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## An Imperfect Solution: The Due Process Case for Providing Court-Appointed Interpreters for Pro Se Plaintiffs

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## AN IMPERFECT SOLUTION: THE DUE PROCESS CASE FOR PROVIDING COURT-APPOINTED INTERPRETERS FOR PRO SE PLAINTIFFS

by: Abdullah Z. Khalil\*

### ABSTRACT

*A federal law, the Court Interpreters Act, provides litigants with complimentary access to a qualified or professionally certified interpreter in actions instituted by the United States. The majority of pro se civil litigation in federal courts is initiated by the United States, and thus, those pro se litigants who speak little-to-no English need not pay for access to an exceptional interpreter. Indeed, federal courts offer interpreters proficient in a multitude of languages, and the courts work hard to ensure adequate interpretation in proceedings brought by the United States.*

*However, those limited-English-proficient pro se plaintiffs initiating their own lawsuits face a steep climb to vindicate their private rights against nongovernmental defendants. Beyond the inherent challenges associated with filing and proceeding absent legal counsel, these litigants further proceed absent the language skills necessary to understand the meaning and effect of a court's hearings. The Court Interpreters Act effectively ignores this class of litigants. While federal district judges have the power to appoint interpreters for civil litigants on a discretionary basis, district judges do not always exercise this power. Anything short of a mandate to provide interpretation services to the small group of non-English-speaking pro se plaintiffs overlooked by the Court Interpreters Act risks continued denial of their right of meaningful access to the courts.*

*In this Comment, I argue that under both common sense and the procedural due process Mathews factors, language access is a material component of a litigant's right to be heard. Our judicial system works hard to accommodate pro se litigants while also denying those pro se litigants who lack adequate English skills access to an interpreter. To remedy this flagrant unfairness, I propose that the Administrative Office of the United States Court should amend its Policy Guidance so that pro se plaintiffs pleading a colorable cause of action receive interpretation services as needed.*

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## I. INTRODUCTION

*“Access to justice requires linguistic presence, not just physical presence,” she said. “You can be there, but it doesn’t mean you have any ability to help your case if you cannot communicate.”*<sup>1</sup>

Edgardo Loyola sued his former employer, the United States Postal Service, for age and sex discrimination in the Northern District of California.<sup>2</sup> Mr. Loyola moved the court to appoint him both counsel and an interpreter.<sup>3</sup> The court denied both motions.<sup>4</sup> With respect to the denial of counsel, the court analyzed the 1964 Civil Rights Act’s employment discrimination provisions, Ninth Circuit precedent, and the Equal Opportunity Commission’s denial of Mr. Loyola’s claims.<sup>5</sup> The court applied established standards of legal analysis and held that Mr. Loyola did not qualify for an appointed attorney.<sup>6</sup> By contrast, the court denied Mr. Loyola’s motion for the appointment of an interpreter in two sentences: “The court is not authorized to appoint interpreters for litigants in civil cases, and, moreover, has no funds to pay for such a program. Accordingly, the request for appointment of an interpreter is DENIED.”<sup>7</sup> Notably, the court provided no statutory or jurisprudential basis for its inability to appoint Mr. Loyola an interpreter. Mr. Loyola proceeded pro se<sup>8</sup> without an interpreter.

Mr. Loyola lost on summary judgment, and the Ninth Circuit affirmed.<sup>9</sup> Ultimately, the court found that Mr. Loyola “failed to raise a genuine dispute of material fact” with respect to any allegedly discriminatory conduct by the Postal Service.<sup>10</sup>

This Comment will not challenge either the *Loyola* court’s holding or the ultimate resolution of Mr. Loyola’s case. Rather, this Comment addresses an issue encapsulated by the *Loyola* court’s brief denial of an interpreter: federal district courts rarely provide a civil nonprisoner pro se plaintiff who does not speak English with interpretation services.

In fact, this Comment proceeds on a simple, almost certainly uncontroversial premise: poor people who self-represent in court and do not speak English should nevertheless have access to a competent interpreter. But beyond idyllic abstractions, this Comment seeks to show that procedural due process demands interpreters for these unrepresented non-English-speaking plaintiffs, and the cost of providing such an interpreter is not so high as to justify the failure to provide these litigants with an interpreter.

Federal law does furnish certain litigants with complimentary interpretation services. Through the Court Interpreters Act (“Act”), the federal courts are required to provide complimentary access to an interpreter to those litigants who do not speak English and are involved

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<sup>1</sup> *Court Interpreters Deliver Justice in All Languages*, U.S. CTS. (Aug. 10, 2017) (quoting Leonor Figueroa-Feher, Interpreting Program Manager, Administrative Office of the United States Courts), <https://www.uscourts.gov/news/2017/08/10/court-interpreters-deliver-justice-all-languages> [<https://perma.cc/CGV5-LWJA>].

<sup>2</sup> *Loyola v. Potter*, No. C 09–0575 PJH, 2009 WL 1033398, at \*1 (N.D. Cal. Apr. 16, 2009).

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.* at \*2.

<sup>5</sup> *Id.* at \*1–2.

<sup>6</sup> *See id.*

<sup>7</sup> *Id.* at \*2.

<sup>8</sup> “For oneself; on one’s own behalf; without a lawyer.” *Pro Se*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>9</sup> *Loyola v. Donahoe*, 452 F. App’x 798, 798–99 (9th Cir. 2011) (Mem.).

<sup>10</sup> *Id.* at 799.

in actions “instituted by the United States.”<sup>11</sup> Defendants in criminal and civil cases receive complimentary access to an interpreter, as do their respective witnesses.<sup>12</sup> Additionally, the Act provides for the appointment of an interpreter in criminal and civil cases involving hearing-impaired litigants or witnesses.<sup>13</sup>

With respect to civil litigation not instituted by the United States, the Act mandates the provision of interpretation services to prisoners petitioning courts for relief from their prison sentences, such as petitions for writs of habeas corpus.<sup>14</sup> However, in civil cases featuring a non-English-speaking pro se plaintiff, like Mr. Loyola’s workplace-discrimination action, that neither involve *prisoners* nor the need for a sign-language interpreter, the Act empowers courts to appoint an interpreter “where possible . . . on a cost-reimbursable basis.”<sup>15</sup> Courts rarely appoint interpreters on a cost-reimbursable basis, reserving such appointments to “limited circumstances when no other options are available.”<sup>16</sup>

Meanwhile, plaintiffs who do not speak English, are responsible for not only paying their interpreters, but also for finding, hiring, scheduling, and supervising their interpreters.<sup>17</sup> Generally, a plaintiff’s attorney secures the services of an interpreter for their non-English-speaking client and presumably incorporates the costs attendant to interpretation services into the attorney’s fees.<sup>18</sup>

Civil pro se plaintiffs in an action not initiated by the United States who do not speak English fall outside both the Act and the federal judiciary’s policies and procedures arising therefrom. Because they are not defendants in a criminal or civil matter, they do not trigger the Act’s mandatory provision of an interpreter.<sup>19</sup> Similarly, because these plaintiffs are not petitioning the government for relief from a restraint on their physical liberty, their civil cause of action does not qualify for the provision of a complimentary interpreter. And because these pro se plaintiffs proceed absent retained legal counsel, they are unable to rely on a lawyer to prearrange an interpreter for any hearings, depositions, and other legal proceedings requiring the intelligible exchange of verbal communication. Thus, for indigent pro se plaintiffs who do not speak English, the Act and federal judiciary policies institute what is, in effect, a constructive denial of their access to a competent court interpreter. Without access to an interpreter, it is virtually impossible for these plaintiffs to vindicate, or attempt to vindicate, their private grievances.

