No.

In the Supreme Court of the United States

VITOL S.A.; VITOL INC.,

Petitioners,

v.

AUTORIDAD DE ENERGÍA ELÉCTRICA DE PUERTO RICO,

Respondent.

VITOL S.A.; VITOL INC.,

Petitioners,

v.

AUTORIDAD DE ENERGÍA ELÉCTRICA DE PUERTO RICO; FIDELITY AND DEPOSIT CO. OF MARYLAND; FULANO DE TAL; FIADORAS A, B, AND C; ASEGURADORAS X, Y, AND Z; CARLOS M. BENÍTEZ, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998), this Court reaffirmed that a federal court generally may not rule on the merits of a dispute without first determining that it has subject-matter jurisdiction over the matter. The question presented is whether the rule espoused in *Steel Co.* is limited to Article III jurisdictional disputes, as the First Circuit and other circuits have held, or whether it applies to statutory as well as Article III jurisdictional disputes, as the Eleventh Circuit and other circuits have held.

RULE 29.6 STATEMENT

Vitol S.A. is a Société Anonyme organized under the laws of Switzerland with its principal place of business in Geneva. Vitol S.A. is a wholly-owned subsidiary of Vitol Holdings Sàrl.

Vitol Inc. is a Delaware corporation with its principal place of business in Houston, Texas. Vitol Inc. is a wholly-owned subsidiary of Vitol US Holding Co.

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PETITION FOR A WRIT OF CERTIORARI

Vitol S.A. and Vitol Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit (App. 1a-14a) is available at 859 F.3d 140. The order of the district court remanding to Puerto Rico state court (App. 15a-40a) is reported at 2016 WL 9443738. The order of the court of appeals denying rehearing (App. 41a-43a) is not reported.

JURISDICTION

The court of appeals entered judgment on October 2, 2017, after denying petitioners' timely petition for rehearing. App. 41a-43a. In the court of appeals, the parties disputed whether the appellate court had jurisdiction under 28 U.S.C. § 1447. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution provides in part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

Relevant provisions of 28 U.S.C. § 1447, Puerto Rico's Law 458 (P.R. Laws Ann. tit. 3, §§ 928-928h), and Article 1258 of the Puerto Rico Civil Code (P.R. Laws Ann. tit. 31, § 3517), are reproduced at App. 44a-55a.

INTRODUCTION

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court forcefully denounced the "doctrine of hypothetical jurisdictional," *i.e.,* the notion that a federal court may assume "jurisdiction for the purpose of deciding the merits." *Id.* at 94. In doing so, the Court explained that this practice "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.*

The underlying jurisdictional issue in *Steel Co.* concerned whether the plaintiff had Article III standing to sue. *Id.* at 102. But the Court's opinion spoke in broad terms with respect to statutory as well as constitutional jurisdiction. For example:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion . . . . The *statutory and (especially) constitutional elements of jurisdiction* are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Id. at 101-02 (emphasis added) (citations omitted). And this Court's subsequent decisions confirm that *Steel Co.*'s proscription of hypothetical jurisdiction

applies to issues of statutory jurisdiction. *See, e.g.*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *infra* at 24-26.

Several circuits, including the First Circuit below as well as the Second Circuit and Third Circuit, nevertheless have repeatedly held that this proscription does not apply when the jurisdictional dispute is *statutory*, rather than constitutional. *See infra* at 16-18. When presented with a complex jurisdictional dispute of a statutory variety, these circuits feel free to "bypass the jurisdictional issue and proceed to the merits." App. 8a. The First Circuit did just that in the decision below and, in the process of deciding the merits, resolved an important contractual dispute between the parties, declaring the meaning of key contract terms. *Id.* at 9a-14a.

Not all circuits, however, have felt free to exercise hypothetical jurisdictional in such circumstances. In *Friends of the Everglades v. United States EPA*, for example, the Eleventh Circuit looked at *Steel Co.* and concluded that it "explicitly rejected th[at] theory." 699 F.3d 1280, 1288 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 421 (2013). Notwithstanding that the underlying jurisdictional issue was statutory rather than constitutional, Judge Pryor had no difficulty concluding that "[w]e cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment." *Id.* at 1289. At least three other circuits have likewise refused to exercise "hypothetical jurisdiction" even when the underlying dispute is statutory in nature. *See infra* at 18-22.

Opportunities abound for federal courts to invoke hypothetical jurisdiction for the purpose of resolving a case on the merits, in order to avoid having to

tackle a seemingly challenging jurisdictional issue. Moreover, the doctrine concerns a matter of foundational importance: the "nature and limits of the judicial power of the United States." *Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan,* 111 U.S. 379, 382 (1884)). The Court should grant the petition, resolve the circuit conflict, and eliminate any ambiguity over whether the rule confirmed in *Steel Co.* extends to statutory jurisdictional issues.

STATEMENT OF THE CASE

A. Factual Background

Vitol Inc. (VIC) is a commodities trading company that delivers fuel in the Americas and around the world. Pet. CA Br. 6.[1] Between 2005 and 2008, VIC and its sister company, Vitol S.A. (VSA), entered into six fuel-oil supply agreements with the Autoridad de Energía Eléctrica de Puerto Rico (the Puerto Rico Electric Power Authority, or PREPA), a public utility and instrumentality of the Commonwealth of Puerto Rico. App. 2a. Over the life of those six fuel oil supply contracts, VIC and VSA delivered more than $3.8 billion worth of fuel oil to PREPA, and PREPA paid for that oil in accordance with the contracts. Pet. CA App. 190. The profit margin on those deliveries was less than 1% of the revenues received from PREPA. *Id.* at 209. It is undisputed that VIC and VSA delivered the oil, PREPA paid for it, and

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[1] "Pet. CA Br." refers to the Brief on the Merits filed by Petitioners in the First Circuit, and "Pet. CA Reply" refers to Petitioners' Reply Brief on the Merits. "Pet. CA App." refers to the corresponding appendix filed below.

