No. 22-456

In the Supreme Court of the United States

LYNETT S. WILSON, PETITIONER

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) where the complaint was untimely on its face and where the court of appeals declined to consider petitioner's arguments concerning timeliness that were made for the first time on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported but is available at 2022 WL 2135269. The order of the district court (Pet. App. 7a-14a) is not published in the Federal Supplement but is available at 2021 WL 1840753.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2022. A petition for rehearing en banc was denied on August 24, 2022 (Pet. App. 61a-62a). The petition for a writ of certiorari was filed on November 9, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former federal employee who worked at a Department of Veterans Affairs (VA) Medical Center in Maine. Pet. App. 7a. In September 2017, petitioner was suspended for failure to report to work. *Ibid.*; Pet. 5. Petitioner, through counsel, appealed the suspension to the Merit Systems Protection Board (MSPB), alleging that the VA had constructively suspended her from her position by failing to reasonably accommodate her disability. Pet. App. 25a-26a. Petitioner and her counsel consented to participate in electronic filing with the MSPB and to receive all documents issued by the MSPB in electronic form. *Id.* at 4a.

On May 16, 2019, an administrative law judge found that petitioner failed to prove by a preponderance of evidence that she was constructively suspended from her position and therefore dismissed her appeal for lack of jurisdiction. Pet. App. 40a. Petitioner and her counsel received the decision electronically on that date. *Id.* at 4a. The decision contained a notice stating that the decision "will become final on **June 20, 2019**, unless a petition for review is filed [with the MSPB] by that date." *Id.* at 40a. The notice also provided detailed instructions concerning the deadlines that must be met to secure further review of the claims decided by the Board, including a warning that "[a]s a general rule," a party seeking judicial review of the MSPB's decision must file a petition for review with the U.S. Court of Appeals for the Federal Circuit "within **60 calendar days** of the date this decision becomes final." *Id.* at 46a. The notice further stated that for cases involving claims of unlawful discrimination, an individual "may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an

appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final." *Id.* at 47a.

Petitioner did not petition the MSPB for review of the administrative law judge's decision, so that decision became the final decision of the MSPB on June 20, 2019. Pet. App. 5a.

2. Petitioner, represented by the same counsel, filed a petition for review in the United States Court of Appeals for the Federal Circuit, seeking review of the MSPB's dismissal for lack of jurisdiction. The petition was filed on August 19, 2019, 60 days after the MSPB decision became final. Pet. App. 7a.[1]

The Secretary of the Department of Veterans Affairs (Secretary) moved to transfer the case to the U.S. District Court for the District of Maine, arguing that because petitioner alleged, in part, a discrimination claim, her appeal contained "mixed claims" that were properly addressed by a district court, not the Federal Circuit. Pet. App. 7a-8a (citation omitted); see *Perry* v. *MSPB*, 137 S. Ct. 1975, 1980-1981 (2017). Petitioner opposed the motion, contending that she had "waive[d] her discrimination claim to the extent required for [the Federal Circuit] to exercise jurisdiction." Pet. App. 8a. On January 17, 2020, the Federal Circuit granted the Secretary's motion, agreeing that "disposition of the jurisdictional question in this case would require the court to consider the merits of [petitioner's] discrimination claim, which is beyond our jurisdiction." *Id.* at 23a.

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[1] The court of appeals incorrectly stated that petitioner "waited 59 days before filing her petition with the Federal Circuit" rather than 60. Pet. App. 5a. That minor inaccuracy did not affect the court's decision and is not relevant to any issue in the case.

On June 8, 2020, the district court granted petitioner's unopposed motion to retransfer the case to the Federal Circuit, stating that it lacked jurisdiction over the case because petitioner had "clearly indicated that [s]he is bringing no claim of discrimination to this court." Pet. App. 21a.

