UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION	)	
	)	
Petitioner,	)	
	)	**Docket Number**
v.	)	**CB-7521-14-0014-T-1**
	)	
LARRY J. BUTLER,	)	**Date:**
	)	**February 29, 2016**
Respondent.	)	

BRIEF ON BEHALF OF *AMICI CURIAE* ASIAN AMERICANS ADVANCING JUSTICE | AAJC, THE ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM, THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, AND THE NATIONAL COUNCIL OF ASIAN PACIFIC AMERICANS

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STATEMENT OF INTEREST

Asian Americans Advancing Justice | AAJC, the Asian & Pacific Islander American Health Forum, the National Asian Pacific American Bar Association, and the National Council of Asian Pacific Americans are nonprofit, nonpartisan organizations which seek to promote the civil rights of Asian Americans, Native Hawaiians, and Pacific Islanders. Our work includes increasing access to health care, improving language access, and promoting justice, equity, and opportunity for these groups, including those who have limited English proficiency ("LEP").

Amici share a common concern about the overarching implications of this case for LEP Americans, who make up 32% of Asian Americans and 9% of Native Hawaiians and Pacific Islanders.

ISSUE PRESENTED

Whether the Social Security Administration ("SSA") has the authority to require Administrative Law Judges ("ALJs") to comply with the SSA's policy in Hearings, Appeals, and Litigation Law Manual ("HALLEX") I-2-6-10 regarding the provision of interpreters for LEP claimants on request.

SUMMARY OF ARGUMENT

This case has profound implications for the rights of thousands of LEP Americans to due process and a fair hearing under the SSA's Old Age, Survivors & Disability Insurance, Supplemental Security Income, and Special Veterans Benefits programs (collectively "Social Security"). In his initial decision ("Initial Decision"), Merit Systems Protection Board ("MSPB") ALJ Michael J. Devine rejected the SSA's efforts to discipline SSA ALJ Larry J. Butler ("Respondent") for refusing to comply with the SSA's policy on the provision of interpreters for LEP claimants on request as expressly stated in HALLEX I-2-6-10. ALJ Devine found that ALJ Butler could not be disciplined for failing to comply with HALLEX I-2-6-10 because as applied the policy conflicted with SSA regulations.

The Initial Decision is deeply troubling because it effectively overturns the SSA's policy of providing interpreters to LEP claimants on request. This policy is solidly grounded in constitutional due process rights, the Social Security Act ("Act"), SSA regulations, and Presidential Executive Order No. 13,166 ("Executive Order"), as well as in concerns of basic fairness and common sense. The Initial Decision ignores these basic rights and fundamentally misreads SSA regulations and HALLEX I-2-6-10.

The Constitution requires that Social Security claimants be given the opportunity to be heard in a meaningful manner, that proceedings be understandable to the layman claimant, and that hearings afford all claimants equal protection of the laws. As the SSA has acknowledged by issuing HALLEX I-2-6-10, there is no way for an LEP claimant's Social Security hearing to comply with these constitutional requirements unless that claimant has an interpreter. In addition, the Act, SSA regulations, and the Executive Order all require that Social Security claimants be afforded a fair hearing. HALLEX I-2-6-10 safeguards these statutory due process

rights by ensuring a fair hearing for claimants who are unable to communicate in English. If allowed to stand, the Initial Decision would condone Respondent's violations of LEP claimants' due process rights under the Constitution, the Act, SSA regulations, and the Executive Order.

Further, the Initial Decision fundamentally misreads HALLEX I-2-6-10. Contrary to the finding in the Initial Decision, HALLEX I-2-6-10 does not limit an ALJ's ability to control participation in a Social Security hearing or intrude on an ALJ's decisional independence. Providing an interpreter pursuant to HALLEX I-2-6-10 does not limit an ALJ's ability to control participation in a Social Security hearing because an interpreter is merely an extension of the claimant who enables the claimant to participate meaningfully in the hearing. Nor does providing an interpreter pursuant to HALLEX I-2-6-10 intrude on an ALJ's decisional independence because the provision of an interpreter under HALLEX I-2-6-10 does not affect an ALJ's ability to making a finding as to an individual's English proficiency under the rules applicable to determining eligibility for Social Security disability benefits. Therefore HALLEX I-2-6-10 is fully consistent with SSA regulations and the Initial Decision erred when it found a conflict between HALLEX I-2-6-10 and SSA regulations.

Finally, LEP claimants are uniquely vulnerable. They are almost always immigrants, often aged, crippled ill, or disabled, by definition out-of-work, and often have limited education. Moreover, in roughly 20% of Social Security disability hearings, LEP claimants lack the assistance of a lawyer or non-lawyer representative. HALLEX I-2-6-10 safeguards these claimants' constitutional and statutory rights by ensuring they receive a full and fair hearing. If the SSA cannot enforce its language access policy, an unknown number of LEP Americans would be rendered helpless in hearings awash in arcane medical and vocational criteria and obscure government jargon. Such an approach also invites widely divergent practices by

different ALJs, hearing offices, and regions, undermining the SSA's express policy of treating similarly situated claimants uniformly nationwide.

