NO. 22-926

In the
# Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

*Petitioner*,

v.

WINDSTREAM HOLDINGS, INC., *ET AL.*,

*Respondents*.

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

## BRIEF IN OPPOSITION FOR RESPONDENT WINDSTREAM HOLDINGS, INC.

GEORGE W. HICKS, JR.
*Counsel of Record*
JULIE M.K. SIEGAL
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 389-5000
george.hicks@kirkland.com

*Counsel for Respondent*

May 24, 2023

## QUESTIONS PRESENTED

1. Whether this Court should "abolish[]" the equitable mootness doctrine, Pet.i, which courts of appeals have uniformly adopted and applied for decades, this Court has often and recently declined to review, and the elimination of which petitioner did not raise and the lower courts did not address in this case.

2. Whether this Court should address the relevance of a stay to the equitable mootness analysis, an issue not addressed in the unpublished summary order below.

3. Whether this Court should address who bears the burden of proof in an equitable mootness analysis, an issue not addressed in the unpublished summary order below.

## CORPORATE DISCLOSURE STATEMENT

Respondent Windstream Holdings, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock. The other reorganized Debtors are all wholly owned direct or indirect subsidiaries of the reorganized entity Windstream Holdings II, LLC, and no other publicly traded corporation holds 10% or more of their stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## INTRODUCTION

In the inherently equitable realm of bankruptcy proceedings, the courts of appeals have universally adopted a doctrine sometimes called "equitable mootness," whereby an appellate court may determine that granting relief to the appellant would work an inequity on innocent third parties and unwind a plan of reorganization or otherwise jeopardize a debtor's emergence from bankruptcy. The label "mootness" is a misnomer; dismissing an appeal as "equitably moot" is not a decision that a court lacks power to grant relief in a constitutional sense, but rather an exercise of power that recognizes that fashioning the appellant's requested relief itself would be inequitable and undermine the purposes of the bankruptcy system.

The Second Circuit's unpublished summary order in this case is a straightforward application of the well-established equitable mootness doctrine. Petitioner, on behalf of out-of-the-money unsecured creditors, wants to unravel a complex Chapter 11 reorganization that was consummated nearly three years ago. After a protracted bankruptcy process, Respondents entered a linchpin settlement that was approved by the bankruptcy court in May 2020, and they filed a plan of reorganization explicitly predicated on that settlement, which the bankruptcy court confirmed in June 2020. In the months following confirmation of the plan, Petitioner filed notices of appeal from both orders but made no meaningful effort to stay either order pending appeal. Consequently, Respondents proceeded to consummate their reorganization in accordance with the plan. That consummation involved multiple complex

transactions, including obtaining $750 million in new investment in the reorganized entities. Respondents emerged from bankruptcy in September 2020.

The district court subsequently dismissed Petitioner's appellate challenges to the settlement and plan as equitably moot, explaining that granting Petitioner the relief it requested would be fundamentally inequitable. Petitioner had made no diligent effort to stay the challenged orders pending appeal, and its desired relief would require unraveling complex transactions premised on those orders, undermine hundreds of millions of dollars of new investment that relied on those orders, and jeopardize Respondents' completed reorganization. On the same grounds, the Second Circuit affirmed in an unpublished summary order.

Petitioner now asks this Court to intervene, raising three questions but principally arguing that the equitable mootness doctrine should be "abolished." Pet.i. There is no valid basis for reviewing that issue. As Petitioner concedes, every single circuit has recognized the equitable mootness doctrine; none has rejected or eliminated it. For good reason, then, this Court has frequently and recently denied petitions presenting the same issue and making the same arguments. Petitioner identifies no changed circumstances warranting different treatment here. Indeed, this case is a remarkably poor vehicle for addressing Petitioner's first question presented because Petitioner never argued below that the equitable mootness doctrine should be abolished—in fact, it expressly disclaimed this position—and no lower court passed on the issue. Abolishing the

doctrine would also make no difference to the outcome of this case, because, on the merits, the bankruptcy court plainly did not abuse its broad discretion in approving the settlement, confirming the plan, and rejecting Petitioner's last-ditch attempts to accord itself more value than other creditors. Nor is there any good reason for this Court to disturb the equitable mootness doctrine: The doctrine is firmly rooted in the fundamentally equitable character of bankruptcy practice, Congress is free to modify it but has consistently declined to do so, and this case readily demonstrates why it is appropriate in certain circumstances.

Petitioner's backup questions presented likewise provide no basis for certiorari. Neither the second nor third question was addressed below, which is unsurprising since Petitioner never raised them before the district court or the Second Circuit panel, even for preservation purposes. The questions are also relatively unimportant, narrow, and non-recurring, arising only in the limited universe of cases involving equitable mootness in bankruptcy appeals within the Second Circuit. Moreover, Petitioner could not conceivably prevail unless the Court granted certiorari and reversed as to both questions, and even then, the Second Circuit would almost certainly reaffirm its equitable mootness decision on remand given the circumstances here. Accordingly, even to the extent the courts of appeals might articulate their equitable mootness considerations slightly differently, those minor and stale distinctions do not merit certiorari, particularly in this case. Every court of appeals aims to balance the importance of finality in bankruptcy proceedings against the appellant's right

to review and relief. The Second Circuit did just that here in correctly concluding that Petitioner's requested relief would upend Respondents' restructuring, disturb settled transactions, and burden numerous third parties. That reasoning is plainly correct and does not justify this Court's intervention. The petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

Respondents provide telecommunications services throughout the United States. Pet.App.10a. Starting in 2013, they engaged in a complex transaction that split their businesses into two companies (Windstream Holdings, Inc. and Windstream Services, LLC), and spun off a real estate investment trust known as Uniti. *Id.* Windstream Services ("Services") then transferred certain telecommunications assets, such as fiber optic cables, copper wires, and real estate, to Uniti, which leased them back to Windstream Holdings ("Holdings") for Holdings to operate through its subsidiaries. *Id.*

In 2017, the hedge fund Aurelius Capital Master, Ltd. ("Aurelius") acquired a controlling position in certain senior unsecured notes issued by Services, for which Petitioner U.S. Bank served as indenture trustee. Pet.App.11a. At the direction of Aurelius, U.S. Bank sued Services in the Southern District of New York, claiming that Services had breached its obligations under the notes. *Id.* The district court held that Services was in default under the notes and awarded Aurelius a judgment of more than $310 million. *U.S. Bank Nat'l Ass'n v. Windstream Servs.*, 2019 WL 948120, at *23-24 (S.D.N.Y. Feb. 15, 2019).

