No._____

IN THE SUPREME COURT OF THE UNITED STATES

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MOHAMED MOHAMED MOHAMUD, ISSA DOREH and
AHMED NASIR TAALIL MOHAMUD,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A jury convicted four Somali men of providing material support to terrorism by sending $10,900 to al-Shabaab. They contested the government's bulk metadata collection used in their case, but the Ninth Circuit ruled that even if it breached the Fourth Amendment, the evidence would not be suppressed. The Ninth Circuit agreed that the Fourth Amendment requires notice to defendants when the prosecution uses surveillance-derived information but found no prejudice to Petitioners from the lack of notice in this case.

This petition presents the following questions for review:

(1) Whether this Court should review the Ninth Circuit's decision to abstain from deciding the Petitioners' Fourth Amendment and statutory challenge to bulk collection of Petitioners' metadata?

(2) Should this Court review the Ninth Circuit's failure to apply the *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), standard of harmlessness beyond a reasonable doubt to Petitioners' constitutional errors?

(3) Did the Ninth Circuit err by conducting an ex parte review to determine if errors were "material" under *Brady v. Maryland*, 373 U.S. 83 (1963), while excluding the security-cleared defense counsel?

(4) Did the Ninth Circuit correctly find sufficient evidence that Issa Doreh knew funds collected in the United States were sent to al-Shabaab?

PARTIES TO THE PROCEEDING

Petitioners Issa Doreh, Mohamed Mohamed Mohamud, and Ahmed Nasir Taalil Mohamud were three defendants in a four-defendant criminal case before the district court and in the appeal before the Ninth Circuit. The fourth defendant/appellant, Basaaly Saeed Moalin, was represented by retained counsel Joshua Dratel before the district court and Ninth Circuit. He is not a party in the instant petition before this Court.

Respondent United States of America was the plaintiff in the district court and the appellee in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

Counsel for Petitioners are not aware of any related proceedings in state or federal courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

IN THE SUPREME COURT OF THE UNITED STATES

MOHAMED MOHAMED MOHAMUD, ISSA DOREH and
AHMED NASIR TAALIL MOHAMUD,

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

Petitioners Issa Doreh, Mohamed Mohamed Mohamud, and Ahmed Nasir Taalil Mohamud respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2020, nearly four years after oral argument. *See* Appendix A: *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020). Four years after that, the Ninth Circuit denied the petition for rehearing or rehearing en banc on February 27, 2025. *See* Appendix B: Denial of the Petition for Rehearing. On May 29, 2025, Justice Kagan granted Petitioners'

request to extend the time to file a petition for certiorari until July 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 18 U.S.C. § 956, 18 U.S.C. § 1956(a)(2)(A), 18 U.S.C. § 1956(h), 18 U.S.C. § 2339A(a), 18 U.S.C. § 2332a(b), 18 U.S.C. § 2339B(a)(1), 18 U.S.C. § 2339B(g)(6), and 50 U.S.C. § 1861. These statutes are set out in the Appendix.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' arguments are based on the Fourth Amendment, the Fifth Amendment, and the Sixth Amendment.

STATEMENT OF THE CASE

The United States charged Petitioners by a Second Superseding Indictment filed on June 8, 2012, which alleged the following:

Count 1: Conspiracy to provide material support to terrorists, in violation of 18 U.S.C. § 956 [conspiracy to kill persons in a foreign country] and 2332a(b) [conspiracy to use a weapon of mass destruction outside of the United States], all in violation of § 2339A(a).

Count 2: Conspiracy to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(g)(6), all in violation of 18 U.S.C. § 2339B(a)(1).

Count 3: Conspiracy to launder monetary instruments, with the intent to provide

material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1), providing material support to terrorists in violation of 18 U.S.C. § 2339A(a); and conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. § 956, all in violation of 18 U.S.C. § 956, all in violation of 18 U.S.C. § 1956(a)(2)(A) and (h).

Count 4: To Moalin only, conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A(a) [Count Four] and providing material support to foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1) and 2 [Count Five].

Count 5: Providing material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1) and (2) on or about April 23, 2008.

(District court docket, *United States v. Moalin*, 10-cr-04246-JM, Southern District of California hereinafter "CR" 147).

The trial commenced on January 28, 2013, and on February 22, 2013, the jury returned guilty verdicts on all counts against all Defendants. (CR 302). Following the Edward Snowden revelations, Petitioners moved for a new trial; the district court heard the motion on November 13, 2013, and denied it by amended order on November 18, 2013. (CR 388). *See* Appendix C.

On April 10, 2014, the Ninth Circuit consolidated appeal numbers 13-50572, 13-50578, 13-50580, and 14-50051. The Ninth Circuit heard the oral argument on November 10, 2016. On September 20, 2020, the Ninth Circuit published *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020); *see* Appendix A. The Petitioners filed

for Ninth Circuit rehearing and petition for rehearing en banc on November 13, 2020. The Respondent filed a petition for rehearing en banc on November 13, 2020, but that petition was denied the same day as untimely. The Respondent subsequently filed a motion to extend time which was granted on December 1, 2020.

