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.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

There can be no dispute about what the First Circuit *said* it decided. The First Circuit declared it "dubitable whether we have jurisdiction to hear this appeal" under 28 U.S.C. § 1447(d). Pet. App. 7a. But following its own "'well established'" rule "'that resolution of a complex jurisdictional issue may be avoided when the merits can easily be resolved in favor of the party challenging jurisdiction,'" the First Circuit simply "bypass[ed] the jurisdictional issue and proceed[ed] to the merits." *Id.* at 8a (citation omitted). And then it resolved the merits by declaring the meaning of a private contract and ruling on the enforceability of the contract generally. *Id.* at 8a-14a. The Question Presented is whether an Article III court can exercise such hypothetical statutory jurisdiction to dispose of a case.

As even PREPA concedes (at 2, 18), the First Circuit's answer to that question directly conflicts with *Friends of the Everglades v. United States EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) (Pryor, J.), *cert. denied*, 571 U.S. 952 (2013), in which the Eleventh Circuit emphatically rejected the exercise of such hypothetical jurisdiction. And the Eleventh Circuit is hardly some lone "outlier," as PREPA suggests (at 24). The Fourth, Fifth, and Seventh Circuits all share the Eleventh Circuit's position. But even if PREPA were right that the "vast majority" of circuits still "actively" invoke hypothetical jurisdiction notwithstanding *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), that would be a reason to *grant* certiorari, not to deny it.

The exercise of hypothetical jurisdiction violates the separation of powers and flouts this Court's

repeated admonitions on the "institutional interests" served by "polic[ing]" the limits on subject-matter jurisdiction, whether constitutional or statutory. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999). As this case illustrates, the exercise of hypothetical jurisdiction also "can come at the expense of state courts' power," raising important federalism interests as well. William Adams & Owen Roberts, *High Court May Consider Ending Hypothetical Jurisdiction*, Law360 (Feb. 13, 2018), https://www.law360.com/articles/1011763/high-court-may-consider-ending-hypothetical-jurisdiction.

This Court's intervention is plainly needed—and, try as it might, PREPA has identified no impediment to deciding the Question Presented here and now.

ARGUMENT

I. PREPA'S ATTEMPT TO EVADE THE QUESTION PRESENTED FAILS

A. The First Circuit's Decision Was—Just As The Court Said—On The Merits

PREPA first pretends (at 8) that the Question Presented is not even implicated here because "the First Circuit's opinion did nothing more than decide a threshold, non-merits question." But the First Circuit *itself* recognized that it was "bypass[ing] the jurisdictional issue and proceed[ing] to the merits." Pet. App. 8a. The court made that statement in invoking the "well established [rule] 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." *Id.* (quoting *Cozza v. Network Assocs., Inc.*, 362 F.3d 12, 15 (1st Cir. 2004)). It did not just slip up and call a disputed issue the "merits" when really it meant

"non-merits." Rather, it followed its rule that reaching the merits is acceptable in cases like this one because—in its view—"Article III jurisdictional disputes are subject to *Steel Co.*, [while] statutory jurisdictional disputes are not." *Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003) (cited in *Cozza*, 362 F.3d at 15).

And the First Circuit was quite right that its decision was on the merits. Not only did the decision resolve the ultimate issue of whether the requirements of 28 U.S.C. § 1446 are met, but it directly construed a private contract between VIC and PREPA, interpreting the phrase "controversies . . . regarding the *terms and conditions of this Contract*" to include controversies that present *purely statutory claims*. Pet. App. 9a-10a (emphasis added). It then gave that declaration about the meaning of the contracts real-world force, using it to bar VIC from consenting to the removal that VSA (which was not a party to the contracts) had sought. *See id.* at 14a. Moreover, it further held that PREPA is not equitably estopped from enforcing one clause of the contracts while simultaneously arguing that the contracts are entirely invalid. *Id.* at 12a.