This constructive denial of an interpreter implicates the procedural due process rights of non-English-speaking litigants, namely the right to be heard ““at a meaningful time and in a meaningful manner.””<sup>20</sup> Some scholars argue that the best solution to this constructive denial of an interpreter to non-English-speaking pro se plaintiffs is for the courts to provide interpreters to *all*

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<sup>11</sup> 28 U.S.C. § 1827.

<sup>12</sup> *Id.* § 1827(d)(1).

<sup>13</sup> *Id.* § 1827(d)(1)(B); U.S. CTS., 5 GUIDE TO JUDICIARY POLICY § 255(a) (2021), [https://www.uscourts.gov/sites/default/files/guide\\_vol05.pdf](https://www.uscourts.gov/sites/default/files/guide_vol05.pdf) [<https://perma.cc/7U87-GFHH>] (listing a Judicial Conference policy that “a court **must** provide sign language interpreters”) (emphasis in original) [hereinafter “GUIDE”].

<sup>14</sup> 28 U.S.C. § 1827(j); GUIDE, *supra* note 13, § 230.

<sup>15</sup> 28 U.S.C. § 1827(g)(4).

<sup>16</sup> GUIDE, *supra* note 13, § 265(b).

<sup>17</sup> *See id.* § 260.

<sup>18</sup> *Id.* § 225.

<sup>19</sup> *See* 28 U.S.C. § 1827(d)(1).

<sup>20</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

litigants and witnesses appearing before the federal courts.<sup>21</sup> While such a result would be ideal, the complimentary provision of costly interpretation services to all non-English-speaking litigants and their witnesses is unrealistic. Two issues arise: first, the concern that frivolous or meritless litigation diverting finite interpretation services. And second, the indefinite and potentially enormous costs such a program would demand.

To work through these issues, this Comment applies the *Mathews* factors, the prevailing test for the adequacy of procedures adjudicating individuals' substantial rights.<sup>22</sup> Under *Mathews*, three factors are balanced to divine whether the procedure comports with due process: "the private interest that will be affected by the official action"; the "risk of an erroneous deprivation of such interest through the procedures used"; and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>23</sup> This Comment will exclusively apply *Mathews* to the issue because courts, such as the *Loyola* court, routinely discuss the third *Mathews* factor—fiscal burdens—when they decline to appoint an interpreter.<sup>24</sup>

Accordingly, this Comment proposes a more limited solution that safeguards the procedural due process rights of those non-English-speaking litigants proceeding pro se, like Mr. Loyola, who face steep barriers to successfully litigating their private grievances in the federal courts: the Judicial Conference of the United States should amend its guidelines to instruct the federal courts to appoint an interpreter for indigent plaintiffs proceeding pro se that present a colorable cause of action.<sup>25</sup>

This targeted proposal works better than a more expansive and all-inclusive policy providing for an interpreter in all cases for two reasons: first, this proposal can easily be incorporated into courts' current processes for evaluating and managing their pro se docket, a process which seeks to identify and adjudicate colorable causes of action. And second, the limited number of plaintiffs who qualify under this proposal—indigent, non-English-speaking, nonprisoner, pro se—limits the financial burden of implementing the proposal.

It is worth providing a "model plaintiff" here to show exactly whom this Comment's proposal seeks to help receive access to an interpreter. The pro se plaintiff subject to this Comment's proposal, like Mr. Loyola, does not qualify for the appointment of counsel.<sup>26</sup> A law firm declined to take this plaintiff's case on a contingency basis, and the Equal Access to Justice Act<sup>27</sup> does not apply to her cause of action. The pro se plaintiff here, like 67 million other individuals residing in the United States, speaks a language other than English at home.<sup>28</sup> She sues in federal court and is thus ineligible for the broad interpretation services offered by certain states' judicial systems.<sup>29</sup> For this non-English-speaking, nonprisoner pro se plaintiff, her access to a

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<sup>21</sup> See Laura K. Abel, *Language Access in the Federal Courts*, 61 *DRAKE L. REV.* 593, 629 (2013).

<sup>22</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>23</sup> *Id.*

<sup>24</sup> See *Loyola v. Potter*, No. C 09-0575 PJH, 2009 WL 1033398, at \*2 (N.D. Cal. Apr. 16, 2009).

<sup>25</sup> Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 *U. PA. L. REV.* 585, 601 (2011).

<sup>26</sup> *Loyola*, 2009 WL 1033398, at \*2.

<sup>27</sup> 28 U.S.C. § 2412(c)(2).

<sup>28</sup> Karen Zeigler & Steven A. Camarota, *67.3 Million in the United States Spoke a Foreign Language at Home in 2018*, *CTR. FOR IMMIGR. STUD.* (Oct. 29, 2019), <https://cis.org/Report/673-Million-United-States-Spoke-Foreign-Language-Home-2018> [<https://perma.cc/HD72-TWE8>].

<sup>29</sup> See Abel, *supra* note 21, at 597 (listing several jurisdictions that provide interpretation services in all state court proceedings).

competent, qualified interpreter rests on a federal judge's exercise of discretion.<sup>30</sup> This Comment argues that if this plaintiff can plead a colorable cause of action despite being unrepresented by counsel, the federal courts must appoint her an interpreter so she can meaningfully litigate her suit.

Section II of this Comment outlines the current statutory basis for the federal courts' provision of complimentary interpretation services, the Court Interpreters Act. Section III describes the various programs, procedures, and professionals employed by the federal courts to manage their pro se dockets. Section IV discusses the procedural due process basis, encapsulated in the *Mathews* balancing factors, for the provision of an interpreter. Section V acknowledges the budgetary challenges associated with the unfettered provision of costly interpretation services and thereby proposes a more targeted amendment to the Judicial Conference's Guidance to the federal courts.

## II. THE COURT INTERPRETERS ACT

The Court Interpreters Act is the primary vehicle upon which the federal judiciary relies in its efforts to appoint interpreters for litigants who require such services. At the outset, this Comment recognizes that the Supreme Court and various Courts of Appeals' access-to-justice decisions arise mainly in the context of criminal laws.<sup>31</sup> Nevertheless, these decisions provide a useful, access-to-justice context upon which the principles undergirding the Act's enactment and present-day applications should be evaluated.

The Supreme Court has not had the opportunity to address the Constitution's protections—if any—for interpreter services. Various Court decisions, however, when applied to those litigants—mainly criminal defendants—who do not speak English, implicitly affirm the importance of interpretation for non-English-speaking litigants. For example, the protected right to cross-examine witnesses<sup>32</sup> presupposes that one is able to communicate with the witnesses in a common language. Similarly, a criminal defendant's due process right to be present in the courtroom when in circumstances affecting her substantial rights<sup>33</sup> similarly presupposes an intelligible hearing carried out a common language.

