No. 17-5126

In The Supreme Court of the United States

MOHAMED OSMAN MOHAMUD,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AND PROFESSOR ERWIN CHEMERINSKY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Fourth Amendment and the separation of powers doctrine prohibit the government's seizure, retention, search, and subsequent use of United States citizens' emails and other private internet and telephonic communications under § 702 of the Foreign Intelligence Surveillance Act, where those searches are conducted in the United States in the absence of any judicial warrant or individualized judicial review?

2. Where this Court's precedent places the burden of proving harmless error on the government, should the Sixth Amendment right to jury trial and the separation of powers doctrine foreclose circuit courts from sua sponte declaring preserved trial errors to be harmless when the government has not raised harmlessness; and, if such sua sponte review is permitted, should this Court exercise its supervisory authority to articulate a clearer and fairer standard?

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Ninth Circuit Federal Public and Community Defenders[2] provide representation, in

[1] Under Sup. Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of amici's intention to file this amicus brief ten days before the due date. Letters of consent from both parties to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

[2] The *amici* Defenders are: Hilary Potashner, California Central Federal Defender; Heather Williams, California Eastern Federal

each district of the Ninth Circuit and pursuant to 18 U.S.C. § 3006A, to accused persons who lack the financial means to hire private counsel. Amici regularly advocate on behalf of the criminally accused in federal court, with a core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system.

Amici Defenders have a strong interest in the controversies presented here since, left uncorrected, they threaten defendants' core rights and open the door to government overreach. The Ninth Circuit's sua sponte determination of harmlessness is of particular concern, because it contravenes not only Circuit precedent, but established and fundamental principles of the adversary system.

Erwin Chemerinsky is the Dean and Distinguished Professor of Law and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law. He is the author of 10 books, including treatises on constitutional law and federal court jurisdiction and casebooks on constitutional law and criminal procedure. He has

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Defender; Steven Kalar, California Northern Federal Defender; Reuben Cahn, Exec. Dir., Federal Defenders of San Diego, Inc.; John T. Gorman, Guam Federal Defender; Peter C. Wolff, Jr., Hawaii Federal Defender; Samuel Richard Rubin, Exec. Dir., Federal Defender Services of Idaho, Inc.; Anthony Gallagher, Exec. Dir., Federal Defenders of Montana; Rene Valladares, Nevada Federal Defender; Andrea George, Exec. Dir., Eastern District of Washington Community Defender; Rich Curtner, Alaska Federal Defender; Jon Sands, Arizona Federal Defender; and Michael Filipovic, Washington Western Federal Defender.

written over 250 law review articles, many of which deal with issues of federal court jurisdiction.

SUMMARY OF ARGUMENT

1. The court of appeals found four likely evidentiary errors but deemed them cumulatively harmless. That court's harmless error analysis--conducted sua sponte with respect to three of the errors--disregarded the restrictions this Court has placed on appellate determinations of harmlessness. Those restrictions provide a vital safeguard for the Sixth Amendment right to trial by jury. The Court should grant the writ to clarify and reaffirm the limits of harmless error analysis, and particularly the limits on sua sponte harmless error review.

2. The court of appeals interpreted § 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a, as permitting the warrantless search and seizure of Americans' personal email communications. This holding threatens the integrity of the Fourth Amendment as historically understood, and with it the protection of Americans from the abuse of government power. Review by the Court is essential.

ARGUMENT

I. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THE APPROPRIATE STANDARD FOR SUA SPONTE HARMLESS ERROR ANALYSIS.

The court of appeals found four likely evidentiary errors but deemed them cumulatively harmless. Pet. App. 59. That court's harmless error analysis--conducted sua sponte with respect to three of the errors--disregarded the restrictions this Court has placed on appellate determinations of harmlessness. Those restrictions provide a vital safeguard for the Sixth Amendment right to trial by jury. The Court should grant the writ to clarify and reaffirm the limits of harmless error analysis, and particularly the limits on sua sponte harmless error review.