For these reasons, Amici strongly support the SSA's policy of providing LEP claimants with interpreters on request and the SSA's accompanying authority to discipline ALJs who refuse to comply with it. Accordingly, Amici urge the MSPB to (1) grant the SSA's Petition for Review, (2) reverse the Initial Decision, and (2) issue a final decision finding that Respondent was required to provide interpreters on request to LEP claimants pursuant to HALLEX I-2-6-10.

FACTUAL AND PROCEDURAL BACKGROUND

As of 2013, approximately 61.6 million Americans spoke a language other than English at home. JIE ZONG & JEANNE BATALOVA, *The Limited English Population in the United States*, MIGRATION POLICY INSTITUTE (July 8, 2015), http://www.migrationpolicy.org/print/15316#. About 25.1 million of these individuals—8% of the total U.S. population—were considered to be LEP. *Id.*

In 2000, President Clinton issued the Executive Order on "Improving Access to Services for Persons with Limited English Proficiency." Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000). Presidents Bush and Obama each reaffirmed this order. Fed. Coordination & Compliance Section, U.S. Dep't of Justice, *Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency)* (2001); Fed. Coordination & Compliance Section, U.S. Dep't of Justice, *Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13,166* (2011). Section 2 of the Executive Order requires federal agencies to develop and implement plans for improving LEP access to federal programs and activities.

Pursuant to the Executive Order, the SSA submitted its LEP plan to the Department of Justice on December 19, 2000. *Plan for Providing Access to Benefits and Services for Individuals with Limited English Proficiency (LEP)*, SOCIAL SECURITY ADMIN., https://www.ssa.gov/multilanguage/LEPPlan2.htm#&a0=0 (last updated Aug. 2011). It launched a National Telephone Interpreter Service in October 2002 for SSA employees, including ALJs. *See id.* § 2. Of the 2,757,800 claimants for Social Security disability benefits in fiscal year 2014, a total of 139,439 or 5.06% were LEP, and of the 262,166 claimants for Social Security Income aged benefits in that same year, a total of 113,632 or 43.34% were LEP. *Quarterly Data for Spoken Language Preferences of Supplemental Security Income Aged Applicants*, SOCIAL SECURITY ADMIN., https://www.ssa.gov/open/data/LEP-Quarterly-Spoken-Language-SSI-Aged-Applicants.html (last updated Jan. 19, 2016); *Yearly Data for Spoken Language Preferences of Social Security Disability Insurance Claimants*, SOCIAL SECURITY ADMIN., https://www.socialsecurity.gov/open/data/LEP-Yearly-Spoken-Language-DI-Claims.html (last updated Oct. 5, 2015).

I. The SSA's Policy on the Provision of Interpreters in HALLEX I-2-6-10

HALLEX is an SSA publication that contains principles and procedures for carrying out the SSA's policies and "provides guidance for processing and adjudicating claims." SOCIAL SECURITY ADMIN., HALLEX I-1-0-1, *Purpose* (2005). In 2005, as part of its LEP plan, the SSA adopted in HALLEX a policy to grant claimants interpreters on request. *See* Pet'r's Ex. 4. HALLEX I-2-6-10, as in effect from 2012 to 2013, provided: "SSA will provide an interpreter free of charge, *to any individual requesting language assistance* or when it is evident that such assistance is necessary to ensure that the individual is not disadvantaged." *Id.* (emphasis added).

II. Respondent's Refusal to Provide Interpreters to LEP Claimants

Since August 2010, Respondent has been employed by the SSA as an ALJ in Fort Myers, Florida. Initial Decision at 7. Throughout 2012 and 2013, Respondent held multiple hearings without interpreters despite LEP claimants having requested them. *Id.* at 8–11. During this time, Respondent was aware of the SSA policy to provide interpreters on request but apparently had fundamental objections to it. *Id.*

When Respondent's practice came to the attention of the SSA, his superiors repeatedly asked and directed him to adhere to the SSA policy in HALLEX I-2-6-10. On October 31, 2012, the SSA's Appeals Council ordered Respondent to comply with SSA policy and rehear LEP claimant Portal's case with an interpreter present. *Id.* at 9. On October 31, 2013, Hearing Office Chief ALJ Rossana D'Alessio further directed Respondent to comply with SSA policy and rescind his denial of an interpreter request in LEP claimant Ordonez's case. *Id.* at 8. Respondent failed to comply with this directive and Hearing Office Chief ALJ D'Alessio reassigned the Ordonez case. *Id.* at 10.

On June 19, 2013, Acting Assistant Regional Chief ALJ Michael Davenport directed Respondent to comply with SSA policy and rehear three LEP claimants' cases—the Gonzalez, Alvarado, and Rosa cases—with interpreters present and to give notification when he had done so. *Id*. at 9. On July 17, 2013, Hearing Office Chief ALJ D'Alessio directed Respondent in writing to provide by July 29, 2013 the dates on which he would rehear the cases. *Id.* Respondent failed to comply and Hearing Office Chief ALJ D'Alessio reassigned the cases. *Id.* at 10. On November 19, 2013, Regional Chief ALJ Ollie Garmon issued a letter of reprimand to Respondent for his repeated refusal to provide interpreters in the Gonzalez, Alvarado, and Rosa cases. Pet'r's Ex. 27.