Faced with an unexpected and immediate need for more than $310 million in liquidity, Respondents filed voluntary chapter 11 bankruptcy petitions on February 25, 2019. *Id.*

### B. Bankruptcy Court Proceedings

In bankruptcy court, Respondents filed a complaint against Uniti to recharacterize the 2015 transaction as a financing instead of a sale and lease. They also asserted related claims for breach of contract and fraudulent transfer. Pet.App.38a. Following months of litigation, Respondents and Uniti negotiated a settlement resolving Respondents' claims in exchange for compensation from Uniti to Respondents in the amount of $1.2 billion in net present value. *Id.* On May 12, 2020, after a two-day evidentiary hearing, the bankruptcy court approved the settlement in a detailed ruling. Pet.App.143a-182a.

Six weeks later, on June 26, 2020, the bankruptcy court confirmed Respondents' chapter 11 Plan of reorganization. Pet.App.46a-142a. That Plan was expressly conditioned on the Uniti settlement, and the settlement formed an "inextricable part of the Plan." Pet.App.14a. The Plan provided for certain transactions to take place on the date it became effective: (1) all existing interest in the Debtors would be canceled, and reorganized equity interests would be issued to first-lien claimants; (2) proceeds from a new senior secured credit facility would be distributed to first-lien claimants and used to pay other allowed claims and fund various claim reserves; (3) liens granted under the new credit facility would be deemed approved; and (4) the Debtors would consummate a

$750 million rights offering to first-lien claimants. Pet.App.14a.

Petitioner objected to the Plan, contending that it violated the Bankruptcy Code by distributing no value to general unsecured creditors. The bankruptcy court rejected that argument, explaining that there was no unencumbered value left to distribute after accounting for the secured creditors' prepetition and adequate-protection liens and superpriority adequate-protection claim. *See* Pet.App.15a. The court observed that the claims asserted by secured creditors far exceeded "any reasonable assumption of unencumbered assets" by "an order of magnitude of hundreds of millions of dollars." Pet.App.16a. The bankruptcy court authorized Respondents to immediately begin implementing the Plan's provisions and effectuating the approved restructuring transactions. Pet.App.136a.

**C. District Court Proceedings**

**1.** Petitioner appealed both the May 12 Settlement Order and the June 26 Confirmation Order—the former two weeks after its issuance, and the latter one week after its issuance. Pet.App.38a. Petitioner did not immediately seek a stay of either order. In fact, for two months following its appeal of the Confirmation Order, Petitioner made no attempt whatsoever to seek a stay pending appeal of either order.

In the meantime, Respondents proceeded to consummate the Plan in accordance with the schedule set forth at the confirmation hearing and in the Confirmation Order. That schedule explicitly stated that Respondents anticipated that the effective date

and substantial consummation of the Plan would occur "in September 2020." Pet.App.140a. On July 15, 2020, Petitioner moved to consolidate and expedite the appeals, on the basis that Respondents anticipated consummation of the Plan occurring in September 2020. Pet.App.38a. But despite recognizing that its appeal "could be rendered [equitably] moot if the Plan is consummated" in September, Petitioner still did not seek any stay of either of the appealed orders. D.Ct.Dkt.20-cv-5440, Dkt.4 at 11. On August 3, the U.S. District Court for the Southern District of New York granted the motion to consolidate but denied the motion to expedite. Pet.App.35a-45a. Petitioner still did not seek a stay of either order.

It was not until September 1, 2020—more than two months after the Settlement Order and Confirmation Order were issued—that Petitioner even gestured at seeking a stay of those orders. Even then, Petitioner did not file an independent motion for stay, but rather filed an unrelated objection in the bankruptcy court and appended to that objection a cursory and procedurally improper request to "stay the effective date" of the Plan. Without waiting for the bankruptcy court to rule on that request, Petitioner filed a new motion in the district court on September 4 seeking "a determination of post-effective date jurisdiction, or, in the alternative, a stay … pending the appeal." Pet.App.27a.

On September 17, 2020, the bankruptcy court denied Petitioner's "half-hearted" request to stay the Confirmation Order, describing it as "a sham and procedural gambit" that made "no attempt" to demonstrate that a stay was actually warranted.

Pet.App.5a. Meanwhile, Respondents continued to implement the Settlement and Confirmation Orders. As anticipated, the Plan became effective and was substantially consummated on September 21, 2020. Pet.App.17a. On November 2, 2020, the district court denied Petitioner's motion for a "determination of post-effective date jurisdiction" or, alternatively, a stay pending appeal. Pet.App.26a-34a. It held that the former request was an impermissible attempt to decide the equitable mootness question outside the context of the appeal as a whole, and it held that it lacked Article III jurisdiction over the latter request because the plan had been consummated, rendering the request for a stay moot. Pet.App.31a-33a.

**2.** The district court subsequently dismissed Petitioner's appeals as equitably moot. Pet.App.8a-25a. The court explained that because the Plan was consummated on September 21, 2020, Petitioner's appeals were presumed equitably moot, and Petitioner could not overcome that presumption unless it could satisfy the so-called "*Chateaugay* factors" established by Second Circuit precedent. Pet.App.19a (quoting *In re Charter Commc'ns*, 691 F.3d 476, 482 (2d Cir. 2012)); *see Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944 (2d Cir. 1993). Those five factors require the appellant to show that:

> (1) the court can still order some effective relief;
>
> (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity;
>
> (3) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction

> that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court;
>
> (4) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and
>
> (5) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Pet.App.19a-20a (quoting *Charter*, 691 F.3d at 482).

