No. 18-_____

# In the Supreme Court of the United States

ANDREW BENNETT, RODERICK V. ROYAL, MARY MOORE, JOHN W. ROGERS, and WILLIAM R. MUHAMMAD, ET AL.,

*Petitioners,*

v.

JEFFERSON COUNTY, ALABAMA,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May the doctrine of equitable mootness bar an appeal to an Article III Judge of a Plan of Adjustment providing for ratemaking enforcement authority by the Bankruptcy Court of sewer user rates and fees pledged to pay refinanced pre-petition Sewer revenue warrants for forty years in violation of the Tenth Amendment's reservation of municipal utility rate-making authority to the States and to the people?

2. If the Bankruptcy Act allows appeals to be mooted for only two specific consummated transfers or distributions of property (defined in 11 USCS § 1101(2)) unless a stay is obtained before the appeal, to wit:

(1) business asset sales or leases (11 USCS § 363), and

(2) loans or credit advances of new post-petition operating funding secured by business assets in priority to other creditors (11 USCS § 364).

This case raises the extremely significant issue of how can the Judge made doctrine of Equitable Mootness extend and enlarge the mooting of appeals from two to all consummated transactions unless a stay is obtained before the appeal, and not contravene the Act and Congressional limits on the types of transfers plainly stated in § 363 and § 364 which may be mooted as proscribed by the Act?

3. Because under the Tenth Amendment judicial power to determine the extent of Federal jurisdiction over municipal sewer utility ratemaking resides in an Article III Court, may an Article I, legislative Judge use the doctrine of equitable estoppel to bar

review by an Article III Judge of a refinancing of pre-petition sewer warrant debt subject to a claim by Petitioners, who are ratepayers and special taxpayers, that the Federal Bankruptcy Judge's exclusive power to enforce sewer rates charged to repay the debt violates powers "reserved to States or to the people" under the Tenth Amendment. (*See,* Appendix D, excerpt from BK 2248, Confirmation Order dated 11/22/13))

4. May equitable mootness be applied to bar appeal and review of the Article I, legislative Judge's invalidation of State sovereignty over issuance of County sewer revenue debt embodied in express State constitutional provisions (a) requiring majority voter approval of sewer fees which result in a foreclosure liens on real property of sewer users, and (b) having other limits on, and requirements for, debt issuance and use of debt proceeds for public purposes (see, *e.g.*, *New York v. United States*, 505 U.S. 144, 149, 112 S. Ct. 2408, 2414 (1992)) especially where a Chapter 9 Plan's consistency with State sovereignty was a foundational requirement for this Court's initial ruling sanctioning Chapter 9's constitutionality under the Tenth Amendment under *United States v. Bekins*, 304 U.S. 27, 58 S. Ct. 811 (1938) and, *cf.*, *Ashton v. Cameron Cnty. Water Improvement D. No. 1,* 298 U.S. 513, 56 S. Ct. 892 (1936).

5. Since transfers and distributions of property not subject to reversal on appeal under § 363, § 364 and § 1101(2) cannot exist in this case because governmentally owned and operated sewer system property cannot be sold or leased under § 363 or hypothecated in credit transaction under § 364, and since

Congress expressly excludes § 363 and § 364, and § 1101(2) from Chapter 9 under § 103(g) and § 901, this case raises the extremely significant issue of how can equitable mootness loosely adopted from a reference to § 363, § 364, and § 1101(2) in Chapter 11 cases, be extended to this Chapter 9 case, where those provisions are understandably excluded given the governmental, public ownership and non-transferability of sewer system property and assets, without doubly contravening Congressional intent?

6. Even if this Court determines equitable mootness applies generally to consummated transactions approved in Chapter 9, unless a stay is pending, the Court should address the critical issue that the Plan of Adjustment and waiver of the 14 day automatic stay of 3020(e) was timed by the Bankruptcy Court to take away any ability of the Petitioners to request a stay, because the Plan was not approved until November 22, 2013, three days after consummation of the November 19, 2013, purchase and sale of the refinancing warrants, the unconstitutional sale of which, were the subject of Petitioners' adversary complaint and objections to the Plan. (*cf.,* Appendix D-confirmation of plan to issue debt where sewer rates and denial of an automatic 14-day stay are under Bankruptcy Article I Court's exclusive control with an effective date of November 22, 2013, with Appendix F-Purchase Agreement to buy and sell sewer warrants confirmed prices and interest rates and yields on November 19, 2013, with final effective date of Purchase Agreement on November 20, 2013).

7. The Circuits seem hopelessly split on the Standard of Review—de novo or abuse of discretion-

for, and the importance of up to five specific factors comprising, equitable mootness-ability to provide some relief,

a. whether relief will unwind the intricate relationships in the final approved plan or only affect separable transactions,

b. whether a party affected by relief was before the court and had notice of relief proposed before Plan approval,

c. whether the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable parts of the order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from, and,

d. the factor used only in this case-whether the appellant objected to the Courts order waiving the automatic 14-day stay three days after a stay was moot or futile because the execution of the refinancing appellant objected to, occurred three days before it could be subject to an automatic four day stay.

The factors applied to determine equitable mootness continue to change with every decision where every circuit is using equitable estoppel for pragmatic reasons but there is no statutory language for common reference. Equitable mootness writes §§ 363 and 364 [dealing with two different consummated transactions] out of the Act because every consummated transaction in a Plan now has the same treatment as those identified by Congress as meeting the rigorous requirements in §§ 363 and 364. Equitable mootness

denies due process because there is no statutory notice of how to avoid it because the bankruptcy court who is trying to avoid an appeal of his order also makes the decision on granting the stay which if not granted bars the appeal. A better name for Equitable Mootness is an appeal that the bankruptcy court has to order by granting a stay. If only based on a stay, this doctrine then usurps the Article III Judge's duty to review Constitutional claims of violations of the Tenth Amendment as required by Article III.

8. No Circuit Courts to date have required a stay pending appeal of placement of debt sold three days before the debt sale was approved in a confirmed Plan and therefore three days before appellant could have even known of the debt sale for which a stay was needed as ruled by the Eleventh Circuit in this case. If this decision is allowed to stand no bankruptcy transaction consummated any time before Plan confirmation is appealable. With this case the Eleventh Circuit has gone way beyond all other Circuits in applying mootness to pre-confirmation transactions as long as there is a technical final closing after confirmation. This case should be overturned by the Court to prevent a precedent which expands the limits § 364 and § 363 that deny appeal of two types of transfers without a pending stay, to the point that these sections are meaningless. When debt is sold before Plan confirmation and there are no innocent purchasers of that debt because the warrant purchasers knew it was impossible to get a stay after the

fact of execution of the transfer, sale or debt placement agreement.[1]

[1] "Extended such credit in good faith" is a part of 11 USCS § 364(e) on which "Equitable Mootness' has been said to have a connection in several Circuits.

