Case No.: 15-2379

In the
United States Court of Appeals
for the Sixth Circuit

CITY OF DETROIT, MICHIGAN,

Plaintiffs/Appellants,

v.

WILLIAM M. DAVIS and DETROIT ACTIVE and RETIRED EMPLOYEE ASSOCIATION as listed,

Defendants/Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Case No.: 14-cv-14899
Hon. Bernard A. Friedman
Magistrate Judge R. Steven Whalen

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. EQUITABLE MOOTNESS REMAINS INAPPLICABLE

In the City's response brief, very little time is spent examining the relevant, constitutionally sensitive reasoning of the District Court in the case of *Bennett v. Jefferson County, Alabama*, 518 B.R. 613 (N.D. Al. 2014). That court ultimately concluded that "[i]n light of the public and political interests at stake in any Chapter 9 proceedings, the court will deny the County's appeals to equity to allow allegedly unconstitutional provisions of the Confirmation Order to stand without review." *Id.* at 638. This is the question squarely before this Court, and cannot be ignored. Instead, Appellee seems to suggest that the constitutional questions should be insulated from review altogether.

It is also worth noting that even the Ninth Circuit, which sometimes applies equitable mootness in Chapter 9 proceedings, has yet to grapple with how the doctrine applies when there are serious constitutional questions that would escape review through its application. *See In re City of Stockton*, 542 B.R. 261, 274 (B.A.P. 9th Cir. 2015)("This appeal arguably presents a paradigm case for considering application of equitable mootness in a chapter 9 context because the constitutional and political concerns that troubled the court in Jefferson County are not present..."). When these concerns are present, as they are in the instant

appeal, the reasoning of the court in the Jefferson County case is of utmost importance.

II. EQUITABLE MOOTNESS DOES NOT PROHIBIT EXAMINATION OF THE MERITS

"Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2nd Cir. 2005). Indeed, "[o]ften, an appraisal of the merits is essential to the framing of an equitable remedy." *Id.* Contrary to Appellee's arguments, there is no basis for concluding that important political, constitutional and public questions need to be ignored even if this Court concludes that equitable mootness is applicable and that the plan was substantially consummated.

Significant public interests are at stake in this appeal, including the cursory and shallow analysis of the State of Michigan's constitutional Pensions Clause provision by the lower court. This elevated, constitutional status for public pensions was described as a "paramount law of the state" by the Michigan Supreme Court in the case of *Detroit Police Officers Asso. v. Detroit*, 391 Mich. 44; 214 N.W.2d 803 (1974). Even if the doctrine of equitable mootness is held to

apply in this case, the interests of third parties in finality does not justify a reviewing court's failure to address the bankruptcy court's treatment of the Pensions Clause issue, which also affects millions of third party Michigan residents that are not party to this appeal.

III. APPELLANTS' PROPOSED REMEDIES DO NOT REQUIRE UNWINDING THE PLAN

The Appellee repeatedly claims that the proposed remedies will unwind the plan, but provides no evidence that this is the case. For example, Appellee claims that scrapping conditional language related to a third party default would effectively dismantle the plan, and result in losses to others, including retirees. But the parade of horrors described in the brief is speculative and does not follow from any of Appellants' remedies, nor is it supported by any evidentiary hearing on the effects of Appellant's proposed remedies. Indeed, the idea that the pensions would face even greater cuts if the appeal is successful is simply bizarre, as the appeal is premised on the argument that the cuts were unconstitutional and unauthorized in the first place.

At most, the City is speaking of actions that it will take in the event that certain provisions of the plan are held to be unenforceable. In reality, there is nothing in the plan itself that requires the continuing constitutional violation, and

no reason for it to remain.

IV. APPELLANT TIMELY RAISED REMEDIES THAT COULD BE ORDERED TO AVOID DISMISSAL ON BOTH EQUITABLE AND CONSTITUTIONAL MOOTNESS GROUNDS

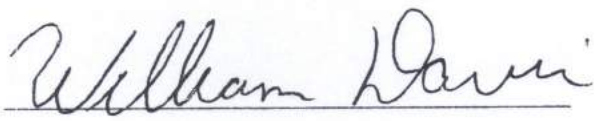
The City claims that, although Appellant's opening brief addressed the issue of equitable mootness in the opening brief and noted that the lower court could fashion a remedy by striking unconstitutional language contained in the Confirmation Order, Appellant did not specify that this remedy could encompass prohibiting future pension cuts. By its nature, however, this remedy encompasses a prohibition on future pension cuts.

Moreover, the City's argument ignores the actual procedural posture of this case: The order of dismissal entered by the District Court was the result of a motion filed by the City of Detroit, and did not address the arguments raised in the appeal of the confirmation order. In that brief, the City raised the issue of constitutional mootness, and Appellant, in his response brief, noted that the case was not constitutionally moot because there was relief that could be provided in the form of an order that prohibited future pension cuts in the event of a third party's default on contributions. There is simply no basis for finding that Appellant failed to timely raise these issues.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant's opening brief, this Court should **REVERSE** the order of the District Court and **REMAND** this case to the District Court to decide the appeal on the merits.

Respectfully submitted,



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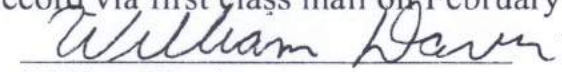
CERTIFICATE OF SERVICE

The undersigned certifies that copies of **APPELLANT'S REPLY BRIEF** were served on all counsel of record via first class mail on February 12, 2016.



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