No.

IN THE

# Supreme Court of the United States

AURELIUS CAPITAL MANAGEMENT, LP,

*Petitioner,*

v.

TRIBUNE MEDIA COMPANY, F/K/A TRIBUNE COMPANY, F/K/A TIMES MIRROR CORPORATION; OFFICIAL COMMITTEE OF UNSECURED CREDITORS; OAKTREE CAPITAL MANAGEMENT, LP; ANGELO GORDON & COMPANY; AND JPMORGAN CHASE BANK, NA, ET AL.

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

ROY T. ENGLERT, JR.
*Counsel of Record*
MARK T. STANCIL
ALAN E. UNTEREINER
MATTHEW M. MADDEN
KATHLEEN SHEN
*Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP*
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

## QUESTION PRESENTED

This case concerns a judge-made doctrine known as "equitable mootness." That doctrine allows district courts and courts of appeals to refuse to hear appeals from Chapter 11 bankruptcy proceedings, even though such appeals are explicitly authorized by the Bankruptcy Code. Both the district court and the court of appeals in this case invoked that doctrine to refuse to review a non-Article III bankruptcy judge's final decision that extinguished a multi-billion-dollar fraudulent-transfer claim for pennies on the dollar.

This Court has never reviewed the legitimacy of the equitable mootness doctrine. In the absence of this Court's review, not only has this "curious doctrine" (*In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., joined by Becker, Greenberg, Lewis, McKee, and Sarokin, JJ., dissenting)) taken root in the face of clear statutory and constitutional objections, but also the lower courts are in disarray as to how the doctrine—if it exists at all—should be applied.

The question presented is:

Whether Article III courts can refuse to exercise appellate jurisdiction assigned to them by Congress over the final decisions of non-Article III bankruptcy courts based on a determination of "equitable mootness," and, if that doctrine exists, whether it can be invoked to (a) protect the interests of participants in the bankruptcy confirmation process whose actions are challenged in the appeal, and (b) condition the recognition of appellate rights conferred by statute on taking actions (such as posting a bond to obtain a stay) not required by any statute or rule.

## RULE 14.1(b) STATEMENT

In addition to the parties named in the caption, the following entities were parties to the proceeding before the United States Court of Appeals for the Third Circuit and may therefore be considered respondents under this Court's Rule 12.6: Deutsche Bank Trust Company Americas, solely in its capacity as successor Indenture Trustee for certain series of Senior Notes, Law Debenture Trust Company of New York, solely in its capacity as successor Indenture Trustee for certain series of Senior Notes, Wilmington Trust Company, and EGI-TRB LLC.

Tribune Media Company's affiliated debtors (certain of which no longer exist) were: 435 Production Company, 5800 Sunset Productions Inc., Baltimore Newspaper Networks, Inc., California Community News Corporation, Candle Holdings Corporation, Channel 20, Inc., Channel 39, Inc., Channel 40, Inc., Chicago Avenue Construction Company, Chicago River Production Company, Chicago Tribune Company, Chicago Tribune Newspapers, Inc., Chicago Tribune Press Service, Inc., ChicagoLand Microwave Licensee, Inc., Chicagoland Publishing Company, Chicagoland Television News, Inc., Courant Specialty Products, Inc., Direct Mail Associates, Inc., Distribution Systems of America, Inc., Eagle New Media Investments, LLC, Eagle Publishing Investments, LLC, forsalebyowner.com corp., ForSaleByOwner.com Referral Services, LLC, Fortify Holdings Corporation, Forum Publishing Group, Inc., Gold Coast Publications, Inc., GreenCo, Inc., Heart & Crown Advertising, Inc., Homeowners Realty, Inc., Homestead Publishing Co., Hoy, LLC, Hoy Publications, LLC, InsertCo, Inc., Internet Foreclosure Service, Inc., JuliusAir Company, LLC, JuliusAir Company II, LLC, KIAH Inc., KPLR, Inc., KSWB Inc., KTLA Inc., KWGN Inc., Los Angeles Times Communications LLC, Los Angeles Times International, Ltd., Los Angeles Times Newspapers, Inc., Magic T Music Publishing Company, NBBF, LLC, Neocomm, Inc., New Mass. Media, Inc., Newscom Services, Inc., Newspaper Readers Agency, Inc., North Michigan Production Company, North Orange Avenue Properties, Inc., Oak Brook Productions, Inc., Orlando Sentinel Communications Company, Patuxent Publishing Company, Sentinel Communications News Ventures, Inc., Shepard's Inc., Signs of Distinction, Inc., Southern Connecticut Newspapers, Inc., Star Community Publishing Group, LLC, Stemweb, Inc., Sun-Sentinel Company, The Baltimore Sun Company, The Daily Press, Inc., The Hartford Courant Company, The Morning Call, Inc., The Other Company LLC, Times Mirror Land and Timber Company, Times Mirror Payroll Processing Company, Inc., Times Mirror Services Company, Inc., TMLH 2, Inc., TMLS I, Inc., TMS Entertainment Guides, Inc., Tower Distribution Company, Towering T Music Publishing Company, Tribune Broadcast Holdings, Inc., Tribune Broadcasting Company, Tribune Broadcasting Holdco, LLC, Tribune California Properties, Inc., Tribune CNLBC, LLC (f/k/a Chicago National League Ball Club, LLC), Tribune Direct Marketing, Inc., Tribune Entertainment Company, Tribune Entertainment Production Company, Tribune Finance, LLC, Tribune Finance Service Center, Inc., Tribune License, Inc., Tribune Los Angeles, Inc., Tribune Manhattan Newspaper Holdings, Inc., Tribune Media Net, Inc., Tribune Media Services, Inc., Tribune Network Holdings Company, Tribune New York Newspaper Holdings, LLC, Tribune NM, Inc., Tribune Publishing Company, Tribune Television Company, Tribune Television Holdings, Inc., Tribune Television New Orleans, Inc., Tribune Television Northwest, Inc., Tribune Washington Bureau, Inc. (f/k/a Tribune Broadcasting News Network, Inc.), ValuMail, Inc., Virginia Community Shoppers, LLC, Virginia Gazette Companies, LLC, WATL, LLC, WCCT, Inc. (f/k/a WTXX Inc.), WCWN LLC, WDCW Broadcasting, Inc., WGN Continental Broadcasting Company, WLVI Inc., and WPIX, Inc.

## RULE 29.6 STATEMENT

Petitioner Aurelius Capital Management, LP, has no parent corporation, and no publicly held corporation owns more than 10% of its shares.

## TABLE OF CONTENTS

**TABLE OF CONTENTS – cont'd**

**Page**

**TABLE OF CONTENTS – cont'd**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**<u>Cases</u>**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**



**<u>Constitution and Statutes</u>**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**



**<u>Legislative Materials</u>**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a–39a) is reported at 799 F.3d 272. The opinion of the district court (App. 40a–70a) is unreported.

