No.

In the Supreme Court of the United States

KING LAW GROUP, PLLC, ET AL.

Petitioners,

v.

M2 TECHNOLOGY, INCORPORATED

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S. Ct. 1003 (1998), this Court emphasized that a federal court must first establish as "an antecedent" matter that it has jurisdiction. The circuits are split, however, as to how to handle situations where jurisdictional and merits facts overlap. The Fourth and Fifth Circuits interpret *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946) to support a general rule that a federal court must assume (without deciding) jurisdiction and proceed to the merits. The majority circuits interpret *Steel Co.* more strictly to require determination of jurisdiction first, but even they disagree as to whether a federal court should apply a lower standard of proof for the jurisdictional determination (as the Third Circuit holds), or whether the standard should vary based upon the stage of the case (as the First Circuit holds). The question presented is:

> In light of the *Steel Co.* rule that jurisdiction must be determined as "an antecedent" matter, what is the proper procedure for handling situations in which jurisdictional and merits facts overlap.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners King Law Group, PLLC, Richard C. King Jr., and Mary Ellen King, were the appellants in the Fifth Circuit proceedings. M2 Software, Inc. was the declaratory defendant in the district court proceedings in the Eastern District of Texas.

Respondent M2 Technology, Inc. was the appellee in the Fifth Circuit proceedings and the declaratory plaintiff in the district court proceedings in the Eastern District of Texas.

Pursuant to Rule 29.6, neither the petitioners nor the defendant has a parent company, and no publicly-held company owns 10% or more of the stock of any petitioner, or of the defendant.

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INTRODUCTION

Petitioners respectfully petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is available at *M2 Technology, Inc. v. M2 Software, Inc.*, ---Fed. App'x---, 2018 WL 4191098 (5th Cir. 2018), and is reproduced at App. 1a–6a. The order of the Fifth Circuit denying rehearing *en banc* is reproduced at App. 7a. The final order of the district court is available at 2017 WL 1197118 (App. 8a–14a), and the corresponding initial order is available at 2016 WL 6996169 (App. 15a–26a).

JURISDICTION

This petition raises factual challenges to subject-matter jurisdiction (including Article III justiciability), and to personal jurisdiction. These challenges were bypassed by the district court and by the Court of Appeals, under contested procedures that divide the circuits. The Court of Appeals entered judgment on August 31, 2018 (App. 1a), and denied a petition for rehearing *en banc* on October 12, 2018. (App. 3a).

Under Article III of the Constitution, federal courts are limited to adjudication of "Cases" or "Controversies." U.S. Const. art. III, § 2; *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90, 133 S. Ct. 721 (2013). The Declaratory Judgment Act requires "a case of actual controversy." 28 U.S.C. § 2201. "[T]he phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764 (2007), citing *Aetna Life Ins. Co.*

v. Haworth, 300 U.S. 227, 240, 57 S. Ct. 461 (1937). The controversy must be "definite and concrete" (*Id.*) and based upon a "present right" by "established facts," not upon a hypothetical basis. *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977), quoting *Aetna Life Ins.*, 300 U.S. at 242. *See Already*, 568 U.S. at 97–99 (applying rule in context of a trademark declaratory action).

Here, Petitioners presented an uncontroverted factual record demonstrating that there was no justiciable controversy based upon any present right. The declaratory defendant was not the trademark owner. The defendant had also expressly divested all causes of action and rights to sue for past, present, or future infringement.

Without a justiciable controversy, the federal courts lacked Article III subject-matter jurisdiction. The federal courts also lacked personal jurisdiction, where the out-of-state defendant was never formally served. The post-judgment record demonstrated that, instead, Respondent had executed a fraud on the court to capture a default, when its counsel falsified a declaration of service filed with the district court clerk. ROA.565 ¶ 15.

When a lower federal court "'lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95, 118 S. Ct. 1003 (1998), citing *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829 (1936) and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997), and quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (brackets in original)). By the foregoing rule, this Court has jurisdiction to grant certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article III, Section 2, Clause 1 of The Constitution of the United States of America, provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to controversies . . . between citizens of different states . . . .

2. The Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* provides, in relevant part:

> (a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

This is a declaratory judgment action filed under the Declaratory Judgment Act, 28 U.S.C. § 2201, in which Respondent sought a declaration of non-infringement of registered federal trademarks, but failed to name the federal trademark owner. Despite the lack of a justiciable controversy, the Fifth Circuit affirmed an Article III default judgment and a denial of a motion to set it aside *without ever* reaching Petitioners' factual challenges to jurisdiction, under contested procedures of the minority circuits in a circuit split that is subject of this petition.

On July 20, 2012, Respondent M2 Technology, Inc. ("Respondent") filed a declaratory action that erroneously

named as the only declaratory defendant a non-exclusive licensee, M2 Software, Inc. ("M2 Software"). ROA.12; ROA.568–76. M2 Software holds no legally cognizable interest in the subject federal trademarks and, moreover, had already expressly relinquished all causes of action and any rights to sue or counterclaim. ROA.572. The sole party that did hold such rights, the federal trademark owner, was not named in this action. ROA.568–76.

The petitioners are Richard C. King Jr., Mary Ellen King, and King Law Group, PLLC (hereinafter "Petitioners"), counsel that submitted factual challenges to jurisdiction and who were sanctioned under Rule 11(b)(2) for making such argument—even though that argument was supported by decisions of the majority circuits within a circuit split, and by the established precedent of this Court.

The Fifth Circuit is joined by the Fourth Circuit for the minority circuit view. Both circuits rely upon a contested interpretation of *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773 (1946), to apply a general rule that when jurisdictional and merits facts overlap, a federal court must assume (without deciding) jurisdiction to proceed to the merits or contested issues of law.

Petitioners contend that *Bell* was not intended to permit the *ultra vires* determination reached here. Instead, the procedures applied by the minority circuits are squarely in conflict with this Court's rule set forth in *Steel Co.*, that a court must first establish jurisdiction as "an antecedent" matter. *Steel Co.*, 523 U.S. at 94.

This case delivers to the Court an ideal vehicle to address the issue presented and to resolve the circuit split. Under the procedural posture here, not only was jurisdiction not determined as "an antecedent" matter, it

was not determined *at all*. This matter presented a situation that tested, and broke, the limits of the procedures applied in the minority circuits that are squarely in conflict with *Steel Co.*

A. Course of Proceedings and Disposition Below

The proceedings pertinent to the issue presented are as follows.

