No.

IN THE

Supreme Court of the United States

BRIAN TUTTLE,
Petitioner,

v.

ALLIED NEVADA, ET AL.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the 3rd Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a judge made doctrine known as "equitable mootness". That doctrine allows courts reviewing bankruptcy court orders to refuse to hear appeals from final bankruptcy court orders, even when such appeals are explicitly authorized by the Bankruptcy Code. Both the district court and the court of appeals in this case invoked equitable mootness to refuse to review several non-Article III bankruptcy judge's final decisions, one of which approved a crammed down bankruptcy plan that extinguished dissenting shareholders holder's equity security claims.

This Court has never reviewed the legitimacy of the equitable mootness doctrine. In the absence of This Court's review, not only has the judge made abstention doctrine 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 final decisions of non-Article III bankruptcy courts on a determination of "equitable mootness," and, if that doctrine exists, (a) what is the appropriate standard of review, and (b) whether it can invoked when relief is available that would not scramble a bankruptcy plan or hurt third parties.

RULE 14.1 (b) STATEMENT

All parties appear in caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF CONTENTS-cont'd

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES-cont'd

Page(s)

TABLE OF AUTHORITIES-cont'd

Page(s)

Other Materials

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unreported. The opinions of the District Court (App. B, C) are unreported.

JURISDICTION

The Court of appeals entered a judgment on 3/27/2018, and denied rehearing on 5/9/2018. 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 Title 11 and 28 of the U.S. Code are set forth in Appendix G.

STATEMENT

"Equitable mootness" is a doctrine developed by appellate courts that provides under certain circumstances for the dismissal of appeals from bankruptcy court orders. Unlike conventional mootness doctrines, equitable mootness is not concerned with a court's ability to grant relief but rather with protecting reliance interests created by the implementation of a bankruptcy plan. The "judicially created" doctrine "is not technically 'mootness'- constitutional or otherwise- but instead 'a prudential doctrine that protects the need for

finality in bankruptcy proceedings and allows third parties to rely on that finality' by 'prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract.'" In re *City of Detroit*, 838 F.3d 792,798 (6th Cir. 2016). Generally, under equitable mootness an Article III appellate court declines to consider an appeal from an Article I bankruptcy court on merits in light of the consummation of transactions authorized by the Article I bankruptcy court. In re *SW Boston Hotel Venture*, LLC, 748 F.3d 393,402 (1st Cir. 2014). In dismissing appeals, even where relief is available, the guiding principles of an appellate court's "equitable toolbox" deem certain investor's interests "more worthy than others" so those investors may make financial decisions "without fear that an appellate court will wipe out or interfere with their deal." In re *TribuneMedia Co.,* 799 F.3d 272 (3d Cir. 2015). In sum, the policy is based on the prudential concern that it is inequitable to potentially harm investors relying on a confirmed bankruptcy plan. *Id.*

But appellate courts have never analyzed the source of their authority to refuse to hear an appeal on equitable mootness grounds. In re *Semcrude, L.P.*, 728 F.3d 314 (3d Cir. 2013). Simply put, there is none. In re *One2One*, 805 F.3d 428 (Krause,J.,concurring) (3d Cir. 2015). Equitable Mootness is not found in any statute, Bankruptcy Code, Supreme Court holding, or established doctrine of abstention, and a series of recent Supreme

Court decisions make clear the doctrine of equitable mootness cannot survive constitutional scrutiny. *Id.* In light of a federal court's obligation to hear cases within their jurisdiction, the policy's shaky footing raises serious constitutional and separation of powers concerns by placing "far too much power in the hands of bankruptcy judges". In re *Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring).

In the absence of a textual foundation, the doctrine's development is inconsistent among the circuits with appellate courts split on everything from: a) the appropriate standard of review, b) which party bears the burden of proof, and even c) the name of the doctrine. Although in recent years, courts have become increasingly critical of equitable mootness, they have repeatedly declined to directly address challenges to its constitutionality, citing the need for either, a binding Supreme Court precedent, or review *en banc* which they have repeatedly denied.[1] "[I]ntervention by the U.S. Supreme Court is needed in order to address the validity

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[1] To date the Supreme Court has declined to address equitable mootness at least four times. *See, e.g.,* In re *City of Detroit*, 838 F. 3d 792 (6th Cir.), cert denied, 2017 WL 1365666 (U.S.2017); In re *Tribune Media Co.*, F3d 272 (3rd Cir.2015), cert denied, 136 S. Ct. 1459 (2016); In re *Charter Comm'ns*, Inc., 691 F.3d 476 (2nd Cir. 2012), cert denied, 133 S. Ct. 2021 (2013); In re *GWI PSC Inc.*, et al, 230 F.3d 788 (5th Cir. 2000), cert denied.

of the doctrine and (if valid) its proper scope." Paul Avron *Equitable Mootness: Is It Time for the Supreme Court to Weigh In?* American Bankruptcy Journal (March 2017).

A. The Allied Nevada Bankruptcy Proceedings

This case arises out of a Chapter 11 restructuring voluntarily filed by Allied Nevada Gold Corp ("Allied Nevada"), a publicly owned U.S.-based gold and silver producer. At the time of the voluntarily filed bankruptcy petition, Allied Nevada had reported assets of over$1.4 billion dollars with approximately $700 million in shareholder equity. Petitioner, Brian Tuttle ("Mr. Tuttle), is a holder of now-cancelled common stock in Allied Nevada. Mr. Tuttle's shares were extinguished, and his life savings wiped out, by a bankruptcy plan he, and the majority of shareholders, voted against.

In the years predating bankruptcy, Allied Nevada raised over one billion dollars from the public with the ostensible goal of turning their core asset- the Hycroft Mine- into a world class gold and silver producer. See *LBP Holdings v. Allied Nevada Cv-14-508513-CP* Superior Court (Ontario 2016). Purportedly, the capital Allied Nevada raised was to finance expansion of the Hycroft mine, so the miner could access vast gold and silver reserves contained in sulfide ore bodies that require a mill for extraction. *Id.* Approximately $600 million, of the billion dollars raised, was taken in via equity placements- with the last equity offering closing just three months prior to the voluntarily filed bankruptcy petition- and the other, $404 million, from a 2012 bought deal offering of

8.75% senior unsecured notes. *Id.* Pursuant to the Chapter 11 restructuring, approximately $15 million of the billion dollars raised was recovered.

