No. 21-17

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

REPLY BRIEF OF PETITIONER IN SUPPORT OF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

ARGUMENT

I. THE TIME FOR THIS COURT'S REVIEW OF EQUITABLE MOOTNESS IS NOW.

As the Petition explained, the lower courts frequently abstain from deciding bankruptcy appeals under the doctrine of "equitable mootness"—a practice that conflicts with this Court's repeated mandate that the federal courts exercise the jurisdiction conferred on them by Congress.

The Brief in Opposition confirms that the conflict with this Court's decisions is fully developed. Indeed, respondents contend that *all* the courts of appeals that hear bankruptcy cases have adopted some version of equitable mootness. BIO 21–23. Moreover, although dissenting and concurring opinions have criticized the doctrine for 20 years, there is no sign of any *en banc* court of appeals overturning it. Simply put, there is no reason for this Court to wait any longer to address the doctrine's validity.

Instead, the most that can be hoped for going forward is a case in which equitable mootness prevents a court of appeals from reaching a significant undecided question of bankruptcy law, and in which a dissenting or concurring opinion criticizes the lower courts' continued adherence to the doctrine—precisely as happened here: the Third Circuit majority refused to address the merits of petitioner's argument that "horizontal gifting"[1] violates the Bankruptcy Code's requirement of

[1] Broadly speaking, "horizontal gifting" is the practice of allowing senior creditors to collude with the debtor to "give" some of the recovery those creditors could otherwise demand to one or more classes of more junior creditors, in order to secure some

equal treatment of similarly situated creditors. It did so expressly because of equitable mootness, and Judge Krause directly criticized that doctrine in her separate opinion. This case, in other words, is an ideal vehicle for addressing the foundational validity of equitable-mootness abstention.

A. Forfeiture Presents No Vehicle Problem.

It is specious for respondents to argue that the discretionary doctrine of forfeiture would bar the Court from using this ideal vehicle to review the equitable-mootness doctrine.

Respondents contend that Mr. Hargreaves should not be allowed to argue the invalidity of equitable mootness before this Court without having done so before the Third Circuit panel. BIO 6, 13–16. But this Court has frequently recognized that its settled "practice permits review of an issue not pressed [in the court of appeals] as long as it has been passed upon." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *accord, e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). This case fits that mold: the panel below followed circuit precedent and applied equitable mootness, while Judge Krause objected to the doctrine in

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benefit (*e.g.*, a vote in favor of the reorganization plan) from those junior creditors—and thereby further strengthen the plan sponsors' ability to steamroll any dissenting creditors during the plan-approval process. See generally Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, 38 No. 12 BLL-NL 1 (Dec. 2018).

her separate opinion. The issue this Court will review was directly passed on by the Third Circuit panel.

It would have been pointless, moreover, for petitioner to ask the panel to reject the equitable-mootness doctrine because the panel was bound by Third Circuit precedent to apply it. Petitioner raised in the Third Circuit the issues that that court had authority to address, and it is raising in this Court the issue that this Court has authority to address. *Cf. Carr* v. *Saul*, 141 S. Ct. 1352, 1361 (2021) (in the administrative-law context: "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested. Such a vain exercise will rarely protect administrative agency authority or promote judicial efficiency" (cleaned up)).

Finally, as respondents note, the "chief" reason for observing forfeiture rules at the certiorari stage "is the Court's need for a properly developed record on appeal." BIO 14. Here, there is no shortcoming in the record, and respondents do not even attempt to identify one. The multiple opinions of the panel fully flesh out the issue. Nor is it foreseeable that any future court of appeals opinion will address the issue at any greater length, since, as respondents emphasize, *all* panels in *all* circuits are bound by precedent to apply the doctrine.[2]

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[2] The Eighth Circuit appears to be the last to have fallen in line, having done so only in August 2021. See *FishDish, LLP* v. *VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880, 884 (8th Cir. 2021) (endorsing equitable mootness but expressing reservations based on the fact that "invoking this doctrine often results in 'the refusal of the Article III courts to

