

INTERPRETING INJUSTICE: THE DEPARTMENT OF HOMELAND SECURITY’S FAILURE TO COMPLY WITH FEDERAL LANGUAGE ACCESS REQUIREMENTS IN IMMIGRATION DETENTION

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I. INTRODUCTION

Pablo Gracida-Conte died in Immigration and Customs Enforcement (ICE) custody from a treatable heart condition on October 30, 2011.¹ He was a Mexican man who spoke the indigenous language Mixteco Bajo.² When he died, Mr. Gracida-Conte had been detained for 142 days and had been complaining of severe medical symptoms.³ The Department of Homeland Security (DHS) Report on Mr. Gracida-Conte’s death concedes that he could have survived had he received adequate medical assistance in a timely manner.⁴ The report concludes, “[L]anguage and cultural barriers were factors in the failure of [detention] staff to address Gracida’s medical needs . . . it would have been reasonable to expect [detention] staff to take steps to arrange for a Mixteco Bajo interpreter. However, there is no evidence that this ever occurred.”⁵ Mr. Gracida-Conte was part of the sizeable indigenous

¹ See American Civil Liberties Union, Detention Watch Network, and National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* 10 (February 2016) [hereinafter *Fatal Neglect: How ICE Ignores Deaths in Detention*], http://immigrantjustice.org/sites/immigrantjustice.org/files/Fatal%20Neglect_ACLU%2C%20DWN%2C%20NIJC.pdf (<https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>), archived at <https://perma.cc/E8TP-4BVJ> (reporting on how egregious violations of medical care standards in ICE immigration detention were a major factor in eight detainee deaths). Mr. Gracida-Conte was detained at the Eloy Detention Center in Eloy, Arizona, which is run by the private contractor, Corrections Corporation of America. See *id.* at 10. He was the tenth detainee to die at that facility. See *id.* at 3.

² See *id.* at 10.

³ See *id.*

⁴ See Dep’t of Homeland Security, *Death Investigation for Pablo Gracida-Conte* 12 (Aug. 15, 2012) <https://www.documentcloud.org/documents/2695513-Gracida-Conte-%20Pablo.html>, archived at <https://perma.cc/BY8A-D6XN> (last visited Feb. 6, 2017) (concluding that Mr. Gracida-Conte’s death would have been preventable if he received appropriate medical care in detention).

⁵ Detention center management conceded that their language line service, Interpretalk, has Mixteco Bajo interpreters. *Id.* at 14. Nevertheless, ICE Health Service Corps staff was unable to reach a Mixteco Bajo interpreter and instead only spoke Spanish with Mr. Gracida-Conte. See *id.* While the nurse who conducted Mr. Gracida-Conte’s initial intake did not record his language, there are numerous references to his language throughout his file. See *id.* at 4–6.

Mixtec community in the United States.⁶ While ICE medical care standards require language assistance for non-English speaking detainees, the inspectors did not cite the detention center as noncompliant for failing to use an interpreter for Mr. Gracida-Conte.⁷ He is one of 166 detainees who have died in ICE custody since 2003.⁸

DHS has faced ongoing criticism in recent years for the deplorable conditions in many of its immigration detention centers, as overseen by ICE.⁹ Fatally negligent medical care,¹⁰ sexual abuse,¹¹ inaccessible legal services,¹² and solitary confinement¹³ are among the issues plaguing immigration detention centers across the nation. Barriers to language access compound all of these problems for most immigrant detainees who are Limited English Profi-

⁶ See Blake Gentry, *Exclusion of Indigenous Language Speaking Immigrants in the U.S. Immigration System, A Technical Review*, AMA CONSULTANTS (2015) 18, http://www.amaconsultants.org/uploads/Exclusion_of_Indigenous%20Languages_in_US_Immigration_System_19_June2015version_i.pdf, archived at <https://perma.cc/W7WY-YPFD> (reporting that there were at least 180,000 Mixtec speakers in the United States in 2010 and that the population of Mixtec speakers is growing in Mexico).

⁷ *Id.* at 14.

⁸ See Immigration and Customs Enforcement, *List of Deaths in ICE Custody* [hereinafter *List of Deaths in ICE Custody*], https://www.ice.gov/sites/default/files/documents/FOIA/2016/detaineeDeaths11_28_2016.pdf (last visited Feb. 5, 2017) (listing the full name, age, country of origin, detention center, location of death, and cause of death of detainees in most cases).

⁹ See U.S. Comm'n on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* 125 (Sept. 2015) [hereinafter *U.S. Commission on Civil Rights Report*], http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf, archived at <https://perma.cc/6YNL-ESYE> (finding that “DHS, its component agencies, and contractors detain undocumented immigrants in a manner inconsistent with civil detention and instead detain [them] like their criminal counterparts in violation of detained immigrants’ Fifth Amendment Rights”).

¹⁰ See Human Rights Watch, *US: Deaths in Immigration Detention- Newly Released Records Suggest Dangerous Lapses in Medical Care*, (July 7, 2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention> (reporting that substandard medical care and violations of detention standards probably contributed to seven of eighteen detainee deaths between 2012-2015); *Fatal Neglect: How ICE Ignores Deaths in Detention*, *supra* note 1; Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody* 47 (Feb. 2009), https://www.prisonlegalnews.org/media/publications/dying_for_decent_care_fiac_report_on_immigration_detainee_medical_care_2009.pdf (finding that without a competent interpreter “health issues are more likely to be ignored, misdiagnosed and/or incorrectly treated” for detainees who do not speak English); see also, Human Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention* 1-2 (Mar. 2009), https://www.hrw.org/sites/default/files/reports/wrd0309web_1.pdf, archived at <https://perma.cc/8KNA-528J> (reporting on systematic medical abuses including life-threatening “delays in medical treatment and testing” and “the shackling of pregnant women during transport”).

¹¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE “Highlights” (2013), <http://www.gao.gov/assets/660/659145.pdf>, archived at <https://perma.cc/JD83-7JXS> (reviewing 215 sexual abuse and assault allegations reported to ICE headquarters from October 2009 through March 2013 and finding that ten ICE facilities had failed to report forty percent of total allegations).

¹² See *U.S. Comm’n on Civil Rights Report*, *supra* note 9, at 125 (finding that “[p]ractices at detention facilities, including requiring detainees to pay for telephone calls to their attorneys, inhibit the detainees’ Due Process rights, including access to counsel”).

¹³ See *id.* at 124 (reporting that some ICE facilities are “overusing solitary confinement for LGBT detainees”).

cient (LEP)¹⁴ and have difficulty communicating with detention center staff.¹⁵

Elana, an indigenous Guatemalan mother who spoke Mam, the Mayan language of half a million Guatemalans, was detained with her two-year-old son for over three weeks without language access in ICE family detention.¹⁶ Even though Elana informed detention center staff that she spoke Mam, staff never used a Mam interpreter or gave her documents in Mam during her time in detention.¹⁷ Instead, ICE officers interacted with her in Spanish, a language she does not speak, to which she could only respond with gestures.¹⁸ ICE's failure to use an interpreter resulted in prolonged detention for Elana and her child as well as delayed legal representation.¹⁹ Moreover, ICE did not provide Elana with an interpreter when she sought medical treatment for herself and her son.²⁰ Rather, medical personnel gave Elana a check-up in Spanish that she did not understand, and gave her child five vaccinations without her consent.²¹

The cases of Elana, Mr. Gracida-Conte, and others in immigration detention underscore the needs of LEP detainees as well as the detrimental effects of DHS and ICE's failure to comply with federal language access policy.²² The recent surge of mothers and children fleeing violence from

¹⁴ LEP individuals are defined as people "who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English." 1 Limited English Proficiency.gov, *Commonly Asked Questions and Answers Regarding Executive Order 13166*, https://www.lep.gov/faqs/042511_Q&A_LEP_General.pdf (last visited Feb. 7, 2017) [hereinafter *Commonly Asked Questions and Answers Regarding Executive Order 13166*].

¹⁵ See *U.S. Comm'n on Civil Rights Report*, *supra* note 9, at 125 (reporting that "DHS does not sufficiently train employees to interact with detainees who do not speak English or Spanish and who face other communication barriers because of political, cultural, and socio-economic differences"); see also Molly Hennessy-Fiske, *Latest Complaint on Family Detention: Few Spanish-Speaking Staffers*, L.A. TIMES, Aug. 6, 2015, <http://www.latimes.com/nation/immigration/la-na-family-detention-spanish-20150806-story.html>, archived at <https://perma.cc/WCG6-3UHQ> (reporting on lawsuits alleging that inadequate services at ICE detention centers are linked "in part, to a basic problem: Many detention center staff members do not speak Spanish").

¹⁶ See American Immigration Lawyers Association, *CRCL Complaint on Challenges Faced by Indigenous Language Speakers in Family Detention* 5 (Dec. 10, 2015) [hereinafter *CRCL Complaint*], <http://www.aiala.org/advo-media/press-releases/2015/crcl-complaint-challenges-faced-family-detention>, archived at <https://perma.cc/Y9YJ-RH5P> (last visited Feb. 21, 2017).

¹⁷ See *id.* Elana and her son were detained in ICE family detention at South Texas Family Residential Center in Dilley, Texas, which is operated by the private contractor, Corrections Corporation of America; see also Corrections Corporation of America, *South Texas Family Residential Center*, <https://www.cca.com/facilities/south-texas-family-residential-center>, archived at <https://perma.cc/7AFG-5ZZK> (last visited Feb. 6, 2017) (explaining that the detention center has a capacity of 2,400 immigrant women and children).

¹⁸ *CRCL Complaint*, *supra* note 16, at 5.

¹⁹ See *id.*

²⁰ See *id.* at 6.

²¹ See *id.*

²² See *id.*; see also *Fatal Neglect: How ICE Ignores Deaths in Detention*, *supra* note 1 at 5 (reporting that fifty-six detainees have died in immigration detention during the Obama administration).

Central America highlights immigration detention conditions in the United States.²³ In response to the influx of families, DHS opened new family detention facilities in Texas, overseen by ICE.²⁴ In December 2015, the CARA Family Detention Pro Bono Project (CARA)²⁵ filed a complaint against DHS's Office of Civil Rights and Civil Liberties (CRCL). In the complaint, CARA alleged a lack of adequate interpretation and translation services for indigenous language speakers in ICE family detention facilities.²⁶ Elana and her son are plaintiffs in the complaint.²⁷

Increasing language access for LEP individuals will be a challenge under the new Trump administration.²⁸ Just days after his inauguration, President Trump mandated a sweeping expansion of immigration detention through an Executive Order,²⁹ and the White House removed all Spanish-language content from its website.³⁰ As the Trump Administration continues

²³ See AMERICAN IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES, AND RESPONSES 1 (June 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf, archived at <https://perma.cc/CC9N-6K3H> (finding that between 2013 and 2015, Customs and Border Patrol apprehended 85,956 unaccompanied immigrant children from Central America and Mexico at the southwest border as well as 43,338 “family units,” or children traveling with a parent or legal guardian).

²⁴ In July 2014, DHS opened a “makeshift” family detention center at the Federal Law Enforcement Training Center in Artesia, New Mexico, but closed it November 2014 and transferred the detainees to the Dilley facility. See *id.* at 10–12. Currently, private prison companies operate the South Texas Family Residential Center in Dilley, Texas and Karnes County Residential Center in Karnes City, Texas. See *id.* at 10. Corrections Corporation of America (CCA) operates the Dilley center under ICE contract. See *supra* note 17. GEO Group, Inc. operates the Karnes center under ICE contract. See *infra* note 142. In December 2016, a federal judge found that the conditions at Karnes and Dilley were unfit for children and invalidated the detention centers’ licenses, prompting the release of hundreds of detained families. See Nigel Duara, *Hundreds of women and children are released from Texas immigration detention*, L.A. TIMES, (Dec. 6, 2016), <http://www.latimes.com/nation/la-na-texas-immigration-detention-release-20161204-story.html>.

²⁵ Since April 2015, CARA has provided legal representation to hundreds of indigent Central American mothers and children detained in ICE facilities in Texas. *CRCL Complaint*, *supra* note 16, at 1. CARA is a collaboration of four organizations: Catholic Legal Immigration Network, Inc. (CLINIC), American Immigration Lawyers Association (AILA), Refugee and Immigrant Center for Education and Legal Services (RAICES), and the American Immigration Council. *Id.*

²⁶ See *id.*

²⁷ *Id.* at 5.

²⁸ See Ilan Stavans, Opinion, *Trump, the Wall, and the Spanish Language*, N.Y. TIMES, (Jan. 30, 2017) https://www.nytimes.com/2017/01/30/opinion/trump-the-wall-and-the-spanish-language.html?_r=0 (discussing President Trump’s rebuke of presidential candidate Jeb Bush for speaking Spanish and the White House’s decision to strip Spanish-language content from its website).

