Docket No. _____

In the
Supreme Court of the United States

GLM DFW, Inc., *Petitioner,*

v.

Windstream Holdings, Inc., *Respondent*.

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

This case concerns the dismissal of bankruptcy appeals as equitably moot without evaluating the merits of the appeals.

Early in the Windstream bankruptcy case, the bankruptcy court authorized Windstream to pay $80 million to so-called "critical vendors," whose unsecured claims were otherwise of the same priority as GLM's claim. The bankruptcy court permitted Windstream to determine which creditors were "critical," thus delegating its core judicial fact-finding function; it permitted the process to be secret such that Windstream did not have to publicly disclose who was being paid, thus violating the core bankruptcy principle of transparency; and it permitted the payments without requiring that Windstream satisfy strict elements governing criticality, thus violating the core bankruptcy principle of equality. In the end, the bankruptcy court allowed Windstream to pay these chosen creditors 100% of their prepetition claims, while most other creditors, like GLM, received nothing, not even a penny. The Second Circuit dismissed GLM's appeal as equitably moot.

Accordingly, the questions presented are:

1. Whether the doctrine of equitable mootness is a valid doctrine that can be applied to deny appellate review of bankruptcy court orders that are not expressly mooted by statute and that do not directly involve a challenge to a confirmed plan and, if so, what elements or factors govern the doctrine?

2. If the doctrine of equitable mootness is a valid doctrine, which party bears the burden of proof?

3. If this appeal is not equitably moot, whether the bankruptcy court erred in approving the critical vendor payments by impermissibly delegating its essential judicial function in permitting Windstream to determine which vendors were critical, by ordering that the identity of the critical vendors be secret, and by failing to specify strict elements that would govern the inquiry?

PARTIES TO PROCEEDING

The parties to the judgment under review are the following:

GLM DFW, Inc., a Texas corporation.

Windstream Holdings, Inc. and its subsidiary entities.

CORPORATE DISCLOSURE STATEMENT

Petitioner GLM DFW, Inc. is owned by Mary Galvan, of Dallas, Texas.

RELATED PROCEEDINGS

GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), No. 20-1275-bk (2d. Cir.).

GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), No. 19-CV-4854 (CS) (S.D.N.Y.).

In re Windstream Holdings, Inc. et. al., 19-223212 (RDD) (Bankr. S.D.N.Y.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

OPINIONS BELOW

This Petition involves a dismissal for equitable mootness of GLM's appeal by the United States Court of Appeals for the Second Circuit. That dismissal is not published but is available at:

https://www.ca2.uscourts.gov/decisions/isysquery/f60461d2-d713-49e6-998c-2dbeea34b4da/1/doc/20-1275_so.pdf

GLM's appeal was an appeal of an opinion of the United States District Court for the Southern District of New York, by which the District Court affirmed the United States Bankruptcy Court for the Southern District of New York. The District Court's opinion is published at *GLM DFW, Inc. v. Windstream Holdings Inc. (In re Windstream Holdings, Inc.)*, 614 B.R. 441 (S.D.N.Y. 2020).

The underlying order of the United States Bankruptcy Court for the Southern District of New York is not published and does not contain a memorandum opinion or findings of fact and conclusions of law.

All the foregoing opinions and orders have been reproduced in the appendix to this petition.

JURISDICTION

The United States Bankruptcy Court for the Southern District of New York had bankruptcy jurisdiction to enter a final order, as conferred on the District Court and referred to the Bankruptcy Court, under 28 U.S.C. §§ 157(b)(2) and 1334.

The United States District Court for the Southern District of New York had jurisdiction over the appeal of the Bankruptcy Court's order under 28 U.S.C. § 158(a)(1).

The United States Court of Appeals for the Second Circuit had jurisdiction to decide the appeal below under 28 U.S.C. § 158(d)(1).

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Second Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. Art. III § 1.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . .
>
> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. Art. III § 2.

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section [final bankruptcy court and district court orders].

28 U.S.C. § 158(d)(1).

STATEMENT OF THE CASE

I. The Parties.

Windstream Holdings, Inc. and its affiliates and subsidiaries ("Windstream") provide network and communication services across the country. Despite being based in Little Rock, Arkansas, Windstream filed a Chapter 11 bankruptcy case in the White Plains Division of the United States Bankruptcy Court for the Southern District of New York, on February 25, 2019.

