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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly applied the equitable mootness doctrine in dismissing petitioners' attempt to completely unwind one of the largest and most complex prearranged bankruptcies ever attempted, years after the plan of reorganization was confirmed and consummated, where doing so would be practically impossible and unfair to numerous third parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents state as follows:

Respondent Charter Communications, Inc. is a publicly held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent CCH I Capital Corporation was dissolved on December 31, 2009.

Respondents CCH I, LLC; CCH II, LLC; and CCH II Capital Corporation are wholly-owned and solely-controlled indirect subsidiaries of Charter Communications, Inc. and, accordingly, no other publicly held corporation owns 10% or more of their stock.

No corporate disclosure statement is required for Respondent Official Committee of Unsecured Creditors, which is not a corporate entity.

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INTRODUCTION

This case involves a challenge by two structurally subordinated unsecured creditors and stockholders to the terms of Charter's $12 billion plan of reorganization that became effective on November 30, 2009. The plan, which was reached during "once-in-a-lifetime market conditions" when "the global credit markets went into the financial equivalent of cardiac arrest," represented "a major achievement for the Debtors and [their] stakeholders." Pet. App. 67a, 128a, 153a. Petitioners received the highest recovery among all unsecured noteholders. Nonetheless, petitioners objected to confirmation of the plan and have pursued their appeals over the past three-and-a-half years in an attempt to increase their recoveries even more. The District Court dismissed their appeals (and others) as "the epitome of equitable mootness not only because the Plan has been substantially consummated, but because each requested remedy would be inequitable and would nullify the Plan's authorization by the various constituencies and the Bankruptcy Court, thereby causing the entire Plan to unravel and threatening New Charter's vitality." *Id.* at 42a. The Second Circuit unanimously affirmed, and rehearing *en banc* was denied without dissent or comment.

Petitioners now ask this Court to review the highly fact-intensive and case-specific decisions of the courts below. But aware that this Court typically does not grant *certiorari* to review lower courts' application of settled law to fact, petitioners attempt to cloak their request for error correction with various legal challenges. Petitioners thus mount a broadside challenge to the very viability of the equitable mootness doctrine, and point to two purported splits of

authority pertaining to how courts apply the doctrine. None of those issues warrants this Court's review.

First, the well-established doctrine of equitable mootness has been universally endorsed by all twelve Circuit Courts with jurisdiction to hear bankruptcy appeals. In light of that broad consensus, this Court has often and recently denied petitions such as this, which seek to eviscerate the doctrine. Despite petitioners' alarmist allegations that the equitable mootness doctrine has "run amok," Pet. 29, petitioners' own cited cases show that equitable mootness arguments are rejected in many of the cases in which they are made. Those decisions recognize, as did the courts below, that evaluating equitable mootness is a highly fact-intensive analysis that turns on, among other things, the complexity of the plan of reorganization, the circumstances of the debtor and the creditors, the nature and extent of the transactions that have occurred since confirmation, the specific relief requested, and the impact that relief would have on the plan, the debtor, creditors, and other third parties who relied on the confirmed plan. Weighing those factors on a case-by-case basis, courts routinely turn away equitable mootness arguments—albeit on facts very different than those that were before the Second Circuit in this case.

Second, this case is an inappropriate vehicle by which to consider any unresolved questions about the scope and contours of the equitable mootness doctrine. By any measure, the Second Circuit's equitable mootness determination is plainly correct, and the shallow splits of authority to which petitioners point would have no meaningful impact on that analysis. The reasons are straightforward. Because petitioners

are appealing from the Bankruptcy Court's confirmation order, the *only* relief that this or any other court could provide would be to completely unravel Charter's long-completed reorganization *three-and-a-half years* after the plan was confirmed. Not surprisingly, scores of transactions have been undertaken in reliance on the plan during that time period: equity in New Charter has been distributed and has traded in large volumes on the NASDAQ stock exchange; hundreds of millions of dollars in payments have been collected and disbursed (and have changed hands many times over); significant operational, governance, and regulatory changes to Charter have been made; and many of the original parties involved in negotiating the plan have long since divested any interest in Charter. As the Second Circuit recognized, there is simply no feasible way to claw back that equity, undo those payments, or haul back into court those absent parties—all of which would be required if a court were to attempt to grant petitioners the relief they seek.

The petition also suffers from other vehicle problems. Petitioners have waived many of the arguments they now make—including their claim for monetary relief. And because petitioners did not diligently pursue a stay of plan confirmation from the Second Circuit or the Circuit Justice—or seek expedited review of their appeals in the lower courts—they have waived any ability to pursue further challenges to the confirmation order. Moreover, any disagreement about the application of the equitable mootness doctrine in this case is likely beside the point, given the weakness of petitioners' underlying challenges to the bankruptcy plan. The Bankruptcy Court rejected those challenges in a thorough and well-

reasoned 82-page opinion and 72-page order that followed 19 days of hearings in which the court heard testimony from 33 witnesses. And, in ruling on petitioners' stay motion, the District Court held that petitioners were unlikely to succeed on the merits of their claims and that "[n]either [petitioner] has demonstrated that any of the Bankruptcy Court's findings were clearly erroneous." Pet. App. 47a.

Third, the purported splits of authority identified by petitioners are overstated and do not warrant this Court's review. At best, petitioners have identified shallow disagreements about how the Courts of Appeals should review lower courts' equitable mootness decisions. The Second Circuit is in the majority on both issues identified by petitioners, and it is far from clear that those disagreements make any practical difference as to how this or any other case would be decided.

