No. _____

In The
Supreme Court of the United States

DAVID HARGREAVES,

Petitioner,

v.

NUVERRA ENVIRONMENTAL SOLUTIONS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK D. TATICCHI
FAEGRE DRINKER BIDDLE & REATH LLP
1500 K Street NW
Suite 1100
Washington, DC 20001

CATHERINE M. MASTERS
FAEGRE DRINKER BIDDLE & REATH LLP
311 S. Wacker Drive
Suite 4300
Chicago, IL 60606

AARON D. VAN OORT
Counsel of Record
NICHOLAS J. NELSON
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402
(612) 766-7000
aaron.vanoort@faegredrinker.com

Counsel for Petitioner

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

JAMES H. MILLAR
CLAY J. PIERCE
FAEGRE DRINKER BIDDLE
& REATH LLP
1177 Avenue of the Americas,
41st Floor
New York, NY 10036

PATRICK A. JACKSON
FAEGRE DRINKER BIDDLE
& REATH LLP
222 Delaware Avenue
Suite 1410
Wilmington, DE 19801

QUESTION PRESENTED

Several courts of appeals have adopted a new abstention doctrine—called "equitable mootness"—under which Article III courts decline to exercise jurisdiction to determine the legality of a consummated bankruptcy reorganization plan, on the theory that it would be inequitable to disturb even an unlawful plan. This doctrine has been subject to sharp and sustained criticism from across the federal bench—and for good reason, as it has no support either in the bankruptcy statutes or in this Court's abstention doctrine, and has distorted the bankruptcy system Congress did ordain, by preventing important questions of bankruptcy law from being decided, causing bankruptcy appeals to be dismissed far more readily than other cases in similar circumstances, and artificially incentivizing arrangements that can be hastily consummated.

The question presented is: Whether the doctrine of equitable mootness is inconsistent with the federal courts' "virtually unflagging" obligation to hear and decide cases within their jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Petitioner David Hargreaves is a natural person.

RELATED PROCEEDINGS

In re Nuverra Environmental Solutions, Inc. (*Hargreaves* v. *Nuverra Environmental Solutions, Inc*.), No. 17-10949. United States Bankruptcy Court, District of Delaware. Confirmation order entered July 25, 2017.

In re Nuverra Environmental Solutions, Inc. (*Hargreaves* v. *Nuverra Environmental Solutions, Inc*.), Nos. 17-10949-KJC and 17-1024-RGA. United States District Court for the District of Delaware. Motion for stay pending appeal denied August 3, 2017; judgment entered August 21, 2018.

In re Nuverra Environmental Solutions, Inc., No. 18-3084. United States Court of Appeals for the Third Circuit. Judgment entered January 6, 2021, as amended February 2, 2021.

PARTIES TO THE PROCEEDING

Petitioner David Hargreaves was a creditor of respondent Nuverra Environmental Services, Inc., an objector to Nuverra's proposed Chapter 11 plan of reorganization in the Bankruptcy Court, and the appellant in the District Court and Third Circuit.

Respondents Nuverra Environmental Services, Inc.; Badlands Power Fuels, LLC (DE); Heckmann Water Resources Corporation; Heckmann Water Resources

PARTIES TO THE PROCEEDING—Continued

Corporation (CVR), Inc.; HEK Water Solutions, LLC; Heckmann Woods Cross, LLC; NES Water Solutions, LLC; Nuverra Total Solutions, LLC; Badlands Leasing, LLC; Badlands Power Fuels, LLC (ND); Ideal Oilfield Disposal, LLC; Landtech Enterprises, LLC; 1960 Well Services, LLC; and Appalachian Water Services, LLC, were the debtors in the underlying Chapter 11 proceeding in the Bankruptcy Court and the appellees in the District Court and Third Circuit.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit panel majority, and Judge Krause's concurrence in the judgment, as amended (Pet. App. 1–19), are published at *In re Nuverra Environmental Solutions, Inc.*, 834 F. App'x 729 (3d Cir. 2021). The District Court's opinion (Pet. App. 20–69) is published at *In re Nuverra Environmental Solutions, Inc.*, 590 B.R. 75 (D. Del. 2018). The Bankruptcy Court's oral ruling approving Nuverra's plan of reorganization, and that court's subsequent written opinion, are unreported but are reproduced in the Appendix at Pet. App. 162–175 and Pet. App. 84–161, respectively.

JURISDICTION

The Third Circuit entered judgment on January 6, 2021, and amended its judgment on February 2, 2021. That court denied petitioner's timely filed petition for en banc rehearing on February 4, 2021. Pet. App. 176–177. This petition is timely filed within 150 days after judgment. *See* Supreme Court Order dated

March 19, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the Constitution provides, in relevant part, that "[t]he judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States."

28 U.S.C. § 157(b)(1) provides, in relevant part, that "Bankruptcy judges may hear and determine all cases under title 11" that are referred to them, "subject to review under section 158 of this title."

28 U.S.C. § 158(a) provides, in relevant part, that "[t]he district courts of the United States shall have jurisdiction to hear appeals" from judgments and certain orders "of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title."

28 U.S.C. § 1291 provides, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. Legal Framework

1. Federal Jurisdiction and Abstention

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them," *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.)). Once jurisdiction has properly attached, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Ibid.* (quoting *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). Hence this Court's oft-repeated exhortation that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 194 (2012).

