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

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Respondents misconstrue the relevant facts and minimize the importance of the issues. Petitioner Amir Meshal, an American citizen, seeks a remedy against the four FBI agents who personally ran roughshod over his Fourth and Fifth Amendment rights during a criminal investigation abroad into suspected terrorist activity that petitioner did not commit and for which he was never charged. Those agents first interrogated petitioner for four day-long sessions in a building controlled and operated by the FBI. App. 71a. The agents coerced petitioner into signing a standard waiver of rights form used in criminal investigations, falsely telling him that he had no choice if he wanted to go home. App. 14a-15a, 71a-72a. Because petitioner refused to confess to a crime he had not committed, the agents threatened him with torture, disappearance, and death. App. 6a-7a, 71a-73a. When petitioner still did not confess, and when local courts threatened to secure his release, the agents caused his surreptitious transfer to another country so they could continue to detain, interrogate, and threaten him in secret and without access to a lawyer or court. Pet. 3-4; App. 73a-75a. In total, respondents deprived petitioner of his liberty and grossly mistreated him for more than four months. App. 6a-7a, 75a. Respondents alone, and not foreign officials, controlled whether and when petitioner would be released. Pet. 3-4; Second Amended Complaint ¶¶ 52, 96, 121-122, 161, 170C-170D, *Meshal v. Higgenbotham*, No. 1:09-cv-02178-EGS (D.D.C. Feb. 21, 2012), ECF No. 51.

The district court found the agents' treatment of petitioner "outrage[ous]," "appalling," and

"embarrassing," but denied relief, concluding it was constrained by circuit court precedent interpreting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App. 100a. Judge Pillard, in her 33-page dissent that respondents essentially ignore, concluded that an American citizen should have a remedy for such gross law enforcement misconduct under a faithful reading of this Court's *Bivens* jurisprudence. App. 35a.

This Court should grant the petition to resolve the circuit division over whether the assertion of national security considerations supports dismissal of *Bivens* suits; because the D.C. Circuit majority departed from this Court's jurisprudence in significant respects; and because denying an American citizen any remedy for Fourth and Fifth Amendment violations by federal agents based on national security and extraterritoriality raises a question of exceptional importance.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE LOWER COURT DIVISION OVER WHETHER THE ASSERTION OF NATIONAL SECURITY CONSIDERATIONS JUSTIFIES DISMISSAL OF A *BIVENS* ACTION AGAINST FEDERAL AGENTS.

Respondents (BIO 21-23) dispute the existence of any conflict between the D.C. Circuit's decision in this case and the Second Circuit's decision in *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *petitions for cert. pending*, Nos. 15-1358 and 15-1359

(filed May 9, 2016) and No. 15-1363 (filed May 6, 2016),[1] but mischaracterize both decisions in the process. A critical question in every *Bivens* case is whether the asserted claim seeks to apply *Bivens* in a new context. In *Turkmen*, the Second Circuit took the position that the presence of national security considerations is not enough, by itself, to create a new context under *Bivens*. The D.C. Circuit ruled otherwise here.

Specifically, the majority below held that national security was one of two essential reasons this case arose in a new *Bivens* context. App. 6a, 8a-9a, 10a, 11a. The Second Circuit, by contrast, held that national security considerations did not alter the *Bivens* context. *Turkmen*, 789 F.3d at 233-35. The dissents in *Turkmen* and *Meshal* likewise disagreed sharply with the respective majority opinions on this question. *See id.* at 275 (Raggi, J., dissenting) (executive's exercise of national security authority is "an unprecedented *Bivens* context"); App. 38a (Pillard, J., dissenting) (case arises in a familiar *Bivens* context where, as here, "FBI agents violate a suspect's Fourth and Fifth Amendment rights by detaining him without charges and threatening him with torture, disappearance, and death"); *see also* App. 31a (Kavanaugh, J., concurring) ("strongly disagree[ing]" with the dissent that *Meshal* does not present a new context). The petition for certiorari filed by the Solicitor General in *Turkmen*, moreover, emphasizes the Second Circuit's rejection of national security considerations as a basis for dismissing the *Bivens* suit. *See Ashcroft. v. Turkmen*, No. 15-1359,

[1] The *Turkmen* petitions are scheduled for consideration at the Court's October 7 conference.