In *Lewis v. Casey*, the Supreme Court held that some form of accommodation is required to ensure non-English-speaking prisoners' constitutional right to access the courts is safeguarded.<sup>34</sup> There, prisoners instituted a class-action suit against the Arizona Department of Corrections, alleging that Arizona's correctional facilities infringed on the prisoners' right to access the courts by failing to provide the prisoners with access to an adequate law library.<sup>35</sup> The Court noted that while the right to access the courts is "well-established," such a right was limited to the "right to bring to court a grievance."<sup>36</sup> And for the majority of the prisoners, those who were literate or those who spoke English, the Court held that the alleged inadequacy of the correctional facilities' libraries did not infringe upon the constitutional right to access the courts absent a showing of a

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<sup>30</sup> See *id.* at 635 (discussing district judges' discretionary authority under the Court Interpreters Act).

<sup>31</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>32</sup> *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

<sup>33</sup> *United States v. Gagnon*, 470 U.S. 522, 526–27 (1985).

<sup>34</sup> *Lewis v. Casey*, 518 U.S. 343, 356–57 (1996) ("Of course, we leave it to prison officials to determine how best to ensure that inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement.").

<sup>35</sup> *Id.* at 350.

<sup>36</sup> *Id.* at 354.

cognizable legal injury.<sup>37</sup> However, for two inmates, one illiterate and, most important for our purposes, one who spoke no English, the Court held that the correctional facilities' failure to provide access to an adequate law library *did* constitute a violation of their right to access the courts.<sup>38</sup> While the prisoners' confinement was a key component of the *Lewis* Court's holding, given that the prisoners had no other avenue to access legal knowledge but the allegedly inadequate prison library, the case is relevant for our purposes for two reasons: first, the prisoners were asserting a civil claim unrelated to their confinement and thus exempt from the Court Interpreters Act. And second, the *Lewis* Court, while denying most of the prisoners' claims for want of injury, essentially held that language-access is a material component of the generalized right litigants have to access the courts.

The Second Circuit's *Negron v. New York* decision impelled Congress to enact the Court Interpreters Act ("Act").<sup>39</sup> In *Negron*, a Puerto Rican immigrant who neither understood nor spoke any English was convicted of second-degree murder in New York and sentenced to twenty years imprisonment.<sup>40</sup> The Second Circuit upheld a district judge's grant of Mr. Negron's petition for a writ of habeas corpus because New York did not provide Mr. Negron with an interpreter at trial.<sup>41</sup> Notably, New York did not provide Mr. Negron with an interpreter on standby who could translate the proceedings from English to Spanish.<sup>42</sup> In a memorable line, the court noted that the proceedings must have been a "babble of voices," particularly given that twelve of the state's fourteen witnesses testified in English.<sup>43</sup> Ultimately, the court found that "[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice" require that a non-English-speaking defendant have access to an interpreter at his or her criminal trial.<sup>44</sup>

Congress agreed that leaving the decision of whether to appoint an interpreter to an exercise of discretion led to unjust results; accordingly, Congress styled the Act in a manner that mandates the appointment of an interpreter for limited-English-proficient criminal defendants and those subject to certain civil proceedings.<sup>45</sup> Under the Act, courts "shall" appoint a "certified interpreter" or an "otherwise qualified interpreter" either "on [its] own motion or on the motion of a party" who is limited-English-proficient.<sup>46</sup> With respect to the qualifications of interpreters, the Act grants the Administrative Office of the United States Courts authority to establish and administer programs to identify and certify interpreters for court-room settings.<sup>47</sup>

These are not garden-variety interpreters; rather, these interpreters must be able to interpret "specialized and legal terminology, formal and informal registers, dialect and jargon, varieties in language and nuances of meaning."<sup>48</sup>

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<sup>37</sup> See *id.* at 349.

<sup>38</sup> See *id.* at 356.

<sup>39</sup> H.R. REP. NO. 95-1687, at 3 (1978), as reprinted in 1978 U.S.C.C.A.N. 4652, 4652-54.

<sup>40</sup> *United States ex rel. Negron v. New York*, 434 F.2d 386, 387-88 (2d Cir. 1970).

<sup>41</sup> *Id.* at 388.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 389.

<sup>45</sup> See 28 U.S.C. § 1827(a).

<sup>46</sup> *Id.* § 1827(d)(1)(A).

<sup>47</sup> *Id.* § 1827(a).

<sup>48</sup> *Federal Court Interpreters*, U.S. CTS., <https://www.uscourts.gov/services-forms/federal-court-interpreters> [<https://perma.cc/EF9E-XBHP>].

An interpreter may be “federally certified” in only three languages: Spanish, Navajo, and Haitian Creole.<sup>49</sup> Federally certified Spanish interpreters must pass a written exam to even be allowed to sit for an oral exam, which measures a candidate’s ability to “accurately perform simultaneous as well as consecutive interpretation and sight translations as encountered in the federal courts.”<sup>50</sup> While the United States Courts do not publish the testing results, individual interpreter’s blogs and testing preparation companies’ marketing exam-preparation materials indicate that more than 90% of all Spanish interpreters who take the oral exam fail.<sup>51</sup> And demand for these interpreters is high, with requests for Spanish-language interpretation constituting “roughly 96 percent of all interpreting requests,” which in 2017 constituted 254,736 court proceedings.<sup>52</sup>

The United States Courts classify interpreters of all languages besides Spanish, Navajo, and Haitian Creole as “professionally qualified.”<sup>53</sup> There are three avenues, each indicative of superlative interpretation skills, by which one may become “professionally qualified”: passing a United States Department of State “conference or seminar interpreter test”; passing the United Nations interpreter test; or maintaining membership “in good standing” in one of two professional interpreter organizations.<sup>54</sup> The individual district courts, pursuant to the Act,<sup>55</sup> maintain a list of all federally certified or professionally qualified interpreters, and “play a direct role” in locating interpreters.<sup>56</sup>

If neither a federally certified nor professionally qualified interpreter can be found, a “Language Skilled/*Ad Hoc*” interpreter may suffice if such person can “demonstrate to the satisfaction of the court” that they possess the competency to interpret judicial proceedings.<sup>57</sup>

The Act appropriates “necessary” funds to “the Federal judiciary” so that it may properly recruit, retain, and operate a roster of interpreters who meet the statutory qualifications.<sup>58</sup> However, the Act specifically conditions the “implementation” of its provisions—the roster of federally certified and professionally qualified interpreters—on “the availability of appropriated funds.”<sup>59</sup> Federally certified and professionally qualified interpreters are paid \$566.00/day and \$495.00/day, respectively, while language skilled/*ad hoc* interpreters are paid \$350.00/day.<sup>60</sup> Funds for interpretation come from the general funds appropriated for “court support staffing.”<sup>61</sup>

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<sup>49</sup> *Interpreter Categories*, U.S. CTS., <https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories#a1> [<https://perma.cc/ELD7-N6XY>]. The United States Courts no longer certify Navajo and Haitian Creole interpreters. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Gabriela Munoz, *An Autopsy of the Federal Oral Exam, Part 2: How to Study Smarter*, THE LONE INTERPRETER (Jan. 27, 2020), <https://gabrielamunoz.blog/2020/01/27/an-autopsy-of-the-federal-oral-exam-part-2-how-to-study-smarter/> [<https://perma.cc/FW6U-XAVS>]; see also *Federal Oral Exam Training Program*, INTERPRETRAIN, <https://interpretrain.com/pages/federal-court-interpreter-exam-training> [<https://perma.cc/CR4N-3BQQ>].

