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

RESPONDENT PAUL G. ALLEN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should determine the general validity of the equitable mootness doctrine in a case where the bankruptcy court rejected all of Petitioners' objections to the plan of reorganization largely on factual grounds, Petitioners do not contend that any of the bankruptcy court's factual findings were clearly erroneous, and Petitioners have waived any claim to the relief they now seek.

2. Whether, as every circuit court has held, an appeal from a bankruptcy court order approving a plan of reorganization is equitably moot where the plan has been substantially consummated, where granting the relief sought by Petitioners would undermine the plan and the successful revitalization of the company, and where all objections to the plan were fully addressed by the bankruptcy court and rejected largely on factual grounds.

3. Whether a circuit court errs in reviewing a district court's equitable mootness determination for abuse of discretion – the review standard typically employed for other discretionary, equitable decisions – where the standard of review did not determine the outcome of the appeal because the underlying factual record compelled the determination that Petitioners' appeal was equitably moot.

CORPORATE DISCLOSURE

Paul G. Allen is not a corporate respondent subject to Rule 29.6.

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Consistent with decisions reached by courts of appeals in every other circuit, the Second Circuit declined to entertain Petitioners' objections to essential, intensely negotiated elements of the substantially consummated bankruptcy plan (the "Plan") of Charter Communications, Inc. and its subsidiaries (collectively, "Charter"). There was nothing unusual, let alone "extreme" (Pet. 29),[1] about the Second Circuit's conclusion that Petitioners' appeal was equitably moot. The Second Circuit correctly determined that the debtor's settlement with its former controlling shareholder Paul G. Allen (the "Allen Settlement") was critical to Charter's reorganization, and that modifying the terms of the Allen Settlement as Petitioners requested would "cut the heart out of the reorganization," "seriously threaten[] Charter's ability to reemerge successfully from bankruptcy," and "cast[] uncertainty over Charter's operations" and continued viability, Pet. App. 18a-20a – to the detriment of countless third parties that have relied in good faith on its reemergence. These determinations rested, in turn, on detailed factual findings by the bankruptcy court that Petitioners do not, and could not, credibly challenge as clearly erroneous.

Petitioners attack the Second Circuit's decision on three different fronts. Petitioners challenge (i) the

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[1] Citations to "Pet. __" are to the Petition for a Writ of Certiorari and to "Pet. App. __" are to the Appendix to the Petition for a Writ of Certiorari, both dated January 10, 2013.

purported "presumption" of equitable mootness that the lower courts applied upon finding that the Plan had been substantially consummated; (ii) the Second Circuit's application of a supposedly incorrect standard to review the district court's equitable mootness determination; and (iii) the propriety of the equitable mootness doctrine itself. For the reasons discussed below, none of these issues merits this Court's review.

First, the Second Circuit's application of the equitable mootness doctrine is consistent with the approach taken by every other circuit court,[2] all of which have adopted the doctrine. The purported circuit split identified by Petitioners concerning a "presumption" of mootness applied by some courts and supposedly rejected by others reflects, at most, a semantic distinction but not a substantive difference in approach. In any event, every circuit court – all of which construe the equitable mootness doctrine to involve a fact-intensive inquiry – would find Petitioners' challenge to Charter's now fully-consummated, successful reorganization to be equitably moot under the facts of this case.

Second, the Second Circuit's application of an abuse-of-discretion standard of review to equitable mootness determinations accords with long-settled law of the Third and Tenth Circuits. Petitioners exaggerate the alleged circuit split whereby other circuits purportedly review such determinations de novo. The modest split that does exist does not

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[2] References to "every circuit court" throughout this brief refer to every circuit other than the Federal Circuit, which does not hear bankruptcy-related appeals.

warrant review. Applying the de novo standard of review that Petitioners advocate could not possibly change the outcome of this case, which did not turn on any deference the Second Circuit accorded to discretionary judgments of the district court, but on the compelling factual findings of the bankruptcy court.

Indeed, because the circuit splits Petitioners identify are so shallow – and so plainly immaterial to the outcome of this case – it is clear that Petitioners seek to use them as pretexts for attacking the equitable mootness doctrine itself. This case, however, is a wholly inappropriate vehicle for doing so. There is no split among the courts over the doctrine's existence, and for good reason. The doctrine is universally accepted because it safeguards against the massive injury to countless individuals and entities that could occur from the unwinding of numerous transactions consummated in reliance on a confirmed plan of reorganization. There is no basis for Petitioners' extraordinary request that this Court reach out to decide an important question of bankruptcy law on which there is no split of authority and that was not discussed by any court below.

Attempting to manufacture a basis for such extraordinary review, Petitioners ignore the doctrine's salutary purposes and instead seek to portray it as a tool for abuse and manipulation that is regularly used to deprive creditors of any Article III forum, even where effective relief is supposedly available and can be rendered without harming innocent third parties. There is, in fact, no basis for these hyperbolic claims. Moreover, Petitioners

waived their claims for the relief they contend could be so readily effectuated by the lower courts.

As a consequence, Petitioners now rest their arguments on a clear mischaracterization of the decision below. They repeatedly claim that the Second Circuit "acknowledge[ed] the availability of effective relief," (Pet. (i)) and "acknowledged . . . that a monetary judgment . . . would not imperil the reorganization in the slightest" (*id*. 27). In fact, the Second Circuit reached quite the opposite conclusion, holding that Petitioners simply ignored:

> the heavy transactional costs associated with the monetary relief they seek. Modifying the terms of the Allen Settlement, including striking the releases, would be no ministerial task. The Allen Settlement was the product of an intense multi-party negotiation, and removing a critical piece of the Allen Settlement – such as Allen's compensation and the third-party releases – would impact other terms of the agreement and *throw into doubt the viability of the entire Plan*.

Pet. App. 16a (emphasis added). Thus, the Second Circuit flatly rejected Petitioners' argument that monetary relief could be fashioned without threatening Charter's successful reorganization. This Court should not decide the fate of an important and long-standing bankruptcy rule on the basis of a clear distortion of a lower court decision.

