No. _____

IN THE

Supreme Court of the United States

MARIA MARGARITA VALDEZ-ARAIZA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In conducting harmless-error review, an appellate court may not resolve conflicting evidence, assess the credibility of witnesses, or view the evidence in the light most favorable to the prosecution. *Neder v. United States*, 527 U.S. 1, 19 (1999); *Kotteakos v. United States*, 328 U.S. 750, 763-64, 765-67 (1946); *Weiler v. United States*, 323 U.S. 606, 611 (1945).

The Ninth Circuit concluded that multiple evidentiary errors did not warrant reversal because:

(1) the jury would have "disbelieved" the defendant's testimony regardless; and

(2) the evidence "creat[ed] a reasonable foundation from which to conclude" the defendant was guilty.

Is the Ninth Circuit's decision consistent with this Court's precedents?

RELATED CASES

Undersigned counsel is not aware of any directly related cases within the meaning of Supreme Court Rule 14.1(b)(iii).

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The memorandum disposition of the court of appeals (App. 1a) is unpublished. *United States v. Valdez-Araiza*, No. 18-10022, 2019 WL 2743701 (9th Cir. July 1, 2019).

JURISDICTION

The court of appeals entered judgment on July 1, 2019 (App. 1a) and it denied a petition for rehearing on July 11, 2019 (App. 7a). This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A complete recitation of the facts appears in the opening brief. Appellant's Opening Brief ("Op. Br.") at 4-22, *United States v. Valdez-Araiza*, No. 18-10022 (9th Cir.) (DktEntry: 19), *available at* 2018 WL 3493506.

A jury convicted Petitioner Maria Valdez of falsely stating in a passport application that she was a United States citizen by birth in Arizona, in violation of 18 U.S.C. § 1542. The Indictment required the government to prove the falsity of her statement that she was a United States citizen—i.e., to prove that she was not born in Arizona, as she claimed—and that she knew the statement was false when she applied for the passport. *See United States v. Evans*, 728 F.3d 953, 957, 962 (9th Cir. 2013) (holding in a prosecution under 18 U.S.C. § 1542 based on a claim of birth in

the United States that "the government had to prove beyond a reasonable doubt that [she] was not a United States citizen" and place of birth "is a question for the jury").

Ms. Valdez's defense was that her parents told her she was born in a midwife's home in Arizona during a brief visit by her parents from Mexico in 1956. Op. Br. 6. She testified through a Spanish-language interpreter that her father, who worked for the Mexican government, later obtained a Mexican birth certificate in her name so that she could receive the benefits of Mexican citizenship while growing up in Mexico. *Id.* at 6-7. She introduced documents that supported her belief that she was born in Arizona, *id.* at 5-6, and a defense expert testified that before changes to Mexican law in 1997 first allowed for dual citizenship, some Mexican families falsely registered their children born in the United States as born in Mexico for legal reasons. *Id.* at 7. She acknowledged that she had previously obtained nonimmigrant visitor visas for entry into the United States using her Mexican birth record, as well as a Mexican national identification number and Mexican birth certificates for her daughters. *Id.*

The Mexican birth record was the centerpiece of the government's case, but its unreliability was apparent on its face. First, it misspelled the child's last name differently in two places on the same page. *Id.* at 10. Second, it incorrectly indicated that Ms. Valdez's mother was 35 years old in 1957, when she must have been 36, according to the undisputed trial evidence. *Id.* Moreover, its date and place-of-birth information conflicted with a 1973 Social Security record, the affidavit of Ms. Valdez's deceased mother, the affidavit of a second person who swore that he was present for the birth, and a 1996 baptismal certificate from a church in Mexico. *Id.* at 5-6, 10.

A first trial ended in a hung jury and a mistrial on April 3, 2017, with five jurors voting to acquit. *Id.* at 4. On October 27, 2017, after a second four-day trial, a jury entered a verdict of guilty. *Id.* At sentencing on January 17, 2018, the district court imposed a sentence of 10 months of imprisonment and 3 years of supervised release. *Id.*

On appeal, Ms. Valdez argued that multiple prosecution witnesses in the second trial only, including at least two experts, testified that she was not a United States citizen—and thus that her statement was necessarily false—in violation of an in limine ruling in the first trial and various evidentiary rules.