²⁹ See The White House.gov, *Executive Order: Immigration Enforcement Improvements*, Sec. 5(a): Detention Facilities (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> (mandating that DHS “allocate all legally available resources to immediately construct, operate, or control facilities to detain individuals at or near the land border with Mexico”).

³⁰ See Ed O’Keefe, *Looking for a Spanish version of WhiteHouse.gov? No existe-todavía*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/looking-for-a-spanish-version-of-whitehouse-gov-ya-no-existe/?utm_term=.13686779883b

to ramp up ICE raids³¹ and prioritize detention and deportation, ensuring language access to LEP detainees is more important than ever.

Civil rights laws and federal language access policy set the requirements that agencies, including DHS, must follow to prevent discrimination against LEP individuals in their federally funded programs and activities.³² Title VI of the Civil Rights Act of 1964 (Title VI) prohibits national origin discrimination in federally funded programs and activities.³³ Consistent with the goals of Title VI, former President Clinton passed Executive Order 13166 (EO 13166) in August 2000 mandating that each federal agency prepare a plan to improve access to federally funded programs for LEP individuals, thereby increasing language access and reducing national origin discrimination.³⁴ Furthermore, EO 13166 instructed agencies to follow the Department of Justice (DOJ) LEP Guidance document, which clarified the standards for measuring required language access compliance.³⁵ The DOJ LEP Guidance articulates a four-factor balancing test to determine whether a federal agency or federal assistance recipient has taken “reasonable steps” to provide LEP individuals with “meaningful access” to its programs and activities, thus determining agency compliance with both EO 13166 and Title VI.³⁶

(reporting that the Trump administration no longer has a Spanish-language version of the White House website, in contrast to both the Obama and George W. Bush administrations).

³¹ See Tal Kopan, *ICE operations net nearly 700 arrests, DHS says*, CNN, (Feb. 13, 2017) <http://www.cnn.com/2017/02/13/politics/ice-raids-enforcement-arrest-numbers/> (reporting on more than 680 arrests in one week across the United States); Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. One Week*, N.Y. TIMES, (Feb. 12, 2017) https://www.nytimes.com/2017/02/12/nyregion/immigration-arrests-sanctuary-city.html?_r=0 (reporting 600 hundred arrests in one week, and specifically on home arrests and detentions in New York City).

³² See generally Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C.A. § 2000d (West 2015) [hereinafter *Title VI*] (mandating that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”); see also Exec. Order No. 13166, 65 Fed. Reg. 50, 121, (Aug. 11, 2000) [hereinafter *EO 13166*] (mandating that all federal agencies take reasonable steps to ensure that LEP individuals have meaningful access to federal programs and activities, in compliance with Title VI’s prohibition on national origin discrimination); see also U.S. Dep’t. of Justice, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance [hereinafter *DOJ LEP Guidance*], 65 Fed. Reg. 50, 123–24 (Aug. 16, 2000) (extending guidance to federal agencies); see also U.S. Dep’t. of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41, 455 (June 18, 2002) [hereinafter *DOJ Recipient Guidance*] (extending the DOJ LEP Guidance to federal financial assistance recipients).

³³ *Title VI*, *supra* note 32.

³⁴ *EO 13166*, *supra* note 32.

³⁵ *DOJ LEP Guidance*, *supra* note 32.

³⁶ See *id.* (establishing the four-factor balancing test); see also *DOJ Recipient Guidance*, *supra* note 32 (extending the four-factor balancing test to federal financial assistance recipients).

For the last fifteen years, DHS has routinely failed to comply³⁷ with the language access requirements of EO 13166.³⁸ ICE, the DHS component agency that oversees immigration detention, is also noncompliant with EO 13166 and the DOJ's LEP Guidance. Based on the DOJ's four-factor test, neither DHS nor ICE has taken reasonable steps to provide LEP immigrant detainees with meaningful access to essential programs and activities, such as medical care, the law library, and communications with deportation officers. LEP detainees face systemic communication barriers that English-speaking detainees do not. Thus, DHS and ICE discriminate against LEP immigrant detainees on the basis of their national origin in violation of Title VI. For this reason, DHS should revise its Language Access Plan and mandate that ICE require detention center staff to use interpretation services and to translate vital documents for LEP detainees in all its programs and activities.

This Comment analyzes how DHS and ICE are noncompliant with federal language access policy, EO 13166, and Title VI. In Part II, I provide a background legal framework on language access and national origin discrimination and put immigration detention into that context. In Part III, I analyze how DHS and ICE have not taken reasonable steps to ensure meaningful access to their programs and activities by LEP individuals in immigration detention centers across the United States based on the DOJ's four-factor test. In Part IV, I make recommendations for DHS and ICE to eliminate structural barriers to language access in immigration detention, and I suggest remedies that immigrants and advocates can use to hold the agencies accountable. First, ICE must increase general transparency by maintaining a complete public list of all its detention facilities and it must track language data of all its detainees. Next, DHS and ICE must revise their Language Access Plans to increase language access uniformity across all ICE facilities. Pursuant to the DOJ's four-factor test, ICE must provide free interpretation and translation services to LEP detainees. Finally, there must be greater oversight to effectively enforce EO 13166 so that DHS, ICE, and other noncompliant agencies are accountable to LEP individuals' civil rights.

II. LANGUAGE ACCESS, NATIONAL ORIGIN DISCRIMINATION, AND IMMIGRATION DETENTION

While the majority of Americans only speak English at home, there are at least 350 other languages spoken in households across the United States.³⁹

³⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-91, LANGUAGE ACCESS: SELECTED AGENCIES CAN IMPROVE SERVICES TO LIMITED ENGLISH PROFICIENT PERSONS 7 (2010), <http://www.gao.gov/assets/310/303599.pdf>, archived at <https://perma.cc/BVY6-6Y5F> [hereinafter 2010 GAO Report] (finding that DHS was not yet compliant with federal LEP policy as of 2010).

³⁸ EO 13166, *supra* note 32.

³⁹ See U.S. Census Bureau, *Census Bureau Reports at Least 350 Languages Spoken in U.S. Homes* (Nov. 3, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15->

More than twenty-five million LEP individuals live in the United States.⁴⁰ Equal access to federal government services is essential for the LEP population, and is crucial in the immigration detention context, where detainees face deportation from the United States while in government custody. Using Title VI, EO 13166, and the DOJ LEP Guidance as a backdrop, this section describes how denial of language access services in immigration detention is a form of national origin discrimination under Title VI of the Civil Rights Act of 1964, EO 13166, and the DOJ LEP Guidance.

A. *Background on DHS, ICE, and CRCL*

A variety of structural barriers within DHS and ICE compound language access challenges for LEP individuals. DHS's lack of internal and external oversight creates accountability problems.⁴¹ This section provides a background on DHS, and two of its component agencies: ICE and DHS Office of Civil Rights and Civil Liberties (CRCL). This section analyzes how the various types of ICE immigration detention centers and contracts affect jurisdiction of Title VI, EO 13166, and agency guidance over language access.

In response to the 9/11 terrorist attacks, the Bush administration passed the Homeland Security Act of 2002 (the Act) and created DHS, a new cabinet-level executive agency.⁴² The Act also dissolved the DOJ's former Immigration and Naturalization Service (INS), and transferred its functions into three new DHS component agencies: U.S. Citizenship and Immigration Services (USCIS),⁴³ Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP).⁴⁴ ICE states that its "primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration."⁴⁵ ICE has three directorates to accomplish its mission:

185.html, archived at <https://perma.cc/6HX3-2DK5> (analyzing the "most comprehensive data ever released from the Census Bureau" on the diverse languages spoken throughout the United States).

⁴⁰ U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009-2013* (Oct. 2015), <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>, archived at <https://perma.cc/AN66-KB3X>.

⁴¹ See Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 56, 81-88 (2014) (analyzing DHS CRCL's limited capacity to resolve external complaints, including a 2011 complaint against the U.S. Forest Service for using DHS Customs and Border Protection agents as interpreters in violation of Title VI and EO 13166.) Schlanger previously served as the CRCL Officer from 2010-2012. *Id.* at 54, n.d1.

⁴² See Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002) (creating the Department of Homeland Security).

⁴³ See *id.* at § 271.

⁴⁴ See *id.* at § 441; see also 6 U.S.C.A. § 542 (West) (renaming the "Bureau of Border Security" the "Bureau of Immigration and Customs Enforcement," and the "Customs Service" the "Bureau of Customs and Border Protection").

⁴⁵ Immigration and Customs Enforcement, *What We Do*, <https://www.ice.gov/overview>, archived at <https://perma.cc/JQ3Q-Y3WD> (last visited Feb. 12, 2017).

Homeland Security Investigations (HSI), Enforcement and Removal Operations (ERO), and Management and Administration (M&A).⁴⁶ ERO oversees detention and deportation.⁴⁷ HSI investigates domestic and international activities related to the unlawful smuggling of people and goods into and out of the U.S.⁴⁸ M&A is comprised of project managers and support staff to help conduct various ICE operations.⁴⁹

Additionally, the Act created CRCL⁵⁰ whose primary mandate is to examine DHS's internal actions that involve civil rights rather than actions by external entities,⁵¹ such as federal funding recipients. CRCL's three main functions are to oversee DHS compliance with governing civil rights laws and regulations across its federally conducted programs and activities, to assist with DHS policy creation and implementation, and to investigate civil rights and civil liberties complaints against DHS employees.⁵² In general, CRCL's introspective function is very different from other agencies' civil rights offices, and is crucially distinct from the DOJ Civil Rights' Division whose primary mission is prosecution.⁵³ Consequently, the CRCL "lacks authority to prosecute or discipline" or "to provide individual remedies,"⁵⁴ which in turn makes internal enforcement of Title VI and EO 13166 within DHS unlikely.

B. Title VI of the Civil Rights Act of 1964

Title VI of the landmark Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against individuals who seek their services.⁵⁵ Title VI mandates that no one, on the basis of "national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁵⁶ To implement Title VI, federal agencies must issue

⁴⁶ See Immigration and Customs Enforcement, *Who We Are*, at <https://www.ice.gov/about>, archived at <https://perma.cc/MEA9-U2X3> (last visited Feb. 12, 2017).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *supra* note 111, at § 705; see generally 6 U.S.C. § 345 (codifying CRCL's functions).

⁵¹ See Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 301 (2015) (analyzing CRCL's functions and its struggles to influence policy); see also Schlanger, *supra* note 110, at 64 (distinguishing CRCL's functions from those of other agencies' civil rights offices).

⁵² See 6 U.S.C. § 345; see also Schlanger, *supra* note 110, at 62 (describing CRCL's primary functions); Sinnar, *supra* note 120, at 302 (summarizing CRCL's "three core functions").

⁵³ See Schlanger, *supra* note 110, at 62–64 (explaining CRCL's functions and contrasting them with other agencies' civil rights offices).

⁵⁴ *Id.* at 98.

⁵⁵ Title VI, *supra* note 32.

⁵⁶ *Id.* (emphasis added)

regulations and guidance for their financial assistance recipients to follow in their programs and activities.⁵⁷

A “recipient” is subject to Title VI if it either receives federal assistance and/or operates a program or activity.⁵⁸ Notably, Title VI does not apply directly to federal agencies.⁵⁹ Rather, Title VI recipients are either public or private entities who receive direct or indirect federal assistance, or who run programs and activities on behalf of a federal agency.⁶⁰

A person’s language often identifies her national origin.⁶¹ Consequently, “discrimination against persons from other nations may be triggered when a person speaks a language other than English.”⁶² While Title VI prohibits intentional national origin discrimination,⁶³ the Supreme Court has extended this prohibition to agency regulations that have discriminatory effects.⁶⁴ In 2003, DHS issued its regulations mandating Title VI compliance for all of its component agencies to ensure that no person, on the basis of “national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Homeland Security.”⁶⁵ The DHS regulations extend to all component agencies,⁶⁶ including ICE.⁶⁷ Thus, ICE must comply with DHS’s Title VI regulations to ensure that its funding recipients do not discriminate against LEP individuals on the basis of national origin.

⁵⁷ See *id.* at § 2000d-1; see also Department of Homeland Security Office for Civil Rights and Civil Liberties, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 Fed. Reg. 21, 755 (Apr. 18, 2011) [hereinafter *DHS Recipient Guidance*] (issuing final policy guidance to recipients of federal DHS funding).

⁵⁸ See generally U.S. Dep’t of Justice, *Title VI Legal Manual*, <https://www.justice.gov/crt/title-vi-legal-manual#V>, archived at <https://perma.cc/YDQ7-CX3K> (last visited Feb. 7, 2017) (explaining when an entity qualifies as a “recipient” under Title VI).

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *DOJ LEP Guidance*, *supra* note 32.

⁶² *Id.*

⁶³ *Title VI*, *supra* note 32.

