No. 19-5936

In the Supreme Court of the United States

CESAR ROSARIO LOPEZ-RAMOS,

Petitioner,

v.

MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR MINNESOTA IN OPPOSITION

KEITH M. ELLISON
Minnesota Attorney General

JOSEPH M. SANOW
Nobles County Attorney

TRAVIS J. SMITH
Special Assistant County Attorney
Counsel of Record

2651 Broadway Avenue
Slayton, MN 56172
travis@smithjohnsonlaw.com
(507) 836-6541

QUESTION PRESENTED

Whether admission at trial of statements made to police by a criminal defendant through an interpreter implicates the Confrontation Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

In the Supreme Court of the United States

No. 19-5936

CESAR ROSARIO LOPEZ-RAMOS,

Petitioner,

v.

MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR MINNESOTA IN OPPOSITION

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (Pet. App. A1-A12) is reported at *State v. Lopez-Ramos*, 929 N.W.2d 414 (Minn. 2019). The published opinion of the Minnesota Court of Appeals (Pet. App. B1-B10) is reported at *State v. Lopez-Ramos*, 913 N.W.2d 695 (Minn. Ct. App. 2018). The district court's verbal order denying petitioner's motion to exclude (Pet. App. C1-C7) is not reported.

JURISDICTION

The Minnesota Supreme Court issued its decision on June 12, 2019 and entered judgment on June 28, 2019. The petition for writ of certiorari was filed on September 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

ARGUMENT

This case presents a question that, as one circuit judge has observed, does not usually vex courts facing Confrontation Clause challenges: who is the declarant of an out-of-court statement? *See United States v. Charles*, 722 F.3d 1319, 1332 (11th Cir. 2013) (Marcus, Circuit J., concurring) (explaining that this question does not ordinarily trouble courts because "the answer is usually obvious"). At no point, either before or since *Crawford*, has this Court confronted a case where the identity of the declarant was in question.

But resolution of the present case turns on the answer to this question for a very simple reason: if Petitioner is—as the Minnesota Supreme Court held—the declarant of the statements he made through an interpreter, the Confrontation Clause does not apply, and the analysis is over. This is so because the Sixth Amendment cannot compel what the Fifth Amendment forbids. On the other hand, if the interpreter is the declarant the analysis is just beginning and several other questions must be answered, including: what

precisely are the statements the interpreter is making? Are those statements hearsay? If so, are they testimonial?

Petitioner argues that this Court's decisions in *Crawford v. Washington* 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), are incompatible with the majority approach to this issue as typified by *United States v. Nazemian,* 948 F.2d 522 (9th Cir. 1991). Petitioner further contends that the Eleventh Circuit's decision in *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013), which explicitly rejected the *Nazemian* approach, created a split between the federal circuits, and that this Court should resolve that split.

Nonetheless, this Court should deny certiorari for two reasons. First, the circuit split is not deep, and insofar as the circuit split was created by the Eleventh Circuit's decision in *Charles*, the split was created by dicta. Second, the Minnesota Supreme Court's decision is correct and is not, despite Petitioner's protestations to the contrary, in conflict with this Court's decisions in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

1. THE CIRCUIT SPLIT IS PERCEIVED RATHER THAN REAL.

Petitioner claims there is "profound and deepening disagreement among the lower courts." Pet. 6. But this assessment exaggerates the level of disagreement amongst the lower courts. Indeed, since this Court decided *Crawford*, only four of the federal circuits have addressed the question

presented and their treatment of the question has generally been brief, unnecessary to the result, or both.

State authority on the question presented is similarly scarce. The Minnesota Supreme Court is the only state court of last resort to have considered and decided this question.[1] And only five state intermediate appellate courts have done likewise post-*Crawford*.[2] Moreover, none of the

---

[1] The Massachusetts' Supreme Judicial Court has explicitly refused to answer this question. *Com. v. AdonSoto*, 58 N.E.3d 305, 314 (Mass. 2016). (explaining that "we decline to wade into this thicket of unsettled constitutional principles where, at least as concerns the Sixth Amendment, the Supreme Court has not yet provided guidance, and where, in any event, it is unnecessary to do so because we can decide the issue in this case on State constitutional grounds.").

