Out of Sight, Out of Mind: Deprivation of Due Process in Removal Proceedings

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Introduction

I wake up & it breaks my heart. I draw the blinds & the thrill of rain breaks my heart. I go outside. I ride the train, walk among the buildings, men in Monday suits. The flight of doves, the city of tents beneath the underpass, the huddled mass, old women hawking roses, & children all of them, break my heart. There's a dream I have in which I love the world. I run from end to end like fingers through her hair. There are no borders, only wind. Like you, I was born. Like you, I was raised in the institution of dreaming. Hand on my heart. Hand on my stupid heart.

Cameron Awkward-Rich
"Meditations in an Emergency" (2019)

At the age of eighteen, Ousman Darboe spent nearly ten months pending trial in solitary confinement at Rikers Island in New York,[1] an institution known for its "deep-seated culture of violence" and "excessive and unnecessary use of force by staff."[2] For five of those ten months, Ousman did not even know he was allowed to step outside for an hour a day to get fresh air—so he simply did not.[3] Solitary confinement for a period exceeding fifteen consecutive days is deemed torture by the United Nations.[4]

1 Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story is a Common One for Black Immigrants*, Vox Media (Feb. 5, 2020), https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline.

2 *Id.*; U.S. Dep't of Just., CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (Aug. 4, 2014). Solitary confinement for juveniles in Rikers' has since ended. *See* Matt Stieb, *Is Solitary Confinement Here to Stay at Rikers Island?*, N.Y. Mag. (Jan. 21, 2022), https://nymag.com/intelligencer/2022/01/is-solitary-confinement-here-to-stay-at-rikers-island.html.

3 Ibrahim, *supra* note 2.

4 Reuven Blau & Graham Rayman, *Solitary at Rikers: 'People Go Crazy in There,'* The City (Jan. 17, 2023), https://www.thecity.nyc/2023/1/17/23559414/solitary-confinement-rikers-jail-people-go-crazy-in-there. One former inmate recounts:

> [E]ventually you find yourself talking to yourself and then eventually you find yourself counting the cockroaches that come through your doors, or how many times you're going to see a mouse today. And you

After being at Rikers Island for about sixteen months, Ousman was finally sentenced to serve time for petty theft before ultimately being paroled nine months later.[5] Ousman, then twenty years old, was free to start fresh. He joined a re-entry group for young men released from Rikers, moved in with his parents, and began dating his longtime friend from high school.[6] Shortly thereafter, however, a neighbor accused Ousman of stealing her jewelry.[7] Despite the fact that no stolen jewelry was ever recovered from Ousman's belongings, he was charged for the crime after that same neighbor identified him as the assailant in a police lineup.[8] After pleading not guilty, Ousman was released on bail.[9] But, seeing as this charge was itself a violation of his parole, Ousman was sent back to Rikers where he continued to shuffle in and out of solitary confinement.[10] His time in Rikers had taken a toll on Ousman, and he eventually took a plea deal for the robbery offense in exchange for "time served,"[11] meaning that his confinement in Rikers up until that point could be used to satisfy the sentence for robbery offense. Ousman maintains to this day that he did not commit the robbery, but his plea enabled Ousman to be released and return home to his parents.[12] The nightmare appeared to be over.

However, this matter is not so simple for people like Ousman: he was undocumented.[13] He had traveled to the United States from Gambia at the age of six.[14] Immigration and Customs Enforcement ("ICE") agents appeared at Ousman's parents' home only months after his release from Rikers.[15] The agents knocked on Ousman's door, posing as police

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stare out the window endlessly just looking at the grass and leaves blowing in the winds. People go crazy in there.

Id.

5 Ibrahim, *supra* note 2.

6 *Id.*

7 *Id.*

8 *Id.* (Ousman's sister recounts: "'She thinks that he did it because it was a 'big black man' . . . and [that's who] Ousman was.'").

9 *Id.*

10 *Id.*

11 *Id.* Innocent defendants often plead guilty to "get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial." John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 173 (2014).

12 *See* Ibrahim, *supra* note 2.

13 *Id.*

14 *Id.*

15 *Id.*

and claiming to have a warrant.[16] Once Ousman opened the door, ICE agents were able to arrest him as a deportable noncitizen,[17] due to the sole offense on his criminal record and his status as an undocumented person.[18]

ICE took Ousman on July 31, 2017.[19] Days later, his girlfriend would learn that she was pregnant.[20] Ousman would miss the birth of his daughter.[21] He would miss the first two and a half years of her life.[22] He would miss countless memories with his eight siblings and parents.[23] And he would marry an old high school friend from within the walls of a detention center.[24] This is because Ousman would be incarcerated again—only this time, he would be incarcerated under ICE.[25] In the years to come, Ousman would even be pardoned from the robbery charge that he had plead guilty to, but ICE would nonetheless detain him for three years—longer than any other New Yorker in the history of ICE detention.[26]

To be clear, Ousman had not committed a new crime that led to his arrest. Rather, his criminal past enabled ICE to detain him without any ability to defend himself. Thousands of noncitizens, regardless of their criminal history, face the same targeted mistreatment as Ousman. Part I of this paper explores the consequences of criminal conviction and immigration law violations, drawing a connection between the two legal processes and highlighting the need for due process in both. In the first subsection of Part I, I specifically point to the right to state-appointed counsel in criminal proceedings as required by due process, and the noticeable lack of such a right in immigration proceedings. Further, in the next subsection of Part I, I highlight the urgent and widely acknowledged need for adequate interpreter services in courtrooms to ensure due

16 *See id.*

17 *See* Felipe De La Hoz, *The ICE Ruse: How Agents Impersonate Local Law Enforcement and Lie to Make Arrests*, Documented (June 18, 2018), https://documentedny.com/2018/06/18/the-ice-ruse-how-agents-impersonate-local-law-enforcement-and-lie-to-make-arrests/.

18 Ibrahim, *supra* note 2.

19 *Id.*

20 *Id.*

21 *See id.*

22 *Id.*

23 *See id.*

24 *Id.*

25 *Id.*

26 *Id.*; Matt Katz, *Held by ICE Longer Than Any New Yorker, Bronx Man Is Finally Freed*, WNYC News (Sept. 29, 2020), https://www.wnyc.org/story/held-ice-longer-any-new-yorker-bronx-man-finally-freed/.

process, and the ways in which interpreter services in immigration courtrooms are falling far short. In Part II, I explore recent litigation across the federal courts through which noncitizens and attorneys have argued for further due process protections in immigration proceedings; I note the tools that have worked in a number of recent cases and how they may be used to provide due process protections for noncitizens in the future.

I. Due Process Issues in Removal Proceedings

In determining which, if any, protections apply to noncitizens in proceedings brought forth by the government, it is necessary to understand the foundational principles that separate citizens and noncitizens into separate protective categories. The text of the Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of the law."[27] Due process requires, "in an elemental and fundamental sense, that there should be some form of a hearing in front of a neutral fact-finder and an opportunity to be heard 'at a meaningful time and in a meaningful manner,' before an individual is deprived of a fundamental right or property interest."[28] As a part of the Bill of Rights, this aspect of the Fifth Amendment applies to all persons in the United States, and not just documented citizens of the United States.[29]

Much has been said about an individual's due process rights in a criminal proceeding, which is perhaps the most legible way in which a person can be deprived of a fundamental right like life or liberty through incarceration or the death penalty. Due to the risk of losing these rights if convicted, courts have enforced a number of measures to ensure that an individual's opportunity to be heard in criminal court is truly meaningful. In doing so, courts have acknowledged the dire need of a defendant to make their case to the best of their ability before being deprived of a sacred and protected feature of personhood. These protective measures include a right to government-provided counsel,[30] a speedy trial,[31] and the right to a "qualified court interpreter" for Limited

27 U.S. Const. amend. V.

28 United States v. Karper, 847 F. Supp. 2d 350, 357 (N.D.N.Y. 2011) (quoting Mathews v. Eldridge, 424 U.S. 319, 333–34 (1976)).

29 Devitri v. Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018) ("The Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.").

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

31 Barker v. Wingo, 407 U.S. 514 (1972).

English-Proficiency ("LEP") defendants.[32]

When faced with immigration proceedings that may result in deportation, a respondent[33] in immigration court likewise faces the threat of losing their life, liberty, and property. Many individuals subject to deportation risk persecution, violence, or death if deported to the country from which they fled.[34] If an individual is found deportable, they risk losing their liberty in ICE detention, which functions akin to prison.[35] In fact, ICE maintains that their primary correctional principles are those of "care, custody, and control," which are identical to the principles enforced in criminal correctional facilities.[36] Moreover, individuals in ICE detention risk losing their personal property located within the United States at the time of their removal.[37] More broadly speaking, much like mass incarceration's effects on predominantly Black and Latinx communities,[38] the deportation of a primary wage earner from a household hinders that household's ability to hold onto their substantial and wealth-bearing investments, such as their homes.[39]

32 Ramos-Martinez v. United States, 638 F.3d 315, 325 (1st Cir. 2011) ("Once the court is on notice that a defendant's understanding of the proceedings may be inhibited by his limited proficiency in English, it has a duty to inquire whether he needs an interpreter.").

33 A noncitizen subject to proceedings in immigration court is referred to as the "respondent." *See* Exec. Off. for Immigr. Rev., Fact Sheet (updated Dec. 2, 2022), https://www.justice.gov/eoir/observing-immigration-court-hearings.

34 *See* Sarah Stillman, *When Deportation is a Death Sentence*, New Yorker (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence.

35 U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 2 (Oct. 6, 2009) ("ICE operates the largest detention and supervised release program in the country . . . [T]he facilities that ICE uses to detain [noncitizens] were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.").

36 *Id.*

37 Guillermo Cantor & Walter Ewing, *Deported with No Possessions: The Mishandling of Migrants' Personal Belongings by CBP and ICE* 1, Am. Immigr. Council (Dec. 2016) ("[T]he data spotlights the all-too-common loss of critical belongings . . . Loss of these items can leave newly deported migrants stranded in unfamiliar and possibly dangerous cities with no means of buying a bus ticket home, calling for help, securing government services, or staying warm in frigid temperatures.").

38 *See generally* Ames Grawert & Terry-Anne Craigie, *Mass Incarceration Has Been a Driving Force of Economic Inequality*, Brennan Ctr. for Just. (Nov. 4, 2020), https://www.brennancenter.org/our-work/analysis-opinion/mass-incarceration-has-been-driving-force-economic-inequality.

39 *See* Jacob S. Rugh & Matthew Hall, *Deporting the American Dream: Immigration Enforcement and Latino Foreclosures*, 3 Socio. Sci. 1053, 1057, 1069 (2016). Researchers have found:

This confines the broader economic advancement of immigrant communities over time and effectively limits their ability to cultivate generational wealth.[40] In this way, deportation has a profound impact on the individuals subject to the removal process, and the ripples of this impact are absorbed by communities with high exposure to ICE.

Despite the threat of deprivation to life, liberty, and property, due process is not afforded to individuals facing immigration proceedings in the same manner afforded to criminal defendants. Immigration proceedings fall under the jurisdiction of the Executive Office of Immigration Review ("EOIR"), an office within the Department of Justice ("DOJ").[41] Proceedings in immigration court are "administrative" civil proceedings, which differ in structure to criminal proceedings.[42] Civil proceedings do not include a stringent adherence to protections like government-appointed counsel, reliable courtroom interpreter requirements, or speedy facilitation.[43] Without these protections, only 37% of immigrants secure legal representation in their removal cases, and the 89% of respondents that appear in immigration court with limited English proficiency must rely on a system of courtroom interpretation that is unreliable and overburdened.[44]

Additionally, the judges who are appointed to the EOIR are not appointed through the same procedures as judges in traditional civil or criminal courtrooms. EOIR judges do not derive their power from Article III, which grants the judiciary its necessary independence from the influence of Congress and the President.[45] Rather, the DOJ allows

> The ensuing consequences of foreclosure for Latino households of reduced home ownership and wealth illustrate how legal status and racialized patterns of deportation act to stratify Latinos' housing outcomes and impede social mobility . . . For millions of Latino households, plummeting home equity and home ownership have been devastating in the twenty-first century context of risky lending and the foreclosure crisis.

Id. at 1070.

40 *Id*. at 1069–70.

41 8 C.F.R. § 1003.0 (2023).

42 Exec. Off. for Immigr. Rev., *supra* note 34.

43 *See* Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties, Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 Admin. L. Rev. 367, 370 (1993) ("Criminal defendants are afforded constitutional safeguards to which civil defendants are not entitled.").

44 Cristobal Ramón & Lucas Reyes, *Language Access in the Immigration System: A Primer*, Bipartisan Pol'y Ctr. (Sept. 18, 2020), https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer/.