On February 7, 2014, Hearing Office Chief ALJ D'Alessio directed Respondent to comply with SSA policy and rehear three LEP claimants' cases—the Ortiz, Portal, and Aceves cases—with interpreters present and to give notification when he had done so. Initial Decision at 11. After Respondent again failed to comply, Hearing Office Chief ALJ D'Alessio reassigned the cases. *Id.*

III. The Initial Decision and the SSA's Appeal

On April 22, 2014, the SSA filed a Complaint against Respondent pursuant to 5 U.S.C. §§ 3105 and 7521 and 5 C.F.R. § 1201.137. *Id.* at 5. The SSA's Complaint sought a finding of good cause to suspend Respondent for sixty days based on three charges, including that he failed to follow instructions by failing to comply with Hearing Office Chief ALJ D'Alessio's directives and that he violated SSA policy by failing to provide foreign language interpreters to certain claimants on request. *Id.* Respondent filed an Answer on June 25, 2014, denying that HALLEX was binding authority on SSA ALJs. *Id.* at 6.

From February 24, 2015 to February 27, 2015, the MSPB held a hearing on the merits of the case, presided over by ALJ Devine. *Id.* at 6–7. ALJ Devine issued the Initial Decision on September 16, 2015, finding that the SSA failed to show good cause to impose sanctions on Respondent. Specifically, ALJ Devine stated that the SSA did not prove: (1) that Respondent did not comply with Hearing Office Chief ALJ D'Alessio's directives to rescind his denial of an interpreter in the Ordonez case; (2) that Respondent was obligated to comply with Hearing Office Chief ALJ D'Alessio's directives to rescind his denials of interpreters in the Ortiz and Aceves cases; and (3) that Respondent failed to follow SSA policy. *Id.* at 17–18, 66.

The SSA filed a Petition for Review of the Initial Decision on October 21, 2015, arguing that ALJ Devine's ruling was based on legal and factual errors, and requesting that the MSPB

reverse the Initial Decision and issue a final decision finding good cause to suspend ALJ Butler for sixty days. Pet'r's Br. at 1–3. On February 2, 2016 the MSPB granted Amici's motion to file an amicus brief in this case.

ARGUMENT

I. HALLEX I-2-6-10 Protects Claimants' Rights to a Fair Hearing Under the Constitution.

A. HALLEX I-2-6-10 safeguards claimants' Fifth Amendment rights to due process of law.

Claimants in Social Security hearings have a constitutional right to due process of law under the Fifth Amendment. *Richardson v. Perales*, 402 U.S. 389, 401–02 (1971). In this context, due process requires that claimants be afforded a full and fair hearing. *See, e.g.*, *Flatford v. Chater*, 93 F.3d 1296, 1305 (6th Cir. 1996) (citing *Perales*, 402 at 401–02) ("Due process requires that a social security hearing be 'full and fair.'"); *Miles v. Chater*, 84 F.3d 1397, 1400 (11th Cir. 1996) ("[A Social Security] claimant is entitled to a hearing that is both full and fair."); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (same). This constitutional due process right has been recognized by both Congress and the SSA, and has been implemented through legislation and regulation. *See Perales*, 402 U.S. at 400 (noting that in order to carry out its "statutory duties" under the Act, the SSA adopted regulations stating that the "procedure at the [Social Security] hearing generally . . . shall be . . . of such nature as to afford the parties a reasonable opportunity for a fair hearing.") (first alteration in original).

It is well established that in order for a Social Security hearing to be full and fair, claimants must be given the opportunity to be heard "in a meaningful manner" and the proceedings must be "understandable to the layman claimant." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted); *Perales*, 402 U.S. at 400. Due to their limited ability to read, speak, write, or understand English, LEP claimants cannot receive the full

and fair hearing that *Matthews* requires without an interpreter present. *See, e.g.*, *Liu v. Colvin*, No. C14-1389RSM, 2015 WL 1599659, at *6 (W.D. Wash. Apr. 9, 2015) (holding that LEP claimant "was not afforded a full and fair hearing by the [SSA] ALJ" where, because of her LEP status, "she was confused during the hearing and did not fully understand the questions . . . [and] felt that speaking in English limited her ability to communicate the complexities of her conditions"); *Aman v. Astrue*, No. 1:10-cv-00426-MHW, 2011 WL 4505173, at *8 (D. Idaho Sept. 28, 2011) ("'[T]raditional notions of due process would suggest that without an interpreter, a claimant unable to communicate in English would hardly receive a full hearing . . . in accordance with the beneficent purposes of the [Social Security] Act.'" (quoting *Martinez v. Astrue*, No. 3:07cv699 (SRU), 2009 WL 840661, at *2 n.1 (D. Conn. Mar. 30, 2009) (internal quotation marks omitted) (alterations in original)); *Di Paolo v. Barnhart*, No. 01-CV-3123 (JG), 2002 WL 257676, at *8 (E.D.N.Y. Feb. 8, 2002) ("Without an interpreter, [claimant] was unable to communicate her position and was therefore denied her right to a full and fair hearing.").