The district court first reasoned that Petitioner could not satisfy the *Chateaugay* factors because it failed to diligently seek a stay of the Confirmation Order or implementation of the Plan. Instead, Petitioner "waited more than two months to seek a stay pending appeal in the Bankruptcy Court." Pet.App.21a. That "failure to take prompt action to obtain a stay" warranted dismissal of the appeals as equitably moot. Pet.App.22a.

The court next concluded that Petitioner could not meet the second or third *Chateaugay* factors, either, because granting the relief Petitioner sought "would both jeopardize debtors' emergence from bankruptcy and require unraveling numerous complex transactions agreed to in connection with the Plan." *Id.* Notably, in its opening brief before the district court, Petitioner had argued that the Settlement Order and Confirmation Order should be vacated entirely. But Petitioner abandoned that request for

relief in its reply brief, and instead asked the court to rewrite the consummated Plan by either (i) requiring Respondents to issue additional shares of stock for unsecured creditors, thereby diluting the value of shares issued to secured creditors; (ii) disgorging stock from secured creditors; or (iii) diverting cash payments due to Respondents under the Uniti settlement to unsecured creditors instead. Pet.App.22a.

The district court rejected those late-breaking suggestions. It explained that Petitioner's proposals would jeopardize crucial financial support from secured creditors and holders of first lien claims. Those creditors and lienholders were compensated with equity in Respondents' reorganized entities, so "[d]isgorging or diluting the value of that equity would knock the props out from under the Plan by devaluing support from critical parties." Pet.App.23a. Doing so would also mean "unwinding consummated transactions that have already vested equity and other rights" in secured creditors. *Id*. (internal quotation omitted). Furthermore, diverting cash payments owed to Respondents would "jeopardize" their emergence from bankruptcy by "diminishing their reemergent liquidity" and "devaluing cash and equity distributions that have already been made to secured and first lien creditors." Pet.App.24a. For those reasons, the court concluded, granting Petitioner's request relief would be "highly disruptive," and "[f]airness compel[led]" it to deny relief. Pet.App.23a-24a.

### D. Second Circuit Proceedings

Petitioner appealed to the Second Circuit. In its briefing, Petitioner did not ask the Second Circuit to eliminate the equitable mootness doctrine. To the contrary, Petitioner expressly conceded that it "does not seek to abolish the equitable mootness doctrine." C.A.Reply.3; *see also* C.A.Br.40-41 (acknowledging that "there may be a place for equitable mootness"). Instead, Petitioner argued that equitable mootness was unwarranted "[u]nder the[] circumstances" of this case because the Settlement and Confirmation Orders are "legally indefensible." C.A.Br.2-3, 33; *see also* C.A.Reply.5 (asking court to "limit[] the application of equitable mootness on these facts"). Petitioner also argued that the district court "misapplied" the Second Circuit's factors for determining equitable mootness. C.A.Br.42; C.A.Reply.21.

The Second Circuit unanimously affirmed in an unpublished summary order, concluding that the district court did not abuse its discretion in dismissing the appeals as equitably moot. At the outset, the panel rejected Petitioner's request to "limit[]" the equitable mootness doctrine. Pet.App.4a-5a. It noted that Petitioner had "not suggested any principled rule" by which the court could "limit the doctrine or determine when its application is overbroad." Pet.App.4a. Instead, Petitioner had merely asked the court to "carve out the facts of this case ad hoc." *Id.*

The Second Circuit then held that the district court did not abuse its discretion in applying its framework for assessing equitable mootness. The court explained that Petitioner had "failed to diligently seek a stay of the plan." Pet.App.6a.

Petitioner did not request a stay until two months after the bankruptcy court entered its Confirmation Order, and "[e]ven then, [the] request was awkwardly appended to an unrelated motion and demonstrated little serious effort to show that the requirements for issuing a stay were met." Pet.App.5a. The court also observed that Petitioner was aware as early as the confirmation hearing that Respondents intended to consummate the Plan in September 2020, yet "neglected to request a stay until September 1, 2020—well into the period in which the plan was expected to be consummated." Pet.App.6a. Because Petitioner did not satisfy the fifth *Chateaugay* factor of diligently seeking a stay, the court concluded, the district court did not abuse its discretion in dismissing the appeal as equitably moot. *Id.*

Because Petitioner's "failure to diligently pursue a stay" sufficed to affirm the district court, the Second Circuit did not address Respondents' challenges to the district court's findings on the second and third *Chateaugay* factors. *Id.* Nevertheless, it noted that it "discern[ed] no error in the district court's analysis or conclusions concerning" those factors, either. *Id.*

Petitioner sought rehearing *en banc*. As in its merits briefing, Petitioner did not seek the abolition of the equitable mootness doctrine. Instead, Petitioner argued that the Second Circuit's *Chateaugay* framework "should be revised" so "courts in this circuit can apply the equitable mootness doctrine to avoid, and not invite, inequity." C.A.Pet.7; *see also* C.A.Pet.12 (arguing that the *Chateaugay* factors "should be modified"). The Second Circuit denied rehearing *en banc* without dissent.

## REASONS FOR DENYING THE PETITION

### I. The First Question Presented Does Not Merit Review.

Petitioner's first question presented asks whether the equitable mootness doctrine should be "abolished." Pet.i. This issue is the principal basis for Petitioner's request for certiorari; throughout the petition, Petitioner asserts that the equitable mootness doctrine is "entirely inappropriate," "should be eliminated," "should be set aside," and "must be abolished entirely." Pet.3, 7, 25. For numerous independent reasons, this question does not warrant the Court's review.

