No. 15-1002

In the Supreme Court of the United States

AIFANG YE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

An agent of the Department of Homeland Security (DHS) interviewed petitioner with the assistance of a Mandarin interpreter and then prepared a written statement in English based on petitioner's admissions. Petitioner reviewed that statement with the Mandarin interpreter, made alterations, initialed each paragraph, and then signed the statement.

The question presented is whether the Confrontation Clause of the Sixth Amendment barred the government from offering the statement that petitioner reviewed and signed into evidence at petitioner's trial, because prosecutors did not call as a witness the Mandarin interpreter who translated during petitioner's DHS interview and then assisted petitioner in reviewing the written statement.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-14a) is reported at 792 F.3d 1164. An accompanying memorandum opinion (Pet. App. 15a-17a) is not published in the Federal Reporter, but is available at 606 Fed. Appx. 416.

JURISDICTION

The judgment of the court of appeals as amended was entered on December 10, 2015. Petitions for rehearing and rehearing en banc were denied on December 10, 2015. The petition for a writ of certiorari was filed on February 4, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern Mariana Islands, petitioner was convicted of making a false statement in a pass-

port application, in violation of 18 U.S.C. 1542, and conspiring to make a false statement in a passport application, in violation of 18 U.S.C. 371. The district court sentenced petitioner to concurrent sentences of one year of probation on each count and five months of home confinement as a condition of supervised release. C.A. E.R. 1-3. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioner, a physician, is a citizen of China, as is her husband, Xigao Cheng. In September 2011, while pregnant, petitioner traveled with her husband to the island of Saipan, which is part of the United States Commonwealth of the Northern Mariana Islands. Pet. App. 4a. Petitioner's husband returned to China about five days later. Petitioner, however, overstayed her tourist visa. Gov't C.A. Br. 4. She remained in Saipan through February 2012, when she gave birth to a baby, Jessie. Jessie's birthplace made her a U.S. citizen. Pet. App. 4a; Gov't C.A. Br. 4.

Petitioner wanted to obtain a U.S. passport for Jessie. Parents who wish to obtain a passport for a child under the age of 16 may do so through one of several procedures. First, both parents may submit an application together in person at a passport office. Pet. App. 4a. Second, in the alternative, one parent may submit a passport application in person, along with "a notarized statement or affidavit from the absent parent consenting to the issuance of the passport." *Ibid.* (citing 22 C.F.R. 51.28(a)(3)(i)).

Petitioner wanted to obtain a U.S. passport for Jessie without complying with either of these procedures. Her husband was in China, and she "did not want to have her husband seek a notarized statement" because doing so could have "draw[n] attention" in

China "to the birth of a second child." Pet. App. 4a. Accordingly, at the suggestion of Kaiqi Lin, a translator and document preparer, petitioner and her husband arranged for petitioner to apply in person at the passport office along with the brother of petitioner's husband (Zhenyan Cheng), who used the passport belonging to petitioner's husband in order to impersonate him. *Ibid.* To carry out that plan, Lin drove petitioner and Zhenyan to the Saipan passport office. There, petitioner presented her passport, and Zhenyan presented the passport belonging to petitioner's husband. Zhenyan then falsely signed the passport application for Jessie as her father, using the name of petitioner's husband. *Id.* at 5a.

Agents with the Department of Homeland Security (DHS) learned of the passport fraud because they had been conducting surveillance of Lin as part of an investigation of other immigration-related misconduct. Gov't C.A. Br. 8. On the day that petitioner and Zhenyan submitted the fraudulent passport application, agents observed Lin's car—occupied by Lin, petitioner, and Zhenyan—close to the passport office. *Ibid.* They followed the car to a hotel. *Ibid.* When the car stopped at the hotel, an agent observed the passports of petitioner and her husband inside, and inspected the passports. *Id.* at 9.

Once back at the DHS office, agents conducted several records checks that provided evidence that petitioner and Zhenyan were involved in passport fraud. Government records revealed that petitioner's husband had left the country in the previous year and had not returned—but also revealed that petitioner and her husband had purportedly executed an in-person passport application for their daughter in

Saipan on the day that petitioner, Zhenyan, and Lin had been observed together in the vicinity of the passport office. Gov't C.A. Br. 9-10. Agents thereafter arrested Zhenyan at the Saipan airport, in connection with the apparent passport fraud. *Id.* at 10.

