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IN THE SUPREME COURT OF THE UNITED STATES

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RITZEN GROUP, INC., )

Petitioner, )

v. ) No. 18-938

JACKSON MASONRY, LLC, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, November 13, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

JAMES K. LEHMAN, ESQ., Columbia, South Carolina; on behalf of the Petitioner.

GRIFFIN S. DUNHAM, ESQ., Nashville, Tennessee; on behalf of the Respondent.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-938, Ritzen Group versus Jackson Masonry.

Mr. Lehman.

ORAL ARGUMENT OF JAMES K. LEHMAN

ON BEHALF OF THE PETITIONER

MR. LEHMAN: Mr. Chief Justice, and may it please the Court:

28 U.S.C. Section 158 provides that district courts shall have jurisdiction to hear appeals from final order of bankruptcy judges entered in cases and proceedings referred to bankruptcy judges under Section 157.

The order in this case merely determined where the parties would litigate Ritzen's contract claim. Under Section 158, such an order is not a final order entered in a case or proceeding.

As this Court determined just four terms ago in Bullard versus Blue Hills Bank, the fact that an order disposes of a proceeding is not, despite what -- despite what Respondent and the government contends, the test for

1 determining finality. That, in the words of the  
2 Court, slices the case too thin.

3 Rather, an immediately appealable  
4 order is determined by considering the larger  
5 process at issue and whether the order is final  
6 by examining whether it alters the status quo  
7 and fixes the rights and obligations of the  
8 parties.

9 In Bullard, the relevant process was  
10 the plan confirmation process. Here, the  
11 relevant process is the claims adjudication or  
12 the claims allowance process under Chapter 5 of  
13 the Bankruptcy Code.

14 As in Bullard, the order here did not  
15 resolve the larger process. It did not alter  
16 the status quo, nor did it fix the obligations  
17 of the parties. On the contrary, it simply  
18 continued the automatic stay so the underlying  
19 claim would proceed in bankruptcy court.

20 In arguing otherwise, Respondent and  
21 the government badly misperceived the role of  
22 the automatic stay in bankruptcy cases.

23 The automatic stay is not itself one  
24 of the substantive processes of bankruptcy. It  
25 is a utility provision that supports the

1 operation of these other processes. In fact, it  
2 was Jackson who argued that Ritzen's motion for  
3 relief triggered the claims adjudication  
4 process, claiming the stay motion constituted an  
5 informal proof of claim.

6 Such an order changes little and, in  
7 the words of this Court, does not alter the  
8 status quo or fix the rights and obligations of  
9 the parties.

10 Contrary to what the government has  
11 represented in its brief, Section 158 was not  
12 actually enacted in 1978. In fact, Section 158  
13 was enacted in 1984. The reason this, what  
14 appears to be a small mistake, I believe, is a  
15 very significant matter because it  
16 misunderstands the history of the bankruptcy  
17 jurisdictional framework.

18 JUSTICE ALITO: But, as I understand  
19 what you've just said, you're not contesting  
20 that this was a proceeding. You're just saying  
21 it wasn't a final order in the proceeding. Is  
22 that right?

23 MR. LEHMAN: That's correct. As this  
24 Court noted in Bullard, there's an endless  
25 number of contested matters, many of which are

1 not -- are -- are of a less significant nature.

2 The question is not on what is a  
3 proceeding but what is on an immediately  
4 appealable proceeding. And in Bullard, the  
5 Court looked at the process to determine whether  
6 or not that had the indicia of finality.

7 JUSTICE ALITO: And when would that --  
8 when would it become final? At the end of the  
9 case?

10 MR. LEHMAN: We would submit that it  
11 would become final under this Court's test that  
12 when the status quo changed, and when the rights  
13 and obligations of the parties were fixed.

14 JUSTICE ALITO: And when would that --

15 MR. LEHMAN: For example --

16 JUSTICE ALITO: -- yeah. And when  
17 would that be?

18 MR. LEHMAN: Well, for example, Rule  
19 8002 actually lays out a fascinating -- a very  
20 good framework for final orders because it  
21 determines what orders cannot be extended in  
22 terms of time frame.

23 The first under 8002(d)(2)(A) is the  
24 granting of the automatic stay cannot be  
25 extended, but the denial of the automatic stay

1 isn't mentioned. The second one, the  
2 authorization of a sale under 363, for example.  
3 The third one, the authorization of financing  
4 under 364.

5 It goes back to the Court's reasoning  
6 in Bullard, where the Court determined that  
7 there is no -- that there is no symmetry in  
8 finality, that, in fact, a final rule is often  
9 determined, such as the grant of a motion to  
10 dismiss but not a denial --

11 JUSTICE ALITO: Well --

12 MR. LEHMAN: -- of a motion to  
13 dismiss.

14 JUSTICE ALITO: -- maybe you could  
15 simplify this a little bit for me. The --  
16 there's a denial of relief from the stay, and  
17 when can that party -- when can the party who  
18 sought relief from the stay take an appeal,  
19 contesting the denial of relief from the stay?

20 MR. LEHMAN: When, in the words of  
21 this Court, the discrete dispute between the  
22 parties are resolved. I --

23 JUSTICE ALITO: When would that  
24 happen?

25 MR. LEHMAN: As a result -- in this?



1 JUSTICE ALITO: Yes. Yeah.

2 MR. LEHMAN: In this particular place,  
3 at the end of the claims adjudication process.  
4 It was the Respondent that said that the claims  
5 adjudication process was triggered by the motion  
6 to lift the stay.

7 JUSTICE ALITO: Yeah, okay. And at  
8 that point, isn't the issue of whether there  
9 should have been relief from the stay moot?

10 MR. LEHMAN: No. This Court has  
11 recognized at least three different occasions  
12 that that is not an unreviewable decision, that  
13 that is a decision, as a result of a single  
14 appeal rule, that has to be respected and  
15 preserved.

16 JUSTICE ALITO: Okay. What relief  
17 would be -- could be granted at that point?

18 MR. LEHMAN: Just like this Court did  
19 in the Olberding case, the Court could vacate  
20 the decision and send it back. Importantly,  
21 under Rule 502(j), it's specifically allowed  
22 under the bankruptcy code.

23 Under Rule 502(j), a -- an order that  
24 -- a claim that has been allowed or disallowed  
25 can be changed. An allowed claim can be

1 disallowed. A disallowed claim can be --

2 JUSTICE ALITO: Okay. So the court --

3 MR. LEHMAN: -- allowed for -- for  
4 good reason.

5 JUSTICE ALITO: -- says there should  
6 have been -- on appeal, there should have been  
7 relief from the -- from the stay. So what does  
8 that do for the party who sought relief from the  
9 stay?

10 I think your argument has to be that  
11 undoes everything that happened since that  
12 point, right?

13 MR. LEHMAN: Well, with respect, it's  
14 no different than a motion to remand, a motion  
15 to transfer venue. It's a motion to deny a -- a  
16 denial of a motion to abstain under --

17 CHIEF JUSTICE ROBERTS: Well, it's a  
18 little different because the bankruptcy has gone  
19 on, right? The bankruptcy has concluded, and  
20 part of the bankruptcy is you're divvying things  
21 up, and depending on how much this person gets,  
22 that person gets more, and -- but now you say  
23 you've got to go back and start over with  
24 respect to one person's claim.

25 I -- I don't understand how you can

1 unscramble that egg.

2 MR. LEHMAN: But this is something  
3 that bankruptcy lawyers deal with every single  
4 day. It can be done through a variety of  
5 matters, but, as a practical matter, Your Honor,  
6 given the length of the typical bankruptcy and  
7 the length of the appeal, it wouldn't be  
8 unscrambled before the bankruptcy process was  
9 entered -- ended in the first place.

10 As a practical matter, as we cite to  
11 you in our reply brief, in the footnote on page  
12 19, the average bankruptcy case is concluded in  
13 seven months. The average appeal -- the first  
14 appeal takes nine months. In this case, the  
15 second appeal took a little bit less time than  
16 that.

17 But -- so, as a practical matter,  
18 there is no such thing as undoing because  
19 whether you took the appeal at the moment that  
20 the stay relief was denied or at the moment that  
21 the claims adjudication process was ended, you  
22 are still going to have an appeal that extended  
23 well beyond the plan confirmation process.

