No. 17-1678

In The
Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

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

BRIEF OF ALAN MYGATT-TAUBER AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Alan Mygatt-Tauber has published multiple articles on the extraterritorial application of the Constitution and runs http://followtheflag.net, a website devoted to studying the Constitution's extraterritorial application. He is interested in the sound development of law in this area. He submits this brief to share his expertise on the subject and address the lower court's erroneous decision to apply the presumption against extraterritoriality, a doctrine unique to the interpretation of statutes, to the Constitution of the United States, a text to which it is ill-suited.

SUMMARY OF ARGUMENT

Because of the cross-border nature of the shooting at the center of this case, the lower court assumed that this case involved an extraterritorial application of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, the extraterritorial aspects of this case should not be considered a "special factor" that counsels hesitation in the recognition of a remedy under *Bivens*. The court below erred when it wrongfully relied on a statutory canon of construction when examining a constitutional remedy. The concerns underlying the statutory presumption – concerns about conflicts with foreign law,

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or his counsel funded its preparation or submission. Both parties have consented to the filing of this amicus brief.

U.S. sovereignty, and an assumption that Congress acts domestically, unless it clearly indicates otherwise – are not implicated here. If anything, when interpreting the Constitution, these concerns run in the opposite direction.

And even if the presumption were applied, under this Court's tests, the actions taken by Agent Mesa do not implicate extraterritoriality at all. That is because when examining whether the presumption applies, courts look to the context of the statute to determine its "focus." Here, the context of the Constitution and the "focus" on preventing unreasonable actions by government agents both suggest that extraterritoriality is not implicated. Finally, the location of the shooting – in a culvert area largely controlled by the U.S. Border Patrol – is more akin to the control exercised by the United States in Guantanamo Bay, Cuba, than to those areas where the Constitution does not apply. So application of the *Bivens* remedy in this context is not "extraterritorial" at all.

ARGUMENT

I. EXTRATERRITORIALITY IS NOT A "SPECIAL FACTOR" COUNSELING HESITATION IN FINDING A *BIVENS* REMEDY

In rejecting the *Bivens* claim here, the court below found that the extraterritorial nature of the claim presented a "special factor" counseling hesitation. Pet. App. at 19-23. It held that this factor "underlies and

aggravates the separation-of-powers issues" identified elsewhere in the opinion. *Id.* at 19. To bolster its holding, the majority relied on the presumption against extraterritoriality, citing the D.C. Circuit's decision in *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017). For the reasons outlined below, this was error.

A. The Presumption Against Extraterritoriality is Inapplicable

In its analysis of extraterritoriality as a "special factor," the majority below makes a critical mistake – it imports a statutory canon of construction into a constitutional analysis, an area which this Court has long recognized requires a different set of interpretive rules. *See*, *e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 407 (1819). As a result, the court inappropriately relied on the presumption against extraterritoriality. In fact, a *Bivens* remedy can be found without implicating a presumption against extraterritoriality. If anything, given the purposes behind the Constitution – and the nature of its design – any presumption in applying the Constitution should run in the opposite direction, and counsel in favor of finding an extraterritorial application of constitutional limits.

1. The Presumption Against Extraterritoriality is a statutory canon of construction

The presumption against extraterritoriality is a canon of construction that was designed for *statutes*. It cautions that courts should not presume that a statute passed by Congress applies outside the territorial boundaries of the United States "unless there is the affirmative intention of the Congress clearly expressed" to give it such extraterritorial effect. *Morrison v. Nat'l Bank of Australia*, 561 U.S. 247, 255 (2010).

This presumption dates back to the medieval axiom *Statua suo claudunter territorio, nec ultra territorium disponunt*: "Statutes are confined to their own territory and have no extraterritorial effect." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 268 (2012). It derives from international law concerns that a sovereign is bound to respect the subjects and rights of all other sovereigns outside its own territory. *Id.* at 270. *See also Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953). This Court has never applied the presumption to an interpretation of the Constitution.