The Ninth Circuit agreed that "the government introduced evidence in violation of the district court's in limine ruling from the first trial," and it "identified multiple errors in [the] second trial," including that "[t]he district court erroneously admitted certain evidence," but it nonetheless affirmed the conviction. App. 3a.

First, the court of appeals agreed that a prosecution expert, a senior citizenship adjudication officer with U.S. Citizenship and Immigration Services ("CIS"), improperly offered an opinion "on th[e] ultimate legal issue," in direct violation of the prior in limine ruling and evidentiary rules. App. 3a. The expert testified that Ms. Valdez was not a United States citizen because she had previously been issued a nonimmigrant visa to enter the United States. App. 3a.

Second, the court of appeals agreed that a "fraud prevention manager" with the U.S. State Department's Western Passport Center "impermissibly offered opinion testimony given that she was a fact witness and not noticed as an expert." App. 3a.

The witness discussed Ms. Valdez's passport application and then testified—contrary to the defense expert and without expertise in Mexican law or custom—that a person with a Mexican birth record was not born in the United States. Excerpts of Record ("ER") 174, *United States v. Valdez-Araiza*, No. 18-10022 (9th Cir.) (DktEntry: 20-2).

Third, the court of appeals agreed that a "fraud manager" with the Arizona Department of Health Services "offered testimony regarding Valdez's use of the passport that was potentially prejudicial and of limited probative value." App. 3a. The witness testified that the State of Arizona officially denied Ms. Valdez's later-filed and unrelated application for a delayed birth certificate and further explained the State's reasons for rejecting the very same supporting evidence of Arizona birth that Ms. Valdez had attached to the passport application. ER 133-38, 157.

Each of these apparently authoritative witnesses communicated with an aura of expertise that Ms. Valdez was not a United States citizen and added to the expert drumbeat that her statement on the passport application, as well as her trial testimony, was false.

Nonetheless, the Ninth Circuit concluded, although "[t]he district court erroneously admitted certain evidence," these errors were harmless when considered both individually and cumulatively. App. 3a-6a. First, the Ninth Circuit held that the errors individually did not satisfy the plain error standard for reversal (App. 4a), because the jury would have disbelieved Ms. Valdez's testimony regardless and because the evidence was sufficient to support her conviction:

> The jury was instructed that it was free to accept or reject the experts' opinion testimonies, it heard other testimony that nonimmigrant visas of the sort [the CIS officer] described are reserved for non-U.S. citizens, and Valdez's Mexican birth record was admitted as evidence, thus **creating a reasonable foundation from which to conclude that she was born in Mexico** and not in the United States. **Significantly, Valdez herself chose to testify in her defense**, **offering evasive and confusing responses to questions** and, when asked by a juror if her father lied to procure her Mexican birth record given her insistence that she was born in the United States, replying, "No. He had no reason to lie." *See United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir. 1981) ("**When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth**."). Given the evidence presented at trial, **Valdez's own testimony in particular**, we conclude that improper admission of these testimonies did not change the outcome of the trial.

App. 4a (emphasis added).

Second, on harmless-error review, the Ninth Circuit rejected Ms. Valdez's claim of cumulative error. App. 6a (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). The government conceded that harmless-error review applied to this claim (Brief of Appellee at 56, *United States v. Valdez-Araiza*, No. 18-10022 (9th Cir.) (DktEntry: 38), *available at* 2019 WL 296912), because, as the Ninth Circuit recognized, a non-constitutional error was preserved (App. 4a). *See United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). Without additional analysis, the court of appeals concluded that the government established that the prejudice resulting from the multiple errors was more probably harmless than not:

> Finally, although we have identified multiple errors in Valdez's second trial, we conclude, after "analyzing the overall effect of [all] the errors in the context of the evidence introduced at trial against the defendant," *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996), that the cumulative effect of these errors did not deprive Valdez of a fair trial.

App. 6a.

In a petition for rehearing, Ms. Valdez established that the court of appeals overlooked that the only *objective* basis it cited for concluding that the jury would not have believed her—her testimony that her father had not lied—was in fact not a contradiction at all in light of her earlier testimony, as discussed below. Appellant's Petition for Panel Rehearing at 1, *United States v. Valdez-Araiza*, No. 18-10022 (9th Cir.) (DktEntry: 57). She further argued that without the support of that sole purported discrepancy, the Ninth Circuit's conclusion that the multiple errors did not affect the outcome rested on an impermissible appellate finding that she was not credible. *Id.* at 2-3.

