 25–28 (describing the DOJ policy guidance for federal agencies to provide language access for limited English proficient individuals).

129. Enforcement of Title VI of the Civil Rights Act of 1964, 65 Fed. Reg. at 50,124–25.

130. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., LANGUAGE ACCESS PLAN, *supra* note 60, at 2; U.S. CITIZENSHIP & IMMIGRATION SERVS., LANGUAGE ACCESS PLAN 1–2 (2012).

131. *See* U.S. GOV'T ACCOUNTABILITY OFFICE., GAO-10-714, DHS NEEDS TO COMPREHENSIVELY ASSESS ITS FOREIGN LANGUAGE NEEDS AND CAPABILITIES AND IDENTIFY SHORTFALLS 9–27 (2010) ("DHS has taken limited actions to assess its foreign language needs and capabilities and to identify potential shortfalls."); Beck, *supra* note 12, at 27–29 (discussing the lack of enforcement mechanisms).

132. *See* Beck, *supra* note 12, at 28–29; *see also* TERE RAMOS, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, CLEARINGHOUSE COMMUNITY, WHEN ACCESS TO LANGUAGE MEANS ACCESS TO JUSTICE: HOW TO ADVOCATE EFFECTIVELY ON BEHALF OF LIMITED-ENGLISH PROFICIENT PERSONS 5 (2018) (on file with author) (describing the ebbs and flows of the Department of Justice's "lackluster" enforcement of compliance with Title VI and explaining that the Department of Justice has taken a "voluntary compliance" approach).

133. Memorandum from Eric Holder, Att'y Gen., to Heads of Fed. Agencies, Gen. Counsels, and Civil Rights Heads (Feb. 17, 2011), https://www.lep.gov/sites/lep/files/resources/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf (acknowledging "significant variations in the extent to which federal agencies are aware of, and in compliance with, principles of language access").

134. Exec. Order 13166, *supra* note 15 (requiring agencies to "develop and begin to implement [language access] plans within 120 days of the date of this order [Aug. 11, 2000]"); DEP'T OF HOMELAND SEC., LANGUAGE ACCESS PLAN 1 (2012); *see also* U.S. GOV'T ACCOUNTABILITY

land Security still may not be in compliance with Executive Order 13166 because of its failure to provide meaningful language access to limited English proficient individuals.[135] Moreover, the Executive Branch under the Trump Administration is steadily chipping away at language access, rather than expanding it, contrary to the intent of the Executive Order.[136]

In addition to its lack of a private enforcement mechanism, the Executive Order may not be a reliable method to produce long-term and lasting change. Because executive orders can easily be revoked or canceled with changes in administration, any language access progress that relies on Executive Order 13166 could easily be reversed.[137]

Although the deprivation of language access constitutes national origin discrimination under the Civil Rights Act and is contrary to Executive Order 13166, the limited scope of the former and the lack of adequate enforcement mechanisms for the latter render both options ineffective to address language access issues in asylum interviews. Given the lack of recourse via statute or executive order, this Article proposes a constitutional solution grounded in the Due Process Clause for a more workable method of challenging language access problems in asylum interviews.

III. DUE PROCESS FRAMEWORK FOR LANGUAGE ACCESS

Because Title VI of the Civil Rights Act and Executive Order 13166 have fallen short of achieving meaningful language access for limited English proficient asylum seekers, this Article proposes two procedural due process challenges to the Department of Homeland Security's failure to provide interpreters at asylum interviews. Procedural due process creates an avenue to challenge government procedures that deprive an individual of their life, liberty, or property.[138] Historically, due process has not been the primary vehicle to achieve language access because of immigration law's plenary power doctrine and the courts' avoidance of constitutional questions.[139] Despite these challenges, a deeper look into procedural due process doctrine reveals an opening that supports a con-

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OFFICE, GAO-10-91, LANGUAGE ACCESS: SELECTED AGENCIES CAN IMPROVE SERVICES TO LIMITED ENGLISH PROFICIENT PERSONS 7 (2010) (noting that the Department of Homeland Security's language access plan was pending as of 2010).

135. *See* Beck, *supra* note 12, at 35–38 (explaining how the Department of Homeland Security is noncompliant with Executive Order 13166 because it has failed to provide meaningful language access to limited English proficient individuals in immigration detention).

136. *See supra* note 8 and accompanying text (describing the Trump Administration's policies limiting language access in the immigration context).

137. *See generally* VIVIAN S. CHU & TODD GARVEY, CONGRESSIONAL RESEARCH SERV., EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 7–9 (2014).

138. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

139. *See* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (explaining that courts should not "pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *infra* text accompanying notes 142–44 (explaining the plenary power doctrine).

stitutionally protected right to a government-provided interpreter in asylum interviews.

