No. 21-17

In The
Supreme Court of the United States

DAVID HARGREAVES,

Petitioner,

v.

NUVERRA ENVIRONMENTAL SOLUTIONS, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Bankruptcy proceedings are equitable in nature. Over the past forty years, every circuit court that hears bankruptcy appeals has adopted a doctrine sometimes called "equitable mootness" to reject bankruptcy appeals in narrow circumstances where the only possible relief would require unwinding a plan of reorganization and work an inequity on innocent third parties. In this case, after the plan of reorganization was consummated, Petitioner disclaimed any desire to have it unwound; instead, he sought an "individual payout" of his claim. Because this individual payout was barred as a matter of law by the Bankruptcy Code, the Third Circuit rejected his appeal under equitable mootness. In this Court, Petitioner does not challenge the Third Circuit's application of equitable mootness or rejection of his individual payout remedy. Instead, for the first time in years of litigation, he asks this Court to reject the doctrine of equitable mootness altogether. The question presented is:

Whether the doctrine of equitable mootness is consistent with the Court's recognition that bankruptcy cases are inherently proceedings in equity, and courts should not employ any remedy that would be inequitable or violate the law.

RULE 29.6 STATEMENT

Respondent Nuverra Environmental Solutions, Inc. is a publicly held company. No publicly held company holds 10% or more of the stock of Nuverra Environmental Solutions, Inc.

Respondent Nuverra Environmental Solutions, Inc., is the sole parent of Respondents Badlands Power Fuels, LLC (DE), Heckmann Water Resources Corporation, Heckmann Water Resources (CVR), Inc., HEK Water Solutions, LLC, Heckmann Woods Cross, LLC, NES Water Solutions, LLC, and Nuverra Total Solutions, LLC.

Respondent Badlands Power Fuels, LLC (DE), is the sole parent of Respondents Badlands Leasing, LLC, Badlands Power Fuels, LLC (ND), Ideal Oilfield Disposal, LLC, and Landtech Enterprises, LLC.

Respondent Heckmann Water Resources (CVR), Inc., is the sole parent of Respondent 1960 Well Services, LLC.

S&D Holdings, LLC, is the sole parent of Respondent Appalachian Water Services, LLC.

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INTRODUCTION

The bankruptcy process relies on finality and predictability in service of the core purposes of chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1532), which are the rehabilitation of debtors and the orderly distribution of estate assets to creditors. This process culminates in the confirmation and consummation of the plan of reorganization. "Substantial consummation"—a term defined in the Bankruptcy Code—is the pivotal moment of implementation of a plan of reorganization.[1] Upon substantial consummation of a large chapter 11 case, a series of complex transactions occur—e.g., distributions of cash and securities are made to creditors, shares of the reorganized entity are issued and traded on public exchanges, corporate acquisitions and divestitures occur, tax consequences are realized, and lawsuits are dismissed. *See In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.).

For decades, courts universally have agreed that, in some cases, it would defeat the bankruptcy process designed by Congress and injure innumerable third parties for an appellate court to undo consummation of a plan years later, even if that could somehow be done. Accordingly, because of the "reliance interests engendered by the plan,

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[1] "Substantial consummation" is: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

coupled with the difficulty of reversing critical transactions," every court of appeals applies a doctrine that sometimes is called "equitable mootness" to reject certain bankruptcy appeals where the only conceivable remedy is the complete unwinding of a consummated plan. *Id.* at 770.

Equitable mootness is a "narrow" doctrine that courts apply "with a scalpel, not an axe." *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). In fact, while the Petition touts judicial "criticism" of the equitable mootness doctrine, Pet. i, it fails to acknowledge that the doctrine and its application have narrowed over time, in response, in part, to such criticism. As a result, as now applied, application of the equitable mootness doctrine "should be the rare exception." *In re SemCrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013).

For example, the Petition highlights then-Judge Alito's dissent from twenty-five years ago in *In re Cont'l Airlines*, 91 F.3d 553 (3d Cir. 1996). *Continental* applied equitable mootness with a focus solely on the implications of plan reversal on third parties and the success of the plan. Then-Judge Alito criticized the majority's failure to consider whether a remedy could be fashioned that would not result in the complete undermining of the confirmed plan. *Id.* at 571-72 ("[W]e retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case. Thus, a remedy could be fashioned in the present case to ensure that the Continental reorganization is not undermined.").

Presently, the test for equitable mootness employed by the Third Circuit asks: "(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 the plan." Pet. App. 31 (citation and internal quotation marks omitted). In applying this test, and in recognition of then-Judge Alito's concern, the Third Circuit specifically—and carefully—considers whether *any* remedy could be fashioned for the appellant that would not undermine the debtor's consummated reorganization. As the Third Circuit said in this case, equitable mootness is a doctrine:

> 'by which an appellate court deems it prudent for practical reasons to forbear deciding an appeal when to grant the relief requested will undermine the finality and reliability of consummated plans of reorganization.' *In re Tribune Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015) . . . . There is a 'strong presumption that appeals from confirmation orders of reorganization plans . . . need to be decided[,]' . . . and 'a court may fashion whatever relief is practicable instead of declining review simply because relief is not available.' *In re Blast Energy Servs., Inc.*, 593 F.3d 418, 425 (5th Cir. 2010).

