No.

IN THE

# Supreme Court of the United States

LAW DEBENTURE TRUST COMPANY OF NEW YORK, AND $R^2$ INVESTMENTS, LDC,

*Petitioners,*

v.

CHARTER COMMUNICATIONS, INC., CCH I, LLC, CCH I CAPITAL CORPORATION, CCH II, LLC, CCH II CAPITAL CORPORATION, PAUL G. ALLEN, AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

This case concerns a judge-made doctrine called "equitable mootness." As part of the multi-billion-dollar Chapter 11 reorganization plan for the nation's fourth-largest cable provider, the bankruptcy court granted a select group of insiders payouts worth hundreds of millions of dollars, at the expense of other stakeholders, including petitioners. But the legality of that plan has not been reviewed by a single Article III court because the lower courts held that the appeals from the bankruptcy court were equitably moot. The equitable-mootness doctrine—which this Court has never endorsed—has no basis in the Bankruptcy Code and, as one Member of this Court has observed, has been "extended well beyond" any conceivable legitimate foundation. *In re Cont'l Airlines*, 91 F.3d 553, 570 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

The question presented is:

Whether the court of appeals correctly dismissed these bankruptcy appeals as "equitably moot" despite acknowledging the availability of effective relief and, in conflict with other circuits, by applying a presumption of mootness and reviewing the district court's mootness determination only for abuse of discretion.

## RULE 29.6 STATEMENT

Law Debenture Trust Company of New York is 100% owned by LDC Trust Management Limited, which in turn is 100% owned by Law Debenture Corporation plc, a publicly held corporation.

$R^2$ Investments, LDC, is an investment fund whose investment manager is Amalgamated Gadget, L.P. No publicly held corporation owns 10% or more of the stock of either entity.

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## PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a–23a) is reported at 691 F.3d 476. The district court's decision (Pet. App. 24a–56a) is reported at 449 B.R. 14. The bankruptcy court's opinion (Pet. App. 57a–153a) is reported at 419 B.R. 221, and its findings and conclusions (Pet. App. 154a–431a) are unreported.

## JURISDICTION

The Second Circuit issued its decision on August 31, 2012. Petitioners timely filed petitions for rehearing en banc, which were denied on November 13, 2012 (Pet. App. 432a–433a) and October 18, 2012 (*id.* at 434a–435a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. § 158 provides:

(a) The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees * * * of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

* * * * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

## STATEMENT

This case is about a doctrine that allows Article III courts to refuse to entertain the merits of indisputably live appeals from non-Article III bankruptcy courts. The doctrine is called "equitable mootness," but that moniker is highly misleading: There is nothing genuinely "moot" about live bankruptcy appeals, and there is nothing genuinely "equitable" about declaring a bankruptcy plan to be immune from Article III appellate review simply because its proponents raced to consummate the plan before that review could commence. What is more, the equitable-mootness doctrine is entirely judge-made, and in recent years it has morphed into a cudgel repeatedly wielded by the "winners" in bankruptcy court to deprive the "losers" of their statutory right to appeal.

This case presents two particularly troubling mutations of the equitable-mootness doctrine. The Second Circuit held that once a bankruptcy plan is substantially consummated, any appeal challenging the plan's confirmation is *presumed* to be equitably moot. That holding accords with decisions by the First, Sixth, and D.C. Circuits, but it directly conflicts with decisions by the Third, Fourth, Ninth, Tenth, and Eleventh Circuits. The Second Circuit further held that when a district court dismisses a bankruptcy appeal as equitably moot, a court of appeals reviews that dismissal only for abuse of discretion. That holding accords with decisions by the Third and Tenth Circuits but, as the decision below correctly acknowledged, is in direct conflict with decisions by the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits.

More fundamentally, this case concerns whether the equitable-mootness doctrine is cognizable at all and, if so, under what circumstances. The Second Circuit acknowledged that petitioners had diligently pursued their legal rights to challenge the plan; that the merits of petitioners' appeal could be decided; and that effective relief could be fashioned without disturbing the reasonable expectations of any innocent third parties. Only those parties who proposed and profited from the disputed plan—or others who later invested in the new enterprise with full awareness of petitioners' legal challenge—would be affected. And yet the Second Circuit believed itself powerless to decide the merits of petitioners' (substantial) legal challenges simply because respondents had successfully rushed to consummate the plan and were unwilling to abandon the benefits of their illicit bargain. In any other context, a defendant's completion of an unlawful transaction and a desire to retain its rewards would pose no obstacle to judicial review. But in the bizarre world of equitable mootness, that is exactly what happens.

The time has come for this Court to rein in the "curious doctrine" of equitable mootness (*In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting)), and this case presents the ideal opportunity to do it.

### A. Charter's Prearranged Bankruptcy And The Bankruptcy Court Proceedings

Respondents Charter Communications, Inc. (CCI) and its affiliates (collectively, Charter) comprise the nation's fourth-largest cable company. Pet. App. 4a. In 2009, Charter filed for—and promptly emerged from—Chapter 11 bankruptcy, shedding billions of dollars in debt and wiping out shareholder equity. As the bankruptcy court acknowledged, the Charter reorganization plan was an "ambitious and contentious" "gamble" that presented "unusually complex legal issues" subject to "differing interpretations." *Id.* at 63a, 66a, 72a. The bankruptcy court ultimately confirmed the plan over objections by petitioners, the SEC, the U.S. Trustee, and others, in an order that has never been reviewed by an Article III court.

1. CCI is Charter's parent company, and respondent Paul Allen effectively controlled the enterprise through his 91% equity voting share of CCI (and 7% ownership stake), his chairmanship of CCI's board of directors, and his authority to appoint several other board members. *Id.* at 5a, 25a n.1, 26a, 68a–69a. Petitioner Law Debenture Trust Company ("LDT") represents investors that held CCI's $479 million in corporate bonds, and petitioner $R^2$ Investments, LDC held approximately 18,550,000 shares of CCI's common stock. *Id.* at 27a.

