

JUDICIAL DISCRETION IN THE COURT INTERPRETERS ACT:
OUR CENTURY-OLD REMEDY TO A MODERN LEP
AMERICAN ISSUE

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INTRODUCTION

If you were tasked with determining which criminal defendants are entitled to a court interpreter, where would you start? The first obvious answer is that if a defendant does not speak English, he or she should receive an interpreter. Or maybe it would be reasonable to say that any defendant who is not fluent in English, or for whom English is not a first language, should also receive a translator. The legal world is a complicated and nuanced one, after all. Even fluency in English is hardly an assurance of understanding the modern legal landscape.¹

It is no secret that the American people have become increasingly dissatisfied with how the country treats citizens of various ethnic and immigrant backgrounds.² More than seventy-five percent of the American population sees immigration overall in a positive light—the highest rate of public approval in the last twenty years.³ This growing positivity towards immigrant Americans necessitates discussion on those individuals' rights.

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¹ See *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 121 (S.D.N.Y. 1960) (in which the outcome of a private lawsuit between meat suppliers hinged on the two parties' differing definitions of the word "chicken"); see also Michael Rozansky, *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR., (Sept. 12, 2017), <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2017/09/Civics-survey-Sept-2017-complete.pdf> (referring to a survey in which more than a third of interviewed United States citizens could not name a single protection enumerated in the First Amendment).

² See *Race Relations*, GALLUP (2021), <https://news.gallup.com/poll/1687/race-relations.aspx> (referring to the statistics that in June-July 2020, American adults are on average eighteen percent less satisfied with how Hispanic Americans are treated, twenty percent less satisfied with how Asian Americans are treated, and eleven percent less satisfied with how immigrants are treated than in June-July 2013).

³ See Ed Lowther, *US Election 2020: Trump's Impact on Immigration – in Seven Charts*, BBC NEWS, (Oct. 21, 2020), <https://www.bbc.com/news/election-us-2020-54638643>.

Although legal issues relating to the rising limited English proficiency (LEP) population in the United States abound, this Comment will focus on one key legal tool for the LEP population: courtroom interpreters. The modern standard for providing courtroom interpreters, set by the Court Interpreters Act of 1978, relies on judicial discretion to determine an individual's need for such an interpreter.⁴ However, courts have used the judicial discretion standard in determining court interpreter needs as long ago as 1907.⁵ This Comment will address this century-old standard and explore the changes in the country that render it obsolete, the potential replacement standards that better suit the Court Interpreters Act's goals, and the potential drawbacks to those replacements.

After briefly defining the composition of the American LEP population in Section One and outlining the two-prong Court Interpreters Act test that currently directs interpreter appointments in Section Two, this Comment will make several observations on the relevant legislative and judicial history. The third Section of this Comment will examine the original landmark case regarding court interpreter rights: *Perovich v. United States*.⁶ *Perovich* introduced the judicial discretion standard for the assignment of court interpreters.⁷ This case analysis will illuminate both why the judicial discretion standard was established and the extreme lengths that it took for an LEP defendant to obtain an interpreter under *Perovich*. The fourth Section will examine court interpreter rights as a function of due process rights under *United States ex rel. Negron v. New York*.⁸ Under *Negron*, the right to an interpreter is a necessary fulfillment of LEP defendants' Sixth and Fourteenth Amendment rights.⁹ The following Sections will address cases in which courts denied interpreter rights in ways that set potentially dangerous precedents. One such controversial case is *Gonzalez v. United States*,¹⁰ where a judge used his discretionary power to determine that an LEP defendant did not need an interpreter.¹¹ Many scholars have heavily debated this case's accuracy,

⁴ See 28 U.S.C. § 1827(d)(1).

⁵ *Perovich v. United States*, 205 U.S. 86, 91 (1907).

⁶ *Id.*

⁷ *Id.*

⁸ 434 F.2d 386 (2d Cir. 1970).

⁹ See *id.* at 389-90.

¹⁰ 33 F.3d 1047 (9th Cir. 1994).

¹¹ *Id.* at 1051 (referring to district court opinion below).

highlighting the central issue with the modern discretionary standard. The final Section of the background analysis, although not directly related to the issue of the Court Interpreters Act, briefly takes account of the Sixth Amendment right to counsel. Ultimately, this Comment will conclude that the judicial discretion standard—as it currently stands—poses a strong threat to the constitutional rights of LEP individuals. Therefore, this Comment proposes that the judicial discretion standard should be abolished because it sometimes violates due process rights while presenting little benefit.

BACKGROUND

I. DEFINING THE LIMITED ENGLISH PROFICIENCY POPULATION

Limited English proficiency (LEP) individuals are any individuals above the age of five who do not speak English “very well” as defined by the United States Census Bureau.¹² As of 2013, over twenty-five million Americans were categorized as LEP.¹³ Of that group, about five million were native-born, meaning that approximately eighty percent of the LEP population is comprised of immigrants.¹⁴

Compared to the national population, the American LEP population is less educated and more likely to live in poverty than Americans who speak fluent English.¹⁵ This level of comparative poverty is likely related to this population’s increased likelihood of working in labor, maintenance, service, and personal care industries.¹⁶

Although LEP Americans make up well over eight percent of the national population, or 25.1 million Americans as of 2013,¹⁷ their numbers are not uniformly scattered across the nation.¹⁸ LEP Americans tend to live in certain areas over others.¹⁹ The three most LEP-

¹² Jie Zong & Jeane Batalova, *The Limited English Proficient Population in the United States in 2013*, THE ONLINE J. OF THE MIGRATION POL’Y INST., (July 8, 2015), [https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states-2013#:~:text=while%20the%20majority%20of%20these,Limited%20English%20Proficient%20\(LEP\).&text=though%20most%20LEP%20individuals%20are,States%2C%20most%20to%20immigrant%20parents](https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states-2013#:~:text=while%20the%20majority%20of%20these,Limited%20English%20Proficient%20(LEP).&text=though%20most%20LEP%20individuals%20are,States%2C%20most%20to%20immigrant%20parents).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Zong & Batalova, *supra* note 12.

¹⁹ *Id.*

populous states are California, Texas, and New York.²⁰ These three states account for just over half of the total LEP population.²¹ Adding in the next three most LEP-populous states, Florida, New Jersey, and Illinois, accounts for about two-thirds of the national LEP population.²²

The LEP American population's cultures and language fluencies cannot be lumped together under any monolithic assumptions. There are some relevant trends, however. More than sixty-four percent of the LEP citizenry, over sixteen million of the total 25.1 million population as of 2013, speaks Spanish.²³ About forty percent of the total LEP population are immigrants from Mexico, El Salvador, Cuba, and the Dominican Republic.²⁴

There are also trends in the LEP population beyond spoken languages and national origin. When compared to fluent English-speakers, LEP Americans are far more likely to work jobs in construction, service, production, and transportation than in management, science, or art-related jobs.²⁵ Additionally, one quarter of LEP Americans live below the federal poverty line: a rate of poverty that is nearly double the average rate of poverty among English-speaking Americans.²⁶ The average LEP American also faces a proportionally greater threat of incarceration than the average English-speaking American. Although there are no published numbers on LEP incarceration rates compared to English-speaking Americans, the LEP population is largely made up of high-risk demographics for incarceration.²⁷ Americans of Latin American descent are imprisoned at 1.3 times the rate of white Americans.²⁸ This rate can be even higher in areas with higher LEP populations. In New Mexico,²⁹ Hispanic inmates make up sixty-one percent of the total prison population.³⁰ In Arizona and Califor-

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Zong & Batalova, *supra* note 12.

²⁵ *See id.*

²⁶ *Id.*

²⁷ *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project 1, 6 (Oct. 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

²⁸ *Id.*

²⁹ Zong & Batalova, *supra* note 12 (citing New Mexico as the state with eighth highest percentage of LEP residents).