Pet. App. 8.

The cautious approach taken by the Third Circuit also is evident in decisions of other circuits. *See, e.g.*, *Blast Energy Servs.,* 593 F.3d at 425; *In re Transwest Resort Props., Inc.*, 801 F.3d 1161, 1169 (9th Cir. 2015) ("Third parties' reliance on the consummation of the plan is not enough to find this prong satisfied;" instead, "the specific relief sought must bear unduly on innocent third parties."). Indeed, applying these and similar principles, courts have regularly declined to hold that an appeal is equitably moot, even after substantial consummation of a plan has occurred.[2]

Until his petition for certiorari in this Court, Petitioner David Hargreaves ("Hargreaves") had no qualms with the Third Circuit's test for equitable mootness. Instead, after consummation, Hargreaves made clear that he "does not seek revocation of the

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[2] *See, e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d 161, 170 (3rd Cir. 2012) (rejecting equitable mootness because, although the plan was substantially consummated, the relief at issue would not upset the plan); *Tribune Media*, 799 F.3d at 272 (rejecting equitable mootness after substantial consummation because, although "some of the money has been paid out, it has gone to a readily identifiable set of creditors against whom disgorgement can be ordered, and assuming the Trustees prevail on the merits, Class 1f members by definition cannot have *justifiably* relied on the payments"); *SemCrude*, 728 F.3d at 325 (rejecting equitable mootness because, as "then-Judge Alito explained, the feared consequences of a successful appeal are more appropriately dealt with by fashioning limited relief at the remedial stage"); *In re Pac. Lumber Co.*, 584 F.3d 229, 240-41 (5th Cir. 2009) (discussing how "equitable mootness did not stand in the way" of the court's granting relief in several prior cases).

plan," D.D.E. 36 at 12,[3] and, instead, asked the district court and the Third Circuit to "exercise its remedial powers and fashion relief in a way that would not upset the Plan—*i.e.*, '*by ordering payment of his claim in full*.'" Pet. App. 34 (emphasis added). Thus, the Third Circuit framed the *sole* question as follows:

> Here, the contending parties frankly state, and we agree, that the Plan has been substantially consummated under part one of the equitable mootness test. There also appears to be agreement under part two that the only relief that might not fatally scramble the Plan would be an individual payout of a relatively small sum, like the $450,000 that Hargreaves seeks. The question thus becomes whether such relief is permitted by the Bankruptcy Code, and the short answer is it is not.

Pet. App. 9.

Perhaps recognizing that his *sole* "individual payout" argument below has no merit, Hargreaves now reverses course and abandons that argument in this Court—nowhere challenging the Third Circuit's conclusion that an individual payout is prohibited by the Bankruptcy Code. Instead, for the first time in years of litigation, Hargreaves mounts a frontal assault on equitable mootness, asking this Court to

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[3] Citations taking the form "D.D.E. ___" refer to entries on the docket of the district court in case number 17-cv-01204 (D. Del.).

now reject a decades-old doctrine that is universally supported by the courts of appeals.

The Petition should be denied for at least three reasons. *First,* even if this Court were inclined to revisit equitable mootness at this late date, this is not the vehicle to do it. Hargreaves forfeited the question he presents: "[w]hether the doctrine of equitable mootness is inconsistent with the federal courts' 'virtually unflagging' obligation to hear and decide cases within their jurisdiction." Pet. i. Nowhere was this argument raised by Hargreaves below, either at the district court or at the Third Circuit. To the contrary, the Third Circuit applied the equitable mootness test advocated by Hargreaves. He should not now be permitted to challenge the validity of that test simply because he does not like the outcome of the decision.

More fundamentally, given the positions taken by Hargreaves, this case is not just "equitably moot"—it is *constitutionally* moot under Article III. As noted above, Hargreaves explicitly forswore—and thus forfeited—any claim that the plan should be revoked, and does not now challenge the Third Circuit's rejection of the "individual payout" remedy that he sought in place on his own volition. Accordingly, even if Hargreaves were right that the bankruptcy plan was flawed due to so-called "horizontal gifting," there is no remedy left to cure that flaw. *See Chafin v. Chafin*, 568 U. S. 165, 172 (2013) (explaining Article III mootness arises when "it is impossible for a court to grant any effectual relief whatever").

Second, the question presented does not warrant this Court's review. Hargreaves does not and cannot identify any circuit split or any unsettled question. That is because, despite Hargreaves' mischaracterization of it as "a *new* abstention doctrine" adopted by "*several* courts of appeals," Pet. i (emphasis added), *every* circuit court over the last four decades has adopted equitable mootness in some form. Over time, the courts have narrowed the doctrine to apply only in rare cases, protecting the rights of aggrieved parties to appeal where possible and ensuring that the development of bankruptcy law is not stunted.

Third, equitable mootness is consistent with this Court's cases. Equitable mootness has nothing to do with whether a federal court should abstain from hearing a case due to federalism concerns. Pet. 3-4 (citing abstention cases). Nor does it have anything to do with the Court's standing cases (Pet. 5) or cases where a court has wrongfully determined that it "lacked jurisdiction" to review an appeal (Pet. 5-6).