On March 27, 2009, Charter filed for Chapter 11 bankruptcy protection and simultaneously submitted a proposed reorganization plan to the bankruptcy court. *Id.* at 3a, 26a. That plan had been prearranged by Allen and an *ad hoc* group of

lenders—known as the "Crossover Committee"—who were creditors of certain mid-level entities in Charter's capital structure. *Id.* at 5a. CCI's bondholders and shareholders (other than Paul Allen) were not invited to participate in the bankruptcy planning. *Ibid.*

Not surprisingly, the insiders reaped enormous rewards under their prearranged plan. The "cornerstone" was a $200 million cash payment to respondent Allen to induce him to *continue* to wield substantial equity control over CCI. *Id.* at 6a–7a, 35a & n.13.[1] The plan also gave substantial benefits to members of the Crossover Committee, by swapping much of their debt for equity and allowing them to purchase additional shares in an exclusive rights offering, all at bargain-basement prices set by the plan.[2] *Id.* at 7a, 335a–337a. In addition, the plan included sweeping releases absolving respondent Allen and other nondebtor third parties

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[1] In particular, the "Allen Settlement" paid Allen *to retain* 35% voting control of CCI (permitting reinstatement of an affiliate's senior debt facility), and *to retain* an ownership interest in a subsidiary holding company (permitting CCI's valuable net operating losses, or "NOLs," to survive any cancellation-of-debt income generated by the reorganization). See Pet. App. 6a, 29a–30a.

[2] When the plan became effective, those shares *immediately* traded at nearly twice their acquisition price—a massive, overnight return. Compare CCI 2009 Form 10-K Annual Report F-13 (Feb. 26, 2010), and CCI S-1 Registration Statement, at item 15 (Dec. 31, 2009), with CCI 2010 Form 10-K Annual Report 31.

from practically any liability relating to Charter. *Id.* at 7a, 30a–31a, 124a–126a.

By contrast, the plan was unkind to the outsiders like petitioners. CCI's bondholders received only 32.7 cents on the dollar and an allocation from a pending legal settlement, despite the seniority of their claims to respondent Allen's equity stake. *Id.* at 7a, 31a. The bondholders voted overwhelmingly to reject the prearranged plan. CCI's shareholders—other than Allen, who received the $200 million payment described above—received no recovery at all and were deemed to reject the plan. *Ibid.*

Petitioners' objections to the plan should have been the end of it; the Bankruptcy Code forbids the approval of a plan unless there is an affirmative vote of at least one "impaired" class of a debtor's claimants. See 11 U.S.C. § 1129(a)(10). To engineer such approval at CCI, the plan carved out a separate class of unsecured creditors who together held a couple million dollars in claims against CCI—principally a former CEO's severance package—at the same priority level as petitioner LDT's $479 million. See *id.* at 138a–143a. Moreover, it artificially "impaired" that small class of unsecured creditors by paying their claims in full but without post-petition interest (their entitlement to which went undetermined). *Ibid.* Because these claimants received nearly a 100% payout, they understandably voted in favor of the plan. *Ibid.* The bankruptcy court then relied on that gerrymandered vote in

deciding to confirm the plan over petitioners' dissent. *Ibid.*[3]

2. Petitioners objected to Charter's reorganization plan, as did the SEC, the U.S. Trustee, and others. *Id.* 7a–8a, 124a n.27. In particular, petitioners objected under 11 U.S.C. § 1129 to the plan's method of securing the requisite approval of an "impaired" class of claim holders, its $200 million payment to Allen, its releases to Allen and other nondebtors, and its failure to value CCI's considerable assets and modest liabilities separately from its "enterprise" valuation of CCI's heavily encumbered affiliates. *Id.* at 8a.

Charter asked the bankruptcy court to "cram down" their prearranged plan by confirming it over petitioners' objections. The bankruptcy court did so on November 17, 2009. *Id.* at 7a. Petitioners promptly moved in the bankruptcy court for a stay of

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[3] The bankruptcy court held in the alternative that 11 U.S.C. § 1129(a)(10) can be satisfied on a "per plan" basis rather than a "per debtor" basis. Pet. App. 143a. According to the bankruptcy court, therefore, an affirmative vote by an impaired class at any of Charter's 131 affiliated debtors would permit a reorganization plan to be crammed down on claimants of the other 130 debtors. *Ibid.* Petitioner LDT challenged that conclusion as amounting to an improper "substantive consolidation" of these jointly administered bankruptcies. *Id.* at 54a n.39; see also *In re Owens Corning*, 419 F.3d 195, 205–12 (3d Cir. 2005) ("Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery."); *In re Leslie Fay Cos.*, 207 B.R. 764, 779 (Bankr. S.D.N.Y. 1997).

the confirmed plan's implementation, and for certification of their appeals for expedited direct review by the Second Circuit under 28 U.S.C. § 158(d)(2). *Id.* at 7a, 14a & n.3. Debtors opposed the stay and certification requests, and the bankruptcy court denied both. *Ibid.* The next day, the district court likewise declined to stay plan implementation. *Ibid.* And on the following business day, debtors made their plan "effective" and engaged in a number of the transactions contemplated by the confirmed plan. *Id.* at 7a.

### B. The District Court's Decision

Petitioners took separate appeals to the district court. Respondents opposed the appeals on the merits, but also moved to dismiss them as equitably moot. Although the district court acknowledged that petitioners were not seeking to "unravel[] the current Plan" (Pet. App. 41a), it granted respondents' motions to dismiss in a joint opinion (*id.* at 34a–66a).

The district court began with the premise that "bankruptcy appeals are strongly presumed to be equitably moot where the reorganization plan has been 'substantially consummated.'" *Id.* at 37a–38a. Here, the debtors had substantially consummated their reorganization plan soon after its confirmation. The district court therefore placed the "burden" on petitioners to demonstrate that the relief sought on appeal would not "jeopardize the bankruptcy's finality or otherwise be inequitable." *Id.* at 42a; see also *id.* at 55a n.41.

The district court concluded that petitioners failed to carry that burden with respect to *any* of their challenges to the plan. The district court

observed that the reorganization plan contained a non-severability clause, according to which every plan provision was deemed "integral to the Plan." *Id.* at 33a; see also *id.* at 42a–43a & n.22. In the district court's view, this provision meant that the court could not "modify the Confirmation Order or the Plan to provide for the requested relief, *not even to grant effective relief*, without nullifying the Plan's authorization." *Id.* at 43a (emphasis added).

### C. The Court of Appeals' Decision

The Second Circuit considered the cases in tandem and affirmed. Like the district court, the court of appeals began with the premise that "[i]n this circuit, an appeal is presumed to be equitably moot where the debtor's plan of reorganization has been substantially consummated." Pet. App. 9a. An appellant can rebut that presumption, the court explained, only by demonstrating "all" of "five factors":

> (1) 'the court can still order some effective relief';
>
> (2) 'such relief will not affect the re-emergence of the debtor as a revitalized corporate entity';
>
> (3) 'such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court';
>
> (4) '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.'

