

Jena McCabe

Can You Hear Me Now:
Court Interpreters for California Civil Cases

Can You Hear Me Now: Court Interpreters for California Civil
Cases

Executive Summary

While the Due Process Clause grants criminal defendants the right to court interpreters, civil litigants have to find their right through statutes. In 2014, California, the state with the largest limited-English proficient ("LEP") population in the country, finally joined the forty states with legislation providing free court interpreters in civil cases.

This progress is a response to the Department of Justice's ("DOJ") investigation into the California court system. The DOJ found that California failed to comply with Title VI of the Civil Rights Act of 1964 by not providing fair access to LEP individuals. California's law prior to 2014 mandated that the parties in civil cases pay their own interpreters' fees with two exceptions: (1) particular family law cases would have interpreters if federal funding allowed; and (2) courts would waive interpreters' fees for parties appearing in forma pauperis. California also allowed family members or friends to interpret for LEP litigants despite their inability to provide effective interpretation.

California's new legislation—embodied in Bill 1657— instructs the Judicial Council of California to reimburse courts for providing court interpreters to any party. However, access

to interpreters depends on state budget. Until sufficient funds are available, courts will prioritize interpreters to cases in the following order: (1) domestic violence, protective orders for parents, divorce, restraining orders, and certain elder abuse; (2) unlawful detainer; (3) parental rights termination; (4) conservatorship or guardianship; (5) sole child custody or visitation rights; (6) all other harassment or elder abuse; (7) all other family law issues; and (8) all other cases. The Judicial Council implemented its "Language Access Plan," which includes various techniques for courts to employ such as education and training for court staff and "I Speak" cards to promote early identification of LEP individuals.

This Note proposes application of remote interpreting technology to allow interpreters to service multiple distant courthouses from a single location. Further, this Note suggests introducing need-based and subject matter-based prioritization until California allocates adequate funding for civil court interpreters.

Can You Hear Me Now: Court Interpreters for California Civil
Cases

I. INTRODUCTION

Seventy-year-old Halmoni¹ is poor and speaks no English.² She lives in an apartment complex where a trespassing maintenance worker has repeatedly sexually attacked her.³ After Halmoni reported the incidents to law enforcement, the maintenance worker violently pounded on her door and tried to enter her apartment while she slept.⁴

¹ "Halmoni" is the Korean word for "grandma." Katie Askew, *How to Say Grandma and Grandpa in 20 Languages*, AM. GRANDPARENTS ASS'N, <http://www.grandparents.com/family-and-relationships/grandparent-names/grandpa-grandma-different-languages>. The following story is true, and her name was redacted to protect her identity. See *Two Litigants Complained the L.A. Courts Did Not Give Them Interpreters*, L.A. TIMES 1, 3 (Nov. 4, 2014), <http://documents.latimes.com/two-litigants-complained-1-courts-did-not-give-them-interpreters/> [hereinafter LAFLA Complaint]. Accordingly, this Note will refer to her as "Halmoni."

² LAFLA Complaint, *supra* note 1, at 3.

³ *Id.*

⁴ *Id.*

In October 2010, Halmoni sought a restraining order in pro per against her attacker.⁵ The Los Angeles Superior Court (“Superior Court”) granted a temporary restraining order and set the hearing for the following month.⁶ However, the court refused to process Halmoni’s fee waiver request for a Korean interpreter because “it did not provide interpreters in cases such as hers and [Halmoni] could bring a friend to interpret.”⁷ Ultimately, the Superior Court did process her request but denied it, explaining that “[t]here is no right to an interpreter provided at public expense in a civil case.”⁸

Before 2014, California was one of ten states without legislation providing free interpreters to civil litigants.⁹ On

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* “Family and friends are often called on to interpret. It is unlikely, however, that family or friends acting as interpreters can provide quality interpretation of a legal proceeding.” Diana K. Cochrane, Note, *¿Como Se Dice, <Necesito a un Interprete>? The Civil Litigant’s Right to a Court-appointed Interpreter in Texas*, 12 SCHOLAR 47, 59 (2009).

⁸ LAFLA Complaint, *supra* note 1, at 3.

⁹ Sudhin Thanawala, *California Moves to Provide Interpreters in All Court Cases*, BIG STORY (Aug. 16, 2015, 4:07 PM),

September 28, 2014, Governor Jerry Brown signed a bill (“Bill 1657”) into law granting civil litigants the right to a court interpreter.¹⁰ The goal of the legislation is to make this right a reality for all by 2017.¹¹

This Note explores California’s new legislation providing free interpreters to civil litigants, while balancing the needs of civil litigants with the costs of interpreters. Further, this Note argues that the statutory embodiment of Bill 1657—Section 756 of the Evidence Code (“section 756”) and Section 68092.1 of

<http://bigstory.ap.org/article/7f5f98aa585f44d7a2e57392039d2acd/california-moves-provide-interpreters-all-court-cases>. The other nine states were Alaska, Illinois, North Carolina, New Hampshire, Nevada, Oklahoma, South Dakota, Wyoming, and Vermont. *Id.*

¹⁰ Assemb. 1657, 2013-14 Leg., Reg. Sess. (Cal. 2014). Bill 1657 added section 756 to, and repealed section 755 of, the Evidence Code; it also added section 68092.1 to the Government Code. *Id.* All code sections in this Note should be presumed to be California’s unless otherwise designated.

¹¹ JUDICIAL COUNCIL OF CAL., STRATEGIC PLAN FOR LANGUAGE ACCESS IN THE CALIFORNIA COURTS: EXECUTIVE SUMMARY (2015), <http://www.courts.ca.gov/documents/LAP-Executive-Summary.pdf>. [hereinafter Executive Summary].

the Government Code—complements the federal stance, but in practice, the law could do more. Section II below presents the historical background of court interpreters in the American legal system, and more notably, the importance of interpreters in a civil context. Section II also introduces the Department of Justice (“DOJ”) investigation into the language accessibility of the California court system and the complaint that prompted it. Section III contrasts California’s new law regarding court interpreters with its predecessor. Section IV compares the California law with legislation from two other states and considers the general controversy surrounding the civil right to court interpreters. Section V proposes how the new legislation might be improved with technology and statutory amendments.

