No. 24-957

IN THE
Supreme Court of the United States

WILLIAM STENGER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Separation of Powers Clinic at The Catholic University of America's Columbus School of Law (previously at the Antonin Scalia Law School at George Mason University) provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation. The Clinic has submitted numerous briefs at this Court and lower federal courts in cases implicating separation of powers, including the use of "hypothetical jurisdiction."

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

In its opinion below, the Second Circuit expressly assumed "hypothetical" statutory jurisdiction to sidestep a difficult jurisdictional matter and instead resolve the case by ruling on the underlying merits. *See* Pet.App.7a. That was error and raises serious separation-of-powers concerns.

As this case demonstrates, difficult jurisdictional questions "may occur which [a federal court] would gladly avoid," but the constitutionally limited nature of federal jurisdiction means the court "cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Regardless of the "difficulties," the Court "must" resolve its own jurisdiction because the Court equally has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.*

Accordingly, this Court has held that a federal court may not decide the merits of a case nor "pronounce upon the meaning" of a law "when it has no jurisdiction to do so," and thus courts cannot exercise "hypothetical jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). But that is precisely what the Second Circuit did below, relying on prior circuit caselaw allowing the exercise of hypothetical statutory jurisdiction.

This case presents an excellent vehicle for the Court to reject hypothetical statutory jurisdiction, which is inconsistent with this Court's caselaw and the Constitution, *see* Part I, *infra*, is illogical on its own terms, *see* Part II, *infra*, and causes significant detrimental consequences, *see* Part III, *infra*.

ARGUMENT

I. Hypothetical Statutory Jurisdiction Is Inconsistent with This Court's Precedent.

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "Without jurisdiction the court cannot proceed at all." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). "'[T]he first and fundamental question is that of jurisdiction.'" *Steel Co.*, 523 U.S. at 94 (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). And given that federal courts "possess only that power authorized by Constitution and statute," their jurisdiction "is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see Butcher v. Wendt*, 975 F.3d 236, 245 (2d Cir. 2020) (Menashi, J., concurring in part and concurring in the judgment).

"Because of this basic principle, the Supreme Court has squarely rejected the practice of 'assuming jurisdiction for the purpose of deciding the merits—the 'doctrine of hypothetical jurisdiction'—because it 'carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.'" *Butcher*, 975 F.3d at 245 (Menashi, J., concurring in part and concurring in the judgment) (quoting *Steel Co.*, 523 U.S. at 94). For a court "to resolve contested questions of law when its jurisdiction is in doubt" is, "by very definition, for a court to act ultra vires." *Steel Co.*, 523

U.S. at 101–02; *see Butcher*, 975 F.3d at 245 (Menashi, J., concurring in part and concurring in the judgment).

The Second Circuit has repeatedly held that it cannot assume "Article III jurisdiction" but has viewed that as different from assuming "statutory jurisdiction." *See* Pet.App.7a. As explained below, there is no meaningful distinction between the two as a matter of first principles, *see* Part II, *infra*, but just as importantly, the Second Circuit's approach is contrary to this Court's precedent.

In rejecting hypothetical jurisdiction in *Steel Co.*, this Court repeatedly declined to distinguish statutory jurisdiction from Article III jurisdiction. For example, the Court explained that "[t]he *statutory* and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101 (emphasis added). The Court even defined "subject-matter jurisdiction" as "the courts' *statutory* or constitutional *power* to adjudicate the case." *Id.* at 89 (first emphasis added). Prior cases made the same point. *See, e.g.*, *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction ... is an Art. III as well as a statutory requirement."). "Nothing in this definition or the Court's holding suggests that limitations on subject-matter jurisdiction are less binding when created by statute rather than by the Constitution." *Butcher*, 975 F.3d at 247 (Menashi, J., concurring in part and concurring in the judgment).

In fact, in pointing to cases that had improperly assumed hypothetical jurisdiction, *Steel Co.* included ones involving statutory jurisdiction. *See* 523 U.S. at 94 (citing *SEC v. Am. Capital Investments, Inc.*, 98 F.3d 1133, 1139–42 (9th Cir. 1996), and *Browning-Ferris Industries v. Muszynski*, 899 F.2d 151, 154–59 (2d Cir. 1990)). And *Steel Co.* also noted that certain "statutory arguments, since they are 'jurisdictional,' would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*." *Id.* at 93.

Accordingly, *Steel Co.* repeatedly treated Article III jurisdiction and statutory jurisdiction the same for these purposes. Subsequent Supreme Court cases confirmed this view. In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), the Court held that although "subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues," *id.* at 584. In so holding, the Court expressly affirmed that it is "subject-matter jurisdiction," *id.*—not some subset of subject-matter jurisdiction—that must precede a decision on the merits, *see Butcher*, 975 F.3d at 246–47 (Menashi, J., concurring in part and concurring in the judgment).