In every case in which this Court has relied on the presumption against extraterritoriality, it has done so in the statutory context. *See*, *e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (Refusing to extend the Racketeer Influence and Corrupt Organization Act to acts outside the United States. "This principle finds expression in a canon of statutory construction known as the presumption against

extraterritoriality."); *Morrison*, 561 U.S. at 255 (Refusing to extend §10(b) of the Securities and Exchange Act to securities traded on foreign exchanges. "This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate."); *EEOC v. Arab American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991) (Refusing to extend Title VII to employment in a foreign country. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" *quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); *Foley Brothers*, 336 U.S. at 285 (Refusing to extend U.S. labor law overseas); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (Upholding contempt citations against American citizen in France who refused to comply with judicially issued subpoenas.).

As the cases above make clear, this Court typically applies the presumption to the question of whether an Act of Congress *regulating conduct* applies abroad. The only time this Court has deviated was to question whether it should recognize a *cause of action* brought under the Alien Tort Statute. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 115 (2012). But even this was a statutory application of the canon.[2]

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[2] As the name makes clear, the Alien Tort Statute is an act of Congress. *See* 28 U.S.C. § 1350. While the statute grants courts jurisdiction, it does not itself create any causes of action, which is why this Court was called upon to determine its outer limits.

Even in cases where it would be most apt – when the Court was asked to determine whether the Constitution applies beyond our borders – the Court did not even address, let alone rely on, the presumption in its decisions. In *Boumediene v. Bush*, 553 U.S. 723 (2008), for example, the Court relied on the history of the writ of *habeas corpus* to decide the Suspension Clause applied in Guantanamo Bay, Cuba. The Court did not rely on the presumption in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) when it held that the Fourth Amendment did not apply to the search of a Mexican citizen's residence in Mexico, relying instead on use of the Amendment's phrase "the people," and a host of prior cases, to determine that it did not apply to aliens lacking "substantial connections" to the United States.

In *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) in deciding that the wife of a serviceman was entitled to Sixth Amendment protections even when stationed and tried abroad, the Court relied on the text on Article I, Section 8, Cl. 14 to hold that Congress can only subject members of the land and naval forces to courts martial. The presumption against extraterritoriality gets nary a mention. In *Reid v. Covert*, 354 U.S. 1 (1957), the plurality expressly rejected an argument that the Constitution did not apply abroad when it held that the dependents of service members could not be tried for capital offenses before a court martial. And even in *In re Ross*, 140 U.S. 453 (1891), where the Court held that the Constitution has no effect outside of the United States, it did not rely on

the presumption against extraterritoriality to bolster its decision.

Simply put, this Court has never applied the presumption against extraterritoriality to its interpretation of the Constitution. Neither this case, nor the *Bivens* remedy itself, provides a reason to change that.

2. The reasons behind the presumption – concern about conflicts with foreign law, concern for U.S. sovereignty, and an assumption that Congress acts domestically – are not implicated here

This Court has identified three rationales behind the presumption against extraterritoriality, none of which are implicated by this case. Those three rationales are: 1) concern about conflicts with foreign law and resultant interference with foreign affairs; 2) concern for U.S. sovereignty; and 3) an assumption that Congress acts domestically, unless it clearly indicates otherwise.

The lower court found that the extraterritorial nature of the proposed remedy posed the potential to create friction by applying U.S. law to foreign conduct. *Hernandez v. Mesa (Hernandez II)*, 885 F.3d 811, 822-23 (5th Cir. 2017). The court also relied on this Court's holding in *Kiobel* that the presumption "helps insure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."

569 U.S. at 116. *See also RJR Nabisco*, 136 S. Ct. at 2100 (The presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."); *ARAMCO*, 499 U.S. at 248 (The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."). *But see Morrison*, 561 U.S. at 255 ("The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law" (*citing Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993)).[3]

Here, there is no concern about a conflict between U.S. law and Mexican law – Mexican authorities want to see justice for the death of their citizen, and in fact, the Mexican government supports this suit. *See, e.g.*, Brief for the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, 16-1678 (cert. stage brief); Brief for the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, 15-118 (merits stage brief). This also addresses the lower court's concern about extending a remedy. When this Court has cautioned about friction regarding remedies, it has done so in the face of opposition from foreign governments. *See*, *e.g.*, *RJR Nabisco*, 136 S. Ct. at 2106 (recognizing concern by

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[3] *Sale* itself refers to *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). *Smith* notes that "the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." This argument is addressed below.

other nations with U.S. treble damages remedies); *id.* at 2107 (noting that in *Morrison*, France had submitted an amicus brief stating that many foreign states had chosen different remedies for securities fraud). Here, the Mexican government specifically supports the recognition of a *Bivens* remedy and, unlike in *RJR Nabisco* and *Morrison*, no member of the international community has weighed in expressing concern about doing so.[4] Therefore, recognition of the remedy would not create any "friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *RJR Nabisco*, 136 S. Ct. at 2106.

