No. ____

IN THE

Supreme Court of the United States

WILLIAM STENGER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article III requires federal courts to confirm their jurisdiction over a case *before* adjudicating its merits, whether that jurisdiction is "constitutional" or "statutory" in nature. *Steel Co. v. Cits. for a Better Env't*, 523 U.S. 83, 94–95 (1998). Here, the Second Circuit explicitly chose not to do so. Instead, it invoked so-called "hypothetical statutory jurisdiction" to skip the jurisdictional inquiry and reach the merits. This practice has drawn *every* court of appeals into a conflict, which "raises serious concerns" that only this Court can resolve. *Waleski v. Montgomery, McCracker, Walker & Rhoads, LLP*, 143 S.Ct. 2027, 2027 (2023) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J. and Barrett, J.).

This case also presents a second longstanding circuit conflict over the availability of *coram nobis* relief to correct a criminal restitution order. Here, the Second Circuit merely assumed that the All Writs Act provides such jurisdiction and rushed to rubber-stamp the District Court's rejection of such relief on the merits. Those decisions (i) looked past newfound, undisputed evidence that Petitioner's restitution order is based on a state official's false testimony and (ii) are "ultra vires." *Id.* at 2028 (quoting *Steel Co.*, 523 U.S. at 102).

The questions presented are:

1. Whether a court exercising so-called "hypothetical statutory jurisdiction" exceeds its power under Article III; and

2. Whether a district court may issue a writ of *coram nobis* to correct a fundamental error in a criminal restitution order.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Second Circuit affirming the denial of William Stenger's writ of *coram nobis* is not reported in the Federal Reporter but is available at 2024 WL 3220260 and is reproduced at Pet.App.1a. The order of the court of appeals denying rehearing en banc is not reported in the Federal Reporter but is available at 2024 WL 5401506 and is reproduced at Pet.App.12a.

The decision of the U.S. District Court for the District of Vermont is not reported in the Federal Supplement but is available at 2023 WL 12019411 and is reproduced at Pet.App.14a.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on June 28, 2024. Pet.App.1a. It denied rehearing en banc on September 27, 2024. Pet.App.12a. On December 18, 2024, Justice Sotomayor extended the time to file this petition until February 24, 2025. No. 24A596 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Under Article III, the "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. That power shall extend only to "cases, in law and equity, arising under this Constitution, the laws of the United States," and treaties, along with other "cases" and "controversies."

Article III is reproduced in full at Pet.App.34a.

INTRODUCTION

The Second Circuit ruled on the merits of Petitioner's appeal without first determining whether it had the power to do so. In putting the merits question before the jurisdictional question, the court gave short shrift to both and failed to adequately address the fundamental issues presented by this petition. It improperly assumed "hypothetical statutory jurisdiction" and skipped the underlying jurisdictional issue: whether a writ of *coram nobis* can provide relief from a criminal restitution order. Both questions, however, implicate entrenched circuit conflicts.

First, the Second Circuit stated that it "is well settled that where the jurisdictional issue is statutory in nature—as it is here, under the All Writs Act—we may assume hypothetical jurisdiction and address the substance of claims that are plainly without merit." Pet.App.7a. n.2. But "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Cits. for a Better Env't*, 523 U.S. 83, 101 (1998). This Court flatly rejected the practice in *Steel Co.*, holding that the Constitution has never allowed "a court to resolve contested questions of law when its jurisdiction is in doubt." *Id.* Nevertheless, some courts—like the court below—have engineered a workaround to *Steel Co.*'s holding. These courts exercise hypothetical jurisdiction where the contested jurisdictional question is "statutory," rather than purely constitutional, in nature.

A federal court's power to resolve statutory claims without first assuring itself of its power to do so is "well settled" in only certain circuits, however. Seven circuits endorse "hypothetical statutory jurisdiction," while five have rejected it. And one—the Seventh Circuit—seems ambivalent.

This deep and entrenched circuit split has evaded the Supreme Court's resolution for too long. Admittedly, that evasion is perhaps unsurprising: every hypothetical statutory jurisdiction petition will have been resolved against the petitioner on merits that at least two circuit judges find clear. That arguable vehicle problem will exist in every such petition. But if courts were conducting the threshold analysis required under the Constitution, many cases, including Petitioner's, would result in different outcomes on the merits.

More fundamentally, the reality that a majority of circuits regularly evade this Court's clear rejection of hypothetical jurisdiction is nothing short of astonishing. That serious, purely legal question informs the day-to-day adjudicatory functions of the federal courts. If Petitioner is correct, a majority of circuits are regularly acting *ultra vires*; if Petitioner is incorrect, the other five circuits are wasting immeasurable judicial resources on jurisdictional analyses that, according to the court below, are simply needless. Either way, the question calls out for resolution.

Second, this petition also presents the opportunity to efficiently resolve another circuit split, over the jurisdictional issue that the Second Circuit skipped. Whether a writ of *coram nobis* can offer relief from an

erroneous criminal restitution order divides at least two circuits, with others like the Second simply avoiding providing an answer through hypothesis. That second purely legal question also is ripe for review.

