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Immigrants' Rights Project
ACLU National Legal Department

April 15, 2024

U.S. Department of Homeland Security
Office of the General Counsel
Mail Stop 0485
Attn: Regulatory Affairs Law Division
245 Murray Lane SW
Washington, DC 20528-0485

U.S. Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

VIA USPS

Re: Petition for Rulemaking: Interpreters for Affirmative Asylum Interviews

Dear Madam or Sir:

The American Civil Liberties Union, along with 52 other diverse organizations from across the country, submits the enclosed Petition for Rulemaking, asking the Department of Homeland Security and Department of Justice to promulgate regulations governing the provision of interpreters for noncitizens with affirmative asylum applications before U.S. Citizenship and Immigration Services. This Petition for Rulemaking is submitted in accordance with 5 U.S.C. § 553(e) and, with respect to DHS, the process set forth for such petitions under 6 C.F.R. Part 3.

As outlined in a recent coalition letter to DHS and DOJ, USCIS's decision to return to its rule requiring individuals to bring their own interpreters to their affirmative asylum interviews raises grave legal and ethical concerns.¹ We submit this Petition for Rulemaking to provide USCIS with the opportunity to correct its error, and ask for a response and the opportunity to engage with the Departments on this important issue. If the Petition is not granted, Petitioners intend to challenge the regulation in court.

We have also attached two comments in further support of the Petition and anticipate that additional comments in support will follow.

¹ The original letter is available at <https://www.aclu.org/documents/letter-uscis-denial-of-language-access-asylum-applicants>. Letter to Ur Jaddou and Kristen Clarke, Re: USCIS Denial of Language Access to Affirmative Asylum Applicants (Nov. 30, 2023). Additional signatories joined since we submitted the letter to the agencies, bringing the total number of signatories to 110. The final version that reflects all signatories is on file with the ACLU.



Please direct all future communications regarding this issue to My Khanh Ngo, ACLU (415-343-0764; mngo@aclu.org; 425 California St., 7th Floor, San Francisco, CA, 94104).

Respectfully submitted,

/s/ My Khanh Ngo

On behalf of:

American Civil Liberties Union
Afghans For A Better Tomorrow
African Advocacy Network
Aldea – The People’s Justice Center
American Gateways
American Immigration Council
American Translators Association
Asian Americans Advancing Justice-Atlanta
Asian Americans Advancing Justice-Southern California
Association of Language Companies
Asylum Seeker Advocacy Project (ASAP)
BancaLenguas Language Justice Collective
Black Alliance for Just Immigration (BAJI)
Center for Empowering Refugees and Immigrants (CERI)
Center for Gender & Refugee Studies
Centro Legal de la Raza
Coalition for Humane Immigrant Rights (CHIRLA)
Community Legal Advocates of New York
Cornell Immigration Law and Advocacy Clinic
Florence Immigrant and Refugee Rights Project
Haitian Bridge Alliance
HIAS Pennsylvania
Human Rights First
Immigrant Defenders Law Center
International Refugee Assistance Project (IRAP)
International Rescue Committee
Just Detention International
Justice at Work Pennsylvania
Justice in Motion
Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law
Kids in Need of Defense
La Raza Community Resource Center (SF)
Long Island Language Advocates Coalition



Martinez & Nguyen Law, LLP
Michigan Immigrant Rights Center
National Association of Judiciary Interpreters and Translators (NAJIT)
National Center for Lesbian Rights
National Immigrant Justice Center
National Immigration Project (NIPNLG)
New American Legal Clinic at San Joaquin College of Law
New Mexico Immigrant Law Center
Northeastern University School of Law Immigrant Justice Clinic
Oasis Legal Services
Pars Equality Center
Project ANAR
Public Justice Center
Public Law Center
Respond Crisis Translation
Rocky Mountain Immigrant Advocacy Network
Sikh American Legal Defense and Education Fund (SALDEF)
Sonoma Immigrant Services
Texas Immigration Law Council
The Young Center for Immigrant Children's Rights

CC:

The Honorable Ur M. Jaddou
Director, U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

Ms. Shoba Sivaprasad Wadhia
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security

VIA EMAIL

**PETITION FOR RULEMAKING TO
PROMULGATE REGULATIONS GOVERNING THE PROVISION OF
INTERPRETERS FOR AFFIRMATIVE ASYLUM INTERVIEWS**

SUBMITTED TO
THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND
THE UNITED STATES DEPARTMENT OF JUSTICE

APRIL 15, 2024

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Afghans For A Better Tomorrow
African Advocacy Network
Aldea – The People’s Justice Center
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I. STATEMENT OF PETITION

The American Civil Liberties Union and 52 other organizations, described below, hereby petition the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) (collectively “Departments”) to initiate a rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 533, to promulgate regulations governing the provision of interpreters in affirmative asylum interviews conducted by U.S. Citizenship and Immigration Services (“USCIS”) under section 208 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1158. Pursuant to 8 U.S.C. § 1158(d)(1), the Attorney General has vested USCIS with initial jurisdiction over asylum applications filed by noncitizens physically present in the United States or seeking admission at a port-of-entry, and who are not placed into removal proceedings in immigration court. *See* 8 C.F.R. § 208.2(a)(1). Similarly, pursuant to 8 U.S.C. § 1158(b)(3)(C), USCIS has initial jurisdiction over asylum applications filed by any unaccompanied noncitizen children as defined under 6 U.S.C. § 279(g), irrespective of whether they are in removal proceedings. This Petition for Rulemaking addresses interpretation in interviews for applications filed by both sets of applicants, hereinafter referred to as “affirmative asylum applications.”

II. SUMMARY OF PETITION

This Petition for Rulemaking asks the Departments to adopt regulatory changes regarding the provision of interpreters during interviews for affirmative asylum applications. The existing regulations, adopted in 1994, provide that an applicant “unable to proceed with the [affirmative asylum] interview in English must provide, at no expense to USCIS, a competent interpreter fluent in both English and the applicant’s native language or any other language in which the applicant is fluent.” 8 C.F.R. § 208.9(g)(1).² As elaborated below, this regulation violates federal requirements to provide meaningful language access, discriminates against individuals with limited English proficiency (“LEP”)³ and those who are unable to afford to hire their own professional interpreters, and deprives them of the ability to fully participate in these life-or-death proceedings. The regulation also conflicts with Executive Order 13166 and both DOJ and DHS’s own interpretations of that Order, creates grave ethical concerns, and raises serious due process and equal protection problems. Moreover, it is inefficient and illogical as, since 2006, USCIS has paid for its own telephonic contract interpreters to monitor the quality of interpretation during these interviews and there is no added cost in having these same interpreters provide interpretation for LEP asylum seekers.

Our proposed regulation would increase USCIS’s efficiency with little-to-no impact on the agency’s bottom line. If granted, this Petition would essentially allow USCIS to return to its

² USCIS appears to suspend this requirement for unaccompanied noncitizen children in the custody of the Office of Refugee Resettlement, but by regulation 8 C.F.R. § 208.9(g)(1) applies to all unaccompanied noncitizen children. U.S. Citizenship & Immigr. Servs., Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, HQRAIO 120/12a (Mar. 25, 2009), https://www.uscis.gov/sites/default/files/document/memos/uac_filings_5f25mar09.pdf.

³ DOJ Guidance defines LEP persons as “[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English.” Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41459 (June 18, 2002).

pandemic-era practice which, for three years, suspended the regulation via a temporary rule providing that asylum applicants who could not proceed with their interviews in English need not bring their own interpreters to the asylum interview and could instead use the DHS-provided telephonic interpreters. Notably, in justifying the suspension and extending the temporary rule four times, USCIS acknowledged that agency-funded interpreters do not increase costs for the agency and that it is more efficient to use government-provided interpreters to address the backlog of affirmative asylum cases. Yet in a stark reversal and without any explanation, USCIS has reverted to its pre-2020 practices—putting the burden on asylum seekers with LEP to procure their own interpreter despite the availability of a government-paid interpreter during the same interview.

For the reasons outlined below, the Departments should grant this Petition and use their authority to amend 8 C.F.R. § 208.9(g)(1) to state that USCIS shall provide interpreters for all adjudicatory interviews unless the applicant elects to provide their own.

III. STATEMENT OF INTEREST

The Petitioners are immigration advocates, law school clinics, and non-governmental organizations, as well as coalitions and associations of interpreters, translators and other advocates, with extensive collective experience working with asylum seekers, including advocating on legal and policy issues impacting the current immigration system and language access.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over four million members and supporters, dedicated to the principles of liberty and equality embodied in this Nation's Constitution and civil rights laws. The ACLU's Immigrants' Rights Project engages in a nationwide litigation and advocacy program to enforce and protect the civil liberties and civil rights of immigrants. In particular, the ACLU Immigrants' Rights Project has a longstanding interest in safeguarding access to asylum and the due process and equal protection rights of noncitizens implicated in this Petition.

Afghans For A Better Tomorrow (AFBT) is an Afghan-American community and advocacy organization whose aim is to organize the Afghan-American community to bring about systemic change in the U.S. and beyond to ensure all Afghans have lives of safety, dignity, and freedom. AFBT was founded by necessity ahead of the American withdrawal from Afghanistan and currently supports and organizes alongside hundreds of Afghans seeking asylum.

The African Advocacy Network (AAN) is a San Francisco-based nonprofit founded in 2009 to serve the growing Diaspora of African and Afro-Caribbean immigrants by providing immigration legal services. AAN provides services with experienced and trained linguistic capacity in more than ten languages that span the African continent including Amharic, Arabic, Berber, Dioula, Effutu, French, Haitian Creole, Kru, Senya, Sonufu, Spanish, Tigrinya, Wolof, and more. Driven by its desire to serve vulnerable refugees and immigrants, AAN acts in collaboration with community partners, individuals, faith-based groups, and advocates to amplify its impact and to ensure the equity of all voices and sustain its mission: To provide every African and Afro-Caribbean immigrant with the dignity and legal protection they deserve while easing the many cultural and legal obstacles faced by this immigrant community. Given the demographic that AAN serves and the unique languages its clients speak, it understands the immense importance of

language access for all and the difficulties individuals applying for asylum face in securing reliable, competent, and professional interpreters in their best language.

Aldea – The People’s Justice Center (Aldea) is a 501(c)(3) nonprofit organization that provides quality free and low-cost legal services to vulnerable immigrant populations throughout the United States, with a focus on Berks County, Pennsylvania. Aldea represents immigrants before USCIS, the Immigration Courts, the Board of Immigration Appeals and the federal courts, including unaccompanied minors and minor immigrant children who have been placed into removal proceedings. Aldea partners with local and nationwide community-based organizations to provide solutions for the health and wellbeing of its clients.

American Gateways is a 501(c)(3) nonprofit corporation whose mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional immigration legal services at no or low cost, education, and advocacy. American Gateways began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the United States. Over the past 33 years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

The American Immigration Council (Immigration Council) is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants.

The American Translators Association (ATA) was founded in 1959 to promote the recognition of professional translators and interpreters; establish standards of competence and ethics; provide its members with professional development opportunities; and to advocate on behalf of the profession. ATA is the largest professional association of interpreters and translators in the United States, with more than 8,500 members working in over 90 languages.

Asian Americans Advancing Justice-Atlanta (Advancing Justice-Atlanta) is a nonpartisan, nonprofit organization dedicated to protecting the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders, and other immigrant communities in Georgia and the Southeast. Grounded in values of anti-racism, equity, and the liberation of all people, Advancing Justice-Atlanta aims to expand legal protections for immigrant and limited English proficiency communities and advocates against unjust, oppressive laws and policies. Advancing Justice-Atlanta has longstanding interests in expanding language access and protecting immigrants’ due process rights.

Asian American Advancing Justice-Southern California (“AJSOCAL”) is a social justice organization that protects and strengthens the rights and dignity of Asian American and Pacific Islander (AAPI) communities, especially those that are most disadvantaged. AJSOCAL’s work embraces both the legal aspect and the quality of life for AAPI Community. AJSOCAL provides legal aid, advice, and counseling in eight languages for English-limited and low-income communities in the Los Angeles and Orange County area.

Founded in 2002, the Association of Language Companies (ALC) comprises more than 150 language services companies providing interpreting, translation, transcription, captioning, localization, instruction, and testing in more than 250 languages. ALC members are at the forefront of providing federally mandated language access under Title VI of the Civil Rights Act of 1964, Executive Order 13166, and Section 1557 of the Patient Protection and Affordable Care Act, as well as numerous state and municipal laws. ALC's organizations and members believe that language access saves lives and contributes to the efficient and fair administration of justice in the United States.

The Asylum Seeker Advocacy Project (ASAP) believes that asylum seekers can make change by standing together. ASAP works with its members — over 600,000 asylum seekers — to build a more welcoming United States. ASAP works with individuals who have come to the United States seeking asylum, regardless of where they are located. ASAP members come from nearly every country on Earth and live in every U.S. state and territory.

BanchaLenguas Language Justice Collective (BanchaLenguas) is a worker-owned collective based in New Orleans, Louisiana, that partners with justice-minded communities to create multilingual spaces. BanchaLenguas believes that language is a human right, and it strives to create space for everyone to understand and be understood in the language in which they feel most powerful. BanchaLenguas believes that USCIS's decision to go back to its policy of requiring asylum seekers to bring their own interpreters not only places a heavy, harmful, and undue burden on them as they navigate a complex immigration system, but also goes against language justice values of having access to high-quality interpretation.

The Black Alliance for Just Immigration (BAJI) is a national Black-led and centered organization founded in Oakland, California in 2006. BAJI fights for the rights of Black migrants and African Americans through organizing, legal advocacy, research, policy, and narrative building to improve the conditions of Black communities by advancing racial justice and migrant rights.

Center for Empowering Refugees and Immigrants (CERI) is a grassroots, non-profit organization committed to the mental health support of the Bay Area's underserved refugee community since 2005. CERI's mission focuses on the comprehensive well-being of refugees and immigrants from Southeast Asia and beyond, who have been profoundly affected by war, torture, genocide, or other forms of extreme trauma.

