

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

RAM BASNET,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	No. 285 WAL 2022
UNEMPLOYMENT	:	
COMPENSATION BOARD OF	:	
REVIEW	:	
	:	
Respondent.	:	

***MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF
OF PENNSYLVANIA INTERBRANCH COMMISSION FOR RACIAL,
GENDER AND ETHNIC FAIRNESS AND PENNSYLVANIA CLINICAL LAW
PROFESSORS IN SUPPORT OF PETITION FOR ALLOWANCE OF
APPEAL***

Pursuant to Rule 531(b)(1)(iii) of the Pennsylvania Rules of Appellate Procedure, the Pennsylvania Interbranch Commission for Racial, Gender and Ethnic Fairness and Pennsylvania Clinical Law Professors respectfully move for leave to file the accompanying *amicus curiae* brief in support of Petitioner’s Petition for Allowance of Appeal. In support of their Motion, *amici* state:

1. Rule 531(b)(1)(iii) permits an *amicus curiae*, defined as “a non-party interested in the questions involved in any matter pending in an appellate court,” to file a brief in support of a Petition for Allowance of Appeal with leave of court.

2. This case presents important questions concerning the extent to which Pennsylvania administrative agencies must take affirmative action to ensure that their quasi-judicial proceedings are fully accessible to persons of limited English proficiency (LEP). Because thousands of such proceedings take place each year, and because a significant proportion of the Commonwealth's population is of limited English proficiency, the case presents an issue of public importance. Moreover, while this Court has addressed language access issues in the judicial context, it has not yet done so in the administrative context; thus, this is also case of first impression.

3. *Amicus curiae* Pennsylvania Interbranch Commission for Racial, Gender and Ethnic Fairness was established in 2005 by this Court and the other two branches of Pennsylvania government. Its mission is to implement recommendations from a 2003 study and report by the Supreme Court Committee on Racial and Gender Bias in the Justice System, which found numerous instances of bias and invidious discrimination within the legal profession and the justice system as a whole. The report addressed access to the courts for individuals with limited English proficiency (LEP), and set forth recommendations for ways in which the Court could address deficiencies found in the provision of translation and interpretation services within Pennsylvania's justice system. A subsequent survey conducted by the Commission in 2007 analyzed the provision of such services by the

Commonwealth's administrative agencies and found similar problems in several of the agencies' delivery of these services. The Commission continues to work toward the elimination of these deficiencies to this day. The Commission members authorized the filing of this brief.

4. *Amici curiae* Pennsylvania Clinical Law Professors are law faculty across Pennsylvania who work with students to represent low-income individuals, including those with limited English proficiency, in civil proceedings. Through this representation, these *amici* have become familiar with barriers that LEP individuals often encounter in such proceedings. A list of these *amici* is found in the Appendix to the brief.

5. As such, *amici* seek to offer the Court their perspective concerning the legal issues presented in this case and the reasons justifying the granting of the Petition for Allowance of Appeal

6. In accordance with Pa. R.A.P. 531(b), no person or entity, other than the *amici curiae*, their members, or counsel, (i) paid in whole or in part for the preparation of the *amici curiae* brief, or (ii) authored in whole or in part the *amici curiae* brief.

7. WHEREFORE, *amici* respectfully request that the Court grant leave to file the proposed *amicus curiae* brief attached as Exhibit A.

Respectfully submitted,

Dated: November 18, 2022

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EXHIBIT A

**IN THE SUPREME COURT OF PENNSYLVANIA
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Petitioner,	:	
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v.	:	No. 285 WAL 2022
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COMPENSATION BOARD OF	:	
REVIEW	:	
	:	
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***BRIEF OF AMICI CURIAE PENNSYLVANIA INTERBRANCH
COMMISSION FOR RACIAL, GENDER AND ETHNIC FAIRNESS AND
PENNSYLVANIA CLINICAL LAW PROFESSORS IN SUPPORT OF
PETITION FOR ALLOWANCE OF APPEAL***

**Brief in Support of Petition for Allowance of Appeal from the
October 19, 2022, Order of Commonwealth Court Affirming the
Unemployment Compensation Board of Review’s Decision No. B-20-09-H-
6112, dated September 7, 2021**

