No. _____

In The
Supreme Court of the United States

ISL LOAN TRUST, et al.,

Petitioners,

v.

MILLENNIUM LAB
HOLDINGS II, LLC, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a bankruptcy court has authority, under Article III of the Constitution and this Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), to enter final judgment releasing without consent a non-debtor's claims against other non-debtors that arise solely from non-bankruptcy substantive law, so long as the bankruptcy court concludes that granting the release is integral to the restructuring of the debtor-creditor relationship.

II. Whether an Article III court may dismiss a properly noticed appeal from a bankruptcy court's decision confirming a plan of reorganization under Chapter 11 of the Bankruptcy Code as "equitably moot" even though a live case or controversy exists under Article III of the Constitution, thereby leaving the bankruptcy court's decision un-reviewed by any Article III court.

PARTIES TO THE PROCEEDING

Petitioners, objectors-appellants below, are ISL Loan Trust; ISL Loan Trust II; NN (L) Flex—Senior Loans; NN (L) Flex—Senior Loans Select; Voya CLO 2012-1, Ltd.; Voya CLO 2012-2, Ltd.; Voya CLO 2012-3, Ltd.; Voya CLO 2012-4, Ltd.; Voya CLO 2013-1, Ltd.; Voya CLO 2013-2, Ltd.; Voya CLO 2013-3, Ltd.; Voya CLO 2014-1, Ltd.; Voya CLO 2014-2, Ltd.; Voya CLO 2014-3, Ltd.; Voya CLO 2014-4, Ltd.; Voya CLO 2015-1, Ltd.; Voya High Income Floating Rate Fund; Voya Prime Rate Trust; Voya Senior Income Fund; Voya Floating Rate Fund; Axis Specialty Limited; California Public Employees' Retirement System; The City of New York Group Trust; Medtronic Holdings Switzerland GMbH; New Mexico State Investment Council; Voya Investment Trust Co. Plan for Employee Benefit Investment Funds-Voya Senior Loan Trust Fund; and Voya Investment Trust Co. Plan for Common Trust Funds-Voya Senior Loan Common Trust Fund (collectively, "*Petitioners*" or "*Voya*").

There are two groups of Respondents. Respondents, debtors-appellees below, are Millennium Lab Holdings II, LLC and Millennium Health LLC (collectively, "*Debtors*"). Respondents, former shareholders and appellees below, are TA Millennium, Inc., TA Associates Management, L.P., Millennium Lab Holdings, Inc. and James Slattery (collectively, "*Non-Debtor Equity Holders*").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel state that no Petitioner has a parent corporation, and no publicly held company owns 10% or more of any Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings below originated in the United States Bankruptcy Court for the District of Delaware before the Honorable Laurie Selber Silverstein, United States Bankruptcy Judge (the "*Bankruptcy Court*"), under the caption *In re Millennium Lab Holdings II, LLC, et al.*, Case No. 15-12284 (LSS). The Bankruptcy Court entered judgment confirming the Debtors' Plan of Reorganization with nonconsensual third-party releases on December 14, 2015 and issued an Opinion (following remand from the District Court) concluding it had constitutional authority to impose the releases on October 3, 2017. 575 B.R. 252 (Bankr. D. Del. 2017).

On February 11, 2016, Petitioners filed a petition in the United States Court of Appeals for the Third Circuit (the "*Court of Appeals*") for permission to bring a direct appeal from the Confirmation Order following the Bankruptcy Court's certification under 28 U.S.C. § 158(d)(2), which was denied on February 24, 2016 under the caption *In re Millennium Lab Holdings II, LLC, et al.*, No. 16-8017.

STATEMENT OF RELATED PROCEEDINGS
– Continued

Petitioners filed two appeals that were heard in the United States District Court for the District of Delaware before the Honorable Leonard P. Stark, United States District Judge (the "*District Court*"). The first appeal, taken directly from the plan confirmation order, was under the caption *Opt-Out Lenders v. Millennium Lab Holdings II, LLC, et al. (In re Millennium Lab Holdings II, LLC, et al.)*, Civil Action No. 16-110-LPS, and resulted in a Corrected Memorandum Opinion issued on March 20, 2017 denying without prejudice the motion to dismiss the appeal as equitably moot and remanding the case to the Bankruptcy Court for further proceedings on the constitutional authority issue. 242 F. Supp. 3d 322 (D. Del. 2017). Petitioners' second appeal, taken from the Bankruptcy Court's decision on remand, was under the caption *Opt-Out Lenders v. Millennium Lab Holdings II, LLC, et al. (In re Millennium Lab Holdings II, LLC, et al.)*, Civil Action No. 17-1461-LPS. On September 21, 2018, the District Court issued an Opinion affirming the Bankruptcy Court's constitutional authority ruling and dismissing the balance of the second appeal as equitably moot. 591 B.R. 559 (D. Del. 2018).

Petitioners appealed the District Court's decision as of right to the Court of Appeals under the caption *In re Millennium Lab Holdings II, LLC, et al.*, No. 18-3210. On December 19, 2019, the Court of Appeals issued a precedential Opinion affirming the District

STATEMENT OF RELATED PROCEEDINGS
– Continued

Court's rulings on constitutional authority and equitable mootness. 945 F.3d 126 (3d Cir. 2019).

While the case was before the Bankruptcy Court, and prior to plan confirmation, Petitioners filed suit against the Non-Debtor Equity Holders and affiliated persons in the United States District Court for the District of Delaware asserting claims under the federal Racketeer Influenced and Corrupt Organizations ("*RICO*") statute, common law fraud, aiding and abetting fraud, conspiracy to commit fraud and restitution under the caption *ISL Loan Tr. v. TA Assocs. Mgmt., L.P.*, Civil Action No. 15-cv-1138 (the "*Fraud Action*"). That matter is stayed pending the outcome of the proceedings before this Court.