[2] Of those intermediate appellate courts, four have rejected Confrontation Clause challenges to the admission of interpreted statements and three have done so in plain or harmless error postures. *See People v. Jackson*, 808 N.W.2d 541, 552 (Mich. Ct. App. 2011) (holding on plain error review that defendant did not have a constitutional right to confront nurse who interpreted hand-squeezes during officer's questioning of witness because what she reported were properly considered to be the witness' statements and "[d]efendant had a full opportunity to cross-examine [the witness], thus satisfying his Confrontation Clause rights."); *State v. Sierra-Depina*, 213 P.3d 863, 866 (Or. Ct. App. 2009) (holding that "any error in admitting the interpreter's statements was harmless" and therefore refusing to "address the question of whether it was error under the federal constitution to admit them."); *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. Ct. App. 2008) (holding that "[a]lthough a police interrogation is a testimonial setting, the testimony was being given by [the defendant] while [the interpreter]'s function was to translate the testimony. … Under the language conduit rule, however, the statements of the translator are considered to be the statements of the declarant, and [the defendant] would not have the right to, in essence, confront himself."); *People v. Morel*, 798 N.Y.S.2d 315, 318-19 (N.Y. App. Div. 2005) (concluding that, while defendant's Confrontation Clause claim was not preserved for appellate review, if the court were to address it in the interests of justice, "[w]hile defendant's statements were arguably testimonial in that they resulted from 'structured police questioning' albeit of a noncustodial nature, the translator was not subject to police questioning, and … was not a declarant within the normal sense of the term.").

(Footnote continued on next page.)

courts that have considered whether the admission of a criminal defendant's interpreted out-of-court statements implicates the Confrontation Clause have addressed the impact of this Court's decision in *Ohio v. Clark,* 135 S. Ct. 2173 (2015), on the resolution of that question. Accordingly, this Court's review is not warranted at this time.

As Petitioner correctly notes, the vast majority of jurisdictions that have considered whether the Confrontation Clause applies to a criminal defendant's interpreted out of court statements have adopted the approach of the Ninth Circuit in *Nazemian.* Pet. 6 n.1. There, the Ninth Circuit concluded that the appropriate approach to resolving this question is to consider on "a case-by-case basis whether the translated statements fairly should be considered the statements of the speaker." *Nazemian,* 948 F.2d at 527.

To that end, the Ninth Circuit identified various factors for district courts to consider when deciding "whether the interpreter's statements should be attributed to the defendant under either the agency or conduit theory." *Id.* Among those factors are "which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's

---

Only one state intermediate appellate court, the Maryland Court of Special Appeals, has reached a contrary conclusion. *See Taylor v. State*, 130 A.3d 509, 539–40 (Md. Ct. Spec. App. 2016) (adopting *Charles* as "the correct application of current law" and holding that the interpreter was the declarant of statements made by defendant to police).

qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." *Id.* Thus, "[a] defendant and an interpreter are treated as identical for testimonial purposes if the interpreter acted as a 'mere language conduit' or agent of the defendant." *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 775 (2012); *see also United States* v. *Shibin*, 722 F.3d 233, 248 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014); *United States* v. *Budha*, 495 Fed. Appx. 452, 454 (5th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1243 (2013). Indeed, both the trial court and the Minnesota Court of Appeals resolved this case using the *Nazemian* approach. Pet. Appx. C6-7; *State v. Lopez-Ramos*, 913 N.W.2d 695, 708 (Minn. Ct. App. 2018), aff'd, 929 N.W.2d 414 (Minn. 2019).

A. The federal circuits have not engaged in extensive analysis of the question presented post-*Crawford*.

Since *Crawford* only four courts of appeals have addressed Confrontation Clause challenges to the admissibility of out-of-court interpreted statements. Of those four circuits, three – the Fourth, Fifth, and Ninth – have rejected those challenges in cases involving plain error or in an unpublished decision. *Shibin*, 722 F.3d at 248-9; *Budha*, 495 Fed. Appx. at 454; *Orm Hieng*, 679 F.3d at 1140. The Eleventh Circuit's approach is admittedly more complicated and will be addressed later.

