

No. 15-1002

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

**BRIEF FOR THE MASSACHUSETTS ASSOCIATION
OF COURT INTERPRETERS, INC. AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

ALAN JAY ROM
ROM LAW PC
14 Mansfield Drive
Chelmsford, MA 01824

PAUL R.Q. WOLFSON
Counsel of Record
JEANNIE RHEE
DEREK WOODMAN*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

QUESTION PRESENTED

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

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I. THE NINTH CIRCUIT’S “LANGUAGE CON- DUIT” THEORY RESTS ON A FUNDAMEN- TAL MISUNDERSTANDING OF LANGUAGE INTERPRETATION	5
A. The “Language Conduit” Theory Wrongly Presumes That Language In- terpretation Is An Objective And Pre- cise Process	6
B. Because Language Interpretation In- volves Numerous Subjective Judg- ments, Interpreters Should Be Consid- ered The Declarants Of Their English Interpretations For Confrontation Clause Purposes	7
II. RESOLUTION OF THE QUESTION PRESENT- ED IS OF VITAL IMPORTANCE TO THE PROPER ADMINISTRATION OF JUSTICE.....	14
A. Interpretation Is Increasingly Com- mon As The Limited English Proficient Population Continues To Increase	15
B. Inaccurate Interpretations Can Have Devastating Consequences For Crimi- nal Defendants.....	17

TABLE OF CONTENTS—Continued

	Page
1. Mistakes by professional interpreters can prejudice defendants	19
2. Unskilled interpreters only exacerbate the potential for prejudice	20
C. This Court Should Resolve The Division Among The Circuits To Benefit Both The Interpreter Profession And Limited English Proficient Defendants.....	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	18
<i>Commonwealth v. Ferrer</i> , 759 N.E.2d 353 (Mass. App. Ct. 2001).....	19
<i>Mekhoukh v. Ashcroft</i> , 358 F.3d 118 (1st Cir. 2004)	19
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009).....	13, 14
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	17
<i>Perez-Lastor v. INS</i> , 208 F.3d 773 (9th Cir. 2000)	18
<i>United States ex rel. Negron v. New York</i> , 434 F.2d 386 (2d Cir. 1970).....	18
<i>United States v. Budha</i> , 495 F. App'x 452 (5th Cir. 2012).....	23
<i>United States v. Carrion</i> , 488 F.2d 12 (1st Cir. 1973)	18
<i>United States v. Charles</i> , 722 F.3d 1319 (11th Cir. 2013).....	7, 8, 14, 23
<i>United States v. Nazemian</i> , 948 F.2d 522 (9th Cir. 1991).....	23
<i>United States v. Orm Hieng</i> , 679 F.3d 1131 (9th Cir. 2012).....	6, 23
<i>United States v. Shubin</i> , 722 F.3d 233 (4th Cir. 2013)	23

TABLE OF AUTHORITIES—Continued

	Page(s)
DOCKETED CASES	
<i>Commonwealth v. Torres</i> , No. 1434CR003814 (Mass. Dist. Ct.)	21, 22
STATUTES, RULES, AND REGULATIONS	
Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002)	20
OTHER AUTHORITIES	
Ahmad, Muneer L., <i>Interpreting Communities: Lawyering Across Language Difference</i> , 54 UCLA L. Rev. 999 (2007)	6, 8, 11
Barrachina, Sergio, et al., <i>Statistical Approaches to Computer-Assisted Translation</i> , 35 Computational Linguistics 3 (2009)	7
Berk-Seligson, Susan, <i>The Bilingual Courtroom</i> (2002)	6
Carey, Chief Justice Paula M. & Harry Spence, <i>Massachusetts Trial Court Language Access Plan</i> (Dec. 2014), http://www.mass.gov/courts/docs/language-access-plan.pdf	17
Connell, James G. & Rene L. Valladares, <i>Cultural Issues In Criminal Defense</i> (2003)	9, 12

TABLE OF AUTHORITIES—Continued

	Page(s)
Dunnigan, Timothy & Bruce T. Downing, <i>Legal Interpreting on Trial: A Case Study, in 8 Translation and the Law</i> 93 (Marshall Morris ed., 1995)	9
González, Roseann D., et al., <i>Fundamentals of Court Interpretation: Theory, Policy, and Practice</i> (2d ed. 2012).....	3, 7, 8, 10
Hale, Sandra B., <i>The Discourse of Court Interpreting</i> (2004)	7, 9, 11, 12
Hovland, Debra L., <i>Errors in Interpretation: Why Plain Error Is Not Plain</i> , 11 <i>Law & Ineq.</i> 473 (1993).....	19
Migration Policy Institute, <i>U.S. Immigrant Population and Share Over Time, 1850-Present</i> , http://migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time (last visited Mar. 7, 2016)	17
Mikkelson, Holly, <i>On the Horns of a Dilemma: Accuracy vs. Brevity in the Use of Legal Terms by Court Interpreters, in 8 Translation and the Law</i> 201 (Marshall Morris ed., 1995)	12
Moore, Albert J. , <i>Trial By Schema: Cognitive Filters in the Courtroom</i> , 37 <i>UCLA L. Rev.</i> 273 (1989).....	6, 11

