No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HALIM KHAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. Amend. VI.

The question presented is:

Whether translated out-of-court testimonial statements may be admitted by the Government as evidence against a defendant without providing the defendant with an opportunity to cross-examine the interpreter, and without violating the Confrontation Clause of the U.S. Constitution, simply because the interpreter is deemed by the trial judge to be either an agent of the defendant or to have acted as a language conduit.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

- *United States v. Khan*, No. 23-480, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 23, 2024.

- *United States v. Khan*, et al., No. 1:20-cr-0007, U.S. District Court for the Northern Mariana Islands. Judgment entered March 10, 2023.

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I. OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals regarding the question of whether an interpreter's out-of-court translation may be properly admitted without any prior opportunity to cross-examine the interpreter is unreported. (App. A, 1a).

II. JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 23, 2024. (App. A, 6a). The Ninth Circuit denied a timely petition for rehearing on August 29, 2024. (App. B, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

Under U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

IV. STATEMENT OF THE CASE

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), this Court firmly held that under the Sixth Amendment, without exception, to admit an out-of-court testimonial statement for use against a criminal defendant, the defendant must have an opportunity to cross-examine the declarant. Today, twenty years after *Crawford* was decided, defendants' constitutional rights continue

to be undermined, and even eliminated, by the Ninth Circuit Court of Appeals' prevailing legal standards, under *United States v. Nazemian,* 948 F.2d 522 (9th Cir. 1991), and its progeny, which allows the admission of interpreters' translations of criminal defendants' out-of-court, testimonial statements for use against the defendant with no opportunity for cross-examination by substituting the jury's evaluation of the translator with a trial judge's subjective determination.

The question at issue here is whether an interpreter's out-of-court, testimonial translations of a defendant's statements may be properly admitted at trial against the defendant where the defendant did not have an opportunity to cross-examine the interpreter, without violating the defendant's rights under the U.S. Constitution or creating hearsay issues. This Court should grant review to clarify the scope of the U.S. Constitution's Sixth Amendment protections with respect to the admission of extrajudicial, testimonial translations of a defendant made through an interpreter without the opportunity to cross-examine the interpreter.

A. Background

On July 30, 2020, the Government indicted Halim Khan ("Mr. Khan") and two other co-defendants, Servillana Soriano ("Ms. Soriano") and Aminul Islam, on the sole count of Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371. *See* CA9 1-ER-2.[1]

[1] "1-ER- 2" refers to volume 1, page 2 of the Ninth Circuit Excerpts of Record. *See* Excerpts of Record, Volume 1 of 6, *United States v. Khan*, No. 22-2716 (9th Cir. filed June 6, 2023), ECF No. 45. All other citations to the Ninth Circuit Excerpts of Record will be written as "CA9 #-ER-##" with the first number indicating the volume and the second number indicating the page. *See United States v. Khan*, No. 22-2716 (9th Cir. filed June 6, 2023), ECF Nos. 13.2, 13.3, 13.4, 13.5.

After the indictment was amended, the operative Second Superseding Indictment alleged that Mr. Khan and the other individuals conspired to defraud the United States Citizenship and Immigration Service ("USCIS") by "impeding, impairing, obstructing, and defeating" its "fair and objective evaluation of petitions to classify aliens as CW-1 workers." 4-ER-646. The Government claimed that the alleged conspiracy was a "fraudulent" non-immigrant petition for temporary workers (the "Petition") submitted to USCIS by petitioner RES International LLC ("RES" or "the Company"). *Id.* The Petition sought approval for RES to employ three non-resident alien individuals as "CW-1 workers" in Saipan, Commonwealth of the Northern Mariana Islands ("CNMI") for a one-year term. *Id.* The CNMI, as well as Saipan, are part of the United States of America. The CW-1 program allows foreign workers in Saipan to be able to temporarily work in the CNMI under the purview of the United States federal immigration system. 2-ER-100.