GLM DFW, Inc. ("GLM") provided waste and environmental brokerage and other services to Windstream at 600 locations across the country. GLM is a small, family-owned and operated business. When Windstream filed its bankruptcy case, it owed almost $2 million to GLM, which it was prohibited by the bankruptcy laws from paying prior to a Chapter 11 plan. This caused extreme economic hardship for GLM, as GLM was nevertheless required to pay, from its own funds, the many third-party vendors with whom it had actually arranged and brokered services for Windstream.

II. The Critical Vendor Motion and Objection.

Because the bankruptcy laws prohibited Windstream from paying its prebankruptcy creditors, Windstream filed a motion with the bankruptcy court seeking authority to pay certain prebankruptcy claims. On February 25, 2019, and as one of its many so-called "first day motions," Windstream thus

filed a motion for authority to pay: (i) $80 million to so-called "critical vendors," *i.e.* vendors whose continuing provision of goods or services was critical for the operation of its business; (ii) $91 million to creditors with certain liens; and (iii) $13 million to so-called "503(b)(9) creditors," creditors entitled to priority under the Bankruptcy Code due to the nature of their claims.

GLM objected to the motion on the same bases it now raises here. First, GLM objected on the basis that the bankruptcy court failed to set forth the correct, strict elements for what vendors would qualify as critical vendors under applicable case law. Second, GLM objected on the basis that it was for the bankruptcy court, as the trier of fact, to decide which vendor was critical or not, and that the bankruptcy court could not delegate this essential judicial function to a litigant. Third, GLM objected on the basis that Windstream sought to keep secret from its creditors, including GLM, which creditors were being paid as critical vendors, lien claimants, or 503(b)(9) creditors.

GLM did not object to lien claimants or 503(b)(9) creditors being paid ahead of GLM, as these creditors had higher priority claims, but GLM pointed out that all creditors were entitled to know who these lien claimants and 503(b)(9) creditors were, partially in order to test Windstream's assertions that these were, in fact, valid, higher priority creditors, before $104 million was paid to them. With respect to critical vendors, GLM pointed out that it could not understand—because Windstream was not required to explain—why GLM would not be considered a criti-

cal vendor, given that its services by way of removing trash were critical under any scenario, but that apparently 263 other unsecured creditors were being treated as critical and were therefore being paid in full.

III. The Critical Vendor Hearing.

The bankruptcy court held a hearing on the motion and on GLM's objection on April 16, 2019. The hearing did not go well for GLM, to say the least.

First, the bankruptcy court refused to permit GLM to inquire of Windstream's witness who the critical vendors were. GLM was unable to effectively cross-examine this witness or present contrary evidence without this most fundamental fact. Second, the bankruptcy court chastised GLM for suggesting that the court needed to make the factual determination as to which creditor was critical, noting that it could not convene "263 separate hearings:"

> Right, uh huh. And that's when they're backing up the trucks and taking the equipment away, or refusing to provide the access to the customers who want to watch the NCAA tournament? And I am to break, and the Debtors are to break each time, without having actually dealt with their vendors, who they have a long-term relationship, and create an adversary hearing with evidence regarding the process, and with them making the threat? That's what you want to have happen?

Third, the bankruptcy court, dismissive of GLM's arguments, labeled GLM's position as a "parochial, narrow objection," thus implicitly confirming that a different standard applies in large Chapter 11 cases than all other cases.

GLM pointed out that these concerns were not justified because the automatic stay prevented creditors from taking adverse actions and because, if everyone knew who the critical vendors were, it was likely that most of them would not be objected to. GLM also pointed out that there was no need for 263 hearings, as many bankruptcy hearings are conducted on voluminous evidence and numerous parties with documentary testimony and other aids to facilitate a factual determination. But, even if the bankruptcy court's concerns were justified, it was not for the bankruptcy court to create a "large case" exception to the statutes that Congress enacted.

