25-6783 ORIGINAL

No. 25-____

In the
Supreme Court of the United States

RONALD GERARD BOYAJIAN,

Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(Ad Hoc Panel: Judges Berzon, Rawlinson, and Collins in No. 25-6292),

Respondent.

YUZEF ABRAMOV and UNITED STATES OF AMERICA, Real Parties in Interest.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Pro Se

January 23, 2026

QUESTIONS PRESENTED

1. Whether a three-judge panel may usurp the authority of the full court of appeals by intercepting and terminating a petition for a writ of mandamus addressed to the *en banc* court, thereby nullifying the mechanism Congress and this Court have established under Federal Rule of Appellate Procedure 40 for ensuring circuit uniformity and resolving questions of exceptional importance.

2. Whether a court of appeals' use of unpublished, non-precedential orders to create an intra-circuit conflict on a constitutional question, followed by an ad hoc procedural blockade to prevent *en banc* review and publication of the conflicting decision, constitutes an abuse of the "appellate shadow docket" that warrants this Court's supervisory intervention.

PARTIES TO THE PROCEEDING

Petitioner is Ronald Gerard Boyajian, a federal prisoner. He sought publication of an unpublished Ninth Circuit decision, *Abramov v. United States*, that created an intra-circuit conflict on a key jurisdictional issue. When publication was denied, he petitioned the Ninth Circuit *en banc* for a writ of mandamus to enforce the circuit's mandatory publication rule.

Respondent is the United States Court of Appeals for the Ninth Circuit. An ad hoc three-judge panel thereof intercepted and terminated Petitioner's *en banc* mandamus petition.

The Real Parties in Interest are Yuzef Abramov and the United States of America, who were the parties in the underlying appeal, *Abramov v. United States*, No. 22-56057 (9th Cir.).

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INTRODUCTION

A secret three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, acting without jurisdiction or any apparent authority, hijacked a petition addressed to the full *en banc* court. This procedural maneuver served a single purpose: to conceal an intra-circuit split on a matter of constitutional significance. An earlier panel had created a new, more stringent harmless-error test for the extraterritorial reach of a federal criminal statute but designated its decision unpublished. When Petitioner sought to bring this conflict to the full court's attention via a mandamus petition, the ad hoc panel intercepted the filing, struck it, and barred Petitioner from filing anything further. The petition never reached a single active judge for *en banc* consideration.

This case presents a profound breakdown of the appellate structure. The Ninth Circuit's actions violate the letter and spirit of Federal Rule of Appellate Procedure 40, which vests the *en banc* power exclusively in the majority of active circuit judges. It is a textbook example of the "appellate shadow docket"—the use of procedural shortcuts and non-precedential orders to dispose of consequential cases in the dark, shielding them from public scrutiny and this Court's review. The underlying legal issue suppressed here is of exceptional importance: the constitutional limits on Congress's power to criminalize conduct abroad. This Court should grant certiorari to restore the structural integrity of the *en banc* process and to clarify that courts of appeals cannot use procedural machinations to create and then hide conflicts on vital constitutional questions.

OPINIONS BELOW

All orders below are unpublished and are reproduced in the Appendix:

- Order of the Ad Hoc Panel (Berzon, Rawlinson, Collins, JJ.) terminating mandamus petition and barring future filings (Oct. 29, 2025).

- Order of the Merits Panel (Hurwitz, Miller, Sung, JJ.) denying motion to publish the *Abramov* memorandum disposition (September 24, 2025).
- Memorandum Disposition in *Abramov v. United States*, No. 22-56057 (9th Cir. June 27, 2025).
- Memorandum Disposition in *United States v. Boyajian*, No. 16-50327 (9th Cir. June 9, 2023).