## JURISDICTION

The court of appeals entered judgment on August 19, 2015, and denied rehearing on September 11, 2015. App. 2a, 319a–320a. On November 18, 2015, Justice Alito extended the time within which to file the petition for certiorari to and including January 11, 2016 (No. 15A541). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Article III of the Constitution and Titles 11 and 28 of the U.S. Code are set forth in the Appendix at 321a–323a.

## STATEMENT

This case involves a judge-made doctrine that assigns final, unreviewable authority to non-Article III bankruptcy judges contrary to clear statutory directives and long-settled constitutional principles. The doctrine is called "equitable mootness," and it deprives Article III courts of any meaningful oversight over live appeals from the most consequential legal decisions in large-scale corporate reorganization proceedings under Chapter 11 of the Bankruptcy Code. The doctrine allows federal courts to elect not to adjudicate the merits of appeals from final decisions of bankruptcy courts confirming reorganization plans, once those confirmed plans have been consummated. The doctrine rests on the notion that, once a plan has taken effect, its beneficiaries—even parties in the bankruptcy court who pushed for confirmation over the legal objections of dissenting creditors—are entitled to rely on the challenged plan's not changing, whether or not it was infected by legal error.

This Court should grant review to determine whether the equitable mootness doctrine can survive in the face of clearly contrary statutory commands and longstanding constitutional principles requiring non-Article III bankruptcy courts to operate subject to Article III review. Even if the doctrine survives in some fashion, this Court's review is urgently needed to bring uniformity (and some measure of restraint) to this device. It creates uncertainty (and encourages extreme positions and gamesmanship) in the bankruptcy courts. It thwarts the development of bankruptcy law. And it insulates important legal rulings from Article III oversight. This case, which is symptomatic of the unpredictability of the doctrine, provides an excellent vehicle for considering both the validity and the scope of the doctrine.

### A. Judicial Review In Bankruptcy Cases

Congress may establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. Art. I, § 8, Cl. 4. Exercising that authority, Congress has enacted statutes establishing and regulating the federal courts' broad jurisdiction over bankruptcy cases. The current scheme originated in the Bankruptcy Reform Act of 1978 but was significantly overhauled in 1984 in response to *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).[1] It vests original jurisdiction over all Chapter 11 bankruptcy "cases" in the district courts, 28 U.S.C. § 1334(a), and carefully defines the relationship between non-Article III bankruptcy judges and Article III courts. It authorizes the district courts to refer "cases under [Chapter] 11" to bankruptcy judges. The latter may "hear and determine" such referred cases and "enter appropriate orders and judgments, *subject to review under section 158 of this title*." 28 U.S.C. §§ 157(a), (b)(1) (emphasis added).

In Section 158, Congress established two levels of review by Article III courts. First, district courts "shall have jurisdiction to hear appeals * * * from final judgments, orders, and decrees" of the bankruptcy courts. 28 U.S.C. § 158(a)(1). Second, "courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by the district courts in such appeals. *Id.* § 158(d)(1). Congress's scheme seeks to ensure that bankruptcy cases are adjudicated in a manner consistent with Article III of the Constitution. See pages 14–21, *infra*.

---

[1] In *Northern Pipeline*, the Court held that it violated Article III to vest non-Article III bankruptcy judges with the authority to adjudicate traditional state-law contract and warranty claims related to bankruptcy proceedings. See 458 U.S. at 87 (plurality); *id.* at 91 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).

In several provisions of the Bankruptcy Code enacted before *Northern Pipeline*, Congress has singled out particular kinds of bankruptcy court orders that may *not* be reviewed by an appellate court. See 11 U.S.C. § 363(m) (sales or leases of property of the debtor's estate to a purchaser or lessor acting "in good faith," unless stayed during appeal); *id.* § 364(e) (same for good-faith extensions of credit). Congress, however, has enacted no similar provision relating to final decisions confirming a Chapter 11 plan; on the contrary, as explained above, such decisions are statutorily reviewable on appeal without restriction in both the district court and the court of appeals, with or without a stay pending appeal.[2]

Similarly, Congress has included provisions specifically governing both mandatory and permissive abstention in bankruptcy cases. Congress requires "district court[s]" to abstain from exercising their *original* jurisdiction in bankruptcy cases over specified claims under state law, if another action has already been "commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2); see also *Stern* v. *Marshall*, 131 S. Ct. 2594, 2619–20 (2011). With respect to permissive abstention, Congress authorizes "district courts" to refrain from exercising original jurisdiction over any "particular proceeding" if abstention is "in the interest of justice" or "in the interest of

---

[2] Section 1127(b) imposes certain restrictions on the ability of either a "proponent of a [Chapter 11 reorganization] plan" or "the reorganized debtor" to modify a plan following its confirmation, 11 U.S.C. § 1127(b), but in no way limits the appeal rights of those who objected to a plan.

comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1); see also *Stern*, 131 S. Ct. at 2619–20. As in other abstention settings, Congress has made certain decisions regarding abstention under Section 1334(c)(1) and (2) partially unreviewable on appeal. See 28 U.S.C. § 1334(d) (barring appellate review by "the court of appeals" or this Court of all permissive-abstention rulings under Section 1334(c)(1) and of all rulings *to abstain* under Section 1334(c)(2)). But, again, Congress has *not* enacted appellate-review-barring provisions with regard to final decisions confirming a Chapter 11 plan.

### B. The Tribune Bankruptcy Proceedings

This case arises out of a leveraged buyout (LBO) of, and subsequent Chapter 11 filing by, the Tribune Company ("Tribune"), a media conglomerate. Just before its 2007 LBO, Tribune had a market capitalization of about $8 billion and about $5 billion in debt (the "pre-LBO debt"). Petitioner Aurelius Capital Management, LP ("Aurelius"), manages entities that own pre-LBO debt.

The LBO involved a two-step transaction. In Step One, an entity controlled by Sam Zell made a tender offer and ultimately purchased more than half of Tribune's publicly held shares. In Step Two, that same entity purchased all remaining Tribune shares. Those transactions took Tribune private, and were financed by saddling Tribune with an additional $8 billion of debt (the "LBO debt").

The LBO debt was backed by Tribune's own assets, but also guaranteed by the company's subsidiaries. Those guarantees gave the LBO debt "structural seniority" over the pre-LBO debt. The result was that Zell bought out Tribune's shareholders with money borrowed by the company, and those loans moved to the top of Tribune's capital structure (jumping ahead of the pre-LBO debt). Zell and his entity risked almost nothing. The deal generated fees exceeding $280 million for the large banks that financed it on behalf of lenders ("LBO Lenders").

The LBO Lenders' internal models showed that this deal was likely to fail—and it did. "Tribune, in a declining industry with a precarious balance sheet," filed a Chapter 11 bankruptcy petition in December 2008. App. 5a. The bankruptcy court appointed a committee of unsecured creditors (the "Committee"), which obtained permission to pursue various legal claims against the LBO Lenders, Zell, and others (collectively, "LBO-related claims").