I.

Respondent filed the present declaratory action on July 20, 2012 and named only a non-owner, M2 Software. ROA.12. Respondent pursued the action against a *non-owner* even while the appropriate coercive action by the actual federal trademark *owner* was proceeding. The present action lacked a justiciable controversy without the owner named, and instead was a calculated attempt by the Respondent to increase litigation costs as a part of a "strategy of attrition that they're trying to undergo."[1]

In an earlier coercive action involving a district court record that pre-dated the assignment described below, the Fifth Circuit had held that "the owner of a trademark is a required party to an infringement suit concerning the mark." *Escamilla v. M2 Tech., Inc.,* 536 F. App'x 417, 419 (5th Cir. 2013) ("*Escamilla I*") (emphasis added, citations omitted). It thus had affirmed a district court's dismissal without prejudice, "[b]ecause the district court could not proceed to the merits without an indispensable party[.]" *Escamilla I*, 536 F. App'x at 423 (emphasis added).

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[1] *Escamilla I*, 536 F. App'x at 423 n. 5. The Court of Appeals inexplicably assigned the pronoun contraction "they're" to mean the speaker's own company, *Id.*, but the term's reference to Respondent is clear from the subsequent transcript context.

After the original decision subject of the foregoing appeal, David Escamilla (the original founder of M2 Software and former co-owner of the trademarks) acquired a full assignment of the *entire* rights, title, and interest, and associated goodwill, in the subject federal trademarks. ROA.572. The July 12, 2012 trademark assignment addressed a July 6, 2012 report and recommendation requiring that the infringement action not proceed until either Mr. Escamilla "show sole standing as to the claims raised or [M2 Software] represents itself through counsel."[2] The assignment timely and diligently fulfilled the first option provided by the court's directive.[3]

The Fifth Circuit appropriately recognized the assignment as "ostensibly negating any need for M2 Software's joinder," *Escamilla I*, 536 F. App'x at 423, and then correctly recognized Mr. Escamilla as the federal trademark owner. *Escamilla v. M2 Tech., Inc.*, 581 F. App'x 449, 450 (5th Cir. 2014) ("*Escamilla II*") (recognizing "David Escamilla" as "owner of a trademark for M2"), *cert. denied*, 135 S. Ct. 1895 (2015).

Nevertheless, by a strategy of attrition by which Respondent sought to leverage its significant financial advantage in litigation, Respondent filed the present duplicative action and named only the corporate non-owner. To falsely assert jurisdiction, Respondent attached

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[2] *Escamilla v. M2 Tech., Inc.*, No. 4:11CV516, 2012 WL 4506081, at *5 (E.D. Tex. Jul. 6, 2012) (emphasis added), *report and recommendation adopted in part, rejected in part on other grounds,* 2012 WL 4501644 (E.D. Tex. Sep. 28, 2012).

[3] A later panel of the Court of Appeals overlooked the disjunction "or" in misconstruing the order as an order to obtain counsel. *See M2 Tech. 2014*, 589 F. App'x at 677. An earlier panel, however, had gotten it right, more correctly noting that M2 Software had never even been a party. *Escamilla I*, 536 F. App'x at 423 n. 6.

to its complaint an undated registration record from 2010 trademark office proceedings, listing M2 Software from a time period prior to the assignment. ROA.14; ROA.21–23 (undated and inaccurate complaint attachment). *Compare* ROA.568–76 (the true federal registration, lodged by Petitioners on the post-judgment record).

Knowing that, absent a default, it would be precluded from bringing this action due to its prior loss by a final judgment of the Trademark Trial and Appeal Board (TTAB) (sustaining allegations of "likelihood-of-confusion" and priority involving materially the same marks and usages), Respondent rushed to the district court clerk to obtain entry of default. ROA.51. As post-judgment challenges would later show, Respondent executed a fraud on the court to obtain the default, entering a false declaration by its counsel that "service" had been effected on an "authorized agent" (*Id.*), when such counsel had instead only directed that an envelope be mailed to a corporate address *not addressed to any natural person*. ROA.605; ROA.546; ROA.565 ¶ 15. Default judgment entered, and M2 Software appealed. ROA.462.

With no record available on the default, M2 Software challenged jurisdiction in the original proceeding appeal by relying upon the record of a related appeal, including a request for judicial notice of publicly available records of the United States Patent and Trademark Office (USPTO). Such records demonstrated that Respondent had attached outdated trademark office records to its complaint, and that the actual federal trademark owner was not named in this action. The records for which judicial notice was sought further demonstrated that by an assignment recorded at the USPTO, the named defendant, M2 Software, had already expressly relinquished all causes of

action and lacked any rights to sue or counterclaim. Notes 6 through 9, *infra* (post-judgment records). With no actual controversy, no Article III jurisdiction existed. *See, e.g., Already,* 568 U.S. at 90–93.

Nevertheless, under contested procedures that divide the circuit courts, the Fifth Circuit elected to bypass the factual challenges to jurisdiction. *See M2 Tech., Inc. v. M2 Software, Inc.,* 589 F. App'x 671, 676 (5th Cir. 2014), *cert. denied sub nom.*, *Escamilla v. M2 Tech., Inc.*, 135 S. Ct. 1895 (2015), *reh'g denied*, 135 S. Ct. 2854 (2015) ("*M2 Tech. 2014*"). Instead, by a vague suggestion that jurisdictional facts overlapped the merits, the Fifth Circuit found that it need only conduct a *prima facie* test (taking all jurisdictional allegations as true) for it to assume, *without deciding*, jurisdiction and proceed to the merits or contested issues of law:

> M2 Technology alleged that M2 Software owned the M2 mark . . . . had M2 Technology failed to prove M2 Software's ownership, and had the Lanham Act not provided standing for a non-exclusive licensee (a question we need not decide today), M2 Technology would have lost on the merits, not for lack of jurisdiction.

M2 Tech. 2014, 589 F. App'x at 676 (emphasis added), citing *Bell*, 327 U.S. at 682.