A. To Safeguard the Sixth Amendment Jury Trial Right, Harmless Error Review Must Be Carefully Limited.

The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.

Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004); *see United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

At the same time, Congress and this Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. *See, e.g.,* 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 757-59 (1946). The Court has thus determined that most errors--even constitutional errors--are subject to harmless error analysis. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

This Court has accommodated both the absolute jury trial right and the interest in avoiding the societal cost of unnecessary reversals by insisting that harmless error review be carefully limited. These limits can be distilled into five principles.

First, the burden of proving harmlessness rests on the government. If the government cannot show that the error did not affect the verdict, both the Sixth Amendment jury trial right and the underlying right at issue require reversal and a new trial at which a jury untainted by the error can determine the defendant's guilt. For constitutional error, the government must show harmlessness beyond a reasonable doubt. *See, e.g., Chapman v. California*,

386 U.S. 18 (1967). For non-constitutional error, the inquiry is "whether the error itself had substantial influence [on the verdict]. If so, *or if one is left in grave doubt*, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765 (emphasis added); *see, e.g., United States v. Olano*, 507 U.S. 725, 741 (1993) (under Fed. R. Crim. P. 52(a), the government "bears the burden of showing the absence of prejudice").

Second, harmless error analysis must focus on the effect of the error on the verdict rendered, rather than the verdict a hypothetical jury would have rendered in an error-free trial. As a unanimous Court explained in *Sullivan*:

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

508 U.S. at 279 (emphasis in original); *see, e.g., Kotteakos*, 328 U.S. at 764 ("[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the

minds of other men, not on one's own, in the total setting.").

Third, unlike when determining sufficiency of the evidence, *e.g., Jackson v. Virginia*, 443 U.S. 307 (1979), appellate judges making harmless error assessments may not view the evidence in the light most favorable to the prosecution, *see, e.g., United States v. Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999). Thus, for example, appellate judges may not make credibility determinations or draw inferences in the government's favor. Appellate judges must recognize the possibility that jurors may disbelieve a prosecution witness because of impeachment, the witness' demeanor, or the inherent implausibility of the witness' testimony. *See, e.g., Fulminante*, 499 U.S. at 298-99; *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question"); *cf. Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (in assessing whether erroneous limitation of cross-examination is harmless, court must "assum[e] that the damaging potential of the cross-examination were fully realized"). Similarly, jurors may credit a defense witness--even one whose testimony the appellate judges disbelieve. *See, e.g., United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (given that prosecution and defense witnesses both "gave a plausible account," neither of which was "*inherently* unlikely to be true . . . and given the further fact that we are precluded from making independent credibility determinations on appeal," error cannot be found harmless (emphasis in original)).

The practical reason for this approach is simple: appellate judges, unlike jurors, cannot observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). They cannot observe shifty eyes, or nervous swiveling, or a flushed face, or a sweaty brow. A muttered sentence that draws derisive snickers from the jury has the same weight in a transcript as a confident assertion that draws nods of agreement. Even a document may have a strikingly different effect when presented to a jury in the courtroom through a sponsoring witness than when reviewed in the cloister of an appellate judge's chambers. Appellate judges who attempt to assess the weight to be given a witness' testimony or the significance to be afforded a particular document engage in a task they lack the institutional competence to perform.

The constitutional reason to view the evidence in the light most favorable to the defense is equally simple: the Sixth Amendment categorically assigns the fact-finding function to the jury, rather than to judges--"a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Appellate judges

> are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice,

> juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945). In light of this constitutional allocation of responsibility, appellate judges may not weigh the evidence and make their own assessments of credibility and probative value.

Fourth, and relatedly, appellate judges must examine "the record as a whole," not merely those portions that favor the government. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see, e.g., Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949) (considering entire record and finding that erroneous admission of hearsay was not harmless); *Kotteakos*, 328 U.S. at 764 (harmless error inquiry "must take account of what the error meant to [the jurors], not singled out and standing alone, but in relation to all else that happened"). The record as a whole includes evidence the defense elicits on cross-examination of government witnesses and evidence the defense presents in its case.