In short, nothing about this case warrants further review. The Second Circuit correctly applied the established doctrine of equitable mootness to dismiss petitioners' attempt to entirely unwind "perhaps the largest and most complex prearranged bankruptc[y] ever attempted," *id.* at 63a, years after the plan was consummated and after scores of transactions had been undertaken in reliance on that plan. To attempt to unwind those transactions now would not only be grossly inequitable, but likely impossible. In this case and in others, the lower courts continue to prudently apply the equitable mootness doctrine on a case-by-case basis to dismiss only those appeals where relief truly cannot be granted as a practical matter. For these reasons, and for those explained below, the Court should deny this petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Petitioner Law Debenture Trust Co. of New York ("LDT") was the "most structurally subordinated creditor in Charter's capital structure, and furthest removed from the operational assets." Pet. App. 27a. Petitioner R^2 Investments, LDC ("R^2") owned convertible notes represented by LDT and also became a substantial equity holder by opportunistically acquiring Charter common stock *after* Charter filed for bankruptcy. *Id.* Despite their subordinate status, Charter's bankruptcy plan afforded the noteholders represented by LDT (including R^2 itself) $24.5 million in cash, preferred stock (that was subsequently redeemed fully for $143 million in cash in April 2010), and a potential portion of the $27 million in litigation settlement proceeds held by New Charter. *Id.* at 36a n.14. That recovery was "the highest recovery under the Plan among all of the Debtors' unsecured noteholders." *Id.* at 89a-90a. In a freefall bankruptcy—which the Bankruptcy Court found had "loomed large," *id.* at 87a—they would have recovered a fraction of that, *id.* at 89a (noting that "in a liquidation … Noteholders would receive recoveries in the range of approximately 18.4% of their claims," but "[t]heir recoveries under the Plan far exceed that range, providing an estimated recovery of 32.7%"). Under any scenario, the Bankruptcy Court found that Charter was "hopelessly insolvent at the equity level." Second Circuit Joint Appendix ("JA") A-460. Indeed, R^2's motion to form an official committee of Charter equity security holders was opposed by the United States Trustee, denied by the Bankruptcy Court, and not appealed. *Id.* at A-456, A-460.

Respondent Charter Communications, Inc. ("CCI") and its affiliates (collectively, "Charter") comprise one of the nation's largest cable television providers. Pet. App. 26a. At the time of its bankruptcy filing, Charter had "a large operationally sound business" but was "saddled with almost twenty-two billion dollars in debt at various levels of a capital structure stacked with multiple intermediate limited liability holding companies." *Id.* (quotation marks omitted). During normal market conditions, Charter had a variety of refinancing options available by which it could manage that debt. *See id.* at 68a. But "[f]ollowing the bankruptcy of Lehman Brothers Holdings, Inc. on September 15, 2008, the global credit markets went into the financial equivalent of cardiac arrest." *Id.* at 67a. With commercial lending at a virtual standstill, "Charter needed to restructure promptly to avoid a potentially catastrophic free-fall bankruptcy." *Id.* at 69a.

Charter thus filed for Chapter 11 bankruptcy protection and simultaneously submitted a proposed reorganization plan to the Bankruptcy Court. *Id.* at 3a, 26a. The cornerstone of that plan was the "Allen Settlement"—an agreement among Charter's Board of Directors and Management, Respondent Paul Allen (a controlling shareholder of CCI), and the Crossover Committee (a committee of junior bondholders). *Id.* at 5a. Contrary to petitioners' suggestions of impropriety, *see* Pet. 4-5, the Bankruptcy Court found that the Allen Settlement was "in the best interests of the Debtors' estates and [was] fair and equitable." Pet. App. 116a. Moreover, the Allen Settlement was the "linchpin of the Debtors' Plan, without which the Debtors' restructuring goals would have been unobtainable, the Plan would not be confirmable or feasible, and the

substantial recoveries by the many parties in interest in these cases, including the fulcrum creditors and trade creditors, would fail to exist." *Id.* at 182a.

Understanding why requires a recognition that Charter's restructuring was undertaken "during perhaps the most challenging period in the modern era of global corporate finance." *Id.* at 67a. The nation was "in the midst of an historic financial crisis" in which "[c]ommercial lending came to a virtual halt." *Id.* Those realities formed the bedrock of Charter's plan of reorganization. "Given the uncertainty in the credit markets at the time," the plan was possible *only* if Charter could reinstate its nearly $12 billion senior secured debt—which featured unusually favorable interest rates and was necessary to preserve several billions of dollars worth of "net operating losses" ("NOLs"), that could be used to reduce future tax liability. *Id.* at 69a, 176a-77a. Reinstatement of that debt was critical because the circumstances of the "historic financial crisis" made it "unclear whether a senior credit facility [that] large could be replaced at all on any terms." *Id.* at 67a, 69a.

As all three lower courts found, the *only* way to reinstate Charter's senior secured debt was to somehow induce Respondent Allen to retain the requisite control over CCI needed to avoid triggering the change-of-control provisions in the credit agreement, which would cause a default on Charter's $11.4 billion senior secured debt. *See id.* at 6a, 27a, 117a. Likewise, Charter could preserve roughly $2.85 billion in NOLs only if Mr. Allen agreed to forbear from exercising his contractual exchange rights and to maintain a one percent ownership interest in a CCI affiliate. *See id.* at 6a. "Achieving these goals [of

reinstating debt and preserving valuable NOLs] required an agreement with Mr. Allen to take certain actions that he had no legal duty to perform, and to refrain from taking certain actions he was legally permitted to perform." *Id.* at 117a.

Although petitioners attempt to paint a picture of insider bias, the "*unrebutted testimony*" showed that the Allen Settlement was the product of aggressive, arms'-length, good-faith negotiations among Charter, Respondent Allen, and the Crossover Committee. *See id.* at 28a-29a, 122a (emphasis added). Each party was represented by its own sophisticated legal and financial advisers. *Id.* at 179a. The negotiations lasted more than a month, including multiple proposals and counter-proposals, and resulted in concessions and modifications from all parties. *Id.* at 122a. Indeed, "the Crossover Committee was negotiating as an adversary with its own dollars at stake against Mr. Allen. *Any value flowing to Mr. Allen from the [Allen] Settlement came directly from the Crossover Committee's pocket.*" *Id.* at 122a (emphasis added). The Bankruptcy Court found that the settlement was "indisputably … the product of a spirited negotiation in which sophisticated adversaries and their expert advisors bargained with each other aggressively and in good faith at a time when the prospect of a free-fall bankruptcy loomed large." *Id.* at 87a.

The plan of reorganization that resulted from those negotiations was an "extraordinary achievement." *Id.* at 67a. Among other things, the plan "removed more than $8 billion from Charter's highly leveraged capital structure; secured the investment of approximately $1.6 billion in new capital by means of a rights offering

during an exceptionally difficult and uncertain time in the credit markets; reinstated a $12 billion senior credit facility and certain junior secured debt that preserved favorable existing credit terms; and saved hundreds of millions of dollars in annual interest expense that would have been payable if the senior credit facility had to be replaced at current market pricing, and preserved billions of dollars of [NOLs]." *Id.* at 28a-29a.