24 And that's why bankruptcy lawyers deal  
25 with this issue of claim contingency all the

1 time, and they work with reserves, just like  
2 they did here. And the parties agreed that they  
3 would not object to the plan on the condition  
4 that this appeal could go forward. And there  
5 was a security set aside in the amount of  
6 \$400,000.

7 Now we don't believe that that's the  
8 entirety of our damages, but that's the security  
9 that the parties agreed to. And if that's less  
10 than -- if that's not enough to cover our  
11 damages, then that's the risk that we took in  
12 agreeing to that claim filing.

13 JUSTICE SOTOMAYOR: Would you have had  
14 the right, if you chose, not to waste your time  
15 in adjudicating this in bankruptcy court and  
16 choosing -- could you have chosen to appeal  
17 immediately after the injunction was denied?

18 MR. LEHMAN: Your Honor, I missed the  
19 first part of your question, and so I --

20 JUSTICE SOTOMAYOR: Assuming you  
21 wished not to incur the expense and time of  
22 adjudicating this in the bankruptcy proceeding,  
23 could you have chosen at the time the injunction  
24 order denying the request to lift the stay was  
25 issued, could you have appealed then?

1           MR. LEHMAN: I believe that under 158  
2 there's an interlocutory operation, 158(a)(c),  
3 as well as 1292(a). By definition --

4           JUSTICE SOTOMAYOR: So the answer is  
5 yes?

6           MR. LEHMAN: Yes, Your Honor --

7           JUSTICE SOTOMAYOR: So isn't that --

8           MR. LEHMAN: -- as an interlocutory  
9 appeal.

10          JUSTICE SOTOMAYOR: -- so isn't that a  
11 different question, since you accept the  
12 responsibility that you could have appealed,  
13 isn't the issue whether you should have  
14 appealed, and isn't there a split on that  
15 question among the circuits?

16          MR. LEHMAN: Well, Your Honor, I --

17          JUSTICE SOTOMAYOR: Because what  
18 you're basically saying is I didn't have to.

19          MR. LEHMAN: With respect, Your Honor,  
20 I believe that there are two very important  
21 reasons.

22                 First of all, it's not a matter of  
23 having to. It's a matter of whether the Court  
24 would have allowed us to under the interlocutory  
25 standard. And given the environment that we

1 were in, we did not believe an interlocutory  
2 appeal would have been granted.

3 But moreover --

4 JUSTICE SOTOMAYOR: So you're  
5 answering me no --

6 MR. LEHMAN: Well --

7 JUSTICE SOTOMAYOR: -- that you  
8 couldn't have? I -- I don't know what you're  
9 arguing.

10 MR. LEHMAN: With respect, the  
11 question was could we have appealed.  
12 Theoretically, we could have filed an  
13 interlocutory appeal.

14 As a practical matter, that's only  
15 with leave of court. And we did not -- and --  
16 and so it wasn't something automatically that we  
17 could do.

18 And so, second of all, with respect to  
19 the second appeal, the reality was the -- the --  
20 the relationships between the parties were going  
21 to result in the second substantive appeal. The  
22 question is whether the Court is going to compel  
23 the parties to appeal or whether the parties  
24 will be able to consolidate their appeals at the  
25 end of the discrete dispute.

1 JUSTICE BREYER: What's the difference  
2 -- is it the case that a creditor says to the  
3 bankruptcy judge: Judge, I don't want to be  
4 here. Go lift the automatic stay. And the  
5 judge says, you're right.

6 Now can the debtor appeal?

7 MR. LEHMAN: Yes, Your Honor.

8 JUSTICE BREYER: Okay. If the debtor  
9 can appeal then, why can't the creditor appeal  
10 if he reaches the opposite conclusion?

11 In both cases, I imagine the immediate  
12 appeal is given because, in many instances,  
13 though certainly not all, getting rid of a  
14 creditor or keeping a creditor will change in a  
15 pretty significant way the nature of the final  
16 plan.

17 Now what have I said wrong?

18 MR. LEHMAN: With respect, this Court  
19 addressed that very issue in Bullard, and the  
20 Court said that confirmations of a plan change  
21 the status quo and set the rights and  
22 obligations of a party. But denials, while the  
23 parties continue to negotiate, do not do that.

24 The --

25 JUSTICE BREYER: They don't do that.

1 Why not? Why not? If we have an imaginary case  
2 where a creditor who happens to make this motion  
3 has \$100 million, and everybody else taken all  
4 together has \$3.50. Okay?

5 Now it seems to me that getting rid of  
6 that creditor would change the nature of the  
7 final plan. Wouldn't it?

8 MR. LEHMAN: If the merits --

9 JUSTICE BREYER: I don't think Bullard  
10 was addressing that issue.

11 MR. LEHMAN: Not exactly, Your Honor,  
12 but it was certainly addressing the question --

13 JUSTICE BREYER: All right.

14 MR. LEHMAN: -- of the symmetry that  
15 the court --

16 JUSTICE BREYER: Okay. So what's the  
17 answer to that issue? I'm not saying symmetry  
18 automatically makes the same result.

19 All I am saying, it seemed to me,  
20 being very much an amateur in this field, but  
21 you are not, that the reason for allowing the  
22 initial appeal, were they to grant it, is  
23 because of the enormous change that might work  
24 in the nature of the plan. And if that's the  
25 reason, the same thing is true when you deny it.



1           Now is -- that's what I'm getting at  
2 as a question. I'm not giving you an answer. I  
3 want to know what you think.

4           MR. LEHMAN: And under the Bullard  
5 standard, I do not believe the denial changes  
6 the status quo. As this Court said, the stay  
7 remains in effect. Final does not determine the  
8 state of affairs.

9           JUSTICE BREYER: I see. So, in other  
10 words, in my case, \$100 million gone out of the  
11 estate, \$3.53 left. That didn't change  
12 anything.

13           MR. LEHMAN: No, the granting -- the  
14 granting does change it. The status quo is  
15 different.

16           JUSTICE BREYER: No, now we have it  
17 the other way.

18           MR. LEHMAN: If the stay is agreed --

19           JUSTICE BREYER: A hundred million is  
20 there --

21           MR. LEHMAN: I've got that part.

22           JUSTICE BREYER: -- as opposed to the  
23 \$3.53. That changes nothing.

24           MR. LEHMAN: The Court does not look  
25 at the significance of the matter in determining

1 whether or not it's final.

2 JUSTICE BREYER: I didn't say it did.  
3 I just said the reasoning seems to be similar if  
4 my reasoning is correct. That's why I put it as  
5 a question.

6 MR. LEHMAN: And -- and I would submit  
7 the Court answered this question in Bullard,  
8 that unless the status quo was changed, that  
9 it's not a final order, because it doesn't end  
10 that substantive process.

11 If it's a \$3.50 creditor that is  
12 otherwise excluded from the estate by the  
13 granting of the stay, that's a final judgment  
14 with respect to that creditor. If it's a  
15 million dollar creditor and that's denied, the  
16 status quo is still not changed. The status quo  
17 continues and that creditor continues within the  
18 bankruptcy process.

19 Now I may have misunderstood the  
20 Court's question, but I believe that was an  
21 attempt to answer it.

22 JUSTICE BREYER: Thank you.

23 MR. LEHMAN: It does assume some facts  
24 in evidence, that I am more of an expert.

25 (Laughter.)

1                   MR. LEHMAN: But I will defer to the  
2 Court.

3                   I would -- I would continue by  
4 suggesting that the government's  
5 characterization of bankruptcy law is  
6 misunderstood.

7                   Not only does the government  
8 misunderstand the framework for the  
9 jurisdiction, overlooking the fact that 158 was  
10 not passed in 1978 but was something to remedy  
11 1293, which the court in the First Circuit, In  
12 re Saco Lo., which this Court has cited  
13 favorably, had to address.

14                   1293 did not use the word  
15 "proceedings." 1293 was -- was drafted in a way  
16 that required a final order but without the  
17 concept of proceeding.

18                   And, there, the First Circuit said we  
19 have to -- we -- we look back over 200 years and  
20 how this Court has looked at bankruptcy orders  
21 and recognized that, in some cases, some  
22 bankruptcy proceedings are different, are  
23 treated differently. And, as a result of that,  
24 certainly, Congress did not intend to change  
25 this under 1293.