Out of these cases, the most significant analysis was undertaken by the Ninth Circuit in *Orm Hieng*. There, in a few paragraphs the Ninth Circuit analyzed whether *Crawford* and its progeny had "undercut the theory or reasoning underlying [*Nazemian*] in such a way that the cases are clearly irreconcilable." 679 F.3d at 1139.

After briefly examining this Court's decisions in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the *Orm Hieng* court concluded that while these decisions make it clear that the Sixth Amendment requires an opportunity to confront the declarant of a statement, "[t]hey do not address the question whether, when a speaker makes a statement through an interpreter, the Sixth Amendment requires the court to attribute the statement to the interpreter." 679 F.3d at 1140. Accordingly, the Ninth Circuit concluded that these cases were not in direct conflict with *Nazemian* and that, as a three-judge panel, they were required to apply *Nazemian*. *See also United States v. Ye*, 808 F.3d 395, 401 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 2462 (reiterating that "*Nazemian* remains binding circuit precedent because it is not clearly irreconcilable with *Crawford* and its progeny.")

The Fifth Circuit expressed its agreement with this conclusion in a one-paragraph discussion in the unpublished decision *United States v. Budha*, 495 Fed. Appx. 452, 454 (5th Cir. 2012). And the Fourth Circuit took a similar approach in *United States v. Shibin* where it rejected a Confrontation Clause

claim on plain-error review, noting that the interpreted statements of a witness "were introduced as prior inconsistent statements" and concluding that "[t]he interpreter was nothing more than a language conduit." 722 F.3d at 248 (4th Cir. 2013).

B. The perceived circuit split was created by dicta in *Charles*.

Petitioner argues that the Eleventh Circuit created a split in the federal circuits with its decision in *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013). In *Charles,* the Eleventh Circuit began with the assumption that "[a]s an initial matter, there is no debate that the *statements of the interpreter* as to what Charles said are '*testimonial*.'" *Id.* at 1323 (emphasis added).[3] The court went on to argue that "given the nature of language interpretation, the statements of the language interpreter and Charles are not one and the same." *Id.* at 1324. Accordingly, the court said that "for purposes of the Confrontation Clause, there are two sets of testimonial statements that were made out-of-court by two different declarants[,] … and the language interpreter is the declarant of her out-of-court English language statements." *Id.* Admittedly, this approach appears to be diametrically opposed to the majority approach typified by *Nazemian*.

[3] As will be discussed in greater depth later, this assumption is untenable in light of this Court's decisions in *Michigan v. Bryant,* 562 U.S. 344 (2011), *Ohio v. Clark,* 135 S. Ct. 2173 (2015), and *Williams v. Illinois*, 567 U.S. 50 (2012).

But Petitioner overstates the depth and profundity of the divide in the circuits on this issue. First of all, the *Charles* court's entire discussion of the nature of language translation was dicta. The *Charles* court reviewed the appellant's claim "for plain error because Charles did not object during her trial to the CBP officer's testimony as a violation of her rights under the Confrontation Clause." *Charles*, 722 F.3d at 1322. The court ultimately concluded that it "[could not] say that the error in admitting the CBP officer's testimony was 'plain' as there is no binding circuit precedent (prior to our decision here) or Supreme Court precedent clearly articulating that the declarant of the statements testified to by the CBP officer is the language interpreter." *Id.* at 1331. Indeed, as Judge Marcus noted in his concurrence, "because of the posture of this case, the government primarily argued that the lack of binding precedent meant that the error was not plain, depriving us of full merits briefing on the underlying constitutional question." *Id.* at 1334 (Marcus, J. Concurring).

Therefore, the *Charles* court's musings about the nature of language translation, and its conclusion that interpreters are the declarants of statements that they have translated for others, being unnecessary for the resolution of the case, are dicta. It is universally recognized that "dicta is not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010); *see also Parents Involved in Cmty. Sch. v. Seattle Sch.*

Dist. No. 1, 551 U.S. 701, 737, 127 S. Ct. 2738, 2762 (2007) (explaining that this Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."), *accord. Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821).

