No. 22-914

In the

Supreme Court of the United States

STANLEY WALESKI,

Petitioner,

v.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS LLP, NATALIE RAMSEY AND LEONARD BUSBY,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit properly affirm the district court's determination that Mr. Waleski's claims are plainly time-barred without second-guessing the decisions of the bankruptcy court and the district court holding that this matter falls within the federal bankruptcy courts' "arising in" jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Montgomery, McCracken, Walker & Rhoads LLP does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Stanley Waleski ("Mr. Waleski") initiated this lawsuit against Montgomery, McCracken, Walker & Rhoads, LLP, Natalie D. Ramsey, and Leonard Busby (collectively, "MMWR") on April 18, 2018 in the Court of Common Pleas for Luzerne County, Pennsylvania. Mr. Waleski's claims were based on legal services MMWR provided during a chapter 11 proceeding in the case captioned *In re Tronox Inc., et al.*, Case No. 09-10156 in the U.S. Bankruptcy Court for the Southern District of New York. Mr. Waleski purported to assert breach of contract claims on his own behalf and on behalf of a putative class of persons (the "Avoca Plaintiffs") who asserted personal injury claims based on alleged exposure to creosote released by the wood treatment plant in Avoca, Pennsylvania owned by Tronox, Inc. (f/k/a Kerr-McGee Corporation).

A. Mr. Waleski's Original State Court Complaint.

Mr. Waleski claimed that in the course of its work in the Tronox bankruptcy on the Avoca Plaintiffs' behalf, MMWR breached its professional obligations by:

(a) serving as bankruptcy court-approved counsel for one of the Avoca Plaintiffs in his capacity as a member of the unsecured creditors committee;

(b) failing to object to a group proof of claim filed by another group of personal injury claimants against Tronox based on

creosote exposure (the "Mississippi Claimants");

(c) drafting the trust documents that would govern the administration of the Tort Claims Trust in a manner that failed to accord the Avoca Plaintiffs priority over competing claims; and

(d) failing to object to the $5.15 billion settlement of the related adversary proceeding ("Anadarko Litigation") from which the Tort Claims Trust received partial funding and which constituted a compromise of claims in the bankruptcy case.

1. MMWR played an integral role in the administration of the Tronox bankruptcy.

Represented by Powell Law Group, P.C. ("PLG"), the Avoca Plaintiffs initially pursued separate actions against Tronox and/or its predecessor(s) in Luzerne County, Pennsylvania, alleging personal injury caused by exposure to creosote produced by the Tronox plant. After Tronox and its affiliates filed for protection under chapter 11, PLG retained MMWR to assist in its representation of the Avoca Plaintiffs in the Tronox bankruptcy. Working on behalf of the Avoca Plaintiffs, MMWR played an integral role in the Tronox bankruptcy through preparation and confirmation of the reorganization plan.

Shortly after the chapter 11 filing, MMWR assisted in securing a seat for one of the Avoca Plaintiffs, Michael E. Carroll, on the unsecured creditors committee. Mr. Waleski alleged that Mr. Carroll took on fiduciary duties as a member of the unsecured creditors' committee and that MMWR's representation of Mr. Carroll gave rise to a conflict of interest with the Avoca Plaintiffs. Acting in its "official capacity as bankruptcy court-approved counsel," Mr. Waleski asserted, MMWR also took responsibility for drafting the trust distribution procedures ("TDPs") that were incorporated into the debtors' chapter 11 reorganization plan to govern the administration of personal injury and property damage claims through the Tort Claims Trust. (App. 53a).

2. The bankruptcy court confirmed the reorganization plan, including the trust distribution procedures that MMWR drafted, and approved payment of a substantial fee to MMWR from the bankruptcy estate.

On November 30, 2010, the bankruptcy court confirmed the First Amended Joint Plan of Reorganization ("Plan"), including the trust distribution procedures that MMWR drafted to govern the operation of the Tort Claims Trust. The Plan established four categories of tort claims that would be administered through the Tort Claims Trust in accordance with the TDPs. The Avoca Plaintiffs' claims were in "Category D," comprised of non-asbestos toxic exposure claims. The Plan provided that the trustee would make final determinations on the

allowance or disallowance of claims pursuant to the TDPs.