STATEMENT

A. Factual Background.

The Petitioner, William Stenger, pleaded guilty to providing false information to Vermont state regulators in January 2015. Pet.App.15a. Specifically, he fraudulently represented that his AnC Bio VT EB-5 [1] project's business projections were reasonable. Pet.App.15a–16a. The regulators had placed a hold on investment into Petitioner's project in June 2014 after learning that the U.S. Securities and Exchange Commission was investigating potential securities violations related to the project. *See* Pet.App.4a. n.1, JA636. [2] But they lifted their hold in April 2015. Pet.App.4a. n.1.

Based on this conviction, in April 2022, the District Court ordered Petitioner to pay $250,000 in

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[1] The EB-5 Immigrant Investor program is a government program through which immigrant investors can obtain lawful permanent residency by showing that their investment in a commercial enterprise would create at least ten jobs. *See EB-5 Immigrant Investor Program*, U.S. Citizenship and Immigration Services (Mar. 1, 2023), https://tinyurl.com/5t525eeu. Vermont's EB-5 program was uniquely administered by the state government, and continues to operate despite attempts to wind it down. *See Vermont EB-5 Program*, Department of Financial Regulation (Nov. 2023), https://tinyurl.com/3ybbz846.

[2] References to the JA are to the Joint Appendix filed by the parties in the Court of Appeals. Dkt. Nos. 20, 21, 22, 23, 24.

restitution to 36 people. Those people, however, had invested in the project *after* the state regulators lifted their hold. Pet.App.16a–17a.

The District Court relied on testimony at sentencing by one of the Vermont regulators, Commissioner Susan Donegan. Donegan specifically testified that she would *not* have lifted the hold had she known "before March of 2015" that the information Petitioner provided in January 2015 was unreliable. *See* Pet.App.31a. That turned out to be false.

In April 2023, a year after sentencing, Petitioner's counsel discovered two internal state memoranda documenting two early *February 2015* teleconferences involving Donegan's colleagues and SEC attorney investigators.[3] *See* Pet.App.24a–28a. One memo documented that SEC attorneys warned the Vermont regulators that information similar to that provided by Petitioner to potential investors in January 2015 was not reliable. Pet.App.24a–26a. Thus, Commissioner Donnegan knew in February 2015 that Petitioner's projections from January 2015 were unreliable, and her testimony that, had she known of that unreliability she would not have lifted the hold in March 2015, was plainly false.

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[3] Mr. Stenger's counsel had access to the materials prior to sentencing. But they were not text searchable, and among the approximately six million pages of discovery materials provided to the defense and thus evaded earlier notice. Once discovered, they were promptly brought to the District Court's attention in support of the *coram nobis* petition at issue. JA439.

B. Procedural Background.

1. After learning that Commissioner Donegan *had* known Petitioner's projections were unreliable before March of 2015, Petitioner promptly filed a petition for a writ of *coram nobis*. JA439. The petition asked the District Court to strike the restitution order because the regulator's decision to lift the hold was an intervening cause of the subsequent investors' participation in the project. Pet.App.21a–22a; JA440.

The District Court denied the petition. Pet.App.23a. It did not explicitly grapple with whether *coram nobis* relief is available to correct a fundamental error in a criminal restitution order. Instead, it offered a paragraph about the history of the writ that did not acknowledge the uncertainty over the writ's availability and hastened on to the merits. Pet.App.19a. For the court, it did not matter that, in sentencing Petitioner, it had relied on a government witness's false testimony that the regulators would not have lifted the investment hold had they known that Petitioner's information was unreliable. It instead declined to correct its judgment, reasoning that Petitioner's false representation to Vermont regulators—several links earlier in the chain of causation—rose to the level of proximate cause. Pet.App.21a–22a.

2. On appeal, the government observed that whether *coram nobis* relief is available to challenge a restitution order is an unsettled question in the Second Circuit. Brief of Appellee 26–27, United States v. Stenger, No. 23-6528 (2d Cir. Nov. 22, 2023), Dkt. No. 30. But it did not challenge the court's jurisdiction. *Id.* at 27. Petitioner, by contrast, argued

that the court was required to resolve the jurisdictional issue before addressing the merits. Reply Brief of Appellant 1, United States v. Stenger, No. 23-6528 (2d Cir. Dec. 11, 2023), Dkt. No. 34.

The Second Circuit affirmed. But it did not resolve the jurisdictional issue. It instead invoked "hypothetical statutory jurisdiction" in a footnote to skip the jurisdictional inquiry, explaining that "[a]lthough Stenger suggests that we must decide this threshold jurisdictional issue before reaching the substance of his petition, we disagree. It is well settled that where the jurisdiction issue is statutory in nature—as it is here, under the All Writs Act—we may assume hypothetical jurisdiction." Pet.App.7a. n.2. It thus declined to consider whether "a writ of *coram nobis* is available to challenge a noncustodial component of a sentence, including a restitution order." Pet.App.7a. n.2.