Instead, equitable mootness is a *bankruptcy* doctrine, grounded in the Bankruptcy Code's suggestion that "courts should keep their hands off consummated transactions," *UNR Indus.*, 20 F.3d at 769, and in the "age-old principle that in formulating equitable relief a court must consider the effect of the relief on third parties," *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.). Put differently, "bankruptcy courts are courts of equity," *Young v. United States*, 535 U.S. 43, 50 (2002), and the equitable mootness doctrine is simply a recognition that, in some limited cases, equity requires that the court refrain from granting

any remedy. Nothing about this Court's cases is inconsistent with that common-sense proposition.

STATEMENT OF THE CASE

A. Bankruptcy Court Proceedings

Respondents, Nuverra Environmental Solutions, Inc., and its affiliates (collectively, "Nuverra"), which collectively operate as an oilfield logistics company, filed petitions for relief under chapter 11 of the Bankruptcy Code on May 1, 2017. Upon the commencement of their chapter 11 cases, Nuverra had approximately $460 million in secured indebtedness, *see* JA0366, JA0387 (Solicitation and Disclosure Statement),[4] with a midpoint estimated valuation of approximately $302.5 million. *Id*. at JA0449. Due to the deficiency of asset value to satisfy secured claims, there was no expectation on the petition date that, under the priority scheme outlined in the Bankruptcy Code,[5] unsecured creditors would receive any recovery in the chapter 11 cases.

Nonetheless, Nuverra, via extensive negotiations with creditors—including the official committee of unsecured creditors—presented a comprehensive settlement and plan of reorganization to the bankruptcy court that provided an enhanced

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[4] Citations taking the form "JA ___" refer to entries in the Joint Appendix filed by the parties in the court of appeals at Docket No. 18-3084.

[5] *See generally* 11 U.S.C. § 1129(b) (requiring, among other things, that, for a plan to be "fair and equitable," a senior class of creditors, absent its consent, must be paid in full before junior classes receive any recovery).

recovery to unsecured creditors. These distributions to unsecured creditors were made possible by the willingness of secured creditors to accept a reduced recovery below what they were entitled to under the Bankruptcy Code.

As part of the settlement, most of this recovery was appropriately allocated to the class of creditors (Class A7) whose claims arose out of Nuverra's day-to-day business operations (the "business creditors"). This treatment facilitated Nuverra's ability to continue operating as a going concern. Another class, consisting of holders of Nuverra's 9.875% senior notes (Class A6), also received enhanced recovery, though this represented a small percentage of their $40.4 million in claims.

Hargreaves was a holder of the 2018 notes in Class A6, and a former member of the official committee of unsecured creditors. Despite the enhanced recovery to creditors of Class A6, Hargreaves objected to confirmation of the plan of reorganization, alleging that the separate classification of the 2018 noteholders from the business creditors in Class A7 was improper. He further argued that the difference in the recovery between the two classes constituted unfair discrimination and that the plan violated the Bankruptcy Code's requirement that a nonconsensual plan be "fair and equitable." JA1344-JA1360 (Unsecured Bondholder's Obj. to Confirmation).

After considering Hargreaves' objection and the evidence, the bankruptcy court issued a decision on July 24, 2017. In that decision, the bankruptcy court

found that the separate classification of the unsecured noteholders from the business creditors was appropriate, that the treatment afforded each class did not unfairly discriminate, and that treatment was "fair and equitable" under the Bankruptcy Code. On July 25, 2017, the bankruptcy court issued an order confirming the plan.

B. District Court Proceedings

Hargreaves appealed the bankruptcy court's decision to the district court, seeking reversal of the bankruptcy court's order, which would have resulted in the unwinding of the plan. Hargreaves moved for a stay pending appeal, but that request was denied by the district court on August 3, 2017. JA2541-JA2549 (Mem. Order Den. Mot. to Stay Pending Appeal). Hargreaves chose not to appeal denial of the stay.

With Hargreaves not having pursued an appeal of the denial of his stay request, Nuverra then consummated the plan of reorganization, by, among other things, incurring $71.79 million of post-bankruptcy "exit" financing, distributing millions of dollars in cash, and issuing new shares of common stock that began trading on the NYSE American stock exchange. *See* Nuverra Envtl. Sol. Inc., Quarterly Report (Form 10-Q) at 13-33 (Nov. 8, 2017). Nuverra later filed a motion seeking dismissal of Hargreaves' appeal on grounds including equitable mootness. The issue of equitable mootness was fully briefed before the district court, and Hargreaves did not challenge the doctrine in any way. JA2582-JA2613 (Official Tr. of Bankr. Appeal).

Although Hargreaves initially sought to overturn the plan in its entirety, he changed his position during the appeal. While still arguing that the confirmation order violated the Bankruptcy Code, he requested a new form of individualized relief: payment in full of his $450,000 claim in cash, plus interest. D.D.E. 36 at 13, 17. At the same time, he made abundantly clear that he *did not* seek revocation of the plan. *Id.* at 12 ("Mr. Hargreaves does not seek revocation of the Plan"); *id.* at 17 ("Mr. Hargreaves seeks payment in full of his claim . . . without any other changes in the Plan or corresponding impact on any other constituency."); Appellant's Br.[6] 54 (same); *id.* at 15-16 ("While the Plan cannot be entirely unwound, the Debtors can remedy the injury caused to Mr. Hargreaves by providing to him . . . payment in full.").

