

No. _____

In the Supreme Court of the United States

ADEL HASSAN HAMAD, PETITIONER,

v.

ROBERT M. GATES, IN HIS INDIVIDUAL CAPACITY, ET AL.
RESPONDENTS

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

PETITION FOR 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?

PARTIES TO THE PROCEEDING

PETITIONER:

ADEL HAMAD

RESPONDENTS:

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ESTABAN RODRIGUEZ,
DANIEL K. MCNEILL,
GREGORY J. IHDE,
All in their individual capacities, and
THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i	
PARTIES TO THE PROCEEDING	ii	
TABLE OF CONTENTS.....	iii	
TABLE OF AUTHORITIES.....	ii	
OPINIONS BELOW	1	
JURISDICTION	1	
STATUTORY PROVISION INVOLVED	1	
STATEMENT OF THE CASE	2	
REASONS FOR GRANTING THE WRIT OF CERTIORARI	7	
I. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT’S DECISION THAT IT DID NOT HAVE JURISDICTION TO HEAR MR. HAMAD’S CLAIMS DUE TO 28 U.S.C. § 2241(E)(2) DIRECTLY CONFLICTS WITH THIS COURT’S PRIOR DECISIONS.		9
A. This Court Struck Down § 2241(e) in its Entirety in <i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....		9
B. The Ninth Circuit’s Decision Conflicts with this Court’s Prior Decisions, Which Require that Courts Read a Jurisdiction-Stripping Statute Narrowly to Avoid the Serious Constitutional Question Which Would Arise if the Statute Applies to Constitutional Claims.....		10
C. The Ninth Circuit’s Decision that it could Avoid the Serious Constitutional Question Because Mr. Hamad was Seeking Only Monetary Damages is in Conflict with the Time-Honored Right to Seek a Judicial Remedy – Including a Civil Remedy – for Constitutional Violations.		12
II. REVIEW IS NECESSARY BECAUSE IF 28 U.S.C. § 2241(E)(2) PRECLUDES ANY JUDICIAL FORUM FROM HEARING COLORABLE CONSTITUTIONAL AND OTHER FEDERAL CLAIMS, THE QUESTION OF WHETHER CONGRESS MAY ENACT SUCH LEGISLATION WITHOUT VIOLATING THE CONSTITUTIONALLY-MANDATED SEPARATION OF POWERS AND DUE PROCESS CLAUSE SHOULD BE DECIDED BY THIS COURT.		16

III. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT’S DECISION TO APPLY THE RATIONAL BASIS TEST TO 28 U.S.C. § 2241(E)(2) IS IN CONFLICT WITH THIS COURT’S PRIOR PRECEDENT THAT STRICT SCRUTINY SHOULD APPLY UNDER THE DUE PROCESS CLAUSE GIVEN THAT ACCESS TO THE COURTS IS A FUNDAMENTAL RIGHT.	21
CONCLUSION	23
APPENDIX	1A
COURT OF APPEALS OPINION.....	2A
DISTRICT COURT OPINION, April 13, 2012	35A
DISTRICT COURT OPINION, Dec. 8, 2011.....	48A
DISTRICT COURT OPINION, May 27, 2011.....	68A
COURT OF APPEALS DENIAL OF REHEARING <i>EN BANC</i> (Dec. 16, 2013).....	77A
PLAINTIFF'S SECOND AMENDED COMPLAINT (Jan. 6, 2012).....	78A

TABLE OF AUTHORITIES

Cases

<i>Al Janko v. Gates</i> , 831 F. Supp. 2d 272 (D.C. Cir. 2011)	9
<i>Al-Zahrani v. Rodriguez</i> , 669 F.3d 315 (D.C. Cir. 2012)	9
<i>Bartlett v. Bowen</i> , 816 F.2d 695 (D.C. Cir. 1987)	11, 18
<i>Battaglia v. General Motors Corp.</i> , 169 F.2d 254 (2nd Cir. 1948)	18, 19
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5
<i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971)	passim
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	passim
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977)	21, 22
<i>Bowen v. Mich. Acad. of Family Physicians</i> , 476 U.S. 667 (1986)	16
<i>Bush v. Lucas</i> , 462 U.S. 367 (1983)	15
<i>Carlson v. Green</i> , 446 U.S. 14 (1980)	15
<i>Chappell v. Wallace</i> , 462 U.S. 296 (1983)	15
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988)	21
<i>Commodity Futures Trading Com'n v. Schor</i> , 478 U.S. 833 (1986)	18
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	15
<i>Department of Navy v. Egan</i> , 484 U.S. 518 (1988)	15
<i>Hamad v. Gates</i> , 732 F.3d 990 (9th Cir. 2013)	passim
<i>Iqbal v. Ashcroft</i> , 556 U.S. 662 (2009)	5
<i>Johnson v. Robinson</i> , 415 U.S. 361 (1974)	11, 18
<i>Kiyemba v. Obama</i> , 561 F.3d 509 (D.C. Cir. 2009)	9