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Pa.R.A.P. 531(b)4

INTEREST OF *AMICI CURIAE*

The **Pennsylvania Interbranch Commission for Racial, Gender and Ethnic Fairness** (“Commission”) was established in 2005 by the Pennsylvania Supreme Court and the other two branches of Pennsylvania government. Its mission is to implement recommendations from a 2003 study and report by the Supreme Court Committee on Racial and Gender Bias in the Justice System, which found numerous instances of bias and invidious discrimination within the legal profession and the justice system as a whole. The first chapter of the report addressed access to the courts for individuals with limited English proficiency (LEP). The recommendations from that chapter included several directed to the Court to address deficiencies found in the provision of translation and interpretation services within Pennsylvania’s justice system. A subsequent survey conducted by the Commission in 2007 analyzed the provision of such services by the Commonwealth’s administrative agencies and found similar problems in several of the agencies’ delivery of these services. The Commission continues to work toward the elimination of these deficiencies to this day. The Commission members authorized the filing of this brief.

Pennsylvania Clinical Law Professors work with law students to represent low-income individuals, including those with limited English proficiency, in civil proceedings throughout Pennsylvania. Through this representation, these *amici* have

become familiar with barriers that LEP individuals often encounter in such proceedings. These *amici* also teach, research, and write in various areas of civil law. A complete list of their names, titles, and affiliations is set forth in the appendix to this brief.

In accordance with Pa. R.A.P. 531(b), this is to certify that no person or entity, other than the *amici curiae*, their members, or counsel, (i) paid in whole or in part for the preparation of the *amici curiae* brief, or (ii) authored in whole or in part the *amici curiae* brief.

SUMMARY OF ARGUMENT

In this case, a Commonwealth administrative agency failed to address the obstacles encountered by a non-English-speaking claimant and instead placed the obligation on to her to overcome the language barrier. The case thus presents important questions concerning how administrative agencies must act affirmatively to ensure that their proceedings are accessible to persons of limited English proficiency (LEP). These questions are of substantial public importance because they involve the fundamental rights of Pennsylvanians to access justice; and are of first impression because they have not been addressed by this Court. 210 Pa. Code § 1114(b)(3), (b)(4).

ARGUMENT

In this case, the Commonwealth Court upheld the dismissal of an unemployment compensation claim by a native speaker of Nepali, essentially on the ground that she—rather than the Department of Labor and Industry—failed to take sufficient action to overcome her own language barrier. While this ruling would seem shocking under any circumstances, the fact that the case arose during the height of the pandemic—when the Department could rarely even be reached by phone and responded in English when it was—underscores the serious consequences that can result when an administrative agency fails to comply with its obligations to act affirmatively to provide language access.

The case thus presents important questions concerning the extent to which Pennsylvania administrative agencies must ensure that their quasi-judicial proceedings are fully accessible to persons of limited English proficiency (LEP). These questions are of substantial public importance because they involve the fundamental rights of Pennsylvanians to access justice; and are of first impression, in that they have not been addressed by this Court. 210 Pa. Code § 1114(b)(3), (b)(4).

This Court has previously recognized the importance of addressing language barriers in the context of judicial proceedings, initially through the creation of the Interbranch Commission on Racial, Gender, and Ethnic Fairness, and ultimately by adopting the Uniform Judicial System’s statewide Language Access Plan. However,

there has been less attention to these issues in the context of *administrative* matters, where the legal rights of Pennsylvanians are also determined. Yet the importance of addressing language barriers in the administrative context is no less urgent than that of ensuring language access in the courts.

I. In Pennsylvania, administrative proceedings determine the legal rights of large numbers of LEP individuals in matters involving essential human needs.

In Pennsylvania, a wide variety of legal claims are decided in the first instance at the administrative level in quasi-judicial proceedings. Many of these proceedings concern basic human needs, such as income, employment, health and social services.

Examples include proceedings of:

- The Department of Human Services (DHS), which handles hearings covering nearly 280 different areas, including the denial, suspension, termination, or reduction of any DHS-issued benefit (e.g., cash assistance; Medical Assistance; Supplemental Nutrition Assistance Program (SNAP) benefits). DHS also handles hearings concerning access to aging programs and services for the Department of Aging;¹
- The Department of Labor and Industry (DLI), which handles Unemployment Compensation hearings;²

¹ *Hearings and Appeals Process*, Pa. Dep't of Hum. Res., <https://www.dhs.pa.gov/Services/Disabilities-Aging/Pages/Hearings-and-Appeals.aspx> (last visited Nov. 16, 2022).

² *Benefit Appeals*, Pa. Dep't of Lab. & Indus., <https://www.uc.pa.gov/appeals/Pages/default.aspx> (last visited Nov. 16, 2022).