Petitioners are not aware of any other case or proceeding that directly related to the proceeding now before this Court.

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INTRODUCTION

This case involves the interplay of three important trends in federal bankruptcy law: (1) the lower courts' implementation of this Court's teachings in *Stern v. Marshall*, 564 U.S. 462 (2011), concerning Article III's limitations on the power of bankruptcy courts to enter

final judgments disposing of non-bankruptcy claims; (2) the use of nonconsensual, third-party releases by proponents of Chapter 11 reorganization plans to immunize non-debtor plan sponsors and affiliated persons against liability for non-bankruptcy claims by other non-debtors; and (3) the lower courts' reliance on the doctrine of equitable mootness to insulate legally-questionable bankruptcy court plan confirmation orders from review by any Article III court. The Court of Appeals below approved the Bankruptcy Court's constitutional authority to order the compulsory release of Petitioners' common law fraud and RICO claims against other non-debtors only after modifying the test established by this Court in *Stern* for determining whether a bankruptcy court may enter final judgment on a claim consistent with Article III, thereby exacerbating a split among the Circuits as to the elements of that test. It then affirmed the District Court's dismissal of the remainder of Petitioners' appeal—which *inter alia* challenged the Bankruptcy Court's authority under the Bankruptcy Code to impose the releases—as equitably moot, thereby ensuring that no Article III court would ever review the merits of Petitioners' statutory and equitable arguments.

This Court should grant review of the Court of Appeals' decisions both as to the elements of the *Stern* test and equitable mootness. By grafting onto the *Stern* test the notion that a bankruptcy court can enter final judgment extinguishing a claim so long as it concludes the release is "integral to the restructuring of the debtor-creditor relationship," the Court of Appeals

substantially expanded the circumstances under which a bankruptcy court can enter a final judgment, which this Court has limited to claims that either arise from the bankruptcy itself or would necessarily be resolved as part of the claims allowance process. In doing so, the Court of Appeals misread *Stern* and has injected real uncertainty into the bankruptcy system concerning the boundaries of bankruptcy courts' adjudicatory power.

The Court of Appeals' equitable mootness ruling also warrants this Court's review. Equitable mootness is a judge-made prudential doctrine used by Article III courts to dismiss appeals from bankruptcy court orders that are squarely within the scope of their subject matter jurisdiction. Not only does this practice violate what this Court has characterized as the Judiciary's "virtually unflagging obligation" to exercise the jurisdiction given them, but it also undermines a primary rationale for why the delegation of bankruptcy cases to Article I courts is consistent with the separation of powers doctrine: namely, that Article I bankruptcy courts are subject to the supervision of Article III courts. Equitable mootness effectively removes Article III courts from the business of reviewing and supervising bankruptcy court decisions to confirm Chapter 11 reorganization plans, arguably the most important decision in a Chapter 11 bankruptcy. This practice is all the more pernicious when nonconsensual third-party releases are involved, since such releases—assuming they can ever be permissible—create a "moral hazard" on the part of non-debtor corporate insiders who believe they can structure a reorganization plan and use

the bankruptcy process to shield themselves from personal liability to other non-debtors. By permitting such insiders to insulate their plan from appellate review, by accelerating consummation and then arguing that an appeal is equitably moot, the doctrine of equitable mootness encourages the inclusion of ever more legally-aggressive provisions in Chapter 11 plans. This Court should review the constitutional and legal underpinnings of this doctrine in order to give much-needed guidance to the lower federal courts.

OPINIONS BELOW

The Third Circuit's opinion is officially reported at 945 F.3d 126 (3d Cir. 2019). App.1. The District Court's opinion on Petitioners' first appeal, remanding the case to the Bankruptcy Court, is officially reported at 242 F. Supp. 3d 322 (D. Del. 2017). App.198. The District Court's opinion on Petitioners' second appeal affirming the Bankruptcy Court's constitutional authority ruling and dismissing the balance of the appeal as equitably moot is officially reported at 591 B.R. 559 (D. Del. 2018). App.39. The Bankruptcy Court's remand opinion is officially reported at 575 B.R. 252 (Bankr. D. Del. 2017). App.100.

JURISDICTION

The Court of Appeals below entered judgment on December 19, 2019, affirming the District Court's

ruling that the Bankruptcy Court had constitutional authority to impose the disputed nonconsensual releases and dismissing the remainder of the appeal under the equitable mootness doctrine. App.37-38. Having been filed within 90 days of the entry of judgment by the Court of Appeals, the Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate Article III, section 1 of the United States Constitution, which provides that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The questions presented also implicate Title 28 of the Unites States Code, section 158, which provides in pertinent part that: "(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."

STATEMENT OF THE CASE

1. The Fraud Action

Petitioners were lenders of approximately $106.3 million of senior secured debt issued by Debtors in April 2014 pursuant to a $1.825 billion credit facility (the "*Credit Facility*") governed by a credit agreement dated as of April 16, 2014 among, *inter alia*, debtors Millennium Health, LLC, f/k/a Millennium Laboratories, LLC ("*Millennium*" or the "*Company*") and its parent Millennium Lab Holdings II, LLC ("*Holdings*"), and the several lenders from time to time party thereto (the "*Lenders*"). App.207. The Credit Facility was issued as part of a "dividend recapitalization" transaction for the benefit of the non-debtor stockholders of Holdings—the Non-Debtor Equity Holders. Nearly $1.3 billion of the Credit Facility proceeds was paid as a "special dividend" to those shareholders. *Id*.

