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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

While Respondents try to position this as a case where the Second Circuit elected not to "second guess the lower courts' exercise of jurisdiction," BIO 13, there can be no dispute as to what the Second Circuit actually decided. The Second Circuit declared that the overriding jurisdictional question presented here is a "difficult" question for which all doubts must be resolved "in favor of remand." Appendix A at 3a-4a. But, rather than answer this first and fundamental question, the Second Circuit side-stepped it altogether, invoking "hypothetical jurisdiction" to affirm the lowers courts' dismissal on the state law merits, while disregarding its own mandate to resolve any doubt in favor of remand. Appendix A at 4a-5a.

The Second Circuit's invocation of "hypothetical jurisdiction" conflicts with this Court's decision in *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83 (1998) and its progeny, most notably, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), where this Court explained that courts *cannot* invoke "hypothetical jurisdiction" to dismiss a case on the merits before reaching the question of subject matter jurisdiction. *Id.* at 584-85. No petition that we have seen or Respondents have cited has presented an issue where "hypothetical jurisdiction" was invoked in this manner. The two cases cited by Respondents, BIO 22, miss the mark. *Cf. Autoridad de Energia Electrica de Puerto Rico v. Vitol S.A.*, 859 F.3d 140, 145 (1st Cir. 2017) (non-merits dismissal based on a forum selection clause in favor of the "party challenging jurisdiction"), *cert. denied*, 138 S.Ct. 2616 (2018); *Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 277 (3d Cir. 2016) ("non-merits dismissal on claim preclusion grounds"), *cert. denied*, 137 S.Ct. 2296 (2017).

In contrast, this case presents the perfect example of the problem created when subject matter jurisdiction is bypassed to reach the state law merits and close the courts' door to an aggrieved plaintiff. Here, Mr. Waleski presents a merits question implicating federalism values, a difficult question of subject matter jurisdiction, a plaintiff who filed his state law claims against same state defendants in state court and a lower court willing to skip the jurisdictional inquiry to reach the merits – which provides the ideal opportunity for this Court to finally tackle the circuit courts' conflicting approaches to "hypothetical jurisdiction." *See* Brian A. Kulp, *Jurisdictional Avoidance: Rectifying the Lower Courts' Misapplication of Steel Co.*, 44 Harv. J.L. & Pub. Pol'y 374, 397-99 (2021).

As Respondents concede, the Second Circuit's approach to "hypothetical jurisdiction," shared by the Third, Sixth, Ninth, Federal and D.C. Circuits, directly conflicts with the position of the Eleventh Circuit, which is in line with the Fourth, Fifth and Seventh Circuits, while the remainder of the circuit courts have taken a muddled approach to "hypothetical jurisdiction," issuing a number of conflicting opinions in the twenty-five years since *Steel Co.* This does not "represent progress toward a consensus." BIO 15. This evidences an ongoing division, as well as general confusion regarding the delineations of subject matter jurisdiction – which, as this Court has rightly observed, stems largely from the laxity with which the courts have used the label "jurisdictional" to refer to issues that do not actually involve a court's adjudicatory authority. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' . . . only for prescriptions delineating the classes of cases . . . falling within a court's

adjudicatory authority."). These are all compelling reasons to grant Mr. Waleski's petition.

The invocation of "hypothetical jurisdiction" to skip over difficult questions of subject matter jurisdiction and reach the state law merits "offends fundamental principles of separation of powers" and "carries the courts beyond the bounds of authorized judicial action." *Steel Co.*, 523 U.S. at 94-95. As this case illustrates, "hypothetical jurisdiction" allows the federal courts to strip the state courts of judicial domain over areas in which the state courts have an overriding interest—here, the special interest in regulating lawyers within the state, which is "essential to the [states'] primary governmental function of the administration of justice," *Gunn v. Minton*, 568 U.S. 251, 264 (2013), and the adjudication of disputes between state residents on claims under state law.

