No. 13-9200

In the Supreme Court of the United States

ADEL HASSAN HAMAD, PETITIONER
v.
ROBERT M. GATES, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF ADEL HASSAN HAMAD'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 2241(e)(2) prevent courts from hearing Mr. Hamad's non-habeas legal claims arising under the United States Constitution and laws of the United States?

2. If 28 U.S.C. § 2241(e)(2) precludes any judicial forum from hearing Mr. Hamad's claims, does the statute violate the Due Process Clause or constitutional limits on the separation of powers?

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STATEMENT OF INTEREST

Amicus curiae is the Center for Constitutional Rights (CCR), a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. The Center brought the first habeas petition on behalf of families of Guantánamo detainees to this Court in *Rasul v. Bush*, 542 U.S. 466 (2004), and since then has coordinated the efforts of hundreds of attorneys in litigating individual detainee cases, as well as directly representing individuals, including several petitioners in *Boumediene v. Bush*, 553 U.S. 723 (2008). CCR has also represented several sets of civil damages plaintiffs in cases arising out of deaths, torture and abuse at Guantánamo. *See, e.g.*, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert denied*, 130 U.S. 1013 (2010); *Al-Zahrani v. Rumsfeld*, 669 F.3d 315 (D.C. Cir. 2012); *Celikgogus v. Rumsfeld*, 920 F. Supp. 2d. 53 (D.D.C. 2013).[1]

SUMMARY OF ARGUMENT

Petitioner Hamad, a former Guantánamo detainee, brought suit against several military and civilian officials, seeking damages for violations of international law and of his Fifth Amendment rights. The district court dismissed Hamad's claims on a variety of grounds. As to all defendants other than former Defense Secretary

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[1] No counsel for any party authored this brief of amicus curiae in any part, nor did any counsel for any party nor any person other than amicus curiae make a financial contribution intended to fund the preparation or submission of the brief. The parties were informed of amicus curiae's intent to file more than ten days prior to the filing of this brief, and both parties have consented to the filing.

Gates (who did not contest residence within the district[2]), it dismissed for lack of personal jurisdiction. *Hamad v. Gates*, 2011 U.S. Dist. LEXIS 57405 (W.D. Wash. May 27, 2011). All claims against Gates under international law were disposed of by allowing the United States to substitute itself under the Westfall Act and dismiss pursuant to sovereign immunity. *Hamad v. Gates*, 2011 U.S. Dist. LEXIS 141429 at *23-*30 (W.D. Wash. Dec. 8, 2011). Finally, the district court dismissed the Fifth Amendment *Bivens* claim against Gates by determining that Hamad had failed to adequately plead the Defense Secretary's personal involvement in his prolonged arbitrary detention. *Hamad v. Gates*, 2012 U.S. Dist. LEXIS 52487 (W.D. Wash. Apr. 13, 2012).

The Court of Appeals, however, affirmed the dismissals on a different ground, finding that Congress had stripped away jurisdiction over all of Hamad's claims. *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013). This jurisdictional holding was predicated on application of Section 7(b) of the Military Commissions Act of 2006 (MCA), codified at 28 U.S.C. § 2242(e)(2), which states as follows:

> Except [for challenges to CSRT determinations under the Detainee Treatment Act of 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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[2] *Hamad v. Gates*, 2011 U.S. Dist. LEXIS 57405 at *3 (W.D. Wash. May 27, 2011).

The Court of Appeals erred in holding that Congress has the power to deprive the federal courts of jurisdiction to decide these issues. The text, structure, and history of Article III make clear that there must always exist some form of federal judicial review over federal questions, whether by means of original jurisdiction in lower federal courts (as has existed by statute since 1875) or appellate jurisdiction (as has existed in the Supreme Court since the first Judiciary Act over claims originating in state courts of general jurisdiction). By purporting to eliminate all jurisdiction—whether original or appellate—over certain categories of federal questions, MCA Sec. 7(b) violates this constitutional mandate and is void.

