NO._____

In The
Supreme Court of the United States

BASAALY MOALIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a United States Court of Appeals may avoid ruling on a constitutional challenge to a statute implicating Fourth Amendment concerns if it determines that suppression is not an available remedy?

(2) Does 50 U.S.C. § 1861 *et seq*, the Foreign Intelligence Surveillance Act's "Access to Business Records" authority, require, or even permit, *ex parte* and *in camera* review of evidence derived from collection made pursuant to its authority?

PARTIES TO THE PROCEEDING

Petitioner Basaaly Saeed Moalin was one of four defendants in a criminal case before the District Court for the Southern District of California and in the appeal before the Ninth Circuit.

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

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STATEMENT OF RELATED PROCEEDINGS

Petitioner's writ of certiorari is respectfully submitted to review the Opinion in the Ninth Circuit Court of Appeals, Docket No. 13-50572, *United States of America v. Basaaly Moalin*, filed September 2, 2020. *See* Appendix A1. Petitioner's case originates in the District Court for the Southern District of California, in the case *United States v. Moalin*, Case No. 10 Cr. 4246.

Petitioner's three co-defendants have filed a separate petition for a writ of certiorari, *Mohamud v. United States*, Application No. 24A1160. Otherwise, counsel for Petitioner is 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).

OPINIONS AND ORDERS ENTERED IN THIS CASE

(1) Order of the United States Court of Appeals for the Ninth Circuit (denying petition for rehearing), Docket No. 13-50572, filed February 27, 2025. *See* Appendix A107;

(2) Opinion of the United States Court of Appeals for the Ninth Circuit (affirming Defendants' convictions), Docket No. 13-50572, filed September 2, 2020. *See* Appendix A1;

(3) Judgment of the United States District Court for the Southern District of California, Docket No. 10 Cr. 4246, filed November 22, 2013. *See* Appendix A60;

(4) Amended Order of the United States District Court for the Southern District of California (denying motion for new trial), Docket No. 10 Cr. 4246, filed November 18, 2013. *See* Appendix A88;

(5) Order of the United States District Court for the Southern District of California (denying motion for new trial), Docket No. 10 Cr. 4246, filed November 14, 2013. *See* Appendix A71;

(6) Order of the United States District Court for the Southern District of California, Docket No. 10 Cr. 4246 (denying motions to suppress evidence and statements), filed February 17, 2012. *See* Appendix A64.

IN THE SUPREME COURT OF THE UNITED STATES

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BASAALY MOALIN,

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

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Petitioner Basaaly Moalin respectfully petitions 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 September 2, 2020, nearly four years after oral argument. *See* Appendix A: *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020) ("*Moalin*"). 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.

Petitioner's three co-defendants moved May 29, 2025, for an extension of time in which to file their petition until July 28, 2025, and Justice Kagan granted Petitioner's request in a May 29, 2025 Order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Petitioner subsequently moved to join that request for an extension, but that request was untimely, and the Court did not act upon it. This Petition is therefore untimely as well for the reasons set forth below.

This Court possesses discretion to consider an untimely petition for writ of *certiorari* in a criminal case if "the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 63-65 (1970); *see Bowles v. Russell*, 551 U.S. 205, 212 (2007).

Here, as set forth in Petitioner's prior motion, it is respectfully submitted that Petitioner meets that standard. Counsel could not locate Petitioner for a period of time after the Ninth Circuit's decision denying the Petiton for Rehearing because Petitioner had been released from custody and was living in a halfway house. Once counsel was able to locate and communicate with Petitioner was made.

Regarding this Petition, there were subsequent delays – due to the restrictions on Petitioner's movement imposed by his community confinement (halfway house) – in completing and transmitting the forms necessary for Petitioner's motion to proceed *in forma pauperis*. Petitioner was represented by retained, and not appointed, counsel below, and his 15 years in prison unsurprisingly devastated his financial condition.

Also, the call records collected, retained, and used, and which were at issue in the case, and which are the subject of this Petition, were Petitioner's. While Petitioner has completed the custodial portion of his 18-year prison sentence, his conviction nevertheless will continue to impose collateral consequences upon him and his employment opportunities.

This Petition raises similar issues, based on the same facts and Ninth Circuit rulings, as that in the Petition filed by Petitioner's three co-defendants, only with a more focused Question Presented.