<sup>52</sup> *Court Interpreters Deliver Justice in All Languages*, *supra* note 1.

<sup>53</sup> See *Interpreter Categories*, *supra* note 49.

<sup>54</sup> *Id.*

<sup>55</sup> 28 U.S.C. § 1827(g)(1).

<sup>56</sup> *Court Interpreters Deliver Justice in All Languages*, *supra* note 1.

<sup>57</sup> *Interpreter Categories*, *supra* note 49.

<sup>58</sup> 28 U.S.C. § 1827(g)(1).

<sup>59</sup> *Id.* § 1827(g)(2).

<sup>60</sup> *Federal Court Interpreters*, *supra* note 48.

<sup>61</sup> *The Judiciary Fiscal Year 2022 Congressional Budget Summary*, ADMIN. OFF. U.S. CTS., app. at 1.7 (Feb. 2021), [https://www.uscourts.gov/sites/default/files/appendix\\_01\\_-\\_court\\_support\\_staffing\\_fy\\_2022\\_0.pdf](https://www.uscourts.gov/sites/default/files/appendix_01_-_court_support_staffing_fy_2022_0.pdf) [<https://perma.cc/896Q-A4NP>].



The Act has a built-in limitation that constrains the pool of individuals who have complimentary access to these eminently qualified interpreters: the Act only applies to those involved in “judicial proceedings instituted by the United States.”<sup>62</sup> As discussed above, civil matters brought by prisoners challenging their confinement, including petitions for a writ of habeas corpus, are interpreted to be “instituted by the United States.”<sup>63</sup> This is an expansive limitation, and Congress saw fit to use the phrase “instituted by the United States” multiple times in the Act.<sup>64</sup> Accordingly, plaintiffs suing a private party or an entity contained within the United States federal government, as Mr. Loyola did, fall outside the Act’s mandate.

Further, the Act states that district courts “shall” make interpreting services available to individuals who are *not* parties to an action instituted by the United States “on a cost-reimbursable basis.”<sup>65</sup> The Judicial Conference cautions courts to appoint interpreters pursuant to this provision sparingly, in circumstances “when no other options are available.”<sup>66</sup> For example, in *Sayed v. Profitt*, Mr. Sayed, a prisoner, brought suit against the Colorado Department of Corrections, alleging that the prison’s policy barring ablution violated his First Amendment right to the free exercise of his religion.<sup>67</sup> Another inmate assisted Mr. Sayed, who had limited English proficiency, with his court filings.<sup>68</sup> The court declined to appoint Mr. Sayed an interpreter, reasoning that it was “without authority” because Mr. Sayed did not qualify under the Act as a defendant or as a prisoner contesting his incarceration.<sup>69</sup> However, the court offered Mr. Sayed access to an interpreter under the reimbursement provision provided that “Mr. Sayed demonstrate that he is able to reimburse the United States for these costs.”<sup>70</sup> Ultimately, Mr. Sayed moved the court to reconsider its denial of an interpreter, but such a motion was deemed as “moot” when Mr. Sayed lost on summary judgment.<sup>71</sup> Given *Sayed*, it appears that a civil nonprisoner pro se plaintiff would qualify for a cost-reimbursable interpreter only if the plaintiff can demonstrate, presumably through a showing of financial records, that the plaintiff could reimburse the United States for the costs, discussed above, of Certified, Professionally Qualified, or Language Skilled/*Ad Hoc* interpreter’s services. For an indigent plaintiff, such a showing appears impossible.

In sum, under the Court Interpreters Act, a specialized interpreter capable of capturing the complexity and nuance that arises in a courtroom setting is available, free of charge, to civil and criminal defendants, prisoners contesting their loss of liberty as a result of some official action, and any witnesses participating in such actions. The Act primarily applies to those who face criminal sanctions. For civil plaintiffs, interpretation services are provided by their attorney. For pro se plaintiffs, like Mr. Loyola and Mr. Sayed, courts strictly construe the Act and deny them an interpreter notwithstanding the plaintiffs’ lack of counsel and potential inability to locate and pay an interpreter.<sup>72</sup> And though the Act permits courts to appoint an interpreter on a cost-reimbursable basis, an indigent plaintiff is likely unable to prove to the court that she is capable of reimbursing the court for the interpreter.

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<sup>62</sup> 28 U.S.C. § 1827(g)(4).

<sup>63</sup> GUIDE, *supra* note 13.

<sup>64</sup> 28 U.S.C. §§ 1827(a), (b)(1), (b)(3), (d)(1), (e)(2).

<sup>65</sup> *Id.* § 1827(g)(4).

<sup>66</sup> GUIDE, *supra* note 13, § 265(b).

<sup>67</sup> *Sayed v. Profitt*, No. 09-cv-00869-MSK-KMT, 2010 WL 1687897, at \*1 (D. Colo. Apr. 21, 2010).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Sayed v. Profitt*, 743 F. Supp. 2d 1217, 1218 n.1 (D. Colo. 2010), *aff’d* 415 F. App’x 946 (10th Cir. 2011).

<sup>72</sup> *Id.*

Thus, for indigent civil nonprisoner pro se plaintiffs, access to an interpreter, while not outrightly denied, is constructively denied given their inability to either pay for an attorney, pay for an interpreter, or satisfy to the court that they could, at some future date, reimburse the United States for an interpreter. For non-English-speaking plaintiffs, their ability to access the courts has little meaning if they are unable to understand the proceedings. This result is particularly puzzling given that, as the next Section shows, the federal courts have certain policies and procedures in place to assist these same pro se litigants access the courts.

### III. PRO SE IN THE U.S.A.

Civil plaintiffs do not have a fundamental right to legal counsel; courts appoint counsel in civil matters on a case-by-case basis.<sup>73</sup> The right to self-represent before a civil tribunal dates back to this nation's founding.<sup>74</sup> Federal statutory law has permitted individuals to self-prosecute civil cases since 1789.<sup>75</sup> The current pro se statutory provision, incorporated in the United States Code, is unequivocal: "In all courts of the United States the parties may plead and conduct their own cases *personally* or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."<sup>76</sup> So ingrained is the right to proceed pro se in civil proceedings that the Supreme Court relied on the United States's history of permitting civil self-representation in its holding that the Sixth Amendment permits criminal defendants to self-represent.<sup>77</sup>

Plaintiffs elect to proceed pro se for a number of reasons. Primarily, plaintiffs elect to proceed without the assistance of counsel because they cannot afford an attorney.<sup>78</sup> While it is true that some litigants may procure an attorney through a contingency-fee arrangement, most pro se plaintiffs, as shown below, seek to litigate claims—like the assertion that an alleged civil rights abuse warrants an injunction—that generally do not fall into one of the categories of claims that attorneys take up on a contingency-basis.<sup>79</sup> Prisoners not asserting a claim for relief from their incarceration, recall Mr. Sayed, similarly proceed pro se because they often lack the funds to hire an attorney.<sup>80</sup> However, not all pro se plaintiffs lack the necessary funds to hire and retain counsel—some elect to proceed pro se because they do not trust lawyers.<sup>81</sup> Others met with

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<sup>73</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”).

<sup>74</sup> Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 987 (2007).

<sup>75</sup> See *id.* (discussing the Judiciary Act of 1789's pro se provisions).