#### A. This Question is Often and Recently Denied.

The question whether this Court should abolish the equitable mootness doctrine is often and recently denied. In the last several years, the Court has repeatedly received petitions making the same arguments that Petitioner advances regarding the purported impropriety of equitable mootness and the need to eliminate the doctrine. And the Court has just as repeatedly denied those petitions. *See, e.g.*, *KK-PB Financial, LLC v. 160 Royal Palm, LLC*, 142 S. Ct. 2778 (2022) (Mem.); *Hargreaves v. Nuverra Env't Sols, Inc.*, 142 S. Ct. 337 (2021) (Mem.); *Elliott v. Fin. Oversight & Mgmt. Bd. for P.R.*, 142 S. Ct. 74 (2021) (Mem.); *GLM DFW, Inc. v. Windstream Holdings, Inc.*, 142 S. Ct. 226 (2021) (Mem.); *Bennett v. Jefferson Cnty., Ala.*, 139 S. Ct. 1305 (2019) (Mem.); *Tuttle v. Allied Nevada Gold Corp.*, 139 S. Ct. 481 (2018) (Mem.); *L. Debenture Tr. Co. of New York v. Charter Commc'ns., Inc.*, 569 U.S. 968 (2013) (Mem.); *Spencer*

*ad hoc Equity Comm. v. Idearc, Inc.*, 565 U.S. 1203(2012) (Mem.).

Petitioner does not even acknowledge that this Court has consistently considered and denied review of this issue in recent years. Nor does Petitioner identify any changed circumstances warranting different treatment here. Petitioner provides no reason why the Court has denied review in six cases in the last five years but should nevertheless grant review in this case.[1] Petitioner's silence is telling and confirms that this petition should meet the same fate as its predecessors.

**B. There is No Circuit Split.**

That the Court has consistently denied certiorari regarding this issue is not surprising: As Petitioner concedes, the circuits have unanimously adopted the equitable mootness doctrine. Pet.19. Indeed, more than twenty years ago, the *en banc* Third Circuit called equitable mootness a "widely recognized and accepted doctrine." *In re Cont'l Airlines*, 91 F.3d 553, 558-59 (3d Cir. 1996) (*en banc*). What was true then has only become more so. All twelve circuits with jurisdiction over bankruptcy appeals have "now

[1] Even the lone amicus brief supporting the Petition largely recycles the same arguments made by largely the same group of professors who have submitted amicus briefs in prior cases presenting the same question. *Compare, e.g.*, Br. for a Group of Bankruptcy Law Professors 10 (describing the equitable mootness doctrine as lacking "a firm basis in statutory provisions"), *with* Br. for Professors of Bankruptcy Law 5, *Hargreaves v. Nuverra Environmental Solutions, Inc.*, No. 21-17 (calling the equitable mootness doctrine "untethered to anything in the Bankruptcy Code").

endorsed the equitable mootness doctrine." Pet.19. *See*, *e.g.*, *In re Fin. Oversight & Mgmt. Bd. for P.R.*; 987 F.3d 173 (1st Cir. 2021); *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993); *In re Trib. Media Co.*, 799 F.3d 272 (3d Cir. 2015); *Behrmann v. National Heritage Found., Inc.,* 663 F.3d 704 (4th Cir. 2011); *In re Idearc, Inc.*, 662 F.3d 315 (5th Cir. 2011); *In re American HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005); *In re UNR Indus., Inc.*, 20 F.3d 766 (7th Cir. 1994); *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880 (8th Cir. 2021); *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018); *Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949 (10th Cir. 2020); *Bennett v. Jefferson Cnty., Ala.*, 899 F.3d 1240 (11th Cir. 2018); *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). The circuits' universal acceptance of the equitable mootness doctrine is strong reason to resist Petitioner's call for this Court to "abolish" it.

Petitioner cites a handful of scattered dissents and concurrences questioning equitable mootness. *See* Pet.11, 14, 17-18. But none of these separate opinions has formed the basis of a successful petition for certiorari or even *en banc* consideration. If a court of appeals is of the view that the equitable mootness doctrine should be eliminated, it can revisit its precedent *en banc*. Alternatively, if a panel believes that this Court's jurisprudence warrants overturning a prior panel decision adopting the equitable mootness doctrine, it can eliminate the doctrine without going *en banc*. *See, e.g.*, *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 776 (7th Cir. 2019) (overruling prior panel decision because "[a]n intervening Supreme Court decision … displace[d] the rationale of our precedent"). If and when a circuit split emerges as a result of these

developments, this Court's review of the propriety of the equitable mootness doctrine may be warranted in an appropriate case. *See, e.g.*, *AMG Cap. Mgmt., LLC v. FTC*, 141 S.Ct. 1341, 1345, 1351 (2021) (resolving circuit split created by Seventh Circuit's *Credit Bureau* decision). But no court of appeals has seen fit to take this step. Until then, there is no basis for this Court to intervene.

### C. This Case Is a Poor Vehicle to Address the Question Presented.

Even if the Court were inclined to review the splitless issue of whether the equitable mootness doctrine should be abolished, this case would be an exceptionally poor vehicle to do so for numerous reasons.

First, Petitioner never argued below that the equitable mootness doctrine should be "abolished." Pet.i. To the contrary, in the Second Circuit, Petitioner explicitly stated that it "does *not* seek to abolish the equitable mootness doctrine," C.A.Reply.3 (emphasis added); *see also* C.A.Br.40-41 (acknowledging that "there may be a place for equitable mootness"). Instead, Petitioner claimed that equitable mootness was not warranted "on these facts" and that the district court "misapplied" the Second Circuit's equitable mootness factors. *See* C.A.Br.2-3, 33, 42; C.A.Reply.5, 21; C.A.Pet.7, 12 (arguing that Second Circuit's approach "should be revised" or "modified"). Petitioner thus never asked the Second Circuit to address or resolve the question it now presents to this Court.

Because Petitioner's question "was not raised below," it is forfeited. *Sprietsma v. Mercury Marine*,

537 U.S. 51, 56 n.4 (2002). By itself, this defect warrants denial. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173, 1978 (2016) ("The Department failed to raise this argument … below, and we normally decline to entertain such forfeited arguments."); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below."); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010) (argument "not mentioned below" is "too late, and we will not consider it").

