No. 06-102

IN THE

Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

Petitioner,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

STEPHEN M. HUDSPETH
6 Glen Hill Road
Wilton, CT 06897
(203) 762-2846

PETER J. WANG
Z. ALEX ZHANG
JONES DAY
30th Floor
Shanghai Kerry Center
1515 Nanjing Road West
Shanghai 200040
People's Republic of China
(86)(21) 2201-8000

GREGORY A. CASTANIAS
(*Counsel of Record*)
VICTORIA DORFMAN
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

QUESTION PRESENTED

A divided panel of the Court of Appeals for the Third Circuit held that a district court must first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of *forum non conveniens*. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an already-existing 2-4 split among the circuits, and invited this Court's review.

The question presented is:

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

There is no parent company or publicly held company owning 10% or more of Petitioner's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Constitution, Statutes & Rules

Other Authorities

TABLE OF AUTHORITIES
(Continued)

Page

BRIEF FOR PETITIONER

The complaint in this case alleges misconduct committed by one non-U.S. entity (Sinochem, a Chinese company) against another non-U.S. entity (MISC, a Malaysian company). Most of the relevant acts occurred in China, and most of the relevant witnesses and documents are located there. The dispute is being adjudicated in China, where China's courts have conclusively determined that they have jurisdiction over the action initiated there by Sinochem. In the parallel action filed by MISC in federal district court, the district court concluded that it had subject-matter jurisdiction over the action, but was unable to determine without discovery whether it had personal jurisdiction over the defendant, Sinochem. Even so, the court dismissed the suit on *forum non conveniens* grounds.

A divided panel of the Third Circuit vacated the judgment of dismissal and remanded for the district court to first establish conclusively whether it has personal jurisdiction over Sinochem before reaching the *forum non conveniens* issue. That decision was contrary to this Court's precedents allowing dismissal of actions on threshold non-merits grounds, and to this Court's precedents treating dismissals such as *forum non conveniens* dismissals as precisely this sort of threshold, non-merits issue. Moreover, as the Third Circuit itself recognized, the rule embraced by its decision creates multiple inefficiencies, and it is also contrary to the norms of international comity. That court's judgment should be reversed.

OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Pennsylvania was issued on February 27, 2004, and is available at 2004 WL 503541 (E.D. Pa.) (Pet. App. 48a-69a). The subsequent opinion of that court, denying MISC's motion for reconsideration, was issued on April 13, 2004, and is available at 2004 WL 825466 (E.D. Pa.) (Pet. App. 37a-47a).

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006, and is reported at 436 F.3d 349 (Pet. App. 3a-36a). The Third Circuit's order denying rehearing and rehearing *en banc* is unreported (Pet. App. 1a-2a). This Court's order granting certiorari is reprinted in the Joint Appendix (J.A. 15).

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006. Pet. App. 3a-36a. The Court of Appeals' order denying Sinochem's petition for rehearing *en banc* was issued on March 23, 2006. Pet. App. 1a-2a. On June 6, 2006, Petitioner timely filed an application to extend the time to file a petition for certiorari from June 21, 2006, to July 21, 2006. On June 8, 2006, Justice Souter granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution and Rule 4(k)(2) of the Federal Rules of Civil Procedure, which are set out in full in the Appendix to the Petition for Certiorari. Pet. App. 70a-71a.

STATEMENT OF THE CASE

A. Background

This is a dispute about the shipping of steel coils to China. In 2003, Petitioner Sinochem, a Chinese company, contracted with Triorient Trading Inc., an American company not a party to this action, for the sale of steel coils. Pursuant to that contract, a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law. Pet. App. 37a-38a, 49a.

The steel coils were loaded in Philadelphia onto a vessel owned by Respondent MISC, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA), ch. 229, § 1, 49 Stat. 1207 (1936).[1] Pet. App. 38a, 49a.

B. The Parallel Chinese and Federal District Court Proceedings

1. The filing of the Chinese action. On June 8, 2003, Sinochem filed a petition for preservation of a maritime claim in the Guangzhou Admiralty Court; in response to Sinochem's petition, the court ordered the ship arrested. Upon its arrival at the Chinese port, MISC's vessel carrying Sinochem's cargo was in fact arrested by order of the Admiralty Court. The arrest was based on an allegation that MISC had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, MISC posted a U.S. $9,000,000 security bond to obtain release of its vessel. Pet. App. 38a, 50a. On July 2, 2003, Sinochem timely perfected its petition for preservation by filing a complaint in the Chinese

---

[1] This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean, the carrier, regarding the vessel. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 4-1, at 193 (2d ed. 1975). The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York arbitration with U.S. law" to apply to disputes under it. An opinion of the Chinese court in the related proceeding, however, stated that English law governed disputes under the charter party. Pet. App. 38a n.2, 66a.

Admiralty Court, alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading. Pet. App. 50a.

2. The filing of the U.S. action. While the Chinese action was pending—*i.e.*, after Sinochem had filed its petition for preservation of a maritime claim—MISC filed this suit in the United States on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the vessel's arrest, it negligently misrepresented "the vessel's fitness and suitability to load its cargo." Pet. App. 39a (internal quotation marks omitted). Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and for "failure to observe the rules of [international] comity." Pet. App. 48a, 51a.

3. The rejection of MISC's jurisdictional challenge in China. After filing the U.S. action, MISC challenged the jurisdiction of the Chinese courts to entertain Sinochem's Complaint. The Admiralty Court rejected that challenge; MISC appealed that rejection; and, on February 27, 2004, the Guangdong Higher People's Court (the "Chinese High Court") affirmed, concluding that the Chinese Admiralty Court had jurisdiction over the dispute. Pet. App. 6a. Specifically, the Chinese High Court rejected MISC's argument that the choice-of-law provisions contained in the bill of lading and charter party controlled the case and compelled the location of jurisdiction in the London Maritime Arbitration Commission. Pet. App. 6a. That judgment was not further appealable. Pet. App. 6a n.6.

4. The dismissal of the federal district court action. In the United States, the district court, on March 1, 2004, granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration of that ruling. The court determined that it had subject-matter jurisdiction over MISC's action pursuant to admiralty and maritime jurisdiction, *see* 28 U.S.C. § 1333(1), because the alleged

tort, the seizure of the vessel at a port in China, occurred on navigable waters, and because the incident had a sufficient connection to maritime activity. Pet. App. 9a-15a.

As to personal jurisdiction, the court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. Pet. App. 55a-59a. However, the court stated that "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute," should the assertion of such jurisdiction be consistent with Sinochem's due process rights. Pet. App. 59a. The court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens.* Pet. App. 60a, 67a.