It follows that, except in cases where federal-court jurisdiction is truly lacking (*e.g.*, because the controversy has become moot in the Article III sense), the circumstances in which a federal court may properly abstain from exercising its jurisdiction are vanishingly rare. In fact, the *only* circumstances in which this Court has recognized the power of a federal court to decline its otherwise-proper jurisdiction have been ones where structural "principles of comity and federalism" strongly recommend it. *Quackenbush*, 517 U.S., at 723; *see Railroad Comm'n of Texas* v. *Pullman Co.*,

312 U.S. 496, 500–501 (1941) (allowing state courts to construe a statute before federal courts pass on its constitutionality); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 332–334 (1943) (abstention to avoid unnecessary interference with a state's conduct of its own affairs); *Younger* v. *Harris*, 401 U.S. 37, 53–54 (1971) (abstention from enjoining state criminal proceedings); *Colo. River*, 424 U.S., at 817–819 (abstention to avoid duplicating litigation already in state court).[1]

Moreover, although the Court has never formally declared the above categories of abstention to be a closed list, it has oft and recently refused to expand the circumstances in which federal courts may decline to exercise jurisdiction. *See, e.g.*, *Knick* v. *Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2177 & n.8, 2188 (2019) (overruling rule requiring exhaustion of state remedies for takings claims, over dissent citing *Pullman* abstention); *Sprint Commc'ns*, 571 U.S., at 77 (refusing to extend "exceptional" situations for *Younger* abstention).

The Court has been similarly skeptical of requests to allow the federal courts to refuse to adjudicate a suit on "prudential" grounds, repeatedly emphasizing that such discretionary control over the exercise of federal jurisdiction is in "tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually

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[1] *See generally Colo. River*, 424 U.S., at 813–817 (surveying and stressing narrowness of *Pullman*, *Burford*, and *Younger* abstention); 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 4241–4247 (3d ed.).

unflagging." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

In *Lexmark*, the Court confronted the question whether there is a "prudential" component to the federal standing requirement, which would enable courts to decline to hear cases that satisfy the requirements of Article III. *Id.*, at 125–127.

Writing for the Court, Justice Scalia answered that question with a resounding "no," explaining that once the Constitution's "irreducible constitutional minimum" had been met, the remaining questions concerning a claimant's eligibility for relief were merits-based issues of statutory interpretation, not quasi-jurisdictional "prudential" judgments. *Id.*, at 127–128; *cf. Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 167 (2014) (citing *Lexmark* and questioning the "continuing vitality of the prudential ripeness doctrine").[2]

Mata v. *Lynch*, 576 U.S. 143 (2015), was similar. There, the Board of Immigration Appeals denied as untimely a noncitizen's motion to reopen his case and rejected his request for equitable tolling of the deadline. *Id.*, at 146. On appeal, the Fifth Circuit held that it lacked jurisdiction to review the Board's

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[2] In *Lexmark*, the Court likewise disapproved the label "statutory standing" because it conflated merits questions ("the absence of a valid . . . cause of action") with jurisdictional ones ("*i.e.*, the court's statutory or constitutional *power* to adjudicate the case") (internal quotation marks omitted; emphasis in original). 572 U.S., at 128 n.4.

equitable-tolling determination. *Id.*, at 146–147. This Court reversed, holding that the resolution of the petitioner's claim for equitable relief went to the merits of the appeal, not the court's power to hear it:

> [T]he right course on appeal is to take jurisdiction over the case, explain why [the claimant is not entitled to equitable tolling], and affirm. . . . The jurisdictional question (whether the court has power to decide if tolling is proper) is of course distinct from the merits question (whether tolling is proper). . . . The Fifth Circuit thus retains jurisdiction even if [the] appeal lacks merit.
>
> And when a federal court has jurisdiction, it also has a "virtually unflagging obligation . . . to exercise" that authority. . . . Accordingly, the Court of Appeals should have asserted jurisdiction over [the] appeal and addressed the equitable tolling question.

Id., at 150 (citations omitted); *accord New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 358–359 (1989) (noting that although federal courts retain "discretion in determining whether to grant certain types of relief," they "lack the authority to abstain from the exercise of jurisdiction that has been conferred").

The upshot from all of these cases is that except in a handful of narrow, clearly defined categories of cases, federal courts must exercise their jurisdiction—and say what the law is—in the disputes that come before them.

2. "Equitable Mootness"

Despite these principles, in bankruptcy cases several courts of appeals have developed a new abstention doctrine called "equitable mootness" that is entirely unconnected to the federalism and comity concerns that animate all of the abstention doctrines approved by this Court.

Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1101–1195) allows a financially distressed debtor (or its creditors) to seek relief in the form of a judicially approved plan of reorganization. Typically, such plans specify how much property from the debtor's estate (if any) each of the debtor's creditors will receive as part of the reorganization. If the plan is approved, the end result is the discharge of many, if not most, of the debtor's pre-bankruptcy obligations.

District courts refer virtually all Chapter 11 bankruptcy proceedings to bankruptcy judges. *See* 28 U.S.C. § 157(a). The task of approving or disapproving a Chapter 11 reorganization plan, therefore, falls initially to a bankruptcy court. *Id.*, § 157(b)(2)(L). The district courts have jurisdiction to hear appeals from bankruptcy court decisions, 28 U.S.C. § 158; Fed. R. Bankr. P. 8001, and the regional circuits have jurisdiction to conduct further review, 28 U.S.C. § 1291; Fed. R. App. P. 3.[3] As numerous commentators have observed,

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[3] In both appellate courts, review of the bankruptcy court's decision (aside from its factual findings) is *de novo*—"without the slightest deference." *U.S. Bank Nat'l Ass'n*, 138 S. Ct., at 965–968.

that review is critically important to the integrity of the bankruptcy system—not only because of the Constitution's constraints on the authority of non-Article III judges, but also because Article III courts operate at a greater remove from the intense (and frequently pro-confirmation) pressures that bankruptcy judges face. *See, e.g.*, David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 443–445 (1982-1983) (discussing historical basis and need for independent judicial decisions in bankruptcy cases); Katelyn Knight, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253, 253–255, 276–279, 281 (2009) (stressing need for judiciary independent of political and social pressures, and bankruptcy judges' and parties' ability to manipulate).

