No.

In the Supreme Court of the United States

LYNETT S. WILSON,
PETITIONER,

v.

DENIS RICHARD MCDONOUGH, SECRETARY, U.S. DEPARTMENT OF VETERAN AFFAIRS; U.S. DEPARTMENT OF VETERAN AFFAIRS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an acknowledged and intractable conflict regarding an important question under the Federal Rules of Civil Procedure. Eight courts of appeals agree that a complaint may be dismissed *only* if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The First Circuit is the only circuit that departs from this settled principle. In the First Circuit a complaint may be dismissed if the plaintiff "waives" an argument against dismissal by failing to raise it in opposition to a motion to dismiss even if the complaint plainly states a claim. To add insult to injury, plaintiffs cannot even appeal such dismissals because the First Circuit holds that the failure to make the argument in the opposition to the motion to dismiss also waives it on appeal.

The question presented arises repeatedly in disputes in the First Circuit, the First Circuit refuses to reconsider it, and it continues to generate problems and confusion for countless litigants and courts. The underlying cases are significant—often involving vulnerable, under-resourced litigants, those least able to procure expensive counsel who can research and draft filings that methodically refute every argument in a motion to dismiss no matter how flawed. Because this case presents an excellent vehicle for resolving this important question of federal law, and bringing the First Circuit's law into alignment with that of every other, the petition should be granted.

The question presented is:

Whether a complaint that states a claim may be dismissed on the grounds that a plaintiff waived an argument against dismissal by failing to make the argument in opposition to a motion to dismiss.

RELATED PROCEEDINGS

United States Court of Appeals (Fed. Cir.):

Wilson v. *Dep't of Veteran Affairs*,
No. 19-2283 (Nov. 17, 2020)

United States District Court (D. Me.):

Wilson v. *Dep't of Veteran Affairs*,
No. 2:20-cv-00019-NT (May 07, 2021)

United States Court of Appeals (1st Cir.):

Wilson v. *McDonough*,
No. 21-1498 (Jun. 14, 2022)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, Petition Appendix ("Pet. App.") 1a-6a, is unpublished but available at 2022 WL 2135269. The court's order denying rehearing en banc (Pet. App. 61a-62a) is unreported. The district court's order dismissing petitioner's case (Pet. App. 7a-14a) is unpublished but available at 2021 WL 1840753.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2022. Pet. App. 1a-2a. The court of appeals denied a timely petition for rehearing en banc on August 24, 2022. Pet. App. 61a-62a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8 is reproduced at Pet. App. 63a-65a. Federal Rule of Civil Procedure 12 is reproduced at Pet. App. 66a-70a.

STATEMENT OF THE CASE

This case presents a square and recognized conflict over a question fundamental to Rule 12(b)(6) of the Federal Rules of Civil Procedure: Whether a complaint that states a claim may be dismissed on the grounds that a plaintiff waived an argument against dismissal by failing to make the argument in opposition to a motion to dismiss.

The majority rule, applied in eight circuits, holds that a failure to oppose a motion to dismiss is not sufficient grounds to dismiss a complaint that states a claim. The reasoning espoused by the majority circuits is that a defendant carries the burden to prove that a complaint does not state a claim and only a complaint that in fact fails to state a claim may be dismissed under Rule 12(b)(6).

In the proceedings below, however, the First Circuit followed its longstanding precedent that a complaint may be dismissed under Rule 12(b)(6)—even if it states a claim—if the plaintiff failed to make a complete argument against dismissal in opposition to a motion to dismiss. In reaching that result, the First Circuit deepened the entrenched and acknowledged conflict between itself and every other circuit that has considered this question. Petitioner argued that the First Circuit should adopt the majority rule both in her briefing to the panel and in a timely petition for rehearing en banc. But the First Circuit declined to rectify this longstanding and significant conflict between its law and the law of eight other courts of appeals.

The First Circuit's conclusion that a failure to oppose a motion to dismiss in the district court is a categorical waiver, including on appeal, is an extreme sanction; particularly as compared to the more forgiving forfeiture

standard that courts apply in similar contexts.[1] The extreme sanction upheld here by the First Circuit is particularly striking considering that, more often than not, a motion to dismiss under Rule 12(b)(6) is the first step a defendant will take in a federal action. Dismissal for failure to oppose a motion to dismiss forecloses any merits consideration of a plaintiff's complaint—even if a meritorious claim is clear on the face of the complaint or any deficiency could be easily corrected by an amended complaint.

The Court should grant review and resolve this split. This case readily satisfies the criteria for this Court's review. The conflict between the First Circuit and every other on the question presented is acknowledged, entrenched, and widespread. Eight circuits are arrayed against the First Circuit's view. The conflict has been recognized by multiple courts and commentators.[2]

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[1] The First Circuit has "delineated the taxonomy of waiver and forfeiture. A party waives a right when he intentionally relinquishes or abandons it, whereas he forfeits the right if he fails to make a timely assertion of [it]. For purposes of appellate review, the distinction is important. While a waived issue normally may not be resurrected on appeal, a forfeited issue may be reviewed for plain error." *United States v. Vazquez-Molina*, 389 F.3d 54, 57 (1st Cir. 2004) (quotations and citations omitted), *rev'd on other grounds*, 125 S. Ct. 1713 (2005).

