No. 08-

IN THE

Supreme Court of the United States

AD HOC COMMITTEE OF KENTON COUNTY BONDHOLDERS,
Petitioners,

v.

DELTA AIR LINES, INC.,
KENTON COUNTY AIRPORT BOARD, UMB
BANK, N.A., AS TRUSTEE, POST EFFECTIVE DATE COMMITTEE
AS SUCCESSOR TO THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF DELTA AIR LINES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents three questions important to the administration of cases under the Bankruptcy Code, the first of which this Court recently granted review to decide but, for procedural reasons, did not do so. *See Travelers Indem. Co. v. Bailey*, --- U.S. ----, 129 S.Ct. 2195 (2009). In the bankruptcy of Delta Air Lines, Inc., the bankruptcy court modified the obligations owed by one of Delta's lessors, a non-debtor, to its non-debtor bondholders, and enjoined those bondholders from filing any claims against that lessor, even though the claims would have no direct impact on Delta's estate. The lower appellate courts not only implicitly accepted this result, but refused on "equitable" grounds to review that decision. The questions presented, therefore, are:

(1) Whether the Bankruptcy Code grants bankruptcy courts jurisdiction to permanently release non-debtors from claims of other non-debtors that have no impact on the *res* of a debtor's estate?

(2) Whether courts may use the judge-made doctrine of "equitable mootness" to deny Article III review of a bankruptcy decision even though a case or controversy remains, solely because any remedy fashioned on appeal would be, in the court's judgment, inequitable?

(3) Whether the Bankruptcy Code grants bankruptcy courts jurisdiction to restructure and modify bond debt owed by a non-debtor to other non-debtors, which has no impact on the *res* of a chapter 11 debtor's estate?

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

The Ad Hoc Committee of Kenton County Bondholders (the "Kenton County Bondholders Committee") is a private non-governmental party and hereby certifies that there are no corporate parents, affiliates and/or subsidiaries of said committee. The members of the Kenton County Bondholders Committee are as follows:

(i) Perella Weinberg Partners Xerion Master Fund Ltd. (f/k/a Xerion Partners II Master Fund Limited) is a Bermuda corporation, which has no corporate parent and whose affiliates and/or subsidiaries are Perella Weinberg Partners Xerion Offshore Fund Ltd. (f/k/a Xerion Partners II International Limited), Perella Weinberg Partners Xerion Fund LP (f/k/a Xerion Partners II L.P.), and Perella Weinberg Partners Xerion Capital LP (f/k/a Xerion Capital Partners LLC); no publicly held corporation holds 10% or more of its equity interests;

(ii) Bergen Capital, a division of Scott and Stringfellow, is a Virginia corporation, whose corporate parent is BB&T Corporation and which has no affiliates and/or subsidiaries; no publicly held corporation holds 10% or more of its equity interests;

(iii) United Equities Company LLC is a New York limited liability company, whose managing member is Moses Marx and which has no corporate parent, affiliates and/or

subsidiaries; no publicly held corporation holds 10% or more of its equity interests;

(iv) RSA, LLC is an Ohio limited liability company, whose managing member is Murray Sinclair, Jr. and which has no corporate parent, affiliates and/or subsidiaries; no publicly held corporation holds 10% or more of its equity interests;

(v) RBS Capital Ltd. is a Florida limited partnership, whose sole general partner is RBS Investment Management Inc. and sole limited partner is Roger Smith; no publicly held corporation holds 10% or more of its equity interests;

(vi) Carty & Co. is a Tennessee corporation, whose corporate parent is Carty Financial, Inc. and which has no affiliates and/or subsidiaries; no publicly held corporation holds 10% or more of its equity interests; and

(vii) Duncan-Williams, Inc. is a Tennessee corporation, whose corporate parent is Williams holding company and which has no affiliates and/or subsidiaries; no publicly held corporation holds 10% or more of its equity interests.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, members of the Kenton County Bondholders Committee, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) is reported at 309 F. App'x 455. The opinion of the district

court affirming the bankruptcy court's order (App. 7a-29a) is reported at 374 B.R. 516. The bankruptcy court's order (App. 32a-58a) is reported at 370 B.R. 537.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2009. (App. 1a.) A petition for rehearing *en banc* was denied on April 23, 2009. (App. 431a-432a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The complete text of U.S. CONST. art. I, § 8, cl. 4, U.S. CONST. art. III, § 2, cl. 1, 11 U.S.C. §§ 105, 524, and 28 U.S.C. §§ 157, 158, 1334 is set forth in the Appendix. (App. 453a-498a.)

STATEMENT OF THE CASE

The Petitioners, all of them non-debtors, are a group of holders (or investment advisors to holders) of about $50 million of standard-form revenue collection municipal bonds (the "Bonds") issued by the Kenton County Airport Board ("KCAB"), also a non-debtor. KCAB issued the Bonds in 1992 to finance the construction of Terminal 3 (the "Terminal") at the Cincinnati/Northern Kentucky Airport. (App. 4a.) The Bonds were issued under an indenture governed by Kentucky law (the "Indenture") with KCAB as issuer and UMB Bank, N.A. (the successor of Star Bank, N.A.) as trustee (the "Trustee"). (App. 32a-33a.) The Petitioners own more than 10% of the total amount of the Bonds issued.

The debtor, Delta Air Lines, Inc. ("Delta," and with its affiliated debtors under Case No. 05-17923 (ASH) (Bankr.