The trust was to be funded with an initial $12.5 million cash payment by Tronox, plus 12% of the proceeds of a related adversary proceeding brought by the debtors against Anadarko Petroleum Corp., the former parent, based on the fraudulent transfer of assets out of the bankrupt entity ("Anadarko Litigation").

In approving the Plan, the bankruptcy court also approved payment of attorneys' fees to MMWR from the bankruptcy estate based on its representation of Mr. Carroll and Mr. Carroll's substantial contribution to the administration of the bankruptcy.

The Plan became effective on February 14, 2011. The following day, MMWR notified PLG that MMWR's representation was terminated. Brown Rudnick LLP and Weitz & Luxenberg, PC subsequently represented the Avoca Plaintiffs in connection with post-confirmation proceedings in the Tronox bankruptcy.

3. The bankruptcy court ruled that the Avoca Plaintiffs' objections to the Mississippi Claimants' group proof of claim were meritless.

Like the Avoca Plaintiffs, the Mississippi Claimants asserted that they were harmed by exposure to creosote from a Tronox site in their state. An *ad hoc* committee representing the Mississippi

Claimants filed a group proof of claim in the bankruptcy court prior to the August 12, 2009 claims bar date. The trust claims administrator subsequently approved their individual claims ("Mississippi Claims") in the aggregate amount of $343 million.

The Avoca Plaintiffs, through their then-counsel Brown Rudnick, objected to the proposed distribution of funds allocated for payment of Category D claims to the Mississippi Claimants. By Memorandum Opinion dated June 17, 2015, the bankruptcy court rejected the Avoca Plaintiffs' challenges as meritless and affirmed the trustee's decision to include the Mississippi Claimants in the Category D distributions.

4. The district court adopted the bankruptcy court's Report and Recommendation and approved the $5.15 billion settlement of the Anadarko Litigation.

In 2014, the parties in the Anadarko Litigation negotiated a proposed settlement of the fraudulent transfer claims, which were assets of the debtor's estate, in the amount of $5.15 billion. On November 10, 2014, the district court entered an Order adopting the bankruptcy court's Report and Recommendation approving the $5.15 billion settlement, from which the Tronox Tort Claims Trust received 12% of the proceeds.

Mr. Waleski asserted that the $5.15 billion settlement was not sufficient to ensure full payment of all of the Avoca Plaintiffs' claims and alleged that

MMWR breached its obligations to the Avoca Plaintiffs by failing to file an objection to the proposed settlement of the Anadarko Litigation.

B. The District Court for the Middle District of Pennsylvania Held that the Bankruptcy Court for the Southern District of New York Was in the Best Position to Rule on Mr. Waleski's Remand Motion.

MMWR removed this action under 28 U.S.C. § 1452(a) on the ground that federal courts have original jurisdiction over all civil proceedings arising in cases under the bankruptcy code. Following removal to the U.S. District Court for the Middle District of Pennsylvania, Mr. Waleski moved to remand the action to state court, while MMWR sought to transfer the case to the U.S. District Court for the Southern District of New York for referral to the bankruptcy court in which Mr. Waleski's claims arose. The district court granted MMWR's motion to transfer, concluding that the resolution of Mr. Waleski's claims on the merits would "involve analyzing and potentially questioning the bankruptcy court's own resolution of the Avoca Plaintiffs' objections, and the distribution that the Avoca Plaintiffs eventually received." (App. 71a).

C. The Bankruptcy Court Determined That This Is a Case "Arising In" the Tronox Bankruptcy and Denied Mr. Waleski's Motion to Remand.

