No. 18-5548

In The
Supreme Court of the United States

BRIAN TUTTLE,

Petitioner,

v.

ALLIED NEVADA GOLD CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Sean E. O'Donnell
Christopher W. Carty
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
Bank of America Tower
New York, NY 10036
(212) 872-1000

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

Counsel for Allied Nevada Gold Corp., et al.

QUESTION PRESENTED

Whether the Third Circuit—consistent with every other court of appeals that has considered the question—correctly declined to deem the equitable mootness doctrine unconstitutional, and correctly held that the doctrine's requirements were met on the facts of this particular case.

PARTIES TO THE PROCEEDINGS

Respondents Allied Nevada Gold Corp., n/k/a Hycroft Mining Corp., and its reorganized subsidiaries (Allied Nevada Gold Holdings LLC, Allied VGH Inc., ANG Central LLC, ANG Cortez LLC, ANG Eureka LLC, ANG North LLC, ANG Pony LLC, Hasbrouch Production Co. LLC, Hycroft Resources & Development Inc., Victory Exploration Inc., and Victory Gold Inc.) were debtors in the bankruptcy court and appellees in the district court and the court of appeals.

Petitioner Brian Tuttle was a movant-objector in the bankruptcy court and the appellant in the district court and the court of appeals.

RULE 29.6 DISCLOSURE

Hycroft Mining Corp., f/k/a Allied Nevada Gold Corp., is the direct and/or indirect parent corporation of each of the other reorganized debtor subsidiaries. No public corporation owns 10% or more of Hycroft Mining Corp.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

In The
Supreme Court of the United States

No. 18-5548

BRIAN TUTTLE,

Petitioner,

v.

ALLIED NEVADA GOLD CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

The Petition is the latest in a string of oft-denied petitions challenging the equitable mootness doctrine. Like the prior petitions, the Petition in this case implicates no circuit conflict; on top of that, it is an exceptionally poor vehicle to review any facet of the challenged doctrine. It should be denied as well.

STATEMENT

1. a. Allied Nevada Gold Corp. and its reorganized subsidiaries (collectively, "Allied Nevada") are U.S.-based gold and silver producers operating in the State of Nevada. In March 2015, Allied Nevada filed a voluntary petition for relief under chapter 11 of title 11 of the U.S. Code (the "Bankruptcy Code"). At that time, Allied Nevada was

carrying $340 million of secured debt and $350 million of unsecured debt. Pet. App. A, at 2.[1]

Allied Nevada took several steps to ensure a successful reorganization. Prior to filing for bankruptcy protection, Allied Nevada negotiated a restructuring and support agreement with certain lenders representing 100% of its funded secured debt and approximately 67% of its unsecured notes. When Allied Nevada's business was negatively affected by a number of factors—including declining gold and silver prices—Allied Nevada successfully renegotiated the agreement and avoided termination. Pet. App. A, at 3; Pet. App. B, at 4-5.

Allied Nevada also worked with the other major stakeholders in the bankruptcy proceeding. Pursuant to the Bankruptcy Code, the U.S. Trustee for the District of Delaware appointed a committee of unsecured creditors ("Creditors Committee") and a committee of equity holders ("Equity Committee"), which took discovery, conducted independent valuation analyses, investigated potential claims, and participated in negotiations regarding a plan of reorganization.[2] In addition, members of an informal

---

[1] Because the Petition Appendix is not consecutively paginated, citations are to the page number of the cited document.

[2] For example, when Allied Nevada sought approval to sell certain assets that, in its financial advisor's opinion, was in the best interests of creditors, the Equity Committee conducted extensive fact-finding and concluded that it could not find an alternative transaction that would assure a greater return. Pet. App. C, at 3-4.

committee of noteholders agreed to provide debtor-in-possession financing and to fund an exit facility. Pet. App. A, at 3 & n.3.