*Id.* at 10a (quoting *Frito-Lay, Inc.* v. *LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952–53 (2d Cir. 1993) (*"Chateaugay II"*)).

The court concluded that petitioners had satisfied *three* of those five factors on every claim raised by their appeals. See *id.* at 14a–16a, 20a, 22a. In particular, the court agreed that petitioners had been "diligent in seeking a stay of the confirmation order (factor 5)." *Id.* at 14a; see also *supra* pp. 7–8. The court further held that it *could* grant effective relief to petitioners on each claim (factor 1)—specifically, monetary payments from respondents CCI or Allen, a standalone valuation of CCI and recovery of any misappropriated value, and the removal of the nondebtor releases. See Pet. App. 14a, 20a, 22a.

The court also held that none of that effective relief would "adversely affect parties without an opportunity to participate in the appeal (factor 4)." *Id.* at 14a–15a; see also *id.* at 20a, 22a. "[T]he parties most affected [by the relief requested] would be Charter itself, Allen, and Charter's creditors, all of whom are either parties to this appeal or participated actively in the bankruptcy proceedings." *Id.* at 15a. With respect to any "[l]ess direct effects" that "may be felt by reorganized Charter's shareholders," the court concluded that it was sufficient that "Charter has regularly and fully disclosed the existence of this appeal and the

possibility of an adverse ruling as a risk factor" in public financial reports. *Id.* at 15a–16a.

Applying abuse-of-discretion review, however, the court concluded that the district court had correctly dismissed petitioners' appeals. The court acknowledged that "the courts of appeals are split over whether a de novo or abuse of discretion standard of review applied." *Id.* at 12a. Casting its lot with the Third and Tenth Circuits (*id.* at 12a–13a), the court held that the district court had not abused its discretion in concluding that petitioners failed to satisfy factors 2 and 3 (*id.* at 16a, 20a, 22a). The court stated that it would "cut the heart out of the reorganization" to deprive respondent Allen of his payment and nondebtor releases even if they "are legally unsupportable." *Id.* at 18a–19a.[4] Similarly, R²'s request for a standalone valuation of CCI, though "simple relief," would require "a significant revision of Charter's reorganization." *Id.* at 20a. And it was likewise a permissible "exercise of discretion" to dismiss petitioner LDT's claim that the plan improperly gerrymandered CCI's stakeholders to achieve a "cram down" against dissenting bondholders. *Id.* at 22a–23a. The court of appeals acknowledged that those bondholders' claims would

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[4] At the same time, the court recognized that a $200 million remedy "would not impact reorganized Charter's financial health" because "reorganized Charter has been quite successful with substantial assets and cash flow." Pet. App. 16a. Likewise, the court recognized that the plan's nondebtor releases were *expressly severable* from the rest of the plan under a "term sheet" incorporated into the Allen Settlement. *Id.* at 17a n.4.

be satisfied in full by "the simple payment of $330 million." *Id.* at 22a. But it refused to review the bondholders' entitlement to that remedy on the ground that any "legal conclusions" supporting such a "simple payment" would also "require unwinding the plan and reclassifying creditors." *Ibid.*

## REASONS FOR GRANTING THE PETITION

The Second Circuit committed three errors of law, each of which merits this Court's review. First, it held—consistent with three Circuits but in conflict with five others—that reviewing courts must *presume* equitable mootness once debtors have substantially consummated a bankruptcy reorganization plan. Second, it held—consistent with two Circuits but in conflict with five others—that courts of appeals should review only for abuse of discretion a district court's dismissal of an appeal on equitable-mootness grounds. This case illustrates just how outcome-determinative both of those choices can be.

But there is an even more basic infirmity in the decision below: The court of appeals held that a fully contested appeal may be dismissed even when (i) effective relief can be fashioned, (ii) appellants have diligently pursued their rights, and (iii) granting relief would not upset the reasonable expectations of innocent third parties. It is far from clear that equitable mootness is *ever* legitimate. See, *e.g.*, *In re Cont'l Airlines*, 91 F.3d at 567–73 (Alito, J., dissenting). The United States, for example, has rightly called equitable mootness a "judicial construct of questionable foundation" that "is open to substantial abuse, and invites manipulation of the bankruptcy process," and has explained that "to the

extent the Bankruptcy Code addresses the issue, it appears to preclude the doctrine." Pet. 22–23, *United States* v. *GWI PCS 1, Inc.*, No. 00-1621 (Apr. 2001). But if the doctrine exists at all, it cannot possibly justify "the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded." *In re Cont'l Airlines*, 91 F.3d at 571 (Alito, J., dissenting).[5]

This Court's review is necessary to resolve those deep, acknowledged, and intractable divisions among the circuits on important questions that arise in countless bankruptcy appeals. Review is also warranted so this Court may evaluate—for the first time—the fundamental legitimacy of an "equitable mootness" doctrine that looms large in virtually every major Chapter 11 reorganization.

## I. The Circuits Are Divided Over Whether There Is A Presumption Of Equitable Mootness Whenever A Reorganization Plan Has Been Substantially Consummated

A. The Second Circuit held that "[i]n this circuit, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." Pet. App. 9a; see also 11 U.S.C. § 1101(2) (defining "substantial consummation"). Applying that presumption, the court of

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[5] This case does not, by contrast, present questions about statutory mootness under 11 U.S.C. § 363(m) or similar provisions of the Bankruptcy Code. Cf. *Ind. State Police Pension Trust* v. *Chrysler LLC*, 130 S. Ct. 1015 (2009) (mem.).

appeals concluded that petitioners had "failed to establish" two of the mootness "factors." *Id.* at 16a. Accordingly, held the court, the merits of the appeal could not be decided.