Fifth, the inquiry is not "merely whether there was enough [evidence] to support the result apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765; *see id.* at 767 (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" absent the error). The question instead is whether, in light of the entire record, the government has established that the error did not affect the jury's verdict. *See Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question,

however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (quotation omitted)); *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) ("We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of.").

B. The Court of Appeals' Harmless Error Analysis Ignored This Court's Limits and Violated Petitioner's Sixth Amendment Jury Trial Right.

The court of appeals' harmless error methodology violated the principles outlined above. The court's cursory analysis gave no indication that it placed the burden of proving harmlessness on the government--much less that it required the government to prove harmlessness beyond a reasonable doubt, as *Chapman* requires for errors of constitutional magnitude. The court gave no indication that it assessed "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279 (emphasis in original). To the contrary, the court's focus on the "futility and costliness of reversal and further litigation" involves exactly the kind of "speculat[ion] upon probable reconviction" that this Court expressly forbids. *Kotteakos*, 328 U.S. at 764. The court of appeals' focus on the "costliness" of a retrial is particularly troubling given the harsh, thirty-year sentence that petitioner faces.

In addition, the court of appeals' discussion of the record focuses on the sufficiency of the evidence, addresses only the prosecution case, and fails to view the record in the light most favorable to the defense. *E.g.*, Pet. App. 5-20, 26-31. In each of these respects, the court's harmless error analysis contravenes long-standing, constitutionally-rooted principles.

C. The Court of Appeals' Deeply Flawed Conclusion Demonstrates The Dangers of Sua Sponte Harmless Error Review.

The government did not assert that three of the four potential evidentiary errors the court of appeals identified were harmless. Nonetheless, that court invoked harmless error sua sponte because, it maintained, "in the context of the entire trial record, 'the harmlessness of the errors is not reasonably debatable,' and further litigation would be futile." Pet. App. 59 (quoting *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1101 (9th Cir. 2005)). The court of appeals' deeply flawed conclusion demonstrates why sua sponte harmlessness review of constitutional error should be permitted rarely, if ever.

The court of appeals' approach did exactly what its own decisions prohibit: it "unfairly tilt[ed] the scales of justice" by "construct[ing] the government's best arguments for it without providing the defendant a chance to respond." *Gonzalez-Flores*, 418 F.3d at 1101. Petitioner had no opportunity to address the principles that govern harmless error review--principles the court of appeals largely ignored, as

discussed above. Nor did petitioner have an opportunity to analyze the record in light of those principles. The court of appeals' sua sponte harmlessness review was especially inappropriate on a lengthy and complex record such as this, and in a close case where, as the court of appeals acknowledged, Pet. App. 21, 25, the defendant mounted a "spirited," "supportable," and "solid" defense.

To vindicate the fundamental Sixth Amendment right to trial by jury, the Court should grant the writ, reaffirm the careful limits it has placed on harmless error review, and determine when, if ever, sua sponte harmlessness review is appropriate for constitutional errors.

II. THE NINTH CIRCUIT'S AFFIRMANCE OF WARRANTLESS SURVEILLANCE UNDER § 702 CONTRAVENES THIS COURT'S JURISPRUDENCE AND, LEFT UNCORRECTED, WILL ELIMINATE VAST SWATHS OF CORE FOURTH AMENDMENT PROTECTION.

The court of appeals interpreted § 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a, as permitting the warrantless search and seizure of Americans' personal email communications. Pet. App. 36-50. This holding threatens the integrity of the Fourth Amendment as historically understood, and with it the protection of Americans from the abuse of government power. Review by the Court is essential.

A. The Reach of the Fourth Amendment Exception Adopted by the Ninth Circuit Is Too Great to Survive Constitutional Scrutiny and Conflicts with This Court's Precedent.

