No. 20- _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the interplay between two competing propositions of constitutional law. The first proposition is that the United States Virgin Islands, as an unincorporated territory, is subject to the power of Congress under Article IV, Section 3 of the Constitution to make rules and regulations to govern the territory. Pursuant to this grant of constitutional authority, Congress passed Tariff Act of 1930, which specified that the internal/domestic customs territory of the United States excludes the United States Virgin Islands. *See* 19 U.S.C. § 1401(h). The second proposition is that international/foreign border searches are recognized as an exception to the Fourth Amendment's warrant requirement. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977).

In this case a warrantless search of the Petitioner's mail was conducted at an internal/domestic customs border between the continental United States and the United States Virgin Islands.

The questions presented are:

1. Does the international/foreign border-search exception to the Fourth Amendment allow routine, suspicion-less searches at internal/domestic "customs borders" where the Fourth Amendment applies with full force on both sides of the internal/domestic customs border?

2. Do routine warrantless searches of mail traveling from the continental United States to the United States Virgin Islands violate the Fourth Amendment?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, Steven Baxter, and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Steven Baxter, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix herein at App. 1a. The opinion of the United States Court of Appeals for the Third Circuit is published and reported at *United States v. Baxter,* 951 F.3d 128 (3d Cir. 2020). App. 3a. The denial of Petitioner's Petition for Rehearing *en banc*, issued on April 29, 2020, is not officially reported and is reproduced in the Appendix herein at App. 26a.

The District Court's order is not officially reported and is reproduced in the Appendix herein at App. 28a. The transcript of the suppression hearing is reproduced in the Appendix herein at App. 70a.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit vacating the District Court's order was entered on February 21, 2020. A timely petition for panel rehearing and rehearing *en banc* was denied on April 29, 2020. The present petition is being filed by postmark on or before July 28, 2020. Supreme Court Rules 13.1, 13.3, 29.2, and 30.1. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides that:

> 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.

U.S. Const. amend. IV.

The Territorial Clause provides that:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. art. IV, § 3, cl. 2.

The Revised Organic Act of 1954 provides, in pertinent part, that the Fourth Amendment applies in full to the Virgin Islands. *See* 48 U.S.C. § 1561.

For purposes of the customs territory of the United States, "[t]he term 'United States' includes all Territories and possessions of the United States except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the island of Guam." 19 U.S.C. § 1401(h).

STATEMENT

This case arose out of a search of mail conducted by Customs and Border Patrol ("CBP") in March 2017, a United States Postal Service ("USPS") priority mail package was sent from South Carolina to the United States Virgin Islands (the "USVI" or the "Virgin Islands"), which a CBP agent opened without a warrant or consent. App. 28-29a. CBP regularly opens USPS mail from the mainland United States without a warrant. App. 29a. On April 3, 2017, another priority mail package sent from South

Carolina to the USVI was x-rayed, determined to contain a firearm, and opened by CBP. App. 30a.

These searches, as conceded by counsel for the Government at the trial level, were part of a strategic decision of the CBP to surreptitiously open mail destined for the Virgin Islands. App. 30a; App. 185a. Indeed, CBP agents had been instructed since 2012 or 2013 to check the incoming mail in the USVI on a daily basis. App. 102a. A CBP Agent who testified at the suppression hearing believed that CBP was prohibited from opening letter mail (absent a search warrant) but that was only restriction. App. 102-03a.. The expressed rationale was that CBP does not need a warrant because of the "border search authority." App. 104a. Counsel for the Government argued the same at the trial level. App. 185a.

The Petitioner moved the District Court to suppress the evidence obtained from the warrantless searches; the motion was granted. App. 69a. In issuing the order to suppress the evidence obtained from the searches, the District Court found both *United States v. Ramsey*, 431 U.S. 606 (1977) and *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994) inapposite because neither case concerned mail originating from the continental United States to be delivered in the USVI. App. 42-43a. The Government conceded as much to the District Court. *See* App. 170a (Government counsel stating, "Your Honor, there is no authority on this specific question.").