The Second Circuit then proceeded to adjudicate the merits. Pet.App.7a. n.2. It held that the District Court did not abuse its discretion by concluding that no extraordinary circumstances required vacating the restitution order. Pet.App.7a–8a. And in doing so, it breezily adopted the District Court's analysis.

The Second Circuit then denied Petitioner's petition for rehearing without explanation. Pet.App.12a.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions regarding the scope of a federal court's power and the availability of petitions for *coram nobis* relief. The decision below expressly invoked the controversial "hypothetical statutory jurisdiction" doctrine—the subject of a longstanding conflict that divides every court of appeals—to avoid resolving the subject of another circuit split: the availability of a writ of *coram nobis* to correct a restitution order.

Both splits are ripe for resolution. This Court should reverse the Second Circuit's exercise of extraconstitutional authority, hold that *coram nobis* relief is available in this context, and remand for a closer look at the merits.

I. THE DECISION BELOW EXACERBATES A DEEP CIRCUIT SPLIT OVER "HYPOTHETICAL STATUTORY JURISDICTION."

The Second Circuit's order invoked hypothetical statutory jurisdiction to reach and reject the merits of Petitioner's argument without first establishing jurisdiction to enter that judgment. In doing so, it repeated its practice of resolving disputes without first assuring itself of its power to do so, and cemented its position alongside six other circuits.

The courts of appeals are deeply divided over the propriety of hypothetical statutory jurisdiction. Five circuits—the Eleventh, Fourth, Fifth, Eighth, and Tenth—have rejected the doctrine. The Seventh Circuit's approach is in flux. And the remaining circuits—seven of them—have blessed the doctrine.

A closer look at the practices across these circuits reveals a fundamental disagreement about the scope

of *Steel Co.* The circuits that invoke hypothetical statutory jurisdiction do not recognize that the *Steel Co.* court meant what it said when it held that "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment." 523 U.S. at 101. This Court's intervention is needed to rein in the circuits that regularly exceed their constitutional and statutory authority by entering judgments without assured jurisdiction.

1. Five circuits recognize that federal courts cannot assume hypothetical statutory jurisdiction to resolve the merits of a case.

The Eleventh Circuit has read *Steel Co.* to establish that "an inferior court must have *both* statutory and constitutional jurisdiction before it may decide a case on the merits." *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) (Pryor, J.) (emphasis added). As Judge William Pryor put it, "We cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment." *Id.* at 1289;[4] *see Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998) ("Important jurisdictional questions cannot be ignored merely because they are difficult. To do otherwise would allow defendants to evade [] statutory requirements."); *In re Bayour Shores SNF,*

[4] Although *Friends of the Everglades* recognized an "exception" to this rule where "there is substantial overlap between interpreting a statute to resolve the merits of a case and determining an issue of statutory standing," it has maintained that a court must first determine the merits when (as here) a "statutory issue involves subject matter jurisdiction … and that issue is distinct from the merits." 699 F.3d at 1289.

LLC, 828 F.3d 1297, 1328–29 (11th Cir. 2016) (similar).

The Fourth Circuit also requires resolving jurisdictional issues before addressing the merits. In *Di Biase v. SPX Corporation*, it chastised the district court for skipping to the merits instead of resolving "issues related to jurisdiction and standing pursuant to the LMRA and ERISA." 872 F.3d 224, 232 (4th Cir. 2017). The court explained that it could not, "as the district court has done, assume subject matter jurisdiction merely to reach a less thorny issue." *Id.* at 231.

The Fifth Circuit initially sanctioned assuming statutory jurisdiction, but ultimately reversed course. In *United States v. Ortiz*, it determined that it "must decide the [statutory] jurisdictional question" because "the Supreme Court rejected the theory of hypothetical jurisdiction." No. 06-10431, 2007 WL 1223991, at *1 (5th Cir. Apr. 25, 2007) (per curiam). *Ortiz* thus rejected earlier precedent "pretermit[ting]" the practice. *United States v. Rivera-Cerda*, 200 F. App'x 372, 373 (5th Cir. Sept. 21, 2006) (per curiam)).

The Eighth Circuit similarly reversed course after nearly a decade. In *Public School Retirement System of Missouri v. State Street Bank & Trust Co.*, it held that a court must assure itself of statutory jurisdiction at the "threshold." 640 F.3d 821, 825 (8th Cir. 2011). This marked a shift in practice from *Lukowski v. INS*, where the court assumed hypothetical statutory jurisdiction despite being "less certain" that the practice was "sound." 279 F.3d 644, 647 & n.1 (8th Cir. 2002).

The Tenth Circuit also has changed approaches over time. Most recently, it held that a federal court cannot merely "assume it ha[s] jurisdiction to dismiss … claims under Rule 12(b)(6)." *Chance v. Zincke*, 898 F.3d 1025, 1028–29 (10th Cir. 2018). This followed a decision expressing uncertainty about hypothetical statutory jurisdiction, *see Abernathy v. Wandes*, 713 F.3d 538, 557 n.17 (10th Cir. 2013), and another invoking hypothetical statutory jurisdiction, *see Yancey v. Thomas*, 441 F. App'x 552, 555 n.1 (10th Cir. 2011) (skipping *Rooker-Feldman* inquiry to address family law issue).