II. HISTORICAL BACKGROUND

A. The Right to a Court Interpreter

California has the greatest share of individuals that are limited-English proficient (“LEP”) in the country.¹² Los Angeles

¹² Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States*, MIGRATION POLICY INST. (July 8, 2015), <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

County alone comprises 10 percent of the U.S. LEP population.¹³ According to the 2010 census, about 20 percent of Californians are considered to be LEP.¹⁴ The five most spoken languages within this population are: Spanish (66.8%), Chinese (8.2%), Vietnamese (4.5%), Tagalog (4.0%), and Korean (3.5%).¹⁵

¹³ *Id.* The five counties with the largest LEP populations in descending order are: Los Angeles County, California; Miami County, Florida; Harris County, Texas; Cook County, Illinois; and Queens County, New York. *Id.* While the LEP population in Los Angeles is 10 percent of the total U.S. LEP population, the next largest county, Miami, only comprises 3 percent. *Id.*

¹⁴ FIELD RESEARCH CORP., AN OVERVIEW OF THE FINDINGS FROM THE LIMITED ENGLISH PROFICIENCY SURVEY (2013), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Communications_-_Telecommunications_and_Broadband/Reports_and_Presentations/Overview_Limited_Eng_Report_Communications_2013.pdf.

¹⁵ *Id.* These proportions roughly reflect the five greatest nationwide proportions: Spanish (64%), Chinese (6%), Vietnamese (3%), Korean (2%), and Tagalog (2%). Zong & Batalova, *supra* note 12. However, Korean-speaking LEP individuals outnumber Tagalog speakers by 90,000 in the United States as a whole. *Id.*

A study of California court interpreters concluded, "[a]llowing proceedings to continue when one party is incapable of participating fully significantly impairs the quality of the process and its results."¹⁶ When roughly 20 percent of the state's population cannot participate fully in court proceedings because they lack proficiency in English, the only language in which courts are conducted,¹⁷ we have a serious problem. Language, after all, is the primary form of communication in a legal proceeding, and fairness in the proceeding depends on a

¹⁶ Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, 17 *PROTEUS* 2 (Nat'l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), 2008, <http://nebula.wsimg.com/59dde04f42a333cba98aa66c271055cb?AccessKeyId=5AF78834A5D9003DD559&disposition=0&alloworigin=1>.

¹⁷ Cal. Civ. Proc. Code § 185(a) (2000). If Spanish becomes the majority language in California, perhaps this law will change so that some cases will proceed in Spanish. See Paul Saffo, *Spanish: California's Once and Future Language*, PAUL SAFFO: FUTURIST (Jan. 2, 2006), <http://www.saffo.com/02006/01/02/spanish-californias-once-and-future-language/> (considering the probability and consequences of Spanish as California's majority language).

party's ability to speak or understand the language.¹⁸ With LEP individuals more likely to live in poverty than English speakers,¹⁹ they would benefit greatly from the right to free court interpreters.

1. The Criminal Defendant's Constitutional Right to a Court Interpreter

The right to a court interpreter began in the criminal justice system.²⁰ Notably, criminal defendants have a constitutionally protected right to an interpreter.²¹ Under the Fifth and Fourteenth Amendments of the U.S. Constitution, due process requires that interpreters be made available to people at risk of losing life, liberty, or property from a criminal charge.²² The Sixth Amendment of the U.S. Constitution similarly grants criminal defendants the right "to be confronted with the witnesses against him . . . and to have the Assistance of

¹⁸ Thomas M. Fleming, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings Is Not Proficient in the Language Used*, 32 A.L.R.5TH 149, 2 (1995).

¹⁹ Zong & Batalova, *supra* note 12.

²⁰ Cochran, *supra* note 7, at 53.

²¹ *Id.*

²² *Id.*; see U.S. CONST. amends. V, XIV.

Counsel for his [defense].”²³ Thus, a criminal defendant, without access to an interpreter, is denied these constitutionally protected rights in trial without knowing what the witnesses are testifying to or without being able to adequately confer with counsel.²⁴

Moreover, certain criminal convictions serve as grounds for an alien’s deportation from the country.²⁵ As such, that alien would struggle to remain in America without understanding the trial proceedings and therefore being unable to present a proper defense. This risk is considerable in California, a state home to more immigrants than any other state in the country.²⁶

The policy of protecting the ability to understand court proceedings, as criminal defendants risk losing their fundamental human rights, applies in the civil context as well.

²³ U.S. CONST. amend. VI.

²⁴ United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

²⁵ *E.g.*, 8 U.S.C. § 1227(a)(2)(A) (“Any alien who . . . is convicted of a crime for which a sentence of one year or more may be imposed, is deportable.”).

²⁶ Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, PUB. POLICY INST. OF CAL. (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

Part IV of this Note will delve deeper into public policy and examine why civil litigants were denied the same right that their criminal defendant counterparts enjoyed.

2. The Civil Litigant's Statutory Right to a Court Interpreter

In civil cases, the right to an interpreter is statutorily based—federal or state legislation must explicitly provide the right.²⁷ For instance, the Court Interpreters Act²⁸ requires that interpreters be provided for parties in federal court who are unable to understand the proceedings or communicate with counsel.²⁹ The Court Interpreters Act does so for criminal and civil actions brought by the United States in federal court.³⁰

For civil actions not brought by the United States in federal court, states like Arizona and Texas codified the right to a court interpreter.³¹ However, because each state has its own laws, this right can differ quite a bit depending on the jurisdiction. For instance, some state statutes require courts

²⁷ Cochrane, *supra* note 7, at 55.

²⁸ 28 U.S.C. § 1827 (2012).

²⁹ Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1931 (2000).