Second, because Petitioner did not press below its argument that the equitable mootness doctrine should be abolished, no lower court passed on that issue. As the Court has explained many times, because it is "a court of review, not of first view," it does not "generally … consider arguments" that the lower courts "did not have occasion to address." *Byrd v. United States*, 138 S.Ct. 1518, 1527 (2018); *see, e.g.*, *Town of Chester, N.Y., v. Laroe Ests., Inc.*, 581 U.S. 433, 441 n.4 (2017) ("[I]n light of … the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *City & Cnty. of San Francisco, Calif., v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (refusing to resolve issue "without the benefit of thorough lower court opinions").

Petitioner does not acknowledge these flaws, much less explain why the Court should abandon its longstanding practice of denying petitions that raise

issues "not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Instead, Petitioner contends that "recent decisions of this Court" warrant revisiting the doctrine of equitable mootness. *See* Pet.18 (citing two decisions from 2022). Those "major questions" decisions are entirely inapposite, but in all events, this is precisely the sort of argument that ought first to be presented and addressed in the courts of appeals. Nor does Petitioner confront the fact that the decision below is an unpublished, unsigned summary order, even though this Court typically does not review such decisions. *See Plumley v. Austin*, 574 U.S. 1127, 1127 (2015) (Thomas, J., dissenting from denial of certiorari). If the Court were ever interested in this issue, it should at least wait for a published opinion discussing the merits of the equitable mootness doctrine, which would help "guide [its] analysis of the merits." *Clinton*, 566 U.S. at 201. That is not this case.

Third, even if this Court were to grant review and "abolish" the equitable mootness doctrine as Petitioner requests, it would not make a difference to the outcome of this case, because, on the merits, the bankruptcy court did not abuse its discretion in approving the Uniti settlement and confirming the Plan. Indeed, it is not a close question. As a result of the Uniti settlement, Respondents received more than $1.2 *billion* in net present value. The bankruptcy court did not err, much less abuse its broad discretion, in balancing the range of expected litigation outcomes against the benefits of settlement and adjudging that figure as "well above the lowest … range of reasonableness." Pet.App.80a.

Nor did the bankruptcy court abuse its discretion in confirming the Plan. The Plan complied with the Bankruptcy Code, received wide support from creditors (including from a majority of voting unsecured creditors), and was the only feasible path out of bankruptcy. It maximized recoveries for Respondents' creditors and preserved Respondents' businesses, saving thousands of jobs and ensuring that consumers retained telecommunications services. Although Petitioner challenged the bankruptcy court's conclusion that the secured creditors' prepetition liens and adequate protection claim left no unencumbered value to distribute to unsecured creditors, the bankruptcy court accurately determined that the adequate protection claim far exceeded "any reasonable assumption of unencumbered assets in an order of magnitude of hundreds of millions of dollars." Pet.App.16a. That conclusion was supported by testimony by Respondents' expert witnesses. By contrast, Petitioner offered no competing expert valuation of the secured creditors' collateral or the size of their adequate protection claim.

In short, even if this Court were to grant certiorari and abolish the doctrine of equitable mootness, and a reviewing court were to reach the merits of Petitioner's challenges to the bankruptcy court's orders, the outcome of this case would be the same—Respondents would prevail. Petitioner's question presented would be "better resolved in other litigation where … it would be solely dispositive of the case." *Relford v. Commandant*, 401 U.S. 355, 370 (1971).[2]

---

[2] Petitioner insinuates that Respondents filed for Chapter 11 in bad faith. *See* Pet.5. That is incorrect, but regardless,

### D. The Equitable Mootness Doctrine is a Valid Exercise of Equitable Power.

Petitioner devotes the lion's share of its argument for review of the first question presented to challenging the equitable mootness doctrine on the merits. *See* Pet.9-25. But as reflected by the unanimity of the courts of appeals, the equitable mootness doctrine is a well-established prudential doctrine that is firmly grounded in the fundamentally equitable character of bankruptcy practice. Petitioner's contention that it "must be abolished entirely," Pet.25, is deeply misguided, as this case well demonstrates.

**1.** Courts sitting in bankruptcy "are courts of equity and apply the principles and rules of equity jurisprudence." *Young v. United States*, 535 U.S. 43, 50 (2002); *see also Bank of Marin v. England*, 385 U.S. 99, 103 (1966) ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."). Petitioner's argument that equitable mootness purportedly lacks support in the Bankruptcy Code thus misses the point. The doctrine of equitable mootness flows directly from traditional equitable considerations, including that a court sitting in equity may refuse to fashion relief when doing so would prejudice third parties. The fact that Congress did not codify that "age-old principle" does not delegitimize the longstanding equitable rule. *In re*

---

Petitioner never moved to dismiss the Chapter 11 proceeding on that ground, and it is not now challenging the Chapter 11 filing as made in bad faith.

*Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994).

Petitioner's constitutional argument fails, too. The term "equitable mootness" is shorthand for the recognition that in the unique context of bankruptcy, a court may be constitutionally *able* to alter the outcome but nevertheless unwilling to do so. *See In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994), *cert. denied*, 513 U.S. 999 (1994); *In re Manges*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). The terminology may be "an inapt description," *Continental Airlines*, 91 F.3d at 559, but there is nothing controversial about the idea that a "court can prevent substantial harm to numerous parties" by declining to disrupt a confirmed and consummated bankruptcy plan of reorganization, *id.* It 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.*, 29 F.3d at 304; *see also In re Trib. Media Co.*, 799 F.3d at 287 (Ambro, J., concurring) (quoting same).

Refusing to disturb consummated plans of reorganization when doing so would be inequitable advances the ability to achieve finality, which is "essential" in bankruptcy proceedings. *In re Chateaugay Corp.*, 988 F.2d at 325. If transactions that have been consummated under an unstayed bankruptcy court order are routinely vulnerable to nullification, "the threat of disruption would make it more difficult to attract participation by the multiple parties often required to make a reorganization work."

Wright & Miller, *Equitable Mootness in Bankruptcy*, 13B Fed. Prac. & Proc. Juris. §3533.2.3 (3d ed.).

