No. 14-650

In the Supreme Court of the United States

ABDUL RAHIM ABDUL RAZAK AL JANKO, PETITIONER

v.

ROBERT M. GATES, FORMER SECRETARY OF DEFENSE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
MATTHEW M. COLLETTE
SYDNEY FOSTER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 28 U.S.C. 2241(e)(2) bars petitioner's action for money damages against military and civilian officials.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the petition for a writ of certiorari, respondents former Attorney General John D. Ashcroft and former Director of the Federal Bureau of Investigation Robert S. Mueller, III were defendants-appellees in the court of appeals.

Although the petition for a writ of certiorari states that Richard B. Myers, Peter Pace, Michael Glenn Mullen, Gary Speer, James T. Hill, Bantz Craddock, James G. Stavridis, and Daniel McNeill were defendants in the district court and appellees in the court of appeals, those individuals were not named in petitioner's operative complaint, and they were not appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 14-650

ABDUL RAHIM ABDUL RAZAK AL JANKO, PETITIONER

v.

ROBERT M. GATES, FORMER SECRETARY OF DEFENSE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 741 F.3d 136. The opinion of the district court (Pet. App. 27a-53a) is reported at 831 F. Supp. 2d 272.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2014. A petition for rehearing was denied on July 3, 2014 (Pet. App. 55a-56a, 58a-59a). On September 22, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Syrian citizen, was formerly detained by the U.S. military in Afghanistan and at the detention facility at Guantánamo Bay, Cuba. Pet. App. 2a-3a. During petitioner's detention at Guantánamo, the military established "Combatant Status Review Tribunals" (CSRTs) to review whether individual Guantánamo detainees were "properly detained" as "enemy combatant[s]." Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy 3 (July 7, 2004).[1] On two occasions, CSRTs determined that petitioner was properly detained as an enemy combatant. Pet. App. 4a, 32a-33a.

Subsequently, the United States District Court for the District of Columbia granted petitioner's habeas petition, holding that he was not "lawfully detainable as an enemy combatant under the [Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224,] at the time he was taken into custody by U.S. forces in 2002." *Al Ginco* v. *Obama*, 626 F. Supp. 2d 123, 130 (2009). The court ruled that, although the government contended that petitioner had been part of al Qaeda or the Taliban at one point in time and had been "inducted into al Qaeda's military training program," any such relationship had ended before U.S. forces took him into custody. *Id.* at 129-130. The government did not appeal that decision, and petitioner was transferred out of U.S. custody. Pet. App. 4a.

2. Petitioner then filed suit in the United States District Court for the District of Columbia seeking damages arising out of his former detention. Pet.

---

[1] http://www.defense.gov/news/Jul2004/d20040707review.pdf; see Pet. App. 4a, 19a-20a; *Hamad* v. *Gates*, 732 F.3d 990, 993-994 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

App. 4a, 29a-30a. The operative complaint named as defendants the United States, then-Secretary of Defense Robert M. Gates, 19 other named government officials, and 100 unnamed "John Does" and "Jane Does," all of whom (except the United States) were sued in their individual capacities. *Id.* at 34a-35a; C.A. App. 10-13, 18-27. Petitioner asserted claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and he alleged that various subsets of the individual defendants had violated the Fourth and Fifth Amendments, international law, and 42 U.S.C. 1985. Pet. App. 5a, 35a n.8. The United States substituted itself for the named defendants on petitioner's international-law claims under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679. Pet. App. 34a n.6, 35a n.8, 45a-48a & nn.14, 17.

The district court dismissed petitioner's complaint. Pet. App. 27a-53a. The court held that under 28 U.S.C. 2241(e)(2) it lacked subject-matter jurisdiction over the action. See Pet. App. 38a-43a. With exceptions not relevant here, that provision states that:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any [non-habeas] 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.

Petitioner had argued that Section 2241(e)(2) does not apply to this action because he has not been "determined by the United States to have been properly

detained as an enemy combatant." Although two CSRTs found him to be properly detained as an enemy combatant, petitioner contended that the district court's later grant of habeas relief represented a "determin[ation] by the United States" that he was not properly detained. The district court rejected that argument, holding that the term "United States" in Section 2241(e)(2) refers exclusively to the Executive Branch. Pet. App. 40a-42a. The court also rejected petitioner's various constitutional challenges to Section 2241(e)(2). *Id.* at 42a-43a n.12.