Furthermore, all SSA ALJs, including Respondent, bear a heightened responsibility to ensure due process because of their role as both factfinder and decider under the SSA's nonadversarial hearing process. *See* 20 C.F.R. §§ 404.943, 416.1443 (2015). As a result, in order to comport with constitutional due process, an ALJ has a duty to develop the record affirmatively. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) ("[U]nlike the typical judicial proceeding, a social security disability hearing is nonadversarial, with the ALJ responsible in every case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised . . . ." (internal quotation marks and citations omitted)); *Gold v. Sec. of Health, Educ. & Welfare*, 463 F.2d 38, 43 (2d Cir. 1972) (noting that the ALJ's duty to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant

facts surrounding the alleged right or privilege" is especially important when, as is often the case in a Social Security hearing, the claimant is not represented). In the case of an LEP claimant, courts have found that an ALJ cannot satisfy his or her duty to develop the record affirmatively in a hearing without an interpreter present. *See, e.g.*, *Novikov v. Astrue*, No. C07-5415BHS, 2008 WL 4162941, at *4–5 (W.D. Wash. Sept. 2, 2008) ("[Claimant] was unable to adequately make himself understood, and, as such, the record as a whole cannot be said to be complete."); *Di Paolo*, 2002 WL 257676, at *8 ("[I]n failing to provide [claimant] with an interpreter, the ALJ in this case neglected to fulfill his duty to develop the factual record by effectively examining [claimant].").

The record in this case demonstrates the importance of HALLEX I-2-6-10 in ensuring that Social Security claimants receive a full and fair hearing and that such hearings result in a full factual record. Multiple LEP claimants in cases before Respondent could not understand English or be heard meaningfully without an interpreter. In several instances the lack of an interpreter undermined the claimant's ability to participate effectively in his or her Social Security hearing and led to gaps in key elements of the factual record. Hearing Office Chief ALJ D'Alessio, Respondent's immediate supervisor, reheard three of Respondent's cases after they were removed from his docket because he refused to provide claimants with interpreters when they requested them. Initial Decision at 8–10. As Hearing Office Chief ALJ D'Alessio testified, "[One LEP claimant] had very little ability to communicate in English. . . . The other two, they were able to speak English to a certain extent, such as . . . every day common English, not the kind that you would find in a proceeding like [a Social Security hearing], where you would have more complex sentences, a more complex medical terminology." Tr. at 306. In one particularly egregious example, an LEP claimant could not even speak ten total words of English. After

listening to the transcript of that claimant's hearing before Respondent, Hearing Office Chief ALJ D'Alessio testified, "She barely understood what [Respondent] was talking about. She kept saying—she couldn't even answer the questions." *Id.* at 367–69.

Other experienced, supervisory ALJs testified extensively that Respondent's policy threatened LEP claimants' due process rights to a full and fair hearing. Associate Chief ALJ Kathleen Scully-Hayes testified, "I find it particularly egregious that the [LEP] individuals were not given their full opportunity to have a full, fair hearing in front of an ALJ, and multiple times." *Id.* at 231–32. After listening to a recording of one of Respondent's hearings in a case she reheard after it was removed from his jurisdiction, Hearing Office Chief ALJ D'Alessio testified that one LEP claimant "was supposed to have a fair hearing, and [Respondent's] hearing was so unfair to her." *Id.* at 367–69. Chief ALJ Debra L. Bice testified that the failure to provide an interpreter in a hearing for an LEP claimant could cause "substantive harm to the claimant" because "the judge does not know if the question was understood, or if the answer reflected the claimant's thoughts." *Id.* at 113–14. Associate Chief ALJ Scully-Hayes characterized Respondent's refusal to allow interpreters in LEP claimants' hearings as something that could "have such a dramatic effect on claimants who were coming before an administrative judge for a hearing." *Id.* at 751. And Hearing Office Chief ALJ D'Alessio testified that in at least one hearing Respondent's refusal to provide an interpreter prevented him from soliciting key medical evidence from the LEP claimant that would have made it clear she qualified for Social Security benefits. *Id.* at 367–69. Respondent's routine denial of LEP claimants' requests for interpreters shows a gross insensitivity to both the practical needs of such claimants seeking to establish their eligibility for Social Security benefits and the constitutional right of such

claimants to due process of law, as well as a blatant disregard of Respondent's duties as an ALJ to develop a meaningful record and ensure a fair hearing.

B. HALLEX I-2-6-10 safeguards claimants' Fifth Amendment rights to equal protection of the laws.

LEP claimants in Social Security hearings also have a constitutional right to equal protection of the laws under the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits states from maintaining racially segregated schools); *see also Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) ("State action, for purposes of the equal protection clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action."). In view of SSA's fundamental duty to ensure that claimants are not denied equal protection of the laws under the Constitution, SSA was fully within its authority under the Act and SSA regulations to issue guidance to ALJs that LEP claimants should be provided with an interpreter on request, and to seek discipline for ALJs who refuse to do so.