Millennium is a health care company that focuses on laboratory-based diagnostic testing subject to substantial government oversight to prevent health care fraud. App.208. Petitioners contend their participation in the Credit Facility was obtained by fraud: they were told, *inter alia*, that Millennium was not involved in any government investigations that would reasonably be expected to have a Material Adverse Effect on the Company, when Millennium was a knowing target of

such an investigation by the U.S. Department of Justice (the "*DOJ*") and other federal agencies that posed an existential threat to the Company. App.210-211. Petitioners allege that the Non-Debtor Equity Holders and certain other non-debtor tortfeasors participated in that fraud, which enabled the Non-Debtor Equity Holders to siphon the $1.3 billion "special dividend" from the Company while leaving the Lenders to bear the economic consequences of the government's fraud case.

On December 9, 2015, Appellants filed the Fraud Action in the District Court against five third-party non-debtors, including the Non-Debtor Equity Holders. App.210. The complaint in the Fraud Action demands a jury trial and asserts direct claims for federal RICO violations, as well as state law claims for fraudulent inducement, aiding and abetting fraud, and civil conspiracy arising from misrepresentations and other misconduct by Defendants in connection with Voya's agreement to provide debt financing to Debtors under the Credit Facility. The Fraud Action was never referred to the Bankruptcy Court and is stayed pending the outcome of this appeal.

2. The Plan Releases and Permanent Injunction

On May 21, 2015, Millennium disclosed to its Lenders for the first time the existence of the DOJ investigation and that it had entered into an agreement in principle with the DOJ, the Centers for Medicare and Medicaid Services, and various other government

entities, to settle, *inter alia*, claims under the False Claims Act for Medicare fraud. App.209. If they did not settle, the Debtors faced the imminent revocation of their Medicare billing privileges, which would have called their survival into question. Millennium's ultimate $256 million settlement payment would conclude three years of federal investigation, prevent imminent revocation of its Medicare billing privileges, and resolve claims by the government for illegal conduct dating back to 2008.

With the Company lacking the ability to fund the settlement following the special dividend payment, and following failed out-of-court restructuring efforts, on November 10, 2015, the Debtors each commenced a voluntary chapter 11 bankruptcy case in the Bankruptcy Court (the "*Chapter 11 Cases*"). Debtors also filed the *Prepackaged Joint Plan Of Reorganization For Millennium Lab Holdings II, LLC, et al.* (as amended, the "*Plan*"). The Bankruptcy Court had subject matter jurisdiction over the Debtors' Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. The Plan provides the non-debtor defendants in Voya's Fraud Action, including the Non-Debtor Equity Holders, with full releases and discharges of any and all claims against them, including Petitioners' common law fraud claims. The Plan also explicitly enjoins the commencement or prosecution of any of the released claims. App.210. The Government's insistence that the settlement be consummated before the end of 2015 resulted in extraordinarily accelerated proceedings in the Bankruptcy Court.

The Plan gave the Non-Debtor Equity Holders the right to insist that all appeals from the Confirmation Order be exhausted ***before*** the Plan could be consummated. Following the Bankruptcy Court's confirmation of the Plan, the Non-Debtor Equity Holders deliberately waived that right, with full knowledge that Voya's appeal was pending and that the nonconsensual releases of Voya's claims against non-debtors could be stricken from the Plan as unlawful. App.78.

3. Proceedings Below

On December 11, 2015, the Bankruptcy Court issued its plan confirmation ruling on the record. Finding that it had "related to" subject-matter jurisdiction, the Bankruptcy Court did not address the issue of whether it had constitutional authority to order the releases pursuant to *Stern*. The Bankruptcy Court overruled Voya's remaining objections to the Plan and entered the Confirmation Order on December 14, 2015.

Petitioners appealed the Confirmation Order to the District Court, arguing that (i) the Bankruptcy Court lacked constitutional and statutory authority to enter the releases and Permanent Injunction and (ii) even if the Bankruptcy Court had such authority, the extraordinary relief of nonconsensual, third-party releases was not warranted on the present record. App.211-214; 223. Debtors moved to dismiss the appeal as equitably moot. App.224-225. The District Court had subject matter jurisdiction over a direct appeal from a final order of the Bankruptcy Court under 28

U.S.C. §§ 158(a) and 1334. On March 20, 2017, the District Court "remand[ed] th[e] case to the Bankruptcy Court to consider whether, or clarify its ruling that, [it] had constitutional adjudicatory authority to approve the nonconsensual release of Appellants' direct non-bankruptcy common law fraud and RICO claims against the Non-Debtor Equity Holders; and, if it does not have such authority, to submit proposed findings of fact and conclusions of law regarding the final disposition of these claims through the Confirmation Order, or, alternatively, to strike the nonconsensual release of Appellants' claims from the Confirmation Order." App.234. Determining it could not rule on the Debtors' equitable mootness argument until the constitutional issue was resolved, the District Court declined to rule on the motion to dismiss and did not address any of Voya's non-constitutional arguments. App.227-228; 235.

