

**ES DIFÍCIL APRENDER INGLÉS:  
EXPANDING THE ENGLISH-LANGUAGE  
WAIVER TO ALLOW ELDERLY  
IMMIGRANTS TO NATURALIZE**

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*The current naturalization laws for immigrants require them to know English before they can naturalize. These laws create a complex situation for elderly immigrants who want to become citizens but have cognitive difficulty learning languages. Research has shown that as people age it becomes more difficult to learn a new language, and Congress has acknowledged this in part by offering an English-language waiver for those who have been in the country from fifteen to twenty years.*

*In this Note, Ms. Swanson seeks to reconcile the dilemma that arises when an elderly person of upstanding moral character meets all the other requirements for naturalization but cannot speak English. Ms. Swanson first analyzes different proposed solutions from other authors, pointing out the impracticalities of implementing such solutions. She then provides a novel idea allowing for all persons over fifty years of age to gain citizenship, regardless of their ability to speak English, if they obtain an affidavit signed by someone who is willing to serve as their translator when needed.*

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## I. Introduction

In 1897, Mr. Ricardo Rodriguez was the first ethnic Mexican permitted to naturalize and become a citizen of the United States.<sup>1</sup> His application for naturalization created controversy because, as the court stated: “He is a very ignorant and illiterate man, not being able to read or write either English or Spanish. He speaks the latter tongue . . . .”<sup>2</sup> Previous court opinions on the issue argued that the Fourteenth Amendment’s expansion of citizenship only extended to African-Americans and not to other racial groups.<sup>3</sup> The court in Mr. Rodriguez’s case dismissed arguments that only Caucasians and African-Americans had rights to citizenship.<sup>4</sup> The court also found that Mr. Rodriguez’s illiteracy and inability to speak English were insufficient grounds to prevent a man who possessed a good moral character and who was attached to the principles of the U.S. Constitution from gaining U.S. citizenship.<sup>5</sup> Two attorneys “of the court”<sup>6</sup> filed amici curiae briefs to dispute the finding that Mr. Rodriguez could demonstrate his attachment to the U.S. Constitution because his illiteracy prevented him from writing.<sup>7</sup> The court responded, “[T]he testimony also discloses that he is a very good man, peaceable and industrious, of good moral character, and law abiding ‘to a remarkable degree.’ And hence it must be said of him . . . he has illustrated and emphasized his attachment to the principles of the constitution.”<sup>8</sup>

If Mr. Rodriguez applied for citizenship today, a century later, possessing the same qualities of good moral character and leading a life marked by an attachment to the U.S. Constitution, his application

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1. *In re Rodriguez*, 81 F. 337, 355 (W.D. Tex. 1897).

2. *Id.* at 337.

3. *Id.* at 348–49. In his opinion, District Judge Maxey reviewed four cases of denied naturalization to a native of China, a native of British Columbia, a native of Hawaii, and a native of Japan. *See generally id.* In the leading case of *In re Ah Yup*, Judge Sawyer reviewed legislative history and determined that the Fourteenth Amendment was designed to exclude natives of China from naturalization by only “extending the right of naturalization to Africans and persons of African descent.” *Id.*

4. *Id.*

5. *Id.* at 355.

6. *Id.* at 337. The two attorneys, named A.J. Evans and T.J. McMinn, filed papers of opposition, signed as amici curiae, and stated that Ricardo Rodriguez was ineligible for citizenship as he was not “a white person, nor an African, nor of African descent.” *Id.*

7. *Id.* at 355.

8. *Id.*

would be denied because he could not speak, read, or write English.<sup>9</sup> This presents a paradox: one hundred years ago, a non-English-speaking man naturalized and became a U.S. citizen, overcoming arguments that Mexicans did not merit U.S. citizenship.<sup>10</sup> Today, that same man could not gain citizenship, despite the well-accepted extension of naturalization rights to all races and ethnicities. The ability to speak and write English does not, by itself, create a better or more useful citizen, nor does it advance the policy goals of the U.S. immigration system.<sup>11</sup> In a small way, Congress recognizes this fact through its creation of a limited waiver to the English language requirement.<sup>12</sup> Under current law, individuals who apply for citizenship qualify for a waiver of the English language requirement if they are at least fifty years old and have lived as a legal permanent resident in the United States for twenty years, or if they are at least fifty-five years old and have lived in the United States for fifteen years.<sup>13</sup>

The ability to speak the English language does not directly advance the policy goals of the U.S. immigration system, and it becomes more difficult for individuals to learn a new language as they age.<sup>14</sup> The naturalization process, however, requires an applicant to speak English,<sup>15</sup> and the ability to speak English is almost a necessary skill for anyone who plans to make a permanent life in the United States.<sup>16</sup> The ability to speak English has transformed into a necessity due to the increasing number of public programs, often administered by the

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9. 8 U.S.C. § 1423 (2006); *Id.*

10. *In re Rodriguez*, 81 F. at 354–55.

11. Angela McCaffrey, *Hmong Veterans' Naturalization Act: Precedent for Waiving the English Language Requirement for the Elderly*, 19 GEO. IMMIGR. L.J. 495, 545–46 (2005). Various exemptions to the naturalization requirements show that the English language requirement is just a proxy for arriving at the goal that the applicant for citizenship must be an upright and worthy citizen. *Id.*

12. *Id.* at 498.

13. 8 U.S.C. § 1423(b)(2)(A)–(B).

14. Sophie Auriacombe et al., *Letter and Category Fluency in Normal Elderly Participants: A Population-Based Study*, 8 AGING NEUROPSYCHOLOGY & COGNITION 98, 104 (2001); Hans W. Dechert, *Some Critical Remarks Concerning Penfield's Theory of Second Language Acquisition*, in *THE AGE FACTOR IN SECOND LANGUAGE ACQUISITION* 67, 79 (David Singleton & Zsolt Lengyel eds., 1995).

15. 8 U.S.C. § 1423(a)(1).

16. See Raven L. Hill, *In Balto. Co., Providing Interpretation Services Emerges as Crucial Need*, BALT. SUN, Feb. 21, 2001, available at [http://articles.baltimoresun.com/2011-02-21/health/bs-md-co-immigrant-growth-20110221\\_1\\_adequate-language-services-health-care-census-data](http://articles.baltimoresun.com/2011-02-21/health/bs-md-co-immigrant-growth-20110221_1_adequate-language-services-health-care-census-data) (noting that many Limited English Proficiency (LEP) individuals need interpretation for health care services and that there are often not enough interpreters to meet demand).

states, which are only accessible in English.<sup>17</sup> Learning English or any other foreign language is far more difficult for an elderly person than for a young adult or child.<sup>18</sup> As a result, current law lacks a middle ground between promoting true citizenship values, acknowledging the difficulty of learning a language at an advanced age, and recognizing the practical necessity of access to English-only government programs.

This Note proposes the expansion of the waiver to the English language requirement to include all individuals who are otherwise qualified to naturalize. These individuals must have lived in the United States as a legal permanent resident for at least five years, be at least fifty years of age regardless of whether or not they speak English, and they must submit an affidavit of translation signed by a person willing to swear an oath that he or she will translate when needed. In support of this proposal, Part II of this Note examines the growing population of elderly Limited English Proficiency (LEP) individuals<sup>19</sup> in the United States and the difficulty the elderly experience when trying to learn a new language. Part II also describes the development of the naturalization requirements, highlighting the relative novelty of the English language requirement,<sup>20</sup> and finally, Part II explores the daily difficulty facing immigrants when they do not know English. Part III analyzes various proposals to alleviate the tension between English-only laws and the difficulty the elderly face when learning English. One proposal suggests expanding the waiver to the English language requirement to all persons aged fifty or older, while another proposal recommends modifying the English language requirement so that one qualifies for the waiver based on attempts to learn English. A different solution recommends removing the root of this problem by repealing English-only laws. These proposals, however, all present various flaws by either ignoring the necessity of the English language or ignoring political realities. In Part IV, this Note resolves all the is-

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17. Tony Dokoupil, *Why 'English Only' Will Get the OK in Oklahoma*, NEWSWEEK, May 31, 2010, at 8. "About 30 states already have English-only laws requiring them to conduct official business in the mother tongue, with some exceptions. . . . Now there's a third wave. About 10 additional states have passed 'official English' laws through at least one legislative body since immigration reform broke down in 2006." *Id.*

18. Auriacombe et al., *supra* note 14, at 104; Dechert, *supra* note 14, at 79.

19. The acronym "LEP" will be used to refer to an individual with Limited English Proficiency.

20. Internal Security Act of 1950, ch. 1024, Pub. L. No. 831, § 30, 64 Stat. 987, 1018 (codified at 8 U.S.C. § 704).

sues presented with a new proposal: all persons fifty years of age or older may gain citizenship, regardless of their ability to speak English, if they obtain an affidavit signed by someone willing to serve as their translator when needed.

## II. Background

The problems facing elderly LEPs who desire to naturalize arise from the intersection of sociological, neurological, historical, and political issues. First, there are a growing number of elderly LEPs in this country.<sup>21</sup> Moreover, elderly LEPs are unlikely to learn English because learning a new language presents massive difficulties for elderly persons.<sup>22</sup> This in turn prevents individuals from naturalizing because one must possess the ability to speak, read, and write English to naturalize and become a U.S. citizen.<sup>23</sup> This requirement, though difficult to meet, has a practical purpose given the growing number of English-only laws.<sup>24</sup>

### A. Increase in the Number of Elderly LEPs

The population of elderly LEP individuals in the United States is growing and is likely to continue to grow for some time.<sup>25</sup> This trend is not surprising given the growth of all foreign-born persons in the United States.<sup>26</sup> Young working-age persons compose the vast majority of the increase in foreign-born persons.<sup>27</sup> Nevertheless, the number of foreign-born persons age sixty-five or older has also grown quickly—nearly doubling from 2.7 million people in 1990 to 4.3 million people in 2006.<sup>28</sup> The elderly currently account for about eleven percent of all foreign-born persons, while the foreign-born elderly comprise eight percent of all elderly Americans.<sup>29</sup> The population of aging

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21. Mark A. Leach, *America's Older Immigrants: A Profile*, 32 GENERATIONS 34, 35 (2009) (giving an overview of the demographics of older immigrants in the United States).