45 8 C.F.R. § 1003.10 (2023); U.S. Const. art. III.

the country's chief law enforcement officer—the Attorney General—to appoint those judges.[46] Often, these judges come from within the Attorney General's own office, ICE, DHS, or the US Attorney's Office as former representatives for the state.[47] This conflict of interest is not hidden; the federal government says this explicitly in the Code of Federal Regulations, stating, "[i]mmigration judges shall act as the Attorney General's delegates in the cases that come before them."[48] Hence, a visible doubt arises about the EOIR's ability to conduct "judicial" proceedings that are traditionally considered independent, and critically so, from the executive influence of the DOJ. This question on the legitimacy of immigration courts remains unresolved, with numerous critics observing their fundamental flaw:

> They are not actual courts, at least not in the sense that Americans are used to thinking of courts — as neutral arbiters of law, honoring due process and meting out impartial justice . . . . It's hard to imagine a more glaring conflict of interest than the nation's top law-enforcement agency running a court system in which it regularly appears as a party.[49]

The mixing of executive and judiciary functions in immigration proceedings contrasts sharply with the principles behind the structuring of American courts. Executive interference in judicial matters has been a general concern embedded throughout American jurisprudence, as judges' ability to remain impartial may be influenced through the executive's looming presence in their affairs.[50] It is this specific concern that has historically compelled the judiciary to remain independent.[51]

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46 *Id.*

47 U.S. Dep't of Just., EOIR Announces 24 New Immigration Judges (Oct. 27, 2021), https://www.justice.gov/d9/pages/attachments/2023/05/30/eoir_announces_24_new_immigration_judges_10272021.pdf.

48 8 C.F.R. § 1003.10 (2023).

49 The Ed. Bd., *Immigration Courts Aren't Real Courts. Time to Change That*, N.Y. Times (May 8, 2021), https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html.

50 *Why America Needs an Independent Immigration Court System: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Judiciary Comm.*, 117th Cong. 2 (2022) (Statement of Greg Chen, Am. Immigr. Laws. Ass'n) ("Another example of the improper pressure the executive branch has exerted over the immigration courts is a December 2017 memorandum issued by then-Attorney General Jeff Sessions encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.").

51 Am. Bar Ass'n, *The Rule of Law and the Courts* (Aug. 22, 2019). https://americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-and-the-courts/. ("An independent judiciary is necessary to ensure the rule of law is

The EOIR's departure from judicial independence and relaxation of conventional courtroom formalities—particularly those of due process—renders indigent LEP individuals in immigration proceedings defenseless in navigating a body of law that takes barred attorneys years to understand. In this way, many individuals in immigration proceedings lack any "opportunity to be heard . . . at a meaningful time and in a meaningful manner" as required by due process in situations as dire as removal proceedings.[52]

A. Access to Counsel

In United States criminal courts, defendants have a right to counsel protected by the Sixth Amendment.[53] This Sixth Amendment right to counsel also contemplates defendants that cannot afford to retain private counsel; in these cases, the government is required to provide representation to criminal defendants at little-to-no cost.[54] The reasoning behind this right to counsel is presented in *Powell v. Alabama*, 287 U.S. 45 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[55]

As demonstrated in the Court's reasoning in *Powell*, criminal jurisprudence views a wrongful conviction arising solely from an absence of counsel as an unacceptable outcome, leading courts to ensure that a criminal defendant has an unfettered right to counsel that is not

respected. Judicial independence means that judges are not subject to pressure and influence and are free to make impartial decisions based solely on fact and law.").

52 Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

53 Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

54 *Id.*

55 Powell v. State of Alabama, 287 U.S. 45, 68–69 (1932).

conditioned on their ability to pay.[56] A total lack of understanding of the legal process would deprive a criminal defendant of any meaningful opportunity to make their case and battle imprisonment, binding the right to counsel as an essential prong of due process.[57]

But the figurative defendant contemplated in *Powell* also enters an immigration court every single day, confused and unfamiliar with the procedures taking place around them and faced with the looming threat of death, detention, or deprivation. Recognizing the parallels between individuals subjected to removal proceedings and defendants in criminal court, the federal government did provide noncitizens with a right to have representation present in immigration court.[58] Notably, this statute governing the "right to counsel" in immigration court unequivocally relieves the government of any financial obligation to *provide* such counsel.[59] The government merely *allows* a noncitizen to have counsel in removal proceedings, with no guarantee of unhampered access to that counsel and no guarantee of provided counsel for indigent respondents. Accordingly, nearly two-thirds of respondents in immigration proceedings are forced to represent themselves pro se.[60]

In civil immigration proceedings, the role of counsel can be near-dispositive in garnering successful outcomes. A national study on the role of counsel in immigration court found that "immigrants with attorneys fare[] far better: among similarly situated removal respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, and five-

56 18 U.S.C. § 3006A.

57 *See Powell*, 287 U.S. at 68–69.

58 8 U.S.C. § 1362. The statute provides, "In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings."

59 *Id.*

60 Ingrid Eagly & Steven Shafer, Am. Immigr. Council, Access to Counsel in Immigration Court 5 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. A national study on immigration courts found:

> During the six-year period from 2007 to 2012, little more than one-third of immigrants were represented by counsel (37 percent). Detained immigrants—held in prisons, jails, and detention centers across the country—were the least likely of all immigrants to be represented . . . only 14 percent of detained immigrants secured an attorney, almost five times less than nondetained immigrants (66 percent).

and-a-half times greater that they obtained relief from removal."[61] Moreover, an individual's likelihood of being able to post bond hinges significantly on their ability to advocate through counsel.[62] Despite the stark difference in outcomes between those with and without representation, the burden of providing counsel to indigent individuals in immigration proceedings falls on nonprofits and pro bono attorneys in the absence of governmental responsibility. These organizations are creaking and buckling under the massive volume of cases that enter immigration court just to stagnate indefinitely.[63]

In the event that an individual in removal proceedings *is* able to retain counsel through pro bono representation or the work of legal aid and non-profits, there are issues with access to counsel in ICE facilities, where noncitizens are detained prior to their hearings if they cannot post bond.[64] ICE currently oversees over 400 active detention centers,[65] imprisoning over 35,000 individuals.[66] Despite ICE's administration, these centers are operated primarily by private corporations or county jails.[67] Between inconsistencies in visitation policies, remote locations, poor technological capabilities, and the interfering interests of private companies, noncitizens with counsel are effectively deprived of that counsel through ICE's mismanagement.

61 Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015).

62 Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & Soc'y Rev. 117, 119 (2016).

63 Boston Immigration Court Pro Bono Committee Meeting on Wednesday, November 9, 2022 ("Now everyone has a huge number of cases. If they could get freed up from those cases, then they would have more of a capacity to jump in and take more. But a lot of these cases are just sitting there, and not moving.") (on file with author).

64 *See, e.g.*, *Seeking Release from Immigration Detention*, Am. Immigr. Council (Sept. 13, 2019), https://www.americanimmigrationcouncil.org/research/release-immigration-detention (describing limited access to attorneys for ICE detainees).

65 Noelle Smart et al., *ICE Detention Trends*, Vera Inst. of Just., https://www.vera.org/ice-detention-trends/ (last visited Dec. 5, 2023).

66 *Immigration Detention Quick Facts*, TRAC Immigration, https://trac.syr.edu/immigration/quickfacts/detention.html#detention_held (last visited Dec. 5, 2023).

67 Eileen Sullivan, *A.C.L.U. Says Immigration Detention Facility Should Be Shut Down*, N.Y. Times (Sept. 22, 2022), https://www.nytimes.com/2022/09/22/us/politics/aclu-ice-immigration-detention.html (about 80% of detained noncitizens are held in privately run facilities.).

1. Location

An observable example of ICE's interference with detainees' due process rights is the sheer distance between their detention centers and legal aid providers. Although most legal aid organizations that are able to provide free counsel services to detained noncitizens are located in larger cities, ICE's detention centers are often remotely located. Thirty percent of detainees are located in a detention center more than 100 miles away from the nearest government-listed legal aid service provider, and the median distance between an ICE facility and its nearest government-listed legal aid facility is 56 miles.[68] In a particularly grave example, detainees in Etowah County Detention Center in Gadsen, Alabama are referred by the government to their nearest legal aid service provider: Loyola Law Clinic in New Orleans, Louisiana—over 400 miles away.[69] The government's abandonment of responsibility to provide counsel results in pro bono attorneys paying transportation costs out-of-pocket just to be able to visit detainees in person.[70] This is perhaps the most visibly obvious way in which detainees are deprived of access to their counsel; the physical isolation of ICE detention centers can eliminate any opportunity for many detainees to ever meet with an attorney face-to-face.

68 Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. Times (Sept. 28, 2017), https://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

69 *Id.*

70 *See, e.g.*, *Appeals*, Legal Aid Ctr. of S. Nev., https://www.lacsnprobono.org/resources-and-training/appeals/ (last visited Dec. 5, 2023) ("The Pro Bono Program does not reimburse attorneys or litigants for travel costs to attend oral argument.")

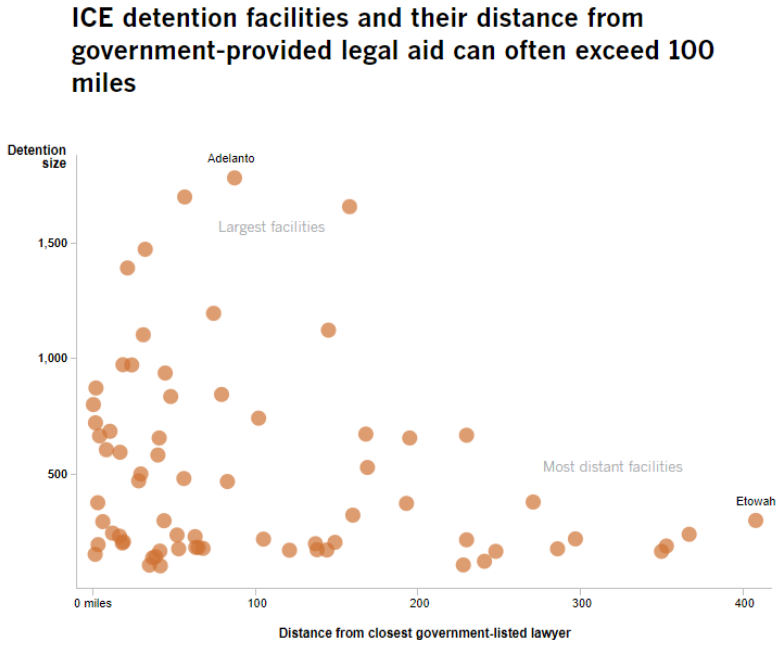

Figure 1.[71] The above figure charts each ICE detention facility by its population and its proximity to the closest government-listed legal aid provider in miles.

The distance between aid providers and detention facilities hinders those detainees whose cases are heard swiftly by an immigration judge, compared to the many detained noncitizens who wait for months on end to be heard in court.[72] Given the massive distances between legal aid organizations and many ICE detention centers and the fact that some deportation cases for detainees can be decided within twenty-four hours,[73] many detainees are not provided the time to even consider obtaining the services of counsel. In centers like the one located in Tucson, Arizona, nearly all detainee cases between 2007 and 2012 were decided within one single day, resulting in a representation rate

71 Kim, *supra* note 69.

72 *Immigration Detention in the United States by Agency*, Am. Immigr. Council (Jan. 2, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf. ("Across the country, noncitizens who are detained while defending themselves against deportation in immigration court are routinely held for longer than six months. . . [N]oncitizens who applied for relief from removal were held in California ICE detention centers for an average of 421 days.").

73 Kim, *supra* note 69.

of 0.002%, the lowest among any immigration court.[74] Not only does this phenomenon effectively deprive these individuals of their right to counsel entirely by limiting the amount of time that detainees have to seek out counsel, but it also does not allow for a meaningful amount of time to generate a viable defense pro se (if even possible). In this way, the variance in detention time and location is almost always detrimental: on one hand, detainees living for months in remote ICE detention centers are deprived of their liberty for excessive amounts of time and are virtually unreachable by legal aid providers. On the other hand, detainees who are geographically closer to major cities and receive a speedy opportunity to be heard are often insufficiently prepared to argue their cases, with or without counsel.

2. Communication Limitations

Even as ICE claims to recognize and remedy the physical barriers between attorneys and detainees, the agency continues to fetter access within its centers. A function of the pandemic is that it has allowed for a new flexibility for attorneys, clients, and courts.[75] Companies like Zoom have expanded the ways that clients can access their attorneys, and many matters that were once understood to only be handled in-person have shifted to phone or email.[76] Accordingly, many legal aid organizations and pro bono attorneys rely on video service providers and phone calls to be able to meet with their clients, especially when their clients are located in detention facilities hundreds of miles away. However, this access is encumbered by ICE's impositions.

Dozens of ICE detention facilities do not allow for scheduled phone calls between detainees and attorneys and do not provide any opportunity for attorney access via phone at a chosen time or date.[77] Even in the case that an attorney *is* able to schedule a phone call with their detained client, ICE agents will frequently, and seemingly arbitrarily, not allow for the detainee to call their attorney at the agreed-upon

74 *Id.*

75 Wendell Jisa, *The Zoom Boom in Law: The Good, the Bad, & the Data*, Bus. L. Today (Jan. 14, 2022). https://businesslawtoday.org/2022/01/the-zoom-boom-in-law-the-good-the-bad-the-data/.