In dismissing on the ground of *forum non conveniens*, the district court noted, without any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent-misrepresentation claim existed in the Chinese Admiralty Court. Pet. App. 67a-68a. The district court concluded that the "private interest" factors of the *forum non conveniens* determination, such as ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses, pointed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless of whether MISC's action continued in the United States. Pet. App. 64a, 68a.

The district court also observed that the "public interest" factor, the avoidance of unnecessary conflict-of-laws problems, also favored dismissal because Chinese law would apply to MISC's claim that Sinochem made negligent misrepresentations to the Chinese Admiralty Court. Pet. App. 65a-66a. Furthermore, as no United States interests were implicated, the court held that dismissal for *forum non conveniens* was appropriate despite the deference that must

be paid to the plaintiff's (in this case MISC's) choice of forum. Pet. App. 67a. The district court subsequently issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. Pet. App. 37a-47a.

C. The Court of Appeals' Decision

A divided panel of the Court of Appeals for the Third Circuit affirmed the finding of admiralty jurisdiction, but concluded that the district court improperly decided the *forum non conveniens* motion prior to ascertaining whether it had personal jurisdiction over Sinochem. The panel majority, Judges Ambro and Alarcon (Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation), concluded that, while *forum non conveniens* is a non-merits ground for dismissal, the district court nonetheless should have determined whether personal jurisdiction existed prior to dismissing on *forum non conveniens* grounds because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction . . . and venue." Pet. App. 21a. The majority acknowledged that "Courts of Appeals have split on the issue," and chose the rule adopted by the Fifth, Seventh, and Ninth Circuits, while rejecting the rule that governs in the Courts of Appeals for the Second and D.C. Circuits. Pet. App. 16a-17a.

The majority candidly recognized that its decision "may not seem to comport with the general interests of judicial economy," and that it reached its decision not "without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." Pet. App. 26a. Believing itself bound by precedent, however, the majority invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." Pet. App. 26a.

Judge Stapleton filed a dissenting opinion, observing that the court would "make[] no assumption of law declaring power" by deciding not to exercise whatever jurisdiction it may have, and therefore dismissal on *forum non conveniens*

grounds without first determining its own jurisdiction is proper. Pet. App. 36a (internal quotation marks omitted). Judge Stapleton also noted that the majority's decision "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." Pet. App. 33a.

Sinochem petitioned for rehearing *en banc*, which was denied. Pet. App. 1a-2a. On September 26, 2006, this Court granted Sinochem's petition for certiorari. J.A. 15.

SUMMARY OF THE ARGUMENT

The Court should reverse the judgment of the Court of Appeals for the Third Circuit for the following reasons:

First, the Third Circuit's decision is contrary to this Court's case law. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), establish the impropriety of the previously longstanding practice, followed by some lower courts, of assuming (without deciding) its subject-matter and personal jurisdiction over an action in order to dismiss a case on the merits. But this bar on "hypothetical jurisdiction" is only a bar on deciding the merits of a dispute without first ascertaining the court's power to decide those merits. The rule of *Steel Co.* does not forbid the practice of dismissing suits on dispositive *non-merits* grounds which, although not "jurisdictional" in the narrowest sense of that term, are nonetheless "threshold grounds for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585.

Indeed, this Court's case law, both before and after *Steel Co.* and *Ruhrgas*, has repeatedly endorsed the practice of dismissing on threshold non-merits grounds that are not, in the narrow sense, "jurisdictional." In *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court approved the discretionary practice of declining to exercise pendent jurisdiction before ascertaining that jurisdiction. In *Ellis v.*

Dyson, 421 U.S. 426, 436 (1975), the Court approved of courts abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), before determining whether there was a "case or controversy." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999), the Court similarly considered Rule 23 certification issues related to statutory standing prior to considering the plaintiffs' Article III standing. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000), decided after *Steel Co.* and *Ruhrgas*, the Court considered whether a statute permits a cause of action before considering the jurisdictional question of Eleventh Amendment immunity. In *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004), the Court approved of dismissing a case on prudential standing grounds before reaching the question of Article III standing. And in *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005), the Court considered the public-policy bar of *Totten v. United States*, 92 U.S. 105 (1875), to be "the sort of 'threshold question' [that] may be resolved before addressing jurisdiction."

These cases reflect the repeated application of a simple rule: Dispositive issues that deny a federal-court audience to the merits of a case, even if not considered to be "jurisdictional" in the narrow sense of that term, may nonetheless be decided at the outset of a case.

It matters not that the "threshold groun[d] for denying the audience on the merits" is grounded, as here, on a doctrine that calls for the exercise of judicial discretion. Certainly, abstention doctrines, as in *Younger*, or prudential-standing doctrines, as in *Kowalski*, are discretionary in nature, yet deciding to abstain or dismiss on prudential grounds prior to ascertaining subject-matter and personal jurisdiction is in perfect accord with *Steel Co.* and *Ruhrgas.*

Forum non conveniens is a classic example of a threshold non-merits ground for dismissal. "[A] court that dismisses on other non-merits grounds such as *forum non conveniens* . . ., before finding subject-matter jurisdiction, makes no

assumption of law-declaring power that violates the separation of powers principles." *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998) (quoted with approval in *Ruhrgas*, 526 U.S. at 584-85), *superseded by statute on other grounds*. "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), *superseded by statute on other grounds*.

This Court has labeled *forum non conveniens* "a supervening venue provision," *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), and has observed in several cases that a *forum non conveniens* decision is not a ruling on the merits, as it does not bear on the substantive right to recover, *id.* at 454; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988). Consistent with this view, this Court has itself decided a venue question antecedent to resolving questions of personal jurisdiction. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-81 (1979). In sum, *forum non conveniens* is a non-merits ground for dismissal that may be considered at the outset, before subject-matter and personal jurisdiction are conclusively established, without running afoul of the *Steel Co.* bar on "hypothetical jurisdiction."

Second, *forum non conveniens* is particularly apt for consideration at the outset of a case. For one, the public and private factors of the *forum non conveniens* determination, as well as international comity considerations, counsel against the rule adopted by the Third Circuit. That rule would require foreign defendants such as Sinochem to be subjected to jurisdictional litigation, including potentially expensive, burdensome, and time-consuming discovery in United States courts, despite the dispute being so patently unconnected to the United States that a *forum non conveniens* dismissal is appropriate in the first instance.

For another, the approach taken by the Third Circuit is wildly inefficient. Both the majority and the dissenting judge below agreed that its decision did not "comport with the general interests of judicial economy." Pet. App. 26a; *see also* Pet. App. 34a.

