No. _____

In The Supreme Court of the United States

VIVIAN TAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL V SCHAFLER
Counsel of Record for Petitioner
ALYSSA D. BELL
COHEN WILLIAMS LLP
724 South Spring St., 9th Floor
Los Angeles, CA 90014
(213) 232-5144
mschafler@cohen-williams.com
abell@cohen-williams.com

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA
BERKELEY SCHOOL OF LAW
Law Building 214
Berkeley, CA 94720-7200
(510) 642-6483
echemerinsky@law.berkeley.edu

DAVID K. WILLINGHAM
KING & SPALDING LLP
633 W 5th St., Suite 1600
Los Angeles, CA 90071
(213) 218-4005
dwillingham@kslaw.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Rogers v. United States, 422 U.S. 35 (1975), holds that a deliberating jury's questions must be "answered in open court," and that defense counsel must be "given an opportunity to be heard before the trial judge respond[s]." *Id.* at 39. A *Rogers* error is thus premised on a district court's *failure to allow* the defendant to be present, to participate, or to object. Yet the Ninth Circuit recently held that plain error review applies to *Rogers* claims, placing an unfair burden of preservation on criminal defendants who are complaining of being deprived of their fundamental rights to presence and consultation. In so doing, the Ninth Circuit deepened an existing split among the Circuits. This Court should therefore grant certiorari to answer the following important question:

Does plain error review govern claims of *Rogers* error on appeal, as the Ninth Circuit held below, or are such claims reviewed for harmlessness beyond a reasonable doubt, as the Eighth and D.C. Circuits have held?

STATEMENT OF RELATED CASES

- *United States v. Tat*, No. 14-cr-702, U.S. District Court for the Central District of California. Judgment entered Feb, 4, 2019.
- *United States v. Tat*, No. 19-50034, Consolidated with No. 19-50078, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on Oct. 21, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Vivian Tat petitions for a writ of certiorari to review the Memorandum and Judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's unpublished Memorandum and published Opinion in *United States v. Tat*, No. 19-50034 (9th Cir. 2021), are reproduced below at App. 1 and App. 5.

JURISDICTION

The Ninth Circuit issued its Memorandum and Opinion on October 21, 2021. App. 1. The court denied Ms. Tat's petition for panel rehearing/rehearing *en banc* on January 12, 2022. App. 18. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 43.

Defendant's Presence.

> (a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

> (1) the initial appearance, the initial arraignment, and the plea;
>
> (2) every trial stage, including jury empanelment and the return of the verdict; and
>
> (3) sentencing.
>
> . . .

STATEMENT OF THE CASE

Almost fifty years ago, this Court established that a district court violates Rule 43 of the Rules of Criminal Procedure if it fails to answer a deliberating jury's question in open court, or fails to give counsel the opportunity to be heard before the court responds. In *Rogers*, this Court's seminal case interpreting Rule 43, a deliberating jury sent a note to the trial court asking if it would accept a verdict of "[g]uilty as charged with extreme mercy of the Court." 422 U.S. at 36. Without involving the defendant or his counsel, the trial court "advise[d] the jury that the Court's answer was in the affirmative." *Id*. This Court vacated the conviction, holding that "the jury's message should have been answered in open court and . . . [defense] counsel should have been given an opportunity to be heard before the trial judge responded." *Id*. at 41.

Critically, the defendant in *Rogers* did not raise the issue of the trial court's unilateral response to the

jury's note until *certiorari*. *Id*. at 36–37. Yet in *Rogers*, this Court nevertheless reviewed the lower court's error for harmlessness. *Id.* at 40 ("Although a violation of Rule 43 may in some circumstances be harmless error, the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed, does not permit that conclusion in this case.") (internal citation omitted).

In keeping with the application of harmless error review in *Rogers*, the Eighth and D.C. Circuit Courts of Appeals have applied the harmless error standard of review where a defendant is denied her right to presence and consultation following a jury note, *irrespective* of whether she objected before the district court.