Petition for a Writ of Certiorari 13 (filed May 9, 2016) ("*Ashcroft* Cert. Pet'n") (Second Circuit improperly allowed a *Bivens* action "to be pursued against executive branch officials for national security actions taken after the 9/11 attacks") (quoting joint dissent from denial of rehearing en banc). At the same time, respondents have stressed in this case the D.C. Circuit's reliance on those same considerations in dismissing the *Bivens* suit here. BIO 12 (D.C. Circuit properly barred a *Bivens* action where "[p]etitioner's claims squarely implicate national security").[2]

In seeking to minimize or dismiss the conflict, respondents note (BIO 23) that this case also concerns government misconduct abroad. But national security was as critical to the ruling below as was extraterritoriality. App. 14a-15a (holding that case presents a new context because it involves *both* national security and extraterritorial conduct). Thus, while other factors were at issue in *Turkmen* and *Meshal*—immigration and policy decisions by senior government officials in *Turkmen* and extraterritorial conduct in *Meshal*—national security was central to both decisions. And those decisions reached conflicting conclusions on whether national security alters the *Bivens* context and justifies dismissal.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court recognized that assertions of national

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[2] Other *Turkmen* petitioners expressly recognize the circuits' conflicting treatment of national security. *See Hasty v. Turkmen*, No. 15-1363, Petition for a Writ of Certiorari 22 (filed May 6, 2016) (Second Circuit's ruling in *Turkmen* "conflicts" with D.C. Circuit's ruling in *Meshal*).

security by federal officials should not bar *Bivens* suits because of the heightened risk those officials will violate the Constitution through overzealous action, *id.* at 524, and the need to compensate citizens who suffer the consequences, *id.* at 523 n.7. The tension between the Second and D.C. Circuits reflects a larger confusion on *Bivens*' availability in cases implicating national security—a question on which lower courts have reached widely divergent results. Pet. 12-13 & n.3 (citing cases).

At the very least, should the Court grant certiorari in *Turkmen*, petitioner respectfully submits that it should also grant certiorari here so that any decision on the scope of the *Bivens* remedy can be informed by the different legal and factual scenarios presented by the two records. In particular, *Meshal* provides the Court with a vehicle for addressing the relationship between *Bivens* and national security in a case that mirrors *Bivens* in important respects. Like the plaintiff in *Bivens*, petitioner, an American citizen, seeks redress against the law enforcement agents who directly violated his constitutional rights during a criminal investigation. *See Turkmen*, 789 F.3d at 265 (Raggi, J., dissenting) ("claims challeng[ing] . . . errant conduct by a rogue official" are "the typical *Bivens* scenario"). In *Turkmen*, as the Solicitor General emphasizes, noncitizens seek redress against senior executive or supervisory policy officials in connection with policy decisions and enforcement of the nation's immigration laws. *Ashcroft* Cert. Pet'n 12, 13-20. Granting certiorari in *Meshal*, alongside *Turkmen*, would thus allow the Court to consider the range of factors that could affect *Bivens*' availability in cases implicating national security.

II. THE D.C. CIRCUIT MAJORITY'S RULING DEVIATES SUBSTANTIALLY FROM THIS COURT'S PRECEDENTS BY BLURRING THE LINE BETWEEN CIVILIAN LAW ENFORCMENT AND MILITARY ACTION IN WARTIME.

Respondents (BIO 15-16, 20-21) strain to avoid the exceptional nature of the D.C. Circuit majority's ruling by obscuring the critical distinctions between this case and *Bivens* actions against military officials for military decisions during wartime. *See Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc) (suit by military contractor against military officials for military decisions in warzone); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012) (same); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit by military detainee against military officials for wartime decisions). The majority below stretched those rulings in ways that both conflict with this Court's decisions and are fundamentally important for American citizens facing law enforcement abuses. Pet. 25-26; App. 35a (Pillard, J., dissenting).

First, unlike *Vance* and *Doe*, the majority below expanded this Court's limited exception to *Bivens* for suits by servicemembers against military officials, an exception that rests on "the unique disciplinary structure of the military establishment." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *accord United States v. Stanley*, 483 U.S. 669, 683 (1987). Second, unlike the decisions respondents cite, the majority eviscerated the line between *Bivens* actions against law enforcement agents for constitutional violations in criminal investigations and those against military officials for military decisions in

wartime. In its place, the majority substitutes "national security," a term that is notoriously malleable and prone to abuse. *Mitchell*, 472 U.S. at 523; App. 59a (Pillard, J., dissenting). No precedent of this Court, nor any decision by another circuit, supports an exception to *Bivens* so devoid of a limiting principle and so at odds with *Bivens*' central purpose of deterring and redressing unconstitutional conduct by federal law enforcement agents. *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

