No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RODOLFO MORALES-CORTEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a defendant who timely objects to a prosecutor's misconduct during closing argument nevertheless bear the burden to show that it caused him prejudice?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Rodolfo Morales-Cortez and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Morales-Cortez*, No. 21-CR-1799-BAS, U.S. District Court for the Southern District of California, Judgment issued June 9, 2022.
- *United States v. Morales-Cortez*, No. 22-50131, U.S. Court of Appeals for the Ninth Circuit, Memorandum issued December 8, 2023.

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INTRODUCTION

When a prosecutor commits misconduct during closing argument and the defendant timely objects, the Ninth Circuit nevertheless places the burden on a criminal defendant to prove that the misconduct harmed him. This approach deviates from the general rule established in Federal Rule of Criminal Procedure 52(a) that the government bears the burden to establish that an error was harmless. *See United States v. Olano,* 507 U.S. 725, 734 (1993). It further conflicts with the observation of this Court in *Chapman v. California* that, "[c]ertainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. 18, 24 (1967). Unsurprisingly, the Ninth Circuit stands apart from most of its sister circuits, which properly place the burden on the government.

Here, all parties agree that the prosecutor erred. He "made misstatements during closing arguments that improperly implied that evidence had been introduced" which the district court had repeatedly excluded. Appendix A (Memorandum Disposition). There was also no question that Mr. Morales timely objected to these misstatements. On appeal, however, the Ninth Circuit placed the burden on Mr. Morales to prove that the prosecutor's misconduct harmed him.

This allocation of the burden was wrong. And Mr. Morales is not alone in facing it: the Ninth Circuit has shouldered defendants with this presumption for decades, affirming convictions like his despite agreed-upon evidence of official malfeasance. For the reasons that follow, this Court should grant certiorari and bring the Ninth Circuit in step with its peers.

OPINION BELOW

The Ninth Circuit affirmed Mr. Morales's conviction in a memorandum decision. *See* Appendix A. The panel then denied Mr. Morales's petition for rehearing. See Appendix B.

JURISDICTION

The Ninth Circuit affirmed Mr. Morales's conviction on December 8, 2023. Appendix A. The court denied Mr. Morales's petition for rehearing or rehearing en banc on February 15, 2024. Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

8 U.S.C. § 1325(a)(1) punishes noncitizens who "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers[.]"

Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT OF THE CASE

After a Border Patrol agent found him waiting by the roadside, Rodolfo Morales stood trial for violating one provision of the illegal-entry statute. To establish his guilt under this particular provision, the government needed to prove that Mr. Morales "enter[ed] . . . the United States at any time or place other than as designated by immigration officers" on the day of his arrest. 8 U.S.C. § 1325(a)(1).

In other words, the government needed to prove *how* Mr. Morales came to be waiting by the highway. He was only guilty of this particular offense if the evidence established that he crossed the international border fence beyond any reasonable doubt. Anything else mandated a not-guilty verdict—for instance, if Mr. Morales was instead smuggled through the nearby Tecate Port of Entry.

At trial, the government offered no direct evidence of Mr. Morales's manner of entry into the United States. In his opening statement, the prosecutor told the jury a straightforward story. He anticipated that the evidence would reflect that Agent Tran arrested Mr. Morales on the morning of May 20, 2021. ER-34. Agent Tran found Mr. Morales, the prosecutor explained, because he "heard over the radio that other agents were tracking a group" of suspected undocumented immigrants

starting around one o'clock that morning. ER-34. Those agents tracked footprints starting from an "area [that] is right next to the border fence." ER-34.

The prosecutor continued. One group of agents "began following his footprints[,]" while Agent Tran "had to leave and do transport duty" unrelated to this case. ER-34. When Agent Tran "came back hours later, they were still tracking" Mr. Morales. ER-34. The prosecutor explained that Agent Tran then "began to drive back and forth" on Highway 94 "to cut off this group of individuals that was proceeding north." ER-34. After another hour on the road, Agent Tran spotted footprints on a dirt road off Highway 94 leading into the brush. ER-35. "He got out, looked at those footprints, and followed them into the brush." ER-35. "Mere yards into the brush," Agent Tran discovered Mr. Morales. ER-35.