But in Ms. Tat's case, the Ninth Circuit took a different, contradictory approach: It applied plain error based on the (erroneous) notion that, even though the district court did not follow *Rogers—i.e.*, it did not address the note in open court and expressly told Ms. Tat's counsel that it would not hold a hearing in which she could provide input or lodge an objection—Ms. Tat could have objected to the district court's unilateral response to the jury, but failed to do so. In so doing, the Ninth Circuit erred and deepened a split among the Circuits.

The standard of review that applies to *Rogers* errors clearly matters. As this Court has explained, meeting the "exacting plain-error standard" "is difficult." *Greer v. United States*, ___ U.S. ___, 141 S. Ct. 2090, 2097, 2099 (2021). The "defendant has the burden of

establishing each of the four requirements for plain-error relief." *Id*. at 2097. By comparison, the "harmless error standard" is "more lenient. . . ." *Id.* at 2093. The government bears the burden of establishing harmlessness and may prevail only where it can show that the claimed error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

The standard of review will, therefore, in many cases if not most, determine whether a defendant must live with the lifetime consequences of a conviction, or whether she will be afforded a new trial. This Court has recently and regularly granted certiorari to review questions regarding whether the Courts of Appeals should review particular questions for plain error or, instead, for harmlessness beyond a reasonable doubt. *See*, *e.g.*, *Greer*, 141 S. Ct. at 2099 (holding that petitioner's unpreserved *Rehaif* claim was not a structural error and was therefore subject to plain error review); *Holguin-Hernandez v. United States*, ___ U.S. ___, 140 S. Ct. 762, 764 (2020) (holding that plain error review should not apply to a challenge regarding the reasonableness of a sentence because the defendant's district-court argument for a specific sentence preserved his claim on appeal that the sentence imposed was unreasonably long); *Puckett v. United States*, 556 U.S. 129, 133–34 (2009) (holding that plain-error review applies to a forfeited claim that the Government failed to meet its obligations under a plea agreement); *United States v. Vonn*, 535 U.S. 55, 58 (2002) (holding that a defendant who lets Rule 11 error pass without objection in the trial court must carry the burdens of plain error

review). In the face of such high stakes and grievous consequences, defendants across different jurisdictions should not face disparate and frequently determinative standards of review depending on the Circuit in which they are charged.

Ms. Tat presents just such a case—one where the standard of review dictated the outcome of her appeal. Below, the district judge's unilateral response to the jury's note undercut the key theme of Ms. Tat's defense: The judge instructed jurors that the absence of a key, cooperating witness (Raymond Tan) from her trial was "not an issue for [their] determination," while Ms. Tat had argued vociferously at trial that his absence was a critical fact from which jurors could, and should, infer that he was an exculpatory witness, giving rise to reasonable doubt as to her innocence. Because the district judge's erroneous instruction directed jurors not to consider Ms. Tat's theory of innocence, the government could not have shown that the judge's error was harmless beyond a reasonable doubt. As such, had Ms. Tat been tried in the Eighth or D.C. Circuits, her conviction would have been vacated.

Fundamentally, it makes little sense to apply the plain error standard of review to *Rogers* claims. A defendant who is denied her right to presence, and her right to participate in formulating the district court's response to a jury's note, has *per se* suffered a deprivation that impeded her ability to lodge an objection. To apply plain error unjustly punishes the defendant for the district court's failure to respect her most basic and fundamental rights.

For these, and the reasons discussed herein, this Court should grant certiorari, resolve an important split among the Circuits[1] as to the proper standard of review for claims of *Rogers* error, and correct the Ninth Circuit's misguided path.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Vivian Tat, a California-based branch manager for East West Bank, went to trial on charges, *inter alia*, that she conspired with Tan to launder $25,500 in supposed criminal proceeds, in violation of 18

[1] The Eighth and D.C. Circuits both apply harmlessness review to claims of *Rogers* error. *See United States v. Harris*, 491 F.3d 440 (D.C. Cir. 2007); *United States v. Anwar*, 428 F.3d 1102 (8th Cir. 2005); *United States v. Fulcher*, 626 F.2d 985 (D.C. Cir. 1980); *United States v. Nelson*, 570 F.2d 258 (8th Cir. 1978); and *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975).