2. The Seventh Circuit's position on hypothetical statutory jurisdiction is unclear, reflecting the growing confusion among the circuits.

Like the Fifth, Eighth, and Tenth Circuits, the Seventh Circuit has expressed concern about its longstanding practice of assuming hypothetical statutory jurisdiction. But it is not clear whether it presently views the practice as lawful. While the Seventh Circuit adopted the hypothetical statutory jurisdiction workaround soon after *Steel Co.*, *see Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 672 (7th Cir. 1998), it has since observed that "the [Supreme] Court has been unwavering in its insistence that our adjudicatory authority is limited by the Constitution and Congress, and *no* result justifies our intervening where we have not been granted the power to do so." *Groves v. United States*, 941 F.3d 315, 323 (7th Cir. 2019) (Barrett, J.) (citing *Steel Co.*, 523 U.S. at 101–02); *see also Meyers v. Oneida Tribe of Indians of Wis.*, 936 F.3d 818, 823 (7th Cir. 2016) (similar). And it has rejected an invitation to assume without deciding that a district court erred

in granting a Rule 12(b)(1) motion and nevertheless affirm dismissal under Rule 12(b)(6). *Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 557 (7th Cir. 2021). Neither of the more recent decision confronted the court's use of hypothetical statutory jurisdiction in *Sternberg* or took a clear position on the broader circuit conflict.

3. Like the Second below, the First Third, Sixth, Ninth, Federal, and D.C. Circuits all sanction using hypothetical statutory jurisdiction.

The First Circuit frequently invokes hypothetical statutory jurisdiction. *See, e.g.*, *Johansen v. Liberty Mut. Grp. Inc.*, 118 F.4th 142, 148 (1st Cir. 2024) (declining to "tarry" and instead "bypass[ing] the jurisdictional conundrum" presented); *Caribe Chem Distribs., Corp. v. S. Agric. Insecticides, Inc.*, 96 F.4th 25, 28 (1st Cir. 2024) (skipping question on remand order's appealability). It has long read *Steel Co.* to "distinguish[] between Article III jurisdiction questions and statutory jurisdiction questions, holding that the former should ordinarily be decided before the merits, but the latter need not be." *Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys.*, 173 F.3d 46, 54 (1st Cir. 1999).

As demonstrated by the underlying order, the Second Circuit similarly takes advantage of the hypothetical statutory jurisdiction workaround. For the Second Circuit, brushing aside the jurisdictional question to resolve a dispute on the merits represents "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 124 (2d Cir. 2020) (cleaned up); *see In re Hyatt*, No. 22-

1844, 2025 WL 100677, at *2 n.1 (2d Cir. Jan. 15, 2025) ("While the bankruptcy court proceeded on hypothetical jurisdiction to consider the merits of these claims, we have held that jurisdictional issues related to statutory standing and sovereign immunity need not be decided as a threshold matter.").

The Third Circuit cemented the hypothetical statutory jurisdiction workaround shortly after this Court decided *Steel Co.* In *Bowers v. National Collegiate Athletic Association*, it reasoned that *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." 346 F.3d 402, 415–16 (3d Cir. 2003); *see Jordon v. Att'y Gen. of U.S.*, 424 F.3d 320, 325 n.8 (3d Cir. 2004) (assuming jurisdiction to decide derivative citizenship claim).

The Sixth Circuit also quickly adopted the workaround. In a footnote, it reasoned that "it is appropriate for a federal court to reserve difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." *Philips v. Ameritech Info. Sys., Inc.*, 178 F.3d 1295, 1999 WL 96650, at *2 n.1 (6th Cir. Feb. 5, 1999) (table) (cleaned up). It has since followed that rule. *See, e.g.*, *Khodr v. Holder*, 531 F. App'x 660, 665 n.4 (6th Cir. 2013) (assuming jurisdiction to weigh evidence supporting alien's petition for review); *Montague v. NLRB*, 698 F.3d 307, 313 (6th Cir. 2012) (assuming jurisdiction to defer to NLRB's treatment of Letter of Agreement).

The Ninth Circuit also assumes hypothetical statutory jurisdiction. For that circuit, implementing "[t]he goals behind the Supreme Court's general admonitions against hypothetical jurisdiction—to avoid advisory opinions on the merits and drive-by jurisdictional rulings"—sometimes requires courts to skip a "novel and important" jurisdictional question in favor of a simpler merits question. *Bakalian v. Cent. Bank of Repub. of Turkey*, 932 F.3d 1229, 1236 (9th Cir. 2019). And even granting the doctrine's legitimacy, the Ninth Circuit has expressed confusion over how to properly apply it. In *One Fair Wage, Inc. v. Darden Restaurants Inc.*, it noted that "*Steel Co.*'s progeny left us with some uncertainty about the relationship between subject-matter jurisdiction and subject-matter adjacent questions." No. 21-16691, 2023 WL 2445690, at *2 (9th Cir. Mar. 10, 2023).