"On the surface, the story of Allied Nevada appears to reflect the classic narrative of a Company in Chapter 11... This, however, is not a classic tale." Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. Ill. L. Rev. 1487, 1489 (2017). As a general overview, Allied Nevada's restructuring transferred 99% of the new equity in the restructured miner (now operating as Hycoft Mining Corp) to a group of six lenders, ("DIP Lenders", "Exit Facility Lenders") that agreed to a $78 million dollar second priority lien debtor in possession facility.[2] App. A at 3.

The lynch pin, to Allied Nevada's plan was a $505,956,000.00 net non-cash adjustment. In determining the amount of the write-downs, Allied Nevada relied on internal data and assumptions that are considered highly susceptible to bias and manipulation. *Id.* at 1493. The $505,956,000.00 adjustment was not in accordance with

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[2] Two of the DIP lenders settled unrelated SEC cases within months of the bankruptcy proceedings. See:

https://www.sec.gov/news/pressrelease/2014-195.html; *https://www.sec.gov/news/pressrelease/2015-237.html*.

Codification Topic 360 of GAAP as under the provisions of paragraph 360-10- 35-17, an adjustment is recognized only when the carrying amount of a long-lived asset is not recoverable and exceeds fair value. *Id.* at 1494. In addition to not being in accordance with GAAP accounting standards, the $505,956,000.00 was in violation of Section 409 of the Sarbanes Oxley Act.[3]

In support of their bankruptcy plan, Allied Nevada submitted two valuations- both performed by Moelis and Company ("Moelis")- to the bankruptcy court. The Moelis evaluations relied solely on Allied Nevada's financial

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[3] The $505,956,000.00 adjustment was never disclosed in Allied Nevada's 10k preliminary report for Q4 2014; which listed assets in excess of 1.4 billion dollars, and a reported shareholder equity of $707,469,000.00 as of December 31st 2014. Pursuant to the Sarbanes Oxley Act Allied Nevada had 4 days to notify the public of any material impairments -which they failed to do. Section 409 of the Sarbanes Oxley Act obligates public companies to disclose "on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer...as the Commission determines, by rule, is necessary or useful in the protection of investors and in the public interest." Pursuant to the Sarbanes Oxley Act public companies must report certain material corporate events on a more current basis. The SEC requires Companies file an 8-K report within four business days in the event of a material impairments (see *Item 2.06*).

statements and were "riddled with assumptions, qualifications, and disclaimers." *Id.* at 1494. In April 2015, Moelis first estimated Allied Nevada's value to be between $360 million and $510 million, [Bankr. Ct. Dkt. No. 252, ex. E], a value significantly lower than the $1.4 billion Allied Nevada had reported to regulators in their preliminary 2014 report and as part of the December 2014 issuance of new public stock. *Id.* at 1502 (citing Allied Nevada Gold Corp., Registration Statement (Form S-3) (Nov. 19, 2014)). Allied Nevada's initial Disclosure Statement exhibited the first Moelis evaluation, and outlined the plan treatment, with an estimated recovery for holders of allowed claims, and holders of allowed interests. The estimated recovery for all holders, other than existing equity interests and note claims, was 100%. [Bankr. Ct. Dkt. No. 252, at 4.]

Months later, Allied Nevada sought to revise the plan. As a first step, Allied Nevada commissioned a newvaluation from Moelis, which- just weeks after its original valuation- reduced its' valuation of Allied Nevada from between $360 million - $510 million to between $200 - $300 million. [Bankr. Ct. Dkt. No. 933, ex. F.][4] Allied Nevada then re-negotiated with its creditors. These negotiations resulted in a settlement and an amended

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[4] The Amended Disclosure Statement omitted federal income tax carry-overs estimated to be worth approximately $177 million in the original Disclosure statement. [Bkr. Dkt. No. 252 at 59.]

restructuring plan. App. A at 4. Under the amended plan, holders of general unsecured claims- originally valued at 100% in Allied Nevada's initial Disclosure Statement- saw their estimated recovery fall to 3.3% - 3.8%. [Bankr. Ct. Dkt. No. 252 at 4.] [Bkr. Dkt. No. 933 at 4.] The change to the general unsecured claims holders estimated recovery was due to, not just the lower Moelis evaluation, but also, the general unsecured claims being gerrymandered with note claims.

The amended plan saw DIP facility claim holders recovery of the new equity go from 25% to over 90%. What was lost in Note Claims, the DIP lenders made up via the issuance of convertible notes under an Exit Facility, which exchanged DIP claims for new equity at the 2nd Moelis evaluation, resulting in the six DIP lenders taking home 99% of the reorganized equity on a fully diluted basis. See *In the Matter of He Securities Legislation Ontario* paragraph 21 (May 27, 2016). Shareholders' rights to equity securities were cancelled under the plan, and in place, they were gifted a pro rata share of new warrants- an illusory recovery which allow holders to purchase stock in the new company. App. A at 4.

B. Mr. Tuttle's Examiner Motion

Citing 11 U.S. Code §1104 Mr. Tuttle moved the bankruptcy court to appoint an examiner to investigate, amongst other things: the December 2014 public equity offering, Allied Nevada's financial statements and impairments, insider trading, the mismanagement of

affairs, and fraudulent conveyance. [Bkr. Dkt. No. 819.] After a hearing on the motion, the bankruptcy court denied Mr. Tuttle's request to appoint an Examiner, finding an Examiner was "not appropriate", in part, because the Creditor's Committee had undertaken an investigation. [See September 11th, 2015 Hearing Transcript at 90.] No evidence of the alleged investigation was ever entered into evidence and no witness with knowledge of such an investigation testified. Mr. Tuttle sought reconsideration. [Bkr. Dkt. No. 1110.]

