No. 22-456

In the Supreme Court of the United States

LYNETT S. WILSON,
PETITIONER

v.

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

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The United States forges a new path to opposing certiorari: flag that a case presents an additional cert-worthy threshold question, implicating an intractable and longstanding 8-4-1 circuit conflict. As the United States admits, the question whether courts have the power to "assume" statutory jurisdiction implicates a three-decade-old circuit split on a fundamental constitutional question at the heart of federal courts' power to render judgment in a case and on which every circuit has weighed in. Opp. 16-17; *see also infra* pp. 6-10 (discussing split).

Contrary to the United States' position, the fact that this case raises that question is not a reason to deny the petition, but further reason to grant it. There is, after all, no way this Court can otherwise reach and resolve that deep circuit conflict but in a case like this one—where a party lost in the court of appeals on some other basis—because the doctrine comes into play only in cases where a court determines that ruling against a party on a different basis provides the court with "an easier path to

decision." Opp. 6. This Court nearly granted certiorari on this issue only a few years ago in *Vitol S.A v. Autoridad de Energia Electrica de Puerto Rico*, No. 17-951 (U.S.). This case now presents a clean vehicle to decide it.

The Court should, therefore, add the following question to this case and grant certiorari:

> Whether the rule espoused in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998), is limited to Article III jurisdictional disputes or whether it applies to statutory as well as Article III jurisdictional disputes.

See Opp. 17.

As for the circuit split addressed in the petition, the United States twists itself in knots pretending the split is not what petitioner says it is or is not implicated in this case. Both claims are wrong, as reading the decisions below and the cases in the split makes plain.

The split is glaring. Eight circuits have squarely held that a district court impermissibly fails to hold the movant to its burden of persuasion by granting a Rule 12(b)(6) motion on the basis that the plaintiff failed to oppose the motion in full or in part. Pet. 10-14; *see, e.g.*, *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021); *Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018). The First Circuit, in contrast, holds that a well-pleaded complaint may be dismissed solely because a party's arguments against dismissal were not "raise[d]" in opposition to the motion dismiss and are, therefore, "waived." Pet. App. 5a. "Only the First Circuit has adopted [that] position." *Marcure*, 992 F.3d at 632.

This case squarely implicates the circuit split. Petitioner's case was not dismissed on its merits; it was dismissed on the basis of waiver. Twice. The United States concedes the district court dismissed the case on the basis of waiver. Opp. 6. The court of appeals *also*

dismissed the case on the basis of waiver.[*] Neither court held the United States to its burden to establish that the complaint "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). That burden cannot be met in this case because the complaint plainly states a claim.

This case is thus the archetypical example of a case that only the First Circuit would dismiss. Had this case arisen in the D.C. Circuit, the district court would have been obligated to actually determine whether the complaint could be dismissed as untimely. *See* Pet. 20 n.10 (collecting cases applying *Washington Alliance*). Neither the district court nor the court of appeals undertook that analysis because courts in the First Circuit are not required to do so; they may dismiss even meritorious complaints solely on the basis of waiver.

The United States nowhere disputes that the two circuit splits this case implicates are legally and practically significant and nationally important. Thousands of motions to dismiss and oppositions to motions to dismiss are filed in federal courts nationwide each year—the rule that governs waiver and forfeiture in the context of those motions is enormously significant and

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[*] The United States argues the split is not implicated because the First Circuit panel, after conducting its own "*de novo*" review of the complaint, held that petitioner's complaint failed to state a claim on the merits. Opp. 8-11. But that is not what happened. The court of appeals applied the exact same waiver rule that the district court erroneously applied. The First Circuit panel held that petitioner's complaint was ineligible for equitable tolling not because it is ineligible for equitable tolling (it clearly is) but because "she waived [her equitable tolling arguments] …. by not raising them" in opposition to the motion to dismiss. Pet. App. 5a. The panel's holding that it does not matter whether petitioner's complaint in fact states a claim because she failed to make an adequate argument against dismissal in her motion to dismiss is what the circuit split is about.