The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh have, under similar circumstances, applied plain error review to *Rogers* claims. *See United States v. Fernandez-Hernandez*, 652 F.3d 56 (1st Cir. 2011); *United States v. Sabetta*, 373 F.3d 75 (1st Cir. 2004); *United States v. Wright*, 392 F.3d 1269 (11th Cir. 2004); *United States v. Paul*, 57 Fed.Appx. 597 (6th Cir. 2003);*United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Wager*, 165 F.3d 913 (4th Cir. 1998); *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994); *United States v. Patterson*, 23 F.3d 1239 (7th Cir. 1994); *United States v. Carter*, 973 F.2d 1059 (10th Cir. 1992); *United States v. Hollis*, 971 F.2d 1441 (10th Cir. 1992); *United States v. Roberts*, 913 F.2d 211 (5th Cir. 1990); *United States v. Giacalone*, 652 F.2d 1158 (6th Cir. 1978); and *United States v. Rodriguez*, 545 F.2d 829 (2d Cir. 1976).

U.S.C. § 1956(h). App. 5. Ms. Tat's defense was that she was an unwitting participant in the transaction. That is, she did not know that the bank transaction she helped to facilitate involved illicit funds because Tan lied to her to secure her participation, telling her, through her friend and Tan's wife, co-defendant Ruimin Zhao, that the funds derived from a seafood business, not a corrupt source.

The government chose not to call Tan as a witness, however. It claimed, on the eve of trial, that Tan had lied in his interviews with the government. Ms. Tat subpoenaed Tan to testify at trial but he invoked his Fifth Amendment privilege to decline to testify. The district court denied Ms. Tat's request for a missing witness instruction. Ms. Tat therefore argued in closing that the jury could and should infer from Tan's absence at trial that his testimony would have been exculpatory. Specifically, Ms. Tat's counsel argued, "The government didn't even call its own cooperating witness. . . . He's their witness and they didn't call him. Ask yourselves why. The answer from the evidence is clear. Raymond lied to Vivian. . . ."

During deliberations, the jury returned a note asking "Where is Raymod [*sic*] Tan?" Ms. Tat and her defense team learned of the note from the district judge, who came into the hall outside the courtroom and told defense counsel the gist of what the jury had asked. The judge then returned to the courtroom.

When Ms. Tat and defense counsel entered the courtroom moments later to address the jury's note,

they observed the district judge already writing a response on the note itself. The judge informed them that he was going to tell the jurors that Mr. Tan's absence was not an issue for their determination. He queried why defense counsel had bothered to come into the courtroom and stated that there would not be a hearing. The judge then sent the jury his unilateral response, which stated: "That is not an issue for your determination."

Government counsel was not present. Ms. Tat's codefendant, Ms. Zhao, was not present. Ms. Zhao's lawyer was not present. There was no interpreter, no court reporter, and no record of the proceedings. Neither Ms. Tat nor her counsel saw the jury's note. There was no opportunity for Ms. Tat to have any input into the formulation of the response, or even to object, and the next proceeding on the record was the jury's return of a guilty verdict.

In rejecting Ms. Tat's claim of error arising from these facts, a three-judge panel of the Ninth Circuit Court of Appeals concluded that (1) plain error review applied because Ms. Tat was afforded an opportunity to object, but failed to do so (even though she had previously sought a missing witness instruction based on Tan's absence), (2) the district court's failure to "invite comment on its response to the jury's question expressly" was not erroneous, but merely fell short of best practices, and (3) the district court did not plainly err because, while both the jury's question and the court's response to it were "ambiguous," the "most natural reading of the question is that the jury literally asked

about Tan's physical location," and "[a]ssuming that the district court had the same interpretation, its answer was legally and factually correct." App 4.

Ms. Tat filed a petition for panel rehearing or rehearing *en banc*, arguing that (1) the three-judge panel that decided her case erroneously applied plain, instead of harmless, error review, and that (2) the panel's conclusions contravened *Rogers* and the many decisions that have relied upon it to hold that a defendant is deprived of her right to a fair trial where the district court fails to consult her in response to a jury's note. Ms. Tat's petition was denied. App. 19.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW TO SETTLE A SPLIT AMONG THE CIRCUITS REGARDING THE STANDARD OF REVIEW THAT APPLIES TO CLAIMS OF *ROGERS* ERROR ON APPEAL.