Respondents seek to obscure the majority's ruling by suggesting that it turned on factors unique to wartime. BIO (I) (question presented concerns "detention during counterterrorism operations in war-torn East Africa"). But the Fourth and Fifth Amendment violations—extrajudicial detention and coercive interrogation to extract a confession—occurred in Kenya and Ethiopia, neither of which was a war zone, as the U.S. government conceded below. Appellant's C.A. Br. 29 (citing transcript). And the majority opinion did not base its holding on any nexus to war or military activity—nor could it, given petitioner's allegations. App. 17a ("The context of this case is a potential damages remedy for alleged actions occurring in a terrorism investigation conducted overseas by federal law enforcement officers."). The ruling thus applies equally to Fourth and Fifth Amendment violations committed in federal counterterrorism investigations in any foreign country. Pet. 26-27 n.7.[3]

[3] The majority opinion, moreover, is not easily confined to counterterrorism investigations. If, as respondents insist, extraterritoriality is a "particularly compelling reason" to deny

III. THE D.C. CIRCUIT'S RELIANCE ON EXTRATERRITORIALITY WARRANTS REVIEW.

The Fourth and Fifth Amendments apply to U.S. citizens abroad, and thus applied to petitioner when respondents arbitrarily detained him for fourth months and threatened him with disappearance and death. Pet. 28-29 (citing cases). The majority below agreed, App. 14a n.4, but nevertheless foreclosed any remedy, finding that extraterritoriality altered the context and provided a special factor in addition to national security that counseled hesitation, App. 17a, 20a. The majority misconstrued both the role of extraterritoriality in the *Bivens* analysis and the actions of Congress, which support *Bivens*' availability for the misconduct alleged here. Pet. 28-31; App. 45a-51a (Pillard, J., dissenting).

Respondents maintain (BIO 13-15) that the presumption against extraterritorial application of statutes bars petitioner's *Bivens* action. App. 18a-19a. But, as Judge Pillard explained, "[t]he presumption sets only a default rule of statutory construction to aid courts in determining whether Congress intended to legislate with respect to foreign occurrences." App. 53a-54a (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013)). The presumption is therefore irrelevant to a *Bivens* action "to enforce constitutional provisions that all

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a *Bivens* remedy, it is an equally compelling reason to deny such remedy in any federal investigation of a U.S. citizen abroad, whether that investigation involves counterterrorism or corporate fraud. BIO 13. *See also* App. 31a-32a (Kavanaugh, J., concurring) (federal courts should not recognize a *Bivens* remedy for unconstitutional conduct abroad).

agree apply abroad, especially given that the very genesis of *Bivens* lies in the acknowledged inactivity of Congress." App. 54a (Pillard, J., dissenting).

RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016), merely applies this default rule of statutory construction. *Id.* at 2106-08 (construing separately the reach of the statute's substantive and remedial provisions in light of the presumption to evaluate congressional intent as to each). *Nabisco* has no relevance to the extraterritorial application of the Constitution, which does not depend on congressional action or intent. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 758-64 (2008); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion). For the same reason, *Nabisco* has no relevance to the scope of non-statutory constitutional remedies.

Congressional action *is* relevant to determining *Bivens*' scope, but the majority below misstates its relevance. The question is not whether Congress has authorized the action, a proposition that would turn *Bivens* on its head. *Bivens*, 403 U.S. at 405 (Harlan, J., concurring). Rather, it is whether Congress has provided an alternative remedy or a comprehensive scheme addressing the conduct at issue. *E.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 424-27 (1988) (Social Security Act); *Bush v. Lucas*, 462 U.S. 367, 380-81, 388 (1983) (comprehensive federal civil service regulation). Here, Congress has neither provided an alternative remedy for protecting petitioner's constitutional rights, App. 19a, 42a, nor enacted a comprehensive scheme to displace

Bivens, App. 42a.[4] Congress has instead consistently preserved the *Bivens* remedy for misconduct by federal agents against U.S. citizens, even as this Court has repeatedly instructed that Congress can displace *Bivens* with a legislative substitute. Pet. 21-23; App. 42a-44a (Pillard, J., dissenting).