The D.C. Circuit also assumes hypothetical statutory jurisdiction to resolve substantive issues of law. It has explained that *Steel Co.* is "related to Article III jurisdiction, not … to a statutory limit." *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (assuming jurisdiction to interpret Back Pay Act); *see Am. Hosp. Ass'n v. Azar*, 964 F.3d 1230, 1246 (D.C. Cir. 2020) (assuming jurisdiction to interpret a federal budget act).

And finally, the Federal Circuit similarly recognizes an Article III exception for hypothetical statutory jurisdiction. In *Minesen Co. v. McHugh*, it explained that "[w]hile 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." 671 F.3d 1332, 1337 (Fed. Cir. 2012) (assuming jurisdiction to resolve contract claim).

4. Justices of this Court and judges across the circuits that sanction the assumption of hypothetical jurisdiction have openly questioned its legality.

Members of this Court read *Steel Co.* to bar the popular practice of assuming hypothetical statutory jurisdiction. In a dissent from the denial of certiorari, Justice Thomas, joined by Justices Gorsuch and Barrett, observed that this "Court categorically repudiated 'the doctrine of hypothetical jurisdiction" in *Steel Co. Waleski v. Montgomery, McCracker, Walker & Rhoads, LLP*, 143 S. Ct. 2027, 2027 (2023) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J. and Barrett, J.) (cleaned up). That dissent explained that it "appears exceedingly difficult to reconcile hypothetical statutory jurisdiction with the text and structure of Article III and this Court's decision in *Steel Co.*" *Id.* at 2028.

Judges in circuits that accept the practice have similarly questioned whether the doctrine is legitimate. *See, e.g.*, *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 518 (D.C. Cir. 2018) (Edwards, J., concurring) (questioning the validity of hypothetical statutory jurisdiction); *Butcher v. Wendt*, 975 F.3d 236, 245–55 (2d Cir. 2020) (Menashi, J., concurring in part) (same).

Nevertheless, a majority of circuits employ the practice, which means that either (a) that majority is regularly acting *ultra vires* by entering judgments without jurisdiction, or (b) the five other circuits that

reject the practice are wasting judicial resources on an unnecessary task.

* * *

This Court should resolve this longstanding and recognized division among the lower courts.

II. THE COURT BELOW UNLAWFULLY ASSUMED "HYPOTHETICAL STATUTORY JURISDICTION" TO ADJUDICATE THE MERITS OF PETITIONER'S CASE.

The Second Circuit's decision is seriously mistaken. By skipping the key jurisdictional question, it cemented its position on the wrong side of a long-entrenched circuit split. Worse yet, its refusal to engage with that question likely infected the merits analysis by giving the entire exercise short shrift. This Court should grant the petition and reverse.

1. The jurisdiction of federal courts to adjudicate cases and controversies is conferred and constrained by Article III of the U.S. Constitution and—pursuant to Article III—by Congress. As a result, this Court has admonished lower courts to refrain from adjudicating the merits of a case without constitutional and—where relevant—Congressional authority. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.").

The practice of assuming "hypothetical" jurisdiction to resolve the merits of a case is an unconstitutional end-run around these principles. The Court recognized this inevitable conclusion in

Steel Co. v. Citizens for a Better Environment, where the Court analyzed how "the particulars of respondent's complaint … measures up to Article III's requirements," 523 U.S. at 104—and it also answered the threshold question whether subject-matter jurisdiction (there, standing) needs to be determined before a merits analysis, *see id.* at 93–101. The Court explained that the "requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" 523 U.S. at 94–95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Thus, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* at 101.

That conclusion should be no surprise. This Court long ago established that "[w]ithout jurisdiction [a federal court] cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868). Indeed, some jurists clearly identified the constitutional problem with hypothetical jurisdiction well before *Steel Co.*'s attempt to end the practice. *See, e.g., Clow v. U.S. Dept. of Housing & Urban Dev.*, 948 F.2d 614, 628 (9th Cir. 1991) (O'Scannlain, J., dissenting) ("[H]ypothetical jurisdiction cannot lie where actual jurisdiction is clearly absent. Indeed, the very concept of hypothetical jurisdiction is indefensible.").

Bedrock constitutional principles and this Court's precedents make clear that courts cannot skip jurisdictional questions—however thorny—to resolve the merits.

2. Notwithstanding *Steel Co.*'s clear holding, courts began engineering an unconstitutional workaround almost immediately after the decision. *See, e.g.*, *Kauthar*, 149 F.3d at 672. Specifically, several circuit courts have read *Steel Co.* to permit assuming "hypothetical *statutory* jurisdiction." These courts have typically done so by characterizing as "complicated and not entirely clear" *Steel Co.*'s language addressing statutory jurisdiction. *Seale v. INS*, 323 F.3d 150, 156 (1st Cir. 2003).