<sup>76</sup> 28 U.S.C. § 1654 (emphasis added).

<sup>77</sup> See *Faretta v. California*, 422 U.S. 806, 815–16 (1975) (relating situations in which the Court found criminal defendants may self-represent).

<sup>78</sup> See Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 133 (1998).

<sup>79</sup> See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089–92 (2007) (noting that a Supreme Court decision precluding attorneys from collecting fees in civil rights cases when the defendant voluntarily changes their behavior could deter attorneys from pursuing such cases).

<sup>80</sup> See Wayne T. Westling & Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. L.J. 273, 308 (1985) (“Where the chances of having counsel appointed by the court are so slim, and where the normal attorney fees are prohibitive to an incarcerated plaintiff, it is not surprising that most indigent prisoner plaintiffs proceed pro se.”).

<sup>81</sup> See Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 380 (1988) (listing anti-lawyer sentiment as one of the reasons plaintiffs proceed pro se).

attorneys, who advised them to proceed pro se because their litigation involved uncomplicated or routine matters.<sup>82</sup> Some pro se plaintiffs live in areas with few attorneys and are thus essentially forced to proceed pro se if they want their matter heard.<sup>83</sup> Other reasons abound, including a litigant's holding of "a belief that the court will do what is right whether the party is represented or not," and "a trial strategy designed to gain either sympathy or procedural advantage over represented parties."<sup>84</sup>

The federal courts liberally construe pro se pleadings to account for those litigants' lack of legal training and acumen. The Supreme Court, in *Haines v. Kerner*, instructed the lower courts to evaluate pleadings submitted by pro se litigants "to less stringent standards than formal pleadings drafted by lawyers."<sup>85</sup> However, the *Haines* Court declined to address what level of stringency constitutes "less."<sup>86</sup> In a later case, the Court cautioned that before dismissing a facially frivolous pro se pleading, the district courts should evaluate whether granting the self-represented party leave to amend could yield a colorable cause of action.<sup>87</sup> The lower courts assess pro se pleadings, therefore, from standards fashioned by the Circuit Courts of Appeals.<sup>88</sup> Generally, the lower courts ignore the pro se pleading's grammatical errors and strive to identify a cause of action that the pro se litigant would have pled had she consulted an attorney.<sup>89</sup>

Prisoners bring the majority of pro se civil litigation, often through causes of action, like habeas corpus petitions, that are tangentially related to the criminal law.<sup>90</sup> While this Comment does not address prisoner pro se civil litigation,<sup>91</sup> the question of whether policies geared towards addressing civil prisoner pro se litigation are ill-suited at addressing civil nonprisoner pro se litigation warrants inquiry. In any event, civil nonprisoner pro se plaintiffs bring various causes of action in the federal courts, including actions in contract, personal injury, and real property law.<sup>92</sup> Most civil nonprisoner pro se actions, however, are brought for alleged civil rights violations or on claims of employment discrimination.<sup>93</sup> Regardless of the claim, nonprisoner pro se plaintiffs, like Mr. Loyola, almost always lose.<sup>94</sup> This Comment does not seek to quibble with the outcome of civil pro se cases generally, but the stark disparity in outcomes between those represented and unrepresented by counsel is notable.

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<sup>82</sup> See Frances H. Thompson, *Access to Justice in Idaho*, 29 *FORDHAM URB. L.J.* 1313, 1316 (2002) (discussing an Idaho survey in which 31% of pro se litigants surveyed were advised to proceed pro se by attorneys).

<sup>83</sup> *Id.* at 1315.

<sup>84</sup> Drew A. Swank, *The Pro Se Phenomenon*, 19 *BYU J. PUB. L.* 373, 379 (2005). Other reasons include a "mistrust of the legal system," an "increased sense of individualism and belief in one's own abilities," and "a belief that litigation has been simplified to the point that attorneys are not needed." *Id.*

<sup>85</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

<sup>86</sup> Schneider, *supra* note 25, at 600.

<sup>87</sup> See *Denton v. Hernandez*, 504 U.S. 25, 34 (1992) (dictum).

<sup>88</sup> See Schneider, *supra* note 25, at 601.

<sup>89</sup> See *id.*

<sup>90</sup> See *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. fig. 4 (Feb. 11, 2021), [https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures\\_map](https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map) [<https://perma.cc/2SJB-WQMD>] [hereinafter "Pro Se Statistics"].

<sup>91</sup> See generally Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 *FORDHAM L. REV.* 1219 (2011) (evaluating the rise in civil prisoner pro se litigation).

<sup>92</sup> See Pro Se Statistics, *supra* note 90.

<sup>93</sup> See Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 *U. CHI. L. REV.* 1820, 1840 (2018).

<sup>94</sup> See *id.* at 1838 (calculating a 4% success rate for actions brought by pro se plaintiffs).

By statute, Congress provides the federal courts with various tools to manage their pro se dockets. One statute requires federal district courts to provide alternative dispute resolution services to litigants.<sup>95</sup> Recently, some district courts instituted experimental mediation programs specifically targeting pro se litigants; of these types of programs, eighty-four in total, at least eighteen are specifically reserved for those pleading civil complaints.<sup>96</sup> Another statute provides the district courts with funding for pro se staff attorneys and other staff.<sup>97</sup> Courts have wide latitude to utilize these attorneys and staff as they see fit.<sup>98</sup> In some districts, these officials exclusively handle pro se prisoner petitions; conversely, in other districts, these individuals perform “much of the initial screening, including in forma pauperis (IFP) petitions, and [] some legal research on motions.”<sup>99</sup>

Pro se staff attorneys and clerks often work in conjunction with federal magistrate judges, who submit recommendations for the disposition of pro se cases to the district court.<sup>100</sup> Indeed, nearly all the federal district courts assign some of their pro se dockets to magistrate judges.<sup>101</sup> One district court established a “Pro Se Office” headed by a magistrate that manages its entire pro se caseload.<sup>102</sup> Beyond generalized docket management, the magistrate oversees a number of clerks who screen pro se pleadings, direct litigants to amend insufficiently pleaded complaints, and provide litigants with advice on procedural matters.<sup>103</sup>

This snapshot indicates that the federal courts have made and continue to make a concerted effort to provide pro se litigants with the opportunity to meaningfully access the courts. From specialized dispute resolution programs to dedicated, accommodating staff, the courts have leveraged creative thinking and congressional funding to assist litigants to overcome their lack of legal counsel. However, the considered efforts of the lawyers and staff engaging with pro se litigants, the “boots on the ground,” have little meaning or relevance to litigants who speak a different language. Even if we assume that these individuals have family, friends, or acquaintances fully capable of translating documents,<sup>104</sup> the absence of an interpreter inhibits their right to be heard.

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<sup>95</sup> 28 U.S.C. § 651.

<sup>96</sup> *Alternative Dispute Resolution Now an Established Practice in Federal Courts*, U.S. CTS. (June 25, 2012), <https://www.uscourts.gov/news/2012/06/25/alternative-dispute-resolution-now-established-practice-federal-courts> [<https://perma.cc/S7PQ-8RU6>].

<sup>97</sup> See 28 U.S.C. § 715 (“The chief judge of each court of appeals, with the approval of the court, may appoint a senior staff attorney[,] . . . staff attorneys and secretarial and clerical employees . . .”).