3. On September 25, 2020, the Federal Circuit dismissed the petition. Pet. App. 17a-20a. The court noted that petitioner "continue[d] to classify this matter as a 'mixed case' " despite her disavowal of her discrimination claim in district court. *Id.* at 18a (citation omitted). The court observed that although petitioner now claimed that she was constructively discharged in retaliation for protected activity, she failed to explain what her protected disclosure might have been "apart from her internal claim of disability discrimination." *Id.* at 18a-19a. The court explained that while an individual may disavow her discrimination claim in order to seek review in the Federal Circuit, doing so here would "leave nothing for this [c]ourt to review" because petitioner "would lack any allegation capable of supporting her claim that her absence from work was the result of improper acts by the agency." *Id.* at 19a. As a result, petitioner, "who ha[d] been represented by counsel through the entirety of the proceedings, effectively pled herself out of" court. *Ibid.*

The Federal Circuit concluded that the interests of justice warranted dismissal rather than another transfer to the district court in light of petitioner's "continued refusal to proceed with the claim in th[e] proper forum." Pet. App. 19a. But on petitioner's unopposed motion, the Federal Circuit later vacated its dismissal order and transferred the case back to the District of Maine. *Id.* at 15a-16a.

4. On December 18, 2020, petitioner filed a four-count complaint and administrative appeal in district court. Pet. App. 71a-83a. Petitioner alleged that the Secretary had violated the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, by failing to accommodate her disability. In addition, petitioner asserted a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and two separate claims (whistleblower reprisal and procedural error) alleging, in nearly identical language, that the MSPB decision violated the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 79a-82a. The Secretary moved to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 10a. Petitioner, still represented by counsel, filed a response to the Secretary's motion. *Ibid.*; see Pet. 6.

The district court granted the Secretary's motion and dismissed petitioner's complaint. Pet. App. 7a-14a. As to subject matter jurisdiction, the court agreed with the Secretary that petitioner could not now assert jurisdiction in the district court given her prior arguments that the same court lacked jurisdiction to hear her case. *Id.* at 10a-11a. The court observed that petitioner's response to the Secretary's jurisdictional argument consisted of "a single, confusing sentence" that did not explain why the argument was erroneous or even whether her disagreement was factual or legal. *Id.* at 11a.

As to timeliness, the Secretary's motion had contended that to the extent petitioner wished to challenge the MSPB's dismissal of her discrimination claims, petitioner was required to file an appeal in the district

court by July 19, 2019, 30 days after the MSPB's decision became final. 5 U.S.C. 7703(b)(2). Because petitioner's complaint had not been filed until December 18, 2020, the Secretary argued the complaint was untimely. Pet. App. 11a. The Secretary also contended that equitable tolling was not available to petitioner. *Ibid.* The district court noted that petitioner's opposition brief made "no response to this argument." *Id.* at 12a. On that basis, the court "conclude[d] that [petitioner] has waived her right to respond" to the Secretary's arguments regarding timeliness and equitable tolling, and thus "concede[d] the [Secretary's] points." *Ibid.*

After adopting the Secretary's arguments on jurisdiction and timeliness, each of which independently supported dismissal, the district court further concluded that petitioner had failed to comply with the District of Maine's Local Rule 7(b), which requires written objections to a motion to dismiss to be filed within 21 days. Pet. App. 13a. The court noted that petitioner filed her response 30 days after the deadline had passed and 51 days after the Secretary filed his motion. *Ibid.* Petitioner's violation of the local rule "separately justifie[d] granting the [Secretary's] motion." *Ibid.*[2]

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court found it unnecessary to address the question whether the district court had statutory jurisdiction to consider petitioner's discrimination claims, relying on circuit precedent permitting it to "assume statutory jurisdiction * * * to follow an easier path to decision." *Id.* at 4a (citing *Díaz-Báez*

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[2] The government had consented to petitioner's request for a 30-day extension of time to file her opposition, but petitioner failed to file her extension motion with the district court. Pet. C.A. Reply Br. 8-9.

v. *Alicea-Vasallo*, 22 F.4th 11, 17 n.3 (1st Cir. 2021)). That easier path, the court reasoned, "involve[d] the untimeliness of [petitioner's] complaint." *Ibid.* The court noted that petitioner admitted that "the decision [of the MSPB] became final on June 20, 2019, a date taken straight from her complaint." *Id.* at 5a. Because undisputed facts established that petitioner had not sought review in any court until she filed in the Federal Circuit on August 19, 2019, the court of appeals agreed with the district court that petitioner was "time-barred from litigating in the district court." *Ibid.*

The court of appeals noted that petitioner, now represented by new counsel, had made several arguments on appeal challenging the district court's conclusion of untimeliness, including an argument for equitable tolling. Pet. App. 5a. But the court of appeals found that petitioner had waived these new arguments by failing to raise them in district court. *Id.* at 5a-6a. The court also concluded that to the extent petitioner contended she could not waive her equitable-tolling argument, that contention was incorrect. *Id.* at 6a n.2.

