SEP 2 5 2009

No. 09-104

IN THE

Supreme Court of the United States

AD HOC COMMITTEE OF
KENTON COUNTY BONDHOLDERS,
Petitioners,

v.

DELTA AIR LINES, INC., *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In the bankruptcy of Delta Air Lines, Inc. ("Delta"), the Bankruptcy Court approved a settlement (the "Settlement") among Delta, the Kenton County Airport Board ("KCAB"), which leased facilities to Delta, and UMB Bank, N.A., as trustee on behalf of holders of bonds that were paid for with Delta's lease payments. The Settlement, which the Bankruptcy Court approved as fair and equitable to all bondholders, was also incorporated in Delta's plan of reorganization and approved by over 97% in amount of the voting bondholders. Petitioners failed to obtain a stay, and Delta's assets were distributed in accordance with the plan. The lower appellate courts affirmed the approval of the Settlement, both on the merits and because Petitioners' appeal had been mooted by the irreversible distribution of Delta's assets.

Petitioners' contentions that the Bankruptcy Court exercised jurisdiction over matters unrelated to the debtor's estate and that the courts below refused to consider the merits of Petitioners' claims are contrary to the express findings and holdings of the lower courts. Accordingly, the questions actually presented by this case are:

(1) Whether the Bankruptcy Court was prohibited from approving an agreement among Delta and non-debtors that included *consensual* releases among the non-debtors.

(2) Whether the courts below properly denied Petitioners' appeal from the Bankruptcy Court as moot.

(3) Whether the Bankruptcy Court erred in applying settled principles of law to conclude that it had jurisdiction over the agreement among Delta and the non-debtors.

RULE 29.6 STATEMENT

Respondent Delta Air Lines, Inc. has no parent corporation. JP Morgan Investment Management, Inc. (investment advisor of the Pension Benefit Guaranty Corporation), which is a wholly-owned subsidiary of public company J.P. Morgan Chase & Co., is the only publicly held company that owns 10% or more of the stock of Delta Air Lines, Inc.

Respondent Kenton County Airport Board is a governmental agency organized and operating under Chapter 183 of the Kentucky Revised Statutes and therefore exempt from filing a statement under Rule 29.6.

The parent corporation of respondent UMB Bank, N.A., is UMB Financial Corporation, a publicly traded corporation. No publicly held company holds 10% or more of UMB Financial Corporation's stock.

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BRIEF IN OPPOSITION

The Petition advances no valid reason for this Court to review the decision below. There is no conflict in the circuits that could be resolved by this case. Nor does this case present any important or unsettled question of federal law that warrants this Court's consideration. The courts below applied well-settled principles of bankruptcy and contract law in rejecting Petitioners' objection to a settlement that was agreed to on their behalf by their duly authorized agent. The application of those well-settled principles to the facts of this case does not merit review by this Court.

Contrary to Petitioners' claims, this case does *not* present the question whether bankruptcy courts can discharge obligations of non-debtors. In this case, the debtor in bankruptcy—Delta—renegotiated its obligations to respondent KCAB and to the holders of bonds issued by KCAB that were funded and guaranteed by Delta. As part of that renegotiation, KCAB and the bondholders, represented by respondent UMB Bank as indenture trustee for the bonds (the "Trustee"), renegotiated their related obligations among one another. The resulting agreement was submitted for approval to the Bankruptcy Court, as required by the Bankruptcy Code.

Petitioners purchased a small minority of the bonds, in most cases after Delta filed for bankruptcy and the Trustee gave notice that it was negotiating with Delta and KCAB. Petitioners declined offers to participate in the settlement negotiations and instead challenged UMB Bank's authority as indenture trustee to agree on behalf of the bondholders to the new terms, including limited releases of KCAB and UMB Bank. That contention was rejected on the merits by each of the courts below based on the terms of the trust indenture governing the bonds—a case-specific ruling of contract interpretation that Petitioners do not ask this Court to review.

Accordingly, it is settled for purposes of this case that the non-debtors' obligations to one another were modified by a duly authorized consensual agreement. The modification was not imposed by the Bankruptcy Court, but rather was *contractual*. Petitioners all but ignore this fact in trying to portray this case as presenting the question this Court did not reach last Term in *Travelers Indem. Co. v. Bailey*, --- U.S. ---,

129 S. Ct. 2195 (2009)—*i.e.*, whether a bankruptcy court can release a non-debtor from claims by third parties *without* their duly authorized consent. That is not what happened here, and thus that question cannot be resolved by reviewing this case. Petitioners seek to keep this litigation alive in the hopes of extracting some benefit from doing so, but the key question they urge the Court to decide is not even presented here.