- The Department of Transportation, which handles hearings concerning the denial or suspension of various categories of licenses and permits;³ and
- The Department of Insurance, which handles proceedings, such as those concerning insurance policy terminations and health care (e.g., Children’s Health Insurance Program (CHIP)).⁴

This is only a partial list, since there appears to be no central compilation of the types of proceedings in which rights are determined at the administrative level, or of the number of proceedings held each year. There can be no doubt, however, that that number is substantial. For example, DLI alone decided over 70,000 initial appeals in 2020 and over 57,000 in 2021, plus approximately 6,000 further appeals from those decisions each year.⁵

These kinds of agency decisions have a tremendous impact on the rights and welfare of Pennsylvanians. According to the U.S. Department of Labor (DOL), the Unemployment Compensation program to which the Petitioner in this case applied “offers the first line of defense against the ripple effects of unemployment.” Notice of Policy Guidance Regarding Limited English Proficiency Persons, 68 Fed. Reg. 32289, 32303 (May 29, 2003). Not only does it ensure that a “significant proportion

³ *Department of Transportation*, Pa. Dep’t of Lab. & Indus., <https://www.dli.pa.gov/Individuals/Disability-Services/odhh/law-guide/Pages/PennDOT.aspx> (last visited Nov. 16, 2022).

⁴ *Administrative Hearings Office*, Pa. Ins. Dep’t, <https://www.insurance.pa.gov/Regulations/Pages/AdminHearingsOffice.aspx> (last visited Nov. 16, 2022).

⁵ *Unemployment Insurance Data*, Century Found., <https://tcf-ui-data.shinyapps.io/ui-data-explorer/> (last visited Nov. 16, 2022) (choose “PA” from the dropdown).

of the necessities of life, most notably food, shelter and clothing, can be met on a week-to-week basis while the claimant searches for work,” it also “provide[s] temporary wage replacement that helps claimants to maintain their purchasing power and stabilize the economy.” *Id.* Decisions of other agencies address similarly important needs, such as for food, employment, health care, and social services.

Further, for many individuals, the administrative decision is as a practical matter the *final* decision, given the cost in time and legal fees of appeals to the Commonwealth Court. And, even if an individual does manage to appeal, the appeal is based on the administrative record. If that record is skewed by language barriers, a fair determination becomes impossible.

Evidently, data is not readily available concerning the numbers of LEP individuals who end up in Pennsylvania’s administrative courts, or who would utilize them if language barriers were not an issue. However, there is no doubt that Pennsylvania has a large LEP population. According to the Unified Judicial System’s Language Access Plan:

Pennsylvania is the tenth most linguistically diverse state in the country. Statewide, 1,218,174, or 10.2%, of Pennsylvania’s 12 million residents speak another language at home. They speak more than 100 languages and are dispersed throughout the Commonwealth. The most commonly spoken languages vary both within and among counties, and

the influx of new immigrants brings with it emerging new languages throughout the state.⁶

More recent census data indicates nearly 12% of Pennsylvanians above 5 years old speak a language other than English at home.⁷

Even for individuals who can speak some English, navigating government programs can be difficult. For LEP persons, in the absence of adequate language services, these difficulties can become insurmountable barriers. As illustrated by the facts of this case, the failure by an agency to provide adequate language services has the potential to compromise the administrative agency's ability to determine facts and dispense justice.

II. Federal law obligates state administrative agencies to take affirmative steps to assist LEP individuals in administrative proceedings.

The failure of administrative agencies to provide adequate language access violates federal civil rights laws. Section 601 of Title VI of the Civil Rights Act of 1964 states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. In *Lau v. Nichols*, the U.S. Supreme Court

⁶ Unified Jud. Sys. of Pa., Language Access Plan 7 (2017), <https://www.pacourts.us/Storage/media/pdfs/20210214/184044-theunifiedjudicialsystemofpennsylvanialanguageaccessplan-005972.pdf>.

⁷ *Language Spoken at Home*, U.S. Census Bureau (2021), <https://data.census.gov/cedsci/table?q=language&g=0400000US42&tid=ACSST1Y2021.S1601>.

interpreted Title VI and its implementing regulations to prohibit conduct that has a disparate impact on LEP persons. 414 U.S. 563 (1974). In the four decades following *Lau*, the U.S. Department of Justice (DOJ) and other federal agencies have continually reaffirmed the Court’s interpretation of Title VI.