³⁰ *Id.*

³¹ See *infra* Part IV(A).

to pay interpreters' fees for any legal proceeding, including civil, while others simply give courts the discretion to provide for those services.³²

B. Legal Aid Foundation of Los Angeles Complaint

In 2010, the Legal Aid Foundation of Los Angeles ("LAFLA") filed a complaint with the DOJ on behalf of two indigent Korean speakers against the Superior Court.³³ The court regularly provided Spanish-speaking interpreters free of charge—despite no existing law requiring it to—but failed to provide interpreters for other languages in civil cases.³⁴

One of the complainants was Halmoni, the elderly grandmother who needed protection from her sexual assailant.³⁵ The other was a single mother ("Mom") who sought child custody

³² Compare CAL. GOV'T CODE § 68092.1 (West 2015) ("[I]t is imperative that courts provide interpreters to all parties who require one."), with ARIZ. REV. STAT. ANN. § 12-241 (2003) ("The court may when necessary appoint interpreters"). See also *infra* Part IV(A) (considering statutes from California, Arizona, and Texas regarding payment for court interpreters).

³³ LAFLA Complaint, *supra* note 1, at 1.

³⁴ *Id.* at 2-3.

³⁵ See *supra* Part I.

and support.³⁶ Like Halmoni, Mom is indigent and a native Korean speaker.³⁷ Mom had been raising her seven-year-old son alone and was struggling to provide for him against resistance from his father.³⁸ Consequently, she needed the court's intervention.³⁹

Mom knew she would have to testify at the hearing in order to obtain sole custody, unpaid child support, and modification of child support.⁴⁰ She filed a fee waiver request for a Korean interpreter, but the Superior Court denied her request, stating that "Korean interpreters are not provided for this type of hearing."⁴¹ Because Mom could not afford her own interpreter, she looked for a friend or family member who could interpret, but her search was unsuccessful.⁴²

Fortunately for Mom and Halmoni, this story has a hero. LAFLA intervened and paid the \$300 fees for Korean-language

³⁶ LAFLA Complaint, *supra* note 1, at 2. Her name was redacted to protect her identity. *See id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

court interpreters for Mom and Halmoni.⁴³ Following these cases, LAFLA brought the problem to the attention of the DOJ.⁴⁴

C. Department of Justice's Investigation (Federal Mandate)

In response to the LAFLA complaint, the DOJ initiated an investigation into the Superior Court "to ensure that [LEP] individuals have meaningful access to court proceedings and court operations."⁴⁵ Access to the courts is a right founded in the Due Process Clause.⁴⁶ Because California receives financial assistance from the federal government, including the DOJ, California must comply with Title VI of the Civil Rights Act of 1964 ("Title VI")⁴⁷ by providing meaningful access to LEP individuals.⁴⁸

The DOJ investigation into the Superior Court revealed serious problems in its court interpretation system. First,

⁴³ *Id.* at 2-3.

⁴⁴ *Id.* at 1.

⁴⁵ Letter from U.S. DEP'T OF JUSTICE, to Toni G. Cantil-Sakauye, et al., Chief Justice, Cal. Sup. Ct. (May 22, 2013) (on file with the Legal Aid Foundation of Los Angeles), http://www.lafla.org/pdf/DOJ_Findings052213.pdf.

⁴⁶ *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

⁴⁷ 42 U.S.C. § 2000d (2012).

⁴⁸ U.S. DEP'T OF JUSTICE, *supra* note 45, at 2.

where family and friends acted as interpreters, the DOJ found that judicial officials in the Superior Court often were unable to assess the “interpreter’s” ability to communicate in both English and the other language.⁴⁹ The DOJ also found that some officials failed to even ask the family members or friends about their language abilities, and some transcripts showed that the “interpreters” inappropriately interjected during the proceedings.⁵⁰ The DOJ’s discoveries regarding the Trial Court Trust Fund, which provides state funding for court interpreters,⁵¹ were particularly troubling. California’s state budget allocates over \$90 million annually to the Trial Court Trust Fund, but some of those funds have been underutilized and even diverted to other purposes.⁵²

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Id.* at 6; CAL. GOV’T CODE § 68085 (West 2013).

⁵² U.S. DEP’T OF JUSTICE, *supra* note 45, at 6; JUDICIAL COUNCIL OF CAL., TRIAL COURT INTERPRETERS PROGRAM EXPENDITURE REPORT FOR FISCAL YEAR 2010-2011 (2012), <http://www.courts.ca.gov/documents/tcip-expenditure-fy1011.pdf> (reporting that \$3 million of savings from the court interpreter program would assist offsetting trial court budget reductions).

As a result of these findings, the DOJ made several suggestions, including the following: courts must be educated that California law does not impede them from providing interpreters and being reimbursed; the Judicial Council of California ("Judicial Council") should refrain from re-allocating unspent funds in the Trial Court Trust Fund; to alleviate concerns about exceeding the Trial Court Trust Fund, California might consider initially prioritizing particularly sensitive cases to receive funds first; and California should attempt to identify LEP litigants as soon as possible.⁵³ Since the DOJ investigation made California aware of the many flaws in its court interpretation system, California adopted the DOJ's suggestions with the introduction of Bill 1657, and the Judicial Council devised several strategies to help the state satisfy this federal mandate.⁵⁴

III. CALIFORNIA'S LEGISLATION

A. California's Law Prior to Bill 1657

⁵³ U.S. DEP'T OF JUSTICE, *supra* note 45, at 8-9. This list is not exhaustive but rather touches on a few of the DOJ's recommendations.

⁵⁴ Part III (C) of this Note will provide specific examples of the Judicial Council's strategy.

Bill 1657 brought significant change to two California statutes relating to civil court interpreters:⁵⁵ Government Code section 68092—the general rule for who must pay for an interpreter⁵⁶—and Evidence Code section 755 (“section 755”)—an exception for particular family law cases.⁵⁷ Still, other statutes persisted despite the change and seem compatible with California’s new law.⁵⁸

1. Government Code Section 68092 and Evidence Code Section 755

Prior to passing Bill 1657, California still reserved the right for criminal defendants unable to understand English to have an interpreter at no cost to the defendant;⁵⁹ those fees are to be paid by the court pursuant to Government Code section 68092.⁶⁰ But in civil cases, any interpreter or translator fee

⁵⁵ Assemb. 1657, 2013-14 Leg. Reg. Sess. (Cal. 2014).

⁵⁶ CAL. GOV’T CODE § 68092(b) (West 2011).