C. Objections to Allied Nevada's Bankruptcy Plan

When it came time to put Allied Nevada's bankruptcy plan to a vote, shareholders, by majority, rejected the restructuring. [Bkr. Dkt. No. 1107 ex. A.] Mr. Tuttle represented himself *pro se* and objected to the amended plan in filings, and at the hearing on the plan's confirmation. In a brief supporting Mr. Tuttle's, and other *pro se* party's objections to the plan, Mr. Tuttle reiterated colorable claims made in his examiner motion and moved to prosecute for equitable disallowance. Mr. Tuttle observed that Moelis's valuation relied "entirely on [Allied Nevada's] own financial reports," which, he argued, were unreliable because they had failed to comply with the Sarbanes-Oxley Act or follow Generally Accepted Accounting Principles. [Bkr. Dkt. 1114 at 3–9.] Mr. Tuttle also questioned the legitimacy of the asset impairment claimed on Allied Nevada's financial reports. [Bkr. Dkt.1114 at 6.] At the hearing, Mr. Tuttle entered into evidence a 253 page technical report of M3

Engineering and Technology which indicated the Hycroft mill project had "an after-tax Net Present Value of $1.81 billion at a 5% discount rate". [10/6/2015 Confirmation transcript at 119.] Mr. Tuttle argued the multi-million dollar M3 Engineering and Technology technical report was a better representation than the Moelis evaluations and the bankruptcy plan was proposed in bad faith.[5] The bankruptcy court disagreed, and confirmed the crammed down plan over the objections of Mr. Tuttle and other equity security holders on October 8th, 2015. App. A at 6. The amended plan became effective twelve days. App. A

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[5] In addition to his arguments at the hearing, Mr. Tuttle filed several *pro se* motions with the bankruptcy court. These included, among others, a motion for standing to prosecute claims of equitable disallowance, a motion for reconsideration of the confirmation order, a motion to take depositions upon written examination and a motion to compel discovery. After the bankruptcy court advised Mr. Tuttle they would not hear his Motion to Prosecute for Equitable Disallowance- scheduled as a contested matter for that hearing- or 2nd Examiner motion, Mr. Tuttle orally moved to stay the confirmation hearing till contested matters were resolved. The bankruptcy court denied the oral motion to stay. Later the bankruptcy court denied all of Mr. Tuttle's outstanding motions in a three-page order in January 2016- finding the confirmation of Allied Nevada's restructuring rendered contested matters moot. [Bkr. Dkt. No. 1373 (listing and denying motions filed by Tuttle).]

at 10-11.

D. Appeals to the District Court and Third Circuit

Mr. Tuttle, and other *pro se* parties, appealed the bankruptcy court's orders to the District Court for the District of Delaware, and Mr. Tuttle moved the bankruptcy court for a stay pending appeal. See ["Notice of Appeal" Bkr. Dkt.1163] ["Notice of Appeal" Bkr. Dkt.1176] ["Motion for Stay Pending Appeal" Bkr. Dkt.1172. filed 10/21/2015].[6] Allied Nevada was served the notice of appeal, as was the Ad Hoc Committee of the 6 DIP lenders. See "Certificate of Service" [Bkr. Dkt.1176, Bkr. Dkt.1172.] A day after, Mr. Tuttle's notice of appeal and motion to stay pending appeal was docketed, Allied Nevada consummated the restructuring. As a result, Mr. Tuttle's common stock became worthless, and his appeal equitably moot.

The appeals, one which included other *pro se* appellants, primarily challenged the bankruptcy court's October 8, 2015, confirmation order and denial of Mr. Tuttle's examiner motion. [1:15-969, Dkt. No. 29 at 1.] The appeals were docketed at 1:15-CV-946-SLR and 1:15-CV-949-SLR. The district court dismissed both appeals as equitably moot. [15-946, Dkt. No. 29.] The *pro se* parties appealed that order to the Third Circuit, and the Court docketed two separate appeals. [Notice of Appeal, 16-3745; Notice of Appeal, 16-3746.] Mr. Tuttle also appealed the bankruptcy court's January 2016 order denying his various motions, including a motion for reconsideration of

the confirmation order and motion to stay the bankruptcy confirmation. App. B at 1 [Bkr. Dkt. No. 1373]. The district court again, dismissed Mr. Tuttle's additional claims as equitably moot. A third appeal to the Third Circuit followed. [Notice of Appeal, Oct. 3, 2017, 17-1513].

In dismissing the appeals as equitably moot the district court, cited Mr. Tuttle's inability to obtain a stay as a critical factor. App. B at 17. The district court noted that Allied Nevada substantially consummated the restructuring on October 22nd 2015- just two weeks after the confirmation hearing. App. B at 16. Additionally, the district court found, the relief Mr. Tuttle requested "would adversely third parties that acted in reliance on the amended plan's confirmation"- including the DIP lenders that crafted the plan; and shareholders, whom, by majority, rejected it. App. B at 19.

Turning to the three consolidated appeals filed with the Third Circuit, Mr. Tuttle reiterated arguments previously made to the District Court that: equitable mootness is unconstitutional and inapplicable to Mr. Tuttle's requests for relief. [17-1513 "Opening Brief".] In addition to arguments that recent Supreme Court rulings render equitable mootness no longer a viable doctrine, Mr. Tuttle cited precedential rulings of the Fifth and Ninth circuits, contending the DIP lenders were not the kind of third parties equitable mootness was designed to protect, and that partial relief should save his appeal from a dismissal. [17-1513 "Opening Brief".] Mr. Tuttle contended equitable mootness was used as sword of

sophisticated investors rather than a shield to protect the innocent. [16-3745, 16-3746 "Opening Brief"]. Mr. Tuttle argued that resolving the appeals, on their merits, would actually benefit third parties: particularly, shareholders whose stock was extinguished by a plan they voted against, and minority holders of unsecured debt impaired to 4 cents on the dollar. [16-3745, 16-3746 "Opening Brief"].

The Third Circuit employed an abuse of discretion standard of review and affirmed the district court's equitably moot dismissals.[6] App. A at 13. In the panel's opinion the court offered no consideration to Mr. Tuttle's arguments equitable mootness is unconstitutional and superseded by recent Supreme Court rulings. Rather, after acknowledging: "[a]ppellants devoted much of their briefing to the argument that equitable mootness is unconstitutional", the panel succinctly concluded:

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[6] The Third Circuit's opinion finding Mr. Tuttle never filed a motion for stay is a critical error. App. A at 5 ("Importantly, none of the Appellants filed a motion to stay."). Mr. Tuttle twice motioned the bankruptcy court for a stay, and one of the appeals, dismissed as equitably moot, sought relief from the bankruptcy court's denial of those motions. See In re *Allied Nevada Bankr. D.Del* 15-10503 "*Motion to Stay Pending Appeal*" -filed 10/21/2015 [Bkr. Dkt.1172]; See *also* In re *Allied Nevada D.Del* 16-058 (SLR): "*Statement of Issues to be Presented on Appeal*". [Bkr. Dkt.1399.]