The Center for Gender & Refugee Studies (CGRS) defends the human rights of courageous refugees seeking asylum in the United States. With strategic focus and unparalleled legal expertise, CGRS champions the most challenging cases, fights for due process, and promotes policies that deliver safety and justice for refugees. Through a nationwide technical assistance and training program, CGRS provides knowledge, expertise, and resources to help attorneys provide the best possible representation to their clients, including through effective use of interpreters, cross-cultural awareness, and trauma-informed practices.

Centro Legal de la Raza (Centro Legal) is a comprehensive legal services organization protecting and advancing the rights of low-income populations across Northern California. Centro

Legal's Immigrants' Rights Practice provides direct legal representation, full-scope legal consultations, pro se assistance for individuals navigating removal proceedings without legal representation, and know-your-rights education to thousands of individuals and families each year. Centro Legal has several affirmative asylum clients and hundreds of unaccompanied minor clients with TVPRA asylum applications pending before USCIS, many of whom speak Indigenous Mayan languages. On dozens of occasions, Centro Legal staff have met with their clients to prepare for asylum interviews – a stressful and retraumatizing process particularly for children who have suffered persecution in their native countries – only to arrive at the asylum interview to learn no interpreter is available. Centro Legal is committed to collaborating with partner organizations and USCIS to ensure competent and reliable language access for asylum applicants.

The Coalition for Humane Immigrant Rights (CHIRLA) is a nonprofit membership-based organization dedicated to creating a more just society fully inclusive of immigrants and to advancing the civil and human rights of immigrants and refugees. Founded in 1986, CHIRLA services the immigrant community to meet its evolving needs, including by providing legal services. In providing such services for numerous immigration benefits, CHIRLA and its clients have repeatedly experienced the multi-layered inequity caused by the requirement for applicants to provide their own interpreters. Given the particularly sensitive nature of asylum and other humanitarian relief, this requirement is especially harmful in those cases.

Community Legal Advocates of New York is a private, nonprofit organization that is dedicated to closing the social justice gap by advancing the rights of low- and moderate-income clients. Consistent with the vision of its founders, CLA provides free or low cost holistic civil legal and advocacy services to residents of Long Island and NYC. CLA provides direct representation to marginalized communities including immigrants and survivors of domestic violence, as well as the LGBTQ+, disabled, and elderly communities. The majority of CLA's work is comprised of affirmative immigration applications and petitions.

Cornell Law School's Immigration Law and Advocacy Clinic represents clients in immigration matters and partners with immigrant advocacy organizations on projects supporting the immigrant community throughout Ithaca, New York State, Louisiana, and the broader United States. Founded in 2020, the Immigration Law and Advocacy Clinic is composed of law student-attorney teams who work on a range of immigration issues, including DACA, asylum, and detention concerns. The clinic also regularly conducts outreach to local community members and detained immigrants on legal processes. Prof. Jakki Kelley-Widmer leads the Clinic with additional instruction provided by Prof. Alisa Whitfield.

The Florence Project is a 501(c)(3) nonprofit organization that provides free legal and social services to the thousands of adults and unaccompanied children detained in immigration custody in Arizona on any given day. The Florence Project was founded in 1989 to provide free legal services to asylum seekers and other migrants in a remote immigration detention center in Florence, Arizona where people had no meaningful access to counsel. The Florence Project has expanded significantly since that time and now provides free legal and social services to thousands of detained adults and unaccompanied children throughout Arizona. This includes providing representation before USCIS on hundreds of cases of unaccompanied children seeking asylum.

Haitian Bridge Alliance (HBA) is a grassroots, non-profit, community-based organization incorporated in California. HBA's mission is to assist Haitian and other immigrants to acclimate to the United States and ensure their success in navigating their new lives. HBA focuses on Black people, the Haitian community, women and girls, LGBTQIA+ individuals, and survivors of torture and other human rights abuses. HBA's staff includes four lawyers who represent asylum seekers from Haiti and several African countries in removal defense and affirmative asylum proceedings. HBA is very concerned about language access and competent interpreters for its Haitian and African clients and community members.

Founded in 1882 to provide resettlement services to the Jewish people, since the 1970's HIAS Pennsylvania has provided legal and social services to people of all faiths and backgrounds. Their mission is to support low-income immigrants of all backgrounds as they build new lives in our community. Through immigration legal services and an array of social services, HIAS PA works to address their needs, defend their rights, and advocate for their equitable inclusion in American society. HIAS PA is one of the largest immigration legal services providers in the state of Pennsylvania, assisting low-income immigrants from all over the state in stabilizing their legal status and obtaining immigration legal benefits for which they are eligible. In the last fiscal year, HIAS Pennsylvania provided services to close to 6,000 immigrants. Of those, approximately 5,500 clients received immigration legal services including affirmative asylum.

Human Rights First is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest U.S. programs for pro bono legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to indigent asylum applicants, including many before U.S. Citizenship and Immigration Services Asylum Offices across the country. Human Rights First has conducted research, issued reports, and provided recommendations to the United States Government regarding compliance with its legal obligations under international law with respect to its policies and treatment of people seeking asylum.

Immigrant Defenders Law Center (ImmDef) is a next-generation social justice law firm that defends immigrant communities against an unjust immigration system. ImmDef envisions a future where no immigrant is forced to face that unjust immigration system alone. ImmDef has a strong interest in ensuring that USCIS provides interpreters for affirmative asylum applicants, particularly those who speak indigenous and rare languages, as well as unaccompanied children and other especially vulnerable populations.

The International Refugee Assistance Project (IRAP) is a global legal aid and advocacy organization working to create a world where refugees and all people seeking safety are empowered to claim their right to freedom of movement and a path to lasting refuge. IRAP represents asylum seekers, refugees, and immigration benefit applicants who need to rely on interpreters and translators to navigate USCIS processes within the United States and abroad.

The International Rescue Committee (IRC) works in 29 U.S. cities and more than 50 countries to help people affected by humanitarian crises to survive, recover, and rebuild their

lives. In the U.S., IRC provides legal services, resettlement assistance, and integration support to thousands of refugees who have been lawfully admitted to the U.S. as well as Iraqi and Afghan special immigrants, asylum-seekers, asylees, victims of human trafficking, humanitarian parolees, TPS holders, lawful permanent residents, and others.

Just Detention International (JDI) is a health and human rights organization that seeks to end sexual abuse in all forms of detention. JDI works to hold government officials accountable for sexual abuse in detention, challenge the attitudes and misperceptions that allow sexual abuse to flourish, and make sure that survivors get the help they need to heal. Ensuring that all people in detention have access to information and the ability to communicate meaningfully with language access is essential to their safety and dignity.

Justice at Work Pennsylvania (JAW) is a legal aid program representing low-wage Pennsylvania immigrant workers as they pursue economic and social justice through the provision of legal services, education, and advocacy. For over 45 years, JAW, formerly known as Friends of Farmworkers, has provided direct immigration and employment representation to thousands of workers, largely limited English proficient (LEP) Pennsylvanians. Due to the many barriers LEP individuals encounter when interfacing with government agencies, JAW's advocacy work has long included efforts to increase language access at the local, state, and federal levels. JAW interacts with many LEP asylum seekers through its robust intake system; JAW's interest in language justice for all extends to those affirmatively applying for asylum.

Justice in Motion was founded in 2005 to address abused migrant workers who were shut out of the justice system because of borders and formed a Defender Network of human rights lawyers and nonprofit organizations to make justice across borders a reality. Justice in Motion believes in a world where justice is global and due process is accessible to all who seek freedom and safety from persecution, no matter where they are born or where they come from, including access to meaningful, adequate interpretation services at every affirmative asylum interview.

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law represents immigrants facing deportation before federal immigration authorities and in federal courts, and represents immigrant community-based organizations on litigation and advocacy projects. The Clinic is currently preparing a forthcoming report about language access issues in immigration detention facilities nationwide.

Kids in Need of Defense (KIND) is the preeminent international nongovernmental organization devoted to the protection of unaccompanied and separated children. KIND has offices and staff across the United States, Mexico, and Europe. KIND staff, along with an extensive network of private sector pro bono and nongovernmental partners provide unaccompanied children with innovative, holistic care that includes legal representation and psychosocial support.

Since 1970, La Raza Community Resource Center has served as a bridge between San Francisco and Spanish speaking immigrant families with direct support and advocacy to ensure Latino and Indigenous immigrant communities can access resources, realize their power, and thrive. In the heart of the Mission District of San Francisco, La Raza offers legal immigration

services, a family resource center and basic needs such as a food pantry, rental assistance and diapers.

The Long Island Language Advocates Coalition (LILAC) is a coalition of individuals and organizations based on Long Island who are concerned about the unequal access to essential programs, such as health care, law enforcement, social services, and justice through the courts, by persons with limited English proficiency. Many of the coalition members work with the immigrant community and are familiar with the difficulties they experience when interacting with government agencies. LILAC advocates for the removal of all barriers to equal access to programs and services, educates service providers and community members on best practices and language access rights and requirements, and works for the elimination of discriminatory policies and practices. LILAC fully supports the provision of professional interpreters at all asylum interviews. It is of utmost importance that all applicants for immigration relief be provided with the opportunity to fully explain their circumstances and that they fully understand the information provided to them. Failure to do so places asylum applicants at a distinct disadvantage, is a denial of due process, and places their lives in peril.

Martinez & Nguyen Law, LLP, also known as MNM is a small firm owned by Latina attorneys, located in City of Industry, California. MNM represents unaccompanied minors detained in ORR custody and also low-income families who are in removal proceedings. MNM provides *pro bono* services for children who cannot afford private legal services.

Michigan Immigrant Rights Center (MIRC) is a statewide legal resource center for Michigan's immigrant communities that works to build a thriving Michigan where immigrant communities experience equity and belonging. MIRC's work is rooted in three pillars: direct legal services, systemic advocacy, and community engagement and education. MIRC represents children in Michigan who have been or continue to be in ORR custody. Many of MIRC's clients require interpretation to effectively present their experiences of persecution or abuse to USCIS interviewers. MIRC advocates for language access for all clients.

The National Association of Judiciary Interpreters and Translators (NAJIT) is a leading professional organization that promotes excellence in legal interpretation and translation. Founded in 1978, NAJIT provides resources, training, and advocacy for professionals working in legal and judicial settings, striving to uphold high language access standards and cultural competence.

National Center for Lesbian Rights (NCLR) is a national legal organization with a mission to protect the rights and dignity of LGBTQIA+ people and families. NCLR has an Immigration Project to provide legal services to those fleeing persecution based on their sexual orientation, gender identity or HIV-status. The project especially serves low-income LGBTQIA+ members of the community who may otherwise have a harder time finding *pro bono* representation. Almost all of NCLR's clients are not fluent English speakers and interpretation services are vital for them to participate in their immigration application.

The National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many

asylum seekers, torture survivors, and unaccompanied children who have entered the United States by crossing the U.S.-Mexico border. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change, including policy reform, impact litigation, and public education.

The National Immigration Project (NIPNLG) is a membership organization of attorneys, advocates, and community members who are driven by the belief that all people should be treated with dignity, live freely, and flourish. NIPNLG litigates, advocates, educates, and builds bridges across movements to ensure that those who are impacted by our immigration and criminal legal systems are uplifted and supported. NIPNLG recognizes that to have meaningful access to the U.S. immigration system, the U.S. government must provide noncitizens with competent interpretation.

The New American Legal Clinic at San Joaquin College of Law (NALC) is a clinic located within San Joaquin College in Clovis, California. The clinic's mission is twofold: to prepare law students for the practice of law and to provide quality legal services to under-resourced residents of the Central Valley. The NALC team comprises a California State Bar Certified Specialist in Immigration and Nationality Law, a senior staff attorney, four client services coordinators, an administrative assistant, a grant administrator, and several law student clerks. Through various grants and funding sources, NALC represents over 500 clients annually, focusing on affirmative-based remedies such as naturalization, family-based petitions, adjustment of status, VAWA, asylum, U-Visas, and T-Visas. Additionally, NALC offers comprehensive removal defense representation before the Executive Office of Immigration Review, commonly known as immigration court. All services provided by NALC are completely free of charge.

New Mexico Immigrant Law Center (NMILC) is the only statewide immigration legal services nonprofit in New Mexico that provides free legal representation to immigrants seeking humanitarian relief. NMILC provides legal services to survivors of trafficking and crime, unaccompanied minors, asylum seekers, DACA recipients, applicants for citizenship, people in detention, and people in removal proceedings. NMILC serves many diverse communities, including Afghan evacuees, who must file for asylum affirmatively. Since 2022, NMILC has helped 185 Afghans apply for asylum, and has observed and experienced hardship in complying with the interpreter requirement in serving vulnerable populations.

The Northeastern University School of Law Immigrant Justice Clinic (IJC) represents noncitizen clients in a variety of immigration matters; engages in immigrant rights' advocacy projects; and conducts intakes at immigration detention centers. The types of cases include applications for asylum, U-visas, T-visas, and other forms of relief. Given the IJC's regular work with affirmative asylum applicants, the IJC views access to competent interpreters as not just a matter of procedural fairness, but as a fundamental human right. Such access would help rectify systemic barriers and ensure that all asylum seekers receive fair and just treatment in their pursuit of safety and protection.

Oasis Legal Services ("Oasis") is the leading nonprofit legal service provider to the LGBTQ+ immigrant community living on the West Coast, serving over 700 LGBTQ+ immigrants each year. Since opening in 2017, Oasis has represented over 1,500 LGBTQ+ asylum seekers in front of USCIS, including almost 900 clients whose asylum cases are still pending. Oasis clients

come from over 68 different countries but all have fled to the United States to escape horrific violence because of their sexual orientation, gender identity, gender expression, or HIV-positive status. Oasis understands how important it is for asylum seekers like its clients to have reliable access to professional interpreters during asylum interviews to preserve fairness, safety, and accuracy in the affirmative asylum process.

Founded in 2010, Pars Equality Center (Pars) is a 501(c)(3) nonprofit, community-based organization with DOJ recognized centers in San Jose, Los Angeles, and Fremont, California. Pars provides social and legal services dedicated to helping all members of Iranian, Afghan, Middle Eastern and other underrepresented immigrant communities achieve their full potential as informed, self-reliant, and responsible members of the American society. Pars' wide range of services include Immigration Legal Services; Education & Outreach; Citizenship & ESL classes; job training and placement; tax preparation; public benefits assistance; financial education; entrepreneurship; mentoring; and mental health services.

