No. 17-951

# In The
# Supreme Court of the United States

VITOL S.A.; VITOL, INC.,

*Petitioners,*

v.

AUTORIDAD DE ENERGÍA
ELÉCTRICA DE PUERTO RICO,

*Respondent.*

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

## BRIEF FOR RESPONDENT IN OPPOSITION

EDUARDO J. CORRETJER REYES
*Counsel of Record*
CORRETJER, L.L.C.
625 Ponce de León Avenue
San Juan, Puerto Rico 00917-4819
Tel.: 787-751-4618
Fax: 787-759-6503
ejcr@corretjerlaw.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

Did the First Circuit properly affirm the district court's threshold determination that removal was improper before deciding questions of statutory jurisdiction?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-14a)[1] is reported at 859 F.3d 140. The order of the court of appeals denying rehearing en banc (Pet. App. 41a-43a) is not reported. The order of the United States District Court for the District of Puerto Rico remanding the case to the Commonwealth of Puerto Rico Court of First Instance, San Juan Part (Pet. App. 15a-40a), is not reported but is available at 2016 U.S. Dist. LEXIS 39714.

## JURISDICTION

The judgment of the First Circuit was entered on June 13, 2017. The order denying the motion for rehearing en banc was entered on October 2, 2017. The petition for a writ of certiorari was filed on January 2, 2018. Petitioners Vitol S.A. and Vitol, Inc. (Vitol S.A. and Vitol, Inc. collectively "Petitioners") invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

In the court of appeals, the parties contested whether the First Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1447(d).

[1] "Pet. App." refers to the Appendix to the Petition for Certiorari.

## STATEMENT OF THE CASE

In the case below, the First Circuit decided one threshold question – whether the case was improperly removed to federal court – before deciding another – whether there was statutory appellate jurisdiction to review the district court's remand order. Petitioners attempt to make their petition about the much broader question of whether a court may bypass a statutory jurisdictional question to decide a case on the merits under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But that is not an issue here because the First Circuit did not make any determination of the merits. Even if *Steel Co.*'s plurality holding applies beyond the Article III context, the decision below was entirely permissible under this Court's subsequent decisions.

Moreover, while Petitioners contend that the circuits are heavily divided on the application of so-called "hypothetical statutory jurisdiction," there is no significant split. The vast majority of circuits have held that *Steel Co.* applies only in the Article III context and not when statutory jurisdiction is at issue. Furthermore, any "split" is virtually nonexistent in situations such as this, where the only jurisdictional question was whether the First Circuit had *appellate* jurisdiction, rather than deciding whether the court of original jurisdiction had the authority to invoke the full power of the federal courts. And there is no split concerning whether a court can decide a threshold remand question before a jurisdictional question.

Finally, the petition should be denied because this case is a poor vehicle for review. Even if the Court were to grant the petition, the district court's order remanding the case to Puerto Rico Commonwealth court will ultimately stand. The most that this Court could do is remand for the First Circuit to definitively determine whether it had appellate jurisdiction. Either way, the result will be an affirmance of the district court's order: If the First Circuit does not have appellate jurisdiction, the district court's order is not appealable, and if the First Circuit does have jurisdiction, it already determined that the district court's order is correct. If the Court is interested in the question presented, it should wait to decide it in a case where the outcome could be affected.

## A. Factual Background

1. The Autoridad de Energía Eléctrica de Puerto Rico (the Puerto Rico Electric Power Authority or "PREPA") is a utility corporation owned by the Commonwealth of Puerto Rico and an instrumentality of said government. P.R. Laws Ann. tit. 22, § 193; Pet. App. 2a. Vitol S.A. is a Swiss corporation that did business in the United States and Puerto Rico, among other places, using the doing business as name of Vitol S.A., Inc. Resp. CA Br. 8-9.[2] Vitol, Inc. is a Delaware corporation that was, during the relevant time period, a subsidiary of Vitol S.A. *Id.*

[2] "Resp. CA Br." refers to the Brief on the Merits filed by Respondent in the First Circuit.

Between August 2005 and December 2008, PREPA entered into six fuel oil contracts with Vitol S.A. and Vitol, Inc. *Id.* at 10-16; *see also* Pet. App. 2a. Each contract contained a representation by Petitioners that they were authorized to enter into and perform their obligations under the contracts and that they were not prohibited from doing business in Puerto Rico or barred from contracting with agencies or instrumentalities of the Commonwealth of Puerto Rico. Pet. App. 4a. As part of the terms and conditions of the contracting process, Petitioners had to submit and submitted sworn statements to the effect that neither them nor any of their partners had been convicted nor pled guilty to any felony or misdemeanor involving fraud, misuse or illegal appropriation of public funds as enumerated in article 3 of Act 458 of September 22, 2004, as amended, P.R. Laws Ann. tit. 3, § 928b ("Act 458"), and that they had no knowledge of being under judicial, administrative or legislative investigation in any country. Pet. App. 3a-4a, 48a. Pursuant to Act 458, the six contracts also contained clauses providing that the guilty plea or conviction of the Petitioners of any of the crimes enumerated in Act 458 or their equivalent in another jurisdiction would result in the automatic rescission of the contracts then in effect between PREPA and Petitioners. Pet. App. 4a-5a; *see also* P.R. Laws Ann. tit. 3, §§ 928c and e (Pet. App. 49a, 51a). The six contracts also contained clauses requiring that the contracts be governed by and construed in accordance with the laws of the Commonwealth of Puerto Rico and a mandatory forum-selection clause designating the Commonwealth courts as the courts of exclusive

jurisdiction to decide the judicial controversies among the parties regarding the terms and conditions of the contracts. Pet. App. 3a.

