NO. 07-50737

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLANT,

V.

LUIS POSADA CARRILES,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

The Honorable Kathleen Cardone

BRIEF FOR THE UNITED STATES

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CERTIFICATE OF INTERESTED PERSONS

1. *United States v. Luis Posada Carriles*, No. 07-50737. Case below: *United States v. Posada Carriles*, 3:07-CR-87 (W.D. Tex.).

2. The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully suggests that oral argument may be helpful to the Court in this case. The issues posed in this appeal are complex, interrelated and fact-specific. Oral argument may be helpful to develop the issues in full.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

NO. 07-50737

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BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

This is an appeal from a district court's order suppressing evidence and dismissing an indictment in a criminal case. The district court's jurisdiction rested on 18 U.S.C. § 3231 and Fed. R. Crim. P. 12(b)(3)(C). That court entered its order on May 8, 2007. The government timely filed a notice of appeal on June 5, 2007.

3R. 779.[1] This Court's jurisdiction rests on 18 U.S.C. § 3731.

STATEMENT OF THE ISSUES

1. Whether, in a case charging the defendant with making false statements to immigration authorities, the district court properly suppressed statements made by the defendant during a naturalization interview.

2. Whether the district court properly dismissed an indictment for making false statements during an immigration interview, based on a finding that the government engaged in deceit and outrageous conduct.

STATEMENT OF THE CASE

On January 11, 2007, a grand jury of the Western District of Texas returned a seven-count indictment charging Luis Posada Carriles (the "defendant") with making false statements in connection with his efforts to obtain naturalization as a

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[1] Citations herein conform to the following convention: "R." refers to the record by docket entry; "*x*R. *y*" refers by volume and page number to the collected pleadings in the record; "H. Tr." refers to R.112, the transcript of the May 4, 2007 suppression hearing; "DX3, *xy* at *z*" refers to the transcripts introduced at the defendant's suppression hearing as exhibit 3, where *x* is the number of the transcribed tape, *y* is the tape side and *z* is the Bates number of the page.

A series of audio cassette recordings made during the defendant's interview with immigration officials figured prominently in the proceedings below. During the proceedings, a separate transcript was produced from the digital copy of each side of a given audio tape, and the parties and court subsequently cited to the transcripts and portions of the recordings by tape number and side. For example, "1A" referred to the transcript or recording of side A for the first tape. The transcripts were produced through discovery and Bates numbered as they became available; these numbers serve as the transcript page numbers

United States citizen. Count one alleged naturalization fraud, by making false statements both on a written application for naturalization (a Form "N-400") and during an audio-recorded April 2006 naturalization interview, in violation of 18 U.S.C. § 1425(a). Counts two through six alleged the substantive offenses of making false statements during the naturalization interview, in violation of 18 U.S.C. § 1015(a). Count seven also alleged the substantive offense of making of a false statement, but on the Form N-400.

The defendant untimely moved to exclude the transcripts and recordings of the naturalization interviews that resulted in his indictment, on the ground that the recordings were inaudible in part, and were tainted because the interviewer's questions were inaccurately interpreted by an uncertified translator. The defendant further moved to suppress the statements that he made in the course of the naturalization interview by arguing, among other things, that the interview was a pretext for developing the instant criminal indictment.

On May 4, 2007, the district court conducted an evidentiary hearing on the defendant's motions to exclude and to suppress. On May 8, 2007, it entered an order granting the defendant's motions in part, after finding that the government engaged in deceit and trickery by failing to inform the defendant that he was subject to a criminal investigation and engaging in outrageous conduct. The

district court dismissed the entire indictment, and this appeal followed.

STATEMENT OF FACTS

A. Background

The defendant, a Cuban national and Venezuelan citizen, claims that he has devoted his life to opposing Fidel Castro. *See* 1R. 52; 2R. 347.[2] The defendant "has allegedly been involved in and/or associated with some of the most infamous events of twentieth-century Central American politics," including violent clandestine initiatives to topple the Castro regime and to precipitate regime change in Central America. 2R. 347. Among other things, the defendant was charged in Venezuela for his involvement in a 1976 airliner bombing that killed more than 70 people, but escaped from custody. *See id.*; 1R. 213. He reportedly participated in a series of bombings targeting tourist locations in Havana, Cuba, in 1997. 2R. 347. He was also arrested, tried and convicted in Panama for crimes related to his involvement in a 2000 plot to assassinate Castro, but was released in 2004 as part of a general amnesty. *See* 1R. 213–14.

The events following the defendant's release from Panamanian custody were

[2] The defendant's history factored prominently in litigation concerning his pretrial detention. The district court ultimately accepted the parties' proffers of this background in reaching its decision, but otherwise heard no evidence. *See* R.60. Thus, citations for the facts described here are to the pleadings and proffers made during the detention litigation, as well as the district court's order on that matter.

at the heart of the case. Had this matter gone to trial, the government's evidence would have shown that the defendant obtained a Guatemalan passport, bearing his picture but the false name "Manuel Enrique Castllo Lopez," shortly after his release from custody. The evidence would further show that, contrary to the account he gave to immigration authorities, the defendant—assisted by several accomplices—traveled to a location near Cancun, Mexico, where he boarded a motor vessel named the *Santrina*. They then traveled by sea and the defendant surreptitiously entered the United States near Miami, Florida.

After unlawfully entering the United States, the defendant filed an application for asylum with the Customs and Immigration Service ("CIS") of the U.S. Department of Homeland Security ("DHS"). 1R. 214. A hearing on the application was scheduled for May 17, 2005. *Id.* In a letter sent to the immigration judge that morning, the defendant claimed that he was too ill to participate in the proceeding, 1R. 215, but he did conduct a secretive press conference later that afternoon, *id.*; *see* R.60 at 51. Later in the day, the defendant was apprehended by immigration authorities and detained in their custody.

The defendant then filed with CIS a Form N-400 petition for naturalization, based upon his service in the U.S. armed forces. H. Tr. 138; 8 U.S.C. § 1440. The defendant listed several aliases in response to a question on the N-400 concerning

his use of prior names, but he did not acknowledge using the name "Manuel Enrique Castillo Lopez" on the Guatemalan passport.

B. The Naturalization Interview and Indictment

Under immigration regulations, "[s]ubsequent to the filing of an application for naturalization, each applicant shall appear in person before a Service officer designated to conduct examinations." 8 C.F.R. § 335.2(a). Susana Bolanos, an adjudications officer with CIS, was designated to conduct the defendant's April 2006 interview at the El Paso, Texas, Processing Center. Officer Bolanos, who works in the Washington, D.C. headquarters of CIS, specializes in adjudicating cases that may involve immigration fraud and national security. H. Tr. 117.

During the subsequent suppression hearing, Bolanos testified that she received the defendant's Alien file ("A-file") five or six months before the naturalization interview and concluded, after conducting research from publicly available sources, that he might not be eligible for naturalization. H. Tr. 71. Nonetheless, Bolanos interviewed the defendant, explaining that he was entitled to an interview and that an interview was necessary to "clarify any issues that we may see in the application." *Id.* She further explained that she always interviewed applicants, even if information in the application indicated that he might not be eligible, because an interview could help determine whether, in fact, the applicant

was qualified. *Id.*; *see also* H. Tr. 136.

In addition to reviewing the defendant's A-file, Bolanos prepared for the interview by meeting several weeks in advance with DHS attorneys Jo Ellen Ardinger and Nick Perry, as well as with an attorney from the Office of Immigration Litigation of the U.S. Department of Justice ("DOJ") and another DOJ criminal attorney. H. Tr. 72–73. According to Bolanos, the purpose of the meeting was to ensure that the questions she and Ardinger would ask during the interview properly flowed. H. Tr. 73.

Bolanos confirmed that she prepared the interview questions herself. *Id.*; *see also* H. Tr. 80, 101. According to Bolanos, no one, including the DOJ criminal attorney, requested that she ask any particular question or show the defendant any document during the interview. H. Tr. 73, 91, 101–02.[3] Bolanos noted, however, that questions concerning past criminal activity, false testimony or the use of aliases were all germane to determining whether the defendant established good moral character—a requirement for naturalization—and were, therefore, relevant to her adjudication of the naturalization application. H. Tr. 74. She added that she never asked questions that were not relevant to determining whether the defendant

[3] Although Bolanos was aware of the false passport, she did not believe that she knew the defendant was the subject of a criminal investigation prior to the naturalization hearing. H. Tr. 99

demonstrated good moral character. H. Tr. 80.

The participants in the ensuing recorded interview included Bolanos, Ardinger, Perry, and a Spanish-language translator, as well as the defendant and variously one or both of his Spanish-speaking attorneys. H. Tr. 75–76. Although the defendant's native language is Spanish, Bolanos understood that he spoke English well and, indeed, part of the interview required testing his English competency. DX3, 1A at 341–50; H. Tr. 84-85. The defendant responded to questions in English at various times during the interview. *See* H. Tr. 85; DX3, 4A at 497.