For all these reasons, this Court's intervention and guidance is plainly needed and Respondents' brief actually serves to demonstrate why Mr. Waleski's petition for a writ of certiorari should be granted.

ARGUMENT

I. RESPONDENTS' ATTEMPT TO EVADE THE QUESTION PRESENTED FAILS

Notwithstanding Respondents' attempts to frame this as a case where the Second Circuit simply elected not to "second guess the lower courts' exercise of jurisdiction," BIO 13, the Second Circuit itself declared that the existence of subject matter jurisdiction over this case was questionable, presenting a "difficult" question of

"first impression." Appendix A at 4a-5a. But rather than tackle this difficult jurisdictional question, which courts are bound to do first, the Second Circuit bypassed it altogether, invoking "hypothetical jurisdiction" to affirm the lower courts' dismissal on the state law merits. *Id.* The Second Circuit did this by following its self-created precedent holding that, while a court may not "assume" the constitutional elements of subject matter jurisdiction, it may "assume" the statutory elements of jurisdiction, as summarized in *Butcher v. Wendt*, 975 F.3d 236, 242 (2d Cir. 2020).

> [T]he Court's holding in *Steel Co.* was limited to standing under Article III (that is, constitutional standing), which it distinguished from "statutory standing." . . . We have consistently kept faith with *Steel Co.*'s focus on Article III jurisdiction. "The bar on hypothetical jurisdiction," we have held, "applies only to questions of Article III jurisdiction." *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005).

Respondents try to downplay the breadth of this Second Circuit rule by arguing that *Steel Co.* and its progeny do not set forth "an absolute mandate that jurisdictional issues be resolved before reaching the merits." BIO 25. (citing *Ruhrgas,* 526 U.S. 574 and *Sinochem International Co., Ltd. v. Malaysia International Shipping Corporation*, 549 U.S. 422 (2007)). But, in doing so, Respondents unabashedly misstate this Court's holdings, which expressly prohibit a merits-based dismissal before reaching the question of subject matter jurisdiction.

As this Court explained in *Ruhrgas,* a court may, in appropriate circumstances, dismiss a case on non-merits grounds like, for example, personal jurisdiction, before reaching the question of subject matter jurisdiction, because a dismissal on non-merits grounds "makes no assumption of law-declaring power," such as would offend "the separation of powers principles underlying. . . *Steel Company*." *Ruhrgas,* 526 U.S. at 583-85. Similarly, a court may, in appropriate circumstances, dismiss a case under the doctrine of forum non conveniens, without first reaching the question of subject matter jurisdiction, because a forum non conveniens dismissal is simply "a determination that the merits should be adjudicated elsewhere." *Sinochem*, 549 U.S. at 432 (citing *Ruhrgas*).

Here, the Second Circuit did precisely what *Steel Co.* and its progeny mandate cannot be done. The Second Circuit assumed law-declaring power, then proceeded to decide the state law merits. Contrary to Respondents' representations, no petition that has come before this Court in recent years has presented an issue where "hypothetical jurisdiction" was invoked in this fashion. In *Autoridad de Energia*, 138 S.Ct. 2616, for example, this Court declined certiorari review over a non-merits dismissal in favor of the party challenging jurisdiction based on a forum-selection clause. *Autoridad de Energia,* 859 F.3d at 145. While, in *Hoffman*, 137 S.Ct. 2296, this Court declined certiorari review over a non-merits dismissal issued on claim preclusion grounds. *Hoffman*, 837 F.3d at 277-78. These cases are in keeping with *Steel Co.* and *Ruhrgas* because the lower courts declined jurisdiction in favor of other judicial forums where the merits of the case could be, or already had been, properly heard.

In stark contrast to *Autoridad* and *Hoffman*, here, the Second Circuit's invocation of "hypothetical jurisdiction" flies in direct contravention of *Steel Co.* and its progeny. And, without this Court's intervention, the Second Circuit's assumption of law-declaring power will only perpetuate the circuit split and imperil the rights of state court litigants. This is a compelling reason to grant Mr. Waleski's petition.