The doctrine of "equitable mootness," however, operates to prevent Article III review of a bankruptcy court order confirming a reorganization plan. "Equitable mootness is a judicially-created doctrine of abstention that permits the dismissal of bankruptcy appeals where [(1)] confirmed plans have been substantially completed"—that is, where the debtor's assets have been distributed as provided for in the plan and the reorganized entity has commenced its operations—and (2) in the Article III courts' view, "reversal would prove inequitable or impracticable." *Drivetrain, LLC* v. *Kozel (Abengoa Bioenergy Biomass of Kan., LLC)*, 958 F.3d 949, 955 (10th Cir. 2020).

"Stated bluntly, equitable mootness negates appellate review of the confirmation order or the underlying plan, regardless of the problems therein or the merits

of the appellant's challenge." *In re City of Detroit, Mich.*, 838 F.3d 792, 798 (6th Cir. 2016). If a court decides that it would not offer any remedy, then it abstains from jurisdiction and dismisses the appeal—making no assessment of whether the bankruptcy plan was lawful and leaving the bankruptcy court's reorganization order unreviewed.

At least six Courts of Appeals—the First, Third, Fourth, Sixth, Tenth, and Eleventh Circuits—have precedentially applied the equitable mootness doctrine to dismiss bankruptcy appeals. *See In re Lopez-Munoz*, 983 F.3d 69 (1st Cir. 2020); *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc); *Mac Panel Co.* v. *Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002); *In re City of Detroit*, *supra*; *Drivetrain*, *supra*; *Bennett* v. *Jefferson Cty., Ala.*, 899 F.3d 1240, 1240, 1247 (11th Cir. 2018).

Two other Courts of Appeals—the Second and Fifth Circuits—have done so at least non-precedentially. *See In re Windstream Holdings, Inc.*, 838 F. App'x 634, 636 (2d Cir. 2021) ("Equitable mootness is a prudential doctrine under which a court may dismiss a bankruptcy appeal when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."); *Dropbox, Inc.* v. *Thru, Inc. (In re Thru, Inc.)*, 782 F. App'x 339, 340 (5th Cir. 2019) ("The doctrine authorizes an appellate court to decline review of an otherwise viable appeal of a Chapter 11 reorganization plan . . . when the reorganization has progressed too far for the requested relief practicably

to be granted." (internal quotation marks omitted)).[4] These are hardly isolated incidents: in the circuit courts alone, equitable mootness has stymied many dozen cases over the past fifteen years.[5]

Other segments of the federal bench, however, have made sharp and sustained criticisms of equitable-mootness abstention. For example, when the en banc Third Circuit endorsed the doctrine by a bare 7-6 majority, then-Judge Alito explained for the six dissenters that it "is unjustified and unjust" for courts to "refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief," when "any threat to the reorganization or to legitimate reliance interests could be taken into account in framing the . . . relief." *In re Continental Airlines*, 91 F.3d, at

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[4] In other opinions, the Second and Fourth Circuits have suggested that equitable mootness does not prevent a court from deciding the merits of a bankruptcy case. *See Deutsche Bank AG* v. *Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005) ("equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule"); *Behrmann* v. *Nat'l Heritage Found.*, 663 F.3d 704, 713–714 & n.3 (4th Cir. 2011) (same, quoting *Deutsche Bank*). But these courts continue to apply equitable mootness to abstain when they deem it prudent.

[5] For examples in the last 12 months alone, see *In re Financial Oversight & Management Board for Puerto Rico*, 989 F.3d 123 (1st Cir. 2021); *In re Financial Oversight & Management Board for Puerto Rico*, 987 F.3d 173 (1st Cir. 2021); *In re Windstream Holdings, Inc.*, 838 F. App'x 634 (2d Cir. 2021); *In re Lopez-Munoz*, 983 F.3d 69 (1st Cir. 2020); *Clark* v. *Council of Unit Owners of 100 Harborview Drive Condo.*, No. 19-2140, 2021 WL 2157604 (4th Cir. May 27, 2021)—and, of course, the decision below.

567, 573. He later elaborated that equitable mootness "places far too much power in the hands of bankruptcy judges" because it "can easily be used as a weapon to prevent any [Article III] review of bankruptcy court orders confirming reorganization plans." *Nordhoff Invs.* v. *Zenith Elec. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring).

Since then, other dissenters in the Courts of Appeals have continued urging reconsideration of "this legally ungrounded and practically unadministrable 'judge-made abstention doctrine,'" *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438, 439 (3d Cir. 2015) (Krause, J., concurring), criticizing it as "a derogation of our 'virtually unflagging obligation' to decide cases within our jurisdiction," *In re City of Detroit, Mich.*, 838 F.3d 792, 805–814 (6th Cir. 2016) (Moore, J., dissenting).

B. Factual and Procedural History

In this case, the courts below deployed equitable-mootness abstention to avoid ruling on the legality of a Chapter 11 reorganization practice known as "horizontal gifting." This practice has been criticized by commentators as "state-sanctioned bribery" and "court-sanctioned graft" because debtors and senior creditors can use it to incentivize the members of impaired classes to accede to a plan even though, like the plan at issue here, it is egregiously discriminatory in its treatment of certain classes. But equitable-mootness abstention makes it unreviewable by Article III courts in

most cases. So here: the lower courts declined to decide whether the practice was lawful because the plan had already been consummated.