"To be sure, the Supreme Court has sometimes discussed the jurisdiction 'that is authorized by Article III of the Constitution,' on the one hand, 'and the statutes enacted by Congress,' on the other." *Id.* at 247 (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). "'But this merely highlights that both requirements exist; it does not intimate that the requirements delineated in a statutory grant of

jurisdiction are any less a constraint on courts' power than the requirements described directly in the Constitution.'" *Id.* (quoting *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 517 (D.C. Cir. 2018) (Edwards, J., concurring)).

Accordingly, this Court has *already* held that a federal court may not simply assume jurisdiction—be it "statutory" or "Article III." *See Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018). "'To deny this position' would undermine the separation of powers by 'elevating the judicial over the legislative branch.'" *Id.* (alteration omitted).

II. The Doctrine of Hypothetical Statutory Jurisdiction Is Nonsensical.

The doctrine of hypothetical statutory jurisdiction is also wrong as a matter of logic and first principles.

First, Article III itself makes clear that federal court jurisdiction is limited by both the Constitution and the statutes passed by Congress: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States." U.S. Const. art. III, § 2. And pursuant to Article III, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004), which Congress does by enacting statutes, *see Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

Thus, every statutory jurisdictional limitation on a lower court inherently derives from Article III. *See*

Palmore v. United States, 411 U.S. 389, 401 (1973) (noting that "the task of defining [lower courts'] jurisdiction[] was left to the discretion of Congress").

For example, Article III authorizes Congress to establish diversity jurisdiction in the lower federal courts, *see* U.S. Const. art. III, § 2, and Congress has exercised that authority by passing a statute requiring the amount in controversy exceed $75,000, *see* 28 U.S.C. § 1332(a). A court invoking hypothetical jurisdiction would first have to determine whether that dollar requirement is an "Article III" jurisdictional limit it must follow, or instead a "statutory jurisdictional" limit it could ignore. The answer is that it is *both*, as explained above. But more importantly, the answer does not matter. It is a jurisdictional limit and thus cannot be assumed by a federal court. *See, e.g.*, Brian A. Kulp, *Jurisdictional Avoidance: Rectifying the Lower Courts' Misapplication of* Steel Co., 44 Harv. J.L. & Pub. Pol'y 374, 394 (2021) ("Lest the courts act in contravention of the separation-of-powers and federalism principles embodied in Article III, they cannot dispense with the statutory elements of jurisdiction any more than the constitutional ones….").

Thus, as Justices Thomas, Gorsuch, and Barrett noted in a separate dissent on this very topic: "the lower courts' distinction between 'statutory jurisdiction' and 'Article III' jurisdiction seems untenable." *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027 (2023) (Thomas, J., dissenting from denial of certiorari).

Second, no explanation has been provided for why the Court could assume so-called statutory jurisdiction only when the resolution of the merits is obvious, as the Second Circuit does. Either jurisdiction exists, or it doesn't—the answer cannot turn on the ease with which the Court can resolve the merits of the underlying claim. In fact, *Steel Co.* expressly rejected the notion that the court's subject-matter jurisdiction turns on the supposed "inadequacy of the federal claim," at least outside of the rare situation where the claim is so "completely devoid of merit as not to involve a federal controversy" at all. *Steel Co.*, 523 U.S. at 89. If "all cause-of-action questions may be regarded as jurisdictional questions, and thus capable of being decided where there is no genuine case or controversy, it is hard to see what is left of th[e case-or-controversy] limitation in Article III." *Id.* at 93.

* * *

Jurists have long recognized the illogic of hypothetical jurisdiction. For example, then-Judge Clarence Thomas argued in 1991 that "[w]hen federal jurisdiction does not exist, federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved. It follows that federal courts have a 'special obligation' to appraise at the outset their own jurisdiction…. This tenet is as solid as bedrock and almost as old." *Cross–Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 339 (D.C. Cir. 1991) (Thomas, J., dissenting in relevant part). "A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may," but hypothetical jurisdiction "changes this fundamental precept to read, in

effect, that under certain circumstances a federal court should decide cases regardless of whether it can, and need not determine whether it can, before it does." *Id.* at 340.

Judge O'Scannlain likewise pointed out over 30 years ago that "[t]he concept of hypothetical jurisdiction is therefore nonsensical: without actual jurisdiction, the court cannot act, and it is illogical to suggest that 'hypothetical' jurisdiction may exist where actual jurisdiction may not." *Clow v. U.S. Dep't of Hous. & Urb. Dev.*, 948 F.2d 614, 625 (9th Cir. 1991) (O'Scannlain, J., dissenting). "Within the context of our constitutional system, the concept of hypothetical jurisdiction simply has no place. A court has no discretion where it has no power, and to suggest otherwise is to erode a fundamental limitation on the exercise of judicial authority." *Id.* at 628; *see also Koff v. United States*, 3 F.3d 1297, 1300 (9th Cir. 1993) (O'Scannlain, J., concurring in the judgment) ("I believe we are forbidden to assume we have jurisdiction to exercise the judicial power created by Article III and vested in us by statute.").