[2] *See, e.g.*, Alexis Pawlowski, *Reply or Perish: The Federal Rule 83(A)(1) Problem with Local Rules Requiring Responses to 12(B)(6) Motions*, 90 Fordham L. Rev. 1781, 1795 (2022) ("Unlike the majority of circuits described above, the First Circuit has held that district courts have the discretion to dismiss an action because of a party's failure to respond to a motion…."); Steven S. Gensler & Lumen N. Mulligan, 1 Fed. R. of Civ. P., Rules and Commentary, Rule 12 (February 2022 Update) ("Some circuits hold that Rule 12(b)(6) motions can be granted solely because they are unopposed. Other circuits hold that, while the plaintiff has forfeited its ability to

Further percolation will not resolve this divide: The arguments on both sides have been thoroughly made, and in the face of those arguments the First Circuit has repeatedly reaffirmed its rule. The First Circuit considers its rule so well settled that it declined even to publish its opinion affirming dismissal in this case and relegated its response to petitioner's arguments against applying its waiver rule to a footnote—even though the argument that the Court should adopt the majority rule was thoroughly briefed and argued. Oral Arg. at 0:01-1:46; C.A. Br. 37-42; *see also* Pet. Reh'g En Banc. There is no realistic prospect that the First Circuit will yield, nor that all eight circuits on the opposite side of this split will align themselves with the First. The remaining circuits (the Fourth, Eighth, and Ninth) are also in need of guidance from this Court, as their district courts are in complete disarray on this issue. The question presented was dispositive in both proceedings below and there are no obstacles to resolving it in this Court.

The question presented raises an issue of fundamental importance, and its correct disposition is essential to the proper and uniform operation of the Federal Rules of Civil Procedure nationwide. Rule 12(b)(6) does not task courts with assessing the quality of oppositions to motions to dismiss. Rather, it calls on courts to assess the sufficiency of complaints. Yet in the First Circuit a litigant must file an immaculate opposition on pain of having her entire case dismissed on waiver grounds. Cases that consider "waiver" in the context of Rule 12(b)(6) motions number in the thousands.[3] Because

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present arguments for why the complaint is sufficient, the court still must assess the sufficiency of the complaint.") (collecting cases).

[3] A Westlaw search by the undersigned for unopposed motions to dismiss in the context of waiver brought up nearly five thousand cases in federal courts across the country. Cases in this context are

this case presents an optimal vehicle for resolving this significant issue, the petition should be granted.

1. Petitioner Lynett Wilson is a former employee of the U.S. Department of Veterans Affairs, Veterans Affairs Medical Center located in Augusta, Maine ("VAMC-Augusta"). Pet. App. 71a. She worked at VAMC-Augusta as a Lead Radiologic Diagnostic Technician from November 2015 until September 2016. *Id.* at 31a, 74a. Petitioner is a qualified individual with disabilities who suffers from asthma. *Id.* at 74a-75a.

2. On September 12, 2016, petitioner had a severe asthma attack and filed a workers' compensation claim. *Id.* at 75a. After a medical examination, petitioner's treating physician determined she was unable to work in her assigned office as the poor air quality aggravated her asthma. *Id.* at 75a-76a. But petitioner's employer denied her requested accommodation. *Id.* at 76a. Unable to work in an office in which she could not breathe, petitioner stopped coming to work and was suspended without pay. *Id.*

3. On June 28, 2017, petitioner filed a petition with the U.S. Merit Systems Protection Board ("MSPB") alleging that the VAMC-Augusta had constructively suspended her by failing to accommodate her asthma. *Id.* at 25a. Petitioner's MSPB petition resulted in an unfavorable Initial Decision from an MSPB Administrative Law Judge. *Id.* at 25a-26a. That decision became final on June 20, 2019. *Id.* at 40a. On August 19, 2019, petitioner appealed the decision to the U.S. Court of Appeals for the Federal Circuit. *Id.* at 7a.

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so numerous that many district courts have lengthy string cites of cases implicating exactly this issue. *See, e.g.*, *Shorter v. Los Angeles Unified Sch. Dist.*, No. CV 13-3198 ABC (AJW), 2013 WL 6331204, at *5 (C.D. Cal. Dec. 4, 2013) (collecting cases in the Ninth Circuit involving waiver in the context of Rule 12(b)(6) motions).

4. The case then became ensnared in a procedural morass. The Federal Circuit determined it lacked jurisdiction because the case involved a disability discrimination claim and so transferred the case to the District of Maine, the District of Maine then transferred the case back to the Federal Circuit, and then the Federal Circuit dismissed the case. *Id.* at 17a-18a. The Federal Circuit then granted petitioner's unopposed motion to vacate the dismissal and have the case again transferred to the District of Maine so that her claims could be adjudicated on the merits. *Id.* at 15a-16a.

5. On December 18, 2020, following retransfer to the District of Maine, petitioner filed the first and only operative complaint in this case: a four-count complaint asserting disability discrimination (Count One), retaliation for engaging in protected EEO activity (Count Two), a whistleblower claim (Count Three), and a claim of procedural error (Count Four). *Id.* at 71a-84a.

6. On February 23, 2021, the government moved to dismiss the complaint. *Id.* at 10a. As relevant here the government argued that petitioner's complaint was untimely. *Id.* There is a 60-day deadline for filing a suit like petitioner's in the Federal Circuit, but only a 30-day deadline for filing a similar suit in federal district court. *Id.* at 5a. Petitioner filed suit in the Federal Circuit on the 59th day following the MSPB decision. *Id.* Petitioner's counsel filed a short opposition to the motion to dismiss. The opposition was not a model of clarity; it did not systematically address the government's arguments. CA Br. Add. A71-A77. The thrust of the opposition was simply that the complaint could not be dismissed because it stated a claim. *Id.* As relevant here, the district court held that petitioner's failure to clearly address the government's timeliness argument waived her opposition to it, and thus granted the motion to dismiss on timeliness grounds. Pet. App. 7a, 10a-12a. Petitioner appealed.