The Court of Appeals needlessly reached this constitutional question, so fraught with fundamental implications for the separation of powers. This Court has made clear that federal courts are free to dispose of cases on "threshold questions" without first deciding that "the parties present an Article III case or controversy." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotations omitted). The Court of Appeals could have addressed questions of personal involvement and qualified immunity prior to reaching the question of whether Sec. 7(b) validly strips jurisdiction over Hamad's claims.

ARGUMENT

I. The Constitution forbids removal of all federal court jurisdiction over federal questions

Section 7 of the MCA purports to eliminate all jurisdiction (both original and appellate) in all courts (both federal and state) over various types of claims relating to

abuse of "enemy combatants." The Constitution forbids such a broad elimination of all federal jurisdiction over federal question claims like those at issue here.

The text of Article III states:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. …
>
> **Section 2.** The judicial Power shall extend to all Cases, [arising under federal law];—to all Cases affecting [foreign officials];—to all Cases of admiralty and maritime Jurisdiction;—to Controversies [between six sets of governmental and/or diverse parties].
>
> In all Cases affecting [foreign officials and states], the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const., Art. III, §§ 1-2. Section 2 uses imperative language ("shall extend") to make clear that the "judicial Power" must include "all Cases" involving federal questions (those "arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority").[3] And the first sentence of Section 1 ensures

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[3] The "judicial Power" must also extend to "all Cases" in the other two mandatory categories of Section 2—Ambassadors and Admiralty. But out of the nine categories of "Cases" and "Controversies" set forth in section 2, only in the three sets of "Cases" *must* some form of federal jurisdiction lie. *See* Akhil R. Amar, *A Neo-*

that some federal court—whether the Supreme Court or some lower federal courts created by Congress—will exercise this judicial power, again using imperative language ("shall be vested").

The clause in Section 1 giving Congress discretion over the structure of the lower federal courts[4] and the clause in Paragraph 2 of Section 2 allowing Congress to make exceptions to the Supreme Court's appellate jurisdiction cannot be read in isolation from the sections mandating that "[t]he judicial Power … shall be vested" in federal courts and "shall extend to all cases… arising under" federal law. Congress does not have the option to eliminate all lower federal courts[5] and to simultaneously

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Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. Rev. 205, 261-62 (1985). In other words, these three sets of "Cases" (involving federal questions, ambassadors, and admiralty) comprise a "mandatory tier" of cases in which "state courts were not permitted to be the final word"; at some point, a federal court must be able to rule on the issue, even if only on appellate review from a state court system. *Id.*

Of course, as to Ambassador cases, original federal jurisdiction in the Supreme Court is guaranteed by Section 2 ¶ 2. That leaves only "Cases, in *Law and Equity*, arising under" federal law, and admiralty cases (which were considered to arise in neither law nor equity, *see* Akhil R. Amar, *Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1513 (1990). Thus, putting aside the Ambassador cases reserved for the original jurisdiction of the Supreme Court, and the state-vs.-state controversies that remain in the Supreme Court's original jurisdiction after the 11th Amendment, Article III reserves for mandatory federal court review only claims involving uniquely federal subject matter—cases "arising under" federal law and admiralty. Just such uniquely federal questions are at issue in the present case.

[4] That clause vests federal judicial power conjunctively in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."

[5] Whether Congress can avoid creating any lower federal courts in the first place, or withdraw their jurisdiction entirely, is a difficult question, as state courts are not in fact courts of unlimited subject

restrict the Supreme Court's appellate jurisdiction without limitation. Instead, read together, the first three paragraphs of Article III mandate that some federal court must have some form of jurisdiction (whether appellate or original[6]) over "all Cases … arising under" federal law. This requirement can be satisfied by vesting original federal-question jurisdiction in the district courts (as has existed consistently since 1875); or, if original jurisdiction is left to state courts, by allowing an avenue for appeal to some federal court at some point in the life of the case (as has existed consistently since the founding, *see, e.g.*, § 25 of the first Judiciary Act, which

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matter jurisdiction—for instance, they may not be empowered to direct injunctions and extraordinary writs such as habeas and mandamus to federal officers, or entertain (involuntarily) prosecutions under federal criminal statutes. For present purposes, the question is academic, as MCA Section 7 purports to eliminate *all* jurisdiction, not just all *federal* jurisdiction, over certain sorts of claims.

