Lost in Translation: The Best Evidence Rule and Foreign-Language Recordings in Federal Court

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"[T]he difference between the almost right word and the right word is really a large matter—'tis the difference between the lightning-bug and the lightning."[**]

ABSTRACT: The federal court system and the Federal Rules of Evidence are designed around the English language. As the United States becomes increasingly diverse and multicultural, however, a growing number of Americans speak a primary language other than English. The federal courts and the Federal Rules of Evidence must accommodate parties, witnesses, and evidence presented in a foreign language, notwithstanding their English-only orientation. Federal Rule of Evidence 1002, known more colloquially as the Best Evidence Rule, assumes that evidence will come in only one, English flavor, however. The Best Evidence Rule is powerful and straightforward, ensuring that jurors have access to original writings and recordings in order to evaluate their meaning accurately. When applied to English-language writings and recordings to require that juries examine originals, the Best Evidence Rule improves accuracy. But when rigidly applied by federal courts to require English-speaking jurors to evaluate foreign-language recordings for themselves, the rule and its rationale break down. If the plain language of the Best Evidence Rule mandates such a result, as one federal circuit court recently held, the Federal Rules of Evidence should be amended to remove foreign-language recordings from its orbit, lest accuracy suffer and the import of foreign-language recordings get lost in translation. This Article offers concrete amendment alternatives that would exempt foreign-language writings and recordings from the Best Evidence Rule and pave the way for the efficient and meaningful consideration of foreign-language content by American

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[**] THE ART OF AUTHORSHIP: LITERARY REMINISCENCES, METHODS OF WORK, AND ADVICE TO YOUNG BEGINNERS 87–88 (George Bainton ed., 1898) (detailing a letter from Mark Twain).

juries. But this Article also charts a novel and detailed course through the existing Federal Rules of Evidence allowing for the admissibility of English transcripts of foreign-language recordings outside the Best Evidence Rule. Should federal courts unite around this common-sense interpretation of the Best Evidence Rule that allows for the fair and effective presentation of ubiquitous foreign-language evidence, costly amendments to the Federal Rules of Evidence can be avoided. If the federal courts do not interpret the existing Federal Rules of Evidence in a manner that offers a workable solution for burgeoning foreign-language evidence in the federal court system, however, the Best Evidence Rule should be amended to reflect our multicultural reality and to release foreign-language writings and recordings from its rigid constraints.

INTRODUCTION

The federal court system and the Federal Rules of Evidence are designed around the English language: "It is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English."[1] As the United States becomes increasingly diverse and multicultural, however, a growing number of Americans speak a primary language other than English.[2] The federal courts and the Federal Rules of Evidence must accommodate parties, witnesses, and evidence presented in a foreign language, notwithstanding their English-only orientation. Federal Rule of Evidence 1002, however—known more colloquially as the Best Evidence Rule—assumes that evidence will come in only one, English flavor.[3] Its inflexible mandate that juries consider "original" content has caused significant confusion and conflict among the federal courts in connection with foreign-language writings and recordings. The federal courts must unite around a common-sense interpretation of the Best Evidence Rule that allows for the fair and effective presentation of ubiquitous foreign-language evidence. If the federal courts do not interpret the existing Federal Rules of Evidence in a manner that offers a workable solution for burgeoning foreign-language evidence in the federal court system, the Best Evidence Rule must be amended to reflect our multilingual reality and to release foreign-language writings and recordings from its rigid constraints.

The latest data from the U.S. Census Bureau shows that the primary language spoken in more than twenty-seven million American households is not English.[4] This ever-growing population of non-English speakers may become involved in proceedings before the U.S. federal courts, whether as parties or witnesses. Of course, proceedings in the federal courts are conducted exclusively in English and federal jurors are expected to be proficient in the English language.[5] Federal courts are required to enlist the services of qualified

1. United States v. Diaz, 519 F.3d 56, 64 (1st Cir. 2008) (alteration in original) (quoting United States v. Rivera-Rosario, 300 F.3d 1, 5 (1st Cir. 2002)).

2. *See* AM. BAR ASS'N STANDING COMM. ON ETHICS & PRO. RESP., FORMAL OPINION 500: LANGUAGE ACCESS IN THE CLIENT-LAWYER RELATIONSHIP 2 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-500.pdf [https://perma.cc/V46M-4L6R] ("Between 1990 and 2013, the population of persons having limited English proficiency grew [eighty] percent, from nearly [fourteen] million to 25.1 million.").

3. FED. R. EVID. 1002.

4. *See* U.S. CENSUS BUREAU, HOUSEHOLD LANGUAGE, https://www2.census.gov/programs-surveys/acs/experimental/2020/data/XK201601.xlsx [https://perma.cc/7LEB-62X5]; *see also* AM. BAR ASS'N STANDING COMM. ON ETHICS & PRO. RESP., *supra* note 2, at 2 n.3 ("In 2013, approximately 61.6 million individuals, foreign and U.S. born, spoke a language other than English at home. While the majority of these individuals also spoke English with native fluency or very well, about [forty-one] percent (25.1 million) were considered as having Limited English Proficiency (LEP), which is defined as speaking English 'less than very well.'").

5. *See Diaz*, 519 F.3d at 64 (explaining that federal court proceedings must be conducted in English); 28 U.S.C.A. § 1865 (2020) (providing for disqualification from jury service of an individual who "is unable to read, write, and understand the English language with a degree of proficiency").

interpreters to assist parties and witnesses in certain federal proceedings who speak a language other than English.[6] Indeed, the 2020 Annual Report for the U.S. Courts found that federal judges used interpreters in 225,175 proceedings in the preceding year.[7]

Accommodating non-English speakers involved in federal proceedings requires more than translation of trial testimony, however. Due to the explosion of non-English speakers in the American population, original documents and recordings offered into evidence to assist juries in arriving at a verdict may also be in a language other than English. The federal reporters are littered with examples of recordings of non-English conversations that have been offered into evidence in the U.S. courts.[8]

Rule 1002 of the Federal Rules of Evidence, the Best Evidence Rule, regulates proof of the content of writings and recordings in federal court.[9] Its mandate is simple and straightforward. It demands that an "original" writing or recording be offered into evidence whenever a party seeks to prove the "content" of that writing or recording.[10] This means that the fact-finder must have access to the writing or recording itself and may not rely upon secondary evidence, such as trial testimony, that describes or summarizes its content. The policy behind the rule is equally straightforward and is based upon long-standing, common-sense notions regarding the transfer of information across multiple sources.[11] Even children understand that playing the game of "telephone," and passing information from one person to the next, results in the original message becoming hopelessly garbled.[12] The Best Evidence Rule

6. *See* 28 U.S.C.A. § 1827(d)(1) ("The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—(A) speaks only or primarily a language other than the English language[.]").

7. *Court Operations and Pandemic Response – Annual Report 2020*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/court-operations-and-pandemic-response-annual-report-2020 [https://perma.cc/43N8-4ZQ2]. The vast majority of translations were from Spanish to English. *Id.* ("Spanish . . . account[ed] for [ninety-seven] percent of all reported interpreting events in fiscal year 2020.").

8. *See infra* Part II.

9. FED. R. EVID. 1002.

10. *Id.* The Best Evidence Rule also covers photographs and permits a "duplicate" to be offered into evidence, as well as an original. *See* FED. R. EVID. 1003.

11. *See* 4 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1179 (3d ed. 1940) (noting that secondary evidence of content "is always liable to errors on the part of the copyist").

12. *See* Lisa Smith, *The Telephone Game… Can It Be This Easy to Improve Listening and Communication Skills?*, (Oct. 25, 2019, 8:19 AM), https://www.tapinto.net/towns/bernardsville-and-bedminster/sections/education/articles/the-telephone-game-can-it-be-this-easy-to-improve-listening-and-communication-skills [https://perma.cc/ZG2A-Z7YT] ("As people relay the message from one person

insists upon removing the middleman and provides jurors with the original evidence to rely upon in determining the message for themselves.

For recordings created in the English language, the operation of the Best Evidence Rule is clear. Parties must offer the "original" into evidence so that the jurors may evaluate it and decipher its content for themselves.[13] This means playing an English-language recording for the jury and allowing the jury to divine its meaning. Although transcripts of English-language recordings may be given to jurors while recordings are played as illustrative aids, the transcripts are not evidence and must be disregarded in favor of the recordings if jurors find any discrepancy between the two.[14]

But the Best Evidence Rule's mandate and justification falter when foreign-language recordings are offered into evidence. An English-speaking jury lacks the capacity to decipher a foreign-language recording on its own. Playing a foreign-language recording will do nothing to convey content and may even confuse or mislead the jury if some members of the venire attempt to serve as amateur translators. An English-translation transcript prepared by a qualified interpreter is necessary to convey the content of a foreign-language recording to a federal fact-finder in a meaningful fashion. But an English transcript, or even trial testimony describing the content of a recording, constitutes secondary evidence seemingly banned by the Best Evidence Rule.[15] This apparent clash between the Best Evidence Rule and the need to convey foreign-language content to American juries has caused a great deal of confusion in the federal courts.

Federal appellate courts have reviewed the admissibility of English transcripts in this context frequently, with the vast majority finding them admissible as substantive evidence when admitted alongside the original foreign-language recordings they translate.[16] A few federal courts have even upheld the substantive admission of English transcripts as proof of the content of foreign-language recordings without corresponding admission of the underlying recordings.[17] Yet, these federal opinions almost never *mention* the Best Evidence Rule, let alone offer a detailed analysis of how it operates to allow such secondary evidence in the context of foreign-language recordings. Rather, most federal courts have pragmatically allowed the substantive admission of English transcripts to prove the content of foreign-language recordings without delving into the finer points of evidence law.

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to another, the message often gets distorted, sometimes so much so that the intent of the original message is completely lost.").

13. *See, e.g.*, United States v. McMillan, 508 F.2d 101, 105–06 (8th Cir. 1974).

14. *Id.*

15. *See* CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE: PRACTICE UNDER THE RULES § 10.9, at 1422 (5th ed. 2018) ("A written transcript of a recording does not qualify as a 'duplicate'" and "may not be received to prove the content of an original recording without showing the unavailability of the original.").

16. *See infra* Section II.A.

17. *See infra* Section II.C.

In the absence of clear evidentiary guidance on this issue, a panel of the Tenth Circuit Court of Appeals recently held in *United States v. Chavez* that the plain language of the Best Evidence Rule demands that all original recordings, *including foreign-language recordings*, be admitted as the "primary evidence" of their content in federal court.[18] According to this holding, English-language transcripts may not be offered as substantive evidence of the content of foreign-language recordings and should be relegated to mere illustrative status, to be disregarded in the event that jurors find a discrepancy between the recordings and the transcripts.[19] This holding thus treats English-language recordings and foreign-language recordings in identical fashion for purposes of the Best Evidence Rule.

Applying the Best Evidence Rule rigidly in this context fails to recognize the crucial distinction between English and foreign-language recordings that eviscerates the justification for the rule. A foreign-language recording that English-speaking jurors cannot comprehend is simply incapable of conveying "content" as required by Federal Rule of Evidence 1002.[20] And insisting inflexibly upon production of an original recording as the primary evidence of its content fails to offer English-speaking jurors any meaningful means of evaluating foreign-language recordings. Although the majority of federal courts have permitted the substantive admission of English transcripts for precisely this reason, none have explained how doing so accords with the Best Evidence Rule and there is now a conflict among the federal circuits regarding proper treatment of foreign-language recordings. Without a detailed evidentiary roadmap for the admission of English transcripts of foreign-language recordings, crucial evidence may be lost in translation. Litigants and judges will continue to operate without a playbook that may be consistently executed in the increasingly common circumstance in which foreign-language recordings become important evidence in federal proceedings.

This Article analyzes the interplay between the seemingly rigid command of the Best Evidence Rule and the foreign-language recordings increasingly offered into evidence in federal court. Part I offers a brief introduction to the Best Evidence Rule and explains its well-accepted operation in the context of English-language recordings. Part I then illustrates the inherent incongruity created by a strict application of the Best Evidence Rule to foreign-language writings and recordings. Part II dives into the federal precedent regarding the admissibility of foreign-language recordings and English transcripts, highlighting the conflicting and opaque authority on this important topic. Part II then details the Tenth Circuit's recent decision in *United States v. Chavez* which sets up a dangerous conflict among the federal circuit courts with respect to the admission of original foreign-language recordings. Part III examines and explains

18. United States v. Chavez, 976 F.3d 1178, 1196, 1199 (10th Cir. 2020).

19. *Id.* at 1196.

20. FED. R. EVID. 1002.

the "plain language" interpretation supporting the Tenth Circuit's application of the Best Evidence Rule in *Chavez*, arguing that an amendment to the Federal Rules of Evidence is necessary to accommodate foreign-language writings and recordings if this interpretation is correct. Part III then offers concrete amendment alternatives that would exempt foreign-language writings and recordings from the Best Evidence Rule and pave the way for the efficient and meaningful consideration of foreign-language content by American juries. Part IV takes the opposite tack and critically examines the letter and framework of the existing Federal Rules of Evidence in a quest to determine whether the Best Evidence Rule, as currently written, does in fact demand the admission of original foreign-language recordings as primary evidence. Part IV identifies several previously unexplored avenues within the existing Rules allowing for the substantive admission of English transcripts outside the Best Evidence Rule to enable English-speaking jurors to evaluate foreign-language evidence. Finally, Part IV urges federal courts to unite behind this interpretation of the existing Rules to allow for the common-sense admission of English transcripts of foreign language recordings and to avoid the costly process necessary to amend the Federal Rules of Evidence. The Article then briefly concludes.

