No. 21-1197

IN THE

Supreme Court of the United States

KK-PB FINANCIAL, LLC,

Petitioner,

v.

160 ROYAL PALM, LLC,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent's Opposition improperly resorts to a tangled web of mischaracterizations regarding alleged fraudulent "scheming" by Petitioner and its principal (Palm Beach developer, Mr. Glenn Straub) concerning the 2013 sale of the Palm House Hotel (the "Hotel"). As described herein, the Bankruptcy Court below considered and expressly rejected these mischaracterizations of alleged misconduct. In truth, Petitioner and Mr. Straub are the biggest victims of the Hotel sale transaction, having received approximately $7 million for the Hotel that the Bankruptcy Court determined was worth nearly $20 million based on a sale which occurred almost ten years ago. But because Petitioner provided *seller financing* in the form of a $27 million mortgage in this commercial real estate transaction, the Bankruptcy Court incorrectly (i) disallowed Petitioner's mortgage claim in its entirety and (ii) "awarded" Petitioner a $0.0 claim in Respondent's bankruptcy case. After more than three years of appeals, no court below has reviewed the merits of the Bankruptcy Court's disallowance of Petitioner's $27 million mortgage claim. Instead, the District Court and Eleventh Circuit improperly dismissed the appeal on mootness grounds (including constitutional mootness).

With respect to constitutional mootness, the Eleventh Circuit ignored this Court's holding in *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). Relief in the present case is not impossible – which is the standard required in this Court's *Tempnology* decision. Additionally, as set forth below, the lower courts should not have applied equitable mootness in refusing to consider the merits of Petitioner's constitutionally mandated appeal.

This Court should accept review.

ARGUMENT

A. The Opposition's Smear Campaign Should Be Ignored

Sidestepping the questions presented in the Petition, the Opposition spends many pages attempting to smear Petitioner and its principal, Mr. Straub. We summarily address only a few of the most egregious attacks here. The Opposition repeatedly asserts that Mr. Straub participated in a "fraudulent transfer scheme" in connection with Mr. Straub's sale of the ownership of the hotel to Robert Matthews – seeking to associate Mr. Straub with Mr. Matthews (who defrauded foreign nationals in exchange for investments).

In fact, Petitioner and Mr. Straub are the biggest victims of Mr. Matthews' fraud related to the hotel. Mr. Straub received payment of only approximately $7 million for a property worth approximately $19 million by the *Debtor's* expert valuation, and which was sold in bankruptcy for approximately $40 million. Mr. Straub had no involvement in Mr. Matthews' wrongdoing.

As the Bankruptcy Court held in the Estimation Order:[1] "the evidence . . . does not support a finding that Mr. Straub caused [the Debtor] to give the note and mortgage with actual intent to defraud creditors." App. 79a-80a. Rather, Mr. Straub expected the hotel to be financed and completed:

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1. Capitalized terms not defined herein have the meaning defined in the Petition.

> Debtor argues that Mr. Straub knew that [Debtor] would be unable to service the debt owed to [Petitioner]. There is no evidence to support the conclusion that Mr. Straub had that subjective understanding at the time of the closing. Indeed, based on the evidence admitted here, he expected [Debtor] to raise capital to complete the project, pay [Petitioner's] obligation, and make a success of the hotel.

App. 68a. The Debtor also suggests the transaction was "classically fraudulent" because Mr. Straub transferred "his then-worthless equity interest in the Debtor." Opp., at 3. In fact, the Bankruptcy Court found, based on the testimony of the *Debtor's* expert, that the Hotel was worth at least $19 million at the time of the transfer—far from "worthless." App. 69a-70a.

The Opposition similarly misrepresents that Petitioner indicated no desire to bid on the Hotel. *See* Opp., at 17. Debtor ignores that the Bankruptcy Court, at the Debtor's request, withdrew the public bid procedures before the bid deadline had passed and adopted private sale procedures prohibiting other bids. In fact, at the hearing before the Bankruptcy Court on the private sale procedures (on just 48 hours' notice), KK-PB objected and informed the Bankruptcy Court it wished to make a cash bid to purchase the Hotel—and produced a $50 million cashier's check to substantiate its intention. *See* A.0407.[2] The Opposition clearly seeks to distract from the meritorious nature of the Petition.