At the core of the LBO-related claims was the allegation that the LBO Lenders had participated in a fraudulent transfer by saddling a struggling Tribune with $8 billion in LBO debt. A fraudulent-transfer claim allows creditors to set aside obligations incurred by a debtor when the transaction either is motivated by an actual intent to "hinder, delay, or defraud" creditors, 11 U.S.C. § 548(a)(1)(A), or (without regard to actual intent) has the effect of depleting the resources of an insolvent, undercapitalized, or illiquid debtor, *id*. § 548(a)(1)(B). Here, the crux of the fraudulent-transfer claim was that the LBO Lenders lent money to Tribune, and subordinated the pre-LBO debt, even though the struggling enterprise could not sustain those massive additional burdens.

Various groups proposed plans of reorganization. Petitioner Aurelius and others proposed one plan (the "Noteholder Plan"), which among other things proposed to litigate the LBO-related claims. Another plan, proposed jointly by the Debtor, the Committee, and certain LBO Lenders (the "DCL Plan"), proposed to settle those claims. Not surprisingly given the role of certain LBO Lenders in formulating it, the DCL Plan proposed an exceedingly friendly settlement of the LBO-related claims. The bankruptcy judge ultimately concluded that one of those claims—which would have voided the entire amount of $8 billion LBO debt as a fraudulent transfer—was in "equipoise." See App. 230a. Nonetheless, the DCL Plan proposed to settle *all* of the LBO-related claims for far less than the 50 cents on the dollar that this "equipoise" determination (on a single claim) supported. More particularly, the claims were settled for $369 million in additional compensation to the pre-LBO noteholders—roughly 16 cents on the dollar—plus certain interests in a Litigation Trust.

In July 2012, the bankruptcy judge (notwithstanding his own "equipoise" determination) issued a final decision approving the DCL Plan over Aurelius's vehement objections. Aurelius and the pre-LBO noteholders' indenture trustees (the "Trustees")[3] sep-

---

[3] Law Debenture Trust Company of New York and Deutsche Bank Trust Company Americas (collectively, "Trustees") were indenture trustees (or successor trustees) for pre-LBO noteholders, including Aurelius. They continue to represent pre-LBO noteholders in connection with their separate appeal regarding other objections to the DCL Plan.

arately appealed different aspects of the confirmation order to the district court, invoking 28 U.S.C. § 158(a).

Aurelius and the Trustees each moved for a stay of the final order pending appeal. The bankruptcy judge offered to impose a stay, but made it contingent on posting a massive $1.5 billion bond (an amount the judge deemed necessary to protect the entire bankruptcy estate against potential costs that Tribune might incur while consummation of the plan was delayed). App. 78a.[4] Since posting a bond of that size was practically impossible, Aurelius and the Trustees declined.

### C. The District Court's Decision

In the same order in which it conditioned a stay on a $1.5 billion bond, the bankruptcy court declined requests to certify direct appeals to the court of appeals. App. 77a–78a. The appeal to the district court was fully briefed by October 2012. Aurelius sought an expedited decision, but the DCL Plan's proponents successfully opposed expedition. On December 31, 2012, the DCL Plan was consummated. Eighteen days later, Tribune moved to dismiss the appeals as "equitably moot."

Eighteen months later, the district court dismissed both appeals. App. 40a–67a. The court iden-

---

[4] Aurelius and the Trustees filed emergency motions in the district court, asking that the bond requirement be vacated and their appeals expedited. The motions were denied, and the Third Circuit dismissed Aurelius's appeal from that ruling for want of jurisdiction.

tified "five prudential factors" that, in the Third Circuit, inform the decision whether to dismiss an appeal as equitably moot:

> (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.

App. 44a–45a (citing *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc)). Those factors, the court explained, ultimately can be reduced to "two analytical steps: '(1) whether a confirmed plan has been 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.'" App. 45a (quoting *Samson Energy Resources Co.* v. *SemCrude, L.P. (In re SemCrude, L.P.)*, 728 F.3d 314, 321 (3d Cir. 2013)).

Applying this two-step and five-factor analysis, the district court first held that the reorganization plan had been substantially consummated. It stated, moreover, that consummation had occurred "due in part to" appellants' "failure to obtain a stay" (noting that they had declined to post the $1.5 billion bond demanded by the bankruptcy court, on the ground that the amount was "prohibitive and more than the total value of their claims"). App. 47a–48a.

Next, the district court concluded that the relief sought by Aurelius "directly attacks the DCL Settlement" and, if granted, would "have the feared outcome of collapsing the DCL Plan." App. 53a–54a. The court rejected Aurelius's submission that there were "at least three remedies" available that would award Aurelius full (or at least partial) relief without unraveling the DCL Plan: (1) allowing the LBO-related claims to proceed and ordering *Tribune* to fund any liability arising out of their adjudication or settlement, (2) allowing the Litigation Trust to pursue those claims against, and recover any liability from, *the LBO Lenders*, or (3) same as option two except that the available relief would be limited to reassigning the 35% share of the Litigation Trust payable to the LBO Lenders. The district court rejected the first option as "inequitable" because the full amount sought in recovery was "approximately 22% of the over $7 billion reorganization plan." App. 51a. It rejected the other two options on the ground that they would "eviscerate the DCL Plan." App. 51a–52a.

**D. The Court Of Appeals' Decision**

Invoking the same five factors and two-step analysis, a panel of the Third Circuit affirmed in part and reversed in part. App. 1a–39a. Equitable mootness, the panel initially explained, encourages "investment in a reorganized entity" (although no such investment was at issue here) and "benefits the estate." App. 14a, 16a. By contrast, the panel noted, "the remedy of taking from one class of stakeholders the amount given to them in excess of what the law allows"—language that described at least two of the three remedies sought by Aurelius—"is not apt to be inequitable, as there is little likelihood it will have damaging ripple effects beyond the classes that the redistribution immediately affects." App. 17a.

The panel nevertheless held that the district court did not abuse its discretion in ruling that Aurelius's appeal "should be deemed moot." App. 4a, 18a. The panel assumed that Aurelius was right on the merits of its appeal, but concluded that it still would be "inequitable to correct the [bankruptcy court's] mistakes" for specified "twofold" reasons. App. 19a. First, the panel cited a reason that applies equally to almost every bankruptcy case: "[B]ankruptcy is concerned primarily with achieving a workable outcome for a diverse array of stakeholders, and the reliable finality of a confirmed and consummated plan allows all interested parties to organize their lives around that fact." App. 19–20a. Second, it pointed to Aurelius's failure to post the $1.5 billion bond. App. 20a.

The panel, however, reversed the dismissal of the Trustees' appeal. It reasoned that the Trustees were requesting disgorgement of a much smaller amount ($30 million) and so did not risk unraveling the DCL Plan. App. 22a–25a.