Agent Tran was, unsurprisingly, the government's first witness. But his testimony hit road-bumps almost immediately. When asked to explain the origins of Mr. Morales's arrest, Agent Tran said that he "overheard Agent Brian Peck looking for" something around one in the morning. ER-43. Before he could say what exactly Agent Peck was looking for, defense counsel objected on hearsay grounds. ER-43. The district court sustained this objection. ER-43.

The prosecutor tried rephrasing the question. He asked Agent Tran, "[w]here did you – how did you begin your involvement in the apprehension?" ER-43–44. Agent Tran answered the same way. He again attempted to relay what Agent Peck had said "[v]ia the service radio of [his] vehicle[.]" ER-44. Defense counsel cut short the response before Agent Tran could communicate the substance of Agent Peck's statement. ER-44.

The prosecutor then tabled the issue for the moment. He simply asked Agent Tran *where* he went, without attempting to explain why Agent Tran went where he did. ER-44. Agent Tran explained that he began to drive to an area called La Gloria, a canyon adjacent to the U.S.-Mexico border. ER-43. In his experience, La Gloria was "an area that's commonly used for individuals trying to enter the United States illegally[.]" ER-45.

But Agent Tran never made it to La Gloria. "[O]n [his] way to the La Gloria area, [he] was called back to the station to transport" a group of unrelated people. ER-47.

The focus then returned to Mr. Morales. On his way back to the station, Agent Tran again "overheard agents working --" ER-47. Defense counsel again objected on hearsay grounds before Agent Tran could finish. ER-47.

This time, the government responded. The prosecutor argued that the objected-to statement was a present sense impression under Federal Rule of Evidence 803(1). ER-47.

The district court disagreed in the following oral ruling:

> I'll allow it solely for its influence on Agent Tran. So in other words, ladies and gentlemen, you're not to – you're not to accept whatever he says someone says for the truth of what they said, but only for what it made him do after he heard whatever it was.

ER-47.

Agent Tran then answered the question. He told the jury that he "overheard some agents working [a] group in the La Gloria area, so [he] went down there." ER-47. He explained that he attempted to intercept the group by patrolling the highway

north of La Gloria. ER-48.

Agent Tran eventually spotted footprints on a dirt road adjacent to Highway 94. ER-49. That dirt road, dubbed "Recycling Center Road" by Border Patrol, ER-49, ran perpendicular to Highway 94, going north, ER-60. He "got on the radio and informed the agents that the sign – the footprints that they gave earlier . . . is across the road." ER-49. "Shortly thereafter," he found Mr. Morales with a group of people "trying to conceal himself behind a bush." ER-50. Mr. Morales admitted to being a citizen of Mexico without status in the United States. ER-53–54.

Cross-examination centered on two topics: local smuggling trends and Agent Tran's limited role in the search for Mr. Morales. He confirmed that some undocumented immigrants were smuggled "across the border" in vehicles at ports of entry rather than hiking through La Gloria. ER-59. Those drivers then take their cargo to a "dropoff point" to await passage further north. ER-59. That point "could be on the side of the road" or "could be a house[,]" ER-59, where the immigrants then "have to wait for another ride," ER-60. On the subject of footprints, Agent Tran confirmed that he did not track the footprints on the dirt road back to the border. ER-63. He likewise did not attempt to match Mr. Morales's shoes with any footprints from the road. ER-63–64.

The prosecutor took another crack at the hearsay problem on redirect. ER-70. He posed the question to Agent Tran: "Now, you responded to this area because you heard agents tracking footprints." ER-70. Defense counsel objected, and the court again admitted the testimony only to "explain[] why he did what he did[,]" not for its truth. ER-70.

Despite the court limiting admissibility, the prosecutor asked Agent Tran for more details regarding the other agents' observations. Specifically, he asked Agent Tran whether "anyone explain[ed] the footprints over the radio as they observed them[.]" ER-72. Defense counsel objected on hearsay grounds, which the district court sustained. ER-72.

This tracking evidence again surfaced in the hearing on jury instructions. Defense counsel requested a specific limiting instruction relating to the "footprinting issue." ER-125. He suggested the following specific limiting instruction: "the testimony about what Agent Tran heard from other agents is not admitted for substantive evidence, just for what it caused Agent Tran to do." ER-125–26.

The district court initially agreed with the defense, but quickly backtracked. ER-126–27. The court ultimately decided to give a generic limiting instruction that did not flag Agent Tran's testimony in particular. ER-127. That instruction read: "In addition, some evidence was received only for a limited purpose. When I have instructed you to consider certain evidence in a limited way, you must do so." ER-127.