The district court alternatively rejected all of petitioner's claims on various other grounds, including that the defendants were entitled to qualified immunity for the constitutional and Section 1985 claims; that the international-law claims fail because they do not assert violations of the "law of the place" under the FTCA, 28 U.S.C. 1346(b)(1); and that all claims against the United States are barred under the FTCA because they "aris[e] in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 43a-53a & nn.13 & 21.

3. The court of appeals affirmed the dismissal of petitioner's claims on the ground that the district court lacked subject-matter jurisdiction under Section 2241(e)(2). Pet. App. 1a-25a. The court of appeals did not reach the district court's alternative grounds for dismissal. See Resp. C.A. Br. 22-53.

a. The court of appeals first held that petitioner's action satisfies all of the prerequisites for application of Section 2241(e)(2)'s jurisdictional bar. Pet. App. 7a-21a. Like the district court, the court of appeals held that the phrase "determined by the United States to have been properly detained as an enemy combatant" refers to a determination made exclusively by the

Executive Branch. *Id.* at 9a-12a. The court explained that Section 2241(e)(2) uses the term "United States" not only in that phrase, but also in providing that the statute applies only to aliens "detained by the United States," 28 U.S.C. 2241(e)(2). Pet. App. 11a. Given that "the detaining authority referred to as 'the United States' in section 2241(e)(2) is exclusively the Executive Branch," the court concluded that the term "United States" in the adjacent statutory phrase "determined by the United States to have been properly detained as an enemy combatant" also refers exclusively to the Executive Branch. *Id.* at 12a; see *id.* at 11a-12a.

The court of appeals found additional support for that conclusion in the text of neighboring Section 2241(e)(1), which, in parallel language, bars jurisdiction over habeas petitions filed by aliens "detained by the United States" and "determined by the United States to have been properly detained as an enemy combatant." Pet. App. 13a-14a.[2] The court explained that because Section 2241(e)(1) "depriv[es] federal courts of jurisdiction to decide the lawfulness of *executive* detention, the phrase 'determined by the United States' must refer to an executive-branch determination." *Id.* at 14a. And because that provision is "plainly *in pari materia*" with Section 2241(e)(2), the court of appeals concluded that the term "United States" should be given the same meaning in the latter provision, which addresses non-habeas actions. *Id.* at 13a.

---

[2] This Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that the application of Section 2241(e)(1) to Guantánamo detainees violates the Suspension Clause of the Constitution (Art. I, § 9, Cl. 2). See 553 U.S. at 792.

The court of appeals also determined that its interpretation of Section 2241(e)(2) was supported by the statutory history of that provision. A prior version of Section 2241(e)(2), enacted in 2005, had applied to, among others, aliens detained by the "Department of Defense" whom the "D.C. Circuit" had determined to be properly detained through statutory-review procedures. See Pet. App. 15a-16a (citation omitted); see also Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, § 1005(e)(1), 119 Stat. 2739, 2742 (28 U.S.C. 2241(e)(2) (Supp. V 2005)). The court explained that when Congress amended the provision in 2006, it replaced "the independent, judicial propriety-of-detention determination" as a trigger for the jurisdictional bar over non-habeas actions with "a non-judicial determination made by the same entity that detains the alien (the United States)." Pet. App. 16a. The court inferred from that change that Congress intended to extend the jurisdictional bar to any detainee determined by the Executive Branch to have been properly detained. And for that reason, the court concluded that "[a]dopting [petitioner's] interpretation would deprive the changes * * * of any real and substantial effect and flout the Congress's manifest intent to have section 2241(e)(2)'s applicability turn on a non-judicial status determination." *Ibid.* (citation and internal quotation marks omitted).