Nor is there any reason for this Court to consider the holding below that Petitioners' objection is equitably moot in view of the closing and the distribution of Delta's assets in and after May 2007. *All eleven* circuit courts to consider the issue have approved the concept of equitable mootness (Pet. 18-20 (citing cases)), and Petitioners point to no conflict between the mootness holding below and the decision of any other court. And in any event, this case is a poor vehicle for examining whether an appeal from a bankruptcy court can be denied on equitable grounds, given that (i) both appellate courts below also affirmed the Bankruptcy Court's decision on the merits, as an alternative holding; and (ii) by the time Petitioners' appeal was decided by the District Court, Delta's estate had been distributed, and that distribution could not be reversed. To the extent that the doctrine of equitable mootness holds any interest, this Court should address it in a case where there is no decision on the merits and where some remedy might be practicable.

Finally, the Petition supplies no reason for this Court to take up the case-specific question whether the renegotiated arrangements among Delta, KCAB and the Trustee fell within the subject matter juris-

diction of the Bankruptcy Court. That jurisdiction encompasses claims "arising under title 11" and "arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The courts below applied settled principles of bankruptcy law in deciding, based on the multiple "inextricably interrelated" agreements between Delta, KCAB and the Trustee, that the Bankruptcy Court had jurisdiction over the Settlement. Petitioners do not contend that this ruling conflicts with any decision of any other court. Nor does the Petition show that any purpose would be served by this Court's reexamination of that case-specific holding.

STATEMENT

1. In 1992, Delta entered into a Lease Agreement with KCAB for use of facilities to be constructed at the Cincinnati/Northern Kentucky Airport (the "Lease"). Pet. App. 320a-421a. To fund the construction, KCAB issued *non-recourse* revenue bonds, which were governed by a trust indenture between KCAB and the Trustee (the "Indenture"). *Id.* 67a-319a. The Indenture provided that payments on the bonds would be funded by Delta's rent under the Lease, and the Lease required Delta to pay the Trustee directly, who would distribute the funds to the holders of the bonds (the "Bondholders"). *Id.* Delta also guaranteed payment on bonds in a separate agreement with the Trustee (the "Guaranty"). *Id.* 422a-30a.

2. In 2005, Delta filed for bankruptcy. It advised KCAB and the Trustee that it intended to reject the Lease under section 365(a) of the Bankruptcy Code, which permits debtors to reject certain contracts

upon approval by the bankruptcy court. Delta, KCAB and the Trustee began negotiations, with the Trustee acting at the direction of a majority of the Bondholders, as provided in the Indenture.

The parties reached a global agreement in February 2007. The Settlement cancelled the Lease and the bonds. *Id.* 41a-42a. Delta and KCAB agreed to a new lease. *Id.* 42a. The Bondholders received notes from Delta and a substantial unsecured claim, which entitled them to vote on Delta's plan of reorganization and to share in the distribution of Delta's estate. *Id.* The Settlement included narrow, limited mutual releases among Delta, KCAB, the Trustee and the Bondholders with respect to the matters addressed in the Settlement and the agreements relating to the bonds. *Id.* 42a-43a. As an agreement that rejected the debtor's lease and disposed of property of the estate, the Settlement was required to be approved by the Bankruptcy Court. 11 U.S.C. §§ 363, 365(a).

3. Petitioners held a small minority of the bonds, almost all of which were purchased *after* Delta was in chapter 11, and in most cases, after the Trustee gave notice that it was negotiating a settlement. Petitioners declined invitations to participate in those negotiations. They objected to the Settlement on the grounds that the Trustee lacked authority under the Indenture to bind the Bondholders and that the Bankruptcy Court lacked subject matter jurisdiction to approve the terms of the Settlement that released KCAB and the Trustee from claims by the Bondholders. Pet. App. 34a. Petitioners did not argue that the Settlement was unfair. *Id.*

The Bankruptcy Court rejected Petitioners' objections and approved the Settlement. After a hearing at which Petitioners were the only objectors, the Bankruptcy Court determined that the Trustee, having been directed by a majority in amount of the Bondholders, was authorized under the Indenture to enter into the Settlement on behalf of the Bondholders. *Id.* 46a-52a. The Bankruptcy Court also determined that it had subject matter jurisdiction over the Settlement under 28 U.S.C. § 1334(b), because the Settlement resolved claims "arising under title 11" and "arising in or related to cases under title 11," (*id.* 53a-54a), and it found the Settlement fair and equitable to all parties. *Id.* 58a.