At the outset of the interview, conducted over two days, the defendant was placed under oath, warned in both English and Spanish that his responses "may be used for any purpose in any legal or administrative proceedings" and that, if he lied or intentionally gave false information, he "[m]ay be subject to criminal or civil penalties," or be denied immigration benefits. DX3, 1A at 334–36. He was further advised that he could refuse to answer a question if he felt that a truthful response would tend to incriminate him, DX3, 1A at 336, and that he had the right to terminate the interview at any time, *id.* The defendant responded that he understood his rights, *id.*; indeed, he relied on this advice at various times by refusing on Fifth Amendment grounds to answer questions relating to his criminal

activities. *See, e.g.*, DX3, 3A at 1164–74.

Because his unlawful entry could affect the requisite finding of good moral character, Bolanos asked the defendant about how he entered the United States. H. Tr. 82–84. These questions were prompted by public reports about his entry in Miami, with the help of associates aboard the *Santrina*. *See id.*; DX3, 1B at 388. The defendant instead testified that a "coyote," or alien smuggler, had driven him through Mexico to the U.S. point of entry near Matamoros, Mexico. DX3, 1A at 360–68. When asked whether the trip to the United States also involved stops in Cancun and Isla Mujeres—where he reportedly began his journey by sea—the defendant responded, "No." DX3, 1B at 387–88.

The defendant also denied ever providing a picture of himself for the fabrication of any type of false documentation, at least not since an incident, recounted in a newspaper article, when he used a falsified passport to exit Panama. DX3, 1B at 384. He further denied ever having held a passport from Guatemala. DX3, 3B at 439–40. Because the N-400 requires an applicant to declare the aliases he has used, Bolanos asked at various times about the defendant's aliases. *See, e.g.*, DX3, 1A at 353. He acknowledged several that had not been included in his initial application, but did not include the name he used on the Guatemalan passport, "Manuel Enrique Castillo Lopez." DX3, 4A at 489–90. Finally, the

defendant unambiguously denied ever seeing the *Santrina*, or the members of the vessel's crew, in Mexico. DX3, 3B at 454–55.

As a consequence of these responses, and similar false statements the defendant made in his naturalization application, a grand jury in the Western District of Texas returned a seven-count indictment, charging him with naturalization fraud and related offenses. 1R. 16. Count one alleged that the defendant: falsely stated that he had entered the United States by land from Matamoros, Mexico; that he falsely denied being in Cancun or Isla Mujeres; that he falsely stated that he never saw the *Santrina* in Mexico; that he falsely denied seeing the crewmembers of the vessel while en route to the United States; that he falsely denied having a Guatemalan passport; and that he falsely claimed on the N-400 to have used only the aliases of Ramon Medina and Franco Rodriguez, all in violation of 18 U.S.C. § 1425. 1R. 17–18.

The remaining counts alleged the substantive offenses of making the false statements described above in connection with a naturalization proceeding, in violation of 18 U.S.C. § 1015(a). That is, counts two through six involved statements that the defendant made during the April 2006 naturalization interview, while count seven alleged a false statement made when the defendant submitted his written N-400 naturalization application. 1R. 18–21.

C. The Suppression Hearing

The district court scheduled trial to begin on May 11, 2007, and ordered an April 27, 2007 deadline for filing pretrial motions, followed by a May 2, 2007 status conference. Late on April 30, 2007, two days before the status conference, the defendant untimely moved to exclude from evidence the tapes and resulting transcripts of the naturalization interview. In so moving, the defendant argued that substantial portions of the transcripts indicated inaudibility in the recordings; that the government failed to provide a relief interpreter during the interview, resulting in inaccurate interpretation; and that the transcripts contained inaccuracies and were prepared by translators of uncertain credentials. 3R. 607.

At the court's request, the government furnished the recordings and transcripts to the court, for *in camera* review. 3R. 706. The defendant also moved to suppress the statements that he made in the course of the naturalization interview, arguing, among other things, that the naturalization interview was a pretext for developing a criminal indictment. 3R. 533.

On May 4, 2007, the district court conducted a hearing on the defendant's motions,[4] during which Bolanos testified as summarized above. On cross-

[4] Given the lateness of the defendant's filing, the government expressed concern about the May 2, 2007 status hearing. On May 2, 2007, the court stated that it intended to move the status conference to May 4, 2007, and to hold an evidentiary

examination, she acknowledged that, prior to the interview, she had concluded that the defendant probably was not eligible for naturalization because of a foreign conviction for an aggravated felony, H. Tr. 108; that she did not personally seek an N-426 eligibility certificate from the armed forces, but understood that it had been filed and approved, H. Tr. 106; that it was unusual for her to become personally involved in a naturalization interview, H. Tr. 112; that portions of the pre-interview warnings the defendant received were specifically tailored to his case, *id.*; and that she was aware an informant had told investigators about how the defendant had actually entered the United States, H. Tr. 123.

She denied, however, that the actual purpose of the naturalization interview was to collect evidence for criminal prosecution, *see, e.g.*, H. Tr. 129, and explained that she interviewed the defendant to adjudicate his application and clarify some of the issues raised by media reporting about him, H. Tr. 133. Bolanos once again noted that, even in instances where the subject's naturalization file appeared to warrant denial, she could never actually deny an application without first interviewing the applicant. H. Tr. 136, 139–40.

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hearing during that status conference. The government further noted that potential witnesses were unavailable on such short notice. Nevertheless, the government responded to the defendant's motions by May 2, 2007, and presented the testimony recounted above. *See* H. Tr. 18–19.

The defendant presented the testimony of Carlos Spector, an attorney he qualified as an expert on immigration law, policies and practices. Spector testified that an aggravated felony conviction—such as the defendant's Panamanian conviction—was a statutory bar to naturalization; and that the proceeding itself seemed irregular because, among other things, naturalization interviews were not typically videotaped or audiotaped, nor did they involve multiple questioners, focus upon the subject's mode of entry into the United States or his use of aliases. H. Tr. 149–53.[5]

Under cross-examination, however, Spector admitted that his experience was limited to immigration adjudications in certain areas of Texas, and that he had no experience with CIS adjudicators from the Washington, D.C. headquarters. H. Tr. 161. He further admitted that he could not say whether applicants convicted in foreign countries but—like the defendant—subsequently pardoned, routinely received interviews. H. Tr. 162. Spector agreed that evidence that an applicant had used aliases, or had made false statements to the adjudicator, were relevant to the good moral character inquiry, H. Tr. 162–63, and confirmed that an applicant

[5] The defendant also claimed that the proceedings were irregular because CIS failed to submit a Form N-426 certifying the defendant's military service, which in Spector's experience was necessary to adjudicate his application. This argument was subsequently mooted. *See* 3R. 746.

like the defendant had the authority to end an interview at any time or to refuse to answer questions, H. Tr. 163–64.

D. The District Court's Order

Following the suppression hearing, the trial judge, apparently assisted by her court interpreter, listened to the audio recordings of the naturalization interview *in camera*. 3R. 746. In the course of that review, the court compared the recordings with the transcripts, as well as verifying the interview translator's Spanish-language rendition of the English-language questions and answers during the interview. *Id.* On May 8, 2007, the district court entered an order granting the defendant's motion to suppress the recordings. H. Tr. 775. In addition, although the defendant had not moved to dismiss the charges, the district court dismissed all seven counts in the indictment, including those to which the grounds for dismissal—alleged defects in the interview—did not pertain. *Id.*

1. Improper translation

At the outset, the court found that, although portions of the recordings were inaudible, the inaudible portions were not so substantial as to render them untrustworthy. It therefore denied the defendant's motion insofar as it challenged the use of the recordings on audibility grounds. 3R. 747. The district court further found inaccuracies in the government's transcripts of the interview that rendered

the documents unreliable and inadmissible. 3R. 749. However, the court noted that sufficient time remained for the parties to submit alternate transcripts or stipulate to a more accurate transcript. *Id.*

The district court then turned to consider the accuracy of translation services during the defendant's naturalization interview. In its *in camera* review of the recordings, the court observed that there were "numerous instances where words were incorrectly interpreted or not interpreted at all, where Defendant appeared to provide unresponsive answers as a result of his confusion over the questions, and where [he] expressed difficulty understanding what was said to him." 3R. 751.

