NO. 20-1400

In the

Supreme Court of the United States

MARK ELLIOTT, ET AL.,
Petitioners,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL
Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

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1. The judge-made "equitable mootness" doctrine lacks a constitutional or statutory foundation and is contrary to this Court's jurisprudence.

Respondents-Appellees do not dispute that "equitable mootness" is a judge-made doctrine, and this Court has never adopted it. (Petition 2-3, 16-20)

This judge-made doctrine is fundamentally at odds with this Court's recent ruling in *Mission Product*, as well as this Court's recognition in *Hall* and *Gelboim* that an appeal from a final district court judgment is a matter of right. (Petition 2-3, 16-20)

The fact none of these three cases themselves expressly addressed whether equitable mootness stands as a valid doctrine is a reason to grant the writ. The Questions Presented are important questions of federal law that have not been, but should be, settled by this Court.

a. *Hall* and *Gelboim* state that, by statute, an appeal is a matter of right.

Respondents argue that 48 U.S.C. §2166(e)(2) "does nothing more than grant appellate jurisdiction" (Opposition 21). However, the operative language of §2166(e)(2) is the same as 28 U.S.C. §1291 ("shall have jurisdiction"). And §1291 itself provides a right of appeal here. Respondents ignore §1291.

This Court in *Hall*, in 2018, expressly stated that "[a]ppeal from …. a final decision is a 'matter of right'" under §1291 (Petition 18). *Gelboim* is in accord (Petition 18).

Respondents have no answer to *Hall* (c*f.* Opposition 20), and altogether ignore *Gelboim*.

Respondents' argument – that "[t]he statute does not grant Petitioners rights" (Opposition 20) – is *contra* to this Court's recent decisions in *Hall* and *Gelboim*.

National R.R. Passenger (Opposition 21) discussed the potential availability of a laches defense if there was an unreasonable delay in filing a claim that prejudiced a defendant (536 U.S. at 121-22) — *not* whether an appeal is a matter of statutory right.

b. *Mission* rules that, if statutory jurisdiction for the appeal exists, the court of appeals has no discretion to dismiss.

Petitioners-Appellants recognize that *Mission* did not specifically address "equitable mootness." But once this Court concluded there was a live controversy, that was the end of the analysis – this Court did not go on to discuss whether "equitable mootness" might be invoked (Petition 18-19).

Moreover, *Mission* contradicts the premise of equitable mootness, which is that the court of appeals has discretion to decline to decide a case on its merits (Petition 16-17). *Mission* stated there is *no* discretion ("only," "impossible") (Petition 17).

Mission's approach is consistent with this Court's pronouncements in *Hall* and *Gelboim* that a litigant has a statutory right of appeal (Petition 18).

This Court should resolve whether (i) a court of appeals *has* discretion to decline to decide an appeal

on its merits, or (ii) an appellant has a statutory right of appeal (as stated in *Hall* and *Gelboim*) and there is *no* discretion to dismiss the appeal (as stated in *Mission*).

2. There are compelling reasons to review this case.

The judge-made "equitable mootness" doctrine is of recent (1981) origin, *see Markell*, at 381-382. Yet, after 40 years, it is hard to see how more "percolation" in the courts of appeals will assist this Court. And because the doctrine has no statutory foundation authorizing the dismissal of appeals – indeed, flies in the face of what this Court has ruled is a statutory right of appeal – case law applying "equitable mootness" is all-over-the-lot (*see Markell*, at 384-85, 393-97; Petition 4, 29-37). Thus, the important question of whether "equitable mootness" may be invoked, and, if so, under what circumstances, is ripe for review.

Also, this case presents the question of whether a court of appeals has discretion to dismiss an appeal in a particularly significant context, since here "equitable mootness" was invoked to preclude consideration on appeal of the merits of an appellants' position – supported by this Court's ruling in *Security Industrial* (Petition 20, 23) – that their constitutional rights as secured creditors have been violated and their property taken, without just compensation, by a government which is a party to the appeal.

Moreover:

- Whether a judge-made "equitable mootness" doctrine should be recognized was actively contested by Petitioners-Appellants below.

- Deciding whether the doctrine should be recognized will have the real-world consequence in this case of requiring remand to decide the underlying merits, since the First Circuit made no rulings on the merits.
- In light of most circuits endorsing some form of equitable mootness, and the constraints on the ability of one panel to overturn a precedential opinion from its own circuit, this may be a unique opportunity for this Court to decide whether this judge-made doctrine trumps the statutory right of appeal. Even if this Court elects to recognize the doctrine, this Court could provide guidance to the courts of appeals concerning its application.