B. Procedural History

Perhaps unsurprisingly, given the value created by Charter's plan at a time of unprecedented financial market turmoil, the plan enjoyed the support of the Debtors' primary stakeholders and the "enthusiastic support" of Respondent Official Committee of Unsecured Creditors. Pet. App. 119a-20a. Indeed, the plan was exactly what the Bankruptcy Code was intended to foster—it preserved the Debtors as a going concern and maximized enterprise value. Nonetheless, to obtain richer recoveries for themselves, petitioners raised various arguments regarding whether the plan met the requirements for confirmation under 11 U.S.C. § 1129.

To resolve those and other challenges, the Bankruptcy Court heard testimony from 33 witnesses over 19 hearing days. *See* Pet. App. 33a. Petitioner R[2], however, neither examined a single witness nor introduced any evidence. After a careful and thorough review of the record and extensive post-trial briefs, the Bankruptcy Court confirmed the plan in an 82-page opinion and 72-page order containing findings of fact and conclusions of law. *See id.* at 57a-153a, 154a-248a. The Court found the plan, including the Allen Settlement and its associated releases, to be fair and in

the best interests of the estates, remarking that it "represents a major achievement for the Debtors and [their] stakeholders that should enable a deleveraged Charter to flourish as a restructured and recapitalized enterprise." *Id.* at 153a. The court further found that the "various and sundry objections" by LDT and R^2 were "long on rhetoric but short on proof," and "reflect[ed] a conscientious attempt to extract greater value" than that to which they were entitled. *Id.* at 91a, 152a.

The Bankruptcy Court announced its decision on October 15, 2009, but did not enter the confirmation order until one month later, on November 17, 2009. *Id.* at 152a-53a. Shortly before the plan was to become effective, petitioners moved for a stay of the confirmation order, which the Bankruptcy Court denied. In denying the stay, the Bankruptcy Court emphasized that its "opinion is record-based," and that "[v]irtually every part of the opinion is larded with factual findings" because "factual issues … underlie the decision." JA A-623:20-24; *see also* Pet. App. 66a. Petitioners' legal challenges were thus unlikely to prevail on appeal. LDT subsequently sought a stay from the District Court, but R^2 chose not to file a brief in the District Court in support of a stay, and instead merely filed a "joinder" in LDT's request without identifying any of the issues it later raised on appeal. *See* JA A-634 to A-636. The District Court denied the stay motion, holding that petitioners had failed to demonstrate even "a substantial possibility of success" on the merits of their claims. *Id.* A-659; *see also id.* at A-669. Petitioners took no further actions to stay the confirmation order. They did not seek a stay from the Second Circuit or the Circuit Justice. And they did not seek expedited review of their appeals even while

Charter's plan was not only substantially, but *entirely* consummated—with hundreds of millions of dollars changing hands, New Charter equity and debt being sold and resold many times over, and countless irreversible transactions occurring in the years that followed.

On March 30, 2011—nearly a year and a half after the plan's confirmation—the District Court dismissed petitioners' appeals as equitably moot. The court held that the plan had been substantially consummated and held, based on the facts before it, that effective relief could not be granted on any of petitioners' claims of error "without nullifying the Plan's authorization" in its entirety. Pet. App. 43a. The court reasoned that each remedy requested by petitioners "requires vacating and modifying cherry-picked provisions of the Plan without any consideration for their substantial impact on the provisions left intact." *Id.* at 41a-42a. Granting such relief under the facts of this case, the court reasoned, "would be inequitable and would nullify the Plan's authorization by the various constituencies and the Bankruptcy Court, thereby causing the entire Plan to unravel and *threatening New Charter's vitality*." *Id.* at 42a (emphasis added). The court thus held that this case was "the epitome of equitable mootness" and dismissed petitioners' appeals accordingly. *Id.* The District Court expressly found that "[n]either [petitioner] has demonstrated that any of the Bankruptcy Court's findings were clearly erroneous." *Id.* at 47a.

The Second Circuit affirmed. In a unanimous opinion, the Court of Appeals held that it would be "inequitable to grant LDT and R^2 the relief they seek now that the reorganization plan has been

substantially consummated." *Id.* at 2a. In so holding, the Second Circuit addressed and rejected petitioners' arguments that any purported legal errors could be addressed through narrow, "surgical" remedies, such as by excising certain provisions from the plan or ordering prospective monetary awards. *Id.* at 19a-20a; *see also id.* at 14a, 16a. To the contrary, the Court of Appeals acknowledged that granting petitioners the relief they sought would "require unraveling complex transactions undertaken after the Plan was consummated." *Id.* at 16a. For example, "[m]odifying the terms of the Allen Settlement" would "cut the heart out of the reorganization," *id.* at 16a, 18a, "throw into doubt the viability of the entire Plan," *id.* at 16a, and "seriously threaten[] Charter's ability to re-emerge successfully from bankruptcy," *id.* at 19a. Similarly, granting petitioners' request for a revaluation was "not the type of relief that can be undertaken without knocking the props out from under completed transactions or affecting the re-emergence of the debtor from bankruptcy." *Id.* at 21a. And correcting any alleged errors in applying the cramdown provisions of 11 U.S.C. § 1129 "would require unwinding the Plan and reclassifying creditors," which was "the opposite of a surgical change to the Plan." *Id.* at 22a.

REASONS FOR DENYING THE WRIT

The petition for *certiorari* should be denied. The equitable mootness doctrine has been unanimously endorsed by the Circuit Courts, and this Court has often and recently denied petitions leveling broadside challenges to the doctrine like those mounted by petitioners. Even if there were some reason for this Court to weigh in on the doctrine, this case presents an inappropriate vehicle by which to do so. The Second

Circuit correctly applied settled law to the facts of this case in dismissing petitioners' appeals. Petitioners' underlying merits challenges, moreover, have been rejected by the lower courts, and petitioners have waived their ability to pursue further relief by failing to diligently pursue their remedies below. Finally, the purported splits of authority to which petitioners point are overstated, shallow, and unlikely to impact the outcome of this (or any other) case.

