No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE WALTER CLAROS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

When a criminal defendant timely objects to a trial court's evidentiary ruling, this Court and every court of appeals *except* the Ninth Circuit hold that the government bears the burden to show the error was harmless. By contrast, the Ninth Circuit holds that "a *defendant* must still prove that the error or defect was prejudicial." *United States v. Torres*, 794 F.3d 1053, 1061 (9th Cir. 2015) (emphasis added). The question presented is:

Which party bears the burden to show prejudice when a defendant timely objects to a trial court's erroneous evidentiary ruling.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Jose Walter Claros 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. Claros,* U.S. District Court for the Southern District of California, Order issued August 13, 2024.
- *United States v. Claros* No. 24-7288, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued March 13, 2026.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Rules of Criminal Procedure

Other

APPENDIX INDEX

IN THE SUPREME COURT OF THE UNITED STATES

JOSE WALTER CLAROS,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Jose Walter Claros respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on March 13, 2026.

INTRODUCTION

It is not only black-letter law but a matter of common sense that a party who fails to timely object to an evidentiary error bears the burden of proving that this error affected the outcome of a trial. But the contrary is also true: when a party *does* timely object to an evidentiary error, the opposing party who benefited from the error bears the burden to show it did *not* affect the trial's outcome.

That is precisely what this Court confirmed over thirty years ago in *United States v. Olano*, 507 U.S. 725, 734–35 (1993). There, the Court concluded that under Federal Rule of Criminal Procedure 52, the government bears the burden to prove an error "harmless" when the defendant timely objects, but that the defendant bears the burden to prove that an error "affects substantial rights" when he does *not* object. Applying *Olano* (as they must), eleven courts of appeals agree, holding that when a defendant timely objects to an evidentiary error, the appellate court must reverse unless the government can prove the error harmless.

The Ninth Circuit does not. Instead, the Ninth Circuit holds that even if a defendant timely objects to an evidentiary error, the "*defendant* must still prove that the error or defect was prejudicial." *United States v. Torres*, 794 F.3d 1053, 1061 (9th Cir. 2015) (emphasis added). To correct this misplaced burden and bring the Ninth Circuit in line with settled law and common sense, this Court should grant certiorari.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Claros's conviction in a memorandum disposition. *See United States v. Claros*, No. 24-7288, 2026 WL 711208, at *1 (9th Cir. Mar. 13, 2026) (attached here as Appendix A).

JURISDICTION

On March 13, 2026, the Ninth Circuit denied Mr. Claros's appeal and affirmed his conviction. *See* Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

Jose Walter Claros was convicted under 8 U.S.C. § 1326 of being a noncitizen who unlawfully reentered the United States after a previous removal. The only contested element in his case was whether he was, in fact, a "noncitizen."

At trial, Mr. Claros testified that he grew up in the United States and does not know who his parents were or where he was born. His earliest memories are of living with two foster parents, though he does not know where. When he was five, he remembers that someone put him in a car and drove him several hours to live with his aunt in Los Angeles. He does not remember crossing any borders during this trip.

When he was ten years old, Mr. Claros ran away from his aunt and ended up living with a series of Mexican families through a church's informal foster care program. One of these families told him that if he were ever stopped by police, Mr. Claros should "just say you're from Mexico."

In 1982, when Mr. Claros was 13 years old, he was arrested with a group of neighborhood kids for stealing hubcaps. Eventually, he landed in immigration custody, where an agent from the former Immigration and Naturalization Service (INS) asked Mr. Claros where he was born. Following the instructions from his foster family, Mr. Claros said he was born in Mexico.

But the INS agent was skeptical. In her report, the agent wrote that while Mr. Claros "claims to be a native and citizen of Mexico," he "appear[ed] to know very little about Mexico." She also observed that he "doesn't remember where his family lives in Mexico" and had "changed his place of birth (state) two different times." Because of these inconsistencies, the agent concluded that Mr. Claros "may not be a citizen of Mexico." Nevertheless, the INS agent processed him as a voluntary return to Mexico.

When Mr. Claros arrived in Mexico as a 13-year-old orphan, no one from the Mexican government met him or provided him any sort of Mexican identification paperwork. Instead, he simply walked out onto the streets of Tijuana. But because he didn't have a place to go, he returned to the United States.

