No. 21-17

# In the Supreme Court of the United States

DAVID HARGREAVES, PETITIONER

*v.*

NUVERRA ENVIRONMENTAL SOLUTIONS, INC., ET AL., RESPONDENTS

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

**BRIEF FOR PROFESSORS OF BANKRUPTCY LAW AS AMICI CURIAE SUPPORTING PETITIONER**


LAWRENCE S. ROBBINS
*Counsel of Record*
MATTHEW M. MADDEN
CAROLYN M. FORSTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
*2000 K Street, NW, 4th Floor*
*Washington, DC 20006*
*(202) 775-4500*
*lrobbins@robbinsrussell.com*

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## INTEREST OF AMICI CURIAE

Amici curiae, whose names and affiliations are set forth in the attached Appendix, are 21 professors of law who have expertise bearing directly on the question presented in this case. They regularly teach courses in bankruptcy law and principles, and have authored numerous articles, treatises, and textbooks on bankruptcy law. Amici have an interest in the orderly development of bankruptcy law and practice, including through the robust and thoughtful appellate review of hard questions posed by complex cases.[1]

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae or their counsel, has made a monetary contribution to this brief's preparation or submission. The institutional affiliations of the amici are for identification only.

## ARGUMENT

The judge-made doctrine of equitable mootness has the extraordinary effect of causing Article III courts to refuse to review meritorious, live appeals from bankruptcy court orders. It does so even though there is nothing genuinely "moot" about cases in which effective relief is indisputably available, nor anything genuinely "equitable" about immunizing erroneous bankruptcy court decisions from appellate scrutiny.

As Judge Krause explained in this case, equitable mootness is a "problematic doctrine" that "lure[s]" appellate courts into "abdicating [their] jurisdiction when [they] should be exercising it, and stunting the development of * * * bankruptcy jurisprudence when it's [their] duty to promote it." Pet. App. 18 (quotation and alteration marks omitted). Indeed, the lower courts' application of this purported doctrine has left vexing questions of bankruptcy law persistently unresolved by those courts that have the authority—and responsibility—to decide them. The ultimate effect of the impoverished record in the courts of appeals is that important ambiguities and controversies in bankruptcy law never percolate up to this Court for review and definitive decision.

The consequence is bankruptcy law that varies from bankruptcy courtroom to bankruptcy courtroom, depending on the presiding judge. Legal analysis of consequential questions is concentrated in the handful of bankruptcy courts that regularly handle the country's most complex corporate bankruptcies. What is more, sophisticated parties in those high-stakes cases know how to wield equitable mootness to their advantage, by advocating aggressive legal

positions to receptive bankruptcy judges and then rushing to consummate confirmed reorganization plans before appeals have run their course. The resulting uncertainty ripples through the capital markets.

None of this is consistent with Congress's carefully tailored scheme of appellate review in bankruptcy cases, nor with the federal courts' duty to decide cases that are within their jurisdiction and properly before them. This Court should grant the petition to rein in the lower courts' abdication of their jurisdictional obligations, promote the development of bankruptcy law, and level the playing field in bankruptcy cases.

## I. Equitable Mootness Upends Statutory Appellate Rights Enacted To Ensure Meaningful Review Of Bankruptcy Court Decisions By Article III Courts

Congress has explicitly provided for Article III courts' appellate review of final orders and judgments entered by non-Article III bankruptcy judges. That review equips district courts to oversee the bankruptcy judges to whom they refer cases, and facilitates the courts of appeals' issuance of binding, precedential rulings on important legal questions under the Bankruptcy Code.

The equitable-mootness doctrine thwarts that scheme of appellate review, however, by excusing courts from exercising those responsibilities. It is a judge-made doctrine of abstention from hearing and deciding appeals over which Congress has indisputably vested courts with jurisdiction. Bankruptcy court decisions—no matter how unlawful—thereby evade the Article III scrutiny that Congress intended. The equitable-mootness doctrine has no basis in the

statutes governing bankruptcy appeals, or in the abstention principles strictly limited by this Court's decisions.

