

No. 24-1322

IN THE
Supreme Court of the United States

BARINGS LLC, ET AL.,

Petitioners,

v.

AG CENTRE STREET PARTNERSHIP, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

There is a stark division among circuits over the scope of a reviewing court’s remedial authority over a confirmed Chapter 11 plan. Respondents, Serta Simmons Bedding, LLC and its affiliated debtors (“Serta”), and the Competing Lenders and Citadel Equity Fund Ltd. (“Lenders”), try but fail to muddy the waters on that split. They ignore the view of the First, Second, Third, and Fourth Circuits that the relief the Fifth Circuit awarded is impermissible. In those courts, if an unlawful plan provision is “essential,” the court can *only* make the “up-or-down decision” to “affirm or vacate Plan approval.” *In re Financial Oversight & Management Board for Puerto Rico*, 989 F.3d 123, 132-33 (1st Cir. 2021); Pet. 13-17. Thus, these other circuits reject the Fifth Circuit’s blue-pencil remedy for key plan provisions. This conflict in authority—on an issue this Court already recognized as important in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024)—warrants this Court’s review.

Respondents observe that the cases opposite the Fifth Circuit involved equitable-mootness determinations, as did the Fifth Circuit’s own decision, but the Petitioning Lenders are not asking the Court to review the propriety of the equitable mootness doctrine. Respondents’ focus on equitable mootness elides the critical point—questions about a court’s authority to rewrite a confirmed bankruptcy plan on appeal often arise in the context of equitable-mootness determinations because a court’s remedial authority is antecedent and adjacent to the mootness inquiry.

Nonetheless, whether a court has authority to excise an unlawful plan provision is distinct from whether the court should decline on prudential grounds to hear a challenge to that provision. How the court answers the authority question could affect its willingness to dismiss on prudential grounds, but the former does not control the latter, and the two issues cannot be merged. Equitable mootness is a case-specific finding concerning disruption to actual and interested bankruptcy parties. Whether a court has the power to excise a material plan provision is a legal question—and the answer to that remedial question should be the same in all courts. Yet the Fifth Circuit endorses appellate blue-penciling of material plan provisions, whereas other circuits reject such judicial revisions. Only this Court can resolve that conflict.

Respondents' other arguments against review are makeweight. On the merits, they offer threadbare attempts to justify the excision remedy. They do not address the primary flaws in the decision below—that it undermines the Bankruptcy Code's protection of creditors' voting rights and contravenes bedrock contract principles undergirding the Code. This Court already recognized in *Purdue Pharma* that whether to “unwind[] reorganization plans that have already become effective and been substantially consummated” is a question worthy of consideration. 603 U.S. at 226. Respondents cannot meaningfully contest that creditors, debtors, and courts alike need clear guidance on that question.

None of respondents' contrived vehicle problems has merit. This case presents a legal question of remedies, not a factbound dispute on equitable mootness.

The issue at hand was both presented to and addressed by the Fifth Circuit.

The Court should grant the petition.

ARGUMENT

I. THE FIFTH CIRCUIT’S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Respondents cannot obscure the disagreement among the courts of appeals on the remedial authority of an appellate court addressing an unlawful but material provision in a plan.

The Fifth Circuit takes the view that it can “surgically excise” a plan provision *without regard* for its materiality. App. 48a. By contrast, other circuits have concluded that they lack authority to erase a material plan provision without allowing the parties to renegotiate. The First Circuit held that courts face an “up-or-down decision” to “affirm or vacate Plan approval” when the unlawful provision is “an essential component” of the plan. *Puerto Rico*, 989 F.3d at 132-33. The Second Circuit held it could not invalidate “critical” provisions of a plan without “renewed negotiations.” *In re Charter Communications, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). The Third Circuit determined that eliminating a “central issue” from a plan would require “recall[ing] the entire Plan for a redo.” *In re Tribune Media Co.*, 799 F.3d 272, 280-81 (3d Cir. 2015). And the Fourth Circuit concluded that upsetting a “necessary condition” of plan confirmation would require “other parts of the plan * * * to be re-configured” by seeking renewed “approval by * * * lenders.” *In re U.S. Airways Group, Inc.*, 369 F.3d 806, 811 (4th Cir. 2004). The Ninth Circuit, mean-

while, has taken an intermediate position—which respondents ignore entirely. *In re Transwest Resort Properties, Inc.*, 801 F.3d 1161, 1172 (9th Cir. 2015).