The day after Zhenyan's arrest, petitioner went to the DHS office on her own initiative to speak to a DHS agent. Gov't C.A. Br. 13. She saw Special Agent Ryan Faulkner, the agent who had inspected her passport and her husband's passport in Lin's car. *Id.* at 9, 13. Petitioner told Special Agent Faulkner that she had information she wanted to give him. *Id.* at 13. So that petitioner could speak to Special Agent Faulkner in Mandarin, Special Agent Faulkner called a service of DHS's United States Citizenship and Immigration Services division (USCIS) known as the "Language Line," Pet. App. 5a, whose translators assist the Immigration and Customs Enforcement, Customs and Border Patrol, and Citizenship and Immigration Services sections of DHS by performing "translation services as needed" telephonically, C.A. E.R. 49; see *id.* at 465. During the interview conducted with the assistance of the "Language Line" interpreter, petitioner acknowledged that she had applied for a U.S. passport the week before; explained that Zhenyan had impersonated her husband to facilitate the filing; and stated that she had known what she did was wrong. See *id.* at 47-48.

Special Agent Faulkner typed up a summary of what petitioner had told him in a document labeled a "statement of" petitioner. C.A. E.R. 522, 524. Special Agent Faulkner then reviewed that draft statement with petitioner, paragraph by paragraph, with the assistance of the "Language Line" translator. For

each paragraph, Special Agent Faulkner requested that petitioner place her initials next to the paragraph if she understood and agreed with the statement and had no corrections to its contents. Petitioner did so for every paragraph in the document, after making corrections or clarifications in several cases. *Id.* at 524-527. She also made several additions to the statement. *Id.* at 526-527. After completing her review, petitioner signed the bottom of the statement. *Id.* at 529.

2. A grand jury in the United States District of the Northern Mariana Islands charged petitioner with making a false statement in a passport application, under an aiding and abetting theory, in violation of 18 U.S.C. 1542, and with conspiring to make a false statement in a passport application, in violation of 18 U.S.C. 371. Pet. App. 5a.[1]

Before trial, petitioner "objected that it would violate the Confrontation Clause of the Sixth Amendment to admit statements [petitioner] had made to DHS unless the USCIS Language Line translator[] who assisted [petitioner] w[as] called to testify." Pet. App. 11a. On the first day of trial, the district court conducted a hearing concerning the objection.[2] It then

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[1] Zhenyan was also charged with making a false statement in a passport application and conspiring to commit that offense, but he was acquitted by the jury. Pet. App. 5a-6a.

[2] At the hearing, the district court heard "testimony and other evidence regarding the nature of USCIS's translation services." Pet. App. 11. The evidence the court reviewed included a sworn declaration from the interpreter who assisted petitioner in reviewing her statement. The interpreter attested that she was a USCIS language specialist with native fluency in Mandarin; that she had been employed by USCIS as a language specialist for over a decade; and that she had "provided interpretation services over the

orally overruled the objection, permitting the government to offer petitioner's signed statement into evidence. Gov't C.A. Br. 16; see Pet. App. 11a.[3]

At the close of trial, the jury convicted petitioner on both counts. Pet. App. 6a. The district court sentenced petitioner to concurrent sentences of one year of probation on each count and to five months of home confinement as a condition of supervised release. C.A. E.R. 2-3.

3. The court of appeals affirmed. Pet. App. 1a-14a; *id.* at 15a-17a (unpublished memorandum opinion addressing sufficiency claims). As relevant here, the court rejected petitioner's Confrontation Clause challenge. *Id.* at 11a-14a. The court explained that it had held in *United States* v. *Nazemian*, 948 F.2d 522, 525-528 (9th Cir. 1991), cert. denied, 506 U.S. 835 (1992), that "as long as a translator acts only as a language conduit, the use of the translator does not implicate the Confrontation Clause." Pet. App. 11a. It noted that it had reaffirmed this approach after this Court's decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and related cases. Pet. App. 11a (citing *United States* v. *Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir.), cert. denied, 133 S. Ct. 775 (2012)).

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phone" for petitioner's interview, during which she provided translations that "were true, accurate, and to the best of [her] ability." C.A. E.R. 49.

[3] Petitioner's counsel did not seek to call the "Language Line" translator as a witness in petitioner's case. Instead, counsel sought to use the translator's absence to sow doubt about the government's proof, arguing that since the government had not called the translator, jurors should not rely on the written statement as accurately reflecting petitioner's words. See C.A. E.R. 343-344 (opening statement); *id.* at 904-913 (closing statement).