1. Bankruptcy judges are authorized to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11" that are referred to them by the district courts vested with original jurisdiction over those matters. 28 U.S.C. § 157(b)(1); see also *id.* § 1334. Bankruptcy courts "may enter appropriate orders and judgments" in such cases and core proceedings, including ordering the "confirmation of plans" of reorganization. *Id.* § 157(b)(1), (b)(2)(L).

Not surprisingly, Congress made bankruptcy judges' orders and judgments "subject to review" by Article III courts. 28 U.S.C. § 157(b)(1). To that end, Congress enacted a robust scheme of appellate oversight of bankruptcy judges' decisions. District courts have "jurisdiction to hear appeals" from, among other things, bankruptcy judges' "final judgments, orders, and decrees." *Id.* § 158(a)(1). Parties thus have the statutory right to "appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards." *Stern* v. *Marshall*, 564 U.S. 462, 474-75 (2011).

The courts of appeals, in turn, "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by the district courts. 28 U.S.C. § 158(d)(1). They review the bankruptcy or district courts' legal conclusions de novo. See *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018). This tiered scheme of appellate review empowers district courts

to supervise the bankruptcy judges in their districts, and authorizes the courts of appeals to address the legal issues presented in bankruptcy cases and establish binding circuit precedent on them.

2. Congress has authorized only limited exceptions to the appellate review of bankruptcy court orders required by statute. The Bankruptcy Code states that *certain* orders entered by a bankruptcy judge, in *specific* situations, are not subject to reversal on appeal because that would be unfair to the settled expectations of innocent third parties. Specifically, sections 363(m) and 364(e) of the Bankruptcy Code, 11 U.S.C. §§ 363(m), 364(e), "provide that certain components of sales and loans cannot be attacked on appeal if undertaken in good faith." Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 403 (2019); see also 28 U.S.C. § 1334 (expressly providing for permissive and mandatory abstention by district courts in certain specified bankruptcy cases within their original jurisdiction).

But Congress did not enact any similar carve-out from statutory appellate rights for the confirmation of Chapter 11 reorganization plans. As Professor Bruce Markell, a former bankruptcy judge, has explained, "this lacuna means that confirmation orders should not have the presumptions of finality without review that sale orders and lending orders enjoy." *Needs of the Many*, 93 Am. Bankr. L.J. at 404. The equitable-mootness doctrine nevertheless inserts a judge-made rule against disturbing confirmed, consummated reorganization plans that is untethered to anything in the Bankruptcy Code.

3. As petitioner correctly observes (Pet. 20), the lower courts' creation of a doctrine of appellate abstention in bankruptcy cases is irreconcilable with those courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); see also *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 72 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction."). This Court has made clear that federal courts may abstain from hearing cases that are properly brought before them "only [in] exceptional circumstances." *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989). Accordingly, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813.

The limited circumstances in which the federal courts may permissibly abstain from exercising the jurisdiction granted to them are those in which some "deference to the States" favors "the withholding of authorized equitable relief because of undue interference with state proceedings." *New Orleans*, 491 U.S. at 359, 368. Such withholding is justified "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813.

But equitable mootness does nothing of the sort. Bankruptcy appeals dismissed as equitably moot are not then heard and resolved somewhere else. Rather, they are never heard and resolved *at all*. There is, therefore, "no analogue for equitable mootness among the abstention doctrines." *In re One2One Commc'ns,*

*LLC*, 805 F.3d 428, 440 (3d Cir. 2015) (Krause, J., concurring). Because equitable mootness involves "no other forum and no later exercise of jurisdiction * * * relinquishing jurisdiction is not abstention; it's abdication." *Ibid.;* see also Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 Ky. L.J. 269, 290 (2018) (identifying the "strong tension" between equitable-mootness dismissals and the "duty of federal courts to fully exercise their jurisdiction under statute and the Constitution").

## II. Equitable Mootness Precludes The Development And Predictability Of Bankruptcy Law

The all-too-routine invocation of equitable mootness to dismiss appeals deprives bankruptcy law of the thoughtful analysis and predictable precedent that appellate review provides. In so doing, it leaves the development of that jurisprudence to a relatively small number of non-Article III bankruptcy judges who sit in the jurisdictions where the most complex bankruptcy cases are concentrated.