I. THE BEST EVIDENCE RULE

A. *ORIGINS AND OPERATION*

Evidence law long demanded that a party produce the "best evidence" available to prove their case: "[T]he best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed."[21] Strictly demanding the "best evidence" in all circumstances would be onerous, however. It would mean calling every available witness instead of using applicable hearsay exceptions to admit their out-of-court statements or taking the jury to the scene of an accident rather than using diagrams or pictures to acquaint the jury with the location. And mandating the best evidence in all circumstances is not necessary, because parties already possess natural incentives to advance the best proof possible in an adversarial system. A failure to do so could have serious repercussions if the fact-finder draws a negative inference from the absence of the evidence deemed most persuasive. Primarily for these reasons, modern evidence law no longer truly demands the "best evidence" in all circumstances.[22] In one notable circumstance, however, even contemporary evidence law demands what has come to be known as the "Best Evidence Rule."

The Best Evidence Rule applicable in federal court may be found in Federal Rule of Evidence 1002, which provides: "An original writing, recording, or photograph is required in order to prove its content unless these rules or

21. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 (1768).

22. MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.1, at 1398 (noting that "it is viewed as generally unnecessary for the law of evidence to compel parties to produce the 'best' evidence").

a federal statute provides otherwise."[23] This modern version of the Best Evidence Rule might be succinctly summarized by the adage that "a document speaks for itself." When a party seeks to prove the content of a writing, recording, or photograph, the party *must* produce an original of that writing, recording, or photograph for the jury to consider. A party may not ordinarily offer a testimonial description of a writing or recording or other summary or version.[24] Although Rule 1002 retains the common law requirement of an original to prove the content of a writing, the common law rule has been somewhat relaxed by Rule 1003, which allows for the admissibility of "duplicate[s]" as well.[25] With the advent of reliable and accurate copying mechanisms, duplicates serve the same function as originals in providing jurors with original content to decipher for themselves.[26] For example, if a plaintiff in a defamation suit sought to prove that their former boss defamed them by writing a damaging letter to a prospective employer, they would be required to admit the original letter written by their boss or an appropriate duplicate; the Best Evidence Rule would prevent them from simply offering testimony about the content of the allegedly defamatory letter.[27]

The Best Evidence Rule is designed to promote the accuracy of the fact-finding process.[28] When the content of a particular writing or recording—like the letter in the example above—is in dispute, the writing or recording itself is undoubtedly the most reliable resource for resolving the dispute. And there is reason to be concerned about a testimonial description or other secondary evidence. Words are a lawyer's stock-in-trade and determining the legal effect of language demands precision: "[A] mistake in a few letters of an ordinary deed may represent it as giving to *Jones* instead of to *Jonas* or as giving *five*

23. FED. R. EVID. 1002.

24. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.1, at 1399 ("In its modern form, the exclusionary effect of the Rule is primarily directed against testimony and other forms of secondary evidence . . . .").

25. FED. R. EVID. 1003 ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.").

26. *See* FED. R. EVID. 1003 advisory committee's note ("When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.").

27. *See, e.g.*, Atkins v. Walker, 445 N.E.2d 1132, 1136 (Ohio Ct. App. 1981) (bringing a libel action based on a letter to a hospital chief of staff—testimony concerning the contents of the letter was inadmissible under the Best Evidence Rule).

28. *See* Victor J. Gold, *Contents of Writings, Recordings, and Photographs*, *in* 31 FEDERAL PRACTICE AND PROCEDURE § 7182 (Charles Alan Wright & Arthur R. Miller eds., 2d ed.), Westlaw (database updated April 2022) ("Secondary evidence concerning the contents of a writing, recording, or photograph can threaten accurate fact-finding in three ways."); *see also* Gordon v. United States, 344 U.S. 414, 421 (1953) (stating that an original "is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description").

hundred instead of *four* hundred acres."[29] Allowing secondary evidence of the content of a document or a recording poses risks of mistake and the mistransmission of critical facts:

> [O]ral testimony as to the terms of the writing is subject to a greater risk of error than oral testimony as to events or other situations. The human memory is not often capable of reciting the precise terms of a writing, and when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence.[30]

And, of course, permitting secondary evidence about the content of a writing or recording opens the door to fraud, as well as to honest error: "As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence."[31] For all of these reasons, Rule 1002 continues to insist upon the best evidence—an original or duplicate—to prove the content of writings, recordings, and photographs.

Article X of the Federal Rules of Evidence does provide exceptions to the Best Evidence Rule. For example, Rule 1004 permits "other evidence of the content . . . if . . . all the originals are lost or destroyed, and not by the proponent acting in bad faith."[32] And Rule 1006 permits use of summaries "to prove the content of . . . writings, recordings, or photographs" so "voluminous" that they "cannot be conveniently examined in court."[33] In justifying these exceptions to the Best Evidence Rule, the original Advisory Committee described the Rule as one "of preference: if failure to produce the original is satisfactory [sic] explained, secondary evidence is admissible."[34]

B. THE BEST EVIDENCE RULE AND RECORDINGS

The application of the Best Evidence Rule to *English-language* recordings offered as evidence in a federal trial is well-settled. Proving that a particular conversation took place on a recording implicates the Best Evidence Rule, because it requires proof of the "content" of the recording. Thus, a litigant must admit and play the original recording or a duplicate of it for the jury.[35] Jurors may then listen to the English-language recording and decide for themselves the meaning of what transpired, just as they examine an original document to determine its substance. So, for example, if the government in a drug prosecution sought to prove that illicit drug transactions were arranged during recorded English-language conversations intercepted by the government,

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29. 4 WIGMORE, *supra* note 11, § 1181 (emphasis added).

30. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1986).

31. 4 WIGMORE, *supra* note 11, § 1179; *see also* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.1, at 1400 ("[T]he Rule serves as a safeguard against forgery or fraud.").

32. FED. R. EVID. 1004.

33. FED. R. EVID. 1006.

34. FED. R. EVID. 1004 advisory committee's note.

35. FED. R. EVID. 1003.

it would have to admit and play the recordings for the jury so that the fact-finder could decide for themself whether the recorded conversations actually reflect the drug transactions alleged.[36]

Importantly, a transcript of a recording prepared by someone who listened to it does *not* qualify as an admissible "duplicate" of a recording, because it is not a "counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original."[37] A transcript presents the very risks of human mistake, fraud, and mistransmission that the Best Evidence Rule was designed to address. A transcript may contain errors, omissions, or misrepresentations by the human translator. Thus, according to the Best Evidence Rule, a transcript of a recording may not be introduced without production of the recording itself.[38]

Transcripts of English-language recordings are frequently provided as "aids" to juror understanding, however, they are to be consulted only while the recording itself is played in open court.[39] Jurors are instructed that the recording they are listening to is "the evidence" and that they are to rely solely upon it—and not on the transcript—if they find any discrepancy between the two.[40] Allowing jurors to listen to a recording and to determine its content for themselves makes eminent sense in the context of English-language recordings. And relegating transcripts to a supporting role reinforces accuracy in fact-finding, maintaining the focus on the original evidence and not on an adversarial interpretation of it. In keeping with the policy of Rule 1002, an original English-language recording itself constitutes the best evidence of the events and conversations it portrays, and jurors are equally able to interpret it.

Although all proceedings in the U.S. federal courts take place in English, that does not mean that all evidence in its original form will be in English.[41]

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36. *See* United States v. Calderin-Rodriguez, 244 F.3d 977, 987 (8th Cir. 2001) (holding that the use of transcripts was permissible where jury only viewed them "as the tapes were played in the courtroom" and affirming instructions to jury to rely on the tapes themselves).

37. *See* FED. R. EVID. 1001(e); MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1422 ("A written transcript of a recording does not qualify as a 'duplicate' under FRE 1001(e) . . . .").

38. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1422 ("[T]ranscripts may not be received to prove the content of an original recording without showing the unavailability of the original.").

39. Transcripts are typically used as aids only while the recording is played in court and do not go to the jury room. *See, e.g.*, *Calderin-Rodriguez*, 244 F.3d at 987 (holding the use of transcripts permissible where jury only viewed transcripts as tapes played in the courtroom; judge instructed jury to rely on tapes themselves); United States v. Scarborough, 43 F.3d 1021, 1024–25 (6th Cir. 1994) ("The preferred practice is for the court not to submit transcripts to the jury unless the parties stipulate to their accuracy.").

40. *See* United States v. McMillan, 508 F.2d 101, 105–06 (8th Cir. 1974) (approving such an instruction); *see also* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1423 ("A transcript of a recording is normally not admissible as substantive evidence unless the parties stipulate to the contrary.").

41. *See* United States v. Diaz, 519 F.3d 56, 64 (1st Cir. 2008) ("[I]t is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English.").

In our increasingly multicultural society, the recordings offered into evidence in federal court do not necessarily involve English-language speakers.[42] More and more, parties and witnesses appearing in federal court do not speak English as their first language.[43] Not surprisingly, therefore, the federal reporters are peppered with cases in which recordings of conversations in Spanish, Farsi, Chinese, and many other languages have been offered into evidence.[44]

When a recording reflects a conversation conducted in a language other than English, the Best Evidence Rule's rationale for requiring presentation of the original recording falters. Federal proceedings are to be conducted in the English language, and jurors in the federal court system are required to be proficient English speakers.[45] Thus, they are largely unable to comprehend and interpret such recorded foreign-language conversations on their own. Playing a recording in open court and instructing jurors that the recording itself is the sole evidence upon which they are to rely in determining content becomes nonsensical when the recording is figuratively (or literally) Greek to jurors. This becomes even more problematic when one or more jurors has some experience with the foreign language in question. In that instance, the jurors with some familiarity are likely to serve as underground translators and experts in conveying the content of the recordings to other jurors who do not speak the language at issue. Of course, the qualifications of these juror experts, as well as the quality of their jury room translations, will be hidden from the court and the parties.[46]

Due to this disconnect between the Best Evidence Rule and foreign-language recordings, most federal courts have treated such recordings differently from their English-language counterparts. When foreign-language recordings are at issue, most federal courts have permitted vetted English-language transcripts prepared by qualified translators to be admitted as substantive

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42. *See* U.S. CENSUS BUREAU, *supra* note 4 (describing the growing number of U.S. residents who do not speak English as their primary language).

43. *See Court Operations and Pandemic Response – Annual Report 2020*, *supra* note 7 (describing the volume of translators required to assist limited English proficiency speakers appearing in federal court).

44. *See, e.g.*, United States v. Camargo, 908 F.2d 179, 183 (7th Cir. 1990) (using Spanish recordings); United States v. Taghipour, 964 F.2d 908, 909 (9th Cir. 1992) (using Farsi recordings); Primo Broodstock, Inc. v. Am. Mariculture, Inc., No. 2:17-cv-9-FtM-29CM, 2017 WL 1502714, at *13 (M.D. Fla. Apr. 27, 2017), *order clarified sub nom.* PB Legacy, Inc. v. Am. Mariculture, Inc., No. 2:17-cv-9-FtM-29NPM, 2020 WL 104154 (M.D. Fla. Jan. 9, 2020) (using transcription of Chinese video recordings).

45. *See supra* note 5 and accompanying text.

46. *See* United States v. Fuentes-Montijo, 68 F.3d 352, 355 (9th Cir. 1995), *supplemented*, 74 F.3d 1247 (9th Cir. 1996) (unpublished opinion) ("When, as here, a district court is faced with a jury that includes one or more bilingual jurors and the taped conversations are in a language other than English, restrictions on the jurors who are conversant with the foreign tongue is not only appropriate, it may in fact be essential. Where the translation of a portion of the tape is disputed, both sides have an interest in what information is given to the jury. The rules of evidence and the expert testimony would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties.").

evidence of the content of those recordings and have not treated English-translation transcripts as mere "illustrative aids."[47] These courts reason that providing jurors with an English translation of a foreign-language recording is the only effective and fair method of conveying content to an English-speaking jury in federal court.[48]

Although federal courts almost uniformly allow the substantive admission of English transcripts in the context of foreign-language recordings, most federal opinions addressing the admissibility of such transcripts gloss over a number of evidentiary hurdles to their admission. Federal opinions often fail to address the pretrial disclosure of a translator who prepared an English transcript as an expert witness. Rarely do they discuss the need to qualify a translator as an expert witness pursuant to Federal Rule of Evidence 702.[49] And there is scant treatment of the hearsay and confrontation issues involved in admitting an English-language transcript prepared by an expert translator outside of court. Finally, very few federal opinions dealing with foreign-language recordings even mention the Best Evidence Rule, and none explain precisely *how* the admission of an English transcript in lieu of an original foreign-language recording squares with the dictates of Rule 1002. Indeed, in contrast to the typical precision surrounding evidentiary issues in federal opinions, there is a "street law" quality to the admission of English-language transcripts of foreign-language recordings. Because common sense demands admission of some English translation of foreign-language recordings, most federal courts admit transcripts out of necessity, while avoiding the niceties of evidence law.[50]

Recently, however, a divided panel of the Tenth Circuit Court of Appeals conducted a careful, plain-language analysis of the Best Evidence Rule and its impact on the admissibility of foreign-language recordings and English transcripts reflecting their content. Insisting upon strict adherence to the Best Evidence Rule, the majority in *United States v. Chavez* reversed a drug conviction due to the prosecution's use of English transcripts of Spanish-language recordings without admitting the recordings themselves.[51] The majority found that the Best Evidence Rule applies to foreign-language recordings exactly as it does to English-language recordings and held that admission of an English transcript in the absence of the original foreign-language recording violates the rule.[52] The Tenth Circuit's recent refusal to accept the substantive admissibility of English transcripts of foreign-language recordings has created a circuit split on the intersection between foreign-language recordings and

47. *See infra* Sections II.A–.C and accompanying notes.

