No. 20-5133

IN THE

Supreme Court of the United States

STEVEN BAXTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Failing to regard the unique facts, the Government skirts the crux of the constitutional questions presented – whether and how the border-search doctrine, which concerns an international border (encompassing the "customs border"), differs from the Fourth Amendment's application to only a "customs border."

Any meaningful analysis reveals a material distinction, markedly increased when only the "customs border" has been exited but the travel originated and stayed inside the sovereign border. The Government's argument and the decision below are fundamentally flawed, this case squarely presents the opportunity to articulate the proper constitutional standard; the Court should grant the writ.

I. CERTIORARI IS WARRANTED TO ADDRESS WHETHER INTERNAL/DOMESTIC CUSTOMS BORDERS IS THE LEGAL EQUIVALENT TO AN INTERNATIONAL/FOREIGN BORDER, WHICH WOULD VITIATE THE FOURTH AMENDMENT.

Often described as the "border-search *exception*," international border searches are not excepted from the Fourth Amendment, instead this Court has explained that warrantless "searches made at the border, … are reasonable simply by virtue of the fact that they occur at the border[,]" *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) (cleaned up), because "the expectation of privacy is less at the border than it is in the interior[,]" *id.* at 154.

However, "[n]otwithstanding a traveler's diminished expectation of privacy at the border, the search is still measured against the Fourth Amendment's reasonableness requirement[.]" *United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013). The Constitution applies "limits on searches at the border, but [this Court] has neither spoken definitively on that subject nor clearly defined the limits[.]"

United States v. Seljan, 547 F.3d 993, 999-1000 (9th Cir. 2008). *See also Flores-Montano*, 541 U.S. at 154 n. 2 (cleaned up) ("leav[ing] open the question whether, and under what circumstances, a border search might be deemed unreasonable").

While this Court has not fully elaborated, the Ninth Circuit has held, "because the border search exception is limited in scope to searches for contraband, border officials may conduct a forensic cell phone search only when they reasonably suspect that the cell phone contains contraband." *United States v. Cano*, 934 F.3d 1002, 1020 (9th Cir. 2019). Recognizing *Flores-Montano*, *supra*, the court "held that a 'highly intrusive' search—such as a forensic cell phone search—requires some level of particularized suspicion." *Id.* (citations omitted). The decision was influenced "significantly, [because this] Court has recognized that the dignity and privacy interests of the person being searched' at the border will on occasion demand some level of suspicion in the case of highly intrusive searches of the person." *Cotterman*, 709 F.3d at 963 (cleaned up).

This Court's recognition "begs the question: Particularized suspicion of what? Contraband? Or evidence of future border-related crimes?" *Cano*, 934 F.3d at 1020. In the Ninth Circuit, "border searches are limited in scope to searches for contraband and do not encompass searches for evidence of past or future border-related crimes," and for an international border search, "to conduct a more intrusive, forensic cell phone search border officials must reasonably suspect that the cell phone to be searched itself contains contraband." *Id.*

The question at bar remains – whether, or what degree of, suspicion is required for a search of mail traveling from the US mainland to a US territory where the Fourth Amendment fully applies at both departure and arrival. However, *Cano* illuminates that the even a true international border search does not unequivocally abrogate the requirement for a warrant or "some level of suspicion."

Unique cases require

> examin[ing] the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment. Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Samson v. California, 547 U.S. 843, 848 (2006) (cleaned up).

But the Court of Appeals did not recognize the Fourth Amendment's significance, instead relying on circuit precedent having "established the applicability of the border-search exception to the Fourth Amendment at the customs border between the mainland United States and the Virgin Islands." *United States v. Baxter*, 951 F.3d 128, 131 (3d Cir. 2020); App. 10a. The decision misconstrued this Court's jurisprudence (and if its reading of *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994) was accurate, *Hyde* did as well), conflicting with Ninth Circuit cases (e.g., *Cotterman*, *Seljan*, and *Cano*, *supra*) recognizing the Fourth Amendment's reasonableness requirements apply to even true border searches and vary upon circumstances; thus, the opinion below was wrong. But this Court's precedent makes clear, the Fourth Amendment applies even to international border searches, despite a reduced "expectation of privacy[.]" *Flores-Montano*, 541 U.S. at 154.