4. The Settlement was also incorporated into Delta's plan of reorganization, which was approved by 89.19% of the Bondholders in number holding 97.35% of the bonds in amount. *Id.* 46a. Petitioners unsuccessfully sought a stay of the order approving the Settlement from both the Bankruptcy Court (*id.* 434a) and the District Court (*id.* 442a).

5. The plan was consummated in May 2007. As provided in the Settlement, Delta issued the Bondholders notes in the amount of $65,875,000 as well as 5,848,211 shares of Delta stock, both freely tradable. *Id.* 12a. Hundreds of million shares of Delta's stock have since traded hands, and Delta has paid tens of millions of dollars on the notes.

6. Petitioners appealed to the District Court, which held that the appeal was equitably moot, because the terms among the non-debtors could not be modified without upsetting the Settlement, pursuant to which tens of millions of dollars worth of freely tradable

Delta stock and notes had been distributed to hundreds of bondholders, as provided in the Plan of Reorganization – a distribution that the District Court concluded "cannot be reversed." *Id.* 14a-20a. The District Court further determined that even if approval of the Settlement could be reversed, such a reversal would create an "unmanageable, uncontrollable situation" for the Bankruptcy Court, given that Delta had also rejected, assumed and modified numerous contracts in accordance with the Settlement. *Id.* 19a. The District Court also rejected Petitioners' arguments on the merits, holding that the Bankruptcy Court had correctly determined that the Indenture authorized the Trustee's entry into the Settlement on behalf of the Bondholders (*id.* 24a-27a), and that the Bankruptcy Court had jurisdiction to approve the Settlement (*id.* 21a-24a).

7. The Court of Appeals for the Second Circuit affirmed the District Court's holding that Petitioners' claim was equitably moot (*id.* 5a-6a), and also affirmed the decision on the merits "for substantially the reasons stated in the Bankruptcy Court's thorough and well-reasoned decision" (*id.* 6a).

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO OPPORTUNITY TO DECIDE WHETHER BANKRUPTCY COURTS CAN RELEASE NON-DEBTORS

This case presents no opportunity to decide whether bankruptcy courts can discharge obligations owed by one non-debtor to another, because the Bankruptcy Court did not discharge any such obligation. The releases of KCAB and the Trustee included in the

Settlement as part of the renegotiation of Delta's Lease and Guaranty were consensually agreed to as part of the Settlement by the Trustee, acting on the Bondholders' behalf, as directed by a majority in amount of the Bondholders in accordance with the terms of the Indenture.

The first question stated in the Petition thus is simply not presented by this case. Nor does the Petition provide any reason for this Court to consider the question this case does in fact present—*i.e.*, whether a bankruptcy court can approve an agreement among a debtor and non-debtors that includes the *consensual* resolution of related issues among the non-debtors. That uncontroversial proposition, which Petitioners do not even purport to challenge, does not merit this Court's review.

A. Petitioners' Claims Against Respondents Were Released by Agreement of the Trustee on Their Behalf

Contrary to the Petition, this case does not present the question whether bankruptcy courts can release non-debtors from their debts to third parties. Petitioners claim that this case presents the issue presented but not decided in *Travelers Indem. Co. v. Bailey*, --- U.S. ---, 129 S. Ct. 2195 (2009). It does not.

In *Travelers*, the question was whether a bankruptcy court presiding over the bankruptcy of an insolvent asbestos manufacturer could discharge alleged liabilities of non-debtor insurance companies to non-consenting third-party asbestos claimants. After filing for bankruptcy, the asbestos manufacturer settled its coverage claims against its insurers. *Id.* at 2199. In approving that settlement, the bankruptcy

court enjoined "all persons" from asserting any claim against the insurers relating to asbestos. *Id.* Years later, certain asbestos claimants sued the insurers on various theories, including theories that the insurers had themselves directly engaged in actionable wrongdoing that harmed the claimants. A settlement of these claims was presented to the bankruptcy court that had overseen the asbestos manufacturer's bankruptcy, which decreed in approving the settlement that the claims were barred by its prior injunction. *Id.* at 2201.