A. Extending Fundamental Fairness to Asylum Interviews

Courts have significantly curtailed the procedural due process rights of noncitizens in the immigration context.[140] Nevertheless, courts have held that removal proceedings in immigration court must be fundamentally fair, which includes the right to an interpreter for limited English proficient individuals.[141] The same procedural due process rights that include a right to a government-provided interpreter for noncitizens in removal proceedings should apply to asylum seekers during the asylum interview stage of the affirmative asylum process.

The story of procedural due process in immigration law is one of extremes. On the one hand, well-settled law affords Congress and the Executive Branch plenary power to control immigration.[142] On the other hand, despite Congress's broad power "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country,"[143] courts have held that "the executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy."[144] Therefore, noncitizens are entitled to variable procedural due process protections depending on their immigration status and their physical location.[145]

Noncitizens arriving at the U.S. border and seeking admission into the United States, termed "arriving aliens,"[146] have virtually no procedural due process rights.[147] The U.S. Supreme Court has explained that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[148] The Court's reasoning is

140. *See infra* notes 147–49 and accompanying text.

141. *See* Amadou v. Immigration & Naturalization Serv., 226 F.3d 724, 726–28 (6th Cir. 2000).

142. Kleindienst v. Mandel, 408 U.S. 753, 761 (1972); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); *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.").

143. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

144. Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1036–37 (5th Cir. 1982).

145. *See* B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 105–09 (2017).

146. 8 C.F.R. §§ 1.2, 1001.1(q) (2020) (defining the term "arriving alien").

147. *See* U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); *see also* Shaughnessy v. U.S. *ex rel*. Mezei, 345 U.S. 206, 215–16 (1953) (holding that initial admission into the United States is a privilege); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("As to [noncitizens who have not acquired residence in, or have never been admitted into, the United States], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.").

148. *Mezei*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544).

that noncitizens do not have a right to enter the United States because entry is a privilege granted by a sovereign nation.[149]

Yet, the U.S. Supreme Court has limited the plenary power doctrine in removal proceedings via the Due Process Clause of the Fifth Amendment.[150] As a result, noncitizens in removal proceedings in the United States fare better than "arriving aliens" in terms of due process rights.[151] The Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]"[152] Notably, the Fifth Amendment speaks of "person[s]" and not "citizens."[153] Thus, the Court held that noncitizens within the United States, regardless of their immigration status, are entitled to due process.[154] The Court also held that a noncitizen's removal from the United States is a deprivation of a liberty interest,[155] and that removal proceedings are a hybrid between criminal and civil cases:

> 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 . . . 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.[156]

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149. *Knauff*, 338 U.S. at 544; Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

Id.; *see generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 857–64 (1987) (describing and critiquing the judiciary's use of sovereignty to justify "federal control over immigration").

150. Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

> [I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.

Id. However, the U.S. Supreme Court did not find a procedural due process violation in *Yamataya* even though the noncitizen did not understand English, did not know that the investigation was considering her deportation, and had not been permitted to consult with counsel or friends. *See id*. at 87, 101. Since *Yamataya*, however, "procedural due process [has] flowered in immigration law as a significant exception to the plenary power doctrine." Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632 (1992).

151. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing a distinction between the due process rights of noncitizens applying for admission at the U.S. border and noncitizens defending against removal).

152. U.S. CONST. amend. V.

153. *Id.*

154. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens.").

155. *See* Bridges v. Wixon, 326 U.S. 135, 154 (1945).

156. *Id.* Nevertheless, noncitizens in removal proceedings do not receive the full panoply of constitutional protections afforded criminal defendants because immigration proceedings are categorized as civil. *See* Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. 1984).

Therefore, removal proceedings must comport with procedural due process.[157]

More specifically, courts have held that the Due Process Clause requires removal proceedings—the second step of the affirmative asylum process—to be "fundamentally fair" because they can subject an individual to expulsion from the United States.[158] Fundamental fairness includes adequate notice and a reasonable opportunity to respond to the charges against the noncitizen, including the right to present evidence and witnesses.[159] Due process also requires the government to provide noncitizens in removal proceedings with competent interpreters if necessary;[160] however, the right to interpretation only extends to questions directed to the limited English proficient individual.[161]

Courts should extend at least the same procedural due process protection of fundamental fairness to noncitizens applying for asylum. Applying for asylum, both through the affirmative and defensive processes, is different from applying for the privilege to enter the United States.[162] Unlike the latter, which is at the near-complete discretion of the political branches under the plenary power doctrine,[163] the right to petition for asylum stems from the United States' treaty obligations under the 1967 Protocol Relating to the Status of Refugees.[164] By treaty, the political branches of government have limited their plenary power over immigration and agreed to the principle of nonrefoulement, that is, to not return

157. Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that undocumented persons are entitled to due process in deportation hearings).

