Equitable Mootness

Hon. Deborah L. Thorne

General Approach to Equitable Mootness: Its Application in Each Circuit[1]

First Circuit:

The First Circuit has found equitable mootness to be appropriate where "in the absence of a stay, a sale has progressed so far that relief would be impracticable." *PPUC Pa. Pub. Util. Comm'n v. Gangi*, 874 F.3d 33, 37 (1st Cir. 2017); *see also In re Pub. Serv. Co. of N.H.*, 963 F.2d 469, 473 (1st Cir. 1992). In *Gangi*, the court applied the three-factor test established in prior decisions, considering: "(1) whether the appellant 'pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order;' (2) whether the challenged plan proceeded 'to a point well beyond any practicable appellate annulment;' and (3) whether providing relief would harm innocent third parties." *Gangi*, 874 F.3d at 37 (quoting *Pub. Serv. Co. of N.H.*, 963 F.2d at 473–74) (internal citations omitted).

More recently, the First Circuit applied the doctrine of equitable mootness to a complex restructuring case under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), a law that Congress modeled after Chapter 9 of the Bankruptcy Code.[2] The court recognized the applicability of equitable mootness to cases that request "after-the-fact judicial rejections or modifications of confirmed plans under PROMESA." *In re Fin. Oversight & Mgmt. Bd.*, 987 F.3d 173, 183 (1st Cir. 2021). These decisions demonstrate that equitable mootness remains a relevant and evolving doctrine within the First Circuit that is applied to a range of cases, from traditional bankruptcy situations to complex restructuring issues.

Second Circuit:

In the Second Circuit, when a debtor's reorganization plan is substantially consummated, an appeal is presumed equitably moot. *R^2 Invs., LDC v. Charter Comms., Inc. (In re Charter Comms., Inc.)*, 691 F.3d 476, 482 (2d Cir. 2012). The Second Circuit follows the factors outlined in *In re Chateaugay Corp.*, 10 F.3d 944 (2d Cir. 1993), in determining whether a presumption of equitable mootness can be overturned. *R^2 Invs.*, 691 F.3d at 482. The *Chateaugay* factors are:

> (a) the court can still order some effective relief;
>
> (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity;

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[1] This material was prepared with assistance from Erin Frith, term law clerk to Judge Deborah Thorne and Alicia Rodriguez, Judge Thorne's extern and 3L at Loyola University Chicago School of Law.

[2] Richard Cooper & Antonio Pietrantoni, *Filling an Empty Arsenal: Puerto Rico's Bankruptcy from the Recovery Act to PROMESA*, Harv. L. Sch. Bankr. Roundtable (Feb. 20, 2024), https://bankruptcyroundtable.law.harvard.edu/2024/02/20/filling-an-empty-arsenal-puerto-ricos-bankruptcy-from-the-recovery-act-to-promesa (describing how Congress enacted PROMESA in June 2016, modeling the Act after Chapter 9 of the Bankruptcy Code).

> (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court;
>
> (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and
>
> (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Id. (quoting *Chateaugay*, 10 F.3d at 952–53 (2d Cir. 1993)) (internal quotation marks omitted). "Only if all five *Chateaugay* factors are met, and if the appellant prevails on the merits of its legal claims, will relief be granted." *Id.* Further, in *In re BGI, Inc.*, the Second Circuit expanded the application of equitable mootness, finding the doctrine "applies to appeals arising from Chapter 11 liquidation proceedings, as well as appeals from Chapter 11 reorganization proceedings." *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 772 F.3d 102, 107 (2d Cir. 2014).

In *U.S. Bank National Association v. Windstream Holdings, Inc.*, a group of bankruptcy law professors filed a brief in support of the petitioner's position that the Second Circuit has misinterpreted and misapplied the doctrine of equitable mootness.[3] Brief for a Group of Bankruptcy Law Professors as Amici Curiae Supporting Petitioner, *U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc.*, 144 S. Ct. 71 (2023) (No. 22-926) [hereinafter Brief]. In their Brief, the professors asserted that the lack of constitutional basis for equitable mootness, combined with its demonstrated potential for abuse, requires it to be abolished. *Id.* at 3. Specifically, the Brief argued that the Second Circuit erred in holding that an appeal is equitably moot if that plan has been substantially consummated and the appellant failed to seek a stay. *Id.* at 4. The professors further maintain that equitable mootness improperly allows an appellate court to decline to hear even a meritorious case, leaving appellants remediless. *Id.*[4] This has opened the

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[3] *See* Petition for Writ of Certiorari, *U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc.*, 144 S. Ct. 71 (2023), 2023 WL 2648028, *cert. denied*. The petitioners argued that the Supreme Court should grant the writ, emphasizing that presently, a Bankruptcy Court's improper findings are allowed to stand because they are "shielded" from appellate review under the doctrine of equitable mootness. *Id.* at 4. Further, petitioners asserted that because billions of dollars move through the bankruptcy system, the harm caused by the doctrine of equitable mootness is substantial due to its barring of an individual's appeal resulting in the obstructing of equitable outcomes. *Id.* Petitioners argued that review by the Supreme Court is "necessary" in order to address the inequities resulting from the Second Circuit's holding that "an appeal from a substantially consummated plan is automatically equitably moot if the appellant does not diligently seek a stay of the confirmation order, and the placement of the burden of all proofs on the appellant." *Id.* at 8–9.

[4] A 2024 Note in the Cornell Law Review argues that judges are "incentivized" not to reject equitable mootness arguments even when they could do so because "evidence suggests that most non-bankruptcy judges do not enjoy their bankruptcy work, making the option to dismiss bankruptcy appeals without a hearing on the merits more attractive than it might be otherwise." Zachary R. Hunt, Note, *On Bankruptcy Appeals: Equitable Mootness as Gatekeeper to Plan Confirmation Review*, 109 Cornell L. Rev. 1587, 1607–08 (2024). Hunt attributes this tendency to numerous factors, including the length of Article III judges' dockets and the "institutional design" of appeals in

door to what is described as "bankruptcy hardball" where firms act quickly, proactively, and aggressively in order to evade appellate review under the doctrine of equitable mootness. *Id.* at 5.[5] Accordingly, the Brief urges the Supreme Court to grant the petition for certiorari, allowing it to address and rectify the issues associated with equitable mootness, whether that be through the significant constraining of the doctrine or through eradicating the doctrine in its entirety. *Id.* at 7.