⁵⁷ CAL. EVID. CODE § 755 (repealed 2014).

⁵⁸ Compare *infra* Part III(A)(2) (discussing older statutes regarding interpreters for witnesses, small claims cases, and deaf parties), with *infra* Part III(B) (discussing recent legislation regarding civil court interpreters generally).

⁵⁹ CAL. CONST. art. I, § 14.

⁶⁰ CAL. GOV’T CODE § 68092(a) (West 2011).

had to be paid by the litigant.⁶¹ As explained in Part III (B) below, the subsequent enactment of Government Code section 68092.1 casts doubt on the current force of this law.⁶²

Section 755 was an exception to civil litigants' general duty to pay interpreters' fees.⁶³ Under section 755, interpreters were required for proceedings regarding domestic violence, parental rights, and marriage dissolution or legal separation cases involving a protective order,⁶⁴ a requirement that was contingent upon federal funding.⁶⁵ However, for parties appearing in forma pauperis, interpreters' fees would be waived.⁶⁶ Remarkably, section 755 expressly authorized non-interpreters, such as family members or friends, to assist LEP individuals,⁶⁷ despite that non-interpreters cannot likely provide effective

⁶¹ CAL. GOV'T CODE § 68092(b) (West 2011).

⁶² See CAL. GOV'T CODE § 68092.1 (West 2015).

⁶³ Compare GOV'T § 68092(b) (requiring parties to pay all interpreters' fees), with CAL. EVID. CODE § 755(b) (repealed 2014) (requiring courts to pay interpreters' fees under certain circumstances).

⁶⁴ EVID. § 755(a).

⁶⁵ *Id.* § 755(e).

⁶⁶ *Id.* § 755(b).

⁶⁷ *Id.* § 755(d).

interpretation for legal proceedings.⁶⁸ As explained in Part III (B) below, the later enactment of section 756 expanded the civil litigant's right to an interpreter.⁶⁹

2. Other Relevant California Statutes

Notably, other areas of California law remain untouched by Bill 1657. For example, courts still provide interpreters for witnesses in either a criminal or civil case if they are unable to understand or express themselves in English.⁷⁰ Additionally, in small claims cases, the court may allow another individual—other than an attorney—to assist a non-English-speaking party.⁷¹

Moreover, California has historically treated and continues to treat hearing impairment as a protected disability, charging its courts with the interpreters' fees for those who cannot hear the proceedings.⁷² Yet, while the inability to *understand* the language of the proceedings produces essentially the same result, LEP individuals were denied free interpreters in civil cases.⁷³

⁶⁸ Cochrane, *supra* note 7, at 59.

⁶⁹ See *infra* Section III(B).

⁷⁰ CAL. EVID. CODE § 752(a) (West Supp. 2016).

⁷¹ CAL. CIV. PROC. CODE § 116.550(a) (West 1995).

⁷² See CAL. EVID. CODE § 754 (West Supp. 2016).

⁷³ See CAL. GOV'T CODE § 68092(b) (West 2011).

B. California's Law After Bill 1657

Today, the Judicial Council assumes the financial responsibility of reimbursing courts for providing court interpreters in civil cases "to any party who is present in court and who does not proficiently speak or understand the English language for the purpose of interpreting the proceedings in a language the party understands, and assisting communications between the party, his or her attorney, and the court."⁷⁴ Notably, court interpreters are to be provided at no cost, "regardless of the income of the parties," under Government Code section 68092.1.⁷⁵

Although Government Code section 68092.1 seems irreconcilable with Government Code section 68092, which requires civil litigants to pay for their own interpreters,⁷⁶ it is important to remember that the latter also provides the criminal defendant's right to a court interpreter.⁷⁷ Furthermore, under Government Code section 68092.1, some parties will still

⁷⁴ EVID. § 756(a) (West 2011) (emphasis added).

⁷⁵ CAL. GOV'T CODE § 68092.1(b) (West 2015).

⁷⁶ *Id.* § 68092(b).

⁷⁷ *Id.* § 68092(a).

have to pay for their own interpreters unless sufficient funds are available.⁷⁸

In any event, California does not blindly ignore the financial hurdles before it. Recognizing that “no cost” interpreters do come at a price, the legislature devised a system that offers state-funded interpreters to parties on a priority basis depending on the type of case involved.⁷⁹ The categories of cases at the top of the priority list receive interpreters first, while those at the bottom receive interpreters only if funds remain.⁸⁰ This hierarchy, ranked from the highest to the lowest priority, is as follows:

1. Domestic violence; protective orders involving the Uniform Parentage Act⁸¹ or ending a marriage or domestic partnership; orders restraining future violence, threats, and stalking; physical abuse or neglect of elders;⁸²
2. Unlawful detainer;⁸³

⁷⁸ See *id.* § 68092.1(b).

⁷⁹ See EVID. § 756(b).

⁸⁰ *Id.*

⁸¹ CAL. FAM. CODE § 7600 *et seq.* (West, Westlaw through 2015 Sess.).

⁸² EVID. § 756(b)(1).

⁸³ *Id.* § 756(b)(2).

3. Termination of parental rights;⁸⁴
4. Conservatorship or guardianship;⁸⁵
5. A parent's sole child custody or visitation rights;⁸⁶
6. All other orders prohibiting harassment and elder abuse;⁸⁷
7. All other family law issues;⁸⁸
8. And any other civil case.⁸⁹

The coordination of section 756 and Government Code section 68092.1 will eventually make court proceedings accessible to all civil litigants.⁹⁰ Until sufficient funds are made available, California focuses on the subject matter of cases⁹¹ and prohibits courts from discriminating based on the financial status of the LEP party⁹² or by the primary language spoken by the party.⁹³

C. California's Response to the DOJ's Suggestions

⁸⁴ *Id.* § 756(b) (3) .

⁸⁵ *Id.* § 756(b) (4) .

⁸⁶ *Id.* § 756(b) (5) .

⁸⁷ *Id.* § 756(b) (6) .

⁸⁸ *Id.* § 756(b) (7) .

⁸⁹ *Id.* § 756(b) (8) .

