No. 24-1322

In the Supreme Court of the United States

BARINGS LLC, ET AL., PETITIONERS

v.

AG CENTRE STREET PARTNERSHIP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The bankruptcy court affirmed the debtors' chapter 11 reorganization plan over the objection of some creditors. By the time the objecting creditors' appeals reached the Fifth Circuit, the plan had been substantially consummated and numerous third parties and transactions had relied upon it. All parties to the appeals agreed that the Fifth Circuit should not unwind the consummated plan. They disagreed over whether it would be equitable for the court to order narrower relief by excising the challenged plan provision. After engaging in a fact-intensive balancing of equitable considerations, the court determined that excising the provision would be an appropriate remedy in this case. The question presented is:

Should the court of appeals have considered unwinding the already consummated chapter 11 plan, even though no party asked it to do so?

CORPORATE DISCLOSURE STATEMENT

Serta Simmons Bedding, Inc. (as successor to Serta Simmons Bedding, LLC), was owned immediately following emergence by the holders of first-lien second out claims and Non-PTL Claims. Pursuant to the Second Amended Joint Chapter 11 Plan of Reorganization, on July 31, 2023, Serta Simmons Bedding, Inc. entered into an agreement and plan of merger with its subsidiary, Dreamwell, Inc., pursuant to which Serta Simmons Bedding, Inc. merged with and into a subsidiary of Dreamwell, Inc., resulting in Serta Simmons Bedding, Inc. becoming a wholly owned subsidiary of Dreamwell, Inc., and subsequently converted from a corporation to a limited liability company named Serta Simmons Bedding, LLC.

The following entities were debtors in the bankruptcy case and are respondents here: Dawn Intermediate, LLC; Serta Simmons Bedding, LLC; Serta International Holdco, LLC; National Bedding Company L.L.C.; SSB Manufacturing Company; The Simmons Manufacturing Co., LLC; Dreamwell, Ltd.; SSB Hospitality, LLC; SSB Logistics, LLC; Simmons Bedding Company, LLC; Tuft & Needle, LLC; Tomorrow Sleep LLC; SSB Retail, LLC; and World of Sleep Outlets, LLC.

The parent company of each of respondents Serta International Holdco, LLC; SSB Manufacturing Company; Simmons Bedding Company, LLC; Tuft & Needle, LLC; Tomorrow Sleep LLC; and SSB Retail, LLC, is Serta Simmons Bedding, LLC.

Respondent National Bedding Company L.L.C.'s parent company is Serta International Holdco, LLC, whose parent company is Serta Simmons Bedding, LLC.

The parent company of each of respondents The Simmons Manufacturing Co., LLC; Dreamwell, Ltd.; SSB

Hospitality, LLC; and SSB Logistics, LLC, is SSB Manufacturing Company, whose parent company is Serta Simmons Bedding, LLC.

Respondent World of Sleep Outlets, LLC's parent company is SSB Retail, LLC, whose parent company is Serta Simmons Bedding, LLC.

Dawn Intermediate, LLC has no parent company.

No publicly held corporation has an ownership interest in 10% or more of any respondent's stock.

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INTRODUCTION

The chapter 11 reorganization plan in this case resolved a complex, high-stakes bankruptcy involving thousands of creditors, with billions of dollars at stake. Today, more than two years after the plan's effective date, the now-reorganized debtors (SSB) are major participants in a highly competitive business environment. In the court below, respondent SSB and petitioners jointly moved to dismiss the appeals challenging the plan on the ground that the appeals were equitably moot. The central premise of the motion to dismiss the appeals was true then and remains true now: it would be both impossible and inequitable to unwind the already-consummated reorganization plan.

The Fifth Circuit agreed that it should not unwind the plan but denied petitioners and SSB's motion to dismiss the appeals as equitably moot. Pet. App. 52a & n.20. Petitioners do not ask this Court to review the court's equitable mootness ruling. They do not contend in this Court (as petitioners and SSB did below) that the Fifth Circuit should have *declined* jurisdiction because imposing a remedy would imperil the reorganized debtors and inequitably harm innocent third parties.

Instead, petitioners assert here that the court of appeals could *exercise* jurisdiction even if it meant vacating the substantially consummated plan, unscrambling the innumerable third-party transactions that relied on the plan, and forcing the reorganized debtors back into bankruptcy. See Pet. 35 ("appellate courts would not be 'stripped of their jurisdiction'" if they "'must let the parties go back to square one'") (quoting Pet. App. 51a). According to petitioners, the court of appeals erred by failing to recognize that, once it exercised jurisdiction, it

faced "a binary choice": affirm a plan it found to be unlawful or unravel the plan and send all stakeholders—parties and non-parties—back to the drawing board. *Ibid.*

There is no circuit split on that question. The courts of appeals unanimously agree that a reviewing court should not vacate a substantially consummated reorganization plan if doing so would jeopardize the revitalized debtor or would inequitably harm innocent third parties. The Fifth Circuit applied this principle in the decision below. See Pet. App. 48a (agreeing the court should not "unwind[] the entire Plan and trigger[] a whole new confirmation proceeding"). All the cases petitioners cite as conflicts are in accord. In all of them the courts declined to exercise appellate jurisdiction because any remedy available to them would have been inequitable and would have injured innocent stakeholders.