Ultimately, Allied Nevada reached a global resolution with its major stakeholders (including both the Creditors Committee and the Equity Committee) and proposed a plan of reorganization under which: (i) secured creditors would receive a distribution in the form of new secured debt in the reorganized debtors; (ii) unsecured creditors would receive options to receive a cash recovery or privately held common stock in the reorganized debtors; and (iii) equity security holders (like Petitioner) would receive a distribution in the form of warrants to purchase new shares of common stock. Pet. App. A, at 3-4.

b. Around the same time that Allied Nevada announced a global resolution, Petitioner filed a motion to appoint an independent examiner to investigate potential claims against Allied Nevada, and sought discovery in relation to those claims. Allied Nevada, the Creditors Committee, and the committee of noteholders objected.

The Equity Committee—appointed to represent the interests of holders of equity securities, like Petitioner—submitted a response explaining that "it had considered the allegations in [the] motion but found no colorable claims giving rise to the equitable disallowance for any creditor's claim." Pet. App. A, at 4. Based on its review of a "valuation analysis [provided by Allied Nevada's financial advisor], [an] operational analysis, and [an] analysis of certain potential claims in negotiating the terms of the

settlement that is embodied in the Consensual Plan of reorganization," the Equity Committee "concluded that the proposed settlement provide[d] existing equity holders with the best opportunity for a recovery given [Allied Nevada's] current circumstances." *Id.* at 4-5 (last two alterations in original) (citation and internal quotation marks omitted).

The bankruptcy court held a hearing on Petitioner's motion and denied it. Pet. App. A, at 5; Pet. App. F.

c. The bankruptcy court then considered the proposed plan of reorganization and objections at a confirmation hearing. In support of the plan, Allied Nevada offered the testimony of multiple witnesses, including the debtors' chief financial officer and an expert from the debtors' financial advisor. The latter advised the court that Allied Nevada's enterprise value as a going concern was in the range of $200 to $300 million—a value that (but for the concessions agreed to by creditors in the global resolution) would have placed equity security holders short of any recovery by at least $350 million under the distribution scheme set forth in the Bankruptcy Code. Pet. App. A, at 2-3, 5.

Petitioner objected to the plan, asserting (among other things) that it undervalued the debtors and that equity security holders were entitled to an additional recovery beyond the stock warrants provided for in the negotiated plan. But apart from cross-examining Allied Nevada's witnesses, Petitioner neither "proposed an alternative

enterprise valuation analysis [n]or proffered any new evidence or witness to substantiate [his] objections." Pet. App. A, at 5-6.

Despite not having filed or noticed any stay motion, Petitioner in the course of the confirmation hearing orally requested that the bankruptcy court stay the hearing. The court denied the motion as untimely. Pet. App. A, at 5-6.

In October 2015, the bankruptcy court issued an order confirming the plan over Petitioner's objections. The court "found no evidence that the plan itself was not proposed in good faith; instead it found that the plan was the product of negotiation[s] among numerous parties, all of whom had different interest[s], including Allied Nevada itself, the secured lenders, the Creditors Committee, and the Equity Committee as a fiduciary representative for all shareholders." Pet. App. A, at 6 (alterations in original) (citation and internal quotation marks omitted). The court also "accepted [Allied Nevada's] valuation analysis" as "reasonable, persuasive, credible and accurate," as well as "not *** controverted by other persuasive evidence." *Id.* (ellipsis in original) (citation and quotation marks omitted).

Although the class of equity security holders had voted to reject the plan, the bankruptcy court noted that "the Equity Committee's conclusion favoring the plan remained." Pet. App. A, at 6. Based on the evidence submitted at the confirmation hearing, the court held "that the reorganization plan was fair to the stockholders—the most junior class receiving a

recovery—and that it provided more than they would have received in a liquidation." *Id.*

d. Two weeks later, on the effective date, Allied Nevada consummated the plan and emerged from bankruptcy as a privately held company. Pet. App. A, at 6. As envisioned by the plan, the debtors (i) repaid a portion of certain prepetition debt instruments and other secured obligations, as well as the debtor-in-possession facility; (ii) rejected certain capital lease obligations and other contracts; and (iii) eliminated all existing liens. Pet. App. B, at 8.