Respondents focus on the fact that courts often address the available-remedies question in the context of equitable mootness. Lenders Opp. 18; Serta Opp. 13-15. But that context does not obviate the conflict among courts on the separate and antecedent question of a court’s remedial authority. Equitable mootness is a prudential doctrine that comes into play only *after* a court determines that reversal on one issue would require unwinding a consummated plan; it does not address a court’s power to impose a materially different plan on disenfranchised creditors.

To be sure, the available-remedies issue could affect how a court determines whether relief “can be granted without unjustly upsetting a debtor’s plan of reorganization,” which is why the remedial issue is often discussed in equitable-mootness cases. *Charter Communications*, 691 F.3d at 481. But *what* relief is available and *whether* the court should entertain awarding it are distinct questions.¹

While respondents insist that this is really a dispute over “the Fifth Circuit’s finding that the present

¹ Lenders contend that the question of what remedy to impose comes only after a court decides that a case is not equitably moot. Lenders Opp. 24. But the ultimate remedy imposed is different from the threshold question of the range of remedies that *could* be imposed. Equitable mootness considers “whether the relief requested” would have adverse consequences, App. 45a; understanding what relief is available thus informs that inquiry. Regardless, whether viewed as a first or second question, the scope of a court’s remedial authority is distinct from the prudential question of equitable mootness.

matter was not equitably moot,” Lenders Opp. 23-25; Serta Opp. 22-23, the Petitioning Lenders are not asking this Court to review the equitable mootness doctrine, Pet. 35. And respondents do not dispute that the Court can answer the remedial question and leave for another day the propriety of equitable mootness. Indeed, the remedial question only becomes *more* important as courts like the Fifth Circuit move away from prudential mootness doctrines.

Respondents similarly attribute the different outcomes in the circuits to the “fact-intensive analysis” of equitable mootness. Lenders Opp. 20-24; Serta Opp. 15-22. They contend that other circuits merely “concluded in *different* cases on *different* facts that the requested relief would be imprudent or inequitable,” Lenders Opp. 24, “jeopardiz[ing] the debtor’s ‘emergence as a revitalized entity,’” Serta Opp. 16. But they miss the forest for the trees: Equitable mootness was at issue in those cases only because the courts rejected the approach taken below and correctly held that invalidating a key plan provision would *require* renegotiation and a new vote.

Charter Communications is a case in point. Contra Serta Opp. 16; Lenders Opp. 21. There the Second Circuit explained that it could not execute a “quick, surgical change” because excising key plan provisions would destroy the parties’ bargain—the jilted party may “not be willing to give up” its bargained-for benefits “without also reneging on at least part of the benefit” it bestowed on other parties. 691 F.3d at 486. Accordingly, “the parties would have to enter renewed negotiations.” *Ibid.* It was these “renewed ne-

gotiations” that would “cast[] uncertainty over Charter’s operations,” warranting dismissal on equitable-mootness grounds. *Ibid.*

Respondents contend that the lower courts “all agree on the rules applicable to plan modification,” Serta Opp. 19, because none has “a categorical rule forbidding ‘blue-penciling’ of a Chapter 11 plan or requiring a redo of confirmation any time an appellate court finds that a plan should be changed,” Lenders Opp. 20. That attacks a straw man: All agree that plan revisions are permissible *in some instances, e.g.*, when minor provisions are deemed unlawful. *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (“some” non-material provisions “could be stricken from the plan without undoing other portions of it”). But the other circuits—apart from the Fifth Circuit—ask whether the challenged provision is material, *i.e.*, nonseverable, and only blue-pencil if it is *not*. Pet. 13-17. Indeed, Serta’s cited law-review articles addressing “blue penciling,” at 18 n.3, only demonstrate that this is a significant legal issue worthy of resolution.

Respondents’ supposedly contrary cases only prove the point. *Behrmann v. National Heritage Foundation* observes that “the Confirmed Plan expressly provides that any clause may be severed should it be determined to be unenforceable, which suggests that the plan would remain viable absent the” challenged provisions. 663 F.3d 704, 714 (4th Cir. 2011); see also *In re MPM Silicones, LLC*, 874 F.3d 787, 805 (2d Cir. 2017) (concluding changes to interest rate for certain loans would not “alter a critical piece of the Plan” and remanding to bankruptcy court to adjudicate “limited” revisions).