Finally, the court of appeals rejected petitioner's contention that the constitutional-avoidance canon supported his interpretation. Pet. App. 21a-22a n.9. The court explained that the constitutional-avoidance canon does not apply where, as here, only one construction of the statute is fairly possible. *Ibid.*

Accordingly, because two CSRTs had determined that petitioner was properly detained as an enemy combatant, the court of appeals concluded that petitioner "has been determined by the United States to have been properly detained as an enemy combatant" within the meaning of Section 2241(e)(2) and therefore held that Section 2241(e)(2) bars his current claims for damages. See Pet. App. 9a-21a.

b. The court of appeals then rejected petitioner's arguments that Section 2241(e)(2) is unconstitutional as applied to his money-damages action "because it deprives him of a damages remedy for violations of his constitutional rights," citing its previous decision rejecting that argument. Pet. App. 21a-24a (citing *Al-Zahrani* v. *Rodriguez*, 669 F.3d 315, 319-320 (D.C. Cir. 2012)). The court also rejected petitioner's contention that application of Section 2241(e)(2) would violate the separation-of-powers principle of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), under which Congress may not "prescribe[] the outcome of pending litigation * * * by means other than amending the applicable law." Pet. App. 23a-24a. The court explained that *Klein* does not apply where, as here, the suit was not pending at the time of the congressional action. See *ibid.*

ARGUMENT

The court of appeals correctly held that Section 2241(e)(2) forecloses petitioner's money-damages action. Petitioner's arguments to the contrary (Pet. 9-22) lack merit, and he does not contend that any other circuit has reached a different conclusion on either his statutory or his constitutional arguments. The only other circuits that have addressed the constitutionality of Section 2241(e)(2) have reached the same conclu-

sion as the decision below, and this Court recently denied review of those decisions. See *Ameur* v. *Gates*, No. 14-6711, 2015 WL 232012 (Jan. 20, 2015); *Hamad* v. *Gates*, 134 S. Ct. 2866 (2014) (No. 13-9200). Further review is therefore unwarranted.[3]

1. Petitioner contends (Pet. 17-22) that because he was granted habeas relief, Section 2241(e)(2) does not bar his money-damages action against federal officials. That argument rests on a misinterpretation of Section 2241(e)(2).

a. With exceptions not relevant here, Section 2241(e)(2) prohibits a court from exercising jurisdiction over a non-habeas action "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)(2). The court of appeals correctly held that the phrase "determined by the United States to have been properly detained as an enemy combatant" refers exclusively to an Executive Branch determination, not to a judicial ruling in a habeas proceeding.

---

[3] Although the court of appeals did not reach the district court's alternative bases for dismissing the complaint, including qualified immunity, see Pet. App. 43a-53a & nn.13 & 21, were certiorari granted, respondents would raise those bases as alternative grounds to affirm the judgment. See Resp. C.A. Br. 22-53. In addition, respondents would renew their argument that a remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is inappropriate in this context (see Resp. C.A. Br. 28-34; note 6, *infra*), which neither the district court nor the court of appeals reached.

Taken in isolation, the phrase "United States" is "susceptible of multiple meanings." Pet. App. 10a. For that reason, in construing "United States" in various federal statutes, courts have examined the relevant statutory context to determine whether the term refers to the United States as a sovereign, the components of the Executive Branch alone, or some other concept. See, *e.g.*, *Massachusetts* v. *Microsoft Corp.*, 373 F.3d 1199, 1250 (D.C. Cir. 2004) (holding that context establishes that "United States" in 15 U.S.C. 16(g) means Executive Branch alone); *King* v. *Russell*, 963 F.2d 1301, 1303-1304 (9th Cir. 1992) (per curiam) (reaching same holding for term "United States" in 28 U.S.C. 1391(e)), cert. denied, 507 U.S. 913 (1993). For a number of reasons, the statutory context of Section 2241(e)(2) indicates that the phrase "determined by the United States to have been properly detained as an enemy combatant" refers exclusively to the Executive Branch. See Pet. App. 9a-16a.

First, the text of Section 2241(e)(2) makes clear that "United States," which appears three times in that provision, means the Executive Branch. The phrase immediately preceding "determined by the United States to have been properly detained as an enemy combatant" limits Section 2241(e)(2)'s application to an alien who "is or was detained by the United States." As the court of appeals concluded, the use of "United States" in that phrase clearly refers exclusively to the Executive Branch; Congress and the Judiciary do not detain enemy combatants. See Pet. App. 11a-12a. And because it would be discordant to interpret the term "United States" in two different ways within the same sentence, it follows that the

phrase "determined by the United States" also refers exclusively to the Executive Branch. See *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998); Pet. App. 11a-12a.