Petitioner attacks equitable mootness on the well-trodden basis that courts are obligated to exercise jurisdiction given to them. Pet.12-13. But courts are not declining to exercise Article III jurisdiction when dismissing an appeal as equitably moot; they are exercising that jurisdiction and making the decision not to disturb a substantially consummated plan of reorganization when the result would be profoundly inequitable. In other words, equitable mootness is an exercise of the court's "discretionary power to fashion a remedy in cases seeking equitable relief." *In re Paige*, 584 F.3d 1327, 1335 n.7 (10th Cir. 2009). Or as the Second Circuit has put it, "equitable mootness bears only upon the proper remedy, and does not raise a threshold question of [the] power to rule." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005). In contrast to constitutional mootness, which prevents Article III courts from exercising jurisdiction where none exists, equitable mootness is an exercise of Article III jurisdiction to determine whether the requested relief is equitable. Properly understood, therefore, the equitable mootness doctrine is an uncontroversial application of a well-established principle.

If equitable mootness were as pernicious as Petitioner characterizes it, Congress could easily step in and override the unanimous circuits by legislation. Indeed, as Petitioner acknowledged below, the equitable mootness doctrine has been the subject of congressional hearings, including recently. *See* C.A.Br.41. But Congress has not seen fit to disturb

the doctrine. In fact, Congress did not eliminate the practice in its last substantial overhaul of the Bankruptcy Code, in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), even though the doctrine was well-established (and occasionally criticized) even then. Congress' nonintervention is particularly revealing given that it used BAPCPA to eliminate other judicial interpretations with which it disagreed. *See, e.g.*, *In re Dumont*, 581 F.3d 1104 (9th Cir. 2009) (acknowledging that BAPCA abrogated *In re Parker*, 139 F.3d 668 (9th Cir. 1998), and the "ride through" or "pay and drive" option that allowed Chapter 7 debtors to continue payments on property subject to a security interest as if the bankruptcy had never occurred). If Congress had been dissatisfied with the equitable mootness doctrine, it could and would have acted in 2005, and it remains free to abrogate the doctrine at any time. That it has not done so confirms that the doctrine should not be eliminated, particularly by this Court's fiat in the face of unanimous circuit acceptance.

**2.** This case is a perfect example of why the equitable mootness doctrine makes sense in certain circumstances. Granting Petitioner's requested relief would be profoundly inequitable because Petitioner failed to diligently seek a stay of the Plan or Confirmation Order and its requested relief would require unwinding complex transactions, adversely affect numerous parties, and undermine Respondents' emergence from bankruptcy.

Petitioner made no meaningful effort to diligently seek a stay of the bankruptcy court's orders. That is

relevant to the equitable mootness analysis because an appellant who fails to exercise due diligence in seeking a stay upon confirmation is not entitled later to demand that third parties should be forced to unravel transactions carried out in reliance on the bankruptcy court's unstayed orders. *See In re MPM Silicones*, 874 F.3d 787, 804-05 (2d Cir. 2017); *Metromedia*, 416 F.3d at 144-45. At the confirmation hearing in June 2020, Respondents stated that they intended to consummate the Plan in late August or early September of 2020, including time for regulatory approvals. Pet.App.6a. The bankruptcy court confirmed the Plan on June 25, 2020. Petitioner did not seek a stay for more than two months, and even then did not file a motion but rather appended its request for a stay to an unrelated motion. Pet.App.5a. Consistent with Respondents' prediction at the confirmation hearing, the Plan became effective and was substantially consummated on September 21, 2020.

Petitioner claims that seeking a stay would have been futile because Respondents needed months to satisfy regulatory requirements. Pet.28. The Second Circuit rejected that argument because Petitioner forfeited it, Pet.App.6a, and this Court thus cannot consider it. It is not credible in any event. Respondents explicitly stated that they intended to consummate the Plan in late August or September 2020. Pet.App.6a. The Confirmation Order reflected the same timing. Pet.App.140a. And *Petitioner* explicitly relied on that timeline in its motion to expedite. Pet.App.40a. All indications were that consummation would occur in a matter of months,

triggering Petitioner's need at least to diligently pursue a stay.

Even if Petitioner's failure to diligently pursue a stay were irrelevant, granting Petitioner the relief it requested on appeal would both jeopardize Respondents' emergence from bankruptcy and require unraveling numerous complex transactions agreed to in connection with the Plan—as Petitioner's own course of conduct below reflects. At first, Petitioner asked the district court to vacate and remand both the Settlement Order and the Confirmation Order. Doing so would obviously upend Respondents' emergence from bankruptcy and undo countless settled transactions. Apparently recognizing those obvious problems, Petitioner in its district court reply brief then pivoted to asking the court to order Respondents to either (1) issue additional shares of stock to unsecured creditors (which would, of course, dilute the stock of secured creditors); (2) disgorge stock from secured creditors and transfer it to unsecured creditors; or (3) redirect funds that Uniti owes Respondents pursuant to the settlement agreement to unsecured creditors instead. Pet.App.22a.

As the district court correctly found, these belated proposals would cause no less upheaval than vacating the Settlement and Confirmation Orders entirely. The first two options, diluting or disgorging stock that secured creditors received, are just other ways to rewrite the bargains struck in the reorganization that was consummated more than two and a half years ago. The Plan was "predicated upon financial support from secured creditors and holders of first lien claims" who "were compensated with equity" in the reorganized

entities. Pet.App.23a. It would be fundamentally inequitable to dilute or disgorge the value that secured creditors and first lien claimholders received because they relied on that equity in (1) agreeing to the Plan and (2) contributing $750 million upon consummation of the Plan to ensure that the reorganized Respondents remained viable. *See* Pet.App.14a. The district court correctly concluded that Petitioner's first two proposals would thus "knock the props out from under" the Plan. Pet.App.23a (quoting *Charter*, 691 F.3d at 482). Moreover, those proposals would also "require unwinding consummated transactions that have already vested equity and other rights" in secured creditors. Pet.App.23a. Several complex transactions took place at consummation, including the discharge of the secured creditors' claims and security interests, the issuance of new reorganized equity in exchange for those claims, Respondents' $750 million rights offering, and the creation of Respondents' new senior secured credit facility. Those transactions, which were provided for in the Plan, *see* Pet.App.14a, were all predicated on the distribution of reorganized equity required by the Plan and confirmed by the bankruptcy court. Disgorgement or dilution of that equity would both undermine those transactions and disrupt the years of additional dealings, regulatory approvals, and reliance interests that have followed them.

