No. 24-957

IN THE

Supreme Court of the United States

WILLIAM STENGER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

DAVID J. WILLIAMS
GRAVEL & SHEA
P.O. BOX 369
Burlington, VT 05402

LAWRENCE D. ROSENBERG
Counsel of Record
NICHOLAS A. CAMPBELL
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Petitioner

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INTRODUCTION

The government essentially concedes that the hypothetical statutory jurisdiction question is cert worthy, and cannot seriously contest that the *coram nobis* question is also cert worthy. It tries to avoid these conclusions by concocting an appellate standing argument—which is derivative of its key argument that this case presents a bad vehicle. But the government's opposition is based on two fundamental errors: one legal, and one factual.

First, the government essentially asserts that a petitioner lacks appellate standing unless he can *conclusively* show that he would win below but-for the wrongly decided issues on appeal. *See* Opp. 6–9. That can't be right. And it isn't: a petitioner need only show that his injury is "likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation omitted). And because Petitioner suffered a procedural-style injury by the Second Circuit's failure to conduct its jurisdictional analysis, remanding to the Second Circuit for that analysis would redress Petitioner's injury. In addition, as Petitioner explained before, Pet. 28, and explains below, *infra* pp. 9–10, if the jurisdictional issues are decided in his favor, it is likely the merits will also be decided in his favor.

Second, the government claims Petitioner advanced a proximate cause argument on the merits below—but in fact, he advanced an intervening cause argument. *See, e.g.*, JA 440, 446, 798. And that matters: neither the District Court nor the Court of Appeals considered Petitioner's intervening cause argument. Instead, both courts addressed only a proximate cause

argument. If either court had considered Petitioner's actual merits argument, he likely would have prevailed. *See* Pet.App.7a–8a. And again, closer attention to the jurisdictional question would likely lead the Second Circuit to this conclusion on the merits.

With those issues resolved, the petition presents a unique opportunity to resolve two clean circuit splits in one case. Petitioner showed how the courts of appeals are deeply divided on whether federal courts can "assume" hypothetical statutory jurisdiction to resolve the merits of a case. *See* Pet. 8–16. And he showed that several circuits are similarly at odds on whether a writ of *coram nobis* is available to correct a criminal restitution order. *See id.* 20–23. This case tees up both of those questions—questions that, Petitioner explained, are both important and likely to recur. *See id.* 24–27.

Again, the government all but concedes this. Indeed, the government never contests that the hypothetical statutory jurisdiction question has created a deep circuit split. *See* Opp. 9–10. And while it attempts to distinguish the *coram nobis* split away as irrelevant, it lacks legal backing to do so—despite its protests, a circuit split that includes unpublished opinions is a circuit split all the same. *See id.* 11–12.

The petition presents a strong vehicle to resolve two circuit splits. This Court should grant the petition.

ARGUMENT

I. THIS PETITION PRESENTS A STRONG VEHICLE TO RESOLVE TWO IMPORTANT CIRCUIT SPLITS

This petition presents the unusual opportunity for this Court to efficiently resolve two circuit splits. The first question is the subject to a long-standing and deeply entrench split that concerns the powers of the federal judiciary: whether a court can assume hypothetical statutory jurisdiction to resolve the merits of a case. The second question also implicates the scope of federal judicial power, but under the All Writs Act: whether a writ of *coram nobis* can empower courts to entertain challenges to criminal restitution orders.

In its opposition brief, the government goes to great lengths to avoid these two clean splits. But both questions are important and recurring, and both splits are clean. The Court should consider both or either questions presented.

1. *First*, this Court should resolve whether the federal courts can assume hypothetical statutory jurisdiction to resolve the merits of a case.

The government all but concedes that the hypothetical statutory jurisdiction question is a cert-worthy. *See* Opp. 9–11. This is not surprising. Several members of this Court have acknowledged that the "continued use of hypothetical jurisdiction is the subject of a longstanding split of authority." *Waleski v. Montgomery, McCracker, Walker & Rhoads, LLP*, 143 S. Ct. 2027, 2027 (2023) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J. and Barrett, J.). And in his petition, Petitioner showed that five circuits have cleanly

rejected the doctrine, while seven of them happily deploy it. *See* Pet. 8. That alone warrants review of this question.

Confronting a deep circuit-split, the government attempts to shield the case from review by minimizing the problems posed by hypothetical subject matter jurisdiction. *See* Opp. 9–11. According to the government, "the exercise of hypothetical statutory jurisdiction is often—as in this case—of limited practical importance, insofar as courts apply it when presented with claims that are plainly without merit." *Id.* 9 (internal quotation marks omitted). But it is a serious constitutional problem for federal courts to resolve merits questions without establishing jurisdiction—no matter how "obvious" a merits question may be.