JURISDICTION

The Ninth Circuit's ad hoc panel entered its final order terminating the case on October 29, 2025. This Court has jurisdiction to review that final order by writ of certiorari under 28 U.S.C. § 1254(1) and its supervisory authority over the lower federal courts. The petition is timely filed under Supreme Court Rule 13.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 40(c): When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions [40(b)(2)(A)]; or (2) the proceeding involves a question of exceptional importance [40(b)(2)(D)].

Ninth Circuit Rule 36-2: Criteria for Publication. A written, reasoned disposition of a case must be published in a signed opinion if it: (a) Establishes, alters, modifies or clarifies a rule of law, or (b) Calls attention to a rule of law that appears to have been generally overlooked; … .

Article I, § 8, cl. 3 (Foreign Commerce Clause), Article III, § 2 (case-or-controversy and, through interpretation, standing), 28 U.S.C. §§ 1254(1), 1651, 2071, 2072, and Federal

Rule of Appellate Procedure 47.

STATEMENT OF THE CASE

A. Petitioner's Conviction and the *Boyajian* One-Step Harmless-Error Rule

Petitioner was convicted in the Central District of California of violating 18 U.S.C. § 2423(c), which criminalizes illicit sexual conduct in foreign places by a person who "travels in foreign commerce." At trial, the district court failed to instruct the jury on this essential jurisdictional element. On appeal, a Ninth Circuit panel affirmed in an unpublished memorandum. *Boyajian v. United States*, No. 16-50327 (June 9, 2023). Applying this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), the panel held the error was harmless based on a one-step analysis: whether the record contained "overwhelming" evidence of Petitioner's "traveler" status (the statute at the time exempted from its reach foreign conduct by Americans while temporarily or permanently residing abroad). The panel did not require a finding that the omitted element was uncontroverted by the defendant. The government now cites the non-precedential *Boyajian* decision to defend similar convictions.

B. The *Abramov* Decision and the Conflicting Two-Step Standard

Two years later, in *Abramov v. United States*, No. 22-56057, a different Ninth Circuit panel confronted the same instructional error under § 2423(c). The government, relying on and urging alignment with *Boyajian*, argued that overwhelming evidence of travel rendered the error harmless. The *Abramov* panel explicitly rejected that argument. At hearing, circuit judges Miller and Sung repeatedly explicate for the benefit of government counsel that pursuant to *Neder* affirmance requires the government prove "uncontroverted" not just overwhelming evidence. Oral argument transcript (App. D at 12a,15a,18a) The Ninth Circuit's website provide online accessible archived audio (https://www.ca9.uscourts.gov/media/audio/?20251212/25-5975/) and video https://www.ca9.uscourts.gov/media/video/?20250604/22-56057/) recordings of this hearing.

The panel held that *Neder* imposes a stricter, two-step test for harmless error when an element is omitted from the jury's consideration: (1) the element must be uncontroverted at trial, *and* (2) the record must contain overwhelming evidence supporting the element. Because Abramov had contested his status as a "traveler," the panel reversed his conviction and 150-year sentence, and remanded for a new trial. Unpublished memorandum (June 27, 2025) (App. C). The panel, however, designated its dispositive constitutional ruling as a non-precedential memorandum.

C. The Procedural Blockade: Denied Publication and Intercepted Mandamus

Because the unpublished *Abramov* rule directly conflicted with the *Boyajian* rule still being applied to him, Petitioner moved to publish the *Abramov* decision. He argued that publication was mandatory under Ninth Circuit Rule 36-2 because the decision "alter[ed]" a rule of law and called attention to an "overlooked" aspect of this Court's precedent. The parties Abramov and United States did not oppose publication. The *Abramov* panel denied the unopposed motion without explanation. (App. B).

Petitioner then sought a writ of mandamus from the Ninth Circuit *en banc*. The petition was expressly addressed to the full court and asked it to exercise its supervisory authority to compel publication under Rule 36-2 and resolve the clear intra-circuit conflict. The petition was never circulated to the active judges of the Ninth Circuit. Instead, on October 29, 2025, an ad hoc panel of three judges—none of whom served on the *Boyajian* or *Abramov* merits panels—issued a summary order. (App. A). Without explanation, analysis, or citation to any rule or authority, this panel struck the mandamus petition, ordered the clerk to close the case, and barred Petitioner from making any further filings. The *en banc* court was never given the opportunity to consider the petition addressed to it.