Following transfer to the U.S. District Court for the Southern District of New York and referral to the

bankruptcy court, the bankruptcy court accepted supplemental briefing and heard oral argument on Mr. Waleski's motion to remand. By Memorandum Decision dated July 18, 2019, the bankruptcy court denied Mr. Waleski's motion for remand and alternative request for permissive abstention. The bankruptcy court summarized its decision as follows:

> The alleged wrongs committed by the defendants involved the performance of bankruptcy-specific tasks and the assertion of bankruptcy-specific objections and rights, and the dispute between the parties did not exist – and could not have existed – outside of the context of the Tronox bankruptcy cases. The dispute also implicates the integrity of the bankruptcy process and in certain respects requires the interpretation of prior orders and rulings of this Court.

(App. 51a).

D. Mr. Waleski's Amended Complaint

Following the denial of his remand motion, Mr. Waleski filed a motion for leave to amend his complaint. MMWR opposed Mr. Waleski's request to amend his complaint on the basis of futility, asserting that the amended pleading would not survive a motion to dismiss. During the December 5, 2019 hearing on Mr. Waleski's motion, the bankruptcy court granted Mr. Waleski leave to amend and construed MMWR's memorandum in opposition as a motion to dismiss the amended complaint. The court requested

supplemental briefing on the issue of whether Mr. Waleski's claims, as articulated in the amended complaint, were barred by the statute of limitations and reserved consideration of the other grounds for dismissal articulated in MMWR's briefing.

Like his original complaint, Mr. Waleski's amended complaint set forth claims against MMWR based on its conduct in representing the interests of the Avoca Plaintiffs in the Tronox bankruptcy. Mr. Waleski omitted his prior allegations that MMWR breached its obligations to the Avoca Plaintiffs by failing to object to the Mississippi Claims and by failing to object to the $5.15 billion settlement of the Anadarko Litigation. The nature of Mr. Waleski's claims against MMWR – and the timeline of key events relevant to the accrual of those claims – remained unchanged.[1]

1. MMWR's representation began in January 2009.

On January 27, 2009, PLG retained MMWR to assist in its representation of the Avoca Plaintiffs in the Tronox bankruptcy. The Contingent Fee Agreement, upon which Mr. Waleski's claims were purportedly based, provides in relevant part as follows:

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[1] In his amended complaint, Mr. Waleski also dropped his claims against the individual defendants, Ms. Ramsey and Mr. Busby. Ms. Ramsey and Mr. Busby were appellees below solely because Waleski appealed the denial of his remand motion, which was based on the claims set forth in his original complaint.

> MMWR will, in a manner to be mutually agreed with PLG, represent the interests of these same plaintiffs in the bankruptcy proceeding of Tronox. . . . MMWR shall proceed in the Tronox Bankruptcy in such manner as PLG and MMWR shall both agree. MMWR shall also assist PLG in the Avoca Litigation in such manner as PLG and MMWR shall both agree.

(App. 8a).

2. MMWR's misconduct allegedly occurred in 2009 and 2010.

On February 5, 2009, MMWR began representing Mr. Carroll as a member of the unsecured creditors' committee. Mr. Waleski contended that MMWR's representation of Mr. Carroll in his capacity as a member of the unsecured creditors' committee while simultaneously representing the interests of the Avoca Plaintiffs constituted a conflict of interest. As Mr. Carroll's counsel, MMWR drafted a Tort Claims Trust Agreement to govern the administration of a personal injury creditors' trust, which would be responsible for receiving funds recovered by the bankruptcy estate and administering such funds to pay allowed personal injury creditor claims.

On August 12, 2009, MMWR allegedly prepared and filed proofs of claim on behalf of each of the Avoca Plaintiffs in the Tronox bankruptcy. Mr. Waleski

faulted MMWR for filing the proofs of claim in an "unknown" dollar amount.

On November 30, 2010, the bankruptcy court confirmed the Plan, which incorporated the Tort Claims Trust Agreement and TDPs that MMWR drafted. Mr. Waleski claimed that MMWR failed to draft the trust documents in a way that would better protect the Avoca Plaintiffs' interests.