Had this case been decided in one of the other circuits, the court would have conducted a severability analysis, considering the Plan's nonseverability clause and the undisputed testimony that the indemnity provision was material. See *Charter Communications*, 691 F.3d at 485-86. Because the indemnity was "an essential component" of the Plan, the court would face an "up-or-down decision" to "affirm or vacate Plan approval." *Puerto Rico*, 989 F.3d at 132-33; see Pet. 28-30. Perhaps in those circuits the court would have dismissed the appeal as equitably moot. But the court would not have been obliged to do so—and if it did not dismiss, it would have had no choice but to "recall the entire Plan for a redo." *Tribune Media*, 799 F.3d at 281. Only in the Fifth Circuit would the court impose an entirely new plan, never approved by creditors, with no regard for the materiality of the change or the Code's requirement of creditor approval. On that issue, courts are firmly divided and will remain so unless this Court intervenes.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

Respondents offer little to defend the remedy of excising a material plan provision, relegating most of their arguments to footnotes. Lenders Opp. 30-33 & n.4; Serta Opp. 20 n.4. They do not seriously dispute that the Fifth Circuit's decision contravenes the Bankruptcy Code's mandate to allow creditors to vote on material modifications to a plan. Pet. 21-24. Nor that it violates the black-letter contract-law principles underlying the Code, which require courts to conduct a severability analysis before excising material provisions. *Id.* at 25-30.

1. Respondents note that the Code does not expressly “limit” an appellate court’s remedial powers. Serta Opp. 20 n.4; Lenders Opp. 33 n.4. That misses the point. The Code deliberately protects creditors’ voting rights by requiring that material modifications to a plan in bankruptcy court receive sufficient creditor votes. Pet. 21-24. And the court’s duty “to ensure that a plan complies with the Code,” Lenders Opp. 33 n.4, includes its obligation, once it has deemed a plan provision unlawful, to ensure the revised plan has sufficient creditor approval, Pet. 22-23.

“[T]he reasons underlying” those protections in bankruptcy court should prevent an appellate court from later disrupting the parties’ agreed-upon bargain without allowing creditors a revote. *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). Respondents do not explain why an appellate court can award relief that a bankruptcy court cannot.

Lenders assert that severability principles have no bearing here because “a confirmed plan is a court-approved instrument that binds all parties in interest,” Lenders Opp. 33 n.4, while ignoring the black-letter principle that a confirmed plan is treated as a contract, Pet. 25. Other court-approved contracts, such as settlement agreements, are subject to severability analyses. *E.g.*, *In re UAL Corp.*, 428 F.3d 677, 682 & n.4 (7th Cir. 2005) (“overturning” settlement was “possible result” because of nonseverability clause); *Corn Plus Cooperative v. Continental Casualty Co.*, 516 F.3d 674, 682 (8th Cir. 2008); *Leverso v. SouthTrust Bank of Alabama*, 18 F.3d 1527, 1530 (11th Cir. 1994). Although a court-approved class-wide settlement, like a Chapter 11 plan, can bind class members “whether they agreed to it or not,” Lenders

Opp. 33 n.4, courts still consider whether provisions of such agreements are severable, *e.g.*, *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 720 (2d Cir. 2023).

The same is true here: The remedy for an invalid provision in a Chapter 11 plan turns on whether the provision is severable from the rest of the plan. If not, then the whole plan—like any contract—is unenforceable, and a new plan must be negotiated and approved. Multiple courts of appeals have reasoned as much. Pet. 27-28. Respondents ignore their severability analyses.

2. Lenders’ attempt to devise a justification for the decision below fares no better. They claim that the Petitioning Lenders were “keenly aware” that a court might strike down the indemnity provision. Lenders Opp. 31-32. There is no evidence for Lenders’ “keenly aware” assertion. Regardless, it is irrelevant. Parties negotiate and perform ordinary contracts with the understanding that a court might later declare a provision of their bargain unlawful, but courts nonetheless enforce the principle that, if a provision essential to the agreement is invalid, the entire contract becomes unenforceable. Pet. 26-27; *e.g.*, *Givaudan SA v. Conagen Inc.*, 128 F.4th 485, 499-506 (2d Cir. 2025) (applying severability analysis where parties “consummated” agreement).