Relying upon cases presenting similar claims of translation errors in the context of removal proceedings, *see, e.g.*, *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000), the court reviewed the translator's work at the defendant's interview. 3R. 749–51. The district court listed what it considered "some of the most egregious [translation] deficiencies," 3R. 751, on each recording. It observed that, on tape 1A, the rights warnings statement that the defendant was administered at the outset of the proceedings was not translated at all, foreclosing a guarantee that he understood them. 3R. 751–52. Turning to tape 1B, the court observed that the questioner inquired whether, from the time the defendant had been released from jail in Panama until the time he entered Mexico in March 23 or 24, 2005, "you

haven't been to Mexico." According to the court, however, the translator added the phrase, "you had never been to Mexico prior to that date?" 3R. 752–53. In the court's view, the translator changed the question from the one actually asked to an inquiry into whether the defendant had been in Mexico prior to his jail time in Panama, a matter "which [in its view] could potentially cause numerous problems with respect to a time line and the Government's theory as to how he entered the country." 3R. 753.

The district court identified other translation inaccuracies in tape 2A. Bolanos inquired whether the defendant had ever presented a U.S. passport to officials in a foreign country, which the translator interpreted in a way that the district court found meant "I understand that you have never said that you are an American citizen, but you have presented documentation to immigration officials . . . that they believed you were an American." 3R. 754. In the court's view, the error caused "a break-down in communication between Bolanos and Defendant." *Id.* In addition, the court determined that a question about whether the defendant had ever applied for a permit to enter the United States was inaccurately translated as whether the defendant had sought an application for permanent residency. 3R. 755. Finally, when the defendant declined to answer a question concerning the commission of crimes, Bolanos noted that his declination would be taken into

account in the final adjudication of his application. The translator asked Bolanos to repeat the question, then translated it to mean, "every answer that you give today, will be taken into account to determine whether to adjudicate your petition or not." *Id.* This translation, to the court, inexplicably "caused Bolanos' statements to lose their meaning and effectiveness." 3R. 755–56.

In reviewing tape 2B, the district court observed that the defendant once stated, in Spanish, "when it came time for what is called the presentation of evidence," but this statement was translated as, "when the evidence technicians came." 3R. 756. Later, when the defendant was questioned about his Panamanian arrest, the court believed that the translator inaccurately used the term "tribunal" rather than "court," which the court believed might cause ambiguity because the former term has "various connotations." *Id.* On the same tape, the court noted that an interviewer asked the defendant whether he had told a government official that he abandoned the plan to detonate a car bomb in the 2000 Panama assassination attempt. The translator interpreted the question in a way that meant, according to the district court, "[a]fter you were arrested, did you at any time tell any official of the North American government that you had abandoned the idea of putting a bomb in a car because many Panamanians could die?" 3R. 757. The impact of this inaccuracy, the court determined, was that "[t]here is no guarantee that Defendant

understood the question being asked him and thus there is no guarantee that his answer was an accurate one." *Id.*

The district court identified what it considered other translation inaccuracies on tape 3A. First, during introductory remarks, Bolanos stated that they would "continue the review of your application . . . on question 5. . . where we were discussing the overthrow of governments, I don't think that we did go through that completely." *Id.* The district court faulted the translation of these remarks as, "[w]e are going to continue checking your application. We are going to continue where we stopped, we were speaking about the overthrow of governments." 3R. 758. Later, an interviewer asked whether the defendant ever "trie[d] to recruit an individual to assist in the 1997 and 1998 bombing in Cuba." *Id.* Again, the district court faulted the translation, which it determined meant, "[d]id you personally take charge of the recruitment of some/any person who participated in these bombs that exploded in Cuba in the year 1997 and 1998?" *Id.*

Further, when an interviewer observed that she might expect Posada's attorney to object to a series of questions, the statement was translated to mean "[i]t is very probable that your attorney would object to the questions." *Id.* The impact of any variance, according to the court, was simply that it "may have caused several misunderstandings." *Id.* When an interviewer told the defendant's counsel

that the term "objection" was not appropriate because the interview was not a "court hearing," the translator stated in Spanish, "this isn't a trial," an inaccuracy that the court believed "may have affected Defendant's view of what was occurring at the interview." 3R. 758–59.

In tape 3B, the court faulted the translator and Bolanos for a supposedly confusing line of questioning about the defendant's activities promoting the overthrow of the Cuban government, caused in part from the translator initially mistaking Bolanos's word "taught" for "thought." 3R. 759. The court acknowledged that Bolanos ultimately clarified and explained the question. *Id.* Similarly, Bolanos asked whether the defendant had ever been in possession of an immigration document that was not lawfully issued, and the translator construed the question as, "[a]t any time have you acquired or possessed or received an immigration document that is not valid, that is not a real document." 3R. 760. Though conceding that the translator "interpreted the statement correctly in the end," the court determined that "the tone and tenor of the tape indicate that Bolanos was so hard for everyone to understand, including the interpreter, that this Court cannot be assured that there was a 'meeting of the minds.'" *Id.*

Finally, turning to tape 4A, Bolanos told the defendant in English that the interviewers would review the application and answers and, if further questions

were warranted they would set up another appointment for clarification. The translator did not translate these remarks, but asked in Spanish whether the defendant understood. The defendant responded, "Yes." 3R. 761. The exchange prompted the court to remark that "[t]his is, again, a complete lack of interpretation." *Id.*

Given these inaccuracies, the district court determined that the translation services at the defendant's naturalization interview were unreliable, and suppressed any statements he made at the interview. 3R. 762.

2. Outrageous government conduct

The district court went further, dismissing the entire indictment after determining that the government's conduct of the interview deceived the defendant as to its true purpose and was so outrageous that it constituted a violation of the defendant's right to due process.

The district court relied upon this Court's decision in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), in reaching its decision to dismiss the indictment. 3R. 773. In *Tweel*, the court suppressed evidence obtained in violation of the defendant's Fourth Amendment rights when agents of the Internal Revenue Service ("IRS") initiated a civil audit solely to obtain documents for a criminal investigation. The district court noted that the principles in *Tweel* had been

extended by some other district courts to prohibit the government from gathering criminal evidence through proceedings ostensibly conducted for civil or administrative purposes. 3R. 767–70; *see, e.g.*, *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Ore. 2006), *appeal pending*, No. 06-30100 (9th Cir. submitted Sept. 25, 2007).

Based on such decisions, the district court found that, in the instant case, "the evidence is overwhelming that the Government improperly manipulated the administration of criminal justice in order to secure criminal indictments(s) against Defendant." 3R. 771. In reciting such "overwhelming" evidence, the district court observed that Bolanos had determined that the defendant was probably not eligible for citizenship, due to his foreign felony conviction, but nonetheless chose to interview him. *Id.* The court also observed that it was "completely disingenuous" for the government to argue that a hearing was warranted to assess the defendant's good character when, well before the hearing, it had collected extensive materials related to his conduct. 3R. 771–72.

Further, in the court's view, the manner in which the interview was conducted—involving consultation with DOJ attorneys; its duration when, in the court's experience, most similar proceedings last thirty minutes; and the involvement of two government attorneys and two defense attorneys—tended to

indicate that "there was no genuine administrative interview and the entire interview was, instead, a pretext for a criminal investigation." 3R. 772. Based on these circumstances, the court found that the government "engaged in fraud, deceit, and trickery" by "misrepresent[ing] to Defendant that the purpose of asking him such extensive questions about his means of entry into the United States, his conduct in Panama and Venezuela, and his use of various aliases and passports was merely to 'clarify the record'" in adjudicating his naturalization application. 3R. 773. Ultimately, the court found "the Government's tactics in this case" to be "so grossly shocking and so outrageous as to violate the universal sense of justice," and dismissed all seven counts of the indictment. 3R. 774

SUMMARY OF THE ARGUMENT

1. The district court erred in suppressing all statements the defendant made during his naturalization interview as the result of allegedly defective translation services at the interview. In false statement prosecutions, the defendant's understanding of the questions—and the effect such understanding had upon his state of mind—are ordinarily questions for the jury. Only in rare cases, where defects in the questions make them fundamentally ambiguous, may a court usurp the jury's function. The relevant inquiry must focus upon the particular line of questioning leading to the answers charged as false. In this case, there was no

such fundamental ambiguity. The defendant was charged with giving distinct and unambiguously false answers to distinct questions, and the district court found no fault with the translations of these questions and answers. Moreover, the district court erred by effectively suppressing all of the defendant's statements without regard to the particular questions leading to false answers. Furthermore, it was clear from the context of the questioning that the defendant in fact understood the questions posed to him. A jury certainly could have so determined, and the district court erred by substituting its own determination.

2. The district court also erred in dismissing the indictment in its entirety, based on its view of the government's trickery, deceit and outrageous conduct. The drastic remedy of dismissal on these bases is applied only in the rarest of circumstances involving the most extreme government conduct. Here the defendant—who by all accounts has led an extraordinary and controversial life—sought out a benefit from the government and invoked the requirement for an interview. The defendant, who was represented by counsel, knew that false statements at the interview might subject him to criminal charges. It was appropriate for adjudicators charged with determining whether the defendant met his burden of establishing good moral character to inquire about his manner of entry into the United States, when that account was at odds with other reports.