⁹⁰ *See id.* § 756; CAL. GOV'T CODE § 68092.1 (West 2015) .

⁹¹ EVID. § 756 .

⁹² GOV'T § 68092.1 .

⁹³ *See* EVID. § 756; *see also* GOV'T § 68092.1 .

The year after the DOJ reprimanded the Superior Court for its failure to provide LEP litigants meaningful access to the court system, the California State Assembly introduced Bill 1657.⁹⁴ California adopted the DOJ's suggestions discussed in Part II (E) above. Initially, California began its reform by prioritizing which cases would receive interpreters at no cost.⁹⁵

Additionally, the Judicial Council plans to improve early identification of LEP litigants while judicial officers undergo training on all language access policies to properly assist those individuals.⁹⁶ For instance, the Judicial Council is developing a toolkit that includes "I Speak" cards, which court personnel will use at various points in the courts.⁹⁷ To accommodate speakers of non-written languages, the Judicial Council is exploring alternative technological ways to aid early identification of language needs.⁹⁸ Education for judicial and

⁹⁴ Assemb. B. 1657, 2013-14 Leg., Reg. Sess. (Cal. 2014).

⁹⁵ See EVID. § 756(b).

⁹⁶ Executive Summary, *supra* note 11, at 4-5.

⁹⁷ LANGUAGE ACCESS PLAN IMPLEMENTATION TASK FORCE, JUDICIAL COUNCIL OF CAL., RECOMMENDATIONS PROGRESS REPORT FOR OCTOBER 19, 2015 2 (2015), <http://www.courts.ca.gov/documents/LAPITF-20151019-Progress-Report.pdf> [hereinafter Progress Report].

⁹⁸ *Id.*

court staff will now include a revised course on interpretation, and a group of experienced judges will review the educational content and make recommendations.⁹⁹

Finally, the Judicial Council promises to secure adequate funding without reducing other court services.¹⁰⁰ An online platform making interpretation tools available to courts will further aim to minimize costs.¹⁰¹ The Judicial Council is even considering providing courts with written guidance on pursuing other funding opportunities.¹⁰²

By following the DOJ's recommendations, California seems to have satisfied its duties under Title VI.¹⁰³ In order to fully comply with Title VI, however, the Judicial Council will have to ensure that sufficient funds are appropriated so that all civil litigants—not just those within the first few levels of priority in section 756—will have free interpreters.

IV. THE GOOD, THE BAD, AND THE UGLY: THE IMPACT & SIGNIFICANCE OF THIS LEGISLATION

⁹⁹ *Id.* at 15.

¹⁰⁰ Executive Summary, *supra* note 11, at 5.

¹⁰¹ See Progress Report, *supra* note 97, at 19.

¹⁰² *Id.* at 17.

¹⁰³ See *supra* Section II(C).

Bill 1657 protects civil litigants' abilities to understand court proceedings.¹⁰⁴ But Bill 1657 will undoubtedly also have an impact on state court funding.¹⁰⁵ Already, California has significantly more interpreters than any other state, and court interpretation services cost over \$92 million per year.¹⁰⁶ Allocating more money to interpretation might burden California's already strained court budget. In recent years, California has had to close courthouses and lay off employees due to budget problems.¹⁰⁷ In order to fully understand the impact or effectiveness the law will have on California, it is important to consider Bill 1657 in the context of similar laws in similarly situated states.

A. Other States' Laws

¹⁰⁴ See *supra* Part III(B).

¹⁰⁵ See Thanawala, *supra* note 9 ("[T]he courts [will] need more than the \$92 million they were spending [on court interpreters].").

¹⁰⁶ Executive Summary, *supra* note 11, at 5.

¹⁰⁷ Corina Knoll, *After Federal Probe, State Examines Need for Civil Court Interpreters*, L.A. TIMES (Nov. 4, 2014), <http://www.latimes.com/local/countygovernment/la-me-language-access-courts-20141105-story.html>.

Before 2014, forty states already provided court interpreters in civil cases, including Arizona and Texas.¹⁰⁸ Because the foregoing states also share a border with Mexico, it is particularly important to compare these states' models with California's new legislation and see what should be implemented or avoided based upon the results in those states.

1. Arizona¹⁰⁹

Arizona takes a much less complicated approach to appointment of court interpreters than its neighbor, California, does: "The court may when necessary appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to the same penalties for disobedience."¹¹⁰ Two Arizona evidence rules refine this statute.¹¹¹ First, the interpreter is subject to the qualification rules relating to experts and to an oath that the translation will be true.¹¹² Second, the trial

¹⁰⁸ See Thanawala, *supra* note 9.

¹⁰⁹ 9 percent of Arizona residents are LEP, which exceeds the nationwide proportion of 8 percent. Zong & Batalova, *supra* note 12.

¹¹⁰ Ariz. Rev. Stat. § 12-241 (1955). Deaf persons are guaranteed interpreters by Arizona Revised Statute section 12-242 (2000).

¹¹¹ State v. Burris, 643 P.2d 8, 13 (Ariz. Ct. App. 1982).

¹¹² Ariz. R. Evid. 604.

court has discretion to decide whether the interpreter is qualified based upon arguments regarding competency, and the accuracy of the interpretation may be impeached and determined by the jury.¹¹³ To implement these laws, each court must create its own language access plan.¹¹⁴ Along with other city departments, Arizona's capital's courts have spent about \$260,000 in a year on court interpretation.¹¹⁵

In contrast, California purposely elaborates on how courts should approach a case where an interpreter might be necessary. California's more complicated model, however, is preferable. Where courts have too much discretion, such as the Superior Court did before Bill 1657, only a small subset of LEP individuals benefit.¹¹⁶ For instance, the government routinely offered Spanish-speaking interpreters in many civil cases in the Superior Court, like in Halmoni's hearing, but rarely offered

¹¹³ Ariz. R. Evid. 702.

¹¹⁴ Language Access Planning, Ariz. Sup. Ct. Admin. Order No. 2011-96 (Sept. 12, 2011).

¹¹⁵ Eugene Scott, *Phoenix Aims to Balance Cost, Need for Interpreters*, ARIZ. REPUBLIC (Sept. 2, 2014), <http://www.azcentral.com/story/news/local/phoenix/2014/09/01/phoenix-cost-public-need-interpreters/14948509/>.