⁶⁴ See *DOJ LEP Guidance*, *supra* note 32; *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that the San Francisco public school system’s failure to provide English language instruction to Chinese students violated Title VI by denying those students a meaningful opportunity to participate in public education). But see *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (limiting *Lau* by holding that no private right of action exists to enforce agency “disparate-impact” regulations under Title VI). Following a lawsuit against Department of Human Services in Washington, D.C. alleging violations of Title VI, the parties reached a landmark settlement agreement in which the Department would immediately provide language access to its customers. See Washington Lawyers’ Committee for Civil Rights and Urban Affairs, *Landmark Settlement Reached in Lawsuit on DC Department of Human Services’ Violations of Language Access Requirements*, (Nov. 19, 2016), <http://www.washlaw.org/news-media/533-language-access-settlement>.

⁶⁵ 6 C.F.R. §21.1. (2016) (emphasis added).

⁶⁶ See *id.*

⁶⁷ See U.S. Dep’t of Homeland Sec., *Operational and Support Components*, <http://www.dhs.gov/components-directorates-and-offices>, archived at <https://perma.cc/6CZV-G9Z8> (last visited Feb. 7, 2017) (listing ICE as a component agency).

C. Executive Order 13166

On August 11, 2000, former President Clinton issued EO 13166 aiming to improve access to federal programs for people who are LEP.⁶⁸ Under EO 13166, federal agencies must create and implement systems to give LEP individuals meaningful access to agency services without an undue burden on the agency's mission.⁶⁹ Notably, EO 13166 applies to both federally conducted and federally assisted programs and activities.⁷⁰ A federal agency's own programs and activities are "federally conducted," whereas recipients of federal assistance have "federally assisted" programs and activities.⁷¹

D. DOJ LEP Guidance

On the same day that EO 13166 came into effect, the DOJ issued policy guidance (DOJ LEP Guidance) for federal agencies to provide LEP individuals access to their federally conducted programs and activities in their primary languages in compliance with Title VI.⁷² DOJ regulations require agencies to publish Title VI guidelines for their recipients⁷³ and clarifies that national origin discrimination includes a variety of discriminatory actions.⁷⁴ EO 13166 mandates that each federal agency prepare a language access plan and/or guidance for its recipients in accordance with the DOJ LEP Guidance standards and submit it to the DOJ within 120 days.⁷⁵ Moreover, EO 13166 applies more broadly than does Title VI; EO 13166 covers *all* federal agency programs and activities,⁷⁶ whereas Title VI only covers federally assisted programs and activities. Both Title VI and EO 13166 also cover programs and activities that are contracted out to private entities,⁷⁷ such as privately contracted immigration detention centers. An agency must require that its contracting entity knows federal language access standards and uses the

⁶⁸ See *EO 13166*, *supra* note 32; see also *Commonly Asked Questions and Answers Regarding Executive Order 13166*, *supra* note 14 (defining "LEP" individuals).

⁶⁹ See *EO 13166*, *supra* note 32.

⁷⁰ See *id.*

⁷¹ See *id.* For example, a federally conducted DHS program and activity is ICE immigration detention at the service processing centers because those facilities are ICE-owned and operated. See *infra* notes 124–125. On the other hand, ICE detention at the family detention facilities is federally assisted. See *id.* at note 142.

⁷² See *id.*; see also *DOJ LEP Guidance*, *supra* note 32, at 50, 124.

⁷³ See *DOJ LEP Guidance*, *supra* note 32, at 50, 124 (referencing 28 C.F.R. § 42.401 et seq.).

⁷⁴ See generally 28 C.F.R. § 42.104 (2016) (defining discrimination that is prohibited under Title VI, including specific actions and employment practices). For example, a federally funded program discriminates based on a person's national origin when it denies that person a service or participation in a service, provides a different service, subjects a person to segregation or separate treatment, restricts a person's enjoyment of a service, or treats a person differently from others when seeking a service.

⁷⁵ See *EO 13166*, *supra* note 32.

⁷⁶ See *Commonly Asked Questions and Answers Regarding Executive Order 13166*, *supra* note 14.

⁷⁷ See *id.* at question 14.

agency's language access plan when conducting its activities and programs.⁷⁸ Specifically, the agency must mandate the entity's compliance with its LEP policy in the contract.⁷⁹ Therefore, when an agency contracts with a private entity, the agency is responsible for the private entity's compliance with federal LEP policy.⁸⁰

1. Four-Factor Test for Determining Meaningful LEP Access

The DOJ LEP Guidance establishes a four-factor balancing test to determine whether an agency has taken "reasonable steps" to provide LEP individuals with "meaningful access" to its programs and activities.⁸¹ The test is designed for agencies and recipients to determine their obligations to provide LEP assistance under EO 13166 and Title VI, and the DOJ LEP Guidance explains how these entities must assess each factor.⁸² The first factor analyzes the number or proportion of LEP individuals that access a particular program or activity.⁸³ This factor essentially measures how many LEP individuals would be excluded from a program or activity if the agency or funding recipient did not take affirmative steps to remove language barriers.⁸⁴ Agencies or funding recipients that frequently serve LEP individuals must take additional action to show their efforts are reasonable than those that serve LEP individuals infrequently.⁸⁵

The second factor is the frequency with which LEP individuals contact the program.⁸⁶ The more often LEP individuals contact a program or activity, the more responsibility the agency or funding recipient has to serve them.⁸⁷

The third factor examines the nature of the program and its importance to LEP individuals.⁸⁸ Significantly, the DOJ LEP Guidance emphasizes that "[m]ore affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence."⁸⁹ Additionally, there is "strong

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See DOJ LEP Guidance, supra* note 32, at 50, 124.

⁸² *See id.* at 50, 123. The DOJ LEP Guidance is self-enforcing and does not create a mechanism for the DOJ to enforce other agencies' compliance.

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.* For example, an agency's plan for encounters with LEP individuals "may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services." *See id.* at 50, 125. *See e.g.* Social Security Administration, *Plan for Providing Access to Benefits and Services With Limited English Proficiency (LEP)*, *infra* note 189.

⁸⁶ *See DOJ LEP Guidance, supra* note 32, at 50, 125.

⁸⁷ *See id.* For instance, if "LEP individuals must access the recipient's program or activity on a daily basis, e.g., as they must in attending elementary or secondary school, a recipient has greater duties than if such contact is unpredictable or infrequent." *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.* Barriers to language access in detention have lethal consequences. *See Fatal Neglect: How ICE Ignores Deaths in Detention, supra* note 1 (finding that ICE's failure to

evidence of the program’s importance” when an agency or funding recipient makes its program “compulsory.”⁹⁰

The fourth and final factor examines the agency or funding recipient’s available resources to devote to its programs and activities.⁹¹ Larger entities generally have more resources, so they have a greater responsibility to provide meaningful access to LEP individuals who frequently contact them than do small entities that lack resources and have infrequent LEP contact.⁹² Furthermore, large entities that claim to have limited resources will need to provide substantial proof of those financial restrictions.⁹³

2. The 2011 Attorney General Memorandum and DHS Recipient Guidance

Eleven years after EO 13166, some federal agencies were still noncompliant with the language access policy. On February 17, 2011, Attorney General Eric Holder issued a memorandum renewing the federal government’s commitment to EO 13166 and directing all agencies to come into compliance.⁹⁴ The memorandum reaffirmed EO 13166’s mandate and found that “[d]espite the legal and public service obligations that compel federal agencies and recipients to ensure language access,” there were “significant variations” in federal agencies’ compliance with EO 13166.⁹⁵ According to a 2010 Government Accountability Office (GAO) report, DHS was among only three executive-level agencies still noncompliant with EO 13166.⁹⁶

Specifically, the memorandum requested that agencies commit to eight “action items,” or specific steps, in order to fully comply with EO 13166.⁹⁷

provide Mr. Gracida-Conte with an interpreter contributed to his death). At least 155 detainees died in ICE detention between 2003 and January 2016. See *List of Deaths in ICE Custody*, *supra* note 8. ICE finally released information regarding detainee deaths in 2010, after months of Freedom of Information Act litigation. See Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), http://www.nytimes.com/2010/01/10/us/10detain.html?_r=0,2-3 (reporting that ICE records show that one detainee died after being left in isolation with head injuries for thirteen hours without medical treatment while ICE officials considered deporting him to Africa to avoid bad publicity).

⁹⁰ See *DOJ LEP Guidance*, *supra* note 32, at 50, 125.

⁹¹ See *id.*

⁹² See *id.*; see e.g. *infra* note 189 (describing the Social Security Administration and Department of Education’s application of the four-factor test in their Language Access Plans).

⁹³ *DOJ LEP Guidance*, *supra* note 32, at 50, 125.

⁹⁴ Memorandum from the Attorney General to Heads of Federal Agencies, General Counsels, and Civil Rights Heads, *Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166* (Feb., 17, 2011) [hereinafter *2011 Attorney General Memo*], https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf, archived at <https://perma.cc/2YEB-U5NN>.

⁹⁵ See *id.* at 1. See *2011 Attorney General Memo*, *supra* note 94, at 2 (calling for all federal agencies to come into “full compliance”); see also *2010 GAO Report*, *supra* note 37, at 7 (finding DHS noncompliant).

⁹⁶ See *2010 GAO Report*, *supra* note 37, at 7 (finding that DHS, the Department of Defense, and the Department of Agriculture were not yet compliant with EO 13166). This public recognition of agency inaction may have spurred DHS to finally issue its Language Access Plan a few a year later. See *2012 DHS Language Access Plan*, *infra* note 96.

⁹⁷ See *2011 Attorney General Memo*, *supra* note 94, at 2–3.

To clarify the action items, the memorandum also provided a supplement with “specifics” to guide agencies in effectively complying with EO 13166.⁹⁸ The action items directed all agencies to: (1) establish a Language Access Working Group;⁹⁹ (2) evaluate and/or update the agency’s LEP needs by “conducting an inventory of languages most frequently encountered;” (3) submit updated LEP plans within six months of the memorandum and to establish a schedule of periodic review of agency LEP services and policies; (4) train agency staff to “competently identify LEP situations and take the necessary steps to provide meaningful access;”¹⁰⁰ (5) notify the public, including LEP communities, of agency LEP policies;¹⁰¹ (6) consider LEP needs when establishing agency hiring criteria;¹⁰² (7) collaborate with other agencies to share written translations and standardize federal terminology; and (8) for agencies providing federal assistance, issue recipient guidance within six months of the date of the memorandum.¹⁰³

Nevertheless, it remains unclear whether there is any oversight mechanism for agency compliance with EO 13166 and if the DOJ is conducting periodic review. To evaluate compliance with the memorandum, the DOJ’s Civil Rights Division originally planned to conduct a follow-up language access survey of federal agencies later in 2011.¹⁰⁴ Instead, in May 2011 the DOJ issued a language access self-assessment to guide agencies in their efforts to comply with EO 13166 and the memorandum.¹⁰⁵ While the 2006 language access survey required agencies to submit their results to the DOJ,¹⁰⁶ the self-assessment did not; instead, it assisted agencies to make

⁹⁸ See *id.* at Supplement 1–3.

⁹⁹ See *id.* at Supplement 1 (explaining that the Working Group would oversee the consistent implementation of the agency’s language access plan by first identifying barriers to language access, and then creating resolutions with external stakeholders and internal agency programs).

¹⁰⁰ See *id.* at Supplement 2 (instructing agency staff to identify when an LEP person needs help, to ascertain their primary language, and to use a variety of methods to facilitate communication).

¹⁰¹ See *id.* (describing ways to publicize LEP policy “to achieve maximum and effective notification to LEP communities,” such as on agency websites and through multimedia).

¹⁰² See *id.* (encouraging agencies to assess the benefits of hiring bilingual staff).

¹⁰³ See *id.*

¹⁰⁴ See 2011 Attorney General Memo, *supra* note 94, at 3 (planning a language access survey similar to the 2006 survey).

¹⁰⁵ See U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., LANGUAGE ACCESS ASSESSMENT AND PLANNING TOOL FOR FEDERALLY CONDUCTED AND FEDERALLY ASSISTED PROGRAMS 8-14 (May 2011), http://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf, archived at <https://perma.cc/9ZSD-RR6Q> [hereinafter *DOJ Language Access Assessment*].

¹⁰⁶ See U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., *Federal Language Access Survey*, http://www.lep.gov/resources/2008_Conference_Materials/FedLangAccessSurvey.pdf archived at <https://perma.cc/SAD7-BKTS> (requesting that agencies submit responses to the survey by April, 2006); see also Federal Interagency Working Group on Limited English Proficiency, 2008 *Federal Interagency Conference on Limited English Proficiency: Conference Agenda 7* (Sept. 3, 2008), http://www.lep.gov/whats_new/Agenda%20FINAL.pdf, archived at <https://perma.cc/LYC9-DJ7S> (finding that the 2006 language access “[s]urvey responses revealed dramatic variations across the federal government with respect to addressing the LEP needs of agency constituents”).

their own LEP plan.¹⁰⁷ While the 2006 survey results were used for initiating further DOJ oversight measures, such as the 2011 Attorney General memorandum,¹⁰⁸ it does not appear that the DOJ is reviewing the information in the 2011 self-assessment.

