No. _____

IN THE
Supreme Court of the United States

AIFANG YE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce an out-of-court, testimonial translation, without making the translator available for confrontation and cross-examination?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Aifang Ye respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's amended opinion (Pet. App. 1a), which also denied rehearing and *en banc* rehearing, is reported at 808 F.3d 395. The Ninth Circuit's original opinion is reported at 792 F.3d 1164. The Ninth Circuit's accompanying, non-precedential memorandum opinion (Pet. App. 15a) is available at 606 F. App'x 416. The District Court for the Northern Mariana Islands' oral order denying Petitioner's confrontation clause argument (Pet. App. 18a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment on December 10, 2015, and denied a timely petition for rehearing or rehearing *en banc* on that same date.

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

INTRODUCTION

This Court has made clear that the Confrontation Clause forbids the government from introducing out-of-court testimonial statements that are "untested by the adversary process, based on a mere judicial determination of reliability." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). However, the circuit courts are split on whether this rule applies to out-of-court translations, which prosecutors often seek to introduce as a defendant's own words while simultaneously refusing to make the original translator available for confrontation. This case presents the ideal vehicle to resolve this important split.

In this case, Petitioner was convicted based almost exclusively on a government-translated "confession" that was directly attributed to Petitioner as her own words, even though she does not understand English and never wrote or spoke any of the words contained in the translation. Furthermore, no jury was ever asked to deem the translation reliable—instead, that determination was made solely by a judge. Had Petitioner been tried in the Eleventh Circuit, the Confrontation Clause would have entitled her to confront and cross-examine the translator. Because she was tried in the Ninth Circuit, she was deprived of this constitutional right.

The issue presented in this case has great significance. Translators in the field must make on-the-fly determinations about a non-English-speaking suspect's intent, dialect, and word usage. The resulting translation is inherently dependent on the particular

translator, because "[i]nterpreters do not interpret words; they interpret concepts." *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (quotation marks omitted). Indeed, translations are truly the words of the interpreter herself—not of the underlying speaker—because "much of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the" translator. *Id.* at 1325 (quotation marks omitted).

The independent judgment and subjectivity that are inherent in translations raise significant constitutional concerns when, as here, the prosecution seeks to introduce an out-of-court translation as evidence of guilt and directly attribute it to the defendant as her own words, while refusing to let the defendant confront or cross-examine the translator. These problems are further exacerbated where, as here, the translation is a critical piece of evidence in the government's case, and the translator was a government employee whose job depended on providing translations for law enforcement agents. Such translators "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2007).

The Second, Fourth, Fifth, and Ninth Circuits have concluded that the Confrontation Clause imposes no obligation on the government to make the translator available in such cases. Pet. App. 11a-12a; *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012); *United States v. Budha*, 495 F. App'x 452 (5th Cir.

2012); *United States v. Koskerides*, 877 F.2d 1129, 1135-36 (2d Cir. 1989). Those circuits have adopted the "language conduit" theory, which states that "reliable" out-of-court translations of a defendant's statements must be directly attributed to the defendant herself, and there is no Sixth Amendment requirement that the government make the translator available for confrontation. And it is the court—not the jury—who decides whether the translation was "reliable."

The Eleventh Circuit, however, has expressly rejected the language conduit theory as inconsistent with *Crawford*, as well as *Melendez-Diaz* and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)—which required the government to produce lab technicians who had signed out-of-court affidavits that were used against the defendants. The Eleventh Circuit concluded that translations involve such a high level of subjective interpretation and input that they are properly attributed to the translator—not to the underlying speaker—for Confrontation Clause purposes. *Charles*, 722 F.3d at 1324-25. That makes it especially critical for a defendant to be able to confront and question the translator, even more so than in the case of a technician who prepares an objective lab report, as this Court addressed in *Melendez-Diaz* and *Bullcoming*. *Charles*, 722 F.3d at 1329. The Eleventh Circuit rejected the language conduit test as a remnant of the now-overruled decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford*, 541 U.S. at 60, which equated a statement's "reliability" with its admissibility for Confrontation Clause purposes.

Charles, 722 F.3d at 1327-28 (citing *Crawford*, 541 U.S. at 60).

This Court should take this opportunity to resolve the circuit split and confirm that there is no "translator exception" to the Confrontation Clause. The language conduit theory presumes that translators are "mere scriveners" or "conduits" for the underlying speaker—a fact that is both wrong as a matter of linguistics and irrelevant as a matter of law. Experts broadly acknowledge that translations are inherently subjective and require significant input from the translator. For these reasons, translations must be attributed to the translator, not the underlying speaker. Further, this Court held in *Bullcoming* that "analysts who write reports that the prosecution introduces must be made available for confrontation," *even if the analyst was acting as an unquestionably-accurate scrivener*. 131 S. Ct. at 2715. Thus, even if a judge finds the translation to be perfectly accurate, the Confrontation Clause still requires the translator to be made available.

The language conduit test allows prosecutors to "[a]dmit[] statements deemed reliable by a judge," without ever letting the defense test those statements via confrontation. *Crawford*, 541 U.S. at 61. That is "fundamentally at odds with the right of confrontation," under which the reliability of a translation can be determined only by a jury after confrontation and extensive cross-examination, not by a judge reading a copy of the translator's resume. *Id.*

This case presents the ideal opportunity to resolve the split that has arisen on this issue. After arriving from China, Petitioner, who spoke only Mandarin Chinese, was questioned by an Immigration and Customs Enforcement ("ICE") agent who spoke only English. The ICE agent telephoned a Department of Homeland Security ("DHS") translator, who attempted to translate the officer's English questions into Chinese, then communicate Petitioner's Chinese responses back into English for the officer. Through this process, the officer wrote down the translator's English statements, which the prosecution promptly labeled as Petitioner's own "confession" and sought to use as the critical piece of evidence against Petitioner at trial, while refusing to make the DHS translator available for confrontation.

Petitioner objected before and during trial, arguing that the Confrontation Clause required the government to make the DHS translator available. The district court and Ninth Circuit both applied the language conduit theory and held, based on a review of the translator's resume and her translation here, that the translations were reliable and therefore must be directly attributed to Petitioner as her own words, even though she does not understand English and never wrote or spoke any of the words contained in the translation. The courts concluded that the government had no obligation to produce the DHS translator.

As the government conceded below, there is a circuit split on whether the language conduit theory is compatible with this Court's interpretation of the

Confrontation Clause. A writ of certiorari should be granted, and this Court should overrule the language conduit test as the last remnants of *Roberts*.

STATEMENT OF THE CASE

A. An ICE Agent Relies On A DHS Translator To Question Petitioner.

Petitioner is a medical doctor in China; she and her husband Xigao Cheng are both Chinese citizens. Pet. App. 4a. In September 2011, they traveled to Saipan in the Northern Mariana Islands, a U.S. territory. *Id.* Xigao soon returned to China, but Petitioner remained in Saipan and in February 2012, she gave birth to her second child, Jessie, who is a U.S. citizen. *Id.*

Petitioner sought to obtain a U.S. passport for her daughter, but both parents' consent is required. *See* 22 C.F.R. § 51.28(a)(3)(i). Because Xigao was in China and unable to travel back to Saipan, he could not appear in person at the passport office to consent, nor could he send a notarized statement from China because it would alert Chinese officials that the couple had a second child, which would have violated China's "one child" policy. Pet. App. 4a. On the advice of Kaiqi Lin, whom Petitioner had hired to provide translation services while she was in Saipan, Xigao gave his passport to his brother Zhenyan, who traveled to Saipan and posed as Xigao. *Id.*

On March 29, 2012, Petitioner, Zhenyan, and Lin went to the passport office in Saipan. On the application, Petitioner accurately signed as Jessie's

mother, but Zhenyan falsely signed as Jessie's father, and they successfully submitted the passport application for Jessie. Pet. App. 5a. Coincidentally, the DHS had been surveilling Lin—the man who had proposed the subterfuge. *Id.* A DHS agent soon approached Lin, who confirmed that Zhenyan had used his brother's passport. *Id.* Zhenyan was arrested for falsely providing information on a passport application. *Id.*

A few days later, Petitioner was questioned by ICE Agent Ryan Faulkner, who intended to obtain a confession from Petitioner for aiding and abetting Zhenyan. However, there was a problem: Petitioner spoke only Mandarin Chinese, *see* C.A.E. 43,[1] and Agent Faulkner spoke only English, *see* C.A.E. 492. Agent Faulkner telephoned the "Language Line," which is "an arm of the Department of Homeland Security." C.A.E. 465. The translators are located in New York—almost 8,000 miles from Saipan—and ICE "pays [the translators] to provide this service to us." C.A.E. 301. The ICE "agents kn[e]w these [DHS translators] by first name" and often had a "rapport" with them, because they have "worked with them" so often. C.A.E. 251, 249, 276. Agent Faulkner himself had used these translators "at least 75" times in the past. C.A.E. 466.

