

LANGUAGE CERTIFICATION: OBTAINING ACCESS TO COMPETENT INTERPRETERS FOR A GROWING INDIGENOUS POPULATION IN THE CENTRAL VALLEY

I. INTRODUCTION

Marlyn Perez, an indigenous worker from Guatemala, describes her experience working in the fields of Florida.¹ She claims her manager forced her and others farm workers to work twelve hour days, without breaks, in the hot Florida sun.² The workers were charged for beverages, lunch, and transportation.³ When Marlyn inquired about her pay, the manager told her there was no negotiating and that she had no rights.⁴ Marlyn's story is not unique.⁵ Farm workers are often vulnerable to workplace abuses because of their language barriers and undocumented status.⁶

In 2002, a study found that the United States agricultural industry spent over 18 million dollars in farm worker salaries.⁷ California alone employed 1.1 million seasonal farm workers.⁸ Of those farm workers, 40 percent worked in the California Central Valley.⁹ Farm workers are important in supplying labor and controlling agricultural production costs.¹⁰ Today in California's Central Valley, one in every four

¹ Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, THE ATLANTIC (Jan 29, 2018), available at <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 170 (2015).

⁶ Ramchandani, *Supra* note 1.

⁷ Stephen Devadoss & Jeff Luckstead, *Contributions of Immigrant Farmworkers to California Vegetable Production*, J. OF AGRIC. & APPLIED ECON., Dec. 2008, at 879.

⁸ *Id.* at 880.

⁹ *Id.*

¹⁰ *Id.* at 891.

farmworkers is of indigenous Mexican origin from the state of Oaxaca.¹¹ While Oaxacans are not the majority of agricultural workers, their numbers are growing and organizations like California Rural Legal Services and Centro Binacional Para el Desarrollo Indígena Oaxaqueño (CBDIO) are working rapidly to assist this new marginalized group.¹² As a minority group, Oaxacans are vulnerable to discrimination and abuse due to their language barriers.¹³

Language Certification ensures that individuals who speak an indigenous Mexican language have meaningful access to the legal system and an ability to defend their individual rights.¹⁴ In Part I this comment will discuss the issues indigenous farmer workers face in the fields due to their inability to speak Spanish or English. Part II will analyze the constitutional, federal, and state laws that safeguard an individual's right to obtain a court interpreter. Part III will discuss whether existing laws on interpreters apply to indigenous languages and how rights may be affected when an interpreter is not provided. Lastly, Part IV will issue recommendations on ways to provide competent interpreters for individuals who speak an indigenous Mexican language.

II. FACTUAL BACKGROUND

In general Oaxacans in the United States are located in Oregon and Washington with most being concentrated in the California Central Valley.¹⁵ A study conducted by several organizations found “farmworkers who speak only an Indigenous language are at risk every

¹¹ CAL. RURAL LEGAL ASSISTANCE, INC., THE INDIGENOUS PROGRAM FACTSHEET [hereinafter “CLRA FACTSHEET”], available at <http://www.crla.org/sites/all/files/content/uploads/Resources/CRLA-FastFact-IP-v4x.pdf> (last visited Dec. 31, 2018).

¹² See *id.*; *Indigenous Interpreters*, CBDIO (publication date), <http://centrobinacional.org/en/programs/fresno-headquarter/indigenous-interpreters-program/> (last visited Dec.31, 2018).

¹³ See Kristen et al., *supra* note 5, at 169.

¹⁴ See Rebecca Beitsch, *How Bad Translation by Court Interpreters Can Turn Misunderstanding into Injustice* (PBS television broadcast, Aug. 17, 2016) [hereinafter “PBS Broadcast”].