<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982).....	21
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	14
<i>Minneeci v. Pollard</i> , ___ U.S. ___, 132 S. Ct. 617 (2012)	15
<i>Plyler v. Moore</i> , 100 F.3d 365 (4th Cir. 1996)	22
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974).....	22
<i>Ryland v. Shapiro</i> , 708 F.2d 967 (5th Cir. 1983).....	22
<i>Schweiker v. Chilicky</i> , 487 U.S. 412 (1988).....	15
<i>United States v. Klein</i> , 80 U.S. 128 (1871).....	20
<i>United States v. Stanley</i> , 483 U.S. 669 (1987)	15
<i>Webster v. Doe</i> , 486 U.S. 592 (1988).....	9, 11, 17, 18
<i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007).....	15
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	18

Statutes

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331.....	3
28 U.S.C. § 1346(b)	5
28 U.S.C. § 1350.....	3
28 U.S.C. § 2241(e)	passim
28 U.S.C. § 2241(e)(2)	passim
28 U.S.C. § 2679(d)(1).....	5

Other Authorities

Blackstone's Commentaries, 3rd vol.....	14
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Henry M. Hart, Jr., <i>The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic</i> , 66 Harv. L. Rev. 1362 (1953).....	12
Lawrence Gene Sager, <i>Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts</i> , 95 Harv. L. Rev. 17 (1981)	19, 20
M. Redish, <i>Federal Jurisdiction: Tensions in the Allocation of Judicial Power</i> 7-34 (1980)	19
Stephen I. Vladeck, <i>Boumediene's Quiet Theory: Access to Courts and the Separation of Powers</i> , 84 Notre Dame L. Rev. 2107 (2009) ...	11, 12, 19, 20
Telford Taylor, <i>Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals</i> , 65 Judicature 199 (1981)	19
Theodore Eisenberg, <i>Congressional Authority to Restrict Lower Federal Court Jurisdiction</i> , 83 Yale L. J. 498 (1974)	19

Petitioner Adel Hassan Hamad respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App., *infra*, 2A-34A) is reported at 732 F. 3d. 990 (9th Cir. 2013). The Court of Appeals' order denying Petitioner's timely petition for rehearing *en banc* (App., *infra*, 77A) was entered December 16, 2013. The opinions of the District Court (App., *infra*, 35A-76A) are not reported but are available at 2011 WL 2118280 (W.D. Wash. May 27, 2011), 2011 WL 6130413 (W.D. Wash. Dec. 8, 2011), and 2012 WL 1253167 (W.D. Wash. Apr. 13, 2012).

JURISDICTION

Petitioner seeks review of a final decision of the Ninth Circuit Court of Appeals entered on October 7, 2013. A petition for rehearing *en banc* was timely filed and denied on December 16, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2241(e) of Title 28 of the United States Code Provides:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), 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.

28 U.S.C. § 2241(e).

STATEMENT OF THE CASE

1. Petitioner Adel Hamad is a Sudanese national who was seized by Pakistani police and a United States official, from his Pakistani apartment in July 2002. App., *infra*, 111A. In approximately January 2003, after being held in Pakistani prisons for six months in deplorable conditions, the United States officials transported Mr. Hamad to Bagram Air Base in Afghanistan. App., *infra*, 111A-112A. When Mr. Hamad arrived at Bagram, American officials pushed and dragged him outside, kicked him, cut his clothes off with a knife, and left him naked outside in the freezing cold. App., *infra*, 112A. Dogs were set upon Mr. Hamad while United States military personnel laughed and mocked him. App., *infra*, 112A. He was forced to stand for three straight days without sleep or food. App., *infra*, 113A. Mr. Hamad eventually collapsed from malnourishment and dehydration and was hospitalized for two weeks as a result. App., *infra*, 113A.

In March 2003, Mr. Hamad was transported to the United States Naval Base at Guantanamo Bay, Cuba, where he was held until December 2007. App., *infra*, 114A. While there, Mr. Hamad was isolated, often without a mattress, blanket, regular showers, or toilet paper. App., *infra*, 114A. In 2005, a Combatant Status

Review Tribunal (“CSRT”), in a divided opinion, determined that Mr. Hamad was an “enemy combatant” based only on his employment with two organizations with which he did charity work, one of which he had left years before. App., *infra*, 114A-115A. A rare dissenting opinion for the CSRT panel found that Mr. Hamad’s designation as an enemy combatant was unwarranted and would have “unconscionable results.” App., *infra*, 115A. The decision, including the dissenting opinion, took into account both classified and unclassified information. App., *infra*, 115A.