The Ninth Circuit denied the petition for rehearing without analysis. App. 7a.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's precedents that a court reviewing for harmless error may not resolve conflicting evidence or assess the credibility of witnesses.

A. Usurping the jury's factfinding power is contrary to the Sixth Amendment's guarantee of a trial by a jury.

The Sixth Amendment's right to a jury trial "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The right to jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . . meant to ensure [the people's] control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). This Court has repeatedly held that appellate courts must

respect this right when conducting harmless-error review pursuant to 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52:

> [Appellate courts] are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [the court] think[s] the defendant was guilty. That would be to substitute [the court's] judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945).

> [I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the by the error.

Kotteakos v. United States, 328 U.S. 750, 763-64 (1946) (internal citations and footnotes omitted).

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. United States, 326 U.S. 607, 615 (1946). In other words, the Sixth Amendment demands that "[a] reviewing court making this harmless-error inquiry does not . . . 'become in effect a second jury to determine whether the defendant is guilty.'" *Neder v. United States*, 527 U.S. 1, 19 (1999) (quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (1970)).

Similarly, the Court has repeatedly held that an appellate court may not assess the credibility of witnesses. The Court has explained, "[i]t is not for us to weigh the

evidence or to determine the credibility of witnesses," *Glasser v. United States*, 315 U.S. 60, 80 (1942), because "questions of credibility, whether of a witness or a confession, are for the jury," *Jackson v. Denno*, 378 U.S. 368, 386 n.13 (1964). This "fundamental premise of our criminal trial system[—] . . . that 'the *jury* is the lie detector,'" *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (plurality opinion) (emphasis in original) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973))—is rooted in the Sixth Amendment's right to a jury trial:

> The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story.

United States v. Bailey, 444 U.S. 394, 414-15 (1980). In other words, the Court has rejected the idea that "the power to review embraces the right to invade the province of the jury by determining questions of credibility." *Goldman v. United States*, 245 U.S. 474, 477 (1918).

Therefore, usurping the jury's factfinding power by resolving conflicting evidence or by assessing the credibility of witnesses is contrary to the Sixth Amendment's guarantee of a trial by a jury. *See Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (observing that central to the Sixth Amendment right is the ability to have the jury, not the judge, decide the facts of the case).

B. The Ninth Circuit held that the cumulative effect of multiple evidentiary errors did not render the defense less persuasive, and that the individual errors did not affect the verdict, in part based on its own judgment that Ms. Valdez's trial testimony was not believable.

This Court has held that the cumulative effect of multiple errors may render a trial fundamentally unfair, even if each error considered individually would not require reversal. *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973) (the combined effect of individual errors "deprived Chambers of a fair trial"); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *see also Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (characterizing the holding in *Chambers* as, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation").

In determining whether the combined effect of individually harmless errors violated a defendant's right to a fair trial, the question is whether the errors rendered the defense "far less persuasive than it might [otherwise] have been." *Chambers*, 410 U.S. at 294; *accord Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007). This requires a "fair assurance" that the "jury was not substantially swayed by the error." *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007) (citation omitted); *accord United States v. Lloyd*, 807 F.3d 1128, 1170 (9th Cir. 2015); *Kotteakos*, 328 U.S. at 776; *see also Olano*, 507 U.S. at 741 (the government bears the "burden of showing the absence of prejudice" resulting from non-forfeited error under FED. R. CRIM. P. 52(a)).

In holding that the inadmissible testimony by three authoritative prosecution witnesses had no substantial impact on the jury's assessment of Ms. Valdez's

credibility and defense, the Ninth Circuit invaded the jury's exclusive province to make credibility determinations. As support for its conclusion that the "multiple errors" occurring only in the second trial did not affect the verdict, the Ninth Circuit reasoned that Ms. Valdez offered "*evasive and confusing* responses to questions." App. 4a (emphasis added). It is one thing to conclude that trial errors were harmless in light of a defendant's *objective* inconsistencies or contradictions. It is another for appellate judges who had no opportunity to observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said," *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985), to find that a witness who testified through a foreign-language interpreter gave "evasive and confusing" testimony. Such a subjective judgment, where unsupported by specific instances of inconsistencies or contradictions, is not a permissible basis upon which to conclude that the jury was not going to believe Ms. Valdez anyway. *See Weiler*, 323 U.S. at 610-11 (appellate courts do not "determine the credibility of . . . testimony").

