No. 12-847

In the
# Supreme Court of the United States

LAW DEBENTURE TRUST COMPANY OF NEW YORK, AND $R^2$ INVESTMENTS, LDC,
*Petitioners,*

V.

CHARTER COMMUNICATIONS, INC., ET AL.,
*Respondents.*

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

## BRIEF OF BANKRUPTCY LAW PROFESSORS IN SUPPORT OF GRANTING THE PETITION

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## INTEREST OF AMICI CURIAE[1]

Amici are all bankruptcy professors at major American law schools who collectively represent a broad range of perspectives on bankruptcy law.[2] With respect to the issue in this case, amici have a variety of views on whether there should be an equitable mootness doctrine and, if so, what its contours should be. Amici agree on one thing: in light of the very important role the equitable mootness doctrine plays in bankruptcy proceedings in this country, the disagreements in the courts of appeals concerning the contours of the doctrine, and the absence of any previous guidance from this Court, the Court should grant the petition for a writ of certiorari.

## SUMMARY OF ARGUMENT

The "equitable mootness doctrine" is regularly invoked by Article III courts as a basis for refraining from hearing bankruptcy appeals after a

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party made a monetary contribution intended to fund the preparation or submission of this brief. Aurelius Capital Management, LP ("Aurelius") contributed to the preparation of this brief. Aurelius is not a party to this case, but is a frequent participant in bankruptcy proceedings.

[2] The list of amici filing this brief is attached hereto as Schedule A.

reorganization plan has been substantially consummated. Equitable mootness differs from actual mootness because it can apply even when an appellate court would be able to grant effective relief to the party challenging a bankruptcy court order. It is a judge-made doctrine that goes beyond the provisions of the Bankruptcy Code making certain transactions effectively immune from challenge—nothing in the Code bars courts from hearing appeals simply because a reorganization plan has been substantially consummated. The underlying bases for the doctrine appear to be that there are circumstances beyond those enumerated by Congress in which it is sensible to preserve a reorganization plan or to protect the interests of third parties who reasonably relied on the adoption of a reorganization plan, or circumstances where it is simply impracticable to "unscramble the eggs" after a plan has been consummated.

Whether courts are authorized to go beyond the terms of the statute to refrain from hearing appeals in such circumstances, and whether the particular standards established by various courts of appeals are appropriate exercises of such authority, are issues that have not been addressed by this Court but should be. As a matter of first principles, finality interests, reliance interests, and practical concerns are important in bankruptcy proceedings. Accordingly, an expert proposing revisions to the Bankruptcy Code might favor writing some applications of the equitable mootness doctrine into the Code. Or an expert critiquing the particular tests developed by the lower courts might conclude that one is preferable to another as a matter of policy or that some courts applying the doctrine reached

sensible results while others did not. But experts would also recognize that federal courts are normally required to decide issues properly brought before them by parties with standing when the case is not actually moot. Indeed, federal courts have a "virtually unflagging obligation" to exercise their jurisdiction rather than refrain from doing so. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Moreover, when equitable mootness is invoked, it means that no Article III court may review the decisions of a non-Article III bankruptcy court, even though those decisions may affect billions of dollars and the livelihoods of thousands of persons.

The equitable mootness doctrine has developed without any guidance from this Court. As an initial matter, given that the doctrine goes beyond the terms of the Bankruptcy Code and that federal courts generally have a duty to exercise their jurisdiction rather than to refrain from doing so, whether there should be such a doctrine is not clear and ought to be decided, and only this Court can do so.

In addition, the equitable mootness test has been formulated and applied in different ways by different courts and there are well-developed conflicts in the circuits on important aspects of the doctrine that will not be resolved without review by this Court. First, the Second Circuit *presumes* equitable mootness once a reorganization plan has been substantially consummated. Three other circuits agree with that approach but five others do not. Second, the Second Circuit and two others review district court determinations of equitable mootness under the

abuse of discretion standard while five other circuits review these decisions *de novo*. As the extensive nature of these conflicts illustrates, the equitable mootness doctrine is not an obscure rule that is invoked infrequently, but plays an increasingly important role in bankruptcy practice.

In fact, it appears that sophisticated parties have learned that a "pre-packaged" reorganization plan that is designed to be consummated over a weekend may be insulated from review by an Article III court even though the plan contains terms that would be determined to be unlawful if the plan were subjected to judicial review, and those parties are increasingly exploiting that opportunity. And because there are numerous circuits on each side of the conflicts, they are very unlikely to be resolved without a decision by this Court.