The court of appeals further explained that the language-conduit test set forth in *Nazemian* was satisfied in petitioner's case. Pet. App. 12a-14a. The court stated that under *Nazemian*, "whether the translator was merely a language conduit" required consideration of which party supplied the interpreter; whether the party had a motive to mislead or distort; the interpreter's qualifications and skill; and whether actions taken subsequent to the conversation were consistent with the translated statements. *Id.* at 12a. These factors, the court concluded, favored treating the interpreter here as a mere language conduit. The court emphasized the translator's native fluency in Mandarin and extensive training and experience; the fact that a DHS agent had petitioner "confirm line-by-line read-backs of what [she] had said"; and the fact that petitioner's subsequent actions were consistent with her translated statement. *Id.* at 13a. Accordingly, the court found no violation of the Confrontation Clause in the admission of petitioner's signed statement. *Id.* at 13a-14a.

4. Petitioner has now completed her sentence of probation and supervised release, and she has returned to China. Pet. C.A. Br. 4.

ARGUMENT

Petitioner renews her contention (Pet. 14-38) that the Confrontation Clause barred the government from offering into evidence the statement that petitioner signed following review with an interpreter, because the government did not call as a witness the interpreter who assisted petitioner in that review. Petitioner is mistaken. The Confrontation Clause poses no obstacle to the admission of a statement that a defendant has herself reviewed with an interpreter

and signed. And while some nascent disagreement exists concerning the admissibility of interpreted statements that a defendant has not expressly adopted, no disagreement exists concerning the admissibility of signed, expressly adopted statements. This Court's review is not warranted.

1. The 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. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court construed that provision in light of "the common-law history of the confrontation right," *Michigan* v. *Bryant*, 562 U.S. 344, 353 (2011) (citing *Crawford*, 541 U.S. at 50), and held that absent a prior opportunity for cross-examination, testimonial hearsay is generally barred by the Clause, *Crawford*, 541 U.S. at 68. This Court has explained in cases following *Crawford* that the limits the Confrontation Clause imposes are constraints only on statements that constitute "testimonial hearsay." *Davis* v. *Washington*, 547 U.S. 813, 823 (2006); see *Bryant*, 562 U.S. at 354-355, 359 n.5.

The admission into evidence of the written statement petitioner signed after review with an interpreter does not fall within this category, because the statement was neither hearsay nor testimonial.

a. The written statement was not hearsay because party admissions are not hearsay evidence. See, *e.g.*, *United States* v. *Crowe*, 563 F.3d 969, 976 n.12 (9th Cir. 2009) (citing Fed. R. Evid. 801(d)(2) (2009)); *United States* v. *Ramos-Cardenas*, 524 F.3d 600, 609-610 (5th Cir.), cert. denied, 555 U.S. 908 and 555 U.S. 949 (2008); *United States* v. *Tolliver*, 454 F.3d 660, 664-665 (7th Cir. 2006), cert. denied, 549 U.S. 1149

(2007); see also Fed. R. Evid. 801(d)(2) (specifying that an opposing party's statement is not hearsay).

Petitioner's written statement was a party admission. Courts of appeals have uniformly treated a statement signed by a defendant who has been apprised of the statement's contents as an admission of the defendant—even if the defendant did not herself prepare the statement and reviewed its contents only with the help of a translator. See, *e.g.*, *United States* v. *Frank*, 599 F.3d 1221, 1240 & n.21 (11th Cir.) (statement in Khmer language prepared by Cambodian officers and signed by English-speaking defendant, after review with interpreter), cert. denied, 562 U.S. 876 (2010); *United States* v. *García*, 452 F.3d 36, 39-40 (1st Cir. 2006) (affidavit in English that was signed by Spanish-speaking defendant after its contents were translated into Spanish by immigration officer for the defendant's review); *United States* v. *Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002) (stating that "[o]rdinarily a signed statement, even if written by another in another's words, would be adopted as the party's own if he signed it," but recognizing an exception when there was "a considerable language barrier" and evidence did not show "that the [statement] was read to" the defendant "or that he read it, or that he could read it"); see also *United States* v. *Felix-Jerez*, 667 F.2d 1297, 1299 (9th Cir. 1982); *United States* v. *Johnson*, 529 F.2d 581, 584 (8th Cir.), cert. denied, 426 U.S. 909 (1976). Accordingly, courts have found no Confrontation Clause problem posed by such statements. See *Frank*, 599 F.3d at 1240 n.21; *Orellana-Blanco*, 294 F.3d at 1148; *Johnson,* 529 F.2d at 584. Those principles control here: Since the English-language statement in this case was one that petitioner "adopted as