In no case cited by petitioners did a court exercise jurisdiction and select from the "binary choice" of remedies petitioners say the Fifth Circuit had here. None of the supposed "split" cases deemed a plan unlawful yet affirmed it without modification, and none of those cases unraveled a plan after it had been consummated. The courts were never in that predicament because in all petitioners' cited cases the courts dismissed the appeals as equitably moot without considering the merits. Because no court has endorsed petitioners' view that a court exercising appellate jurisdiction must choose from the remedies petitioners identify, there is no circuit split on that issue.

The issue also is not preserved because it was not presented to the court below. No party argued in the Fifth Circuit that, if the court exercised jurisdiction, it

had the binary choice of remedies that petitioners describe here. In fact, the one thing all parties agreed upon in the court of appeals was that the court should not unravel the consummated plan. Petitioners, for example, argued "the Court should not entertain such a drastic request" as "undo[ing] confirmation and requir[ing] the Plan to be unwound." CA5 Doc. 135 at 5.[1] So did the appellants challenging the plan, who expressly disclaimed the remedy of unwinding it. Because no party contended below that the court of appeals should have considered vacating the entire plan, this case is not a suitable vehicle for this Court to consider that issue.

Below, SSB and petitioners jointly argued that the court of appeals should decline jurisdiction without reaching the merits because the appeals were equitably moot. Here, petitioners argue that the court of appeals could exercise jurisdiction and, upon finding illegality in the plan, should have eschewed the remedy that does the least harm (excising the offending plan provision) and instead considered the remedy that does the most harm (unraveling the entire plan). See Pet. 35.

That issue is not the subject of any circuit conflict. Nor was it presented to the court below. This Court should deny the petition.

STATEMENT

A. Factual Background

SSB is one of the leading manufacturers and distributors of mattresses in North America. Pet. App. 64a. It owns and manages some of the best-selling bedding

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[1] Unless otherwise noted, docket numbers and record on appeal citations refer to *Citadel Equity Fund, Ltd.* v. *Serta Simmons Bedding, LLC*, No. 23-20363 (5th Cir.).

brands in the mattress industry: Serta®, Beautyrest®, Simmons®, and Tuft & Needle®. *Ibid.*

In 2016, SSB entered into a syndicated credit agreement under which it borrowed over $1.95 billion from a group of lenders. Pet App. 65a. Four years later, as the COVID-19 pandemic spread through the United States, SSB faced strong economic headwinds. *Id.* at 68a-69a. To salvage the business and protect its stakeholders, SSB began exploring options to raise liquidity and reduce its debt and interest expenses. *Id.* at 68a-70a.

After negotiating with various lender groups to restructure its debt, SSB narrowed the options to two proposals—one by a group that includes petitioners here, and the other by a group that includes some of the respondents here. See Pet App. 69a-71a; CA5 Doc. 135 at 7-8. In some respects, the proposals were similar. Both were submitted by lender groups that were parties to the 2016 credit agreement with SSB. See Pet App. 70a-71a. Both groups proposed exchanging their existing debt for new debt on a non-pro rata basis—meaning SSB would repurchase only the debt held by the winning group of lenders, not all debt issued under the 2016 agreement. See *id.* at 70a-72a. And both groups maintained that the proposed transaction was permitted by a provision of the 2016 credit agreement allowing SSB to repurchase debt on a non-pro rata basis in "open market purchases." See *id.* at 66a, 70a-74a.

After further negotiations, petitioners' proposal emerged as the clear winner. See CA5 Doc. 135 at 8. Petitioners' proposal reduced SSB's total debt and interest payments and allowed SSB to retain its intellectual property. The respondent lenders' proposal, in contrast, would have saddled SSB with more debt and higher interest payments, and would have stripped SSB of its

valuable intellectual property. SSB therefore accepted petitioners' proposal and rejected the proposal by the respondent lenders. See Pet App. 73a-74a.[2]

In the ensuing transaction in 2020, SSB repurchased approximately $1.2 billion of existing loans from petitioners (and other lenders in the winning group), in exchange for approximately $875 million in new loans. Pet. App. 11a-12a. The winning lender group that included petitioners also provided SSB with $200 million in new-money super-priority loans. *Ibid.* In a 2020 agreement memorializing this transaction, SSB indemnified the lenders for claims and liabilities arising from the transaction. See *id.* at 11a-13a.

The 2020 transaction spawned four lawsuits. First, some respondent lenders that submitted the unsuccessful proposal sued to block the transaction. See *N. Star Debt Holdings, L.P.* v. *Serta Simmons Bedding, LLC*, No. 652243/2020 (N.Y. Sup. Ct.); Pet. App. 75a. They voluntarily dismissed that suit after the court denied a preliminary injunction, Pet. App. 75a-76a, but later filed another suit seeking damages, and a smaller lender group (respondent LCM) filed additional suits. See *AG Ctr. St. P'ship L.P.* v. *Serta Simmons Bedding, LLC*, No. 654181/2022 (N.Y. Sup. Ct.); see also *LCM XII Ltd.* v. *Serta Simmons Bedding, LLC*, No. 20-5090 (S.D.N.Y.); *LCM XXII Ltd.* v. *Serta Simmons Bedding, LLC*, No. 21-3987 (S.D.N.Y.).

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[2] Petitioners are sometimes referred to below as the "PTL Lenders," see CA5 Doc. 141, the "Supporting Lenders," see CA5 Doc. 135, the "Required Lenders," see CA5 Doc. 126, or the "Favored Lenders," CA5 Doc. 142.