Over the next four decades, Mr. Claros often lived in the U.S. for stretches of time before being deported. Whenever he was picked up by immigration agents, he would say he was from Mexico because "they already had me down as a Mexican." He thought that if he tried to say he didn't know where he was born, "they wouldn't believe me because I already lied one time." During interviews with immigration agents, Mr. Claros never had a lawyer and continued to give inconsistent names, dates of birth, places of birth, and parents' names.

At one point, Mr. Claros decided that he had "had enough" and was "going to stay [in Mexico] and find me a job." But to get a job, Mr. Claros needed documents showing he was a Mexican citizen. He traveled to a registrar's office to try to get a copy of his birth certificate. But "the workers look[ed] in the computer" and "couldn't find me." So Mr. Claros was never able to get a birth certificate or any form of identification showing he was a Mexican citizen. Before trial, the government also conducted its own independent investigation into Mr. Claros's citizenship with Mexican authorities. They searched for a birth certificate but could not find one.

After being targeted by members of a drug cartel, Mr. Claros again tried to enter the United States in 2023 and was charged with illegal reentry under 8 U.S.C. § 1326. During the initial stages of his prosecution, Mr. Claros signed a plea agreement stating that he was a Mexican citizen. But before he entered that plea, his defense attorney reviewed the immigration file and found the 1982 document stating that Mr. Claros "may not be a citizen of Mexico." The attorney then probed Mr. Claros and found that Mr. Claros didn't actually know where he was born. Because Mr. Claros could not truthfully admit the element of alienage, he withdrew his plea, and the case was set for trial.

To explain why a 13-year-old street kid might have wrongly claimed to be a Mexican national, defense counsel sought to introduce Professor Holly S. Cooper from the University of California as an expert witness. Defense counsel submitted Professor Cooper's 34-page declaration and curriculum vitae detailing her long and distinguished career as an immigration lawyer and one of the leading national experts on citizenship law and migrant children.

In this declaration, Professor Cooper explained that "[c]hildren often do not understand the concept of citizenship or nationality," so it is "not uncommon to meet an immigrant child who does not know their date of birth, place of birth, or their parents' names." This is "especially true for foster children and orphans, who may not have family to tell them about their heritage or nationality" and thus have "no understanding of their personal histories." Professor Cooper reviewed Mr. Claros's immigration file and found the details of his case "consistent" with children she had interviewed who lacked reliable information about their personal histories. Mr. Claros thus sought to present Professor Cooper as an expert witness to explain to the jury why "someone in Mr. Claros's position would erroneously admit alienage or provide wildly inconsistent dates of birth, places of birth, and even the names of his parents."

But the district court did not allow Professor Cooper to testify. The court stated that Professor Cooper's testimony would only provide "generalities that can happen to minors who are deported." Defense counsel timely objected, drawing an analogy to this Court's recent decision in *Diaz v. United States*, which held that a government expert witness could testify that "*most* drug couriers know that they are transporting drugs" without opining on whether a *specific* defendant had the necessary mental state. 602 U.S. 526, 528 (2024) (emphasis added). But the court rejected the analogy to *Diaz*, claiming that Professor Cooper's testimony "wouldn't really be the same" as a drug expert. The jury then found Mr. Claros guilty of the single count of illegal reentry.

On appeal, Mr. Claros argued that the trial court erred in excluding Professor Cooper's testimony, relying again on this Court's decision in *Diaz*. In an unpublished memorandum, and without mentioning *Diaz*, the Ninth Circuit held that the exclusion of Mr. Claros's expert witness was not an abuse of discretion because the witness "would not help the jury understand Claros's multiple sworn admissions, as an adult, and over decades, that he was born in Mexico." Pet. App. 2a.

The Ninth Circuit also concluded that, even if the district court erred in excluding the expert testimony, "the error was harmless." Pet. App. 2a. But the Ninth Circuit did not say which party bore the burden to show harmlessness. Instead, it cited *United States v. Torres*, 794 F.3d 1053, 1056 (9th Cir. 2015), which held that even if a defendant timely objects to an evidentiary error, the "*defendant* must still prove that the error or defect was prejudicial." 794 F.3d at 1061 (emphasis added). This petition follows.

