No. 22-914

IN THE

Supreme Court of the United States

STANLEY WALESKI,

Petitioner,

v.

MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP, *et al.*,

Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Stanley Waleski respectfully petitions for rehearing of this Court's June 26, 2023 Order denying his petition for a writ of certiorari. In a rare three-Justice dissent, Justices Thomas, Gorsuch and Barrett would have granted the petition in order to resolve an "entrenched Circuit split."

REASONS FOR GRANTING REHEARING

The petition for rehearing should be granted due to intervening circumstances of a substantial or controlling effect and other substantial grounds. Sup. Ct. R. 44.2. Since the preparation of Waleski's certiorari petition, the Second Circuit issued two more inconsistent opinions, one a few days before the filing, and one thereafter. *Compare Rahman v. Mayorkas*, 2023 WL 2397027 (2d Cir. Mar. 8, 2023) with *Phoenix Light SF Ltd. v. Bank of New York Mellon*, 66 F.4th 365 (2d Cir. 2023). These opinions illustrate what Judge Menashi so vehemently criticized in *Butcher v. Wendt*, 975 F.3d 236, 245 (2d Cir. 2020) as the confusion of "non-jurisdictional questions" with "true jurisdictional questions"—a confusion that has afforded the Second Circuit the "discretion to ignore statutory limits on [] jurisdiction," resulting in a deeply entrenched circuit split on the permissibility of "hypothetical jurisdiction."

In *Rahman*, 2023 WL 2397027 at *3 n. 2, the Second Circuit repeated what it did in this case and skipped a question of federal subject-matter jurisdiction by invoking its self-created rule that permits courts to "assume hypothetical jurisdiction where. . . [subject-matter jurisdiction] stems from a federal statute." *Id.* at *3 n. 2.

Yet, just the following month, confronted with a question of Article III standing in *Phoenix Light*, the Second Circuit recognized that *Steel Co.*[1] gives courts only the "'leeway' to dismiss actions based on non-jurisdictional, non-merits grounds" before addressing subject-matter jurisdiction. 66 F.4th 365 at 370 (citing *Steel Co.* and *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422 (2007)). These inconsistent opinions highlight the problems that lower courts face grappling with the Second Circuit's (and other courts') increasingly tenuous distinction between the "constitutional" and so-called "statutory" elements of subject-matter jurisdiction, and *why* it calls out for clarification and determination from this Court.

I. THE SECOND CIRCUIT'S RECENT DECISIONS DEEPEN THE CIRCUIT SPLIT ON "HYPOTHETICAL JURSIDICTION"

In *Steel Co.*, this Court explained that the "statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers" that must be addressed before reaching the merits of a case. 523 U.S. at 101-02. Therefore, the fundamental question the courts are always bound to ask and answer *first* is that of federal subject-matter jurisdiction. *Id.* at 94. The only exception is where a case can be dismissed on non-merits grounds, 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 AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999).

1. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

Notwithstanding this clear precedent, the Second Circuit and other circuit courts have misinterpreted *Steel Co.* and its progeny as permitting federal courts to exercise "hypothetical jurisdiction" to skip difficult questions of subject-matter jurisdiction, where the questions arise from a statute, rather than from the "case or controversy" clause of Article III of the U.S. Constitution—thereby treating "statutory jurisdiction" as an inferior element of subject-matter jurisdiction that can be "assumed" in order to give courts the ability to rule on the merits. *See, e.g., Boos v. Runyon*, 201 F.3d 178, 185 n.3 (2d Cir. 2000) (citation omitted); *Butcher*, 975 F.3d at 242-43 (citing *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005)); *Rahman*, 2023 WL 2397027 at *3 n. 2. Fundamentally, to mix sports metaphors, when it comes to a question of subject-matter jurisdiction, it is the lower courts' job to "call the balls and strikes," not to "punt."