S.D.N.Y.), the "Debtors"), and KCAB entered into several agreements providing that Delta would lease the Terminal from KCAB (the "Lease"), maintain the Terminal, and guarantee payments due under the Bonds (the "Guaranty"). (App. 8a-9a; 320a-421a; 422a-423a.) Under the Lease, KCAB assigned all payments received from Delta to the Trustee, who would then pay the principal and interest owing under the Bonds. (App. 8a; 33a.) Delta was not party to the Indenture, and although its payment obligations under the Bonds were non-recourse, KCAB remained obligated under the Bonds (the "Bondholders"). (App. 8a; 135a; 195a-197a.) Notably, if Delta failed to occupy any part of the Terminal, the Lease required KCAB to use its best efforts to re-let the unused portion (App. 394a-398a), and the Indenture provides that the proceeds of any such re-letting would be available to pay the Bondholders (App. 98a-99a). Thus, if Delta stopped paying rent for the Terminal for any reason, KCAB was obligated to find new tenants for the Terminal, and the rental payments from those new tenants would be used to pay the Bondholders until they were paid in full.

In September 2005, the Debtors filed petitions under Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. (App. 4a-9a.) In April 2006, the Debtors sought to reject the Lease under section 365 of the Bankruptcy Code. (App. 9a.) The Trustee objected, joined by KCAB, but at the direction of a majority of Bondholders (not including the Petitioners) ultimately settled with Delta and KCAB, subject to bankruptcy court approval (the "Settlement"). (App. 33a-34a.) The Settlement canceled the Lease and Indenture and provided that (1) Delta and KCAB would enter into a new lease of the Terminal; and (2) purportedly in full satisfaction of the Bonds, the Bondholders would receive a note issued *by Delta* and an unsecured claim

against Delta (entitling Bondholders to vote on the Plan) for less than the balance owed under the Bonds. (App. 10a; 33a.) The Settlement also released and fully immunized KCAB and the Trustee from any liability to Bondholders for their breach of the Indenture (including liability for granting themselves releases) or for authorizing a blanket injunction enjoining all Bondholder claims against them. (App. 10a-11a.) Further, if any part of the Settlement was vacated or reversed on appeal, the parties had the option to void the Settlement. (App. 518a-519a.)

The Bondholders could not opt out of the Settlement. (App. 65a.) Moreover, the Debtors' disclosure statement (the "Disclosure Statement"), which was approved on February 7, 2007 and then distributed to Delta's stakeholders in connection with soliciting votes on Delta's proposed plan of reorganization (the "Plan"), did not describe the Settlement's terms. (App. 11a.)

The Petitioners objected to the Settlement. Nevertheless, on April 24 and 25, 2007, respectively, the bankruptcy court entered an order and decision (collectively, the "Settlement Order") authorizing the Settlement. (App. 11a.) On those same days, the bankruptcy court held a hearing and issued its order confirming the Plan. (App. 12a.) Among other things, the Settlement Order enjoined the Bondholders (including the Petitioners) from filing any claims they had not only against Delta (the debtor), but against the Trustee and KCAB as well. (App. 63a.)

The Petitioners appealed the Settlement Order to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 158, and sought a stay from the bankruptcy court pending appeal. (App. 12a.) The bankruptcy court acknowledged that several issues—including whether the Petitioners held certain claims against

the settling parties—remained unadjudicated, but found that the Settlement resolved them and denied the stay. (App. 444a-445a.) On April 27, 2007, Petitioners sought a stay in the district court, which was denied at a hearing held on May 2. (App. 433a-443a.) Although the Petitioners began preparing an appeal of that denial to the Second Circuit, the Respondents stipulated that the failure to request a stay from the court of appeals was not grounds for mootness. (App. 19a.) On May 3, 2007, Delta began making distributions. (App. 12a.)

On August 27 and 28, 2007, the district court entered an opinion and order finding that the Petitioners' appeal was equitably moot and affirming the Settlement Order. (App. 29a.) Pursuant to 28 U.S.C. § 1291, the Petitioners appealed the decision. After oral argument, on February 9, 2009, the Court of Appeals for the Second Circuit affirmed. (App. 1a-6a.) On April 23, the court denied rehearing *en banc*. (App. 431a-432a.)

In approving the Settlement, the lower courts rejected the Petitioners' argument that the bankruptcy court lacked jurisdiction to release KCAB and the Trustee from claims of the Petitioners that were not derivative of, and could not affect, the Debtors' bankruptcy estate. The bankruptcy court entered the releases because they were "extremely narrow in scope" and because all parties involved, including Delta and the Bondholders, "received substantial consideration." (App. 57a.) The district court agreed, finding further that the releases were proper because they "comprised valuable consideration for KCAB and the Bond Trustee in return for their agreement to give up indemnification rights against Delta under section 6.08 of the Lease." (App. 22a.) Significantly, the lower courts approved the releases even though they extended to claims that have no impact on

Delta's bankruptcy estate (even under the Lease's indemnity provision), including claims against the Trustee and KCAB based on their own wrongdoing—violations of various obligations to the Bondholders under the Indenture and the Lease. (App. 63a.)

The district court dismissed the Petitioners' appeal as equitably moot because the Plan had been "substantially consummated" and because a "comprehensive change in circumstances" had occurred. (App. 16a.) Among other reasons, the court found that ordering relief for the Petitioners would be inequitable because "a vacatur of the Settlement Order, even if it were possible, would . . . knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court." (App. 19a.) The Second Circuit affirmed, holding that the district court "did not err—much less abuse its discretion." (App. 5a.) Neither court, however, found that the appeal was constitutionally moot because no case or controversy existed.