Respondents argue that Congress "has enacted related tort causes of action" without creating a damages remedy that would cover the circumstances presented here. BIO 16-17 (quoting App. 29a (Kavanaugh J., concurring)). This argument fails for two reasons. First, as noted above, *Bivens*, by definition, does not require Congress to enact a cause of action. Second, those statutes demonstrate consistent congressional support for a *Bivens* remedy for misconduct by federal agents outside the United States. The Detainee Treatment Act of 2005 enacts a limited good-faith defense from damages in suits brought by noncitizen detainees. 42 U.S.C. § 2000dd-1(a). Congress's limitation of the defense to noncitizen suits makes sense only in light of its continued understanding that U.S. agents would face ordinary liability in U.S. courts when they mistreat U.S. citizens. App. 47a-48a n.2 (Pillard, J., dissenting); *see also Vance*, 701 F.3d at 220 (Hamilton, J., dissenting) (statute reflects Congress's assumption that U.S. citizens, whether at home or

[4] This Court also considers whether the plaintiff has an alternative state tort remedy. *Minneci*, 132 S. Ct. at 623, 626 (state tort remedy for alleged Eighth Amendment claims against private prison corporation); *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007) (state tort remedy for alleged unconstitutional interference with property rights). Petitioner has no remedy under state tort law either. App. 19a, 42a.

abroad, could "pursue relief under *Bivens*, subject to the familiar qualified immunity defense"). [5] The Torture Victim Protection Act extends a remedy already available to U.S. citizens against U.S. agents under *Bivens* to U.S. citizens tortured by foreign agents. 28 U.S.C. § 1350 note. Respondents' suggestion that in opening U.S. courts to suits against foreign agents acting under color of foreign law, Congress also sought to preclude suits by U.S. citizens against U.S. officials for violating the Constitution "is counterintuitive to say the least." App. 48a (Pillard, J., dissenting). It similarly defies logic to suggest that when Congress established administrative compensation schemes for individuals harmed by negligent *military* officials or contractors at home or abroad, *see* Military Claims Act, 10 U.S.C. § 2733; Foreign Claims Act, 10 U.S.C. § 2734, it thereby intended to preclude *Bivens*, the traditional remedy for constitutional violations by federal law enforcement agents. App. 46a-47a (Pillard, J., dissenting); *see also Vance*, 701 F.3d at 220 (Hamilton, J., dissenting) (neither Military Claims Act nor Foreign Claims Act applies to constitutional violations or intentional torts).

If accepted, respondents' reliance on "related" tort claims," and its embrace by the majority below, App. 8a-9a, "leads to an inexplicable result: that civil remedies are available to most victims of torture

[5] Consistent with this understanding, Congress the following year precluded all damages actions by certain noncitizens, again leaving undisturbed U.S. citizens' ability to bring *Bivens* actions. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636 (2006) (barring damages actions by noncitizen enemy combatants).

except a United States citizen tortured by United States agents abroad." App. 50a (Pillard, J., dissenting) (emphasis in original). The decision also contradicts the public position of the executive branch, which, to demonstrate U.S. compliance with treaty obligations, has insisted repeatedly that individuals who are arbitrarily detained and tortured by federal agents, as petitioner was, can seek redress in federal courts through *Bivens*. Pet. 23; App. 48a-50a (Pillard, J., dissenting).

While the majority below sought to confine its ruling to constitutional misconduct in a counterterrorism investigation abroad, App. 13a, 20a, its reasoning resists such limitation. The majority places the focus on the "special needs of foreign affairs combined with national security." App. 23a. That focus would bar *Bivens* relief to citizens even for law enforcement misconduct in the United States as long as the conduct implicates national security and foreign affairs. This Court should review a lower court decision whose reasoning and result is so far afield from any exception to *Bivens* this Court has recognized and that so imperils a citizen's ability to pursue some remedy when federal agents violate his constitutional rights.[6]

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[6] Petitioner's claims would not be barred on alterative grounds if he is allowed to proceed, as respondents claim. BIO 20 n.6. First, the district court specifically found that petitioner has plausibly alleged violations of his Fourth and Fifth Amendments rights by respondents, App. 78a-81a, a finding the D.C. Circuit did not question on appeal. Second, respondents are not entitled to qualified immunity because detaining an American citizen for four months without judicial process and coercively interrogating him, including with credible threats of disappearance and death, violates clearly established

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: October 3, 2016

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constitutional rights, even when carried out on foreign territory. Appellant's C.A. Reply Br. 18-28.