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## OPINIONS BELOW

The decision of the Eleventh Circuit is reported at *Bennett v. Jefferson Cty,* 899 F.3d 1240, 2018 U.S. App. LEXIS 22736, 27 Fla. L. Weekly Fed. C 1182, 66 Bankr. Ct. Dec. (LRP) 26 (11th Cir. 2018). (App.1a). The United States District Court for the Northern District of Alabama, Southern Division, Memorandum Opinion that the Petitioners' appeal is not moot and denying the Respondent's Motion to Dismiss the appeal as moot is reported at *Bennett v. Jefferson County*, 518 B.R. 613. (App.27a). The District Court's § 1292(b) certification for interlocutory appeal of following issue states:

> Whether the Ratepayers' appeal of the Confirmation Order is moot either constitutionally, statutorily, and/or equitably–based on consummation and/or the Ratepayers' failure to obtain a stay pending appeal. (Appendix C, Doc. 48, p.6).

## JURISDICTION

The Eleventh Circuit denied rehearing on October 31, 2019. (App.102a). This Court has jurisdiction under 28 U.S.C. §§ 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

**U.S. Constitution, Article III, Section 1**, in relevant part:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. ***

**U.S. Constitution, Article III, Section 2,** in relevant part:

> The judicial power shall extend to all cases, in law and equity, *arising under this Constitution*, the laws of the United States, ***-to controversies to which the United States shall be a party . . . " (Emphasis added)

**U.S. Constitution, Tenth Amendment**

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**U.S. Constitution, Fourteenth Amendment, Sec. 1**

> No person shall be *** deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

### 1. Introduction

Published opinions of the Eleventh Circuit state, that from at least 1996 to 2003, elected and appointed officials in Jefferson County, Alabama took bribes and payoffs[1] to enter into bogus contracts and contracts procured by fraud, bribes and corruption with sewer system constructors and contractors, bond underwriters and interest rate swap counterparties who received corrupt contract payments and unfair underwriting markups and swap profits from proceeds of County sewer revenue "swap warrants." The Series 2002(C), 2003(B) and 2003(C) refinancing swap warrants (the "Swap Warrants") were issued [after bribes arranged by JPMorgan] in the amount of $3.047 billion to replace $2.675 billion of conventional fixed rate warrants at 4-5% interest with no new money raised. (Appendix G, proof of claim 211-1 excerpt, PDF p.7). The $2.675 billion of principal owed in 2002 passed through as sewer charges to Ratepayers is roughly the same amount of accreted principal owed today, post-petition, (Initial Principal of $1.78 billion "accreting" to $2.55 billion of principal at 6.45 to 8% interest. (D. Doc 7-9, pp. 10-12) backed by sewer rates enforced by the bankruptcy court and passed through today to Ratepayers as a result of the confirmed Plan of Adjustment (Appendix H, B. Doc 1916-5, p. 4). Even though payments for debt have been included

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[1] See, *e.g.*, *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195, 1202 (11th Cir. 2009); *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010); *U.S. v Langford* 647 F.3d 1309 (11th Cir. 2011).

in the sewer charges since 2002 no principal has been paid down. To be sure, Sewer Ratepayers and Petitioners owe the same amount of principal today, after consummation of the bankruptcy plan-after 16 years of sewer charges including debt service payments-that they owed in 2002 before the corrupt Swap Warrant refinancings. Under the bankruptcy plan, junk bond, tax-exempt interest of 6.45% to 8% required on the "accreted" principal of $2.55 billion, increases the debt load passed through to Ratepayers, with interest, to $6.6 billion with no new money raised. Now the total amount of sewer fees collections that are being enforced by the bankruptcy court to secure the $6.6 billion in new debt, with the excess subordinated to pay operating costs and new capital costs, is $14 billion dollars payable over 40 years when no new money has been raised for capital projects benefitting Ratepayers since before 2002. This amount far exceeds the ability of most Ratepayers and since backed by real property liens is a taking without due process, but cannot be changed by elected County commissioners approved by the voters because of the control of sewer ratemaking by the Federal Bankruptcy court. *See,* Appendix I, excerpt from transcript of Plan confirmation hearing-B. Doc 2275-2.

Swap Warrants are a type of auction rate debt, that are like municipal bonds, but payments are secured not by County owned sewer system improvements or any other County assets,[2] but only by Libor

[2] Substantial consummation is a Chapter 11 concept relating to transfers or distribution of assets by the debtor, not applicable to a sewer system owned in a governmental or public capacity which may not transfer its assets: "substantial consummation" means: (A) transfer of all or substantially all of the property

indexed variable rate payments from interest rate swap counterparties which are secured by the County's covenant to increase sewer rates backed by assessment type liens, required to be, but ruled not allowed to be, approved by majority vote, on the homes and commercial real estate of citizens connected to the sewer system (*see*, Alabama Constitutional Amendment 73), in an amount sufficient to pay a fixed rate to the swap counterparties plus the difference between the Libor index and the actual auction rate on the warrants. In 2008, the auction rate market collapsed. On September 16, 2008, Syncora and other sewer warrant holders filed a complaint in the Northern District of Alabama to appoint a receiver with the authority to raise rates required to pay the Series 2002-3 "refinancing" sewer warrants issued to purchase interest rate swaps, primarily executed by JPMorgan. Federal District Court Judge Proctor abstained after a finding that a receiver should be appointed but that the federal court had no jurisdiction. Ironically, Judge Proctor stated that Federal law did not allow a Federal District Court to be involved directly or indirectly in the type of municipal sewer fee ratemaking engaged in by the Federal Bankruptcy Court that Petitioners' claim presents a constitutional, which is one of the issues of great national significance in this Petition. Judge Proctor stated upon motion of the Debtor-Jefferson County:

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proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. 11 USCS § 1101(2).

> The Johnson Act "has been broadly construed to prohibit federal court actions that indirectly as well as directly affect rate orders." Under this "effects test," the Act is inapplicable only when "the relief [the plaintiff] seeks, if granted, would not in any way affect the rates established" by the ratemaking authority. (Internal citations omitted). *Bank of N.Y. Mellon v. Jefferson Cnty*., No. 2:08-CV-01703-RDP, 2009 U.S. D. LEXIS 122093, at *48 (N.D. Ala. June 12, 2009).[3]

On December 1, 2008, an indictment against Larry P. Langford, William Blount and others was opened in the Northern District of Alabama. 7:08-cr-00245-LSC-PWG, *USA v. Langford et al*. This indictment included charges for bribery related to the 2002(C), 2003(B) and 2003(C) sewer warrants as discussed in the appeal of Langford's conviction on September 28, 2009, at *U.S. v Langford*, 647 F.3d 1309 (11th Cir. 2011) .

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[3] Judge Proctor abstained from deciding the Receiver Motion based on argument advanced by the County in its Opposition. *See*, *e.g.*, *Bank of New York Mellon,* supra, 2009 U.S. D. LEXIS 122093, *72 ("Defendants [the County and its then-Commissioners] argue that the court should abstain from [appointing a receiver without rate-making authority] because rendering a decision would require the court to decide unsettled issues of Alabama law, something better left to courts of the State of Alabama under traditional notions of federalism and comity.") (footnote omitted)]. Accordingly, the County should be judicially estopped to argue before this Court, the Circuit Court or the District Court in a merits appeal that the retention of jurisdiction provisions in the Confirmation Order are lawful and enforceable. *See Ward v. AMS Servicing, LLC, No.* 14-14052, 2015 WL 1432982, *2-3 (11th Cir. Mar. 31, 2015).