Finally, even if the Court were to overlook all of these grounds for refusing Petitioners' extraordinary

request, any decision it would render on the existence of the doctrine would almost certainly make no difference to the outcome of this case, and would thus amount to an advisory opinion. Petitioners cannot prevail on their underlying legal challenges unless they demonstrate clear error in numerous detailed factual findings by the bankruptcy court. And, even if they could clear that hurdle, the lower courts would inevitably deny the relief they seek as a remedial matter, for the same compelling reasons they deemed the appeal equitably moot.

STATEMENT OF THE CASE

Charter's over $20 billion dollar Plan was "'perhaps the largest and most complex prearranged bankruptcies ever attempted.'" Pet. App. 26a (quoting *id.* 63a). Mr. Allen organized and partially financed Charter over a decade ago, when he acquired and combined a number of cable properties and, in 1999, led an IPO, which transformed Charter into a publicly held company. Along the way, Mr. Allen invested more than $8 billion in Charter, in part via personal guaranty agreements with the sellers of cable properties acquired by Charter. Mr. Allen, however, received no consideration from Charter in exchange for entering into these guaranty agreements, which enabled Charter to grow. *Id.* 63a. In connection with its 1999 IPO, and to induce Mr. Allen to make such a significant investment, Charter entered into various contracts with Mr. Allen, including an Exchange Agreement, designed to provide liquidity to Mr. Allen for his Charter investment. Under the Exchange Agreement, Mr.

Allen could exchange his "Holdco" units[3] for stock of Charter on a tax-free basis, though doing so could trigger negative tax consequences to Charter. *Id.* 27a.

In the years following the IPO, Charter continued its growth so that by 2008 it was the nation's fourth-largest cable television provider. While operationally sound, Charter carried almost $22 billion in debt at various levels of its corporate structure. *Id.* 28a. After Lehman Brothers Holdings Inc. filed for bankruptcy in September 2008, Charter's Board, its senior management and its outside advisors realized that the company "was in serious trouble" due to severe dislocation in the global credit markets, lower valuation multiples in the cable sector and the company's own excessive leverage. *Id.* 67a-68a. Charter's refinancing options "became far more limited in the immediate aftermath of the upheaval" that occurred in the fall of 2008. *Id.* 68a.

Charter accordingly formulated a restructuring proposal that ultimately formed the basis for the Plan and the Allen Settlement. Charter and its financial and legal advisors recognized that, due to the longstanding contractual relationships between Mr. Allen and Charter, Mr. Allen alone was uniquely able to provide the value needed for a successful reorganization. *Id.* 65a, 69a-70a. Charter proposed what eventually became the Allen Settlement because Charter required Mr. Allen's cooperation for

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[3] Mr. Allen indirectly owned some of his interest in Charter via a limited liability company called Charter Communications Holding Company, LLC ("Holdco"), which held the equity of Charter's operating subsidiaries.

its Plan to succeed. *Id.* 65a.

Part of Mr. Allen's cooperation involved his preservation for Charter of $2.85 billion in net operating losses ("NOLs") post-reorganization. To preserve these NOLs, Charter needed Mr. Allen both to maintain an ownership interest in Holdco and to refrain from exercising his right to exchange his Holdco units for shares of Charter common stock under the Exchange Agreement, prior to any bankruptcy filing. *See id.* 114a-117a. In addition, Mr. Allen's retention of an interest in Holdco permitted Charter to step up the tax basis of its assets, allowing Charter to save approximately $500 million through future tax deductions. *Id.*

The Debtors and their advisors also recognized that Mr. Allen was uniquely positioned to enable Charter to reinstate its debt at favorable interest rates. The credit agreements under which Charter had borrowed nearly $12 billion required Mr. Allen and/or certain related parties to maintain a 35 percent voting (but not equity) interest in Charter in order to avoid a default. A default based on Mr. Allen's not maintaining this 35 percent voting interest could have cost Charter *hundreds of millions of dollars in extra interest annually* because, between Charter's entry into these credit arrangements and the November 2008/February 2009 time frame, the global credit crisis had dramatically increased interest rates. *Id.* 69a-70a, 79a. Combined, the benefits provided by Mr. Allen to Charter were "estimated to total well over $3 billion," in exchange for which Mr. Allen received approximately $180 million. *Id.* 88a, 35a, 115a.

Recognizing that these over $3 billion in benefits

were essential for a successful reorganization, Charter proposed that Mr. Allen undertake to retain a 35 percent voting interest in Charter, to designate four directors for its Board and to maintain a one percent interest in Holdco, post-closing. *Id.* 69a-70a, 113a-114a.

Because Mr. Allen's agreement to maintain a 35 percent voting interest and to designate four of Charter's directors significantly increased his litigation risks, Mr. Allen negotiated certain third-party releases that became part of the Plan. *Id.* 128a. As the Bankruptcy Court found, Charter received "substantial consideration" in exchange for the third-party releases, which were included in recognition of the "uniquely personal structuring benefits" that Mr. Allen could provide. *Id.* 126a-127a. Final agreement on Mr. Allen's compensation was achieved only after "vigorous and hard-fought three-way negotiations involving the Debtors, Mr. Allen and the Crossover Committee" which was comprised of representatives of financial institutions that owned a large percentage of Charter's senior notes. *Id.* 70a, 122a.

Petitioners opposed Plan confirmation. They did not ask the bankruptcy court to order a direct monetary payment from Charter or Mr. Allen to them, nor did they seek to strike the third-party releases while leaving the rest of the Plan intact. Petitioners only sought the outright denial of the Plan's confirmation.

After a 19-day trial, the bankruptcy court, *inter alia*, overruled Petitioners' objections and confirmed the Plan, articulating its reasons in a lengthy and fact-laden Opinion on Confirmation of Plan of

Reorganization and Adjudication of Related Adversary Proceeding, and in its detailed Findings of Fact, Conclusions of Law, and Order Confirming Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code. *See generally id.* 57a-431a. The bankruptcy court made extensive factual findings concerning the integral nature of the Allen Settlement to the Plan. Judge Peck "carefully considered" the costs and benefits of the Allen Settlement to Charter, and concluded that both the "significant consideration being paid to Allen" and the third-party releases were provided in exchange for "enormous value" given by Mr. Allen to Charter, and that the Allen Settlement was ultimately fair to Charter and in the best interests of Charter's creditors. *Id.* 112a-138a.