Following the Attorney General's memorandum, DHS issued final policy guidance (DHS Recipient Guidance) in April 2011 for its financial assistance recipient agencies in compliance with EO 13166 and Title VI.¹⁰⁹ The DHS Recipient Guidance does *not* cover ICE enforcement activities, immigration detention, or alternatives to immigration detention, however, because they are subject to the DHS language access plan,¹¹⁰ which was later released in February 2012.¹¹¹ These two guidance documents are distinct: the DHS Recipient Guidance covers federally *assisted* activities, while the DHS LEP plan covers federally *conducted* activities.¹¹² When state and local jails are federally assisted to detain immigrants, those recipients must also determine whether DHS or DOJ is the primary source of federal assistance, and follow that agency's LEP guidance accordingly.¹¹³ The two agencies' guidance documents are similar, however, because the DHS Recipient Guidance incorporates the DOJ LEP and Recipient Guidance by reference.¹¹⁴ Essentially, the DHS Recipient Guidance governs ICE detention when DHS is the primary funding source, including private contractors, alternatives to detention programs, and state and local prisons or jails that detain immigrants.¹¹⁵ Conversely, when DOJ is the primary funding source of a state or local prison, then the DOJ Recipient Guidance governs.¹¹⁶

¹⁰⁷ See *DOJ Language Access Assessment*, *supra* note 105, at 3.

¹⁰⁸ *2011 Attorney General Memo*, *supra* note 94, at 3.

¹⁰⁹ *DHS Recipient Guidance*, *supra* note 57.

¹¹⁰ See *id.* at 21, 756 (initially referring to the language access plan as the "LEP plan").

¹¹¹ See DEP'T OF HOMELAND SECURITY, *LANGUAGE ACCESS PLAN*, (Feb. 28, 2012) [hereinafter *2012 DHS Language Access Plan*], <http://www.dhs.gov/sites/default/files/publications/crcl-dhs-language-access-plan.pdf>, archived at <https://perma.cc/GEM5-DQQW>.

¹¹² See *id.* (covering DHS federally conducted programs and activities); see also *DHS Recipient Guidance*, *supra* note 57 (covering DHS federally assisted programs and activities).

¹¹³ See *id.*

¹¹⁴ See *id.*; see also *DOJ Recipient Guidance*, *supra* note 32, (extending the four-factor balancing test to federal financial assistance recipients).

¹¹⁵ See *DHS Recipient Guidance*, *supra* note 57, at 21, 756 (explaining that the Guidance does not apply to certain ICE immigration detention programs and activities that are federally conducted).

¹¹⁶ See *id.* (explaining that DOJ Guidance governs "where DOJ is the primary provider of Federal assistance to recipients"); see, e.g., U.S. DEP'T. OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFFICE 19 (Dec. 15, 2011) [hereinafter *DOJ Investigation of the Maricopa County Sheriff's Office*] <http://www.clearinghouse.net/chDocs/public/PN-AZ-0001-0004.pdf> archived at <https://perma.cc/SU9B-ESTE> (establishing that the DOJ funded the local sheriff's office in Maricopa County, Arizona and that it was subject to Title VI and the DOJ Recipient Guidance).

3. Immigration Detention

Immigration detention is a multibillion-dollar industry.¹¹⁷ Between 2001 and 2013, the annual number of detained adult immigrants more than doubled from 204,459 to 440,557.¹¹⁸ Immigration detention expanded in recent years due to numerous factors such as changes in immigration law that criminalize more offenses and require mandatory detention for more individuals, privatization of immigration detention, and the congressional immigration bed quota which requires DHS to fill at least 34,000 detention beds daily.¹¹⁹

As of August 2013, ICE oversaw adult immigration detention at about 250 facilities in collaboration with private contractors or state and local governments.¹²⁰ ICE cannot detain immigrant children, unless they are detained in family residential detention facilities with a parent.¹²¹ DHS delegates detention and removal management to ICE ERO.¹²² While ICE operates a few of its own detention centers, private prison companies operate the majority of immigration detention facilities.¹²³

ICE oversees various types of immigration detention facilities some of which receive funding from DHS and others that receive funding from the

¹¹⁷ Immigration detention currently costs U.S. taxpayers more than \$5 million each day. See American Immigration Council, *Giving the Facts a Fighting Chance: Addressing Common Questions on Immigration* 18 (Dec. 2015), <https://www.americanimmigrationcouncil.org/research/addressing-common-questions-immigration> archived at <https://perma.cc/WGE5-USSF> (providing statistics on immigration detention).

¹¹⁸ See *id.*

¹¹⁹ See *id.*; see also Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 251 (stating that DHS “shall maintain a level of not less than 34,000 detention beds through September 30, 2014”), <https://www.congress.gov/113/plaws/publ76/PLAW-113publ76.pdf> archived at <https://perma.cc/4MWR-YDXY>.

¹²⁰ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 8 (2014) [hereinafter *2014 GAO Report on Immigration Detention*], <http://gao.gov/assets/670/666467.pdf> archived at <https://perma.cc/MLP5-MX74>.

¹²¹ In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), enhancing protections for unaccompanied “alien” children (UAC) by mandating that DHS transfer those children to the care and custody of the Health and Human Services’ Office of Refugee Resettlement (ORR) within seventy-two hours so that children are detained in “the least restrictive setting.” Pub. L. 110-457, 122 Stat. 5044, 5077-78; 8 U.S.C. § 1232(b)(3). Nevertheless, as of July 2015, the GAO found that DHS was still not uniformly transferring UACs to ORR custody within seventy-two hours. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE WHILE IN DHS CUSTODY “Highlights” (2015) (finding that the transfer process of UACs from DHS to HHS is inefficient and recommending that DHS document its interagency process).

¹²² See Immigration and Customs Enforcement, Enforcement and Removal Operations, <https://www.ice.gov/ero> archived at <https://perma.cc/7393-3RBP> (last visited Feb. 25, 2016).

¹²³ See American Immigration Council, *supra* note 117, at 18; see also Cody Mason, *Dollars and Detainees: The Growth of For-Profit Detention*, THE SENTENCING PROJECT 10 (July 2012), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Dollars-and-Detainees.pdf> archived at <https://perma.cc/RE47-E8T3> (finding that two private prison contractors operate almost half of ICE’s private facilities: the Corrections Corporation of America (CCA) and the GEO Group).

DOJ.¹²⁴ Facilities are either short-term (under seventy-two hours) or long-term, and include a variety of contract types: service processing centers, contract detention facilities, intergovernmental service agreements, family residential facilities, and U.S. Marshals Service intergovernmental agreements or contracts.¹²⁵

The numerous types of immigration detention facilities require different applications of Title VI, EO 13166, and agency guidance documents in each context.¹²⁶ EO 13166 covers both federally conducted and federally assisted programs and activities, including programs and activities that are contracted out to private entities.¹²⁷ EO 13166 applies equally to both private entities and state or local governments.¹²⁸ Therefore, two issues must be analyzed to determine which laws, regulations and guidance documents apply to each type of immigration detention facility: (1) whether the program or activity is federally *conducted* or federally *assisted*; and (2) if the program is federally *assisted*, which agency provides its primary funding. Whether the source of primary funding is DHS or DOJ dictates which agency's LEP guidance that recipient should follow.¹²⁹ The agency is responsible for clarifying its LEP policy to each recipient regardless of how much funding they contribute to that recipient.¹³⁰

The following table describes each type of ICE immigration facility or contract, as well as the agency funding source and corresponding language access requirements.

¹²⁴ See 2014 GAO Report on Immigration Detention, *supra* note 129, at 7–9 (describing the types of ICE immigration detention centers, including the U.S. Marshals Service facilities which also receive DOJ funding).

¹²⁵ See *id.* at 8, 9, Table 1; see also *Fatal Neglect: How ICE Ignores Deaths in Detention*, *supra* note 1, at 4 (explaining some of the different ICE contract types).

¹²⁶ ICE does not maintain a complete public list of its detention facilities. See Mason, *Dollars and Detainees: The Growth of For-Profit Detention*, *supra* note 123, at 8–9 (reporting that “ICE never provided a complete and accurate list of facilities even after months of requesting information”). For example, while ICE’s website states that it houses immigrant detainees in more than 250 facilities, that webpage links to a “Detention Facility Locator” map which only shows 80 detention facilities. Compare Immigration and Customs Enforcement, *Detention Management Factsheet* [hereinafter *ICE Detention Management Factsheet*] (Nov. 11, 2011) <https://web.archive.org/web/20160323123547/https://www.ice.gov/factsheets/detention-management-archived> at <https://perma.cc/NG9N-M6Z7>, with, Immigration and Customs Enforcement, *Detention Facility Locator* [hereinafter *ICE Detention Facility Locator*] (last visited Feb. 25, 2016) <https://www.ice.gov/detention-facilities> archived at <https://perma.cc/S4UY-5YE2>. Conversely, the DOJ website features a list of U.S. Marshals Service facilities as of 2011. See Dep’t. of Justice, Office of the Federal Detention Trustee, *Location of Prisoners Held*, <http://www.justice.gov/archive/ofdt/prisoner-location.htm> archived at <https://perma.cc/MA9K-LTDF> (last visited Feb. 25, 2016). Nevertheless, the list does not indicate whether the source of funding for the facilities is public or private. See *id.*

¹²⁷ See *Commonly Asked Questions and Answers Regarding Executive Order 13166*, *supra* note 14.

¹²⁸ See *id.* at question 14 (finding that “when a different entity conducts certain activities for the federal agency, then the Executive Order applies to the entity’s activities”).

¹²⁹ See *DHS Recipient Guidance*, *supra* note 44.

¹³⁰ See *Commonly Asked Questions and Answers Regarding Executive Order 13166*, *supra* note 14 (clarifying that the agency has the responsibility to “ensure that the entity knows the general standards for LEP access and applies the agency’s plan”).

ICE Immigration Detention Facility/Contract Types, Funding and Language Access Requirements		
<i>Facility/Contract Type</i>	<i>Description</i>	<i>Funding and Language Access</i>
Service Processing Center (SPC)	ICE owns and operates SPCs which only house noncitizen detainees. ¹³¹ As of August 2013, ICE owned only six SPCs, comprising 11% of the total detainee population. ¹³² ICE staffs the SPCs with a combination of its own employees as well as contract employees. ¹³³	<ul style="list-style-type: none"> • Federally conducted • DHS funding • EO 13166 only • DHS and ICE Language Access Plans
Contract Detention Facility (CDF)	Private entities own and operate CDFs under ICE contract and only house noncitizen detainees. ¹³⁴ In 2013, the seven CDFs represented about 18% of the detainee population. ¹³⁵	<ul style="list-style-type: none"> • Federally assisted • DHS funding • Title VI and EO 13166 • DHS and ICE Language Access Plans
Family Residential Facility	Local government entities own and operate family residential facilities which house noncitizen detainees who are families with children. ¹³⁶	<ul style="list-style-type: none"> • Federally assisted • DHS funding • Title VI and EO 13166 • DHS and ICE Language Access Plans
Intergovernmental Service Agreement (IGSA)	Facilities which are owned by either state or local governments or private entities that are operated under ICE contract agreements with those government entities. ¹³⁷ IGSAs are either “dedicated,” which exclusively house ICE detainees, or “nondedicated” which house ICE detainees with their other prison population. ¹³⁸ In 2013, there were only nine dedicated IGSAs, compared with seventy-two nondedicated IGSA. ¹³⁹	<ul style="list-style-type: none"> • Dedicated IGSA • Federally assisted • DHS funding • Title VI and EO 13166 • DHS and ICE Language Access Plans
		<ul style="list-style-type: none"> • Nondedicated IGSA • DHS and DOJ funding • Title VI and EO 13166 • DHS and ICE Language Access Plans or DOJ Language Access Plan
U.S. Marshals Service (USMS)	ICE contracts with the DOJ USMS to house immigrant detainees either together or separately from the federal prison population at those facilities. ¹⁴⁰	<ul style="list-style-type: none"> • <i>Federally conducted (DOJ) or assisted (DHS)</i> • <i>DHS and DOJ funding</i> • <i>Title VI (assisted only)</i> • <i>EO 13166</i> • <i>DHS and ICE Language Access Plans or DOJ Language Access Plan</i>

ICE oversees the federally conducted DHS programs and activities at the service processing centers (SPCs), contract detention facilities (CDFs), and privately operated IGSA and USMS facilities. Since ICE owns the SPCs, and directly manages and operates them, those detention programs and activities are federally conducted and thus subject to EO 13166. While ICE does not own the CDFs, they are operated under ICE contract. While it

¹³¹ 2014 GAO REPORT ON IMMIGRATION DETENTION, *supra* note 129, at 8, 9, tbl.1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

remains unclear without analyzing each individual contract, it appears that the programs and activities at CDFs are federally assisted, and thus subject to Title VI in addition to EO 13166.¹⁴¹ Likewise, privately operated IGSA and USMS facilities that are operated and managed under ICE contract may also be federally assisted. Thus, at the very least, EO 13166, and the DHS and ICE Language Access Plans govern these programs and activities. If these facilities are in fact federally assisted, they are also subject to Title VI.