The Fifth Circuit thus applied a hypothetical approach that it treats as the "general rule" when jurisdictional and merits facts overlap. *Montez v. Department of the Navy*, 382 F.3d 147, 150 (5th Cir. 2004) (holding "the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case"), citing *Bell*, 327

U.S. at 682. As set forth herein, the approach applied by the Fifth Circuit as a general rule squarely conflicts with the established law of this Court, and with the majority of other Courts of Appeals.

II.

After the original default judgment was affirmed and a petition for certiorari denied, Petitioners properly filed a Rule 60(b) motion to set aside the default and default judgment, and to dismiss (the "Rule 60(b) Motion"). ROA.537. In light of the default judgment, the Rule 60(b) Motion filed by Petitioners relied upon a post-judgment record that was M2 Software's first factual record in this case. *See, e.g.,* ROA.555–56, ROA.560 ¶ 2, ROA.568–75.

The district court declined to reach the factual challenges to jurisdiction. App. 21a.[4] It instead held, under the Fifth Circuit's view, that the earlier examination of jurisdictional *allegations* in original proceedings precluded any post-judgment factual challenge to jurisdiction. *Id.* The district court also conflated Respondent's fraud on the court with jurisdictional matters "already considered" (App. 21a), an erroneous conflation that allowed Respondent's brazen fraud on the court in obtaining the default to escape any examination at any stage by any court.

Several decisions of the district court and the Court of Appeals followed. *All* relied upon the earlier *prima facie* test that simply examined jurisdictional allegations, under the Fifth Circuit's view, to assume hypothetical jurisdiction (without reaching factual challenges) and proceed to contested issues of law. *See, e.g., M2 Tech., Inc. v. M2*

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[4] *M2 Tech., Inc. v. M2 Software, Inc.,* 2016 WL 6996169, at *3 (E.D. Tex., Mar. 04, 2016).

Software, Inc., sub nom. *Escamilla v. M2 Tech., Inc.*, 657 F. App'x 318, 319 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 2194 (2017) ("*M2 Tech. 2016*") (a consolidated decision addressing this case in paragraph "2").

On March 30, 2017, the district court assessed Rule 11(b)(2) sanctions against Petitioners by finding that the Rule 60(b) Motion "lack[ed] merit" under the procedures applied in the Fifth Circuit. App. 12a, 13a, 21a, 22a–26a. Although Petitioners *factually* challenged jurisdiction, the district court found such challenges foreclosed by the Fifth Circuit's prior *facial* analysis in original proceedings, under jurisdictional procedures that divide the regional circuits.

On May 1, 2017, Petitioners appealed. ROA.1426. In the appeal, Petitioners again submitted factual challenges to jurisdiction—challenging jurisdiction directly in the jurisdictional statement, and in argument to demonstrate that Petitioners' factual challenges to jurisdiction at the district court had easily met the standards for "legal plausibility" and, as such, the Rule 11(b)(2) sanctions should never have issued against counsel.

On August 31, 2018, the Fifth Circuit again declined to reach factual jurisdictional challenges, by a three-judge panel that included an intersecting member of the *M2 Tech. 2016* panel that had authored the decision upon which the district court relied in its final order subject of this appeal. App. 1a, 13a.[5] Although Article III jurisdiction is required at all case phases (and subject to challenge at any time), the Fifth Circuit again bypassed factual challenges to jurisdiction and found the issue of jurisdiction to have been "addressed" by the original proceedings——

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[5] *M2 Tech., Inc. v. M2 Software, Inc.,* 2017 WL 1197118, *3 at n. 1 (E.D. Tex., Mar. 30, 2017), citing *M2 Tech. 2016*, 657 F. App'x at 319.

proceedings that had only examined the jurisdictional allegations to assume, without deciding, jurisdiction. *See* App. 4a, citing *M2 Tech. 2014*, *supra*, 589 F. App'x at 676 (which, in turn, relies upon *Bell*, 327 U.S. at 682).

Petitioners timely filed a petition for rehearing *en banc*, pointing out the conflict between the Fifth Circuit's faulty procedures and this Court's directive in *Steel Co.*, and the conflict with the majority of the federal circuits. The *en banc* petition was denied on October 12, 2018 (App. 7a).

As a result of the minority circuit procedures subject of the circuit split, at no point in this multi-year litigation have Petitioners' factual objections to federal court jurisdiction *ever* been reached, yet this case is now at final disposition. This petition for certiorari follows.

B. Factual Background

The facts pertinent to the issue presented are concise:

1. Pursuant to a July 12, 2012 trademark assignment, M2 Software assigned all rights, title, and interest, and associated goodwill, in the subject marks (including all trademarks, service marks and trade names) to David Escamilla, the original founder of M2 Software who was previously a co-owner of the marks.[6] With the assignment duly executed and notarized,[7] M2 Software expressly relinquished "all causes of action (in law or equity) and rights to sue, counterclaim, and/or recover for past, present, and future infringement . . . [and] all rights corresponding to the foregoing throughout the world."[8]

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[6] ROA.572 ¶ 1.1; ROA.560–66, 568–75, 619–20, 642–43.

[7] ROA.574.

[8] ROA.572.

2. David Escamilla is the sole federal trademark owner.[9] The Rule 60(b) record included authenticated records of registrations from the United States Patent and Trademark Office (USPTO), in the form approved for submission into evidence in federal trademark practice at the USPTO, 37 C.F.R. § 2.122(d)(1), showing current status and title and independently verifiable on a public government electronic database.[10]

3. Appellee's incorrect suggestion in its complaint of M2 Software's status as the federal trademark owner, relied upon by the facial analysis of *M2 Tech. 2014* adopted by the Court of Appeals, was supported by a reference to "Exh. A" in Appellee's complaint.[11] "Exhibit A" was a two-page copy of obsolete trademark registration data, showing prior information, but bearing no dates of status.[12] As evidence that 37 C.F.R. § 2.122(d)(1) would properly reject as undated, such document failed to raise even a genuine issue of fact to contradict Petitioners' accurate factual challenge demonstrating that the indispensable federal trademark owner was not named in this action.

REASONS FOR GRANTING THE WRIT

Federal courts are courts of limited jurisdiction, "possess[ing] only that power authorized by Constitution and statute . . . ." *Kokkoken v. Gardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction . . . the burden of establishing the contrary rests upon the

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[9] ROA.568–75.

[10] *Id.*

[11] ROA.14 ¶ 12.