C. The *Charles* dicta has never been adopted by the Eleventh Circuit.

As of the date of this brief, *Charles* has been cited in the Eleventh Circuit a total of seventeen times.[4] Of the seventeen Eleventh Circuit cases that cite *Charles*, only three even acknowledge its discussion of interpreters as declarants for the purposes of the Confrontation Clause, and none of them adopt the *Charles* court's approach.[5]

---

[4] The only other federal circuit to cite *Charles* is the Ninth Circuit. That court cited *Charles* only once and only as an example of an appellate court consulting the Department of Labor, Bureau of Statistics, Occupational Outlook Handbook. *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 929 (9th Cir. 2017).

[5] Eight cases cite *Charles* only for a recitation of the uncontroversial plain error standard of review or the circumstances under which that standard applies. *See United States v. Napolis*, 772 Fed. Appx. 786, 788 (11th Cir. 2019); *United States v. Germain*, 759 Fed. Appx. 866, 869 (11th Cir. 2019), *cert. denied,* 140 S. Ct. 161 (2019); *United States v. Osmakac*, 868 F.3d 937, 959 (11th Cir. 2017); *United States v. Matlack*, 674 Fed. Appx. 869, 871 (11th Cir. 2016); *United States v. Cruickshank*, 837 F.3d 1182, 1190–91 (11th Cir. 2016); *United States v. Persaud*, 605 Fed. Appx. 791, 796 (11th Cir. 2015); *United States v. Eady*, 591 Fed. Appx. 711, 718 (11th Cir. 2014); *United States v. Reason*, 571 Fed. Appx. 828, 830 (11th Cir. 2014).

Four cases cite *Charles* for the standard by which statements are determined to be testimonial. *See United States v. McKinney*, 713 Fed. Appx. 910, 915 (11th Cir. 2017); *United States v. Wilson*, 788 F.3d 1298, 1316 (11th Cir. 2015); *United States v. Seregin*, 568 Fed. Appx. 711, 717 (11th Cir. 2014); *United States v. McGowan*, 552 Fed. Appx. 950, 956 (11th Cir. 2014).

The remaining two cases cite to Judge Marcus' discussion of the impropriety of reaching constitutional questions when it is unnecessary to do so. *See Rosa &*

(Footnote continued on next page.)

In one such case, wherein the Confrontation Clause was not at issue, the Eleventh Circuit actually said that the *Charles* court "considered whether the District Court's admitting a defendant's out-of-court statements to an interpreter during an interview with a customs official violated the Sixth Amendment's Confrontation Clause, *and held that it did not*." *United States v. Gonzalez-Flores*, 572 Fed. Appx. 790, 792 (11th Cir. 2014) (emphasis added). This may be a somewhat strained assessment of *Charles*, but the *Charles* court held *only* that the admission of a defendant's interpreted out-of-court statement was not *plain* error. *Charles*, 722 F.3d at 1331. If the *Charles* court had *held* on the merits that the admission of a defendant's interpreted out-of-court statements violates the Confrontation Clause unless the interpreter is subject to confrontation, then the *Gonzalez-Flores* court would have been wrong. As it is, the *Gonzalez-Flores* court's assessment of *Charles* isn't exactly *wrong*, it just isn't particularly careful.

Next, in *United States v. Garcia-Solar*, the Eleventh Circuit said that the *Charles* court "found that the officer's testimony related to the interpreter's out-of-court statements, not the defendant's, … the officer could not act as a 'surrogate' for the interpreter, and his testimony did not satisfy

---

Raymond Parks Inst. for Self Dev. v. Target Corp., 812 F.3d 824, 830, n.13 (11th Cir. 2016); *Corbett v. Transportation Sec. Admin.*, 767 F.3d 1171, 1182 (11th Cir. 2014); *id.* at 1184 (Martin, J. dissenting).

the defendant's constitutionally protected right to cross-examine the interpreter." 775 Fed. Appx. 523, 529 (11th Cir. 2019). But the *Garcia-Solar* court resolved the defendant's claim on harmless error grounds. *Id.* Thus, it was not necessary for the *Garcia-Solar* court to conclude that the dicta from *Charles* was binding in order to resolve that case. Accordingly, *Garcia-Solar's* discussion of the *Charles* dicta was itself dicta.