"Continental controls here and will continue to control unless and until we reconsider it en banc, or the Supreme Court takes up the issue, which it has declined to do despite recent entreaties." App. A at 8 (citations omitted)].

REASONS FOR GRANTING THE PETITION

Supreme Court review is needed to interpret fundamental and constitutional rights, to curb the unbound development of depriving parties in bankruptcy cases appellate review expressly authorized by statute. This petition- the third request to review equitable mootness in four years- provides a unique vehicle to do so. Unlike, the creditors in *Tribune,* or the pensioners in *Detroit*, Mr. Tuttle is in the majority of his voting class, and had his rights to property cancelled- not impaired. Case after case, fundamental rights of parties, like Mr. Tuttle, are disregarded so beneficiaries of questionable bankruptcy plans- including, as here, sophisticated investors who pressed the limits of bankruptcy law in a cram down reorganization- will not have the terms of their "deal" (whether lawful or not) challenged on appeal.

I. Equitable Mootness Undercuts the Constitutional Rights of Litigants as it Essentially Permits a Case to Go Unheard Before An Article III Court

A. It is well founded that the power to adjudicate private rights must be vested within an Article III court. *N. Pipeline Contr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 77 (1982). The constitutionality of Congress's delegation of bankruptcy matters to bankruptcy courts

under the Bankruptcy Code depends on the availability of Article III appellate review. *Id.* 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). Equitable mootness directly undermines this broad appellate scheme that ensures the constitutionality of the bankruptcy-court system. In re *One2One*, 805 F.3d at 445 ("Equitable mootness drastically weakens that supervisory authority, and therefore threatens a far greater 'impermissibl[e] intru[sion] on the province of the judiciary.'") (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851–52 (1986)).

Equitable mootness is a judicially created doctrine invoked by courts acting in their capacity as appellate courts. In re *Semcrude*, L.P.728 F.3d 314, 316 (3d Cir. 2013). This doctrine is wholly separate from the much more thoroughly litigated doctrine of constitutional mootness, which requires the exercise of judicial power to be used only when a case or controversy exists. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). In essence, constitutional mootness comes into play when granting relief becomes impossible. In re *Cont'l Airlines*, 91 F. 3d 553,558 (3d Cir. 1996) (citing Church of Scientology v.

United States, 506 U.S. 9,12 (1992). Equitable mootness on the contrary, is invoked when granting relief can still be done, but the court refuses to do so because it would be inequitable. In re *Cont'l Airlines,* at 558-59.

The doctrine has come into play in large part due to bankruptcy's unique process. Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, bankruptcy courts were labeled as units of the district courts. 28 U.S.C. § 151 (2000). District courts retain exclusive jurisdiction over bankruptcy cases, but are permitted to refer those cases to the bankruptcy court in order to lighten the caseload of the judges within the district. 28 U.S.C. § 157(a) (2000). Congress enacted a comprehensive system of appellate review in order to ensure that the bankruptcy-court system complied with the Constitution. Congress's appellate scheme arises out of *Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50, (1982). Before *Northern Pipelines*, Congress had given bankruptcy judges almost unlimited power to decide bankruptcy cases and allowed the chief judge of each circuit to create appellate panels of bankruptcy judges. In *Northern Pipeline*, this Court held that this practice was unconstitutional because it "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Article III district court, and ha[d] vested those attributes in a non-Article III adjunct," *id.* at 87, and "threaten[ed] to circumvent the "clear institutional protections" for judicial independence enshrined in the Constitution, *id.* at 60.

In response to *Northern Pipelines*, Congress created two levels of broad appellate review, giving district courts "jurisdiction to hear appeals . . . from final judgments, orders, and decrees" from bankruptcy courts, 28 U.S.C.§ 158(a)(1), and "courts of appeals . . . jurisdiction of appeals from all final decisions, judgments, orders and decrees" entered by the district courts in bankruptcy cases, *id.* § 158(d)(1). Bankruptcy judges may only hear and determine cases under title 11 and enter appropriate orders and judgments that are "*subject to review* under section 158 of this title." Section 157 (b)(1) (emphasis added). Indeed This Court has always assumed that, "if the bankruptcy 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). This structure ensures that the Constitution's "clear institutional protections" of judicial independence would be available whenever constitutionally required in bankruptcy cases. See H.R. Rep. No. 98–882 (1984), *reprinted in* 1984 U.S.C.C.A.N. 576.

B. Article III Appellate Courts must retain supervising authority over Article I bankruptcy courts. The necessity of preserving Article III review of bankruptcy court orders is heightened by the nature of the bankruptcy-plan confirmation process. Confirmation orders frequently resolve fiercely contested private-right claims which raise significant legal questions and involve large sums of money. *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33,55 (1989). Congress was aware of

these Article III concerns when it enacted (and amended) the current framework of appeals in bankruptcy cases. Indeed, many of these provisions discussed above were enacted in 1984 in the aftermath of *Northern Pipelines* 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 Pipelines*.

In recent years, this Court has continued to emphasize the importance of these protections. In *Stern* v. *Marshall*, 564 U.S. 462 (2011), This Court held that bankruptcy courts are prohibited by the Constitution from entering final judgments on state law claims. *Id.* at 478–82. Equitable mootness, insulating bankruptcy court orders confirming a potentially deficient plan from appellate review, is particularly troubling since a creditor has no other alternative forum in which to pursue their claim against a debtor. After all, most creditors do not truly consent to bankruptcy court adjudication in the first place. See *Stern*, 131 S.Ct. at 2614 (second alteration).

Again in *Wellness Int'l* This Court reaffirmed the supervisory relationship between Article I bankruptcy courts and Article III appellate courts in *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1943–1944 (2015). Noting appellants have a confirmed right to have their claims brought before an Article III tribunal that may only be waived by the litigants themselves. *Id.* at 1932, 1943–1944 (2015). As the Supreme Court framed it,

the separation-of-powers allows non-Article III judges to hear claims, but an issue arises when the door is closed on those claims to be brought on appeal before an Article III tribunal. *Id.* at 1944. Allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988). Equitable mootness upsets this balance of power. In re *City of Detroit*, 838 F.3d at 811–812 (Moore, J., dissenting); In re *One2One*, 805 F.3d at 445 (Krause, J., concurring).