7. The First Circuit affirmed in an unpublished disposition. *Id.* at 1a. The panel held that the appeal could be resolved entirely on the basis of waiver. *Id.* at 5a. Notwithstanding that petitioner's complaint may have stated a claim on which relief could be granted, the First Circuit held that the complaint was properly dismissed as untimely because petitioner had "waived" any arguments against dismissal on timeliness grounds "by not raising them before the district judge." *Id.*

Petitioner argued in her briefs on appeal, and at oral argument, that a complaint cannot be dismissed solely on the basis of waiver, and that ruling against petitioner on this ground would entrench a significant circuit conflict. Oral Arg. at 0:01-1:46; C.A. Br. 37-42; C.A. Reply Br. 5-11; *see also* Pet. Reh'g En Banc. The panel did not address that argument in its opinion except to note, in a footnote,[4] that the First Circuit's rule is to the contrary. Pet. App. 6a.

8. The First Circuit denied a timely petition for rehearing en banc. *Id.* at 61a-62a.

REASONS FOR GRANTING THE PETITION

The decision below deepens an intractable split over a key tenet of the Federal Rules of Civil Procedure. As it stands, one circuit allows its district courts to apply a harsh and unforgiving standard in determining whether to dismiss a complaint even if the complaint states a claim. The positions on both sides are fully fleshed out; the

[4] *See* Pet. App. 6a ("In her memo opposing Defendants' dismissal motion, Plaintiff made passing reference to res judicata, collateral estoppel, and claim preclusion—not only did she not explain or apply the elements of these doctrines, but she never explained whether or how these doctrines relate to law of the case. And passing references like hers are not enough to present and preserve an issue for review. . . . Also, to the extent she implies that we cannot deem an equitable-tolling argument waived in situations like hers, she is wrong.") (citations omitted).

question is cleanly presented; and this case offers the ideal vehicle for the Court to resolve it. The Court should grant the petition.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A COMPLAINT MAY BE DISMISSED ON THE BASIS OF NON-OPPOSITION EVEN IF THE COMPLAINT OTHERWISE STATES A CLAIM

Eight circuits have held that a plaintiff's complaint cannot be dismissed unless the complaint fails to state a claim.[5] Those courts reason that under the Rules, a plaintiff may stand on her complaint and decline to file an opposition to a motion to dismiss at all. A single circuit—the First Circuit—has held the opposite: District courts may dismiss a complaint, even if the complaint states a claim, when the opposition to a motion to dismiss fails to

[5] There is a modest degree of variation between the circuits on this point, in which the different majority-rule circuits apply the majority rule differently depending on the circumstances. *See, e.g.*, *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 806 (5th Cir. 2012) (reversing district court's dismissal of plaintiff's complaint on the grounds that plaintiff "waived" its argument on standing through incomplete opposition, reasoning that "Rule 12 does not by its terms require an opposition"); *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003) (observing that a district court could dismiss a complaint as an explicit sanction for failure to comply with a local rule subject to its *Meade* factors that analyze prejudice in such a sanction and the culpability of the litigant); *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) ("In reaching our result, we do not suggest that the district court may never rely on the local rule to treat a motion to dismiss as unopposed and subject to a dismissal without a merits analysis. There may be some cases where the failure of a party to oppose a motion will indicate that the motion is in fact not opposed, particularly if the party is represented by an attorney and in that situation the rule may be appropriately invoked."). However, there is general uniformity among the eight circuits that a plaintiff's complaint cannot be dismissed unless the complaint fails to state a claim, even if the plaintiff does not oppose a motion to dismiss.

adequately address an argument. Indeed, the First Circuit will not even review such dismissals, because the First Circuit holds that the failure to raise the argument in the opposition to the motion to dismiss also waives it on appeal. This split has been acknowledged by numerous courts.[6] The entrenchment of each side is clear: other courts of appeals have recognized the First Circuit's rule and either expressly rejected it, *Marcure v. Lynn*, 992 F.3d 625, 632 (7th Cir. 2021), or narrowed their Circuit's

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[6] *Block v. Dakota Nation Gaming Comm'n*, No. 1:16-CV-01054-CBK, 2017 WL 1745469, at *2 (D.S.D. May 3, 2017) ("The circuits are split on whether a court may grant a motion to dismiss solely on the basis that the plaintiff did not file a response opposing the motion."); *Abram v. Sohler*, No. 8:22-CV-152, 2022 WL 3108101, at *3 (D. Neb. Aug. 4, 2022) (acknowledging circuit split and deciding to follow "the majority of the federal courts of appeal" in holding that failure to respond to a motion to dismiss does not warrant dismissal of a complaint); *Anderson v. Greene*, No. CIV. 05-0393-WS-M, 2005 WL 1971116, at *2-3 (S.D. Ala. Aug. 16, 2005) (acknowledging the courts are "not unanimous" on this issue and deciding to follow the majority rule); *Tamburo v. Hall*, No. 2:13-CV-01537, 2015 WL 1276711, at *3 n.2 (S.D.W. Va. Mar. 19, 2015) (observing that some courts grant a motion to dismiss merely because it is unopposed, but choosing to "decide[] these issues on their merits"); *Voacolo v. Fed. Nat'l Mortg. Ass'n*, 224 F. Supp. 3d 39, 41–42 (D.D.C. 2016) (acknowledging there is a "circuit split" on the issue); *Parks v. N.C. Dep't of Pub. Safety*, No. 5:13-CV-74-BR, 2014 WL 32064, at *3 (E.D.N.C. Jan. 6, 2014) (noting that "most courts do not apply such an unforgiving and relentless sanction" as dismissing a complaint because it is unopposed) (quotations omitted); *Hampton v. Hamm*, No. 2:20-CV-385-WKW, 2022 WL 69214, at *3 (M.D. Ala. Jan. 6, 2022) (acknowledging the First Circuit follows a contrary rule to the Eleventh Circuit in treating a failure to respond to a motion to dismiss as conceding the motion); *Singh v. Collectibles Mgmt. Res.*, No. 1:16-CV-00835_LJO_BAM, 2016 WL 5846997, at *2 n.1 (E.D. Cal. Oct. 5, 2016) (declining to dismiss complaint for merely failing to oppose motion to dismiss, observing that "a number of sister circuits" follow the majority rule and choosing to follow those circuits).

