No. 19-5948

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This Court's precedents that define harmless-error review strike a careful balance between finality and efficiency, on the one hand, and the Sixth Amendment's guarantee of a trial by a jury rather than by appellate judges, on the other. The Ninth Circuit deviated from those precedents in holding that erroneous evidentiary rulings were harmless both when considered individually on plain-error review and when considered cumulatively under the more-probably-than-not-harmless standard for preserved, non-constitutional error.

First, the court of appeals relied on its own subjective judgment that the defendant's testimony was "evasive and confusing," as opposed to objectively inconsistent, contradictory, or utterly without plausibility.

Second, the court of appeals did not properly analyze the effect of the inadmissible testimonies on the jury's verdict; instead, it reasoned that the evidence created "a reasonable foundation" for the conviction and that the jury could have drawn inferences that would lead it to disbelieve the defendant's testimony, without addressing the evidence and the inferences that *supported* her defense.

The Ninth Circuit's misapplication of the rules of harmless error has so far departed from the usual course of appellate review as to call for an exercise of this Court's supervisory power. The decision underscores the need for clear guidance on the proper application of harmless-error review, as the government's own citation of primarily circuit court opinions shows. Brief in Opposition ("BIO") 15.

ARGUMENT

I. The government's arguments do not undermine the case for certiorari.

A. Contrary to the Sixth Amendment, the Ninth Circuit relied on its own subjective judgment about the defendant's credibility.

The government contends that the court of appeals "simply noted" (BIO 14) that the defendant gave "evasive and confusing responses" (App. 4a), rather than "weigh[ed] [her] credibility as a witness" (BIO 14). However, "evasive" and "confusing" are subjective conclusions. They were not "simply noted" or a mere "preface" to another observation (BIO 14); instead, they were "significant[]" to the court of appeals and, in context, distinct findings in support of harmlessness. App. 4a ("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.'") (emphasis added).

The government views Ms. Valdez's testimony that her father "had no reason to lie" as corroborating the government's case and as an inconsistency, because one could infer from her statement that she was implicitly admitting to having been born in Mexico. BIO 14. In context, however, the jury likely understood her to be saying that her father had never *deceived* Mexican officials when obtaining the Mexican birth record, given her earlier testimony that he "found a way to be able to register me because of, you know, he knew people." Excerpts of Record ("ER") 390. Exploiting connections to get officials to "look the other way" is different from *deceiving* them. So understood, her testimony was not confusing, incriminatory, or inconsistent.

Contrary to the government's suggestion, Ms. Valdez does not contend that the court of appeals "was required simply to assume that the jury would have credited" her claims, including her explanation for the Mexican birth record's existence. BIO 14-15. Her argument is that the court of appeals could not find that she was unbelievable unless it relied upon an *objective* inconsistency, contradiction, or indication that her claims were utterly without plausibility. Without such objective circumstances, the court of appeals could not rely on her "own testimony in particular" as a "significant[]" factor in establishing harmlessness. App. 4a. ("Significantly, Valdez herself chose to testify. . . ."); *id.* ("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."). Under the Sixth Amendment, whether on plain-error review or on review of preserved claims, credibility decisions are for the jury alone. Pet. 7-8.

Therefore, the Ninth Circuit's misapplication of basic rules of harmless-error review calls for an exercise of this Court's supervisory power.[1]

[1] The government incorrectly implies that the Ninth Circuit reviewed the cumulative-error claim for plain error. BIO 12-13. The government correctly conceded in the court of appeals that harmless-error review applied because a non-constitutional error had been preserved (i.e., testimony that Ms. Valdez had prior "immigration apprehensions" (App. 5a)). *See* Brief of Appellee at 55-56, *United States v. Valdez-Araiza*, No. 18-10022 (9th Cir.) (DktEntry: 38), *available at* 2019 WL 296912 ("[I]f this Court finds that multiple errors occurred, and some were preserved by objection, it nonetheless affirms the convictions if the cumulative error 'was more probably than not harmless'"; not arguing that plain-error review should apply) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)).

B. Contrary to this Court's precedents, the Ninth Circuit focused on the evidence that supported the verdict and discounted the evidence that undermined it.

The government posits that the Ninth Circuit did not simply analyze the sufficiency of the evidence because it explicitly considered Ms. Valdez's testimony and concluded that the "improper admission of the[] testimonies did not change the outcome." BIO 16, 17 (quoting App. 4a). The court reached that conclusion, however, by reasoning *only* that the evidence provided a "reasonable foundation" for the verdict, and part of that foundation was the court's preferred adverse inference from her testimony (which, as shown above, the jury could reasonably have rejected). App. 4a. In short, the court of appeals applied sufficiency review in the guise of harmless-error review.