The lower courts also found that the bankruptcy court had authority to modify and discharge the debt obligations of a non-debtor, KCAB, under the Indenture even though no debtor was a party to the Indenture. The bankruptcy court found that it had jurisdiction to modify "the contractual relationship between KCAB and the Bond Trustee under the Indenture" because "[b]oth KCAB and the Bond Trustee are direct creditors of Delta [and] . . . [a]ll three of these agreements—the Lease, the Indenture and the Guaranty—are inextricably related to each other." (App. 53a.) In rejecting the Petitioners' argument that Section 9.06 of the Indenture prohibited the Trustee from compromising their individual rights to principal and interest (App. 46a-47a), the bankruptcy court found that it had jurisdiction to restructure

KCAB's Bond obligations because "the sole source of payment of the Bonds" was the Lease, and because the Bankruptcy Code "overrides private agreements" (App. 47a). Moreover, although it acknowledged Indenture Section 9.06 (requiring the consent of *all* bondholders to change the principal and interest under the bonds), the bankruptcy court held that the Trustee had the power to enter into the Settlement because (i) it had the right under the Indenture to litigate and settle on behalf of all Bondholders (App. 57a-58a); and (ii) a majority of Bondholders voted in favor of the Plan, under which they received distributions from the Settlement (App. 58a).

Similarly, the district court found it had "related to" jurisdiction under the Bankruptcy Code allowing it to restructure the debt of non-debtors under the Indenture and to bind non-debtors to that restructured debt because the settled litigation had "more than a 'conceivable effect' on the bankruptcy estate." (App. 21a.) Further, the district court found that, because the Indenture was "inextricably related" to the Lease and Guaranty, "the court could not resolve the creditor claims of KCAB and the Bondholders against Delta without a corresponding resolution of the relationship between KCAB and the Bondholders." (App. 21a.) Thus, "Delta's bankruptcy . . . also compromised the rights to payment under the Bonds and therefore overrides" Indenture Section 9.06. (App. 26a.) The district court agreed that the Trustee's right to litigate and settle and the Plan vote overrode individual bondholder rights under Section 9.06. (App. 26a.) Although finding that KCAB did not have re-let obligations to the Bondholders, the district court found that the Indenture "does appear to provide that money produced through re-letting the facilities should be applied toward the payment of the Bonds." (App. 28a.)

Because it found the appeal equitably moot, the Second Circuit did not reach the merits of the Petitioners' appeal, except to say that it would have affirmed the bankruptcy court's restructuring of KCAB's Indenture obligations for "substantially the reasons stated in the Bankruptcy Court's thorough and well-reasoned decision." (App. 6a.)

REASONS FOR GRANTING THE PETITION

As explained in the sections that follow, this Court should grant review: (I) to reconcile conflicting circuit decisions and establish the limit of a bankruptcy court's subject matter jurisdiction to alter private rights of non-debtors that are not derivative of, or otherwise directly related to, the debtor's rights or the *res* of the debtor's bankruptcy estate; (II) to reaffirm the constitutional necessity for Article III courts to review bankruptcy court decisions absent constitutional mootness; and (III) to decide whether the Bankruptcy Code grants bankruptcy courts the power to restructure the debt of non-debtors. If left unreviewed, the decisions below will create substantial uncertainty over the administration of bankruptcy cases in the United States at a time when, given the current global financial crisis, certainty under this Nation's insolvency regime is most vital.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE BANKRUPTCY CODE AUTHORIZES BANKRUPTCY COURTS TO RELEASE NON-DEBTORS FROM LIABILITY

Chapter 11 of the United States Bankruptcy Code is designed to help debtors reorganize their debt. To that end, if debtors comply with the plan confirmation requirements prescribed in the Bankruptcy Code, bankruptcy courts routinely release debtors of further liability to their creditors. The question presented here, and on which the courts of

appeal disagree, is whether a bankruptcy court may also permanently release the liability of *non-debtors* to other *non-debtors*—that is, parties who have not sought relief under the Bankruptcy Code.

This Court has never decided that issue. Last Term, this Court was confronted with the issue, but ultimately did not decide it. *See Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008), *rev'd on other grounds*, *Travelers Indem. Co. v. Bailey*, --- U.S. ----, 129 S.Ct. 2195 (2009). This case presents a prime opportunity to resolve the inter-circuit conflict and remove the uncertainty surrounding bankruptcy courts' authority to grant such relief.

Whether the Bankruptcy Code authorizes a bankruptcy court to release non-debtors will become increasingly important as bankruptcy filings increase, and will be especially acute when large corporations seek chapter 11 relief and potential claims by non-debtors against other non-debtors present an obstacle to a successful reorganization.

As this Court has recognized, "[b]ankruptcy jurisdiction, at its core, is *in rem*." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006). Congress has provided bankruptcy courts jurisdiction to restructure bankruptcy petitioners' debts, giving them original jurisdiction not only over the petitioners' property and matters arising under the Bankruptcy Code or in a bankruptcy case, but also over matters "related to cases under title 11." 28 U.S.C. § 1334(b); *see also* 28 U.S.C. § 157(a)-(c) (providing that bankruptcy courts may decide "core" proceedings under the Bankruptcy Code and may hear and determine "non-core" proceedings "otherwise related to" a case under the Bankruptcy Code). But this jurisdiction "is grounded in, and limited by, statute[,]" and therefore "'related to' jurisdiction

cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

Within this statutory framework, the Second Circuit found that the bankruptcy court did *not* have subject matter jurisdiction to release a non-debtor by enjoining claims that do not "directly affect the *res* of the bankruptcy estate." *Travelers*, 517 F.3d at 66, *rev'd on other grounds*, 129 S.Ct. 2195; *see also Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995) (same).

This Court granted certiorari in *Travelers*. Ultimately, however, it did not decide the issue because it was not raised on direct appeal of the order approving the non-debtor release, but only twenty years later by collateral attack. *See Travelers*, 129 S.Ct. at 2206 n.7. Noting that its holding was "narrow," this Court stated that "[w]e do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." *Id.* at 2207. In the same discussion, the Court observed that, by enacting section 524(g), "Congress explicitly authorized bankruptcy courts, in some circumstances," to impose such injunctions, and that, "[o]n direct review today," such an injunction "would have to be measured against the requirements of § 524 (to begin with, at least)." *Id.* at 2207 (citing 11 U.S.C. § 524(g)(4)(A)(ii)). The Court also acknowledged that, if there had been a direct appeal of the previous order, "the Court of Appeals would indeed have been duty bound to consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction." *Id.* at 2203.

