No. 15-1461

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Constitution Project is an independent bipartisan organization that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to foster consensus-based solutions to pressing constitutional challenges. Through a combination of scholarship, advocacy, policy reform, and public education initiatives, The Constitution Project seeks to protect our constitutional values and strengthen the rule of law.

After September 11, 2001, the Project created its Liberty and Security Committee, a blue-ribbon committee of prominent Americans, to address the importance of safeguarding civil liberties while working to preserve our national security. In its work, the Committee emphasizes the need for all three branches of government to play a role in protecting constitutional rights. The Project appears regularly before federal courts, including this Court, in cases that raise these important constitutional questions. *See, e.g.*, *United States* v. *Jones*, 132 S. Ct. 945 (2012); *Boumediene* v. *Bush*, 553 U.S. 723 (2008).

The instant petition raises just such questions. The court of appeals' decision fails to strike the appropriate balance between protecting civil liberties and preserving national security, and eliminates the role of the judiciary in maintaining that balance in cases like Mr. Meshal's. The Project accordingly urges the Court to grant certiorari and hold that an American citizen properly states a

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties were timely notified of amicus's intention to file this brief. Letters consenting to the filing of this brief are on file with the Clerk.

claim for damages when he asserts unconstitutional detention and torture by U.S. officials, regardless of whether the actions occurred abroad or in a purported terrorism investigation. Any other conclusion impermissibly allows the Executive Branch to too easily evade the Constitution's protection of American citizens.

SUMMARY OF ARGUMENT

The FBI's unconstitutional interrogation, detention, and renditions of U.S. citizen Amir Meshal are well documented in the petition for certiorari and the opinions below. Both lower courts recognized that Mr. Meshal had plausibly alleged violations of his Fourth and Fifth Amendment rights based on the FBI's conduct, but denied him a remedy nonetheless. In so doing, the two courts misunderstood the role of Congress and inappropriately deferred to the Executive. The district court erroneously concluded that "[o]nly the legislative branch can provide United States citizens with a remedy for mistreatment by the United States government on foreign soil." Pet. App. 69a. A panel majority of the court of appeals compounded the error for fear of "'second-guess[ing]' executive officials" on matters that may "touch[] on" national security, foreign policy, or diplomacy. *Id.* 20a-22a.

The panel majority's approach departs from this Court's considered understanding of the *Bivens* remedy and upsets the system of checks and balances wisely enshrined in our Constitution. *See Mistretta* v. *United States*, 488 U.S. 361, 380 ("[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."). As Judge Pillard rightly explained in dissent:

> Judicial scrutiny becomes particularly important when executive officials assert that individual rights must yield to national security and foreign policy imperatives. Presented with cases involving assertions of paramount national interests in apparent tension with individual liberty, the federal courts have proved competent to adjudicate. Removing all consequence for violation of the Constitution treats it as a merely precatory document.

Pet. App. 36a (Pillard, J., dissenting).

Unless the court of appeals' error is corrected by this Court, American citizens abroad will have no effective remedy against unconstitutional mistreatment by their own government where "national security" is broadly invoked. Certiorari is warranted in order to re-establish the boundaries in effect when the government investigates its own citizens, and to restore the proper balance of power among the three coequal branches of government.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI AND REAFFIRM THE JUDICIARY'S HISTORICAL RESPONSIBILITY TO SAFEGUARD CONSTITUTIONAL RIGHTS THAT WOULD OTHERWISE GO UNPROTECTED

"'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief'" and provide an "independent limitation upon the exercise of federal power." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-394 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). Restraining the politi-

cal branches is accordingly a feature of the system, not a drawback. And while the extent of a *Bivens* remedy is informed by the separation of powers, the Court stated in that case that only a remedial scheme that was "equally effective" would replace a remedy arising directly under the Constitution. *Id.* at 397. Even the government conceded that Mr. Bivens could not be left "entirely without remedy for an unconstitutional invasion of his rights by federal agents." *Id.* at 390. Neither the lack of affirmative congressional ratification of a *Bivens* remedy for the hyper-specific issue at hand, nor the effect of the cause of action on executive prerogatives, was an obstacle to the Court's recognition of a remedy for harm inflicted on an American citizen by agents of his own government acting contrary to the Constitution.[2]

Justice Harlan's concurring opinion further emphasized that the only relevant separation-of-powers concern was whether citizens could avail themselves of a comprehensive alternative remedial scheme. He asked only "whether the power to authorize damages … [was]

