No. 14-30217

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant-Appellant,

On Appeal From the United States District Court
For the District of Oregon
Honorable Garr M. King

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AND PROFESSOR ERWIN CHEMERINSKY IN SUPPORT OF REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

DATED: February 27, 2017

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae 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.

[1] Counsel for amici state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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

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

law and criminal procedure. He has written over 250 law review articles, many of which deal with issues of federal court jurisdiction.

In accordance with Ninth Cir. R. 29-2(a), amici state that all parties have consented to the filing of this brief.

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC TO CORRECT THE PANEL'S HARMLESS ERROR ANALYSIS.

The panel found four likely evidentiary errors but deemed them cumulatively harmless. The panel's harmless error analysis--conducted sua sponte with respect to three of the errors--disregarded the restrictions the Supreme 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 rehearing to reaffirm and enforce the limits of harmless error analysis.

A. The Panel Should Not Have Conducted Sua Sponte Harmless Error Review.

The government did not assert that three of the four potential evidentiary errors the panel identified were harmless. Nonetheless, the panel 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. B at 9 (quoting *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1101 (9th Cir. 2005)). It is doubtful that sua sponte harmlessness

review of constitutional error is *ever* appropriate, given the importance of the rights at stake and the unfairness of denying the defendant an opportunity to address the issue. But circuit and Supreme Court precedent make clear that it is inappropriate on a lengthy and complex record such as this, and in a close case where, as the panel acknowledged, Pet. App. A at 21, 25, the defendant mounted a "spirited," "supportable," and "solid" defense. *See, e.g., United States v. Kloehn*, 620 F.3d 1122, 1130 (9th Cir. 2010). The panel's approach did exactly what this Court's 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.

The panel's sua sponte harmlessness review is especially troubling because the panel rested that review on the conclusion that the harmlessness of the errors was not "reasonably debatable," but offered no analysis to support that assertion. Pet. App. B at 8-9. As the following parts show, the panel's approach, to the extent it can be discerned, disregarded the limits the Supreme Court has placed on harmless error review.

B. 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 the Supreme 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 Supreme 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).

The Supreme 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.").

C. The Panel's Harmless Error Analysis Ignored the Supreme Court's Limits and Violated Appellant's Sixth Amendment Jury Trial Right.

The panel's harmless error methodology violated the principles outlined above. The panel'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 panel 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 panel's focus on the "futility and costliness of reversal and further litigation" involves exactly the kind of "speculat[ion] upon probable reconviction"

that the Supreme Court expressly forbids. *Kotteakos*, 328 U.S. at 764. The panel's focus on the "costliness" of a retrial is particularly troubling given the harsh, thirty-year sentence that Mohamud faces.

In addition, the panel's 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. A at 5-20, 26-31. In each of these respects, the panel's harmless error analysis contravenes long-standing, constitutionally-rooted principles.

II. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC TO DETERMINE WHETHER DISCLOSURE OF THE FISA APPLICATIONS, ORDERS, AND RELATED MATERIALS WAS "NECESSARY" UNDER 50 U.S.C. § 1806(f) OR REQUIRED AS A MATTER OF DUE PROCESS.

When an "aggrieved person" such as Mohamud moves to suppress the fruits of Foreign Intelligence Surveillance Act[3] surveillance, the court must review the FISA application, order, and related materials *ex parte* and *in camera*, unless "disclosure [to the defendant] is necessary to make an accurate determination of the legality of the surveillance," 50 U.S.C. § 1806(f), or unless disclosure is required as a matter of due process. Although the district court acknowledged that "it would be helpful to the court to have defense counsel review the [FISA]

[3] References to FISA surveillance include FISA Amendments Act ("FAA") surveillance. Disclosure of the relevant materials underlying either form of surveillance turns on 50 U.S.C. § 1806(f) and due process.

materials prior to making arguments," the court interpreted "necessary" in § 1806(f) to mean "much closer to 'essential' than to 'helpful'" and denied disclosure to the defense. ER I:226. As a result, the novel and complex FISA issues that this case presents were resolved based on the court's *ex parte* review of the underlying materials.