Finally, the Court of Appeals' opinion is inconsistent with the principle of constitutional avoidance, which was one of the justifications for the rule of discretion adopted in *Ruhrgas*. In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates potentially significant due process issues under the Fifth Amendment. Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional, non-merits ground for decision, it is therefore more consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery and subsequent litigation, whether the court has personal jurisdiction over Sinochem consistent with the Due Process Clause. This course of action would avoid federal court entanglement in difficult constitutional questions, whose resolution in these circumstances would be purely advisory.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S PRECEDENTS

A. The Bar On "Hypothetical Jurisdiction" Only Prohibits Courts From Granting An Audience On The Merits Prior To Ascertaining Jurisdiction; It Does Not Prohibit Dismissals On Threshold, Non-Merits Grounds

No one can seriously dispute the principle that a court should not reach the merits of a case if it does not have jurisdiction. To do so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). At the same time,

however, the term "jurisdiction" is notoriously generalized—it may refer to any number of concepts (including, but scarcely limited to, "subject-matter" jurisdiction and "personal" jurisdiction). "'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings . . . .'" *Id.* at 90 (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). *See also Cross-Sound Ferry Servs. Inc. v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of rehearing) (referring to the "woolliness of the concept" of determining what issues are "jurisdictional"), *abrogated by Steel Co.*, 523 U.S. 83; *Muthig v. Brant Point Nantucket, Inc*., 838 F.2d 600, 603 (1st Cir. 1988) (Breyer, J.) ("recogniz[ing] the protean quality of the word 'jurisdiction'"). But at the most basic level, "jurisdiction" refers to a court's authority to decide the merits of the dispute that is brought before it. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'") (quoting *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

That is what the Court's bar on the exercise of "hypothetical jurisdiction" means, no more and no less: A federal court may not assume it has power and then go on to decide the merits of a dispute. But it does not follow from this rule that federal courts are prohibited from declining that power in the first instance, as the district court in this case did. The Third Circuit, in reversing the district court, erroneously viewed the bar on "hypothetical jurisdiction" as an inflexible rule requiring that "jurisdiction" (which it understood as referring only to subject-matter and personal jurisdiction) must always be decided first. This Court's decisions hold otherwise.

Prior to the Court's 1998 decision in *Steel Co.*, some lower courts would skip the step of ascertaining their own jurisdiction in order to dismiss a case on the merits. As one Court of Appeals described the practice, "[w]hen the merits

of the case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching the jurisdictional contention." *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996). It was this practice of leaping to the merits, referred to as "assumed" or "hypothetical" jurisdiction, that this Court halted in *Steel Co.*, 523 U.S. 83.

There, the Court explicitly repudiated the "practice . . . [of] 'assuming' jurisdiction for the purpose of deciding the merits." *Id*. at 94 (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The Court "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers," and held that disputes over Article III jurisdiction (such as constitutional standing) must be resolved before deciding the merits, *id*., lest the federal courts "act *ultra vires*." *Id.* at 102.

The Court nonetheless noted that a number of its prior cases had allowed dismissals on *non-merits grounds* reached before deciding issues of subject-matter or personal jurisdiction. Citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court observed that in that case, "we declined to decide whether a federal court's pendent jurisdiction extended to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction." *Steel Co.*, 523 U.S. at 100 n.3. The Court also cited *Ellis v. Dyson*, 421 U.S. 426, 436 (1975), noting that "the authoritative ground of decision" upon which the District Court had relied was *Younger* abstention, which has been treated as jurisdictional, rather than determining first whether there was a "case or controversy." *Steel Co.*, 523 U.S. at 100 n.3 (internal quotation marks omitted). The Court further acknowledged

that statutory standing questions can be given priority over questions of Article III jurisdiction. *Id*. at 97 n.2.

Thus, while rejecting "hypothetical jurisdiction," the Court also rejected the notion that "jurisdiction" must always be decided first. The Court's opinion noted that these prior decisions "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id*. at 101. *See also id*. at 111 (Breyer, J., concurring) ("The Constitution does not impose a rigid judicial 'order of operations' when doing so would cause serious practical problems.").

Following *Steel Co.*, the Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), elaborated on *Steel Co.*'s distinction between jurisdictional and merits questions. It held that "there is no unyielding jurisdictional hierarchy" between questions of subject-matter and personal jurisdiction. *Id.* at 578. Thus, *Ruhrgas* established that courts are not obligated to resolve subject-matter jurisdiction before personal jurisdiction, particularly where a "defect in subject-matter jurisdiction raises a difficult and novel question," and personal jurisdiction is "straightforward" and presents "no complex question[s]." *Id*. at 588. The Court reaffirmed *Steel Co*.'s central holding that it is permissible to select among non-merits bases for dismissal at the outset of a case: "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id*. at 585 (citing *Moor*, 411 U.S. 693, and *Ellis*, 421 U.S. 426). Quoting approvingly from the D.C. Circuit opinion in *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)—with which the Third Circuit in this case explicitly disagreed (*see* Pet. App. 25a-26a)—this Court posited that "'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (ellipses in *Ruhrgas*). Notably, the full quote in *Papandreou* refers to "non-merits grounds such as

forum non conveniens and personal jurisdiction . . . ." 139 F.3d at 255.

Since its decisions in *Steel Co.* and *Ruhrgas*, the Court has continued to follow (and endorse) the practice of dismissing on threshold non-merits grounds that are not, rigorously speaking, "jurisdictional." In *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), the Court held that Rule 23 certification issues "themselves pertain to statutory standing, which may be properly treated before Article III standing." *Id.* at 831 (citing *Steel Co*., 523 U.S. at 92).

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court approved of what it described as the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before addressing "whether the Eleventh Amendment forbids [the] statutory cause of action." *Id*. at 779 (emphasis in original). The Court endorsed this practice as consistent with *Steel Co*. because there was no risk of the courts acting *ultra vires*: "[T]here is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id*.

In *Kowalski v. Tesmer*, 543 U.S. 125 (2004), the Court faced a challenge, brought by attorneys, to the constitutionality of Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty. Before reaching the merits, the Court asked whether the plaintiff attorneys, who invoked the rights of "hypothetical indigents," had standing to bring these claims. Citing *Ruhrgas*, the Court "assume[d], without deciding" that the attorneys' allegations of Article III "injury in fact" "are sufficient." *Id*. at 129 n.2. Having assumed the existence of Article III standing, the Court then addressed the "alternative threshold question" of whether the prudential standing requirements were satisfied. *Id*. at 129. The Court ultimately concluded that the attorneys did not have third-

party standing. *Id*. at 134. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (dismissing on the ground of prudential standing, "which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction'") (citation omitted).