At trial, the Government sought to show that the Petition's representation that an "employer-employee relationship" existing between RES and the beneficiaries under the employment terms set forth in the petition was false and fraudulent. 3-ER-557. The Government claimed that Mr. Khan had an integral role in getting RES to submit the Petition that falsely and fraudulently alleged that three men would be employed by RES full-time. *Id.*

During the trial, the Government relied on testimony from Special Agent Jonas, who interviewed Mr. Khan on June 11, 2020. 2-ER-69–70. Special Agent Jonas questioned Mr. Khan for about three hours. 3-ER-397. Special Agent Jonas used a

Bengali interpreter, who was translating over the phone, to translate the conversation between him and Mr. Khan. 3-ER-390–91. There was no evidence in the record that the three hours of questioning was recorded or transcribed. The prosecution did not enter, or even attempt to enter, any written statement by Mr. Khan that was obtained during the interrogation. Accordingly, Special Agent Jonas testified largely from his memory about what was said during the June 11, 2020 interrogation. 3-ER-390–91, 398. Because the interrogation occurred over two years before trial, during his testimony, Special Agent Jonas had difficulty recalling, exactly, what Mr. Khan had said (through the interpreter) during the interrogation. 3-ER-398.

To conduct Mr. Khan's interrogation, Special Agent Jonas called a private translation company on the phone and was provided with a randomly selected interpreter. 3-ER-390–91. Special Agent Jonas had no information about the interpreter that he used, not even the interpreter's name. 3-ER-394–5. When asked, Special Agent Jonas stated he had no information at all about the interpreter's qualifications. *Id.* Special Agent Jonas explained that he did not ask the interpreter for any such information because it was not his position to make such inquiries and he had no concerns about the quality of the interpreter. *Id.* Despite having no information regarding the interpreter's ability or qualifications to properly and adequately translate, Special Agent Jonas testified that, during his interrogation, Mr. Khan, through the interpreter, told Special Agent Jonas that he knew the three men named in the Petition and that he was related to each of them. 3-ER-399. Special

Agent Jonas further stated that Mr. Khan, through the interpreter, explained to him how Mr. Khan had approached Ms. Soriano to help the three men petition USCIS through RES. 3-ER-399–400. Special Agent Jonas also stated that Mr. Khan, through the interpreter, told him that Ms. Soriano needed the men to pay a fee for petitioning USCIS. *Id.* Special Agent Jonas' testimony about Mr. Khan's translated statements was used at trial to connect Mr. Khan to Ms. Soriano and the alleged conspiracy. *Id* . Any objective person would expect that the translations of Mr. Khan's statements would be used against Mr. Khan at trial, and therefore, they constituted out-of-court, testimonial statements. *See Crawford v. Washington*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Despite the government's use of these statements to convict Mr. Khan of the alleged conspiracy, the Government never called the interpreter to testify at trial.

B. Procedural History

On March 28, 2022, the jury found Mr. Khan guilty. Mr. Khan appealed his conviction to the Ninth Circuit Court of Appeals, arguing, *inter alia*, that the trial court violated Mr. Khan's Sixth Amendment Right to Confrontation by failing to provide Mr. Khan the opportunity to cross-examine the interpreter who translated Mr. Khan's interrogation conducted by Special Agent Jonas.

Mr. Khan's appeal was heard on June 12, 2024, and on July 23, 2024, the Ninth Circuit issued a memorandum opinion affirming Mr. Khan's conviction. (App. A, 6a). On the issue of Special Agent Jonas' interpreter, the Ninth Circuit, relying on *United*

States v. Nazemian, 948 F.2d 522 (9th Cir. 1987), held that the admission of Special Agent Jonas' testimony regarding the interpreter's translation of Mr. Khan's statements during the interrogation did not violate the Confrontation Clause because there was sufficient evidence for the trial judge to determine that Agent Jonas' interpreter acted as a "language conduit" for Mr. Khan. (App. A, 4a). Thus, under *Nazemian*, the Government could admit Agent Jonas' testimony regarding the interpreter's translation without providing Mr. Khan with an opportunity to cross-examine the interpreter. *Id.*

On August 6, 2024, Mr. Khan filed a petition for rehearing *en banc*, arguing that the Ninth Circuit erred when it found that the out-of-court statements by Mr. Khan's interpreter were properly admitted, even though Mr. Khan was never provided an opportunity to cross-examine the interpreter. The Ninth Circuit denied the petition for rehearing on August 29, 2024. (App. B, 7a).