Conversely, ICE oversees the federally assisted programs and activities at the family residential facilities, as well as select IGSA and USMS facilities because state or local governments own, operate, and/or manage them. Therefore, this raises the second issue of whether DHS or DOJ provides the detention center with its primary source of funding.¹⁴²

Similarly, DOJ primarily funds some correctional facilities that house immigrant detainees alongside the prison population. Within those facilities, DHS sometimes provides funding and ICE oversees the federally assisted programs and activities that involve immigrant detainees. These facilities are either state or local correctional centers or USMS facilities. It is unclear which of these facilities the DOJ provides primary funding. Of the \$8.8 billion that the DOJ requested for prisons and detention funding for FY 2016, \$1.5 billion was for Federal Prisoner Detention (FPD).¹⁴³ Nonetheless, any facility receiving primary DOJ funding is subject to EO 13166, the DOJ Recipient Guidance, the DOJ Language Access Plan, and Title IV.¹⁴⁴

¹⁴¹ See generally DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, *supra* note 55 at Part VI(B), Direct Contract Relationship (explaining how to determine whether a private entity is a recipient of federal assistance depends on whether “the entity has voluntarily entered into a relationship with the Federal government akin to a contract and receives Federal assistance under a condition or assurance of compliance with Title VI”).

¹⁴² For example, even though the Karnes County Residential Center is owned by the local government of Karnes County, Texas, it is managed and operated by ICE under an IGSA with the USMS by a private prison contractor, the GEO Group, Inc. See GEO Group, Inc., *Locations: Karnes County Residential Center*, <http://www.geogroup.com/FacilityDetail/FacilityID/57> (last visited Feb. 5, 2017); see also IMM. AND CUSTOMS ENFORCEMENT, *Detention Facilities: Karnes County Correctional Center*, <https://www.ice.gov/detention-facility/karnes-county-correctional-center> (last visited Feb. 5, 2017). Thus, it appears that the programs and activities at the Karnes facility are federally assisted by DHS.

¹⁴³ DEP'T OF JUSTICE, FY 2016 BUDGET REQUEST- PRISONS AND DETENTION, http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/4._prisons_and_detention_fact_sheet.pdf, archived at <https://perma.cc/ZC9E-X8FQ>.

¹⁴⁴ For example, in a December 2011 investigation and subsequent lawsuit, the DOJ alleged that its federal funding recipient, Maricopa County Sheriff's Office, was conducting widespread discrimination against Latino LEP detainees based on their national origin in violation of Title VI and the DOJ Recipient Guidance. See DOJ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFF., *supra* note 116, at 19 (finding that despite having agreed to comply with Title VI and the DOJ Recipient Guidance when receiving federal funding, Maricopa County Sheriff's Office knowingly denies LEP inmates language access. The investigation found that “LEP inmates, who are overwhelmingly Latino, do not receive the same services and benefits as non-LEP inmates, are pressured to sign important immigration-related documents without language assistance, and are singled out for punishments, such as being subjected to lockdowns and disciplinary segregation for failing to understand English commands.”); see also *United States v. Maricopa Cty., Ariz.*, 915 F. Supp. 2d 1073, 1081 (D. Ariz. 2012) (holding that the DOJ stated a claim for national origin discrimination against the LEP population under both Supreme Court precedent and Title VI regulations).

III. DHS AND ICE'S FAILURE TO COMPLY WITH EO 13166

Neither DHS nor ICE has taken reasonable steps to ensure meaningful access to its programs and activities for LEP individuals, and therefore, are still noncompliant with EO 13166. Crucially, LEP detainees in ICE custody do not have meaningful access to essential programs such as medical services, the law library, and communications with deportation officers in their primary languages. The result is unequal treatment of LEP detainees across ICE detention centers in violation of EO 13166 and Title VI's prohibition on national origin discrimination. A variety of structural barriers within ICE contribute to these violations; a widespread lack of transparency, uniform standards and procedures between detention facilities, and accountability further prevent LEP detainees from meaningful access to the agency's programs.

A. *DHS Has Not Taken Reasonable Steps to Ensure Meaningful Access to its Programs and Activities for LEP Individuals*

DHS failed to comply with the most basic initial requirements of the Executive Order for almost ten years.¹⁴⁵ As of December 1, 2009, DHS had still not completed its language access plan in accordance with the LEP Guidance.¹⁴⁶ When DHS ultimately issued its final policy guidance to recipients in 2011, it still did not include its LEP plan which would cover its own federally conducted programs and activities.¹⁴⁷ The DHS Office of Civil Rights and Civil Liberties (CRCL) was assigned to oversee the implementation of the DHS LEP Plan, which is now known as the Language Access

¹⁴⁵ 2010 GAO REPORT, *supra* note 37, at 7, 11. It is unclear why DHS delayed in complying with EO 13166 for so long. EO 13166 is an unfunded mandate that could burden agency compliance. Since DHS has vast resources, however, it would need to show substantial evidence that it cannot comply with EO 13166, as the fourth factor of the DOJ test requires. See DOJ LEP GUIDANCE, *supra* note 32, at 50, 125 (finding that "claims of limited resources from large entities will need to be well-substantiated"). The DHS budget has swelled from \$37.7 billion for FY 2003 to \$64.9 billion for FY 2016. Compare PRESIDENT GEORGE W. BUSH, SECURING THE HOMELAND, STRENGTHENING THE NATION, FY 2003 BUDGET, 8 http://www.scoem.org/library/homeland_security_book.pdf, archived at <https://perma.cc/2NXZ-XPQK>, with DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FY 2016 https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf, archived at <https://perma.cc/69XC-GCEL> [hereinafter DHS BUDGET-IN-BRIEF FY 2016]. While the DHS budget allocates \$3.3 billion for detention and removal, it does not indicate specific amounts for all its programs and services. DHS BUDGET-IN-BRIEF FY 2016 at 9. It does not allocate any funding to language services. *Id.* In stark contrast, another executive-level agency, the Department of Health and Human Services (HHS), issued its recipient guidance in compliance with EO 13166 on August 30, 2000 only 19 days after EO 13166 was signed into effect. See U.S. DEP'T OF HEALTH AND HUM. SERV., TITLE VI OF THE C.R. ACT OF 1964; POL'Y GUIDANCE ON THE PROHIBITION AGAINST NAT'L ORIGIN DISCRIMINATION AS IT AFFECTS PERSONS WITH LIMITED ENGLISH PROFICIENCY, 65 Fed. Reg. 52762-01 (Aug. 30, 2000).

¹⁴⁶ See 2010 GAO REPORT, *supra* note 37, at 7.

¹⁴⁷ DHS RECIPIENT GUIDANCE, *supra* note 44.

Plan.¹⁴⁸ Nevertheless, DHS failed to publish its Language Access Plan in accordance with the DOJ LEP Guidance under the EO 13166's mandate until February 28, 2012,¹⁴⁹ well after the Attorney General issued his 2011 Memorandum ordering all federal agencies to comply with LEP.¹⁵⁰

1. Neither the DHS 2011 Language Access Plan Nor the CRCL 2014 Draft Language Access Plan Meets DHS Obligations Under EO 13166

Despite clear guidance on how to comply with EO 13166,¹⁵¹ neither DHS nor CRCL meet those Title VI obligations in their respective language access plans. This section analyzes how the two languages access plans are noncompliant with EO 13166.

When DHS finally issued its Language Access Plan in February 2012, it only generally applied the four-factor analysis and did not uniformly address the Attorney General's action items.¹⁵² For example, DHS complied with the Attorney General's first action item¹⁵³ by planning to establish a Language Access Working Group.¹⁵⁴ Conversely, DHS did not follow the Attorney General's second action item of "conducting an inventory of languages most frequently encountered"¹⁵⁵ because DHS conceded that *most* of its component agencies were still not collecting data on the languages spoken by the LEP individuals that used its programs and activities.¹⁵⁶ Tracking language data is essentially part of the first factor of the four-factor analysis; it is necessary to determine the number and proportion of LEP individuals

¹⁴⁸ See 2010 GAO REPORT, *supra* note 37, at 7 (describing the upcoming plans); *see generally* 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111 (creating the initial DHS Language Access Plan); *see also* DEP'T OF HOMELAND SEC., OFF. FOR C.R. AND C.L., DRAFT LANGUAGE ACCESS PLAN (Sept. 3, 2014), https://www.dhs.gov/sites/default/files/publications/draft-crcl-lep-plan_0.pdf, *archived at* <https://perma.cc/Y8US-YKAA>. [hereinafter 2014 DHS CRCL DRAFT LANGUAGE ACCESS PLAN] (outlining the most current DHS Draft Language Access Plan).

¹⁴⁹ 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111.

¹⁵⁰ See 2011 ATT'Y GEN. MEMO, *supra* note 94, at Supplement 1 (ordering agencies to issue LEP plans within six months of the February 2011 memo).

¹⁵¹ Taken together, three guidance documents clarify the minimum requirements for DHS to follow when drafting their language access plan: (1) the 2000 DOJ LEP Guidance articulates a four-factor test to determine whether an agency has taken reasonable steps to provide meaningful language access to LEP individuals. *See* DOJ LEP GUIDANCE, *supra* note 32, at 50, 124 (creating the four-factor balancing test); (2) the 2011 DHS Recipient Guidance adopted the DOJ's four-factor test. DHS RECIPIENT GUIDANCE, *supra* note 57; (3) the 2011 Attorney General Memo instituted eight "action items" for agencies to complete in creating their language access plans and complying with EO 13166. *See* Part II(B)(2) (listing and describing the action items).

¹⁵² 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111.

¹⁵³ See 2011 ATT'Y GEN. MEMO, *supra* note 94, at 2 (instructing agencies to "Establish a Language Access Working Group that reflects your agency's organizational structure and is responsible for implementing the federally conducted and federally assisted provisions of the Executive Order").

¹⁵⁴ 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 6.

¹⁵⁵ See 2011 ATT'Y GEN. MEMO, *supra* note 94, at 2 (describing action item 2).

¹⁵⁶ 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 7.

contacting a program and to identify which languages those individuals speak. Thus, DHS must first track language data to determine how it will then provide “meaningful access” to LEP individuals.

Additionally, the DHS Language Access Plan gives its component agencies instructions that contradict the Attorney General’s Memorandum.¹⁵⁷ Instead of instructing its component agencies to address the Attorney General’s eight action items, the DHS Language Access Plan directs component agencies to include a minimum of *fourteen* elements in their own language access plans.¹⁵⁸ For example, DHS does not specifically require component agencies to inventory the languages most frequently spoken as the Attorney General’s second action item requires.¹⁵⁹ Thus, the DHS Language Access Plan creates confusion over whether its component agencies must address the Attorney General’s requirements and DHS’s requirements, or only DHS’s requirements.

DHS’s Language Access Plan does not sufficiently address the fact that ICE ERO is among the component agencies not yet uniformly tracking language data of LEP immigrant detainees.¹⁶⁰ According to the DHS Language Access Plan, ICE expressed its commitment to increase access to its programs to LEP individuals.¹⁶¹ To track language data in ICE detention, ERO planned to “implemen[t] . . . procedures for documenting the languages spoken by ICE detainees to help ensure effective communication;” “encourag[e] detention facilities to note each detainee’s language in his or her detention folder;” and make changes to the book-in process and database to identify and record LEP detainee language data.¹⁶² While these are crucial goals, it is alarming that these fundamental measures had not yet been implemented twelve years after EO 13166k. If ICE is not even tracking the language data of its LEP detainees, it has not yet taken reasonable steps to provide meaningful access to LEP detainees under EO 13166 or the DOJ LEP Guidance.

Similarly, the 2014 DHS Office of Civil Rights and Civil Liberties (CRCL) Draft Language Access Plan presents vague guidance that barely addresses the four-factor test and does not mention the Attorney General Memo’s action items at all.¹⁶³ CRCL does not indicate whether DHS has conducted inventory of the most frequently encountered languages by component agencies.¹⁶⁴ Instead, the CRCL Draft Plan generally states that it will “identify effective methods for collecting and tracking the languages of callers to the CRCL telephone line and other interactions with LEP persons to

¹⁵⁷ Compare 2011 ATT’Y GEN. MEMO, *supra* note 94, at 2–3, with 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 4–5.