The Brief further explains that the doctrine of equitable mootness has departed from its original purpose and earlier interpretations, now operating as "a judicial doctrine that permits appellate courts to decline to review even demonstrably erroneous decisions based on notions of 'consummation' and the lack of a stay and even where effective relief is both possible and wholly justified." *Id.* at 10–11. To address this concern, the Brief opines that "any surviving doctrine of equitable mootness should be cabined to the requirement that there be a showing of 'no effectual relief whatsoever.'" *Id.* at 17 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The professors also highlight the lack of uniformity among the circuits regarding the elements used to apply equitable mootness and the weight given to any particular element. *Id.* at 19. Despite compelling arguments in favor of the petitioner, the Supreme Court denied the petitioner's petition for a writ of certiorari.

Third Circuit:

The Third Circuit has addressed the application of equitable mootness in several cases. In *In re Continental Airlines*, the Third Circuit discussed five factors considered by other courts and adopted by the Third Circuit. *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996). Those five factors are:

> (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.

Id. The court emphasized that the first factor, whether the reorganization plan has been substantially consummated, is of "foremost consideration." *Id.*

Later, in *Samson Energy Resources Co. v. SemCrude, L.P.*, the Third Circuit reduced the previous five-factor approach into two analytical steps: "(1) whether a confirmed plan has been

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bankruptcy, which Hunt argues "encourages deference to the bankruptcy court's initial confirmation." *Id.* Hunt further argues that the lack of an appealing alternative to equitable mootness has contributed to the doctrine's use, expansion, and influence, imploring the courts to permit as many dismissals as possible. *Id.* at 1608, 1613.

[5] *See* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 389–99 (2019) (explaining that equitable mootness undermines the development of consistent doctrine as it allows parties to cut off the ability to appeal by quickly consummating a plan, thus creating a separate realm for each bankruptcy judge who can "create rules for his or her court that go unchallenged even if they are objectively incorrect").

substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *Samson Energy Res. Co. v. SemCrude, LP (In re Semcrude, L.P.)*, 728 F.3d 314, 321 (3d Cir. 2013).

Fourth Circuit:

In *Mac Panel Co. v. Virginia Panel Corp.*, the Fourth Circuit affirmed the district court's dismissal of an appeal as equitably moot, aligning with the district court's reasoning that "any reversal of the bankruptcy court order would 'require the undoing of financial transactions involving third parties' and would 'create an unmanageable . . . situation for the bankruptcy court.'" *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 623 (4th Cir. 2002). In its application of equitable mootness, the Fourth Circuit relied on the following factors in determining "whether judicial relief on appeal can, as a pragmatic matter, be granted":

> (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties.

Id. at 625.

Fifth Circuit:

In *Manges v. Seattle-First National Bank (In re Manges)*, the Fifth Circuit recognized that its court has "employed the concept of 'mootness' to address equitable concerns unique to bankruptcy proceedings." *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038 (5th Cir. 1994). Reasoning that mootness in that context "is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *Id.* at 1039. The court additionally used the three factors historically used by the Fifth Circuit in examining mootness: (1) "whether a stay has been obtained," (2) "whether the plan has been 'substantially consummated,'" and (3) "whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *Id.* (quoting *Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.)*, 939 F.2d 289, 291 (5th Cir. 1991)).

Further recognizing equitable mootness and its active applicability in 2019, the Fifth Circuit limited the typical application of equitable mootness to complex cases in which a plan has been substantially consummated. In *New Industries, Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, the Fifth Circuit reasoned that equitable mootness was inappropriate where the debtor had not yet proposed a plan, much less consummated one, and where "[r]eversal on appeal would only affect a few third parties, all of whom participated in the bankruptcy court." *New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, 914 F.3d 1000, 1001 (5th Cir. 2019).

Sixth Circuit:

In *Curreys of Nebraska, Inc. v. United Producers, Inc.* (*In re United Producers, Inc.)*, the Sixth Circuit dismissed a creditor's appeal as moot as "[a]ll three factors of the equitable mootness inquiry weigh[ed] in favor" of such a finding. *Curreys of Neb., Inc. v. United Producers, Inc.* (*In re United Producers, Inc.)*, 526 F.3d 942, 951–52 (6th Cir. 2008). The court's opinion provided some insight into the Sixth Circuit and the application of equitable mootness, explaining that equitable mootness issues "have rarely been decided in the Sixth Circuit." *Id.* at 947. The case further explained that "[t]he leading Sixth Circuit case on equitable mootness issues is *In re American HomePatient*." *Id.* (citing *Bank of Montr. v. Off. Comm'n of Unsecured Creditors (In re Am. HomePatient, Inc.)*, 420 F.3d 559 (2005)).

In *American HomePatient,* the Sixth Circuit adopted the Fifth Circuit's formulation to determine the mootness of an appeal: "(1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *Am. HomePatient*, 420 F.3d at 563. Although the court acknowledged the Seventh Circuit's alternative approach, which asks "whether it is prudent to upset the plan of reorganization at this late date," the Sixth Circuit declined to adopt that approach. *Id.* (quoting *City of Covington v. Covington Landing Ltd. P'ship*, 71 F.3d 1221, 1225 (6th Cir. 1995)).

All this to say, equitable mootness has an active, continuing influence on the Sixth Circuit's contemporary decision-making and current jurisprudence.

Seventh Circuit:

When it comes to the Seventh Circuit's relationship with the equitable mootness doctrine, the circuit is unique in that the Circuit, via Judge Easterbrook's opinion, expressly rejected equitable mootness by name. In *In re UNR Industries, Inc.*, the Seventh Circuit "banished 'equitable mootness' from the (local) lexicon." *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). In doing so, the court stated "[w]e ask not whether this case is moot, 'equitably' or otherwise, but whether it is prudent to upset the plan of reorganization at this late date." *Id.* Although the Seventh Circuit refused to recognize or apply equitable mootness by name, it adopted the doctrine's substantive rationale by considering whether a plan of reorganization had been substantially consummated and determining whether disturbing the plan at that stage would be prudent. *Id.* The court simply rejected the characterization of that inquiry as mootness, which the Court described as the "inability to alter the outcome," and what equitable mootness actually is, the "unwillingness to alter the outcome." *Id.* at 769, 771.