Meanwhile, the newly formed reorganized debtors:

- appointed their boards of directors and adopted new organizational documents;
- dissolved certain prior business entities;
- pursuant to a new credit agreement, incurred $126.7 million of new first lien term loans;
- entered into a new indenture and issued approximately $95 million of new second lien convertible notes, a figure that grew by $15 million with calls to fund $5 million more;
- effectuated an interim distribution of new common stock to eligible holders of allowed general unsecured claims, at least one of whom has received approval to trade the stock with a third party;

- issued 100% of the new warrants to holders of the canceled common stock; and
- distributed approximately $1.8 million in cash to satisfy certain claims allowed by the Bankruptcy Code and to cure obligations with respect to assumed executory contracts and unexpired leases.

Pet. App. B, at 8-9.[3]

e. At a hearing held in January 2016—three months after consummation of the plan—the bankruptcy court considered various additional motions that Petitioner had filed. The court denied each of the motions. Pet. App. A, at 6-7; Pet. App. D.

The first set of motions concerned Petitioner's standing to prosecute equitable subordination claims against various creditors, a request to depose parties to the restructuring support agreement, and a renewed request to appoint an examiner. The bankruptcy court held that, given the entry of the confirmation order and effectuation of the releases outlined in the plan, the relief requested in the first two motions was moot. The court denied the examiner motion as no different than Petitioner's prior request for an examiner and, in any event, found it precluded by the Bankruptcy Code in view of the plan's confirmation. Pet. App. B, at 10-11.

---

[3] These facts reflect the state of affairs as of June 26, 2016, the date that Allied Nevada moved in the district court to dismiss the appeal as equitably moot, and the record before the district court when it dismissed the appeal.

Petitioner's second set of motions—filed after the entry of the confirmation order but just one day before the plan effective date—sought a stay of the confirmation order, reconsideration of the findings of fact and conclusions of law made with respect to confirmation, and reconsideration of the denial of the (untimely) oral motion for stay. Because Petitioner did not seek expedited consideration of his (new) stay motion, such that it could be heard prior to the confirmation order taking effect, the bankruptcy court denied that motion as moot. Petitioner's remaining arguments, the court concluded, fell short of the standard for reconsideration. Pet. App. B, at 11, 17.

Petitioner's final set of motions, filed just two weeks before the January 2016 hearing, set forth various discovery requests. The bankruptcy court rejected them, explaining that confirmation had rendered discovery moot and that Petitioner had not acted diligently. Pet. App. B, at 11-12.

2. Petitioner, along with another objector and his self-styled ad hoc committee of equity security holders (of which he was purportedly the chairman), appealed several of the bankruptcy court's rulings to the district court, which consolidated the appeals into two cases. Pet. App. A, at 7; *see also* Pet. App. B, at 13 (listing issues on appeal); Pet. App. C, at 11-12 (same). At no point, however, did Petitioner seek a stay of the confirmation order from the district court pursuant to Federal Rule of Bankruptcy 8007(b)(2).

The district court dismissed both appeals as equitably moot in separate opinions.[4] Applying Third Circuit precedent, the court first determined that Allied Nevada had substantially consummated its plan of reorganization. In addition to crediting the declaration of Allied Nevada's executive vice president and chief financial officer, which detailed the transactions and events that had transpired after confirmation, the court considered the fact that Petitioner had not even timely requested (let alone carried his burden to obtain) a stay. Pet. App. B, at 16-17.