Although the Ninth Circuit also cited to a single purported inconsistency in Ms. Valdez's testimony—that her father did not lie to a civil servant in Mexico to obtain her Mexican birth record and that he "had no reason to lie" (ER 400-01)—as support for its conclusion that the multiple errors did not affect the verdict, its inference that she was untruthful was unfounded. The Ninth Circuit overlooked that she had previously explained on the stand that her father, who "always worked for the [Mexican] government" (*id.* at 305), "found a way to be able to register [her] because of, you know, he knew people" (*id.* at 390). In other words, he had no reason

to lie to obtain the birth record because he knew people in the Mexican government. Her testimony that he did not lie was thus *consistent* with her earlier claim that he had obtained the inaccurate Mexican birth record with the acquiescence of the Mexican authorities, not by deception. Shorn of the support of this single purported discrepancy, and without reference to any other specific, objective basis to conclude that Ms. Valdez was not credible, the standalone judgment that her testimony was "evasive and confusing" is an impermissible appellate credibility finding.

The Ninth Circuit's decision leaves no room for doubt that it based its harmlessness conclusion on its judgment that Ms. Valdez was not credible. The court of appeals relied on and even quoted *United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir. 1981), which addressed a sufficiency-of-the-evidence claim, for the proposition that "[w]hen the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth." App. 4a. And the memorandum by its own terms signaled that Ms. Valdez's "own testimony in particular" was a "significant[]" and even a decisive factor. App. 4a. ("Given the evidence presented at trial, *Valdez's own testimony in particular*. . . .") (emphasis added); *id.* ("*Significantly*, Valdez herself chose to testify. . . .") (emphasis added).

The Ninth Circuit's reliance on Ms. Valdez's decision to testify also overlooked that she testified similarly in the first trial that ended in a hung jury, in which the inadmissible testimony was not introduced and five jurors voted to acquit her (Op. Br. 4). *See United States v. Thompson*, 37 F.3d 450, 454 (9th Cir. 1994) (a prior hung jury is "persuasive evidence that the district court's error affected the verdict"). As

the district court commented in denying a motion for judgment of acquittal at the conclusion of the prosecution's case in chief, "it[was] not the strongest case or a clear-cut case" (ER 36). *See Frederick*, 78 F.3d at 1381 ("In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.").

On harmless-error review, the question is whether, in light of the entire record, the government has established that the error did not affect the jury's verdict. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained.") (internal quotation marks and citation omitted). Here, in a false statement case, two government experts told the jury that Ms. Valdez's statements were false—that she was in fact not born in Arizona, as she claimed—and a third testified that the State of Arizona later officially rejected her identical factual claim and defense. Allowing multiple prosecution experts to opine on the ultimate legal issue is a particularly prejudicial error because it creates "a significant danger that the jurors would conclude erroneously that they were not the best qualified to assess the [matter], that they should second guess their own judgment, and that they should defer to the Government's experts." *United States v. Hanna*, 293 F.3d 1080, 1086-87 (9th Cir. 2002). Because the jury's assessment of her testimony was critical,

these errors rendered her defense "far less persuasive than it might have been." *Chambers*, 410 U.S. at 294. She did not get the jury trial to which she was entitled.

Harmless-error review reflects "a trade-off between important process values and the Constitution's protection of individual rights." Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. Rev. 2027, 2027 (2008). The Ninth Circuit's application of harmless-error review here "ha[s] exceeded the scope of the initial compromise," *id.*, and thus calls for an exercise of this Court's supervisory powers.

C. The question presented is recurring and important.

The Court should also grant the writ because appellate courts often invade the jury's role in conducting harmless-error review. For example, in *United States v. Ford*, No. 09-20863, 402 F. App'x 946, 948-49 (5th Cir. 2010) (unpublished), the Fifth Circuit held that an error admitting evidence about the defendant's prior convictions and arrests, which could have impacted the assessment of the defendant's credibility, was harmless because his account was "far less plausible than the officers' story." In *United States v. Wright*, 625 F.3d 583, 609, 612-13 (9th Cir. 2010), a child-pornography-possession case, the Ninth Circuit held that an error in precluding evidence that a potential third-party culprit had a "penchant for adolescent boys" was harmless, even though the defendant testified, maintained his innocence, and said he had no sexual interest in adolescents. In *United States v. Dowlin*, 408 F.3d 647, 664 (10th Cir. 2005), the Tenth Circuit held that a failure to grant a continuance was harmless because, even if the exculpatory witness had been located and his testimony believed, that testimony "would not have precluded the jury from finding" the