¹⁵⁸ 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 4–5.

¹⁵⁹ Compare 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 4–5, with 2011 ATT’Y GEN. MEMO, *supra* note 94, at 2 (describing action item 2).

¹⁶⁰ 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at app. at 15–16.

¹⁶¹ *Id.* at app. at 14.

¹⁶² *Id.* at app. at 15–16.

¹⁶³ 2014 DHS CRCL DRAFT LANGUAGE ACCESS PLAN, *supra* note 148.

¹⁶⁴ *Id.* at 12.

assist CRCL in future language services.”¹⁶⁵ Even though the CRCL Draft Plan adopts the DOJ’s definition of meaningful access,¹⁶⁶ that goal cannot be achieved without first tracking language data. Without this crucial data, it is impossible for CRCL to determine how many LEP individuals are excluded from DHS programs and activities and which ones actually have meaningful access.

The CRCL Draft Plan does not provide practically *any* guidance for DHS component agencies, including ICE, to follow to ensure meaningful access. The CRCL Draft Plan mentions “detention” twice.¹⁶⁷ For example, the CRCL Draft Plan only vaguely states that it will “collaborate with ICE on translating the ICE Detainee Handbook . . . into additional languages,”¹⁶⁸ yet, it does not specify whether those languages will be the languages most frequently spoken by LEP detainee population. The CRCL Draft Plan also generally mentions that it will “[p]rovide training, technical assistance, and resources for personnel in the immigration enforcement and detention contexts.”¹⁶⁹ Thus, the CRCL Draft Plan is ineffective guidance for DHS component agencies and will not ensure uniformly meaningful access to LEP detainees.

In conclusion, DHS has not taken reasonable steps to ensure meaningful access for LEP detainees. Neither the 2012 DHS Language Access Plan nor the 2014 CRCL Draft Language Access Plan adequately incorporate the DOJ four-factor analysis or the Attorney General’s Memorandum.¹⁷⁰ Neither Language Access Plan requires ICE to conduct an inventory of the languages spoken by LEP detainees,¹⁷¹ thereby disregarding the first factor of the DOJ four-factor test and the Attorney General’s second action item altogether.¹⁷² By ignoring these fundamental frameworks, DHS and CRCL are perpetuating ICE’s lack of transparency and uniformity in language access in immigration detention facilities across the United States. Structurally, CRCL does not have the power to prosecute other DHS component agencies.¹⁷³ Therefore, neither DHS nor CRCL require ICE to comply with Title

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 3 (defining “meaningful access” as “[l]anguage assistance that results in accurate, timely, and effective communication is available at no cost to the LEP individual. For LEP individuals, meaningful access denotes access that is not significantly restricted, delayed or inferior as compared to programs or activities provided to English proficient individuals.”)

¹⁶⁷ *Id.* at 11, 12.

¹⁶⁸ *Id.* at 11.

¹⁶⁹ *Id.*

¹⁷⁰ Compare 2012 DHS LANGUAGE ACCESS PLAN, *supra* note 111, at 7, and 2014 DHS CRCL DRAFT LANGUAGE ACCESS PLAN, *supra* note 152, with DOJ LEP GUIDANCE, *supra* note 32, at 50, 124, and 2011 ATT’Y GEN. MEMO, *supra* note 94.

¹⁷¹ *Id.*

¹⁷² See DOJ LEP GUIDANCE, *supra* note 32, at 50, 124 (indicating that the first factor is analyzing the number or proportion of LEP individuals that contact the agency); see also 2011 ATTORNEY GENERAL MEMO, *supra* note 94, at 2 (instructing agencies to conduct an inventory of languages most frequently spoken by LEP individuals in “action item” 2).

¹⁷³ Schlanger, *supra* note 110, at 98.

VI and EO 13166's prohibition on national origin discrimination against LEP detainees.

B. ICE's 2015 Language Access Plan Does Not Ensure Meaningful Access for LEP Immigrant Detainees

When ICE finally issued its Language Access Plan¹⁷⁴ in June 2015, it failed to sufficiently address many essential requirements of federal LEP Policy, including the DOJ's four-factor balancing test, the Attorney General's action items, and DHS's minimum elements for component agency language access plans.¹⁷⁵ The ICE Language Access Plan (Plan) states that ICE's policy is providing meaningful access to its programs and activities to LEP individuals which "includes providing timely and effective communication to . . . LEP individuals in ICE custody."¹⁷⁶ Additionally, the Plan applies to a variety of ICE functions such as when "ICE employees and contractors interact with members of the public, persons involved in law enforcement exchanges, persons detained in ICE custody, and persons subject to reporting requirements with ICE (e.g., orders of recognizance, orders of supervision)."¹⁷⁷ Nevertheless, the ICE Plan does not indicate that it has taken reasonable steps to ensure meaningful access, and instead lists a fragmented strategy that will not likely create uniform language access for LEP individuals in their communications with ICE.

First, the ICE Plan incorporates the DOJ's definition of "meaningful access,"¹⁷⁸ but it does not even mention the four-factor balancing test. It is unclear what language data, if any, ICE relied upon to write its Plan. Again, the first factor of the balancing test is assessing the number or proportion of LEP individuals who contact a program to determine language needs and the agency's responsibility to provide access.¹⁷⁹ Without tracking language data, ICE cannot determine how many detainees are LEP or which languages are most widely spoken in detention.

Second, the ICE Plan does not comply with the Attorney General's action items.¹⁸⁰ The ICE Plan does not address the Attorney General's require-

¹⁷⁴ U.S. DEP'T OF HOMELAND SECURITY, *Language Access Plan 3* (June 14, 2015) [hereinafter *DHS Language Access Plan*], <https://www.ice.gov/sites/default/files/documents/Document/2015/LanguageAccessPlan.pdf>, archived at <https://perma.cc/55PJ-QCPN>.

¹⁷⁵ Compare *id.*, with *DOJ LEP Guidance*, *supra* note 32, at 50, 124, and, 2011 Attorney General Memo, *supra* note 94, at 2–3, and, 2012 *DHS Language Access Plan*, *supra* note 111, at 4–5.

¹⁷⁶ *DHS Language Access Plan*, *supra* note 174, at 3.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* at 5 (defining meaningful access as "language assistance that results in accurate, timely, and effective communication and that is available at no cost to the LEP person. For LEP persons, meaningful access denotes access that is not significantly restricted, delayed, or inferior as compared to program or activity access that provided to English proficient persons"); *DOJ LEP Guidance*, *supra* note 32, at 50, 124.

¹⁷⁹ See *DOJ LEP Guidance*, *supra* note 32, at 50, 124 (indicating that the first factor is analyzing the number or proportion of LEP individuals that contact the agency).

¹⁸⁰ Compare *DHS Language Access Plan*, *supra* note 174, with, 2011 Attorney General Memo, *supra* note 94.

ment to conduct an inventory of most frequently spoken languages, just like the DHS Plan ignored this requirement.¹⁸¹ For example, the ICE Plan instructs ICE staff to “make reasonable efforts” to identify LEP individuals¹⁸² but does not *require* staff to track language data from every LEP encounter.¹⁸³ Instead, the ICE Plan states that ERO is only tracking data of language services *provided* through its USCIS Language Services Section (LSS) interpretation contract.¹⁸⁴ ICE is only partially tracking language data; it tracks language services actually provided, but does not comprehensively inventory the languages most frequently spoken by the detainee population as the DOJ LEP Guidance and Attorney General Memorandum require in this context.

Third, the ICE Plan does not even comply with DHS’s fourteen “minimum” required elements for component agency language access plans.¹⁸⁵ For example, the fifth element of the DHS Plan requires component agencies to establish “procedures or protocols” for staff to recognize if an LEP individual needs assistance, identify his language, access language services, and *record* the contact.¹⁸⁶ As stated above, ICE does not require its staff to track the primary language of each detainee, even though it concedes it has the capability to do so.¹⁸⁷ Additionally, the seventh element of the DHS Plan explicitly requires component agencies to track data by “outlin[ing] steps for implementing and maintaining a mechanism for collection and management of data relating to non-English needs, especially through existing databases or tracking systems.”¹⁸⁸ ICE has merely identified that it has the capability to track language data in its existing databases but has not proactively required its staff to do so. This ambiguity likely will lead to a lack of uniformity and accountability in data tracking and provision of LEP services across the 250 facilities that ICE oversees.

Thus, ICE has not demonstrated that it has taken reasonable steps to provide meaningful access to LEP detainees and has not shown that it is in compliance with EO 13166.

¹⁸¹ Compare 2012 DHS Language Access Plan, *supra* note 111, at 7, with DHS Language Access Plan, *supra* note 174, at 3.

¹⁸² See DHS Language Access Plan, *supra* note 174, at 9 (describing how ICE staff should assess an LEP individual’s primary language).

¹⁸³ See *id.* at 10–11 (stating that “[a] detainee’s primary language is able to be captured” in the ICE database, and that medical personnel have the “capability to track interpretation services provided to LEP individuals”).

¹⁸⁴ *Id.* at 11.

¹⁸⁵ See 2012 DHS Language Access Plan, *supra* note 111, at 4–5. While the 2012 DHS Language Access Plan is in tension with the 2011 Attorney General Memo, it is remarkable that ICE does not at least follow its own agency’s language access requirements.

¹⁸⁶ See *id.* at 5 (describing the fifth minimum requirement “Language Access Procedures/Protocols”).

¹⁸⁷ *Id.* app. at 3, 11.

¹⁸⁸ *Id.* at 5.

1. Applying the Four-Factor Analysis to ICE

Other agencies clearly apply the DOJ four-factor analysis as a foundation for their language access plans.¹⁸⁹ The following application of the four-factor analysis weighs heavily in favor of ICE providing free interpretation for any communication with detention center staff and translation of vital documents for *all* LEP detainees, at the very least in the languages most frequently spoken by the detained population. Furthermore, the outcome is consistent with ICE's policy that "meaningful access" is "language assistance that results in accurate, timely, and effective communication and that is available *at no cost* to the LEP person . . . [and] access that is not significantly restricted, delayed, or inferior" to access provided to English speakers.¹⁹⁰

a. Factor 1. Number or Proportion of LEP Individuals

The first factor assesses the number or proportion of LEP individuals that contact a program or activity.¹⁹¹ The greater the number of LEP individuals to contact a program, the more affirmative steps an agency must take for its efforts to be classified as "reasonable."¹⁹² Agencies must prepare a plan for encounters with LEP individuals, which "may be as simple" as being ready to use a commercial telephonic language service provider for interpretation.¹⁹³ Here, ICE ERO works exclusively with the foreign-born population.¹⁹⁴ ICE planned to detain more than the current 34,000 immigrants on a daily basis in FY 2016,¹⁹⁵ thereby requiring thousands of LEP individuals to use its programs and activities every day. Thus, based on the sheer number or large proportion of LEP individuals in detention, ICE should at least be prepared to allow those individuals to use a telephonic

¹⁸⁹ See SOCIAL SECURITY ADMINISTRATION, *Plan for Providing Access to Benefits and Services With Limited English Proficiency (LEP)*, Section 3, (updated Aug. 2011) [hereinafter *SSA Language Access Plan*], <https://www.ssa.gov/multilanguage/LEPPlan2.htm#&a0=2>, archived at <https://perma.cc/A7S2-DPF6> (calculating the top five language preferences other than English for all services, assessing the overall volume of LEP contact with programs, stating the importance and nature of programs, and detailing resources available for interpretation and translation as well as the expenditures on language access); see also U.S. DEPT OF EDUCATION, *Policy Directive to Ensure Meaningful Access to Federally Conducted Programs and Activities for Individuals with Limited English Proficiency 2*, 13 (Sept. 24, 2012), <http://www2.ed.gov/policy/gen/leg/foia/acsocro1102.pdf> (needs perma link) (describing the four-factor analysis and its importance for the development of language access plans across the agency).

¹⁹⁰ *DHS Language Access Plan*, *supra* note 174, at 5.

¹⁹¹ *DOJ LEP Guidance*, *supra* note 32, at 50, 124.

¹⁹² *Id.*

¹⁹³ *Id.* at 50, 125.

¹⁹⁴ See ICE (does it need to be defined as "ICE" in footnote 107?), *Who We Are*, *supra* note 115 (describing the mission of ERO as "identifies and apprehends removable *aliens*, detains these individuals when necessary and removes illegal *aliens* from the United States") (emphasis added); see also 8 U.S.C.A § 1101(a)(3) (West 2015) (defining "alien" as "any person not a citizen or national of the United States").