48. *See infra* Sections II.A–.C and accompanying notes.

49. *But see* United States v. Abonce-Barrera, 257 F.3d 959, 964–65 (9th Cir. 2001) (analyzing qualifications of translator as expert under Rule 702).

50. *See infra* Sections II.A–.C and accompanying notes.

51. United States v. Chavez, 976 F.3d 1178, 1182 (10th Cir. 2020).

52. *Id.* at 1195.

the Best Evidence Rule.[53] As the number of non-English recordings offered into evidence in federal court increases with the expanding cultural diversity of our society, it is imperative that the federal courts reckon with this issue and bring precise evidentiary analysis to bear in admitting them.

II. MIXED MESSAGES: FOREIGN-LANGUAGE RECORDINGS AND ENGLISH TRANSCRIPTS

There are no less than four identifiable approaches to the use of foreign-language recordings and English transcripts in federal trials. The first three approaches recognize the necessity of treating foreign-language recordings differently from their English-language counterparts. The fourth approach, recently espoused by a divided panel of the Tenth Circuit Court of Appeals in *United States v. Chavez*, rejects any distinction between foreign-language recordings and their English-language counterparts for purposes of the Best Evidence Rule.[54] This Part discusses each of these four approaches in turn.

A. COMMON SENSE APPROACH: ENGLISH TRANSCRIPTS AS SUBSTANTIVE EVIDENCE

Foreign-language recordings frequently have been admitted into evidence in federal court *in addition to* English-language transcripts reflecting their content. In these circumstances, jurors have access to both the original recording (in keeping with Best Evidence principles) as well as an English transcript to convey content. As described below, the First, Second, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals have adopted, or at least validated, this approach.

In these cases, the issue becomes the proper status of the transcripts. Courts must determine whether English transcripts are to be treated solely as illustrative aids (as required by the Best Evidence Rule in the case of English-language recordings) or whether the transcripts should be treated as substantive evidence upon which jurors may rely in determining the content of the recordings. The vast majority of federal opinions recognize the need for jurors to rely upon English transcripts substantively to ascertain content where the underlying recording is in a language other than English. Some federal courts have noted that admitting *both* a foreign-language recording and an English transcript into evidence comports with the Best Evidence Rule. Very few of the federal opinions that tackle this issue expressly reference the Best Evidence Rule, however, let alone explain how the rule permits substantive admission of a transcript.[55] While they frequently fail to explain the interaction

53. *See infra* Sections II.A–.C and accompanying notes.

54. *See infra* Section II.D and accompanying notes.

55. *See* United States v. Morales-Madera, 352 F.3d 1, 9 (1st Cir. 2003) ("This practice of admitting reliable English transcripts in evidence is entirely consistent with the best evidence rule. The rationale behind the best evidence rule—that 'the [recording itself] is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description' of it—

between the Best Evidence Rule and foreign-language recordings, most federal courts pragmatically recognize that jurors must be given some translation of non-English material upon which they may rely in reaching a verdict.

United States v. Cruz, out of the Eleventh Circuit, involved evidence of a recorded Spanish conversation allegedly arranging a drug sale.[56] The original Spanish language recording was itself admitted into evidence at trial, along with an English-language transcript.[57] The trial judge "permitted the jury to consider *both* the [original] recording and the transcript during . . . deliberations."[58] On appeal of his drug conviction, the defendant argued that the trial court erred in allowing the jury to consider the English transcript during deliberations, because the jury necessarily relied upon the transcript as "substantive evidence" where they did not understand the primary Spanish recording.[59] In considering the defendant's argument, the Eleventh Circuit described the "proper procedure" for admitting transcripts of foreign-language recordings, as follows:

> Initially, the district court and the parties should make an effort to produce an 'official' or 'stipulated' transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.[60]

Because the defendant failed to take advantage of his opportunity to challenge the government's transcript by presenting one of his own, the Eleventh Circuit found that he could not complain about the admission of the English transcript.[61] The court further held that the jury properly considered the transcript as "substantive evidence" where the government played the original Spanish recordings in open court as the jury read along using the English transcript, with an interpreter signaling to the jury when to turn the pages of the transcript.[62] In this way, the jury was able to "detect changes in voice modulation and note any hesitancies or other characteristics which might give meaning to the tape recording."[63]

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is not undercut when the original recording is played to the jury and the undisputedly accurate English transcript is admitted in evidence." (alteration in original) (citation omitted)).

56. *See generally* United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985) (involving a Spanish recording and its corresponding English transcript).

57. *Id.* at 1022.

58. *Id.*

59. *Id.* at 1023.

60. *Id.* (quoting United States v. Wilson, 578 F.2d 67, 69–70 (5th Cir. 1978)).

61. *Id.*

62. *Id.* at 1024.

63. *Id.*

In *United States v. Camargo*, the trial court in a drug prosecution also admitted both original Spanish-language recordings, as well as English transcripts of those recordings, for the jury's consideration.[64] The trial court instructed the jury that the recordings constituted the "real evidence," and that the transcripts were the translator's interpretation of the conversations which took place in Spanish.[65] On appeal, the defendant objected to the admission of the transcripts.[66] The Seventh Circuit upheld the trial court's handling of the transcripts, explaining that "the transcripts were a virtual necessity because the recorded conversations took place in Spanish."[67] The court acknowledged that trial judges typically instruct juries to disregard transcripts if they vary from original recordings but explained that "[s]uch an instruction would have been a throwaway here; the tapes were in Spanish whereas the jury was English-speaking."[68] Noting that the defendant had failed to object to the accuracy of the transcripts, the Seventh Circuit affirmed.[69]

United States v. Ramirez was another drug prosecution in which "[t]he government introduced into evidence three recordings of conversations in Spanish and three transcripts that translated [them] into English."[70] At trial, the defendant requested that the jury be instructed that the original Spanish recordings were the primary evidence and that they should resolve variations between the recordings and transcripts in favor of the recordings.[71] The trial

64. United States v. Camargo, 908 F.2d 179, 182–83 (7th Cir. 1990).

65. *Id.* at 183.

66. *Id.*

67. *Id.*

68. *Id.*; *see also* United States v. Mendiola, 707 F.3d 735, 738 n.2 (7th Cir. 2013) ("Common sense and our case law both dictate that juries need transcripts of recorded conversations when those conversations take place in a foreign language and are admitted into evidence before an English-speaking jury."). Still, there is confusion concerning the status of an English transcript within the Seventh Circuit. *See* United States v. Cruz-Rea, 626 F.3d 929, 936 (7th Cir. 2010) (stating that "[t]ranscripts of recorded conversations are a virtual necessity when the conversations take place in Spanish and are admitted into evidence before an English-speaking jury," but suggesting that the tapes are the primary evidence even in this context (alteration in original)).

69. *Camargo*, 908 F.2d at 183. The Seventh Circuit Federal Criminal Jury Instructions also acknowledge the importance of treating English transcripts as evidence of content in the context of foreign language recordings:

> During the trial, [list name of language] language recordings were admitted in evidence. You were also given English transcripts of those recordings so you could consider the contents of the recordings. It is up to you to decide whether a transcript is accurate, in whole or in part. You may consider the translator's knowledge, training, and experience, the nature of the conversation, and the reasonableness of the translation in light of all the evidence in the case. You may not rely on any knowledge you may have of the [name] language. Rather, your consideration of the transcripts should be based on the evidence introduced in the trial.

THE WILLIAM J. BAUER PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.15 (2022).

70. United States v. Ramirez, 576 F. App'x 385, 387 (5th Cir. 2014).

71. *Id.*

judge rejected the request, explaining that a different instruction is appropriate when a recording is in a foreign language.[72]

> In those circumstances, the court explained, the recording must be translated into English, because court proceedings must be in English. Moreover, the English translation in the transcript is the official record that the jury should rely on for the contents of the recorded conversation. The court acknowledged, however, that the [original] recording may be considered by the jury for reasons *other than assessing the contents of the conversation*; for example, as an aid to determine that a particular person is speaking.[73]

The defendant challenged the admission of the English transcripts accompanied by this instruction on appeal.[74] In an unpublished opinion, the Fifth Circuit affirmed, explaining that "[t]ypically, the recording is the primary evidence, but when that recording captures a foreign language conversation *the transcript controls*."[75]

In *United States v. Placensia*, the trial court admitted both foreign-language recordings and English transcripts of them.[76] In so doing, the trial court instructed the jury that:

> [A r]ecording itself is the primary evidence of its own contents. Where the discussions were in English, transcripts are not evidence. On the other hand, where the discussions were in Spanish, transcripts of the discussions as translated into English are evidence, and you may consider those transcripts like any other evidence during your deliberations.[77]

The defendant argued that the district court erred in admitting the transcripts, because it "resulted in over-emphasis of the content of the transcripts."[78] On appeal, the Eighth Circuit affirmed, explaining that the district court properly allowed the translated transcripts of foreign-language tape recordings to be used as evidence during trial and jury deliberations where the defendant conceded the accuracy of the transcripts.[79]

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72. *Id.*

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.* at 388 (emphasis added).

76. United States v. Placensia, 352 F.3d 1157, 1165 (8th Cir. 2003).

77. *Id.*

78. *Id.*

79. *See id.* In *United States v. Gutierrez*, the trial court admitted into evidence Spanish-language audio recordings and distributed English transcripts prepared by a testifying interpreter to the jury as an "aid" but did not admit the transcripts into evidence or send them to the jury room. *See* United States v. Gutierrez, 757 F.3d 785, 788 (8th Cir. 2014). On appeal, the Eighth Circuit described this procedure as "unorthodox," explaining that a jury "usually cannot understand the audio recording" where the evidence is a foreign-language recording and that "[t]ranscripts must be prepared and introduced as evidence so that the jury has a basis for considering the substance of

United States v. Morales-Madera, a First Circuit case, involved a drug prosecution in Puerto Rico.[80] At trial, recordings of Spanish conversations were themselves introduced into evidence and played for the jury.[81] The jury was given English-language transcripts of the recordings to use as aids while listening to the recordings.[82] But the transcripts were not admitted into evidence and were not provided to the jury for use in deliberations.[83] On the defendant's appeal of his conviction, the admission of the original recordings was not at issue. Rather, the defendant argued that the court erred by *not requiring admission into evidence of the English transcripts* in addition to the Spanish-language recordings.[84] In reviewing the defendant's conviction, the First Circuit also acknowledged the difference between English-language recordings and Spanish-language recordings: "Providing an English-language transcript of wiretap evidence is more than merely useful when the recorded language is not English; for Jones Act purposes, it is necessary. The language of the federal courts is English. Participants, including judges, jurors, and counsel, are entitled to understand the proceedings in English."[85] Because of this, the court found that English transcripts of foreign-language recordings *must be admitted* into the record and not used merely as "aids" and that in this context "an instruction that the jury should consider only what is on the tape and not what is in the English transcript would not be appropriate."[86] In holding that the transcripts should have been admitted into evidence, the First Circuit did pay lip service to the Best Evidence Rule, stating that "[t]he best evidence rule requires that the tape recordings themselves must be furnished, absent agreement to the contrary, but does not require that English translations of those tapes be excluded from evidence."[87] Still, the court failed to explain *how* the Best Evidence Rule permits substantive reliance on transcripts as proof of content.

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the recording." *Id.*; *see also* United States v. Chavez-Alvarez, 594 F.3d 1062, 1069 (8th Cir. 2010) ("Without translation, an English-speaking jury would not have been able to understand the content of recorded conversations that took place in Spanish."); United States v. Cano-Flores, 796 F.3d 83, 89 (D.C. Cir. 2015) (admitting recordings and transcripts because "it generally makes little sense to say that accurate transcriptions do not qualify as evidence" when recordings are in a foreign language and that "jurors dealing with calls made in a foreign language are likely to take the vast majority of their understanding from the translations, turning to the recordings only for special issues").

80. *See* United States v. Morales-Madera, 352 F.3d 1, 4 (1st Cir. 2003).

81. *Id.* at 5.

82. *Id.*

83. *Id.*

84. *Id.* at 4.

85. *Id.* at 7.

86. *Id.* at 9; *see also* United States v. Rengifo, 789 F.2d 975, 983 (1st Cir. 1986) (holding that trial court did not abuse its discretion in sending English transcripts of Spanish recordings to jury room and in instructing jury to consider the transcripts "like any other evidence in the case").

