

No. 15-1461

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**In The  
Supreme Court of the United States**

AMIR MESHAL

*Petitioner,*

v.

CHRIS HIGGENBOTHAM, FBI SUPERVISING SPECIAL  
AGENT, IN HIS INDIVIDUAL CAPACITY, *ET AL.*,

*Respondents.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the District of  
Columbia Circuit*

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**BRIEF OF DONALD BORELLI, JOE NAVARRO,  
AND MARK FALLON AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONER**

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***INTEREST OF AMICI CURIAE***<sup>1</sup>

Before retiring in 2010, *amicus curiae* Donald Borelli served in the FBI for twenty-five years. Most recently, he served as Assistant Special Agent in

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<sup>1</sup> This brief is filed with the written consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund its preparation or submission.

Charge in the FBI's Counterterrorism Division in New York; previously, among other notable roles, he served in the FBI's legal attaché office in Amman, Jordan, with responsibility for overseeing FBI activities in Jordan, Lebanon, and Syria. The awards Mr. Borelli has received for his service to the nation include the Attorney General's Award, the FBI Director's Award, and the Award for Excellence from the FBI's International Operations Division. Mr. Borelli is currently a Senior Advisor at The Soufan Group, an international strategic consultancy group. He is also a Fellow at the Center on National Security at Fordham Law School and a Senior Fellow at the Center for Advanced Defense Studies in Washington, D.C.

*Amicus* Joe Navarro is a twenty-five year veteran of the FBI, where he served as an agent and a supervisor. Mr. Navarro was a founding member of the National Security Division's Behavioral Analysis Program and for seventeen years served as a SWAT team operator. In 2002, he was asked by the FBI to develop and teach the Bureau's Advanced Counterterrorism Interview Course at Quantico, VA, which he taught until 2008.

*Amicus* Mark Fallon spent thirty-one years as a federal agent, counterintelligence officer, counterterrorism official, and national security professional. At different times he served as the Deputy Assistant Director for Counterterrorism and Director of the Training Academy at the Naval Criminal Investigative Service ("NCIS") and as the Assistant Director for Training of the Federal Law

Enforcement Training Center. Mr. Fallon has been involved in significant terrorism investigations such as the investigation of Sheik Omar Abdel Rahman (known as “the Blind Sheik”) and those responsible for the attack on the *USS Cole*. After the attacks of September 11th, Mr. Fallon was appointed the Deputy Commander and Special Agent in Charge of the Department of Defense Criminal Investigation Task Force. Today, he works as an international security consultant, author, and noted authority on counterterrorism, violent extremism, counter-intelligence, and criminal investigations. He is the Director of ClubFed, LLC, providing strategic consulting services to clients in the public and private sectors. In addition, Mr. Fallon is Vice Chair of the International Association of Chiefs of Police IMPACT Section and Past-Chair of the High Value Detainee Interrogation Group Research Committee.

*Amici* submit this brief to present the Court with legal authority—which is fully consistent with their own personal experiences—that FBI agents are required to adhere to the Constitution whenever and wherever they carry out their work. This mandate applies with equal force to FBI investigations within the territory of the United States and abroad. The requirement that FBI agents follow the Constitution is embedded in the FBI’s core values and in the internal directives that govern FBI operations, and it

is also a rule of law that has been consistently applied by our federal courts.<sup>2</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* respectfully urge this Court to grant certiorari. This case presents fundamental issues of exceptional importance regarding the legal framework within which FBI agents conduct criminal investigations. As relevant to this appeal, that framework is simple: At all times, and regardless of their geographic location, FBI agents are expected to conform their conduct to the requirements of the U.S. Constitution. This principle is especially true when the FBI is investigating a U.S. citizen for possible violations of criminal law. It applies to *all* investigations, regardless of whether they occur at home or abroad, or whether they relate to terrorism or tax fraud.