Finally, the Eleventh Circuit's only substantive discussion of *Charles* occurred in *United States v. Curbelo*, 726 F.3d 1260 (11th Cir. 2013).[6] There, the Eleventh Circuit considered whether the admission of translated transcripts of wiretapped telephone conversations violated the Confrontation Clause. *Id.* at 1271. It held that the decision in *Charles* had no effect on the outcome in *Curbelo*. *Id.* at 1276. The court rightly noted that *Charles* was resolved against the defendant on plain error grounds, and it went on to hold that because the content of the transcripts was admitted through the testimony of a participant in the translated conversations, who independently testified to the accuracy of the transcripts and was subject to cross examination, the Confrontation Clause was satisfied. *Id.*

[6] *Curbelo* was decided only two weeks after *Charles.* The court issued its opinion in *Charles* on July 25, 2013, and it issued its opinion in *Curbelo* on August 9, 2013.

Insofar as the Eleventh Circuit has ever authoritatively interpreted *Charles,* it did so in *Curbelo*, and *Curbelo* interpreted the dicta of *Charles* very narrowly. *Curbelo* explained that "[t]he translator's only assertion in the transcripts is his or her implicit statement that the translation was accurate." *Id.* at 1272. The court went on explain that its reasoning in *Charles* was derived solely from this principle. Thus, according to the Eleventh Circuit in *Curbelo,* while "the language interpreter is the declarant of her out-of-court English language statements," *Charles*, 722 F.3d at 1324, those "statements" are limited to the interpreter's "implicit assertions about the meaning of words," because "[o]f course, the only assertions that an interpreter makes relate to this process of transferring meaning." *Curbelo*, 726 F.3d at 1273 n.8.[7]

Thus, *Curbelo* stands both for the proposition that *Charles*' discussion of language interpreters *vis-à-vis* the Confrontation Clause is dicta and that said dicta means *only* that the interpreter is a declarant only as to "his or her *implicit* statement that the translation was accurate." *Id.* at 1272. Accordingly, the Eleventh Circuit has *never* held in binding precedent that a

[7] The court helpfully explained that "[w]hen an interpreter or translator renders the French 'l'etat, c'est moi' into 'I am the state,' he is not asserting *he* is the state, but rather that 'I am the state' is an accurate rendering of what the speaker (or Louis XIV) said. It is this added layer—the translator or interpreter's implicit assertions about the meaning of words—that make 'the statements of the language interpreter and [the defendant] ... not one and the same.'" *Curbelo*, 726 F.3d at 1273 n.8. (quoting *Charles*, 722 F.3d at 1324).

language interpreter is the declarant of the assertions conveyed by statements that he or she translated into English. Therefore, insofar as there is a split in the circuits, that split was created by dicta in *Charles*, and *Curbelo* dramatically reduced the scope of that dicta.

On a final note, as of the date of this writing, *Charles* has been cited only twice by the federal district courts in the Eleventh Circuit. Neither case cited *Charles* for the proposition that admission of a defendant's interpreted statement violates the Confrontation Clause unless the interpreter is subject to cross examination.

The District Court for the Southern District of Florida cited *Charles* solely for the meager proposition that Confrontation Clause claims not raised at trial can be raised on appeal and reviewed for plain error. *Dames v. United States*, 2015 WL 13842061, at *2 (S.D. Fla. Aug. 10, 2015). The District Court for the Northern District of Georgia cited *Charles* for the proposition that "[a] defendant's own statements made directly to the testifying witness are non-hearsay under Fed. R. Civ. P. 801(d)(2)(A)." *Espinal v. United States*, 2017 WL 9439169, at *5 (N.D. Ga. Feb. 13, 2017), *report and recommendation adopted*, 2017 WL 1084526 (Mar. 21, 2017).[8]

[8] Only one federal district court, the Eastern District of Michigan, has mentioned *Charles* for the idea that admission of a defendant's interpreted statement violates the Confrontation Clause unless the interpreter is subject to
(Footnote continued on next page.)