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2. Citations taking the form "A ___" refer to entries in the Appendix filed in the Court of Appeals for Case No. 20-12361.

B. The Eleventh Circuit's Refusal To Follow *Tempnology* Merits Exercise of the Court's Supervisory Power

The Debtor argues that the court below "faithfully applied this Court's guidance" because it "cited" *Tempnology*. Opp. 20. But the Eleventh Circuit cannot have faithfully applied *Tempnology's* holding, because relief in this case *was not* "impossible." *Tempnology*, 139 S. Ct. at 1660 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

None of the reasons the Debtor cites to justify a finding of impossibility support its position. First, the Debtor argues that Petitioner could not recover under the Plan as a Class 3 unsecured creditor because it is currently not a Class 3 creditor under the Plan. *See* Opp. 23. But the "[P]lan could be restructured to comport with the Bankruptcy Code," without changing the Plan, if Petitioner successfully appealed the Confirmation Order. *Ala. Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1226 n.21 (11th Cir. 2011); *see also In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (holding case was not moot because a substantially consummated plan could be modified to strike certain releases under the plan). Where recovery under the Plan is *possible*, relief is not "impossible" and this case is not moot.

The Debtor also argues that Petitioner's proposed relief would prejudice other creditors in Class 3, but those creditors have *already* received the distributions that they reasonably expected to receive under the Plan—proceeds from the sale of the Hotel—and the Plan does

not guarantee any future distributions to them. Indeed, creditors' expectations cannot be prejudiced because they knew, when they voted for the Plan, that "the Debtor cannot estimate the amount of any potential recovery from litigation surrounding such payments, if any." *See* Disclosure Statement, A.0700.

The Debtor next argues relief is impossible because it depends on "conjecture" about "what *might* happen in the future." Opp. 24. But Petitioner's interest in the outcome of its appeal of the award to the Debtor's counsel (the "Contingency Fee Appeal") is not hypothetical or conjectural because "a concrete interest, however small, in the outcome of the litigation" is tangible. *Chafin*, 568 U.S. at 166. So long as the possibility of recovering funds remains through the pending Contingency Fee Appeal, and the Pending Estate Action,[3] Petitioner retains a "concrete interest, however small" in this case.

The Opposition cites cases for the proposition that even if Petitioner prevails on the Contingency Fee Appeal, no case or controversy would exist. These cases do not support the Opposition's position. In *Provident Life & Accident Ins. Co. v. Transamerica-Occidental Life Ins. Co.*, 850 F.2d 1489 (11th Cir. 1988), the issue was that the case was between the wrong parties who had no relationship; it had nothing to do with the effect of an appeal pending between the parties where the availability of relief depended on the outcome of another appeal. In *Lewis v. Continental*

3. Currently the following adversary proceeding against third parties is still pending: *160 Royal Palm, LLC v. South Atlantic Regional Center, LLC et al.*, Adv. Proc. 19-01740-EPK (Bankr. S.D. Fla. Nov. 21, 2019).

Bank Corp., 494 U.S. 472 (1990), this Court ruled that a constitutional challenge was rendered moot by a new statute that everyone agreed was constitutional. Unlike in *Lewis*, here there was no "intervening circumstance" such as the passing of a statute to deprive Petitioner of its stake in the litigation—the Contingency Fee Appeal is part of this overall case, and until it is decided the possibility of relief in the Estimation Order Appeal and Confirmation Order Appeal remains.