That made it "difficult to undo the acts of third parties proceeding under the plan without prejudicing those third parties." Pet. App. B, at 18. The amended plan, the district court reasoned, "involved intricate transactions" and "was the result of compromises and agreements that took place over many months among debtors, [restructuring and support agreement] parties, the creditors committee, and the equity committee." *Id.*

Moreover, because Petitioner was challenging the valuation of the plan, "relief would detrimentally affect the rights of numerous third parties not before the court, *** including exit funding lenders as well as recipients of the distributions and issuances of

[4] As the Third Circuit noted, "[t]he District Court's reasoning for the equitable mootness dismissal is substantially the same in both opinions." Pet. App. A, at 7 n.7. For convenience, this brief cites to the most recent opinion at Petition Appendix B.

new common stock and new warrants and parties who may have obtained the instruments through trades on the open market." Pet. App. B, at 19. "Given the number of parties involved in the negotiation, approval, and substantial consummation of the amended plan, the court conclude[d] that public policy favors leaving the amended plan undisturbed." *Id.* at 19-20.

Ruling in the alternative, the district court found with respect to the motions heard at the January 2016 hearing "that the bankruptcy court did not abuse its discretion or err in denying [Petitioner's] motions for reconsideration and other motions." Pet. App. B, at 14 n.11.

3. The Third Circuit affirmed the dismissal of the appeal as equitably moot in a non-precedential opinion.

As a threshold matter, the Third Circuit noted that "[t]he Appellants devote much of their briefing to the argument that equitable mootness is unconstitutional." Pet. App. A, at 8. But it agreed with the district court's "succinct[] state[ment]" that "equitable mootness is a valid doctrine in this Circuit." *Id.*

Turning to Petitioner's alternative argument, the Third Circuit held that the district court did not abuse its discretion in applying the equitable mootness doctrine. Petitioner "d[id] not meaningfully dispute the District Court's conclusion that Allied Nevada's reorganization plan has been substantially consummated." Pet. App. A, at 10-11 (recounting facts set forth in Allied Nevada's chief financial

officer declaration). His sole argument in rebuttal—that Allied Nevada had yet to complete a strategic transaction it had hoped to finance following reorganization—"fail[ed] to negate the cascade of transactions and distributions that ha[d] followed since the plan's consummation." *Id.* at 11. And Petitioner "did not timely seek or obtain a stay." *Id.* at 11-12.

The Third Circuit then considered whether, in light of substantial consummation of the plan, granting Petitioner's "requested relief would require undoing the plan as opposed to modify[ing] it in a manner that does not cause its collapse." Pet. App. A, at 12 (alteration in original) (citation and internal quotation marks omitted). Here, the Third Circuit emphasized, Petitioner "asked the District Court to vacate the confirmation order, unwind completed transactions, and revalue Allied Nevada so as to increase the distribution to stockholders. In other words, *** to do the whole thing over." *Id.* The Third Circuit found no reason to fault the district court for rejecting that request, and further held that the district court was not obligated to "*sua sponte* fashion[] alternative relief." *Id.* at 12-13. The Third Circuit also endorsed the district court's finding that, "in undoing the plan, substantial harm would be done to third parties, including Allied Nevada's creditors and other debtholders, and more generally, stakeholders who held superior claims." *Id.* at 13.

In conclusion, the Third Circuit recognized that even though the equitable mootness doctrine "should be cautiously applied, [it] sometimes is warranted to prevent a court from unscrambling complex

bankruptcy reorganizations where the appealing party should have acted before the plan became extremely difficult to retract." Pet. App. A, at 14 (citation and internal quotation marks omitted). Because "[t]hat is the case here," the Third Circuit affirmed the dismissal of Petitioner's claims as equitably moot. *Id.*

4. Petitioner sought rehearing en banc, which the Third Circuit denied without requesting a response. Pet. App. G.

REASONS FOR DENYING THE PETITION

The Petition, like numerous others before it, provides no basis for this Court to delve into the equitable mootness doctrine. For at least three decades, the courts of appeals have agreed that equitable considerations can limit adjudication of an appeal from a bankruptcy court. The courts of appeals have also agreed that the focal point of the equitable mootness inquiry is whether, in the face of substantial consummation of a plan of reorganization, it would be impractical or imprudent to grant the relief requested by an appellant. In light of those longstanding agreements, this Court has predictably and repeatedly declined to consider the question presented—including in recent years. Petitioner's rehash of the same constitutional arguments that others have aired on prior occasions is no reason for the Court to grant certiorari in this case.