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[2] As both the majority and dissent below recognized, Congress has indeed addressed the persistence of the *Bivens* remedy in its amendments to the Federal Tort Claims Act, each time explicitly preserving *Bivens* as a parallel cause of action. Pet. App. 43a-45a (citing legislative history); *id.* 46a-47a (congressional silence on *Bivens* in the creation of the Military Claims Act, Foreign Claims Act, and Torture Victim Prevention Act weighs in favor of, not against, a *Bivens* remedy). However, the panel majority was wrong to assume that any particular kind or degree of congressional action is a *prerequisite* to a *Bivens* remedy. Rather, as explained in this brief, the *Bivens* remedy exists by default for violations of U.S. citizens' Fourth and Fifth Amendment rights *unless* Congress or another body provides an adequate alternative remedial scheme, or the action is brought by service members and implicates considerations specific to the military. Neither exception is present here.

placed by the Constitution itself exclusively in Congress' hands." 403 U.S. at 401-402 (Harlan, J., concurring in the judgment). Answering in the negative, he posited that the general grant of jurisdiction by Congress to the courts rebutted the proposition that the power being exercised was "inherently legislative." *Id.* at 403 (internal quotation marks omitted). The judicial branch, he continued, must guard against "the popular will as expressed in legislative majorities" that might otherwise authorize rights-transgressing behavior. *Id.* at 407. Therefore, Justice Harlan wrote, it was not appropriate to "await express congressional authorization of traditional judicial relief with regard to these legal interests." *Id.* And far from deferring to the executive branch, "the judiciary ha[d] a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Id.* at 408. Unlike the panel majority in this case, Justice Harlan did not countenance "an area of executive action where courts hesitate to intrude absent congressional authorization." Pet. App. 21a.

Decisions since *Bivens* have reinforced that the remedy persists, except where a specific alternative remedy displaces it; generalized legislative or executive prerogatives do not suffice. In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court dismissed concerns that a *Bivens* remedy for gender discrimination in congressional hiring would amount to a "'lack of respect due [a] coordinate branch of government,' []or … an 'initial policy determination of a kind clearly for non-judicial discretion.'" *Id.* at 235 n.11 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). This Court also found no intrusion upon the congressional prerogative to fashion alternative remedies, because Congress had not created such an alternative. *Id.* at 247 (finding that Congress's

decision not to extend the Civil Rights Act to employees in Davis's position "le[ft] undisturbed whatever remedies petitioner might otherwise have").

In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court likewise held that the absence of an "explicit congressional declaration" that no relief would be available weighed in favor of allowing a *Bivens* claim under the Eighth Amendment to move forward. This was so even though the Federal Tort Claims Act provided the plaintiff with a cognizable cause of action; as the Court noted, "the *Bivens* remedy is more effective than the FTCA remedy" and served as "a more effective deterrent." *Id.* at 20-21. The Court specifically noted that Congress viewed its statutory remedy "as fully adequate only in combination with the *Bivens* remedy," *id.* at 19 n.5—a conclusion that confirms that the judiciary's role as protector of individual constitutional rights is fully compatible with, and in fact necessary to, the separation of powers.

This Court's *Bivens* cases have never sanctioned the level of judicial deference to the political branches applied by the panel majority below. Rather, while this Court has rejected *Bivens* remedies in various circumstances, it has typically been in situations where the Court identifies an adequate alternative remedial scheme accessible to the plaintiff, not mere legislative silence as in this case. In *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983), the Court ruled that *Bivens* does not extend to a federal employee's wrongful termination suit because of the existence of a comprehensive alternative civil service remedy regime. In *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), the Court observed that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that

may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423. For an aggrieved Social Security claimant, those "adequate remedial mechanisms" took the form of "'probably the largest adjudicative agency in the western world.'" *Id.* at 446 (quoting *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983)). In *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), the denial of a *Bivens* cause of action likewise relied on "the wide variety of administrative and judicial remedies" available to the plaintiff. *Id.* at 562;[3] *see also Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 72 (2001) (prisoner petitioner conceded "alternative remedies [including state tort and administrative remedies] … at least as great, and in many respects greater, than anything that could be had under *Bivens*").

And twice the Court denied *Bivens* remedies based on considerations specific to the internal functioning of the military. *See Chappell* v. *Wallace*, 462 U.S. 296 (1983); *United States* v. *Stanley*, 483 U.S. 669 (1987).[4] In *Chappell*, the Court denied the remedy to service

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[3] The Court's only reference to separation of powers concerns came in a brief statement that Congress's ability to "tailor any remedy to the problem perceived" would "lessen[] the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562.