On January 15, 2021, the Ninth Circuit ordered Petitioners to file a response to the United States's petition for rehearing en banc, and the government was ordered to file a response to Petitioners' petition for rehearing en banc. Four years later, on February 27, 2025, the Ninth Circuit unanimously voted to deny both parties' petitions for rehearing. A copy of that order is attached as Appendix B. The mandate was issued on March 5, 2025.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW CONCERNING THE GOVERNMENT'S COLLECTION, RETENTION, AND USE OF TELEPHONE METADATA

The Ninth Circuit all but concluded that the mass collection of telephony metadata under 50 U.S.C. §1861 (Section 215 of the USA PATRIOT Act) of the Foreign Intelligence Surveillance Act ("FISA") was unauthorized and likely violated the Fourth Amendment but avoided a making a final merits decision by finding that any error would have been harmless. *United States v. Moalin*, 973 F.3d 977, 992-93, 996 (9th Cir. 2020); Appendix A. The United States did not disclose to Petitioners the method by which it obtained their data, and only after surveillance activities were reported to Congress after trial did the United States inform Petitioners that

Mr. Moalin's data had been collected (along with every other cellphone user). The Ninth Circuit held that any illegality associated with the interception of Mr. Moalin's electronic communications through other surveillance programs which "may have violated the Fourth Amendment" was also harmless error. *Id.* at 100-01.

The Ninth Circuit's refusal to decide the Fourth Amendment issue is in defiance of this Court's precedent regarding metadata, such as historical cell site data, which is protected by the Fourth Amendment. *See Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206 (2018). Given that the telephony metadata at issue in this case is analogous to the cell site data in *Carpenter*, the Ninth Circuit erred by disregarding this precedent and proceeding directly to harmless error. *Id.* at 1001. The Ninth Circuit did not apply the standard of review for constitutional errors and, consequently, did not consider whether these constitutional errors were harmless beyond a reasonable doubt.

Each of Petitioners' arguments had a constitutional dimension so the United States was required to prove beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The failure of the prosecution to provide *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), material is a constitutional claim, *United States. v. Moalin*, 973 F.3d at 1001-02. There is a constitutional dimension to Petitioners' attempt to present exculpatory evidence in the testimony by defense witness Halima Ibrahim. *Id.* at 1002-03. The district court's refusal to order the

government to provide safe passage to a defense witness (Farah Shidane, a/k/a "Farah Yare") for purposes of a deposition overseas pursuant to Federal Rule of Criminal Procedure Rule 15. *Id.* at 1003-04. Finally, the trial court's failure to prohibit the government from presenting "expert" testimony about the notorious "Black Hawk Down" incident in Mogadishu, Somalia in 1993, in which eighteen U.S. soldiers were killed. *Id.* at 1005-06. This is a constitutional issue under the recently decided *Andrew v. White*, 604 U.S. ___ (2025), 145 S. Ct. 75, 78 (2025) (per curiam).

In *Andrew*, this Court ruled that introducing highly prejudicial, irrelevant evidence, such as gendered and inflammatory references to the defendant's personal life, can violate due process by making a trial fundamentally unfair. *Andrew v. White*, 145 S. Ct. at 78 ("By the time of Andrew's trial, this Court had made clear that when 'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.' *Payne v. Tennessee*, 501 U. S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).") Petitioners argued that the "Black Hawk Down" testimony, referencing the 1993 killing of eighteen U.S. soldiers and a Hollywood blockbuster, was similarly prejudicial and irrelevant, serving only to inflame the jury's emotions. At least the relationship between Ms. Andrew and her husband was a factual issue in the trial; the "Black Hawk Down" testimony had no tie to any fact presented at trial and the sole purpose of the testimony was to portray Petitioners

as aligned with enemies and terrorists who killed U.S. soldiers.

A. The Errors Below Relating to FISA

The Ninth Circuit correctly held that "the telephony metadata collection program exceeded the scope of Congress's authorization in section 1861 and therefore violated that section of FISA." *Id.* at 996 (citing *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015)). The Ninth Circuit went on to observe that the violation of the statute also likely violated the Fourth Amendment, but instead of following the argument through, the Ninth Circuit shortcutted to harmless error and found that any illegalities did not taint the government's collection of evidence, including its subsequent electronic surveillance conducted pursuant to FISA:

> [c]ontrary to defendants' assumption, the government maintains that Moalin's metadata "did not and was not necessary to support the requisite probable cause showing" for the Subchapter I application in this case. Our review of the classified record confirms this representation.

977 F.3d at 997.

The Ninth Circuit also noted that:

> [even] if we were to apply a "fruit of the poisonous tree" analysis, *see Wong Sun* [*v. United States*, 371 U.S. 471, 487-488 (1963)], we would conclude, based on our careful review of the classified FISA applications and related information, that the FISA wiretap evidence was not the fruit of the unlawful metadata collection.

Id. at 993 (citing *Wong Sun,* 371 U.S. at 488).

After secretly determining that the government's illegal surveillance was neither the exclusive nor essential justification for the wiretap against Mr. Moalin, the Ninth Circuit chose not to address the potential Fourth Amendment violation directly. However, following a review of Petitioners' briefing, the court observed that "for all these reasons, defendants' Fourth Amendment argument has considerable force." *Id.*, at 992. The Ninth Circuit added it did "not come to rest as to whether the discontinued metadata program violated the Fourth Amendment because even if it did, suppression would not be warranted on the facts of this case." *Id.* at 992-93, (citing *United States v. Ankeny*, 502 F.3d 829, 836-37 (9th Cir. 2007)).

With respect to whether appellants were entitled to notice of the FISA collection, the Ninth Circuit concluded that

> assuming without deciding that the government should have provided notice of the metadata collection to defendants, the government's failure to do so did not prejudice defendants. Defendants learned of the metadata collection, albeit in an unusual way, in time to challenge the legality of the program in their motion for a new trial and on appeal.