Respondents-Appellees argue that "Petitioners can identify only a handful of federal judges" who have criticized equitable mootness (Opposition 25). Respondents understate the number – plus, one of that "handful" is now Justice Alito (Petition 3-4, 20-23; Opposition 26).

Respondents seek to divine support from this Court's past denials of certiorari in other cases (Opposition 13n.3). However:

- All but one of these cases pre-dates *Mission*. In *ISL*, the petition overlooked *Mission* and equitable mootness was not its primary focus.
- None were cases in which equitable mootness was invoked to avoid addressing the merits of a secured creditor's claim that its property was taken by a government party to the appeal without just compensation.
- One can only speculate as to the Court's reasons for denying certiorari in particular cases (*e.g.*, was the

5+ pages question presented section, stating eight questions, a factor in denying certiorari in *Bennett*?)

Respondents argue that this case is a poor vehicle because (Respondents say) Petitioners' challenge to the Plan is meritless (Opposition 31-34). But if the underlying merits were so obviously meritless, the First Circuit could have addressed the merits in the alternative, but did not. The underlying merits are for a future remand, not part of the Questions Presented.

Furthermore, Respondents – while digressing into the underlying merits – do not convincingly explain how a "finding" of "just compensation" for purposes of the Fifth Amendment can be predicated on the "result" of a confidential mediation-settlement process, for which there is no record, that parties sought to be bound did not participate in. (Petition 36-37&n.72; App. 108a; Opposition 32-33).

The mediation and litigation were supposed to be kept "entirely separate" and "not be conflated" and "information regarding events or actions in the mediation process" was not to be submitted to the district court.[1] Yet that court relied upon the "result" of the mediation-settlement process for its "finding". (App. 108a; Petition 36-37; *see* note 1). This "finding" is subject to *de novo* review. *See U.S. Bank* v. *Village at Lakeridge*, 138 S.Ct. 960, 965, 967n.4, 968n.7 (2018).

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[1] Appendix (docketed in 19-1182 5/4/2020): JA-2-188-to-189; JA 2-190-to-191; Appellants' Opening Brief 38-40 (docketed in 19-1182 5/1/2020); Appellants' Reply 34-35 (docketed in 19-1182 5/1/2020).

Respondents incorrectly argue that, if Petitioners ultimately prevail, tens of thousands transactions would need to be unwound and Petitioners' success on appeal could be fatal to Commonwealth's fiscal recovery (Opposition 3, 11-12, 23). In fact, no transactions in COFINA bonds would be unwound. Monetary relief is sought – only against Commonwealth – in an amount that represents less than 2% of the $17.5 billion in pledged revenues Commonwealth took (Petition 25, 31), leaving Commonwealth with 98%. And compensating nonconsenting bondholders for the estimated $316 million Commonwealth took from them will hardly be "fatal" to Commonwealth, which has $10.8 billion unrestricted cash on hand, and YTD net cash flow running $1.2 billion ahead of plan.[2]

3. Respondents do not rebut Petitioners' showing that the First Circuit's opinion conflicts with the approach to equitable mootness in other circuits.

Respondents'-Appellees' attempt (Opposition 22) to counter Professor Markell's observation of "disuniformity" in the circuits (*Markell*, at 384-85, 393-97; Petition 4, 29) plucks language out-of-context from *Collier* §1129.09[1] (actual context: "Although…there is not as yet any generally accepted statement of the doctrine") and *Kupetz* (actual context: "The courts of appeal have developed various multi-factor tests…").

[2] https://www.aafaf.pr.gov/ financial-documents/treasury-single-account/ (6-4-2021).

a. Is relief available against a plan proponent and a party to the appeal who took appellants' property?

Cases in the Fourth, Fifth, Sixth, Seventh and Ninth circuits recognize that "equitable mootness" only protects truly "innocent" third parties (Petition 30). Active participants in the reorganization process, including creditors, asset purchasers, new investors, and debtors who possibly could pay more, are *not* "innocent third parties" (Petition 30, citing cases; *In re Paige*, 584 F.3d 1327, 1331-32, 1343-44 (10th Cir. 2009)).

Yet here the appeal was dismissed despite relief, including monetary compensation, being sought only against Commonwealth (App. 29a), which took Petitioners'-Appellants' property without just compensation. The First Circuit effectively treated Commonwealth as an "innocent third party", which it was not.

b. Does it matter that appellants are secured bondholders asserting constitutional rights, including under the Takings clause?