2. THE MINNESOTA SUPREME COURT'S DECISION IS CORRECT.

The Minnesota Supreme Court's conclusion that the "use of an interpreter to translate a statement from one language to another does not implicate the Confrontation Clause … because the act of processing the statement from one language to another does not transform the interpreter into a witness against the defendant," *State v. Lopez-Ramos*, 929 N.W.2d 414, 420 (Minn. 2019), is fully consistent with this Court's Confrontation Clause jurisprudence in *Crawford* and its progeny. Despite Petitioner's assertions to the contrary, the Minnesota Supreme Court did not "impermissibly create[] an exception to the Confrontation Clause for language interpreters based on a reliability test similar to the one that Crawford already rejected." Pet. 14. Rather, the court held that under these circumstances, Petitioner himself was the declarant of the out-of-court statements at issue and the interpreter was therefore not a witness against him. *Lopez-Ramos*, 929 N.W.2d. at 423.

---

cross examination. In *Jackson v. Hoffner*, the court stated that "[p]ost-Crawford, the Eleventh Circuit Court of Appeals has held that an interpreter is the "declarant" for Confrontation Clause purposes and a defendant has a right to confront the interpreter." 2017 WL 1279232, at *9 (E.D. Mich. Apr. 6, 2017). But *Jackson* involved habeas review of a state conviction, and the court pointed to *Charles* only to show that the Michigan Court of Appeals' application of *Nazemian* to the petitioner's case was not an "unreasonable application of 'clearly established federal law, as determined by the Supreme Court.'" *Id.* (quoting 28 U.S.C. § 2254(d)). But the fact that this Court has not ruled on the question is, by itself, sufficient under 28 U.S.C. § 2254(d) to establish that the Michigan Court of Appeals did not unreasonably apply clearly established federal law. Accordingly, insofar as the court in *Jackson* opined that *Charles* created a split in the circuits, that opinion was unnecessary to resolve the question at hand.

Accordingly, unless the Sixth Amendment can compel what the Fifth Amendment forbids, the Confrontation Clause "simply has no application because [Petitioner] cannot complain that he was denied the opportunity to confront himself." *Id.* (quoting *Orm Hieng*, 679 F.3d at 1140).

But Petitioner, the *Charles* court, and the dissent in the Minnesota Supreme Court begin their analyses with the facile assumption that a criminal defendant's interpreted out-of-court statements are testimonial simply because the statements were made in the context of a police interrogation. Pet. 14; *Charles*, 722 F.3d at 1323 (asserting "as an initial matter, there is no debate that the statements of the interpreter as to what Charles said are 'testimonial.'"); *Lopez-Ramos*, 929 N.W.2d at 424 (Hudson, J., dissenting) (characterizing the interpreter's statements as "a third-party declarant's testimonial statements to the police").

But even though "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," *Crawford*, 541 U.S. at 52, one kind of police interrogation produces statements that, even if they are testimonial, *never* implicate the Confrontation Clause: interrogations of criminal defendants.

Again, unless the right to confrontation negates the privilege against self-incrimination, the Confrontation Clause cannot be implicated where the statements at issue are the statements of a criminal defendant. Accordingly,

any assertion that the statements at issue here implicate the Confrontation Clause because they occurred in the course of a police interrogation of the defendant begs the question.

Moreover, even if the interpreter is the declarant of the statements at issue, the assumption that the interpreter's statements are ipso facto testimonial is untenable in light of this Court's decisions in *Davis v. Washington*, *Michigan v. Bryant*, *Ohio v. Clark*, and *Williams v. Illinois*. For starters, this Court "made clear in *Davis* that not all those questioned by the police are witnesses and not all interrogations by law enforcement officers are subject to the Confrontation Clause." *Michigan v. Bryant*, 562 U.S. 344, 355 (2011) (internal citations and quotation marks omitted). That is, in *Davis*, this Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

In *Bryant*, this Court explained that "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Bryant*, 562 U.S. at

370. Thus, "*Davis* requires a combined inquiry that accounts for [the purposes of] both the declarant and the interrogator." *Id.* at 367.