law in a manner inconsistent with the First Circuit's rule, *see Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018) (narrowing D.C. Circuit law to preclude implied waiver by failure to oppose); *Cohen v. Bd. of Trustees of the Univ. of the D.C.*, 819 F.3d 476, 480-84 (D.C. Cir. 2016) (recognizing First Circuit's conflict with other circuits and holding that dismissal of complaint *with prejudice* after plaintiff failed to timely file an opposition was an abuse of discretion).

The uncertainty over this area is palpable, with district courts in circuits that have yet to weigh in—the Fourth, Eighth, and Ninth—in disarray, applying one rule or the other seemingly at random, sometimes even within the same judicial district. In those circuits, litigants are left to guess which rule may be applied depending on which courthouse they are in, or even depending on which judge was assigned the case. The conflict has been openly acknowledged by courts and commentators alike, and there is no chance it will resolve itself. *See, e.g.*, *supra* note 6. The conflict is mature and ready for this Court's review. Definitive guidance over the correct standard for dismissing a complaint is overdue. The circuit conflict is undeniable and entrenched, and it should be resolved by this Court in this case.

A. Eight Circuits Refuse to Dismiss Complaints Simply Because an Argument was Not Made in an Opposition to a Motion to Dismiss

The vast majority of circuits to address the issue have taken the straightforward view that a plaintiff's complaint cannot be dismissed unless the complaint fails to state a claim. These courts reason that any other rule would turn what should be an attack on the legal sufficiency of the complaint into an attack on the legal sufficiency of the response in opposition to the motion to

dismiss. Such a rule, those circuits reason, would be contrary to the text, history, and purposes of the Rules.

1. The decision below conflicts with settled law in the D.C. Circuit. In *Washington Alliance of Technology Workers v. United States Department of Homeland Security*, a labor union sought to challenge certain DHS regulations related to work eligibility for nonimmigrant aliens. 892 F.3d 332, 336 (D.C. Cir. 2018). The complaint alleged that the regulations were unlawful for numerous reasons. *Id.* The district court dismissed the complaint relying on a mixture of grounds including that the plaintiff union had filed "a deficient opposition to the DHS's motion to dismiss." *Id.* In reversing that basis for the district court's dismissal the D.C. Circuit concluded that a "party may rest on its complaint in the face of a motion to dismiss if the complaint itself adequately states a plausible claim for relief." *Id.* at 345. Any other rule would "turn[ ] what should be an attack on the legal sufficiency of the complaint into an attack on the legal sufficiency of the response in opposition to the motion to dismiss." *Id.*

In reaching that conclusion, the court distinguished cases where a litigant has "conceded an issue" in a non-dispositive motion by leaving it "entirely unaddressed" to the circumstances present there. *Id.* at 344. The union had "asserted" in its opposition that "[e]ach count contains both a legal and factual basis for relief." *Id.* (internal quotation marks and alterations omitted). This "indicated it adhered to its position that its complaint was well-pleaded." *Id.* at 345. The court recognized that the union "would have been wise to more fully develop its argument" against dismissal beyond this single sentence. *Id.* at 344. But by filing an opposition, and insisting that its complaint stated a claim, the union did not "concede" that dismissal was appropriate; it did not "yield or grant," "acknowledge" or "accept" the arguments for dismissal in the motion to dismiss. *Id.* at 345. The union "was not silent

when confronted with the argument that its allegations fell short." *Id.* And a district court cannot "subvert the FRCP 12(b)(6) inquiry simply because the court finds the plaintiff's opposition to the motion to dismiss, although pressed, underwhelming."[7] *Id.*

2. The decision below also squarely conflicts with established law in the Seventh Circuit. In *Marcure v. Lynn*, the Seventh Circuit explicitly considered and rejected the First Circuit's position on this issue. 992 F.3d 625, 632 (7th Cir. 2021). In *Marcure*, a district court struck a plaintiff's response to a motion to dismiss because it was not compliant with Rule 11(a), then granted the defendants' motion to dismiss on the grounds that it was unopposed. *Id.* at 627-28. In reversing that decision, the Seventh Circuit surveyed the law of every circuit nationwide, *id.* at 631-32 & n.2, and found that "[o]f the eight circuit courts to consider this issue, six have held that courts may not grant Rule 12(b)(6) motions solely because they are unopposed," *id.* at 631, and that "[o]nly the First Circuit has adopted the position" "that Rule 12(b)(6)'s requirement[s]" could be "overridden," *id.* at 632. The Seventh Circuit explained that it did not find the reasoning supporting the First Circuit's rule "persuasive" and thus "reject[ed]" the First Circuit's approach in favor of the majority view, "which has the sounder reading of

[7] While an "underwhelming" argument differs from an "unmade" argument—and the D.C. Circuit's decision in *Washington Alliance* involved an "underwhelming" argument—the ultimate holding in *Washington Alliance* rings true for "unmade" arguments because "a party may rest on its complaint in the face of a motion to dismiss if the complaint itself adequately states a plausible claim for relief." *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018).

the federal rules and more closely aligns with [its] own treatment of Rule 12(b)(6)." *Id.*[8]