PREPA consumed the oil to generate electricity—which it then sold to its users. Pet. CA App. 189-90.

In addition to detailed terms relating to the specifications for the fuel oil to be delivered (including, for example, required levels for temperature, viscosity, water and sediment) and the delivery mechanism, each of the six agreements included a substantively identical forum selection clause. Pet. CA Br. 8-9. For example:

> The Contract shall be governed by, and construed in accordance with the laws of the Commonwealth of Puerto Rico. Also, the contracting parties expressly agree that only the state courts of Puerto Rico will be the courts of competent and exclusive jurisdiction to decide over the judicial controversies that the appearing parties may have among them regarding *the terms and conditions* of this Contract.

App. 3a (emphasis added) (quoting contracts). Each agreement warranted that VIC or VSA was "not prohibited from doing business in Puerto Rico or barred from contracting with agencies or instrumentalities of the Commonwealth of Puerto Rico." *Id.* at 4a (quoting contracts).

In 2007, VSA—a separate corporate entity from VIC—pleaded guilty to grand larceny in New York state court in connection with the United Nations Oil-for-Food Programme in Iraq. *Id.* at 6a. It is undisputed that the allegations at issue in that case had nothing to do with Puerto Rico, PREPA, or VIC's supply contracts. Moreover, at the time VSA itself

had no contractual relationship with PREPA. *Id.* at 19a-20a.

Following this conviction, PREPA declined to cancel the two still-extant contracts with VIC. Pet. CA App. 197-200. Instead, PREPA assured VIC in writing that PREPA was not cancelling the two remaining contracts and asked VIC to continue delivering fuel oil—which VIC then did. Pet. CA App. 198-200. But as PREPA's financial situation deteriorated in 2009, PREPA changed its tune and accused VIC of violating a Puerto Rico statute called "Law 458." Pet. CA App. 197-98. In general terms, Law 458 bars the Puerto Rico government from contracting with parties that have been convicted of certain crimes. *See* P.R. Laws Ann. tit. 3, §§ 928-928h (App. 46a-54a). PREPA alleged that *VSA*'s 2007 New York court conviction, which it claimed to have only recently discovered, nullified and voided PREPA's contracts with *VIC* in their entirety and ab initio. App. 18a.

B. District Court Proceedings

In 2009, PREPA sued VIC and VSA in Puerto Rico Commonwealth court, alleging that, in light of VSA's New York conviction and Law 458, PREPA's final two contracts with VIC were "null" and without legal effect. *Id.* at 17a-18a. In 2012, PREPA filed another complaint in Puerto Rico state court, alleging that its first four contracts with VIC were also "null" and "void ab initio" under Law 458. *Id.* at 18a-19a. In both complaints, PREPA sought statutory remedies stemming from VIC's alleged Law 458 violation that go far beyond merely nullifying the contracts. *Id.* PREPA reached outside of Law 458 to claim a one-way statutory confiscation

remedy under Article 1258 of the Puerto Rico Civil Code (P.R. Laws Ann. tit. 31, § 3517; App. 55a). Pet. CA App. 219-20. Under PREPA's theory, because the contracts are allegedly "null" and "void," PREPA is entitled under Article 1258 of the Puerto Rico Civil Code to seize back every dollar it paid over the life of the contracts—amounting to billions of dollars all told—without providing *any* offset for the value of the fuel oil VIC and VSA delivered and PREPA consumed to generate electricity that PREPA sold, for substantial revenue, to its power customers. Pet. CA App. 216-17, 219-20 (citing P.R. Laws Ann. tit. 31, § 3517; App. 55a).

PREPA's complaint does not assert any claim for *breach of contract* based on a violation of the terms and conditions of the contract such as an alleged defect in the quality or quantity of fuel oil delivered, the timing of the deliveries, or the prices charged. Pet. CA Br. 10. To the contrary, PREPA admitted that VIC was its "best supplier." Pet. CA App. 22. PREPA also admitted that PREPA sustained no direct damages under any of the contracts at issue, Pet. CA App. 228, and PREPA is not seeking damages for breach of contract. Instead, PREPA's claim is that the contracts should be treated under Puerto Rico statutory law as if they never existed—*i.e.,* that they are "null," "void *ab initio*," and without "any legal effect whatsoever." *See* Pet. CA App. 70, 217-20, 227.

VIC and VSA removed both of PREPA's actions to federal court (D. Puerto Rico) pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship. App. 7a. The district court denied without prejudice PREPA's motions for remand in both actions, and the cases were consolidated. The case proceeded to

discovery. *Id.* at 6a-7a, 19a-23a. But, in 2015, eighteen months after the parties filed cross-motions for summary judgment, PREPA filed a third motion to remand after the case had been assigned to a new judge, arguing that the forum selection clauses in VIC's contract precluded VIC from consenting to removal. *Id.* at 16a, 19a, 21a, 33a-37a.

PREPA argued that the forum selection clauses prevented all defendants from consenting to removal—thus defeating the unanimity among defendants required by 28 U.S.C. § 1446(b)(2)—on the ground that VIC was bound by the forum selection clauses to litigate in the Puerto Rico courts. *Id.* at 33a-37a. In response, VIC and VSA argued that the forum selection clauses did not apply to this litigation because PREPA was manifestly *not* seeking to enforce the "terms and conditions" of the contracts, but instead arguing that the contracts should be deemed as if they never even existed under a Puerto Rico statute. *Id.* at 29a-30a. VIC and VSA also pointed out the fundamental unfairness of PREPA, on the one hand, trying to enforce the forum selection clauses in the contracts while, on the other hand, arguing that the contracts lacked any "legal effect" whatsoever. *Id.*

In March 2016, the district court granted PREPA's motion. *Id.* at 39a. Without identifying any change in circumstances or new evidence warranting a remand, the court held that the forum selection clauses prevented VIC from consenting to removal by VSA, and therefore defeated unanimity, because "PREPA would have no claims against Vitol Inc. were it not for the contracts that include the forum selection clauses." *Id.* at 27a-28a. The court also rejected VIC and VSA's argument that PREPA

should be equitably estopped from invoking the forum selection clauses—and thus enjoying the rights and benefits of the contract—given that PREPA's position in this litigation is that those contracts should be treated as though they do not exist and never existed. *Id. at* 29a-30a.

