No. 18-5548

In the Supreme Court of the United States

BRIAN TUTTLE,
Petitioner,

v.

ALLIED NEVADA GOLD CORP., ET AL.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Equitable mootness, a judge-made doctrine, allows courts to avoid hearing jurisdictionally proper bankruptcy appeals. Without this Court's supervision, this "curious doctrine" has found a foothold across the country, even in the face of pronounced constitutional concerns. *In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

Equitable mootness has long faced criticism for its lack of legal grounding and the profound unfairness it works on less sophisticated creditors. Even placing those defects aside, it is now clear that equitable mootness conflicts with this Court's recent confirmation that, when Congress confers jurisdiction, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013)) (internal quotation marks omitted). That decision bars federal courts from relying on "prudential" considerations to avoid hearing cases within their statutory jurisdiction. Equitable mootness does precisely what *Lexmark* prohibits: it allows Article III judges to create their own barriers to appeals expressly authorized by Congress in an attempt to promote finality and protect reliance interests.

The question of equitable mootness's ongoing vitality is both important and ripe for review. The doctrine stunts the development of bankruptcy law, produces disparate outcomes, and encourages unfair

gamesmanship by debtors. Its shaky justification and practical consequences have been the subject of considerable academic and judicial commentary. Without this Court's review, equitable mootness will continue to "serve[] as part of a blueprint for implementing a questionable [reorganization] plan that favors certain creditors over others without oversight by Article III judges." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 448 (3d Cir. 2015) (Krause, J., concurring).

The petition should be granted.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S HOLDINGS.

Respondents' key contention—that all of the circuits apply some form of equitable mootness—need not have been pressed, because Petitioner does not disagree. That uniformity should not be mistaken for correctness. The central argument of the *pro se* Petition is that the decision below conflicts with decisions of this Court. *See* Sup. Ct. R. 10(c). Whatever legal underpinning the doctrine may have had in the past, it is now in conflict with this Court's decision in *Lexmark*.

1. Courts of appeals' now-routine refusal to hear bankruptcy appeals cannot coexist with this Court's holding that Article III courts may not decline to hear cases assigned to them by statute. Congress unambiguously subjects final orders of bankruptcy judges to appellate review by Article III courts. Under *Lexmark*, federal courts may not abdicate that jurisdiction based on their own prudential

assessments.

In *Lexmark*, this Court made clear that Congress has the power to determine which causes of action the federal courts should hear. 572 U.S. at 128. *Lexmark* should have resolved the debate about equitable mootness. As dissenting judges have pointed out, equitable mootness suffers from the same infirmities that proved fatal in *Lexmark*. Instead of looking to the Bankruptcy Code or other sources of statutory authority, courts have fashioned their own prudential factors that primarily address whether relief would be too disruptive to finality and reliance interests. Like the prudential standing factors applied by the *Lexmark* district court, the considerations are not necessarily unreasonable. There were surely good reasons, for example, to avoid "duplicative damages or complexity in apportioning damages" in Lanham Act cases. *Lexmark*, 572 U.S. at 135 (quoting *Conte Bros. Auto., Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998)). But those are precisely the kinds of policy questions that, under *Lexmark*, federal courts cannot decide. Only Congress can weigh those interests and determine whether equitable mootness should be part of the statutory scheme.

Congress has never done so. As the Solicitor General has stated, no provision of the Bankruptcy Code authorizes equitable mootness, and "to the extent the Bankruptcy Code addresses the issue, it appears to preclude the doctrine." Petition for Writ of Certiorari, *United States* v. *GWI PCS 1, INC.*, No. 00-1621, 2001 WL 34124814, at *22 (Apr. 2001). Congress carefully crafted a system of appellate review for bankruptcy decisions that ensures that an Article III judge will

have the final say where the Constitution so requires. Using its authority to make "uniform Laws on the subject of Bankruptcies throughout the United States," Congress established the system for appeals in bankruptcy cases, and it did not provide this mechanism for abstention. U.S. Const. art. I, § 8, cl. 4.