In particular, the Court was satisfied that the Allen Settlement was "the best settlement that could be achieved under the circumstances" in part because "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.* 122a.

Although the bankruptcy court announced its decision on October 15, 2009, the decision was not entered until November 17, 2009, and the Plan did not become effective until November 30, 2009. The bankruptcy court denied petitioners and other parties' request to stay its Confirmation Order pending appeal, holding 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." 11/23/09 Stay Hr'g

Tr. 58:20-24 (CTA2 J.A. A-623); *see also* Pet. App. 66a. The Petitioners next turned to the district court, which, on November 25, 2009, also denied a stay, finding that Petitioners had not met their burden on any of the four elements needed for a stay, 11/25/2009 Stay Hr'g Tr. 15:15-18 (CTA2 J.A. A-640-69) and cited to numerous factual findings of the bankruptcy court, including "that the settlement is not only fair to Charter but is in its best interests." (*Id*. A-666.) Petitioners did not seek a stay from the Second Circuit. The Plan therefore became effective on November 30, 2009, and, as Petitioners concede, was substantially (now entirely) completed.

Petitioners appealed the Plan's confirmation and, on March 30, 2011, the district court dismissed the appeals, finding that they "represent[ed] the epitome of equitable mootness not only because the Plan ha[d] 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." Pet. App. 42a. The district court recognized that "'an appeal should . . . be dismissed as [equitably] moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'" *Id*. 87a (citation omitted) (alterations in original). The district court found that the relief requested by Petitioners was unavailable because the Allen Settlement was "'integral'" to the Plan. *Id*. 42a.

The district court also noted that "[n]either Appellant has demonstrated that any of the bankruptcy court's findings were clearly erroneous."

Id. 47a. It found that undoing the Allen Settlement would nullify the "authorization for the reorganization" and "the numerous transactions consummated in reliance on the Plan," *id.* 48a, creating an unmanageable situation for the bankruptcy court, which would have to, among other things, unwind such transactions and somehow "compensate Allen for his completed performance of the [Allen] Settlement *and* allow him the opportunity to walk away from Charter or otherwise decline to cooperate in achieving the restructuring goals." *Id.* 49a (emphasis in original).

On August 31, 2012, the Second Circuit affirmed the district court's equitable mootness determination. It reviewed the district court's equitable decision for abuse of discretion, scoured the factual record and concluded that Petitioners "failed to establish that the relief they request would not affect Charter's reemergence as a revitalized entity and would not require unraveling complex transactions undertaken after the Plan was consummated." *Id.* 16a. In particular, the Second Circuit found that the "Allen Settlement was the product of an intense multi-party negotiation, and removing a critical piece of the Allen Settlement – such as Allen's compensation and the third-party releases – would impact other terms of the agreement and throw into doubt the viability of the entire Plan." *Id.* The Second Circuit found "no evidence that the settlement consideration paid to Allen or the third-party releases were simply incidental to the bargain that was struck." *Id.* 19a. The Second Circuit thereafter denied Petitioner's request for a rehearing *en banc*. *Id.* 432a-435a.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO OCCASION TO ADDRESS THE EXISTENCE OF THE EQUITABLE MOOTNESS DOCTRINE

A. Every Circuit Recognizes the Equitable Mootness Doctrine

One of the principal reasons this Court grants review of lower court decisions is to resolve conflicts among the circuits. S. Ct. Rule 10(a). That basis for review is wholly absent with respect to the central issue Petitioners seek to raise – *i.e.*, whether the equitable mootness doctrine should exist at all. Every circuit has adopted the doctrine. *See, e.g.*, *In re Cont'l Airlines*, 91 F.3d 553, 558-59 (3d Cir. 1996) (noting that equitable mootness is a "widely recognized and accepted doctrine"); *see also In re Centrix Fin. LLC*, 394 F. App'x 485, 491 & n.2 (10th Cir. 2010); *In re Smith*, 209 F. App'x 607, 607-08 (8th Cir. 2006) (per curiam); *Bank of Montreal v. Official Committee of Unsecured Creditors* (In re American HomePatient, Inc.), 420 F.3d 559, 563 (6th Cir. 2005).

The doctrine is universally accepted for good-reason: in bankruptcy proceedings, "the ability to achieve finality is essential to the fashioning of effective remedies." *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993). Finality is also essential because numerous parties, including countless strangers to the bankruptcy proceedings themselves, rely in good faith on approved and substantially consummated plans of reorganizations, and the resulting reemergence of the debtor as a revitalized concern. In applying the doctrine in a

case similar to this one, Judge Easterbrook explained the scope of such reliance interests:

> Since the plan went into effect, more than 15 million shares of New UNR have been distributed to its creditors and pre-petition shareholders and are trading on public exchanges. . . . Corporate acquisitions and divestitures (not to mention ordinary commercial transactions) have occurred; tax consequences (including a $90 million income tax benefit) have been realized; large insurance settlements have been disbursed; lawsuits have been dismissed. Undoing all of this is impossible.

In re UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994). So too here, during the past three-and-a-half years, an equally sweeping number of transactions have taken place in reliance on the finality of Charter's reorganization. (*See* Charter Opp. § II.A.) By promoting finality, therefore, the doctrine "provides a vehicle whereby the court can prevent substantial harm to numerous parties." *In re Cont'l*, 91 F.3d at 559.

Where, as here, there is unanimity among the lower courts, this Court does not reach out to decide a settled issue in the absence of certain unique circumstances that are absent here. There is no confusion among the lower courts over whether the doctrine exists. *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169-70 (1994) (relying on this factor as basis for granting review despite absence of any circuit

conflict). Nor do Petitioners or their *amici* cite to any case in which this Court has previously noted and reserved judgment on the issue. *Cf. id.* at 167.