PREPA spends most of its brief just ignoring what the First Circuit actually did, then posits in a footnote that the court's construction of the contracts was "merely a stepping stone" to deciding remand was proper. BIO 29 n.6. But the interpretation and enforcement of contractual terms is exactly the sort of "law-declaring power" that this Court has recognized can only be exercised by a court of competent jurisdiction. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 433 (2007) (citation omitted). And resolving a

contractual dispute is fundamentally different than choosing to *forgo* the exercise of judicial power by abstaining or dismissing for forum non conveniens.[1]

Moreover, the First Circuit's equitable-estoppel ruling has substantive implications well beyond whether this case must be heard in Puerto Rican court. PREPA makes clear (at 30-31) that it will invoke the First Circuit's decision to argue that VIC and VSA are precluded from raising an equitable-estoppel defense after remand. That argument highlights that the First Circuit's decision purports to resolve a state-law defense that goes to the heart of PREPA's substantive claims. For precisely that reason, commentators have explained that the First Circuit's "reliance on hypothetical statutory jurisdiction raises serious federalism concerns by permitting federal courts to potentially preempt and preclude decision-making by state tribunals under state law." Adams & Roberts, *supra*.

B. The First Circuit's Exercise Of Hypothetical Jurisdiction Altered The Outcome That It Reached

Trying to minimize the significance of the First Circuit's choice to reach the "merits," Pet. App. 8a, PREPA also repeatedly contends that the First

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[1] *Marra v. Papandreou*, 216 F.3d 1119 (D.C. Cir. 2000), recognized that, in resolving "the validity of a forum-selection clause," a court "address[es] issues that would be conventionally understood as going to the 'merits' of a contract dispute." *Id.* at 1122. But *Marra* simply held that the court could reach those "merits" issues where the party raising them—the Greek government there—had *waived* the otherwise applicable jurisdictional bar of sovereign immunity. *Id.* at 1123-24. No such waiver exists here.

Circuit simply decided among threshold issues that led to the same place—affirmance. *See, e.g.*, BIO 3 ("Either way, the result will be an affirmance of the district court's order"); *id.* at 27 (suggesting that "the district court's decision . . . is guaranteed to be affirmed"). For support, it relies on cases in which courts chose among different "jurisdictional issues" or simply "abstain[ed]" from reviewing a matter altogether. *Ruhrgas AG*, 526 U.S. at 584, 585; *see* BIO 14 (collecting lower-court decisions).

But the premise of PREPA's argument—that the "jurisdiction" and "merits" paths here both led to the same place—is indisputably incorrect. A determination that the First Circuit lacked subject-matter jurisdiction under § 1447(d) would have led it to *dismiss* the appeal.[2] By instead *affirming* the district court's opinion, the First Circuit assumed for itself the power to resolve VIC and VSA's merits-based challenges to that decision, rather than leaving those issues for the Puerto Rican courts. It thus issued precisely the sort of "hypothetical judgment" condemned by the Eleventh Circuit in *Friends of the Everglades*, 699 F.3d at 1289, and this Court in *Steel Co.*, 523 U.S. at 101. The Question Presented is thus squarely presented.

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[2] Such § 1447(d) dismissals for lack of jurisdiction are commonplace. See, *e.g.*, *Exxon Mobil Corp. v. Starr Indemnity & Liability Insurance Co.*, 716 F. App'x 349, 351 (5th Cir. 2018) (per curiam) (applying § 1447 and dismissing appeal "for want of jurisdiction"), and *Branch Banking & Trust Co. v. Bryant*, 709 F. App'x 200 (4th Cir. 2018) (per curiam) (similar). As a simple Westlaw search shows, such dismissals are legion.

II. THE QUESTION PRESENTED PLAINLY WARRANTS THIS COURT'S REVIEW

Taking the First Circuit's decision on its terms, it is clear that certiorari is warranted.

A. The Courts Of Appeals Are Undeniably Divided Over The Exercise Of Hypothetical Statutory Jurisdiction

PREPA does not deny the courts of appeals are divided on the Question Presented. Pet. 16-22; *see* Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power,* 68 Ala. L. Rev. 493, 497, 511 (2016). Rather, it claims (at 18 (emphasis added)) that the courts of appeals are not "'*deeply* divided'" and then it dismisses (at 24) Judge Pryor's opinion for the Eleventh Circuit as a mere "outlier." Even if PREPA's characterization of the conflict were plausible, a clear circuit split on an issue of this importance, no matter how deep, warrants review.