2. Respondents rely on *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 717 (1996), for the proposition "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*." Br. in Opp'n 17 (emphasis added). That broad holding, made in the context of addressing the historic and limited abstention doctrines, does not resolve the conflict with this Court's decisions as Respondents suggest.

First, the appellate jurisdiction that the Third Circuit and others have declined to exercise is clearly a creature of statute. In the Bankruptcy Code of 1978, Congress established a United States bankruptcy court as an "adjunct" to each federal district court as part of a wide-ranging procedural and substantive revision to the bankruptcy laws. 28 U.S.C. § 151(a) (1976 ed., Supp. IV); *see generally* Carol K. Muranaka, *The Judicial Power of the Bankruptcy Court*, 18-NOV Haw. B. J. 22 (2014) (describing the history of bankruptcy courts). The Court significantly curtailed the authority of bankruptcy judges in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which struck down the 1978 Code's delegation of authority to bankruptcy judges because Congress had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and

ha[d] vested those attributes in a non-Art. III adjunct," *id.* at 87

In response, Congress made significant revisions to the Bankruptcy Code in 1984. Among other changes, Congress created two levels of appellate review. First, district courts have "jurisdiction to hear appeals * * * from final judgments, orders, and decrees" from bankruptcy courts. 28 U.S.C.§ 158(a)(1). Second, "courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by the district courts in their supervisory role over the bankruptcy courts. *Id.* § 158(d)(1). This structure was designed to ensure that review by an Article III judge, insulated by the Constitution's "clear institutional protections" of judicial independence, would be available whenever constitutionally required. *See* H.R. Rep. No. 98–882 (1984), *reprinted in* 1984 U.S.C.C.A.N. 576.[1]

Furthermore, despite past "grand pronouncements that [ ] 'courts of bankruptcy are essentially courts of

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[1]*Stern* v. *Marshall*, 564 U.S. 462 (2011), reaffirmed the need for Article III review of bankruptcy court orders. There, this Court held that bankruptcy courts could not enter final judgments on state law claims, even though the Bankruptcy Code authorized them to do so. *Id.* at 478–82. Adherence to Congress's decision to give Article III judges appellate review over bankruptcy orders, 28 U.S.C. § 158(a)(1), (d)(1), is particularly critical because *Northern Pipeline* and *Stern* strongly suggest that the availability of such review is constitutionally required.

equity, and their proceedings inherently proceedings in equity,'" more recent decisions recognize the fundamentally statutory character of the bankruptcy courts after the 1984 code amendments. *See* Mark N. Berman, '*Wither' the Equity Powers of the Bankruptcy Court*, Harvard Law School Bankruptcy Roundtable (May 27, 2014). For example, in *Law* v. *Siegel*, 571 U.S. 415, 421 (2014) (citations omitted), the Court reversed an equitable remedy for abusive litigation practices because "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Though the Bankruptcy Code authorizes bankruptcy judges to consider equitable principles on certain issues, the requirement that Article III courts conduct appellate review is not one of them.

3. Finally, Respondents would waive away all those concerns on the theory that equitable mootness addresses only the remedy. Br. in Opp'n 18–19. But there will be an unreviewed—and, because courts use the doctrine to decline jurisdiction, unreviewable—merits decision at the heart of each case decided on equitable mootness grounds. As Respondents emphasize, whether the appellant has been granted a stay prior to confirmation is a critical factor in many circuits. The standard for granting a stay asks whether the appellant is likely to succeed on the merits. In other words, to have your bankruptcy appeal heard, you must first convince the same judge that just denied you relief that you are nonetheless "likely" to succeed on appeal.

Barring the use of equitable mootness would not unnecessarily burden the judicial system. District courts would simply be required to hear appeals from

final orders of bankruptcy judges, as instructed by Congress. After a review of the merits, equitable factors may then be properly considered when fashioning relief, but courts must strive to provide even partial relief where it will not fatally scramble the restructuring plan.

II. THE QUESTION PRESENTED IS IMPORTANT AND RIPE FOR REVIEW.

A. Equitable Mootness Impairs the Development of Bankruptcy Law and Promotes Gamesmanship.

Equitable mootness has had broad ramifications for bankruptcy law and a broad class of litigants that create an urgent need for this Court's intervention.