IV. The Critical Vendor Order.

The bankruptcy court overruled all of GLM's objections and, on April 22, 2019, entered its final order granting Windstream's motion and approving all of the critical vendor, lien claimant, and 503(b)(9) creditor payments. Among other things, that order "authorized," but did not direct, the Windstream debtors "in their sole discretion to . . . pay any accrued but unpaid prepetition Vendor claims . . . up to the amount set forth for each category of Vendor Claims set forth in the Motion." In other words, the order failed to even set forth the standards that Windstream would be required to internally use to determine which vendor would be a critical vendor.

The order also required Windstream to keep a list of those vendors being paid and to share the list with the United States Trustee and the Official Committee of Unsecured Creditors, and to make the same available for *in camera* inspection to the bankruptcy court, but to not otherwise provide the list to creditors such as GLM.

V. The District Court Appeal.

GLM appealed the bankruptcy court's order to the district court. After full briefing, on April 3, 2020, the district court issued its opinion affirming the bankruptcy court in all respects, subsequently publishing its opinion.

VI. The Second Circuit Dismissal.

GLM subsequently appealed to the Second Circuit. However, during the Second Circuit proceedings, Windstream confirmed a Chapter 11 plan of reorganization. Under that plan, general unsecured creditors, including GLM, were paid nothing, even though the 263 critical vendors, also unsecured creditors, were paid in full. Based on the confirmation of the plan, Windstream argued to the Second Circuit that it should dismiss GLM's appeal because the confirmation of the plan equitably mooted the appeal.

The doctrine of equitable mootness applies to bankruptcy court orders confirming Chapter 11 plans where, notwithstanding the merits of an appeal, it is impossible for the appellant to obtain meaningful relief upon a remand; *i.e.*, the eggs cannot be unscrambled, or any relief would be inequita-

ble. *See, e.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005).

Windstream presented no evidence on this argument or on any inequity, and it failed to explain why the confirmation of its plan mooted the appeal; *i.e.*, why no relief was possible for GLM upon any reversal or remand. GLM responded that it was not seeking relief from the confirmation order itself and that it was not impossible for the bankruptcy court to give it and all other unsecured creditors potential relief upon a reversal and remand, such as, for example, by ordering that certain critical vendor payments be disgorged and then equitably distributed between all creditors.

The Second Circuit, applying a presumption of equitable mootness once a plan is confirmed—as noted below, the only circuit court to apply such a presumption and the only one to apply any equitable mootness doctrine to an order other than the confirmation order itself—held that GLM failed to rebut this presumption. Accordingly, on February 18, 2021, the Second Circuit entered its order dismissing GLM's appeal as equitably moot, without deciding the merits of the appeal.[1]

[1] This Petition is timely under the Court's March 19, 2020 order extending the deadline to file a petition for a writ of certiorari to 150 days from the lower court's order.

REASONS FOR GRANTING THE PETITION

I. There is a Circuit Split With Respect to the Application of the Doctrine of Equitable Mootness.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The doctrine of equitable mootness conflicts with this principle and the related Constitutional principle that it is for Congress, and not the judiciary, to curtail federal appellate jurisdiction. Importantly, equitable mootness is not a jurisdiction doctrine and is instead a prudential one. *See, e.g., Deutsche Bank AG London Branch v. Metromedia Fiber Network Inc. (In re Metromedia Fiber Network Inc.)*, 416 F.3d 136, 143-44 (2d Cir. 2005).

While all the circuit courts appear to recognize the doctrine of equitable mootness, there is a circuit split with respect to two subsidiary questions: (i) when should the doctrine be applied; and (ii) can it be applied to an order other than an order confirming a Chapter 11 plan?

With respect to the application of the doctrine, Justice Alito, writing in dissent in 1996, noted that different circuits apply "quite different" tests to determine the application of the doctrine. *See In re Continental Airlines*, 91 F.3d 553, 568-69 (3d Cir. 1996) (Alito, J., dissenting). In that case, Justice Alito compared the Third Circuit's test with that of the Eleventh Circuit. *See id.* The Third Circuit's

test analyzed five factors: (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." *Id.* at 560. The Eleventh Circuit, on the other hand, looked only at whether "reorganization plan has been so substantially consummated that effective relief is no longer available." *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992).