On November 15, 2005, the Administrative Review Board (ARB) found that Mr. Hamad was eligible for release, but did not notify his habeas counsel of this determination until March 2007. App., *infra*, 83A, 115A. Mr. Hamad was not released until December 2007 – nearly two years after the ARB decision – only a few weeks before his habeas case was scheduled to be adjudicated. App., *infra*, 83A. As a result, Mr. Hamad never had the chance to challenge his detention through a habeas proceeding.

2. Mr. Hamad filed an action in the United States District Court in the Western District of Washington against several military and civilian government officials, alleging violations of the Fifth Amendment, Customary International Law under the Alien Tort Statute (ATS) 28 U.S.C. § 1350, and the Fourth Geneva Convention. App., *infra*, 128A-136A. The District Court had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1350 (Alien Tort Statute). App., *infra*, 84A-85A.

Mr. Hamad sought relief in the form of compensatory damages, punitive damages, attorney's fees, and "such further relief as the Court may deem just and proper." App., *infra*, 136A-137A. The District Court dismissed the case against all defendants other than Robert M. Gates (Gates) for lack of personal jurisdiction. App., *infra*, 76A.

3. Defendant Gates argued that the MCA § 7, 28 U.S.C. § 2241(e)(2) stripped the District Court of jurisdiction to hear the case. App., *infra*, 50A-51A. However, the District Court determined that it had subject matter jurisdiction to hear the case against Defendant Gates, holding that *Boumediene v. Bush*, 553 U.S. 723 (2008), struck down MCA § 7, 28 U.S.C. § 2241(e) in its entirety. App., *infra*, 51A-53A.

Defendant Gates then argued that he was entitled to qualified immunity, and that Mr. Hamad had failed to prove Defendant Gates' personal involvement in the constitutional violations. App., *infra*, 38A. The District Court held that Defendant Gates was not entitled to qualified immunity in this case, because "a reasonable federal official would know that detaining a person, after determining he is eligible for release, violates a clearly established constitutional right." App., *infra*, 42A. The District Court also rejected Defendant Gates' argument that special factors counseling hesitation existed which would preclude a *Bivens* claim, instead conceding that Mr. Hamad's claim fit into a traditional *Bivens* claim. App., *infra*, 53A-59A. Despite these holdings on the MCA, qualified immunity, and special factors, the District Court dismissed the action because it

determined that under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662, 675-678 (2009), Mr. Hamad had not sufficiently alleged that Defendant Gates personally participated in the violation of Mr. Hamad's rights. App., *infra*, 43A. The District Court also dismissed the ATS claims, finding that the United States could substitute itself for Defendant Gates under the *Westfall* Act, 28 U.S.C. § 2679(d)(1), because he was acting within the scope of his employment, and thus, the claims were precluded by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). App., *infra*, 62A-65A.

4. Mr. Hamad appealed the District Court's decision regarding whether he had sufficiently alleged personal participation by Defendant Gates in the Complaint under a supervisor liability theory. App., *infra*, 9A. Mr. Hamad also appealed the district court's decision that the ATS is not a statutory exception to the *Westfall* Act, and the decision that Mr. Gates was acting within the scope of his employment, App., *infra*, 9A. Defendant Gates cross-appealed, claiming the MCA precluded judicial review of Mr. Hamad's claims, that Defendant Gates was entitled to qualified immunity, and that special factors precluded recognition of a *Bivens* claim. App., *infra*, 9A; *see also* App., *infra*, 53A-59A.

The Ninth Circuit Court of Appeals overturned the District Court decision regarding the MCA, holding that this Court in *Boumediene* did not strike down the jurisdiction stripping provision of MCA § 7, 28 U.S.C. § 2241(e)(2), and thus, the District Court and Court of Appeals lacked jurisdiction to hear the case. App., *infra*, 2A-34A. The Ninth Circuit, although acknowledging that this Court in

Boumediene did not differentiate between (e)(1) and (e)(2), App., *infra*, 21A, held that *Boumediene* struck down only § 2241(e)(1) as unconstitutional, and that § 2241(e)(2) remained valid and enforceable. App., *infra*, 24A-27A. The Ninth Circuit also rejected Mr. Hamad’s arguments regarding severability, concluding that § 2241(e)(2) was severable from § 2241(e)(1), and thus could be read as a separate statute. App., *infra*, 27A.