Petitioners thus attempt to manufacture a justification for review, claiming that the doctrine is "'open to substantial abuse, and invites manipulation.'" (Pet. 12 (quoting Pet. 23, *United States* v. *GWI PCS 1, Inc.*, No. 00-1621 (Apr. 2001)).) But the government brief from which Petitioners quote offers *no* evidence in support of this claim; the government simply cited risks that could have – but did *not* – materialize in the relevant case itself. Pet. 23 n.12, *United States* v. *GWI PCS 1, Inc.* In fact, Petitioners' own cases belie their hyperbole, demonstrating that, even where stays are denied, courts still *reject* the majority of equitable mootness claims. (*See* Charter Opp. § I.) Even Petitioners' *amici* do not argue that the doctrine should be abandoned; indeed, they concede that "finality interests, reliance interests, and practical concerns are important in bankruptcy proceedings." (*Amici* Br. 3.)

In short, Petitioners have failed to justify their extraordinary request that the Court reach out to review and overturn a longstanding doctrine that has been embraced by every court of appeals and serves indisputably important and salutary purposes.

B. This Case Is an Inappropriate Vehicle for Addressing the Existence of the Equitable Mootness Doctrine

In addition to the absence of any justification for reviewing the unanimous consensus of the circuit

courts, numerous other factors make this case an inappropriate vehicle for such extraordinary action. Petitioners ask this Court to decide an important question of bankruptcy law that was not discussed by any court below, was raised only in a perfunctory fashion in a petition for rehearing *en banc*, and is predicated on a claim (concerning the availability of effective relief) that was waived below and now rests on a clear mischaracterization of the decision below. Moreover, even if the Court were to overlook all of these legitimate reasons for refusing Petitioners' extraordinary request, any decision it would render on the existence of the doctrine would almost certainly make no difference to the outcome of this case, and would thus amount to an advisory opinion.

1. This Court Should Not Review an Issue Not Addressed by the Courts Below

Neither the district court nor the Second Circuit addressed whether the longstanding and well-established equitable mootness doctrine should continue to be recognized. Petitioners' request that this Court grant certiorari to review this question is thus inconsistent with the Court's settled practice. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-10 (2001) (dismissing writ and declining to parse constitutional issues not reviewed by the lower courts); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (noting that in general, issues should be addressed by lower courts before they are reviewed by the Supreme Court); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 130 S. Ct. 2971, 2995 & n.28 (2010) ("this

Court is not the proper forum to air [an issue not addressed by the district court or circuit court] in the first instance").

This practice reflects the Court's wise recognition that its final pronouncements benefit from the considered views of the lower courts. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Court benefits from "permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (Court's experience "exemplifies the wisdom of allowing difficult cases to mature through full consideration by the courts of appeals"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (opinions from lower courts "may yield a better informed and more enduring final pronouncement by this Court"). If the Court were to review the viability of the equitable mootness doctrine here, it would do so without the benefit of any lower court analysis of a far-reaching and important issue of bankruptcy law.

Petitioners will undoubtedly claim that raising the issue prior to the rehearing *en banc* stage would have been futile. But in other cases, parties have properly preserved issues for review by raising them before appellate panels notwithstanding contrary circuit precedent. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (noting petitioner had devoted "a few pages" to issue despite panel's inability to overrule circuit precedent foreclosing jurisdiction over the claim). Moreover, even in their Petition for Rehearing *en Banc*, where circuit precedent posed no barrier, Petitioners devoted a scant three paragraphs to the issue. This

drive-by presentation did not include many of the arguments now raised in their brief or that of their *amici*. Nor did it acknowledge the justification for the doctrine that Judge Easterbrook identified in *UNR Industries*, 20 F.3d at 769 – a justification deemed worthy of consideration by both then-Judge Alito, in his *Continental Airlines* dissent, *see* 91 F.3d at 571, and by Petitioners' *amici* (*see Amici* Br. 10).

All of these circumstances make it highly improvident for the Court to decide a fundamental question of bankruptcy law on the basis of arguments that would be made for the very first time in this Court. Petitioners' showing that the issue is a recurring one (*see* Pet. 29-31) confirms that there will be ample future opportunities for parties to challenge the existence of the equitable mootness doctrine in the lower courts, and to do so in a manner commensurate with the doctrine's importance. This Court should await such further developments, and the analytical insights they will generate.

2. Petitioners' Attack on the Doctrine is Predicated on Claims that They Have Waived, and Now Rests on a Distortion of the Decision Below

The Court should decline to address the issue of the doctrine's existence not only because it lacks the benefit of lower court analysis, but because Petitioners seek to raise the issue on the basis of a claim that they waived below, and that they now predicate on a clear mischaracterization of the lower court's ruling.

Petitioners repeatedly argue that the doctrine is invalid because it was used in this case to foreclose

judicial review even though effective relief was available, and no innocent third parties would be affected by that relief. (Pet. 2, 13, 22; *see also id.* (i).) Petitioners claim that "effective" relief is available because they purportedly "seek limited remedies – money judgments and the striking of nondebtor liability releases – and not an unwind of Charter's reorganization plan." (*Id.* 25.) In fact, neither Petitioner sought monetary damages or the striking of nondebtor releases before the bankruptcy court or the district court. (*See supra* Stmt. Case.) These claims have therefore been waived. *See, e.g., Beaulieu v. I.R.S.*, 865 F.2d 1351, 1352 (1st Cir. 1985) ("it is a party's first obligation to seek any relief that might fairly have been thought available in the district court before seeking it on appeal"); *Adelphia Bus. Solutions, Inc. v. Abnos*, 482 F.3d 602, 607 (2d Cir. 2007) (refusing to address issue in light of appellant's "failure to raise the issue in the bankruptcy court"). That waiver eliminates the linchpin for Petitioners' attack on the doctrine of equitable mootness.

Petitioners ask the Court to ignore that waiver because the Second Circuit assumed they could pursue these claims. *See* Pet. App. 14a-15a. But the Second Circuit's willingness to assume the validity of these claims in order to reject Petitioners' appeal on other grounds does not excuse their waiver. It thus does not entitle them to seek relief from this Court on the basis of forfeited claims.

Moreover, Petitioners flatly misstate the nature of the Second Circuit's assumption. The lower court assumed that it was "not *impossible* to grant [Petitioners] relief, in the sense that the appeals are

not constitutionally moot." Pet. App. 14a (emphasis added); *see also id.* 8a (explaining that equitable mootness can apply where "effective relief could *conceivably* be fashioned") (emphasis added). But in entertaining a theoretical possibility that Petitioners could obtain effective relief, the Second Circuit did *not* "acknowledge[] . . . that a monetary judgment . . . would not imperil the reorganization in the slightest." (Pet. 27.)