3. The decision below also breaks with precedent in the Tenth Circuit. In *Issa v. Comp USA*, a former employee appealed the dismissal of his Title VII claim of racial discrimination against Comp USA. 354 F.3d 1174, 1176-77 (10th Cir. 2003). The district court in Utah had granted Comp USA's motion to dismiss based solely on Issa's failure to comply with Local Rule 7-1(d), which provides that "[f]ailure to respond timely to a motion may result in the court granting the motion without further notice." *Id.* at 1177. Despite the local rule's discretionary language, the district court treated it as dispositive, neither "address[ing] the merits of the motion" nor "engag[ing] in an analysis of whether dismissal was appropriate as a sanction for plaintiff's failure to respond." *Id.*

The Tenth Circuit reversed and remanded. The purpose of Rule 12(b)(6), the court reasoned, is to "test the sufficiency of the allegations within the four corners *of the complaint* after taking those allegations as true." *Id.* (emphasis added) (internal quotations omitted). Regardless of whether a plaintiff responds to a motion to dismiss, the district court must therefore "still examine the allegations in the plaintiff's complaint and determine whether the plaintiff has stated a claim upon which relief can be granted." *Id.* at 1178.

4. The Seventh, Tenth and D.C. Circuits' holdings align with the decisions of five other circuits, all of which prohibit the granting of 12(b)(6) dismissals for the mere

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[8] The Seventh Circuit continues to adhere to this rule. *Swafford v. Jordan*, No. 21-3189, 2022 WL 2829762, at *2 (7th Cir. July 20, 2022); *Hudson v. Gaines*, No. 20 C 5663, 2022 WL 4272781, at *2 (N.D. Ill. Sept. 15, 2022); *LeSure v. Walmart Inc.*, No. 21-CV-472-PP, 2022 WL 3647908, at *8 (E.D. Wis. Aug. 24, 2022).

failure to oppose. *Giummo v. Olsen*, 701 F. App'x 922, 924 (11th Cir. 2017) (per curiam) ("The district court abused its discretion by … grant[ing] the defendants' motion to dismiss based solely on the plaintiffs' failure to respond in opposition."); *McCall v. Pataki*, 232 F.3d 321, 322-23 (2d Cir. 2000) ("If a complaint is sufficient to state a claim on which relief can be granted, the plaintiff's failure to respond to a Rule 12(b)(6) motion does not warrant dismissal."); *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) ("[I]f a motion to dismiss is granted solely because it has not been opposed, the case is simply not being dismissed because the complaint has failed to state a claim upon which relief may be granted. Rather, it is dismissed as a sanction for failure to comply with the local court rule."); *Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991) ("[T]he district court abused its discretion in dismissing [plaintiff's] complaint solely for his failure to respond to defendants' motion to dismiss."); *Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d 1210, 1214 (5th Cir. 1980) ("The trial court should have considered some sanction other than [Rule 12(b)(6)] dismissal with prejudice for failure to observe a filing deadline.").

B. A Single Circuit Allows a Complaint to be Dismissed Even if that Complaint States a Claim

In contrast with the majority rule, the First Circuit holds that a complaint may be dismissed on the grounds that a plaintiff waived an argument against dismissal by failing to make it in opposition to a motion to dismiss. That is so even when the complaint on its face states a claim. The First Circuit treats that conclusion as the logical outgrowth of its broader doctrine that a complaint may be dismissed for a mere failure to file an opposition.

1. The leading case in the First Circuit is *Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143 (1st Cir. 2004). In *Pomerleau*, the plaintiffs failed to file oppositions to the

defendants' motions to dismiss. *Id.* at 144. The district court then granted both motions, "based on the lack of opposition and the force of the defendants' arguments." *Id.* at 144–45.

On appeal, the First Circuit reiterated its rule, enunciated two years earlier in *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1 (1st Cir. 2002), that district courts may dismiss complaints as "a sanction for the plaintiffs' failure to file an opposition," *Pomerlau*, 362 F.3d at 145, reaffirming that "it is within the district court's discretion to dismiss an action based on a party's unexcused failure to respond to a dispositive motion when such response is required by local rule, at least when the result does not clearly offend equity." *Id.* (quoting *NEPSK*, 283 F.3d at 7). But the First Circuit expressed uncertainty as to whether the district court *in fact* had dismissed the complaint as a sanction or instead had evaluated the complaint and dismissed it on the merits. *See id.* at 146. The court explained that it was "unsure" whether the district court had relied on a local rule in dismissing the complaint, and that it was unsure whether the District of Massachusetts even *required* a non-moving party to respond to a motion to dismiss under its local rules. *Id.*

The court resolved the uncertainty by adopting the rule that now prevails in the First Circuit—that failure to address the *arguments* in a motion to dismiss waives any opposition to those arguments. The First Circuit explained that "[d]espite our concerns with the district court's orders, we need not decide whether the district court acted appropriately in dismissing the plaintiffs' complaint *because the plaintiffs failed to raise below the issues that they now argue on appeal*." *Id.* (emphasis added). The First Circuit thereby crafted the rule that now prevails in that circuit—a rule that permits district courts to dismiss meritorious complaints on the grounds that a plaintiff waived an argument against dismissal in

opposing the motion to dismiss, and then deprives them of appellate review for the exact same reason. *See id.* The First Circuit further explained that if a district court "wrongly grants the motion to dismiss because of the plaintiff's procedural default, … a party who fails to object to a motion to dismiss must raise any claims of error by filing the appropriate post-judgment motion, or forfeit his or her right to raise those claims" on appeal. *Id.* at 146-47. "To hold otherwise would undermine the ability of the district courts to serve as an effective and efficient forum for the resolution of disputes." *Id.* at 147.