For its part, the Fifth Circuit considers "(1) whether a stay was obtained, (2) whether the plan has been 'substantially consummated,' and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009). The Seventh Circuit, "banish[ing]" the phrase "equitable mootness from the (local) lexicon," asks not whether the appeal is moot but whether "it is prudent to upset the plan of reorganization at this late date." *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994). Specifically, that court requires "compelling reasons" to upset an implement plan. *Id.* The First Circuit analyzes "(1) whether the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order; (2) whether the challenged plan proceeded to a point well beyond any practicable appellate annulment; and (3) whether providing relief would harm innocent third parties."

Cooperativa de Ahorro y Credito v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.), 989 F.3d 123, 129 & 131 (1st Cir. 2021).

Here, the Second Circuit applied its test for equitable mootness, holding that the "substantial consummation" of a plan will not equitably moot an appeal if "all of the following" are met:

> (a) the court can still order some effective relief; (b) such relief will not affect the reemergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993) (internal citations and quotations omitted).

This test is significantly different from the tests of the other circuits. First, this test applies a pre-

sumption of equitable mootness and requires proof that an appeal is not equitably moot, as opposed to proof that it is equitably moot. Second, it requires proof on five elements, each of which must be met for the appeal to not be equitably moot, as opposed to an analysis of various factors. Third, and unlike with other circuits, this test imposes on an appellant a requirement to seek a stay of the underlying order pending appeal. Fourth, and perhaps most importantly, this test analyzes whether appellate relief will affect the re-emergence of the debtor as a revitalized corporate entity, thus implying that the debtor's economic success is critical to determining whether to consider the appeal or not.

Separately, the circuit courts limit the doctrine of equitable mootness to confirmed reorganization plans. *See, e.g., In re Fin. Oversight & Mgmt. Bd.*, 989 F.3d at 129 (holding that the doctrine applied to "whether to reject an appeal of an order confirming a plan of reorganization"); *In re Pacific Lumber Co.*, 584 F.3d at 240 (holding that the doctrine "constrain[s] appellate review, and potential reversal, of orders confirming reorganization plans"); *In re UNR Indus.*, 20 F.3 at 769 ("we have recognized that a plan of reorganization, once implemented, should be disturbed only for compelling reasons").

Other than confirmed plans, the Bankruptcy Code itself provides for statutory mootness by specifying that two types of bankruptcy court orders will not be reviewable on appeal, due to the importance of finality to those orders, unless a stay pending appeal is obtained. *See* 11 U.S.C. § 363(m) (applicable

to orders approving sales) & 364(e) (applicable to orders approving postpetition financing). Indeed, that the Bankruptcy Code expressly moots two types of common orders, but not critical vendor or other first-day orders, strongly suggests that Congress did not intend any other bankruptcy court orders to be subject to an equitable mootness analysis.

Here, GLM was not challenging Windstream's confirmed plan but only the bankruptcy court's critical vendor order. The Second Circuit, however, noted that it applies the doctrine of equitable mootness to orders other than just plan confirmation orders, such as orders denying motions to convert and orders approving settlements. Opinion at p. 5. (citing *Beeman v. BGI Creditors' Liquidating Trust (In re BGI Inc.)*, 772 F.2d 102, 109 n.12 (2d Cir. 2014). GLM has been unable to locate a reported opinion from any circuit other than the Second Circuit applying equitable mootness to a bankruptcy court order other than an order confirming a plan (except for statutorily moot orders as described above).

Thus, it is appropriate for this Court to resolve this circuit split by, first, deciding whether the doctrine of equitable mootness is a valid doctrine that can be applied by the federal courts; second, what the elements or factors governing the doctrine's application are; and third, whether the doctrine applies to the bankruptcy court's critical vendors order or whether it is limited to confirmed plans of reorganization (and statutorily moot orders).

II. There is a Circuit Split With Respect to the Burden of Proving Equitable Mootness.

Likewise, there is a circuit split with respect to the party who bears the burden of proving that an appeal is equitably moot.

While other circuit courts require the party seeking dismissal of an appeal to bear the burden of proving equitable mootness, the Second Circuit applied a presumption that GLM's appeal was equitably moot on account of Windstream's plan and placed the burden on GLM to demonstrate that its appeal was not moot. Opinion at p. 4. *See also Apollo Global Mgmt. LLC v. Bokf NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 804 (2d Cir. 2017) ("[w]here . . . a reorganization plan has been substantially consummated, we presume that an appeal of that plan is equitably moot"); *Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 772 F.3d 102, 108 (2d Cir. 2014) (requiring "objector" to overcome presumption of equitable mootness).