87. *Morales-Madera*, 352 F.3d at 9. Although the *Chavez* majority cited this portion of the opinion for the proposition that the Best Evidence Rule requires admission of the primary foreign-language recordings, that portion of the *Morales-Madera* court's statement appears to be

In *United States v. Ben-Shimon*, the court admitted English transcripts to aid the jury as they listened to recordings in Hebrew.[88] The defendant objected to the trial judge's admission of the transcripts.[89] On appeal, the Second Circuit affirmed the conviction and rejected the defendant's argument that admission of the transcripts was erroneous, stating that when a recorded conversation is conducted in a foreign language, "an English language transcript may be submitted to permit the jury to understand and evaluate the evidence."[90] While the Second Circuit did not expressly state that it considered the transcripts "substantive evidence" upon which the jury could rely in determining the content of the Hebrew recordings, the court acknowledged the important distinction between English-language recordings which jurors may evaluate without the aid of a transcript and foreign-language recordings which require additional interpretation to be useful.[91]

In the vast majority of federal cases, therefore, both the original foreign-language recording and an English-translation transcript are admitted into evidence and presented to the jury, but the jury is instructed that the English transcript is substantive evidence upon which it may rely in ascertaining the content of the original recording.

B. TECHNICAL COMPLIANCE: "ADMITTING" THE ORIGINAL RECORDING WHILE WITHHOLDING IT FROM THE JURY

Other federal cases have endorsed something of a compromise position with respect to foreign-language recordings, with trial courts requiring that the original recordings be "admitted" into evidence but allowing them to be withheld from the fact-finder. In these cases, the jury has only the English translation transcript upon which to rely in determining the content of the

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dicta given that the recordings were, in fact, admitted in that case, and the court was instead considering whether *transcripts* should also have been admitted. *See* United States v. Chavez, 976 F.3d 1178, 1197 (10th Cir. 2020) (citing *Morales-Madera* for the proposition that the Best Evidence Rule requires admission of foreign-language originals).

88. United States v. Ben-Shimon, 249 F.3d 98, 100 (2d Cir. 2001); *see also* United States v. Bahadar, 954 F.2d 821, 830 (2d Cir. 1992) ("While the general, and preferred, practice in dealing with tape-recorded evidence is to play the tapes and allow transcripts only as an aid, we do not believe that Judge Bartels abused his discretion by utilizing the procedures that he did, especially since the tapes were mostly in foreign tongues . . . .") In *Bahadar*, the tapes were available, admitted, and played, in part, with transcripts read into evidence after trial judge noted that jury could understand nothing on tapes as they played. *Id.*; United States v. Abonce-Barrera, 257 F.3d 959, 962 (9th Cir. 2001) (playing Spanish-language tapes for the jury with English translations read to the jury).

89. *Ben-Shimon*, 249 F.3d at 100.

90. *Id.* at 101.

91. *Id.* The *Chavez* majority pointed out that the Second Circuit referred to the recording in this passage as "the evidence," suggesting that the recording itself is the evidence that must be considered by the jury according to the Best Evidence Rule. *See Chavez*, 976 F.3d at 1197. The question raised in *Chavez*—whether a transcript may be admitted *in lieu of* a foreign language recording—was not raised in *Ben-Shimon*, however. *Id.*

recordings, though the original recordings are technically "in evidence." Federal appellate opinions from the Fifth and Ninth Circuits have also upheld this approach.

United States v. Franco was a drug prosecution involving recorded conversations in Spanish between a confidential informant and the defendants.[92] At trial, the Spanish-language audio recordings were admitted into evidence but were not played for the jury.[93] The trial court refused to play representative recordings for the jury, because the court found that "the tone or inflection of a foreign language would be meaningless or misleading."[94] Instead, 110 English-translation transcripts were admitted into evidence and were sent to the jury room during deliberations.[95] The jury was instructed that it could listen to the audio recordings upon request, but no request was made.[96]

On appeal of their convictions, the defendants argued that the trial court erred in sending the English transcripts to the jury room.[97] Once again, the defendants did not cite the Best Evidence Rule in raising their objection to the use of the transcripts.[98] In rejecting the defendants' argument under a plain error standard of review, the Ninth Circuit emphasized the distinction between English-language and foreign-language recordings offered at trial:

> The district court also correctly held that the relation between tapes and transcripts changes when the tapes are in a foreign language. When tapes are in English, they normally constitute the actual evidence and transcripts are used only as aids to understanding the tapes; the jury is instructed that if the tape and transcript vary, the tape is controlling. When the tape is in a foreign language, however, such an instruction is "not only nonsensical, it has the potential for harm where the jury includes bilingual jurors."[99]

The Ninth Circuit further described the "translated transcripts" of the Spanish-language recordings "as [the] primary evidence" that "substitute[s] for the tapes."[100] The Ninth Circuit concluded that the district court did not err in

92. United States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998).

93. *Id.* at 626–27.

94. *Id.* at 626.

95. *Id.* at 625–26. The defense was given an opportunity to seek corrections to the government transcripts, which they did with some success, or to submit alternate transcripts, which they did not do. *Id.* at 626. Accordingly, the Ninth Circuit found that the defense failed to challenge the accuracy of the transcripts. *Id.*

96. *Id.* at 627.

97. *Id.* at 625.

98. *Id.* at 625–29.

99. *Id.* at 626 (citations omitted); *but see* United States v. Armijo, 5 F.3d 1229, 1234–35 (9th Cir. 1993) (noting with approval that the court instructed the jury "that the tape, rather than the [translation], was evidence").

100. *Franco*, 136 F.3d at 626; *see also* United States v. Fuentes-Montijo, 68 F.3d 352, 355–56 (9th Cir. 1995), *supplemented*, 74 F.3d 1247 (9th Cir. 1996) (unpublished opinion) ("When faced with a taped conversation in a language other than English and a disputed English translation

declining to play the foreign-language recordings for the jury or in sending the English transcripts to the jury room.[101]

In *United States v. Valencia*, the trial judge in yet another drug prosecution "admitted" the recording of a Spanish conversation into evidence but refused to allow it to be played for the jury after polling the jury and determining that one juror spoke and understood Spanish.[102] Instead, the judge allowed jurors to have copies of an English-language transcript of the recording, the accuracy of which was stipulated, as the transcript was read into the record.[103] On appeal, the defendants argued that the trial judge erred in refusing to allow the actual Spanish-language recording to be played for the jury, alleging that the jury would have benefitted from the "oral demeanor" of the participants.[104] Once again, the defendants did not cite the Best Evidence Rule in making their argument.[105]

The Fifth Circuit noted that it was the first time the court "had to decide the propriety of admitting the English translation of a foreign language tape as evidence while excluding the tape itself."[106] The court concluded that "an English translation transcript can be introduced into evidence without admitting or playing the underlying foreign language tape for the jury."[107] The court acknowledged that jurors are ordinarily instructed that the recording controls if there is any discrepancy between the recording and the transcript but explained that such an instruction "*is only useful when the jury can understand the tape itself.*"[108] Although it noted that "one could plausibly argue that the better, more consistent approach would have been to have the jury listen to the tape, just as the jury listened to the Spanish speaking witness," the Fifth Circuit ultimately held that the trial court did not abuse its discretion in refusing to play the tape due to the risk of jury confusion.[109] Thus, federal courts have approved the practice of withholding "admitted" original foreign-language recordings from jurors and substituting English-language transcripts as substantive evidence of their content.

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transcript, the usual admonition that the tape is the evidence and the transcript only a guide is not only nonsensical, it has the potential for harm where the jury includes bilingual jurors.").

101. *Franco*, 136 F.3d at 628.

102. United States v. Valencia, 957 F.2d 1189, 1193 (5th Cir. 1992), *overruled on other grounds by* United States v. Keith, 230 F.3d 784, 786 (5th Cir. 2000).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1194.

108. *Id.* at 1195 (emphasis added).

109. *Id.* at 1196.

C. A LEAGUE OF ITS OWN: ADMITTING ENGLISH TRANSCRIPTS WITHOUT ADMITTING THE ORIGINAL FOREIGN-LANGUAGE RECORDINGS

Some federal courts have even gone one step further and have held that English-language transcripts may be admitted *in lieu* of the original foreign-language recordings. These courts dispense with the need to admit the original recordings usually required by the Best Evidence Rule altogether, allowing English transcripts to substitute for the recordings completely. Still, very few circuit opinions address this precise issue. As reflected by the foregoing discussion, the foreign-language recordings themselves are typically admitted into evidence *in addition to* English-language transcripts, whether or not the fact-finder is given access to the original recordings. There are a few federal appellate cases, however, that uphold substantive admission of an English-language transcript without admission into evidence of the underlying foreign-language recording.

United States v. Grajales-Montoya out of the Eighth Circuit was such a case.[110] Although he did not cite the Best Evidence Rule, the defendant argued that the trial court abused its discretion by admitting into evidence *only* the transcripts of certain tape-recorded Spanish conversations.[111] At trial, the defendant had requested that the court admit the tapes, as well as the transcripts, so that his counsel could play them before the jury.[112] The defendant argued that it was important for the jury to hear the tone of the conversations between the actual participants, rather than that of the government's actors who read translations of the tapes in court.[113] But the trial court refused, expressing doubt that jurors would be able to discern relevant inflections and idiosyncrasies in the conversations without understanding the language being spoken.[114] The Eighth Circuit affirmed the exclusion of the tapes, holding that the trial court had not abused its discretion where it could discern no reliable means of enabling jurors who do not speak Spanish to interpret inflections and tone.[115]

Similarly, in *United States v. Estrada*, the Seventh Circuit upheld the district court's decision to admit English transcripts of Spanish-language recordings

110. United States v. Grajales-Montoya, 117 F.3d 356, 367 (8th Cir. 1997).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The First Circuit has also upheld the admission of English transcripts without admission of the underlying recordings in *United States v. Kifwa*, explaining that: "[f]oreign-language recordings, however, are treated differently. For commonsense reasons, 'play[ing] foreign language tapes endlessly to an uncomprehending jury' is not required." United States v. Kifwa, 868 F.3d 55, 60 (1st Cir. 2017) (alteration in original) (quoting United States v. Chaudhry, 850 F.2d 851, 856 (1st Cir. 1988)). The court suggested, however, that "parties may agree to forgo having jurors listen to foreign-language recordings that they do not understand," though no agreement was apparent on the facts of the case. *Id.*

without admitting the recordings themselves.[116] The defendant sought to have the government introduce the Spanish-language recordings at trial, though he did not cite the Best Evidence Rule. When "[the defendant] argued that the 'transcript is merely an impression or an aid to the tape itself,' the district court responded, 'It's more than an aid in this case because it's a translation from another language.'"[117] When the defense continued to press the point by saying "I know that, but the tape has to be in evidence for it to be an aid to the translation, because, clearly, the jury has to have the right to go back to the original evidence," the trial judge replied, "[w]ell, they can't. It's in Spanish."[118] Thus, the trial court highlighted the practical impossibility of treating foreign-language recordings like their English counterparts at trial. The Seventh Circuit declined to second-guess the trial court's decision to admit only the English transcripts, noting that "the district court may have doubted whether a jury not proficient in Spanish would be able to properly comprehend from the tapes an individual's tone or inflection."[119] Thus, at least two circuit opinions have approved the practice of admitting English-language transcripts of foreign-language recordings without admitting the recordings themselves into evidence.

D. *PLAIN LANGUAGE CONSTRUCTION OF THE BEST EVIDENCE RULE:* UNITED STATES V. CHAVEZ

The majority opinion in the Tenth Circuit's recent *Chavez* decision clashes with the clear majority of federal opinions regarding foreign-language recordings, holding that they must be treated in the same manner as their English-language counterparts in order to satisfy the mandate of the Best Evidence Rule. In *United States v. Chavez*, the defendant was convicted of drug distribution.[120] During his trial, the government admitted into evidence three transcripts made from audio recordings of conversations between the defendant and a confidential informant during controlled drug buys.[121] The conversations were conducted mainly in Spanish, and the transcripts translated the conversations into English.[122] The government did not admit the actual Spanish recordings into evidence or play them for the jury.[123] Although the defense conceded the accuracy of the transcripts and offered no competing English transcripts for the jury's consideration, the defense later objected to

116. United States v. Estrada, 256 F.3d 466, 473 (7th Cir. 2001).

117. *Id.* at 472–73.

118. *Id.* at 473 (alteration in original).

119. *Id. Estrada* reflects a split within the Seventh Circuit, as well as a split between circuits. As discussed *infra*, another panel of the Seventh Circuit held after *Estrada* that English-language transcripts are mere aids to understanding and that foreign-language recordings are to be treated in the same manner as English recordings. *See* United States v. Nunez, 532 F.3d 645, 651 (7th Cir. 2008).

120. United States v. Chavez, 976 F.3d 1178, 1181 (10th Cir. 2020).

121. *Id.* at 1182.

122. *Id.* at 1185.

123. *Id.* at 1182.

the admission of the transcripts citing the Best Evidence Rule.[124] The defense demanded that the government play the actual recordings in Spanish and "provide a line by line translation about who is saying what, when" for the jury.[125] The district court overruled the defendant's Best Evidence objection to the admission of the transcripts and instructed the jury:

> The translated transcripts are the evidence you should rely on. You are not free to reject the translation contained in the transcripts of the tape recordings …. You are . . . free to give this evidence whatever weight or consideration you deem to be justified.[126]

Chavez was convicted, but a divided panel of the Tenth Circuit reversed due to the admission of the English transcripts without admission of the underlying Spanish audio recordings.[127] The court reasoned that the Best Evidence Rule was triggered because the government sought to prove the content of the audio recordings by offering transcripts of them into evidence.[128] The court held that the plain language of Rule 1002 mandates that the original foreign-language recordings be admitted into evidence before English translations of them may be admitted: "[U]nder the plain meaning of Rule 1002, the best-evidence rule does *not* permit courts to admit English-translation transcripts of foreign-language recordings when the recordings themselves are not also in evidence."[129]

The court went on to note that "Congress has approved of specific exceptions to the best-evidence rule, but an exception for foreign-language recordings is not among them."[130] The Tenth Circuit reversed Chavez's drug conviction, finding that the erroneous admission of the English transcripts without admission of the underlying recordings was not harmless.[131]

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124. *Id.* at 1190.