3. MMWR's representation ended on February 15, 2011.

On February 14, 2011, the Plan became effective. The Tort Claims Trust was funded with an initial $12.5 million cash payment. On February 15, 2011, MMWR terminated its representation of the Avoca Plaintiffs.

4. The Avoca Plaintiffs' Claims were allowed in the "greatly reduced" amount of $949 million following the January 15, 2014 Trustee's Report.

On January 15, 2014, the trustee issued a final report of allowed claims to be paid from the Tort Claims Trust, including the Avoca Plaintiffs' claims, which were approved in the amount of $949 million. Mr. Waleski alleged that if the Avoca Plaintiffs' claims had been properly valued when originally filed, or if the filing had been corrected by amendment, or if the claims had been liquidated and fixed by an appropriate motion, the Avoca Plaintiffs' claims would have been approved in the amount of $5.3 billion

instead of the "greatly reduced amount of $949 million." (App. 31a).

5. Mr. Waleski filed suit against MMWR on April 11, 2018.

Mr. Waleski filed his original complaint on April 11, 2018, more than seven years after the effective date of the Plan and the initial $12.5 million funding of the Tort Claims Trust, and more than four years after the trustee issued its final report allowing the Avoca Plaintiffs' claims in the "greatly reduced amount of $949 million."

E. The Bankruptcy Court Dismissed This Lawsuit, Holding that Based on Mr. Waleski's Own Allegations, His Claims Were Time-Barred.

By Memorandum Decision dated February 21, 2020, the bankruptcy court dismissed the Amended Complaint as barred by the statute of limitations. The court's decision was grounded in two alternative bases justifying dismissal. First, the court concluded that under Pennsylvania's gist of the action doctrine, Mr. Waleski's claims were tort claims, not contract claims, and were therefore barred by the applicable two-year statute of limitations. (App. 33a-41a). Second, the court held that even if the four-year statute of limitations for contract claims were applicable, Mr. Waleski's claims were nevertheless time-barred because they accrued more than four years before Mr. Waleski filed suit. (App. 41a-48a).

F. The District Court for the Southern District of New York Affirmed the Decisions of the Bankruptcy Court Denying Mr. Waleski's Remand Motion and Dismissing This Action as Time-Barred.

Mr. Waleski appealed to the district court, seeking to overturn the bankruptcy court's orders denying his remand motion and dismissing his complaint. Adopting the bankruptcy court's findings, reasoning, and conclusions, the district court upheld the bankruptcy court's exercise of jurisdiction over Mr. Waleski's claims, stating, in part, as follows:

> …what is complained about is the Montgomery firm's activity in the bankruptcy court and the integrity of those proceedings in the bankruptcy court and to what extent you can create priority for one group of tort claimants over a similarly situated group of tort claimants.
>
> Arranging priority among claimants is one of the key functions of a bankruptcy court, and the complaint of the plaintiffs pleads right into those functions.

(App. 11a).

The district court likewise affirmed the bankruptcy court's dismissal of the case, holding that Mr. Waleski's claims were time-barred under Pennsylvania law. (App. 17a-19a).

G. The Second Circuit Affirmed the Dismissal of Mr. Waleski's Complaint on the Ground that it is Time-Barred and Denied Mr. Waleski's Request for Rehearing.

Mr. Waleski appealed to the Second Circuit, seeking review of the district court's holdings with regard to both the availability of statutory jurisdiction and the untimeliness of Mr. Waleski's claims.[2] Following the submission of briefs, on September 23, 2021, the panel heard oral argument. On November 8, 2022, the Second Circuit entered an order affirming the judgment of the district court.

Noting that the statutory basis for jurisdiction in this case is complex and requires a highly fact-specific inquiry, the Second Circuit did not second guess the lower courts' exercise of jurisdiction, assuming hypothetical jurisdiction to reach the obvious ground for dismissal on the merits:

> [U]nder our caselaw, "where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other

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[2] Petitioner's implication that the statute of limitations issue was not presented for review by the Second Circuit is incorrect. (Pet. 3) ("…rather than addressing the question presented to it on appeal – whether there is 'arising in' bankruptcy jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) . . . the Second Circuit invoked 'hypothetical jurisdiction' expressly to side-step this admittedly 'difficult' question, and affirmed the lower courts on the merits"). Two of the four issues presented for review in Mr. Waleski's opening brief filed with the Second Circuit challenge the district court's dismissal of his claims based on the statute of limitations.