1. Although bankruptcy courts publish many pages of rulings analyzing and applying the Bankruptcy Code, those decisions lack any binding effect in future cases. Even a given bankruptcy judge is not bound to adhere to his or her own prior decisions in other cases. See, *e.g.*, *In re AM Int'l, Inc.*, 203 B.R. 898, 905 (D. Del. 1996) ("[T]he Bankruptcy Court is not bound by its previous decisions."). The binding force of district courts' decisions in bankruptcy appeals, too, is generally limited to "the immediate parties to a case."

Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States,* 12 Nev. L.J. 787, 827 (2012).[2]

The development of bankruptcy law thus depends on appeals reaching the courts of appeals for decision on their merits. And for that to happen, parties must have meaningful access to the full scope of appellate review that Congress provides to them.

Equitable mootness stunts that normal process of jurisprudential development by blocking appellants' ability to exercise their statutory appellate rights. See Pet. App. 17 (Krause, J., concurring) (equitable mootness "precludes the development of bankruptcy law"). This case is a prime example: The Bankruptcy Code prohibits judicial confirmation of Chapter 11 reorganization plans that "discriminate unfairly" among creditors. 11 U.S.C. § 1129(b). Respondents' reorganization plan affords petitioner only 5 cents on the dollar of his unsecured claims, while other unsecured creditors receive 100 cents on the dollar of their claims. Pet. 12-13. Over petitioner's objection, the bankruptcy court held that this is not unfair discrimination because the favored unsecured

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[2] Bankruptcy courts regularly view themselves as being "free to disagree with and disregard district court precedent." Mead, *Stare Decisis*, 12 Nev. L.J. at 827; see also *In re Jones*, 538 B.R. 844, 848 (Bankr. W.D. Okla. 2015) ("Under principles of *stare decisis*, a decision of a federal district court judge or bankruptcy court is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *In re Ford*, 415 B.R. 51, 60 (Bankr. N.D.N.Y. 2009), aff'd *sub nom. Community Bank N.A.* v. *Ford*, No. 5:09-cv-633 (GLS), 2009 WL 9540679 (N.D.N.Y. Dec. 8, 2009) ("[J]ust as there is no 'law of the district' mandated for district judges to follow, bankruptcy judges are likewise not bound by decisions of a single district court judge.").

creditors' additional recovery was "gift[ed]" to them by the debtors' senior creditors out of estate property that otherwise would have gone to those senior creditors. Pet. App. 5.

Amici take no position—and likely disagree among themselves—on whether the bankruptcy court correctly held that there is a "horizontal gifting" exception to the Bankruptcy Code's confirmation requirements. But amici each agree with Judge Krause that this is among a "series of open issues" presented by petitioner's case that deserve authoritative resolution by the court of appeals. Pet. App. 17. By dismissing petitioner's appeal without ruling on its merits, the decision below contributed to a troublesome deficit of binding precedent on these and other disputed questions of bankruptcy law.

This case is hardly an aberration in that respect. Indeed, "[t]he larger and more complicated the case, the more likely the appeal will be equitably moot." Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. 1715, 1734 (2018). The equitable-mootness doctrine thus especially precludes appellate review of the "central disputes in the largest business bankruptcies," as "courts commonly use the doctrine to sidestep" those questions. Timothy K. Lewis & Ronald Mann, *Courts Should Review Bankruptcy Equitable Mootness Doctrine*, Legal Intelligencer (June 8, 2016); see also Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 789-791 (2010) (observing that equitable mootness "can be dispositive in even the most important bankruptcy matters").

Some of those questions go to the heart of the bankruptcy process itself. The Fifth Circuit, for

example, felt "constrain[ed]" by the "judicial anomaly" of equitable mootness not to resolve the merits of an appeal from a confirmed plan that appeared to divide unsecured claims arbitrarily into separate classes "in order to gerrymander an affirmative vote on reorganization." *In re Pacific Lumber Co.*, 584 F.3d 229, 240, 251 (5th Cir. 2009). Likewise, the Second Circuit declined to review challenges to a confirmed plan's embedded settlement of billions of dollars of claims against a powerful insider for fear that any modification of that settlement on appeal—even to remove any illegal terms—would have "seriously threaten[ed]" the parties' ability to compromise on a new plan. *$R^2$ Invs.* v. *Charter Commc'ns, Inc.* (*In re Charter Commc'ns, Inc.*), 691 F.3d 476, 486 (2d Cir. 2012). In these and other cases, "equitable mootness merely serve[d] as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges." *One2One Commc'ns*, 805 F.3d at 448 (Krause, J., concurring).