frequently recurring. And the question whether statutory jurisdiction may be "assumed" for purposes of deciding another issue "has significant implications for this case and for many others." *Steel Co.*, 523 U.S. at 89. If assumed statutory jurisdiction is impermissible, as the United States suggests, it could be only because it fails to "observ[e] the constitutional limits set upon courts in our system of separated powers." *Id.* at 109-10. That is a question this Court should answer. Especially where, as here, eight courts of appeals embrace the practice, four reject it, and the D.C. Circuit straddles both sides. *See infra* pp. 6-10; *Mowrer v. Dep't of Transp.*, 14 F.4th 723, 733-34 (D.C. Cir. 2021) (Katsas, J., concurring). *But see id.* at 749 (Randolph, J., concurring in part and concurring in the judgment).

ARGUMENT

I. This Case Directly Implicates the Circuit Split Raised by the Original Question Presented

1. As the petition established, this case implicates a clear and intractable conflict over whether courts may dismiss meritorious complaints merely because a party failed to adequately oppose a motion to dismiss. Pet. 8-19.

2. In response, the United States claims that First Circuit law does not squarely conflict with the law of any other circuits. Opp. 12-15. Specifically, the United States argues that the facts here are distinguishable from *Washington Alliance*, and that *Marcure* and the other cases in the split are not about dismissals on the basis of waiving individual arguments but dismissals based on the failure to file an opposition at all. The United States is mistaken.

As an initial matter, the United States cannot credibly dispute that the First Circuit's ruling squarely conflicts with the holding in *Washington Alliance*. *Washington Alliance* held that a plaintiff does not waive

any arguments against dismissal when the plaintiff's opposition insists that the complaint states a claim. 892 F.3d 332, 344 (2018). The D.C. Circuit thus would not treat the arguments in this case as "unaddressed" and waived. *Contra* Opp. 12-13. Under *Washington Alliance*, a plaintiff avoids waiver by "assert[ing] that '[e]ach count contains both a legal and factual basis' for relief." 892 F.3d at 344 (quoting plaintiff's opposition). The opposition in this case did exactly that. *See* Opp. MTD 3-4 (Dist. Ct. Docket No. 37) (asserting that the "complaint when considered as a whole … is plausible … and states a claim upon which relief can be granted"). *Washington Alliance* clearly held that failing to argue a specific point in an opposition to a motion to dismiss *does not concede it*. 892 F.3d at 344-45. Both the district court and the court of appeals in this case held exactly the opposite. *See* Pet. App. 5a, 12a.

The United States next turns to *Marcure* and the other cases in the split and argues their holdings are limited to failure to file an opposition at all. Opp. 13-14. That is incorrect. These cases announced a far broader rule: dismissing a meritorious complaint on the basis of implicit waiver fails to hold the movant to the burden of establishing that the complaint itself "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see Marcure*, 992 F.3d at 631; *Issa v. Comp USA*, 354 F.3d 1174, 1177-78 (10th Cir. 2003); *Giummo v. Olsen*, 701 F. App'x 922, 924-25 (11th Cir. 2017) (per curiam); *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000); *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991); *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991); *Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d 1210, 1214 (5th Cir. 1980). The United States would read those cases to announce a bizarre rule under which parties would be better off filing nothing in response to a motion

to dismiss than actually filing one. None of those circuits endorses that position.

3. The United States also contends that the court of appeals actually affirmed dismissal of the complaint on the merits based on its "*de novo*" review, not based on waiver. Opp. 8-11. That is a strange argument given that the court of appeals explicitly said it was affirming the district court's waiver-based dismissal on the basis that plaintiff "waived" her arguments against dismissal. Pet. App. 5a-6a. The court of appeals did not assess the sufficiency of plaintiff's complaint any more than the district court did; if it had, it would have held that the complaint could not be dismissed because the complaint states a claim and nothing on the face of the complaint or in the record forecloses equitable tolling. Pet. 24.

The First Circuit applied the same rule in this case that it routinely applies. *See, e.g.*, *Harriman v. Bolduc*, No. 1:22-cv-00264-JDL, 2023 WL 2162809, at *2 (D. Me. Feb. 22, 2023). Absent this Court's intervention, the First Circuit will continue dismissing meritorious complaints.