Two of the three panel members filed a concurring opinion, App. 28a–39a, responding to Judge Krause's very recent concurring opinion in *In re One2One Communications, LLC*, 805 F.3d 428, 438 (3d Cir. 2015). Judge Krause had criticized the equitable mootness doctrine in detail. According to her, that doctrine bears no resemblance to recognized abstention doctrines and is unlikely to be approved by this Court, which in recent years "has repeatedly endeavored to narrow the scope of the abstention doctrines." *Id.* at 440. It lacks any support in, indeed *is undermined by*, the relevant provisions of the Bankruptcy Code (including 11 U.S.C. §§ 363(m), 364(e), and 1127(b)) and of the jurisdictional statutes governing bankruptcy cases (including 28 U.S.C. §§ 157(b)(1), 158(a), and 1334). 805 F.3d at 441–44. It "raises serious constitutional concerns by failing to provide appellate review of bankruptcy judges' decisions in an Article III court." *Id.* at 444–46. And it creates a "deleterious effect on our system of bankruptcy adjudication." *Id.* at 446–48. Judge Krause also contended that, if not abandoned, the doctrine should at least be substantially revised to eliminate multiple areas of confusion in its implementation. *Id.* at 452–54. Judges Ambro and Vanaskie disagreed. App. 28a–39a.

## REASONS FOR GRANTING THE PETITION

This case involves the judge-made doctrine of "equitable mootness"—never reviewed by this Court—which allows federal courts to refuse to hear live appeals from decisions of bankruptcy courts confirming Chapter 11 reorganization plans. These appeals are expressly authorized by statute. Yet, in case after case, the statute is disregarded so that beneficiaries of a plan—including, as here, the very parties who pressed the bankruptcy court to confirm their plan over other creditors' objections—will not have the terms of their challenged bargain (whether lawful or not) upset on appeal. As the Solicitor General has observed, the doctrine is "a relatively recent judicial construct of questionable foundation" and is “open to substantial abuse, and invites manipulation of the bankruptcy process.” No. 00-1621 Pet. 22–23, *United States* v. *GWI PCS 1, Inc.* (“U.S. 00-1621 Pet.”).

Equitable mootness is also fundamentally at odds with the federal courts’ “virtually unflagging” duty to exercise their given jurisdiction. *Sprint Commc’ns Inc.* v. *Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). And the doctrine likewise undermines the constitutional underpinnings of modern bankruptcy practice, in which virtually every contested Chapter 11 case is first decided by a bankruptcy judge not appointed under Article III. A foundational premise of that system, recognized repeatedly by Congress, is the availability of appellate review by Article III courts over almost every significant decision a bankruptcy court may make—hence the explicit authorization of confirmation appeals in the statute. Equitable mootness jettisons those principles in the name of expediency, leaving bankruptcy judges to allocate billions of dollars in property rights without review by an Article III tribunal. The equitable mootness doctrine is illegitimate, root and branch.

If the doctrine is to survive in any form, this Court should resolve widespread confusion surrounding its application. Because “equitable mootness” has evolved unmoored from any statutory or constitutional foundation, the lower courts have produced many different approaches to the doctrine. These entrenched circuit conflicts have caused uncertainty, stunted the development of bankruptcy law, and impaired the proper functioning of Chapter 11 in large reorganization cases—the complex cases in which appellate review is most needed.

## I. Review Is Necessary To Determine Whether Article III Courts Can Decline To Exercise Appellate Jurisdiction Expressly Assigned To Them By Congress

A. This Court should grant review to determine whether the judge-made doctrine of equitable mootness can persist in the face of the clear statutory command that confirmation appeals "shall" be heard by Article III courts. Under the plain language of the Code, "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 * * * *subject to review* under section 158." 28 U.S.C. § 157(b)(1) (emphasis added). Section 158, in turn, provides that "[t]he district courts of the United States *shall* have jurisdiction to hear appeals * * * from final judgments, orders, and decrees" of the bankruptcy courts. *Id.* § 158(a)(1) (emphasis added); see also *id.* § 158(d)(1) ("[t]he court of appeals *shall* have jurisdiction of appeals from all final decisions" entered by district courts in appeals taken under Section 158(a)) (emphasis added).

What is more, several provisions of the Bankruptcy Code single out particular kinds of bankruptcy court orders that, in the absence of a stay pending appeal, *will* become unreviewable. See 11 U.S.C. § 363(m) (certain sales or leases of property); *id.* § 364(e) (good-faith extensions of credit). But Congress chose not to say the same about orders confirming a Chapter 11 plan. "Under the maxim of *expressio unius* * * * Congress's express inclusion of two bankruptcy-law exceptions to appellate review indicates an intent to preclude the recognition of others." U.S. 00-1621 Pet. 23. Nor has Congress taken the more limited step of restricting the appeal rights created under 28 U.S.C. § 158(a)(1) and 158(d)(1) to situations where a confirmation plan has not been "substantially consummated."

Moreover, Congress has enumerated certain circumstances in which district courts may abstain from exercising their *original* jurisdiction. See 28 U.S.C. § 1334(c)(1), (2); pages 4–5, *supra*. But those provisions have nothing to do with refusing to exercise *appellate* jurisdiction conferred over decisions of a bankruptcy court. To the contrary, these provisions confirm that, if Congress had contemplated anything remotely resembling the equitable mootness doctrine, it would have said so. Indeed, as explained above, Congress has elected to impose certain limits on appeals taken from abstention rulings made by the district courts in bankruptcy cases, see 28 U.S.C. § 1334(d), but has not restricted the appeal rights created under 28 U.S.C. § 158(a)(1) and (d)(1). In short, not only is equitable mootness inconsistent with the express statutory right of appeal, but there is no basis to infer that Congress intended—but forgot—to carve out a giant exception for the appellate review of confirmation orders once a plan has been consummated. See also U.S. 00-1621 Pet. 23 ("[T]o the extent the Bankruptcy Code addresses the issue, it appears to preclude the doctrine.").

B. By providing litigants with the right to seek district court review of adverse confirmation orders, Congress purposefully has reserved to Article III courts exactly the judicial oversight that this Court's separation-of-powers jurisprudence requires. "Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern*, 131 S. Ct. at 2608 (quoting *Northern Pipeline*, 458 U.S. at 58). This Court has not hesitated to strike down even supposedly "slight" encroachments on Article III's protections accompanying "the judicial power of the United States." See *id.* at 2620 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

The constitutionality of Congress's delegation of bankruptcy matters to bankruptcy courts under the Bankruptcy Code indeed depends on the availability of Article III appellate review. Cf. *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring) (emphasizing "the extent of review by Art. III courts provided on appeal" in determining the constitutionality of delegating private-right disputes to the bankruptcy courts). The Constitution requires that the "essential attributes of judicial power"—including the power to review decisions made by non-Article III tribunals—be reserved to Article III courts. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 852–53 (1986). "Even if a case is tried in the first instance in a non-article III tribunal, a separation-of-powers interest remains in ensuring appellate review by an article III court." Richard H. Fallon, Jr., *Of*

*Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 939 (1988).