¹⁵ RICARD MINES, SANDRA NICHOLS & DAVID RUSTEN, CAL. ENDOWMENT, FINAL REPORT ON CALIFORNIA’S INDIGENOUS FARM WORKER 18 (2010).

day.”¹⁶ They take safety risks by handling chemicals whose labels they cannot read.¹⁷ Furthermore, they face discrimination and harassment due to their inability to speak Spanish or English.¹⁸ Recently, indigenous Mexicans in Ventura County were forced to work in hazardous air quality that resulted from the California wildfires.¹⁹ The workers stated that they went to work because they did not want to be fired and they were unable to communicate their rights.²⁰

However, assisting the growing Oaxacan population can be a challenge.²¹ Few people in the Central Valley are fluent in an indigenous Mexican language.²² Therefore, interpreters who speak the same dialect are difficult to obtain.²³ Individuals who need interpreting services rely on friends or family who can speak Spanish to translate to someone who can then translate to English.²⁴ However, friends and family are usually not a good source for assistance because they either do not speak Spanish themselves or they may make devastating errors in translation.²⁵ In a Virginia courtroom a man yelled “I did not rape anybody,” after his interpreter told him he was guilty of “violación” which means rape instead of “infracción” which means infraction.²⁶ These mistakes are common even among those who have been translating for friends and family in less demanding situations than a courtroom.²⁷ Other courts are experimenting with

¹⁶ Kara Schilli, *Not Everyone Speaks Spanish! The Need for Indigenous Language Interpreters in California’s Agricultural Workforce*, UC DAVIS W. CTR. FOR AGRIC. HEALTH & SAFETY, July 19, 2018.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Sophia Boyd & Scott Simon, *Many California Farmworkers Forced To Stay Behind During The Wildfires* (NPR radio broadcast November 24, 2018).

²⁰ *Id.*

²¹ CRLA FACTSHEET, *supra* note 11.

²² Telephone Interview with Yenedit Valencia, Vice President, Centro Binacional para el Desarrollo Indígena Oaxaqueño (Aug. 10, 2018) [hereinafter “Valencia Interview”].

²³ *Id.*

²⁴ Marisol León, *Silenced by Bureaucratic Adjudication: Mesoamerican Indigenous Language Speakers and Their Right to Due Process of Law*, 30 Harv. J. Racial & Ethnic Just. 339, 355 (2014).

²⁵ *Indigenous Language Services*, MIXTECO, available at <http://mixteco.org/indigenous-language-services> (last visited Dec. 31, 2018).

²⁶ See PBS Broadcast, *supra* note 14.

²⁷ *Id.*

interpreter call centers.²⁸ However, telephone interpreters often do not speak the correct dialect of the individual needing interpretation services.²⁹

The vice president of Centro Binacional Para el Desarrollo Indígena Oaxaqueño (CBDIO), Yenedit Valencia, says language certification ensures individuals who speak an indigenous Mexican language can effectively communicate through a qualified interpreter.³⁰ Court certified interpreters are tested by the court system to ensure that they can accurately translate from one language to English.³¹ When accurate and effective interpreting services are not provided an individual may be at risk of incarceration or is left without a legal remedy for harm they have suffered.³² Interpreters who are not certified are not tested on their ability to accurately translate communications.³³ One agency with a team of local indigenous interpreters is Centro Binacional para el Desarrollo Indígena Oaxaqueño (CBDIO).³⁴ However, when lawyers and agencies seek individuals who speak the indigenous language they do not turn to agencies like CBDIO because the organization cannot promote themselves as having certified interpreters.³⁵ Certified interpreters are important in safeguarding the rights of individuals who do not speak English.³⁶ Furthermore, the right to a court interpreter is safeguarded by the Constitution, federal statutes, and state statutes.³⁷

²⁸ Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 320 (1996).

²⁹ Valencia Interview, *supra* note 22.

³⁰ *Id.*

³¹ See JUD COUNCIL OF CAL., COURT INTERPRETERS FACT SHEET 3-5 (JUD. COUNCIL OF CAL., ed., Apr. 2017) [hereinafter "FACT SHEET"].

³² See U. S. ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970); Andrew Sommer, *EEOC Targets California's AG Industry in Recent Spate of Suits*, 19 No. 21 CAL. EMP. L. LETTER 8 (2010).

³³ See JUD. COUNCIL OF CAL., *Supra* note 31.

³⁴ Valencia Interview, *supra* note 22.

³⁵ *Id.*

³⁶ See PBS Broadcast, *supra* note 14.