Harmless-error review asks not "merely whether there was enough to support the result, apart from the phase affected by the error" but "what effect the error had . . . upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764, 765 (1946). In conducting such review, a court must consider "whether the record contains evidence that could rationally lead to a contrary finding" in *favor* of the defendant. *Neder v. United States*, 527 U.S. 1, 19 (1999). The Ninth Circuit did the opposite, asking whether there was sufficient untainted evidence to support a verdict *against* the defendant. The Ninth Circuit thus turned harmless-error review on its head.

C. In arguing that resolution of the questions presented would not affect the outcome, the government omits important facts and overlooks crucial inferences.

The question presented does not deal merely with whether the court of appeals reached the right result in this case; it addresses a serious and—as the government's brief confirms, oft-repeated—misapplication of the harmless-error doctrine by the inferior courts. *See Carella v. California*, 491 U.S. 263, 266-67 (1989) ("[A]lthough we have the authority to make the harmless-error determination ourselves, we do not ordinarily do so."). The particularities of that error may be "factbound" in the instant case (BIO 11, 13), but its significance is substantial and wide-reaching.

In any case, the government is mistaken that resolution of the questions presented would not affect the outcome because the court of appeals "correctly determined" that the cumulative error was harmless. BIO 12-13. The government's cherry-picked facts and incomplete analysis (BIO 2-9, 12-13) overlook that the prosecution's evidence was, in the trial court's view, "not the strongest" (ER 36), and that five jurors in the first trial, in which the inadmissible expert testimonies were not introduced, voted to acquit. These and the other omitted facts discussed below strongly suggest that the self-reinforcing errors in the second trial "had substantial influence" on the jury's view of Ms. Valdez's credibility. *Kotteakos*, 328 U.S. at 765.

First, the government argues that the State Department "fraud prevention manager" and "passport specialist" (ER 159), who discussed the details of Ms. Valdez's passport application and then testified that a person with a Mexican birth record was not born in the United States, "neutralized potential prejudice" by "specifically disclaiming" knowledge of where Valdez was "actually born" (BIO 12).

The fraud prevention manager, however, explained only that she had "no knowledge" of whether her office ever *investigated* to determine if Ms. Valdez "was not actually born in the U.S." ER 173. That single, ambiguous statement did not neutralize the prejudice of what the court of appeals correctly held was "expert" testimony. App. 3a.

Second, the government addresses the senior citizenship adjudicator's devastating expert opinion that Ms. Valdez was not a United States citizen, which it introduced "in violation of the district court's in limine ruling from the first trial" (App. 2a) and after a change in defense counsel. The government argues that the jury was instructed that it did not have to believe any expert testimony (BIO 12), but the instruction did not forbid the jury to credit the expert's ultimate-legal-issue opinion, and it even encouraged the jury to do so. ER 49 ("This opinion testimony is allowed because of the education or experience of this witness."). Although the government characterizes the opinion as a mere "snippet of conclusory testimony" (BIO 13), it came in the final, climactic moments of the prosecutor's direct examination (ER 285).

The government argues that the citizenship adjudicator's expert opinion was inconsequential to the jury's credibility analysis in light of other evidence that Ms. Valdez was born in Mexico. BIO 12-13. But her prior assertion of her Mexican citizenship to obtain nonimmigrant visas in 1993 and 2000 and her use of those visas (BIO 4, 5, 6, 10, 13, 16) does not prove that she was not *also* a United States citizen. *See Vance v. Terrazas*, 444 U.S. 252, 255 (1980) ("Terrazas[] was born in this country, the son of a Mexican citizen. He thus acquired at birth both United States and Mexican citizenship."). The jury could have concluded that she had good reason to

seek the visas rather than to prove her United States citizenship because it was faster, cheaper, and less complicated to do so. The jury heard that a state court in 1998 dismissed her *pro se* petition for recognition of her Arizona birth on procedural grounds for improper service (ER 319-20, 382, 383, 562), and that she later hired a lawyer to prove her citizenship.

The other evidence of Mexican birth is similarly subject to competing reasonable inferences. An agent testified that Ms. Valdez told him in 2001 that she was "born" in Mexico. BIO 5, 8, 13. The government omits, however, that Ms. Valdez ultimately testified that the agent "didn't ask" where she was "born" (ER 350) but where she was "from" (ER 351). She answered that she was "from" Mexico (ER 351), which was where she "gr[e]w up" (ER 304). Thus, the government's claim that Ms. Valdez "acknowledged that she had informed a U.S. immigration officer in 2001 that she had been born in Mexico" is incorrect. BIO 8.