B. Respondents' Mootness Argument Is Not Even Colorable.

Respondents fall back on an implausible contention that the case is moot in the genuine, constitutional sense. That is plainly wrong. Mootness occurs only when some development causes the parties to lose any "concrete interest, however small, in the outcome of the litigation," such that "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 161 (2016). Nothing remotely like that has happened here. The concrete interest Mr. Hargreaves has is in recovering money from Nuverra. He continues to claim he is owed that money, and Nuverra continues not to pay it. As the Court has noted, "nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (citation omitted). That is what Mr. Hargreaves is demanding.

Stripped of the inapt "constitutional mootness" label, respondents' real argument seems to be that the Third Circuit did not dismiss Mr. Hargreaves's appeal under the equitable-mootness doctrine but, instead, made a merits determination that the "individual payout" remedy he seeks is not available under the Bankruptcy Code. See BIO 5–6, 18.[3] Thus, according to

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entertain a live appeal over which they indisputably possess statutory jurisdiction' " (quoting *In re Cont'l Airlines*, 91 F.3d 553, 571 (3d Cir. 1996) (Alito, J., dissenting))).

[3] Respondents' ultimate goal appears to be the creation of a classic heads-I-win-tails-you-lose scenario: an individual creditor

respondents, anything the courts say about equitable mootness in this case is a mere "advisory proclamation." BIO 17–18.

Contrary to respondents' characterization, the Court of Appeals expressly "conclude[d] that the District Court correctly determined that Hargreaves's appeal is equitably moot." Pet. App. 2–3; *id.*, at 14. Indeed, its entire opinion was addressed to a single question: was Mr. Hargreaves's appeal equitably moot? See Pet. App. 8–9. In answering that question, the court concluded that ordering Nuverra to pay Mr. Hargreaves would require ordering it to pay other members of his class of creditors as well. Pet. App. 14.[4] The Third Circuit did not hold that this relief would require revoking the reorganization plan. Compare BIO 4–5, 17. Nor did it say that Mr. Hargreaves had forfeited or waived it. See Pet. App. 14. Instead, the panel majority held that it believed ordering such relief "would fatally scramble

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like Mr. Hargreaves can never seek appellate review of an unfair discrimination ruling because the Code prohibits it, and a broader class can never seek review of such a ruling because a decision ordering relief to the entire objecting class would fatally scramble the plan—and therefore be equitably moot. See Pet. App. 17 (opinion of Judge Krause warning of this problem).

[4] Even though Mr. Hargreaves argued (and continues to maintain) that the courts can order payment to him without also ordering it to other members of his class of creditors who did not appeal the confirmation order, the panel considered both individual and classwide redress—as it was required to do under Third Circuit law. See *Tribune Media Co.* v. *Aurelius Capital Mgmt., L.P. (In re Tribune Media Co.)*, 799 F.3d 272, 278 (3d Cir. 2015) (court facing an equitable mootness challenge must "fashion whatever relief is practicable").

the plan," and so it declared the appeal to be equitably moot. *Ibid.*

Accordingly, if this Court grants review, vacates the decision below, and remands for a determination of the merits, Mr. Hargreaves will be able to seek the relief that the panel majority rejected as barred by its equitable-mootness precedents. See Pet. App. 14.

This case is therefore not moot, and the question presented is ripe for this Court's review.

II. REVIEW IS WARRANTED, NOT DUE TO A CIRCUIT SPLIT, BUT BECAUSE OF THE PROFOUND CONFLICT BETWEEN EQUITABLE MOOTNESS AND THIS COURT'S PRECEDENTS.

Respondents raise two arguments why the question presented does not warrant certiorari: (1) there is no split in the circuits on the validity of equitable mootness, BIO 19–24; and (2) equitable mootness is, in respondents' view, "consistent with this Court's cases," BIO 28–31. Neither argument holds water.