76 *Id.*

77 Aditi Shah & Eunice Hyunhye Cho, ACLU, No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers 7 (2022), https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf.

time and date.[78] When these calls do actually take place, many attorneys report that they experience poor audio quality and interruptions, inhibiting their ability to communicate with their clients.[79] Moreover, approximately 85% of ICE detention centers only allow for phone use in the form of outgoing calls by detainees, which are charged at rates between $0.21 and $0.40 per minute.[80] Many detainees are indigent,[81] and this cost can be impossible to meet. These lapses in communication over phone can have devastating impacts on detainees, as their cases continue to proceed regardless of attorney access issues.[82]

Despite the rising prevalence of video conferencing, information on scheduling a video conference call via Zoom or Skype is near-impossible to find online for most ICE detention centers. Dozens of centers appear to not offer any virtual visiting at all, while four out of the fifteen facilities designated by ICE as having "Virtual Attorney Visitation" programs had no idea that such a program even existed when contacted.[83] Data from responsive ICE facilities show that only half of attorneys who are able to schedule in-person visits are allowed to bring their laptops into their meetings with detainees at ICE facilities, limiting their ability to take notes, review materials, and perform research.[84] Only a few ICE detention facilities provide any option to exchange written messages online in the form of emails or online messaging.[85] Of the less than a quarter of ICE facilities that *do* offer a form of email services, there is no promise of confidentiality, and the detainee is required to pay to use the service per email or message.[86]

When visits do take place in person, detainees and attorneys are frequently not afforded required attorney-client privilege, as many attorneys are barred from contact visits or visits in confidential settings.[87]

78 *Id.*

79 *Id.* at 17 (A pro bono attorney recalls, "[T]he phone lines are horrible! They have a lot of static and you can barely hear the client, you have to tell them to yell into the phone which is bad because they are not able to have a somewhat quiet conversation with you . . .").

80 *Id.*

81 Shah & Cho, *supra* note 78, at 16.

82 *Id.* (One attorney notes, "In [sic] one occasion, the staff would not confirm whether or not my client was still detained at their facility and could not tell me his whereabouts. A few days later I found out he was in the process of being removed.").

83 *Id.* at 18.

84 *Id.* at 8.

85 *Id.*

86 *Id.* at 20.

87 *See id.* at 25.

While a number of federal courts have upheld the right to confidentiality and attorney-client privilege in a prison setting (under the argument that confidentiality is an inseparable aspect of a defendant's Sixth Amendment right to counsel),[88] and although ICE purports to provide confidential spaces to attorneys and clients in detention,[89] client meetings often take place in non-confidential settings[90] and some facilities have entirely suspended their in-person visits indefinitely.[91] Considering the lack of clarity and stability in scheduling phone calls, Zoom visits, or corresponding over email, in-person visits are potentially the only opportunities that attorneys could have to engage in confidential and unencumbered conversations with their clients. An inability to be able to schedule such visits has a significant impact on an attorney's ability to meaningfully assist a detainee in their case, and to garner any semblance of a positive outcome.[92]

3. Additional Barriers in Private Facilities

Departures from established norms in detention facilities can also be explained by ICE's continuing entanglement with corporate interests, in a manner otherwise frowned upon for criminal detention facilities. President Biden signed an executive order upon assuming

88 *See, e.g.*, Adams v. Carlson, 488 F.2d 619, 620 (7th Cir. 1973) ("Effective protection of access to counsel requires that traditional privacy of lawyer-client relationship be implemented in the prison context.").

89 U.S. Immigr. Customs & Enforcement, Legal Access in Detention: At a Glance 1 (Aug. 2021), https://www.ice.gov/doclib/detention/LegalAccessAtAGlance.pdf.

90 *See* Shah & Cho, *supra* note 78, at 25–27.

91 *Id.* at 8.

92 *Id.* at 12–15. Attorneys across the US report facing major barriers to representation because of these practices:

> [A]n attorney who practices at Orange County Jail in New York commented, "the most frequent impact is not being able to review evidence with a client—whether it's DHS's evidence against them or whether it's evidence in support of the application for relief." . . . An attorney at Bluebonnet Detention Center in Texas described, "I had to prepare a client detained in Bluebonnet for an IJ [(immigration judge)] review. We only ha[d] 30 minutes and met two times. He called me from [a] phone in [the] detention center. [The] IJ denied his case. Sustained the negative CFI [(credible fear interview)]. I think my client was nervous, and I did not have an opportunity to prepare him more."

Id. (alteration in original).

office in 2021 that detailed the process of phasing out privately operated prisons and for-profit incarceration.[93] But the private prisons impacted by this order did not simply disappear. Rather, a number of them were absorbed by the corporations contracted by ICE to operate as immigrant detention centers.[94] The fact that immigration detention is considered *civil* detention operated by an executive agency, and not *criminal* detention, allows for a carveout in Biden's promise that ICE leverages. Through this loophole, the number of detainees in privately operated ICE detention centers has grown by more than 50% under Biden, despite the administration's expressed intention of moving away from for-profit detention.[95] One such example is Moshannon Valley Correctional Facility in Pennsylvania, which ceased operation as a private federal prison only to reopen months later as an ICE detention center.[96] ICE assured the public that this facility was not functioning as a prison for undocumented people who have not actually committed a criminal offense, with the ICE Acting Director of the Philadelphia Field Office noting: "Immigration detention is not punitive detention . . . . immigration detention is to secure removal from the country or detention through the removal proceedings. . ."[97] While the Acting Director confirmed that some detainees did indeed have criminal convictions, he assured that ICE detention would "be for immigration purposes," instead of a stand-in for criminal punishment without the due process of a criminal trial.[98]

Regardless, many of these detainees have no criminal record whatsoever and are still forced to remain in for-profit prisons.[99] Further, ICE places many detainees in private prison confinement under even stricter conditions based on their own over-inclusive categorizations

93 Exec. Order No. 14,006, 3 C.F.R. 474 (2021).

94 *See* Eunice Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration.

95 *See id.*

96 Jessica Shirey, *Moshannon Valley Correctional Facility to Reopen as ICE Center*, Gant News (Sept. 29, 2021), https://gantnews.com/2021/09/29/moshannon-valley-correctional-facility-to-reopen-as-ice-center/.

97 *Id.*

98 *Id.*

99 *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC Immigr. (Apr. 3, 2020), https://trac.syr.edu/immigration/reports/601/.

of "criminal" histories,[100] reasoning that *any* detainee with *any* criminal record (including misdemeanors, like failure to leash a dog[101]) may receive differential treatment based on their "criminal" status.[102] In a recent report from the American Immigration Council, researchers found that ICE's haphazard categorization of inmates has snowballed into "indiscriminate enforcement,"[103] where otherwise law-abiding noncitizens live in the same amount of fear of deportation as noncitizens who have committed higher-level "deportable" offenses. The report

100 *See id.* ICE's discretion enables the organization to group individuals together based on their own defined levels of criminality:

> ICE possess more flexibility for detainees with little or no criminal history including where they are detained, the amount of staff required for supervision, and the range of options available for release including ICE's alternatives to detention (ATD) programs. ICE's own criteria for supervision and release is more complicated and individualized than just criminal history, and ICE ultimately has the authority to use its discretion according to agency priorities.

Id. at 3. *See also ICE Detains Fewer Immigrants with Serious Criminal Convictions Under Trump Administration*, TRAC Immigr. (Dec. 6, 2019), https://trac.syr.edu/immigration/reports/585/ ("The number of individuals convicted of serious felonies fell from between 7,500 and 8,000 in 2017 to around 6,000 in [early 2019] . . . . an increasing number of detainees have . . . committed at most misdemeanors [not felonies].").

101 Uriel J. García, *The Number of Undocumented Immigrants in Detention Centers Has Increased by More than 50% Since Biden Took Office*, Tex. Trib. (Dec. 2, 2021), https://www.texastribune.org/2021/12/02/joe-biden-ice-immigration-detention/ ("Overall, 75% of ICE detainees have no criminal record—ICE classifies a person as a convicted criminal even if the crime is as innocuous as not keeping a dog on a leash, according to TRAC's analysis.").

102 *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC Immigr. (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583/. Data shows:

> ICE officers may use criminality to determine bond amounts, conditions of release and probation, and level of security while in detention. Immigration judges may also take criminal history into consideration when adjusting bond amounts and adjudicating various applications for deportation relief . . . Significant changes in the composition of detainees with criminal histories, as we see here, could be tied to specific national or regional ICE policies, and could signal widespread changes in how ICE is using its discretion over the detention of non- citizens.

Id.

103 *ICE Didn't Follow Federal Enforcement Priorities Set by Biden Administration*, Am. Immigr. Council (June 27, 2023), https://www.americanimmigrationcouncil.org/foia/ice-enforcement-priorities.

notes: "Despite specific policies laid out by the DHS Secretary, ICE agents arrested and removed tens of thousands of people not designated as priorities. . . . ICE's enforcement actions against non-priority immigrants accounted for roughly one-third of its enforcement activity during this period."[104]

The most egregious examples of fettered access to counsel often take place in privately operated ICE facilities, such as those run by CoreCivic.[105] Contracts with ICE provide companies like CoreCivic and GEO Group with a quarter of their total revenues.[106] These for-profit facilities contract with other corporations to charge for phone and email services available to detainees, marred by the slew of issues described previously.[107] Further, there are numerous, documented instances of retaliatory action from these companies against detainees, typically in the form of solitary confinement, forced feeding, excessive force, and restrictions on privileges like commissary food purchases and recreation.[108] Notably, a number of detainees participated in a hunger strike in 2017 at Adelanto Detention Facility operated by GEO Group.[109] Counsel was then barred from legal visits with those specific detainees, with no explicit reasoning provided for the denial.[110] At the same

104 *Id.*

105 *See, e.g.*, Letter from Martin Heinrich, Ben Ray Luján, Dianne Feinstein, Edward J. Markey, Elizabeth Warren, and Alex Padilla, U.S. Senators, to Hon. Tae D. Johnson, Acting Dir., Immigr. & Customs Enforcement (Oct. 18, 2022), https://www.heinrich.senate.gov/imo/media/doc/ice_torrance.pdf (describing "chronically inadequate conditions" at a CoreCivic run facility).

106 Letter from Am. Immigr. Laws. Ass'n to Hon. Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just. and Hon. Joseph V. Cuffari, Inspector Gen., U.S. Dep't of Homeland Sec., Request for a Formal Review into the Implementation of Executive Order 14006 and Immigration & Customs Enforcement Acquisition of Closed Facilities (Feb. 9, 2022), https://www.aila.org/aila-files/4C02AB38-1FB8-41EC-AFCD-C209B5B6FCB8/22020851.pdf?1697590308.

107 Shah & Cho, s*upra* note 78, at 8.

108 *See* ACLU & Physicians for Human Rts., Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention (2021), https://www.aclu.org/report/report-behind-closed-doors-abuse-retaliation-against-hunger-strikers-us-immigration-detention.

109 *See* Rebecca Plevin, *Asylum-Seekers Allegedly Pepper-Sprayed at Adelanto Detention Center Settle with GEO Group*, Desert Sun (Feb. 6, 2020), https://www.desertsun.com/story/news/2020/02/06/asylum-seekers-allegedly-pepper-sprayed-adelanto-detention-center-settle-geo-group/4680659002/.

110 Letter from Michael Kaufman, Senior Staff Att'y, ACLU of S. Cal, to David A. Martin, Field Off. Dir., U.S. Immigr. & Customs Enforcement and Gabriel Valdez, Assistant Field Off. Dir., U.S. Immigr. & Customs Enforcement, Mistreatment of Detainees Participating in a Hunger Strike at Adelanto Detention Facility (June 30, 2017), https://www.aclusocal.org/sites/default/files/field_documents/

detention center, an attorney was denied a legal visit with her clients immediately following her public advocacy and statements as, ironically, the Co-Director of Community Initiatives for Visiting Immigrants in Confinement.[111] Officers in detention facilities may also place detainees participating in hunger strikes in lockdown for days by claiming a medical necessity to do so when none clearly exists.[112] This lockdown could potentially hinder attorneys from being able to meet with their clients, and they often will not know that their visiting access is denied until they have already driven a vast distance to reach the detention center.[113]

As noted earlier, the majority of detainees lack counsel entirely. Thus, they must prepare their own legal defenses relying on their facility's law library for research. Access to the law library is an issue that several federal criminal courts have addressed extensively, ultimately settling on an understanding that that if access to a legal assistant or other methods are not available, defendants have a fundamental right to access the law library.[114] However, in the privately operated ICE facilities, most of the resources available in the library are provided only in English, limiting LEP detainees' access to information needed to prepare their defenses.[115] The facilities also impose a time limit,[116] fail to update their materials to reflect the current law,[117] disable basic computer controls,[118] and arbitrarily limit printer access which forces detainees to

aclu_letter_re_adelanto_hunger_strike.pdf ("[F]acility staff have limited the detainees' ability to communicate with people outside the facility, including their counsel.").

