No. 14-30217

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMED OSMAN MOHAMUD,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Portland Division

REPLY BRIEF OF APPELLANT

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Introduction

This appeal challenges the lack of protections afforded individual citizens against the power of the government in national security cases. The government's response repeatedly evades the core issues by reframing its arguments in ways unsupported by the facts and law.

On the key issues of entrapment and government overreaching, the government fails to follow this Court's instruction that "[t]he relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition." *United States v. Poehlman*, 217 F.3d 692, 703 (9th Cir. 2000) (emphasis in original). Instead, the government's response blurs the distinction between pre-contact and post-contact evidence, fails to respect governing Supreme Court precedent, and supports government-created crime and impermissible investigative actions against a vulnerable teenager.

On the jury instructions, evidentiary rulings, and other trial issues, the government repeatedly relies on the wrong standard of review to claim the judge merely exercised discretion, when there is no discretion to violate the Constitution or to misinterpret statutes and evidentiary rules. The government suggests that neither its closing argument, which incorrectly limited the scope of the entrapment

defense and broadened the definition of predisposition, nor the court's failure to give correct jury instructions necessary to the defense theory of the case, were harmful or misleading, despite the centrality of those issues to the case and the jury's note showing that it was confused.

On the discovery restrictions and trial limitations on cross-examination and compulsory process, the government again undervalues the constitutional rights at issue by reframing the limits as discretionary. The government also repeatedly invokes discretion for the pervasive errors of law regarding evidence of "state of mind," when each of those errors violated evidentiary rules and denied constitutional fair trial rights. The only question should be whether the repeated constitutional errors were harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967), a case and principle never addressed in the government's response.

Where "the focus [is] on the constitutional acceptability of the government conduct," which requires the Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," the Court provides de novo review. *United States v. Preston*, 751 F.3d 1008, 1020 (9th Cir. 2014) (en banc); *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997). De novo review is institutionally appropriate for such issues because courts of appeals have advantages in situations "involv[ing] application of a legal standard to a set of facts,

which 'require[s] the consideration of legal concepts and involves the exercise of judgment about the values underlying legal principles.'" *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002) (quoting *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989)); *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (explaining the institutional advantages of appellate courts based on their ability "to maintain control of, and to clarify, the legal principles," to "unify precedent," and to "stabilize the law"). Thus, while "[q]uestions of trial management are ordinarily reviewed for abuse of discretion," that standard must be heightened when the "case turns on the defendant's [constitutional] rights." *United States v. Ward*, 989 F.2d 1015, 1017 (9th Cir. 1992) (citing *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc)). To the extent the government repeatedly intimates that the abuse of discretion standard applies to issues of constitutional law and legal questions, *see*, *e.g.*, Resp. Br. at 53, 61, 69, 73, 80, 84, 85, it is incorrect.

On the surveillance and privacy issues, the government's response addresses the issues in order from the broadest to the most narrow. That sequence departs from the structure of the Opening Brief and reverses the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008).

Substantively, the government's response on surveillance includes three themes: the construction of statutory authority inconsistent with principles protecting individual rights; the insistence that, as long as the government intended only to target unprotected persons, the privacy interests of protected United States persons amount to nothing; and the assumption that it is inconsequential that the government maintains a massive database of incidentally intercepted communications of United States citizens that are later accessed and searched without judicial review. In granting relief, the Court should reject the government's stinting version of the privacy rights of American citizens.

A. The Government's Extensive Intrusion Into And Influence Over The Teenaged Defendant's Life Constituted Entrapment As A Matter Of Law And Violated Due Process.

The government's sting operation against an easily-influenced teenager, who had committed no crime, simply went too far in creating a crime that would never have occurred without the government's intervention. The government's response does not distinguish between pre- and post-contact evidence, as necessary to accurately assess predisposition for purposes of entrapment as a matter of law. In addition, the factors the government cites as evidencing predisposition are not

supported by the record. The reasoning and holdings of Supreme Court and Ninth Circuit case law establish that the government's customized sting operation that preyed on Mr. Mohamud's known vulnerabilities constituted entrapment as a matter of law and violated the Due Process Clause.

1. The Government's Statement Of Facts Blurs The Distinction Between Pre- And Post-Governmental Contacts.

In assessing predisposition, "only those [post-contact] statements that indicate a state of mind untainted by the inducement are relevant[.]" *Poehlman*, 217 F.3d at 704-05. Accordingly, the Court must carefully distinguish between pre- and post-contact evidence. Yet the government's statement of facts does not identify post-contact evidence. Right from the start, as it describes defendant "predict[ing] a 'dark day,'" and his "plan" that he "had been preparing . . . for some time," the government omits that these statements, the entire plan, and all preparation occurred only after Mr. Mohamud was in contact with government agents.

Other examples abound. After discussing defendant's *Jihad Recollections* contributions (which do not discuss domestic terrorism), the government notes that the defendant "drafted an article for *Inspire* as well," which referenced domestic terrorism. Resp. Br. at 9. *Inspire* magazine did not exist until well after government agents contacted Mr. Mohamud, and the first and only appearance of his "draft" article was in an email to undercover agent Youssef. *Compare* Resp. Br. at 9 n.6,

with ER 5494-95. No trace of that article or any similar statements by Mr. Mohamud were found on his computer when the FBI surreptitiously seized and searched it in November 2009. ER 949-57.

The section of the government's brief reciting the defendant's "other online activities" describes activities from various time periods, without making clear which events post-dated government contact. The defendant's online access to "an encrypted Al Qaeda video," for example, occurred on November 13, 2010 – over a year after initial government contact. *Compare* Resp. Br. at 11, *with* ER 5640. Similarly, the defendant's claim to have read about ammonium nitrate occurred in 2010 in response to undercover operative Hussein's question about his knowledge of bombs (although in Hussein's assessment, the defendant knew nothing). ER 4683-84; 5361.

With respect to Amro Al-Ali, the defendant's known contacts with Al-Ali prior to government contact involved mainly discussion of attending a religious school in Yemen. The other facts noted by the government, including the reference to Abdul Hadi, occurred post-contact. Resp. Br. at 10-11.

The remainder of the government's statement of facts describes events and statements occurring post-contact, which cannot prove predisposition unless they are untainted by government influence. There was simply no evidence that defendant's

statements upon which the government relies were anything more than false bravado intended to impress the undercover agents, primed by the Bill Smith emails encouraging violence against the West. This Court should follow the guidance of *Poehlman* and place little weight on these post-contact statements as evidence of the defendant's pre-contact predisposition.

2. The Evidence Cited By The Government Does Not Prove The "Pre-" Aspect Of Predispostion.

The government does not dispute the presentence writer's conclusion that "there is no evidence Mohamud had previously researched, planned, or intended to carry out a domestic attack" until the FBI "offered Mohamud the means and opportunity to become 'operational' within the United States." ER 3517. But the government claims that the evidence was sufficient for the jury to find predisposition. The factors the government cites as evidencing predisposition are not supported by the record, certainly not beyond a reasonable doubt.

For example, the government claims Mr. Mohamud showed no reluctance or hesitancy in agreeing to become "operational." Resp. Br. at 42, 45. But the government's narrative skips straight to post-contact events without giving any weight to Mr. Mohamud's rejection of the Bill Smith overtures over the course of more than six months. Contrary to the government's claim, the references to domestic jihadi violence in the emails from Bill Smith were clear:

- I wanted to talk some to you. *I am here in the west as well*, but here i am one of the only muslims around. *I want to get more involved it the fight for The Ummah*. I want to help rid the occupiers from palestine.

- I want to find other brothers that think like i do. *I want to help bring about our Ummah here in the west. I see in the news that other brothers are trying to fight, i want to as well*. what can i do, do you know who i can talk to, can you help. I want to get more involved.

- It is frustrating, *i want to fullfill my purpose, and help with what is to come*. Any help you could give me would be appreciated. I envision joining others who have the same desire. *If we can get the west preoccupied with problems, and struggles here, then they will be less involved in Palestine*.

- *I know that if we bring the fight here to the west and bring the focus here, the efforts of our brothers in Palestine will have more success as the west will be focusing here instead of there*.

- It looks like there has been some action against the west in the last few weeks. I sometimes wonder who is getting these guys set up. *i cant tell you how easy it should be to bring any community here in the west to its knees*. I think these guys are making things way too complicated.

- this is all I think about, *if more of us talked, and thought about these things Palestine might not be occupied. What am I supposed to do? just sit around and do nothing?* who can I talk to? there is nobody here that wants to do, say, or think about what matter. *we arent going to win by sitting, and letting incompetence run the show. I am not afraid*.

Def. Ex. 1001 at 1-13 (emphases added). The government's argument that the defendant "appeared eager and enthusiastic throughout," Resp. Br. at 46, ignores his lack of response to these initial emails praising domestic terrorism.

The government also ignores the series of emails that were required before Mr. Mohamud agreed to a face-to-face meeting with Youssef. In response to the first email, Mr. Mohamud stated he could not "help the brothers" because he could not travel, and did not invite further contact. ER 4056. The government persisted and upped the ante by invoking the name of Allah and suggesting, "I'm sure [God] has good reason for you to stay where you are." ER 4409. Even then, Mr. Mohamud did not respond. It required a third email, two weeks later, and then another week of silence, before the government's efforts finally generated an agreement to meet. ER 5046-47. As SA Chan admitted, the FBI would not take "no" for an answer. ER 5044. The government's claim that Mr. Mohamud "evinced no hesitation whatsoever," Resp. Br. 45, 46, is simply not supported by the record.

The government also argues that the sting did not prey on vulnerabilities because "there was no evidence at trial that [the defendant] was any more vulnerable than any other 19-year old." Resp. Br. at 49 n.14. Yes, there was. The record is full of uncontroverted evidence establishing that Mr. Mohamud was particularly impressionable. ER 4092 (describing the defendant as "looking for guidance" and

"easily influenced"); ER 1268 (referring to Mr. Mohamud as a "manipulable" and "conflicted kid"); ER 5835 (his father told agents that his son was "still a child and immature"). Further, the national expert who testified regarding adolescent brain development elaborated on how Mr. Mohamud "definitely came across as very immature," provided examples of his unsophisticated thinking, and explained how he was susceptible to the "reward of companionship" from the undercover agents. ER 6021, 6023-27, 6039-40.

The uncontroverted evidence also demonstrated that Mr. Mohamud was upset at his parents' divorce, was going through an identity crisis, and was heavily abusing drugs and alcohol. ER 5411, 5820, 5980, 6160. The government argues that the use of drugs and alcohol was a cunning ploy by the defendant to hide his extremism. Resp. Br. at 46. No such conclusion is reasonable – especially beyond a reasonable doubt – with even a cursory review of the text messages related to the over-the-top addictive behavior documented by Defense Exhibit 1016 and reinforced by the testimony of numerous witnesses.

In assessing entrapment as a matter of law, the Court reviews all the evidence to determine whether a reasonable juror could find *beyond a reasonable doubt* predisposition to commit the crime charged. This case does not resemble the cases cited by the government involving individuals who had previously engaged in the

crime charged: a person who had dealt LSD and then was caught in a sting involving sales of LSD (*United States v. Staufer*, 38 F.3d 1103, 1105 (9th Cir. 1994)), and a person who sought places to rob and then was caught in a stash house robbery sting (*United States v. Si*, 343 F.3d 1116, 1120-21 (9th Cir. 2003)). Here, the government provided no proof that the defendant had taken any steps toward the domestic use of a weapon of mass destruction until well after the first governmental contact. Prior to government influence, the defendant's statements and actions were all consistent with being conflicted and confused and demonstrated no criminal predisposition to commit the crime charged.

3. The Government's Actions Constituted Entrapment As A Matter Of Law And Violated The Due Process Clause.

This Court's opinion in *United States v. Pedrin*, 797 F.3d 792 (9th Cir. 2015), supports Mr. Mohamud's position regarding entrapment as a matter of law and government overreaching in violation of due process. The defendant in *Pedrin* asserted on appeal that the government's stash house robbery sting constituted outrageous government conduct that violated due process. The Court noted that "the relevant question [in assessing the government's conduct] is what the government knew when it was setting up the sting, not what it learned later." *Pedrin*, 797 F.3d at 797. This Court held, "What the government learns only after the fact cannot supply the individualized suspicion that is necessary to justify the sting if the government

had little or no basis for such individualized suspicion when it was setting up the sting." *Id*.

In contrast to *Pedrin*, the government in the present case – despite massive surveillance – had only a slim basis consisting of First Amendment protected speech for contacting Mr. Mohamud. The defendant was law abiding, and there was no evidence of preparation or planning for the domestic use of a weapon of mass destruction. Indeed, the extensive back and forth with Bill Smith demonstrated no evidence of predisposition to commit the crime charged.

As informed by *Pedrin*, the six factors from *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013), all militate strongly in favor of dismissal:

> 1) Mr. Mohamud had not committed, solicited, or prepared for any crime prior to government contact;
>
> 2) any individualized suspicion was based on writings, associations, and speech protected by the First Amendment with no element of imminent danger;
>
> 3) the government's role was overwhelming in a case where the government provided all the wherewithal to a person with no capacity to commit the offense himself;
>
> 4) the government encouragement involved extremely experienced and sophisticated agents customizing their personas to maximize the target's desire to meet their expectations, using the types of flattery, appeals to religion, political necessity, and brotherhood that are most likely to influence a vulnerable teen;

> 5) the government planned or suggested each aspect of the offense conduct; and
>
> 6) the suspected threat prior to government intervention involved only foreign travel, not the kind of domestic activity encouraged by Bill Smith and by Youssef's email about God's purpose to help the brothers in the United States.

Although the *Pedrin* defendant did not raise entrapment as a matter of law, Judge Noonan's dissent from denial of rehearing en banc provides an additional focus on how the holdings and reasoning of Supreme Court authority provide bright lines against the governmental overreaching that occurred in this case:

> When the government puts psychological pressure on persons to commit a crime this pressure militates towards a finding of entrapment. In *Sorrells*, for example, the Court focused on the fact that the government agent was, like Sorrells, a war veteran who relied on this status in order to pressure Sorrells into getting him liquor. In *Sherman v. United States*, the Court emphasized the psychological pressure the government put on Sherman by relying on an informant who was, like Sherman, a recovering drug addict and who "resort[ed] to sympathy" to persuade Sherman to buy drugs. In *Jacobson*, the Court focused on the psychological pressure the government put on Jacobson by repeatedly sending him mailings tempting him to purchase the illegal materials.

United States v. Pedrin, 806 F.3d 1009, 1010 (9th Cir. 2015) (Noonan, J., dissenting from denial of rehearing) (citations omitted). What the government describes as "rapport-building" in this case, Resp. Br. at 49, is precisely the type of psychological pressure that Judge Noonan recognized the government should not use against a vulnerable individual to create crime.