On November 4, 2009, the SEC found that the Series 2002C, 2003B and 2003C auction rate sewer warrants used to purchase associated interest rate swaps (hereafter referred to as the "Swap Warrants") had been solicited and procured by payoffs and these payoffs had been passed along to Ratepayers as higher sewer fees and charges. (*See*, B. Doc 1041-3, pp. 27-31)[4] The SEC specifically found a willful violation of Securities laws by J.P. Morgan. (*Id.* at 27-37).

On April 29, 2010, Syncora, a bond insurer which guaranteed the payments of the certain warrants issued to purchase "interest rate swaps" arranged principally by JPMorgan filed suit for conspiracy and fraud against J.P. Morgan and Jefferson County for failing to disclose that sewer fees could not be raised sufficiently, based on the wealth levels of the sewer ratepayers, to repay the warrants which were in default and being paid

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[4] All citations marked " B. Doc p._-" are to Bankruptcy Case No. 11-05736-TBB (Bankr. N.D. Ala. filed Nov. 9, 2011). Citations marked "AP 16 __p.__" are to docket entries in adversary proceeding No. 12-00016 (Bankr. N.D. Ala. filed Feb. 3, 2012); citations marked "AP 120 ___p.__" are to docket entries in adversary proceeding No. 12-00120 (Bankr. N.D. Ala. filed Aug. 15, 2012). Citations to the Eleventh Circuit's electronic case docket (Case No. 15-11690) are formatted "Cir. [date]___,p.__.; citations to district court's electronic case docket (No. 2:14-cv-00213-SLB) are formatted "D. Doc [entry number]:[page/paragraph];" Citations to bankruptcy court transcripts are formatted as "Bankr.Tr.[month].[day].[year]:[page]." To the extent a document's electronic CM/ECF pagination ("Page X of Y") differs from the document's internal pagination, citation is to the CM/ECF pagination.

by Syncora. Appendix J-Syncora Complaint. Syncora's complaint stated at the outset:

> This action arises out of one of the biggest cases of municipal corruption in United States history and a massive fraud perpetrated by Defendants Jefferson County and JPMorgan in connection with billions of dollars of municipal debt that the County, with the aid of JPMorgan, issued to finance a sewer system remediation project. As part of an unprecedented scheme of corruption and abuse, which has resulted in over 20 criminal convictions (including several County Commissioners), and multiple SEC enforcement actions (including ones against JPMorgan and two of its former senior bankers), Jefferson County and JPMorgan fraudulently induced Syncora, a New York-based insurer, to provide over $1 billion in insurance coverage for certain of the County's municipal debt.

The complaint talks about the corruption that produced no-bid contracts and unnecessary swap financings that resulted in criminal charges but does not mention that all the money stolen from warrant proceeds is still being passed through as sewer fees and charges to the little people who use the sewer. In fact, their sewer fees are used by the County to file bankruptcy against the Ratepayers resulting in higher charges. (*See*, Appendix H).

### 2. Brief History of Petitioners/Ratepayers Claim

Syncora plaintiffs then secured appointment of a receiver in State court. *Bank of N.Y. Mellon v. Jef-*

*ferson Cnty.*, Case No.:CV-2009-02318. (the "Receiver Case") On June 24, 2011, Petitioners Ratepayers ("Ratepayers") acting on their own behalf and on behalf of a putative class filed a motion to intervene in Receiver's Case (Appendix K, excerpt-full motion to intervene in Claim 211-1), detailing the components of an estimated $1.630 billion dollars in "corrupt activity" markups and overcharges on future sewer bills to Petitioners who are Ratepayers and "special taxpayers" under the Act. (§ 902(3), § 943(a)) which directly and indirectly resulted from the bribes and payoffs by JPMorgan to procure the issuance of the 2002-3 "swap warrants." (See, Appendix B, note 8).

> "rate increases to be proposed or implemented by the court appointed receiver, Mr., Young will be unconstitutional in violation of (a) Article 94(a), (b) sections 222, 225 and 226, Article 7, and (c) Article 45 of the State of Alabama Constitution, will violate Code of Alabama @11-8-10, will be confiscatory and will exceed their ability to pay*** Accordingly, the Intervenors are so situated that any order by this Court adhering to Mr. Young's rate increases will impair or impede their ability to protect against an unconstitutional, unlawful, unreasonable, and confiscatory rate increase" Appendix K—AP120, Doc 20-3.

In November of 2011, Jefferson County filed Chapter 9 bankruptcy. B.Doc 1. On June 4, 2012, Petitioners/Ratepayers, a year after filing their motion to intervene in the Receiver Case, filed their § 101 (5)(B) proof of claim in bankruptcy making the same

claims as in the Receiver Case that future collection of sewer fees equal to $1.63 billion were void *ab initio* as unconstitutional, and otherwise violations of Alabama State laws. B. Doc 1041; Claims Register 211-1. On July 12, 2012, Ratepayers filed a complaint in intervention in AP 16 to enjoin a ruling [that the trustee could collect System Revenues including Ratepayers claimed overcharges of $1.63 billion] that would have a preclusive effect on Ratepayer Intervenors' § 101(5)(B)[5] claims that about half the System Revenues were charged unconstitutionally. On September 6, 2012, Ratepayers brought their AP 120 Class Action "Complaint of Unconstitutionality" for an injunction to cancel System Revenue collections that violated their constitutional rights against Mellon Bank as Indenture Trustee, Jefferson County, Syncora, JPMorgan, Various Stand By Credit Banks who had been tendered the Swap Warrants and others. Appendix L, AP120, Doc. 2.

On September 29, 2012, Ratepayers brought their Amended AP 120 Complaint to enjoin any Plan of Adjustment with pledges of System Revenues collected from Ratepayers to amortize "the Series 2002C, 2003B and 2003C sewer refunding warrants with associated interest rate swaps" because they were void and un-

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[5] (5) The term "claim" means-

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(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. 11 U.S.C.S. § 101)

enforceable, inter alia, under the Alabama Constitution. AP120, Doc. 9.

By June 7, 2013 there had been hearings on a half dozen motions to dismiss the Complaint in intervention in AP 16 and amended and final complaint in AP 120. Both Complaints sought stop the refinancing of the Swap Warrants procured by fraud and corruption and issued in violation of State Constitutional debt ceilings and gift of public funds provisions as proposed in the Plan of Adjustment (Appendix M, AP 120 Docket) Rather than stay the Plan of Adjustment so Ratepayers claims could be adjudicated, the bankruptcy court stay Ratepayers claims to give the County time to sell refinancing warrants to moot Ratepayers claims. Ratepayers legitimate constitutional claims were frozen out, in bad faith without any recourse to an Article III court. (Relationship of AP 16, AP 120 and the Bankruptcy appeal is discussed in Motion to consolidate Appendix N)

On August 8, 2013, the County filed its Disclosure Statement Regarding Chapter 9 Plan of Adjustment for Jefferson County, Alabama (Dated July 29, 2013). B.Doc.1977. On November 6, 2013, the County filed its Chapter 9 Plan of Adjustment for Jefferson County, Alabama (Dated November 6, 2013). B.Doc.2182. The bankruptcy court denied Ratepayers claims and dismissed their Adversary Proceeding in the Plan of Adjustment on November 22, 2013. Without a hearing or any semblance of due process. B.Doc.2248 The Bankruptcy Court also approved the County's Motion for Approval Pursuant to the Confirmation Order of Compromises and Settlements and Related Relief with Respect to the Chapter 9 Plan of Adjustment for

Jefferson County, Alabama, which contained towards the end the following:

> 43. This Motion further requests that the Court "order otherwise" under Bankruptcy Rule 3020(e) and waive any stay of the Confirmation Order so that the County can promptly consummate the Plan and avoid the risk of further changes in the financing markets.