Id., at 1001 (citing *United States v. Mohamud*, 843 F.3d 420, 436 (9th Cir. 2016)).

Appellants also argued that there were other, warrantless unlawful electronic surveillance programs which were used against them, but the Ninth Circuit again relied on the ex parte evidence to reject the claim: "[b]ased on our careful review of the classified record, we are satisfied that any lack of notice, assuming such notice was required, did not prejudice defendants." *Id.* The Ninth

Circuit ruled that the government's violation of FISA §1861 was harmless, the government's potential violation of the Fourth Amendment was harmless, and the government's failure to provide Appellants the required notice under the Fourth Amendment was harmless but did not publicly say how.

In each instance the Ninth Circuit failed to articulate the proper standard for an error of constitutional magnitude as required for the potential Fourth Amendment violation: that the government establish the error's harmlessness beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15 (1999) (*quoting Chapman v. California,* 386 U.S. 18, 24 (1967)); *see also Gautt v. Lewis*, 489 F.3d 993, 1014-16 (9th Cir. 2007).

This case presents an ideal vehicle to resolve an increasingly recurring question: whether courts may avoid enforcing the Fourth Amendment in the face of a clear constitutional error by using harmless error (and applying it incorrectly). The Ninth Circuit did not apply the *Chapman v. California*, 386 U.S. 18 (1967), standard by placing the burden on the government to prove harmlessness beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 7-8 (1999); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991).

The Ninth Circuit treated constitutional errors—including potentially unlawful surveillance under FISA and the Fourth Amendment, and the suppression of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)—as harmless

based on a silent record and with ex parte review. The phrase "harmless beyond a reasonable doubt" appears nowhere in the Ninth Circuit's published opinion and that failure directly conflicts with multiple precedents of this Court. Nearly four decades ago in *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988), this Court reversed because the lower court failed to apply *Chapman* and instead relied on the sufficiency of the remaining evidence—an impermissible substitute for the harmless-beyond-a-reasonable-doubt standard. In *Yates v. Evatt*, 500 U.S. 391, 402-03 (1991), the Court reversed because a state court improperly analyzed harmlessness in asking whether the jury could have convicted absent the error, rather than whether the error contributed to the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995), reiterated that when a reviewing court is in "grave doubt" as to whether an error affected the verdict, the conviction cannot stand.

This precedent has not been questioned or undercut in the subsequent three decades. But in *Moalin,* the Ninth Circuit conducted its own ex parte review of classified material and concluded—without adversarial testing and without applying *Chapman*—that unlawful surveillance and the suppression of exculpatory materials and exclusion of exculpatory testimony did not prejudice the defense. These are precisely the kinds of determinations this Court has warned against: ones made without full adversarial process and without the government proving harmlessness to the required constitutional standard.

This Court should grant review to clarify that when constitutional violations are established appellate courts should not sidestep to *Chapman* by omitting it, softening it, or replacing it with a silent record review.

Further, the Fourth Amendment issue is one that this Court should speak to because the law is supposed to care a great deal that the officers are acting in good faith. *See Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419 (2011) (if police are acting in good-faith and under formerly binding precedent, then the Fourth Amendment does not require suppression.) The police conduct here is not in good-faith as in being based on any previously accepted mode of surveillance. Instead, this was a secret data harvesting program that the United States was using to prosecute Petitioners. This case involves a secret record where the defendants never get to look at the evidence that supposedly dooms their constitutional claims. The Ninth Circuit's refusal to decide the illegality that was plainly before it calls for this Court's correction.

The United States Constitution has a right to privacy and the Fourth Amendment is one manifestation thereof. The law requires that before seizure, search, and bulk retention of private metadata, the government is required to get a warrant from a neutral magistrate before it seizes and mines the undifferentiated metadata of hundreds of millions of people to investigate them. The Founders were in favor of placing "'obstacles in the way of a too permeating police surveillance.' *United States v. Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948)."

Carpenter v. United States, 585 U.S. at 305, 138 S. Ct. at 2214. The United States is not a surveillance state and the officers that enacted this program and hid it should be reminded of that.

In *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 2485 (2014), this Court recognized that cell phone data, due to its vast scope and intimate detail, implicates profound privacy concerns, holding that warrantless searches of such data violate the Fourth Amendment. The bulk telephony metadata collection under FISA § 1861, as in this case, *Moalin*, 973 F.3d at 992-93, similarly amasses sensitive personal information, enabling an unprecedented level of intrusion into private lives, as cautioned in *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 2217 (2018) (holding that historical cell-site data constitutes a Fourth Amendment search). Such programs, conducted in secrecy and without adequate judicial oversight, erode the constitutional protections against a surveillance state, as this Court warned in *Katz v. United States*, 389 U.S. 347, 351 (1967) (establishing privacy as a core Fourth Amendment value), and *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (noting that unchecked surveillance chills democratic freedoms). The Court should grant certiorari to reaffirm that the Fourth Amendment forbids such blanket surveillance and provide lower courts with clearer guidance about safeguarding individual privacy.

Judged by the proper standard, and, as set forth in section C below, especially with the participation of security-cleared trial court counsel in identifying

the impact of the errors, it is respectfully submitted that the Ninth Circuit would not have affirmed Appellants' convictions. Accordingly, Petitioners ask this Court to grant review in this case to decide whether the multiple errors related to the FISA interceptions and evidence were harmless beyond a reasonable doubt.