³⁰ Nellis, *supra* note 27, at 20.

nia,³¹ Hispanic inmates make up an average of forty-two percent of the total imprisoned population.³² Beyond the race-centered trends, it is a well-documented fact that impoverished Americans are far more likely to be incarcerated than Americans who are not impoverished.³³ The fact that LEP Americans share demographics with groups that face heavy rates of incarceration suggests a substantial threat of over-incarceration of LEP Americans at the very least, and presents a long-standing systemic incarceration problem for LEP Americans at the very worst.

II. THE COURT INTERPRETERS ACT OF 1978: THE CURRENT AND ONLY FEDERAL LEGISLATION TO PROTECT RIGHTS TO COURT INTERPRETERS

The current courtroom interpreter guidelines are a recent phenomenon. Congress passed the Court Interpreters Act in 1978,³⁴ and it became a milestone in representative history for LEP defendants for two reasons. First, the Act was the first legislation to establish a standard for both LEP individuals to be given court interpreters³⁵ and the quality of court interpreters.³⁶ Second, by establishing a more complex test than the relevant case law, the judicial duty that the Act created was more restrictive towards federal courts than the previous solitary standard of judicial discretion.³⁷ The Act set guidelines for when a court is required to provide an interpreter to a defendant

³¹ Zong & Batalova, *supra* note 12 (citing California as state with highest percentage of LEP residents and Arizona as tenth highest).

³² Nellis, *supra* note 27, at 20.

³³ See Tara O'Neil Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION FORUM (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/> (discussing the upward trend in incarceration in America in recent years, the fact that the bulk of those incarcerations are based on victimless drug offenses, and the statistics of why people in poverty are more likely to face incarceration); see also Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>; Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQUENCY 562, 581 (2013).

³⁴ 28 U.S.C. §1827.

³⁵ See 28 U.S.C. §1827(d)(1) (setting out standard for LEP individuals to be given court interpreters).

³⁶ Holly Mikkelsen, *Court Interpreting at a Crossroads*, MONTEREY INST. OF INT'L STUD. (1999), <https://acebo.myshopify.com/pages/court-interpreting-at-a-crossroads>.

³⁷ 28 U.S.C. §1827.

based on a two-pronged test.³⁸ A court-appointed interpreter must be provided when: (1) the defendant “speaks only or primarily a language other than English,” and (2) the presiding judicial officer finds that the defendant’s English proficiency “inhibits the party’s comprehension of proceedings or communication with counsel or the presiding judicial officer.”³⁹

The need for the Court Interpreters Act likely stemmed from many issues. Beyond the need for a better standard than *Perovich*, discussed below, there was also a growing need for interpreters who were properly qualified.⁴⁰ The standard for granting a court interpreter was based entirely on judicial discretion.⁴¹ There are many potential reasons for setting such a lax standard, but the answer likely lies in the time period and the advancement, or lack thereof, of civil rights when the standard was first put in place.

A. *What is Fluency?*

The Court Interpreters Act does not define what does or does not qualify as fluency.⁴² It is not difficult to see why. The modern definition of fluency is “the ability to converse freely in a language.”⁴³ This standard, like the Act, leaves much to be desired in the way of specific markers.

The Council of Europe has devised the Common European Framework of Reference for Languages (CEFR) to address this very question.⁴⁴ To better capture the nature of language proficiency, the CEFR standard defines individuals as one of six levels of competency: A1, A2, B1, B2, C1, and C2.⁴⁵ A1 is the lowest level of language competency, whereas C2 is the highest.⁴⁶ At the B2 level, the individual is

³⁸ 28 U.S.C. §1827(d).

³⁹ *Id.*

⁴⁰ See, e.g., Mikkelsen, *supra* note 36 (noting that in many countries there was a need to ensure the quality of interpreting services for the judiciary).

⁴¹ *Perovich*, 205 U.S. at 91.

⁴² See 28 U.S.C. § 1827.

⁴³ *Fluency*, LAW INSIDER, <https://www.lawinsider.com/dictionary/fluency#:~:text=fluency%20means%20the> (last visited Feb. 23, 2022).

⁴⁴ *The CEFR Levels*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/common-european-framework-reference-languages/level-descriptions> (last visited Feb. 23, 2022).

⁴⁵ *Id.*

⁴⁶ *Id.*; see also *Global scale – Table 1 (CEFR 3.3): Common Reference Tables*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/common-european-framework-reference-languages/table->

considered fluent.⁴⁷ At this level, individuals are able to interact “with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party.”⁴⁸

B. *Perovich v. United States and the Birth of the Court Interpreter Judicial Discretion Standard*

An LEP American’s right to a court interpreter was first established in the 1907 Supreme Court case *Perovich v. United States*.⁴⁹ *Perovich* was a murder trial.⁵⁰ Vuko Perovich, the defendant, was a Greek immigrant who had moved to the United States less than ten years before his trial.⁵¹ By all accounts, he was unfamiliar with the English language before he first arrived in Alaska to pan for gold.⁵² The evidence against Perovich was entirely circumstantial, as there were no witnesses to the alleged crime and no concrete evidence that the person who had been killed was the alleged victim.⁵³ Perovich requested a court interpreter, but the trial judge unilaterally determined that Perovich did not need one.⁵⁴ At trial, Vuko Perovich’s testimony was found to be riddled with inconsistencies,⁵⁵ and he was found guilty of murder in the first degree and sentenced to death.⁵⁶

After conviction, Vuko Perovich appealed the trial court’s decision on several issues, including an admission of inadmissible hearsay

1-cefr-3.3-common-reference-levels-global-scale (defining A1 and A2 speakers as “basic users,” B1 and B2 speakers as “independent users,” and C1 and C2 speakers as “proficient users”).

⁴⁷ See Council of Europe, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ Mollie M. Pawlosky, Note, *When Justice is Lost in the Translation: Gonzales v. United States, and “Interpretation” of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 439 (1996).

⁵⁰ *Id.*

⁵¹ Ronald S. Everett & Deborah Periman, “The Governor’s Court of Last Resort:” *An Introduction to Executive Clemency in Alaska*, 28 ALASKA L. REV. 57, 74 (2011).

⁵² Claus-M. Naske, *The Case of Vuco Perovich*, 78 PAC. NW. Q. 2, 6 (1987).

⁵³ *Perovich*, 205 U.S. at 89-92 (commenting on whether the trial court erred in allowing the issue to proceed against the defendant’s motion for a not guilty verdict because of *corpus delicti*. The facts proved that the victim’s remains were found burned in a cabin owned by Perovich’s former partner Jaconi. However, the body had been so badly burned that an identification was impossible. Perovich was found guilty based on his comments about hating his former partner and wanting to kill him, and on his possession of items from his partner’s cabin. The Supreme Court determined that a reasonable jury could conclude that the body in the cabin was Jaconi and that Perovich had killed him).

⁵⁴ *Id.* at 91.

⁵⁵ *Id.* at 89-90.

⁵⁶ *Id.* at 89.

evidence, lack of *corpus delicti*, and that he had not received a court interpreter for his testimony.⁵⁷ The Court acknowledged all of these issues in error, but held that, "[t]hese are the questions which we deem it necessary to notice . . . yet we are satisfied . . . that the defendant was properly convicted."⁵⁸ In holding that the lack of a translator made no significant difference to the case outcome, the appellate court did not address Vuko Perovich's immigrant background.⁵⁹

After the Court affirmed his conviction, Perovich received two stays of execution and spent twenty-one years insisting that he was innocent.⁶⁰ He was a model prisoner and even was encouraged by his warden to make further appeals for his freedom.⁶¹ In 1927, after substantial self-advocacy and advocacy by organizations that believed in his cause, Perovich received a pardon from President Coolidge and lived the remainder of his life quietly.⁶²

Vuko Perovich was part of a much smaller minority as an LEP citizen in 1907, compared to today. In the 1900 census, the latest documentation available at the time of Perovich's trial, approximately 1.47 million LEP Americans comprised less than two percent of the entire American population.⁶³ This means that the LEP population in 1900 represented less than one quarter of the estimated eight percent of America that it represented as of 2013.⁶⁴ Even if one was to adjust the numbers to account for the rise in the LEP population between 1900 and 1910, the number of LEP citizens would only rise to an estimated 2.61 million.⁶⁵ This is just over ten percent of the 2013 LEP population, and less than three percent of the national population at the time.⁶⁶

⁵⁷ *Id.* at 91-92.