The government did not heed these limits. Within seconds of beginning his closing argument, the prosecutor asserted that Mr. Morales was guilty because he was "observed by Border Patrol" "quickly after his entrance" across the border. ER-138. After being tracked, the prosecutor argued, Mr. Morales evaded agents for "nearly five hours" before capture. ER-138. Defense counsel objected immediately for "facts not in evidence." ER-138. The district court overruled this objection

without explanation. ER-138.

With the blessing of the court, the prosecutor continued. He argued that Mr. Morales was part of a group of people who were originally tracked in the La Gloria area, adjacent to the border fence. ER-140. This tracking, in the government's view, proved that Mr. Morales hopped the border fence in the La Gloria area. ER-140–41. According to the prosecutor, he couldn't have crossed any other way. ER-140–41.

Defense counsel then closed. He stressed that no witness tied Mr. Morales to the La Gloria group. ER-143. Defense counsel highlighted that the circumstantial evidence was equally consistent with Mr. Morales surreptitiously entering at the nearby port of entry. ER-144.

The prosecutor's rebuttal returned to the tracking testimony. He argued that "[t]he evidence shows that the defendant – that Border Patrol agents tracked the group starting in La Gloria right by the fence." ER-152–53. Defense counsel again objected, reminding the district court that the tracking testimony "wasn't admitted for substantive evidence." ER-153. The district court again overruled the objection. ER-153.

So the prosecutor continued. He made the argument explicit: "Agent Tran began to go through this area because that's where [the undocumented people] were at." ER-153. Agent Tran and the others "were tracking the same group." ER-153.

He then pivoted to place the manner-of-entry burden on the defense. He argued that "[t]here was no evidence that [Mr. Morales] came in a car." ER-153. Despite Agent Tran's testimony on cross, he asserted that "[t]here was no evidence

that you have to go east to get around the Border Patrol checkpoint" to the west. ER-153. The prosecutor used these misrepresentations to paint the defense theory as mere "speculation." ER-153.

The prosecutor concluded by driving the point home. He argued that Mr. Morales "ma[de] unlawful entry into the United States right near the border fence," evading Border Patrol for hours until his capture "four miles inland[.]" ER-155. For that reason, he was guilty of the § 1325(a)(1) offense.

The district court then instructed the jury. As it had previously ruled, the court declined to give a specific limiting instruction regarding the tracking testimony. ER-127. Nonetheless, the jury still thought the issue close enough to deliberate over the course of two days—longer than the actual presentation of evidence in the case. They ultimately returned a guilty verdict.

Mr. Morales appealed to the Ninth Circuit. He raised three interlocking claims arising from the tracking testimony. Relevant here, Mr. Morales claimed that the prosecutor committed misconduct by repeatedly citing the non-testifying agents' statements as substantive evidence that the agents tracked Mr. Morales from the border fence five hours before his roadside arrest. Compounding this error, the prosecutor finished by marshalling this non-evidence to shift the burden of proof and falsely claim that "[t]here was no evidence" of any alternative manner of entry. ER-153.

Although the court solely admitted the statements for effect-on-listener purposes, the prosecutor himself only ever referred to them for their truth. And he did so at every opportunity: in his opening statement, ER-34; direct examination of

Agent Tran, ER-43, 44, 47; redirect examination of Agent Tran, ER-71; in his closing argument, ER-138; and in rebuttal argument, ER-152–53.

In its answering brief ("AAB"), the government conceded error in its initial closing argument, but defended the rebuttal closing. AAB 16–17. It further claimed that any prosecutorial misconduct was not reversible because the "defendant must show that it is 'more probable than not that the misconduct materially affected the verdict.'" AAB 16 (citing *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001)). Put another way, the government placed the burden on Mr. Morales despite his timely objection and the government's confession to misconduct.

