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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Lacking any constitutional or statutory basis, courts have contrived the doctrine of "equitable mootness" from whole cloth. The doctrine contradicts the Bankruptcy Code's plain text and the jurisdictional provisions of title 28 of the United States Code. It defies Article III courts' "unflagging duty" to exercise their jurisdiction. It undermines separation-of-powers principles. And it is prone to mischief and abuse. This case, which exemplifies such mischief and abuse, presents an ideal opportunity to abolish the inequitable doctrine of equitable mootness. But even if this Court chooses not do so, it should at least settle the material conflicts among the Circuits' application of this court-made doctrine. These include (1) whether an appellant must seek a stay to preserve its statutory right of review; and (2) which party bears the burden of proving that an appellate remedy would be inequitable.

Respondents' briefs serve only to amplify the need for this Court's review. The fact that many parties have asked this Court to reconsider the doctrine illustrates its increasing use as a tactic to deprive litigants of their Article III review rights. Respondents' arguments about the appeal's merits highlights that by applying the doctrine here, the courts below deprived Petitioner (U.S. Bank National Association, solely in its capacities as indenture trustee for unsecured notes issued by Windstream) of the right to have an Article III court consider its issues on the merits. Their discussion of the supposed upheaval that would befall reorganized Windstream if it were subject to those appeals, made as they were at the District Court and the Circuit Court below—and entirely without supporting evidence—only emphasize the doctrine's unworkability

and why an appellate court, just like any other court, must review such issues with a developed evidentiary record that was not, and could not have been, presented in the trial court.

Respondents' arguments that this case is a poor vehicle to address the issues presented and that Petitioner has failed to preserve its challenge to the doctrine's viability ignore the record. They prematurely raised equitable mootness in the District Court before the Windstream chapter 11 plan had even been consummated, and Petitioner's only opportunity to respond was in a reply brief on the merits. Months later, despite such deficiencies—and despite the District Court's assurances otherwise—equitable mootness became the sole basis for its disposition of Petitioner's appeal. All of Petitioner's challenges to the viability, formulation, and application of equitable mootness were then properly presented to the Circuit Court in its appeal and in its request for en banc review.

Article III courts should not have a free hand to rely on equity to deprive parties of their statutory and constitutional rights of review. Having suffered the inequities of this doctrine's application, Petitioner has properly raised and preserved its challenges. The significant questions presented are ripe for review.

I. The Equitable Mootness Doctrine is Based on Faulty Reasoning and Contravenes Article III Courts' Obligations

The time has come for this Court to exercise its supervisory power to eviscerate the flawed doctrine of

equitable mootness. Equitable mootness is historically, statutorily, and constitutionally baseless, conflicts with the very structure of the Bankruptcy Code and related jurisdictional statutes, and contravenes Article III courts' inherent duty to adjudicate cases. *See* Pet. App'x A at 4a; Pet. at 9-19.

The doctrine's recent history emphasizes the need for review. As Windstream notes, in recent years many other petitioners have drawn this Court's attention to the doctrine's potential for abuse. Windstream Op. at 13-14. The number of these petitions demonstrates the extent to which equitable mootness has become a barrier to appellate review of the most important bankruptcy court decisions—orders confirming bankruptcy reorganization plans—and indeed, the extent to which it has become a "part of the Plan." *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 889 (8th Cir. 2021) (quoting *One2OneCommuns., LLC v Quad/Graphics, Inc.*, 805 F.3d 428, 446-47 (3d Cir. 2015) (Krause, J., concurring)).