2. No later than October 2005, Vitol S.A. learned that it was under investigation by the Independent Inquiry Committee of the United Nations Oil-for-Food Programme for paying illegal surcharges to Iraqi officials to lift Iraqi oil. Resp. CA Br. 11. No later than April 2006, Vitol S.A. learned that it was under investigation by the New York County District Attorney in connection with its participation in the United Nations Oil-for-Food Programme. *Id.* In October 2006, Vitol, Inc. was incorporated. *Id.* Between October 2006 and January 2007, Vitol, Inc. became Vitol S.A.'s subsidiary and remained so until December 28, 2007. *Id.* at 11, 13, 15. On November 20, 2007, Vitol S.A. admitted to paying or causing illegal surcharges to be paid to Iraqi public officials during its participation in the United Nations Oil-for-Food Programme and pled guilty in New York state court to first degree grand larceny, which is a felony. Pet. App. 6a.

In May 2009, over radio broadcast, PREPA learned that an entity named Vitol had been convicted in New York. Pet. App. 6a, n.6. After learning that said Vitol entity was in fact Vitol S.A. and after the corresponding inquiries, PREPA filed suit against Petitioners for breach of contract seeking declaratory judgment, rescission, damages, and restitution or reimbursement.

## B. Procedural Background

1. In November 2009 and November 2012, PREPA filed two suits in the Commonwealth of Puerto Rico Court of First Instance as to the six contracts. Pet. App. 6a-7a. Petitioners removed both actions to the U.S. District Court for the District of Puerto Rico. *Id.* PREPA timely moved for remand of both cases pursuant to the unanimity requirement necessary for removal under 28 U.S.C. § 1446(b)(2) due to the mandatory forum-selection clauses in the contracts. Pet. App. 19a and 22a. The district court consolidated the cases. Pet. App. 15a. On March 16, 2016, the district court granted PREPA's motion and remanded the case to the Commonwealth Court. Pet. App. 39a. The district court determined that Vitol Inc. was barred from consenting to removal because the unanimity requirement of 28 U.S.C. § 1446(b)(2)(A) could not be satisfied, as all six contracts contained valid mandatory forum-selection clauses requiring Vitol Inc. to litigate contractual disputes in the Commonwealth Court. *Id.* 36a.

2. Petitioners appealed the remand order to the First Circuit. PREPA contested the court of appeals' jurisdiction asserting that remand orders are not reviewable on appeal or otherwise pursuant to 28 U.S.C. § 1447(d). Resp. CA Br. 1-4. PREPA also sustained that, to the extent that the remand order was appealable, the First Circuit's review was limited to determining whether the district court's finding that there was a defect in the removal procedure as a result of Petitioners' failure to meet the unanimity requirement was colorable. Resp. CA Br. 4-6. Petitioners asserted that the

court of appeals had jurisdiction to hear the appeal and that § 1447(d) only bars appellate review of remand orders based on lack of jurisdiction or based on a defect in the removal procedure and does not bar appellate review based on the failure to meet the unanimity requirement due to a forum-selection clause. The court of appeals asserted that it was "dubitable" whether it had jurisdiction to hear the appeal but affirmed the remand order because it found "no difficulty in holding that the forum selection clauses [in the six contracts] are enforceable, and the unanimity requirement is consequently not satisfied." Pet. App. 8a.

3. Petitioners' brief neglects the significant procedural developments that have transpired since the First Circuit affirmed the district court's remand order. On July 2, 2017, the Financial Oversight and Management Board for Puerto Rico filed a petition on behalf of PREPA seeking to restructure PREPA's debts under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2164. Seeing this as an opportunity to evade the forum-selection clauses in the contracts, on July 26, 2017, Petitioners again removed the consolidated action to federal court (D. Puerto Rico) claiming that Title III provides "an independent and previously unavailable basis for subject matter jurisdiction over this action." Resp. App. 6a.[3] On January 16, 2018, PREPA moved to remand the case to the Commonwealth court. Resp. App. 17a-32a. As of the date of this filing, Petitioners'

[3] "Resp. App." refers to the Appendix to the instant opposition to the petition.

response is due April 14, 2018, and PREPA's reply is due April 21, 2018. Resp. App. 34a-35a.