158. Pouhova v. Holder, 726 F.3d 1007, 1011 (7th Cir. 2013) (quoting Barradas v. Holder, 582 F.3d 754, 762 (7th Cir. 2009)); Felzcerek v. Immigration & Naturalization Serv., 75 F.3d 112, 115 (2d Cir. 1996) (quoting Bustos-Torres v. Immigration & Naturalization Serv., 898 F.2d 1053, 1055 (5th Cir. 1990)). Additionally, the Immigration and Nationality Act codifies statutory protections for noncitizens in removal proceedings, including a reasonable opportunity to examine evidence against them and to present evidence, as well as representation at no expense to the government. *See* INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4) (2018); *see generally* Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 693 (2015) (discussing the rights of noncitizens in removal proceedings).

159. *See* Jacinto v. Immigration & Naturalization Serv., 208 F.3d 725, 727–29 (9th Cir. 2000) (due process in immigration court requires a "full and fair hearing," which includes presenting personal testimony).

160. *See* Amadou v. Immigration & Naturalization Serv., 226 F.3d 724, 726 (6th Cir. 2000) (holding that the asylum applicant "was deprived of his due process right to a full and fair hearing because of the incompetence of the interpreter"). Due process does not require that the interpreter be certified. Indeed, many court interpreters, even in the state and federal court systems, are not certified. *See* Grabau & Gibbons, *supra* note 87, at 255–57.

161. *See* El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 752 (9th Cir. 1991).

162. *See infra* text accompanying notes 163–67.

163. Although the United States has no international obligations concerning immigration outside of the protection context, it may have moral obligations concerning immigration. *See* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510, 1563–65 (2019) (advocating "a theory of sovereignty that obligates former colonial powers to open their borders to former colonial subjects").

164. Protocol Relating to the Status of Refugees, art. 1, ¶ 1, Jan. 31, 1967, 19 U.S.T. 6223 (incorporating Convention Relating to the Status of Refugees, art. 2–34, July 28, 1951, 19 U.N.T.S. 6268); *see* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982).

refugees to places where they would be persecuted.[165] The United States has also agreed "as far as possible [to] facilitate the assimilation and naturalization of refugees."[166] Congress codified these treaty obligations into domestic law by providing a process for seeking asylum in the United States, which can lead to lawful permanent residence and then naturalization.[167] The United States' underlying treaty obligations render asylum a special form of relief, differentiated from most other forms of relief, which are only creatures of statute.

The fundamental fairness standard applied to immigration proceedings should be extended to asylum interviews because migration for purposes of seeking asylum is qualitatively different from other forms of migration.[168] The higher stakes involved in migration for asylum, because of the risk of persecution, put asylum seekers in a posture closer to noncitizens in removal proceedings facing potential expulsion from the United States. The risk of persecution that asylum seekers face if erroneously denied protection is akin to the penalty of removal. The Second Circuit has recognized that an individual's interest in a government-provided interpreter is high "[w]hen [the] government seeks to . . . inflict some significant mandatory change on the conditions of the individual's life[.]"[169] The government's grant or denial of an asylum application at the asylum interview stage certainly affects the conditions of an asylum seeker's life, by either providing protection in the United States or initiating the formal process to deport the asylum seeker to a place where they may face persecution.

The circumstances surrounding asylum interviews counsel for at least the same level of procedural due process protections as removal proceedings. Accordingly, the right to a government-provided interpreter in removal proceedings should be extended to asylum interviews to ensure that the inability to communicate in English does not silence asylum seekers in the affirmative process.

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165. *See* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.N.T.S. 6268 (prohibiting the expulsion or return of refugees).

166. *Id.* art. 34.

167. *See* INA § 208, 8 U.S.C. § 1158 (2018) (outlining eligibility for asylum); INA § 209(b), 8 U.S.C. § 1159(b) (delineating the criteria for asylees to adjust status to lawful permanent resident status); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (explaining that "one of Congress' primary purposes [in the 1980 Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees"); S. REP. NO. 96-256, at 141 (1979) (explaining that the purpose of the Refugee Act was to "give[] statutory meaning to our national commitment to human rights and humanitarian concerns").

168. Regardless of the differences between asylum and other forms of migration, the author advocates for government-provided interpreters in all immigration interviews.

169. Abdullah v. Immigration & Naturalization Serv., 184 F.3d 158, 165 (2d Cir. 1999).

B. Procedural Due Process Right to Petition for Asylum Under the Affirmative Process Under Mathews v. Eldridge

The *Mathews v. Eldridge*[170] balancing test for procedural due process also supports the extension of the fundamental fairness standard and its concomitant right to a government-provided interpreter from the immigration court context into the asylum interview context.[171] Two questions arise when crafting a *Mathews* due process challenge to the government's failure to provide interpreters in asylum interviews. The first is whether the Due Process Clause applies to this context. If the answer to this question is yes, then the second is what process is due.[172] First, the Due Process Clause applies to the affirmative asylum context because noncitizens have a constitutionally protected right to apply for asylum using the affirmative asylum procedures. Second, under the *Mathews* balancing test, due process requires that the government provide an interpreter to limited English proficient asylum seekers.