V. REASONS FOR GRANTING THE PETITION

This case presents a question that is of critical importance to criminal justice, and whose resolution is essential to ensuring the preservation of defendants' Sixth Amendment right to cross-examination, as well as the uniformity of applications of federal law across circuits. In the opinion under review, the Ninth Circuit has admitted testimony regarding translations of extrajudicial, testimonial statements in clear contravention of this Court's holdings in *Crawford v. Washington*, *Melendez-Diaz v. Massachusetts*, and *Bullcoming v. New Mexico*, violating the constitutional rights of Mr. Khan and potentially many future defendants.

Moreover, a circuit split is emerging with respect to this issue. In *Nazemian*, 948 F.2d at 525–26, the Ninth Circuit found that an interpreter's translation of a defendant's statements could be attributed directly to the defendant where the trial judge determined that the translation bore certain hallmarks of reliability. In *United States v. Charles*, 722 F.3d 1319, 1321 (11th Cir. 2013), a case that, like *Nazemian*, involved an officer testifying about statements made by a defendant through an interpreter who never testified, the Eleventh Circuit came to a different conclusion than the Ninth Circuit. In *Charles*, the Eleventh Circuit held that under the framework this Court articulated in *Crawford*, a defendant has a constitutional right to confront the interpreter in these circumstances. 722 F.3d at 1323. This Court should review and correct the Ninth Circuit's distorted interpretations of this Court's holding in *Crawford* and its progeny that allow the government to avoid the strictures of the Sixth Amendment by convincing the trial judge, as opposed to the jury, that the interpreter was a conduit for the defendant.

A. This Court Should Grant Review to Decide Whether *United States v. Nazemian* Has Been Overruled by *Crawford v. Washington* and its Progeny.

The Ninth Circuit's *Nazemian* opinion highlights the need for clarity and uniformity regarding the application of this Court's holding in *Crawford v. Washington* in the context of allowing the admission of out-of-court, testimonial statements that have been translated by a third party, without the need for the Government to produce the interpreter at trial, thus denying a defendant the opportunity to cross-examine the interpreter. This is a vital question that implicates

the constitutional rights of a broad swath of criminal defendants. The Ninth Circuit's prevailing standards, as articulated in *Nazemian* and its progeny, are inconsistent with this Court's holdings in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

1. This Court's prior holdings make clear that the Confrontation Clause's cross-examination requirement is applicable even where the statement at issue bears hallmarks of reliability.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. Amend. VI. The right to cross-examine witnesses is part and parcel of a defendant's rights under the Confrontation Clause. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). This Court has long understood that "the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails[,]" and advances such goals by ensuring that "convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). The contours of this right have been expounded upon in numerous decisions in this Court, including *Crawford*, *Melendez-Diaz*, and *Bullcoming*. These decisions all stand for the principle that out-of-court testimonial statements may only be admitted where the defendant is able to cross-examine the declarant, even in circumstances in which the out-of-court statement is likely to be reliable.

In *Crawford*, this Court held that out-of-court testimonial statements may only be admitted for use against a defendant where the defendant has the opportunity to

cross-examine the declarant. 541 U.S. at 36–37. In reaching this holding, the Court found that the Framers had not intended "to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability,'" *Id.* at 61, and found that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* The Court explicitly rejected the test articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), which allowed a jury to hear evidence based on a judicial finding of reliability. *Crawford*, 557 U.S. at 65. The Court found that the "unpardonable vice" of this test was "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* Further, in *Crawford*, this Court found that the Confrontation Clause's guarantee was a *procedural* guarantee, not a substantive one. Accordingly, this Court held that 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*." *Id.* at 61 (emphasis added).