4. Finally, the United States argues that the chaos in district courts in the Fourth, Eighth, and Ninth Circuits, *see* Pet. 17-19, is irrelevant, *see* Opp. 14-15. But this Court exists to bring uniformity and stability to federal law. The fact that dozens of cases each year are being treated differently on a recurring and exceptionally important threshold issue, even in the very same courtrooms, calls for this Court's review.

II. The Additional Circuit Split Identified in Respondents' Brief Makes this Case *More* Worthy of Certiorari

This case also presents an ideal opportunity to resolve an 8-4-1 circuit split regarding whether courts may "assume" statutory jurisdiction.

1. As the United States flags in its opposition (at 15-17), this case implicates an entrenched and intractable

conflict over whether courts may "assume" statutory jurisdiction when they believe that another ground provides an easier route to dismissal of the case. This conflict is longstanding and acknowledged. *See* Ryan C. Williams, *Jurisdiction as Power*, 89 U. Chi. L. Rev. 1719, 1783-84 (2022); Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power,* 68 Ala. L. Rev. 493, 497, 511-12, 542-44 (2016).

a. It is settled law in the First Circuit that courts may assume statutory jurisdiction if another ground provides "an easier path to decision." Pet. App. 4a (citing *Díaz-Báez v. Alicea-Vasallo*, 22 F.4th 11, 17 n.3 (1st Cir. 2021)); *see Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003) ("well established").

The same rule is also settled law in the Second, Third, Sixth, Eighth, Ninth, Tenth, and Federal Circuits. *See, e.g.*, *Butcher v. Wendt*, 975 F.3d 236, 244 (2d Cir. 2020) ("not unique"); *Jordon v. Att'y Gen. of U.S.*, 424 F.3d 320, 325 n.8 (3d Cir. 2005); *Khodr v. Holder*, 531 F. App'x 660, 665 n.4 (6th Cir. 2013); *Lukowski v. INS,* 279 F.3d 644, 647 n.1 (8th Cir. 2002); *De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1291 (9th Cir. 2022) ("settled"); *Yancey v. Thomas,* 441 F. App'x 552, 555 n.1 (10th Cir. 2011); *Minesen Co. v. McHugh,* 671 F.3d 1332, 1337 (Fed. Cir. 2012).

The Second Circuit's opinion in *Butcher v. Wendt*, 975 F.3d 236 (2d Cir. 2020), sets forth the reasoning of the majority side of the split. The court explained that *Steel Co.* "focus[ed] on Article III jurisdiction" and courts must keep "faith" with that focus. *Id.* at 242. Thus, "[w]here the potential lack of jurisdiction is a constitutional question," courts must "decide the question." *Id.* (quotation marks omitted). If, however, "jurisdictional constraints are imposed by statute, not the Constitution," it is "particularly prudent to assume hypothetical jurisdiction

where the jurisdictional issues are complex and the substance of the claim is plainly without merit." *Id.* at 242-43 (cleaned up).

b. Those cases conflict with settled law in the Fourth, Fifth, Seventh, and Eleventh Circuits. *See, e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 232-34 (4th Cir. 2017); *Garcia v. Quarterman*, 573 F.3d 214, 216 n.4 (5th Cir. 2009); *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 573 (7th Cir. 2012); *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288-89 (11th Cir. 2012), *cert. denied*, 571 U.S. 952 (2013).

The Eleventh Circuit's holding in *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) (Pryor, J.), embracing the minority position, is instructive. Quoting the portion of *Steel Co.* that explained that "[t]he *statutory* and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers," the Eleventh Circuit explained that *Steel Co.* bars courts from assuming *any* type of jurisdiction—constitutional or statutory. *Id.* at 1288 (quoting *Steel Co.*, 523 U.S. at 101) (emphasis added).

c. The D.C. Circuit stands on both sides of the split. *See Mowrer*, 14 F.4th at 737-38 (Katsas, J., concurring) (citing conflicting cases). The arguments on each side were fully ventilated in dueling opinions by Judge Katsas and Judge Randolph in *Mowrer v. Department of Transportation*, 14 F.4th 723 (D.C. Cir. 2021). In *Mowrer*, the D.C. Circuit first held that the Fair Credit Reporting Act "waives federal sovereign immunity," *id.* at 730, then held that the plaintiffs nonetheless lacked a cause of action under the Act, *id.* at 732-33.