Eighth Circuit:

In 2021, the Eighth Circuit addressed equitable mootness. *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880 (8th Cir. 2021). Rather than adopting "a specific multi-factor test," the Eighth Circuit focused on "whether the Court can grant relief without undermining the plan and,

thereby, affecting third parties." *Id.* at 889 (quoting *SRE Restructuring, Inc. v. Wooley (In re SI Restructuring, Inc.)*, 542 F.3d 131, 136 (5th Cir. 2008)). The court identified the most important considerations as "whether the confirmed plan has been substantially consummated and, if so, what effects reversal of the plan would likely have on third parties." *Id.* The court further concluded that while an appellant's failure to seek or obtain a stay pending appeal is relevant, it is not determinative. *Id.* at 889 (quoting *In re Paige,* 584 F.3d 1327, 1339 (10th Cir. 2009)).

Ninth Circuit:

In *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, the Ninth Circuit said that the relevant question was whether a case "present[s] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply." *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012) (quoting *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 933 (9th Cir. 1999) (alteration in original)). The court explained that it had not previously adopted nor articulated a test; rather, their precedent looked to "whether a stay was sought, whether the plan has been substantially consummated, whether third party rights have intervened, and, if so, whether any relief can be provided practically and equitably." *Id.* at 881. The court endorsed the following framework:

> [F]irst . . . , whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.

Id.

Tenth Circuit:

The Tenth Circuit addressed equitable mootness by name in the 2009 case, *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1337 (10th Cir. 2009), holding that if the court "can fashion effective relief for [the appellant] and [the] appeal passes the constitutional mootness test, [it] must still determine if ordering such relief would be equitable" in "a confirmed Chapter 11 case involving other parties." *Id.* at 1338 (quoting *Metro. Life Ins. Co. v. Milk Palace Dairy, LLC (In re Milk Palace Dairy, LLC)*, 327 B.R. 462, 467 (B.A.P. 10th Cir. 2005). The Tenth Circuit discussed six questions to ask in order for a court to hear an appeal of a bankruptcy court's decision on equitable mootness grounds. *Id.* at 1339. The six questions are:

> (1) Has the appellant sought and/or obtained a stay pending appeal? (2) Has the appealed plan been substantially consummated? (3) Will the rights of innocent third parties be adversely affected by reversal of the confirmed plan? (4) Will the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—be undermined by reversal of the plan? (5) If appellant's challenge were upheld, what would be the likely impact upon a successful reorganization of the debtor? And (6) based upon a quick look at the merits of appellant's challenge to the plan, is appellant's challenge legally meritorious or equitably compelling?

Id. Additionally, the court noted that these questions need not be weighed equally, nor are they necessarily determinative. *Id.*

In 2020, the Tenth Circuit upheld the district court's application of the doctrine of equitable mootness to a Chapter 11 cash-only liquidation. *Drivetrain, LLC v. Kozel (In re Abengoa Bioenergy Biomass of Kan., LLC)*, 958 F.3d 949, 953 (10th Cir. 2020). In doing so, the court of appeals reviewed each of the six factors set forth in *Paige*. *Id.* at 957. Ultimately, the court's application of the six *Paige* factors reinforced the Tenth Circuit's approach to determining whether a bankruptcy case is equitably moot, and the Circuit's application of equitable mootness to a Chapter 11 liquidation illustrates the doctrine's evolving role.

Eleventh Circuit:

The Eleventh Circuit applied equitable mootness in *In re Club Associates*. *First Union Real Est. Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992). The court wrote "the test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *Id.* It reaffirmed this "multifactor analysis" in *Ullrich v. Welt (In re Nica Holdings, Inc.)*, 810 F.3d 781, 786 (11th Cir. 2015).

In 2018, the Eleventh Circuit addressed, for the first time, whether equitable mootness applies in the Chapter 9 context. *Bennett v. Jefferson Cnty., Ala.*, 899 F.3d 1240, 1250. The court found "no reason to reject the doctrine," holding that equitable mootness can apply in Chapter 9 cases. *Id.* More recently, in *In re Stanford,* the Eleventh Circuit distinguished equitable mootness from statutory mootness, the latter being the doctrine at issue in the case. *In re Stanford,* 17 F.4th 116, 121–22 (11th Cir. 2021). Although *Stanford* did not apply equitable mootness, its discussion recognized the doctrine as a distinct concept within bankruptcy law. Together, these decisions demonstrate the Eleventh Circuit's continued recognition and development of equitable mootness within the Circuit.

D.C. Circuit:

In *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), the District of Columbia Circuit discussed its approach to equitable mootness. The court found that when determining if "equitable considerations may justify a decision not to decide a case on the merits[,] . . . . a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail" is required. *Id.* at 1147–48. To that end, the D.C. Circuit adopted the Ninth Circuit's analytical framework when dealing with an equitable mootness issue. *Id.* at 1148.

No. 22-926

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

v.

WINDSTREAM HOLDINGS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR A GROUP OF BANKRUPTCY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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April 18, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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OTHER AUTHORITIES Page(s)

Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances,* 100 TEX. L. REV. 1079 (2022)..... 5, 19, 22

Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L. J. 377 (2019) 3-5, 12, 20-22

Bruce H. White and William L. Medford, *Equitable Mootness and Substantial Consummation: Are You Losing Your Appeal*, 20 AM. BANKR. INST. J. 26 (2006)..... 9

Charles Jordan Tabb, Kara J. Bruce, and Laura Napoli Coordes, The Law of Bankruptcy (6th Edition West, forthcoming 2023)..... 1

7 COLLIER ON BANKRUPTCY (Henry Sommer & Richard Levin, eds., 16th ed. 2023)..... 20

George W. Kuney, *Understanding and Taming the Doctrine of Equitable Mootness*, NORTON ANNUAL SURVEY OF BANKRUPTCY LAW (West 2018) 2, 6-10, 12

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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of law professors who are actively involved in teaching and writing on issues of bankruptcy law and commercial law. While two of your amici have published leading articles on equitable mootness, each of the *amici* are particularly interested in assisting the courts in resolving the complex issues that arise in bankruptcy litigation—especially when such cases affect thousands of entities and billions of dollars. This is such a case.