The Plan was Confirmed on November 22, 2013, but the prices and financial markets interest rate commitments were consummated or locked in three days before the confirmation order on November 19, 2013. November 19, 2013 is the real "substantial consummation" date in this case. after which there could be no further changes in the financing markets affecting the deal. As stated above, substantial consummation is inapplicable in a governmental bankruptcy because only the revenues collected from Ratepayer Petitioners pledged to the old swap warrants were transferred to the new warrants—no County assets are transferred or distributed (Appendix F, D. Doc 7-9, p. 6). In any event, the reason for the waiver of the 14-day stay was moot on November 22 when the waiver was granted because the purchase of the New Sewer Warrants had already taken place on November 20, 2013. The only act that remained was delivery of the physical warrant certificate to DTC the clearing agent and final legal and closing opinions—the pricing and interest rates had been finalized on November 19 with the Warrant Purchase Agreement signed sealed and delivered on November 20, 2013 locking in the loan rates. (Appendix F).

There was no separate motion to waive the 14 day stay. The requested waiver was in the very back, paragraph 43, of the Motion for Approval of Settlements and Compromises It is not true that "the ratepayers did not object to the County's motion to waive the automatic stay" as stated by the Circuit Court (Appendix A, p. 5 of 29). On November 13, 2013, the Ratepayers filed their 'Opposition To [November 6] Motion for Approval Pursuant to The Confirmation Order of Compromises and Settlements and Related Relief with Respect to the Chapter 9 Plan of Adjustment for Jefferson County, Alabama." This Opposition states in part:

> "Ratepayer/Claimants strongly objected to the stay until a confirmation of a plan of adjustment because it was viewed as a way to allow the County to avoid a hearing on the merits of the validity of the lien against Ratepayer revenues as alleged in the amended complaint. (AP-120, Doc. 98). The instant Motion attempts to avoid such a hearing and is therefore un enforceable against Ratepayer/claimants who are not a part of the settlement worked out with a separate class of creditors.

Ratepayers facts above show clearly that as stated by the 2nd Circuit:

> the "parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and 5) 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." *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.),* 10 F.3d 944, 952 (2nd Cir. 1993) (*Chateaugay II*) (Emphasis added).

### 3. The Memorandum Opinion of the District Court

Quoting from *Sun Am. Corp.*, 77 F.3d at 1333, the District Court stated that "[a] case does not become moot simply because an appellate court is unable to completely restore the parties to the status quo ante," D.Doc.35:27-28. This comment addressed the County's contention that a successful appeal would require the unwinding of transactions that have taken place under the confirmed Plan, such as the issuance of the New Sewer Warrants and the retiring of the old Sewer Warrants. But the County's contention, County's Brief at 27-28, also advanced by Amicus, Amicus Brief at 13, conflates the doctrine of equitable mootness, which is not present here as discussed herein, with constitutional mootness. The District Court correctly noted that while facts on the ground might limit the scope of relief available, they do not render the Ratepayers' appeal constitutionally moot. *See* Sun Am. Corp., 77 F.3d at 1333 ("The ability of the appellate court to effectuate a partial remedy is sufficient to prevent mootness.") (quotation omitted). And striking the "exclusive" 40-year retention of jurisdiction provisions, or declaring them unenforceable, would be "meaningful" relief. *See Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (appeal not moot where meaningful relief can be granted).

The District Court rejected the proposition urged by the County that the Approved Rate Structure is "antecedent to and independent of the Confirmation Order that validated it," noting that the ability of the New Sewer Warrant holders to enforce the Approved Rates Structure against future County Commissioners in the same bankruptcy court that approved it was not "a mere convenience instead of one of the primary and extraordinary methods of securing the warrants." D.Doc.35:28, n.20. The District Court correctly recognized that the propriety of enforcement by the bankruptcy court is "the live question on appeal . . . ." *Id.* (Italics added). This statement applies equally to the concerns raised by Amicus as to the validity of the County's consent for expansion of the power of the bankruptcy court through the retention of jurisdiction provisions.

The District Court further noted that "[p]art of the relief the[] [Ratepayers] seek is the ability to elect Commissioners who, instead of 'tak[ing] unpopular stances' or 'actions that [are] not desired by many of their constituents,' . . . are accountable to them, and not to federal enforcement of the Approved Rate Structure. Vacating the Approved Rate Structure of the Confirmation Order would grant them that relief." D.Doc.35:29, n.21. (Internal citation omitted). Because some effectual relief is available to the Ratepayers, their appeal is not constitutionally moot.

The District Court Judge also found that the appeal was not statutorily moot because § 364(e) did not apply.

The District Court discussed the contours of the doctrine of equitable mootness, noting that this Court

has stated that "substantial consummation," a factor courts consider in determining if an appeal of a confirmation order is equitably moot, "'is a Chapter 11 concept . . . .'" D.Doc.35:37 (quoting *In re Seidler*, 44 F.3d 945, n.3 (11th Cir. 1995)). Equitable mootness is, indeed, a Chapter 11 concept. *In re Grimland, Inc.*, 243 F.3d 228, 231 (5th Cir. 2001) (courts have developed the concept "in response to the particular problems presented by the consummation of plans of reorganization under Chapter 11.") (Italics added).

Responding to the County's citation to *Alexander v. Barnwell Cnty. Hosp.*, 498 B.R. 550 (D. S.C. 2013), the District Court emphasized that that court did not question whether Chapter 9 embraced the concept of "substantial consummation," D.Doc.35:37, n.26, a term defined in section 1101(2) of the Code, and applicable only in Chapter 11 cases. Note 7, *supra*; *see* 11 U.S.C. §§ 103(f) ("Except as provided in section 901 . . . , only chapters 1 and 9 of this title apply in a case under such chapter 9."), 103(g) ("Except as provided in section 901 . . . , subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter."), and 901(a) (Code section 1101 is not among the 78 sections and subsections of the Code incorporated into Chapter 9 by Congress). While substantial consummation is only one of the factors this Court considers in deciding if an appeal from a Chapter 11 confirmation order is equitably moot, the premise underlying case law dismissing as equitably moot appeals from confirmation orders is that the plans have been substantially consummated. But that premise is inapposite in the Chapter 9 context because substantial consummation is not one of the concepts incorporated through Code section 901(a). Thus, it

appeared to the District Court, appropriately, that the Alexander court simply presumed that the Chapter 11 concept of equitable mootness applied in Chapter 9. *See* Alexander, 498 B.R. at 559-60, deals with a hospital acting in a proprietary capacity whereas the County operates the sewer system in a governmental capacity where none of the system property may be hypothecated to secure any loans for the system.