¹⁹⁵ *DHS Budget-In-Brief FY 2016*, *supra* note 145, at 5.

interpretation service (such as Language Line) to speak with an interpreter, and to access vital documents as the DOJ LEP Guidance suggests. Another solution would be hiring more bilingual staff.

b. Factor 2. Frequency of Contact with Program

The second factor measures the frequency with which LEP individuals must contact the program.¹⁹⁶ When “LEP individuals must access the recipient’s program or activity on a daily basis . . . a recipient has greater duties than if such contact is unpredictable or infrequent.”¹⁹⁷ LEP individuals in ICE immigration detention are required to use ICE’s programs and activities on a daily basis, 24 hours a day, 7 days a week until they are released from detention or deported. Since LEP individuals must *constantly* use ICE’s programs and activities while they are detained, ICE has a great responsibility to provide LEP detainees with meaningful access under this factor.

c. Factor 3. Nature and Importance of the Program

The third factor examines the nature and importance of the program to LEP individuals.¹⁹⁸ Notably, the DOJ LEP Guidance emphasizes that agencies must proactively take steps to provide access, “where the denial or delay of access may have life or death implications than in programs that are not as crucial to one’s day-to-day existence.”¹⁹⁹ Additionally, a “compulsory” program is “strong evidence of the program’s importance.”²⁰⁰ Here, ICE’s general detention program is “compulsory” because immigrants are arrested and placed in detention, and do not voluntarily choose to be detained. Furthermore, meaningful access to some of ICE’s programs and activities, such as medical services, the law library, legal representatives, and communications with deportation officers “may have life or death implications” for LEP individuals.²⁰¹ For example, if an LEP individual is unable to express her fear of returning to her country of origin to her deportation officer, she may be deported and killed.²⁰²

¹⁹⁶ DOJ LEP Guidance, *supra* note 32, at 50, 125.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ At least 155 detainees have died in ICE custody since 2003. See *List of Deaths in ICE Custody*, *supra* note 8.8. Additionally, the Supreme Court has long recognized the high stakes of deportation. See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (finding that “deportation is a drastic measure and at times the equivalent of banishment of exile”); see also *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (recognizing the severity of deportation and extending a criminal defendant’s Sixth Amendment right to effective counsel to include advice on possible immigration consequences of pleas and sentencing).

²⁰² See Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, THE GUARDIAN (Oct. 12, 2014), <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>, archived at <https://perma.cc/22Z3-LHXE> (finding that as many as 83 Central Americans were killed after being deported since 2014).

d. Factor 4. Available Resources

The fourth factor analyzes the agency's existing available resources to devote to its programs and activities.²⁰³ Larger entities with more resources that frequently contact LEP individuals have a greater responsibility to provide meaningful access to LEP individuals than do small entities with infrequent LEP contact.²⁰⁴ The total FY 2016 budget for DHS is approximately \$64.9 billion.²⁰⁵ ICE will receive about 10% of that budget,²⁰⁶ or roughly \$6.3 billion.²⁰⁷ More than half of ICE's budget, or "\$3.3 billion [will be used] to provide safe, secure, and humane detention and removal of removable individuals who are held in Government custody"²⁰⁸ Significantly, the DHS budget does not allocate *any* funding directly to providing interpretation or translation, and thus, funding from those services presumably must come from the \$3.3 billion ICE detention budget. ICE plans to spend \$123.54 per day on each detained adult,²⁰⁹ multiplied by at least 34,000 detainees is roughly \$4.2 million per day. Hence, ICE likely has the resources available to provide interpretation and translation services to give all LEP individuals meaningful access to programs and activities during their time in detention.

2. ICE's Failure to Track Language Data is Noncompliance with EO 13166

ICE has failed to engage in the threshold analysis of the nature and scope of its obligations in detention: identifying the primary languages spoken by LEP detainees.²¹⁰ For example, the "Detainee Handbook" illustrates this problem. ICE theoretically provides the Detainee Handbook to all detainees during the initial intake process.²¹¹ The Detainee Handbook is available in English and Spanish.²¹² It has also been translated into Chinese, Portuguese, French, Arabic, and Vietnamese, but is only available to LEP detainees upon request.²¹³ It is unclear, however, whether these five additional languages represent the most widely spoken languages in the LEP detainee population. Without available data on the most frequently spoken languages by LEP detainees, ICE's removal statistics should create a rough estimate.

²⁰³ *DOJ LEP Guidance*, *supra* note 32, at 50, 125.

²⁰⁴ *Id.*

²⁰⁵ *DHS Budget-In-Brief FY 2016*, *supra* note 145, at 9.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 54.

²⁰⁸ *Id.* at 5.

²⁰⁹ *Id.* at 54.

²¹⁰ *2011 Attorney General Memo*, *supra* note 94; *2012 DHS Language Access Plan*, *supra* note 111, at 4–5; *DOJ LEP Guidance*, *supra* note 32, at 50, 124 (the first factor of the DOJ test is to determine the number or proportion of LEP individuals).

²¹¹ *DHS Language Access Plan*, *supra* note 174, at 6.

²¹² *Id.*

²¹³ *Id.*

ICE removal statistics are categorized by country of citizenship,²¹⁴ so it is likely that the top countries of removal correspond with the primary languages spoken by LEP detainees. According to the FY 2014 ICE removal statistics, there were 315,943 removals of foreign nationals.²¹⁵ Vietnamese, one of the five additional languages in which the Detainee Handbook is printed, clearly does *not* comprise one of the top languages of immigrant detainees: in 2014 there were only 48 ICE removals to Vietnam,²¹⁶ representing only 0.015% of total removed individuals. In 2015, ICE removed only 32 individuals to Vietnam.²¹⁷

Conversely, indigenous languages from Central America or Mexico comprise some of the top languages currently spoken in immigration detention.²¹⁸ The top five countries of citizenship for the 315,943 removals in 2014 were: Mexico (176,968 or 56%), Guatemala (54,423 or 17%), Honduras (40,695 or 12.88%), El Salvador (27,180 or 8.6%), and the Dominican Republic (2,130 or 0.67%).²¹⁹ Similarly, the FY 2015 ICE removal statistics reveal the same top five countries of citizenship for the 235,413 total removals.²²⁰ Even though Spanish is the predominant language spoken in these five countries, a large portion of the population in Mexico and Guatemala speak indigenous languages.²²¹ According to a 2015 study of indigenous-language speakers in the immigration system, “DHS has named Kanjjobal, Quiche, Kachiquel, and Mam as Mayan Languages, but omitted 25 other Mayan languages spoken in Mexico, Belize, Guatemala, Honduras, and El Salvador; excluding the second largest Mayan language, Q’eqchi, and the third, Yucatec Maya.”²²² While at least 94% of immigrants in ICE detention are Mexican or Central American, indigenous languages are extremely underrepresented, with only 7% of all languages spoken by this group even appearing on the “I Speak” card which is designed to assist detention staff in identifying an LEP individual’s language.²²³

²¹⁴ See U.S. DEP’T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2014 app. A at 12–17 [hereinafter *FY 2014 ICE ERO Report*], <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>, archived at <https://perma.cc/5RGA-5KEQ> (categorizing removal statistics by country of citizenship).

²¹⁵ *Id.* at 1, 17.

²¹⁶ *Id.* at 13.

²¹⁷ See U.S. DEP’T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2015 13, 17 [hereinafter *FY 2015 ICE ERO Report*], <https://www.ice.gov/sites/default/files/documents/Report/2015/fy2015removalStats.pdf>, archived at <https://perma.cc/WBM5-LUQA>.

²¹⁸ See Gentry, *supra* note 6, at 46 (estimating that “between 18,819 and 22,858” Guatemalan indigenous language speakers were deported in FY 2014).

²¹⁹ *FY 2014 ICE ERO Report*, *supra* note 214, at app. A at 12–17.

²²⁰ The top countries of removal were Mexico (146,132 or 62%), Guatemala (33,249 or 14%), El Salvador (21,920 or 9.3%), Honduras (20,309 or 8.6%), and the Dominican Republic (1,946 or 0.82%). *FY 2015 ICE ERO Report*, *supra* note 217.

²²¹ Gentry, *supra* note 6, at 12, 13, 46.

²²² *Id.* at 13.

²²³ *Id.*; see also U.S. DEP’T OF HOMELAND SEC., I SPEAK . . . LANGUAGE IDENTIFICATION GUIDE, <http://www.dhs.gov/xlibrary/assets/crcl/crcl-i-speak-booklet.pdf>, archived at <https://perma.cc/7CX2-MMCU> (stating that “this guide assists literate individuals who are not proficient in English to identify a preferred language.”)

Similarly, the ICE Language Access Plan concedes that as of March 2015, LEP detainees at family residential facilities spoke numerous indigenous languages.²²⁴ The ICE Plan does not clarify, however, which of these languages were spoken in other detention centers which comprise the vast majority of detention facilities.²²⁵ Instead, the ICE Plan vaguely states that “[e]fforts are currently underway to improve the language services provided in ICE residential facilities including identifying vendors through ICE’s existing Language Services Blanket Purchase Agreement that can provide interpretation services to indigenous speakers.” These efforts are important, but they will be insufficient unless ICE first tracks basic indigenous language data across all its detention centers.

Regarding other essential ICE programs and activities, such as medical services and accessing legal information, it does not appear that ICE has surveyed LEP language needs or requires interpretation or translation when LEP detainees try to use those services. The ICE Plan states that language services are available to medical staff 24/7,²²⁶ however; the ICE Plan does not indicate whether medical services staff are trained and *required* to use language line during their interactions with LEP individuals.²²⁷ Additionally, LEP detainees merely have access to the law library rules and procedures in Spanish,²²⁸ but the ICE Plan does not mention whether any legal materials are translated into Spanish or other languages. If not, LEP detainees do not have meaningful access to legal materials at ICE facilities.

Therefore, ICE has failed to take reasonable steps to ensure that LEP detainees have meaningful access to its programs and services. ICE has only superficially complied with federal LEP policy. It has not effectively applied the four-factor analysis, followed the DOJ LEP Guidance, the Attorney General Memorandum, or the requirements of the DHS Language Access Plans. By not even tracking the primary languages of its detainees, ICE has inexcusably neglected and effectively silenced the LEP immigration population for more than fifteen years. This is clear national origin discrimination in violation of Title VI. It is time that DHS and ICE reform their LEP policies to finally come into compliance with EO 13166 and to give LEP detainees meaningful access to their programs and activities.

²²⁴ See *DHS Language Access Plan*, *supra* note 174, at 10 (finding that “[a]s of March 2015, the following Mayan dialects are represented within the ICE family residential facilities: Quiche (K’iche), Mam, Achi, Ixil, Awakatek, Jakalteq (Popti), and Qanjobal (K’anjob’al”).

²²⁵ See *id.*

²²⁶ See *id.* at 6 (stating that “ICE Health Service Corps (IHSC) will continue to use its own separate language services contract, which is available 24/7 for use by healthcare staff.”)

²²⁷ *Id.*; see also *Death Investigation for Pablo Gracida-Conte*, *supra* note 4, at 121 (documenting how ICE Health Service Corps medical staff’s failure to use an interpreter for four months contributed to Mr. Gracida-Conte’s death).

²²⁸ See *DHS Language Access Plan*, *supra* note 174, at 6.

IV. RECOMMENDATIONS FOR REFORM

DHS and ICE must make immediate reforms to prohibit further national origin discrimination against LEP detainees in violation of Title VI and EO 13166. Most of the following recommendations could be instituted quickly, at minimal cost.

A. DHS/ICE Should Maintain a Complete Public List of All Its Detention Centers

First, DHS and ICE should keep a comprehensive, updated, public list of all detention facilities in the United States. Without a comprehensive public list of all ICE detention facilities, this fundamental lack of transparency will continue to obscure the analysis of language access in immigration detention and to compound EO 13166's primary goal of ensuring meaningful access to programs and activities for LEP individuals. It is essential to know where LEP immigrants are detained and what type of contract applies to that facility.²²⁹ Otherwise, enforcing DHS and ICE accountability for EO 13166 compliance will be nearly impossible.

DHS and ICE should simply publish the complete list of facilities that they presumably already have within their agencies. Currently, the "Detention Facility Locator" on ICE's website publicly lists the locations of eighty detention facilities, along with addresses and contact information.²³⁰ In contradiction, ICE's website indicates that immigrants are detained in more than 250 facilities nationwide.²³¹ Thus, ICE should update the Detention Facility Locator to include *all* its facilities. ICE likely already has a list of all of its contracted private and public detention facilities. For example, ICE clearly already tracks biographical and location data of its detainees, as evidenced by the "Online Detainee Locator System," a tool on ICE's website that the public can use to search for an adult ICE detainee who is currently detained or who has been released from custody within the last sixty days.²³² The Online Detainee Locator System provides clear evidence that ICE tracks data about its detainees including their location, biographic information, and A-number. Therefore, updating the Detention Facility Locator on ICE's website to include all its detention facilities should not be time-consuming or costly.

²²⁹ The list should also clarify whether DHS or DOJ is the primary funding source so that federal recipients can better understand which LEP Guidance to follow.