B. The Bankruptcy Case

In 2023, SSB filed for chapter 11 protection in bankruptcy court in the Southern District of Texas. Pet. App. 76a. The filing of the chapter 11 case automatically stayed non-bankruptcy litigation against SSB, including the suits mentioned above. See 11 U.S.C. 362.

In bankruptcy court, SSB and petitioners filed an adversary proceeding against the parties who challenged the 2020 transaction to obtain a global resolution of the outstanding claims against the transaction. Pet. App. 77a-78a. Lenders that opposed the transaction, including some respondents here, filed counterclaims and third-party claims alleging the transaction was unlawful. See *id.* at 78a. SSB and petitioners moved for summary judgment, arguing, among other things, that the transaction was permitted under the 2016 agreement as an "open market purchase" of SSB's pre-existing debt. See *id.* at 78a-79a.

The bankruptcy court issued a partial final judgment holding that the 2020 transaction was a permissible open market purchase. It also certified its partial judgment for direct review by the Fifth Circuit under 28 U.S.C. 158(d). Pet. App. 79a. But it reserved judgment regarding whether the 2020 transaction violated the covenant of good faith and fair dealing. Meanwhile, SSB moved forward with its chapter 11 plan of reorganization. The bankruptcy court consolidated in one proceeding the trial on the remaining claims in the adversary proceeding as well as a hearing on whether to confirm SSB's chapter 11 plan. *Id.* at 80a.

One disputed issue in the plan confirmation hearing concerned the indemnity provision that is the subject of this certiorari petition. As noted, in the 2020 agreement, SSB indemnified the new lenders from liability for

claims challenging the transaction. Pet. App. 12a-13a. The original chapter 11 plan proposed that this pre-bankruptcy indemnity would "survive [the bankruptcy] unimpaired and unaffected." *Id.* at 15a & n.7 (citation omitted). Some of SSB's creditors, including some respondents here, argued that this indemnity obligation violated 11 U.S.C. 502(e)(1)(B), which precludes debtors from paying contingent claims for reimbursement that arose before the bankruptcy. Pet. App. 15a.

In response to these objections, petitioners and SSB modified the indemnity provision in the plan. In the original pre-bankruptcy indemnity, SSB had indemnified all lenders that acquired SSB debt in the 2020 transaction. In the new indemnity provision included in the plan, SSB indemnified supporters of the plan that were existing holders of the 2020 debt at the time the plan was confirmed. CA5 Doc. 135 at 14-15. In SSB's and petitioners' view, the new indemnity was consistent with 11 U.S.C. 502(e)(1)(B), which bars only prepetition contingent claims. The new indemnity was not a claim that arose before SSB filed the bankruptcy petition but rather one component of a settlement with then-current holders of the 2020 debt, such as petitioners, that supported confirmation of SSB's chapter 11 plan. See Pet. App. 88a-90a. Petitioners' witnesses testified without contradiction at the confirmation hearing that they would not have supported the plan if not for the indemnity. See CA5 ROA 3424:2-3425:7; *id.* at 3477-78; *id.* at 3514; *id.* at 3549-50. And because petitioners held a large portion of SSB's total outstanding debt, their support was crucial for the plan to be confirmed. See *id.* at 3299.

The bankruptcy court confirmed the plan over the objections of some creditors, including some respondents

here. The court found there was no section 502(e)(1)(B) violation because the new "indemnity replaced the pre-petition indemnity" and was part of a "basket of consideration" given by SSB in exchange for petitioners "agree[ing] to equitize almost a billion dollars in secured claims plus provide the Reorganized Debtors with financing on a go-forward basis." Pet. App. 88a-89a. As for the claims sent to trial after the summary judgment ruling, the court held that the 2020 transaction did not violate the covenant of good faith and fair dealing. *Id.* at 96a-98a.

The parties that had opposed the indemnity provision appealed the order confirming the plan. Petitioners and SSB filed a joint motion asking the Fifth Circuit to dismiss those appeals without reaching the merits on the ground that the appeals were equitably moot. See CA5 Doc. 126.

Equitable mootness, a doctrine unique to bankruptcy cases, "is a kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest." *In re Texxon Petrochemicals, L.L.C.*, 67 F.4th 259, 261 (5th Cir. 2023) (citation and quotations omitted). Unlike Article III mootness, the "equitable mootness doctrine is prudential rather than jurisdictional." *In re Vineyard Bay Dev. Co.*, 132 F.3d 269, 271 (5th Cir. 1998). "[E]quitable mootness determinations involve 'a discretionary balancing of equitable and prudential factors.'" *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 483 (2d Cir. 2012) (quoting *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc)). If warranted by equitable considerations, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective

relief is no longer available." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994).