Finally, the Debtor dismisses the significant interest Petitioner has in reversing the legal findings of the orders below because those findings have so far been applied preclusively only to "non-parties." Opp., at 25. But the Debtor does not deny that the findings could result in issue preclusion against Petitioner in a future case, and Petitioner has a concrete interest in preventing that injury. *See, e.g.*, *Agripost, Inc. v. Miami-Dade Cty.*, 195 F.3d 1225, 1230 (11th Cir. 1999) (holding that when a party "is prejudiced by the collateral estoppel effect of" a court order, the party has standing because "the litigant has been aggrieved by the judgment"); *Cf. Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1299-1301 (10th Cir. 2008) (holding a contingent liability can be an injury in fact, because a favorable ruling would eliminate potential liability and consequences of potential liability).

C. This Court Should Review the Equitable Mootness Doctrine Now

When the Opposition finally discusses the bases of the Petition, its argument falls flat, and instead actually highlights the need for Supreme Court review of the equitable mootness doctrine. The Petition presents an

important question of federal law – implicating countless bankruptcy reorganizations every year and involving billions of dollars, and should be settled by this Court. The Opposition cites to various writ petitions relating to equitable mootness that this Court has denied over the years. These writ petitions are testament to the problems that the doctrine is creating, and supports accepting, not denying, review.

1. Equitable Mootness Has No Statutory Basis

The Opposition does not identify any statutory basis for the equitable mootness doctrine. No statutory basis exists. "[A]s courts and litigants . . . have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring).

Indeed, the applicable statutes give parties to bankruptcy proceedings the statutory right to appeal final orders of the bankruptcy court in core proceedings, including confirmation orders. *See* 28 U.S.C. § 157(b)(1) (bankruptcy judge jurisdiction is "subject to review under section 158 of this title."); 28 U.S.C. § 158(a) (United States district courts have jurisdiction to hear appeals of bankruptcy court judgments and certain orders); 28 U.S.C. § 1291 (jurisdiction of courts of appeals). Certain statutes prohibit reversal on appeal of certain transfers in limited circumstances. *See* 11 U.S.C. §§ 363(m), 364(e). But no statutory immunity exists for confirmation orders or estimation orders. The Opposition has no answer to the point raised in the Petition that basic canons of statutory

construction compel the presumption that Congress did not intend to immunize other orders. Pet., at 18-19.

2. Equitable Mootness Conflicts with Relevant Precedent of This Court

The Opposition also fails to rebut the Petition's arguments that the equitable mootness doctrine conflicts with this Court's precedents.

The Opposition asserts that despite this "Court's skepticism of 'prudential' doctrines," the equitable mootness doctrine does not "compel appellate courts to decline to exercise their jurisdiction or impose prudential requirements as if they were conditions to standing." Opp., p. 31. The Opposition misses the point.

The equitable mootness doctrine "permit[s] federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997); *see also Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016) (equitable mootness "negates appellate review of the confirmation order or the underlying plan, regardless of the problems therein or the merits of the appellant's challenge."). This is contrary to federal courts' "virtually unflagging" obligation to hear and decide cases within their jurisdiction, and this Court's precedent. Pet., at 19-25.

The Opposition asserts that the Eleventh Circuit "did not shirk its obligation to exercise jurisdiction over Petitioner's appeal." Opp., at 32. That is false. In reality, the courts below entirely passed on the merits of Petitioner's appeals of the Estimation Order and the Confirmation Order. The district court granted Respondent's motion to dismiss Petitioner's appeals on grounds of equitable and constitutional mootness, and the Eleventh Circuit affirmed. Merits avoided.

Despite the Opposition's assertions, this Court's precedents in no way support the lower courts' "polite pass." The Opposition appears to be arguing that bankruptcy courts are "courts of equity," and thus declining to exercise jurisdiction to review orders from bankruptcy courts is proper because federal courts may decline to exercise jurisdiction when "asked to employ its historic powers as a court of equity." Opp., at 32. No Supreme Court precedent supports such a sweeping proposition that equity is a magic word that wipes away appellate rights or the Court's holdings.