³⁷ See U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

III. LEGAL AUTHORITY

A. *Constitutional Right to a Court Interpreter*

The United States Supreme Court has not recognized an individual's constitutional right to a court interpreter.³⁸ However, the Court has determined that certain rights may be affected when a person is unable to understand court proceedings.³⁹ Specifically, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution are used to support the right to a court interpreter.⁴⁰

The Fourteenth and Fifth Amendments of the Constitution state that individuals shall not be deprived of life, liberty, or property without due process.⁴¹ Due Process is the right of an individual to have an opportunity to provide a meaningful defense.⁴²

Due Process is fundamental to the criminal defendant who is at risk of losing life or liberty due to incarceration.⁴³ In the case of *U. S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386 (2d Cir. 1970), Rogelio Negron was charged with murder after he allegedly stabbed his friend during a drunken brawl.⁴⁴ Despite his inability to speak English and to participate in his trial the Court convicted Negron of the charges against him.⁴⁵ The United States Appellate Court stated “most of the trial must have been a babble of voices” for Rogelio Negron whose primary language was Spanish.⁴⁶ The Court determined that Rogelio Negron's due process right was violated because he was a passive observer during his trial that was mainly conducted in English.⁴⁷ He was unable to assist counsel in his defense, was unable to confront the

³⁸ Sylvia Tiscareño, Esq., *Court Interpreters - Providing Equal Access to Justice*, NEV. LAW. 24 (2013) at 24.

³⁹ See *U.S. ex rel. Negron v. State of New York*, 434 F.2d 386, 389 (2d Cir. 1970); *M.M.V. v. Texas Dep't of Family & Protective Servs.*, 455 S.W.3d 186, 189–90 (Tex. App. 2014).

⁴⁰ See *U.S. ex rel. Negron*, 434 F.2d at 389; see *M.M.V.*, 455 S.W.3d at 189.

⁴¹ U.S. CONST. amend. XIV, § 1; *id.* amend. V; Exec. Order No. 13166, 65 Fed. Reg. 50,121 ((month and day), 2000), reprinted in 42 U.S.C.A. § 2000d (West, Westlaw through 2019 legislation); CAL. CONST. art. I, § 14.

⁴² *United States v. Juan*, 704 F.3d 1137, 1141 (9th Cir. 2013).

⁴³ *Flynn v. City of Las Cruces, New Mexico*, No. CV 15-00195 KG/WPL, 2016 WL 9776576, at *2 (D.N.M. Oct. 6, 2016).

⁴⁴ *U. S. ex rel. Negron*, 434 F.2d at 386.

⁴⁵ *Id.*

⁴⁶ *Id.* at 388.

⁴⁷ *Id.*

witnesses against him, and was unable to comprehend the proceedings.⁴⁸ The Court affirmed the lower court's decision to provide the defendant with an interpreter and retry him or release him.⁴⁹ Without a court interpreter Rogelio Negron could not effectively understand or engage in his defense, leaving him vulnerable to conviction without a fair opportunity to be heard.⁵⁰

Civil litigants have been provided with fewer protections than the criminal defendant under the Due Process Clause.⁵¹ The amount of protection provided by the Due Process Clause varies with the circumstances and rights at stake.⁵² While the right to a court interpreter is generally recognized by the court system for the criminal defendant the court does not recognize the same right for the civil litigant.⁵³ Unlike the criminal defendant, who is at risk of losing life or liberty in a criminal proceeding, the civil defendant has less at stake.⁵⁴

The California Supreme Court rejected the notion that a litigant, whose primary language was Spanish, was denied his Due Process rights when the Court rejected his request for an interpreter in a property damage civil suit.⁵⁵ The Court opined that Due Process is violated when there is "no alternative means to secure the relief sought."⁵⁶ It further stated that a civil litigant can obtain interpreting assistance from relatives or local organizations.⁵⁷ However, obtaining interpreting through a relative or organizations does not always ensure that the individual receives effective and accurate interpreting services.⁵⁸

Despite the lack of high stakes like those in criminal proceedings, a civil litigant who does not understand the proceedings may have several rights at stake that hinge on the outcome of litigation in

⁴⁸ *Id.*

⁴⁹ *See id.* at 386.

⁵⁰ *Id.*

⁵¹ *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985).

⁵² *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁵³ *See U. S. ex rel. Negron*, 434 F.2d at 386; *Jara v. Mun. Court*, 21 Cal. 3d 181(1978).

⁵⁴ *Flynn v. City of Las Cruces, New Mexico*, *Supra* note 42.