Outside of the Second Circuit, the party seeking the dismissal of an appeal bears the burden of proving equitable mootness. *See, e.g.*, *Tribune Media Co. v. Aurelius Capital Mgmt. LP*, 799 F.3d 272, 277-78 (3d Cir. 2015) ("The party seeking to invoke the doctrine bears the burden of overcoming the strong presumption that appeals . . . need to be decided."); *Wells Fargo Bank N.A. v. Tex. Grand Prairie Hotel Realty, LLC (In the Matter of Texas Grand Prairie Hotel Realty, LLC)*, 710 F.3d 324, 327 (5th Cir. 2013)

(holding that debtor has burden of proving that application of equitable mootness is appropriate).

Thus, it is appropriate for this Court to resolve this circuit split by, among other things, deciding who bears the burden of proving or disproving the doctrine of equitable mootness.

III. This Court Should Exercise Its Supervisory Power to Control When Appeals Can Be Dismissed for Equitable Mootness.

Justice Alito, in a lengthy and thoughtful opinion in 1996, dissented against the application of equitable mootness:

> The majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals 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. . . . In my view, if the doctrine of "equitable mootness" has any validity, it is more limited than the majority holds. The dangers inherent in the majority's adoption and broad interpretation of this doctrine are illustrated by this case.

In re Continental Airlines, 91 F.3d 553, 567 (3d Cir. 1996 (Alito, J., dissenting).

Justice Alito noted that parties and courts assume the existence of the doctrine, but "[w]hat is the basis of this doctrine?" *Id.* at 569. Reasoning that the doctrine is not based on the "case-or-controversy" requirement and that the doctrine "is not really about 'mootness' at all," Justice Alito again asked "on what is it based." *Id.* Examining the various theories advanced by the courts to justify the doctrine, Justice Alito found it unnecessary to decide these questions, concluding instead that "neither of these policies justifies what has happened in this case -- the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded." *Id.* at 571.

As noted above, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Equitable mootness is not a jurisdictional doctrine but rather a prudential one. *See, e.g., Deutsche Bank AG London Branch v. Metromedia Fiber Network Inc. (In re Metromedia Fiber Network Inc.)*, 416 F.3d 136, 143-44 (2d Cir. 2005). Equitable mootness, therefore, directly conflicts with the appellate courts' "virtually unflagging obligation" to exercise their jurisdiction and, as a prudential doctrine, it is equally as important to consider the prudence and wisdom of meaningful appellate participation in core bankruptcy matters. This is especially important here.

First, the Article III courts have an obligation to supervise and provide proper guidance and case law to the Article I bankruptcy courts, since the bank-

ruptcy courts exercise the district court's original bankruptcy jurisdiction. *See* 28 U.S.C. §§ 157(a); 1334(a). It is true that the district court here considered the merits of the Petitioner's appeal, but that would not have happened had Windstream confirmed its plan sooner (as noted below, the district court—applying the Second Circuit's dismissal of GLM's appeal as precedent—recently dismissed a separate appeal as equitably moot, thus preventing any Article III review of the Article I court's action).

Second, the circuit courts have rarely reviewed the merits of critical vendor or other first day practice in large Chapter 11 cases, even though hundreds of millions of dollars may be involved and the "eggs" may be "scrambled" for the rest of the case. This is largely due to the absence of creditors willing to stand before the juggernaut that is a large Chapter 11 case, and then to mount years of appeals. Thus, rarely does a test case on these important issues make its way to the circuit level and, rather than dismissing such a case as moot, the circuit courts should provide all lower courts with the benefit of their views and rulings.

Moreover, the Second Circuit's opinion risks too broad an application of the doctrine. Not only did the Second Circuit employ equitable mootness to dismiss the Petitioner's appeal regardless of the appeal's merits, thereby preventing the development of needed and important "critical vendor" case law at the circuit level, but the district court (sitting as a bankruptcy appellate court) then applied that precedent to dismiss another appeal in the same underlying bankruptcy case, thus suggesting a domino ef-

fect. *See U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 2021 U.S. Dist. LEXIS 117256 (S.D.N.Y. June 22, 2021). In that subsequent matter, the district court dismissed as equitably moot the bankruptcy court's approval of a multi-billion dollar settlement by Windstream objected to by one of Windstream's largest creditors. The point is that too liberal an application of this doctrine suggests that, rather than only being applied prudentially, it is capable of being applied to virtually any bankruptcy court order, so long as a Chapter 11 plan is confirmed.