Respondents themselves had, in prior proceedings, described Petitioners' bonds as "secured by a statutory lien" (Petition 6-7). Respondents do not dispute that in other circuits, appeals by parties claiming secured status have not been dismissed as equitably moot (Petition 32). The fact some circuits have applied equitable mootness to dismiss constitutional claims simply underscores the need for this Court to provide guidance.

c. Is seeking a stay a prerequisite to an appeal even if relief can be had against a plan proponent and party to the appeal who took appellants' property?

Respondents do not dispute that decisions from the Third, Fifth and Sixth circuits – as well as then Judge (now Justice) Alito in dissent – have said seeking or obtaining a stay is *not* a prerequisite to an appeal (Petition 33). And the Ninth Circuit (in which the equitable mootness doctrine originated) declined to dismiss where appellant (who failed to seek or obtain a stay) sought monetary relief. *In re Sylmar Plaza*, 314 F.3d 1070, 1074 (9th Cir. 2002).

That other panels in those same circuits considered whether a stay was sought or obtained as a factor simply underscores the potential for inconsistent application of "factors" to defeat a statutory right of appeal.

4. Respondents' arguments addressed to how the Questions Presented should be decided, and to the underlying merits, are not germane to whether review is appropriate.

The issue presently at hand is whether this Court should grant the writ and decide the Questions Presented. Nevertheless, Respondents'-Appellees' nongermane arguments are addressed below:

a. Failure to seek and obtain a stay cannot be grounds to dismiss an appeal where compensatory relief is sought.

Respondents, like the First Circuit, place significant weight on Petitioners'-Appellants' failure

to seek and obtain a stay of the confirmation order. (Opposition 11-12, 29-30; App. 27a-28a).

Respondents ignore the principle that, if monetary relief is possible, a stay is *not* even available. (Petition 27-28, 35).

This principle is consistent with law in the Fifth Amendment Takings context that, if "an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking". *Knick* v. *Township of Scott*, 139 S.Ct. 2162, 2176-77 (2019).

As the First Circuit acknowledged (App-29a), Petitioners seek compensatory relief against Commonwealth, a party to the appeal, for taking Petitioners' property. Even apart from the practical barriers and substantial expenses appellants face in any attempt to obtain and bond a stay of a plan confirmation order (Petition 23, 34), since here compensatory relief is sought, a stay was not available under the settled principle recognized in *Knick*.

At the least, there is a division among circuit judges as to whether seeking a stay is a prerequisite to an appeal. Petition 33; Point 3.c, above.

Relatedly, on failure to seek expedition: neither Respondents (who had the burden to establish equitable mootness, Petition 28&n.62) nor the First Circuit explain how — once the Plan was consummated (Opposition 10) — failure to seek expedition made any difference. No authority is cited for the proposition that a court of appeals may dismiss a timely appeal seeking monetary relief, brought as of right by an appellant who complied with all deadlines set by the court (which, in some cases, reflected

reasonable unopposed extensions). 48 U.S.C. §2126(d) (Opposition 11) refers to the duty of the court, not Petitioners.

Finally, Petitioners stand in a completely different posture than the Pinto-Lugo appellants who sought what they themselves described as "apocalyptic" relief, affecting tens of thousands of completed transactions by non-parties on the open market (App. 25a-26a). Respondents repeatedly conflate the relief sought by Pinto-Lugo with the relief sought by Petitioners (who seek monetary relief from Commonwealth).

b. Self-selected parties cannot, by agreement on a settlement incorporated into a bankruptcy plan, effectively preclude appellate review.

Respondents stress that the First Circuit believed its hands were tied because there had been a settlement (Opposition 27-28) – even though Petitioners were not parties to the settlement, which was the result of a confidential process for which there is no record (Petition 9-11, 36-37). The First Circuit believed it "face[d] an up-or-down decision – affirm or vacate Plan approval" (App. 29a). Thus, the First Circuit opted to "deny" Petitioners' appeal (App. 30a).

But there was another option: determine whether Petitioners are entitled to monetary relief (*i.e.*, just compensation) from Commonwealth, which did the taking and has the pledged revenues it took.