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[1] "C.A.E." refers to the Court of Appeals "Excerpts of Record" filed by Petitioner in the Ninth Circuit on February 20, 2014.

A DHS translator named Jingyan ("Jane") Lee came on the line. C.AE. 50. Agent Faulkner was familiar with Lee from prior telephonic translations. C.A.E. 523. Agent Faulkner relied on Ms. Lee to question Petitioner about the events leading up to the passport application being submitted for Jessie. Agent Faulkner would ask a question in English, then the DHS translator Jane Lee would attempt to translate it into Mandarin. Petitioner would provide a response in Mandarin, then the translator would attempt to translate it back into English for Agent Faulkner, who wrote down the English statements, had Lee translate them one more time, and then had Petitioner sign them. C.A.E. 40.

The audio of the conservation was not recorded, even though the government had the capability to record it. C.A.E. 503. The only record of the conversation was Petitioner's "confession": a statement that is written in a language (English) that Petitioner cannot understand, and that is composed entirely of statements made by the DHS translator, Jane Lee. C.A.E. 47-48. The "confession" outlined how Petitioner had allegedly conspired with Lin and Zhenyan to impersonate Petitioner's husband and thereby falsely obtain a passport for Jessie. *Id.* The confession contained incriminating statements such as: "When Immigration first asked me about why I had my husband's Chinese passport, I lied and told them that he sent it in the mail to me," C.A.E. 115, and concluded by saying, "I know what I did was wrong." C.A.E. 116.

B. The Prosecution Introduces The DHS Translator's Statements Against Petitioner And Refuses To Make The Translator Available For Confrontation.

Petitioner was indicted in the District Court for the Northern Mariana Islands for conspiracy to make a false statement in a passport application and for aiding and abetting Zhenyan's false statement. C.A.E. 192.[2] Unsurprisingly, the prosecution sought to introduce the translated "confession" and attribute its words to Petitioner as direct evidence of her guilt.

Petitioner objected before and during trial, arguing that the Confrontation Clause required the government to make the translator available so that Petitioner could confront and cross-examine her about the English statements she provided against Petitioner. The prosecutors refused to make the translator available. Instead, the government drafted an *ex parte* statement for the DHS translator to sign. C.A.E. 41-41. The statement claimed that the "interpretation services I rendered during [the] interview [of Petitioner] were true, accurate, and to the best of my ability." C.A.E. 50. The government offered this statement and a copy of the DHS translator's resume, in lieu of making the translator available for confrontation and questioning at trial. Petitioner argued that a resume and affidavit

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[2] Zhenyan was also indicted, but the jury acquitted him. He raised the same arguments involving the translators used for his interrogation, which the district court similarly overruled.

were not enough to satisfy the Confrontation Clause's protections. C.A.E. 253-54.

The district court laid out its view of the law: "We're looking at the reliability. I believe that is what we need to address foremost; the reliability of the interpreter services." C.A.E. 244. "I'm looking at [*United States v.*] *Nazemian* .... It's a 1991 Ninth Circuit decision that discusses the interpreter as a language conduit. So what I understand this process entails is it stems from the *Ohio v. Roberts* U.S. Supreme Court decision ...." C.A.E. 245.

Relying on *Nazemian* and *Roberts*—both of which equated a statement's reliability with its admissibility under the Confrontation Clause—the district court concluded that the DHS translation was admissible because the prosecutors had provided "indicias of reliability as set forth in the rule of *Ohio v. Roberts*." Pet. App. 20a. Accordingly, the translation was not only admitted, but it was directly attributed to Petitioner as her own words, and the prosecutor did not have to produce the DHS translator for questioning.

As the government later conceded, the English "confession" was the critical piece of the government's case against Petitioner. *See* Ninth Circuit Answering Br. for the United States at 21 n.7. She was convicted of making a false statement in a passport application and conspiring to make a false statement in a passport application, C.A.E. 1, and was sentenced to 12 months' imprisonment, C.A.E. 2.

C. The Ninth Circuit Applies The Language Conduit Theory To Find No Confrontation Clause Violation.

On appeal to the Ninth Circuit, Petitioner again argued that the Confrontation Clause required the government to make the DHS translator available for confrontation. On July 10, 2015, the Ninth Circuit affirmed, concluding that the translator's statements could be attributed directly as Petitioner's own words, even though Petitioner does not understand English. Pet. App. 11a-12a.

Citing its prior decision in *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991)—the same case relied upon by the district court—the Ninth Circuit concluded that "as long as a translator acts only as a language conduit, the use of the translator does not implicate the Confrontation Clause." Pet. App. 11a. *Nazemian*'s language conduit test set out several factors to determine when a translation can be used without violating the Confrontation Clause, including "which party supplied the interpreter," "whether the interpreter had any motive to mislead or distort," "the interpreter's qualifications and language skills," and "whether actions taken subsequent to the conversation were consistent with the statements as translated." 948 F.2d at 527.

Reviewing these factors, the panel concluded that they weighed in the government's favor here because the DHS translator was experienced, and the translations seemed reliable. Pet. App. 13a. The panel

acknowledged Petitioner's claim that *Nazemian*, with its focus on a judicial determination of reliability, was "inconsistent with the Supreme Court's decisions in *Crawford* …, *Melendez-Diaz* …, and *Bullcoming*," which said that such reliability determinations can be made only by a *jury after cross-examination*. Pet. App. 11a. But the panel found the argument to be foreclosed by the decision in *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012), which had concluded that, even post-*Crawford*, *Nazemian* still controlled in the Ninth Circuit because the language conduit test was not "clearly irreconcilable" with *Crawford* and its progeny. *Id.* at 1139.

The Ninth Circuit rejected Petitioner's other arguments and affirmed her convictions. Petitioner timely sought rehearing *en banc*. In opposition, the government acknowledged that there was a circuit split on when out-of-court translations can be used, but the government insisted that the Ninth Circuit's *Roberts*-based language conduit theory was still the proper test for translations. *See* United States' Response to Petition for Rehearing En Banc at 12-13.

On December 10, 2015, the Ninth Circuit issued a slightly revised opinion, leaving unchanged its Confrontation Clause analysis, and simultaneously denied Petitioner's request for rehearing and *en banc* rehearing. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted here because the circuit courts are in open disagreement about the important and recurring issue of whether the Confrontation Clause allows a prosecutor to use testimonial statements made by an out-of-court translator, without making the translator available for confrontation.

The Second, Fourth, Fifth, and Ninth Circuits have held that an out-of-court translator who "reliably" interprets a defendant's statements is acting only as a "language conduit" for the defendant and that the translation is therefore attributed solely to the defendant herself. In those circuits, "reliability" is determined by the court, and the government is not required to offer the translator for cross-examination, despite the fact that the government is using the *translator*'s (not the defendant's own) statements against the defendant. *See* Part I.2, *infra*. However, the Eleventh Circuit has expressly rejected the language conduit theory and has held that a translation should be attributed as the words of the interpreter—not of the original speaker—and therefore the government must make the translator available for confrontation. *See* Part I.3, *infra*.

The Eleventh Circuit is correct. The language conduit theory is derived from the now-overturned *Roberts* decision, which equated a statement's reliability with its admissibility under the Confrontation Clause. *See* Part II, *infra*. Further, translators provide statements that require far more

independent judgment than a technician who reads machine-generated lab results—yet this Court has already required the prosecution to make available the technicians who perform such tests. *Melendez-Diaz*, 557 U.S. at 329; *Bullcoming*, 131 S. Ct. at 2715.

This case is an ideal vehicle to resolve this issue. *See* Part III, *infra*. Not only has Petitioner preserved her argument at every stage of litigation, but the government also conceded at the Ninth Circuit that the translation was a critical piece of evidence against Petitioner. Further, the translator not only worked for the government—and thus had an incentive to provide translations that would be as incriminating as possible—but she also had a prior working relationship with the very officer who interrogated Petitioner. The government even conceded to the Ninth Circuit that there is a circuit split.