[6] Of course, Congress' choice as to where *original* jurisdiction of federal questions will lie may in turn affect its ability to make exceptions to the Supreme Court's *appellate* jurisdiction under Art. III § 2, cl. 2. *See* Amar, *A Neo-Federalist View of Article III*, 65 B.U.L. Rev. at 255-57:

> Congress may make exceptions to the Supreme Court's appellate jurisdiction in the mandatory categories, but only if it creates other Article III tribunals with the power to hear all the excepted cases. Congress need not create such courts in the first instance; plenary Supreme Court appellate jurisdiction of all federal question and admiralty cases decided by state courts would satisfy the requirement that the "judicial Power shall extend to all" these cases. But if Congress seeks to make exceptions to the Supreme Court's appellate jurisdiction in these cases, then it must create another federal court to fill the gap in mandatory federal jurisdiction. Such a court could be an original tribunal, or could sit in direct appellate review over state courts.

expressly authorized appellate review of federal questions in the Supreme Court).[7]

The history of the drafting of Article III and the confirmation debates confirm this view. The first drafts of the "Virginia Plan," from which the final text of Article III was ultimately derived, mandated federal jurisdiction over "questions which involve the national peace and harmony" and was intended in part to preserve "the security of foreigners where treaties are in their favor." 1 Max Farrand, The Records of the Federal Convention of 1787 at 238 (1911) (Randolph; Yates' notes). The first draft of the Committee on Detail (the Randolph-Rutledge Draft) mandated federal jurisdiction over only issues arising from acts of Congress, and allowed Congress to decide which other cases "involving the national peace and harmony" the Supreme Court could hear. This discretion over other federal question cases disappeared entirely from the next draft, the Wilson-Rutledge Draft, which made all such federal question jurisdiction mandatory in the federal courts, with Congress having discretion to assign original jurisdiction from the Supreme Court to lower federal tribunals. 2 Farrand 173, 186-87 ("The Legislature may (distribute) [assign any part of]

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[7] The 1789 Judiciary Act, § 25, 1 Stat. 73, 85-87, granted the Supreme Court appellate jurisdiction over federal questions (more precisely, denials of federal claims or "exemptions") arising on appeal from state court systems, *see generally* Amar, *Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. at 1515-17, and the current original general federal question jurisdiction in district courts has been continuously available since 1875. *See* Act of March 3, 1875, § 1, 18 Stat. 470, now codified at 28 U.S.C. § 1331(a); *see also* Act of February 13, 1801, § 11, 2 Stat. 92 (first creating plenary federal question jurisdiction in district courts). Moreover, the Alien Tort Statute has conferred federal jurisdiction over claims cognizable under its terms since the founding. *See* 1 Stat. 77; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004) (recognizing statute as a "grant of jurisdiction").

th(is)e Jurisdiction … in the Manner and under the limitations which it shall think proper (among) [to] such (other) [inferior] Courts as it shall constitute from Time to Time."). And in one of the final major debates over what would become Article III, the delegates rejected by a vote of six states to two a provision that would have allowed Congress to make exceptions not to the appellate power of the Supreme Court, but rather to the "judicial power" itself. 2 Farrand 431 ("The following motion was disagreed to, to wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct'"). Finally, the Committee on Style, appointed merely "to revise the style of, and arrange, the articles which have been agreed to by the House" (2 Journal of the Federal Convention 691)—that is, to make "technical and syntactical, rather than substantive" changes to the draft referred to it, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 794 (1984)—altered the Inferior Courts clause from "such Inferior Courts as *shall, when necessary*, from time to time, be constituted by the Legislature of the United States" to its final form, "such inferior courts as the Congress may from time to time ordain and establish," 2 Farrand 600 (emphasis added); the original form acknowledges that other actions of Congress (pursuant to the Exceptions Clause) might make the creation of such lower federal courts obligatory.