[12] ROA.21–23.

party asserting jurisdiction." *Id.* Accordingly, a federal court must establish, as "an antecedent" matter, that it actually holds jurisdiction. *Steel Co.*, 523 U.S. at 94.

In practical operation of the *Steel Co.* directive, real difficulties arise "whenever a jurisdictional determination entails similar facts as those on the merits" —for example, as to how to reconcile an early jurisdictional factual determination with the right to a jury, and as to preclusive effects. *See, e.g.*, Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 990 (2006) (Clermont). In the two decades since this Court decided *Steel Co.*, the circuits have become deeply entrenched in a split from an overall attempt to address these difficulties:

> A split among our sister courts of appeals has emerged on the proper procedure for handling situations in which jurisdiction is intertwined with the merits.

CNA v. United States, 535 F.3d 132, 143 (3d Cir. 2008) (emphasis added), as amended (Sept. 29, 2008), citing *Montez*, 382 F.3d at 150. As set forth below, this case presents an ideal vehicle by which to resolve the split, on an issue of fundamental daily importance to the federal courts.

I. The Court Should Grant Certiorari to Resolve the Intractable Split among the Circuits as to the Proper Procedure for Handling Situations in Which Jurisdictional and Merits Facts Overlap

Consistent treatment of procedures where jurisdictional and merits facts overlap is critical to preserving due process, and to ensuring adherence to the Constitutional limitations of Article III. This Court has "admonished itself and other federal courts for being 'less than meticulous' in classifying issues as jurisdictional or merits-based." *CNA*, 535 F.3d at 144 n. 8, quoting *Arbaugh v. Y & H Corp.*, 546

U.S. 500, 515, 126 S. Ct. 1235 (2006). That laxity is attributed, in part, to a lack of established guidance on the correct procedure for a federal court to follow when jurisdictional and merits facts overlap, in light of the *Steel Co.* directive that jurisdiction be determined first.

The result has been a wide divergence of procedures applied by the regional federal circuits. The majority circuits interpret *Steel Co.* to strictly require determination of jurisdiction as an antecedent matter. *Steel Co.*, 523 U.S. at 101. The Fourth and Fifth Circuits have adopted a minority view, applying an exception to the *Steel Co.* rule in situations where jurisdictional and merits facts overlap.

The Third Circuit, acknowledging the split, has adopted a middle position, finding it necessary to determine jurisdiction first under *Steel Co.*, but directing that a lower standard of proof should be applied to the jurisdictional determination. The First Circuit applies a mixed standard of proof, depending upon stage of the case.

The matter has percolated in the federal circuit courts in the two decades since this Court decided *Steel Co.*, and the circuit split is now ripe for review on certiorari.

A. The Fourth and Fifth Circuits Rely upon *Bell* for Their General Rule That Federal Courts Must Assume (Without Deciding) Jurisdiction

1. The Fifth Circuit applies its own exception to the *Steel Co.* rule repudiating the practice of assuming (without deciding) jurisdiction to reach contested issues of law:

> However, where issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court *must assume jurisdiction and proceed to the merits*.

Montez, 392 F. 3d at 159 (emphasis added), citing *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981),

cert. denied, 454 U.S. 897 (1981), and *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1347 (5th Cir. 1985). The Fifth Circuit describes this procedure as its "general rule." *Id.* at 150.

The Fifth Circuit decided *Montez* in 2004, which served to provide an exception within the Fifth Circuit to this Court's 1998 *Steel Co.* decision. To support the circuit-created exception, the Fifth Circuit relied, at source, upon *Bell.* The *Montez* decision cites *Williamson*, and *Daigle*, *supra*, which in turn, each cite *Bell*, 327 U.S. at 682.

The Fifth Circuit similarly relied upon *Bell*, at source, in the present case. App. 4a (finding jurisdiction issue "addressed" in *M2 Tech. 2014*, 589 F. App'x at 676–77 which, in turn, cites *Bell*, 327 U.S. at 682). By its interpretation of *Bell*, the Fifth Circuit bypassed all factual challenges to jurisdiction filed by Petitioners, at several stages of this multi-year litigation:

> i) in assuming (without deciding) jurisdiction after a *prima facie* test that addressed only facial allegations, while refusing to reach factual jurisdictional challenges during appeal of the original proceedings (a default judgment);[13]
>
> ii) in refusing to reach the factual jurisdictional challenges on review of the Rule 60(b) Motion;[14]
>
> iii) in affirming Rule 11(b)(2) sanctions for counsel's factual jurisdictional challenges (App. 4a.), and refusing to reach the direct factual

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[13] *M2 Tech. 2014*, 589 F. App'x at 676–77.

[14] *M2 Tech. 2016*, 657 F. App'x at 319 (categorizing Petitioners' new factual jurisdictional challenge as within a jurisdiction argument that had "already been considered and rejected by this court," but referencing the facial-only analysis of *M2 Tech. 2014*).

> jurisdictional challenges at the Court of Appeals.[15]

The Fifth Circuit's "general rule" is tested at its limits here, because the Circuit was forced to apply its divergent hypothetical approach to assume jurisdiction to affirm a *default* judgment (and, similarly, to affirm an order denying a Rule 60(b) motion to set it aside and for sanctions). With a default judgment, there is not a trial stage to which a federal court might defer a jurisdictional challenge when a direct factual attack is submitted under Rule 60(b). On the case posture presented here, by the Fifth Circuit's circuit-dividing procedures, jurisdiction was not simply *deferred* (itself a violation of *Steel Co.*), but it was never *reached.*

This matter is now at final disposition. The result is that an Article III judgment affecting the Constitutional rights of multiple parties, both party and non-party, has now been entered and affirmed by the Fifth Circuit, without ever establishing subject-matter jurisdiction (including Article III justiciability) or personal jurisdiction.

2. Recognizing the split among its sister circuits, and without guidance from this Court on this issue, the Fourth Circuit aligned with the Fifth Circuit when it announced the "proper legal framework" for those situations where "the jurisdictional facts are inextricably intertwined with those central to the merits." *See Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir. 2009). The Fourth Circuit thus found:

> A district court should assume jurisdiction and assess the merits of the claim when the relevant

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[15] Appellants' Jt. Br. at 1, 36–42, *M2 Tech. 2016,* 2017 WL 2877055 (5th Cir. Jun. 27, 2017) (No. 17-40476); Appellants' Jt. Rep. Br. at 14–17, *M2 Tech. 2016,* 2017 WL 3866739 (5th Cir. Aug. 10, 2017) (No. 17-40476).