This is also an issue of great importance to the criminal justice system generally. As the federal in-court interpreter manual says, the "potentially grave consequences of inaccurate legal interpretation mandate that great skill and caution be utilized by interpreters."[3] The determination of whether a translator used "great skill and caution" can be made only by a jury after the defense questions her about the translation and her abilities—it is not a question for a

[3] Administrative Office of the U.S. Courts, *Federal Court Interpreter Orientation Manual and Glossary* 25 (2014), http://www.uscourts.gov/file/federal-court-interpreter-orientation-manualpdf-0.

judge to decide based on a copy of the translator's resume and the translator's promise that she had tried her "best."

As the country becomes more linguistically diverse, the use of translations will only increase. In the 2010 census, over 60 million individuals reported that they speak a language other than English at home. Camille Ryan, U.S. Census Bureau, *Language Use in the United States: 2011*, at 3 (Aug. 2013), http://www.census.gov/prod/2013pubs/acs-22.pdf. Of those, 13 million said that they speak English "not well" or "not at all." *Id.* Additionally, almost half of all recent federal convicts are non-U.S. citizens—the people against whom the government is most likely to seek to introduce out-of-court translations. Mark Motivans, Bureau of Justice Statistics, *Federal Justice Statistics 2010—Statistical Tables* 20 (Dec. 2013), http://www.bjs.gov/content/pub/pdf/fjs10st.pdf.

All criminal defendants, including those who do not speak English, are entitled to the full protections of the Confrontation Clause. Because there is no such thing as a "translator exception" to the Confrontation Clause, this Court should grant the petition.

I. The Circuits Are Openly Split On The Existence Of A "Translator Exception" To The Confrontation Clause.

1. The government has acknowledged that there is a circuit conflict about whether the Confrontation Clause allows the prosecution to introduce out-of-court, testimonial translations without calling the translator

to testify. *See* United States' Response to Petition for Rehearing En Banc at 12. The Second, Fourth, Fifth, and Ninth Circuits, as well as several state appellate courts, have rejected Confrontation Clause arguments and permitted the prosecution to use such translations without allowing the defense to confront the translator. However, as the government noted, the "Eleventh Circuit recently parted company with th[e Ninth] and other circuits and held that *Crawford* requires the interpreter to testify if a defendant's translated statement is introduced at trial." *Id.* Only this Court can resolve the split.

2. The "federal courts initially designed the language conduit theory as an evidentiary tool" for determining when a statement was hearsay. Tom S. Xu, C*onfrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of* Crawford?, 67 Vand. L. Rev. 1497, 1499 (2014); *see, e.g.*, *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973); *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *United States v. Beltran*, 761 F.2d 1, 9 (1st Cir. 1985). However, the courts have "gradually extended [the language conduit's] reasoning to the Sixth Amendment context" and now frequently "invoke[] the language conduit theory to circumvent th[e] constitutional requirement" of confrontation. Xu, 67 Vand. L. Rev. at 1499.

The seminal case employing the language conduit test to a Confrontation Clause challenge was *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991), wherein the Ninth Circuit relied heavily on *Roberts*'s

"indicia of reliability" test to determine whether a translation could be attributed to the defendant for Confrontation Clause purposes. *Id.* at 527-28. To determine whether the translation could be used against the defendant, *Nazemian* looked to factors such as "which party supplied the interpreter," "whether the interpreter had any motive to mislead or distort," "the interpreter's qualifications and language skills," and "whether actions taken subsequent to the conversation were consistent with the statements as translated." *Id.* at 527. The court discounted the fact that the translator was provided by the government, which had also failed to introduce *any* "evidence of the interpreter's competence." *Id.* at 527-28. To the court, the most important factor was reliability: because the translator was used several times, he "must have been competent enough to allow communication between the parties." *Id.* at 528. Because the translator's statements were reliable, *Nazemian* attributed the translation to the defendant herself, relieving the government of its Sixth Amendment burden of calling the translator. *Id.* Other circuits followed this same logic in applying the language conduit test to exempt translator testimony from the Confrontation Clause's protections. *See, e.g.*, *United States v. Koskerides*, 877 F.2d 1129, 1135-36 (2d Cir. 1989); *United States v. Cordero*, 18 F.3d 1248, 1253 (5th Cir. 1994).

In 2004, this Court held in *Crawford* that the government must make available for confrontation a witness who made an out-of-court accusation against her husband during police questioning. 541 U.S. at 68-69. *Crawford* made clear that the rules of evidence and

judicial determinations of "reliability" were no longer the touchstone for the Confrontation Clause—rather, reliability must be determined by a jury after viewing the witness under oath, in person. *Id.* at 61-63. A few years later, *Melendez-Diaz* concluded that the government had to make available a lab technician who had prepared a lab report showing a substance to be cocaine, even though the report was relatively objective and almost certainly accurate. 557 U.S. at 318-20. And in *Bullcoming*, this Court again addressed a lab report and made clear that the technician who prepared the report—not a surrogate—must be made available for confrontation. 131 S. Ct. at 2715.

After these decisions, which roundly rejected the *Roberts* judicial-reliability test for Confrontation Clause challenges, the circuits began to disagree over whether the language conduit theory was still valid.

For the circuits that retained the language conduit test, the Ninth Circuit again provided the seminal decision. In *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012), the government sought to introduce an out-of-court translation made during the defendant's post-arrest interrogation, and the defendant argued that he had a right to confront the translator under the Confrontation Clause. 679 F.3d at 1136-37. Relying on the language conduit theory, the Ninth Circuit majority rejected the defendant's argument because the translator was "highly competent" and did not have "any motive to mistranslate." *Id.* at 1139. The panel acknowledged that the language conduit theory was based on "principles of the law of evidence" and

likewise acknowledged that *Crawford* had "divorc[ed] the Sixth Amendment analysis from the law of evidence." *Id.* at 1140. *Orm Hieng* nonetheless followed *Nazemian*, on the theory that *Crawford* had occasionally used the "vocabulary of the law of evidence," making it unclear how much "interplay, if any, [there is] between the Confrontation Clause and the law of evidence." *Id.* at 1140-41. The *Orm Hieng* majority concluded that, even though there was "tension" between *Nazemian* and *Crawford*, the decisions were not "clearly irreconcilable"—and thus the panel was bound by *stare decisis* to follow *Nazemian*. *Id.* at 1139. The majority stated that they would await "further pronouncement from the [Supreme] Court" on the issue. *Id.* at 141.

Judge Berzon concurred in *Orm Hieng* but criticized the language conduit theory, which "rests, at bottom, on a pre-*Crawford* understanding of the unity between hearsay concepts and Confrontation Clause analysis." *Id.* at 1149 (Berzon, J., concurring). She said that the language conduit test "seems to be in great tension with the holdings of *Melendez-Diaz* … and *Bullcoming*," because "[t]ranslation from one language to another is much *less* of a science than conducting laboratory tests, and so much more subject to error and dispute." *Id.* (emphasis in original). Without confrontation, "a party cannot test the accuracy of the translation in the manner in which the Confrontation Clause contemplates." *Id.* However, Judge Berzon felt that *Orm Hieng* was not a proper case to take *en banc* because, among other reasons, the translator was

actually in the courtroom during the trial but had not been called. *Id.*

In Petitioner's case, the Ninth Circuit concluded that it was bound by its decisions in *Nazemian* and *Orm Hieng* to reject Petitioner's Confrontation Clause argument. Pet. App. 11a-12a.