## REASONS FOR DENYING THE PETITION

### A. The First Circuit's Decision Does Not Conflict With *Steel Co.* Or Implicate Questions About Hypothetical Jurisdiction

#### 1. *Steel Co.* and its progeny do not bar consideration of other questions before subject-matter jurisdiction outside the Article III context

In affirming the district court's remand order, the First Circuit did not run afoul of *Steel Co.*'s prohibition on courts bypassing subject-matter jurisdiction to decide the merits of a case. Attempting to manufacture a question worthy of review, Petitioners focus only on a single division between Article III jurisdiction and statutory jurisdiction. Regardless of whether it involved an interpretation of the forum-selection clause, the First Circuit's opinion did nothing more than decide a threshold, non-merits question, which has been explicitly permitted by this Court since *Steel Co.*

In *Steel Co.*, this Court held that a court may not decide the merits of a claim until it has determined whether it has Article III jurisdiction over the matter. Contrary to Petitioners' argument, this did not create an absolute rule of jurisdictional sequencing, and has never been read as doing so. Viewed in its proper context, *Steel Co.* addressed a far more mundane and

uncontroversial principle – that a court should not exercise its power to declare the law until it is satisfied it has the authority to do so. *Steel Co.*, 523 U.S. at 94.

Justice Scalia's plurality opinion neither created a blanket rule nor overruled decades of precedent outlining exceptions to the uncontroversial idea that subject-matter jurisdiction should *generally* be decided first. The Court's opinion explicitly recognized that a different approach could be warranted in cases with unique procedural postures, *see id.* at 95 & n.2, and readily acknowledged that the Court's jurisprudence had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question," *id.* at 101. At the same time, the Court's reasoning distinguished and elevated Article III jurisdictional issues, holding that in those instances, jurisdiction must be decided first because "[t]he statutory *and (especially) constitutional* elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Id.* (emphasis added). Thus, while *Steel Co.* pronounced a generally applicable rule in Article III cases, the plurality opinion cannot properly be read to create an absolute bar on all instances of "hypothetical jurisdiction," particularly where a court renders a decision that does not invoke its "power to declare the law." *Id.* at 94.

Moreover, it is unclear whether Justice Scalia's statements about hypothetical jurisdiction actually reflect the views of a majority of the Court. Discussion of "hypothetical jurisdiction" appears in Part III of Justice Scalia's opinion, which was joined by four other

justices. Two members of that majority – Justices O'Connor and Kennedy – noted in a separate concurrence that although courts should generally "be certain of their jurisdiction before reaching the merits of a case," the Court's references to other, limited cases where it may be proper "should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserving difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'" *Id.* at 110-11 (O'Connor, J., concurring) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)).

Justice Breyer, who concurred in the judgment but did not join Part III of the Court's opinion, also wrote separately, stating that federal courts "often" and "typically" decide jurisdictional issues first, but need not "always," do so. *Id.* at 111 (Breyer, J., concurring in part). His concurrence noted that it made both theoretical and practical sense to allow courts to assume jurisdiction in certain instances, and stated that he "would not make the ordinary sequence an absolute requirement." *Id.* at 111-12 ("Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when [assuming an easy answer on the substantive merits] the same party would win or lose regardless?"). Justice Stevens, joined by Justices Souter and Ginsburg, also expressed disagreement with an absolute rejection of hypothetical jurisdiction, particularly regarding statutory issues. *Id.* at 121-31 (Stevens, J., concurring in the judgment). Thus, even assuming

*Steel Co.* applies beyond the Article III context, only three justices unconditionally supported a rule Petitioners now assert to be absolute. It is therefore inaccurate to read *Steel Co.* as creating the expansive rule that Petitioners assert here.

Petitioners' argument is further undermined by this Court's decisions since *Steel Co.*, which have specifically permitted courts to address certain questions before deciding subject-matter jurisdiction.

In *Ruhrgas AG v. Marathon Oil Co.*, this Court unanimously stated that *Steel Co.* only required that "jurisdiction *generally* must precede merits in dispositional order." 526 U.S. 574, 577 (1999) (emphasis added). Although the issues required interpreting *Steel Co.*, the Court did not engage in a rote examination of whether the Fifth Circuit had decided subject-matter jurisdiction before addressing other questions. Rather, the Court framed the question as whether the lower court had assumed its "law-declaring power" in a way that violates fundamental separation of powers principles. *Id.* at 584-85. Writing for a Court that included every member of the *Steel Co.* majority, Justice Ginsburg held that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits," and it was therefore entirely proper for a court to decide the issue of personal jurisdiction before deciding whether it possessed subject-matter jurisdiction.[4] *Id.* at 585.

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[4] Petitioners argue that *Ruhrgas* cannot not be read as permitting the exercise of hypothetical statutory jurisdiction,

Eight years later, the Court again expanded its understanding of when a court may first decide questions other than subject-matter jurisdiction. In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), this Court held that a district court "has discretion to respond" to a *forum non conveniens* motion – which it characterized as a "supervening venue" question – before deciding "any other threshold objection," including subject-matter jurisdiction. *Id.* at 425, 429. Writing again for a unanimous court, Justice Ginsburg explicitly noted that *Steel Co.*'s prohibition on jurisdictional sequencing was not absolute, and that "[b]oth *Steel Co.* and *Ruhrgas* recognized that a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 431. Moreover, *Steel Co.*'s prohibition is not triggered simply because a court must make a determination which may involve a "brush with factual and legal issues of the underlying dispute." *Id.* at 433. Rather, the "critical point" that rendered *forum non conveniens* "a threshold, nonmerits issue" was simply that resolving such a motion "does not entail any assumption by the court of substantive 'law-declaring power.'" *Id.* (quoting *Ruhrgas*, 526 U.S. at 584-85).