[4] In the remaining two cases that refused to recognize the existence of a *Bivens* cause of action, the defendants were not actually individual federal agents. *See Minneci* v. *Pollard*, 132 S. Ct. 617, 623 (2012) (denying a *Bivens* claim against private employees of a private prison and noting that alternative state tort law remedies existed); *FDIC* v. *Meyer*, 510 U.S. 471, 485-486 (1994) (denying a *Bivens* claim against a federal agency while preserving one against the individual offending officers). Here, as in *Bivens*, individual FBI agents committed the constitutional violations and are the named defendants.

members suing their superior officers for discrimination based on the "unique disciplinary structure of the military establishment and Congress' activity in the field." 462 U.S. at 304. Among the Court's specific justifications were the "special and exclusive system of military justice;" Congress's "plenary Constitutional authority over the military;" and the "peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline." *Id.* at 300-304. Four years later, the Court in *Stanley* denied a *Bivens* remedy to service members alleging injuries that "'arise out of or are in the course of activity incident to service.'" 483 U.S. at 684 (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)). Again, the Court's concerns were specific to the internal functioning of the military. *Id.* at 683 ("[T]he mere process of arriving at correct conclusions [were the Court to recognize a *Bivens* remedy] would disrupt the military regime."). Mr. Meshal is not a service member and is not suing military operatives for conduct incident to military service. Accordingly, none of the military-specific concerns raised in *Chappell* or *Stanley* is present here.[5]

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[5] The panel majority below cited military cases as support for its reliance on "national security" as a special factor counseling hesitation, but each is distinguishable. Pet. App. 11a-12a. Two of them merely applied the prohibition on *Bivens* suits for service members to "security contractors in a war zone, performing much the same role as soldiers." *Vance* v. *Rumsfeld*, 701 F.3d 193, 199 (7th Cir. 2012); *Doe* v. *Rumsfeld*, 683 F.3d 390, 392, 394 (D.C. Cir. 2012) (denying *Bivens* remedy to U.S. civilian translator working for the Marines in Iraq and tortured by NCIS agents). Two others involved non-citizen plaintiffs. *See Ali* v. *Rumsfeld*, 649 F.3d 762, 764 (D.C. Cir. 2011); *Arar* v. *Ashcroft*, 585 F.3d 559, 584 (2d Cir. 2009). And the plaintiff in *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), sought damages "against top Defense Department officials for a range of policy judgments pertaining to the designation

Each of these cases either reaffirmed or, at the very least, did not disturb the separation of powers analysis that the Court laid out in *Bivens*, *Davis*, and *Carlson*. That analysis made clear that the *Bivens* remedy persists unless displaced by clearly articulated remedial alternatives or precluded because service member suits would disrupt the internal military regime. It is not removed by lack of congressional ratification or generalized assertions of executive power.

In this regard, *Bivens* is but a manifestation of this Court's longstanding recognition of the judiciary's essential role as a bulwark against executive and legislative overreach. *See Boumediene* v. *Bush*, 553 U.S. 723, 745 (2008) (noting that the judiciary plays a key role in "maintain[ing] the 'delicate balance of governance' that is itself the surest safeguard of liberty" (citation omitted)); *United States* v. *Morrison*, 529 U.S. 598, 616 (2000) ("Under our written Constitution … the limitation of congressional authority is not solely a matter of legislative grace."); *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989) ("[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *United States* v. *U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317 (1972) (judicial oversight of domestic security surveillance by the Executive branch "accords with our basic constitutional doctrine that individual freedoms will best be pre-

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and treatment of enemy combatants." *Id.* at 547. None of these cases is like Mr. Meshal's. Moreover, each of the decisions appears to over-read *Chappell* and *Stanley*, making an unsupported leap from concern over internal military functioning to an ill-defined exception for generalized executive branch invocation of national security not recognized in this Court's decisions.

served through a separation of powers and division of functions among the different branches and levels of Government"); *United States* v. *Brown*, 381 U.S. 437, 442-443 (1965) ("This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."); *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of [legislative] power"); *id.* at 211-212 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."); *Duncan* v. *Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued."); *Myers* v. *United States*, 272 U.S. 52, 292-293 (1926) (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'"); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

This historical judicial role not only keeps the executive and legislative branches firmly within their constitutional lanes, but also preserves and protects the rights of the people. As Madison explained:

> If [the Bill of Rights is] incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 *Annals of Cong.* 457 (1789) (Joseph Gales, Sr. ed., 1834).

Indeed, the judiciary's function to assure redress for constitutional violations is the basis for the *Bivens* remedy itself. As Justice Harlan explained, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment," and damages are the only possible remedy in cases such as this one. *Bivens*, 403 U.S. at 407-410 (Harlan, J., concurring); *see also Davis*, 442 U.S. at 242 ("[J]usticiable constitutional rights are to be enforced through the courts … unless such rights are to become merely precatory."). Judicial recognition of a *Bivens* remedy is thus a limited but vital tool in maintaining the institutional balance inherent in the separation of powers, serving to ensure official accountability and safeguarding constitutional rights that would otherwise go unprotected.