C. Decision Below

VIC and VSA appealed. *Id.* at 7a. PREPA immediately moved to dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," except in certain circumstances. *See* App. 7a-8a. This Court has interpreted § 1447(d) *in pari materia* with § 1447(c), so that it "preclude[s] review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure." *Powerex Corp. v. Reliant Energy Servs. Inc.,* 551 U.S. 224, 229 (2007) (discussing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976)).[2]

In light of this precedent, the First Circuit and other circuits have held that remand orders based on forum selection clauses are reviewable under § 1447(d), reasoning that such a remand order is not

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[2] This Court has repeatedly recognized that 28 U.S.C. § 1447(d) is a jurisdictional provision limiting the authority of the courts to hear certain appeals. *See, e.g.*, *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 638 (2006); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 636 (2009); *Osborn v. Haley*, 549 U.S. 225, 239 (2007); *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 711 (1996); *see also Hagans v. Lavine*, 415 U.S. 528, 538 (1974) ("Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or another.").

based on a "defect" in the removal process, but rather "the interpretation of . . . a contract." *Autoridad de Energía Eléctrica de Puerto Rico v. Ericsson, Inc.*, 201 F.3d 15, 17 (1st Cir. 2000). PREPA argued that this case is different, however, in that, here, PREPA invokes the forum selection clauses in order to establish lack of unanimity, and so argued that § 1447(d) stripped the court of jurisdiction. App. 7a-8a. Courts and commentators have noted the difficulty in assessing whether (and how) § 1447(d) applies in such circumstances.[3] The First Circuit referred PREPA's motion to dismiss to the merits panel for consideration.

After hearing oral argument, the court of appeals affirmed. The court first observed that it was "dubitable whether we have jurisdiction to hear this appeal." App. 7a. The court explained that, on the one hand, "[a] remand order that is based on a breach of the unanimity requirement is not appealable pursuant to 28 U.S.C. § 1447(d)." *Id.* But on the other hand, "§ 1447(d) is *not* a bar to review of a remand order based on a forum-selection clause." *Id.* at 8a (emphasis added) (citation omitted). This case thus raises the question "whether a remand order based on a lack of unanimity *due to* a forum selection clause is

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[3] *See, e.g.*, *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1044 (11th Cir. 2001) (although a remand for lack of unanimity "is normally not subject to appellate review," the "matter at hand [involving a forum selection clause] . . . is not the normal case"); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3740 (4th ed. Apr. 2017 update, Westlaw) (observing that "the appealability of remand orders . . . has created much confusion over the years").

reviewable." *Id.* The court avoided this question, however, by invoking the hypothetical jurisdiction doctrine. As the court explained, it is "well established in th[e First] Circuit" that the court could assume jurisdiction "when the merits can easily be resolved in favor of the party challenging jurisdiction." *Id.* (citation omitted).

"[B]ypass[ing] the jurisdictional issue and proceed[ing] to the merits," the court construed the meaning of the forum selection clauses. *Id.* at 8a-14a. The court concluded that the phrase "regarding the terms and conditions of this Contract" encompassed the "statutory claims here" because those claims "plainly relate to the agreements at issue." *Id.* at 10a. The court rejected the argument that a forum selection clause governing claims "regarding the terms and conditions" of a contract is limited to claims that actually turn upon the "terms and conditions" of the contract. Instead, the court pointed to the fact that the contracts mentioned Law 458, even though PREPA's claims were not based on any provision mentioning Law 458. *Id.* at 11a.

The court also rejected VIC and VSA's argument that it would be "unreasonable and unjust" to permit PREPA to invoke the forum selection clauses when PREPA was arguing that the contracts were "void ab initio." *Id.* In doing so, the court pointed to a decision from the Seventh Circuit in which the party seeking to *avoid* application of the forum selection clauses was the party arguing that the contracts were void. *Id.* at 12a (citing *Muzumdar v. Wellness Int'l Network Ltd.,* 438 F.3d 759, 762 (7th Cir. 2006)). In this case, however, the party seeking to invoke the forum selection clauses was the same party arguing that the contracts were void.

VIC and VSA sought rehearing, arguing, among other things, that the court had erred in exercising hypothetical jurisdiction to dispose of the case on the merits. Rehearing was denied.[4] App. 42a.

REASONS FOR GRANTING THE WRIT

The circuits are deeply divided over whether the rule reaffirmed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), against the exercise of hypothetical jurisdiction applies only to Article III jurisdictional disputes or instead applies to both Article III and statutory jurisdictional disputes. The position of the First Circuit and several other circuits that the rule is limited to Article III jurisdictional disputes cannot be squared with either *Steel Co.* or this Court's subsequent decisions, and contravenes basic principles established by Article III and recognized by this Court concerning the nature and limits of the power of the federal courts. The authority of the federal courts to decide the merits of cases and controversies without first establishing that they have jurisdiction to do so is a matter of first order importance. The question presented is recurring and squarely implicated here. Certiorari is therefore warranted.