<sup>98</sup> See Lois Bloom & Herschel Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L., ETHICS & PUB. POL’Y 475, 488–93 (2002) (discussing the federal courts’ responses to rising instances of pro se litigation).

<sup>99</sup> CARROLL SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 85 (1985). To clarify, a party proceeding *in forma pauperis* may commence, prosecute, or defend “any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees.” 28 U.S.C. § 1915(a)(1).

<sup>100</sup> See Bloom & Hershkoff, *supra* note 98, at 490–92 (discussing magistrate judges’ duties).

<sup>101</sup> See SERON, *supra* note 99, at 100 (stating that over eighty percent of federal magistrates surveyed handled pro se matters).

<sup>102</sup> See Bloom & Hershkoff, *supra* note 98, at 496 (discussing the Eastern District of New York).

<sup>103</sup> See *id.* at 496.

<sup>104</sup> See *Frequently Asked Questions About Pro Se Litigation*, U.S. DIST. CT. FOR DIST. MASS. 3, <https://www.mad.uscourts.gov/general/pdf/prosefaqs.pdf> [<https://perma.cc/6A6U-C4A6>].

#### IV. PROCEDURAL DUE PROCESS: *MATHEWS* BALANCING

For civil nonprisoner pro se plaintiffs pleading a colorable cause of action, the access to justice benefits arising from the provision of an interpreter far outweigh the attendant costs of such a program. Indeed, the provision of an interpreter implicates substantial procedural due process considerations.

The Supreme Court, through its procedural due process line of cases, has affirmed and reaffirmed that the Constitution protects litigants' right to adjudications before tribunals that are to be accessible and intelligible.<sup>105</sup> First, this Section will briefly overview the *Mathews* balancing test, the current framework by which courts judge the adequacy of certain procedures. Second, this Section will show that for civil nonprisoner pro se litigants who speak a language other than English, procedural due process, pursuant to *Mathews*, requires litigation to be linguistically accessible.

##### A. *Mathews Balancing Factors*

The Constitution's due process protections flow from Magna Carta.<sup>106</sup> The Fifth Amendment ensures that the federal government may not deprive "any person" of "life, liberty, or property" absent "due process of law."<sup>107</sup> The Fourteenth Amendment incorporates the Fifth Amendment's procedural due process protections to the states.<sup>108</sup> These amendments, among other things, safeguard individuals' right to be heard in a civil proceeding adjudicating their substantial interests.<sup>109</sup> It is axiomatic that the right to be heard "at a meaningful time and in a meaningful manner" underlies the minimum due process protections afforded to all litigants.<sup>110</sup>

The Supreme Court has time and again held that individuals deserve some form of "hearing" before being deprived of "property interests."<sup>111</sup> Indeed, the right to be heard extends to civil proceedings in which a litigant faces a "grievous loss of any kind," and "is a principle basic to our society."<sup>112</sup> Early procedural due process jurisprudence sought to evaluate the adequacy of the procedures anteceding a deprivation in accordance with the "settled usages and modes of proceeding[s] existing in the common and statute law of England."<sup>113</sup> Subsequently, the Court settled on a more nuanced inquiry whereby the fairness of procedures was evaluated in the context of each specific case's facts.<sup>114</sup> This ultimately led to not one body of procedural due process law applicable to novel fact patterns, but rather a collection of particularized precedents which neither

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<sup>105</sup> See *Carey v. Piphus*, 435 U.S. 247, 262 (1978) (explaining that procedural due process serves to ensure that "the government has dealt with [an individual] fairly").

<sup>106</sup> *Obergefell v. Hodges*, 576 U.S. 644, 723 (2015) (Thomas, J., dissenting).

<sup>107</sup> U.S. CONST. amend. V, cl. 3.

<sup>108</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>109</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (noting due process of law requires "an effective opportunity to defend by confronting any adverse witnesses and by presenting [one's] own arguments and evidence orally").

<sup>110</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>111</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974).

<sup>112</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

<sup>113</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856).

<sup>114</sup> See Gary Lawson et al., "*Oh Lord, Please Don't Let Me Be Misunderstood!*": *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 14 (2005).

yielded a workable definition of “fairness” nor supplied the legal community with a common due process terminology with which it could discuss “fairness.”<sup>115</sup>

The Court established a common, flexible framework for procedural due process analyses in *Mathews v. Eldridge*.<sup>116</sup> In *Mathews*, the Court articulated a three factor balancing test to determine whether particular procedures comport with the litigant’s procedural due process rights: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>117</sup> Put simply, the *Mathews* factors balance two sets of competing interests: the costs and benefits of added procedures, and the private and governmental interests at stake.<sup>118</sup>

Though the *Mathews* Court evaluated the adequacy of administrative procedures relating to the denial of social security benefits,<sup>119</sup> the Court has applied *Mathews* to a variety of contexts. For example, in *Mitchell v. W.T. Grant Co.*, the Court upheld Louisiana’s procedures for sequestering delinquent property without providing the debtor with notice or a hearing because sequestration was not “final.”<sup>120</sup> And in *Boumediene v. Bush*, the Court noted that “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings” being consistent with the *Mathews* factors for determining whether the procedures preceding a deprivation of liberty satisfy due process.<sup>121</sup> Thus, the *Mathews* factors, while arising in an administrative context, apply with equal force to proceedings before the judiciary.

### B. Applying *Mathews*

The *Mathews* factors provide a framework to answer the question whether a particular procedure comports with due process. Accordingly, the two proposed changes to the Judicial Conference’s Guidance with respect to interpretation policies will be weighed against one another in light of the *Mathews* factors: first, an all-inclusive interpretation program that provides complimentary interpretation to all who qualify (“expansive proposal”), and second, this Comment’s proposal for the provision of interpreters to indigent pro se litigants who plead a colorable cause of action pursuant to a court’s docket management program (“limited proposal”). In so doing, this Comment will show that the third factor, the fiscal and administrative burdens of each, disfavors a blanket provision of interpreters to all litigants.

The first *Mathews* factor is the “private interest that will be affected by the official action.”<sup>122</sup> Recognized private interests include the interest in “pursuing a particular livelihood,”<sup>123</sup>

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<sup>115</sup> *Id.* at 14–15.

<sup>116</sup> *Id.* at 20.

<sup>117</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>118</sup> Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 39–40 (1976).

<sup>119</sup> *Mathews*, 424 U.S. at 319.

<sup>120</sup> *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 609 (1974).

<sup>121</sup> *Boumediene v. Bush*, 553 U.S. 723, 781 (2008).

<sup>122</sup> *Mathews*, 424 U.S. at 335.

<sup>123</sup> *Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir. 2009) (quotation omitted).

the “deprivation of real or personal property,”<sup>124</sup> and “retaining employment.”<sup>125</sup> For civil pro se litigants, including prisoners who are not challenging their confinement, their private interest is the opportunity to receive a favorable result in litigation.<sup>126</sup> For example, this favorable result may be “retaining employment,” as exemplified in *Loyola*, where Mr. Loyola disputed the circumstances that led to his termination from the Postal Service.<sup>127</sup> Non-English-speaking plaintiffs asked to endure a trial held in a language unknown to them would not be able to understand the judge’s instructions, the defense’s questions, and the witnesses’ testimony. By providing non-English-speaking litigants with an interpreter, the courts are in effect providing these plaintiffs with the opportunity to be heard. Thus, the private interest here—an opportunity to receive a favorable result in litigation—is tantamount to an interest in receiving justice. Therefore, for both the expansive proposal and the limited proposal, the first *Mathews* factor favors the provision of an interpreter.