This Court's decisions following *Crawford* have made clear that the *Crawford* holding applies even where the out-of-court statements have strong indicia of reliability. First, in *Melendez-Diaz*, the Court applied *Crawford* to the admission of drug-testing reports, holding that for such reports to be properly admitted, the defendant must have had an opportunity to cross-examine the analyst that produced it. 557 U.S. at 306. There, this Court rejected the government argument that testimony which was the "result of neutral, scientific testing" was exempt from the Confrontation Clause's cross-examination requirement. *Melendez-Diaz* at 317. In

doing so, the Court not only rejected the argument, but found it to be "little more than an invitation to return to our overruled decision in *Roberts*." *Id.* Further, this Court rejected the contention that forensic evidence was indisputably neutral and reliable. *Id.* The Court noted that a forensic analyst responding to a request from law enforcement may feel pressure to alter evidence to support the prosecution, and that while "an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst." *Id.* at 318 (cleaned up). The Court also observed that cross-examination served the purpose not only of identifying fraudulent analysts, but also of revealing incompetency, *id.* at 319, finding that, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320.

Subsequently, in *Bullcoming*, this Court held that defendants have a right to cross-examine analysts who conduct a blood-alcohol analysis. 564 U.S. at 662. There, the government argued that cross examination was not needed because the analyst "simply transcribed the result generated by the gas chromatograph machine, presenting no interpretation and exercising no independent judgment." *Id.* at 659 (cleaned up). However, the Supreme Court found that the analyst's actions in transcribing results, such as the analyst's finding that no "circumstance or condition affected the integrity of the sample or the validity of the analysis," still must be evaluated in front of a jury through cross-examination. *Id.* at 660. There, the Court stressed that, "[t]he text of the Sixth Amendment does not suggest any open-ended

exceptions from the confrontation requirement to be developed by the courts." *Id.* at 662 (quoting *Crawford*, 541 U.S., at 54).

2. Ninth Circuit precedent, as articulated in *United States v. Nazemian* and its progeny, is inconsistent with this Court's holdings in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

In the instant case, when the trial court admitted Special Agent Jonas' testimony regarding the interpreter's out-of-court, testimonial statements, it relied on the Ninth Circuit precedent set forth *United States v. Nazemian*, which held that an interpreter's translations of a defendant's statements could themselves be attributed to the defendant where the trial judge determines that the translations bore certain hallmarks of reliability. 948 F.2d at 525–26. This precedent is directly contradicted by this Court's decisions in *Crawford*, *Melendez-Diaz*, and in *Bullcoming*.

a. According to Ninth Circuit precedent, testimony regarding an interpreter's translations of a defendant's testimonial statements are admissible where the judge finds that the interpreter was reliable, even where the defendant has no opportunity to cross-examine the interpreter.

This Court's holdings in *Crawford*, *Bullcoming*, and *Melendez-Diaz* make clear that, without exception, if the Government uses an out-of-court testimonial statement as evidence against a defendant, the defendant must have the opportunity to cross-examine the declarant. Here, however, the court below relied on existing Ninth Circuit precedent to excuse compliance with the Sixth Amendment and to justify the admission of defendant's incriminating statements made through an interpreter, simply based upon the trial judge's determination that the interpreter served as a

mere "conduit" for Mr. Khan. Because the trial court found that the interpreter was a conduit for Mr. Khan, Special Agent Jonas was allowed to testify about Mr. Khan's statements, as heard through the interpreter, without providing any information about the interpreter's qualifications and without providing Mr. Khan with an opportunity to cross-examine the translator. This result is wholly inapposite and inconsistent with this Court's holdings in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