I. *STEEL CO.* REAFFIRMS A FOUNDATIONAL RULE CONCERNING THE EXERCISE OF JUDICIAL POWER

In *Steel Co.*, this Court squarely rejected the idea that a federal court can "proceed immediately to the

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[4] The First Circuit stayed the petition for rehearing as it concerned VIC's counterclaim in Appeal No. 16-1438, but denied the petition for rehearing in all other respects. *See* App. 42a. That counterclaim is not at issue in this petition.

merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." 523 U.S. at 93.

Steel Co. concerned whether a federal statute that imposed reporting requirements for toxic chemicals created liability for past reporting failures that had already been remedied. 523 U.S. at 86. A group sued Steel Company under the statute's citizen-suit provision, seeking to require Steel Company to pay civil penalties to the government. *Id.* at 86-88. As it came to this Court, the case presented two questions: (1) whether the statute authorized suits for purely historical violations (the "merits") and (2) whether the plaintiffs had Article III standing to challenge the purely historical violations at issue. *Id.* at 88-89. The district court held for Steel Company on both questions, and the Seventh Circuit reversed. *Id.* at 88.

Although the issue of hypothetical jurisdiction was not raised by the parties before this Court, Justice Stevens's concurrence argued that the Court should bypass the Article III issue (on constitutional avoidance grounds) to dismiss the case on the merits. *Id* at 113. In response to Justice Stevens and to the "substantial body of Court of Appeals precedent" endorsing the doctrine, *id.* at 93-94 & n.1, Justice Scalia's opinion for the Court forcefully rejected the doctrine of hypothetical jurisdiction.

Justice Scalia explained for the Court that the doctrine of hypothetical jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94. Because "[t]he

requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States,'" it is "is 'inflexible and without exception.'" *Id.* at 94-95 (alteration in original) (citation omitted). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-02.

In so holding, the Court grappled with prior cases that seemed to allow hypothetical jurisdiction. *Id.* at 98. The Court distinguished these cases on the basis of their "extraordinary procedural postures," *id.*, which "typically involv[ed] multiple parties or companion cases, in which the merits had already been addressed." Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 Ala. L. Rev. 493, 507-08 (2016). The Court did *not* argue that bypassing jurisdiction in those cases was justified because they involved statutory (not constitutional) jurisdictional issues, even though "that likely would have been an easier way to distinguish those cases than relying on their 'extraordinary procedural postures.'" *Id.*

The Court's decision in *Steel Co.* squares with the restraint that this Court has shown generally in terms of the exercise of judicial power when jurisdiction is at issue. The Court has long recognized that "[i]t is a fundamental precept that federal courts are courts of limited jurisdiction" and therefore "[t]he 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); *see also, e.g.*, *DaimlerChrysler Corp. v. Cuno*,

547 U.S. 332, 341 (2006) (assuring jurisdiction is necessary to ensure that "the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))).

Indeed, because federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto," a federal court "has a special obligation to 'satisfy itself . . . of its own jurisdiction.'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citations omitted); *see also Gunn v. Minton*, 568 U.S. 251, 256-57 (2013). This restraint applies to *all* jurisdictional limitations, whether set directly by the Constitution or by Congress exercising its constitutional court-defining role. Because "Congress has the constitutional authority to define the jurisdiction of the lower federal courts," "once the lines are drawn," courts may not "'disregard[]'" or "'evade[]'" those limits. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (citation omitted).

The First Circuit's rule allowing courts to assume jurisdiction to dispose of cases on the merits when the jurisdictional issue is statutory in nature sharply conflicts with this understanding and the well-established precedent on which *Steel Co.* rests.

II. THE CIRCUITS ARE DEEPLY DIVIDED OVER WHETHER *STEEL CO.* APPLIES TO STATUTORY JURISDICTIONAL ISSUES

A. The First Circuit And Other Circuits Hold That *Steel Co.* Applies Only To Article III Jurisdictional Disputes

Despite *Steel Co.*'s clear rule against assuming jurisdiction to decide the merits, the First Circuit has continued to do just that on the theory that *Steel Co.* forbids courts from assuming only the *constitutional* components of subject-matter jurisdiction (such as Article III standing), not the *statutory* requirements. *See, e.g.*, *Restoration Preservation Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003) ("[W]hile Article III jurisdictional disputes are subject to *Steel Co.*, statutory jurisdictional disputes are not."). In *Restoration Preservation*, the First Circuit characterized this rule as "well established in this circuit." *Id.* Following this "well established" rule, the court below felt free to assume jurisdiction because the dispute concerned statutory subject-matter jurisdiction under § 1447(d). *See* App. 8a.

The First Circuit has repeatedly embraced a robust view of the hypothetical jurisdiction doctrine. *See, e.g.*, *Telles v. Lynch*, 639 F. App'x 658, 661 & n.6 (1st Cir. 2016); *Cozza v. Network Assocs., Inc.*, 362 F.3d 12, 15 (1st Cir. 2004); *Davignon v. Clemmey*, 322 F.3d 1, 11 (1st Cir. 2003); *Parella v. Retirement Bd. of the R.I. Emps.' Ret. Sys.*, 173 F.3d 46, 53-57 (1st Cir. 1999). Indeed, in *Steel Co.*, this Court itself recognized that the First Circuit was among those courts "which find it proper" to exercise hypothetical jurisdiction when a "merits question is more readily

resolved." 523 U.S. at 93-94 (citing *United States v. Parcel of Land,* 928 F.2d 1, 4 (1st Cir. 1991)). In *Parcel of Land*, the First Circuit touted that "[t]his circuit has taken full advantage" of hypothetical jurisdiction as a way to "blaze[] a path around a jurisdictional nettle." 928 F.2d at 4. Even though *Steel Co.* effectively abrogated *Parcel of Land*, the First Circuit continues to apply its rule.