In the context of discussing the historic, limited doctrines of abstention, this Court in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), acknowledged the authority of a federal court to decline to exercise jurisdiction to "employ its historic powers as a court of equity." *Id.* at 717. But *Quackenbush*, and the principles espoused therein, do not help Respondent. Under *Quackenbush*, proper abstention involves deferring to other jurisdictions (*id.* at 716-730), not declining jurisdiction, especially in the absence of another court exercising its jurisdiction. Moreover, as a recent bankruptcy court noted: "bankruptcy courts are not

courts of equity. Rather, bankruptcy courts exercise authority granted by statute and may address both legal and equitable claims." *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D. N.J. Feb. 25, 2022). Here, the Confirmation Order was ostensibly issued under the bankruptcy court's authority pursuant to 11 U.S.C. § 1129. The Estimation Order was ostensibly issued under the bankruptcy court's authority pursuant to 11 U.S.C. § 502. There is no authority to "decline" jurisdiction.

Further, Article III courts' exercise of their jurisdiction to review bankruptcy court decisions is of particular importance. In *Stern v. Marshall*, this Court acknowledged that district courts are to review final judgments of bankruptcy courts in core proceedings "*under traditional appellate standards*." 564 U.S. 462, 468, 474-75 (2011) (emphasis added). In *Wellness Int'l Network, Ltd. v. Sharif*, this Court expressed that Congress' provision of power to enter orders and judgments in core proceeding is "subject to appellate review by the district court," and that the work of the bankruptcy courts does not violate separation of powers so long as "Article III courts retain supervisory authority over the process" and bankruptcy courts "are subject to control by Article III courts . . . ." 575 U.S. 665, 678-81 (2015).

In *Bullard v. Blue Hills Bank*, this Court acknowledged that "a creditor can appeal without delay" a bankruptcy court order granting confirmation. 575 U.S. 496, 506 (2015). That appellate right, and the supervision and control referenced by this Court in the above decisions, is only a façade if the equitable mootness doctrine is allowed to persist.

3. The Identified Circuit Split Is Crucial

The Opposition in effect says "who cares" to the fact that the circuits disagree about the application of the equitable mootness doctrine. *See* Opp., at 28-30. The Opposition baldly posits that the differing applications don't matter, when of course they do. For example, the Eighth Circuit requires "a preliminary review of the merits" of an appeal as a precondition to application of equitable mootness. *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 890 (8th Cir. 2021). Such a review would at least provide appellants seeking review of confirmation orders (such as Petitioner here) with an opportunity to show a reviewing appellate court the errors in a challenged confirmation order.

D. The Invocation of Equitable Mootness to Find the Estimation Order Is Constitutionally Moot, and Other Pernicious Effects of the Equitable Mootness Doctrine, Show that This Case Presents a Proper Vehicle to Review the Doctrine Now

This is a particularly appropriate case in which to review the equitable mootness doctrine because the pernicious effects of the doctrine were realized. The lower courts bootstrapped the application of the equitable mootness doctrine as to the Confirmation Order, to find the earlier order – the Estimation Order – constitutionally moot. Yet, the Estimation Order was appealed approximately 11 months before the Confirmation Order was even issued and under *Tempnology*, the relief requested by Petition is not "impossible." The Opposition's argument that no effectual relief whatsoever is available is wrong. *See supra*, § B.

The Opposition provides no answer to the many ill-effects of the equitable mootness doctrine, arguing simply that the doctrine aligns with preserving finality and predictability in bankruptcy proceedings. No cited authority supports the argument that Congress or this Court intended the most important orders issued in a bankruptcy proceeding – confirmation orders – to be so easily made impervious to appeal. The circuit court case cited by the Opposition, *In re UNR Indus., Inc.*, 20 F.3d 766 (7th Cir. 1994) asserts that Congress indicated in certain provisions of the Bankruptcy Code that courts "should keep their hands off consummated transactions." But this refers to *specific* transactions (*see* 11 U.S.C. §§ 363(m), 364(e) as noted above) – and does not include confirmation orders. Reference to specific transactions reflects Congress's intent *not* to limit appeals of confirmation orders, which is directly contrary to the position the Opposition asserts. Absent Congressional approval, this Court should not allow the lower courts' misuse of the equitable mootness doctrine to continue, as it merely facilitates the shirking of their appellate duties in favor of expediency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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