1           A year later, Congress fixed that  
2 problem with a very elegant solution in 158. In  
3 158, they included the word "proceeding" to go  
4 back and recognize over the last 200 years that  
5 there would be some proceedings in bankruptcy  
6 that would be final.

7           However, they included a word, a  
8 guardrail, to ensure that that did not get out  
9 of control, and that guardrail was the word  
10 "final," a word that this Court had used and  
11 interpreted since Congress enacted the Judiciary  
12 Act of 1789 and a word that brings all the soil  
13 of 1291 with it.

14           "Final" is a term of art. "Final" has  
15 200 years of definition behind it. And that --  
16 and -- and Congress fixed the problem of 1293  
17 through 158.

18           But, to that end, 158, the finality  
19 consideration, as this Court recognized and as  
20 even the Solicitor General recognized, the  
21 finality requirement has significance, has  
22 import.

23           It's not just the last order in the  
24 sequence. It's not just the order that disposes  
25 of a motion for an extension of time. It's not

1 the order that disposes of a retention of  
2 professionals.

3 Those are not matters that aren't  
4 deemed final. Those don't change the status  
5 quo. Those don't fix the rights and obligations  
6 of the parties.

7 Second of all, I believe the  
8 government is mistaken about 362(e).

9 JUSTICE ALITO: Before you go on to  
10 that, I'm not sure I quite understand why, if  
11 you agree that the motion for relief from the  
12 stay is a proceeding, why an order saying, no,  
13 I'm not granting relief from the proceeding, is  
14 not final?

15 MR. LEHMAN: Well, as this Court noted  
16 in Bullard, there are literally countless  
17 numbers of proceedings in contested matters.  
18 But it stretches the concept of finality to  
19 assume that the -- the order that disposes of  
20 all those proceedings meets the qualification of  
21 what this Court called an immediately appealable  
22 order.

23 JUSTICE ALITO: So what if the order  
24 denying relief from the stay says and this is  
25 the final word on this subject. This is not

1 going to be reexamined. It's not final?

2 MR. LEHMAN: No, because the stay by  
3 its very nature can -- is -- is fluid. As even  
4 the Sixth Circuit recognized, facts and  
5 circumstances can change.

6 Even the Respondent cited a case from  
7 the Tenth Circuit at page 38 of their brief  
8 where they talk about how the court had granted  
9 relief from the stay. Ten months later  
10 reconsidered it.

11 The First Circuit in the Atlas case,  
12 the basis for their ruling, because there were  
13 competing -- there was a first to file rule  
14 question between two district judges.

15 The First Circuit said the order of  
16 the -- of -- of the stay relief isn't final.  
17 Things can change that would cause the Puerto  
18 Rican judge to decide that the Virginia judge  
19 should go forward.

20 And at that point, the bankruptcy  
21 court will have to once reconsider whether the  
22 stay applies, whether the stay is final. But  
23 the stay by its very nature is fluid.

24 It's no different than the way this  
25 Court analyzed a motion to deny a -- a -- a

1 request for abstention under the Gulf Aerospace  
2 case versus Mayacamas.

3           There, the Court rejected the concept  
4 of the collateral order doctrine because the  
5 first -- the first requirement was that the  
6 issue be conclusively resolved. And the Court  
7 looked at that and said: Abstention, three  
8 months -- months from now, the district court  
9 may decide that the state court matter should go  
10 forward. And so this cannot be a final order by  
11 definition because it doesn't conclusively  
12 resolve the issue.

13           Now I would like to also point out  
14 that, with respect to the injunction that is  
15 claimed here, that's defeated by the very terms  
16 of the rule. Under 363(c)(2)(C), the code says  
17 that the -- that the stay expires upon the  
18 discharge. That's a -- that's something that  
19 this Court recognized just last term in Taggart  
20 versus Lorenzen, that there is a distinction  
21 between the automatic stay and the injunction.

22           There's no -- and -- and even going  
23 back to Celotex in 1995, there's no textual  
24 basis to believe that there is a permanent  
25 injunction with the stay that, by its very

1 nature, and even Congress in the same  
2 legislative history that the government cites  
3 admits, is temporary.

4 And then, finally, I would argue that  
5 they're mistaken about the application of  
6 362(e). 362(e) is a very different part of the  
7 motion -- of the -- of the stay than 362(d)(1).  
8 362(e) relates to actions against the property  
9 as opposed to actions against the debtor.

10 Now, in this case, we're seeking -- we  
11 sought relief under 362(d)(1), for cause. We  
12 did not bring basically what was an in rem  
13 action or an action regarding a secured party  
14 under relief under 362(e). There was a lot of  
15 ink spilled on the question of 362(e), the  
16 injunction, the -- the fact that there was a  
17 preliminary hearing and a final hearing. I  
18 would submit to the Court that those concepts  
19 are not applicable here.

20 What is critical here is that the  
21 Respondent dragged the motion to lift the stay  
22 into the claims adjudication process. It was  
23 the Respondent who, in responding to the motion  
24 to lift the stay, objected as an informal proof  
25 of claim.



1           By objecting as an informal proof of  
2 claim, the Respondent is triggering the entire  
3 claims adjudication process. And, of course,  
4 after that point, we filed an adversarial  
5 proceeding. They filed an adversarial  
6 proceeding. We had competing proofs of claim.

7           That is the claims adjudication  
8 process under Chapter 5, 501, the submission of  
9 a claim; 502, objection; 503, the resolution of  
10 that claim by the court. That is the broader  
11 substantive bankruptcy process that was resolved  
12 here.

13           But this Court has never recognized  
14 that decisions about where to -- where to  
15 litigate are final orders when they're denied.  
16 When they're granted, that's one thing. That  
17 changes the status quo. That dismisses the  
18 case. But, when they're denied, those are not  
19 final orders.

20           And, finally, I would also point out  
21 that the -- from a policy perspective, the  
22 question here, as the Court looked in Bullard,  
23 the Court noted that if the Court had ruled  
24 otherwise, it could possibly give the debtor  
25 greater leverage over the creditors because the

1 debtor could hold up the creditors with a threat  
2 of appeals.

3           That same dynamic applies here. If  
4 you allow creditors or, I should say, if you  
5 force creditors to take appeals on early  
6 preliminary matters, the definition of which is  
7 very -- is impossible to define the limits of  
8 under the Respondent's suggested rules, you're  
9 going to tilt the playing field with respect to  
10 those negotiations.

11           Debtors are in bankruptcy for a  
12 reason. They have limited resources. And to  
13 allow or force creditors whose motions are  
14 denied -- I'm not talking about the motions that  
15 are granted; that's the exchange we had earlier  
16 -- but creditors whose motions are denied to  
17 immediately take those appeals is going to  
18 change the way the bankruptcy process works.

19           Now I think that we've even seen that  
20 right now with the Sixth Circuit.

21           JUSTICE KAVANAUGH: Well, most -- most  
22 of the courts of appeals have that rule, though.

23           MR. LEHMAN: Well, with respect, Your  
24 Honor, I believe that that rule is dated -- is  
25 based in most of those cases on an outdated

1 anachronism under a former bankruptcy rule, Rule  
2 701. The reality is the only two courts to have  
3 considered this in any detail within the last 10  
4 years has been the First Circuit, and that was  
5 three months after their ruling in the Bullard  
6 case that this Court then affirmed, and the  
7 Sixth Circuit.

8           The other circuits, I would submit  
9 their rulings are largely based -- and if you  
10 look at the majority of them over the last two  
11 decades, it would be grants or denials in a very  
12 summary, often in a footnote or in dicta, as  
13 opposed to a careful analysis of this issue.

14           In reality, under the old bankruptcy  
15 rule, under 701, they had to file an adversarial  
16 proceeding in order to challenge the stay.  
17 Under the new bankruptcy rules, under 4001,  
18 that's a contested matter. It's not an  
19 adversarial proceeding.

20           But, in filing an adversarial  
21 proceeding under Rule 701, there was often a  
22 claim for relief, claim 1, just like a  
23 declaratory judgment action; claim 2, breach of  
24 contract. And in many of those cases, the  
25 underlying merits were determined.