And it was certainly proper for the adjudicators to ask the applicant for citizenship about reports that he committed notorious acts of violence.

The record shows no deceit or trickery, nor outrageous conduct that justifies the extreme sanction of dismissal—including the dismissal of two counts wholly separate from the faulted interview. The government conducted a thorough interview of an extraordinary applicant for citizenship, a circumstance that gave the defendant no license to lie to the interviewers.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY USURPED THE JURY'S ROLE BY SUPPRESSING STATEMENTS THE DEFENDANT MADE AT HIS NATURALIZATION INTERVIEW.

A. Standard of Review

Ordinarily, this Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Guidry*, 456 F.3d 493, 501 (5th Cir. 2006); *United States v. Gutierrez-Farias*, 294 F.3d 657, 662 (5th Cir. 2002). However, the district court's interpretations of law are reviewed *de novo*. *See Guidry*, 456 F.3d at 501; *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004).

B. The district court erred by suppressing the interview statements, and thus removing the issue of the defendant's understanding from the jury's proper consideration, without considering the particular statements charged as false or context demonstrating the defendant's understanding.

The district court couched its suppression decision in due process terms, finding that supposed errors in translation during the interview constituted a violation of the defendant's due process rights. In support, the court cited the "well accepted" proposition that a competent interpreter is critical to a fair *removal* hearing. 3R. 749 (citing *Kotasz v. United States*, 31 F.3d 847, 850 n.2 (9th Cir. 1994)).

At the outset, these same due process considerations do not apply to the proceeding at issue here—an interview conducted to determine an applicant's eligibility for a benefit that he seeks from the government. Indeed, the Second Circuit has identified an "important distinction" between removal proceedings and interviews to adjudicate an analogous immigration benefit, for adjustment to Special Agricultural Worker status. In such administrative proceedings, unlike in the removal context, "the government has not sought out individuals with the purpose of depriving them of their liberty or expelling them from the country; rather, aliens have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish." *Abdullah v. INS*, 184

F.3d 158, 165 (2d Cir. 1999) (assuming, for the sake of argument, that such applicants are even entitled to due process protections). As a result, the court rejected the notion that due process requires applicants for a benefit be provided with competent interpreters. *Id.* at 166.

Similar to the application at issue in *Abdullah*, the defendant here affirmatively petitioned for an immigration benefit that he bore the burden to establish. Thus, to the extent that the district court excluded the tapes and transcripts on the ground that inaccurate translation violated his due process rights, the court erred as a matter of law. The defendant simply had no due process right to a competent interpreter at the naturalization interview. The cases cited by the district court, which concern the right to a translator during removal proceedings—in other words, where the government has "sought out individuals with the purpose of depriving them of their liberty or expelling them from the country," *id.* at 165—are therefore inapposite, and provide no basis for suppression on due process grounds.

However, even assuming that there was a legitimate due process issue before the district court, the crux of its concern, and ultimate ruling, involved ambiguity and the defendant's understanding of the questions posed to him. Specifically, the court noted instances where it felt there had been "a break-down in communication

between Bolanos and Defendant," 3R. 754; or where alleged translation errors "may have affected Defendant's view of what was occurring at the interview," 3R. 759; where "[t]here is no guarantee that Defendant understood the question being asked him and thus there is no guarantee that his answer was an accurate one," 3R. 757; and an absence of an "assur[ance] that there was a 'meeting of the minds,'" 3R. 760.

Courts have considered this same issue in other contexts involving false statements, such as prosecutions for perjury. They have held that resolving any ambiguity in the questions to which a defendant is alleged to have falsely answered, and determining the effect of any ambiguity on the defendant's understanding of the questions and his subsequent answers, is properly the jury's province. *See United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980) (collecting cases); *see also, e.g., United States v. Damrah*, 412 F.3d 618, 627 (6th Cir. 2005). Only in rare instances may a trial court usurp the jury's role and determine that the questions are fatally flawed. "It is only in exceptional cases that a question is so ambiguous, fundamentally ambiguous, such that no answer can be false as a matter of law. If there is no fundamental ambiguity, the jury resolves any ambiguities." *Damrah*, 412 F.3d at 627; *see also United States v. Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d

Cir. 1987) (applying test to 18 U.S.C. § 1014), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482 (1997). Significantly, the *Damrah* court applied this fundamental ambiguity standard to a violation of 18 U.S.C. § 1425, and at least one court has used the same standard to address and reject the very issue presented here: whether alleged translation errors in questions and responses that later served as the basis for false statement charges made the exchange ambiguous as a matter of law. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1239–41 (2d Cir. 1983); *see also United States v. Somsamouth*, 352 F.3d 1271, 1277 n.4 (9th Cir. 2003).

"A question is fundamentally ambiguous when 'men of ordinary intelligence' cannot arrive at a mutual understanding of its meaning." *Culliton*, 328 F.3d at 1078 (quoting *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986)). "We have stated that the point [of fundamental ambiguity] is reached 'when it [is] entirely unreasonable to expect that the defendant understood the question posed to him.'" *Ryan*, 828 F.2d at 1015 (quoting *United States v. Slawik*, 548 F.2d 75, 86 (3d Cir. 1977)). Even in reviewing a defendant's post-conviction ambiguity claim, this Court has emphasized that questioning is fundamentally ambiguous only where a reasonably-minded jury *must* have harbored a reasonable doubt as to the elements of the charged false statement crime. *Bell*, 623 F.2d at

1136. The record and the law in this case demonstrate that the district court erred by conducting its own *in camera* evidentiary hearing and assuming the fact-finder role for an issue properly resolved by a jury.

1. The district court found no ambiguity or translation error in the particular questions and answers charged as false.

Whether a fundamental ambiguity in questioning justifies usurping the jury's function in a false-statement prosecution must be analyzed by reviewing *the particular questions or line of questioning* that resulted in a defendant's statement later charged as false. *See Bell*, 623 F.2d at 1137 (reviewing "the crucial question and answer"); *see also United States v. Reilly*, 33 F.3d 1396, 1418 (3d Cir. 1994) (reviewing specific statement charged for ambiguity); *United States v. Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992) (reviewing specific line of questioning forming the basis for a count in the indictment); *Ryan*, 828 F.2d at 1015–19 (reviewing separately each charged statement); *Lighte*, 782 F.2d at 375–76 (reviewing separately individual series of questions and, within those series, distinct questions). Moreover, the existence of some ambiguous questions within an exchange does not necessarily make the questions resulting in the charge fundamentally ambiguous. *Lighte*, 782 F.2d at 375 ("[T]he fact that some ambiguous questions were asked does not preclude a perjury conviction.").

This crucial requirement for a district court to analyze claims of fundamental ambiguity with reference to the *particular questions and answers charged as false* has recently been emphasized in the context of a claim, similar to that presented to this Court, that ambiguous questions infected an entire interview. In *United States v. Safavian*, 451 F. Supp. 2d 232, 248 (D.D.C. 2006), the court expressly rejected the argument that "th[e] entire interaction was ambiguous." It observed that "[n]either the law nor the record supports such an argument." *Id.* Indeed, even when, as here, an interview is conducted in a foreign language, and the defendant is able to identify errors in the translation, a court may not find fundamental ambiguity unless those errors affect the specific questions and answers that led to the charge. *See Somsamouth*, 352 F.3d at 1277 n.4 ("Although the transcript reveals a number of inaccuracies in the son-in-law's translation, it does confirm that there was no error *regarding the critical questions and answers*.") (emphasis added); *see also Sun Myung Moon*, 718 F.2d at 1239 (noting that the government properly dismissed one of five perjury counts after the court agreed with a defendant that the portion of his testimony charged in that count had been inaccurately translated); *id.* at 1241 (rejecting ambiguity claim as to another count because, even assuming that there were inaccuracies in the translation of some of the defendant's answers, those answers had no relationship to the

statement charged as false).

The district court reached its conclusion to suppress the defendant's statements after listing "some of the most egregious" translation errors that it found during the defendant's naturalization interview.[6] However, there was no basis for the court to usurp the jury's function because, even assuming that the translator erred at times, the court found "no error regarding the critical questions and answers" that formed the basis for this indictment. *Somsamouth*, 352 F.3d at 1277 n.4.

Consider the "critical questions and answers" charged as false in the indictment. Substantive counts two through six (count one and count seven involved statements that were not made at the interview) alleged that the defendant made certain specific and particular false statements. For example, count three charged the defendant with falsely claiming that he had never been to Cancun or Isla Mujeres, Mexico. 1R. 17–18. That count was based on an exchange contained on tape 1B, in which the interviewer asked, "were you ever in Cancun?"