Below, Waleski asked the Second Circuit whether there is "arising in" bankruptcy jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) over a removed state law legal malpractice suit brought by a non-debtor private litigant against his former same-state bankruptcy attorneys, where the underlying bankruptcy case is long closed, the attorneys were not bankruptcy court-appointed, and the suit does not in any way implicate the bankruptcy estate. But, rather than answer this admittedly "difficult" question of subject-matter jurisdiction, for which the Second Circuit acknowledged that all doubts should be resolved in favor of remand, the Second Circuit invoked the notion of "hypothetical jurisdiction" to avoid the question altogether, reasoning that because the question presented derived from 28 U.S.C. §§ 1334(b) and 157(a),

rather than the "case or controversy" clause in Article III of the U.S. Constitution, it could simply assume federal-subject matter jurisdiction to address the case on the merits of Pennsylvania state law, although neither side had briefed or raised the concept of "hypothetical jurisdiction." Appendix A at 3a-9a.

Critically, Article III of the U.S. Constitution limits federal subject-matter jurisdiction both by the bounds of "judicial power," Article III, § 2, and by the extent to which Congress vests that power in the lower courts, Article III, § 1. Appendix F at 83a-84a. Therefore, any distinction between the "constitutional" and so-called "statutory" elements of jurisdiction is fundamentally untenable because both limitations stem from Article III.[2] Therein lies the confusion and potential for mischief that Judge Menashi rightly criticized in his concurrence in *Butcher*.

As Judge Menashi explained in *Butcher*, in attempting to draw a distinction between the "constitutional" and "statutory" elements of jurisdiction, the Second Circuit has confused "non-jurisdictional questions" with "true jurisdictional limitations," resulting in inconsistent results and inconsistent opinions. *Butcher*, 975 F.3d at 245. In some cases, the Second Circuit purports to assume "statutory jurisdiction" in order to bypass questions of "statutory standing," where it is not *actually* assuming federal subject-matter jurisdiction, but in other cases,

2. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1. Congress did so with respect to bankruptcy courts in Title 28 . . .").

like the one here, the Second Circuit purports to assume "statutory jurisdiction" to bypass statutory limits on federal-subject matter jurisdiction imposed by Congress, which is blatantly "inconsistent with *Steel Co.* and with the Constitution." *Id.* at 245, 247-48.

This confusion is at the core of a deeply entrenched circuit split. The Third, Sixth, Ninth, Federal and D.C. Circuits have expressly endorsed the Second Circuit concept of "hypothetical jurisdiction." *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 appear to have similarly interpreted the critical gate-keeping analysis of federal subject-matter jurisdiction. *See Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1289 (11th Cir. 2012); *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1381 n.4 (11th Cir. 1998); *B.R. v. F.C.S.B.*, 17 F.4th 485, 492 (4th Cir. 2021); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005); *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 284 n. 6 (5th Cir. 2011); *Groves v. United States*, 941 F.3d 315, 323 (7th Cir. 2019); *Boim v. Am. Muslims*

for Palestine, 9 F.4th 545, 557 (7th Cir. 2021); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 823 (7th Cir. 2016).

Meanwhile, the First, Eighth and Tenth Circuits have issued inconsistent rulings on "hypothetical jurisdiction" in the twenty-five years since *Steel Co.*, acknowledging the tenuous distinction between "statutory" and "constitutional" jurisdiction passed down by the Second Circuit. *Compare Seale v. I.N.S.*, 323 F.3d 150, 156 (1st Cir. 2003) *with Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 60 (1st Cir. 2003); *Fed. Home Loan Mortg. Corp. v. Briggs*, 556 Fed. Appx. 557, 558 n. 2 (8th Cir. 2014) *with Lukowski v. Immigration & Naturalization Serv.*, 279 F.3d 644, 648 n.1 (8th Cir. 2002); *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1245 (10th Cir. 2007) *with Yancey v. Thomas*, 441 Fed. Appx. 552, 559 n. 1 (10th Cir. 2011).