The individualized relief sought by Hargreaves would have involved providing him a recovery not available to any other holder of the unsecured 2018 notes (*i.e.*, 100% recovery in cash). Hargreaves requested this form of discrimination while, ironically, also propounding the simultaneous argument that the plan "unfairly discriminated" against him as a creditor by providing a lower recovery than other creditors in a different class. Although the "unfair discrimination" standard applies to differences of treatment among separate classes, section 1123(a)(4) contains an absolute restriction on differential treatment of creditors

[6] Citations to "Appellant's Br." refer to the brief of Appellant David Hargreaves, filed in the court of appeals at Docket No. 18-3084 on December 28, 2018.

within the same class. *See* 11 U.S.C § 1123(a)(4) (stating that a plan of reorganization must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment . . . .").

Not surprisingly, this individualized relief sought by Hargreaves was "of much concern" to the district court, which noted that Hargreaves "offer[ed] no support for his position that a remedy exists that allows him to receive, on appeal, treatment better than other creditors in the same class." Pet. App. 35. Instead, as the district court observed, the relief sought by Hargreaves "would violate § 1123(a)(4) of the Bankruptcy Code." *Id.*

Because it was unable to grant the relief Hargreaves sought, and there was no "practicable relief" that would not "require undoing the Plan" and thus "necessarily harm third parties," the district court granted Nuverra's motion and rejected Hargreaves' appeal. *Id.* at 46. The district court then proceeded, in the alternative, to hold that the plan did not unfairly discriminate between classes, and that the bankruptcy court correctly found a rational basis for the separate classification of the 2018 notes. *Id.* at 46-69.

C. Third Circuit Proceedings

Hargreaves appealed to the Third Circuit. In light of the district court's two-part decision, Hargreaves' brief both fully addressed the merits of his claim and also argued against the district court's finding of equitable mootness. As to equitable

mootness, he did not question either the Third Circuit's formulation of the standard or the validity of the doctrine more generally. Appellant's Br. 47-54. To the contrary, he accepted the equitable mootness test articulated by the Third Circuit in *SemCrude, L.P.*, 728 F.3d 314 (3d Cir. 2013) and quoted above (*supra* at 3), and asked that the court apply it in his favor because the "individual payout" he requested would neither harm third parties nor fatally scramble the plan. *Id.* Thus, the only question before the Third Circuit was the validity of the lone "individual payout" remedy Hargreaves sought. Pet. App. 9.

In affirming the district court, and rejecting the appeal, the Third Circuit held that "the relief [Hargreaves] seeks, a personal payout, is disallowed by the Bankruptcy Code[.]" *Id.* at 3. Judge Krause concurred only in the judgment, finding that she "would confine equitable mootness to the narrow role envisioned by our precedents, reach the merits questions outlined above, and ultimately resolve this appeal in favor of the reorganized debtors." *Id.* at 19.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A PROPER VEHICLE TO REVISIT EQUITABLE MOOTNESS.

Even if this Court were inclined to undo forty years of jurisprudence and reject the equitable mootness doctrine, this case would not be the vehicle to do it. Hargreaves has forfeited his challenge to

the doctrine, and, in its current posture, the case is constitutionally moot.

Forfeiture. This Court has repeatedly stated that it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted); *see also NCAA v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). This principle "help[s] to maintain the integrity of the process of certiorari," *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992), and is undergirded by "a constellation of practical considerations, chief among which is [the Court's] need for a properly developed record on appeal," *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (refusing to resolve a question about punitive damages in the first instance). This Court addresses questions not raised or passed on below only in "exceptional circumstances." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

Prior to submitting his petition for a writ of certiorari, Hargreaves never raised the question he now presents. After years of appellate proceedings—and despite the opportunity to fully brief equitable mootness before two Article III courts—Hargreaves only now raises the issue of whether the doctrine of equitable mootness conflicts with federal courts' obligation to hear and decide cases within their jurisdiction.

Furthermore, neither Nuverra nor the courts below raised this question. Even Judge Krause, who raised concerns, *sua sponte*, about the effects of

equitable mootness on the development of bankruptcy jurisprudence, did not raise or address the question presented here: whether equitable mootness conflicts with this Court's abstention cases (or any of the other cases cited by Hargreaves). Pet. App. 15-19.

Even after the Third Circuit panel had issued its decision, Hargreaves did not question the validity of equitable mootness or its compatibility with this Court's abstention cases in his request for rehearing before the original panel or the court *en banc*—even though an *en banc* court could have reconsidered the validity of equitable mootness. Instead, Hargreaves argued that the panel had not correctly *applied* the equitable mootness standard set forth in *SemCrude* and *Tribune Media* to the facts of this case.[7]

Hargreaves has not presented any extraordinary reason that would justify departure from the ordinary rule that forfeited questions should not be reviewed. In fact, Judge Krause raised the exact same issue the Petition does, citing most of the same cases, six years ago in a concurrence. *In re One2One*

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[7] *See SemCrude*, 728 F.3d at 321 (holding that "equitable mootness . . . proceed[s] in two analytical steps: (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"); *Tribune Media*, 799 F.3d at 278 (holding that "in cases where relief would neither fatally scramble the plan nor significantly harm the interests of third parties who have justifiably relied on plan confirmation, there is no reason to dismiss as equitably moot an appeal of a confirmation order for a plan now substantially consummated").