At any rate, this case is an inappropriate vehicle for taking up the question presented. The Third Circuit's non-precedential opinion below did not

address Petitioner's principal constitutional arguments challenging the viability of the equitable mootness doctrine, and, according to Petitioner, the courts of appeals have yet to do so more generally. The remaining aspects of the question presented—*i.e.*, the standard of review for reviewing equitable mootness determinations, and whether an appeal can be deemed moot when limited equitable relief is available—are either waived or are not implicated by the facts here. Petitioner's failure to seek a timely stay, followed by substantial consummation of the plan, dooms his arguments under even the narrowest conception of the equitable mootness doctrine. Further review is not warranted.

I. NO COURT HAS REJECTED THE EQUITABLE MOOTNESS DOCTRINE

A. The Courts Of Appeals Are Not In Conflict

1. Petitioner makes no attempt to identify a split of authority over the viability of the equitable mootness doctrine. None exists.

Surveying the case law more than 20 years ago, the Third Circuit remarked that equitable mootness was a "widely recognized and accepted doctrine," and it "s[aw] no reason why [it] should part company with [its] sister circuits in their adoption." *In re Continental Airlines*, 91 F.3d 553, 558-559 (3d Cir. 1996) (en banc). The doctrine's widespread acceptance has only grown. As the Tenth Circuit more recently observed, "[e]very other circuit to consider the issue"—the exception being the Federal Circuit, which does not have jurisdiction over

bankruptcy appeals—"has found that 'equitable,' 'prudential,' or 'pragmatic' considerations can render an appeal of a bankruptcy court decision moot." *In re Paige*, 584 F.3d 1327, 1337-1338 (10th Cir. 2009) ("We now make explicit what may previously have been implicit, and we adopt the equitable mootness doctrine.").[5]

Beyond its uniform recognition across the courts of appeals, the only two courts of appeals to have adjudicated constitutional challenges to the equitable mootness doctrine have rejected them. *See In re City of Detroit*, 838 F.3d 792, 799-800 (6th Cir. 2016); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 432-433 (3d Cir. 2015). Accordingly, this Court's review of Petitioner's primary constitutional challenge would be both unwarranted and premature.

2. The same goes for Petitioner's attempt—relegated to the tail-end of the Petition (at 36-38)—to invoke purported differences in application of the equitable mootness doctrine across the circuits.

---

[5] *See, e.g., In re Public Serv. Co. of N.H.*, 963 F.2d 469, 473 (1st Cir. 1992); *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993); *Behrmann v. National Heritage Found., Inc.*, 663 F.3d 704, 713 (4th Cir. 2011); *In re Idearc, Inc.*, 662 F.3d 315, 318 (5th Cir. 2011); *In re American HomePatient, Inc.*, 420 F.3d 559, 563-564 (6th Cir. 2005); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); *In re President Casinos, Inc.*, 409 F. App'x 31, 31-32 (8th Cir. 2010) (per curiam); *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012); *In re Lett*, 632 F.3d 1216, 1225-1226 (11th Cir. 2011); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-1148 (D.C. Cir. 1986).