Most recently, this Court held that it could consider whether a suit by former spies must be dismissed under the public-policy bar of *Totten v. United States*, 92 U.S. 105 (1875), which prohibits suits against the government based on covert espionage agreements, prior to ruling on the government's jurisdictional objection. *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). In moving to dismiss in the lower courts, the government argued that the Tucker Act requires such a suit to be filed in the Court of Federal Claims, rather than in a district court; the Government did not petition for certiorari on that question. *Id*. The Court explained that it "may assume for purposes of argument that this Tucker Act question is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim." *Id*. The Court then held that "application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger v. Harris*, or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." *Id*. (internal citation omitted).

The need for this flexibility was grounded in the reasons behind the *Totten* bar itself: "[T]o first allow discovery or other proceedings in order to resolve the jurisdictional question," "would be inconsistent" with the purpose of the *Totten* bar—"to defeat the asserted claims [and] to preclude judicial inquiry." *Id*. Thus, "whether or not the Government was permitted to waive the Tucker Act question, we may dismiss respondents' cause of action on the ground that it is barred by *Totten*." *Id*.

All of these cases reflect the repeated application of a simple rule: Dispositive issues that deny a federal-court

audience to the merits of a case, even if not considered to be "jurisdictional" in the narrow sense of that term, may nonetheless be decided at the outset of a case. That statement of the rule is a clear one that can easily be applied by lower federal courts, and it allows courts the flexibility of dismissing cases that should not gain entry to the federal system on any number of grounds not traditionally styled as "jurisdictional" grounds—while simultaneously avoiding any possibility of a federal court acting *ultra vires* or issuing advisory opinions, which was the Court's central concern in *Steel Co.*[2]

---

[2] Although not addressed by the Third Circuit, *dicta* in some of this Court's prior decisions create the appearance of a "broken circle" in this area. *See* Pet. at 11 n.2 (quoting *Steel Co.*, 523 U.S. at 97 n.2). That is, there is some tension between *Ruhrgas*'s holding (allowing threshold dismissals on personal-jurisdiction rather than subject-matter jurisdiction grounds) and this Court's *dicta*, suggesting that subject-matter jurisdiction has a primacy over such issues as personal jurisdiction and venue. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 950-51 (2006). The Court may wish to clarify in its decision that there is, in fact, no "broken circle" in this area.

Wachovia was a statutory-construction case. There, the Court was interpreting 28 U.S.C. § 1348, which provides that, for *diversity-jurisdiction* purposes, national banks "shall . . . be deemed citizens of the States in which they are respectively located." The Court held that a national bank is "located" in the state designated in its articles of association as the locus of its main office, and it distinguished *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977), which had interpreted the former *venue* statute for national banks as encompassing any county in which a branch office of a national bank is "located." The Court explained its distinction on the ground that "located" has no fixed meaning and may properly vary for subject-matter and venue purposes in view of the differences between the two concepts: "[V]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience. . . . Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases." *Wachovia*, 126 S. Ct. at 950-51 (internal citations omitted).

B. Discretionary Barriers To Federal Court May Be Decided At The Outset

Numerous doctrines are not, rigorously speaking, "jurisdictional," yet they play much the same role as do jurisdictional rules—like a finding of no jurisdiction, these doctrines abjure the federal courts' power to decide the merits of a dispute at the outset. Many of them, in fact, are discretionary or prudential. They, too, can be decided at the outset without offending the basic prohibition on "hypothetical jurisdiction," as none of these doctrines poses any risk that the federal courts will render pronouncements that are *ultra vires* and thus strictly advisory.

To begin, this Court stated unequivocally in *Steel Co.* that the bar on "hypothetical jurisdiction" does not prohibit threshold decisions on "*discretionary* jurisdictional question[s]." 523 U.S. at 100 n.3 (emphasis added). In fact, the Court in *Steel Co.* and *Ruhrgas* relied on cases addressing discretionary barriers to federal court prior to Article III jurisdiction to demonstrate the limits of the bar.

Younger abstention is a classic discretionary doctrine, grounded as it is in fundamental principles of equity. *See Younger v. Harris*, 401 U.S. 37, 44-46 (1971). This Court has made clear that *Younger* abstention is one of those threshold barriers to federal-court entry that may properly be decided before ascertaining jurisdiction. In *Ellis*, the Court bypassed the question of whether there was a "case or controversy," in favor of the exercise of discretion to abstain

---

Of course, that distinction between subject-matter jurisdiction and venue is an accurate one, but it does not follow from this accurate statement that *only* jurisdictional issues may be considered as "threshold, non-merits issues" under *Ruhrgas*. Nor did *Wachovia* say anything about the order in which such issues must be decided; indeed, neither the Court in *Wachovia* nor the parties in their briefing cited either *Steel Co.* or *Ruhrgas*. There is no conflict between *Wachovia* and the rule proposed here.

under *Younger*. 421 U.S. at 436. *See Tenet*, 544 U.S. at 6 n.4; *see also Steel Co.*, 523 U.S. at 100 n.3; *Ruhrgas*, 526 U.S. at 585. Other abstention doctrines, too, may be considered before "jurisdictional" issues without running afoul of *Steel Co.*'s bar on hypothetical jurisdiction.[3]

Pendent jurisdiction (now known as supplemental jurisdiction, *see* 28 U.S.C. § 1367) may be declined as a matter of judicial discretion. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006); 28 U.S.C. § 1367(c). In *Moor*, the Court bypassed the question of whether a federal court could assert pendent jurisdiction over state-law claims against a new party, in favor of the exercise of discretion in declining pendent jurisdiction. 411 U.S. at 715-16. *See Steel Co.*, 523 U.S. at 100 n.3; *Ruhrgas*, 526 U.S. at 585; *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites"); 28 U.S.C. § 2201(a).

Similarly, questions of improper venue are committed to the discretion of the district court. *See American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981)); 28 U.S.C. § 1404(a). As noted, this Court in *Leroy v. Great W. United*

---

[3] *See, e.g.*, *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006) (relying on this Court's characterization of *Younger* abstention as a "threshold question" that "may be resolved before addressing jurisdiction" to hold that it was not necessary to decide subject-matter jurisdiction before dismissing the case as presenting a nonjusticiable political question) (internal quotation marks omitted); *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 66 & n.1 (1st Cir. 2002) (relying on *Steel Co.* to affirm the bankruptcy court's decision to exercise its discretion to abstain under 28 U.S.C. § 1334(c)(1), without first resolving subject-matter jurisdiction question).