Indeed, the government misses the point. The question presented is an important one about power, not practicality. It concerns the Constitution's and Congress's limits on federal court authority. This Court observed that, when it comes to hypothetical jurisdiction, "[m]uch more than legal niceties are at stake." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Id.* This Court established that practicality is beside the point: "However desirable prompt resolution of the merits [] question may be, it is not as important as observing the constitutional limits set upon courts in our system of separate powers." *Id.* at 110.

The government also appears to claim that *Steel Co.* carved out an exception for "easy" merits questions,

based upon a strained of a later concurrence by Justice Scalia, the author of *Steel Co.* Opp. 9–10. That is wrong. *Steel Co.* itself described the "general proposition that an 'easy' merits questions may be decided on the assumption of jurisdiction" as "precedent-shattering." 523 U.S. at 99 (emphasis removed). And Justice Scalia's later acknowledgement that a "jurisdictional ground for dismissal" includes "the absence of a cause of action" that "is so clear that respondents' claims are frivolous," *Tenet v. Doe*, 544 U.S. 1, 12 (2005) (Scalia, J., concurring), concerned allegations that did not fit a cause-of-action "mold" at all—not allegations that make out a claim but would obviously fail, *see Steel Co.*, 523 U.S. at 89.

2. *Second*, this Court should take the opportunity to resolve another circuit split: whether a writ of *coram nobis* is available to challenge a restitution order.

The government argues that this case presents a poor vehicle to resolve this question. Opp. 11. It attempts minimize that there is a circuit conflict at all, underscoring that two of split-creating cases are "nonprecedential." *Id.* 12. But when it comes to tallying circuit splits, it is this Court's practice to treat published and unpublished opinions the same. *See, e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve the conflict between a published opinion and an "unpublished order" of the Eleventh Circuit); *Johnson v. United States*, 529 U.S. 694, 699 n.3 (2000) (listing unpublished decision in overview of circuit split). That should not be a surprise: "[a]n unpublished opinion may have a lingering effect in [a] Circuit." *Smith v. United States*,

502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from denial of certiorari). So the government's attempt to vanish a circuit split fails.

At bottom, then, the government does not seriously contest that this case thus presents a second viable circuit split—in turn making the petition an unusually efficient vehicle. *See* Pet. 20–23; *United States v. Mischler*, 787 F.2d 240, 241 n.1 (7th Cir. 1986); *United States v. Stefanoff*, 149 F.3d 1192, 1998 WL 327888, at *1 (10th Cir. June 22, 1998); *Campbell v. United States*, 330 F. App'x 482, 483 (5th Cir. 2009) (per curiam). And the split is in area fraught with confusion. Indeed, the scope of *coram nobis* has spawned *at least two additional circuit splits*. *See* Pet. 22 n.5. This Court should take the opportunity to resolve two important legal questions.

II. PETITIONER HAS STANDING TO SEEK REVIEW OF THE QUESTIONS PRESENTED

The government claims that Petitioner was not harmed by the judgment below and that a favorable ruling from this Court would not redress Petitioner's injury. To establish appellate standing, a petitioner must demonstrate that it (1) "has experienced an injury fairly traceable to the judgment below" and that (2) "a favorable ruling from the appellate court would redress that injury." *West Virginia v. EPA*, 597 U.S. 697, 718 (2022) (internal quotation marks omitted). Petitioner was injured by the judgment below, and a favorable opinion from this Court would likely remedy that injury, so Petitioner has standing.

1. The government protests that Petitioner "sustained no injury from the only aspect of the judgment below that he challenges in this Court: the

court of appeals' exercise of 'hypothetical jurisdiction' over his *coram nobis* claim." Opp. 7. And it complains that Petitioner cannot prove with certainty that a favorable outcome with this Court would lead to success on the merits on remand. But it is Petitioner's contention that the short shrift the Second Circuit afforded the jurisdictional question harmed him; the court injured Petitioner by depriving him of an important step in its analysis as it barreled toward the merits. And the notion that Petitioner must now show a 100% chance of success on the merits upon remand cannot be right: such a rule is not only far from normal practice, it is entirely unworkable.

a. Petitioner's theory of harm is far from unusual. *See id.* 6–8. Federal courts often find standing in analogous circumstances. For example, the Supreme Court has acknowledged that, when an agency fails to follow certain procedures, that failure creates a concrete harm. As Justice Scalia, writing for this Court, put it in *Lujan v. Defenders of Wildlife*: "There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right … Thus, under our case law, one living adjacent to the site for proposed construction … has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld." 504 U.S. 555, 572 n.7 (1992). What's more, a person whose procedural interest is violated "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.*; *see also WildEarth Guardians v. Jewell*, 738 F.3d 298,

305 (D.C. Cir. 2013) ("[W]e relax the redressability and imminence requirements for a plaintiff claiming a procedural injury …."). As a result, that "doctrine relieves the plaintiff of the need to demonstrate that (1) the agency action would have been different but for the procedural violation, and (2) … court-ordered compliance with the procedure would alter the final result." *In re Endangered Species Act Section 4 Deadline Lit-MDL No. 2165*, 704 F.3d 972, 977 (D.C. Cir. 2013).