Petitioner finds significant that courts have given the doctrine more than one name. But in the end, to quote the article that Petitioner relies on, "[t]he most significant over-arching factor *** in the various similar circuit court tests *** boils down to whether changes to the status quo following the [plan confirmation] order being appealed make it impractical or inequitable to unscramble the eggs." David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine*, 25 NORTON J. BANKR. L. & PRAC. 245, 249 (2016) (second alteration in original) (citation and internal quotation marks omitted). Thus, although "[t]he courts of appeal have developed various multi-factor tests for determining whether bankruptcy appeals are equitably moot[,] *** [t]hese tests tend to be variations on the same theme *** [and] consider factors [that] are interconnected and overlapping." *Id.* at 247 (last alteration in original) (citation and internal quotation marks omitted).

Petitioner also overreaches in asserting that the Second, Third, and Tenth Circuits disagree with the Fifth, Sixth, Ninth, and Eleventh Circuits over the applicable standard of review. Petitioner's own authority takes pains to underscore that any disagreement is much narrower in scope. *See* Matthew D. Pechous, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547, 566-567 (2012) (explaining that, apart from four circuits, "[t]he rest *** have yet to explicitly address the issue,

have only explicitly considered the issue in nonbinding unpublished opinions, or have not considered the issue at all") (footnotes omitted). And even then, "vagueness in opinions as to the specific type of mootness being addressed has caused some courts of appeals to believe mistakenly that other circuits have adopted one standard or another." *Id.* at 567; *see also In re United Producers, Inc.*, 526 F.3d 942, 946 (6th Cir. 2008) ("[T]he case law is sparse regarding the standard of review to be applied."). Thus, at minimum, further percolation on that issue is necessary.

3. Given the foregoing, it is unsurprising that this Court has never taken up a question relating to the equitable mootness doctrine. To the contrary, the Court has denied certiorari on nearly two dozen occasions between 1988 and last year—including in the four instances listed in the Petition (at 3 n.1).[6]

---

[6] *E.g., Ochadleus v. City of Detroit*, 137 S. Ct. 1584 (2017) (Mem.); *Beeman v. BGI Creditor's Liquidating Tr.*, 136 S. Ct. 155 (2015) (Mem.); *Mitrano v. Tyler*, 134 S. Ct. 2679 (2014) (Mem.); *Mitrano v. JPMorgan Chase Bank, N.A.*, 571 U.S. 983 (2013); *Spencer Ad Hoc Equity Comm. v. Idearc, Inc.*, 565 U.S. 1203 (2012); *Prime Healthcare Servs. L.A., LLC v. Brotman Med. Ctr., Inc.*, 565 U.S. 1156 (2012); *Parker v. Motors Liquidation Co.*, 565 U.S. 1113 (2012); *Ad Hoc Comm. of Kenton Cty. Bondholders v. Delta Air Lines, Inc.*, 558 U.S. 1007 (2009); *Ivaldy v. Loral Space & Commc'ns Ltd.*, 555 U.S. 1126 (2009); *Official Comm. of Unsecured Creditors v. Adelphia Commc'ns Corp.*, 552 U.S. 941 (2007); *Hayes v. Genesis Health Ventures, Inc.*, 550 U.S. 935 (2007); *Hayes v. Genesis Health Ventures, Inc.*, 545 U.S. 1129 (2005); *Armstrong v. Segal*, 543 U.S. 1050 (2005); *U.S. Rest. Props., Inc. v. Convenience USA, Inc.*, 541

There is no reason for a different result here. If and when a court of appeals takes up the invitation to revisit its recognition of the equitable mootness doctrine, this Court will have ample opportunity—with the benefit of a fully reasoned decision—to resolve any such newly created conflict.

B. The Petition's Constitutional Arguments Are Overblown

In the absence of any circuit conflict warranting this Court's review, Petitioner resorts to arguing the merits of the equitable mootness doctrine. Those arguments are neither well developed nor meritorious.