In *Nazemian,* a pre-*Crawford* case, the Ninth Circuit held that admitting an undercover agent's testimony regarding the defendant's statements—as translated by an interpreter—did not violate the Confrontation Clause or create any hearsay issues, even where the defendant had no opportunity to cross-examine the interpreter. 948 F.2d at 525, *see also United States v. Orm Hieng*, 679 F.3d at 1139. In *Nazemian*, the Ninth Circuit held that where the interpreter has been found to be reliable, they may serve as a mere "conduit" for the defendant. *Nazemian*, 948 F.2d at 527. Accordingly, the Ninth Circuit found that the interpreter's translations may be directly attributed to the defendant. *Id.* The Ninth Circuit provided a non-exhaustive list of factors, which could be used by a judge to determine the reliability of the translation at issue, including who provided the interpreter, whether there was any motive for the interpreter to mislead or distort the defendant, the interpreter's qualifications and skill, and whether any actions taken after the conversation at issue were consistent with the translation provided. *Nazemian*, 948 F.2d at 527, *see also Orm Hieng*, 679 F.3d at 1139. Based on these factors, the *Nazemian* court found that because the interpreter had translated statements over the course of a prolonged

period and multiple meetings, because there was no motive to mistranslate, and because the defendant engaged in subsequent actions that were consistent with the proffered translation, the statements were likely reliable and accordingly presented no Confrontation Clause or hearsay problems. *Nazemian*, 948 F.2d at 528.

In 2012, after *Crawford*, *Melendez-Diaz*, and *Bullcoming* were decided, the Ninth Circuit revisited the *Nazemian* holding in *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012). In *Orm Hieng*, a Drug Enforcement Agency ("DEA") testified that he interviewed the defendant using a Cambodian interpreter who interpreted the DEA's questions from English to Cambodian, and then translated Hieng's responses from Cambodian back into English. *Orm Hieng*, 679 F.3d at 1136. The Government did not call the Cambodian interpreter to testify at trial. *Id.* at 1137. The DEA agent's trial testimony regarding the interpreter's translations from that interview undercut Hieng's primary defense and Hieng was ultimately convicted. *Id.* Hieng appealed his conviction asserting that the district court's error in allowing the DEA to testify about the statements made by the interpreter at trial violated Hieng's Sixth Amendment right to confrontation. *Id.* at 1135, 1138-39. As part of his Sixth Amendment argument, Hieng asserted that *Nazemian* had been overruled by *Crawford* and its progeny. *Id.* at 1309. Reviewing under the plain error standard, *id.* at 1139, the Ninth Circuit rejected this argument, finding that it was bound to the *Nazemian* precedent unless a Ninth Circuit *en banc* court or this Court undercut that precedent in such a manner that the cases were "clearly irreconcilable." *Orm Hieng*, 679 F.3d at 1139 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)). The

Orm Hieng court found that this Court's decisions in *Crawford*, *Melendez-Diaz*, and *Bullcoming* did not directly address the question of whether the Sixth Amendment requires the court to attribute an interpreter's translation to the interpreter himself, and accordingly, found that those cases were not in direct conflict with the Ninth Circuit's *Nazemian* holding. *Id.* at 1140. Therefore, the *Orm Hieng* court upheld *Nazemian*. *Id.*

b. The vitality of *Nazemian* has been challenged in the Ninth Circuit and elsewhere, and a circuit split is emerging with respect to the questions at issue.

Although the Ninth Circuit has upheld *Nazemian* as the prevailing law, the *Orm Hieng* panel's finding that *Nazemian* was not "clearly irreconcilable" was far from absolute. In *Orm Hieng* and other cases, the Ninth Circuit has recognized that although this Court has not directly ruled on whether a translated statement may be attributed to the original speaker, the Court's holdings in *Crawford* and its progeny throw the vitality of the *Nazemian* precedent into doubt. *Id.* at 1145 (Berzon, J., concurring); *United States v. Romo-Chavez*, 681 F.3d 955, 964 (9th Cir. 2012). While the *Orm Hieng* court upheld *Nazemian*, the panel nonetheless noted "that there is ... tension between the *Nazemian* analysis and the Supreme Court's recent approach to the Confrontation Clause." *Orm Hieng*, 679 F.3d at 1140. Further, in a concurring opinion in *Orm Hieng*, Judge Berzon stated that in light of this Court's holdings in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the Ninth Circuit should reconsider the vitality of its Confrontation Clause precedent, *en banc*. *Id.* at 1145 (Berzon, J., concurring). Judge Berzon continued, stating that *Nazemian*'s holding "seems in