Specifically, distinguishing the Court of Appeals' *Hyde* decision (which allowed a warrantless search when an individual left the USVI for the mainland United States), the District Court observed, while 19 U.S.C. § 1467 "specifically authorized

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," App. 60a, it was "aware of no statutory authority authorizing similar inspections of persons or items entering the United States Virgin Islands from the United States mainland." App. 61a.

On February 21, 2020, the Court of Appeals, relying on circuit precedent, issued a precedential opinion in the instant case vacating the order of the District Court. App. 3a.

REASONS FOR GRANTING 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.

This Court has noted, despite the Fourth Amendment, that the "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619. However, the Court of Appeals incorrectly extrapolated such statement to apply to internal (i.e. domestic) customs borders, when this Court's jurisprudence expressly applies only to international (i.e. foreign) borders: "[i]mport restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations… [including] the power to exclude aliens[.]" *Id.* And *Ramsey* also made clear that, necessarily, only international/foreign border searches are a longstanding exception to the Fourth Amendment: "[b]order searches, then, from before the adoption of the Fourth Amendment, have been considered to be

'reasonable' by the single fact that the person or item in question had entered into our country from outside." *Id.*

However, the same cannot hold true about the search in this case that occurred at an internal/domestic customs border, which cannot have been considered reasonable at the time of the Fourth Amendment – because no such territories existed that gave rise to the possibility of an internal/domestic customs border: "[a]lthough the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

Admittedly, this Court has never addressed the "internal/domestic" versus "international/foreign" border distinction's impact (if any) on the Fourth Amendment. Given that the search at issue certainly does not fall within the international/foreign border-search exception, which predates the Fourth Amendment, *see Ramsey,* 431 U.S. at 619, this Court should grant the writ to resolve any doubt that "the general rule that warrantless searches are presumptively unreasonable," *Horton v. California*, 496 U.S. 128, 133 (1990), also applies to internal/domestic customs borders.

II. THE DECISION BELOW IS WRONG.

Given that the historical international/foreign border-search exception necessarily does not include the search at issue, the District Court properly analyzed the search in context of reasonableness, "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate

governmental interests." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Likewise, the Court of Appeals' circuit precedent reasoned that, while this Court's border-search "cases do not directly support application of the border search exception to the search at issue… the rationale of those cases" supported a conclusion that those searches were reasonable. *Hyde*, 37 F.3d at 122. But the crucial distinctions in the Court of Appeals circuit precedent that *might* justify the suspicion-less searches of persons traveling from the USVI to the continental United States are absent here.

First, *Hyde* concerned a search incident to entry into the continental United States.[1] Thus, while subject to Fourth Amendment analysis, the considerations justifying governmental actions were much more aligned with those inherent in the international/foreign border-search exception as "the justifications for the exception to the warrant requirement are generally framed in terms of threats posed at the point of entry." *United States v. Kim*, 103 F. Supp. 3d 32, 56 (D.D.C. 2015). To be sure, this Court's precedent revolves around the sovereign right to police *entry at international/foreign borders*. *See Almeida-Sanchez*, 413 U.S. 266, 272 ("It is undoubtedly within the power of the Federal Government to exclude aliens from the

[1] *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973) (The border-search exception applies "not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search."); *see also Hyde*, 37 F.3d at 121 n.4.

country… [, which] can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders."); *Montoya de Hernandez*, 473 U.S. at 538 ("with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."); *id.* at 544 ("at the international border, [ ] the Fourth Amendment balance of interests leans heavily to the Government… [including] protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.").

It is abundantly clear that the polestar of the international/foreign border-search exception, allowing routine searches at the international/foreign border, is "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country[.]" *Ramsey*, 431 U.S. at 616. Any person or effect traveling from the continental United States to the USVI, however, has already entered the country (and the United States customs zone). Therefore, "[n]one of those significant governmental interests in monitoring what comes *in* to the country apply in this case." *Kim*, 103 F. Supp. 3d at 56 (emphasis in original).