22. Auriacombe et al., *supra* note 14, at 105.

23. 8 U.S.C. § 1423(a)(1).

24. *Official English Map*, PROENGLISH, <http://proenglish.org/official-english/state-profiles> [hereinafter *English in the 50 States*] (last visited Oct. 30, 2011).

25. Leach, *supra* note 21, at 35 (giving an overview of the demographics of older immigrants in the United States).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

foreign-born persons will also continue to grow—a population predicted to quadruple in size and reach sixteen million persons by the year 2050.<sup>30</sup>

### **B. Difficulties the Elderly Face When Trying to Learn a New Language**

The increase in the number of elderly foreign-born individuals creates a unique problem not faced by foreign-born young adults: the older the individuals are, the less likely they will have the mental capacity to master a new language.<sup>31</sup> Scholars of second language acquisition have long said that “earlier is better” when it comes to learning a new language.<sup>32</sup> Scholars use the “critical period hypothesis” to explain that after approximately age twelve it becomes very unlikely that new language learners will ever fully master a new language to the point that they do not have an accent in the foreign language.<sup>33</sup> The “critical period” ends at the age when most people undergo a natural neurological change as the body and the brain mature.<sup>34</sup> Although the critical period hypothesis only addresses the ideal time period to fully master a language,<sup>35</sup> the elderly struggle not just to master, but simply to learn a new language.<sup>36</sup> This results from the inevitable neurological and biological changes which occur as people age.<sup>37</sup> Language fluency and cognition skills diminish once one enters an advanced age.<sup>38</sup> Also, the ability to learn and recall new words diminishes with age, with a marked difference in this vocabulary skill when one reaches the age of sixty-five.<sup>39</sup> Therefore, the elderly often

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30. Judith Treas & Jeanne Batalova, *Older Immigrants*, in *SOCIAL STRUCTURES: DEMOGRAPHIC CHANGES AND THE WELL-BEING OF OLDER PERSONS* 1, 4 (K. Warner Schaie & Peter Uhlenberg eds., 2007).

31. Auriacombe et al., *supra* note 14, at 104.

32. See James E. Flege, *Age of Learning and Second Language Speech*, in *SECOND LANGUAGE ACQUISITION AND THE CRITICAL PERIOD HYPOTHESIS* 101, 101 (David Birdsong ed., 1996).

33. *Id.* at 101–02.

34. *Id.* at 102. The end of the critical period to learn a second language is marked by a neurological change such as “lost plasticity, hemispheric specialization, or neurofunctional reorganization.” *Id.*

35. *Id.* at 101.

36. See Auriacombe et al., *supra* note 14, at 104.

37. ELIZABETH G. JOINDER, *THE OLDER FOREIGN LANGUAGE LEARNER* 10 (1981).

38. *Id.*; KATHRYN A. BAYLES & ALFRED W. KASZNAK, *COMMUNICATION AND COGNITION IN NORMAL AGING AND DEMENTIA* 153 (1987).

39. BAYLES & KASZNAK, *supra* note 38, at 148.

face difficulties with cognition and verbal skills that they did not face when they were younger; this creates difficulties for an older person attempting to learn a new language.<sup>40</sup> The English language requirement for naturalization<sup>41</sup> places a high burden on the elderly because the elderly struggle to learn new languages.

### C. Naturalization Law and Policy

An individual may acquire citizenship through multiple paths, including naturalization. Besides naturalization, individuals can acquire U.S. citizenship through birth.<sup>42</sup> U.S. immigration statutes codify the basic international principle that nationality will be acquired at birth.<sup>43</sup> Citizenship at birth is premised on the principles of either *jus soli*, meaning right of the land, which confers citizenship to anyone born in the country or *jus sanguinis*, meaning the right of blood, which confers citizenship upon descendants of a citizen.<sup>44</sup>

Aside from the right to citizenship at birth, the process of naturalization allows certain persons born into foreign citizenship to become U.S. citizens. The Immigration and Nationality Act defined naturalization to mean “the conferring of nationality of a state upon a person after birth.”<sup>45</sup> Article I of the U.S. Constitution gives Congress the power “[t]o establish a uniform Rule of Naturalization.”<sup>46</sup> This section will address the benefits of naturalization, the policies underlying Congress’s decision to regulate naturalization, the history of

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40. See Auriacombe et al., *supra* note 14, at 105. In describing the results of a study which tested the elder’s letter fluency and category fluency, the author states “[t]he fact that age influences both fluency tasks supports the hypotheses of cognitive slowing and defective working memory with aging.” *Id.*

41. 8 U.S.C. § 1423(a)(1) (2006).

42. *Id.* § 1401. This statute describes the requirements for citizenship at birth.

The following persons will acquire citizenship at birth: (1) persons born in the United States, (2) a person born outside of the United States to parents both of whom are citizens of the United States if one parent resided in the United States prior to the birth of the child, and (3) a person born outside of the United States to one U.S. citizen parent who was physically present in the United States for at least five years before the birth of the child, two of those years after the parent had reached the age of fourteen.

*Id.*

43. *Id.* § 1423; THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 15 (West 6th ed. 2008).

44. ALEINIKOFF ET AL., *supra* note 43, at 15.

45. 8 U.S.C. § 1101(a)(23).

46. U.S. CONST. art. I, § 8, cl. 4.

naturalization in the United States, and the current requirements to naturalize.

#### 1. BENEFITS OF CITIZENSHIP THROUGH NATURALIZATION

Although legal permanent residents (LPR) of the United States enjoy substantial rights and benefits, citizenship still confers many desirable benefits not available to an LPR.<sup>47</sup> Only citizens have the right to run for federal office.<sup>48</sup> Only citizens may vote in federal elections.<sup>49</sup> Also, the federal government, in cases of national interest, may restrict non-citizens from serving in federal government positions.<sup>50</sup> Even more significant to daily living, eligibility for important federal benefits is contingent on citizenship.<sup>51</sup> Congress's power to deny federal benefits to persons on the basis of citizenship has withstood equal protection clause challenges.<sup>52</sup> In addition to the specific conferral of rights gained through citizenship, citizenship status also bestows specific liberties, including freedom from deportation, meaning the liberty to control one's own life and travel.<sup>53</sup> In the last twenty years the government has significantly increased the number of actions which are grounds for deportation of a non-citizen or an LPR.<sup>54</sup> This provides LPRs with a strong incentive to naturalize. As a result, there are many reasons why an LPR would desire to naturalize and gain citizenship.

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47. The acronym "LPR" will be used to refer to an individual who is a legal permanent resident of the United States.

48. U.S. CONST. art. I, §§ 2-3.

49. *Id.* amend. XV.

50. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976).

51. See 8 U.S.C. §§ 1611-12 (2006). This legislation made LPRs ineligible for food stamps and social security and other types of non-emergency benefits. See Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 483 (1999).

52. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). The Court held that Congress may rationally prohibit LPRs who have lived in the United States for fewer than five years from qualifying for federal medical insurance. *Id.* The Court acknowledged that through its power to regulate naturalization, Congress has the power to make rules against LPRs that would be "unacceptable" for citizens. *Id.* The Court went further to say: "The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.*

53. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized . . . is . . . absolute and unqualified.").

54. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476 [hereinafter Legomsky, *The New Path of Immigration Law*] (noting the increase, since 1986, in the types and number of offenses for which LPRs may be removed).



## 2. NATURALIZATION POLICY IN THE UNITED STATES

The various formulations of naturalization law throughout U.S. history have attempted to use the conferral of citizenship to advance certain public policies, such as promoting political participation; creating and solidifying community connections; and rewarding industrious, hard-working individuals. First, citizenship advances the public policy of political participation: expanded citizenship creates expanded participation and helps ensure that individuals become personally engaged in the political process.<sup>55</sup> Expansive political participation benefits the public as a whole because political decisions impact the whole community rather than just the select individuals born with citizenship rights.<sup>56</sup> Second, citizenship builds community. The citizen title usually indicates that an individual has an emotional and symbolic attachment to his or her country.<sup>57</sup> Further, naturalization demonstrates one's assimilation to the community and helps ensure that the citizenship body reflects the actual composition of the community as a whole.<sup>58</sup>

Finally, "bilateral liberalism," as labeled by Professor Gerald L. Neuman, represents the most significant public policy underlying naturalization laws.<sup>59</sup> This policy finds a social contract between the individual and the country granting citizenship.<sup>60</sup> The individual bargains for the benefits and protections of citizenship while the country bargains to receive the involvement of the citizen in the political process and the citizen's contributions to fields such as "trade, technology, military service, or sports."<sup>61</sup> This policy explains limitations or requirements to reaching naturalization—the policy posits that only applicants who serve a net benefit to the country should have the right to become citizens.<sup>62</sup>

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55. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 240 (1994). Neuman labels this justification for naturalization the "republicanism" perspective. *Id.*

56. *Id.*

57. Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 291–92 (1994) [hereinafter Legomsky, *Why Citizenship?*] (arguing that symbolism and community justifies citizenship).

58. Neuman, *supra* note 55, at 241. Neuman labels this justification for naturalization the "communitarianism" perspective. *Id.*

59. *Id.* at 239–40.

60. *Id.*

61. *Id.*

62. *Id.* at 239.