In the decision below, the D.C. Circuit concluded that a *Bivens* action is not available against respondent FBI agents because the relevant events occurred overseas and in the context of a terrorism investigation. *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015). The court held that two special factors counseled hesitation under *Bivens*: (1) the case involved national security, “an area of executive action where courts hesitate to intrude absent congressional authorization,” and (2) this Court “has never ‘created or even favorably mentioned a non-

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<sup>2</sup> *Amici* express no view on the merits of Petitioner’s claims in the event that the case is permitted to proceed under *Bivens*.

statutory right of action for damages on account of conduct that occurred outside the borders of the United States.” *Id.* at 425-426 (citation omitted). The Court of Appeals also discussed “practical factors counseling hesitation,” including “diplomatic consequences” of judicial “second-guess[ing]’ [of] executive officials operating in ‘foreign justice systems’” and possible extensions of constitutional protections “outside the ordinary peacetime contexts for which they were developed.” *Id.* at 427 (citation omitted).

*Amici* believe, however, that in a *Bivens* action, the federal courts would be capable of addressing Petitioner’s constitutional claims without causing adverse consequences. Faithful adherence to the Constitution is at the heart of the FBI’s core values. It is also required by the legal directives that govern FBI operations. Further, over many years, federal courts have consistently applied constitutional rules to the overseas conduct of FBI and other law enforcement agents, especially when the rights of U.S. citizens are at issue.

## ARGUMENT

### I. THE FBI RESPECTS THE CONSTITUTIONAL RIGHTS OF UNITED STATES CITIZENS ABROAD, INCLUDING DURING TERRORISM INVESTIGATIONS

Founded in 1908, the FBI is “one of the world’s premier security and crime-fighting forces.”<sup>3</sup> It works to address national security threats—principally terrorism, espionage/foreign intelligence operations, and cyber and high-tech crimes—as well as domestic criminal threats such as public corruption, civil rights violations, organized crime, white collar crime, and violent crime, and in so doing carries out “dual responsibilities as a law enforcement and intelligence agency.”<sup>4</sup>

From its early days as a squad of some thirty-four agents, today’s FBI has grown to a force of approximately 36,000 employees with an operating budget of more than \$8 billion per year.<sup>5</sup> In addition to its domestic operations, the FBI maintains sixty-

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<sup>3</sup> U.S. Dep’t of Justice, FBI, *Today’s FBI: Facts & Figures 2013-2014*, at 5 (2013), available at <http://www.fbi.gov/stats-services/publications/todays-fbi-facts-figures/facts-and-figures-031413.pdf/view> [hereinafter *FBI Facts & Figures*].

<sup>4</sup> *Id.* at 5, 33, 45.

<sup>5</sup> *Id.* at 9, 45. For a detailed history of the FBI see generally U.S. Dep’t of Justice, FBI, *The FBI: A Centennial History, 1908-2008* (2008), available at <http://www.fbi.gov/about-us/history/a-centennial-history/the-fbi-a-centennial-history-1908-2008> [hereinafter *FBI Centennial History*].

three international offices and fifteen additional international legal attaché sub-offices.<sup>6</sup>

For much of the twentieth century, the FBI focused on domestic organized crime, although its work has long had an international component.<sup>7</sup> The attacks of September 11, 2001 prompted a major realignment. Since those attacks, the FBI's national security role has grown in importance and the Bureau has shifted its focus from that of a "reactive law enforcement agency" to a "proactive" one.<sup>8</sup> "Combating terrorism" is now the FBI's "top investigative priority."<sup>9</sup> Driven by that goal, the FBI has increased its agent force by forty percent and has tripled the number of intelligence analysts it employs.<sup>10</sup> It has also significantly strengthened its efforts to formally coordinate with other agencies, notably by establishing joint task forces and

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<sup>6</sup> *FBI Facts & Figures*, *supra* note 3, at 8, 14, 34.

<sup>7</sup> *Id.* at 19, 20.

<sup>8</sup> JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41780, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS 1, 2, 18 (2013) [hereinafter BJELOPERA].