## ARGUMENT

### THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THERE SHOULD BE AN "EQUITABLE MOOTNESS" DOCTRINE AND, IF SO, WHAT ITS CONTOURS SHOULD BE.

The Court should grant the petition for a writ of certiorari and decide whether there should be an equitable mootness doctrine of any sort. If so, the Court should resolve the various conflicts in the circuits concerning the scope of the doctrine.

#### A. The Court Should Determine Whether There Should Be An Equitable Mootness Doctrine.

This case presents an important opportunity for this Court to address the threshold issue raised in the Petition: whether the equitable mootness

doctrine should exist at all. Pet. 22-29. The answer to that question is both important and subject to reasonable disagreement—and it has never been addressed by this Court. Thus, although Amici are not necessarily of one mind about *whether* the equitable mootness doctrine should exist, they all agree that the Court should use the opportunity presented by this case to address that important question.

**1. The Equitable Mootness Doctrine Is a Judicial Creation Allowing Courts To Refrain From Exercising Their Jurisdiction.**

The equitable mootness doctrine originated in the Ninth Circuit's decision in *In re Roberts Farms, Inc.*, 652 F.2d 793, 797-98 (9th Cir. 1981). In that case, the Ninth Circuit dismissed a Bankruptcy appeal as moot after suggesting that the bankruptcy plan confirmed by the Bankruptcy Court had "been so far implemented that it [was] impossible to fashion effective relief for all concerned." *Id.* at 797.

Subsequent decisions and commentary have found the exact basis for the decision to be somewhat puzzling. Equitable mootness has been described as "one of the most … puzzling concepts in bankruptcy law. … Although the equitable mootness doctrine is embraced in every circuit, the rationale underlying the doctrine is unsettled at best." R. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 J. Bankr. L. & Prac. 1, Art. 2 (2010).

Nevertheless, as then-Judge Alito explained when he was on the Third Circuit, the *Roberts Farms, Inc.* decision appeared to be based on the theory that

courts should refrain from deciding a case where "no relief was practicable as a result of the many post-confirmation transactions that were irreversible" due to former Bankruptcy Rule 805. *In re Continental Airlines*, 91 F.3d 553, 569 (3rd Cir. 1996) (Alito, J., dissenting). Rule 805 formerly provided that, unless stayed, "an order approving a sale of property … to a good faith purchaser … shall not be affected by the reversal or modification of such order on appeal." Two provisions of the Bankruptcy Code contain similar rules. One provision states that "the reversal or modification on appeal of an authorization … of a sale or lease of property does not affect the validity of a sale or lease." 11 U.S.C. § 363(m). Another provision contains almost identical language with respect to authorizations "to obtain credit or incur debt." 11 U.S.C. § 364(e).

Nevertheless, as Judge Alito explained in his 1996 dissenting opinion, "the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested." 91 F.3d at 570. That extension is illustrated by the Second Circuit's description of its version of the doctrine in this case:

> In this circuit, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated. Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.), 94 F.3d 772, 776 (2d Cir. 1996) ("Chateaugay III "). … The presumption of equitable mootness can be overcome, however, if all five of the "Chateaugay factors" are met:

> (1) "the court can still order some effective relief";
>
> (2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity";
>
> (3) "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";
>
> (4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and
>
> (5) "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."

Pet. App. 9a-10a (citing *In re Chateaugay Corp.*, 10 F.3d 944 at 952-53 (2d Cir. 1993)). As that shows, an initially modest rule has expanded into a presumption that an appellate court may grant no relief unless five factors are met that go far beyond the terms of the rule from which the rule doctrine appears to have arisen.

In this case, petitioners do not seek to invalidate any good faith sale authorized pursuant to the reorganization plan of respondent Charter Communications. Nor do petitioners seek to invalidate credit obtained or debt incurred by Charter. And the court of appeals acknowledged that it could order effective relief (factor one), that the

adverse parties are participating in the proceeding (factor 4), and that petitioners diligently sought a stay (factor 5). As Judge Alito stated almost 17 years ago, the equitable mootness doctrine, as elaborated after *Roberts Farms*, broadly bars appeals that are not barred by the Bankruptcy Code. *See also In re Philadelphia Newspapers, LLC* 690 F.3d 161, 170 (3d Cir. 2012), *quoting Nordhoff Invs. Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J. concurring) (The equitable mootness doctrine "'can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges.'"). In addition, as Petitioners argue, Pet. 23, substantial constitutional problems are presented by a doctrine that may broadly bar appeals when effective relief is available, the relevant parties are before the court, and a stay was timely sought.