Nor would allowing such a remedy interfere with foreign affairs. Although the Mexican government sought Respondent's extradition for a criminal trial, a request the United States refused to honor,[5] allowing a civil remedy within the United States would not interfere with the Executive's decision to shield Respondent from a criminal trial in Mexico. On the other hand, completely denying a remedy could gravely affect our foreign relations with Mexico.

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[4] Of the many amicus briefs filed in this case's prior trip to the Court, none expressed concern by foreign nations with recognizing a civil damages remedy. *See* amicus briefs filed in 15-118.

[5] Maggie Penman, "High Court to Hear Case of Mexican Boy Killed in Cross-Border Shooting," The Two Way, February 20, 2017, avail. at https://www.npr.org/sections/thetwo-way/2017/02/20/516275461/high-court-to-hear-arguments-in-case-of-mexican-boy-killed-in-cross-border-shoot.

A second rationale for the presumption against extraterritoriality is a concern for U.S. sovereignty.[6] This Court recognized this in *Lauritzen*, expressing concern for the idea that a statute may be read to open our courts to those who had never had any connection at all to the United States. 345 U.S. at 576-77. ("[The Jones Act] makes no explicit requirement that either the seaman, the employment, or the injury have the slightest connection to the United States.")[7] The D.C. Circuit also relied on this rationale in *Meshal v. Higgenbotham*. ("Whether the reason for reticence is concern for our sovereignty or respect for other states, extraterritoriality dictates constraint in the absence of clear congressional action.") 804 F.3d 417, 425 (D.C. Cir. 2015).

Again, this concern is not implicated here. Unlike *Lauritzen*, there is a clear connection to the United States – the accused is a U.S. federal agent. And, unlike the events in *Meshal*, the action which gives rise to this suit took place in the United States.[8] There is no concern that recognizing a *Bivens* action would open our courts to those with no connection to the United States. By definition, *Bivens* only applies to actions by, and

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[6] The Court has expressed concern about opening up U.S. courts to those with no connections to the United States.

[7] This also underlay the Court's concern in *Verdugo-Urquidez*, about opening our courts to "some undefined, limitless class of citizens who are beyond our territory." 494 U.S. at 275 (Kennedy, J., concurring).

[8] While Hernandez was killed on the Mexican side of the border, it is undisputed that Agent Mesa was standing in the United States when he pulled the trigger.

against, federal agents. Thus, U.S. sovereignty is not implicated.

The final concern underlying the presumption against extraterritoriality is an assumption that Congress generally acts with domestic concerns in mind. *See*, *e.g.*, *RJR Nabisco*, 136 S. Ct. at 2100; *Foley Bros.*, 336 U.S. at 285. Here, there is no presumption about Congressional intent, because there is no statute to examine. Because Congress did not legislate, there is no basis for relying on an assumption that, when it *does* act, it does so with domestic concerns in mind.[9]

True, the Constitution is itself the result of a legislative act, coupled with ratification by the several states. But as noted earlier, this Court has a different set of interpretive rules for the Constitution. Further, as discussed more fully below, this ratification was premised on the belief that the Bill of Rights would more strictly limit the powers of the federal government. Given that context, it makes no sense to read a restriction on the reach of the Bill of Rights solely to U.S. territory into the document. And this Court has

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[9] This lack of Congressional action has been used as support for the argument that courts should not recognize an extraterritorial *Bivens* remedy. *See*, *e.g.*, *Meshal*, 804 F.3d at 430-31 (Kavanaugh, J., concurring). Even so, this Court *would* recognize an extraterritorial statutory remedy if Congress provided specific indicia of its intent to so apply it. In the absence of Congressional action, one cannot draw a conclusion either way. Yet, for the reasons explained in the following section, when examining the Constitution, the presumption argues in favor of finding an extraterritorial *Bivens* remedy.

previously rejected such a reading. *Reid v. Covert*, 354 U.S. 1 (plurality opinion).