### 3. HISTORY OF NATURALIZATION LAWS IN THE UNITED STATES

The requirements to become a U.S. citizen through naturalization have evolved substantially from their original formulation.<sup>63</sup> Under the first federal naturalization statute in 1790, Congress only required that free white applicants: (1) live in the United States for two years, (2) state a simple oath to support the U.S. Constitution, and (3) be of good moral character.<sup>64</sup> Five years later the statute was amended with the following changes: (1) the period of residence was increased to five years, (2) the applicant was now required to make a formal declaration of intent to naturalize three years prior to the conferment of citizenship, and (3) the applicants were now required to renounce allegiance to their former country of citizenship and swear allegiance to the United States.<sup>65</sup> In addition, applicants needed to demonstrate their attachment to the Constitution of the United States.<sup>66</sup> The English language requirement did not become part of the naturalization requirements until more than a hundred years after the passage of the first two naturalization statutes.<sup>67</sup>

### 4. CURRENT NATURALIZATION LAW

The naturalization statute today retains some of the same principles from the original naturalization requirements. The current law, however, also places more stringent conditions on the right to naturalize, premised upon promoting certain public policies. Currently, to become a U.S. citizen, an applicant for naturalization must: (1) reside in the United States as a legal permanent resident of the United States for the last five years;<sup>68</sup> (2) have “a knowledge and understanding of the fundamentals of the history, and of the principles . . . of the United

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63. Compare 8 U.S.C. § 1423 (2006) (stating the current requirements to naturalize), with Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (1790) (stating the first naturalization requirements set forth in the year 1790).

64. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE Vol. 7 § 94.01(2)(b) (rev. ed. 2011).

65. Act of Mar. 26, 1790, ch. 3, 1 Stat. 414; GORDON ET AL., *supra* note 64, at § 94.01(2)(b).

66. Act of Mar. 26, 1790, ch. 3, 1 Stat. 414.

67. Act of June 29, 1906, ch. 3592, § 8, 34 Stat. 596.

68. 8 U.S.C. § 1427. Temporary absences from the residence do not automatically break the length of residence or physical presence. *Id.* § 1427(b). An absence of less than six months does not affect the residency requirement. *Id.* An absence, however, of more than six months but less than a year creates a rebuttable presumption that the resident broke the chain of residency. *Id.*; ALEINIKOFF ET AL., *supra* note 43, at 64.

States";<sup>69</sup> (3) have good moral character;<sup>70</sup> (4) be attached to the principles of the Constitution;<sup>71</sup> and (5) demonstrate "an understanding of the English language, including an ability to read, write, and speak words . . . [provided], [t]hat the requirements of this paragraph relating to ability to read and write shall be met if the applicant can read or write simple words and phrases."<sup>72</sup> Congress created a waiver to the English language requirement, however, acknowledging the difficulty of learning a new language at an advanced age.<sup>73</sup> In the Immigration and Nationality Act, Congress authorized an exemption to the English language requirement for anyone who either "(A) is over fifty years of age and has been living in the United States for . . . at least twenty years . . . or (B) is over fifty-five years of age and has been living in the United States for . . . at least fifteen years."<sup>74</sup> As a result, persons who qualify for the waiver are not subject to the English language requirement, and they may also bring an interpreter with them to translate the citizenship exam used to determine an applicant's knowledge of U.S. history.<sup>75</sup>

##### 5. DEVELOPMENT OF THE ENGLISH LANGUAGE REQUIREMENT

The ability to speak English was not a requirement for naturalization applicants until 1906<sup>76</sup> when Congress amended the naturalization statute requiring applicants to speak English.<sup>77</sup> When the amendment was originally proposed, it faced heavy opposition from members of the House of Representatives who recognized the difficulty that elderly, illiterate immigrants, with few educational opportuni-

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69. 8 U.S.C. § 1423(a)(2).

70. *Id.* § 1427(a)(3).

71. *Id.* This provision may carry little weight in light of the Supreme Court ruling in *Schneiderman v. United States*. See generally 320 U.S. 118 (1943). The Court held that Schneiderman, an active Communist Party member who advocated for the overhaul of the U.S. government, still satisfied the requirement of being attached to the principles of the Constitution because he believed that the change in government should occur through constitutional provisions permitting amendments to the Constitution rather than through violent means. *Id.* at 136; SANFORD LEVINSON, CONSTITUTIONAL FAITH 148–49 (1988). See generally David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35 (2002).

72. 8 U.S.C. § 1423(a)(1).

73. *Id.* § 1423(b)(2); see Helene C. Colin, Comment, *No Hablo Ingles: Waivers to the English Language Requirement for Naturalization*, 37 CAL. W. INT'L L.J. 329, 351 (2007).

74. 8 U.S.C. § 1423(b)(2).

75. 8 C.F.R. §§ 312.2, 312.4 (2011).

76. Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599 (1906).

77. *Id.*

ties, would have in learning English.<sup>78</sup> Later, during the McCarthy Era—signified by fear and distrust of foreigners—merely speaking English was deemed insufficient to confer the benefit of citizenship on a permanent resident.<sup>79</sup> Instead, the requirement was amended to add the more demanding English *literacy* requirement under the Internal Security Act of 1950, stating: “No person . . . shall hereafter be naturalized as a citizen of the United States . . . who cannot demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language.”<sup>80</sup> Even in 1950, Congress recognized the difficulty the elderly face when learning a new language. Congress therefore exempted individuals who were fifty years or older and had resided in the United States for at least twenty years from the newly amended English language requirement.<sup>81</sup> Not until 1990, however, did Congress expand the waiver to also encompass individuals who had lived in the United States for fifteen years and were fifty-five years of age or older.<sup>82</sup>

Although the stringent English language requirement, encompassing both English literacy and the ability to speak English, remains an element of naturalization to this day, the requirement only obliges a showing of simple spoken English and simple English literacy.<sup>83</sup> The current English language requirement will be met “if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made.”<sup>84</sup> In addition to the low-bar requirement of simple English knowledge, Congress has created waivers for the English language requirement which tend to demonstrate that the requirement only serves as a proxy for a model, beneficial citizen.<sup>85</sup> Congress has allowed applicants to show their merit in

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78. See McCaffrey, *supra* note 11, at 516. Several congressmen stated their displeasure and noted that the added English language requirement would “shut the door” on immigrants. *Id.*

79. See Ricardo Gonzalez Cedillo, *A Constitutional Analysis of the English Literacy Requirement of the Nationalization Act*, 14 ST. MARY’S L.J. 899, 928–29 (1983).

80. Internal Security Act of 1950, ch. 1024, Pub. L. No. 831, § 30, 64 Stat. 987, 1018 (codified at 8 U.S.C. § 704 (1952)).

81. *Id.*

82. Act of Nov. 29, 1990, Pub. L. No. 101-649, § 403, 104 Stat. 5039, 5039 (1990).

83. 8 U.S.C. § 1423(a)(1) (2006).

84. *Id.*

85. Spiro, *supra* note 51, at 495–96. Spiro explains that English literacy advocates argue the desirability of an English language ability as an element of naturalization because it signals that a citizen will have the ability to fully participate in the political process. *Id.* at 495. However, Spiro rejects this argument by noting that the growth in non-English media permits non-English speakers to be involved in the political process. *Id.* At 495–96.

other ways.<sup>86</sup> For instance, Congress created a waiver of the English language requirement, for both literacy and speaking ability, for Hmong veterans of the Vietnam War, a special guerrilla force in Laos.<sup>87</sup> This congressional waiver lessened the burdens of naturalization for people who clearly had shown their commitment and loyalty to the United States through military service.<sup>88</sup> This waiver demonstrates Congress's willingness to forgo the English language requirement if an applicant demonstrates evidence of loyalty and service to the United States.<sup>89</sup>

Although Congress places requirements on naturalization applicants because it wants to confer citizenship to loyal and civic-minded persons,<sup>90</sup> this does not justify the application of the English language requirement as it stands today. At most the English language requirement serves as a proxy for civic-mindedness. This proxy narrows the conferral of citizenship benefits to persons able to participate in the political process, to persons who have a stake in participation, and to persons who have the best chance of benefitting the country through their services.<sup>91</sup> This use of the English language requirement fails when applied to elderly individuals who have the qualities of a good citizen but who have difficulty learning a new language because of their age.

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86. *Id.*

87. The Hmong Veterans' Naturalization Act of 2000, Pub. L. No. 106-207, 114 Stat. 316 (2000) (current version at 8 U.S.C. § 1423); McCaffrey, *supra* note 11, at 501-02.

88. McCaffrey, *supra* note 11, at 496-97.

89. *Id.* at 497. Congress was likely motivated to pass this exemption due to its knowledge of the special sacrifice made by the Hmong veterans to the American effort in the Vietnam War. *Id.* at 504. However, this waiver also recognized the difficulty the aged Hmong veterans had in learning English. *Id.* at 506.

90. Neuman, *supra* note 55, at 240-41 (stating that one argument to explain U.S. naturalization law "places primary emphasis on political participation as the purpose of citizenship").

91. Leah Sullivan, *Press One for English: To Form a More Perfect Union*, 50 S. TEX. L. REV. 589, 605 (2009). The author notes that LEPs are exempt from jury duty due to their inability "to listen and follow the interpreter" and therefore are unable to participate in the political process and civic duties. *Id.* (citing *Hernandez v. New York*, 500 U.S. 352 (1991)). Further, the author notes a finding by the U.S. Department of Education that LEPs are less likely to be employed, to work continuously, and to work in high-pay sectors. *Id.* (citing ELIZABETH GREENBERG ET AL., U.S. DEP'T OF EDUC., ENGLISH LITERACY AND LANGUAGE MINORITIES IN THE UNITED STATES, ix (2001), available at [http://nces.ed.gov/pubs2001/2001464\\_1.pdf](http://nces.ed.gov/pubs2001/2001464_1.pdf)).