⁵⁸ *Id.* at 92.

⁵⁹ See *Perovich v. United States*, 205 U.S. 86, 91 (1907).

⁶⁰ Nakse, *supra* note 52, at 4, 5, 7.

⁶¹ *Id.* at 5-6.

⁶² *Id.* at 9.

⁶³ 1900 U.S. CENSUS BUREAU, Vol. 1, 490 (calculated using the overall U.S. population and recorded LEP immigrant population in 1900 census).

⁶⁴ Zong & Batalova, *supra* note 12.

⁶⁵ 1900 U.S. CENSUS BUREAU, Vol. 1, 2; 1910 U.S. CENSUS BUREAU, Vol. 1, 1267 (estimated by comparing the 1,471,332 reported non-English-speaking residents in 1900 and 3,091,207 in 1910 and adjusting for the difference in the numbers for 1907. This estimation necessarily assumes a steady, linear increase in LEP Americans with no major anomalies. Rounded up to the nearest hundredth of a million).

⁶⁶ *Id.* (estimated using the same linear model of population growth from the 1900 to 1910 as was used to estimate the 1907 LEP population).

Courts have repeatedly cited the *Perovich* holding as the dictating authority that defendant interpreter rights are determined under the judiciary discretion standard.⁶⁷ Following this decision, there would be no federal legislation to govern the issuance of court interpreters for another seventy years.⁶⁸ Because of this lack of legislation, the *Perovich* standard gave trial courts unrestricted discretionary power over court interpreter requests with no further guidelines.⁶⁹

C. Negron Reframes the Issue of Court Interpreters as a Means of Protecting Sixth Amendment Rights

The Court Interpreters Act passed just years after another landmark decision: *United States ex rel. Negron v. New York*.⁷⁰ *Negron* was a Second Circuit *habeas corpus* proceeding for Rogelio Nieves Negron, a Spanish-speaking defendant in a homicide case.⁷¹ Negron was a Puerto Rican native with the equivalent of a sixth-grade education.⁷² He was in the United States for work, and had resided in the United States for only a few months.⁷³ Negron had lived in the United States once before, but that stay was only a few months long.⁷⁴ He was able to sporadically interact with a prosecution-affiliated witness translator for a total of twenty to forty minutes during court recesses, but was supplied no translator of his own.⁷⁵ Negron neither spoke nor understood English.⁷⁶ His court-appointed attorney did not

⁶⁷ See, e.g., *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (holding that balancing a defendant's right to confrontation against the public's interest in the economical administration of criminal law was in the sound discretion of the trial judge); *United States v. Carrion*, 488 F.2d 12, 14-15 (1st Cir. 1973) (citing *Perovich* as authority for the idea that trial courts are granted broad discretion in assigning court interpreters because of how many factors go into the decision); *United States v. Rodriguez*, 424 F.2d 205, 206 (4th Cir. 1970) (citing *Perovich* in holding that the use of an interpreter is a matter within the discretion of the trial court); *United States v. Desist*, 384 F.2d 889, 901 (2d Cir. 1967) (holding that *Perovich* discretion allows the trial court sole authority to evaluate the defendant's ability to understand and express himself in English); *Suarez v. United States*, 309 F.2d 709, 712 (5th Cir. 1962) (holding that the use of the interpreter was within the trial judge's discretion).

⁶⁸ See 28 U.S.C. §1827.

⁶⁹ See, e.g., *Rodriguez*, 424 F.2d at 206.

⁷⁰ 434 F.2d 386 (2d Cir. 1970).

⁷¹ *Id.* at 387-88.

⁷² *Id.* at 388.

⁷³ *Id.* at 387.

⁷⁴ *Id.*

⁷⁵ *Id.* at 388.

⁷⁶ *United States ex rel. Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

speak Spanish and was thus unable to communicate with him.⁷⁷ Negron was convicted in state court, but later released in federal district court on *habeas corpus*.⁷⁸ When the state challenged Negron's release, the Second Circuit Court affirmed the decision to release Negron on the grounds that Negron had not received a court interpreter, even though the state had known he did not speak English.⁷⁹

The Second Circuit's opinion in *Negron* set two important precedents. First, the court wrote that the Sixth Amendment rights to "sufficient present ability to consult with his lawyer with a reasonable degree of understanding" and to confront an adverse witness can exist only where a defendant is able to understand the language of his counsel or adverse witness, respectively.⁸⁰ Second, the court held that Negron and his counsel did not waive the right to an interpreter by failing to ask for one.⁸¹ To grant Negron "a matter of simple humanness,"⁸² the appellate court held that the district court had a duty to make it unmistakably clear to Negron that he had a right to a competent translator, even if that translator came at the state's expense.⁸³

Negron was the first major case to acknowledge the right to an interpreter as an extension of constitutional rights.⁸⁴ This decision also established a duty for courts to grant interpreters to individuals who need them,⁸⁵ implying that a requirement exists in the decision of whether to grant a court interpreter beyond the seemingly boundless *Perovich* standard. Riding the wave of civil rights legislation of the late 1960s,⁸⁶ *Negron* established a line of thinking that translates directly to the Court Interpreters Act, as it took the same approach as the Act in adding a requirement to the *Perovich* standard instead of changing it entirely.

⁷⁷ *Id.*

⁷⁸ *Id.* at 387-88.

⁷⁹ *Id.* at 387-91.

⁸⁰ *Id.* at 389.

⁸¹ *Id.* at 390.

⁸² *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970).

⁸³ *Id.* at 390-91.

⁸⁴ *Id.* at 389 (quoting the Sixth and Fourteenth Amendments).

⁸⁵ *Id.*

⁸⁶ History.com Editors, *Civil Rights Act of 1964*, HISTORY.COM, (Jan. 25, 2021), <https://www.history.com/topics/black-history/civil-rights-act#:~:text=the%20Civil%20Rights%20Act%20of%201964%2C%20which%20ended%20segregation%20in,of%20the%20civil%20rights%20movement> (discussing the Voting Rights Act and the Fair Housing Act as movements that followed the Civil Rights Act in both timeliness and spirit).

D. *The Tapia Holding Affirms that the Court Interpreters Act Test is More Stringent than the Perovich Standard*

The Court Interpreters Act's two-pronged test, although still reliant on judicial discretion, should not be misinterpreted as the boundless discretionary standard that the *Perovich* standard was. The first prong of the test, that the defendant must be found not to speak English very well, or to primarily speak another language,⁸⁷ informs the basis of discretion called for in the Act's second prong.⁸⁸

This was made clear in *United States v. Tapia*.⁸⁹ In *Tapia*, the Fifth Circuit was faced with the issue of whether Martin Tapia, a Spanish-speaking LEP man, was improperly denied the use of an interpreter.⁹⁰ Rather than an interpreter, the district court granted him a bilingual attorney.⁹¹ The government argued that whether Tapia was given an interpreter or a bilingual attorney was a matter of judicial discretion.⁹² The Fifth Circuit in no way challenged the discretionary standard under the Court Interpreters Act.⁹³ The Fifth Circuit did, however, acknowledge that the district court knew about Tapia's difficulty with English because an interpreter was used to arraign him.⁹⁴ Further, the district court had not made an inquiry as to whether Tapia's language difficulties would inhibit his understanding of court proceedings.⁹⁵

The Fifth Circuit remanded the case with explicit instructions to make an inquiry pursuant to the Court Interpreters Act.⁹⁶ According to the Fifth Circuit, the test set forth in the Act was not to be taken as a lengthy retelling of the old standard from *Perovich*, but rather as an inquiry into whether the defendant was given the necessary tools to understand his own proceedings.⁹⁷ Regardless of whether he was able to communicate with his counsel, the Act's inquiry under *Tapia* must

⁸⁷ 28 U.S.C. § 1827(d)(1).

⁸⁸ *Id.*

⁸⁹ 631 F.2d 1207 (5th Cir. 1980).

⁹⁰ *Id.* at 1208-09.

⁹¹ *Id.* at 1209.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980).