B. The Prosecutor's Closing Argument Violated Due Process By Negating And Misstating The Legal Standard For The Defense Of Entrapment.

The prosecutor's closing argument repeatedly returned to two themes that, separately and cumulatively, violated the right to a fair trial by negating the entrapment defense and broadening the standard for predisposition. Op. Br. at 64-71. The government's response conflates and misstates the improper arguments and asserts an inapplicable standard of review. Resp. Br. at 50-53. Under the well-established standards for reviewing improper prosecutorial closing arguments, the Court should reverse the conviction and remand for a new trial.

1. The Government Improperly Argued In Closing That An Individual Cannot Be Entrapped To Commit The Charged Offense.

The government argues that the prosecutor's argument "was entirely proper" and did not "even suggest that entrapment was not a legally viable basis for acquittal." Resp. Br. at 50. But the government argued exactly that: "An individual simply cannot be entrapped to commit an offense such as this." ER 6223. The gist of the government's response seems to be that, in context, the closing argument meant something different. Resp. Br. at 51-52. To that end, the response ignores or quotes selectively from the bullet-pointed eight additional similar prosecutorial arguments that the defense asserts are improper. *Compare* Resp. Br. at 51, *with* Op. Br. at 65-66. But the government's meaning was clear and not subject to

interpretation: "[T]his is not a situation where a person could be entrapped." ER 6359. That argument misstated the entrapment defense.

2. The Government Improperly Urged Conviction Based On Predisposition To Commit Similar Acts.

The government does not directly deny that the prosecutor urged conviction based on predisposition to commit similar acts, contrary to the pretrial ruling that the government must prove predisposition to commit the crime charged:

> MR. SADY: And I'm hoping that what I understood the Court was ruling was that in adopting the Ninth Circuit instruction, the crime refers to the crime charged, not similar crimes, which was the nature of our objection.
>
> THE COURT: It is the crime charged.

ER 2429. *Compare* Op. Br. at 66-69, *with* Resp. Br. at 54-57. But the government claims that there was no burden shifting and that the closing argument merely commented on the evidence. Resp. Br. at 52. The burden shifting argument cannot be addressed separately from the claimed error: by arguing an easier standard for predisposition, the government diluted its burden of proof, which the trial court had ruled was to prove predisposition to the attempted use of a weapon of mass destruction in the United States. ER 2431. The prosecutor was not commenting on the evidence but asserting the incorrect legal standard.

3. The Improper Closing Arguments Violated The Defendant's Right To Present A Complete Defense And Diluted The Government's Burden Of Proving Guilt Beyond A Reasonable Doubt.

In determining whether a prosecutor's statements constitute misconduct, the first step is to determine "whether the prosecutor made improper statements during the course of the trial," which is a question of law reviewed de novo. *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005); *see also United States v. Perlaza*, 439 F.3d 1149, 1169 & n.22 (9th Cir. 2006). The second step of the inquiry is "whether the improper statements identified in the preceding section were so prejudicial to [the defendant's] substantial rights that a new trial is required." *Weatherspoon*, 410 F.3d at 1150. When the defendant objects at trial, the question of prejudice is reviewed for harmless error, and "[t]o determine whether the prosecutor's misconduct affected the jury's verdict, [the court] look[s] first to the substance of a curative instruction." *Id*. at 1150-51.[1]

Applying the correct standard of review, the improper closing arguments require reversal and remand for a new trial. This Court has recently found prosecutorial closing arguments that misstated the applicable law were reversible

[1] The standard of review cited by the government applies to a prosecutor's good faith error of fact, which is not at issue. Resp. Br. at 50 (citing *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012)).

error, even under the very deferential standard of review under the Antiterrorism and Effective Death Penalty Act. *Deck v. Jenkins*, No. 13-55130, 2016 WL 518819 (9th Cir. Sept. 29, 2014), *as amended* Feb. 9, 2016. In *Deck*, the Court held that, under clearly established Supreme Court authority, a prosecutor's misleading arguments to the jury regarding the law of attempt rose to the level of a federal constitutional violation. *Id*. at *19 (citing *Sechrest v. Ignacio*, 549 F.3d 789, 807 (9th Cir. 2008)). As did the defense in this case, the Court relied on cases centered on the due process implications of improper comments and the right to present a defense. *Id*. at *19 (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985)).

The prosecutor's improper closing argument in the present case was extremely prejudicial. First, the prosecutor's statements were neither inadvertent nor isolated, given the nine repetitions of the "an individual simply cannot be entrapped to commit such an offense" argument, and the pretrial litigation rejecting the "similar conduct" instruction. Second, the statements went to the heart of the defense theory of the case. Further, the prejudice was not minimized by jury instructions. The trial judge overruled the defense objection during the closing argument and refused to issue a corrective instruction. ER 6258-60. The jury's note asking whether "the crime" could "include 'a similar' crime *as stated by the prosecution in closing*

statements" demonstrates that reasonable jurors could be and were misled by the improper arguments. ER 2846 (emphasis added).

Where, as here, the prosecutor's misstatements "were not inadvertent or isolated," "went to the heart of [the defendant's] defense," and were not remedied by curative instructions, the prosecutor's misconduct results in "actual prejudice" and violates the defendant's constitutional right to a fair trial. *Deck*, 2016 WL 518819, at *26 (noting, in finding that a prosecutor's misstatements resulted in prejudice, that "[t]he lawyers' diametrically opposed statements of the law in closing arguments clearly confused the jury, as evidenced by the jury's request for clarification").

C. The Trial Court's Failure To Provide Adequate Jury Instructions On The Defense Theory Of The Case Violated The Right To A Fair Trial

Although a defendant is not entitled to the instructions of his choice, "[t]he legal standard is generous: 'a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility.'" *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (quoting *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987)). The trial judge committed reversible error by refusing to provide clear, legally supported, and

factually based instructions that were necessary for the jury to understand the theory of the defense.

While agreeing that the Court reviews the adequacy of jury instructions de novo, the government responds that the generic entrapment instruction adequately covered the defense theory. Resp. Br. at 53-61. But, model instructions are not "definitive," and they "are not a substitute for the individual research and drafting that may be required in a particular case." Introduction, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, iii-iv (2010). In this case, the model instruction was inadequate to convey the defense theory of the case in a number of ways.

Predispostion To Commit The Specific Offense Charged: While reprising the arguments it raised pretrial, the government ultimately concedes that the district court correctly ruled, and the proffered defense instruction correctly stated, that predisposition to commit the crime charged is required. Resp. Br. at 56 ("*So while the government must ultimately convince a jury that a defendant was predisposed to commit the crime charged*, evidence that a defendant was predisposed to commit similar or related crimes may satisfy that standard.") (emphasis added). The point of the government's argument – that evidence of similar acts may be relevant – misses

the mark because it does not explain how the generic instruction informed the jury that a finding of predisposition to commit similar crimes would not suffice.

Much of the government's argument on appeal relies on cases where evidence, especially prior bad acts under Rule 404(b), was sufficient to support a finding of predisposition to commit the crime charged. *Compare* Resp. Br. at 55-57 (citing *United States v. Brand*, 467 F.3d 179, 200 (2d Cir. 2006), *with* ER 1855-56 (government trial memo relying on identical cases). Since the government is not now claiming that the district court's pretrial ruling on the burden of proving predisposition was incorrect, these citations are largely irrelevant to whether the requested instruction was duplicative of the generic instruction. Responding to the same argument pretrial, the defense demonstrated that the government "simply erred in grafting the standard for admitting prior bad act evidence with the ultimate fact to be proven." ER 2129-30. As the defense argued pretrial, *Brand* "related to what evidence would be *admissible* during an entrapment trial and was not intended to set forth the *definition* of predisposition." ER 2212 (emphasis in original); *see* ER 2257-61 (government arguing for the *Brand* instruction). The trial court correctly resolved the issue by holding that the government had to prove predisposition to commit the crime charged in the indictment. ER 2429, 2431.

The government's rehashing of its pretrial arguments on predisposition to commit similar conduct reinforces the defense position by demonstrating that the jury could not have guessed the correct law without a more specific instruction. The defense position was and is simple: the jury should be instructed in accordance with the Supreme Court's ruling that the predisposition must be "to commit the crime charged" and that "evidence that merely indicates a generic inclination" has little probative value. *Jacobson v. United States*, 53 U.S. 540, 550-51 & n.3 (1992). The generic instruction did not convey that rule to the jury. The trial court's failure, over repeated and explicit objection, to advise the jury that "the crime" in the entrapment instruction referred to the crime charged in the indictment allowed the jury to be misled into accepting the prosecutor's arguments that the government need only prove predisposition to commit a similar offense, not the crime of attempted use of a weapon of mass destruction in the United States. This diluted the government's burden of proof. *See United States v. Bello-Bahena*, 411 F.3d 1083, 1089-90 (9th Cir. 2005); *United States v. Zuniga*, 6 F.3d 569, 571 (9th Cir. 1993). The government's argument in closing that predisposition to commit similar acts would suffice reinforces the need for reversal. *See United States v. Smith*, 217 F.3d 746, 751 (9th Cir. 2000) (failure to give instruction constituted reversible error where prosecutor argued contrary position in closing).

The Meaning Of "Innocent": The government combines its response regarding the predisposition instruction with its response regarding the word "innocent" in the inducement instruction, but the two instructions cover different aspects of the entrapment defense and two separate ways in which the model instruction left legal rules pertinent to the defense theory of the case unclear. Regarding inducement, the model instruction provided by the trial judge stated, "In determining whether the defendant was induced by government agents to commit the offense, you may consider any government conduct creating a substantial risk that *an otherwise innocent person* would commit *an offense*…." ER 2831 (emphasis added). The defense requested that the judge replace "innocent" with "not otherwise predisposed," and further requested an instruction stating that predisposition "is not a test of whether a person is inclined toward criminality generally or inclined to do other acts . . . ." ER 2043-44.

The qualification that "innocent" could include general negative characteristics was fully supported by governing precedent in *Jacobson* and *Poehlman*. The factual basis for the qualification derived from Mr. Mohamud's extremist writings and the drinking and drug use that were far from the actions of an innocent. By refusing to modify and clarify the inducement instruction as requested, the trial judge failed to sufficiently inform the jury that "innocent" did not have its

vernacular meaning of being unimpeachable and that "offense" meant the offense charged.

"Wherewithal" To Commit The Crime Charged; Vulnerability To Inducement; Evaluation of Post-Contact Evidence Of Predisposition; And The Government Agents' State Of Mind: The government does not dispute that the defendant's requested theory of defense instructions were directly supported by case law and were factually supported. Instead, the government broadly responds that the trial court did not err because the model entrapment instruction "fairly and adequately covered" the nuances of all of the requested instructions. But the generic factors listed in the model entrapment instruction could not have imparted the specific and perhaps counter-intuitive legal rules to the jury.

For example, the jury could not have intuited from the generic instruction directing it to consider "the nature of the government's inducement" that Mr. Mohamud's lack of ability to commit the offense unaided was a factor to be considered reflecting his lack of predisposition. ER 1979, 2043, 2215-17, 2769-70. Likewise, the instruction to consider the "defendant's character and reputation" did not specifically make the jury aware that Mr. Mohamud's vulnerability increased the likelihood that his actions were the product of inducement rather than predisposition, as case law holds. ER 2020, 2170, 2769.

Importantly, the government has not identified any instruction that could have informed the jury that evidence of predisposition generated after contact with the government should be considered with care to ensure that it does not constitute the product of inducement, as this Court expressly stated in *Poehlman*. Op. Br. at 76-78. And the government also does not appear to have identified any instruction that conveyed the irrelevance of the agents' subjective state of mind to the entrapment defense. Op. Br. at 78-79. This aspect of the defense was critical given the ongoing evidentiary disputes regarding the agents' testimony about the reasons for their actions, and the risk that the jury would reject entrapment without a showing of governmental bad faith. The legal rule is clear: inducement depends on the effect on the target, not the intention of law enforcement. *United States v. McClain*, 531 F.2d 431, 435 (9th Cir. 1976) ("[I]t is not the state of mind of the government agent that is important; . . . it is the 'predisposition of the defendant' to commit the offense . . . that is, his state of mind, that counts."). Although the defense was permitted to argue these points in closing, instructions were necessary to inform the jury of the validity of the legal theories underlying those arguments.

First Amendment Rights: The government claims that the trial judge correctly refused to instruct the jury that Mr. Mohamud's speech and thoughts were constitutionally protected under the First Amendment. The government claims that

the First Amendment instruction was not necessary because the inflammatory writings and comments were evidence of predisposition, rather than part of the crime charged, and because the government informed the jury that the defendant's speech was protected. Resp. Br. at 59-61. But the trial judge adopted a gag order barring the defense from referring to the First Amendment in opening statement or closing argument. Op. Br. at 80. The lack of an instruction from the trial judge explicitly informing the jury that Mr. Mohamud's speech and thoughts were constitutionally protected created an unfair risk that the protected writings, beliefs, and associations would spill over from being evidence of predisposition to warranting punishment on their own. The refusal to provide the jury with the First Amendment instruction, in combination with the First Amendment gag order, violated the Constitution.

Response To Jury Note: Without citation, the government asserts three times that the trial judge's response to the jury's note is reviewed for abuse of discretion. Resp. Br. at 57-58. Because the note implicated the defense theory of the case, the elements of the offense, and the one-sided presentation of the government's theory of the case, the standard of review is de novo. *Bello-Bahena*, 411 F.3d at 1089 (citing *United States v. Fejes*, 232 F.3d 696, 702 (9th Cir. 2000)) (theory of defense); *see United States v. Liu*, 731 F.3d 982, 987 (9th Cir. 2013) (flawed jury instruction); *Norris v. Risley*, 918 F.2d 828, 830 (9th Cir. 1990) (right to a fair trial).

The Court should find that the instruction failed to provide the "concrete accuracy" required in this context. *United States v. Frega*, 179 F.3d 793, 809 (9th Cir. 1999). Instead of simply answering the question, the district court's response addressed types of evidence that could be considered. The instruction validated the jury's understanding of the prosecutor's argument that the proof of predisposition to commit similar conduct – whatever that means – sufficed rather than requiring proof beyond a reasonable doubt of predisposition to commit the crime charged. The trial court's obfuscating response to a note that went to the core of the only defense deprived Mr. Mohamud of a fair trial.

D. The Government And District Court's Withholding Of Classified Evidence And Information Impermissibly Skewed The Fact-Finding Process, Violating Mr. Mohamud's Rights To Confront His Accusers, Due Process Of Law, And Effective Assistance Of Counsel.