The Ninth Circuit dismissed Mr. Hamad’s separation of powers and due process challenges to § 2241(e) by determining that it could avoid the serious constitutional question of “whether Congress may completely deny a plaintiff access to [a] federal forum to seek a remedy for a violation of constitutional rights” on the grounds that “Hamad seeks only money damages, and the Constitution does not require the availability of such a remedy, even where the plaintiff’s claim is based on alleged violations of constitutional rights.” App., *infra*, 28A.

The Ninth Circuit dismissed Mr. Hamad’s claim that § 2241(e)(2) violated the Equal Protection component of the Due Process Clause of the Fifth Amendment, holding that the rational basis test was the appropriate standard of review, and that § 2241(e)(2)’s preclusion of judicial review of actions seeking a remedy for constitutional violations brought by alien detainees held at Guantanamo Bay “easily passes rational basis review.” App., *infra*, 33A. The Ninth Circuit did not address Mr. Hamad’s argument that strict scrutiny is the appropriate standard of review because the issue at stake – judicial review of

claims seeking a remedy for constitutional violations – is a fundamental right. App., *infra*, 33A.

The Ninth Circuit also rejected Mr. Hamad’s argument that MCA § 7, 28 U.S.C. § 2241(e)(2) was an unlawful bill of attainder, concluding that judicial limitations outlined in § 2241(e) have not historically fallen within the meaning of legislative punishment. App., *infra*, 29A.

5. Mr. Hamad filed a petition for rehearing *en banc* with the Ninth Circuit to challenge the panel’s decision. The Ninth Circuit denied the petition for rehearing *en banc* on December 16, 2013.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Ninth Circuit’s decision, that Congress can strip all courts of jurisdiction to adjudicate Mr. Hamad’s constitutional and other federal claims, threatens a sweeping and radical change to ordered liberty and due process rights that this Court has always protected. First, this Court has protected these rights – that are at the heart of our nation’s system of government – by repeatedly interpreting jurisdiction-stripping statutes to avoid application to constitutional claims. Second, the Court has indicated in numerous cases that stripping of jurisdiction of courts to hear constitutional and other federal claims is both a violation of the Due Process Clause and an unconstitutional limitation on the separation of powers. Third, this Court’s precedent notes that precluding access to the courts of federal claims without strictly scrutinizing such statutes is also a violation of Due Process.

Should this Court leave the Ninth Circuit's decision intact, Mr. Hamad will have no access to a judicial forum to hear his claims of grievous constitutional and federal violations at the hands of United States officials. In addition, a message will be sent that Congress may strip all courts (federal and state) of jurisdiction to hear claims involving the United States Constitution and other federal law, thereby allowing Congress to have the final say on when rights are violated and when they are not. That, in turn, will have profound repercussions to liberty and our nation's rule of law.

Throughout our nation's history, it has been the courts' role, not Congress's or the Executive's, to hear and adjudicate claims for violations of Constitution and other federal law. This time-honored role, and a role critical to the nation's form of government, is at risk when Congress takes jurisdiction away from the courts to decide important question of constitutional and federal rights. Both our nation's separation of powers, as well as individual's due process rights, require that a judicial forum be available to hear individual's constitutional and other federal claims.

Moreover, taking away access to the courts to disfavored groups without sufficient cause also violates the Constitution's guarantee of equal protection and due process. Given that access to the courts is at the heart of the nation's balance of power, Congress' actions to take away such access to the courts should be viewed with the strictest of scrutiny.

This Court should grant certiorari and confirm to the world that the United States is a nation of laws, and that it will give all those who have colorable constitutional and federal claims the right to be heard and seek a remedy for alleged violations of the law.

I. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT’S DECISION THAT IT DID NOT HAVE JURISDICTION TO HEAR MR. HAMAD’S CLAIMS DUE TO 28 U.S.C. § 2241(e)(2) DIRECTLY CONFLICTS WITH THIS COURT’S PRIOR DECISIONS.