Corp., 443 U.S. 173 (1979), approved of dismissing a case for improper venue prior to ascertaining the existence of personal jurisdiction. *Id.* at 180.

Finally, whether a plaintiff or set of plaintiffs in a putative class action has satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure is considered a discretionary ruling. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185 (1974). In *Ortiz*, as noted, the Court considered Rule 23's requirements (which it said "pertain to statutory standing") prior to considering the question of Article III jurisdiction. 527 U.S. at 831 (citing *Steel Co.*, 523 U.S. at 92).

The discretionary nature of these gatekeeping doctrines thus has no bearing on the issue before this Court. Consistent with *Steel Co.*, its ancestors, and its progeny, such discretionary doctrines may be employed at the outset of a case to deny a federal-court audience to the merits, because "'a court that dismisses on . . . non-merits grounds . . . makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (quoting *Papandreou*, 139 F.3d at 255). Indeed, this Court's cases already demarcate this boundary between "threshold grounds for denying audience to a case on the merits" and the merits inquiry. *Ruhrgas*, 526 U.S. at 585. *See also Tenet v. Doe*, 544 U.S. at 12 (Scalia, J., concurring) (emphasizing that the *Totten* rule of dismissal, which is "the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction, is . . . not referring to the run-of-the-mill, nonthreshold *merits* question whether a cause of action exists") (quoting *id.* at 6 n.4) (emphasis in original).

The line between "denying the audience on the merits" and the merits inquiry is relatively clear, and relatively easy to apply. Courts are well-equipped to determine, based on the claims and defenses asserted in the pleadings, whether a ruling is a "merits" ruling or not; courts certainly have

experience in drawing that line when applying *res judicata* and collateral estoppel. *See, e.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988) (holding that a state court's failure to follow a prior *forum non conveniens* ruling did not merit an injunction under the relitigation exception of the Anti-Injunction Act because it "did not resolve the merits"). The line also has pragmatic force, in that courts can adapt its application to fit the circumstances of a given case, and can choose among threshold non-merits issues to dismiss a case based on considerations of ease, practicality, efficiency, or constitutional avoidance. Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 269-70 (2000) (endorsing a pragmatic approach to threshold dismissals over "rigidly applied rules of procedure"); *see generally id*. at 269 ("Our courts need to be practical and efficient if they are to carry out their mission of serving the citizenry. . . . One can find within the accepted power of a court to determine its subject-matter jurisdiction, the ability to decide whether it can dismiss cases on preliminary grounds when such dismissals will save time, energy and cost.").[4]

---

[4] In addition, allowing federal courts to bypass jurisdictional issues in favor of procedural issues may have the collateral but still salutary benefit of engendering respect for court orders entered prior to a conclusive determination of a court's jurisdiction. *See* Joan Steinman, *After* Steel Co.: *"Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 872 (2001) (explaining that, for practical reasons, a court should be allowed to make procedural rulings relating to jurisdiction prior to ascertaining jurisdiction: "A court may need to enter orders regarding pleadings and discovery before it can make a well-grounded determination as to whether subject-matter (or personal) jurisdiction exists. It may appropriately impose sanctions if such discovery orders are disobeyed."); *Willy v. Coastal Corp*., 503 U.S. 131, 138 (1992) (court can impose sanctions under Fed. R. Civ. P. 11 even though it lacks subject-matter jurisdiction because such action "'does not signify a district court's assessment of the legal merits of the complaint'") (quoting *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 396 (1990)).

In all of these cases, the Court approved dismissals on discretionary threshold grounds without reaching questions of "jurisdiction" (understood, as the Third Circuit did, in the narrow sense of subject-matter and personal jurisdiction). This illustrates the central flaw in the Court of Appeals' reasoning. The Third Circuit believed that the *Ruhrgas* rule does not apply because "a court following *Ruhrgas* can dismiss with certainty that the case is not properly before it." Pet. App. 32a. By contrast, the Third Circuit reasoned that "[a] case dismissed for *forum non conveniens* . . . is not faulty—by definition. It is a case properly before the court to determine the merits, although it is simply more convenient to do so elsewhere." Pet. App. 32a. That analysis is flatly inconsistent with the Court's treatment of abstention and other similar discretionary doctrines that deny a federal-court audience to claims at the outset of litigation. If the Third Circuit's expansive view of the ban on hypothetical jurisdiction were correct, all of these cases would, as a matter of necessity, have been decided differently.

C. *Forum Non Conveniens,* Like These Other Discretionary Bars To Consideration Of The Merits, May Also Be Decided At The Outset

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The district court's dismissal of MISC's complaint, which "resist[ed] imposition upon its jurisdiction," represented a proper threshold non-merits ground for denying an audience to a case on the merits. It was not, as the Third Circuit suggested, an *ultra vires* act.

To begin, this Court in *Ruhrgas* quoted—with approval—the D.C. Circuit's opinion in *Papandreou*, 139 F.3d at 255. This Court held, quoting *Papandreou*, that "'a court that dismisses on other non-merits grounds such as . . . personal

jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (ellipses in *Ruhrgas*). As noted above, the full quote from *Papandreou* states that "a court that dismisses on . . . non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles." 139 F.3d at 255. And indeed, that statement is just as true with respect to the doctrine of *forum non conveniens* as it is with respect to personal jurisdiction, or improper venue, or abstention, or any of the other non-merits threshold issues that allow a federal court to dismiss a suit and avoid the merits of a dispute: No "assumption of law-declaring power" is made when the court abjures jurisdiction before deciding whether such jurisdiction exists.

Three of this Court's decisions—*Am. Dredging Co.*, 510 U.S. 443, *Leroy*, 443 U.S. 173, and *Chick Kam Choo*, 486 U.S. 140—compel the conclusion that the Third Circuit was wrong to view *forum non conveniens* otherwise. Taken together, these three cases demonstrate that *forum non conveniens* is precisely one of those "threshold grounds for denying audience to a case on the merits," *Ruhrgas*, 526 U.S. at 585.

In *American Dredging*, this Court observed: "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." 510 U.S. at 453; *see also Gulf Oil Corp.*, 330 U.S. at 507 (noting that the discretionary aspect of the doctrine allows courts to refuse a suit in a formally authorized venue). The Court in *American Dredging* emphatically stated that "the [*forum non conveniens*] doctrine is one of procedure rather than substance," 510 U.S. at 453, because it "does not bear upon the substantive right

to recover, and is not a rule upon which . . . actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." *Id.* at 454.