In the years since *Pomerleau*, the First Circuit has consistently applied that case's rule that a complaint may be dismissed on the basis of waiver if the plaintiff fails to sufficiently develop an argument against dismissal in an opposition to a motion to dismiss.[9] In *Palange v. Forte*, No. 21-1481, 2022 WL 2359627 (1st Cir. Apr. 7, 2022), a pro se plaintiff's complaint was dismissed in the district court because he did not "develop" his argument against defendants' motion to dismiss on *Rooker-Feldman* grounds. *Id.* at *1. On appeal, the First Circuit then cited *Pomerleau* for the principle that the dismissal was proper and for the proposition that the plaintiff's failure to

[9] While the First Circuit's *Pomerleau* principle is neither explicitly mandatory nor permissive, a handful of district courts in the circuit have chosen to not follow it. *See, e.g.*, *Johnson v. City of Biddeford*, No. 2:17-CV-00264-JDL, 2018 WL 1173428, at *2 (D. Me. Mar. 6, 2018) ("In opposition, Johnson has neither objected nor responded to the State Defendants' first argument that there are insufficient allegations of conspiracy to state a claim pursuant to § 1985. Pursuant to Local Rule 7(b), failure to respond to a motion to dismiss means that opposition to the motion is waived ... and the motion may be granted for that reason alone. *However, in an excess of caution, I address the merits of the State Defendants' argument*.") (quotation marks and citations omitted, emphasis added).

oppose defendants' motion to dismiss doubled as a waiver of the right to appeal the dismissal as well. *Id.* (citing *Pomerleau*, 362 F.3d at 147).

Palange represents an unbroken line of cases in the First Circuit that reiterate and apply the *Pomerleau* principle. In contrast with the approach of the D.C. Circuit announced in *Washington Alliance*, the First Circuit has repeatedly applied *Pomerleau* in affirming the dismissal of complaints in the face of "unopposed" motions to dismiss. *See Neufville v. Coyne-Fague*, No. 21-1158, 2021 WL 3730224, at *1 (1st Cir. June 2, 2021) (affirming district court's dismissal of plaintiff's complaint for failure to respond to motion to dismiss, citing *Pomerleau* as precedent); *Newman v. Lehman Bros. Holdings Inc.*, 901 F.3d 19, 27 (1st Cir. 2018) (affirming dismissal of pro se plaintiff's complaint where argument was "waived" below for not being presented in opposition to defendant's motion to dismiss); *Torres-Fuentes v. Motorambar, Inc.*, 396 F.3d 474, 475 (1st Cir. 2005) (same).

C. District Courts in the Fourth, Eighth and Ninth Circuits Are in Disarray Over the Correct Rule

Lower courts in the Fourth, Eighth, and Ninth Circuits are in disarray over the appropriate rule, sometimes applying the majority rule and sometimes applying the First Circuit rule. It is untenable that litigants even within a single circuit cannot discern the standard governing waiver of issues in oppositions to motions to dismiss. Yet the waiver rules applied in these circuits often vary based only on the views of the particular judges who happen to hear their cases.

1. Numerous district courts in the Fourth, Eighth, and Ninth Circuits have followed the majority rule. *See Casey v. Brennan*, No. 1:19CV1204, 2021 WL 1177436, at *2 (M.D.N.C. Mar. 29, 2021) (applying the majority rule); *see also Evans v. Gilead Scis., Inc.*, No. 20-CV-00123-

DKW-KJM, 2020 WL 5189995, at *5 (D. Haw. Aug. 31, 2020) (similar); *Ortiz v. Alvarez*, No. 1:15-CV-00535-KJM, 2015 WL 5092681, at *5 (E.D. Cal. Aug. 28, 2015) (similar); *Orlick v. Grand Forks Hous. Auth.*, No. 2:14-cv-54, 2:14-cv-69, 2015 WL 10936736, at *6 (D.N.D. Mar. 19, 2015), *aff'd*, 616 F. App'x 218 (8th Cir. Oct. 8, 2015) (similar); *Hanshaw v. Wells Fargo Bank, N.A.*, No. 2:11-CV-00331, 2014 WL 4063828, at *4 n.5 (S.D.W. Va. Aug. 14, 2014) (same); *Kimbrough v. Woodbury Cnty. Jail*, No. C 13-3002-MWB, 2014 WL 941674, at *4 (N.D. Iowa Mar. 11, 2014) (similar); *Taylor v. Hull*, No. 4:13-CV-1065-CEJ, 2014 WL 562739, at *1 (E.D. Mo. Feb. 13, 2014) (similar); *Tyco Thermal Controls LLC v. Rowe Indus., Inc.*, No. 5:10-CV-01606 JF (PVT), 2010 WL 4056007, at *2 (N.D. Cal. Oct. 15, 2010); *Anderson v. Nationwide Mut. Ins. Co.*, No. 3:07-cv-00097, 2007 WL 9711270, at *1 (S.D. Iowa Dec. 5, 2007) (similar). *See also Ramos v. Rals Subway Nova LLC*, No. CV RBD-18-1223, 2018 WL 4914022, at *6 (D. Md. Oct. 10, 2018) ("Plaintiff, however, has not waived any claims merely because he has not reasserted them in opposition to his opponent's motion. Plaintiff does not even waive his claims by failing to oppose a Motion to Dismiss entirely."). Some of these courts have expressly recognized the conflict in choosing to follow the majority rule. *See R.N. by & through Neff v. Travis Unified Sch. Dist.*, No. 2:20-cv-00562-KJM-EFB, 2022 WL 1214902, at *5 (E.D. Cal. Apr. 25, 2022) (acknowledging conflict; following majority rule).

