No. 24-5913

IN THE SUPREME COURT OF THE UNITED STATES

LILI TYDINGCO,
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-APPELLANT

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INTRODUCTION

As this case demonstrates, courts across the United States are divided with respect to how this Court's holdings in *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny applies to statements made by interpreters. The Respondent's position, which relies heavily on the Ninth Circuit's analysis in *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991) and the reliability test contained therein, highlights the vital need for this Court to grant certiorari and to clarify that the Confrontation Clause's cross-examination requirement applies to *all* third-party out-of-court, testimonial statements–without exception, equally across the nation.

Moreover, this Court should grant certiorari to resolve confusion and conflict in the lower courts with respect to the definition of "harboring" under the Alien Harboring Act–which may well have been outcome determinative in Mrs. Tydingco's case.

ARGUMENT

I. THE INTERPRETER'S STATEMENTS ARE TESTIMONIAL HEARSAY BY A WITNESS ADVERSE TO THE DEFENDANT.

A. The interpreter's statement is third-party hearsay.

The Respondent first restates the Ninth Circuit's reasoning in *Nazemian* and *Orm Hieng,* 679 F.3d 1131, 1149 (9th Cir. 2012), and argues that Mrs. Tydingco's interpreter served merely as her "language conduit" and accordingly, that Mrs. Tydingco herself was the declarant. (Opp. at 10.). However, as the Eleventh Circuit explained in *Charles*, "the statements of the language interpreter and [the defendant] are not one and the same." *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir.

2013). The *Charles* court explained that "[r]ather than word for word … interpreters render meaning by reproducing the full content of the ideas being expressed. Interpreters do not interpret words; they interpret concepts." *Id.* at 1324 (internal quotation omitted). The court further explained that "there are many forces, such as differences in dialect and unfamiliarity of colloquial expressions, which 'operate to frustrate the interpretation of semantic meaning.'" *Id.* at 1324 (quoting Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1035 (2007)). Similarly, in *Taylor v. State*, the Court of Special Appeals of Maryland held that "By treating [the interpreter] as nothing more than a neutral mouthpiece through which [the defendant's] messages passed without being affected in any way, the State asks us to endorse a fallacy or misconception that ignores the reality of language interpretation." 226 Md. App. 317, 349-50 (2016), *see also United States v. Orm Hieng*, 679 F.3d 1131, 1149 (9th Cir. 2012) (Berzon, J., concurring) ("[t]ranslation from one language to another is much less of a science than conducting laboratory tests, and so much more subject to error and dispute.").

This finding is also supported by recent scholarship. *See, e.g.,* Alicia Neumann, *Criminal Law: Incompatible Approaches to Interpreters' Translations: Protecting Defendants' Right to Confront – State v. Lopez-Ramos, 929 N.W.2d 2d 414*, 47 MITCHELL HAMLINE L. REV. 751, 772 (2021) ("Interpreters regularly disagree about the proper translation of a statement because interpreters' use of discretion while translating ultimately impacts the end result of a translation. Interpreters invoke their discretion to use 'more (or less) polite language, … inject or omit hesitation; use

more formal … language; or introduce ambiguities.'" (quoting Casen B. Ross, *Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. CHI. L. REV. 1931, 1965-66 (2014)); Said M. Shiyab, *Translation as a Subjective and Creative Act: Choices and Constraints*, 23 GLOBAL JOURNAL OF HUMAN SOCIAL SCIENCE: LINGUISTICS & EDUCATION 35, 36 (2023). ("Translators' perception of a text is a crucial aspect of the translation process, as it influences how they interpret and convey the meaning of the source text into the target language. Translators' perception of the text is shaped by a range of factors, such as their linguistic and cultural background, their personal experiences and beliefs, and their knowledge of the subject matter and context of the text.").

In this instance, concerns regarding the quality of the interpreter's translations are particularly potent given how little is known about Mrs. Tydingco's interpreters' identity and qualifications; Officer Muna did not know what dialect the interpreter was speaking, what her qualifications were, whether she had graduated from high school or college, or even her name. (Pet. at 4-5). Accordingly, because the interpreter's description of Mrs. Tydingco's Chinese-language statements cannot be directly attributed to Mrs. Tydingco, the interpreter is the declarant and this Court's holding in *Crawford* should apply.