Equitable mootness allows federal courts to abandon their "jurisdiction to hear appeals . . . from final judgments, orders, and decrees." 28 U.S.C. § 158(a)(1). Thus, equitable mootness undercuts the clear institutional protections intended to be inherent in the requirement Article III appellate courts retain supervising authority over Article I bankruptcy courts. Equitable mootness vests the essential attributes of judicial power in an Article I court, making the doctrine unconstitutional.

C. Equitable Mootness places far too much power in the hands of bankruptcy judges. Nearly all the common themes explored when deciding whether or not a court should invoke equitable mootness are first controlled by the bankruptcy court. Because the factors considered when determining whether an appeal is equitably moot

are effectively within the control of the bankruptcy court, an Article I judge can determine whether a litigant is able to obtain review by an Article III judge.

Essentially an appellate court's analysis boils down to (1) whether a stay has been sought and/ or obtained, (2) whether the plan has been substantially consummated, (3) whether the requested relief affects the rights of third parties not present before the court, (4) whether the requested relief would affect the success of the reorganization plan, and (5) the public policy implications concerning the finality of bankruptcy judgments. In re *GWI PCS 1, Inc*, 230 F. 3d 788,800 (5th Cir. 2000); In re *Chateaugay* I, 10 F. 3d 944,952-53 (2d Cir. 1993);In re *Tribune Media Co.*, 799 F. 3d 272,278 (3d Cir. 2015).

Under the current construction of the bankruptcy system, the bankruptcy court itself has enormous control over a number of these factors, essentially acting as judge, jury and executioner when it comes to the finality of the bankruptcy process. Not only is the bankruptcy judge deciding whether to confirm the reorganization plan, they also decide important factors that are later considered when an appellate court determines if an appeal should even be heard. In re *One2One*, 805 F.3d at 445 (Krause, J., concurring) ("The [equitable mootness] 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.").

Beginning with the granting of a stay, in general, parties seeking a stay of a judgment, order, or decree of the bankruptcy court must first file an initial motion with the bankruptcy court itself. Fed. R. Bankr. P. 8007 (a)(1)(A). This leaves the decision to grant a stay wholly at the discretion of the bankruptcy judge, an Article I judge, who also decided whether the reorganization plan should be approved. A party seeking a stay of the judgment may alternatively file the motion within the district court if certain unique factors are present. *Id* at (b)(1)-(b)(2)(B). However, courts have routinely admonished creditors who first sought relief from stay before the district court rather than the bankruptcy court. See In re *Roberts Farms* Inc., 652 F. 2d 793,798 (9th Cir, 1981). This places the factor of whether a stay has been obtained within the bankruptcy judge- a critical factor in the majority of courts imploring equitable mootness.

Turning to the second factor considered, substantial consummation of the plan often hinges greatly upon whether or not the bankruptcy judge granted a stay. This, again, gives the bankruptcy judge a tremendous amount of power. Absent a stay, the debtor may begin to conduct and finalize agreements in reliance on the bankruptcy court's decision, which cannot be reversed by the appellate court. In re *Kahihikolo*, 807 F.2d 1540, 1542 (11th Cir 1987). If the bankruptcy judge fails to grant a stay, a high probability is created that the plan will be substantially consummated by the time the appellate court reaches its decision. In re *U.S. Brass Corp.*, 169 F.

3d 957,959 (5th Cir. 1999). This effectively rests the two most critical factors solely at the discretion of the very same judge who ruled on whether or not to confirm the plan.

Equitable mootness not only prevents appellate review of a non-Article III judge's decision; it delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue since the bankruptcy court controls nearly all the variables that are considered in assessing whether a plan is equitably moot. In re *City of Detroit*, 838 F.3d 798 (6th Cir. 2016). This serious violation of an appellant's right has consistently denied numerous appellants their right to final review of their appeals in bankruptcy cases and many times is used as a "weapon" of sophisticated investors insulating their bankruptcy plan from Article III review. *Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) ("[The] equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges.").

II. The Original Creation and Subsequent Expansion of Equitable Mootness Was Done So on the Premise of Faulty Reasoning and Analysis

Courts have never analyzed the source of their authority to refuse to hear an appeal on equitable

mootness grounds. In re *Semcrude, L.P.*, 728 F.3d 314 (3d Cir. 2013); see also: In re *City of Detroit,* 838 F. 3d at 809 (Moore, J., dissenting) ([T]he doctrine has become embedded in our case law, although we have yet to explore its legal basis in any detail..."). "[I]t has become painfully apparent that there is none." In re *One2One*, 805 F.3d (Krause,J.,concurring) (3d Cir. 2015). ("[C]ourts and litigants...have struggled to identify a statutory basis for the doctrine it has become painfully apparent that there is none.").

There have emerged two separate theories on the creation of equitable mootness. In re *Cont'l Airlines*, 91 F.3d 553, 570 (3d Cir. 1996) (Alito, J., dissenting). The first theory is that the doctrine originated from In re *Roberts Farms*, Inc., the generally accepted first court of appeals decision referencing equitable mootness. *Id.* The second theory places the foundation of equitable mootness in various provisions found within the Bankruptcy Code. *Id.* at 570. In *Robert Farms*, the Ninth Circuit extracted the doctrine of equitable mootness from former Bankruptcy Rule 805 to hold that a court should dismiss an un-stayed appeal to preserve specific transactions made in reliance on a bankruptcy court order. See In re *Roberts Farms*, 662 F 2d 793,797 (9th Cir. 1981). Former rule 805, however dealt solely with a "sale to a good faith purchaser" that could never be "affected by the reversal or modification of such order on appeal." *Id.* at 793; Fed. R. Bankr. P. 805 (1976).

A. Equitable Mootness has no legitimate origin in case law, resulting in inconsistency and abuse across circuits. Notwithstanding its narrow scope, *Roberts Farms* has been expanded to give rise to the doctrine of equitable mootness. See *Cont'l Airlines*, 91 F, 3d at 570 (Alito, J, dissenting). As then-Judge Alito articulated, "the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested." *Cont'l Airlines*, 91 F, 3d at 570 (Alito, J, dissenting). "This gradual but ultimately quite substantial extension of *Roberts Farms* cannot be squared with the narrow authority on which the decision relied." *Id* at 570. Indeed, courts have distorted *Roberts Farms* to the point that they can completely disregard the merits of an appeal simply because rewarding relief seems inequitable. In re *Chateaugay Corp.*, 988 F.2d 322,324 (2d Cir. 1993). This power to relinquish jurisdiction over claims cannot be reconciled with the narrow holding of *Roberts Farms.* In re *City of Detroit,* 838 F. 3d at 809 (Moore, J., dissenting). Nevertheless, circuit courts continuously invoke the doctrine by citing to its sister circuits instead of examining whether such power originates from any constitutional or congressional authority. *Cont'l Airlines*, 91 F, 3d at 559 (Alito,J, dissenting) ([T]he majority does not undertake an independent analysis of the origin or scope of the doctrine but is instead content to rely on the decision of other circuit court of appeals.")