Project ANAR is an Afghan community immigration organization offering legal services, education, and advocacy for Afghan asylum-seekers. Project ANAR has assisted hundreds of Afghans who have applied for asylum with USCIS. The requirement to provide in-person interpreters is a barrier for Project ANAR's community, forcing Afghan asylum applicants and pro bono attorneys to scramble to identify primarily Pashto and Dari interpreters on short notice. This requirement also puts a strain on Project ANAR's limited capacity, as one of, if not the only, Afghan community led legal services organizations. Project ANAR receives several requests a month for interpretation at asylum interviews, and staff have attended at least half a dozen in 2024 alone as interpreters for individuals who could not find an in-person interpreter elsewhere.

The Public Justice Center (PJC) is a nonprofit civil rights and anti-poverty legal organization established in 1985. The PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients and client communities on a wide variety of legal issues, including immigrants' civil rights and language access in immigration proceedings and health care.

Public Law Center (PLC) is a nonprofit organization that provides free civil legal services, including immigration law services, to low-income individuals and families across Orange County. The majority of clients served by PLC's Immigration Unit have limited English proficiency, necessitating the use of interpreters and translators to effectively understand and communicate during USCIS interviews.

Respond Crisis Translation (Respond) is a United States-based language justice organization that mobilizes globally to provide rapid response emergency translation and interpretation support in 180+ languages for asylum-seekers, refugees, migrants, and anyone else for whom language access poses a critical barrier. Respond's Language Democracy Project works to document language rights violations in the U.S. immigration system and beyond, and advocates for policies that allow asylum-seekers to fully exercise their language rights.

Rocky Mountain Immigrant Advocacy Network (RMIAN) is a 501(c)(3) nonprofit organization based in Westminster, Colorado, that provides legal and social services to adults in

detention as well as families and children, with a particular focus on advocating on behalf of unaccompanied immigrant youth. RMIAN promotes knowledge of legal rights; provides zealous, no-cost legal representation in removal proceedings; elevates the importance of universal representation, given the critical consequences resulting from lack of access to counsel for under resourced people in removal proceedings; and advocates for a humane, functional, and efficient immigration system. RMIAN has a deep interest in ensuring that people seeking asylum in the United States have meaningful access to a fair adjudication process, including language access for people with limited English proficiency.

The Sikh American Legal Defense and Education Fund (SALDEF) is the nation's oldest civil rights organization focused on building leadership and capacity in the Sikh American community. A minority religious community, with a diaspora centered in the Punjab region of South Asia, numerous Sikhs were granted and continue to apply for asylum in the United States. Specifically, SALDEF works to ensure the religious rights of asylees and others in government custody are respected and that these individuals have meaningful access to justice, religious and cultural accommodations, and in-language materials.

Sonoma Immigrant Services (SIS) is a 501(c)(3) nonprofit organization whose mission is to strengthen the community through accessible education and advocacy, including immigration legal services for Sonoma County residents. SIS's services include pro-bono removal defense in immigration court, affirmative filings and interviews before USCIS, and a free citizenship education program. SIS assists the community in seeking asylum and reunifying their families.

Texas Immigration Law Council's mission is to protect and promote the rights of immigrants and refugees in Texas. Texas Immigration Law Council promotes immigrants and refugees' meaningful access to justice by serving as a convenor and by providing legal resources and technical assistance to legal service providers throughout Texas.

The Young Center is the only organization federally appointed by the Office of Refugee Resettlement as independent Child Advocate for trafficking victims and other vulnerable unaccompanied children in federal government custody, as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA). The Young Center accompanies youth through their process of applying for immigration relief and advocates for their best interests by considering each child's safety, due process rights, developmental needs, and expressed wishes. The Young Center is deeply concerned that failure to guarantee access to interpreters for affirmative asylum-seekers appearing before USCIS will pose serious due process and safety risks for vulnerable groups, particularly children who would otherwise have no access to linguistic support necessary to meaningfully participate in their asylum interviews.

IV. BACKGROUND

A. Legal Framework

i. Language Rights Are Deeply Rooted in Federal Civil Rights Law

Language access rights are enshrined in federal law by Title VI of the Civil Rights Act of 1964 and its implementing regulations, which guarantee LEP people meaningful access to federally funded programs and activities. As the Supreme Court held in 1974, these language access protections stem from Title VI’s prohibition against discrimination on the basis of national origin.⁴ This foundational link between national origin discrimination and language access formed the basis for the subsequent expansion of language access requirements applicable to federal agencies.

In 2000, President Clinton issued Executive Order 13166 (“EO 13166”), which directed “each Federal agency [to] examine the services it provides and develop and implement a system” that would “ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964.”⁵ In other words, federal programs and activities that are provided in English *must* be accessible to persons with LEP. To implement these language rights, EO 13166 directed federal agencies to take a number of steps, including: publishing guidance on how recipients of federal financial assistance can provide access to LEP persons; improving the language accessibility of federal agency programs; and implementing consistent standards of language assistance across federal agencies.⁶

Since then, the federal government—led by DOJ, and later joined by DHS—has issued various guidance documents pursuant to EO 13166 outlining what federal agencies and funding recipients must do to provide meaningful language access.

DOJ Guidance 2002-2011

In June 2002, DOJ issued guidance stating that “when oral language services are necessary, recipients [of federal funding] should generally offer competent interpreter services free of cost to the LEP person.”⁷ Shortly after, DOJ issued a memorandum to the heads of all federal agencies, general counsels, and civil rights directors, directing them to create or modify language access plans that are consistent with EO 13166, “to ensure meaningful access for LEP individuals to the important benefits, services, information, and rights provided by the agencies themselves.”⁸ In 2010, Attorney General Eric Holder issued a memorandum establishing the DOJ Language Access Working Group to oversee federal agencies’ full compliance with EO 13166.⁹ The next year, he issued another memorandum to the heads of federal agencies, general counsels, and civil rights heads reaffirming the mandate of EO 13166 and announcing that the DOJ Civil Rights Division

⁴ See *Lau v. Nichols*, 414 U.S. 563, 568 (1974), *abrogated on other grounds by Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁵ Exec. Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

⁶ *Id.*; see also Dep’t of Just., Limited English Proficiency: What Federal Agencies and Federally Assisted Programs Should Know about Providing Services to LEP Individuals 2 (2005), <https://www.justice.gov/file/1252541/download>.

⁷ 67 Fed. Reg. at 41462.

⁸ Ass’t Att’y Gen. for C.R., Dep’t of Just., Memorandum re Executive Order 13166 ¶ 2 (July 8, 2002), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/LANG-Gov-MemoAssAGExOr1316607.08.02.pdf>.

⁹ Att’y Gen., Dep’t of Just., Memorandum re Language Access Obligations Under Executive Order 13166 (June 28, 2010), https://www.lep.gov/sites/lep/files/resources/language_access_memo.pdf.

would undertake periodic monitoring to ensure agencies' compliance with language access requirements.¹⁰ These memoranda underscore how DOJ has consistently viewed EO 13166's language access requirements as a mandate.

Critically, DOJ has emphasized two points in the context of meaningful language access applicable across all federal agencies and funding recipients. First, DOJ has stressed that, "as time goes on, the bar of reasonableness is being raised."¹¹ In the words of former Acting Assistant Attorney General for Civil Rights Loretta King: "The need to show progress in providing all LEP persons with meaningful access increases over time . . . We cannot reward past non-compliance with lenient enforcement today"¹² Second, DOJ has underscored that, "even in tough economic times, assertions of lack of resources will not provide carte blanche for failure to provide language access. Language access is essential and is not to be treated as a 'frill' when determining what to cut in a budget."¹³

DHS Guidance 2011

In accordance with EO 13166 and DOJ's instructions, in 2011, DHS issued its own guidance for provision of meaningful language access.¹⁴ Although this guidance was directed at federal funding recipients, DHS acknowledged that "[p]ursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations . . . additionally appl[ies] to the programs and activities of Federal agencies, including DHS" and, as such, the "guidance to [funding] recipients will apply to all DHS components."¹⁵ To guarantee that the agency and its components comply with EO 13166, DHS delegated authority to its Office for Civil Rights and Civil Liberties to "[e]nsure that all . . . federally-conducted programs or activities of the Department comply with . . . Executive Order 13166."¹⁶ DHS thus recognizes that "Executive Order 13166 governs DHS's own Federally conducted activity."¹⁷

More Recent Guidance, and DOJ and DHS Language Access Plans

The current administration has continued to strengthen the federal government's

¹⁰Att'y Gen., Dep't of Just., Memorandum re Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166 (Feb. 17, 2011),

https://www.lep.gov/sites/lep/files/resources/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

¹¹ Acting Ass't Att'y Gen. for C.R. Loretta King, Remarks at the Meeting of the Federal Interagency Working Group on Limited English Proficiency 8 (Apr. 20, 2009), https://www.lep.gov/Kingremarks4_20_09.pdf (quoting Letter from Merrily A. Friedlander, Chief, Dep't of Just. C.R. Div. Coordination & Rev. Section, to Lilia G. Judson, Exec. Dir., Ind. S. Ct. Div. of State Ct. Admin. (Feb. 4, 2009)).

¹² *Id.*

¹³ *Id.*

¹⁴ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 Fed. Reg. 21755 (Apr. 18, 2011).

¹⁵ *Id.* at 21756, 21760 n.4.

¹⁶ Dep't of Homeland Sec., Delegation to the Officer for Civil Rights and Civil Liberties for Matters Involving Civil Rights and Civil Liberties, Including Equal Employment Opportunity and Workplace Diversity 3 (Oct. 26, 2012), https://www.dhs.gov/sites/default/files/publications/crcl-delegation-19003_0_0.pdf.

¹⁷ *See* 76 Fed. Reg. at 21756.

commitment to language justice.¹⁸ In November 2022, Attorney General Merrick Garland issued the “Memorandum to Improve Access to Services for People with Limited Proficiency in English,” reaffirming the principles in EO 13166 and directing all agencies to update their language access policies and plans.¹⁹ In announcing the memorandum, Attorney General Garland proclaimed that “[a]ll people in this country, regardless of the language they speak, deserve meaningful access to programs and activities that are conducted or supported by federal agencies.”²⁰ He also emphasized that “[t]he Justice Department is committed to working with our federal partners to address linguistic barriers in governmental services that deny individuals a full opportunity to participate in economic, social, and civic life.”²¹

DOJ led the way with its own Language Access Plan (“LAP”), which reiterates the principle “that it is the Department’s responsibility, and *not that of an individual* seeking services, to take reasonable steps to ensure meaningful access to all Department programs and activities.”²² Importantly, the DOJ LAP also provides that, absent exigent circumstances, certain individuals should not be relied on for language assistance services, including family members, neighbors, and friends.²³

DHS subsequently issued its own revised Language Access Plan that applies to all agency components.²⁴ The 2023 DHS LAP reiterates DHS’s position that “EO 13166 establishes both procedural and substantive requirements for agencies in providing language access.”²⁵ Substantively, EO 13166 requires DHS and its components to “provide meaningful access to its programs and activities to those who are LEP,” an obligation that “may be met through the

¹⁸ In addition to the effort to strengthen EO 13166’s protections, President Biden also issued Executive Order 13985, entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” 86 Fed. Reg. 7009 (Jan. 25, 2021). That EO instructed federal agencies to “recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity” by “assess[ing] whether, and to what extent, [their] programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.” *Id.* at 7009. This further demonstrates the role of federal agencies, including DOJ and DHS, in ensuring equal access to programs and benefits.

¹⁹ Att’y Gen., Dep’t of Just., Memorandum re Strengthening the Federal Government’s Commitment to Language Access (Nov. 21, 2022),

https://www.justice.gov/d9/pages/attachments/2022/11/21/attorney_general_memorandum_-_strengthening_the_federal_governments_commitment_to_language_access_0.pdf.

²⁰ Press Release, Off. of Pub. Affs., Dep’t of Just., Attorney General Merrick B. Garland Issues Memorandum to Improve Access to Services for People with Limited Proficiency in English (Nov. 21, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-garland-issues-memorandum-improve-access-services-people-limited>.

²¹ *Id.*

²² Dep’t of Just., Language Access Plan 1 (Aug. 15, 2023) (emphasis added), <https://www.justice.gov/d9/2023-08/DOJ-Language-Access-Plan-August-2023.pdf>.

²³ *Id.* at 8.

²⁴ Dep’t of Homeland Sec., Language Access Plan 3 (Nov. 2023) [hereinafter “DHS LAP”], https://www.dhs.gov/sites/default/files/2023-11/23_1115_dhs_updated-language-access-plan.pdf. USCIS has also issued its own Language Access Plan that “summarizes [the agency’s] efforts to comply with EO 13166.” U.S. Citizenship & Immigr. Servs., Language Access Plan 2 (Dec. 2019) [hereinafter “USCIS LAP”], <https://www.dhs.gov/sites/default/files/publications/uscisc-updated-language-access-plan-2020.pdf>. The USCIS LAP established a Language Access Working Group to “monitor agency progress on implementing the goals and expectations set forth in the USCIS Language Access Plan,” including a subgroup that focuses specifically on “the provision of interpreters during immigration benefits interviews.” *Id.* at 3.