⁵⁵ *Jara v. Mun. Court*, 21 Cal. 3d at 186.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See MIXTECO*, *supra* note 25.

parental right proceedings, evictions, and other civil proceedings.⁵⁹ The Court has recognized that Due Process is violated in certain civil cases when the litigant is not provided with an opportunity to provide a meaningful defense.⁶⁰ In *In re Doe*, 99 Haw. 522 (2002).⁶¹, the mother of foster children appealed her case on the basis that the Court failed to provide her with an interpreter throughout the court proceedings. The Court held that parental rights cannot be terminated without a meaningful opportunity to be heard.⁶² The Court recognized the right non-English speaking parents to have an interpreter in family court, although they ultimately found that the Plaintiff in the case was able to understand the proceedings without an interpreter.⁶³ Furthermore, in *In re Applied Cleantech, Inc.*, No. CV 12719-VCL, 2017 WL 65427 (Del. Ch. Jan. 5, 2017),⁶⁴ the Court established that an interpreter should be provided for the civil litigant when possible to increase the access to courts for individuals who are not fluent in English.⁶⁵

Additionally, in criminal cases the Sixth amendment provides the defendant with the right to confront witnesses against him.⁶⁶ The Sixth Amendment protects an individual's right to be present at trial, the right to understand the testimony of a witness, and an opportunity to cross-examine a witness.⁶⁷ A criminal defendant cannot adequately confront the witnesses against him if the individual is unable to comprehend the proceedings.⁶⁸ In *Garcia v. State*, 149 S.W.3d 135(Tex. Crim. App. 2004)⁶⁹, the criminal defendant's interpreter did not interpret the testimony of various witnesses during trial.⁷⁰ The Court held that the defendant's Sixth Amendment right to confrontation was violated because the defendant was unable to

⁵⁹ Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 562 (2004).

⁶⁰ See *In re Doe*, 99 Haw. 522 (2002); *In re Applied Cleantech, Inc.*, No. CV 12719-VCL, 2017 WL 65427, at *1 (Del. Ch. Jan. 5, 2017).

⁶¹ *In re Doe*, 99 Haw. At 522.

⁶² *Id.* at 533.

⁶³ *Id.* at 533.

⁶⁴ *In re Applied Cleantech, Inc.*, *supra*, 2017 WL 65427.

⁶⁵ *Id.*

⁶⁶ U.S. CONST. amend. XIV, §1; U.S. CONST. amend. V.

⁶⁷ See *Garcia v. State*, 149 S.W.3d 135, 140–41 (Tex. Crim. App. 2004); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313–14 (2009).

⁶⁸ *Garcia v. State*, 149 S.W.3d at 135.

⁶⁹ *Id.*

⁷⁰ *Id.* at 136.

understand the witness's testimony and the trial was remanded.⁷¹ Even though the Supreme Court does not recognize a constitutional right to a court interpreter for English Language learners, the federal government and California have implemented statutes to protect an individual's right to access to the court system.⁷²

B. Federal Rights to Interpretation

Title VII of the Civil Rights Act of 1964 provides "No 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."⁷³ The purpose of Title VII is to afford equal protection of the law to minority groups in the United States.⁷⁴ The Supreme Court held that language was a part of national origin and discrimination based on an inability to speak English violated Title VII.⁷⁵ Furthermore, Executive Order 13166 (Executive Order) expanded access to federal agencies for individuals who did not speak English.⁷⁶ Farmworkers who speak an indigenous language cannot obtain meaningful access the court system without an interpreter because they do not speak English.⁷⁷

An executive order is a "document that the President issues and so designates" without having to go through the normal law-making process.⁷⁸ This power can be exercised without the authority of the legislature and derives from various articles in the Constitution.⁷⁹ In 2000, then President Bill Clinton passed the Executive Order to establish better access to assistance to non-English speaking

⁷¹ *Id.* at 145.

⁷² Exec. Order No. 13166, 65 FR 50121 (2000), 42 U.S.C.A. § 2000d (West), Cal. CONST., art. I § 14.

⁷³ 42 U.S.C.A. § 2000d (West).

⁷⁴ § 2000d (West).

⁷⁵ *Lau v. Nichols*, 414 U.S. 563, 566, (1974).

⁷⁶ Exec. Order No. 13166, 65 FR 50121 (2000).

⁷⁷ *See M.M.V. v. Texas*, 455 S.W.3d at 189.