The collection of millions of Americans' electronic communications should not be subject to warrantless interception and review on the theory that, because their interception is "incidental"—i.e., not the *primary* target, according to the government, of its surveillance action—it is exempt from Fourth Amendment protection. *See* Pet. Cert. 13, 19-22. This purported exception is startlingly broad even on its face, and results in a de facto circumvention of Fourth Amendment protection for Americans.

Whether that circumvention is actively desired or merely a useful result for the government, the end result is the same: millions of Americans' private communications are secretly swept up and then retained by the government for secret review, without a warrant, without meaningful judicial oversight, and without accountability. Amici agree with petitioner that this scheme violates the Fourth Amendment and cannot be squared with this Court's decisions in *Keith* and *Berger*. *See* Pet. Cert. 19-22 (discussing, *inter alia*, *United States v. United States District*, 407 U.S. 297 (1972) (*Keith*) and *Berger v. New York*, 388 U.S. 41 (1967)).

B. The Court of Appeals Erroneously Expanded the Third-Party Doctrine.

In ruling against petitioner regarding the warrantless seizure and search of his emails, the court of appeals held that he had a "diminished" interest in the privacy of his communications, simply because those communications "had been sent to a third party." Pet. App. 46. In reaching that conclusion, the court glossed over the pivotal doctrinal distinction between a communication at risk of being turned over to law enforcement by its intended recipient, versus a communication that is directly intercepted by law enforcement. More fundamentally, it failed to adequately address the acute challenges to Fourth Amendment jurisprudence occasioned by the vast scope and dizzying speed of recent and ongoing technological shifts, instead stretching the third-party doctrine beyond where this Court ever intended it to go. In the process, a circuit split was created between the Ninth Circuit and the Sixth Circuit, the latter having correctly held in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), that people have a reasonable expectation of privacy in the contents of sent emails, such that "government agents violate[] the Fourth Amendment when they obtain[] the contents of [defendant's] emails" without a warrant. *Id*. at 288.

As of 2013, the National Security Agency had already intercepted, via cyber surveillance, nearly 200 million communication records. Russell L. Weaver, *Cybersurveillance in a Free Society*, 72 Wash. & Lee. L. Rev. 1207, 1208 (2015). "[E]ven if

Americans were not the intended targets of [this] eavesdropping, they routinely fell 'into the [NSA's] global net.'" *Id.* at 1209 (quoting Scott Shane, *Documents Detail Surveillance*, N.Y. Times, June 21, 2014, at A9). This surveillance capacity and use—which "can only be regarded as extraordinary"—is generally acknowledged as "present[ing] a huge potential for abuse." *Id.* at 1239-40.

Indeed, the court of appeals acknowledged as "most troubling" the "vast, not *de minimis*" volume of such "incidentally" collected communications. Pet. App. 41. Rather than check the threat implicit in that concern, however, the court instead held that the warrantless search of petitioner's emails was acceptable under the Fourth Amendment because his privacy interest in his emails was "diminished." Pet. App. 46. That decision, should it stand, is a green light to the government to continue the warrantless interception, review, and use in criminal prosecutions of the contents of Americans' private communications.

This practice violates the *Katz* doctrine, which is no less true and urgent than when the Court first articulated it: a subjective and reasonable expectation of privacy is protected by the Fourth Amendment from government intrusion. *Katz v. United States*, 389 U.S. 347, 351-52 (1967). That is, "it is *society's* beliefs and expectations that determine the scope of privacy protected by the Fourth Amendment." Bernard Chao, et al., *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, U. Denv. Sturm College of Law, Working Paper No.

17-03, 12-13 (April 19, 2017) (discussing *Katz* and *Rakas v. Illinois,* 439 U.S. 128 (1978)).

It is generally understood that society expects the contents of emails to be private, and empirical research confirms this. A carefully constructed survey of 1200 participants, for example, found that 87% would consider police monitoring of "where and who you send emails to as well as how much data is sent"—i.e., just the virtual envelope of the communications, rather than the far-more-private content itself—to violate a reasonable expectation of privacy. Chao et al., *supra*, at 48; *see also* Christine S. Scott-Hayward, Henry F. Fradella, and Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 Am. J. Crim. L. 19, 58 (2015) (concluding that "society tends to have significantly higher expectations of privacy than the Supreme Court and many lower courts acknowledge").