3. The presumption against extraterritoriality runs in the opposite direction for constitutional cases

Unlike Congressional action, which is presumed to focus on the domestic sphere, the Court should presume that the Constitution applies extraterritorially. The Framers of the Constitution set out to create a government of limited powers and then further constrained the general powers of the government by placing certain additional restrictions in the Bill of Rights. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Because statutes generally authorize government action, it is necessary to imply the ends of such authorizations. The Bill of Rights, on the other hand, generally provides limits on government power, so finding such ends is unnecessary.

In *Morrison*, this Court instructed that, when determining whether a statute should apply extraterritorially, an explicit statement that "this law applies abroad" was unnecessary – "[a]ssuredly context can be consulted as well." *Morrison*, 561 U.S. at 265. Here, the context of the constitutional design is instructive. To vindicate this original design, courts have a duty to presume that these restrictions apply to all actions by the federal government wherever taken, in the absence of a clear intent otherwise.

This Court is familiar with determining the context of constitutional provisions. In *ARAMCO*, it distinguished Title VII from the Lanham Act, because that Act "applies to 'all Commerce which may lawfully be regulated by Congress.' " 499 U.S. at 252. The Court had previously found that this language granted extraterritorial reach to the Lanham Act, because the Constitution grants Congress the power to regulate commerce with foreign nations. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

Furthermore, while this Court is generally loath to interfere in the Executive's role as the "sole organ of the federal government in the field of international relations," *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936), the very design of the Constitution requires such interference at times. *See, e.g.*, Art. I, § 8, cl. 3 (granting Congress the power to regulate "Commerce with foreign nations"); Art. I, § 8, cl. 11 (Congress has the power "to declare War" while Art. II makes the President the Commander in Chief); Art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"); Art. III, § 2, cl. 1 ("The judicial Power shall extend to all cases . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects"); Art. III, § 2, cl. 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original jurisdiction.").

The exercise of any of these powers by the coordinate branches can, and does, interfere with the Executive's ability to speak with one voice on behalf of the

nation. And this Court has never hesitated to vindicate the requirements of the Constitution, even in the face of Executive arguments to the contrary. *See*, *e.g.*, *Kiobel*, 569 U.S. 108 (holding that the Alien Tort Statute did not reach actions outside the United States); *Garcia v. Texas*, 564 U.S. 940 (2011) (refusing to enforce judgment of International Court of Justice based solely on the Executive's determination to comply); *Medellin v. Texas*, 552 U.S. 491 (2008) (same); *Boumediene v. Bush*, 553 U.S. 723 (2008) (extending Suspension Clause to alleged enemy combatants held in Guantanamo Bay, Cuba). Each of these decisions undoubtedly affected the foreign relations of the United States, in direct opposition to the Executive's stated position, but this Court has never shied from its duty to uphold its constitutional role. It should feel no compunction doing so here, especially when the end result is applying a remedy against a U.S. agent in a U.S. court, for actions taken on U.S. soil.

Finally, the presumption against extraterritoriality should run the other way in constitutional cases because of Congress's differing powers to address the Court's reliance on the presumption. In the statutory context, Congress can overturn this Court, if the presumption fails to reflect Congressional intent. It did so in the wake of *ARAMCO*, (*see* Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(b)(1)(B), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e-1(c)(1))) and *Morrison* (*see* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 929P(b)(1), Pub. L. No. 111-203, 124 Stat. 1376, 1864 (2010) (codified at

15 U.S.C. § 77v(c))). In the constitutional context, however, only a constitutional amendment can overcome a finding that the Constitution does not apply abroad. Thus, because it is more difficult to correct an error regarding the reach of the Constitution, the Court should hesitate before it announces that the Constitution does not apply extraterritorially in any particular case.

But Congress *can* wield its powers to restrict available remedies for constitutional violations that occur abroad. If Congress feels this Court errs in recognizing a remedy here, it can act to correct it, just as it can correct a holding that a statute does not apply extraterritorially. Thus, a presumption that the Constitution applies extraterritorially is the balanced counterpoint to the statutory presumption against such extraterritorial application.