The *Roberts Farms* decision concerned a very narrow factual scenario in which equitable mootness was invoked to deny an appeal. Subsequent courts have contorted this scenario to apply equitable mootness to a wide swath of cases that should be heard. In *Roberts Farms* an order was entered confirming a plan of arrangement. In eventually dismissing the appeal as moot, the court stressed the ineptitude of the appellants. *Id.* They focused heavily on the appellants' failure to seek a stay before the bankruptcy court, and their lack of justification for doing so, as a major misstep in the litigation process. *Id.* at 798. The Court held that equitable mootness should be invoked. *Id.* In analyzing previous cases from their circuit, they noted that "the failure to seek stays coupled with substantial change of circumstances would justify dismissal of the appeal for lack of equity. *Id.* (citing Valley Nat'l Bank of Arix. v. Tr., 609 F.2d 1274 (9th Cir. 1979)). The Ninth Circuit continued, saying that they felt it was obligatory to diligently pursue all available remedies when failing to pursue those remedies would render it inequitable to reverse the original order. *Id.* With the appellants failing to seek a stay from the bankruptcy court and exerting minimal effort to stay the plan, the trustee was given every opportunity to implement the approved plan. *Id.* It was this scenario with which equitable mootness was created.[8]

Later appellate level opinions gradually increased the scope of equitable mootness. It was expanded to deny

appellate review if the court could not provide "effective relief." In re *Cont'l Airlines*, 91 F. 3d 553,570 (3d Cir. 1996) (Alito, J., dissenting) (citing In re *Information Dialogues*, Inc. 662 F. 2d 475,477 (8th Cir. 1981). From there, it was extended even further to justify refusing to hear an appeal if the court could not award "equitable" relief . *Id.* (citing In re *Chateaugay*, 988 F. 2d 322,324 (2d Cir. 1993). Both of these interpretations of the *Roberts Farm* opinion are vastly different from the original case.

As a whole the applications of equitable mootness found today throughout the circuits differs greatly from that original invocation. In other guiding cases, appeals were dismissed as equitably moot where parties did everything in their power to properly preserve their appeal, including appealing the confirmation order to the district court and attempting to gain a stay from both the district and bankruptcy court. *Manges v. Seatle-First Nat'l Bank*, 29 F. 3d 1034, 1037 (5th Cir. 1994). Situations such as these, where the party seeking reversal of the confirmation order has diligently sought to exercise their appellate rights, are a far cry from the facts before the Ninth Circuit in *Roberts Farms*. To be clear, equitable mootness is no longer a doctrine entrenched in punishing individuals who failed to preserve their potential appeal, but instead used as a catchall doctrine to deny appellate review to parties, regardless of fault.

B. An Appellate Court does not have the authority to decline to hear an appeal from a bankruptcy court order on statutory grounds. While many courts pointed

towards the *Roberts Farms* decision as the foundational starting point for equitable mootness, the Seventh Circuit extended a theory focused upon provisions found within the Code. In re *Cont'l Airlines*, 91 F. 3d 553,570 (3d Cir.1996) (Alito,J., dissenting) (citing Matter of UNR Industries, Inc., 20 F.3d 766,769 (7th Cir. 1994). Various provisions within the Code suggested that courts refrain from disturbing completed transactions. *Id.* One such provision stated that courts reversal of an order authorizing the sale or lease of property "does not affect the validity of a sale or lease," permitting the sale to survive the reversal. *Id.* (citing 11 U.S.C. § 363 (m)). Another provision withdrew the power from the appellate court to reverse a reorganization plan once that plan has been substantially consummated. *Id.* (citing 11 U.S.C. §1127 (b)). Courts have reasoned that these provisions created a gap in the Code that needed to be filled by federal common law, dictating under which circumstances an appeal that might jostle a plan of reorganization could be pursued. *Id.*

Equitable mootness is far from the usual situation in which a federal court is permitted to exercise its common-law-making authority to fill the interstices of a pervasively federal framework as a result of an implied delegation by Congress. Charles Alan Wright, et al., *Federal Practice and Procedure* § 4516 (2d ed. 2016). "*Expressio unius est exclusion alterius*" is a fundamental cannon of construction that says to express or include one thing implies the exclusion of other. *Expressio unius est*

exclusion alterius, Black's Law Dictionary (10th ed. 2014). Congress has not implied that it intended for the Bankruptcy Code's limited protection of certain transactions on appeal to be supplemented or expanded by a judge-made doctrine. In re *City of Detroit*, 838 F.3d 792, 809–810 (6th Cir. 2016) (Moore, J., dissenting); In re *Continental Airlines*, 91 F.3d at 570 (Alito, J., dissenting) ("I do not see how any broader rule could reasonably be extracted . . . from . . . 11 U.S.C. §§363(m) and 364(e).").

It is incorrect that, as some courts have suggested, equitable mootness can be inferred from federal courts' authority to "fill th[e] gap" in the Bankruptcy Code, which "favor[s] the finality of bankruptcy decisions" but "does not expressly limit appellate review of plan confirmation orders." In re *Semcrude*, 728 F.3d at 317. The plain language of 28 U.S.C. § 158(d)(1), 11 U.S.C. §§ 363(m) & 364(e), does not provide a statutory foundation on which to rest this doctrine, at least not in its current 'total denial' state. By their terms, §§ 363(m) and 364(e) do not prevent an appellate court from hearing an appeal, or even from granting a particular remedy- they prevent the appellate court's remedy from affecting certain transactions. See In re *Brown*, 851 F. 3d 619 548 (6th Cir. 2017).