A. This Court Struck Down § 2241(e) in its Entirety in *Boumediene v. Bush*, 553 U.S. 723 (2008).

This case raises an issue of great federal importance given that the Ninth Circuit has interpreted this Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), as preserving 28 U.S.C. § 2241(e)(2).¹ That statute prohibits any judicial review of Mr. Hamad’s claims, including claims arising from violations of the United States Constitution. If in fact the statute exists and precludes judicial review of claims, including colorable constitutional claims, a serious constitutional question would be presented. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

The Court can avoid this serious constitutional problem by clarifying that it struck down § 2241(e) in its entirety in *Boumediene* because the subsections were not severable. As the District Court recognized, this Court struck down MCA § 7, 28 U.S.C. § 2241(e) as a whole in *Boumediene*. Using clear and plain language, this Court struck down § 2241(e) without making a distinction between

¹ The D.C. Circuit also erroneously found that this Court struck down 28 U.S.C. § 2241(e) only as applied to habeas claims. *See Al Janko v. Gates*, 831 F. Supp. 2d 272, 278-80 (D.C. Cir. 2011); *see also Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012) *Kiyemba v. Obama*, 561 F.3d 509, 512 n. 1 (D.C. Cir. 2009).

the two subsections of (e)(1) and (e)(2). This Court stated, “The only law we identify as unconstitutional is MCA § 7, 28 U.S.C. § 2241(e).” *Boumediene*, 553 U.S. at 795; *see also id.* at 733 (“Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ.”). As the District Court noted in its opinion, “[I]f the Supreme Court meant ‘the first provision of § 7’ only, then it would have said so.” App., *infra*, 51A.

Should this Court determine that § 2241(e)(2) was not struck down by *Boumediene*, then individuals who allege violations of the United States Constitution or United States laws will be without any judicial forum to seek a remedy for the alleged violations, including violations of the United States Constitution.

B. The Ninth Circuit’s Decision Conflicts with this Court’s Prior Decisions, Which Require that Courts Read a Jurisdiction-Stripping Statute Narrowly to Avoid the Serious Constitutional Question Which Would Arise if the Statute Applies to Constitutional Claims.

The Ninth Circuit should have read 28 U.S.C. § 2241(e)(2) as not precluding Mr. Hamad’s constitutional claims, even if he sought damages as one form of relief. This Court should grant this petition to hear this case because in finding that 28 U.S.C. § 2241(e)(2) stripped it of jurisdiction to hear Mr. Hamad’s constitutional and other federal claims, the Ninth Circuit is in conflict with well-settled law of this Court. This Court has held time and time again that jurisdiction-stripping statutes should be read narrowly to not apply to constitutional claims unless Congress explicitly states otherwise. Here, Congress

has not explicitly stated within the text of 28 U.S.C. § 2241(e)(2) that it sought to strip the courts of jurisdiction over constitutional claims.

As this Court noted in *Webster v. Doe*, “Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” 486 U.S. 592, 603 (1988); *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974) (there must be clear and convincing evidence of Congress’ intent to restrict access to judicial review of [constitutional] challenges before the courts will construe the statute as precluding access to the courts).

Without such clear intent, courts should read such statutes narrowly to avoid that serious constitutional question. *See Webster*, 486 U.S. at 603; *see also Boumediene*, 553 U.S. at 787 (“[W]e are obligated to construe the statute to avoid [constitutional] problems’ if it is ‘fairly possible’ to do so.”) (internal citations omitted); *Robinson*, 415 U.S. at 367 (Courts “will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question(s) may be avoided.”); *Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987) (“[C]ourts have declined to find an intention on the part of Congress to preclude all judicial review of constitutional claims.”). *See also* Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107 (2009) (courts should use the doctrine of constitutional avoidance to avoid the serious constitutional question that would

arise if a statute was interpreted as taking away the jurisdiction over colorable constitutional claims); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (“the Court should use every possible resource of construction to avoid the conclusion” that Congress wanted to effect an unconstitutional withdrawal of jurisdiction over constitutional claims).

In this case, while the language of 28 U.S.C. § 2241(e)(2) refers to any *action* relating to any aspect of the detention, it does not specifically state that it applies to constitutional claims. Without that explicit language, the Ninth Circuit did not have clear and convincing evidence that it was Congress’ intent to preclude all judicial review of constitutional claims when it decided it could not hear Mr. Hamad’s claims. Thus, the Ninth Circuit’s decision is in conflict with this Court’s prior precedent.

C. The Ninth Circuit’s Decision that it could Avoid the Serious Constitutional Question Because Mr. Hamad was Seeking Only Monetary Damages is in Conflict with the Time-Honored Right to Seek a Judicial Remedy – Including a Civil Remedy – for Constitutional Violations.

The Ninth Circuit held that it could avoid this serious constitutional question because Mr. Hamad was only seeking monetary damages, and “the Constitution does not require the availability of such a remedy, even where the plaintiff’s claim is based on alleged violations of constitutional rights.” App., *infra*, 28A. To support this holding, the Ninth Circuit noted that a “*Bivens* remedy ‘is not an automatic entitlement’” and “‘in most instances we have found

a *Bivens* remedy unjustified” because of the presence of special factors or where there is qualified immunity, which prevents a plaintiff bringing a constitutional claim from being awarded damages. App., *infra*, 28A.