125. *Id.* at 1192.

126. *Id.* (first alteration in original) (emphasis omitted). Although the defendant challenged this jury instruction on appeal, the majority did not reach the issue of the instruction, because it reversed based upon the Best Evidence Rule. *Id.* at 1214.

127. *Id.* at 1199.

128. *Id.* at 1198.

129. *Id.* at 1195.

130. *Id.* (citation omitted).

131. *Id.* at 1204–05. Although it appears that the defense did not challenge the accuracy of the transcripts, the Tenth Circuit majority opinion expressed serious reservations about the transcripts:

> [T]his transcript is devoid of information regarding its authorship and other aspects of its creation. The transcript contains no information addressing who prepared it, how much time elapsed between the statements in each row, what process its preparer used to create it, or how and why the statements were broken up in the manner in which they were, among other missing contextual details.

Id. at 1186. The court also expressed concerns about how four Spanish words could translate to thirty-eight words in English as was reflected in one of the transcripts. *Id.* at 1188. Apparently, the government hired a "firm" to perform the translation of the recordings but did not call the preparer to testify due to logistical difficulties. *Id.* at 1189 n.6. Instead, the government called a

Thus, the Tenth Circuit held that the Best Evidence Rule's well-accepted operation with respect to English-language recordings translates directly to foreign-language recordings—the proponent must admit the foreign-language recordings as the primary evidence and English-language transcripts may be offered merely to aid the jury in evaluating the admitted recordings:

> Specifically, we have allowed English-translation transcripts of foreign language recordings only as aids in understanding the *admitted* recordings themselves (i.e., the primary evidence). In other words, under our practice, the English-translation transcript is permitted for use only in conjunction with the foreign-language audio recording: it is the recording itself—not the transcript of the recording—that constitutes the primary evidence.[132]

The majority in the *Chavez* case expressed conflicting views about the *use* of a foreign-language recording at trial once it is "admitted" into evidence. On the one hand, the majority held that foreign-language audio recordings are the "primary evidence" and that English transcripts are mere aids to understanding.[133] In keeping with this holding, it would seem that the original foreign-language recordings would need to be *played* for the jury as the primary evidence and could not be "admitted" into evidence only to be withheld from the fact-finder as has been permitted by some federal courts. Under this interpretation of *Chavez*, the Tenth Circuit would disapprove of the approach to foreign-language recordings in cases like *Franco* and *Valencia* described above.[134]

In a sleight-of-hand footnote, however, the *Chavez* majority seemingly softened its hard-line approach to foreign-language recordings, appearing to endorse the "admission" of the original recordings without necessarily requiring that they be played.[135] The majority stated: "What we do not address is how a district court . . . may properly regulate the use of such foreign-language audio recordings once they are admitted into evidence."[136] The majority went on to explain that district courts need not "routinely play the foreign-language audio recordings in their entirety for the jury."[137] Perhaps this footnote merely acknowledges a trial court's unassailable right to redact overly broad evidence.[138]

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law enforcement agent who had previously performed an "interpretation" for the government to review the transcripts and affirm their accuracy at trial. *Id.* The confidential informant who participated in the conversations also testified to the accuracy of the transcripts. *Id.* at 1190, 1212.

132. *Id.* at 1196.

133. *Id.*

134. *See supra* notes 92–108 and accompanying text.

135. *See Chavez*, 976 F.3d at 1199 n.14.

136. *Id.*; *see also* Idaho v. Rodriguez, 386 P.3d 509, 511 (Idaho Ct. App. 2016) ("[T]he State produced the original audio recordings, and the court admitted them as evidence. The best evidence rule requires production of the original, not presentation to the jury.").

137. *Chavez*, 976 F.3d at 1199 n.14.

138. *See* FED. R. EVID. 403.

But it may suggest that the majority would approve of the approach taken in *Franco* and *Valencia* and would permit a foreign-language recording to be "admitted" into evidence but withheld from the jury in its entirety. What is clear is that the *Chavez* majority held that original foreign-language recordings are the primary evidence that must be admitted to comply with the Best Evidence Rule and that reliance solely on English translation transcripts as proof of content is prohibited.

Judge Hartz wrote a lengthy dissent, opining that "[t]he sin of the trial judge was to use his common sense."[139] The dissent highlighted the distinction between English-language and foreign-language recordings and argued that the Best Evidence Rule does not mandate the admission of foreign-language recordings for consideration by American juries.[140] Judge Hartz also noted that no other federal circuit court has ever "reversed a district court for admitting" an English transcript of a foreign-language recording.[141] Judge Hartz then tackled the apparent conflict between the plain language of the Best Evidence Rule and the typical treatment of foreign-language recordings, offering a detailed evidentiary roadmap for the admission of English translation transcripts *in lieu of* original foreign-language recordings.[142] He expressed his hope that his detailed analysis would "provide essential guidance for courts in the future."[143]

First, Judge Hartz argued that admitting an English transcript of a foreign-language recording does not violate the Best Evidence Rule because such a transcript constitutes an admissible "expert" opinion in its own right.[144] He noted that, unlike a transcript of an *English* recording, a translation of a *foreign-language* recording requires "*specialized knowledge*" within the meaning of Federal Rule of Evidence 702 and is necessary to help a lay jury understand what it otherwise would not.[145] Hence, the dissent argued that an English transcript of a foreign-language recording constitutes an admissible expert opinion under Rule 702.[146]

Judge Hartz next explained that, although an English transcript may be admitted as an expert opinion, the original foreign-language recording itself may nonetheless be excluded as irrelevant under Federal Rule of Evidence 402.[147] An original recording may have no "tendency"—if presented in a foreign tongue—to make the meaning of any facts of consequence more or

139. *See Chavez*, 976 F.3d at 1214 (Hartz, J., dissenting).
140. *See id.* at 1218–19.
141. *Id.* at 1214.
142. *See id.* at 1218–19.
143. *Id.* at 1217.
144. *Id.* at 1217–18.
145. *Id.* at 1217–19, 1221.
146. *Id.*
147. *Id.* at 1218; *see also* FED. R. EVID. 402 (stating that only relevant evidence is admissible); FED. R. EVID. 401 (stating that evidence is relevant if it has "any tendency" to make a fact of consequence more or less probable than it would be without the evidence).

less likely.[148] Further, Judge Hartz explained that Federal Rule of Evidence 403 might require the exclusion of a foreign-language recording if its presentation could confuse or mislead the jury, particularly if there is a risk that the jury may attempt an underground translation.[149] Judge Hartz acknowledged that a foreign-language recording might be admissible in certain cases under Rules 402 and 403 if it had an important tendency to help jurors understand the tone, inflection, or identity of the speakers in the context of a particular dispute.[150] But absent such special circumstances, exclusion of the primary foreign-language recording would be justified.

According to Judge Hartz, exclusion of the original foreign-language recording would not affect the admissibility of the expert's translation—the English transcript.[151] This is because Federal Rule of Evidence 703 permits experts to rely upon facts or data in forming opinions that would be inadmissible at trial.[152] So long as other experts in the field would reasonably rely on a particular type of inadmissible information, a trial expert may base their opinion upon it as well.[153] Because all expert translators would reasonably rely upon the content of an original foreign-language recording in rendering an expert translation, a translator could rely upon the inadmissible recording in creating the English transcript. In this manner, according to Judge Hartz, the Federal Rules of Evidence permit the admission of an English transcript as an "expert opinion" *without admission of the underlying foreign-language recording*.

Judge Hartz also pointed out that the Advisory Committee note to the Best Evidence Rule explicitly references the use of original writings and recordings as the basis for expert opinion under Rule 703.[154] This note suggests an exception to the Best Evidence Rule under such circumstances: "It should be noted, however, that Rule 703 allows an expert to give an opinion based on matters not in evidence, and the present rule [Rule 1002] must be read as being limited accordingly in its application."[155] Thus, Judge Hartz concluded that Federal Rules of Evidence 702 and 703 permit admission of an English translation transcript of a foreign-language recording.[156] He further argued that the Best Evidence Rule does not operate to foreclose admission of the transcript, because it demands an original to prove content of a writing or

148. *Chavez*, 976 F.3d at 1218 (Hartz, J., dissenting).

149. *See id.*; FED. R. EVID. 403.

150. *Chavez*, 976 F.3d at 1214 (Hartz, J., dissenting).

151. *Id.* at 1217–19.

152. FED. R. EVID. 703 ("If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.").

153. *Id.*

154. *Chavez*, 976 F.3d at 1218–19 (Hartz, J., dissenting).

155. FED. R. EVID. 1002 advisory committee's note (citation omitted).

156. *Chavez*, 976 F.3d at 1223 (Hartz, J., dissenting).

recording "unless these rules or a federal statute provides otherwise."[157] In Judge Hartz's view, by allowing inadmissible data to be used as the basis for an expert opinion, "Rule 703 provides otherwise" and eliminates the need for proof of the original.[158] Thus, Rule 703 overrides Rule 1002 when the original recording is used as a basis for an expert opinion translating a foreign-language recording.[159]

Finally, Judge Hartz questioned the distinction drawn in some cases (and possibly endorsed by the majority in a footnote) between the "admission" of an original recording and its provision to the jury, if it is to "prove content" under the Best Evidence Rule:

> [T]he majority opinion suggests that a court can admit into evidence the original recording of a foreign-language conversation but refuse to allow the jury to listen to it. Again, how can that be? What in the world does it mean, then, to admit something into evidence? Surely it has something to do with consideration by the jury. But if the jury is barred from listening to the recording, how can it consider that recording (as opposed to considering a translation or transcript) in reaching its verdict?[160]

As Judge Hartz points out, it seems impossible to have it both ways: If the Best Evidence Rule requires admission of an original foreign-language recording as the "primary evidence," the recording cannot be withheld from the jury whose job it is to determine content from the primary evidence. With this painstaking analysis, Judge Hartz's dissent sought to chart a clear evidentiary roadmap for the substantive admission of English translation transcripts in lieu of the original foreign-language recordings they translate.

The Seventh Circuit's decision in *United States v. Nunez* is the lone circuit case that appears to support the *Chavez* majority's reading of the Best Evidence Rule as applied to foreign-language recordings.[161] In *Nunez*, the prosecution played recordings of Spanish conversations purporting to reflect the defendant's drug transactions at trial.[162] The prosecution presented English transcripts of the conversations, including translations of alleged code words for money and narcotics, to the jury to use as aids in listening to the recordings.[163]

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157. *Id.*

158. *Id.* at 1218.

159. *Id.*; *see also* Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 66 ("For all purposes, Rule 703 creates an exception to the original writing rule, Rule 1002."). Importantly, the *Chavez* majority declined to address the dissent's Rule 703 analysis because the parties had not raised nor briefed it. *See Chavez*, 976 F.3d at 1203 n.17.

160. *Id.* at 1219–20 (Hartz, J., dissenting).

161. United States v. Nunez, 532 F.3d 645, 655–56 (7th Cir. 2008).

162. *Id.* at 650.

163. *Id.* at 649–50.

The defendant objected to the transcripts, but the trial judge allowed them, instructing "the jury that it could afford as much weight as it felt proper to the transcripts of the intercepted conversations."[164] Although the Seventh Circuit noted that "[t]ranscripts of recorded conversations are a virtual necessity when the conversations take place in Spanish and are admitted into evidence before an English-speaking jury," it still found that this instruction was erroneous and that the court should have instructed the jury that the recording itself was the "primary evidence," that the transcript was available only to evaluate the recording, and that "it should disregard" the transcript "and rely on its own interpretation of the recording" if it found the transcript in any way incorrect.[165] Although it did not explicitly reference the Best Evidence Rule, the Seventh Circuit appeared to apply it to foreign-language recordings just as it applies to English-language recordings.[166] Therefore, opinions in the Seventh and Tenth Circuits take a plain language approach to the Best Evidence Rule that requires foreign-language recordings to be considered by American juries as the "primary evidence" of their content.

III. THE "PLAIN LANGUAGE" APPROACH: THE NEED TO AMEND THE FEDERAL RULES OF EVIDENCE

As the cultural and linguistic diversity of American society expands, it is to be expected that foreign-language documents and recordings will be offered into evidence in federal court with increasing frequency. And it is imperative that litigants and judges have a clear understanding of how the Best Evidence Rule interacts with such evidence. If the Tenth Circuit is correct that the Best Evidence Rule, as currently articulated, applies to foreign-language recordings exactly as it does to English-language recordings, an amendment to the Federal Rules of Evidence is necessary to permit the fair and efficient introduction of such evidence in federal court.

A. THE PLAIN LANGUAGE APPROACH DECONSTRUCTED

In *Chavez*, the majority held that the plain language of Rule 1002—the Best Evidence Rule—applies to foreign-language recordings exactly as it does to recordings in English.[167] This would mean that the well-accepted methodology that applies to proof of English-language recordings applies to ones in a foreign tongue as well. The majority's plain language interpretation of the Best Evidence

164. *Id.* at 651.