Nuverra Environmental Solutions, Inc. is an oilfield logistics company.[6] On May 1, 2017, Nuverra filed a Chapter 11 bankruptcy petition. Pet. App. 3.[7] Nuverra's reorganization plan was unusual, however, in the way it discriminated between unsecured creditors. In 2018, Nuverra had issued a series of notes worth about $40 million pre-bankruptcy. Pet. App. 4. Petitioner David Hargreaves held notes of this kind, worth about $450,000. Pet. App. 4. But Nuverra's reorganization plan proposed to replace these notes with securities and cash totaling about five cents on the pre-bankruptcy dollar. Pet. App. 23.

By contrast, the plan proposed much more favorable treatment for Nuverra's other unsecured creditors. It created another group of claimants that included Nuverra's trade creditors, as well as anyone who had brought or could bring against Nuverra any "lawsuits involving employment, commercial, and environmental issues, other claims for injuries and damages, and various shareholder and class action litigation."

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[6] *See* Nuverra Environmental Solutions, Inc., Mar. 16, 2021 10-K at 5, https://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=115727019&type=HTML&symbol=NES&companyName=Nuverra+Environmental+Solutions+Inc.&formType=10-K&dateFiled=2021-03-16&CK=1403853 (last visited June 27, 2021).

[7] The petition was filed by Nuverra and a coterie of related entities, collectively referred to as "Nuverra."

JA2195–JA2197 (7/21/17 Hr'g Tr. 40:1–42:1).[8] The plan directed that all of these debts would be unimpaired by the bankruptcy—*i.e.*, that liquidated claims would be paid at 100 cents on the dollar, and unliquidated claims in ongoing or future litigation could be paid in full as if the bankruptcy had never occurred.

Usually, the Bankruptcy Code allows a reorganization plan to impair a class of debt in only two sets of circumstances. On the one hand, the class of impaired creditors may approve the plan by a two-thirds vote. 11 U.S.C. §§ 1126, 1129(a)(8). On the other hand, "the court may confirm . . . a 'cramdown' plan . . . impairing the interests of some non-consenting class," *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018), but only if the court finds that "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1).

Given the strongly disfavored treatment of Mr. Hargreaves's class under Nuverra's proposed plan, the holders of the 2018 Notes voted to reject it. Pet. App. 4. Mr. Hargreaves also individually filed an objection, explaining that the plan could not be confirmed over the class's objections because it discriminated against the class in violation of § 1129(b)(1) and misclassified them

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[8] 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.

by putting them in a separate class from Nuverra's other unsecured creditors. B.D.E. 290 at 2.[9]

In response to the discrimination objection, Nuverra argued that the discrimination was a permissible form of "horizontal gifting." Nuverra argued that, because its assets were insufficient to pay even its senior secured creditors, none of the unsecured creditors were entitled to *any* recovery. As a result, said Nuverra, any recovery offered to unsecured creditors was merely a "gift" from the secured creditors, and was not subject to § 1129's bar on unfair discrimination.

Mr. Hargreaves disagreed, pointing out that the Bankruptcy Code does not allow senior creditors to treat the debtor's assets as their personal slush fund. Instead, if a creditor agrees to accept less than it is entitled to, the leftover assets "remain[] in the estate for the benefit of other claim-holders"—and thus remain subject to all applicable legal rules governing reorganization plans. *Dish Network Corp.* v. *DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 99 (2d Cir. 2011).

As Mr. Hargreaves also explained, the validity of "horizontal gifting" is a question of critical importance to bankruptcy practice, being both unsettled and hotly disputed by practitioners and commentators alike. *See, e.g.*, Michael H. Strub, Jr., Jeffrey M. Reisner, *A Re-Examination of the Rules of Property Rights and Post-Petition Gifting in Bankruptcy*, 28 AM. BANKR.

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[9] Citations taking the form "B.D.E. ___" refer to entries on the docket of the Bankruptcy Court in this matter, in case number 17-10949 (Del. Bankr.).

INST. L. REV. 93, 134 (2020) ("In the end, though, the legality of gifting is currently uncertain, and the judicial authority is disjointed and inconsistent. It likely will remain so, unless the issue is clarified by legislation or by the Supreme Court."); *compare* Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, 38 No. 12 BLL-NL 1 ("Markell I"), at 1 (Dec. 2018) ("Gifting in reorganizations . . . is state-sanctioned bribery."), and *id.*, at 10 ("[Horizontal gifting] is court-sanctioned graft, in which senior creditors co-opt the powerful and carefully balanced reorganization system to their own ends. Ignoring the historic and textual requirement of unfair discrimination on false claims of dispensing 'gifts' distorts the system Congress crafted. It should be stopped."), and Ralph Brubaker, *Short Sales, Mortgagee Give-Ups, and the Debtor's Homestead Exemption: Taking Bankruptcy's Priority Rules Seriously*, 40 No. 11 BLL-NL 1 at 1 (Nov. 2020) ("*Bankruptcy Law Letter*'s Contributing Editors have followed [gifting] developments closely and have roundly and consistently condemned each and every permutation of priority perversion that prevails in Chapter 11."), *with* Jeffrey Davis, *The Supreme Court's* Jevic *Decision Regarding Structured Dismissals in Bankruptcy is Wrong. What's a Lawyer to Do?* 27 AM. BANKR. INST. L. REV. 161, 171 (2019) ("Bankruptcy practitioners have strongly defended gifting."), *and* Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's* Armstrong *Decision on Creative Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 AM. U. L. REV. 1345,

1349 (2006) (arguing that gifting should be encouraged as consistent with the Absolute Priority Rule and the Unfair Discrimination Prohibition).