I. The Lower Courts Are Properly Applying The Well-Established Doctrine Of Equitable Mootness.

Hoping to manufacture a legal issue from what was undeniably a fact-intensive decision, petitioners ask this Court to review and invalidate the entire doctrine of equitable mootness. *See, e.g.*, Pet. 22-29. For a litany of reasons, this Court should decline petitioners' invitation.

To begin, petitioners do not—because they cannot—suggest that a split of authority exists among the lower courts concerning the viability of the equitable mootness doctrine. To the contrary, the Circuit Courts are in unanimous agreement on the issue: All twelve Courts of Appeals with jurisdiction to hear bankruptcy appeals have endorsed and adopted the equitable mootness doctrine. *See, e.g.*, *In re Healthco Int'l, Inc.*, 136 F.3d 45, 48 (1st Cir. 1998); *In re Burger Boys, Inc.*, 94 F.3d 755, 759-60 (2d Cir. 1996); *In re Zenith Elecs. Corp.*, 329 F.3d 338, 342-47 (3d Cir. 2003); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 713-14 (4th Cir. 2011); *In re Scopac*, 624 F.3d 274, 281-82 (5th Cir. 2010); *In re Am. HomePatient, Inc.*, 420 F.3d 559, 563-65 (6th Cir. 2005); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); *In re President Casinos, Inc.*, 409

F. App'x 31, 31-32 (8th Cir. 2010) (per curiam); *In re Thorpe Insulation Co.*, 677 F.3d 869, 879-83 (9th Cir. 2012); *In re Paige*, 584 F.3d 1327, 1337-38 (10th Cir. 2009); *In re Lett*, 632 F.3d 1216, 1225-26 (11th Cir. 2011); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986).

It is thus not surprising that this Court has often and recently denied petitions for *certiorari* seeking to challenge the equitable mootness doctrine. In fact, the Court has denied such petitions no fewer than 13 times over the past 20 years, including denying two petitions just last Term.[1] Significantly, the Court also has denied review of two recent petitions from the Second Circuit leveling broad-brushed challenges at the doctrine of equitable mootness, such as those asserted by petitioners here.[2]

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[1] *See Prime Healthcare Servs. L.A., LLC v. Brotman Med. Ctr., Inc.*, 132 S. Ct. 1095 (2012); *Parker v. Motors Liquidation Co.*, 132 S. Ct. 1023 (2012); *Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc.*, 130 S. Ct. 539 (2009); *Ivaldy v. Loral Space & Commc'ns Ltd.*, 555 U.S. 1126 (2009); *Hayes v. Genesis Health Ventures, Inc.*, 550 U.S. 935 (2007); *Official Comm. of Unsecured Creditors v. Adelphia Commc'ns Corp.*, 552 U.S. 941 (2007); *U.S. Rest. Props., Inc. v. Convenience USA, Inc.*, 541 U.S. 1044 (2004); *Nationwide Mut. Ins. Co. v. Berryman Prods., Inc.*, 528 U.S. 1158 (2000); *Shelton v. Rosbottom*, 528 U.S. 869 (1999); *Bank of N.Y. v. Cont'l Airlines, Inc.*, 519 U.S. 1057 (1997); *Manges v. Seattle-First Nat'l Bank*, 513 U.S. 1152 (1995); *UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 513 U.S. 999 (1994); *Hamilton Taft & Co. v. Fed. Express Corp.*, 509 U.S. 905 (1993).

[2] *See Parker*, 132 S. Ct. 1023 (2012) (denying writ of certiorari to the Second Circuit); *Adelphia Commc'ns Corp.*, 552 U.S. 941 (2007) (denying writ of certiorari to the Second Circuit in challenge to equitable mootness doctrine generally and standard for applying the doctrine).

In an attempt to convince the Court to take a different tack in this case, petitioners make a number of alarmist allegations about the lower courts' application of the equitable mootness doctrine. By petitioners' telling, the lower courts are "regularly invok[ing]" the doctrine "to deny Article III review of a bankruptcy court's confirmation order." Pet. 22. In that manner, petitioners claim that the equitable mootness doctrine has "run amok" and is being "substantial[ly] abuse[d] … by bankruptcy plan proponents." *Id.* at 24, 29 (quotation marks omitted).

Those allegations are long on rhetoric and short on facts. Petitioners' and their *amici's* own cases demonstrate as much. Of the 39 cases petitioners cite to justify their claim that the equitable mootness doctrine has "run amok," *id.* at 29, courts *rejected* equitable mootness arguments in over half. Moreover, even in the most recent Tenth Circuit case cited by petitioners' *amici* as evidence of the lower courts' supposed increased willingness to invoke equitable mootness to "refrain[] from hearing bankruptcy appeals," *see* Br. of Bankruptcy Law Professors 2, the court *declined* to find the appeal equitably moot and fully addressed the merits of the creditors' challenges to the plan, *see In re Stephens*, 704 F.3d 1279, 1282-83 (10th Cir. 2013).[3]

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[3] Notably, the *amicus* brief supporting the petition for *certiorari* in this case was funded by distressed debt firm Aurelius Capital Management. *See* Br. of Bankruptcy Law Professors 2 n.1. Aurelius, like Petitioner R², routinely buys stock in corporations teetering on or in bankruptcy, for pennies on the dollar, in hopes of recovering an oversized litigation-driven payout in subsequent bankruptcy proceedings.

As these and other decisions reflect, equitable mootness is a highly fact-intensive inquiry that requires the careful balancing and consideration of a number of different circumstances that necessarily vary from case to case. In each case, a court applying the doctrine must give careful consideration to, among other things, the size and sophistication of the bankruptcy estate; the circumstances of the debtor, creditors, and other interested parties; the nature and extent of the transactions that have occurred since the plan was confirmed; the specific relief requested by the challengers; and the impact that relief would have on the plan, the debtor, creditors, and other third parties who relied on the confirmed plan. Those considerations are inescapably case-specific, and a court's application of those considerations—and thus the equitable mootness doctrine itself—will necessarily depend on the specific facts before it.