1. Whether the Due Process Clause Applies

Before determining whether there has been a deprivation of due process and what process is constitutionally mandated, the first step is deciding whether the Due Process Clause applies.[173] The Due Process Clause applies if there is a deprivation of a constitutionally protected liberty or property interest.[174] First, there must be a deprivation.[175] Second, the deprivation must be of life, liberty, or property.[176] In the context of the affirmative asylum process, the deprivation at issue is the deprivation of meaningful access to the full affirmative asylum process, including the asylum interview, created by Congress and the Executive Branch. The failure to provide meaningful access to the full affirmative asylum process constitutes a deprivation of a protected property interest.

Constitutionally protected liberty or property interests can originate in the Constitution or in positive rules of law that create an entitlement to a government benefit.[177] Noncitizens must have a reasonable expectation

170. 424 U.S. 319 (1976).

171. *Id.* at 334–35.

172. *See* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 871 (2000).

173. *See* Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (citing Wolff v. McDonnell, 418 U.S. 539, 577 (1974)) (explaining that "limited due process rights attach" where there is a constitutionally protected liberty or property interest).

174. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Chemerinsky, *supra* note 172, at 871 (explaining that procedural due process is triggered only where there is a deprivation of life, liberty, or property).

175. *See* Chemerinsky, *supra* note 172, at 871 ("Only if a person is deprived of life, liberty or property does the court need to proceed with a procedural due process analysis.").

176. *See id.*

177. *See Augustin*, 735 F.2d at 37 ("In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit.").

of the liberty or property interest that is based in positive law.[178] In the context of procedural due process, the concept of property is broad, "tak[ing] many forms."[179] Property interests protected by the Due Process Clause may be intangible.[180]

Courts have already recognized that noncitizens have a protected property interest in petitioning for asylum, reasoning that positive rules of law created by Congress and the Executive Branch confer a constitutionally protected right to petition the government for asylum.[181] These positive rules of law specifically provide for a two-step affirmative asylum process, including the asylum interview and immigration court hearing.[182] Because the statute and relevant regulations create the two-step affirmative asylum process, asylum seekers have a reasonable expectation to the full affirmative asylum process.[183] Accordingly, there is a protected property interest in the right to petition for asylum using the two-step affirmative asylum process.

Due process doctrine has recognized property interests similar to the property interest in the right to petition for asylum using the affirmative asylum process. In *Logan v. Zimmerman Brush Co.*,[184] the U.S. Supreme Court recognized a right to use the adjudicatory procedures established by positive law as a property interest protected by due process.[185] Similar

178. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–77 (1972) ("[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

179. *Id.* at 576; *see also* Ralph R. Mabey & Jamie A. Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745, 777 (1993) (explaining that "the concept of property in the procedural due process context is relatively flexible and expansive").

180. *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988).

181. *See, e.g.*, *Augustin*, 735 F.2d at 37 ("Although a grant of asylum is discretionary, the [INA] creates a right to petition for such relief."); Jean v. Nelson, 727 F.2d 957, 982 (11th Cir. 1984) (explaining that Congress intended "to grant aliens the right to submit and the opportunity to substantiate their claim for asylum" (quoting Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982))); *Haitian Refugee Ctr.*, 676 F.2d at 1038 (holding that the relevant regulations, INA provision, and the Protocol Relating to the Status of Refugees evince "a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum"); *see also* Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 306–07 (2001). The Fifth Circuit has not explicitly classified this interest as a liberty or property interest. *See Haitian Refugee Ctr.*, 676 F.2d at 1039 ("Whether this minimal entitlement [to petition for asylum] be called a liberty or property interest, we think it is sufficient to invoke the guarantee of due process.").

Although holding that noncitizens have a protected interest in applying for asylum, courts have concluded that they do not have a constitutionally based entitlement to a grant of asylum because it is a discretionary form of relief. *See Jean*, 727 F.2d at 981 ("[W]hen dispensation of a statutory benefit is clearly at the discretion of an agency, . . . then there is no creation of a substantive interest protected by the Constitution."); *Haitian Refugee Ctr.*, 676 F.2d at 1039 ("There is no constitutionally protected right to political asylum itself."); *see also* INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2020) (providing that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum" (emphasis added)).

182. *See supra* text accompanying notes 23–38 (describing the affirmative asylum process).

183. *See supra* notes 23–38 and accompanying text.

184. 455 U.S. 422 (1982).