#### D. Practical Necessity of English Proficiency in the United States

Congress may have imposed the English language requirement upon naturalization applicants for many reasons, including the difficulty of living in the United States without speaking English.<sup>92</sup> First, most public service providers and most persons acting in the public sphere in the United States use English, posing difficulties for elderly LEP individuals.<sup>93</sup> For instance, almost all businesses in the United States write contracts in English.<sup>94</sup> At common law, some contract law consumer fraud protections do not extend to individuals who do not speak English.<sup>95</sup> Many courts and the Restatement of Contracts make an exception to the general rule that the written terms of a contract control when confronted with an oral misrepresentation.<sup>96</sup> In such cases, courts will either rescind the contract or enforce it according to its oral representation.<sup>97</sup> If, on the other hand, a Spanish-speaking consumer signed a contract written in English, and the merchant or dealer made a fraudulent oral assertion as to the contract's terms in Spanish, courts will likely find that "the Spanish-Only Consumer's negligence in failing to obtain a translation of the written contract precludes any remedy for the merchant's deceit."<sup>98</sup> There exist many other such situations in the public sphere that pose difficulties for elderly LEP individuals.

92. See McCaffrey, *supra* note 11, at 549 (noting the importance elderly immigrants place on learning English because of the need to speak English to access services).

93. See Amy Trang, *What Older People Want: Lessons from Chinese, Korean, and Vietnamese Immigrant Communities*, 32 GENERATIONS 61, 62-63 (2009). The author presents research which shows that the elderly population of Asian-Americans in Fairfax County, Virginia find language a challenge in the public sphere, especially when needing to access medical care. *Id.* at 61.

94. See RESTATEMENT (SECOND) OF CONTRACTS §§ 202, 212 (1981). These sections presume the use of English in American contracts. Section 212 Interpretation of Integrated Agreement, states that contracts are interpreted to construe the general usage of the English language. *Id.* § 212. Section 202 Rules in Aid of Interpretation, also states that the general English language is used to interpret contracts, rather than the language of a locality or region. *Id.* § 212.

95. See Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1034 (1996). The author notes that the lack of consumer protections for a non-English speaking party to a contract opens up the likelihood of targeted fraud at LEPs. *Id.* at 1035. "The Spanish-Only Consumer has become a victim of choice for unscrupulous merchants in America. Current frauds cover the full spectrum of the consumer marketplace: from telemarketing to home solicitation sales to the car lot." *Id.* at 1034.

96. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (stating the rule for fraud and misrepresentation and noting the case citations to support the rule).

97. *Id.* §§ 163-64.

98. Bender, *supra* note 95, at 1039.

Second, Congress may have imposed the English language requirement because some statutes specifically intended to ignore elderly LEPs and only protect the English-speaking elderly. For instance, the Patient Self-Determination Act (PSDA) mandates that all health care facilities receiving state programming funds must provide patients with written information regarding advance directives.<sup>99</sup> This legislation has the admirable goal of encouraging the elderly to consider their end-of-life health care options and to consider putting their end-of-life desires in writing.<sup>100</sup> This statute neglects, however, to consider elderly LEP individuals.<sup>101</sup> The advance directive requirement of the PSDA does not mandate that the written information be given in the elderly patient's language of choice.<sup>102</sup> As a result, very few health care providers will assume the financial burden of supplying translations of the advance directive information.<sup>103</sup>

Finally, the presence of "English-only" state laws means that many elderly LEPs cannot communicate with state government offices, and thus LEPs find it difficult to access the services state governments provide.<sup>104</sup> The current English-only movement has produced legislation in thirty-one states establishing English as the official language.<sup>105</sup> Although the legislation comes in various forms, the statutes generally specify that "English is to be the only language used for government documents, meetings, and all other official actions."<sup>106</sup> Moreover, some employers have created English-only policies in the workplace.<sup>107</sup> English-only state legislation or policies in the work-

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99. 42 U.S.C. § 1396a(w) (2006).

100. See Catherine J. Jones, Note, *Say What? How the Patient Self-Determination Act Leaves the Elderly with Limited English Proficiency Out in the Cold*, 13 ELDER L.J. 489, 493 (2005) (summarizing the legislative history of the Patient Self-Determination Act and stating, "[T]he bill espoused the idea that 'increased knowledge' would promote the use of advance directives and in turn 'enhance patient participation in health care decisions.'").

101. *Id.* at 499.

102. *Id.*

103. *Id.*

104. See Carol Schmid, Comment, *Language Rights and the Legal Status of English-only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 89-90 (1992).

105. *English in the 50 States*, *supra* note 24. The thirty-one states with official English laws include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming. *Id.*

106. Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 673 (2009).

107. *Id.* at 669.

place have inherent adverse implications for LEPs.<sup>108</sup> English-only proponents state that these laws will encourage LEPs living in the United States to learn English.<sup>109</sup> Despite the clear importance of learning English to survive in a society of English-only laws, many elderly LEPs still struggle to learn English due to the great difficulty of mastering a new language at an advanced age.<sup>110</sup>

Efforts to challenge English-only laws or to increase access to public services for LEP individuals have been unsuccessful so far. Although constitutional and federal statutory challenges to English-only laws have at times been successful,<sup>111</sup> the challenges have not swept away English-only laws or their impact on LEPs, nor are they likely to anytime soon.<sup>112</sup> In *Alexander v. Sandoval*, the U.S. Supreme Court denied a remedy to applicants for driver's licenses who brought a class action suit against the Alabama Department of Public Safety in response to the Department's policy of administering the driver's license test only in English.<sup>113</sup> The plaintiffs based their claim on Title VI of the Civil Rights Act which prohibits states from classifying individuals on the basis of national origin in such a way that persons are "excluded from participation in, [are] denied the benefits of, or [are] subjected to discrimination under any program or activity" within Title VI.<sup>114</sup> In addition, the Department of Justice previously exercised its enforcement authority under this provision by forbidding recipients of federal program funding from using the funds to commit unlawful Title VI discrimination.<sup>115</sup> Instead of ruling that the class of plaintiffs had a cause of action, the Court found that Title VI gave no

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108. Schmid, *supra* note 104, at 90 ("If enforced, they could deprive language minorities of important rights in the workplace, voting booth, and in the education arena.").

109. *Id.* at 71.

110. See Auriacombe et al., *supra* note 14, at 104.

111. Hill et al., *supra* note 106, at 675 (English-only statutes "run afoul of the First Amendment in that they require English to be the only language spoken by elected officials and government employees. Courts have consistently held that these English-only provisions are an unconstitutional restriction on citizens' rights to communicate with elected officials and constituents.").

112. See *English in the 50 States*, *supra* note 24 (even though some challenges have been successful, it has not been sufficient to overturn the English-only legislation present in thirty-one states).

113. *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001). LEPs sued the state of Alabama because their driver's license test was only available in English, arguing national origin discrimination under Title VI. *Id.* at 276. The Court held that Title VI gives no private right of action for disparate impact discrimination or for any discrimination which is not intentional. *Id.* at 294.

114. 42 U.S.C. § 2000d (2006); *Sandoval*, 532 U.S. at 278.

115. *Sandoval*, 532 U.S. at 278.



private right of action for disparate treatment.<sup>116</sup> The result of the *Sandoval* case demonstrates the practical difficulty elderly LEPs face when attempting to access services in an English-only society.

Further, the result in *Sandoval* diminishes attempts by the executive branch to increase LEP individuals' access to public services. President Clinton issued Executive Order 13,166 commanding the executive branch to improve accessibility of government services to LEP individuals.<sup>117</sup> This Order encompasses services funded by the federal government and carried out at the state level, such as state motor vehicles departments.<sup>118</sup> However, any hope LEP individuals held for increased accessibility ensuing from the Executive Order has gone unfulfilled as a result of decisions by the judicial branch.<sup>119</sup>

Despite the courts' unwillingness to give LEP individuals a remedy under Title VI, they have taken steps to cut down English-only laws.<sup>120</sup> Some of the most restrictive English-only laws, which demanded that states and localities conduct all business in English, have been cut down by successful First Amendment challenges.<sup>121</sup> Nevertheless, these laws still present practical difficulties to LEPs, especially for elderly LEPs. Overall, the need for elderly LEPs to navigate the English world becomes evident when viewed in light of consumer fraud laws, advance directive laws, and the ever growing number of English-only laws.

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116. *Id.* at 293.

117. Exec. Order No. 13,166, 65 C.F.R. § 159 (2000).

118. See U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., FTA C 4702.1A, GUIDANCE CIRCULAR CIVIL RIGHTS: TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS 2 (2007), available at 2007 WL 5395637.

119. *Sandoval*, 532 U.S. at 293.

120. Hill et al., *supra* note 106, at 675–81.

121. *Id.* Arizona's proposed Official-English Amendment to the state constitution was rejected by both the Ninth Circuit and the Arizona Supreme Court because it was too broad and would cut off government communication to LEPs. *Id.* at 675–78. Oklahoma's Initiative Petition would have declared English the official language and required that all official documents be in English, making no exception for educational institutions. *Id.* at 678–79. The Oklahoma Supreme Court found that this would prevent citizens from effectively communicating with their government. *Id.* at 679–80. The Alaska Supreme Court found a similar Alaskan law unconstitutional on similar grounds. *Id.* at 680–81.

### III. Analysis

#### A. Tension Between a Practical Need to Speak English and the Elderly LEP's Inability to Learn English

The number of aging LEP individuals is growing and will likely continue to grow due to an increase in the elderly LEP population and the difficulty the elderly have in acquiring second languages.<sup>122</sup> This fact creates tension with the current anti-immigrant sentiment in the United States that increasingly backs English-only laws.<sup>123</sup> In addition, the current economic recession makes it more difficult for local governments, state governments, and the federal government to pay for translators, translations, or bilingual workers.<sup>124</sup> As a result, elderly LEPs suffer when they cannot fully function in the English-only United States. A variety of solutions have been proposed to address this problem, but none of the solutions adequately fix each prong of the issue.