Professor Ralph Brubaker is the James H.M. Sprayregen Professor of Law at the University of Illinois. He is a Conferee of the National Bankruptcy Conference, a Fellow and former Scholar-in-Residence of the American College of Bankruptcy, a former member of the Executive Committee of the Board of Directors of the American Bankruptcy Institute, and a member of the American Law Institute.

Professor Kara Bruce is a Professor of Law at the University of Oklahoma College of Law, where she teaches bankruptcy and commercial law courses. She is a former scholar-in-residence at the American Bankruptcy Institute, a coauthor of the Sixth Edition of The Law of Bankruptcy hornbook, and a contributing editor to the Bankruptcy Law Letter.

Professor Diane Lourdes Dick is a Professor of Law at University of Iowa College of Law. She focuses her teaching and scholarship on business and tax law,

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[1] Pursuant to Rule 37.2.(a) notice was given to counsel of record for all parities of our intention to file an amicus brief at least 10 days prior to the due date. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

with particular emphasis on commercial finance, business bankruptcy and out-of-court restructuring. She has been invited to deliver lectures at the Harvard Kennedy School, The Brookings Institution, and at professional association meetings, law schools, and graduate tax programs around the country.

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Professor George W. Kuney[2] is the author of *Understanding and Taming the Doctrine of Equitable Mootness.*[3] He is the Lindsay Young Distinguished Professor of Law and Director, Clayton Center for Entrepreneurial Law at The University of Tennessee, Knoxville.

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[2] Professor George Kuney is no relation to counsel of record.

[3] NORTON ANNUAL SURVEY OF BANKRUPTCY LAW, 2018 Edition, 1-71.

Professor Bruce A. Markell is the author of one of the leading articles on equitable mootness entitled *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377 (2019). He is a retired bankruptcy judge for the District of Nevada, and a former member of the Ninth Circuit Bankruptcy Appellate Panel. He contributes to COLLIER ON BANKRUPTCY, (including the section on equitable mootness), and is a member of Collier's editorial advisory board. He is a conferee of the National Bankruptcy Conference, a fellow and former scholar-in-residence of the American College of Bankruptcy, a charter member of the International Insolvency Institute, and a life member of the American Law Institute.

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INTRODUCTORY STATEMENT

The question presented in this case is one of national and systemic importance: "Does the lack of statutory and constitutional basis for equitable mootness, combined with its demonstrated potential for abuse, require it to be abolished." Cert. Pet. (i). The answer is yes.

The Second Circuit held that equitable mootness allows a court to dismiss a bankruptcy appeal "when, even though effective relief could conceivably be fashioned, implementation of that relief would be

inequitable," App. 3a, citing *In re Metromedia Fiber Network, Inc.,* 416 F.3d 476, 483 (2d Cir. 2012). The court held that this form of abstention is appropriate "when the debtor's reorganization plan has been substantially consummated," App. 3a, (citing *In re BGI, Inc.,* 772 F.3d 102, 108 (2d Cir. 2014)), and when the appellant did not diligently seek a stay of the confirmation order. App. 4a.

The Second Circuit's ruling that an appeal is equitably moot if the plan has been "substantially consummated" and if the appellant did not seek a stay is wrong. The ruling violates a core principle that there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Construction Dist. v. United States,* 424 U.S. 800, 817 (1976). As summarized recently: "When equitable mootness is invoked, appellate courts often reach an extraordinary conclusion: even if the appellant has a meritorious case, the court will decline to hear the appeal. This leaves aggrieved appellants with no recourse for even profound errors made during the confirmation process." [4]

That this violation of duty is exacerbated by a lack of analytical soundness has been shown by ever-increasing criticism by the academic community. Professor Bruce Markell has documented the "pernicious effects" of the equitable mootness doctrine, including the "perversion and disruption of appellate jurisdiction;" "a dilution and impoverishment of the sources of interpretation of the Bankruptcy Code;" and the "perpetuation of a possibly unconstitutional deference

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[4] Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377, 381 (2019).

by Article III courts to courts not possessed of the judicial power of the United States."[5]

Further, as Professor Adam Levitin has stated, equitable mootness causes Chapter 11 to suffer from "illusory appellate review."[6] "[T]he limited nature of appellate review in bankruptcy "reduces public oversight in Chapter 11 and intensifies the authority of bankruptcy courts."[7]

Equitable mootness has, in turn, permitted the increase in "bankruptcy hardball" in which distressed firms routinely engage in aggressive tactics that then elude appellate review.[8] Professor Levitin cites the numerous articles that focus on the "coercive restructuring techniques" and the related problems created by "the doctrine of equitable mootness [which] have been decried in scholarship."[9]

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[5] *Id.* at 397-413.

[6] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances,* 100 TEX. L. REV. 1079, 1121 (2022).

[7] *Id.* at 1122 (citing Melissa B. Jacoby, *Corporate Bankruptcy Hybridity,* 166 U. PA. L. REV. 1715, 1733 (2018)).

[8] *Id.* at 1085.

[9] *Id*. at 1085 and n.13, (citing Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377, 397-98 (2019) (describing the pernicious effects of the current application of equitable mootness); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L. J. 269, 291-92 (2018) (stating that equitable mootness is unfair because it encourages "any party to invoke it no matter that chance of success"); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L.& PRAC. 1, 45-46 (2010) ("The current construction of equitable mootness is not without its faults.")

Judicial dissatisfaction with equitable mootness has also surfaced. Then-Judge Alito's dissent in *In re Continental Airlines,* 91 F.3d 553, 567-83 (3d Cir. 1996) questioning the Third Circuit's wisdom in adopting the doctrine of equitable mootness "is widely viewed as the bedrock of equitable mootness skepticism among the circuit courts."[10] Justice Alito, noted that equitable mootness unduly restricts appellate review and "places too much power in the hands of bankruptcy judges."[11] The harm is evident: an erroneous ruling by a non-article III court is then asserted to be immune from appellate review. Because substantial consummation is largely in the sole control of a debtor, an aggrieved party has no mechanism to preserve appellate review once a stay is denied. An egregious error by a bankruptcy court, coupled with a refusal to stay the improper ruling, defeats the right to have an Article III court review a decision by a bankruptcy court.