great tension with the holdings of *Melendez–Diaz and Bullcoming*." *Id.* at 1149 (citations omitted). In *United States v. Romo-Chavez*, Judge Berzon reiterated her concerns about the continued vitality of *Nazemian* under *Crawford* and its progeny, explaining that the *Nazemian* standard requires a "high degree of reliability" and "[w]here the interpreter's background and tested proficiency does not confirm the capacity for such accuracy, the entire premise on which *Nazemian* stands—shaky though it may be with regard to the Confrontation Clause after *Crawford*—collapses." 681 F.3d at 964 (Berzon, J. concurring) (internal citations omitted).

Moreover, a circuit split is emerging with respect to the Confrontation Clause questions at issue in *Nazemian* and in the instant case. The Eleventh Circuit's ruling in *United States v. Charles*, also implicates the viability of the language conduit/agency theory upon which *Nazemian* is based. 722 F.3d 1319, 1323 (11th Cir. 2013). In *Charles*, a Customs and Border Patrol officer at Miami International Airport suspected the defendant of a possible immigration crime. *Id.* at 1320–21. The defendant only spoke Creole. *Id.* at 1320. Because none of the CBP officers spoke Creole, the interrogating officer called an interpreter service. *Id.* at 1321. The interrogating officer then asked questions in English; the interpreter would translate the English-language questions to the defendant in Creole and then relay the translated Creole responses in English back to the interrogating officer. *Id.* At trial, the government did not call the interpreter to testify, instead relying on the interrogating officer to tell the jury what the interpreter had told him over the phone. *Id.* On appeal, the Eleventh Circuit found the officer's testimony violated the

Confrontation Clause because the interpreter made an out-of-court testimonial statement when she translated what the defendant said, and because the defendant did not get an opportunity to cross-examine the interpreter. *Id.* at 1323, 1331. In finding the Sixth Amendment violation, the *Charles* court also rejected the government's theory, under previous Eleventh Circuit law, *United States v. Alvarez,* 755 F.2d 830, 860 (11th Cir. 1985), that the court "should treat interpreter's out-of-court statements as if they are the defendant's own and thus, consider Charles to be the declarant of those statements for purposes of the Confrontation Clause analysis." *Charles*, 722 F.3d at 1325.

c. The Ninth Circuit's holdings in *Nazemian* and its progeny, contravene this Court's holdings in *Crawford* and its progeny and must be corrected in order to preserve defendants' Sixth Amendment rights.

The *Nazemian* "conduit" test is nearly identical to the reliability tests that were overturned in *Crawford*, which required the judge to consider several factors to determine whether out-of-court statements were reliable. There, this Court warned that such tests were "amorphous" and ultimately unconstitutionally placed the judge in the jury's position to make factual findings. *Crawford*, 541 U.S. at 63–66. In *Nazemian*, similar to *Crawford*, the proffered "conduit" test merely articulates a non-exhaustive list of factors that a judge may consider when determining the reliability of an interpreter's translation. In fact, *Nazemian* is arguably more amorphous than the *Roberts* test that this Court overturned in *Crawford*. *Nazemian* fails to enumerate a firm set of factors for a judge to consider before finding that an interpreter acted as a "conduit" for a declarant, but rather lists four nonexclusive factors without

explaining which factors carry more weight. *Nazemian*, 948 F.2d at 527. As a result, the *Nazemian* holding creates the same type of opportunity for the judge to reach subjective conclusions on reliability with few procedural safeguards that this Court firmly and repeatedly rejected in *Crawford* and its progeny.