> more obvious grounds," we may "assume hypothetical jurisdiction in order to dismiss on those obvious grounds." *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 123 (2d Cir. 2020). Indeed, "doing so is particularly appropriate where" – as here – "we are satisfied that we have Article III jurisdiction," "the [statutory] jurisdictional issue is both novel and arguably complex," and the lower court rested its dismissal on a threshold legal determination that the claim at issue "is plainly time-barred." *Id.* at 123-24 (internal quotation marks and alteration omitted).

(App. 4a-5a).

Holding that Mr. Waleski's claims "clearly sound in tort under the 'gist-of-the-action' doctrine," (App. 7a), the Second Circuit concluded that the bankruptcy court "properly dismissed his complaint as time-barred under Pennsylvania's two-year statute of limitations for tort claims." (App. 9a). On December 16, 2022, the Second Circuit denied Mr. Waleski's petition for panel rehearing and for rehearing *en banc.* (App. 81a-82a).

REASONS FOR DENYING THE PETITION

A. There Is No Significant Disagreement Amongst the Circuits Requiring Resolution at This Time.

This Court should deny Mr. Waleski's petition because the evolving approaches taken by the circuit courts on the issue of "hypothetical jurisdiction" represent progress toward a consensus in a developing area of law and not an entrenched circuit split requiring this Court's intervention. Guided by this Court's analysis in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) regarding the fundamental requirements of Article III jurisdiction, the circuit courts have to varying degrees analyzed whether and under what circumstances it may be appropriate to bypass a thorny question of statutory jurisdiction to decide a case where the outcome on the merits is clear. Confronting this issue in any number of unique factual and procedural circumstances, a significant majority of the circuit courts have, at times, found it appropriate to reach the merits before resolving a question of statutory jurisdiction, while adhering to *Steel Co.*'s fundamental mandate that Article III jurisdiction may never be assumed.

Below, the Second Circuit embraced the approach followed by a majority of the circuit courts in the wake of *Steel Co.*, observing that "'where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds,' we may 'assume hypothetical jurisdiction in order to dismiss on those obvious grounds.'" (App. 4a-

5a). While some circuit courts have expressed more reluctance than others regarding the exercise of hypothetical jurisdiction, the precise contours of this infrequently-considered doctrine continue to evolve as circuit courts are confronted with new fact patterns and nuanced procedural issues that require courts to consider anew whether difficult questions of statutory jurisdiction may be unnecessary to resolve in favor of an efficient and unassailable resolution on the merits.

Just 25 years after this Court handed down its decision in *Steel Co.* – a decision that did not profess to establish any guiding principles as to whether or when a federal court may assume statutory jurisdiction if Article III jurisdiction is satisfied – it is unsurprising that the circuit courts are still refining their respective approaches to this issue. Given the rarity with which circuit courts have occasion to consider the exercise of hypothetical statutory jurisdiction and the recency of this Court's guidance in the context of Article III jurisdiction, this Court should allow the current body of case law to percolate in the circuit courts and consider revisiting this issue only if a deep and problematic split in authority develops.

Notwithstanding Petitioner's attempt to frame the Second Circuit approach as a "rule" requiring the exercise of hypothetical jurisdiction, the Second Circuit's willingness to assume statutory jurisdiction in certain unique circumstances and on a case-by-case basis does not create a direct conflict with any other court of appeals that finds it necessary to resolve a question of statutory jurisdiction in any given case. The Second Circuit treats the exercise of hypothetical

statutory jurisdiction as a discretionary option available only in appropriate circumstances and not as a mandate. *See, e.g.*, *Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006) ("So long as we are satisfied that we have Article III jurisdiction, we have discretion to decline to resolve difficult jurisdictional questions"); *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 123 (2d Cir. 2020) ("where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds, this court can assume hypothetical jurisdiction in order to dismiss on those obvious grounds").