⁹⁶ *Id.* at 1209-10.

⁹⁷ *See id.*

be made in regard to the defendant's understanding of the proceedings overall.⁹⁸

III. THE PURPOSE AND BURDEN OF JUDICIAL DISCRETION

According to the National Judicial College, the judicial discretion standard exists to “increase[] fairness and [] help to promote an equitable legal process by allowing the judge to consider individual circumstances . . . when the law is insufficient or silent.”⁹⁹ Under this standard, judges must determine the correct law to apply and consider what would result in an equitable judgment.¹⁰⁰

A court can only overturn a matter of judicial discretion on a clear showing of an abuse of discretion.¹⁰¹ Because the trial judge must evaluate many different issues, and issues under the judicial discretion standard seldom offer a correct legal answer, appellate courts must defer to the trial court's discretion unless the trial court clearly abuses its discretionary authority.¹⁰² This standard is appropriate for circumstances like sentencing guidelines, where judges are given a range of punishments for criminal actions and must determine where within that range a particular criminal action falls.¹⁰³

IV. *GONZALEZ V. UNITED STATES*, THE NINTH CIRCUIT, AND THE ENSUING DEBATE

The Court Interpreters Act includes the *Perovich* standard of judicial discretion as the second prong of its test.¹⁰⁴ Rather than eliminating and replacing the standard, the Act narrowed the required discretion to apply solely to the topic of whether the defendant

⁹⁸ *Id.* at 1210.

⁹⁹ J. Thomas Zaney, *Judicial Discretion: 10 Guidelines for its Use*, THE NAT'L JUD. COLL. (2015), <https://www.judges.org/news-and-info/judicial-news-judicial-discretion-guidelines/>.

¹⁰⁰ *Id.*

¹⁰¹ Julia Rugg, *Identifying and Understanding Standards of Review*, GEO. UNIV. L. CTR. 4-5 (2019), <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf>.

¹⁰² *Id.*

¹⁰³ David Debold & Minodora D. Vancea, *Two Recent Supreme Court Decisions Emphasize the Significant Discretion of District Judges to Impose Sentences Outside of the Sentencing Guidelines Range*, GIBSON DUNN (Dec. 12, 2007), <https://www.gibsondunn.com/two-recent-supreme-court-decisions-emphasize-the-significant-discretion-of-district-judges-to-impose-sentences-outside-of-the-sentencing-guidelines-range/>.

¹⁰⁴ See 28 U.S.C. § 1827(d).

understands their own court proceedings.¹⁰⁵ The way that this standard is written, a judge has the power under the second prong to find that a defendant does not speak English well, but well enough still to not require the appointment of a court interpreter.¹⁰⁶

The fear that a judge would deny an interpreter to a defendant in need is not a hypothetical one. The current discretionary standard has led to real-world controversy,¹⁰⁷ most notably in *Gonzalez v. United States*.¹⁰⁸ In *Gonzalez*, Miguel Angel Gonzalez was convicted of conspiracy to possess cocaine with intent to sell.¹⁰⁹ He appealed his conviction to the Ninth Circuit, arguing that he had been denied an interpreter at the district court despite his need.¹¹⁰ The government argued in return that Gonzalez had not made a pretrial motion on the matter, and that it was within the court's discretion to deny a requested interpreter.¹¹¹ The Ninth Circuit determined that the judge in the District Court of Oregon was justified in denying an interpreter, despite acknowledging that Gonzalez experienced in-court problems due to his non-fluency in English, holding that "Gonzalez's language difficulties did not constitute a 'major' problem."¹¹²

Clinging tightly to the Act's language that interpreters must be provided when a party's LEP status affects them "*so as to inhibit* such party's comprehension,"¹¹³ the Ninth Circuit took several factors into account in determining whether the lower court rightfully denied Gonzalez an interpreter. First, Gonzalez had lived in the United States for twenty years.¹¹⁴ Next, Gonzalez was able to respond to the questions he was asked, even though his responses were "brief and somewhat inarticulate."¹¹⁵ The court also noted a statement by Gon-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Pawlosky, *supra* note 49, at 436.

¹⁰⁸ 33 F.3d 1047 (9th Cir. 1994).

¹⁰⁹ *Id.* at 1048.

¹¹⁰ *Id.*

¹¹¹ See *id.* at 1049.

¹¹² *Id.* at 1050-51; see also *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991) (citing *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) to demonstrate that the district court inquiry regarding interpreters is whether the needs of the Court Interpreters Act have been met).

¹¹³ *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1994) (citing 28 U.S.C. 1827(d)(1)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1051.

zalez's lawyer that he felt Gonzalez's plea was made competently.¹¹⁶ Gonzalez himself, on the other hand, claimed that he did not understand the full extent of his guilty plea and its consequences.¹¹⁷ Nonetheless, the Ninth Circuit's focus was on the district court's decision and whether it was an abuse of discretion, rather than focusing on the needs of Gonzalez.¹¹⁸ In all, the appellate court upheld the district court's decision.¹¹⁹

The Court Interpreters Act is not often cited in federal courts,¹²⁰ and virtually never cited at the district court level.¹²¹ Any future court interpreting the Act, therefore, will likely rely heavily on the cases in which it has already been interpreted. Because of the nature of the judicial landscape, *Gonzalez* threatens to be a pivotal case in future decisions. At the time of this Comment, there has been no legislative or judicial response to these cases. The holding in *Gonzalez* has instead become a common precedent for federal inquiries into the Court Interpreters Act.¹²²

V. AN IMPOSSIBLE BURDEN AND THE PLAIN ERROR RULE

The standard in *Gonzalez* created a dangerous precedent for future interpretations of the Act. According to the *Gonzalez* decision, a defendant must "demonstrate that [his or her counsel] was ineffective with respect to recognizing [the defendant's] language difficulties."¹²³ This precedent bared its teeth in another Ninth Circuit case: *Anh Bi Lee v. United States*.¹²⁴ The defendant in this case, known as Le, was a federal prisoner by the time of the appeal.¹²⁵ Le claimed ineffective counsel during his plea bargain process.¹²⁶ The Ninth Circuit determined, based on *Gonzalez*, that Le had not

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1048.

¹¹⁸ *Id.* at 1051.

¹¹⁹ *Gonzalez v. United States*, 33 F.3d 1047, 1048 (9th Cir. 1994).

¹²⁰ Pawloski, *supra* note 49, at 458 (explaining that *Gonzalez* was only the seventh instance in which a federal court interpreted the Court Interpreters Act between 1978 and 1996 where the lower court had denied an interpreter).

¹²¹ *Id.* at 456 (explaining that district courts only interpreted the Act twelve times between 1978 and 1996).

¹²² *See, e.g., Anh Bi Lee v. United States*, 362 F. App'x 752, 754 (9th Cir. 2010).

¹²³ *Gonzalez*, 33 F.3d at 1051.

¹²⁴ 362 F. App'x 752 (9th Cir. 2010).

¹²⁵ *Id.* at 753.

¹²⁶ *Id.*

demonstrated that his counsel was ineffective regarding his language difficulties and affirmed the district court's decision.¹²⁷

On appeal, the Ninth Circuit explained that Le did not show evidence of information that he did not know, but should have known between accepting the guilty plea and going to trial.¹²⁸ The court also found that Le did not make a sufficient showing that evidence was not adequately explained to him.¹²⁹ The burden that the *Gonzalez* precedent placed on Le in this case required Le to explain just what it was that he was not aware of.

The court also held that Le's complaint must show that his counsel's performance fell below an objective standard of reasonableness through an identification of acts or omissions that are not the result of reasonable professional judgement.¹³⁰ This reasonableness test, established by the Supreme Court, is the accepted standard for all claims of ineffective counsel.¹³¹

The hardest facts to prove are the ones you do not know, yourself. Stated generously, the duty to prove one's own misunderstanding is a heavy burden. If all the relevant information had been presented to Le, and Le understood only half of it, perhaps he could have pointed towards the information that was obviously incomprehensible to him. But what if he had understood eighty percent of what was said? What about ninety? Would he have been able to point towards exactly what he misunderstood? Perhaps Le technically understood the proceedings but missed important connotative context to what was being said. Small, easily missed language and cultural issues have been known to cause problems in the court of law.¹³²

¹²⁷ *Id.* at 753-54.