In a trial permeated with government secrecy, the trial court was "remiss in protecting [the] defendant's right to a full and meaningful presentation of his claim to innocence." *United States v. Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013) (quoting *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990)). In its response, the government reconstitutes the clash between secrecy and a fair trial as involving solely questions of discovery and invokes a discretionary standard of review. *Compare* Op. Br. at 83-104, *with* Resp. Br. 61-80. The constitutional questions regarding the production of information necessary for effective

confrontation of witnesses and presentation of a complete defense are reviewed de novo. *See Preston*, 751 F.3d at 1020 (where the "focus [is] on the constitutional acceptability of the government conduct," which requires the Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," the Court provides de novo review).[2] Under any standard of review, the consistent devaluation of individual constitutional rights in the face of government claims of national security violated CIPA's presumption that "the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without [CIPA]." S. Rep. No. 96-823, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4302.

While addressing the issues involving classified evidence, the defense continues to object to procedures that deprive counsel of access to the classified briefs filed by the prosecutors. The government agrees that a defendant "has a need to know if the court determines that the information sought to be withheld is both relevant and helpful to the defense." Resp. Br. at 70. The defense has a difficult time envisioning a scenario under which the facts surrounding the information that was

[2] In any event, as elaborated in the NACDL amicus brief, the trial court misconstrued the discovery statute regarding what constitutes "need," which alone would require de novo review of defense access issues. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

not disclosed would not be "relevant and helpful." As the government recognizes, if "relevant and helpful," the inquiry regarding access ends without any further balancing of interests. Moreover, there is no basis for the government's failure to disclose its legal positions. Legal arguments submitted in ex parte filings should be stricken and the government ordered to provide them so the defense can effectively respond.

1. Depriving Mr. Mohamud Of The True Identities Of The Undercover Operatives Who Testified Against Him Violated His Rights To Confrontation, Due Process, And Effective Assistance Of Counsel.

The government complains that the defense "fails to identify any actual prejudice" from having the undercover operatives testify with false names and light disguises and without revealing their true backgrounds. Resp. Br. at 71-72. On the next page, the government argues that the agents' backgrounds must be unimportant because "defendant explored this subject only briefly during cross-examination." Resp. Br. at 73. The limited cross-examination resulted directly from the prohibition on defense investigation to obtain "the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination": the witnesses' names and addresses. *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

Smith described the basic investigation needed to develop grounds for impeachment, including bias favoring the prosecution. Neither *Delaware v. Van*

Arsdall, 475 U.S. 673 (1986), nor *United States v. Falsia*, 724 F.2d 1339 (1983), qualified *Smith*'s holding. Resp. Br. at 73-74. In *Van Arsdall*, the Court reversed for cutting off inquiry "that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." 475 U.S. at 679. And *Falsia* is irrelevant because it involved full cross-examination of known drug enforcement agents and a claim of improper closing argument. 724 F.2d at 1343.

The government points out that an actual threat to the witness can provide a basis for limiting cross-examination, citing to *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974), and *United States v. Rangel*, 534 F.2d 147 (9th Cir. 1976). Resp. Br. at 74. In both cases, the informant's life had been threatened, causing the witness to have to relocate. *Rangel*, 534 F.2d at 148; *Cosby*, 500 F.2d at 407. In *Giles v. California*, 554 U.S. 353 (2008), the Supreme Court clarified that wrongful actions against a witness do not constitute an exception to the Sixth Amendment right of confrontation absent the defendant's intent to prevent the witness from testifying. *Accord Carlson v. Attorney Gen. of California*, 791 F.3d 1003, 1010 (9th Cir. 2015) (under the Sixth Amendment and *Giles*, "the forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case"). The present case involves no actual threat to the witnesses, and no

evidence of wrongful acts by the defense designed to prevent those witnesses from testifying.

With respect to the government's claims about lack of prejudice, the defense was deprived of the tools necessary to provide specific facts. It is standard in criminal cases for defense counsel to:

- Question undercover police witnesses about the extent of their undercover work and how that work requires the officer to become adept at dissembling;
- Prepare for cross-examination through contact with counsel who have dealt with the operatives and, through them or court files, obtain transcripts of prior testimony to show bias, disturbing patterns of testimony, or inconsistent statements;
- Use information about prior work to challenge the officers' claims that actions of the defendant are "standard" or not;
- Ascertain through official records, public database searches, and social media whether the operative had prior complaints of misconduct, disciplinary actions, or questionable conduct;
- Develop information to support inferences of bias from the prospect of career advancement based on participation in the investigation.

The specific locations and agencies where the operatives worked were necessary to undertake these basic inquiries that the law requires effective counsel to perform, but that information was absent from the sanitized resumés.[3]

Moreover, counsel's investigation on Mr. Mohamud's behalf had discovered the identity and location of one of the operatives. Op. Br. at 90. Yet the district court order prevented counsel from conducting the standard investigation described above. It is fundamentally unfair to now say, as the government does, that Mr. Mohamud's argument fails because he cannot prove what information would have developed in an investigation he was not permitted to undertake. *See United States v. Budziak*, 697 F.3d 1105, 1113 (9th Cir. 2012) ("[C]riminal defendants should not have to rely solely on the government's word that further discovery is unnecessary.").

More generally, like shackles on a defendant, the use of disguised operatives testifying under phony names infused the trial with messages of danger and drama that are anathema to the fair trial guaranteed by the Sixth Amendment. *See Deck v. Missouri*, 544 U.S. 622, 635 (2005) (visible shackling inherently prejudicial) (citing *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Each time the operatives testified, the

[3] Prevented from effective cross-examination, the defense even agreed to forego testimony from the agents and rely instead solely on the recordings. ER 2283-86. The trial court denied that procedure upon objection from the government. ER 95.

jury was implicitly told that revealing these witnesses' real names and backgrounds to the defendant would place the witnesses in danger.

2. The District Court's Denial Of Discovery Regarding, And Testimony From, "Bill Smith" Violated the Fifth And Sixth Amendment Rights To Compulsory Process, Confrontation, And Presentation Of The Complete Theory Of The Defense.

The trial court recognized that the Bill Smith emails were relevant to the entrapment defense because Bill Smith was the first government agent to make contact with Mr. Mohamud. ER 39. Bill Smith was a percipient witness to the first six months of the government's outreach efforts to Mr. Mohamud, and that contact continued up until May 13, 2010, six weeks before Youssef first initiated his contact.[4] After successfully arguing to the trial judge that the emails "spoke for themselves," and so discovery of Bill Smith's identity would not be helpful to the defense, the government shifted its position at trial and asserted a need "to explain both the content and intent" of the emails through Bill Smith's handler, SA Dodd. Resp. Br. at 78.

[4] The government quotes an erroneous portion of the trial judge's ruling finding that "Bill Smith broke off contact with [defendant] in April 2010[.]" Resp. Br. at 76 (quoting ER 38-39). The court later corrected its opinion, noting the final contact occurred on May 13, 2010, and that the defense "reasonably argues that Bill Smith's statements in the final email do not indicate he wishes to cease contact." ER 42.

Unlike the case upon which the government relies, Bill Smith was not a "mere tipster" who had "no information that could form a basis of either exculpatory or inculpatory information." *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995). Bill Smith was a percipient witness to "both the content and intent" of the emails, as well as to his interactions with the FBI handler. Once the government abandoned the winning position on discovery that the emails spoke for themselves, Bill Smith became an essential source for cross-examination and rebuttal testimony, especially to impeach the self-serving explanations provided by SA Dodd regarding the meaning of the email messages. Instead, the FBI agent was able to testify free from impeachment or contradiction while Bill Smith remained hidden behind a veil of mystery. The fundamental rights to confront adverse witnesses and to exercise compulsory process deserve more protection than the government's argument of "Heads we win, tails you lose."

3. The Selective Declassification Of Previously Classified Material Violated Due Process In This Case.

The government's public response on selective declassification says nothing, once again highlighting the unfairness of the classification procedures. The defense cannot even know from the brief whether the government agrees with the legal argument that it is not permitted to use its declassification authority in a manner that skews the fact-finding process. Op. Br. at 94-100; s*ee generally* Joshua L. Dratel,

Sword or Shield? The Government's Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions, 5 Cardozo Pub. L. Pol'y & Ethics J. 171 (2006). The government only offers the conclusory statement that it did not engage in "selective declassification." Resp. Br. at 78.

In its public filing, the government has not controverted Mr. Mohamud's strong prima facie case establishing that the government selectively declassified communications during the relevant time period. The defense cannot directly respond to any reasons for lack of production set forth in the classified filings, but notes that, having "benefitted from the cooperation" with security agencies, the government cannot "in fairness, be permitted to disclaim all responsibility for obtaining" material in classified documents. *United States v. Libby*, 429 F. Supp. 2d 1, 11 (D.D.C. 2006) (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1478 (D.D.C. 1989)). In assessing the government's classified response, the Court should consider: 1) *Brady* requires the production of evidence favorable to the defendant, Op. Br. at 96-98 (describing potential exculpatory uses of communications); 2) *all* intercepted statements of the defendant are discoverable under Rule 16, regardless of whether they must be produced under *Brady*, Op. Br. at 96 (citing *United States v. Bailleaux*, 685 F.2d 1105, 1113-15 (9th Cir. 1982)); and 3) the obligation to

produce intercepted statements extends to any government agency involved in the surveillance, *United States v. Santiago*, 46 F.3d 885, 893-94 (9th Cir. 1995).

4. The Failure To Allow Discovery Of Classified Brady Material And Its Replacement With Inadequate Substitute Evidence Violated The Right To A Fair Trial.

The fundamental purpose of a substitution under CIPA is to place the defendant, as nearly as possible, in the same position as if the classified information were available to the defense. *Sedaghaty*, 728 F.3d at 903-04; 18 U.S.C. app. 3 § 6(c)(1). When the evidence at issue is helpful or material to the defense, the balance should be struck in favor of the defendant. *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008) (relying on *United States v. Reynolds*, 345 U.S. 1 (1953), and *Roviaro v. United States*, 353 U.S. 53 (1957)). "Helpful" information includes information that does not reach the level of *Brady* material but which is useful to counter the government's case or to bolster a defense. *Aref*, 533 F.3d at 80; *United States v. Mejia*, 448 F.3d 436, 456-57 (D.C. Cir. 2006).

The government argues that the summary report was an adequate CIPA substitute because it did not omit any information that would have been helpful to the defense and, further, because the classified reports that it was drawn from were themselves inadmissible hearsay. Resp. Br. at 79-80. However, while the summary document marked as an exhibit may have been hearsay (as the government argued),

the actual testimony of the agents who made the assessments would have been admissible direct evidence. The government had the choice to provide the classified information by making those agents available to the defense, or to allow summaries of their testimony to be introduced as substantive evidence.

The summary report did not serve the same purpose as either of those options. It allowed the government to present the testimony of the case agent, who derogated the opinions contained in the report on direct examination, while precluding the defense from putting the summary itself before the jury. Moreover, the summary omitted all factual details regarding the assessments that constituted admissible evidence helpful to the defense: the identities of the agents who performed the assessments, the number of agents, when the first assessment occurred, who participated in the discussions, and the factual bases for their conclusions.

Here, the summary report did not give the defendant the full substance of the suppressed discovery. *See Sedaghaty*, 728 F.3d at 907 (conviction reversed because the summary of classified information was distorted and incomplete); *United States v. Moussaoui*, 591 F.3d 263, 281-83 (4th Cir. 2010) (approving provision of classified information to cleared defense counsel pursuant to a protective order). The district court's rulings allowed the government to withhold exculpatory evidence in key areas in violation of Mr. Mohamud's constitutional rights.

5. The Trial Court's Refusal To Provide Material Regarding Amro Al-Ali Violated Due Process.

The government does not address the failure to provide any discovery regarding Amro Al-Ali's interrogations and the information underlying the Red Notices. Op. Br. at 103-04. The Court should review this classified material and determine whether, as the defense counter-terrorism expert testified, the material would have been helpful to the defense. If so, the conviction should be reversed on this ground alone or in combination with the other violations of constitutional rights.

E. By Misconstruing And Misapplying The "State Of Mind" Hearsay Exception, The District Court Violated The Confrontation Clause, The Right To Compulsory Process, And The Right To A Fair Trial

In response to the detailed and particularized claims of serious constitutional violations pervading the trial, Op. Br. at 104-28, the government relies almost entirely on an argument never made at trial – that the defense opened the door to evidence of the officers' states of mind by asserting that the FBI went too far in creating the crime. Resp. Br. at 80-81. This argument is counterfactual. The defense opening statement could not have prompted the government's introduction of the FBI agents' state of mind based on the Red Notice hearsay about Amro Al-Ali because the government, in its opening statement, had already repeatedly referred to that evidence:

- "At this time, Al-Ali had been identified by the FBI as wanted by the Saudi government because he was recruiting Westerners as fighters for al-Qaeda. He was an al-Qaeda recruiter." ER 3955.

- "The FBI believed that the defendant – they believed that Al-Ali was actually headed to Afghanistan to join other fighters who were fighting against U.S. forces. The FBI believed that Al-Ali had been – was recruiting the defendant to join him." ER 3955.

- "And they were aware of his desire to travel to Yemen to meet Al-Ali, who was believed to be an al-Qaeda recruiter." ER 3956-57.

And of course the government had argued pretrial for admission of the Red Notice. ER 2592-93.

Moreover, contrary to the government's claims, the defense opening did not place the officers' subjective motivations for investigating the defendant at issue. The defense only pointed out what is minimally necessary for an entrapment defense: the FBI went too far in the creation of crime. ER 3976-4003. The reference to the defendant's vulnerability went to whether he had been induced, and did not suggest a motivation for the investigation. Nor did the defense opening leave the jury with any "false impression" that had to be cured by the Red Notice. Resp. Br. at 81.The quoted passage of the defense opening says the surveillance revealed nothing about domestic terrorism, which was completely true. Resp. Br. at 81. Further, the opening statement merely factually noted that a new plan developed after the Bill Smith emails proved unsuccessful. Resp. Br. at 82.

Nothing in the defense opening statement waived rights to confrontation and compulsory process or permitted the trial judge to deviate from the plain meaning of the Rules of Evidence. *See also United States v. Wales*, 977 F.2d 1323, 1328 (9th Cir. 1992) (Kozinski, J., concurring) ("I'm aware of no authority for admitting inadmissible evidence just because we think turnabout is fair play."). A district court's construction of the hearsay rule is a question of law that is reviewed de novo. *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002). This Court also reviews de novo whether an evidentiary error results in a violation of constitutional rights. *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015); *Orellana-Blanco*, 294 F.3d at 1148. The government's claim that the trial court had "discretion" to violate the Rules of Evidence and the right to confrontation is untenable. Resp. Br. at 80, 82, 84.