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)§, 50 U.S.C. 1806(e), (f), (g), and 50 U.S.C. § 1861§§.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's arguments are based on the Fourth Amendment, the Fifth Amendment, and the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case presents important questions related both to the adjudication of constitutional challenges and to the disclosure requirements of the Foreign Intelligence Surveillance Act ("FISA") constellation of statutes. The Ninth Circuit's avoidance of the harmless-constitutional-error doctrine introduces a worrying gap in constitutional remedy jurisprudence, especially in national security cases involving FISA, and the Classified Information Procedures Act ("CIPA"), both of which create substantial tensions on the adversarial process by allowing for *ex parte* and *in camera* review of certain materials, to the manifest disadvantage of defendants.

Compounding this issue lower courts have incorrectly applied 50 U.S.C. § 1861 by reviewing the material derived therefrom only *ex parte* and *in camera*, when these materials are not subject to the such a statutory requirement.

I. *Procedural History*

A. *The Charges Against Petitioner*

Petitioner-Defendant Basaaly Moalin, alongside Co-Defendants Mohamed Mohamed Mohamud ("M. Mohamud"), and Issa Doreh, were indicted October 20, 2010 (ECF #1)[1], in a five-count Indictment unsealed November 2, 2010. All three defendants were remanded without bail (ECF #16.) A Superseding Indictment

[1] "ECF" refers to the Electronic Case Filing System docket numbers in the District Court for the Southern District of California, for the case *United States v. Moalin*, Case No. 10 Cr. 4246.

added Ahmed Nasir Taalil Mohamud ("Nasir Mohamud") as a defendant. (ECF #38.)

All five counts in the Second Superseding Indictment related to defendants' alleged transmission of money–a total of $15,900 (ECF #147)–from the U.S. to Somalia, purportedly in support of al-Shabaab, a Somali organization that was designated an Foreign Terrorist Organization by the U.S. Department of State February 26, 2008. (A. 105-106).

Petitioner, a naturalized U.S. citizen who emigrated to the U.S. from Somalia in 1996, and drove a taxi in San Diego, was alleged to have organized the transmittal of the funds and also to have contributed his own money to the amount transferred to Somalia.

B. *The Collection, Retention, and Use of Petitioner's Call Records*

In 2003, Petitioner's call records were collected by the National Security Agency ("NSA") pursuant to § 1861, the business records provision of FISA, and an investigation was opened, but later closed after it did not yield anything of either foreign intelligence or law enforcement value. *United States v. Moalin*, 973 F.3d 977 (Dkt. #24-1)[2] at 7, 49.

Years later, relying on information subsequently provided by NSA from its prior collection of Petitioner's call records, the Government applied for a FISA warrant for electronic surveillance. That request was approved and, as a result,

[2] "Dkt." refers to the Docket Entry number in the United States Court of Appeals for the Ninth Circuit, for the case *United States v. Moalin*, 973 F.3d 977.

Petitioner was subject to electronic surveillance from December 2007 through part of August 2008. (ECF #123).

C. *Pretrial Litigation*

Petitioner raised the FISA suppression motion on both statutory and constitutional grounds both pretrial and in his motion for new trial. (ECF #92, Def. Mtn. to Suppress); (ECF #345, Def. Mtn. New Trial.) The District Court denied the pretrial motion, and did not grant either an evidentiary hearing and access by security-cleared defense counsel to the documents underlying the FISA applications and orders (including redacted *ex parte* portions of the government's response to the motion). (ECF #124, A. 64, suppression denial; ECF #386, A. 71, denying new trial.)

D. *The Trial*

Trial of Petitioner and his three co-defendants commenced January 28, 2013, and February 22, 2013, relying on the fruits of the FISA wiretap evidence admitted in evidence as part of the government's case, the jury convicted all four defendants on all counts. (ECF #303.)

E. *The Disclosures by Edward Snowden*

Nearly four months after completion of the trial, *The Washington Post,* in its June 8, 2013, edition, published the first in continuing series of articles by a variety of news organs, including *The Guardian* and *The New York Times*, detailing disclosures by Edward Snowden, a former NSA contract employee. The documents Snowden provided revealed the existence of the scope of NSA's electronic

surveillance, interception, and collection, including communications data relevant to U.S. persons.

In response to the Snowden/*Washington Post* disclosures, within two weeks Congressional hearings were convened on the subject. During a June 18, 2013, appearance before the House Permanent Select Committee on Intelligence ("HPSCI"), Sean Joyce, Deputy Director, FBI, defending the call data collection program, testified regarding criminal cases that had been initiated as a result of the NSA interception/collection programs.

Initially, in his prepared remarks, Deputy Director Joyce informed the panel about a particular (initially unidentified) case:

> the FBI had opened an investigation shortly after 9/11. We did not have enough information nor did we find links to terrorism, so we shortly thereafter closed the investigation. However, the NSA, using the business record FISA, tipped us off that this individual had indirect contacts with a known terrorist overseas. *We were able to reopen this investigation, identify additional individuals through a legal process and were able to disrupt this terrorist activity*.