Petitioner's theory is similar, and is thus inoffensive to Article III standing requirements. "'Federal courts,' it bears repeating, 'are courts of limited jurisdiction.'" *In re: 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016) (Sutton, J.) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "Before they may act, they must ensure their power to act." *Id.* The Second Circuit did not assure itself of its jurisdiction, amounting to an injury not unlike a procedural violation. That harmed Petitioner, and warrants a remand so the Second Circuit can undertake the proper process as a remedy. And, though not necessary to establish standing, Petitioner contends that requiring the Second Circuit to take a remedy the procedural injury would likely lead to a different outcome on the merits.

b. As a result, the government's claim that Petitioner's ability to obtain relief following a favorable disposition from this Court is "speculati[ve]" is misplaced. Opp. 8. Start with the general rule that where "there is an injury sufficient to confer appellate standing, then the causation and redressability requirements will ordinarily be satisfied as well."

Wells Fargo Bank, N.A. v. Mesh Suture, Inc., 31 F.4th 1300, 1305 (10th Cir. 2022) (citing *Seila Law LLC v. CFPB*, 591 U.S. 197, 211 (2020)). When analogous procedural-style interests are undermined, a challenger need not show that "court-ordered compliance with the procedure would alter the final result." *In re Endangered Species Act Section 4 Deadline Lit-MDL No. 2165*, 704 F.3d at 977; *see also Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."). So Petitioner easily meets the redressability requirement.

c. But even under the usual standing rules, a challenger can establish redressability without proving with certainty he will prevail on remand. He need only show that his injury is "likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).

To start, Petitioner's procedural-style injury would be redressed by the Second Circuit undertaking the jurisdictional analysis. That on its own establishes standing under *Hollingsworth*.

But it is worth noting that, while such an outcome is not necessary to establish standing here, there is also good reason to think that a favorable judicial decision from this Court—ordering the jurisdictional analysis—would *also* allow Petitioner to prevail on the merits below. As Petitioner explained, the district court ordered Petitioner to pay restitution on the theory his false statement to a state regulator about

the vitality of his AnC Bio project led investors to invest in the project. Pet.App.16a–17a. According to the court, "the false statement to which Mr. Stenger admitted at the time of his guilty plea was a sufficient proximate cause to support a restation order even if there were other causes at play." Pet.App.18a.

But the district court never actually addressed Petitioner's argument. Petitioner did not argue that the Vermont regulators' decision to reauthorize the solicitation of investment in the AnC Bio project in April 2015, despite being aware of Petitioner's illicit activities, constituted a *proximate cause*. Instead, Petitioner argued that it constituted a an *efficient intervening cause*. JA 440, 446, 798. While a "superseding cause is a cause that is unforeseeable and may be described as abnormal or extraordinary," 3 Fed. Jury Prac. & Instr. § 120:63 (7th ed.), an "'efficient intervening cause' is a new and independent act, itself a proximate cause of a result, breaking the causal connection between the original wrong and the result," *id.* § 120:64.

The Second Circuit *also* overlooked this feature of Petitioner's argument. *See* Pet.App.7a–8a. A more careful approach to the jurisdictional question should beget a more careful approach to the merits (and to Petitioner's actual arguments). So a favorable ruling from this Court would likely lead to Petitioner prevailing on the merits.

2. The government also points out that "petitioner himself *invoked* the lower courts' jurisdiction to review that claim on the merits, and he believes that the court of appeals' jurisdiction hypothesis was correct." Opp. 7. On Petitioner's theory of the case, is

not clear why this should matter. Regardless, the government tells only half of the story. While Petitioner did invoke the lower courts' jurisdiction, he also argued that the Second Circuit was obligated to conduct the jurisdictional inquiry. *See* Pet.App.7a. And Petitioner maintains that the court's decision to skip it contributed to a skewed merits decision.

CONCLUSION

The Court should grant the petition.

June 9, 2025

Respectfully submitted,

WEST VIRGINIA
UNIVERSITY
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

DAVID J. WILLIAMS
GRAVEL & SHEA
P.O. Box 369
Burlington, VT 05402

LAWRENCE D. ROSENBERG
Counsel of Record
NICHOLAS A. CAMPBELL
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Petitioner