B. The *Brady* and Constitutional Trial Evidentiary Errors Below

In denying Appellants' *Brady* claim, *see* 973 F.3d at 1001-02, the Ninth Circuit concluded, after its ex parte review of classified information provided by the government, that any non-disclosure to Appellants was not "material," and therefore did not constitute a *Brady* violation. However, the information referred to in the intelligence assessment and the linguist's memoranda, which likely would have negated any criminal intent on Mr. Moalin's part (and therefore the intent of the other defendants as well), and established that his contacts with Somalia were widespread and not intended to support al-Shabaab, but instead were directed at humanitarian relief in Somalia and his own commercial interests there, was decidedly material.

The Ninth Circuit failed to apply the correct standard of review to constitutional dimensions of the evidentiary arguments of Petitioners. For example, regarding the District Court's preclusion of certain exculpatory testimony by defense witness Halim Ibrahim, the Ninth Circuit stated it could not "say that the exclusion of Ibrahim's testimony regarding the 2009 conference 'more likely than

not affected the verdict.'" *Id.* at 1003 (quoting *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004)). That is not the harmless beyond a reasonable doubt standard.

Similarly, with respect to the denial of safe passage for Mr. Shidane, the Ninth Circuit stated that "[e]ven if the district court did abuse its discretion, any error, in denying either defendants' request for 'safe passage' or their request to depose Shidane by video, was harmless." *Id.* at 1005. Regarding the government expert's testimony about the "Black Hawk Down" incident, *see id.*, the Ninth Circuit decided that "even if the district court did abuse its discretion in admitting the testimony, the error was harmless." *Id.* (*citing Pang*, 362 F.3d at 1192).[1]

Ultimately, considering the claim of cumulative error, the Ninth Circuit answered that "[t]o the extent we have found the claimed errors of the district court harmless, 'we conclude that the cumulative effect of such claimed errors is also harmless because it is more probable than not that, taken together, they did not materially affect the verdict.'" *Id.* at 1006 (quoting *United States v. Fernandez*, 388 F.3d 1199, 1256-57 (9th Cir. 2004)).

Here, while each of the errors listed above includes an evidentiary aspect based on the Federal Rules of Evidence, each also clearly presents a constitutional

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[1] In so doing, the Ninth Circuit stated that "[t]he expert's testimony was not tied to defendants or to al-Shabaab in any way and was therefore unlikely to have prejudiced the jury against defendants." 973 F.3d at 1005. The testimony was about Somali men hunting down and killing eighteen U.S. soldiers. And the defendants were Somali men who were being accused of supporting the terrorists in Somalia. There is no reason for this testimony except to connect Petitioners to the malefactors who killed our troops in *Black Hawk Down*.

issue: respectively, the Fifth Amendment Due Process right to disclosure of exculpatory evidence, the Sixth Amendment right to present testimony (with the Fifth Amendment Due Process right to present a defense), the Sixth Amendment right to call witnesses; and the Fifth Amendment Due Process right to a fair trial free of undue prejudice and aggregate evidentiary error.

The phrase "harmless beyond a reasonable doubt" does not appear at all in the Ninth Circuit's opinion, despite the four instances – including whether the accumulation of error denied appellants a fair trial – in which the Ninth Circuit considered a potential error harmless. An error "cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999). Yet that was the case with each of the errors enumerated above, and surely all of them in combination. Also, when a defendant is not able to proffer a full and fair defense, Fifth and Sixth Amendments rights to present a defense are implicated, and the court must engage in the stricter harmless error analysis to ensure that the "error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15, quoting *Chapman*, 386 U.S. at 24.

In *Andrew v. White*, this Court reaffirmed that evidentiary errors could rise to a constitutional violation when they undermine fundamental fairness, as when irrelevant, inflammatory evidence (such as the "Black Hawk Down" testimony here) distorts the fact-finding process. 604 U.S. at ___ (citing *Payne v. Tennessee*, 501 U.S. 808 (1991); *Estelle v. McGuire*, 502 U.S. 62 (1991)). The Ninth Circuit's failure

to apply *Chapman* to this error, as well as to the Fourth Amendment and *Brady* violations, mirrors the error in *Andrew*, where the lower court insufficiently scrutinized the prejudicial impact of evidence under a constitutional lens.

C. The FISA and Brady Issues Could Not Adequately Be Decided Ex Parte

1. Ex Parte proceedings are inadequate

In deciding that the violations of §1861 and the potential Fourth Amendment violations did not taint the FISA-generated evidence, the Ninth Circuit relied wholly on an ex parte review of the classified record. The same is true for the Ninth Circuit's determination of Appellants' *Brady* issue. However, it is respectfully submitted that ex parte examination of the record– particularly when each Appellant below had trial counsel who possessed the requisite security clearance to review the classified information at issue – does not provide the Court sufficient basis for a decision that affirms convictions and long prison sentences. It is axiomatic that ex parte proceedings deprive the Court of the ability to make an accurate determination. *See Alderman v. United States*, 394 U.S. 165, 168, 180-85 (1969) (refusing "to accept the ex parte determination of relevance by the Department of Justice in lieu of adversary proceedings in the District Court"). Ex parte proceedings also deny a criminal defendant the Fifth Amendment guarantee of Due Process, and the Sixth Amendment right to confrontation.