On that point, GLM takes particular issue with one of the Second Circuit's elements for equitable mootness: whether the relief sought by the appellant "will not affect the re-emergence of the debtor as a revitalized corporate entity." *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993). Respectfully, the profitability and viability of a corporate enterprise should never be more important than one's access to the federal courts.

At a minimum, the Second Circuit, if it granted GLM relief on appeal, could have left it to the bankruptcy court to determine an appropriate remedy on remand, if any. In other words, as a prudential doctrine, as opposed to a jurisdictional requirement, the Second Circuit could and should have found a prudential resolution that balanced the interests of all parties, as opposed to an inflexible application of the doctrine and one where the appellate court served as the finder of fact—something that it is not well suited to do.

As the Fifth Circuit has wisely counseled, the doctrine is applied "with a scalpel rather than an axe" and "appellate review need not be declined when, because a plan has been substantially consummated, a creditor could not obtain full relief. If the appeal succeeds, the courts say, they may fashion whatever relief is practicable." *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 240-41 (5th Cir. 2009). The Second Circuit simply concluded that reversing the payments to the critical vendors would necessitate the undermining of Windstream's plan. But that is illogical: on remand the bankruptcy court can decide, with transparency and particularized findings, which vendors were critical and which not. The truly critical vendor would not have to return its payment, while the non-critical vendor, were it to be required to return its payment, would be of little moment or danger to the plan, since the vendor was never critical to begin with.

Thus, it is appropriate for this Court to review the Second Circuit's opinion to ensure that federal courts are not improperly or too readily failing to exercise their jurisdiction, thereby depriving litigants of their right to federal appellate review pursuant to the jurisdiction conferred by Congress.

IV. This Court Should Exercise Its Supervisory Power to Prevent the Unfettered and Inequitable Application of the Critical Vendors Doctrine.

This case illustrates the dangers inherent in too permissive a critical vendor practice—which it has

become precisely because the appellate courts have not provided meaningful guidance and this Court has not addressed the issue. GLM and most creditors were paid nothing, while certain chosen creditors were paid. The identity of these chosen creditors was secret. And, the bankruptcy court delegated (or abdicated) its authority as the finder of fact to Windstream to decide for itself who was a critical vendor. Respect for the federal courts and the Bankruptcy Code strongly call for this Court's review of this practice, which has been permitted by the lower courts to devolve into a practice that is not premised on criticality at all, but rather on convenience.

Three core principles are implicated. First, the bankruptcy court is a federal court. Its job is to weigh the evidence and decide the facts. That core function cannot be delegated. *See, generally, N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81 (1982). Second, the Bankruptcy Code has a strong policy of transparency; all creditors have a right to know what the debtor is doing with their money. *See, e.g., In re Vaughan*, 429 B.R. 14, 29 (Bankr. D.N.M. 2010) ("for a chapter 11 debtor-in-possession, absolute transparency is required"). Third, the Bankruptcy Code has a strong policy of the equality of creditors, according to their respective priorities. *See Beiger v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

The bankruptcy court violated all of these fundamental principles, in the name of expediency. A chapter 11 debtor obtains immense benefits. It is not too much to ask that it also abide by these core

principles. *See, e.g., In re McKenna*, 580 B.R. 1, 14 (Bankr. D.R.I. 2017). Another problem arising from this practice of the bankruptcy court is also the answer to the question of why Windstream, a company from Little Rock, Arkansas, would file bankruptcy in White Plains, New York: it was precisely to obtain the benefit of a practice that it believed to be highly favorable to itself and that would not be permitted by other venues. This frequent practice of forum shopping and venue engineering in large cases likewise leads to a loss of respect for the process and the Bankruptcy Code itself. *See, generally, In re Crosby Nat'l Golf Club LLC*, 534 B.R. 888, 894-95 (Bankr. N.D. Tex. 2015) (decrying forum shopping and resulting loss of respect: "Two Fort Worth companies are prime examples of this trend. Radio Shack, which is .76 miles from this court, filed for bankruptcy in Delaware, as did Quicksilver Resources, which is .12 miles from this court.").