In their motion to dismiss the appeals as equitably moot, petitioners and SSB argued that it was too late to unravel the substantially consummated reorganization plan. They contended that the indemnity was "necessary to [plan] confirmation" and that "any attempt to unwind the Plan would have unjustifiable and deleterious impacts on third parties not before the Court." CA5 Doc. 126 at 2-3. They explained that "distributions required under the Plan have already been made." *Id.* at 11. They also pointed out that "third parties have entered into major commercial transactions with the Reorganized Debtors," and that "a new board has been appointed." *Id.* at 12. SSB's "customers, supplie[r]s, and employees" likewise "depended on SSB having a confirmed Plan." *Id.* at 21. Accordingly, petitioners and SSB argued, "[e]xcising the indemnity … and thereby nullifying confirmation and forcing SSB back into bankruptcy" would "upset[] the settled expectations of … third parties, and the many transactions that have been made in reliance on confirmation." *Ibid.*

The appellants challenging the plan, for their part, agreed that the plan should not be unwound but they argued the court should order narrower relief. They expressly disclaimed the drastic remedy of unraveling the reorganization plan that had already been substantially consummated. See CA5 Doc. 142 at 1 ("[T]he excluded lenders are not asking the Court to undo the plan and put Serta back into bankruptcy."); CA5 Doc. 141 at 3-4 ("Citadel does not seek to overturn the Confirmation Order as a whole, unwind the Debtors' emergence from bankruptcy, or affect the rights of third parties not before the Court."). But appellants argued the appeals

were not equitably moot because, in their view, the court could impose another remedy: it could excise the challenged indemnity provision from the plan. They contended this "fractional relief" would be consistent with prior Fifth Circuit precedent striking unlawful plan provisions. See CA5 Doc. 142 at 11-16 (citation omitted); see CA5 Doc. 141 at 15-21. They also argued that striking the indemnity would not be "unfair" to petitioners because petitioners "took a calculated risk by voting in favor of a plan based on the hope" that the challenged indemnity would survive. CA5 Doc. 142 at 2; see CA5 Doc. 141 at 19.

Petitioners and SSB disagreed. They argued the indemnity "was critical and necessary to confirmation," and "cannot be excised from the Plan without triggering an entirely new confirmation proceeding." CA5 Doc. 126 at 13. They pointed to the uncontroverted testimony that petitioners "would not have voted for a plan without indemnity protection." *Id.* at 14, 16. And they explained that, "given [petitioners'] substantial holdings in SSB, the Plan would not have been confirmable without the indemnity." *Id.* at 16. In petitioners' and SSB's view, the facts and equities in this case distinguished it from others in which the Fifth Circuit granted "fractional relief" by surgically excising plan provisions. See *id.* at 18 (citation omitted). Accordingly, petitioners and SSB argued that, while "[a]ppellants contend that they are not trying to put the Debtors back in bankruptcy or undo confirmation, … the remedy they seek—severance of the indemnity … —would do just that." CA5 Doc. 158 at 10 (citations and quotations omitted).

The Fifth Circuit denied petitioners and SSB's motion to dismiss the appeals as equitably moot. It agreed—as all parties had argued—that it should not

"unravel[]" the plan. Pet. App. 48a. But it held that under its precedents, "excision does not toll doom for the Plan." *Id.* at 49a. It distinguished cases petitioners and SSB had cited to argue the indemnity should not be excised, holding, for example, that "unlike *In re Manges*, … excision would not harm many third parties which have substantially relied on the indemnity's presence in the Plan." *Ibid.*

The Fifth Circuit also rejected what it took "to be the heart" of the equitable mootness argument—that excision would be "unfair" to petitioners, who "agreed to support the Plan only because of the settlement indemnity." Pet. App. 50a. The court stated that "[p]arties supporting [unlawful plan] provisions could always argue they would have done things differently if they had known the provisions would later be excised." *Id.* at 50a-51a. In the Fifth Circuit's view, if it "cannot excise specific provisions but must let the parties go back to square one—which [it] cannot do without destroying the underlying Plan—then the appellate courts are effectively stripped of their jurisdiction over bankruptcy appeals." *Id.* at 51a.

On the merits, the court determined the indemnity provision was unlawful and, as a remedy, it "excise[d] the offending indemnity" from the plan. Pet. App. 61a. In the same opinion, the Fifth Circuit reversed the bankruptcy court's partial summary judgment order. The court of appeals held that the 2020 transaction "was not a permissible open market purchase within the meaning of the 2016 Agreement." *Id.* at 30a. It therefore remanded "for reconsideration of the Excluded Lenders' breach of contract counterclaims." *Id.* at 44a.

REASONS FOR DENYING THE PETITION

I. The Circuit Courts Are In Agreement On The Question Presented

Petitioners assert that the Fifth Circuit is an outlier because it failed to appreciate that it faced a binary choice of remedies after deeming the plan's indemnity provision unlawful: affirm the plan anyway or send the parties—and non-parties who depended on the plan—back to the drawing board. Pet. 24.

There is no circuit split on this issue; in fact, *no* circuit follows petitioners' approach. They all agree that a reviewing court should not unwind a substantially consummated plan and send a reorganized debtor back into bankruptcy when doing so would harm innocent third parties. And they all agree that there are circumstances where a court should decline appellate jurisdiction, rather than impose a remedy that would be inequitable and do more harm than good.

To decide whether they can craft an equitable remedy in a particular case, courts engage in an equitable and prudential balancing of interests. In some plan appeals—like the ones petitioners say are conflicts—the courts decline jurisdiction. In others—like the decision below—they exercise jurisdiction because they determine they can impose a suitable remedy. Never do they do what petitioners say the Fifth Circuit should have done in this case: affirm a plan they found to be unlawful or require innocent stakeholders in a consummated plan to start again from scratch.

A. Petitioners' Cases Do Not Address The Question Petitioners Ask This Court To Consider

According to petitioners, "courts need clarity regarding what relief to order when they deem a provision unlawful on appeal, but the plan has already been consummated." Pet. 31. Yet no case cited by petitioners addresses that issue. All the cases petitioners identify as conflicts concern an antecedent question: whether to exercise appellate jurisdiction. And in all those cases the courts declined jurisdiction on prudential grounds because they determined the appeals were equitably moot. They did not "deem a [plan] provision unlawful," nor did they "order" any "relief." *Ibid.* They all dismissed appeals without considering the merits.