Assertions that a settlement embodied in a bankruptcy plan presents an "all-or-nothing" choice to the court of appeals, and that allowing an appeal to proceed to the merits would cause the entire plan to

unravel, have been rejected as "Chicken Little" arguments in the Third Circuit. *In re Semcrude*, 728 F.3d 314, 323-25 (3d Cir. 2013). Respondents' "Chicken Little" arguments lack force here where the estimated monetary compensation is less than 2% of the $17.5 billon taken (Petition 25-26, 31).

Whether the settlement, to which Petitioners were not parties, precludes Petitioners from obtaining monetary relief from Commonwealth need not be decided by this Court to grant the writ. But what happened highlights the pernicious impact of equitable mootness on the judicial process, particularly when Constitutional violations are asserted, such as Petitioners' claim that Commonwealth has taken their property without just compensation:

- The district court viewed the Plan as the "result" of a mediation-settlement process which "determined" distributions and "incorporates a complex series of interrelated compromises and settlements" that "are inextricably interwoven" and "all hinge on one another" – thus "approval of all of these compromises and settlements is required." (App. 87a, 108a).
- The First Circuit agreed the district court had no choice: "The Title III court could approve or disapprove the plan" – it could not compel Commonwealth to settle for less (App. 29a).
- The First Circuit similarly believed its own hands were tied (App. 29a-30a).

If equitable mootness can be invoked to preclude an appellate ruling on the merits of whether secured creditors are entitled to monetary compensation for a taking of their property, the

doctrine leaves debtors and self-selected creditors free to craft a bankruptcy plan in confidential negotiations, secure in the knowledge that, if the district court believes it is "required" to approve the plan, there will likely be no appellate review either.

The notion that a debtor and self-selected creditors can tie the hands of a court of appeals and render the product of their agreement effectively unreviewable on appeal is at odds with the approach this Court took in *American United* v. *City of Avon Park*, 311 U.S. 138 (1940), where this Court – in analogous circumstances – reversed confirmation of a municipal debtor's plan (Petition 15). *A fortiori* here, where Petitioners do not seek to reverse confirmation altogether – they seek compensation from Commonwealth, a party to the appeal, for what it took from them.

c. Recognition of equitable defenses to claims has no bearing on whether a judge-created doctrine may be invoked to defeat a statutory right of appeal.

Respondent's argument that this Court has endorsed other equitable doctrines – laches, equitable estoppel, unclean hands and *pari delicto* (Opposition 17-20) – is off point. These doctrines – if the elements are met – may provide *defenses* to the *merits* of a *lawsuit*. That is very different from invocation of "equitable mootness" to dismiss a timely as-of-statutory-right appeal without addressing the merits.

In *none* of Respondents' cited cases did this Court suggest that a doctrine providing an equitable defense to a lawsuit gives a court of appeals license to

dismiss an appeal – notwithstanding a statutory right of appeal – without considering the merits.

Furthermore, these defenses have elements not met here. In *Petrella* v. *Metro-Goldwyn-Mayer,* 572 U.S. 663, 667, 677-79 (2014), this Court ruled that laches cannot be invoked to preclude a lawsuit for damages brought within the statutory limitations period. *A fortiori*, laches cannot be invoked to dismiss a timely appeal. Also, *National R.R. Passenger* (Opposition 17) states laches requires prejudice to the party asserting the defense. Since Petitioners only seek relief from parties to this appeal, the only "prejudice" that could be claimed is Commonwealth's assertion that it would not have settled to only take 98% of $17.5 billion. But paying just compensation on account of Commonwealth's unconstitutional taking is not legally cognizable "prejudice."

Other doctrines Respondents reference require elements Respondents do not even suggest apply here. Thus, equitable estoppel requires both intentional deception and proof of reliance. *Petrella*, 572 U.S. at 684-85. *Burford* abstention, discussed in *Quackenbush* (Opposition 20), deals with concerns about interfering with state regulation and has no conceivable application.

d. Relief for nonconsenting bondholders is available.

Respondents' argument based on *Young* (Opposition 34) is a merits argument for remand. As noted in the Petition (at 12), 1,826 subordinate bondholders voted "no" on the Plan. *Young* underscores that appropriate relief may be awarded to all nonconsenting COFINA subordinate bondholders.

See 324 U.S. at 209-214. Consistent with 11 U.S.C. §1123(a)(4), the monetary relief sought can benefit all nonconsenting bondholders, while those who accepted the Plan will receive the treatment they negotiated and/or "agree[d] to". The express exception in §1123(a)(4) ("unless the holder … agrees to a less favorable treatment …") applies.

CONCLUSION

The writ should be granted.

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Respectfully Submitted,

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