Viewing *forum non conveniens* as a "supervening venue provision," then, *Leroy* establishes that it is appropriate to resolve questions of venue prior to addressing personal jurisdiction: "Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the [original judicial district]." 443 U.S. at 180. The Court explained that the "question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Id*. But, "when there is a sound prudential justification for doing so, . . . *a court may reverse the normal order of considering personal jurisdiction and venue*." *Id*. (emphasis added). This flexibility is allowed because "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties." *Id*.

Finally, like *American Dredging*, 510 U.S. at 453-54, this Court's decision in *Chick Kam Choo*, 486 U.S. 140, demonstrates that *forum non conveniens* dismissals do not "resolve the merits" of a complaint. There, the Court addressed whether the Anti-Injunction Act's relitigation exception, "founded in the well-recognized concepts of *res judicata* and collateral estoppel," allowed a federal court to enjoin a subsequent proceeding brought in Texas state court to enforce the federal dismissal on *forum non conveniens* grounds. *Id*. at 148. Petitioner argued that the federal court had adjudicated the merits of her claim and thus, the federal court's judgment had preclusive effect. *Id*. The Court, however, held that the relitigation exception did not apply because "[t]he District Court did not resolve the merits of

[petitioner's] claim . . . . Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine." *Id*. Thus, *Chick Kam Choo*—like *American Dredging*—plainly establishes that *forum non conveniens* is a non-merits issue, properly utilized to deny audience to a case on the merits.[5]

---

[5] The same Term that the Court decided *Chick Kam Choo*, the Court also held that a denial of a *forum non conveniens* motion does not fall within the collateral-order doctrine, in part because "in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988). However, as the Third Circuit itself noted, *Biard* does not establish that *forum non conveniens* is a "merits" issue because of this Court's decision in *Chick Kam Choo*, and because any entanglement in the merits is necessarily minimal; "[n]othing in *Biard* directs a court to assess the relative strength of the parties' arguments and to select one paramount issue." Pet. App. 20a (internal quotation marks and alterations omitted). Furthermore, in making this comment, *Biard* was addressing a specific aspect of the collateral-order doctrine, the "separate and collateral" requirement, which seeks to avoid "repetitive appellate review of substantive questions in the case." 486 U.S. at 528.

Of course, there is no risk of "repetitive appellate review" of the merits after a *grant* of a *forum non conveniens* motion, which is the case here. And, in an appropriate case, a district court can exercise its discretion to deny a motion to dismiss if it determines that the *forum non conveniens* motion would be better informed by further consideration of jurisdictional (or even merits) issues. But, in all events, if a *complete* separation from merits were a prerequisite for dismissing the suit before ascertaining jurisdiction, then *Ruhrgas* would have been decided differently. After all, ascertaining personal jurisdiction requires an inquiry into the defendant's contacts with the forum and relationship of those contacts to the plaintiff's injury, *see, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), which, in turn, requires at least some examination of the allegations of the complaint. *See generally* David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 FORDHAM L. REV. 3147, 3180-84 (2006) (urging that *forum non conveniens* is not a merits inquiry and does not require antecedent confirmation of jurisdiction).

The Third Circuit purported to agree that *forum non conveniens* is a non-merits issue. Yet it still concluded that personal jurisdiction had to be conclusively verified before a *forum non conveniens* dismissal could lie. The Court of Appeals relied in part on *Gulf Oil Corp.*, 330 U.S. 501, for this conclusion. Pet. App. 21a-22a. In *Gulf Oil*, the Court enumerated the criteria for applying *forum non conveniens* and noted in passing that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507. Of course, *Gulf Oil* did not involve the issue of (and therefore did not address) the order in which to resolve preliminary, non-merits challenges, and so its "even when jurisdiction is authorized" language cannot reasonably be read as *requiring* jurisdiction to be conclusively and inflexibly established first. Any such reading of *Gulf Oil*, moreover, would be inconsistent with the Court's more-recent cases, such as *American Dredging*, *Leroy*, *Steel Co.*, *Ruhrgas*, and multiple other decisions holding that a court may indeed choose to decide threshold, non-merits issues before deciding whether it has jurisdiction. *See also, e.g.*, *Moor*, 411 U.S. 693; *Ellis*, 421 U.S. 426.[6]

---

[6] In concluding otherwise, the Third Circuit adopted the nomenclature of a law-review article, which posited three categories of issues: "jurisdictional," "merits," and issues that "fit[] somewhere between" pure jurisdictional issues and pure merits issues. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 321-22 (1999). The Third Circuit reasoned that *forum non conveniens* belongs to this new "third category." Pet. App. 18a.

That conclusion was untenable for multiple reasons. *First*, nothing in this Court's jurisprudence suggests *these* three categories, or even three categories at all. Rather, as explained in Part I(A), above, the relevant categories are two—"merits" issues, on the one hand, and "threshold issues that deny an audience on the merits," on the other. The latter can

* * * *

In sum, *forum non conveniens* is a non-merits ground for dismissal that may be considered at the outset, before subject-matter and personal jurisdiction are conclusively established, without running afoul of the *Steel Co.* bar on "hypothetical jurisdiction." Indeed, *forum non conveniens* might well be considered "jurisdictional" in a broader sense of the term: Although it is judge-made doctrine with a long common-law lineage, it does regulate entry to federal courts, and it possesses what the late Chief Justice Rehnquist called "the most salient characteristic of jurisdictional statutes"—

---

be "jurisdictional" (however that term is defined) or not, discretionary or non-discretionary.

Second, the Court of Appeals ignored the conclusion reached by Professor Idleman's article, which appears just one page after the analysis upon which the Court of Appeals relied, that it is *appropriate* for a federal court to dismiss on his "third category" grounds (including, presumably, *forum non conveniens*) prior to determining jurisdiction:

> [T]hese ["third category"] issues could also theoretically be reached in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although [it] would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

Idleman, *supra*, at 323. The article's analysis is entirely consistent with the analysis in *Papandreou*, on which this Court relied in *Ruhrgas*, and the article so recognizes. *Id*. at 332, 336. The Third Circuit, however, chose to ignore Professor Idleman's analysis of this point.

Finally, in a later article, penned after *Ruhrgas* was decided, Professor Idleman, while questioning the correctness of *Ruhrgas*, acknowledged that "nothing in *Ruhrgas* suggests the contrary—. . . courts may resequence threshold inquiries other than personal jurisdiction prior to subject-matter jurisdiction." Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 4 (2001).

"its commands are addressed to courts rather than individuals." *Lindh v. Murphy*, 521 U.S. 320, 344 (1997) (dissenting opinion).

