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., CCH I, LLC, CCH I CAPITAL CORPORATION, CCH II, LLC, CCH II CAPITAL CORPORATION, PAUL G. ALLEN, AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents ask this Court to deny review, but they do so only by ignoring what the Second Circuit actually said. The court of appeals squarely addressed two issues on which the circuits are divided, cast its lot with those circuits that have given equitable mootness the widest berth, and applied those legal rulings in declining to exercise Article III review. And the court did so despite concluding that effective relief was available, that such relief could be obtained without unfairly affecting innocent third parties, and that petitioners had diligently sought a stay. Understandably, respondents do not defend the legitimacy of this judge-made doctrine. And their reasons for denying further review are meritless.

I. Two Squarely Presented, Entrenched Circuit Splits Merit Review

Respondents' attempts to downplay the two circuit conflicts are insubstantial.

A. 1. Respondents acknowledge that the circuits are divided over whether to presume equitable mootness after substantial consummation of a reorganization plan. They acknowledge that the "contrary view" of the Tenth Circuit leaves that court in stark "disagree[ment]" with the First and Second Circuits. Debtors/Committee Opp. 30; Allen Opp. 25. That is more than enough to merit review.

But there is more: Respondents' claim that this split is limited to those three circuits is dead wrong. Debtors/Committee never even mention the Third and Fourth Circuits, and Allen does so only in passing (at 27). Those circuits consistently require

that mootness proponents prove that any remedy would be inequitable. Pet 16.

The Ninth Circuit (which Allen doesn't address) has also held that a mootness proponent bears a "heavy burden" under *either* of "two mootness doctrines"—constitutional *or* equitable mootness. *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012); see also *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004). Contrary to Debtors'/Committee's assertion (at 30), that is exactly how courts in the Ninth Circuit apply those cases. *E.g.*, *Clear Channel Outdoor, Inc.* v. *Knupfer (In re PW, LLC)*, 391 B.R. 25, 34 (B.A.P. 9th Cir. 2008). And the Eleventh Circuit has likewise held that "'[e]ven if substantial consummation has occurred,'" "[t]he party asserting mootness bears the burden of persuasion." *In re Lett*, 632 F.3d 1216, 1225–26 (11th Cir. 2011).[1]

In contrast, the D.C. Circuit has squarely concluded that a "finding of substantial consummation" calls for a "strong presumption of mootness." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986). The First Circuit relied on *AOV* when establishing the same rule. See *In re Public Serv. Co. of N.H.*, 963 F.2d 469, 473 n.13 (1st Cir. 1992). And respondents neglect to mention that district courts in the Sixth Circuit routinely apply that presumption after the unpublished decision in *In re Eagle Picher*

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[1] That, of course, is also the rule for any other kind of "mootness" claim, as this Court reiterated just this Term. *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013).

Industries, Inc., Nos. 96-4309, 97-4260, 1998 WL 939869, at *4 (6th Cir. Dec. 21, 1998). See Pet. 14.

2. Allen (but not Debtors/Committee) contends that the mootness presumption is merely "semantic," but that is demonstrably untrue. To "overcome" the Second Circuit's presumption of mootness, petitioners were obligated to demonstrate "all five" "*Chateaugay* factors." See Pet. App. 10a. The Second Circuit acknowledged that petitioners had gone three-for-five, but that Circuit's run-the-table presumption required the court below to dismiss these appeals.

That would not have happened in the Tenth Circuit. See *In re Paige*, 584 F.3d 1327, 1343 (10th Cir. 2009). Free of any rigid presumption favoring dismissal, that court emphasized that its "foremost concern" was with any effects that remedies would have on innocent third parties. *Ibid.*[2] Here, the Second Circuit explicitly acknowledged that petitioners' remedies would have *no* troublesome third-party effects, and thus they would *not* warrant dismissal under *Paige*. Pet. App. 14a–16a, 20a, 22a. In short, the Second Circuit's adoption of the equitable-mootness presumption made all the difference. Cf. *Already*, 133 S. Ct. at 733 (Kennedy, J., concurring) ("When a court has imposed the burden to establish a certain proposition on the wrong party, remand from a reviewing court is often appropriate.").