But PREPA's effort to downplay the *breadth* of the conflict is not plausible. For example, PREPA acknowledges (at 23) that "the Fourth and Fifth Circuits[] have not approved of hypothetical statutory jurisdiction," then claims that there is no real division with the First Circuit because those courts "have never issued a ruling rejecting its application in every instance." But *everyone* agrees that there are certain circumstances—like those in *Sinochem* and *Ruhrgas*—in which a court can dispose of a case on *non-merits* grounds without first satisfying itself that it has jurisdiction. What separates the First Circuit from the Fourth and Fifth Circuits is that the First Circuit has been

willing to resolve *merits* issues in that posture, too, while the Fourth and Fifth Circuits have not.

PREPA contends that *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659 (7th Cir. 1998), casts doubt on the Seventh Circuit's rule that "a court may not presume hypothetical jurisdiction in order to decide a question on the merits," even where only statutory jurisdiction is dubious. *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 573 (7th Cir. 2012). But *Kauthar* involved a question of statutory *standing*, not *jurisdiction*. 149 F.3d at 672. *Steel Co.* itself recognized that "statutory standing" is different, 523 U.S. at 97 n.2, as this Court has subsequently held, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 n.4 (2014) (lack of statutory standing—unlike statutory jurisdiction—"does not implicate . . . the court's statutory or constitutional *power* to adjudicate [a] case" (citation omitted)). *Kauthar* thus does nothing to call into question the Seventh Circuit's rejection of hypothetical statutory *jurisdiction*.[3]

Given that four circuits have rejected hypothetical statutory jurisdiction (the Fourth, Fifth, Seventh, and Eleventh), and six others have succumbed to its temptations (the First, Second, Third, Sixth, Ninth, and Federal Circuits), it is unsurprising that different panels within the Eighth, Tenth, and D.C. Circuits have approached this issue in different ways. *Compare* Pet. 20-22,

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[3] Nor does *Zahn v. North American Power & Gas, LLC*, 847 F.3d 875 (7th Cir. 2017). *Zahn* simply held that the district court was wrong to find it lacked jurisdiction and, after finding that "the district court has jurisdiction to hear this case," addressed the merits and remanded. *Id.* at 877-78.

with BIO 20-23. But the fact that hypothetical statutory jurisdiction has produced both inter-circuit and intra-circuit divisions just underscores that this Court's guidance on the matter is needed.

PREPA's fallback argument (at 25) that the "issue of hypothetical statutory jurisdiction in the appellate context" has not divided the courts of appeals also fails. Indeed, *Friends of the Everglades* itself concerned statutory *appellate* jurisdiction. 699 F.3d at 1286; *see also, e.g.*, *United States v. Harris*, 530 F. App'x 900, 900-01 (11th Cir. 2013) (per curiam). And the Tenth Circuit has likewise applied *Steel Co.* to consideration of statutory limits on the court's appellate jurisdiction. *See United States v. Springer*, 875 F.3d 968, 973 (10th Cir. 2017).

That is hardly surprising. *Steel Co.* itself relied interchangeably on cases involving appellate and original jurisdiction, because the key point—that the existence of subject-matter jurisdiction is a prerequisite to a court's exercise of the law-declaring power—is identical in both. *See Steel Co.*, 523 U.S. at 94 (citing, inter alia, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). An Article III appellate court is no more justified in exercising hypothetical jurisdiction to decide a case than a district court.

B. The First Circuit's Strong Embrace Of Hypothetical Jurisdiction Is Misguided

The acknowledged circuit conflict over such a fundamental separation-of-powers issue cries out for resolution by this Court. And here, review is all the more needed because the majority of circuits are plain wrong. *Steel Co.*'s rationale for rejecting the exercise of hypothetical jurisdiction applies with full force to statutory jurisdiction. Pet. 12-15, 26-28; *see*

Stillman, *supra*, at 513 ("Federal courts are equally bound by constitutional and statutory jurisdictional rules, and they are equally inviolable."). "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," *Steel Co.*, 523 U.S. at 101-02, and courts cannot violate statutory constraints any more than constitutional ones.