Commc'ns, 805 F.3d 428, 446 (3d Cir. 2015) (Krause, J., concurring). In that case, Judge Krause specifically noted that the appellant *had* properly preserved the question, which should have been a flag to Hargreaves. *Id.* at 448. Despite that flag, Hargreaves chose to not pursue a frontal attack on equitable mootness, including in either his request for rehearing or *en banc* review, but instead decided to raise it for the first time in his Petition.

This Court has denied certiorari in many cases raising the validity or scope of equitable mootness, even where the petitioner actually preserved the issue. *See, e.g.*, *Bennett v. Jefferson Cty., Alabama*, 899 F.3d 1240 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1305 (2019)*; In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015), *cert. denied*, 577 U.S. 1230 (2016); *In re Charter Commc'ns, Inc.*, 691 F.3d 476 (2d Cir. 2012), *cert. denied*, 569 U.S. 968 (2013); *In re GWI PCS 1 Inc.*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001). Denial of certiorari to Hargreaves, who decided not to raise the issue below, is even more appropriate in this case.

Article III Mootness. "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). Accordingly, when "it [is] impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Id.*

Here, given the history of this case and the positions taken by Hargreaves, there is no available relief that any court (including this one) could now grant him—even if it were to find a flaw in the chapter 11 plan of reorganization. Hargreaves made abundantly clear below that he "does not seek revocation of the Plan and the imposition of a new chapter 11 plan in its place . . . . Rather, Hargreaves submits that this Court may fashion a practicable remedy by ordering payment of his claim in full." D.D.E. 36 at 12; *see also* Pet. App. 9 (Third Circuit noting the only relief sought by Hargreaves was an "individual payout"). But the Third Circuit rejected his *sole* requested relief as inconsistent with the Bankruptcy Code, and Hargreaves nowhere challenges that ruling in his lengthy Petition in this Court.[8]

Hargreaves did not raise any other requested relief to the Third Circuit, and any attempt to raise new relief at this point would be forfeited. Accordingly, even if this Court were to grant the certiorari petition, and even if it were to strike down

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[8] Nor could he. Section 1123(a)(4) of the Bankruptcy Code requires that a plan of reorganization "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest[.]" 11 U.S.C. § 1123(a)(4). Awarding Hargreaves the full amount of his claim would give him superior treatment to the other members of his class. Thus, even if Hargreaves continued to press this requested relief, this case would still be moot because an "individual payout" is not permitted. Pet. App. 13 n.7 ("Our job is to decide cases and controversies in which we can offer a measure of lawful relief . . . . Here we cannot offer any such relief, and that concludes the matter.").

the doctrine of equitable mootness, and even if this Court or the Third Circuit held that the bankruptcy plan was flawed because of "horizontal gifting,"[9] there would be no relief that Hargreaves could receive that would cure that supposed flaw. This case is thus moot. *See In re Pub. Serv. Co. of New Hampshire*, 963 F.2d 469, 471 (1st Cir. 1992) (explaining, in the bankruptcy context, that "[j]urisdictional concerns may arise from the constitutional limitations imposed on the exercise of the Article III judicial power in circumstances where no effective remedy can be provided").

The Article III mootness problem in this case is highlighted by cases where there remained a "live controversy" in the context of a bankruptcy appeal. *See In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 987 F.3d 173, 182 (1st Cir. 2021) (holding Article III mootness does not apply because "[w]e have a live controversy: Appellants want the Plan confirmation undone, and appellees do not"); *see also Mission Prod. Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652, 1661 (2019) (appeal not moot where petitioner claimed it could "seek the unwinding of prior distributions to get its fair share of the estate"). Here, in contrast to these cases, Hargreaves does *not* want the plan of reorganization undone, and he has abandoned the only other relief he sought below—which is not viable anyway. Thus, what Hargreaves really wants is for this Court to issue an advisory proclamation that "equitable mootness is now dead,"

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[9] Notably, Judge Krause, while raising concerns related to equitable mootness, made clear that she would "resolve this appeal in favor of the reorganized debtors" on the "merits." Pet. App. 19.

with no prospect that it will impact his underlying appeal. That is not the role of Article III courts.

II. THERE IS NO CIRCUIT SPLIT OR UNSETTLED QUESTION WARRANTING THIS COURT'S REVIEW.

"[C]ertiorari jurisdiction exists to clarify the law." *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 610, (2015). On this issue, no clarification is required. Over the four decades that courts have applied the doctrine of equitable mootness, unanimity among the circuits has emerged, such that every circuit that considers bankruptcy appeals has a form of the doctrine. That doctrine, moreover, has been narrowed to apply only in rare cases; it has not stunted the development of bankruptcy law.