TABLE OF AUTHORITIES—Continued

	Page(s)
National Association of Judiciary Interpreters and Translators, <i>Frequently Asked Questions About Court And Legal Interpreting And Translating</i> , http://www.najit.org/certification/faq.php#techniques (last visited Mar. 7, 2016)	8
Pistone, Michael R. & Philip G. Schrag, <i>The New Asylum Rule: Improved but Still Unfair</i> , 16 <i>Geo. Immigr. L.J.</i> 1 (2001)	19
Schofield, Regina B. & Michael L. Alston, <i>Accommodating Limited English Proficiency in Law Enforcement</i> , http://onlineresources.wnylc.net/pb/orcdocs/LAR_C_Resources/LEPTopics/LE/LEPinLE/limitedenglish.htm (last visited Mar. 7, 2016)	20
Shulman, Michael B., <i>No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants</i> , 46 <i>Vand. L. Rev.</i> 175 (1993)	13
U.S. Census Bureau, <i>2006-2010 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States</i> , http://factfinder.census.gov/bkmk/table/1.0/en/ACS/10_5YR/DP02/0100000US10400000US25 (last visited Mar. 7, 2016)	16, 17

TABLE OF AUTHORITIES—Continued

	Page(s)
U.S. Census Bureau, <i>2008-2012 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States</i> , http://factfinder.census.gov/bkmk/table/1.0/en/ACS/12_5YR/DP02/0100000USI0400000US25 (last visited Mar. 7, 2016)	16
U.S. Census Bureau, <i>2009-2013 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States</i> , http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/DP02/0100000USI0400000US25 (last visited Mar. 7, 2016)	16
U.S. Census Bureau, <i>2010-2014 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States</i> , http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP02/0100000USI0400000US25 (last visited Mar. 7, 2016)	15, 16, 17
U.S. Census Bureau, <i>Language Use and English Ability, Persons 5 Years and Over, by State: 1990 Census</i> , https://www.census.gov/population/socdemo/language/table1.txt (last visited Mar. 7, 2016)	15

TABLE OF AUTHORITIES—Continued

	Page(s)
U.S. Dep’t of Homeland Security, <i>Table 1 Persons Obtaining Lawful Permanent Resident Status: FYs 1820 to 2013</i> , https:// www.dhs.gov/publication/yearbook-immigra tion-statistics-2013-lawful-permanent-resid ents (last visited Mar. 7, 2016).....	16
United States Courts, <i>Initiatives - Annual Report 2014</i> , http://www.uscourts.gov/ statistics-reports/initiatives-annual-report- 2014 (last visited Mar. 7, 2016)	17
Zong, Jie & Jeanne Batalova, Migration Policy Institute, <i>The Limited English Proficient Population in the United States</i> (July 8, 2015), http://www.migrationpolicy.org/arti cle/limited-english-proficient-population-uni ted-states	16

INTEREST OF AMICUS CURIAE¹

The Massachusetts Association of Court Interpreters, Inc. (“MACI”) is an organization that advocates for meaningful language services and equal access to justice for limited English proficient persons. MACI’s members are professional interpreters in approximately seventy languages, including Spanish, Portuguese, Chinese, Haitian Creole, and Vietnamese, which in 2014 embraced 74.1% of Massachusetts residents with limited English proficiency. MACI’s members endeavor to deliver accurate and timely on-site interpretation services throughout the legal process.

Through its public outreach, legislative, and legal activities, MACI strives to improve interpreting services in Massachusetts, to raise awareness about the work of court interpreters, and to identify and recommend improved standards for the interpreter profession. It also seeks to improve the quality of interpreting services by advocating for just pay and working conditions for language professionals. MACI and its members are guided by their commitment to the profession, the justice system, and the limited English proficient population that they serve.

This petition raises an important question under the Sixth Amendment’s Confrontation Clause about the right to confront language interpreters who provide out-of-court, testimonial interpretations of defendants’ statements. MACI and its members have an interest in

¹ Amicus certifies that this brief was written by undersigned counsel, that no counsel for a party authored any portion of this brief, and that no entity or person, aside from amicus, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of the brief.

ensuring that competent interpreters are used at every stage of the criminal justice process and that the nature of their professional work is understood by courts. MACI's members are keenly aware that language interpretation does not involve simple word-for-word translation. Instead, an interpreter attempts to accurately convey a speaker's intended message through a series of complex judgments based on numerous verbal and non-verbal cues—a task that requires considerable skill and an understanding of cultural differences, idioms, dialect idiosyncrasies, and possible multiple meanings of words and phrases. Properly understood, therefore, interpretation involves far more subjectivity than the court of appeals' "language conduit" theory contemplates. Consequently, the precise English words and sentences spoken by the interpreter should not be attributed to the limited English proficient defendant.

What is more, the lower court's standard fails to protect limited English proficient defendants from faulty interpretations. Even experienced, professional interpreters with ample training make mistakes, and MACI's members have observed firsthand the harm that such errors can inflict on the communities they serve. MACI believes that the best way to ensure that the judge and jury understand the true meaning of a defendant's out-of-court statements is through cross-examination of the interpreter. Accordingly, MACI urges this Court to grant review in this case and to hold that the Confrontation Clause requires the prosecution to make interpreters available for confrontation when it seeks to introduce their out-of-court, testimonial language interpretations as evidence.