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[2] The quoted text of the *Paige* opinion contradicts Allen's claim (at 26) that that court still weighed substantial consummation more heavily than other mootness factors.

3. Debtors/Committee (but not Allen) assert that petitioners waived their challenge to the presumption by allegedly failing to raise that issue *in the district court*. Opp. 28. They do not dispute that the validity of the mootness presumption was pressed *and* passed upon in the court of appeals. See Pet. App. 9a–10a; R[2] C.A. Br. 44–49; Debtors C.A. Br. 43–49. This Court requires one or the other; here we have both. In any event, the issue *was* raised in the district court,[3] which is why the Second Circuit correctly ignored respondents' identical waiver argument below. This Court should, too.

B. Respondents concede (Debtors/Committee Opp. 31; Allen Opp. 31) that the circuits are divided over the standard for reviewing a lower court's equitable-mootness dismissal. That is reason enough for this Court's review, but again there is more: Although respondents claim that we have "grossly exaggerate[d]" the split (Allen Opp. 31; see also Debtors/Committee Opp. 27), they are wrong here, too. Respondents now see a 3–1 conflict—with the Fifth Circuit opposing the Second, Third, and Tenth Circuits—but the court of appeals also recognized its disagreement with the Sixth and Eleventh Circuits. Pet. App. 12a. Indeed, Allen—before he was trying to fend off *certiorari*—forthrightly informed the court

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[3] Petitioners argued at length that *respondents* had failed to show an entitlement to equitable mootness (R[2] D. Ct. Reply Br. 1–14); the district court nonetheless held that it would "strongly presume[]" mootness (Pet. App. 37a–38a). That is more than sufficient. See also *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (any argument in support of a claim made below is preserved).

of appeals that the Sixth and Eleventh Circuits would review the district court's equitable-mootness dismissal *de novo*. Allen C.A. Br. 25 n.5 (arguing that those circuits "should not be followed").

Allen was right the first time. The Sixth Circuit squarely adopted *de novo* review in *In re United Producers, Inc.*, 526 F.3d 942 (6th Cir. 2008); see Pet. 19. Respondents speculate that the Sixth Circuit might come out the other way in an appeal from a district court rather than a bankruptcy appellate panel, but *United Producers* explicitly held that "[t]his distinction makes no difference * * * because the judgments of Bankruptcy Appellate Panels are equivalent to the judgments of district courts." 526 F.3d at 946 n.1.

Respondents concede that the Eleventh Circuit in *In re Club Associates* applied *de novo* review *to something*, but they contend that the court did not "expressly address" whether that standard of review extended to the equitable-mootness issue in particular. Debtors/Committee Opp. 33. But mootness was the *only* issue in *Club Associates*. What is more, the Eleventh Circuit applied *de novo* review in *In re Winn-Dixie Stores,* and held that it was "bound" to do so by *Club Associates*. See 286 F. App'x 619, 622 & n.2 (11th Cir. 2008).

The Ninth Circuit likewise applies *de novo* review. Pet. 20; see also *Stokes* v. *Gardner*, 483 F. App'x 345, 346 (9th Cir. 2012). And respondents provide no basis for their speculation that the Eighth Circuit might someday reverse course and adopt abuse-of-discretion review—or, in any event, why a 4–4 circuit split would be less reviewable than a 5–3 one.

C. As a last-ditch effort, respondents contend that the choice among conflicting standards made no difference to the Second Circuit's dismissal. It is hard to imagine, however, that the court of appeals devoted so much attention simply to dicta. Given the relief we seek—and Charter's undisputed ability to afford it (see Pet. 25–27)—there is every reason to believe that the court of appeals will reverse course if this Court resolves the conflicts differently.

II. The Dismissal Of Live Bankruptcy Appeals Under A Judge-Made "Mootness" Doctrine Merits Review

As the petition explains—and as *amici* bankruptcy scholars confirm[4]—equitable mootness lacks any basis in the Bankruptcy Code and flies in the face of Article III courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). As a practical matter, equitable mootness is invoked to shield from review the distribution of billions of dollars of assets each year, and yet the doctrine has taken root without this Court's review or endorsement. Respondents dispute none of this.