²⁵ DHS LAP, *supra* note 24, at 2.

provision of language services such as . . . on-demand or prescheduled interpretation services.”²⁶ Procedurally, EO 13166 “requires DHS to prepare a plan to improve access to its federally conducted programs and activities for eligible persons who are LEP.”²⁷ DHS’s LAP also instructs its components to update their own language access plan.²⁸ According to DHS, component LAPs must, at minimum, develop language access protocols that “include limits on the use of family members, friends, or other persons associated with persons who are LEP to rare situations and nonessential information.”²⁹

In sum, all federal agencies, including both DOJ and DHS, have a duty under federal law to ensure that their services and programs are meaningfully available to LEP individuals. Guidance and other documents issued by both Departments outline their language access obligations in a concrete manner. DHS’s guidance requires DHS and its components, including USCIS, to comply with EO 13166 and Title VI by providing interpretation services and limiting the use of family members or friends as interpreters to rare situations. DOJ’s guidance emphasizes its role in working with other federal agencies to ensure full access of LEP individuals to their services.³⁰

ii. Language Rights Implicate Constitutional Principles

In addition to implicating statutory and regulatory protections, language access violations also raise constitutional concerns. First, the Constitution guarantees due process protections that implicate language access. The U.S. Constitution provides that no person should be “deprived of life, liberty, or property” without due process of law.³¹ It is well established that Fifth Amendment due process applies to noncitizens in the United States.³² Noncitizens are entitled to due process whether their presence is lawful, unlawful, temporary, or permanent.³³

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”³⁴ At a minimum, it requires that noncitizens be given notice and an opportunity to be heard.³⁵ In immigration proceedings, for example during removal hearings, due process requires that a noncitizen who faces deportation be provided (1) notice of the charges against him, (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard.³⁶

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ *Id.* at 7.

³⁰ *See, e.g., supra* note 19 (referencing DOJ’s coordination authority under Executive Orders 12250 and 13166); *supra* notes 7-10 (DOJ guidance).

³¹ U.S. Const. amend. V; *see also* U.S. Const. amend. XIX.

³² *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

³³ *Zadvydas*, 533 U.S. at 693.

³⁴ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

³⁵ *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (“The fundamental requisite of due process of law is the opportunity to be heard . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” (internal citations and quotation marks omitted)).

³⁶ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98 (1953).

LEP individuals do not have a meaningful opportunity to be heard without adequate language services providing interpretation and translation between English and their language of proficiency.³⁷ In the context of immigration proceedings, therefore, it is well established that due process requires noncitizens to be provided with an interpreter for a full and fair hearing.³⁸ In *B.C. v. Attorney General United States*, for example, the Third Circuit applied the *Mathews* balancing test—weighing (1) the private interest at stake, (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards, and (3) the fiscal and administrative burden of additional procedural safeguards—to consider whether an immigration judge violated a noncitizen’s due process rights by failing to meaningfully evaluate whether he needed an interpreter.³⁹ In doing so, the court recognized that LEP noncitizens in immigration proceedings have considerable interests at stake, including “the right to stay and live and work in this land of freedom.”⁴⁰ The court further reasoned that there is an “unacceptably high risk of erroneously depriving a noncitizen of his liberty when an immigration judge does not properly assess whether he needs an interpreter” which can lead to “inaccurate factual or credibility findings that may cause the noncitizen to be deported unfairly.”⁴¹ Likewise, on the third factor, the court recognized that adequate interpretation procedures also benefit the orderly administration of removal proceedings.⁴²

Without language access services, “procedural rights would be meaningless in cases where the judge and . . . applicant cannot understand each other.”⁴³ Accordingly, because “competent translation is fundamental to a full and fair hearing,” due process requires that “deportation proceedings must be translated into a language [a noncitizen] understands.”⁴⁴

Second, LEP status frequently intersects with race, national origin, and wealth. As such, language access policies also implicate equal protection principles. The Constitution prohibits the government from discriminating on the basis of race and national origin unless the classification is narrowly tailored to achieve a compelling government interest.⁴⁵ And the Constitution restricts the government from discriminating based on ability to pay, particularly where substantial individual interests are at stake.⁴⁶

³⁷ See, e.g., *Hernandez-Garza v. INS*, 882 F.2d 945 (5th Cir. 1989); cf. *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (discussing the right to an interpreter when due process is implicated, in the criminal court context)

³⁸ *B.C. v. Att’y Gen. United States*, 12 F.4th 306, 314 (3d Cir. 2021); see also *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (“The presence of a competent interpreter is important to the fundamental fairness of a hearing, if the [noncitizen] cannot speak English fluently.”).

³⁹ *B.C.*, 12 F.4th at 315–17.

⁴⁰ *Id.* at 315 (citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).

⁴¹ *Id.*; see also *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (“The ability of the adjudicator . . . to make a reasonable assessment of the applicant’s credibility is obviously hampered by his inability to understand the applicant’s statements.”).

⁴² *B.C.*, 12 F.4th at 316.

⁴³ *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996); see also *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (“A hearing is of no value when the [noncitizen] and the judge are not understood. The very essence of due process is a ‘meaningful opportunity to be heard.’” (internal citations omitted)).

⁴⁴ *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

⁴⁵ *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–12 (2013).

⁴⁶ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 217–18 n.16, 230 (1982); *Williams v. Illinois*, 399 U.S. 235, 244 (1970); *Tate v. Short*, 401 U.S. 395, 398 (1971).

B. Factual Background

The USCIS interpreter regulation predates the federal government’s focus on language access that began with EO 13166 in 2000. The Immigration and Naturalization Service (“INS” or “Service”)—a former component of DOJ that adjudicated affirmative asylum applications until that function was transferred with the formation of DHS—originally required noncitizens to provide their own interpreters under an “operations policy.”⁴⁷ When the INS decided to “amend existing regulations to streamline the adjudication of asylum applications” in 1994, the agency adopted the interpreter operation policy as an agency regulation.⁴⁸

During the 1994 rulemaking process, several commenters criticized INS’s decision to adopt the requirement that asylum applicants provide their own interpreters as an official agency rule.⁴⁹ The commenters argued that the rule would “impose a financial burden on applicants and that it may be difficult for applicants to find competent interpreters, particularly for certain languages.”⁵⁰ The agency dismissed the commenters’ concerns, finding that “[a]ny other rule would impose an undue financial burden on the Government.”⁵¹

For many years, applicant-provided interpreters were the only interpreters present at affirmative asylum interviews. But the Asylum Division began to express concerns about interpreter fraud and the quality of interpretation among applicant-provided interpreters in the early 2000s.⁵² To combat these concerns, the Asylum Division started phasing in contracted telephonic interpreter monitors in the first half of 2006.⁵³ Contract monitors did not provide interpretation themselves; rather, they listened into interviews and interrupted when they detected poor interpretation or fraud.⁵⁴ Importantly, the interpreter monitoring program was supposed to be an interim step in combating interpreter fraud and ensuring accurate interpretation. The agency intended to eventually provide professional interpreters for applicants.⁵⁵

In fact, USCIS took several steps towards its goal of agency-funded interpreters in the mid-2000s. In 2007, USCIS proposed a rule in the Federal Register providing that the agency would supply interpreter services for applicants unable to speak English.⁵⁶ The Asylum Division prepared

⁴⁷ Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 *Denv. L. Rev.* 707, 716 (2020).

⁴⁸ Rule and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 *Fed. Reg.* 14779-01, 14779, 14782-83 (Mar. 30, 1994); *see also* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 *Fed. Reg.* 62284-01, 62284, 62293 (Dec. 5, 1994).

⁴⁹ 59 *Fed. Reg.* at 62293.

⁵⁰ *Id.* at 62292–93.

⁵¹ *Id.* at 62293.

⁵² Gov’t Accountability Off., *U.S. Asylum System: Agencies Have Taken Actions to Help Ensure Quality in the Asylum Adjudication Process, but Challenges Remain 50* (Sept. 2008) [hereinafter “GAO Report”], <https://www.gao.gov/assets/gao-08-935.pdf>.

⁵³ *Id.*

⁵⁴ U.S. Citizenship & Immigr. Servs., Asylum Division, *Affirmative Asylum Procedures Manual 14* (May 2016) [hereinafter “Asylum Manual”], <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>.

⁵⁵ GAO Report, *supra* note 52, at 50; *see also* Asylum Manual, *supra* note 54, at 13 (stating that contract interpreters will be used “[u]ntil the promulgation of regulations requiring USCIS to provide interpretation at affirmative asylum interviews”).

⁵⁶ *Interpretation in Asylum Interviews*, 72 *Fed. Reg.* 22,596, 22,601 (Apr. 30, 2007).

a request for a multiple-award contract for interpreter services and anticipated that the contract would be in place by the end of September 2008.⁵⁷ This change would have obviated the need for contract monitors—but it never came to pass. Instead, the agency abandoned its proposed rule without explanation. Asylum interviews for LEP applicants thus continued with two interpreters present—an interpreter provided by the applicant and a monitor interpreter provided by the government. Because procuring an interpreter is often difficult and expensive, many asylum applicants proceed with nonprofessional interpreters, such as family members or friends.⁵⁸

This remained the status quo until the COVID-19 pandemic. In September 2020, DHS temporarily amended its regulations to allow asylum applicants to use government-provided interpreters during interviews to reduce the risk of COVID-19 transmission by in-person applicant-provided interpreters.⁵⁹ In adopting the temporary rule, DHS acknowledged that the rule would pose no additional cost to the agency and would, in fact, increase efficiency in the affirmative asylum process while decreasing the burden on applicants.⁶⁰ DHS extended the temporary rule four times during the pandemic; the rule remained in place for nearly three years.⁶¹ In September 2023, USCIS resumed requiring applicants to provide their own interpreters with little explanation. In response, 110 immigrants’ rights and civil rights organizations, including multiple Petitioners, submitted a letter to DHS and DOJ regarding problems with this policy.⁶²

V. LEGAL AUTHORITY TO PROMULGATE THE RULE

The Attorney General possesses the authority to establish procedures for asylum applications.⁶³ The regulations and statute provide USCIS with initial jurisdiction for asylum applications filed by noncitizens physically present in the United States or seeking admission at a

⁵⁷ GAO Report, *supra* note 52, at 50-51.

⁵⁸ Public statistics on who serves as an interpreter in asylum interviews are unavailable. But a study of asylum interviews from the early 1990s found that interpreters “are frequently family members or friends.” Dadhania, *Language Access*, at 723 n.100 (quoting Sarah Ignatius, Nat’l Asylum Study Project, An Interim Assessment of the Asylum Process of the Immigration and Naturalization Service 12-13 (Deborah Aner, ed., 1993) (finding that “39 percent of applicants relied on a friend or relative without formal experience”)); *see also* Karli Goldenberg, *Asylum Seekers Will Have to Use Phone Interpreters, U.S. Gov’t Says*, United Press Int’l (Sept. 24, 2020), https://www.upi.com/Top_News/US/2020/09/24/Asylum-seekers-will-have-to-use-phone-interpreters-US-govt-says/4091600993661/ (“It’s a really big barrier to expect asylum seekers to provide their own interpreters for the asylum office at their own cost. What results is that a lot of people simply don’t have that or are choosing between paying for an interpreter versus paying for an attorney to have legal representation at the interview.”).

⁵⁹ Asylum Interview Interpreter Requirement Modification Due to COVID-19, 85 Fed. Reg. 59655, 59655 (Sept. 23, 2020). From March 2020 to June 2020, USCIS temporarily suspended all face-to-face services, including asylum interviews. *Id.* at 59656. From June 2020 to September 2020, USCIS resumed in-person interviews with COVID-19 precautions requiring applicant-provided interpreters to sit in a separate office during the interview.

⁶⁰ 85 Fed. Reg. at 59658.

⁶¹ *See* Asylum Interview Interpreter Requirement Modification Due to COVID-19, 86 Fed. Reg. 15072–76 (Mar. 22, 2021) (extending rule from March 22, 2021, to September 20, 2021); Asylum Interview Interpreter Requirement Modification Due to COVID-19, 86 Fed. Reg. 51781–88 (Sept. 17, 2021) (extending rule from September 20, 2021, to March 16, 2022); Asylum Interview Interpreter Requirement Modification Due to COVID-19, 87 Fed. Reg. 14757–63 (Mar. 16, 2022) (extending rule from March 16, 2022, to March 16, 2023); Asylum Interview Interpreter Requirement Modification Due to COVID-19, 88 Fed. Reg. 16372–78 (Mar. 17, 2023) (extending rule from March 16, 2023, to September 12, 2023).

⁶² *See supra* note 1.

⁶³ 8 U.S.C. § 1158(d)(1) (stating that the “Attorney General shall establish a procedure for the consideration of asylum applications filed under [8 U.S.C. § 1158(a)]”).

port-of-entry, and who are not placed into removal proceedings in immigration court,⁶⁴ as well as asylum applications filed by any unaccompanied noncitizen children,⁶⁵ respectively. DHS also may promulgate rules and regulations related to the asylum process as part of its authority to administer and enforce immigration and nationality matters.⁶⁶

VI. THE DEPARTMENTS SHOULD AMEND THE RULE GOVERNING INTERPRETERS FOR AFFIRMATIVE ASYLUM INTERVIEWS

Statutory, regulatory, and constitutional considerations all favor amending the interpreter rule to allow for agency-funded interpreters. Practical and ethical considerations further support the Petition’s proposed change.

A. Government-Funded Interpreters Are Necessary to Comply with EO 13166

The USCIS regulation at issue is a relic of a time before the federal government fully fleshed out its obligations to accommodate LEP individuals in all federal programs and activities. In light of EO 13166 and its associated mandates—which postdate the 1994 promulgation of the interpreter rule—the Departments must reevaluate § 208.9(g)(1) to conform with federal civil rights protections.

As discussed above, EO 13166 requires DHS and its components, including USCIS, to provide LEP individuals with meaningful access to its programs and operations.⁶⁷ DHS’s 2011 guidance—which was directed at federal funding recipients, but which “additionally appl[ies] to the programs and activities of Federal agencies, including DHS”—outlines DHS’s own interpretation of its obligation to provide meaningful language access under EO 13166.⁶⁸ The current requirement that LEP applicants provide their own interpreter clearly violates DHS’s interpretation of EO 13166.

First, the failure to provide an interpreter for asylum interviews conflicts with DHS’s guidance outlining the contexts where certified interpreters are strongly encouraged. Specifically, DHS strongly recommends using professional interpreters “[w]here individual rights depend on precise, complete, and accurate interpretation or translations, such as in the context of . . . administrative hearings.”⁶⁹ Precise, complete, and accurate interpretation is *essential* in asylum

⁶⁴ 8 C.F.R. § 208.2(a)(1)(i).

⁶⁵ 8 U.S.C. § 1158(b)(3)(C).

⁶⁶ *Id.* § 1103(a)(3).

⁶⁷ *See supra* Part IV.A.