6. Petitioner filed a petition for rehearing en banc. The court of appeals denied the petition without noted dissent. Pet. App. 61a-62a.

ARGUMENT

The unpublished decision below is correct and does not conflict with any decision of another court of appeals. Petitioner primarily contends (Pet. 8-19) that further review is warranted to resolve a purported conflict in the lower courts concerning the propriety of dismissing a complaint under Federal Rule of Civil Procedure 12(b)(6) based on a plaintiff's failure to oppose a motion to dismiss. But the dismissal of petitioner's complaint was not premised on her failure to file an

opposition brief, and her case accordingly does not implicate any such conflict. At all events, this case would be a poor vehicle in which to address the question presented because petitioner's complaint was properly and independently dismissed for lack of subject matter jurisdiction, a threshold issue that this Court could be required to consider if it granted certiorari. Further review is not warranted.

1. The court of appeals correctly affirmed the dismissal of petitioner's complaint. Pet. App. 1a-6a.

a. Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief may be granted." To survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007); see Fed. R. Civ. P. 8(a)(2). In considering a motion to dismiss, a court must accept all well-pleaded material factual allegations in the complaint as true and construe them, along with reasonable inferences from those facts, in the light most favorable to the non-moving party. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009). Although the timeliness of a complaint is generally an affirmative defense, "dismissal under Rule 12(b)(6) * * * is appropriate if the complaint contains everything necessary to establish that the claim is untimely." *Tobey* v. *Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018) (citation omitted); see, *e.g.*, *Álvarez-Maurás* v. *Banco Popular of Puerto Rico*, 919 F.3d 617, 628 (1st Cir. 2019); *Ott* v. *Maryland Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 658 (4th Cir. 2018); *Akassy* v. *Hardy*, 887 F.3d 91, 95 (2d Cir. 2018).

Applying these principles on *de novo* review, the court of appeals correctly affirmed the dismissal of

petitioner's complaint because it was untimely on its face. The complaint (1) described the suit as "a 'mixed case' of discrimination and non-discrimination based claims," Pet. App. 72a, (2) acknowledged that the MSPB's decision "became final on June 20, 2019," *ibid.*, and (3) alleged that petitioner "filed a timely appeal of the MSPB Final Order with the U.S. Court of Appeals for the Federal Circuit * * * which was ultimately transferred to the U.S. District Court for the District of Maine," *ibid.* As the court of appeals noted, and petitioner did not dispute, "mixed-case" suits like petitioner's must be filed within 30 days of a final decision, meaning the deadline for petitioner's suit was July 19, 2019. *Id.* at 3a. Because petitioner did not file in any court until August 19, 2019, the court of appeals correctly held that "she is time-barred from litigating in the district court." *Id.* at 5a.[3]

b. Petitioner criticizes the decision below as resting on a purported rule adopted by the First Circuit that "a failure to oppose a motion to dismiss in the district court is a categorical waiver." Pet. 2; see Pet. 7, 15-16. That assertion mischaracterizes both the decision below and the First Circuit's precedent.

In the First Circuit, as in other circuits, "[w]hen deciding a 12(b)(6) motion, the mere fact that a motion to dismiss is unopposed does not relieve the district court of the obligation to examine the complaint itself to see

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[3] Certain of the facts cited by the court of appeals, such as the date on which petitioner filed her appeal in the Federal Circuit, were derived from documents outside the complaint. The court of appeals explained that it could rely on such documents without converting the Secretary's motion into a motion for summary judgment. See Pet. App. 4a n.1. Petitioner does not contend in this Court that the court of appeals erred in relying on these documents.

whether it is formally sufficient to state a claim." *Pomerleau* v. *West Springfield Pub. Sch.*, 362 F.3d 143, 145 (1st Cir. 2004) (citation and internal quotation marks omitted); see, *e.g.*, *Stevenson* v. *City of Seat Pleasant, Md.*, 743 F.3d 411, 416 n.3 (4th Cir. 2014) (citing *Pomerleau*, 362 F.3d at 145). Accordingly, in the First Circuit, as elsewhere, "a court may not automatically treat a failure to respond to a 12(b)(6) motion as a procedural default." *Pomerleau*, 362 F.3d at 145.