Second, routine "[c]ustoms searches of persons traveling from the Virgin Islands to the mainland have [ ] been conducted consistently for over 75 years." *Hyde*, 37 F.3d at 121. That, in itself, substantially reduces an individual's expectation of privacy in such a situation. *See id.* at 118 (citing *Montoya de Hernandez*, 473 U.S. at

537) ("in certain limited situations the government's interest in conducting a search without a warrant outweighs the individual's privacy interest.").

Third, and lastly, that practice is conducted pursuant to a federal statute, 19 U.S.C. § 1467, which authorizes searches of persons and effects entering the continental United States or the USVI either from a foreign country or from a United States territory or possession – *but not from the continental United States*. Such statutory authority is consistent with the considerations that justify the pre-Constitution "border-search exception[,] grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, *who and what may enter the country*." *Ramsey*, 431 U.S. at 620 (emphasis added). *See also Montoya de Hernandez*, 473 U.S. at 539 ("Congress had recognized these difficulties. Title 19 U.S.C. § 1582 provides that 'all persons coming into the United States from foreign countries shall be liable to detention and search authorized ... [by customs regulations].' Customs agents may 'stop, search, and examine' any 'vehicle, beast or person' upon which an officer suspects there is contraband or 'merchandise which is subject to duty.' § 482; see also §§ 1467, 1481; 19 CFR §§ 162.6, 162.7 (1984).").

Here, however, there is no statutory authority to search persons or effects traveling from within the continental United States to the USVI. *See* JA-34; *United States v. Barconey*, No. CR 2017-0011, 2019 WL 137579, at *9 (D.V.I. Jan. 8, 2019) ("[t]he Government concedes that there is no federal statute or regulation specifically authorizing Customs officers to conduct searches of individuals and luggage entering

the Virgin Islands from the continental United States."). Nor would the Constitution permit such, as the Fourth Amendment seamlessly applies from the starting point through the destination. *See* 48 U.S.C. § 1561 (applying, *inter alia*, the Fourth Amendment with the same force and effect in the USVI as in the United States or in any State of the United States). But condoning the searches at issue in this case would result in the Fourth Amendment losing all efficacy for persons and effects travelling from the continental United States to the USVI.

And simply because a legitimate interest exists (e.g., in identifying illegal contraband – as it does within the continental United States and everywhere) that "is not enough to argue" in face of the Fourth Amendment. *Almeida-Sanchez*, 413 U.S. at 273.

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:
>
> 'These (Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indipensable [sic] freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.'

Id. at 273–74 (citation omitted).

While it *might* be constitutionally permissible to treat entry into the continental United States from the USVI similar to entry from a foreign country (due to the internal/domestic customs border), undeniably, in the other direction it is not.

The international/foreign border-search exception does not apply, nor are its justifications implicated, because anything arriving in the USVI from the continental United States was already both inside the country *and* inside the United States customs zone. The Fourth Amendment prohibits such searches when travelling from state to state and *must* have the same effect here. *See* 48 U.S.C. § 1561 (providing that the Fourth Amendment applies in full force in the Virgin Islands). At bottom, the Fourth Amendment prohibits the warrantless searches that occurred.

The Court of Appeals concluded that circuit precedent "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." *Baxter*, 951 F.3d at 131; App. 10a (citing *Hyde, supra*). This is necessarily incorrect, as it is contrary to this Court's precedent that the border-search exception encompasses international/foreign border searches understood to be outside the scope of the Fourth Amendment since before its adoption. *See, e.g., Ramsey*, 431 U.S. at 619. *Accord Barconey*, 2019 WL 137579, at *8 ("*Hyde* does not stand for the broad proposition that the border search exception is mechanically applied to searches occurring at the internal customs border between the mainland United States and the Virgin Islands, such that any routine customs search performed at the border is exempt from the requirement of a warrant, probable cause, or reasonable suspicion.").