⁶⁸ 76 Fed. Reg. at 21756, 21760 n.4 (“Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the DOJ Agency LEP Guidance are to additionally apply to the programs and activities of Federal agencies, including DHS.”).

⁶⁹ *Id.* at 21762.

interviews.⁷⁰ Inaccurate interpretation can prejudice an asylum applicant in numerous ways.⁷¹ It may cause the asylum officer to erroneously refer an applicant to removal proceedings. Or it may introduce credibility concerns that can follow the applicant into removal proceedings.⁷² And, if the applicant’s interpreter fails to interpret accurately, the asylum officer can terminate the asylum interview “at the fault of the applicant.”⁷³ The interview must be rescheduled, resulting in delay in adjudication and potential delay in work authorization.

Indeed, the government has recognized the importance of precise, complete, and accurate interpretation in asylum interviews by funding telephonic contract monitors whose entire purpose is to ensure accurate interpretation. Over two decades ago, USCIS’s predecessor, the INS, “recognize[d] that Service-appointed interpreters could benefit applicants and the [affirmative asylum] program.”⁷⁴ And more recently, USCIS found that government-funded monitors are “necessary to help prevent misunderstanding of genuine asylum seekers’ claims due to poor translation.”⁷⁵ Thus, under DHS’s own rubric, an asylum interview is exactly the sort of administrative proceeding “[w]here individual rights depend on precise, complete, and accurate interpretation”—meaning “the use of certified interpreters is strongly encouraged.”⁷⁶

Second, the failure to provide an interpreter for asylum interviews contradicts DHS’s warning against reliance on an LEP individual’s friends or family members for interpretation. DHS’s guidance to federal funding recipients, which additionally applies to its components, instructs that “recipients should not plan to rely on an LEP person’s family members, friends, or other informal interpreters to provide meaningful access to important programs and activities.”⁷⁷ This is because, “[i]n many circumstances, family members, friends, or other applicants are not competent to provide quality and accurate interpretations,” or “LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement, family or financial information to a family member, friend, acquaintance, or

⁷⁰ See Larry Seward, *End of Pandemic-Era Practice of Providing Interpreters for Asylum Seekers Stirs Confusion, Anger*, CBS News Miami (Sept. 29, 2023), <https://www.cbsnews.com/miami/news/end-of-pandemic-era-practice-on-providing-interpreters-for-asylum-seekers-stirs-confusion-anger/> (quoting immigration attorney’s assessment that “[a] poor interpreter, somebody that has not been certified or not had the experience being an interpreter concerns [him] in how [the applicant] can tell [their] story and how it comes across” and that “[t]he difference between winning and losing is in the translation”).

⁷¹ 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 how, without the proper interpreter, “a man whose primary language is Mam was unable to explain that his family had been killed in his Guatemalan town, which could be a basis for asylum”).

⁷² See 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), <https://perma.cc/K2HC-TAZE> (“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)); 8 C.F.R. § 1240.7(a) (ICE lawyer can introduce the asylum officer’s notes to impeach the asylum seeker’s credibility).

⁷³ U.S. Citizenship & Immigr. Servs., *Affirmative Asylum Procedures Manual 14* (2016), <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>.

⁷⁴ 65 Fed. Reg. at 76125.

⁷⁵ 72 Fed. Reg. at 22601.

⁷⁶ 76 Fed. Reg. at 21762.

⁷⁷ *Id.* at 21763.

member of the local community.”⁷⁸ Moreover, DHS’s LAP also directs components to develop language access protocols that “include limits on the use of family members, friends, or other persons associated with persons who are LEP to rare situations and nonessential information.”⁷⁹ An asylum interview necessarily involves essential and sensitive information. An LEP individual may hesitate to share the full scope of their trauma—which is essential to establishing an asylum claim—with a family or friend in the interview.⁸⁰ Or they may not want to reveal aspects of their identity that are critical to their asylum claim, such as their sexuality or gender identity.⁸¹ Conversely, the applicant’s family or friend may subconsciously soften the interviewer’s questions to protect their loved one.⁸² While understandable, such less-than-accurate interpretation can cause misunderstandings and prevent asylum seekers from fully and accurately explaining their asylum claims.

“For these reasons,” according to DHS guidance, “when oral language services are necessary, recipients should offer competent interpreter services free of cost to the LEP person” instead of relying on the LEP individual’s friends or family members.⁸³ This is “particularly true” when “conducting administrative hearings,” “managing situations in which . . . access to important benefits and services are at stake,” or “when credibility and accuracy are important to protect an individual’s rights and access to important services.”⁸⁴ As discussed previously, important benefits are at stake in an asylum interview, and credibility and accuracy are critical. Nevertheless, USCIS persists with a policy that forces many asylum applicants to rely on untrained family or friends for interpretation.

Third, the failure to provide interpreters for asylum interviews is improper under the test DHS uses to determine whether the agency or its component is providing meaningful language access. In its 2011 guidance directed at funding recipients, DHS adopted “the four-factor analysis set forth in the DOJ Agency LEP Guidance,” and noted that “[p]ursuant to Executive Order 13166,” the test “[is] to additionally apply to the programs and activities of Federal agencies, including DHS.”⁸⁵ The four-factor test determines the level of language access services required by balancing (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program, (2) the frequency with which LEP individuals come in contact with the program, (3) the nature and importance of the program or activity to people’s lives, and (4) the resources available and costs associated with potential language services.⁸⁶

⁷⁸ *Id.*; see also Diana K. Chochrane, *Como Se Dice, Necesito a un Intreprete - The Civil Litigant's Right to a Court-Appointed Interpreter in Texas*, 12 *Scholar* 47, 59-60 (2009); Dadhania, *supra* note 47, at 723; Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 *Clinical L. Rev.* 347, 375 (2000).

⁷⁹ DHS LAP, *supra* note 24, at 7.

⁸⁰ See McCaffrey, *supra* note 78, at 375; Chochrane, *supra* note 78, at 59-60.

⁸¹ See *supra* note 80.

⁸² Dadhania, *supra* note 47, at 723 & n.104 (describing this phenomenon and explaining that “[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” (quoting Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 115-16 (2d ed. 2017))).

⁸³ 76 Fed. Reg. at 21763.

⁸⁴ *Id.*

⁸⁵ *Id.* at 21760 n.4.

⁸⁶ *Id.* at 21760.

Application of the balancing test demonstrates that agency-funded interpreters are required to meet USCIS’s language access obligations. As to the first prong, a large proportion of USCIS’s clientele is LEP. Affirmative asylum applicants are generally recent arrivals to the United States who are less likely to have English proficiency. While USCIS does not publish official data on the proportion of asylum applicants that require an interpreter, several data points indicate that the vast majority of affirmative asylum applicants are LEP. DHS reported in the initial temporary COVID-19 interpreter rule that “[a]ccording to internal data for asylum interviews scheduled in FY19, 83% of asylum applicants spoke at least one of the 47 languages [on the GSA Schedule] and only 5% spoke a language not included on this list.”⁸⁷ Together, these statistics indicate that about 88% of affirmative asylum applicants speak a language other than English. This comports with data about asylum seekers in the immigration court setting. According to DOJ Executive Office for Immigration Review (“EOIR”) data from FY 2001 to FY 2021, 90% of asylum seekers in immigration court required the services of an interpreter.⁸⁸ The most recent publicly available EOIR data show that, in FY 2023, 95% of immigration court cases completed involved a respondent who required the services of an interpreter.⁸⁹ Whether the proportion of asylum applicants before USCIS who are LEP is 88%, 90%, or 95%, the percentage is undoubtedly extremely high. This aligns with the experience of practitioners, including many of the undersigned Petitioners, who report that nearly all clients require an interpreter for their asylum interview. As to the second and third prongs, the Asylum Division serves LEP individuals every day, and the asylum officer’s decision deeply affects the lives of LEP individuals who are fleeing persecution and grave danger in their home countries. On the fourth prong, USCIS can provide interpreters to LEP asylum seekers at no additional cost to the agency, as discussed below.⁹⁰ Thus all four prongs weigh in favor of USCIS-provided interpreters.

Comparing the interpreter rule to the sample applications of the four-factor test given in DHS’s guidance is instructive. DHS explained that “a fire department in a largely Hispanic community may need oral interpreters immediately available and should give serious consideration to hiring some bilingual staff.”⁹¹ That is because, under the four-factor test, the fire department serves a large proportion of Spanish-speakers, Spanish-speakers frequently use the service, and the services provided are important to people’s lives. Therefore, any additional cost of having interpreters would be justified. DHS contrasted that example with “the case of a voluntary general public tour of a firehouse, in which pre-arranged language services for the particular service may not be necessary” since “the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low.”⁹² On the continuum between emergency fire services and a voluntary public tour, the affirmative asylum program is much closer to the former than the latter since the program frequently serves LEP individuals and similarly implicates life-or-death decisions that require agency officials to gather accurate information. Thus, as with the

⁸⁷ 85 Fed. Reg. at 59657 n.16.

⁸⁸ Transactional Recs, Access Clearinghouse, The Impact of Nationality, Language, Gender, and Age on Asylum Success (Dec. 7, 2021), <https://trac.syr.edu/immigration/reports/668/>. This data is drawn from immigration court records.

⁸⁹ Transactional Recs. Access Clearinghouse, Outcomes of Immigration Court Proceedings (Jan. 2024), <https://trac.syr.edu/phptools/immigration/closure/> (select “fiscal year completed – 2024” and “language”).

⁹⁰ 59 Fed. Reg. at 62293.

⁹¹ 76 Fed. Reg. at 21762.

⁹² *Id.*

emergency fire program, the four-factor test shows that the affirmative asylum program requires government-funded interpreters.

As outlined above, DOJ plays a crucial role in ensuring that all federal agencies and federal fund recipients provide language access consistent with EO 13166. The practices of other federal agencies are therefore illustrative of the shortcoming of USCIS's regulation. Other agencies regularly provide interpreters for LEP individuals, even when the benefits or programs at issue are not a matter of life or death. For instance, the National Labor Relations Board requires its Regional Offices to secure and pay for certified interpreter services whenever LEP witnesses appear at hearings.⁹³ And the Department of Labor has a blanket purchase agreement "for language translation/interpretation services, audio messaging, and 24-hour language translation/interpretation services" that is available to all department components.⁹⁴ The list goes on, including diverse agencies such as the Social Security Administration, the Internal Revenue Service, the Department of Transportation, and the Environmental Protection Agency.⁹⁵

⁹³ *Solar Int'l Shipping Agency, Inc.*, 327 N.L.R.B. No. 69 (Dec. 31, 1998); *George Joseph Orchard Siding, Inc.*, 325 N.L.R.B. No. 34 (Jan. 9, 1998).

⁹⁴ Dep't of Labor, Language Access Plan 31-32 (2023), <https://www.dol.gov/sites/dolgov/files/OASAM/crc/files/FY2023-LAP.pdf>.

⁹⁵ See, e.g.:

- **Social Sec. Admin.**, Program Operations Manual System, at DI 23040.001: Interpreters for Individuals with Limited English Proficiency (LEP) or Individuals Requiring Language Assistance (Aug. 21, 2023), <https://secure.ssa.gov/poms.nsf/lnx/0423040001> ("We recognize that using qualified interpreters, including bilingual staff who can communicate directly with claimants in their primary language, efficiently facilitates our processes, deters fraud, and assures that we do not disadvantage individuals with limited English proficiency (LEP). Disability determination services (DDS) will provide an interpreter (free of charge) to any individual requesting language assistance, or when it is evident that such assistance is necessary to ensure that the individual is not disadvantaged.");
- Off. of Equity, Diversity & Inclusion, **Internal Revenue Serv.**, Language Access for Taxpayers with Limited English Proficiency: Frequently Asked Questions 3 (2016), https://www.irs.gov/pub/irs-utl/FAQs_Taxpayers_LEP.pdf ("[Q:] Will I have to pay for use of an interpreter provided by the IRS or IRS funded partner? [A:] No. The IRS and IRS funded partners provide interpreter service free of charge to taxpayers.");
- **Dep't of Transp.**, Language Access Plan 9 (2023), <https://www.lep.gov/sites/lep/files/media/document/2023-11/2023%20Department%20of%20Transportation%20%28DOT%29%20Language%20Access%20Plan.pdf> ("DOT will provide oral language assistance (e.g., qualified interpreters) in both face-to-face (i.e., onsite oral interpretation) and telephonic or virtual encounters to facilitate meaningful access to DOT programs and improve administrative effectiveness. The oral telephonic interpretation service will allow DOT employees to communicate with persons with LEP, at no charge to them, in more than 125 languages" and "will be available 24 hours a day, 7 days a week, and 365 days a year.");
- **Env. Protection Agency**, EOA Order No. 1000.32: Compliance with Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency 2, 6 n.4 (2017), https://www.epa.gov/sites/default/files/2017-03/documents/epa_order_1000.32_compliance_with_executive_order_13166_02.10.2017.pdf ("Upon determining the need for language assistance services, the EPA will take reasonable steps to ensure that all communication is conducted with the use of a qualified contract interpreter or translator, through telephonic or video interpretation with qualified interpreters, or with the use of a bilingual staff member. . . . In an effort to provide centralized language services to all of EPA's officers, the External Civil Rights Compliance Office has established a contract vehicle for document translation, in-person interpretation, and telephonic interpretation services that is available for all EPA HQ and regional program offices.").

In sum, the current regulation requiring applicant-provided interpreters is clearly incompatible with DOJ and DHS’s own guidance on meaningful language access. In stark contrast to EO 13166 and DHS’s guidance pursuant to that Order, USCIS has failed to provide the support necessary for LEP individuals to meaningfully access the affirmative asylum interview process. Without a qualified interpreter provided by the agency, many LEP asylum applicants—especially applicants without economic means—must rely on untrained family members and friends which can seriously affect their asylum application and any subsequent immigration court proceedings. Perhaps recognizing that its current regulatory requirement runs directly counter to EO 13166, USCIS’s Language Access Plan notes that the agency “will continue to study options for providing more interpretation services during interviews in our USCIS domestic field offices.”⁹⁶ But USCIS cannot meet its language access obligations merely by “studying options”—EO 13166’s language access requirements are clear and it is time for action.