To the complete contrary, it faulted Petitioners for ignoring that the "Allen Settlement was the product of an intense multi-party negotiation, and [that] removing a critical piece of the Allen Settlement – such as Allen's compensation and the third-party releases – would impact other terms of the agreement *and throw into doubt the viability of the entire Plan*." Pet. App. 16a (emphasis added). Indeed, it noted that the bankruptcy court had found, on the basis of ample evidence, "that the compensation to Allen and the third-party releases were critical to the bargain that allowed Charter to successfully restructure and that undoing them, as the [Petitioners] urge, would *cut the heart out of the reorganization*." *Id.* 18a. Petitioners thus "failed to establish 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.* 16a.

This Court should not decide the viability of an important doctrine of bankruptcy law on the basis of claims for relief that were waived below, and that now rest on clear mischaracterizations of the basis of the lower court's ruling.

3. A Decision on the Doctrine of Equitable Mootness Will Almost Certainly Not Affect the Outcome of the Case

Finally, a decision by this Court on the existence of the doctrine of equitable mootness would almost certainly not affect the outcome of this case, and would thus render any opinion by this Court advisory. First, Petitioners have little, if any, chance of prevailing on their underlying legal challenges, all of which require that the lower courts overturn numerous detailed factual findings by the bankruptcy court under a clearly erroneous standard of review. Second, even if they could make such showings, the relief they seek would be denied as a remedial matter, for the same compelling reasons the lower courts deemed their appeal equitably moot.

a. The crux of Petitioners' claim that they are entitled to any relief is now – and always has been – that the terms of the Allen Settlement were inherently unfair, and that the classification of creditors was gerrymandered to secure an affirmative vote. (Pet. 26-29.) Notably, the bankruptcy court rejected both of these arguments based on a series of *factual* determinations embodied in a lengthy decision rendered after hearing testimony from 33 witnesses over the course of nearly three weeks of hearings. Pet. App. 33a. Acknowledging that the Allen Settlement was somewhat "controversial," Judge Peck "carefully considered" the costs and benefits of the Allen Settlement to Charter, and concluded that both the "significant consideration being paid to Allen" and the third-party releases were provided in exchange for "enormous value" to

Charter given Mr. Allen's unique position with respect to the estate, and that the Allen Settlement was thus fair to Charter, and in the best interests of Charter's creditors. Pet. App. 112a-128a. The bankruptcy court also found that Petitioners failed to produce *any* evidence of gerrymandering. *Id.* 140a.

Even if this Court were to overturn the unanimous judgment of the circuit courts and eliminate the doctrine of equitable mootness, Petitioners have no grounds for relief unless they can show that these detailed, fact-laden determinations were clearly erroneous. They cannot make that showing. Indeed, the bankruptcy court noted that Petitioners' objections were "long on rhetoric and short on proof," Pet. App. 91a. And, in concluding that Petitioners could not establish a substantial probability of prevailing on appeal, the district court noted Petitioners' repeated failure to address the substantial evidence refuting their claims. 11/25/09 Stay Hr'g Tr. 23:6-8 (CTA2 J.A. A-662 ("LDT completely ignores the finding that 'the plan has been accepted by ten different impaired classes of claims'")); *id.* 24:15-17 (CTA2 J.A. A-663 ("LDT's argument . . . ignores the full scope of the plan and all of the evidentiary support at trial")); *id.* 26:5, 27:3-6 (CTA J.A. A-665-666 (the "bankruptcy court's opinion discusses in substantial detail the basis for its findings that the settlement is not only fair to Charter but is in its best interests" and "there's no contention by LDT" to the contrary)).[4]

b. Even if Petitioners could overcome this

[4] The district court referred only to petitioner LDT because petitioner R[2] did not even file a brief in support of a stay.

enormous hurdle, there is even less chance they could obtain any relief. As then-Judge Alito noted, the finality interests that animate the equitable mootness doctrine would have to be taken into account as a matter of remedy if the doctrine did not exist. *In re Cont'l Airlines*, 91 F.3d at 571. Thus, even if this Court were to eliminate the doctrine and Petitioners prevailed on the merits of their challenges on remand, the lower courts would confront the same factors that led them to dismiss the appeal as equitably moot. The relief Petitioners seek would still "cut the heart out of the reorganization," and "throw into doubt the viability of the entire Plan." Pet. App. 16a, 18a. The enormous reliance interests on that reorganization would have grown only stronger during the intervening years of litigation on remand from this Court, and Petitioners would thus be even less able "to establish 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.* 16a. These facts would inevitably lead the lower courts to deny relief as a matter of judicial discretion.

In short, any decision this Court might render on the existence of the equitable mootness doctrine has an infinitesimally small chance of affecting the ultimate outcome of this case, and thus an unacceptably high risk of constituting an advisory opinion. As Respondent demonstrates next, the subsidiary issues Petitioners have raised concerning the application of the doctrine are not independently worthy of review. In all events, resolution of those issues is unwarranted because, for the reasons just discussed, any decision by this Court concerning the

existence of presumptions or the standard of review likewise cannot affect the outcome of this case.

II. THE PURPORTED CIRCUIT SPLIT OVER THE PRESUMPTION IN CASES INVOLVING EQUITABLE MOOTNESS CLAIMS DOES NOT WARRANT REVIEW

A. The Purported Circuit Split Over the Presumption Is Exaggerated and Reflects a Mainly Semantic Disagreement

Petitioners' claim of a circuit split concerning the presumption applicable in cases of equitable mootness is greatly exaggerated, and rests largely on semantic, not substantive, distinctions. Every circuit has construed equitable mootness as a fact-driven inquiry involving the same basic considerations, one of the most important being whether the challenged plan of reorganization has been "substantially consummated."[5] This emphasis on "substantial