Steel Co.'s bottom-line holding, however, does not distinguish between statutory and Article III standing. It instead treats the two as susceptible to the same analysis. Indeed, it held that *both* "statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 523 U.S. at 101. Statutory "restraints" are not worth much if courts can "assume" them away.

This Court's linking of statutory and constitutional jurisdiction makes sense. Statutory jurisdiction flows from the same font as constitutional jurisdiction: Article III. After all, Article III does not simply set the outer bounds of the judicial power. It also empowers Congress to set—by statute—the jurisdiction of the federal courts within those bounds. Assuming away those bounds exceeds the judicial power.

Notwithstanding this commonsense conclusion, some courts have read *Steel Co.*'s characterization of an earlier case—*National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974)—as evidence of the propriety of hypothetical statutory jurisdiction. *See, e.g.*, *Coan v. Kaufman*, 457 F.3d 250, 256 (2d Cir. 2006); *Bowers*, 346 F.3d at 415. These courts focus on dicta in *Steel Co.* that seems to distinguish *National Railroad* on the ground that it concerned "an issue of *statutory* standing," thus suggesting the two are not subject to the same restrictions. But *National Railroad* "did not actually bypass any statutory jurisdictional issues, so *Steel Co.*'s seeming endorsement of *National Railroad* does not support hypothetical statutory jurisdiction." Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 Ala. L. Rev. 493, 522 (2016). Instead, "no issue of statutory standing was skipped" because the merits question had been improperly framed as a standing issue—an analytical wrinkle later ironed out in *Lexmark International, Inc. v. Static Components, Inc.*, 572 U.S. 118 (2014). *Id.* at 525.

This Court's post-*Steel Co.* practice also implicitly rejects the hypothetical statutory jurisdiction doctrine. *Id.* at 528–33. For example, in *Ruhrgas AG v. Marathon Oil Co.*, a case decided the year after *Steel Co.*, the Supreme Court considered whether a court may dismiss a case for lack of personal jurisdiction before establishing subject-matter jurisdiction. 526 U.S. 574 (1999). And in that case, the subject-matter jurisdiction question was whether the parties satisfied the *complete* diversity requirement under 28 U.S.C.

§ 1332. But the Constitution requires only *minimal* diversity to satisfy Article III jurisdiction, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967), and the parties did not contest minimal diversity. *Ruhrgas*, 526 U.S. at 584. So the subject-matter jurisdiction issue was purely one of statutory dimensions. And the Court still reasoned that "*Steel Co.* is the backdrop" for the case. *Id.* at 577; *see* Stillman, *supra* at 529. That would not be true if *Steel Co.* did not also bar hypothetical statutory jurisdiction.

* * *

The Second Circuit did not even attempt to justify its reliance on hypothetical statutory jurisdiction, despite its suspect status. This Court should reverse.

III. This Court Can Resolve a Second Circuit Split by Determining the Availability of a Writ of *Coram Nobis* to Correct a Restitution Order.

This Court need not go any further than resolving the circuit split over hypothetical statutory jurisdiction. But the underlying jurisdictional issue that the Second Circuit skipped is a pure question of law that also has divided circuit courts: whether a writ of *coram nobis* is available to correct a criminal restitution order. This petition therefore presents an opportunity to efficiently resolve two entrenched splits with one grant.

1. The writ of *coram nobis* is an "ancient common-law remedy." *United States v. Denedo*, 556 U.S. 904, 910 (2009). It "emerged in sixteenth century England … to correct errors of fact not appearing on the record that would have precluded the court's judgment had the court known of the error when it

rendered judgment." Brenden W. Randell, Comment, United States v. Cooper*: The Writ of Error Coram Nobis and the* Morgan *Footnote Paradox*, 74 Minn. L. Rev. 1063, 1069 (1990).

At common law, the writ "was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment," and has since "had a continuous although limited use also in our states." *United States v. Morgan*, 346 U.S. 502, 507 (1954). Courts have granted the writ to resolve a variety of injustices: "to inquire as to the imprisonment of a slave not subject to imprisonment, insanity of a defendant, a conviction on a guilty plea through the coercion of fear of mob violence, failure to advise of right to counsel." *Id.* at 508. And "in its modern iteration *coram nobis* is broader than its common-law successor." *Denedo*, 556 U.S. at 911. It is thus broadly used as a "tool to correct a legal or factual error." *Id.* at 913

This Court has held that the writ of *coram nobis* may be used to correct errors (1) "of the most fundamental character" that render the proceeding invalid, (2) where there are sound reasons for the failure to seek earlier relief, and (3) when the defendant "may" continue to suffer from his conviction even though he is out of custody. *Morgan*, 346 U.S. at 509 n.15, 511–12.

The All Writs Act, which permits the "Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a),

vests federal courts with "the authority to grant a writ of *coram nobis*," *Denedo*, 556 U.S. at 910–11.