This Court's recent decision in *MOAC Mall Holdings LLC v. Transform Holdco LLC* (issued after this Petition was filed) emphasizes the need to review the doctrine. 143 S. Ct. 927 (2023). That case concerned section 363(m) of the Bankruptcy Code, which prohibits an appellate court from disturbing the sale of property to a good-faith purchaser "unless such authorization and such sale or lease were stayed pending appeal." *Id.* at 932 (quoting 11 U.S.C. § 363(m)). This is the same statute that the Seventh Circuit relied on to articulate the foundation for the equitable mootness doctrine. *See In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); Pet. at 16-17. At issue in *MOAC* was whether section 363(m) was

jurisdictional or merely restricted the relief an appellate court could provide. 143 S. Ct. at 932-33. This Court concluded that section 363(m) was *not* jurisdictional. *Id.* at 940. And in doing so, this Court dislodged the already-weak foundation of equitable mootness.

First, while the question presented in *MOAC* involved statutory (rather than equitable) mootness, this Court noted that the Court's "cases disfavor these kinds of mootness arguments." *Id.* at 935. Unlike the restrictions in section 363(m), equitable mootness is not statutorily derived, so appellate courts have even less reason to evade their constitutionally mandated Article III review. *See* Pet. at 14-19. Second, the Court observed that section 363(m) did not render an appeal moot because it does not foreclose a court's ability to "grant any effectual relief whatever to the prevailing party" even if appellate review might eventually prove ineffective in that particular case. 143 S. Ct. at 934 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)); *id.* at 934-35. *MOAC* thus delegitimizes the theory that the doctrine of equitable mootness is rooted in a policy embedded in section 363(m) that "courts should keep their hands off consummated transactions." *In re UNR Industries, Inc.*, 20 F.3d at 769. *MOAC* instead demonstrates that the Bankruptcy Code—like every other area of law—disfavors mooting appellate review.

Respondents' other arguments are similarly flawed. Windstream argues that in dismissing an appeal as equitably moot, a court actually exercises its jurisdiction. Windstream Op. at 22. But the doctrine allows Article III courts to abdicate their duty to consider the merits of an appeal. *Samson Energy Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 728 F.3d 314, 317 (3d Cir. 2013)

("[E]quitable mootness, a judge-made abstention doctrine . . . allows a court to avoid hearing the merits of a bankruptcy appeal[.]"). An abdication of jurisdiction cannot be an exercise of it.

Windstream also argues that if equitable mootness were a problem, Congress would have intervened. Windstream Op. at 22-23. While Congress bears the role of legislating, this Court still has the right and duty to quell judicial activism that contravenes Congress's explicit mandate that Article III courts hear appeals from bankruptcy court rulings. *See* 28 U.S.C. §158(a). And Windstream's argument proves too much: it suggests that the judiciary should refrain from interpreting *any* statute that Congress can amend—which is essentially all statutes.

Respondents' remaining policy arguments are incorrect and overblown. They argue that vacating the orders would "upend Respondents' emergence from bankruptcy and undo countless settled transactions." Windstream Op. at 25; *see also* Elliott Op. at 8-10. But parties routinely close transactions in the face of potential litigation, pricing that risk into the transaction. Pet. at 22-23. Sophisticated parties transacting through the bankruptcy process do not need a unique immunity from appeal unavailable to every other litigant. *See In re Cont'l Airlines*, 91 F.3d 553, 572 (3d Cir. 1996) (Alito, J., dissenting). And the policies of facilitating reorganization and protecting reliance interests can be addressed through a court's choice of remedies. *Id.* at 571 (Alito, J., dissenting) (noting that courts "retain the ability to craft . . . a remedy that is suited to the particular circumstances of the case").

II. Review is Necessary to Resolve the Circuit Split Regarding the Stay Requirement and Burden of Proof

The Second Circuit's approach to equitable mootness is an outlier among the Circuits, and this approach has consequences. *See* Pet. 26-28. While acknowledging the Circuit split in the weight placed on an appellant's attempt to obtain a stay and on which party bears the burden of proof in showing lack of equitable mootness, Windstream dismisses these differences as unworthy of this Court's attention. Windstream Op. at 29-34. This Circuit split, Windstream argues, is "relatively unimportant, narrow, and non-recurring" because it manifests only in "the limited universe of cases involving equitable mootness in bankruptcy appeals within the Second Circuit." *Id.* at 29. But the differences in equitable mootness rules among the Circuits are not "unimportant." As happened here, those rules can steer the course of billion-dollar bankruptcies, allowing the parties privileged by an Article I court's ruling to shield that ruling from any Article III review on the merits. Even if this Court does not review the foundations of the equitable mootness doctrine (and the time to do so is now), it should harmonize and circumscribe the rules to prevent abuse.