111 *See Attorneys and Visitors Illegally Barred from Detention Centers for Criticizing Operations*, ACLU S. Cal. (Aug. 25, 2015), https://www.aclusocal.org/en/press-releases/attorneys-and-visitors-illegally-barred-detention-centers-criticizing-operations.

112 Letter from Michael Kaufman, *supra* note 111, at 2.

113 *Id.*

114 Bellamy v. McMickens, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) ("Prisoners have a constitutional right of access to the courts. Thus prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

115 *Id.*

116 *See, e.g.*, Ams. for Immigrant Just. & S. Poverty L. Ctr., Prison by Any Other Name: A Report on South Florida Detention Facilities 17, 25 (2020), https://aijustice.org/wp-content/uploads/2020/05/cjr_fla_detention_report-final_1.pdf.

117 *See, e.g.*, *id.* at 25 ("The law library is bleak, with outdated resources most detained individuals cannot understand because of the language barrier.").

118 *See, e.g.*, Gonzalez v. Gillis, No. 21-60634, 2023 WL 3197061, at *1 (5th Cir. May 2, 2023) (Plaintiff alleged that detention facility removed vital immigration and

handwrite their extensive legal materials.[119] As undocumented people who are tasked with, quite literally, documenting themselves and their histories in order to defend their cases, this is harmfully limiting.

ICE claims only a small number of deaths take place in their facilities.[120] Despite this, COVID-19 took a number of lives in ICE detention throughout the last few years,[121] and many detainees have committed suicide in privately operated detention.[122] If a detainee dies in ICE custody before their hearing, they never have the opportunity to be heard. The grim conditions in private detention and the frustrating lack of communication that many noncitizens experience have dire impacts, not only on detainees' court outcomes but on their lives.

B. Language Accessibility

Another manner in which ICE, the EOIR, and DHS alienate noncitizens is through their failure to adhere to the norms of language accessibility in legal proceedings. Courtroom interpretation services are required in any case facilitated by the United States against a defendant possessing a limited understanding of English, the language of record in court.[123] In criminal court, this requirement is further incorporated as an indispensable aspect of due process, mandating that criminal defendants be provided the opportunity to fully comprehend the charges and procedures brought forth against them:

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federal cases from LexisNexis program in law library).

119 *See, e.g.*, Graham v. Maketa, 227 P.3d 516, 518 (Colo. App. 2010) (affirming dismissal of plaintiff's claim that denial of printer access, requiring him to handwrite twenty-two page petition, infringed on his constitutional rights).

120 *Detainee Death Reporting*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/detain/detainee-death-reporting (last visited Dec. 5, 2023).

121 *See, e.g.*, *Deaths at Adult Detention Centers*, Am. Immigr. Laws. Ass'n, https://www.aila.org/infonet/deaths-at-adult-detention-centers#2022 (last visited Dec. 6, 2023) (collecting ICE reported deaths in detention centers).

122 *Id.*

123 28 U.S.C. § 1827. The statute reads in relevant part:

> The presiding judicial officer . . . shall utilize the services of the most available certified interpreter . . . in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings speaks only or primarily a language other than the English language.

Id.

> It is fundamental that a defendant must be told what he has been accused of in a language he or she can understand. This is the responsibility of the government, which brought the charges, not of the defendant. For a non-English speaking defendant to stand equal with others before the court requires translation. Non–English speaking criminal defendants currently are at a substantial disadvantage. A criminal defendant cannot aid in his own defense without meaningful access to relevant documents he or she can understand.[124]

On its face, this requirement of apt interpretation appears deeply necessary to most who can imagine themselves in a high-stakes situation, like criminal court, unable to comprehend the language of the proceedings around them.[125] While this requirement may appear to be unquestionably important, adherence to strict interpretation standards is not uniformly enforced across courts. Perhaps the requirement does not seem as critical in a civil court setting, wherein a civil defendant faces, at most, a monetary penalty or a demand for injunctive relief. However, immigration courts operate under civil guidelines in practice, despite the potential risks on life, liberty, and property that a detainee may face if ordered removed.[126]

On August 11, 2000, President Clinton signed Executive Order 13166, which requires all federal agencies to provide "meaningful access" to LEP individuals "without unduly burdening[] the fundamental mission of the agency."[127] This requirement seemingly holds offices like EOIR to providing the same interpretation standards in immigration

124 United States v. Mosquera, 816 F. Supp. 168, 175 (E.D.N.Y. 1993).

125 *See id.* The court noted:

> Each person can empathize and imagine himself in an alien society confronted by a strange legal system, with his future hanging in the balance of justice, and not able to understand any of the testimony being offered against him. . . . His only contact with the proceeding would be the points his court-appointed counsel thought important enough to be communicated to him.

Id. (quoting Benjamin G. Morris, *The Sixth Amendment's Right of Confrontation and the Non-English Speaking Accused*, Fla. Bar J., No. 41 1967, at 475, 481–82).

126 See People v. Lazaro, No. B316852, 2022 WL 4923843, at *6 (Cal. Ct. App. Oct. 4, 2022) ("Lazaro admitted in his testimony that he signed and initialed the *Tahl* form and that the interpreter read to him the paragraph regarding immigration consequences, but he claims he did not understand what was read to him and his attorney did not ask if he had any questions. Lazaro explained that he did not ask his interpreter about the paragraph regarding immigration consequences because he was scared of '[t]he consequences of deportation.'").

127 Exec. Order 13,166, 3 C.F.R. 289 (2001).

court that due process requires in criminal court. Yet, as described below, EOIR requirements of courtroom interpretation are not executed or enforced in the same careful manner that criminal courts require when potentially depriving a defendant of fundamental rights that are nearly identical to those exposed in removal proceedings.

1. Limited Obligation

Despite the federal requirement that a courtroom provide "meaningful access" in the form of interpreters for LEP respondents upon request or determination, EOIR and the immigration courts have stretched the definition of "meaningful access" to far beyond its breaking point. By specifying that this access must be provided to respondents only to the extent that it does not "unduly burden" EOIR,[128] the agency is able to preserve its resources at the cost of LEP respondents' access. Across immigration courtrooms, there is no uniform minimum requirement for the services that an interpreter must provide beyond statements directed at an LEP respondent by a factfinder, and their answers to those statements.[129] Thus, most interpreters will *only* interpret statements directed specifically to and from the LEP respondent, leaving them with no understanding of in-court conversations between their own attorneys, judges, DHS trial attorneys, English-speaking witnesses, and others.[130]

By way of the Fifth Amendment's guarantee of a fair trial, due process mandates that a criminal defendant be able to participate meaningfully in preparing their own defense if their life, liberty, or property are threatened by the state.[131] In order to participate meaningfully, criminal defendants must be able to fully *comprehend*

128 *Id.*

129 Exilus, 18 I. & N. Dec. 276, 281 (B.I.A. 1982) ("[We] do not find that due process requires translation of the entire hearing. [A]ll that need be translated are the immigration judge's statements to the [noncitizen], the examination of the [noncitizen] by his counsel, the attorney for [INS]and the immigration judge, and the [noncitizen's] responses to their questions."); *see also* Tomas, 19 I. & N. Dec. 464, 465 (B.I.A. 1987) ("Although all of the hearing need not be translated for the hearing to be fair, the respondents must be able to participate meaningfully in certain phases of their own hearing.").

130 *See Exilus*, 18 I. & N. Dec. at 281; *see also* Laura Abel, Brennan Ctr. for Just., Language Access in Immigration Courts (2011).

131 Hartooni v. Immigr. & Naturalization Serv., 21 F.3d 336, 340 (9th Cir. 1994) ("The right of a person facing deportation to participate meaningfully in the deportation proceedings by having them competently translated into a language he or she can understand is fundamental.").

the proceedings around them, which is a responsibility of the state to ensure.[132] The result of partial interpretation is, effectively, a deprivation of due process in immigration legal proceedings for most LEP individuals. In contrast, immigration courts continue to maintain that due process does *not* require complete courtroom interpretation.[133] This lack of effective interpretation also burdens counsel's ability to render services. Respondents that have retained counsel are dependent on that counsel not only for legal assistance, but also for assistance in a basic understanding of the language being used around them—a role that counsel is not intended to fulfill and cannot perform meaningfully. The case is even more grim for the majority of respondents appearing in immigration courts daily, tasked with representing themselves pro se.[134] Without even the assistance of counsel to rely on, pro se LEP respondents have no access to the proceedings taking place in court around them—proceedings which could potentially deprive them of their life, liberty, and property if decided unfavorably against them.

By essentially removing a noncitizen's voice from proceedings that directly concern them, any LEP noncitizen is irredeemably impaired from defending themselves in adversarial proceedings. Regardless, EOIR limits their obligation to remedy this injury, and continues to exclude respondents from processes concerning their own fate, taking place right in front of them. Observers of this deprivation note:

> [T]he lack of complete interpretation perpetuates law's exclusionary tendencies in exactly the moment when the client seeks the law's assistance to gain inclusion. . . . [S]tories are told about her, in front of her, but without permitting (much less enabling) her comprehension. . . . The client is effaced, reduced to a mute, dark figure, uncomprehending of all that transpires around her.[135]

Many noncitizens are familiar with feeling alienated and isolated. However, that exclusion is particularly insidious when it bars people from understanding the process by which their rights are stripped away before their very eyes.

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132 *See* Court Interpreters Act, 28 U.S.C. § 1827(d)(1)(A).

133 Muneer I. Ahmed, *Interpreting Communities: Lawyering Across Language Difference*, UCLA L. Rev. 999, 1026 n.87 (2007) ("The policy of providing only partial interpretation in immigration court proceedings, unless the immigration judge determines that full interpretation is necessary, has survived due process challenge.")

134 Eagly & Shafer, *supra* note 61.

135 Ahmed, *supra* note 134, at 1028.

2. Lack of Interpreter Standards

While an in-person interpreter is an imperative and beneficial service for noncitizens that can help to remedy the deep alienation felt in courtroom proceedings, the standards of interpreters employed by EOIR are a continuing subject of scrutiny. As noted earlier, EOIR limits their obligation to provide apt interpretation to only the extent at which it does not "unduly burden" the agency.[136] Accordingly, in response to criticisms regarding the lack of complete interpretation in immigration courts, federal agencies point to the fact that resources in immigration courts are sparse and stretched thin to begin with. With interpreters working long hours for gradually reducing pay, their mental well-being and quality of services suffers.[137]

There are fewer than 100 staff interpreters with EOIR across sixty courtrooms and dozens of languages.[138] With over 300,000 cases coming before EOIR each year, the agency contracts with private corporations in order to provide additional interpreter services as needed.[139] Presently, EOIR has a standing contract with SOSi International LLC to provide interpreter services for LEP respondents in immigration courts.[140] Upon contracting with the DOJ/EOIR, SOSi immediately cut the standard pay rate for interpreters and established a number of working conditions for interpreters that were widely regarded to be "exploitative."[141] For example, the contract between SOSi International

136 *See supra* Section I.B.

137 Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. on Migration & Sec. 207, 216 (2021). Interpreters are often not permitted to take scheduled breaks throughout their work:

> [E]ven the most "experienced or talented" interpreter can become mentally fatigued after just 30 minutes of sustained simultaneous interpretation or prolonged periods [], "resulting in a significant loss of accuracy" . . . . Exploitative treatment of these interpreters . . . has caused several labor disputes over wages, employee classification, and union-busting.

Id. (internal citations omitted).

138 *Id.* at 209.

139 *Providing Immigration Court Interpreting Services for the U.S. Department of Justice*, Sosi, https://www.sosi.com/case-studies/language-support-case-studies/providing-immigration-court-interpreting-services-for-the-us-department-of-justice/ (last visited Dec. 6, 2023).

140 *Id.*

141 Barak, *supra* note 138, at 216 ("When SOSi took over interpretation responsibilities for the court, it cut interpreter pay by nearly half, reducing rates from $65/hour

and EOIR provided the contract workers with no guaranteed breaks; many critics of this agreement note that the quality of translation services diminishes in accuracy after "just 30 minutes of sustained simultaneous interpretation," hindering the outcomes of LEP respondents.[142] Given the often-traumatic nature of refugee and asylum cases, the burden on courtroom interpreters to serve as the voice of the respondent in court cannot be overstated, and breaks for these workers is of utmost importance.[143]

Moreover, attorneys have expressed concern that beyond the predominantly Spanish language services provided, interpreters are typically not equipped to cover uncommon languages or the full range of dialects that respondents may possess.[144] Even within Spanish itself, there exists a wide array of speaking norms, accents, and vocabularies that are incorrectly captured by many traditional Spanish-speaking interpreters.[145] Beyond this, some courts have recently begun to turn their attention to non-native English speakers and the variety of dialects within the English language; those who speak a lesser-known dialect of

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to $35/hour. Interpreters are made to travel to various courts around the country on short notice. They work long, often unpredictable shifts."); *see also* Amparo Jiménez-Ivars, *Telephone Interpreting for Asylum Seekers in the US: A Corpus-Based Study*, J. of Specialised Translation, July 2021, at 125, 128 ("Untrained volunteer—or paid—interpreters, no matter how committed to the common good they may be, are not likely to show professional competencies such as awareness of the interpreters' code of ethics and may conduct themselves arbitrarily, for example, aligning themselves with one party or going beyond their role.").