A. The Equitable Mootness Doctrine Is Not New and Has Been Universally Adopted.

Hargreaves characterizes the doctrine of equitable mootness as a "new abstention doctrine." Pet. 7. But there is nothing "new" about a doctrine that traces its history back at least forty years to *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981).[10] In that case, which was decided under the Bankruptcy Act of 1938[11] (the predecessor to the current Bankruptcy Code, which was adopted in 1978), the Ninth Circuit rejected an appeal where

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[10] Nor is it accurate to call equitable mootness an "abstention doctrine," for reasons discussed in section III below.

[11] Pub. L. 75–696, ch. 575, 52 Stat. 840 (1938).

"the plan of arrangement [had] been so far implemented that it [was] impossible to fashion effective relief for all concerned" and where "reversal of the order confirming the plan of arrangement . . . would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.* at 797.

Roberts Farms justified the burden this rule places on aggrieved parties in bankruptcy cases as necessary in order "to prevent frustration of orderly administration of estates under various provisions of the Bankruptcy Act. If an appellant fails to obtain a stay after exhausting all appropriate remedies, that well may be the end of his appeal . . . . For this reason there is a concomitant obligation on the courts to consider such stay applications thoroughly and with full appreciation of the consequences of a denial." *Id.* at 798.

Attempting to downplay the unanimity among the courts, Hargreaves only acknowledges that "several courts of appeals" have adopted the doctrine of equitable mootness. Pet. 7. In fact, in the forty years since *Roberts Farms*, "'[e]very Circuit Court has recognized some form of equitable mootness,' save the Federal Circuit (which does not hear bankruptcy appeals)." *Tribune Media*, 799 F.3d at 286 (citing to Nil Ghosh, *Plan Accordingly: The Third Circuit Delivers a Knockout Punch with Equitable Mootness*, 23 Norton J. Bankr. L. & Prac. 224 & n.8 (2014) (collecting cases)).[12] That includes

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[12] *See, e.g.*, *In re Healthco Int'l, Inc.*, 136 F.3d 45, 48 (1st Cir. 1998); *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012); *In re U.S. Airways Grp.*, 369 F.3d 806, 809 (4th Cir.

the Second and the Fifth Circuits, which Hargreaves incorrectly identifies as only having adopted the doctrine "non-precedentially."[13] Pet. 9. Although not all courts utilize the name "equitable mootness," all apply a substantially similar equitable principle. *See UNR Indus.*, 20 F.3d at 769 ("[W]e banish 'equitable mootness' from the (local) lexicon. We ask not whether this case is moot, 'equitably' or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.").

There are many sound reasons for this doctrine. For example, in an oft-cited opinion, Judge Easterbrook explained:

> In common with other court of appeals, we have recognized that a plan of reorganization, once implemented, should be disturbed only for compelling reasons . . . . Several provisions of the Bankruptcy Code of 1978,

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2004); *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009); *In re United Producers, Inc.*, 526 F.3d 942, 947 (6th Cir. 2008); *UNR Indus.,* 20 F.3d at 769; *In re President Casinos, Inc.*, 409 F. App'x. 31 (8th Cir. 2010) (unpublished); *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012); *In re Paige*, 584 F.3d 1327, 1337 (10th Cir. 2009); *In re Holywell Corp.*, 911 F.2d 1539, 1543 (11th Cir. 1990), *rev'd on other grounds sub nom. Holywell Corp. v. Smith*, 503 U.S. 47 (1992); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147–48 (D.C. Cir. 1986).

[13] Surprisingly, Hargreaves fails to identify *In re Blast Energy Servs., Inc.*, 593 F.3d 418 (5th Cir. 2010), one of the Fifth Circuit precedents specifically relied on by the Third Circuit in this case. *See* Pet. App. 8 (quoting *Blast Energy Servs.*, 593 F.3d at 425).

> [specifically §§ 363(m) and 1127(b)],[14] provide that courts should keep their hands off consummated transactions . . . . And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events. Self-protection through the adjustment of prices may affect the viability of the reorganization, and in any event may distort the allocation of assets away from the persons who can make the most valuable uses of them and toward persons who are less sensitive to the costs of *ex post* changes of plans. By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate. Many common law

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[14] Section 363(m) provides that the reversal or modification on appeal of a bankruptcy court order authorizing the sale or lease of real property "does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." 11 U.S.C. § 363(m). Section 1127(b) allows the reorganized debtor to modify the plan after confirmation, but only prior to "substantial consummation of such plan." 11 U.S.C. § 1127(b).

> doctrines, such as the rule that a holder in due course takes free of certain defects in its predecessor's rights, reflect the importance of this effect. We do likewise in preserving plans of reorganization unless a powerful reason demands alteration.

UNR Indus., 20 F.3d at 769-70; *see also Tribune Media*, 799 F.3d at 287 (Ambro, J., concurring) ("One prominent and frequently cited explanation for the genesis of equitable mootness is that various provisions of the Bankruptcy Code, notably §§ 363(m) and 1127(b), bespeak a congressional intent 'that courts should keep their hands off consummated transactions.'") (citation omitted).