Petitioner's third option was likewise deeply inequitable. Petitioner asked that amounts owed by Uniti to Respondents under the settlement be redirected to unsecured creditors. Those hundreds of millions of dollars of settlement proceeds were critical to the viability of Respondents' business operations,

secured creditors' support for the Plan, assured a new senior secured credit facility, and permitted the $750 million rights offering. Diverting that money from Respondents to their unsecured creditors would jeopardize Respondents' emergence from bankruptcy by diminishing their liquidity. Pet.App.24a. It would rob secured and first lien creditors of the value of the cash and equity distributions they have already received. And it would devalue Respondents' outstanding shares, harming all shareholders (including numerous third parties) and those who rely on Respondents' financial stability.

In sum, each form of relief that Petitioner seeks would be an inequitable redistribution of value and undermine the support for the Plan that was critical to its acceptance. Far from being a "poster child for the abuses of the doctrine" of equitable mootness, Pet.25, this case demonstrates precisely why that doctrine makes perfect sense in certain circumstances and should not be categorically abolished.

## II. The Second And Third Questions Presented Do Not Merit Review.

After devoting most of the petition to the first question presented, Petitioner presents two additional questions as almost an afterthought, suggesting that the Court can "curtail the [equitable mootness] doctrine's worst excesses by resolving two aspects of the doctrine"—specifically, whether an appellant must "diligently seek a stay," and whether an appellant bears the "burden of proof." Pet25, 30. Petitioner's argument suggests that the Court must grant both the second and third questions together. *See* Pet.8-9 (describing these "two aspects" as the "[s]econd"

reason for granting certiorari). For a number of reasons, however, neither question warrants the Court's review.

At the outset, this Court should not grant certiorari to review the second and third questions presented because the Second Circuit did not opine on either issue. As noted, because this Court is "a court of review, not of first view," it does not generally consider issues that the lower courts did not address, *Byrd*, 138 S.Ct. at 1527, and it prefers to review issues with "the benefit of thorough lower court opinions," *Zivotofsky*, 566 U.S. at 201. The unpublished, unsigned summary order here contains no discussion of either of Petitioner's second or third questions presented—which is unsurprising because Petitioner never raised those issues before the panel, even for preservation purposes. Instead, Petitioner merely asked for a vague "limit" to the application of equitable mootness. As the panel observed, Petitioner had "not suggested any principled rule by which [the court] should limit the doctrine or determine when its application is overbroad." Pet.App.4a. Petitioner simply "invite[d] [the court] to carve out the facts of this case ad hoc." *Id*.

Only in its petition for rehearing *en banc* did Petitioner switch tacks and argue, for the first time, that the Second Circuit should "recognize alternatives where a stay is unavailable" and "shift the burden to the appellee to produce evidence about the harm to parties who have justifiably relied on confirmation." C.A.Pet.8, 11. But the Second Circuit did not grant rehearing; indeed, not one judge even wrote a separate opinion that might provide this Court with something

other than a blank slate upon which to write. Nor has Petitioner pointed to any other Second Circuit decision—or a decision by any other court of appeals—providing any reasoning regarding either of its two remaining questions presented. *Cf. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S.Ct. 1365, 1372 (2018) (reviewing unpublished decision where prior published decisions provided analysis on both sides of issue). Were the Court ever inclined to review these two issues, it should do so in a case where they were at least somewhat, if not thoroughly, ventilated below.

Furthermore, Petitioner's second and third questions presented are relatively unimportant, narrow, and non-recurring issues that arise only in the limited universe of cases involving equitable mootness in bankruptcy appeals within the Second Circuit. This Court has already denied several petitions for certiorari challenging the Second Circuit's framework. *Charter*, 569 U.S. 968; *Parker v. Motors Liquidation Co.*, 565 U.S. 1113 (2012); *Off. Comm. of Unsecured Creditors v. Adelphia Commc'ns Corp.*, 552 U.S. 941 (2007). Petitioner offers no reason why its Second Circuit-specific challenge here should meet a different fate.

Indeed, the Petition is a particularly unattractive vehicle for reviewing the Second Circuit's framework because the Court must grant review and reverse on *both* questions presented even to conceivably make a difference in this case. If the Court grants the second but not the third question and holds that diligently seeking a stay is not required but merely one of the factors in the equitable-mootness assessment, the

Second Circuit will affirm on the basis of its alternative observation that it "discern[ed] no error in the district court's analysis or conclusions concerning the second and third *Chateaugay* factors," *i.e.*, that "the relief requested would jeopardize [Respondents'] emergence from bankruptcy and require unraveling numerous complex transactions related to the plan." Pet.App.6a. And if the Court grants the third but not the second question, the Second Circuit will affirm on the basis of its observation that Petitioner did not diligently seek a stay. Petitioner thus must prevail on both questions presented for this Court's review to have any possible effect on the outcome in this case.

Even then, however, Petitioner is exceptionally unlikely to prevail on remand. Even putting *no* weight on Petitioner's failure to diligently pursue a stay, it remains the case that the Plan has been substantially consummated, multiple complex transactions have closed, numerous third parties have relied on the Plan, and attempting to unscramble the egg would be unfair to those third parties and endanger Respondents' emergence from bankruptcy. These aspects are considered by the Second Circuit under the second and third *Chateaugay* factors, but Petitioner's only challenge as to those factors is not on the merits—*i.e.*, whether its requested relief would "jeopardize [Respondents'] emergence from bankruptcy and require unraveling numerous complex transactions related to the plan," Pet.App.6a—but on the burden of proof for satisfying those factors.