In 2002, DOJ issued formal policy guidelines governing language access in the courts and was explicit that the definition of “court” included “administrative adjudicatory systems or administrative hearings.” Notice of Policy Guidance Regarding Limited English Proficiency Persons, 67 Fed. Reg. 41455, 41459 n.5 (June 18, 2002). The main requirement is that courts, including administrative agencies, must “take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.” *Id.* at 41459. The agency must provide language assistance “at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits or services.” *Id.* at 41461. Meaningful access includes several affirmative obligations, including the requirement that the agency (1) avoid relying on an LEP person’s family members, friends, or other informal interpreters; (2) identify LEP persons and explain to them how to get language help; and (3) ensure that staff know their obligations to provide meaningful access to information and services. *Id.* at 41462, 41465.

Guidance issued by DOL, which funds state unemployment compensation programs, similarly sets out affirmative requirements for state agencies, such as DLI, that oversee these programs. U.S. Dep't of Labor, Emp. & Training Admin., Unemployment Insurance Program Letter No. 02-16 (Oct. 1, 2015); *see also* U.S. Dep't of Labor, Emp. & Training Admin., Unemployment Insurance Program Letter No. 02-16, Change 1 (May 11, 2020). The emphasis is again on the agency engaging in active “methods” for “identifying and reaching other LEP individuals” including those who speak less common languages. U.S. Dep't of Labor, Emp. & Training Admin., Unemployment Insurance Program Letter No. 02-16, at 8 (Oct. 1, 2015). Once such language needs are identified, agencies should ensure that future vital program communications occur in the appropriate language for that LEP individual (*e.g.*, claimant decisions/determinations, notices of right to appeal, and appeal decisions). *Id.* at 10.

In sum, Title VI and applicable federal guidance make clear that to provide meaningful language access in proceedings, administrative agencies cannot place the burden onto LEP individuals but rather must engage in affirmative steps to both identify them and provide them with language services.

III. This Court has taken extensive steps to ensure compliance with Title VI in judicial proceedings, but has not had occasion to do so in the administrative context.

This Court has long recognized the importance of providing meaningful access to LEP individuals in judicial proceedings. In 1999, the Court appointed the Committee on Racial and Gender Bias in the Justice System to examine, *inter alia*, “the scope of responsibility of courts and administrative agencies to provide oral interpretation services to persons in a variety of judicial and administrative proceedings.”⁸ It instructed that, for “state courts and agencies that conduct administrative hearings[,] . . . Title VI mandates that broad policies be instituted to ensure that the proceedings are fully accessible to LEP persons.”⁹ The Committee subsequently issued its Final Report, which included extensive findings concerning the needs of LEP individuals and recommendations for meeting those needs.¹⁰

Subsequently, in 2017, the Court approved a statewide Language Access Plan.¹¹ At its outset, the plan states:

Equal access to the courts is fundamental to the legitimacy of our system of justice and trust and confidence of Pennsylvanians in our courts. Language services for individuals . . . are essential to ensure that they are able to fully participate in judicial proceeding and court services, programs and activities in which their rights and interests are at stake.¹²

⁸ Pa. Supreme Ct., Comm. on Racial and Gender Bias in the Justice System, Final Report 19 (2016), <https://pa-interbranchcommission.com/wp-content/uploads/2022/01/FinalReport.pdf>

⁹ *Id.* at 24

¹⁰ *Id.* at Chapter 1.

¹¹ Language Access Plan, *supra* note 7.

¹² *Id.*

In particular, the Plan specifies how the courts should carry out their affirmative duty to identify and register LEP litigants, by taking on the responsibility for early identification of the need for language services and adding a notation to the litigants' record of their LEP status to inform future encounters with the individual.¹³ Further, the Plan prohibits the courts from shifting the burden onto the LEP individual: “[i]ndividuals who are LEP . . . should never be expected to use informal interpreters, such as family members, opposing parties, or their counsel.”¹⁴

Thus, this Court has taken decisive steps to ensure equal access to justice for LEP individuals in the judicial context. However, the Court has not had the occasion to confront the question of compliance with Title VI by Commonwealth administrative agencies in proceedings where rights are adjudicated. Yet ensuring compliance in those proceedings is no less important and no less legally required.

IV. This case presents a striking example of a failure by an administrative agency to take affirmative steps to provide equal access to an LEP claimant.