As Petitioner acknowledges, the Second Circuit's willingness, under appropriate circumstances, to assume hypothetical jurisdiction where the jurisdictional requirement is only statutory is shared by each of the Third, Sixth, Ninth, and Federal Circuits. *Jordon v. AG of the United States*, 424 F.3d 320, 325 n.8 (3d Cir. 2005) ("*Steel Co.* only 'requires courts to answer questions concerning *Article III jurisdiction* before reaching other questions.'") (quoting *Bowers v. NCAA*, 346 F.3d 402, 416 (3d Cir. 2003)); *Khodr v. Holder*, 531 Fed. Appx. 660, 665 n.4 (6th Cir. 2013) (where jurisdictional question is statutory and there is no doubt that the court has Article III jurisdiction, "we are not required to resolve the statutory-interpretation question, because we conclude that, assuming our power to review all of his claims, Abou Khodr's petition is nevertheless without merit"); *De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1291 (9th Cir. 2022) ("Although we cannot assume Article III jurisdiction

arguendo . . . it is settled that we can assume *statutory* jurisdiction arguendo when the jurisdictional issue is complex, but the claim asserted clearly lacks merit."); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) ("While we are generally obligated to resolve jurisdictional challenges first, Supreme Court precedent only requires federal courts to answer questions concerning their Article III jurisdiction – not necessarily their statutory jurisdiction – before reaching other dispositive issues.").

Petitioner correctly notes that the First, Eighth, and Tenth Circuits have likewise issued rulings consistent with the Second Circuit view. *Greenwood v. N.H. PUC*, 527 F.3d 8, 13 (1st Cir. 2008) ("This court has consistently interpreted the *Steel Co.* rule as applying in its strict form only to issues going to Article III requirements."); *First State Ins. Co. v. Nat'l Cas. Co.*, 781 F.3d 7, 10 n.2 (1st Cir. 2015) ("We may continue to bypass thorny jurisdictional issues and resolve cases on the merits where, as here, those jurisdictional issues implicate only statutory or prudential considerations."); *Lukowski v. INS*, 279 F.3d 644, 647 n.1 (8th Cir. 2002) ("We clearly have Article III jurisdiction . . . so this is not the type of jurisdictional issue that must be decided before addressing the merits of the controversy."); *Yancey v. Thomas*, 441 Fed. Appx. 552, 555 n.1 (10th Cir. 2011) ("Although the [*Rooker-Feldman*] doctrine poses a jurisdictional bar to our consideration of a claim, the bar is based on a statute, not Article III of the Constitution, so we can avoid the issue if we dismiss a claim on any other ground."). In arguing that these courts of appeal "have not been consistent in their

application of the Second Circuit rule," Petitioner incorrectly characterizes the Second Circuit's discretionary approach as a directive that obligates a federal court to exercise hypothetical jurisdiction in a particular set of circumstances. A circuit court's decision to resolve a question of statutory jurisdiction rather than exercising hypothetical jurisdiction in any particular case does not conflict with the discretionary approach taken by the Second Circuit. To the extent that any circuit court has reached internally inconsistent conclusions regarding the propriety of exercising hypothetical statutory jurisdiction in the wake of *Steel Co.*, any such conflict represents an intra-circuit split capable of resolution by the circuit court without this Court's intervention.

The Seventh and D.C. Circuits have likewise interpreted *Steel Co.* as permitting federal courts to reach the merits without resolving nuanced questions of statutory jurisdiction under appropriate circumstances. *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 672 (7th Cir. 1998) ("Because this is a statutory standing question, we need not resolve it definitively before addressing merits questions."), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2008) ("*Steel Company* explicitly recognized the propriety of addressing the merits where doing so made it possible to avoid a doubtful issue of *statutory* jurisdiction; the case excluded such jurisdiction from the rule of absolute purity that it established for Article III jurisdiction."); *accord Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008) ("*Steel Co.* requires that

we prioritize the jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt").