B. Amending the Interpreter Regulation Will Bring It in Line with USCIS’s Stated Commitment to Fulfilling Its Language Access Obligations

USCIS’s refusal to fix this flaw in its regulations is particularly surprising given its experience working with LEP individuals. USCIS “regularly interacts with individuals in languages other than English.”⁹⁷ Accordingly, language access plays a critical role in allowing the agency to fulfill its duties, and the agency has stated that it is “committed to providing language access to . . . LEP communities.”⁹⁸ The agency has often pursued policies that encourage meaningful access for LEP individuals—but the interpreter policy at 8 C.F.R. § 208.9(g) stands out as a glaring exception (among other exceptions that fall outside the scope of this Petition, including USCIS’s failure to provide applicants with translations of decisions, as well as failure to provide translations of I-589 asylum and other required application forms—particularly humanitarian protection forms like those necessary for U- and T-visas).⁹⁹

In accordance with DHS’s expectation that its components comply with their language access obligations under EO 13166, USCIS has—in other similar contexts—adopted numerous policies to facilitate LEP individuals’ meaningful access to the agency’s services and programs. For example, the agency provides digital information about immigration benefits in 25 languages.¹⁰⁰ Topics range from navigating employee verification, to biometrics, to how to report immigration scams.¹⁰¹ The agency also provides citizenship resources in 21 languages.¹⁰² In another example, multilingual Citizenship Outreach Toolkits, complete with language-specific voiceovers, enable USCIS Community Relations Officers to host information sessions about

⁹⁶ USCIS LAP, *supra* note 24, at 13.

⁹⁷ *Id.* at 2.

⁹⁸ *Id.* at 3.

⁹⁹ USCIS has also failed to ensure that its constituents receive language services at every critical point of contact with the agency, including on hotlines and at agency offices. The agency could take a major step in addressing this by implementing a policy requiring a bilingual workforce, particularly for common languages, and providing interpretation services to cover other languages during those interactions.

¹⁰⁰ *Id.* at 6–7.

¹⁰¹ Multilingual Resource Center, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/tools/multilingual-resource-center>.

¹⁰² Citizenship Multilingual Resources, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/citizenship/find-study-materials-and-resources/citizenship-multilingual-resources?sel_lang=All&doc_type=All&items_per_page=100.

citizenship and naturalization in many languages.¹⁰³ The agency also provides interpreters, at no cost to the applicant, for credible fear, reasonable fear, and safe third country agreement screening interviews.¹⁰⁴ These measures demonstrate the agency's recognition of its obligations to make its services and programs accessible to LEP individuals.

In addition to fulfilling its obligations under EO 13166, the "provision of language access serves to increase efficiency for USCIS."¹⁰⁵ Improved language access accommodations allow "people [to] understand the criteria for the benefit(s) they are applying for," meaning that "they fill out applications correctly, which in turn reduces the need to reject incorrectly filed applications, issue Requests for Evidence, or deny cases for missing information."¹⁰⁶ Language access efforts within the agency have thus "promoted economic efficiency, streamlined operations, improved the speed for sharing information, reduced supply costs, and reduced the printing of emails and documents."¹⁰⁷ In short, USCIS's language access efforts further its mission by increasing the agency's efficiency.

USCIS's persistent refusal to provide government-funded interpretation services for affirmative asylum interviews is inconsistent with its numerous and successful language access efforts in other areas. Amending 8 C.F.R. § 208.9(g) would allow the Departments to bring that regulation in line with its many other policies that prioritize language access.

C. Providing Interpreters Is Both More Efficient and Cost-Neutral

USCIS has the opportunity to increase its efficiency with little-to-no impact on the agency's bottom line. USCIS has already explicitly recognized that an interpreter rule like the one Petitioners propose would increase its efficiency at every step of the asylum interview process. Before the interview begins, "government-funded interpretation will eliminate pre-interview inefficiencies, such as screening out ineligible interpreters."¹⁰⁸ During the interview, "USCIS-provided interpretation is likely to be faster and more efficient [than] when the applicant-provided interpreter is not a professional."¹⁰⁹ That is because contract monitors "already regularly serve as interpreters for screening interviews in expedited removal and other contexts and act as interpreter monitors or occasionally serve as the primary interpreter during affirmative asylum interviews, so they are familiar with the operational realities of asylum interviews and the role of an interpreter during those interviews."¹¹⁰ Contract monitors are also usually familiar with the technical language necessary for asylum interviews. Beyond increasing the speed of interpretation, "[t]he use of contract interpreters will increase the efficiency of the asylum interviews as interviews would not need to be rescheduled due to failure to appear (because the applicant did not bring a proper

¹⁰³ USCIS LAP, *supra* note 24, at 5–6.

¹⁰⁴ *Id.* at 10. Advocates have raised issues with how interpretation is provided in these contexts—including the failure of USCIS asylum officers to consistently use interpreters in the individual's best language—that are not addressed in this Petition.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 85 Fed. Reg. at 59658.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; *see also* DHS LAP, *supra* note 24, at 4 ("Interpreting is a complex task that combines several abilities beyond language competence in order to enable delivery of an effective professional interpretation in a given setting.").

interpreter) or interpreter incompetence.”¹¹¹ After the interview, government-funded interpreters “will eliminate time spent on examining whether an interpreter misinterpreted any material aspects of the asylum interview or committed fraud or acted improperly because of the strict vetting and testing requirements for contract interpreters.”¹¹²

These efficiency gains are not mere conjecture by advocates—rather, USCIS identified each of the aforementioned ways in which asylum interviews would be more efficient with government-funded interpreters in its temporary interpreter rules. And over the course of three years—as USCIS gained experience with using government-provided interpreters for asylum interviews—USCIS reiterated that government-provided interpreters were preferable from an efficiency standpoint *four times*.¹¹³

The Departments cannot overlook the substantial efficiency benefits of offering government-funded interpreters. As DOJ and DHS are undoubtedly aware, USCIS faces a substantial backlog of affirmative asylum applications. In September 2023, USCIS reported that the government had 974,571 affirmative asylum applications pending final decision—up from 470,786 in April 2022.¹¹⁴ The backlog is growing more quickly than projected. Just three months earlier, in June 2023, USCIS had reported that it did not anticipate reaching a backlog of one million before the end of calendar year 2024.¹¹⁵ And processing times for affirmative asylum applications are approaching a decade.¹¹⁶ The interview process is a major reason for the backlog. USCIS reports that “[o]ver 94% of the[] pending applications are awaiting an interview by an asylum officer.”¹¹⁷ The agency simply cannot afford to forego a rule that will result in substantial efficiency gains.

Critically, USCIS can achieve these significant efficiency gains at little or no additional expense. Decades ago, the INS originally justified the requirement that applicants provide their own interpreters on financial grounds.¹¹⁸ But in the intervening years, the agency revised its system to include contract monitors. As it stands, almost all interviews that would utilize a government-provided interpreter under the Petition’s proposed rule “would have had a contracted monitor under the status quo.”¹¹⁹ As USCIS reiterated, because “the cost of monitoring and interpretation are

¹¹¹ 85 Fed. Reg. at 59658.

¹¹² *Id.*

¹¹³ 86 Fed. Reg. at 15074; 86 Fed. Reg. at 51784; 87 Fed. Reg. at 14759; 88 Fed. Reg. at 16374. USCIS recognized that the asylum backlog increased since the original temporary final rule. 87 Fed. Reg. at 14761 n.58. But if the agency had relied on applicant-provided interpreters, the backlog likely would have increased at a faster rate. *Id.*

¹¹⁴ Amanda Atkinson, Off. of Citizenship, P’ship, & Engagement, U.S. Citizenship & Immigr. Servs, Talking Points at the USCIS Asylum Quarterly Engagement (Sept. 19, 2023),

<https://www.uscis.gov/sites/default/files/document/outreach-engagements/AsylumQuarterlyEngagement-FY23Quarter4PresentationTalkingPoints.pdf>; U.S. Citizenship & Immigr. Servs., Number of Form I-589 by Status, Office, Month (June 21, 2022),

https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStats_FY22Q2_I_589_FilingCompletionPending.csv.

¹¹⁵ U.S. Citizenship & Immigr. Servs., Annual Report 2023, at 5 (2023),

https://www.dhs.gov/sites/default/files/2023-07/23_0630_cisomb_2023-annual-report-to-congress.pdf.

¹¹⁶ *Id.*

¹¹⁷ 85 Fed. Reg. at 59659.

¹¹⁸ 59 Fed. Reg. at 62293.

¹¹⁹ 86 Fed. Reg. at 15075.

identical under the contract” and because “monitors will no longer be needed for these interviews,” the agency can implement this new rule without increasing costs.¹²⁰ In short, using government-provided interpreters would “be cost neutral or negligible as USCIS is already paying for these services even without this rule.”¹²¹

D. Ethical and Practical Reasons Militate in Favor of Providing Interpreters

Other considerations also weigh in favor of the proposed rule. First, increasing numbers of affirmative asylum applicants seeking refuge in the United States speak Indigenous or other rare languages.¹²² Finding an interpreter is extraordinarily difficult for rare language speakers. Often, only a handful of people in the United States speak their language,¹²³ and contracting a rare-language interpreter, if even possible, is expensive.¹²⁴ Sometimes, the handful of interpreters for rare languages are often already under DHS contract as monitors, and thus foreclosed from serving as an applicant-provided interpreter. Indigenous languages also frequently require relay interpretation—for instance, a Mixteco asylum seeker may need two interpreters, one to interpret from Mixteco to Spanish and another to interpret from Spanish to English.¹²⁵ But Indigenous-language speakers have no way to identify an adequate Spanish to English interpreter since they speak neither language. And relay translation doubles the cost for the applicant. Therefore, requiring these applicants to provide interpretation services inevitably causes continuances and delays. The government is in a much better position to successfully secure interpreters for rare language speakers, ensuring that their cases can continue to be processed efficiently.

Second, the current regulation burdens legal service organizations, including some of the undersigned Petitioners. As nonprofits, these organizations have limited resources to serve the ever-growing population of affirmative asylum seekers who cannot afford paid legal service. Requiring applicants to provide interpreters means that they must spend their limited resources scrambling to track down interpreters for their clients. The task is particularly difficult for rare

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.*

¹²² Medina, *supra* note 71; Zefitret Abera Molla, *Improving Language Access in the U.S. Asylum System*, Ctr. for American Progress (May 25, 2023), <https://www.americanprogress.org/article/improving-language-access-in-the-u-s-asylum-system/> (describing increased number of migrants who speak Indigenous and other rare languages); 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> (“According to the Department of Justice, Mam was the ninth most common language used in immigration courts last year, more common than French.”).

¹²³ Medina, *supra* note 71 (describing “[t]he small number of interpreters who do have a basic grasp of [I]ndigenous languages”); Abera Molla, *supra* note 122 (discussing “a shortage of interpreters, especially in Indigenous languages and languages of lesser or limited diffusion”); Cindy Carcamo, *Ancient Mayan Languages Are Creating Problems for Today’s Immigration Courts*, *L.A. Times* (Aug. 9, 2016), <https://perma.cc/4B7N-FQF3> (similar); Ashley Cleek, *The Government Says Border Patrol Agents in the Southwest Speak Spanish – but Many Migrants Speak Indigenous Languages*, *World* (July 3, 2018), <https://theworld.org/stories/2018-07-03/government-says-border-patrol-agents-southwest-speaks-spanish-many-migrants-speak> (similar); Andrew Warner, *Refugee Crisis Means More Demand for Pashto, Dari Interpreters*, *MultiLingual* (Sept. 30, 2021), <https://multilingual.com/refugees-increased-demand-interpreters/> (same, as to Pashto and Dari interpreters).

¹²⁴ 65 Am. Jur. Trials 1, § 26 (2024) (“Court interpreters’ fees can run to \$800 per day, with lodging and travel in addition. The fee can be even more if the language to be interpreted is rare.”).

¹²⁵ Abera Molla, *supra* note 122 (describing use of relay interpretation between English, Spanish, and an Indigenous language).

language interpreters.¹²⁶ And paying for the interpreters burdens their budget. Unlike the government, these often small and local organizations are not in a position to sign large contracts ensuring that language services for all necessary languages will be readily available.

Third, creating a system that forces many applicants to use nonprofessional interpreters raises serious ethical concerns. As discussed above, applicants may not want to share the full scope of their trauma with their family member or friend.¹²⁷ Using family members or friends may force applicants to expose identities that they prefer not to share with their community.¹²⁸ Moreover, interpreters should be neutral and trained to employ appropriate ethical frameworks of confidentiality and fidelity of interpretation, but “a family member or friend, especially in highly charged situations, cannot remain neutral.”¹²⁹ This is particularly true for an asylum interview, where the interpreter has a personal stake in whether the applicant receives protection from persecution.¹³⁰ Finally, nonprofessional interpreters may also lack an understanding of professional norms of confidentiality.¹³¹ For these reasons, nonprofessional interpreters, like family members and friends, are more likely to make mistakes, omit important information, or breach confidentiality.¹³² Unsurprisingly, then, numerous government entities, including DOJ and DHS, recommend against or prohibit the use of family or friends as interpreters.¹³³

¹²⁶ See, e.g., Beth Wang, *New York Migrant Surge Sparks Need for Legal Interpreters*, Bloomberg L. (Dec. 20, 2023), <https://news.bloomberglaw.com/litigation/new-york-migrant-surge-sparks-need-for-legal-interpreters> (describing “severe shortage of translators fluent in less common languages” in New York).

¹²⁷ 76 Fed. Reg. at 21763; see also McCaffrey, *supra* note 78, at 375; Chochrane, *supra* note 78, at 59-60.

¹²⁸ See McCaffrey, *supra* note 78, at 375; Chochrane, *supra* note 78, at 59-60.

¹²⁹ Teresa B. Morales & Nathaniel D. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion—How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the “Discretion” of the Trial Court*, 37 St. Mary’s L.J. 1123, 1149 (2006).

¹³⁰ See Chochrane, *supra* note 78, at 90; McCaffrey, *supra* note 78, at 375.

¹³¹ Chochrane, *supra* note 78, at 59-60.