There are thus legions of cases rejecting equitable mootness arguments, albeit on facts that are very different from those in this case. For example, in *In re Zenith Electronics Corp.*, the Third Circuit held that equitable mootness did not block a bankruptcy appeal seeking the return of professional fees to the bankruptcy estate because a successful appeal "would not knock the props out from under the authorization for every transaction that has taken place and in fact would leave the plan entirely intact." 329 F.3d at 346. Similarly, in *In re Paige*, the Tenth Circuit declined to find an appeal equitably moot because granting relief would not "undo any complex transactions," 584 F.3d at 1342, would not "unduly affect third parties," *id.* at 1344, and would not create "an unmanageable situation for the bankruptcy court," *id.* at 1347-48. The relief sought was principally to reverse a single

transaction, which would have no effect on other transactions. *See id.* at 1342-43. Simply put, there was little to unwind.

The case law thus demonstrates that far from "routinely" invoking equitable mootness to dismiss bankruptcy appeals, Pet. 23, the lower courts are judiciously applying the doctrine to specific factual scenarios, and are reserving its application for those instances in which appropriate and just relief truly cannot be fashioned as a practical matter. And when courts do apply the doctrine, they do so consistently.

Faced with the reality that courts reject equitable mootness arguments more often than they embrace them, petitioners maintain that the Second Circuit below broke new ground by finding this case equitably moot even though "effective relief is available to petitioners on each of their claims." *Id.* at 25; *see also id.* at 22. That grossly mischaracterizes what the Second Circuit held. The Court of Appeals merely stated that "it is not impossible to grant LDT and R^2 relief, in the sense that the appeals are not *constitutionally* moot." Pet. App. 14a (emphasis added). But it *rejected* petitioners' argument that "the relief they request would not affect Charter's emergence as a revitalized entity and would not require unraveling complex transactions undertaken after the Plan was consummated." *Id.* at 16a. For purposes of *equitable* mootness, the Second Circuit repeatedly observed that fashioning relief this late in the day was impossible as a practical matter, because it would "cut the heart out of the reorganization," *id.* at 18a, and "throw into doubt the viability of the entire Plan," *id.* at 16a. As the Court of Appeals explained, even if petitioners were correct on the merits, the

challenged "provisions could not be excised without seriously threatening Charter's ability to re-emerge successfully from bankruptcy. Nor could the monetary relief requested be achieved by a quick, surgical change to the confirmation order." *Id.* at 19a-20a. To the contrary, rather than entitle petitioners to a payment, "[t]he legal errors [petitioners] allege[d], if proven, would require unwinding the Plan and reclassifying creditors. This is the opposite of a surgical change to the Plan." *Id.* at 22a.

II. This Case Is An Inappropriate Vehicle By Which To Consider The Contours Of The Equitable Mootness Doctrine.

Even if there were some reason for this Court to weigh in on the equitable mootness doctrine, this would be an inappropriate case in which to do so. That is true for three reasons. *First*, the lower courts' application of the equitable mootness doctrine in this case was unquestionably correct, and it is highly unlikely that resolving any of the narrow legal issues identified by petitioners would impact the outcome of this case. *Second*, petitioners failed to diligently pursue their requested relief in the lower courts and have therefore waived their ability to mount further challenges to the confirmation order. *Third*, even assuming there were errors in the Second Circuit's equitable mootness analysis (and there were not), those errors would be irrelevant because, as the lower courts held, petitioners are unlikely to prevail on the merits of their substantive challenges to the confirmed plan.

A. Under Any Standard, The Second Circuit's Equitable Mootness Decision Was Correct.

The petition mounts various challenges to the legal standards the Second Circuit applied in reviewing the dismissal of petitioners' appeals on equitable mootness grounds. Given the particular facts of this case, however, it is highly unlikely that any shift in those standards would impact the outcome. This case is the "epitome of equitable mootness," Pet. App. 42a, and there is every reason to think petitioners' appeals would have been found equitably moot by any court.

The significance of the relief petitioners are seeking cannot be overemphasized. The *only* relief petitioners could possibly obtain in this case—as a matter of law—would be a complete reopening of Charter's bankruptcy case. Petitioners attempt to soften that request by saying that they are seeking "limited remedies" in the form of "money judgments and the striking of nondebtor liability releases." Pet. 25. But that is wishful thinking. As the Second Circuit held, there is nothing limited about the relief sought in this case. *See* Pet. App. 19a-22a.

Petitioners' challenges, to begin, are far broader than they are willing to admit—in addition to seeking a money judgment and the striking of heavily negotiated and interdependent releases, petitioners seek a complete revaluation of the Debtors and a ruling that the plan violates the cramdown provisions of 11 U.S.C. § 1129(b). *See* Pet. App. 20a-23a. But even setting aside those omissions, the simple truth is that granting *any* of petitioners' requested remedies necessarily would require entirely unwinding Charter's plan. *Id.* at 19a-22a. This case does not arise from an adversary proceeding in which a claim for money

damages or some other sum certain was denied; rather, petitioners appealed from *confirmation of the plan itself*. As a matter of law, the only remedy this or any other court could provide would be to reverse the confirmation of the plan and order the lower court to reopen Charter's bankruptcy three-and-a-half years after New Charter emerged from Chapter 11 proceedings.

Petitioners suggest that, rather than blowing up the entire plan of confirmation, they would be "satisfied in full by the simple payment of $330 million." Pet. 12 (quotation marks omitted). But as the Second Circuit explained, "the legal conclusions required to find for [petitioners] would require much more than simply paying the CCI Noteholders' claims in full"; they would "*require unwinding the Plan*." Pet. App. 22a (emphasis added). There is thus no feasible way—legally or equitably—to grant petitioners relief without unwinding Charter's entire plan of reorganization. Moreover, petitioners have no legal right to money damages. And even if they did, they waived their ability to seek a money judgment because they failed to make any claim for monetary relief in the Bankruptcy Court—they only opposed confirmation of the plan.

It is not difficult to see why attempting to reverse Charter's plan of confirmation three-and-a-half years after the fact would not only be grossly inequitable, but *practically impossible*. To begin, granting petitioners their requested relief would only put petitioners, respondents, and other parties (not before the Court) back at the negotiating table. The outcome of a different, hypothetical negotiating process, with petitioners attempting to exercise hold-up power over Charter's reorganization, is inherently

indeterminate—petitioners might have received nothing at all. There is simply no way to know. As the District Court explained, "[t]oo much speculation and guesswork would be involved in restoring [petitioners] to the unknown position that [they] would have held had the Plan contained different provisions." *Id.* at 54a.