142 Barak, *supra* note 138, at 216.

143 *See* Lisa Aronson Fontes, Interviewing Clients across Cultures 162 (2008). An interpreter recalls:

> The worst time for me was when I was interpreting the victim impact statement of a sadistic rape [of a young girl] . . . . She was weeping . . . and I was repeating everything . . . using the word "I," as if it had happened to me. I was trying to put emphasis where she put emphasis and convey in my speech, as much as I could, the feelings she was conveying as she spoke. Then at the end, the court took a recess and I went to the bathroom, splashed water on my face, and I was supposed to walk right into the next courtroom and begin working on the next case. I was shaking like a leaf.

Id.

144 Barak, *supra* note 138, at 213.

145 *Id.* ("Spanish varies greatly across countries; speakers from each country have distinct accents and vocabularies . . . Attorneys said this linguistic disconnect caused miscommunications with potentially grave consequences. As many pointed out, while some interpreters attempted to account for such differences, this was not uniform.").

English may nonetheless still require interpreter services to understand the procedures taking place around them.[146] Judges must determine if the need for such an interpreter exists, and they sometimes fail to make such a determination if a respondent appears even vaguely proficient in English.[147]

The immigration courts differ in their language certification protocols from other types of courts. For example, the federal district courts require that courtroom interpreters attain certification through the Administrative Office of the U.S. Courts, while most state courts require interpreters to pass an examination provided by the Consortium for Language Access in the Courts.[148] In contrast, the EOIR either conducts their own independent screening or allows for the private corporations with whom they contract to employ their own certification standards.[149] The public lacks insight into these screening processes, with the Brennan Center for Justice noting that "[t]his lack of public information is contrary to the prevailing standards for the administration of skills assessment tests, including tests assessing the skills of court interpreters."[150] Lack of uniformity in ensuring that courtroom interpreters are capable and accurate has a measurable impact on outcomes. Even minor interpretation mistakes—from emphasizing or excluding hedge words such as "uh" or "um," to implied interjections of personal opinion and bias—warp the voice of the respondent in court, and present an inaccurate depiction of their answers.[151] By diminishing

146 *See, e.g.*, Daniel Weissner, *Speakers of English Dialects Have Right to Interpreter - 3rd Circ.*, Reuters (Sept. 1, 2021), https://reuters.com/legal/litigation/speakers-english-dialects-have-right-interpreter-3rd-circ-2021-09-01/. Observers note an LEP respondent's interaction with an immigration judge:

> When he told the judge he was from Cameroon, the judge asked only whether he needed a French interpreter or was "okay with English." B.C., who did not have a lawyer, said he was comfortable proceeding in English, according to the 3rd Circuit. At a hearing on the merits of B.C.'s application, the judge proceeded without asking if he required an interpreter and rejected B.C.'s claim that he was not a fluent English speaker, at one point asking, "why would you have to practice English if that's your native language?"

Id.

147 *See, e.g.*, *id.*

148 Abel, *supra* note 131, at 6.

149 *Id.*

150 *Id.*

151 Barak, *supra* note 138, at 209 ("For instance, Berk-Seligson finds interpreters' use of linguistic hedge words—such as '*um*,' '*uh*,' or '*well*,'—undermines credibility and testimony. In another study, immigration court observers in New York noted

the important role that interpreters play in courtroom proceedings and easing their requirements, the EOIR ignores the understanding that "[c]ourt interpreters function as gatekeepers, helping to enforce, redefine, or contest the legal system's control over litigants and the societal subordination of minority-language speakers."[152]

3. Inconsistent Courtroom Technology

This lack of uniformity has worsened over time, in new ways. Due to the fact that the burden is on noncitizens in immigration court to rebut the state's argument for removal, "[a]n immigrant's voice is often the only evidence they can provide."[153] Thus, an interpreter's ability to convey that voice clearly and accurately is vital. Courtrooms range widely in the technology available to interpreters, or lack thereof. Some courtrooms utilize a transmitter that they can speak into and a pair of headphones for the LEP person they are assisting.[154] When technology fails or courtrooms do not utilize any technology, interpreters must stand immediately next to or behind the person they are assisting, and whisper their interpretation into the LEP respondent's ear as the parties speak.[155] The EOIR's inability to implement uniform regulations regarding courtroom interpretation results in inconsistent opportunity to be heard for respondents across courtrooms.

The rise in video-conferencing technology and remote participation[156] has both increased *and* fettered the presence of respondents' voices in court, contributing further to the lack of consistency in courtroom interpretation. An overall lack of interpreters

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multiple instances when interpreters made anti-immigrant statements in open court, like immigrants should 'get the f- - - out.'") (internal citations omitted).

152 *Id.* at 210.

153 *Id.* at 208.

154 Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .* , 43 Emory L.J. 1095, 1099 n.14 (1994).

155 Sonya Rao, Privatizing Language Work: Interpreters and Access in Los Angeles Immigration Court 96 (2021) (Ph.D. dissertation, University of California, Los Angeles) (on file with eScholarship, University of California) ("Observational data attests to the subpar upkeep of audio equipment, and consequent reorganization of seating to accommodate whispered interpretation . . . [S]cholars on court interpreting note that whisper interpreting may be confusing and difficult for the recipient of the interpreting to hear.") (internal citations omitted).

156 *See generally* Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* 2, Brennan Ctr. for Just. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

has driven courts to allow for interpretation to take place through video-conferencing platforms, with interpreters attending virtually instead of in person.[157] This does increase the number of interpreters available at any given moment, but it also arguably decreases the quality of interpretation. Interpreters working virtually have noted that the background din of respondents' locations, a higher "no-show" rate due to technological issues, the inability to access physical documents, and the lack of confidentiality in virtual translation significantly limit their ability to provide accurate services.[158] Most interpreters who are video-conferenced into proceedings have their voices broadcasted throughout the courtroom through speakers.[159] Advocates have noted that this method of interpretation drives respondents to deliver shortened or inarticulate answers, which may impact a factfinder's perception of their testimony.[160] Moreover, video-conferencing technology relies on stable network connection, and the quality of interpreter services suffers from disruption, delay, and a lack of clarity in this medium. This method also hinders counsel and respondent from the ability to spontaneously interject or seek clarification,[161] and limits a factfinder's ability to accurately assess nonverbal cues, gestures, and intonation.[162] The impacts are most dire, however, for LEP respondents who face confusion, isolation, and further alienation when their ability to advocate for themselves hinges on an unreliable internet connection.

II. Remedies

Within the context of the aforementioned due process issues in ICE detention centers, this Part explores the various methods through which attorneys and detainees are currently attempting to seek relief through the courts. Advocates, through trial and error, have attempted

157 Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, Marshall Project (Mar. 20, 2019), https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation.

158 *What I've Learned from Remote Court Interpreting*, Am. Translators Ass'n Chron., (Sept. 16, 2020), https://www.atanet.org/interpreting/what-ive-learned-from-remote-court-interpreting/.

159 This practice has been observed by the author.

160 Barak, *supra* note 138, at 213. ("In addition to making immigrants appear inarticulate, short answers can make them seem nervous, hesitant, or disingenuous . . . . Given the possibility of shortened interpretations, some attorneys prepped clients to provide testimony in 'bite-sized speech' with deliberate pauses allowing—and prompting—interpreters to produce word-for-word interpretations.").

161 *Id.* at 211.

162 *Id.* at 214.

to call attention to the barriers that ICE places between attorneys and detainees, and this Part explores a number of cases that have had some success in doing so. Next, this Part addresses the legal instruments available for LEP detainees, highlighting potential pathways that appear to have some potential for success before the courts.

There are limited remedies available for noncitizens arguing due process deprivations in removal proceedings. The viability of these remedies relies, too, on noncitizens' access to counsel in navigating the legal procedures required. This effectively renders indigent and LEP noncitizens as barred from accessing remedies. Aware of the limitations that exist in both initial removal proceedings and any opportunity to appeal, various legal aid organizations, non-profits, and pro bono attorneys are collectively taking action to improve attorney access conditions in ICE detention facilities.[163] These efforts, while strong and promising, will take years to implement, and will require a consistent oversight of ICE in order to maintain the agency's accountability, which it currently lacks.[164] Moreover, issues regarding judicial review,[165] standing,[166] and questions of federal jurisdiction[167] often result in a parsing-apart and dismissal of detainees' claims.[168] As legal aid organizations, non-profits, and pro bono attorneys fight this battle,

163 *See, e.g.*, Am. for Immigrant Just. v. U.S. Dep't of Homeland Sec., No. 1:2022cv03118, 2023 WL 4364096, at *1 (D.D.C. July 6, 2023) (challenge to ICE detention conditions in four facilities brought by group of attorneys).

164 Am. Immigr. Council, Oversight of Immigration Detention: An Overview 1, 2 (May 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/oversight_of_immigration_detention_an_overview.pdf ("Some of the offices with oversight over immigration detention are independent of ICE, while others are located within the agency. There is no oversight body for immigration detention that is independent of DHS as a whole.").

165 Christopher Manion, *Agency Indiscretion: Judicial Review of the Immigration Courts*, 82 St. John L. Rev. 787, 789 (2008) (Despite criticism of immigration judges' lack of adherence to standards set by the Department of Justice, noncitizens hoping to appeal immigration decisions encounter: "[A] recent circuit split over whether a particular type of ruling, in which the BIA affirms an immigration judge's ruling without issuing an opinion, is subject to judicial review by the circuit courts.").

166 Immigration courts have varying standards for in-person or in-jurisdictional presence, which arises as an issue in *in absentia* deportation proceedings. *See infra* Section II.D.

167 *See* Patel v. Garland, 596 U.S. 328, 347–48 (2022) (Gorsuch, J., dissenting) ("Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. *No court may even hear the case.* It is a bold claim promising dire consequences for countless lawful immigrants." (emphasis added)).

168 *See, e.g.*, Santos-Zacaria v. Garland, 143 S. Ct. 1103 (2023).

thousands of noncitizens will continue their struggle to be adequately acknowledged in proceedings that can determine the rest of their lives.

A. Recent Due Process Claims Against DHS and ICE (Access to Counsel)

In an attempt to address the access-to-counsel and communication issues across ICE detention centers, legal aid attorneys have filed a slew of cases in federal courts. Complaints in these cases have been directed at individual detention centers, multiple detention centers, private corporations contracted by ICE, ICE as a whole, the Department of Homeland Security, and more. Grueling as it may be, the trial-and-error nature of these cases is slowly illuminating a pathway for future claims—as well as the potentially inescapable pitfalls.

1. Americans for Immigrant Justice v. U.S. Department of Homeland Security

In 2022, ICE issued a report regarding attorney access in ICE facilities[169] in accordance with the 2021 Department of Homeland Security Appropriations Act.[170] In an accompanying statement to the Act, Congress required ICE to generate a report regarding the "number of legal visits that were either denied or not facilitated" in their institutions and the number of ICE facilities that were currently underperforming per the standards of attorney-client communication required for adequate due process.[171] Despite this requirement, the ICE report plainly states:

> ICE ERO [Enforcement and Removal Operations] does not track the number of legal visits that were denied or not facilitated and/or the number of facilities that do not meet ICE standards for attorney/client communications. However, in FY 2020, ICE's inspections did not identify any legal representatives being denied access to their clients . . . .[172]

The report continues on to state that all ICE facilities *do* adequately provide noncitizens with opportunities to meet with counsel, and that noncitizens in ICE custody may file a "grievance" with their facility if their access to counsel has been restricted during their

169 U.S. Immigr. & Customs Enforcement, *Access to Due Process: Fiscal Year 2021 Report to Congress* (2022).

170 H.R. Rep. No. 116-458, at 37 (2020).

171 U.S. Immigr. & Customs Enforcement, *supra* note 170, at ii.

172 *Id.* at 2.

detention.[173] After an inspection of seventy-seven of their facilities, ICE determined that *only twelve* allegations of due process violations took place among the tens of thousands of ICE detainees nationwide.[174] To address issues of phone access and its cost for detainees, ICE stated their recent policy of providing detainees with 520 free minutes per month, but noted that this was only available to detainees imprisoned in facilities contracting with one specific private telecommunications company.[175] Accordingly, this policy only applied to thirty-nine detention centers.[176] The agency continued on to state that they provide many other detainees with an undefined amount of "free minutes,"[177] while the majority of ICE detainees are left with ICE's minimum standard of "reasonably priced telephone services based on federal and state regulations at rates comparable to those charged to the general public."[178] The report concludes with: "ICE actively supports access to legal representation and provides noncitizens multiple avenues to that access, whether in-person or virtually."[179]

These findings were at odds with the experiences of many pro bono immigration attorneys, non-profits, and legal aid providers, who pushed back on this report and cited ICE's own admission that the agency "does not track" due process violations across its facilities.[180] In a complaint filed on October 13, 2022, five legal service providers (Americans for Immigrant Justice, Florence Immigrant and Refugee Rights Project, Immigration Justice Campaign, Immigration Services and Legal Advocacy, and Refugee and Immigrant Center for Education

173 *Id.*

174 *Id.* at 3.