As petitioners' cases explain, equitable mootness is a prudential doctrine that courts apply to "carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." *Charter Commc'ns*, 691 F.3d at 481 (cited Pet. 14-15). To perform this "discretionary balancing of equitable and prudential factors," *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (citation omitted), courts consider a broad range of facts and circumstances. For example, the Second Circuit asks whether: "(1) the court can still order some effective relief; (2) such relief will not affect the [debtor's] re-emergence … as a revitalized corporate entity; (3) such relief will not unravel intricate transactions …; (4) the [adversely affected] parties … have notice of the appeal and an opportunity to participate ….; and (5) the appellant pursued [a stay] with diligence …." *Charter Commc'ns*, 691 F.3d at 482 (citation and quotations omitted).

Like other discretionary balancing tests, equitable mootness cannot be reduced to any inflexible rule. See

Charter Commc'ns, 691 F.3d at 482 ("[T]here is no *per se* equitable mootness" because courts must "examine the actual effects of the requested relief"). But the equitable mootness doctrine generally instructs courts to avoid "relief [that] would lead to profoundly inequitable results," like "fatally scrambl[ing] the [already consummated] plan and/or harm[ing] third parties." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 144 (3d Cir. 2019) (cited Pet. 15-16).

Every one of the cases cited by petitioners in support of a circuit split dismissed an appeal as equitably moot. See *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 989 F.3d 123, 135 (1st Cir. 2021) ("*FOMB*") ("dismiss[ing] [appeal] as equitably moot") (emphasis omitted); *Charter Commc'ns*, 691 F.3d at 488 (same); *Millennium Lab*, 945 F.3d at 129, 144 (same); *In re Tribune Media Co.*, 799 F.3d 272, 280-81 (3d Cir. 2015) (same); *In re U.S. Airways Group*, 369 F.3d 806, 811 (4th Cir. 2004) (same). Yet, while petitioners rely exclusively on equitable mootness cases, they expressly disclaim presenting an equitable mootness question to this Court. See Pet. 35 (petitioners "do not … question the propriety of the equitable mootness doctrine"); see also *id.* at ii (not raising equitable mootness in question presented).

Indeed, petitioners now appear to concede that the court below properly exercised jurisdiction, as petitioners contend that "appellate courts would not be 'stripped of their jurisdiction'" if this Court adopts petitioners' position. Pet. 35 (quoting Pet. App. 51a). Petitioners also do not argue here that the lower court erred when it found the plan indemnity unlawful. The question petitioners bring to this Court is: *after* exercising jurisdiction and *after* finding illegality, what should the Fifth Circuit have done next?

That question is unaddressed in petitioners' cases because none of them reached the merits or awarded any relief. See, *e.g.*, *FOMB*, 989 F.3d at 131 ("in denying this appeal as equitably moot we will not reach the merits"). Those courts did not exercise jurisdiction and "face an up-or-down decision" to "affirm or vacate Plan approval," as petitioners suggest. *Id.* at 133 (citation omitted); cf. Pet. 17, 27, 35. They declined jurisdiction to avoid that dilemma because "granting such relief would be as futile as squeezing the toothpaste back in the tube." *FOMB*, 989 F.3d at 133.

B. Petitioners' Cases Are Not In Conflict With The Decision Below

1. Petitioners identify these equitable mootness decisions as purported conflicts because, unlike the Fifth Circuit in this case, the courts there concluded they should not modify allegedly unlawful plan provisions. But all that shows is that courts engaged in fact-intensive equitable and prudential interest-balancing may reach different outcomes when presented with different facts.

As petitioners' cases state (and petitioners acknowledged below), "it is within the power of an appellate court to order [a] Settlement severed from the Plan and keep the rest of the Plan in place." *Tribune*, 799 F.3d at 280-81 (cited at CA5 Doc. 126 at 17). To be sure, when all the equities are considered, there may be compelling reasons to leave a plan unchanged. Below, petitioners and SSB argued the Fifth Circuit should decline jurisdiction rather than alter the plan in this case. But there is no ironclad rule that a plan provision, even one essential to the bargain, can never be excised. The question, all circuits agree, is whether a remedy would be equita-

ble in a particular case when considering all the relevant facts and circumstances and the interests of all stakeholders.

Petitioners' cases illustrate the point. Petitioners cite *Charter Communications*, where the Second Circuit found that a settlement between the debtor and investor Paul Allen was the "cornerstone" of a plan. Pet. 14 (quoting *Charter Commc'ns*, 691 F.3d at 480). But the court of appeals did not hold that the Allen settlement's undisputed importance to the plan was, by itself, sufficient reason to leave the settlement undisturbed. On the contrary, it determined that it *could* still excise the settlement—but should not do so if excision would inequitably harm innocent third parties or, as a practical matter, threaten the debtor's restructuring efforts.

As the Second Circuit explained, "if the Allen Settlement were unlawful, it would not be inequitable to require the parties to that agreement to disgorge their ill-gotten gains." *Charter Commc'ns*, 691 F.3d at 484. The court likewise suggested that excision would not be inequitable to the reorganized debtor's shareholders, who would see the value of their investment decline, because the company had disclosed "the possibility of an adverse ruling as a risk factor" and a "prudent investor would take this information into account before purchasing shares." *Id.* at 484-85.