Other courts have emphasized that "bankruptcy courts . . . are courts of equity and appl[y] the principles and rules of equity jurisprudence." *Young*, 535 U.S. at 50. Thus, equitable mootness "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir.1994) (Posner, J.); *see also In re Paige*, 584 F.3d 1327, 1335 (10th Cir. 2009) ("[T]he doctrine of equitable mootness is rooted, at least in part, in the court's discretionary power to fashion a remedy in cases seeking equitable relief.").

By contrast, *no* court of appeals has deemed it wise to reject the principle of equitable mootness. That is not surprising. Doing so would seriously disrupt the bankruptcy process and the principles on which it rests: finality and predictability.

"[W]ithout equitable mootness, any dissenting creditor with a plausible (or even not-so-plausible) sounding argument against plan confirmation could effectively hold up emergence from bankruptcy for years (or until such time as other constituents decide to pay the dissenter sufficient settlement consideration to drop the appeal), a most costly proposition." *Tribune Media*, 799 F.3d at 288-89 (Ambro, J., concurring). Moreover, without the ability to rely on a confirmation order, lenders would be less willing to provide debtor-in-possession financing, creditors would be less willing to negotiate settlements of their claims, and disgruntled creditors would be more inclined to clog the federal judicial system with frivolous appeals. *See id*. As a result, the ability of chapter 11 reorganizations to rehabilitate debtors and provide a fresh start would be fatally undermined.

To be sure, "equitable mootness is only in play for consideration when modifying a court order approving a since-consummated plan would do significant harm." *Id*. For example, here, Nuverra issued publicly traded securities under its plan that were subsequently traded on a national exchange. It would be the height of inequity if someone who purchased Nuverra securities four years after confirmation suddenly were to find the issuer of those securities plunged back into bankruptcy as a result of an unstayed confirmation appeal.

B. The Equitable Mootness Doctrine Is Narrow and Does Not Inhibit Development of the Law.

The past forty years of equitable mootness jurisprudence have allowed the courts to test, challenge, and refine the doctrine. For example, when the Third Circuit issued its decision in *Continental*, some twenty-five years ago, the doctrine was still "in its infancy." *Tribune Media*, 799 F.3d at 278. The doctrine that Hargreaves now seeks to overturn, however, is no longer the hazy, ill-defined teaching of the majority in *Continental.* In response to the concerns expressed in the dissent of then-Judge Alito in *Continental*, and those expressed by some other judges and commentators, the Third Circuit and other courts have honed and narrowed the doctrine of equitable mootness.

This honing is evident from a comparison of the test initially adopted by the Third Circuit in *Continental* and the test applied by the Third Circuit in this case. Like other circuits, the Third Circuit now looks not only to whether substantial consummation has occurred (and therefore, whether reversal of the entire plan would prove inequitable or impractical), but also whether *any* relief could be fashioned in the event that the appeal were to be successful. As the Third Circuit here explained: There is a "strong presumption that appeals from confirmation orders of reorganization plans . . . need to be decided[,]" . . . and "a court may fashion whatever relief is practicable instead of declining review simply because full relief is not available." Pet. App. 8 (quoting *Blast Energy Servs.*, 593 F.3d at 425); *see also Tribune Media*, 799 F.3d at 277–78

("'Equitable mootness' is a narrow doctrine . . . [and] [t]he party seeking to invoke the doctrine bears the burden of overcoming the strong presumption that appeals from confirmation orders of reorganization plans—even those not only approved by confirmation but implemented thereafter (called 'substantial consummation' or simply 'consummation')—need to be decided.") (citation omitted).

Accordingly, Hargreaves' suggestions that the doctrine is "tragic" (Pet. 19) and has "stunted bankruptcy law" (Pet. 24) are overwrought and unfounded. The Third Circuit and other courts repeatedly have enforced the mandate to use equitable mootness as a "scalpel," applying it in limited cases where "it is not only as difficult to restore an estate to the *status quo ante* consummation as it is to gather all the feathers from the proverbial pillow, [but] it is also a crushing expense to the reorganized entity and its shareholders." *Tribune Media*, 799 F.3d at 288 (Ambro, J., concurring).[15] Accordingly, in the vast majority of bankruptcy cases, courts of appeals *do*

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[15] *See also In re Chateaugay Corp.*, 10 F.3d 944, 952 (2d Cir. 1993) ("Substantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief."); *SemCrude*, 728 F.3d at 320 (explaining that equitable mootness is considered where "granting relief on appeal [is] almost certain to produce a 'perverse' outcome—'chaos in the bankruptcy court' from a plan in tatters and/or significant 'injury to third parties.'") (citations omitted); *Paige*, 584 F.3d at 1347–48 ("Appellees have failed to present any reason for this court to suspect that reversal of the Joint Plan would create an unmanageable situation for the bankruptcy court.").

reach the merits and *do* develop bankruptcy law—despite equitable mootness.