175 *Id.* at 4.

176 *Id.*; *see List of ICE Facilities Providing Free Telephone Minutes*, Am. Immigr. Laws. Ass'n (Oct. 28, 2021), https://www.aila.org/library/ice-facilities-free-telephone-minutes.

177 *See* U.S. Immigr. & Customs Enforcement, *supra* note 170, at 4. These "free minutes" are typically only offered in ten to fifteen minute increments, and widely limited to public areas of the detention units and non-confidential phone lines. Memo from Nat'l Immigrant Just. Ctr., ACLU of S. Cal., and S. Poverty L. Ctr. to Staff of the H. and S. Appropriations Subcomms. on Homeland Sec., Concerns re Veracity of Ice's February 2022 "Access to Due Process" Report (Mar. 22, 2022), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2022-03/NGO-Rebuttal-to-ICE-Legal-Access-Report-March-22-2022.pdf.

178 U.S. Immigr. & Customs Enforcement, Standard 5.4: Telephone Access (2019), https://www.ice.gov/doclib/detention-standards/2019/5_4.pdf.

179 U.S. Immigr. & Customs Enforcement, *supra* note 170, at 7.

180 Complaint at 5, Ams. for Immigrant Just. v. U.S. Dep't of Homeland Sec., No. 1:2022cv03118, 2023 WL 4364096 (D.D.C. July 6, 2023).

and Legal Services) filed suit against DHS, ICE, and their respective acting directors for the chronic deprivation of due process rights for ICE detainees.[181] In their complaint, plaintiffs cited a separate study conducted by the ACLU, reporting a glaring lack of phone service, denial of visitation with counsel, inadequate interpreter services, shortcomings of video conferencing capabilities, lack of privacy and confidentiality, and email/fax/mailing delays across dozens of facilities.[182] Plaintiffs noted that ICE determined their own detention standards based on various Performance-Based National Detention Standards, all of which purport to guarantee a level of access to counsel in detention facilities.[183] By adopting these detention standards, ICE assumed a responsibility to adhere to them, which they have failed to do as documented in the findings of the ACLU.[184] Moreover, ICE does not attempt to monitor compliance with these standards, rendering their assertions of adequacy baseless.[185] In their claims for relief, plaintiffs specifically cite a denial of substantive due process rights and the right to fair custody proceedings in violation of the Fifth Amendment.[186] This matter is still pending, but a number of cases emerging from COVID-19 lockdowns and limitations are revelatory of the courts' views on due process matters in immigration proceedings.

2. Ernesto Torres v. U.S. Department of Homeland Security

One such case is *Ernesto Torres v. United States Department of Homeland Security*, a class-action suit filed by the American Immigration Lawyers' Association in the United States District Court of Central California on behalf of multiple detainees against DHS, ICE, and ICE-affiliated corporation GEO Group, Inc.[187] Plaintiffs' claims remained largely intact following a motion to dismiss by defendant GEO Group,

181 *Id.* at 1–3.

182 *Id.* at 5.

183 *Id.* at 4; U.S. Immigr. & Customs Enforcement, 2008 Operations Manual ICE Performance-Based National Detention Standards (2008).

184 Shah & Cho, *supra* note 78, at 7–8.

185 Letter from ACLU et al. to Hon. Alejandro Mayorkas, Sec'y of Homeland Sec. and Tae D. Johnson, Acting Dir., Immigr. & Customs Enforcement, Coalition Letter to DHS and ICE on Access to Counsel in Immigration Detention (Oct. 29, 2021), https://www.aclu.org/documents/coalition-letter-dhs-and-ice-access-counsel-immigration-detention.

186 Complaint, *supra* note 181, at 64–65.

187 Torres v. U.S. Dep't of Homeland Sec., No. 5:18-cv-02604, 2020 WL 3124216 (C.D. Cal. Apr. 11, 2020) (granting plaintiff's motion for a temporary restraining order).

who privately operated Adelanto ICE Processing Center in California ("Adelanto").[188] Communication issues at Adelanto predated the COVID-19 pandemic, with most attorneys already opting to visit their clients imprisoned at Adelanto in person in order to avoid the myriad aforementioned issues involving phone access, email, fax, and video-conferencing.[189] The introduction of COVID-19 social distancing measures rendered in-person legal visitations at Adelanto effectively impossible.[190] These restrictive measures did not lead to a relaxation in the pre-pandemic limitations on virtual communications, and deportation hearings proceeded as scheduled throughout the pandemic despite the widespread issues in attorney access.[191] In an effort to immediately remedy the daily harm caused by ICE's restrictions, plaintiffs sought relief in the form of a preliminary injunction requiring ICE to promptly undertake measures to improve attorney access conditions.[192]

In the meantime, the court evaluated the possibility of a temporary restraining order ("TRO") on ICE's activities in order to prevent additional and irreparable harm.[193] The standard for a TRO requires a plaintiff to demonstrate that they are (1) "likely to succeed" on the merits of their claim; (2) that they are "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "that the balance of equities tips in [their] favor;" and (4) "that an injunction is in the public interest."[194] The court determined that plaintiffs did meet this burden and granted a TRO against ICE, DHS, and GEO Group.[195] In evaluating plaintiff's "likelihood of success" in their claim, the court credited plaintiffs' claim that there were less restrictive alternatives to client communication than the practices implemented by defendants.[196] Moreover, the court stated that "Defendants have likely interfered with established, ongoing attorney-client relationships," and that "[d]etained immigration proceedings at Adelanto appear to be barreling on, and without reasonable access to attorneys."[197] In addressing plaintiffs'

188 *Id.* at 2–3.
189 *Id.* at 4–5.
190 *Id.* at 5. ("Attorneys must provide their own PPE, including goggles, for any visit. During non-contact visits at Adelanto, attorney and client are separated by plexiglass, so it is not possible to share documents or obtain client signatures.").
191 *Id.* at 6–7.
192 *See id.*
193 *See id.*
194 *See id.* at 7 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).
195 *Id.* at 14–15.
196 *Id.* at 9.
197 *Id.* at 9–10.

irreparable harm, balance of equities, and public interest arguments, the court once more credited plaintiffs' argument that lack of access to counsel can be dispositive in immigration proceedings.[198] In crediting this claim, the court cited a number of federal cases that validated the link between a deprivation of constitutional rights and irreparable harm,[199] and specifically applied that link to the context of immigration proceedings.[200] The court actively emphasized the importance of this link in citing prior federal due process cases involving the rights of *citizens*, implying that *noncitizens* required identical protections. In doing so, the court broadly noted that "[s]ociety's interest lies on the side of affording fair procedures to *all persons*, even though the expenditure of governmental funds is required."[201]

Accordingly, the court issued a TRO against all defendants.[202] This order required GEO Group at Adelanto to make all outgoing legal telephone calls free of charge and unmonitored, create a process through which attorneys and clients could pre-schedule these calls, create a confidential process through which attorneys could dispatch sensitive documents to detainees, and provide contact information for detainees to counsel.[203] While the court was careful to limit the implications of this temporary holding to the circumstances surrounding COVID-19 and Adelanto specifically,[204] this precedent is an effective resource for future suits against DHS and ICE and provides a citable reference for detainee due process claims in federal court.

198 *Id.* at 11.

199 *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (finding that risk of deportation "underscores" importance of access to counsel); Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (finding deprivation of constitutional rights is "unquestionably" an irreparable injury).

200 *Torres*, 2020 WL 3124216 at *8 ("The harm to the attorney plaintiffs is of a different order, but is the flip side of the same constitutional coin, and is irreparable . . . 'The deprivation of constitutional rights unquestionably constitutes irreparable injury.'") (internal citations omitted).

201 Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983) (emphasis added).

202 *Torres*, 2020 WL 3124216 at *11.

203 *Id.* at 14–15.

204 *Id.* at 15.

3. Southern Poverty Law Center v. U.S. Department of Homeland Security

In a similar manner to *Torres*, the Southern Poverty Law Center filed a class-action suit in 2020 against various ICE centers across Georgia and Louisiana, citing exacerbated attorney access issues in light of COVID-19.[205] The original suit was filed prior to the pandemic, and later modified to request a TRO in response to ICE's restrictive pandemic protocols.[206] Plaintiffs alleged near-identical issues to those in *Torres*, and set forth two separate claims: (1) that DHS and ICE had violated their clients' right to counsel in removal proceedings; and (2) that DHS and ICE had set forth pandemic-related restrictions that were *punitive*, in violation of substantive due process rights.[207]

In *Southern Poverty Law Center*, the district court noted jurisdictional obstacles to its ability to hear cases pertaining to the discretionary matters of executive agencies; however, the obstacles did not ultimately bar the court from hearing all of plaintiffs' claims. This is only true because plaintiffs raised *two* claims: (1) a right-to-counsel claim under the Due Process Clause of the Fifth Amendment; and (2) a substantive due process claim alleging punitive treatment. Fifth Amendment due process claims brought by detained noncitizens in removal proceedings are typically facially deficient per the standards of subject matter jurisdiction in federal court.[208] Simply put, this conflict arises over the judiciary's ability to review standards and procedures set forth by the executive branch, particularly in the removal of noncitizens. DHS, as an executive agency, will typically prevail on its motion to dismiss a case for federal court's lack of jurisdiction to decide issues arising from removal procedures, over which DHS has exclusive and independent control. Accordingly, the court rightly elected to *not* consider the question of its jurisdiction over plaintiff's access-to-counsel claim as it related to removal proceedings, acknowledging its inability to hear this matter.[209] After acknowledging the lack of jurisdiction over plaintiffs' first claim, the court here opted, instead, to assert its jurisdiction over plaintiff's *second* claim in evaluating whether detainees' restrictive treatment in detention was punitive in nature. To satisfy

205 S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 18-760, 2020 WL 3265533, at *1 (D.D.C. Jun. 17, 2020).
206 *Id.* at *2–3.
207 *Id.* at *2.
208 *Id.* at *14.
209 *Id.* at *17.

jurisdictional grounds on this claim, the court pointed to the fact that the question of punitiveness and the alleged substantive due process issues expanded *beyond* the matter of representation issues strictly in removal proceedings, over which they typically do not have jurisdiction.[210] By determining that plaintiffs had indeed set forth claims *independent* of the removal process, the court was able to establish that it did actually have jurisdiction over a portion of plaintiff's claims such that it was able to hear this case on substantive due process grounds.

After confirming jurisdiction, the court evaluated the basis for a TRO per the same prongs set forth in *Torres*: Plaintiffs' likelihood of success on the merits of their claim, a showing of irreparable harm, consideration of a TRO's impact on the public interest, and a balance of equities.[211] As a basis for evaluation on punitive nature, the court stated that civil detainees were likely to prevail in arguing that their conditions were "objectively unreasonable or excessive" in regard to the Government's purported interest in implementing them.[212] Ultimately, the court determined that ICE's policies on communications were indeed punitive in nature and implicated substantive due process rights, stating:

> They are, in short, inadequate. The Court does not address here whether that lack of action would be problematic under normal circumstances, or in a pre-COVID-19 world in which remote legal visits and communications may be less necessary. But these are not normal circumstances—the risks associated with COVID-19 render these circumstances exigent. In this situation, when in-person legal visitation is no longer a less harsh alternative, such conditions are likely to be punitive.[213]

Thus, the court found that plaintiffs succeeded in demonstrating the factors required for a TRO, and granted a TRO in part that provided for enhanced telephone and email access, scheduling procedures, and confidentiality protections.[214] While refraining from specifically stating the positive implications that this had for detainees represented by

210 *S. Poverty L. Ctr.*, 2020 WL 3265533 at *17 (holding that the Court did have jurisdiction to hear claims relating to *bond hearings*, as a separate matter from removal proceedings. "The Court therefore does not view Plaintiff's substantive due process claim as a claim that directly invokes the detained immigrants' right to counsel in removal proceedings.").

211 *Id.*

212 *Id.* at *28.

213 *Id.* at *29.

214 *Id.* at *34–35.

counsel in *removal* hearings, the court nonetheless was able to significantly improve attorney access conditions by creatively circumventing jurisdictional issues and applying a broad set of substantive due process protections. These added protections, while not intended for the specific benefit of attorneys and clients in removal proceedings, nonetheless did increase clients' access to counsel in removal proceedings.[215] However, this case is also illustrative of the point that a detainee's claim will not survive a motion to dismiss from an executive agency wherein it does not establish grounds independent of and collateral to removal procedures.[216]

Despite the now-qualified merits of a due process argument for detainees, judges often choose to distinguish the particulars of any given detention center from established precedent, reluctant to grant a broad, "one-size-fits-all" remedy to common issues across centers.[217] Additionally, the novelty of COVID-19 influenced courts in extending protections to detainees that were only temporary. In a post-pandemic world, it is unclear if these arguments will prevail, and the power of

215 *See SPLC Statement on the Stipulated Dismissal of SPLC V. DHS*, S. Poverty L. Ctr. (Apr. 20, 2023), https://www.splcenter.org/presscenter/splc-statement-stipulated-dismissal-splc-v-dhs (describing settlement agreement in which ICE agreed to improve conditions by adding "adding confidential consultation rooms, telephones for legal calls and a room for remote video calls").