For starters, Petitioner overlooks the "long *** established" principle "that a federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (citation and internal quotation marks omitted). It is equally well established that "bankruptcy courts *** are courts of equity and appl[y] the principles and rules of equity jurisprudence." *Young v. United States*, 535 U.S. 43, 50 (2002) (alteration in original) (citation and

---

U.S. 1044 (2004); *Nationwide Mut. Ins. Co. v. Berryman Prods., Inc.*, 528 U.S. 1158 (2000); *Shelton v. Rosbottom*, 528 U.S. 869 (1999); *Bank of N.Y. v. Continental Airlines, Inc.*, 519 U.S. 1057 (1997); *Manges v. Seattle-First Nat'l Bank*, 513 U.S. 1152 (1995); UNARCO *Bloomington Factory Workers v. UNR Indus., Inc.*, 513 U.S. 999 (1994); *Hamilton Taft & Co. v. Federal Express Corp.*, 509 U.S. 905 (1993); *Miami Ctr. Ltd. P'ship v. Bank of N.Y.*, 488 U.S. 823 (1988).

internal quotation marks omitted); *see Bank of Marin v. England*, 385 U.S. 99, 103 (1966) ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.").

Equitable mootness is of a piece with those precepts. "As Judge Posner has put it, equitable mootness 'is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties.'" *In re Tribune Media Co.*, 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., joined by Vanaskie, J., concurring) (quoting *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994)); *accord In re Paige*, 584 F.3d at 1335 n.7 ("[E]quitable mootness is rooted, at least in part, in the court's discretionary power to fashion a remedy in cases seeking equitable relief.").

Petitioner stretches to frame the equitable mootness inquiry as inconsistent with Article III courts' power to review bankruptcy court decisions. But "equitable mootness bears only upon the proper remedy, and does not raise a threshold question of [the] power to rule." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005). Indeed, "a court is not inhibited from considering the merits before considering equitable mootness." *Id.* Although Petitioner would prefer (Pet. 35-36) that courts do so in every case, that preference does not render unconstitutional the practice of considering whether relief can be fashioned *assuming that an appellant has prevailed on the merits*. *See In re Tribune Media*, 799 F.3d at 281 ("When determining whether the case is equitably moot, we of course must

assume [appellant] will prevail on the merits because the idea of equitable mootness is that *even if* [appellant] is correct, it would not be fair to award the relief it seeks."). In the end, even Petitioner does not go so far as to argue that equitable factors are irrelevant to the disposition of a bankruptcy appeal. *See* Pet. 36 (suggesting that after merits analysis "[t]hird parties, and even the health of the reorganization plan as a whole, can then be taken into consideration").

The precedent that Petitioner invokes does not dictate a different conclusion. Pet. 14-19 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Stern v. Marshall*, 564 U.S. 462 (2011); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015)). Those cases "considered whether *Congress* may redirect adjudication from state courts and Article III courts to Article I courts," and "[n]ot *one* *** discusses whether an Article III court may abstain from hearing a case, as the primary evil the cases address (congressional aggrandizement) is irrelevant." *In re Tribune Media*, 799 F.3d at 285 (Ambro, J., joined by Vanaskie, J., concurring).

Finally, Petitioner makes much of the equitable mootness doctrine's focus on whether an appellant diligently seeks a stay of the confirmation order. But Petitioner's view—that the requirement to seek a stay from the bankruptcy court in the first instance makes that court "judge, jury and executioner when it comes to the finality of the bankruptcy process," Pet. 20—is unfounded. However a bankruptcy court

ultimately rules on a stay request does not bear on an appellant's diligence in making that request. And as the Petition (at 21) acknowledges, the Federal Rules of Bankruptcy Procedure expressly permit an appellant to seek a stay from the district court. *See* FED. R. BANKR. P. 8007(b)(2); *see also* p. 22, *infra* (discussing Petitioner's failure to obtain or timely seek a stay, or seek relief from the district court). It is therefore neither relevant nor correct for Petitioner to suggest (Pet. 22) that the stay decision "rests *** solely at the discretion" of the bankruptcy court.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REVIEWING THE QUESTION PRESENTED

Even if this Court were inclined to review the question presented, it should not use this "unique vehicle" (Pet. 14) for at least three reasons.