That holding accords with the conclusions of three other Circuits. The First Circuit held, in *Rochman* v. *Northeast Utilities Service Group (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469, 473 n.13 (1992), that the substantial consummation of a reorganization plan "raises a 'strong presumption' that an appellate court will not be able to fashion an equitable and effective remedy." See also *Deloitte & Touche LLP* v. *Aquila Biopharmaceuticals, Inc. (In re Cambridge Biotech Corp.)*, 214 B.R. 429, 431 (D. Mass. 1997) (applying *In re Pub. Serv. Co. of N.H.*). Likewise, the Sixth Circuit has held in an unpublished opinion that "[s]ubstantial consummation raises a presumption that the appeal is moot and should be dismissed." *Unofficial Comm. of Co-Defendants* v. *Eagle-Picher Indus., Inc. (In re Eagle Picher Indus., Inc.)*, Nos. 96-4309, 97-4260, 1998 WL 939869, at *4 (6th Cir. Dec. 21, 1998); see also *First Century Bank, NA* v. *Sovereign Pocahontas Co. (In re HNRC Dissolution Co.)*, No. 0:05-CV-79-HRW, 2006 WL 782837, at *5 (E.D. Ky. Mar. 28, 2006) (applying *In re Eagle Picher Indus., Inc.*); *United Steelworkers of Am.* v. *Ormet Corp. (In re Ormet Corp.)*, No. 2:04-CV-1151, 2005 WL 2000704, at *4 (S.D. Ohio Aug. 19, 2005) (same). And the D.C. Circuit held in *In re AOV Industries, Inc.*, 792 F.2d 1140, 1149 (1986), that many of the appellate challenges before it were "control[led]" by "a strong presumption of mootness" generated by the substantial consummation of a plan.

B. By contrast, the Tenth Circuit explicitly rejected the Second Circuit's presumption in *Search Market Direct, Inc.* v. *Jubber (In re Paige)*, 584 F.3d 1327, 1331, 1339–40 (10th Cir. 2009). The court there concluded "that the party seeking to prevent this court from reaching the merits of the appeal bears the burden of proving that * * * the court should abstain from reaching the merits of the case." *Id.* at 1339–40. The court proceeded to "reject the conclusion that some circuits have reached"—citing a Second Circuit decision—"that a finding of substantial consummation will shift the burden to the party seeking to have the court reach the merits of its challenge to the plan." *Id.* at 1340 (citing *Aetna Cas. & Sur. Co.* v. *LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996) ("*Chateaugay III*")).

As the Tenth Circuit explained, "the party inviting the court not to reach the merits of an appeal *always* carries the burden of showing that the answers to the [relevant factors] demonstrate that it would be unfair or impracticable to reverse the confirmed plan." *Ibid.* (emphasis added). The court held that no factor—substantial consummation or any other—"create[s] a presumption against the court reaching the merits of the challenge." *Ibid.* Indeed, the court stated, it is even "less inclined" to determine mootness where—as here—the plan proponents "accelerated the consummation of the plan despite their knowledge of a pending appeal." *Id.* at 1343. The court went on to hold that "[t]he district court [had] wrongly placed the burden of proof on this issue" on the appellant, and reversed that court's dismissal order because "[a]ppellees have

the burden of proof on this issue" and had failed to meet it. *Id.* at 1343, 1348.

Likewise, the Eleventh Circuit held in *Alabama Department of Economic and Community Affairs* v. *Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1225 (2011), that "[t]he party asserting mootness bears the burden of persuasion." "'[E]ven if substantial consummation has occurred, a court must still consider all the circumstances of the case to decide whether it can grant effective relief.'" *Ibid.* The Ninth Circuit has also held that "[t]he 'party moving for dismissal on mootness grounds bears a heavy burden,'" and that court has never shifted that burden to an appellant after substantial consummation. See *Motor Vehicle Cas. Co.* v. *Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012); *Focus Media, Inc.* v. *Nat'l Broad. Co. (In re Focus Media, Inc.)*, 378 F.3d 916, 923 (9th Cir. 2004). Moreover, the Third and Fourth Circuits have grappled with bankruptcy appeals that—like this one—challenged nondebtor releases after a plan's substantial consummation, without presuming equitable mootness. *Gillman* v. *Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 210 (3d Cir. 2000); *Behrmann* v. *Nat'l Heritage Found.*, 663 F.3d 704, 713–14 (4th Cir. 2011).[6]

C. The latter Circuits have the better of the argument. For starters, a presumption of mootness

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[6] See also *So. Pac. Transp. Co.* v. *Voluntary Purchasing Grps., Inc.*, 246 B.R. 532, 534 (E.D. Tex. 2000) ("Obviously, the burden is upon the party asserting the equitable mootness doctrine to prove that it applies.").

conflicts with the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). Bankruptcy appellants have a statutory right to seek Article III review of bankruptcy court orders. 28 U.S.C. § 158(a), (d)(1). A presumption of mootness abridges the express command of Congress.

Presuming mootness after substantial consummation of a reorganization plan also insulates from Article III review the most consequential orders that a non-Article III bankruptcy court issues. The present case is a telling example: The bankruptcy court distributed billions of dollars in assets, richly rewarding some stakeholders while wiping others out entirely. And it did so by approving a plan gerrymandered to ensure cramdown over vociferous objections. The presumption of mootness shields all of that from Article III review, effectively giving bankruptcy courts the final word on the lawfulness of their own orders. And it does all this based upon a factor—the timing of substantial consummation—that is largely in the control of the bankruptcy court and the plan's proponents.

Finally, a presumption of equitable mootness is difficult to square with the fact that, in every other mootness context, the presumption works just the opposite way. Proponents of *constitutional* mootness must bear a heavy burden before such appeals will be dismissed. See, *e.g.*, *County of L.A.* v. *Davis*, 440 U.S. 625, 631 (1979). Proponents of *prudential* mootness—to which the Second Circuit analogized equitable mootness (Pet. App. 21a. But cf. *infra* p. 20–21)—bear "the formidable burden" of demon-

strating mootness. *Already, LLC* v. *Nike, Inc.*, ___ S. Ct. ___, No. 11-982, slip op. at 4 (Jan. 9, 2013) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)); see also *id.*, slip op. 1 (Kennedy, J., concurring) (same); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). There is no reason to invert the presumption when it comes to the doctrine of equitable mootness.

## II. The Circuits Are Divided On The Standard For Reviewing A District Court's Decision To Dismiss An Appeal As Equitably Moot

As the decision below explicitly acknowledged, "the courts of appeals are split over whether a de novo or abuse of discretion standard of review should be applied by a court of appeals" when reviewing a district court's equitable-mootness dismissal of a bankruptcy appeal. Pet. App. 12a.