B. The interpreter's statements are testimonial.

In their Opposition, the Respondent states that the interpreter's statements were not testimonial because: (1) the interpreter's purpose was a mechanical one; and

(2) because they claim that the purpose of the CBP interview was to process Xinyi's parole and not to enable a future prosecution. (Opp. at 16).

First, the Respondent's argument, for which it offered no legal authority, that the interpreter's statements are not testimonial because their purpose was "mechanical", (Opp. at 16), lacks merit and is directly contradicted by this Court's holdings in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 310 (2009). In those cases, this Court found that forensic analysis and blood alcohol analysis conducted in anticipation of litigation constituted testimonial statements that were not exempt from the confrontation requirement.

In *Bullcoming*, this Court found that a blood-alcohol report describing analysis that was conducted using a gas chromatograph machine constituted a "testimonial" statement that was subject to the confrontation requirement. 564 U.S. at 647. There, this Court rejected the New Mexico Supreme Court's argument that the analyst had "simply transcribed the result generated by the gas chromograph machine" and that the analyst's role was that of "mere scrivener." *Id.* at 656. This Court found that such analysis raised "red flags" for several reasons, including that "[m]ost witnesses testify to their observations of factual conditions or events." *Id.* at 660. As in *Bullcoming*, in the instant case, it is irrelevant that the interpreter would have merely testified as to her supposedly "mechanical" interpretation of Mrs. Tydingco's statements.

Similarly, in *Melendez-Diaz*, this Court found that there was "little doubt" that certificates of analysis showing the results of forensic analysis performed on seized

bags of cocaine fell within the "core class of testimonial statements" described in *Crawford*. 557 U.S. at 310. In *Melendez-Diaz*, this Court rejected the contention that the testimony at issue was not subject to the confrontation clause because it was the "result of neutral, scientific testing." *Id.* at 318. Instead, the Court noted that it was not clear that "what respondent call[ed] 'neutral scientific testing' is as neutral or as reliable as respondent suggests" and that forensic analysts could be subject to influence and manipulation, and may even be incentivized to "alter the evidence in a manner favorable to the prosecution." *Id.* In each of those cases, this Court soundly rejected any contention that supposedly "neutral" scientific testing was exempted from the requirements of Confrontation Clause. The Respondent's argument that translation serves a merely "mechanical" purpose should be rejected for similar reasons here.

Second, the Respondent contended that secondary inspection is solely intended to determine the traveler's admissibility into the United States, not for law enforcement purposes, and accordingly the interpreter's statements were non-testimonial. (Opp. at 16). However, in *Charles*, the Eleventh Circuit confronted a nearly identical fact pattern, wherein the defendant had arrived at the Miami International Airport and then was sent to secondary inspection, where he was interrogated by a Customs and Border Patrol (CBP) officer via an interpreter. 722 F.3d at 1321. There, the lower court found that there was "no debate" that the statements of the interpreter as to what the defendant had said in Creole were testimonial. *Id.* at 1323.

Further, although the Respondent argues that statements made for the purpose of immigration processing do not qualify as testimonial, the cases to which they cite are distinguishable insofar as their findings were made with respect to annotations on immigration forms, not with respect to statements made during a secondary interrogation led by a CBP agent at the U.S. border. *United States v. Santos*, 947 F.3d 711, 729 (11th Cir. 2020) (annotations on defendant's naturalization application found to be non-testimonial); *United States v. Lang*, 672 F.3d 17, 22-23 (1st Cir. 2012) (same); *United States v. Caraballo*, 595 F.3d 1215, 1229 (11th Cir. 2010) (information in agent-generated immigration form was non-testimonial). Indeed, at trial, Officer Muna himself acknowledged that statements made during his interrogation of Mrs. Tydingco could be used in criminal prosecutions. (Pet. at 5-6). Accordingly, the interpreter's statements made during the course of Officer Muna's interrogation of Mrs. Tydingco served the dual purpose of facilitating Xinyi's immigration processing and enabling the future prosecution of any alleged criminal activity discovered.