Justice Alito's concerns have since been echoed by other judges. In 2015, in a concurring opinion Judge Cheryl Krause "pick[ed] up the mantle first assumed by then-Judge Alito . . . and sought to comprehensively

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[10] George Kuney, *Understanding and Taming the Doctrine of Equitable Mootness,* NORTON ANNUAL SURVEY OF BANKRUPTCY LAW, 2018 edition, 36.

[11] *See e.g., Nordhoff Investments v. Zenith Electronics,* 258 F.3d 180, 192 (3d Cir 2001) (Alito, J., concurring) (noting that "equitable mootness doctrines can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans."). *See also, In re Continental Airlines,* 91 F.3d 553, 567-83 (3d Cir. 1996) (Alito, J., dissenting).

dismantle the doctrine of equitable mootness—a doctrine adrift and in need of reconstruction by our court."[12]

We urge this Court to grant the petition for certiorari in order to limit and constrain the unwarranted expansion of the doctrine of equitable mootness.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted in order for this Court to determine whether the doctrine of equitable mootness should be abolished or substantially limited.

First, whatever its doctrinal legitimacy, equitable mootness has expanded beyond its original purpose. Initially based on a constitutional principle that a court should not hear a matter where it cannot grant any form of effective relief, it has now been transformed into a broad, and non-textual equitable doctrine that permits bankruptcy courts to decline to exercise jurisdiction even when such jurisdiction is firmly rooted in their statutory grant.

Enlarging the reach of equitable mootness harms the bankruptcy system and represents an unwarranted migration of federal jurisdiction from Article III Courts to the bankruptcy courts. "By excising appellate review, equitable mootness tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy." *In re One2One Communications, LLC*, 805 F.3d 428, 447 (2015) (Krause, J., concurring).

Second, this Court should grant certiorari in order to resolve the many and significant conflicting decisions

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[12] Kuney, *supra* note 10, at 38, citing *In re One2One Communications, LLC*, 805 F.3d 428, 447 (2015).

from almost every circuit court. Even if the doctrine has some limited application, it has been applied unevenly and is currently lacking in any semblance of uniformity and coherence.

Third, the unwarranted enlargement of the doctrine of equitable mootness has led to substantial abuses in the bankruptcy system, and in particular, in larger Chapter 11 cases. Scholars have noted the increasing lawlessness now evident in Chapter 11.[13] In order to curtail and reverse this trend it is now critical that this Court direct the appellate courts to accept the responsibility to fulfill their jurisdictional mandate and to provide effective appellate review over the bankruptcy courts.

I. THIS COURT SHOULD GRANT CERTIORARI TO LIMIT THE DOCTRINE OF EQUITABLE MOOTNESS; THE USE OF EQUITABLE MOOTNESS IS CONTRARY TO THE DUTY OF FEDERAL COURTS TO EXERCISE THEIR JURISDICTION.

A. The doctrine of equitable mootness was originally based on a narrow concept of an inability of a court to grant effective review.

The equitable mootness doctrine "traces its origins in American jurisprudence to constitutional mootness, found in Article III of the U.S. Constitution."[14] Constitutional mootness is based on the requirement

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[13] Lynn LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANK. L. JOURNAL, 247, 251 (June 2022).

[14] Kuney, *supra* note 10, at 4.

of a "case or controversy" in Article III and is "jurisdictional." *Reynolds v. Serisfirst Bank (In re Stanford),* 17 F.4th 116, 122 (11th Cir. 2021).

The underlying rationale for constitutional mootness is based on a threshold determination that there is no possibility of "effective relief whatever."[15] *Mills v. Green,* 159 U.S. 651, 653 (1895).

As Justice Roberts wrote for a unanimous Court in *Chafin v. Chafin,* 568 U.S. 165, 172 (2013) "a case 'becomes moot' only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. . . . As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot" (citing *Mills v. Green,* 159 U.S. 651, 653).

Equitable mootness is substantially different from constitutional mootness. "Under the doctrine of equitable mootness, a bankruptcy appeal is to be dismissed as moot *even though effective relief could conceivably be granted* if such relief would be inequitable."[16] "Constitutional mootness is characterized by an '*inability*

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[15] *See id.,* at 5. "The mere inability to restore the parties to the state in which they were before (i.e., the status quo ante) is not grounds for rendering an appeal constitutionally moot. Rather, the test for mootness is whether any meaningful relief can be granted, 'even if it only partially redresses the grievances of the prevailing party'" (citing *United Artists Theatre Co. v. Walton,* 315 F.3d 217, 226 (3rd Cir. 2003)).

[16] *Id.* at 7 (emphasis added) (citing Bruce H. White and William L. Medford, *Equitable Mootness and Substantial Consummation: Are You Losing Your Appeal*, 20 AM. BANKR. INST. J. 26, 26 (2006)).

to alter the outcome.' By contrast, equitable mootness involves an "*unwillingness* to alter the outcome."[17]

Equitable mootness first surfaced after the adoption of the 1978 Code in *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981). Although decided after the Code was enacted in 1978, it looked mostly to the prior Bankruptcy Act.[18] The Circuit Court based the notion of equitable mootness on its constitutional antecedent, specifically citing *Mills v. Green,* 159 U.S. 651 (1985) for the proposition that mootness may arise where events "render it impossible for this court . . . to grant any effectual relief whatsoever." *Id*. at 797.[19] The court found that it was faced with a situation "where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned." *Id*.

It is now clear, however, that the doctrine of equitable mootness has become unmoored from its constitutional antecedents. It no longer has a firm basis in statutory provisions or the Constitution. It no longer looks to the narrow requirement that there be no effectual relief whatsoever. It has now become a judicial doctrine that permits appellate courts to decline to review even demonstrably erroneous decisions

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[17] *Id.* (emphasis in original).