The First Circuit is not alone in this view. The Second Circuit and Third Circuit have also squarely and repeatedly held that *Steel Co.*'s "bar on hypothetical jurisdiction applies only to questions of Article III jurisdiction." *Moore v. Consolidated Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005); *see also Conyers v. Rossides*, 558 F.3d 137, 150 (2d Cir. 2009), *cert. denied*, 568 U.S. 933 (2012); *Fama v. Commissioner of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000); *Aljani v. Chertoff*, 545 F.3d 229, 237-38 (2d Cir. 2008); *accord Bowers v. National Collegiate Athletic Ass'n*, 346 F.3d 402, 415-16 (3d Cir. 2003) ("*Steel Co.* . . . should not be understood as requiring courts to answer all questions of 'jurisdiction,' broadly understood. . . . Instead, that case requires courts to answer questions concerning Article III jurisdiction before reaching other questions."); *Jordon v. Attorney Gen. of the U.S.*, 424 F.3d 320, 325 n.8 (3d Cir. 2005).

The Federal, Sixth, and Ninth Circuits have likewise held that *Steel Co.* does not limit the exercise of hypothetical jurisdiction when it comes to statutory jurisdiction. *See 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."); *Khodr v. Holder*, 531 F. App'x 660, 665 n.4 (6th Cir. 2013) (joining the "several circuits [that] have interpreted *Steel Co.* to permit courts to assume that *statutory* jurisdiction—as distinct from *constitutional* jurisdiction—exists in order to resolve a case, by means of a straightforward merits analysis, in favor of the party contesting jurisdiction"); *Montague v. NLRB*, 698 F.3d 307, 313 (6th Cir. 2012) (same); *NLRB v. Barstow Cmty. Hosp.-Operated by Cmty. Health Sys., Inc.*, 474 F. App'x 497, 499 (9th Cir. 2012) ("[U]nlike Article III jurisdiction, statutory jurisdiction can be presumed to exist when the merits are more easily resolved[.]").

While this precedent appears to stand in stark contrast to *Steel Co.*, it is, as one commentator has observed, "perhaps unsurprising" that circuits have continued down this path, "given [courts'] interest in maintaining flexibility to efficiently dispose of cases on their dockets." Stillman, *supra*, at 510.

B. The Eleventh Circuit And At Least Three Other Circuits Have Rejected That Rule And Applied *Steel Co.* To Statutory Jurisdictional Disputes

Not all circuits, however, have gone along. For example, the Eleventh Circuit has squarely rejected this position. In *Friends of the Everglades v. United States EPA*, the court concluded that it lacked statutory subject-matter jurisdiction over several petitions for review of an administrative rule. 699 F.3d 1280, 1288-89 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 421 (2013). It further held that, under *Steel*

Co., it could not exercise hypothetical jurisdiction and deny the petitions on the merits, "[e]ven if the resolution of the merits were foreordained." *Id.* at 1288. The court explained that, in its view, *Steel Co.* requires a federal court to "have *both* statutory *and* constitutional jurisdiction before it may decide a case on the merits." *Id.* (emphasis added); *see also id.* at 1286 (rejecting argument that "a court must satisfy itself of its jurisdiction before addressing the merits of a case only when the issue involves jurisdiction under Article III of the Constitution"). As the court put it, "[w]e cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment." *Id.* at 1289.[5]

Three other circuits, while not explicitly addressing whether the rule embodied in *Steel Co.* distinguishes between constitutional and statutory jurisdictional issues, have likewise refused to exercise hypothetical jurisdiction even when the jurisdictional issue is statutory. The Fourth Circuit has held that it cannot "assume subject matter jurisdiction merely to reach a less thorny issue." *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017). Citing *Steel Co.,* that court explained that a court must *always* ensure itself of jurisdiction,

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[5] The Eleventh Circuit has applied this rule in subsequent cases involving statutory jurisdictional issues. *See, e.g.*, *United States v. Harris*, 530 F. App'x 900, 901 (11th Cir. 2013) ("[T]he court must resolve any jurisdictional questions before it may address the merits of the case before it."); *Amerijet Int'l, Inc. v. NLRB*, 520 F. App'x 795, 798 (11th Cir. 2013) ("[W]e cannot [assume jurisdiction and thereby] create jurisdiction in the district court in the face of a congressional pronouncement that leaves the power to conduct an initial inquiry solely in the hands of the NLRB's General Counsel.").

including for statutory issues. *See id.* at 232-34 (assessing whether 29 U.S.C. §§ 185 and 1132(a)(1)(B) conferred jurisdiction); *see also, e.g.*, *Ameur v. Gates*, 759 F.3d 317, 322 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). The Seventh Circuit has also refused to exercise hypothetical jurisdiction in the statutory context. *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 572-73 (7th Cir. 2012). And the Fifth Circuit has likewise rejected the use of hypothetical jurisdiction to evade a statutory jurisdictional issue. *Leal Garcia v. Quarterman*, 573 F.3d 214, 216 & n.4, 224-25 (5th Cir. 2009); *see also, e.g.*, *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 283 (5th Cir. 2011) (refusing to treat prior exercise of jurisdiction as law of the case in light of *Steel Co.*, "which made the determination of jurisdiction a necessary antecedent to a ruling on the merits").

Other circuits, meanwhile, have taken a more schizophrenic approach to the issue. For example, the Eighth Circuit has often stated that *Steel Co.* prevents a court from assuming jurisdiction, including in cases involving *statutory* jurisdiction. *See, e.g.*, *Public Sch. Ret. Sys. v. State St. Bank & Tr. Co.*, 640 F.3d 821, 825-27 (8th Cir. 2011) (applying *Steel Co.* and considering whether that the district court had jurisdiction under 28 U.S.C. § 1332); *Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009) (quoting *Steel Co.* and explaining that the district court did not have statutory jurisdiction). But the Eighth Circuit has also held that a non-Article-III jurisdictional question "is not the type of jurisdictional issue that must be decided before addressing the merits of the controversy," *Lukowski*

v. INS, 279 F.3d 644, 647 n.1 (8th Cir. 2002), and professed confusion about whether *Steel Co.* "applies to statutory jurisdiction," *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1017-18 (8th Cir. 2011).