With the Second Circuit at the epicenter of the split, that court's two recent decisions only serve to deepen the split, perpetuating the "confusion" that Judge Menashi warned of in *Butcher.* In *Rahman*, 2023 WL 2397027, the Second Circuit did exactly what it did in Waleski's case. It invoked "hypothetical jurisdiction" to skip a question of subject-matter jurisdiction where the question of federal subject-matter jurisdiction stemmed from 28 U.S.C. § 1291. *Id.* at *3 n. 2. Yet, just one month later, addressing a question of Article III standing in *Phoenix Light*, 66 F.4th 365, the Second Circuit acknowledged that *Steel Co.* gives the courts "'leeway'" *only* "to dismiss actions based on *non-jurisdictional, non-merits grounds*" before reaching questions of federal subject-matter jurisdiction. *See id.* at 370 (citing *Steel Co.* and *Sinochem,* 549 U.S. 422 (2007)) (emphasis added).

These inconsistent opinions highlight the problems that lower courts face grappling with the Second Circuit's tenuous distinction between the "constitutional" and so-called "statutory" elements of subject-matter jurisdiction. As even early proponents of the Second Circuit rubric have observed, "[t]he term 'statutory jurisdiction' is susceptible to a wide variety of constructions," and it is questionable whether Justice Scalia actually meant to "exempt from the ruling in *Steel Co.* the kind of statutory jurisdictional issue[s]," for which the courts have actually "assumed" jurisdiction. *Seale v. I.N.S.*, 323 F.3d at 156. *See also Edwards v. City of Jonesboro*, 645 F.3d 1014, 1017-18 (8th Cir. 2011) ("Whether [the *Steel Co.*] rule also applies to statutory jurisdiction . . . is a matter of some dispute."); *McClendon v. City of Albuquerqu*e, 630 F.3d 1288, 1297 (10th Cir. 2011) ("'The word 'jurisdiction' has 'many, too many meanings,' it is 'capable of different interpretations,' and it has sometimes been used with 'excessive[ ] exuberan[ce]' to encompass 'things other than the [true] absence of constitutional or statutory power to adjudicate a matter.'") (Citations omitted).

Recognizing this, the Court has urged that a rule *not* "be referred to as jurisdictional unless it [actually] governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *See, e.g, Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435-36 (2011). Notwithstanding this clear warning, in the twenty-five years since *Steel Co.*, the Second Circuit has been expounding on the assumption of "statutory jurisdiction," without any sign of a consensus among the circuit courts as to whether the "jurisdictional label" has been correctly applied in drawing a hierarchical distinction between the different elements of federal subject-matter jurisdiction.

For this reason, the notion of "hypothetical jurisdiction" calls out for clarification and direction from this Court, and Waleski respectfully submits that his petition for rehearing should be granted.

Given that three Justices of this Court already believe certiorari should be granted to address the "entrenched Circuit split" and fundamental questions of constitutional law presented here, any Justice who believes that the Second Circuit path is the correct one should also see the benefit of certiorari, so as to direct the Eleventh, Fourth, Fifth and Seventh Circuits to follow that path and ensure that on questions of subject-matter jurisdiction, the same rule applies throughout the nation. There simply cannot be different jurisdictional rules in different circuits.

II. IN THE ABSENCE OF CLEAR DIRECTION FROM THIS COURT, THE SECOND CIRCUIT RULE WOULD PROMOTE JURISDICTION FOR THE SAKE OF CONVENIENCE

The two recent decisions of the Second Circuit highlight another problem. In the absence of direction from this Court regarding the contours of "subject-matter jurisdiction," and whether "statutory jurisdiction" may properly be assumed, the Second Circuit rule promotes the use of "hypothetical jurisdiction" for the sake of convenience.

In *Phoenix*, 66 F.4th 365, the Second Circuit recognized the limited "leeway" provided by *Steel Co.* because in that case the Second Circuit could rely on issue preclusion to affirm the judgment of the lower court on non-merits grounds. *Id.* at 370. But, in *Rahman*, 2023

WL 2397027, where the Second Circuit was presented with a question going to the statutory limits on federal subject-matter jurisdiction under 28 U.S.C. § 1291, the Second Circuit invoked "hypothetical jurisdiction" to side-step the issue altogether. *Id.* at *3 n. 2. *Phoenix* and *Rahman*, thus, highlight how the Second Circuit rule promotes the use of "hypothetical jurisdiction" as a tool for "jurisdiction by convenience."