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[4] Respondents do not seriously engage any of *amici*'s arguments. Respondents' chief complaint is that a distressed-asset investor funded the brief. Debtors/Committee Opp. 15 n.3. But respondents do not explain why a firm that is a frequent victim of the equitable-mootness cudgel should not be heard; more importantly, that does not diminish the fact that a dozen leading bankruptcy scholars joined this cause.

Unable to defend the doctrine's basic legitimacy, respondents instead assert that the Circuits are "[p]roperly [a]pplying" it. Debtors/Committee Opp. 13. That is not true, but in any event it is no answer—even twelve wrongs do not make a right. Nor does it matter that parties invoking an illegitimate doctrine sometimes lose anyway, or that this Court has denied previous (patently flawed) petitions touching on the issue. And respondents' efforts to gin up "vehicle" problems depend on a bold mischaracterization of the decision below.

A. 1. Respondents' primary ground for opposing review is that *application* of the equitable-mootness doctrine is "highly fact-intensive." Debtors/Committee Opp. 16. Perhaps so. But that is scarcely a reason to refuse to consider *the doctrine's basic legitimacy*, and that is the question presented.

Respondents contend that lower courts deny equitable-mootness arguments "more often than they embrace them." Debtors/Committee Opp. 17. Their only support for this claim, however, are the 39 appellate decisions cited in the petition to demonstrate the recurrence of the question presented (which respondents do not dispute). Contrary to respondents' assertion, those citations were not offered as a comprehensive survey of the equitable-mootness landscape. And respondents surely know that the vast majority of equitable-mootness dismissals occur in the *district courts*. In the Second Circuit alone, a Westlaw search reveals at least twenty decisions resolving equitable-mootness claims in the last five years—*every* appeal was dismissed as moot.

Respondents also note that this Court has denied *other* petitions involving equitable mootness.

Debtors/Committee Opp. 14 & nn.1–2. But none of those petitions presented two circuit splits regarding the doctrine's application, and none challenged the doctrine's validity where, as here, the court of appeals had held that appellants diligently sought a stay and that effective relief could be awarded without unfairly affecting third parties. Moreover, most of the cited petitions long predate the doctrine's recent exponential growth. See *id.* at 13–14 (six circuits adopted some form of the doctrine in the last four years).[5]

B. Respondents urge the Court to wait for another case to consider the merits of an equitable-mootness doctrine. But these purported "vehicle problems" are illusory.

1. Respondents repeatedly claim that this appeal would require unraveling the bankruptcy plan or scores of transactions based on it. That is wrong, and it rests on a gross misreading of the Second Circuit's decision.

The court of appeals determined that it *could* award effective relief from parties before the court. Pet. App. 16a, 20a, 22a. Respondents maintain that

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[5] Some petitions were *pro se* and had myriad defects (*e.g.*, *Parker*, *Ivaldy*, *Hayes*); other petitioners had not even requested a stay (*e.g.*, *Adelphia Communications*, *Shelton*); and in still others an Article III court had opined on the underlying merits (*e.g.*, *Kenton County Bondholders*, *Berryman Products*). Respondents highlight two petitions from the Second Circuit. Debtors/ Committee Opp. 14 & n.2. In neither instance had the petitioner sought a stay in the lower courts (among other problems).

when the court of appeals held that effective relief was "not impossible," it did not really mean that such relief *was possible*. Debtors/Committee Opp. 17; Allen Opp. 18–19. Let there be no doubt about what relief is at issue: Petitioners seek the striking of the nondebtor releases and monetary payments to compensate them for the various illegalities of the bankruptcy plan. No one—not even respondents—has suggested that respondents (including Charter, with annual revenues in excess of $7 *billion*) cannot afford such payments.[6]

Instead, respondents repeatedly invoke the Second Circuit's statement (Pet. App. 16a) that petitioners' challenge to the Allen settlement "would impact other terms of the agreement and throw into doubt the viability of the entire Plan." See Debtors/Committee Opp. 17–18; Allen Opp. 19. Leaving aside the fact that respondents indiscriminately use this *one* claim to describe *all* of petitioners' challenges, this proposition is itself disturbing. It rests on the premise that Allen, having struck an illegal bargain, should not be stripped of his spoils without getting another opportunity to decide whether to support the plan. But the law aims to restore *victims* of illegal conduct—not *perpetrators*—to their original positions.