The case law in the Tenth Circuit is similarly mixed. On one hand, the Tenth Circuit has refused to allow hypothetical jurisdiction for matters of statutory jurisdiction. *United States v. Springer*, 875 F.3d 968, 972-73 (10th Cir. 2017) (discussing statutory jurisdiction over interlocutory appeals under 28 U.S.C. § 2255); *see Dutcher v. Matheson*, 733 F.3d 980, 984-85 (10th Cir. 2013); *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). But on the other hand, the Tenth Circuit has observed that there is confusion on this issue, *see Abernathy v. Wandes*, 713 F.3d 538, 557 n.17 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1874 (2014), and suggested that hypothetical jurisdiction is permissible for statutory jurisdiction, *see Yancey v. Thomas*, 441 F. App'x 552, 555 n.1 (10th Cir. 2011); *Ball v. Mayfield*, 566 F. App'x 765, 769 n.3 (10th Cir. 2014).

The D.C. Circuit also has divided internally, with the more recent case coming out against using hypothetical jurisdiction on statutory issues. *Compare Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (stating that *Steel Co.* allows the exercise of hypothetical jurisdiction for statutory jurisdictional questions), *with Forras v. Rauf*, 812 F.3d 1102, 1105 (D.C. Cir.) ("[T]he district court leapfrogged over the serious jurisdictional issues that Bailey raised and decided the [merits]. But assessing jurisdiction is not a 'legal nicet[y]'; it is an 'essential ingredient' of our ability to hear a case. The district court plainly should have satisfied any jurisdictional concerns before turning to a merits

question . . . ." (alteration in original) (citation omitted)), *cert. denied*, 137 S. Ct. 375 (2016).

The "circuit split" over whether courts are free to exercise hypothetical jurisdiction as long as the underlying jurisdictional dispute is statutory in nature is deep, acknowledged (*see* Stillman, *supra*, at 497, 511-12), and warrants this Court's review.

III. THE EXERCISE OF HYPOTHETICAL JURISDICTION CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS

A. Neither The Reasoning Nor Holding Of *Steel Co.* Depends On The Nature Of The Underlying Jurisdictional Dispute

The First Circuit and other circuits that have allowed the exercise of hypothetical jurisdiction as long as the jurisdictional issue is statutory in nature have misunderstood *Steel Co.* Because the particular jurisdictional issue disputed in *Steel Co.* was standing, the opinion understandably refers to "Article III jurisdiction." *See* 523 U.S. at 95, 98, 100 n.3, 101. But in referring to standing the Court was *not* drawing a doctrinal distinction between constitutional and statutory subject-matter jurisdiction and sanctioning the exercise of hypothetical jurisdiction as long as the jurisdictional issue was statutory in nature. On the contrary, the Court said that *both* components of jurisdiction—statutory and constitutional—are "essential." *See id.* at 101. Indeed, at the front of the "long and venerable line" of cases cited by the Court to rebuke the doctrine of hypothetical jurisdiction, *id.* at 94, is a case involving Congress's repeal of this Court's *statutory* appellate jurisdiction. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1869) ("The

first question necessarily is that of jurisdiction; for, if [one statute] takes away the jurisdiction defined by [an earlier statute], it is useless, if not improper, to enter into any discussion of other questions.").

Further, several of the lower court decisions that *Steel Co.* expressly cited—and thus abrogated—concerned only statutory jurisdiction. *See* 523 U.S. at 93-94 (abrogating, *inter alia*, *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996) (bypassing issue of jurisdiction under 28 U.S.C. § 1291), *and Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski*, 899 F.2d 151, 154, 159-60 (2d Cir. 1990) (bypassing issue of jurisdiction under environmental statutes)). And while *Steel Co.* observed that a court can address a merits question before resolving a question of "statutory *standing*," *see id.* at 97 & n.2 (emphasis altered), the Court has since made clear that statutory *standing* is not a component of subject-matter *jurisdiction*; rather, it is just another aspect of the merits. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88 & n.4 (2014) ("statutory standing . . . does not implicate subject-matter jurisdiction" (citations omitted)). *Steel Co.*'s discussion of statutory standing therefore provides no support for the notion that a court can bypass a question of statutory subject-matter jurisdiction to opine on the merits. *See* Stillman, *supra*, at 525.

Similarly, as discussed above, *supra* at 14, in grappling with prior decisions that arguably allowed hypothetical jurisdiction, the *Steel Co.* Court distinguished the decisions on procedural grounds. *See* 523 U.S. at 98. The Court did *not* take the simpler route of differentiating them by explaining that bypassing jurisdiction in those cases was

justified because they involved statutory (rather than constitutional) jurisdictional issues.

B. Subsequent Decisions Confirm That The Rule In *Steel Co.* Applies To Statutory Jurisdictional Issues

This Court's subsequent decisions in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), confirm that the rule applied in *Steel Co.* is not limited to Article III jurisdictional disputes.

In *Ruhrgas* this Court considered whether a dispute about subject-matter jurisdiction must always be resolved before a dispute about personal jurisdiction. *See* 526 U.S. at 577-78. Notably, the dispute about subject-matter jurisdiction in *Ruhrgas* was whether complete diversity existed under 28 U.S.C. § 1332—a statutory issue. *See id.* at 584. Thus, if *Steel Co.* were limited to Article III jurisdictional disputes, then the Court could have easily distinguished *Steel Co.* in *Ruhrgas*.