The second *Mathews* factor is the “risk of an erroneous deprivation of such an interest through the procedures used.”<sup>128</sup> To evaluate the risk of an erroneous deprivation, courts consider the nature of the loss relative to community and societal norms.<sup>129</sup> Thus, for example, the permanent loss of custody of one’s children, the Court held, requires a higher standard of proof than the loss of one’s personal property.<sup>130</sup> The procedures currently applied by the federal courts can be summarized as such: defendants in criminal and civil matters, prisoners contesting their incarceration, hearing-impaired individuals, and those plaintiffs who can satisfy to the court that they are capable of reimbursing the cost of an interpreter will receive an interpreter. For everyone else, an attorney generally funds the interpretation, but they are, of course, permitted to self-fund an interpreter, too. For indigent non-English-speaking pro se plaintiffs, the gravity of the loss is superficially tied directly to their particular cause of action: some may bring to federal court a claim for damages pursuant a federal cause of action,<sup>131</sup> while others may bring a claim alleging their constitutional rights have been violated.<sup>132</sup> Regardless of the particular grievance brought before the court, non-English-speaking litigants proceeding pro se are unable to marshal a competent litigation strategy and are unable to intelligently participate at hearings and trial. Thus, for both the expansive proposal and the limited proposal, the risk of a deprivation, while technically variable given the myriad types of suits brought in federal court, would be enormous. Accordingly, the second *Mathews* factor favors the provision of an interpreter, and thus supports both the expansive proposal and the limited proposal.

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<sup>124</sup> *Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (motor vehicles); *see also* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

<sup>125</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–43 (1985).

<sup>126</sup> *See* Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 848–49 (2008) (listing “outcome of litigation” as the *Mathews* first factor private interest for pro se prisoner litigants).

<sup>127</sup> *Loyola v. Potter*, No. C 09–0575 PJH, 2009 WL 1033398, at \*1 (N.D. Cal. Apr. 16, 2009).

<sup>128</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>129</sup> *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (“Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.”).

<sup>130</sup> *See id.* at 758.

<sup>131</sup> *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a) (affording individuals a private cause of action for money damages against creditors “who fail[] to comply with any requirement imposed” by the statute).

<sup>132</sup> 42 U.S.C. § 1983 (imposing liability on those who deprive citizens and those within a state’s jurisdiction of “any rights, privileges, or immunities secured by the Constitution and laws”).

The third *Mathews* factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>133</sup> To successfully defeat a *Mathews* attack on an in-place procedural scheme, the government must demonstrate sufficient “countervailing interests.”<sup>134</sup> For example, in *City of Los Angeles v. David*, the Supreme Court found that procedures employed by a city to adjudicate car-impoundment disputes did not violate due process as exemplified by *Mathews*.<sup>135</sup> There, Edwin David (“David”) sued the city of Los Angeles to recoup the costs he incurred to retrieve his car, which the city impounded due to David’s alleged parking violation.<sup>136</sup> In addition to finding David’s interests—access to the money he spent on the allegedly erroneous impoundment and access to his vehicle—were not particularly strong, the Court found that the city had a strong interest in the timely adjudication of the most pressing impoundment disputes.<sup>137</sup> Specifically, the Court concluded that impoundment disputes involving individuals who, unlike David, could not pay the impoundment fees required quick adjudication.<sup>138</sup> Accordingly, because the city had limited resources, personnel, and fora in which to hold the disputes, disputes involving individuals who did pay the fee and merely sought recompense were by necessity delayed.<sup>139</sup> The Court noted that “[t]he administrative resources” available to adjudicate these hearings were not unlimited.<sup>140</sup> Accordingly, Los Angeles’s practice of swiftly marshaling its limited resources to the most pressing matters was upheld as not violative of the *Mathews* factors and, therefore, in keeping with due process.<sup>141</sup>

To apply a *Mathews* third-factor analysis, as the Court did in *David*, to the expansive proposal and the limited proposals, the government’s interests need to be identified. The government—more specifically, the federal courts—has a strong interest in operating in a manner that minimizes administrative burdens.<sup>142</sup> Moreover, the federal courts have a strong interest in ensuring that they minimize the use of “procedure[s] that] sometimes result[] in a substantial expenditure of scarce judicial resources.”<sup>143</sup> An “expenditure” is “[t]he act or process of spending or using money, time or energy, etc.; esp[ecially], the disbursement of funds,” and also “[a] sum paid out.”<sup>144</sup> Thus, according to the Supreme Court, one resource that the federal courts should carefully expend is money.

The expansive proposal, suggested by some scholars, is rooted in the idea that procedural due process demands the complimentary provision of an interpreter to *all* litigants who do not speak English.<sup>145</sup> Two issues would arise were the federal courts to institute such a proposal. First, scarce judicial sources would almost certainly go to litigation unworthy of the expense the courts

<sup>133</sup> *Mathews*, 424 U.S. at 335.

<sup>134</sup> *Nelson v. Colorado*, 581 U.S. 128, 139 (2017).

<sup>135</sup> *City of Los Angeles v. David*, 538 U.S. 715, 719 (2003).

<sup>136</sup> *Id.* at 716.

<sup>137</sup> *Id.* at 718.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 719.

<sup>142</sup> See GUIDE, *supra* note 13, § 265 (“Because of the administrative burden placed on the judiciary in having to subsequently track and collect the reimbursed costs of these services, interpreter services should be provided on a cost-reimbursable basis only in limited circumstances when no other options are available.”).

<sup>143</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (emphasis added) (discussing a since-overturned procedure for evaluating government officials claims for qualified immunity).

<sup>144</sup> *Expenditure*, BLACK’S LAW DICTIONARY, *supra* note 8.

<sup>145</sup> See, e.g., Abel, *supra* note 21, at 602–03.



would incur. Under the expansive proposal, the federal courts would be required to provide a complimentary interpreter in frivolous cases.<sup>146</sup> Simply put, a proposal that would force the courts to pay for an interpreter in frivolous matters would result in a “substantial expenditure of scarce judicial resources.”

The second issue arising from an expansive proposal that calls for the blanket provision of complimentary interpretation services is the massive cost of such a program. For example, as discussed above, in 2017 there were 254,736 court proceedings which required an appointed interpreter pursuant to the Court Interpreters Act.<sup>147</sup> Recall also that federally certified and professionally qualified Spanish interpreters are paid \$566.00 per day.<sup>148</sup> For the purposes of this Section, this Comment will assume that all Spanish interpretation services were performed by federally certified or professionally qualified Spanish interpreters and, further, will assume that each proceeding lasted no more than one day. Accordingly, to get a rough estimate of the cost incurred by the federal courts for *statutorily mandated* Spanish interpretation, the number of court proceedings requiring Spanish interpretation (254,736) is multiplied by the cost of an interpreter (\$566). The resulting figure is \$144,180,576. In 2017, the federal courts received roughly \$7 billion from Congress.<sup>149</sup> Thus, in 2017, the federal courts spent roughly 2% of their total budget on Spanish interpretation services mandated by Congress under the Court Interpreters Act. Stated differently, in 2017, roughly 1.5% of the federal courts’ budget went to providing Spanish-language interpreters to defendants in matters instituted by the United States, prisoners disputing their confinement under habeas corpus and similar theories, deaf individuals, defendants in civil matters, and any witnesses appearing in such actions. While this figure makes up a comparatively small percentage of the federal courts’ total budget, the number is nevertheless large, and the courts are rightly weary of expanding their spending on interpretation services. An expansive proposal to provide blanket interpretation for all languages to any litigant who speaks a language other than English would almost certainly expand this number significantly. Indeed, in 2017, the federal district courts saw 292,076 civil nonprisoner cases,<sup>150</sup> and the provision of a \$566 per day interpreter for each of the myriad hearings associated with civil cases would create a substantial expenditure.

Thus, an expansive proposal of the blanket provision of interpretation services, while laudable in theory, is almost certainly not required by procedural due process.

Conversely, a limited proposal that calls for interpretation services for non-English-speaking pro se plaintiffs who overcome the district court’s pro se screening procedures is unlikely to substantially stretch judicial resources beyond their current amount.<sup>151</sup> First, by incorporating the question of whether to appoint an interpreter into the overall evaluation of whether the pro se litigant has presented a colorable cause of action, the limited proposal fits within the federal courts’ current operations. Magistrate judges, law clerks, and pro se staff attorneys are already evaluating pro se plaintiffs’ causes of action for frivolity. A limited provision would simply require these

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<sup>146</sup> See Levy, *supra* note 93, at 1831 (noting that some commentators view measures that aid pro se litigants “may lead courts to devote more resources to cases that often prove frivolous”).

<sup>147</sup> *Court Interpreters Deliver Justice in All Languages*, *supra* note 1.

<sup>148</sup> *Federal Court Interpreters*, *supra* note 48.

<sup>149</sup> Administrative Office of the United States Courts, *The Judiciary FY 2022 Congressional Budget Summary*, at 5 (Feb. 2016), [https://www.uscourts.gov/sites/default/files/fy\\_2017\\_federal\\_judiciary\\_congressional\\_budget\\_summary\\_0.pdf](https://www.uscourts.gov/sites/default/files/fy_2017_federal_judiciary_congressional_budget_summary_0.pdf) [<https://perma.cc/6YM9-LM83>].

<sup>150</sup> *Federal Judicial Caseload Statistics 2017*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> [<https://perma.cc/8FYH-ULAB>].

<sup>151</sup> For information on those procedures, see Bloom & Hershkoff, *supra* note 98.

judges and staff to further ask two questions: whether this pro se plaintiff pleading a nonfrivolous cause of action needs interpretation services and whether she can afford them. If she does so need and cannot so afford, then an interpreter, whom the Court Interpreters Act requires the courts to identify and retain, should be assigned to the case.

Yes, the interpreters will cost the federal courts the same amount, \$566.00 a day for a federally certified or professionally qualified Spanish interpreter, that they spend on statutorily mandated interpretation services. Yes, a real increase in “expenditure[s] of scarce judicial resources” will result from the provision of an interpreter for non-English-speaking pro se plaintiffs. Without hazarding to delve into an analysis of the specific cost, suffice to say that it will be something. But *Mathews* is a balancing test. The massive costs associated with providing an interpreter to all non-English-speaking litigants to the federal courts’ expenditures outweigh the due process benefits of providing an intelligible forum to all litigants because some litigants are represented by counsel and can thereby procure an interpreter.

However, given that pro se plaintiffs already face the severe disadvantage of proceeding absent counsel, denying them an interpreter to preserve expenditures essentially forecloses their ability to successfully vindicate their claims. And because this population forms a rather small subset of litigants who remain in court past the initial screening and subsequent motions to dismiss,<sup>152</sup> the added costs of providing an interpreter would be comparatively small. To flesh out the numbers, from 2000–2019, roughly 1.4 million pro se plaintiffs sued in federal court.<sup>153</sup> Assuming that an equal number of plaintiffs filed a lawsuit each year, then roughly 78,950 pro se plaintiffs brought suit per year in the district courts. Multiplying this number by the percentage of Americans who speak another language, 21.9%,<sup>154</sup> results in 17,290 non-English-speaking pro se plaintiffs filing per year. This number is much smaller than the previously identified total civil nonprisoner filings, 292,076. Thus, by limiting the provision of complimentary interpretation services to a small, select class of pro se plaintiffs, this Comment’s limited solution is unlikely to significantly burden the federal judiciary’s finances.

Accordingly, on balance, procedural due process likely demands that the federal courts provide a complimentary interpreter to non-English-speaking pro se plaintiffs who plead a nonfrivolous, colorable cause of action.

## V. AMENDING THE JUDICIAL CONFERENCE’S POLICY GUIDANCE

Section 260 of the Judicial Conference’s Guide to Judiciary Policy, entitled “Civil Proceedings Not Initiated by the Government,” lays out the general policy described above: “Interpreter services needed to assist parties in civil proceedings not instituted by the United States, both in-court and out-of-court, are the responsibility of the parties to the action . . . .”<sup>155</sup>

Given that due process likely demands the provision of an interpreter for non-English-speaking pro se plaintiffs who present a colorable cause of action, an amendment to § 260 should succinctly lay out this requirement. For example, this phrase would likely suffice: “For parties unrepresented by counsel, the court must provide an interpreter to those litigants who adequately plead a legally cognizable cause of action.”

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<sup>152</sup> See Pro Se Statistics, *supra* note 90, at fig. 5 (calculating that between 2000–2019, pro se litigants made 11% of a civil nonprisoner filings in the U.S. district courts).

<sup>153</sup> See *id.* at fig. 3.

<sup>154</sup> Zeigler & Camarota, *supra* note 28.

<sup>155</sup> GUIDE, *supra* note 13, § 260.

The specific wording is not nearly as important as the binding nature of the amendment. The current policy, as outlined above, constructively denies non-English-speaking civil nonprisoner plaintiffs their day in court. To adequately revitalize these plaintiffs' ability to meaningfully participate in their cases, the amendment must mandate the provision of an interpreter.

## VI. CONCLUSION

More than ever before, people in this country speak a language other than English. The United States has made significant efforts in virtually all fora of public and private life to break down language barriers. Interpretation services for judicial proceedings, it would seem, should have arisen contemporaneously with other language-access accommodations. But it took an act of Congress, the Court Interpreters Act, to mandate the provision of interpreters in certain types of cases. Through the Court Interpreters Act, Congress has made clear that a language barrier will not impede the United States's efforts to vindicate its interests in a judicial forum.

But that is not enough. The courts regularly see litigation between private parties. These private parties are not required to have an attorney, and indeed some cannot afford an attorney. But one's lack of legal counsel does not foreclose their right to understand the proceedings adjudicating their interests. The Supreme Court has made clear what most intuitively understand to be the case: for a hearing to be fair, the person to whom the hearing applies must be able to understand what is going on.

For poor people suing others, the challenges of figuring out how to sue, where to sue, and what to sue over place them at a significant disadvantage relative to those parties who are represented by counsel. Language barriers should not augment these disadvantages. Fairness, due process, justice, common sense—each of these demands that poor people who do not speak English and bring a valid lawsuit should have an interpreter.