In addition, Section 2241(e)(2) applies either to an alien "determined by the United States to have been properly detained as an enemy combatant" *or* to an alien who "is awaiting such determination." That disjunctive structure strongly indicates that a single entity makes the relevant "determination." If petitioner were correct that both the Executive Branch and the Judicial Branch can make the relevant "determination" (see Pet. 22), an alien could both have been determined to be an enemy combatant (by the Executive Branch) *and* simultaneously be awaiting "such determination" (by the Judicial Branch). That would not be consistent with a statute that treats those two circumstances as alternatives.

Second, neighboring Subsection (e)(1) of Section 2241, which was enacted at the same time as the current version of Subsection (e)(2), unequivocally uses the term "United States" to mean the Executive Branch. See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2635. In language that parallels Subsection (e)(2), Subsection (e)(1) withdraws jurisdiction over habeas actions filed by any 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." The phrase "determined by the United States" in that provision must refer exclusively to the Executive Branch's determination. As the court of appeals explained, "[i]n a statute depriving federal courts of jurisdiction to decide

the lawfulness of *executive* detention, the phrase 'determined by the United States' must refer to an executive-branch determination." Pet. App. 14a; see *id.* at 18a n.7 ("The statute cannot be fairly read to include within the meaning of 'determined by the United States' a judicial decision which, in the same statutory section, the Congress attempted to preclude."). The identical phrase "determined by the United States" in Subsection (e)(2) should be construed the same way. See, *e.g.*, *Nijhawan* v. *Holder*, 557 U.S. 29, 39 (2009).

Third, the statutory history of Section 2241(e)(2) indicates that Congress intended an Executive Branch determination of an alien's status alone to trigger the jurisdictional bar. The version of Section 2241(e)(2) that preceded the current version barred a non-habeas "action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who * * * has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with [statutory-review] procedures * * * to have been properly detained as an enemy combatant." DTA § 1005(e)(1), 119 Stat. 2742 (28 U.S.C. 2241(e)(2)(B) (Supp. V 2005)). As the court of appeals explained, that provision recognized that the detaining entity (the Department of Defense) was different from the entity determining the propriety of the detention (the D.C. Circuit). See Pet. App. 15a-16a. But when Congress amended the statute in 2006, it "abandoned the independent, judicial propriety-of-detention determination in favor of a non-judicial determination made by the same entity that detains the alien (the United States)." *Id.* at 16a. See MCA § 7(a), 120 Stat. 2635. That change signaled Con-

gress's intent that the statutory bar be triggered by the determination of the detaining authority, rather than by the determination of the reviewing court. That inference is confirmed by the legislative record.[4]

b. Petitioner does not meaningfully address the statutory context that the court of appeals found to support the respondents' interpretation of Section 2241(e)(2), and he does not address the statutory history of Section 2241(e)(2) at all. See Pet. 21-22. Instead, petitioner cites (Pet. 19-20) a decision of this Court interpreting the term "United States" in 28 U.S.C. 518(a) (relating to the Justice Department's representation of the United States in this Court), see *United States* v. *Providence Journal Co.*, 485 U.S. 693, 701 (1988), and a decision of the Eighth Circuit interpreting "United States" in a plea agreement, see *Margalli-Olvera* v. *Immigration & Naturalization Serv.*, 43 F.3d 345, 352 (1994). Those decisions lack substantial relevance to the interpretation of "United States" in Section 2241(e)(2). Neither decision involved multiple indications in the operative text and statutory history that "United States" refers exclusively to the Executive Branch. And in fact, the Eighth Circuit decision that petitioner cites did not even hold that "United States" as used in the plea agreement encompassed the Judiciary, but rather

---

[4] See 152 Cong. Rec. 20,319 (2006) (Sen. Cornyn) ("[T]he determination that is the precondition to the litigation bar [in Section 2241(e)(2)] is purely an executive determination."); see also *id.* at 20,275 (Sen. Feingold) (stating that Section 2241(e)(1) is triggered by "the designation of the executive branch alone"); *id.* at 19,955 (Sen. Levin) ("The only requirement under the bill * * * is that the Government determines that the alien detainee is an enemy combatant.").

held only that the term included multiple components of the Justice Department. See *id.* at 352-353 (applying canon that plea agreement should be construed against the government). The cited decisions thus do not suggest that the decision below will "complicate[] the interpretation of the term ['United States'] in other federal statutes" (Pet. 18-19), nor do they indicate a conflict of authority requiring this Court's resolution.