The Constitution commands searches be reasonable, and there exists an undeniable and marked difference between the routine search of mail traveling from the US mainland to the USVI and international border searches that informed this Court's jurisprudence. Even if the internal "customs border" creates a reduced expectation of privacy compared to interstate borders, it does not diminish such expectation (nor heighten the legitimate interest of the government) to near the same extent as the international border. Accordingly, it does not automatically follow that the routine searches in this case were reasonable under the Fourth Amendment.

II. THE DECISION BELOW WAS WRONG.

A. This Court's Fourth Amendment border-search jurisprudence does not apply to the search at issue.

As discussed, *supra*, even if the "customs border" implicated some type of international-border-like reduced expectation of privacy, it does not necessarily follow that the government may conduct routine searches of persons or mail without suspicion. Moreover, for the reasons that follow, border-search jurisprudence is wholly inapplicable when travelling from the US mainland to the USVI.

As "[t]he Government's interest in preventing the *entry* of unwanted persons and effects is at its zenith at the international border[,]" *id.* at 152, the strongest factor implicating the border-search doctrine is inapposite. The search in question indisputably did not occur at an international border, nor to deter entry. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("exclud[ing] aliens from the country… by routine inspections and searches of individuals or conveyances seeking to cross our borders."); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538,

544 (1985) ("stopping and examining persons entering this country … at the international border protecting from entrants who may bring anything harmful into this country").

Consequently, asserting "the rationale of those cases" supports a conclusion that those searches were reasonable is wrong. *Hyde*, 37 F.3d at 122; *accord id.* at 120 ("the authority of the United States to impose such duties and to exclude people and goods at places other than its international borders is also substantially restricted by the Constitution.").

Furthermore, determining reasonableness under the Fourth Amendment, "may be guided by the meaning ascribed to it by the Framers of the Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Given there was no territory-like, unincorporated possession akin to the USVI at the time of the adoption of the Bill of Rights, there is no doubt the case *sub judice* falls outside the scope of Fourth Amendment as originally intended. *See Downes v. Bidwell*, 182 U.S. 244, 251 (1901) ("[t]he question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803.").

Just as the border-search doctrine rationale does not apply, neither does an originalism-based interpretation because the instant issue could not have arisen until after the US began acquiring unincorporated territories. Accordingly, the dramatic distinction between the "customs border" considerations and international border-

search jurisprudence, including intent at the adoption of the Fourth Amendment, requires an independent analysis in the first instance.

B. Warrantless, Routine Searches of Mail Traveling from the US Mainland to the USVI are Not Reasonable Under the Fourth Amendment.

The Government fails to address the salient point: here, the Fourth Amendment applies at the place of departure, the US mainland, *and* at the place of arrival, the USVI. *See* 48 U.S.C. § 1561 (the Fourth Amendment applies to the USVI with equal force as in the Several States). No precedent of this Court nor the Third Circuit directly addresses whether the search at issue "violate[d] the Bill of Rights contained in § 3 of the Revised Organic Act of the Virgin Islands[,]" which "expresses the congressional intention to make the federal Constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory. A claim of violation of the Bill of Rights, therefore, amounts in substance to a claim of unconstitutionality[.]" *In re Brown*, 439 F.2d 47, 50-51 (3d Cir. 1971) (footnote omitted).

The essential element of an international border is separation of the sovereign from the foreign – where illegal import and export of persons and effects can be prevented. Where US law is sovereign, the Government has the right and duty to prevent its violation at the threshold, because once that threshold is crossed, US sovereign power is implicated. But that situation did not exist here. The starting and ending points were both subject to the same sovereign.

