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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes there is a circuit split on the propriety of the language conduit test, *i.e.*, whether an interpreter's translation of foreign-language statements is properly attributable to the foreign-language declarant for Confrontation Clause purposes on the ground that the interpreter was a mere "language conduit." Certiorari is warranted here because the language conduit test was the sole rationale relied upon by the district court and Ninth Circuit in rejecting Petitioner's Confrontation Clause claim. *See* Part I, *infra*. That test shielded from cross-examination the DHS interpreter whose formal out-of-court English translation and self-serving *ex parte* affidavit were unquestionably the critical pieces of evidence against Petitioner, who cannot read, speak, or understand English. Tellingly, the government does not defend the language conduit test on its merits. *See* Pet. 25-36 (explaining why the test is inconsistent with the Confrontation Clause).

Realizing that this case directly implicates the circuit split on the survival of the language conduit test post-*Crawford*, the government attempts to conjure up an alternative basis for affirmance. Making an argument never advanced in the court below, the government primarily hypothesizes that Petitioner's signature on a copy of the government's English translation means that Petitioner "adopted" the translation—*even though she could not possibly read or understand what it said*—and thus she has no Confrontation Clause rights. BIO 8-10, 13-15.

But whether or not a translated statement is signed is a distinction without a difference for Sixth Amendment purposes. Even the government recognizes that a suspect cannot "adopt" a statement that she cannot understand. Thus, the government concedes, as it must, that Petitioner's signature is meaningless *unless* she had been accurately apprised of the translation's contents by the DHS interpreter, such that the English words can be seen as Petitioner's own. BIO 9, 13. The relevant question thus remains whether the Confrontation Clause allows the accuracy and trustworthiness of a translated statement to be made by a judge using *ex parte* affidavits, as the government argues; or instead must be made by a jury relying on witness testimony, as Petitioner argues. *See* Part II, *infra*. The fact that a translated statement has been "signed" simply begs the question of whether the translation was accurate in the first place.

Accordingly, at the very first step, the government's signature-as-adoption "distinction" just repackages the language conduit test that the courts below used. The government's attempt to reframe the issue fails, because in all translator cases, the government proffers the same legal fictions to argue that a defendant unwittingly adopted a translation. For example, in *United States v. Charles*, 722 F.3d 1319, 1325-27 (11th Cir. 2013), the Eleventh Circuit rejected the government's argument that the translator and defendant had impliedly adopted each other's statements under Federal Rule of Evidence 801(d)(2)—*the same rule the government invokes here*. BIO 8-9.

Regardless of the name the government gives its theory, it has always involved the same analysis and served the same purpose: to obtain a conviction based on an out-of-court translation, without ever allowing the translator to be cross-examined.

Thus, the *sole* reason the government can muster for denying certiorari here is that this case directly implicates the exact same legal questions as the cases that the government concedes have resulted in a split. The petition for a writ of certiorari should be granted.

I. The Government's Concessions Confirm Certiorari Is Warranted.

The government first acknowledges that the district court and Ninth Circuit both rejected Petitioner's Confrontation Clause claim *exclusively* on the ground that the language conduit test did not require the government to make the DHS interpreter available for confrontation. BIO 5-6. The government then concedes that "disagreement has emerged among courts of appeals concerning the application of the Confrontation Clause to certain translated statements" pursuant to the language conduit test. BIO 11. Citing the very same cases that Petitioner presented, *see* Pet. 16-23, the government acknowledges that "[t]hree courts of appeals have found no Confrontation Clause problem in such testimony following *Crawford*," but "[o]ne court of appeals has reached a contrary conclusion." BIO 11-12 (citing *Charles*, 722 F.3d at 1321; *United States v. Shibin*, 722 F.3d 233, 235, 248 (4th Cir. 2013); *United States v. Budha*, 495 F. App'x

452, 454 (5th Cir. 2012); *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012)). The government also confirms that state appellate courts are split on the issue. BIO 12 n.4.

While the government perfunctorily claims that this Court should wait for further percolation—because "*only* four courts of appeals have addressed the continuing validity" of the language conduit test, BIO 14 (emphasis added)—a 3-1 split is more than sufficient to warrant certiorari, especially given the unchallenged evidence that those four circuits hear the vast majority of cases involving translators. *See* Pet. 24-25.

The government next claims that a formal translation compiled by a government employee during a police interrogation is actually not "testimonial." BIO 10. But the government admitted below that the interpreter here "relayed testimonial statements and questions designed to elicit them." Response to Petition for Rehearing En Banc 15. In any event, the government acknowledges there is a circuit split on this question. *See* BIO 13, 15.

The government also concedes that the trial court here directly relied on an *ex parte* "sworn declaration from the interpreter" that listed her credentials and swore that her translation was "'true, accurate, and to the best of [her] ability.'" BIO 5 n.2. But the government never responds to Petitioner's argument that the "Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits." *Melendez-Diaz v. Massachusetts*, 557 U.S.

305, 329 (2007); Pet. 30. Nor does the government respond to this Court's warning that a government-employed translator "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." 557 U.S. at 318; Pet. 38.