⁷⁸ John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981). (The normal lawmaking process begins with Congress. The executive order disregards congress.)

⁷⁹ *Id.*

individuals.⁸⁰ In passing this executive order, former President Clinton sought to make federal agencies more accessible to English Language Learners.⁸¹ The Order provides that federal agencies need to implement a system to provide access to services for individuals who do not speak English.⁸²

Similarly, the Federal Court Interpreters Act of 1978 was passed by Congress to provide guidance to the courts on providing interpreters to ensure the quality of the translation.⁸³ It further solidifies the right to a court certified interpreter by providing that a certified interpreter should be provided in the courtroom unless no certified interpreter is available.⁸⁴ The Act was meant to protect a defendant's ability to effectively communicate with his attorney and to understand the court proceedings.⁸⁵ However, this right has been limited to criminal cases and subject to available funding.⁸⁶ California law expands on the federal protections in obtaining a court interpreter.⁸⁷

C. California Laws on Interpretation

The California Constitution incorporates the right of a criminal defendant to be provided with a court interpreter when necessary.⁸⁸ California acknowledged the growing population of non-English speakers and enacted California Government Code § 68560 to address the issue.⁸⁹ It established a committee to review the language needs of California citizens and established solutions to provide competent court interpreters.⁹⁰ California states "it is imperative that courts provide interpreters to all parties who require one."⁹¹ In an effort to

⁸⁰ Katherine L. Beck, *Interpreting Injustice: The Department of Homeland Security's Failure to Comply with Federal Language Access Requirements in Immigration Detention*, 20 HARV. LATINX L. REV. 15 (2017).

⁸¹ Exec. Order No. 13166, 65 FR 50121 (2000).

⁸² Exec. Order No. 13166

⁸³ *United States v. Johnson*, 248 F.3d 655, 661 (7th Cir. 2001).

⁸⁴ 28 U.S.C.A. § 1827 (West).

⁸⁵ *United States v. Johnson*, 248 F.3d at 661.

⁸⁶ § 1827.

⁸⁷ See CAL. GOV. CODE § 68561; Assembly Bill 1657 Section 1 (2014), available at www.leginfo.ca.gov

⁸⁸ CAL. CONST., art. I § 14; Jena MacCabe, *Can You Hear Me Now?: Interpreters for California Civil Cases*, 49 LOY. L.A. L. REV. 685 (2016).

⁸⁹ GOV'T § 68560.

⁹⁰ *Id.*

⁹¹ GOV'T § 68092.

provide competent interpreters, California requires that the interpreter be certified, absent a showing of good cause for lack of certification.⁹² Language certification and registration are examinations that the court provides to determine an individual's ability to speak English fluently as well as another language.⁹³

Unlike the federal government, California requires that court interpreters should also be provided in civil cases.⁹⁴ The Legal Aid Foundation of Los Angeles complained to the Department of Justice after two Korean speaking women were denied court paid interpreters in civil court after they were unable to find family or friends who could assist them with interpreting.⁹⁵ One of the women sought custody of her child while the other sought protection from her sexual assailant.⁹⁶ The Department of Justice investigation concluded that there were significant issues with the courts ability to assess and provide competent interpreters.⁹⁷ Shortly thereafter, California passed Assembly Bill 1657 which created Evidence Code 756.⁹⁸ Assembly Bill 1657 stated that certified interpreters should be provided free of charge in both civil and criminal cases when possible.⁹⁹ Evidence Code 756 provides a list of civil cases in which an interpreter should be provided if funds are available.¹⁰⁰ The list is ordered from the highest priority to the lowest as follows:

- 1) Actions or proceedings under the Uniform Parentage Act
- 2) Actions and proceedings for dissolution or nullity of in which a protective order has been granted or is being sought
- 3) Actions and proceedings for physical abuse or neglect under the Elder Abuse and Dependent Adult Civil Protection Act
- 4) Actions and proceedings relating to unlawful detainer.
- 5) Actions and proceedings to terminate parental rights.
- 6) Actions and proceedings relating to conservatorship or guardianship

⁹² GOV'T § 68561.

⁹³ See FACT SHEET, *supra* note 31.

⁹⁴ Assembly Bill 1657 Section 1 (2014) available at www.leginfo.ca.gov.