In justifying "course of the investigation" hearsay testimony, the government cites to *United States v. Makhlouta*, 790 F.2d 1400 (9th Cir. 1986). In *Makhlouta*, the government introduced hearsay evidence that explained, in an entrapment case, why the agents made the first approach to the defendant. 790 F.2d at 1402. While the defense did not raise the issue on appeal, the Court stated the admission of the hearsay was erroneous because, "under the law of entrapment, 'it is not the state of mind of the government agent that is important; . . . it is the "predisposition of the

defendant to commit the offense . . . that counts.'" *Id.* (quoting *McClain*, 531 F.2d at 435) (alterations in original). The Court stated that, if raised on appeal, the error – and the Court found the admission of the irrelevant testimony was error – would have been harmless because the substance of the hearsay had been established by multiple witnesses who were subject to cross-examination. *Id*.[5] In contrast, in the present case, the hearsay from the Red Notices was the only way the jury heard about the extremely prejudicial and often-repeated allegations about Amro Al-Ali.

This case is also distinguishable from *United States v. Wahchumwah*, 710 F.3d 862 (9th Cir. 2012), upon which the government relies for its "course of investigation" argument. Resp. Br. at 83. In *Wahchumwah*, which did not involve the defense of entrapment, two agents of the United States Fish and Wildlife Service testified that they investigated the defendant "based on anonymous complaints that he was selling eagle parts." *Id.* at 865-66. This Court held that admission of the incidental testimony did not violate the Confrontation Clause because it was not offered for its truth. *Id.* at 871.

[5] The government also cites to this Court's opinion in *United States v. Munoz*, 412 F.3d 1043, 1050 (9th Cir. 2005), without mentioning that Mr. Munoz did not assert his Confrontation Clause rights. Resp. Br. at 83. Further, as with *Makhlouta*, and unlike the present case, the same testimony came in through non-hearsay testimony, so the investigative steps were "self-evident and surely harmless." *Munoz*, 412 F.3d at 1050.

In contrast, the present case did not involve a bare assertion of prior anonymous complaints, but the full admission of the Red Notice itself as Exhibit 80 and pervasive testimony regarding the notice and its substantive content by the prosecution throughout the trial. Every mention of the Red Notice put the authority of Interpol behind the hearsay statements despite the "inherent unreliability" of law enforcement hearsay – here, Saudi Arabian law enforcement. *See United States v. Mezas de Jesus*, 217 F.3d 638, 641 n.6 (9th Cir. 2000). Because the government argued that Amro Al-Ali was a key figure, the hearsay regarding what the agents thought of him could not have been compartmentalized by the jury to its purported state of mind purpose. Op. Br. at 106-20. As in *Shepard v. United States*, "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds." 290 U.S. 96, 104 (1933). Admission of the evidence over repeated objections constitutes reversible error. Op. Br. at 106-20.

On the second series of state of mind errors, the government does not even try to justify the exclusion of evidence of bias during cross-examination of its agents, which violated the Rules of Evidence, the right of confrontation, and the right to present a complete defense. Op. Br. at 121-24. This omission is not surprising. The government's current position that hearsay regarding the "course of the investigation" is relevant to prove the agents' good intentions leaves no basis to

exclude evidence of their bias or motive. Resp. Br. 80-83. The exclusion of this evidence left the defense unable to cross-examine SA Dodd regarding the Bill Smith emails and prevented exploration of the operatives' bias demonstrated during the planning meetings and post-meeting debriefings, as well as the FBI's institutional interest in motivating Portland to join the Joint Terrorism Task Force. Op. Br. at 123.

The government also does not attempt to justify the government operatives' testimony, over objection, regarding their interpretation of Mr. Mohamud's mental state. Op. Br. at 124-27. The trial court repeatedly allowed the government to elicit purely speculative lay testimony regarding the meaning of the defendant's recorded words. Basic evidentiary principles foreclose speculation about what is in another person's mind absent foundation not established in this case. *See United States v. Vera*, 770 F.3d 1232, 1243 (9th Cir. 2014) (reversible error for officer to testify without foundation regarding the meaning of phone calls: "an officer may not testify based on speculation, rely on hearsay or interpret unambiguous, clear statements.").

While allowing testimony regarding the operatives' beliefs about their target's state of mind, the trial court consistently sustained government objections to Mr. Mohamud's contemporaneous writings that reflected his state of mind pre-government contact. Op. Br. at 127-28. In an entrapment case, contemporaneous statements are admissible because they "were not self-serving declarations about a

past attitude or state of mind, but were manifestations of his present state of mind." *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977). Without distinguishing *Partyka*, the government relies on a case where the defendant, in a fraud investigation with no entrapment issues, attempted to introduce her own statements to investigators to try to demonstrate that her prior actions were not done with criminal intent. *United States v. Sayakhom*, 186 F.3d 928, *amended by* 197 F.3d 959 (9th Cir. 1999). Unlike the writings in this case, the investigative interview in *Sayakhom* met neither of the two prerequisites of Rule 803(3) of the Federal Rules of Evidence: the interview involved her previous, not "then-existing state of mind," and it included statements "of memory or belief to prove the fact remembered or believed." The only case offered to justify the trial court's ruling is therefore irrelevant.[6]

The pervasive errors regarding the meaning of "state of mind" under the Federal Rules of Evidence, and the resulting denial of the right to cross-examine witnesses, present exculpatory evidence, and compel testimony supporting the defense theory of the case, constituted reversible error. This Court should review the

[6] The government notes that other out-of-court statements of the defendant were admitted, Resp. Br. at 84-85, but does not explain why the proper introduction of some evidence justifies the erroneous exclusion of other evidence.

errors de novo, but, under any standard of review, the extensive and prejudicial errors require a new trial.

F. The Trial Court's Refusal To Rule On The Constitutionality Of The Government's Non-FISA Seizures, Searches, and Interrogations Violated Mr. Mohamud's Constitutional Rights.

The trial court refused to answer the question of whether government agents pursued the investigation against Mr. Mohamud so vigorously that they violated the Fourth and Fifth Amendments in order to surreptitiously question him and to obtain a copy of his computer hard drive. Because the government's involvement in the Oregon State Police interview, in addition to the FBI-directed seizures and subsequent searches of Mr. Mohamud's computer, violated Fourth and Fifth Amendment rights, the answer to that question would have been material and exculpatory to the defense theory that the teenaged defendant was entrapped by overreaching government agents. *See Kyles v. Whitley*, 514 U.S. 419, 441-49 (1995) (evidence that could be used to attack the integrity of the investigation is subject to *Brady* disclosure obligations). It would have supported his motion to dismiss on due process grounds, and it would have informed the court's assessment of the government's intent in failing to provide pretrial notice of FAA surveillance. Moreover, without a ruling on the full scope of the constitutional violation, the trial court could not accurately assess whether any fruits of that conduct tainted the

ensuing investigation. Depriving Mr. Mohamud of a ruling with such import violated his Fourth Amendment rights, the Due Process Clause, the Confrontation Clause, and the constitutional right to present a defense.

1. The Government's Reliance On The Abuse Of Discretion Standard Is Misplaced Because Whether A Pretrial Ruling Violates The Defendant's Constitutional Rights Is Reviewed De Novo.

As a preliminary matter, this assignment of error requires de novo review, not review for abuse of discretion as the government claims, because it involves a determination of whether the trial court's refusal to rule violated the defendant's constitutional rights. *Haischer*, 780 F.3d at 1281; *United States v. Ward*, 989 F.2d 1015, 1017 (9th Cir. 1992). The government cites *United States v. Bensimon*, 172 F.3d 1121 (9th Cir. 1999), for the proposition that "[p]retrial rulings governing trial evidence are reviewed for abuse of discretion." Resp. Br. at 85. On the contrary, *Bensimon* supports de novo review on restrictions on cross-examination, only applying the abuse of discretion standard to the balancing of probative value and prejudicial effect of a prior conviction offered by the government for impeachment purposes under Federal Rule of Evidence 609(b). *Id*. at 1125, 1128. A constitutional violation requires reversal unless it is harmless beyond a reasonable doubt. *Haischer*, 780 F.3d at 1281.

This Court's decision in *United States v. Mazzarella* provides a useful framework for analyzing the issue raised here. 784 F.3d 532 (9th Cir. 2015). The defendant in *Mazzarella* claimed that the government had violated *Brady* by failing to disclose potentially helpful information about three of the prosecution trial witnesses, including information about potential immunity agreements and information that one of the witnesses had copied documents from the defendant's business for the government. *Id*. at 537. The trial court denied the defendant's motion for a new trial, finding that the evidence was not necessarily impeaching, that the witnesses would have been deemed credible regardless, and that the other evidence of guilt was substantial. *Id*. at 536-37. The trial court also found that the government had not violated the Fourth Amendment. *Id*. at 536. This Court considered the trial court's constitutional rulings de novo, but ultimately reversed because the trial court abused its discretion by failing to a hold a hearing on disputed issues of fact. *Id*. at 537, 539, 541.

In the present case, this Court must first consider de novo whether the refusal to rule violated Mr. Mohamud's constitutional rights. Only if the Court finds no constitutional violation would the Court then consider whether the refusal to rule was an abuse of discretion.

2. The Government Ignores Critical Facts That Make The Constitutional Violations Highly Relevant To The Defense Theory Of The Case And To Defense Motions For Relief.

The government contends that a constitutional finding regarding the validity of the interrogation, seizure, and search was not required either to determine the issue of taint under the Fourth Amendment or for its independent evidentiary value to the defense case. Resp. Br. at 86-88. The government is wrong on both fronts.

As to the Fourth Amendment ruling regarding taint, the government relies on a factually distinguishable case, *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004). Resp. Br. at 86-87. Unlike the present case, the taint question in *Crawford* related to one primary illegality – a parole search of the defendant's home – and a single, concrete piece of evidence – the defendant's later statement after being arrested on preexisting probable cause. *Crawford*, 372 F.3d at 1055. By contrast, this case involves complex and repeated primary illegalities – the FBI's direction of a state-initiated interrogation and two receipts and exploitations of Mr. Mohamud's full computer hard drive. The evidence potentially tainted by that illegality is far from concrete, extending to the possible use of the information in creating a subject profile and tailoring the sting to known vulnerabilities.

Crawford is also distinguishable because the trial court in that case reached both suppression questions of illegality and taint. *Id*. at 1052. Only the appellate

court, which was not called upon to make credibility determinations, assumed the illegality and affirmed on the grounds that the statement was not tainted. *Id*. at 1054. In this case, the trial court should have determined the scope of the initial illegality before making complex credibility determinations regarding government agents' biases and motivations in a sensitive national security investigation, especially when the evidence of attenuation was primarily established through classified evidence untested by any adversary process. By relying on *Crawford* without noting any of these distinctions, the government has failed to respond to the defense position that a ruling by the trial court was constitutionally required in the present case.[7]

The government's next position that a ruling of a constitutional violation would have had no evidentiary value also ignores critical facts. Resp. Br. at 87. The government repeatedly describes the *state* officers as the relevant actors, implying that the *federal* agents were merely passive observers. *See*, *e.g.*, Resp. Br. at 85 (describing the federal agents as merely "observ[ing]" the interview and

[7] The government emphasizes the fact that Mr. Mohamud is not challenging the trial court's ruling that the later investigation had an independent, untainted source. Resp. Br. at 86. However, the government withheld through use of CIPA any evidence that the defense might need to make that argument. The defense was effectively required to take the government at its word that its investigation was not tainted by the constitutional violations, despite evidence that continued to surface disproving each of the government's factual assertions regarding what was learned through the subterfuge of the Oregon state investigation. ER 859-60, 890, 1268, 1271-72.

"review[ing]" the contents of Mr. Mohamud's computer); Resp. Br. at 87 (describing the "material OSP gathered and shared with federal agents"); Resp. Br. at 87-88 (stating that constitutional violation by "other" agents would not be relevant). But in fact it was the federal agents who were the primary actors in the constitutional violation. They used the legitimate state interview to surreptitiously ask Mr. Mohamud questions about his background and his views about Somalia. ER 788. They directed state officers to provide them with a full copy of Mr. Mohamud's hard drive and to search the drive for terms like "Yemen," ER 678-89, 853, although Mr. Mohamud had only consented to its use by state investigators to "make sure he was not researching date rape drugs." ER 600, 613.

The government's argument that a constitutional violation would not be admissible evidence fails when considered in light of these critical facts. The Federal Rules of Evidence permit impeachment by a showing of bias because, "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury . . . ." *United States v. Abel*, 469 U.S. 45, 51 (1984). A defendant has a constitutional right to show bias on the part of prosecution witnesses. *Id.* at 50. In *People v. Clower*, 16 Cal. App. 4th 1737, 1742 (5th Dist. 1993), the California appellate court held admissible testimony about prior warrantless searches to prove a pattern of harassment. *See also People v. Jakes*,

2 N.E.3d 481, 488 (Ill. App. 2013) (reversing post-conviction court's denial of discovery regarding other cases in which officers engaged in misconduct "to establish a pattern or practice of coerced confessions and perjury"). The fact that the federal agents who masterminded the sting operation against Mr. Mohamud violated his constitutional rights during the course of the same investigation would have been admissible both as impeachment and substantive evidence to demonstrate the agents' bias and motive, to support the defense of entrapment, and to bolster the defense's other requests for relief.

G. Because The Government Violated The Statute Requiring Pretrial Notice Of FAA Surveillance, It Should Have Been Barred From Using The Products Of Such Surveillance, Or, In The Alternative, The Case Should Be Remanded For A Determination Of The Facts

The mandatory notice statute must have teeth to effectuate its rule-of-law purpose of providing the opportunity for pretrial litigation regarding warrantless surveillance. Op. Br. at 137-45. In response, the government argues, in effect, that the statute countenances even deliberate violations of the pretrial notice requirement, and that, in exercising judicial supervisory authority, the court and the defense should simply trust the government. Resp. 142-47. The Court should reject both these approaches. Further, contrary to the government's claim, the question is not whether the trial court abused its discretion. Resp. Br. at 142. Both the construction of the mandatory notice statute and the question whether factual development is a

necessary predicate to the exercise of supervisory authority are legal questions reviewed de novo. *See United States v. Thompson*, 728 F.3d 1011, 1015 & n.6 (9th Cir. 2013); *United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013). This Court should reverse the trial court's rulings and grant a meaningful remedy for the statutory violation.

1. The Statute Should Be Construed To Require At Least Suppression Where The Government Intentionally Or Recklessly Failed To Provide Mandatory Pretrial Notice Of FAA Warrantless Surveillance.