As NACDL demonstrated in its initial amicus brief in this case (filed June 3, 2015), the district court erred in its interpretation of § 1806(f). The legislative history and statutory purposes of 50 U.S.C. § 1806(f) demonstrate that disclosure is "necessary" under § 1806(f) when it would substantially promote an accurate determination of legality. NACDL Amicus Brief at 5-13. In addition, under the circumstances here disclosure is required as a matter of due process. NACDL Amicus Brief at 14-24.

Disclosure is particularly significant because Mohamud is one of only a handful of defendants who have ever received notice of Section 702 surveillance--a novel scheme enacted in 2008 that permits the warrantless collection of Americans' emails on U.S. soil. In light of the complexity of both the legal and technological issues related to this surveillance, disclosure was warranted. Indeed, because of the absence of disclosure, the district court and the panel did not receive fully informed, adversarial argument about whether the "targeting" and "minimization" procedures actually used in this case complied with the Fourth Amendment,

whether the novel methods actually used to collect and later access Mohamud's communications were lawful, whether the government's surveillance actually complied with the FISC's orders despite significant compliance problems during the relevant period, or whether the person targeted by the surveillance had "substantial connections" to the United States, rendering the surveillance unlawful.

The panel brushed aside these compelling grounds for disclosure. In a single paragraph in its unpublished memorandum opinion, the panel merely asserted that the district court did not abuse its discretion under § 1806(f); that due process did not require disclosure; and that the limited disclosure of declassified material the government agreed to make satisfied the substitution standard in the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3, § 6(c). Pet. App. B at 10. Without any meaningful analysis, therefore, the panel continued an unbroken, 39-year history of *ex parte* proceedings under FISA.

Congress never intended FISA litigation to be conducted entirely *ex parte*, particularly in cases as complex as this one. Instead, as the legislative history of § 1806(f) makes clear, Congress expected FISA applications and orders to be disclosed to the defense in a substantial number of cases. Two authoritative Senate Reports--one from the Senate Judiciary Committee and the other from the Senate Intelligence Committee--described the disclosure provision as "striking a reasonable balance between an entirely in camera proceeding which might

adversely affect the defendant's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information." S. Rep. 604(I), 95th Cong., 1st Sess. 58 (footnote omitted; ellipsis in original), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3959; *see* S. Rep. 701, 95th Cong., 1st Sess. 64, *reprinted in* 1978 U.S.C.C.A.N. 3973, 4033.

The Senate Reports noted that judicial discretion to grant or deny disclosure and a hearing "'is to be guided by an evaluation of the complexity of the factors to be considered by the court and by the likelihood that adversary presentation would substantially promote a more accurate decision.'" *Id*. (quoting *United States v. Butenko*, 494 F.2d 593, 607 (3d Cir. 1974 (en banc)).

The Reports clearly contemplated disclosure in some cases, whether in whole or in part:

> [I]n some cases, the court will likely be able to determine the legality of the surveillance without any disclosure to the defendant. In other cases, however, the question may be more complex because of, for example, indications of possible misrepresentation of fact, vague identification of the persons to be surveilled or surveillance records which . . . call[] into question compliance with the minimization standards . . . . In such cases, the committee contemplates that the court will likely decide to order disclosure to the defendant, in whole or in part since such disclosure "is necessary to make an accurate determination of the legality of the surveillance."

S. Rep. 604(I), *supra*, at 58, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3959-60; *see* S. Rep. 701, *supra*, at 64, *reprinted in* 1978 U.S.C.C.A.N. 3973, 4033.

Finally, the Reports affirm Congress' intention that, if the court finds disclosure is necessary but the government argues it would damage national security, the government must either "disclose the material or forego the use of the surveillance-based evidence." S. Rep. 604(I), *supra*, at 58, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3960; *see* S. Rep. 701, *supra*, at 65, *reprinted in* 1978 U.S.C.C.A.N. 3973, 4033-34.