185. *Id.* at 430–32 (holding that the right to use state law adjudicatory procedures is a property interest that is protected by the due process clause of the Fourteenth Amendment); *see also* M.A.K.

to how the Refugee Act and related regulations created the two-step affirmative asylum procedure, the Illinois Fair Employment Practices Act (FEPA), at issue in *Logan*, created a comprehensive procedure to adjudicate claims of reemployment discrimination.[186]

Logan held that the complainant had a property right "to use the FEPA's adjudicatory procedures."[187] The Court explained that "having made access to the courts an entitlement . . . the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme."[188] Applying the rationale of *Logan* to the asylum context, a noncitizen has a statutory entitlement to the full process of affirmative asylum delineated by the Refugee Act and relevant regulations, including the nonadversarial interview with an asylum officer.[189]

The Supreme Court further explained in *Logan* that states cannot deny individuals use of "established adjudicatory procedures" if this deprivation would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."[190] One difference between the adjudicatory procedures at issue in *Logan* and those in the asylum context is that some asylum applicants do receive an opportunity to be heard at the immigration court stage of the asylum process if they are referred to immigration court.[191] However, this opportunity does not negate the fact that certain asylum applicants are not receiving meaningful access to all of the procedures fashioned by the government to which they have a property interest. The Refugee Act authorized the Executive Branch to create a process for applying for asylum. The Executive Branch, to effec-

Inv. Grp., LLC v. City of Glendale, 897 F.3d 1303, 1309–10 (10th Cir. 2018) (holding "[u]nder *Logan*, . . . M.A.K. had a property interest in its statutory cause of action to challenge the blight determination process for abuse of discretion").

186. *See Logan*, 455 U.S. at 424–25 (citing Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, ¶ 851 *et seq.* (1979)).

187. *Logan*, 455 U.S. at 429–30.

188. *See id.* at 430 n.5.

189. *See supra* notes 23–38 and accompanying text (describing the affirmative asylum process); *see also* Augustin v. Sava, 735 F.2d 32, 36–37 (2d Cir. 1984) (holding that noncitizens have "certain procedural and substantive entitlements" under the Immigration and Nationality Act and regulations, including a hearing before an immigration judge during which they can present evidence, cross-examine witnesses, and examine and object to evidence offered against them). In *Polk v. Kramarsky*, 711 F.2d 505, 509 (2d Cir. 1983), the Second Circuit distinguished *Logan*, 455 U.S. 422 (1982), and explained that the deprivation in *Logan* destroyed the underlying right of action, whereas in *Polk* there was only an extended delay. The context of asylum interviews is more akin to *Logan* than *Polk* because an asylum seeker could be deprived of the asylum interview, rather than only being subject to a long delay. *Compare Polk*, 711 F.2d at 509, *with Logan*, 455 U.S. at 429–30.

190. *Logan*, 455 U.S. at 429–30 (quoting Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (internal quotation marks omitted).

191. *See supra* text accompanying notes 31–37 (describing the second step of the affirmative asylum process). Only affirmative asylum applicants without lawful status are referred to immigration court if the asylum officer does not grant their applications. *See supra* text accompanying note 31 (describing the process under which certain asylum applications are referred to immigration court after the asylum interview). Accordingly, asylum applicants with lawful status do not receive the opportunity to pursue their applications in immigration court. *See infra* note 199 and accompanying text.

tuate the Refugee Act and the United States' treaty obligations, created the two-step affirmative asylum process, which includes an asylum interview.[192]

Failure to provide an interpreter to limited English proficient asylum seekers can deny them meaningful access to this two-step affirmative asylum process, thus constituting a deprivation of a property interest. Once created, the government cannot deprive noncitizens meaningful access to this process—a property interest—without proper procedural safeguards.[193] Therefore, the government may not deprive an asylum seeker access to the full affirmative asylum process without balancing the *Mathews* factors.[194]

2. What Process Is Due

Once a protected interest is implicated, one must determine what procedures are required under the Due Process Clause using the *Mathews* balancing test.[195] One must weigh and balance the three *Mathews* factors: (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 the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[196] Balancing the *Mathews* factors reveals that denying limited English proficient asylum seekers full access to affirmative asylum procedures violates due process and that a government-provided interpreter is required under the Due Process Clause.

a. Private Interest

The first factor, the private interest that will be affected by the official action, measures how important the interest is to the individual.[197] The more significant the interest to the individual, the more procedural safeguards are necessitated by the Due Process Clause.[198] Here, access to

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192. *See supra* note 167 and accompanying text.

193. *Logan*, 455 U.S. at 432.

> While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

Id. (quoting Vitek v. Jones, 445 U.S. 480, 490 n.6 (1980)).

194. *See id.* at 430 n.5.

195. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); *see also* Chemerinsky, *supra* note 172, at 888–89.

196. *Mathews*, 424 U.S. at 335.

197. *See* Chemerinsky, *supra* note 172, at 888 ("First the court says to balance the importance of the interest to the individual.").

198. *See id.* at 888–89.

the full affirmative asylum process is of utmost importance to asylum seekers.

Asylum seekers have a weighty interest in full access to the affirmative process and the opportunity to present their asylum claims in a nonadversarial setting before an asylum officer. Asylum seekers who have lawful status in the United States are not referred to immigration court and thus only have one opportunity at the asylum office to present their claims for asylum.[199] Asylum seekers without lawful status in the United States face removal proceedings and potential expulsion from the United States if they are referred to immigration court after an unsuccessful asylum interview.