Such an appeal is now before the Court. This case presents the same issue, on direct appeal, that was raised in *Travelers*—whether the Bankruptcy Code grants a bankruptcy court jurisdiction to release non-debtors from claims that would not affect the *res* of a chapter 11 debtor's estate.

A. THE CIRCUIT COURTS, CONSTRUING THE SAME PROVISIONS OF THE BANKRUPTCY CODE, ARE DIVIDED OVER WHETHER THEY AUTHORIZE A BANKRUPTCY COURT TO RELEASE NON-DEBTORS

Section 524(e) of the Bankruptcy Code provides 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." Some circuits have interpreted that section as prohibiting a bankruptcy court from releasing a non-debtor. Those circuits hold that section 105(a) of the Bankruptcy Code, which provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code,]" does *not* grant authority to release non-debtors. Other circuits, however, have held that under certain circumstances section 105(a) *does* authorize bankruptcy courts to release non-debtors from liability to other non-debtors, and that section 524(e) does not limit that authority.

This conflict among the circuits has prompted commentators to note that "[t]he propriety of third-party releases is thus an issue that cries out for Supreme Court guidance[.]" *See* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 19 (2006).

1. The Ninth And Tenth Circuits Hold That, Except Where The Code Expressly Authorizes Non-Debtor Releases, Section 524(e) Prohibits Bankruptcy Courts From Discharging The Liabilities Of Non-Debtors

Two circuits have held that bankruptcy courts lack jurisdiction to release non-debtors from liability. The Ninth Circuit has held, "*without exception*, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *Resorts Int'l v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995) (emphasis added), *cert. denied*, 517 U.S. 1243 (1996).

Indeed, the Ninth Circuit has rejected the argument that such authority can be found in section 105, concluding that "the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief sought by [the debtor]" where such relief would discharge the liability of a non-debtor. *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989). The court's conclusion was "buttresse[d]" by the addition of Bankruptcy Code section 524(g) under the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, which specifically authorizes the release of non-debtors from liability in *asbestos* cases. *Lowenschuss*, 67 F.3d at 1402 n.6. "That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases." *Id.*

The Tenth Circuit, also relying on section 524(e), has held that a bankruptcy court cannot issue "a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor." *Landsing Diversified Props.-II*

v. First Nat'l Bank & Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 601-02 (10th Cir. 1990). Like the Ninth Circuit, the Tenth Circuit has held that "a bankruptcy court's supplementary equitable powers" under section 105(a) cannot provide an independent basis for releasing non-debtors from claims of other non-debtors, because it would be "inconsistent" with section 524(e). *Id.* at 601 ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." (quoting *Ahlers*, 485 U.S. at 206)).

2. Other Circuits Have Held That The Bankruptcy Code Authorizes Non-Debtor Releases Under Certain Circumstances

In contrast to the Ninth and Tenth Circuits, other circuits have held that a bankruptcy court *does* have the authority to release non-debtors from liability to other non-debtors, at least under certain circumstances.

The Seventh Circuit recently decided that section 524(e) did not bar the bankruptcy court from releasing non-debtors. *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008). The court held that the bankruptcy court had authority to release non-debtors under section 105(a), as well as section 1123(b)(6), which permits the court to include in a chapter 11 plan "'any other appropriate provision not inconsistent'" with the Bankruptcy Code. *Id.* at 657 (quoting 11 U.S.C. § 1123(b)(6)). The court "[held] that this 'residual authority' permits the bankruptcy court to release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the bankruptcy code." *Id.*

Also relying on sections 105(a) and 1123(b)(6), the Sixth Circuit has held that releases of non-debtors are permissible where certain factors are present. *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir.), *cert. denied*, 537 U.S. 816 (2002). That court has determined that section 524(e) explains the effect of a debtor's discharge under the Bankruptcy Code and "[i]t does not prohibit the release of a non-debtor." *Id.* at 657.

Similarly, the Second Circuit has decided that a bankruptcy court may release non-debtors upon "finding that truly unusual circumstances render the release terms important to success of the plan . . ." or "if the affected creditors consent." *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142, 143 (2d Cir. 2005).

Both the Eleventh and the Fourth Circuits have permitted bankruptcy courts to release non-debtors. *See Munford v. Munford, Inc. (In re Munford, Inc.)*, 97 F.3d 449, 455 (11th Cir. 1996) (finding that releases enjoining indemnification and contribution claims against non-debtors were permitted under section 105 and Federal Rule of Civil Procedure 16 where they were integral to the debtor's settlement with the non-debtor and were fair and equitable); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir.) (allowing permanent non-debtor releases necessary for a debtor's reorganization where the non-debtors provided consideration to mass tort victims), *cert. denied*, 493 U.S. 959 (1989).

Finally, the Third and Fifth Circuits have stated in *dicta* that a bankruptcy court may have authority to release non-debtors under certain circumstances. *See Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000) (declining to "establish [its] own rule regarding the

conditions under which non-debtor releases and permanent injunctions are appropriate or permissible"); *Zale*, 62 F.3d at 760 (although finding that a bankruptcy court lacked jurisdiction to issue certain permanent non-debtor releases enjoining claims that were not derivative of the debtor's estate, suggesting that such releases—coupled with a channeling injunction—may not violate section 524(e)).

B. THE COURT SHOULD GRANT REVIEW BECAUSE THE ISSUE IS CRUCIAL TO THE REORGANIZATION OF BUSINESSES UNDER THE BANKRUPTCY CODE

Resolving the issue now squarely before the Court is essential so that businesses reorganizing under chapter 11—as well as the many non-debtors whose rights may be significantly altered by those reorganizations—understand their respective rights as to non-debtor releases.