The Second Circuit's rules, in particular, combine to create uniquely appellee-friendly barriers to review. As Respondents acknowledge, every other Circuit (with the exception, in part, of the Ninth) considers whether the appellant seeks a stay as part of a holistic review of the equities—not as a sole determining factor. Windstream Op. at 32-33. Furthermore, in *requiring* an appellant to seek a stay, the Second Circuit departs from any statutory

foundation. Pet. at 27. And only the Second Circuit places the burden on the appellant to show that a substantially consummated reorganization is not equitably moot. *Id.* at 30-31. In any other Circuit, Respondents could not invoke equitable mootness based solely on the timing of Petitioner's pursuit of a stay, without also showing that the equities require a finding of mootness. *See, e.g, Vestavia Hills, Ltd. v. U.S. Small. Bus. Admin. (In re Vestavia Hills, Ltd.)*, 630 B.R. 816, 831 (S.D. Cal. 2021) (declining to find an appeal moot—although the appellant did not seek a stay—where the appellee did not bear its "heavy burden in demonstrating the appeal is equitably moot.") (cleaned up).

The Second Circuit's approach also matters because of the sheer volume of large chapter 11 cases filed in courts within that Circuit. More than one-sixth of the nation's large bankruptcies are filed in the Southern District of New York alone.[1] This is not a "limited universe of cases[.]" Windstream Op. at 29.

The Second Circuit's rules combine to allow plan proponents—such as Respondents—to engineer equitable mootness by moving towards consummation at a breakneck speed, leaving inadequate time to develop evidence (Pet. at 32) while relying on the practical unavailability of a stay to avoid Article III review (*Id.* at 28-30). In most Circuits, the appellate court, in weighing the equities,

1. Allie Schwartz *et al.*, *Trends in Large Corporate Bankruptcy and Financial Distress, Midyear 2022 Update*, at 7, Cornerstone Research (2022), available at: https://www.cornerstone.com/wp-content/uploads/2022/09/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-Midyear-2022-Update.pdf.

would consider Petitioner's efforts to expedite its appeal and to pursue a stay once its necessity became apparent. *Id.* at 29. In all other Circuits that have considered the question, Windstream could not raise equitable mootness as a defense so late in the briefing process and then rely on that precise lateness to avoid presenting evidence. *Id.* at 31. Instead, *Respondents* would bear the burden of showing equitable mootness, thus preventing this type of gamesmanship. *Id.* at 31-32.[2]

Respondents' fact-based arguments prove the salience of the Circuit split. Both Windstream and Elliott devote substantial portions of their briefs to arguing why appellate review was unnecessary and inappropriate in *this* bankruptcy. Windstream Op. at 3, 18-19, 23-27, 30-33; Elliott Op. at 4-10; *see also* Elliot Op. at 10 (arguing that the Court should deny review because "the equities . . . lie so decidedly on one side of the equation"). Windstream goes so far as to dismiss Petitioner's argument for shifting the burden of proof by asserting that Petitioner has failed to show that shifting the burden would have changed the outcome below. Windstream Op. at 32.