Moreover, if asylum seekers do not receive meaningful access to the asylum interview, any problems in presenting their claims that arise at that stage may continue to haunt them through the remainder of the asylum process. For example, mistakes in interpretation at the asylum interview can burden the applicant in immigration court if they result in seemingly contradictory testimony because the Department of Homeland Security can use asylum interview notes to impeach the credibility of the applicant.[200]

Additionally, meaningful access to the nonadversarial asylum interview is especially valuable for asylum seekers due to trauma they may have suffered. Past trauma may cause asylum seekers to appear reluctant or nervous in a formal court setting with an opposing attorney.[201] Moreover, many studies have shown that the likelihood of winning asylum at the immigration court stage "depends largely on chance" because it is significantly impacted by the immigration judge assigned to the case.[202] The private interest is therefore high—access to an asylum interview is of significant importance to asylum seekers who are facing persecution and potentially death in their home countries.

199. *Compare* 8 C.F.R. § 208.14(c)(2) (2020) ("In the case of an applicant who is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status at the time the application is decided, the asylum officer shall deny the application for asylum."), *with id.* § 208.14(c)(1) ("[I]n the case of an applicant who appears to be inadmissible or deportable . . . , the asylum officer shall refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings . . . .").

200. *See supra* text accompanying notes 81–84 (describing the Department of Homeland Security counsel's use of asylum interview notes to impeach asylum applicants in removal proceedings).

201. Although all aspects of the asylum process can retraumatize asylum seekers, an adversarial hearing before the immigration judge can be especially taxing. *See* S. POVERTY LAW CTR., INNOVATION LAW LAB, THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 4 (2019) (reporting on how abusive treatment by judges "retraumatize[s] survivors of persecution"); Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process through Adjudicators*, 19 MICH. J. RACE & L. 53, 75–76 (2013) (explaining that "the immigration process itself can be traumatic").

202. *See* ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 54 (2016); *see also* Ramji-Nogales et al., *supra* note 24, at 301–03.

b. Likelihood of Erroneous Deprivation and Value of Additional Safeguards

The second *Mathews* factor considers two things: (1) the risk of any erroneous deprivation of the interest through the existing procedures; and (2) the probable value, if any, of additional or substitute procedures in reducing the risk of erroneous deprivation.[203] Here, there is a risk of erroneous deprivation of full access to the affirmative asylum process for limited English proficient asylum seekers because they may be unable to meaningfully access the asylum interview without a professional, government-provided interpreter. The additional procedure of providing interpreters for limited English proficient asylum seekers at the asylum interview stage would significantly reduce the risk of this deprivation.

A limited English proficient asylum seeker cannot have meaningful access to the asylum process without an interpreter. Although limited English proficient asylum seekers currently must bring their own interpreter, a nonprofessional interpreter may not be qualified to interpret complex legal proceedings.[204] The use of nonprofessional interpreters may foreclose limited English proficient asylum seekers from fully accessing the asylum interview stage of the affirmative process because they may be unable to fully and accurately present their claims to the asylum officer. If the asylum seeker fails to bring an interpreter without good cause, then the asylum application can be dismissed.[205] In such cases, asylum seekers do not receive full access to the affirmative asylum procedures.

Erroneous deprivation of full access to the affirmative asylum process is likely even though USCIS uses contract interpreters to monitor asylum interviews.[206] If the asylum officer determines, with the aid of the monitor, that the asylum seeker's interpreter is inadequate, the interview may be rescheduled.[207] The monitors are not permitted to step in and interpret, demonstrating that their focus is identifying fraud, rather than protecting the rights of asylum seekers.[208] Moreover, a contract interpreter in the requisite language may not always be available, especially for rare languages, which presents the risk that the interview may proceed without any oversight of the quality of interpretation.[209]

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203. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

204. *See supra* notes 86–93, 99–104 and accompanying text (discussing the skills required to be interpreters in legal settings and the inadequacies of nonprofessional interpreters).

205. *See supra* notes 70–71 and accompanying text (describing the harsh consequences of an asylum seeker's failure without good cause to bring an adequate interpreter to the asylum interview).

206. *See supra* notes 72–76 and accompanying text (discussing the role of contract interpreters in monitoring asylum interviews).

207. *See supra* notes 77–80 and accompanying text (explaining the ramifications of bringing an interpreter that the asylum officer deems inadequate).

208. *See supra* notes 72–76 and accompanying text (describing the role of the monitors).

209. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13 (providing that if the asylum officer "is not connected with a contract interpreter [who has cleared the appropri-

Government provision of an interpreter for limited English proficient asylum seekers is a highly valuable additional safeguard. Limited English proficient asylum seekers will be able to meaningfully access the asylum interview stage with a professional, government-provided interpreter. Government-provided interpreters put limited English proficient asylum seekers on more equal footing with each other and with English speakers, regardless of the asylum seeker's language abilities, financial resources, and legal representation.[210]

c. Governmental Interest

The third *Mathews* factor considers the government's interest, including the function involved and the fiscal and administrative burdens that the additional procedures would require.[211] Generally, the more the additional procedures will cost the government, the less likely a court is to mandate them under the Due Process Clause.[212] Although there will be a significant cost to the government to provide interpreters in asylum interviews, especially in-person interpreters, it will be tempered by benefits to the government as well as by eliminating the need for contract interpreters to monitor interpretation.[213]

The cost of interpretation will be offset by the elimination of spending on contract interpreters to monitor interpretation at asylum interviews because they will no longer be needed. Moreover, the Department of Homeland Security has a vast and expanding budget; however, current expenditures related to USCIS constitute only a small percentage of this budget despite a vast backlog of cases.[214] The provision of interpreters at asylum interviews would comprise only a small percentage of the Department of Homeland Security's budget.

If the Department of Homeland Security uses telephonic interpreters on an interim basis until the provision of in-person interpreters is possible, the immediate administrative burden on the agency in finding interpreters will not be onerous.[215] Because the Department of Homeland

ate security checks] within ten minutes, he or she should proceed with the interview, without monitoring by the contract interpreter").

210. *See supra* note 36 (discussing criticisms of government-provided interpreters in immigration court).

211. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

212. *See* Chemerinsky, *supra* note 172, at 889 ("The government's interest in administrative efficiency is such that the more expensive the procedures would be, the less likely it is that a court will require them.").

213. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13–14 (describing the role of contract interpreters to monitor the interpretation at asylum interviews).

214. *Compare* AM. IMMIGRATION COUNCIL, *supra* note 111, at 2–3, *with* U.S. CITIZENSHIP & IMMIGRATION SERVS., BUDGET OVERVIEW: FISCAL YEAR 2021 CONGRESSIONAL JUSTIFICATION 10–11 (2020), https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Budget%2C%20Planning%20and%20Performance/USCIS_FY_2021_Budget_Overview.pdf.

215. In-person interpretation is preferable to telephonic interpretation. *See* BERK-SELIGSON, *supra* note 90, at 246 (describing the shortcomings of telephonic interpretation); *see also* Ingrid V.

Security already contracts with interpretation services to provide interpreters for the credible fear process, it would not need to identify a new bank of interpreters.[216] Additionally, the federal government contracts with companies that provide in-person interpretation for immigration proceedings, which could also be used for asylum interviews.[217] If the Department of Homeland Security decides to hire staff interpreters for commonly used languages like Spanish and Mandarin as the immigration courts generally do, there may be more of an administrative burden initially in recruiting these employees.[218] However, staff interpreters will ultimately be more cost-effective because they will decrease the need for finding and hiring contract interpreters.[219]

Ultimately, the use of government-provided professional interpreters will benefit the Department of Homeland Security because they will lead to more efficient and accurate proceedings. Asylum interviews will proceed more smoothly and quickly with professional interpretation, resulting in asylum officers being able to conduct more interviews, which will decrease the backlog of pending asylum cases.[220] Additionally, fewer interviews will need to be rescheduled due to inadequacy of interpreters.[221] With more accurate interpretation, there will also be less erroneous referrals to immigration court, where there is currently a back-

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Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 982 (2015) ("[C]ourt interpreters who appear remotely via videoconference become tired faster and suffer inferior performance."); Ilan Roziner & Miriam Shlesinger, *Much Ado About Something Remote: Stress and Performance in Remote Interpreting*, 12 INTERPRETING 214, 214 (2010) (finding that remote interpretation produces "considerable psychological effects" in interpreters, including compounded "feelings of isolation and alienation").

216. *See* 8 C.F.R. § 208.30(d)(5) (2020) ("If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the [credible fear] interview."); U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13–14 (describing government provision of contract interpreters to monitor asylum interviews).

217. *See* Jaafari, *supra* note 8 ("The Department of Justice has translation contracts with three organizations for both in-person and phone interpreters . . . .").

218. *See id.* ("The courts typically have staff translators for Spanish and Mandarin, the two most common foreign languages they deal with."); *supra* notes 42–49 and accompanying text (discussing the most common countries of origin of asylum seekers utilizing the affirmative process). In immigration court, nearly 75% of cases completed in Fiscal Year 2018 involved Spanish-speaking noncitizens. *See* DEP'T OF JUSTICE, STATISTICS YEARBOOK, *supra* note 40, at 18 (showing that out of 182,421 cases completed in Fiscal Year 2018, 134,611 were for Spanish-speaking noncitizens).

219. *See* MINN. SUPREME COURT INTERPRETER ADVISORY COMM., BEST PRACTICES MANUAL ON INTERPRETERS IN THE MINNESOTA STATE COURT SYSTEM 30 (1999), http://www.mncourts.gov/documents/0/Public/Interpreter_Program/Ch_7_hiring_Ch_8_suggestions.pdf (finding that it is more cost-effective to hire staff interpreters as employees rather than using contract interpreters when "demand for interpreter services in a particular language is great").