B. This Court has long recognized remedies for unconstitutional actions taking place outside the United States

All of the lower courts which have rejected a *Bivens* remedy for extraterritorial conduct did so, at least in part, because this Court has not recognized an implied right of action to remedy the violation of constitutional rights for such conduct. *See*, *e.g.*, *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring). That is incorrect. While this Court has never before addressed whether a *Bivens* remedy is available for extraterritorial conduct, it has recognized common law rights of action – stemming from the Constitution – against

federal agents (including military personnel) for actions which took place entirely overseas.

In 1851, in *Mitchell v. Harmony*, this Court recognized a claim under the Fifth Amendment against a military officer who had taken the private property of an American citizen in Mexico. 54 U.S. 115 (1851). Harmony was a merchant traveling in Mexico, when he was compelled by the U.S. Army to travel with them from San Elisario to Chihuahua, which this Court found to be a forceful taking of his property. *Id.* at 132. Harmony sued in trespass and was awarded damages by a jury. *Id.* at 128. Mitchell defended on the grounds that the taking was for a public purpose. *Id.* at 132. The Court rejected this defense, along with the similar argument that the Court lacked jurisdiction because the actions occurred in Mexico. The Court noted:

> The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States.

Id. at 137. Here the courts have jurisdiction over the claims raised by the Petitioner against Agent Mesa. The only question before the Court is whether such a claim exists. No one denies that if Agent Mesa had killed Petitioner on the U.S. side of the culvert, an action would lie. *Mitchell* suggests that Petitioner's death on the Mexican side does not change that outcome.

Just a few years later, the Court of Claims recognized a similar claim for violating the Fifth Amendment – a taking without just compensation – in *Wiggins v. United States*, 3 Ct. Cl. 412 (1867) (The Wiggins's Case). There, a Navy Commander in charge of a ship of war opened fire on San Juan del Norte, Nicaragua, also known as Greytown. *Id.* at 421. After coming ashore, and in fear of reprisal, Commander Hollins ordered the destruction of 21,000 pounds of gun powder, owned by Dexter, Harrington, & Co., a Massachusetts company, by casting it into the bay. *Id.* In reviewing a claim under the Fifth Amendment, the Court of Claims held that the case could not be distinguished from *Grant v. United States*, 1 Ct. Cl. 41 (1863), which dealt with the destruction of property in one of the territories of the United States, to prevent its falling into the hands of the enemy. *Id.* at 422. It therefore sustained a judgment against the United States. The court noted that under no circumstances would Commander Hollins have been shielded from suit. *Id.* at 422-23 ("It is true that any agent or officer of the United States who, without any just cause or lawful authority, takes or destroys the property of a citizen, though he act by color of his office, it will not shield him from damages at the suit of the injured party.").

In both cases, the courts acknowledged that a damages suit is available against a military officer for actions taken, even during time of war, in a foreign country, and that the Constitution requires recompense. If the courts are willing to recognize a damages remedy under those circumstances, it must recognize

one here, where a federal agent (not military officer), acting in a law enforcement capacity (not during a military action), takes an action in the United States (not abroad) which causes an injury.

C. The cases relied on by the lower court are incorrect and distinguishable

In reaching its conclusion that the extraterritorial nature of the suit barred a *Bivens* remedy, the court below relied on the decision of the D.C. Circuit in *Meshal v. Higgenbotham* to support its conclusion that such a remedy would be inappropriate. 885 F.3d at 823. This reliance was misplaced for two reasons.

First, the D.C. Circuit was incorrect to rely on a statutory canon of construction to analyze a constitutional claim. And the majority provided little in the way of analysis to support its argument that the extraterritorial nature of the claim was a "special factor" counseling hesitation. Its sole justification was a citation to a Seventh Circuit case, *Vance v. Rumsfeld*, 701 F.3d 193, 198-99 (7th Cir. 2012).

Then-Judge Kavanaugh concurred, also finding that the extraterritorial nature of the complaint was a "special factor" counseling hesitation in the creation of a non-statutory remedy. He relied, however, on the argument that the parties could not point to a single case in which a federal court recognized a *Bivens* action for conduct by U.S. officials abroad. *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring). As noted above, however, there is a history of recognizing damages actions

for constitutional violations taking place outside our borders. He also argued that there was no reason to provide a laxer rule in *Bivens* cases than in statutory cases. But this ignores the arguments above that in constitutional cases, the presumption should support extraterritoriality.