At the same time, the First Circuit, like other courts of appeals, has long recognized that a district court is not required to develop arguments not made by a party represented by counsel. See, *e.g.*, *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir), cert. denied, 494 U.S. 1082 (1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").[4] And arguments not made in the district court generally are not considered by courts of appeals—even in appeals from dismissals for failure to state a claim.[5]

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[4] See also, *e.g.*, *James Cape & Sons Co.* v. *PCC Const. Co.*, 453 F.3d 396, 401 (7th Cir. 2006) ("District judges are not mind readers, and should not be required to explain to parties whether or how their complaints could be drafted to survive a motion to dismiss."); *Gregory* v. *Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir.) (en banc), cert. denied, 558 U.S. 1025 (2009); *Therrien* v. *Target Corp.*, 617 F.3d 1242, 1252 (10th Cir. 2010).

[5] See, *e.g.*, *Bell* v. *Sheriff of Broward Cnty.*, 6 F.4th 1374, 1377 (11th Cir. 2021); *Harper* v. *Southern Pine Elec. Coop.*, 987 F.3d 417, 424 n.9 (5th Cir. 2021); *Jones* v. *Horne*, 634 F.3d 588, 603 (D.C. Cir. 2011); *M.M. Silta, Inc.* v. *Cleveland Cliffs, Inc.*, 616 F.3d 872, 879 (8th Cir. 2010); *Venkatraman* v. *REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005); *Lepard* v. *NBD Bank*, 384 F.3d 232, 235 (6th Cir. 2004), abrogated on other grounds by *Marshall* v. *Marshall*, 547

In this case, the court of appeals affirmed the dismissal of petitioner's complaint only after conducting a *de novo* review and concluding, based on facts contained in the complaint itself, that petitioner's filing was untimely. Although the court declined to consider petitioner's new arguments regarding equitable tolling and her other excuses for untimeliness, it did so not based on any categorical rule about "failure to oppose a motion to dismiss," Pet. 2—in fact, petitioner filed an opposition to the Secretary's motion—but based on the hornbook rule that courts of appeals generally do not consider arguments not raised in the district court. Pet. App. 5a (citing decisions to that effect). The decision below is therefore a pedestrian application of the uniform rule that courts of appeals have discretion not to consider arguments made for the first time on appeal, including in appeals from dismissal under Rule 12(b)(6).

To be sure, the *district court* concluded that petitioner had violated Local Rule 7(b) by filing her opposition brief after the 21-day deadline, and explained that this default provided an additional, independent ground that "separately justifie[d]" dismissal of petitioner's complaint. Pet. App. 13a. But the court of appeals did not affirm based on that alternative holding; indeed, it did not even mention petitioner's late filing of her opposition brief. This case thus does not present any question about the propriety of granting a motion to dismiss

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U.S. 293 (2006); *Zerilli-Edelglass* v. *New York City Transit Auth.*, 333 F.3d 74, 79 (2d Cir. 2003); *McDonald* v. *Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002); *Kyle* v. *Morton High Sch.*, 144 F.3d 448, 454 (7th Cir. 1998) (per curiam); *Althouse* v. *Resolution Trust Corp.*, 969 F.2d 1544, 1546 (3d Cir. 1992); *Powers* v. *Boston Cooper Corp.*, 926 F.2d 109, 111 (1st Cir. 1991); *Vincent* v. *Trend W. Tech. Corp.*, 828 F.2d 563, 570-571 (9th Cir. 1987).

solely on the ground that the plaintiff failed to file an opposition in compliance with a district court's local rules.

2. Petitioner contends that the lower courts are divided on the question presented, with "[t]he majority rule" holding "that a failure to oppose a motion to dismiss is not sufficient grounds to dismiss a complaint that states a claim." Pet. 2; see Pet. 8-19. As explained above, however, the court of appeals did not affirm the dismissal of petitioner's complaint based on her "failure to oppose a motion to dismiss." Instead, its affirmance was premised on the facial untimeliness of petitioner's complaint and her the failure, at the district court level, to present the arguments on which she sought to rely on appeal. The purported circuit conflict petitioner identifies thus is not implicated in her case, and the cases petitioner cites do not demonstrate that another court of appeals would have reached a different result on the facts here.