⁹⁵ See MacCabe, *supra* note 88, at 689.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See CIVIL PROCEDURE – INTERPRETERS – FEES, 2014 Cal. Legis. Serv. Ch. 721 (A.B. 1657) (West); see also MacCabe, *supra* note 88, at 689.

⁹⁹ See CIVIL PROCEDURE – INTERPRETERS – FEES, 2014 Cal. Legis. Serv. Ch. 721 (A.B. 1657) (West).

¹⁰⁰ CAL. EVID. CODE § 756 (West).

- 7) Actions and proceedings by a parent to obtain sole legal or physical custody of a child or rights to visitation.
- 8) All other actions of Elder Abuse and Dependent Adult Civil Protection Act.
- 9) All other actions and proceedings related to family law.
- 10) All other civil actions or proceedings.¹⁰¹

Although courts have determined that there are fewer rights at stake for the civil litigant than for a criminal litigant, when farmworkers cannot access the court system they are vulnerable to being taken advantage of especially in the workforce.¹⁰²

IV. ANALYSIS

A. Criminal Cases

The United States Constitution Fourteenth, Fifth and Sixth Amendments provide criminal defendants with the right to confront witnesses and the right to have an opportunity to provide a meaningful defense under the Due Process Clause.¹⁰³ The right to confront a witness includes the right to understand the accusations being made against the defendant and an opportunity to cross examine.¹⁰⁴ When an individual does not understand the proceedings, they are vulnerable to being incarcerated and deprived of life, liberty, and property without an opportunity to be heard.¹⁰⁵ If a criminal defendant does not speak English and is not provided with an adequate interpreter they cannot assist counsel in their defense, they cannot understand the charges brought against them, they cannot understand the testimony being offered against them, and they cannot adequately assist with cross-examining a witness.¹⁰⁶

In *Garcia v. State*, 149 S.W.3d 135(Tex. Crim. App. 2004),¹⁰⁷ the defendant's primary language was Spanish. Jose Garcia was convicted and sentenced to eight years in prison for sexual assault; he appealed for a new trial because he was not provided with an interpreter

¹⁰¹ *Id.*

¹⁰² *Flynn v. City of Las Cruces, New Mexico*, No. CV 15-00195 KG/WPL, 2016 WL 9776576, at *2 (D.N.M. Oct. 6, 2016); Kristen et al, *supra* note 5.

¹⁰³ U.S. CONST. amend. XIV, §1.; *id.* amends. V & VI.

¹⁰⁴ *Garcia v. State*, 149 S.W.3d 135 (Tex. Crim. App. 2004), at 140.

¹⁰⁵ U.S. ex rel. Negron v. State of New York, 434 F.2d 386 (2d. Cir. 1970), at 386.

¹⁰⁶ *See Id.*; *see also Garcia*, 149 S.W.3d at 140.

¹⁰⁷ 149 S.W.3d at 142.

throughout the trial.¹⁰⁸ Most of the witnesses in this case testified in English and the defendant could not understand what was being said.¹⁰⁹ The Court held that the defendant had a constitutional right to confront the witnesses against him and that the defendant was denied that right.¹¹⁰ The case was remanded to the lower court for an assessment of harm where Jose Garcia was ultimately provided with a new trial.¹¹¹

In Oregon, an Oaxacan immigrant was convicted of stabbing a co-worker.¹¹² The Judge in this case assumed the man spoke Spanish and provided a Spanish interpreter.¹¹³ The man's conviction was overturned upon learning that the man actually spoke the indigenous language of Mixteco.¹¹⁴ In both cases, the individuals were deprived of liberty without an opportunity to assist counsel in cross-examining the witnesses at trial and were not provided with an opportunity to provide a meaningful defense.¹¹⁵

B. Civil Matters

Additionally, a court interpreter may change the outcome of civil cases where the litigant has certain rights at stake.¹¹⁶ Within the last few years, sexual harassment issues have been at the forefront of national news.¹¹⁷ Farm workers are often subject to such harassment that is exasperated by language barriers, cultural barriers, and immigration status.¹¹⁸ Title VII of the Civil Rights Act of 1964 protects an individual from discrimination based on sex, race, color, and national origin.¹¹⁹

Over the years, California has seen an increase in discrimination against indigenous Mexican farmworkers.¹²⁰ In 2010, the EEOC filed

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 140.