The court’s reasoning is erroneous for two reasons. First, Mr. Hamad is not seeking monetary damages only, but any “other relief the Court found just and proper,” including possible declaratory or injunctive relief. App., *infra*, 136A-137A. Second, and more importantly, the fact that he seeks monetary damages should not preclude his access to a judicial forum to vindicate his constitutional rights. The issue presented is whether Congress may completely deny a plaintiff access to a judicial forum to seek a remedy for the violation of a constitutional right, regardless of whether the plaintiff is ultimately entitled to money damages for his claims.

In essence, the Ninth Circuit sought to avoid the serious constitutional question by attempting to decide the merits of the claim prematurely. It did this by pointing to “special factors” and immunities as the reasons why Mr. Hamad may not be entitled to money damages. App., *infra*, 28A. However, those are issues that a court should address once it determines it has jurisdiction and whether the violation of a constitutional right occurred. Again, the issue is not whether Mr. Hamad is ultimately entitled to damages; it is whether Congress can prevent any person – or, like here, a disfavored group of persons – from having a judicial forum adjudicate a constitutional claim and consider whether a remedy is available. As this Court held in *Bivens v. Six Unknown Named Agents of Federal*

Bureau of Narcotics, “the question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.” 403 U.S. 388, 397 (1971).

In *Bivens*, the Supreme Court found that the petitioner, having stated a constitutional violation by federal officials, was “entitled to recover money damages for any injuries that he suffered as a result” of the agent’s violation of the petitioner’s constitutional rights. *Bivens*, 403 U.S. at 397. Because monetary damages have been recognized throughout the history of the United States as the “ordinary remedy for an invasion of personal interests in liberty,” the question is not whether a person is entitled to the monetary damages, but whether he can prove the injury which then would entitle him to receive any available remedy for that injury. *Bivens*, 403 U.S. at 395. Moreover, it has been recognized since before the formation of the United States that “every right, when withheld, must have a remedy, and every injury its proper redress.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803)(quoting Blackstone’s Commentaries, 3rd vol., 109). This Court went further in *Marbury* to note that the United States would lose the right to call itself a “government of laws, and not of men...if the laws furnish no remedy for the violation of a vested legal right.” *Marbury*, 5 U.S. at 163.

Mr. Hamad’s constitutional claims fit squarely into a *Bivens* action given that his complaints involve prolonged arbitrary detention and illegal treatment,

and he has no alternative remedy available. This Court has historically limited *Bivens* claims only where an alternative remedy is available, or where a person has voluntarily placed themselves within the military structure. *See, e.g., Minneci v. Pollard*, ___ U.S. ___, 132 S. Ct. 617 (2012); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983) (all denying a *Bivens* remedy because other, alternative remedies were available to vindicate petitioner’s claims); and *see, e.g., Department of Navy v. Egan*, 484 U.S. 518 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983) (all involving military disciplinary structure).

Contrarily, courts have a long standing tradition of recognizing *Bivens* causes of actions for Fifth Amendment violations where, like here, no alternative remedy is available. *See, e.g., Davis v. Passman*, 442 U.S. 228, 243-4 (1979) (holding that a *Bivens* remedy existed under the Due Process Clause when plaintiff had “no effective means other than the judiciary to vindicate [plaintiff’s constitutional] rights”); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (following *Bivens* and *Passman*).

Given that Mr. Hamad’s claims for prolonged arbitrary detention, torture, and CIDT at Guantanamo Bay fit “squarely” within the traditional bounds of a *Bivens* action, and that the District Court found that a *Bivens* remedy in this case “is necessary” because no suitable alternative remedy exists, App., *infra*,

59A, this Court should grant certiorari in this case without considering as dispositive the fact that Mr. Hamad seeks monetary damages.

If the Court does not grant certiorari on this question, the implications are that Mr. Hamad, and others who allege constitutional violations at the hands of United States officials, will have no judicial forum whatsoever to hear their constitutional claims where Congress does not explicitly state that a jurisdiction-stripping statute applies to constitutional claims, posing a serious constitutional problem in this case and beyond.

II. REVIEW IS NECESSARY BECAUSE IF 28 U.S.C. § 2241(e)(2) PRECLUDES ANY JUDICIAL FORUM FROM HEARING COLORABLE CONSTITUTIONAL AND OTHER FEDERAL CLAIMS, THE QUESTION OF WHETHER CONGRESS MAY ENACT SUCH LEGISLATION WITHOUT VIOLATING THE CONSTITUTIONALLY-MANDATED SEPARATION OF POWERS AND DUE PROCESS CLAUSE SHOULD BE DECIDED BY THIS COURT.