Nevertheless, the Court of Appeals failed to acknowledge that salient difference, concluding "[t]he existence of Fourth Amendment protections within the

Virgin Islands does not undermine Congress's ability to direct that a customs border exists *between* the United States mainland and the Virgin Islands[.]" *Baxter*, 951 F.3d at 134; App. 18a. Such is a distinction without a difference; an airplane flying from D.C. to Miami through international airspace does not transform a subsequent search at Miami International Airport into a border search.

The Court of Appeals failed to conduct a complete or independent Fourth Amendment analysis, rather, invoking *Hyde* to justify the same reduced requirement on the Government at the "customs border" that applies at the international border, and *United States v. Ezeiruaku*, 936 F.2d 136 (3d Cir. 1991) to justify that reduction regardless of direction (*see Baxter*, 951 F.3d at 133-36; App. 15a-21a). Such decision omitted the analysis in direct contravention of this Court's express requirement to "examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848.

Accordingly, the expansion of *Hyde* conflates and misrepresents the border-search jurisprudence by this Court and conflicts with Ninth Circuit precedent properly informed by such.

C. The Decision Below Represents an Unwarranted and Improper Expansion of the *Insular Cases*.

This Court has declined any "further expansion" of the *Insular Cases,* and indeed has outright cautioned against it. *Reid v. Covert*, 354 U.S. 1, 14 (1957); *see also Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (declining to extend the *Insular Cases*).

The Court of Appeals' holding would severely diminish the Fourth Amendment protections, and threaten the remaining constitutional protections, extended to the USVI. The Bill of Rights would not "have the same force and effect there as in the United States or in any State of the United States[.]" 48 U.S.C. § 1561. Unlike with interstate travel, the holding below subjects any person or effect traveling into or out of the USVI to arbitrary searches.

Such result is contrary to the holdings and rationale of this Court's Fourth Amendment jurisprudence. Nor did the Court of Appeals conduct a Fourth Amendment reasonableness inquiry and conclude that such a holding comports with the Fourth Amendment reasonableness analysis; rather, the decision relied on the USVI's status as an unincorporated territory, statutorily outside the US customs zone. The decision built on *Hyde's* reliance on, and represents an improper expansion of, the *Insular Cases*.

Hyde relied on *Downes v. Bidwell* for the proposition "that as a general rule whenever a government acquires territory …, the relation of the territory to the new government is to be determined by the acquiring power in the absence of stipulations upon the subject." *Hyde*, 37 F.3d at 120 (quoting *Downes*, 182 U.S. at 300 (White, *J.*, concurring)). Reasoning that, under *Downes*, "Congress could impose the challenged duty, free of the constitutional requirement that impost must be uniform throughout the United States[,]" the *Hyde* court focused its analysis around the USVI being an unincorporated territory of the United States. 37 F.3d at 120-21.

Hyde reasoned that "Congress has broad power to regulate commerce between the United States and its unincorporated territories, just as it has broad authority to regulate commerce with foreign nations[,]" ultimately concluding, "as far as the interests of the sovereign are concerned, we perceive the interest of the United States in warrantless searches without probable cause at this 'internal' border to be little different from its interest in such searches at its international borders." *Id.* at 122.

However, unlike the *Insular Cases*, which held constitutional rights do not necessarily apply to unincorporated territories, the *Hyde* court was confronted with the task of reconciling 48 U.S.C. § 1561 applying the Fourth Amendment to the USVI with statutory authorization for "customs inspections when travelers enter the United States from the Virgin Islands and other United States possessions in the same manner as if the traveler had come from a foreign country[.]" 19 U.S.C. § 1467. As Congress extended the Fourth Amendment to the USVI, and pronounced all then-existing laws "inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency" through 48 U.S.C. § 1561, the *Hyde* "[a]ppellees urge[d] that these actions by Congress repeal[ed] 19 U.S.C. § 1467." 37 F.3d at 123. But the court disagreed, and "perceive[d] no intent on the part of Congress to repeal § 1467. … believ[ing] the legislative history would bear some evidence of that intent, … and perceived no inconsistency between its authorization of such searches and the Fourth Amendment's prohibition against 'unreasonable searches.'" *Id.*

Accordingly, the narrow view of *Hyde* is, despite the Fourth Amendment applying to the USVI, in certain circumstances warrantless searches may be

reasonable under the Fourth Amendment. Despite that narrow basis, the decision takes an expansive reading of *Hyde,* effectively disavowing Fourth Amendment protections (indeed, all constitutional rights extended under 48 U.S.C. § 1561) in the USVI for, instead, the expansion federal powers deemed inherent over unincorporated territories.