Indeed, the Court of Appeals' precedent acknowledges the "internal/domestic" versus "international/foreign" border dichotomy, noting the instant issue differs

greatly from those considered under this Court's border-search exception jurisprudence because

> 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. Here we are presented with a situation somewhat different from the usual one, a situation in which the sovereign has created a border within its sovereign territory.

Hyde, 37 F.3d at 120.[2]

Consequently, the warrantless searches at issue in this case necessarily are subject to the ordinary Fourth Amendment analysis. As made plain by the Government, the searches at issue were part of routine, suspicion-less searches conducted out of strategy and tactics. App. 30a; App. 185a. Thus, here, as explained by this Court, "[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Montoya de Hernandez*, 473 U.S. at 537.

As discussed, *supra*, the border-search exception encompasses the understanding of the Framers that international/foreign border-searches were not subject to Fourth Amendment requirements, which necessarily does not encompass internal/domestic customs border searches as such did not exist at that time. *Wilson*, 514 U.S. at 931. Thus, as the District Court of the Virgin Islands observed in a similar

[2] *See also Barconey*, 2019 WL 137579, at *8 ("Unlike the international border, the same sovereign controls on both sides of the internal customs border, and likewise, the protections of the Fourth Amendment apply on both sides of the internal customs border.").

case, the circuit precedent relied upon is far less encompassing than as described by the Court of Appeals in the decision below:

> Instead, *Hyde* stands for the more limited proposition that, because the internal customs border shares many of the characteristics of an international border, it is appropriate to examine and weigh the United States' interest in regulating the movement of people and goods across the internal customs border and the individual's expectations of privacy at that border—considerations typically associated with searches occurring at the nation's international borders—in determining whether a search conducted at the internal customs border is reasonable under the Fourth Amendment. The searches in *Hyde* were deemed to be reasonable in light of those factors *and* in light of Congress' specific authorization of the search of individuals and their belongings arriving in the United States from the Virgin Islands.

Barconey, 2019 WL 137579, at *8 (emphasis in original).

Moreover, this Court's decision in *Torres v. Com. of Puerto Rico*, 442 U.S. 465 (1979) is instructive (if not outright controlling). In *Torres,* the criminal defendant traveled from Florida to Puerto Rico via a commercial flight, Torres's luggage was searched without a warrant and without reasonable suspicion. *Id.* at 467. This Court noted that "Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling." *Id.* at 470 (citation omitted). Ultimately, because the Puerto Rican constitution had a provision containing the language of the Fourth Amendment, this Court concluded that the constitutional requirements of the Fourth Amendment applied, and the "evidence obtained in the search of [Torres's] luggage should have been suppressed." *Id.* at 474. Given that Congress has statutorily applied the Fourth Amendment to the USVI, *see* 48 U.S.C.

§ 1561, the suppression of evidence in this case should have been affirmed by the Court of Appeals pursuant to *Torres.*[3]

Accordingly, the decision below, and circuit precedent, is incompatible with the Constitution, and under the proper Fourth Amendment analysis, the District Court's order suppressing the evidence should have been affirmed. The Court should grant the Petitioner's writ to correct the decision below.

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

The court of appeals' decision involves an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). There are only two circuits (the Third and the Ninth) that review decisions from the U.S. Territories that are outside of the United States customs zone (Puerto Rico is within the customs zone, *see* 19 U.S.C. § 1401(h)). Consequently, the possibility of a circuit-split is minimal compared to most constitutional issues presented to this Court and, by necessary extension, allowing the issues presented here to develop further in the Ninth Circuit would not aid in this Court's consideration of the matter.

Additionally, this case squarely presents the questions as they were addressed by the District Court and the Court of Appeals. Consequently, this case is an ideal vehicle for the Court to consider the intersection of internal/domestic customs zones and the Fourth Amendment.

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[3] To the extent that there is any tension between *Torres* and *Ramsey,* this Court should grant the writ to resolve the tension.

CONCLUSION

For the foregoing reasons, 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: 2020.07.14 13:25:29 -04'00' Dated: July 14, 2020

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