1                   When the rules changed in 1984 from  
2 701 to 7001, challenges to stays no longer were  
3 raised as adversarial proceedings. Instead,  
4 they were raised under Rule 4001 as a contested  
5 matter.

6                   So it's understandable that courts in  
7 the '82 to '84 circa were deeming a motion to  
8 lift the stay in an adversarial proceeding  
9 context as a discrete substantive dispute  
10 between the parties that often resolved a  
11 discrete, within that proceeding.

12                  JUSTICE KAVANAUGH: Your theory under  
13 the Bullard test is that the denial of relief  
14 from the stay does not alter the status quo for  
15 the creditor, is that right?

16                  MR. LEHMAN: Your Honor, it doesn't  
17 alter the status quo for either one.

18                  JUSTICE KAVANAUGH: And why is that on  
19 the status quo? I guess this might depend on  
20 how you define status quo, but it's going to  
21 prevent the creditor from enforcing judgments  
22 and seizing property, and the creditor is going  
23 to lose money. So I guess that depends on  
24 status quo, but they're going to have effects.

25                  MR. LEHMAN: No, the status quo is --

1 is -- was determined at the date of the filing  
2 of the bankruptcy.

3 JUSTICE KAVANAUGH: Right.

4 MR. LEHMAN: It was originally dating  
5 back to the filing of the bankruptcy. And as  
6 this Court noted in Bullard, when the plan  
7 confirmation was denied, the stay continued.  
8 The status quo did not change.

9 What we're contending is nothing  
10 changed in the bankruptcy court --

11 JUSTICE KAVANAUGH: End on that.

12 MR. LEHMAN: I'm sorry.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Dunham.

16 ORAL ARGUMENT OF GRIFFIN S. DUNHAM

17 ON BEHALF OF THE RESPONDENT

18 MR. DUNHAM: Mr. Chief Justice, and  
19 may it please the Court:

20 Section 158 of the judicial code  
21 provides for a district court's jurisdiction  
22 over final decisions and orders that are issued  
23 in proceedings. In this case, it appears as  
24 though Ritzen has conceded that a stay relief  
25 motion and a notice to the debtor and a hearing

1 on that motion constitutes a proceeding.

2 So the only issue now is whether or  
3 not that order issued by the bankruptcy court  
4 was, indeed, final. With respect to finality,  
5 this Court can simply borrow to the age-old  
6 tradition of what finality means under  
7 Section 1291 of the judicial code, and that is  
8 whether or not the order leaves nothing else to  
9 do except for execute upon the judgment, in this  
10 case, the decision.

11 The bankruptcy court made it very  
12 clear that upon entry of the order dismissing --  
13 I'm sorry, the order denying the motion for  
14 relief from the automatic stay, there was only  
15 one thing to do, and that was to have the claims  
16 adjudication process happen within the  
17 bankruptcy case.

18 Therefore, that was a final decision  
19 that conclusively terminated the proceeding.  
20 There was nothing left to do for the parties,  
21 except to take the issues between the two, the  
22 claims and the counterclaims, and have them  
23 resolved by the bankruptcy court.

24 CHIEF JUSTICE ROBERTS: Well, there's  
25 nothing -- nothing left to do between the

1 parties other than litigate the case.

2 MR. DUNHAM: That's correct, Your  
3 Honor.

4 CHIEF JUSTICE ROBERTS: Well, that's  
5 kind of a big part of the whole thing.

6 (Laughter.)

7 MR. DUNHAM: Right, and the important  
8 nuance there is there's nothing left to do with  
9 respect to the decision that denied stay relief.  
10 Certainly, there was going to have to be some  
11 negotiations, possibly some litigation, within  
12 the context of the bankruptcy case.

13 But, with respect to the stay relief  
14 motion, that decision, there was nothing left to  
15 do upon entry of that decision to execute upon  
16 the judge's decision that all the claims  
17 adjudication would have to run through the  
18 bankruptcy case.

19 JUSTICE BREYER: A summary judgment  
20 motion, once it's decided, there's nothing left  
21 to do in respect to the summary judgment motion.  
22 All there is, is, as the Chief just said,  
23 litigate the entire case. Do you want to say  
24 the summary judgment motion is final?

25 MR. DUNHAM: Your Honor, a grant of a

1 summary judgment is -- is indeed final. And --

2 JUSTICE BREYER: So we can appeal, and  
3 everybody's going to appeal from the summary  
4 judgment motions?

5 MR. DUNHAM: Yes, Your Honor, those  
6 would be raised within the context of an  
7 adversary proceeding.

8 JUSTICE BREYER: What about a regular  
9 case out of bankruptcy court?

10 MR. DUNHAM: Yes, Your Honor.

11 JUSTICE BREYER: Well, I never heard  
12 of that, that you could appeal immediately from  
13 the denial of summary judgment.

14 MR. DUNHAM: Oh, not -- not from the  
15 denial of summary judgment. No, Your Honor. I  
16 -- sorry, I understood the question to mean a  
17 grant of summary judgment.

18 JUSTICE BREYER: No, no, no. That  
19 would be the case, obviously. But we're here  
20 talking about a denial of the motion, not a  
21 grant.

22 MR. DUNHAM: That's correct. So, Your  
23 Honor, in the context of a denial of summary  
24 judgment within an adversary proceeding in a  
25 bankruptcy case --



1 JUSTICE BREYER: I'm not literally  
2 talking about summary judgment. I'm just  
3 repeating really what the question of the Chief  
4 is and want you to focus on that, that the fact  
5 that it's over in respect to what the particular  
6 motion is about doesn't necessarily prove that  
7 it's a final judgment.

8 Maybe there are other things that are.  
9 Deny a request to call a witness. That is over  
10 in respect to the witness calling, but the case,  
11 it's not a final decision you can appeal, you  
12 see.

13 I mean, that's, I think, the thrust of  
14 the question. So that -- that's what I think we  
15 wanted you to hear.

16 MR. DUNHAM: And, Your Honor, I  
17 believe that, to answer your question, I believe  
18 in the oral argument in Bullard, the -- Justice  
19 Breyer, you had mentioned the fact that  
20 Collier's identifies approximately 47 contested  
21 matters. And so, to the extent that someone is  
22 denied the opportunity to call a witness, that  
23 wouldn't be a proceeding.

24 JUSTICE BREYER: I'm not being  
25 literal. Maybe you want to say something extra

1 about why this is final.

2 CHIEF JUSTICE ROBERTS: And if you do,  
3 I apologize for interrupting your -- your two  
4 minutes opening, so I at least will not ask --  
5 ask a question for the next two minutes.

6 MR. DUNHAM: No, Your Honor.

7 (Laughter.)

8 JUSTICE BREYER: Nor will I because I  
9 had those two.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Old habits are  
12 hard to break. I apologize.

13 MR. DUNHAM: Your Honor, for -- for  
14 the Court's edification, I waive my right for  
15 any of the two minutes. It's better --

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: I anticipated  
18 that's what you were doing.

19 (Laughter.)

20 MR. DUNHAM: Yes, Your Honor. Yes,  
21 Your Honor.

22 (Laughter.)

23 MR. DUNHAM: So the question about  
24 finality is -- is whether or not any decision is  
25 final determines -- is determined by whether or

1 not there is anything left to do except for  
2 execute on it.

3           The real hurdle is whether or not it  
4 constitutes a proceeding. So, certainly, the  
5 claims adjudication process was going to be  
6 subsequent to the stay relief motion and that  
7 stay relief proceeding. However, the finality  
8 of the stay relief order cannot be dictated by a  
9 future proceeding that is going to result in  
10 litigation. It's going to --

11           JUSTICE SOTOMAYOR: Why not? Meaning  
12 what Ritzen points out is that in the proceeding  
13 that's going on, the issue of bad faith is going  
14 to be litigated.

15           And during that litigation, the motion  
16 can be renewed to lift the stay and if, you  
17 know, part of -- or lift the stay. So it's not  
18 final/final in the sense of it's subject to  
19 renewal under changed circumstances, so --

20           MR. DUNHAM: Yes, Your Honor, there  
21 are two responses to your question. The first  
22 one relates to the reason for the filing of a  
23 stay relief motion.

24           In this case, they asserted bad faith,  
25 but a reason for filing is not -- is different

1 than whether or not there has been a denial of  
2 the relief requested. So the sole relief that  
3 was requested was going back to state court.