The Fifth Circuit has likewise maintained the language conduit theory post-*Crawford*. In *United States v. Budha*, 495 F. App'x 452 (5th Cir. 2012), the defendant (who spoke only Nepalese) was arrested, and the interrogating officers used a translator over the phone. 495 F. App'x at 453. Citing *Crawford*, *Melendez-Diaz*, and *Bullcoming*, Budha argued that the government could not use the translations without calling the translator. *Id.* at 454. Relying on *Orm Hieng*, the Fifth Circuit unanimously rejected that claim and concluded that "translations of the defendant's own statements … do not implicate defendant's confrontation rights," because the court's own "review of the record" showed that the translator was a mere conduit. *Id.*

The Fourth Circuit has also employed the language conduit theory in the face of Confrontation Clause challenges post-*Crawford*. In *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013), the government introduced an out-of-court translation (made by an FBI translator) of the defendant's statements. 722 F.3d at 247-48. The Fourth Circuit rejected the defendant's argument that he was entitled to cross-examine the translator, concluding that the "interpreter was nothing more than

a language conduit" for other speakers who could be cross-examined. *Id.* at 248.[4]

3. In 2013, the Eleventh Circuit rejected the reasoning of the cases above and instead adopted the rationale of *Crawford*, *Melendez-Diaz*, and *Bullcoming*. *See United States v. Charles*, 722 F.3d 1319, 1323-25, 1327-30 (11th Cir. 2013). The facts in *Charles* are very similar to those in Petitioner's case: Charles had been detained on suspicion of using a fraudulent passport, but she spoke only Creole, so a Customs and Border Protection officer used an over-the-phone DHS interpreter—likely the same service used by the ICE agent in Petitioner's case—who translated the officer's English questions into Creole, then Charles' Creole responses back into English. *Id.* at 1321. At trial, rather than produce the translator, the prosecution offered the Customs and Border Protection officer to testify as to what the DHS translator had said. *Id.*

The Eleventh Circuit concluded that this violated the Confrontation Clause. The court began by noting that the translator—not Charles—was the "declarant of the out-of-court testimonial statements that the

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[4] Numerous state appellate courts have also relied on the language conduit theory, even post-*Crawford*, to reject Confrontation Clause challenges to out-of-court translators. *See People v. Jackson*, 808 N.W.2d 541, 552 (Mich. Ct. App. 2011); *State v. Umanzor*, 682 S.E.2d 248 (N.C. Ct. App. 2009); *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. Ct. App. 2008); *Cassidy v. State*, 149 S.W.3d 712, 715-16 (Tex. Ct. App. 2004); *People v. Malanche*, No. F060845, 2012 WL 688069, at *5 (Cal. Ct. App. Mar. 2, 2012); *Correa v. Superior Court*, 40 P.3d 739, 747-48 (Cal. 2002).

government sought to admit." *Id.* at 1323. After all, the officer testified to what the translator had said in English—not what Charles had said in Creole. *Id.* at 1324.

The court then noted that the English translation and the underlying foreign statements are "not one and the same," because "[l]anguage interpretation … does not provide for a one-to-one correspondence between words or concepts in different languages." *Id.* (quotations omitted). Further, translations can be frustrated because of "differences in dialect and unfamiliarity of colloquial expressions." *Id.* Accordingly, "much of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the listener." *Id.* at 1325 (quotation marks omitted). Given that this Court had ruled in *Melendez-Diaz* and *Bullcoming* that even lab technicians must testify, "certainly the Confrontation Clause requires an interpreter of the concepts and nuances of language to be available for cross-examination." *Id.* at 1329.

Finally, *Charles* relied directly on "*Crawford* and the Supreme Court's post-*Crawford* jurisprudence" to reject the language conduit theory. *Id.* at 1327-29. The language conduit is based on hearsay evidence rules regarding reliability, which are "too narrow a test for protecting against Confrontation Clause violations. *Id.* at 1327.[5]

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[5] The Maryland Court of Special Appeals recently issued a thorough opinion fully adopting *Charles*'s analysis and rejecting

4. The existing circuit split on this issue warrants this Court's review, as nothing will be gained by waiting for other circuits to weigh in. The district courts in the Fifth and Ninth Circuits alone account for over 70% of the occurrences nationwide where *in-court* interpreters are used—an excellent proxy for where prosecutors are most likely to introduce *out-of-court* translations.[6]

Further, the states constituting the Fourth, Fifth, Ninth, and Eleventh Circuits contain nearly 64% of the nation's residents who speak a language other than English at home,[7] and account for 74% of the nation's cases involving immigration offenses—the most likely

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the language conduit test. *See Taylor v. State*, No. 2686, ___ A.3d ___, 2016 WL 324902, at *26 (Md. Ct. Spec. App. Jan. 27, 2016) ("[W]e can safely conclude that no court could adopt [the language conduit test] without abandoning or substantially undercutting *Crawford*, *Melendez-Diaz*, and *Bullcoming*."); *see id.* at *19 ("[T]he Supreme Court … has already considered and rejected nearly all of the possible justifications for creating a confrontation exception for interpreters.").

[6] *Interpreting: An Every-Day Event in Federal Courts*, The Third Branch: Newsletter of the Federal Courts (May 2011) (out of 349,442 nationwide "interpretation events" in federal district courts in fiscal year 2010, 124,847 occurred in Fifth Circuit and 123,623 occurred in Ninth Circuit).

[7] *See* U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population Five Years and Over: 2009-2013 (2015), https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html (38,538,139 such individuals in those states, out of 60,361,574 nationwide).

cases where the government would seek to use out-of-court translations.[8]

Given these figures, there is no point in waiting for language-conduit rulings from places like the Third or Seventh Circuits, where the issue does not often arise. Plus, the circuits that adopted the language conduit theory pre-*Crawford* will be in the same situation as the Ninth Circuit in *Orm Hieng*: reluctantly bound by *stare decisis* to follow their prior precedent, despite its inconsistency with this Court's pronouncements. *See, e.g.*, *Koskerides*, 877 F.2d at 1135-36 (Second Circuit's pre-*Crawford* decision adopting language conduit test).

This Court should grant a writ of certiorari to resolve the acknowledged circuit split.

II. The Language Conduit Test Is Inconsistent With *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

The Court should grant the petition for the additional reason that the language conduit test is incompatible with this Court's decisions in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

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[8] *See* U.S. Courts, Table D-3, U.S. District Courts, Criminal Judicial Business (2014), http://www.uscourts.gov/statistics/table/d-3/judicial-business/2014/09/30 (in fiscal year 2014, cases in those three circuits accounted for 15,814 criminal defendants facing immigration offenses, out of 21,995 such defendants nationwide).

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This provision governs "the manner in which [the prosecution's] witnesses give testimony in criminal trials" and requires the prosecution to present "live testimony" from its witnesses "in court subject to adversarial testing." *Crawford*, 541 U.S. at 43. The Confrontation Clause forbids the prosecution from introducing "[t]estimonial statements of witnesses absent from trial," unless "the declarant is unavailable" *and* "the defendant has had a prior opportunity to cross-examine." *Id.* at 59.[9]

2. As a threshold matter, there should be "no debate that the statements of the interpreter as to what [Petitioner] said are 'testimonial,'" *Charles*, 722 F.3d at 1323, and thus directly implicate the Confrontation Clause rule announced in *Crawford*.

First, the translations must be attributed as the words of the DHS translator—not as those of Petitioner—because "much of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the" translator. *Charles*, 722 F.3d at 1325 (quotation marks omitted). After all, the government here introduced the DHS translator's English statements—not Petitioner's Chinese statements. *See id.* at 1324.

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[9] There is no dispute here that Petitioner had no prior opportunity to cross-examine the DHS translator, nor did the government ever allege the translator was "unavailable."

In fact, it would be odd to attribute the English "confession" to Petitioner, who cannot even understand English. *See Taylor*, ___ A.3d ___, 2016 WL 324902, at *25 ("[T]he language-conduit approach creates a legal fiction as to the identity of the speaker."). Accordingly, the DHS interpreter is the "witness who made the statement" against Petitioner. *Bullcoming*, 131 S. Ct. at 2713.

Second, the government conceded below that the translator "relayed testimonial statements and questions designed to elicit" further testimonial statements from Petitioner. United States' Response to Petition for Rehearing En Banc at 15. There should therefore be no dispute that the DHS translator's statements were testimonial. Indeed, those statements were formalized into a "confession" whose sole purpose was to establish Petitioner's guilt at trial—the paradigmatic testimonial statement. It was "entirely clear from the circumstances that the interrogation [of Petitioner] was part of an investigation into possibly criminal past conduct," *Davis v. Washington*, 547 U.S. 813, 829 (2006), which sought to establish "past events potentially relevant to later criminal prosecution," *id.* at 822. The translator's role during the interrogation was to collect statements that would be neatly compiled into the "confession." As this Court has noted, "[a] document created solely for an 'evidentiary purpose', … made in aid of a police investigation, ranks as testimonial." *Bullcoming*, 131 S. Ct. at 2717; *see Crawford*, 541 U.S. at 51-52 (listing formalized

"affidavits" and "confessions" as prime "testimonial" material).[10]

Accordingly, the DHS translation implicated the Confrontation Clause, and thus the DHS translator should have been made available.