But *Ruhrgas* did not dismiss *Steel Co.* as irrelevant or rely on any distinction between statutory and constitutional jurisdiction. Instead, in holding that personal jurisdiction can sometimes be reached before subject-matter jurisdiction, it relied on the fact that both types of jurisdiction are "essential element[s]" of a federal court's adjudicatory authority and so both present *non-merits* grounds for dismissal. *See id.* at 584-85 (citation omitted). "*Ruhrgas*'s refusal to ground its decision on the distinction between statutory and constitutional issues" "would be very difficult to explain if *Steel Co.* had preserved hypothetical

statutory jurisdiction [for statutory jurisdictional disputes]." Stillman, *supra*, at 531, 530.

Sinochem reinforces this point. In *Sinochem* the Court held that a court may dismiss a case on *forum non conveniens* grounds before determining whether it has subject-matter (or personal) jurisdiction. *See* 549 U.S. at 425. As in *Ruhrgas*, the subject-matter jurisdiction dispute in *Sinochem* concerned statutory jurisdiction, *see id.* at 428, and as in *Ruhrgas*, the Court did not rely on any statutory-vs.-constitutional distinction for assuming jurisdiction. Instead, the "critical point" was that "[r]esolving a *forum non conveniens* motion does not entail any assumption by the court of substantive 'law-declaring power.'" *Id.* at 433 (citation omitted). In contrast, hypothesizing statutory subject-matter jurisdiction in order to address the merits *does* entail the "assumption by the court of substantive law-declaring power." After all, a federal court has no more power to declare law in a case over which Congress *has not* provided jurisdiction than in one over which Congress *cannot* provide jurisdiction. *See, e.g.*, *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, in both *Ruhrgas* and *Sinochem* the Court held that courts may choose among *non-merits* bases for dismissal, if more than one threshold basis for dismissal is present, but the Court refused to embrace the exercise of hypothetical jurisdiction to dispose of cases *on the merits*. The decisions thus strongly support the conclusion that *Steel Co.* forbids a court from exercising hypothetical jurisdiction even as to issues of statutory jurisdiction.

C. Hypothetical Jurisdiction Offends Article III And The Basic Limits On The Power Of The Federal Courts

Statutory jurisdiction is no less dispensable to the exercise of federal judicial power than constitutional jurisdiction. Indeed, Article III itself grants Congress the authority to establish lower federal courts and, by definition, that authority includes the power to *limit* the jurisdiction of the federal courts. A court's exercise of hypothetical jurisdiction therefore contravenes Article III, regardless of whether the jurisdictional dispute is constitutional or statutory in nature, or both. *See* Stillman, *supra*, at 548 ("Article III dictates that statutory subject-matter jurisdiction is no less necessary for the exercise of jurisdiction . . . ."). In this regard, disregarding a statutory limit on jurisdiction is a direct affront to Article III.

"Federal courts are courts of limited jurisdiction . . . ." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citation omitted). Jurisdiction has multiple dimensions. Some jurisdictional requirements, like Article III standing, come directly from the Constitution. Others come *indirectly* from the Constitution—by statutes enacted by Congress. The Constitution provides that courts have only the jurisdiction that Congress expressly grants. *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982) ("Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of federal

judicial power . . . ."). A federal court is no more free to act without—or in contravention of—statutory authority than it is constitutional authority. Either way, a court acting without jurisdiction is acting *ultra vires*. Accordingly, the same basic rules apply to statutory jurisdiction as to Article III standing—*e.g.*, the consent of the parties is irrelevant, estoppel does not apply, and a court must raise the issue *sua sponte*. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *Insurance Corp. of Ireland*, 456 U.S. at 701-02; Stillman, *supra*, at 517-18.

Contrary to the position taken by the First Circuit and several other courts, exercising hypothetical jurisdiction in statutory cases *does* "offend[] fundamental principles of separation of powers," *Parella*, 173 F.3d at 55 (citation omitted), in the same way as exercising hypothetical constitutional jurisdiction. "Subject-matter jurisdiction . . . functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Insurance Corp. of Ireland*, 456 U.S. at 702. In fact, "the central principle of a free society [is] that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988). That is why exercising hypothetical jurisdiction in statutory cases effects a transfer of the authority "to decide whether certain categories of cases should be extended a federal forum" "from the democratically responsive and accountable Congress to the courts." Stillman, *supra*, at 517-18.

The hypothetical jurisdiction doctrine still regularly invoked by the First Circuit and other

circuits in the wake of *Steel Co.* for statutory jurisdictional issues flouts these fundamental limits on the power of the federal courts and is irreconcilable with this Court's precedents.

IV. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND SQUARELY IMPLICATED HERE

The authority of the federal courts to assume hypothetical jurisdiction for the purposes of resolving a case on the merits is an issue of undeniable importance. As this Court itself has admonished, hypothetical jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co.*, 523 U.S. at 94.

This question, moreover, is not only recurring; it is also squarely presented by this case. After observing that it was "dubitable whether [it had] jurisdiction to hear this appeal," the First Circuit bypassed the jurisdictional issue because it believed that "'the merits [could] easily be resolved in favor of the party challenging jurisdiction.'" App. 8a (citation omitted); *see id.* ("Because we find no difficulty in holding that the forum selection clauses are enforceable, and the unanimity requirement is consequently not satisfied, we bypass the jurisdictional issue and proceed to the merits.").

This case also starkly illustrates the fundamental separation of powers implications of assuming statutory jurisdiction to get rid of cases on the merits. In 28 U.S.C. § 1447(d) Congress explicitly directed that "[a]n order remanding a case to the State court from which it was removed *is not reviewable on appeal or otherwise*," except in certain

circumstances. (Emphasis added.) Nevertheless, the First Circuit simply assumed jurisdiction and proceeded to issue a decision on the merits of the dispute—exactly what Congress proscribed, if PREPA's position were correct. And in doing so, the court exercised the "law declaring" power of the federal courts by construing the meaning of the parties' contract under what it viewed as the relevant legal principles of construction.