> facts—for jurisdictional and merits purposes—are inextricably intertwined.

Kerns, 585 F.3d at 195, citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (decided prior to *Steel Co.*) and *Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009) (decided post-*Steel Co.*). *See Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016) (holding that a court must proceed to the merits when a material jurisdictional fact "overlaps with a fact that needs to be resolved on the merits"), citing *Adams*, 697 F.2d at 1219.

To support its view, the Fourth Circuit relied upon a Fifth Circuit decision, *Williamson*, and the Fifth Circuit's interpretation of *Bell*:

> Thus, when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined, the trial court should ordinarily assume jurisdiction and proceed to the intertwined merits issues. . . . As the Supreme Court has explained . . . a trial court should dismiss under Rule 12(b)(1) only when the jurisdictional allegations are "clearly . . . immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous."

Kerns, 585 F.3d at 193, citing *Williamson*, 645 F.2d at 415, quoting *Bell*, 327 U.S. at 682.

B. The Third Circuit Applies a Lower Standard of Jurisdictional Proof

The rule applied in the Fourth and Fifth Circuits attempts to address the difficulties described above after *Steel Co.*, when an early jurisdictional fact determination is made in circumstances of jurisdictional and merits facts overlap. *See, e.g.,* Clermont, *supra*, 91 Cornell L. Rev. at

990. The Third Circuit similarly recognizes these difficulties, but has taken a different approach to the issue.

The Third Circuit attempts to follow the *Steel Co.* requirement that jurisdiction be determined as an antecedent matter, but it tries to address the complications arising with a jurisdictional and merits facts overlap by applying a lower standard of proof to the jurisdictional determination. *See CNA,* 535 F.3d at 144 (noting that "a district court must take care not to reach the merits of a case" when "jurisdiction is intertwined with the merits").

As the Third Circuit explains, by lowering the standard of proof, it seeks to "ensure that defendants are not allowed to use Rule 12(b)(1) to resolve the merits too early in litigation." *Id.* "By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery." *Id.*

Cementing the circuit split described in this petition, the Fourth Circuit directly examined, and rejected, the Third Circuit's approach. *See Kerns*, 585 F.3d at 195 n. 7 ("We lack confidence in the efficacy of the less-stringent Rule 12(b)(1) standard espoused by the Third Circuit[,]" referencing *CNA*, 535 F.3d at 145 in which the Third Circuit "conclud[ed] that plaintiffs are adequately protected because district courts require 'less of a factual showing than would be required to succeed at trial.'").

C. The First Circuit Varies the Standard Based Upon the Stage of the Case

Like the Third Circuit, the First Circuit recognizes that a lower standard of jurisdictional proof might present a compromise to address the difficulties presented by

overlapping jurisdictional and merits facts. However, the First Circuit holds that the jurisdictional standard of proof should *vary*, based upon the stage of the case. *See Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675–78 (1st Cir. 1992) (addressing lower standards of proof on pretrial motions that would not apply at trial).

D. The Majority Circuits Interpret *Steel Co.* More Strictly to Require Jurisdiction to Be Determined as an Antecedent Matter

Notwithstanding the various attempts by the foregoing circuits to address the difficulties inherent in an early jurisdictional fact determination, at least seven Circuit Courts comprise the majority circuits that interpret *Steel Co.* more strictly to require determination of jurisdiction as an antecedent matter. *See e.g., Chance v. Zinke*, 898 F.3d 1025, 1029 (10th Cir. 2018) ("Thus, the district court couldn't assume it had jurisdiction . . . And we can't make that assumption either"); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 821 (7th Cir. 2016) ("a court may not decide the merits of a case without subject matter jurisdiction even if the parties have not themselves raised it"); *Public Sch. Ret. Sys. v. State St. Bank & Tr. Co.*, 640 F.3d 821, 825–27 (8th Cir. 2011) ("Instead, we have noted that 'jurisdiction is a threshold question and must be answered before all other questions.'") (citation omitted); *Am. Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534, 537 (6th Cir. 2007) ("[s]ubject matter jurisdiction is always a threshold determination"). The Ninth and Eleventh Circuits both altered their prior positions in light of *Steel Co. See, e.g., Friends of the Everglades v. U.S. EPA*, 699 F.3d 1280, 1289 (11th Cir. 2012) ("[w]e cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment," citing *Steel Co.*), *cert. denied*, 134 S. Ct. 421 (2013); *Newdow v. Lefevre*, 598 F.3d 638, 645–46 (9th

Cir. 2010) ("After *Steel Co.*, a court cannot do what [cited] court did: address the merits of a case without ensuring it has jurisdiction over the case.").[16]

The majority circuits nonetheless remain in a sub-split on a related question summoned by the issue presented in this petition, namely, whether the *Steel Co.* requirement for antecedent determination of jurisdiction applies only to Article III jurisdiction, or to both Article III and statutory jurisdiction. The D.C. Circuit recently found that this Court's later decision in *Sinochem* supports the latter interpretation. *See Kaplan v. Central Bank of the Islamic Rep. of Iran*, 896 F.3d 501 (D.C. Cir. 2018):

> Rather than assuming (without deciding) jurisdiction and going on to address the merits, *Steel Co.* explained, a court must first establish as "an antecedent" matter that it has jurisdiction. . . . Insofar as those [cited circuit] decisions interpreted *Steel Co.'s* prohibition against "hypothetical jurisdiction" to be confined solely to questions of Article III jurisdiction, they would be in tension with the broader interpretation established in *Sinochem*.

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[16] The *CNA* description of circuit groupings within the split (*CNA*, 535 F.3d at 143) was based upon the 2008 status, and contains slight differences from that presented in this petition. These differences are due in part to the subsequent 2009 decision in *Kerns,* in which the Fourth Circuit aligned with the Fifth Circuit, and the Eleventh Circuit's vacillation on the issue. *See Friends of the Everglades*, 699 F.3d at 1289 (in 2012, holding a court "cannot exercise hypothetical jurisdiction" in line with majority circuits, but applying exception to *Steel Co.* if there is a "substantial overlap" of jurisdiction and merits); *compare Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003) (bypassing factual challenges if jurisdictional facts "implicate" the merits), citing *Williamson*, 645 F.2d at 415–16.