Moreover, as the Third Circuit majority explained here, an aggrieved creditor can always seek a stay of the confirmation order in the district court. And "if the district court's decision on a stay motion would have the practical effect of ending a case" due to equitable mootness, then "our precedents indicate that an immediate appeal could be brought to us." Pet. App. 13-14 n.7; *see In re Revel AC, Inc.*, 802 F.3d 558, 567 (3d Cir. 2015) (holding that an order denying request for a stay is final and appealable when "the upshot of declining [the] stay request is to prevent [the movant] from obtaining a full airing of its issues on appeal and a decision on the merits"). But in this case, Hargreaves chose not to appeal the denial of his stay request by the district court, paving the way for consummation to move forward.

Finally, it is important to note that, even where equitable mootness applies, appellate courts can and do nevertheless reach the merits of the bankruptcy issues. For example, in *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), a Second Circuit panel analyzed the merits of an appeal before equitable mootness, reasoning that "[b]ecause equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *Id.* at 144 (citation omitted); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 713 n.3 (4th

Cir. 2011) (same).[16] In this way, too, the presence of equitable mootness concerns do not, as Hargreaves suggests, automatically consign bankruptcy merits issues to the "proverbial dustbin" (Pet. 22) and prevent development of bankruptcy law.

III. EQUITABLE MOOTNESS IS CONSISTENT WITH THIS COURT'S CASES.

Leaving aside the vehicle problems and the lack of any circuit split, the equitable mootness doctrine is, in fact, entirely consistent with this Court's cases on abstention, jurisdiction, and standing relied on in the Petition (3-6, 20-23). As Hargreaves rightly observes (Pet. 3-4), the Court's abstention cases primarily concern circumstances in which federal courts should abstain from ruling in favor of a state. *See*, *e.g.*, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (holding that "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States"). Those federalism concerns are irrelevant here.

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[16] If Hargreaves is arguing that appellate courts *must* reach merits issues first, even when there is no feasible remedy, *see* Pet. 29 (suggesting "courts normally decide the merits of the claims first, then tailor any relief as appropriate"), that would impose an unnecessarily "rigid order[] of battle." *Pearson v. Callahan*, 555 U.S. 223, 224 (2009) (internal quotation marks and citation omitted). Practically, it would force overburdened district and appellate courts to labor through *every* merits issue in *every* bankruptcy appeal—no matter how spurious—only to then pronounce that the appeal must be rejected on equitable mootness grounds.

Nor is this case anything like those in which an appellate court refused to entertain jurisdiction *at all*, *Mata v. Lynch*, 576 U.S. 143, 149 (2015) (finding that the Fifth Circuit had improperly dismissed an appeal from a decision of the Board of Immigration Appeals for lack of jurisdiction), or imposed prudential requirements under the guise of "standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (finding that a court "cannot limit a cause of action that Congress has created merely because 'prudence' dictates"). While Hargreaves strains to make equitable mootness fit these cases, primarily citing the uncontroversial maxim that "a federal court's obligation to decide a case is 'virtually unflagging,'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013), the fact is that the Third Circuit here *did* take "jurisdiction" over his appeal and decided this case by finding there was no relief it could provide him—thus, rejecting his appeal. That is within the mainstream of this Court's cases.

This Court has "long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv.,* 491 U.S. at 358. At the same time, that "principle does not eliminate . . . and the categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted." *Id*. at 359.

At its most basic level, equitable mootness simply is an application of the principle that a court will not

do harm to innocent third parties in order to grant equitable relief to a claimant before it. It is a doctrine that does not seek to restrain the power or the jurisdiction of the court, but rather to prevent the imposition of relief that would be fundamentally inequitable. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 987 F.3d at 182 (concluding that this Court's abstention doctrines are "inapplicable here [in an equitable mootness context], where the issue at hand turns not on jurisdiction but on the merits of what is in form and substance a request for equitable relief").

As noted above, and as this Court repeatedly has held, "the proceedings of bankruptcy courts are inherently proceedings in equity," *Katchen v. Landy*, 382 U.S. 323, 336 (1966), and the general rules of equity apply to bankruptcy proceedings. *See Loc. Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934); *Pepper v. Litton*, 308 U.S. 295, 304 (1939) ("[A] bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it . . . it applies the principles and rules of equity jurisprudence.") (citing *Larson v. First State Bank of Vienna, S.D.*, 21 F.2d 936, 938 (8th Cir. 1927)). Equitable relief "is not a matter of absolute right to either party; but a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case." *Willard v. Tayloe*, 75 U.S. 557, 560 (1869). It, therefore, is "well settled that the imposition of an equitable remedy must not itself work an inequity." *Van Wagner Advert. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 195 (App. Div. 1986).

Here, the relief requested by Hargreaves not only would work an inequity on those who relied on the finality of Nuverra's plan of reorganization, but, as determined by the Third Circuit, would violate applicable provisions of the Bankruptcy Code. A court cannot use its jurisdiction to grant relief that would violate the law. As this Court said in *Mata*, if the law "precludes [the plaintiff] from getting the relief he seeks, then the right course is to take jurisdiction over the case, explain why that is so, and affirm." 576 U.S. at 149-50. That is *exactly* what the Third Circuit did here.

Because equitable mootness, particularly as now applied in the Third Circuit and elsewhere, is a limited application of longstanding equitable principles and consistent with the cases cited by Hargreaves, the Court has no need to consider the question presented, and should deny the petition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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