The Ninth Circuit recognizes that the privacy interests in email and physical mail "are identical." *United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008). Even in *Mohamud*, the court noted that "we treat emails as letters." Pet. App. 45. The court goes astray, however, in its application of the third-party doctrine to conclude that, once an email has been received—i.e., for all practical purposes, once it has been sent—that expectation of privacy is significantly diminished for Fourth Amendment purposes. Pet. App. 45-46.

In so concluding, the court of appeals relies on a line of third-party-doctrine cases from half a century

ago: *United States Miller*, 425 U.S. 435 (1976); *United States v. White*, 401 U.S. 745 (1971); and *Hoffa v. United States*, 385 U.S. 293 (1966). Pet. App. 46. In *Miller*, this Court held that the defendant had "no legitimate 'expectation of privacy'" in copies of bank records because those documents were "not confidential communications." 425 U.S. at 442. In *Hoffa*, the Court held that there was no constitutional protection for comments made voluntarily and directly to a government informer. 385 U.S. at 413 ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."). And in *White*, the Court held that police eavesdropping via a wired informant was likewise permissible. 401 U.S. at 753.

The court of appeals, however, then glosses over the crucial distinction between those cases and the government interception of Mohamud's emails—that "prior case law contemplates a diminished expectation of privacy due to the risk that the recipient will reveal the communication, *not that the government will be monitoring the communication unbeknownst to the third party*." Pet. App. 46 (emphasis added). Regarding this profoundly different posture—the government as interceptor rather than recipient of a third-party's interception—the court of appeals says merely that, "[w]hile these cases do not address the question of government interception, the communications at issue here had been sent to a third party, which reduces Mohamud's privacy interest at least somewhat . . ." *Id.* "At least

somewhat" is not defined, nor is the rationale for the conclusion elucidated or defended.

The application of this Court's third-party doctrine exception to the facts of this case is not supported, diminishes the Fourth Amendment, contravenes *Katz*, and conflicts with the Sixth Circuit's holding in *Warshak*. *See* Pet. Cert. 24-25; *see also* Weaver, *Cybersurveillance in a Free Society*, 72 Wash. & Lee. L. Rev. at 1232 (noting that the third-party doctrine, "[i]f literally applied . . . creates a gaping hole in the Fourth Amendment and suggests that the Fourth Amendment provides almost no protection against the NSA's massive surveillance operation").

Finally, in addition to enjoying a reasonable expectation of privacy, the contents of Americans' emails are also entitled to protection under a traditional theory of trespass upon chattels. The Tenth Circuit explored this reasoning in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), drawing on this Court's Fourth Amendment trespass reasoning in *United States v. Jones*, 565 U.S. 400 (2012). "[T]he warrantless opening and examination of (presumptively) private correspondence . . . . seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment," the Tenth Circuit stated. *Ackerman*, 831 F.3d at 1307 (citations omitted). Recognizing that the framers "were concerned with the protection of physical rather than virtual correspondence," the court observed that "a more obvious analogy from principle to new technology is hard to imagine and, indeed, many

courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications." *Id*. at 1308 (citations omitted). Thus, even in the unlikely event that this Court were to hold *Katz* inapplicable here because of the third-party doctrine, Fourth Amendment protection should still apply.

C. Review Should Be Granted Because § 702 Implicates Linked Constitutional Concerns Involving the Fourth Amendment, First Amendment, and Separation of Powers.

As petitioner discusses, the overall constitutionality of § 702 has yet to be addressed by this Court. Amici agree that such review is essential. Not only does § 702 infringe on rights guaranteed by the Fourth Amendment, as outlined above, that infringement runs hand in glove with a blow to the exercise of free expression under the First Amendment. In addition, § 702's shift of traditional judicial checks on executive power to the executive branch itself raises grave concerns regarding the separation of powers. *See* Pet. Cert. at 26-29. In light of these questions of exceptional national importance, this Court should grant review.