Petitioner also contends (Pet. 20-22) that his interpretation is compelled by the constitutional-avoidance canon. But courts are obligated to "'construe * * * statute[s] to avoid [constitutional] problems'" only "if it is 'fairly possible' to do so." *Boumediene* v. *Bush,* 553 U.S. 723, 787 (2008) (quoting *Immigration & Naturalization Serv.* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001)) (second set of brackets in original). Here, as the court of appeals held, "only one construction of section 2241(e)(2) is 'fairly possible.'" Pet. App. 22a n.9 (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). And in any event, no serious constitutional question is raised by applying the statute to aliens previously detained as enemy combatants who have been granted habeas relief. See pp. 13-18, *infra*.

2. The court of appeals correctly held that applying Section 2241(e)(2) to bar petitioner's damages action is constitutional, even assuming that petitioner is entitled to the constitutional protections that he invokes. That holding is consistent with the conclusions reached by both of the other courts of appeals to have addressed the constitutionality of Section 2241(e)(2). See *Ameur* v. *Gates*, 759 F.3d 317, 325-327 (4th Cir. 2014), cert. denied, No. 14-6711, 2015 WL 232012 (Jan. 20, 2015); *Hamad* v. *Gates*, 732 F.3d 990,

1003-1004 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).[5]

a. Petitioner argues (Pet. 10-14) that application of Section 2241(e)(2) to bar his constitutional money-damages claim violates Article III of the Constitution. Petitioner appears to contend that the Constitution requires courts to hear all money-damages claims for alleged constitutional violations or, in the alternative, that only courts—not Congress—may preclude such claims. Those arguments lack merit.

i. As the court of appeals recognized in a prior decision upon which it relied below, Pet. App. 22a-23a, and as the Fourth Circuit and the Ninth Circuit each held in rejecting the same challenge to Section 2241(e)(2), money-damages remedies for violations of constitutional rights "are not constitutionally required" and may be barred by Congress. *Al-Zahrani* v. *Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012); see *Ameur*, 759 F.3d at 326; *Hamad*, 732 F.3d at 1003. That conclusion is consistent with the decisions of other courts of appeals holding, in the context of other statutes, that it is "certain[]" that the Constitution does not "mandate[] a tort damages remedy for every claimed constitutional violation." *Harris* v. *Garner*, 190 F.3d 1279, 1288 (11th Cir.), vacated, 197 F.3d 1059 (11th Cir. 1999) (en banc), reinstated in relevant part, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065 (2001); see, *e.g.*, *Zehner* v. *Trigg*, 133 F.3d 459, 461-462 (7th Cir. 1997).

---

[5] Petitioner does not argue in his certiorari petition, as he did below, that Section 2241(e)(2) violates the Due Process Clause or the separation-of-powers principle recognized in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Petitioner has thus forfeited those challenges.

As the D.C. Circuit has explained, this "Court has made this eminently clear in its jurisprudence finding certain of such claims barred by common-law or statutory immunities, and applying its 'special factors' analysis" to preclude implied causes of action under the Constitution. *Al-Zahrani*, 669 F.3d at 319-320. For example, in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), this Court explained that under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), an implied damages remedy for alleged constitutional violations "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550. That principle refutes petitioner's view that individuals are constitutionally entitled to a money-damages remedy for any constitutional violation.

Moreover, even if a common-law damages remedy might be warranted in this context in the absence of congressional action,[6] petitioner cites no decision in which this Court has held or suggested that an express congressional bar on money-damages claims, such as Section 2241(e)(2), is unconstitutional. In-

---

[6] Although not necessary to the decision in this case, every court of appeals to have addressed the issue has held that courts may not imply a *Bivens* remedy in the military-detention context. See *Allaithi* v. *Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014); *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-203 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013); *Doe* v. *Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540, 547-556 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (per curiam), cert. denied, 558 U.S. 1091 (2009); see also Resp. C.A. Br. 28-34.