The government states that Ms. Valdez did not attach her Mexican birth record to her passport application (BIO 2, 7), but it omits that the jury heard other testimony that could have neutralized any inference that she was hiding the record. Ms. Valdez's immigration lawyer testified that the lawyer typed the application (ER 359) and determined which accompanying documents to submit (ER 387), deciding to omit the Mexican birth record (ER 385) that Ms. Valdez had provided to her (ER 372, 385). The government also omits the fact that the lawyer included an official State of Arizona "Certificate of No Birth Record," clarifying that Ms. Valdez had no birth record in Arizona. ER 572.

In light of this evidence, the senior citizenship adjudicator's expert opinion that Ms. Valdez was not a United States citizen—and thus that her trial testimony and her statement on the passport application was necessarily false—likely had substantial influence on the jury's assessment of Ms. Valdez's credibility and defense.

Third, the testimony of the State of Arizona "fraud manager"—that Arizona rejected Ms. Valdez's same supporting evidence of Arizona birth (ER 133-38, 157)—was not "similarly harmless" (BIO 13) merely because other witnesses *subsequently* discussed the 2010 Arizona application and Ms. Valdez *subsequently* introduced a *second* copy of the 2010 Arizona application into evidence (ER 141, admitting Ex. 55). As the prosecutor acknowledged at trial, the exhibit that Ms. Valdez later introduced was fully "contained in Government's Exhibit 16," which had previously been admitted (ER 143), and the affidavits and other documents that Ms. Valdez needed to support her claim of Arizona birth were all included in admitted exhibits that contained her passport application (ER 567-579, 582-600).

The government suggests that the Arizona fraud manager's testimony was less prejudicial because Ms. Valdez was "charged" with and "convicted" for "making a false statement in the application *and use* of a passport," in violation of 18 U.S.C. § 1542. BIO 2, 5 (emphasis added). She was not. Although § 1542 is titled, "[f]alse statement in application and use of passport," it contains two distinct paragraphs and crimes, *United States v. Aifang Ye*, 808 F.3d 395, 399-400 (9th Cir. 2015), and the Indictment did not charge a "use of a passport" under the second paragraph (ER 59). On that basis, the Ninth Circuit correctly concluded that the Arizona fraud manager's official

"testimony regarding Valdez's use of the passport"—including that Arizona officially rejected her same supporting evidence of Arizona birth—"was potentially prejudicial and of limited probative value, *see* Fed. R. Evid. 403." App. 3a.

The inadmissible testimonies of these witnesses, who appeared before the jury with an aura of expertise and authority, were not harmless. Allowing multiple prosecution experts to opine on the ultimate legal issue 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). Therefore, the government fails to establish that this Court's resolution of the questions presented would not affect the outcome of the case.

II. This case is a good vehicle.

In addition to its argument that resolution of the questions presented would not affect the outcome, see Part I(C), *supra*, the government emphasizes that the opinion was unpublished (BIO 9, 11, 17). Unpublished decisions, however, now make up 93 percent of the Ninth Circuit's decided cases and 88 percent of all cases decided in the federal appellate courts.[2] In Fiscal Year 2018, "judicial panels [of the Ninth Circuit] produced 534 published opinions and 7,774 unpublished opinions."[3] The

[2] Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, tbl. B-12 (2018), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2018.pdf (last visited Dec. 2, 2019).

[3] United States Courts for the Ninth Circuit, *2018 Annual Report* at 46 (2018), *available at* https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2018.pdf (last visited Dec. 2, 2019).

court's "total merit terminations [that year] included 1,897 prisoner cases [and] 947 criminal cases." *Id.* If the rules of harmless error are not scrupulously applied in unpublished cases, then the Sixth Amendment's guarantee of a trial by a *jury* has become illusory.

Moreover, this Court routinely grants certiorari to review unpublished decisions of the courts of appeals. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Gamble v. United States*, 139 S. Ct. 1960 (2019); *Class v. United States*, 138 S. Ct. 798 (2018); *Manrique v. United States*, 137 S. Ct. 1266 (2017); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016); *Descamps v. United States*, 570 U.S. 254 (2013).

The case is also a good vehicle because it provides an opportunity to clarify the rules of harmless error both on plain-error review and on review of preserved claims. Under either standard, an appellate court must not violate the Sixth Amendment by substituting its own subjective judgment about witness credibility for that of the jury. Under either standard, an appellate court must not merely conclude that evidence supported the verdict and that the jury could have chosen to disbelieve the defendant's testimony, without addressing whether the evidence or the inferences that supported the defense could rationally lead to a contrary finding. The Ninth Circuit's decision violates these important principles, perhaps because they are presently articulated in a patchwork of this Court's older cases.

Therefore, the Court should grant certiorari to provide clear, contemporary guidance regarding the proper application of harmless-error review.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 11th day of December, 2019.

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