In determining whether a classification violates the Fifth Amendment's equal protection guarantee, courts look to whether the "classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment . . . ." *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). LEP Americans meet all the "traditional indicia of suspectness" used to determine whether such a classification is invalid: they are "saddled with [] disabilities . . . subject[] to . . . a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 11, 28 (1973). They are almost always immigrants, often have

limited education, and as a result are routinely excluded from representation in the political process. Therefore any state action that discriminates against LEP individuals must be narrowly tailored to achieve a compelling government interest. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Respondent offered only one feeble justification for his discriminatory policy of denying interpreters to LEP claimants: that HALLEX I-2-6-10 conflicted with SSA regulations because it interfered with his ability to make a determination of whether a claimant can communicate in English, and therefore interfered with his ability to make a determination of whether a claimant was disabled. Tr. 420–23. As the SSA explained in its brief, and as discussed more fully in Part III, there is no facial conflict between HALLEX I-2-6-10 and SSA regulations. Pet'r's Br. 21–26 (noting that the presence of an interpreter does not affect the outcome of the hearing, particularly since "the ability to communicate in English is a material factor in only two of eighty-two" rules determining Social Security eligibility); Tr. 68 (testimony of Chief ALJ Bice) (testifying that a claimant's ability to speak English must be determined "based on all evidence," not based solely on his or her ability to communicate in English at the hearing); *id.* 261 (testimony of Hearing Office Chief ALJ D'Alessio) ("If the interpreter is sitting there, all they're doing is translating. It doesn't affect anything in [the] hearing.").

Even assuming that denying interpreters to LEP claimants in specific cases could further a compelling government interest in preventing as-applied conflicts between HALLEX I-2-6-10 and SSA regulations—a dubious proposition with which both the SSA and Amici disagree—Respondent himself admitted that his blanket policy of denying interpreters to LEP claimants was not narrowly tailored to address such as-applied conflicts. Tr. 455–58 (testimony of Respondent) (admitting that his policy resulted in the denial of LEP claimants' requests for

interpreters before he had determined whether the ability to speak English was a material factor in determining whether the claimant was disabled). Where a discriminatory classification is not linked "in any way" to the specific compelling government interest identified, the classification cannot be said to be narrowly tailored. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507–08 (1989). Therefore Respondent's grounds for applying a blanket policy of denying interpreters to LEP claimants cannot be legitimately construed as furthering any compelling government interest.

HALLEX I-2-6-10 is a valid SSA policy solidly grounded in the basic due process and equal protection rights guaranteed by the Constitution. In view of the SSA's fundamental duty to safeguard claimants' constitutional rights to a full and fair hearing, including by ensuring that SSA ALJs affirmatively develop the record in nonadversarial Social Security hearings, the SSA was fully within its authority to issue guidance to ALJs that LEP claimants should be provided with an interpreter on request, and to seek discipline for ALJs who refuse to do so. Respondent's routine denial of LEP claimants' requests for interpreters in violation of this valid policy seriously jeopardized claimants' due process and equal protection rights. Accordingly, the Initial Decision, which condones Respondent's practice of depriving LEP claimants of their constitutional rights, cannot stand.

II. HALLEX I-2-6-10 Protects Claimants' Rights to a Fair Hearing Under the Act, SSA Regulations, and the Executive Order.

Through HALLEX I-2-6-10, the SSA has taken appropriate steps to protect claimants' rights to a fair hearing under the Act, SSA regulations, and the Executive Order. As the Supreme Court affirmed in *Perales*, the Act's procedure for Social Security hearings "must be fair—and it must work." 402 U.S. 389 at 399. While the conduct of a hearing "rests generally in the examiner's discretion" and thus can be "informal" so as to be understandable to the layman

claimant, the Court indicated such procedures must be "fundamentally fair." *Id.* at 399–401 (internal quotation marks omitted); *see also Wilburn v. Astrue*, 626 F.3d 999, 1003 (8th Cir. 2010) ("Social security disability applicants are entitled to a full and fair hearing . . . ."); *Kelley v. Heckler*, 761 F.2d 1538, 1540 (11th Cir. 1985) ("When an unrepresented claimant unfamiliar with administrative hearing procedures appears before an ALJ, the ALJ is under an obligation to develop a full and fair record; *i.e.*, the record must disclose that there has been a full and fair hearing."). Essential to a fair hearing is the claimant's ability to understand the proceedings, respond meaningfully to the ALJ's questions, and accurately communicate his or her medical and workplace limitations. In recognition of this basic fact, since 2005 the SSA has adopted in HALLEX I-2-6-10 a policy of providing any LEP claimant who requests one with an interpreter.

The Act provides claimants with the right to a hearing whenever they disagree with any determination with respect to their entitlement to, or the amount of, benefits, and confers on the Social Security Commissioner the responsibility and authority to ensure the hearing is fair. 42 U.S.C. §§ 405, 1383 (2012). SSA regulations require that an ALJ "looks *fully* into the issues . . . ." 20 C.F.R. §§ 404.944, 416.1444 (2015) (emphasis added). The regulations also provide that ALJs will question the claimant at the hearing and that the claimant has the "right to appear before the [ALJ] . . . to present evidence and to state his or her position." *Id.* §§ 404.950(a), 416.1450(a). Because SSA hearings are nonadversarial and confer upon ALJs the responsibility to act simultaneously as both factfinder and decisionmaker, the ALJ conducting a Social Security hearing bears an enhanced responsibility to ensure that the claimant is equipped to participate meaningfully in a hearing. This is particularly important since roughly 20% of Social Security claimants appear alone without a lawyer or nonlawyer representative.