ARGUMENT

I. The Ad Hoc Panel's Order Decimates the En Banc Process Mandated by Congress and This Court.

The *en banc* mechanism is the primary institutional safeguard for maintaining the "law of the circuit" and is a power that belongs to the full court of appeals, not a select few. Fed. R. App. P. 40(c). This Court has repeatedly emphasized that the authority to hear a case *en banc* is a critical tool for "securing uniformity of the court's decisions" and resolving "question[s] of exceptional importance." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250 (1953). The power is vested exclusively in "[a] majority of the circuit judges who are in regular active service." Fed. R. App. P. 40(c).

Here, an ad hoc panel of three judges arrogated that power for itself. It intercepted a petition directed to the *en banc* court and disposed of it unilaterally, preventing it from ever being circulated to the active judges for a vote. No published rule of the Ninth Circuit or the Federal Rules of Appellate Procedure authorizes such a procedure. It is a structural deviation of the highest order. By preventing circulation, the panel functionally repealed Rule 40, leaving the circuit with no "workable procedures" for exercising its *en banc* authority. *See W. Pac. R.R. Corp.*, 345 U.S. at 259.

This is not a mere procedural misstep; it is a fundamental breakdown of the appellate structure designed by Congress. When a three-judge panel can secretly nullify a litigant's access to the full court, it undermines the very legitimacy of the judicial process. This Court's supervisory authority is required to correct such a grave departure from established procedure and to reaffirm that the *en banc* power cannot be usurped by a shadow panel.

II. This Case Is a Vehicle to Address the Corrosive Effect of the Appellate "Shadow Docket."

This Court has recently expressed grave concerns about the use of unexplained,

summary orders to decide momentous issues on its own "shadow docket."[1] The same concerns apply with equal, if not greater, force to the courts of appeals, where the overwhelming majority of cases are resolved through such means.

The Ninth Circuit terminates over 90% of its appeals via unpublished, non-precedential memorandum dispositions.[2] This practice, which the late Justice Scalia warned fosters a body of "secret law" insulated from stare decisis[3], becomes profoundly corrosive when combined with procedural barriers that prevent internal correction. This case is a textbook example. The *Abramov* panel announced a significant, conflict-creating constitutional rule, but shielded it from precedential effect through non-publication. Then, the ad hoc panel erected an insurmountable procedural wall to block *en banc* review.

This combination of non-publication and procedural obstruction creates an appellate shadow docket where significant legal developments occur without transparency, precedential weight, or the possibility of review. It allows panels to experiment with the law or create intra-circuit conflicts without accountability. By granting certiorari in this case, which presents a clean procedural vehicle, the Court can provide urgently needed guidance

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[1] See, e.g., *A.A.R.P. v. Trump*, 604 U.S. ____ (2025) (Alito, J., dissenting). Justice Alito, joined by Justice Thomas, has condemned the issuance of emergency orders "without giving the lower courts a chance to rule, without hearing from the opposing party, … and without providing any explanation for its order." As Justice Alito noted, such actions risk bypassing "established procedures" and the "obligation to follow the law," enabling unaccountable federal processes. Id. (slip op., at 5). See, also, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (Alito, J., dissenting), *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) Roberts, CJ, dissenting), *Noem v. Doe* (May 2025) (Jackson, Sotmayor JJ, dissenting), *Trump v. Wilcox* (May 2025) (Kagan, Sotomayor, Jackson, JJ, dissenting)

[2] Will Yeatman, *Ninth Circuit Review-Reviewed: A Surfeit of Unpublished Opinions?* Yale J Regul 9/16/24. https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-a-surfeit-of-unpublished-opinions/

[3] See, e.g., *Jones v. Superintendent, Va. State Farm*, 465 U.S. 1014 (1984) (Scalia, J., dissenting from denial of certiorari), and subsequent dissents criticizing the Ninth Circuit's reliance on unpublished, uncitable dispositions; Justice Scalia warned that such practices threaten to create a body of "secret law" insulated from the constraints of precedent and meaningful public scrutiny.

on the limits of non-publication and affirm that procedural rules cannot be manipulated to shield important decisions from the light of day.