¹³² Several studies conducted in the healthcare setting demonstrate that professional interpreters improve outcomes as compared to family members or other ad hoc interpreters. See, e.g., Ali Labaf et al., *The Effect of Language Barrier and Non-Professional Interpreters on the Accuracy of Patient-Physician Communication in Emergency Department*, 3 Adv. J. Emerg. Med. 38 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6789075/> (concluding that “[n]on-professional interpreters cannot effectively facilitate patient-physician communication, as their translation is error-prone”); Xixi Wang, *The Impact of Using Ad Hoc Interpreters and Professional Interpreters on Hospital Costs and Patient Satisfaction Rates of Limited-English-Proficient Patients in the Emergency Department*, 4 Int’l J. Econ. Com. & Mgm’t 245, 255 (2016), <https://ijecm.co.uk/wp-content/uploads/2016/03/4316.pdf> (concluding that the use of professional interpreters minimizes negative clinical consequences as compared to ad hoc interpreters); Leah S. Karliner et al., *Do Professional Interpreters Improve Clinical Care for Patients with Limited English Proficiency? A Systematic Review of the Literature*, 42 Health Servs. Rsch. 727 (2007) (concluding that the “use of professional interpreters is associated with improved clinical care more than is use of ad hoc interpreters, and professional interpreters appear to raise the quality of clinical care for LEP patients to approach or equal that for patients without language barriers”).

¹³³ See, e.g., U.S. Dep’t of Just., Considerations for Providing Language Access in a Prosecutorial Agency 13 (Sept. 2011), https://www.lep.gov/sites/lep/files/resources/092111_Prosecutors_Planning_Tool.pdf (“Family members, children, neighbors, [and] friends. . . should not be used as interpreters.”); U.S. Dep’t of Health & Hum. Servs., *May an LEP Person Use a Family Member or Friend as His or Her Interpreter?* (Nov. 19, 2015), <https://www.hhs.gov/civil-rights/for-individuals/faqs/may-an-lep-person-use-a-family-member-as-an-interpreter/709/index.html> (requiring a qualified interpreter when important information is being conveyed because “friends and family members may not have the ability to ensure the LEP person being served fully understands what a health provider is communicating to them,” and in some cases “a family member or friend may have an interest in misrepresenting what is being said, such as when domestic abuse is the cause of a medical visit”); U.S. Dep’t of Ag.,

Moreover, permitting clients to proceed with interpreters who lack training or professional experience also raises ethical concerns for attorneys. The ABA advises that “[i]f a nonprofessional interpreter is contemplated . . . the lawyer should proceed cautiously in light of the reduced ability to assess the nonprofessional’s level of proficiency and the concomitant increased risk of inaccuracies in interpretation.”¹³⁴ ABA standards specifically warn against nonprofit organizations permitting the use of family or friends as interpreters because it “gives rise to serious risks that the interpretation will not be neutral, and that the interpreter will not fully understand or be able to translate the legal options available.”¹³⁵

Notably, the regulation precludes anyone who serves as an interpreter from testifying on behalf of the applicant. Thus, even if the applicant has a family member, friend or other community member who is willing to act as an interpreter, and in the extremely unlikely scenario that the individual is professionally trained to interpret, that individual would not be able to submit testimony in support of the applicant’s asylum application. Family members, friends, and community members—such as work or political party colleagues, or church leaders—are often crucial witnesses for asylum applicants. USCIS’s regulation therefore seriously disadvantages LEP applicants, especially rare language speakers, by disqualifying potential witnesses from their asylum application.

Fourth, increased mistakes cause unnecessary referrals to removal proceedings, which are costly to both the government and applicants. Failure to bring an adequate interpreter can result in referral to removal proceedings without the opportunity for an asylum interview.¹³⁶ For applicants, this means navigating the complex and adversarial immigration court system, expensive legal fees (if they can afford an attorney at all), and months—or potentially years—of further uncertainty about their status. For the Departments, a case that might have been resolved via a simple asylum interview now requires ongoing attention from a DHS attorney at multiple master calendar hearings and an individual calendar hearing, diverting much-needed litigation resources away from other cases. In addition to resources expended by DHS, DOJ must provide an immigration judge to adjudicate the applicant’s claim, an interpreter to ensure the applicant can meaningfully

Language Access Plan 18 & n.14 (Nov. 9, 2023), <https://www.lep.gov/sites/lep/files/media/document/2023-11/2023%20Department%20of%20Agriculture%20%28USDA%29%20Language%20Access%20Plan.pdf> (“Absent exigent circumstances, Department staff shall avoid using the following individuals to provide language assistance services . . . [f]amily members (especially minor children); [n]eighbors; [f]riends; [a]cquaintances or bystanders [and] [a]bsent exigent circumstances, use of adult family members as interpreters shall be allowed only if the individual with LEP is offered a qualified interpreter and declines that interpreter, in writing.”); U.S. Equal Emp. Opportunity Comm’n, Language Access Plan 12 (2023), <https://www.lep.gov/sites/lep/files/media/document/2023-11/2023%20Equal%20Opportunity%20Commission%20%28EEOC%29%20Language%20Access%20Plan.pdf> (limiting interpretation by friends or family members to “exigent circumstances in which the deadline to file is imminent, a bilingual staff member is unavailable to assist, and the field office is unable to obtain qualified interpretive services [for the intake interview] on short notice” and requiring the agency to procure a qualified interpreter after the charge is filed for any subsequent enforcement activity).

¹³⁴ AMA Comm. on Ethics & Pro. Resp., Formal Op. 500 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-500.pdf.

¹³⁵ Am. Bar Ass’n, Standing Comm. on Legal Aid & Indigent Defense, Standard 2.3 on Promoting Language Justice, https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/updated-standards-for-the-provision-of-civil-legal-aid/standard-2-3-on-promoting-language-justice/.

¹³⁶ 8 C.F.R. §§ 208.9(g)(1), 208.10.

participate in every immigration court hearing, and other courtroom and administrative staff to facilitate the proceedings, not to mention resources expended on any appeals before the BIA or the federal courts of appeals.

Fifth, requiring applicants to provide their own interpreters creates a system where vulnerable asylum seekers are susceptible to exploitation by “*notarios*” or other bad actors. In many Spanish-speaking countries a *notario* is qualified to draft legal documents and provide legal advice—unlike a notary public in the United States.¹³⁷ Thus *notarios*, who may have a notary public license, prey on asylum seekers’ misconceptions about the role of a notary to offer illegitimate legal services to asylum seekers.¹³⁸ In multiple undersigned Petitioners’ experience, many noncitizens fall victim to *notario* fraud after they encounter *notarios* while searching for an interpreter to assist with an asylum interview.¹³⁹ Hiring a *notario* can result in the use of incompetent interpreters during the interviews, forfeiture of legitimate claims to immigration relief due to missed deadlines, filing of incorrect or incomplete forms, or waived arguments. As a result, applicants who hire *notarios* lose thousands of dollars on fraudulent legal services, may be unnecessarily deported, or may even face criminal liability for filing false claims.¹⁴⁰

Therefore, various other practical and ethical considerations—including the burden the current rule places on the applicant, service providers, nonprofit organizations, and the government—weigh in favor of amending the rule along the lines of this Petition.

E. The Due Process Clause Requires USCIS to Provide Interpreters

In addition to violating federal law and common sense, 8 C.F.R. § 208.9(g) runs afoul of the Constitution. The current interpreter rule violates due process protections as measured by the *Mathews v. Eldridge* framework.¹⁴¹ The *Mathews* test balances (1) the private interest at stake, (2) the risk of erroneous deprivation, and the probable value of additional procedural safeguards, and (3) the fiscal and administrative burden of additional procedural safeguards.¹⁴²

The private interest at stake could not be higher. USCIS oversees the process by which asylum seekers who fear persecution or torture in their home countries can affirmatively seek life-saving protection in the United States. By engaging in this process, these asylum seekers place themselves at risk of deportation to their home countries if their applications for protection are denied. For many asylum seekers, an erroneous deportation could mean serious injury or even death.

¹³⁷ See *Notario Fraud: Overview*, Public Counsel, <https://publiccounsel.org/issues/immigrants-rights/notario-fraud/>.

¹³⁸ *Id.*

¹³⁹ Larry Seward, *End of Pandemic-Era Practice of Providing Interpreters for Asylum Seekers Stirs Confusion*, *Anger*, CBS News (Sept. 29, 2023), <https://www.cbsnews.com/miami/news/end-of-pandemic-era-practice-on-providing-interpreters-for-asylum-seekers-stirs-confusion-anger/> (quoting one asylum seeker who stated that “[i]t is very difficult” to find an interpreter).

¹⁴⁰ Agrawal, *supra* note 72 (“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)).

¹⁴¹ 424 U.S. 319 (1976).

¹⁴² *Id.* at 335.

The risk of erroneous deprivation is high. Interpretation is a specialized skill. As discussed above, using an untrained friend or family member can lead to inaccurate interpretation. And even if a contract monitor can mitigate the risk of inaccurate interpretation, the interpersonal dynamic between an asylum seeker and their loved one can cause the asylum seeker to leave out critical information regarding their asylum claim, such as the explicit details of the persecution they faced or information regarding an identity that would qualify as a protected status. Withholding critical language services leaves asylum officers without the full picture in many asylum interviews, thus impeding accurate decision-making and leading to erroneous referrals to removal proceedings in immigration court.¹⁴³ Further, the individual’s application may be prejudiced if they are forced to use a friend or family member as an interpreter when they would otherwise be a witness on behalf of the asylum applicant.

In some instances, applicants are unable to find even a friend or family member to serve as an interpreter. This leads to additional deprivations. An asylum officer may treat an applicant who fails to bring an interpreter without good cause as failing to appear for the interview.¹⁴⁴ The officer can refer the applicant to removal proceedings and the applicant may lose work authorization.¹⁴⁵ Even if an officer exercises positive discretion to allow the applicant to reschedule the interview, the applicant remains in legal limbo while awaiting another interview slot and there is no guarantee of whether or when they would be able to procure a competent interpreter.

Finally, the fiscal and administrative burden of providing interpreters for LEP asylum applicants is essentially zero. As USCIS stated in its temporary rule, “the cost of monitoring and interpretation are *identical* under the contract” and “monitors will no longer be needed for these interviews.”¹⁴⁶ Thus, the agency can provide an interpreter to applicants without increasing the agency’s financial burden. In short, using government-provided interpreters would “be cost neutral or negligible as USCIS is already paying for these services even without this rule.”¹⁴⁷

“The very essence of due process is a meaningful opportunity to *be heard*.”¹⁴⁸ By refusing to provide interpretation services to LEP asylum applicants, USCIS forces LEP applicants to rely on potentially inferior interpretation option and thus deprives them of meaningful participation in their asylum interview. Without the option of an agency-funded interpreter, the risk of erroneous deprivation is too high—particularly considering the serious private interest at stake and the negligible cost to the agency of providing an interpreter.¹⁴⁹

¹⁴³ For example, one study from the Boston Asylum Office showed that English speakers were nearly twice as likely to be granted asylum than non-English speakers, and non-English speakers were referred to immigration courts 80% of the time as compared to 58% of the time for English speakers. Anna R. Welch & Sara P. Cressey, *Due Process Denied: A Case Study on the Failures of the U.S. Affirmative Asylum System*, Harv. Int’l L. J. (June 1, 2023), <https://journals.law.harvard.edu/ilj/2023/06/due-process-denied-a-case-study-on-the-failures-of-u-s-affirmative-asylum/>.

¹⁴⁴ See 8 C.F.R. § 208.9(g).

¹⁴⁵ See *id.* § 208.10.

¹⁴⁶ 85 Fed. Reg. at 59658, 59660 (emphasis added).

¹⁴⁷ *Id.* at 59658.

¹⁴⁸ *B.C. v. Att’y Gen.*, 12 F.4th 306, 314 (3d Cir. 2021) (emphasis added) (citing *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984)).

¹⁴⁹ See, e.g., *id.* at 316 (“Failing to provide an interpreter when needed makes meaningless a noncitizen’s right to due process.”); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (“It is long-settled that a competent translation is

In addition to the importance of adequate language services as fundamental to due process protections, particularly in the context of immigration proceedings, federal agency guidelines have established consistent protections for LEP individuals as discussed herein. A federal agency violates due process when it fails to abide by its own rules resulting in the deprivation of a protected interest.¹⁵⁰ Pursuant to Executive Order 13166 and corresponding agency guidelines, including DOJ and DHS language access plans, guidelines, and memos, LEP individuals must be afforded meaningful access to language services under due process protections. The INA and regulations further make clear that the right to an interpreter and to have access to due process in proceedings are rooted in a noncitizen’s statutory and constitutional rights. The INA protects a noncitizen’s right to “a reasonable opportunity to examine the evidence against [him], [and] to present evidence on [his] own behalf[.]”¹⁵¹ An individual can only fulfill this right if they are provided with adequate language access services that allow them to comprehend their proceedings and communicate effectively with their arbitrator. Without proper interpretation services, LEP individuals face the very real risk of being deprived of their liberties without a meaningful opportunity to understand or be heard.

F. The Equal Protection Clause Requires USCIS to Provide Interpreters

Failure to provide language access services implicates the constitutional guarantee of equal protection because it unconstitutionally discriminates against LEP noncitizens by placing a higher burden on them than English-speaking noncitizens seeking asylum. It also constitutes wealth-based discrimination because the policy disadvantages asylum applicants based on their inability to afford a competent, professional interpreter, which has no bearing on the merits of the strength of their asylum claims, and is not supported by any rational basis.

As explained above, noncitizens who fear persecution or torture face extremely high stakes when applying for asylum. If asylum is granted, the noncitizen will receive protection from deportation, eligibility for public benefits, and a path to permanent residence, but if asylum is denied, the noncitizen faces deportation to their home country.¹⁵² To receive asylum, the noncitizen must show that they have experienced past persecution or have a well-founded fear of future persecution.¹⁵³ And to have a meaningful opportunity to make the required showing, LEP asylum seekers must have language services.