SUMMARY OF ARGUMENT

As a growing number of limited English proficient individuals come in contact with the criminal justice system, more convictions rest on out-of-court English interpretations² of the defendant’s interrogation statements. But because of a legal fiction rooted in a flawed understanding of the nature of language interpretation, defendants in some circuits have no opportunity to confront their interpreters and expose through cross-examination errors in translation. This case presents an ideal opportunity for this Court to settle a division among the circuits and clarify that the Confrontation Clause does not exempt language interpreters from cross-examination.

The court below held that petitioner was not entitled to cross-examine the interpreter of her interrogation statements because the interpreter was merely a “language conduit” through which her words flowed and were mechanically and objectively converted into English. Consequently, according to the Ninth Circuit, the interpreter’s English statements could be attributed to the petitioner herself and no right to confrontation applied. But the “language conduit” theory rests on a fundamental misunderstanding of how interpretation works. An interpretation is not a simple equation with foreign-language words on one side and English-

² Interpretation is the process of transferring ideas spoken in one language to another, whereas translation is the process by which written ideas are transferred between languages. See González et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 791-792 (2d ed. 2012). Although these professions are commonly assumed to be interchangeable, they are not. Each practice requires distinct skills and training. Rarely do interpreters act as translators, or vice versa. The focus of this brief is on interpretation and related Confrontation Clause concerns.

language words on the other. Instead, it is an imprecise and subjective process in which an interpreter must make split-second judgments based on context, cultural understanding, evaluation of multiple meanings of a word, and a host of other factors. While the interpreter's goal is to faithfully reproduce the meaning of the defendant's statements, the resulting interpretation is by no means a word-for-word equivalent. It is rather the interpreter's personal understanding of what the speaker intended to convey, and it reflects the countless subjective decisions the interpreter makes in the process of understanding the speaker's message, converting it to a second language, and delivering it to the listener.

In contrast to the Ninth Circuit and others, the Eleventh Circuit rejects the "language conduit" theory and, consistent with its more nuanced and accurate understanding of language interpretation, holds that an interpreter's out-of-court, testimonial interpretation cannot be attributed to the defendant and therefore implicates the Confrontation Clause. That variance across jurisdictions in the Sixth Amendment rights of limited English proficient defendants warrants this Court's review. The Court should resolve the division among the circuits and jettison the ill-conceived "language conduit" theory.

The United States welcomes hundreds of thousands of new immigrants into the country each year. Many of those individuals have limited English proficiency and require an interpreter to navigate the criminal justice system. When the prosecution seeks to introduce an allegedly incriminating out-of-court interpretation against such a defendant, he should be permitted to cross-examine the interpreter to test the accuracy of the interpretation and expose any flaws.

Such a rule protects the Sixth Amendment rights of defendants and improves the quality of language interpretation throughout the criminal justice system.

ARGUMENT

I. THE NINTH CIRCUIT’S “LANGUAGE CONDUIT” THEORY RESTS ON A FUNDAMENTAL MISUNDERSTANDING OF LANGUAGE INTERPRETATION

An out-of-court interrogation involving an interpreter, like the one at issue here, produces two sets of statements: first, the statements made in a foreign language by a limited English proficient defendant, and second, the statements made in English by the interpreter. The Fourth, Fifth, and Ninth Circuits treat those two sets of statements as one and the same and, on that basis, conclude that the Confrontation Clause is inapplicable to interpreters’ renderings. They attribute the interpreter’s English statements to the defendant himself, even though the defendant never actually uttered those words.

The legal fiction that those courts employ to treat the defendant as the speaker of the interpreter’s English words is often referred to as the “language conduit” theory. It is based on the mistaken idea that an interpreter can mechanically and objectively translate the defendant’s statements into English verbatim. In reality, interpretation is a complex process that involves many split-second judgments that are influenced by the interpreter’s own experiences, cultural understanding, and command of both languages. In short, interpretations are subjective. As such, they cannot be mechanically attributed to the defendant himself for Confrontation Clause purposes. A proper understanding of interpretation should lead this Court to reject the “language conduit” theory and instead (as the Eleventh Cir-

cuit does) require defendants to have the opportunity to cross-examine language interpreters if an out-of-court, testimonial interpretation is introduced by the prosecution.

A. The “Language Conduit” Theory Wrongly Presumes That Language Interpretation Is An Objective And Precise Process

The “language conduit” theory is premised on a deeply flawed understanding of language interpretation. It assumes that, as long as the interpreter is “highly competent” and harbors no “motive to mistranslate,” *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012), the defendant’s words can be mechanically converted into English, just as a sum of yuan can be converted into dollars. Under this view, interpretation is “an invisible pipe, with words entering in one language and exiting—completely unmodified—in another language.” Berk-Seligson, *The Bilingual Courtroom* 219 (2002). The theory presumes words and phrases to have a unitary meaning that can be translated word for word.