It is particularly insufficient on appeal, when the intricacies of the impact of certain information on the issues may not be apparent from the cold record. The

necessity of that perspective renders defense counsel's contribution indispensable. Indeed, the direction in *Neder* that a Court must conduct a "thorough examination of the record" 527 U.S. at 19, before concluding that the constitutional error was harmless is impossible to achieve without input from one party to the case (and in particular the party that bears the full brunt of a contrary holding based on ex parte review).

2. The Ninth Circuit's conclusion is directly contradicted by the public record

These general principles are even more pertinent in the context of Petitioners' case, where the Ninth Circuit's ex parte review led to conclusions which are directly contradicted by public statements from high-ranking officials, undermining the reliability of the judicial process and implicating constitutional fairness. For example, regarding the FISA issues, the Ninth Circuit acknowledged that the FBI's Deputy Director publicly testified before Congress in a manner entirely contrary to the Ninth Circuit's conclusion that the unlawful metadata collection did not taint the FISA wiretap evidence. *See United States v. Moalin*, 973 F.3d at 997-98. The Deputy Director's testimony suggested that the metadata collection was integral to establishing probable cause for the FISA surveillance, directly challenging the Ninth Circuit's assertion, based on its ex parte review, that "Moalin's metadata 'did not and was not necessary to support the requisite probable cause showing'" for the FISA wiretap application. *Id.* at 997.

The Ninth Circuit dismissed this contradiction by stating that "if the statements of public officials created a contrary impression, that impression is inconsistent with the facts presented in the classified record." *Id.* at 993 (footnote omitted). This dismissal without adversarial input is particularly troubling given the availability of security-cleared trial court defense counsel who could have tested the classified record's veracity against the public testimony, potentially revealing discrepancies critical to the Fourth Amendment analysis. The reliance on ex parte review to resolve a constitutional issue—without allowing defense counsel to challenge the government's representations—deprived Petitioners of a fair opportunity to contest evidence central to their convictions, implicating their Fifth Amendment due process rights.

The Deputy Director's public statements, made under oath before Congress, suggested that the metadata collection was a critical component of the surveillance framework, directly undermining the Ninth Circuit's ex parte conclusion that the metadata was irrelevant to the FISA wiretap's probable cause. This discrepancy creates, at minimum, "virtual equipoise" as to the harmlessness of the Fourth Amendment violation, requiring reversal under this Court's precedent. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). Yet, the Ninth Circuit resolved this critical issue without input from security-cleared defense counsel, who could have probed the classified record to clarify whether the metadata collection indeed influenced the FISA application, as the Deputy Director's testimony implied.

This Court has long emphasized that ex parte proceedings are inadequate for resolving complex factual disputes, particularly when constitutional rights are at stake. *See Alderman,* 394 U.S. at 181-84. Here, the Ninth Circuit's ex parte dismissal of a potential Fourth Amendment violation, despite conflicting public testimony, similarly risks a miscarriage of justice by foreclosing the adversarial process necessary to protect Petitioners' constitutional rights.

The public statements at issue at the very least create the necessity for an evidentiary hearing. This is the grave doubt circumstance in which "a judge 'feels himself in virtual equipoise as to the harmlessness of the error' and has 'grave doubt' about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so.'" *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)) (*quoting Kotteakos v. United States*, 328 U.S. 750, 765 (1946)) (brackets in *Merolillo*). Sworn Congressional testimony by the FBI's Deputy Director should satisfy the "virtual equipoise" required for grave doubt.

3. With the clear contradiction between the statements of a high government official before Congress, security-cleared counsel should have been allowed to review the evidence

The Ninth Circuit maintained that while "defendants contend the government was required to produce any favorable, material evidence relating to the FISA surveillance or to the previously terminated investigation of Moalin[,]" 973 F.3d at 1002, based on the Ninth Circuit's "review of the classified record and of

the district court's extensive sealed orders covering *Brady* issues, neither the classified FISA materials nor the file concerning the previously terminated investigation of Moalin contained favorable, material information." *Id.* Such a conclusive determination could not possibly be reached with any confidence without the contribution of security-cleared defense counsel providing the requisite defense perspective – the whole objective of the adversary process's quest for accurate, just, and fair process and results. Conversely, granting security-cleared defense counsel access to the classified record the Ninth Circuit reviewed would not only satisfy constitutional imperatives, but it would also ultimately provide the Court with the adversarial testing which is required for finding truth. *Polk Cnty. v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 450 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.") There is a strong case for reaching the opposite conclusion from that of the Ninth Circuit, and with the benefit of adversarial testing by cleared defense counsel, the Court could determine that the FISA-obtained evidence was unlawfully acquired or materially tainted, warranting its suppression, the vacatur of Petitioners' convictions, and the granting of a new trial consistent with due process.

D. The Evidence Was Insufficient to Support the Convictions of Petitioner Doreh

Issa Doreh was charged in Count 1 of the Second Superseding Indictment with conspiracy to provide material support to terrorists in violation of 18 U.S.C. §

2339A(a); Count 2, conspiracy to provide material support to a Foreign Terrorist Organization in violation of 18 U.S.C. § 2339B(a)(1); Count 3, conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956(a)(2)(A) and (h); and Count 5, providing material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1) and (2). *United States v. Moalin*, 973 F.3d at 1006.