¹¹² John Grund, *Does the System Work for Minorities?*, OR. ST. B. BULL. (January 1993), at 9.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See U.S. CONST. amend. XIV, § 1; *id.* amend. V.

¹¹⁶ See *In re Doe*, 99 Haw. 522 (2002), at 533; Rearick, *supra* note 60.

¹¹⁷ See Kristen et al., *supra* note 5, at 175.

¹¹⁸ *Id.* at 175.

¹¹⁹ 42 U.S.C.A. § 2000d (West).

¹²⁰ MINES ET AL., *supra* note 16, at 60.

two lawsuits against big agricultural industries for sexual harassment of their workers.¹²¹ In one of those cases a girl and several men filed suit against Giumarra Vineyards Corporation for harassment they experienced at the hand of a co-worker.¹²² All the plaintiffs in the case were Oaxacan.¹²³ A male co-worker made sexual advances at a young teenage girl and when two other workers came to her defense they were all fired.¹²⁴ The case was eventually settled.¹²⁵

In Oregon, a company settled a lawsuit when two men filed a discrimination suit based on national origin.¹²⁶ The men were of Oaxacan origin and were subject to sexual harassment by their co-workers.¹²⁷ The co-workers would expose themselves to the men and ridiculed them for speaking their native language of Mixtec.¹²⁸ The harassers would refuse to call the men by their names but instead called them “toad”.¹²⁹

Similar cases have caught the attention of the Human Rights Watch organization, the Southern Poverty Law Center, and the EEOC.¹³⁰ Agricultural industries are vulnerable to liability for the actions of their employees in Title VII violation suits.¹³¹ Additionally, Title VII seeks to prevent discrimination based on national origin and Oaxacans do not have other remedies for discrimination in the workplace aside from the court system.¹³² Farmworkers are already vulnerable to workplace abuses.¹³³ One way farmworkers could hold employers accountable for what occurs in the workplace is through the court system.¹³⁴

¹²¹ Sommer, *supra* note 32.

¹²² *U.S. E.E.O.C. v. Giumarra Vineyards Corp.*, No. 1:09-CV-02255-AWI, 2012 WL 393333, at *1 (E.D. Cal. Feb. 6, 2012).

¹²³ *Id.*

¹²⁴ *See* Sommer, *supra* note 32.

¹²⁵ *Giumarra Vineyards Corp.*, 2012 WL 393333.

¹²⁶ EEOC, *Woodburn Tree Farm Settles EEOC Lawsuit for Sexual and Ethnic Harassment*, 2011 WL 4062365 (2011).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, THE ATLANTIC (Jan 29, 2018); *see also* Sommer, *supra* note 32.

¹³¹ *See* EEOC, *Woodburn Tree Farm Settles EEOC Lawsuit for Sexual and Ethnic Harassment*, 2011 WL 4062365 (2011); *Giumarra Vineyards Corp.*, 2012 WL 393333.

¹³² *See* Kristen et al, *supra* note 5; *see* 42 U.S.C.A. § 2000d (West).

¹³³ *See* Kristen et al, *supra* note 5, at 170.

¹³⁴ *Id.*

Unfortunately, some employers feel like they can take advantage of farmworkers because they are not likely to seek assistance due to the language barrier.¹³⁵ When a court fails to provide an interpreter this issue is further exacerbated.¹³⁶

V. RECOMMENDATION

A. *An Attorney's Duty to their Client.*

The first line of defense for a litigant who does not speak English is his attorney.¹³⁷ A judge has broad discretion to determine whether the litigant needs an interpreter and it is the duty of an attorney to object to a failure of the court to provide an interpreter during the proceedings.¹³⁸ In the case of *Valladares v. United States*, 871 F.2d 1564(11th Cir. 1989)¹³⁹, the defendant was on trial for possession and distribution of Marijuana.¹⁴⁰ On appeal, the Court held that it did not need to decide whether an interpreter was necessary in the proceeding because there was not an objection during the trial.¹⁴¹ An attorney who seeks to represent an individual who speaks an indigenous Mexican language should advocate for an interpreter or object to the denial of one if it may be of significant importance.¹⁴²

B. *The Certification Process*

When certified interpreters are not available the court may fail to provide an interpreter or turn to unqualified family, friends, or organizations for interpretation services.¹⁴³ For this reason, the lack of certified interpreters is synonymous with a lack of access to interpreters in criminal and civil cases.¹⁴⁴ The certification process is a test provided by the California Courts that assesses an individual's ability to fluently speak a language, understand technical terms, and

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *People v. Carreon*, 151 Cal. App. 3d 559, 566, 198 Cal. Rptr. 843, 847 (Ct. App. 1984); see *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See MIXTECO, *supra* note 25.