Such expansion, leaning on *Hyde* for the proposition that the "customs border" implicates nearly identical considerations as the international border, is based upon the *Insular Cases*. In no way can the narrow reading of *Hyde* justify the result – not only does the federal, statutory authorization that rationalizes the narrow view of *Hyde* not exist, but the decision allowing searches of mail without suspicion actually exceeds the boundaries of what Congress has authorized for outbound mail, i.e., domestic mail exiting across an international border, leaving both US sovereignty *and* the US customs zone.

Specifically, federal statute authorizes, with certain express limitations "a Customs officer [to] stop and search at the border, without a search warrant, mail of domestic origin transmitted for export by the United States Postal Service and foreign mail transiting the United States that is being imported or exported by the United States Postal Service." 19 U.S.C. § 1583(a)(1). For mail being exported to foreign territory, "[m]ail weighing in excess of 16 ounces sealed against inspection under the postal laws and regulations of the United States may be searched [only] *if there is reasonable cause to suspect* that such mail contains one or more" specifically listed items of contraband." 19 U.S.C. § 1583(c)(1) (emphasis added).

Thus, the decision below allowing governmental searches of all mail crossing only the "customs border" exceeds permitted searches of mail crossing the international border, despite that the USVI is of the same sovereign and USVI residents are American citizens, as this Court has held and "subsequently reaffirmed, several times, that a United States territory is not a foreign country." *United States v. Baxter*, 2018 WL 6173880, at *10 (D.V.I. 2018), *vacated and remanded,* 951 F.3d 128 (3d Cir. 2020); App. 49a (collecting cases). Such cannot be reconciled with the narrow reading of *Hyde* as it is not authorized by federal statute, but contrary to it.

Rather, the outcome below is incorrectly based on the reasoning that the USVI is an unincorporated territory and results in a clear and unwarranted expansion of the *Insular Cases* that diminishes the rights of American citizens and renders the Constitution in its own right (as extended via statute to the USVI) illusory. This Court, accordingly, should correct the decision below to prevent an expansion of the *Insular Cases. See Reid, supra; Fin. Oversight & Mgmt. Bd. for P.R., supra.*

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND THIS CASE PRESENTS A GOOD VEHICLE.

While the Ninth and Third Circuits are the only courts of appeals to consider issues arising from "customs borders" distinct from international borders, their precedents are incompatible and this Court "has neither spoken definitively on that subject nor clearly defined the limits, if any" that the Fourth Amendment imposes in such context. *Seljan*, 547 F.3d at 999–1000. Moreover, even if, early in the Republic, routine searches between the US mainland and US Territories were constitutionally permissible, today's ubiquitous travel, shipping, and general technological

advancements fundamentally affect the analysis. *See Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("[t]echnology has the dual and conflicting capability to decrease privacy and augment the expectation of privacy.").

The vast import of the instant issues cannot be overstated, as "these Fourth Amendment rights belong in the catalog of indispensable freedoms." *Almeida-Sanchez*, 413 U.S. at 274 (cleaned up). This case, therefore, squarely presents an extremely "important question of federal law that has not been, but should be, settled by this Court" (Sup. Ct. R. 10(c)), as "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Almeida-Sanchez*, 413 U.S. at 274.

CONCLUSION

For the reasons stated herein, and in the Petition, the Petitioner prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2021.01.06 17:05:11 -05'00' Dated: January 6, 2021

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