A. The Second Circuit held that the district court's decision to dismiss petitioners' appeals as equitably moot was reviewable only for "abuse of discretion." *Ibid.* It reasoned that such dismissals are "somewhat analogous" to mootness dismissals arising from a "defendant's voluntary cessation of allegedly illegal conduct," in which abuse-of-discretion review is also applied. *Ibid.* See, *e.g.*, *W. T. Grant Co.*, 345 U.S. at 633–34. The Second Circuit's position accords with decisions by the Third and Tenth Circuits. *In re Cont'l Airlines*, 91 F.3d at 560; *In re Paige*, 584 F.3d at 1334–35.

B. By contrast, the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits review a district court's equitable-mootness dismissal *de novo*. Those courts have generally relied on the fact that courts of

appeals and district courts play the same role as appellate tribunals in bankruptcy cases under 28 U.S.C. § 158. In *United States* v. *GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 799–800 (5th Cir. 2000), for example, the Fifth Circuit explained that courts of appeals and district courts "'perform the same function'" in "'the bankruptcy appellate process'" when they review bankruptcy court decisions. It therefore applied *de novo* review in addressing the appropriateness of an equitable-mootness dismissal.

Likewise, the Sixth Circuit in *Curreys of Nebraska, Inc.* v. *United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946 (2007), applied the "well established" principle that it "independently reviews a decision of the bankruptcy court that has been appealed to the Bankruptcy Appellate Panel." (Bankruptcy Appellate Panels—or BAPs—hear bankruptcy appeals in some circuits in the same capacity as district courts do in other circuits. See *id.* at 946 n.1; see also 28 U.S.C. § 158(b), (c)).[7] De novo review of a BAP's equitable-mootness conclusion, the court explained, is "consistent" with the court of appeals' "plenary review of the decisions of a lower court exercising its appellate jurisdiction." 526 F.3d at 947.

In reaching that conclusion, the Sixth Circuit explicitly recognized (*id.* at 946) that the en banc Third Circuit had reached the opposite conclusion

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[7] For the sake of clarity, our references in this Part to equitable-mootness dismissals by a "district court" include such orders issued by a bankruptcy appellate panel.

(by a 7–6 vote) in *Continental Airlines*. But the Sixth Circuit adopted the position of then-Judge Alito's dissent, agreeing that "the court of appeals is 'in just as good a position to make this determination as was the district court.'" *Ibid.* (quoting 91 F.3d at 568 n.4 (Alito, J., dissenting)).

The Ninth and Eleventh Circuits have long hewn to the same principles. See *Baker & Drake, Inc.* v. *Pub. Serv. Comm'n of Nev.*, 35 F.3d 1348, 1351 (9th Cir. 1994); *Olympic Coast Inv., Inc.* v. *Crum (In re Wright)*, 329 F. App'x 137, 137 (9th Cir. 2009); *First Union Real Estate Equity & Mortg. Invs.* v. *Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Liquidity Solutions, Inc.* v. *Winn-Dixie Store, Inc. (In re Winn-Dixie Store, Inc.)*, 286 F. App'x 619, 622 & n.2 (11th Cir. 2008) (per curiam). Moreover, the Eighth Circuit applied "careful de novo review" to a district court's equitable-mootness dismissal in an unpublished opinion. *Zegeer* v. *President Casinos, Inc. (In re President Casinos, Inc.)*, 409 F. App'x 31, 31 (2010) (per curiam).[8]

C. The de-novo Circuits have the better view—there is simply no good reason for one appellate court to defer to another appellate court's dismissal on equitable-mootness grounds. As explained above, the Second Circuit reasoned by analogy to prudential-mootness dismissals following a

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[8] The Fourth Circuit has acknowledged but not resolved the issue. *Retired Pilots Ass'n of U.S. Airways, Inc.* v. *US Airways Grp., Inc. (In re US Airways Grp., Inc.)*, 369 F.3d 806, 809 n.* (4th Cir. 2004).

defendant's voluntary cessation of the conduct that was causing the plaintiff's injury. Pet. App. 12a–13a. But those cases rest on the very different premise that it often makes sense to *withhold* (not necessarily *preclude*) judicial relief until the defendant resumes his allegedly illegal conduct—at which time the plaintiff can return to court to vindicate his rights. See *In re Cont'l Airlines*, 91 F.3d at 569 (Alito, J., dissenting) (citing 13A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3533.1 at 226 (1984)). Under the equitable-mootness doctrine, by contrast, the appellant forever loses his right to Article III review, even though he is alleging a *permanent and existing* injury from the bankruptcy plan (not merely a *potential and future* injury from resumed misconduct).

Moreover, as the Second Circuit acknowledged, the courts of appeals apply plenary review to virtually all other legal rulings by a district court in bankruptcy appeals. Pet. App. 12a. There is no reason to depart from that tried-and-true approach in response to a district court's conclusion that an appeal is equitably moot. See *In re Cont'l Airlines*, 91 F.3d at 568 n.4 (Alito, J., dissenting) (criticizing the majority's departure from the Third Circuit's "unbroken and well-established line of authority * * * holding that '[b]ecause the district court sits as an appellate court in bankruptcy cases, our review of the district court's decision is plenary'").

Finally, to whatever extent an equitable-mootness doctrine is appropriate, it is a "judicial anomaly" that should be applied "with a scalpel rather than an axe." *Bank of N.Y. Trust Co.* v.

*Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009). De novo review of district court dismissals is better suited to ensuring that the equitable-mootness doctrine adheres—and returns (see Part III, *infra*)—to its proper limits. See *In re Cont'l Airlines*, 91 F.3d at 568 n.4 (Alito, J., dissenting); cf. *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988) (abuse-of-discretion review provides "flexibility" to the lower court).

## III. This Court's Review Is Necessary To Determine Whether Article III Courts Can Decline To Review Live Bankruptcy Appeals Where Effective Relief Is Available

Presumptions and standards of review aside, this Court's review is necessary for a more fundamental reason: The equitable-mootness doctrine is now regularly invoked to deny Article III review of a bankruptcy court's confirmation order even where, as here, effective relief is fully available. It is doubtful that equitable mootness is ever cognizable. But here—where the court of appeals acknowledged that some effective relief is available; that petitioners fully pursued their appellate rights; and that no innocent third parties would be affected by granting petitioners relief—the doctrine is simply invalid.

In the court of appeals' view, it would not be "equitable" to hear petitioners' appeals because granting relief would disturb the benefits of the bargain that respondents claimed for themselves under the plan. But the entire point of these appeals was that those very benefits *were illegal*. This Court

should take the opportunity to make clear that—if equitable mootness exists at all—it cannot defeat Article III review where the appellate courts "indisputably possess statutory jurisdiction and * * * meaningful relief can be granted." *In re Cont'l Airlines*, 91 F.3d at 571 (Alito, J., dissenting).