3. Because the translation was testimonial, the courts below erred in allowing the translation to be used without requiring the government to call the translator.

The language conduit theory originates in the "reliability" standard announced in *Roberts*, which held that out-of-court statements offered against a defendant were admissible so long as they bore "indicia of reliability," 448 U.S. at 65-66. *See Crawford*, 541 U.S. at 53-54, 59.[11] Like *Roberts*, the language conduit test "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Id.* at 62 . For example, the test requires the court to inquire into "whether the interpreter had any motive to mislead or distort," and to analyze "the interpreter's qualifications and language skill." Pet. App. 12a.

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[10] Further, it is irrelevant that the DHS translator may not be considered a "conventional" witness. *Melendez-Diaz*, 557 U.S. at 315-16.

[11] In fact, in ruling on Petitioner's objection here, the district court expressly—and repeatedly—relied on *Roberts*. Pet. App. 20a; C.A.E. 245.

But the language conduit's focus on having a judge determine reliability is misplaced. *Crawford* expressly rejected *Roberts*' reliability test because reliability is "an amorphous, if not entirely subjective, concept" that yields "unpredictable and inconsistent application" by the courts. 541 U.S. at 63, 66. Reliability must be assessed by a jury after viewing in-person confrontation and cross-examination at trial—rather than by written statements reviewed "in private by judicial officers." *Id.* at 43.

The Confrontation Clause therefore provides a procedural protection that applies *regardless of whether a judge thinks the evidence is reliable.* The procedural right cannot be disregarded simply because the trial court believes it is unnecessary in a particular instance. *Crawford*, 541 U.S. at 61. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Melendez-Diaz*, 557 U.S. at 317-18 (quotation marks omitted).

The government conceded below (as it must) that the language conduit test "turns in part on the [judge's determination of the] reliability of the translation." United States' Response to Petition for Rehearing En Banc at 13. That alone should be enough to conclude that the test is incompatible with the Confrontation Clause and should be rejected. But the government insists that the test's references to reliability are designed "only to determine whether" the translated statements are attributable to the defendant in the first place. *Id.* That makes little sense. If the language

conduit test were designed to determine whether the translator speaks for the defendant, then it would turn exclusively on questions of agency—not reliability. The reliability of a translation says absolutely nothing about whether it should be attributed to the defendant.[12]

4. Not only is the language conduit theory based on an outdated legal test, but it also circumvents the most basic *purpose* of the Confrontation Clause: to ensure that the reliability of evidence is determined by "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. That is precisely why the "Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits." *Melendez-Diaz*, 557 U.S. at 329. But by allowing the prosecution to introduce highly subjective, formal statements made by an out-of-court declarant, without any opportunity for cross-examination by Petitioner, the language conduit test runs afoul of the principles this Court announced in *Crawford* and repeatedly affirmed over the last decade.

Crawford held that the primary purpose of the Confrontation Clause was to redress the civil-law mode of criminal procedure that used unsworn declarations as evidence of guilt, without ever allowing confrontation or cross-examination of the declarants. 541 U.S. at 50. The language conduit theory allows, and

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[12] Further, as *Charles* held, even assuming that a translator is the defendant's agent, there are still Confrontation Clause concerns because translation is such an inexact science that it would be unfair to attribute the translator's statements as the defendant's own. 722 F.3d at 1324-25.

even encourages, precisely that same problem to occur, as shown by Petitioner's ordeal here. The prosecution's case turned on an out-of-court, unsworn statement provided by a faceless government employee whom the government refused to provide for confrontation. In that way, this case is even worse than *Crawford* itself, where at least the out-of-court conversation had been audio recorded so the jury could hear it, and the testimonial statements were made by someone who was not a government employee. *Id.* at 38.

The Confrontation Clause concerns are also stronger here than in *Melendez-Diaz* or *Bullcoming*. *See Charles*, 722 F.3d at 1329-30. In those cases, this Court held that the government must produce for trial the lab technicians who had prepared machine-generated lab test results. *Melendez-Diaz*, 557 U.S. at 317-18; *Bullcoming*, 131 S. Ct. at 2715. Even though such evidence *seemed reliable*, this Court still held that the original technician "who made the certification"—*not a surrogate*—must be made available for confrontation. 131 S. Ct. at 2710; 557 U.S. at 317-18. Here, not only was the critical translation introduced via a surrogate (the ICE agent), but the missing witness (the DHS translator) would have been questioned about the inherently subjective nature of her translations, rather than the relatively cut-and-dry chemical analyses in *Melendez-Diaz* and *Bullcoming*. *See Charles*, 722 F.3d at 1329-30. As the government conceded below, translations are often difficult because "there are so many different dialects of a specific language." C.A.E. 469; *see also Charles*, 722 F.3d at 1324. "It is generally accepted that translation of any

kind … involves some measure of approximation"—that is, a translator often conveys only the speaker's "meta-meaning," rather than a verbatim transliteration.[13] The "idea of any sort of literal or 'word-for-word' translation [is] untenable."[14] Cross-examination is the perfect tool by which to test the reliability of the translation; judicial determinations based on the cold record are constitutionally inadequate.

Bullcoming's rationale also defeats the language conduit's basic assumption that a translator is protected from confrontation because she is a "mere scrivener" or "conduit" for the underlying speaker's own words. Not only is that theory wrong as a matter of linguistics, as discussed above, but it is also irrelevant as a matter of law. In *Bullcoming*, the government argued that the lab analyst did not have to be called, because he was merely recording what a machine had reported. 131 S. Ct. at 2713. This Court rejected that argument, concluding that even if the analyst were a mere scrivener with unquestioned accuracy, the government would still have to make him available for confrontation. *See id.* at 2715. The case is

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[13] Hans J. Vermeer, *Translation Today: Old and New Problems*, Mary Snell Hornby, Franz Pöchhacker, and Klaus Kaindl, eds., 2 *Translation Studies: An Interdiscipline* 3, 11 (1994).

[14] Michèle Kaiser-Cooke, Translatorial Expertise: A Cross-Cultural Phenomenon from an Inter-Disciplinary Perspective, *in* Mary Snell Hornby, Franz Pöchhacker, and Klaus Kaindl, eds., 2 Translation Studies: An Interdiscipline 135, 138 (John Benjamins 1994).

even clearer with a translator, who absolutely must make subjective, independent judgment calls. "Treating the [interrogating] officer as a 'surrogate' for the interpreter, a much less suitable substitute than the expert testifying in *Bullcoming*, does not satisfy [Petitioner's] constitutionally protected right to cross-examination of the interpreter." *Charles*, 722 F.3d at 1330.

The use of out-of-court translations therefore presents Confrontation Clause concerns at least as strong as those presented in *Crawford*, *Melendez-Diaz*, or *Bullcoming*.

6. By relieving the government of its burden to produce the translator, the language conduit test deprived Petitioner of all four procedural safeguards that the Confrontation Clause protects: (a) cross-examination; (b) testimony under oath; (c) the jury's opportunity to observe the translator's "demeanor"; and (d) the face-to-face presence of the translator as she testifies against Petitioner. *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).

The most important of these protections, of course, is cross-examination, which this Court has called the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quotation marks omitted). Cross-examination enables a defendant to attack the credibility of a witness by probing his personal history, experience, sensory perceptions, and motives, as well as providing the jury

a fuller picture of events. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974).

It goes without saying that Petitioner could never test the recollection or challenge inconsistent statements or perceptions of a witness who never testified. Defense counsel could not question the DHS translator about seemingly minor word variations—like "forged" versus "copied"—that could have significant legal implications. Pet. App. 12a-13a. Nor could counsel cross-examine the translator about her experience, her error rate, her state of mind during the translation, her background, her schooling, or even the acoustics during the translation process. C.A.E. 495-96; *see* Administrative Office of the U.S. Courts, *Federal Court Interpreter Orientation Manual and Glossary* 23 (2014), http://www.uscourts.gov/file/federal-court-interpreter-orientation-manualpdf-0 ("Concentrated listening is crucial for an exact rendering of the original message."); *Melendez-Diaz*, 557 U.S. at 321 (a declarant's "honesty, proficiency, and methodology" are "the features commonly in focus in … cross-examination"). Instead, all the jury saw was a written "confession" that seemed to have no flaws or doubts, and defense counsel for Petitioner was left to try and cross-examine the ICE agent, who was an altogether inadequate substitute because he admitted he was completely dependent on the DHS translator. *See Bullcoming*, 131 S. Ct. at 2715-16 (noting the critical importance of being able to cross examine the lab analyst who actually made the certification, rather than a surrogate).