Indeed, and since the petition was filed, the Eighth Circuit expressly recognized the incongruity of the equitable-mootness doctrine and a litigant's right to appellate review of bankruptcy-court decisions on their merits. *FishDish, LLP* v. *VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880, 888-891 (8th Cir. 2021). "Writing on a clean Eighth Circuit slate," and distinguishing the en banc Third Circuit's approach in *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) that was applied in this case, the court of appeals held that at least some inquiry into whether a "confirmed plan must be set aside on the merits" is "required before equitable mootness

may be invoked." *Id.* at 890. It reached that conclusion in express agreement with Judge Krause that "'[m]erits review is particularly important for complex questions, like whether a plan comports with the Bankruptcy Code's cram down provisions, an issue that often cries out for appellate review . . . or claims involving conflicts of interest or preferential treatment that go to the very integrity of the bankruptcy process.'" *Ibid.* (quoting *One2One Commc'ns*, 805 F.3d at 454 (Krause, J., concurring)). The Eighth Circuit also explained that such merits review is necessary to provide "supervisory review of the merits of [a] plan by an Article III court that has an 'unflagging obligation' to exercise its appellate jurisdiction." *Ibid.*

Nevertheless, the growing frequency with which many other courts continue to invoke equitable mootness obstructs Congress's efforts to encourage appellate precedent in bankruptcy cases. See *One2One Commc'ns*, 805 F.3d at 438 (Krause, J., concurring) (bemoaning that courts are regularly "dismiss[ing] appeals in the simplest of bankruptcies"). In fact, Congress responded to "widespread unhappiness at the paucity of settled bankruptcy-law precedent" by trying to encourage *more*, not *less*, binding appellate precedent in bankruptcy cases. *Weber* v. *United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007). As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Congress authorized courts of appeals to hear direct appeals from certain consequential bankruptcy court decisions, including ones involving "a question of law as to which there is no controlling decision" or "a

question of law requiring resolution of conflicting decisions." 28 U.S.C. § 158(d)(2). The purpose of fast-tracking certain bankruptcy appeals for direct review by the courts of appeals was "to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level." H.R. Rep. No. 31, Pt. 1, 109th Cong., 1st Sess. 148 (2005). Equitable mootness, however, has the countervailing effect of leaving many such questions unsettled—in both the standard, two-tier appeals and the newer, direct ones. See, *e.g.*, *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018) (claims raised on direct appeal were equitably moot); *In re Pacific Lumber Co.*, 584 F.3d 229 (same).

2. The absence of robust appellate review of reorganization-plan confirmation orders gives bankruptcy judges outsized influence on the interpretation of the Bankruptcy Code. And that influence is not spread evenly. A relatively narrow band of bankruptcy judges concentrated in the Southern District of New York, the District of Delaware, and, more recently, the Eastern District of Virginia and the Southern District of Texas hear a large proportion of the "mega" Chapter 11 cases. See Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. Legal Stud. 119 (2018); Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. (forthcoming 2021). Accordingly, a relatively narrow group of judges is interpreting the bankruptcy laws in big cases—with relatively few decisions subject to review and reversal as a result of equitable mootness. See Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 408.

3. Equitable-mootness dismissals not only stifle the development of the bankruptcy law, but also weaken public perception of the system's legitimacy. Aggrieved parties who believe that they did not get a fair shake in the bankruptcy court then come to find out that no appellate court will address the merits of their appeals. When such appeals are dismissed without a hearing, "even fewer people get to tell their stories to a court of higher authority, or to observe an appellate court considering the matter." Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1735.

**III. Equitable Mootness Invites Gamesmanship And Distorts Bankruptcy Outcomes**

Equitable mootness gives parties powerful incentives to advocate aggressive legal positions against their adversaries in bankruptcy court free from concern that an appellate court will look unkindly on their sharp tactics. The government has acknowledged that equitable mootness is therefore "open to substantial abuse, and invites manipulation of the bankruptcy process." U.S. Pet. 22-23, *United States* v. *GWI PCS 1, Inc.*, No. 00-1621 (Apr. 23, 2001).