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit—contrary to this Court and all other courts of appeal—places the burden on a defendant who has timely objected to prove that a trial court's evidentiary error affected the outcome.

Federal Rule of Criminal Procedure 52 governs the standard used in criminal cases to determine whether an error is reversible:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52. Although both subsections turn on whether the error affects "substantial rights," neither subsection, on its face, specifies *which party* bears the burden to show whether substantial rights were affected.

In *United States v. Olano*, 507 U.S. 725 (1993), however, the Court clarified who bore the burden for each subsection. *Olano* first explained that when a defendant timely objects, Rule 52(a) requires a "so-called 'harmless error' inquiry" to "determine whether the error was prejudicial." *Id*. at 734. *Olano* then stated that "Rule 52(b) normally 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*. (emphases added). *Olano* referred to this as a "burden shifting" distinction between Rule 52(a) and (b). *Id*. So while *Olano* held that Rule 52(b) requires that "the defendant rather than the Government" show prejudice when he fails to object, this holding rested on the principle that the government bears the burden to show harmlessness under Rule 52(a) when the defendant *does* object. *Id.*

Eleven courts of appeal have dutifully followed this holding. All have held that if the defendant timely objects to an error, "the burden falls to the government to show the error was harmless." *United States v. Taylor*, 848 F.3d 476, 484 (1st Cir. 2017); *see also United States v. Roldan*, 167 F.4th 569, 579 (2d Cir. 2026) ("The government bears the burden of proving that an evidentiary error was harmless."); *United States v. Vazquez, 271 F.3d, supra*, at 93, 100 (citing *Olano* to hold that the "Government has burden of proof under harmless error standard, while defendant has burden under plain error standard"); *United States v. Brown*, 136 F.4th 87, 93 (4th Cir. 2025) (quoting *Olano* to hold that "the government 'bears the burden of persuasion with respect to prejudice'" under Rule 52(a)); *United States v. Carpenter*, 140 F.4th 733, 741 (5th Cir. 2025) ("The Government bears the burden of proving beyond a reasonable doubt that the error was harmless.") (quotations and alterations omitted); *United States v. Fox*, 134 F.4th 348, 385 (6th Cir. 2025) ("The burden lies with the Government to explain why an error should not upset the trial court's determination.") (quotations omitted); *United States v. Storme*, 83 F.4th 1078, 1078 (7th Cir. 2023) ("The government bears the burden of proving that an error was harmless."); *United States v. Agbaje*, 175 F.4th 962, 966 (8th Cir. 2026) ("The government bears the burden of proving an error is harmless."); *United States v. Butler*, 141 F.4th 1136, 1144 (10th Cir. 2025) ("The government bears the burden of proving harmless error."); *United States v. Pon*, 963 F.3d 1207, 1227 (11th Cir. 2020) (holding that "[t]he government bears the burden of showing harmlessness" when "the issue was properly preserved by timely objection"); *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004) (noting that "the burden is on the government to demonstrate that the error was harmless").

But the Ninth Circuit does not follow *Olano*'s burden-shifting scheme. In *United States v. Torres*, 794 F.3d 1053, 1058 (9th Cir. 2015), the trial court excluded a defense witness's testimony over the defendant's timely objections. On appeal, the Ninth Circuit held that:

> [E]ven assuming that the district court erred, as Torres alleges, *a defendant* must still prove that the error or defect was prejudicial. *See* Fed.R.Crim.P. 52(a); *see also United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (holding that where the defendant has made a timely objection to an error, Rule 52(a) applies).

Id. at 1061 (emphasis added).

This makes no sense. As explained above, *Olano* stands for the *opposite* conclusion—that "[i]t is the defendant rather than the Government who bears the burden" under Rule 52(b) when he fails to object, but that this represents an "important difference" from Rule 52(a), where *the Government* bears the burden. *Olano*, 507 U.S. at 734. In other words, neither *Olano* nor Rule 52(a) requires that a defendant who timely objects "must still prove that the error or defect was prejudicial"—yet that is precisely the authority *Torres* cited to reach a contrary holding.