(ECF #345-2 at 9-10) (emphasis added).

Later in the session, during the question and answer period, Deputy Director Joyce confirmed that the unidentified case was *this* case: *United States v. Moalin*, and that the individual who was the subject of the initial (closed) investigation, and whose phone records had been the subject of Section 215 [50 U.S.C. § 1861] collection and storage, was Petitioner Moalin.

F. *Petitioner's Motion for a New Trial*

Based on the information provided by Mr. Snowden's disclosures, and Deputy Director Joyce's congressional testimony, Petitioner moved, pursuant to Rule 33, Fed.R.Crim.P., for a new trial because (1) the government had not disclosed before trial its use of Petitioner's call records collected pursuant to § 1861; and (2) the government's collection, retention, and use of Petitioner's call data in its investigation of him violated both FISA and the Fourth Amendment. Petitioner also requested an evidentiary hearing on those issues.

The District Court conducted oral argument on the motion November 13, 2013, and denied it by an amended November 18, 2013, Order. (ECF #388, A. 88).

G. *Petitioner's Appeal to the Ninth Circuit*

Petitioner and his three co-defendants subsequently appealed to the Ninth Circuit Court of Appeals, raising, *inter alia*, the constitutionality (and fidelity to FISA's provisions) of the collection, retention, and use of his call records pursuant to § 1861. The Ninth Circuit conducted oral argument November 10, 2016, and issued its opinion September 20, 2020. *See United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020); A. 1.

Petitioner and his co-defendants-appellants petitioned for rehearing and rehearing *en banc* November 13, 2020. Respondent also filed a petition for rehearing *en banc* that same day, but that petition was denied that same day as untimely. Respondent subsequently filed a motion to the extend time for filing a petition for rehearing, and that motion was granted December 1, 2020.

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

REASONS FOR GRANTING THE PETITION

It is respectfully submitted that this Court should hold that if a Court of Appeals chooses to avoid deciding a Fourth Amendment challenge by means of a suppression determination alone, leaving open the possibility of a constitutional violation, it must apply the established harmless-constitutional-error review standard of "beyond a reasonable doubt."

I. The Ninth Circuit Improperly Avoided Petitioner's Fourth Amendment Challenge to Bulk Metadata Collection Made Pursuant to 50 U.S.C. § 1861 *et seq.*

A. *The Ninth Circuit's Opinion*

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 proceeded to observe that the violation of the statute also likely violated the Fourth Amendment, finding that "defendants' Fourth

Amendment argument has considerable force." *Id.*, at 992. However, the Court ultimately decided it would "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)).

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:

> Contrary to defendants' assumption, the government maintains that Moalin's metadata "did not and was not necessary to support the requisite probable cause showing[.]" [. . .] Our review of the classified record confirms this representation. 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).

B. *The Ninth Circuit Erred In Not Addressing Petitioner's Constitutional Challenge to § 1861*

Faced with Petitioner's constitutional challenge to 50 U.S.C. § 1861, and upon finding that the challenge raised "problematic" issues and had "considerable force," the Ninth Circuit was presented with three options: (1) find the statute constitutional; (2) apply the principle of constitutional avoidance and limit the construction of the statute

to avoid the constitutional issue; and/or (3) find the statute unconstitutional and apply harmless-constitutional-error review.

Instead, the Ninth Circuit chose *none* of those alternatives. After significant discussion of the "problematic" invasiveness of the metadata collection program, *Moalin*, 973 F.3d at 989-993, the Ninth Circuit neither found the statute constitutional or unconstitutional; nor did it attempt to apply a limiting construction to the statute based upon the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

Using a suppression analysis to effectuate constitutional avoidance would be improper because it would deprive a criminal defendant the possibility of harmless-constitutional-error review, which is of a stricter standard than harmless non-constitutional error review, even when the underlying reason for suppression is, in fact, constitutional in nature. *Compare Neder v. United States*, 527 U.S. 1, 2 (1999) (did not "contribute" to the verdict "beyond a reasonable doubt") *with United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir.1997) ("more probable than not that the error did not materially affect the verdict").

C. *The Constitutional-Harmless-Error Standard*

By avoiding deciding the constitutional challenge, either outright or through limitation, the Ninth Circuit improperly avoided application of the clearly established 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*, 527 U.S. at 2 (*quoting Chapman,* 386 U.S. at 24; *see also Gautt v. Lewis*, 489 F.3d 993, 1014-16 (9th Cir. 2007); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991).