First, the certworthiness of Mr. Hargreaves's Petition does not rest on the existence of a circuit split but rather on the clear and palpable conflict between the lower-court decisions embracing equitable mootness and this Court's precedents on federal jurisdiction and abstention. Pet. 20–24; see also Pet. 3–11. Thus, although respondents are correct that every circuit to consider the question has held that Article III courts

can sometimes abstain from hearing live bankruptcy appeals on equitable-mootness grounds,[5] that fact only *strengthens* the need for certiorari, since the chance of a self-correction has by now diminished to the point of nonexistence. Review in this Court is the only feasible recourse that remains.

Moreover, "the doctrine's widespread acceptance, standing alone, does not establish its validity. After all, the system of bankruptcy adjudication struck down in *Stern* [v. *Marshall*, 564 U.S. 462 (2011),] had been unanimously upheld by district courts and courts of appeals." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 449 (3d Cir. 2015) (Krause, J., concurring).

Second, respondents' argument that equitable mootness "is consistent with this Court's cases," BIO 28, is flatly wrong and rests on a mischaracterization of the doctrine's contours and application in the lower courts.

Respondents argue that the lower courts are not, in fact, applying an abstention doctrine when they declare a case to be equitably moot, but are, instead, simply undertaking a remedy-focused merits analysis. BIO 28 ("the equitable mootness doctrine is, in fact, entirely consistent with this Court's cases on abstention,

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[5] While the circuits agree that the doctrine exists, the lack of any principled basis for it has generated considerable confusion in the courts. As the amici bankruptcy professors point out (Br. at 15–17), the courts of appeals diverge widely about *when* equitable-mootness abstention is proper, *how* courts should decide whether a particular case is equitably moot, and even *who* bears the burden of proof on the equitable-mootness inquiry.

jurisdiction, and standing"); BIO 30 ("It, therefore, is well settled that the imposition of an equitable remedy [in a bankruptcy case] must not itself work an inequity" (cleaned up)).

But even a cursory review of the circuits' equitable-mootness decisions belies that description. As the Petition explained, the courts of appeals describe equitable mootness as "a judicially-created doctrine of abstention," *Drivetrain, LLC* v. *Kozel (Abengoa Bioenergy Biomass of Kan., LLC)*, 958 F.3d 949, 955 (10th Cir. 2020), and "a judge-made abstention doctrine," *In re Semcrude, LP*, 728 F.3d 314, 317 (3d Cir. 2013); *Harkey* v. *Grobstein (In re Point Ctr. Fin., Inc.)*, 957 F.3d 990, 1002 (9th Cir. 2020), that "allows courts to abstain from appeals," *New Indus., Inc.* v. *Byman (In re Sneed Shipbuilding, Inc.)*, 916 F.3d 405, 408 (5th Cir. 2019).

The lower courts' judgments match their descriptions: when they find an appeal equitably moot, they do not *affirm* the bankruptcy court's confirmation order but rather *dismiss* the appeal. See, *e.g.*, *In re City of Detroit*, 838 F.3d 792, 795 (6th Cir. 2016); *In re Villaje del Rio, Ltd.*, 283 F. App'x 263, 265 (5th Cir. 2008) (when "equitable mootness exists," the "appeal must be dismissed"). That pattern held true here. The District Court, "ruling the appeal equitably moot, dismissed it," and the Third Circuit affirmed that dismissal. Pet. App. 6, 14.