4 The reasons for going back to state  
5 court were rooted somewhat in bad faith. So the  
6 Court's determination of whether or not the  
7 reasons were valid is simply an evidentiary  
8 issue that is subject --

9 JUSTICE GORSUCH: I'm not -- I'm not  
10 sure that quite gets there.

11 JUSTICE SOTOMAYOR: No, no, please go  
12 ahead.

13 JUSTICE GORSUCH: No, no, I think  
14 we're asking the same thing, which is forget  
15 about the reasons. Just forget about them.  
16 Forget about the nature of the claim. There is  
17 a lift stay request. It has been denied.

18 It can be subject to reconsideration  
19 later. That's Justice Sotomayor's point. And I  
20 think you'd agree -- maybe -- maybe you'd tell  
21 me that's wrong, it can't be ever revisited,  
22 but, if it can be, does that pose a problem for  
23 you?

24 MR. DUNHAM: It does not. And I would  
25 say that in response to the question about

1 whether or not there could be a renewed stay  
2 relief motion, certainly, any party can file a  
3 motion at any time seeking relief from a prior  
4 order that's been entered.

5           However, in the context of a stay  
6 relief order that's been denied, any renewed  
7 motion, if based on the same facts, certainly is  
8 going to be denied for law of the case and for  
9 other estoppel reasons.

10           JUSTICE GORSUCH: Well, no, no. I  
11 mean, a judge is free to change his or her  
12 mind --

13           MR. DUNHAM: Yes.

14           JUSTICE GORSUCH: -- during the life  
15 of a case and find it persuasive today but  
16 didn't find it persuasive yesterday. That's the  
17 nature of interlocutory orders.

18           And, again, I'm just -- I may be  
19 beating a dead horse, but I think this is what  
20 the Chief Justice, whose two minutes I'm sure is  
21 up by now, Justice Breyer, Justice Sotomayor,  
22 and now me are asking all basically the same  
23 thing, is how do you call something final if  
24 it's subject to reconsideration by a judge for a  
25 considerable period of time?

1                   MR. DUNHAM: And, Your Honor, I will  
2 submit that reconsideration or the filing of a  
3 renewed stay relief motion does not determine  
4 that a prior order that's been issued is final  
5 or interlocutory.

6                   It's simply a creation of a new  
7 proceeding, if there is a renewed motion based  
8 on a change of circumstances, because like, in  
9 any bankruptcy case, certainly, the facts can  
10 change during the duration or the pendency of  
11 the case.

12                   JUSTICE SOTOMAYOR: But what an  
13 anomaly. You concede that a motion to dismiss  
14 if denied is not immediately appealable.

15                   MR. DUNHAM: Yes.

16                   JUSTICE SOTOMAYOR: But now you're  
17 saying that a motion to lift a stay is and must  
18 -- not only is but must be immediately  
19 appealable. There's a dichotomy there. They're  
20 the same thing. They're based on the same  
21 argument, bad faith.

22                   Why should we have one piecemeal  
23 litigation and one not?

24                   MR. DUNHAM: The simple answer to your  
25 question, Justice Sotomayor, is that a motion to

1 dismiss, a motion for a change of venue, a  
2 motion for remand, all of those are not  
3 proceedings.

4           If they are denied simply because  
5 there is no alteration of the status quo and the  
6 denial does not fix the rights and obligations  
7 of the parties, it doesn't move the case  
8 forward, and, therefore, to use the Court's  
9 words, it changes little.

10           A stay relief motion is entirely  
11 different. That is the opportunity for a court  
12 to lift one of the most fundamental building  
13 blocks of any bankruptcy case.

14           And, therefore, when the judge  
15 ultimately and finally and conclusively  
16 terminates that proceeding by denying the stay  
17 relief, it not only informs the court -- I'm  
18 sorry, informs the movant that the litigation  
19 has to occur in bankruptcy case, but it also  
20 prevents that creditor from being able to rely  
21 upon the state court right to a jury trial, the  
22 state court Rules of Evidence, the state court  
23 Rule of Procedure, the ability to adjudicate the  
24 claim in state court as it could have done but  
25 for the existence of the bankruptcy petition.

1           And, therefore, it does change a lot.  
2           And it does move the case forward by denying  
3           their relief from stay so that the parties can  
4           adjudicate it in bankruptcy court.

5           It's also important to note that  
6           although Ritzen disagrees with this contention,  
7           both the -- the government and Jackson Masonry  
8           on the same page that the filing of a bankruptcy  
9           petition creates effectively a temporary  
10          restraining order. And this is based on the  
11          legislative history in other courts.

12          The preliminary hearing on stay relief  
13          creates a de facto preliminary injunction. When  
14          the order is finally denied -- the -- I'm sorry,  
15          the motion is finally denied, that's akin to a  
16          permanent injunction that's going to remain in  
17          place until discharge, case closure, case  
18          dismissal, or when the property reverts in the  
19          debtor.

20          That's -- that's simply the fixing of  
21          the rights of the parties because, once that  
22          denial of stay relief is entered and the  
23          permanent injunction effectively goes into  
24          place, the ability to file a relief from the  
25          stay under 362, it goes away. And so it



1 certainly does move the case forward and it  
2 certainly -- it disposes of a discrete dispute  
3 within the larger bankruptcy case.

4 CHIEF JUSTICE ROBERTS: Could I ask  
5 you to respond to your friend's comments on the  
6 difficulties or lack of difficulties of an  
7 entanglement, I guess I'll call it? In other  
8 words, the fact that the one -- in the absence  
9 of finality, that the case would require going  
10 back to the unraveling what had happened in the  
11 bankruptcy without the claims being adjudicated  
12 in the state proceeding?

13 MR. DUNHAM: Yes, Your Honor. I  
14 believe that the term that was used was whether  
15 or not it's going to unscramble the bankruptcy  
16 case. And, certainly, there is a stay relief  
17 denial, and then there is case administration.  
18 There's negotiations. There are plan proposals.  
19 Ultimately, in this case, there's plan  
20 confirmation where creditors are provided  
21 treatment and then Jackson Masonry is able to  
22 perform under the plan.

23 Ritzen now seeks to wait until the end  
24 of the bankruptcy case, without objecting to the  
25 plan, after confirmation, after the adjudication

1 of its claim, to which it expressly consented to  
2 the jurisdiction of the bankruptcy court, and  
3 now it wants to ask this Court to ultimately  
4 provide it a path to go back to state court and  
5 get a different result.

6 And that different result would blow  
7 up the entire bankruptcy case. If Ritzen is  
8 correct at the state court level, which we  
9 obviously posit it wouldn't be, but if it could  
10 go back, that changes the entire dynamics of the  
11 bankruptcy case. Creditors have already been  
12 paid in this case. The plan has been  
13 substantially consummated. There are a number  
14 of hours that are involved in that entire  
15 process.

16 JUSTICE SOTOMAYOR: You're not arguing  
17 the case is moot, are you?

18 MR. DUNHAM: I certainly believe that  
19 the case is equitably moot on several grounds.

20 JUSTICE SOTOMAYOR: Legally moot?

21 MR. DUNHAM: I don't believe it's  
22 legally moot. I believe that it's equitably  
23 moot. And if I may, Your Honor, answer the  
24 question as to why that is.

25 Equitable mootness, at least the

1 mootness standard, the mootness principle is  
2 founded upon the simple position, whereas  
3 whether this Court is able to fashion a remedy  
4 that restores Ritzen to the previous position,  
5 it cannot in this case, because there, one, has  
6 been a plan that's been proposed and confirmed  
7 that included a discharge, and also included a  
8 plan injunction against proceeding that has not  
9 been appealed.

10           Ritzen tries to argue in its reply and  
11 argued at the podium today that that was carved  
12 out in connection with plan confirmation, but it  
13 wasn't. If the Court can look at the docket, it  
14 can see that only the claim objection and the  
15 two adversary proceedings were carved out.

16           And so the one remaining issue that  
17 has been appealed that was not carved out was  
18 the denial of the stay relief. So now that  
19 Jackson Masonry has obtained that plan  
20 confirmation that has resulted in a discharge,  
21 revesting of the property, and a plan  
22 injunction, it is effectively moot because there  
23 is no automatic stay that exists.