The Second Circuit held that the bankruptcy court lacked authority to release the claims that the nonconsenting claimants sought to assert against the insurers where there was no impact on the *res* of the debtor's estate. *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66, 68 (2d Cir. 2008). This Court granted a petition for certiorari, but because it determined that the bankruptcy court's injunction was a final judgment that could not be collaterally challenged, it did not decide whether the injunction barring all claims against the insurers relating to asbestos had been proper. *Travelers*, 129 S. Ct. at 2206-07.

Petitioners also cite (Pet. 10) the Fifth Circuit's holding in *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995) that a bankruptcy court had improperly released a debtor's insurer from claims by third parties. The *Feld* court held that the release was improper because the bankruptcy court "provided no alternative means for [the claimant] to recover [and] improperly discharged a potential debt of . . . a nondebtor." 62 F.3d at 761.

Unlike in these cases, here the Bankruptcy Court did not discharge KCAB's or the Trustee's obligations to non-consenting third parties. Rather, it ordered that the non-debtor claims be released as set forth in an agreed Settlement among Delta, KCAB and the Trustee acting on behalf of the Bondholders that modified their respective obligations under the Lease, the Guaranty and the Indenture and included their mutual release of one another from claims based on those agreements and the Settlement. As the Bankruptcy Court stated in approving the Settlement, it "does not release claims against third parties, and releases only those claims amongst the Releasing Parties." Pet. App. 57a.

Petitioners do not appear to dispute that a bankruptcy court can approve a *consensual* release among non-debtors, a seemingly non-controversial proposition. *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) (identifying consensual releases as appropriate). Rather, they argue that this Court should decide "the extent to which a bankruptcy court may approve releases of non-debtor liability *without the consent of affected non-debtors*." Pet. 16 (emphasis added). Yet as shown above, that is not what happened here. In this case—unlike in *Travelers* and *Feld*—the releases were ordered by the Court with and upon the duly authorized consent of the Bondholders, by the Trustee acting on their behalf as directed by a majority of Bondholders by amount, as provided in the Indenture. Although Petitioners disputed the Trustee's authority to enter into the Settlement on their behalf without their consent, all three courts below construed the Indenture as authorizing the Trustee to bind *all* Bondhold-

ers. Petitioners do not ask this Court to review the correctness of that case-specific question of state law contract interpretation.

B. The Decision Below Does Not Conflict with any Other Circuit Court Decision

Petitioners assert that this case presents an opportunity to resolve a conflict among the circuit courts in interpreting section 524(e) of the Bankruptcy Code, which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Even if such a conflict exists, this case provides no occasion to resolve it, because Petitioners did not even cite section 524(e) when this case was before the Bankruptcy Court, the District Court or the Second Circuit, and it is well-settled that this Court does not decide questions not raised in the court of appeals. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). Moreover, even apart from Petitioners' waiver, this case presents no opportunity to resolve the claimed conflict, because section 524(e) is not implicated here.

Petitioners have identified no decision by any court that is inconsistent with the result reached below. It may be, as Petitioners contend, that some circuits have determined that section 524(e) prohibits bankruptcy courts from releasing non-debtors from liabilities shared with a bankrupt debtor, *see, e.g., Landsing Diversified Properties-11 v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 600-02 (10th Cir. 1990) (holding that 524(e) prohibits bankruptcy courts from granting third party releases), and that others construe section

524(e) to mean simply that a discharge of a debtor does not in itself discharge other persons with liability for the same debt, *see, e.g.*, *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657 (6th Cir. 2002) (holding that section 524(e) "explains the effect of a debtor's discharge" and "does not prohibit the release of a non-debtor"), *cert. denied*, 537 U.S. 816 (2002). None of the courts below had any occasion to choose sides in that dispute, however, because, as noted above, the releases approved as part of the Settlement were consensual, having been entered into by the Trustee on behalf of the Bondholders.