¹¹⁶ See LAFLA Complaint, *supra* note 1, at 3-4.

interpreters of other languages.¹¹⁷ Moreover, the Judicial Council created a statewide language access plan to systematically set standards for every court in the state.¹¹⁸ This plan will once again be more effective than leaving too much discretion to individual courts because consistent application of interpretation services is in the best interest of Californians.¹¹⁹

2. Texas¹²⁰

The state of Texas gives special consideration to the Spanish speakers in its counties bordering Mexico.¹²¹ In those counties, interpreters can be appointed on a full-time or part-

¹¹⁷ *Id.* at 4.

¹¹⁸ JUDICIAL COUNCIL OF CAL., STRATEGIC PLAN FOR LANGUAGE ACCESS IN THE CALIFORNIA COURTS: EXECUTIVE SUMMARY (2015), <http://www.courts.ca.gov/documents/LAP-Executive-Summary.pdf>.

¹¹⁹ See Kevin G. Baker, *Bill Analysis*, Assemb. B. 1657, at 3 (Cal. 2014).

¹²⁰ About 15 percent of Texas residents are LEP. Abel & Ho, *supra* note 16, at 7 (citing the 2005 census). Although Texas has the second highest LEP population in the country, California has 5 percent more LEP residents than Texas and over 10 percent more than the nationwide proportion. Zong & Batalova, *supra* note 12.

¹²¹ TEX. CIV. PRAC. & REM. CODE ANN. § 21.021 (West 1985).

time basis to serve the court.¹²² Courts may also appoint an interpreter sua sponte or in response to a party's motion.¹²³ After appointing an interpreter, Texas courts have the discretion to appropriate government funds to compensate interpreters or to require one or more of the parties to cover the fee.¹²⁴ Because the Texas judiciary is non-unified, interpreters are not paid by the state.¹²⁵ Instead, each local government must pay its own interpreters' fees or require the

¹²² TEX. CIV. PRAC. & REM. CODE ANN. § 21.022 (West 1985).

¹²³ TEX. GOV'T CODE ANN. § 57.002 (West 2013). Although the statutory language is that a "court shall appoint a certified court interpreter . . . if a motion is filed," courts and the Attorney General have interpreted this statute to be discretionary. Cochrane, *supra* note 7, at 64.

¹²⁴ Tex. R. Civ. P. 183. Deaf parties are guaranteed interpreters by Texas Civil Practice & Remedies Code section 21.002 (Vernon 1985).

¹²⁵ TEX. JUDICIAL BRANCH, *Translation & Interpretation* (2016), <http://www.txcourts.gov/programs-services/translation-interpretation.aspx>.

parties to do so independently.¹²⁶ In a single year, a single county in Texas spent almost \$63,000 on court interpreters.¹²⁷

Similarly, California could benefit from full-time court interpreters in its counties where the LEP population is greatest. Such counties might be Santa Clara, San Francisco, Los Angeles, San Mateo, Imperial, Alameda, and Orange where immigrants represent more than 30 percent of the population.¹²⁸ In fact, the Judicial Council and the courts plan to emulate the Texas model by proactively recruiting new interpreter staff members.¹²⁹ However, qualification of staff interpreters should not be limited to a single non-English language.¹³⁰ Courts should hire interpreters for all the languages most frequently needed

¹²⁶ *Id.*

¹²⁷ Logan G. Carver, *Court Interpreters Translate into High Cost for Lubbock County*, LUBBOCK-AVALANCHE J. (Jan. 15, 2012, 1:10 AM), <http://lubbockonline.com/crime-and-courts/2012-01-14/court-interpreters-translate-high-cost-lubbock-county#> (noting the 2011 court interpretation expenditure in Lubbock, Texas).

¹²⁸ Mejia & Johnson, *supra* note 26.

¹²⁹ Executive Summary, *supra* note 11, at 4.

¹³⁰ *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 21.023 (West 1985) (Texas border county interpreters must be competent to speak *Spanish* and English) (emphasis added).

in the respective county's population.¹³¹ Notably, the state pays for court interpreters through the Trial Court Trust Fund,¹³² alleviating the burden for a county to have to pay for interpreters itself, as is Texas's practice.¹³³ State—rather than local—funding ensures equal access to the courts because counties that would otherwise be underfunded if expected to independently compensate interpreters cannot fall short. The Judicial Council must find a way to provide interpreters statewide, regardless of the financial state of any particular courthouse.

B. The Controversy Surrounding Civil Litigants' Rights

At first glance, the inclination to classify litigants based on the type of legal proceeding might seem logical and fair. Criminals may be subject to death, imprisonment, fine, loss of civil rights, property forfeiture, license revocation, or the duty to register with authorities.¹³⁴ They are subject to

¹³¹ For example, California could focus on hiring staff interpreters for Spanish, Chinese, Vietnamese, Tagalog, and Korean speakers. See *supra* Part (II) (A).

¹³² CAL. GOV'T CODE § 68085 (West 2013).

¹³³ See TEX. JUDICIAL BRANCH, *supra* note 125.

¹³⁴ 3 B.E. WITKIN & NORMAN EPSTEIN, WITKIN & EPSTEIN, CAL. CRIM. LAW PUNISHMENT § 5 (4th ed. 2012).

these dangers through involuntary prosecution while civil litigation is generally considered voluntary.¹³⁵ However, such assumptions are imprecise. First of all, civil defendants generally do not voluntarily enter into litigation.¹³⁶ Second, when parental rights or safety from an attacker are at stake, litigation can hardly be considered voluntary. These plaintiffs, like Mom and Halmoni, need a court to intervene and protect their rights.

Ultimately, when the dangers resulting from an unfavorable verdict cease to separate the criminal defendant's situation from the civil litigant's, the logic justifying the rights for the former but not the latter falls away. As discussed in Part II (A) (1) above, the Due Process Clause assigns criminal defendants the right to counsel when they are at risk of losing life, liberty, or property. If this right exists at all in civil cases, it has only been when the litigant faced incarceration.¹³⁷ Still, civil litigants who are at risk of losing liberty do not

¹³⁵ *Cochrane*, *supra* note 7, at 57.