A. There are considerable constitutional problems with refusing to hear appeals from non-Article III bankruptcy courts in the name of "equitable mootness." This Court's approval of non-Article III adjudication has turned on, among other things, whether Article III courts still retain "'essential attributes of judicial power'" like the "de novo" review of "legal rulings." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 852–53 (1986); cf. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592–93 (1985) (availability of some Article III review supports administrative adjudication); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 939 (1988) ("Even if a case is tried in the first instance by a non-article III tribunal, a separation-of-powers interest remains in ensuring appellate review by an article III court."). As this Court recently explained in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the bankruptcy court's authority to enter binding, final judgments in "core" bankruptcy proceedings—like plan confirmation—is supposed to be subject to district court review on appeal "under traditional appellate standards," *id.* at 2604.

The concern that the lower federal courts—and particularly those in the Second Circuit—are routinely turning away bankruptcy appeals is

magnified by what the government has correctly identified as the potential for "substantial abuse" of the equitable-mootness doctrine by bankruptcy plan proponents. Pet. 23, *United States* v. *GWI PCS 1, Inc.*, No. 00-1621 (Apr. 2001). In this case, for example, respondents secured confirmation over vociferous objections that their plan was illegal. They then successfully opposed a stay pending appeal by threatening to exercise a self-destruct deadline they had built into their plan (but had postponed *six times* to facilitate confirmation). See Bankr. S.D.N.Y. Dkt. Nos. 946, 972. And one business day later, they rushed to consummate their plan—only to contend later that depriving them of the "important" but allegedly illegal plan terms they implemented would be unjust. In that manner, respondents used the Second Circuit's equitable-mootness doctrine "as a weapon to prevent any appellate review." *Nordhoff Invs., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., dissenting).

The equitable-mootness doctrine encourages precisely such gamesmanship by any debtor or related insider who wants to protect an "ambitious and contentious," prearranged reorganization plan from Article III appellate review. Stay requests halting bankruptcy reorganizations are rarely granted and, when granted, often require appellants to post substantial bonds. See, *e.g.*, *ACC Bondholder Grp.* v. *Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337 (S.D.N.Y. 2007) (setting a $1.3 billion bond as a condition to a stay pending appeal). And without a stay, plan proponents often can quickly implement a sophisticated corporate reorganization by completing

a series of paper transactions. Bankruptcy appellants should not so easily be denied their only shot at Article III review—certainly not in the absence of any statement by this Court that such a drastic departure from basic principles of judicial review is warranted.

B. Indeed, the decision below illustrates just how far equitable mootness has strayed from any legitimate origin. The Second Circuit correctly concluded that effective relief is available to petitioners on each of their claims. See Pet. App. 14a, 20a, 22a. Petitioners seek limited remedies—money judgments and the striking of nondebtor liability releases—and not an unwind of Charter's reorganization plan. Moreover, that relief is available from active participants in Charter's bankruptcy proceedings, who are litigants before the Court. *Id.* at 14a–16a, 20a, 22a. And petitioners diligently pursued their claims by applying to stay plan implementation pending appeal. *Id.* at 14a, 20a, 22a.

Despite all that, the Second Circuit concluded that appellate review was unavailable. With respect to two of petitioners' challenges, the court of appeals held that the pertinent plan provisions were simply too "important" to the plan insiders to permit the appeal to be heard on the merits. *Id.* at 19a. Petitioners contended, for example, that the blanket liability releases granted to respondent Allen and other nondebtors were unlawful. The court of appeals refused to reach that claim, even though respondent Allen and the other plan proponents had expressly agreed in a "term sheet" for their settlement that any judicial decision to strike the plan's nondebtor releases *would not affect the*

*validity of any other plan provision*. See *id.* at 17a n.4.[9]

Likewise, petitioners challenged respondent Allen's extraction of $200 million from Charter while CCI's bondholders were shorted $330 million and the

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[9] In this additional respect, the Second Circuit's decision conflicts with numerous other circuits that "have agreed that equitable mootness need not foreclose an appeal from aspects of Chapter 11 plan confirmation that solely concern * * * releases." See *Hilal* v. *Williams (In re Hilal)*, 534 F.3d 498, 501 (5th Cir. 2008) (collecting cases); see also *Behrmann*, 663 F.3d at 714 (releases claim not moot where, as here, the releases were severable from the plan); *United Artists Theatre Co.* v. *Walton (In re United Artists Theatre Co.)*, 315 F.3d 217, 228 (3d Cir. 2003) (court could "modify" the plan's "indemnity provision" and "the Plan otherwise would survive intact"); *W.R. Huff Asset Mgmt. Co.* v. *HSBC Bank USA (In re PWS Holding Corp.)*, 228 F.3d 224, 236 (3d Cir. 2000) ("The releases (or some of the releases) could be stricken from the plan without undoing other portions of it."). In fact, the question whether a bankruptcy court has the power to grant nondebtor releases at all is itself the subject of a deep split among the circuits. Compare Pet. App. 124a–126a with *Vitro S.A.B. de CV* v. *Ad Hoc Group of Vitro Noteholders (In re Vitro S.A.B. de CV)*, No. 12-10542, 2012 WL 5935630, at *23 (5th Cir. Nov. 28, 2012); *Resorts Int'l, Inc.* v. *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401–02 (9th Cir. 1995); *Landsing Diversified Props.-II* v. *First Nat'l Bank & Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600–02 (10th Cir. 1990), amended by *Abel* v. *West*, 932 F.2d 898 (10th Cir. 1991). The Bankruptcy Code does not authorize nondebtor releases, except in asbestos cases. See 11 U.S.C. § 524(e), (g).

rest of CCI's equity holders received nothing. See *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 437 (1999) (rejecting shareholders' retention of equity in a reorganized enterprise, over the objection of senior creditors, upon granting themselves the exclusive right to contribute "new value" to the enterprise). The court of appeals acknowledged that a monetary judgment completely remedies petitioners' injury and would not imperil the reorganization in the slightest. Pet. App. 16a. Charter, it explained, "has been quite successful" since emerging from bankruptcy, and has substantial assets and cash flow, access to an $800 million revolving line of credit, and long-term debt structured on favorable terms." *Ibid.* Indeed, Charter generated $7.1 billion in 2010 revenue and $7.2 billion in 2011 revenue. CCI 2011 Form 10-K Annual Report 33. But the court declined to reach the merits.[10]