In *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120 (2d Cir. 2019), for example, the Second Circuit assumed "hypothetical jurisdiction" in reverse, reasoning that a prior panel of the Second Circuit had assumed "statutory jurisdiction" in order to avoid a *res judicata* bar to a challenge to jurisdiction. That case concerned a Florida state court judgment entered against the Republic of Cuba pursuant to 28 U.S.C. § 1605(a)(7), which had been enforced successfully against the Republic of Cuba for over a decade in multiple jurisdictions. In an enforcement action filed in the Southern District of New York in 2014, Banco Bilbao Vizcaya Argentaria, S.A. (the "Bank") raised a challenge to the court's jurisdiction to enforce the state court judgment, and the issue of subject-matter jurisdiction was argued at length before the district court and the Second Circuit. On appeal, the Second Circuit recounted the various enforcement efforts over the years and ultimately reached the merits, agreeing with the defendants that certain electronic funds transfers were not attachable under the applicable statutes, but rejecting all other arguments as "unavailing"—thereby permitting New York enforcement actions to continue. *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014).

Notwithstanding the *Hausler* decision, in a separate enforcement action filed in 2017, the Bank again raised the issue of subject-matter jurisdiction. But, on appeal, rather than holding that the 2014 decision was a *res judicata* bar to the Bank's jurisdictional challenge, the Second Circuit found that the *Hausler* panel had merely assumed "statutory jurisdiction" to reach the merits, subjecting the question of subject-matter jurisdiction to *de novo* review. *Vera,* 946 F.3d at 146 n. 22. The Second Circuit then reversed, concluding that the district court lacked subject-matter jurisdiction to enforce the Florida state court judgment and holding that the district court's turnover orders were void and must be vacated. *Id.* at 145-146. The issue then came before this Court on a petition for certiorari review, but the petition was denied. *Fuller v. Banco Bilbao Vizcaya Argentaria, S.A.*, 141 S. Ct. 364 (2020).

The case law, thus, highlights two issues.

First, the potential for "hypothetical jurisdiction" as a tool for "jurisdiction by convenience"—sometimes invoked to avoid difficult jurisdictional questions, as it was in Waleski's case, and other times, to avoid a prior result in favor of a different outcome.

Second, the severe and damaging consequences to the courts and to the parties from the assumption of "statutory jurisdiction." If the Second Circuit correctly decided *Vera*, then "hypothetical jurisdiction" allows a federal court to bypass subject-matter jurisdiction to reach the merits and issue orders, only to have those orders vacated when another court finally addresses the question of subject-matter jurisdiction years later.

In both cases, use of "hypothetical jurisdiction" defies the federalist values at the core of our nation's constitution, which impose upon the federal courts an "unflagging obligation" to exercise only the jurisdiction given to them by Congress, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), and gives them "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Therefore, for this reason too, Waleski's petition for rehearing should be granted. One court's view of "convenience" cannot trump jurisdiction.

III. THIS IS AN APPROPRIATE CASE FOR REHEARING

Finally, Waleski's petition should be granted because this is an appropriate case for rehearing and certiorari. Respondents in this case underwent the cumbersome procedural exercise of removing, transferring venue 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. Now, if rehearing is denied, Waleski will be left with no judicial forum in which to redress his grievances, all because the Second Circuit declined to perform the jurisdictional gate-keeping analysis that all federal courts are obligated to perform.

These issues strike at the core of our nation's constitution. That is precisely why Waleski's certiorari petition garnered the vote of three Justices of the Court, who would have granted his petition. And, because the case law shows ongoing confusion, let alone no progress towards any consensus, now is the time for the Court to provide clarity on the notion of "hypothetical jurisdiction" and bring consistency to the circuit courts.

CONCLUSION

For the foregoing reasons, and those stated in Waleski's original petition, the Court should grant rehearing, grant the petition for a writ of certiorari, and review the judgment of the Second Circuit.

Respectfully submitted,

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CERTIFICATION OF PARTY

Stanley Waleski, by and through undersigned counsel, hereby certifies that this petition for rehearing is restricted to the grounds specified in Sup.Ct.R. 44.2 and has been presented in good faith and not for delay.

Respectfully submitted,

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