C. Congress was aware of these Article III concerns when it enacted (and amended) the current framework of appeals in bankruptcy cases. Indeed, many of the provisions discussed above were enacted in 1984 in the aftermath of *Northern Pipeline* precisely to correct the Article III shortcomings of the Bankruptcy Reform Act of 1978. And there is abundant evidence in the legislative history of Congress's overriding concern with Article III safeguards and the demands of *Northern Pipeline*.[5]

D. In a closely related bankruptcy appellate setting, the Eleventh Circuit has ruled that it would violate Article III even for *Congress* to preclude all appellate review by Article III courts of a final decision made by a bankruptcy court under 11 U.S.C. § 305 to dismiss or suspend a Chapter 11 case. See *Parklane Hosiery Co., Inc.* v. *Parklane/Atlanta Venture (In re Parklane/Atlanta Joint Venture)*, 927 F.2d 532, 536–38 (11th Cir. 1991); *Goerg* v. *Parungao (In re Goerg)*, 930 F.2d 1563, 1565–66 (11th Cir. 1991). Section 305, which originated in the 1978 Act

[5] See, *e.g.*, 130 Cong. Rec. H7489 (daily ed. June 29, 1984) (statement of Rep. Rodino); *id.* at H7492 (statement of Rep. Kastenmeier); 130 Cong. Rec. S8890 (daily ed. June 29, 1984) (statement of Sen. Dole) (the jurisdictional provisions "ha[ve] been carefully crafted to ensure [the bill's] constitutionality under" *Northern Pipeline*); *id.* at S8895-97 (detailed analysis of jurisdictional provisions by Sen. Hatch); 130 Cong. Rec. E1107-09 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier); 130 Cong. Rec. E1107-09 (daily ed. Mar. 20, 1984) (amendment offered by Rep. Kastenmeier).

but "was left untouched by Congress in its [1984] overhaul of the 1978 Act's jurisdictional structure," *Chem. Bank* v. *Togut (In re Axona Int'l Credit & Commerce Ltd.)*, 924 F.2d 31, 35 (2d Cir. 1991), authorizes a "court" to "dismiss" or "suspend all proceedings in" a Chapter 11 case where (a) "a petition under section 1515 for recognition of a foreign proceeding has been granted" and doing so would serve "the purposes of chapter 15 of this title," or (b) such dismissal or suspension would "better" serve "the interests of creditors and the debtor." 11 U.S.C. § 305(a)(1), (2). As originally enacted, Section 305(c) also provided that an order dismissing or suspending a case under Section 305(a) "is not reviewable by appeal or otherwise." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 305(c), 92 Stat. 2549; see also *Parklane*, 927 F.2d at 536; *Axona*, 924 F.2d at 34–35 & n.2.

In *Parklane*, the Eleventh Circuit held that these provisions violated Article III and were contrary to *Northern Pipeline* because "[t]he entry of an order by the bankruptcy court to dismiss or suspend under Section 305 would terminate the district court's jurisdiction over the instant case without review by an Article III court." 927 F.2d at 538 (citing *Northern Pipeline*); see also *Goerg*, 930 F.2d at 1565–66 (same).

In response to similar rulings and the recommendations of the Federal Courts Study Committee (FCSC), Congress amended Section 305(c) to provide for Article III judicial review by the district court of any Section 305 rulings by the bankruptcy court. Judicial Improvements Act of 1990, Pub. L. No. 101-

650, § 309, 104 Stat. 5089, 5113. Congress inserted after the phrase "is not reviewable by appeal or otherwise" in Section 305(c) the following qualifying language: "by the court of appeals under section 157(d), 1291, or 1292 * * * or by the Supreme Court of the United States under section 1254" of Title 28. See *Goerg*, 930 F.2d at 1566; *Axona*, 924 F.2d at 33–35. The FCSC recommended and Congress made this change precisely because they recognized that, without such Article III review, bankruptcy courts could not rule on motions under Section 305.[6] The equitable mootness doctrine suffers from the same constitutional defect that the amendments to Section 305(c) sought to cure.

E. The necessity of preserving Article III oversight of the bankruptcy courts is heightened by the nature of the bankruptcy-plan confirmation process. Confirmation orders frequently resolve fiercely contested private-right claims, such as the fraudulent-transfer claim at issue in this case, which raise significant legal questions and involve large sums of money. Cf. *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 55 (1989) ("[A] bankruptcy trustee's right to recover a fraudulent conveyance * * * [is] more accurately characterized as a private rather than a public right."); *Stern*, 131 S. Ct. at 2614 (same). Indeed, this Court has always assumed that, "if the bank-

---

[6] See 136 Cong. Rec. S17580 (daily ed. Oct. 27, 1990) (section-by-section analysis provided by Sen. Grassley, who was a member of the FCSC); *Report of the Federal Courts Study Committee*, at 77 (April 2, 1990) (recommending change to § 305 "[b]ecause bankruptcy judges may enter trial orders only if there is appellate review in an Article III court").

ruptcy court overrules an objection and grants confirmation, a creditor can appeal without delay." *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686, 1694–95 (2015); see also *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1940 (2015) ("Congress gave bankruptcy courts the power to 'hear and determine' core proceedings and to 'enter appropriate orders and judgments,' *subject to appellate review by the district court*." (quoting 28 U.S.C. § 157(b)(1) (emphasis added)); *Stern*, 131 S. Ct. at 2603–04 ("Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards."); *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2171–72 (2014) (same).

The constitutional concerns implicated by courts' oversight of the plan confirmation process have been magnified by *Bullard*. This Court held that bankruptcy court orders *denying* confirmation are not entitled to immediate appellate review—a decision premised on the assumption that orders *approving* confirmation are the more significant orders entitled to Article III review. See 135 S. Ct. at 1692. Equitable mootness, however, leaves the entire confirmation process without *any* Article III oversight, contrary to the express will of Congress.

Equitable mootness thus threatens separation-of-powers principles from two directions. It diminishes the power of Article III courts and leaves "far too much power in the hands of bankruptcy judges." *Nordhoff Invs., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d

180, 192 (3d Cir. 2001) (Alito, J., concurring).[7] At the same time, the doctrine encourages federal courts to second-guess Congress's carefully considered and clearly conveyed decision to confer a right to appeal—all on the basis of federal judges' independent evaluation of the "prudence" or "equities" of allowing an appeal. Cf. *Lexmark Int'l Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.") (citation omitted).

* * *

This extreme departure from the statutory and constitutional scheme cries out for this Court's review. Since its apparent origin more than three dec-

---

[7] Any control apparently retained by Article III judges in determining whether to apply the doctrine is largely illusory, as "bankruptcy courts control nearly all of the variables" in the equitable-mootness equation—including whether and under what conditions to grant a stay of confirmation—"all before plan challengers reach an Article III court." *One2One*, 805 F.3d at 445 (Krause, J., concurring). In the Tribune case, it was also the bankruptcy court that determined—four months before the reorganization plan took effect—that appeals would go to the district court and not the court of appeals. App. 77a-78a. In any event, "the separation of powers does not depend on * * * whether the 'encroached-upon branch approved the encroachment.'" *Wellness Int'l*, 135 S. Ct. at 1955 (Roberts, C.J., dissenting) (quoting *Free Enter. Fund* v. *Pub. Company Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010)).

ades ago in *Trone* v. *Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981), the doctrine has taken firm root in the lower courts—despite the shifting rationales offered for it—and has "gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested." *Continental*, 91 F.3d at 570 (Alito, J., dissenting); accord U.S. 00-1621 Pet. 21–22 & n.8 (discussing extensions and shifting rationales). Only this Court can dislodge it by enforcing the statutory and constitutional constraints that ensure the proper functioning of the Bankruptcy Code.