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[10] By contrast, other circuits have concluded that active combatants in the bankruptcy proceedings have an exceedingly tenuous claim to "equitable mootness" when they are defending their own spoils on appeal. In *Spirtos* v. *Moreno (In re Spirtos)*, 992 F.2d 1004, 1007 (9th Cir. 1993), for example, the court held that it could award effective relief "by ordering * * * a party to this appeal[] to return the money to the estate" where that party "knew at the time he received and spent his plan distribution that [the appellant] had appealed the bankruptcy court's decision." Accord *TNB Fin., Inc.* v. *James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 232 n.6 (5th Cir. 2001) ("Of course, the administrative claimants are not strangers to the bankruptcy case, and as parties

With respect to the two other appellate issues, the court of appeals affirmed dismissal not because the relief sought on appeal would *itself* unravel Charter's plan, but based on hypothetical concerns. For example, petitioner $R^2$ sought a separate valuation of CCI's assets and liabilities, and requested a pro rata share of any surplus value as an equity holder. See Pet. App. 20a. The court of appeals did not contend that such a hearing or any resulting surplus distribution to petitioners would upend Charter's reorganization. See *id.* at 20a–21a. Instead, it affirmed dismissal on the unsupported ground that providing petitioner $R^2$ a standalone valuation of CCI would necessarily entitle hypothetical *other* parties to standalone valuations of every *other* Charter entity. *Ibid.* But there are no such hypothetical other parties who objected to Charter's reorganization and appealed from the bankruptcy court's confirmation order.

Similarly, petitioner LDT challenged the gerrymandered and artificially impaired class of CCI stakeholders for purposes of allowing the "cram down" of the plan. See 11 U.S.C. § 1129(a)(10). Once again, the court of appeals recognized that the bondholders can be made whole though a $330 million payment, and that such a payment will not threaten Charter's re-emergence from bankruptcy. Pet. App. 22a. But "[a]s with [petitioner] $R^2$'s claims regarding valuation," the court of appeals affirmed the district court's "exercise of its discretion in

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intimately connected to the case administration, their expectations may not be settled.").

dismissing the claim" on the ground that granting monetary relief to petitioner LDT would require a wholesale reclassification of Charter's claimants. *Id.* at 22a–23a. But no party has asked for that, and the requested $330 million payment would not knock the props out from under the plan—it would simply remedy the damages caused by illegal confirmation.

* * *

The decision below confirms that the equitable-mootness doctrine has truly run amok. If equitable mootness has any validity at all, it cannot preclude Article III courts from hearing appeals where effective relief can be fashioned without unwinding the plan or disturbing reasonable expectations of innocent third parties, and where the appellants diligently sought appellate review. At the very least, this Court should consider whether such extreme applications of the doctrine are legitimate.

## IV. These Issues Are Recurring And Nationally Important

For more than three decades—and with steadily increasing frequency—the lower courts have been confronted with claims that bankruptcy appeals are equitably moot. See*, e.g.*, *In re Thorpe Insulation Co.*, 677 F.3d at 879–83; *In re Lett*, 632 F.3d at 1225–26; *Bank of N.Y. Trust Co.* v. *Pac. Lumber Co. (In re Scopac)*, 624 F.3d 274, 281–82 (5th Cir. 2010); *Alberta Energy Partners* v. *Blast Energy Servs., Inc. (In re Blast Energy Servs., Inc.)*, 593 F.3d 418, 424–26 (5th Cir. 2010); *Schaefer* v. *Superior Offshore Int'l, Inc. (In re Superior Offshore Int'l, Inc.)*, 591 F.3d 350, 353–54 (5th Cir. 2009); *In re Paige*, 584 F.3d at 1337–48; *In re Pac. Lumber*, 584 F.3d at 240–44,

249–52; *In re Hilal*, 534 F.3d 498, 500–01 (5th Cir. 2008); *In re United Producers*, 526 F.3d at 946–52; *Bank of Montreal* v. *Official Comm. of Unsecured Creditors (In re Am. Homepatient, Inc.)*, 420 F.3d 559, 563–65 (6th Cir. 2005); *Deutsche Bank AG* v. *Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143–45 (2d Cir. 2005); *In re Focus Media*, 378 F.3d at 922–24; *In re US Airways Grp., Inc.*, 369 F.3d at 809–11; *U.S. Trustee* v. *Unofficial Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.)*, 329 F.3d 338, 345–48 (3d Cir. 2003); *In re United Artists Theatre Co.*, 315 F.3d at 228; *MAC Panel Co.* v. *Va. Panel Corp.*, 283 F.3d 622, 625–27 (4th Cir. 2002); *Nordhoff Invs.*, 258 F.3d at 184–91; *In re Grimland*, 243 F.3d at 231–32; *In re GWI PSC 1*, 230 F.3d at 799–805; *In re PWS Holding Corp.*, 228 F.3d at 235–37; *S.S. Retail Stores Corp.* v. *Ekstrom (In re S.S. Retail Stores Corp.)*, 216 F.3d 882, 884–85 (9th Cir. 2000); *In re Cont'l Airlines*, 203 F.3d at 209–11; *Nationwide Mut. Ins. Prods.* v. *Berryman Prods. Inc. (In re Berryman Prods., Inc.)*, 159 F.3d 941, 943–46 (5th Cir. 1998); *Chateaugay III*, 94 F.3d at 775–76; *South St. Seaport L.P.* v. *Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 759–60 (2d Cir. 1996); *In re Cont'l Airlines*, 91 F.3d at 557–67; *Resolution Trust Corp.* v. *Best Prods. Co. (In re Best Prods. Co.)*, 68 F.3d 26, 29–30 (2d Cir. 1995); *Manges* v. *Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038–43 (5th Cir. 1994); *In re UNR Indus.*, Inc., 20 F.3d 766, 768–71 (7th Cir. 1994); *Chateaugay II*, 10 F.3d at 952–54; *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047–49 (7th Cir. 1993); *In re Spiritos*, 992 F.2d at 1006–07; *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co.* v. *Official Comm. of Unsecured Creditors*

*of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325–27 (2d Cir. 1993) ("*Chateaugay I*"); *In re Pub. Serv. Co. of N.H.*, 963 F.2d at 471–76; *In re Club Assocs.*, 956 F.3d at 1069–71; *Haliburton Serv.* v. *Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79, 81–82 (5th Cir. 1988); *Miami Ctr. Ltd. P'ship* v. *Bank of N.Y.*, 820 F.2d 376, 378–80 (11th Cir. 1987); *In re AOV Indus., Inc.*, 792 F.2d at 1146–50; *Trone* v. *Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 796–98 (9th Cir. 1981).