The subsequent ratification debates in the several states "produced almost no suggestions by [the Constitution's advocates] that Congress could delimit the sphere of federal court jurisdiction," Clinton, 132 U. Pa. L. Rev. at 810; *id.* at 810-40, and Hamilton's famous defenses of the federal judiciary in Federalist 78-82 are consistent with the notion of mandatory federal jurisdiction over

the three sets of "Cases" in Section 2. *See* Federalist 81 (power of Congress to create inferior federal courts "is evidently calculated to obviate the *necessity* of having recourse to the supreme court, in every case of federal cognizance."); Federalist 82 ("The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public reasons receive their *original or final* determination in the courts of the union." (emphasis added)); *see also* 1 Annals of Congress 831-32 (J. Gales ed. 1789) (Rep. Smith, in debates over Judiciary Act, stating Art. III allows "no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States."). *See generally* Clinton, 132 U. Pa. L. Rev. 741.

This Court has never upheld a complete preclusion of all federal judicial fora for constitutional claims, and has applied the strongest of presumptions against preclusion of such claims.[8] Article III demands some federal court review—whether original or appellate—over all federal-question claims.[9] Because MCA Section 7 pur-

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[8] *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding provisions depriving district courts of jurisdiction over "second or successive" habeas petition because Supreme Court retained original jurisdiction); *Reno v. AADC*, 525 U.S. 471 (1999) (upholding severe but not complete restriction of federal judicial review); *see also Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n.12 (1986); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

[9] The two polar ends of the academic debates over Congress' power to alter the jurisdiction of the federal courts have been staked out by Justice Story and Professor Henry Hart, but each would actually reach a result consistent with the above sentence. Story opined that the "whole judicial power" set forth in Section 2 "must … be vested in some [federal] court, by congress," "at all times, … either in an original or appellate form." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329, 331 (1816); *see also* 3 JOSEPH STORY,

ports to eliminate all such review over Hamad's constitutional (*Bivens*) claims and claims under international law (both directly and pursuant to the Alien Tort Statute), it is unconstitutional and void.[10]

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) § 1589 ("One of two courses only could be open for adoption,—either to create inferior courts under the national authority, to reach all cases fit for the national jurisdiction, which either constitutionally or conveniently could not be of original cognizance in the Supreme Court; or to confide jurisdiction of the same cases to the State courts, with a right of appeal to the Supreme Court."). That view is slightly broader than the position set forth in this brief, which distinguishes the six sets of "Controversies" included in Section 2 as non-mandatory subjects of federal jurisdiction.

Professor Hart's famous dialogue, included in his standard Federal Jurisdiction casebook, opines that Congressional restrictions under the Exceptions Clause "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan," whereas Congress has plenary, unlimited power to wrest jurisdiction from the inferior federal courts. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). MCA Section 7 removes the Supreme Court entirely from considering fundamental claims, including constitutional claims, over issues of unique federal importance, and thus violates even Hart's unduly narrow conception of the limits on Congressional power as well.