[5] *E.g., In re Pub. Serv. Co. of N.H.*, 963 F.2d 469, 473-75 (1st Cir. 1992) (courts must determine whether relief would be "inequitable or impracticable" in light of changed circumstances, including whether stay has been sought, plan has been substantially consummated, and "innocent third parties" would be affected); Pet. App. 8a-11a (equitable mootness "must be based on facts," including whether plan has been substantially consummated, relief can be fashioned without affecting debtor's emergence, unraveling plan, or adversely affecting non-parties, and stay was diligently sought); *In re Cont'l Airlines*, 91 F.3d at 560 (3d Cir. 1996) (discussing same factors, and noting "foremost consideration" is substantial consummation); *In re U.S. Airways Grp., Inc.*, 369 F.3d 806, 810 (4th Cir. 2004) (reviewing same factors enumerated by the Second Circuit, and noting substantial consummation "weighs heavily in favor of" equitable mootness); *Manges v. Seattle-First Nat'l Bank* (In re

consummation" reflects the understanding expressed by numerous courts of appeals that once a reorganization plan has been implemented, a court is less likely to be able to fashion an equitable remedy without undoing a successful reorganization, frustrating the expectations of the reorganized debtor, its creditors, new shareholders, and other parties who have relied on the plan, and undercutting the policies intended to foster the final

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Manges), 29 F.3d 1034, 1040-45 (5th Cir. 1994) (evaluating whether stay had been sought, plan has been substantially consummated, and effect of relief sought on third parties, and noting substantial consummation can inform its judgment on other factors); *Centrix*, 394 F. App'x at 488 (10th Cir. 2010) (same); *In re American HomePatient*, 420 F.3d at 563-64 (6th Cir. 2005) (evaluating whether stay was sought, substantial consummation has occurred and effect of relief on third parties); *Smith*, 209 F. App'x at 607-08 (8th Cir. 2006) (equitable considerations mooted appeal where plan had been implemented and stay had not been sought); *In re Brotman Med. Ctr., Inc.*, 442 F. App'x 317, 317-18 (9th Cir. 2011) (substantial consummation constituted a "comprehensive change of circumstances" rendering relief inequitable), *cert. denied*, 132 S. Ct. 1095 (2012); *Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc.* (In re Winn-Dixie Store, Inc.), 286 F. App'x 619, 623 (11th Cir. 2008) (per curiam) (challenge to plan will not be entertained when stay has not been granted and substantial consummation has occurred); *cf. In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986) (equitable mootness determination requires "case-by-case judgment regarding the feasibility or futility of effective relief" without allowing for "piecemeal dismantling" of substantially consummated plan). Although the Seventh Circuit has "banish[ed]" the term "'equitable mootness' from the (local) lexicon" because it found that the phrase "fosters confusion," that circuit nonetheless applies the substance of the "equitable mootness" doctrine consistently with the other circuits. *See United States v. Segal*, 432 F.3d 767, 773-74 & n.4 (7th Cir. 2005).

resolution of bankruptcy matters. *See, e.g.*, *Centrix*, 394 F. App'x at 488; *Winn-Dixie*, 286 F. App'x at 623; *Manges*, 29 F.3d at 1040-43 & n.13; *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993).

In the First and Second Circuits, this recognition is articulated as a rebuttable presumption of equitable mootness that arises *once it is established* that "the debtor's plan of reorganization has been substantially consummated." *See* Pet. App. 9a; *Pub. Serv.*, 963 F.2d at 474 & n.13.[6] Contrary to Petitioners' suggestion, however, neither circuit applies "a presumption of equitable mootness" at the outset of its inquiry. (Pet. 17.) Any such "presumption" is applied only *after* it has *already been demonstrated* that substantial consummation of a bankruptcy plan has occurred – and this factor is recognized by *all courts* as central to, and often dispositive of, the equitable mootness analysis. Thus, the "presumption" does not shift the ultimate burden of proving mootness from the proponent of the doctrine.

Though Petitioners assert that the circuits are divided over whether substantial consummation triggers a "presumption" of equitable mootness (Pet. 15-17), only one of the cases they cite, from the Tenth Circuit, actually disagrees with the formulation of

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[6] To show a deeper and more mature split, Petitioners claim the Sixth and D.C. Circuits employ such a presumption. (Pet. 14.) The Sixth Circuit decision they cite, however, is unpublished and non-precedential. *In re Eagle Picher Industries, Inc.*, 172 F.3d 48, 1998 WL 939869 (6th Cir. 1998). And, in *AOV,* the D.C. Circuit recognized a presumption of mootness only for challenges to the particular plan at issue, based on the facts of that case. *See* 792 F.2d at 1149.

such a presumption. *See Search Mkt. Direct, Inc. v. Jubber* (In re Paige), 584 F.3d 1327, 1339-40 (10th Cir. 2009). But even the *Paige* court did not reject the *substance* of the presumption – that demonstrating substantial consummation can often satisfy the burden of demonstrating equitable mootness. As the *Paige* court acknowledged, the equitable mootness factors other than substantial consummation are "given much less weight and, in some cases, completely ignored." *Id.* In *Paige*, the court also explained that "some of the reasons courts are reluctant to undo substantially consummated bankruptcy plans [did] not pose serious problems" in that particular case: The bankrupt individual in *Paige* had only one valuable asset, a domain name, and the only purpose of any proposed reorganization plan was to direct the transfer of that domain name from the debtor, not to revitalize the debtor's business. *Id.* at 1343.[7]

In a subsequent case involving a true reorganization – where the debtor sought to emerge from bankruptcy with a viable business – the Tenth Circuit again recognized that substantial consummation is the linchpin of an equitable mootness analysis. *See Centrix*, 394 F. App'x at 488. The court explained that "the 'substantial consummation' yardstick" can inform the court's determination of other equitable mootness considerations, such as "finality concerns and the reliance interests of third parties upon the plan as

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[7] *See also In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004) (because debtor sought "an exit instead of a do-over," considerations that often counseled against unwinding a substantially consummated plan were inapplicable).

effectuated." *Id.* Thus, notwithstanding its semantic objections to the Second Circuit "presumption," the Tenth Circuit, like every other circuit, is significantly more likely to find an appeal equitably moot once a bankruptcy plan has been substantially consummated.[8]

Apart from the Tenth Circuit in *Paige*, no other court of appeals (and no other case cited by Petitioners) expressly rejects the substantial consummation presumption. To support the fiction that there is a deep and mature split, Petitioners cite decisions from the Third, Fourth and Eleventh Circuits, each of which reiterates that the proponent of the equitable mootness doctrine bears the ultimate burden of establishing that the doctrine should be applied. (Pet. 15-16.) This is a proposition, however, with which all the circuit courts agree – including, as respondent has just shown, the First and Second Circuits.