The bankruptcy court overruled that objection and adopted Nuverra's horizontal-gifting rationale. Pet. App. 168–171. The bankruptcy court likewise rejected Mr. Hargreaves's misclassification argument, agreeing with Nuverra that "separate classification is necessary to maintain ongoing business relationships"—even though, as noted, the classes receiving 100 percent payment included not just trade creditors but also ongoing and still-inchoate litigation claims. Pet. App. 166. The Bankruptcy Court therefore entered an order confirming the Plan. Pet. App. 161.

Mr. Hargreaves then appealed the plan confirmation order, but Nuverra acted immediately—and successfully—to leverage the equitable mootness doctrine to avoid Article III review of the horizontal-gifting question. Even before the plan was confirmed, Nuverra had expressed its intent to consummate it—that is, to issue new securities in the reorganized, post-bankruptcy company—as soon as possible. D.D.E. 3, at 3, 8.[10]

Despite this, both the bankruptcy court[11] and the district court[12] declined to stay implementation of the plan pending appeal—an outcome that has become

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[10] 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.).

[11] Pet. App. 174.

[12] Pet. App. 82.

almost inevitable in plan-confirmation appeals. *See generally* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377 (2019). In this case, the District Court rested that denial, in part, on the theory that "[t]he possibility that an appeal may become [equitably] moot does not alone constitute irreparable harm for purposes of obtaining a stay." Pet. App. 81–82. Thus, while Mr. Hargreaves's appeal of the plan confirmation was still in its infancy, Nuverra consummated the reorganization, then sought to dismiss the appeal as equitably moot. D.E. 31.

In response to those arguments, Mr. Hargreaves explained that the courts would not have to unwind the reorganization in order to enter judgment on his single $450,000 claim—or, easier yet, to simply declare that his claim was unimpaired and (like all of the other unimpaired claims Nuverra had allowed for its potential litigation creditors) could proceed to litigation after the bankruptcy proceedings were over. But the district court rejected these arguments, abstained from deciding the case under the equitable-mootness doctrine, and dismissed the appeal. Pet. App. 70. In the alternative, the district court affirmed on the merits, upholding the practice of horizontal gifting. Pet. App. 70.

A divided panel of the Third Circuit affirmed on equitable-mootness grounds.[13] The panel majority, like

[13] In light of the Third Circuit's settled rule in favor of equitable mootness, Mr. Hargreaves did not argue to that court the wholesale invalidity of the equitable mootness doctrine. He did point out, however, that the equitable considerations informing a

the District Court, concluded that Mr. Hargreaves was ineligible for *any* relief because (1) the court could not unwind the plan without harming third parties; and (2) the "interim" relief he requested—payment of his $450,000 claim or permission to assert it against the reorganized Nuverra—would fail to afford equal treatment to other members of his class, in violation of Chapter 11's plan-confirmation standards. Accordingly, the panel affirmed the dismissal without addressing whether discriminatory horizontal gifting is legal.

Judge Krause dissented from the panel's equitable mootness holding, pointing out that the relief Mr. Hargreaves had requested—"individualized payment"—would neither require unwinding the reorganization nor harm any innocent third parties. Pet. App. 15. Instead, Judge Krause explained, the panel should have addressed the merits, including whether the Bankruptcy Code authorized the relief Mr. Hargreaves sought; whether "horizontal gifting" is exempt from an unfair-discrimination challenge; and whether the plan unlawfully discriminated between non-consenting creditors. Pet. App. 17. Judge Krause dissented from the panel's failure to reach and resolve those questions.[14]

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bankruptcy appellate court's remedial judgments should not be based on formalistic rules such as those endorsed by the panel majority. *See* Brief of Appellant David Hargreaves in 3d Cir. No. 18-3084, ECF Doc. No. 003113120868, at ECF Page # 56–63.

[14] Judge Krause stated, without elaboration, that she would rule in favor of Nuverra on those merits-related questions and thus "concur[red] only in the judgment." Pet. App. 18, 19.

The Court of Appeals then denied Mr. Hargreaves's timely petition for rehearing en banc. Pet. App. 176–177.

REASONS FOR GRANTING THE WRIT

The term "equitable mootness" is a misnomer—and a tragic one at that. As the Third Circuit recognized below, it has nothing whatsoever to do with mootness but is instead a judge-made rule of abstention, pursuant to "which an appellate court [may] dee[m] it prudent for practical reasons to forbear deciding an appeal" from a bankruptcy court's decision to confirm a plan of reorganization. Pet. App. 8 (cleaned up).

There is no foundation for this doctrine. No statute sanctions it. No structural principle of our constitutional system commends it. No decision of this Court approves it. Indeed, quite the opposite. Numerous decisions of this Court, from *Colorado River* to *Lexmark* to *Mata*, have hammered home the core judicial command that the federal courts have a "virtually unflagging" responsibility to exercise the jurisdiction conferred on them by the Constitution and the Congress of the United States—and that they may not eschew that jurisdiction merely because "prudence" so counsels.

The Third Circuit here, like many other courts before it in similar cases across the country, shrugged off that obligation in favor of a docket-pruning doctrine that turns on an appellate court's own judgment of prudence and practicality. This Court's review is

needed to end that jurisdictional abdication, which not only harms individual litigants but also impedes the courts' ability to resolve critical, disputed questions of bankruptcy law and artificially channels bankruptcy plans into forms that can easily be rushed to consummation so as to evade Article III review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS DISAPPROVING PRUDENTIAL REFUSAL OF FEDERAL JURISDICTION.

As a prudential abstention doctrine, equitable mootness cannot be squared with this Court's precedents insisting that federal courts exercise the jurisdiction conferred on them by Congress and Article III.