In truth, however, the process of understanding words, sentences, and discourse is not mechanical; it requires judgment to discern the speaker’s meaning. See Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 *UCLA L. Rev.* 999, 1032 (2007). Words act as signs or cues as to what the speaker intends the listener to comprehend. See Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 *UCLA L. Rev.* 273, 318 (1989) (“[S]poken words are only a ‘cue to the meaning entertained by the speaker.’”).

Language comprehension depends on speaker and listener sharing a perceptual context from which they

can understand the spoken words. The interpreter's knowledge and experience are needed to make sense of the combination of words or phrases uttered by the speaker. Indeed, "[i]f the interpreter believes her/his role is to be that of a machine that robotically transforms words from one language to another, with no room for 'interpretation' or decision-making on their part, their renditions will very rarely be accurate." Hale, *The Discourse of Court Interpreting* 12 (2004); accord González et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 17 (2d ed. 2012) ("Not only is word-for-word or literal interpretation impossible because of the lack of one-to-one correspondence in word equivalence between languages, but it usually distorts speaker meaning and misrepresents actual testimony."). This is borne out in the field of machine translation, which has so far failed to develop translation technology that can produce high-quality translation without the assistance of human judgment. See Barrachina et al., *Statistical Approaches to Computer-Assisted Translation*, 35 *Computational Linguistics* 3, 4 (2009).

B. Because Language Interpretation Involves Numerous Subjective Judgments, Interpreters Should Be Considered The Declarants Of Their English Interpretations For Confrontation Clause Purposes

The Eleventh Circuit rejects the "language conduit" theory and requires that interpreters be made available for cross-examination. *United States v. Charles*, 722 F.3d 1319, 1324-1331 (11th Cir. 2013). It recognizes that "[l]anguage interpretation ... does not provide for a 'one-to-one correspondence between words or concepts in different languages.'" *Id.* at 1324

(quoting National Association of Judiciary Interpreters and Translators (“NAJIT”), *Frequently Asked Questions About Court And Legal Interpreting And Translating*, <http://www.najit.org/certification/faq.php#techniques>). Instead, “interpreters render meaning by reproducing the full content of the ideas being expressed.” *Id.* (quoting NAJIT, *supra*). And that task entails more than a mechanical translation of words; it requires an understanding of “differences in dialect,” “colloquial expressions,” and “the contextual, pragmatic meaning of specific language.” *Id.* at 1325 (quoting Ahmad, 54 UCLA L. Rev. at 1036). Thus, according to the Eleventh Circuit, the interpreter, and not the defendant, must be considered the declarant of the English interpretation.

The Eleventh Circuit’s approach is consistent with the true nature of language interpretation, which entails far more than simply acting as a “conduit.” Interpreters must possess numerous skills, including complex linguistic knowledge and cognitive abilities. *See* González, *Fundamentals of Court Interpretation* 19-25. First, an interpreter must have a college-level command of (at least) two languages and must be able to manipulate and to conserve registers and speech styles from the most formal to the most casual. An interpreter must be able to call upon that knowledge while interpreting either consecutively (alternating with the speaker) or simultaneously (interpreting while the speaker is talking), and when interpreting a message from English into a foreign language or vice versa. Those cognitive tasks require acute memory, concentration, and analytical skills.

In addition, an interpreter must possess extensive knowledge of the world and its various cultures. A deep cultural understanding is necessary to resolve in-

interpreting challenges resulting from the lack of direct equivalents between two languages. Otherwise, an interpreter will be unable to comprehend and properly interpret cultural references, idioms, colloquialisms, slang, and humor. There are further difficulties with regional, rural, and urban speech styles, codeswitching (when a speaker alternates between languages), and hybrid language use. In short, the role of an interpreter is “enormously complex.” Dunnigan & Downing, *Legal Interpreting on Trial: A Case Study, in 8 Translation and the Law* 93, 111 (Morris ed., 1995).

The interpretation process occurs in three steps—comprehension, conversion, and delivery. Hale, *The Discourse of Court Interpreting* 3. Each stage requires myriad split-second decisions that draw on the interpreter’s knowledge and subjective judgment about the speaker’s intended meaning and how it should be conveyed. And at each stage there are numerous opportunities for error that can distort the speaker’s message and even transform an innocent statement into an incriminating one.

At the comprehension stage, the interpreter must understand the message the speaker intends to convey. This requires knowledge not only of the vocabulary, grammar, and syntax of the speaker’s language, but also of idioms, cultural connotations, and dialectical differences. Interpreters must be familiar with “all levels of language” from formal legal language to colloquialisms and specialized slang. Connell & Valladares, *Cultural Issues In Criminal Defense* §2.2[c] (2003).

Even the simplest words can present a challenge. The English word “table,” for example, can denote a piece of furniture, the serving of food (as in “he sets a good table”), a plateau, a chart containing numbers, and

to delay (as in “they tabled the motion”). In French, however, “table” only expresses three of those English concepts (furniture, serving of food, and charts). But the French “table” also denotes additional concepts, such as “*aimer la table*” (to enjoy the good life) and “*faire table rase*” (to wipe the slate clean). See González, *Fundamentals of Court Interpretation* 804.