In sum, the government concedes that the decisions below rest squarely on an important issue of constitutional law on which the circuits are split. If allowed to stand, the decision below would permit the same abuses that this Court has held the Confrontation Clause was designed to prevent. Pet. 28-35. These concessions are more than enough to warrant certiorari.

II. The Fact That A Translated Statement Was Signed By The Defendant Is Irrelevant For Sixth Amendment Purposes.

The sole ground offered by the government for why this Court should deny review is that the ICE agent and the DHS translator who interrogated Petitioner told her to sign a copy of the government's English translation, which consisted entirely of words that Petitioner *did not write, did not speak, and did not understand*. BIO 8-10, 13-15. The government's reliance on this fact as a distinguishing characteristic is a red herring, because it simply repackages the language conduit theory and begs the question.

1. Standing alone, the fact that Petitioner unwittingly signed the translated English statement is irrelevant. As the government itself acknowledges,

Petitioner's signature could have adopted the translated statement *only* if the government shows that Petitioner was meaningfully "apprised of the statement's contents" by the DHS interpreter. BIO 9; *see also* BIO 13 (same). Accordingly, the government's newfound argument—just like the language conduit test—depends entirely on whether the translator was trustworthy and the translation was accurate, such that it could represent Petitioner's own words. Pet. App. 12a-14a. Also just like the language conduit test, the government claims that these accuracy and trustworthiness determinations can be made by a judge relying on the DHS interpreter's out-of-court, *ex parte* affidavit swearing that her work was "'true, accurate, and to the best of [her] ability.'" BIO 5 n.2. When viewed in this light, it is clear that the government's signature-as-adoption theory just restates the language conduit test, both in its purpose and in its methodology.

The entire point of Petitioner's claim is that the only way to know whether she was accurately "apprised of the [English] statement's contents" by the DHS interpreter, BIO 9, would be to call the interpreter and subject her to cross-examination about the accuracy of her work and what she told Petitioner—which is precisely what Petitioner demanded at trial and the government refused to allow.

In other words, regardless of whether there was a signature, the central question in this case is the same: under the Confrontation Clause, who gets to decide whether a testimonial translation is accurate and whether the translator had an incentive to mislead—

the trial judge, or the jury? The government's reliance on the signature just begs the question. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

Given this, it is unsurprising that the government never raised the signature theory at the Ninth Circuit, which—like the district court—relied exclusively on the language conduit test and never found the signature to be a distinguishing or even relevant fact. Tellingly, the government's opposition to rehearing *en banc* on the language conduit issue never even *mentioned* that the translation was signed, let alone that the signature was a critical fact. This confirms that the government's newfound reliance on the signature is a makeweight distinction.

The government's dissembling is nothing new. In all translation cases, the government relies on the same theory but occasionally calls it something different. For example, in *Charles* the government contended that a government translator was the defendant's implied "agent" and thus the translation was a party admission under the Federal Rules of Evidence. *Charles*, 722 F.3d at 1325-27. As the government acknowledges, the Eleventh Circuit rejected that claim, holding that even if the Federal Rules of Evidence would attribute the translation to the defendant, "that would not make 'the interpreter's statements … the same as the defendant's own statements' for purposes of the Confrontation Clause." BIO 13 (quoting *Charles*,

722 F.3d at 1325, 1326). The same conclusion applies here.

2. In its attempt to create a vehicle issue here, the government heavily relies on a footnote in *United States v. Frank*, 599 F.3d 1221, 1240 n.21 (11th Cir. 2010), to claim that Petitioner's Confrontation Clause claim would fail even in the Eleventh Circuit, which later rejected the language conduit test in *Charles*. BIO 9, 13-14. In reality, *Frank* shows that Petitioner actually would have prevailed in the Eleventh Circuit—and thus confirms the circuit split. The government argues that *Frank* found no Confrontation Clause violation because the defendant had signed his translated confession. BIO 9, 13-14. But in fact, Frank's Confrontation Clause claim actually failed because *"defense counsel had full opportunity to develop [the translator's] testimony through cross-examination" taken in the presence of the defendant.* United States' Motion to Admit Deposition of Witness Seng Leena at 2, 5, *United States v. Frank*, No. 04-cr-20778 (S.D. Fla. Nov. 9, 2006), ECF No. 155 (emphasis added). In other words, notwithstanding his signed confession, Frank was still allowed to fully cross-examine his accuser—an opportunity that the government refused to provide to Petitioner. [1]

[1] The translator in *Frank* could not attend trial, so the government flew him from Cambodia, and the parties deposed him before trial—a procedure that *Crawford* expressly endorsed. *See* 541 U.S. at 57.

Accordingly, far from helping the government, *Frank* actually confirms there is a circuit split *even when the defendant signed the translation.* Courts rejecting the language conduit theory do so regardless of whether a translated statement was signed by the defendant. The prosecutors here refused to make the DHS interpreter available at *any* time for *any* kind of questioning by defense counsel, and instead offered a self-serving *ex parte* affidavit. C.A.E. 50. But in the Eleventh Circuit, a defendant in the exact same circumstances would have the opportunity to fully cross-examine the translator face-to-face, regardless of the fact that the defendant had signed the translation.