Id., at 510-11, citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31, 127 S. Ct. 1184 (2007).

Should this Court apply its discretion to reach this sub-split, it may ultimately find (as did the concurring opinion in Kaplan) that any "distinction between statutory limitations on subject-matter jurisdiction and other Article III jurisdictional limitations is tenuous, as both limitations arise from Article III." Id. at 517–18 (Edwards, J., concurring). *See Id.* (the rule that a court without jurisdiction lacks power to adjudicate a case "applies equally, whether jurisdiction is lacking because there is no case or controversy, or because Congress has declined to grant a lower court jurisdiction over a category of cases.").

A grant of certiorari on the issue presented will provide the Court an opportunity to further complete the mosaic of controlling law in this area after *Steel Co.*

II. The Fifth Circuit's Decision Is Erroneous

A grant of certiorari is also supported because the Fifth Circuit's decision is erroneous, and squarely conflicts with the established precedent of this Court.

A. The Minority Circuits' Interpretation of *Bell* Conflicts with the *Steel Co.* Rule

This Court directed in *Steel Co.* that jurisdiction must "be established as a threshold matter," presenting this rule as "inflexible and without exception." *Steel Co.*, 523 U.S. at 93. *Steel Co.* rejected the developing practices of lower courts that had found it "proper to proceed immediately to the merits question, despite jurisdictional objections" in the interests of expediency. *Id.* This Court criticized hypothetical jurisdiction, describing it as a doctrine "that enables a court to resolve contested questions of law when its jurisdiction is in doubt." *Id.* at 101. "Without jurisdiction

the court cannot proceed at all in any cause." *Id.* at 94, quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

The contested procedures applied by the minority circuits squarely conflict with the foregoing rules. In circumstances where jurisdictional and merits fact overlap, if "the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case" (*Montez*, 392 F.3d at 150, quoting *Williamson*, 645 F.2d at 415), then a court is proceeding *ultra vires* from the point at which it elects to bypass jurisdictional factual challenges.

All of the minority circuits' decisions rely, at source, upon *Bell*, 327 U.S. at 682, to support their view that jurisdiction may be assumed. However, *Bell* has been criticized for a lack of clarity, including in relation to the Fifth Circuit's interpretation—a defect that has caused a number of courts to "erroneously conflate the question of subject matter jurisdiction with the question of whether the plaintiff can prove that the statute actually applies to the defendant or the defendant's conduct." 2 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE § 12.30(1) (Matthew Bender 3d ed. 1997) (MOORE). "This distinction is important," because jurisdictional challenges are subject to materially different procedural rules. *Id.*

Applying its interpretation of *Bell*, the Fifth Circuit has resisted treating jurisdictional issues as threshold.[17]

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[17] *See, e.g., M2 Tech. 2014*, 589 F. App'x at 676 n. 5. The Fifth Circuit imprecisely refers to "certain issues" submitted as "threshold" that it resisted treating as such. *Id.* The briefing shows the issues submitted as "threshold" had included factual challenges to subject-matter jurisdiction (including Article III justiciability) and personal jurisdiction. Appellants' Br. at 3, 7, 10–15, 33, *M2 Tech., Inc. v. M2 Software, Inc.*, 589 F. App'x 671 (5th Cir. 2014), (Nos. 13-41060, 14-40192), 2014 WL 7642904 at *3, *7, *10–15, *33.

Former Justice Rehnquist acknowledged the lack of clarity of *Bell* when he addressed the Fifth Circuit's possible misinterpretation:

> Instead, [the Fifth Circuit] proceeded to step on what is, in my opinion, a legal landmine when it elaborated on the meaning of *Bell* . . . . The Court of Appeals obviously recognized its obligation to follow the dictates of that case as best it could, and because to me the decision in *Bell* is one of the most cryptic in the recent history of this Court's jurisprudence, I have nothing but sympathy for those who seek to divine its meaning.

Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157–61 (1982) (Rehnquist, J., dissenting). Justice Rehnquist authored this dissent shortly after *Williamson* was decided—a case in which the Fifth Circuit relied upon *Bell*, and a case that creates the fundamental underpinnings of the Fifth Circuit's post-*Steel Co.* precedent of *Montez* at the heart of the circuit split. *CNA*, 535 F.3d at 143.

The circuit split stemming from the circuits' colliding interpretations of *Bell* and *Steel Co.*, is ripe for a grant of certiorari. The Fifth Circuit declined to convene *en banc* to reconsider its precedent (App. 7a), though it is aware that its procedures are not followed by most circuits. At least one judge on that court, Judge Garza, shortly before his retirement, opined that the Fifth Circuit's procedures may be in conflict with *Steel Co. See Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 407 n. 20 (5th Cir. 2014) (Garza, J.) (expressing "doubt about whether a court can ever assume jurisdiction and proceed to the merits, *Montez*, 392 F.3d at 150," in light of *Steel Co.*).

Absent *en banc* review, which the Fifth Circuit has already declined, this Court is the last avenue by which the circuit split can be resolved without further delay. *See Davis v. Ft. Bend County*, 893 F.3d 300, 305 (5th Cir. 2018) (describing "rule of orderliness" whereby only a grant of certiorari by this Court can overrule a prior panel absent *en banc* review, without an intervening change in law).

B. The Majority Circuits Would Reach the Opposite Result

The split in the circuits has resulted in the inconsistent application of federal law. Here, the opposite result would have been achieved in a majority circuit, with factual challenges to jurisdiction addressed first. In the majority circuits, this case would have been properly dismissed (in the original proceedings) or the default judgment would have been set aside as void for lack of jurisdiction (on a direct attack).

The different outcome here stemmed in part from the Fifth Circuit's conflict with the broader precedent of this Court. For example, while the Fifth Circuit found a direct attack foreclosed by original proceedings, this Court holds that a direct attack on personal jurisdiction is appropriate after (as here) a *default* judgment.[18] The Restatement (Second) of Judgments similarly advises that a direct attack on subject-matter jurisdiction is appropriate for a

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[18] *See, e.g.*, *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099 (1982) (a defendant is "always free to ignore . . . judicial proceedings, risk a default judgment, then challenge that judgment on jurisdictional grounds in a collateral proceeding."); *Reynolds v. Int'l Amateur Athletic Fed.*, 23 F.3d 1110, 1121 (6th Cir. 1994) ("defects in personal jurisdiction are not waived by default").

default judgment. FED. R. CIV. P. 60(b)(4).[19] A defaulting defendant is always entitled mount a direct attack on a default judgment by reliance upon a new record submitted with a Rule 60(b) motion. *See Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976).