Even under ideal circumstances, interpreter's translations are not precise enough to merit special treatment, and they are at least as—if not more—impervious to distortion and manipulation as were the tests discussed in *Melendez-Diaz* and in *Bullcoming*. In those cases, this Court highlighted the inadequacies of even fairly strict reliability tests. In *Melendez-Diaz*, this Court found that even supposedly "neutral scientific testing" is not immune from manipulation or human error, due to pressure from law enforcement, lack of proper training, or other causes. 557 U.S. at 318–320. There, this Court found that confrontation was a necessary means of assuring accurate forensic analysis and of deterring fraudulent analysis in the first instance. *Id.* at 318–19. Further, the Court found that confrontation is a tool to identify incompetent analysts, and that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at 319. Finally, the Court rejected the Government's argument that analysts' affidavits regarding their forensic analyses were akin to business records, finding both that the affidavits did not qualify as such, and that "even if they did, their authors would be subject to confrontation nonetheless." *Id.* at 321.

Similarly, in *Bullcoming*, where the Government had argued that cross-examination was not needed because the alcohol-blood analyst had not exercised

independent judgment and merely transcribed results generated by a machine, the Court nonetheless found that cross-examination was still required because the defendant should have been afforded the opportunity to ask questions designed to reveal incompetence, evasiveness, or dishonesty on the part of the analyst, as well as regarding the particular test and testing process that was employed. 564 U.S. at 660–661. On this point, the Court firmly held that its "precedent cannot sensibly be read any other way." *Id.* at 663.

Again, even under perfect circumstances, an interpreter's account of a defendant's words would be subject to the same, and arguably greater, concerns regarding manipulation, human error, and deficiencies in skill and judgment as this Court had identified in *Melendez-Diaz*. The Ninth Circuit found as much in its decision in *Orm Hieng*, in which Judge Berzon's concurrence recognized that, translation "is much *less* of a science than conducting laboratory tests, and so much more subject to error and dispute." 679 F.3d at 1149 (Berzon, J., concurring) (emphasis original). But in the instant case, the Ninth Circuit has applied the *Nazemian* reliability factors and found an interpreter to be reliable under extremely questionable circumstances, where the interpreter could not be identified by name, where the court lacked any information regarding the interpreter's background, the interpreter's proficiency in the Bengali language, or any other information needed to assess the skill, reliability and accuracy of an interpreter's work and where there was no recording or written statement made of the interrogation. That the Ninth Circuit found the unnamed interpreter in the instant case to be sufficiently reliable to act as

a "conduit" for Mr. Khan in court, with no opportunity for cross-examination, puts into sharp relief the "amorphous" and "entirely subjective" nature of the reliability factors articulated in *Nazemian* and exemplifies the inherent inadequacies of judge-made reliability tests as an alternative to cross-examination.

More importantly, even if an interpreter could perfectly translate a defendant's statement word-for-word, or even if *Nazemian* contained a more precise test, *Crawford* and its progeny make it clear that under the Sixth Amendment, the interpreter should still be subject to confrontation. In *Crawford*, this Court firmly held that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. The Court further found that the Confrontation Clause does not merely reflect a judgment about "the desirability of reliable evidence ..., *but about how reliability can best be determined*." *Id.* at 61 (emphasis added). The "conduit" test put forth in *Nazemian* circumvents this process and empowers the trial judge to make determinations about an interpreter's competency and reliability with no opportunity for the defendant to interrogate them, or for the jury to reach an informed decision on the question independently.

In light of the clear contradiction between the Ninth Circuit's holding in *Nazemian* and this Court's holdings in *Crawford* and the cases that have followed it, this Court should grant review to clarify the scope of its holding in *Crawford* and to, once again, emphasize that, *Crawford* and its progeny require an opportunity to cross-examine a declarant who provides testimonial evidence against a defendant, so as to

ensure that the *jury* evaluates the interpreter instead of delegating the decision to the trial judge using *Nazemian*'s amorphous, judge-determined test.

VI. CONCLUSION

For the foregoing reasons, Mr. Khan respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted this 27th day of November, 2024.

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