This refusal to exercise jurisdiction is exactly like the conduct this Court has repeatedly condemned. See *Mata* v. *Lynch*, 576 U.S. 143, 150 (2015) (reviewing

court should have resolved the case by deciding the merits of the equitable issue, rather than refusing jurisdiction); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125–127 (2014) (impermissible for court to decline to entertain appeal for "prudential" reasons); *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 358–359 (1989) (court's "discretion in determining whether to grant certain types of relief" did not give it "authority to abstain from the exercise of jurisdiction that has been conferred").[6]

In short, by refusing to acknowledge—much less defend—the doctrine of equitable mootness *as it actually exists*, respondents all but concede its incompatibility with this Court's precedents, see Pet. 3–6, and thus confirm the need for this Court's review.

III. EQUITABLE MOOTNESS DISTORTS BANKRUPTCY LAW AND PRACTICE.

As just explained, the parties agree that equitable mootness cannot stand as a jurisdictional rule. They disagree, if at all, only about whether and how the doctrine can be reformed into a merits inquiry in order to remain viable. As this Court has frequently recognized,

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[6] Respondents also argue that equitable mootness cannot be an abstention doctrine because the federalism concerns that animate the recognized abstention doctrines are absent here. BIO 28. That is exactly backwards. As shown above, the federal courts ***do*** treat equitable mootness as an abstention doctrine; the absence of any federalism concerns in Chapter 11 cases merely shows that it is an illegitimate one. See Pet. 3–11, 20–24.

the distinction between jurisdiction and merits manifestly matters.

For one thing, courts and counsel alike are well-trained to address jurisdictional objections before addressing the merits of an appeal. Therefore, as long as courts persist in framing equitable mootness in jurisdictional terms, the doctrine will continue to impair the development of bankruptcy law, see Brief for Professors of Bankruptcy Law as *Amici Curiae* 7–15, foreclose the meaningful Article III review of bankruptcy court decisions that Congress prescribed, *id.*, at 3–7, hobble the development and predictability of bankruptcy law, *id.*, at 7–13, and invite gamesmanship that distorts bankruptcy outcomes, *id.*, at 13–15.

Respondents offer no persuasive response. They protest that equitable mootness "does not inhibit development of the law," BIO 25, but the only cases they can muster for that proposition are decisions that developed *the law of equitable mootness*.[7] And they say almost nothing in response to the arguments raised both in the Petition (at 24–32) and the Law Professors' *amicus* brief (at 7–15) concerning the myriad ways in which equitable mootness at best stymies the development of the law and at worst has been weaponized to

[7] Respondents seem to believe that because (in their words) "equitable mootness jurisprudence" has been "honed and narrowed" in various ways over time, BIO 25, review of the doctrine is not warranted. But none of that "honing" and "narrowing" has provided a satisfactory statutory (or other doctrinal) basis for equitable mootness, and it is telling that respondents themselves do not even attempt to offer one.

preclude appellate review of plans of questionable legality.

Respondents also observe in passing that a court *may* consider remedy-focused issues before dismissing an appeal as equitably moot. BIO 27. But that is little comfort. As Judge Krause observed here, such an approach still leaves "other merits questions" undecided. Pet. App. 16, 17. And as the Petition explains, the remedial inquiry itself is distorted when it is conducted in isolation, without considering whether a legal wrong has occurred. Pet. 29–30. As a result, equitable mootness relegates "essential attributes of judicial power" to non-Article-III bankruptcy judges rather than "retain[ing such power] in the Art. III court." *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co*., 458 U.S. 50, 81 (1982).

Finally, it is no answer to suggest (as respondents do, BIO 27) that an objector may seek a stay of confirmation to preserve review. As the Petition explains (at 27–28), the lower courts routinely hold that the risk of equitable mootness cannot support a stay, especially when (as is almost always the case) the objector seeks only monetary relief. Against that backdrop, and given the deferential standard of review that applies to appeals of stay denials, respondents' suggestion that parties in Mr. Hargreaves's position could find ready vindication on appeal from such denials, see BIO 27, is strained, to say the least. In any event, it makes no doctrinal sense to say that whether review of a substantially consummated plan is equitably moot

depends on whether the objector made an *unsuccessful* attempt to seek a stay.

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

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

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