On remand, the Bankruptcy Court held that it had constitutional adjudicatory authority to approve the nonconsensual third-party release of Petitioners' Claims against the non-debtor defendants in the Fraud Action. App.101. Petitioners appealed from the Bankruptcy Court's constitutional rulings and also reasserted the additional arguments it raised during the 2016 appeal which the District Court had never addressed. App.42. The Debtors moved to dismiss on equitable mootness grounds. In resolving this second appeal, the District Court again determined it had to resolve the *Stern* question before addressing equitable mootness. App.61-63. The District Court affirmed the

Bankruptcy Court's determination that it had authority under Article III to enter final judgment releasing Petitioners' claims against non-debtors, and dismissed the remainder of Petitioners' appeal as equitably moot. App.97. In the alternative, it also considered the merits of Petitioners' non-constitutional arguments and affirmed the Confirmation Order. *Id.*

Petitioners filed a timely appeal to the Court of Appeals, which had subject matter jurisdiction to review the District Court's decision pursuant to 28 U.S.C. §§ 158(d) and 1291. Affirming the District Court's decision, the Court of Appeals held that the Bankruptcy Court possessed constitutional authority to confirm the Plan because the nonconsensual third-party releases imposed on Petitioners were integral to the restructuring of the debtor-creditor relationship. App.3-4. It further held that the District Court did not abuse its discretion by dismissing the remainder of Petitioners' appeal as equitably moot. App.4.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION BELOW HAS CREATED A CIRCUIT SPLIT CONCERNING THE PROPER TEST FOR DETERMINING THE SCOPE OF A BANKRUPTCY COURT'S CONSTITUTIONAL AUTHORITY TO ENTER FINAL JUDGMENT UNDER *STERN*.

A. *Stern*'s Holding.

The Court should review this case for two reasons. *First*, the Court of Appeals' decision below, which misreads *Stern*, has exacerbated a Circuit split as to what the appropriate test is for determining the scope of a bankruptcy court's authority to enter final judgment under Article III of the Constitution and *Stern*. *Second*, the elements of the appropriate test, particularly as applied to the imposition of mandatory releases of non-debtors' claims against other non-debtors without their consent—which have assumed a more and more prominent role in Chapter 11 bankruptcies—is an issue of substantial importance to the development of bankruptcy law and the protection of the constitutional separation of powers in the bankruptcy context.

In its landmark ruling in *Stern*, this Court held that, as an Article I court, the Bankruptcy Court lacked the constitutional power to enter a final judgment on a state law tortious interference counterclaim the debtor asserted against the creditor-plaintiff in an adversary proceeding "that is not resolved in the process of ruling on [the counterclaim defendant's] proof of claim," even though the Bankruptcy Court had

statutory power to adjudicate that counterclaim as a "core" proceeding. *Stern*, 564 U.S. at 503. The Court grounded its holding in Article III of the Constitution, which provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. As one of the foundational elements of the Constitution's separation of powers among the federal government's three branches, Article III both helps to protect each branch from undue interference by the other two branches and to secure individual liberty. *Stern*, 564 U.S. at 483; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). It achieves these objectives by appointing Article III judges to serve for life and insulating them against diminution of their salaries, thereby ensuring they will render decisions "with the 'clear heads . . . and honest hearts' deemed 'essential to good judges.'" *Stern*, 564 U.S. at 484 (citation omitted).

This Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Id.* at 484 (citation omitted). More precisely, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id*. (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line*

Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)); *see also Northern Pipeline*, 458 U.S. 50 (plurality opinion) (holding Congress' vesting of Article I bankruptcy judges under the Bankruptcy Act of 1978 with authority to decide state law claim for breach of contract against entity that was not otherwise part of the bankruptcy proceedings violated Article III).

Stern rejected each of the debtor's arguments for why the bankruptcy court's entry of final judgment on her state law counterclaim was constitutional. As a claim by one private party against another that arose from state law, the counterclaim was not a "public right" that could constitutionally be assigned for adjudication to an Article I tribunal. *Stern*, 564 U.S. at 488-95; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-55 (1989) (holding that fraudulent conveyance action filed on behalf of a bankruptcy estate was a "private right" and explaining "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court."). To the contrary, the Court explained

> [w]hat is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be

> taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

Stern, 564 U.S. at 494-95 (emphasis in original). In short, the " 'experts' in the federal system at resolving common law counterclaims such as [debtor's] are the Article III courts, and it is with those courts that [debtor's] claim must stay." *Id*. at 494.

Furthermore, the fact that the counterclaim defendant had filed a proof of claim against the debtor's estate did not confer constitutional authority on the bankruptcy court to adjudicate the debtor's state tort-law-based counterclaim. *Id*. at 495-500. The Court construed its precedents in this area as authorizing the entry of final judgment by a bankruptcy court only where the process of ruling on the creditor's proof of claim "would necessarily result in the resolution" of the debtor's counterclaim. *Id*. at 496-98; *see also Katchen v. Landy*, 382 U.S. 323, 336 (1966) (holding that because preference action would be resolved as part of process of allowing or disallowing creditor's claim, the creditor could not insist that the preference action be adjudicated before an Article III court); *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (per curiam) (holding that preference action against creditor who filed proof of claim against the estate was triable by the bankruptcy court without a Seventh Amendment jury trial right). But in *Stern*, "there was never any reason to believe that the

process of adjudicating [the counterclaim defendant's] proof of claim would necessarily resolve [the debtor's] counterclaim." 564 U.S. at 497. The issues that would need to be decided to resolve each of these claims were different. Nor did the counterclaim in any way derive from, or depend upon, federal bankruptcy law. *Id*. at 499.

In the Court's view, and in the *Stern* opinion's definitive formulation of the test for determining the scope of a bankruptcy court's constitutional authority to enter final judgment on a party's claim, "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; ***the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process***." *Id*. (second emphasis added). In *Stern,* because the debtor's tortious interference counterclaim neither stemmed from the bankruptcy nor would necessarily be resolved in the claims allowance process, the bankruptcy court had no constitutional authority to adjudicate it. *Id.*

B. The Circuits Are Split Over the Elements of the *Stern* Test, With Most Circuits Rejecting the Subjective Test Adopted by the Court of Appeals.