<sup>9</sup> *FBI Facts & Figures*, *supra* note 3, at 34. *See also* James B. Comey, Statement Before the Senate Judiciary Committee (December 9, 2015), *available at* <https://www.fbi.gov/news/testimony/oversight-of-the-federal-bureau-of-investigation-8> (affirming "[c]ounterterrorism remains the FBI's top priority") [hereinafter Director Comey Address].

<sup>10</sup> *FBI Facts & Figures*, *supra* note 3, at 31; BJELOPERA, *supra* note 8, at 2.

collaborating closely with law enforcement officials in foreign countries.<sup>11</sup>

Throughout this period of major change, and notwithstanding the complexities of its worldwide operations and the pressures of preemptive national security work, the FBI has remained committed to upholding and respecting the U.S. Constitution in both its domestic and foreign operations, including in national security investigations.

For example, in Executive Order 12333, President Ronald Reagan prescribed guidelines for the activities of U.S. agencies gathering intelligence within and outside the United States. By its terms, the order applies to the FBI in its intelligence-gathering capacity, requiring it to “[c]onduct counterintelligence activities outside the United States in coordination with the CIA as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General.”<sup>12</sup> This document repeatedly emphasizes that while foreign intelligence is “essential to informed decisionmaking in the areas of national defense and foreign relations”

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<sup>11</sup> See Comm’n on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Rep. to the President of the United States 452, 466 (2005), *available at* [http://fas.org/irp/offdocs/wmd\\_report.pdf](http://fas.org/irp/offdocs/wmd_report.pdf); Att’y Gen. Guidelines for Domestic FBI Operations, at 5–6 (2008), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2008/10/03/guidelines.pdf> [hereinafter 2008 AG Guidelines]; see generally BJELOPERA, *supra* note 8, at 1–4; *FBI Facts & Figures*, *supra* note 3, at 8, 34, 54, 57; Director Comey Address (discussing various collaborations with international partners).

<sup>12</sup> Exec. Order No. 12333, 46 Fed. Reg. 59941, 59949, 59953 (Dec. 4 1981) (as stated at sections §§ 1.4 & 3.4(f)(6)).

and is a “priority objective,” it must be pursued in a manner that is “consistent with the Constitution and applicable law” and “respectful of the principles upon which the United States was founded.”<sup>13</sup> The order requires that the FBI and other subject agencies “use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad” and that the intelligence gathering procedures adopted by all subject agencies “protect constitutional and other legal rights and limit use of such information to lawful governmental purposes.”<sup>14</sup> The order further provides that nothing in it “shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.”<sup>15</sup>

The mandate that the FBI respect the Constitution is consistent with the FBI’s longstanding values, and the Attorney General and the FBI have implemented this mandate in their formal operational guidelines. One of the FBI’s “Core Values” is “[r]igorous obedience to the Constitution of the United States,” which ensures that the FBI carries out its activities with “[f]airness and compassion” by “treat[ing] everyone with the highest regard for constitutional, civil, and human rights.”<sup>16</sup>

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<sup>13</sup> *Id.* § 2.1.

<sup>14</sup> *Id.* § 2.4.

<sup>15</sup> *Id.* § 2.8.

<sup>16</sup> FBI Domestic Investigations and Operations Guide § 3.1 (2011), *available at* <http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version/fbi->

As the FBI has explained in a recent publication, “[i]t is the FBI’s responsibility to protect Americans not only from crime and terrorism but also from incursions into their constitutional rights,” and it is “therefore ingrained in FBI personnel to carry out all activities with full adherence to the Constitution and the principles of personal liberty and privacy.”<sup>17</sup> Indeed, at the very outset of his or her service, each FBI agent swears an oath to “support and defend the Constitution of the United States[.]”<sup>18</sup>

Consistent with its core values and the sworn oath of its agents, and as required by Executive Order 12333, the 2003 Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection provide that “intelligence gathering activities must be carried out in a ‘responsible manner that is consistent with the Constitution and applicable law[.]’”<sup>19</sup> The guidelines

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domestic-investigations-and-operations-guide-diog-october-15-2011-part-01-of-03 [hereinafter DIOG].