Nowhere in the Opinion does the Ninth Circuit find there was evidence that petitioner Doreh was aware of the identity of Shikhalow as Aden Ayrow, let alone evidence of knowledge that monies sent to Somalia were for the purpose of supporting Shikhalow or al Shabaab. The fact that transcripts may indicate Doreh was aware of Shikhalow's death on May 1, 2008, in a U.S. missile strike did not in any way prove Doreh knew the person codefendant Moalin was talking to on phone calls was in fact Aden Ayrow. The entire set of transcripts relied on in the Opinion suffers from the same infirmity – a lack of evidence that Doreh knew monies collected in the United States were for the purpose of supporting Ayrow and/or al Shabaab.

To convict Issa Doreh on Count 1, the reviewing court had to find the government had proven (1) that Doreh entered into a conspiracy; (2) that the objective thereof was to provide material support or resources to al-Shabaab; and (3) that Doreh then knew and intended that such support or resources would be used in preparation for, or in carrying out, a separate conspiracy to murder, kidnap, or maim outside of the United States. *See* 18 U.S.C. § 2339A; *United States v. Hassan*,

742 F.3d 104 (4th Cir. 2014); *United States v. Chandia*, 514 F.3d 365, 372 (4th Cir. 2008). With respect to the first element, the government was obliged to prove a conspiracy — that is, an agreement between two or more people to engage in illegal activity. *See United States v. Burgos,* 94 F.3d 849, 857-58 (4th Cir. 1996) (en banc). Issa Doreh's involvement in such a conspiracy would be adequately demonstrated if the evidence showed "a slight connection between [him] and the conspiracy." *See United States v. Kellam*, 568 F.3d 125, 139 (4th Cir. 2009) (internal quotation marks omitted).

The "existence of a tacit or mutual understanding is sufficient to establish a conspiratorial agreement, and proof of such an agreement need not be direct — it may be inferred from circumstantial evidence." *Id.* The Opinion sets forth no such evidence, tacit or otherwise, that Issa Doreh had entered into an agreement with anyone to engage in illegal activity. The government never proved that Doreh ever supported al-Shabaab or Aden Ayrow. It should be noted here that the government admitted it did not know and could not prove that the person identified as Shikhalow (on any intercepted calls, including the 11 calls Issa Doreh participated in) was in fact Aden Ayrow. The Opinion acknowledges as much at page 54: "While the transcripts do not include direct conversations between Doreh and Shikhalow, they describe Doreh's involvement with Moalin and others in transferring funds from San Diego to Shikhalow's organization in Somalia." While the transcripts do

show Doreh's very limited involvement in the transfer of funds, they do not show knowledge that the funds were to Shikhalow or to al-Shabaab.

Even if Issa Doreh was found to have supported an insurgency against Ethiopia, there was no proof that that insurgency was either al-Shabaab or a terrorist group let alone a group designated by this Country as an FTO. As to the second element of the conspiracy charged in Count 1, "material support or resources" is defined as "any property, tangible or intangible, or service," including "currency," "training," "expert advice or assistance," "weapons," or "personnel." 18 U.S.C. § 2339A(b)(1). The third element required the government to establish that Issa Doreh acted "with the knowledge or intent" that such material support or resources would be used to commit a specific violent crime. *United States v. Stewart*, 590 F.3d 93, 117-18 (2d Cir. 2009) ("Stewart and Yousry knew that their actions provided material support to a conspiracy to end the cease-fire and thereby unloose deadly acts of terrorism by al-Gama'a and others, then they were on notice that what they were doing was prohibited by a statute that criminalizes the provision of material support "knowing or intending that [such support is] to be used in preparation for, or in carrying out," criminal actions. 18 U.S.C. § 2339A.")

Under the instructions given by the district court as to Count 1, the government had to prove beyond a reasonable doubt for purpose of Count 1 that Issa Doreh intended to commit murder and/or he intended to provide material support for a weapon of mass destruction. As to either, mere recklessness or

knowledge would not satisfy the government's burden. *See United States v. Chhun,* 744 F.3d 1110, 1117 (9th Cir. 2014). When viewed in the light most favorable to the government, the evidence was insufficient to show that Issa Doreh had the requisite mens rea of intent to commit the offenses in Count 1, namely murder and/or to provide a weapon of mass destruction.

Similarly, as to Count 2 which alleged a conspiracy to provide material support to a foreign terrorist organization in violation of § 2339B, the government had to prove Doreh became a member of the conspiracy charged in Count 2 while knowing of its unlawful object and intending to help accomplish it. Again, the evidence was not just insufficient; it was absent because there was no evidence to support a finding that Issa Doreh knew of any unlawful object nor that he intended to accomplish an unlawful object by doing his job which was to act as a minor player in the Shidaal Express. As the government well knows, when Basally Moalin asked Issa Doreh on April 23, 2008, for the name of the sender, Doreh said, "Well he is not here now; he is the one who sent it, I can't log into the website; I don't have an account, I don't send money, you know." When asked who sends the money, Doreh says "Abdirizak is the person who sends the money." (Exhibit 159; 6RT 1059.)

Count 3 required that Issa Doreh knew of the unlawful purpose of a conspiracy to launder money and intended to accomplish the unlawful purpose. Again, the evidence presented by the government was that Doreh was a clerk in the Shidaal Express; a person who had no access to the actual mechanics of money

transfers. The government knew this not only on the basis of its investigation and indictment of the owner of the Shidaal Express (Abdirizak Hussein) but because of Doreh's statements on the intercepted calls.

Again, as is true in the case of Counts 1-3, a necessary element of Count 5 in the case of Doreh was that he "knowingly provided material support or resources to al-Shabaab" and there was no evidence to support such an allegation.