The Ninth Circuit took up the government's offer. In an unpublished opinion, it agreed with Mr. Morales that "[t]he prosecutor made misstatements during closing arguments that improperly implied that evidence had been introduced that Morales and others in his group had been tracked at the La Gloria canyon by border agents." *United States v. Morales-Cortez*, No. 22-50131, 2023 WL 8519122, at *1 (9th Cir. Dec. 8, 2023). Reversal, however, was unwarranted "because Morales was not prejudiced by the prosecutor's misstatements." *Id.*

The panel's analytical framework for this conclusion, however, was unclear. It explicitly declined to resolve an acknowledged intra-circuit split on the standard of review for claims of improper argument by prosecutors. *Id.* (citing *United States v. Velazquez*, 1 F.4th 1132, 1137 (9th Cir. 2021)). It likewise did not address which party bore the burden of proving harmlessness on appeal, even though the government had placed that burden squarely on Mr. Morales. AAB 16. But the panel did cite *Velazquez*, in which the Ninth Circuit held that "[t]he defendant must

show that it is more probable than not that the misconduct materially affected the verdict." 1 F.4th 1132 at 1136.

This petition follows.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for three reasons.

First, there is a circuit split among the lower courts regarding which party should bear the burden of establishing harmlessness in cases of prosecutorial misconduct during closing argument. The First, Second, Eighth, and Ninth Circuits place the burden on the defendant. Other than the D.C. Circuit, which does not appear to have a clear rule regarding this issue, the remaining circuits all analyze claims of misconduct under Rule 52(a) and place the burden on the government to establish harmlessness.

Second, the Ninth Circuit's rule conflicts with this Court's precedent and the general, national rule, articulated in Federal Rule of Criminal Procedure 52(a), that when a defendant timely objects and the government is the party in error, the government bears the burden to show that its error was harmless.

Third, the question presented is an issue of exceptional national importance, and this case is an ideal vehicle to resolve the issue. Every year, criminal defendants are convicted after trials in which the prosecutor engaged in some form of misconduct. Placing the burden on the defendant to show that the misconduct was not harmless undercuts long established and common-sense norms of American justice. It also reduces the incentives prosecutors have to avoid misconduct. And

had the burden been properly placed on the government in this case, Mr. Morales's conviction would have been overturned by the Ninth Circuit.

Thus, the Court should grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

I. There is a circuit split regarding which party should bear the burden of establishing harmless error in prosecutorial misconduct claims.

The Court should grant certiorari in this case to resolve a troubling circuit split regarding harmless error analysis and prosecutorial misconduct claims among the circuit courts. The First, Second, Eighth, and Ninth Circuits have all adopted special rules placing the burden on the defendant to establish that an error was not harmless in cases alleging prosecutorial misconduct, even where the defendant objects to the misconduct at trial. The remaining circuits take the opposite tack.

Consider the Ninth Circuit first. There, the burden is unambiguously enforced against the defendant, who "must show that it is more probable than not that the misconduct materially affected the verdict." *Velazquez*, 1 F.4th at 1136. The government—the party that benefitted from the misconduct—bears no such burden.

The origin of this special rule is puzzling. The most commonly cited case in the Ninth Circuit is *United States v. Hinton,* which acknowledged that the defendant had properly objected at trial, but then cited to an earlier case for the proposition that the "defendant must demonstrate that he was prejudiced by the misconduct" to obtain a reversal. 31 F.3d 817, 824 (9th Cir. 1994). In that earlier case, *United States v. Christophe,* the Ninth Circuit held that to establish reversible error on prosecutorial misconduct, "a defendant must establish: (1) the existence of

prosecutorial misconduct; (2) that the issue was preserved for appeal; and (3) that defendant was prejudiced by the misconduct." 833 F.2d 1296, 1301 (9th Cir. 1987). For support it cited to *United States v. Berry,* a plain error case that contains no discussion of which party bears the burden of establishing prejudice. 627 F.2d 193, 197 (9th Cir. 1980). *Berry*, in turn, cites to *United States v. Roberts,* which appears to be the first case to discuss claims of prosecutorial misconduct and harmless error, *Roberts*, however, does not address where the burden should fall regarding prejudice. 618 F.2d 530 (9th Cir. 1980).

Whatever its origins, this special rule has persisted to the present day. Just this year, the Ninth Circuit applied this presumption-against-prejudice principle to affirm a homicide accessory prosecution. *See United States v. Virgen-Mendoza*, 91 F.4th 1033, 1040 (9th Cir. 2024) ("To demonstrate prejudice, the defendant 'must show that it is more probable than not that the misconduct materially affected the verdict.'") (quoting *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011)).