More significantly, since the plan was confirmed three-and-a-half years ago, Charter has distributed New Charter's equity interests, collected and disbursed hundreds of millions of dollars (which have since changed hands many times over), and made significant operational, governance, and regulatory changes. For example, Charter has:

- cancelled and deregistered all of Old Charter's outstanding stock;
- issued approximately 88.7 million shares of New Class A Stock to 193 stockholders through a rights offering, which provided Charter with $1.66 billion in new capital;
- converted certain old notes into approximately 21.1 million shares of New Class A Stock;
- issued approximately 5.5 million shares of preferred stock to holders of certain notes;
- exchanged certain old notes for new notes valued in aggregate at approximately $1.77 billion;
- issued warrants to holders of certain notes to allow them to purchase approximately 7.7 million shares of New Class A stock;
- disbursed approximately $938.4 million in cash to certain older noteholders;

- disbursed a rollover fee of approximately $25.3 million to certain noteholders that participated in the notes exchange as an incentive to secure their commitment to the exchange;
- disbursed an Equity Backstop Fee of approximately $48 million to members of the Crossover Committee to secure their commitment to backstop the rights offering;
- consummated the Allen Settlement by paying Mr. Allen $180 million; issuing him new CCH II Notes worth $85 million, approximately $60 million in New Class B Stock, and warrants allowing him to purchase approximately 4.7 million shares of New Class A Stock; among other consideration;
- redeemed Mr. Allen's CC VIII preferred membership units;
- filed amended certificates of incorporation with the Delaware Secretary of State for CCI and all corporate subsidiaries, and amended the operating agreements for each LLC subsidiary;
- filed numerous registration statements with the SEC registering common stock and notes so they are publicly freely tradable;
- obtained hundreds of necessary regulatory approvals from the FCC and other governmental agencies for, *inter alia*, the transfer of telecommunications licenses and franchise agreements;
- named a new slate of directors as required by the plan, adopted a Value Creation Plan and Management Incentive Plan as provided for in

the plan, made initial payments under the Value Creation Plan, granted restricted stock awards to hundreds of employees under the Management Incentive Plan, and granted awards of equity to numerous employees;

- amended various employment agreements as provided for in the plan; and
- cancelled the Mirror Note between CCI and Holdco.

See JA A-697 to A-699.

These are no mere "paper transactions." These are real, substantial transactions on which numerous third parties have relied and which have irreversible consequences. Hundreds of millions of dollars have been disbursed to parties not before the Court. On March 31, 2010—months after petitioners abandoned seeking a stay, but while these appeals were pending—Charter drastically reformed its nearly $12 billion senior secured credit facilities in reliance on the plan's confirmation, entering into a new financing agreement with its senior secured lenders. *Id.* at A-699 to A-700. The new senior secured credit facility involves a new debt structure, different lenders, and different interest rates than Charter's pre-bankruptcy facility, and it allows New Charter access to a new revolver and the flexibility to incur new incremental term loans and issue first-lien notes. *See id.* Since that time, Charter has entered into interest rate swap transactions with third parties not before the Court, with a notional amount of $2 billion to fix a certain portion of its variable interest rate exposure under the new credit agreement. *Id.* The swaps were based on the maturity profile that now exists as a result of the plan and the amendments to the credit agreement. *Id.* How these

could possibly ever be undone at this stage is anyone's guess.

Likewise, Mr. Allen forever declined to exercise his rights under the exchange agreement in effect prior to the reorganization, and instead exchanged a portion of his holdings in Holdco for shares of CCI common stock and cash in a taxable transaction. *Id.* at A-701. He also transferred his 30% interest in the preferred stock of CC VIII to Charter and caused CII to merge with a subsidiary of CCI. *See id.* Through these transactions, both Charter and Mr. Allen engaged in transactions that had tax implications for 2009 that cannot be unwound. These transactions were the bedrock for assumptions underlying Charter's enterprise value upon emergence, which, in turn, was the basis for the entire restructuring.

Most obviously, New Charter's common stock, notes, and warrants have traded in large volumes since December 2, 2009. *See id.* at A-1143 to A-1145. Indeed, Charter has been relisted on a stock exchange since emergence, and over 350,000 shares of reorganized Charter stock had traded on NASDAQ as of two-and-a-half years ago. *Id.* at A-1144. Moreover, the "most active members of the Crossover Committee," Pet. App. 84a, which petitioners claim improperly obtained "substantial benefits" under the plan, Pet. 5, including equity in New Charter, have divested significant portions, if not all, of their Charter equity holdings, primarily through public offerings.[4] In

[4] Specifically, these "most active members"—Apollo Management L.P. ("Apollo"), Oaktree Capital Management, L.P. ("Oaktree"), and Crestview Partners, L.P. ("Crestview")—have divested 100%, 89%, and 33% of their Charter equity holdings, respectively. *See*

other words, it is third parties who purchased that stock—not members of the Crossover Committee—who would be substantially affected should petitioners prevail on the merits of their appeals.

Given these undeniable facts, this is an exceptionally poor case for this Court to take up the issue of equitable mootness.

B. Petitioners Waived Their Right To Seek Further Relief.

This case is an inappropriate vehicle for taking up the equitable mootness doctrine for the further reason that petitioners did not diligently pursue a stay of the Bankruptcy Court's confirmation order. They have thus waived their right to obtain the relief they now seek.