Contrary to the government's theory and argument at trial, evidence presented to the jury proved Issa Doreh was not only not able on his own to grant discounts or to transmit monies from San Diego to Somalia, every transaction was approved not by him but by Donnah Locsin. (4RT 761.) Additionally, during a call on April 23, 2008 (Exhibit 159; 6RT1059), Moalin asks Doreh about the name of a sender on a particular transfer and Doreh says "he" (meaning Abdirizak) is not here now and "he" is the one who sent it and that he (Doreh) can't log into the website, "I don't have an account, I don't send money, you know." (*Id.* p. 2.) Abdisalam Guled testified that money was sent to Somalia from the diaspora through a hawala and that when money is sent through a hawala by a recognized charity that has an account with the hawala, normally a fee is not charged. If it is not recognized as charity, but the promise of charity sending of this money (outreach or hospital), the fee is minimized but still charged. (12RT 1687).

Furthermore, contrary to the government's contention and argument to jurors, discounts were made by the owner, Mohamud Ahmed and his business

manager, Abdirizak Hussein, not by Issa Doreh. The government knew full well that this was true as reflected in the separate indictment (Southern District of California, Case No. 13CR1514-JM, filed on April 23, 2013) in which Abdiaziz Hussein (aka Abdiaziz Hussen, aka Abdirizak) was alleged in Count 1 to be "Shidaal's manager and responsible for daily operations from 2007 until approximately November 2009. Of particular interest is the fact that overt acts relating to transfers on April 23, 2008, and April 25, 2008, mirrored those in Doreh's indictment as caused by Moalin, Issa Doreh and Mohamud Mohamed, however the government alleged in 13CR1514 that these transfers were caused by Hussein. (CR 147; ER 7-8). In fact, Issa Doreh did not have access to the money wiring equipment; he did not have an ID and password to enter the system, and he certainly was not, as argued by the government, in a position to waive fees or discounts. The government's argument at page (13RT 1974) of its rebuttal argument, that Moalin told someone named Shikhalow that Issa Doreh could waive the fee does not make it true.

The Second Superseding indictment states, in Overt Act 11, "on or about July 15, 2008, defendant Doreh caused the transfer of $2,280 from San Diego, California to Somalia." (ER 8). The government argued the same at the time of trial. Not only did the government know that Doreh did not have the access, authority or power to transfer money to Somalia, the government also misrepresented the transfer of $2,280 as personally sent by him. That money, as the government knows well from

its translation of the intercepted calls on July 8 and 21, 2008, was sent to Farah Shidane who was not affiliated with al-Shabaab but was involved in humanitarian relief. While presenting the fact of the transactions during trial, the government concealed from jurors the actual intercepted calls which would have shown the recipient was Farah Shidane who worked to provide humanitarian relief in Somali. His efforts were completely opposed by al-Shabaab. The fact that funds were sent from the diaspora to Somalia for humanitarian relief is evidenced in a call on February 18, 2008, presented as a defense exhibit. In that call, which is between Moalin and Sahal, who had been mentioned in the first call as the guy that runs the orphanage, Issa Doreh is introduced to Sahal as the guy that runs the orphanage. Government witness Bryden also testified to the money sent by members of the diaspora to Somalia. (3RT 440).

On a call at 04:56:39 UTC on July 2, 2008, between Farah Shidane, Moalin and Mohamed Mohamud, the three have a lengthy discussion of fighting, however the attack by Farah Shidane and his people were of Ethiopians. He makes clear in this conversation when he says "The situation changed and our army was forced to follow them and attack the Ethiopians from the rear. This was the first time in one year of fighting that we attacked them from behind while they were in retreat." (Exhibit 182 at p. 6-7; 6RT 1090). If the government is correct, certainly not conceded by Doreh, that references to "the youth" were in fact a reference to al-Shabaab, the distinction between what Farah Shidane's men were doing and what

"the youth" were doing is great. Farah Shidane says in that same call that "The Youth fought for three minutes and left. That resulted in some of our brothers being exposed to danger and the enemy came around and killed some of our men, like professor Aspro and others, although they fought well. Furthermore, other groups of fighters joined the fight, and it continued for four hours without stop. (*Id.*) Farah Shidane says, in response to Sheik Mohamed's question, that the Somali Islamic Liberation Organization and his (Shidane's group) are the same. (*Id.* at 4 of 7). At no time does Shidane or anyone else say that the Somali Islamic Liberation Organization is the same as or affiliated with al-Shabaab.

With respect to the Opinion's conclusion that Doreh caused the transfer of $2,280 from San Diego to Somalia on July 15, 2008 (Count 1, Overt Act 11(n), there were four calls on July 8, only three of which (Exhibits 183, 184 and 185; 5RT 886, 889, 6RT 1117) were introduced into evidence by the government. Exhibit 184 is a call on July 8, 2008, from Moalin and Doreh to Mohamed Abdi Hassan Yusuf. This call clearly concerns monies collected were intended to be sent to the students of the Koran School, the people and the orphans. He continues to say that the money has been divided into three Koran schools. Hassan says he and the children don't have anything to transport the grain and no means of transportation for these books. (Exhibit 184 at p 7).

In a call on July 8, 2008, from Moalin to Doreh, when asked by Moalin if Doreh sent the money, Doreh says "I gave the money to Mohamud. I didn't send the

money." (6RT 1117). At the time of this call, Mohamud Ahmed was the owner of Shidaal Express.