Here, as in *Torres*, Mr. Claros timely objected to the trial court's exclusion of a defense witness. This highly qualified expert witness could have explained to the jury why a 13-year-old U.S. citizen might have falsely claimed to be a Mexican citizen, since it is common for orphans in the immigration system not to know their parents or their place of birth. But even though defense counsel objected at every turn to the exclusion of this expert witness, the Ninth Circuit cited *Torres*, thereby requiring Mr. Claros to "still prove that the error or defect was prejudicial." Pet. App. 2a. This misplaced the burden and defied *Olano*, the holding of every other circuit court, and common sense.

The Ninth Circuit's reliance on *Torres* in Mr. Claros's case was not an isolated incident. To the contrary, Ninth Circuit panels routinely cite *Torres* to require a showing of harmlessness. *See, e.g.,* U*nited States v. Granillo, No. 24-46, 2025 WL 2399976, at *1 (9th Cir. Aug. 19, 2025)*; *United States v. Klein*, No. 23-3022, 2025 WL 1733975, at *1 (9th Cir. June 23, 2025); *United States v. Garcia*, No. 22-10291, 2025 WL 314126, at *4 (9th Cir. Jan. 28, 2025);*United States v. Vera-Rivas*, No. 23-374, 2024 WL 4707897, at *1 (9th Cir. Nov. 7, 2024); *United States v. Russell*, No. 22-50056, 2024 WL 4054382, at *3 (9th Cir. Sept. 5, 2024); *United States v. Ponce-Galvan*, No. 22-50114, 2024 WL 1342671, at *2 (9th Cir. Mar. 29, 2024); *United States v. Figueroa-Juarez*, No. 22-50085, 22-50086, 2023 WL 8053742, at *1 (9th Cir. Nov. 21, 2023); *United States v. Rivera*, No. 21-50137, 2023 WL 4646110, at *1 (9th Cir. July 20, 2023); *United States v. Wells*, No. 20-30009, 2022 WL 17668096, at *1 (9th Cir. Dec. 14, 2022); *United States v. Keshishyan*, No. 22-50030, 2022 WL 17547801, at *1 (9th Cir. Dec. 9, 2022); *United States v. Holguin*, No. 19-50158, 2022 WL 7441252, at *2 (9th Cir. Oct. 13, 2022); *United States v. Lonich*, No. 18-10298, 2022 WL 95934, at *2 (9th Cir. Jan. 10, 2022); *United States* *v. Lischewski*, 860 F. App'x 512, 515 (9th Cir. 2021); *United States v. Lane*, No. 19-10317, 2021 WL 2029193 (9th Cir. May 21, 2021); *United States v. Morel-Pineda*, 829 F. App'x 187, 192 (9th Cir. 2020); *United States v. Robledo*, 816 F. App'x 198, 199 (9th Cir. 2020). Accordingly, the Ninth Circuit is perpetuating its erroneous reading of *Olano* and Rule 52(a) and systemically misplacing the burden to show harmless error in case after case.

II.

This case presents a recurring and important issue.

It is difficult to overstate how often federal appellate courts must consider the prejudicial effect of evidentiary errors. Every year, thousands of federal criminal cases go to trial, most of which are followed by an appeal alleging some type of evidentiary error. Of these cases, a significant portion of challenges involved preserved errors. So in cases outside the Ninth Circuit, the courts of appeals will properly place the burden on the government to show that such error was harmless. But the Ninth Circuit will place the burden on the defendant to show that the error he objected to would have led to a different outcome—an erroneous legal standard that applies to hundreds of cases every year.

Not only is harmless-error review ubiquitous, it also presents "an inherently futile challenge: to evaluate the effect of a hypothetical situation on a group of persons the judges have never met and about whom they seldom have information." David A. Shields, *East vs. West-Where Are Errors Harmless? Evaluating the Current Harmless Error Doctrine in the Federal Circuits*, *supra*. As one veteran judge observed, "we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt"—an approach that is "dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence." Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev., supra, at 1167, 1170. So assessing the impact of an evidentiary error is already a task fraught with speculation and subjectivity.