Idioms and metaphors likewise present significant difficulties. The English idiom “That’s a horse of a different color” becomes “*Eso es harina de otro costal*” in Spanish (“That’s flour from a different bag”). González, *Fundamentals of Court Interpretation* 806. But a literal translation of either phrase would make little sense to a listener. The Spanish metaphor “*no tenía en donde caerme muerto*” similarly lacks an English equivalent. It could be interpreted as “I didn’t even have a dime to my name.” But that interpretation does not convey the desperation of the literal translation, “I didn’t even have a place to fall down dead.” *Id.* at 807.

And even when the interpreter possesses all of the required linguistic and cultural knowledge—which is rarely the case—accurate comprehension is not assured because language is often ambiguous. Nobody knows this better than a judge who has attempted to resolve a dispute between two parties over words in a contract or to discern the “plain meaning” of a statute. And a judge can spend hours trying to understand written text, whereas an interpreter has only seconds to comprehend a speaker’s statement. Comprehension is thus best understood not as a mechanistic, objective process, but rather as “a set of procedures that involves selectively applying one’s personal experiences or knowledge of the world to the surface structure of sentences to yield a meaning. In so doing, one elaborates,

assimilates, or perhaps ‘imagines’ the sentence.” Moore, 37 UCLA L. Rev. at 320.

The next stage is conversion, in which the interpreter must decide how best to express the speaker’s message in the target language. Because “direct equivalents are rarely available to two different languages,” the interpreter cannot simply translate, word for word, the speaker’s statement; instead, the interpreter is “confronted with a number of different choices.” Hale, *The Discourse of Court Interpreting* 4. Making those choices involves subjective judgments at the word, sentence, and even conceptual level. That is because the interpreter cannot just convey the semantic—or literal—meaning of the words the speaker uttered; he must also convey the pragmatic—or contextual—meaning of the statement. See Ahmad, 54 UCLA L. Rev. at 1032. The interpreter must also express the speaker’s tone, level of formality, and intended meaning, while dealing with issues such as false cognates, homophones, words with multiple meanings, differences in dialect, and idioms and expressions with no ready equivalent. All this the interpreter must do in a matter of seconds. In addition, he must be constantly switching back and forth between the two languages: converting the English statement into the foreign language and then converting the foreign language reply into English.

Conversion in the criminal context presents heightened challenges, because the interpreter often must communicate legal concepts that are uniquely found in English-language legal systems (or are *not* found in those systems). In the American legal system, a homicide committed with “malice aforethought” is murder—the most serious form of homicide—but the concept of “malice aforethought” is absent from or dif-

ferent in other legal systems. See Mikkelson, *On the Horns of a Dilemma: Accuracy vs. Brevity in the Use of Legal Terms by Court Interpreters*, in 8 *Translation and the Law* 201, 204-205 (Moore ed., 1995). Likewise, other legal systems have terms for elements of a homicide crime that function like “malice aforethought,” but express different concepts and have no English equivalent. In Argentina the term is “*alevosía*,” which roughly translates into treachery; in Mexico it is “*ventaja*,” which is when the perpetrator is stronger or better armed than the victim. *Id.* at 207.

Similar ambiguities and inconsistencies can be found across all legal systems and in every language. Fluency in another language cannot guarantee proper interpretation in the legal setting, because legal terms and concepts vary even between countries that use a shared language. One example is interpreting Spanish-language statements about homicide crimes. The penal codes in Spanish-speaking countries differ both substantively and linguistically, and a defendant’s understanding of the various levels of homicide will be influenced by his country of origin. The most serious homicide in Spain and Ecuador is called “*asesinato*,” but in Mexico it is called “*homicidio calificado*,” and in Argentina there is no devoted term, only a set of defining circumstances that render a killing subject to the most severe punishment. Mikkelson, *in Translation and the Law* 206-207.

The final step in interpretation is the delivery of the statement. Hale, *The Discourse of Court Interpreting* 5. In delivery, the interpreter must “conserv[e] the language level, tone, style and intent of the speaker.” Connell & Valladares, *Cultural Issues In Criminal Defense* §2.2[c]. The statement is not a verbatim translation of each word uttered of the kind a computer pro-

gram might generate. Instead, it is the culmination of the numerous split-second judgment calls described above.

Given the vast knowledge required for interpretation and the judgments that an interpreter must repeatedly make, errors are unavoidable. And even the most minor errors in interpretation can significantly alter the meaning of a defendant's or a witness's statement. In one instance, a man was convicted on drug charges after he exclaimed "¡Hombre, ni tengo diez kilos!" Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 Vand. L. Rev. 175, 176 (1993). A court interpreter mistakenly translated the sentence as "Man, I don't even have ten kilos." *Id.* But "kilo" in Spanish can mean either "kilogram" or "cent" depending on the context and the speaker's dialect. *Id.* at 176 n.3. Given the defendant's Cuban dialect and the context (the defendant was responding to a request for a loan), the sentence should have been interpreted as "Man, I don't even have ten cents." *Id.* at 176. Instead, the interpreter mechanically translated "kilo" to "kilogram" without considering the surrounding circumstances, and the interpreter altered the meaning of the defendant's statement in a manner that was fatal to his case.