Fundamental to the chapter 11 restructuring process is consensus among the debtor's stakeholders in formulating a reorganization plan that addresses their divergent interests. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 681–82 (1993). In bankruptcy, expeditious settlement is favored over prolonged litigation. *See, e.g.*, *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939) (explaining that "[t]here frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation"). Consequently, settlements will continue to play an important role in resolving chapter 11 cases and successfully reorganizing debtors.

An integral component of all settlements is the mutual release of claims and potential claims. *See* Jill E. Fisch,

Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 CORNELL L. REV. 589, 610 n.116 (1991) ("The usual settlement agreement provides for a resolution of all pending claims between the parties arising from the subject transaction and includes a release of such claims."). In a typical two-party, non-bankruptcy dispute, no defendant would settle a claim without obtaining a release to prevent the subsequent assertion of the same claim.

In the bankruptcy context, however, where the interests of many differently-situated litigants are implicated, the situation is more complex. A debtor, especially in large cases, is often faced with claims by a multitude of creditors. Making peace with them will likely involve one or more settlements approved by the bankruptcy court. Inevitably, non-debtor constituencies will bargain for releases from claims not only from the debtor, but also from other non-debtors.

Accordingly, the extent to which a bankruptcy court may approve releases of non-debtor liability without the consent of affected non-debtors is a question of central importance to all complex bankruptcy cases. *See* Thomas E. Patterson & Brendt C. Butler, *Do Bankruptcy Courts Have the Power to Issue Releases and Permanent Injunctions with Respect to Non-Debtor Parties in Chapter 11? Depends on Which Court You Ask*, SM014 ALI-ABA 415, 417 (2007) ("Over the last two decades . . . chapter 11 reorganization plans have increasingly included provisions releasing and/or permanently enjoining claims of creditors or other parties in interest against non-debtor parties such as the debtor's officers, directors, or non-debtor affiliates.").

Indeed, given the global financial crisis and the unprecedented number of significant chapter 11 cases on the

horizon, resolution of this question is especially important. *See* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 965 (1997) ("[T]he bankruptcy court is quickly becoming the forum for resolution of many of the largest and most complex mass litigations."). Over the last year, a number of high-profile, iconic American institutions already have filed chapter 11 petitions. *See, e.g.*, *In re Gen. Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y. filed Jun. 1, 2009); *In re Chrysler LLC*, No. 09-50002 (Bankr. S.D.N.Y. filed Apr. 30, 2009); *In re Wash. Mutual, Inc.*, No. 08-12229 (Bankr. D. Del. filed Sept. 26, 2008); *In re Lehman Bros. Holdings, Inc.*, No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER, APPLYING THE JUDGE-MADE DOCTRINE OF EQUITABLE MOOTNESS, ARTICLE III JUDGES MAY DECLINE TO REVIEW BANKRUPTCY APPEALS THAT ARE NOT CONSTITUTIONALLY MOOT

The Court should also grant review to determine the existence and scope of the doctrine of "equitable mootness," which nearly every circuit has adopted. The doctrine serves to deprive parties of their right to Article III review even where the appealed bankruptcy court orders are not constitutionally moot. No basis for the doctrine exists in either the Constitution or the Bankruptcy Code.

A. EQUITABLE MOOTNESS EXPANDS THE DOCTRINE OF CONSTITUTIONAL MOOTNESS TO PERMIT ARTICLE III COURTS TO DECLINE TO HEAR ACTIVE CASES AND CONTROVERSIES

Federal courts have long applied the mootness doctrine to decline to review cases where it is *impossible* to provide

effective relief. *See Mills v. Green*, 159 U.S. 651, 653 (1895) (finding that federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them]"). The mootness doctrine is derived from the constitutional directive that federal court review is limited to actual cases or controversies. *See* Art. III, § 2, cl. 1; *see also North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (acknowledging the derivation of the doctrine in the case-or-controversy clause). Petitioners do not challenge that doctrine.

In the bankruptcy context, however, courts have expanded mootness beyond its constitutional roots by creating a new doctrine of "equitable mootness." Under this expanded mootness, an Article III court may decline to hear an appeal of a bankruptcy court order even though it is *not* constitutionally moot (because *some* effective relief could be fashioned), on the ground that fashioning any relief on appeal would be inequitable. *See, e.g.*, *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness').") (emphasis in original), *cert. denied*, 513 U.S. 999 (1994); *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) ("[A]n appeal should also be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.").

Beginning with the Ninth Circuit, a majority of courts of appeals have adopted the doctrine and have used it to decline appellate review of bankruptcy orders. *See Trone v. Roberts*

Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797–98 (9th Cir. 1981); *see also, e.g.*, *In re Cont'l Airlines*, 91 F.3d 553, 558–59 (3d Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 1057 (1997); *Tompkins v. Frey (In re Bel Air Assocs.)*, 706 F.2d 301, 305 n.10 (10th Cir. 1983); *Metro Prop. Mgmt. Co. v. Info. Dialogues, Inc. (In re Info. Dialogues, Inc.)*, 662 F.2d 475, 476–77 (8th Cir. 1981) (*per curiam*).

The circuits have adopted several different, multi-factor tests for determining whether an appeal is barred by equitable mootness. Each test, however, presumes that a case or controversy still exists because some remedy can be fashioned, but allows the courts discretion to decline Article III review based on other factors.