The other case cited by the County is even less persuasive, and equally non-binding. *In re City of Vallejo, Cal.*, 551 Fed. App'x 339 (9th Cir. Dec. 31, 2013), is an unpublished decision comprised of two paragraphs; the court, like the Alexander court, presumed with no analysis that equitable mootness applied in Chapter 9 cases. 15

The District Court noted the differences between Chapter 9 and Chapter 11 cases, including that state sovereignty is at stake, and a municipality, like the County, is not a private business operating to make a profit and has no stockholders. D.Doc.35:38. The District Court further noted the differing prudential concerns: the twin policies underlying Chapter 11 are preserving going concern value and maximizing value to facilitate distributions to creditors, while the principal policy underlying Chapter 9 is the continued provision of public services. D.Doc.35:39.

### 4. The Opinion of the Circuit Court

The Circuit Court based its opinion on a fact not in evidence that "These new warrants were sold based on a commitment— backed up by an unstayed court order—to set sewer rates at particular amounts over the course of the next 40 years." (p. 25). The

facts presented to the District Court and the Circuit Court clearly show that the warrants were sold on November 19, 2013 with interest rates and prices fixed before there was even a hearing on the Confirmation Order which did not start until November 20, 2013. Only delivery of a physical certificate to DTC to be converted into electronic certificates was left for the "Delivery." (Appendix F). The Appellate panel also disregarded the fact that the AP 16 intervention and AP120 complaints to enjoin the sale of the new warrants were commenced in July of 2012 and litigated aggressively until arbitrarily stayed in June of 2013 three months before the disclosure statement was filed and 5 months before the Plan Adjustment was filed. A requested injunction against the sale of new warrants and a requested stay of the sale of new warrants is functionally the same thing.

The Circuit Panel totally failed to consider the Article III court's judicial power and obligation to hear the Constitutional issue of whether the Bankruptcy Court's exclusive control over sewer rate making for 40 years invaded the rights of the people under the Tenth Amendment. There was also no consideration of the appellate panel of the failure to apply constitutional limits on debt ceilings and voter approval rights implicate State Sovereignty under the tenth amendment and the foundational, constitutional underpinnings of Chapter 9 itself, which must be reviewed on appeal by an Article III judge. Even though the Confirmation order states:

> "the Court shall retain exclusive jurisdiction to enforce the Approved Rate Structure and the Rate Resolution, to require the County

> to otherwise comply with the New Sewer Warrants and the New Sewer Warrant Indenture, and to hear and adjudicate any action or proceeding enforcing, challenging, or collaterally attacking the Approved Rate Structure or the Rate Resolution."

The 11th Circuit panel summarizes its position on these issues that:

> "That a Chapter 9 bankruptcy plan subjects the residents of Jefferson County to rate increases over time, instead of forcing them to bear the financial pain all at once, does not transmogrify it into one that per se violates the ratepayers' constitutional rights. *Cf. Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1277 (11th Cir. 2017) ("the greater power normally includes the lesser").

## REASONS FOR GRANTING THE WRIT

### I. SINCE CONGRESS HAS SPOKEN THAT ONLY TWO TYPES OF TRANSACTIONS ARE IMMUNE FROM REVERSAL OR MODIFICATION ON APPEAL, DURING THE PENDENCY OF A STAY, EQUITABLE MOOTNESS VIOLATES CONGRESSIONAL INTENT AND MUST BE LIMITED IN ITS APPLICATION BY THIS COURT UNTIL CONGRESS PASSES LEGISLATION INCORPORATING THE DOCTRINE OF EQUITABLE MOOTNESS INTO THE ACT. THERE IS NO WAY TO ACCOMPLISH CONSISTENCY AMONG THE CIRCUITS ABSENT SOME STATUTORY BASIS FOR DENYING AN APPEAL WHERE NEITHER CONSTITUTIONAL MOOTNESS OR STATUTORY MOOTNESS APPLIES.

In a Chapter 11 case, any "reversal or modification on appeal," of two specifically designated types of transactions, is barred as "statutorily moot," unless Bankruptcy Court authorization is "stayed pending appeal": (1) a sale or lease of business property under 11 USCS § 363(b) or (c)[6] or (2) "fresh money" or incurring new debt or extension of credit or loans under 364 (c) or (d) [which does not include refinancing as we have in the instant case] (*See,* 363(m) and 364(e)). Circuits have read into the Bankruptcy law "equitable mootness" of appeals of <u>all</u> transactions authorized and substantially consummated in an approved Plan of Confirmation unless the transaction is stayed before Confirmation using the definition of the term "substantial consummation" in 1101.2. The operative sec-

tion of the Code 1127(b) does not use the term as a basis for appellate jurisdiction of an Article III Court, to wit: "reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation." Where there is a specific bankruptcy law provision which governs, the District Court is not allowed any wiggle room to use Judge made "prudential estoppel" law to resolve the issue. *See*, *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("We have long held that whatever powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); and *Czyzewski v. Jevic Holding* Corp., 137 S. Ct. 973, 986-987 (2017) ("Congress did not authorize a "rare case" exception. We cannot "alter the balance struck by the statute," not even in "rare cases. ( . . . courts cannot deviate from the procedures "specified by the Code," even when they sincerely "believ[e] that . . . creditors would be better off") (internal quotation marks and citations omitted)).

Section 1127(b), unlike section 363(m) and 364(e), only deals with modifications after confirmation by the debtor, to protect creditors, not deny creditors their appeal rights, and provides no guidance on the power of the court of appeals [to employ prudential estoppel] . . . to fill the interstices of the Code with the same approach. Under *Law v. Siegel*), §§ 1101(2) and 1127 cannot be "borrowed" to balance the equities where there is express direction from Congress on the two types of transactions—363 and 364-that are subject to be "mooted" on appeal together with express detailed direction on the specific terms and character of such transactions required to moot the appeal. *See,* 363 (b) and (c) and 364 (b) and (d). In

light of the specific legislation on mootness on appeal no other extension can be allowed without contravention of Congressional intent.

The Court should also consider that waiver of Rule 3020(e) to allow for consummation to bar an appeal directly contravenes Rule 9006(c) which specifically provides:

> (2) Reduction Not Permitted. The court may not reduce the time for taking action under Rules *** 8002, ***.

Under the admonitions of *Law* because Bankruptcy Rule 9006 expressly prohibits reduction of the 14-day time to appeal under 8002, the Eleventh Circuit's abrogation of the specific Code authorizing an appeal within 14 days under a Judge made prudential mootness legal standard violates expressly applicable bankruptcy procedural rules. The Supreme Court opinions in *Law* and *Czyzewski* say that the mootness standard cannot be

Used to "fill the interstices of the Code." Here there are not interstices to fill because Congress has designated the two types of consummated transfers or credit transactions that may not be appealed absent a pending stay. If all other transactions get the same treatment under equitable mootness absent a pending stay, Congressional intent has been defiled.

## II. BECAUSE SECTIONS 101 AND 901 OF THE ACT, EXPRESSLY MAKE INAPPLICABLE TO CHAPTER 9 363(M), 364(E), 1101.2, AND 1127(B) THE ELEVENTH CIRCUIT'S EXTENSION OF "EQUITABLE MOOTNESS" TO CHAPTER 9 CASES IS EVEN MORE QUESTIONABLE THAN IN CHAPTER 11 CASES AND THIS PETITION SHOULD BE GRANTED SO THE MATTER MAY BE FULLY BRIEFED.