[6] Indeed, at times "errors" found by the district court were not errors at all. For example, the district court faulted the translator and questioners for not translating the initial rights warning given to the defendant, 3R. 751, but the record reveals that these warnings *were* translated, *see* DX3, 1A at 334–36.

(translated as "¿usted estuvo en Cancún?"). DX3, 1B at 387.[7] The defendant responded unambiguously, "No." *Id.* The interviewer then asked, "Were you ever in Isla Mujeres?" ("¿Usted estuvo en Isla Mujeres?"), to which the defendant again responded, "No." *Id.* The interviewer then went further in asking whether the defendant had visited Isla Mujeres during his March 2005 trip to enter the United States. *Id.* The defendant once again responded, "No." *Id.* The district court found no translation error in this unambiguous exchange but, nonetheless, dismissed the count to which it pertained.

Similarly, count six charged the defendant with falsely claiming that he had never possessed a Guatemalan passport. 1R. 20. This charge was based on a line of questioning after Bolanos had reviewed the false documents that the defendant had admitted to using. Following that review, she asked, "Guatemala, have you ever had a passport from Guatemala?" ("Guatemala, ¿usted tuvo un pasaporte de Guatemala?"). DX3, 3B at 439. The defendant replied, "No." *Id.* She then asked, "¿Nunca?" ("Never"), and again the defendant responded, "No." Bolanos

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[7] Citations to excerpts of the recorded interview refer this Court to the transcript introduced at the suppression hearing. The district court determined that the transcript should be excluded as unreliable, because portions that the court could hear were transcribed as "inaudible." However, any such defects do not substantially impact the excerpts quoted here. The district court supplemented the record to include the CD that it reviewed, R.109, and that recording is therefore available in the appellate record for this Court's review.

persisted, noting that the defendant had lived in Guatemala for a long period and asking, "Nothing from Guatemala, ever" ("Nunca, ninguno de Guatemala"). DX3, 3B at 440. The defendant once again responded, "That I remember, no" ("Que yo recuerde, no"). *Id.* The district court likewise found no ambiguity or translation error in this line of questioning.

Counts two, four and five charged the defendant with falsely claiming to have entered the United States by land, rather than on the *Santrina*, and with denying that he saw the *Santrina*'s crewmembers while in Mexico. 1R. 17–20. The counts were based on the following exchange, which occurred later in the interview, after the defendant described his alleged entry into the United States by land, with the help of an unknown smuggler. The interviewer noted that media reports stated that he actually arrived by boat on the *Santrina*. DX3, 3B at 454. The defendant confirmed that he was aware of those reports. *Id.* The interviewer then asked the defendant, "When you were in Mexico, did you ever see the [S]antrina?" ("¿Cuando usted estuvo en México, usted vio el [S]antrina?"). DX3, 3B at 455. The defendant replied, "No." *Id.* The interviewer then asked whether he had seen the crew of the *Santrina* while in Mexico, listing their names and asking, "Did you see them at all while you were in Mexico?" ("¿Cuando usted estuvo en México usted alguna vez a estas personas las vio?"). *Id.* The defendant

confirmed, "No," *id.*, and again, the district court found no ambiguity or translation error in this straight-forward series of questions and answers.

The district court provided no basis for suppressing these statements by the defendant, instead focusing on extraneous translation errors elsewhere in the interview. For example, in the court's review of tape 1B, it faulted what it considered translation errors in preliminary questions concerning the defendant's previous trips to Mexico, which, the court opined, "could potentially cause numerous problems with respect to a time line and the Government's theory as to how [the defendant] entered the country." *See* 3R. 753. Any such "potential" problems, however, had no effect on the critical questions, "Have you ever been in Cancun/Isla Mujeres," or the defendant's straightforward responses of "No."

The remaining critical exchanges, as described above, occurred on tape 3B. Nevertheless, the district court focused on other alleged translation errors in the other recordings. For example, as described above, the district court found on tape 2B that the translator "did not represent the spirit of the conversation," 3R. 756, and on tape 3A, that alleged errors in tangential questioning "raises the issue of whether there could have been effective communication between the people

asking the questions and Defendant," 3R. 758.[8] Such "issues" about the "spirit" of the communication have nothing to do with demonstrating fundamental ambiguity in the critical questions and answers charged as false. None of these alleged errors (the determination of which, at any rate, properly was for the jury to make), even if they did occur, make the exchanges charged in the indictment fundamentally ambiguous, because there is simply no relationship between them and the answers alleged to be false. *See Sun Myung Moon*, 718 F.2d at 1240–41.

Indeed, the district court's identification of alleged translation errors unrelated to the counts in the indictment, and thus tangential to the fundamental ambiguity inquiry, continued even with tape 3B. Here, the district court focused on confusion in phrasing a question about whether the defendant promoted the overthrow of the Cuban government, as well as some confusion in questioning the defendant about whether he had ever possessed a passport not lawfully issued. Significantly, the district court found that "[w]hile [the translator] interpreted the

[8] Interestingly, on tape 4A, the court faulted the translator for, at one point, *not* translating Bolanos's opening comments; instead, the translator asked the defendant if he understood, to which the defendant responded, "yes," and then proceeded to begin making a statement—in English. 3R. 760–61; DX3, 4A at 497. The district court interpreted this as faulty work by a translator, but a jury may well have interpreted it as evidence, consistent with Bolanos's testimony, that the defendant understood English well and, perhaps, as evidence that the district court's concern that the translator failed to capture the "spirit" of the conversation was unfounded.

statement correctly in the end . . . this Court cannot be assured that there was a 'meeting of the minds.'" 3R. 760.

But the issue before the district court was not whether there was a "meeting of the minds." *See Culliton*, 328 F.3d at 1079 ("[A] question is not fundamentally ambiguous simply because the questioner and respondent might have different interpretations."). The court simply identified nothing "unduly vague or ambiguous about" the critical exchange relating to count six, *Sun Myung Moon*, 718 F.2d at 1241, in which Bolanos unambiguously asked whether the defendant had ever possessed a Guatemalan passport—a question to which the defendant responded, "No." Nor did the district court specify any ambiguity at all in the questions about the *Santrina* or its crew, which formed the basis for counts two, four and five. Indeed, for reasons described below, the context of these lines of questioning belies any claim that the defendant suffered from mis-translation of the critical questions, because it is apparent that he understood what he was asked.

In *Sun Myung Moon*, 718 F.2d 1210, the Second Circuit considered a defendant's claim, similar to that advanced here, that certain errors in the translation of his testimony rendered the questions asked fundamentally ambiguous. Among other things, the defendant asserted that two of his answers were mis-translated, "thus casting the third answer [charged as false] in a

misleading context." *Id.* at 1240. Even though these queries and answers occurred in the same line of questioning, the court rejected his argument: "Even assuming inaccuracies with respect to the first two answers, we fail to see any relationship between them and the third answer, the one alleged to be false." *Id.* at 1240–41. Separately, the court rejected a challenge to another count in that indictment, simply finding "nothing unduly vague or ambiguous" about the questions leading to the defendant's straight-forward false statements. *Id.* at 1241.

In this case, the alleged translation errors did not even occur in the same line of questioning as those during which the defendant answered falsely and for which he was charged. Rather, the district court discovered translation errors in portions of the defendant's interview that were wholly tangential to the questioning that led to these charges.

2. The district court erred in suppressing the defendant's statements because a jury could determine from the context that the defendant understood the questions to which he falsely responded.

Fundamental ambiguity—the only appropriate reason for removing the question of the defendant's understanding of questions from the jury—involves an objective test, which cannot be determined apart from the context of the exchange. *See Lighte*, 782 F.2d at 372. "[A] question is not fundamentally ambiguous simply

because the questioner and respondent might have different interpretations. Rather we must consider the context of the question and [the defendant's] answers, as well as other extrinsic evidence relevant to his understanding of the questions posed . . . ." *Culliton*, 328 F.3d at 1079 (citing, among others, *Swindall*, 971 F.2d at 1553). Because fundamental ambiguity only occurs "'when it [is] entirely unreasonable to expect that the defendant understood the question posed to him,'" *Ryan*, 828 F.2d at 1015 (quoting *Slawik*, 548 F.2d at 86), a court may not displace the jury if the context or other evidence demonstrates that a jury might find that the defendant understood the questioning, *see Reilly*, 33 F.3d at 1418.

In this case, despite the district court's vague misgivings about "meetings of the minds" or translation that "may have caused several misunderstandings," there is ample evidence from the context of the critical questions that the defendant understood what he was being asked. For example, the response charged in count three concerned the defendant's denial that he recently possessed a Guatemalan passport. After listing a number of false passports that the defendant admitted using, the questioner asked if he had one from Guatemala. The defendant responded, "No." DX3, 3B at 439. Bolanos pressed, "Nunca?" or "Never?," to which the defendant again responded, "No." *Id.* But Bolanos pointed out that he had lived in Guatemala for years, *id.*, and then she declared,

"Nothing from Guatemala, ever," to which the defendant again agreed, DX3, 3B at 440. Given this exchange, it would be entirely reasonable to find that the defendant understood what he was being asked, and the question cannot be fundamentally ambiguous.