D. This Case Is the Correct—and Perhaps Only—Vehicle for the Court to Resolve These Constitutional Questions.

This is the first case involving § 702-derived information to reach this Court. It may well be the last. This case thus represents the correct vehicle for the Court to authoritatively resolve the significant constitutional issues that § 702 presents.

Since 2008, the government has provided notice in only a handful of cases that it planned to introduce information obtained, or derived from, § 702 surveillance.[3] Indeed, from 2008 to 2013, no defendants were provided notice, contrary to the government's assurances to this Court in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). *See* Br. for Petitioner, *Amnesty*, 2012 WL 3090949, at *8; Tr. of Oral Argument at 2-4.[4] In the wake of revelations about the scope of the Government's surveillance under § 702, the Department of Justice gave notice to a few defendants in criminal cases

[3] Amici are aware of only eight cases, including this one, where notice has been provided. *See United States v. Hasbajrami*, No. 11-CR-623 (E.D.N.Y. Apr. 2, 2014) (ECF No. 69), *appeal docketed*, No. 15-2684 (2d Cir.); *United States v. Khan*, No. 12-CR-659 (D. Or. Apr. 3, 2014) (ECF No. 59); *United States v. Mihalik*, No. 11-CR-833 (C.D. Cal. Apr. 4, 2014) (ECF No. 145); *United States v. Muhtorov*, No. 12-CR-33 (D. Colo. Oct. 25, 2013) (ECF No. 457); *United States v. Al-Jayab*, No. 16-CR-181 (N.D. Ill. Apr. 8, 2016) (ECF No. 14); *United States v. Mohammad*, No. 15-cr-358 (N.D. Ohio Dec. 21, 2015) (ECF No. 28); *United States v. Zazi*, No. 09-CR-663 (E.D.N.Y. July 27, 2015) (ECF No. 59).

[4] http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf.

(belatedly, in some instances). *See* Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times (July 15, 2013). But the small number of cases in which notice has been given stands in stark contrast to the scope of § 702 surveillance and its consequences for the privacy of millions of people around the world. The government has never explained this vast discrepancy.

The government's ability to insulate § 702 surveillance from meaningful judicial review extends beyond criminal prosecutions. The government has succeeded in delaying or preventing review of the constitutionality of § 702 surveillance in civil cases, primarily owing to the government's steadfast refusal to admit whether the it has subjected plaintiffs' communications to surveillance. *See Jewel v. NSA*, 2015 WL 544925, *2-5 (N.D. Cal. 2015) (denying motion for summary judgment on state secret grounds in case challenging upstream surveillance); *Wikimedia v. NSA*, 857 F.3d 193 (4th Cir. 2017) (reversing dismissal of constitutional challenge to § 702 surveillance).

Moreover, in nearly a decade of § 702 surveillance, the FISC's review of the government's certifications or directives has never reached the Foreign Intelligence Court of Review, much less this Court. In fact, in that period only one provider has challenged a directive it received under § 702. *See [Redacted]*, Memorandum Opinion (FISC 2014) (available at https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2006%2006.13.17%20--%20REDACTED.PDF). Even then, the provider was

not granted access to opinions of the FISC on which the government relied. *See [Redacted]*, Opinion on Motion for Disclosure of Prior Decisions (FISC 2014) (available at https://www.documentcloud.org/documents/3865012-Eff-16-Cv-02041hsg-Doc-12-06-13-17-Redacted.html). The provider was ultimately ordered to comply with the directive, and it did not appeal that decision to the FISCR. And, although recent reforms have introduced an adversarial element to the 702-certification process, the proceedings before the FISC overwhelmingly remain a secret and ex parte process. For these reasons, this case presents an unusual--perhaps unique--opportunity to address the constitutionality of § 702 surveillance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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