The Court of Appeals below did not apply the *Stern* test as articulated in the *Stern* opinion itself. Instead, it reformulated the test by construing the second prong as allowing a bankruptcy court to enter final

judgment "when it resolves a matter that is integral to the restructuring of the debtor-creditor relationship" even if the claim at issue would not "necessarily be resolved in the claims allowance process." App.17; 22; *Stern*, 564 U.S. at 499. Because the Bankruptcy Court concluded that the nonconsensual release of Petitioners' claims against the Non-Debtor Equity Holders was necessary for the Debtors to successfully reorganize, and hence was integral to the restructuring of the debtor-creditor relationship in this specific bankruptcy proceeding, the Court of Appeals held that the Bankruptcy Court had constitutional authority to enter a final judgment extinguishing those claims over Petitioners' objection. App.26-27.

By reformulating the *Stern* test, the Third Circuit deepened a widening Circuit split over what the correct test is. As the Third Circuit acknowledged in its opinion below, most Circuits apply the *Stern* test as this Court definitively formulated it. App.23 n.12. These Courts faithfully apply *Stern* by holding that Congress may bypass Article III only if "the action at issue" (*i.e.*, the claim as to which judgment is sought) "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process"—not some other bankruptcy-related process (*e.g.*, plan confirmation), but *the claims allowance process* set forth in Section 502 of the Code. *Stern*, 564 U.S. at 499; *see In re Glob. Technovations Inc.*, 694 F.3d 705, 722 (6th Cir. 2012) (describing *Stern*'s holding as "[w]hen a claim is 'a state law action independent of the federal bankruptcy law and *not necessarily resolvable by a ruling*

on the creditor's proof of claim in bankruptcy,' the bankruptcy court cannot enter final judgment" (emphasis added) (quoting *Stern*, 564 U.S. at 487)); *In re Ortiz*, 665 F.3d 906, 911, 914 (7th Cir. 2011); *In re Fisher Island Invs., Inc.*, 778 F.3d 1172, 1192 (11th Cir. 2015) (holding that bankruptcy court had constitutional authority to enter final judgment where the claim "was 'necessarily resolve[d]' by the bankruptcy court through the process of adjudicating the creditors' claims" (citation omitted)); *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 564-65 (9th Cir. 2012) (holding that bankruptcy court lacked constitutional authority to enter final judgment because the claim at issue "need not necessarily have been resolved in the course of allowing or disallowing the claims against the . . . estate"). As stated most forcefully by the Tenth Circuit:

> But along the way *Stern* did clearly take at least one thing off the table. It held that when a "claim is a state law action . . . ***and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy***," it implicates private rights and thus is not amenable to final resolution in bankruptcy court. ***Indeed, the Court repeated this point —repeatedly.*** So whatever else you might say in the midst of this still-very-much-ongoing battle over bankruptcy and public rights doctrine, you can say this much: ***cases properly in federal court but arising under state law and not necessarily resolvable in the claims allowance process trigger Article III's protections.***

Loveridge v. Hall (In re Renewable Energy Dev. Corp.), 792 F.3d 1274, 1279 (10th Cir. 2015), *as amended on denial of reh'g* (July 28, 2015) (Gorsuch, J.). The only Circuit that supports the Third Circuit's reading of *Stern* is the Seventh. *See Ortiz*, 665 F.3d at 914.

This Circuit split risks fostering confusion and inconsistent results over an issue that is fundamental to the operation of the federal bankruptcy system. Bankruptcy courts across the country issue hundreds of decisions every day. Clear rules are necessary to enable courts and litigants to reliably determine the circumstances under which a bankruptcy court can enter a final judgment as opposed to those in which the district court must exercise final adjudicatory power. The decisions of the Third and Seventh Circuits, which break with their fellow Circuits as well as with the actual language of the *Stern* opinion, warrant intervention by this Court to clarify the law.

C. Clarifying the *Stern* Test in the Context of Nonconsensual Releases in Chapter 11 Plans of Reorganization Would Resolve A Recurring Issue That is Important to Both the Development of Federal Bankruptcy Law and the Protection of the Separation of Powers Within the Federal Government.

This Court should grant review of the first question presented and answer it in the negative.

Although the Court of Appeals below criticized Petitioners for not being "faithful to what *Stern* actually says," it is the Court of Appeals' reformulation of the *Stern* test that is inconsistent with the *Stern* opinion itself. App.22. Echoing Respondents' argument below, the Third Circuit grounded its adoption of the "integral to the restructuring of the debtor-creditor relationship" test in the discussion that appears on page 497 of the Court's opinion. App.22-25. *Stern*, 564 U.S. at 497 (quoting *Langenkamp*, 498 U.S. at 44). This phrase appears in the course of the *Stern* Court's discussion of *Langenkamp*. But actual examination of the text of both *Langenkamp* and *Stern* reveals that this language is nothing more than a description of *the claims allowance process*. It is not an independent standard.

Stern does not use the "claims allowance process" as a proxy for a broader category of bankruptcy-related proceedings (like plan confirmation) "integral to the restructuring of the debtor-creditor relationship" that a bankruptcy court can use to adjudicate claims that, as a matter of constitutional law, can only be adjudicated by an Article III court. To the contrary, a claim that does not stem from the bankruptcy itself is "integral to the debtor-creditor relationship" *for Article III purposes* only if it is necessarily resolved in the claims allowance process. *Langenkamp* makes this clear in discussing the fact that, *where a creditor has filed a proof of claim* and is met with a preference action from the trustee, *then* "that action becomes part of the claims-allowance process which is triable only in equity." 498 U.S. at 44; *see also Stern*, 564 U.S. at 497

(interpreting *Langenkamp* to this effect). "In other words, *the creditor's claim and the ensuing preference action* by the trustee *become integral to the restructuring of the debtor-creditor relationship* through the bankruptcy court's *equity jurisdiction*." *Langenkamp*, 498 U.S. at 44 (first and second emphasis added). But "[i]f, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does *not* 'become[ ] part of the claims-allowance process' subject to resolution by the bankruptcy court." *Stern*, 564 U.S. at 497 (quoting *Langenkamp*, 498 U.S. at 44).