[her] own," *Orellana-Blanco*, 294 F.3d at 1148, when she signed the statement after review with an interpreter, the statement is properly attributable to petitioner, and it can pose no Confrontation Clause problem.

b. Even if the statement at issue in this case were viewed as a statement of the "Language Line" interpreter, the statement would pose no Confrontation Clause problem because it would not properly be classified as testimonial. A statement is "testimonial" if "the circumstances objectively indicate * * * that the primary purpose" of the statement is to establish "past events potentially relevant to later criminal prosecution." *Ohio* v. *Clark*, 135 S. Ct. 2173, 2180 (2015); see *Bryant*, 562 U.S. at 356, 358. That is not so here. The primary purpose of the "Language Line" interpreter was simply to facilitate communication between a foreign-language interviewee and the government. See C.A. E.R. 49 (interpreter's affidavit explaining that her role was to provide "true, accurate" translations of petitioner's statements from Mandarin to English and the agent's statements from English to Mandarin). That purpose is divorced from the identity of the speaker; the contents of the statements made; and any investigative purposes of a government official conducting an interview in a particular case. Since the "Language Line" translator's primary purpose was not "to create a record for trial," or to "obtain[] testimonial evidence against [an] accused," *Clark*, 135 S. Ct. at 2180 (citation omitted), but simply to translate conversations related to the work of a number of DHS divisions, even if the relevant statements were those of an interpreter, they would not properly be described as testimonial.

2. Petitioner is mistaken in contending (Pet. 16-25) that this Court's intervention is warranted in this case to resolve a disagreement among the courts of appeals.

a. As petitioner notes, some recent disagreement has emerged among courts of appeals concerning the application of the Confrontation Clause to certain translated statements. Since *Crawford*, four courts of appeals have addressed Sixth Amendment challenges to testimony by law enforcement or immigration officers concerning what an interpreter told them a witness or defendant had said. *United States* v. *Charles*, 722 F.3d 1319, 1321 (11th Cir. 2013); *United States* v. *Shibin*, 722 F.3d 233, 235, 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); *United States* v. *Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir.), cert. denied, 133 S. Ct. 775 (2012). None of those cases involved defendants (or other declarants) who had expressly adopted a translated statement. Accordingly, the courts in these four cases considered whether an interpreter's translation of foreign-language statements was properly attributable to the foreign-language declarant for Confrontation Clause purposes on the ground that either the interpreter was the declarant's agent or the interpreter was a mere "language conduit." See *United States* v. *Nazemian*, 948 F.2d 522, 526-527 (9th Cir. 1991) (outlining agency and language-conduit theories), cert. denied, 506 U.S. 835 (1992).

Three courts of appeals have found no Confrontation Clause problem in such testimony following *Crawford*, applying agency or language-conduit theo-

ries. *Orm Hieng* concluded that *Crawford* permitted an interpreter's translation of a defendant's statements to be attributed to the defendant under some circumstances, based on consideration of a number of factors relevant to whether the interpreter was acting as the defendant's agent or as a language conduit. *Orm Hieng*, 679 F.3d at 1139 (listing factors). The Fifth Circuit likewise treated statements made through an interpreter as attributable to a defendant for Confrontation Clause purposes in an unpublished post-*Crawford* decision, *Budha*, 495 Fed. Appx. at 454, and the Fourth Circuit adopted a comparable approach in a decision in a plain-error posture, *Shibin*, 722 F.3d at 249.[4]

One court of appeals has reached a contrary conclusion. In *Charles,* in the course of rejecting a defendant's Confrontation Clause claim under plain-error principles, the Eleventh Circuit concluded that it had been error to permit a law enforcement officer to testify "as to the out-of-court statement made by an interpreter who translated [the defendant's] Creole language statements into English during" questioning. 722 F.3d at 1321. The court rejected the treatment of interpreters as mere language conduits on the ground that "[l]anguage interpretation * * * does not provide for a one-to-one correspondence between words or concepts in different languages." *Id.* at 1324 (citation and internal quotation marks omitted). And it concluded that even if an interpreter qualified as a