Here, the district court held—and it cannot be disputed—that the groundless detention, mistreatment, and torture of an American citizen by FBI agents plausibly represent violations of the Fourth and Fifth Amendments. Pet. App. 81a. The parties agreed that Mr. Meshal has no alternative remedy, congressionally-created or otherwise, for his claims of constitutional vi-

olations by the Executive and that, just as in *Bivens*, the choice is between "'damages or nothing.'" *Id.* 82a. Accordingly, Mr. Meshal's case falls squarely within the core *Bivens* framework. Recognition of a *Bivens* remedy will therefore uphold, not undermine, the checks and balances enshrined in the Constitution's separation of powers architecture.

II. THE COURT OF APPEALS IDENTIFIED NO VALID REASON TO ABANDON ITS RESPONSIBILITY TO ASSURE REDRESS FOR CONSTITUTIONAL VIOLATIONS

The panel majority below held that that the extraterritoriality of Mr. Meshal's injuries, in combination with national security concerns, precluded a *Bivens* remedy. Pet. App. 5a. But this Court has never suggested that the motivation of law enforcement officers who violate the Constitution—or their bare invocation of "national security" when torturing an American citizen—has any bearing on the *availability* of a *Bivens* action, though it may conceivably affect its ultimate *success*.[6]

The panel majority's categorical denial of *Bivens* remedies in the "national security context," Pet. App.

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[6] A wide range of case-specific doctrines are available to address the panel majority's concerns, should they prove well-founded. *See, e.g.*, *United States* v. *Reynolds*, 345 U.S. 1 (1953) (state secrets); *Baker*, 369 U.S. 186 (political question); *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (absolute immunity); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (removal of privileged evidence rendered it impossible for the plaintiff to put forward a prima facie case). The mere existence of these tools proves that courts have always been capable of balancing government and citizen interests in the national security sphere. *See* Pet. App. 64a-66a. Amicus takes no position on the applicability of any of these doctrines in this case.

12a, ignores this Court's numerous cases upholding judicial scrutiny in that very arena. *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 530 (2004) ("[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."). Addressing the persistence of civil judicial review during the Civil War, the Court stated:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-121 (1866). In recent years, the Court has repeatedly decided cases involving highly sensitive issues of national security without "weaken[ing] our Nation's ability to deal with danger." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); *see also Boumediene*, 553 U.S. at 797 ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.").

While the panel majority below was right that this Court has never had occasion to confront the availability of *Bivens* to remedy constitutional violations committed abroad, *see* Pet. App. 20a, amicus respectfully submits that that is a reason to grant the petition in this case, which presents a compelling vehicle for resolution of the issue. On certiorari, the Court should reverse the lower court's ruling that the Executive can turn off the judiciary's ability to enforce the Constitution's protections simply by shifting its constitutional violations offshore. *See Boumediene*, 553 U.S. at 727 ("To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'").

As the panel majority below acknowledged, Pet. App. 20a, American citizens carry the Constitution with them when they travel overseas. *See, e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 5-6 (1957) ("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."); *Balzac* v. *Porto Rico*, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted."); *Al Bahlul* v. *United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part) ("As a general matter, the U.S. Constitution applies to U.S. citizens worldwide."); *Kar* v. *Rumsfeld*, 580 F. Supp. 2d 80, 83 (D.D.C. 2008) ("The Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq." (citations omitted)); *see also* Pet. App. 20a n.4 ("Nor do we question whether constitutional protec-

tions generally apply to American citizens outside the United States when dealing with their government.").

For each of the rights that citizens carry with them, courts have long been vigilant to provide a remedy. *Marbury*, 5 U.S. (1 Cranch) at 163 ("It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (granting writ of mandamus because "the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *De Lima* v. *Bidwell*, 182 U.S. 1, 176-177 (1901) (petitioners could bring suit to recover customs duties, despite lack of congressional remedy, because "[i]f there be an admitted wrong, the courts will look far to supply an adequate remedy"); *see also* Pet. App. 36a (Pillard, J., dissenting) ("Removing all consequence for violation of the Constitution treats it as a merely precatory document.").[7]

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[7] The panel majority stated that this Court has never "'created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.'" Pet. App. 20a. But *Bivens* is that right of action, and there was no need for that decision to specify that a remedy would obtain for constitutional deprivations regardless of their location. Further, this Court and the court below have recognized *Bivens* actions in analogous contexts that belie the panel majority's reliance on extraterritoriality. *See, e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 734, (2011) (recognizing the availability of a *Bivens* remedy for a U.S. citizen apprehended by FBI agents as he boarded a flight to Saudi Arabia); *In re Sealed Case*, 494 F.3d 139, 141 (D.C. Cir. 2007) (recognizing a *Bivens* action for unconstitutional conduct in Burma).

This Court has never held that the happenstance of extraterritoriality could play any role in the constitutional calculus, much less help negate a *Bivens* remedy for an American citizen tortured by individual federal officers and left without an alternative remedy. At the very least, this represents an important and pressing question that this Court should review and decide with the benefit of briefing and argument. Further percolation is unnecessary, and this case is an ideal vehicle. This Court should grant the petition and reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2016