<sup>17</sup> *FBI Facts & Figures*, *supra* note 3, at 74; *see also id.* at 6; Director Comey Address (discussing the FBI’s focus on defending the U.S. from terrorism and protecting privacy, civil rights and civil liberties).

<sup>18</sup> Jonathan L. Rudd, *Our Oath of Office: A Solemn Promise*, FBI LAW ENFORCEMENT BULLETIN (Sept. 2009), *available at* <http://www2.fbi.gov/publications/leb/2009/september2009/oath.htm>.

<sup>19</sup> Att’y Gen. Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, Introduction (2003), *available at* <https://www.fas.org/irp/agency/doj/fbi/nsiguidelines.pdf>; *see also id.* § I.B.3, at 7–8.

instruct that even certain authorized departures from the guidelines must “be carried out in a manner consistent with the Constitution[.]”<sup>20</sup>

More recently, in January 2014, President Obama issued Presidential Policy Directive 28 (“PPD-28”), setting forth standards for the collection and maintenance of signals intelligence. Under PPD-28, signals intelligence must be gathered in a manner that is consistent with the United States’ role “in upholding democratic principles and universal human rights; . . . and the legitimate privacy and civil liberties concerns of U.S. citizens and citizens of other nations.”<sup>21</sup> The FBI does not collect signals intelligence, but consistent with PPD-28, the Bureau has adopted procedures for handling signals intelligence that it receives from other members of the intelligence community.<sup>22</sup> These procedures reaffirm the Bureau’s adherence to Executive Order 12333 and the Constitutional standards upon which

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<sup>20</sup> *Id.* § I.D.2, at 11.

<sup>21</sup> Presidential Policy Directive 28 (Jan. 17, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>. The FBI defines “signals intelligence” as “electronic transmissions that can be collected by ships, planes, ground sites, or satellites” and communications intelligence as a type of signals intelligence that “refers to the interception of communications between two parties.” The FBI, About Us, *Intelligence Collection Disciplines (INTs)*, *available at* <https://www.fbi.gov/about-us/intelligence/disciplines>.

<sup>22</sup> Presidential Policy Directive 28 Policies and Procedures, at 1 (Feb. 2, 2015), *available at* <http://fas.org/irp/agency/doj/fbi/fbi-ppd-28.pdf> [hereinafter FBI PPD-28 Policies].

it rests. The FBI PPD-28 Policies state that, even in the event of an approved departure from the procedures outlined therein, “all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States.”<sup>23</sup>

More generally, to *Amici*’s knowledge, all publicly available guidelines governing the FBI’s conduct of its operations reflect that same commitment to respect and uphold the Constitution.<sup>24</sup> And in *Amici*’s experience, the commitment to abide by the Constitution set forth in the FBI’s policy documents is reflected in the FBI’s

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<sup>23</sup> *Id.* at 7.

<sup>24</sup> See DIOG, *supra* note 16, at §§ 3.1.1, 4.1.3. The FBI’s domestic conduct is generally governed by the 2008 AG Guidelines and by the DIOG. The guidelines that apply to foreign operations are generally classified in whole or in relevant part. See 2008 AG Guidelines, *supra* note 11 § I.A, at 12; DIOG § 1.1 (listing (1) the Attorney General’s Guidelines for Extraterritorial FBI Operations and Criminal Investigations; (2) the Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (to the extent not superseded by the 2008 AG Guidelines); (3) the Attorney General Guidelines on the Development and Operation of FBI Criminal Informants and Cooperative Witnesses in Extraterritorial Jurisdiction; (4) the Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigation; and (5) the Memorandum of Understanding Concerning Overseas and Domestic Activities of the Central Intelligence Agency and the Federal Bureau of Investigation). *Amici* do not rely here on any classified source.

culture and in its day-to-day practices both domestically and abroad.

## **II. COURTS HAVE APPLIED THE CONSTITUTION TO PROTECT UNITED STATES CITIZENS ABROAD, INCLUDING IN TERRORISM CASES**

The FBI's longstanding commitment to respect the Constitution—including when it acts abroad in respect of U.S. citizens—reflects and implements the long-established rule that the Constitution applies to and constrains U.S. government action against U.S. citizens abroad.