24           If there's no automatic stay that  
25 exists, how can Ritzen get relief from the

1 automatic stay in connection with a future  
2 appellate proceeding? That's the first part.

3 The second part is that nothing  
4 required Ritzen to consent to the jurisdiction  
5 of the bankruptcy court, but it filed an  
6 adversary proceeding and without reservation and  
7 allowed the bankruptcy court to determine the  
8 case to finality.

9 This Court in Caterpillar versus Lewis  
10 had a similar type of situation where the Court  
11 ultimately concluded that a -- that a procedural  
12 defect is not fatal if a federal adjudication  
13 exists and there was jurisdiction at the time of  
14 entry of the judgment.

15 That's what we have here. We have an  
16 adjudication on the merits of the breach of  
17 contract claim. Ritzen consented to it. Nobody  
18 contests that the bankruptcy court had  
19 jurisdiction. And now it wants to unwind it and  
20 do what this Court proscribed by allowing for  
21 the exorbitant cost of a dual trial when a  
22 district court sitting with jurisdiction has  
23 already made a decision.

24 JUSTICE BREYER: That's true, but, in  
25 every case throughout the entire legal system,

1 there's always a choice of the kind at issue  
2 here.

3           If you say that you have to wait 'til  
4 the end of the case to appeal the result you  
5 don't like of a motion, if, for example, X wants  
6 to leave, the trial judge -- the bankruptcy  
7 judge or the trial judge -- no, okay?

8           If you have to wait 'til the end of  
9 the case and appeal it, if your -- if the judge  
10 was right, no problem. But, if he was wrong and  
11 you were right, everything has to be done all  
12 over.

13           So you say give them an immediate  
14 appeal. If you give an immediate appeal, what  
15 happens is what he said. You have all that time  
16 of nine months of having an intermediate appeal.  
17 If there are a thousand creditors, they might  
18 all do it. And God only knows how long this  
19 case is going to take. That's why they have big  
20 backlogs in some other countries. They're too  
21 kindhearted in allowing immediate appeals, okay?

22           So do you want to say something about  
23 that?

24           MR. DUNHAM: I --

25           JUSTICE BREYER: How do we balance

1 those two?

2 MR. DUNHAM: I would love to respond  
3 to it. And there are two things that I would  
4 respond to. One is every creditor in the  
5 country should be lining up behind our side of  
6 the podium here, and the reason is because what  
7 Ritzen is proposing is to moot every creditor's  
8 ability to obtain meaningful relief on appeal  
9 when the stay relief order was denied.

10 And that's simply because upon plan  
11 confirmation and discharge occurs, there is no  
12 stay in place and, therefore, any party who  
13 tries to appeal the -- the denial, it's  
14 immediately moot and it's going to be dismissed.

15 So I would say that, to answer the  
16 first question, is that there might be more  
17 appeals during the pendency of the bankruptcy  
18 case, but those would be meaningful appeals.  
19 And creditors need to have the ability to have  
20 meaningful appeal, not one that gets mooted.

21 The second issue that I have with  
22 Ritzen's position and that responds to Your  
23 Honor's question is that we have to presume that  
24 actors -- that creditors are going to act in  
25 their own economic interest in connection with a

1 bankruptcy case.

2 In a case like this, where the  
3 bankruptcy court is saying that we're going to  
4 adjudicate it through a truncated summary claims  
5 adjudication procedure, that a creditor is not  
6 going to spend a lot of time and a lot of money  
7 on an appeal process just to get to an even  
8 lengthier and more expensive state court when it  
9 could be resolved.

10 Debtor side lawyers, we're not afraid  
11 of appeals during bankruptcy case. And,  
12 certainly, to the extent that this piecemeal  
13 litigation continues to -- to crop its head in  
14 this case, piecemeal litigation is the concern  
15 about extending the length of a bankruptcy case.  
16 And -- I'm sorry, extending the length of -- of  
17 -- of any case.

18 But bankruptcy is different because,  
19 obviously, it's an aggregation of many  
20 individual disputes. And the -- the concern is  
21 that if you wait until the end of a case, that's  
22 an additional time where a debtor remains in  
23 bankruptcy, certainly is not credit-worthy when  
24 financing is important, it has to incur the  
25 United States trustee fees that are always going

1 to be incurring so long as the case is open, and  
2 lastly, the competitors of a debtor are able to  
3 use the existence of bankruptcy against them in  
4 the marketplace.

5 JUSTICE KAVANAUGH: They argue from  
6 the language in Bullard that the -- the "alter  
7 the status quo" language in Bullard that this  
8 doesn't -- the denial here doesn't meet that  
9 test. Can you address that?

10 MR. DUNHAM: I certainly can. Justice  
11 Kavanaugh, the reason that Bullard is -- is  
12 perfectly consistent, obviously, Bullard stands  
13 for the proposition that an order denying  
14 confirmation is interlocutory for obvious  
15 reasons. In that case, the debtor had an  
16 opportunity to amend, did not --

17 JUSTICE KAVANAUGH: I'm focusing on --

18 MR. DUNHAM: -- move the case forward.

19 JUSTICE KAVANAUGH: -- that precise  
20 language, "alter the status quo." So if you can  
21 zero in on that.

22 MR. DUNHAM: Yes. So alteration of  
23 the status quo in our case comes from two  
24 different levels. One is because the court  
25 unequivocally decided that the claims



1 adjudication process would be in bankruptcy.  
2 So, prior to that ruling, it was an unknown as  
3 to whether or not it was going to be adjudicated  
4 in the state court or bankruptcy court. The  
5 court made it clear.

6 The second reason is, to use our  
7 injunction analogy, is that you have various  
8 stages of the injunction process. We all know  
9 that a permanent injunction -- or at least our  
10 position is that a permanent injunction can be  
11 and should be immediately appealable.

12 And so, to the extent that the  
13 petition creates a TRO, preliminary hearing  
14 creates a preliminary injunction, and then the  
15 denial of a motion to dismiss is effectively an  
16 injunction against that creditor for the  
17 duration of the bankruptcy case, until it gets  
18 revisited.

19 So the alteration of the status quo is  
20 the fixation of where the claims are going to be  
21 adjudicated and also moving it from just being a  
22 creditor who has rights under 362 to one whose  
23 rights have been fully exhausted under 362.

24 JUSTICE ALITO: It's true Bullard did  
25 use this phrase "alteration of the status quo"

1 and in a particular context, but do you think we  
2 should elevate that to an essential element of  
3 finality?

4           Is the final order in a case, as  
5 ordinarily understood, always one that alters  
6 the status quo? Sometimes the effect of the  
7 final order is to leave the -- leave the status  
8 quo in place.

9           MR. DUNHAM: It -- Your Honor, I -- it  
10 is our position that the use of the term "status  
11 quo," I believe, was used -- was one time in  
12 Bullard, and it came to define really what it  
13 took to move a case forward. And so there are  
14 -- in subsequent sentences. So our position is  
15 not that status quo needs to be established  
16 every time in order for there to be finality.  
17 We think status quo is more of a definition of  
18 the proceeding as opposed to finality.

19           We compartmentalize it by arguing that  
20 finality is looked at by whether or not there's  
21 anything left to do. So a proceeding does  
22 involve the status quo. And so I think that in  
23 order to have a proceeding, discrete dispute,  
24 significant, and one that moves the case  
25 forward, sometimes status quo could move the

1 case forward.

2 So our position is not that that  
3 should become a new standard. However, even  
4 with the "alteration of the status quo" language  
5 used in this case, we believe that the status  
6 quo has been altered for the reasons --

7 JUSTICE SOTOMAYOR: The Sixth Circuit  
8 viewed it differently than you.

9 MR. DUNHAM: No, Your Honor.

10 JUSTICE SOTOMAYOR: They -- they seem  
11 to think --

12 MR. DUNHAM: Our -- we --

13 JUSTICE SOTOMAYOR: -- of it as part  
14 of the finality order.

15 MR. DUNHAM: The Sixth Circuit's  
16 opinion, we think, is -- is perfect because it  
17 considered the fact that you can't have finality  
18 unless there's -- if there is without prejudice.

19 Your Honor, I see my time --

20 CHIEF JUSTICE ROBERTS: Please finish  
21 your answer.

22 MR. DUNHAM: And so the Sixth Circuit  
23 said that the finality test is difficult because  
24 we haven't given the parties a test. But it  
25 looked at it in two tranches, the first one

1 being whether or not we had a proceeding and  
2 whether or not it was final.