**2. Whether the Equitable Mootness Doctrine Should Exist Is Unclear and Should Be Decided by this Court.**

As explained above, it is clear that the equitable mootness doctrine extends far beyond any specific provision of the Bankruptcy Code. Whether the courts have authority to create such a judicial extension to the Bankruptcy Code, and, if so, whether such an extension is desirable, are difficult questions worthy of this Court's attention.

On the one hand, there are non-textual arguments favoring the creation of an equitable mootness doctrine. Judge Easterbrook suggested one such justification in *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). In that case, Judge

Easterbrook acknowledged that 11 U.S.C. § 1127(b) restricts the ability of bankruptcy courts—but not appellate courts—to modify reorganization plans after "substantial consummation" of the plan. *Id.* at 769. He suggested, however, that the difficulties in "any effort to unscramble an egg … are so plain and so compelling that courts fill the interstices of the Code with the same approach." *Id*.

Judge Alito called Judge Easterbrook's approach "an interesting theory," *Continental Airlines*, 91 F.3d at 571, and it is. Nevertheless, there are important reasons to doubt the courts' authority to unilaterally impose such an extension without Congressional authority. Congress has provided in Sections 363(m) and 364(e) that appellate courts may not disturb good faith purchases and decisions to obtain credit or incur debt under certain circumstances. In addition, in Section 1127(b) Congress has prohibited bankruptcy courts from unscrambling eggs. But Congress did not provide that appellate courts may not modify reorganization plans after they are substantially consummated—to the contrary, Congress authorized appeals without regard to whether a plan had been substantially consummated.

Moreover, Sections 363(m) and 364(e) show that Congress knows how to limit the scope of appellate review. The Solicitor General, after calling the equitable mootness doctrine a "judicial construct of questionable foundation," noted that "[t]his Court has never endorsed" the doctrine, and invoked the maxim of *expressio unius est exclusio alterius* to argue that "Congress's express inclusion of two bankruptcy-law exceptions to appellate review

indicates an intent to preclude the recognition of others." Petition for a Writ of Certiorari, *United States v. GWI PCS I, Inc.*, No. 00-1621 (Apr. 2001), at 22, 23.

Despite Congress's apparent decision not to limit the authority of appellate courts beyond the restrictions in Sections 363(m) and 364(e), it may be that actions protected from review by those provisions in some cases effectively limit the ability of appellate courts to knock the props out from under reorganization plans that have been substantially consummated. But any resulting doctrine should at the least be tied to the relevant statutory provisions. As Judge Alito explained in 1996 and commentators have subsequently recognized, the courts of appeals are not developing rules that follow from particular provisions enacted by Congress, but instead are elaborating a doctrine without tying it to the provisions of the Bankruptcy Code. This Court should review this development.[3]

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[3] That the courts are creating a doctrine unmoored to the Code is illustrated by their divergence concerning the appropriate test for equitable mootness. As explained above at pages 7-8, the Second Circuit applies a five-factor test and requires each factor to be met in order to overcome a presumption of equitable mootness after a reorganization plan has been substantially consummated. The Third Circuit also applies a five-factor test, but review of its factors, as enunciated in *Philadelphia Newspapers*, 690 F.3d at 168-69, shows that they are similar but not identical to the Second Circuit's factors. Moreover, the factors are applied differently. The Second Circuit requires each factor to be satisfied or the appeal

### B. If The Court Adopts An Equitable Mootness Doctrine, It Should Resolve The Conflicts In The Circuits Concerning The Contours Of The Doctrine.

If the Court determines that there should be an equitable mootness doctrine, it should resolve the conflicts in the circuits concerning (1) whether equitable mootness should be presumed after a reorganization plan has been substantially consummated and (2) whether review by a court of appeals of a district court's equitable mootness determination should apply the abuse of discretion standard or conduct *de novo* review. This case is an appropriate vehicle to resolve each of those issues.