The reason the court of appeals declined to modify the plan was that, as a practical matter, doing so could jeopardize the debtor's "emergence as a revitalized entity" and "require unraveling complex transactions." *Charter Commc'ns*, 691 F.3d at 485-86. The court was concerned that, if the settlement were disturbed, Allen might "reneg[e] on … the benefit he bestowed on [the debtor]." *Id.* at 486. And that knock-on effect of excision

would "seriously threaten[] [the debtor]'s ability to reemerge successfully from bankruptcy." *Ibid.*

Petitioners' other cases are in accord. *Tribune*, for example, held that the court should consider "the interests of third parties who have justifiably relied on plan confirmation." 799 F.3d at 278. And it observed that "reliance on consummation of a plan would not be justified if a third party obtained a benefit that was inconsistent with a contract, statute, or judgment." *Ibid.* (citing *Charter Commc'ns*, 691 F.3d at 484). Thus, as petitioners' cases reflect, equitable mootness is not normally established by the mere fact that a remedy would alter a plan provision that some party relied upon. See, *e.g.*, *id.* at 280 ("[T]he remedy of taking from one class of stakeholders the amount given to them in excess of what the law allows is not apt to be inequitable …."). Courts also consider other equitable factors, such as whether modification would harm innocent third parties whose reliance was justified.

Accordingly, petitioners' cases recognize that confirmed plans can be modified in some circumstances, when it would be equitable to do so. See, *e.g.*, *Tribune*, 799 F.3d at 279 (noting Third Circuit case holding releases could be struck); *Millennium Lab*, 945 F.3d at 142 n.18 (same). In *FOMB*, for example, the First Circuit distinguished a Third Circuit decision, *In re SemCrude, L.P.*, 728 F.3d 314 (3d Cir. 2013), which held that an appeal seeking to modify a plan was not equitably moot. The difference, the First Circuit explained, was that in *SemCrude* "the debtor's financial well-being would not be threatened … nor would any other third-party be negatively impacted." *FOMB*, 989 F.3d at 133-34.

Accordingly, petitioners' cases do not expose any circuit conflict on altering plan provisions; they illustrate

how different facts and circumstances lead to different outcomes when courts engage in equitable interest-balancing. See *Millennium Lab*, 945 F.3d at 144 n.20 ("[O]ur holding today is specific and limited to the particular facts of this case."). Like other circuits, the Fifth Circuit sometimes finds that plan provisions can be modified and sometimes not, depending on the facts and equities of each case. Here, the Fifth Circuit excised the indemnity provision but in *In re Thru, Inc.*, it held that "[u]nwinding the Plan" would be "the only way to remedy its allegedly unfairly discriminatory aspects," so limited relief was not available. 782 F. App'x 339, 341 n.4 (5th Cir. 2019) (per curiam). Indeed, in the decision below, the court considered other Fifth Circuit cases refusing to modify or disrupt plans and distinguished them on the facts. Pet. App. 49a ("[U]nlike *In re Manges*, … excision would not harm many third parties which have substantially relied on the indemnity's presence in the Plan.").[3]

Nor do petitioners' cases or authorities support their contention that it is strictly forbidden "for an appellate

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[3] Other sources confirm that there is no circuit split on this issue. See Jonathan M. Seymour, *Bankruptcy Appeal Barriers*, 82 Wash. & Lee L. Rev. 87, 124 (2025) ("[A]ppellate courts have increasingly rejected a binary choice between vacating confirmation orders and dismissing appeals," instead "increasingly emphasiz[ing] the option to grant a prevailing appellant limited relief") (citing *In re MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017)); Tiffany Chang, Note, *Equitable Mootness in the Second Circuit*, 31 S. Cal. Interdisc. L.J. 353, 375 (2022) ("the Second Circuit has … shown support for blue penciling"—i.e., modifying a plan on appeal) (citing *In re MPM Silicones, L.L.C.*); Shana Elberg, Amy Van Gelder & Jason M. Liberi, *Equitable Mootness and Bankruptcy Appeals*, Practical Law Bankruptcy & Restructuring (discussing "[b]lue [p]encil [m]ethod" as a strategy used by courts, citing precedent from the Third Circuit).

court to rewrite a confirmed plan on appeal when a material provision is deemed unlawful without giving the parties a chance to renegotiate." Pet. 3. Rather, courts agree they have the power to excise material provisions but should use that remedy only if, after considering all the facts and circumstances, doing so would be equitable.

2. When assessing the equities in particular cases, some courts find that plan provisions can be modified, while others find they cannot be. But different *outcomes*—especially the outcomes of fact-bound prudential interest-balancing—do not mean the courts applied different *rules*. And, in fact, the lower courts all agree on the rules applicable to plan modification, even when they arrive at different results in particular cases.

Petitioners claim the Fifth Circuit's statement that a court can "fashion whatever relief it deems practicable" is the "opposite" of the rule in other circuits. Pet. 3 (quotations omitted) (discussing Pet. App. 61a (court may "fashion whatever relief is practicable") (citation omitted)). But one of petitioners' Third Circuit "split" cases quotes this *exact* rule, citing precedent from the Fifth Circuit. *Tribune*, 799 F.3d at 278 (discussed Pet. 15) ("a court may fashion whatever relief is practicable" (quoting *In re Blast Energy Servs., Inc.*, 593 F.3d 418, 425 (5th Cir. 2010))). Similarly, in *Charter Communications*, another so-called "split" case, the Second Circuit described the equitable mootness inquiry as an "exercise of discretion as to whether it is practicable to grant relief." 691 F.3d at 483.