[10] At the very least, "'the Court should use every possible resource of construction to avoid the conclusion that [Congress intended to effectuate an unconstitutional withdrawal of jurisdiction].'" David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limit on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2509 (1998) (quoting Hart, 66 Harv. L. Rev. at 1399). Here, constitutional avoidance would be served by an interpretation presuming that Sec. 7(b) was exclusively intended (in the absence of a "superstrong" clear statement to the contrary from Congress, *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 730-31 (1990) (courts apply "a superstrong presumption against preclusion of constitutional claims")) as a means of barring back-door routes to challenge *detention* in some civil action other than habeas. Of course, logically,

An unconstitutional jurisdictional statute must be disregarded as "void." *Marbury v. Madison*, 5 U.S. 137, 177, 180 (1803); *see also United States v. Klein*, 80 U.S. 128, 147-48 (1871) (disregarding unconstitutional statute that divested court of jurisdiction and reinstating judgment obtained under prior statutory scheme); *Armstrong v. United States*, 80 U.S. 154 (1871) (same).[11]

* * *

The lower courts have repeatedly erred in addressing this question in cases brought by former Guantánamo detainees (or their survivors) without a full understanding of its implications for constitutional structure. *See, e.g.*, *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012); *Janko v. Gates*, 741 F.3d 136, 145-47 (D.C. Cir. 2014); *Hamad*, 732 F.3d at 1003-06. There is no sign that any of these courts fully considered the argument that the text, history and structure of Article III forbids stripping all federal court review of federal question claims.

The Court of Appeals implied that its "jurisdictional" dismissal actually avoided these questions of constitutional structure "because Hamad seeks only money damages, and the Constitution does not require the availability of such a remedy, even where the plaintiff's

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such an interpretation would lead to the same outcome Hamad urges here—striking all of MCA section 7, both subsections (a) (invalidated by *Boumediene*) and (b). *See* Pet. at 9-10.

[11] *See also* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. at 1387 ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction."); *see also Boumediene v. Bush*, 476 F.3d 981, 1011 (D.C. Cir. 2007) (Rogers, J., dissenting) (stating that habeas repeal was unconstitutional, and that proper outcome was to hold that "on remand the district courts shall follow the return and traverse procedures of" the preexisting habeas statute).

claim is based on alleged violations of constitutional rights." *Hamad*, 732 F.3d at 1003; *cf. Al-Zahrani*, 669 F.3d at 319-20 ("But the only remedy [plaintiffs'] seek is money damages, and... such remedies are not constitutionally required"). This simply trades one fundamental question of constitutional structure for another: where it is "damages or nothing,"[12] as here, can Congress simply decide that it is "nothing" by eliminating all *Bivens* remedies without providing *any* alternative route for relief (whether fully equivalent to *Bivens* relief or not) of an injury to constitutional rights? Outside the context of claims by military servicemen (*see, e.g.*, *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987)), that question has not been conclusively resolved by this Court, and the controversy continues to generate fulsome and contentious academic debate.[13]

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[12] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

[13] To the extent that the decision below can be read to use the term "jurisdictional" loosely, to refer to the absence of a valid cause of action, that usage is an error. *Cf. Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case."). Because such errors in precedential caselaw present grave opportunities for subsequent mischief, this Court has frequently intervened to correct similar mistakes. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (Title VII 15-emplyee minimum rule not jurisdictional, and thus subject to waiver); *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*) (7 day filing period under federal rule of criminal procedure 33 not jurisdictional, and thus subject to waiver); *Scarborough v. Principi*, 541 U.S. 401 (2004) (EAJA element that government action be "not substantially justified" was not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (bankruptcy rule 4004 deadline not jurisdictional, and thus subject to waiver).

II. On remand the lower courts may avoid addressing the constitutional question of the validity of MCA Sec. 7(b)

These are novel and complex questions of constitutional structure, which the federal courts would do well to avoid deciding unnecessarily. Under this Court's existing precedent, the lower courts need not opine on any of the constitutional questions discussed above. The government asserted a variety of defenses not implicating subject matter jurisdiction below, which the Court of Appeals failed to consider, and which might resolve these claims without forcing a decision on the more difficult and fraught constitutional questions.