## II. Even If The Equitable Mootness Doctrine Is Allowed To Persist, Review Is Necessary To Resolve Deep Confusion In The Lower Courts Over Its Scope And Application

Even among the courts that have embraced the doctrine, there is widespread disagreement as to how it should operate. The result is that the availability of appellate review is unpredictable and, as the decision below reflects, often denied in situations in which no reasonable basis exists for depriving litigants of the appellate review Congress accorded them. Accordingly, even if this Court were inclined to preserve the doctrine in some form (or assume its validity), review is needed to resolve deep disagreements in the circuits over the doctrine's scope and proper implementation.

A. Of particular importance in this case, the circuits are divided over whether the doctrine may be invoked to protect the supposed reliance interests of creditors who participated in the confirmation process and supported the contested plan. In the decision below, the Third Circuit specifically invoked the interest of creditors "who voted for the Plan" notwithstanding their extensive participation in the bankruptcy proceedings. App. 18a. Equitable mootness, the court reasoned, protects the interests of *any* stakeholder—whether a proponent of the disputed plan or a true third party—who "rel[ies] on the emergence of a reorganized entity from court supervision." App. 16a.

In contrast, the Ninth Circuit has rejected this broad approach. In *JPMCC 2007-C1 Grasslawn Lodging, LLC* v. *Transwest Resort Properties Inc. (In re Transwest Resort Properties, Inc.)*, 801 F.3d 1161 (9th Cir. 2015), that court held that a creditor who participated in the confirmation process was, by virtue of that involvement, *not* an "innocent third party" protected by the equitable mootness doctrine. See *id.* at 1169–70.[8] Other circuits share that understanding of the doctrine's limitation. See *Search Market Direct, Inc.* v. *Jubber (In re Paige)*, 584 F.3d 1327, 1344 (10th Cir. 2009) (finding it "hard to consider" plan proponent "a 'third party' or at least an innocent third party" given its "pivotal role in the bankruptcy proceedings"); *Bank of N.Y. Trust Co.* v. *Pac. Lumber Co. (In re SCOPAC)*, 624 F.3d 274, 282 (5th Cir. 2010) (major creditors who participated in confirmation proceedings "should not be considered third parties for the purposes of mootness analysis").

---

[8] Without extension, the due date for a certiorari petition in *Transwest* is January 21, 2016.

The Ninth Circuit was correct in refusing to shield combatants in a contested confirmation process from appellate review. As the Ninth Circuit observed in *Transwest*, participants in the confirmation process have already had the opportunity to make their views regarding the plan known—and to consider the appellant's objections—and have nevertheless "chose[n] to go forward with the confirmation." 801 F.3d at 1169–70 & n.10. In those circumstances, there is nothing unfair about their facing the ordinary risk of appeal. See *One2One*, 805 F.3d at 453 (Krause, J., concurring) ("Just as opponents of a reorganization plan must diligently pursue their claims, so must plan proponents."). Indeed, when a "sophisticated financial entity" in this situation "helps craft a reorganization plan that 'press[es] the limits' of the bankruptcy laws, appellate consequences are a foreseeable result." *Transwest*, 801 F.3d at 1170 (quoting *Bank of N.Y.* v. *Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 244 (5th Cir. 2009)).

B. The circuits also "are split" over the standard of review to be applied to a district court's decision to dismiss an appeal as equitably moot. *Paige*, 584 F.3d at 1334–35. In this case, the Third Circuit applied the abuse-of-discretion standard. App. 10a. The Second and the Tenth Circuits apply the same deferential standard. See *R² Invs., LDC* v. *Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.),* 691 F.3d 476, 483 (2d Cir. 2012); *Paige*, 584 F.3d at 1335. According to the Third Circuit, abuse of discretion is the appropriate standard because an equitable-mootness dismissal "involves a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III." *Continental*, 91 F.3d at 560.

By contrast, the Fifth, Sixth, Ninth, and Eleventh Circuits review equitable-mootness dismissals *de novo*. See *In re GWI PCS 1 Inc.*, 230 F.3d 788, 799–800 (5th Cir. 2000); *Curreys of Nebraska, Inc.* v. *United Producers, Inc. (In re United Producers)*, 526 F.3d 942, 946–47 (6th Cir. 2008) (acknowledging conflict with Third Circuit); *Baker & Drake, Inc.* v. *Pub. Serv. Comm'n of Nevada (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994); *First Union Real Estate Equity & Mortg. Invs.* v. *Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992). These courts reason that equitable-mootness dismissals should be subject to *de novo* review just like any other decision made by a district court sitting as an appellate court. See, *e.g.*, *United Producers*, 526 F.3d at 947.

Indeed, courts of appeals apply plenary review to virtually all other legal rulings by a district court exercising appellate jurisdiction in bankruptcy. See, *e.g.*, *Cinicola* v. *Scharffenberger*, 248 F.3d 110, 115 n.1 (3d Cir. 2001) ("Because the district court sits as an appellate court in bankruptcy cases, our review of its decision is plenary."); *Bowers* v. *Atlanta Motor Speedway, Inc. (In re Southeast Hotel Properties Ltd. P'ship)*, 99 F.3d 151, 154 (4th Cir. 1996) (same). And *de novo* review makes sense because, as then-Judge Alito observed, a court of appeals is "in just as good a position to make this determination as was the district court." *Continental*, 91 F.3d at 568 n.4 (Alito, J., dissenting). Plenary review also helps to ensure that the equitable mootness doctrine remains "limited in scope and cautiously applied," as it was originally intended to be. *Id.* at 559 (majority opinion). More fundamentally, the notion that courts have "discretion" to refuse to afford litigants the appellate rights conferred on them by Congress is profoundly troubling.

C. These divisions reflect a deeper confusion as to the basic nature and purpose of the doctrine, "many aspects" of which remain in disarray despite years of application by the courts of appeals. *United Producers*, 526 F.3d at 946.[9] Consider, for example, the role of a stay of plan implementation pending appeal. In all but one of the circuits that have adopted equitable mootness, an appellant's *effort* to obtain a stay pending appeal is relevant to the analysis. See, *e.g.*, *Rev Op Grp.* v. *ML Manager LLC (In re*

---

[9] The circuits consider different factors in deciding whether to dismiss based on equitable mootness, compare App. 44a–45a (five factors, refined into "two analytical steps," in Third Circuit), with *Pac. Lumber*, 584 F.3d at 240 (three factors in Fifth Circuit), *Behrmann* v. *Nat'l Heritage Found.*, 663 F.3d 704, 713 (4th Cir. 2011) (four factors), and *Paige*, 584 F.3d at 1339–40 ("six questions," including a "quick look" at the merits, in Tenth Circuit). They also look to different parties to "prove" those factors, compare *Dill Oil Co.* v. *Stephens (In re Stephens)*, 704 F.3d 1279, 1283 (10th Cir. 2013) ("The party seeking to prevent the court from reaching the merits bears the burden of proving these factors weigh in favor of dismissal."), with *Charter Commc'ns*, 691 F.3d at 482 ("In this circuit, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated."). Both of these entrenched circuit conflicts have been acknowledged. See, *e.g.*, *Paige*, 584 F.3d at 1338–40.