Chapter 11 reorganization plan proponents are keenly aware that equitable mootness will make disputed plan terms effectively unreviewable once the plan has been confirmed and implemented. Debtors and other plan proponents thus have every incentive to push the envelope of legality under the Bankruptcy Code, which affects bargaining power and skews outcomes in bankruptcy court. Moreover, these parties often strategically resist the adjudication of contentious issues *until* plan confirmation, and then

"rush to consummate a restructuring plan to insulate the deal from further judicial scrutiny." Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1734. Parties have followed this playbook for giving bankruptcy judges the last word on contested legal issues in numerous large bankruptcies in recent years.

The success of these strategies follows from plan proponents' control over equitable mootness's key levers when they decide how quickly to implement their confirmed plan. First, they can make it less likely that courts will stay plan confirmation pending appeal by including aggressive deadlines in a plan that effectively require its speedy implementation. Moreover, unless the plan is stayed—and it almost never is[3]—debtors and other plan proponents can push ahead with consummating plan transactions, issuing new securities, and paying allowed claims even while appeals are still pending. The effect—and often the *intent*—of doing so is to make the dismissal of those appeals on equitable-mootness grounds more likely. See *In re Pacific Lumber Co.*, 584 F.3d at 242 (confirmation appeal presented "a *fait accompli*, a

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[3] Among other reasons: courts typically require appellants to post large financial bonds to insure debtors against any losses they might sustain during the pendency of a stay. Equitable mootness thus "reduces the leverage of parties financially unable to post the bond required to obtain a stay pending appeal," further skewing the balance between bankruptcy parties. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1734-1735; *see also* Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 402 (describing the bond requirements imposed in bankruptcy cases as often being "ruinous to the point of significantly burdening—if not crushing—the ability to appeal an erroneous ruling").

plan that was substantially consummated within weeks of confirmation").

Equitable mootness thus "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans." *Nordhoff Invs., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring in the judgment). As Professor Adam Levitin recently told a congressional subcommittee, "debtors have * * * weaponized the equitable mootness doctrine, taking care that plans go effective—and money starts changing hands—as soon as possible after confirmation." Adam J. Levitin, Written Testimony Before the H. Comm. on the Judiciary Subcomm. on Antitrust, Commercial, and Administrative Law 14 (July 28, 2021); see also Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 Calif. L. Rev. 745 (2020). This Court should review the entirely judge-made doctrine under which this unsettling state of affairs has developed.

**IV. Equitable Mootness Is Applied Inconsistently**

Equitable mootness, lacking any real grounding in bankruptcy statutes, is applied inconsistently among the courts of appeals. For starters, the circuits have "fashioned many different routes" for invoking equitable mootness. *In re VeroBlue Farms USA, Inc.*, 2021 WL 3411834, at *6; see also Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 393, 397 (describing "confusion in the development of a consistent and coherent doctrine" and "variances in each circuit's expression of the doctrine"). The Second Circuit, for instance, considers five factors as bearing on the equitable-mootness inquiry. See *In re Charter*

*Commc'ns, Inc.*, 691 F.3d at 482. The Third Circuit, by contrast, has distilled the doctrine down to "two analytical steps." *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). Other circuits utilize still other tests, with the First and Fifth Circuits each applying a different three-factor analysis, see *In re Financial Oversight & Mgmt. Bd. for Puerto Rico*, 989 F.3d 123, 129 (1st Cir. 2021); *In re Pacific Lumber Co.*, 584 F.3d at 240 (5th Cir. 2009), and the Tenth Circuit adhering to a six-factor analysis, see *In re Paige*, 584 F.3d 1327, 1339 (10th Cir. 2009).