III. The Suppressed Legal Issue Is a Recurring Constitutional Question of Exceptional Importance.

The procedural blockade in this case was not employed to hide a trivial matter. It was used to conceal a significant intra-circuit conflict over the constitutional limits on federal extraterritorial criminal jurisdiction. The conflict between *Boyajian*'s one-step harmless-error test and *Abramov*'s stricter two-step test under *Neder* is a recurring issue of national importance.

This Court has repeatedly scrutinized congressional attempts to regulate conduct beyond our borders. As Justice Thomas has warned, an overly expansive reading of the Foreign Commerce Clause risks allowing Congress to "regulate prostitution in Australia" or "working conditions in factories in China," effectively acting as "the world's lawgiver." *Baston v. United States*, 580 U.S. 1182 (2017) (Thomas, J., dissenting from denial of certiorari). The jurisdictional element in 18 U.S.C. § 2423(c) is the sole tether preventing such a result. The stricter two-step harmless-error rule from *Abramov* serves as a vital judicial check on that power, ensuring the jurisdictional nexus is properly established before a citizen is convicted.

The *Abramov* rule also aligns perfectly with this Court's recent jurisprudence in the civil context, which has progressively narrowed the extraterritorial reach of federal statutes. In cases like *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021), this Court has insisted that claims must "touch and concern the territory of the United States ... with sufficient force" to displace the presumption against extraterritoriality. The suppressed *Abramov* rule is the criminal-law analogue to this

principle. By burying it, the Ninth Circuit has obstructed doctrinal coherence and left a critical constitutional boundary undefined.

IV. Petitioner Has Standing, and This Case Is an Ideal Vehicle for Review.

Petitioner has clear Article III standing. The non-publication of *Abramov* inflicts a concrete and particularized injury: it allows the government to continue relying on the weaker *Boyajian* standard against him while denying him the ability to cite binding, conflicting precedent from *Abramov*. Specifically, citing *Abramov* as *precedent* would enable Petitioner to (1) recall the Boyajian mandate, (2) obtain remand in his current motions for new trial direct appeal case No. 24-1582, and (3) demonstrate circuit conflict for certiorari. An order from this Court vacating the ad hoc panel's procedural blockade and directing circulation of his mandamus petition would directly redress that injury by restoring the proper *en banc* process designed to resolve such conflicts.

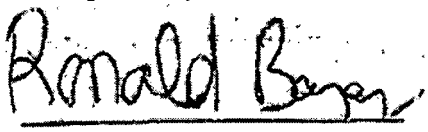
This case presents an ideal and pristine vehicle for addressing the questions presented. The Court need not reach the complex merits of the underlying harmless-error analysis or Petitioner's criminal conviction. It need only decide the threshold procedural question: whether a three-judge panel can prevent an *en banc* petition from ever reaching the *en banc* court. A simple remand with instructions to circulate the petition in accordance with Rule 40 would correct the grave structural error committed below and vindicate the integrity of the Federal Rules of Appellate Procedure.

CONCLUSION

A three-judge panel of the Ninth Circuit, acting in the shadows, dismantled the *en banc* process to hide a decision that alters the constitutional boundaries of federal power. This structural rupture, emblematic of the growing crisis of the appellate shadow docket, demands this Court's supervisory review. The petition for a writ of certiorari should be granted.

Dated: January 23, 2025

Respectfully submitted,



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