216 *See* Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., 524 F. Supp. 3d 919, 952 (N.D. Cal. 2021). Reviewing 9th Circuit precedent, the court found:

> In *J.E.F.M.*, the Ninth Circuit held that a district court did not have jurisdiction over claims by minors in removal proceedings that they were entitled to have attorneys represent them at government expense because those claims "arise from removal proceedings" and "[r]ight-to-counsel claims are routinely raised in petitions for review filed with a federal court of appeals." In *National Immigration Project of the National Lawyers Guild*, the district court held it did not have jurisdiction over access-to-counsel and due process claims challenging immigration court and detention facility policies implemented in response to the COVID-19 pandemic, finding that those claims "arise from the course of removal hearings." However, "claims that *are independent of or collateral to the removal process* do not fall within the scope of [provisions regarding judicial review]."

Id. (internal citations omitted) (emphasis added).

217 *See* Nat'l Immigr. Project of Nat'l Laws. Guild v. Exec. Off. of Immigr. Rev., 456 F. Supp. 3d 16, 34 (D.D.C. 2020) (denying TRO by crediting Government's proffered interest of restricting attorney access for the purposes of public health and safety during COVID-19. "Plaintiffs' proposed relief, in contrast, would require this Court to impose a one-size-fits-all approach on all (or most) of the nation's immigration courts and their specific cases, as well as on all (or most) of the nation's immigration detention facilities and their unique circumstances.").

citing TROs as a form of precedent does not carry the same authority as citing to a court holding.[218] The current *Americans for Immigrant Justice* case proceeding through courts is promising but may be vulnerable to negative distinction from the particulars set forth in *Torres* and the pitfalls illuminated in federal courts' jurisdiction over access-to-counsel issues in *Southern Poverty Law Center*. In the meantime, detainees continue to face proceedings for which they are underprepared and from which they are alienated. The gravity of this problem cannot be overstated.

B. Motion to Reopen (Language Accessibility)

A natural consequence of the detainee's lack of adequate attorney access is that they often lose their removal hearings for lack of preparation and assistance. In the event that a noncitizen is ordered removed, the noncitizen may file *one* motion to reopen their matter in immigration court within 90 days of a final administrative order in their case.[219] In filing these claims, appellants must be aware of the post-departure bar that prevents the Board of Immigration Appeals ("BIA") from considering matters set forth by respondents who have already been physically removed from the United States.[220] Despite the existence of this bar, there is no mention of it in the statutes governing motions to reopen in immigration court.[221] Nonetheless, two federal regulations[222] prohibit the adjudication of motions filed post-departure, "providing that motions to reopen 'shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.'"[223] This

218 TROs are a form of injunctive relief that are only binding for the period of time indicated in the order; case holdings and opinions arising from a final disposition, on the other hand, are binding on future cases within the jurisdiction and may be cited as such. *See* Fed. R. Civ. P. 65.

219 Nat'l Immigr. Project, Practice Advisory: Post-Departure Motions to Reopen and Reconsider 5 (2019), https://nipnlg.org/sites/default/files/2023-07/2023_post-departure-bar-advisory.pdf. Note that the time requirement for a motion to reopen is subject to equitable tolling and statutory exceptions—particularly in the cases of petitioners seeking asylum related to relief based on country conditions, or if petitioner is proffering a claim regarding status under the Violence Against Women Act.

220 *Id.* at 19.

221 *Id.* at 7–8.

222 8 C.F.R. § 1003.2(d) (2023) (motions filed with the BIA); *id.* § 1003.23(b)(1) (motions filed with the IJ).

223 Nat'l Immigr. Project, *supra* note 220, at 9 (quoting 8 C.F.R. § 1003.2(d) (2023)).

technically renders a motion to reopen as available only to noncitizens who are still within the boundaries of the United States and awaiting physical removal, but this bar has been generously interpreted by courts to include various jurisdiction-specific exceptions and carveouts.[224]

Regardless, motions to reopen are tedious due to the courts' reluctance to disturb prior rulings, indicating that "[a noncitizen] who seeks to reopen removal proceedings out of time ordinarily faces a steep uphill climb."[225] Before laying out arguments in support of motions to reopen for appellants to leverage, expectations must be hedged. The framing of a motion to reopen as a cumbersome and ultimately unrewarding burden for petitioners has been preserved in precedent across circuits.[226] The standard for evaluating a motion to reopen has thus been regarded as highly deferential to the largely monolithic authority of immigration courts, specifically due to "the threat [the motion] poses to finality."[227] Even in cases where a federal court is persuaded that there are valid merits to proffer a viable motion to reopen, the court routinely defers to the final authority of the BIA.[228] Still, for the sake of argument and hope, the claim may be worth making.[229]

224 *See id.* at 10. So far, ten circuits have invalidated the post-departure bar regulation. *Id.* Three of them (the Second, Third, and Fifth Circuits) have invalidated the regulation "in the context of motions filed pursuant to the statute, (i.e. timely, not numerically barred motions), but have upheld the regulation in the context of non-statutory, regulatory *sua sponte* motions". *Id.*

225 Tay-Chan v. Barr, 918 F.3d 209, 211 (1st Cir. 2019).

226 *Id.*; *see also* Xu Yong Lu v. Ashcroft, 259 F.3d 127 (3d Cir. 2001); Vyloha v. Barr, 929 F.3d 812 (7th Cir. 2019); Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005); Ray v. Gonzales, 439 F.3d 582 (9th Cir. 2006).

227 *See* Medina v. Whitaker, 913 F.3d 263, 266 (5th Cir. 2019); *see also* Perez v. Holder, 740 F.3d 57, 61 (1st Cir. 2014); Bbale v. Lynch, 840 F.3d 63, 66 (1st Cir. 2016).

228 *Ray*, 439 F.3d at 591. This opinion notes the trend of hesitation to disturb the jurisdiction of the BIA:

> Second, we are reluctant to rule on the merits of an issue that the BIA has not itself addressed. In [*INS v. Ventura*] the Supreme Court instructed that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." The decision of whether to reopen a case is certainly one over which the BIA typically has jurisdiction . . . . [We] decline to rule on the merits of a claim that involves close examination of the BIA's own appeals process.

Id. (internal citations omitted).

229 *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html ("[The system] depends almost entirely on the cooperation of those it seeks to control. If everyone . . . suddenly exercised his constitutional

1. Ineffective Assistance

If a defendant is able to establish that they were deprived of meaningful access to competent counsel in criminal court, they may file for relief under the argument that their assistance by counsel was ineffective, known as a *Strickland* argument.[230] This typically requires that a criminal defendant prove: (1) that their counsel's "performance was deficient;" and (2) the deficient performance prejudiced their defense "so as to deprive the defendant of a fair trial."[231] In a motion to reopen, an appellant may, among other claims, put forth an ineffective assistance of counsel claim, near-identical to the aforementioned *Strickland* argument in formulation.[232] This ineffective assistance of counsel claim in a motion to reopen may present one avenue that LEP respondents can leverage to remedy language-related due process violations that prejudiced their initial cases in immigration court.

The framing of this argument is paramount to a claim's ability to survive in court, and case history provides guidance on adequately articulating grounds. In *Siong v. I.N.S.*, the appellant was able to successfully argue an ineffective assistance of counsel claim in their appeal of the BIA's denial of their motion to reopen.[233] The United States Court of Appeals for the Ninth Circuit remanded the case to the BIA with specific directions to grant a motion to reopen.[234] In its holding, the court did adhere to its practice of deferring to immigration courts for final authority, but its specific instructions on *how* this deference must operate, per the court's findings, is illuminating. In a motion to reopen in the Ninth Circuit, prejudice in an ineffective assistance of counsel claim only violates due process if the proceeding was "so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case,"[235] and "[p]rejudice is ordinarily presumed in immigration proceedings when counsel's error 'deprives the [noncitizen] of the appellate proceeding entirely.'"[236] This presumption, while rebuttable, is found *not* rebutted in the case where an appellant is able to show

rights, there would not be enough judges, lawyers, or prison cells to deal with the ensuing tsunami of litigation.").

230 Strickland v. Washington, 466 U.S. 668, 687 (1984).

231 *Id.*

232 *Id.*; Nat'l Immigr. Project, *supra* note 220, at 4.

233 Siong v. Immigr. & Naturalization Serv., 376 F.3d 1030 (9th Cir. 2004).

234 *Id.* at 1042.

235 *Id.* at 1037.

236 *Id.* (quoting Rojas-Garcia v. Ashcroft, 339 F.3d 814, 826 (9th Cir. 2003)).

"plausible grounds for relief."[237] The focus of this analysis will center Siong's legal claims of prejudice regarding language access, with the caveat he also alleged several procedural oversights on the part of Counsel.[238]

In his argument relating to language access, Siong claimed to have worked with four different interpreters throughout his asylum hearings, none of whom were able to precisely interpret his expressions regarding political violence.[239] In initially denying Siong's motion to reopen, the BIA did not have access to a transcript of the hearing, making it "extremely difficult to pinpoint direct evidence of translation errors."[240] Given the low bar of mere plausibility for establishing grounds for relief, the court credited as plausible Siong's claim that a transcript would reveal that many of his answers during the hearing were actually "unresponsive and unrelated to the questions."[241] Citing to the fact that "unresponsive answers by the witness provide circumstantial evidence of translation problems," the court determined that Siong had established at least plausible grounds for relief regarding faulty translation.[242] Accordingly, the court remanded this case to the BIA, finding that the BIA had erred in its grounds for denial.[243] Here, the court noted that Siong only needed to demonstrate that he had plausible grounds for relief: "We conclude that he has. Siong need only show that 'the BIA could plausibly have determined that he was [eligible for relief] based on the record before it.'"[244] Accordingly, the case was sent back to the BIA with specific grounds to grant the motion to reopen.[245] Notably, despite the fact that the motion to reopen was based on an ineffective assistance of counsel claim, the court still found that Siong demonstrated plausible grounds for relief for the claims Siong alleged about his *interpreters*, not just his counsel, specifically considering and validating a claim of a due process violation for inadequate courtroom interpretation in this motion to reopen.[246] Accordingly, in considering whether to bring forth a motion to reopen on the grounds of ineffective interpreter services,

237 Dearinger *ex rel.* Volkova v. Reno, 232 F.3d 1042, 1045–46 (9th Cir. 2000).
238 *See Siong*, 376 F.3d at 1035–41.
239 *Id.* at 1035.
240 *Id.* at 1041 (citing Perez-Lastor v. Immigr. & Naturalization Serv., 208 F.3d 773, 778 (9th Cir. 2000)).
241 *Id.* at 1041–42.
242 *Id.* (quoting *Perez-Lastor*, 208 F.3d at 778).
243 *Id.* at 1042.
244 *Id.* at 1038.
245 *Id.* at 1042.
246 *Id.*

plaintiffs may cite to this precedent as judicially validated support.[247]

In the case where an appellant alleges that a language barrier between them and their *counsel* prejudiced their case, motions to reopen on the grounds of ineffective assistance of counsel have also been an effective means of arguing for relief. This can be a powerful tool for LEP appellants who struggle to communicate with their English-speaking attorneys, and thus cannot meaningfully participate in the preparation of their own case as required by due process. *Iturribarria v. Immigration and Naturalization Service*, also in the Ninth Circuit, is helpful as guidance here.[248] In this case, the BIA rejected appellant's motion to reopen on the grounds that it was untimely filed and ineligible for equitable tolling.[249] On review, the Ninth Circuit determined that this case was indeed eligible for equitable tolling, as it contemplated issues of deception, fraud, and error.[250] Specifically, the court determined that appellant's original attorney in immigration court instructed appellant to sign a number of inaccurate documents and affidavits that had been provided in English, despite appellant's limited English proficiency.[251] Provided that the appellant could not even understand his prior counsel's error until *after* the documents were translated for him post-holding, the court deemed equitable tolling appropriate.[252] Regardless, the court declined to remand to the BIA with directions to reopen, citing appellant's failure to meet the standard of establishing prejudice in a manner that would have had an impact on the *outcome* of his claim.[253] Nonetheless, this case

247 However, bear in mind that the court validated this argument in combination with other alleged oversights regarding translation on the part of Siong's counsel. Without more, a motion to reopen specifically on the grounds of interpreter shortcomings may not be met with similar success.

248 Iturribarria v. Immigr. & Naturalization Serv., 321 F.3d 889 (9th Cir. 2003).

249 *Id.* at 894. Equitable tolling occurs when a court pauses or "tolls" the statutory limitation period after commencement of proceedings. *Id.*

250 *Id.* at 903.

251 *Id.* at 898.