Cross-examination of the DHS translator was also critical because Petitioner had no other way of credibly refuting the translation. The translation session was not recorded, even though the ICE agent had the ability to do so. Thus, unlike in *Melendez-Diaz* and *Bullcoming*, there was no "source material" that could be re-translated (or retested) and then presented to the jury by a different witness who was willing to be cross-examined. *See Bullcoming*, 131 S. Ct. at 2718 (noting that the original blood sample was retained and could "be retested by other analysts").

In addition to cross-examination, the Confrontation Clause requires a witness to provide testimony under oath and via face-to-face testimony, thereby "impressing [the witness] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury," *Craig*, 497 U.S. at 845-46 (quotation marks omitted); *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988), and thereby also allowing the jury to view the witness's demeanor, *Craig*, 497 U.S. at 846. Judicial review of a translator's resume and out-of-court affidavit swearing to accuracy is not an adequate substitution for a statement made in-person, under oath, in front of a jury. *Crawford*, 541 U.S. at 52 n.3. There is "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial.'" *Coy*, 487 U.S. at 1017. But here, neither Petitioner nor the jury (nor even the trial judge) ever saw the DHS translator—and therefore could never judge her seriousness and demeanor.

* * *

At Petitioner's trial, the prosecutor candidly said, "Would it be ideal for the Government to bring the[] [translator] in? Yes. Clearly." C.A.E. 247. But producing the translator was not just "ideal"—it was constitutionally required by this Court's decisions in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

This Court should adopt the Eleventh Circuit's rationale and provide the *coup de grace* to the language conduit test, because there is no such thing as a "translator exception" to the Confrontation Clause. *See Bullcoming*, 131 S. Ct. at 2713 (noting the Court's refusal to provide a "'forensic evidence' exception" to the Confrontation Clause).

III. This Case Is The Perfect Vehicle To Resolve The Circuit Split.

For a number of reasons, Petitioner's case presents the ideal opportunity through which to resolve this important constitutional issue.

First, Petitioner has preserved her Confrontation Clause claim at every stage of litigation, including at the district court, where she vigorously argued both before and during trial that the DHS translator must be made available for confrontation pursuant to *Crawford*. C.A.E. 245, 478, 490, 529; Pet. App. 20a. Petitioner renewed her argument at the Ninth Circuit and also in her *en banc* brief.

Second, the DHS translator's statements here were critical to the government's prosecution. In fact, the government conceded this at the Ninth Circuit. In its

merits brief, the government switched the order of issues and addressed the Confrontation Clause argument first: "*The United States starts with this [language conduit] issue precisely because this piece of evidence was so important to its case.*" Ninth Circuit Answering Br. for the United States at 21 n.7 (emphasis added); *see also Crawford*, 541 U.S. at 67 (finding it especially noteworthy that the prosecutor referred to the out-of-court statement as "damning evidence" against the petitioner). The government's concession confirms that the violation here could not possibly be considered harmless, unlike in other cases that nominally raised this issue. *See* Br. for the United States in Opposition at 16, *Santa Cruz v. United States*, No. 12-6807 (arguing harmless error).[15]

Third, the translator here was a DHS employee located almost 8,000 miles away—someone whom Petitioner did not know. By contrast, the ICE officer interrogating Petitioner said that he had previously worked with the DHS translators at least 75 times in the past, including with the specific DHS translator

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[15] Relatedly, the defense's ability to question the translator was especially important here because Petitioner's primary defense was her level of *mens rea*. C.A.E. 249. The government had to show that Petitioner's violation was "willful." Pet. App. 6a. Even a slight mistranslation or miscommunication could convert an innocuous term into one with a significantly negative implication for *mens rea*—such as the translator's statement that Petitioner admitted that her acts were "wrong," as opposed to simply being "incorrect." C.A.E. 48; *see, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 13 (1992) (O'Connor, J., dissenting) (noting critical error of out-of-court interpreter who had "translated 'manslaughter' only as 'less than murder'").

who provided statements against Petitioner. C.A.E. 523. It is especially concerning for the government to use the out-of-court statements of *one of its own employees* against Petitioner, all the while refusing to allow Petitioner to confront the government accuser. As this Court noted in *Melendez-Diaz*, witnesses whose jobs depend on providing statements to law enforcement "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." 557 U.S. at 318.

Fourth, in response to several prior petitions raising the language conduit theory, the government opposed certiorari on the grounds that there was no circuit split. *See* Br. for United States in Opp. at 17, *Santacruz*, No. 12-6807 (arguing lack of split); Br. for the United States in Opposition at 10, *Budha v. United States*, No. 12-7148 (same). After *Charles*, that argument obviously holds no water: the government itself has conceded there is a circuit split on this issue. *See* United States' Response to Petition for Rehearing En Banc at 12.

This case thus presents an excellent vehicle for this Court to resolve a recurring and important issue on which the circuits are split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. AIFANG YE, *Defendant-Appellant*.	No. 12-10576 D.C. No. 1:12-cr-00009-RVM-2 ORDER AND AMENDED OPINION

Appeal from the District Court
for the Northern Mariana Islands
Ramona V. Manglona,
Chief District Judge, Presiding

Argued and Submitted
February 19, 2015—Honolulu, Hawaii

Filed July 10, 2015
Amended December 10, 2015

Before: Richard R. Clifton, N. Randy Smith,
and Michelle T. Friedland, Circuit Judges.

Order;
Opinion by Judge Friedland

ORDER

The opinion filed July 10, 2015, appearing at 792 F.3d 1164, is hereby amended as follows:

The language of footnote 2 is added to the opinion:

> Ye is correct that in *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998), the Supreme Court interpreted "willfully" to mean "undertaken with a bad purpose," *id.* at 191, 118 S. Ct. 1939, and "with knowledge that [the defendant's] conduct was unlawful," *id.* at 192, 118 S. Ct. 1939 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994)). At the same time, however, the Court acknowledged that "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Id.* at 191, 118 S. Ct. 1939 (quoting *Spies v. United States*, 317 U.S. 492, 497, 63 S. Ct. 364, 87 L.Ed. 418 (1943)). Given this equivocation, we do not understand *Bryan* to have overruled *Browder*, which specifically defined willfully in the context of § 1542. Neither do we understand the Supreme Court's mention of § 1542 in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 60, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007), to have overruled *Browder*. Although *Safeco* instructed that "in the criminal law 'willfully' *typically* narrows the otherwise sufficient intent, making the government prove something extra," *id.* (emphasis added), "typically" does not mean always. The Supreme

> Court has instructed that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989). Because *Browder*'s interpretation of § 1542 directly applies here, that instruction controls.

With this amendment, the panel has unanimously voted to deny appellant's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are **DENIED.** Further petitions for rehearing and rehearing en banc shall not be entertained.

OPINION

FRIEDLAND, Circuit Judge:

Following a jury trial, Aifang Ye appeals her convictions relating to the provision of false information on a passport application. She argues that the district court's jury instructions erroneously failed to condition her convictions on a finding that she intended to violate the passport laws. We hold that the crimes for which Ye was convicted are not specific intent crimes, so her challenges to the jury instructions fail. Ye's additional argument that the government's failure to call certain

translators as witnesses at trial violated her rights under the Confrontation Clause is foreclosed by precedent. We therefore affirm.

I. Background

Aifang Ye and her husband, Xigao Cheng, both Chinese citizens, traveled from China to Saipan in September 2011. Ye's tourist visa permitted her to stay until October 2011. Xigao returned to China in September, but Ye, who was pregnant with their second child, overstayed her visa. In February 2012, Ye gave birth to her daughter, Jessie, in Saipan. Jessie's place of birth makes her a U.S. citizen entitled to a U.S. passport.

Parents of a U.S. citizen child under age 16 may obtain a U.S. passport for the child if both parents apply in person at the passport office. Alternatively, the application may be executed by only one of the parents if that parent shows a notarized statement or affidavit from the absent parent consenting to the issuance of the passport. 22 C.F.R. § 51.28(a)(3)(i).

Ye and her husband wished to obtain a U.S. passport for Jessie but, because drawing attention to the birth of a second child might have created difficulties for them at home, Ye did not want to have her husband seek a notarized statement. On the advice of Kaiqi Lin, whom Ye had hired to provide translation and document preparation services, her husband instead gave his passport to his brother Zhenyan Cheng, who would be traveling to Saipan. Zhenyan then traveled to Saipan, bringing his brother's passport with him to Saipan.