*Mortgs. Ltd.)*, 771 F.3d 1211, 1215 (9th Cir. 2014); *Charter Commc'ns*, 691 F.3d at 481–82; *Behrmann*, 663 F.3d at 713; *Paige*, 584 F.3d at 1339 (10th Cir. 2009); *Pac. Lumber*, 584 F.3d at 240 (5th Cir. 2009); *Continental*, 91 F.3d at 560. But see *SEC* v. *Wealth Mgmt. LLC*, 628 F.3d 323, 332 n.5 (7th Cir. 2010) (disputing relevance of seeking a stay). As the Ninth Circuit explained, if an appellant "neglect[s] diligently to pursue [its] available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court" and thereby "permit[s] * * * a comprehensive change of circumstances to occur," then it would be "inequitable" to allow the appellant to upset those changed circumstances on appeal. *Roberts Farms*, 652 F.2d at 798.

But in practice there is no predictable relationship between an appellant's conduct in seeking a stay and dismissal for equitable mootness. Instead, the baseline level of "diligence" required to avoid equitable mootness shifts constantly as courts apply this doctrine on the fly. In this case, the Third Circuit acknowledged that petitioner Aurelius had "promptly moved for a stay." App. 8a. Nevertheless, the court held that petitioner's failure to post the gargantuan $1.5 *billion* bond required to obtain that stay was an "important reason" to dismiss the appeal as equitably moot. App. 20a; see also App. 21a (characterizing the failure to post a $1.5 billion bond as a "risk-adjusted choice by * * * a rational actor").

But just two years earlier, the Third Circuit reversed the dismissal of an appeal notwithstanding the appellant's failure *even to seek* a stay. See *SemCrude*, 728 F.3d at 322–23. In *SemCrude*, the court correctly recognized that "neither the Bankruptcy Code nor any other statute predicates the ability to appeal a bankruptcy court's ruling on obtaining a stay." *Id.* at 322; cf. *Nordhoff*, 258 F.3d at 191–92 (Alito, J., concurring) (characterizing "appellants' failure to *seek* a stay" as the "primar[y] influence[]" in decision to affirm dismissal) (emphasis added). Thus, in one decision, a would-be appellant was not required to seek a stay at all precisely because Congress has imposed no such condition on appellate rights; in the next, the appeal was dismissed because appellants did not post a $1.5 billion bond and obtain a stay.[10]

---

[10] This case was a particularly poor candidate for the invention of a new extra-statutory requirement to post a bond. The bond demanded by the bankruptcy court was wholly unlike an ordinary supersedeas bond, which is paid by the defendant to insure the position of a judgment creditor during the pendency of an appeal. See *Peacock* v. *Thomas*, 516 U.S. 349, 359 (1996). Here, the proposed bond was calculated to insure the position of the *entire estate (including the enterprise, its creditors, and its shareholders)* during the appeal's pendency, see App. 20a–21a, and bore no relation to any past adjudicated liability of Aurelius, the issues on appeal, or even the amount of capital Aurelius had at issue. See Bruce A. Markell, *Equitable Cuteness: Of Mountains and Mice*, 35 No. 11 BANKRUPTCY LAW LETTER NL 1, 8 (2015) ("[C]uriously absent from the equitable mootness discussion is the fairness in requiring an appellant to be at risk for damage yet to occur to the estate for simply exercising its appeal rights."). In any event, posting such a bond would be virtually impossible in almost any large reorganization. Here, for example, even if it had ready access to $1.5 billion (which Aurelius most definitely did not), no rational creditor would post $1.5 billion to insure against changing market condi-

Such inconsistency is commonplace across the circuits. Compare, *e.g.*, *Charter Commc'ns*, 691 F.3d at 484 ("That [appellants] were not granted a stay does not affect the analysis[,] * * * which looks only to diligence in *seeking* a stay."), with *In re UNR Indus., Inc.*, 20 F.3d 766, 769–70 (7th Cir. 1994) (in finding appeal equitably moot notwithstanding denied motion to stay implementation, reasoning that "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization"). Indeed, the inconsistency sometimes occurs within the very same case. Here, the Third Circuit held that the Trustees' separate appeal was *not* equitably moot, even though it involved claims concerning the same unstayed, substantially consummated plan of reorganization as did petitioner's appeal—and even though the Trustees likewise declined to post a $1.5 billion bond. App. 22a.

All of this results from conditioning the right to appellate review on purportedly discretionary, judge-made factors instead of following the ordinary rule that courts exercise the jurisdiction conferred on them by statute. If the doctrine of equitable mootness is to exist at all, it should be a truly narrow and predictable doctrine, not the morass it has become because of inconsistent development in the lower courts unmoored from any source of law other than judges' shifting intuitions.

D. If any principle is discernible from this doctrinal chaos, it is this: Small claims are reviewable,

---

tions, operations of the debtor, and other forces entirely beyond the creditor's control.

but large claims are not. Or, as the Third Circuit plainly stated below, "the lower a potential recovery is, the less likely an appeal is to be equitably moot because courts will be more willing to make minor changes to a plan of reorganization than big ones." App. 22a n.4. The Trustees' claims, thus, were allowed to proceed because their appeal concerned only "$30 *million* in the context of a $7.5 *billion* reorganization." App. 23a.

This same tolerance for relatively low-value appeals helps explain the outcomes of other equitable mootness cases both inside and outside the Third Circuit. "[T]he amounts involved" in the appeal allowed to go forward in *SemCrude*, for instance, were less than 0.13% of the amount designated for distribution to the class and less than 0.01% of the reorganization as a whole. 728 F.3d at 324. More recently, the Third Circuit held that the doctrine of equitable mootness is simply inapplicable in low-value bankruptcies. See *One2One*, 805 F.3d at 435 (reversing dismissal of appeal involving only "a $200,000 investment in the reorganized debtor and only one secured creditor that held a blanket lien on the Debtor's assets for less than $100,000"). In *Pacific Lumber*, the Fifth Circuit reversed the dismissal of an appeal for similar reasons, noting that "awarding relief on the full $11 million would seem not to imperil a reorganization involving hundreds of millions of dollars." 584 F.3d at 250.