The Bankruptcy Confirmation purported to dismiss as equitably moot Petitioners' Adversary Complaint and Plan objections to the constitutionality of sewer fee collections backing the Swap Warrants and new warrants which refinanced the swap Warrants under "sections 105(a) and 1123(b), Bankruptcy Rule 9019(a)." (Confirmation, Doc. 2248, pp. 20-25)

As this Court stated in *Law v. Siegel*, 571 U.S. 415, 421:

> It is hornbook law that § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code."

In Chapter 1, USCS § 103(g), is a mandate that except as provided in Section 901, Chapter 11 provisions only apply in Chapter 11: "103(g) Except as provided in section 901 of this title, subchapters I, II, and III of Chapter 11 of this title apply only in a case under such chapter." In a "governmental" versus "proprietary" Chapter 9 proceeding no property or assets of the municipality government are sold or transferred, which sale or transfer is the gravamen of "substantial consummation" because governmental assets are owned by the public. The County Sewer system is publicly owned in a governmental, not a proprietary, capacity.

*Jones v. Jefferson Cnty.*, 206 Ala. 13, 16, 89 So. 174, 177 (1921) (with respect to the construction and operation of its sewerage plant ***we hold that the county of Jefferson is acting in a public or governmental capacity). Jefferson County may pledge tax revenues to secure debt obligations or sewer user revenues, if and when collected, to pay warrants, but no property of assets of the County were pledged to repay any of the debt "adjusted" by the Bankruptcy. Congress expressly excluded the concept of substantial consummation and obtaining a stay before debt is issued (which must be post-petition new debt and not refinancing of prepetition debt as in this case) *see, Mem. Opinion from District Court* which states*:*

> A bankruptcy court's equitable power must and can only be exercised within the confines of the Bankruptcy Code." . . . "By their express terms, sections 364(c) [and] (d) apply only to future—*i.e.*, post-petition—extensions of credit. They do not authorize the granting of liens to secure pre-petition loans." (D. Doc. 35, pp. 32-33)

The two concepts underpinning equitable mootness: (1) Substantial consummation and (2) a "stay" of issuance of post-petition debt pending appeal, are both concepts operative only in Chapter 11 cases. *Cf.*, 11 U.S.C. § 1101(2) (defining term), 11 U.S.C. § 1127 (b) (operative provision), 11 USCS § 364(e) (requiring "stay" of authorized of post-petition debt before an appeal to prevent non-appealable issuance), and § 363 (m) (requiring a "stay" before an appeal of the sale of certain described business assets) are inapplicable to Chapter 9. See, 11 U.S.C. §§ 103(f) and (g), and

901(a) (listing statutes incorporated into Chapter 9 of the Code, but omitting § 1101(2), § 1127(b), § 364(e) and § 363(m)). Moreover, the $1.786 Billion loan the Eleventh Circuit found to be substantially consummated was refinancing of pre-petition debt, not new money debt as required by 364 and substantial consummation of the debt refinancing purchased by new investors occurred three days before the plan of adjustment was approved and three days before the waiver of the 14-day automatic stay of Rule 3020 (e) was approved which made it impossible to oppose the automatic 14-day stay before debt was sold making a stay moot. (Cir. Doc. Motion for Rehearing filed 9/7/2018, pp. 18-19. Therefore, even if equitable mootness based to prudential considerations under § 105 (a) using the § 364(e) or 363(m) "unless a stay is requested" by analogy is similar to substantial consummation under the §§ 1101(2)/§ 1127(b) Chapter 11 concepts, these concepts are expressly inapplicable to Chapter 9 under 103(g) (and should not be used here because no municipal property or assets can be sold or pledged under the Alabama Constitution and only "pre-petition" refinancing of the swap warrants was in the Plan of Adjustment not post-petition <u>new money</u> debt).

## III. THE COURT SHOULD GRANT THE WRIT BECAUSE EVEN IF SECTIONS 363, 364 AND 1101/1127 WERE INCLUDED IN CHAPTER 9 UNDER 901 (AND THEY ARE NOT), OR THIS WERE A CHAPTER 11 CASE (AND IT IS NOT), BECAUSE THE PLAN WAS APPROVED THREE DAYS AFTER CONSUMMATION OF THE SALE OF THE PRE-PETITION REFINANCING WARRANTS AND THE APPROVAL OF DEBTOR'S MOTION TO WAIVE THE AUTOMATIC 14 DAY STAY OF RULE 3020(E) THERE COULD BE NO "EQUITABLE MOOTNESS.

The purchase and sale of the $1.786 billion in principal accretion warrants debt occurred three days before the Plan of Confirmation Order and the waiver of the 14-day automatic stay occurred. (see, Appendix F, excerpt from D.Doc. 7-9 Filed 02/10/14, pp. 1-58) Even if Equitable Mootness applies to Chapter 9, because the County Debtor approved substantial consummation of the debt sale on November 19, 2013, and the Warrant Purchase Agreement was executed November 20, 2013, two days before the November 22, 2013, Plan of Adjustment approving the purchase and sale and granting waiver of the automatic 14-day stay of Rule 3020(e), "equitable" basis for protecting the purchasers of the principal accretion warrants, reliance of the authorization of the transaction in the Order approving the Bankruptcy Plan, is missing here. (Id.) The authorization by the Bankruptcy court's confirmation on November 22, 2013 (Doc. 2248, p. 79) three days after the consummation of the sale of the refinancing warrants on November 20, 2013, moots any effect from Petitioners making a request for a Stay before the confirmation order was approved.

To be sure, the Bankruptcy Court's approval of the motion to waive the 14 day automatic stay of Rule 3020(e) on November 22, 2013, could do nothing to change the sale of the $1.786 billion in warrants that had already taken place with knowledge by the purchasers that the Plan approving the sale had not been approved. Because the refinancing Ratepayers seek to appeal occurred *prior to* the confirmation, this case is analogous to *Williams v. Citifinancial Mortg. Co.*, 256 B.R. 885, 897 (B.A.P. 8th Cir. 2001), where the court stated:

> The Chapter 13 case was dismissed prior to the confirmation of a plan; therefore, an appeal, whatever the substance, cannot disturb "the plan,"

Petitioners/Ratepayers only seek to appeal a transaction that occurred prior to the confirmation of the Plan. The issuance of the confirming sale wire on November 19, 2013, made it impossible to stay the Plan confirmation before the sale of warrants occurred. (Appendix F). In all Chapter 11 cases applying substantial consummation as the basis for equitable mootness, the putative appellant creditor had a chance to request a stay before debt sale constituting substantial consummation. Moreover, in two AP cases and many objections to the Disclosure Statement and the Plan Ratepayers sought to enjoin the sale. *See, e.g. Fleet Nat'l Bank v. H&D Entm't, Inc.*, 96 F.3d 532, 540 (1st Cir. 1996); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992); *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996).

Even the 11th circuit cited a supreme court case where the investor knew before the sale that the sale was being challenged. *Wayne v. United Gas Co.*, 300 U.S. 131, 133–35 (denying an attempt to dismiss a bankruptcy appeal as moot due to the sale of the debtor's property in a separate state-court proceeding, because the creditors proceeded in state court "with full knowledge" that the debtor was simultaneously seeking reconsideration of the order dismissing its bankruptcy petition). Here the investor knew that the Plan had not been confirmed and signed the firm purchase agreement anyway. The panel's endorsement of a Judge made "prudential" estoppel rule is in direct conflict with *Law v Siegel* ) because of *Law*'s guidance that Section 364(e)-as the governing law for the facts of this case that is expressly made inapplicable to Chapter 9 by 11 USC § 901-cannot be waived, or disregarded by a Judge made rule to " balance the equities."