When the government violates the mandatory notice statute, the proper remedy "is exclusion under Title III or FISA, a remedy which is triggered when the government seeks to introduce evidence into a covered proceeding." *In re Grand Jury Subpoena (T-112)*, 597 F.3d 189, 201 (4th Cir. 2010). The government asks the Court to break with the Fourth Circuit because 1) the statutory suppression remedy in the *T-112* decision was only "suggested in *dicta*"; 2) the government in this case "did not deny the existence" of the warrantless collection; and 3) pretrial notice was provided for Title I and III FISA surveillance. Resp. Br. at 146. None of these arguments supports the government's interpretation of the statute to have no meaningful remedy for notice violations.

First, the statutory suppression remedy discussed in *T-112* was not dicta. There, the court held that the appellant could not litigate the government's denial

that it had conducted surveillance. 597 F.3d at 201. The court reached that conclusion by interpreting the statute as providing a remedy of suppression if the government attempted to use evidence derived from surveillance that it had denied conducting. *Id.* Thus, interpreting the statute to require suppression was essential to the reasoning underlying the court's holding. *Id*.

Second, the government in the present case, as in *T-112*, explicitly denied the existence of the warrantless surveillance when, prior to trial, the defense repeatedly and expressly asked for such notice and, instead of disclosing, the government repeatedly told the court that it was in full compliance with its discovery obligations. ER 2965-67. The court in *T-112* merely held the government to its representation that no surveillance occurred, without any finding that the representation was false. ER 2907-08. Here, suppression is especially appropriate because, by affirmatively asserting that it complied with requested discovery, the government effectively denied the existence of warrantless surveillance and that denial has turned out to be false. Suppressing derivative evidence following a false representation of no surveillance is appropriate.

Third, the notice of Title I and III collection does not mitigate the failure to provide mandatory notice of FAA warrantless surveillance and, in fact, is irrelevant to the statutory violation. The government cites *United States v. Donovan*, 429 U.S.

413 (1977), for the proposition that failure to comply with a statutory notice provision does not necessitate suppression. Resp. Br. at 146. In *Donovan*, the Court distinguished between discretionary and mandatory notice provisions and relied on legislative history stating, "The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute." *Id*. at 430 (quoting 114 Cong. Rec. 14485-86 (1968) (statement of Senator Hart)). In doing so, the Court in *Donovan* provided strong support for suppression in this case, which involves an explicit statutory "shall" requirement of pretrial notice. The statutory "shall" would be superfluous unless construed to have meaning beyond the constitutional minimum. *See United States v. Kowalczyk*, 805 F.3d 847, 857 (9th Cir. 2015) (construing "shall" regarding the statutory right to counsel to extend beyond the constitutional minimum to avoid rendering the language superfluous).

In *Donovan*, the Court stated that suppression is required for "statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 429 U.S. at 433-34 (quoting *United States v. Giordano*, 416 U.S. 505, 527 (1974)). The mandatory notice requirement for warrantless surveillance "directly and substantially" implements the statutory scheme, especially when considered in the context of Congress's

instruction that the government must "either disclose the material or forgo the use of the surveillance-based evidence." S. Rep. No. 95-701 at 65 (1978).[8]

The trial court's determination that there is no meaningful statutory remedy even for a deliberate violation of the statute would render the mandatory notice requirement illusory. As jury trials become increasingly rare, prosecutors risk little by betting that violation of the notice requirement will pass undetected in the over 95 percent of cases resolved with guilty pleas. The statute must be read to have a statutory remedy for intentional and reckless violations in order to accomplish its legislative purpose.

2. The Trial Court Erred In Failing To Require Production Of Evidence Regarding The Government's Violation Of The Notice Statute.

In opposing remand for development of the facts underlying the violation of the mandatory notice statute, the government engages in circular reasoning, gratuitously assuming that which is to be proved. *See Sturges v. Crowninshield*, 17 U.S. 122, 139 (1819). The government argues that, because the district court found "no evidence of prosecutorial misconduct, let alone flagrant misconduct," no

[8] The Court in *Donovan* also expressly adopted the reasoning of this Court's ruling in *United States v. Chun*, 503 F.2d 533 (9th Cir. 1974), upon which the defense relies in this case regarding constitutional roots and statutory purposes of the notice provision. *Compare Donovan*, 429 U.S. at 431 *with* Op. Br. at 139-40.

evidentiary hearing was required. Resp. Br. at 143. But of course the trial court had no evidence – no documents, no affidavits, no testimony – explaining what happened. Op. Br. at 137-45. The government ignores this Court's holding that "arguments in briefs are not evidence." *Comstock v. Humphries*, 786 F.3d 701, 709 (9th Cir. 2015). The only predicate information for the trial court's conclusions were arguments in briefs.

Even without discovery, the defense presented a strong case based on the litigation history and from the larger public record indicating that intentional or reckless prosecutorial misconduct had occurred. The history of the case contradicted the government's claim that it "had not considered the particular question" of whether FISA activity could be the fruit of warrantless FAA surveillance. ER 2996. Indeed, the defense repeatedly raised that precise question pretrial. ER 1287 (initial discovery request included any material relating to "any eavesdropping, wiretapping, or electronic recording of any kind."); *see also* ER 1318-19. Even more explicitly, the defense requested discovery of earlier surveillance, noting that "the existence of any pre-FISA surveillance must be determined in order to litigate any FISA procedures as fruits of potential warrantless intrusions." ER 443. The defense also alerted the government to public information indicating that the fruit of the poisonous tree doctrine applied to warrantless surveillance that resulted in FISA

requests. ER 444 (citing report that between 10 and 20 percent of FISA requests were tainted by warrantless surveillance). Several months later, the defense supplemented its discovery request to specify FAA surveillance, stating that "[t]he discovery indicates a high likelihood that such surveillance occurred." ER 478.

As the record shows, the defense repeatedly directed the government to the exact type of surveillance and demanded discovery for the exact reason the government now claims not to have considered. This Court should reject as without foundation the trial court's claim that the government's provision of the late notice, "without prodding from the court or the defense," amounted to "strong evidence of the lack of prosecutorial misconduct." ER 179. The government's reliance on cases where prosecutors are presumed to have acted properly are irrelevant based on the prima facie evidence in this case that the government responded inaccurately to explicit and unmistakable discovery requests. Resp. Br. at 144.

The public record from the relevant time frame also contradicts the trial court's view of the government's conduct as voluntary self-correction and supports the inference that counter-terrorism prosecutors were ultimately forced by the Solicitor General to make the legally required disclosures. ER 2926. Both in briefing and oral argument in *Clapper v. Amnesty Int'l USA*, the Solicitor General assumed that the government must "provide advance notice of its intent" to use any

information "derived" from FAA surveillance, within the plain meaning of that term, so the person can challenge the lawfulness of the surveillance. Brief for Petitioners at 8, *Clapper*, 133 S. Ct. 1138 (2013), 2012 WL3090949; *see* Transcript of Oral Argument at 4-5, *Clapper*, 133 S. Ct. 1138 (2013). The Supreme Court relied on those representations in finding that the FAA would not be insulated from constitutional challenges because advance notice would allow challenges to be raised pretrial. *Clapper*, 133 S. Ct. at 1154.

But it turned out that notices of FAA surveillance were *not* previously being provided to criminal defendants. Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 15, 2013, at A11. National security lawyers had reviewed and approved the Solicitor General's position that advance notice was required, but the actual practice by prosecutors did not correspond with that representation and depended on an untenable legal interpretation of "derived." Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013, at A3 ("The move [to begin disclosing FAA surveillance] comes after an internal Justice Department debate in which Solicitor General Donald B. Verrilli Jr. argued that *there was no legal basis for a previous practice of not disclosing links to such surveillance*, several Obama administration officials familiar with the deliberations said.").

On October 25, 2013, the government for the first time provided notice of evidence derived from FAA electronic surveillance in a prosecution. Devlin Barrett, *U.S. Tells Suspect for First Time It Used NSA Surveillance Program in Criminal Case*, Wall St. J., Oct. 25, 2013. The notice in the present case came shortly after that time, concurrently with Attorney General Eric Holder's statement that the Department of Justice was reviewing cases to determine whether notice was required. Sari Horwitz, *Justice Is Reviewing Criminal Cases That Used Surveillance Evidence Gathered Under FISA*, Wash. Post, Nov. 15, 2013.

"[R]eckless disregard for the prosecution's constitutional obligations" constitutes "flagrant" prosecutorial behavior and warrants sanctions. *United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008). Without full development of the relevant facts, the trial judge did not have the predicate information for exercise of judicial supervisory power. *Hernandez-Meza*, 720 F.3d at 769 (remanding for factual development regarding discovery violation for exercise of supervisory power). The public record establishes at least the initial showing to require an evidentiary hearing regarding the government's actions in this case, where express requests for discovery were ignored, and where the government made affirmative representations that all obligations had been met. The government's blasé treatment of what were apparently systemic and individualized violations of constitutional and

statutory rights reinforces the need for a determination of the relevant facts as a predicate to the exercise of judicial supervisory power. *See Chapman*, 524 F.3d at 1088.

H. The Warrantless Retention And Searches Of The Content Of Mr. Mohamud's Electronic Communications Violated The FISA Amendments Act And The Constitution.

The government spends much time on the lack of protection of foreign communications abroad under the United States Constitution, which is not disputed by the defense. But at issue in the present case is the government's statutory and constitutional authority to retain and later access communications of *American citizens* acquired in the United States incidentally to surveillance of foreign communications. The government's response does not construe the government's statutory authority consistently with provisions that evince Congress's intent to protect Americans' communications from warrantless collection by the intelligence agencies, and it minimizes the intrusiveness of allowing the NSA, FBI, and CIA to retain and search through a massive database of United States citizens' communications.

The defense addresses the questions facing this Court from the narrowest to the broadest:

- As a matter of statutory interpretation, § 702 of the FAA does not authorize the government to retain and to access the content of American communications.

- Even if statutorily authorized, secondary searches of § 702 databases to access the content of American communications requires prior judicial review under the Constitution.

- Alternatively, the statute is unconstitutional on its face and as applied as to the collection and retention of American communications.

1. Section 702 Of The FAA Does Not Authorize The Government To Retain And Later Access Americans' Electronic Communications That Are "Incidentally" Intercepted While Targeting Foreigners.

The government seeks to reframe the question from whether § 702 *authorizes* retention and accessing of Americans' communications to whether the statute "prohibits" such searches. Resp. Br. at 139. Accordingly, the government does not cite to any statutory language stating that Congress considered and approved the mass retention and accessing of the content of Americans' emails, texts, and telephone calls. Resp. Br. at 139-42. Moreover, the government does not address the case law requiring explicit authorization for actions with such significant constitutional implications. *Hamdi v. Rumsfeld*, 542 U.S. 507, 544 (2004) (calling for Congress to unmistakably articulate when a statute will operate in "derogation of customary liberty").

In *ACLU v. Clapper*, the Second Circuit held that § 215 of the Patriot Act (50 U.S.C. § 1861) did not authorize the bulk collection of telephone metadata. 785 F.3d 787 (2d Cir. 2015). The statutory language of § 215 allowed government agents to seek telecommunications records that are "relevant to an authorized investigation." *Id*. at 795 (quoting 50 U.S.C. § 1861(b)(2)(A)). The government argued that bulk collection allowed it to create a "historical repository," which in turn would be necessary for it to identify relevant information. *Id*. at 812-13. The Second Circuit disagreed that the language of the statute "allow[ed] the government to collect phone records only because they may become relevant to a possible authorized investigation in the future." *Id*. at 818. The court concluded that the plain text of the statute was "decidedly too ordinary for what the government would have us believe is such an extraordinary departure from any accepted understanding" of relevance. *Id*. at 819.

The present case provides far less in the way of authorizing language than § 215. The "targeting" language only references foreign communications, and the phrase upon which the government's argument depends – "incidentally collected" – appears nowhere in the statute. The government points to no language referencing retention of Americans' communications and certainly cannot come close to finding

a reference to accessing the content of incidentally-intercepted communications of United States persons.

In *Hamdi*, the Court found no language in the Authorization for the Use of Military Force permitting the government to detain American citizens without recourse to the courts. 542 U.S. at 543-44. The Court refused to read the statute as derogating "customary liberty" in the absence of lawmakers speaking "clearly and unmistakably" on the point. *Id*. at 544. The Constitution describes a national government that "possesses only limited powers." *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014). Given the abuses of privacy that FISA sought to remedy, this Court should not assume that Congress intended to undermine customary protection of Americans' communications when it has not clearly articulated that intention.

The government claims that the adoption of FISC-approved minimization procedures demonstrates congressional authorization for it to retain a database of Americans' communications subject to later access without judicial review. But if that were Congress's intent, it would have said so. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). If anything, the statute's minimization requirement

evinces Congress's intent that the government must in fact minimize the intrusiveness of its foreign intelligence surveillance on United States persons – not Congress's intent to authorize the wholesale collection, retention, and searching of Americans' international communications, as the government claims. *See Setser v. United States*, 132 S. Ct. 1463, 1469 (2012) (explaining that maxim of *expression unius est exclusion alterius* does not readily apply to limitations on authority). The statute does not impliedly authorize all intrusions other than those expressly forbidden, as the government would interpret it.

To the extent the FAA's silence is ambiguous, the Court should construe the statute to require judicial review of the search of the content of American citizens' communications under the doctrine of constitutional avoidance. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Because the government has failed to demonstrate that the statutory language of the FAA – in a "clear statement" or at all – authorizes the retention and accessing of Americans' communications without judicial review, the searches in the present case violated the statute, requiring suppression under 50 U.S.C. § 1806(f).

2. The Government's Post-Seizure Searches Of The Content Of An American Citizen's Communications Violated The Constitution Because They Occurred Without Judicial Review And Other Analogues To The Fourth Amendment's Warrant Requirement.

The government acknowledges that the scope of acquisitions under § 702 are "substantial" and include vast amounts of private communications of American citizens incidentally acquired. Resp. Br. 137-38; *see also* Barton Gellman et al., *In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are*, Wash. Post, July 5, 2014. The government bases its authority to catalogue and to search these troves of private American communications on the erroneous assumption that these searches occasion no intrusion into protected privacy rights greater than what occurs when the communications are incidentally acquired. Resp. Br. at 131-132. This remarkable and unprecedented claim should be soundly rejected because it does not comport with the principle that the extent of Fourth Amendment intrusions must be tied to their justifications. Op. Br. at 152-53 (citing, *inter alia*, *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987), and *Riley v. California*, 134 S. Ct. 2473 (2014)).

This principle fully applies to the present circumstance. Section 702 contemplates the warrantless surveillance of specific foreign targets who are located abroad. Nothing in the justification for the initial interception of foreign communications permits the government to bypass the Fourth Amendment entirely

when it obtains American communications in the course of that surveillance. Thus, storing, databasing, and then searching those communications for the communications of Americans requires Fourth Amendment justification beyond merely the authority to target foreigners living abroad.