Petitioners point to no case holding that section 524(e) disallows a consensual release of the kind present here. Rather, in each of the cases cited by Petitioners where the court disallowed the release of a non-debtor, the release purported to bar claims by *non-consenting* persons. *See, e.g., Airadigm Commc'ns, Inc. v. Fed. Commc'ns Comm'n (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 655 (7th Cir. 2008) (considering "whether a bankruptcy court can release a non-debtor from creditor liability *over the objections of the creditor*" (emphasis added)); *Munford v. Munford, Inc. (In re Munford, Inc.)*, 97 F.3d 449, 453-55 (11th Cir. 1996) (considering whether, as part of a settlement between the debtor and a defendant, the bankruptcy court could enjoin non-settling defendants from seeking contribution from defendant); *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 623 (9th Cir. 1989) (considering whether bankruptcy court could enjoin creditor from enforcing judgment against officers of the debtor); *Menard-Sanford v. Mabey (In*

re A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) (considering whether bankruptcy court could enjoin non-settling claimants from suing directors of debtor), *cert. denied*, 493 U.S. 959 (1989); *see also Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) (disallowing discharge of non-debtor from liabilities to securities fraud claimants where majority of claimants that consented to plan had no authority (unlike here) to bind minority of claimants that did not).

The question in each of these cases—whether Section 524(e) prevents bankruptcy courts from releasing non-debtors from *non-consenting* claimants—is not presented by this case, because the release of claims by the Bondholders was *consensually* agreed to by the Trustee, acting on their behalf and under their instruction, as provided by the Indenture.

Moreover, the cases cited by Petitioners all involve bankruptcy court releases of non-debtor claims that were preexisting and *independent* of the debtors' debt. No such release of preexisting or independent claims occurred here; instead, the very claims released were those that arose from the Settlement itself and were fully adjudicated at a hearing in front of the Bankruptcy Court. The Petitioners were never denied their "day in court"—in fact, they had it, in front of three different tribunals. Although Petitioners argued below that they had independent claims—*i.e.*, that KCAB was directly liable for the bonds and that the Trustee breached the Indenture by entering into the Settlement—the courts below carefully considered and rejected those very claims under the terms of the Indenture. They concluded that KCAB was not liable for bond debt under the Indenture (Pet. App. 36a; *id.* 27-28a) and that the Trustee did not breach

the Indenture by entering into the Settlement, because the Indenture authorized the Trustee's entry into the Settlement on behalf of the Bondholders (*id.* 46a-52a; *id.* 24a-27a). The Petition does not ask this Court to review either of these two constructions of the Indenture by the courts below. Nor would such review be an appropriate use of this Court's resources.

C. The Alternative Mootness Holding Below Makes this Case a Poor Vehicle to Review the Approval of the Settlement

This Court would not even be able to reach the question whether the non-debtor releases at issue were appropriate unless it first reversed the lower courts' holding that Petitioners' appeal was equitably moot. As shown below, however, Petitioners fail to explain why the mootness holding either was incorrect or presents any significant legal question meriting this Court's attention.

II. THE EQUITABLE MOOTNESS HOLDING BELOW DOES NOT MERIT REVIEW

Petitioners argue that this Court should evaluate the holding below that Petitioners' challenge to the Bankruptcy Court's approval of the Settlement was equitably moot. Pet. 17. But they identify no decision by this Court or any other court that casts doubt on that decision, which applied a well-settled principle governing appeals from bankruptcy courts. And in any event, this case is a particularly poor vehicle for examining when courts can properly deny an

appeal from a bankruptcy court order as equitably moot.

A. There Is No Circuit Conflict or Other Circumstance that Would Justify Review

Petitioners urge this Court to evaluate whether an appeal from a bankruptcy court order can *ever* be denied as equitably moot, but the Petition advances no persuasive reason for this Court to examine that question.

There is no dispute in the circuit courts, which agree that an appeal from a bankruptcy court order can be rendered equitably moot if the debtor's reorganization has been substantially consummated or if circumstances have so changed that any relief would create an unmanageable situation for the bankruptcy court. *See, e.g., Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008) (explaining equitable mootness as "an equitable doctrine applied to protect parties' settled expectations and the ability of a debtor to emerge from bankruptcy"); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.) (noting that the essential question is "whether it is prudent to upset the plan of reorganization at this late date"), *cert denied*, 513 U.S. 999 (1994); *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002); *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996), *cert. denied*, 519 U.S. 1057 (1997); *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *Frito-Lay Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir.

1993). Petitioners agree that "[a] majority of courts of appeals have adopted the doctrine." Pet. 18; *see also id.* 18-20 (collecting cases). They cite no circuit court that has rejected the doctrine, because there is none.