¹³⁶ *But see*, e.g., CAL. CIV. PROC. CODE § 387 (West 1995) (permitting a person to intervene as a defendant).

¹³⁷ *Turner v. Rogers*, 131 S. Ct. 2507,2517 (2011).

have the automatic due process right to counsel that their criminal defendant counterparts do.¹³⁸

That the U.S. Constitution provides a criminal, but not civil, right to counsel is important to the exploration of the right to court interpretation because the imbalance between civil and criminal rights has deep roots in the law. However, denying rights to a litigant simply because the case is civil rather than criminal seems counterintuitive when the policy supporting the right in the criminal case is the same. Although the Constitution only protects criminal litigants' rights,¹³⁹ the risk of losing liberty or property potentially makes these civil cases essentially quasi-criminal instead. Nevertheless, courts continue to treat civil cases—even quasi-criminal ones—differently,¹⁴⁰ and laws, like California's new one, are important to change how courts in the future will treat civil litigants.

V. PROPOSAL

¹³⁸ *Id.* at 2520 (“[T]he Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration.”).

¹³⁹ See *supra* Part II(A)(1).

¹⁴⁰ See, e.g., *Turner*, 131 S. Ct. at 2520.

California courts now face the challenge of implementing Bill 1657. With such great need for interpreters,¹⁴¹ California will have to develop new strategies to satisfy the demand. In practice, technological interpretation could help California immediately and into the future by minimizing court costs. Statutorily though, California might want to reconsider which cases will receive interpreters first in order to maximize access to the courts for the people who need it most.

A. A Permanent Solution: Remote Interpreting Technology

Technology could alleviate some of the costs that California now faces in providing interpreters to more of the civil cases at lower priority on section 756's list. Not only could it help California realize the 2017 goal for free court interpreters more quickly, technology could also save the state money going forward, money that could be used in other areas of need in the courts. For instance, using remote technology would allow interpreters to devote all of their time to interpreting rather than wasting time—and money—traveling between locations.¹⁴² An interpreter could remain at the same location

¹⁴¹ See *supra* Part (IV).

¹⁴² Jessica Sperling, *Communicating More for Less: Using Translation and Interpretation Technology to Serve Limited English Proficient Individuals*, MIGRATION POLICY INST. 1, 4 (Jan.

all day and provide services for cases all over. That interpreter could also handle a caseload that might otherwise require additional interpreters simply because of the distance between courthouses.

Arizona has already implemented video remote interpreting technology in various courtrooms across the state.¹⁴³ Video remote interpreting allows the party to see and hear the interpreter while the interpreter can hear everything going on in the courtroom from audiovisual equipment that allows them to be in distinct locations.¹⁴⁴ From an interpreter room in Phoenix equipped with video equipment, interpreters can connect with courtrooms in distant counties.¹⁴⁵

2011), <http://www.migrationpolicy.org/research/communicating-more-less-using-translation-and-interpretation-technology-LEP>.

In its investigation of the Los Angeles Superior Court, the DOJ noted that litigation could be delayed because non-Spanish interpreters often must travel long distances to serve litigants. U.S. Dep't of Justice, *supra* note 45, at 5.

¹⁴³ ARIZ. JUDICIAL BRANCH, *Video Remote Interpreting* (2016), <http://www.azcourts.gov/interpreter/Video-Remote-Interpreting>.

¹⁴⁴ Sperling, *supra* note 142, at 5.

¹⁴⁵ ARIZ. JUDICIAL BRANCH, *supra* note 143.

Likewise, Texas provides free Spanish-language remote interpretation by telephone or video.¹⁴⁶ Notably, Texas prioritizes resources to rural district and county-level courts before all other courts and then to cases in the following order: hearings on protective orders; indigent criminal defendants and juvenile respondents; probate and mental health cases; family law cases; civil cases; and other cases.¹⁴⁷ This prioritization is reminiscent of that in section 756,¹⁴⁸ so California might be wise to adopt a similar system to manage its great need for interpreters.

Texas differs significantly from Arizona though in that Texas's remote interpretation is consecutive¹⁴⁹ rather than

¹⁴⁶ OFFICE OF COURT ADMIN., TEX. JUDICIAL BRANCH, *Texas Court Remote Interpreter Service: Policies and Procedures*, (2015), <http://www.txcourts.gov/media/907149/TCRIS-Policies.pdf>.

¹⁴⁷ *Id.* at 2.

¹⁴⁸ See CAL. EVID. CODE § 756(b) (West 2015).

¹⁴⁹ Consecutive interpreting involves speakers pausing periodically to give the interpreter the chance to relay the words in the language that the other understands. Sperling, *supra* note 142, at 2. Simultaneous interpreting does not require such pauses, which in turn requires a more skilled interpreter. *Id.*

simultaneous due to insufficient funding.¹⁵⁰ Any technological interpreting should preserve simultaneity—like Arizona’s—because consecutive interpreting would impracticably delay court proceedings by periodically interrupting the flow of dialogue.¹⁵¹ Fortunately, remote simultaneous interpreting technology is easy to use.¹⁵² The Judicial Council has already recognized the use of video remote interpreting of sign language in court.¹⁵³ Courts could easily appropriate this technology for LEP parties, saving money that would otherwise be required to invest in new equipment.

Costs for remote interpreting technology may vary greatly depending on the court’s specific needs. For instance, a court

¹⁵⁰ Compare OFFICE OF COURT ADMIN., *supra* note 146, at 2 (explaining that remote interpretation services will only be consecutive), with ARIZ. JUDICIAL BRANCH, REMOTE INTERPRETER TIP SHEET (2013), http://www.azcourts.gov/Portals/168/RemoteInterpreterTipSheet_9.2013.pdf (reminding remote interpreters to know when to use simultaneous interpretation).

¹⁵¹ Sperling, *supra* note 142, at 5.