165. *Id.*

166. The *Nunez* opinion is in conflict with other cases out of the Seventh Circuit discussed *supra*. In *Camargo*, the Seventh Circuit upheld an instruction that English transcripts were "real evidence" in connection with foreign-language recordings. *See* United States v. Camargo, 908 F.2d 179, 183 (7th Cir. 1990). And a panel of the Seventh Circuit upheld admission of a transcript *in lieu of* an original foreign-language recording in *Estrada*. *See* United States v. Estrada, 256 F.3d 466, 473 (7th Cir. 2001).

167. United States v. Chavez, 976 F.3d 1178, 1202 (10th Cir. 2020).

Rule in *Chavez* rests to some extent on unassailable logic. It proceeds as follows: An audio recording of a foreign-language conversation constitutes a "recording" within the meaning of Rule 1002.[168] The definition of "recording" for purposes of Rule 1002 is found in Rule 1001(b): "A 'recording' consists of letters, words, numbers, or their equivalent recorded in any manner."[169] Seeking to prove the substance of the conversation that took place through an audio recording is an effort to prove the "content" of that recording within the meaning of Rule 1002.[170] As the Advisory Committee note to Rule 1002 states: "If, however, the event is sought to be proved by the written [or recorded] record, the rule applies."[171]

The Best Evidence Rule demands "[a]n original" or a "duplicate" to prove the content of a recording unless otherwise provided.[172] The foreign-language recording itself would count as the "original," because an "original" "means the writing or recording itself."[173] A "duplicate" of the recording would be "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original."[174] A transcript does not qualify as a duplicate.[175]

Other evidence of content is admissible only if otherwise provided by the Rules of Evidence or by a federal statute.[176] For example, Rule 1004 allows "[o]ther [e]vidence of [c]ontent" when originals are lost or destroyed so long as they were not lost or destroyed by the proponent of the evidence acting in bad faith.[177] That provision also allows alternative evidence of content if an original cannot be obtained "by any available judicial process."[178] Rule 1006 allows use of a "summary, chart, or calculation" to prove the content of writings or recordings that are too "voluminous" to be "conveniently examined in court."[179]

But none of the above "exceptions" to the Best Evidence Rule currently listed in Article X of the Federal Rules of Evidence cover foreign-language

168. *Id.*

169. FED. R. EVID. 1001(b).

170. FED. R. EVID. 1002 ("An original writing, recording, or photograph is required *in order to prove its content* unless these rules or a federal statute provides otherwise." (emphasis added)).

171. *See* FED. R. EVID. 1002 advisory committee's note.

172. *See* FED. R. EVID. 1002 (requiring "[a]n original" to prove content); FED. R. EVID. 1003 ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.").

173. FED. R. EVID. 1001(d) ("An 'original' of a writing or recording means *the writing or recording itself* or any counterpart intended to have the same effect by the person who executed or issued it." (emphasis added)).

174. FED. R. EVID. 1001(e).

175. MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1422 ("A written transcript of a recording does not qualify as a 'duplicate' under FRE 1001(e) . . . .").

176. FED. R. EVID. 1004.

177. FED. R. EVID. 1004(a).

178. FED. R. EVID. 1004(b).

179. FED. R. EVID. 1006.

recordings. Indeed, Judge Hartz's dissent in *Chavez* acknowledged that Rule 1002 "[o]n its face . . . seems to require that the original in the foreign language be admitted if the translation is to be presented to the jury."[180] According to this plain language analysis, Rule 1002 requires that the proponent of a foreign-language recording play the original for the jury, so that the jury may determine its "content" for themselves. An appropriately vetted English-language transcript may accompany the recording, but the jury should be instructed that the transcript is "not evidence" and that it may be used only for "illustrative" purposes.

Treating a foreign-language recording in this manner presents serious practical difficulties, however. First, it leaves an English-speaking jury with *no evidence* of the content of a foreign-language recording. The original recording provides none because jurors *do not comprehend* the language being spoken on the recording, and an accompanying English-language transcript also offers none if it is "not evidence" and is to be used by jurors solely for "illustrative" purposes. In his dissent in *Chavez*, Judge Hartz illustrated the inanity of treating foreign-language recordings like their English counterparts with the following example:

> Consider a defendant being prosecuted for fraud based on false statements in a document written in a foreign language. If the translation of the document is not evidence, then the jury verdict cannot be based on it. The jury would have to base its verdict on the foreign-language document that no juror could understand. How is that possible? How could the jury know that the defendant uttered a falsehood when it does not know the meaning of what the defendant said?[181]

As bad as *no evidence* of content may be, litigants may end up with something worse than nothing when one or more jurors have some familiarity with the foreign language used in a recording. Though their qualifications and translations will not be subject to the scrutiny of the parties or the court, these jurors effectively will serve as underground experts, interpreting the foreign-language recording for other jurors during deliberations.[182] Such amateur jury-room translations may contain material inaccuracies or omissions that cannot be challenged by the parties. Unbeknownst to the court or the litigants,

180. United States v. Chavez, 976 F.3d 1178, 1218 (10th Cir. 2020) (Hartz, J., dissenting).

181. *Id.* at 1219.

182. *See* United States v. Fuentes-Montijo, 68 F.3d 352, 355 (9th Cir. 1995), *supplemented*, 74 F.3d 1247 (9th Cir. 1996) (unpublished opinion) ("When, as here, a district court is faced with a jury that includes one or more bilingual jurors and the taped conversations are in a language other than English, restrictions on the jurors who are conversant with the foreign tongue is not only appropriate, it may in fact be essential. Where the translation of a portion of the tape is disputed, both sides have an interest in what information is given to the jury. The rules of evidence and the expert testimony would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties.").

the jury's verdict may be based upon misconceptions about the meaning of critical foreign-language conversations.

And it is no answer to "admit" the original foreign-language recording into evidence but to withhold it from the jury's consideration if, in fact, the Best Evidence Rule applies. As described above, some federal courts have adopted this compromise approach to foreign-language recordings, and the majority in *Chavez* gave a nod to this practice in a cryptic footnote.[183] But technical "admission" of an original recording without presentation to the fact-finder is fundamentally at odds with the Best Evidence Rule. The mandate of the Best Evidence Rule is that parties *must* provide the fact-finder with the "original" writing or recording so that the fact-finder may examine it and determine "content" for itself without risk of mistransmission or mistranslation within secondary evidence.[184] Thus, if the Best Evidence Rule applies to foreign-language recordings, the rule cannot be satisfied by a trial procedure that technically "admits" the original recording "into evidence" but withholds it from the jury—how are jurors to determine content for themselves from the original if they never have access to it?

Therefore, if the plain language analysis offered by the majority in *Chavez* is correct, the Federal Rules of Evidence—and the Best Evidence Rule in particular—leave courts and litigants in an absurd position. Parties seeking to prove events through recordings must present original recordings in foreign tongues as the "primary evidence." Courts must instruct jurors that they are to rely upon the foreign-language recordings alone for evidence of their content and are to treat any English translations purely as illustrative aids. For the majority of jurors who do not comprehend the language at issue, they will be left with no evidence of content upon which to rely in reaching a verdict. Even more troubling are circumstances in which some jurors have just enough knowledge of the language at issue to attempt to translate in the jury room without oversight from the parties or the court.

B. CORRECTING COURSE: AMENDING THE BEST EVIDENCE RULE

If the Federal Rules of Evidence, as written, lead to an incoherent evidentiary outcome, the remedy is clear. Article X of the Federal Rules of Evidence should be amended to allow for fair and effective proof of foreign-language documents and recordings in federal court.[185] If the existing "plain language" of Rule 1002 covers foreign-language recordings, that plain language can be redrafted to offer a sensible and workable approach to foreign-language

183. *See supra* Section II.B and accompanying notes; *Chavez*, 976 F.3d at 1199 n.14 (holding did not require that "district courts must routinely play the foreign-language audio recordings in their entirety for the jury").

184. *See* FED. R. EVID. 1002.

185. *See* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1876–78 (2019) (urging amendments to the Federal Rules of Evidence are necessary to resolve conflicts and confusion among the federal courts).

evidence. Such an amendment would avoid absurd outcomes by simply removing non-English writings and recordings from the ambit of the Best Evidence Rule.

Importantly, an amendment removing foreign-language recordings from the bounds of the Best Evidence Rule would be a narrow one. It would simply mean that a party seeking to prove the content of a foreign-language recording would not *be required to* admit the original recording as evidence of that content under Rule 1002. Parties could continue to seek admission of original foreign-language recordings as relevant under Rule 402 to the extent that certain recordings might assist the fact-finder in resolving issues other than content. For example, an original recording in a foreign language might help jurors resolve disputed issues such as the identity of speakers, the tone of a conversation, or the timing of certain remarks.[186] Judge Hartz in his *Chavez* dissent acknowledged that admission of foreign-language recordings themselves could be important in certain cases for purposes such as these.[187] A request to admit an original foreign-language recording for such purposes would remain subject to a Rule 403 objection to the extent that hearing the foreign conversation could prejudice the jury or cause confusion.[188] This could be especially important in those cases where jurors possess some knowledge of the foreign language at issue.[189] Thus, an amendment to Article X of the Federal Rules of Evidence to remove foreign-language recordings would make their admission *discretionary* rather than *mandatory*.

There are two principal methods for removing non-English documents and recordings from the ambit of the Best Evidence Rule to resolve the problems with its strict application in this context. One would seek to limit the application of all of Article X to "English-language" writings and recordings by amending its existing "Definitions" provision found in Rule 1001. Alternatively, an entirely new provision could be added to Article X of the Federal Rules of Evidence, expressly exempting foreign-language writings and recordings from the Best Evidence Rule.

One possible way to remove foreign-language recordings from the Best Evidence Rule would be to amend the "Definitions" provision found in Rule 1001. Rule 1001 provides the definitions "[t]hat [a]pply to [t]his [a]rticle."[190]

186. *See* United States v. Cruz, 765 F.2d 1020, 1024 (11th Cir. 1985) (playing a foreign-language recording may help the jury "detect changes in voice modulation and note any hesitancies or other characteristics which might give meaning to the tape recording").

187. *Chavez*, 976 F.3d at 1214 (Hartz, J., dissenting).

188. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

189. *See, e.g.*, United States v. Valencia, 957 F.2d 1189, 1199 (5th Cir. 1992) (upholding the decision of a lower court to keep a recording from the jury after it polled the jury and learned that one juror spoke Spanish), *overruled on other grounds by* United States v. Keith, 230 F.3d 784, 786 (5th Cir. 2000).

190. FED. R. EVID. 1001.

Of course, the Best Evidence problem applies equally to both foreign-language recordings and foreign-language writings. Thus the definition of both "writings" and "recordings" would need to be amended to include only "English-language" writings and recordings. Such an amendment might read as follows:

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE[191]

In this article:

(a) A "writing" consists of English-language letters, or words, and numbers or their equivalent of any of these set down in any form.
(b) A "recording" consists of English-language letters, or words, and numbers or their equivalent of any of these recorded in any manner.
(c) A "photograph" means a photographic image or its equivalent stored in any form.
(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.
(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Because the references to "writings" and "recordings" in Rule 1002 and throughout Article X track the definitions in Rule 1001, this amendment would restrict the operation of the Best Evidence Rule to English-language writings and recordings.

Another amendment alternative would be the addition of a new rule at the end of Article X exempting foreign-language writings and recordings from the Best Evidence Rule. Such a rule would not prescribe the *method for proving* a foreign-language writing or recording with any precision. This flexibility would avoid treading into the areas of expert testimony, authentication, hearsay, and confrontation that could be implicated by the use of a transcript at trial. Instead, a new rule might briefly provide that an original is *not required* in the case of foreign-language writings or recordings, leaving the proper method of proof to other rules. In so doing, a new Rule 1009 might borrow language from the existing exceptions to the Best Evidence Rule found in Rule 1004[192] and read:

191. Suggested amended language underscored.

192. FED. R. EVID. 1004:

RULE 1009. FOREIGN-LANGUAGE WRITINGS AND RECORDINGS

An original is not required, and other evidence of the content of a writing or recording is admissible, if the writing or recording was made in a language other than English.

C. THE AMENDMENT ALTERNATIVES: MERITS AND DEMERITS

There are clear costs and benefits associated with both amendment alternatives. Either amendment would have the positive impact of eliminating the absurd evidentiary outcomes described above. Parties would not be required to admit and play confusing and essentially nonsensical, non-English recordings at trial. Consistent with rules regarding expert opinion testimony, authentication, hearsay, and confrontation, parties would be free to admit vetted English-translation transcripts into evidence to prove the content of foreign-language recordings to English-speaking federal jurors.

Despite the palliative effects of an amendment to Article X of the Federal Rules of Evidence, both amendment alternatives could effect a significant change in existing trial practice. In almost all of the published federal cases involving foreign-language recordings, the original foreign-language recordings were admitted into evidence along with English-language transcripts.[193] Very few federal cases involved the circumstance presented in the *Chavez* case in which an English transcript was admitted without the underlying original recording.[194] Although the appellate cases rarely reference the Best Evidence Rule, it is the Best Evidence Rule that is responsible for the routine admission of the original recordings (most often by the government in criminal cases).[195] An amendment clarifying that admission of an original foreign-language recording is *not* required by the Best Evidence Rule could lead to fewer prosecutors seeking to admit them, in which case original foreign-language recordings may more frequently be omitted from the trial record. This is precisely what happened in *Chavez*. Of course, the prosecution would remain obligated to provide the original recording to the defense during discovery and the defense would remain free to offer the original recording

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> An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith; (b) an original cannot be obtained by any available judicial process; (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (d) the writing, recording, or photograph is not closely related to a controlling issue.