This Court's opinion in *Steel Co.* later vindicated then-Judge Thomas and Judge O'Scannlain by citing their dissents from *Cross-Sound* and *Clow*, *see Steel Co.*, 523 U.S. at 98, 99, but hypothetical jurisdiction has unfortunately crept back into some lower courts' jurisprudence.

III. Hypothetical Statutory Jurisdiction Causes Pernicious Effects.

This Court has explained that "hypothetical jurisdiction produces nothing more than a

hypothetical judgment," *Steel Co.*, 523 U.S. at 101, but as Judge Menashi explains, "such a judgment can have real consequences," *Butcher*, 975 F.3d at 253 (Menashi, J., concurring in part and concurring in the judgment). Hypothetical jurisdiction is therefore much more than a technical dispute about whether a case is rejected on the merits or due to lack of jurisdiction.

As Judge Menashi has explained, "a dismissal on the merits can create binding precedent on important legal questions" by "defin[ing] the essential elements a plaintiff must plead to state a claim for a particular cause of action." *Id.* at 248. Those pronouncements matter because circuit court decisions are binding not just on subsequent panels but on the lower courts, as well. *See id.*

In propounding on the merits of a case without first establishing its jurisdiction, "[t]he court may also determine the scope and application of affirmative defenses including various types of estoppel, a wide range of forms of legal immunity from suit, the equitable doctrine of laches, a claim of privilege, and the barring effect of res judicata and related preclusion principles." *Id.* (alteration and quotation marks omitted).

For example, imagine a district court assumed hypothetical jurisdiction in a diversity case and proceeded to hold that the plaintiff's state-law claim failed on the merits. That case should have been dismissed without prejudice and without any discussion of the merits, and the plaintiff could refile in state court and pursue the claim there (subject to,

e.g., the statute of limitations). But the federal district court's resolution of the merits could very well preclude that state suit because the very same claim, involving the very same parties, had already been resolved on the merits.

Finally, as Judge O'Scannlain explained, "the concept of hypothetical jurisdiction threatens to swallow numerous statutory restraints on the federal courts." *Clow*, 948 F.2d at 628. Judge Menashi agreed in *Butcher*, where he noted that nothing would stop a circuit court from "assum[ing] jurisdiction over cases that Congress has barred us from considering," including "original jurisdiction over federal question and diversity of citizenship cases," "appellate jurisdiction to review the decisions of other courts of appeals," "the decisions of district courts in other circuits," or even "matters within the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Appeals for the D.C. Circuit, or the U.S. Court of Appeals for Veterans Claims." *Butcher*, 975 F.3d at 247–48 (Menashi, J., concurring in part and concurring in the judgment) (citing 28 U.S.C. §§ 1331–32, 1254, 1294, 1295, 8 U.S.C. § 1535, and 38 U.S.C. § 7252).

* * *

This Court should adopt the views expressed by then-Judge Thomas and Judge O'Scannlain before *Steel Co.*, by a majority of Justices in *Steel Co.* itself, and by Judge Menashi after *Steel Co.*—and expressly reject the doctrine of hypothetical statutory jurisdiction. *Cf. Donziger v. United States*, 143 S. Ct. 868, 870 (2023) (Gorsuch, J., dissenting from the

denial of certiorari) ("I can only hope that future courts weighing [an important separation-of-powers issue] will consider carefully Judge Menashi's dissenting opinion.").

IV. This Case Is an Ideal Vehicle.

Three Justices have already indicated this issue is worthy of review. *See Waleski*, 143 S. Ct. 2027 (Thomas, J., dissenting from denial of certiorari). In *Waleski*, the petitioner raised only the question of hypothetical jurisdiction, without any related issue of interest and shorn from an explanation of why the use of hypothetical jurisdiction mattered in *that specific case*.

Stenger's petition is a stronger vehicle because it raises a second question presented that itself is worthy of review. That makes this case analogous to *Steel Co.*, where the Court initially granted review on an underlying statutory issue but then asked for supplemental briefing on the hypothetical jurisdiction issue, for which the case is now known. *See Steel Co.*, 523 U.S. at 86, 88. Stenger's case also provides a concrete example of how assuming statutory jurisdiction leads to the problematic development—or underdevelopment—of other important areas of legal doctrine.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition.

Respectfully submitted,

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