2. Yet, many courts in these circuits have also taken the *opposite* approach and applied the waiver rule used by the First Circuit. Several courts within the Ninth Circuit have held that "[w]here plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived." *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009), *aff'd*, 646 F.3d 1240 (9th Cir. 2011). *See also Christensen v. ReconTrust Co.*, No. 2:12-CV-21 JCM

(GWF), 2012 WL 1185909, at *1 (D. Nev. Apr. 6, 2012) ("In the absence of an amended complaint, ReconTrust's motion to dismiss is rendered effectively unopposed. Accordingly, this court finds itself constrained to grant the motion and dismiss the complaint."); *Shorter v. Los Angeles Unified Sch. Dist.*, No. CV 13-3198 ABC (AJW), 2013 WL 6331204, at *5-6 (C.D. Cal. Dec. 4, 2013) (similar).

The same is true in both the Fourth and Eighth Circuits. *See Hewitt v. City of Minneapolis*, No. CIV. 12-2132 (DWF/FLN), 2013 WL 718189, at *5 & 5 n.6 (D. Minn. Feb. 27, 2013) (dismissing complaint with prejudice where plaintiff did not timely file their opposition to a motion to dismiss, and was held to have waived all arguments); *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:13-CV-19979, 2018 WL 279992, at *2 (S.D.W. Va. Jan. 3, 2018) (applying minority approach); *Panico v. City of Westover*, No. 1:21-CV-96, 2022 WL 989120, at *3 (N.D.W. Va. Mar. 31, 2022) (same); *Peters v. Bray*, No. 4:12-cv-582, 2013 WL 7137524, at *1 (S.D. Iowa Apr. 1, 2013) (same).

II. This Case Is an Ideal Vehicle for Reviewing This Important Question

1. The question presented is of exceptional legal and practical importance. The circuit conflict has now reached nine circuits, with eight other circuit courts unanimously and firmly disagreeing with the First Circuit over the proper rule. The standard for dismissing a complaint under the Federal Rules of Civil Procedure should be uniform. Instead, the First Circuit's rule turns an opposition to a motion to dismiss into a high stakes game where failing to address even one argument can doom an otherwise meritorious complaint. Countless litigants are burdened by this rule and will continue to be unless this

Court provides relief and brings the First Circuit into conformity with every other circuit.

The sheer number of decisions applying waiver rules to oppositions to motions to dismiss confirms the issue's importance, and there is no genuine dispute that the issue arises frequently in courts nationwide.[10] *See supra* note 3. The number of motions to dismiss filed each year in federal courts around the country is staggering. *See* Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. Chi. L. Rev. 883, 923 (2020) (estimating the number at around 15,000 motions to dismiss for failure to state a claim each year). Where even a small fraction of those motions implicate waiver, the need to resolve the question presented is obvious. There is a reason that commentators are tracking this issue, flagging the circuit split, and cautioning parties to tread carefully in opposing motions to dismiss. *See supra* note 2. In the meantime, whether a dismissal solely on the basis of the quality of an opposition to a motion to dismiss will be upheld will continue to vary between the First

[10] In the D.C. Circuit alone, following that Circuit's decision in *Washington Alliance*, numerous district courts have acknowledged they can no longer deem unopposed or undeveloped arguments as conceded at the motion to dismiss stage. *See, e.g.*, *Lucas v. District of Columbia*, No. 13-CV-143 (TFH), 2019 WL 4860730, at *9 (D.D.C. Oct. 2, 2019) (acknowledging that district courts within the D.C. circuit can no longer dismiss claims because a motion to dismiss was unopposed after *Washington Alliance*); *see also Buitrago v. D.C.*, No. 18-CV-261(EGS), 2020 WL 1033343, at *4 (D.D.C. Mar. 3, 2020) ("Although [plaintiff] does not specifically respond to this argument in his opposition brief, the Court will consider whether he has adequately alleged such a claim in his Third Amended Complaint" due to *Washington Alliance*); *Ndoromo v. Barr*, No. CV 18-2339 (CKK), 2019 WL 2781412, at *3 (D.D.C. July 2, 2019), *aff'd*, No. 19-5211, 2020 WL 873550 (D.C. Cir. Feb. 13, 2020) (similar); *Amissah v. Gallaudet Univ.*, No. CV 19-679 (RC), 2019 WL 2550334, at *3 n.1 (D.D.C. June 20, 2019) (similar).

Circuit and every other. The Court's review is urgently warranted.

The consequences of the First Circuit's draconian rule have been felt by plaintiffs in dozens of cases within that circuit. *See, e.g.*, *Griffin v. Town of Cutler*, No. CIV.05-52-B-W, 2005 WL 2476249, at *1 (D. Me. Oct. 5, 2005) (collecting cases where plaintiffs' claims were dismissed at the motion to dismiss stage because their opposition brief to the motion to dismiss was insufficient or absent). These cases involved important issues ranging from parents seeking compensation for injuries inflicted on their newborn, *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990), to a family seeking justice after a family member was killed by law enforcement, *Est. of Bennett v. Wainwright*, No. 06-28 PC, 2007 WL 1576744, at *4 (D. Me. May 30, 2007) (dismissing plaintiffs' claims against one defendant because plaintiff did not respond to defendant's motion to dismiss arguments), *report and recommendation adopted by sub nom. In re Bennett v. Wainwright*, No. CIV. 06-28-P-S, 2007 WL 2028961 (D. Me. July 9, 2007), *aff'd sub nom. Est. of Bennett v. Wainwright*, 548 F.3d 155 (1st Cir. 2008). Nor are these cases outliers. The *Pomerleau* principle is applied so often in the First Circuit that the First Circuit's order below used a "*see, e.g.*" cite containing three cases involving waiver on the discrete issue of equitable tolling alone. Pet. App. 5a.[11]