Moreover, the deep divisions among the Circuits are, at this point, well entrenched. The Second Circuit cited two of its prior decisions as supporting a presumption of mootness after substantial consummation. See Pet. App. 9a (citing *Chateaugay III* and *Chateaugay II*). And district courts in the Second Circuit routinely apply the presumption to appeals following substantial consummation of a plan. See *Cyrus Select Opportunities Master Fund, Ltd.* v. *Ion Media Networks, Inc.* (*In re Ion Media Networks, Inc.*, 480 B.R. 494, 501 (S.D.N.Y. 2012) (relying on the decision below and holding that appellant "failed to overcome the presumption of equitable mootness"); *In re Motors Liquidation Co.*, No. 10 Civ. 9094 (RMB), 2011 WL 1842224, at *5 (S.D.N.Y. May 10, 2012) (appellant had not "overcome the strong presumption that its appeal is moot"); *Freeman* v. *Journal Register Co.*, 452 B.R. 367, 372 (S.D.N.Y. 2010) (applying "a 'strong presumption'" of mootness); *Bernardez* v. *Pawlowski (In re Pawlowski)*, 428 B.R. 545, 550 (E.D.N.Y. 2009) (appellant "fail[ed] to rebut the resulting presumption of mootness" after substantial plan consummation); *Windels Marx Lane & Mittendorf LLP* v. *Source Enters., Inc. (In re Source Enters.,*

*Inc.)*, 392 B.R. 541, 548 (S.D.N.Y. 2008) (applying "'a strong presumption'" of mootness); *Compania Internacional Financiera S.A.* v. *Calpine Corp. (In re Calpine Corp.)*, 390 B.R. 508, 518 (S.D.N.Y. 2008) (appellants failed "to rebut the presumption that the [a]ppeals are moot"); *Kenton County Bondholders Comm.* v. *Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 516, 522 (S.D.N.Y. 2007) (applying "'a strong presumption'" of mootness); *ACC Commc'ns Grp.* v. *Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 367 B.R. 84, 94 (S.D.N.Y. 2007) (appellants "fail[ed] to meet their burden" to overcome the "presumption of mootness"); *Loral Stockholders Protective Comm.* v. *Loral Space & Commc'ns Ltd. (In re Loral Space & Commc'ns Ltd.)*, 342 B.R. 132, 138 (S.D.N.Y. 2006) (appellant failed "to rebut the presumption that its appeal is moot").

In the Circuits that have rejected any mootness presumption, by contrast, courts repeatedly put the burden squarely on the proponent of an appeal's dismissal. See, *e.g.*, *Maxwell Techs., Inc.* v. *ISE Corp. (In re ISE Corp.)*, No. 11 Civ. 2704 L(NLS), 2012 WL 4793068, at *2 (S.D. Cal. Oct. 9, 2012) ("[T]he 'party moving for dismissal on mootness grounds bears a heavy burden.'"); *Meritage Homes of Nev., Inc.* v. *JPMorgan Chase Bank, N.A. (In re South Edge LLC)*, 478 B.R. 403, 412 (D. Nev. 2012) (same); *Friesen* v. *Seacoast Capital Partners II, L.P. (In re QuVIS, Inc.)*, 469 B.R. 353, 363 (D. Kan. 2012) ("The party asserting lack of jurisdiction based on mootness bears the burden of proof under both the constitutional and equitable mootness doctrines."); *In re VOIP, Inc.*, 461 B.R. 899, 903 n.4 (S.D. Fla. 2011) ("The burden of establishing mootness is on the party seeking dismissal."); *In re Anderson*, 349 B.R.

448, 454 (E.D. Va. 2006) ("[A]ppellees, as the moving parties, bear the burden of showing that Anderson's appeal is equitably moot and should be dismissed.").

Likewise, the Circuits that review a district court's equitable-mootness dismissal only for abuse of discretion have not wavered from that standard of review. See, *e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d 161, 167 (3d Cir. 2012), pet. for cert. filed, No. 12-642 (Nov. 16, 2012); *In re SemCrude, L.P.*, 456 F. App'x 167, 170 (3d Cir. 2012); *Sutton* v. *Weinman, (In re Centrix Fin. LLC*), 394 F. App'x 485, 486 (10th Cir. 2010); *In re Zenith Elecs. Corp.*, 329 F.3d at 343; *Official Comm. of Unsecured Creditors* v. *SPGA, Inc. (In re SPGA, Inc.)*, 34 F. App'x 49, 50 (3d Cir. 2002). And the Circuits that review the district courts' equitable-mootness decisions de novo are also standing pat. See, *e.g.*, *Stokes* v. *Gardner*, No. 11-35233, 2012 WL 1944552, at *1 (9th Cir. May 30, 2012) (unpublished); *Tech. Lending Partners LLC* v. *San Patricio County Cmty. Action Agency (In re San Patricio County Cmty. Action Agency)*, 575 F.3d 553, 557 (5th Cir. 2009); *Premier Entm't Biloxi LLC* v. *Pacific Inv. Mgmt. Co. LLC (In re Premier Entm't Biloxi LLC)*, No. 08-60349, 2009 WL 1616681, at *2 (5th Cir. 2009) (per curiam).

One need not agree with a leading commentator that equitable mootness is a "disgraceful doctrine" (David Gray Carlson, *The Res Judicata Worth of Illegal Bankruptcy Reorganization Plans*, 82 TEMP. L. REV. 351, 413 n.549 (2009)) to recognize that the doctrine constitutes a "substantial barrier to appeals brought by dissenters from the resolution of a bankruptcy case" that "can be dispositive in even the most important bankruptcy matters" (Troy A.

McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 790–91 (2010)). Bankruptcy courts determine legal rights to billions of dollars' worth of assets every year. See THE 2012 BANKRUPTCY YEARBOOK & ALMANAC 28 Kerry A. Mastroianni ed., 22d ed. 2012) (public companies that filed for bankruptcy in 2011 had $104 billion in assets). Those decisions ought not to be so readily insulated from Article III review.

This Court has yet to opine on even the basic contours of equitable mootness. With respect, the time for it to do so has arrived.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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