Finally, although the Respondent raises the issue of Mrs. Tydingco's English fluency as evidence of the reliability of the interpreter's statements, (Opp. at 8-9), per this Court's holdings in *Crawford* and its progeny, this is an issue that should have been left to the jury to determine–after Mrs. Tydingco had an opportunity to subject the interpreter to cross-examination. *Crawford*, 557 U.S. at 61 (the Confrontation Clause commands "not that the evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination.").

C. There is a clear circuit split on this issue, as noted in multiple cases cited by the Respondent.

While the Respondent argues that there is "no conflict in the lower courts warranting this Court's intervention" with respect to the constitutionality of translated statements, (Opp. at 14), a number of cases—including some to which the Respondent cites in support of their position—show that this is not the case. First, there *is* a clear circuit split on this issue; the Eleventh Circuit's *Charles* decision remains good law and continues to be applied to this day. *See, e.g.*, *United States v. Garcia-Solar*, 775 Fed. Appx. 523, 529 (11th Cir. 2019) (citing *Charles* in support of the holding that "[w]hen a law enforcement officer testifies regarding what an interpreter told him that a defendant said, the defendant has a Sixth Amendment right to confront the interpreter."). Further, in *Taylor*, the Court of Special Appeals of Maryland reached a similar conclusion, finding that "the Supreme Court … has already considered and rejected nearly all of the possible justifications for creating a confrontation exception for interpreters" and further, that "the Ninth Circuit's language-conduit doctrine does exactly what *Crawford* forbids[.]" 226 Md. App. at 367.

Lower courts have identified tension between this Court's holding in *Crawford* and the right to confront interpreters even within many of the decisions that the Respondent cited in support of its argument that interpreters' statements are exempt from the Confrontation Clause requirements. *See, e.g.*, *State v. Lopez-Ramos*, 913 N.W.2d 695, 702 (Minn. 2019) ("Unlike most cases involving a Confrontation Clause or hearsay challenge, the identity of the declarant is not obvious when an interpreter

translates a foreign language speaker's statements into English."); *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012) (noting that "there is … tension between the *Nazemian* analysis and the Supreme Court's recent approach to the Confrontation Clause."), *see also Com. v. AdonSoto*, 475 Mass. 497, 506 (2016) ("Although the issue [of whether an interpreter is the 'declarant' of a translated statement] is significant for the development of our criminal and constitutional jurisprudence, we decline to wade into this *thicket of unsettled constitutional principles where … the Supreme Court has not yet provided guidance.*") (emphasis added).

II. THE RESPONDENT'S OPPOSITION BRIEF REVEALS THE LACK OF CONSENSUS ON THE DEFINITION OF "HARBORING" UNDER THE ALIEN HARBORING ACT.

In their Opposition brief, the Respondent surveys the various definitions of "harboring" governing the Alien Harboring Act across circuits. (Opp. at 18-23). Under many of these definitions, it is likely that Mrs. Tydingco would not have been found guilty. Mrs. Tydingco's defense at trial was centered on the showing that she did not purposefully evade Xinyi's detection by immigration authorities or intentionally violate the law of the United States. Under many of these definitions, such a showing would have been sufficient for Mrs. Tydingco to have been found not guilty based on the showing that she informed Officer Muna of her intention to send Xinyi to school in the CNMI and that she provided Xinyi's school with a map to her residence. (Pet. at 3-4). *See, e.g.*, *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013) ("the mere act of providing shelter to an alien, when done without intention to help

prevent the alien's detection by immigration authorities or police, is ... not an offense under [8 U.S.C.] § 1324(a)(1)(A)(iii)."); *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008), as amended (June 19, 2008) ("harboring" encompasses conduct "tending to substantially facilitate an alien's remaining in the United States illegally and to prevent authorities from detecting the alien's unlawful presence.") (internal quotation marks and citation omitted); *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir.1928) (harboring means to "clandestinely shelter, succor, and protect improperly admitted aliens"); *United States v. Costello*, 666 F.3d 1040, 1050 (2012) (defendant must have provided "a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 14th day of March, 2025 (Chamorro Standard time).

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