#### B. Proposal to Expand the English-Language Waiver to All Persons Fifty or Older

The first proposal seeks to expand the English-language waiver to all persons age fifty or older. Professor Angela McCaffrey argues for this expansion so that all persons age fifty or older who would otherwise qualify to become a citizen may naturalize.<sup>125</sup> The current English language waiver for legal permanent residents (LPR) exempts LPRs age fifty or older who have lived in the United States for twenty years or LPRs age fifty-five or older who have lived in the United States for fifteen years.<sup>126</sup> Professor McCaffrey's proposal suggests expanding the current waiver of the English language requirement to cover all persons age fifty or older.<sup>127</sup> McCaffrey's proposal simply

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122. See Leach, *supra* note 21, at 35–36.

123. Gabriel Schaefer, *November 2nd: A Victory for Official English*, PROENGLISH (Nov. 3, 2010, 11:03 A.M.), <http://proenglish.org/blog/239-november-2nd-a-victory-for-official-english>.

124. See *It's Time to Repeal Executive Order 13166!*, PROENGLISH (Aug. 24, 2010), <http://www.proenglish.org/component/content/article/60-national-alerts/346-its-time-to-repeal-executive-order-13166>.

125. McCaffrey, *supra* note 11, at 543.

126. 8 U.S.C. § 1423(b)(2) (2006).

127. McCaffrey, *supra* note 11, at 550.

takes the standard naturalization requirements and creates a more sweeping waiver to the English language requirement for the elderly.

Professor McCaffrey's proposal recognizes the difficulty elderly individuals face when trying to learn a new language.<sup>128</sup> This difficulty is not only neurological but also stems from the reduced educational opportunities many older immigrants faced in their youth.<sup>129</sup> McCaffrey's proposal also recognizes that the English language requirement prohibits many residents who have contributed to U.S. security, to society, and to the economy from becoming U.S. citizens.<sup>130</sup> Beyond the idea that these applicants demonstrate the ideal qualities of a citizen, McCaffrey's proposal also recognizes the heavy burden current immigrants carry as a result of their inability to naturalize. The current English-language waiver requires lengthy residence periods, thereby barring many immigrants from the benefits of citizenship, including the right to vote and faster processing of family-based visa petitions.<sup>131</sup> A U.S. citizen may immediately begin the visa petition process for his or her minor child or spouse without any wait time.<sup>132</sup> Spouses and minor children of an LPR, on the other hand, must wait years to begin the process due to numerical quotas placed on their admission.<sup>133</sup> For instance, LPRs who petitioned on behalf of their spouses or minor children in January 2008 had to wait until February 2011 for the visa to begin the processing stage.<sup>134</sup> Petitions for relatives from Mexico face an even longer wait; as of February 2011, only petitions filed in April 2005 or earlier were being processed.<sup>135</sup> Thus, LPRs must wait far longer than U.S. citizens to reunite with their families. Making an elderly LEP wait to attain fifteen or twenty years of residency to qualify for the current English-language waiver

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128. *Id.* at 529–30.

129. *Id.*

130. *Id.* at 538–39. McCaffrey describes the language exemption made for Hmong Veterans and argues that it shows the need to provide language exemptions for all persons who are fifty years or older and have lived lawfully in the United States for at least five years. *Id.* at 497–98.

131. *Id.* at 547. “The damage to elderly immigrants posed by not being able to pass the naturalization exam is extremely detrimental. They are harmed by the lack of a feeling of acceptance, the inability to participate fully in our democracy, the unavailability of safety nets available to citizens and the inability to reunite expeditiously with family members.” *Id.*

132. 8 U.S.C. § 1151 (b)(2)(A)(i).

133. ALEINIKOFF ET AL., *supra* note 43, at 301–02.

134. *Visa Bulletin for February 2011*, U.S. DEPT OF STATE (Jan. 11, 2011), [http://travel.state.gov/visa/bulletin/bulletin\\_5228.html](http://travel.state.gov/visa/bulletin/bulletin_5228.html).

135. *Id.*

to the citizenship exam presents a heavy burden to family reunification. As Professor McCaffrey states: "On balance, this is too great a price to pay for the fifteen or twenty years wait required before elderly can take the exam . . . particularly when extra time is unlikely to increase the odds that they will pass the exam."<sup>136</sup> McCaffrey's proposal broadly encompasses the understanding that elderly individuals can be upright citizens and merit the benefits of citizenship, even if they do not have English-language skills.

McCaffrey's proposal, however, neglects the practical importance and even necessity of the English language in U.S. society, a necessity codified in the English-only laws of the majority of states.<sup>137</sup> As a result, expanding the English-language waiver to permit more elderly LEPs to naturalize has benefits, but it does not address the practical issue of how these applicants will survive a largely English-only U.S. government after they have become citizens. The goal of expanding the rights of citizenship to deserving individuals has obvious merit, but this goal ignores the practical warning inherent within the English language requirement—knowledge of English ensures a more productive lifestyle and a higher quality of life in the United States.<sup>138</sup> Congress may have intended to caution potential candidates for naturalization with its English language requirement: if you will be a U.S. citizen, it is beneficial to know English in order to navigate public services.<sup>139</sup> As a result, Professor McCaffrey's proposal does not fully address the tension between deserving elderly citizenship applicants and a country of English-only laws.

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136. McCaffrey, *supra* note 11, at 547. McCaffrey references the fact that persons who are exempted from the English language requirement may have an interpreter for their required United States history exam. *See id.*

137. *English in the 50 States*, *supra* note 24 (demonstrating that thirty-one states have some variety of an English-only law).

138. Not speaking English creates many difficulties in accessing health services and Medicare. *See, e.g.,* Carrie L. Graham et al., *From Hospital to Home: Assessing the Transitional Care Needs of Vulnerable Seniors*, 49 *THE GERONTOLOGIST* 23, 31 (2009) (discussing the difficulty of accessing transitional care without English); Schmid, *supra* note 104, at 90 (stating that if English-only laws are enforced "they could deprive language minorities of important rights in the workplace, voting booth, and in the education arena"); Trang, *supra* note 93, at 62.

139. *See supra* Part II.D.

### C. Proposal to Change the Requirement to a Reasonable Effort to Learn English

A second proposal, advanced by Helene C. Colin, an immigration law practitioner,<sup>140</sup> suggests conferring citizenship upon individuals who have demonstrated an attempt to learn English, even though the attempt was unsuccessful.<sup>141</sup> Ms. Colin's proposal recognizes that an ideal candidate for citizenship, despite best efforts to learn, may not speak English.<sup>142</sup> Colin's proposal allows any individual, of any age, who has attempted to learn English to become a U.S. citizen regardless of his or her inability to speak English.<sup>143</sup> According to this proposal, if a person demonstrates that he or she has attempted to learn English by completing an English as a Second Language (ESL) course, that person can waive the English language requirement of the naturalization process.<sup>144</sup>

Colin's proposal recognizes the apparent connection between the traits of a civic-minded, dedicated citizen and learning English.<sup>145</sup> In fact, Colin's proposal goes even further—recognizing the underlying principles of the naturalization requirements by arguing for a greater focus on those principles.<sup>146</sup> By expanding the class of persons eligible to become citizens, the number of persons in the United States with a motive to seek involvement in the political process will increase.<sup>147</sup> Colin's proposal also recognizes that some people who want to learn English face difficulties in doing so because of illiteracy, age, time, or money.<sup>148</sup> Colin's proposal would give the benefits of citizenship to persons who want to learn English and have tried, but who were unsuccessful.<sup>149</sup>

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140. *Young Attorneys: Helene C. Colin*, SAN DIEGO SOURCE, <http://www.sddt.com/microsite/youngattorneys09/finalist.cfm?f=D36AWLZO> (last visited Oct. 23, 2011).

141. Colin, *supra* note 73, at 351.

142. *See id.*

143. *Id.* at 351–53.

144. *Id.*

145. *See id.* at 353.

146. *Id.* at 352.

147. *Id.*

148. *Id.* at 329. The author presents an anecdotal story of Susana, a legal permanent resident who desired to become a U.S. citizen. *Id.* Susana was eligible to become a citizen except for her inability to speak English. *Id.* Her children attempted to teach her, but she was still unable to learn. *Id.*; *see also In re Blasko*, 466 F.2d 1340, 1341 (3d Cir. 1972) (describing Blasko, a Hungarian-born immigrant, who attempted to naturalize after attending English classes for a year, failed the English examination and, was prohibited from becoming a citizen).