Respondents also contend that the only relief available to petitioners "as a matter of law" is the

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[6] In any event, the size of such a remedy would ultimately be a question within the equitable discretion of a court ordering relief *after* deciding the merits of petitioners' claims.

full unwind of Charter's reorganization plan. Debtors/Committee Opp. 19–20. Unsurprisingly, they cite no authority for this breathtaking assertion. Appellate courts can "modify * * * any judgment, decree, or order of a court lawfully brought before it for review." 28 U.S.C. § 2106; see also 11 U.S.C. § 105 ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1024 (2013) (contesting "the legal availability of a certain kind of relief * * * confuses mootness with the merits"). None of the umpteen post-confirmation transactions listed by respondents (Debtors/Committee Opp. 21–23) will be unwound. Even the Second Circuit acknowledged—although respondents never mention it—that "the relief [petitioners] seek would not adversely affect parties without an opportunity to participate in the appeal" (Pet. App. 14a–15a) and that "prudent investor[s]" in the reorganized Charter would not be unfairly affected (*id.* at 16a).

Relatedly, respondents contend that petitioners "waived" any such relief when they objected to plan confirmation in the bankruptcy court. Nonsense. If the bankruptcy court does not credit an objection to confirmation, the dissenting party seeks on appeal whatever remedies are available to cure—in whole or in part—those deficiencies. Respondents' suggestion that objecting parties must request alternative relief during confirmation proceedings is just made up.

2. Debtors/Committee assert that petitioners' efforts to obtain a stay were inadequate, but they fail to mention that the Second Circuit rejected that argument—and with good reason. See Pet. App. 14a

n.3. The district court issued its order denying a stay the evening before Thanksgiving, and respondents rammed through the substantial consummation of their plan the next business day. Respondents insist that a bankruptcy appellant—who has twice been denied a stay—nonetheless must demand the attention of the court of appeals and then the Circuit Justice (even over a holiday weekend). As the Second Circuit held, that is not the law (*ibid.*); if it were, that proposition would itself merit this Court's review.[7]

3. Allen (alone) asserts (at 15–17) that the validity of equitable mootness was "not addressed" below, but he wisely stops short of claiming that the issue is not properly before this Court. The panel passed upon—at some length—the "Legal Standard for Equitable Mootness" by explaining and following Circuit precedent. Pet. App. 8a. In any event, petitioners' claim that these appeals are not equitably moot fully preserves their entitlement to argue that this is so because the doctrine lacks legitimacy. *Yee*, 503 U.S. at 534. And as Allen concedes, petitioners gave the *en banc* Second Circuit—which, unlike the panel, had the authority to overrule circuit precedent—the opportunity to revisit the issue. It declined. Nothing more need be done, and this Court will have no small supply of the lower courts' "considered views" (Allen Opp. 16) when it addresses this issue.

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[7] It is also irrelevant—and was properly ignored by the Second Circuit—that R² filed a "joinder" in Law Debenture's stay application instead of writing its own. Contra Debtors/Committee Opp. 10.

4. Respondents have pulled out all the stops to prevent Article III review of their "ambitious" "gamble" of a reorganization plan. Pet. App. 63a, 72a. They crammed down that reorganization over the vociferous objections of CCI's bond- and stock-holders, the SEC, and U.S. Trustee. They engineered the affirmative vote of a tiny, "impaired" creditor class that they actually paid in full. They doled out $180 million to their controlling shareholder (Allen) as an illegal thank-you gift for not casting Charter into a free-fall bankruptcy (as if he otherwise would have scuttled his many Charter investments). They refused even to value CCI—in which petitioners held their interests—while siphoning *billions* of dollars in accrued tax losses that CCI owned. And respondents granted sweeping liability releases to Allen and other insider non-debtors on their way out the door.

Nevertheless, respondents predict that they will prevail on the merits of those machinations. This is not the place to litigate those legal challenges. It is sufficient, for now, to highlight the bankruptcy court's admission that this case involved "unusually complex" legal issues "subject to differing legal interpretations." Pet. App. 66a. Those "legal interpretations" determined rights to hundreds of millions of dollars, and petitioners deserve to have them heard by an Article III court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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