Ordinarily courts address jurisdictional issues prior to deciding non-jurisdictional issues. However, it would be well within any federal court's discretion to address other dispositive non-jurisdictional issues prior to reaching the putative jurisdictional issue created by defendants' invocation of Section 7. This Court has made clear that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits'" and thus may dismiss on "'threshold questions'" without first deciding that "the parties present an Article III case or controversy" by establishing subject matter and personal jurisdiction. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999), and *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005), and distinguishing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998)).

Steel Co. had "clarified that a federal court generally may not rule on the merits of a case without first determining that it has [subject-matter and personal] jurisdiction," but in *Sinochem*, Justice Ginsberg, writing for a unanimous Court, held that a district court could dismiss

a case on a threshold non-jurisdictional issue without first determining that the court had subject-matter jurisdiction over the case. *Sinochem*, 549 U.S. at 430-31, 432. Unlike *Ruhrgas*, where this Court held that a case could be disposed of for absence of one form of jurisdiction (*personal* jurisdiction) prior to establishing that another form of jurisdiction (*subject-matter* jurisdiction) existed, in *Sinochem* the district court disposed of the case under the doctrine of *forum non conveniens*, a non-jurisdictional issue. This Court held that while non-jurisdictional, *forum non conveniens* was nonetheless a threshold, non-merits upon which a district court could dismiss, "bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Id.* at 432. "[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits,'" *id.* at 431 (quoting *Ruhrgas*, 526 U.S. at 585), and *forum non conveniens*, a deliberate abstention from the exercise of jurisdiction in favor of an alternate tribunal, "'represents the sort of 'threshold question' [that] . . . may be resolved before addressing jurisdiction.'" *Id.* at 431 (quoting *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005)).

The Court so held despite acknowledging that a trial court "may need to identify the claims presented and the evidence relevant to adjudicating those issues to intelligently rule on a *forum non conveniens* motion," *id.* at 433, as some factors in deciding the issue "will substantially overlap factual and legal issues of the underlying dispute." *Id.* at 432 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)). As examples of similar "threshold questions," the *Sinochem* Court cited declining to adjudicate state-law claims on discretionary grounds without first determining whether pendent ju-

risdiction exists over those claims,[14] the decision to abstain from exercising jurisdiction pursuant to *Younger v. Harris* without first determining that a case or controversy exists,[15] and the decision to dismiss a case under the *Totten* rule against adjudicating claims under espionage contracts with the government without first addressing jurisdiction.[16] This Court noted that, as with *forum non conveniens*, "other threshold issues may similarly involve a brush with 'factual and legal issues of the underlying dispute.'" *Id.* at 433. Summing up, the *Sinochem* Court approvingly cited a statement of a general rule by the Seventh Circuit: "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem*, 549 U.S. at 431 (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

Prior to *Sinochem*, *Tenet v. Doe* had also recognized that its narrow rule—that courts could bar claims under the *Totten* rule barring litigation of spying contracts before reaching subject matter jurisdiction—had broader implications for the order in which courts could take threshold questions. Like *Sinochem*, *Tenet* expressly noted that prudential standing questions may be considered before Article III (jurisdictional) standing questions. *See Tenet*, 544 U.S. at 7 n.4. Moreover, the Court noted that *Totten* created "a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry" into the matter. *Id.* Thus it would make no sense to allow discovery to resolve the jurisdictional question (whether Doe's claim was subject to the Tucker Act, and thus had been filed in the wrong court of first instance) when dismissal could be accomplished under the *Totten* rule instead.

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[14] Citing *Moor v. Alameda County*, 411 U.S. 693 (1973).

[15] Citing *Ellis v. Dyson*, 421 U.S. 426 (1975).

[16] Citing *Tenet v. Doe*, 544 U.S. 1 (2005).