149. Colin, *supra* note 141, at 329.

This blanket waiver to the English language requirement expands citizenship rights too far. It may encourage persons to obtain false certifications that they have attempted to learn English when they have not.<sup>150</sup> Although the U.S. Customs, Immigration, and Naturalization Service (USCIS) could license certain ESL programs to offer classes which meet the requirements of the proposed law,<sup>151</sup> the programs would prove difficult to monitor.<sup>152</sup> Even a self-sustaining monitoring system, which would pay for itself by fees collected from applicants,<sup>153</sup> remains open to fraud.<sup>154</sup> Colin's proposal would mean the creation of a whole new industry of English language classes, which would require certification and monitoring by the Department of Homeland Security.<sup>155</sup> In addition, a certificate by the Department of Homeland Security would not ensure that applicants who took the English course would actually put full effort into learning English. Instead, the proposal's guarantee will ensure that by simply attending the class an applicant would earn a path to citizenship, thus incentivizing the applicant to ignore the importance of learning in the ESL class.<sup>156</sup> Colin's proposal allows persons of all ages to avoid learning English simply because they did not learn it in class the first time around. With the increased number of English-only laws, this proposal would harm people who have the capacity to learn English by

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150. See Donna Leiwnand, *Task Forces Aim to Fight Immigration Fraud*, USA TODAY, June 8, 2006, at 3A. Immigration fraud is an ongoing and frequent concern for immigration authorities such as the U.S. Customs and Immigration Services and Immigration and Customs Enforcement, as well as for Congress. *Id.* Immigration authorities constantly battle to devise new detection systems to stay ahead of the abusers of the immigration system who make and use fraudulent or forged documents. *Id.*

151. See 42 C.F.R. § 34.2(c) (2011). The Department of Homeland Security now certifies certain U.S. physicians to complete medical examinations to ensure that a beneficiary seeking to adjust status and become an LPR does not have communicable diseases which could pose a threat to the public health. *Id.*

152. See U.S. DEPT OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 83.4 (2010). The section of the immigration authority's field manual regarding certification procedures for these private surgeons is five pages long. *See id.* These requirements are likely lengthy and difficult to monitor. *See id.* As a result, a system requiring selection and certification of ESL programs would likely be just as difficult to monitor. *See id.*

153. Colin, *supra* note 73, at 354. Colin suggests that "[f]inancing for the language training could be addressed in a variety of ways. A combination of resources can be pooled to finance the classes. For example, applicants may be required to contribute a fee." *Id.*

154. See Leiwnand, *supra* note 150.

155. Colin, *supra* note 73, at 354.

156. See Sullivan, *supra* note 91, at 603 (noting that multilingual policies reduce incentives to learn English).

taking away the motivation for learning it. Younger persons who are more likely to learn a new language should attempt to learn English until they attain fluency; they should not just attempt it once, as this proposal would incentivize. Further, this proposal completely ignores the practical necessity of speaking English in the United States.<sup>157</sup>

#### D. Proposal to Repeal English-Only Laws

Some scholars advocate a completely different proposal to the problem: the elimination of English-only laws. These scholars propose improving the accessibility of public programs and services to LEPs, thereby eliminating the practical difficulties an elderly LEP faces in everyday life.<sup>158</sup> Some scholars argue that English-only laws are unconstitutional.<sup>159</sup> In addition, they argue that Title VI of the Civil Rights Act protects persons from discrimination in federally-funded programs<sup>160</sup> and mandates that the government must accommodate LEPs with regard to public services.<sup>161</sup> This means that all state or local programs which receive federal funding, including state motor vehicles departments, should not discriminate on the basis of national origin.<sup>162</sup> The Clinton administration even issued an executive order demanding that more government agencies improve access for LEPs.<sup>163</sup> Overall, this proposal places blame on English-only laws for creating the underlying problem instead of blaming the elderly for failing to learn English.

This proposal makes a strong attack on English-only laws by recognizing the serious implications English-only laws could have on the rights of U.S. residents—"If enforced, [English-only laws] could deprive language minorities of important rights in the workplace, voting booth, and in the education arena."<sup>164</sup> English-only laws do not

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157. See *supra* Part II.D.

158. Schmid, *supra* note 104, at 91 ("There is a need to rethink to what extent one should have the 'right to language' independent of the national origin label. Unless there are property safeguards for language minorities . . . groups will be able to promote a hidden agenda." (internal citations omitted)).

159. *Id.* at 75 ("English-only laws imposed by the government on private businesses may violate the First and Fourteenth Amendment.").

160. Hill et al., *supra* note 106, at 699.

161. *Id.* (explaining that the U.S. Supreme Court has held that schools must accommodate LEP students not simply by providing the same teachers, classes, and curriculum as all other English-speaking students, but by accommodating LEP students' needs more specifically); see *Lau v. Nichols*, 414 U.S. 563, 566-67 (1974).

162. 42 U.S.C. § 2000d-1 (2006).

163. Exec. Order No. 13,166, 65 C.F.R. § 159 (2000).

164. Schmid, *supra* note 104, at 90.

serve their supposed purpose of incentivizing English language learning, but rather promote illegitimate anti-immigrant sentiments.<sup>165</sup> The elimination of these laws would clearly and effectively target the questionable policy arguments underlying English-only laws.

The proposal to remove English-only laws and their progeny lacks pragmatism. This proposal seems unlikely to gain much political support.<sup>166</sup> The current political climate promotes English-only laws, and it appears that English-only laws will continue to spread.<sup>167</sup> Further, providing government services in a second language is a costly undertaking.<sup>168</sup> Given the current budget deficits facing governments at all levels, it appears unlikely that governments will rush to spend money translating documents or making government services more accessible to LEPs.<sup>169</sup> Though legal challenges to English-only laws have met with some success,<sup>170</sup> certain parts of English-only laws have withstood judicial review.<sup>171</sup> For instance, the U.S. Supreme Court decided that Title VI carries no private right of action.<sup>172</sup> As a result, private litigation will have little success arguing that English-only laws violate Title VI or the Constitution.<sup>173</sup> Ten states currently conduct driver's license tests only in English.<sup>174</sup> Although constitutional challenges to English-only laws have some merit, in reality an elderly LEP will face many difficulties in accessing basic govern-

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165. *Id.* at 90–91. “The laws have not done anything to increase proficiency of individuals with a limited knowledge of English. Rather than promote national unity and tolerance of Hispanic and Asian newcomers, the laws have promoted an anti-foreigner attitude among the population.” *Id.*

166. *See* Schaefer, *supra* note 123. Schaefer notes that Oklahoma's successful ballot initiative helped it become the thirty-first state to adopt official English on the same day that the Republicans won a large victory in Congress in the midterm election on November 2, 2010. *Id.* Schaefer contends that this should serve as a wake-up call to newly elected members of Congress, especially Republican- and Tea Party-backed members, to pass similar legislation at the federal level. *Id.*

167. *See id.*

168. *See, e.g.,* Scott B. Cantor et al., *The Language Translation Process in Survey Research: A Cost Analysis*, 27 *HISP. J. BEHAV. SCI.* 364, 365–66 (2005) (noting that it cost \$10,426 to translate a survey of thirty pages and 211 items).

169. *See* Leslie Eaton et al., *States Shut Down to Save Cash*, *WALL ST. J.*, Sept. 4, 2009, at A1.

170. Hill et al., *supra* note 106, at 675; *see supra* text accompanying notes 111–12.

171. *See* Hill et al., *supra* note 106, at 684–85. The authors complete an extensive review of English-only and Official English statutes. *Id.* at 673–87. They generally conclude that Official English statutes “never run afoul of the Constitution.” *Id.* at 684.

172. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

173. *See id.*

174. *English in the 50 States*, *supra* note 24 (these states include Arizona, Kansas, New Hampshire, South Dakota, Wyoming, Hawaii, Maine, Oklahoma, and Utah).



ment services if he or she does not know English. Despite its merits, this proposal faces insurmountable political and economic obstacles, thereby necessitating a more politically viable solution.

**E. Proposal to Expand the Waiver for the Elderly, Subject to the Availability of a Translator**

This Note proposes a modification of Professor McCaffrey's solution of expanding the English language waiver to all persons age fifty or older<sup>175</sup> by adding the requirement that only persons able to obtain a signed affidavit of translation may take advantage of the waiver. When the elderly LEP individual needs to access public services or public documents only available in English, a person willing to serve as translator signs the affidavit of translation. An affidavit of translation is modeled after the affidavit of support, a document frequently used in the immigration system today.<sup>176</sup> All family-based visa petitions and a small number of employment-based visa petitions require the petitioner to complete an affidavit of support showing that the petitioner has the financial resources to support the intended immigrant.<sup>177</sup> The affidavit of support legally binds the signer for five years after the immigrant enters the United States.<sup>178</sup> Likewise, the affidavit of translation will legally bind its signer to serve as translator to the naturalization applicant whenever the applicant has need of a translator to navigate public services or the public sphere. Specific occasions requiring the need of a translator include: negotiating a written contract, reading a disclosure on advance directives, or interacting with employees at a department of motor vehicles. In addition to the affidavit of translation, this proposal expands the English language requirement waiver to all persons age fifty and older who otherwise qualify to naturalize.

Criticisms of this proposal would likely focus on administrative difficulties and the costs inherent in monitoring and enforcing the affidavit. Some critics may point out the difficulty of enforcing such an agreement upon the translator as well as the problem of finding an al-

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175. McCaffrey, *supra* note 11, at 549.

176. ALEINIKOFF ET AL., *supra* note 43, at 528.

177. 8 U.S.C. § 1182(a)(4)(C)–(D) (2006); *Id.*

178. ALEINIKOFF ET AL., *supra* note 43, at 527–28 (noting that the legislative history behind the Personal Responsibility and Work Opportunity Reconciliation Act demonstrates Congress's desire to limit the amount of welfare non-citizens were obtaining).

ternate should the original translator become incapacitated or otherwise unavailable. Critics may also argue that the USCIS will spend extra money to evaluate and enforce the affidavits.<sup>179</sup>

Other more general concerns may arise with expanding the waiver to the English language requirement. Critics may argue that allowing individuals to naturalize without speaking English has detrimental effects upon American society—that the lack of a single language creates divisions and barriers as opposed to a strong community.<sup>180</sup> In addition, an expansion of the waiver would reduce incentives to learn English and increase government costs by forcing government, at the federal, state, and local levels, to obtain translations.<sup>181</sup> Overall, critics would likely levy arguments against the translation policy due to the administrative difficulties the proposal may pose and due to the perverse incentives the proposal might perpetuate.