[11] Several cases cited in the First Circuit's order below frame the issue as one where arguments were waived on appeal. *See, e.g.*, *Barrett ex rel. Estate of Barrett v. United States*, 462 F.3d 28, 40 n.9 (1st Cir. 2006). That is simply a different route of getting to the same result: a complaint can be dismissed by a district court, even if it states a claim, for non-opposition and then cannot be reviewed by an appellate court because the "argument" against dismissal was not raised below. Whether it is framed as a waiver on appeal or a

And the stakes of this waiver rule extend to cases that potentially implicate billions of dollars and the rights of tens of thousands of individuals. *See, e.g.*, *Washington Alliance*, 892 F.3d at 345 (applying no-waiver rule to permit action challenge nationwide labor regulations to proceed past motion to dismiss); *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 797 (5th Cir. 2012) (applying no-waiver rule in reversing dismissal of plaintiff's complaint, in order to address the merits of foreign citizen standing in federal courts); *Evans*, 2020 WL 5189995, at *1 (applying no-waiver rule to address merits of preemption arguments for product liability suit involving major HIV drug); *Adams v. F.A.A.*, No. 9:95-CV-103, 1995 WL 553630, at *1 (E.D. Tex. Sept. 1, 1995) (applying no-waiver rule to address the merits of plaintiff's arguments that Federal Aviation Administration and other federal agencies lack statutory authority to amend and revoke certain licenses). Despite these potentially high stakes, not all litigants can sufficiently oppose the arguments raised at the motion to dismiss stage when many are pro se or have inept counsel.

Absent this Court's involvement, the First Circuit has no incentive to change its position. This issue—that a complaint cannot be dismissed for mere failure to oppose an argument in a motion to dismiss—was squarely raised in the proceedings below, and the First Circuit's unpublished order did not even acknowledge it. Pet. App. 13a; Oral Arg. at 0:01-0:59; C.A. Br. 37-42; C.A. Reply Br. 5-11; *see also* Pet. En Banc at 6-12. The First Circuit has given every indication it will not relent. The First Circuit's rule will continue to impose harsh consequences on litigants absent this Court's relief.

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waiver at the district court, the rule undermines the principle that a complaint cannot validly be dismissed under Rule 12(b)(6) unless the complaint itself does not state a claim.

2. This case is an ideal vehicle for deciding this significant question. The dispute turns on a pure question of law: the proper standard for adjudicating a 12(b)(6) motion under the Federal Rules. It has no factual or procedural impediments. The question presented was squarely raised below and was the basis for petitioner's request for oral argument in the case. There is no conceivable obstacle to deciding this threshold legal question.

Furthermore, courts on both sides of the conflict have thoroughly ventilated the question presented. The majority and dissenting positions have explored every aspect of the debate. Courts adopting the majority position have expressed the view that a district court may not dismiss a complaint unless the complaint fails to state a claim, because that is the only approach in keeping with the Federal Rules of Civil Procedure. Indeed, the D.C. Circuit in *Cohen* and *Washington Alliance* outlined a path that shows the *Pomerleau* principle need not be followed to its logical extreme; rather, its most onerous effects should be cabined by the Federal Rules. In contrast, the First Circuit has justified its rule as one that protects "overburdened trial judges" from being compelled to be "mind readers" that otherwise would have to tease out arguments from a plaintiff's complaint alone. *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991).

3. The existence of other potential grounds for affirmance are not a barrier to this Court's review. The panel reached and resolved only one question in this appeal: the question whether petitioner's complaint was appropriately dismissed on grounds of untimeliness because she waived any argument against dismissal on those grounds. Pet. App. 1a. That holding was decisive. The panel provided no other justification for its affirmance in this case.

Thus, whether petitioner will be able to establish entitlement to equitable tolling on the merits is not an issue in this case. To be sure, the panel opinion suggested skepticism that petitioner would be able to establish an entitlement to tolling on the merits. Pet. App. 6a. But it is clear that the complaint in this case could not have been dismissed for failure to state a claim on that basis because petitioner's complaint was not required to "anticipate or meet potential affirmative defenses" such as the affirmative defense of untimeliness. *Richards v. Mitcheff,* 696 F.3d 635, 638 (7th Cir. 2012). That is why the First Circuit's order was premised on the waiver issue and not untimeliness on the merits. Pet. App. 1a. Moreover, this Court has consistently taken cases involving questions of *eligibility* for equitable tolling in recent years, without regard to whether a claimant will actually be entitled to toll the statute of limitations at issue. *United States v. Wong*, 575 U.S. 402 (2015); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020); *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493 (2022). The Court heard such a case this term involving the availability of equitable tolling to 38 U.S.C. § 5110(b)(1). *Arellano v. McDonough*, No. 21-432 (S. Ct. argued Oct. 4, 2022).[12]

4. Further percolation will not aid the Court's consideration of these important questions regarding the correct application of the Federal Rules of Civil Procedure. Petitioner's complaint would have been analyzed on its merits had her case arisen in the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, or D.C.

[12] For these same reasons, the question whether petitioner waived her discrimination claim was not reached and resolved below. Pet. App. at 1a. As a consequence, the Court can reach and resolve the question presented in this case and leave these remaining questions for remand, as it frequently does with non-threshold arguments not resolved by the court below.

Circuits. Instead, it was dismissed because it arose in the First. This case cleanly presents the issue and provides an ideal vehicle for resolving the circuit conflict. Not only is it an ideal vehicle, it may be the only one to come before this Court for a long time: the litigants most affected by this outlier rule are those who are *pro se* or possess limited resources unless a law firm or law school clinic decides to become pro bono counsel. Those litigants often lack access to resources and the wherewithal to bring this issue before the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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