The Fourth and Fifth Circuits have neither expressly embraced the concept of hypothetical statutory jurisdiction nor issued a decision rejecting its application in all instances. Jurisprudence from these circuits does not contribute to any perceived split among the courts of appeal on this issue. *See, e.g.*, *Strawser v. Atkins*, 290 F.3d 720, 730 n.6 (4th Cir. 2002) ("We recognize that this principle [of constitutional avoidance] does not permit a court to refrain from resolving a disputed question as to *Article III* jurisdiction . . . but no party contends that this case involves any lack of Article III jurisdiction.") (emphasis added); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 488 n.13 (5th Cir. 2008) (citing *Steel Co.* for the proposition that a federal court "may not, via doctrine of 'hypothetical jurisdiction,' decide cause of action before resolving whether court has *Article III* jurisdiction") (emphasis added).

By professing that it *cannot* assume hypothetical statutory jurisdiction in the wake of *Steel Co.*, the Eleventh Circuit positions itself as the sole outlier with regard to this highly nuanced and case-specific inquiry. *See Friends of the Everglades v. United States EPA*, 699 F.3d 1280, 1288-89 (11th Cir. 2012) (where statutory jurisdiction was in dispute, holding that the court "cannot exercise hypothetical jurisdiction"). Looking past its broad language in this regard, even the Eleventh Circuit recognizes exceptions to the general principle that a court should resolve jurisdictional questions before reaching the

merits; it acknowledges, for instance, that "when there is substantial overlap between interpreting a statute to resolve the merits of a case and determining an issue of statutory standing, a federal court has the power to decide whether a statute creates a cause of action before deciding whether the plaintiff has statutory standing to sue." *Id.*, 699 F.3d at 1289 (citing *Steel Co.*, 523 U.S. at 97 n.2).

The Eleventh Circuit has similarly held that "when 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief,'" a federal court may reach the merits of the claim without first resolving the question of statutory jurisdiction. *Morrison v. Amway Corp.*, 323 F.3d 920, 926 (11th Cir. 2003) (quoting *Garcia v. Copenhaver, Bell & Assocs. M.D.'s, P.A.*, 104 F.3d 1256, 1262 (11th Cir. 1997)). In this circumstance, if a jurisdictional challenge "implicate[s] the merits of the underlying claim," the Eleventh Circuit instructs that

> "[t]he proper court of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case . . . . Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits."

Morrison, 323 F.3d at 925 (quoting *Garcia*, 104 F.3d at 1261); *accord Gardner v. Mutz*, 962 F.3d 1329, 1340 (11th Cir. 2020) (emphasizing the distinction between Article III standing and "*statutory* jurisdiction or standing . . . in which the merits and jurisdictional inquiries may 'overlap'") (quoting *Steel Co.*, 523 U.S. at 97 n.2).

In an effort to present this Court with an issue that warrants review, Petitioner significantly overstates the extent of the disagreement among the circuit courts. This Court has more than once declined to take up questions involving the exercise of hypothetical statutory jurisdiction in recent years. *Vitol S.A. v. Autoridad de Energia Electrica de P.R.*, 138 S. Ct. 2616, 201 L. Ed. 2d 1003 (2018); *Hoffman v. Nordic Nats., Inc.*, 137 S. Ct. 2296, 198 L. Ed. 2d 725 (2017). Petitioner offers no compelling reason for this Court to address the issue now.

B. This Case Does Not Warrant Review by This Court.

Nor does this case implicate the concern articulated by Justice Scalia in *Steel Co.*, namely, that a court exercising hypothetical jurisdiction might "pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so." *Steel Co.*, 523 U.S. at 101-02. While this case, if fully resolved on the merits, would have required an in-depth examination and review of federal bankruptcy law as it relates to MMWR's work in the Tronox bankruptcy, the court below reached only the threshold determination that Mr. Waleski's claims

were barred by the applicable statute of limitations. This obvious basis for dismissal was amply supported by Pennsylvania precedent and did not require the court below to "pronounce upon the meaning or the constitutionality of a state or federal law." *Id.* The Second Circuit's decision to bypass a complex question of statutory jurisdiction already resolved in Respondent's favor by two other federal courts to affirm the dismissal of claims that were plainly time-barred under well-established Pennsylvania law is not worthy of review by this Court.