This reading is confirmed by this Court's reconciliation of *Katchen v. Landy*, 382 U.S. 323 (1966), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) in *Stern*. As explained in *Stern*, the "plenary proceeding [sought in *Katchen*] could be brought into the bankruptcy court because 'the same issue [arose] as part of the process of allowance and disallowance of claims.'" *Stern*, 564 U.S. at 496 (quoting *Katchen*, 382 U.S. at 336). By contrast, in *Granfinanciera*, the trustee's claim was against a non-creditor, which meant it could never be resolved as part of the claims allowance process. *See id*. at 492 (discussing *Granfinanciera*, 492 U.S. 33). Although the Court of Appeals pointed to language in *Granfinanciera* that arguably could suggest a broader "integral to restructuring" test, App.23, quoting *Granfinanciera*, 492 U.S. at 58, this Court ignored that language in formulating the test for determining the scope of a bankruptcy court's constitutional authority in *Stern*. Instead, *Stern* holds—unequivocally—that "Congress may not bypass Article III simply because a

proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue [*i.e.*, the claim as to which judgment is sought] ***stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process***." 564 U.S. at 499 (second emphasis added). Because the "integral to the restructuring of the debtor-creditor relationship" phrasing would constitute a broader test that would expand the circumstances under which a bankruptcy court can enter final judgment on a claim consistent with Article III, it defies logic that this Court would have adopted the narrower "necessarily resolved in the claims allowance process" test had it really intended the broader formulation to be the law. Indeed, the majority of the Courts of Appeals interpret *Stern* as reconciling *Langenkamp*, *Katchen*, and *Granfinanciera* in precisely this fashion. *See*, *e.g.*, *Bellingham*, 702 F.3d at 564 ("[T]he dispositive distinction between the claims in *Stern* and *Katchen* was that in *Katchen*, the trustee's preference action 'would necessarily be resolved in the claims allowance process. . . .'"); *Renewable Energy*, 792 F.3d at 1279 ("As we read *Stern*, it doesn't leave room for the notion that a claim independently arising under state law and not necessarily resolvable in the claims allowance process—but 'factually intertwined' with bankruptcy proceedings—may be sent to bankruptcy court for final resolution without consent.").

What is more, the "integral to the restructuring of the debtor-creditor relationship" test adopted by the Court of Appeals below is inherently subjective in an area of the law where a clear, objective standard is of

particular importance. Here, the compulsory release of Petitioners' non-bankruptcy claims against other non-debtors purportedly satisfied that test because the Bankruptcy Court determined that, without the release, the Non-Debtor Equity Holders would have been unwilling to make their $325 million contribution and the Debtors thus would not have been able to reorganize. App.21. This is essentially a "we know it when the bankruptcy court sees it" test, which is too indeterminate for a matter as important as ensuring that an Article I bankruptcy court confines its actions within the scope of constitutional boundaries.

The test articulated by the Court of Appeals also delegates to the proponents of a Chapter 11 reorganization plan the ability to determine the limits on the constitutional authority of the bankruptcy court that will review the plan. A release or other adjudication of a non-bankruptcy claim can be deemed "integral to the restructuring of the debtor-creditor relationship" merely because, as here, the release or adjudication (i) is desired by someone whose money is necessary to fund the reorganization plan, and (ii) that person refuses to provide the money unless the release or adjudication he or she wants is made part of the Plan. That is a radically-expansive view of a bankruptcy court's adjudicatory authority that would authorize forcible releases of entirely unrelated claims if tactically demanded by parties willing to fund a plan of reorganization. Even the Court of Appeals recognized there is "force" to the argument that "bankruptcy courts' powers would be essentially limitless and that an 'integral

to the restructuring' rule would mean that bankruptcy courts could approve releases simply because reorganization financers demand them, which could lead to gamesmanship." App.25. Yet, the Court of Appeals offered no response to this argument beyond a general admonition against gamesmanship. *Id.* Again, however, maintaining the constitutional separation of powers is too important to rely on an inherently subjective and indeterminate test that is prone to gamesmanship by creative litigants.

This is all the more true given that proponents of pre-packaged plans of reorganization in Chapter 11 bankruptcy proceedings have become increasingly aggressive in their use of nonconsensual third-party releases in the Circuits that permit such releases. The case below is a prime example, where the Non-Debtor Equity Holders leveraged the Debtors' financial distress and the Government's accelerated settlement timetable to obtain for themselves full releases of over $1.3 billion in claims in exchange for a $325 million contribution to the Plan. A constitutional standard that allows plan proponents to set the boundaries of a bankruptcy court's adjudicatory authority is not a reliable mechanism for faithfully adhering to Article III's limitation on the exercise of the judicial power of the United States by tribunals that are not Article III courts.

Under the test actually formulated in *Stern*, the Bankruptcy Court lacked constitutional authority to enter a final judgment extinguishing Petitioners' non-bankruptcy claims against other non-debtors as a

matter of law and without their consent. Petitioners' claims against the non-debtor defendants for common law fraud, aiding and abetting fraud, and violation of the federal RICO statute are "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," and were brought "within the bounds of federal jurisdiction" when Voya commenced the Fraud Action in the District Court. These claims arose well before, and were independent of, Debtors' bankruptcy filing, and thus do not "stem from the bankruptcy itself." Nor would they "necessarily" be resolved in the process for allowing claims against the Debtors' estate; rather, they are direct claims against third-party entities that, by definition, ***cannot be resolved*** in the bankruptcy proof of claim process. Accordingly, "the responsibility for deciding" Voya's Claims "rests with Article III judges in Article III courts. . . ." *Stern*, 564 U.S. at 484.