These potential criticisms fail to recognize the practical daily living habits of an elderly LEP individual and fail to understand the current intricacies of the immigration system. First, expanding the English language waiver to persons age fifty and older does not incentivize people to refrain from learning English. Immigrants in the United States realize the vital importance of learning English for daily living.<sup>182</sup> In particular, the elderly recognize the need to speak English when seeking health care and navigating the health care system.<sup>183</sup> Although these elderly LEPs will now have access to a translator for times of extraordinary medical and service needs, the daily struggle of not knowing English will remain.<sup>184</sup> The change in the English language waiver for naturalization will not affect the everyday incentives for an elderly immigrant to speak English. The translator option will only account for the fact that although the elderly and the young have the same incentives to learn English, elderly LEPs face a large cognitive disadvantage in learning a new language.<sup>185</sup>

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179. Cf. Colin, *supra* note 73, at 354 (noting the potential administrative and financial criticisms that would face the implementation of a new infrastructure to administer an English language training waiver to the English language requirement).

180. See Sullivan, *supra* note 91, at 603.

181. See *id.* at 603–04.

182. McCaffrey, *supra* note 11, at 549; see also Miriam Jordan, *Huddled Classes Yearning to Learn Free*, WALL ST. J., June 12, 2007, at B1.

183. McCaffrey, *supra* note 11, at 549.

184. *Id.*

185. See Flege, *supra* note 32, at 101–02.

Second, the implementation and enforcement of the affidavit of translation will match the current procedures within the USCIS for affidavits of support without any administrative difficulties.<sup>186</sup> The USCIS will recoup any extra cost incurred to implement the procedure for an affidavit of translation through an added fee, and any person wishing to take advantage of the affidavit of translation will have to pay that fee. This matches current USCIS procedures to charge fees for the costs of immigration and naturalization services.<sup>187</sup> If it came to the attention of the government, at the federal, state, or local level, that a naturalized U.S. citizen struggled to navigate services only available in English, the government could pursue an enforcement measure against the person who signed the affidavit of translation. This mirrors the enforcement procedures for the affidavit of support<sup>188</sup> in which the government may legally enforce the affidavit against the sponsor, the person agreeing to provide financial support.<sup>189</sup> As with the affidavit of support, if the sponsored immigrant later applies for cash public benefits, the government may seek to obtain the costs of the benefits from the signer of the affidavit of translation.<sup>190</sup> In addition, the sponsored immigrant can use the affidavit of translation to sue the sponsor if the sponsor does not fulfill his or her financial support obligations.<sup>191</sup> Therefore, it will be simple for the USCIS to apply the procedures it uses for affidavits of support to an affidavit of translation.

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186. 8 U.S.C. § 1183a(b), (e) (2006) (stating the law and implementation of affidavits of support); *Questions and Answers*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 19, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextoid=67b73dc5cb93b210VgnVCM100000082ca60aRCRD>.

187. *See id.* (stating that the USCIS charges fees to pay for the services that it provides).

188. 8 U.S.C. § 1183a(b)(2)(B) (outlining the framework for enforcing the affidavit of support and noting that “[i]f the sponsor fails to abide by the repayment terms . . . the entity may bring an action against the sponsor pursuant to the affidavit of support”).

189. *Id.*

190. *Id.*

191. *Id.* § 1183(a)(c).

## IV. Resolution

### A. Expand the English Language Waiver with an Affidavit of Translation

An expanded English language waiver accompanied by an affidavit of translation solves three problems: (1) the difficulty of learning a language at an advanced age, (2) an elderly American's practical need to communicate in English, and (3) the growing population of elderly LEPs. This proposal allows all naturalization applicants age fifty or older to qualify for the English language requirement waiver, as long as the applicant obtains a signed affidavit of translation. Further, this resolution expands the current waiver by cutting down the residency requirement for elderly LEP individuals from the current twenty years<sup>192</sup> to five years, the normal residency requirement for any individual to naturalize.<sup>193</sup> This solution resolves the underlying issues and does not create many implementation or administrative challenges.

### B. Benefits of the Resolution

#### 1. THE RESOLUTION CONFERS CITIZENSHIP UPON DESERVING INDIVIDUALS

The affidavit of translation solution allows a potential model elderly citizen, in spite of his or her struggles to learn English, to obtain citizenship rights. The English language requirement, like all requirements of naturalization, stems from two public policy reasons for expanding the naturalization process. Some argue that public policy demands rewarding deserving, patriotic, or loyal individuals with citizenship.<sup>194</sup> Others argue that public policy demands expanding the citizenship class to persons who will contribute to the general welfare of the United States.<sup>195</sup> This resolution does not undermine either objective. Currently, the law demands that a naturalization applicant

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192. *Id.* § 1423.

193. *Id.* § 1427.

194. Legomsky, *Why Citizenship?*, *supra* note 57, at 283–84. “Some people believe that one central goal of citizenship law should be the recognition, or perhaps the promotion of allegiance.” *Id.* at 283.

195. *Id.* at 284. This public policy argument can be expressed in two parts: (1) to give citizenship rights to people most likely to contribute to the economy and (2) to give citizenship rights to people most likely to contribute to free-flowing independent thought. *Id.*

live in the United States for at least five years, have good moral character, and pass a test demonstrating his or her knowledge of U.S. civics.<sup>196</sup> A young applicant who meets all of the aforementioned criteria but who does not meet the English language requirement may not truly have the level of merit and the capacity needed to contribute to the United States if he or she has not seriously attempted to learn English. An elderly individual who meets all of the same commendable criteria and who does not speak English, however, may have more merit or a greater capacity to contribute to the United States than the young person because the elderly individual could have the desire to learn English. Because the elderly person faces greater obstacles in learning English than the young applicant,<sup>197</sup> this resolution allows deserving elderly individuals the rights of citizenship.

## 2. THE RESOLUTION ACKNOWLEDGES THE PRACTICAL NEED TO SPEAK ENGLISH IN THE UNITED STATES

This resolution acknowledges the practical need to speak English in the United States. English-only laws decreeing that state governments conduct public affairs in English have increased recently.<sup>198</sup> Further, calls have grown louder for a similar act at the federal level.<sup>199</sup> Beyond the English-only laws, which may have little functional impact on immigrants,<sup>200</sup> speaking English helps individuals to function in American society and obtain access to their basic needs.<sup>201</sup> For example, English-speaking Latinos have greater access to health care than LEP Latinos and as a result, English-speaking Latinos are generally healthier than their LEP counterparts.<sup>202</sup> Regardless of whether or not the progression of the English-only movement promotes the pub-

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196. 8 U.S.C. §§ 1423, 1427.

197. See Auriacombe et al., *supra* note 14, at 104.

198. *English in the 50 States*, *supra* note 24.

199. Sullivan, *supra* note 91, at 612 (describing the proposed English Language Unity Act of 2007 as a bill which would declare English the official language of the United States); Hill et al., *supra* note 106, at 675 (noting another federal attempt at Official English introduced into the Senate, known as the National Language Act of 2008).

200. Hill et al., *supra* note 106, at 674.

201. See Trang, *supra* note 93, at 62–63.

202. CINDY BRACH & FRANCES M. CHEVARLEY, U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR HEALTHCARE RESEARCH & QUALITY, RESEARCH FINDINGS NO. 28: DEMOGRAPHICS AND HEALTH CARE ACCESS AND UTILIZATION OF LIMITED-ENGLISH-PROFICIENT AND ENGLISH-PROFICIENT HISPANICS 3 (2008), available at [http://www.meps.ahrq.gov/mepsweb/data\\_files/publications/rf28/rf28.pdf](http://www.meps.ahrq.gov/mepsweb/data_files/publications/rf28/rf28.pdf).

lic interest, the English-only movement will not disappear soon.<sup>203</sup> Although LEPs' lack of access to basic necessities raises serious policy concerns, government budget cuts make the implementation of costly bilingual programs or translation services unlikely.<sup>204</sup> In contrast to other proposals which seek to expand the English-language waiver or abolish the English language requirement entirely, the affidavit of translation resolution acknowledges the real need for elderly Americans to either speak English or have access to someone who speaks English. The affidavit of translation ensures that in the elderly LEP individual's moments of greatest need, such as a health crisis, the LEP individual will have the ability to communicate to public service providers through his or her translator.

### 3. FINDING A TRANSLATOR HELPS THE ELDERLY GAIN ACCESS TO ACCURATE TRANSLATIONS

Finally, requiring a translator may appear burdensome for the elderly LEP caught in the difficulty of learning a new language and the necessity of communicating in English. Finding a translator really presents no burden at all because most elderly LEPs already rely on an English-speaking family member or friend, often an adult child, to serve as their translator in times of need.<sup>205</sup> Under the status quo system, some family members or friends who act as translators for the elderly may not be fully English-proficient and may fail to translate accurately.<sup>206</sup> This makes obtaining a proper medical diagnosis and treatment difficult.<sup>207</sup> Under this solution of an expanded waiver to the English language requirement, the signer of the affidavit of translation would only serve as a translator if he or she was proficient in English. This should not pose a heavy burden, as many elderly LEP individuals have a relative or close friend proficient enough to serve as a translator under the proposal.<sup>208</sup> This resolution has the benefit of solving all the tensions at issue. It addresses the difficulty of learning

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203. Schaefer, *supra* note 123.

204. Sullivan, *supra* note 91, at 603.

205. See Barbara Plantiko, *Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239, 240 (2002) (stating that many hospitals and other health care providers rely upon a patient's family and friends to translate for a non-English-speaking patient).

206. Jane E. Allen, *Worlds and Words Apart*, L.A. TIMES, Nov. 6, 2000, Part S (Health), at 1.

207. *Id.*

208. See Plantiko, *supra* note 205, at 240.

a new language at an advanced age while acknowledging that basic public services are only available in English, and this resolution will also standardize and improve the proficiency of translators for elderly LEPs.