Because the government's attempts to distinguish this case all collapse back into the same language conduit test, and because the government concedes there is a circuit split on that issue, the Court should grant the petition.

III. The Government's Ploy To Insulate Itself From The Confrontation Clause Is A Reason To Grant Certiorari.

Another critical flaw in the government's signature-as-adoption theory is that it erroneously suggests that the rules of evidence can trump the Confrontation Clause. *See, e.g.*, BIO 8-9 (citing the Federal Rules of Evidence for why the government did not have to call the DHS interpreter). This Court has repeatedly rejected the argument that the Confrontation Clause's "application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time

being.'" *Crawford*, 541 U.S. at 50-51; *accord Melendez-Diaz*, 557 U.S. at 321 (even if test results qualified under hearsay exception for business records, "their authors would be subject to confrontation nonetheless"). Certiorari is warranted here to reject the government's argument once again.

1. Relying on the rules of evidence, the government claims that the translation represented "what petitioner had told" the interrogating officer. BIO 4. But no one can dispute that the translation was actually "what *the DHS interpreter* had told" the interrogating officer. No amount of hand-waiving or reliance on the rules of evidence can change the fact that the English words in the "confession" were literally those of the DHS interpreter, not Petitioner, who had no ability to understand what the English statement said. Petitioner's *amici*—professional court interpreters and linguistic professors—fully agree on this point.[2]

Accordingly, just like in *Charles*, Petitioner "is the declarant of her out-of-court [Chinese] language statements and the language interpreter is the declarant of [the] out-of-court English language statements." 722 F.3d at 1324. Because the DHS interpreter was the declarant of the testimonial translation, the government was required to make the interpreter available for questioning, regardless of what the rules of evidence said. *Melendez-Diaz*, 557 U.S. at 324 ("Whether or not they qualify as business or

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[2] *See Amicus* Br. of Mass. Ass'n of Court Interpreters 6-14; *Amicus* Br. of Interpreting and Translation Professors 8-11.

official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment."); Pet. 26-27.

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the government tried the very same tactic of relying on legal fictions to avoid having the *true declarant* testify before a jury. The government insisted that the rules of evidence permitted a surrogate witness to testify, rather than the person who had actually prepared the critical lab test certificate—and therefore the Confrontation Clause was satisfied. *Id.* at 655-56. This Court properly rejected the government's surrogate theory for the simple reason that the Confrontation Clause does not permit surrogate witnesses, who are wholly inadequate for confrontation. *Id.* at 661 ("[T]he analysts who write reports that the prosecution introduces must be made available for confrontation ….").

The Eleventh Circuit applied this rule in *Charles* and held that even if Federal Rule of Evidence 801(d)(2)—the same rule the government uses here[3]—would attribute a translation to the defendant, "that would not make 'the interpreter's statements … the same as the defendant's own statements' for purposes

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[3] *See* BIO 8-9; Ninth Circuit Answering Br. for United States 23 (noting that language conduit theory "rests on a Rule 801(d)(2) agency theory").

of the Confrontation Clause." BIO 13 (quoting *Charles*, 722 F.3d at 1325, 1326).

Here, the government likewise offered the translation through a wholly inadequate surrogate—ICE agent Ryan Faulkner, who admitted he was "completely reliant" on the DHS interpreter and had no idea what the interpreter told Petitioner. C.A.E. 497. The same rule applies here as in *Bullcoming* and *Charles*: regardless of the legal fictions and rules of evidence the government might employ to "attribute" the DHS translator's statement to Petitioner, the fact remains that Petitioner was convicted based on a formal, out-of-court statement made by the DHS interpreter, and that is why the government was required to call the interpreter.

2. This case illustrates why the Confrontation Clause does not depend on the rules of evidence. In its attempt to avoid the consequences of one overreach (the failure to make the DHS interpreter available), the government hides behind another: the fact that two government law enforcement employees told Petitioner to sign a statement written in a language she cannot understand. Far from curbing government abuses as the Confrontation Clause was designed to do, the government's theory would actually encourage abuse, especially in the context of defendants with language barriers. Government-paid translators interrogating non-English-speaking suspects could write down falsely incriminating English "confessions" and then have the suspects unwittingly initial them—thereby ensuring the suspects will not only be convicted but will be

unable even to call the government translators for questioning.[4]

The government's suggestion that it can rely on legal fictions to obtain a conviction at any cost is reminiscent of inquisitorial regimes whose abuses gave rise to the Sixth Amendment. *See Crawford*, 541 U.S. at 43-44. For this additional reason, the government's reliance on the signature-as-adoption theory must be rejected.

* * *

The government concedes that the courts below rejected Petitioner's Confrontation Clause claim based solely on the language conduit test. The government also concedes there is a circuit split on that issue. Certiorari is therefore warranted, despite the government's attempt to reframe its own merits arguments as vehicle issues.

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[4] This example is hardly an exaggeration. *See Amicus* Br. of Mass. Ass'n of Court Interpreters 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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