## IV. THE COURT SHOULD GRANT THE WRIT BECAUSE THE ORCHESTRATION OF THE EQUITABLE MOOTNESS DEFENSE BY THE BANKRUPTCY JUDGE TO DENY A HEARING ON LOSS OF VOTING RIGHTS AND LOSS THE VALUE OF PROPERTY EQUAL TO AN AGGREGATE $1.630 BILLION OF WASTED WARRANT PROCEEDS IS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

To deny an appeal to Ratepayers whose real properties now have assessment lien mortgages which were increased to refinance prepetition debt by the County without voter approval as required by the Alabama Constitution enforceable by an Article III Judge, is a violation of the Fourteenth Amendment.

Where there is a specific bankruptcy law provision which governs, the District Court is not allowed any wiggle room to use Judge made "prudential estoppel" law to avoid a hearing on the merits of Ratepayers claims. Here there are no good faith purchasers of the warrants who relied on the confirmation order and the lack of stay of the confirmations order which did not exist such that it would be "equitable" to not allow an appeal. By the time the Plan was approved it was too late to request a stay. The order waiving the 14-day automatic stay may have waived a stay of some minor components of the Plan, but those components did not include any claims of the Petitioners related to the enforceability of the collection of $1.6 billion.

## V. THIS PLAN CONFIRMATION THEREFORE RESULTS IN A LOSS OF STATE CONSTITUTIONAL RIGHTS IN VIOLATION OF THE TENTH AMENDMENT WITHOUT A HEARING USING THE JUDICIAL POWER OF AN ARTICLE III JUDGE.

As stated by the third Circuit in *One2One Communs., LLC v. Quad/Graphics, Inc.*, 805 F.3d 428 (3d Cir. 2015):

> "Equitable mootness drastically weakens that supervisory authority, and therefore threatens a far greater "impermissibl[e] intru[sion] on the province of the judiciary," Schor, 478 U.S. at 851-52, than the Court confronted in Northern Pipeline, Stern, or Wellness International. The doctrine not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very

> non-Article III tribunal whose decision is at issue. Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted."

## VI. EQUITABLE MOOTNESS MUST THEREFORE BE REVIEWED TO CURTAIL ITS USE TO ALLOW THE VIOLATION OF TENTH AMENDMENT RESERVATION OF POWERS TO THE STATES AND ITS PEOPLE.

### A. It Is Ironic That the District Court of the Northern District of Alabama Had Already Ruled Before the Bankruptcy Court Took Away the State's Power Over Ratemaking That a District Court Judge Could Not Even Appoint a Receiver to Enforce Sewer Rates.

This appeal presents a classic clash of federal power and state sovereignty –which is our "nation's 'oldest question of constitutional law.'" *Bank of New York Mellon v. Jefferson Cnty., Ala.*, No. 08-CV-1703-RDP, 2009 U.S. D. LEXIS 122093, *73 (N.D. Ala. June 12, 2009).

### B. Review of Deprivation of Tenth Amendment Constitutional Rights Is a Required Judicial Power of the Article III District Court

The District Court Opinion (D. Doc. 35, pp. 38-42) notes that a decision, here Equitable Mootness, which enjoins or deprives individuals of Constitution-

al, must be reviewed by Article III court, has long be the Rule of this Supreme Court.[7]

This Court has long endorsed the principle that equitable remedies, such as the instant injunction against an appeal, must slow down a little bit where the public interest is involved. The District Court ruled:

> This court finds that "equitable mootness" is not applicable in a Chapter 9 appeal challenging terms of the Confirmation Order as unconstitutional although all remedies may not be available to the appellants.***
>
> "The bankruptcy of a public entity," such as the County, "is different from that of a private person or concern. Unlike any other chapter of the Bankruptcy Code, Chapter 9 places federal law in juxtaposition to the rights of states to create and govern their own subdivisions." *In re City of Colorado Springs Spring Creek Gen. Imp. D.*, 177 B.R. 684, 693 (Bankr. D. Colo. 1995). This difference between Chapter 9 and other bankruptcies requires courts to recognize that Congress enacted Chapter 9 in a "constitutional balance" that contemplates "the delicacies of the state-federal relationship." *In re City of Stockton, Cal.*, 478 B.R. 8, 23

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[7] *See, e.g. Yakus v. United States,* 321 U.S. 414, 440-41, 64 S. Ct. 660, 675 (1944)*; Virginian Ry. Co. v. System Federation,* 300 U.S. 515, 552, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest."

(Bankr. E.D. Cal. 2012). Prudential concerns, created in response to complex, but private, corporate reorganizations, cannot insulate a bankruptcy court's decision on constitutional issues involving public governmental entities.

The prudential concerns of a Chapter 9 plan are different from the prudential concerns of a Chapter 11 plan. "[T]wo policies underlying Chapter 11" are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). The policy underlying Chapter 9 "is not future profit, but rather continued provision of public services." *In re Mount Carbon Metro. D.*, 242 B.R. 18, 34-35 (Bankr. D. Colo. 1999). These major differences in the purposes of Chapter 9 and Chapter 11 reorganizations alter analysis of whether equitable considerations should factor into this court's decision to hear the Ratepayers' appeal. *Cf. In Re City of Desert Hot Springs*, 339 F.3d 782, 789 (9th Cir. 2003) ("[S]ignificant differences between a chapter 11 bankruptcy and a chapter 9 bankruptcy . . . change the analysis of the question of finality. . . . "). The County asserts that the "equitable-mootness doctrine exists to promote finality," (Doc. 5 at 64), but it does not acknowledge that the equitable mootness doctrine requires a weighing of "finality and good faith reliance" against "competing interests that underlie the right of a party

> to seek review of a bankruptcy court order adversely affecting him," *see In re Club*, 956 F.2d at 1069. In the case of a Chapter 9 reorganization plan—finality and reliance may be required to yield to the Constitution and the interest of the public in the provision of governmental services.
>
> *** The court notes that the County once argued that a predecessor to this case presented "knotty state-law questions," including "whether a county can validly alienate its ratemaking power in an ordinary contract, without some form of legislative authorization if not a vote of the citizens." See, *Bank of New York Mellon v. Jefferson County*, Case No. 08-CV-1703-RDP, doc. 77 at 10-12 (N.D. Ala. Mar. 23, 2009)(Jefferson County's Motion to Stay). *** *See In Re Pacific Lumber Co.*, 584 F.3d 229, 243 (5th Cir. 2009) (declining to dismiss appeal as equitably moot and noting that "[f]ederal courts should proceed with caution before declining appellate review of the adjudication of [constitutional] rights under a judge-created abstention doctrine."). *Bennett v. Jefferson County*, 518 B.R. 613, 636-637.

The bankruptcy judge here tactically stayed an adversary claim of deprivation of constitutional rights which requested a stay of the confirmation of the sale of the new warrants 4 months before the Plan was filed with the Court without rendering a final judgment subject to appeal under FRCP.