Moreover, it is clear from the interview that the defendant was aware of allegations that he entered the United States aboard the *Santrina*, rather than overland through Mexico. For example, at one point in the interview, the questioner mentioned newspaper articles reporting that the defendant was in Cancun or Isla Mujeres in March 2005. The defendant responded "Castro dice eso todos los dias" or "Castro says that every day," before again denying that he had been to those locations. DX3, 1B at 388. The defendant's knowledge of reporting that he had been in Cancun or Isla Mujeres indicates that he well understood the question when asked if he had ever been to either place.

When asked specifically about the *Santrina* and its crew, the defendant again stated that Castro frequently claimed that he entered the United States aboard that vessel. Indeed, in a moment best appreciated in the audio recording, the defendant does his best imitation of Fidel Castro yelling "Vino en el [S]antrina" or "He came in on the Santrina." *See* DX3, 3B at 454. When then asked whether he saw the *Santrina* in Mexico, the defendant unambiguously

responded, "No." DX3, 3B at 455. Again, this exchange demonstrates a reasonable basis for believing that the defendant understood the questions he was asked, and the questions thus are not fundamentally ambiguous. Given the context and unambiguous nature of the questioning, the court erred by suppressing statements the defendant made during the interview.

II. THE DISTRICT COURT ERRED IN DISMISSING THE INDICTMENT ON THE BASIS OF OUTRAGEOUS CONDUCT ON THE GOVERNMENT'S PART.

A. Standard of Review

This Court reviews the dismissal of an indictment on grounds of outrageous government conduct *de novo*. *United States v. Asibor*, 109 F.3d 1023, 1039 (5th Cir. 1997). "The issue is 'whether the government's prosecution of the crime would abridge fundamental protections against unfair treatment.'" *Id.* (quoting *United States v. Smith*, 7 F.3d 1164, 1168 (5th Cir.1993)).

B. The government did not exploit the naturalization proceeding for an impermissible purpose.

In dismissing the indictment, the district court noted that the defendant "couche[d] his argument in terms of the Fourth, Fifth, and Sixth Amendments," though the court determined that "the concern in the instant case is more accurately categorized as one of due process," 3R. 763, presumably under the Fifth Amendment. The district court had noted that "there's sort of a paucity of case

law out there on" the issue, H. Tr. 24, and ultimately reached a unique decision that the entire indictment should be dismissed. In so holding, the district court relied upon two strains of precedent in reaching its dismissal decision, in essence adopting the analysis of a Ninth Circuit district court in *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Ore. 2006), *appeal pending*, No. 06-30100 (9th Cir. submitted Sept. 25, 2007).

Initially, relying upon *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), the court determined that the defendant's administrative naturalization interview was pretextual, *i.e.*, used by the government for the purpose of collecting evidence for a future criminal case. The court thus found that the government impermissibly engaged in trickery and deceit by failing to warn the defendant that (in the court's view) the government was interviewing him to develop a criminal case. In addition, the district court found the government's "tactics in this case" "so grossly shocking and so outrageous as to violate the universal sense of justice," 3R. 774, and therefore the defendant's due process rights, *see Stringer*, 408 F. Supp. 2d at 1089. Neither the record evidence nor the law support such findings.

1. The defendant failed to meet his burden of showing that the government engaged in trickery or deceit, and no evidence demonstrates the type of conduct sanctioned in *Tweel*.

The Supreme Court has long approved the cooperation of civil and criminal investigative agencies in conducting parallel proceedings to enforce federal law. For example, in *United States v. Kordel*, 397 U.S. 1 (1970), under circumstances similar to the conduct that is alleged to have occurred here, the defendant challenged the government's use of interrogatories during a civil proceeding to obtain evidence for use in a criminal prosecution. The Court found no due process violation, concluding that it would "stultify enforcement of federal law to require a government agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11. In dicta that bears upon the district court's actions here, however, the Court cautioned that it did "not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . nor with any other special circumstances." *Id.* at 11–12 (footnotes omitted); *see also Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912); *SEC v. First Fin. Group of Texas*, 659 F.2d 660, 667 (5th Cir. 1981); *United States v. Unruh*, 855

F.2d 1363, 1374 (9th Cir. 1988); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980).

In *Tweel*, this Court subsequently considered a claim that certain evidence the defendant provided to IRS investigators should be suppressed, because it had been gathered in violation of his Fourth Amendment rights. In that case, a DOJ agency involved only in criminal matters requested the IRS to initiate a civil tax audit of the defendant solely to obtain records for use in an anticipated criminal prosecution. It then misrepresented to the defendant that its purpose in conducting that audit—which required the production of records—was civil in nature. *Tweel*, 550 F.2d at 298. Applying well-established Fourth Amendment law, this Court found that the government improperly obtained the documents through deceit, trickery and deception. It therefore ordered them suppressed. *Id.* at 298–99; *see also United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998).

Other courts have likewise recognized a distinction between proper agency cooperation and civil actions undertaken in bad faith solely to develop criminal evidence. *See Unruh*, 855 F.2d at 1374; *see also United States v. Gel Spice Co.*, 601 F. Supp. 1214, 1218 (E.D.N.Y. 1985) (citing, among others, *Dresser*, 628 F.2d 1368) ("To establish bad faith, defendants must show that the sole purpose of the investigation was investigatory, rather than regulatory."). And some district

courts, notably in the Ninth Circuit, have broadened the analysis in *Tweel* to justify suppressing statements obtained from civil processes after the government concealed a parallel criminal investigation from the target, as well as dismissing the resulting indictment on grounds of outrageous government misconduct. *See Stringer*, 408 F. Supp. 2d at 1089. Indeed, *Stringer*'s dual rationale for dismissing the indictment is apparent in the district court's order here.

However, such a broad reading of *Tweel* is neither faithful to this Court's holding in the case nor to its subsequent precedents, which have emphasized the exceptional magnitude of the deception at issue in *Tweel*. *See United States v. Powell*, 835 F.2d 1095, 1098 (5th Cir. 1988) ("While we have addressed the issue of revenue agents' misrepresentations several times, we have only once [in *Tweel*] held that suppression was appropriate."); *id.* at 1099 (collecting cases). Most analogous to this case, in *United States v. Blocker*, 104 F.3d 720 (5th Cir. 1997), the defendant, relying upon *Tweel*, moved to suppress evidence obtained by an auditor investigating a company pursuant to a state administrative scheme, because the auditor had already agreed with the FBI to furnish it information he uncovered during his investigation.

This Court first emphasized that "*Tweel* requires defendants to bear the burden of showing that" the government materially misrepresented the nature of a

civil proceeding. *Id.* at 729 n.11 (citing *United States v. Caldwell*, 820 F.2d 1395, 1399 (5th Cir. 1987), requiring "clear and convincing evidence"); *see Powell*, 835 F.2d at 1099 (noting that this Court's post-*Tweel* precedents "teach that the suppression burden is indeed a heavy one"). The Court then found that the defendant failed to meet that burden. *Blocker*, 104 F.3d at 729.

Moreover, it distinguished *Tweel* because, in contrast, the auditor "did not use his status . . . to gain access to records that he had no right to inspect." *Id*. Specifically, this Court observed that "[i]n *Tweel* there was *no* genuine civil audit of the kind represented; the only audit was a criminal audit specifically ordered for this particular taxpayer, and falsely represented as a routine civil audit. . . . Here [the auditor's] audit *was*" a legitimate audit. *Id.* at 729–30 (emphases in original).

Likewise, the defendant here failed to meet his burden of showing that the government engaged in trickery, deceit or misrepresentation about the nature of the interview. The record does not demonstrate any improper use of a civil proceeding to develop criminal evidence, nor does it reveal any bad faith or deceit on the government's part in conducting the naturalization proceedings. Indeed, in contrast to *Tweel*, where the government approached the defendant and misrepresented to him that it sought to compel certain information through civil proceedings for the conceded purpose of developing criminal evidence, the

defendant here first *approached the government* and himself sought a *discretionary immigration benefit*—for which he bore the burden of proving eligibility—by filing an application for naturalization. *Tweel* is inapposite because the government sought nothing from the defendant; rather, the defendant sought a benefit from the government and was charged with lying to obtain it. Moreover, there were no promises made—let alone broken—by the government that the defendant's answers during the naturalization interview would only be used for civil purposes. In fact, the defendant was expressly instructed otherwise in warnings issued before his interview. *See United States v. Kontny*, 238 F.3d 815, 819 (7th Cir. 2001); *see also United States v. Knight*, 898 F.2d 436, 438 (5th Cir. 1990); *Powell*, 835 F.2d at 1099.