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will not be allowed to go forward. The Third Circuit, in contrast, does not require each factor to be satisfied and gives varying weight to the factors on an *ad hoc* basis, although whether an appeal would "undermine the plan" is generally the most important factor. *Id*. The Tenth Circuit provided a summary of the factors considered by each circuit in *In re Paige*, 584 F.3d 1327, 1338-39 (10th Cir. 2009). After reviewing the decisions of other circuits, the court adopted a six-factor test similar to the test used in the Third Circuit, but also asking, "based upon a quick look at the merits of appellant's challenge to the plan, is appellant's challenge legally meritorious or equitably compelling?" *Id*. at 1339. Unlike the Third Circuit, the Tenth Circuit did not designate any factor as most important, but instead stated that the "six factors are not necessarily conclusive, nor will each factor always merit equal weight." *Id.*

**1. The Court should determine whether there is a presumption of equitable mootness if a reorganization plan has been substantially consummated.**

The Tenth Circuit's decision in *Paige* shows that there is an entrenched conflict concerning whether equitable mootness should be presumed after a reorganization plan has been substantially consummated. Citing the Second Circuit's decision in *Chateaugay*, the Tenth Circuit "reject[ed] the conclusion that some courts have reached that a finding of substantial consummation will shift the burden to the party seeking to have the court reach the merits of its challenge to the plan." 584 F.3d at 1340. Moreover, as petitioner documented, the conflict in the circuits is broad as well as express. Pet. 13-16.

A presumption of equitable mootness after a reorganization plan has been substantially consummated is similar in effect to an extension of Section 1127(b)—the provision that "dramatically curtails the power of a bankruptcy court to modify a plan of reorganization after its confirmation and 'substantial consummation.'" *Continental Airlines* 91 F.3d at 570 (Alito, J., dissenting). But Congress chose to curtail the power of bankruptcy courts after substantial consummation and did not curtail the power of reviewing courts. To the contrary, Congress permitted appeals to go forward without any such limitation, even though Congress plainly knows how to draft such a limitation. This Court should determine whether the lower courts have properly adopted a presumption that results in a dramatic

curtailment of their jurisdiction to resolve bankruptcy appeals when Congress did not do so.

**2. The Court should determine whether equitable mootness decisions should be reviewed *de novo* or under an abuse of discretion standard.**

Petitioners also demonstrated that there is an express and entrenched conflict in the circuits on the standard of review that should be applied to equitable mootness determinations. Pet. 18-20. Indeed, multiple courts have acknowledged the conflict. For example, in *Paige*, the Tenth Circuit stated that the "courts are split over whether a district court's ultimate determination of equitable mootness should be reviewed de novo or for abuse of discretion." 584 F.3d at 1334-35. The Sixth Circuit in *In re United Producers, Inc.*, 526 F.3d 942 (6th Cir. 2007), also acknowledged the split: it recognized that the majority of the Third Circuit had adopted the abuse of discretion standard in *Continental Airlines*, but expressly rejected that standard and agreed with the position set forth in Judge Alito's dissenting opinion that *de novo* review is appropriate because "the court of appeals is 'in just as good a position to make th[e] determination [concerning equitable mootness] as was the district court.'" *Id.* at 946, *quoting Continental Airlines*, 91 F.3d at 568 n.4 (Alito, J., dissenting). Thus, once again this case presents a conflict that is not likely to be resolved without a decision by this Court.

And again, the recurring question presented is of considerable importance. The law of equitable mootness—if there is to be one—will develop more consistently within and across circuits if appellate

courts make the final legal determination concerning whether an appropriate showing was made to preclude consideration of an appellant's challenge to the provisions of a reorganization plan.

* * * * *

Finally, the impressive string cite on pages 29-31 of the Petition shows that the equitable mootness doctrine is not an obscure rule with few applications. Indeed, in the short time since the Petition was filed, the Tenth Circuit has issued another equitable mootness decision, *In re Stephens*, ___ F.3d ___ (10th Cir. 2013), 2013 WL 151193. Moreover, the decision further illustrates the conflict in the circuits. The Tenth Circuit in *Stephens* began its opinion by noting that it does not presume equitable mootness, but instead requires the party invoking the doctrine to "bear[] the burden of proving the[] factors weigh in favor of dismissal." *Id*. at *2. The court went on to refuse to apply the doctrine even though it recognized "that reversing the confirmation order will likely preclude a successful reorganization," *id*. at *3—a result contrary to the result the Second Circuit would reach on the same facts on account of its presumption.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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