In the Second Circuit, for example, an appeal is presumed to be moot once a confirmed chapter 11 plan has been substantially consummated. *See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996). That presumption may be rebutted only if several conditions are met: the court can order some effective relief; the relief will not affect the debtor's reemergence as a revitalized entity; the relief will not unravel intricate transactions and create an unmanageable situation for the bankruptcy court; the potentially adversely affected parties have notice and opportunity to participate; *and* the appellant pursued with due diligence available remedies to obtain a stay. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993) ("*Chateaugay II*"). The First Circuit has not articulated its own factors, but has tracked the *Chateaugay II* factors in dismissing an appeal as equitably moot. *Rochman v. Ne. Utils. Serv. Co. (In re Pub. Serv. Co.)*, 963 F.2d 469, 471, 476 (1st Cir. 1992), *cert. denied*, 506 U.S. 908 (1992). The Seventh Circuit, although rejecting the term "equitable

mootness," has dismissed an appeal based on reasoning similar to four of the *Chateaugay II* factors. *UNR*, 20 F.3d at 769 (finding it "[im]prudent to upset the plan of reorganization at this late date").

Other circuits have adopted substantially similar, multi-factor tests to determine whether to apply equitable mootness. *See, e.g., Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947-48 (6th Cir. 2008) (adopting a three-prong test); *MAC Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (applying a four-prong test); *In re GWI*, 230 F.3d 788, 800 (5th Cir. 2000) (applying a similar three-prong test); *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992) (considering a similar set of facts).

B. The Doctrine Of Equitable Mootness Conflicts With This Court's Jurisprudence And With The Constitutional Requirement That Article III Courts Decide Cases or Controversies

This Court has never recognized the judge-made doctrine of equitable mootness. To the contrary, the Court has held that an appeal is moot when "an event occurs while a case is pending on appeal that makes it *impossible* for the court to grant any effectual relief *whatever* to a prevailing party[.]" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotations omitted) (emphasis added). Even if reversal of an order cannot "return the parties to the *status quo ante*[,]" an appeal will not be considered constitutionally moot so long as "a court can fashion *some* form of meaningful relief in circumstances such as these." *Id.* at 12-13.

In the bankruptcy context, however, Article III courts have employed the doctrine of equitable mootness to decline to review bankruptcy orders even though some form of meaningful relief *can* be fashioned. *See Cont'l Airlines*, 91 F.3d at 567 (Alito, J., dissenting) ("The majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of 'equitable mootness,' which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief."). Thus, the doctrine violates this Court's directive in *Church of Scientology* that an appeal to an Article III court is not moot where a "possible remedy" is available. 506 U.S. at 13.

Even if the doctrine had some constitutional foundation, no statutory basis exists on which to ground the courts' expansion of the mootness doctrine. Jurisdictional statutes provide that the district courts and the circuit courts of appeal "shall have jurisdiction" over final orders entered by bankruptcy courts, *see* 28 U.S.C. § 158(a) & (d); and those courts have a "virtually unflagging obligation" to exercise their statutory jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Neither 28 U.S.C. § 158 nor the Bankruptcy Code provides lower courts any discretion over which appeals to consider. Conversely, with respect to a narrow class of bankruptcy orders, Congress has expressly limited the relief available on appeal. *See, e.g.*, 11 U.S.C. § 363(m) (limiting the relief available on appeal of an order approving an unstayed sale of a debtor's property to a good faith purchaser); 11 U.S.C. § 364(e) (limiting the relief available on appeal of an order approving postpetition financing provided in good faith).

But no provision in the Bankruptcy Code authorizes Article III courts to decline to review live cases or controversies based on equitable mootness. Had Congress intended for the doctrine of equitable mootness to preclude the appellate review of other types of bankruptcy orders, it would have said so. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (under the maxim of *expressio unius est exclusio alterius*, Congress's express inclusion of certain exceptions indicates an intent to preclude the recognition of others). Nonetheless, almost every circuit has adopted the doctrine. Indeed, some courts have even found that the bankruptcy court committed reversible error, but then have refused to reverse because of equitable mootness. For example, in *Metromedia*, the court concluded that the findings below "were insufficient" to support certain non-debtor releases and that such an error "would ordinarily be remedied by remand to the bankruptcy court." *Metromedia*, 416 F.3d at 143. But it then refused to vacate the order because it found the appeal equitably moot. *Id.* at 145.

Perhaps most disturbing, courts will dismiss appeals as equitably moot even where the appellant has sought expedited appeal and a stay pending appeal. *See, e.g.*, *UNR*, 20 F.3d at 769-70. Although courts initially were reluctant to apply the doctrine if an appellant had sought a stay, they now apply the doctrine even where the appellant sought a stay but was denied one. *Compare Roberts Farms*, 652 F.2d at 798 (finding that failure to seek a stay "creates a situation rendering it inequitable to reverse the orders appealed from"), *with UNR*, 20 F.3d at 770 (observing that "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization[,]" which in turn leads to application of equitable mootness). Thus, under current authority in most circuits, equitable mootness will bar

review by an Article III court unless the appellant *obtains* a stay pending appeal. But requiring an appellant to obtain a stay of a substantial bankruptcy order is extremely burdensome: the appellant must demonstrate that it will be irreparably harmed absent the stay and that this relief will not substantially harm other parties. *See, e.g., Country Squire Assocs. of Carle Place, L.P. v. Rochester Comm. Sav. Bank (In re Country Squire Assocs. of Carle Place, L.P.)*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996) (citing *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1992)).[1]

Indeed, because stays are granted only in narrow circumstances, appellants in such cases rarely preserve their appeal from equitable mootness. *See* Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings,* 44 S.C. L. REV. 621, 650 n.76 (1993) (observing "that stays pending appeal are seldom granted, that appeals typically take a long time, that plan proponents frequently accelerate performance pending appeals to enhance the likelihood that the appeal will be rendered moot, and that the numerous rulings denying review of order approving sales are typically followed in appeals from confirmation orders") (citing Richard F. Broude, REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE § 14.01[1] (1992)).