If 28 U.S.C. § 2241(e)(2) is interpreted to preclude judicial access for colorable constitutional or other federal claims, then this case presents a serious constitutional, and important federal, question that this Court should decide: May Congress completely deny a plaintiff access to a judicial forum to seek a remedy for colorable constitutional and other federal claims?

As the Ninth Circuit recognized in its opinion, this Court has repeatedly avoided this question with regard to preclusion of colorable constitutional claims. App., *infra*, 28A, *citing Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n. 12 (1986) (avoiding the “serious constitutional question that would arise” were a court to interpret a statute to deny a judicial forum for constitutional claims). However, if in fact this Court cannot avoid the question by interpreting

28 U.S.C. § 2241(e)(2) narrowly so as not to apply to constitutional or federal claims, it should answer the question of whether Congress may deny a plaintiff access to a judicial forum to seek relief of colorable constitutional and other federal claims, and if so, under what circumstances. This Court should clarify this issue so that Congress is clear about what it can and cannot do with regard to jurisdiction stripping statutes where constitutional and other federal claims are involved, and so that lower courts have clear guidance on this issue. Doing so would not only clarify the protections afforded in the Constitution, but save time and resources within all branches of government.

This issue has implications much greater than the case now before this Court. Questions of Congressional power to strip courts of jurisdiction to hear claims to remedy constitutional and other federal violations goes to the heart of constitutionally mandated separation of powers, Due Process, and our nation's system of government. If Congress can completely preclude a judicial forum from hearing claims that seek a remedy for a violation of the United States Constitution or other federal law, the implications for United States citizens and noncitizens alike are significant.

Although it has not directly answered the question, this Court's opinions suggest not only that this is a serious constitutional question, but that if the Court were faced with the issue, it would find that Congress cannot preclude all judicial review of constitutional and other federal claims given constitutionally enshrined separation of powers and due process rights. *See Webster*, 486 U.S.

592 (interpreting a statute narrowly that if interpreted to include constitutional claims, would be a complete denial of judicial review and not just a limiting of judicial review); *see also Robinson*, 415 U.S. at 373-374 (“[C]lear and convincing’ evidence of congressional intent [is] required by this Court before a statute will be construed to restrict access to judicial review.”); *Commodity Futures Trading Com’n v. Schor*, 478 U.S. 833, 848 (1986) (Article III provides two distinct protections – the protection of the structure of the United States government through separation of powers and the protection of the individual through due process). Similarly, in *Wolff v. McDonnell*, this Court held, “The right of access to the courts ... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.” 418 U.S. 539, 579 (1974). Thus, the Ninth Circuit’s decision is in tension with this Court’s prior decisions.

Indeed, the leading case on this question and the only circuit opinion directly addressing the question, *Bartlett v. Bowen*, held that any congressional enactment that “effectively foreclose[s] all judicial review” of constitutional claims would “be flatly inconsistent with the doctrine of separation of powers implicit in our constitutional scheme.” 816 F.2d at 706. The *Bartlett* court noted that a statute stripping all courts of jurisdiction to hear constitutional claims removes from the courts the essential judicial function required under separation of powers, and that such a limitation on the jurisdiction of both state and federal courts would be an infringement of due process. *Bartlett*, 816 F.2d at 703; *see*

also *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2nd Cir. 1948) (Congress' power to remove jurisdiction is limited by the Fifth Amendment's Due Process clause).

Due process requires, at a minimum, a judicial forum to hear colorable constitutional and other federal claims, and thus Congress cannot withhold or prevent such jurisdiction consistent with the Constitution. *See* Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107 (2009) (due process limits the ability of Congress to strip all courts of jurisdiction to hear colorable constitutional claims); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 42 (1981) (there must remain "intact some judicial forum capable of providing constitutionally adequate remedies for constitutional wrongs"); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 7-34 (1980) (due process limits Congress' power to deny a judicial forum for the litigation of constitutional claims); Telford Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 Judicature 199 (1981) (same); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498, 527 (1974) ("[I]t is clear that jurisdictional statutes are subject to constitutional limitations.").