220. *See* Grabau & Gibbons, *supra* note 87, at 258–59 (discussing the abilities that professional interpreters must possess, including speed); *see also* Nancy K.D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKELEY J. GENDER L. & JUST. 38, 55 (2006) (describing a California study of the family court interpreter pilot program in which "judicial officers reported that the services of court interpreters reduced the amount of courtroom time needed for hearings").

221. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., AAPM, *supra* note 29, at 13–14 (discussing the current practice of rescheduling interviews as a result of the inadequacy of the interpreter brought by the asylum seeker).

log of over one million cases.[222] Professional interpreters provided by the Department of Homeland Security will more robustly combat potential fraud in interpretation in asylum interviews than having only monitors.[223] Although the Department of Homeland Security will see increased costs associated with the provision of interpreters, these additional procedures will also provide the government significant efficiency benefits.[224]

After courts examine each of the three *Mathews* factors, they have wide discretion in balancing them to determine the contours of the procedures mandated by the Due Process Clause.[225] The question of which procedures the Due Process Clause requires is a constitutional question and is not controlled by existing statutes or regulations.[226] As described above, the factors support a due process right to an interpreter in asylum interviews for limited English proficient applicants to ensure they are not deprived of their property interest in utilizing the full affirmative asylum process.[227]

When balancing the factors in the context of asylum interviews, they strongly point towards requiring the government to supply interpreters. The interests of the asylum seekers are very high. The risk of erroneous deprivation, which is the lack of meaningful access to the asylum

222. *See* AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS, 41–42 (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.pdf ("The failure to appoint an interpreter . . . not only impairs that person's access to justice but also can result in costs and inefficiencies to the court system in the form of appeals, reversals, and remands."); *see also* Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point ("The number of cases pending in immigration courts has more than quadrupled in the last decade, reaching a historic high of slightly more than 1 million as of the end of August 2019."); *Immigration Court Backlog Tool*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited June 21, 2020) (showing over one million pending immigration court cases as of December 2019).

223. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM, *supra* note 55, at 50 ("The interpreter monitoring program was intended as an interim step in combating interpreter fraud and ensuring accurate interpretation in the interview. USCIS plans to issue a rule that would require the Asylum Division to provide professional interpreters.").

224. *See supra* notes 220–23 and accompanying text.

225. *See* Chemerinsky, *supra* note 172, at 889 ("[W]hen there is a three-part balancing test . . . courts have enormous discretion and in all likelihood different factors will point in varying directions.").

226. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (explaining that "[t]he right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in the result in part))). Therefore, the fact that the relevant regulation requires limited English proficient asylum seekers to bring their own interpreters to asylum interviews is not controlling. *See supra* text accompanying notes 51–60 (describing the regulation requiring asylum seekers to bring their own interpreters to asylum interviews).

227. *Cf.* Jacinto v. Immigration & Naturalization Servs., 208 F.3d 725, 733 (9th Cir. 2000) ("[B]oth social security and deportation hearings are likely to be unfamiliar settings for the applicant, and, as the Supreme Court has noted, such procedures 'should be understandable to the layman claimant . . . and not strict in tone and operation.'" (quoting Richardson v. Perales, 402 U.S. 389, 400–01 (1971))). Without a government-provided interpreter, the asylum interview may not be understandable to asylum applicants. *See* sources cited *supra* notes 99–104 (describing the insufficiency of nonprofessional interpreters in the asylum context).

interview stage of the affirmative asylum process, is also high under the current procedures. Although the additional procedures will result in additional costs to the government, they will also result in efficiency benefits for the government.[228] Balancing the factors, procedural due process requires the government to provide limited English proficient asylum seekers with an interpreter at the asylum interview stage of the affirmative asylum process. Without meaningful language access, a noncitizen is foreclosed from accessing the full affirmative asylum process, resulting in an unconstitutional deprivation of a property interest.

CONCLUSION

The Trump Administration has been erecting draconian procedural barriers to asylum, including the denial of language access. This Administration's attack on language access is not a new phenomenon. Rather, the weaponization of language access has a long history, being used since at least the inception of the modern asylum system to silence asylum seekers and foreclose their abilities to meaningfully present their claims.

One long-standing example of the government's failure to provide language access is its refusal to provide an interpreter at asylum interviews. This denial of language access disadvantages limited English proficient asylum applicants without regard to the underlying validity of their claims. The ramifications of the government's failure to provide interpreters at asylum interviews are severe—without suitable provision of interpreters, the asylum process is rendered meaningless for applicants with limited English proficiency. This Article offers a constitutional challenge to this policy grounded in procedural due process. Ensuring adequate language access is a fundamental aspect of providing all asylum seekers meaningful access to the asylum process. Without language access, the proverbial courtroom doors—here, the doors to the asylum office—will remain closed for many.

228. *See supra* notes 220–24 and accompanying text (discussing the costs and benefits of professional interpreters in the asylum interview context).