The application of well-settled principles of equitable mootness by the courts below presents no substantial question of federal law meriting review by this Court. Petitioners argue that equitable mootness has no basis in statute, but the same is true of other equitable doctrines. Indeed, as applied in bankruptcy cases, equitable mootness merely reflects "the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *In re Envirodyne Indus.*, 29 F.3d 301, 304 (7th Cir. 1994); *see also UNR Indus.*, 20 F.3d at 769. Petitioners also argue that equitable mootness violates the separation of powers, by precluding review of bankruptcy court rulings by an Article III court (Pet. 25), but Petitioners did not raise that argument before either of the courts below and have thus failed to preserve it, *see, e.g.*, *Delta Air Lines*, 450 U.S. at 362. In any event, this Court has, of course, approved similar prudential limitations on the availability of relief by Article III courts, *see, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (explaining prudential limitations on standing); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-16 (1976) (describing grounds for abstention).[1]

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[1] The amicus brief supporting the Petition suggests that parties can avoid review by an Article III court by rushing to con-

Regardless, whatever force Petitioners' objection might have in cases where there was no Article III review, it does not correspond to what happened here. Both the District Court and the Court of Appeals *did* review the Bankruptcy Court's decision—and rejected Petitioner's arguments on appeal *on the merits*, as an alternative holding to the mootness ruling. Pet. App. 20a-29a, 6a. Petitioners accordingly were *not* denied Article III review, and thus the separation-of-powers question that they urge this Court to decide is not even presented by this case.

B. This Case Is a Poor Vehicle for Deciding Whether Equitable Considerations Can Moot Appeals from Bankruptcy Courts

Even if there were a substantial question whether district courts can deny appeals from bankruptcy court orders on prudential grounds where a plan of distribution has been substantially consummated or relief would create an unmanageable situation for the bankruptcy court, this case presents a poor vehicle for considering it, for two reasons.

First, given that the courts below also approved the Bankruptcy Court's decision on the merits—affirming

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summate a plan before a stay can be obtained. *See* Brief of Professor George W. Kuney as Amicus Curiae in Support of Petition for a Writ of Certiorari 8-9. Nothing of the kind happened here. To the contrary, Petitioners sought a stay from the Bankruptcy Court and the District Court before the plan was consummated, but failed to show either the required likelihood of success (Pet. App. 433a) or irreparable harm (*id.* 435a-436a). Indeed, on the latter point, Petitioners elected not to argue that their claims to set aside the releases would be mooted absent a stay. *Id.* 436a.

on that alternative ground as well—a reversal on the issue of mootness would not change the outcome of the case. Rather, for Petitioners to prevail, this Court would also need to determine, on the merits, that the Bankruptcy Court erred in approving the Settlement. Yet the Petition fails to show that it would be an appropriate use of this Court's resources to review the Bankruptcy Court's rulings that the Trustee was authorized under the Indenture to enter into the Settlement on behalf of the Bondholders, *see supra* pp. 8-14, or that it had subject matter jurisdiction over the Settlement, *see infra* pp. 19-22. The Court would do better to await a case where the mootness holding was determinative.

Second, in view of the District Court's conclusion that *no* remedy could feasibly be implemented (Pet. App. 16a-18a), a decision in this case would likely provide limited guidance at best. By the time the District Court decided Petitioners' appeal, Delta had already distributed freely tradable stock and notes that had repeatedly changed hands – a distribution that, as the District Court noted, "cannot be reversed." *Id.* 16a. A decision in this case would thus shed little light on how courts should proceed where some remedy might be feasible despite substantial consummation of a plan. Review by this Court would likely be more instructive in a case where some form of relief might be practicable. *Cf. Continental*, 91 F.3d at 571 (Alito, J., dissenting) (disapproving denial of appeal on grounds of equitable mootness where "the courts could surely fashion some measure of

lesser relief that would not disturb the reorganization").[2]

III. THE FACTUAL FINDING BELOW THAT THE SETTLEMENT RELATED TO DELTA'S BANKRUPTCY DOES NOT MERIT REVIEW

The Bankruptcy Court applied well-settled legal standards to the specific circumstances of this case in determining that it had jurisdiction over the Settlement. That case-specific holding was affirmed by both the District Court and the Court of Appeals and is not an appropriate subject for this Court's discretionary review.

The subject matter jurisdiction of the bankruptcy courts extends to "all civil proceedings . . . arising in or related to cases under title 11." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). In nearly every circuit, the existence of "related to" jurisdiction is determined by the test set forth in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). As this Court noted in *Celotex*, a bankruptcy court has "related to" jurisdiction under *Pacor* if "the outcome of th[e] proceeding could conceivably have any effect on the estate being administered in bankruptcy." 514 U.S.