C. The Decision Below Is Not in Conflict with This Court's Precedent.

In affirming the district court's order dismissing Mr. Waleski's suit as time-barred, the Second Circuit did not run afoul of *Steel Co.*'s mandate that a court ensure that it has Article III jurisdiction before proceeding to the merits. The court below expressly concluded that it had Article III jurisdiction and Petitioner does not contend that Article III jurisdiction is lacking.

In *Steel Co.*, this Court held that a federal court may not decide a case on the merits before resolving a disputed question of Article III jurisdiction. 523 U.S. at 94-97. Petitioner overstates this Court's holding, incorrectly asserting that *Steel Co.* ruled "that the federal courts must always decide jurisdictional issues before merits issues."

Notwithstanding Petitioner's characterization, Justice Scalia's plurality opinion does not announce an absolute rule that jurisdictional issues must be

decided in all instances before reaching the merits. As recognized by the overwhelming majority of the circuit courts, *Steel Co.* concerned itself with the sanctity of Article III jurisdiction. *Id.* 98 (disapproving "the practice of deciding the cause of action before resolving Article III jurisdiction"); *id.* 97 n.2 ("…the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974), that the Constitution leaves for resolution through the political process."); *id.* 100 n.3 (noting that Justice Stevens in his concurrence "cannot identify a single opinion of ours deciding the merits before a disputed question of Article III jurisdiction").

This Court's discussion of *National Railroad Passenger* is illustrative. *Steel Co.*, 523 U.S. at 96-97 (citing *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974)). Acknowledging that this Court reached the merits without resolving an issue of statutory standing in *National Railroad Passenger*, the plurality in *Steel Co.* defended the decision as compatible with *Steel Co.'s* holding – that a court must ensure that Article III jurisdiction is present before proceeding to the merits. *Id.*

Not only does *Steel Co.* stop short of requiring federal courts to resolve all jurisdictional questions before reaching the merits, it acknowledges that this Court's precedents "have diluted the absolute purity of the rule that Article III jurisdiction is always an

antecedent question." 523 U.S. at 101. In a concurring opinion joined by Justice Kennedy, Justice O'Connor cautioned against viewing the decision as an absolute rule regarding the exercise of hypothetical jurisdiction: "[T]he Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserving difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'" *Id.* 110-11 (O'Connor, J., concurring) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)).

Petitioner's argument is further undermined by subsequent decisions of this Court, none of which have characterized *Steel Co.* as an absolute mandate that jurisdictional issues be resolved before reaching the merits. In *Ruhrgas AG v. Marathon Oil Company*, while noting that "jurisdiction *generally* must precede merits in dispositional order," this Court approved the practice of deciding the issue of personal jurisdiction without first addressing the issue of subject-matter jurisdiction. 526 U.S. 574, 577 (1999) (emphasis added); *id.* 585 ("[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits"). Similarly, in *Sinochem International Co., Ltd. v. Malaysia International Shipping Corporation*, this Court held that a federal court has discretion to dismiss a case on the ground of *forum non conveniens* before deciding "any other threshold objection," including subject-matter jurisdiction. 549 U.S. 422, 425 (2007); *id.* 431 (noting that "jurisdictional questions *ordinarily* must

precede merits determinations in dispositional order") (emphasis added).

Neither in *Steel Co.* nor in any decision since has this Court announced an absolute rule that a federal court must always resolve non-Article III jurisdictional issues before reaching the merits. The decision of the court below to bypass a novel statutory jurisdiction issue to dismiss a claim that is plainly time-barred was particularly appropriate under the circumstances of this case and does not conflict with this Court's precedent.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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