Nor is this issue merely academic at this point given the First Circuit's ruling on the merits. Because the First Circuit reached the merits of the parties' dispute on the proper interpretation of the contracts (instead of dismissing the case for lack of jurisdiction), PREPA is likely to argue that the First Circuit's construction of the forum selection clauses is entitled to preclusive effect between the parties in further litigation in this case or others—essentially locking in the First Circuit's broad-based (and erroneous) interpretation of the scope of the clause for all disputes between the parties.

Typically, an "unreviewable judgment" does *not* have "preclusive effect" in subsequent litigation. *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006) (citation omitted); *see also* Restatement (Second) of Judgments § 28(1) (1980). This rule applies with full force to remand orders that are not reviewable under § 1447(d). *Kircher*, 547 U.S. at 646-47; *see also* 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4433 (2d ed. Dec. 2017 update, Westlaw). But because the First Circuit purported to affirm "on the merits" here, PREPA will undoubtedly argue that the First Circuit's merits ruling is entitled to preclusive effect. *Vargas-Colon v. Fundacion Damas, Inc.*, 864 F.3d

14, 26 (1st Cir. 2017); *see also Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 849 (9th Cir. 1997) ("[A]n order dismissing an action to enforce a forum selection clause is preclusive on the issue of the applicability, and the enforceability, of the clause when the issues and the parties remain the same."). *But cf.* Stillman, *supra*, at 541 (arguing that a judgment issued pursuant to hypothetical statutory jurisdiction has "uncertain preclusive effects").

Moreover, the exercise of hypothetical jurisdiction itself taints a court's consideration of the merits. As was true here, courts exercise hypothetical jurisdiction when they wish to avoid "complex jurisdictional issue[s]." App. 8a (citation omitted). But the desire to dodge a difficult jurisdictional issue inherently colors a court's merits ruling by creating an incentive for the court to rule in favor of the party contesting jurisdiction on the merits—in order to avoid having to resolve the jurisdictional issue. And the prospect of navigating a difficult jurisdictional maze might cause the court to view the path through the merits as much simpler and easier than in fact it is. That dynamic might well explain the First Circuit's errors here in construing the forum selection clauses. Litigants are entitled to have a federal court review the merits of a dispute without the potential tainting influence of the courts' desire to avoid a difficult jurisdictional issue.[6]

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[6] If this Court grants certiorari and holds that the First Circuit improperly invoked the doctrine of hypothetical jurisdiction to dispose of this case on the merits, VIC and VSA intend to ask the First Circuit to refer the case to a new panel to reconsider the issues, in order to eliminate any risk that the exercise of hypothetical jurisdiction colored the original panel's

If this Court grants the petition and remands the case to the First Circuit with instructions to decide the jurisdictional issue first, it could have a material impact on the outcome of this case. At that point, the First Circuit will either (1) decide that it lacks jurisdiction, in which case it will *not* construe the forum selection clauses or declare the parties' rights under the contracts; or (2) decide that it has jurisdiction and then (appropriately) consider the merits. If the First Circuit ultimately concludes that it has jurisdiction and sides with PREPA on the merits, then VIC and VSA may consider seeking this Court's review and, at that point, this Court would be in a position to consider a challenge to the First Circuit's decision on the merits.

The fact that VIC and VSA argued that jurisdiction existed below is not a basis for denying the petition. The First Circuit, like every federal court, had an obligation to determine its own jurisdiction. Notwithstanding VIC and VSA's position, the court could have decided that it lacked jurisdiction under 28 U.S.C. § 1447(d), in which case the court could not reach any decision on the merits; indeed, the court itself said it was "dubitable" that it had jurisdiction. App. 7a. Moreover, if this Court treats this as a reason to deny review, then it means that the question presented will be effectively

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view of the merits. While this petition does not address the First Circuit's decision on the merits (given the threshold flaw in the court's decision in exercising hypothetical jurisdiction in the first place), the court's interpretation of the parties' contracts as well as the application of equitable estoppel contravenes both the text of the agreement and other court decisions. *See* Pet. CA Br. 21-43; Pet. CA Reply 3-19.

unreviewable by this Court—and lower courts will be free to exercise hypothetical jurisdiction.

The courts that continue to apply hypothetical jurisdiction do so only when the party asserting jurisdiction will lose on the merits. *See, e.g.*, *Cozza v. Network Assocs., Inc.*, 362 F.3d 12, 15 (1st Cir. 2004) ("The rule is well established in this Circuit that resolution of a complex jurisdictional issue may be avoided when the merits can easily be resolved in favor of the party challenging jurisdiction."); *Khodr v. Holder*, 531 F. App'x 660, 665 n.4 (6th Cir. 2013) (same). Thus, by definition, the losing party in a case in which hypothetical jurisdiction is invoked will *always* be in VIC and VSA's position. Moreover, because every federal court has an obligation to determine its own jurisdiction first, the fact that a party argued for jurisdiction cannot be a basis for allowing the exercise of hypothetical jurisdiction.

The need for this Court's intervention is particularly acute given the nature of the question presented. This Court has "the prime responsibility for the proper functioning of the federal judiciary." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.15, at 275 (10th ed. 2013). As one commentator has observed, "[g]iven the lower courts' strong incentives to preserve maximum flexibility, likely only the Supreme Court can put an end to hypothetical statutory jurisdiction." Stillman, *supra*, at 549. In many if not most cases, the losing party will have little incentive to challenge the exercise of hypothetical jurisdiction in this Court. But this case, given its enormous stakes (and the astounding value of the oil that PREPA is seeking to effectively obtain for free from VIC and VSA), presents a rare opportunity for this Court to address the issue.

Nearly two decades after *Steel Co.*, "it is time [for this Court] to put to rest the dubious doctrine of hypothetical statutory jurisdiction." *Id.* at 497. This case provides the opportunity to do so.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 2, 2018