¹²⁸ *Id.* at 754.

¹²⁹ *Id.*

¹³⁰ *Anh Bi Lee v. United States*, 362 F. App'x 752, 754 (9th Cir. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¹³¹ Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1260 (1986) (citing *Strickland v. Washington* as the standard for ineffective assistance claims in both state and federal courts).

¹³² Jieun Lee, *When Linguistic and Cultural Differences Are not Disclosed in Court Interpreting*, MULTILINGUA – J. OF CROSS-CULTURAL AND INTERLANGUAGE COMM'C'N 379, 386-87 (Nov. 2009) (citing an Australian case in which a Korean witness's choice of words to describe items like bed sheets and blankets affected her credibility to the jury); Rebecca Beitsch, *In Many Courtrooms, Bad Interpreters Can Mean Justice Denied*, STATELINE (Aug. 17, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/17/in-many-courtrooms-bad-interpreters-can-mean-justice-denied> (citing a case in which an LEP defendant was told that

The standard of review in discretionary matters for appellate courts is plain error.¹³³ The appellate court must hold that the lower court clearly erred in its judgment upon a weighing of relevant factors.¹³⁴ Under this standard of review, no reasonable judge could argue that the Ninth Circuit erred in its affirmation of the lower court holding.¹³⁵ Le was unable to show in a definitive manner that he had been misinformed.¹³⁶ But for any defendant who speaks some amount of English, this is a high burden of proof.

VI. THE RIGHT TO COUNSEL: A CONSTITUTIONALLY GUARANTEED COURT COST

The Sixth Amendment right to counsel is among the most recognized rights in the country.¹³⁷ Despite being written directly into the Sixth Amendment,¹³⁸ the right to court-appointed counsel has only been a national standard since 1932 and at that point in time was only guaranteed for capital cases.¹³⁹ It took until 1963, in *Gideon v. Wainwright*, for the Supreme Court to hold that the right to counsel even in noncapital cases is a necessary function of a fair trial.¹⁴⁰

Because defendants are guaranteed the right to counsel, the states have been compelled to pay for them in many ways.¹⁴¹ In 2012 alone, state governments spent a total of \$2.3 billion on public defend-

he had been accused of committing a "violación," the Spanish word for rape. The interpreter had meant to tell the defendant that he had been accused of a traffic violation).

¹³³ See *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); see also *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001) (citing *Bogovich v. Sandoval*, 189 F.3d 909, 1001 (9th Cir. 1999) (holding that "a district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact")).

¹³⁴ *Coldicutt*, 258 F.3d at 941.

¹³⁵ See *id.*

¹³⁶ *Anh Bi Lee v. United States*, 362 F. App'x 752, 754 (9th Cir. 2010).

¹³⁷ *Our Rights— Chapter 19: The Right to Counsel*, ANNENBERG CLASSROOM, (June 6, 2017), <https://www.annenbergclassroom.org/resource/our-rights/rights-chapter-19-right-counsel/>.

¹³⁸ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

¹³⁹ *The Right to Counsel*, *supra* note 137 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

¹⁴⁰ *Id.*; see also *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (overturning and rejecting the reasoning in the previous controlling statute from *Betts v. Brady*, 316 U.S. 455 (1942) which the Court describes as having departed from the wisdom of *Powell v. Alabama*, 287 U.S. 45 (1932)).

¹⁴¹ *Erinn Herberman & Tracey Kyckelhahn, State Government Indigent Defense Expenditures, FY 2008–2012 – Updated*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. 2 (2014), <https://bjs.ojp.gov/content/pub/pdf/sgide0812.pdf> (explaining that funding methods, as well as delivery and administration methods, vary from state to state).

ers.¹⁴² As a share of total state spending on judicial-legal expenditures, this figure accounts for approximately 9.5-10 percent of state spending, as was the norm for this period.¹⁴³

ANALYSIS

The judicial discretion standard established under *Perovich* filled a need that otherwise stood unserved. At that time, over four decades before courts universally accepted the right to counsel in criminal cases,¹⁴⁴ the judicial discretion standard was a step in the right direction. But as our country evolves, so must our legal protections.¹⁴⁵ It is this Comment's assertion that the judicial discretion standard in the Court Interpreters Act's two-prong test inhibits both the spirit of the Act and the Sixth Amendment rights of LEP defendants across the country. Appellate courts should therefore reject the judicial discretion standard in the Court Interpreters Act as a violation of LEP Americans' Sixth Amendment rights.

I. THE FOUR TOPICS MAKING REINTERPRETATION OF THE COURT INTERPRETERS ACT NECESSARY

To secure the Sixth Amendment rights of LEP Americans, the Court Interpreters Act's language must be reinterpreted. To understand why and how such a change could be implemented, this analysis will address four fundamental topics. The first topic addresses how the *Perovich* standard was originally useful, but no longer serves its purpose. The second topic observes the outcome of the *Gonzalez* case to illuminate why the Act's current interpretation fails to properly secure LEP due process rights. The third topic examines the unprecedented growth of the interpreting profession in modern years. The fourth topic addresses the practicality of providing interpreters to all LEP defendants, assessing the right to an interpreter as a function of the Sixth Amendment right to due process, comparing it directly with the right to counsel.

¹⁴² *Id.* at 1.

¹⁴³ *Id.*

¹⁴⁴ *Gideon*, 372 U.S. at 344-45.

¹⁴⁵ *Cf. Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (holding that individuals may not be deprived of a fundamental right (in this case the right to marry a person regardless of sex)).

After the examination of the four factors that make removal of the discretionary standard both necessary and practical, this Comment proposes potential solutions. The solutions are reinterpretations of the Court Interpreters Act that seek to either eliminate or severely limit the judicial discretion standard, all of which are more functional interpretations than the current standard. Before the Conclusion, this Comment highlights some shared goals with the English Proficiency Act's proponents. This Comment lastly examines the pragmatic effect that these interpretations would have on court interpreters for LEP Americans.

A. *The Role That the Discretionary Standard Originally Filled*

The Supreme Court decided *Perovich* in 1907, which was before court interpreters were accepted as vital to the justice process as well as before the Court Interpreters Act. With no legislation to guide a court in appointing an interpreter, the judges of the time had to consider all sides of what an interpreter would do for a defendant.¹⁴⁶

The role of an interpreter is sacred in that it entrusts a defendant's own words to another.¹⁴⁷ The court cannot simply find anyone who speaks a given language and appoint them as an interpreter.¹⁴⁸ Because of this intricate nature, courts at every level must swear in an interpreter of the proper professional standing.¹⁴⁹ Qualified interpreters were likely uncommon in the 1900s.¹⁵⁰ With no legislation to set guidelines or qualifications for potential interpreters, the judge had to determine those issues as well.¹⁵¹ Additionally, the transactional costs to courts were likely much higher because of the need to seek out and qualify an interpreter. For these reasons, it was much more practical to give trial courts the discretion to determine when it was necessary to seek out interpreters.

¹⁴⁶ See *Perovich v. United States*, 205 U.S. 86, 91 (1907).

¹⁴⁷ Lee, *supra* note 132, at 380-81 (citing the view of court interpreters as "translation machines" to avoid hearsay in the high courts in Australia, as well as the critical view that interpreters must account for cultural differences to convey the intended feelings).

¹⁴⁸ *Id.* at 381 (further explaining the intricacies of court interpretation).

¹⁴⁹ See, e.g., *Oath of Office for Court Interpreters*, SUP. CT. OF WIS., <https://www.wicourts.gov/services/interpreter/docs/oath.pdf> (last visited Feb. 23, 2022); see also *Language Interpreter Oath 9th Judicial Court*, NCCOURTS, https://www.nccourts.gov/assets/documents/local-rules-forms/958.pdf?FUIX8yU8_vSXTIwQbPSk6NZsLgsKDNmA (last visited Feb. 23, 2022).