In setting out an analytical framework for courts to use when addressing questions of jurisdictional

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because the subject-matter question at issue was a statutory one. Pet. 24-25. This conclusion has no merit. The fact that the Court unanimously chose to interpret *Steel Co.* in a specific way has no bearing on how it would have addressed a separate, broader question.

sequencing, *Ruhrgas* and *Sinochem* demonstrate that *Steel Co.* does not represent an absolute decree that courts may never bypass a question of statutory subject-matter jurisdiction. At bottom, a court may decide an issue that does not implicate its "law-declaring power" before other threshold, jurisdictional issues, such as subject-matter jurisdiction. Both *Ruhrgas* and *Sinochem* make clear that the determination is a qualitative and practical one rather than a formulaic application of *Steel Co.*'s plurality holding. Because Petitioners' claim is largely based on the incorrect conclusion that *Steel Co.* created an absolute rule against the exercise of alternative approaches to threshold issues, they have failed to present an issue necessitating this Court's review.

### 2. The First Circuit's decision was a threshold, non-merits determination under *Steel Co.*, *Ruhrgas*, and *Sinochem*, and thus does not implicate *Steel Co.*'s broad Article III holding

It is indisputable that even under the most restrictive reading of *Steel Co.* and its progeny, a court may prioritize other threshold determinations over the question of statutory subject-matter jurisdiction. While there is no definitive list of which determinations implicate the court's "law-declaring power," a decision that "denies audience to a case on the merits" satisfies that standard. *Sinochem*, 549 U.S. at 432. The D.C. Circuit has characterized a court's "law-declaring power" as

a decision that implicates a party's "primary conduct." *See Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007).

Regardless of the outer limits of its "law-declaring power," the First Circuit's decision here falls squarely within the realm of decisions contemplated by *Ruhrgas* and *Sinochem*, as well as those categories of decisions that have been recognized as permissible by the courts of appeals. Circuit courts have held that decisions based on abstention, first-to-file rules, the Administrative Procedure Act, and even inadequate briefing all satisfy the criteria of being non-merits decisions that do not utilize a federal court's "law-declaring" power. *See Tenet v. Doe*, 544 U.S. 1, 7 & n.4 (2005) (covert espionage agreements); *United States v. Fisher*, 805 F.3d 982, 990 (10th Cir. 2015) (inadequate briefing); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1028 (11th Cir. 2014) (abstention based on international comity); *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1248 (8th Cir. 2012) (*Younger* abstention); *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 852 & n.5 (10th Cir. 2012) (dismissal under False Claims Act's first-to-file rule); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (dismissal for lack of final agency action under the Administrative Procedure Act); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (failure to establish a prerequisite for equitable relief).

Numerous courts have also favorably considered remand to be a permissible threshold issue decided before other jurisdictional questions. When a court decides that it will remand a case to state court –

whether for abstention reasons, for failure to satisfy all of the procedural requirements under § 1441, or for any other reason – the "district court disassociates itself from the case entirely, retaining nothing of the matter on [its] docket." *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996) (discussing remand in the abstention context). In doing so, it conclusively determines an issue that is "*separate* from the merits" of the case. *Id.* For example, in *Kelly v. Maxum Specialty Insurance Group*, the Court of Appeals for the Third Circuit affirmed a district court's discretionary decision to remand a declaratory judgment action on abstention grounds. *See* 868 F.3d 274 (3d Cir. 2017). Relying on *Sinochem*, the Third Circuit expressly stated that "the District Court was permitted to consider and grant a discretionary remand . . . before determining whether it possessed subject matter jurisdiction," specifically because it did not require the assumption of "substantive law-declaring power." *Id.* at 280 n.3 (citing *Sinochem*, 549 U.S. at 431). The district court's decision to remand in this case, and the First Circuit's affirmance of that decision are no different.

Perhaps anticipating that this Court would have little interest in deciding a case that already falls entirely within its existing precedent, Petitioners make much of the First Circuit's statement that it would address the "merits" of Petitioners' claims after bypassing the question of its appellate jurisdiction. In substance, however, the decision did nothing more than choose between two bases for addressing the

threshold question of whether the federal court could exercise jurisdiction over the underlying litigation, which required interpretation of the forum-selection clause.