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[2] Petitioners argued below that the District Court would not have to unwind the Settlement but could somehow excise only its releases. But as the District Court explained, "to nullify the releases while leaving the remainder of the consummated Settlement intact would ignore the tradeoff that allowed the parties to settle in the first instance and would treat a non-severable provision of the Settlement Agreement as dispensable." Pet. App. 17a. As the District Court also noted, disallowing the releases would permit the parties to terminate the Settlement. *Id.*

at 308 n.6 (quoting *Pacor*, 743 F.2d at 994) (emphasis omitted). Petitioners have not challenged the *Pacor* standard as such. Nor did the courts below find jurisdiction under *Pacor* on the ground that the non-debtor claims had only a "conceivable effect" on the estate; rather, they held that the relevant agreements modified by the Settlement—*i.e.*, the Lease between Delta and KCAB, the Guaranty between Delta and the Trustee and the Indenture between KCAB and the Trustee—were "inextricably related" to one another. Pet. App. 53a; *see also id.* 21a (noting that the settlement of non-debtor claims had a "very clear affect" on Delta's estate). Indeed, although Delta was not a party to the Indenture, the Lease required Delta "to do and perform all acts and things contemplated in the Indenture to be done or performed by it." Pet. App. 371a. As the Court of Appeals below affirmed (*id.* 6a), the Bankruptcy Court correctly concluded that it had jurisdiction "under both the 'arising under title 11' and the 'arising in or related to cases under title 11' clauses of 28 U.S.C. § 1334(b)," *id.* 54a.

That decision presents no substantial question of federal law that merits review by this Court. Rather, it rests on case-specific determinations regarding the inextricable relationship between the Lease, the Guaranty and the Indenture and the parties' respective rights under each. Pet. App. 53a. The District Court affirmed that case-specific factual finding (*id.* 21a), as did the Second Circuit (*id.* 6a) (approving the Bankruptcy Court's "thorough and well-reasoned decision"). No useful purpose would be served by yet another review, by this Court, of this fact-intensive issue. *See, e.g., United States v. Johnston*, 268 U.S.

220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Although Petitioners assert that the scope of "related to" jurisdiction is "ambiguous" (Pet. 29), they fail to identify any ambiguity, much less one that could be resolved by this case. Nor do they acknowledge that the Bankruptcy Court held that the claims resolved by the Settlement not only "related to" Delta's bankruptcy, but also "arose under" Title 11 of the Bankruptcy Code. *See* Pet. App. 53a-54a (citing 28 U.S.C. § 1334(b)).

Petitioners assert that this case warrants this Court's exercise of its supervisory power on the ostensible grounds that the Bankruptcy Court "depart[ed] from the accepted and usual course of judicial proceedings" by "restructur[ing] the debts of non-debtors." Pet. 29. That contention grossly mischaracterizes what happened in this case, in two respects.

First, although KCAB issued the bonds that were cancelled by the Settlement, the courts below found that the *only* recourse permitted under the Indenture on that bond debt was against Delta, not against KCAB. Pet. App. 36a, 27-28a. In restructuring that bond debt, the Settlement restructured a debt of *Delta*. As the District Court explained, the Settlement "had more than a 'conceivable effect' on the bankrupt estate; it in fact had a very clear effect on Delta's obligations," and thus squarely fell within the Bankruptcy Court's jurisdiction. *Id.* 21a. Petitioners' contention that the Settlement *also* restructured a debt of KCAB flies in the face of the rulings of the courts below that, under the terms of the Indenture, KCAB had no liability for these non-recourse bonds.

Nor does the Petition advance any reason why this Court would review that case-specific ruling of contract interpretation, which presents no substantial question of federal law.

Second, the Petition fails to show that the District Court's approval of the "consensual releases" of KCAB and the Trustee in the Settlement (Pet. 440a) departed in the least from settled precedent, as explained above. *See supra* pp. 8-14. Petitioners' contention that the Bankruptcy Court "released" nondebtors simply ignores the contrary holdings below that the Trustee was authorized by the Indenture to enter into the Settlement on behalf of the Bondholders. Petitioners assert in passing that this construction of the Indenture was inconsistent with "bond indenture law" (Pet. 30-31), but the courts below each rejected that argument and Petitioners do not ask this Court to review that case-specific question of contract interpretation, which in any event presents no substantial question of federal law for this Court to decide.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 2009

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