Moreover, even in the rare circumstances where an appellant obtains a stay, the movant may be required to post a substantial bond. *See* FED. R. BANKR. P. 8005 ("The district court or bankruptcy appellate panel may condition [a stay pending appeal] . . . on the filing of a bond or other

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[1] Often, the only showing of irreparable harm that an appellant can make is that, absent such relief, it will be equitably mooted. But, if no stay is obtained, the appellee will then argue that the appellant already has conceded that its appeal is moot.

appropriate security with the bankruptcy court."); *In re Farrell Lines, Inc.*, 761 F.2d 796, 797 (D.C. Cir. 1985) (*per curiam*). In some cases, the required bond must be large enough to protect all of the stakeholders in a multi-billion-dollar chapter 11 reorganization—a bond larger than all of the bond capacity likely available in the country. *See, e.g.*, *ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 369 (S.D.N.Y. 2007) (although granting a stay of consummation of a chapter 11 plan pending appeal, requiring appellants to post a $1.3 billion bond within 72 hours).

Equitable mootness, therefore, becomes a potent tool to insulate bankruptcy orders from appellate review, one that stakeholders can easily manipulate. So long as parties can "substantially consummate" a chapter 11 plan before an Article III court considers an appeal, the plan will almost always remain unreviewable. Indeed, as applied by the lower courts, equitable mootness may even insulate orders that bankruptcy courts lacked jurisdiction to issue.

This case illustrates how parties to chapter 11 bankruptcy proceedings, relying on the likely application of equitable mootness, can manufacture an effectively unreviewable order. The Respondents conditioned the Settlement not only on approval by the bankruptcy court under Federal Rule of Bankruptcy Procedure 9019, but also on the confirmation and consummation of the Plan, two events likely to lead to the application of equitable mootness. (*See* App. 506a). And, in the event that the doctrine was not applied or the Petitioners obtained a stay pending appeal, the Settlement gave Respondents the right to rescind the agreement. (*See* App. 518-519a.)

The ability of parties involved in chapter 11 proceedings to manipulate the jurisdiction of Article III courts in this way,

combined with the lower courts' willingness to apply equitable mootness even where appellants have made every effort to obtain a stay pending appeal of a bankruptcy order, defies Congress's intent to provide appellate review of bankruptcy orders under 28 U.S.C. § 158. Where substantial consummation is imminent, an appellant must meet the onerous requirements for obtaining a stay simply to retain the right to appellate review. Thus, equitable mootness stacks the deck against appellants so heavily that it invites parties to seek relief not authorized under the Bankruptcy Code or other applicable law.

C. THE DOCTRINE OF EQUITABLE MOOTNESS, AS APPLIED, VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS CLAUSE

Exercising its authority under Article I, Section 8, Clause 4 "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[,]" U.S. Const. art. I, § 8, cl. 4, Congress established the bankruptcy courts to administer cases under the Bankruptcy Code. 28 U.S.C. § 151. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), however, this Court found that the delegation of bankruptcy jurisdiction exclusively to bankruptcy courts established under Article I violated the Constitution. *Id.* at 87. In response to *Marathon Pipe Line*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"), Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in titles 5, 11 and 28 of the United States Code), vesting original jurisdiction over bankruptcy proceedings with the district courts and referring such authority to the bankruptcy courts. *See* Pub. L. No. 98-353 §§ 101, 104, 98 Stat. 333 (codified as amended at 28 U.S.C. §§ 151-158, 1334 (1984)).

Under the 1984 Act, upon referral from the district courts, bankruptcy courts may decide "core" proceedings under the Bankruptcy Code, subject to appellate review by the district courts under the clearly erroneous standard. *See* 28 U.S.C. §§ 157(a), (b), 158(a); *see also Harman v. Levin*, 772 F.2d 1150, 1153 n.3 (4th Cir. 1985). Bankruptcy courts also are permitted to decide "non-core" proceedings "otherwise related to" a case under the Bankruptcy Code, and, if the parties consent, may issue final orders (subject to appellate review) upon referral from the district courts; otherwise, a final order may only be issued by the district court upon *de novo* review of the bankruptcy court's findings and conclusions. *See* 28 U.S.C. §§ 157(c), 158(a); *see also Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 190 (2d Cir. 2003). In essence, the 1984 Act "correct[ed] the constitutional flaw" of the Bankruptcy Code by ensuring that bankruptcy cases would be subject to the authority and review of an Article III court. 130 CONG. REC. S8891 (June 29, 1984) (remarks of Sen. Hatch), *reprinted in* 1984 U.S.C.C.A.N. at 590.

The doctrine of equitable mootness thwarts this congressional intent and, because it has been applied to preclude Article III review of an Article I court, violates the Constitution as construed in *Marathon Pipe Line*. When the doctrine of equitable mootness is applied, the only substantive review that bankruptcy stakeholders receive is from an Article I tribunal, the bankruptcy court. Neither the Bankruptcy Code nor any other federal statute sanctions such a result, and the appellate courts' refusal to exercise their jurisdiction over bankruptcy appeals is unconstitutional. *See Mills*, 159 U.S. at 653 (under the Article III mootness doctrine, dismissal of a case without consideration of the merits is required when no "effectual relief whatever" can be fashioned).

III. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE BANKRUPTCY CODE PROVIDES BANKRUPTCY COURTS JURISDICTION TO RESTRUCTURE THE DEBT OF A NON-DEBTOR

Finally, the Court should grant review to determine whether "related to" jurisdiction under 28 U.S.C. § 1334(b) extends so far that bankruptcy courts have jurisdiction to restructure debts owed by non-debtors to other non-debtors.

A. The BANKRUPTCY COURTS' "RELATED TO" JURISDICTION IS LIMITED

As explained above, a bankruptcy court may hear matters that are "otherwise related to a case under title 11." *See* 28 U.S.C. §§ 157(c), 1334(b). Although Congress has not defined the words "related to," courts have interpreted Section 157 to provide bankruptcy courts with "jurisdiction over more than simple proceedings involving the property of the debtor or the estate." *Celotex*, 514 U.S. at 308 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Nonetheless, "related to" jurisdiction is not and cannot be limitless and is necessarily "grounded in, and limited by, statute." *Id.* at 307-08; *see also Bd. of Governors, FRS v. MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991) (stating that bankruptcy courts are vested with "limited authority"); *Ahlers*, 485 U.S. at 206.