Although petitioners initially sought a stay of plan confirmation from the Bankruptcy Court and the District Court, they did nothing more to preserve the availability of relief. They did not seek a stay from the Second Circuit or the Circuit Justice. Nor did they

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Charter Communications, Inc., Registration Statement 12 (Form S-1) (Dec. 31, 2009) (listing Charter equity holdings after plan confirmation); Charter Communications, Inc., Registration Statement 6 (Form S-3) (Nov. 10, 2010) (same); Charter Communications, Inc., Prospectus Supplement S-22 (Aug. 8, 2012) (detailing public sale of Charter equity by Apollo and Oaktree); Charter Communications, Inc., Prospectus Supplement S-22 (Nov. 20, 2012) (detailing public sale of Charter equity by Apollo); Charter Communications, Inc., Prospectus Supplement S-11 (Mar. 7, 2013) (detailing public sale of Charter equity by Apollo and Oaktree); Charter Communications, Inc., Prospectus Supplement S-8 (Mar. 19, 2013) (detailing sale of Charter equity by Apollo, Oaktree, and Crestview).

seek expedited review in the courts below. As numerous courts have recognized, litigants that take such a dilatory approach to bankruptcy appeals run the risk that their appeals will be declared equitably moot. *See, e.g.*, *In re SemCrude L.P.*, 456 F. App'x 167, 171 (3d Cir. 2012) ("It is obligatory upon appellant ... to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief ...), if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from." (quotation marks omitted)); *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993) (same); *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981) (same); *see also In re Paige*, 584 F.3d 1327, 1341 (10th Cir. 2009) (explaining that the fact that appellant "made some effort to obtain a stay" but "did not pursue with diligence *all available remedies* to obtain a stay of execution" weighs in favor of equitable mootness (quotation marks omitted)); *In re Pub. Serv. Co. of N.H.*, 963 F.2d 469, 473 (1st Cir. 1992) (same).

Although the plan was substantially consummated soon after confirmation, petitioners' appeals have become even more equitably moot since then, as countless material transactions occurred, and have been relied upon by third parties, in the months and years that followed confirmation. Even if it would have been practical to unwind the plan in the months that followed confirmation, it is not now, three-and-a-half years later.

C. Petitioners' Underlying Claims Are Unlikely to Succeed.

Finally, this case is a bad vehicle for addressing the equitable mootness doctrine because, as two lower

courts have held, petitioners' underlying challenges to the bankruptcy plan are unlikely to succeed on the merits.

The Bankruptcy Court rejected those claims in a thorough and well-reasoned 82-page opinion and 72-page order that followed 19 days of hearings in which the court heard testimony from 33 witnesses. *See* Pet. App. 57a-153a. Additionally, the District Court held that petitioners were unlikely to succeed on the merits of their claims in denying their motions to stay the confirmation order, *see* JA A-669, and subsequently found that "[n]either [petitioner] has demonstrated that any of the Bankruptcy Court's findings were clearly erroneous," Pet. App. 47a. Rather, as these courts recognized, "factual issues … underlie the decision" granting confirmation, making it exceptionally unlikely that petitioners could prevail. JA A-623:20-21; *see also id.* at A-663. Thus, even setting aside the Second Circuit's application of the equitable mootness doctrine in this case, petitioners' underlying claims lack merit.

III. The Purported Circuit Splits Identified By Petitioners Are Grossly Overstated And Do Not Warrant This Court's Review.

Finally, petitioners attempt to secure this Court's review by pointing to purported Circuit splits regarding the initial placement of the burden of proving equitable mootness and the standard by which a Circuit Court reviews a District Court's equitable mootness determination. Given the facts and circumstances of this case, it is highly unlikely that addressing those splits of authority would have any practical impact on the proper outcome of this case. But even setting that aside, the splits themselves—

which petitioners grossly overstate—are exceedingly shallow and not worthy of this Court's review.

A. Petitioners Exaggerate The Circuit Split On The Proper Presumption To Apply In Equitable Mootness Cases.

Petitioners first contend that the Second Circuit erred by holding that "an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." Pet. App. 9a-10a. According to petitioners, this holding is "consistent with three Circuits but in conflict with five others." Pet. 12. Not so.

As an initial matter, petitioners have waived their ability to challenge this issue. Before the District Court, Charter squarely and repeatedly argued that a bankruptcy appeal was presumed to be equitably moot once the plan was substantially consummated. Neither R^2 nor LDT ever objected to that presumption in opposing Charter's motion to dismiss on equitable mootness grounds. LDT also chose not to challenge the District Court's application of the presumption of mootness in the Second Circuit. And, although R^2 belatedly asserted the issue in its Second Circuit briefing, the Second Circuit did not address that point of contention. Having failed to challenge the applicability of the presumption in the lower courts, petitioners cannot now raise the issue for consideration by this Court in the first instance. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if petitioners had properly preserved their challenge to the application of a presumption of equitable mootness, that issue would still not merit this Court's review. Contrary to petitioners' exaggerated claims, the split on this issue is exceedingly shallow, and the Second Circuit is in the majority of the few Circuits that have addressed the question.

As petitioners concede, the Second Circuit's application of a presumption of equitable mootness to appeals from substantially consummated bankruptcy plans is in accord with the law of the First Circuit. *See In re Pub. Serv. Co. of N.H.*, 963 F.2d at 473 n.13; *see also* Pet. 14. Only one other Court of Appeals, however, has addressed the issue. Although the Sixth Circuit has indicated its potential agreement with the Second Circuit, it has done so only in an unpublished, non-precedential opinion that is devoid of all but the most cursory analysis. *See In re Eagle Picher Indus., Inc.*, Nos. 96-4309, 97-4260, 1998 WL 939869, at *4 (6th Cir. Dec. 21, 1998). Petitioners' contention that the D.C. Circuit has also resolved this question, moreover, is incorrect. *See* Pet. 14 (citing *In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986)). In *AOV*, the D.C. Circuit merely held that, in light of the specific facts of the case before it, "a strong presumption of mootness should attach to future challenges" to that particular reorganization plan. *AOV*, 792 F.2d at 1149 (citing "the overwhelming creditor endorsement of the Plan, the multiple judgments below finding that the Code prerequisites for confirmation were met, the actions of the Disbursing Agent to implement the Plan, and the passage of time"). The court did not purport to adopt

any generally applicable presumption as petitioners suggest.

Thus, other than the First Circuit and the Second Circuit, the Tenth Circuit is the only other Court of Appeals to directly address this issue. And although the Tenth Circuit adopted a contrary view, it did so on a questionable ground that no other court has endorsed—namely, by analogizing equitable mootness to constitutional mootness. *See In re Paige*, 584 F.3d 1327, 1339-40 (10th Cir. 2009). In fact, the two types of "mootness" are entirely different: Equitable mootness is a prudential doctrine in which the question is not "whether [the court] *can* provide relief … but also whether [it] *should*," *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005) (emphasis in original).