First, the decision below is an unpublished opinion that disposes of the question presented by confirming that "equitable mootness is a valid doctrine in this Circuit" and that the en banc decision in *In re Continental Airlines* "controls here." Pet. App. A, at 8. The decision does not pass upon any of Petitioner's arguments regarding the validity of the doctrine. Nor, according to the Petition (at 2, 22-23), does *In re Continental Airlines* or any other case. This Court should not review Petitioner's arguments without the benefit of the considered analysis of the courts of appeals.

Second, the facts of this case do not allow this Court to provide the requested "direction" (Pet. 37-38) on the application of equitable mootness.

Although Petitioner now takes the position that review of such determinations should be *de novo*, below he *agreed* that "[a] district court's application of the equitable mootness doctrine to a bankruptcy appeal is reviewed for abuse of discretion." C.A. Br. 11, No. 17-1513 (3d Cir. Sept. 25, 2017). Similarly, Petitioner never requested "effective and equitable relief that would not upset the plan," Pet. 38; quite the opposite, he "asked the District Court to vacate the confirmation order, unwind completed transactions, and revalue Allied Nevada so as to increase the distribution to stockholders." Pet. App. A, at 12-13. Further still, while Petitioner asserts that "the reliance interests of third parties were never scrutinized," Pet. 38, the Third Circuit directly addressed that subject, explaining that "substantial harm would be done to third parties, including Allied Nevada's creditors and the other debtholders, and more generally, stakeholders who held superior claims," Pet. App. A, at 13. Accordingly, this case does not implicate "the appropriate standard of review" or whether equitable mootness "can be invoked when relief is available that would not scramble a bankruptcy plan or hurt third parties." Pet. I; *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) ("The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments.").

In any event, Petitioner's challenge would fail under either a *de novo* or an abuse-of-discretion standard of review. Petitioner "d[id] not meaningfully dispute the District Court's conclusion

that Allied Nevada's reorganization plan ha[d] been substantially consummated" on the plan's effective date. Pet. App. A, at 10-11 (describing "cascade of transactions and distributions"). He also did not diligently seek a stay from the district court after the bankruptcy court denied his untimely oral request at the confirmation hearing and his subsequent written motions noticed for hearing three months later. *Id.* at 11-12 (holding that Petitioner "did not timely seek or obtain a stay"). Even the detractors of equitable mootness concede that the doctrine is properly applied where (as here) "we can fairly say the appealing party should have acted before the plan became extremely difficult to retract." *In re One2One Commc'ns*, 805 F.3d at 452 (Krause, J., concurring) (citation and internal quotation marks omitted); *see id.* (citing *In re SemCrude L.P.*, 456 F. App'x 167, 171 (3d Cir. 2012), as example in which court affirmed finding of equitable mootness because "appellant made an oral motion for a stay in the bankruptcy court, but never filed a written motion or made any other attempts to obtain a stay"). Indeed, Petitioner himself submits that "[i]t was this scenario"—*i.e.*, failing "to diligently pursue all available remedies" and "exerting minimal effort to stay the plan"—for "which equitable mootness was created." Pet. 25.

Third, apart from equitable mootness, the district court (alternatively) found with respect to the motions heard at the January 2016 hearing that "the bankruptcy court did not abuse its discretion or err in denying [Petitioner's] motions for reconsideration and other motions that are the subject of this appeal." Pet. App. B, at 14 n.11. Consequently, even if this

Court were to invalidate the equitable mootness doctrine or overturn its application in this case, that decision would almost certainly have no impact on the ultimate outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Pratik A. Shah
Counsel of Record
Sean E. O'Donnell
Z.W. Julius Chen
Christopher W. Carty
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Allied Nevada Gold Corp., et al.

October 11, 2018