Instead, the Court has taken great care to emphasize "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River*, 424 U.S., at 817–818 (citing *England* v. *Med. Examiners*, 375 U.S. 411, 415 (1964); *McClellan* v. *Carland*, 271 U.S. 268, 281 (1910); *Cohens*, 19 U.S., at 404), and has underscored that abstention is "the exception, not the rule," and is reserved for circumstances involving "undue interference with state proceedings." *New Orleans Pub. Serv.*, 491 U.S., at 358–359 (rejecting exercise of *Burford* or *Younger* abstention). *See also Trump* v. *Vance*, 140 S. Ct. 2412, 2421 (2020) (acknowledging limitation on *Younger* abstention); *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1148

(2017) (reversing court of appeals' decision to abstain under *Pullman*).

In those rare cases where this Court *has* permitted the federal courts to abstain from hearing a case within their authority (*i.e.*, *Pullman*, *Burford*, *Younger*, and *Colorado River*, *see* pp. 3–4, *supra*), it has done so "out of deference to the paramount interests of another sovereign" and out of "concern [for] principles of comity and federalism"—a set of considerations wholly lacking in Chapter 11 bankruptcy cases. *Quackenbush*, 517 U.S., at 723. These traditional abstention doctrines thus operate as a sort of inter-system transfer that channels a dispute to the proper sovereign's courts. Equitable mootness, in contrast, consigns the challenger's lawsuit to oblivion. Nothing in the precedent or first principles of federal abstention doctrine supports such a result.

Formal abstention doctrine aside, the Court has also—and with equally metronomic consistency—rebuffed attempts to imbue the federal courts with the power to decline to decide cases on "prudential" or "discretionary" grounds. *See Lexmark*, 572 U.S., at 126 (recognizing that such a power would be in "tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" (internal quotation marks omitted)).

Indeed, the Court in *Colorado River* explained that "'[i]t was *never* a doctrine of equity that a federal court should exercise its judicial discretion to dismiss

a suit merely because a State court could entertain it.'" *Colo. River*, 424 U.S., at 813–814 (emphasis added) (quoting *Ala. Pub. Serv. Comm'n* v. *S. Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result)). If equity could "never" have supported purely discretionary abstention, even in cases where a parallel forum existed for resolving the parties' claims and where structural principles of federalism and comity favored deference to those parallel proceedings, it follows that a discretionary power to refuse jurisdiction is equally unavailable where the next stop for the challenger's claim is the proverbial dustbin rather than another courthouse.

These same principles clearly foreclose any attempt to abstain from exercising federal jurisdiction over bankruptcy appeals on grounds of "equitable mootness"—a doctrine with many parallels to the "prudential" jurisdictional escape hatches that the Court has tried repeatedly to close. Equitable mootness is animated not by textual constraints on jurisdiction, nor by the structural reality of a federal system of government, but rather by "prudential concerns which focus on whether it is reasonable to entertain the contentions of the parties challenging an order of the bankruptcy court." *Bennett* v. *Jefferson Cty., Ala.*, 899 F.3d 1240, 1247 (11th Cir. 2018); *see also In re Trib. Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015). These judgments of wisdom and prudence belong to *Congress*, not the courts—a conclusion that follows inexorably from this Court's recognition "that Congress, and not the Judiciary, defines the scope of federal jurisdiction within

the constitutionally permissible bounds." *New Orleans Pub. Serv.*, 491 U.S., at 359.

And Congress has said nothing to authorize abstention in this context. To the contrary, Congress has affirmatively directed the district courts and courts of appeals to review bankruptcy courts' plan-confirmation decisions. *See* 28 U.S.C. § 157(b)(1), (2)(L) ("Bankruptcy judges . . . may enter appropriate orders and judgments, subject to review under section 158 of this title" in core proceedings including "confirmations of plans"); *id.*, § 158(a) (district courts' jurisdiction to hear appeals); *id.*, § 1291 (courts of appeals' jurisdiction of appeals from district court decisions). Neither statute contains any exception for equitable mootness.

The absence of such exceptions in the appellate-jurisdiction statutes is reinforced by their presence in the original-jurisdiction statute. In 28 U.S.C. § 1334(c), which deals with the district courts' *original* jurisdiction in bankruptcy cases, Congress expressly allowed abstention "in the interest of comity with state Courts," or out of "respect for State law," or "in the interest of justice." *Id.*, § 1334(c)(1). Sections 158(a) and 1292 create no similar carveouts for appellate bankruptcy jurisdiction; they leave no room for equitable-mootness abstention. *See Comm'r* v. *Asphalt Prod. Co.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify

disregard of what Congress has plainly and intentionally provided.").[15]

Equitable mootness therefore is incompatible both with Congress's grant of bankruptcy appellate jurisdiction and with long-established principles governing when courts may abstain from exercising jurisdiction. Simply put, equitable mootness "is a derelict in the stream of the law," which only this Court can remove. *Flood* v. *Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting). Review should be granted in order to do so.

II. EQUITABLE MOOTNESS DISTORTS AND IMPEDES BANKRUPTCY LAW AND PRACTICE.

As this Court has repeatedly stressed in recent years, limiting jurisdictional rulings to their proper boundaries is essential to the orderly development and administration of the law. Equitable-mootness abstention illustrates that reality: by providing a spurious jurisdictional off-ramp, it has stunted bankruptcy law,

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[15] In addition to being textually limited to original jurisdiction, § 1334 cannot possibly ground the equitable mootness doctrine because it expressly provides that "[a]ny decision to abstain or not to abstain" by a district court "is not reviewable by appeal or otherwise." *Id.*, § 1334(d). The courts of appeals, however, consistently "have not only reviewed [equitable mootness] decisions, but have often reversed them." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 442 (3d Cir. 2015) (Krause, J., concurring). Accordingly, few if any courts have tried to justify equitable mootness with reference to § 1334.

biased the remedial analysis in individual cases, and distorted the structure of reorganization plans.