The First, Second, and Eighth Circuits enforce similar rules. In *United States v. Joyner,* for instance, the First Circuit found that the prosecutor "misstated the trial testimony" during rebuttal closing. 191 F.3d 47, 54 (1st Cir. 1999). But it affirmed the conviction nonetheless because "Joyner ha[d] not shown anywhere near enough evidence to prove that the argument was sufficiently prejudicial to warrant a new trial under the circumstances." *Id.* The Second Circuit employed a similar rule in *United States v. Elias*, 285 F.3d 183 (2d Cir. 2002). There, the court held that "the prosecutor's remarks were improper," but denied reversing the conviction because "Elias had to show that" he would have been acquitted but for

the prosecutorial misconduct. *Id.* at 192. The Eighth Circuit also uses the same approach. *See, e.g.*, *United States v. King,* 36 F.3d 728,733 (8th Cir. 1994) ("To obtain a reversal for prosecutorial misconduct, the defendant must show that (1) the prosecutor's remarks were improper, and (2) such remarks prejudiced the defendant's rights in obtaining a fair trial."). None of these cases cite Rule 52, let alone do they explain why claims of misconduct are not governed by the general rule that the government bears the burden when a defendant properly objected below.

By contrast, a majority of the circuits, comprising the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, place the burden on the government. *See United States v. Brennan,* 326 F.3d 176, 185 (3rd Cir. 2003) ("[T]he defense objected during a break in the summation. . . . Thus, any potential prosecutorial misconduct related to this statement is reviewed for harmless error under Fed. R. Crim. P. 52(a)."); *United States v. Loayza,* 107 F.3d 257, 262 (4th Cir. 1997) (citing to Rule 52(a) and *Olano* for the proposition that "[a] prosecutor's remarks where an objection has been raised are reviewed in their entirety for harmless error"); *United States v. Thomas,* 12 F.3d 1350, 1367 (5th Cir. 1994) ("[W]e must consider whether the statements were improper and, if so, whether they amounted to plain error under Fed. R. Crim. P. 52(b)."); *United States v. Wiley,* 534 F.2d 659 (6th Cir. 1976) ("While we decline to hold that the error reached constitutional proportions, we are likewise unable to hold that it was harmless within the meaning of F. R. Cr. P. 52(a)."); *United States v. Lorefice,* 192 F.3d 647, 651 (7th Cir. 1999) (citing to Rule 52(a) when applying the harmless error analysis to a claim of prosecutorial

misconduct); *United States v. Silverstein,* 737 F.2d 864, 868 (10th Cir. 1984) (applying Rule 52(a) to claims of prosecutorial misconduct, among other errors); *United States v. Tutt,* 704 F.2d 1567, 1570 (11th Cir. 1983) (citing to Rule 52(a) for the conclusion that defendant's claims of misconduct were harmless).

The Court should grant certiorari in this case to bring the First, Second, Eighth, and Ninth Circuits into step with the majority of the circuits. Whether a person receives a fair trial should not depend on which circuit they are tried in. Moreover, given the size of the circuit split and the number of criminal cases tried in the respective jurisdictions, the resolution of the issue presented in this petition will affect a substantial number of cases and ensure greater consistency in the administration of justice across the United States.

II. The rule in the Ninth Circuit conflicts with the general rule and the precedent of this Court that the government bears the burden to show that its own errors were harmless, so long as the defendant objected at trial.

This Court should resolve the split in favor of the majority. As interpreted by the Court, Federal Rule of Criminal Procedure 52(a) establishes the general rule that when a defendant objects to an error, the government bears the burden of establishing that the error was harmless on appeal. Under Rule 52(b), the converse is true only when the defense fails to timely object to an error. The Ninth Circuit's rule conflicts with this basic principle.

United States v. Olano makes this allocation of the burdens clear. 507 U.S. 734 (1993). In *Olano*, the Court examined the difference between plain error analysis under Rule 52(b) and harmless error analysis under Rule 52(a). The Court

reasoned that Rule 52(a) applies "[w]hen the defendant has made a timely objection to an error[,]" requiring the court of appeals "to determine whether the error was prejudicial." 507 U.S. at 734. In contrast, Rule 52(b)—which applies when a defendant fails to timely object—"requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* For "most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Id.*

While *Olano*'s analysis of 52(a) and 52(b) focused on the "subtle but important" differences in word choice between the two rules, *id.*, the larger principle embodied in Rule 52(a) is enshrined in both this Court's prior precedent, the common law, and common-sense principles of fair play.