In *Reid v. Covert*, 354 U.S. 1 (1957), this Court recognized that U.S. citizens enjoy the Constitution's protections in respect of the acts of U.S. government officials abroad. The case concerned two U.S. civilian citizens residing overseas who were tried and convicted by court-martial based on allegations that they had murdered their service-member spouses on U.S. military bases. *Id.* at 3–4. Both defendants sought habeas relief on the grounds that their trials by military authorities were unconstitutional given their status as civilians. *Id.* at 4–5. The Court granted them relief. *Id.* at 5. In doing so, a majority of the Court recognized a proposition that continues to resonate almost a half-century later:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only

act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

*Id.* at 5-6 (plurality opinion); *see also id.* at 56 (“Governmental action abroad is performed under both the authority and the restrictions of the Constitution.”) (Frankfurter, J., concurring in the judgment).

Over the years, lower courts have consistently and unequivocally upheld *Reid’s* mandate that the Constitution applies to U.S. actions against U.S. citizens anywhere in the world in a wide variety of contexts, including terrorism cases. *See, e.g., Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in part and dissenting in part) (“As a general matter, the U.S. Constitution applies to U.S. citizens worldwide[.]”); *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (“It is settled law that the United States is bound by our Constitution when it takes actions that affect citizens outside our territory, therefore the government must provide just compensation for takings by its forces which occur

abroad, when not acts of war.”) (internal citations omitted); *Rosado v. Civiletti*, 621 F.2d 1179, 1189 (2d Cir. 1980) (“the Bill of Rights does apply extraterritorially to protect American citizens against the illegal conduct of United States agents”); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) (recognizing that it is “well settled” that “the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens”), *abrogated on other grounds by United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (holding aliens may not invoke the Fourth Amendment against searches conducted abroad by the U.S. government); *Garvey v. Gibbons*, No. CV 03-6043-GPS (JTL), 2008 WL 4500011, at \*8 (C.D. Cal. Oct. 5, 2008) (recognizing Fourth Amendment protects U.S. citizen alleging excessive force in connection with his arrest and transport by U.S. officials abroad); *United States v. Bin Laden*, 126 F. Supp. 2d 265, 270–71 (S.D.N.Y. 2000) (recognizing Fourth Amendment’s application to U.S. citizens abroad and in the context of foreign intelligence collection).

For example, in the criminal context, courts have consistently recognized that the Fourth Amendment protects U.S. citizens abroad when they are subjected to searches and seizures by U.S. officials. *Powell v. Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966) (recognizing Fourth Amendment’s application to search of military personnel’s off-base home in Japan); *see also United States v. Juda*, 46 F.3d 961, 968 (9th Cir. 1995) (“We agree with Juda that the Fourth Amendment’s reasonableness

standard applies to United States officials conducting a search affecting a United States citizen in a foreign country.”); *Colello v. SEC*, 908 F. Supp. 738, 753–54 (C.D. Cal. 1995) (recognizing that Fourth Amendment applied to freezing of U.S. citizens’ Swiss bank accounts despite a treaty between the United States and Switzerland permitting such seizure based on “reasonable suspicion” alone); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 156–57 (D.D.C. 1976) (considering U.S. participation in wiretapping of U.S. citizens abroad and concluding that “prior judicial authorization is [constitutionally] required for electronic surveillance instituted by the Army on non-military United States citizens” abroad). While the Fourth Amendment generally does not protect non-citizens abroad, see *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), its application to U.S. citizens abroad is firmly established, and the relevant cases have addressed narrower questions that are fully capable of judicial resolution. Among such questions are whether the Warrant Clause is applicable outside the territory of the United States,<sup>25</sup> and whether the United States’