¹⁵⁰ See 1900 U.S. CENSUS BUREAU, *supra* note 63 (far fewer individuals were LEP).

¹⁵¹ *Perovich*, 205 U.S. at 91.

At 8.5 percent of the total national population, the LEP population in the United States is a larger part of this nation than at any other point in the country's history.¹⁵² In 1907, this was not the case.¹⁵³ With an estimated 1.2 million LEP citizens in the entire country, courts would naturally deal with interpreter issues less often than they do today.¹⁵⁴ Fewer affected parties meant that not only did the issue show up less often, but also that it was more easily managed. Courts also had yet to establish the right to an interpreter as a function of constitutional rights. After all, no court asserted that the Constitution guaranteed the right to an interpreter until the Second Circuit's decision in *Negron*.¹⁵⁵ And even if the courts did recognize that right, there was likely no cache of readily available interpreters until decades later during the 1940s.¹⁵⁶

In 1907, the discretionary standard was a step forward. Before *Perovich*, there were no significant Supreme Court cases that addressed the idea of interpretation rights for criminal or civil defendants. The court interpreter profession had not developed the way that it has in more modern times. The unitary grant of judicial discretion was the best that courts could reasonably offer to LEP defendants at the time. But both the needs and the resources of the United States have drastically changed in the last century. Continuing to utilize an old standard like *Perovich* ultimately means little if the system never takes the next full step forward.

B. *Gonzalez Illuminates the Dangers of the Current Discretionary Standard*

In *Gonzalez*, the Ninth Circuit affirmed the decision to deny Miguel Angel Gonzalez an interpreter based on the trial judge's belief that Gonzalez's understanding was not sufficiently inhibited by his

¹⁵² See Zong & Batalova, *supra* note 12.

¹⁵³ See 1900 U.S. CENSUS BUREAU, *supra* note 63.

¹⁵⁴ See *id.*

¹⁵⁵ United States ex rel. Negron v. New York, 434 F. 2d at 386, 389 (2d Cir. 1970).

¹⁵⁶ See Mikkelsen, *supra* note 36; Nina Porzucki, *How the Nuremberg Trials Changed Interpretation Forever*, THE WORLD, (Sep. 29, 2014), <https://www.pri.org/stories/2014-09-29/how-do-all-those-leaders-un-communicate-all-those-languages> (explaining that the modern idea of simultaneous interpretation, where interpreters translate to and for defendants in real time as the statements are being made, originated in the Nuremberg Trials in the mid-1940s. These trials are widely considered to be the cornerstone for the court interpretation profession as it exists today).

language barrier.¹⁵⁷ As noted by the dissent, the case would have likely turned out differently if the court addressed the dispute as a matter of material fact.¹⁵⁸ None of the factors that the court considered outweigh Gonzalez's flat assertion that he did not properly understand his proceedings.¹⁵⁹ But according to the Court Interpreters Act, the Ninth Circuit's task was not to determine whether Gonzalez was able to understand his charges and plea in the lower court. Under the abuse of discretion standard, the Ninth Circuit was not charged with determining whether Gonzalez could understand the proceedings, but rather with assessing the trial judge's determination of whether Gonzalez could understand the proceedings.¹⁶⁰ In other words, the focus of the Ninth Circuit was not on Gonzalez, but on the decision-making of the trial judge.

C. *The Booming Interpreter Profession*

Professional interpreters nowadays find themselves in one of the most in-demand modern industries. According to the Bureau of Labor Statistics, there were about 81,400 interpreters and translators in 2020.¹⁶¹ But beyond just the current numbers, the industry growth has been promising. Between 2008 and 2015, the number of interpreters and translators in the United States nearly doubled.¹⁶² And according to the Department of Labor, the period between 2014 and 2024 is expected to experience a twenty-nine percent growth in the interpreter industry.¹⁶³ Considering the average nine percent growth expected for other industries in the same period,¹⁶⁴ twenty-nine per-

¹⁵⁷ *Gonzalez v. United States*, 33 F.3d at 1047, 1050 (9th Cir. 1994).

¹⁵⁸ *Id.* at 1052.

¹⁵⁹ *Id.* at 1048.

¹⁶⁰ *Id.* at 1051.

¹⁶¹ Bureau of Labor Statistics, *Interpreters and Translators Summary*, U.S. DEP'T OF LAB., <https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm> (last visited Feb. 23, 2022).

¹⁶² Florian Faes, *US Language Industry Booms, Doubles Headcount Within 7 Years*, SLATOR LANGUAGE INDUS. INTEL., (May 24, 2017), <https://slator.com/industry-news/us-language-industry-booms-doubles-headcount-within-7-years/>.

¹⁶³ Tamara Cabrera, *The Translating and Interpreting Industry in the United States*, CERVANTES INST. 9-10, (2017), https://cervantesobservatorio.fas.harvard.edu/sites/default/files/028_report_translation_2.pdf.

¹⁶⁴ *Id.*

cent is a comparatively large expectation. To meet this expectation, academic programs for prospective interpreters are growing as well.¹⁶⁵

The growth in this relatively modern industry¹⁶⁶ indicates that the country is changing more and more to meet the needs of its LEP citizens and residents. It also shows that qualified interpreters are becoming more available to potential employers, including courts. Additionally, the fact that LEP residents are much more common in some states than others,¹⁶⁷ means that the interpreter profession can be largely centralized in those locations to serve individuals who need them.

In 1907, there were no tangible standards for court interpreters, and qualified individuals may have been few and far between. But that simply is no longer the case. The interpreter profession in the modern age has snowballed into a booming industry. It has experienced a massive period of growth that started in 2008 and will likely continue for years to come. With the current rate of growth, there will be little to no issue finding enough interpreters to fill the needs of LEP defendants.

D. *The Sixth Amendment, the Right to Counsel, and Practicality*

Adjusting the Court Interpreters Act's standard in accordance with this Comment's conclusions would likely result in an increase in court interpreter use nation-wide. But this shift would not only be more strongly adherent to the Constitution, it would also be practical. For those who require it, the right to an interpreter, like the right to counsel, is a necessary Sixth Amendment due process right, much in the way that the right to an interpreter is now largely accepted to be.¹⁶⁸

Rather than being subject to a balancing test the same way that the right to an interpreter is, the right to counsel is assured to any defendant who needs it.¹⁶⁹ This assurance has resulted in \$2.3 billion

¹⁶⁵ *Id.* at 4.

¹⁶⁶ See Mikkelson, *supra* note 36 (summarizing the history of court interpretation as a legitimized profession and discussing the important years for interpreters. Important points include that the 1978 Court Interpreters Act placed the first ever requirements for court interpreters, that Canada only began certifying its interpreters in the 1980s, and that State requirements were largely put into place after 1995).

¹⁶⁷ Zong & Batalova, *supra* note 12.

¹⁶⁸ United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

¹⁶⁹ See Gideon v. Wainwright, 372 U.S. 335 (1963).

expense across the country in state expenses.¹⁷⁰ So what separates these rights, that one would be the subject of billions of state tax dollars every year and the other would not even be a guarantee?

Perhaps it is the textual difference. Despite its late materialization in the 1960s,¹⁷¹ the right to counsel is explicitly stated as one of the key protections in the Sixth Amendment.¹⁷² The right to an interpreter however is not explicitly stated in the Sixth Amendment.¹⁷³ Under the Amendment's language, however, it might as well be. As Circuit Judge Kaufman wrote in *Negron*, Sixth Amendment protections become meaningless if the defendant is unable to effectively communicate with the court and with his or her own counsel.¹⁷⁴ Assigning a public defender but not an interpreter to an LEP defendant essentially lowers the value of that lawyer to the defendant. Every small miscommunication, cultural misunderstanding, or other unaccounted for issue leads to a lower value of representation to the defendant. The Sixth Amendment's language itself even strongly implies the necessity of an interpreter for an LEP defendant. Defendants are assured to be "informed of the nature and cause of the accusation . . . confronted with the witnesses . . . and to have the assistance of counsel."¹⁷⁵

All of these required protections of information, confrontation, and assistance have nothing to do with the English language itself, but rather are measures of understanding. The right to confront an opposing party does not exist in a vacuum. There is no point to confronting the opposition without the ability to communicate with them or hear their testimonies and cross-examinations. Even more importantly, the right to be informed of an accusation against oneself requires a deep understanding of the connotative or cultural importance of what is being said.¹⁷⁶ Words like "bench," "bar," "book," "determine," "call," and many others all carry legal definitions that lie far beyond the technical definitions of the words.¹⁷⁷ Just like in *Anh*

¹⁷⁰ See Herberman & Kykelhahn, *supra* note 141, at 1.