To begin with, the decision below does not conflict with *Washington Alliance of Technology Workers* v. *Department of Homeland Security*, 892 F.3d 332 (D.C. Cir. 2018). There, the district court determined "that Washtech stated a plausible claim for relief," but nevertheless dismissed the complaint with prejudice because it concluded that "Washtech's response in opposition to the motion to dismiss was inadequate." *Id.* at 344. The D.C. Circuit reversed, holding 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. But in reaching that holding, the D.C. Circuit distinguished its prior cases "affirm[ing] district court decisions that treated as conceded an issue left entirely unaddressed by the plaintiff in a timely

filed response." *Id.* at 344 (citing *Texas* v. *United States*, 798 F.3d 1108, 1110, 1113–1116 (D.C. Cir. 2015), cert. denied, 577 U.S. 1119 (2016); *Wannall* v. *Honeywell, Inc.*, 775 F.3d 425, 428–429 (D.C. Cir. 2014)). Petitioner's case falls squarely within this line of precedent. Petitioner filed a response to the Secretary's motion to dismiss, but "ma[de] no response to" the Secretary's timeliness arguments, thereby "conced[ing] the [Secretary's] points." Pet. App. 12a.

The decision below also does not conflict with *Marcure* v. *Lynn*, 992 F.3d 625 (7th Cir. 2021). The district court in that case struck the plaintiff's response to a motion to dismiss and then granted the defendants' motion because it was unopposed. *Id.* at 628. The Seventh Circuit reversed, concluding that a district court "may not grant 12(b)(6) motions solely because they are unopposed." *Id.* at 632. At the same time, the Seventh reaffirmed its earlier holding that where a plaintiff "responded to a motion to dismiss but did not address all the challenged claims," the district court could " 'deem[] confessed' the unaddressed claims and dismiss[] them." *Id.* at 632-633 (quoting *Stanciel* v. *Gramley*, 267 F.3d 575 (7th Cir. 2001)). The same logic applies in this case; the district court did not grant the Secretary's motion because it was unopposed, but rather because petitioner *did* oppose the motion and conceded the timeliness issue by failing to address it.

Petitioner also errs in arguing (Pet. 13) that the decision below conflicts with *Issa* v. *Comp USA*, 354 F.3d 1174 (10th Cir. 2003). The Tenth Circuit held in that case only that "a district court may not grant a motion to dismiss for failure to state a claim 'merely because [a party] failed to file a response.' " *Id.* at 1177 (quoting *Reed* v. *Bennett*, 312 F.3d 1190 (10th Cir. 2002))

(brackets in original). The Tenth Circuit reversed and directed the district court on remand "to address the merits of [the defendant's] motion to dismiss." *Id.* at 1179. Here, by contrast, the district court addressed the merits of the arguments presented to it and concluded, after reviewing the complaint, that the Secretary's arguments were correct. See Pet. App. 12a.

For similar reasons, the decision below does not conflict with *Giummo* v. *Olsen*, 701 Fed. Appx. 922 (11th Cir. 2017) (per curiam), *McCall* v. *Pataki*, 232 F.3d 321 (2d Cir. 2000), *Stackhouse* v. *Mazurkiewicz*, 951 F.2d 29 (3d Cir. 1991), *Carver* v. *Bunch*, 946 F.2d 451 (6th Cir. 1991), and *Ramsey* v. *Signal Delivery Serv., Inc.*, 631 F.2d 1210 (5th Cir. 1980). As petitioner acknowledges (Pet. 13-14), those decisions simply hold that a district court may not dismiss an otherwise-sufficient complaint "for the mere failure to oppose" the motion to dismiss. The results of those cases accordingly do not conflict with the dismissal of petitioner's complaint, which did not rest on "mere failure to oppose" the Secretary's motion.

Finally, petitioner errs in asserting (Pet. 17-19) that review is necessary to resolve disagreement or uncertainty among the district courts in the Fourth, Eighth, and Ninth Circuits. As an initial matter, district-court decisions cannot give rise to a conflict warranting this Court's review. See Sup. Ct. R. 10; cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) (noting lack of precedential value of district-court decisions). And in any event, the district court cases petitioner cites primarily concern whether a motion to dismiss can be granted where the plaintiff failed to file any response to the motion. See, *e.g.*, *R.N., by & through Neff* v. *Travis Unified Sch. Dist.*, 599 F. Supp. 3d 973, 980 (E.D. Cal. 2022)

(holding that court "will not grant a 12(b)(6) motion solely because it is unopposed"). As discussed, this case does not implicate any conflict over that question.