In addition, as in *Blocker*, the naturalization interview in this case would have been conducted in the absence of any interest from criminal investigative authorities. Once the defendant filed his application, the government was obligated to adjudicate his application in a process governed by statute and regulation. *Cf. United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (holding defendant's reliance upon *Tweel* misplaced because, unlike in *Tweel*, the defendant voluntarily consented to examination of records by contract). This process necessarily includes an interview, because "[b]efore a person may be

naturalized, an employee of [CIS] . . . shall conduct a personal investigation of the person applying for naturalization." 8 U.S.C. § 1446(a). The Service's implementing regulations make clear that this investigation must include an interview, requiring that "[s]ubsequent to the filing of an application for naturalization, each applicant *shall appear in person* before a Service officer designated to conduct examinations." 8 C.F.R. § 335.2(a) (emphasis added).

Statutes and regulations also constrain the scope of an adjudicator's inquiry. The district court here faulted the government for questioning the defendant "about his means of entry into the United States, his conduct in Panama and Venezuela, and his use of various aliases and passports," and about his involvement in violent activities. 3R. 773–74. But the government has the discretion to require an applicant to aver "all facts which . . . may be material to the applicant's naturalization," 8 U.S.C. § 1445(a), and examiners are authorized to take "testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization." 8 U.S.C. § 1446(b). "Thus the [government] is given very broad authority to make inquiries as long as they are related in some way to the naturalization requirements." *Price v. INS*, 962 F.2d 836, 840 (9th Cir. 1992). And, in conducting that inquiry, the adjudicator "is entitled to know of any facts that may bear on an applicant's statutory eligibility

for citizenship, so it may pursue leads and make further investigation if doubts are raised." *Berenyi v. District Director, INS*, 385 U.S. 630, 638 (1967). Accordingly, as a threshold matter, judicial review of such an exercise of discretion in questioning an applicant is limited. *Price*, 962 F.2d at 841.

But even absent such broad discretion, all of the questions posed to the defendant were manifestly relevant to the examiner's legitimate range of inquiry under the governing regulatory scheme. Specifically, 8 C.F.R. § 316.10(a)(1) provides that "[a]n applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character." Under that same regulation, certain conduct precludes the requisite determination of good moral character. For example, an applicant "shall be found to lack good moral character" if he "was involved in the smuggling of a person or persons into the United States," 8 C.F.R. § 316.10(b)(2)(viii) or "[h]as given false testimony to obtain a[n] [immigration] benefit," *id.* § 316.10(b)(2)(vi). Particularly in view of media reports concerning the defendant's surreptitious entry into the United States, the CIS examiner was virtually obligated to inquire into such circumstances, which allegedly involved "the smuggling of a person," *i.e.*, himself, as well as the likelihood of misrepresentation concerning his mode of entry when he filled out his

naturalization application.

Further, under the governing regulation, adjudicators must

> evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated in this section and the standards of the average citizen in the community of residence. [CIS] . . . may take into consideration, as a basis for its determination, the applicant's conduct and acts *at any time* . . . if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character."

8 C.F.R. § 316.10(a)(2) (emphasis added).

Despite this section's mandate to examiners and the discretion it affords in considering matters pertinent to claims of good moral character, the district court found irrelevant the inquiries concerning the defendant's reported involvement in attempting to assassinate Castro with a car bomb; his involvement in a series of bombings in Havana that killed a foreign tourist; and his alleged participation in the destruction of an airliner that killed more than 70 people. If questions involving such notorious acts of violence are not relevant to a determination of good moral character, *id.*, and ultimately to a decision whether to grant an applicant the status of citizenship, it would be difficult to identify questions that *are* relevant to such an inquiry.

Notwithstanding the examiner's statutory and regulatory duty to inquire into the applicant's good moral character, the district court determined that the

interview was, itself, a mere pretext for developing the basis for an indictment, and that the government deceived the defendant by not disclosing that purpose. For example, the court found it suspicious that Bolanos scheduled an interview even though she testified that she knew the defendant was likely ineligible for naturalization. 3R. 771; H. Tr. 70–71. The court also cited Spector's testimony that, in his experience, CIS usually did not conduct naturalization interviews if it appeared that the applicant was not eligible, 3R. 771, and it observed that CIS ultimately found the defendant ineligible for naturalization, *id.* In the court's view, these considerations amounted to proof that the purpose of the interview was criminal, and that the naturalization proceeding was a charade. None of these factors, however, supports such an unwarranted conclusion.

Spector admitted that he had no experience with the practice of adjudicators, like Bolanos, from the CIS headquarters. H. Tr. 161. Indeed, for reasons described above, the statutory and regulatory provisions governing the adjudication process *require* an interview; if anything, Spector's experience was anomalous, and Bolanos's practice comported with the requirements of law. Moreover, it is of no consequence that the defendant's application was ultimately denied because the foreign pardon was deemed ineffective. There is no evidence in the record that this determination was made before the interview, and, in any

event, the law would not excuse Bolanos from interviewing an applicant to "clarify any issues that we may see in the application," H. Tr. 71, even if such a preliminary assessment had been made,[9] *cf. Damrah*, 412 F.3d at 627 (noting that the interview serves to clarify questions the applicant has about the N-400).

The district court also found it "suspicious" that a DOJ attorney participated in preparations for the interview. 3R. 772. Presumably the court speculated that the attorney manipulated the interview to generate evidence for a criminal case through his "direct[ ] involve[ment] in assisting USCIS prepare for Defendant's administrative interview." *Id.* However, there is absolutely no basis in the record for such a conclusion. Bolanos stated that the attorney simply reviewed the questions that she prepared. H. Tr. 94–95. Throughout her testimony, Bolanos emphasized that the questions were her own, were relevant to her "good moral character" determination, and that no one suggested questions for her to ask. *See* H. Tr. 73–74, 91, 101–02. Bolanos denied that the interview's purpose was to collect evidence for a criminal investigation. H. Tr. 129. The district court provided no basis for its "suspicion" about the propriety of the DOJ attorney's

[9] It would be a harsh practice indeed to refuse to interview an applicant for naturalization because a preliminary review of his application reveals that he *might* be ineligible. Such a rule would eliminate an applicant's opportunity to correct mistakes in the application or to explain why, despite the apparent ineligibility, he is in fact eligible, and would reduce the adjudication process to a paper exercise.

presence during Bolanos's interview preparation. *See Blocker*, 104 F.3d at 728. *Compare Stringer*, 408 F. Supp. 2d at 1088 (noting that criminal investigators were "actively involved in the SEC investigation" by meeting regularly, advising what information was needed for a successful criminal prosecution and intentionally hiding its presence from defense counsel).

Nor is there support in the record for the district court's conclusion that other "anomalous" circumstances in the interview—such as its duration, the presence of several attorneys, or the recording of the interview—demonstrate that it was a pretext for criminal investigation. To be sure, this was not a "typical" naturalization interview. Thus, as Bolanos explained, it was more extensive because the defendant's file contained more material than the average applicant. H. Tr. 70. The defendant was an applicant of great notoriety and the subject of a number of newspaper articles that highlighted his alleged activities and formed the basis for some of Bolanos's questions. *See, e.g.*, H. Tr. 83, 95, 124. Bolanos knew that the defendant's background made his case atypical and highly visible. H. Tr. 96–97. Indeed, Bolanos was apparently assigned to conduct the interview because she specialized in fraud and national security-related cases. H. Tr. 117, 135. There was, however, no basis for the district court to determine that, as a consequence, the circumstances of the interview were sinister or suspicious. The

evidence supports the rather unstartling proposition that an extraordinary applicant, who by all accounts has lived an extraordinary life, required a degree of preparation and thoroughness in the questioning that is not usually necessary.[10]

"Plainly, this was not a situation where the [government] 'trumped-up' a phony [interview] to covertly" examine the defendant. *Blocker*, 104 F.3d at 727. To the contrary, it is uncontested that "[Bolanos] was a *bona fide* [CIS adjudicator] who conducted an *actual*" naturalization interview of the defendant, as required by statute and regulation. *Id.* (emphasis in original). The defendant would have been interviewed by a CIS adjudicator, because he filed an application for naturalization, regardless whether DOJ attorneys attended any session to prepare for the interview. *Id.* The interview was required by statute as a consequence of the defendant's naturalization application and therefore was not the sole product of a criminal investigation. *Id.*; *see also Kordel*, 397 U.S. at 11.