A. Equitable Mootness Impedes the Development of Bankruptcy Law.

First, equitable mootness has harmed the development of bankruptcy law by leading many appeals to be dismissed on "jurisdictional" grounds rather than decided on the merits. In an ordinary case, a court normally decides first whether a claimant has suffered a legal wrong—and if so, the court then proceeds to determine what the remedy might be. The possibility that equitable considerations may place limits on the ultimate remedy—even severe ones—does not affect the court's power to decide the merits. *See Continental Airlines*, 91 F.3d, at 571 (Alito, J., dissenting) ("I do not dispute the desirability of preserving the Continental reorganization, but to my mind this objective implicates a question of remedy, to be decided after the merits of the Trustees' arguments are addressed, and not a threshold question of 'mootness.' ").

Equitable mootness reverses that order of operations. It tells the courts to first ask whether offering a remedy would be "equitable," and if not, to abstain from exercising jurisdiction at all. The result, as Judge Krause lamented below (Pet. App.16), is "to short-circuit the merits analysis": the courts decline to decide whether a reorganization plan violated the law by saying, with a shrug, that they couldn't equitably fix the problem anyway. This precludes Article III courts from

reaching the merits of important, recurring issues of bankruptcy law.[16]

As Judge Krause explained, "this case is illustrative" of that problem. Pet. App. 16. For example, one of the central issues in Mr. Hargreaves's appeal is a difficult and serious one: whether Chapter 11 and this "Court's decision in *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973 (2017), foreclose preferential treatment of a sub-class [of creditors] through horizontal gifting[.]" Pet. App. 17. Much of the commentary on that practice is not complimentary, describing it as "state-sanctioned bribery," "court-sanctioned graft," and a "distort[ion of] the system Congress crafted." Markell I, at 1, 10. Yet the Third Circuit "leapfrogged" that and the other merits issues presented by Mr. Hargreaves's appeal. *See* Pet. App. 17 (Krause, J., concurring in the judgment) (listing issues).

Indeed, for some legal questions, equitable mootness may create a nearly insurmountable barrier to Article III review. That is the situation with the horizontal-gifting question here. As Judge Krause noted, the majority below suggested that "unfair discrimination claims—like the one at issue here—must be brought as a class," not by any individual creditor who is part of the class, and that "awarding class-wide relief generally requires us to scramble a [reorganization] plan." Pet. App. 17 (Krause, J., concurring

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[16] *See, e.g.*, Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377 (2019) ("One by-product of equitable mootness is that the development and evolution of precedent is stunted. . . .").

in the judgment). If that is so, she warned, then no remedy will ever be available for any unfair-discrimination challenge to a consummated plan, and "the invocation of equitable mootness may prevent us from ever weighing in on these questions" concerning the propriety of horizontal gifting. *Ibid.*

The problems with abstention in this case go even beyond the horizontal gifting issue. As Judge Krause also noted, the panel majority's abstention prevented its review of other merits issues concerning the proper construction of the Bankruptcy Code, including whether "the unfair discrimination test [is] focused on a plan's results or the process that produced those results," and "the limits on a plan's ability to divide creditors into classes." Pet. App. 17. By "leapfrogging these issues" as well, rather than deciding them, *ibid.*, the Third Circuit has left bankruptcy courts just as unmoored as they were the day Nuverra filed its Chapter 11 petition. And in case after case, equitable-mootness abstention works similarly to deprive the lower courts of guidance. *See* p. 10 & n.5, *supra*.

Nor can the distortionary effects of equitable mootness be ameliorated by seeking a stay pending appeal of a confirmation order to the district court. For one thing, courts have adopted the all-too-convenient rule that even the near certainty of an equitable mootness dismissal if a plan is consummated does not count as "irreparable harm" sufficient to support a stay. Pet. App. 81. And, because most plan objectors' claims ultimately reduce to a complaint about *money*, the courts have proved similarly unwilling to treat such claims as

"irreparable harm"—even though, as this case aptly shows, once the plan is consummated there is virtually no chance of any monetary recovery. Pet. App. 81 n.5.

The justifications for equitable mootness are further undercut by the fact that the problems the doctrine purports to address—the need for certainty and a desire to protect innocent third parties—are hardly unique to bankruptcy law. To the contrary, there are many other contexts in which parties sometimes argue that reliance interests counsel against a remedy that would unwind a completed transaction: think, for example, of antitrust challenges to corporate mergers, or any claim involving property that has since been transferred to an innocent third party. Yet in *none* of those other legal genres have the courts developed a tradition of eschewing the merits analysis and denying relief based purely on remedial considerations. *See In re Res. Tech. Corp.*, 430 F.3d 884, 886–887 (7th Cir. 2005) (Easterbrook, J.) ("Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations."); *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004) (Easterbrook, J.) ("Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization." (citation omitted)).

Instead, courts normally decide the merits of the claims first, then tailor any relief as appropriate—just as Justice Alito argued in *Continental Airlines* that the courts should do when hearing plan-confirmation appeals. *See* 91 F.3d, at 567, 573 (Alito, J., dissenting). Only in the bankruptcy field, where the remedial analysis has taken on a spurious jurisdictional flavor, has the opposite approach become common. There is no warrant for this anomaly in the law, and the Court should grant review in order to eliminate it.