Rogers held that "[a]lthough a violation of Rule 43 may in some circumstances be harmless error . . . the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed, does not permit that conclusion in this case." 422 U.S. at 41. Although Rogers himself made no objection in the district court and thus his claim was not preserved, the Court did not apply the more stringent plain error standard of review. *Id.*

The Eighth and D.C. Circuits have dutifully followed *Rogers* and exclusively applied harmless error review in cases where defendants have suffered such deprivations of their constitutional and statutory rights.

In *United States v. Anwar*, 428 F.3d 1102 (8th Cir. 2005), the Eighth Circuit reviewed a claim of *Rogers* error upon the defendant's appeal of his convictions for marriage fraud and conspiracy to violate the immigration laws. After the jury retired to deliberate, jurors sent a note requesting the transcripts of the testimony of two government witnesses, both of whom had testified that the defendant "asked if they would marry Pakistani men" and that they "understood the proposed marriages were not intended to be legitimate marital relationships, but instead would be 'green card marriages.'" *Id*. at 1106–07.

"Without consulting the parties, the district court responded in writing," telling the jury that "no transcripts of witness testimony were available." *Id.* at 1114. "The district court informed the parties of the note when the parties reconvened to receive the verdict, and stated it had felt it was not necessary to confer with the parties before answering the jury's question." *Id.*

Upon learning of the jury's note and the district court's response, the defendant made no objection. The court nonetheless applied harmless error review. Citing *Rogers*, the court concluded that "[t]he district court's decision . . . more than likely would not have

changed following a conference with the parties" because it merely "reiterated [] previous instructions to the jury," delivered in both the preliminary and final jury charges, that "jury transcripts would not be available." *Id.* As such, any error was harmless.

Ms. Tat's case bears striking similarities. Like in *Anwar*, Ms. Tat's first opportunity to lodge an objection to the district court's unilateral response to the jury's note came when the district court went on the record to receive the jury's verdict. Yet because Ms. Tat was tried and convicted in the Ninth Circuit, rather than the Eighth, plain rather than harmless error review applied.

In the D.C. Circuit, in *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975), the court reviewed a claim of *Rogers* error upon the defendants' appeal of their convictions for armed robbery and bank robbery. Below, after one day of deliberations, the jury informed the district court that it had reached a verdict. *Id.* at 1320. "[B]efore the jury was brought in to the court room to render its verdict, the judge informed the parties that earlier, and in their absence, there had been a communication from the jury." *Id.* The jury's note had stated, "We have reached a decision on all counts with the exception of one juror. Would you give us further instructions on the one holdout." *Id.* The district court had replied,

> I regret that I cannot give you any instructions on the above. All I can say is that you should continue your deliberations. You have

> been in session for four and a half hours which is not unusually long. If I discharge the jury without a verdict being reached one way or the other, the case will have to be retried.

Id. Upon learning of the jury's note and the judge's response, none of the defendants objected. *Id.*

On review, the court found that "no reversible error" had occurred, even "in light of the permissible 'harmless error' considerations open to us pursuant to *Rogers v. United States*. . . ." *Id.* at 1321. The court reached this conclusion because "[n]o slightest showing of prejudice ha[d] been made to appear" and "the evidence of . . . guilt" was "overwhelming." *Id.* As in the Eighth Circuit, although the defendants lodged no objection to the district judge's handling of the jury's note, the appellate court applied harmless, not plain, error review.