It is beyond cavil that a confirmation order containing a third-party release operates as a judgment that extinguishes the released claims as a matter of law. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151-54 (2009); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987) (holding that order confirming plan that released creditor's claims against guarantor was a final judgment on the merits of those claims); *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) (holding that plan confirmation order containing releases of claims against third parties constituted final judgment on those claims); *In re Digital Impact, Inc.*, 223 B.R. 1, 12, 13 n.6 (Bankr. N.D. Okla. 1998)

("A release, or permanent injunction, contained in a confirmed plan . . . has the effect of a judgment—a judgment against the claimant and in favor of the non-debtor, accomplished without due process. Neither the non-debtor, nor the claimant, have *an opportunity* to present their claims or defenses to the court for determination. . . ."). The Bankruptcy Court's Confirmation Order extinguishing Voya's Claims thus constituted entry of a final judgment disposing of those claims on the merits. Because Voya's Claims did not stem from the bankruptcy proceeding and would not have been resolved in the claims allowance process, the Bankruptcy Court lacked the authority to enter such judgment, and violated Article III of the Constitution by doing so. *Stern*, 564 U.S. at 484, 499, 503.

Nor do Petitioners' claims fall within the "public rights" exception. This Court has held that this exception is limited to claims deriving from a federal regulatory scheme or committed for resolution to a federal administrative agency. *Stern*, 564 U.S. at 490-91 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)). Claims "between two private parties" based on state common law or statutes that are not closely intertwined with a federal regulatory program are "private" rights that must be adjudicated by an Article III Court. *Id*. at 492-93; *see also Granfinanciera*, 492 U.S. at 55 (holding that fraudulent conveyance action on behalf of bankruptcy estate filed against non-creditor in a bankruptcy proceeding did not fall within the "public rights" exception); *Waldman v. Stone*, 698 F.3d 910, 918-20 (6th Cir. 2012); *see also, e.g., In re*

Bellingham, 702 F.3d at 564 ("*Granfinanciera* involved a federal-law claim, and *Stern* involved a state-law claim. But *Stern* held that both claims required an Article III court."). Fraud-based claims by one non-debtor against another that are based on state common law or non-bankruptcy federal law—like Petitioners'—clearly fall on the "private rights" side of the divide. The Court of Appeals below did not express an opinion on this issue. App.24 n.12.

The Court should grant the Petition as to the first question and answer it in the negative.

II. RECENT DECISIONS OF THIS COURT HAVE UNDERMINED THE LEGAL BASIS FOR THE EQUITABLE MOOTNESS DOCTRINE, MAKING THE ISSUE RIPE FOR THIS COURT'S REVIEW.

The Court should also grant review and answer the second question presented in the negative.

After determining that the Bankruptcy Court had constitutional authority to release Petitioners' claims without their consent, the Court of Appeals (following Circuit precedent) affirmed the dismissal of the remainder of Petitioners' appeal as equitably moot. App.27. In doing so, the Third Circuit confirmed that no Article III court would ever consider the merits of Petitioners' contentions that the nonconsensual release was not permissible under the Bankruptcy Code and that, even if it were, there were no extraordinary circumstances in this case that warranted such drastic

relief as part of a Chapter 11 plan of reorganization. The equitable mootness doctrine relied upon by the Court of Appeals is inconsistent with the constitutional role of Article III courts, has been undermined by recent decisions of this Court, and is in need of this Court's review.

Equitable mootness is "a judge-made abstention doctrine that allows a court to avoid hearing the merits of a bankruptcy appeal because implementing the requested relief would cause havoc." *See In re Semcrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013); *see also In re City of Detroit, Michigan*, 838 F.3d 792, 798 (6th Cir. 2016) ("Equitable mootness is not technically 'mootness'—constitutional or otherwise—but is instead a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality by preventing a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract." (internal quotation marks and citation omitted)). Unlike constitutional mootness, which exists where the Court is unable to fashion any effective relief for the parties and no live case or controversy continues to exist, the premise of equitable mootness is that the court can provide meaningful relief but chooses not to in order to protect purported reliance interests in the confirmed reorganization plan. *In re City of Detroit*, 838 F.3d at 798. As the Third Circuit applies the doctrine, in determining whether an appeal is equitably moot, the Court must consider "(1) whether a confirmed plan has been substantially

consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). To obtain dismissal of a properly-filed appeal, a debtor is required to demonstrate that "granting relief on appeal [would] be almost certain to produce a 'perverse' outcome—'chaos in the bankruptcy court' from a plan in tatters and/or significant 'injury to third parties.'" *Semcrude*, 728 F.3d at 320 (citation omitted).

This Court has never considered the merits of the equitable mootness doctrine. Given the prominent role that equitable mootness has come to assume in disposing of appeals from bankruptcy court plan confirmation orders, the Court should do so now and conclude that equitable mootness is inconsistent with the constitutional obligations of an Article III court and should be reviewed by this Court.