Several points are evident from the Reports. First, the Senate Judiciary and Intelligence Committees neither intended nor contemplated an insuperable barrier to disclosure. To the contrary, in choosing a balanced approach, the Committees specifically eschewed "an entirely in camera proceeding."

Second, the Committees--through their reliance on *Butenko*--suggest that the "necessary" standard is met when the district court determines that "adversary presentation would substantially promote a more accurate decision."

Third, the Committees noted the district court's "broad discretionary power to excise certain sensitive portions" from the FISA materials before disclosure. This recognition of the district court's inherent power to take necessary protective measures finds a statutory basis both in § 1806(f) itself and in CIPA. That power substantially ameliorates any national security concerns.

This legislative history shows that courts' treatment of FISA litigation as an "entirely in camera proceeding" contravenes congressional intent. That approach

also violates basic principles of due process. The Supreme Court has declared that "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (quotation omitted). As this Court observed in a secret evidence case, "'One would be hard pressed to design a procedure more likely to result in erroneous deprivations.' . . . [T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995).

The need to interpret the disclosure provisions of FISA as Congress intended, and as due process requires, is particularly stark when a defendant challenges a FISC order under *Franks v. Delaware*, 438 U.S. 154 (1978).[4] Without access to the underlying applications, orders, and related materials, the defense cannot identify specific falsehoods or omissions to make the "substantial preliminary showing" that *Franks* requires for an evidentiary hearing. *Id*. at 155-56. As Judge Rovner acknowledged, "[I]t is well past time to recognize that it is virtually impossible for a FISA defendant to make the showing that *Franks*

[4] Mohamud raised *Franks* claims throughout the proceedings in the district court. Doc. 55 at 17; Doc. 94 at 4; Doc. 489 at 41; Doc. 496 at 24.

requires in order to convene an evidentiary hearing." *United States v. Daoud*, 755 F.3d 479, 496 (7th Cir. 2014) (Rovner, J., concurring), *cert. denied*, 135 S. Ct. 1456 (2015). Judge Rovner added:

> A *Franks* motion is premised on material misrepresentations and omissions in the warrant affidavit; but without access to that affidavit, a defendant cannot identify such misrepresentations or omissions, let alone establish that they were intentionally or recklessly made. As a practical matter, the secrecy shrouding the FISA process renders it impossible for a defendant to meaningfully obtain relief under *Franks* absent a patent inconsistency in the FISA application itself or a *sua sponte* disclosure by the government that the FISA application contained a material misstatement or omission.

Id. at 486. The district court, "which does have access to the application, cannot, for the most part, independently evaluate the accuracy of that application on its own without the defendant's knowledge of the underlying facts." *Id*.

The government invariably resists disclosure of FISA materials to defense counsel on the ground that *any* disclosure of FISA materials, *ever*, to *any* defense counsel, under *any* circumstances, will cause irreparable damage to national security. The Senate Judiciary and Intelligence Committees did not accept that view in 1978, as their Reports confirm. That argument is even more clearly wrong now, following the enactment of CIPA in 1980 (two years after the enactment of FISA) and the extensive experience that courts, prosecutors, and defense counsel have had with the statute since then. Through the use of "appropriate security procedures and protective orders," 50 U.S.C. § 1806(f), a district court can order

disclosure in a manner that adequately protects legitimate national security concerns.

The panel did not come to grips with these issues. Without discussion, it perpetuated the *ex parte* regime under which FISA has functioned since its enactment. On rehearing, the Court should undertake the careful analysis that due process and the adversarial system demand.

CONCLUSION

The Court should grant rehearing and rehearing en banc.

DATED: February 27, 2017

Respectfully submitted,

/s/ John D. Cline
John D. Cline
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4198 words.

/s/ John D. Cline
John D. Cline
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Cline
John D. Cline

CERTIFICATION

U.S. Court of Appeals Docket Number: 14-30217

I hereby certify that the bound copy of the Brief of Amici Curiae National Association of Criminal Defense Lawyers, Ninth Circuit Federal Public and Community Defenders, and Professor Erwin Chemerinsky in Support of Rehearing is identical to the version submitted electronically.

/s/ John D. Cline
John D. Cline