Because United States persons have Fourth Amendment rights that foreigners do not have – and because no constitutional protections are applied to the initial acquisition – this case is unlike those the government relies on for authority. Those cases do not involve a profound mismatch between the basis for the government's initial acquisition and the government's subsequent use of the data. Resp. Br. at 131-32 (citing approval of DNA analysis of lawfully collected samples in *Maryland v. King*, 133 S. Ct. 1958 (2013)).

In addition to disregarding the strong privacy interest implicated by its post-acquisition use of incidentally collected communications, the government intimates that post-acquisition searches of incidentally collected U.S. communications have already been approved in various contexts. Resp. Br. at 131-33. But the government never advises the Court that, in its most frequently cited case, the Court's opinion was explicitly based on the assurance that the communications of United States persons were not databased and, therefore, not accessed:

> The government assures us that it does not maintain a database of incidentally collected information from non-targeted United States

> persons, and there is no evidence to the contrary. On these facts, incidentally collected communications of non-targeted United States persons do not violate the Fourth Amendment.

In re Directives, 551 F.3d 1004, 1015 (FISA Ct. Rev. 2008).

The statute in *In re Directives* was more limited in scope than the § 702 programs in other ways as well. By incorporating § 2.5 of Executive Order 12333, the *Directives* statute required the Attorney General to determine on a case-by-case basis whether there was probable cause to believe the target of the surveillance was a foreign power or an agent of a foreign power. 551 F.3d at 1014. Thus, the statute required some level of individualized suspicion similar to traditional FISA surveillance (even though at a high level of the executive branch rather than a judicial officer), and the suspicion related to a narrower national security interest. Actions with respect to a much smaller category of intercepted communications do not raise the same Fourth Amendment concerns as the vast reach of § 702.

The Privacy and Civil Liberties Oversight Board (PCLOB) also expressed the same constitutional concerns about post-acquisition accessing of Americans' communications under § 702 as are addressed here. While the government references the PCLOB Report's approval for the "core" collection of foreign communications, it omits the limitation of that approval: "Outside of this fundamental core, certain aspects of the Section 702 program raise questions about

whether its impact on U.S. persons pushes the program over the edge into constitutional unreasonableness." PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014) (PCLOB Report). Among other things, the PCLOB Report expressly questioned the "scope of the incidental collection of U.S. persons' communications," "the use of database queries to search the information collected under the program for the communications of specific U.S. persons," and use of the communications for "proceedings that have no relationship to foreign intelligence." *Id*. at 96-97.

Likewise, the President's Review Group on Intelligence and Communications Technologies (PRG) recommended that existing minimization procedures do not "adequately protect the legitimate privacy interests of United States persons" that are infringed when the government later searches through databases of incidentally collected communications. Report and Recommendations of the PRG, *Liberty and Security in a Changing World*, at 148-49 (2013) (Recommendation 12). The report stated that United States persons "are entitled to the full protection of their privacy" even when they communicate with foreigners abroad, and that privacy should "be accorded substantial protection." *Id*. at 149-50.

In sum, the government finds no support for its repeated assertions that its subjective intent to target unprotected communications insulates the retention,

querying, and accessing of Americans' communications from constitutional protections. While the Fourth Amendment may not protect foreigners located abroad, it unquestionably protects Americans whose communications are intercepted in the United States by American intelligence agencies. Once the collected material's American origins are reasonably known, ordinary constitutional protections apply, including individualized suspicion and judicial review.

Government officials have made clear that a central purpose of § 702 surveillance is the interception of United States persons' communications, and the government admits as much in its brief. Resp. Br. 122-23, 134. The government cannot justify creating a warrantless backdoor into United States persons' international communications, as occurred in this case, without a traditional level of individualized judicial review.

3. Acquisition And Retention Of Americans' Electronic Communications Under The FAA Violates The First And Fourth Amendments And The Separation Of Powers.

If the Court finds that neither the statute nor the Constitution bars the government from accessing Americans' communications without a warrant *after* they have been collected, the Court should find that the initial collection and retention of Americans' communications violate the Constitution. Op. Br. at 155-62.

a. The Mass Acquisition, Retention, And Accessing Of American Citizens' Electronic Communications Under § 702 Of The FISA Amendments Act Violate The Fourth Amendment.

Regardless of the nominal targeting of foreign persons abroad, the § 702 programs routinely acquire huge numbers of protected American communications.[9] Contrary to the government's claims, this mass intrusion in private communications implicates the Fourth Amendment. This Court should reject the claim that, simply because foreign persons are being targeted, Americans lose their rights as collateral damage.

Section 702 fails at every level of Fourth Amendment analysis. First, the extreme intrusion into the core privacy rights of Americans should require a warrant

[9] These acquisitions are not limited to communications between Americans and targeted foreigners. Instead, the § 702 surveillance programs also intercept large amounts of: 1) entirely domestic communications between United States citizens that are "about" a targeted foreigner (on the strained theory that the Fourth Amendment does not apply because the "target" is still the foreigner, even though that person is not a party to the seized communication); and 2) entirely domestic communications between United States citizens that have no connection to the nominal target but whose online communications happen to travel in the same internet "transaction" as a targeted communication. Mem. Op. at 17-18, *In re DNI/AG Certification*, No. 702(i)-08-01 (FISA Ct. Sept. 4, 2008) (accepting government's argument that the "target" remains the foreign individual even where that individual is not a party to the communication); *[Caption Redacted]*, 2011 WL 10945618, at *11-12 (FISA Ct. Oct. 3, 2011) (estimating at least "tens of thousands of wholly domestic communications" are seized under § 702 in the above two categories).

or similar individualized judicial review. Second, even if a narrow foreign intelligence exception to the warrant requirement exists, the § 702 programs do not fit within such an exception. Finally, to the extent that "reasonableness" is at issue, the § 702 surveillance programs are unreasonable based on the competing interests at stake and the lack of meaningful protection for Americans' communications.

1) Where Electronic Surveillance Results In Retention Of American Communications, The Government Must Comply With The Warrant Clause Or The Search Violates The Constitution.

The present case involves a United States citizen living in Beaverton, Oregon, and communications intercepted domestically from United States service providers. The government claims that constitutional protection of American citizens, whose communications are listened to and read under § 702, is the same as that of foreign persons who are searched abroad – nothing. Resp. Br. at 100-09. This claim misreads relevant case law.

First, the direct reasoning of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), does not support the conclusion that incidentally acquiring American communications implicates no Fourth Amendment rights. The core holding of *Verdugo-Urquidez* is narrow: when American drug enforcement officers seized a Mexican citizen's property in Mexico, the Mexican citizen did not have Fourth Amendment rights to assert. *Id*. at 274-75. Because *Verdugo-Urquidez* involved the

individualized targeting of a single alien and the search occurred outside the United States, it does not stand for the proposition the Fourth Amendment is generally inapplicable to dragnet searches involving no individualized suspicion with respect to any American communications intercepted. Rather, the Court affirmed the protection of Americans' Fourth Amendment rights: "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government." *Id*. at 266.

The government ignores a critical aspect of *Verdugo-Urquidez*, which is the Court's finding that the location of the search was important: "At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, *and the place searched was located in Mexico*." *Id*. at 274-75 (emphasis added). The government admits that the searches in this case occurred within the United States. Resp. Br. at 109. The government relies on *United States v. Yonn*, 702 F.2d 1341 (11th Cir. 1983) for its claim that, contrary to the direct reasoning of *Verdugo-Urquidez*, the location of the search is irrelevant. Resp. Br. 109-10. In *Yonn*, agents in the United States made consensual recordings of a conversation between an informant and a drug dealer that took place in a motel room. The court found no significance in the location of the microphone in the motel room, which was activated only when the informant was in the room and the recording was

therefore consensual: "The location of the electronic equipment does not alter the irrefutable fact that Yonn had no justifiable expectation of privacy in his conversation with Dozier." 702 F.2d at 1347. *Yonn* does nothing to change the clear directive of *Verdugo-Urquidez* that location matters when assessing the jurisdictional reach of the Fourth Amendment.

The government's additional reliance on cases condoning "incidental" collection and retention is misplaced for several reasons. First, the sheer amount of incidental collection and retention under § 702 bears no relation to the cited cases. *See [Caption Redacted]*, 2011 WL 10945618, at *9 (noting that one of the government agencies using § 702 surveillance "acquires more than two hundred fifty million Internet communications each year"). Second, the cases relied on by the government involved some form of judicial review (Title III and FISA), or a narrowly drawn exception to the warrant requirement (consent and overseas searches of agents of foreign powers where the primary purpose is foreign intelligence). None of them involve programmatically creating a constitutional loophole to acquire massive amounts of private communications of individuals who do fall within the protection of the Fourth Amendment.

2) No Well-Established Exception To The Warrant Clause Applies To The Acquisition And Retention Of Americans' Communications.

The government's invocation of "special needs" fails to recognize that § 702 does not on its face invoke or justify mass surveillance of Americans' communications. Resp. Br. at 110-11. The reason the Snowden disclosures regarding the FAA programs produced shock throughout the country was that the statute did not provide any notice or explicit authorization for acquiring, retaining, and disseminating the contents of Americans' communications.

Programmatic warrantless intrusions into privacy under the special needs doctrine generally involve openly implemented protocols that must be carefully confined to a "primary purpose" other than law enforcement to guard against abuse, as in *Ferguson v. City of Charleston*, where the Court remanded to assure that, after "close review," the drug-testing program of pregnant women was primarily directed toward health issues. 532 U.S. 67, 81, 84-85 (2001). Similarly, the probation and parole search cases involve individuals with substantially reduced privacy expectations. *See United States v. Knights*, 534 U.S. 112, 118-19 (2001); *see also Maryland v. King*, 133 S. Ct. 1958, 1977-80 (2013) (reduced privacy for persons arrested allowed for DNA testing). In contrast, § 702 is based on a "significant purpose" of collecting foreign intelligence, but does not require that the foreign

intelligence interest be the primary purpose as compared to other goals. 50 U.S.C. § 1881a(g)(2)(A)(v). Section 702 also permits the government to engage in warrantless surveillance to obtain information related to "the conduct of foreign affairs of the United States," which could include a universe of innocuous information about trade, social matters, politics, religion, and more, not just information pertaining to national security threats. *Compare* 50 U.S.C. § 1801(e)(1) *with* 50 U.S.C. § 1801(e)(2).

Because § 702 targeting need not be "primarily" for foreign intelligence, the risk of bleed-over into criminal investigations is especially high. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000) (highway checkpoints unconstitutional based on their "primary purpose" of drug interdiction). Further, the government has not established that the type of judicial oversight required under the "special needs" doctrine to prevent misuse occurs in § 702 programs. Rather, court review is limited to ex parte proceedings generally reviewing the government's targeting and minimization procedures. If not carefully cabined as in *Ferguson* and *Edmond*, the "special needs" doctrine, when applied to foreign intelligence surveillance, would swallow the Fourth Amendment. *See Edmond*, 531 U.S. at 37 ("individualized suspicion of wrongdoing" is the "usual rule").

The government's claim that § 702 falls within the scope of a foreign intelligence exception to the Fourth Amendment warrant requirement also fails. The scope of any foreign intelligence exception must be closely circumscribed, as are all warrant exceptions. *See Gant v. Arizona*, 556 U.S. 332, 338 (2009) (describing warrant exceptions as "specifically established and well-delineated") (citations omitted); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (describing exceptions as "jealously and carefully drawn") (citation omitted). The government does not cite any cases that would support a sufficiently broad warrant exception to encompass § 702. *See United States v. Bin Laden*, 126 F.Supp.2d 264, 277 (S.D.N.Y. 2000) (citing *United States v. Truong*, 629 F.2d 908, 915-17 (4th Cir. 1980)) ("[T]he warrant exception adopted by this Court is narrowly drawn to include only those overseas searches, authorized by the President (or his delegate, the Attorney General), which are conducted primarily for foreign intelligence purposes and which target foreign powers or their agents."). In *Directives*, the court defined the foreign intelligence exception to the Warrant Clause much more narrowly than what the government advocates now. 551 F.3d at 1012 ("we hold that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to

be located outside the United States."). The court cautioned that "the Constitution is the cornerstone of our freedoms, and government cannot unilaterally sacrifice constitutional rights on the altar of national security." *Id*. at 1016.

The government criticizes the defense for its "misplaced" reliance on *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), without acknowledging that the very cases upon which the government relies in its response refer to *Keith* as providing the template for Fourth Amendment analysis of foreign intelligence surveillance. *See*, *e.g.*, *In re Sealed Case*, 310 F.3d 717, 738 (FISA Ct. Rev. 2002) ("Congress was aware of *Keith*'s reasoning, and recognized that it applies *a fortiori* to foreign threats."); *Truong*, 629 F.2d at 913 (the Supreme Court in *Keith* "formulated the analytical approach which we employ here in an analogous case"). The Court's reasoning in *Keith* should inform this Court's analysis, especially because Congress directly and explicitly considered the case in enacting FISA. *See*, *e.g.*, S. Rep. 604(I), at 13-14, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3914-16; S. Rep. 701, at 9, 15-16, *reprinted in* 1978 U.S.C.C.A.N. 3973, 3977, 3984-85. Congress intended FISA to provide "new and tighter controls" to protect against privacy invasions that "threaten to undermine our democratic society and fundamentally alter its nature." S. Rep. No. 94-755 (Book II), at 2 (1976).

This case involves domestic investigative activities to gather foreign intelligence: searches and seizures of the private communications of an American citizen, sent and received in the United States, and intercepted in the United States from United States service providers. The reasoning of *Keith* is directly relevant. Indeed, the constitutional considerations favoring privacy are weightier because of the breadth of surveillance that includes information relevant to "the conduct of the foreign affairs of the United States," 50 U.S.C. § 1801(e)(2)(B), and because of the sheer volume of interceptions.

The government relies on cases involving limitations completely missing from the § 702 programs. For example, in citing to *Truong*, the government omits the central holding cabining warrantless surveillance to situations where "the surveillance is conducted 'primarily' for foreign intelligence reasons" and when "the object of the search or the surveillance is a foreign power, its agents or collaborators"). 629 F.2d at 915. Similarly, in *In re Sealed Case*, the FISA Review Court, focused on the narrow scope of the foreign intelligence surveillance. The FISA court had to find "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power," and that the surveillance related to potential attack, sabotage, and clandestine intelligence activities under 50 U.S.C. § 1801(e)(1). *Sealed Case*, 310 F.3d at 722-23. Electronic

surveillance relating to "the conduct of the foreign affairs of the United States" under 50 U.S.C. § 1801(e)(2) was not permitted. *Id*.; *see Zweibon v. Mitchell*, 516 F.2d 594, 613-14 (D.C. Cir 1975) (en banc) (absent exigent circumstances, foreign national security electronic surveillance of domestic individuals, who were neither agents of nor acting in collaboration with a foreign power, required a judicial warrant). Any foreign intelligence exception to the Warrant Clause must be limited to actions designed to protect against foreign threats to the national security, and not to allow surveillance of Americans for general information-gathering about foreign policies.