Moreover, this Court has held that after Congress has given jurisdiction to courts, it cannot take away that jurisdiction as a means to the constitutionally

impermissible end of preventing specific litigation simply because it would not like the outcome of that litigation. *United States v. Klein*, 80 U.S. 128, 145-47 (1871); see Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 70 (1981) (“Congress’ authority to shape federal jurisdiction cannot extend to shaving off discrete and disfavored constitutional claims with deep prejudice to judicially protected rights. Certainly Congress is not empowered to burden the exercise of a constitutional right – not, at least, without a compelling justification.”); Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107, 2132 (2009) (“Congress cannot take away jurisdiction [from the federal courts] as [a] means to a constitutionally impermissible end.”). This is exactly what Congress has attempted to do with regard to Guantánamo Bay detainees through its enactment of 28 U.S.C. § 2241(e)(2). Thus, the Ninth Circuit’s decision is in tension with this Court’s decision in *Klein*.

28 U.S.C. § 2241(e)(2), if it left standing, would be an absolute bar to accessing a court in order to seek relief for a colorable constitutional or other federal claim. Mr. Hamad has never received the opportunity to prove that he suffered an injury caused by government officials’ violations of the United States Constitution. He was released just days before the date his Habeas case was scheduled to be adjudicated, which deprived him of the chance to challenge the legality of his detention. In addition, the Court of Appeals for the Ninth Circuit

dismissed his case before reaching the merits of his claims. Mr. Hamad, like many others who allege violations under the United States Constitution and federal law, deserves his day in court.

III. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION TO APPLY THE RATIONAL BASIS TEST TO 28 U.S.C. § 2241(E)(2) IS IN CONFLICT WITH THIS COURT'S PRIOR PRECEDENT THAT STRICT SCRUTINY SHOULD APPLY UNDER THE DUE PROCESS CLAUSE GIVEN THAT ACCESS TO THE COURTS IS A FUNDAMENTAL RIGHT.

This Court should also grant certiorari and address the serious constitutional question of what standard of review should have been applied to 28 U.S.C. § 2241(e)(2) given that it limits the fundamental right of access to the courts under the Due Process Clause. This Court should clarify that strict scrutiny is the required standard of review.

The Ninth Circuit, in reviewing whether 28 U.S.C. § 2241(e)(2) violated the equal protection clause and due process rights of individuals to access the courts, applied the rational basis test. App., *infra*, 32A-33A. However, this Court's prior decisions state that legislation which discriminately bars the exercise of fundamental rights, like § 2241(e), is subject to strict scrutiny, irrespective of whether the targeted group is a protected class. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights are given the most exacting scrutiny – strict scrutiny). This Court has stated that access to courts to seek the redress of wrongs is a fundamental right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (“The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as

defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (“[P]risoners have a constitutional right of access to the courts.”); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (“meaningful access” to the courts is the touchstone of our system); *Plyler v. Moore*, 100 F.3d 365, 373 (4th Cir. 1996) (finding that the right of prisoners to access the courts is fundamental, and any restriction must be given the most exacting constitutional review); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (“The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.”).

Thus, strict scrutiny is the applicable standard of review and the Ninth Circuit’s application of the rational basis test when it reviewed 28 U.S.C. § 2241(e)(2) is in direct conflict with this Court’s precedent. This Court should grant certiorari and clarify that where Congress seeks to preclude access to the courts for any federal claim, strict scrutiny should be applied to the enacted legislation.

As with the questions above, whether and under what circumstances Congress may preclude access to the courts generally – a fundamental right – is a question with implications for all those whose rights are violated by the United States government and go to the heart of our ordered liberty. Without granting certiorari on this question, Mr. Hamad will be left without access to the courts of the country whose officers allegedly violated his rights without any exacting

scrutiny. If “rational basis” is all that is required to withhold the basic fundamental right of access to our courts, Congress will be able to prevent access to the courts and prevent judicial review of Congressional and Executive action too easily to withstand notions of due process and justice central to our nation’s form of government and to liberty itself. The Court should grant certiorari on this question and clarify this important federal question.

CONCLUSION

This Court is presented with the critical constitutional question of when and under what circumstances Congress may preclude all access to courts for questions arising under the Constitution and laws of the United States. If the Court does not accept certiorari in this case to clarify the limits of Congress’ jurisdiction-stripping authority, Mr. Hamad, who alleges grievous constitutional and federal common law violations at the hands of United States officials, will be left with no ability to seek a remedy in any court – state or federal – in the United States. However, the question has implications that go well beyond the facts of this case. If Congress can preclude access to the courts for individuals to seek a remedy for violations of the Constitution or other legal claims under 28 U.S.C. § 2241(e)(2), there is nothing that prevents Congress from doing so for any group of persons – potentially even for all citizens.

For the forgoing reasons, this Court should grant the petition for a writ of certiorari, and the judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated this 13th day of March, 2014

Respectfully Submitted,

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