[18] *See id.*, (citing *In re Cont'l Airlines,* 91 F.3d at 569-71 (3d Cir. 1996) (Alito, J., dissenting) (the doctrine of equitable mootness seems to have grown out of *In re Roberts Farms, Inc*.)).

[19] The court in *Roberts Farms* also relied on *Valley National Bank of Arizona v. Trustee*, 609 F.2d 1274 (9th Cir. 1979) which based its decision to dismiss an appeal as moot because of the failure of the appellant to obtain a stay. "If appellant fails to obtain a stay after exhausting all appropriate remedies, that well may be the end of his appeal." *Id*. at 798.

based on notions of "consummation" and the lack of a stay and even where effective relief is both possible and wholly justified.

Nothing, however, in the grant of jurisdiction to the District Courts and Courts of Appeal over bankruptcy matters speaks to equitable mootness, nor suggest that appellate courts may decline to exercise jurisdiction based on a phrase that deals only with when a plan may be modified, and disregards the core issue of whether effective relief of some kind is possible.

As one court said in an analogous situation, "There is no jurisprudence in this Circuit that would allow a court to eschew exercise of its proper jurisdiction by refusing to entertain an appeal it has the power to hear on the basis of an ad hoc balancing of self-selected "equitable considerations," and we are not inclined to fashion such." *In re Zenith Electronics Corp.*, 329 F.3d 338, 340 (3d Cir. 2003).

B. The petition for certiorari should be granted because the Second Circuit improperly expanded the notion of equitable mootness and imposed a presumption of mootness based on substantial consummation.

The notion of equitable mootness followed in the Second Circuit has gone far afield from the core principles of constitutional mootness. The availability of effective relief no longer is key. "The Second Circuit has characterized equitable mootness as a prudential doctrine under which a district court may in its discretion dismiss a bankruptcy appeal when, even

though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."[20]

The Second Circuit now focuses on "substantial consummation" and held that "a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated." App. 3a, (citing *In re BGI*, *Inc*., 772. F.3d 102, 108 (2d Cir. 2014)). The phrase substantial consummation is not defined or identified in the statutory provisions that pertain to appellate jurisdiction over a bankruptcy case, as shown by those circuits which have rejected substantial consummation as a presumption of mootness.[21]

The phrase "substantial consummation" appears in Code § 1127(b) which provides that the proponent of a plan "may modify such plan at any time after confirmation of such plan and *before substantial consummation* of such plan. . ."

The definition of "substantial consummation" is set forth in 11 U.S.C. § 1101(2) which contains the following three-part test:

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[20] Kuney, *supra* note 10 at 31 (internal quote marks omitted) (citing *In re BGI, Inc.,* 772 F.3d 102, 107-09) (2d Cir. 2014) (quoting *In re Charter Communications, Inc.,* 691 F.3d 476 (2012)).

[21] "[C]ourts such as the Fourth Circuit have found substantial consummation irrelevant if appellant's requested relief is feasible." Markell, *supra* 93 AM. BANKR. L. J. 396 (citing *Bate Land Co. LP v. Bate Land & Timber (In re Bate Land & Timber* LL), 877 F.3d 188, 196 (4th Cir. 2017)). *See also, Search Market Direct, Inc. v. Jubber (In re Paige*), 584 F.3d 1327, 1342 (10th Cir. 2009). "Substantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief."

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
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> (B) assumption by the debtor . . . of the business or management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

Not only is "substantial consummation" alien to appellate jurisdiction, its meaning in areas in which it does apply is contested. The factors which are required to show substantial consummation in § 1101 are thus unreliable indicators of when equitable mootness should even be considered.

Substantial consummation requires all three factors in § 1101 to satisfy the test of substantial consummation.[22] However, bankruptcy courts disagree over the basic meaning of both a "transfer of all or substantially all of the property proposed by the plan to be transferred," as well as the meaning of the "commencement of distribution under the plan." This means the test for equitable mootness is unclear, varies from court to court, and is far from uniform. Neither phrase tracks nor reflects the constitutional antecedent in *Mills* nor addresses the core question of whether any relief may be available.

For example, the bankruptcy courts are not in agreement on the meaning of "commencement of distributions." Some courts hold commencement should mean not just the beginning of payments to a

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[22] *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 391 (Bankr. E.D.N.C. 2010).

single creditor, but the commencement of distribution to all or substantially all creditors.[23] Other courts hold that even *de minimis* payments constitute commencement of payments.[24] Because various courts hold that commencement can mean even a single payment,[25] the date of "substantial consummation" can occur virtually within one day of plan confirmation or the effective date, thus foreclosing appellate review over potential arguments of equitable mootness.

Reliance on the element found in § 1101(2)(A)—transfer of all or substantially all of the property to be transferred—is equally problematic. One court has held that this condition can be achieved virtually automatically with a mere boiler-plate recitation, such as this: "upon entry of the Confirmation Order, title in the Debtor's Assets will be transferred from the

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[23] *Id.* at 392 (noting that there are "varying opinions" on what is required to show that payments have commenced under a plan" and that there are two schools of thoughts, with one school holding that commencement of payments should mean "substantially all of the payments have been made," and another rejecting that view. "There is no percentage or specific number of payments needed to have been paid in order to qualify as 'commenced.'" (citations omitted).

[24] *See In re Nat'l Tractor Parts, Inc.*, 640 B.R. 916, 921 (Bankr. N.D. Ill. 2022). "The plain language of this Code section does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway."

[25] *In re W. Cap. Partners, LLC*, No. 13-15760 MER, 2015 WL 400536, at *8 (Bankr. D. Colo. Jan. 28, 2015). (Thus, in the Tenth Circuit, "commencement of distribution" for the purposes of § 1101(2)(C) is satisfied when the reorganized debtor begins distributions under the confirmed plan.)

Bankruptcy Estate to the Reorganized Debtor."[26] Provisions similar to this could cut off appellate review concurrently with the entry of a confirmation order, even though the transfer is based mostly on the change of legal identity from "Debtor" to "Reorganized Debtor."