Finally, the government's blanket assertion that additional Fourth Amendment protections are "impracticable" is unsupported. Resp. Br. at 114-16. First, the government's claim that judicial oversight of warrantless searches and seizures of Americans' communications under § 702 would "hinder the government's ability to monitor fast-moving threats" ignores the fact that Congress has already dealt with this concern in the context of traditional FISA surveillance. Resp. Br. at 115. Under 50 U.S.C. § 1805(e), Congress provided an exception for exigent circumstances whereby the Executive could engage in individualized surveillance on an emergency basis, then later receive approval from the FISC. The

government provides no reason why a similar arrangement could not be applied in the context of § 702 surveillance.

Second, the government focuses only on the acquisition stage without addressing whether it is equally "impracticable" to provide Fourth Amendment protections for later actions relating to seized American communications. For example, the government could be required to seek judicial authorization before it retains, queries, or disseminates already seized communications of Americans, which is essentially the current procedure under a different section of FISA. 50 U.S.C. § 1801(h)(4). In fact, judicial approval prior to querying is now what occurs for § 215 metadata collection, although the government originally raised many of the same objections that it raises here. White House Press Release, *Statement by the President on the Section 215 Bulk Metadata Program* (Mar. 27, 2014) (requiring judicial approval for § 215 queries).

Third, surveillance under § 702 does not limit the collection or retention of Americans' private communications to those involving terrorism or other similar threats to national security. Although the government's brief almost exclusively discusses "threats," "terrorist groups," and other concerns "vital to the Nation's security," § 702 allows the government to collect and retain communications that

have nothing to do with any danger to the country. *See* 50 U.S.C. § 1801(e) (definition of foreign intelligence information).

In short, the government presents a false dichotomy by suggesting a zero-sum choice must be made between individualized judicial oversight and national security. The government's attempt to marginalize the Constitution on grounds of efficiency and practicality jeopardizes the liberty of all citizens. *United States v. 1013 Crates Of Empty Old Smuggler Whiskey Bottles*, 52 F.2d 49, 51 (2d Cir. 1931) ("The Fourth Amendment, which prohibits unreasonable searches and seizures, is one of the pillars of liberty so necessary to a free government that expediency in law enforcement must ever yield to the necessity for keeping the principles on which it rests inviolate.").

For the foregoing reasons, even assuming a narrow foreign intelligence exception to the Fourth Amendment exists, the surveillance programs under § 702 are far too broad and indiscriminate to fall under such an exception.

3) The Government's Acquisition, Retention, And Accessing Of Americans' Electronic Communications Violate Core Privacy Interests Protected By The Warrant Clause And Constitute Unreasonable Searches And Seizures.

Because the Warrant Clause has already performed the constitutional balancing regarding private communications, a reasonableness inquiry in this case

is inappropriate. Op. Br. at 160. However, if the Court does reach the question, § 702 should be held to be unreasonable under the Fourth Amendment given the balance of interests involved.

Contrary to the government's claim, the defense does not "conflate[] the test for constitutional reasonableness" with the requirements of a warrant. Resp. Br. at 138. The court in *In re Directives* adopted the reasoning from *Keith* regarding the importance of analyzing a new program's reasonableness by reference to how close the analogies are to standard Fourth Amendment protections. 551 F.3d at 1013 ("the more a set of procedures resembles those associated with the traditional warrant requirements, the more easily it can be determined those procedures are within constitutional bounds."). A comparison between § 702 requirements and those found in Title III and FISA demonstrates how different the former program is in terms of the requirements found in traditional warrants and what the government must establish before a judicial officer:

	Title III	**Traditional FISA**	**§ 702**
Required level of suspicion of an individual	Probable cause the individual is committing, has committed, or is about to commit a criminal offense. 18 U.S.C. § 2518(3)(a).	Probable cause the individual is a foreign power (including terrorist organizations) or an agent of a foreign power. 50 U.S.C. § 1805(a)(2)(A).	None

Required level of suspicion regarding facility to be monitored	Probable cause communications concerning an offense will be obtained through interception. 18 U.S.C. § 2518(3)(b).	Probable cause each targeted facility is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a)(2)(B).	None
Particularity regarding individual to be monitored	Specify the identity, if known, of the person committing the offense or whose communications are to be intercepted. 18 U.S.C. § 2518(1)(b).	Specify the identity, if known, or a description of the specific target of the surveillance. 50 U.S.C. § 1805(c)(1)(A).	None
Particularity regarding location to be monitored	Specify the nature and location of the communications facilities as to which, or the place where, interception will occur. 18 U.S.C. § 2518(1)(b).	Specify the nature and location of each of the facilities or places at which the surveillance will be directed. 50 U.S.C. § 1805(c)(1)(B).	None
Particularity regarding types of communications to be intercepted	Particular description of the type of communication sought to be intercepted. 18 U.S.C. § 2518(1)(b).	Designate the type of foreign intelligence information being sought and the type of communications or activities to be subjected to the surveillance. 50 U.S.C. § 1805(c)(1)(C).	None
Limitations on duration of surveillance	Surveillance orders limited to 30 days. 18 U.S.C. § 2518(5).	Generally 90-120 days; surveillance of a "foreign power" may extend to 1 year. 50 U.S.C. § 1805(d)(1).	1 year. 50 U.S.C. § 1881a(a).

In the absence of any meaningful analogies to Warrant Clause protections, the government relies on inapt references to DNA and drug screening, always omitting the limitations of those cases as exceptions to warrant requirements. For example, the DNA swab of arrestees involved a "negligible" intrusion. *King*, 133 S. Ct. at 1969. The DNA cases involve no discretion exercised by officers: the officers simply need "a safe and accurate way to process and identify the persons and possessions they must take into custody." *Id*. at 1970. Similarly, the Court has approved probation searches based on the significantly diminished expectation of privacy, prior notice, and the need for probation officers to provide supervision in the community. *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001).

In contrast, the scope of surveillance under § 702 is vast: the persons who might be targeted are broadly defined; the purposes of surveillance include anything related to foreign policy, and the intelligence agencies, once in possession of communications, claim they have completely unrestricted authority to do anything they want with Americans' private communications. The cases relied on by the government simply provide no useful analogy to the mass acquisition, retention, and accessing of Americans' electronic communications under § 702.

The government's claim of a pressing national security interest must be closely scrutinized, given § 702's failure to distinguish between "protective" or "counterintelligence" information regarding terrorist attacks, sabotage and clandestine activities of foreign spies, as opposed to the relatively innocuous "affirmative" or "positive" material that can inform the conduct of foreign affairs. *Sealed Case*, 310 F.3d at 723 n.9; 50 U.S.C. §§ 1801(e)(1), (2). While even a proper invocation of national security would not provide the government with a blank check for warrantless intrusions, *Keith*, 407 U.S. at 320, the government interest in this case is far more general and lacking in exigency, thereby detracting from the reasonableness of the individual privacy intrusion with no judicial review or supervision.

Ignoring the basic principle that the Fourth Amendment "protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), the government further claims that "U.S. persons generally have reduced expectations of privacy" in communications with non-U.S. persons outside the United States. Resp. Br. at 123. This is not the law. When a person in the United States pens a letter, or writes an email, or communicates on a telephone, that person has a reasonable expectation of privacy in the communication. *Keith*, 407 U.S. at 313 ("[*Katz*] implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy

which electronic surveillance entails necessitate the application of Fourth Amendment safeguards."); *Alderman v. United States*, 394 U.S. 165 (1969) (phone calls); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (emails). The Fourth Amendment's protection of private content extends not just to domestic communications but to international ones as well. *See*, *e.g.*, *United States v. Ramsey*, 431 U.S. 606, 616–20 (1977).

Likewise, the law does not support the government's contention that intercepted communications receive no Fourth Amendment protection because the information is voluntarily disclosed to others. Resp. Br. at 123. The Supreme Court has unequivocally rejected that argument. *See United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970) ("Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.") (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)). The PCLOB recognized that "emails are functionally analogous to mailed letters and . . . therefore their contents cannot be examined by the government without a warrant." PCLOB Report at 89 & n.407. The government cannot snatch Americans' communications as they are being transmitted, then store and later access their contents, without Fourth Amendment consequences.

Another argument that runs throughout the government's response is that its minimization and other procedures provide adequate protection to seized communications of United States persons. The defense is handicapped in addressing the deficiencies in the minimization and other procedures because the government has not disclosed those at issue here. But the statute itself is circular, requiring limitations only to the extent they are "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801(h). The limitations, therefore, place no meaningful check on government intrusions.

From what is known, the primary, or only, limitations on "retention" are the multi-year periods of varying length set by various government agencies. Allowing retention of communications of United States persons for two or five years provides no meaningful privacy protection, especially when the contents of Americans' communications can be repeatedly accessed without limitation or oversight throughout that time. Moreover, the government's reliance on limiting procedures fails to recognize the necessary implications of its position that the seized communications lack Fourth Amendment protections, which is that none of the statutory limitations on acquisition have any bearing on, or provide any protection

from, its retention, querying, uses, and disseminations of Americans' communications.

The broad scope of the acquisition of private communications and the lack of any real protection on their use establish that § 702 is unreasonable under the Fourth Amendment.

b. Section 702 Blurs The Constitutionally Required Separation Of Powers By Providing Article III Judges The Role Of Designing Programs, Rather Than Ruling On Individual Applications To Authorize Surveillance, And By Delegating To Article III Judges Legislative And Executive Functions.

In testimony before the PCLOB, former FISC Judge James Robertson described the "ex parte FISA process" as judicial "approval," rather than "adjudication." PCLOB, Transcript, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA Patriot Act and Section 702 of the Foreign Intelligence Surveillance Act 35* (July 9, 2013) (ER 3058-59). The judge pointed out that "review[ing] policy determinations for compliance with statutory law" outside the adversary process is "not the bailiwick of judges." *Id*. at 37. The Supreme Court has validated the separation of powers limitations that should apply here: "[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of another coordinate Branch."

Mistretta v. United States, 488 U.S. 361, 382 (1989). Because § 702 co-opts judges to participate in making Executive programs, while leaving the judges no decisions to make based on individualized suspicion regarding specific subjects of Executive interest, the Court should strike down the provisions as exceeding the proper functions of and undermining the independence of the Judiciary.

The participation of judicial officers in the design of surveillance program also violates the non-delegation doctrine because the statute fails to provide clearly delineated policies that specify the boundaries of the delegated authority. *Mistretta*, 488 U.S. at 372-73. The statutory mandate for this surveillance includes the unguided instruction to design a program not to violate the Fourth Amendment. 50 U.S.C. § 1881a(b)(5). Given the Fourth Amendment's reasonableness requirement, and the possibility that the least intrusive search does not determine the limits of reasonableness (*City of Ontario v. Quon*, 130 S. Ct. 2619, 2632), Article III judges are being assigned a legislative and executive function that also compromises the judicial neutrality necessary to adjudicate whether a search authorized by the judges' program violates the Fourth Amendment.

c. Section 702 Violates The First Amendment Because Its Overbreadth And Vagueness Chill Exercise Of Speech, Press, Religious, And Associational Rights.

The government does not dispute the general proposition, stated by the Supreme Court in *Keith*, that national security surveillance "often reflect[s] a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." 407 U.S. at 313-14. Yet the government wrongly implies that surveillance that would otherwise comply with the Fourth Amendment cannot be unconstitutional in violation of the First Amendment. Resp. Br. at 151-52. The cases upon which the government relies actually support the opposite proposition: First Amendment protections inform the Fourth Amendment reasonableness standard. *See*, *e.g.*, *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007) ("First Amendment concerns become part of the Fourth Amendment analysis because, under the Fourth Amendment, the court must examine what is unreasonable in the light of the values of freedom of expression.") (internal quotation marks omitted).

For example, the Court in *Mayer* acknowledged that undercover infiltration of protected organizations could violate the First Amendment if it were conducted for an improper purpose, regardless of the fact that the organization's activities would otherwise not be protected under the Fourth Amendment. *Id*. at 750-54; *see also Roaden v. Kentucky*, 413 U.S. 496, 503-04 (1973) (holding that warrantless

seizure of First Amendment protected materials constitutes a "prior restraint on the right of expression [that] calls for a higher hurdle in evaluation of reasonableness").[10] An investigation that is unlawful under the First Amendment triggers the statutory rule of exclusion, regardless of exclusion under the Fourth Amendment. 50 U.S.C. § 1806(e) and (g).

The government next contends that *Clapper* forecloses a First Amendment claim by holding that the chilling effect of government surveillance did not give plaintiffs – who were not aggrieved parties – standing to challenge the law. Resp. Br. at 152 (citing 133 S. Ct. at 1152). *Clapper*'s holding on standing has no bearing here, where there is no debate that the defendant is an aggrieved party because his communications were searched and seized. Moreover, the Supreme Court has repeatedly confirmed that investigatory searches and seizures can infringe on First Amendment rights by creating an unconstitutional chilling effect. *Stanford v. Texas*, 379 U.S. 476, 484-85 (1965) ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."); *see also United States v. Jones*,

[10] Although the test for infiltration articulated in *Mayer* discussed "good faith," the fact that the government does not intend to suppress speech is not determinative in the First Amendment analysis. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (noting that First Amendment injury can occur as the "unintended but inevitable result of the government's conduct").

132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (generalized surveillance "chills associational and expressive freedoms").

4. Alternatively, The Court Should Authorize Supplemental Briefing With Defense Access To The Relevant Documents.

Based on the novel and complex issues confronting the Court regarding the government's use of electronic surveillance, the defense requested that the Court authorize supplemental briefing based on access to classified material under 50 U.S.C. § 1806(f), Op. Br. at 162-64, a position supported by the amicus curiae brief of the National Association of Criminal Defense Lawyers. The government asserts that defense counsels' access to the classified material under discussion would be "inconsistent with the statutory standard." Resp. Br. at 149-51. But the government's assertion that disclosure should be an exception provides no basis to contradict the defense argument that the trial court misinterpreted the statutory meaning of "necessary." As elaborated in the amicus brief, the government's reading of "necessary" is inconsistent with the overall statutory context and the legislative history. NACDL Br. at 3-25.