Although petitioners attempt to bring the Ninth and Eleventh Circuits into the split, those courts have not addressed the question. The Ninth Circuit's statements—first in *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004), and then in *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012) (quotation marks omitted)—that a "party moving for dismissal on mootness grounds bears a heavy burden" did not refer to equitable mootness at all. Instead, those comments referred to *traditional* mootness, which raises different and other considerations. In addition, the bankruptcy plan in *Thorpe* had not been substantially consummated, *see* 677 F.3d at 882, and thus the Ninth Circuit had no occasion to determine what presumption should attach to substantially consummated plans. Likewise, the Eleventh Circuit case on which petitioners rely also did not involve a substantially consummated plan, so there was no

opportunity for the court to opine on whether a presumption should apply. *See In re Lett*, 632 F.3d 1216, 1226 (11th Cir. 2011).

In the final analysis, only three circuits have directly addressed the question of whether an appeal from a substantially consummated plan should be presumed equitably moot, and the Second Circuit is in the majority. Further percolation of the issue among the Courts of Appeals is thus warranted. In any event, for the reasons discussed above, this case would be an inappropriate vehicle in which to consider this issue.

B. Petitioners Exaggerate The Circuit Split On The Appropriate Standard Of Review.

Petitioners likewise overstate the equally shallow Circuit split regarding the appropriate standard of review by which a Circuit Court must review a District Court's equitable mootness determination.

On the one hand, as petitioners concede, the Second Circuit's decision to apply abuse-of-discretion review accords with the long-settled law of the Third and Tenth Circuits. *See, e.g.*, *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996); *In re Paige*, 584 F.3d at 1334-35; *see also* Pet. 18. On the other hand, petitioners' claim that the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits review a district court's equitable mootness determination *de novo* is incorrect. Of those courts, only the Fifth Circuit has actually addressed the question of the proper standard of review of equitable mootness determinations and concluded that review should be *de novo*. *See In re GWI PCS 1 Inc.*, 230 F.3d 788, 799-800 (5th Cir. 2000). Petitioners simply misstate the law in the Sixth, Eighth, Ninth, and Eleventh Circuits by claiming otherwise.

As an initial matter, the Sixth Circuit's decision in *In re United Producers, Inc.*, 526 F.3d 942, 946 (6th Cir. 2008), is entirely inapposite because that case addresses the standard by which the Circuit Court should review decisions of a Bankruptcy Appellate Panel (which is composed of Article I Bankruptcy Judges) and thus invokes considerations different from those at issue here. Indeed, if anything, the Sixth Circuit's approach accords with that of the Second, Third, and Tenth Circuits. The Sixth Circuit has expressly held, in bankruptcy appeals, that it reviews a district court's "equitable determinations ... for abuse of discretion." *See In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 289 (6th Cir. 2001). And a "district court's determination that an appeal is 'equitably moot' is (by definition) an equitable decision." *Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc.*, 309 F. App'x 455, 457 (2d Cir. 2009).

The Eighth Circuit, for its part, has hardly addressed this question: the best petitioners can muster is a single unpublished and non-precedential case in which the question of the standard of review was not even briefed by the parties. *See In re President Casinos, Inc.*, 409 F. App'x 31 (8th Cir. 2010) (unpublished) (per curiam).

Nor has the Ninth Circuit adopted *de novo* review of district court equitable mootness determinations. Although *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1351 (9th Cir. 1994), states that "[m]ootness is a jurisdictional issue which we review de novo," only *constitutional* mootness—*not equitable* mootness—is jurisdictional, as that court has since explicitly recognized. *See, e.g.*, *In re Thorpe Insulation Co.*, 677 F.3d at 880 (distinguishing jurisdictional,

constitutional mootness from equitable mootness). The decision in *In re Wright*, 329 F. App'x 137, 137 (9th Cir. 2009) (unpublished), moreover, was an unpublished, non-precedential decision on appeal from a Bankruptcy Appellate Panel in which the standard-of-review question was neither briefed nor disputed by the parties.

Finally, petitioners' attempts to characterize the Eleventh Circuit as having taken sides in the split fare no better. The court in *In re Club Associates*, 956 F.2d 1065 (11th Cir. 1992), did not expressly address the standard of review that should apply to equitable-mootness dismissals, but instead merely stated the unremarkable proposition that "[d]eterminations of law made by either the bankruptcy court or the district court are reviewed by this court *de novo*." *Id.* at 1069. Once it does squarely address the question, it is far from clear that the Eleventh Circuit will apply a *de novo* standard of review to district court's equitable-mootness determination, which is (by definition) an *equitable* decision. The Eleventh Circuit also did not address the issue in *In re Winn-Dixie Store, Inc.*, 286 F. App'x 619, 622 & n.2 (11th Cir. 2008) (unpublished) (per curiam), which is an unpublished, non-precedential, per curiam decision in which the standard-of-review question was barely acknowledged by the parties or the Court.

Thus, in final analysis, only four circuits have directly addressed this question—and again only one has disagreed with the approach taken by the Second Circuit. That the majority of those courts apply an abuse-of-discretion standard, moreover, makes good sense. In deciding whether a challenge to a confirmation plan is equitably moot, a district court is

not sitting as an appellate court as it otherwise does when reviewing bankruptcy appeals. Instead, the district court is deciding the equitable mootness question as a matter of first impression, based on evidence put before it. Indeed, in receiving facts, the court may even hold a hearing in which evidence and testimony are presented. The upshot is that, when a Court of Appeals reviews the District Court's equitable mootness decision, it is not just reviewing a pass-through from the Bankruptcy Court. It is reviewing evidentiary determinations made by the District Court. There is thus every reason to think that a Court of Appeals should defer to the District Court's fact-finding regarding equitable mootness just as it traditionally defers to District Court fact-finding in other contexts.

In any event, as explained above, the standard of review in this case is of little moment. In light of the overwhelming facts demonstrating that Charter's plan of reorganization has been not only substantially, but entirely, consummated, the passage of time, the fact that legally-available relief could not be granted without unwinding the plan, and the practical impossibility of unwinding the plan in light of the myriad transactions that had ensued, it would have made no difference whether the Second Circuit reviewed the District Court's equitable mootness decision for abuse of discretion or *de novo*—the same result is compelled by the facts, making this case an exceptionally poor vehicle for review of the issue.

CONCLUSION

For the foregoing reasons, the Court should deny this petition for a writ of certiorari.

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