First, equitable mootness is inconsistent 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); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Objectors to a Chapter 11 reorganization plan have a statutory right to appeal a bankruptcy court's confirmation of that plan to an Article III court. 28 U.S.C. § 158. Both the District Court and the Court of Appeals below indisputably had subject matter jurisdiction to consider

the merits of Petitioners' appeal from the Confirmation Order here. As has been the law for nearly 200 years, a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, this Court recently expressed severe disapproval of judge-made "prudential" doctrines that have no statutory or constitutional foundation, but which courts invoke to dismiss cases otherwise properly within their jurisdiction. *Lexmark Int'l*, 572 U.S. at 126-28 (prudential standing). Such doctrines are inconsistent with the federal Judiciary's virtually unflagging obligation to hear cases over which it has jurisdiction. *Id*. ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." (citation omitted)).

Equitable mootness is precisely the type of judge-made, prudential doctrine of which the Court disapproved in *Lexmark*, and which is in need of consideration by this Court. Courts of Appeals and district courts use this doctrine every day to deny appellate review of plan confirmation orders, even though the appellants have properly invoked their subject matter jurisdiction, because the reviewing court has concluded it would not be equitable or prudent to grant any appellate relief. *See In re One2One Comm'cns, LLC*, 805 F.3d 428, 441 (3d Cir. 2015) (Krause, J., concurring); *In re City of Detroit*, 838 F.3d at 805-06

(Moore, J., dissenting); *see generally In re Continental Airlines, Inc.*, 91 F.3d 553, 567-73 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (criticizing legal foundations of equitable mootness).

Second, equitable mootness is inconsistent with this Court's recent holding that the reason delegation of certain functions to bankruptcy courts does not violate the Constitution's separation of powers is that they are subject to the supervision of Article III courts. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1946 (2015) ("Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. . . . Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by Article III courts, their work poses no threat to the separation of powers."); *see also In re City of Detroit*, 838 F.3d at 806 (Moore, J., dissenting) ("Article III supervision of bankruptcy judges is key to the constitutionality of the bankruptcy-court system. . . ."). Yet, invocation of equitable mootness guarantees that ***no Article III court*** will ever review the merits of a bankruptcy court's plan confirmation decision—arguably the most important judicial decision in any Chapter 11 bankruptcy. Further exacerbating separation of powers concerns, the "doctrine not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue." *In re One2One Comm'cns*, 805 F.3d at 445 (Krause, J., concurring); *see also Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir.

2001) (Alito, J., concurring in the judgment) ("[O]ur court's equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges."). The equitable mootness doctrine thus undermines a key systemic protection for ensuring that adjudication of bankruptcy cases in Article I tribunals does not violate Article III of the Constitution.

Third, equitable mootness frustrates the orderly development of bankruptcy law and encourages plan proponents to attempt to insert unlawful provisions into bankruptcy reorganization plans that will never be reviewed by an Article III court. This case is a perfect example. The Debtors were facing an existential disruption of their business if they lost their Medicare billing privileges, and the Government was threatening to impose just such a consequence if its settlement demands and timetable were not met. The Non-Debtor Equity Holders took advantage of the Debtors' *in extremis* situation to insist that the Plan fully release them from over $1.3 billion in claims in exchange for their $325 million contribution, when they knew the legality of nonconsensual third-party releases was unsettled. Even though the Plan gave the Non-Debtor Equity Holders the right to insist that Plan consummation be delayed until all appeals from the Plan Confirmation Order were exhausted, they knowingly waived that right and accelerated consummation of the Plan so they could then argue that any appeal was equitably moot, thereby insulating the Plan's releases from appellate review. The Court of Appeals agreed.

This is how unlawful reorganization plan provisions seep into the bankruptcy system. *In re One2One Comm'cns*, 805 F.3d at 447 (Krause, J., concurring) ("By excising appellate review, equitable mootness not only tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy."). This Court has repeatedly emphasized that bankruptcy courts can only exercise their equitable powers within the strict confines of the Bankruptcy Code. *See*, *e.g.*, *Cryzewski v. Jevic Hldg. Corp.*, 137 S.Ct. 973, 984-86 (2017) (holding that bankruptcy court could not order a structured dismissal conditioned on distributions that were inconsistent with the Bankruptcy Code's priority scheme); *Law v. Siegel*, 571 U.S. 415, 421 (2014) (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)) ("We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code."). Nothing in the Bankruptcy Code authorizes nonconsensual third-party releases in Chapter 11 reorganization plans, except in the limited context of asbestos liability claims as provided in 11 U.S.C. § 524(g). To the contrary, Section 524(e) of the Code, which provides that a bankruptcy discharge "does not affect the liability of any other entity on, or the property of any other entity, for such debt," prohibits such releases. 11 U.S.C. § 524(e). Three Circuits—the Fifth, Ninth and Tenth—have so held on the grounds that a nonconsensual release issued as part of a plan of reorganization that prohibits creditors from pursuing claims against non-debtors is no different in substance

from a discharge of the non-debtors' liability. *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990); *Field v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760-61 (5th Cir. 1995); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995). Even Circuits that permit such releases impose severe limitations on when bankruptcy courts can impose them. *See*, *e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005) (holding that fair consideration was not given for nonconsensual third-party release where releasors only received a plan distribution on account of their notes against the debtors). Yet, here the Court of Appeals refused to even consider the merits of Petitioners' arguments for why the Bankruptcy Court exceeded the scope of its authority under the Code when it released Petitioners' claims against other non-debtors without their consent. The result is that the litigants in the next bankruptcy will try to push the limits of what kinds of releases are permitted in a Chapter 11 plan even further, secure in the knowledge that no Article III court will review their legality so long as the bankruptcy court confirms the plan and the parties substantially consummate it. In this way, the judge-made doctrine of equitable mootness damages the legitimacy and fairness of the bankruptcy system as a whole.

Equitable mootness is an unconstitutional doctrine that requires this Court's careful evaluation and review. The Court should grant the Petition.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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