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[8] In another Tenth Circuit case cited by *amici*, *In re Stephens* (*see Amici* Br. 15), the court did not mention the substantial consummation presumption, and refused to apply equitable mootness for reasons wholly inapplicable to the present case. *In re Stephens* involved a question of first impression in that circuit regarding the absolute priority rule. The Bankruptcy Appellate Panel (BAP) had certified the appeal to the Tenth Circuit because it recognized that without controlling law on that issue, reorganization plans could not be effectively structured or fairly and predictably relied upon. *See Stephens v. Stephens* (In re Stephens), 704 F.3d 1279, 1283 (10th Cir. 2013). By contrast, the resolution of the straightforward legal arguments advanced by Petitioners turned on the *facts found* by the bankruptcy court (*i.e.*, regarding the inherent fairness of the Allen Settlement, the necessity of the releases and the consideration provided). Pet. App. 112a-128a.

Thus, the only "split" on the issue of a presumption is a largely semantic one between the Tenth and the First and Second Circuits. Every circuit is reluctant to entertain an appeal from an order confirming a substantially consummated bankruptcy plan, and recognizes this as a central factor in the equitable mootness analysis. The Tenth Circuit simply disagrees over whether this reluctance should take the form of a formal "presumption" or not. That disagreement does not warrant this Court's review.

B. Resolution of the Purported Circuit Split Concerning the Presumption Will Not Affect the Outcome of This Case

Even if the presumption issue might otherwise merit review, review is inappropriate in this case, because resolution of the issue cannot affect the outcome of this case. This is true not only for the reasons set forth above in Section I.B.3., but because the presumption cannot even affect the outcome of the equitable mootness inquiry itself. Petitioners' claim to the contrary does not withstand scrutiny. (Pet. 12.)

Without the benefit of the presumption, Respondents would have had to demonstrate not only that the plan had been substantially consummated, but also that, as a result, it would be inequitable and impractical for the courts to grant Petitioners the relief they sought on appeal. To make the latter showing, respondents would have to demonstrate that the relief Petitioners sought would require unraveling the plan, thereby threatening Charter's emergence as a going concern and upsetting the

interests of all those who had relied on its emergence.

As the Second Circuit's opinion makes abundantly clear, the only thing respondents had to do to make the latter showing was to point to the bankruptcy court's findings. Those findings amply established that the settlement compensation and releases were central to the plan of reorganization, and that excising those terms would "cut the heart out of the reorganization," and "throw into doubt the viability of the entire Plan." Pet. App. 16a, 18a. At that point, Petitioners would have found themselves in the same position they were in as a result of the presumption: required "to establish 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.* 16a.

In short, the overwhelming factual findings of the bankruptcy court made application of the presumption in this case an academic exercise. Those findings doomed Petitioners' appeal whether or not Respondents bore the "burden" of invoking them in the first instance. Petitioners do not – because they cannot – point to any decision by the Tenth Circuit (or any other circuit) that even remotely suggests that another court, faced with the findings the bankruptcy court made below, would have permitted Petitioners' appeal to go forward. To the contrary, in all of the cases Petitioners or their *amici* cite, decisions that an appeal was not equitably moot were driven by determinations that the bankruptcy court did not adequately address the objections raised, or that the plan was either not substantially consummated or could be easily

unwound without undermining the proposed revitalization of the debtor's business[9] – factors that are entirely absent here.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THIS COURT TO EXAMINE THE STANDARD OF REVIEW APPLIED TO EQUITABLE MOOTNESS DETERMINATIONS

Petitioners also seek review on the theory that the Second Circuit's application of an abuse of discretion standard of review to a district court's equitable mootness determination – the same standard long

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[9] *See In re Stephens*, 704 F.3d at 1283 (10th Cir. 2013) (on issue of first impression, bankruptcy court lacked guidance required to fully evaluate objections to plan); *In re Thorpe Insulation Co.*, 677 F.3d 869, 879 (9th Cir. 2012) (bankruptcy court did not afford appellant opportunity to be heard on all relevant issues); *In re Cont'l Airlines*, 203 F.3d 203, 207 (3d Cir. 2000) (bankruptcy overruled objections to plan because objectors were not present); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 709 (4th Cir. 2011) (bankruptcy court's factual findings were insufficient); *Ala. Dep't of Econ. & Cmty. Affairs v. Ball Heathcare-Dallas, LLC* (In re Lett), 632 F.3d 1216, 1224 (11th Cir. 2001) (no substantial consummation); *Aetna Ca. & Surety Co. v. LTV Steel Co.* (In re Chateaugay Corp.), 94 F.3d 772, 776 (2d Cir. 1996) (granting relief sought would not require unwinding entire plan); *S. Pac. Transp. Co. v. Voluntary Purchasing Grps., Inc.*, 246 B.R. 532, 535-36 (E.D. Tex. 2000) (modifying or replacing plan to grant relief sought would not prevent emergence of debtor as viable entity); *In re Focus Media, Inc.*, 378 F.3d at 923 (9th Cir. 2004) (debtor wished to terminate bankruptcy proceedings, not to reorganize); *In re Paige*, 584 F.3d at 1324 (10th Cir. 2009) (plan involved only one fundamental transaction, which could easily be undone); *Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev.* (In re Baker & Drake), 35 F.3d 1348, 1351-52 (9th Cir. 1994) (same).

applied by the Third and Tenth Circuits – is in a "deep" and "intractable" conflict with decisions by five other Courts of Appeals. (Pet. 2, 13.) Petitioners are wrong and grossly exaggerate this purported conflict. The only other court of appeals that has directly addressed the question of the proper standard of review to apply to a district court's determination and reached a decision contrary to that of the Second, Third and Tenth Circuits is the Fifth Circuit, which has concluded that the review should be de novo.[10] Attempting (once again) to show a deeper and more mature split, Petitioners cite cases from the Sixth, Eighth, Ninth and Eleventh Circuits. These cases, however, cite do *not* evidence a split because they are distinguishable and/or non-precedential.[11]

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[10] *See United States v. GWI PCS 1 Inc.* (In re GWI PCS 1 Inc.), 230 F.3d 788, 799-800 (5th Cir. 2000).