Courts of appeals to consider the issue have held that a jurisdictional decision based on a forum-selection clause is a non-merits threshold determination under *Ruhrgas* and *Sinochem*, even if it requires the court to make a legal determination as to the clause's scope. In *In re LimitNone*, the Court of Appeals for the Seventh Circuit addressed a motion to transfer based upon the language of a forum-selection clause. *See* 551 F.3d 572 (7th Cir. 2008). Affirming the district court's sequence of decision making, the Seventh Circuit noted that "[d]istrict courts are permitted, indeed, in some instances required, to make whatever factual findings are necessary prior to issuing a preliminary order." *Id.* at 577.[5] Similarly, in *Marra v. Papandreou*, decided seven years before *Sinochem*, the D.C. Circuit upheld dismissal based on a forum-selection clause where the district court had bypassed other jurisdictional questions. 216 F.3d 1119 (D.C. Cir. 2000). The D.C. Circuit specifically rejected the argument that analysis of a forum-selection clause requires a court to assume its "law-declaring power," because even though

[5] Although not strictly an application of what it (and Petitioners) call "hypothetical jurisdiction," the court in *In re LimitNone* noted that the ease of "determining venue before subject-matter jurisdiction is an issue of judicial economy." *Id.* at 576. The court then went on to hold that even if *Steel Co.* were required to be read strictly, the district court was not required to determine its own subject-matter jurisdiction before transferring the case. *Id.*

it may involve interpretation of part of a contract, the court "is not making an assumption of law-declaring power vis-à-vis other provisions of the contract," which "remov[es] any implication that the district court . . . necessarily is also reaching the 'merits' of the parties' substantive claims." *Id.* at 1123.

Here, the First Circuit's decision, although stating in passing that it was ruling on "the merits" (Pet. App. 8a), did nothing more than decide a threshold, non-merits question of whether the district court had properly granted remand. The court of appeals was faced with two options for deciding the same question – one path dismissed the appeal for lack of appellate jurisdiction under § 1447(d), the other addressed the scope of the forum-selection clause to determine whether the unanimity requirement could be met. The mere fact that the First Circuit addressed the substance of the contract as part of its jurisdictional calculation does not convert its threshold decision into an exercise of its "law-declaring" power. *Ruhrgas* itself contemplates just such an overlap, noting, as an example of proper decisional sequencing, that a federal court could make a legal determination that state law does not allow punitive damages under a certain statute, and remand a removed case for failure to meet the statutory amount-in-controversy requirement, thus rendering a *jurisdictional* decision that nonetheless relies on a predicate legal determination. *See* 526 U.S. at 585-86. The First Circuit's decision thus presents nothing more than a straightforward application of *Ruhrgas* and *Sinochem*, and only tangentially – if at all –

implicates the concerns raised by the three-justice plurality in *Steel Co.*

### B. There Is No Significant Disagreement Amongst The Courts Of Appeals Regarding Hypothetical Statutory Jurisdiction

Even if Petitioners' underlying premise is correct – that the First Circuit made a wholly merits-based decision utilizing the doctrine of hypothetical statutory jurisdiction – review of this case is not warranted. The crux of Petitioners' argument, that "the circuits are deeply divided over whether *Steel Co.* applies to statutory jurisdictional issues," Pet. 16, significantly overstates the extent of the disagreement, unnecessarily expanding this case in an attempt to satisfy the Court's criteria for review. In truth, the courts of appeals are far from "deeply divided."

#### 1. A significant majority of circuits have adopted the doctrine of hypothetical statutory jurisdiction

Petitioners concede that numerous courts of appeals have expressly held that *Steel Co.*'s rule is limited to the Article III context, and that in at least some instances, courts may bypass questions of jurisdiction to decide noncontroversial merits questions. Pet. 16-18. The First, Second, Third, Sixth, Ninth, and Federal Circuits have formally adopted what Petitioners label as the doctrine of hypothetical statutory jurisdiction. *Seal v. I.N.S.*, 323 F.3d 150, 155 (1st Cir. 2003); *Official*

*Comm. of Unsec. Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006); *Bowers v. National Collegiate Athletics Ass'n*, 346 F.3d 402, 415 (3d Cir. 2003); *Khodr v. Holder*, 531 F. App'x 660, 665 (6th Cir. 2013); *NLRB v. Barstow Cmty. Hospital-Operated by Cmty. Health Sys.*, 474 F. App'x 497, 499 (9th Cir. 2012); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012). Notably, these courts do *not* exercise hypothetical statutory jurisdiction at every opportunity. They do so only when it represents an appropriate and pragmatic exercise of judicial authority, and where the outcome is clear, in line with Justice Breyer's concurrence in *Steel Co.* itself. *See, e.g.*, *Mead v. Reliastar Life Ins. Co.*, 768 F.3d 102, 107 n.3 (2d Cir. 2014) (noting that hypothetical jurisdiction is not exercised in all circumstances); *see also Halo Electronics v. Pulse Electronics*, 857 F.3d 1347, 1350 & n.1 (Fed. Cir. 2017) (declining to exercise hypothetical jurisdiction).

In addition to the courts that have clearly adopted a narrower view of *Steel Co.*, both the Seventh Circuit and the D.C. Circuit, which Petitioners characterize as rejecting the doctrine and as "divided internally," Pet. 21, have actively applied the doctrine.

Petitioners state that "the Seventh Circuit has also refused to exercise hypothetical jurisdiction in the statutory context." Pet. 20 (citing *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 572-73 (7th Cir. 2012)). While *Leibovitch v. Islamic Republic of Iran* vaguely and in general terms disapproves of "hypothetical jurisdiction," *id.*, the Seventh Circuit has also explicitly assumed hypothetical *statutory* jurisdiction when

appropriate. In one of its first decisions interpreting *Steel Co.*, the Seventh Circuit bypassed "substantial" jurisdictional questions under RICO, holding that it "need not resolve" the statutory standing question "definitively before addressing merits questions." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 672 (7th Cir. 1998), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). Moreover, just last year, the Seventh Circuit appeared to exercise hypothetical jurisdiction, concluding that the district court lacked subject-matter jurisdiction but declining to ignore its merits analysis "because doing so would be an obvious waste of judicial resources." *Zahn v. North American Power & Gas, LLC*, 847 F.3d 875, 877 (7th Cir. 2017).