Judge Randolph, concurring in part and concurring in the judgment, criticized the majority's decision to reach the sovereign-immunity question given the fact that all agreed the plaintiffs' claims failed on the merits. *Id.* at 743 (Randolph, J., concurring in part and concurring in the

judgment). Judge Randolph asserted that it was "improper" for the majority to take a position on the sovereign-immunity question in light of a circuit conflict on the issue, and that the court should have assumed statutory jurisdiction to dispose of the case on the merits. *Id.* He explained that "*Steel Co.*'s priority-of-decision rule is limited to Article III jurisdiction." *Id.* at 745. That limited rule "dr[aws] support from the text and structure of Article III, the common understanding of what it takes to make a justiciable case, and a long and venerable line of precedent stretching back to 1804." *Id.* at 746 (quotation marks omitted). In contrast, Judge Randolph explained, none of those sources supports a similar priority rule for statutory jurisdiction. *See id.* at 746-49.

Judge Katsas wrote a concurrence responding to Judge Randolph's concurrence. *See id.* at 733 (Katsas, J., concurring). Judge Katsas wrote that *Steel Co.*'s "emphatic[]" holding extends to all forms of jurisdiction "without exception." *Id.* (quotation marks omitted). He explained that, "[a]s a conceptual matter, it makes little sense, in distinguishing between jurisdiction and the merits, to differentiate constitutional and statutory jurisdiction." *Id.* at 736. Judge Katsas noted that "nothing in Article III" suggests that jurisdictional rules established under Article III, section 1 (statutory jurisdiction) "are of lesser kind" than those established under Article III, section 2 (case-or-controversy jurisdiction). *Id.* at 737. Because neither Article III nor *Steel Co.* "impose[s] a hierarchy of jurisdictional issues," Judge Katsas concluded, federal courts "should not either." *Id.*

2. The opportunity to resolve this longstanding circuit conflict makes this case more cert-worthy, not less. As the breadth of the split and the sheer number of cases relying on "assumed" statutory jurisdiction reveal, this issue is important and frequently recurring. And no further

percolation is possible because every circuit has chosen a side (or two). This issue also cannot be resolved except in a case like this one, because the entire premise of "assumed" jurisdiction is that *some other* issue was easier to resolve *against* the plaintiff. A case involving another cert-worthy question is thus the best possible vehicle for reviewing and resolving this conflict. Far from weighing against review, the fact that this case implicates the assumed jurisdiction split is a further reason to *grant* review.

3. The United States claims (at 15-17) that there would not be statutory jurisdiction in this case. That is incorrect but also immaterial: If the First Circuit and petitioner are correct that a court of appeals can assume statutory jurisdiction, then the Court can proceed to decide the original question presented; if the First Circuit and petitioner are incorrect, the Court can so hold and remand the case to the First Circuit to resolve the question of statutory jurisdiction in the first instance.

III. This Case Is an Optimal Vehicle for Addressing Both Circuit Splits

This case is an optimal vehicle for deciding both of the circuit splits involved. As the petition explained, it is ideal for resolving the circuit split over whether courts may grant 12(b)(6) motions on the basis of waiver. Pet. 23-25. That dispute turns on a pure question of law; courts on both sides of the conflict have thoroughly ventilated the issue; and the issue was outcome determinative in this case. This case is also an optimal vehicle for deciding the jurisdictional question. The United States identifies no barrier to reviewing it—quite the opposite: the United States claims this case requires the Court to decide it. This case is an ideal vehicle finally to do so.

The United States does not contend that further percolation would aid the Court's resolution of either

question presented. These questions are important and ready for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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