This Court applied the principles of *Davis* and *Bryant* in *Clark*. There, this Court held that the declarant's "statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause." *Clark*, 135 S. Ct. at 2181. Therefore, it is clear from this Court's precedents that, at minimum, when attempting to determine whether a statement is testimonial, it is necessary to consider the "primary purpose" of the *declarant*.[9]

Even assuming arguendo that the interpreter was the declarant of the statements at issue here, the interpreter's primary purpose was to facilitate communication between a foreign-language speaker and the Language Line customer; that is, the interpreter's purpose was to do his job. It must be borne in mind that the question is "objective because it focuses on the understanding and purpose of a reasonable [interpreter] in the circumstances." *Bryant*, 562 U.S. at 369.

In Minnesota, when an interpreter facilitates communication between police and an arrestee, Minnesota law requires the interpreter to "take an oath, to make to the best of the interpreter's skill and judgment a true

[9] Accordingly, it would be nice to know who the declarant is before attempting to divine his or her purpose for giving a statement.

interpretation." *Lopez-Ramos*, 929 N.W.2d at 419–20 (quoting Minn. Stat. § 611.33, subd. 2 (2018)). Accordingly, a *reasonable* interpreter's primary purpose when translating a conversation is "to make to the best of the interpreter's skill and judgment a true interpretation." *Id.* Objectively, the interpreter's purpose is not, and, due to his or her lack of the foundational personal knowledge, *cannot* be, to "prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

Petitioner might point out that the officer's purpose is relevant when determining the primary purpose of the interrogation, and that because the officer's purpose was to "prove past events potentially relevant to later criminal prosecution." *Id.* But the officer was *not* interrogating the *interpreter*. Rather, he was interrogating *Petitioner*. Thus, the interpreter's purpose, to facilitate communication between Petitioner and the Officer, is independent of the purpose of the parties to the conversation. Therefore, even if the interpreter is a declarant, it is far from certain that the interpreter's statements, whatever they might be, are testimonial.

Furthermore, it is well-settled that the Confrontation Clause does not bar the admission of out-of-court statements unless those statements are offered to prove the truth of the matter asserted. *Williams*, 567 U.S. at 57; *Crawford*, 541 U.S. at 60, n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985).

Here, if the *Curbelo* Court is correct, the interpreter impliedly asserted only that the interpretation that he rendered was accurate. But the statements at issue here were not offered to prove that that the translation was accurate. They were offered to prove that Petitioner sexually penetrated the victim.[10] Therefore, if the interpreter's only statement is the implied assertion that his interpretation is accurate, the Confrontation Clause does not apply.

The dissent in the Minnesota Supreme Court reasoned that Petitioner "never said 'We [sic] had intercourse with her.' He said *something* in Spanish, and then an interpreter … said, "[Petitioner] said, 'We had intercourse with her.'" *Lopez-Ramos*, 929 N.W.2d at 424 (Hudson, J. dissenting). But the dissent acknowledged that "[o]f course, the interpreter did not literally say 'Lopez-Ramos said' before rendering each translation. But it was unquestionably implicit in the interpreter's statements … the interpreter was certainly not claiming to have had intercourse with the victim; the interpreter was saying that Lopez-Ramos said he had intercourse with her." *Id.* n.2.

Therefore, according to the dissent, the interpreter's out-of-court statement asserted something like, "Petitioner said that he had intercourse

[10] For a recitation of the statements at issue here, see the Minnesota Court of Appeals opinion. *State v. Lopez-Ramos*, 913 N.W.2d 695, 699 (Minn. Ct. App. 2018), aff'd, 929 N.W.2d 414 (Minn. 2019).

with the victim." But the State did not offer the interpreted statements to prove that Petitioner *said* them. Rather the State offered Petitioner's interpreted statements to prove that Petitioner had sexually penetrated the victim.