Instead of genuinely trying to square the First Circuit's view that "Article III jurisdictional disputes are subject to *Steel Co.*, [while] statutory jurisdictional disputes are not," *Restoration Pres. Masonry, Inc.*, 325 F.3d at 59, PREPA tries to cast doubt on the rule of *Steel Co.* itself. It questions (at 9) whether "Justice Scalia's statements about hypothetical jurisdiction" in his majority opinion "actually reflect the views of a majority of the Court." But four other Justices joined Justice Scalia's opinion in full. And there is simply no way to reconcile the driving principle of *Steel Co.*—that a court cannot declare the law unless it has jurisdiction to do so—with the First Circuit's rule that a court can declare the law even when it lacks jurisdiction to do so if the jurisdictional infirmity is statutory rather than constitutional.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED

In the end, PREPA throws up a smattering of "vehicle" objections (at 27), hoping something sticks.

It suggests (at 27) that a decision by this Court that the First Circuit erred in exercising hypothetical jurisdiction would be purely academic. Not so. Precisely because the First Circuit *did*

interpret the meaning of the parties' contracts and address the equitable-estoppel defense, a decision vacating that ruling will be meaningful. Not only could that lead to a different outcome on the merits, but even if the case still ends up in the Puerto Rican courts, the *way* in which it gets there is likely to matter a great deal. *See* Pet. 29-31; *see also* Adams & Roberts, *supra* ("[B]ecause a decision on the merits can be preclusive in further litigation, a court's dismissal on that basis could create a drastically different outcome down the line than a jurisdictional dismissal."). The most PREPA musters in response is the faint suggestion (at 30-31) that the preclusive effects of the First Circuit's decision on the merits are an "open issue." But that says it all; even PREPA won't rule out preclusion, no doubt because it plans to argue that the First Circuit's decision should be given full preclusive effect if this Court denies certiorari.[4]

PREPA also essentially suggests this Court should await a case where the use of hypothetical jurisdiction affected which party prevailed (not just the consequences of the court's decision). But as a practical matter, that would prevent this Court from ever resolving the important Question Presented. Courts only invoke hypothetical jurisdiction where it appears to them that the party that might lose on jurisdictional grounds also loses on the merits. That

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[4] PREPA says (at 30-31) that preclusion will be for the Puerto Rican courts. But that just reveals another problem with exercising hypothetical jurisdiction. Among other things, to resolve that issue, a *Puerto Rican court* will have to decide the federal jurisdictional issue the First Circuit simply bypassed because of its supposed difficulty.

does not alleviate the systemic, separation-of-powers issues with exercising hypothetical jurisdiction in the first place, but it does mean that losing parties rarely have the incentive to seek this Court's review in what is effectively a darned-if-you-do, darned-if-you-don't posture. Here, however, the massive amount of money at stake and particular merits-based content of the decision below gives the Question Presented real practical significance.

PREPA's closing attempt (at 31) to make something out of petitioners' separate removal under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act is a red herring. The grounds for removal asserted there are wholly distinct from those presented to and passed upon by the First Circuit here, and PREPA (rightly) does not suggest that anything that occurs in connection with the new removal could moot the issue presented in this petition. Moreover, PREPA has specifically invoked the First Circuit's construction of the parties' contracts in this case as a reason for denying removal. *See* BIO App. 34a. This is petitioners' last, and only, chance to seek vacatur of the First Circuit's jurisdictionless decision on the merits.

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The exercise of hypothetical statutory jurisdiction compromises "core separation-of-powers and federalism values." Stillman, *supra*, at 548. Yet, "[g]iven the lower courts' strong incentives to preserve maximum flexibility, likely only the Supreme Court can put an end to hypothetical statutory jurisdiction." *Id.* at 549. This case presents an ideal, and overdue, opportunity to do so.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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