The constitutional norm requires adversarial proceedings to ensure reliable factfinding and to fully explore and frame the legal issues. *See Herring v. New York*, 422 U.S. 853, 857 (1975) ("[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in

defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."); *Greenlaw v. United States*, 554 U.S. 237 (under the "principle of party presentation," courts rely on litigants to "frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present").

The government does not dispute that the issues raised by FAA surveillance are both novel and complex. Resp. Br. at 149-50. On the issue of complexity, the legal issues are matters of first impression upon which this Court can have had no prior experience. Additionally, the instrumentalities and processes of FAA surveillance are far more technologically complex than traditional FISA surveillance. For instance, the differences between Prism surveillance and Upstream surveillance are stark, yet the defense is not even able to address which type of surveillance was used in this case. Further, Prism's degree of intrusion may be much greater than the district court assumed, because access apparently extends to historical electronic records. Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency*, 216 (2015) ("What was new about Prism was that it allowed the

government to obtain *all the stored messages* in a newly targeted user's account right away) (emphasis in original).[11]

The government points out that, even though many FISA surveillance issues will be both novel and complex, the statute contemplates disclosure as the exception, rather than the rule. Resp. Br. at 150 (citing *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982)). The court in *Belfield* had determined the short overheard conversations were irrelevant and unhelpful to the defense, addressing only standard FISA claims in the context of a discovery request. The court recognized, though, that disclosure would be necessary "where the court's initial review of the application, order, and fruits of the surveillance indicates that the question of legality may be complicated by factors such as 'indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling

[11] This possibility is especially significant in the present case where several individuals who later moved abroad may have had purely domestic communications with Mr. Mohamud while they were still living in the United States. The government's ability to access historical emails and other records from a targeted account raises serious concerns about the jurisdictional "foreignness" the government relies on, as it is unclear how that exception applies to stored communications that predate the "foreignness" analysis performed by the targeting agency.

into question compliance with the minimization standards contained in the order.'" *Belfield*, 692 F.2d at 147 (quoting legislative history).

Yet the government implicitly agrees that Congress provided a mechanism for defense access to confidential materials because it contemplated some cases where adversarial testing would substantially benefit the court's deliberative duties to adjudicate the government's implementation of electronic surveillance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defense counsel ensures "that the adversarial testing process works to produce a just result."). This is such a case. The present case involves never-before litigated legal issues regarding a massive and secret surveillance program, as well as concrete factual issues relating to the implementation of the FAA programs generally and as applied in this case, raising potential issues for litigation under *Franks v. Delaware*, 438 U.S. 154 (1978).

There is concrete evidence that the complexity of the surveillance techniques under § 702 and the government's ex parte presentation of them have previously led to erroneous conclusions by the FISC. *[Caption Redacted]*, 2011 WL 10945618, at *2 (Section 702 acquisitions "exceeded the scope of collection previously disclosed by the government and approved by the Court"); *id*. at *5 & n.14 ("government's recent revelation" regarding Upstream collection "fundamentally alters the statutory and constitutional analysis" and is the "third instance in less than three years in

which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program"); *id*. at *6 n.15 ("revelations regarding the scope of NSA's upstream collection implicate" FISA provision criminalizing unauthorized electronic surveillance).

The flaws of non-adversarial deliberations in this context are numerous and inevitable. The government cannot be expected to police itself. The adversarial process is necessary to provide the Court with the critical perspective to assure that the facts are spelled out as completely and understandably as possible, while legal and policy arguments are fully articulated opposing the government's contentions. If disclosure is not "necessary" here, the government does not explain when its standard of necessity could ever be met.

Finally, the fact that the government has publicly disclosed information related to FAA surveillance – including minimization procedures and FISC opinions – undermines its claim that disclosing anything to the defense in this case would harm national security. At a minimum, due process requires balancing the defendant's interest in access to the information against the government's asserted interest. Here, the defendant's interest in disclosure prevails because of the liberty interest at stake and because disclosure to security-cleared defense counsel through

an appropriate protective order would not present a significant risk to national security.

5. The Court Should Order Suppression Of Evidence Derived From Electronic Surveillance Conducted In Violation Of The Statute And Constitution.

If the search was unlawful, the government contends that the good faith exception to the exclusionary rule would prevent suppression. Resp. Br. at 153-56. However, the statute mandates suppression for unlawful searches, and no exception to the exclusionary rule applies.

The plain meaning of the statute is that, if surveillance was "not lawfully authorized or conducted," the evidence "obtained or derived from" it "shall" be suppressed. 50 U.S.C. § 1806(g). This unambiguous direction forecloses interpretive morphing of the statute into something different. *See Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2011) ("'The preeminent canon of statutory interpretation requires us to "presume that [the] legislature says in a statute what it means and means in a statute what it says there."'") (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (alteration in original). Electronic surveillance conducted in violation of the statute or in violation of the constitution is not "lawfully authorized or conducted" within the meaning of the statute. *See ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991) (the Constitution is "law" as FISA

uses that term). Although the unambiguous statute makes resort to legislative history unnecessary, Congress anticipated that the statutory exclusionary rule would apply to challenges to the statute's constitutionality. H. Rep. No. 95-1283 at 92-93 (1978) (in reviewing a motion to suppress FISA evidence, the trial court "is also free to review the constitutionality of the law itself.").

The statutory suppression remedy under FISA has been recognized, without a good faith exception, in *United States v. Glover*, 736 F.3d 509, 515-16 (D.C. Cir. 2013), and *United States v. Rice*, 478 F.3d 704, 712-14 (6th Cir. 2007). Such a construction makes sense because, at the time the statute was promulgated, the constitutionally-based Fourth Amendment exclusionary rule was recognized by *Weeks v. United States*, 232 U.S. 383 (1914), but no good faith exception existed. Therefore, the good faith exception could not have been impliedly incorporated by the lawmakers. The statute's meaning is set at the time of enactment and the meaning of the words does not change.

The government cites *Davis v. United States*, 564 U.S. 229 (2011), for the proposition that the exclusionary rule need not provide incentives to advance "novel Fourth Amendment claims." Resp. Br. at 155. On the contrary, statutory suppression under § 1806(g) codified the exclusionary rule in a manner that contemplated exactly the type of challenges involved in the present case. The reasoning of *Davis*, which

involved police officers who relied on directly applicable Supreme Court precedent, has no application to a statutory expansion of the exclusionary rule directly intended to bring surveillance practices out of the shadows. The government's suggestion that the fruits of searches conducted in reliance on the statute cannot be suppressed would mean that no "aggrieved person" would have an incentive to bring the initial challenge to warrantless surveillance. That conclusion would be contrary to the government's position at oral argument in *Clapper v. Amnesty International*, a civil case decided on standing, where the Solicitor General expressly argued that the legality of the statute would be tested in criminal cases, presumably because the defendant would challenge the statute to seek suppression.

Even assuming the good faith exception might apply to the statutorily mandated suppression remedy, the government fails to establish any basis for the exception to apply here. First, *Illinois v. Krull*, is inapposite because the statute expressly and unmistakably authorized the search in that case, 480 U.S. 340, 343 (1987), whereas § 702 provides no express authorization to acquire, retain, database, and query vast amounts of Americans' communications. When government agents choose to go beyond the bounds of the express statutory language, the exclusionary rule's function as a check on unbridled Executive Branch activity is fully implicated.

The government's claim of reliance on an "order issued by a neutral magistrate," Resp. Br. at 154, also fails because it relies on ex parte orders generally approving § 702's "targeting and minimization procedures," rather than an order authorizing the particular interception, retention, and subsequent search that occurred. The orders issued under § 702 differ from standard probable cause determinations in every aspect of what the Warrant Clause of the Fourth Amendment entails.

Finally, the government could not have been relying on binding appellate precedent because the present case involves the first appellate review of the FAA sought by a defendant with standing to challenge the program. The government's reliance on administrative review of a "similar" program finds no support in the precedent. Resp. Br. at 154. The *In re Directives* opinion was expressly contingent on the fact that the government was not keeping the kind of massive database of incidentally-collected United States person communications that is primarily at issue here. 551 F.3d at 1015.

In sum, the government accessed Mr. Mohamud's communications by searching a database of communications collected and retained without express statutory authorization, under a program never before reviewed and approved by any appellate court. The government's assertion that governmental overreaching in this

context should not result in suppression would effectively reduce the statutory and Fourth Amendment protections against warrantless surveillance to a "form of words" in the national security context. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

I. The District Court's Handling Of Classified Materials Should Be Reviewed De Novo.

Despite the government's contention that a district court's decision to withhold classified discovery "is reviewed for abuse of discretion," Resp. Br. at 61, that standard is inappropriate when the decision affects constitutional rights. *Neal*, 131 F.3d at 823 ("Constitutional issues are reviewed *de novo*."); *see also Haischer*, 780 F.3d at 1281 (noting that the question of whether an evidentiary error violated the defendant's constitutional rights is reviewed de novo); *United States v. Morris*, 633 F.3d 885, 888 (9th Cir. 2011) ("We review due process claims de novo."). Similarly, while the district court may generally have discretion to hold ex parte hearings and make evidentiary rulings, *see* Resp. Br. at 69, 71, such decisions are beyond the court's discretion when they encroach on fundamental constitutional rights. *United States v. Ward*, 989 F.2d 1015, 1017 (9th Cir. 1992) ("Questions of trial management are ordinarily reviewed for abuse of discretion. . . . However, this case turns on the defendant's First and Fifth Amendment rights. We review questions of constitutional law *de novo*.").

J. The Sentence Should Be Vacated Because The Government's Recommendation Involved Improper Bases And Because The Sentencing Involved Procedural Errors.

This Court reviews the sentencing judge's interpretation of the sentencing guidelines and their application as well as compliance with Rule 32 de novo. *United States v. Awad*, 371 F.3d 583, 586 (9th Cir. 2004); *United States v. Luca*, 183 F.3d 1018, 1021 (9th Cir. 1999); *United States v. Houston*, 217 F.3d 1204, 1206-07 (9th Cir. 2000). The government wrongly invokes the discretionary standard of review that applies to the substantive reasonableness of a sentence. Resp. Br. at 157. This appeal involves only procedural issues subject to de novo review. Moreover, because those errors were preserved, the government cannot rely on the higher burden of establishing plain error.

1. [Sealed Supplemental Reply Brief]

2. The Court Should Vacate The Sentence Based On Inter-Related Procedural Errors Involving Failure To Adequately Resolve Controverted Issues, Mischaracterization Of This Court's Legal Standard Regarding The Terrorism Enhancement, And Inadequate Explanation Of Rulings Regarding Post-Offense Rehabilitation, Imperfect Entrapment, And Future Dangerousness.

The procedural errors at sentencing in this case undermined the Supreme Court's overarching instruction that sentencing must be individualized. Op. Br. at

172-78. The government contends that the sentencing judge did not misapply *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012) (en banc), because the judge had already recounted individualized mitigating and aggravating factors before quoting *Ressam*'s "cautionary observation about the need to incapacitate convicted terrorists." Resp. Br. at 162-63. But the passage quoted and highlighted by the government establishes the error: although noting points of mitigation, the judge quoted from *Ressam* to slam the door on the significance of mitigation and impose a sentence based on incapacitation. In other words, the sentencing judge concluded that the defendant must be likely to recidivate, difficult to rehabilitate, and a continuing risk to public safety, regardless of the individualized evidence submitted.

This Court should clarify that there is no terrorism exception to the Supreme Court's requirement individualized analysis in sentencing, *Pepper v. United States*, 131 S. Ct. 1229, 1239-40 (2011), and that *Ressam* does not limit in any way an individual's ability to establish by a preponderance of the evidence mitigating facts, including low likelihood of recidivism and post-offense rehabilitation. The government incorrectly treats this claim as plain error, asserting that the sentencing court's *Ressam* quotation was "uncontroversial" and not in dispute. Resp. Br. at 162. On the contrary, before sentencing, the defense replied in writing to the government's reliance on *Ressam*, arguing the need for individualized sentencing

and unequivocally expressing the concern that "the terrorist epithet will become a substitute for the individual being sentenced." ER 3625-32. Where the written material preserved the issue, the judge is adequately apprised of the defense position and redundant complaints after sentencing do not further the sentencing process. *See United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011) (rejecting plain error review); *United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009) (same).

Similarly, the sentencing judge did not adequately resolve the factual and legal issues required for sentencing. "[A] criminal sentence must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime." *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985); *see also Rita v. United States*, 551 U.S. 338, 356 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."). While mentioning some of the mitigating factors, the judge did not respond to the detailed objections spelled out in defense memoranda regarding the application of the terrorism enhancement and departure under U.S.S.G. § 4A1.3, or explain how those factors affected the ultimate sentence. ER 3685; SER 476; *see Rita*, 551 U.S. at 357 ("Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different

sentence . . . the judge will normally go further and explain why he has rejected those arguments.").

Regarding the terrorism enhancement, the sentencing judge noted only: "The Court is not persuaded by defendant's argument to reject the terrorism enhancement, which shifts the criminal history category from 1 to 6, but defendant's lack of criminal history weighs in his favor." ER 3685. This statement does not provide sufficient individualized reasoning to permit appellate review: Did the judge disagree with the arguments regarding the Sentencing Commission's authority to aggravate criminal history based on an offense factor? Did the defense carry its burden of establishing that there was a very low risk of recidivism based on the psychiatric reports of two uncontroverted experts? What impact did the evidence of post-offense rehabilitation have on the sentence factors under 18 U.S.C. § 3553(a)? Did the sentencing judge regard imperfect entrapment as an encouraged ground for departure? The trial court did not provide this Court with sufficient reasoning to review whether legal errors occurred or whether facts were found that were clearly erroneous. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Accordingly, the sentence should be vacated as procedurally unreasonable.

Conclusion

During the formative period of the Constitution, the Founders recognized the difficult tradeoffs between national safety and individual freedom:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.

THE FEDERALIST NO. 8, at 33 (Alexander Hamilton). Aware of the risks, the Founders provided a Constitution with executive power limited by statutes and judicial review. In the present case, the trial errors alone require reversal and a retrial as in any criminal prosecution. In the context of government overreaching and secrecy in every phase of the prosecution, this Court should vacate the conviction

not only to defend the individual constitutional rights of the accused but to reinforce the rule of law in national security prosecutions.

Respectfully submitted this 29th day of February, 2016.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 14-30217**
	)	
v.	)	
	)	
MOHAMED OSMAN MOHAMUD,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief is accompanied by a motion for leave to file an oversize public reply brief pursuant to Circuit Rule 32-2. The brief has 106 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and a supplemental sealed reply brief is being filed separately. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 29th day of February, 2016.

/s/ Stephen R. Sady
Stephen R. Sady
of Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, I electronically filed the foregoing Reply Brief of Appellant 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/ Jill C. Dozark
Jill C. Dozark