2. The circuits are nevertheless divided over whether, as a legal matter, *coram nobis* may be used to correct a fundamental error in a criminal restitution order like the one here.[5]

The Seventh Circuit has explicitly upheld jurisdiction for restitution-based petitions like Petitioner's. *United States v. Mischler*, 787 F.2d 240, 241 n.1 (7th Cir. 1986) (reading *Morgan* to broadly "retain[] [*coram nobis*'s] vitality in criminal proceedings"). And analogously, the Tenth Circuit has found jurisdiction under the writ to challenge the imposition of measures to collect a criminal fine after the custodial portion of a sentence has ended. *United States v. Stefanoff*, 149 F.3d 1192, 1998 WL 327888, at

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[5] The courts of appeals have generated at least two other splits concerning the writ of *coram nobis* that are not directly implicated here:

First, some circuits require a petitioner to prove an ongoing civil disability stemming from the fundamental error. *See, e.g.*, *United States v. Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *Williams v. United States*, 858 F.3d 708, 715 (1st Cir. 2017); *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014); *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007). Others do not. *See, e.g.*, *United States v. Lesane*, 40 F.4th 191, 203–04 (4th Cir. 2022); *Hirabayashi v. United States*, 828 F.2d 591, 605–07 (9th Cir. 1987).

And *second*, the Eleventh Circuit bars *coram nobis* relief where the petition is based on the discovery of new evidence. *See Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989). Others allow such petitions. *See, e.g.*, *United States v. Scherer*, 673 F.2d 176, 178 (7th Cir. 1982); *Klein v. United States*, 880 F.2d 250, 253–54 (10th Cir. 1989); *du Purton v. United States*, 891 F.3d 437, 440 (2d Cir. 2018) (per curiam).

*1 (10th Cir. June 22, 1998) ("Nonetheless, a criminal defendant who seeks to collaterally attack his conviction and sentence, but who is no longer in custody, is not without remedy: he may file a petition for writ of error coram nobis under the All Writs Act.").

But the Fifth Circuit has rejected the use of *coram nobis* to challenge a restitution order. *Campbell v. United States*, 330 F. App'x 482, 483 (5th Cir. 2009) (per curiam) (citing circuit precedent that challenges to fines should be made on direct appeal). For that court, a federal district court categorically "lacks jurisdiction to modify a restitution order under § 2255, a writ of coram nobis, or any other federal law." *Id.* (cleaned up).

The Second Circuit's failure to grapple with this split was *ultra vires* for the reasons discussed above. It also perpetuates uncertainty over the writ's availability. And that failure also infected the final analysis. Had the court grappled with and resolved the availability of the writ to challenge a restitution order, it would have better understood both (i) how the government official's false testimony undermined the integrity of the proceedings and (ii) the soundness of Petitioner's reasons for not knowing the testimony was false at the time of sentencing. That more careful treatment should have yielded a different result.[6]

[6] The Court need not reach these fact-bound questions if it grants this petition, however, and may instead leave reconsideration of their treatment to the lower courts on remand if Petitioner prevails.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND LIKELY TO RECUR.

Courts frequently invoke hypothetical statutory jurisdiction to resolve the merits of cases in excess of their lawful authority. And the writ of *coram nobis* is an important remedy frequently considered by the federal courts. The questions here therefore are important and likely to recur, so this Court should resolve them.

1. Hypothetical statutory jurisdiction implicates important questions about the separation of powers. Indeed, Justice Scalia, writing for the *Steel Co.* Court, recognized that "[m]uch more than legal niceties are at stake here." 523 U.S. at 101. Assuming hypothetical jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94.

Similarly, this Court has recognized that because "a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power," acting beyond a statutory grant "would undermine the separation of powers by 'elevat[ing] the judicial over the legislative branch.'" *Patchak v. Zinke*, 583 U.S. 244, 254 (2018) (quoting *Cary v. Curtis*, 3 How. 236, 245 (1845)). That is what a federal court does when it assumes hypothetical statutory jurisdiction and resolves a case on the merits. It is creating precedent, often binding precedent, on those merits without assured power to do so. In other words, those separation-of-powers concerns are not mitigated just because courts reserve that indulgence for when a party's claims will lose on the merits. After all, "even a dismissal on the merits

can create binding precedent on important legal questions," like "the scope and application of affirmative defenses" and the "elements a plaintiff must plead to state a claim." *Butcher*, 975 F.3d at 248 (Menashi, J., concurring in part).

And that is not to mention the judicial legitimacy and economy problems presented by the practice. When courts exercise hypothetical statutory jurisdiction, it harms the judiciary's legitimacy by advancing *ultra vires* action. And it hurts judicial economy by continually kicking important jurisdictional questions of first impression down the road for future courts and litigants to resolve (or kick even further down the road). Courts should not force those seeking to comply with the law to engage in endless guessing games about questions of statutory jurisdiction.