As Justice Scalia explained in *Sullivan v. Louisiana*, constitutional harmless error analysis requires a court to determine "whether the guilty verdict actually rendered in this trial was *surely unattributable* to the error." *Sullivan v. Louisiana*, 508 U.S. at 279 (emphasis added).

Yet neither the precise phrase "harmless beyond a reasonable doubt," nor even the essence of that standard, appear anywhere in the Ninth Circuit's opinion. 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.

Properly applying *Chapman* requires two features: (1) the existence of a federal constitutional error; and (2) a determination whether that constitutional error was harmless. In *Chapman*, the Court ruled that the defendant's Fifth Amendment rights

as articulated in *Griffin v. California*, 380 U.S. 609 (1965), had been violated before deciding whether that error was harmless. *See also Kyles v. Whitley*, 514 U.S. 419, 436 (1995) ("*Chapman v. California* held that a conviction tainted by constitutional error must be set aside unless the error complained of "was harmless beyond a reasonable doubt") (citations omitted); *Arizona v. Fulminante*, 499 U.S. 279, 280 (1991) (finding first that the admission of involuntary confessions was unconstitutional under *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), before applying *Chapman* harmless-error rule).[3]

This Court has been exacting in upholding the *Chapman* rule's beyond-a-reasonable-doubt-standard. For example, in *Yates v. Evatt*, 500 U.S. 391, 402-03 (1991), this Court reversed because a state court's harmless error analysis was faulty in asking whether the jury could have convicted absent the error, rather than whether the error contributed to the verdict.

Similarly, in *Deck v. Missouri,* 544 U.S. 622 (2005), this Court adamantly upheld the *Chapman* standard, declaring that

> where a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained."

544 U.S. at 623, *quoting Chapman,* 386 U.S. at 24.

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[3] *See also Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) ("we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis").

Moreover, the burden rests exclusively on the government to establish beyond a reasonable doubt that the error was harmless. *Petrocelli v. Baker*, 862 F.3d 809 (9th Cir. 2017).

D. *The Ninth Circuit Erred In Failing to Consider Alternative Remedies Other Than Suppression*

Notwithstanding those long-settled and fundamental principles, the Ninth Circuit, instead of deciding the Fourth Amendment challenge, resorted to holding that, based on its own *ex parte* analysis, because the "FISA wiretap evidence" was not the "fruit of the unlawful metadata collection," the court could forego a decision on the constitutionality of the metadata collection itself, citing *Ankeny* in which the Ninth Circuit had declined to decide the constitutionality of a search because suppression would not be warranted in any case.

Here, by foregoing a decision on the constitutional question, the Ninth Circuit improperly averted the requirements of *Chapman* while providing only a pseudo-harmless error review in the form of a decision on the availability of suppression remedy alone.

The Ninth Circuit's reasoning was flawed because a Fourth Amendment challenge does not involve solely to suppression of the evidence. By refusing to decide the Fourth Amendment constitutional challenge because of the court's conclusion that a suppression remedy did not exist, the Ninth Circuit impermissibly blocked all other potential alternative remedies that could flow from a finding of unconstitutionality.

For instance, in his appeal, on the grounds of the Fourth Amendment violation at issue, Mr. Moalin moved for dismissal of the indictment, a new trial, and/or an evidentiary hearing. *See, e.g.,* United States v. Moalin, 973 F.3d 977, (Dkt. #24-1) at 123. ("in addition to suppression of evidence, dismissal of the Indictment as to all Appellants is an appropriate remedy"), *citing United States v. Chapman*, 524 F.3d 1073, 1084-88 (9th Cir. 2008),

The unwillingness of the Ninth Circuit to address those potential remedies demonstrates that misapplication of constitutional avoidance, and of potential harmless-constitutional-error review, when a constitutional holding is necessary to adjudicate all issues raised on appeal, creates grave problems. *See also United States v. Ramirez*, 523 U.S. 65, 71, 118 S. Ct. 992, 996, 140 L. Ed. 2d 191 (1998) ("Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression").

Due to the fact that multiple remedies may flow from the constitutional issue presented, avoiding the issue on only one creates non-responsive law.

E. *The Ninth Circuit Erred In Conducting an* Ex Parte *Review of the Materials Relevant to Its § 1861 Determination, and In Not Providing Security-Cleared Defense Counsel Access to Those Materials*

The Ninth Circuit compounded its initial errors by conducting its review of the materials relevant to its determination of the §1861 issues *ex parte*, and concurrently denying security-cleared defense counsel's motion for access to those materials, including those reflecting the chain-of-custody of the §1861 evidence, information

relating to the "reopen[ing]" of the investigation into Petitioner, and the question whether the use of the § 1861 data tainted the FISA applications or any other evidence obtained.