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[4] As petitioner notes, a number of state appellate courts have also rejected "Confrontation Clause challenges to out-of-court translators" following *Crawford*. Pet. 22 n.4 (citing six decisions); cf. Pet. 23 n.5 (citing one contrary decision by an intermediate state appellate court).

defendant's agent—making the interpreter's statements "attributable to the defendant" for purposes of the Federal Rules of Evidence, see Fed. R. Evid. 801(d)(2)(C) and (D)—that would not make "the interpreter's statements * * * the same as the defendant's own statements" for purposes of the Confrontation Clause. *Charles*, 722 F.3d at 1325, 1326. Further, the court concluded that the interpreter's statements were testimonial because "[s]tatements taken by police officers in the course of interrogations are definitively testimonial." *Id.* at 1323 (alteration in original; citation omitted).

Petitioner's case would be an inappropriate vehicle for reviewing this disagreement, however, because petitioner's statement would have been constitutionally admissible under the approach of any court of appeals. As noted above, courts have consistently concluded that when a defendant signs a written statement after being apprised of its contents, the statement is properly attributed to the defendant as her own—irrespective of those courts' views on whether interpreters generally should be treated as mere language conduits. Petitioner identifies no court that has found a Confrontation Clause problem in the admission of a statement reviewed and signed by a defendant. And, to the contrary, the Eleventh Circuit—the sole court of appeals on which petitioner relies for his narrower view of Confrontation Clause—expressly classified a foreign-language statement signed by a defendant following review with a translator as the defendant's own statement for Confrontation Clause purposes. *Frank*, 599 F.3d at 1240 n.21 (concluding that when English-speaking defendant signed Khmer language confession prepared by Cambodian police

officers after the defendant reviewed its contents with interpreter, the defendant's "contention that the admission of his confession violated the Sixth Amendment Confrontation Clause is without merit, as we have held that a party's own admission offered against him is admissible under the Sixth Amendment"). Petitioner's case would thus be an inappropriate vehicle to take up any disagreement between the Eleventh Circuit and other courts of appeals concerning the Confrontation Clause treatment of other types of translated statements.

b. This Court's consideration of language-conduit or agency-based approaches to interpreted statements under the Confrontation Clause would in any event be premature. Since *Crawford*, only four courts of appeals have addressed the continuing validity of these approaches, and their analyses have often been brief, unnecessary to the result, or both. The Fourth Circuit accepted the language-conduit theory in several sentences in a decision that rejected a defendant's claim on multiple grounds, including as a result of its plain-error posture, *Shibin*, 722 F.3d at 248-249; the Fifth Circuit adhered to that approach in a one-paragraph discussion in an unpublished opinion, *Budha*, 495 Fed. Appx. at 454; and the Eleventh Circuit rejected language-conduit and agency theories in a discussion unnecessary to the court's ultimate conclusion that the defendant's Confrontation Clause claim failed on plain-error grounds, *Charles*, 722 F.3d at 1330-1332; see *id.* at 1332 (Marcus, J., specially concurring) (emphasizing this point).

In addition, only one of those four courts of appeals addressed whether, even if translated statements were properly construed as statements of an inter-

preter (rather than the foreign-language declarant), such statements would fall outside the testimonial category to which the Confrontation Clause applies. See *Charles*, 722 F.3d at 1323-1324. That court did so in a one-paragraph discussion that did not appear to apply the method this Court has developed for ascertaining whether statements are testimonial. Compare *ibid.* (stating that "there is no debate" that interpreter's statements were testimonial because "witness statements given to an investigating police officer" are "definitively testimonial") (citations omitted) with *Bryant*, 562 U.S. at 355 ("[N]ot all 'interrogations by law enforcement officers' are subject to the Confrontation Clause.") (citation omitted), and *id.* at 357-378 (whether statement is testimonial should be determined based on a number of factors relevant to statement's "primary purpose").[5] That Eleventh Circuit discussion, moreover, predates this Court's further guidance on the nature of testimonial statements in *Clark*, *supra*. The limited attention that language-conduit and agency approaches have received in the courts following *Crawford* would make this Court's review premature, even if this case were an appropriate vehicle for consideration of those approaches.

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[5] The court of appeals did not have the benefit of adversarial briefing concerning whether the statements qualified as testimonial, because the government argued only that there was no plain error in attributing the statements at issue to the defendant under the agency and language-conduit approaches. Gov't C.A. Br., *Charles*, *supra* (No. 12-14080).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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