As this example makes plain, language interpretation is anything but a passive, robotic process. The "conduit" metaphor is simply inappropriate. The interpreter—not the person who made the original foreign-language statement—should be viewed as the declarant of the English statement, and so the interpreter should be made available for cross-examination if the prosecution seeks to enter the interpretation into evidence. That conclusion follows from this Court's holding in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

There the Court reaffirmed that, regardless of his reliability or professional qualifications, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or the defendant had a prior opportunity for cross-examination. *Id.* at 317-321. As the Eleventh Circuit reasoned, “[i]f, as we know from *Melendez-Diaz*, even results of ‘neutral, scientific testing,’ do not exempt the witness who performed the test from cross-examination, certainly the Confrontation Clause requires an interpreter of the concepts and nuances of language to be available for cross-examination at trial.” *Charles*, 722 F.3d at 1329. This Court should adopt the Eleventh Circuit's reasoning and hold that petitioner was entitled to cross-examine her interpreter.

II. RESOLUTION OF THE QUESTION PRESENTED IS OF VITAL IMPORTANCE TO THE PROPER ADMINISTRATION OF JUSTICE

Absent this Court's review, lower courts will continue to rely on the flawed “language conduit” theory to admit out-of-court interpretations without making the interpreter available for cross-examination. Given current demographic trends, that practice will become increasingly frequent. The limited English proficient population has been growing steadily in the United States over the last two decades, and there is no indication that this growth will slow. Individuals whose proficiency in English is limited face a serious threat from inaccurate or mistaken interpretations, and, without an opportunity to cross-examine interpreters, they will be unable to expose inaccuracies or mistakes to a jury. As a result, limited English proficient defendants face a heightened risk of conviction based on misleading statements or faulty confessions. This Court's review

is warranted to prevent such injuries and resolve the division among the circuits.

A. Interpretation Is Increasingly Common As The Limited English Proficient Population Continues To Increase

The need for professional language services has become increasingly widespread as the limited English proficient population in the United States continues to grow. From 1990 to 2014, that population grew almost 200% from nearly 14 million to 25.3 million.³ The limited English proficient community currently makes up about 8.6% of the U.S. population.⁴

These trends are fully present in Massachusetts. Approximately 1.4 million Massachusetts residents over the age of five—22.2% of the population—speak a language other than English at home.⁵ A sizeable portion of them have limited proficiency in English. From 1990 to 2014, the limited English proficient population in Massachusetts grew from 348,786 to 560,925.⁶ Since 2010, the Commonwealth’s limited English proficient population has increased at twice the rate of the na-

³ Compare U.S. Census Bureau, *Language Use and English Ability, Persons 5 Years and Over, by State: 1990 Census* (“1990 Census Table 1”), <https://www.census.gov/population/socdemo/language/table1.txt>, with U.S. Census Bureau, *2010-2014 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States* (“2014 Table DP02”), http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP02/0100000US10400000US25.

⁴ See 2014 Table DP02.

⁵ *Id.*

⁶ Compare 1990 Census Table 1, with 2014 Table DP02.

tional average.⁷ That community now makes up 8.9% of the Massachusetts population.⁸

These language trends are closely tied to U.S. immigration patterns, as approximately 81% of limited English proficient individuals were born outside the United States.⁹ More than 500,000 documented immigrants arrive in the United States every year.¹⁰ And each year about 1 million immigrants obtain lawful permanent resident status.¹¹ Indeed, from 1990 to 2014

⁷ The Massachusetts limited English proficient population has increased by 5.4% since 2010. The total limited English proficient population in the United States has increased by 2.4%. Compare U.S. Census Bureau, *2006-2010 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States* (“2010 Table DP02”), http://factfinder.census.gov/bkmk/table/1.0/en/ACS/10_5YR/DP02/0100000US|0400000US25, with 2014 Table DP02.

⁸ See 2014 Table DP02.

⁹ See Zong & Batalova, *The Limited English Proficient Population in the United States*, Migration Policy Institute (July 8, 2015), <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

¹⁰ Compare 2014 Table DP02, with U.S. Census Bureau, *2009-2013 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/DP02/0100000US|0400000US25, and U.S. Census Bureau, *2008-2012 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/12_5YR/DP02/0100000US|0400000US25. From 2013 to 2014, an additional 714,987 foreign-born individuals settled in the United States.

¹¹ See U.S. Dep’t of Homeland Security, *Table 1 Persons Obtaining Lawful Permanent Resident Status: FYs 1820 to 2013*, <https://www.dhs.gov/publication/yearbook-immigration-statistics-2013-lawful-permanent-residents>.

the U.S. immigration population grew from 19,767,300 to 42,391,800.¹² Massachusetts welcomed over 75,000 of those immigrants between 2010 and 2014, resulting in an 8.0% increase in the Commonwealth's immigrant population.¹³ The limited English proficient community will likely continue to grow.

The need for language interpreting services will increase as the limited English proficient population increases. Limited English proficient individuals already make a considerable impact on the legal system. In fiscal year 2012, for example, Massachusetts courts had 90,730 in-court events with interpreters.¹⁴ Federal district courts reported using interpreters in 287,579 court events in fiscal year 2014.¹⁵ It is important that these many interpreted events are subject to minimum constitutional safeguards.