Moreover, some circuits put the burden of establishing equitable mootness on the party that is seeking dismissal of an appeal, whereas others presume that appeals from consummated reorganization plans are moot and put the burden on the appellant to rebut that presumption. Compare *In re Charter Commc'ns, Inc.*, 691 F.3d at 482 (2d Cir. 2012) (presumption of equitable mootness), with *In re Paige*, 584 F.3d at 1340 (10th Cir. 2009) (no presumption). The circuits are also divided over whether equitable mootness is available to protect the reliance interests only of innocent third parties, or also those of creditors who were active combatants in the bankruptcy process. Compare *In re Tribune Media Co.*, 799 F.3d at 278 (3d Cir. 2015) (equitable mootness protects all stakeholders), with *JPMCC 2007-C1 Grasslawn Lodging, LLC* v. *Transwest Resort Props., Inc.* (*In re Transwest Resort Props., Inc.*), 801 F.3d 1161, 1169-70 (9th Cir. 2015) (equitable mootness protects only "innocent third parties"). The circuits also disagree on the standard of review that a court of appeals should apply to a district court's equitable-mootness

determination, with some circuits reviewing dismissals de novo and others reviewing only for abuse of discretion. Compare *In re Charter Commc'ns, Inc.*, 691 F.3d at 483 (2d Cir. 2012) (abuse of discretion), with *Curreys of Nebraska, Inc.* v. *United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 946-947 (6th Cir. 2008) (de novo).

The fractured state of the lower courts' equitable-mootness doctrine is hardly surprising. It illustrates the pitfalls of a judge-made abstention doctrine that has no statutory foothold. Courts can hardly be expected to apply equitable mootness "with a scalpel" when they are still designing the rules as they go along. *In re Pacific Lumber Co.*, 584 F.3d at 240. Statutory appellate rights—and the fate of many millions of dollars of debtors' estate property—should not depend on such an unsettled, unsupported rule of jurisdictional abdication.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE S. ROBBINS
*Counsel of Record*
MATTHEW M. MADDEN
CAROLYN M. FORSTEIN
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
*2000 K Street, NW, 4th Floor*
*Washington, DC 20006*
*(202) 775-4500*
*lrobbins@robbinsrussell.com*

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**APPENDIX**

Jared A. Ellias
Bion M. Gregory Chair in Business Law
and Professor of Law
University of California Hastings College of the Law

Christopher G. Bradley
Wyatt, Tarrant & Combs Associate Professor of Law
J. David Rosenberg College of Law at the University of Kentucky

Ralph Brubaker
James H.M. Sprayregen Professor of Law
University of Illinois College of Law

Kara J. Bruce
Professor of Law
University of Toledo College of Law

Diane Lourdes Dick
Professor of Law
Seattle University School of Law

Pamela Foohey
Professor of Law
Cardozo School of Law

John Patrick Hunt
Professor of Law
and Martin Luther King, Jr. Research Scholar
UC Davis School of Law (King Hall)

Melissa B. Jacoby
Graham Kenan Professor of Law
University of North Carolina at Chapel Hill

Robert M. Lawless
Max L. Rowe Professor of Law
University of Illinois College of Law

Adam J. Levitin
Anne Fleming Research Professor
and Professor of Law
Georgetown University Law Center

Jonathan C. Lipson
Harold E. Kohn Professor of Law
Temple University-Beasley School of Law

Lynn M. LoPucki
Security Pacific Bank Distinguished Professor
of Law
UCLA School of Law

Joshua C. Macey
Assistant Professor of Law
University of Chicago

Ronald Mann
Albert E. Cinelli Enterprise Professor of Law
Columbia Law School

Peter V. Marchetti
Associate Professor of Law
Texas Southern University-Thurgood Marshall
School of Law

Bruce A. Markell
Visiting Professor of Practice
Cornell Law School
Professor of Bankruptcy Law and Practice
and Edward Avery Harriman Lecturer in Law
Northwestern Pritzker School of Law

Michael Ohlrogge
Assistant Professor of Law
New York University School of Law

Robert K. Rasmussen
J. Thomas McCarthy Trustee Chair in Law
and Political Science
USC Gould School of Law

Paige Marta Skiba
Professor of Law and Professor of Economics
Vanderbilt Law School

Richard Squire
Professor of Law & Alpin J. Cameron Chair in Law
Fordham Law School

Frederick Tung
Professor of Law
and Howard Zhang Faculty Research Scholar
Boston University