252 *Id.*

253 *Id.* at 902–03. Despite petitioner's demonstration of the hardship that his removal would force upon his family, the Court writes:

> Mr. Iturribarria claims that his three school-aged U.S. citizen children would suffer extreme hardship if he were deported. In support of this claim, the record contains several letters written by a family doctor, an elementary school teacher of his son, and a school psychologist, attesting to the Iturribarrias' strong familial bonds. Some of the letters express the view that the Iturribarria children would suffer if their father were deported and they were compelled to live in Mexico with him . . . We do not wish to minimize the upheaval experienced by citizen children who must leave the United States to accompany

is instructive in providing an avenue for LEP individuals who struggled to communicate effectively with their attorneys in a manner that *can* be demonstrated to have impacted the outcomes of their cases.

2. Defective Notice

Immigrants ordered removed may also support their motion to reopen by alleging defective notice of removal. A noncitizen may attempt this claim by arguing that they did not technically "receive" notice of their removal proceeding and its implications per statutory guidelines because of the language of the notice. A number of cases with this claim have reached federal Courts of Appeals, with LEP appellants arguing that the notice of their hearing did not meet requisite standards.[254] However, these cases typically fail at the appellate level, as courts have routinely held that a notice written or orally delivered to a noncitizen in their non-native language still adequately satisfies due process because a noncitizen should, on their own and without translation, understand that they need to inquire further into the matter at hand.[255] Notably, courts do not actually describe any manner in which these LEP noncitizens can even understand the (English) notices provided to them adequately enough to inquire further, short of "seek[ing] help from someone [else] who can overcome the language barrier."[256] Courts have been able to justify this position by stating that the burden of delivering notice in a variety of languages beyond English is too significant to impose on the government, making little, if any, reference to a noncitizen's burden to understand a language that they do not speak in order to

> a deported parent to his country of deportation. We are compelled by our case law, however, to conclude that the potential hardships described by the letters presented by petitioner are not 'extreme'. . .

Id. at 902.

254 *See, e.g.*, Saldana-Navarro v. Whitaker, 759 F. App'x 427 (6th Cir. 2018); Patel v. Sessions, 751 Fed. Appx. 795, 799 (6th Cir. 2018); Singh v. Holder, 749 F.3d 622 (7th Cir. 2014); Ojeda-Calderon v. Holder, 726 F.3d 669 (5th Cir. 2013).

255 *See, e.g.*, *Saldana-Navarro*, 759 F. App'x at 430 (motion to reopen on the basis of ineffective notice, including lack language accessibility, denied, noting that noncitizens have an "expect[ation] to inquire" in this circumstance despite receiving the document in a language that they cannot comprehend with no further explanation or instruction.); Lopez v. Garland, 990 F.3d 1000, 1003 (6th Cir. 2021) (acknowledging the court's prior findings that a notice delivered in English to a non-English speaker nonetheless satisfies due process by signaling to the noncitizen that they must "seek help from someone who can overcome the language barrier").

256 *Lopez-Garland*, 990 F.3d at 1003.

avoid deportation and the dire consequences thereof. The United States Court of Appeals for the Seventh Circuit summarized this position starkly in response to a plea from a Russian plaintiff who received notice of her proceedings in Spanish and English, noting that her request for a Russian translation was "a broad and troublesome position," because it implied that the Immigration and Naturalization Services ("INS") "must maintain a stock of forms translated into literally all the tongues of the human race," and no court "has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first."[257] Russian is the ninth most-spoken language in the world.[258]

Still, however, arguments continue to trickle through the federal courts based on language accessibility in notices. In *Zhang Lan v. Attorney General of the United States*, the appellant had been ordered removed *in absentia* for failing to attend her removal hearing.[259] Appellant argued that the notice of her hearing did not reach her residential address, and thus did not comport with statutory standards.[260] During her preliminary immigration interview, the appellant had been in the company of other noncitizens from China.[261] Their assigned interpreter spoke in a dialect of Mandarin that she did not understand, and she relied on the assistance of another noncitizen in the room to respond to the interview questions.[262] In this translation process, the appellant's address was incorrectly conveyed, and her deportation order never reached her address.[263] While the United States Court of Appeals for the Third Circuit was unsympathetic to this claim, their reasoning for denial involved a lack of supporting evidence, long delays in filing to reopen, and a presumption of receipt left effectively unrebutted by appellant.[264]Accordingly, the language argument itself may not be moot if an LEP appellant is able to timely file, meet evidentiary requirements, or argue persuasively for equitable tolling.[265]

257 Nazarova v. Immigr. & Naturalization Serv., 171 F.3d 478, 483 (7th Cir. 1999).

258 *The Most Spoken Languages Worldwide in 2023 (By Speakers In Millions)*, Statista (June 16, 2023), https://www.statista.com/statistics/266808/the-most-spoken-languages-worldwide/.

259 Zhang Lan v. Att'y Gen. of U.S., 484 F. App'x 727, 728 (3d Cir. 2012).

260 *See id.*

261 *Id.*

262 *Id.*

263 *Id.*

264 *Id.* at 729–30.

265 *See* Nazarova v. Immigr. & Naturalization Serv., 171 F.3d 478, 484–85 (7th Cir. 1999). The petitioner in this case was late to her own removal proceedings because she was unable to understand the communications provided to her by INS without the assistance of an interpreter; she appealed. Despite finding that the petitioner may

These various remedies have relied on the zealous and tireless work of attorneys, detainees, and appellants alike. While an ocean of due process claims have been able to achieve only a few narrow channels of relief through the courts, access to that relief requires time, safety, and money that most noncitizens in immigration court simply do not have. These efforts, while impactful and necessary, struggle endlessly against a monolith of procedure, precedent, and power historically poised against them.

Conclusion

At the age of twenty-five, almost two years after his ICE arrest, Ousman Darboe eventually lost his removal proceedings case in immigration court.[266] He was ordered to be removed to the country of Gambia where he had not lived since he was six years old.[267] Luckily, the length and severity of Ousman's time in ICE custody had garnered a rare media attention, as his case seemed to "capture everything wrong with our criminal legal and immigration legal systems and how they center anti-Blackness and separate families and communities."[268] This attention led to a gubernatorial pardon for Ousman's pre-existing jewelry robbery charge,[269] which was the charge for which Ousman was deemed deportable, as such an offense is considered that of "moral

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have technically received adequate *notice*, the Court recognizes the predicament that INS creates in these instances regarding respondents' opportunities to be heard:

> [Petitioner]promptly notified the IJ of the reason why she was late in a handwritten motion . . . only minutes after she found out what had happened. We cannot endorse the approach of the IJ and the BIA to this case. The INS sent hopelessly confusing signals to [petitioner] about the most fundamental aspect of her hearing: whether she would be able to understand any of the words she heard, and whether the IJ would be able—quite literally—to comprehend her presentation. It violates due process to insist that [petitioner] should have sacrificed her constitutional right to a meaningful opportunity to be heard so that she could stand corporeal witness—though in essence unable to hear or speak—to her own deportation.

Id. at 485.

266 Ibrahim, *supra* note 2.

267 *Id.*

268 *Ousman Darboe*, Bronx Defs. (Sept. 12, 2022), https://www.bronxdefenders.org/ousman-darboe/.

269 *See id.*

turpitude."[270] This pardon hence cleared Ousman's criminal record, leaving ICE with no basis to remove Ousman from the country according to Ousman and his amici curiae.[271] In September 2020, Ousman was released on bond after three years in ICE detention.[272] But in July of 2023, the United States Court of Appeals for the Second Circuit denied Ousman's petition for review of the BIA's denial to reopen proceedings in light of his pardon.[273] Finding no legal error, the court concluded that the BIA acted within its discretion in denying Ousman's waiver of inadmissibility.[274] The court reached this conclusion despite Ousman's pardon and showing of hardship through his strong familial ties and his wife's financial struggles, resting its decision on the fact that Ousman either "admitted to the underlying conduct, or admitted being present when the crime occurred" for both his youthful offender adjudications and pardoned adult conviction.[275] At the time of publication of this Note, Ousman's future in the United States remains uncertain.

Despite living through a nightmare, the fact that Ousman had a community of friends, family, and attorneys fighting alongside him is a blessing that only a few detained noncitizens are afforded. Although "sanctuary cities" have appeared frequently in the media as havens for noncitizens where local governments refuse to cooperate with immigration law enforcement, the phrase has no real legal meaning.[276] This renders the promise of a "sanctuary" at least somewhat hollow and symbolic; vulnerable to the whims of local government and individual legal actors within the courts.[277] Even within Ousman's home city of

270 *See* Brief for Governor Andrew M. Cuomo of New York as Amicus Curiae in Support of Petitioner and Reversal at 3, Darboe v. Garland, Nos. 19-3956 & 20-2427, 2023 WL 4759250 (July 26, 2023).

271 *See id.* ("Governor Cuomo granted Mr. Darboe a full and unconditional pardon . . . . ICE therefore has no legal basis to remove Mr. Darboe on the basis of his robbery offense because under New York law, Mr. Darboe has not been legally convicted of any crime." (internal citations omitted)).

272 *Ousman Darboe*, *supra* note 269.

273 *Darboe*, 2023 WL 4759250 at *4.

274 *Id.* at *2.

275 *Id.* at *2.

276 Annie Andrews, *The Difference Between "Sanctuary City" and "Welcoming City,"* Fox13 News (Feb. 23, 2017), https://www.fox13seattle.com/news/the-difference-between-sanctuary-city-and-welcoming-city ("The sanctuary label doesn't have any legal meaning, really . . . I think that it's important to realize that even a jurisdiction or city or county calls itself a 'sanctuary' that it doesn't mean that immigration enforcement can't go in there.").

277 Ashley R. Houston et al., *Messaging Inclusion with Consequence: U.S. Sanctuary Cities and Immigrant Wellbeing* 4–5 (July 22, 2023), https://doi.org/10.1016/j.jmh.2023.100199 ("[W]orkers described the city's use of the term 'sanctuary' was

New York, ICE has been able to sidestep the effusive "sanctuary city" promises[278] of government officials by accessing the New York Police Department ("NYPD")'s fingerprint records as recently as 2018.[279] After accessing these records that are maintained and housed by New York's law enforcement operations, ICE agents lured noncitizens to the agency office through the guise of a mandatory meeting.[280] Accordingly, multiple noncitizens voluntarily reported to ICE officers, only to be detained and placed in deportation proceedings upon arrival.[281] This practice only takes place because of ICE's contact with local law enforcement; no promise of a "sanctuary city" or otherwise has been able to protect vulnerable noncitizens from this practice.

When faced with the question of cooperating with ICE, judges, courthouse employees, and prosecutors will encounter an unending conflict between their dedication to due process *for all* and their reputations within the judiciary. Defense attorneys are often implicitly tasked with falling on their swords for clients, making decisions that reflect poorly professionally for the sake of their clients' best outcomes.

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a political gesture or symbolic if it failed to enact additional policies and practices to mitigate immigrants' structural exclusion. For some . . . , tensions between symbolic sanctuary and sanctuary in practice reflect contradictions between federal and local policy domains.").

278 Ryan Devereaux & John Knefel, *ICE Evades Sanctuary Rules by Using NYPD Fingerprints to Find Immigrants and Send Them Call-In Letters*, Intercept (Apr. 26, 2018), https://maketheroadny.org/ice-evades-sanctuary-rules-by-using-nypd-fingerprints-to-find-immigrants-and-send-them-call-in-letters/. New York City officials have pledged not to cooperate in immigration enforcement:

> "We have been very clear that that our police officers and employees will not be a part of a federal deportation force," de Blasio said at the time . . . [NYPD commissioner] said, "The NYPD does not conduct civil immigration enforcement. The NYPD does not seek individual's immigration status. Our work can only be done if every New Yorker has trust in the police and is willing to work with us in our collective efforts to ensure the safety of every neighborhood and every block of this great city."

Id.

279 *Id.* ("Regardless of your immigration status, once we fingerprint you, your fingerprints go into a database in Albany. If ICE has tagged that person for notification for any reason, ICE is gonna know as a result of the arrest, not as a result of any contact from the NYPD.").

280 *See id.*

281 *Id.* ("Though [noncitizens] have ended up in detention, nothing in the letters themselves explicitly indicates that detention would be a possibility. Instead, the letters arrive as an official, albeit vague, document from a federal law enforcement agency. Recipients are forced to decide between complying with the request or risking ICE showing up at their homes or workplaces.").

That burden can be shared by judges, court employees, and prosecutors under the broader goal of preserving due process, by collaboratively diverting noncitizens away from interactions with ICE as often as possible. It is not a simple task. It will be unimaginably difficult, personally and professionally—but, the foundational text of this country's legal system requires it, with many legal actors choosing to look away from that obligation. That act of looking away has allowed for mass deprivations that would cause even the most textualist of legal thinkers to mourn as a grave departure from the country's sacred constitutional protections.

For the time being, Ousman has been able to live with his daughter and watch her grow while ICE continues its fight against him.[282] In an earlier proceeding, Ousman said that his daughter "helps me feel that I got something to fight for, that I got something to go to."[283] In the meantime, thousands of noncitizens just like Ousman remain detained in cages dreaming of their loved ones and the homes that they are told do not belong to them. They, too, are fighting to return to those homes safely in the hope that someone will still be waiting by the door for them there—with outstretched, open arms and years of love to come.

282 *Ousman Darboe*, *supra* note 269.
283 Ibrahim, *supra* note 2.