¹⁷¹ See *Gideon*, 372 U.S. at 342-45.

¹⁷² U.S. CONST. amend. VI.

¹⁷³ *Id.*

¹⁷⁴ See *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970).

¹⁷⁵ U.S. CONST. amend. VI.

¹⁷⁶ See Lee, *supra* note 132, at 381.

¹⁷⁷ Rebecca Jowers, *Common Words with Uncommon Legal Meanings*, L xico Jur dico Espa ol-Ingles, <https://rebeccajowers.com/category/common-words-with-uncommon-legal-meanings/> (last visited Feb. 23, 2022).

Bi Lee, a defendant may not even recognize whether words and phrases carried a different definition or connotation in a legal setting, and would be unable to prove his own misunderstanding. Under the exact language of the Sixth Amendment, the right to an interpreter is all but written into American due process rights.

Providing court interpreters for the entire LEP population would be significantly less costly than providing public defenders for every indigent criminal defendant. State governments spent a total of \$2.3 billion on public defenders in 2012.¹⁷⁸ The next year, the United States had 46.5 million indigent Americans.¹⁷⁹ Assuming that there were no monumental changes in the poverty statistics between 2012 and 2013, this means that the 6.4 million impoverished LEP Americans in 2013 made up 13.76 percent of the impoverished population.¹⁸⁰ Assigning court interpreters for the impoverished LEP defendants,¹⁸¹ and assuming that interpreters would be paid equally to public defenders for the same number of hours, would cost \$320 million.¹⁸² This cost estimate, however, is still much too high. Although providing interpreters costs money, the potential cost is marginal when compared to the cost of assigning a lawyer to every impoverished defendant to fulfill the Sixth Amendment right to counsel. Where defense lawyers spend lengthy hours outside the courtroom researching, conducting interviews, writing arguments, and preparing for trials, court interpreters have no such duties. Interpreters would also be more heavily centralized in states that have higher LEP populations, creating markets in those states that will naturally drive down costs. The amount necessary to pay for the needed interpreters across all fifty states is therefore likely to be only a smaller fraction of the \$320 million ceiling.

There is no justifiable place for judicial discretion in determining a criminal defendant's need for an interpreter. The pool of citizens

¹⁷⁸ See Herberman & Kyckelhahn, *supra* note 141, at 1 (referring to statistics on "indigent defense" spending by state governments).

¹⁷⁹ Zong & Batalova, *supra* note 12.

¹⁸⁰ Mark Memmott, *Poverty Rate Unchanged in 2012*, Nat'l Pub. Radio: The Two-Way (Sept. 17, 2013), <https://www.npr.org/sections/thetwo-way/2013/09/17/223373452/poverty-rate-unchanged-in-2012>; Zong & Batalova, *supra* note 12 (totaling impoverished Americans at 46.5 million. The latest available estimate of the LEP population comes from 2013. This percentage comes from dividing the number of impoverished LEP Americans from the estimated total number of impoverished Americans).

¹⁸¹ Not including disabled Americans who need interpreters.

¹⁸² Derived as 13.76 percent of the \$2.3 billion figure to provide public defenders.

who are assigned interpreters should be larger, rather than smaller, because a misstep would deny an LEP American his or her Sixth Amendment due process rights in the same way that denying counsel would abridge due process rights. A new interpretation of the language in the Court Interpreters Act, or an overruling of the second prong of the Act's current test, would remove this issue.

II. POTENTIAL SOLUTIONS

First, the Court Interpreters Act should adopt the CEFR standard for determining fluency. The CEFR establishes multiple levels of proficiency in a language that creates a more easily applicable test in determining whether someone has difficulty speaking a language.¹⁸³ The Act, on the other hand, currently uses individual judges' discretion to make the same determination.¹⁸⁴ Supplying the CEFR standard should eliminate any uncertainty that may come with changing or replacing the current standard.

A reexamination of the Act under a Sixth Amendment-based claim could provide one of two potential outcomes consistent with this Comment's assertion. First, the discretionary clause could be ruled as an unconstitutional abridgement of due process rights. This is an unlikely option, as the discretionary standard has survived multiple Supreme Court cases and has shown no signs of reconsideration.¹⁸⁵ The determining factor in this issue is whether the Supreme Court is willing to openly declare court interpreter rights to be an aspect of Sixth Amendment due process rights. The Court has made no such declaration so far. However, many appellate courts have made similar statements, with no significant detracting opinions.¹⁸⁶ Following this line of thought, the Supreme Court could easily interpret the judicial discretion standard within the Court Interpreters Act's two-prong test as an unconstitutional affront to LEP Americans' Sixth Amendment rights, thus striking it down.

¹⁸³ See Council of Europe, *supra* note 44.

¹⁸⁴ See 28 U.S.C. 1827(d)(1).

¹⁸⁵ See *Perovich v. United States*, 205 U.S. 86, 91 (1907) (trial court had discretion in whether to grant defendant an interpreter).

¹⁸⁶ See, e.g., *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970).

A. *Declaring the Current Standard an Unconstitutional Violation of Sixth Amendment Rights*

What would happen if the Court Interpreters Act was rewritten to eliminate the judicial discretion standard altogether? With only the first prong of the current test remaining, a defendant would be burdened only with proving that they either do not speak English well or primarily speak another language.¹⁸⁷ This singular test would not have been practical at the time that the Act was enacted, due to the low number of interpreters available to LEP defendants at that time. But in the modern world, with the advancement of the interpreter profession, the model infrastructure of public defenders, and a more concrete standard under which to determine an individual's fluency in English, the current standard is no longer necessary and may be replaced with a more correct interpretation of the Act that better secures the rights of LEP defendants.

The judicial discretion standard does not belong as a matter of basic due process rights and should be reexamined. This provision has been interpreted in a way that limits the obvious and express purpose of the legislation—protecting LEP Americans' Sixth Amendment rights.

B. *Adjusting the Current Standard to Match Modern Facts*

There is another, more moderate solution of reexamining the Court Interpreters Act. If the court finds that the discretionary clause is constitutional, the court should still reexamine the clause to ensure its use does not violate LEP defendants' Sixth Amendment rights.

The central issue in the current interpretation of the Act, as demonstrated in *Gonzalez*, is that the trial court is given discretion on two issues: whether the defendant's LEP status inhibits them at all, and whether that inhibition causes a "major problem."¹⁸⁸ This *Gonzalez* interpretation seemingly adds a third prong to the Court Interpreters Act test, granting the trial court the authority to determine whether a defendant is inhibited, and also the weight of that inhibition. The Act's text says nothing on this latter issue, ending the test at

¹⁸⁷ 28 U.S.C. §1827(d)(1).

¹⁸⁸ *Gonzalez v. United States*, 33 F.3d 1047, 1050-51 (9th Cir. 1994) (holding that even though the defendant's LEP status may have inhibited him, that inhibition did not constitute a large enough issue that he required an interpreter).

the determination of whether a defendant is inhibited by their LEP status.¹⁸⁹ Under a more textualist approach, this test would grant the right to a court interpreter to any individual who does not speak English fluently and experiences any barriers due to that fact. While the statute would remain the same, its interpretation would be more stringent than it currently is. Rather than *restricting* LEP defendants' rights to an interpreter, the discretionary clause would be read as a safeguard against wasteful interpreter assignments. Trial courts would have the discretion to deny interpreters to defendants who technically fulfill the English as a second language requirement of the test's first prong but are otherwise unambiguously fluent in English.