In *Celotex*, this Court considered the tension between the bankruptcy courts' "comprehensive jurisdiction" to efficiently and expeditiously resolve "all matters connected with the bankruptcy estate" and the statutory limitations of that authority. 514 U.S. at 308. The Court noted that the Third Circuit, in *Pacor*, 743 F.2d at 994, had devised a test, which nearly every circuit had adopted, for determining whether "related to" jurisdiction exists. *Celotex*, 514 U.S. at

308 n.6. Under the test, a matter is "related to" a bankruptcy case if its outcome "could conceivably have any effect on the estate being administered in bankruptcy." *Id.* (citing *Pacor*, 743 F.2d at 994). More specifically, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* (citing *Pacor*, 743 F.2d at 994). The Court concluded, "whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." *Id.*; *see also Travelers*, 129 S.Ct. at 2210 (Stevens, J., dissenting) ("A bankruptcy court has no authority, however, to adjudicate, settle, or enjoin claims against nondebtors that do not affect the debtor's estate."). Similarly, courts have held that a bankruptcy court lacks "related to" jurisdiction over a matter involving non-debtors where they would not result in direct or derivative liability to a debtor's bankruptcy estate. *See, e.g.*, *In re Combustion Eng'g*, 391 F.3d 190, 233 (3d Cir. 2005).

This Court, however, has not decided whether a matter involving non-debtors, which could have a "conceivable effect" on a debtor's estate, is nonetheless so remote that it would have "no effect" on the estate. Consequently, "[m]uch of the controversy about bankruptcy jurisdiction surrounds the reach of this 'related to' jurisdiction." *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 645 n.211 (2008).

B. This Case Provides An Opportunity To Clarify That "Related To" Jurisdiction Does Not Give Bankruptcy Courts The Power To Restructure The Debts Of Non-Debtors, Where The Debt Has No Impact On The *Res* Of A Debtor's Estate

This case presents the Court with an ideal opportunity to clarify that a bankruptcy court's "related to" jurisdiction does not authorize bankruptcy courts to restructure the debts of non-debtors that do not affect the *res* of a bankruptcy estate. Absent further guidance, the extent of "related to" jurisdiction will remain ambiguous, resulting in repeated if unintentional overextensions of jurisdiction by bankruptcy judges faced with ever more complex chapter 11 cases. *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 750 ("*Pacor* has produced a state of affairs in which jurisdictional determinations are essentially arbitrary—with countless instances of identical factual and procedural postures producing diametrically disparate results on nominal application of the same 'test.'").

Indeed, the courts below, affirming the bankruptcy court's extension of its jurisdiction far beyond the limits that any other court has determined, thus sanctioned the bankruptcy court's departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

Relying on the "conceivable effect" language of the *Pacor* test, the lower courts in this case held that "related to" jurisdiction was so broad that it gave the bankruptcy court jurisdiction to restructure bond debt issued not by the debtor (Delta), but by one of its lessors. (App. 21a-24a.) The lower courts concluded that the Indenture was "inextricably

related" to Delta's lease and guaranty obligations, even though no debtor was a party to it, it prohibited such a restructuring without every bondholder's consent, and if Delta vacated the premises, KCAB, the issuer, would remain liable to use any proceeds obtained from subsequent tenants to repay the Bonds. (App. 28a.)

In short, the bankruptcy court used Delta's bankruptcy to modify and discharge the bond repayment obligations of KCAB, a *non-debtor* that never petitioned for bankruptcy relief, and that would remain obligated to repay the Bonds from re-let proceeds if Delta stopped making lease payments for *any* reason. (App. 98a-99a; 394a-398a.) Thus, although KCAB has retained the Terminal, including the right to lease it to Delta or any other party, the bankruptcy court fully discharged KCAB from any further obligations (including re-let obligations) to the Bondholders. (App. 29a.)

The bankruptcy court reached that unprecedented result by finding that its "related to" jurisdiction extended so far as to restructure and discharge the private contract rights and obligations of KCAB, the Trustee and the Bondholders—all of them non-debtors—even though the Indenture itself mandated a contrary result. (App. 29a (ignoring the Bondholder's absolute right to seek their principal and interest under Section 9.06, modeled on Section 316 of the Trust Indenture Act (the "TIA"), 15 U.S.C. § 77ppp).) The bankruptcy court held that its jurisdiction over Delta's bankruptcy case trumped those established contract rights of non-debtors, which would have no effect on the *res* of the bankruptcy estate, because the Trustee, at the direction of a majority of Bondholders, could bind all Bondholders to a settlement. (App. 50a-52a.) However, because KCAB never filed for bankruptcy protection and no class was alleged or certified, the outcome below is contrary to bankruptcy law as

well as 70 years of bond-indenture law interpreting provisions identical to those contained in the Indenture and TIA Section 316.[2] *See, e.g.*, *Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1324-25 (10th Cir. 2008) (interpreting a nearly identical provision and finding that actions taken by a trustee at the direction of a majority cannot compromise an individual bondholder's rights under that provision absent consent); *In re Bd. of Dirs. of Multicanal S.A.*, 307 B.R. 384, 388-89 (Bankr. S.D.N.Y. 2004); *see also* 15 U.S.C. § 77bbb (setting forth necessity for regulation).

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[2] The only decisions cited by the bankruptcy court below finding that a majority of bondholders may compromise by settlement an individual bondholder's right to its principal and interest under provisions consistent with TIA Section 316, were class-action lawsuits certified under Federal Rule of Civil Procedure 23(c), and cases where the *issuer* had petitioned for bankruptcy. (App. 52a)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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