deed, under this Court's *Bivens* jurisprudence, courts may not recognize a common-law *Bivens* remedy where Congress's creation of an alternative remedy—even one that does not provide complete relief—demonstrates implicitly that Congress "expected the Judiciary to stay its *Bivens* hand." *Wilkie*, 551 U.S. at 550, 554; see *Schweiker* v. *Chilicky*, 487 U.S. 412, 421, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 388-389 (1983) (emphasizing that "Congress [wa]s in a far better position than a court to evaluate the impact of a new species of [damages] litigation" there). It follows from that principle that Congress may preclude a damages remedy for constitutional violations when it does so expressly. Consistent with that understanding, this Court has emphasized that in the limited circumstances when it has recognized *Bivens* remedies in the past, it has done so only after concluding that, *inter alia*, there was "no explicit statutory prohibition against the relief sought." *Schweiker*, 487 U.S. at 421.

In addition, as the D.C. Circuit has explained, petitioner's argument is inconsistent with this Court's well-settled jurisprudence recognizing that constitutional damages claims may be barred by common-law and statutory immunities. See *Al-Zahrani*, 669 F.3d at 319-320. "Even in circumstances in which a *Bivens* remedy is generally available," this Court has held, "an action under *Bivens* will be defeated if the defendant is immune from suit." *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010). In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), for example, this Court catalogued a wide array of immunities available in damages suits alleging violations of constitutional rights, including absolute immunity available to judges for "acts committed

within their judicial jurisdiction." *Id.* at 418 (citation omitted); see *id.* at 417-429. Similarly, in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), as well as numerous subsequent decisions, this Court held that qualified immunity shields a government official from civil liability if his conduct "does not violate clearly established statutory or constitutional rights." *Id.* at 818. And in *Hui*, this Court recognized Congress's conferral of total immunity on certain individuals from *Bivens* claims. 559 U.S. at 806-808. Given those well-established common-law and statutory bars on constitutional damages claims, Section 2241(e)(2)—which shields government officials from money-damages claims in connection with sensitive decisions relating to ongoing military operations—was well within Congress's power to enact.

ii. Petitioner provides no substantial basis to depart from this Court's long-held view that Congress may preclude a money-damages remedy for constitutional claims. Petitioner cites (Pet. 10) this Court's decisions stating that a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (citation and internal quotation marks omitted); see *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 668, 681 n.12 (1986). But, as courts of appeals have recognized, those decisions did not address bars on *damages* remedies, which is all that is at issue in this case. See, *e.g.*, *Ameur*, 759 F.3d at 325-326; *Hamad*, 732 F.3d at 1003; *American Fed'n of Gov't Emps. Local 1* v. *Stone*, 502 F.3d 1027, 1036-1037 (9th Cir. 2007); *Bryant* v. *Cheney*, 924 F.2d 525, 528 n.2 (4th Cir. 1991); *Stephens* v. *Department of*

Health & Human Servs., 901 F.2d 1571, 1577 (11th Cir.), cert. denied, 498 U.S. 998 (1990).[7]

b. Petitioner also argues (Pet. 14) that Section 2241(e)(2) violates the separation of powers because it assertedly "delegat[es] to the executive branch the crucial function of regulating the jurisdiction of the federal courts." That argument lacks merit. Congress, not the Executive Branch, has determined that non-habeas claims like those at issue here are barred. Petitioner cites no decision supporting his evident view that Congress lacks power to make an Executive Branch status determination (or the fact that an individual is awaiting such a determination) a prerequisite to a jurisdictional bar.

---

[7] In addition, relying on *Bell* v. *Hood*, 327 U.S. 678 (1946), petitioner contends that "a serious constitutional question also arises when a federal statute prevents federal courts from using 'any available remedy' to correct constitutional violations." Pet. 11 (quoting *Bell*, 327 U.S. at 684). Petitioner misreads *Bell*. That decision stated only that "where legal rights have been invaded, *and a federal statute provides for a general right to sue for such invasion*, federal courts may use any *available* remedy to make good the wrong done." 327 U.S. at 684 (emphases added); see *Bush*, 462 U.S. at 374. That holding has no application here, because a federal statute precludes suit altogether (and in any event money damages are not an "available" remedy).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
MATTHEW M. COLLETTE
SYDNEY FOSTER
Attorneys

FEBRUARY 2015