The dismissals of Ratepayers' AP lawsuits without a hearing in the hastily advanced Confirmation Order is wrong. *Crossley v. Lieberman* (E.D. Pa. July 13, 1988), 90 BR 682, aff'd, (3d Cir. Pa. Feb. 16, 1989), 868 F.2d 566. What happened here is the bankruptcy judge buttonholed, an adversary claiming violation of constitutional rights under 101(5)(B) and dispensed with it 3 days after a hastily marketed refinancing at junk bond rates. Ratepayers did not request a stay of the sale of the refinancing warrants before the confirmation they requested an injunction against the sale. The many requests for injunctive relief for the single transaction of interest to Ratepayers-the refinancing warrants-were much stronger and focused than a simple request for a stay of the entire bankruptcy. Ratepayers pursued with diligence all available remedies to obtain a stay of execution of the objectionable part of the order dealing with the refinancing. *PPUC Pa. PUC v. Gangi*, 874 F.3d 33, 37 (1st Cir. 2017).

## VII. THE COURT SHOULD REVIEW THIS CASE TO PROVIDE GUIDANCE ON THE STANDARD OF REVIEW FOR EQUITABLE MOOTNESS CASES TO RECONCILE THE SPLIT OF AUTHORITY AMONG VARIOUS CIRCUIT COURTS

Here, the Constitutional rights of creditor/citizens who are subject to having their water cut off and whose real properties are subject to assessment type liens to repay the loans, is an intense fact-finding exercise for which deference should be given to the findings of the District Court with an abuse of discretion Standard of Review. The issue of resolving the Standard of Review in Equitable Mootness cases is of great national importance and because the

doctrine violates Rules 3020(e) and 8002(a)(1) which set forth the procedural basis and timing for filing an appeal of a Bankruptcy confirmation order.

## VIII. THE CERTIORARI REVIEW IS EXCEPTIONALLY IMPORTANT TO RECONSIDER THE 11TH CIRCUIT RULING THAT IN LOOKING AT THE APPLICABILITY OF PRUDENTIAL OR EQUITABLE OR PRACTICAL MOOTNESS THE DISTRICT COURT'S STANDARD OF REVIEW IS DE NOVO RATHER THAN ABUSE OF DISCRETION WHICH IS AGAINST THE WEIGHT OF CIRCUIT AUTHORITY.[8]

This Court should look at the reasons for the split in the circuits on the legal standard of review as applied to the facts of this case which include:

The 1st, 2nd, 3rd Circuit and 10th Circuits review Equitable Mootness for abuse of discretion. *PPUC Pa. PUC v. Gangi,* 874 F.3d 33, 37 ("We review *** for an abuse of discretion. *Fleet Nat'l Bank v. H&D Entm't, Inc.*, 96 F.3d 532, 540 (1st Cir. 1996) (citation omitted). Any subsidiary findings of fact are reviewed for clear error, and holdings of law are reviewed de novo.; *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992). ("We join those circuits that apply an abuse-of-discretion standard, finding it significant that we are reviewing the district court's own exercise of discretion as to whether it is practicable to grant relief."); "We review

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[8] This Court has consistently ruled that the Standard of Review for cases involving property rights should be consistent among the different circuits. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 426 (2001) *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 280 (1989).

an application of equitable mootness for abuse of discretion, *In re SemCrude, L.P.,* 728 F.3d 314, 320 (3d Cir. 2013), accepting the "findings of fact unless they are completely devoid of a credible evidentiary basis or bear no rational relationship to the supporting data." *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 182 (3d Cir. 2001); *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997). ("Because the doctrine of prudential mootness is concerned with the court's discretion to exercise its power to provide relief . . . , we review the district court's determination of prudential mootness for an abuse of discretion.") (citation omitted). Given the similarities between these doctrines, we adopt the abuse-of-discretion standard of review for determinations of equitable mootness in bankruptcy cases).

The 4th Circuit is still considering its position. "This court has declined to decide whether we review an equitable mootness determination de novo or for abuse of discretion. *See, In re U.S. Airways Grp., Inc.*, 369 F.3d 806, 809 n.* (4th Cir. 2004). We need not resolve that question here either, because we would reverse the district court's dismissal of BLC's appeal under either standard. *Bate Land Co. LP v. Bate Land & Timber LLC (Bate Land & Timber LLC)*, 877 F.3d 188, 195 (4th Cir. 2017); In addition, the Ninth Circuit has not determined the appropriate standard of review. *See, In re Consolidated Water Utilities, Inc.*, 217 B.R. 588, 590 (B.A.P. 9th Cir. 1998). Because the Court's analysis below does not turn on the applicable standard of review, the Court declines to resolve the parties' dispute about the appropriate standard. The Court would reach the same conclusions applying either the de novo or the

abuse of discretion standard. Lien. He did not. *In re Ferrante*, 2018 U.S. D. LEXIS 41385.

The 5th, 6th, and 11th Circuits review equitable mootness de novo. "Equitable mootness is a question of law, and we review its grant by the district court de novo." *In re GWC PCS 1*, 230 F.3d at 799-800 (5th Cir. 2000); *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946-47 (6th Cir. 2008) (reviewing determination of equitable mootness de novo) this Court has reviewed determinations of equitable mootness de novo; "Determinations of law made by either the bankruptcy court or the district court are reviewed by this court de novo. The bankruptcy court's factual determinations are subject to review under the clearly erroneous standard. A district court is not authorized to make independent factual findings. *In re Sublett*, 895 F.2d 1381, 1383-84 (11th Cir. 1990).

The 8th Circuit takes a practical approach not yet convinced that "equitable Mootness" is a completely viable concept. For example, in *Williams v. Citifinancial Mortg. Co. (In re Williams)*, 256 B.R. 885, 897 (B.A.P. 8th Cir. 2001), the 8th Circuit bankruptcy panel comprised of Article I Judges stated::

> If we view the doctrine broadly, applying it to all appeals in which there has been a "comprehensive change of circumstances" that makes granting the relief requested by the appellant inequitable, the instant appeal falls far short of warranting the equitable mootness doctrine's application. As stated above, the doctrine of equitable mootness focuses on equitable or prudential concerns

> rather than the impossibility of granting relief. *In re Roberts Farms, Inc.*, 652 F.2d at 798. Therefore, one of the first questions that must be asked before any equitable doctrine can be applied is "whether he who seeks equity has done equity." *Smith v. World Insurance Co.*, 38 F.3d 1456, 1462 (8th Cir. 1994) (citing *Prow v. Medtronic, Inc.*, 770 F.2d 117, 122 (8th Cir. 1985)). This is part of the doctrine of "unclean hands," *Id.* at 121, and in this case, we believe that the Appellee, IMC, has failed to "do equity," or in other words, has unclean hands.

*See also*, *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); *Litwin v. United States*, 983 F.2d 997, 999 (10th Cir. 1993). ("The trial court's findings of fact will be upheld unless, after review, the appellate court is firmly convinced a mistake has been made."); *Teamsters Local 348 Health & Welfare Fund v. Kohn Beverage Co.,* 749 F.2d 315, 319 (6th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) ("The constituent elements of estoppel constitute questions of fact, and the district court's findings on these matters must be upheld unless clearly erroneous."); *Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1130 (11th Cir 2009) ("We owe the district court's credibility determinations deference.").

## CONCLUSION

Certiorari is warranted for the reasons set forth above.

Respectfully submitted,

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