This Court also holds that Article III jurisdiction must be extant at all stages of a case, and may be challenged at any time. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009). This Court has expressly held that it is improper for a federal court to assert jurisdiction on the basis of mere allegations, in the face of a factual challenge:

> Here, the allegation . . . as to jurisdictional amount was traversed by the answer. The court *made no adequate finding upon that issue of fact*, and the record contains no evidence to support the allegation. There was thus *no showing that the District Court had jurisdiction* and the bill *should have been dismissed* on that ground.

McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189–90 (1936) (emphasis added). The foregoing rules of this Court cannot be reconciled with the minority circuits' procedures on the issue presented. App. 1a.

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[19] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 65 (1982) ("Invalid Default Judgment: Lack of Subject Matter or Territorial Jurisdiction or Adequate Notice," "Except as stated in § 66, a judgment by default may be avoided if it was rendered without compliance with the requirements stated in § 1."). *See, e.g., Jakks Pacific, Inc. v. Accasevek, LLC*, 270 F.Supp.3d 191, 199 (D.D.C. 2017) ("Although Rule 60(b)(4) says "the court may relieve a party ... from a final judgment," there is no discretion if the court lacked subject-matter jurisdiction . . . the mere presence of a default judgment does not itself provide an arguable basis to assume subject-matter jurisdiction.") (emphasis in original, citations omitted).

Under the different procedures of the majority circuits, in similar declaratory actions where factually-erroneous allegations of ownership have formed an artificial basis for jurisdiction, factual challenges to jurisdiction have been reached first. *See, e.g., BASF Plant Science, LP v. Nuseed Americas Inc.*, No. 17-421, 2017 WL 3573811, at *7 (D. Del. Aug. 17, 2017), and *Certainteed Corp. v. Knauf Insul., SPRL,* 849 F.Supp.2d 67, 73 (D.D.C. 2012). In the majority circuits, cases presenting precisely this defect——a factually-erroneous allegation of ownership——are properly reviewed on factual challenge and dismissed for lack of a justiciable controversy as to the named parties. *Id.*

In federal trademark infringement actions, the absence of the federal trademark owner alone requires dismissal for lack of standing, or failure to join an indispensable party.[20] The additional fact presented here——that the non-owner named as the sole declaratory defendant had *also* already expressly relinquished all causes of action and any rights to sue for past, present, or future infringement (Notes 6–9, *supra*)——rendered moot the question of standing. Regardless of whether standing of the non-owner could be proven by Respondent, no justiciable controversy remained. *See, e.g., Already,* 568 U.S. at 90–93 (in trademark declaratory action where there was no question

[20] *See, e.g., Flu Shots of Texas, Ltd. v. Lopez*, No. 3:13-cv-133-O, 2014 L 1327706, at *5, *11 (N.D. Tex. 2014) (dismissing all claims where the federal trademark owner was not named: "Plaintiffs' federal and common law trademark-based claims (Counts I, III, and IV) . . . and claim for violations of the ACPA (Count IX) are dismissed without prejudice for lack of standing. . . . Section 43(a) Lanham Act claim for unfair competition (Count II) is dismissed without prejudice for failure to join an indispensable party and for lack of standing.").

the defendant had standing to sue, finding no justiciable controversy after covenant not to sue).[21]

C. The Minority Circuits' Unconstitutional Procedures Affect Not Only the Parties, but Also Third Parties and the Public

The minority circuits' procedures by which jurisdiction is regularly assumed, without determining whether the named parties even present a justiciable controversy, adversely affect not only the parties named, but also third parties who are blind-sided by decisions entered in an overreach of Article III powers. Here, before securing its conflicting default judgment in this matter in which jurisdiction was lacking, the Respondent had already lost in a TTAB final judgment,[22] and in decisions of the United States Commissioner for Trademarks, on many of the same issues that Respondent sought to relitigate here.[23]

When a federal court simply assumes hypothetical jurisdiction (despite no owner present, and no actual jurisdiction), and proceeds to an Article III determination of contested issues of law, it may hamper the proper

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[21] *See, e.g., Schreiber Foods, Inc. v. Beatrice Cheese, Inc.,* 402 F. 3d 1198, 1202 (Fed. Cir. 2005) (finding no justiciable controversy: "[t]hough an assignment of a patent does not ordinarily include the right to sue for past infringement . . . the assignment . . . explicitly included an assignment of all causes of action.") (citation omitted).

[22] A TTAB final judgment that, as here, sustained allegations of likelihood of confusion and priority under a 37 C.F.R. § 2.135 abandonment or default at that late stage of registration proceedings carries full issue preclusive effect, for which "it is well settled, has the same effect as a judgment on the merits." *See Bass Anglers Sportsman Soc. of Am., Inc. v. Bass Pro Lures, Inc.,* 200 USPQ 819, 822 (TTAB 1978). *See* Trademark Board Manual of Procedure (TBMP) § 602.01, citing *Bass Anglers,* 200 USPQ at 822 ("Collateral estoppel is an effective bar to relitigation of those issues.").

[23] ROA.837–888, 889–94; 896–99; ROA.917.

enforcement of rights by the owner. Here, Respondent holds no authorization from the trademark owner, who was not a party to this case, and the USPTO has already expressly determined that Respondent's uses are creating a "likelihood of confusion" in the public.[24]

By the Fifth Circuit's jurisdictional overreach, it let stand an *ultra vires* judgment affecting the public, the named defendant, the federal trademark owner (*M2 Tech. 2016*, 657 F. App'x at 318–19), and now even counsel. Petitioners were sanctioned simply on the basis of an argument that presented factual challenges that would have been sustained in the majority circuits, but were not under the minority circuits' view. *See* William H. Pate, *To Sanction or Not to Sanction: Why Arguing Against the Court's Precedent is Not an Automatic Rule 11 Violation according to Hunter v. Earth-Grains Co. Bakery,* 25 CAMPBELL L. REV. 115, 127 (2002).