1. Routinely sidestepping appellate review "stunts the development of uniformity in the law of bankruptcy." *In re One2One Commc'ns, LLC*, 805 F.3d at 447. The singular focus on whether the restructuring plan has been consummated ignores the legal conclusions of the lower courts. The absence of meaningful review means "equitable mootness * * * tends to insulate errors by bankruptcy judges or district courts * * * ." *Id.* As equitable mootness dismissals grow more common, the Article III courts provide less and less binding supervision in a subject area "whose caselaw has been plagued by indeterminacy." *In re Pacific Lumber Co.*, 584 F.3d 229, 241–42 (5th Cir. 2009).

2. In the absence of this Court's review, the doctrine itself has spiraled into disarray. Over the years that this questionable doctrine has developed unchecked, "there have developed splits among the circuits as to

the interpretation or application of many of these factors." William L. Norton Jr., *Equitable Mootness*, 8 Norton Bankr. L. & Prac. 3d § 170:87 (2017). These divisions make the doctrine chaotic and unfair in practice.

As the Petition points out, the circuits are split as to the appropriate standard of review.[2] Commentators have identified numerous other inconsistencies among the courts of appeals with regard to the standard of review, the factors to be applied, and the extent to which the merits are considered that lead to different results in cases that should be similar. David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine?*, 25 J. Bankr. L. & Prac. NL Art. 2, Aug. 2016. As Mr. Tuttle argued in the Third Circuit, the circuits are split as to whether sophisticated parties involved in the bankruptcy, who should have been on notice of the appellate consequences of their decisions during the bankruptcy court proceedings, are entitled to the protection of equitable mootness. *Compare* Pet. App. A, at 13 *with In re Transwest Resort Props. Inc.*, 801 F.3d 1161, 1169 (9th Cir. 2015) (holding that those parties present in the confirmation hearings are not

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[2] As Respondents note, Mr. Tuttle acknowledged the Third Circuit's binding precedent that a district court's application of the equitable mootness doctrine is reviewed for abuse of discretion. Br. in Opp'n 21. The point here is that, in the absence of guidance by this Court, the doctrine lacks uniformity.

the "innocent third parties" equitable mootness seeks to protect), and *In re Pacific Lumber Co.*, 584 F.3d at 244 (refusing to apply equitable mootness when "appellate consequences were foreseeable to [appellants] as sophisticated investors * * *"). Finally, the courts of appeals have taken different approaches as to whether equitable mootness can be applied in cases where the court of appeals could fashion partial relief.[3] *Compare* Pet. App. A, at 12–13 (declining to provide partial relief) *with In re Transwest Resort Props. Inc.*, 801 F.3d at 1164 (finding equitable mootness inapplicable where it is "possible to devise an equitable remedy to at least partially address the lender's objections * * *).

All these divisions increase the risk of unfairness to creditors, whose rights may differ dramatically depending on where the debtor decides to file for bankruptcy. One commentator has compared equitable mootness to "a game of roulette," benefiting

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[3] Here, the Third Circuit found no abuse of discretion in the district court's conclusion that affording any relief at all "would likely topple the delicate balances and compromises struck by the [p]lan." Pet. App. A, 13. In doing so, it affirmed the district court's decision not to scrutinize the interests of the appellant creditors. Carefully considering the possibility of partial relief was especially important because those appellants were acting *pro se* and were entitled to liberal construction of their pleadings. *See, e.g.*, *Higgs* v. *Att'y Gen. of the U.S.*, 655 F.3d 333, 339 (3d Cir. 2011).

parties "lucky enough" to find themselves in a favorable jurisdiction when a restructuring plan is confirmed. Caroline L. Rosiek, *Making Equitable Mootness Equal: The Need for A Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 Syracuse L. Rev. 685, 697 (2007).