Applying the standard in either of the proposed ways will do two important things: First, it will fully guarantee all criminal defendants their Sixth Amendment rights. Second, it leaves room for Congress to update or replace the Court Interpreters Act with newer and more modern legislation. The cases of *Gonzalez* and *Anh Bi Lee* have demonstrated the flaws in the old standard.¹⁹⁰ The current Act is the only federal legislation ever to address the issue of court interpreters.¹⁹¹ Not only that, but, the interpreter profession has risen to be an industry with more than 80,000 workers across the nation, and is still growing at a fast rate.¹⁹² Potential Sixth Amendment violations against LEP Americans are not fringe worries, but issues facing a substantial portion of Americans, solvable by a rapidly growing industry.

C. *Reassessing the Standard of Review*

The abuse of discretion standard currently applies to court interpreter assignment challenges because of the second prong of the Court Interpreters Act test.¹⁹³ Removing that prong would also necessitate a change in the appropriate standard of review.

The standard of review more appropriate to granting or denying a court interpreter is the clearly erroneous standard applied to ques-

¹⁸⁹ 28 U.S.C. §1827(d)(1).

¹⁹⁰ See *Gonzalez*, 33 F.3d at 1049-51 (holding that a defendant whose fluency in English is questionable at best, by the modern understanding of the word "fluency," was rightfully denied an interpreter); see also *Anh Bi Lee v. United States*, 362 F. App'x 752, 754 (9th Cir. 2010) (holding that a defendant claiming that he did not understand proceedings must demonstrate what he failed to understand).

¹⁹¹ 28 U.S.C. §1827.

¹⁹² Bureau of Labor Statistics, *supra* note 161.

¹⁹³ 28 U.S.C. § 1827(d)(1).

tions of fact.¹⁹⁴ This is because the determination of whether an individual is LEP is a question of fact, rather than of law, and the judge would no longer have discretion over the issue. This standard would provide a higher level of scrutiny on any court action that denies an interpreter to an individual, creating an environment more centered on protecting Sixth Amendment rights.

D. *Common Ground*

The Court Interpreters Act's current discretionary standard is harmful even from the perspective of those opposed to the rise of non-English languages in the United States. In 2019, the English Unity Act was reintroduced in Congress.¹⁹⁵ This bill, like its previous iterations,¹⁹⁶ aims to establish English as the national language of the United States.¹⁹⁷ Proponents of this bill and its predecessors argue that having one national language will encourage immigrants to speak the common language and ultimately improve their quality of life.¹⁹⁸ The bill's detractors, however, argue that the incentive to learn English already exists¹⁹⁹ and that creating a national language would serve only to harm LEP Americans.²⁰⁰ These detractors worry that non-English-speaking citizens will receive more limited government and legal representation.²⁰¹

The English Unity Act argues not that non-English-speakers should be punished, but instead that they should be encouraged to learn English for their own legal and social benefits.²⁰² This motivation, to avoid issues caused by language barriers, necessarily supports

¹⁹⁴ See Rugg, *supra* note 101, at 2 (explaining that *de novo* review is appropriate for questions of constitutional interpretations).

¹⁹⁵ H.R. 997, 116th Cong. (2019).

¹⁹⁶ See H.R. 997, 115th Cong. (2017); see also S. 678, 114th Cong. (2015).

¹⁹⁷ H.R. 997, 116th Cong. (2019).

¹⁹⁸ See, e.g., Brandon Brice, *Why English Should be the Official Language of the United States*, WASHINGTON TIMES (Dec. 31, 2014), <https://www.washingtontimes.com/news/2014/dec/31/why-english-should-be-official-language-united-sta/>.

¹⁹⁹ See Olga Zenteno, *Don't make English Our Official Language*, SC TIMES (Feb. 7, 2014), <https://www.sctimes.com/story/opinion/2017/02/14/dont-make-english-our-official-language/97859708/>; see also Samantha Yenger Cremean, *Why America Should Never Make English its National Language*, MEDIUM (July 31, 2018), <https://medium.com/the-establishment/why-america-should-never-make-english-its-official-language-31b629bb2e65>.

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² H.R. 997, 116th Cong. (2019) (stating in the preamble that the purpose of this bill is to both include English proficiency as a naturalization requirement, and to "avoid misconstructions

a reinterpretation of the Court Interpreters Act. English Unity Act advocates argue that all Americans should be encouraged to learn and speak English as a national language, so as to promote national unity and to prevent legal misconstructions.²⁰³ But a bill like the English Unity Act would not promote the learning of English among LEP Americans under the current interpretation of the Court Interpreters Act.

The judicial discretion standard in the Court Interpreters Act ultimately discourages LEP Americans from learning English. To see why, consider the CEFR standard. Under this standard, LEP Americans would receive interpreter services until they exceed level B-1 and enter B-2 or higher.²⁰⁴ At that point, there is too strong of an incentive not to learn English. When a person faces the option of either losing their legal protections or keeping them, those people will choose to keep them every time. In its current form, the Act protects LEP citizens who are unable to speak English to the point that their legal misunderstandings are clear to outside parties but does not necessarily protect LEP citizens who are in the process of learning the language. Dedicated, hard-working students of the English language are essentially threatened by the potential end of having their court interpreter safety net torn away before they are ready. This can easily be remedied by either of the proposed solutions above. Reinterpreting the Act to provide interpreters to a broader base of individuals eliminates this issue by removing the incentive for people not to become fluent in English. Before there is any serious discussion of a national language, the legal system must reward LEP Americans who choose to study the English language in the first place.

CONCLUSION

The Court Interpreters Act's discretionary standard is a tool from the dark ages. Before LEP Americans had any other legislation or case history to lean on, the discretionary standard offered judges a way to assign interpreters according to the need that they saw in a defendant.²⁰⁵ It was a necessary step in moving towards legislation like

of the English language texts of the laws of the United States, pursuant to Congress' powers to provide for the general welfare of the United States").

²⁰³ See Brice, *supra* note 198.

²⁰⁴ See Council of Europe, *supra* note 44.

²⁰⁵ *Perovich v. United States*, 205 U.S. 86, 91 (1907).

the Court Interpreters Act. But when the country adopted a new legislative standard in the Act, the judicial discretion standard latched on. As time moves forward and the world becomes more advanced, we must evaluate whether old tools are functional anymore, even those that were useful in their appropriate times. To judge a tool's usefulness, we must first look to what purpose it serves. The judicial discretion standard existed to serve the purpose of court interpreter legislation that did not exist, acting as the only mechanism by which an LEP American could obtain an interpreter. The legislation to replace this standard came late, at the tail end of the civil rights wave in the 1960s and 1970s. But that legislation had no prior sources to reference. Perhaps as a safeguard against its own potential oversights, Congress included the old tool of judicial discretion in with its new test for whether a defendant has the right to an interpreter.²⁰⁶ In doing so, the Court Interpreters Act improved the criminal justice process for LEP defendants but left the door open for courts to continue using a standard rooted in a bygone era.

The United States is an entirely different country now than it was during *Perovich*. The LEP population has multiplied by more than sixteen times its size.²⁰⁷ Advocates for minority group civil rights have addressed such civil rights issues since the 1960s in ways that had not yet been seen before that decade. Interpretation has not only emerged as a competitive, full-time profession, but is growing at an explosive clip.²⁰⁸ And perhaps most importantly, the right to an interpreter has been recognized as a constitutional right for LEP Americans by all but the Supreme Court. The discretionary standard no longer serves its purpose. Instead, it inhibits the Sixth Amendment rights of LEP Americans, especially those who invested themselves into learning their country's dominant language. To better serve the purpose of protecting LEP Americans' due process rights, the discretionary standard in the Court Interpreters Act must be either declared unconstitutional or limited to an extremely narrow reading. This country has a history of protecting individuals' essential rights, as demonstrated by the Court Interpreters Act itself. But times have

²⁰⁶ 28 U.S.C. §1827(d)(1).

²⁰⁷ See 1900 U.S. CENSUS BUREAU, *supra* note 63; see also Zong & Batalova, *supra* note 12.

²⁰⁸ Bureau of Labor Statistics, *supra* note 161.

changed, and so has the American population. The safeguards to essential rights should do the same.