B. Equitable Mootness Leads to Mistaken Remedial Rulings.

Even considered by itself, this stunting of the development of bankruptcy law warrants this Court's review and correction. But if that were not enough, it is easy to see how the equitable mootness analysis could also lead to the wrong outcome in many cases.

Under the ordinary sequence of decisionmaking, a court considers the equities of offering a remedy *after* it has already decided that the claimant has suffered a legal wrong. The existence of that wrong naturally gives weight to the need to offer some remedy, even if it must be tempered or limited by equitable considerations. *Cf. Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021) (holding that the availability of *any* potential relief—even nominal damages—is enough to preclude a finding of (constitutional) mootness).

The equitable mootness doctrine, by contrast, gives a court "jurisdictional" reasons to deny the remedy

first, without the constraint of having concluded that the party who is being denied a remedy has suffered a legal wrong. In theory, the court could assume that it had already decided the claimant should win on the merits. But in practice, it will often be difficult to make that mental leap in a discretionary context like this one, and the need for a remedy simply will not seem as sharp as it would after a merits decision.

Again, this case serves to illustrate. The reorganization plan here left Petitioner with only 5% of his substantial investment, while offering most other unsecured creditors a 100% recovery. If Petitioner is right and the Bankruptcy Code prohibits using horizontal gifting to circumvent the non-discrimination rules, then this is egregiously unlawful treatment. If the lower courts had decided that merits question first and agreed with Petitioner, the need to offer *some* measure of relief on his claim would have taken on a very different character than it did in the antiseptic analysis performed by the Third Circuit majority. (That is especially true because, although Petitioner's $450,000 injury is substantial for Petitioner himself, it is a small amount in the context of the entire bankruptcy.)

By contrast, the equitable mootness doctrine caused the remedial question to arise during an abstention inquiry, before the merits were considered. That very different procedural setting drained much of the equitable force from Petitioner's injury. Restoring the proper order of operations would correct that problem, both in this and in many other bankruptcy appeals.

C. Equitable Mootness Creates Artificial Incentives for Easy-to-Consummate Reorganization Plans.

Finally, the "remedy first" approach used by the Third Circuit and other courts has a distortionary effect on the plan-creation process itself. Because plan proponents understand that substantial consummation will prevent appellate review, they structure their plans to be quickly consummated and to involve transactions (*e.g.*, issuance of stock in the reorganized entity) that a reviewing court would find it difficult—or at least burdensome—to unwind.

The net effect is that the plan structure is determined in substantial part not by the merits of the case or the needs of any party, but by a strategic desire to avoid appellate review of whether the reorganization is lawful.[17] Critics have noted that this "promotes

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[17] *See, e.g.*, Shana A. Elberg, Any Van Gelder, Jason M. Liberi, *Equitable Mootness Doctrine Persists in Bankruptcy Appeals*, Sept. 19, 2017, https://www.skadden.com/insights/publications/2017/09/insights-quarterly-september/equitable-mootness-doctrine-persists (providing roadmap of actions that plan proponents should take in order to be best positioned to invoke equitable mootness); David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine?*, 25 No. 4 J. BANKR. L. & PRAC. NL Art. 2, Aug. 2016 ("Quick consummation of chapter 11 plans is often designed to impair an objector's practical ability to unwind a plan on appeal."); Lenard Parkins, et al., *Equitable Mootness: Will Surgery Kill the Patient*, 19 No. 7 AM. BANKR. INST. J., Sept. 2010 (describing strategies for "making a confirmation order as 'appeal-proof' as possible"); Chad Shokrollahzadeh, *Equitable Mootness and Its Discontents: The Life of the Equitable Mootness Doctrine in the Third Circuit After* In re One2one Communications L.L.C.

gamesmanship," Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269, 291 (2018), and "encourage[s] the hasty confirmation of fragile plans of dubious legality," Chad Shokrollahzadeh, *Equitable Mootness and Its Discontents: The Life of the Equitable Mootness Doctrine in the Third Circuit after* In re One2One Communications L.L.C. *and* In re Tribune Media Co., 18 DUQ. BUS. L.J. 129, 151–152 (2016). But the practice will persist until and unless this Court eliminates the distortionary effect that equitable mootness injects into the plan-confirmation process.

* * *

The Court has labored long and hard in recent years to give clear definitions to—and place clear limits on—concepts like "jurisdiction" and "abstention." Equitable-mootness abstention threatens to erode those efforts and reintroduce the old confusion to bankruptcy appeals. The Court should not permit that.

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and In re Tribune Media Co., 18 DUQ. BUS. L.J. 129, 152 (2016) ("[W]hile the doctrine of equitable mootness may encourage investors to deal with a financially distressed company without the fear of an appellate court 'unraveling the plan,' it may also encourage the hasty confirmation of fragile plans of dubious legality. Most crucially, proponents of reorganization plans may attempt to 'gerrymander' an affirmative vote by placing similar claims into different classes." (footnote omitted)).

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

MARK D. TATICCHI
FAEGRE DRINKER BIDDLE & REATH LLP
1500 K Street NW
Suite 1100
Washington, DC 20001

CATHERINE M. MASTERS
FAEGRE DRINKER BIDDLE & REATH LLP
311 S. Wacker Drive
Suite 4300
Chicago, IL 60606

JAMES H. MILLAR
CLAY J. PIERCE
FAEGRE DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas, 41st Floor
New York, NY 10036

AARON D. VAN OORT
Counsel of Record
NICHOLAS J. NELSON
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402
(612) 766-7000
aaron.vanoort@faegredrinker.com

PATRICK A. JACKSON
FAEGRE DRINKER BIDDLE & REATH LLP
222 Delaware Avenue
Suite 1410
Wilmington, DE 19801

Counsel for Petitioner

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