defendant guilty. In *Greiman v. Thalacker*, 181 F.3d 970, 972-73 (8th Cir. 1999), the Eighth Circuit held that a failure to object to an improper rebuttal witness was harmless because the "jury would not have believed [defendant's] insanity and diminished capacity defenses anyway"; in the appellate court's view, the defense's expert testimony was not credible. And in *Thompkins v. Cohen*, 965 F.2d 330, 333 (7th Cir. 1992), the Seventh Circuit held that the failure to disclose the names of three rebuttal witnesses was harmless because the jury would not have believed the alibi witnesses due to their relationship with the defendant. The prevalence of the problem and the importance of the issue thus warrants this Court's attention.

Therefore, the Court should grant review to ensure that appellate courts do not violate the Sixth Amendment by substituting their own judgment for that of the jury when conducting harmless-error review.

II. The decision below conflicts with this Court's precedents that a court reviewing for harmless error may not view the evidence in the light most favorable to the prosecution, and this Court should provide clear guidance regarding the proper application of harmless-error review.

Harmless-error review, unlike review of the sufficiency of the evidence, *Jackson v. Virginia*, 443 U.S. 307 (1979), does not require or allow a court to view the evidence in the light most favorable to the prosecution. In *Kotteakos*, the Court held that the question on harmless-error review is not "merely whether there was enough [evidence] to support the result" and it rejected the argument that error is harmless "if the evidence . . . would be sufficient to sustain his conviction" absent the error. *Kotteakos*, 328 U.S. at 765-67. In *Neder*, 527 U.S. at 19, the Court held that harmless-error review "asks whether the record contains evidence that could rationally lead to

a contrary finding," i.e., whether the jury could reasonably find in favor of the defendant, thus recognizing that harmless-error review forbids viewing the evidence in the light most favorable to the prosecution. *See also Satterwhite*, 486 U.S. at 258-59; *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of."); *United States v. Prigmore*, 243 F.3d 1, 4 (1st Cir. 2001) ("Because we review the trial record primarily to ascertain whether an error in the district court's jury instructions was harmless . . . we look at the evidence as a whole and not in the light most favorable to the government."); *Dixon v. Williams*, 750 F.3d 1027, 1036 (9th Cir. 2014) (per curiam) (granting habeas relief where a state court reviewing for harmless error "recited only the testimony that *supported* the verdict and did not acknowledge *any* of the testimony supporting" the defense) (emphasis in original); *United States v. Henderson*, 409 F.3d 1293, 1301 n.4 (11th Cir. 2005) ("we review the record de novo when conducting a harmless error analysis, unlike our review of sufficiency of the evidence challenges, in which we view witness credibility in the light most favorable to the government").

The Ninth Circuit improperly conflated review of the sufficiency of evidence with review for harmless error. First, the court of appeals effectively reasoned that the trial errors were harmless because a rational trier of fact could have found the elements of the crime by drawing reasonable inferences. *See Jackson*, 443 U.S. at 319. The Ninth Circuit reasoned:

> The jury was instructed that it was free to accept or reject the experts' opinion testimonies, it heard other testimony that nonimmigrant visas of the sort [the CIS officer] described are reserved for non-U.S. citizens, and Valdez's Mexican birth record was admitted as evidence, thus creating a reasonable foundation from which to conclude that she was born in Mexico and not in the United States.

App. 4a. Other courts have similarly and improperly concluded that errors were harmless because "the jury *could* convict if it drew the necessary inferences in favor of the prosecution." Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1033 & n.168 (2015) (collecting cases) (emphasis in original).

Second, the court of appeals "recited only the testimony that *supported* the verdict and did not acknowledge *any* of the testimony supporting" the defense. *Dixon*, 750 F.3d at 1036 (granting habeas relief for that reason) (emphasis in original). Such analysis reflects review of the sufficiency of the evidence, not for harmless error.

Therefore, the Court should grant review to provide clear guidance regarding the proper application of harmless-error review and to ensure that courts conducting such review do not view the evidence in the light most favorable to the prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 12th day of September, 2019.

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