II. THE QUESTION PRESENTED WARRANTS REVIEW

A. The Circuit Courts are Undeniably Divided Over the Scope of *Steel Co.*'s Directive

As Respondents concede, the circuit courts are deeply divided regarding the scope of *Steel Co.'s* directive. On the one hand, the Second Circuit is of the view that *Steel Co.* applies only to constitutional bases of jurisdiction generally, but does not prohibit the use of assumed or hypothetical jurisdiction where the jurisdictional requirement is only statutory – a view that is shared by the Third, Sixth, Ninth, Federal and D.C. Circuits. *See, e.g, Boos v. Runyon*, 201 F.3d 178, 185 n.3 (2d Cir. 2000); *Jordon v. Attorney Gen. of U.S.*, 424 F.3d 320, 330 n. 8 (3d Cir. 2005); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 346 F.3d 402, 415-16 (3d Cir. 2003); *Khodr v. Holder*, 531 Fed.Appx. 660, 668 n. 4 (6th Cir. 2013); *Bakalian v. Cent. Bank of Republic of Turk.*, 932 F.3d 1229, 1236 (9th Cir. 2019); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir.2012); *Chalabi v. Hasehmite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008).

The Eleventh Circuit, on the other hand, has flatly rejected the notion that any element of subject matter jurisdiction (constitutional or statutory) can be assumed for purposes of passing on the merits – a view that is in line with that of the Fourth, Fifth and Seventh Circuits, which have similarly interpreted the critical gate keeping analysis of subject matter jurisdiction. *See Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1289 (11th Cir. 2012) ("'Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'"); *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1381 n.4 (11th Cir. 1998) ("To do otherwise would allow defendants to evade [] statutory requirements . . . and allow the federal courts to make significant dispositive rulings in a case over which the federal courts may lack jurisdiction."); *B.R. v. F.C.S.B.*, 17 F.4th 485, 492 (4th Cir. 2021) ("Although the term 'jurisdiction' has been used somewhat loosely on occasion in the past, it is now well established that it refers to 'the courts' statutory or constitutional power to adjudicate the case.'"); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005) ("'Subject-matter jurisdiction ... is an [Article] III as well as a statutory requirement . . .'"); *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 284 n. 6 (5th Cir. 2011) ("In *Steel Co.*, the Court emphatically disapproved of the practice of the exercise of 'hypothetical jurisdiction' by federal courts, and held that Article III courts must always resolve true questions of jurisdiction before proceeding to the merits."); *Groves v. United States*, 941 F.3d 315, 323 (7th Cir. 2019) (holding that this Court "has been unwavering in its insistence that [federal courts'] adjudicatory authority is limited by the Constitution and Congress, and *no* result justifies

[courts] intervening where [they] have not been granted the power to do so."); *Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 557 (7th Cir. 2021) ("The Supreme Court has cautioned against deciding merits questions when evaluating challenges to jurisdiction."); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 823 (7th Cir. 2016) ("'[J]urisdiction is vital [] if the court proposes to issue a judgment on the merits.'").

Meanwhile, the First, Eighth and Tenth Circuits have issued conflicting rulings in the twenty-five years since *Steel Co. Compare Seale v. I.N.S.*, 323 F.3d 150, 156 (1st Cir. 2003) (noting that "[t]he term 'statutory jurisdiction' is susceptible to a wide variety of constructions [and] it is arguable that Justice Scalia did not mean to exempt from the ruling in *Steel Co.* the kind of statutory jurisdictional issues" for which the courts have assumed jurisdiction) *with Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 60 (1st Cir. 2003) ("[A] jurisdictional inquiry is not required here given that the question invokes statutory jurisdiction."); *Fed. Home Loan Mortg. Corp. v. Briggs*, 556 Fed. Appx. 557, 558 n. 2 (8th Cir. 2014) ("[W] e have assured that the district court possessed subject matter jurisdiction before proceeding.") *with Lukowski v. Immigration & Naturalization Serv.*, 279 F.3d 644, 648 n.1 (8th Cir. 2002) (adopting the Second Circuit approach); *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1245 (10th Cir. 2007) ("It is now clear, however, that a court must have jurisdiction before it can rule on the merits.") *with Yancey v. Thomas*, 441 Fed. Appx. 552, 559 n. 1 (10th Cir. 2011) (adopting the Second Circuit approach).