Simply put, the first day practice in large cases in certain venues has been permitted to devolve to where it actually breeds contempt for the process—what else should GLM think when it is paid nothing while others are paid in full in a court far away from home and without even being permitted to know who is being paid in full and why? This Court should take this opportunity to address this practice, to correct it where this Court concludes it has gone too far, and to provide a national standard.

The Seventh Circuit limits the critical vendor practice. In *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004), that court mostly prohibited the practice as unsupported by the Bankruptcy Code and

prejudicial to the rights of creditors. More recently, in *Jevic*, this Court upheld the sanctity of the Bankruptcy Code's priority scheme, reversing a bankruptcy court order that "gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017). Although that opinion considered a dismissal of a bankruptcy case, its lesson is nevertheless valid: "[a] distribution scheme . . . cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code." *Id.*

GLM does not suggest that no critical vendor practice should be permitted. GLM agrees that there are creditors who are critical to a reorganization and who should be paid where critical to preserving value for all creditors. *See, e.g., In re CoServ L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2000) (permitting payments to "critical vendors" only in the most "extraordinary circumstances"). That is what the case law generally holds—even the bankruptcy court's own prior precedent, which it ignored. Critical vendor payments should be allowed when the payment is "critical to the debtor's reorganization." *In re Financial News Network Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991). *Accord In re Ionosphere Clubs Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

At a minimum, criticality requires that: (i) the creditor require immediate payment in order to continue providing goods and services; (ii) the goods or services are "essential to the conduct of the busi-

ness," usually meaning that the debtor cannot find a meaningful replacement vendor; and (iii) the creditor will not provide such goods or services without the immediate payment. *See id.* And, the net benefit to the creditors must outweigh the costs (hence the relevance of GLM being paid nothing in the Windstream case).

However, "[e]ven if a vendor is critical to the success of the debtor, the court cannot allow the position to be abused. Critical vendor status must take into account the rights of all of the creditors of the estate and the remedy must be crafted to the circumstances of the case . . . but not a windfall." *In re United Am. Inc.*, 327 B.R. 776, 784 (Bankr. E.D. Va. 2005). Otherwise, to "allow the payment would be to read the doctrine as one of convenience rather than necessity." *In re Financial News Network Inc.*, 134 B.R. at 736.

The bankruptcy court's order here does not attempt to comply with any of this case law or even with the simple notion of what it means to be a "critical" vendor, instead leaving it solely to Windstream to determine which prebankruptcy vendors it would pay—and then not to avoid irreparable harm, but rather, as Windstream's witness testified, to permit Windstream to negotiate favorable terms with the vendors in exchange for the prebankruptcy payment: "Telling a vendor that they're on a list [of critical vendors] deprives us of any leverage that the company may have in a negotiation with that vendor."

And, the reason why the bankruptcy court's order strays so far from any recognized precedent on the

critical vendor practice and from what it means to be critical, or a court finding a fact, or a debtor in Chapter 11, or a creditor entitled to transparency and equality, is precisely because the lack of appellate oversight over the first-day practice has enabled that practice to devolve to the level that it has. Left unchecked, it will continue to devolve, with most large Chapter 11 cases being filed in one or two venues where the bankruptcy courts permit large debtors to do what Windstream was permitted to do here. The importance of the issues, the need to preserve respect for the process, the courts, and the law, and the rights of very many innocent creditors which seem to be lost in large Chapter 11 cases, all call out for this Court's intervention.

CONCLUSION

The circuit split with respect to the application of the doctrine of equitable mootness, and the importance of the issue of federal courts exercising the jurisdiction conferred upon them, strongly call for this Court's review to answer the questions that Justice Alito first asked twenty-five years ago, before the doctrine was permitted to grow unchecked. Likewise, the importance of the issues concerning the critical vendor practice—where chosen, secret creditors are paid in full while others are paid nothing, all while evading meaningful appellate review, calls for this Court's authority. Only this Court can restore critical integrity, transparency, and equality to the practice.

Dated this 16th day of July, 2021.

Respectfully submitted,

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