Likewise, the case law is divided on the meaning of the transfer of all or substantially all of the property of the estate. For example, courts disagree on whether the transfer of "property" includes, or not, the making of payments to creditors under the plan, which in turn materially alters when substantial consummation would occur.[27]

The right to appellate review cannot be tied to such uncertain and contradictory standards. Parties cannot be certain when or if substantial consummation has occurred, nor can courts have certainty that the test for substantial consummation is legally correct. Importing the test of substantial consummation, which is only intended to address plan modification, makes the test for equitable mootness vague, shifting and non-uniform, and in turn makes appellate review rise or fall on vague and unknowable standards.

The requirement that a party must seek a stay is also problematic. The Second Circuit stated that "we have placed significant reliance on the fifth factor, concluding that a chief consideration is whether the appellant sought a stay of confirmation." App. 4a. In

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[26] *Id.* at *6.

[27] As noted above, some courts hold that the "transfer" of property under § 1101(2)(A) includes obligations owed by the debtor. "As such, all or substantially all of the payments must be made for a plan to be substantially consummated." *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 391 (Bankr. E.D.N.C. 2010).

Roberts Farm the court noted the potential unfairness to an appellant who is unable to obtain a stay: "If an appellant fails to obtain a stay . . . that may well be end of his appeal. . . . For this reason, there is a concomitant obligation on the courts to consider such stay applications thoroughly and with full appreciation of the consequences of denial." *Id* at 798. That "obligation" however is on the courts, and beyond the power of an appellant to control.[28]

Another circuit has held that the courts should "focus less slightly on the issue of whether the parties sought a stay, noting that "failure to obtain a stay pending appeal cannot be determinative on the issue of equitable mootness, because it is the absence of a stay that generally has caused the change of circumstances [, so t]his factor would thus be present in all appeals not stayed."[29]

This Court currently has before it a case demonstrating how the requirement for a stay can be readily abused. *MOAC Mall Holdings LLC v. Transform Holdco LLC,* Case No. 21-1270. There the question presented arose under statutory mootness—but the stay issue is identical. Section 363(m) limits appeals

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[28] Recent court decisions demonstrate that courts will sometimes deny a stay of a confirmation order, even where the plan confirmation order raises highly consequential issues of unresolved law, including third-party releases in the context of claims of wide-spread sexual abuse. *See e.g.,* Memorandum Order of district court of Delaware dated April 11, 2023 (ECF No. 193) denying stay of confirmation order in *In re Boy Scouts of America and Delaware BSA,* Civ. No. 22-1237 RGA.

[29] *In re Paige,* 584 F.3d 1327, 1339 (10th Cir. 2009). ("We will be more inclined to accommodate an appellant who has diligently but unsuccessfully pursued a stay, even if awarding him relief may adversely affect third parties.") *Id*. at 1341.

on sale orders "unless such [sale order] were stayed pending appeal."

In MOAC a purchaser of a group of leases (acquiring "designation rights") failed to comply with the statutory obligation to provide adequate assurance of future performance to the debtor, its landlord—all of which is specifically required by Bankruptcy Code § 365. The purchaser assured the bankruptcy court it would *not* argue that an appeal was governed by § 363, and based on this alone the bankruptcy court denied a stay.[30]

The District Court found that the lease assignment violated § 365 and set aside the transaction. However, on rehearing the purchaser argued that the appeal was moot, despite having expressly assured the bankruptcy court it would *not* argue mootness. Stating that it was "appalled" at the appellee's conduct, the District Court altered its opinion and, because no stay had been obtained, permitted the lease assignment despite a finding that the assignment was in plain violation of the Code.[31] Thus, an erroneous decision was immunized from appeal based on questionable conduct by the appellee.

Any surviving doctrine of equitable mootness should be cabined to the requirement that there be a showing of "no effectual relief whatsoever." *Mills v. Green, supra.* By adding a presumption based on consummation and looking to the existence of a stay the Second Circuit has added two conditions which are likely to be beyond the power of an appellant to control and which can be readily manipulated to achieve an unjust result.

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[30] *See* Petition for a Writ of Certiorari, Case No. 21-1270 (March 18, 2023), p. 5-6.

[31] This Court has heard oral argument, and the matter is now pending a decision.

C. The Second Circuit's decision is incorrect. Congress did not authorize bankruptcy courts to dismiss or limit appeals from plan confirmation.

The confirmation of a plan of reorganization is the most consequential of all actions undertaken by a bankruptcy court. The power to alter contractual relations and impair creditors is almost without limit.[32] State law contractual provisions, which cannot be abridged under state law, may nonetheless by altered and impaired under Code § 1124. Secured creditors may have the value of their lien reduced to the market value of the collateral which secures their loan under Code § 1129(b). Unsecured creditors, and even those who vote *against* plan confirmation, can have their claims altered virtually without limit, provided only that they receive at least as much as they would in a hypothetical chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7).

That this power should be subject to a judicial doctrine making such consequential decisions virtually unreviewable is unacceptable. While there may be times when it makes sense to restrict appellate review, Congress has identified them, and has provided for such limitations in at least three Code provisions: sections 363(m), 364(e) and 305.

Section 363(m) provides that an appeal from an order from a sale of property of the estate "does not

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[32] *See* 11 U.S.C. § 1123, "Contents of a Plan" and specifying that a plan may "specify the treatment of any class of claims or interest that is impaired under the plan," and 11 U.S.C. § 1124 defining impairment as an alteration of the legal, equitable or contractual rights to which such claim or interest entitles the holder of such claim or interest.

affect the validity of a sale or lease . . . to an entity that purchased or leased such property in good faith. . . .” Section 364(e) provides for a similar limitation on appeals of orders dealing with obtaining credit. Section 305 permits a bankruptcy court to abstain from hearing a “case” if “the interests of creditors and the debtor would be better served by such dismissal.”

The Bankruptcy Code does not, however, contain any comparable provisions regarding the inviolability of an order confirming a plan of reorganization. Nowhere do the plan provisions set forth in Subchapter II of section 1129, entitled “The Plan” suggest or contain any mootness provision. Nevertheless, “[i]n most large bankruptcy cases, the court’s plan confirmation order never undergoes an appellate review on its merits because the appeal is deemed equitably moot by the time it could be heard.”[33]

II. THIS COURT SHOULD GRANT CERTIORARI TO UNSCRAMBLE AND CLARIFY THE DOCTRINE OF EQUITABLE MOOTNESS.

Petitioner correctly states that the Second Circuit’s opinion conflicts with the decisions from other circuits. Cert. pet. 25-33. At present, there is no general agreement or consensus among the circuits as to the elements of the doctrine or as to the weight to be given to any particular element. As succinctly stated by COLLIER ON BANKRUPTCY, a leading treatise on federal bankruptcy law:

> The circuits consider different factors in deciding whether to dismiss based on equitable

[33] Levitin, *supra* note 6, at 104.