Lin drove Ye and Zhenyan to the passport office in Saipan. Zhenyan presented the passport office employee with his brother's passport, without showing his own passport or a power of attorney from his brother. Ye signed the application as Jessie's mother and Zhenyan signed as Jessie's father, using his brother's name.

Unfortunately for Ye, the Department of Homeland Security ("DHS") had Lin under surveillance that day. After Ye, Zhenyan, and Lin left the passport office, a DHS agent approached Lin in his car and saw two Chinese passports on the passenger seat—Ye's and her husband's. Lin provided the passports to the DHS agent at his request. The agent confirmed that Zhenyan had not had his own passport with him at the passport office.

Zhenyan later was arrested and gave a statement to a DHS agent using the U.S. Citizenship and Immigration Services ("USCIS") "Language Line" for translation assistance. The next day, Ye voluntarily came to the DHS office and provided her own statement using the USCIS Language Line.

Ye then cooperated with the government in its investigation of Lin by placing a recorded phone call to him. Despite Ye's cooperation, both Ye and Zhenyan were indicted. Zhenyan was charged with violating 18 U.S.C. § 1542, which prohibits providing false information in a passport application, and Ye was charged with aiding and abetting that violation. Both were charged with conspiracy to violate § 1542.

Following a joint trial, the jury acquitted Zhenyan but convicted Ye of both counts. Ye timely appealed her convictions.

II. Discussion

A. Specific Intent

The statute under which Ye was convicted, 18 U.S.C. § 1542, provides:

> Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or
>
> Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement-
>
> Shall be [subject to criminal liability].

Ye was convicted under the first paragraph of this statute.

Ye argues that the statute's use of "willfully and knowingly" makes providing a false statement in a passport application a specific intent crime—meaning that it requires the intentional violation of a known legal duty. Ye contends that the district court's instructions defining "willfully" and "knowingly" failed to reflect this requirement.

We review de novo whether jury instructions accurately described the elements of the charged crime. *United States v. Liu*, 731 F.3d 982, 987 (9th Cir. 2013). We hold that a violation of § 1542 does not require specific intent. A conviction under the first paragraph of § 1542 requires only that, in applying for a passport, the defendant made a statement that the defendant knew to be untrue.

The Supreme Court long ago established that the *second* paragraph of § 1542 does not require specific intent. In *Browder v. United States*, the Court defined "willfully and knowingly" in the second paragraph to mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." 312 U.S. 335, 341, 61 S. Ct. 599, 85 L.Ed. 862 (1941).[1] This definition does not require that the defendant knew that her action was unlawful.

Although *Browder* analyzed the second paragraph of § 1542 rather than the first, "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994). This principle counsels us to apply the Supreme Court's definition of "willfully and knowingly" in the second paragraph of § 1542 to the identical language in the first paragraph. Other circuits that have considered the issue agree that *Browder*'s

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[1] *Browder* interpreted a predecessor statute to 18 U.S.C. § 1542. *See* 312 U.S. at 335 n. 1, 61 S. Ct. 599 (quoting 22 U.S.C. § 220 (repealed 1948)). The wording of the predecessor statute was identical in all relevant respects to that of § 1542.

definition applies to the first paragraph and that, therefore, no part of the statute has a specific intent requirement. *See United States v. George*, 386 F.3d 383, 389 (2d Cir. 2004) (Sotomayor, J.); *Liss v. United States*, 915 F.2d 287, 293 (7th Cir. 1990); *United States v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985).[2]

Notwithstanding *Browder*, Ye argues that our decision in *United States v. Winn*, 577 F.2d 86 (9th Cir.

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[2] Ye is correct that in *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998), the Supreme Court interpreted "willfully" to mean "undertaken with a bad purpose," *id.* at 191, 118 S. Ct. 1939, and "with knowledge that [the defendant's] conduct was unlawful," *id.* at 192, 118 S. Ct. 1939 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994)). At the same time, however, the Court acknowledged that "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Id.* at 191, 118 S. Ct. 1939 (quoting *Spies v. United States*, 317 U.S. 492, 497, 63 S. Ct. 364, 87 L.Ed. 418 (1943)). Given this equivocation, we do not understand *Bryan* to have overruled *Browder*, which specifically defined willfully in the context of § 1542. Neither do we understand the Supreme Court's mention of § 1542 in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 60, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007), to have overruled *Browder*. Although *Safeco* instructed that "in the criminal law 'willfully' *typically* narrows the otherwise sufficient intent, making the government prove something extra," *id.* (emphasis added), "typically" does not mean always. The Supreme Court has instructed that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989). Because *Browder*'s interpretation of § 1542 directly applies here, that instruction controls.

1978), established that the first paragraph of § 1542 creates a specific intent crime. The defendant in *Winn* had challenged his conviction under that paragraph on the ground that there was insufficient evidence to prove specific intent. *Id.* at 90. We affirmed because sufficient evidence supported the defendant's conviction. *Id.* at 91. In describing the jury instructions given at trial, we stated that the district court had "correctly instructed the jury that 'an act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law.'" *Id.* Contrary to Ye's reading, *Winn* was solely a sufficiency-of-the-evidence case, so its approval of the "willfully" jury instruction is best understood as stating that the instruction had not improperly reduced the government's burden of proof. Given that there was sufficient evidence in *Winn* to support the jury's finding that the defendant had specific intent, there was no need for us to consider whether the statute actually required specific intent.[3]

More recently, and in a case in which the elements of § 1542 were in dispute, we followed *Browder* in

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[3] Discussing our decision in *Winn*, then-Judge Sotomayor similarly explained: "[The appellant in] *Winn* challenged only the sufficiency of the evidence supporting his conviction ... and not the jury instruction's accuracy. Therefore, the Ninth Circuit's statement that the trial court 'correctly instructed the jury,' for which no support was offered, was not necessary for the court to reach the issue presented on appeal." *George*, 386 F.3d at 396 n. 14 (citation omitted).

interpreting the first paragraph of the statute. In *United States v. Suarez-Rosario*, we stated:

> "The gravamen of the offense ... is the making of a false statement." *United States v. Cox*, 593 F.2d 46, 48 (6th Cir. 1979). Thus, the "crime is complete when one makes a statement one knows is untrue to procure a passport." *United States v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985). Knowing use of any false statement to secure a passport, including the use of a false name or birth date, constitutes a violation of § 1542. *Liss v. United States*, 915 F.2d 287, 293 (7th Cir. 1990). Therefore, under the terms of 18 U.S.C. § 1542, the government must prove that the defendant made a willful and knowing false statement in an application for a passport or made a willful and knowing use of a passport secured by a false statement.

237 F.3d 1164, 1167 (9th Cir. 2001) (alteration in original). This description did not include specific intent among the elements of the offense. Although the parties in *Suarez–Rosario* had not raised the issue of specific intent, it is notable that we relied on *Browder* and cases from three other circuits that had interpreted § 1542 as not including a specific intent requirement. *Id.* (citing *Browder*, 312 U.S. at 340, 61 S. Ct. 599; *Liss*, 915 F.2d at 293; *O'Bryant*, 775 F.2d at 1535; *Cox*, 593 F.2d at 48).

We now join our sister circuits and hold that, consistent with *Browder*, a conviction under the first paragraph of 18 U.S.C. § 1542 does not require specific intent. Because all of Ye's arguments about purported

flaws in the jury instructions depend on the notion that specific intent is required by § 1542, her arguments fail.

B. Confrontation Clause

Prior to trial, Ye and Zhenyan objected that it would violate the Confrontation Clause of the Sixth Amendment to admit statements they had made to DHS unless the USCIS Language Line translators who assisted them were called to testify. After considering testimony and other evidence regarding the nature of USCIS's translation services, the district court overruled the objection. Ye argues on appeal that the district court erred by subsequently admitting the translated statements at trial.

We review alleged violations of the Confrontation Clause de novo. *United States v. Brooks*, 772 F.3d 1161, 1167 (9th Cir. 2014).