III. This Case Delivers a Rare and Exceptional Vehicle to Resolve a Recurring Issue

The procedural posture of this case—involving a default judgment and denial of a Rule 60(b) motion to set it aside, with counsel sanctioned simply for arguing a view subject of a circuit split—simplifies and isolates the recurring issue presented, and creates a rare and exceptional vehicle for this Court's resolution.

A. Unlike the Circumstance for Most Cases Involving the Issue Presented, Here a Grant of Certiorari Will Change the Outcome

First, this case is unlike the vast majority of cases presenting the issue where lower courts may have overreached in assuming jurisdiction under a rationale of

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[24] ROA.1124–32, 1206–14; ROA.1133–1205, 1215–93.

judicial efficiency, where the outcome would not change even if the matter were to be reviewed by this Court. That ordinary scenario (where "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied," *Steel Co.*, 523 U.S. at 92) *is not this case*. In the present matter, the overreach of jurisdiction resulted in a judgment *against* the very party whose jurisdictional challenges were bypassed. As such, a rare and favorable vehicle is presented for certiorari.

Legal commentators have recognized that the foregoing "affected prevailing party" dynamic is a factor delaying the resolution by this Court of jurisdictional procedural issues, including the sub-split described above:

> Yet, despite the existence of a circuit split, the issue of the doctrine's constitutionality is unlikely to be presented to the Court by litigants. In most cases, the losing plaintiff would likely not seek certiorari review of this issue since the best it could hope for is a jurisdictional dismissal. Similarly, in most cases, the winning defendant would prefer to keep its merits victory.

Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power,* 68 Ala. L. Rev. 493, 549 (2016).

Just last term, on a (relisted) petition for certiorari that raised a similar question, a respondent had argued that the case was the wrong one for a grant of certiorari because the petitioner would lose "either way"—either on the merits (as the Court of Appeals had already held after assuming jurisdiction), or because the Court of Appeals would hold it lacks jurisdiction.[25] That respondent's

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[25] *See* John Elwood, *Relist Watch*, ScotusBlog May 25, 2018 ("The power authority argues that Vitol will lose either way . . . . They may

argument essentially advocates for grant of certiorari, now, in the *present* case:

> If the Court is interested in the question presented, it should wait to decide it in a case where the outcome could be affected.[26]

The present petition delivers a case in which the outcome could be affected, and certiorari is now appropriate.

B. Certiorari Is Necessary Because Lower Courts Have No Incentive to Address an Issue Whose Resolution Would Constrain Their Flexibility

Second, the Courts of Appeals are not likely to resolve the split on their own, as shown in part by the Fifth Circuit's denial of *en banc* review. That is because there is no incentive for a lower court to clarify procedural rules, where such a resolution could hamper its flexibility:

> Given the lower courts' strong incentives to preserve maximum flexibility, likely only the Supreme Court can put an end to hypothetical statutory jurisdiction.

Stillman, 68 Ala. L. Rev. at 549. *See Id.* ("until the courts of appeals correct their course, or the Supreme Court is presented with the rare opportunity to settle the issue," the limits placed upon federal courts' jurisdiction are likely to be disregarded or evaded.) Multiple petitions for certiorari have been filed recently

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have a point."), available at http://www.scotusblog.com/2018/05/relist-watch-126/ (as viewed January 2, 2019).

[26] *Vitol S.A. v. Autoridad de Energia Electrica de Puerto Rico,* No. 17-951, 2018 WL 1806998, *1 (Response, U.S. Apr. 30, 2018). The petitioner replied that this suggestion might, "as a practical matter, . . . prevent this Court from ever resolving the important Question Presented." *Vitol S.A. v. Autoridad de Energia Electrica de Puerto Rico,* No. 17-951, 2018 WL 2018450, *10 (Reply, U.S. Apr. 30, 2018).

on this or similar issues.[27] This is a recurring issue, and a grant of certiorari is appropriate.

C. This Case Is Now at Final Disposition

Third, this case has now reached final disposition. Although this petition for certiorari after the final order arrives bifurcated from that of the direct appeal of the Rule 60(b) motion denial, that should not dissuade the Court from granting certiorari. Indeed, the Third Circuit even has a supervisory rule would have avoided the present circumstance of a fragmented appeal. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 92 (3d Cir. 1988) (holding "[s]wift disposition of a Rule 11 motion is essential so that any ensuing challenge to it might be included with the appeal on the merits.").

Had the Third Circuit's rule existed in the Fifth Circuit, it would have eliminated the earlier potential impediment to this Court's review. This Court has recognized its preference to deny certiorari where further proceedings may obviate the need for review, or where further proceedings are likely to alter or refine the issues. *See, e.g., Virginia Military Inst. v. U.S.*, 508 U.S. 946 (1993) (Scalia, J.); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n. 1 (2001) (per curiam) (noting "authority to consider questions determined in earlier stages of the

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[27] *See, e.g., Vitol S.A. v. Autoridad de Energia Electrica de Puerto Rico,* No. 17-951, 2018 WL 300631, at *i (Petition, U.S. Apr. 30, 2018) (question presented of whether an Article III court can exercise "hypothetical" statutory jurisdiction to dispose of a case); *Dallas Mexican Cons. Gen. v. Box,* 2015 WL 9474281, at *9 (Petition, U.S. Dec. 23, 2015) (seeking certiorari in a matter in which the Fifth Circuit's refusal to examine jurisdictional facts resulted in holding a party to a default judgment "for which no jurisdiction could possibly exist").

litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals").

At an earlier phase of this case, legal experts opined that this Court had "surprisingly denied" certiorari.[28] Until the present petition, however, lower court proceedings were still ongoing that might have altered or refined the issues. *See Id.* Final disposition has now entered, and the matter is ripe. A grant of certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[28] Brendan J. O'Rourke, Lawrence I. Weinstein, Celia Cohen, *SCOTUS Opts Not To Remand Case Raising Preclusion Question Answered In B&B Hardware,* NATIONAL LAW REVIEW (May 2, 2015), available online at: http://www.natlawreview.com/article/scotus-opts-not-to-remand-case-raising-preclusion-question-answered-bb-hardware (as viewed January 2, 2019).