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<sup>25</sup> See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 171 (2d Cir. 2008) (holding “the Fourth Amendment’s Warrant Clause has no extraterritorial application and that foreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment’s requirement of reasonableness”); *United States v. Stokes*, 726 F.3d 880, 891–93 (7th Cir. 2013) (same). Inquiries have arisen with respect to Miranda warnings in the Fifth Amendment context, although the questions differ because “a violation of the Fifth Amendment’s right against self-incrimination occurs only when a compelled statement is offered at trial against the defendant,”

participation in a particular search, seizure, or interrogation is sufficiently meaningful for constitutional protections to attach.<sup>26</sup>

Courts have also recognized the Constitution's extraterritorial application in considering habeas petitions made by U.S. citizens who were detained as part of national security and anti-terrorism operations, notably in recent terrorism cases. For example, in *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004), the court roundly rejected the suggestion that it lacked jurisdiction to consider the habeas petition of a U.S. citizen alleged to be held at the direction of U.S. officials in a foreign prison and

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which is often in the United States. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fifth Amendment Challenges)*, 552 F.3d 177, 177, 198, 203–05 (2d Cir. 2008); *Cranford v. Rodriguez*, 512 F.2d 860, 863 (10th Cir. 1975) (finding a “good faith effort to comply with the Miranda doctrine” under the circumstances); *United States v. Dopf*, 434 F.2d 205, 207 (5th Cir. 1970) (finding no Fifth Amendment violation where “appellants were not in [the] custody of the United States”).

<sup>26</sup> See, e.g., *United States v. Getto*, 729 F.3d 221, 233 (2d Cir. 2013) (applying “principles of ‘virtual agency’ and intentional constitutional evasion” in determining whether there was sufficient U.S. participation for constitutional protections to attach); *United States v. Abu Ali*, 528 F.3d 210, 228–30 (4th Cir. 2008) (analyzing whether United States involvement caused constitutional protections to attach under the “joint venture doctrine”); *United States v. Peterson*, 812 F.2d 486, 490–92 (9th Cir. 1987) (same); *United States v. Morrow*, 537 F.2d 120, 139–41 (5th Cir. 1976) (same); see also *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985) (“When there has been no compulsion by a [U.S.] state or federal agent, either directly or by significant participation by such an agent, then the constitutional mandate has not been violated.”).

questioned about his supposed ties to terrorism.<sup>27</sup> The prisoner, who had been studying in Saudi Arabia, was arrested and held indefinitely in a Saudi prison, allegedly at the direction of U.S. officials. *Id.* at 31–32. The court affirmed that the prisoner was entitled to present his habeas claims in federal court, holding that “a citizen cannot be so easily separated from his constitutional rights” and “the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen.” *Id.* at 31, 38, 40, 41, 54. In so concluding, the court recognized “the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law” that had been recently reaffirmed by this Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004), a case which involved the habeas petition of an American citizen who had been captured in a foreign combat zone. *Abu Ali*, 350 F. Supp. 2d at 39.<sup>28</sup>

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<sup>27</sup> After the habeas litigation, Abu Ali was convicted of federal crimes and sentenced to a substantial term of imprisonment. See *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

<sup>28</sup> In a different context, the D.C. Circuit recognized the Constitution’s application abroad in a case alleging a Fifth Amendment takings violation. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511–12 (D.C. Cir. 1984) (en banc), *rev’d on other grounds*, 471 U.S. 1113 (1985). *Ramirez* held that where the U.S. government had established a Regional Military Training Center in Honduras on property belonging to a U.S. citizen, the citizen had a cognizable takings claim. *Id.* at 1511, 1516, 1543. The court rejected the view that “teaming up with foreign agents” could “exculpate officials of the United States

As these cases demonstrate, the Constitution protects U.S. citizens who are the subject of U.S. government investigations regardless of the geographic location and, in certain instances, even where national security interests underlie those investigations. Courts have consistently and successfully applied this fundamental rule of law in the context of overseas activities by the FBI and other U.S. law enforcement agents.

### CONCLUSION

For the reasons stated, *Amici* respectfully ask this Court to grant a writ of certiorari to consider the important issues raised in this case.

Respectfully submitted.

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from liability to United States citizens for the *United States* officials' unlawful acts." *Id.* at 1542–43.