Second, and equally important, *Meshal* is distinguishable on its facts. Meshal alleged that he was detained, interrogated, and tortured by FBI agents, pursuing a counterterrorism investigation, in three African countries. No part of the actions complained of took place in the United States. 804 F.3d 418. Here, Agent Mesa's actions took place entirely within the United States. While the effects of those actions were felt across the border, the actions themselves – the unjustified pulling of the trigger – occurred on U.S. soil.

Vance suffers from the same flaw. There, Vance and his co-plaintiff were working in Iraq for a private security firm, when they were arrested by military personnel, denied access to counsel, detained in solitary confinement, and subject to threats of violence, actual violence, sleep deprivation, extremes of temperature, and other tortious activity. 701 F.3d at 195-96. *Vance* thus dealt with activities entirely taking place within a foreign country and remedies against military personnel. Petitioner here seeks the most traditional *Bivens* remedy – a suit against a law-enforcement officer, accused of violating the Fourth Amendment, as a result of actions originating on U.S. soil.

II. THIS CASE DOES NOT IMPLICATE EXTRATERRITORIALITY UNDER THIS COURT'S TESTS

While the reasons above explain why extraterritoriality would not be a "special factor" counseling hesitation in finding a *Bivens* remedy, there is a simpler reason to avoid finding a special factor here – this case does not concern extraterritorial conduct. Under the tests laid out by this Court, the actions at issue took place entirely within U.S. territory, or territory subject to *de facto* U.S. control, so extraterritoriality is not a concern.

In *RJR Nabisco*, this Court noted that, when dealing with questions about the presumption against extraterritoriality in the statutory context, it engages in a two-step inquiry. 136 S. Ct. at 2101. First, the Court looks to see if the presumption has been rebutted. If the statute in question has not overcome the presumption than the Court "determine[s] whether the case involves a domestic application of the statute, and we do this by looking into the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad. . . ." *Id.*

Even though the presumption does not apply here, the lower courts were also wrong to rely on it because the conduct that is the focus of the underlying constitutional provision – the actions of federal agents – is conduct that occurred in the United States.

A. The "focus" of the Fourth Amendment is action by federal agents

The Court's concern with the "focus" of a statute arose in *ARAMCO* and *Morrison*. There, in trying to determine whether the statute should be given extra-territorial effect, the Court examined the concern Congress was trying to address. In *ARAMCO*, it concluded that Title VII of the 1964 Civil Rights Act had a "purely domestic focus." 499 U.S. at 255. In *Morrison*, the Court concluded that the "focus" of Section 10b of the Securities and Exchange Act was not on the place where a deception originated, but rather upon the purchases and sales of securities in the United States. 561 U.S. at 266. It reached this conclusion because the act did not punish deceptive conduct itself, but only deceptive conduct "'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Id. (quoting* 15 U.S.C. § 78j(b)).

Here, the focus of the Fourth Amendment is on illegal searches and seizures.[10] This Court has long defined the use of excessive or deadly force as a seizure under the Fourth Amendment. *See*, *e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). As Professor Akhil Amar has pointed out,

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[10] U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the core of the Fourth Amendment is reasonableness. Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 801 (Feb. 1994). Specifically, the concern is the reasonableness of actions taken by federal agents in conducting searches and seizures. While this focus may not always implicate domestic actions (*see*, *e.g.*, *Meshal* and *Vance*), here, they do. The question presented by the Petitioner is whether Agent Mesa acted reasonably when he pulled the trigger.[11] At the time he did so, he was standing in the United States. Thus, the "focus" involves the domestic application of the Fourth Amendment, and under *RJR Nabisco*, this case does not involve an extraterritorial application at all.

B. The shooting took place in an area under U.S. control

A final argument that this case does not even implicate the presumption against extraterritoriality is that Petitioner's death took place in an area under *de facto* U.S. control. As a result, under this Court's precedents, there is no extraterritorial application of a remedy. Rather, this case is a run-of-the-mill *Bivens* action, involving an action by a U.S. law enforcement

[11] This would be the question even if Agent Mesa had only wounded, or even missed, the Petitioner. The decision to pull the trigger is the decision to use deadly force. That is the action that must be reviewed for reasonableness. The impacts on Petitioner go to damages.

agent, which violated the Fourth Amendment, in an area under U.S. control.