3           It's our position that the Sixth  
4 Circuit looked at the significant consequences  
5 and alteration of the status quo fixing the  
6 rights and obligations of the parties to  
7 determine the proceeding portion, and then, with  
8 respect to finality, that an order is final if  
9 -- a little bit different than our position. An  
10 order is final if it does fix the rights and  
11 obligations of the parties, again, but there is  
12 nothing else that needs to happen in order for  
13 the judgment to be executed.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Mr. Suri.

17           ORAL ARGUMENT OF VIVEK SURI  
18 FOR THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING THE RESPONDENT

20           MR. SURI: Mr. Chief Justice, and may  
21 it please the Court:

22           I'll begin with the questions that  
23 were just posed about the status quo language in  
24 the Bullard opinion. It depends on how you  
25 understand that language in terms of whether we

1 think it would be a good idea to elevate that  
2 into an element of the test or not.

3 If all you mean by "alter" --

4 JUSTICE SOTOMAYOR: Of which test? Of  
5 proceeding or finality?

6 MR. SURI: Finality. If -- if all you  
7 mean by "alter the status quo" is fix an  
8 obligation that had previously been uncertain,  
9 liquidate something that had previously been  
10 unascertained, then we're perfectly fine saying  
11 that that's a part of finality.

12 If, however, by status quo alteration  
13 what is meant is that there is some action out  
14 in the world that one party couldn't take that  
15 he now is able to take or vice versa, we think  
16 that would be an improper understanding of  
17 finality.

18 I can give a couple of examples to  
19 illustrate that. If a lawsuit in which a  
20 defendant is sued for damages ends in a judgment  
21 for the defendant, you could say in one sense  
22 that the status quo hasn't changed. The  
23 defendant didn't have to pay damages before the  
24 lawsuit ended and he doesn't have to pay damages  
25 after the lawsuit ended. But we'd still

1 understand that that's a final order because  
2 that put an end to that lawsuit.

3 Similarly, if there were a temporary  
4 restraining order issued at the beginning of a  
5 case and a permanent injunction issued at the  
6 end of the case, there is a sense in which the  
7 status quo might not have changed; namely, that  
8 the party that's enjoined was prohibited from  
9 doing that act both before and after the final  
10 judgment. But that doesn't change the fact that  
11 it is a final judgment.

12 JUSTICE GORSUCH: Counsel, on -- on --  
13 on -- on that, the Sixth Circuit placed a great  
14 deal of stress, it seems, on the fact that the  
15 stay relief denial here was entered with -- with  
16 prejudice in its view.

17 But what difference does that really  
18 make in a bankruptcy proceeding where orders are  
19 revisable all the time?

20 So is -- is -- is that even a thing  
21 that -- that -- that -- that exists to say it's  
22 with -- with prejudice when it's not really with  
23 prejudice and -- and, if it really is without  
24 prejudice as a practical matter, what effect  
25 does that have on your argument here?

1           MR. SURI: That's a fair concern,  
2 Justice Gorsuch. The -- the first answer to  
3 that concern is that, as a general matter, if  
4 the bankruptcy court says that it is denying a  
5 motion for stay relief, the creditor can't just  
6 come back and refile the motion.

7           Now I grant there is an exception to  
8 that principle. That exception is that under  
9 Rule 60(b), an analogous equitable doctrine, a  
10 court can revisit a determination that it's  
11 already made if changed circumstances make that  
12 original decision no longer equitable. But  
13 that's not unique to the automatic stay.

14           Any equitable decree, including those  
15 that we would all recognize as final judgments,  
16 can be reopened if the circumstances change.

17           JUSTICE GORSUCH: Does it really have  
18 to meet the standards of -- 60(b) is post-final  
19 judgment relief in normal civil litigation. So  
20 we acknowledge there that there already is a  
21 final judgment and some extraordinary  
22 circumstances have to be met. It's -- it's --  
23 it's not just it's a new day and I see things  
24 differently.

25           But, in the context of an ongoing

1 bankruptcy proceeding, is the standard that  
2 high, is it as high as 60(b), or do you have any  
3 authority to that effect that could help me, or  
4 is it really just the bankruptcy judge's  
5 equitable sense?

6 MR. SURI: It is not just the  
7 bankruptcy judge's equitable sense. And the  
8 best way to see that is in Section 362(e) where  
9 Congress repeatedly uses the word "final" to  
10 determine -- to refer to a bankruptcy judge's  
11 determination of a stay relief order.

12 That -- that word can't be given  
13 meaning if the bankruptcy judge is simply  
14 allowed to come back and say, oh, I'm revisiting  
15 the final --

16 JUSTICE GORSUCH: Do you have any  
17 authority to that effect?

18 MR. SURI: I'm not aware of a specific  
19 case of this Court or -- or a -- or a court of  
20 appeals upholding to that effect. But I think  
21 the broader --

22 JUSTICE GORSUCH: So, if that were  
23 right, though, that would -- that would also  
24 undercut -- and I apologize for -- this just  
25 follows from what you said, that if -- if it



1 really is a matter of statute that compels this  
2 understanding of a -- of a stay relief denial,  
3 then whether the judge adorns it without  
4 prejudice, it's still really with prejudice.

5 Any stay relief denials with  
6 prejudice, that follows from I think what you're  
7 saying, unless I'm missing something, which  
8 perhaps I am.

9 MR. SURI: No. The statute provides  
10 for another type of denial of stay relief, what  
11 it labels a preliminary denial of stay relief,  
12 where the bankruptcy judge says something like,  
13 I'm denying relief because the debtor has a  
14 likelihood of success, but I want further  
15 proceedings. And we don't contend that that  
16 would be final.

17 Where the bankruptcy judge, however,  
18 says, I'm not contemplating further proceedings,  
19 this is a conclusive determination of stay  
20 relief --

21 JUSTICE GORSUCH: So they're tied up  
22 in a bow. The Sixth Circuit had it right. It  
23 just used the wrong terms. It's not with or  
24 without prejudice. It's preliminary versus  
25 final.

1 MR. SURI: Yes, essentially.

2 JUSTICE KAGAN: Mr. Suri, may I take  
3 you to a different place?

4 MR. SURI: Yes.

5 JUSTICE KAGAN: In the last page of  
6 your brief, you refer to another circuit split.  
7 Apparently, there are some circuits that say,  
8 although you may bring an appeal immediately,  
9 you don't have to and you can wait until the  
10 end.

11 And you suggest that we don't have to  
12 think about that question. But, for me, that  
13 question is very tied up in all the policy  
14 concerns that we've been addressing here, the  
15 question of piecemeal appeals on the one hand  
16 versus the danger of undoing a bankruptcy  
17 proceeding on the other. And -- and -- and  
18 those policy concerns for me have a lot of  
19 traction in this case. I'm not sure what else  
20 really to go on.

21 So how can we decide this case without  
22 deciding whether, when we say something is  
23 immediately appealable, we really mean it has to  
24 be appealed at that time?

25 MR. SURI: I'll start with this case

1 and then turn to the broader issue raised by  
2 that split.

3           So, in this case, regardless of  
4 whether as a legal matter one is required to  
5 appeal immediately rather than waiting until the  
6 end of the case, as a practical matter, as  
7 Justice Alito pointed out in an earlier  
8 question, the -- there won't be an opportunity  
9 for effective review at the end of the case  
10 anyway. So, in this case, as a practical  
11 matter, there would likely be a requirement of  
12 taking an immediate appeal.

13           Now, on the broader question, the  
14 issue essentially is: When a litigant takes an  
15 appeal from the final order at the end of the  
16 case rather than the final order at the end of  
17 an individual proceeding, is he allowed to  
18 raise, as a ground for reversal, some mistake  
19 made earlier in the proceedings or earlier in  
20 the case even if he had an opportunity to raise  
21 that earlier on and chose not to do so?

22           The government hasn't taken a position  
23 on that. But, if it would be helpful, I could  
24 lay out the arguments on both sides.