²³⁰ *ICE Detention Facility Locator*, *supra* note 126.

²³¹ *ICE Detention Management Factsheet*, *supra* note 126.

²³² See Immigration and Customs Enforcement, Online Detainee Locator System, <https://locator.ice.gov/odls/homePage.do>, *archived at* <https://perma.cc/7Q4P-P86S> (last visited Feb. 12, 2017) (facilitating public searches for a detainee based on biographic information, including name, country of origin, and date of birth, or by the detainee's nine-digit "A-number" and country of origin.)

B. ICE Should Track, Monitor and Evaluate Language Data of All Detainees

DHS should require that ICE and its other component agencies track language data for all detainees that access their programs and activities to ensure compliance with EO 13166. ICE concedes in its own Language Access Plan that its databases are capable of tracking language data,²³³ so ICE should create a standard procedure for tracking, monitoring, and evaluating language data of its detainees. By effectively identifying and tracking the language data of all detainees, ICE would be able to better assess the first two factors of the DOJ four-factor analysis: the number of detainees that speak each language and the frequency with which they use ICE's programs and activities. In this way, ICE can finally assess which languages are most frequently spoken by LEP detainees and, thus, choose its language service providers accordingly.

To begin efficiently tracking language data, ICE must first establish a system of identifying what language LEP detainees speak during the initial intake process. ICE's current policy is to use the "I Speak" booklets²³⁴ or posters so that literate LEP detainees can point to their language. While the "I Speak" booklets and posters list more than seventy languages, they do not list all of the primary languages of LEP detainees, including all commonly spoken indigenous Central American and Mexican languages.²³⁵ ICE should update the "I Speak" booklets and posters accordingly. Moreover, to aid in language identification the "I Speak" booklet could also have an index by country of origin, which would aid both LEP detainees and ICE staff in more easily identifying a primary language. For example, the Guatemala entry on the index would list the languages spoken in that country: including Spanish and the indigenous languages. Otherwise, the LEP detainee must know how to read or how to identify their language in English to express it to ICE staff. Also, ICE must use telephonic interpreters to aid in the language identification process for illiterate LEP detainees who may not be able to identify their language on the "I Speak" booklet or poster.

Next, ICE should *require* staff to record language data in its current database. Since ICE acknowledges that language data can be captured by its current databases,²³⁶ primary language data must be incorporated into ICE's initial intake process of all detainees. This would streamline data and would reveal the proportion of LEP and English-proficient detainees.

Once ICE uniformly identifies and tracks language data, that information can be used for a variety of purposes. First, ICE will know the proportion of LEP detainees and their primary languages. This information alone can benefit ICE in its contract negotiations with telephonic language service

²³³ See *DHS Language Access Plan*, *supra* note 174, at 9–11.

²³⁴ I Speak . . . Language Identification Guide, *supra* note 223.

²³⁵ Gentry, *supra* note 218, at 12, 13, 46.

²³⁶ See *DHS Language Access Plan*, *supra* note 174, at 9–11.

providers and translation agencies.²³⁷ For example, if one of the primary languages spoken in detention is Mam, a Guatemalan indigenous language, then ICE can set professional standards and seek better rates with interpretation and translation providers that offer services in Mam. This in turn will benefit Mam-speaking detainees, such as Elana.

Additionally, medical services in detention would likely be more efficient if personnel knew the primary language of any detainee that sought health care. Medical services would be more effective if LEP detainees' primary language was recorded in their file. For example, medical personnel could proactively request a telephonic interpreter to assist during a medical check-up or that consent forms are already translated before a patient arrives for an appointment. This would likely cut down on the number of appointments that LEP detainees request with medical personnel, creating more efficient medical services for all detainees.

Furthermore, ICE could improve LEP detainees' access to legal information such as the Detainee Handbook, the law library, immigration forms, and legal service providers by translating those documents into the primary languages spoken in detention. These materials would only need to be translated *once* at ICE headquarters and then it could be efficiently uploaded to the agency website for all detention facilities to access.

Finally, ICE should periodically monitor language needs at its facilities and maintain an updated list of "primary languages." ICE could run a monthly or annual database report on primary languages spoken by LEP detainees and adjust interpretation and translation services accordingly. For example, if ICE finds that Arabic is in demand in their facilities, they could request additional interpreters from their language services provider. Thus, ICE could effectively ensure more meaningful access to its programs and activities for LEP detainees by tracking, monitoring, and evaluating language data.

C. DHS and ICE Should Revise Their Language Access Plans

DHS and ICE's current Language Access Plans do not ensure that the agencies will take reasonable steps to provide meaningful access to its programs and activities for LEP detainees. The plans superficially address the issues without creating uniform systems for agency and contract staff to implement LEP policy in practice. Therefore, the agencies should revise the plans so that staff can use them as practical tools.

DHS and ICE should improve their Language Access Plans using the Social Security Administration's (SSA's) Language Access Plan as a model. The SSA Language Access Plan is succinct, clear, and provides valuable

²³⁷ See *id.* at 6 (listing some of ICE's language service providers: Homeland Security Investigations (HSI) manages ICE's worldwide language services, the USCIS Language Services Section provides language services, and the IHSC uses a separate language services contract.)

agency statistics on LEP data.²³⁸ The SSA Language Access Plan effectively articulates the DOJ four-factor analysis. The plan provides data to show the overall volume of LEP individuals accessing its programs and activities,²³⁹ and a determination of preferred languages.²⁴⁰ For FY 2010, the SSA estimated that about 2.9 million claimants were LEP.²⁴¹ Then, the plan describes the importance of its programs to the people who contact them, including LEP individuals.²⁴² Lastly, the plan addresses the resources that it has available by adding statistics for the cost of interpretation and translation for LEP individuals. To implement cost-effective LEP solutions, the SSA first prioritizes hiring bilingual staff.²⁴³ When bilingual staff cannot assist an LEP individual, the SSA uses third-party interpreters.²⁴⁴ In FY 2010, the SSA spent about \$7.29 million on interpretation and translation, including \$3.39 million on live interpretation and translation services and \$3.9 million on telephonic interpretation services.²⁴⁵ If the total amount spent on SSA interpretation and translation services for FY 2010 were divided by the 2.9 million estimated LEP claimants accessing SSA programs and services for that year, it roughly equals \$2.51 per communication.

Under the DOJ four-factor analysis, the SSA has determined that all LEP individuals are entitled to free interpretation services in all of SSA's programs and activities.²⁴⁶ DHS and ICE should afford its LEP detainees the same meaningful access to its programs and activities.

D. Pursuant to the DOJ Four-Factor Analysis, ICE Should Provide Free Interpretation and Translation Services to All LEP Detainees

The DOJ's four-factor analysis weighs heavily in favor of ICE providing free interpretation and translation services to all its LEP detainees, much like the SSA provides those services to its LEP claimants. ICE should revise its Language Access Plan and policies so that LEP individuals can also have meaningful access to programs and activities while in detention.

Briefly applying the four-factor analysis demonstrates that ICE should provide these services to all LEP detainees. First, there are at least 34,000

²³⁸ See *SSA Language Access Plan*, *supra* note 189, at Section 3 (calculating the top five language preferences other than English for all services, assessing the overall volume of LEP contact with programs, stating the importance and nature of programs, and detailing resources available for interpretation and translation as well as agency expenditures on language access).

²³⁹ See *id.* at Section 3, Factor 1 (calculating that in FY 2010 about 4.1 percent of more than 71 million claimants preferred interviews in a language other than English).

²⁴⁰ See *id.* at Section 3, Factor 1, Table 1 and 2 (documenting the top five preferred languages of LEP speakers by type of service sought).

²⁴¹ *Id.* at Section 3, Factor 1.

²⁴² See *id.* at Section 3, Factor 3 (describing the "critical role" SSA plays in providing essential services to LEP individuals who are SSI eligible).

²⁴³ See *id.* at Section 3, Factor 4 (identifying "9,482 bilingual and multilingual employees, representing 138 different languages and dialects").

²⁴⁴ *Id.*

²⁴⁵ *Id.*; see *id.* at Section 3, Factor 4, Table 4 (calculating SSA expenditures for translations and interpretation services between FY 2007 and FY 2010).

²⁴⁶ See *id.* at Section 2 (D), *Qualified Interpretation Services*.

immigrants detained each day in the United States pursuant to the congressional bed mandate.²⁴⁷ Even without ICE language data to rely on, the removal statistics suggest that the majority of detainees are LEP. So there is a high number and proportion of LEP detainees using ICE’s programs and services. Second, those LEP detainees are in constant contact with ICE’s programs and activities. Third, many of the programs and activities that the LEP detainees access in ICE detention are compulsory, are crucial, and may have life or death consequences.²⁴⁸ Fourth, ICE has adequate resources²⁴⁹ available to provide interpretation and translation services to its LEP detainees. Considering its \$3.3 billion FY 2016 budget, ICE should be able to allocate a similar level of interpretation and translation services to the LEP detainee population as does the SSA to its claimants. If not, ICE must provide “well-substantiated evidence” that it cannot afford to provide language access.²⁵⁰

E. Oversight Is Necessary to Enforce EO 13166 and Title VI

A primary problem with EO 13166 is that it lacks an enforcement mechanism. Without a private right of action for EO 13166 violations,²⁵¹ and without regular oversight, agencies like ICE have little incentive to comply with federal LEP policy. Thus, the DOJ should implement measures to hold agencies accountable to Title VI and EO 13166 by establishing annual compliance surveys and requiring inspectors to document LEP access violations.²⁵² Without greater oversight, DHS and ICE will likely only superficially follow federal LEP policy.

First, the DOJ should implement a periodic Language Access survey to measure agency compliance with EO 13166. The survey could easily be modeled after the Attorney General’s Memo or the self-assessment tool that the DOJ issued in 2011. To encourage compliance, the DOJ should impose fines or sanctions on agencies that are noncompliant. Based on the history of inconsistent agency compliance with EO 13166, this type of language access survey could promote greater language access across federal agencies.

Additionally, ICE should *require* evaluations of language access compliance when inspecting its facilities and institute consequences when facili-

²⁴⁷ See Consolidated Appropriations Act of 2014, *supra* note 119.

²⁴⁸ See *Fatal Neglect: How ICE Ignores Deaths in Detention*, *supra* note 11.

²⁴⁹ See *DHS Budget-in-Brief FY 2016*, *supra* notes 205–209.

²⁵⁰ See *DOJ LEP Guidance*, *supra* note 32, at 50, 125 (describing the fourth factor of the DOJ test which requires large entities to prove that they cannot financially provide language access).

²⁵¹ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that no private right of action exists to enforce agency “disparate-impact” regulations under Title VI).

²⁵² See generally U.S. Dep’t of Justice, *DOJ Agreements and Resolutions*, FEDERAL COORDINATION AND COMPLIANCE SECTION (detailing DOJ investigations, lawsuits, and memorandums of understanding against state and local recipients of their own federal assistance for Title VI violations), <http://www.justice.gov/crt/doj-agreements-and-resolutions>, archived at <https://perma.cc/3DT5-PTAK> (last visited Feb. 12, 2017).

ties fail inspections. The current process of ICE facility inspections lacks impartiality, uniformity and transparency.²⁵³ It is unclear whether language access compliance is a part of ICE's current inspections. Facilities with more than fifty detainees are subject to inspections by either ICE Enforcement and Removal Operations or by ICE Office of Detention Oversight.²⁵⁴ ICE facilities should instead be inspected by third-parties without ICE affiliation to ensure greater impartiality and transparency. Currently, there are no consequences for failed ICE facility inspections.²⁵⁵

V. CONCLUSION

DHS and ICE have failed to take reasonable steps to comply with Executive Order 13166 for over fifteen years, effectively denying thousands of LEP immigrants in detention meaningful access to federal programs and activities. This chronic agency inaction amounts to national origin discrimination under Title VI of the Civil Rights Act of 1964. Based on their essential public service obligations as federal agencies, DHS and ICE should be compelled to respect the due process and human rights of LEP immigrants in detention. Mr. Gracida-Conte died because ICE staff denied him an interpreter to effectively communicate his life-threatening symptoms.²⁵⁶ This egregious deprivation of life must not go unnoticed; his death is one too many.

²⁵³ See National Immigrant Justice Center and Detention Watch Network, *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Detention Center Abuse* (October 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf>, archived at <https://perma.cc/99YB-RVHF> (reviewing five years of inspections at 105 ICE facilities).

²⁵⁴ See *id.* at 7.

²⁵⁵ See *id.* at 5; see also *Death Investigation for Pablo Gracida-Conte*, *supra* note 4, at 12.

²⁵⁶ See *Death Investigation for Pablo Gracida-Conte*, *supra* note 4, at 12; see also *Fatal Neglect: How ICE Ignores Deaths in Detention*, *supra* note 1, at 10.