Similarly, Petitioners assert that the D.C. Circuit is "divided internally" over the applicability of hypothetical statutory jurisdiction. This again misstates the status of the law within that circuit. Since 2000, the D.C. Circuit has held that *Steel Co.* "clearly contemplates . . . the occasional deciding of merits questions before statutory" questions. *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 959-60 (D.C. Cir. 2000). More recently, in *Kramer v. Gates*, *supra*, the D.C. Circuit upheld the use of hypothetical statutory jurisdiction, and relied on footnote two of Justice Scalia's opinion in *Steel Co.*, which explicitly distinguished between Article III jurisdiction (which is accorded absolute decisional priority) and questions of statutory standing (which courts may bypass to assess the merits when proper). *Id.* at 791. Thus, the D.C. Circuit has

repeatedly held that absent an "Article III question," *Steel Co.* "poses no bar" to an initial consideration of the merits before determining statutory jurisdiction. *See Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008).

Petitioners' only response to this line of cases is *Forras v. Rauf*, 812 F.3d 1102 (D.C. Cir. 2016). However, *Forras* did not hold hypothetical statutory jurisdiction inappropriate, but rather reversed a district court for failing to engage with jurisdiction *at all*. *Id.* at 1105 ("[T]he court should have at least paused to address whether deciding an issue like the statute of limitations before confirming its jurisdiction accords with *Steel Co.* and its progeny."). In that case, the district court failed to even state that it was *assuming* jurisdiction, much less that it was exercising hypothetical *statutory* jurisdiction. The D.C. Circuit did not condemn the use of hypothetical statutory jurisdiction generally, but rather criticized the district court's failure to explain its rationale in *that* case. That is not inconsistent with the D.C. Circuit's acceptance of hypothetical statutory jurisdiction, because the doctrine permits a court to bypass jurisdictional questions *only* in limited instances where the merits are uncontroversial. Petitioners cite no other case law to support the existence of an internal split.

As Petitioners also concede, the Eighth Circuit, though not adopting the doctrine wholesale, has held in at least some instances that non-Article III jurisdictional questions need not *necessarily* be decided before addressing the merits of a case. *Lukowski v. INS*, 279

F.3d 644, 647 (8th Cir. 2002). Petitioners, however, mischaracterize the Eighth Circuit as taking a "schizophrenic approach" to such issues. They omit more recent case law that states that although *Steel Co.* represents a general rule in the Article III context, "when a rule of *statutory* jurisdiction, not Article III" is involved, "*Steel Co.* does not directly apply." *Cawley v. Celeste*, 715 F.3d 230, 235 (8th Cir. 2013). While the Eighth Circuit has not universally applied the doctrine, the cases declining to exercise hypothetical jurisdiction rely on broad statements of *Steel Co.*'s language, without analyzing its limits. It has never categorically rejected the doctrine. Thus, the Eighth Circuit is most properly characterized as permitting the exercise of hypothetical statutory jurisdiction in at least some instances.

Finally, the Tenth Circuit has neither expressly adopted nor expressly rejected the doctrine in all instances. Rather, it has declined to exercise hypothetical statutory jurisdiction in some cases, and in others gone out of its way to avoid the question of deciding the doctrine's viability. *Compare Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) ("Jurisdiction is a threshold question that a federal court must address before reaching the merits of a statutory question, even if the merits question is more easily resolved and the party prevailing on the merits would be the same as the party that would prevail if jurisdiction were denied."), *with Hill v. Oliver*, 695 F. App'x 353, 357 (10th Cir. 2017) ("Instead of dismissing" on jurisdictional grounds "the district court assumed without deciding that it

had statutory jurisdiction in order to reach the merits. This was not necessarily wrong, but . . . we have no need to definitively opine on whether [this] hypothetical-jurisdiction approach would be viable"). Thus, while not expressly joining the majority of circuits that have adopted the doctrine, it has not applied the stricter view of *Steel Co*. favored by Petitioners.

### 2. The remaining circuits' disagreement about hypothetical statutory jurisdiction does not require granting the petition

Of the three remaining courts of appeals, only the Eleventh Circuit has explicitly and fully rejected the doctrine's application in all instances, except where the merits and jurisdictional questions are inextricably intertwined. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). Even in doing so, however, *Everglades*' brief analysis did not engage in a detailed review of *Steel Co.*'s contours the way most other circuits have done in approving the doctrine.

The remaining two courts, the Fourth and Fifth Circuits, have not approved of hypothetical statutory jurisdiction, but have never issued a ruling rejecting its application in every instance. Petitioners identify no case where either court has explicitly held that hypothetical statutory jurisdiction may *never* exist. To the contrary, the Fifth Circuit has recognized that *Steel Co.*'s precedential value is unclear. *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 n.11 (5th Cir. 1999); *see also Houston Ref., L.P. v. United Steel, Paper &*

*Forestry, Rubber, Mfg.*, 765 F.3d 396, 407 n.20 (5th Cir. 2014).