Respondents' arguments prove Petitioner's point. They would have this Court make factual judgments

2. Windstream denies the importance of the burden of proof by stating that a developed evidentiary record would "likely" involve the same material a court would review in deciding whether a plan was substantially consummated. Windstream Op. at 31. This is the exact sort of speculation that has led other courts to place the burden on the appellee. *In re SemCrude, L.P*, 728 F.3d at 321 ("Dismissing an appeal . . . should also be based on an evidentiary record, and not speculation.").

and determine the balance of equities based solely on the briefs, without an evidentiary hearing—just as the lower courts here did under Second Circuit precedent. *See* Windstream Op. at 31-32. That is not the best use of this Court's scarce judicial resources, especially when considering whether to grant certiorari. *MOAC*, 143 S. Ct. at 935 ("[W]e decline to act as a court of first view, plumbing the Code's complex depths in the first instance to assure ourselves that [Respondent] is correct about its contention that no relief remains legally available.") (cleaned up)). At a more basic level, it is hard evidence—not the advocacy and speculation in briefs—that provides the most reliable guide. *In re SemCrude, L.P.*, 728 F.3d at 321-26 (declining to apply equitable mootness where the evidence did not back appellee's assertion that the court could not provide "even a modicum of relief" without unraveling the entire plan). By answering Petitioner's second and third questions presented, this Court can ensure that lower appellate courts consider the facts and equities after a full review of all relevant factors and evidence.

III. Petitioner has not waived these arguments.

Windstream claims that Petitioner forfeited the questions presented because they were not raised in the lower courts. Windstream Op. at 16-18. This is incorrect. Unlike the parties in the cases Windstream cites, Petitioner is not introducing a claim that could have been raised but was not. *See, e.g., Sprietsma v. Mercury Marine,* 537 U.S. 51, 56 n.4 (2002) (holding that a claim challenging the governing law of the case was forfeited when not raised below); *Kingdomware Techs., Inc. v. United States,* 579 U.S. 162, 173-74 (2016) (finding

a potential interpretation of the statutory provision forfeited when not raised below); *OBB Personenverkehr AG v. Sachs,* 577 U.S. 27, 38 (2015) (declining to review an argument first raised in the briefing on the merits).

Instead, Petitioner raised these questions when appropriate. *See* Pet. App'x A, at 4a-5a ("Whatever merit there may be to U.S. Bank's criticisms of the doctrine and of the bankruptcy process in general, a panel of this Court 'is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'") (citation omitted). In its Second Circuit brief, Petitioner challenged the constitutional and statutory basis of equitable mootness. Brief for Appellant at 25-32, *In re Windstream Holdings*, No. 21-1754 (2d Cir. Oct. 29, 2021); *see Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (stating that preservation of an issue does not "demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue."). Petitioner then raised its second and third questions at the first available opportunity, in its Petition for Rehearing En Banc. Pet. for Rehearing En Banc at 7-12, *In re Windstream Holdings*, No. 21-1754, (2nd Cir. Nov. 9, 2022). Petitioner could not have raised these issues earlier because the Second Circuit panel was bound by prior Circuit decisions. Pet. App'x A, at 4a-5a.

Furthermore, this Court's practice permits review of an issue so long as it has been passed upon in the lower courts. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'") (citation omitted); *see also United States v.*

Williams, 504 U.S. 36, 41 (1992) (collecting cases). The court below indeed passed on the question relating to the equitable mootness doctrine's lack of basis. Pet. App'x A, at 4a ("U.S. Bank's first argument—that the doctrine's application must be limited because it lacks a basis in the Constitution or Bankruptcy Code and contravenes federal courts' obligation to exercise jurisdiction—is foreclosed by this Court's precedent.").

Windstream also claims that this Court typically does not review unpublished, unsigned summary orders. Windstream Op. at 18. But as this Court has noted in granting a certiorari petition, "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987). *Plumley v. Austin*, 574 U.S. 1127 (2015), on which Windstream relies, is not to the contrary. Windstream Pet. at 18. There, the Court denied the petition for certiorari without elaboration. Justice Thomas wrote in dissent: "True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review." 574 U.S. 1127, 1127 (2015) (Thomas, J., dissenting from denial of certiorari) (cleaned up).

CONCLUSION

For the reasons stated above and in the petition itself, this Court should grant certiorari and answer the questions presented.

Respectfully submitted,

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