> mootness. . . .[T]he Second Circuit has five seemingly independent factors, the Third Circuit has four factors, but condenses its analysis into "two analytical steps," the Fourth Circuit also has four factors, but no condensation, the Fifth Circuit three. Finally, the Tenth Circuit tops the list with "six questions," including a "quick look" at the merits. While the general ingredients of equitable mootness are common, the variations in the statement of the doctrine persist.

7 COLLIER ON BANKRUPTCY ¶ 1120.09[5][a] (Henry Sommer & Richard Levin, eds., 16th ed. 2023) (footnotes omitted).[34]

Moreover, the circuits not only disagree on the elements of the doctrine, but they also disagree on the standard of review to be used to assess the elements:

> Finally, the circuits "are split" over the standard of review to be applied to a district court's decision to dismiss an appeal as equitably moot. The Second, Third Circuit and Tenth Circuits apply an abuse-of-discretion standard. . . . In contrast, the Fifth, Sixth, Ninth, and Eleventh Circuits review equitable mootness dismissals de novo.

7 COLLIER ON BANKRUPTCY ¶ 1120.09[5][e] (Henry Sommer & Richard Levin, eds., 16th ed. 2023) (footnotes omitted). [35]

This uncertainty has exacerbated real-world consequences. When there is no unified standard, counsel

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[34] *See also* Markell, *supra* note 4, at 393.

[35] *Id.* at 396-97.

will tend to be overinclusive in their efforts to establish or negate equitable mootness; the increased cost of this cautionary work depletes the bankruptcy estate and diverts funds to lawyers that should in all fairness go to creditors. In addition, to the extent that circuits defer their equitable mootness determination until the merits, or decide them jointly, courts will engage in superfluous analysis of the merits when equitable mootness is indicated.[36]

Professor Markell writes that "the doctrine also generates more work for an appellate court. Courts often choose to augment their equitable mootness dismissal with a review of the merits. The reasons are more equitable than legal; as one court put it: "The Court provides this alternative analysis because of the high burden that exists for equitable mootness, the parties have devoted a great deal of attention to these additional issues, and the appeal has been pending for quite a while."[37]

III. THE MISAPPLICATION OF EQUITABLE MOOTNESS CAUSES "PERNICIOUS EFFECTS" WITHIN THE BANKRUPTCY SYSTEM.

The "pernicious effects" of the equitable mootness doctrine is examined in detail in Professor Markell's article, including the "perversion and disruption of appellate jurisdiction;" "a dilution and impoverishment of the sources of interpretation of the Bankruptcy Code;" and the "perpetuation of a possibly unconstitu-

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[36] *See id.*

[37] *Id.* at 397 (citing *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 583 n.32 (D. Del. 2018)).

tional deference by Article III courts to courts not possessed of the judicial power of the United States."[38]

Professor Adam Levitin has described the problem with "illusory "appellate review" that now exists in the bankruptcy system.[39] The result of the doctrine is profound: "The U.S. legal system is based on the assumption of the general availability of appellate review."[40] He notes that while every circuit has embraced the doctrine in some form, "debtors have weaponized the doctrine, taking care that plans go effective—and money starts changing hands as soon possible after confirmation." [41]

The lack of appellate review is exacerbated by the significant increase in abusive techniques being employed in large Chapter 11 cases, or what one scholar calls the "accelerating disintegration of big-case Chapter 11 practices." [42]

> Several leading bankruptcy scholars have recently sounded the alarm about the accelerating disintegration of big-case Chapter 11 practices. Professor Jared Ellias and Robert Stark observed that "clever debtors and their lawyers . . . have developed procedural strategies that effectively disable the formal machinery of creditor protection . . . Professor David Skeel charge that '[t]wo of the most important developments in recent bankruptcy

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[38] Markell, *supra* note 4, at 397-413.

[39] Levitin, *supra* note 6, at 1121.

[40] *Id.*

[41] *Id.* at 1127.

[42] Lynn LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANK. L. JOURNAL, 247, 251. (June 2022).

> practice [restructuring support agreements and deathtraps] are intended to distort, and clearly do distort, the voting process."[43]

Because of the ability to distort the system there has been a "routine disregard for the law [which] creates a gangster-like atmosphere in which the case placers not only appear to be, but actually are, above the law."[44] Without effective appellate review this routine disregard of the law will continue unabated, with the ultimate dilution of the effectiveness of Chapter 11, and the loss of confidence in the judicial system that runs Chapter 11.

Another scholar notes that "bankruptcy grifters have infiltrated the Chapter 11 process. Over the past few years, mass tort litigation arising out of the opioid crisis—including the bankruptcy of cases of opioid manufacturers Purdue Pharma and Mallinckrodt—has shifted from state and federal systems to bankruptcy courts."[45]

In short, there has been a "great migration" from Article III courts to the bankruptcy courts, and a concurrent disabling of the appellate system, so that in the end appellate review has become highly problematic, if not highly unlikely, with the failure rate of big-case Chapter 11's remaining high.

The risk is profound. There are currently pending a variety of critical cases that will shape bankruptcy law for decades to come—including issues over third-party releases in mass tort cases and the sexual abuse cases

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[43] *Id.* at 251.

[44] *Id.* at 253.

[45] Lindsey D. Simon, *Bankruptcy Grifters,* 131 YALE L.J. 1154, 1157-58 (2022).

involving the national Boy Scouts of America. Under prevailing equitable mootness doctrines, even a critical error of great magnitude can escape appellate review by a district court, a court of appeals, and then ultimately, by this Court.

This Court should view the absence of effective appellate review as a critical issue, and one worthy of its immediate attention.

CONCLUSION

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

Respectfully submitted,

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April 18, 2023