As a result of USCIS’s decision not to provide interpreter services, LEP asylum seekers face a significantly greater burden and risk than English-speaking asylum seekers. LEP asylum seekers must bear the additional cost of language access, including an interpreter for their asylum interview—which is likely to place a significant financial burden on those who have recently

fundamental to a full and fair hearing. If [a noncitizen] does not speak English, deportation proceedings must be translated into a language the [noncitizen] understands.”); *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (“The presence of a competent interpreter is important to the fundamental fairness of a hearing, if the [noncitizen] cannot speak English fluently.”).

¹⁵⁰ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

¹⁵¹ INA § 240(b)(4)(B).

¹⁵² 8 U.S.C. § 1158(c)(1), (c)(3).

¹⁵³ 8 U.S.C. § 1101(a)(42)(A).

arrived in this country.¹⁵⁴ Those who are unable to find an interpreter, whose interpreter is unavailable at the last minute, or whose interpreter does not provide proper interpretation face the possibility of their interview being delayed, which can delay them from getting asylum and related benefits such as work authorization. And those who cannot afford an interpreter and cannot bring an interpreter to the interview are deemed to have failed to appear for their interview and may not be able to continue with their affirmative asylum application. In sum, failure to provide meaningful language access services places a greater burden on LEP asylum seekers and puts them at greater risk of having their asylum application denied and being deported.

This burden is also disproportionately borne by asylum applicants with limited resources. While some LEP individuals may be able to afford a professional interpreter, thus mitigating the harm of the current policy, many asylum seekers do not have access to the resources necessary to hire an interpreter. Low-income LEP asylum seekers must instead rely on family members or friends to fill the gap left by the agency. But, as discussed above, family members and friends are often a poor substitute for a professional interpreter. The rule accordingly treats low-income LEP asylum seekers differently by forcing them to rely on inferior, nonprofessional interpretation services while wealthier LEP applicants can provide their own professional interpreter. This distinction has serious consequences for low-income LEP asylum seekers who often, as a result of inferior interpretation, struggle to fully or accurately communicate their claims to the asylum officer. And use of a family member or friend ends up disqualifying a potential witness. Thus, the rule discriminates against all LEP asylum seekers, but it uniquely burdens LEP asylum seekers who have limited means.

This violation of LEP noncitizens' equal protection rights is not justified by any compelling government interest or even legitimate government purpose. To the extent USCIS relies upon an interest in reducing costs or administrative burden, those interests are completely undercut by the fact that, for asylum interviews, USCIS provides contract monitors already and the cost of monitoring is identical to the cost of providing interpretation under the contract.¹⁵⁵ Thus, no government interest justifies USCIS's unequal treatment of LEP asylum seekers, particularly those who have limited financial means, especially in such a high-stakes process as an asylum interview.

VII. EXPLANATION OF PROPOSED REGULATORY TEXT

The proposed amendments to the regulatory text address a critical gap in language access for affirmative asylum applicants. First, the proposed text removes the obligation on the LEP applicant to provide their own interpreter and instead gives them the option to use a USCIS-provided interpreter. Second, it removes the penalty on the LEP applicant who cannot provide an interpreter such that it may no longer constitute a failure to appear that could result in referral into removal proceedings. Third, it retains the option for the LEP applicant to provide their own interpreter, who will continue to be monitored by a contract interpreter, at no expense to the government. Finally, where an individual chooses not to provide an interpreter, but the government

¹⁵⁴ Dadhania, *Language Access*, at 723 (“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.”).

¹⁵⁵ 85 Fed. Reg. at 59658.

is unable to procure one for the interview, any resulting delay would be attributed to USCIS for purposes of processing time for the applicant’s employment authorization.

While it is critical to remove the obligation on LEP applicants to bring their own interpreters, USCIS should continue to give all individuals the option of bringing their own interpreter if they prefer, as was the policy under the temporary rule.¹⁵⁶ As frequently reported by advocates, including many of the undersigned Petitioners, the quality of USCIS-provided interpreters can vary. Some applicants may also prefer in-person interpretation to telephonic interpretation.¹⁵⁷ Certain applicants may prefer to work with interpreters that they have had the chance to meet before the interview, rather than divulging sensitive details about their asylum claims to a stranger over the phone.¹⁵⁸ Some applicants may wish to bring interpreters who are prepared to work in a manner responsive to the applicants’ individualized circumstances of trauma or disabilities that impact their communication. As described above, applicants retained the option of bringing their own interpreters, monitored by a contract interpreter, when the requirement to do so under 8 C.F.R. § 208.9(g)(1) was temporarily suspended. There is no reason why applicants should not retain this option. Granting this Petition will make clear that LEP individuals may—but need not—rely on USCIS-provided interpreters. This approach provides the most flexibility and agency to LEP asylum seekers without burdening them based on their financial means and national origin, while maintaining the agency’s ability to monitor interpretation.

Finally, while Petitioners do not intend to tell the agency how it should arrange for government-funded interpreters, USCIS’s experience during the pandemic indicates that using the contract monitors as full interpreters in the short term would create a seamless transition while the agency considers how to meet its language access obligations in the long run. After three years of

¹⁵⁶ 88 Fed. Reg. at 16375.

¹⁵⁷ See Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 68 (2001) (“all else being equal, telephonic interpretation is less reliable than in-person interpretation”); see also U.S. Dep’t of Homeland Sec. Advisory Comm., Report on Family Residential Centers 79 (Sept. 30, 2016) [hereinafter “DHS Advisory Report”], <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>. (“telephonic interpretation, even when available, largely fails to provide effective communication”); see also Alejandra Gonzalez Campanella, *Availability and Acceptability of Interpreting Services for Refugees as a Question of Trauma-Informed Care*, 3 *Interpreting & Soc.* 75, 84 (2023) (reporting that refugees in New Zealand “preferred the support provided by face-to-face language assistance” and that “[t]he problems [with telephonic interpretation] narrated by participants included both technical issues and the lack of human contact and empathy”). In-person interpretation allows the interpreter to capture nonverbal cues, which are an enormously important component of human communication under any circumstances, but all the more so where subjective credibility judgments are at issue. See Pistone & Schrag, *supra* note 157, at 67 (“Interpretation experts recognize that ‘the full context of an interpreted statement involves verbal as well as nonverbal communication.’” (internal citation omitted)); DHS Advisory Report, *supra* note 157, at 97 (“Visual cues can be vital to effective communication.”). In-person interpretation also avoids interruptions due to dropped calls, poor acoustics, or other technological failures. See Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 Wash. L. Rev. 459, 483 (2018) (“The flaws of remote interpretation are well documented: technological glitches impede communication and lead to erroneous interpretation”); DHS Advisory Report, *supra* note 157, at 97 (“Technological limitations mar telephonic interpretation and lead to the loss of important information.”).

¹⁵⁸ Shattuck, *supra* note 157, at 483 (“telephonic interpreters are less likely to gain the trust of the non-English-speaking party”); DHS Advisory Report, *supra* note 157, at 97 (“[Individuals] . . . are less likely to disclose traumatic information over the phone.”).

interpreting during the pandemic, “serving as interpreters during asylum interviews [is] not [] a novel or new function for contract interpreters to perform.”¹⁵⁹

VIII. PROPOSED REGULATORY TEXT

The following are proposed amendments to the current regulation § 208.9(g)(1), implementing the above changes. Any additions are underlined and redactions are indicated with a strikethrough.

Title 8—Aliens and Nationality

CHAPTER I—Department of Homeland Security

SUBCHAPTER B—Immigration Regulations

PART 208—Procedures for Asylum and Withholding of Removal

Subpart A—Asylum and Withholding of Removal

§ 208.9 Procedure for interview before an asylum officer

* * *

(g) *Interpreters.*

(1) Except as provided in paragraph (g)(2) of this section, an applicant unable to proceed with the interview in English ~~must provide~~ shall have the opportunity to provide, at no expense to USCIS, a competent interpreter fluent in both English and the applicant’s native language or any other language in which the applicant is fluent. The interpreter must be at least 18 years of age. Neither the applicant’s attorney or representative of record, a witness testifying on the applicant’s behalf, nor a representative or employee of the applicant’s country of nationality, or if stateless, country of last habitual residence, may serve as the applicant’s interpreter. If the applicant chooses not to provide an interpreter, the asylum officer shall arrange for the assistance of an interpreter, at the expense of USCIS, in conducting the interview. ~~Failure without good cause to comply with this paragraph (g)(1) may be considered a failure to appear for the interview for purposes of 208.10.~~ If a USCIS interpreter is unavailable, any resulting delay will be attributed to USCIS for the purposes of employment authorization pursuant to § 208.7.

IX. CONCLUSION

Every year, thousands of people from all over the world, including vulnerable unaccompanied children, place their lives in USCIS’s hands by stepping forward to apply affirmatively for asylum. The protections the affirmative asylum process offers can be lost without adequate interpretation services. The stakes could not be higher, as interpretation errors can lead to a referral to removal proceedings and ultimately to removal to countries where applicants face

¹⁵⁹ 85 Fed. Reg. at 59658.

persecution and torture. In some respects, the Departments have instituted legal protections to ensure that all persons, regardless of language ability, have meaningful access to our asylum system. But despite the evolution of these legal protections over the last two decades, USCIS has retained an archaic regulation that unnecessarily and unlawfully burdens LEP asylum seekers.

Our client communities—who already start from a position of vulnerability as relatively new arrivals with limited resources—face the daily risk of exploitation; delays associated with requesting interpreters; and the burden, confusion, and chaos of navigating new policies and rules that did not include them or actively excluded them from the process. At a very minimum, USCIS should not make their situations worse by continuing a policy that serves no legitimate purpose and contravenes the principles of fairness and equity underlying language rights. We urge the Departments to take this minimal, efficiency-promoting step to align USCIS’s policy with the federal government’s commitment to language access and grant this Petition.

Appendix A:
Comment from Haitian Bridge
Alliance



April 15, 2024

To: U.S. Department of Homeland Security
U.S. Department of Justice
Re: Petition for Rulemaking re Interpreters for Affirmative Asylum Interviews

Haitian Bridge Alliance (“HBA”) is a grassroots, non-profit, community-based organization incorporated in California. HBA’s mission is to assist Haitian and other immigrants to acclimate to the United States and ensure their success in navigating their new lives. HBA focuses on Black people, the Haitian community, women and girls, LGBTQIA+ individuals, and survivors of torture and other human rights abuses. HBA’s staff includes four lawyers who represent asylum seekers from Haiti and several African countries in removal defense and affirmative asylum proceedings. We are very concerned about language access and competent interpreters for our Haitian and African clients and community members.

With respect to Kreyol speakers, we echo the concerns raised in Section VI(D), points 2, 3, 4, and 5 (*supra*, pages 32-35). Most members of the Haitian immigrant community in the United States are pro se and cannot afford to hire a professional interpreter. Instead, they use a *notario* or a friend or colleague. The applicant doesn’t know the interpreter’s skill level, they are desperate to use anyone they can find.

We have witnessed many cases of poor interpretation, which the applicant either doesn’t recognize or is too afraid to say anything mid-interview. The consequences of poor interpretation can be fatal. In one case, the applicant said that he had two brothers but unbeknownst to the applicant, the interpreter said he had one brother. When the applicant referred to his two brothers later in his testimony, the immigration judge questioned his credibility because of his inconsistent statements.

Despite challenges with even court-appointed Haitian Kreyol interpreters, they are more qualified than the interpreters community members could find. We are afraid that with the government’s return to applying the regulation, 8 C.F.R. § 208.9(g)(1), Haitians would come to the interview without interpreters, which would delay their hearings and waste the time of asylum officers.

We are also concerned about issues of ethics and confidentiality, and the chilling effect using friends and family would have on testimony. For example, sexual violence, LGBTQIA+ status,

certain religious practices and other issues relevant to asylum claims are taboo in the Haitian community and could result in stigma, ostracization, and even violence by others in the community. We have had clients who have not told anyone in their U.S. family community that they were raped or that they are gay for fear of reprisals. If forced to bring a friend or family interpreter, it is likely these individuals would not tell their full story to the asylum officer.

Sincerely,

/s/ Daniel Tse

Daniel Tse

Asylum Coordinator, Haitian Bridge Alliance

Appendix B:

Comment from Long Island
Language Advocates Coalition

**STATEMENT IN SUPPORT OF
PETITION FOR RULEMAKING TO
PROMULGATE REGULATIONS GOVERNING THE PROVISION OF
INTERPRETERS FOR AFFIRMATIVE ASYLUM INTERVIEWS**

The Long Island Language Advocates Coalition vehemently opposes the enforcement of the Department of Homeland Security's (DHS) regulations placing the burden on affirmative asylum applicants to bring their own interpreter to interviews conducted by U.S. Citizenship and Immigration Services (USCIS). This requirement is legally discriminatory, illogical and impractical.

Of the numerous government agencies serving the public, USCIS is an agency that, by the nature of its work, engages in regular interaction with Limited English Proficient communities. For the past three years, due to the COVID-19 pandemic, USCIS has successfully provided interpretation services at affirmative asylum interviews. To cease this practice now, only to revert to an outdated impractical system, is discriminatory and will result in a due process violation as applicants are stripped of a meaningful opportunity to be heard. Whether an asylum application is approved or denied may literally be a matter of life or death for an immigrant who is seeking such relief.

Affirmative asylum seekers, by definition, are fleeing situations of persecution and are therefore among the most vulnerable immigrant populations. Often, low-income applicants appear at these interviews either *pro se* (without representation) or with *pro bono* legal service providers, such as nonprofit organizations. Requiring the applicant, or the nonprofit organization, to bring a qualified interpreter is unduly burdensome and wastes critical resources. Moreover, this requirement leaves applicants vulnerable to fraud by unprofessional and untrained interpreters, thereby undermining the integrity of the process and placing them further at risk. Without precise, complete, accurate and unbiased interpretation, technical and procedural failures will arise, resulting in further delays to a system that is already well beyond its capacity.

The American Civil Liberties Union, in its petition, has outlined reasons why it would benefit USCIS to adopt regulatory changes without being burdensome or costly for the agency. We strongly urge DHS to consider the ACLU petition regarding the provision of interpreters and to adopt these necessary changes which are in line with the agency's stated commitment to meaningful access.

Keiko Cervantes, Ospina, Esq.

Community Legal Advocates of New York Inc.

o/b/o Long Island Language Advocates Coalition