C. Courts have routinely referred to equitable mootness as a judge-made abstention doctrine. In re *Semcrude*, L.P, 728 F. 3d 314,317 (3d Cir. 2013). However, This Court has never recognized it among deeply rooted abstention doctrines that the Court was

willing to accept as valid. In re *One2One Commc'ns.*, LLC, 805 F. 3d 428, 440 (3d Cir. 2015) (Krause, J., concurring). Federal courts may only decline to exercise the jurisdiction vested in them by Congress in limited abstention doctrines recognized by the Supreme Court. Equitable mootness is not one and bares no similarities. *Colo. River Water Conservation Dist.*, 424 U.S. at 813–817 (1976); *Quackenbush*, 517 U.S. at 716 (1996); Gregory Bass & Jeffrey S. Gutman, *Federal Practice Manual for Legal Aid Attorneys* § 2.8 (2015) (listing federal abstention doctrines).

Equitable mootness cannot be justified under traditional abstention doctrines. Those doctrines comprise a small window between a "virtually unflagging" duty to exercise congressionally granted jurisdiction and an absolute duty to do so, and they allow courts to decline jurisdiction only in "exceptional circumstances." *Sprint Commc'ns, Inc.*, 134 S. Ct at 591. No court has recognized equitable mootness as one of those exceptional circumstances. Indeed, equitable mootness fits poorly as an abstention doctrine because it differs from those doctrines in a critical way: Instead of delaying review due to proceedings in a different forum, it eliminates the right of appeal entirely. There is no other available forum in which appellants may challenge a bankruptcy order once dismissed as equitably moot. This Court has consistently held that abstention is not abdication, as abstention is merely the postponement of federal jurisdiction. *England v. La. State Bd. Of Med. Exam'rs*, 375 U.S. 411, 416

(1964). Abstention relinquishes jurisdiction in favor of another tribunal. On the other hand, equitable mootness effectively halts any further exercise of jurisdiction and deprives a litigant his, or her, right to appellate review. So in cases such as equitable mootness, where there is no other forum to bring the appeal or no exercise of jurisdiction at a later date, it trends much closer to abdication.

Not only does the equitable mootness doctrine not share any characteristics with present abstention doctrines, this Court has repeatedly declined to expand current abstention doctrines. In *Sprint Communications*, the Court was asked whether the *Younger* abstention doctrine is applicable when matters appearing before the federal courts are also pending in state-court proceedings. *Spring Commc'ns*, 134 S.Ct. at 588. Without narrowing its holding, the Court reversed the Court of Appeals judgment and explained that "federal courts are obliged to decide cases within the scope of federal jurisdiction." *Id.* Similarly, in *Zivotofsky ex rel.*, when asked to consider the limits of the *Baker* political question abstention doctrine the explained "Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel.*, 132 S.Ct. at 1427 (quoting *Cohens*, 6 Wheat. at 404). See also *Susan B. Anthony List v. Driehaus*, U.S. 134 S. Ct. at 2334, 2347 (2014) (the Supreme Court rejected the prudential ripeness because such equitable doctrines were "in some tension with our recent reaffirmation of the principle that a federal court's

obligation to hear and decide cases within its jurisdiction is virtually unflagging.")

D. An Appellate Court does not have the authority to decline to hear an appeal on prudential grounds. Quoting *Sprint*, This Court derided the use of "prudential" doctrines as reason to abstain from hearing a case in which federal courts obligation to hear cases within their "virtually unflagging jurisdiction". *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (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." at 1388). As judges critical of the doctrine of equitable mootness have pointed out, equitable mootness suffers from the same infirmities that provided fatal in *Lexmark*. In re *City of Detroit*, 838 F.3d at 811–812 (Moore, J., dissenting); In re *One2One*, 805 F.3d at 445 (Krause, J., concurring).

In *Lexmark*, This Court denounced "prudential" doctrines that, similar to abstention doctrines, are used by the courts to forego the exercise of jurisdiction on "prudential rather than statutory or constitutional grounds." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014) (condemning doctrines allowing courts to use 'prudential' considerations to dismiss valid cases). This Court made it clear that Congress- and not the courts- decides which causes of action the federal courts should hear. *Id.* at

1388. As part of a copyright infringement case, the alleged infringer counterclaimed that Lexmark violated the Lanham Act by engaging in false advertising. *Id* at 1384. The district court dismissed the counterclaim for lack of "prudential standing" applying factors adapted from the antitrust context. Assessing whether the counterclaim should have been dismissed, This Court squarely rejected arguments that federal courts might choose, for their own "prudential" reasons, to refuse to hear cases assigned to them by Congress. In doing so, the Court emphasized its "recent reaffirmation principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" *Id.* at 1386 (quoting *Sprint*, 134 Ct. at 591) (internal quotation marks omitted). The Court explained that, assuming a case meets the Constitutional jurisdiction requirements (for example Article III standing), Congress controls whether "a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 1387. To determine whether a case is properly before it, a court should simply apply "traditional principles of statutory interpretation." *Id.*

Prudence plays no role because courts are not empowered to "limit a cause of action that Congress has created merely because prudential dictates." *Id.* at 1388. Instead of looking to the Bankruptcy Code or other statutory authority, appellate courts have fashioned their own prudential factors that primarily address whether relief would be too disruptive to finality and reliance issues. These policy goals may have merit—as did the

goals to avoid "duplicative damages or complex apportionment of damages" in Lanham Act cases. *Id.* at 1392. But federal courts have no role in deciding policy questions controlled by Congress. The constitutionality of the bankruptcy-court system depends on supervision of bankruptcy orders by Article III courts.

Whatever doubts appellate Courts set aside to embrace the doctrine of equitable mootness, This Court has made it clear it cannot survive constitutional scrutiny today. *In re City of Detroit*, 838 F.3d 792, 800 (6th Cir. 2016) (acknowledging that a "fair reading" of *Lexmark* undermines equitable mootness but nonetheless upholding doctrine); *In re One2One Commc'ns, LLC*, 805 F.3d at 440–41 (Krause, J., concurring) (observing "[t]hese recent decisions counsel that equitable mootness is not a logical extension of the narrow abstention doctrines recognized by the Court and will not be viewed favorably as a relatively new prudential one").

E. The concerns focused upon when analyzing any gaps within the code can be cured through other methods that permit judicial review of bankruptcy decisions. Equitable mootness is largely thought of as measures to protect innocent third parties who entered into the bankruptcy process. These concerns have manifested themselves in the separate factors that the differing circuits use in determining whether equitable mootness is appropriate. For example, the Second, Third, Fifth, and Seventh, all to varying degrees, take the effect that reversing the reorganization plan would have on third

parties not before the court into consideration. See In re *Chateaugay* I, 10 F.3d 944,952 (2d Cir. 1993); In re *Tribune Media Co.*, 799 F.3d 272,278 (3d Cir. 2015); In re *Texas Grand Praire Hotel Reality, L.L.C.* 710 F. 3d 324, 327-28 (5th Cir. 2013); and *In re UNR industries, Inc.*, 20 F. 3d 766-769 (7th Cir. 1994).