It is difficult to fathom how an ALJ can fairly "question" the claimant if the claimant does not speak or understand English and there is no interpreter present, or how the claimant can exercise the right to state his or her position as provided in the regulations if the claimant does not speak English proficiently and/or does not feel comfortable speaking English. HALLEX I-2-6-10 is an appropriate measure taken by the federal agency charged with administering the Act to ensure that claimants receive a fair hearing as required by the Act and SSA regulations. The SSA was entirely within its authority to seek discipline for an ALJ who refused to comply with an express agency policy that was grounded in the Act and SSA regulations.

Furthermore, HALLEX I-2-6-10 is the SSA's chosen method of complying with the Executive Order, which directs federal agencies to "develop and implement a system by which LEP persons can meaningfully access th[eir] services consistent with, and without unduly burdening, the fundamental mission of the agency." As LEP.gov explains, "The Executive Order . . . requires that the Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries[,] . . . [and] to ensure that their programs . . . are accessible to LEP persons." Fed. Coordination & Compliance Section, U.S. Dep't of Justice, *Commonly Asked Questions and Answers Regarding Executive Order 13166* (2011); *see also* Fed. Coordination & Compliance Section, U.S. Dep't of Justice, *Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13,166* (2011). Presidents Clinton, Bush, and Obama all have determined that federal agencies need to ensure that LEP Americans can access federal programs meaningfully, further supporting SSA's policy of providing interpreters to LEP claimants on request.

In short, HALLEX I-2-6-10 is a valid SSA policy that protects an LEP claimant's right to a fair hearing under the Act, SSA regulations, and the Executive Order by enabling LEP

claimants to participate effectively in Social Security proceedings. Respondent's routine denial of LEP claimants' requests for interpreters in violation of this valid policy seriously jeopardized claimants' statutory rights to a fair hearing, and demonstrated an astonishing abdication of responsibility by an officer of the United States bound to provide LEP claimants with fair hearings.[1] Accordingly, the Initial Decision, which condones Respondent's practice of depriving LEP claimants of their rights under the Act, SSA regulations, and the Executive Order, cannot stand.

III. The Initial Decision Erred in Finding That HALLEX I-2-6-10 Conflicts with SSA Regulations.

In the Initial Decision, ALJ Devine determined that the SSA could not discipline Respondent based on his refusal to follow HALLEX I-2-6-10 because HALLEX I-2-6-10 conflicts with SSA regulations granting ALJs discretion over access to hearings and thus intruded on Respondent's decisional independence. Initial Decision at 23–25. Contrary to ALJ Devine's findings, HALLEX I-2-6-10 does not conflict with SSA regulations but rather is a key component of ensuring claimant's rights to a fair and meaningful hearing under those regulations and the Act.

A. HALLEX I-2-6-10 does not conflict with regulations governing access to hearings because interpreters are extensions of LEP claimants.

SSA regulations provide that "[a] hearing is open to the parties and to other persons the [ALJ] considers necessary and proper." 20 C.F.R. §§ 404.944, 416.1444 (2015). These regulations mandate that a hearing be open to the claimant, while allowing an ALJ to control the order of witnesses and exclude unnecessary parties. An interpreter is not an extraneous witness or even a distinct "party." Rather, an interpreter is an extension of the claimant and vital to an

[1] If Respondent had objections to the SSA's policies, there were more appropriate mechanisms for voicing these concerns, such as filing a grievance. Tr. at 847–48 (testimony of Regional Chief ALJ Garmon).

LEP claimant's right to be present as a "party" under these regulations. Since interpreters enable LEP claimants to participate meaningfully in SSA proceedings, they are an essential part of a fair hearing for LEP claimants.

SSA policy reflects the idea that interpreters are extensions of claimants. SSA's 2015 Language Access Plan defines interpreters as intermediaries between LEP claimants and SSA staff. Specifically, an interpreter is "an individual who speaks both English and another language fluently and *acts as an intermediary between an individual needing language assistance and SSA staff that is not proficient in the individual's preferred language*." SSA, *Social Security Administration Language Access Plan 3* (2015) (emphasis added). The SSA therefore envisions interpreters as mouthpieces for LEP claimants rather than independent witnesses. Interpreters do not offer independent testimony; they merely allow LEP claimants and SSA staff to understand each other.

Federal courts view interpreters similarly. Many federal courts view interpreters as agents of LEP parties, rendering statements made through an interpreter effectively party statements. *See United States v. Beltran*, 761 F.2d 1, 9–10 (1st Cir. 1985) (finding statements made through an interpreter not hearsay because the interpreter was an "agent" of the party); *United States v. Alvarez*, 755 F.2d 830, 859–60 (11th Cir. 1985) (same); *United States v. Da Silva*, 725 F.2d 828, 831 (2d Cir. 1983) (same). Other federal courts define an interpreter as a conduit through which a court receives a party statement. *See United States v. Cordero*, 18 F.3d 1248, 1253 (5th Cir. 1994); *United States v. Anguloa*, 598 F.2d 1182, 1186 n.5 (9th Cir. 1979) (quoting jury instruction that an interpreter is "not a participant in the trial," but rather "only acts as a transmission belt or telephone"). Case law thus confirms that an interpreter is an essential medium through which a party gives evidence.