3. The unpublished decision below would also be a poor vehicle for addressing the question presented. In addition to determining that dismissal was appropriate for failure to state a claim under Rule 12(b)(6), the district court independently dismissed the complaint for lack of jurisdiction under Rule 12(b)(1). The court correctly concluded that it lacked statutory jurisdiction to hear petitioner's case because petitioner was judicially estopped from litigating in the district court. There is consequently no reasonable likelihood that petitioner could ultimately proceed with her suit even if the Court granted review and held that the complaint should not have been dismissed for failure to state a claim. And because the issue is jurisdictional, this Court would at minimum have to consider whether it could reach the question presented without first considering and deciding that question itself.

The Federal Circuit has "exclusive jurisdiction" over any "appeal from a final order or decision of the [MSPB], pursuant to [5 U.S.C.] 7703(b)(1)." 28 U.S.C. 1295(a)(9). Accordingly, a district court has jurisdiction to review an MSPB decision only if it falls within an exception to Section 7703(b)(1). Here, the potentially relevant exception to the Federal Circuit's exclusive jurisdiction is the one for mixed cases—that is, cases including allegations of "discrimination." 5 U.S.C. 7703(b)(2). But petitioner is judicially estopped from maintaining that her case involves such allegations.

"As a general matter, the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either

in a prior legal proceeding or in an earlier phase of the same legal proceeding." *Alternative Sys. Concepts, Inc.* v. *Synopsys, Inc.*, 374 F.3d 23, 32–33 (1st Cir. 2004) (citation omitted). While there is "no mechanical test for determining its applicability," in the First Circuit "two conditions must be satisfied": (1) "the estopping position and the estopped position must be directly inconsistent," and (2) "the responsible party must have succeeded in persuading a court to accept its prior position." *Id.* at 33; see *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (same).

Here, both conditions are plainly satisfied. Petitioner unambiguously "abandoned her discrimination claims," C.A. App. 9, leading the district court to hold that it lacked statutory jurisdiction and to transfer the action back to the Federal Circuit, Pet. App. 21a. And after the Federal Circuit dismissed her petition, petitioner sought to assert the discrimination claims she abandoned as a basis for the district court's jurisdiction. Pet. App. 10a. The resulting "procedural morass," Pet. 6, is the sort of "improper[] manipulat[ion of] the machinery of the judicial system" that the judicial estoppel doctrine is meant to prevent, *Alternative Sys.*, 374 F.3d at 33. Given petitioner's prior representations about the absence of jurisdiction in the district court, there is no reasonable likelihood that this Court's resolution of the question presented would permit petitioner to proceed with litigation in the district court.

What is more, the presence of that antecedent jurisdictional issue could prevent this Court from reaching the question presented in the petition, or at minimum complicate its review. "[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in

suit (subject-matter jurisdiction)." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007) (citing *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83 (1998)). The court of appeals bypassed the jurisdictional question in this case based on circuit precedent that it interpreted to allow it to "assume statutory jurisdiction." Pet. App. 4a (citing *Díaz-Báez v. Alicea-Vasallo*, 22 F.4th 1, 17 n.3). But this Court has not approved such a practice.

Accordingly, this Court could not reach the question presented in the petition unless it (i) resolved the threshold jurisdictional question in petitioner's favor, (ii) approved the court of appeals' conclusion that courts may "assume" the existence of statutory subject-matter jurisdiction, or (iii) held that a dismissal on timeliness grounds is the sort of threshold, nonmerits determination that a court may make before assuring itself of jurisdiction, see *Sinochem*, 549 U.S. at 430-431; but cf. *Aldossari* v. *Ripp*, 49 F.4th 236, 248 (3d Cir. 2022) ("It is not immediately obvious * * * that [a] statute of limitations counts as a threshold non-merits issue."). The need to address those antecedent issues would make this case an unsuitable vehicle for considering the question presented even if that question otherwise warranted this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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