¹⁵² *Id.*

¹⁵³ See JUDICIAL COUNCIL OF CAL., RECOMMENDED GUIDELINES FOR VIDEO REMOTE INTERPRETING (VRI) FOR ASL-INTERPRETED EVENTS, (2012), <http://www.courts.ca.gov/documents/CIP-ASL-VRI-Guidelines.pdf>.

could rent a simultaneous interpreting telephone and related equipment for ten interpreters for roughly \$10,000 per month over a minimum two-year commitment.¹⁵⁴ One corresponding basic video version would cost \$3,500 to purchase.¹⁵⁵ Alternatively, video-communication systems on computers, such as Skype or Apple's FaceTime, could allow for less expensive interpretation than specialized equipment would.¹⁵⁶

California would benefit greatly from the use of remote interpreting technology. In secluded courthouses that need interpreters, remote interpretation would be particularly cost-effective because a single interpreter could service multiple cases without delay due to travel time. The Judicial Council should initially set up remote interpreting technology in those isolated counties and then expand to other areas where hiring staff interpreters would be inefficient.¹⁵⁷

B. A Temporary Solution: Subject Matter-Based Priority in
Addition to Need-Based Priority

¹⁵⁴ Sperling, *supra* note 142, at 5.

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *See id.*

¹⁵⁷ For example, it might be inefficient to hire a staff interpreter in a courthouse with infrequent need for interpretation.

In the long term, California's law giving civil litigants interpreters for free regardless of their financial ability to pay¹⁵⁸ is the best decision. Extending court-appointed interpreters to all would eliminate the bias that would usually accompany a privately funded interpreter.¹⁵⁹ In the short term, however, looking at a litigant's financial situation might be wise.

If California initially prioritized cases eligible for court interpretation by whether the litigant was indigent or not, as well as by the type of case, more individuals would have meaningful access to the courts. Those individuals who could pay for their own interpreters would do so, while those who could not afford an interpreter would be provided one. In both situations, the right to an interpreter would materialize.

Even without a priority basis shift, section 756 should be amended to enumerate a couple of troubling areas of law that might otherwise be lost in the catchall subdivision at the bottom of the priority list. The first area that should be explicitly included is personal injury, which should be given

¹⁵⁸ See *supra* Part III(B).

¹⁵⁹ T. Caroline Briggs-Sykes, Note, *Lost in Translation: The Need for a Formal Court Interpreter Program in Alaska*, 22 ALASKA L. REV. 113, 131 (2005).

the eighth priority for interpreters, following “[a]ll other actions and proceedings related to family law”¹⁶⁰ and preceding “[a]ll other civil actions or proceedings.”¹⁶¹ With medical bills piling up and lost wages slipping away, victims need access to the courts. Contingency fee agreements allow parties, who might not otherwise be able to afford to, to defend their rights.¹⁶² LEP victims in these cases likewise need interpreters. Section 756 should allow them to defend their rights by giving them a better chance at receiving an interpreter.

Similarly, personal injury defendants need interpreters. Generally, procedural rules should not favor a plaintiff over a defendant.¹⁶³ Lady Justice wears a blindfold. She does not know whom the plaintiff or the defendant is—who stands in greater need for an interpreter in any case. Moreover, declaratory judgment actions shatter the traditional notion of plaintiff and

¹⁶⁰ CAL. EVID. CODE § 756(b)(7) (West 2015).

¹⁶¹ *Id.* § 756(b)(8).

¹⁶² See *Newman v. Freitas*, 61 P. 907, 910 (Cal. 1900).

¹⁶³ See generally CAL. R. CT. 8.212(a) (setting deadlines for appellant’s and respondent’s briefs irrespective of their identities as plaintiff or defendant).

defendant.¹⁶⁴ The defendant being sued for declaratory relief might be the victim of the personal injury. Accordingly, California should provide a court interpreter to whichever party needs one, regardless of the side of the courtroom where the party sits.

Another area of law that should be prioritized higher is employment law, which should be given the ninth priority for interpreters, following personal injury cases and preceding the final catchall subdivision of section 756. Employees needing to enforce their right to minimum wage might often be LEP individuals. After all, many immigrants tell stories of restaurants that would pocket their tips and carwashes that would short paychecks to retaliate against employees who spoke out.¹⁶⁵

¹⁶⁴ See John Dellaportas & Bernadette McGlynn Reilly, *Maintaining Order in Declaratory Judgment Actions*, 235 N.Y. L.J. 1, 1 (2006) (“[T]he party who ordinarily would have been the defendant, by virtue of winning the race to the courthouse, instead becomes the plaintiff to a declaratory judgment action.”).

¹⁶⁵ Steven Cuevas, *Enforcement of New L.A. Minimum Wage Law Will Be Challenging*, KQED NEWS (July 22, 2015), <http://ww2.kqed.org/news/2015/07/22/enforcement-of-new-l-a-minimum-wage-law-will-be-challenging>.

Hopefully, California appropriates sufficient funding quickly so that it does not have to utilize the priority system for long but rather can afford to give all parties court interpreters. In the meantime though, the state cannot forget about personal injury and employment law parties by leaving them with the last chance to get free interpreters.

VI. CONCLUSION

Interpreters are essential to provide LEP individuals meaningful access to the courts. Without being able to understand the proceedings or effectively express themselves, parties cannot help their case, whether assisted by counsel or appearing in pro per. Although the outcome of a case should not concern whether a party speaks English, how could it not when the proceedings are held in English? Court interpreters correct this problem by effectively allowing parties to communicate in English thereby giving them the ability to understand the nature of the legal proceeding.

While criminal defendants have long held the right to court interpretation in the U.S. Constitution, civil litigants have only found this right in certain jurisdictions depending upon the relevant statutes. California's statutes come after many litigants, like Halmoni and Mom, were unable to adequately participate in court proceedings. Now the most language-sensitive cases, according to California, will be given

interpreters first until the state can afford to provide interpreters in all cases—a feat that will hopefully be met by 2017.

Despite the controversy of giving civil litigants rights, California met the suggestions of the DOJ and measured up to two other states bordering Mexico. However, California could do more by implementing interpretation technology and reassessing to whom it will give interpreters first. Nevertheless, California has made great progress, and indiscriminate access to court interpreters is just on the horizon.