In *Chapman,* for instance, the Court made clear that constitutional error in admitting highly prejudicial comments, "certainly casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24. In support of its decision, the Court observed that "[i]t is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.*

The Ninth Circuit has ignored this precedent only in cases involving prosecutorial misconduct. While the Ninth Circuit follows *Olano* and *Chapman* in placing the burden on the government in other cases where it applies Rule 52(a), it has crafted a special rule for prosecutors. The special rule in the Ninth Circuit

conflicts with the general rule identified above by placing the burden on the defendant to show that a prosecutor's misconduct was not harmless, even where the defendant objected at trial.

While the Ninth Circuit's rationale for its rule is unclear, its approach conflicts with the text of Rule 52(a) and this Court's holdings in *Chapman* and *Olano*. It not only conflicts with the common law, but with common sense. If anything, there is even more justification to place the burden on the government to establish harmless error in prosecutorial misconduct claims. In such cases, the government is not only the beneficiary of the error, but also the cause of it and the party in the best position to avoid it. Assigning the burden to the government will give prosecutors additional incentive to avoid committing misconduct in jury trials.

In sum, the Ninth Circuit's approach conflicts with the ordinary application of the harmless error rule articulated by this Court, disregards the plain text of Rule 52(a), and encourages prosecutorial misbehavior. For these reasons, this Court should take up the issue to resolve the conflict.

III. The question presented in this petition is an issue of exceptional national importance, and Mr. Morales's case presents an ideal vehicle.

Circuit split aside, this question is exceptionally important on its own terms. Prosecutors occupy a singular place in our profession. Unlike ordinary attorneys, a prosecutor's duty "is not that [he] shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935). By singling out prosecutors for special treatment, the Ninth Circuit's harmlessness rule runs against this long-accepted admonition.

This issue has special salience in recent years. Now, unlike ever before, prosecutors face public scrutiny across the ideological spectrum. Highly politicized prosecutions on both left and right have dominated the airwaves and drawn unparalleled public interest in the criminal legal system generally, and prosecutors in particular.

By addressing the conflict between the Ninth Circuit and this Court, as well as most circuit courts, this Court can set clear rules for the review of prosecutorial misconduct claims. These rules will provide important incentives for prosecutors to avoid misconduct and will better comport with common-sense notions of fair play—if you commit misconduct in obtaining a conviction, the onus is on you to prove that your actions did not taint the jury's verdict.

Mr. Morales's case presents an ideal vehicle to send this message. Unlike some other claims of improper prosecutorial closing arguments, the misconduct in Mr. Morales's case implicates a core constitutional concern: "the defendant's right to be tried solely on the basis of the evidence presented to the jury." *United States v. Young,* 470 U.S. 1, 7 (1985). There is no dispute—not from the government or the Ninth Circuit—that the trial prosecutor here "made misstatements during closing arguments that improperly implied that evidence had been introduced that Morales and others in his group had been tracked at the La Gloria canyon by border agents." Appendix A. The trial court had, of course, explicitly excluded that evidence from the jury's consideration. The prosecutor's reliance on this evidence in closing thus gave "the impression that evidence not presented to the jury, but known to the prosecutor, support[ed] the charges against" Mr. Morales. *Young,* 470 U.S at 7.

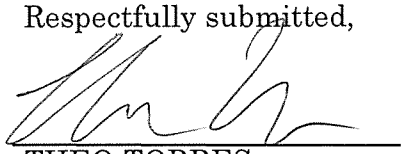
The district court, for its part, failed to correct course. When defense counsel objected during closing, the court overruled the objections without explanation. "By overruling the objection, the court naturally left the jurors with the impression that the prosecutor's" framing was correct. *Velazquez*, 1 F.4th at 1140. It further declined to give the jury a specific limiting instruction regarding this issue when defense counsel requested one. ER-127. As a result, the jury was not alerted to the prosecutor's misconduct in any serious way.

This error tainted the verdict. Without this excluded evidence, the government's manner-of-entry proof was comparatively thin. After all, no witness observed Mr. Morales anywhere near the border fence. Consequently, the prosecutor centered the out-of-court tracking observations in both opening and closing. And even with the defense's objections overruled, the jury still thought the issue close enough to deliberate over the course of two days—longer than the presentation of actual evidence in the case. These facts strongly suggest that the prosecutor's improper argument influenced the jury's deliberations. With the burden properly placed on the government, the Ninth Circuit could not have so easily excused the prosecutor's misconduct.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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