This Court first recognized that the statutory presumption against extraterritoriality had no effect in an area subject to U.S. jurisdiction in *Rasul v. Bush*, when it held that the habeas statute applied in Guantanamo Bay, Cuba. 542 U.S. 466, 480 (2004) ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." *Citing Foley Bros.*, 336 U.S. at 285). The Court extended this understanding to the Suspension Clause of the Constitution in *Boumediene v. Bush*, 553 U.S. 723 (2008). The Court recognized that "it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another." *Id.* at 753.

While the United States does not exercise "complete jurisdiction and control" over the border culvert where Petitioner was killed, it exercises a far greater degree of control than in cases in which this Court has refused to extend constitutional protections. *See*, *e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Warrant Clause did not apply to the search of an alien's home in Mexicali and San Felipe, Mexico).

In dissent the last time this case was before this Court, Justice Breyer, joined by Justice Ginsburg,

described the current situation at the border where these actions took place. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2009-11 (2017) (Breyer, J., dissenting).[12] He noted, and the majority did not disagree, that the culvert is, for all practical purposes, the border and is at least "a special border-related area" (also known as a "limitrophe" area) which has a special status under international law. *Id.* at 2009-10. The culvert was partially paid for by U.S. government funds and is subject to the "jurisdiction" of an International Boundary and Water Commission, with representatives from both nations. *Id.* at 2009. Over 16,000 Border Patrol agents worked along the Southwest border in Fiscal Year 2017, with over 2,000 assigned just to the El Paso Border Sector. U.S. Border Patrol Fiscal Year Staffing Statistics (FY 1992 – FY 2018).[13] The original panel opinion in this case found that "[t]he Border Patrol's exercise of control through its use of force at and across the border more closely resembles the control the United States exercised in Guantanamo than it does the control over Landsberg Prison in *Eisentrager*."[14] *Hernandez v. United States*, 757 F.3d 249, 270 (5th Cir.

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[12] The *per curiam* majority opinion remanded this case to the Fifth Circuit to determine whether a *Bivens* remedy was available in the first instance. It did not address the status of the culvert where Petitioner was killed.

[13] Available at https://www.cbp.gov/newsroom/media-resources/stats, last accessed April 30, 2019. This is up from a total staffing level of just over 4,000 agents in FY 1992, with 627 assigned to El Paso.

[14] In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that German prisoners held in Landsberg Prison in Germany could not claim the protections of the Due Process Clause.

2014), *reinstated in part by Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015), *vacated by Hernandez v. Mesa*, 136 S. Ct. 2003 (2017).[15]

On remand, the *en banc* Fifth Circuit did not directly address the question. *Hernandez II*, 885 F.3d 811.[16] When examining the "objective factors and practical concerns" surrounding this shooting, it is clear that the United States exercises the sort of control over the culvert that would justify applying the Fourth Amendment. *Boumediene*, 553 U.S. at 764. *See also Hernandez*, 136 S. Ct. at 2008-09 (Breyer, J., dissenting). Therefore, even if extraterritoriality were a "special factor" counseling hesitation, it would not be applicable in this case.

[15] While the *en banc* Fifth Circuit overturned the panel as to its analysis of qualified immunity, neither it nor this Court disputed its findings about the degree of control exercised by the Border Patrol.

[16] At best, the *per curiam* majority opinion states that extending *Boumediene* would require its extension "beyond the United States government's *de facto* control of the territory surrounding the Guantanamo Bay detention facility." 885 F.3d at 817. But the opinion never analyzes the degree of control exercised by the Border Patrol within the culvert, merely asserting that the United States exercises neither *de facto* nor *de jure* control. It then cites only to decisions limiting *Boumediene* to the Suspension Clause, not to Guantanamo Bay. *Id.* at n.13.

CONCLUSION

For the reasons outlined above, this Court should not rely on the allegedly extraterritorial nature of the shooting in this case to serve as a "special factor" counseling hesitation in the recognition of a *Bivens* remedy.

Respectfully submitted,

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