Indeed, the *ex parte* examination subverted the entire constitutional harmless error analysis because it deprived Petitioner (through security-cleared counsel) from demonstrating why any unlawful collection, retention, and/or use of the call records data pursuant to § 1861 was, in fact, *not* harmless (and/or how it tainted other evidence the government obtained in its investigation). *See United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999) ("[a]n error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense")

Also, it is axiomatic that *ex parte* proceedings deprive courts of the ability to make accurate determinations. *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. 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 presupposes contributions from the defense. Eliminating that essential element of the examination renders the process a nullity, and deprives the result of the requisite dimension of accuracy.

In denying Petitioner's security-cleared defense counsel access to the relevant materials, the Ninth Circuit also implemented an intolerable double standard. While the Ninth Circuit based its ruling that a suppression remedy did not exist on the text of § 1861 separate and apart from other sections of FISA, particularly 50 U.S.C. §1806, in denying access it reversed itself by incorporating standards from § 1806 to justify withholding access.

As the Ninth Circuit articulated, § 1861 does not contain the nearly identical set of suppression/disclosure provisions contained in § 1806 (electronic surveillance), § 1825 (physical searches), and § 1845 (pen register/trap-and-trace). 50 U.S.C. §§ 1806(f), 1825(g), 1845(f).

The Ninth Circuit relied on the absence of these statutes in denying a statutory suppression remedy to Mr. Moalin, reasoning "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Moalin*, 973 F.3d at 996-997, *quoting Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983).

However, *ex parte* review relies upon *those very same sections* – 50 U.S.C.§1806(f) in particular – in justifying the District Court's denial of Petitioner's motion for access by his security-cleared counsel. *See* § 1806(f) (permitting district court to "review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted").

Although 50 U.S.C. § 1861(f)(5) does contain an "ex parte and in camera" provision it is applicable only to "Government submissions" filed in "proceedings under this subsection," which refers only to the proceedings governing petitions that persons receiving the production order may file, as described in the preceding sections. 50 U.S.C. § 1861(f)(2)(A)-(D), § 1861(3)-(5). The Ninth Circuit's statutory construction analysis of § 1806 gives further support to this interpretation, as § 1861(f)(5)'s narrow application only to proceedings pursuant to petitions made by persons subject to § 1861 production orders should benefit from the presumption "that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23.

Thus, contrary to its rationale in finding an absence of a suppression remedy peculiar to § 1861 dispositive, with respect to security-cleared defense counsel's access to the materials, the Ninth Circuit held

> If the government avers that disclosure of information relating to the surveillance would harm national security, then the court can review the materials bearing on its legality in camera and ex parte. See, e.g., 50 U.S.C. § 1806(f) (allowing in camera, ex parte review of the legality of electronic surveillance under FISA Subchapter I if "the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States").

Moalin, 973 F.3d at 1001.

The Ninth Circuit's inconsistent reasoning cannot present a defendant with a "heads I win, tails you lose" application of FISA. If § 1861 is not subject to the suppression remedies provided elsewhere in FISA, it is *not* subject to the

requirement for *ex parte* and *in camera* review of the metadata collected, retained, disseminated, and relied upon as predicate to an investigation.

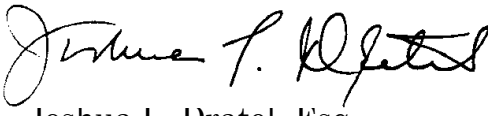
Thus, while § 1806(e), (f), and (g) do apply to the FISA application itself, they do not apply to the evidence derived from the metadata collection, chain-of-custody information, nor to potentially-tainted records relating to the reopening of an investigation into Mr. Moalin, all of which are not subject to statutory *ex parte* and *in camera* review under FISA.

In holding to the contrary, the Ninth Circuit erred in its application of the FISA statutes and affirmed the withholding of information which should have been disclosed to defense counsel.

CONCLUSION

For the reasons set forth above the Supreme Court should grant the instant Petition for Writ of Certiorari to resolve this critical outstanding issue present in national security-related criminal proceedings, and hold that if a Court of Appeals chooses to avoid deciding a Fourth Amendment challenge by means of a suppression determination alone, leaving open the possibility of a constitutional violation, it must apply the established harmless-constitutional-error review standard of "beyond a reasonable doubt," and remand to the Ninth Circuit for a decision on suppression using the correct review standard.

Dated: New York, New York
September 9, 2025



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