Id.

193. *See supra* Section II.A and accompanying notes.

194. *See supra* Section II.C and accompanying notes.

195. *See, e.g.*, United States v. Morales-Madera, 352 F.3d 1, 9 (1st Cir. 2003) ("The best evidence rule requires that the tape recordings themselves must be furnished, absent agreement to the contrary, but does not require that English translations of those tapes be excluded from evidence.").

into evidence and to offer its own version of an English translation for consideration by the jury.[196] But this shift away from mandatory admission of the original foreign-language recording could have an impact. For example, omission of the original foreign-language recording from the trial record could affect ineffective assistance of counsel claims by criminal defendants relating to defense failures to challenge the accuracy of an English translation transcript. Although a criminal defendant could challenge his trial lawyer's failure to offer a competing translation of a foreign-language recording, a defendant may be hard-pressed to demonstrate that such a failure likely altered the outcome of his case without the original foreign-language recording in the record.[197]

Another challenging issue under either version of an amended Best Evidence Rule could be recordings that mix English with other languages. The original recordings in *Chavez* were mostly in Spanish but had some English words mixed in.[198] Recordings that combine English with other languages are not uncommon in federal proceedings, however. Rule 1002 clearly applies to original recordings of English-language conversations, and it would continue to do so following either of the amendments described above. This is because American jurors are able to discern the content of English portions of recordings for themselves and should continue to do so consistent with the long-standing edict of the Best Evidence Rule. If Rule 1002 is amended to exclude foreign-language recordings, trial courts will have to apply the Best Evidence Rule to English portions of a recording, while exempting foreign-language portions of the same recording. Judges could require admission of English portions of original recordings under Rule 1002 and could exercise discretion with respect to redaction of foreign-language remainders under Rule 403. While managing mixed recordings could prove to be a sticky wicket, federal courts already have experience in handling such issues.[199]

It is also important to emphasize that *many* evidentiary problems in connection with the admission of English translation transcripts would *not* be addressed by either proposed amendment to the Best Evidence Rule.[200] Should the Federal Evidence Advisory Committee ultimately proceed with a proposal to amend the Best Evidence Rule, an Advisory Committee note would need to acknowledge the many residual issues surrounding the admissibility of English-language transcripts that are simply not addressed under Article X

196. FED. R. CRIM. P. 16(a)(1)(B)(i) (requiring disclosure of "any relevant written or recorded statement by the defendant").

197. *See* Strickland v. Washington, 466 U.S. 668, 695–96 (1984).

198. United States v. Chavez, 976 F.3d 1178, 1185–86 (10th Cir. 2020).

199. *See generally, e.g.*, United States v. Taghipour, 964 F.2d 908 (9th Cir. 1992) (using recordings were partly in English and partly in Farsi and trial court instructed jury that the tape was evidence for the English portion and that the transcript was evidence for the portion in Farsi).

200. *See* Gold, *supra* note 28, § 7183 (noting that evidence that clears the hurdle of the Best Evidence Rule is not necessarily admissible and that issues of hearsay and authentication may remain).

of the Rules.[201] For example, Judge Hartz is correct that a transcript translating a foreign-language recording into English constitutes an expert opinion that requires "specialized knowledge" within the meaning of Rule 702.[202] This means that the proponent of such a transcript must comply with all pretrial expert disclosure requirements and should properly qualify a testifying translator under Rule 702.[203] Furthermore, English transcripts must be properly authenticated under Article IX of the Rules before they may be admitted as evidence.[204] And, of course, if the transcript itself—as opposed to the trial testimony of a qualified translator—is offered as evidence of the expert's translation, issues of hearsay and confrontation also arise.[205] An amendment removing foreign-language writings and recordings from the bounds of the Best Evidence Rule would simply eliminate an existing barrier to admissibility for English transcripts. It would not pave the way for admission in its own right. Should such an amendment be proposed, an Advisory Committee note should highlight the remaining hurdles to admissibility that courts must consider.

Notwithstanding the limited nature of an amendment exempting foreign-language writings and recordings from the Best Evidence Rule and the change in practice that it might generate, an amendment is necessary if federal courts persist in affording identical treatment to English-language and foreign-language recordings under existing rules. As between the available amendment alternatives, the addition of a new Rule 1009 would seem to offer the superior approach. First, optimal rulemaking should always seek to minimize the risk of unanticipated consequences, and there could very well be some unanticipated consequences to amending the "Definitions" provision found in Rule 1001 to remove non-English writings and recordings from the ambit of Article X altogether.[206] For example, removing foreign-language writings and recordings from Article X coverage could present problems for a proponent trying to offer a Rule 1006 summary of voluminous foreign-language recordings. If Rule 1006 no longer applies to non-English writings and recordings, there could be some question about the availability of the

201. *See* Minutes of the Meeting of April 30, 2021, Advisory Committee on Evidence Rules 14 (Apr. 30, 2021) (discussing many evidentiary issues surrounding admission of English transcripts that would remain after an amendment to the Best Evidence Rule), https://www.uscourts.gov/sites/default/files/ev_minutes_spring_2021_0.pdf [https://perma.cc/4KB6-H8CW].

202. FED. R. EVID. 702(a) (requiring that an expert possess "scientific, technical, or other specialized knowledge").

203. FED. R. CRIM. P. 16(a)(1)(G) (detailing required disclosures for government expert witnesses); FED. R. EVID. 702.

204. FED. R. EVID. 901 ("Authenticating or Identifying Evidence.").

205. FED. R. EVID. 802 (making hearsay inadmissible unless it falls within a hearsay exception); Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (holding that the Sixth Amendment requires confrontation for testimonial hearsay statements offered against criminal defendants).

206. *See* Capra & Richter, *supra* note 185, at 1886–87 (discussing rulemaking efforts to avoid unintended consequences arising from amendments).

vehicle it offers for summarizing voluminous foreign-language content. Furthermore, the existing language of Rule 1001 that defines writings and recordings as letters or words "*or their equivalent set down in any form*" could undermine an amendment if courts were to interpret foreign-language recordings as an "equivalent" to English-language recordings set down in another form.[207] An Advisory Committee note could make the intent to exclude foreign-language recordings and writings clear, but it would be problematic if the plain language of the amendment were at war with its intent. Indeed, ensuring that the plain language of Article X offers clear guidance concerning the introduction of foreign-language writings and recordings would be the goal of an amendment.

For these reasons, a free-standing Federal Rule of Evidence 1009 exempting foreign-language writings and recordings from the requirement of an "original" would seem to be the superior course. Indeed, in recognition of the disconnect between the Best Evidence Rule and foreign-language writings and recordings, the Texas Rules of Evidence already include a provision making English translations of foreign-language documents admissible.[208] This Texas rule was designed to address concerns that jurors might attempt to translate

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207. FED. R. EVID. 1001 (emphasis added).

208. The Texas Rules of Evidence provide:

> (a) Submitting a Translation. A translation of a foreign language document is admissible if, at least 45 days before trial, the proponent serves on all parties: (1) the translation and the underlying foreign language document; and (2) a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate.
>
> (b) Objection. When objecting to a translation's accuracy, a party should specifically indicate its inaccuracies and offer an accurate translation. A party must serve the objection on all parties at least 15 days before trial.
>
> (c) Effect of Failing to Object or Submit a Conflicting Translation. If the underlying foreign language document is otherwise admissible, the court must admit—and may not allow a party to attack the accuracy of—a translation submitted under subdivision (a) unless the party has: (1) submitted a conflicting translation under subdivision (a); or (2) objected to the translation under subdivision (b).
>
> (d) Effect of Objecting or Submitting a Conflicting Translation. If conflicting translations are submitted under subdivision (a) or an objection is made under subdivision (b), the court must determine whether there is a genuine issue about the accuracy of a material part of the translation. If so, the trier of fact must resolve the issue.
>
> (e) Qualified Translator May Testify. Except for subdivision (c), this rule does not preclude a party from offering the testimony of a qualified translator to translate a foreign language document.
>
> (f) Time Limits. On a party's motion and for good cause, the court may alter this rule's time limits.
>
> (g) Court-Appointed Translator. If necessary, the court may appoint a qualified translator. The reasonable value of the translator's services must be taxed as court costs.

TEX. R. EVID. 1009 ("Translating a Foreign Language Document.").

foreign-language documents admitted in Texas courts for themselves.[209] Texas Rule 1009 outlines a detailed procedure very similar to the one utilized by the federal courts in vetting English transcripts of foreign-language documents and recordings.[210] A more detailed amendment to the Federal Rules of Evidence, akin to the Texas rule that outlines a specific procedure for vetting English transcripts, could be considered, but a lean and straightforward amendment that simply removes foreign-language documents and recordings from the reach of the Best Evidence Rule is more in keeping with the Federal Rules of Evidence, leaving the details of vetting transcripts to district judges. That said, the Texas provision demonstrates that evidence rulemaking offers a ready solution to the complexities created by the Best Evidence Rule in the context of foreign-language evidence.

IV. INTERPRETING THE BEST EVIDENCE RULE TO EXCLUDE FOREIGN-LANGUAGE WRITINGS AND RECORDINGS

Of course, if Article X of the Federal Rules of Evidence, as currently drafted, can be read to exempt foreign-language writings and recordings from coverage, there is no need for a costly process to amend the Rules.[211] As outlined above, reading the existing rules to require admission of an original foreign-language recording as the "primary evidence" of its content leads to absurd results in a federal court system that conducts all proceedings in English, and the Supreme Court has held that the Federal Rules of Evidence, no matter how plain their language, should not be read to produce absurd results.[212] Therefore, if Rule 1002, as it is currently drafted, can be interpreted to allow the substantive admission of English translations of foreign-language writings and recordings, courts should so construe it.[213]

First, it is beyond peradventure that evidence admitted in federal court proceedings must be in English.[214] Though the Federal Rules of Evidence

209. *See* Peralta v. State, 338 S.W.3d 598, 601–02 (Tex. Ct. App. 2010) ("The procedures employed are critical because many jurors are fluent in Spanish and may interpret statements differently than a court interpreter or an official English translation. Even more problematic is the risk of Spanish-speaking jurors relating their own versions to other members of venire that speak only English.").

210. TEX. R. EVID. 1009; *see also, e.g.*, United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985) (describing proper procedure for vetting English translation transcripts in federal court).

211. *See* Daniel J. Capra & Liesa L. Richter, *"The" Rule: Modernizing the Potent, But Overlooked, Rule of Witness Sequestration*, 63 WM. & MARY L. REV. 1, 46 (2021) (describing the lengthy and resource-intensive process necessary to amend a Federal Rule of Evidence).

212. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant.").

213. *See* United States v. Chavez, 976 F.3d 1178, 1214 (10th Cir. 2020) (Hartz, J., dissenting) ("If the Federal Rules of Evidence prohibited what the judge did, they would be obtuse. Fortunately, they do not.").

214. *See* United States v. Diaz, 519 F.3d 56, 64 (1st Cir. 2008) (noting that federal court proceedings must be conducted in English).

nowhere provide that the evidence presented in the federal courts should be in the "English language," that fundamental point is implicit in all the Rules.[215] Because federal court proceedings are to be conducted in English, it follows that evidence is to be admitted in English. This simple truism undermines the notion that Rule 1002 mandates that recordings of foreign-language conversations be admitted and presented to federal juries.

And it would appear that the text of Rule 1002 itself can be read to cover English-language writings and recordings only. In finding that the rule mandates admission of foreign-language recordings, the *Chavez* majority focused on the portion of Rule 1002 that spells out *what* the Rule requires: an "original" writing or recording. But the *Chavez* majority failed to focus on the plain language of the remainder of Rule 1002 that spells out the important *purpose* for which an original "is required[—]*in order to prove its content*."[216] Thus, Rule 1002 makes clear that an original must be offered for the purpose of conveying its "content" to the fact-finder. The Merriam-Webster Dictionary defines "content" as "the principal substance," "the meaning," or the "significance" of a writing or recording.[217] In an exclusively English-language proceeding, it is axiomatic that evidence offered in a language other than English is *incapable* of "proving content" as required by Rule 1002. English-speaking jurors in the federal system cannot divine the "meaning" or "significance" or "substance" of a recording if it is conducted in a foreign language. Therefore, because the original foreign-language recording *cannot* prove "content" as required by the plain language of Rule 1002, Rule 1002 does not demand admission of that original.[218]

In fact, the Indiana Supreme Court articulated this very reasoning in finding that Indiana's version of the Best Evidence Rule does not apply to foreign-language recordings. In *Romo v. State*, the defendant was prosecuted for drug offenses and the prosecution admitted an English-translation transcript of clandestinely recorded Spanish conversations between the defendant and a police informant.[219] Although the prosecution sought to play the original Spanish-language recordings at trial, the trial court refused to allow the conversations to be played for the jury.[220] Thus, the English transcripts were the sole evidence of the content of the recorded conversations provided to the jury. Following his conviction, the defendant challenged the admission of

215. *See* FED. R. EVID. 101–06 (providing definitions and purpose for the Rules, but nowhere providing that evidence must be admitted in English).

216. FED. R. EVID. 1002 (emphasis added).

217. *Content*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/content [https://perma.cc/MUD7-N9TE].