II. *FORUM NON CONVENIENS* IS PARTICULARLY APT FOR CONSIDERATION AT THE OUTSET OF A CASE

In addition to being compelled by this Court's decisions, reversal of the judgment of the Third Circuit would serve important ends.

A. Foreign Defendants Ought Not Be Subjected To Discovery And Jurisdictional Litigation Where The United States Is Obviously An Inappropriate Forum

The rule embraced by the Third Circuit would require foreign defendants such as Sinochem to be subjected to jurisdictional litigation, including potentially expensive, burdensome, and time-consuming discovery in United States courts, despite the fact that the dispute is so patently unconnected to the United States that a *forum non conveniens* dismissal is appropriate at the outset of the case. The rule endorsed by Sinochem, however, would allow federal courts to avoid this basic burden on litigants and courts.

Indeed, that is the central concern of the public- and private-interest factors to be considered in applying the *forum non conveniens* doctrine. After establishing that there is an existing alternative forum in a foreign country,[7] a court

---

[7] There is no issue here as to the absence of an alternative forum, a key element of a number of the *forum non conveniens* cases on which the majority in the Court of Appeals relied. *See, e.g.*, Pet. App. 23a ("[T]he Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone [, Inc.]*, 420 F.3d [702,] 705 [(7th Cir. 2005)]."). Here, however, the district court found, and the

will consider "the private interest of the litigant." *Am. Dredging Co.*, 510 U.S. at 448 (internal quotation marks omitted). At its essence, this private interest is in making the "trial of a case easy, expeditious and inexpensive." *Id.* (listing factors such as "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action") (internal quotation marks omitted). *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is appropriate where a "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience") (internal quotation marks and ellipses omitted).

On the "public interest" side, a court will consider "[a]dministrative difficulties" that occur "when litigation is piled up in congested centers instead of being handled at its origin." *Am. Dredging Co.*, 510 U.S. at 448 (internal quotation marks omitted). *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is warranted where a chosen forum "is inappropriate because of considerations affecting the court's own administrative and legal problems") (internal quotation marks and brackets omitted). Moreover, it is not fair to impose the burden of jury duty "upon the people of a community which has no

---

majority did not dispute, that the highest level of Chinese courts has already resolved any jurisdictional issues in the Chinese action in favor of the Chinese court's jurisdiction over both parties. Pet. App. 42a-43a. Indeed, the district court here expressed its "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter." Pet. App. 67a n.11. Thus, the record is clear that Chinese courts, as a result of the Chinese action, present an adequate alternative forum, whose jurisdiction has already been confirmed—and in which the action is *actually* proceeding.

relation to the litigation." *Am. Dredging Co*., 510 U.S. at 448 (internal quotation marks omitted). It is also more appropriate to try a case in a jurisdiction whose law governs, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id*. at 448-49 (internal quotation marks omitted).

Inherent in these public-private calculations are concerns of international comity, as this Court has acknowledged. *Am. Dredging Co.*, 510 U.S. at 464-67 (noting that *forum non conveniens* doctrine has been employed historically to ameliorate problems of international comity). In giving effect to the principle that foreign fora are usually more appropriate to litigate a dispute between non-U.S. parties, the Court in *Piper Aircraft Co*. explained that "a foreign plaintiffs' choice [of forum] deserves less deference" than that of an American plaintiff; thus, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." 454 U.S. at 255-56. The Court further held that a suit can be dismissed on *forum non conveniens* grounds even when the law in the alternative forum is less favorable to the plaintiff. *Id*. at 247.

Consistent with this principle of yielding to foreign sovereigns to adjudicate disputes that are more appropriately filed in their courts, this Court has displayed solicitude to the practices and autonomy of other sovereigns in a variety of contexts. *See, e.g., Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 131-35 (2005) (noting that, out of considerations of international comity, American law does not apply to the "internal affairs" of foreign-flagged vessels); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (relying on comity to hold that Congress did not intend the Sherman Act to apply to foreign conduct that

caused foreign injury independent of any domestic effects).[8] At the same time, lower courts, in *forum non conveniens* and related contexts, have extended due respect to the Chinese judicial system, as the district court here did in expressing its "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter."[9] Pet. App. 67a n.11.

The importance of such issues of international comity further counsels against the Third Circuit's rule: The very purposes of *forum non conveniens*—which "appli[es] only in cases where the alternative forum is abroad," as 28 U.S.C.

---

[8] *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (refusing to recognize a new cause of action under the Alien Tort Statute for violation of the law of nations in part because of "the potential implications for the foreign relations of the United States . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution").

[9] *See, e.g.*, *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 144-45 (S.D.N.Y. 2000) (holding, in a choice of law case, that the Court was bound to respect China's choice of public policy, apply Chinese law per New York's interest-based choice of law rules, and reject the argument that Chinese law violated New York public policy); *Lu v. Air China Int'l Corp.*, No. CV 92-1254 (RR), 1992 WL 453646, at *2 (E.D.N.Y. Dec. 16, 1992) (holding that government ownership of defendant corporation does not undermine the potential for fair resolution of the plaintiff's claim); *BP Chems., Ltd. v. Jiangsu Sopo Corp., Ltd.*, No. 4:99CV323CDP, 2004 U.S. Dist. LEXIS 27855, at *36 (E.D. Mo. Mar. 29, 2004) (noting that in other cases "China has been found to be an adequate alternative forum"). *See also* Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 150 (2005) ("In fact, rule of law has become a major source of legitimacy for China's current government."); Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 137 (2005) (describing judicial reform in China and noting "particularly impressive" results in Shanghai).

§ 1404(a) governs transfers within the federal-court system, *see Am. Dredging Co.*, 510 U.S. at 449 n.2—are frustrated when foreign companies are forced to engage in the full-blown expense and burden of making jurisdictional demonstrations, and the federal courts are expanding time, effort and resources to affirmatively establish jurisdiction, prior to dismissing a suit that was dismissable on *forum non conveniens* grounds at the outset. *See Tenet*, 544 U.S. at 6 n.4 (noting that "to first allow discovery or other proceedings in order to resolve the jurisdictional question" is "inconsistent" with the purpose of the *Totten* bar, which is "to defeat the asserted claims [and] to preclude judicial inquiry"). *See also, e.g.*, Feder, *supra*, 74 FORDHAM L. REV. at 3186 ("[A] strict structuring of non-merits issues would serve to frustrate the very flexibility that makes *forum non conveniens* such a valuable tool for judicial consideration of internationally tinged disputes.").