Likewise, in *United States v. Fulcher*, 626 F.2d 985 (D.C. Cir. 1980), the D.C. Circuit reviewed a claim of *Rogers* error on appeal following the defendant's convictions for mail fraud, wire fraud, and false pretenses. Below, the district court's clerk responded to a jury note that asked to see several exhibits by providing those exhibits to the jury, without informing the defendant of the jury's request. *Id.* at 989. After the jury retired from deliberations for the day, "it was apparent to counsel and the defendant that the jury had received certain exhibits," because they were collected from the jury, but the defendant made no objection. *Id.*

Applying harmless error review, the court concluded that, "[n]otwithstanding the error in failing to notify counsel, it is plain that the defendant was not prejudiced." *Id.* The exhibits provided to the jury, the court reasoned, were in evidence and were responsive to the jury's request. As such, the "record exclude[d] any reasonable possibility of prejudice to the defendant. . . ." *Id.*

Similarly, in *United States v. Harris*, 491 F.3d 440 (D.C. Cir. 2007), the D.C. Circuit reviewed a claim of *Rogers* error on appeal following the defendants' conviction for possession with the intent to distribute cocaine base. Below, after one day of deliberations, the jury sent a mid-afternoon note asking to be excused for the day and informing the court, "We are *not* unanimous!" *Id.* at 449 (emphasis in original). A series of communications between the judge and jury ensured, as the judge later explained:

> I went into the jury room, as is my practice, to release the jury. . . . I told them that they could go home, of course, and I complimented them on their hard work, and tried to say nothing else. But the jury wanted to talk a little bit. I was reluctant, of course, to talk to them at all except to tell them that they could go home. But they began to say things like: "[A]t what point do we-what do we do if we can't decide?" And I said, "Well, I can't really talk to you about a subject like that without the attorneys being present." "Well," they said, "maybe we need some more instruction." And

> I said, "Well, have a nice weekend. We'll talk about it on Monday morning."

Id.

On Monday morning, "before the jury filed in, the judge reported to counsel his interaction with the jury," "stated his intention to read to the jury [an] anti-deadlock instruction," and "stated his intention to re-read the instruction inviting a verdict as to just one of the two defendants, if [the jury was] unable to reach a verdict on both." *Id.* Although the judge "invited objections," "almost immediately after that discussion began . . . he received a note from the jury stating that it had a unanimous verdict." *Id.* After learning that the jury had reached a verdict, the defendants did not object to the judge's supplemental, oral instructions to the jury.

Although the defendants failed to lodge an objection, even after they were expressly afforded an opportunity to do so, the court reviewed their claim of *Rogers* error "in the usual way, to determine harmlessness or prejudice." *Id.* at 451. The court concluded that any error was harmless because the defendants offered "only the suggestion" that the judge "threatened the jurors with indefinite deliberation until unanimity" with his remark, "We'll talk about it on Monday morning." *Id.* at 452. Since the judge made his comment on a Friday afternoon, the court found no threat inherent in his offer to discuss the matter further after the weekend, and therefore, no prejudice.

Each of the aforementioned cases is similar to Ms. Tat's in a critical respect. The defendants' first opportunity to lodge an objection to the district judge's unilateral and uncounseled communication with the jury came *after* any opportunity for meaningful participation in formulating a response to the jury's question had passed, and *after* the jury had returned a verdict. Objection at that point was futile—it served only to fulfill a technical preservation requirement, but had no hope of influencing the judge's message to the jury or, more importantly, the verdict.

Plain error review should have no role to play under such circumstances. It is both nonsensical and unjust to require a defendant to lodge an objection once doing so would have no practical effect upon the trial's outcome, or else face a stringent standard of review. It is particularly irrational where the very nature of the error itself is the deprivation of an opportunity for input or objection.

It is clear, therefore, that the approach outlined in *Rogers*, and dutifully followed by the Eighth and D.C. Circuits, is the right one. This Court should reverse the decision of the Ninth Circuit and hold that harmless error review applies to *Rogers* claims on appeal.

Moreover, the Ninth Circuit's reduction of the rule announced in *Rogers*—that a deliberating jury's questions *must* be "answered in open court," and that defense counsel *must* be "given an opportunity to be heard before the trial judge respond[s]"—to a mere practice pointer will likely have the effect of watering

down *Rogers* and creating confusion. App. 4 ("the far better practice is for a district court to invite comment on its response to the jury's question expressly and to hold all such discussions on the record").