Likewise, the Fifth Circuit's explanation that it can fashion "fractional relief" on appeal, *In re Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 430-31 (5th Cir. 2022) (citation omitted) (cited Pet. 19), is the mirror image of

the Second Circuit's rule that a court can fashion "fractional recovery." *In re Chateaugay Corp.*, 10 F.3d 944, 954 (2d Cir. 1993) (citing Fifth Circuit precedent). And, as noted, petitioners' "split" cases recognize that even provisions at the heart of a plan can be modified if no inequity would result. See *Tribune*, 799 F.3d at 278, 280-81; *Charter Commc'ns*, 691 F.3d at 484.[4]

The lower courts also agree that a reviewing court should decline jurisdiction if granting relief would do more harm than good, such as when any remedy would jeopardize a reorganized debtor's emergence from bankruptcy after a plan has been substantially consummated. Although "[o]ne might argue that holding [an] appeal moot is … by definition *in* equitable" because the appellant cannot obtain relief, "bankruptcy is concerned primarily with achieving a workable outcome for a diverse array of stakeholders" who rely on a consummated plan. *Tribune*, 799 F.3d at 281. As Judge Ambro put it, "[i]n a very few cases, shutting an appellant out of the courthouse does substantially less harm than locking a debtor inside." *Id.* at 289 (Ambro, J., concurring).

The Fifth Circuit applied this principle below. See Pet. App. 61a (quoting *Highland Cap. Mgmt.*, 48 F.4th at 431 ("[T]he court may fashion the remedy it sees fit without upsetting the reorganization.")). And petitioners' other "split" cases are all in agreement. For exam-

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[4] Contrary to petitioners' suggestion, the Bankruptcy Code does not prevent reviewing courts from modifying plan provisions on appeal. See 7 Collier on Bankruptcy § 1127.03 (cited Pet. 5, 6, 13, 14, 22, 33) (noting 11 U.S.C. 1127 "does not limit appellate review of plan confirmation orders" and often "the only relief available to a party in interest is through an appeal of the confirmation order").

ple, the Second Circuit observed in *Charter Communications* that remedies that would "unjustly upset[] a debtor's plan of reorganization" should not be granted. 691 F.3d at 481. Similarly, the Third Circuit concluded it should not grant relief that would cause the plan to "fall apart." *Millennium Lab*, 945 F.3d at 142 n.18. So too in the Fourth Circuit. *U.S. Airways Group*, 369 F.3d at 810 (court declined to issue relief that would "undo[] … reorganization plan"); *id.* at 811 ("What is done cannot now be undone"); see also *FOMB*, 989 F.3d at 130 ("Upsetting the Plan at this late date would throw [thousands of] transactions into doubt, harming … third parties" who "rel[ied] on it in good faith.").

The circuits follow this principle for good reason. Large restructurings like SSB's can involve thousands of parties, months or years of complex negotiations, and billions of dollars on the line. Since SSB emerged from bankruptcy more than two years ago, a new board has been appointed, millions of dollars have changed hands with third parties, old creditors have been paid, and new credit facilities have been established. See CA5 Doc. 126 at 11-12. Attempting to unwind the plan now would threaten SSB's successful emergence from bankruptcy and would harm innocent third parties who relied on the plan. That would be neither equitable nor consistent with the purposes of the Bankruptcy Code.

Petitioners recognized these principles below, explaining that the court should not grant relief that would undermine the reorganization or harm third parties. See CA5 Doc. 126 at 16-20; *id.* at 17 ("[T]here is no support in the Code for [ordering remedies] on appeal that would result in unwinding confirmation and require a new vote on the Plan."). Petitioners also sug-

gested that this was a uniform approach across the circuits. See CA5 Doc. 135 at 67 (explaining that "[c]ourts" "refuse[]" to order relief that would "knock the props out from under" a consummated plan, citing Second and Third Circuit precedent (citations and quotations omitted)). And petitioners recognized the tangible reasons this principle must apply to this case: "forcing SSB back into bankruptcy proceedings" would "wreak … havoc by upsetting the settled expectations of [many] third parties, and the many transactions that have been made in reliance on confirmation." See CA5 Doc. 126 at 21.

If a remedy in bankruptcy would do inequity, such as by jeopardizing the reorganized debtor, the reviewing court may dismiss an appeal as equitably moot. Below, petitioners and SSB moved the Fifth Circuit to decline jurisdiction on equitable grounds. That motion was directed to the court of appeals' equitable discretion. See *Tribune*, 799 F.3d at 289 ("Federal courts have ample equitable authority to decide when no remedy is appropriate ….") (Ambro, J., concurring). While courts exercising this equitable discretion may reach different results in different cases, there is no circuit conflict about the rules they should apply when asked to modify a plan provision.