3. Moreover, equitable mootness has altered the balance in bankruptcy proceedings in ways that Congress did not anticipate in writing the Bankruptcy Code. The doctrine plainly encourages debtors and sophisticated third-parties to rush consummation as soon as the plan is confirmed. *See, e.g.*, *Nordhoff Invs., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d 180, 191 (3d Cir. 2001) (Alito, J., concurring) ("It is disturbing that Zenith, in a seeming attempt to moot any appeal prior to filing, succeeded in implementing most of the plan before the appellants even received notice that the plan had been confirmed."). District courts' reliance on the doctrine to deny any relief has led bankruptcy lawyers to advise their clients to deploy an "offensive use of equitable mootness" to give themselves "the best chance for withstanding an appeal." Lenard Parkins et. al., *Equitable Mootness: Will Surgery Kill the Patient?*, Am. Bankr. Inst. J. 40, 93 (2010).

For smaller creditors, gamesmanship by debtors can be difficult to defeat. All the transactions the district court found substantially consummated the plan immediately after the confirmation order became effective on October 22, 2015. Br. in Opp'n 6. Respondents immediately enacted significant parts of the challenged restructuring plan, despite being on notice of Mr. Tuttle's plan to appeal, which was served on them on October 21, 2015. Notice of Appeal, *In re*

Allied Nevada Gold Corp., No. 15-10503 (Bankr. D. Del. Oct. 21, 2015). That notice included a motion to stay the proceedings. Motion to Stay Pending Appeal, *Allied Nevada,* No. 15-10503. The bankruptcy court denied these motions in a three-page order. Mr. Tuttle appealed the denial of a stay pending appeal to the district court and then to the Third Circuit. Pet. App. A, at 7–8. Each of members of the Equity Committee as of May 26, 2015 filed declarations in the Third Circuit stating that reversal of the confirmation order would not detrimentally affect the rights of new warrant holders. Declarations in Support of Appellant's Opening Brief, *Tuttle* v. *Allied Nevada Gold Corp.*, No. 16-3745 (3d Cir. Dec. 19, 2016).

B. Respondents' Vehicle Concerns Are Overblown.

1. As Respondents note (at 20), the Third Circuit declined to address in detail Petitioner's arguments about the ongoing viability of the equitable mootness doctrine. That is unsurprising in light of the Third Circuit's statement that controlling precedent continues to bind its panels, until en banc reconsideration or such time as this Court intervenes. Pet. App. A, at 8.

That does not mean, however, that the issue is undeveloped. Numerous federal judges have recognized, in opinions and filings to this Court, that the doctrine rests on shaky ground. *In re One2One Commc'ns, LLC*, 805 F.3d at 438 (Krause, J., concurring); *In re Cont'l Airlines*, 91 F.3d at 567 (Alito, J., dissenting); *In re City of Detroit*, 838 F.3d 792, 811–812 (6th Cir. 2016) (Moore, J., dissenting); Br. of Former Federal Judges as Amici Curiae

Supporting Petitioner, *Aurelius Capital Mgmt, L.P.* v. *Tribune Media Co.*, No. 15-891 (U.S. Feb. 12, 2016). Scholars have raised similar concerns. *See, e.g.*, Bruce A. Markell, *Equitable Cuteness: Of Mountains and* Mice, 35 No. 11 Bankruptcy Law Letter NL 1 (2015) (tracing the doctrine's origins to one 1980s case that cited a single 1895 Supreme Court case as authority). If certiorari is granted, a merits decision in this case would draw on a robust debate.

2. Additionally, Respondents assert that this Court's decision on the merits would not affect the underlying case because the district court also decided, absent equitable mootness, that the bankruptcy court did not err or abuse its discretion in one of the Petitioner's three appeals. *See* Br. in Opp'n 22. The "alternative" holding to which Respondents allude is a single sentence in a footnote, accompanied by no analysis of the substance of Mr. Tuttle's claims. *See* Pet. App. B, at 14 n.11. The district court explicitly said that it saw "no need to address" Mr. Tuttle's challenges but went on to say that the bankruptcy court did not abuse its discretion in denying the "motions for reconsideration and the other motions that are the *subject of this appeal*." *Id.* (emphasis added). This purported alternative holding is unreasoned boilerplate and the Third Circuit declined to review it. Pet. App. A, at 14 n.11. At best, Respondents' objection is an argument that Allied Nevada will win on remand—an argument surely all Respondents could make.

CONCLUSION

For the foregoing reasons and those in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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