218. *See* Gold, *supra* note 28, § 7184 n.18 (stating that "[i]f an English translation of a foreign-language writing or recording is deemed to be evidence 'offered to prove contents' of that writing or recording, the best evidence doctrine might lead to the ridiculous conclusion that an English speaking trier-of-fact is precluded from receiving a translation" and suggesting that an English transcript is offered to prove "meaning" rather than "content").

219. Romo v. Indiana, 941 N.E.2d 504, 506 (Ind. 2011).

220. *Id.* at 505.

the transcripts, arguing that transcripts are only permitted as an interpretive aid.[221] Because the original audio recordings were not played, "the English translation transcripts served no proper function and were therefore improperly admitted as evidence."[222]

After reviewing federal authority regarding the substantive admissibility of English transcripts of foreign-language recordings, the Indiana Supreme Court affirmed the defendant's conviction and found the Indiana counterpart to Rule 1002 inapplicable:

> Here, under the reasonable assumption that the jury did not comprehend Spanish, the original recording, being solely in Spanish, would not likely convey to the jury the content of the recorded conversations. Applying the rule to limit the evidence of content to the original Spanish recordings would not serve the purpose of the rule because it *could not prove any content to the jury. We thus hold that the admission into evidence of foreign language translation transcripts is not governed by Evidence Rule 1002.*[223]

The court went on to emphasize the importance of distinguishing the treatment of foreign-language recordings from the treatment of their English-language counterparts:

> In such circumstances, it is the English language transcript, not the foreign language recording, that will be the overwhelming, if not exclusive, source of relevant, probative evidence. Refusing to consider such translation transcripts as substantive evidence is contrary to the aspiration of the Indiana Rules of Evidence favoring "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." We hold that English language translation transcripts of statements recorded in a foreign language, if otherwise admissible, may properly be considered as substantive evidence.[224]

Because the Indiana Best Evidence Rule mirrors Federal Rule 1002, the straightforward analysis offered by the *Romo* court translates seamlessly to the federal context.[225] Federal courts adhering to a strict "plain language" interpretation of the Federal Rules of Evidence should focus on the clear language of Rule 1002 that requires an original recording to be admitted "in

221. *Id.*

222. *Id.*

223. *Id.* at 508 (emphasis added).

224. *Id.* (citation omitted).

225. *Compare* IND. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise."), *with* FED. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.").

order to prove its content."[226] Where foreign-language recordings are incapable of proving "content" to an English-speaking jury, Rule 1002 does not mandate admission of the original recordings.

It is not only the plain language of Rule 1002 that fails to support admission of original foreign-language recordings before English-speaking juries, but also the Rule's underlying policy. The fundamental policy that informs the Best Evidence Rule is not served by requiring admission of "original" foreign-language recordings. To be sure, the risks of imprecision and mistransmission in secondary evidence that give rise to the Best Evidence Rule are certainly present with English-language transcripts of foreign recordings. Faulty translation of a single word of a foreign-language recording has the potential to alter meaning significantly. If a criminal defendant participating in a Spanish conversation captured on a recording offers to sell a government informant a "Coca-Cola" and not the "cocaine" reflected in an English-language transcript of that conversation, that critical mistranslation could directly affect the defendant's fate. The problem is that the remedy demanded by the Best Evidence Rule—admitting evidence of the original recording to remove the intermediary between the original and the jury—fails to afford the contemplated protection against such mistransmission, *because it is in a foreign language that the jury does not understand*. Therefore, the very real risk of mistranslation cannot be corrected by admission of the original foreign-language recording at trial. Disclosure of the recording to the defense, accompanied by the defense's right to offer its own translation to the fact-finder, does. Thus, even if one could argue that the letter of the Best Evidence Rule applies with equal force to foreign-language writings and recordings, its underlying policy clearly does not.

Further, as Judge Hartz noted in his *Chavez* dissent, federal district court judges undeniably possess the discretion to exclude original foreign-language recordings under Rule 403.[227] That provision authorizes trial judges to exclude otherwise relevant and admissible evidence whenever its potential to prejudice, confuse, or mislead the jury substantially outweighs any probative value it may have.[228] A trial judge who finds that a recording in a foreign language may confuse or mislead English-speaking jurors would be well within their discretion to keep that recording away from the jury. If Rule 1002 *required* admission of the original recording anytime a party wished to use the recording to prove the content of a foreign-language conversation, the recording would be lost as evidence whenever a district court judge exercised their discretion to exclude it under Rule 403. Of course, a party need not necessarily use a recording of a conversation to prove its content. A litigant could simply call a witness with personal knowledge of the conversation at

226. FED. R. EVID. 1002.

227. United States v. Chavez, 976 F.3d 1178, 1222–23 (10th Cir. 2020) (Hartz, J., dissenting).

228. FED. R. EVID. 403.

issue to recount it from memory.[229] The Best Evidence Rule does not apply in this circumstance.[230] But this would mean that the jury would have to rely upon an imprecise recollection of the words and tenor of the conversation from a percipient witness rather than on an available expert translation of the *contemporaneously* recorded conversation. Surely, this is not the "best evidence," and it would be truly ironic if Rule 1002 *mandated* resorting to it.[231]

Finally, in his dissent in *Chavez*, Judge Hartz offered his own roadmap within the framework of the existing rules to support the substantive admission of English transcripts of foreign-language recordings without admission of the underlying original recordings themselves.[232] Judge Hartz's characterization of an English transcript of a foreign-language recording as an expert opinion is supported by Rule 702.[233] Translating a foreign-language recording into English certainly requires the "specialized knowledge" contemplated by Rule 702 to support expert opinion testimony.[234] Of course, the original foreign-language recording would be a necessary basis to support a translator's expert opinion—a translator can be expected to rely almost entirely on the original recording in making an expert translation. But, as Judge Hartz points out, Rule 703 permits experts in federal court to rely upon information that would not itself be admissible as evidence to form the basis for their opinions.[235] So long as other experts in the translation field would reasonably rely upon original foreign-language recordings, a federal expert witness may do so.[236] Following this thread, a qualified translator would be permitted to testify to their English translation of a foreign-language recording in a transcript without running afoul of the Best Evidence Rule.[237] Judge Hartz's suggestion

229. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.7, at 1416 ("If the witness has independent knowledge of the matter in question, the witness may testify on the basis of such knowledge without producing the writing, recording, or photograph.").

230. *See* FED. R. EVID. 1002 advisory committee's note ("Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made.").

231. *See* Gold, *supra* note 28, § 7184 ("These limitations on the application of Rule 1002 sometimes lead to the admission of evidence that is clearly not the 'best evidence' available. . . . [A] participant to a conversation may testify as to what was said even though there is a recording of that conversation.").

232. *See Chavez*, 976 F.3d at 1228–33 (Hartz, J., dissenting).

233. *See* FED. R. EVID. 702.

234. FED. R. EVID. 702.

235. FED. R. EVID. 703.

236. FED. R. EVID. 703.

237. Testimony at trial by a witness who compared the original foreign-language recording and created or verified the English transcript would be necessary to support admission of the transcript. *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 10:15 (4th ed. 2013) ("[T]he transcript (or transcripts, if competing versions must be offered because of the failure of the parties to agree) must be received as independent evidence, *supported by the testimony of the translator*, who must qualify as an expert, and if the parties cannot agree on translation issues, competing transcripts should be allowed." (emphasis added) (footnote omitted)). Such testimony would be crucial to authenticate the transcript. *See* FED. R. EVID. 901(b)(1) (allowing

that an original foreign-language recording can thus be used as the basis for an expert English translation without implicating the Best Evidence Rule finds support in the Advisory Committee's note to Rule 1002. The Advisory Committee note acknowledges that Rule 1002 is "limited accordingly in its application" by Rule 703:

> It should be noted, however, that Rule 703 allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.[238]

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authentication through "[t]estimony of a [w]itness with [k]nowledge"). Furthermore, in a criminal case, such testimony would be necessary to satisfy the Confrontation Clause of the U.S. Constitution. An English transcript of a foreign-language recording constitutes an out-of-court statement by the translator regarding the meaning of the words used on the recording. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1424 n.16 ("A transcript is the preparer's out-of-court statement that the persons he identifies participated in the conversation and the words he reports are the ones that the participants spoke."). To prove the content of the recorded conversation, the transcript would be offered "to prove the truth of the matter asserted in the" transcript. *See* FED. R. EVID. 801(c)(2). An English-translation transcript prepared for use in a criminal prosecution would undoubtedly constitute a "testimonial statement" within the meaning of the Sixth Amendment. *See* Crawford v. Washington, 541 U.S. 36, 65 (2004) (describing testimonial statements). Trial testimony by the translator would thus be crucial to affording the defendant the requisite opportunity for confrontation. Of course, to admit the English transcript itself in any case would also require a hearsay exception. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.9, at 1424 n.16 (noting that Rules 803(5), 803(6), and 803(8) could provide hearsay exceptions for transcripts). These reflect some of the thorny issues surrounding admission of an English transcript as substantive evidence apart from the Best Evidence Rule.

238. FED. R. EVID. 1002 advisory committee's note (citation omitted); *see also* Gold, *supra* note 28, § 7183 ("This means that Rule 1002 does not apply where an expert limits testimony to the opinion, even where that opinion is based on the contents of a writing, recording, or photograph."). Distinctions could be drawn between the example given in the Advisory Committee's note—medical records containing a radiologist's interpretation of an X-ray—and an English-language transcript of a foreign-language recording. Such medical records likely contain opinions and information *beyond* the mere reading of an X-ray and, therefore, beyond the "content" of the original X-ray. An English transcript of a foreign-language recording is an opinion solely as to the "content" of the original recording. *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 15, § 10.3, at 1404 ("The Advisory Committee apparently intended that production of an X-ray be excused, even where the expert's opinion is based *in part* on the X-ray . . . . If the witness testifies specifically about the content of the X-ray or to knowledge derived solely from examination of the X-ray, the party calling the witness is normally required to produce the X-ray or explain its absence." (emphasis added)). Further, an X-ray is likely to be as Greek to a lay jury as is a foreign-language recording and yet federal opinions require the admission of the original X-ray to prove content. *See id.* § 10.3, at 1405 ("If the content of the X-ray is directly at issue . . . the Best Evidence Doctrine applies."); *see also* Gold, *supra* note 28, § 7183 ("Rule 1002 applies only if and when the expert's testimony addresses those contents.").

In his dissent in *Chavez*, Judge Hartz also cited evidence treatises supporting the substantive use of English transcripts of foreign-language recordings as expert opinion testimony:

> Translated Transcripts. Where the audible record captures statements or conversations in a language other than English, a transcript in translation is indispensable as a practical matter. . . . The problem of assuring accuracy is compounded, and careful pretrial work by the parties under judicial supervision is essential. Neither the court nor the jury is likely to be qualified to determine the accuracy of the translation by comparing it with the audible record, and both depend heavily on persons fluent in English and the other language. In this instance, the transcript (or transcripts, if competing versions must be offered because of the failure of the parties to agree) must be received as independent evidence, supported by the testimony of the translator, who must qualify as an expert, and if the parties cannot agree on translation issues, competing transcripts should be allowed.[239]

Therefore, federal courts possess several avenues firmly rooted in the language and framework of the existing Evidence Rules that they may follow to exempt foreign-language recordings from the rigid and nonsensical application of the Best Evidence Rule. The vast majority of federal courts already admit English transcripts of foreign-language recordings as substantive evidence.[240] Although many do so in addition to admitting the original foreign-language recordings they translate, some have recognized the propriety of admitting English transcripts in the absence of the underlying recordings, especially where presentation of a recording in a foreign language could confuse or taint the jury.[241] As illustrated above, most federal courts take this pragmatic approach to foreign-language recordings without analyzing or even paying lip service to the Best Evidence Rule. This gap in evidentiary analysis has led to the uncertainty about the interaction between the Best Evidence Rule and foreign-language originals that was on full display in the competing opinions in *United States v. Chavez*.[242] This uncertainty could be remedied by an amendment to the Federal Rules of Evidence expressly removing foreign-language recordings from the coverage of the Best Evidence Rule. But, if federal courts seize the opportunity to spell out the evidentiary justifications for their differential treatment of foreign-language recordings, a costly and resource-intensive amendment to the Rules can be avoided.

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239. United States v. Chavez, 976 F.3d 1178, 1221 (10th Cir. 2020) (Hartz, J., dissenting) (alteration in original) (emphasis omitted).

240. *See supra* Sections II.A–.C.

241. *See supra* Section II.C.

242. *See Chavez*, 976 F.3d at 1182, 1214–15.

CONCLUSION

The Best Evidence Rule is powerful and straightforward, ensuring that jurors have access to original writings and recordings in order to accurately evaluate their meaning. Its rationale is time-honored and well-accepted: adding an intermediary between original content and the entity that must interpret it undermines accuracy. When applied to English-language writings and recordings to require that juries evaluate originals, the Best Evidence Rule improves accuracy. But when rigidly applied to require English-speaking jurors to evaluate foreign-language recordings for themselves, the rule and its rationale break down. If the plain language of Rule 1002 mandates such a result, Article X of the Federal Rules of Evidence should be amended to remove foreign-language recordings from its orbit, lest accuracy decrease and the import of foreign-language recordings get lost in translation. But federal courts have an opportunity to chart a detailed course within the existing Federal Rules of Evidence for the admissibility of English transcripts of foreign-language recordings outside the Best Evidence Rule. Should federal courts unite around an evidentiary roadmap for the admissibility of crucial English translations, costly amendments to the Federal Rules of Evidence may be averted.