The corollary is that the more monetarily significant the error asserted on appeal, the more likely it is to be dismissed as equitably moot. From this perspective, the dismissal of petitioner's claim below is attributable to the fact that it was a high-value claim concerning the validity of an issue that was "central" to the negotiation of the plan (App. 18a)—and not to petitioner's failure to obtain a stay of implementation (App. 20a), or the purported reliance interests of "third party" creditors like the LBO Lenders (App. 18a). Similarly, in *Pacific Lumber*, the Fifth Circuit affirmed the dismissal of "troubling" claims that the confirmation vote had been gerrymandered—not in spite of these claims' acknowledged "significan[ce]," but *because* they were so significant that they called into question the basic legitimacy of the plan. 584 F.3d at 250–51.

As these cases demonstrate, equitable mootness tends to shield egregious legal errors in the confirmation process from appeal, precisely *because they are highly consequential*. The blatant perversity of this *de facto* rule calls out for this Court's attention.

**III. The Routine Dismissal Of Appeals For Equitable Mootness Has Distorted The Bankruptcy Process And Impeded The Development Of Bankruptcy Law**

The validity and contours of the equitable mootness doctrine are matters of nationwide significance, and now is a particularly opportune time for this Court to address those issues. Notwithstanding lower courts' repeated directive that equitable mootness be "limited in scope and cautiously applied," *Continental*, 91 F.3d at 559, the doctrine has become a routine and ordinary part of the confirmation process. In the last six months alone, the courts of appeals have produced three published decisions—

and six separate and conflicting opinions—addressing the basic components of the doctrine, as well as its fundamental validity. See App. 1a (panel opinion); App. 28a–39a (Ambro, J., concurring); *One2One*, 805 F.3d 428; *id.* at 438–54 (Krause, J., concurring); *Transwest*, 801 F.3d 1169; *id.* at 1173–77 (Smith, J., dissenting). This mounting "wave" of equitable-mootness litigation (Markell, 35 No. 11 BANKRUPTCY LAW LETTER NL at 1) exerts a strong influence not only in the negotiation of particular Chapter 11 plans but also on the development of bankruptcy law as a whole.

A. As a "threat * * * looming" over the confirmation process (App. 8a), equitable mootness distorts the negotiation of the plan itself and changes the nature of the plans that are confirmed. In large Chapter 11 bankruptcies, plan proponents routinely resist or delay the adjudication of disputed issues so that they are folded into the final confirmation order. Because equitable mootness effectively removes the prospect of appellate review, plan proponents have little incentive to consider whether the plan resolves disputed issues in a manner that is lawful and would survive appellate scrutiny. All that matters is whether the plan will be confirmed in the first instance by the bankruptcy court (which, again, is not even an Article III court).

Pressure only mounts after confirmation, as proponents rush to consummate the plan. See, *e.g.*, *Charter Commc'ns*, 691 F.3d at 481 (following confirmation, reorganized entity "Charter immediately took actions under the Plan"). Sophisticated bankruptcy litigants lay the groundwork for a successful equitable mootness motion, and by the time the case reaches an Article III court, what is left is a "*fait accompli*, a plan that [has been] substantially consummated," *Pac. Lumber*, 584 F.3d at 242, and an appeal that is likely to be dismissed, regardless of its merits. And, given the existing doctrine, it should come as no surprise that they do so.

Yet all of this staged drama is avoidable. Proponents of a plan can easily reserve a distribution—or even some partial amount—to address the legal issues in dispute (a mechanism authorized by the Bankruptcy Code and routinely used to address disputed claims). But the leverage equitable mootness offers plan proponents over their adversaries is too good to pass up. Indeed, as then-Judge Alito predicted, equitable mootness has become "a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans." *Nordhoff*, 258 F.3d at 192 (Alito, J., concurring). The United States has expressed the same view. U.S. 00-1621 Pet. 23 (doctrine of equitable mootness is "open to substantial abuse, and invites manipulation of the bankruptcy process"). In fact, the ease with which plan proponents maneuver to moot appeals is the worst-kept secret among the Chapter 11 bar.

Today, equitable mootness is anything but equitable. Rather, it invites participants to game the system and "serves as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges." *One2One*, 805 F.3d at 448 (Krause, J., concurring); see also *id.* at 446 (recounting a panel member's observation that "a motion to dismiss an appeal as equitably moot has become 'part of the Plan'" pursued by proponents of the reorganization). Those who design and sponsor reorganization plans should be expected to take reasonable steps to mitigate any disruption that would occur upon appellate reversal. But it is now *de rigueur* for proponents of equitable mootness to claim that the entire reorganization was a "settlement" or "bargain" without which they would not have voted for the plan. Such self-serving statements cannot excuse legal errors in a plan. More fundamentally, it makes no sense to reward such inequitable conduct under a doctrine supposedly grounded in equity. See *Pac. Lumber*, 584 F.3d at 244 n.19 ("Equitable mootness * * * should not be a shield for sharp or unauthorized practices.").

B. The harmful effects of the doctrine are felt not only at the level of the individual bankruptcy, but across bankruptcy law as a whole. The widespread adoption and application of equitable mootness further reduces the already limited number of precedential bankruptcy-law decisions generated by the courts of appeals. See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 789–90 (2010) ("An additional feature of bankruptcy practice that inhibits the resort to appeals up through the Article III courts is the doctrine of equitable mootness.").

The bankruptcy court system is structurally ill suited to the creation of binding precedent to begin with. Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 649 (2002); see also McKenzie, 62 STAN. L. REV. at 783 (noting that, between 2000 and 2007, there was approximately one court-of-appeals level appeal for every 38 business-bankruptcy cases filed, compared with one for every 12 cases filed in non-prisoner civil suits generally). As a result, bankruptcy law "has been plagued by indeterminacy." *Pac. Lumber*, 584 F.3d at 242; see also *Weber* v. *United States*, 484 F.3d 154, 158 (2d Cir. 2007) (noting "widespread unhappiness at the paucity of settled bankruptcy-law precedent"). The lack of settled precedent harms debtors and creditors by thwarting efficient settlement and promoting instead the relitigation of basic legal questions. See Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 AM. BANKR. L.J. 525, 527–28 (1995).

That is why Congress has sought repeatedly to *expand* bankruptcy litigants' appellate rights to increase the opportunity to create binding precedent. See, *e.g.*, 28 U.S.C. § 158(d)(2) (authorizing direct review by the court of appeals of certain significant bankruptcy court orders); H.R. Rep. No. 109-31(I) pt. 1, at 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 206 (Section 158(d)(2), enacted by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, is "intended to be used to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level"); McKenna & Wiggins, 76 AM. BANKR. L.J. at 652 & n.30 ("The legislative history of the 1994 amendments reveals that one driving force behind the move to bankruptcy appellate panels was the idea that BAPs would help to remedy the lack of precedent."). Against this background, it is perverse for courts to dismiss any of the few bankruptcy appeals that are taken—and virtually all that assert highly consequential legal errors—on the basis of the judge-made doctrine of equitable mootness.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROY T. ENGLERT, JR.
*Counsel of Record*
MARK T. STANCIL
ALAN E. UNTEREINER
MATTHEW M. MADDEN
KATHLEEN SHEN
*Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP*
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

JANUARY 2016