Unlike constitutional mootness, which forces a judge's hand in removing a case for lack of jurisdiction, equitable mootness is invoked when a judge is unwilling to provide relief. In re *Transwest Resort Properties*, 801 F. 3d 1161,1167 (9th Cir. 2015). That unwillingness has expanded greatly since the inception of equitable mootness, and should be narrowed. Instead of simply dismissing an appeal all together as equitably moot, courts should be fashioning practicable relief. Equitable mootness turns into "inequitable mootness" when courts dismiss claims simply due to the passage of time before the party has a chance to argue its appeal after diligently pursuing it. In re *Thorpe Insulation Co.*, 677 F. 3d 869,881 (9th Cir. 2012). While interests of third parties investing in reliance of a bankruptcy confirmation is a valid concern, those interests should not be deemed "more worthy than others". In re *TribuneMedia Co.,* 799 F.3d 272 (3d Cir. 2015).

In a situation such as this, where a party has been diligent about seeking a stay, it should be applied "cautious[ly]". In re *Transwest Resort Properties,* Ins.,801 F 3d. 1161,1168 (9th Cir. 2015). This means it should only be invoked after the court hears the merits and

determines the appealing party could not be awarded any relief, not even one dollar, without upsetting the plan. In re Cont'l Airlines, 91 F.3d 553,571 (3d Cir. 1996) (Alito,J., dissenting).

Recently the Ninth Circuit curbed their application of equitable mootness by conducting a 4 prong analysis: (1) whether the appellant fully pursued its rights by seeking_a stay; (2) whether substantial consummation of the plan occurred; (3) the effect on third parties not before the court (4) whether the bankruptcy court can fashion effective and equitable relief without completely undoing the plan. In re *Transwest Resort Props.*, Inc., 801 F.3d at 1167-69 (9th Cir. 2015). The 9th Circuit held that, in addition to determining whether or not an appellant was diligent in seeking to obtain a stay, courts need to consider the third and fourth factors, and focus on "whether the bankruptcy court could fashion equitable relief without completely undoing the plan." Previously in *Thorpe Insulation*, the Ninth Circuit considered a variety of partial relief that might save the appeal from equitable mootness noting that, in practice, some measure of relief that does not "totally upset the plan" is typically available because "traditional equitable remedies are extremely broad and vest great discretion in a court devising a remedy." *In re Thorpe Insulation Co.*, 677 F.3d 869,833 (9th Cir. 2012).

As it currently stands, circuits are using the effect on third parties as a threshold matter that needs to be addressed prior to even hearing the merits of the appeal.

However, they should be using it as a remedial consideration. In *re Cont'l Airlines*, 91 F. 3d 553,572 (3d Cir.1996) (Alito,J., dissenting). Courts could, at the very least, hear the merits of the argument and then, once they reach a conclusion, factor in the reliance interests of third parties to determine the appropriate remedy. This would permit courts the opportunity to decide a case correctly on the merits, instead of denying parties their constitutional right to be heard before an Article III court. Third parties, and even the health of the reorganization plan as a whole, can then be taken into consideration, once it is determined that a remedy needs to be fashioned.

III. The Application of Equitable Mootness Greatly Varies Amongst the Circuits

The circuits have not followed a uniform approach when applying equitable mootness; they cannot even agree on the proper name for the doctrine. In re *UNR. Indus.*, 20 F.3d 766,769 (7th Cir. 1994 ("[B]anish[ing] 'equitable mootness' from the local "lexicon."); In re *Paige*, 584 F. 3d 1327,1330 (10th Cir. 2009)(concluding that equitable mootness is a "misnomer" and that the "doctrine more correctly should be called equitable avoidance or equitable bar"); In re *Cont'l Airlines*, 91 F.3d 553,559 (3d Cir. 1996)(acknowledging that the term "equitable mootness" is an inapt description, but adopting the term nonetheless). Not surprisingly, the standard of review and weight each appellate court gives varying prudential considerations also differs from circuit to circuit.

Where the Second, Third and Tenth Circuits employ an abuse of discretion standard, the Fifth, Sixth, Ninth, and Eleventh Circuits review is *de novo*. In re *Paige* 584 F. 3d at 1334-35 (10th Cir.2009); see also Mathew D. Pechous, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness*, 28 Emory Bank. Dev. J. 547,551-54 (2012). Other differences in the application of equitable mootness include 1) what factors/steps/analyses should be considered; 2) the degree of reliance by third parties; 3) the effects of the appellant's failure to seek or obtain a stay pending appeal; 4) whether a presumption arises upon a finding of substantial consummation; and; 5) which party bears the burden to prove (or disprove) equitable mootness is appropriate. See David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganization or Highly Problematic Judge-Made Abstention Doctrine*, 25 No. 4 J. Bankr. L. & Prac. NL Art. 2 (2016); see also Bruce A. Markel, *Equitable Cuteness: Of Mountains and Mice*, 35 No. 11 Bankr. L. Letter NL1 (2015).

In dismissing Mr. Tuttle's appeals, the Third Circuit ruled the District Court "did not abuse its discretion by not *sua sponte* fashioning alternative relief". App. A at 19, 23. Here the Third Circuit's approach is in conflict with its sister circuit's precedential rulings for multiple reasons. First, the Sixth and Eleventh, the Fifth and Ninth circuits apply a *de novo* standard of review where the Third circuit reviews for an abuse of discretion.

Second, the reliance interests of third parties were never scrutinized and, the panel never made a finding of whether the bankruptcy court could have fashioned effective and equitable relief that would not upset the plan. Finally, and of high significance, is how parties, like Mr. Tuttle, are penalized in the Third Circuit when a bankruptcy court denies their request to stay; whereas other courts only factor in whether a stay was sought.

With such a split amongst the circuits, litigants can never be assured the court adjudicating their bankruptcy appeal has correctly applied the doctrine of equitable mootness. If the policy of equitable mootness is to persist, direction from This Court is necessary so that the correct application of law is applied with uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

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