The same analysis should presumptively apply where the "threshold issue" is qualified immunity. "The entitlement [of officials enjoying qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial" or even to "the commencement of discovery" with its attendant burdens. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As with the *forum non conveniens* doctrine in *Sinochem*, qualified immunity should allow a court "leeway" to "deny[] audience to a case on the merits,'" *Sinochem*, 549 U.S. at 431, prior to reaching any issue of subject-matter jurisdiction, especially given that where qualified immunity validly applies, "considerations of convenience, fairness, and judicial economy" will typically "so warrant." *Id.* at 432.[17]

Like qualified immunity, the application of sovereign immunity, failure to establish personal jurisdiction, and failure to meet pleading standards are manifestly threshold questions that may be addressed before establishing subject-matter jurisdiction. These issues may

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[17] The D.C. Circuit has held, similarly, that the immunity from "judicial inquiry" implicit in the "enrolled bill rule" (which requires courts to "treat the attestations of 'the two houses, through their presiding officers' as 'conclusive evidence that [a bill] was passed by Congress'") allowed it to reach the issue of dismissal under that rule without establishing that plaintiffs even had Article III standing to contest the validity of the statute they challenged. *Public Citizen v. United States Dist. Court*, 486 F.3d 1342, 1343, 1348, 1352 (D.C. Cir. 2007); *id.* at 1349 ("We therefore need not decide whether the enrolled bill rule creates a jurisdictional bar. Nor is it necessary for us to determine whether Public Citizen lacks standing. Accordingly, we will proceed directly to *Marshall Field* [enrolled bill rule] dismissal."). Like *Marshall Field*'s "enrolled bill rule," qualified immunity is an immunity from judicial inquiry and it would be consistent with this Court's precedent to reach that issue prior to deciding difficult jurisdictional questions.

therefore be considered prior to reaching the question of the constitutional validity of MCA Sec. 7(b).[18] As this Court has instructed, "where subject-matter or personal jurisdiction is difficult to determine, and [other threshold] considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Sinochem*, 549 U.S. at 436; *see also Ashwander v. TVA*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring) (Court has avoided deciding constitutional questions "if there is also present some other ground upon which the case may be disposed of").

The district court considered but rejected application of the defense of qualified immunity to the *Bivens* claim against Secretary Gates. *See Hamad v. Gates*, 2012 U.S. Dist. LEXIS 52487 at *5-*13 (W.D. Wash. Apr. 13, 2012). The government's appeal on this ground was not considered by the Court of Appeals. Nor did the Court of Appeals reach the issue of whether Hamad had established personal jurisdiction over defendants other than Gates, whether sovereign immunity ultimately properly allowed dismissal of Hamad's international law claims, or whether Gates' personal involvement was adequately pled. *Hamad v. Gates*, 2011 U.S. Dist. LEXIS 57405 at *3-*14 (W.D. Wash. May 27, 2011) (dismissing claims against all defendants but Gates for lack of personal jurisdiction); *Hamad v. Gates*, 2011 U.S. Dist. LEXIS 141429 at *23-*30 (W.D. Wash. Dec. 8, 2011) (finding international law claims barred by sovereign immunity); *Hamad v. Gates*, 2012 U.S. Dist. LEXIS 52487 at *13-*19 (W.D. Wash. Apr. 13, 2012) (dismissing *Bivens* claim

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[18] At least one court has found lack of a *Bivens* claim to be a suitable threshold issue under *Sinochem*, *see Arar v. Ashcroft*, 532 F.3d 157, 172-73 (2d Cir. 2008) (bypassing jurisdictional issue by concluding no *Bivens* claim existed, following *Sinochem*), *vacated en banc*, 585 F.3d 559 (2d Cir. 2009) (reaching jurisdictional issue, and finding jurisdiction properly existed).

against Gates for failure to adequately plead personal involvement).

Given that all of these defenses constitute "threshold issues" under *Sinochem*, this Court could grant Hamad's petition for certiorari, vacate the decision of the Court of Appeals, and remand for initial consideration of these issues, none of which implicates fundamental questions of constitutional structure such as the jurisdictional question presented by application of Section 7 of the MCA or the question of whether a *Bivens* claim must be available in the absence of any other alternative remedy.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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