This issue is already frequently recurring. As discussed above, courts in the majority of federal jurisdictions routinely exercise hypothetical statutory jurisdiction. *See, e.g.*, *Chun Mendez v. Garland*, 96 F.4th 58, 65 (1st Cir. 2024) (bypassing jurisdictional question to address asylum and withholding of removal claims); *Springfield Hospital, Inc. v. Guzman*, 28 F.4th 403, 416 (2d Cir. 2022) (bypassing jurisdictional question to resolve bankruptcy claim because "[w]hen a jurisdictional issue is statutory in nature, we are not required to follow a strict order of operations but instead may proceed to dismiss the case on the merits"); *see also Rawlins v. Kansas*, No. 11-3034, 2012 WL 1327802, at *2–3 (D. Kan. Apr. 17, 2012) (presuming that the writ of *audita querela* still exists despite "some question as to whether" it does).

And as a result, federal courts across the country routinely issue judgments *ultra vires*.

This Court should intervene.

2. The writ of *coram nobis* is an important remedy frequently considered by federal courts. This petition presents a circuit split concerning its application to criminal restitution orders that also is ripe for resolution.

The writ of *coram nobis* is an important tool for ensuring fairness in proceedings infected with some underlying injustice. Indeed, this "remedy is essentially an assurance that the guaranties of due process under the Federal Constitution will not be denied as a result of the technical limitations of other remedies, such as the writ of habeas corpus." Cortney E. Lollar, *Invoking Criminal Equity's Roots*, 107 Va. L. Rev. 495, 520 (2021). The writ is "an important equitable source of relief for those who are no longer serving a sentence but can point to 'fundamental' errors in their trial or plea proceedings." *Id.* at 526. And it is flexible enough to remedy fundamental errors from the "failure to advise of right to counsel," *Morgan*, 346 U.S. at 508, to mistaken reliance on false testimony by a government official, as here.

Federal district courts regularly adjudicate petitions for a writ of *coram nobis*. *See* Lollar, supra, at 522 ("Since *Morgan*, federal courts have considered writs of coram nobis at a slow but steady rate in criminal cases."); *see, e.g.*, *United States v. Tinker-Smith*, No. 2:24-CV-09141, 2025 WL 372099 (W.D. Wa. Feb. 3, 2025). They often arise in the criminal restitution context. *See, e.g.*, *United States v. Lion*, No. 3:19-CR-00138, 2025 WL 451364 (D. Conn. Jan. 9,

2025); *United States v. Christensen*, No. CR-14-08164, 2021 WL 169069 (D. Az. Jan. 19, 2021); *United States v. Venerri*, 782 F. Supp. 1091 (D. Md. 1991). And they also arise in the analogous criminal fines context. *See, e.g.*, *United States v. Lynch*, 807 F. Supp. 2d 224 (E.D. Pa. 2011); *Dean v. United States*, 418 F. Supp. 2d 149 (E.D.N.Y. 2006); *United States v. Reguer*, 901 F. Supp. 515 (E.D.N.Y. 1995). Yet in the Second Circuit, litigants like Petitioner are left to guess whether jurisdiction over such petitions exists, because that court refuses to decide. And Fifth Circuit litigants are out of luck entirely.

This Court can efficiently resolve the split by also granting review of the second question presented.

V. THIS CASE PRESENTS AN IDEAL VEHICLE.

This case cleanly presents two important purely legal questions ripe for resolution.

First, this petition is an ideal vehicle through which this Court can resolve the hypothetical statutory jurisdiction circuit split. Petitioner acknowledges that *every* hypothetical statutory jurisdiction petition will come to this Court with an arguable vehicle problem. That is, every such petition will have been resolved against the petitioner on the merits, so the respondent always can argue that the result will not change whatever this Court does. But if that argument carries the day, then the majority of circuits will continue to unlawfully exercise hypothetical jurisdiction with impunity. And that creates additional perverse consequences. Had the court slowed down to evaluate whether *coram nobis* jurisdiction actually exists—and concluded that it does, *Mischler*, 787 F.2d at 241 n.1; *Stefanoff*, 1998 WL

327888, at *1—it should have come to a different outcome on the merits. Only this Court's intervention will resolve the conflict dividing every court of appeals, and the sooner the better.

Second, this petition is a convenient vehicle through which this Court also can reconcile the disparate approaches to *coram nobis* relief from fundamentally erroneous restitution orders. Lower courts need guidance on this jurisdictional issue, which the Second Circuit skipped. This Court should clarify that *coram nobis* relief *is* available for criminal restitution orders and can do so efficiently, without wading into the particular facts of this case.

* * *

Resolving these issues and remanding to the Second Circuit will require that court to reconsider the extraordinary circumstances of this case. The Second Circuit's rush past the jurisdictional question downplayed the remarkable fact that a government witness lied about the issue central to the restitution order. Had the court confronted the jurisdictional analysis, it would have taken a more careful approach to the merits as well. Furthermore, resolving these issues will provide much-needed guidance for lower courts on not one, but two fundamental and frequently recurring legal issues—the first of which will continue to evade this Court's review if not taken up in a petition with a posture just like this.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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