In *United States v. Nazemian*, 948 F.2d 522, 525–28 (9th Cir. 1991), we held that, as long as a translator acts only as a language conduit, the use of the translator does not implicate the Confrontation Clause. Ye argues that *Nazemian* is inconsistent with the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, ____U.S. ____, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011). As Ye correctly concedes, however, we already have held that *Nazemian* remains binding circuit precedent because it is not clearly irreconcilable with *Crawford* and its progeny. *United States v. Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir. 2012). As a three-judge panel, we

are bound by *Orm Hieng* and *Nazemian*. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

Ye alternatively argues that the district court misapplied *Nazemian* in admitting the translated statements here. Determining whether the translator was merely a language conduit under *Nazemian* requires analyzing four factors: "(1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated." *United States v. Romo-Chavez*, 681 F.3d 955, 959 (9th Cir. 2012).

Ye contends that the first *Nazemian* factor weighs against treating the translators as language conduits because the translators were provided by the government through its on-demand telephonic translation service. This factor does weigh in Ye's favor, but we have held that this factor is "never dispositive." *Romo-Chavez*, 681 F.3d at 959. This factor would have more weight if the translators were active in directing the interview, *id.* at 959–60, but they were not.

Ye next argues that the second factor weighs in her favor because the translators were independent contractors who would have a motive to distort evidence in the government's favor in order to keep their jobs. Ye further contends that the use of the word "forged" in Zhenyan's original translated statement is in fact evidence of pro-government distortion because Zhenyan would not have used such a

loaded word. But the record is unclear about whether some or all of the translators were independent contractors, and there is no way to know whether Zhenyan actually used the word "forged." The inconclusive nature of the evidence on this factor causes us to give it little weight.

The government's evidence on the third and fourth factors is compelling, and Ye does not argue otherwise. For the third factor, the government provided evidence that all of the translators had native fluency in Mandarin—the language spoken by both Ye and Zhenyan—and that all had extensive professional translation training and experience. Additionally, during the interviews of Ye and Zhenyan, DHS agents checked the accuracy of the translation by asking the translators to have Ye and Zhenyan confirm line-by-line read-backs of what they had said. To test the accuracy of the translation, the DHS agents inserted intentional inaccuracies in the read-backs, which Ye and Zhenyan identified and corrected each time. This indicates that the translators' work was accurate. For the fourth factor, Ye's behavior subsequent to the interview was consistent with her translated statement. During the interview, Ye agreed to cooperate in the government's investigation of Lin, and she later followed through on that agreement by placing a recorded phone call to him. Therefore, both the third and fourth factors strongly favor the government.

On balance, these four factors favor treating the translators as language conduits. Thus, under *Nazemian*, Ye's Confrontation Clause rights were not

violated when the government introduced translated statements from Ye and Zhenyan without calling the translators to testify.

III. Conclusion

For the foregoing reasons, we **AFFIRM** Ye's convictions.[4]

[4] We address Ye's remaining arguments in a concurrently filed memorandum disposition.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. AIFANG YE, Defendant – Appellant.	No. 12-10576 D.C. No. 1:12-cr-00009-RVM-2 MEMORANDUM

Appeal from the District Court
for the Northern Mariana Islands
Ramona V. Manglona, Chief District Judge, Presiding

Argued and Submitted February 19, 2015
Honolulu, HI

Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

Aifang Ye appeals her convictions for aiding and abetting the provision of false information in a passport application in violation of 18 U.S.C. § 1542 and for conspiracy to do the same. She argues that there was insufficient evidence to support her convictions. We review de novo a defendant's appeal challenging the

sufficiency of the evidence. *United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010). We hold that there was sufficient evidence to support the jury's verdicts on both counts.

For the conspiracy conviction, Ye argues that there was insufficient evidence to find that Ye and her brother-in-law Zhenyan Cheng entered into an unlawful agreement because, she contends, there was no evidence that Ye or Zhenyan knew that what they agreed to do was unlawful. Contrary to Ye's assertions, there was sufficient evidence for the jury to find that Ye and Zhenyan agreed to have Zhenyan make a statement he knew to be untrue when applying with Ye for a passport for Ye's daughter. Because we hold in our concurrently filed opinion that violating § 1542 does not require specific intent, the jury did not need to find that either Zhenyan or Ye knew that what they were doing was unlawful. Ye's sufficiency-of-the-evidence arguments challenging the conspiracy conviction therefore fail.

For the aiding and abetting conviction, Ye argues that her conviction should be overturned because Zhenyan was acquitted of providing false information in a passport application and because there was insufficient evidence to support her conviction for aiding and abetting the falsification of a passport application.

Ye's aiding and abetting conviction is not precluded by Zhenyan's acquittal. A jury's acquittal of the principal on the underlying offense charge does not preclude the jury from convicting another defendant for aiding and abetting the acquitted principal.

Standefer v. United States, 447 U.S. 10, 20, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). "[I]t is a long established principle of law that mere inconsistency of verdicts does not require reversal unless there is insufficient evidence to sustain the guilty verdict." *United States v. Van Brandy*, 726 F.2d 548, 552 (9th Cir. 1984) (citations omitted).[1]

Moreover, there was sufficient evidence to sustain Ye's guilty verdict for aiding and abetting Zhenyan's violation of 18 U.S.C. § 1542. As we hold in our concurrently filed opinion, a conviction under the first paragraph of § 1542 requires only that, in applying for a passport, the defendant made a statement the defendant knew to be untrue. Contrary to Ye's contentions, there was sufficient evidence that she and Zhenyan knew that the information Zhenyan would provide the passport office was false, and that she aided him in providing it.

AFFIRMED.

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[1] For purposes of Ye's conspiracy conviction, it also does not matter that the jury acquitted Zhenyan of conspiracy and providing false information on a passport application. "It is well established that a person may be convicted of conspiring with a co-defendant even when the jury acquits that co-defendant of conspiracy." *United States v. Ching Tang Lo*, 447 F.3d 1212, 1226 (9th Cir. 2006).

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA	)	
	)	
vs.	)	
	)	
ZHENYAN CHENG and	)	CR. No. 12-09
AIFANG YE	)	Garapan, Saipan
	)	

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JURY TRIAL
DAY TWO

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BEFORE THE HONORABLE
RAMONA V. MANGLONA,

Chief Judge,

on June 12, 2012

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[123]

(In open court, jury not present:)

THE CLERK: All rise.

The United States District Court for the Northern Mariana Islands is now open and ready for transaction of business. The Honorable Ramona V. Manglona, Chief Judge, presiding.

THE COURT: Good morning everyone. Please be seated.

THE CLERK: If Your Honor please, this is criminal case 12-0009, United States of America versus Zhenyan Cheng and Aifang Ye coming up for a continuation of a motion hearing and the continuation of the jury trial day two.

* * *

[124]

THE COURT: Good morning. I understand the jurors, most of them are in the jury room, but we're still missing one. Whoever it is will be escorted by the Marshal to the witness room so that we can conclude our motion hearing matters first.

Just a recap, yesterday afternoon the Court received testimony from the Government through Special Agent Lansangan on the various issues pertaining to the defendants' written statements, and as stated, the Court has received sufficient arguments, read the briefs, and at this time is prepared to issue an oral ruling and will begin with a recap on the defendants' main Bruton

[125]

objections to both defendants' statements to the special agents.

It was labeled as Plaintiff's Exhibit 2 and 3 in yesterday's hearings, and even as redacted, as shown in the plaintiff's proposed trial Exhibit 14, and I reviewed my copy as to Miss Ye, which is Exhibit 14. I believe I

returned the copy that has a signature, so I should be getting that agreed-upon copy.

As to the defendant Cheng's exhibit, I had 12-A, but this one doesn't have the signature yet. That is understood to be superimposed. But my point is, in regard to a Bruton objection, because of statements that the defendants believe violate their Sixth Amendment right, the Court finds that the redacted versions will sufficiently cure any concerns as stated previously, and so the objections by the defendants are overruled on that limited ground.

The defendants continue their objection as to any hearsay basis for the same statements, as well as Sixth Amendment violation under the Crawford right to confront the interpreters that assisted in preparing and producing the written statements that were written out in English.

[126]

First based on the testimony received yesterday in the review of the Exhibits 1 through 8 from yesterday's proceeding, I first find that for the interpreters' role, that it was and is nontestimonial, in that the interpreters that assisted the agents, three of which assisted in the questioning of Mr. Cheng, the defendant herein, as well as Miss Ye; that these were set forth before the Court as indicias of reliability as set forth in the rule of Ohio v. Roberts, and that, therefore, as nontestimonial and reliable basis to conclude as to the reliability of the interpretation, the Court overrules the objection on that ground.

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