Because interpreters are extensions of the claimants, they are essential to providing a full and fair hearing as required by SSA regulations. Those regulations require the ALJ to question the claimant in a hearing. 20 C.F.R. §§ 404.944, 416.1444 (2015). Without an interpreter acting as an intermediary between an ALJ and an LEP claimant, there is a substantial risk that questions and answers will be misunderstood, and that the SSA will fail in its obligation to develop a full and fair record because of the distortion or omission of important facts. *Kelley*, 761 F.2d at 1540. SSA regulations further unequivocally give a claimant the right to appear and present his or her case before an ALJ. *Id.* Accordingly, it was as improper for Respondent to exclude interpreters from hearings as it would have been to exclude the claimants themselves. Contrary to the Initial Decision, far from conflicting with SSA regulations, HALLEX I-2-6-10 effectuates the SSA's obligations under its regulations by ensuring that an LEP claimant can participate meaningfully in his or her Social Security hearings as a party. In short, HALLEX I-2-6-10 and SSA regulations are fully compatible.

B. The presence of interpreters at LEP claimants' hearings was not a threat to Respondent's decisional independence.

The Initial Decision further erred in finding that HALLEX I-2-6-10 interfered with Respondent's decisional independence by impeding his ability to "make a determination of the claimant's ability to communicate in English." Initial Decision at 25–31. The presence of an interpreter does not dictate the outcome of a hearing or remove the substance of the decision from an ALJ's control. *See Abrams v. SSA*, 703 F.3d 538, 545–46 (Fed. Cir. 2012). The Initial Decision admitted as much when it stated that a "plain reading" of HALLEX I-2-6-10 "allows an SSA ALJ to permit the interpreter's presence, and it does not directly interfere with the SSA ALJ's receipt of the evidence." Initial Decision at 27. The Initial Decision erred, however, in finding that access to an interpreter somehow undermines an ALJ's ability to evaluate a

claimant's English capability. While English proficiency is relevant in certain disability determinations under the SSA's Medical-Vocational Guidelines ("Grid Rules"), it comes into play only at step five of a five-step disability assessment process (sequential evaluation) and represents only two of the eighty-two rules in that process.

English proficiency is relevant only if an ALJ determines that the claimant (1) suffers from a several physical or mental limitation, and (2) lacks the residual functional capacity to perform his or her past relevant work. If so, the ALJ moves on to step five in the sequential evaluation in order to determine if the claimant can perform work, other than whatever work he or she performed in the past, which exists in significant numbers in the national economy, and may do so by using the Grid Rules. At this point, education and English proficiency are deemed relevant. *See* 20 C.F.R. §§ 404.1564, 416.964 (2015); Tr. at 65–69 (testimony of Chief ALJ Bice). Step five evaluates whether the claimant is capable of performing other types of unskilled jobs at various functional levels (sedentary, light, medium, heavy, and very heavy) in view of relevant vocational factors such as age, education, and work experience. Under the Grid Rules, ability to communicate in English is considered in the education column, and is determinative only under Grid Rule 201.17, which deals with individuals aged forty-five to forty-nine and Grid Rule 202.09, which deals with individuals aged fifty to fifty-four ,who are "illiterate or unable to communicate in English" Illiteracy is defined in the Grid Rules as "inability" to read or write, 20 C.F.R. § 404.1564(a)(1), and covers a claimant who is "unable" to communicate in English and "who doesn't speak and understand English," *id.* § 404.1564(a)(5), and thus has little capacity to handle a job that requires language skills, such as a sales clerk.

In contrast, the Department of Justice's definition of LEP for purposes of the Executive Order focuses on U.S. Census Bureau data, which classify individuals in one of four categories

of English language ability: speaks English (1) very well, (2) well, (3) not well, or (4) not at all. Under the Census Bureau categories, a person who speaks English other than "very well" is classified as LEP. In practice, a person who speaks English "well" for everyday purposes may still be LEP. This is completely different from the Grid Rule's definition of English proficiency, which focuses on illiteracy and inability to communicate in English in the context of a claimant's residual ability to perform at least some type of gainful work. As a result, a claimant's request for an interpreter (or an ALJ's finding that the claimant needs an interpreter under HALLEX because he or she "has difficulty understanding or communicating in English") in no way prejudges an ALJ's ultimate decision as to whether the claimant is disabled under the Grid rules. If the MSPB adopts the Initial Decision's reasoning, it effectively would transform English proficiency from a relatively minor consideration to the decisive factor in Social Security hearings, while simultaneously crippling a claimant's ability to communicate why he or she should be deemed disabled under the other eighty SSA criteria.

The Initial Decision erred in finding that "the application of HALLEX I-2-6-10 as enforced by SSA impedes an ALJ's ability to receive testimonial evidence" on the claimant's English proficiency. Initial Decision at 29. ALJ Devine apparently assumed that an LEP claimant's request for an interpreter determines a claimant's lack of English proficiency, and deprived Respondent of discretion to find otherwise. Regional Chief ALJ Garmon testified that, even *after* a request for an interpreter:

> [I]n the totality of the case, the full hearing of the case, it was still the judge's discretion as to whether or not the claimant . . . was fluent enough in English to pass muster . . . . [HALLEX I-2-6-10 and SSA regulations] are two different things altogether. Initially, when [the case] comes in, if someone says, I can't speak English, you're to provide the interpreter. But the judge still has in his discretion throughout the totality of the case to make a determination based on whatever evidence might be in the record as to whether or not that person could speak English.