### C. Answering Potential Criticisms

#### 1. EXPANDING THE ENGLISH-LANGUAGE WAIVER REMOVES INCENTIVES TO LEARN ENGLISH

Some critics argue that the expansion of the English language requirement waiver will incentivize applicants not to learn English. If the waiver expands, persons who may have otherwise learned English to attain citizenship now will forgo the work involved in learning English.<sup>209</sup> People age fifty or older have extreme difficulty learning a new language, regardless of how long they have lived in the United States.<sup>210</sup> In addition, the need to speak English on a daily basis greatly incentivizes learning English.<sup>211</sup> If a person who encounters a daily need to speak English to perform everyday public functions like negotiating a contract,<sup>212</sup> accessing health care,<sup>213</sup> and obtaining a driver's license<sup>214</sup> does not learn English, that person will not likely become more motivated to learn English simply because of a naturalization requirement.

#### 2. PROCEDURAL DIFFICULTIES IN IMPLEMENTING THE AFFIDAVIT OF TRANSLATION REQUIREMENT

Critics may also argue that the affidavit of translation will create burdensome costs, will be difficult to administer, and will be difficult to enforce against the translator. The affidavit of translation does not necessarily create an extra economic burden on the system, and it will follow the enforcement and administrative systems already in place for the analogous affidavit of support.<sup>215</sup>

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209. See Sullivan, *supra* note 91, at 603 (noting that if the government provides essential services to immigrants in their native languages, the immigrants will not have an incentive to learn English).

210. Jacqueline S. Johnson & Elissa L. Newport, *Critical Period Effects in Second Language Learning: The Influence of Maturational State on the Acquisition of English as a Second Language*, 21 COGNITIVE PSYCHOL. 60, 64–65 (1989).

211. McCaffrey, *supra* note 11, at 549.

212. Bender, *supra* note 95, at 1034.

213. Jones, *supra* note 100, at 498–99.

214. See *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001).

215. 8 U.S.C. § 1183a(b)–(c) (2006).

a. *Extra Cost* If the affidavit of translation created additional costs, this proposal would be politically unpopular and hence unrealistic. The affidavit of translation resolution would not add any costs to the federal budget. If the USCIS incurs any extra costs to evaluate the affidavit, including evaluating the translator's English proficiency and verifying the information in the affidavit, fees assessed to the naturalization applicant will recoup the costs. Approximately ninety percent of government administrative costs for immigration applications and processes are paid for by fees upon the applicants.<sup>216</sup> If a legal permanent resident wishes to naturalize under this expanded waiver, he or she must pay an additional fee for the right. As a result, added costs do not pose a barrier to this resolution.

b. *Enforcing the Affidavit* Critics will also likely argue that difficulties enforcing the affidavit may make the affidavit a superfluous piece of paper lacking an enforcement mechanism. Enforcing the affidavit will not pose a heavy burden on the USCIS because it already has mechanisms in place to enforce the analogous affidavit of support.<sup>217</sup> Affidavits of support are binding legal contracts wherein the signer agrees to financially provide for an immigrant entering the United States.<sup>218</sup> A petitioner who files an immigrant visa petition on behalf of a family member so that the new immigrant can gain LPR status in the United States completes an affidavit of support.<sup>219</sup> The affidavits include information on the petitioner's income and financial assets.<sup>220</sup> The petitioner must have enough income to support his or her own household as well as any and all new immigrants at 125% of the poverty rate.<sup>221</sup> The government may legally enforce the affidavit of support.<sup>222</sup> If the immigrant later applies for cash public benefits, the

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216. *Questions and Answers, supra* note 186.

217. 8 U.S.C. § 1183a(c) (listing the remedies available to enforce an affidavit of support, including procedures to collect federal debt (such as wage garnishment and property garnishment) and an order of specific performance).

218. *Id.* § 1183a(a)(1).

219. ALEINIKOFF ET AL., *supra* note 43, at 528 ("Congress not only made most such affidavits enforceable, but also mandated . . . that the visa petitioner execute a legally enforceable affidavit of support for each of the immigrants who qualify either as immediate relatives of citizens or under the family-based preferences.").

220. *Id.*

221. 8 U.S.C. § 1183a(f)(1)(E); see also Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 INTERPRETER RELEASES 1581, 1582 (1997).

222. 8 U.S.C. § 1183a(a)-(c).



government may enforce the cost upon the petitioner.<sup>223</sup> In addition, the sponsored immigrant can also use the affidavit of support to sue the sponsor if the sponsor does not fulfill his or her financial support obligations.<sup>224</sup> The government may enforce the affidavit until the new immigrant gains forty quarters of credit with Social Security (usually meaning ten years of work) or until the sponsored immigrant naturalizes, leaves the United States, relinquishes his or her permanent resident status, or dies.<sup>225</sup>

The affidavit of translation in this resolution would be subject to requirements similar to the affidavit of support. The sponsor would be required to fill out an affidavit promising to serve as a translator when the naturalization applicant needs to access English-only government programs; to communicate to health care professionals about diagnosis, treatments, and end-of-life care options; or to enter into contracts with negotiable terms. To ensure that the translator can serve in the chosen role, the translator will have to take a simple test given by USCIS to demonstrate his or her proficiency in English and of the primary language of the sponsored naturalization applicant. Once the translator signs the affidavit, the government or the naturalization applicant may enforce the affidavit against the signer should the translator unreasonably fail to translate at the needed time.<sup>226</sup>

*c. Obligations of the Translator and Alternative Translators* The affidavit of translation requirement will also include a requirement to obtain an alternate translator. This alternate translator will take on the role of the primary translator if the original translator dies or becomes incapacitated. With the written consent of all parties involved—the original translator, the alternate translator, and the naturalization applicant—the primary translator may shift his or her role as primary translator to the alternate translator if the primary translator leaves the geographic area or for some other reason becomes unavailable. This makes the affidavit of translation administratively feasible should the translator no longer have the capacity to serve.

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223. *Id.* § 1183a(b)–(c).

224. *Id.*

225. *See* 8 C.F.R. § 213a.2 (2011).

226. *Cf.* 8 U.S.C. § 1183a(c)–(e). The statute permits the federal government, the state government, any local governments, and the sponsored immigrant to enforce the affidavit of support against the sponsor. *Id.*

d. *Limits of Enforceability* The proposed system does include scenarios when the affidavit of translation, for purposes of administrative ease, will no longer be enforced. If both primary and alternate translators pass away, the affidavit will no longer be enforceable against anyone.<sup>227</sup> In addition, if the newly naturalized U.S. citizen learns English or dies and hence has no need for a translator, neither the government nor the newly naturalized citizen may enforce the affidavit.<sup>228</sup> In the event that the affidavit is no longer enforceable, the newly naturalized citizen will maintain his or her status as a U.S. citizen. Once someone has earned a citizenship right, the government defers to that citizenship status.<sup>229</sup> As a result, the enforcement of the affidavit of translation has limitations.

The solution of expanding the English-language waiver for the elderly, conditioned upon an affidavit of translation, creates many positive outcomes with minimal administrative difficulties and no negative incentives. The expanded waiver confers citizenship upon deserving individuals, acknowledges the practical necessity of speaking English in the United States, and gives elderly LEPs the benefit of having a translator in times of need. In addition, the expanded waiver will not create perverse incentives to avoid learning English because persons who have the capacity to learn English have many other reasons to do so.<sup>230</sup> The proposal will not create any new administrative difficulties or increased costs if it follows the procedural models already established within the U.S. immigration system. This proposal will best meet the divergent tensions of a growing elderly LEP population, current naturalization law, and the pervasive force of English-only laws in the United States.

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227. See RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981). The Restatement notes the common law understanding that a contract will not be enforceable if the death of one of the parties to the contract was necessary for the fulfillment of the contract: "If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.*

228. Cf. ALEINIKOFF ET AL., *supra* note 43, at 528–29. The regulations denote that affidavits of support are enforceable until the sponsored immigrant is credited with forty quarters of credit of Social Security, naturalizes, departs the United States and relinquishes LPR status, or dies. *Id.*

229. See *Vance v. Terrazas*, 444 U.S. 252, 267 (1980). Congress does not have the right to legislate or impose expatriation, or the taking away of citizenship, unless a citizen voluntarily relinquishes his or her citizenship. *Id.* at 252.

230. See *Jordan*, *supra* note 182.

## V. Conclusion

If Mr. Ricardo Rodriguez attempted to become a U.S. citizen today, over one hundred years after he became the first Mexican national to naturalize, his application would be denied.<sup>231</sup> Despite much advancement in civil rights since that day in 1897, the right of an elderly LPR to gain citizenship without speaking English has regressed. Meanwhile, the number of elderly LEP individuals in this country grows<sup>232</sup> and the difficulties each elderly LEP individual faces also grow in correlation with the increase in English-only laws.<sup>233</sup> This trend means that the English language naturalization requirement currently disserves the goal of expanding citizenship to benefit deserving individuals, including the elderly who struggle to learn new languages,<sup>234</sup> and fails to benefit the United States as a whole.

Some proposals meant to alleviate this tension only tackle part of the problem. The proposal to expand the English-language waiver to all persons age fifty or older<sup>235</sup> neglects the importance of speaking English in the United States. The proposal to change the requirement to a reasonable effort to learn English creates a system open to fraud.<sup>236</sup> A proposal to repeal English-only laws would solve part of the tension but is politically unrealistic. Only an expansion of the English-language waiver for the elderly, provided that the individual has an affidavit of translation, resolves all of the issues at hand. This resolution ensures that the rights and benefits of citizenship are open to the most deserving applicants, while also ensuring that elderly citizens have access to translations for their most crucial needs.

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231. *In re Rodriguez*, 81 F. 337, 355 (W.D. Tex. 1897).

232. Leach, *supra* note 21, at 35.

233. *English in the 50 States*, *supra* note 24.

234. Auriacombe et al., *supra* note 14, at 100–02.

235. McCaffrey, *supra* note 11, at 497.

236. Colin, *supra* note 73, at 332.