B. Inaccurate Interpretations Can Have Devastating Consequences For Criminal Defendants

This Court has often recognized that a defendant's statements during the investigative process are powerful evidence at a criminal trial. *See Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (“[T]he admissions or confessions of the prisoner ... have always ranked high in

¹² See Migration Policy Institute, *U.S. Immigrant Population and Share Over Time, 1850-Present*, <http://migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time>.

¹³ Compare 2014 Table DP02, with 2010 Table DP02.

¹⁴ See Chief Justice Carey & Spence, *Massachusetts Trial Court Language Access Plan 3* (Dec. 2014), <http://www.mass.gov/courts/docs/language-access-plan.pdf>.

¹⁵ United States Courts, *Initiatives - Annual Report 2014*, <http://www.uscourts.gov/statistics-reports/initiatives-annual-report-2014>.

the scale of incriminating evidence[.]”); *see also Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in the judgment) (noting the “indelible impact a full confession may have on the trier of fact” and that “one would have difficulty finding evidence more damaging to a criminal defendant’s plea of innocence”). Prosecutors regularly attempt to use a defendant’s out-of-court statements against him, and those statements often provide a jury with a compelling basis on which to find a defendant guilty.

Because a defendant’s own statements hold such sway, both courts and scholars recognize that complete and accurate language interpretations are essential to a fair trial. Courts have acknowledged that “an incorrect or incomplete translation is the functional equivalent of no translation: the [defendant] must be able to understand the questions posed to him and to communicate his answers to the [interrogator].” *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000). For that reason, courts have long required that an interpreter be provided for a limited English proficient defendant throughout the criminal process. *See, e.g., United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (per curiam); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970). Even the possibility that a defendant may misunderstand a question or be misunderstood in response triggers the need for an interpreter. *See Carrion*, 488 F.2d at 14 (“If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses.”). But providing a qualified interpreter at trial is insufficient if the pretrial interrogation evidence is tainted by an inaccurate interpretation. The Sixth Amendment right

to cross-examine language interpreters can expose potentially incriminating misinterpretations that can occur for a host of reasons, from human error to bias or incompetence.

1. Mistakes by professional interpreters can prejudice defendants

Even professional interpreters make mistakes. Given the difficulty of the task of interpretation, it is unavoidable that a word, phrase, or sentence eventually will be misinterpreted. *See, e.g., Mekhoukh v. Ashcroft*, 358 F.3d 118, 129 (1st Cir. 2004) (“the interpretation of Mekhoukh’s testimony was not flawless”); *Commonwealth v. Ferrer*, 759 N.E.2d 353 (Mass. App. Ct. 2001) (unpublished table decision) (acknowledging minor interpretation errors); Hovland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 Law & Ineq. 473, 481 (1993) (“Errors in interpretation are likely to occur and even if most interpreters were certified, errors would not be completely eliminated.”). As discussed above, interpretation involves complex analyses and split-second judgments.

Certain factors can increase the likelihood that an interpreter makes a mistake. *See Pistone & Schrag, The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 66 (2001) (discussing factors that lead to interpretation mistakes). For example, a witness may mumble or speak in unfamiliar slang or jargon. Or the interpreter may misunderstand the context and therefore misinterpret the word or phrase. An interpreter may not understand an idiomatic expression, regional expression or dialect, or have the particular cultural sensitivity necessary to understand the statement. Any of those circumstances could result

in a mistranslation that incriminates a limited English proficient defendant.

2. Unskilled interpreters only exacerbate the potential for prejudice

The Department of Justice has “strongly encouraged” “the use of certified interpreters” “[w]here individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the contexts of courtrooms and custodial or other police interrogations.” Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,461 (June 18, 2002). The Department thus recognizes that interpretations by uncertified interpreters expose limited English proficient suspects to an increased risk of inaccuracies and mistakes, which can lead to a false arrest or false conviction. Nevertheless, law enforcement agencies continue to rely on self-identified police interpreters.¹⁶ That practice wrongly assumes that the ability to speak two languages qualifies an individual to act as an interpreter. As discussed above, interpretation requires far more. Uncertified and untrained inter-

¹⁶ After the Department of Justice published its initial guidance, the Office of Justice Programs issued a supplemental statement acknowledging that “few law enforcement agencies have in place quality control measures that guarantee that staff members or other interpreters are reliable.... Too often, law enforcement agencies rely on self-identified interpreters without checking competency.” See Schofield & Alston, *Accommodating Limited English Proficiency in Law Enforcement*, http://onlineresources.wnyc.net/pb/orcdocs/LARC_Resources/LEPTopics/LE/LEPinLE/limitedenglish.htm. The statement also recognized that “the ability to speak a foreign language is not the same skill as rendering a foreign language into English or the reverse.” *Id.*

preters expose a defendant to a heightened risk of inaccuracies based on linguistic or cultural misunderstanding.

In one Massachusetts example, U.S. law enforcement officials interrogated a Honduran national using an uncertified police-officer interpreter. The suspect was accused of inappropriately kissing a five-year-old girl. Due to misinterpretations throughout the interrogation, the officers elicited a “confession” that the suspect never actually uttered. *See* Aff. of Dr. Michael O’Laughlin, *Commonwealth v. Torres*, No. 1434CR003814 (Mass. Dist. Ct. Feb. 24, 2015).