While Petitioners hang their hat on the existence of a significant split among the courts of appeals, a thorough review of each circuit's jurisprudence demonstrates that to the extent a split exists, it is not significant. A large majority of courts have held that *Steel Co.* is not an absolute bar on a change in jurisdictional sequencing, a reading supported by this Court's decisions in *Ruhrgas* and *Sinochem*. By contrast, the few courts that have largely rejected the doctrine have done so without any significant analysis. Given that the doctrine is limited in scope only to matters where the exercise of hypothetical jurisdiction is not law-declaring, and that only one outlier court has read *Steel Co.* the same way Petitioners do in this case, there is no need for this Court's review.

### 3. Courts of appeals are not divided over the exercise of hypothetical statutory jurisdiction in the appellate context

Even if this Court were otherwise inclined to address the question of hypothetical statutory jurisdiction, this case presents a poor basis for doing so. In most instances (and in every case cited by Petitioners), the primary question before the court analyzing hypothetical statutory jurisdiction is whether the original forum – be it a district court or agency proceeding – was permitted to adjudicate the merits of an issue without first establishing jurisdiction. Here, however,

there is no question the district court had subject-matter jurisdiction, and the issue of hypothetical statutory jurisdiction could only come up in the context of determining the remand order's reviewability on appeal. The limited exercise of hypothetical statutory jurisdiction in this case undercuts the basis to review the First Circuit's decision as a proxy for all hypothetical statutory jurisdiction cases, because it does not implicate the power of the federal courts in the same way, and because the circuit split on which Petitioners so heavily rely evaporates even further in the appellate context.

Simply stated, the issue of hypothetical statutory jurisdiction in the appellate context does not present the same issues or concerns that animated *Steel Co.* As noted *supra*, the key question in *Steel Co.* and this Court's subsequent interpretation was whether a federal court had, in bypassing a jurisdictional question, exercised its "law-declaring power." *Ruhrgas*, 526 U.S. at 584-85. Appellate courts, however, do not exercise "law-declaring power" in the same way as a court of original jurisdiction, because they do not issue legally binding decisions in the first instance that bring the full power of the federal courts to bear on parties.

While otherwise crucial to the federal judicial construct, appellate review does not involve the same substantial rights as a district court or agency's original exercise of federal power. *See Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 281 U.S. 74, 80 (1930) (Due Process Clause of the Fourteenth Amendment does not imply a right to appeal in civil actions

"provided that due process has already been accorded in the tribunal of first instance"); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) ("[T]he Federal Constitution guarantees no right to appellate review."). This distinction is key in effectuating *Steel Co.*'s admonition that hypothetical jurisdiction is improper when the court is issuing a legally binding decision that implicates the fundamental power of the federal courts. In cases of appellate jurisdiction, when the original jurisdiction of the lower tribunal is unquestioned, the power of the federal courts has already been triggered, and a legally binding decision enacted regardless of the appeal's outcome. Thus, appellate review does not present the same concerns as the Article III hypothetical jurisdiction decried in *Steel Co.* or an agency's determination to exercise federal authority in the first instance.

Given the distinct nature of hypothetical statutory jurisdiction in the appellate context, it is unsurprising that even those circuits that generally disapprove of hypothetical jurisdiction have not significantly or substantively addressed the question of whether an appellate court can engage in hypothetical statutory jurisdiction when the court of original jurisdiction had unquestioned authority to decide the case. When viewed in its proper context, the First Circuit's decision does not implicate any important questions over which the courts of appeals are divided, nor does it involve a question sufficiently important to warrant this Court's review.

### C. This Case Is Not An Appropriate Vehicle For Review Because The Court Cannot Change The Result On The Issue Of Remand

Even if the question presented in the petition were interesting or important, this case is not the right vehicle to review it for several reasons. Primarily, if the Court grants the petition, any decision at the merits phase would have no effect on the ultimate question of remand under 28 U.S.C. § 1447 – no matter which way the Court decides the question presented, this case will be remanded under § 1447.

Critically, Petitioners do not seek review of the merits of the First Circuit's ruling regarding Petitioners' failure to meet the unanimity requirement necessary for a proper removal due to the enforceability and applicability of the forum-selection clauses. Rather, they challenge only the First Circuit's assumption of hypothetical statutory jurisdiction. Accordingly, the most that this Court could do is remand for the First Circuit to definitively determine its jurisdiction. But following such a remand, the district court's decision sending the case back to the court of Puerto Rico under 28 U.S.C. § 1447 is guaranteed to be affirmed.

If the First Circuit were to determine that it has jurisdiction, it would affirm the district court's remand order on its merits, as it previously did. Pet. App. 1a-2a, 14a. If, however, the First Circuit were to determine that it did not have jurisdiction, it could not review the district court's remand order, and the order remanding to the Puerto Rico court would stand. Hence, even

assuming that the Court grants the petition, regardless of how the Court rules on the question presented by the Petitioners, the cases will be remanded to the court of Puerto Rico under § 1447.