DLI's failure to provide Petitioner with language assistance, in conjunction with her inability to read or comprehend the notices, ultimately resulted in her failure to file a timely appeal. Despite this administrative breakdown, the Board of Review dismissed the appeal, citing Petitioner's alleged failure to seek help in understanding

¹³ *Id.* at 30-31.

¹⁴ *Id.* at 5-6.

the Referee’s decision—not DLI’s failure to provide such assistance—as the cause of her delayed appeal. In so holding, the Board improperly deflected the burden of obtaining language services to Petitioner.

The experience of Petitioner is illustrative of the profound linguistic barriers faced by LEP individuals. Due to her limited English proficiency, Petitioner was forced to rely on a friend to navigate Pennsylvania’s online Unemployment Compensation system. In the months after she filed her initial application, she encountered numerous language access hurdles. Unable to decipher the notices she received in the mail, Petitioner called DLI repeatedly, only to be notified that the agency was unable to accept her calls. Finally, with persistence, she was able to get through to a DLI representative. The employee proved less than helpful: during the entirety of the call, the representative spoke in English. At no point did he attempt to ascertain Petitioner’s language need and connect her with appropriate language services, or otherwise advise her of the availability of language assistance.

The context here is important as well. Unemployment skyrocketed during the pandemic; Pennsylvanians filed over 27 million unemployment compensation (UC) claims in 2020 alone.¹⁵ Call volumes during that time rendered DLI’s phone lines

¹⁵ *Pennsylvania Unemployment Compensation Program Data*, Pa. Dep’t of Labor & Indus., <https://www.workstats.dli.pa.gov/Products/UCActivity/Pages/default.aspx> (last visited Nov. 16, 2022).

impenetrable for the vast majority of callers.¹⁶ This lack of adequate access disproportionately impacted would-be claimants with limited English proficiency. While DLI's internal policy does provide for cost-free interpretation assistance,¹⁷ few were able to utilize that service in practice because it proved nearly impossible to get through to the agency, much less to its language hotline.¹⁸

In affirming the Board's order, the Commonwealth Court rendered a decision that is antithetical to agencies' federally mandated obligation to ensure that LEP individuals have meaningful access to their services. The following statement, in which the Commonwealth Court criticized Petitioner for not seeking a friend's help, is representative of the Court's approach:

Importantly, Claimant never explained why she did not contact her "friend" who helped her apply for UC benefits to interpret the papers she received in response thereto, at any point thereafter.

Basnet v. Unemployment Comp. Bd. of Rev., No. 1099 C.D. 2021, 2022 WL 10724122, at *4 (Pa. Commw. Ct. Oct. 19, 2022) (citing R. at 138). This approach permits state agencies to impermissibly shift the burden of obtaining language assistance to LEP Pennsylvanians such as Petitioner. It thus effectively shuts out

¹⁶ See, e.g., Kate Giammarise, *Between Jammed Phone Lines, Many Are Still Fighting to Get Pandemic Unemployment Assistance*, WHYY (Nov. 25, 2020), <https://whyy.org/articles/between-jammed-phone-lines-many-are-still-fighting-to-get-pandemic-unemployment-assistance/>.

¹⁷ *Notification of Free Language Assistance for Accessing Department Services*, Pa. Dep't of Labor & Indus., <https://www.dli.pa.gov/about-dli/EO/LA-Policy/Pages/Notification.aspx> (last visited Nov. 16, 2022).

¹⁸ Giammarise, *supra* note 16.

linguistically marginalized communities from accessing justice, when, for any number of reasons, they are unable to provide their own language services; and it presents a significant threat to the ability of LEP individuals to have their claims fairly heard and decided.

CONCLUSION

For these reasons, *amici* request that this Honorable Court grant the Petition for Allowance of Appeal.

Dated: November 18, 2022

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CERTIFICATE OF COMPLIANCE

Counsel for Petitioner hereby certifies that, pursuant to Pa.R.A.P. No. 531(b)(3), the foregoing Brief of Amici Curiae contains no more than 4,500 words. This word count relies on the word count of the computer program used to prepare this brief.

Dated: November 18, 2022

/s/Jennifer J. Lee

Jennifer J. Lee

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 18, 2022

/s/Jennifer J. Lee
Jennifer J. Lee

CERTIFICATE OF SERVICE

I, Jennifer J. Lee, hereby certify that, on this day, I caused true and correct copies of the foregoing document to be served upon the following via the PAC File electronic-filing system or first-class mail, which satisfies the requirements of Pa.R.A.P. 121:

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