When the interrogation began, the suspect denied any wrongdoing, but the interpreter failed to translate several of the suspect’s statements. The officer attempted to suggest that the suspect kissed the girl because of the suspect’s “feelings for the girl,” but the interpreter failed to translate the question into Spanish properly. Mot. to Suppress Ex. 6 §2, *Commonwealth v. Torres*, No. 1434CR003814 (Mass. Dist. Ct. Mar. 9, 2015). The suspect tried to place the event within the context of simple friendliness and affection, saying that he liked kids a lot. The interpreter mistranslated the response into English as “he wants children.” *Id.*

The suspect then described the underlying event, explaining that the child was about to fall and that he may have brushed her lips when he picked her up and she turned her head. Instead of relaying that the suspect may have brushed against the girl’s lips when she turned, the interpreter said “in the process of her moving from cheek to cheek was probably when I kissed her.” Mot. To Suppress Ex. 6 §3. After further questioning, the suspect said that “if this was a mistake, if what I did is wrong, then I would like to apologize with

all my heart.” The interpreter translated the sentence but eliminated the qualifiers: “Says with all my heart, I would, I would, uh, ask for forgiveness.” *Id.* After several more minutes of questioning, the officer announced that the suspect was under arrest. The suspect, realizing for the first time what was about to happen, asked “for what?” or “how did we get to this point?”¹⁷ *Id.* §4.

As this example demonstrates, even seemingly minor translation errors can prejudice a suspect. The Sixth Amendment right to confrontation would allow a suspect to ask an interpreter questions that would allow the jury to evaluate his skill or accuracy.

C. This Court Should Resolve The Division Among The Circuits To Benefit Both The Interpreter Profession And Limited English Proficient Defendants

The Ninth Circuit’s holding that the Confrontation Clause exempted from cross-examination the interpreter who assisted the government during its interrogation of petitioner was based on the “language conduit” theory. *See* Pet. App. 11a. Under that approach, courts determine whether an interpreter is acting as a “language conduit” by considering a variety of factors such as “which party supplied the interpreter, whether the interpreter had any motive to mislead or distort,

¹⁷ Fortunately, an expert was able to identify the interpretation errors in the recorded interrogation. The suspect’s statements to the officers were ultimately suppressed and the defendant was found not guilty. *See* Mem. of Decision, *Commonwealth v. Torres*, No. 1434CR003814 (Mass. Dist. Ct. Mar. 25, 2015); Verdict, *Commonwealth v. Torres*, No. 1434CR003814 (Mass. Dist. Ct. Apr. 29, 2015). But had the interrogation not been recorded and analyzed by an expert, the officer’s interpretation likely would have been admitted.

the interpreter's qualifications and language skill." *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991). If, under those factors, an interpreter is found to be a "language conduit," then "the interpreter's statements [are] attributed to the defendant," *id.*, and the Confrontation Clause does not apply. In other words, the English words selected by the interpreter are "viewed as the defendant's own, and the defendant cannot claim that he was denied the opportunity to confront himself." *Orm Hieng*, 679 F.3d at 1139. The Fourth and Fifth Circuits follow the same approach. *See United States v. Shubin*, 722 F.3d 233, 248 (4th Cir. 2013) ("The interpreter was nothing more than a language conduit."); *United States v. Budha*, 495 F. App'x 452, 454 (5th Cir. 2012) (*per curiam*) (similar).

The Eleventh Circuit, in contrast, holds that a language interpreter must be made available for cross-examination if the prosecution intends to rely on an out-of-court interpretation in court. *See Charles*, 722 F.3d at 1330-1331. The court refused to apply the "language conduit" theory to the Confrontation Clause. *See id.* at 1327.

Neither the First Circuit nor the Supreme Judicial Court of Massachusetts has considered whether a criminal defendant has a right to confront an interpreter before an interpretation is offered in court. MACI and its members are therefore left to guess which path those courts will take and the rules that will govern their language services. The Sixth Amendment rights of limited English proficient defendants should not vary according to the jurisdiction where they happen to be tried. As it stands now, a Spanish-speaking defendant in a California federal court can be prevented from confronting his interpreter at trial and exposing to the jury the interpreter's mistakes. But in the federal courts in Florida,

that same defendant has a right to question his interpreter and identify contextual inaccuracies or flawed interpretations. The disparate treatment is untenable.

This case presents an ideal opportunity for the Court to resolve the split and clarify that the Confrontation Clause contains no exceptions for out-of-court language interpretations. Doing so would improve the quality of interpreting services in the criminal justice system. Faced with the prospect of cross-examination, interpreters will rightly be held to the highest professional standards. And law enforcement officials will be more likely to employ qualified, professional interpreters if they know that the interpreter can be tested at trial. The increased use of qualified, professional interpreters will in turn ensure that limited English proficient individuals can communicate effectively with law enforcement officials and limit the risk of falsely incriminating interpretations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN JAY ROM
ROM LAW PC
14 Mansfield Drive
Chelmsford, MA 01824

PAUL R.Q. WOLFSON
Counsel of Record
JEANNIE RHEE
DEREK WOODMAN*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

**Admitted to practice in the State of Michigan. Supervision by members of the firm who are members of the District of Columbia Bar.*

MARCH 2016