Moreover, the questions Bolanos asked of the defendant were her own, and were designed to determine whether he met the burden of establishing good moral character, as required by the governing regulations. *See Blocker*, 104 F.3d at 728

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[10] The district court drew upon its own experience with immigration cases in El Paso in determining that supposed irregularities in the interview were suspicious. *See* 3R. 774. The record showed, however, that the interview was extraordinary solely because the applicant was extraordinary.

("The scope of [the auditor's] audit . . . was not in any way altered by his relationship with the FBI."). There was no misrepresentation about the purpose of the interview and, indeed, the represented defendant was advised that his answers could be used in other proceedings. *See Knight*, 898 F.2d at 438; *Powell*, 835 F.2d at 1099. In short, there simply was no deceit or trickery in this case, and certainly no evidence of the deceptive conduct present in *Tweel*. *See Blocker*, 104 F.3d at 727–29; *Powell*, 835 F.2d at 1098. The district court's dismissal of the indictment on this ground is therefore utterly unsupported by this Court's governing precedents.

2. The district court erred in dismissing the indictment based on outrageous government conduct.

In addition to finding that the government engaged in impermissible "fraud, trickery and deceit when it misrepresented to Defendant that the purpose of asking him such extensive questions" was for the naturalization adjudication, the court noted that the government's "tactics" were "outrageous." 3R. 773–74. As in *Stringer*, the district court thus presumably rested its dismissal decision on the ground of a separate defense, that of outrageous government conduct.

This Court, however, has "consistently held that '[g]overnment misconduct does not mandate dismissal of an indictment unless it is "so outrageous" that it

violates the principle of "fundamental fairness" under the due process clause of the Fifth Amendment.' 'Such a violation will only be found in the rarest circumstances.' Thus, a defendant who asserts the defense of outrageous government conduct has an extremely high burden of proof." *Asibor*, 109 F.3d at 1039 (citations omitted). "In order to benefit from the defense of outrageous government conduct, [the defendant] bears the burden of proving that he was not an active participant in the criminal activity and that the government was overinvolved in the charged crime." *Smith*, 7 F.3d at 1167–68; *see Asibor*, 109 F.3d at 1039; *United States v. Arditti*, 955 F.2d 331, 343 (5th Cir. 1992). The defense of outrageous government conduct "is manifestly reserved for only 'the most intolerable government conduct.'" *United States v. Harris*, 997 F.2d 812, 815–16 (10th Cir. 1993) (citation omitted). The defense is "rarely accepted," *id.* at 816, and, indeed, "[t]his Court has never invalidated a conviction on this ground," *Smith*, 7 F.3d at 1168.

There is no evidence that the government coerced the defendant to lie during the naturalization interview, and certainly no evidence that the defendant was anything other than an active participant in the charged offense. In *Smith*, the defendant, as in this case, unsuccessfully argued that questioning by Secret Service agents improperly elicited the charged threats to kill the President. This

Court rejected that defense, because the defendant knew the identities of his questioners and there was no evidence that the questioners intended to elicit new threats. *Id.* at 1169. Likewise, in this case the defendant knew that he was being questioned by government investigators and had been warned that his responses might be used in criminal proceedings. There is no evidence in the record to support a conclusion that the government questioned the defendant for the purpose of eliciting criminal conduct—lies rather than the truth. Indeed, for reasons described above the government was obligated to interview the defendant and to determine whether he met the burden of establishing good moral character. This determination necessarily required establishing whether he truthfully described his entry and his involvement in acts of violence.

Further, far from being a passive participant, the defendant chose to answer these questions falsely and to engage in an attempt to defraud immigration authorities. The defendant failed to meet his burden of proving the government's overinvolvement in his decision to lie to immigration authorities, rather than to tell the truth or remain silent. At best, the evidence shows that the defendant placed himself in a position to give false statements to the government in an administrative proceeding, and then falsely answered the government's questions. For all of the reasons discussed above, this was not a case involving "only . . . the

rarest and most outrageous circumstances," and this Court "has found no due process violation in numerous cases involving more egregious government conduct." *United States v. Duvall*, 846 F.2d 966, 973 (5th Cir. 1988) (collecting cases); *see Asibor*, 109 F.3d at 1039; *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981). The district court clearly erred in dismissing the indictment on these grounds.

3. The district court erred by imposing the extreme sanction of dismissal and by dismissing counts that had no relation to the naturalization interview.

The dismissal of an indictment is "an extreme sanction" that may only be imposed "in extraordinary situations," *United States v. Fulmer*, 722 F.2d 1192, 1194 (5th Cir. 1983), involving the "most egregious prosecutorial misconduct," *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982). "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 368 (1981); *see also Rushen v. Spain*, 464 U.S. 114, 118 (1983). In this case, even assuming that the district court correctly found the government's conduct to be grossly shocking or outrageous, it failed to consider less drastic remedies short of outright dismissal.

The breadth of the district court's order is telling. Although the court found

the government's conduct of the naturalization interview improper, it dismissed counts of the indictment charging an offense wholly separate from the interview, and which had nothing to do with the supposed misconduct. In particular, count seven charged the defendant with making false statements on the written Form N-400 that he originally submitted to apply for naturalization. *See* 1R. 20–21.

This offense was completed when he subscribed as true statements on the form and, indeed, it was his submission of this form that obligated the government to adjudicate his application—and conduct the interview—in the first place. There was no evidence that the government coerced the defendant to apply for naturalization or deceived him into doing so. In other words, the district court dismissed for government misconduct a count in the indictment that was completed before the government even became involved in the case. And because count one, naturalization fraud, was predicated upon false statements in the N-400, 1R. 17, that count also should have survived.

As a result, the district court improperly dismissed two counts that alleged offenses separate from any events involving supposed government misconduct. Thus, even if this Court were to affirm the district court's findings concerning such conduct, its wholly unwarranted dismissal of counts one and seven must be reversed.

4. Even assuming government deception or outrageous conduct, the defendant was not justified in lying to immigration authorities.

Finally, there is another important distinction between *Tweel* and the facts of this case. The defendant in *Tweel*, and in cases purporting to apply *Tweel*, was prosecuted for past conduct that he either admitted to the government in the faulted proceeding, or of which he provided evidence under false pretenses. In other words, the government sought to use evidence to prove the defendant's guilt of crimes it already believed that he committed.

Here, however, the defendant was charged with crimes entirely separate from any activity that the government might have been investigating—making false statements during the naturalization interview itself. He was charged based on his decision to commit the entirely new crime of testifying falsely, in a proceeding that he requested. The government thus could not have planned to use the interview as a vehicle for proving this offense, because there was no crime until the interview itself occurred.

As the Supreme Court explained in *United States v. Mandujano*, 425 U.S. 564 (1976), "'it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the government should not have asked. Our legal system provides methods for challenging the government's

right to ask questions—lying is not one of them,'" *id.* at 577 (quoting *Bryson v. United States*, 396 U.S. 64, 72 (1969)). Indeed, in *United States v. Wong*, 431 U.S. 174, 179–80 (1977), the Court considered a district court's decision, similar to that at issue here, that the government's failure to inform a defendant about his Fifth Amendment rights constituted such a denial of due process that it invalidated his subsequent perjury conviction. The Court rejected this sanction, affirming that "as the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions." *Id.* at 180; *see United States v. Vesich*, 724 F.2d 451, 461 (5th Cir. 1984); *see also United States v. Knox*, 396 U.S. 77, 79 (1969) ("[O]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself."); *Dennis v. United States*, 384 U.S. 855, 867 (1966) (noting that one who elects to make a false official statement as a means of self-help may not escape the consequences by asserting that the statute under which the inquiry was made is unconstitutional).

As in *Mandujano* and *Bryson*, the defendant here had no "privilege to answer fraudulently a question that the government should not have asked." Regardless of the supposed defects in the government's conduct of the interview, the defendant "was free at every stage to interpose his constitutional privilege

against self incrimination," *Mandujano*, 425 U.S. at 584, and indeed, he exercised that right under the advice of counsel throughout the interview, *see, e.g.*, DX3, 3A at 1164–74. He was free to refuse to answer questions or to terminate the interview—which he initiated by seeking the benefit of naturalization—if he chose. DX3, 1A at 334–36. These were the methods "[o]ur legal system provides . . . for challenging the Government's right to ask questions." *Bryson*, 396 U.S. at 72. "[P]erjury [was] not a permissible option." *Mandujano*, 425 U.S. at 584; *see Knox*, 396 U.S. at 82.

Thus, even if the district court were correct in its determination that the government acted improperly in conducting the interview, it erred in dismissing an indictment based on the defendant's false statements at that interview. Assuming that the questions had been improper, "perjury is not a permissible way of objecting to the Government's questions," *Wong*, 431 U.S. at 180, and the government's supposed conduct affords the defendant no license to lie.

CONCLUSION

For reasons stated herein, the United States respectfully requests that this Court reverse the district court's order suppressing the defendant's statements and *sua sponte* dismissing the indictment.

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