Tr. at 813, 826–27. Regional Chief ALJ Garmon also noted that even if a claimant requests an interpreter, "that does not . . . prevent the judge from determining that the claimant spoke fluent English." *Id.* at 837. Likewise, Chief ALJ Bice testified that the finding regarding English proficiency is *not* based on the claimant's request for an interpreter, which only goes to the need for assistance from an interpreter for a "full and fair hearing." *Id.* at 67. On the contrary, as Chief ALJ Bice explained, "the ALJ's evaluation of ability to communicate in English is based on all of the evidence," including the ALJ's examination of medical records and application forms, the ALJ's observations of the claimant's ability to understand questions in English, and the ALJ's direct questioning of the claimant about his or her ability to speak English in the workplace, watch television or movies, read newspapers, and perform everyday tasks.[2] *Id.* at 68–72. In short, ALJ Devine's finding on this point is not supported by evidence and seriously mischaracterizes SSA practice.

IV. If Affirmed, the Initial Decision Would Permit Inconsistent Practices in Social Security Hearings and Perpetuate De Facto Discrimination Against Future LEP Claimants.

The constitutional guarantees of due process and equal protection are inalienable. All Social Security claimants are entitled to their constitutional rights and a full and fair hearing under the Act and SSA regulations. The SSA policy in HALLEX I-2-6-10 effectuates these guarantees and ensures a full and fair hearing for all claimants. Yet the Initial Decision focuses wrongly on whether HALLEX I-2-6-10 was subjected to notice-and-comment rulemaking. In its myopic focus on the provision's origin, the Initial Decision loses sight of the provision's purpose. Due process and equal protection belong to all claimants regardless of whether

[2] It is permissible and common for ALJs to ask the interpreter to step aside temporarily and ask the claimant some questions in English to determine English proficiency. Tr. at 261 (testimony of Hearing Office Chief ALJ D'Alessio). It is possible that a claimant could dissemble his or her ability to speak English, but that risk exists whether the questions are asked in English or translated into a foreign language. As Regional Chief ALJ Garmon and Chief ALJ Bice testified, this is why the proficiency determination should be based on the totality of the evidence.

HALLEX I-2-6-10 itself has the force of law. The Constitution is the law of the land—the rights it guarantees are not subject to administrative rulemaking.

It is especially important to preserve these rights for LEP claimants, who are often uniquely vulnerable. They are almost always immigrants, and often have limited education. They are frequently aged, crippled, ill, or disabled. In many cases, these already disadvantaged claimants lack the assistance of a lawyer or nonlawyer representative. Such claimants, moreover, are often deeply intimidated because of their limited familiarity with U.S. legal proceedings and medical and legal terminology. In this complex and intimidating environment, LEP claimants denied an interpreter face nearly insurmountable challenges in explaining their medical conditions and work limitations in an unfamiliar language.

Ignoring an interpreter's vital necessity to LEP claimants, the Initial Decision surprisingly condones Respondent's denial of constitutional and statutory rights to such claimants. For the MSPB to affirm the Initial Decision would give ALJs broad discretion over the use of interpreters by effectively invalidating HALLEX 1-2-6-10. The implications of this are deeply distressing. Some ALJs may choose not to provide interpreters, just as Respondent did here. *See* Tr. at 477 (testimony of Respondent) ("I have a real problem with this particular provision we're dealing with [*i.e.*, HALLEX I-2-6-10]."). This would result in unequal, unpredictable treatment of LEP claimants depending on which ALJs hears their cases, contrary to SSA policy and the Executive Order, by allowing ALJs to refuse to provide interpreters to LEP claimants without recourse. Far from being a theoretical extreme, this result is a very real possibility given the apparent endorsement of ALJ Butler's practice by the Association of Administrative Law Judges. *See generally* Association of Administrative Law Judges Amicus Curiae Br. Even if some ALJs continue to provide interpreters to some LEP claimants upon

request, other LEP claimants would be left unable to understand and participate meaningfully in their Social Security hearings. Affirming the Initial Decision would invalidate SSA guidance on language access, which seeks to ensure that the conduct of SSA hearings complies with the Constitution, the Act, SSA regulations, the Executive Order, basic fairness, and common sense. If the SSA cannot discipline ALJs for refusing to follow its language access policy, the result will be discrimination against LEP Americans, unequal treatment of similarly situated claimants, and gross miscarriages of justice.

CONCLUSION

For the foregoing reasons, the undersigned Amici respectfully request that the MSPB grant the SSA's Petition for Review, reverse the Initial Decision, and issue a final decision finding that Respondent was required to provide interpreters on request to limited English proficiency claimants in accordance with the due process and equal protection clauses of the Fifth Amendment to the U.S. Constitution, the Social Security Act, Executive Order No. 13,166, Social Security Administration regulations, and Hearings, Appeals, and Litigation Law Manual I-2-6-10.

Respectfully submitted,

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