As Judge Stapleton explained in dissent, the majority's rule "subverts a primary purpose of the doctrine of *forum non conveniens*"—"protect[ing] a defendant" (in this case, Sinochem, a foreign company) "from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." Pet. App. 33a. But the decision below raises an even more troubling issue: The majority did not even take into account the "public interest" side of the *forum non conveniens* equation. As the district court observed, there is scarcely any relation of this litigation to the United States. *See* Pet. App. 66a ("The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates."). *But see* n.1, *supra*. Moreover, "the matter is expected to proceed in the Guangzhou court. . . . We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that

both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782." Pet. App. 43a.

Finally, allowing *forum non conveniens* to be decided at the outset will ensure that the doctrine does not become an illusory protection for foreign litigants. Compared with the jurisdictional rules that prevail in most other countries, the bases for jurisdiction in United States courts are exceedingly generous to plaintiffs. *Forum non conveniens* has thus properly been regarded in the international arena as a flexible tool for limiting the risk that essentially foreign disputes would nonetheless be drawn to United States courts. *See Piper Aircraft*, 454 U.S. at 252 & n.18 (noting that "[t]he American courts . . . are already extremely attractive to foreign plaintiffs," and declining to adopt a rule that would further increase "[t]he flow of litigation into the United States . . . and further congest already crowded courts"); *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1982) (U.K.) ("As a moth is drawn to the light, so is a litigant drawn to the United States."). Indeed, international comparative-law scholars have praised the "more flexible" "framework within which the *forum non conveniens* considerations are examined in the United States," noting that "[t]he great virtue of the *forum non conveniens* approach is its flexibility." J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 15, 30 (1995).

B. It Is Inefficient To Demand That Courts Conclusively Ascertain Personal And Subject-Matter Jurisdiction As A Precondition To Dismissing In Favor Of Litigation In A Foreign Tribunal

There is no dispute that the rule adopted by the Third Circuit (and three other Courts of Appeals) is inefficient. Indeed, the panel majority itself recognized that its own rule "may not seem to comport with the general interests of judicial economy." Pet. App. 26a. The majority

acknowledged that "[w]e do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." Pet. App. 26a. That "regret" is in itself a strong indication that the Court of Appeals' decision was incorrect. In fact, because of its recognition of just how undesirable its rule is, the majority expressly invited this Court to correct its decision: "If the Supreme Court wishes otherwise, we leave that determination to it." Pet. App. 26a.

In his dissenting opinion, Judge Stapleton agreed and emphasized the extent of the inequities wrought by the majority's decision: It "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." Pet. App. 33a. Reversal of the Third Circuit's decision will restore the proper balance, and allow district courts to dismiss actions inappropriately filed in the United States consistent with the "just, speedy, and inexpensive" mandate of federal law. FED. R. CIV. P. 1; *see also Societe Nationale Industrielle Aerospatiale v. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 542-43 (1987) (holding that "first resort to [Hague] Convention procedures whenever discovery is sought from a foreign litigant" is not required because "[i]n many situations the . . . procedure authorized by the Convention would be unduly time consuming and expensive . . . . A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts. *See* Fed. Rule Civ. Proc. 1.").

C. Consideration Of *Forum Non Conveniens* In The First Instance Can Avoid Federal Court Entanglement In Difficult Constitutional Questions, Whose Resolution Would Be Purely Advisory

Finally, the Court of Appeals' opinion is inconsistent with the principle of constitutional avoidance. This was one of

the justifications for the rule adopted in *Ruhrgas*. There, the Court explained that subject-matter jurisdiction need not invariably be determined prior to personal jurisdiction where "a district court has before it a straightforward personal jurisdiction issue presenting no complex questions of state law," whereas "the alleged defect in subject-matter jurisdiction raises a difficult or novel question." *Ruhrgas*, 526 U.S. at 588. *See also Steel Co.*, 523 U.S. at 111-12 (Breyer, J., concurring) ("[T]o insist upon a rigid 'order of operations' in today's world of federal-courts caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost. . . . It means a more cumbersome system. It thereby increases, to at least a small degree, the risk of the 'justice delayed' that means 'justice denied.'") (internal citations omitted).

The venerable doctrine of constitutional avoidance has played an important role in this Court's jurisdictional decisions. *See, e.g.*, *Elk Grove Unified Sch. Dist.*, 542 U.S. at 11 (emphasizing the "'deeply rooted' commitment 'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary" and dismissing the suit on prudential standing grounds to avoid deciding a difficult First Amendment question) (citation omitted); *Leroy*, 443 U.S. at 181 ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available."); *Steel Co.*, 523 U.S. at 112 (Stevens, J., concurring in the judgment) ("Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, the Court should answer the statutory question first.") (internal citation omitted).[10] These cases

---

[10] *See also Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568 (1947) ("[T]his Court has followed a policy of strict necessity in

"illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans*, 415 U.S. at 547 n.12.

In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates potentially significant due process issues under the Fifth Amendment. *See* Pet. App. 60a ("Under [Fed. R. Civ. P.] 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis."). As the Court explained in *Leroy*, where, as here, a long-arm statute authorizes jurisdiction over non-residents "consistent with the Constitution and laws of the United States," *see* Fed. R. Civ. P. 4(k)(2), a court undertaking a personal-jurisdiction analysis must necessarily "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. 443 U.S. at 181. Thus, "[a]s a prudential matter it is our practice to avoid unnecessary decision of [such] novel constitutional questions." *Id*. Indeed, in this case, the district court granted the motion to dismiss on *forum non conveniens* grounds only after examining in detail every basis for personal jurisdiction and concluding that only with further discovery would the

---

disposing of constitutional issues."); *Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) (It is the "considered practice not . . . to decide any constitutional question in advance of the necessity for its decision.") (internal citations omitted); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) (same).

court be able to ascertain whether it has personal jurisdiction over Sinochem. *See* Pet. App. 59a.

Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional ground for decision, it is therefore more consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery and subsequent litigation, whether the court has personal jurisdiction over Sinochem consistent with the Due Process Clause.

* * * *

In sum, the Third Circuit should have reviewed, for abuse of discretion, the district court's dismissal on threshold non-merits grounds of *forum non conveniens*, rather than holding that the district court should have conclusively established jurisdiction before dismissing for *forum non conveniens*. This Court should reverse and order those proceedings to occur on remand.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

STEPHEN M. HUDSPETH
6 Glen Hill Road
Wilton, CT 06897
(203) 762-2846

PETER J. WANG
Z. ALEX ZHANG
JONES DAY
30th Floor
Shanghai Kerry Center
1515 Nanjing Road West
Shanghai 200040
People's Republic of China
(86)(21) 2201-8000

November 3, 2006

GREGORY A. CASTANIAS
(*Counsel of Record*)
VICTORIA DORFMAN
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner