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Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women

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ACCESS DENIED: BARRIERS TO REMEDIES UNDER THE VIOLENCE AGAINST WOMEN ACT FOR LIMITED ENGLISH PROFICIENT BATTERED IMMIGRANT WOMEN

DEBORAH A. MORGAN*

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INTRODUCTION

In 1994, Congress enacted the Violence Against Women Act ("VAWA").[1] Six years later, Congress reauthorized VAWA[2] in part to "address[] residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships . . . ."[3] Over the last ten years, VAWA's provisions have enabled over 20,000 battered immigrants to gain secure immigration status in the United States.[4] Nevertheless, this Comment argues that the United States Citizenship and Immigration Service ("USCIS") has frustrated VAWA's success by failing to administer VAWA remedies for

1. *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1902, Title IV (1994) [hereinafter VAWA I] (codified in scattered sections of 8 U.S.C. and 204 I.N.A.). The Act attempts to provide cohesive federal solutions to address the problem of domestic violence.

2. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, Division B (2000) [hereinafter VAWA II] (codified as amended in scattered sections of 8 U.S.C. and 204 I.N.A.). This section extends funding for VAWA I programs and addresses gaps in protection for certain victims of domestic violence.

3. *See* 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (recognizing the need to prevent abusers from using immigration law to prevent battered immigrant women from leaving them).

4. *See* NAT'L IMMIGRATION PROJECT, PROTECTING IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND OTHER CRIMES, *at* http://www.nationalimmigrationproject.org/Factsheet%20Immigrant%20Survivors.htm (last visited Feb. 27, 2005) (on file with the American University Law Review) (detailing numbers of VAWA claims).

limited English proficient ("LEP") immigrant individuals, particularly women,[5] in accordance with the Constitution, civil rights proclamations, and congressional intent.[6]

The United States admits hundreds of thousands of immigrant spouses every year,[7] and a significant number of them will become victims of domestic violence at the hands of their U.S. citizen ("USC") or legal permanent resident ("LPR") spouses.[8] The USCIS, formerly known as the Immigration and Naturalization Service ("INS"), has a legal obligation to provide linguistically appropriate services that enable LEP women to access VAWA remedies.[9] This responsibility arises under Executive Order 13,166,[10] which extended to federal agencies the obligations of Title VI of the Civil Rights Act of 1964 ("Title VI"), prohibiting discrimination on the basis of national origin.[11] The Fifth Amendment Due Process Clause, which prevents the arbitrary denial of liberty interests,[12] and the Equal

5. VAWA also applies to male spouses. *See* 146 CONG. REC. S10,193 (daily ed. Oct. 11, 2000) (emphasizing VAWA's gender-neutral language). Nevertheless, this Comment focuses on battered immigrant women because the discriminatory administration of VAWA benefits impacts immigrant women more severely because of two important facts. First, legally-admitted spouses are mostly female. *See* U.S. COMM'N ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 51 (1995) (specifying that women made up sixty percent of USC spouses immigrating to the United States for fiscal year 1994). In 1994, two-thirds of LPR spouses were female. *Id*. at 64. There is also significant statistical prevalence of male violence against women compared to female violence against men. *See* NAT'L DOMESTIC VIOLENCE HOTLINE, NATIONAL STATISTICS, DOMESTIC VIOLENCE INFORMATION, *at* http://www. ndvh.org (last visited Feb. 27, 2005) (on file with the American University Law Review) [hereinafter NDVH STATISTICS] (quoting Department of Justice statistic that in ninety-two percent of domestic violence incidents, men commit crimes against women).

6. *See infra* Parts II-III (arguing that USCIS's administration of VAWA violates due process, Executive Order 13,166, and congressional intent).

7. *See* IMMIGRATION & NATURALIZATION SERV., 2002 YEARBOOK OF IMMIGRATION STATISTICS, at 20 tbl.4 (2002) (noting that the United States admitted 294,798 immigrant spouses of U.S. citizens in 2002), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/immigs.htm; *id.* at 21 tbl.5 (indicating that the United States admitted 28,874 immigrant spouses of legal permanent residents in 2002).

8. *See* Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250 (2000) (reporting that thirty-four percent of immigrant Latinas experience domestic violence in a study conducted by the Immigrant Women's Task Force of the Coalition for Immigrant and Refugee Rights and Service).

9. *See infra* Parts II-III (addressing USCIS's obligations under the Fifth Amendment and Executive Order 13,166).

10. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (clarifying that Title VI required federally-funded agencies to provide LEP accommodations and extending such obligations to federally-conducted agencies as well).

11. *See* Pub. L. No. 88-352, 78 Stat. 252, Title VI, §§ 601-602 (1964) (codified at 42 U.S.C. § 2000d) (prohibiting recipients of federal financial assistance from discriminating on the basis of race, color, and national origin when providing services and authorizing federal agencies to establish regulations to achieve these objectives); *see also* Lau v. Nichols, 414 U.S. 563, 568 (1974) (affirming the prohibition of language discrimination as a form of national origin discrimination under Title VI).

12. *See* U.S. CONST. amend. V (prohibiting deprivation of "life, liberty, or property, without due process of law").

Protection Clause, which provides equal protection for similarly-situated individuals, fortify this responsibility.[13]

In order to create programs that enable battered immigrant women[14] to be safe from abuse, it is important to recognize barriers that operate within cultures to impede women's access to available immigration remedies,[15] in addition to accessibility barriers shared by all battered women.[16] However, even culturally-appropriate strategies may fail to reach LEP battered immigrant women because of institutional barriers that systematically exclude them from access to services.[17] By adopting the perspective of an LEP battered immigrant woman,[18] this Comment attempts to expose the

13. *See id.* amend. XIV (barring a state from denying "any person within its jurisdiction the equal protection of the laws."); *id.* amend. V (providing for due process to prevent arbitrary deprivation of life, liberty, or property); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (extending equal protection guarantees to federal acts because discrimination constitutes a deprivation of liberty under the Fifth Amendment).

14. Immigrant domestic violence advocates commonly use this term, but it does not imply that battered immigrant women form a homogenous group. *See* LETI VOLPP, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE 2 (Leni Marin ed., 1995) (noting that immigrant women are diverse in terms of race, sexual orientation, class, length of residence in the United States, and myriad other social attributes). This Comment concentrates on women who are in legally-recognized marriages to USC or LPR men, who do not yet have permanent immigrant status, who speak little or no English, who do not have economic or logistical access to legal representation, and who are eligible to self-petition for VAWA remedies. *See infra* Part I.B (describing May, a hypothetical battered immigrant woman who will guide the reader through the VAWA application process); *see, e.g.*, Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 14 HASTINGS WOMEN'S L.J. 1, 2 (2003) (noting that a typical client at the Domestic Violence Law Clinic in Tucson, Arizona is a "poor, recently immigrated, non-English speaking woman with children").

15. *See* VOLPP, *supra* note 14, at v (offering practical advice to domestic violence service providers so that they can be more culturally sensitive and reduce barriers to access). *See generally* SUDHA SHETTY & JANICE KAGUYUTAN, IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: CULTURAL CHALLENGES AND AVAILABLE LEGAL PROTECTIONS (Feb. 2002) (noting that family and community resistance, fear of official institutions, and improper program design may bar women from services), *available at* http://www.vaw.umn.edu/documents/vawnet/arimmigrant/arimmigrant.html.

16. *See* VOLPP, *supra* note 14, at 3-4 (describing tactics that batterers use against women, including coercion, threats, isolation, and physical, sexual, emotional and economic abuse).

17. *See* Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 393, 398 (2003) (arguing that focusing on cultural barriers rather than institutional ones ignores the racism of agencies and removes the pressure from them to make services accessible); *see also* NANCY MEYER-EMERICK, THE VIOLENCE AGAINST WOMEN ACT OF 1994: AN ANALYSIS OF INTENT AND PERCEPTION 102-08 (2001) (arguing that VAWA normalizes certain types of violence and may discourage women from accessing assistance); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-51 (1991) (critiquing intervention strategies that are solely based on the experiences of women who do not share the same race or class background).

18. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (explaining that the perspective of those on "the bottom" who have experienced discrimination is essential in order to understand how systems fail to provide justice). Despite this paper's focus on language, the discrimination an LEP battered immigrant woman faces based on her lack of English-

discriminatory nature of USCIS's facially-neutral VAWA application procedures and assess the efficacy of language access laws in gaining USCIS's compliance.

This Comment argues that USCIS violates Executive Order 13,166 and due process by continuing its English-only administration of VAWA in a manner that fails to provide LEP battered immigrant women with meaningful access to remedies, and excludes from protection the very individuals that Congress intended VAWA to embrace. Part I provides an overview of USCIS's VAWA and language access obligations and how May, an LEP battered immigrant woman, is unable to access VAWA remedies because of language barriers. Part II outlines due process requirements and argues that USCIS's current failure to provide language-accessible services violates LEP battered immigrant women's heightened due process rights to access VAWA remedies. Part III argues that USCIS's administration of VAWA remedies fails to provide meaningful access for LEP battered immigrant women such as May, and reviews May's options for enforcing USCIS's obligations to her under Executive Order 13,166 and the Equal Protection Clause. Part IV recommends ways in which USCIS could improve LEP battered immigrant women's access to VAWA and suggests how Congress could strengthen USCIS's compliance. This Comment concludes: (1) USCIS's current administration of VAWA is constitutionally inadequate because it deprives LEP battered immigrant women of their liberty interest in VAWA remedies without due process; (2) USCIS violates Executive Order 13,166 because its policies fail to provide meaningful access to LEP women; (3) even though USCIS's actions constitute intentional discrimination against LEP applicants, it is unclear if May has a means to enforce USCIS's obligations under Executive Order 13,166; and (4) Congress should act to close the loophole whereby USCIS can evade judicial enforcement of its obligations to LEP battered immigrant women.

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proficiency is interwoven with that based on her gender, her class, her race, and her immigration status, and will vary according to her particular social location. *See also* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (recognizing that "no form of subordination ever stands alone"). *See generally* Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9-11?"*, 7 J. GENDER, RACE, & JUST. 315, 316 (2003) (describing "pernicious and institutionalized racial barriers in U.S. immigration laws"); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 48 (1997) (discussing how U.S. immigration policies disregard "adverse gender-specific effects"); Olivia Salcido & Madelaine Aldelman, *"He Has Me Tied With the Blessed and Damned Papers": Undocumented-Immigrant Battered Women in Phoenix, Arizona*, 63 HUM. ORG. 162 (2004) (discussing how undocumented immigration status intersects with and reinforces violence against women).

I. BACKGROUND

A. The Violence Against Women Act

After four years of congressional hearings about the social impact of violence against women,[19] Congress enacted the Violence Against Women Act as Title IV of the Violent Crime Control and Law Enforcement Act of 1994 ("VAWA I").[20] Subtitle G of VAWA I specifically provided protections for battered immigrant women and children.[21] Subtitle G gave USCIS the authority to grant immigration benefits to battered immigrant women married to abusive USC or LPR husbands without the abusers' knowledge or consent.[22] Prior to this provision, abusers had considerable power over their wives' immigration status because there was no exception to the statutory requirement that the LPR or USC spouse file immigration paperwork on behalf of the immigrant spouse.[23]

Recognizing the need for women to be able to adjust their immigration status independently of their abusers, VAWA I created two new types of relief for battered immigrant women.[24] The first is self-petitioning, which allows women eligible for spousal immigration benefits to petition for permanent residency without the cooperation of their abusers.[25] The

19. *See, e.g.*, H.R. REP. NO. 103-711, at 112-66 (1994) (recognizing the need for the federal government to address the pervasiveness of violence against women and including protection for immigrants in Title IV, Subtitle G); H.R. REP. NO. 103-395 (1993) (reporting favorably on H.R. 1133, the Violence Against Women Act of 1993, and providing protection for immigrants in Title II, Subtitle D); S. REP. NO. 103-138 (1993) (amending S. 11 and explaining the scope and validity of the civil rights remedy for victims of violence); S. REP. NO. 102-197 (1991) (substituting language for S. 15, the Violence Against Women Act of 1991, to include a civil rights remedy); S. REP. NO. 101-545 (1990) (amending S. 2754, the Violence Against Women Act of 1990).

20. *See* VAWA I, *supra* note 1, §§ 40,001-40,703 (funding educational and social programs, and modifying domestic violence criminal treatment).

21. *See id.* at Subtitle G (amending procedures in Section 204 of the Immigration and Naturalization Act ("I.N.A.") for credible evidence waivers, self-petitioning, and suspension of deportation for battered immigrant spouses and children).

22. *See id.* § 40,701 (establishing self-petitioning for battered immigrant spouses and children); *see also id.* § 40,703 (detailing relief for battered immigrant spouses and children in deportation proceedings before an immigration judge).

23. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., HOW DO I REMOVE THE CONDITIONS ON PERMANENT RESIDENCE BASED ON MARRIAGE?, *at* http://uscis.gov/graphics/howdoi/remCond.htm (last modified May 7, 2004) (on file with the American University Law Review) [hereinafter CONDITIONS] (specifying the standard procedure whereby the couple petitions for immigration benefits jointly to avoid USCIS initiating removal proceedings). *See generally* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991) (discussing the incorporation of sex-based discrimination and male domination in immigration laws and its impact on women).

24. *See* VAWA I, *supra* note 1, at Subtitle G (amending the I.N.A. and authorizing services to lessen violence against women). *See generally* Mayabanza S. Bangudi, *The Violence Against Women Act*, 4 GEO. J. GENDER & L. 489 (2002) (summarizing the provisions of VAWA I and VAWA II, including those for battered immigrant women).

25. *See* VAWA I, *supra* note 1, § 40,701 (providing an exception to standard

second is suspension of deportation, which provides a means for battered immigrant women in deportation proceedings to stay in the United States.[26]

Congress recognized that the immigration protections of VAWA I contained some serious oversights and left some battered immigrant women vulnerable and without an immigration remedy.[27] Congress attempted to address this lack of protection with Division B of the Victims of Trafficking and Violence Protection Act of 2000 ("VAWA II"),[28] Title V of which is entitled the Battered Immigrant Women Protection Act of 2000 ("BIWPA").[29] BIWPA improved procedures such that it authorizes self-petitioning for a battered immigrant woman provided that she married a USC or LPR in good faith, and that her husband subjected her to battering or other extreme cruelty.[30] BIWPA also improved relief for suspension of deportation (renamed cancellation of removal)[31] and established a new U-visa option for violent-crime victims, providing an option for battered immigrant women who otherwise would be ineligible for VAWA relief.[32] However, VAWA II is silent on issues of language access for the beneficiaries of its immigration remedies, implicitly entrusting the

conditional residency procedures).

26. *See id.* § 40,703 (allowing battered women of good moral character who have been in the U.S. for three years to obtain relief where deportation would cause extreme hardship).

27. *See* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (statement of joint managers) (noting inadvertent immigration barriers that allow abusers to wield power over women's immigration status and thus hinder women's safety and ability to leave); *see also* Cecelia M. Espenoza, *No Relief For the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 163 (1999) (arguing that the intersections of VAWA I and the criminal justice system re-victimized battered immigrant women); Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 145-49 (2002) (reviewing the omissions of remedy for battered immigrant women who were divorced or not legally married, who had received public assistance, or who had any criminal conviction).

28. *See* VAWA II, *supra* note 2 (strengthening law enforcement, services, and education for domestic violence).

29. *See id.* at Title V (improving access to immigration benefits and addressing shortcomings of VAWA I).

30. *See id.* § 1503(b)-(c) (revising VAWA I eligibility requirements to include women who unknowingly entered into bigamous relationships, had divorced their abusers because of violence, or whose spouse had died or renounced citizenship before the petition); *see also id.* § 1503(d) (allowing women with certain criminal histories, such as mandatory arrest for violence committed in self-defense, to qualify under good moral character requirements). *But see, e.g.*, Harris, *supra* note 14, at 15-23 (describing the unintended consequences of mandatory domestic violence prosecution on a battered immigrant woman's VAWA eligibility); Kwong, *supra* note 27, at 152 (noting lingering problems with VAWA access for women who cannot show marriage to a man legally resident in the United States).

31. *See* VAWA II, *supra* note 2, § 1504 (changing treatment of service of Notice to Appear so that it no longer terminates a continuous residency period and eliminating time limitations on motions to reopen removal and deportation proceedings).

32. *See id.* § 1513 (providing immigration relief for otherwise ineligible battered immigrant women who report the crime to police, participate in the investigation, and help with the prosecution of the perpetrator).

equitable administration of VAWA benefits to USCIS.[33] As a result, broader statutory and constitutional obligations define the parameters of USCIS's obligations to LEP battered immigrant women.[34]

B. The Story of May, an LEP Battered Immigrant Woman

To understand how USCIS's administration of VAWA impacts individual applicants, consider a scenario involving May, an LEP immigrant woman who married a USC named John last year.[35] May is one of forty-seven million foreign-born people in the United States who speaks a language other than English in the home.[36] May is also among the 1.5 million women per year who are victims of domestic violence in the United States.[37] John began beating May soon after they got married, and it is possible that if she does not leave him, he might kill her.[38] Congress enacted VAWA to offer immigrant women improved protection against domestic violence and to allow them to obtain immigration relief.[39] A foreign-born person has a greater likelihood of a favorable result on her immigration application if she can speak English or if she can get help from someone within the legal system.[40] However, May does not have anyone to

33. *See id.* at Title V (detailing amendments to I.N.A. without addressing means to implement the new provisions successfully).

34. *See infra* Part I.C.1 (reviewing Title VI provisions prohibiting discrimination on the basis of national origin); *infra* Part II.A (summarizing procedural due process rights as applied to LEP individuals' rights to language accommodation).

35. May is a hypothetical LEP battered immigrant woman who will help guide the reader through the VAWA process. *See infra* Part I.B (describing the barriers that May faces at each step of the VAWA application process). *See generally* Joann H. Lee, *A Case Study: Lawyering to Meet the Needs of Monolingual Asian and Pacific Islander Communities in Los Angeles*, 36 CLEARINGHOUSE REV.: J. OF POVERTY L. & POL'Y 172 (2002) (discussing the real-life experiences of a Korean LEP battered immigrant woman attempting to obtain help); Crenshaw, *supra* note 17, at 1262-64 (detailing the real-life experiences of a battered immigrant Latina attempting to access domestic violence services).

36. *See* HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH SPEAKING ABILITY: 2000 2 (Oct. 2003) (noting that this number represents eighteen percent of the total population ages five and over who do not speak English at home), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf; *id.* at 2 fig.3 (reporting that according to the 2000 Census, 28.1 million U.S. residents speak Spanish, two million speak Chinese, 1.6 million speak French, one million speak Vietnamese, 0.7 million speak Russian, and 0.6 million speak Arabic).

37. *See* U.S. DEP'T OF JUSTICE ET AL., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998) (approximating 1.5 million rapes or physical assaults on women annually by intimate partners based on results of a telephone survey of 8,000 men and 8,000 women).

38. *Cf.* NDVH STATISTICS, *supra* note 5 (quoting DOJ statistic that intimate partners murdered 31,260 women between 1976-1996); U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2000 (last revised Feb. 23, 2003) (reporting 1,247 women killed by partners in 2000), *available at* http://www.ojp.usdoj.gov/bjs /abstract/ipv01.htm.

39. *See* VAWA II, *supra* note 2, § 1502(a)(2) (improving remedies to enable women to bring charges against abusers without immigration consequences).

40. *Cf.* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 473-74 (1992) (noting that in asylum cases, an

help her, and she is having a great deal of difficulty accessing the benefits offered by VAWA.[41]

1. Language barriers to accessing VAWA information

When John was out, May tried calling the USCIS customer service number to explain her situation, hoping the representative could advise her on any immigration relief that is available.[42] However, this option did not work for May because neither the voicemail prompts nor the live operators were available in a language she could understand,[43] so May hung up.[44] May went to the local library to access the Internet in the hopes of finding out basic information about her situation.[45] However, the USCIS Website was entirely in English and the lone "TRANSLATE" link at the top of the page simply led to a page of dense English text suggesting May use a free online translation service.[46] The machine-translation service mangled the translated text so badly that May could not understand what it meant,[47] so May gave up.[48]

May never got to see that the Website also provides a referral to the VAWA-funded National Domestic Violence Hotline ("Hotline").[49] The Hotline has advocates who can provide assistance in English and Spanish and can access telephone interpreters in 139 languages.[50] Unfortunately,

applicant who has a similar education level, social class, and political orientation as the immigration judge has a much stronger probability of a favorable outcome).

41. *See infra* Part I.B (describing the barriers May faced in accessing VAWA remedies without outside assistance).

42. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., NATIONAL CUSTOMER SERVICE CENTER, *at* http://uscis.gov/graphics/services/NCSC.htm (last modified May 6, 2004)(on file with the American University Law Review)(describing how to access live operators and detailing available automated information, such as office locations, how to get forms, and basic immigration benefits, but excluding any information on VAWA).

43. *See id.* (asserting that the nationwide service provides "consistent, accurate information and assistance," and is available in English and Spanish, but omitting any reference to availability of language interpretation for other LEP customers).

44. *See, e.g.*, Lee, *supra* note 35, at 179 (describing how an LEP woman hung up when an English-speaking legal services intake worker did not understand her).

45. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., HOW DO I APPLY FOR IMMIGRATION BENEFITS AS A BATTERED SPOUSE OR CHILD?, *at* http://uscis.gov/graphics/howdoi/battered.htm (last modified Oct. 31, 2003) (on file with the American University Law Review) [hereinafter HOW DO I?] (providing details of VAWA's legal foundation, eligibility, and application process in the FAQ section under "Family").

46. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., TRANSLATION INFORMATION, *at* http://uscis.gov/graphics/translate.htm (last modified July 15, 2003) (on file with the American University Law Review) [hereinafter TRANSLATION] (referring visitors to free translation Websites such as AltaVista's Babelfish).

47. *See Tongues of the Web*, ECONOMIST, Mar. 16, 2002, at 26 (noting that the "rough and ready" quality of machine translation has not improved much in thirty years).

48. *See, e.g.*, Lee, *supra* note 35, at 179 (describing how an LEP battered immigrant woman gave up trying to get help because of language barriers).

49. *See* HOW DO I?, *supra* note 45 (referring petitioners to the Hotline phone number 1-800-799-7233 and TDD 1-800-787-3224 for information on shelters, mental health services, legal advice, and information on self-petitioning).

50. *See* NAT'L DOMESTIC VIOLENCE HOTLINE, NDVH SERVICES, *at*

the USCIS Website fails to mention this important fact, and, to make things worse, it buries the referral phone number five screens down in the middle of a background paragraph.[51] Furthermore, the Hotline is unable to provide legal assistance and only can refer May to another agency for further help.[52]

The lack of language accessibility at USCIS may explain why battered immigrant women like May usually seek information from other women in the community, immigrant advocacy organizations, domestic violence agencies, or immigration professionals.[53] Some domestic violence and community organizations have made efforts to provide language-accessible services to VAWA applicants.[54] However, the fact that May can seek information elsewhere, or can obtain language-accessible information from other sources, does not relieve USCIS of its obligations to LEP women.[55]

2. Language barriers to completing a VAWA application

A community member gave May a copy of the VAWA application, Form I-360,[56] but it was available only in English and May could not understand it.[57] Additionally, May was not sure that I-360 was the right form since it did not say anywhere that it was for a VAWA claim, even though this is the name by which May knows this type of relief.[58] The language of the form hindered May's ability to access VAWA remedies because, in order to apply, she had to struggle through five pages of

http://www.ndvh.org/services.html (last visited Feb. 27, 2005) (on file with the American University Law Review) [hereinafter NDVH SERVICES] (detailing how the federally-funded program attempts to provide Title VI compliant services).

51. *See* HOW DO I?, *supra* note 45 (advising domestic victims to contact non-profit organizations, including the Hotline).

52. *See* NDVH SERVICES, *supra* note 50 (explaining that advocates will refer callers to legal agencies in their local area).

53. *See* Dutton, *supra* note 8, at 247-48 (analyzing help-seeking behaviors of Latina domestic violence victims and finding that they tend to access informal networks and social services rather than going to government or law enforcement agencies).

54. *See, e.g.*, FAMILY VIOLENCE PREVENTION FUND, IMMIGRANT & REFUGEE WOMEN'S RIGHTS PROJECT, *at* http://www.endabuse.org/programs/immigrant/ (last visited Feb. 27, 2005) (on file with the American University Law Review) (providing information on battered immigrant women's issues and translated materials on domestic violence).

55. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (requiring federal agencies to provide LEP individuals with equivalent services to those provided to English speakers); 6 C.F.R. § 21.5(a) (2004) (recognizing the obligations of DHS programs under Title VI to provide non-discriminatory services).

56. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT (Sept. 11, 2000) [hereinafter FORM I-360] (allowing designated categories of immigrants to petition for special visa classifications), *available at* http://uscis.gov/graphics/formsfee/forms/i-360.htm.

57. *Cf.* Lee, *supra* note 35, at 179 (describing how an LEP woman failed to get legal help because she could not fill out an English language restraining order form correctly).

58. *See* FORM I-360, *supra* note 56, at Instructions 1 (stating that an applicant may use the petition to classify an alien as "a Battered or Abused Spouse or Chid [sic] of a U.S. Citizen or Lawful Permanent Resident").

instructions in college-level English and fill out a four-page, ten-part application form.[59]

May had to send in evidence with her application.[60] May could not figure out which English-language documents would be appropriate evidence,[61] and it was difficult for her to obtain some of them without arousing John's suspicion or anger.[62] Many of the documents May needed are only available in English, from agencies or organizations that may have little LEP accommodation to assist May in her quest.[63] Additionally, May had to send all supporting documentation in English, and she was unable to find someone who is competent to translate her foreign language documents and who could certify that the translation is accurate.[64]

Thus, May's ability to access, and possibly to obtain, VAWA relief depended upon her English language abilities. The following section explores how USCIS's English-only provision of VAWA information contravenes the intent of Executive Order 13,166 to ensure meaningful access to applicants irrespective of LEP status.

C. USCIS's Language Access Obligations Under Executive Order 13,166

There is no explicit provision in VAWA on language access for LEP women, so a threshold question is whether an agency policy that effectively excludes LEP immigrant women like May is contrary to congressional intent.[65] Even though May is eligible for LPR status based on her familial

59. *See id.* at 1-9 (providing application information for VAWA self-petitions). If May overcomes these initial hurdles, she still may think she cannot apply because USCIS has not updated the form to include the revised eligibility criteria from VAWA II. *See id.* at Instructions 1 (specifying that the form's revision date is September 11, 2000). In fact, according to the language used on the form, many eligible women would think they are ineligible for benefits. *See id.* at Instructions 2 (including eligibility requirements of current marriage to the abuser and current residence in the United States: criteria that VAWA II specifically changed).

60. *See id.* at Instructions 2 (noting that an applicant should file "credible relevant evidence of eligibility" with the self-petition).

61. *See* Dutton, *supra* note 8, at 258 (noting that 78.7% of battered immigrant Latinas spoke or read little or no English).

62. *See* VOLPP, *supra* note 14, at 5 (detailing the hiding or destroying of important papers as a means of exerting power and control over the battered spouse).

63. *See* FORM I-360, *supra* note 56, at Instructions 2 (specifying that appropriate proof includes marriage certificates, utility receipts, mortgage documents, police reports, medical reports, and bank records).

64. *See id.* at Instructions 1 (specifying English language requirements for all parts of the application package).

65. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (noting that where congressional intent on a particular issue is facially clear, both the court and the agency "must give effect to the unambiguously expressed intent of Congress"). Where Congress has not spoken directly to the issue in question, the court will defer to an agency's own interpretation, as long as the statutory interpretation is reasonable. *See id.* at 844-45 (finding valid both explicit and implicit congressional delegation of authority to agencies).

relationship with her husband,[66] under ordinary circumstances she would need John to file a form and request removal of her "conditional" immigration status.[67] John has threatened not to file the necessary paperwork,[68] and May is afraid that the government will deport her if she leaves her husband.[69] However, Congress clearly intended to extend VAWA remedies to battered immigrant women like May, and she could thus apply for immigration relief under VAWA's self-petitioning regulations.[70] In fact, Congress appears to have intended to enable *all* battered immigrant women to have access to VAWA immigration remedies.[71] Thus, by only providing LEP-inaccessible processes and procedures that effectively prevent May from accessing VAWA self-petitioning remedies,[72] USCIS contravenes clear congressional intent to provide help to *all* immigrant victims of domestic violence.[73] The following sections describe how discrimination against LEP individuals is covered under Title VI, which in USCIS's case applies through Executive Order 13,166.

1. Title VI of the Civil Rights Act of 1964

On July 2, 1964, President Johnson signed the Civil Rights Act into law.[74] The Act codified constitutional anti-discrimination mandates and provided for federal action to promote equality and eliminate racial discrimination.[75] It included provisions to end discrimination in public

66. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (providing for unlimited family-based immigration sponsorship for spouses of USCs); *cf.* 8 U.S.C. § 1153(a)(2) (2000) (describing numerically-restricted preference-based allocation of family visas for spouses of LPRs).

67. *See* CONDITIONS, *supra* note 23 (specifying that the couple must file Form I-751 during the ninety days before the wife's second anniversary as a conditional resident to avoid USCIS initiating removal proceedings).

68. *Cf.* Dutton, *supra* note 8, at 259 (calculating that in 72.3% of cases, abusive partners do not file immigration papers for their foreign-born spouses).

69. *Cf. id.* at 275 (stating that 30.6% of battered women reported that they did not seek services because they feared immigration problems).

70. *See* VAWA II, *supra* note 2, § 1503(b)(1) (allowing for self-petitioning for victims of domestic violence who married in good faith); 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (explaining that VAWA II attempts to amend immigration laws that allow USC or LPR husbands to exploit the immigration system to abuse their immigrant wives further).

71. *See, e.g.*, VAWA II, *supra* note 2, § 1503(b)-(c) (covering women eligible for visas based on family relationship); *id.* § 1504 (covering women in deportation proceedings); *id.* § 1505 (providing waivers for women with character or criminal impediments to immigration); *id.* § 1513 (covering women victimized by violence, but who do not have a marital relationship to the abuser).

72. *See supra* Part I.B (describing how providing information and application materials only in English effectively excludes LEP women from accessing VAWA remedies).

73. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (stating that, using standard statutory construction, clear congressional intent is the law).

74. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.) (outlining federal authority to enforce remedial measures that would decrease discrimination).

75. *See* President John F. Kennedy, Address to Congress (Feb. 28, 1963) (noting that

accommodations (Title II),[76] to enforce school desegregation (Title IV),[77] to prohibit discrimination in federal programs (Title VI),[78] and to promote equal employment opportunity (Title VII).[79] The basic aim of the Act was to provide a statutory solution that prevented federally-assisted programs from using taxpayer money to finance discrimination.[80]

Under Title VI, Section 601, organizations receiving federal funding have an obligation to ensure that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[81] Thus, Section 601 prohibits intentional discrimination, whereby a federally-funded program treats a person differently based on their membership in a protected group.[82]

Title VI, Section 602, authorizes and directs federal agencies that extend funding to promulgate implementing regulations.[83] The purpose of the regulations is to implement the provisions of Title VI, Section 601, and thereby outline when differential treatment may warrant agency intercession.[84] For example, the Department of Justice ("DOJ") implementing regulations state that a funded program "may not . . . on the ground of race, color, or national origin: Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program."[85]

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prior legislative and constitutional attempts had not ended racial discrimination), *available at* http://www.congresslink.org/civil/cr1.html.

76. *See* 78 Stat. at 243 (enforcing non-discrimination in commercial establishments).

77. *See* 78 Stat. at 246 (allowing suits against state actors for discriminatory operation of public schools).

78. *See* 78 Stat. at 252 (barring discrimination in any program receiving federal funds).

79. *See* 78 Stat. at 253 (providing for equal treatment in hiring, discharge, and compensation decisions).

80. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL 14 (Jan. 11, 2001) (summarizing statements by President Kennedy and Senator Humphrey during the legislative debates on the Civil Rights Act), *available at* http://www.usdoj.gov/crt/cor/coord/vimanual.pdf.

81. *See* Title VI, § 601, 78 Stat. at 252 (countering lingering segregation and discrimination supported by federal funding).

82. *See* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 n.11 (11th Cir. 1993) (equating the analysis of intentional discrimination under Title VI to an equal protection analysis under the Fourteenth Amendment). To prove a violation under Section 601, a plaintiff must provide evidence to show that "a challenged action was motivated by an intent to discriminate." *See id.* at 1406 (detailing factors such as substantial disparate impact, agency history, and procedural irregularities as indicative of intent to discriminate).

83. *See* Title VI, § 602, 78 Stat. at 252 (providing a means by which agencies could effectuate the non-discriminatory intent of Title VI).

84. *See* Alexander v. Choate, 469 U.S. 287, 293 (1985) (noting that Title VI delegates authority to agencies in order to determine kinds of disparate impact that require modification of federal policies that produce the disparate impact).

85. *See* Nondiscrimination in Federally Assisted Programs—Implementation of Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.104(b) (2004) (outlining prohibited discrimination in the Title VI implementing regulations for federally-assisted programs). In

Therefore, the Act prohibits federally-funded programs not only from intentionally discriminating, but also from conducting facially-neutral activities that have a disparate impact (i.e., a discriminatory effect) on protected groups.[86]

2. Executive Order 13,166

In 2000, President Clinton reiterated the scope of Title VI protection in Executive Order 13,166, which requires programs to provide improved access to "persons who, as a result of national origin, are limited in their English proficiency."[87] Title VI originally excluded from coverage federally-conducted programs such as USCIS that were financed and operated entirely by the federal government.[88] However, Executive Order 13,166 extended the obligations of Title VI to include federal agencies' own activities and required each agency to prepare and implement a plan to improve access by LEP individuals to its services.[89] It also required agencies to draft Title VI guidance for their funded programs to ensure meaningful access for LEP individuals.[90] Thus, under Executive Order 13,166, both federally-funded programs *and* federally-conducted agencies have an obligation to eliminate LEP barriers to full and meaningful participation in their activities.[91]

November 2002, Congress transferred immigration responsibilities, including VAWA remedies, to the new Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Title IV, Subtitle F, § 471 (2002) (codified as amended in 6 U.S.C. § 291) (abolishing the INS under DOJ, and creating USCIS under DHS). Soon after, DHS confirmed that it shared its predecessor's commitment to complying with Title VI. *See* 6 C.F.R. § 21.5(b)(1)(ii) (2004) (mirroring DOJ regulatory language for DHS's own Title VI implementing regulations).

86. *See Alexander*, 469 U.S. at 293-94 (noting that Section 602 of Title VI reaches disparate impact whereas Section 601 only reaches intentional discrimination). A three-prong test exists to evaluate claims of disparate impact discrimination: (1) whether an agency's action, while facially neutral, has a disproportionate discriminatory impact on a protected group; (2) whether the agency can show a legitimate, nondiscriminatory reason for the action; and (3) whether the stated reason is pretextual, or if there is a "comparably effective alternative practice" which is not discriminatory. *See Elston*, 997 F.2d at 1407 (borrowing the disparate impact test from Title VII disparate impact cases).

87. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (requiring federally-conducted and federally-assisted programs to improve access for LEP individuals).

88. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, at 15-16 (defining "federal action that is not federal financial assistance").

89. *See* Exec. Order No. 13,166, § 2 (requiring development and implementation of LEP plans within 120 days of the Executive Order). *But see* S. 557, 109th Cong. (2005) (opposing Executive Order 13,166, and attempting to nullify its effect and prohibit the appropriation of funds for non-English services).

90. *See* Exec. Order No. 13,166, § 3 (noting that the Title VI guidance should be consistent with DOJ Guidance).

91. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., EXECUTIVE ORDER 13166 LIMITED ENGLISH PROFICIENCY RESOURCE DOCUMENT: TIPS AND TOOLS FROM THE FIELD, Introduction (Sept. 21, 2004), *at* http://www.usdoj.gov/crt/cor/lep/tips_and_tools-9-21-04.htm (on file with the American University Law Review) (noting that Executive Order 13,166 required: (1) federal agencies to take steps to provide meaningful access to LEP people to federally-conducted programs; and (2) federal agencies that provide financial

On the same date that the President issued the Executive Order, the DOJ issued a Policy Guidance document to help agencies draft Title VI guidelines for programs.[92] The DOJ guidance notes that failure to provide meaningful access to services for LEP applicants may be discrimination on the basis of national origin,[93] and the DOJ does not distinguish between federally-funded and federally-conducted agencies in this context:

> [W]ith the issuance of Executive Order 13166, for the first time, all 95+ federal departments and agencies are also required to develop and implement appropriate language assistance plans (LAPs) governing their own "federally conducted" programs and activities. These internal federal agency LAPs must be consistent with the standards applicable to recipients of federal financial assistance.[94]

The DOJ then laid out a four-factor balancing test with which federally-conducted and funded agencies could verify that they were taking reasonable steps toward assuring LEP individuals meaningful access to their information and services.[95] The agency should consider the following factors: (1) the number or proportion of LEP persons who receive services; (2) the frequency with which the agency comes into contact with LEP persons; (3) the importance of the agency's service; and (4) the agency's resources.[96] The DOJ later revised and reissued the Policy Guidance[97] and issued the final guidance document in 2002.[98] The basic four-factor test remained constant in the various versions.[99]

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assistance to other programs to publish guidelines on how to provide meaningful access to programs and comply with Title VI).

92. *See* Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency, Policy Guidance, 65 Fed. Reg. 50,123 (Dep't of Justice Aug. 11, 2000) [hereinafter Enforcement of Title VI] (providing a four-step test and examples to ensure its funded programs were in compliance with Title VI obligations to LEP individuals).

93. *See id.* at 50,124 (describing requirements for recipients of federal funding under Title VI).

94. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (requiring that internal federal language assistance plans be consistent with standards applicable to recipients of federal funding).

95. *See* Enforcement of Title VI, *supra* note 92, at 50,124 (providing guidance to federal agencies on how to measure compliance with Executive Order 13,166 and Title VI).

96. *See id.* at 50,124-25 (noting that the DOJ designed the test to be flexible and variable with agency-specific facts).

97. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 66 Fed. Reg. 3,834 (Dep't of Justice Jan. 16, 2001) (adding quality control and agency-specific guidelines to the initial guidance).

98. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (Dep't of Justice June 18, 2002) [hereinafter Guidance to Federal Financial Assistance Recipients] (clarifying, after a notice and comment period, the policy on the use of family members as informal interpreters and the minimum requirements to establish de facto compliance with translation obligations).

99. *Compare* Enforcement of Title VI, *supra* note 92, at 50,124-25 (requiring assessment of the number of LEP individuals, frequency of contact, importance of the

The DOJ test serves as a guide to compliance, and courts should grant substantial deference to the guidelines when determining what constitutes a Title VI/Executive Order violation.[100] While *per se* compliance with the four-factor test may provide evidence of facially meaningful access to activities, it does not absolve programs of their responsibility to ensure that each *individual* LEP applicant has meaningful access to benefits.[101] Therefore, if May challenged a federally-funded agency's language accommodations, a court would likely consider the agency's obligations to the general LEP population within the framework of the DOJ policy guidance,[102] but would do so with reference to specific Title VI obligations to May under Section 601.[103] Therefore, May can challenge a domestic violence shelter that receives federal funding for failing to provide translated VAWA information,[104] but ironically, has little recourse against USCIS. May can probably bring an administrative claim, but the process is notoriously slow and ineffectual.[105] May cannot ask the court to enforce USCIS's obligations to provide her with meaningful access because Title VI, Section 601 only covers federally-funded agencies, not federal agencies

program, and available resources), *with* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,459-61 (mirroring the basic test from Enforcement of Title VI).

100. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); Neal v. Cal. State Univs., 198 F.3d 763, 770 (9th Cir. 1999) (deferring to the interpretation of Title IX provided in the guidelines of a compliance test developed by the Department of Education's Office of Civil Rights), *cert. denied*, 124 S. Ct. 226 (2003). *But see* Mona T. Peterson, Note, *The Unauthorized Protection of Language Under Title VI*, 85 MINN. L. REV. 1437, 1473-74 (2001) (arguing that the Department of Health and Human Services exceeded its Title VI authority by issuing policy guidelines designed to remedy discrimination against LEP individuals).

101. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 601 (1964) (codified at 42 U.S.C. § 2000d) (mandating that "[n]o person" shall be discriminated against on the basis of national origin and providing collective and individual protection).

102. *See, e.g.*, *Neal*, 198 F.3d at 770 (deferring to agency guidelines for interpretation of statutory obligations).

103. *See, e.g.*, Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (finding that plaintiffs stated a claim for intentional discrimination in violation of Section 601 based on a facially discriminatory policy).

104. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,472 (providing detailed suggestions for domestic violence shelters on accommodations to ensure shelters are not discriminating against LEP women in violation of Title VI).

105. *See, e.g.*, Alma Lowry, *Achieving Justice: The Case for Legislative Reform*, 20 T.M. COOLEY L. REV. 335, 348-49 (2003) (critiquing the agency administrative complaint procedure in the environmental protection context for being slow, weak in terms of resolution, and lacking any process by which to stay the challenged action). LEP individuals should be able to access administrative solutions via the DOJ's Civil Rights Division, which now bears the primary responsibility for ensuring agency policies do not result in a disparate impact on protected groups. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,466 (detailing the DOJ Title VI voluntary compliance complaint procedure).

themselves,[106] and Executive Order 13,166 is not enforceable in court.[107] Thus, USCIS can, seemingly without the risk of judicial review, ignore the requirement to provide meaningful LEP access mandated by the Executive Order (its "implied Title VI" obligations).[108] USCIS may not ignore the obligations imposed by the Constitution, however, and the next sections explore whether USCIS is vulnerable to judicial review for violating May's constitutional rights.

II. USCIS'S ADMINISTRATION OF VAWA AND DUE PROCESS RIGHTS

The Constitution distinguishes between citizens and non-citizens.[109] Nevertheless, the Supreme Court has held that where the Constitution does not specifically limit coverage to citizens, it protects all those living in the United States, without regard to race or nationality.[110] May has lived with John in the United States for several years.[111] As a result of her presence in and affiliation with the community, she has gained an entitlement to constitutional protection.[112] Thus, May has a right to live free from arbitrary deprivations of her life, liberty, or property,[113] in the same way as any U.S. citizen would.[114] The next sections describe how USCIS's

106. *See* Title VI, § 601, 78 Stat. at 252 (prohibiting discrimination "under any program or activity receiving Federal financial assistance").

107. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (specifying that the Order "does not create any right . . . enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person"). *See generally* Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 661 (1987) (discussing the difficulty of challenging agency action pursuant to an Executive Order because courts rarely recognize a valid Administration Procedure Act cause of action).

108. *But see infra* Parts II-III (arguing that USCIS is vulnerable to judicial review for both due process and equal protection violations).

109. *Compare* U.S. CONST. amend. XV (protecting the right to vote for "citizens of the United States"), *with id.* amend. XIV (extending equal protection and due process of the law to "all persons").

110. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896) (extending due process protections to all persons in the United States); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (extending equal protection to all persons "within the territorial jurisdiction" of the United States).

111. *See, e.g.*, Dutton, *supra* note 8, at 263 tbl.2 (reporting that the battered immigrant Latinas who took part in the study had been in the U.S. for an average of 5.5 years).

112. *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (determining that past precedent establishes that constitutional protections apply to those who have "come within the territory of the United States and developed substantial connections with this country"), *and* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly."), *with* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (refusing to recognize a liberty interest in initial entry into the United States and upholding Congress's authority to determine acceptable procedures for denial of entry).

113. *See* U.S. CONST. amend. V (prohibiting deprivation of "life, liberty, or property, without due process of law").

114. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (noting that the Due Process Clause applies to those present in the United States, "whether their presence here is lawful,

administration of VAWA remedies violates May's rights by depriving her of an interest protected by due process.

A. Background: Due Process Rights

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[115] Conversely, the government is free to deny privileges without any procedure where there is no *recognized* life, liberty, or property interest.[116] The Supreme Court has not defined the parameters of liberty, simply noting that it encompasses more than freedom from bodily restraint and includes "those privileges long recognized as essential to the orderly pursuit of happiness."[117] Property interests include real and personal property, as well as statutory entitlements such as welfare and government employment.[118]

Due process applies where the government intentionally infringes on a person's protected interests[119] and to prevent arbitrary government action, the government must provide fair procedures where protected interests are at stake.[120] However, the timing and contents of the procedures required depend upon the specific factual scenario.[121] Thus, May's entitlement to notice of VAWA remedies in a language she can understand depends on whether USCIS's administration of VAWA deprives her of a recognized life, liberty, or property interest without due process of law.

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unlawful, temporary, or permanent"); Mathews v. Diaz, 426 U.S. 67, 77-78 (1976) (clarifying that irrespective of immigration status, all persons "within the jurisdiction of the United States" receive due process protection against arbitrary deprivations of life, liberty, or property); *cf.* Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 333-34 (2001) (arguing that all would-be asylum applicants in the U.S. are entitled to fair due process procedures because U.S. statutory grants and commitments to international norms have created a liberty and property interest in seeking asylum).

115. U.S. CONST. amend. V.

116. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.2, at 581 (2d ed. 1992) (arguing that the Supreme Court has enabled agencies to define interests in such a way as to eliminate the requirements of due process by narrowly defining "life, liberty, or property").

117. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (noting that the concept of liberty extends beyond criminal imprisonment, and includes the right to contract, to marry, and to acquire knowledge).

118. *See, e.g.*, *id.* at 578 (determining due process rights of a non-tenured government employee to continued employment); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring a hearing prior to termination of welfare benefits).

119. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 330 (1986) (requiring more than an unintended loss or injury caused by government negligence to constitute a deprivation subject to due process).

120. *See, e.g.*, *Roth*, 408 U.S. at 569-70 (noting that an individual has the right to a prior hearing when liberty and property interests are at stake).

121. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (noting that due process is variable with time, place, and circumstance and requires a balancing of private and government interests).

1. Due process case law

The Supreme Court has struggled to define which interests due process protects and to determine how to balance competing interests so that due process procedures are fair.[122] In *Goldberg v. Kelley*,[123] the Supreme Court evaluated the elements of due process required before an agency could revoke welfare benefits.[124] After determining that the right to continued welfare benefits was a statutory entitlement,[125] the Court noted that the agency should consider the individual circumstances of a recipient when considering appropriate means to ensure due process.[126] In *Goldberg*, because termination of welfare "may deprive an *eligible* recipient of the very means by which to live," the recipient was entitled to a heightened degree of procedural due process.[127]

In *Mathews v. Eldridge*,[128] the Supreme Court developed a flexible approach to evaluating due process procedural protection with a three-prong test.[129] The test balances the private interest, the risk of erroneous deprivation, and the value of the safeguards, and the government's interest in avoiding additional burden.[130] In *Mathews*, the Court distinguished the private interest, namely continued receipt of disability benefits, from that in *Goldberg* by determining that disability recipients were not "on the very margin of subsistence" and therefore there was a lower degree of potential deprivation.[131] There was a lesser chance of error than in *Goldberg* because the evidence was factual, not discretionary, and came from medical experts, not from the beneficiaries themselves.[132] Finally, the Court noted the high potential cost of providing pre-termination hearings to all disability claimants[133] and concluded that such hearings were not

122. *See infra* notes 123-35 and accompanying text (summarizing the Court's rulings in two seminal cases, *Goldberg v. Kelly* and *Mathews v. Eldridge*, that attempt to define the parameters of procedural due process).

123. 397 U.S. 254 (1970).

124. *See id.* at 260 (defining the issue as whether the Due Process Clause requires the agency to provide an evidentiary hearing to a welfare recipient prior to termination of benefits).

125. *See id.* at 265 (concluding that public assistance promotes the general welfare and prosperity of society).

126. *See id.* at 268-69 (pointing out, for example, that requiring written submissions of recipients with little education is unreasonable).

127. *See id.* at 264 (holding that discontinuation of welfare requires a pre-termination evidentiary hearing) (emphasis added).

128. 424 U.S. 319 (1976).

129. *See id.* at 334-35 (noting that due process is flexible to a particular situation).

130. *See id.* at 335 (requiring a balancing of governmental and private interests in order to ascertain whether administrative procedures meet due process requirements).

131. *See id.* at 340-42 (noting that a disabled person likely has access to other financial resources or forms of government assistance in addition to disability payments).

132. *See id.* at 344 (noting that procedural due process requirements vary with the risk of error in fact finding).

133. *See id.* at 347 (surmising that claimants would request a hearing in large numbers prior to termination of benefits).

required in order for the administrative procedures to comport with due process.[134] Thus, the Court established a context-dependent test for due process that provides for notice and hearing procedural requirements that vary with the importance of the interest involved.[135] A court evaluating May's due process claim would therefore analyze USCIS's provisions within the specific context of an LEP battered immigrant woman attempting to assert a VAWA claim.

2. Language access case law

Legal advocacy for language access began in the criminal context almost a century ago and led to the establishment of a due process right to interpretation for LEP criminal defendants.[136] Immigrants in deportation hearings have a similar Fifth Amendment due process right to language assistance.[137] Notably, the Ninth Circuit, in *Walters v. Reno*,[138] the only appellate court case to discuss an immigrant's right to written translations, used a balancing test similar in scope to the DOJ test as part of its due process analysis.[139] The court applied the three-prong test from *Mathews*[140] and concluded that the INS's policy of sending English-only forms to immigrants facing deportation failed to provide constitutionally adequate notice of the severe consequences.[141] The court weighed the plaintiffs'

134. *See id.* at 349 (noting that present administrative procedures that provided for notice and an opportunity to respond, but no hearing, prior to termination were consistent with due process).

135. *See id.* at 334 (observing that past cases have shown that due process is flexible and varies with time, place, and circumstance).

136. *See, e.g.*, Perovich v. United States, 205 U.S. 86, 91 (1907) (noting in dicta that the appointment of an interpreter is at the discretion of the trial court); Negrón v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (stating that a defendant has a due process right to an interpreter if needed to assist with her own defense, receive assistance of counsel, or confront witnesses); *see also* 28 U.S.C. § 1827 (2000) (requiring interpreters for LEP parties in district court cases where the government is a party). Unfortunately, the right to an interpreter in court addresses only part of the problem of legal access. *See* Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 551-59 (2004) (describing language barriers to consulting with counsel and accessing the appellate process).

137. *See, e.g.*, El Rescate Legal Servs., Inc. v. Executive Office for Immigration Review, 959 F.2d 742, 751 (9th Cir. 1992) (recognizing due process rights to sufficient translation to ensure a "full and fair hearing" during deportation proceedings); Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (requiring interpretation that allows "the applicant to place his claim before the judge" in deportation hearings).

138. 145 F.3d 1032 (9th Cir. 1998).

139. *Compare id.* at 1043 (evaluating immigrants' due process rights to notice of deportation by balancing the importance of the service to the individual with the government burden), *with* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,459-61 (providing a four-part test that balances the need for language accommodations with availability of agency resources).

140. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (evaluating due process compliance by balancing the private interest, the risk of erroneous deprivation and the value of the safeguards, and the government's interest in avoiding additional burden).

141. *See Walters*, 145 F.3d at 1041 (noting that even individuals with a reasonable

interest in not being able to stay in the United States against the government's interest in properly administering immigration laws and determined that INS could improve the way it notified immigrants without undue burden.[142] The court declined to require the INS to translate forms, however, even though it said the INS could provide notice effectively by using multilingual forms.[143] Thus, the court established that LEP individuals have due process rights to language assistance in some immigration contexts, but still permitted USCIS to define the parameters under which it provides such assistance.[144]

B. LEP Battered Immigrant Women's Entitlement to VAWA Remedies

Due process attaches to statutorily-created entitlements and requires the government to follow sufficient procedural safeguards before eliminating the interest created.[145] With its enactment of VAWA, Congress recognized a liberty interest whereby women have a right to live free from violence.[146] In addition, Congress recognized the specific barriers faced by immigrant women, such as the fact that May's ability to leave John and live free from violence depends largely on her accessing VAWA relief.[147]

May's entitlement to VAWA remedies is arguably also a property right.[148] May's property interest in the continued processing of her immigration petition is analogous to a person's right to continued state benefits.[149] It is possible that USCIS would treat May as an *applicant* for a benefit, lessening her property entitlement,[150] but Congress recognized that

command of English would not obtain notice from the legalistic, cumbersome, and misleading deportation procedure documents).

142. *See id.* at 1043-44 (noting that INS need make only minor adaptations in the content and presentation method of the forms to comply with due process requirements).

143. *See id.* at 1053 (deferring to the INS the determination of the ways in which it could revise the forms to communicate information more clearly).

144. *See id.* (reminding INS that it should be consistent in furnishing information to LEP applicants).

145. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (noting that the state could only terminate a statutory entitlement to welfare benefits after completing procedures that afforded the beneficiary due process).

146. *See* VAWA I, *supra* note 1, §§ 40,001-40,703 (providing women protection against domestic violence in the form of enhanced arrest and sentencing for violent partners, funding for shelters and hotlines, and education and awareness programs); *see also* VAWA II, *supra* note 2, § 1502(b)(2) (stating that the purpose of the Act is to provide protection against domestic violence to immigrant domestic violence victims).

147. *See* VAWA II, *supra* note 2, § 1502(a)(1) (noting that the purpose of VAWA is to remove immigration laws that keep battered immigrant women locked in abusive relationships).

148. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (requiring a "legitimate claim of entitlement" to a benefit in order for it to be a property interest).

149. *Compare* VAWA II, *supra* note 2, § 1502(a)(2) (providing "protection against deportation" for eligible battered immigrant women), *with Goldberg*, 397 U.S. at 262-63 (discussing a range of entitlements, such as welfare benefits and public employment, that may be regarded as property rights).

150. *See* ROTUNDA & NOWAK, *supra* note 116, § 17.5, at 75 (arguing that Supreme Court

May's entitlement to spousal immigration benefits did not diminish simply because she married an abusive USC or LPR.[151]

If May stays with John for another year, the deadline for him to apply to remove the conditions on her residence will arrive.[152] John will not likely file the necessary paperwork,[153] and USCIS will start proceedings to deport May.[154] If John does not intercept the deportation notice, and if May can understand the English in which it is written, she might seek immigration assistance.[155] If she discloses the abuse to the lawyer, she might learn about and apply for VAWA cancellation of removal options.[156] Once in deportation proceedings, ironically, USCIS must provide May with adequate language assistance to access VAWA benefits.[157]

Deportation proceedings protect an important liberty interest, which justifies the heightened procedures that are necessary to guarantee due process.[158] However, May and other LEP battered immigrant women have a statutory entitlement to immigration remedies that enable them to live free from violence *before* they are placed in deportation.[159] Once Congress has conferred a property or liberty interest, it may not eliminate it without

rulings provide that property entitlements attach, and due process procedures are required, only after the government has granted the beneficiary the benefit). The DOJ has also specifically noted that its suggestions on LEP compliance reach applicants for benefits. *See* FED. INTERAGENCY WORKING GROUP ON LIMITED ENGLISH PROFICIENCY, KNOW YOUR RIGHTS (suggesting that a Food Stamp office that only provides application materials in English and requires applicants to provide their own interpreters may be discriminating in violation of Title VI), *available at* http://www.lep.gov/LEP_beneficiary_brochure.pdf (last visited Feb. 28, 2005). *See generally* Virginia Vance, Note, *Applications for Benefits, Due Process, Equal Protection, and the Right to Be Free From Arbitrary Procedures*, 61 WASH. & LEE L. REV. 883 (2004) (addressing the issue of whether an applicant for benefits is covered by due process or other safeguards against arbitrary denial).

151. *See* VAWA II, *supra* note 2, § 1503(a) (defining the category of persons covered by VAWA II to include spouses as defined elsewhere in the I.N.A. for the purposes of family immigration).

152. *See* CONDITIONS, *supra* note 23 (warning that the couple must file Form I-751 jointly during the ninety days before the second anniversary of becoming a conditional resident).

153. *Cf.* Dutton, *supra* note 8, at 259 (calculating that in 72.3% of cases, abusive USC or LPR spouses do not file immigration papers for their spouses).

154. *See* CONDITIONS, *supra* note 23 (stating that USCIS initiates removal proceedings if the petitioner does not file I-751 in a timely manner).

155. *Cf.* Dutton, *supra* note 8, at 273 tbl.10 (finding that 36.6% of Latinas who had been physically and sexually abused accessed immigration services).

156. *See* VAWA II, *supra* note 2, § 1504 (specifying requirements for cancellation of removal as (i) battery or extreme cruelty, (ii) physical presence in the United States for at least three years, (iii) good moral character, and (iv) extreme hardship upon deportation).

157. *See* El Rescate Legal Servs., Inc. v. Executive Office for Immigration Review, 959 F.2d 742, 751 (9th Cir. 1992) (recognizing due process rights to interpretation to ensure a "full and fair hearing" during deportation proceedings).

158. *See* Hirsch v. Immigration & Naturalization Serv., 308 F.2d 562, 566 (9th Cir. 1962) (finding that due process requires prescribed procedures in a deportation hearing because of the severity of the remedy of deportation).

159. *See* VAWA II, *supra* note 2, § 1503 (providing for self-petitioning remedies for battered immigrant women).

appropriate due process safeguards.[160] However, in the absence of information in a language she can understand, there is a strong probability that May will not find out about available self-petitioning relief or will not apply for immigration benefits.[161] Thus, USCIS's administration of VAWA remedies effectively deprives May of an entitlement that Congress intended her to have.[162]

C. USCIS's Administration of VAWA Violates LEP Battered Immigrant Women's Due Process Rights

USCIS's administrative procedures are constitutionally insufficient to assure May's due process right to VAWA remedies.[163] The Supreme Court has noted that once the government has established an entitlement, "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[164] Using the three-part *Mathews* test, courts have distinguished due process rights inherent in proceedings where the government seeks to deprive an individual of liberty from those where an individual seeks an immigration status enhancement.[165] The following section applies the *Mathews* test to the specifics of May's situation and determines the extent to which due process requires language accommodation for LEP battered immigrant women eligible for VAWA remedies.

1. Application of the Mathews *three-prong test*

The first *Mathews* factor addresses private interests.[166] In *Mathews*, the Supreme Court evaluated the private interest of a plaintiff in protecting his disability benefits from erroneous termination and determined that the interest was low because the recipient had alternative sources of income

160. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (holding that Congress may choose not to create a property interest, but once it has done so, it may not deprive the interest holder of that benefit without procedural safeguards).

161. *See infra* note 228 and accompanying text (discussing that on an annual basis an estimated 50,000 immigrant spouses are eligible for VAWA benefits); *infra* note 225 and accompanying text (noting that approximately 6,000 individuals apply for VAWA annually).

162. *See* VAWA II, *supra* note 2, § 1502(b) (aiming to remove barriers to immigration remedies for battered immigrant women).

163. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing a three-part test to evaluate due process claims that balances private interest against government burden).

164. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal quotation marks and citations omitted) (discussing the long-standing meaning of procedural due process).

165. *Compare* Walters v. Reno, 145 F.3d 1032, 1043-44 (9th Cir. 1998) (finding strong due process rights for immigrants facing deportation), *with* Abdullah v. Immigration & Naturalization Serv., 184 F.3d 158, 165 (2d Cir. 1999) (not finding a due process right to interpretation for applicants for temporary Seasonal Agricultural Worker status).

166. *See Mathews*, 424 U.S. at 335 (detailing the three-part test used to evaluate procedural due process requirements).

available.[167] In contrast, May is more like the welfare beneficiary in *Goldberg*[168] and she has a strong interest in accessing VAWA benefits because she has no viable alternatives to the immigration assistance offered.[169]

Congress intended VAWA to grant to immigrant women battered by USC or LPR husbands a statutory right to remain in the United States free from violence.[170] Due process requirements rise with the danger of deprivation of liberty.[171] Without VAWA relief, there is a likelihood that May will stay in the abusive relationship.[172] Congress recognized that May's situation is dire whether she stays in an abusive relationship or is placed in deportation proceedings and provided an avenue by which May can avoid loss of immigration status, deportation, injury, or even death.[173]

The second prong of the *Mathews* test addresses the risk of erroneous deprivation and the value of the procedural safeguards.[174] USCIS does not have "carefully structured procedures" that provide sufficient safeguards against mistaken deprivation as required in *Mathews*.[175] In fact, USCIS's procedures are completely inappropriate for the specifics of May's

167. *See id.* at 342-43 (noting that the plaintiff had access to private resources and other government aid).

168. *See* 397 U.S. 254, 262 (1970) (holding that the welfare recipient was entitled to a heightened degree of procedural due process because the termination of welfare benefits "may deprive an *eligible* recipient of the very means by which to live"); *see also supra* notes 123-27 and accompanying text (discussing *Goldberg*).

169. *See, e.g.*, Timothy Pratt, *Immigrants in Abusive Homes Often Live in Fear*, LAS VEGAS SUN, Aug. 18, 2003, at 01 (reporting that a battered immigrant woman only left her abusive husband after she learned of VAWA remedies that would allow her to stay in the U.S. with her three children). This is not to say that May will passively endure the violence if she does not gain access to VAWA; battered immigrant women employ a range of survival strategies from talking with other women, obtaining a protective order, or calling the police. *See, e.g.*, VOLPP, *supra* note 14, at 21-34 (discussing how advocates can help battered immigrant women with civil, criminal, and safety options).

170. *See* VAWA II, *supra* note 2, § 1502(a)(3) (explaining that one purpose of VAWA is to remove barriers that prevent USCIS from offering immigration assistance to battered immigrant women).

171. *See* Abdullah v. Immigration & Naturalization Serv., 184 F.3d 158, 165 (2d Cir. 1999) (finding deportation to be a more important due process right than refusal of a work visa).

172. *Cf.* Dutton, *supra* note 8, at 284 tbl.17 (noting that 11.5% of battered immigrant Latinas with an abusive USC or LPR spouse did not access services because they feared immigration consequences); Harris, *supra* note 14, at 12-13 (describing five typical responses of a battered immigrant woman to domestic violence, such as leaving the house, calling a friend, or defending herself, but noting that women rarely sought police or state assistance because of fear of immigration consequences).

173. *See* 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (introducing VAWA II to Congress and noting that its aim was to prevent abusers from using immigration law to prevent a battered immigrant woman from reporting the abuse or leaving the relationship).

174. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing a three-part test to evaluate due process).

175. *See id.* at 346 (finding the administrative procedures to be fair and reliable and in line with due process requirements).

situation.[176] May's lack of English proficiency affects her understanding of the VAWA application process and increases the risk of USCIS erroneously denying her eligibility because she may misunderstand the questions asked, miss important deadlines for filing, or incorrectly fill out the form.[177]

In addition, if May makes a mistake on her VAWA application, USCIS may delay her eligibility for welfare benefits and work authorization, placing her in a precarious economic situation and increasing the impact on her liberty interest to live free from violence.[178] If USCIS provided translated VAWA materials at the information and application stage, May could understand and comply with the procedural requirements.[179] Thus, the additional procedures May seeks are well-targeted to reducing the risk of erroneous deprivation.[180]

The third *Mathews* factor addresses the government's interest in avoiding additional burden.[181] In *Mathews*, the Supreme Court found that there was a significant public interest in not providing evidentiary hearings for all benefit-termination cases because of the substantial on-going cost.[182] In contrast, USCIS could provide cost-effective access by translating Form I-360 once and having copies available for multiple applicants until it next revises the form.[183] Obviously, the cost impact rises with the number of

176. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (arguing that written evidentiary requirements violated due process requirements for welfare recipients, most of whom lacked the education necessary to complete the paperwork).

177. *See, e.g.*, Lee, *supra* note 35, at 179 (describing how an Asian LEP battered immigrant woman failed to get relief because of procedural problems with the court paperwork).

178. *See* Immigration Petitions, 8 C.F.R. § 204.2(c)(6)(ii) (2004) (noting that USCIS can make a prima facie petition determination only if the applicant has fulfilled I-360 requirements and provided evidence to support her claim).

179. *Cf.* Erin Adamson, *Spanish-Language Legal Forms to Help Workers, Immigrants*, TOPEKA CAPITAL J., Oct. 8, 2003, at A10 (explaining that the Kansas court system planned to translate its domestic violence protection forms to enable battered immigrant women to comprehend the process and access the system).

180. *Compare* Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (deciding that an oral hearing was not required where benefit decisions were largely made on the basis of standard medical reports), *with Goldberg*, 397 U.S. at 269 (requiring an oral hearing for welfare recipients who "lack the educational attainment necessary to write effectively and who cannot obtain professional assistance").

181. *See Mathews*, 424 U.S. at 335 (balancing the fiscal and administrative burdens assumed by the government).

182. *See id.* at 347-48 (noting that benefits of providing the hearings must be weighed against the public interest in avoiding the cost).

183. *See* OFF. OF MGMT. & BUDGET, ASSESSMENT OF THE TOTAL BENEFITS AND COSTS OF IMPLEMENTING EXECUTIVE ORDER NO. 13166: IMPROVING ACCESS TO SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY 36 (Mar. 14, 2002) [hereinafter ASSESSMENT] (noting translation cost for I-360 as about $200 per language), *available at* http://www.whitehouse.gov/omb/inforeg/lepfinal3-14.pdf. In 2002, the Office of Management and Budget estimated that INS could translate all 123 of its forms into five languages for less than $150,000. *See id.* at 40 (emphasizing that this would be a one-time, not an annual cost).

languages required, and it is likely VAWA applicants speak and read multiple languages.[184] However, a theoretical cost impact lacks credence, especially when USCIS cannot prove it because of its own failure to compile statistics on the languages spoken by those who seek its services.[185]

In addition, the DOJ Guidance provides for varying levels of language accommodation depending on the number of LEP persons who speak a particular language.[186] Even if there is a significant cost impact for translating information and evidence, cost factors alone cannot override overwhelming due process considerations under the other two prongs.[187] Finally, the equal availability of VAWA remedies benefits society at large because May will be free to pursue criminal remedies against her abuser as originally envisioned by Congress, thus preventing further damage to society caused by domestic violence.[188] Thus, each prong of the *Mathews* test weighs heavily in favor of May, indicating that she has a due process right to LEP-compliant procedures by which she may access VAWA remedies.

2. Constitutionally adequate notice

By limiting May's access to VAWA, USCIS's lack of LEP-compliant procedures deprives May of her liberty interest in VAWA relief in violation of the Fifth Amendment Due Process Clause.[189] May cannot assert a claim

184. *See id.* at 35-36 (indicating that about twenty-five percent of all USCIS customers speak Spanish and an additional two percent each speak Hindi, Chinese, Tagalog, and Arabic); SHIN & BRUNO, *supra* note 36, at 2 fig.3 (reporting that according to the 2000 Census, 28.1 million U.S. residents speak Spanish, two million speak Chinese, 1.6 million speak French, one million speak Vietnamese, 0.7 million speak Russian, and 0.6 million speak Arabic).

185. *See* ASSESSMENT, *supra* note 183, at 43 (commenting that INS does not maintain documentation on the language requirements of the people it serves).

186. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,460 (allowing for a flexible combination of oral and written language accommodations depending upon a four-factor analysis of the number of LEP persons and the importance of the service).

187. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (placing the burden on the agency to find ways to accommodate increased costs associated with constitutionally-required procedures); Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,460 (noting that large entities clearly must substantiate any argument that lack of resources limits their provision of LEP language access); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 57 (2001) (noting USCIS's obligation to provide interpretation services to asylum seekers where the cost is a fraction of its budget).

188. *See* VAWA II, *supra* note 2, § 1502(b)(1) (removing barriers to criminal prosecution of abusers of immigrant women as part of a comprehensive federal domestic violence prevention program).

189. *Cf.* Walters v. Reno, 145 F.3d 1032, 1042 (9th Cir. 1998) (determining that INS forms were constitutionally inadequate because they failed to inform LEP immigrants of their options).

if she has no notice of its availability as a remedy.[190] Even though May is not (yet) in deportation proceedings, her liberty interest in gaining relief from violence heightens the due process requirements of her situation and places it on a par with the rights of the plaintiffs in *Walters*.[191] In *Walters*, the Ninth Circuit held that, without inordinate hardship, the INS could simplify the content and presentation of its forms and provide constitutionally adequate notice to LEP immigrants facing deportation.[192]

USCIS similarly has a Fifth Amendment obligation to provide constitutionally adequate notice, including notice through Form I-360, which adequately informs May of her rights and the consequences to her of not filing the form.[193] Protection of May's due process rights requires that USCIS provide LEP applicants with language assistance so that they may participate effectively in the VAWA process.[194] An English-only process fails to provide a constitutionally-adequate procedure,[195] and in order not to deprive May and other LEP battered immigrant women of access to remedies, USCIS should provide translations of information and evidence as needed.[196] Additionally, provision of LEP-compliant services enables USCIS to interpret and administer VAWA remedies equitably and in line with congressional intent.[197] In light of the foregoing analysis that May has a due process right to access VAWA remedies, the lack of judicial review of USCIS's failure to comply with Executive Order 13,166 and its implied Title VI obligations seems particularly troublesome. The following section examines whether May has any means by which to gain USCIS's compliance.

III. ENFORCING USCIS'S OBLIGATIONS TO LEP BATTERED IMMIGRANT WOMEN

Executive Order 13,166 extended implied Title VI national origin

190. *See supra* Part I.B (detailing the ways in which failure to provide LEP-compliant Websites, information, application forms, and the requirement of English-language evidence hinders May's access to VAWA remedies).

191. *Cf. Walters*, 145 F.3d at 1043-44 (balancing the plaintiffs' significant interest in avoiding deportation with the government's interest in administering immigration laws).

192. *See id.* at 1044 (noting that the benefits of the procedural safeguards against deportation outweighed the burden of making the changes).

193. *See id.* at 1042 (determining that a complex English form advising LEP immigrants of deportation procedures failed to inform them adequately so that they could waive their rights knowingly).

194. *Cf.* Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (requiring translation services that allow an applicant to assert a claim effectively in deportation hearings).

195. *See* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

196. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,463 (warning that failure to translate vital documents "may effectively deny LEP individuals meaningful access" to programs and services).

197. *See* VAWA II, *supra* note 2, § 1502(b)(2) (offering protection against domestic violence to battered immigrant women).

discrimination obligations to federally-conducted agencies such as USCIS.[198] The Executive Order requires the agency to ensure "meaningful access"[199] to its programs for LEP applicants and recipients of benefits.[200] The following discussion illustrates how USCIS's provision of English-only VAWA materials, despite regulations and guidance encouraging LEP-accessibility, contravenes the intent of the Executive Order and its associated implied Title VI obligations.

A. "Meaningful Access" for LEP Battered Immigrant Women

1. Case law

The Supreme Court first correlated language and national origin discrimination in a Title VI case in *Lau v. Nichols*.[201] In *Lau*, a group of Chinese-speaking students challenged their school district's policy of providing instruction in English only.[202] The Supreme Court concluded that the school district's policies conflicted with the goals of Title VI, as implemented in the district's own regulations,[203] because a significant number of LEP students were unable to access the benefits of a federally-assisted program.[204] The holding relied on Section 601 to reverse the court of appeals decision[205] and thus implicitly recognized a private right of action against agencies whose actions had a disparate impact on protected groups in violation of Title VI, Section 602 implementing regulations.[206]

Following the Supreme Court's reasoning in *Lau*, the Eleventh Circuit, in *Sandoval v. Hagan*,[207] found that a policy of the Department of Public

198. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (requiring federally-conducted agencies to provide LEP individuals with equivalent access to that provided to English speakers); U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (requiring that internal federal language assistance plans be consistent with standards applicable to recipients of federal funding).

199. Exec. Order No. 13,166, 3 C.F.R. at 290. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 302 (1985) (finding that a fourteen day limit on Medicaid services was facially neutral and did not deny "meaningful access" to benefits for qualified individuals who had a handicap); Lau v. Nichols, 414 U.S. 563, 568 (1974) (finding that English-only education denied Chinese-speaking students a "meaningful opportunity" to participate in the educational program).

200. Exec. Order No. 13,166, 3 C.F.R. at 290.

201. 414 U.S. 563, 568 (1974).

202. *Id.* at 564.

203. *See id.* at 567 (quoting 45 C.F.R. § 80.3(b)(1)) (noting that the department's Title VI implementing regulations issued pursuant to Section 602 of Title VI prohibited schools from providing differential services and restricting access to programs).

204. *See id.* at 564 (discussing how the school district denied 1,800 Chinese students supplemental English instruction and thus barred their access to other curricula).

205. *See id.* at 566 (finding Section 601 of Title VI sufficient to reverse the lower court's ruling and therefore not reaching an Equal Protection Clause argument).

206. *See id.* at 568 (quoting 45 C.F.R. § 80.3(b)(2)) (discussing the bar on discrimination in regulations passed under Section 602, "which has [discriminatory effect] even though no purposeful design is present").

207. 197 F.3d 484 (11th Cir. 1999), *rev'd*, 532 U.S. 275 (2001).

Safety to provide driver's license examinations only in English had an unlawful disparate impact on LEP individuals in violation of Title VI.[208] The Supreme Court, in *Alexander v. Sandoval*,[209] overturned the lower court's decision and held that the plaintiffs had no private right of action to enforce a disparate impact claim.[210] However, the Court did not address the merits of the case and left intact a private right of action for intentional discrimination claims.[211] Thus, while there remains some debate about the broader implications of the Supreme Court's holding in *Sandoval* for Title VI disparate impact claims,[212] it appears that the correlation of language and national origin articulated in *Lau*[213] is still good law.[214]

2. USCIS does not provide meaningful access to VAWA

The DOJ Guidelines state that federally-funded agencies must ensure that LEP individuals like May have "meaningful access" to programs.[215] The DOJ and DHS Title VI implementing regulations support this goal and

208. *See id.* at 508 (noting that 13,000 residents could not obtain licenses because of the English requirement, that the majority of these LEP individuals were from a country of origin other than the United States, and that the Department made accommodations for other disadvantaged groups such as the deaf and disabled).

209. 532 U.S. 275 (2001).

210. *See id.* at 293 (holding that Title VI does not create a private right of action to enforce disparate-impact regulations promulgated under Section 602).

211. *See id.* at 278 (noting that the only question presented was whether private individuals may sue to enforce Section 602 disparate-impact regulations). *Sandoval*, in effect, did for Title VI plaintiffs what the Supreme Court had done to equal protection plaintiffs fifteen years earlier: required them to prove intentional discrimination in order to state a claim. *Compare id.* at 293 (eliminating a private right of action to enforce disparate-impact regulations promulgated under Section 602, and leaving intentional discrimination under Section 601 as the only cause of action), *with* Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that disproportionate impact alone is insufficient to trigger strict scrutiny for invidious discrimination under the Equal Protection Clause).

212. *Compare* ProEnglish v. Bush, No. 02-2044, 2003 WL 21101726, at *2, *4 (4th Cir. May 15, 2003) (citing the district court's interest in plaintiff's claim that equation of language and national origin is unconstitutional, but upholding prior dismissal for lack of subject matter jurisdiction), *with* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,458 (stating that the DOJ rejects the argument that *Sandoval* strikes down Title VI regulations). *See generally* Note, *After* Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 (2003) (discussing the explicit and implicit ramifications of *Sandoval* on individuals' private right of action).

213. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) (including disparate impact based on provision of English-only services to Chinese-speaking students in regulations banning discrimination based on national origin).

214. *See* Memorandum from Ralph F. Boyd, Jr., Assistant Attorney General, U.S. Dep't of Justice, Civil Rights Div., to Heads of Departments and Agencies General Counsels and Civil Rights Directors 2 (Oct. 26, 2001) (stating that *Sandoval* does not strike down Title VI's disparate impact regulations, and using the facts of *Lau* as an example of disparate impact discrimination on the basis of national origin), *available at* http://www.napalc.org/files/Boyd_Memorandum.pdf.

215. *See* Enforcement of Title VI, *supra* note 92, at 50,124 (noting that agencies that fail to provide meaningful access may be discriminating on the basis of national origin in violation of Title VI).

emphasize funded agencies' responsibilities to provide LEP individuals with the same services as English-speakers.[216] The Executive Order and the DOJ hold USCIS to the same standards as funded agencies.[217] In *Lau*, the Supreme Court found that the lack of provision of language assistance to LEP students effectively barred their ability to participate in the curriculum.[218] The Court reasoned that Chinese-speaking students were likely "to find their classroom experiences wholly incomprehensible and in no way meaningful" in an English-only environment.[219]

Similarly, meaningful access in the VAWA context requires that all eligible battered women are able to access immigration remedies; however, USCIS's current English-only administration of VAWA benefits denies LEP women like May necessary information and effectively prevents them from obtaining relief.[220] In the case of VAWA, where LEP applicants like May make up a large proportion of the population that needs to access services,[221] the dearth of translated materials and other linguistically-accessible services does not provide battered immigrant women meaningful access to VAWA's benefits.[222]

216. *See* Nondiscrimination in Federally Assisted Programs—Implementation of Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.104(b) (2004) (prohibiting provision of different services or providing services in a different manner); Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of Homeland Security, 6 C.F.R. § 21.5(b) (2004) (mirroring DOJ regulatory language of 28 C.F.R. § 42.104(b) in DHS's Title VI implementing regulations); *see also* Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (explaining how Title VI, Section 602 delegates determination of disparate impact discrimination to a federal agency).

217. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (clarifying that while Title VI itself only covers funded agencies, federally-conducted agencies are held to the same standards).

218. *See* Lau v. Nichols, 414 U.S. 563, 564 (1974) (finding disparate impact discrimination where students in some school districts did not receive language assistance in violation of state guidelines).

219. *See id.* at 566 (rejecting the assertion that there could be equality of treatment for LEP students where the school provided identical facilities, teachers, and curriculum, as they did for English-speaking students).

220. *Cf.* Sula Pettibon, *Meza Family's Deaths Reveal Gaps in Domestic Violence Services*, HERALD (Rock Hill, S.C.), Aug. 15, 2004, at 1A (reporting that provision of domestic violence outreach and legal services to Spanish-speaking women increased from thirty-five cases in the first year to 300 cases in subsequent years when the agency made Spanish language information available), *available at* http://www.heraldonline.com/local/story/3744996p-3351426c.html.

221. *Cf.* Dutton, *supra* note 8, at 258 (noting that 78.7% of the battered immigrant Latinas surveyed spoke or read little or no English).

222. *See* Adamson, *supra* note 179, at 10A (quoting Kansas Supreme Court Chief Justice saying that translated forms would help battered immigrant women understand how to proceed legally in domestic violence situations); Lee, *supra* note 35, at 184 (arguing that in order to ensure LEP clients have full access to legal services, providers should remove structures, such as providing English-only information, that bar LEP clients from access).

a. USCIS's VAWA application numbers do not reflect the number of eligible women

Application numbers are a starting point from which an agency can determine the number or proportion of LEP persons who receive services and the frequency with which the agency comes into contact with LEP persons.[223] However, the number of people who *apply* for services may be different than the number of people who are *eligible* for services, but who fail to apply.[224] USCIS deals with an average of twenty-three VAWA petitions per day.[225] However, this number fails to include other contacts with USCIS prior to filing the petition, such as phone inquiries, Website browsing, or personal office visits.[226] It also fails to include potential applicants like May who, because of language barriers, do not learn about and cannot access the services.[227]

Based on the annual number of binational marriages and estimated rates of domestic violence, almost 75,000 battered immigrant women each year may be eligible for VAWA benefits.[228] Yet, USCIS processes around 6,000 VAWA claims each year,[229] and does not compile any data on how many VAWA applications come from LEP battered immigrant women.[230] However, if VAWA applicant characteristics match those of the general USCIS applicant pool, each year roughly 18,500 VAWA-eligible women are LEP.[231] Application numbers that do not adequately reflect the eligible

223. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,459-60 (outlining two of four elements of the DOJ's test for Title VI compliance).

224. *See id.* at 41,463 (noting that lack of awareness of a program denies LEP individuals meaningful access).

225. *See* AILA INFONET, DHS ANSWERS QUESTIONS ON VAWA PETITIONS AND ADJUSTMENT OF STATUS, AND ON U PETITIONS, *at* http://www.aila.org/infonet (last visited Sept. 6, 2004) (on file with the American University Law Review) [hereinafter AILA] (reporting that in 2003, USCIS received 6,700 self-petitions, up from 5,922 the previous year).

226. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS PRIORITIZES BACKLOG REDUCTION IN FY 2005 BUDGET (Feb. 2, 2004), *at* http://www.uscis.gov/graphics/publicaffairs/newsrels/backlogfy2005.pdf (last visited Jan. 30, 2005) (on file with the American University Law Review) [hereinafter BUDGET] (calculating that each day USCIS receives 100,000 Web hits, takes 50,000 calls at its National Call Centers, and sees 25,000 visitors at its district offices).

227. *See, e.g.*, Dutton, *supra* note 8, at 275 (calculating that almost one-quarter of abused immigrant Latinas did not seek services because of English language problems); Pettibon, *supra* note 220 (noting a ten-fold increase in the number of cases involving Spanish-speaking women once the agency instituted language-accessible services).

228. *Compare* Immigration & Naturalization Serv., *supra* note 7 (noting that the U.S. admitted 294,798 spouses of USCs and 28,874 spouses of LPRs in 2002), *and* U.S. Comm'n on Immigration Reform, *supra* note 5 (stating that approximately two-thirds of immigrant spouses are female), *with* Dutton, *supra* note 8 (estimating that thirty-four percent of immigrant women experience domestic violence).

229. *See* AILA, *supra* note 225 (noting that the annual number of self-petitions has increased in past years).

230. *See* ASSESSMENT, *supra* note 183, at 43 (commenting that INS does not maintain documentation on the language requirements of the people it serves).

231. *Cf. id.* at 35-36 (indicating that about twenty-five percent of all USCIS customers

community provide evidence that the lack of language accessibility fails to provide meaningful access to enable an LEP individual to take advantage of services.[232]

The greater the number or proportion of LEP persons an agency serves, the more likely it is that the agency needs to provide language services,[233] and USCIS's lack of LEP services negatively impacts the successful implementation of VAWA's objectives.[234] In addition, the more frequently the agency has contact with LEP individuals, the more likely it is that it needs to provide language services.[235] USCIS has failed to meet its Executive Order 13,166 and implied Title VI obligations to provide meaningful access to VAWA remedies for LEP applicants for whom USCIS provides only English information[236] and for the high number of potential applicants who are unable to access VAWA due to language barriers.[237]

An agency's lack of action in spite of regulations and administrative guidance suggesting action eviscerates the intent of Executive Order 13,166 to eliminate discrimination against protected groups.[238] Thus, USCIS's provision of English-only VAWA materials, despite regulations and guidance encouraging LEP-accessibility, contravenes the intent of the Executive Order and its associated implied Title VI obligations.[239] DHS implementing regulations forbid the restriction of "the enjoyment of any advantage or privilege enjoyed by others receiving any . . . benefit under the program."[240] DOJ holds federally-conducted programs to the same

speak Spanish and an additional two percent each speak Hindi, Chinese, Tagalog, and Arabic).

232. *Cf.* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1408 (11th Cir. 1993) (describing plaintiffs' argument that underutilization of a school resulted from the school district's refusal to distribute information).

233. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,459 (noting that agencies must include previously-excluded populations who are eligible for services but cannot access services because of language barriers).

234. *See* VAWA II, *supra* note 2, § 1502(a)(1) (noting that one of VAWA II's objectives was to remove immigration barriers that kept women in abusive relationships).

235. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,460 (noting that the agency should vary the level of service with frequency of contact).

236. *See, e.g.*, Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (acknowledging that Title VI implementing regulations give an LEP person the right to receive information in a language they understand).

237. *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 566 (1974) (finding that Title VI prohibits use of English-only materials where it excludes LEP individuals from activities).

238. *See Almendares*, 284 F. Supp. 2d at 804 (noting that long-term noncompliance of the agency with requirements for bilingual services, in violation of the Food Stamp Act and its regulations, could show intent to discriminate against LEP recipients).

239. *See Lau*, 414 U.S. at 568-69 (emphasizing that the school district's discriminatory treatment of LEP students was against Congress's Title VI intent to prevent taxpayer money from facilitating discrimination).

240. *See* Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of Homeland Security, 6 C.F.R. § 21.5(b)(1)(iv) (2004) (enumerating specific discriminatory actions

standards as they hold their funded programs.[241] Under DOJ guidelines, USCIS should provide language assistance so as not to deny an LEP battered immigrant woman like May effective access to VAWA immigration benefits.[242] This requirement would include translating "vital written materials" into the language of each regularly encountered group.[243]

b. The lack of translated forms inhibits LEP women's ability to apply for VAWA

No case explicitly addresses the right of LEP individuals to have routine forms translated into a language they understand.[244] However, a court would likely defer to DOJ's guidance to determine an agency's responsibility toward LEP individuals under Title VI and the Executive Order.[245] Under DOJ guidelines, USCIS's administration of VAWA fails to meet implied Title VI requirements because its translation policy fails to provide "meaningful access" for LEP battered immigrant women like May.[246]

The DOJ Policy Guidance describes a "safe harbor" provision whereby a federally-funded agency can establish prima facie compliance with Title VI by meeting two requirements: (1) providing translations of "vital documents" for each LEP group that constitutes the lesser of five percent of the eligible population or 1,000 individuals, and (2) providing written notice, in a language the LEP recipient can read, that sight translation of documents is available for language groups comprised of fewer than fifty people.[247] DOJ holds USCIS to the same obligations as its funded agencies.[248] Unfortunately, USCIS's lack of required record-keeping about

prohibited by Title VI).

241. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (requiring that internal federal language assistance plans be consistent with standards applicable to recipients of federal funding).

242. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,461 (explaining that reasonable language accommodations must be timely, and provided so as not to place a burden on the LEP person).

243. *See id.* at 41,464 (attempting to ensure effective LEP access to program materials by establishing a bright line rule whereby DOJ will consider an agency in compliance with Title VI if it translates vital documents for each LEP language group that constitutes five percent of 1,000 of its clientele, and if it provides translated notice to others of the right to receive sight translation of written materials in their own language).

244. *But see* Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (acknowledging plaintiffs' claim that the agency violated Title VI regulations by sending out materials in English only).

245. *See* Neal v. Cal. State Univs., 198 F.3d 763, 770 (9th Cir. 1999) (deferring to the interpretation of Title IX provided in the guidelines of a compliance test developed by the Department of Education's Office of Civil Rights), *cert. denied*, 124 S. Ct. 226 (2003).

246. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,463-64 (providing guidance on how an agency should determine what "vital" documents it needs to translate in order to be in compliance with Title VI).

247. *Id.* at 41,464.

248. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (requiring that internal federal

which languages VAWA applicants and prospective applicants speak hinders any accurate assessment of specific language translation needs.[249] However, an application of general population language prevalence estimates[250] to the number of eligible LEP VAWA applicants on an annual basis[251] indicates that the lack of *any* translated version of Form I-360 can be nothing but prima facie evidence that USCIS has not satisfied the "safe harbor" requirements.[252]

The fact that Form I-360 is available only in English presents a considerable barrier to May's ability to access VAWA benefits.[253] Such barriers have failed to pass court scrutiny in the past. For example, in *Sandoval*, the Department of Public Safety offered a driver's license test in English only.[254] As a result, thousands of LEP Alabama residents had difficulty getting a driver's license and could not obtain employment or other life essentials.[255] By publishing Form I-360 in its current format, USCIS has similarly failed to consider the demographics of the target population and the negative impact of providing services in English only.[256] USCIS's failure to provide an essential VAWA document in translation deprives LEP battered immigrant women of the opportunity to access VAWA benefits equally.[257] For a couple of hundred dollars per language, USCIS could translate I-360 so that May, and others similarly situated, would have access to the same information as English speakers.[258] By

language assistance plans be consistent with standards for federal funding recipients).

249. *See* ASSESSMENT, *supra* note 183, at 43 (commenting on the general lack of INS documentation regarding languages spoken by the people it serves).

250. *See* U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000 2 (Dec. 2001) (calculating that fifty-one percent of the foreign-born in the U.S. come from Latin America, one-quarter come from Mexico, with China and India accounting for the next highest numbers), *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf.

251. *See supra* note 225 and accompanying text (estimating that USCIS processes 6,000 VAWA applications each year); *supra* notes 228-31 and accompanying text (calculating that there are 75,000 potential applicants and that approximately one-third of USCIS contacts are LEP).

252. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,464 (listing the translation of vital documents as one of two requirements for establishing prima facie compliance with Title VI).

253. *Cf.* Lee, *supra* note 35, at 179 (describing how an LEP woman failed to get legal help because she could not fill out an English language restraining order form correctly).

254. *See* Sandoval v. Hagan, 197 F.3d 484, 489-90 (11th Cir. 1999) (comparing accommodations the Department of Public Safety offered to other disadvantaged residents, such as those who were deaf or illiterate).

255. *See id.* at 489 (stating that the policy affected some 13,000 residents, the vast majority of whom were foreign-born).

256. *See* Dutton, *supra* note 8, at 262 tbl.2 (showing that almost half of all abused Latinas had no English reading ability and almost three-quarters had little or none).

257. *See* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1410 (11th Cir. 1993) (asserting that an agency's failure to share information with the public gives rise to an inference of a discriminatory motive).

258. *See* ASSESSMENT, *supra* note 183, at 36 (reporting that in 2000, estimated translation costs were $189 to $214 per document).

providing I-360 in English-only, USCIS demonstrates its lack of concern with its implied Title VI obligations and its blatant disregard of the guidance provided by the DOJ balancing test.[259]

c. USCIS's evidence requirements bar meaningful access

Similarly, the VAWA evidentiary procedure is confusing and misleading, especially to a non-English speaker like May, and it impedes LEP battered immigrant women's abilities to access VAWA benefits.[260] For example, to assert a VAWA claim, May must provide evidence that she entered into the marriage in good faith, that John is a USC or LPR, that she is a victim of extreme cruelty or abuse, and that she is of good moral character.[261] Form I-360 "encourages" May to submit various types of acceptable credible evidence, including marriage certificates, utility receipts, mortgage documents, police reports, affidavits, medical reports, and bank records.[262] In fact, May *must* submit evidence in order for USCIS to consider her application and authorize the work authorization or welfare benefits she needs to survive without John's economic support.[263] USCIS does allow May to submit other credible evidence if she cannot obtain the

259. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,459-61 (suggesting that, to determine its Title VI obligations to LEP individuals, an agency consider the number of LEP persons who receive services, the frequency of contact, the importance of the service, and resources). As of December 2001, USCIS had translated just 11 of its 123 public-use forms. *See* ASSESSMENT, *supra* note 183, at 36-37 (noting that USCIS had translated 11 forms into Spanish and 8 of them into additional languages, including some in Icelandic and Swedish). It appears to have translated an additional 3 forms since then. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., FORMS AND FEES, *at* http://uscis.gov/graphics/ formsfee/forms/index.htm (last modified Feb. 4, 2005) (supplying translated versions of forms G-14, G-731, and I-131) (on file with the American University Law Review). However, seven of the forms listed in the OMB report are not available online in translation, three of them have actually been removed from the website in the last six months. *See id.* (providing links only to English versions of forms I-9, I-90, I-94, I-94W, I-821, I-823, and I-855, which the OMB report indicated were available in translation). When the visitor clicks on the English form name and scrolls down to the bottom of the description of the form, she can determine if a translated version is available. *See id.* In almost all cases, USCIS lists only an English version. *See id.* The lack of multilingual forms, coupled with the English-only Website, renders much of the information inaccessible to LEP populations in violation of Title VI. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (reviewing Title VI requirements and requiring agencies to ensure they "provide meaningful access" to LEP individuals).

260. *See supra* Part I.B (describing how May could not understand the customer service line, Website, or application materials); *cf.* Lee, *supra* note 35, at 179 (detailing how a court denied an LEP battered immigrant woman a restraining order because of procedural errors she made in filling out the paperwork).

261. *See* VAWA II, *supra* note 2, § 1503 (reviewing VAWA self-petitioning process and evidentiary requirements).

262. *See* FORM I-360, *supra* note 56, at Instructions 2 (delineating requirements for credible evidence determination).

263. *See* Immigration Petitions, 8 C.F.R. § 204.2(c)(6)(ii) (2004) (mandating that USCIS can only make a prima facie petition determination if the applicant has fulfilled I-360 requirements and provided supporting evidence).

specified items.[264] Unfortunately, this fact is in a note separated from the list of requirements by two pages of instructions relating to non-applicable visa categories.[265] Ultimately, such obfuscation frustrates the intent of VAWA to provide a means by which battered immigrant women can petition for immigration relief without having to involve their abusive spouse.[266]

From the foregoing analysis, it is clear that USCIS is in violation of Executive Order 13,166. However, May's options for enforcement of USCIS's obligations are limited.[267] She cannot sue under Title VI because a loophole allows federally-conducted agencies to be held to a lesser enforcement standard than federally-funded agencies.[268] She can likely seek USCIS's purely voluntary compliance through administrative remedies to enforce its Executive Order obligations, but it is unclear how successful this action would be.[269] The next section explores whether May has an alternative cause of action: to go to court and attempt to gain judicial enforcement under an equal protection claim, based on implied Title VI obligations.[270]

B. USCIS's Intent to Discriminate Against LEP Battered Immigrant Women Provides a Private Right of Action

Recently, district courts have found a cause of action where a federally-funded agency fails to address a known disparate impact. The failure to remedy the burden may indicate intentional discrimination against a

264. *See* FORM I-360, *supra* note 56, at Instructions 4 (allowing a self-petitioning battered spouse to "submit any relevant credible evidence in place of the suggested evidence").

265. *See id.* (detailing required evidence and providing exception to credible evidence submission requirements).

266. *See* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (listing VAWA II's attempts to remove obstacles that hinder women from fleeing domestic violence and to reduce circumstances in which the abuser can threaten the women's immigration status).

267. *See supra* notes 104-08 and accompanying text (discussing a gap in enforcement where an administrative remedy is ineffectual, USCIS is not subject to Title VI, and courts will not enforce Executive Order 13,166).

268. *See supra* notes 104-05 and accompanying text (describing how Title VI only covers federally-funded agencies and how administrative remedies are ineffectual).

269. *See, e.g.*, Barbara Plantiko, Comment, *Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239, 258 (2002) (arguing that administrative remedies are insufficient to "remedy denial of meaningful access" to LEP patients in health care settings).

270. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (noting that Title VI's protection is coextensive with the Equal Protection Clause); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 n.11 (11th Cir. 1993) (equating the analysis of intentional discrimination under Title VI to an equal protection analysis under the Fourteenth Amendment); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 495-99 (D.N.J. 2003) (performing identical analyses for plaintiffs' Title VI and equal protection claims); *see also* Plantiko, *supra* note 269, at 259-68 (demonstrating how a plaintiff could frame an equal protection argument using evidence of a Title VI violation).

protected class in violation of Section 601 and the Equal Protection Clause.[271] These courts are possibly showing a philosophical allegiance with critics of the Supreme Court's intent requirement who have argued that "[t]he burden on those who are subjugated is none the lighter because it is imposed inadvertently."[272] The following sections assert that USCIS's lack of accommodation for LEP battered immigrant women like May rises to the level of intentional discrimination, and therefore justifies a private right of action against USCIS for violating the Equal Protection Clause.

1. Case law

An ongoing case in the District of New Jersey, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[273] straddles the *Sandoval* decision and provides a model for disparate impact and intentional discrimination analyses under both Title VI and the Equal Protection Clause.[274] In *South Camden*, a citizen's group alleged that discriminatory processes permitted the placement of a cement factory in a neighborhood where the residents were predominately of color.[275] Prior to *Sandoval*, the *South Camden* court found that the citizen's group had proved disparate impact discrimination by showing that, in violation of agency regulations, a facially-neutral procedure had a discriminatory effect on members of a group protected by Title VI.[276] The court noted that this showing constituted rebuttable prima facie evidence of discrimination for

271. *See, e.g.*, *S. Camden*, 254 F. Supp. 2d at 497 (finding knowledge of, and lack of action to prevent, disparate impact of factory placement as sufficient evidence of intent to discriminate in violation of Section 601 and the Equal Protection Clause); *see also* Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (acknowledging that plaintiffs stated a claim for intentional discrimination in violation of Section 601 based on a facially discriminatory policy). At this time, neither case is final nor is there any way to predict whether or not an appellate court would agree with the district courts' reasoning. *See infra* note 288 (describing how parties are filing cross claims in *South Camden*); *infra* note 292 (mentioning that the court certified a class of plaintiffs in *Almendares*).

272. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1519 (2d ed. 1988) (arguing that the Supreme Court's focus on intent does not comport with the "concept of equal justice under the law" inherent in the Fourteenth Amendment). *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that the Supreme Court's focus on intentional motivation to prove race discrimination fails to address the unconscious racism embedded within governmental actions).

273. 145 F. Supp. 2d 446 (D.N.J. 2001), *modified*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002), *remanded to* 254 F. Supp. 2d 486 (D.N.J. 2003).

274. *See S. Camden*, 254 F. Supp. 2d at 495-99 (using the same analytical framework to evaluate plaintiffs' Title VI and equal protection claims).

275. *See S. Camden*, 145 F. Supp. 2d at 451 (explaining that the permit process considered the technical emissions standards of factory placement, but not the racial implications of cumulative environmental burdens).

276. *See id.* at 484-95 (addressing the adverse impact, disparate impact, and injury causation of a factory in a minority neighborhood and determining it violated Section 602 regulations).

which the factory had no substantially legitimate justification.[277] The court therefore granted a preliminary injunction in favor of the plaintiffs.[278]

After the Supreme Court ruled in *Sandoval*, the defendants submitted a motion to the New Jersey court asking it to vacate its earlier opinion, but the court declined to do so.[279] The court reevaluated the *South Camden* facts in light of *Sandoval's* restriction of judicial remedies for disparate impact claims. The court determined that the plaintiffs could enforce Section 602 by invoking 42 U.S.C. Section 1983,[280] which prohibits state actors from depriving persons of their legally-secured rights.[281] However, on appeal, the Third Circuit held that an administrative regulation cannot create a right enforceable under Section 1983 unless the interest is implicit in the statute authorizing the regulation.[282] Since Section 602 did not reveal any congressional intent to create a private right of action,[283] the Third Circuit held that no agency regulations promulgated pursuant to Section 602 can provide that right.[284] Thus, the Third Circuit foreclosed another avenue by which plaintiffs could assert a private right of action under Title VI against federally-funded programs that have a disparate impact on protected groups.[285] Nevertheless, agencies still may prohibit actions that would have a disparate impact on protected groups by issuing regulations pursuant to Section 602.[286] These regulations allow those

277. *See id.* at 496-97 (concluding that compliance with Environmental Protection Agency guidelines did not establish that there was a substantial legitimate justification for the choice of site because the guidelines did not require consideration of Title VI non-discrimination factors).

278. *See id.* at 452 (remanding the case to the New Jersey Department of Environmental Protection for reevaluation of the factory's permits).

279. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) (denying defendant's motion because there were alternative legal grounds on which to base the preliminary injunction).

280. *See id.* at 518 (relying on Third Circuit precedent that allowed plaintiffs to bring Title VI disparate impact claims under Section 602 or under Section 1983). Justice Stevens had suggested using Section 1983 as a course of action for Title VI disparate impact claims in his dissent in *Sandoval*. *See* Alexander v. Sandoval, 532 U.S. 275, 299-302 (2001) (Stevens, J., dissenting) (arguing that precedent indicates that Section 1983 provides a private right of action to enforce Title VI regulations against state actors).

281. *See* 42 U.S.C. § 1983 (2000) (granting a private right of action where a state actor violates a person's civil rights).

282. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (remarking that the Section 602 regulations went beyond the congressional intent of simply defining the rights outlined in Section 601).

283. *See id.* at 789 (citing *Sandoval*'s conclusion that Section 602 demonstrates an intent only to place restrictions on enforcement, not to provide private rights for any class of protected individuals).

284. *See id.* (noting that Section 602 limits agencies to effectuating rights that Section 601 had already created).

285. *See id.* at 774 (pointing out that Title VI proscribes only intentional discrimination, and, in light of *Sandoval*, the plaintiffs do not have a right of action).

286. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,458 (declaring that *Sandoval* did not address the validity of agency regulations, promulgated under Title VI, Section 602, that prohibit disparate impact discrimination).

negatively affected to access an administrative remedy, even if they cannot prove intent and file suit.[287]

On remand from the Third Circuit, the New Jersey district court revisited the *South Camden* facts for the third time, now examining it in the context of Title VI, Section 601 and the Equal Protection Clause. The court noted that evidence of disparate impact alone is insufficient to meet the heightened evidentiary burden of intentional discrimination.[288] However, the court recognized that disproportionate impact is often probative of intentional discrimination.[289] Among factors indicative of intent, the court included: historical background of the action, the foreseeability of the consequences of the action, the nature and magnitude of the disparity, and knowledge that the action would cause a disparate impact.[290] The court used evidence of the agency's knowledge of likely disparate health impact to allow a claim that the factory's facially-neutral practices were intentionally discriminatory under Section 601 and the Equal Protection Clause.[291] Thus, as some courts interpret the law today, plaintiffs such as May may be able to use evidence of disparate impact and of the defendant's knowledge of a likely adverse impact to prove discriminatory intent.[292]

287. *See* Victor Goode & Phyllis Flowers, *Invisibility of Clients of Color: The Intersection of Language, Culture, and Race in Legal Services Practice*, 36 CLEARINGHOUSE REV.: J. OF POVERTY L. & POL'Y 109, 113-15 (2002) (discussing the benefits and drawbacks of pursuing an administrative solution rather than litigation for a language access complaint under Title VI); Plantiko, *supra* note 269, at 246 (describing the DOJ's administrative enforcement procedures, which require an agency's voluntary compliance to rectify its Title VI violations).

288. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 495 (D.N.J. 2003) (stating that a party must allege "purposeful, invidious discrimination"). The *South Camden* case is ongoing and there has been a flurry of cross claims and counter claims in the last two years. *See, e.g.*, Order, *S. Camden*, (Jan. 12, 2004) (No. 01-cv-702) (dismissing multiple third-party complaints). The Final Pretrial Conference is scheduled for June 2, 2005. *See* Scheduling Order, *S. Camden*, (Nov. 30, 2004) (No. 01-702-FLW-AMD) (providing filing deadlines for plaintiffs and defendants).

289. *See S. Camden*, 254 F. Supp. 2d at 495 (quoting Pryor v. NCAA, 288 F.3d 548, 563 (3d Cir. 2002) for the proposition that "people usually intend the natural consequences of their actions").

290. *See id.* at 496 (reviewing equal protection case law to determine relevant factors to prove intent).

291. *See id.* at 497 (considering agency's knowledge of the factory's likely disparate impacts on residents of color as a basis on which to state a claim of intentional discrimination).

292. *See* Almendares v. Palmer, 284 F. Supp. 2d 799, 809 (N.D. Ohio 2003) (denying defendant's motion for summary judgment and allowing plaintiffs' Title VI right of action for intentional discrimination). The plaintiffs in the case of *Almendares*, low-income LEP recipients of food stamps, argue that the Department of Job and Family Services discriminated against them and obstructed their rights to participate fully in the federal food stamp program by not providing materials in Spanish. *Id.* at 800. They argue that the agency's administration of the program intentionally discriminated against them on the basis of national origin in violation of Title VI. *Id.* at 801. The district court acknowledged the limitations imposed by *Sandoval*, *id.* at 802, but found that the plaintiffs arguably stated a cause of action for intentional discrimination. *Id.* at 804. Notably, the court, drawing on the

2. USCIS intentionally discriminates against LEP battered immigrant women

The text of VAWA clearly indicates congressional intent to provide immigration remedies for May and women similarly situated.[293] Likewise, the text of Title VI clearly indicates congressional intent to eliminate discrimination based on national origin.[294] Title VI itself applies only to federally-funded agencies;[295] however, Executive Order 13,166 holds federally-conducted agencies to the same Title VI standards as the agencies they fund.[296] Under Title VI jurisprudence, national origin discrimination encompasses discrimination on the basis of language.[297] Thus, USCIS violates the spirit and plain language of Executive Order 13,166 (and associated implied Title VI obligations) where its failure to provide bilingual services discriminates against LEP applicants.[298]

a. USCIS knowingly failed to comply with obligations imposed under Executive Order 13,166

USCIS has known about its implied Title VI obligations, as clarified under Executive Order 13,166, for at least four years.[299] USCIS's standard

reasoning of *South Camden*, acknowledged the plaintiffs' claim that the long-term noncompliance of the agency with requirements for bilingual services, in violation of the Food Stamp Act and its regulations, could show intent to discriminate against LEP recipients. *Id.* at 807. The case is ongoing, and the court has certified the class of plaintiffs. *See* Order at 6, *Almendares* (July 16, 2004) (No. 3:00CV7524) (finding that plaintiffs met requirements as class representatives to seek equitable relief for alleged discrimination based on national origin in violation of Title VI). The parties appear to be making efforts to reach a settlement agreement. *See* Third Narrative Settlement Statement of Defendant Ohio Department of Job and Family Services at 1, *Almendares* (Feb. 1, 2005) (No. 3:2000CV7524) (noting that Defendants are reviewing the settlement options); Plaintiffs' Settlement Status Report at 2, *Almendares* (Feb. 1, 2005) (No. 3:00CV7524) (stating that Plaintiffs believe there is agreement on major issues).

293. *See* VAWA II, *supra* note 2, § 1502 (defining VAWA's purpose as to "offer protection against domestic violence" in light of findings that immigration laws acted as a barrier that kept battered immigrant women "locked in abusive relationships").

294. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 601 (1964) (codified at 42 U.S.C. § 2000d) ("No person in the United States shall, on the ground of . . . national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.").

295. *See id.* (limiting the prohibition against discrimination to programs receiving "Federal financial assistance").

296. *See* U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (specifying that federally-conducted agency language assistance plans "must be consistent with the standards applicable to recipients of federal financial assistance").

297. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) (including disparate impact based on provision of English-only services to Chinese-speaking students in regulations banning discrimination based on national origin); Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (reviewing Title VI requirements and requiring agencies to ensure they provide "meaningful access" to LEP individuals).

298. *See, e.g.*, Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (finding that failure to provide bilingual outreach services had a disparate impact on LEP Food Stamp applicants).

299. *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,125 (Dep't of Justice Dec. 6,

operating procedure denies May meaningful access to VAWA services and is in contradiction with Executive Order 13,166 and the DOJ Policy Guidance.[300] A court could construe USCIS's behavior to be indicative of intent to discriminate in violation of the Equal Protection Clause.[301] For example, USCIS's willful failure to comply with implied Title VI mandates, and its denial of required meaningful access to its services for LEP individuals, is evidence of intent to discriminate.[302] Thus far, USCIS has failed to issue even a plan listing its efforts to guarantee meaningful access to LEP applicants.[303] An agency's failure to share basic information about its programs with protected groups raises questions about its discriminatory intent.[304] Such lack of attention is particularly suspect for a federally-conducted agency whose primary function is to work with immigrants and foreigners, a group likely to contain a high proportion of LEP individuals.[305]

b. Disparate impact on LEP battered immigrant women is probative of USCIS's discriminatory intent

USCIS has a legal obligation to provide LEP battered immigrant women like May meaningful access to VAWA remedies.[306] Its knowing non-

2000) (deferring comment on issues of language access issues because the INS planned to address them later "in compliance with Executive Order 13,116").

300. *Cf. Almendares*, 284 F. Supp. 2d at 803 (inferring agency's discriminatory intent from its failure to implement bilingual programs required by Title VI and its implementing regulations).

301. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (noting that impact alone is not sufficient to prove an equal protection violation, and the court should also consider historical background and the administrative history of the action to establish intent).

302. *See Almendares*, 284 F. Supp. 2d at 804 (positing that long-standing noncompliance with a known law and implementing regulation shows intent to discriminate).

303. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., AGENCY SPECIFIC MATERIALS, *at* http://www.usdoj.gov/crt/cor/agency.htm (last visited Feb. 28, 2005) (on file with the American University Law Review) (providing hyperlinks to published federal agency LEP plans and lacking a link to a DHS plan that would cover USCIS).

304. *See* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1410 (11th Cir. 1993) (noting a school's failure to notify minority parents of a school building project in a white neighborhood might indicate discriminatory intent in some circumstances).

305. *See* U.S. DEP'T OF JUSTICE, DEPARTMENTAL PLAN IMPLEMENTING EXECUTIVE ORDER 13,166 (Jan. 10, 2001) (noting that agencies that have "frequent, if not daily, contact with LEP individuals concerning matters of significant importance" must ensure that those served can access the services offered meaningfully), *available at* http://www.usdoj.gov/crt/cor/lep/dojimp.htm (on file with the American University Law Review).

306. *See* VAWA II, *supra* note 2, § 1502(b)(2) (noting that one purpose of VAWA is to protect immigrant women from domestic violence); Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 602 (1964) (codified at 42 U.S.C. § 2000d) (authorizing agency regulations to prohibit discrimination that Section 601 does not cover specifically); Nondiscrimination in Federally Assisted Programs—Implementation of Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.104(b) (Dep't of Justice 2004) (prohibiting actions by DOJ agencies that adversely impact accomplishing program objectives with proscribed groups).

compliance gives rise to an inference of intentional discrimination.[307] In *South Camden*, the New Jersey District Court required the plaintiffs to state a claim that the agency had implemented a facially-neutral policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[308] However, the court rejected the agency's argument that, even if it displayed indifference to potential negative consequences, there was no proof of intent to discriminate,[309] and accepted the plaintiffs' claims that the agency actions demonstrated discriminatory animus.[310] The court reasoned that the plaintiffs' allegations that the placement of the factory had a disparate impact on residents of color were both relevant and probative of the defendant's discriminatory motive.[311]

Similarly, under its current mode of operation, USCIS denies May and other LEP battered immigrant women a meaningful opportunity to access VAWA information[312] and to apply for immigration benefits.[313] USCIS's implied Title VI obligations are clear,[314] yet it has failed to act upon those obligations. USCIS's indifference and avoidance of its Executive Order responsibilities allow an inference that it intended to discriminate against LEP applicants.[315] In addition, USCIS's current policies endorse the pervasive lack of multilingual services offered to prospective VAWA applicants and fail to ensure meaningful access to services for May or any

307. *See Almendares*, 284 F. Supp. 2d at 807 (finding non-compliance with known laws requiring LEP accessibility as indicating intent to discriminate in violation of Section 601).

308. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 495 (D.N.J. 2003) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) (recognizing that Section 601 and equal protection claims require "purposeful, invidious discrimination" against the plaintiff).

309. *See id.* at 496-97 (noting that the burden shifts to the defendant to refute the allegations once the plaintiffs have established discriminatory intent).

310. *See id.* at 496 (observing that the court could infer discriminatory intent from historical background, departures from usual procedure, and foreseeable negative consequences).

311. *See id.* at 497 (noting that a defendant's knowledge of disparate impact, historical practices, and situational specifics is sufficient to state a cause of action under Section 601).

312. *See supra* Part I.B.1 (describing linguistic barriers to accessing basic VAWA information).

313. *See supra* Part I.B.2 (describing linguistic barriers to applying for VAWA benefits).

314. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 601 (1964) (codified at 42 U.S.C. § 2000d) (prohibiting discrimination on the basis of national origin); Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (requiring federally-conducted agencies to provide LEP individuals with equivalent services to those provided to English speakers); U.S. DEP'T OF JUSTICE, *supra* note 80, at ch. 6 (requiring that internal federal language assistance plans be consistent with standards applicable to recipients of federal funding).

315. *See* Almendares v. Palmer, 284 F. Supp. 2d 799, 807 (N.D. Ohio 2003) (positing that long-term noncompliance with requirements for LEP services, in violation of known legal obligations, could show intent to discriminate). The government's history of discriminatory administration of immigration benefits strengthens the inference of intent in this case. *See* sources cited *supra* note 18 (discussing past immigration policies that had a discriminatory effect on women and people of color).

battered immigrant woman who does not speak English.[316] In the case of USCIS, an agency with extensive contact with LEP populations, where the result of lack of language access is as severe as deportation or severe injury, such lack of attention to language barriers rises to the level of "invidious discrimination on the basis of national origin and race."[317] Thus, USCIS's failure to serve those disadvantaged on account of national origin indicates its unlawful discriminatory intent.[318]

Under a *South Camden* analysis, USCIS's facially-neutral evidence procedure disproportionately affects May because it fails to consider the particulars of her situation.[319] In *South Camden*, the New Jersey District Court noted that race-neutral permitting procedures resulted in discriminatory placement of factories in residential communities of color.[320] A new factory would affect the residents' health, which, when added to the cumulative effects of other community-specific environmental factors, constituted an adverse impact.[321] The court concluded that the factory's placement had a disparate impact in violation of Title VI because statistical evidence showed that companies frequently placed new factories in areas where the residents were largely of color.[322] Thus, the district court used a "totality of the circumstances"[323] test that took into consideration community-specific harms.[324]

Similarly, the totality of May's circumstances illustrates that USCIS's

316. *Cf.* Louise Chu, *Rise in Immigrant Domestic Abuse Cases Reflects Better Outreach*, CHARLOTTE OBSERVER, May 16, 2003 (reporting that a thirty percent increase in LEP domestic violence cases resulted from improved outreach to immigrant populations), *available at* http://www.charlotte.com/mid/observer/news/local/ 5881323.htm.

317. *See* Enforcement of Title VI, *supra* note 92, at 50,123-24 (noting that xenophobic prejudice may trigger language discrimination).

318. *See, e.g.*, Connie Paige, *Out of China: A Woman's Story Lifts Veil on Once-Taboo Topic*, BOSTON GLOBE (City Weekly), Nov. 16, 2003, at 1 (reporting on cuts in immigrant domestic violence services and quoting sources who feel that "government programs should do more to respond to" the deficient supply of immigrant services).

319. *Cf.* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 483 (D.N.J. 2001) (finding that a facially-neutral permit procedure disproportionately affected citizens of color because it failed to consider the particulars of their situation).

320. *See id.* at 484 (acknowledging that the defendants followed government guidelines in determining the location of the factories at issue).

321. *See id.* at 490 (requiring defendants to consider external sources of pollution to determine whether or not the placement of a new factory would have an adverse impact on the community).

322. *See id.* at 492-93 ("[I]n the State of New Jersey there is 'a strong, highly statistically significant, and disturbing pattern of association between the racial and ethnic composition of communities, the number of [Environmental Protection Agency] regulated facilities, and the number of facilities with Air Permits[.]'").

323. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (describing how discriminatory purpose can be inferred from "the totality of the relevant facts," such as where an action has a more severe impact on one group than another).

324. *See S. Camden*, 145 F. Supp. 2d at 490 (considering specific health problems within the community, the environmental problems of the neighborhood, and the number of existing industries that impose an environmental burden when assessing Title VI compliance).

actions discriminate against LEP battered immigrant women.[325] While the English-language evidentiary requirement theoretically applies to all applicants for USCIS benefits,[326] in practice it has an unlawful discriminatory impact on those who are LEP as a result of national origin.[327] USCIS fails to consider that it is primarily LEP individuals who will have documents needing translation, that translation imposes a logistical and financial burden on LEP individuals, and that this requirement may pose a barrier to assertion of a VAWA claim.[328] Thus, in light of the clear violation of the Executive Order and invidious intent to discriminate, May is hoping that a judge will enforce USCIS's obligations to her.

C. Lack of Judicial Enforcement of "Meaningful Access"

Title VI and the Equal Protection Clause[329] have much in common.[330] Both are tools of anti-discrimination, introduced in response to an urgent need to eliminate pervasive racial discrimination.[331] Both protect individuals from arbitrary government discrimination on the basis of national origin.[332] Key cases for both have involved discrimination in the educational context.[333] The Supreme Court has found both claims to

325. *See supra* notes 193-200 and accompanying text (describing the disparate impact of USCIS's facially neutral procedures).

326. *See* Immigration Court—Rules of Procedure, 8 C.F.R. § 1003.33 (2004) (requiring that all applicants who submit any foreign language document to USCIS shall also send a certified English translation).

327. *Cf. S. Camden*, 145 F. Supp. 2d at 483 (finding that a facially-neutral permit procedure disproportionately affected citizens of color because it failed to consider the particulars of their situation).

328. *Cf. id.* at 451 (noting that the factory failed to consider issues such as existing emissions levels and the poor health of the community and finding these omissions provided evidence of disparate impact discrimination).

329. The Supreme Court has applied Fourteenth Amendment equal protection guarantees to federal government actions via the Fifth Amendment. *See* U.S. CONST. amend. XIV (barring a state from denying "any person within its jurisdiction the equal protection of the laws"); *id.* amend. V (providing for due process to prevent arbitrary deprivation of life, liberty, or property); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (extending equal protection guarantees to federal acts because discrimination constitutes a deprivation of liberty under the Fifth Amendment).

330. *See* John Arthur Laufer, Note, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1641 (2002) (arguing that the structural schemes of Title VI and the Fourteenth Amendment are indistinguishable).

331. *Compare* Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race"), *with* President John F. Kennedy, Address to Congress (Feb. 28, 1963) (noting that Title VI was needed because prior legislative and constitutional attempts had not ended racial discrimination), *available at* http://www.congresslink.org/civil/cr1.html.

332. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (finding equal protection applied to Chinese citizens who were "within the territorial jurisdiction" of the United States), *with* Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 601 (1964) (codified at 42 U.S.C. § 2000d) (barring discrimination on the basis of "race, color, or national origin").

333. *Compare* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that racially-

require proof of intentional discrimination[334] and that the means by which a plaintiff can prove a violation of either is functionally identical.[335] Courts employ a "burden shifting" mode of analysis for both claims prior to striking down the challenged action.[336] Both have been extended to cover the federal government's own activities in recognition that the federal government should not be allowed to discriminate in a manner prohibited to others.[337]

However, one key difference between the two analyses is how courts have regarded the interconnection of national origin and language.[338] The Supreme Court has established that LEP status is a component of national origin under Title VI.[339] The Supreme Court, though, has declined to reach the issue in its equal protection jurisprudence.[340] In equal protection analyses, courts "apply different levels of scrutiny to different types of

segregated schools violated the Equal Protection Clause), *with* Lau v. Nichols, 414 U.S. 563 (1974) (finding that English-only school programs violated Title VI).

334. *Compare Davis*, 426 U.S. at 240 (observing that disproportionate impact does not prove a law violates the Equal Protection Clause in the absence of a discriminatory purpose), *with* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (restricting plaintiffs to a cause of action proving intentional discrimination in violation of Section 601 and eliminating any right of action to enforce disparate impact discrimination under Section 602).

335. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (noting that Title VI's protection is coextensive with the Equal Protection Clause); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 n.11 (11th Cir. 1993) (equating the analysis of intentional discrimination under Title VI to an equal protection analysis under the Fourteenth Amendment); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 493-99 (D.N.J. 2003) (considering plaintiffs' Title VI and equal protection claims together). *Compare* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977) (discussing evidentiary sources such as legislative history that can help prove discriminatory intent in equal protection claims), *with S. Camden*, 254 F. Supp. 2d at 496 (requiring similar evidentiary sources for a Title VI claim to those noted in *Arlington Heights*).

336. *Compare Arlington Heights*, 429 U.S. at 566 n.21 (stating that once plaintiffs have made a threshold showing of discriminatory intent, the burden shifts to the defendant to show that the same decision would have resulted even had it not considered the impermissible purpose), *with S. Camden*, 254 F. Supp. 2d at 496 (employing the *Arlington Heights* burden-shifting test as part of a Title VI analysis).

337. *Compare* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding that equal protection applies to federal actions by way of the Fifth Amendment because "discrimination may be so unjustifiable as to be violative of due process"), *with* Exec. Order No. 13,166, 3 C.F.R. 289, § 1 (2000) (noting that the federal government has an obligation to ensure accessibility for LEP individuals to its own services, as well as those of its funded programs previously covered by Title VI).

338. *See generally* Plantiko, *supra* note 269 (making Title VI and equal protection arguments on behalf of LEP patients seeking interpretation services at federally-funded hospitals).

339. *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) (finding English-only educational programs for Chinese-speaking students was a form of national origin discrimination under Title VI).

340. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 360 (1991) (declining to decide whether striking a prospective juror on the basis of Spanish language ability was a pretext for ethnic discrimination).

classifications."[341] Courts designate certain groups as "discrete and insular minorities"[342] based on their racial or national origin status and apply strict scrutiny when examining acts that discriminate against them.[343] Courts afford other classifications, such as gender or economic status, either intermediate scrutiny[344] or rational basis scrutiny.[345] The degree of scrutiny that a court would apply to May's claim remains unclear.[346] Lower courts' equal protection analyses have generally refused to recognize the intertwined relationship of language and national origin and have applied rational basis scrutiny to such claims.[347] The lack of agreement on the interconnection of language and national origin discrimination insulates agencies like USCIS from a judicially-enforceable legal obligation to provide meaningful access to battered immigrant women like May outside of a due process analysis.[348]

Once May has stated a cause of action against USCIS for intentionally discriminating against her, the burden shifts to USCIS to provide a rationale for its discriminatory actions.[349] USCIS is likely to advance the same cost and administrative rationales as it would under the third prong of the Fifth Amendment due process test established in *Mathews*.[350] In both a

341. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (discussing situations under which courts require increased judicial scrutiny).

342. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

343. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting that classifications drawn on the basis of race could only be upheld if "necessary to the accomplishment of some permissible [government] objective").

344. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (striking down gender-based polices unless they "serve important governmental objectives and [are] substantially related to achievement of those objectives").

345. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (upholding the constitutionality of discriminatory economic policies that were rationally related to a legitimate government purpose).

346. *See* Smothers v. Benitez, 806 F. Supp. 299, 305 (1992) (noting that "language use by minority language groups has not yet been situated within the framework of legal standards which control the application of the equal protection clause of the fourteenth amendment"); *id.* at 304-10 (discussing situations in which strict, intermediate, or rational basis scrutiny might apply to language minorities).

347. *See, e.g.*, Olagues v. Russoniello, 770 F.2d 791, 801 (9th Cir. 1985) (reviewing past precedent and determining that "a language-based classification is not the equivalent of a national origin classification, and does not denote a suspect class").

348. *Compare* Justin B. Denton, Comment, *Protecting Both Ethnic Minorities and the Equal Protection Clause: The Dilemma of Language-Based Peremptory Challenges*, 1997 BYU L. REV. 101, 120-23 (arguing that courts should not extend strict scrutiny based on language because language minorities do not have a history of discrimination and language classifications are relevant to state interests), *with* Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail To Protect Latinos*, 117 HARV. L. REV. 1420, 1426-38 (2004) (describing how equal protection jurisprudence ignores the intertwined nature of discrimination on the basis of language and race for Latinos/Latinas).

349. *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 496 (D.N.J. 2003) (shifting the burden to the factory to show that the same decision would have resulted in the absence of a discriminatory animus after the citizens group had proved intent).

350. *See supra* Part II.C.1 (applying the *Mathews* three-prong test to assess May's due

due process and equal protection context, USCIS's justifications are unavailing. Under a strict scrutiny equal protection analysis, USCIS's justifications are likely insufficient to show that its current administration of VAWA is necessary to achieve a compelling government purpose.[351] However, the Supreme Court has only established a direct correlation of nationality and language in its Title VI jurisprudence, not in the equal protection context.[352] Thus, courts may review May's claim under a less than strict scrutiny standard, possibly even under the rational basis standard, which would make it easier for USCIS to prevail over a challenge to its practices.[353]

Under a rational basis standard, the policy need only rationally relate to a legitimate government purpose in order to withstand legal challenge.[354] Courts frequently defer to policies that could be associated with the federal government's plenary powers over immigration.[355] However, Congress has clearly spoken about providing battered immigrant women with an immigration remedy in VAWA,[356] and the language policies at issue do not implicate May's eligibility to stay in the United States.[357] The failure of

process right to adequate notice of VAWA remedies).

351. *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 496 (1954) (finding that a policy of segregating schools failed to meet strict scrutiny because there was no compelling state reason for racial discrimination).

352. *Compare* Lau v. Nichols, 414 U.S. 563, 568 (1974) (affirming the prohibition of language discrimination as a form of national origin discrimination under Title VI), *with* Hernandez v. New York, 500 U.S. 352, 360 (1991) (declining to decide whether striking a prospective juror on the basis of Spanish language ability was a pretext for racial discrimination subject to strict scrutiny). The Supreme Court seems to struggle with how to compare language minorities with other protected groups instead of reviewing the history of discrimination and unequal treatment of LEP individuals on its own merits. *See, e.g.*, *Hernandez*, 500 U.S. at 371 ("It may well be, for certain ethnic groups and in some communities, that proficiency in a certain language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

353. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1, at 645-46 (2d ed. 2002) (noting that the burden of proof rests with the challenger under rational basis review, and that courts strike down few laws under this "enormously deferential" standard).

354. *Compare* Ambach v. Norwick, 441 U.S. 68, 81 (1979) (upholding a citizenship requirement for public school teachers as rationally-related to state interests in promoting civic virtues), *with* Romer v. Evans, 517 U.S. 620, 635-36 (1996) (holding a state provision denying protection on the basis of sexual orientation unconstitutional under a rational basis standard).

355. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (upholding denial of Medicare benefits to certain non-citizens in recognition of Congress's ability to make different rules for citizens and non-citizens under its "broad power over naturalization and immigration"). *See generally* Michele E. Kenney, *A Pitfall of Judicial Deference: Equal Protection of the Laws Fails Women in* Lewis v. Thompson, 68 BROOK. L. REV. 525 (discussing how deference to Congress's plenary powers negates equal protection guarantees for non-citizens).

356. *See* VAWA II, *supra* note 2, Title V, §§ 1503-1504 (providing self-petitioning and cancellation of removal immigration remedies for battered immigrant women).

357. *See, e.g.*, *id.* § 1503(b)(1) (describing an eligible woman as one who was married in good faith and was battered, but not specifying that she must speak English to qualify).

USCIS to follow the Executive Order and the DOJ Guidance eviscerates this congressional intent by excluding thousands of potentially eligible women from remedies because they do not speak English.[358] A court could see any cost or administrative justification for USCIS's failure to implement congressional policy,[359] or even to comply with simple recordkeeping tasks to determine the extent of the problem,[360] as a pretext for discriminatory actions.[361] However, because of the lack of clarity regarding the level of scrutiny the court would employ, it is unclear whether May would be successful in attempting to judicially enforce USCIS's obligations, even with persuasive evidence that USCIS's English-only administration of VAWA is contrary to the intent of Executive Order 13,166 and has a discriminatory impact on her.

The Equal Protection Clause court decisions are inconsistent with the plain language of Executive Order 13,166, which recognizes the need to extend protection to language minorities because LEP status results from national origin.[362] The federal government has publicized the assumed correlation in a "Know Your Rights" brochure for LEP individuals which states: "Sometimes, when a government agency or an organization does not help you because you are LEP, they violate the law. This is called National Origin Discrimination."[363] Thus, the intent of the Executive Order and the federal government is to extend protection to LEP individuals, regardless of who provides the services.[364] It is reasonable to assume that the government expects federally-conducted agencies such as USCIS to follow the requirements of the Executive Order,[365] and it is similarly reasonable to assume that May should have a means by which to enforce such protections.[366]

358. *See supra* notes 227-29 and accompanying text (describing how USCIS processes 6,000 VAWA claims per year, whereas 75,000 women are likely eligible).

359. *See supra* notes 183-87 and accompanying text (rejecting arguments about possible cost impacts of translation as part of a due process analysis).

360. *See* ASSESSMENT, *supra* note 183, at 43 (commenting that INS does not maintain documentation on the language requirements of the people it serves).

361. *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (requiring federal agencies to provide LEP individuals with equivalent services to those provided to English speakers); U.S. DEP'T OF JUSTICE, *supra* note 80, ch. 6 (clarifying that while Title VI itself only covers funded agencies, federally-conducted agencies are held to the same standards).

362. *See* Exec. Order No. 13,166 (requiring improved access "for persons, who, as a result of national origin, are limited in their English proficiency").

363. *See* FED. INTERAGENCY WORKING GROUP ON LIMITED ENGLISH PROFICIENCY, *supra* note 150 (describing possible violations of Title VI for LEP beneficiaries).

364. *See* Exec. Order No. 13,166, §§ 2-3 (applying similar obligations toward LEP individuals on federally-conducted agencies as Title VI imposes on federally-funded agencies).

365. *See* Ostrow, *supra* note 107, at 660 (noting that Executive Orders have the force and effect of law).

366. *See, e.g.*, *id.* at 687-88 (arguing that courts should enforce Executive Orders because of the growing importance of "presidential legislation").

IV. RECOMMENDATIONS

The current funding for VAWA expires in 2005.[367] Congressional intent was to provide immigration relief to immigrant women like May who were battered by LPR or USC husbands.[368] As Congress drafts the reauthorization, it should consider closing the loophole that enables USCIS to avoid judicial enforcement of its obligations to provide LEP services to battered immigrant women.[369] For example, Congress could insert language similar to that of Executive Order 13,166 into the BIWPA section of VAWA and require USCIS to administer the program in a manner that ensures it is accessible to all VAWA-eligible women, irrespective of language.[370] Alternatively, Congress could earmark funds to provide linguistically-tailored services to enable the intended beneficiaries to access the benefits it granted.[371] Some domestic violence agencies are accessing VAWA funding to enable provision of LEP services already,[372] and federal line-item funding would likely encourage other organizations, government and non-profit, to improve LEP services.[373] Depending on which agency VAWA authorizes to distribute the funds, this may also have the interesting side-effect of making USCIS a "federally-funded" agency directly subject to Title VI and its associated cause of action.[374]

Even in the absence of line-item funding, USCIS has a legal and ethical obligation to ensure that May, and LEP battered immigrant women

367. *See* VAWA II, *supra* note 2 (reauthorizing VAWA funding until 2005).

368. *See supra* Part I.A (enunciating one purpose of VAWA I and VAWA II as enabling women to leave abusive relationships without fear of immigration consequences).

369. *See supra* notes 104-08 and accompanying text (noting that there are limited ways in which May can assert a cause of action against a federally-conducted agency for failing to provide LEP services). A more permanent option would be for Congress to amend Title VI to expand its coverage to both federally-funded and federally-conducted programs. *Cf.* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (1970) (codified as amended at 42 U.S.C. § 2000e-16(a)) (extending prohibitions on racial discrimination under Title VII of the Civil Rights Act of 1964 to federal employers after Executive Orders forbidding discrimination had proved ineffective).

370. *Cf.* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (noting that "each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency").

371. *Cf.* VAWA II, *supra* note 2, § 1512 (providing line-item grants to provide battered immigrants with access to services and legal representation for VAWA law enforcement and prosecution, and rural and campus outreach programs).

372. *See, e.g.*, CAL. EVID. CODE § 755(e) (West 2004) (noting that funding for LEP services for hearings related to domestic violence comes from state agencies' VAWA funding).

373. *See* Paul M. Uyehara, *Making Legal Services Accessible to Limited English Proficient Clients*, 17 MGMT. INFO. EXCHANGE J., Spring 2003, at 33, 37 (noting costs of $1,500 per month to provide language services at a legal clinic in Philadelphia), *available at* http://www.lri.lsc.gov/pdf/03/030063_uyeharamie.pdf.

374. *See* Pub. L. No. 88-352, 78 Stat. 252, Title VI, § 601 (1964) (codified at 42 U.S.C. § 2000d) (barring agencies receiving federal funding from discriminating on the basis of national origin).

generally, can access VAWA immigration benefits.[375] This obligation to comply with Title VI mandates (implied through Executive Order 13,166) is stronger in the wake of *Sandoval*.[376] The DOJ has articulated, in considerable detail, the steps needed to solve USCIS's most obvious violations of Executive Order 13,166.[377] For example, USCIS should reengineer its Website to contain easily-accessible information in multiple languages on VAWA, application procedures, and the Hotline.[378] At the very least, USCIS should enable one-click translation of all Website content, providing a direct link to a machine translation Website to provide instant translation of the page.[379] It should direct prospective VAWA applicants' inquiries to a special customer service line and ensure that it has multilingual capabilities (for example, pre-recorded translated messages and effective access to telephone interpretation).[380] USCIS should create and distribute informational material on VAWA remedies written in plain English and translated into the languages spoken by eligible populations, in order to educate potential applicants.[381] USCIS should also simplify the English version of Form I-360 and translate it into the languages most commonly spoken by foreign-born spouses.[382] And, USCIS should provide translation of evidentiary submissions for women who have a financial

375. *See* Uyehara, *supra* note 373, at 37 (comparing using the absence of funding as an excuse for not providing equal services to LEP clients to feeling comfortable with private clubs restricted to white men).

376. *See* Note, *supra* note 212, at 1796-97 (advocating stronger administrative remedies for disparate impact discrimination to replace diminishing rights for private enforcement of Title VI).

377. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,455-56 (providing evaluations of implementation procedures, including suggestions for enhanced "recipient language assistance," the use of "informal interpreters," and "written translation safe harbors").

378. *See, e.g.*, MID-VALLEY WOMEN'S CRISIS SERVICE, WELCOME (Mar. 2003), *at* http://www.mvwcs.com/ (providing professionally-translated information on domestic violence services in English, Spanish, Russian, and Vietnamese from the agency's homepage) (on file with the American University Law Review).

379. *Compare* WASH. METRO. AREA TRANSIT AUTH., *at* http://www.wmata.com (last visited Sept. 6, 2004) (on file with the American University Law Review) (providing information easily accessible to LEP customers by using clickable "flags" that trigger automatic translations of text on the page), *with* TRANSLATION, *supra* note 46 (presenting discriminatory barriers to accessing information by requiring users to read English instructions, surf to another site, manually copy and paste text, and select source and target languages from a list written in English).

380. *Compare supra* note 50 and accompanying text (describing how the National Domestic Violence Hotline can access 139 languages), *with supra* note 42 and accompanying text (noting that the USCIS customer service line is available only in English and Spanish).

381. *See, e.g.*, Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 86 (2003) (recommending that community organizations and the police develop multilingual outreach materials to inform battered immigrant women of resources).

382. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,463 (recommending that an agency translate vital documents into the languages spoken by the LEP groups with whom the agency has the most contact).

need and are otherwise unable to obtain translation of materials.[383]

Finally, USCIS should undertake a public information campaign in cooperation with community organizations to ensure that all foreign-born spouses are aware that domestic violence is a crime and that USCIS provides immigration relief for victims of that crime.[384] This may involve culturally-tailored community outreach (for example, posters in grocery stores or flyers in churches) and a rethinking of immigration processes to ensure that USCIS notifies women individually of their options, in a language they can understand.[385] This notification would serve two goals: (1) to notify LEP battered immigrant women of VAWA remedies, and (2) to expand enforcement beyond purely remedial assistance to LEP battered immigrant women and improve awareness of the law, a goal that is more in line with the overall preventive intent of VAWA.[386]

CONCLUSION

Title VI has been the law for over forty years.[387] Congress passed VAWA eleven years ago.[388] Executive Order 13,166 and the DOJ Policy Guidance have been in effect for almost five years.[389] Yet, in violation of these authorities, USCIS has failed to provide the most basic language accommodations to one of the most vulnerable populations it serves: LEP battered immigrant women asserting VAWA claims. By taking advantage

383. *Cf.* Lee, *supra* note 35, at 179 (reporting that an LEP battered immigrant woman abandoned her efforts to apply for assistance because she had no friends able to translate for her).

384. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,465 (emphasizing the importance of letting LEP persons know, in a language they understand, that language assistance is available to help them access the services). There is precedent for a government-mandated multilingual public awareness campaign for VAWA remedies. *See* Mail-Order Bride Business, 8 U.S.C. § 1375(b)(1) (2000) (requiring international matchmaking organizations to provide immigration information "in the recruit's native language," including details of VAWA remedies for battered women). Such mandates provide a civil cause of action for victims. *See, e.g.*, Fox v. Encounters Int'l, 318 F. Supp. 2d 279, 296 (D. Md. 2002) (denying a motion to dismiss in favor of a Ukrainian woman beaten by her USC husband after the matchmaking organization negligently failed to inform her of her VAWA legal rights).

385. *See* Guidance to Federal Financial Assistance Recipients, *supra* note 98, at 41,465 (suggesting working with stakeholders, placing notices in community newspapers, and advertising on non-English language radio stations to publicize resources available to battered immigrant women).

386. *See* ALISON SISKIN, CONG. RESEARCH SERV., DOMESTIC SOC. POLICY DIV., VIOLENCE AGAINST WOMEN ACT: HISTORY, FEDERAL FUNDING, AND REAUTHORIZING LEGISLATION 1 (Oct. 12, 2001) (summarizing VAWA's aims as "enforcement as well as educational and social programs to prevent crime"), *available at* http://usinfo.state.gov/usa/women/violence/reports.htm.

387. *See supra* note 74 (noting that the Act became law in 1964).

388. *See* VAWA I, *supra* note 1 (expanding federal funding of violence against women services starting in 1994).

389. *See supra* notes 92-99 and accompanying text (detailing how the DOJ documents clarified an agency's Title VI obligations to LEP individuals under Executive Order 13,166).

of a loophole in enforcement, USCIS has inverted the historical model where federal agencies were leaders in encouraging others to adopt non-discriminatory policies[390] and is holding itself to a lower standard than it would legally hold agencies to which it provides funds.[391] USCIS should fix its current lack of LEP-accessibility to comply with congressional intent and ensure VAWA's success,[392] but more importantly, to enable scores of LEP battered immigrant women to escape continued violence at the hands of their USC and LPR husbands.

390. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d) (1964) (implementing federal measures to reduce the states' ability to discriminate on the basis of race).

391. *Compare* Title VI, §§ 601-602, 78 Stat. at 252 (providing a private cause of action against federally-funded agencies that violate its non-discrimination provisions), *with* Exec. Order No. 13,166, 3 C.F.R. 289 (2000) (providing no enforceable right of action against federally-conducted agencies for violations).

392. *See* VAWA II, *supra* note 2, § 1502(b)(2) (detailing one of VAWA's purposes as providing protection against domestic violence).