At 03:51:48 UTC on July 21, 2008, Moalin spoke on a call with Farah Shidane who said he had received $1,030 at one time and $1,250 at another time. These funds are the monies the government attributed to Issa Doreh as going to terrorists when in fact they were clearly for Farah Shidane who was neither al-Shabaab nor a terrorist.

There was no evidence to support the allegation that Issa Doreh "caused the transfer of $2,280 from San Diego, California to Somalia." In fact, in a call on July 22, 2008, at 17:25:20 between Moalin and Issa Doreh, Moalin says the transfer belonged to the children and Doreh clearly says "Right, actually I was not present and the man I delegated was absent for awhile. He was not even available yesterday when they did the inquiry." (Exhibit TT-196A; 10RT 1511). As the evidence at trial established, Farah Shidane was involved in humanitarian works. In fact, money from the diaspora for humanitarian work is a threat through the government's intercepted calls. As early as December 2007, there were discussions about fund-raising for orphans, for a school called ILEYS and mention of a man by the name of Sahal who ran an orphanage.

Additionally, not only did the government never prove that the Shikhalow referenced on the calls was Aden Ayrow, but there was also no evidence that there was a relationship between Issa Doreh and Aden Ayrow or al-Shabaab or that

Doreh knew who Ayrow was. Even more significant is the fact that at no time did the government prove, in all of its recorded intercepts that Issa Doreh ever heard the name Shikhalow or Aden Ayrow. Even if Doreh knew Moalin was sending money to Somalia, there was no evidence that he knew this money was being sent to either Ayrow or al-Shabaab or to a terrorist organization or that he did anything other than his job as a clerk at the Shidaal Express – namely to send money from members of the diaspora to Somalia.

In the calls between Issa Doreh and Basaaly Moalin which were introduced at trial, Moalin never mentioned the name Shikhalow as claimed by the government. Moalin would refer to the "cleric" and there is no evidence that Issa Doreh knew the "cleric" was or that it was a reference to Ayrow rather than another cleric. This follows from a probability law: "'When you hear hoofbeats, think horses, not zebras.' The point is that when trying to explain an unknown phenomenon, it's usually sensible to look first to the familiar and only later to the exotic." *Vance v. Rumsfeld*, 701 F.3d 193, 220 (7th Cir. 2012)

The parties stipulated and agreed to the following facts: "[I]n early to mid 2008, one, money collected for the Ayr subclan was given to individuals, including Abukar Suryare, AKA Abukar Mohamed, and Farah Shidane, who were associated with the ILEYS charity; two, money collected by men in Guraceel on behalf of the Ayr subclan was given to a group that was not al-Shabaab; three, there was a (12RT 1732) dispute between al-Shabaab, the Ayr clan, and ILEYS over the

administration of the Galgaduud region. Four, members of the ILEYS charity and the Ayr subclan, including Abukar Suryare, were opposed to al-Shabaab and were Ayrow's enemies." (12RT 1732-1733).

The intercepted calls in which he participated failed to establish that Doreh knew who Shikhalow was, or that he supported al-Shabaab or knew monies were being sent to al-Shabaab, or that he supported terrorism. There is no dispute that monies transferred on July 15, 2008, totaling $2,280 were sent not to al-Shabaab but to Farad Shidane and there is also no dispute that Farah Shidane was not affiliated with al-Shabaab. Government witnesses, as well as Doreh's own words on intercepted calls, proved he was merely a clerk at the Shidaal Express and had no authority over transfers, including no authority over discounts of fees. It must be remembered, according to the government's own expert Bryden, that it was not merely al-Shabaab versus the TFG; it was a broad-based insurgency. In the context of Somali culture, the concept of insurgency refers to a group of regional, clan-based, civil societies that exist autonomously. Government witness Bryden characterized the organizational structure of Somali society as a "segmentary lineage system." (3RT 442-443).

The citations to transcripts in the Opinion failed to prove that any calls involving Issa Doreh supported al-Shabaab or terrorism in any way. The calls must be viewed in the context of the slaughter of Somalis by Ethiopians as well as deaths, displacement, and orphans resulting from drought and famine occurring at that

time and support by the diaspora of humanitarian relief and the removal of the Ethiopian military from Somali soil.

In assessing sufficiency of the evidence, this Court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 307, U.S. 317 (1979). In none of the calls in which Issa Doreh is a participant is there any evidence of his involvement in an agreement to do anything unlawful. There is no agreement as to a conspiracy, to commit murder in Somalia, or to use weapons of mass destruction. There is no evidence at all that Issa Doreh ever knew the name Ayrow, Shikhalow, or al-Shabaab.

In *Jackson v. Virginia,* 443 U.S. at 313-320, this Court held that the Due Process Clause of the 14th Amendment is violated by conviction of a crime without sufficient evidence that each element has been proven beyond a reasonable doubt.[2] It is not enough that Issa Doreh may have known or even associated with the person(s) committing the offenses or unknowingly or unintentionally did things that were helpful to that person or was present at the scene of the crime.

Issa Doreh was the bycatch of bulk collection of metadata, and he did not participate in funding any terrorist. Issa Doreh was a clerk and was unrelated to

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[2] *Bolling v. Sharpe*, 347 U.S. 497 (1954), incorporated the 14th Amendment's guarantee of Due Process from the states to apply to the federal government via the Fifth Amendment's Due Process Clause.

any cleric. He is a simple man thrust into a terrorism case because of an illegal spying program. The fact that the evidence against him was insufficient gives the Court ever more reason to grant review and right this wrong.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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