Therefore, far from "represent[ing] progress toward a consensus," BIO 15, Respondents' own recitation of the

case law – and conflation of "statutory standing" with "statutory jurisdiction"[1] – evidences an ongoing division among the circuit courts, as well as general confusion regarding the delineations of subject matter jurisdiction. As this Court has rightly observed, this confusion is, in large part, due to the laxity with which courts have used the label "jurisdictional" to refer to issues that do not actually involve a court's adjudicatory authority. *See Kontrick*, 540 U.S. 454 (2004). Indeed, Judge Menashi correctly remarked in his concurring *Butcher* opinion that in at least some of the cases in which the circuit courts have invoked "hypothetical jurisdiction," they seem "to have confused non-jurisdictional questions with true jurisdictional limitations. For example, to the extent that a prior decision bypassed an issue of 'statutory standing' to address the merits, it was not assuming jurisdiction . . . But to the extent circuit precedent purports to afford [courts] discretion to ignore statutory limits on []

1. Respondents cite *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 672 (7th Cir. 1998), *abrogated by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), and argue that the Seventh Circuit has "interpreted *Steel Co.* as permitting federal courts to reach the merits without resolving questions of statutory jurisdiction under appropriate circumstances." BIO 19. Respondents are wrong. In *Kauthar*, the Seventh Circuit held that it could bypass a question of "statutory standing," sometimes referred to as "prudential standing" – a concept that, this Court has explained, is distinct from "statutory jurisdiction." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 n. 4 (2014) ("We have on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional . . . That label is an improvement over the language of 'prudential standing,' since it correctly places the focus on the statute. But it, too, is misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case.'").

jurisdiction," as the Second Circuit proclaimed here, "it is inconsistent with *Steel Co.* and with the Constitution." *Butcher*, 975 F.3d at 245. *See also* Lexmark, 572 U.S. at 140 n. 4 (explaining that "statutory standing" is oft confused with "statutory jurisdiction").

This case, therefore, presents the ideal opportunity for this Court to determine the issue and potential contours of "hypothetical" jurisdiction in the wake of *Steel Co.*, and alleviate the confusion among the circuit courts regarding the delineations of subject matter jurisdiction.

B. The Second Circuit Rule Offends Principles of Federalism and Requires this Court's Intervention

Finally, in their attempt to underplay the breadth of the division among the circuit courts, Respondents ignore the compelling policy reason for granting Mr. Waleski's petition – maintaining the critical balance between state and federal power. Respondents underwent the lengthy procedural exercise of removing, transferring and then referring this case from the Luzerne County Pennsylvania Court of Common Pleas to the United States District Court for the Middle District of Pennsylvania to the United States District Court for the Southern District of New York and finally to United States Bankruptcy Court for the Southern District of New York because Respondents believed that the bankruptcy court was the forum where they could obtain the outcome they desired.

Such gamesmanship not only offends the federalism values at the core of Article III, it deprives the state courts of judicial domain over areas in which the state

courts have an overriding interest. And, it harms state court litigants, like Mr. Waleski, who, depending upon the judicial circuit in which they find themselves, are forced to suffer in silence as their state law remedies are decided by federal courts unwilling to perform the critical jurisdictional gate-keeping analysis. This case is thus an ideal vehicle for this Court to resolve an important issue affecting the state-federal balance.

CONCLUSION

Mr. Waleski's petition for a writ of certiorari should be granted.

Respectfully submitted,

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