Petitioners suggest that the First Circuit might somehow reach a different result on the substance of the remand question if its earlier decision is vacated and remanded. Pet. 31. But that is wishful thinking: Following a remand, the First Circuit's protocols call for assignment to the same panel that considered the appeal before this Court's review. *See* First Circuit Internal Operating Procedure VII(D). Accordingly, if the First Circuit's decision were vacated and the case remanded, it would end up before the same panel that already held that remand was proper. Petitioners' attack on the panel's objectivity does not change that outcome. Petitioners speculate that the panel may have been biased to rule in favor of PREPA on the merits of the appeal so that it could assume hypothetical statutory jurisdiction and skip the jurisdictional inquiries, but that attack has no basis. Pet. 30.

The petition is nothing more than the Petitioners wanting to have their "cake and eat it too." In the proceedings below, the Petitioners argued that the First Circuit had jurisdiction to hear their appeal. They vehemently denied that section 1447(d) barred appellate review of all remand orders except those specifically exempted by the statute. Rather, Petitioners strongly asserted that section 1447(d) did not bar review of remand orders not based on a defect in the removal procedure or on lack of jurisdiction, including a remand

order pursuant to a failure to meet the unanimity requirement necessary for removal due to a forum-selection clause.

Despite its own doubts as to its jurisdiction (Pet. App. 7a) ("It is dubitable whether we have jurisdiction to hear this appeal."), the court of appeals granted Petitioners' request and exercised jurisdiction. However, because Petitioners do not like the outcome of the court of appeals' ruling on the merits of the issues on appeal, now they want to object to the court of appeals' exercise of jurisdiction over the appeal. The Court should not countenance such gamesmanship.

Petitioners' attempt to avoid remand to the Commonwealth court, even if they prevail in this Court, rests on the contention that PREPA *may* argue that the First Circuit's decision is entitled to preclusive effect, which *might* attach depending on how a later court views the issue. However, Petitioners sustain that a remand order based on a lack of unanimity– here, the operative basis for remand based on the substance of the forum-selection clause – is unreviewable and therefore is not preclusive in subsequent proceedings.[6] *See* Pet. 28 (citing *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006)). This Court has indicated that a remand order that is even "colorably characterized" in a manner that would be prohibited from review

[6] Although the First Circuit's decision analyzed the contracts' forum-selection clauses to determine their validity and import, that analysis was merely a stepping stone to the ultimate conclusion that "the unanimity requirement could not be met here, and remand was proper." Pet. App. 14a.

under § 1447(d) is barred from appellate review, and would therefore be unreviewable. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) ("We hold that when, as here, the District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred."); *see also Harvey v. UTE Indian Tribe of the Uintah and Ouray Reservation*, 797 F.3d 800, 805 (10th Cir. 2015) (relying on *Powerex* to hold that a remand order "colorably characterized as grounded in lack of unanimity" was not subject to review). Petitioners contend, however, that "because the first circuit purported to affirm 'on the merits,'" there is a risk of preclusion. *See* Pet. 29. Such a result is far from certain.

Courts have not generally addressed the issue of preclusion in the "hypothetical statutory jurisdiction" context, but *Steel Co.* itself cautioned against granting preclusive effect to "drive-by jurisdictional" decisions of the kind that potentially offend Article III. *See* 523 U.S. at 91. At least one scholar (relied on by Petitioners) has stated that "it is doubtful" that hypothetical statutory jurisdiction decisions "should be given preclusive effect," because the lack of a final decision on subject-matter jurisdiction is similar to a decision in which there was no opportunity to contest jurisdiction. In those instances, the Restatement (Second) of Judgments allows a collateral attack on the court's judgment. Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 Ala. L. Rev. 493, 542-44 (2016). Petitioners can demonstrate nothing more than the fact that preclusion is an open

issue, and subject to further litigation in subsequent proceedings. It would make little sense for this Court to review a decision where the only opportunity to change the ultimate outcome rested upon the *possibility* that a reversal might prevent preclusion down the line.

Finally, this case is not an appropriate vehicle for review because barely a month after the First Circuit's decision, and five months before filing the petition, Petitioners again sought to remove this consolidated action to federal court, this time as part of PROMESA's Title III action. PREPA subsequently moved to remand the case to the Commonwealth court, and a decision on that motion is pending. Petitioners fail to mention the subsequent removal in their petition, perhaps fearing that this Court would correctly determine that review was not warranted in a case which may ultimately be heard in federal court. Petitioners' actions throughout this case, and their arguments in the petition, demonstrate that they are simply seeking any avenue to avoid remand based on the contracts they signed. Because review by this Court will not change the outcome of the motion to remand, and because this case raises numerous ancillary issues that are not before the Court, this case is not a proper vehicle for review and the petition should be denied.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

EDUARDO J. CORRETJER REYES
*Counsel of Record*
CORRETJER, L.L.C.
625 Ponce de León Avenue
San Juan, Puerto Rico 00917-4819
Tel.: 787-751-4618
Fax: 787-759-6503
ejcr@corretjerlaw.com

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