Likewise, Lenders are wrong to endorse the Fifth Circuit’s concern that courts would be “stripped of their jurisdiction” if they cannot excise unlawful plan provisions. Lenders Opp. 4-5, 31-32 (quoting App. 50a-51a). If a plan provision is severable, a reviewing

court can modify and affirm the plan, and if it is inseverable, the court can “vacate Plan approval” and remand for the parties to negotiate a new plan that omits the unlawful provision. *Puerto Rico*, 989 F.3d at 133. In no context is the court powerless.

Finally, Lenders’ assertion that the Petitioning Lenders are not “unfairly harm[ed]” by excision, Lenders Opp. 32-33, defies the record. The Fifth Circuit accepted that the Petitioning Lenders “would not have” voted for the Plan without the indemnity, App. 17a, and left undisturbed the bankruptcy court’s finding that the indemnity was “integral” and “essential to” the Plan, App. 122a.

III. THIS CASE SQUARELY PRESENTS A SIGNIFICANT AND RECURRING QUESTION.

A. The Question Presented Is Important.

Respondents do not dispute that the question presented is important. They downplay this Court’s recognition of that issue in *Purdue Pharma*, but they cannot dispute that the Court singled it out as worthy of consideration. Pet. 32-33 (citing 603 U.S. at 226); contra Lenders Opp. 27-28; Serta Opp. 23-24.

Respondents’ alarmist rhetoric about the consequences of reversing confirms the need for clarity. Pet. 33-34. Whether the Fifth Circuit or the other courts of appeals are correct, the uncertainty generated by the decision below is intolerable for the federal bankruptcy laws, which are “intended to have uniform application throughout the United States.” *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945); see U.S. Const. art. I, § 8, cl. 4 (empowering Congress to enact “uniform Laws on the subject of Bankruptcies”).

Only if there is consensus among lower courts concerning their remedial power can creditors and debtors effectively negotiate and approve plans under the procedures Congress dictated in Chapter 11. Once they have clarity, parties can respond accordingly, inserting severability provisions where they would prefer that a plan remain enforceable even if a key provision is invalidated, or including nonseverability provisions (like the one here) where they would prefer to go back to the drawing board.

B. This Case Is An Excellent Vehicle For Addressing The Question Presented.

Respondents' attempt to manufacture vehicle problems fails. This case presents a clean vehicle for resolving the important remedial question on which the circuits are divided. Pet. 34-35.

Respondents are wrong to claim that the Petitioning Lenders did not preserve this issue or that their position here is inconsistent with their arguments below. Serta Opp. 24-26; Lenders Opp. 28-29. The Petitioning Lenders pressed this issue as a predicate to their request to dismiss on equitable-mootness grounds, arguing that simply "striking the indemnity provision" was improper "relief" because the Fifth Circuit "cannot excise the indemnity" without "sending the Plan back for a do-over." *Citadel Equity Fund, Ltd. v. Serta Simmons Bedding, LLC*, No. 23-20363 (5th Cir.), Dkt. 126 at 2-3, Dkt. 158 at 8. And, invoking the same Bankruptcy Code principles cited here, they also argued that excision was improper on the merits because the court could not invalidate the indemnity without "unwind[ing]" the Plan and "forc[ing] Serta back into bankruptcy." *Id.*, Dkt. 135 at 66-70.

The Fifth Circuit clearly considered the remedy argument as relevant to two separate issues, first rejecting it as a ground for equitable mootness, App. 48a-49a, and then—in a separate section—deciding that it had authority to excise the indemnity, App. 61a-62a. And after the Fifth Circuit declined to dismiss on equitable-mootness grounds and ordered excision, the Petitioning Lenders sought rehearing and again argued that courts may not “excise a material provision from a confirmed and consummated bankruptcy plan without sending it back for a revote.” No. 23-20363, Dkt. 255 at lxv, 10-19.

Because the issue was both “pressed” and “passed upon” below, it is preserved for the Court’s review. *Illinois v. Gates*, 462 U.S. 213, 218 & n.1 (1983).

Lenders misfire in arguing that review is unwarranted because litigation over indemnity provisions is “atypical.” Lenders Opp. 30. The particular provision at stake is immaterial to the question presented, which, as Lenders acknowledge, addresses “the kinds of relief” a court can provide, *ibid.*, not what relief should be awarded to address a particular provision. The severability of the indemnity here will be resolved on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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