Rogers did not merely establish best practices for the handling of jury notes. Rather, it is the seminal case interpreting Rule 43, a Rule that affords criminal defendants an expansive right to be present throughout trial, and embodies not only the Fifth and Sixth Amendments' guarantees of a fair trial, but also the common law privilege of presence. *United States v. Martinez*, 850 F.3d 1097, 1100 (9th Cir. 2017). *Rogers* affords criminal defendants the right both to presence and consultation—the right to voice a position on the proper response to a jury's note, or at least to lodge an objection to the same.

In conclusion, it bears repeating that had Ms. Tat been tried and convicted in the Eighth or D.C. Circuits, the outcome of her appeal would have been altogether different. Had the Ninth Circuit *required* (rather than merely recommended) the government to demonstrate that the district judge's unilateral response to the jury's note was harmless beyond a reasonable doubt, the government could not have done so.[2]

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[2] Before the Ninth Circuit, the government argued that plain error review applied because Ms. Tat could have lodged an objection on the record to the district court's response to the jury's note when the court received the jury's verdict. Even assuming Ms. Tat could have objected at this stage, doing so would have been futile, as discussed above. Moreover, and more importantly for present purposes, had Ms. Tat been tried and convicted in the Eighth or

The district judge instructed the jury that Tan's whereabouts was "not an issue for [its] determination," when Ms. Tat had rightfully encouraged jurors to query why the government failed to call him, although it claimed that he had recruited Ms. Tat. *See* Ninth Cir. Manual of Model Jury Ins. § 4.13 ("[A] judge may not forbid a jury from drawing a negative inference from a party's failure to call a witness.") (citing *United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013)).

By instructing the jury that it could not consider Tan's absence from trial, the district judge's supplemental instruction undercut the key theme of Ms. Tat's defense: The prosecution did not call Tan because he had lied to Ms. Tat about the true nature of the funds involved in the allegedly unlawful transaction, and then falsely implicated her to garner cooperation credit and help himself at sentencing.

Aside from its reliance upon Tan, the government's proof that Ms. Tat knew the funds involved in the allegedly-unlawful transaction derived from an illicit source was woefully thin. Jimmy Yip, the government's undercover informant, never told Ms. Tat that the funds were tied to illegal activity—he only spoke to Tan. And Tan told his wife, Ms. Zhao, that the proceeds derived from a seafood business, which she repeated in Ms. Tat's presence during the transaction. Given that

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D.C. Circuits, her failure to object once she learned of the jury's verdict would not have altered the standard of review: harmless, not plain error, review would have governed her claim on appeal.

the government adduced no evidence that *anyone* told Ms. Tat the monies derived from unlawful activity, the government's failure to call Tan was critical. Only Tan could speak to what, if anything, Ms. Tat knew. The district court's instruction thus undercut Ms. Tat's theory of innocence and its error was *not*, quite plainly, harmless beyond a reasonable doubt.

Because the government could not have shown harmlessness, the Ninth Circuit's application of the plain error standard of review was outcome-determinative, and deprived Ms. Tat of her right to a fair trial. Ms. Tat should not be forced to live with a conviction that would have been overturned in the Eighth or D.C. Circuits merely because her alleged misconduct took place within the boundaries of the Ninth Circuit.

No defendant should suffer such a fate, either. This Court should therefore grant certiorari to resolve a split among the Circuits as to the proper standard of review governing claims of *Rogers* error on appeal, and should correct the Ninth Circuit's misguided course by holding that harmless error—not plain error—review applies.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Vivian Tat respectfully requests that this Court grant her petition for writ of certiorari.

Respectfully submitted,

MICHAEL V SCHAFLER
Counsel of Record for Petitioner
ALYSSA D. BELL
COHEN WILLIAMS LLP
724 South Spring St., 9th Floor
Los Angeles, CA 90014
(213) 232-5144
mschafler@cohen-williams.com
abell@cohen-williams.com

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA
BERKELEY SCHOOL OF LAW
Law Building 214
Berkeley, CA 94720-7200
(510) 642-6483
echemerinsky@law.berkeley.edu

DAVID K. WILLINGHAM
KING & SPALDING LLP
633 W 5th St., Suite 1600
Los Angeles, CA 90071
(213) 218-4005
dwillingham@kslaw.com

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