The Ninth Circuit's erroneous approach makes this analysis even less reliable. Not only does it create disparate geographic outcomes, it punishes the party who has timely objected to the trial court's error while benefiting the party who is unjustly advantaged. Because this presents an important and recurring issue, this Court should grant certiorari.

III.

Mr. Claros's case provides a good vehicle to resolve this issue.

Mr. Claros's case also provides a good vehicle for correcting the Ninth Circuit's precedent. As shown, the panel here cited *Torres* with its misguided belief that a *defendant* who timely objects to an evidentiary error "must still prove that the error or defect was prejudicial." Pet. App. 2a. Thus, the Ninth Circuit's decision relied on the exact precedent that requires correction.

There can also be no doubt that the district court here committed an evidentiary error under *Diaz v. United States*, 602 U.S. 526 (2024). In *Diaz*, a trial court had admitted a government drug trafficking expert to rebut the defense of an accused who claimed to be an unknowing courier. *Id*. at 529–30. The government expert testified that because drug traffickers "generally do not entrust large quantities of drugs" to people unaware they are carrying them, "most couriers know they are transporting drugs." *Id.* at 530. The defendant argued that this testimony violated Federal Rule of Evidence 704(b) because it "functionally stated an opinion about whether [she] knowingly transported drugs." *Id.* at 535 (quotations and alterations omitted).

This Court disagreed. It held that because the expert testified about "the knowledge of *most* drug couriers," that testimony "d[id] not necessarily describe Diaz's mental state," since she "may or may not be like most drug couriers." *Id.* at 534 (emphasis *Diaz*). Justice Jackson concurred to emphasize that "Rule 704(b) is party agnostic." *Id.* at 538. She noted that expert testimony may provide "critical assistance to lay factfinders" in cases beyond drug trafficking—for instance, situations involving domestic abuse or a defendant's mental health. *Id.* at 540–41. And Justice Gorsuch's dissent agreed that the majority's opinion allows defendants to use their own experts in these contexts because "what is good for the goose is good for the gander." *Id.* at 545, 551.

But here, the trial court did not extend Mr. Claros any goose/gander equity. Mr. Claros's expert witness, like the government's drug expert in *Diaz*, did not claim that *all* foster children in immigration proceedings lack knowledge of their place of birth or personal history—only that "many of them" do. Nor would she have testified that Mr. Claros himself lacked the necessary mens rea for conviction—only that the details of his case were "consistent" with many children she had interviewed in the immigration foster system. So Professor Cooper's testimony was no more likely to run afoul of Rule 704(b) than the admissible testimony in *Diaz* that "most" couriers know there are drugs in the car. 602 U.S. at 535. Its exclusion thus defied the assurances of Justices Jackson and Gorsuch that "Rule 704(b) is party agnostic" and would be available to both prosecutors and defendants. *Id*. at 538, 545, 551.

Had the Ninth Circuit properly placed the burden of the government, the government could not have proven the exclusion of Mr. Claros's expert witness harmless under *Olano* and Rule 52(a). The government did not have a Mexican birth certificate or any other document showing that Mr. Claros was a citizen of Mexico. All it had was a history of deportations and "admissions" that traced back to the single statement Mr. Claros made as a 13-year-old foster child in immigration custody. The government thus aggressively cross-examined Mr. Claros and made his credibility the centerpiece of its opening and closing statements. Professor Cooper's testimony would have provided a critical counterweight to this attack on Mr. Claros's credibility by showing that many children in the immigration foster system do not know their biological parents, their date of birth, or where they were born. This would have explained to the jury why Mr. Claros might have given inconsistent answers about his place of birth.

Not only did the Ninth Circuit defy Justice Jackson's and Justice Gorsuch's calls to apply *Diaz* to fairly both parties, it compounded this error by placing the burden on Mr. Claros to show harmlessness. To prevent the Ninth Circuit from further perpetuating its erroneous harmless-error precedent, this Court should grant certiorari.

CONCLUSION

For these reasons, this Court should grant Mr. Claros's petition for a writ of certiorari to bring the Ninth Circuit's prejudice standard in line with *Olano* and every other federal court of appeals.

Respectfully submitted,

Date: June 10, 2026

s/ Kara Hartzler
KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467
Attorneys for Petitioner