[11] *Curreys of Nebraska, Inc. v. United Producers, Inc.* (In re United Producers, Inc.), 526 F.3d 942, 946 (6th Cir. 2008) (2-1 adoption of de novo standard of review in affirming a BAP's equitable mootness determination); *but see id.* at 952 (Kennedy, J.) (concurrence believed abuse of discretion review is appropriate); *Zegeer v. President Casinos, Inc.* (In re President Casinos, Inc.), 409 F. App'x 31 (8th Cir. 2010) (per curiam) (unpublished order affirming district court's equitable mootness determination under de novo review); *Baker*, 35 F.3d at 1351 (9th Cir. 1994) (blending constitutional and equitable mootness to justify de novo review of district court's equitable mootness decision); *Olympic Coast Inv., Inc. v. Crum* (In re Wright), 329 F. App'x 137, 137-38 (9th Cir. 2009) (unpublished decision affirming a BAP's equitable mootness determination premised on uncritical application of *Baker*); *First Union Real Estate Equity & Mortgage Investments v. Club Assocs.* (In re Club Assocs.), 956 F.2d 1065, 1069 (11th Cir. 1992) (stating that it reviewed "determinations of law" de novo in affirming district court's equitable mootness decision); *Winn-Dixie*, 286 F. App'x

This modest conflict that does exist does not merit review by this Court. First and foremost, resolution of this conflict will have no effect on the outcome of this case. Petitioners claim that the standard of review is "outcome-determinative" but they offer no support for their contention. (*Id*. 12.) That is because, once again, there is none.

In affirming the district court's dismissal of Petitioners' appeal, the Second Circuit repeatedly recited and relied upon the *bankruptcy court's* detailed factual findings demonstrating that the relief Petitioners sought would threaten Charter's emergence as a revitalized entity. Pet. App. 16a-20a. In this part of its analysis, the Second Circuit did not even mention, much less defer to, any discretionary judgments and assessments by the district court. Even under a de novo standard of review, the bankruptcy court's findings would have dictated the same outcome. Petitioners do not – because they cannot – identify any basis for concluding otherwise.

Petitioners claim that "there is simply no good reason" for a court of appeals to defer to a district court's review of a bankruptcy court order. (Pet. 20.) Even if that were true, it would not justify review of an issue that cannot affect the outcome of the case. *See* Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (even where petition identifies clear conflict, if resolution of that conflict "is irrelevant to the ultimate outcome of the case before the Court," review is unwarranted) (citing

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at 622 & n.2 (11th Cir. 2008) (per curiam) (unpublished decision premised on uncritical application of standard set forth in *First Union*). (Pet. Br. 18-22.)

Sommerville v. *United States*, 376 U.S. 909 (1964)). In all events, Petitioners' claim is not true.

As the Second Circuit explained, "[e]quitable mootness appeals arise in a somewhat different procedural posture: In an equitable mootness dismissal, the district court is not reviewing the bankruptcy court at all, but *exercising its own discretion in the first instance*." Pet. App. 12a (emphasis added); *see also In re United Producers*, 526 F.3d at 953 (Kennedy, J. concurring). The district court, therefore, is not acting as an appellate court when rendering its equitable mootness determination. As such, the district and circuit courts do not sit in equivalent positions as they do in all other bankruptcy appeals.

Moreover, as noted in the thorough analyses performed by the Second, Third and Tenth Circuits, equitable or prudential doctrines like equitable mootness are usually reviewed deferentially. *See, e.g.*, Pet. App. 12a-13a; *In re Cont'l Airlines*, 91 F.3d at 560; *In re Paige*, 584 F.3d at 1335; *see also* 2 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.16, at 4-134 (4th ed. 2010) (discussing deferential review of lower court's equitable determinations). In particular, as the Third Circuit observed, circuit courts generally apply an abuse of discretion review to a district court's application of an analogous equitable doctrine – laches – which also requires a district court to balance the equities involved in permitting a plaintiff to litigate its delayed claims when a defendant's circumstances change substantially in the interim. *In re Cont'l Airlines*, 91 F.3d at 560 (citing Third Circuit precedent holding that "balancing of equities

involved in application of [the] laches doctrine [is] reviewed for abuse of discretion"); *see, e.g., Sanders v. Dooly County, GA*, 245 F.3d 1289, 1291 (11th Cir. 2001) (reviewing for abuse of discretion a district court's determination that doctrine of laches barred claim seeking injunctive relief). There are, therefore, ample reasons for a circuit court to review a district court's equitable mootness determination for abuse of discretion.

In any event, because it would have made no difference whether the Second Circuit applied de novo or abuse of discretion review to the equitable mootness determination in this case, this case is a particularly poor vehicle for review of this issue. *See Mercer v. Theriot*, 377 U.S. 152, 156 (1964) (per curiam) (declining to determine appropriate standard of review where "the evidence was sufficient under any standard which might be appropriate").

What is more, because only four circuits have directly addressed this question in a precedential ruling – and only one has disagreed with the approach taken by the Second, Third and Tenth Circuits[12] – this Court should allow the issue to further percolate among the lower courts. If it is to be reviewed at all, the applicable standard of review should be considered in a case where it could make a difference in the outcome of the litigation. (*See supra* § I.B.1.)

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[12] The First, Seventh and D.C. Circuits have not directly or indirectly addressed the appropriate standard of review to apply to a lower court's equitable mootness determination. The Fourth Circuit has noted the issue but refrained from deciding which standard of review applies. *In re U.S. Airways Grp., Inc.*, 369 F.3d at 809 (4th Cir. 2004).

* * *

This Court will have future opportunities to review all aspects of the equitable mootness doctrine in the context of cases where the issues that might interest this Court are actually relevant to the decisions reached by the courts below. Should this Court wish to review any of the general issues concerning the equitable mootness doctrine raised by Petitioners, awaiting a case that more squarely presents those questions will have the added benefit of allowing for further percolation among the lower courts as they continue to refine and clarify the doctrine, its scope and application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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