Therefore, even assuming arguendo that the dissent is correct, and that implied in every interpreted statement is the phrase "the defendant said," the Confrontation Clause is only implicated if the statement is offered to prove that the defendant said it. Here, that was not the case. Accordingly, the Confrontation Clause was not violated.

Petitioner also claims that the Minnesota Supreme Court adopted a bright-line rule that interpreters are never witnesses against defendants whose statements they have translated to police officers. Pet. 9. But this case did not present the court with an interpreter who was also a police officer, a co-conspirator, or even a witness in the typical sense. Furthermore, as the court noted, Petitioner never challenged the accuracy of the translation of his statements. *Lopez-Ramos*, 929 N.W.2d at 417 n.8. Thus, this case gave the supreme court no opportunity to craft a rule that would account for these or other potentially extenuating circumstances. Rather, the supreme court's opinion crafts a general rule to which future exceptions may well be possible.

Finally, the Minnesota Supreme Court's conclusion that the admission of Petitioner's translated statements did not implicate the Confrontation

Clause must be correct because a contrary conclusion would result in a host of bizarre consequences. For example, if, as *Charles* reasons, an interpreter is *always* the declarant of the translated versions of the statements that he translates, then the interpreter, not the officer, interrogated Petitioner. Are the results of an "interpreter interrogation" among the "core class" of testimonial statements? Moreover, if the interpreter is the declarant of all of the translated statements, then the only legally cognizable statements made during the entire interview were made by the interpreter. Thus, by the rule advocated by Petitioner, the interpreter here merely interrogated *himself*.

Additionally, if the interpreter rather than the foreign-language speaker, is always the declarant of statements translated into English from another language, that fact does not, and cannot, change with the scenery. When a defendant speaks through an interpreter in court, the statements made would necessarily be those of the interpreter, *not the defendant*.[11] Therefore, if interpreters are the declarants of the statements that they translate for criminal defendants, then interpreters are not only witnesses

[11] *See United States v. Solorio*, 669 F.3d 943, 951 (9th Cir. 2012) (concluding that the Confrontation Clause was not violated when an interpreter translated in-court statements of a government informant because the defendant had an opportunity to cross-examine the informant and "[t]he interpreters, who only translated [the informant's] in-court statements, were not themselves witnesses who testified against [the defendant].").

against them *out of court*, they are also witnesses against them *in court* as well.[12]

The result would be that the in-court interpreter would then need to be cross-examined as to what the defendant said. But no matter how many interpreters are used, and no matter how many times they are cross-examined, no court could ever have access to the actual statements of foreign language speakers. Such a procedure could not be resolved expect through the appearance of a *deus ex machina*.

[12] The supreme court helpfully noted that "a foreign language interpreter is more like a court reporter, [who translates] oral communications into a written format, conveying information but not adding content." *Lopez-Ramos*, 929 N.W.2d at 422. No one could legitimately contend that a court reporter is a witness against a criminal defendant. As the supreme court explained, "[w]hen that record is utilized in future proceedings, calling a court reporter to testify is illogical because the written record does not consist of the court reporter's statements but instead consists of the statements made by the actual declarants in the court proceeding." *Id.*

CONCLUSION

The Minnesota Supreme Court's decision was undoubtedly correct. If there is a split in the federal circuits, the split was created by dicta and is merely perceived rather than real. Although there is no doubt that this case provides a good vehicle for this Court to resolve the question presented, such a resolution would be premature and is unnecessary at this time. For all of these reasons, the State respectfully asks this Court to deny the petition for certiorari.

Respectfully Submitted,

JOSEPH M. SANOW
Nobles County Attorney

ADAM E. JOHNSON
Assistant County Attorney

TRAVIS J. SMITH
Special Assistant County Attorney
Counsel of Record

Smith & Johnson
2651 Broadway Avenue
Slayton, MN 56172
travis@smithjohnsonlaw.com
(507) 836-6541

22 NOVEMBER 2019