II. The Petition Does Not Present An Important Question Or A Viable Vehicle

1. The Fifth Circuit's application of equitable mootness principles to the facts of this case does not raise an important or recurring question warranting this Court's intervention. The lower court's this-case-only holding was based on the particular facts and equities of this restructuring. The court considered, among other factors, the extent to which excising the indemnity would harm third parties not before the court, the sophistication of

the parties, the extent to which they assumed the risk, and the likelihood that striking the indemnity would, as a practical matter, undermine the restructuring. Pet. App. 47a-48a, 50a-52a. The Fifth Circuit's discretionary balancing of these prudential factors—right or wrong—is a highly fact-bound conclusion that is a poor candidate for this Court's review. See *McKee* v. *Cosby*, 586 U.S. 1172, 1173 (2019) (Thomas, J., concurring in denial of certiorari) (agreeing that Court should not "take up" a "factbound question"); *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-21 (1994) (Rehnquist, C.J., in chambers) (similar).

Petitioners take issue with the particulars of how the Fifth Circuit conducted this equitable balancing, arguing that the panel should have placed greater weight on testimony about the indemnity's importance to the plan, as well as the plan's severability provision. Pet. 28. But these complaints are textbook requests for "error correction," which is "not among the 'compelling reasons' ... that govern the grant of certiorari." S. Shapiro, et al., Supreme Court Practice § 5.12(c)(3) (11th ed. 2019) (quoting Sup. Ct. R. 10).

Petitioners do not ask this Court to consider the equitable mootness doctrine more generally. Nor do they identify any conflict in the lower courts about how to apply equitable mootness. Regardless, this Court has recently declined to consider petitions raising questions about that doctrine. See, *e.g.*, *U.S. Bank Nat'l Ass'n* v. *Windstream Holdings, Inc.*, 144 S. Ct. 71 (2023) (Mem.) (denying certiorari); *Hargreaves* v. *Nuverra Env't Sols., Inc.*, 142 S. Ct. 337 (2021) (Mem.) (same); *Charter Commc'ns*, 133 S. Ct. 2021 (2013) (Mem.) (same).

Petitioners place great weight on *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), but it does not

suggest the question petitioners raise is important. Cf. Pet. 32-33. There, the Court merely noted that it was not deciding a question that was not presented in the case before it: "[B]ecause [*Purdue Pharma*] involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated." *Purdue Pharma*, 603 U.S. at 226. Leaving an unpresented question undecided does not mean the question warrants this Court's review—especially when the answer depends on a fact-intensive, case-by-case balancing of equitable interests.

Petitioners also cite media coverage of the decision below, but those articles do not concern the question petitioners ask this Court to address. Pet. 34. To be sure, whether the underlying 2020 transaction and associated indemnity were lawful may be important questions in debt markets. See *ibid.* (citing James Nani & Alex Wolf, *Serta Debt Ruling Lobs 'Grenade' Into Restructuring Strategies*, Bloomberg Law (Jan. 3, 2025), https://news.bloomberglaw.com/bankruptcy-law/serta-debt-ruling-lobs-grenade-into-restructuring-strategies; Adam Levitin, *Serta Simmons Uptier: Implications*, Credit Slips (Jan. 2, 2025), https://creditslips.org/2025/01/02/serta-simmons-uptier-implications/). But petitioners do not seek this Court's review of the Fifth Circuit's holdings on those merits issues.

2. In any event, the petition presents a poor vehicle to consider the question petitioners raise because the question was not presented to the court below. Petitioners assert here that the Fifth Circuit had "a binary choice" of remedies, and one of those choices was simply to "affirm" the unlawful plan. Pet. 35. If the Fifth Circuit

was to grant any relief, it had only one option in petitioners' telling: vacate the entire plan. And, according to petitioners, the fact that plan vacatur was the sole available remedy would not mean the court was "stripped of … jurisdiction." *Ibid.* (quoting Pet. App. 51a).

This issue was not litigated below so it should not be litigated for the first time here. In the Fifth Circuit, no party argued that if the court exercised jurisdiction and found the indemnity unlawful it should vacate the entire plan. The appellants expressly disclaimed any remedy that would "undo the plan" or "seek to overturn the Confirmation Order as a whole." CA5 Doc. 142 at 1 (excluded lenders); CA5 Doc. 141 at 3-4 (Citadel). SSB, of course, did not tell the Fifth Circuit it should unwind SSB's consummated reorganization plan and force SSB back into bankruptcy. Nor did petitioners, who filed a joint brief with SSB. CA5 Doc. 126. Rather, petitioners and SSB together argued below that "any attempt to unwind the Plan would have unjustifiable and deleterious impacts on third parties not before the Court." *Id.* at 2-3. The Fifth Circuit did not, as petitioners now suggest, "refus[e] to let the parties 'go back to the drawing board.'" Pet. 30 (quoting Pet. App. 50a). It never considered that relief because no one asked it to. Cf. *Tribune*, 799 F.3d at 278 ("[O]ur starting point is the relief an appellant specifically asks for.").

Because no party advocated below for the position petitioners press in this Court, this case is not a suitable vehicle to consider the question. This is "a Court of review, not of first view," so issues before the Court should not make their "first appearance here." *Rivers* v. *Guerrero*, 605 U.S. 443, 458 (2025) (citations omitted). For good reason, this Court "ordinarily will not decide questions not raised or litigated" below. *City of Springfield* v.

Kibbe, 480 U.S. 257, 259 (1987) (per curiam). This case is no exception. All parties below agreed that the Fifth Circuit should not unwind SSB's consummated plan, so the court of appeals did not consider imposing that remedy. This Court should not consider it either.

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For the foregoing reasons, the Court should deny the petition.

Respectfully submitted.

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