25           On the one hand, in ordinary civil

1 litigation, the rule is that you're allowed to  
2 raise any error made along the way in the case  
3 at the end when there's a final judgment, even  
4 if under the Collateral Order Doctrine or some  
5 special interlocutory appeal statute you had a  
6 right to take up the appeal earlier on and you  
7 chose not to do so.

8           On the other hand, there are good  
9 reasons to think that bankruptcy might be  
10 different. In bankruptcy, there is this concern  
11 about unscrambling the entire bankruptcy at the  
12 end because of some -- some error made along the  
13 way earlier on.

14           So I -- I -- I think in this  
15 particular case the Court doesn't need to know  
16 the answer to that question in order to resolve  
17 whether an automatic stay --

18           JUSTICE SOTOMAYOR: You're suggesting  
19 then that this kind of relief, and motion to  
20 lift the stay, should never be considered  
21 revisitable at the end, but there may be other  
22 types of motions that should? I'm a little  
23 confused.

24           MR. SURI: We are highly skeptical  
25 that this type of order can be a basis for

1 overturning a final judgment at the end of the  
2 whole bankruptcy case.

3 We're not ruling out that there might  
4 be other types of orders that might be  
5 treated --

6 JUSTICE KAVANAUGH: So an --

7 JUSTICE KAGAN: But what --

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE KAGAN: Why shouldn't we just  
10 decide this question? What -- what -- why  
11 doesn't the government have a position? Why  
12 isn't this ripe to decide it now? It seems very  
13 tied up in the whole thing.

14 MR. SURI: The Court shouldn't decide  
15 the question because no one's briefed the  
16 question. And the government doesn't have a  
17 position on it because that was not part of the  
18 question presented. It was not argued below.  
19 It was not argued as part of this case.

20 JUSTICE KAVANAUGH: When you very  
21 objectively and nicely laid out the competing  
22 positions, "must" certainly seemed a lot  
23 stronger than "may."

24 MR. SURI: That is a fair inference  
25 about where the government might be leaning on

1 that question.

2 (Laughter.)

3 MR. SURI: I'd -- I'd like to address  
4 the broader issue of what counts as a  
5 proceeding. Essentially, when we're looking for  
6 a proceeding, we're looking for something that's  
7 a case within the case, something that could  
8 stand on its own outside the bankruptcy as an  
9 independent lawsuit.

10 An example of that is the automatic  
11 stay adjudication. Its equivalent outside  
12 bankruptcy would be a freestanding lawsuit about  
13 whether to enjoin the creditor from taking  
14 particular action against the debtor.

15 And if that lawsuit ends in a  
16 permanent injunction, we'd all say that's a  
17 final judgment. In the same way, when the stay  
18 relief proceeding ends in a final -- in -- stay  
19 relief order, that's a final order as well.

20 In contrast, some of the examples that  
21 Justice Breyer raised would not stand alone as  
22 independent lawsuits. Motion for summary  
23 judgment, for example, would not be its own  
24 lawsuit outside bankruptcy. It would be part of  
25 another lawsuit. So we wouldn't count that as a

1 proceeding and we wouldn't count the order  
2 ending that as final.

3 JUSTICE BREYER: Why is lifting the  
4 stay separate?

5 MR. SURI: You could have a lawsuit  
6 outside bankruptcy that is analogous to a lift  
7 stay proceeding. This is discussed in both of  
8 the conference -- both the House and Senate  
9 reports, which is just a lawsuit about whether a  
10 creditor should be enjoined from taking action  
11 against the debtor.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Five minutes, Mr. Lehman.

15 REBUTTAL ARGUMENT OF JAMES K. LEHMAN  
16 ON BEHALF OF THE PETITIONER

17 MR. LEHMAN: Thank you.

18 I'd like to begin with where the  
19 government ended and then move through some of  
20 the questions that were raised. But we have  
21 here today the same arguments that the  
22 government presented last time.

23 Last time, they took the same position  
24 that the Court should determine the finality of  
25 the order based on the proceeding. And the only

1 difference here in their briefing is, well, now  
2 it should be proceedings that are significant.

3 The Court rejected that logic last  
4 time and it should reject that logic again this  
5 time.

6 In this case, I would strongly  
7 disagree with my friend, who suggests that the  
8 stay has an equivalent proceeding outside.

9 Unlike -- there -- there are things  
10 that are similar, such as the claims  
11 adjudication process. That's a state law  
12 contract type of claim. A DIP financing, a  
13 debtor-in-possession financing, which would be  
14 like a state court lien dispute, or a 363 sale  
15 where a state court complained to enjoin the  
16 sale or quiet title.

17 But the idea that the stay has a  
18 parallel common law state cause of action is not  
19 something that is supported and is not something  
20 that there's any basis in the briefing to  
21 suggest.

22 Now I'd like to go back to the  
23 questions raised -- raised by Justice Sotomayor  
24 about revisiting the automatic stay, and I'd  
25 like to address the four points that were given.



1           First of all, the Respondents actually  
2           cited a case to the Court that changed that.

3           On page 38 of their brief, the  
4           Gledhill case from the Tenth Circuit actually  
5           granted relief from stay and 10 months later  
6           then reconsidered and changed that. Of course,  
7           we've granted other circuits where the result  
8           was the opposite, where the Court denied relief  
9           from stay and recognized that that might change  
10          later.

11          Number two, there was a suggestion by  
12          my friend that it would require a new proceeding  
13          to -- to renew the automatic stay. That's  
14          exactly true. No different than in Bullard,  
15          where it required a new proceeding for a new  
16          plan confirmation, but the Court recognized that  
17          didn't change the analysis. The fact that a new  
18          plan would have to be submitted under a new  
19          proceeding did not suddenly make the old  
20          proceeding an immediately appealable proceeding.

21          Number three, the Respondent suggested  
22          that the motion to dismiss was not a proceeding,  
23          but, in fact, that is -- in fact, it's deemed a  
24          core proceeding under 3 -- 157(b).

25          And then, finally, the government

1 suggests in a rather surprising way that there's  
2 no basis to suggest that 60(b) -- or -- or that  
3 we have to have 60(b) as the standard for  
4 revisiting the automatic stay, with absolutely  
5 no authority to support that view other than the  
6 suggestion that 362(e) somehow imports a  
7 standard under 60(b).

8 First of all, there have been no cases  
9 to suggest that. In fact, the only cases that  
10 have been submitted to this Court suggest just  
11 the opposite.

12 But the Respondent and the government  
13 continue to ignore the fact that 362(e) relates  
14 only to actions against the property. And if  
15 the Court would look at the appendix to the  
16 government's brief, we did not include 362(e)  
17 because we did not believe it was relevant.

18 But, on the government's brief at 4A,  
19 if you read 362(e)(1), the provision provides:  
20 "Thirty days after a request under subsection  
21 (d) of this section for relief from the stay of  
22 any act against property of the estate under  
23 subsection (a) of this section."

24 Now, with respect to the questions  
25 about the permanent injunction, again, neither

1 party has addressed the question that by  
2 definition under the statutory rules, 363 --  
3 362(c)(2)(C) says that the stay expires. The  
4 word "injunction" is nowhere in 362.

5 The stay expires on the discharge,  
6 which is what this Court recognized last term in  
7 Lorenzen. And, by definition, it cannot be a  
8 final order because it is not a final  
9 injunction.

10 It very well may act as a preliminary  
11 injunction under 1292(a), but that is something  
12 that this Court and Congress recognizes as an  
13 interlocutory appeal, not a final order.

14 Now, with respect to the question  
15 about the scrambling of the eggs, the concern of  
16 the Court has been addressed by what exactly  
17 happened here.

18 First of all, the creditors have been  
19 paid, as the Respondent represented, but they  
20 all got 100 cents on the dollar. That was  
21 represented from day one. And that was, in  
22 part, the basis for the bad faith claim that the  
23 bankruptcy was filed inappropriately.

24 So the fact that the debtor -- that  
25 the creditors were paid 100 cents on -- I see my

1 time is up.

2 CHIEF JUSTICE ROBERTS: You can finish  
3 your thought.

4 MR. LEHMAN: The fact that the -- the  
5 creditors received 100 cents on the dollar did  
6 not mean that this will be unscrambled, but that  
7 -- and they received 5.6 million dollars in cash  
8 since then, we believe would satisfy any problem  
9 that we have.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 12:10 p.m., the case  
14 was submitted.)

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