¹⁴⁴ See Cal. Gov. Code, § 68561(WEST).

capability to interpret competently.¹⁴⁵ Currently, the examination consists of a written assessment and an oral assessment.¹⁴⁶ The most common indigenous Mexican languages, like Mixteco, Triki, and Zapoteco, are not available for certification because they are not written languages.¹⁴⁷

For languages that are not written like American Sign Language, the certification process is referred to as a registered language.¹⁴⁸ Registered languages are not tested for language competency like certified languages are tested.¹⁴⁹ However, individuals who seek to be interpreters for a registered language must still pass an oral examination.¹⁵⁰ Currently, languages like Mixteco, Triki, and Zapoteco, are also not available to be registered languages.¹⁵¹

The cost of providing certification tests is offset by the amount of people seeking to become certified interpreters.¹⁵² However, it is unlikely that there will be enough applicants that speak an indigenous Mexican language to offset the cost of testing.¹⁵³ The cost of certifying a language may be of significant cost.¹⁵⁴

An option is to form a coalition with other states to offset the costs of certification testing.¹⁵⁵ Washington, New Jersey, Oregon and Minnesota have established a national State Court Interpreter Certification Consortium.¹⁵⁶ The consortium works together to “sharing existing tests, consultative expertise, certification lists, and the costs of developing additional tests.”¹⁵⁷ While this program is still new, more states have joined the consortium.¹⁵⁸ Since the Oaxacan population is growing in Oregon and Washington in addition to

¹⁴⁵ See Grabau & Gibbons, *supra* note 28, at 260.

¹⁴⁶ See FACT SHEET, *supra* note 31, at 6.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ See Tiscareño, *supra* note 38, at 24.

¹⁵⁰ See FACT SHEET, *supra* note 31.

¹⁵¹ *Id.* at 3.

¹⁵² See Tiscareño, *supra* note 37, at 24.

¹⁵³ MINES ET AL., *supra* note 16, at 60.

¹⁵⁴ Steven Caylor, *Court Advisory Board Takes A Closer Look at Interpreters*, 41 *ADVOCATE* 14, 15 (1998).

¹⁵⁵ Grabau & Gibbons, *supra* note 28, at 319.

¹⁵⁶ *Id.*

¹⁵⁷ Caylor, *supra* note 155, at 15.

¹⁵⁸ Grabau & Gibbons, *supra* note 28, at 319.

California, these states can form a coalition to offset the cost of court certification.¹⁵⁹

VI. CONCLUSION

Due to the growing population of Oaxacans in the Central Valley, competent courtroom interpreters are necessary to provide these individuals with access to the court system.¹⁶⁰ When indigenous Mexicans do not have access to the court system they are left without a remedy to confront the abuses they face in the fields.¹⁶¹ Both criminal and civil litigant may be vulnerable to due process violations.¹⁶² The federal government and California have recognized the importance of access to the legal system for all individuals regardless of national origin.¹⁶³ Federal statutes and California state statutes aim to provide interpreters for individuals who need one whenever possible.¹⁶⁴ Language certification or registration is the initial step to providing indigenous Mexicans with competent court interpreters.¹⁶⁵

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¹⁵⁹ *Id.*

¹⁶⁰ *See* Tiscareño, *supra* note at 24.

¹⁶¹ *See* Kristen et al., *supra* note 5, at 170.

¹⁶² *See U. S. ex rel. Negron*, 434 F.2d at 386.

¹⁶³ *See* Exec. Order No. 13166, 65 FR 50121 (2000); 42 U.S.C.A. § 2000d (West); CAL. CONST., art. I § 14.

¹⁶⁴ *Id.*

¹⁶⁵ *See* Valencia Interview, *supra* note 22.