As to that inquiry, Petitioner makes no effort to show that placing the burden of proof on Respondents would have made a difference in this case. And it

would not have. The Plan was substantially consummated and numerous transactions occurred on the day it became effective. The relief Petitioner requested would unquestionably disturb the rights of parties not before the court. And it would harm the success of the Plan by either upsetting the basic bargains underlying it or diverting hundreds of millions of dollars in Uniti settlement payments from Respondents to their unsecured creditors. Those facts all point in one direction. By any articulation of the equitable mootness test, no matter who bears the burden of proof, affording Petitioner its requested relief would be profoundly inequitable.

Petitioner overstates the importance of building an evidentiary record to analyze whether it would be inequitable to grant the requested relief after a plan of reorganization has been confirmed and consummated. In the Second Circuit, the burden shifts to the appellant to overcome a presumption of equitable mootness only after a plan of reorganization has been "substantially consummated." Pet.App.3a (quoting *In re BGI, Inc.*, 772 F.3d 102, 108 (2d Cir. 2014)). The evidentiary record that Petitioner imagines a debtor developing would likely involve the same material that courts already rely on to determine whether a plan has been "substantially consummated." This case is a perfect example. The Plan itself detailed certain transactions that would occur on the effective date. Pet.App.14a. The courts below relied on those transactions to determine that unraveling them would be inequitable. Petitioner claims that the district court did not identify transactions that it would need to unwind, but that simply ignores the court's discussion of the

transactions that underlay the Plan and took place as soon as the Plan became effective.

Petitioner asserts that the burden should be on the party asserting equitable mootness because whether a particular request for relief would upset a plan of reorganization is an "empirical" question. Pet.32. But it makes no effort to show how an "empirical" analysis would make a difference in this case, and it likely would make no difference in most cases. Here, Petitioner's initial request for relief was for vacatur of the bankruptcy court's orders. Pet.App.22a. It does not take an empirical analysis to conclude that vacatur would upend the Plan, disrupt successive transactions, and burden third parties. Petitioner then changed its tune, seeking various forms of relief that involved disgorging or devaluing stock possessed by secured creditors and first lien holders. Pet.App.22a. The district court's conclusion that reducing the value that secured creditors received in return for their support of the Plan would "knock the props out from under" that Plan, Pet.App.23a, does not depend on precisely how much those creditors would lose. The same goes for Petitioner's proposal to disgorge stock from secured creditors. Disgorging equity would both require unwinding consummated transactions (the vesting of that equity) and disturb the very foundation of the Plan.

For all of these reasons, the alleged circuit splits identified by Petitioner on the second and third questions presented provide no basis for this Court's intervention. To be clear, the purported splits are mischaracterized, ill-defined, and stale. For example, although Petitioner contends that the Second Circuit

is an outlier in requiring appellants to diligently seek a stay, the Ninth Circuit has the same rule; its requirement is not "subject to exceptions in which the failure to seek a stay is excusable." Pet.27; *see Rev Op Group v. ML Manager LLC (In re Mortgs. Ltd.)*, 771 F.3d 1211, 1217 (9th Cir. 2014) (stating that "an objecting party must at least seek a stay to ensure its appeal will not be equitably moot").[3] Furthermore, no court of appeals holds that failure to diligently seek a stay is *not* a factor in considering equitable mootness; even the Seventh Circuit recognizes that "a party that elects not to pursue a stay subsequent to confirmation risks that a speedy implementation of the reorganization will moot an appeal." *Matter of Specialty Equip. Companies, Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993). And the Second Circuit framework challenged by Petitioner has been on the books for three decades, ever since *Chateaugay*. The Court's intervention is not necessary to modify a thirty-year-old multi-factor test.

But even if there were clearly defined, material splits among the circuits on the second and third questions presented, they would not justify certiorari. As explained, the questions are of narrow scope and limited import, this case presents a poor vehicle for addressing them, and the Second Circuit's approach is proper. Although the courts of appeals may articulate their equitable mootness considerations slightly differently, they uniformly aim to answer the same question: whether granting the requested relief would

[3] Petitioner's only support for its proposition is a Ninth Circuit Bankruptcy Appellate Panel decision, which is equivalent to a district court decision, not a Ninth Circuit decision.

be impractical or inequitable in light of how far implementation of the plan of reorganization has progressed. As the Second Circuit explained, courts must "carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." Pet.App.5a (quoting *Charter*, 691 F.3d at 481). The Second Circuit's *Chateaugay* factors, like each circuit's distinctive approach to equitable mootness, "serve to guide that balancing act." Pet.App.5a.

The Second Circuit's equitable mootness framework fairly balances the equities. As recent decisions illustrate, it does not automatically result in the dismissal of appeals after a plan's substantial consummation. *See, e.g.*, *Matter of MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017) (appeal not equitably moot despite plan being substantially consummated); *Ahuja v. LightSquared Inc.*, 644 F. App'x 24 (2d Cir. 2016) (same). On the contrary, it requires courts to carefully balance the bankruptcy system's interest in finality with the right to appeal and the interests of absent third parties. As Petitioner never disputes, the *Chateaugay* factors identify the same interests that every circuit considers, including whether a plan of reorganization is substantially consummated (and whether the appellant diligently pursued a stay if so); whether the court can order some effective relief without jeopardizing the debtor's emergence from bankruptcy or creating an unmanageable morass of unwinding transactions and removing the authorization for transactions that depend on the plan for authorization; and whether absent third parties would be harmed by ordering relief. *See Charter*, 691 F.3d at 482.

Here, the relief requested by Petitioner would fundamentally undermine the bargains struck in the now-consummated reorganization. That would remain true even under Petitioner's preferred approach of ignoring its lack of diligence in pursuing a stay and placing the burden on Respondents. This case thus provides no basis for resolving any potential differences among the circuits over what is, in the end, an equitable determination that is necessarily case-specific and entirely correct.

## CONCLUSION

The Court should deny the petition.

Respectfully submitted,

GEORGE W. HICKS, JR.
*Counsel of Record*
JULIE M.K. SIEGAL
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 389-5000
george.hicks@kirkland.com

*Counsel for Respondent*

May 24, 2023