No. 18-938

IN THE

Supreme Court of the United States

RITZEN GROUP, INC.,

Petitioner,

v.

JACKSON MASONRY, LLC,

Respondent.

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

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari (the "Petition") boils down to (i) whether the Sixth Circuit misapplied this Court's guidance in *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015), and (ii) whether there is a true circuit split. As stated below, *Bullard* is a properly stated rule of law and the Sixth Circuit's application of it is not a basis for certiorari pursuant to Rule 10. But even if this Court decides to analyze the application of *Bullard*, it is clear that the Sixth Circuit correctly relied upon it as instructive guidance yet not as the dispositive precedent. *Bullard* involved the finality of a denial of a Chapter 13 confirmation. The Sixth Circuit looked to *Bullard* as instructive on the issue of finality, but otherwise relied upon applicable statutory authority to determine whether the stay relief hearing was a "proceeding" pursuant to 28 U.S.C. § 158(a). In short, the Sixth Circuit followed and respected *Bullard*, and did not contravene its holding or rationale.

With respect to whether there is a true circuit split, there is not. Seven circuits other than the Sixth Circuit have adopted a blanket position that all denials of stay relief are final and appealable. One circuit (Third Circuit) merely decided that stay relief denials theoretically may not be final (*i.e.*, it depends on whether there was true full disposition of issues), and one circuit (First Circuit) merely stated that there should be an inquiry into whether the rights of the parties were fully adjudicated with respect to the issues at hand. These rulings are not conflicting. The Sixth Circuit in the underlying case, *In re Jackson Masonry, LLC*, 906 F.3d 494 (6th Cir. 2018), adopted a consistent approach with both by determining that stay

relief denials are final unless the bankruptcy court did not finally adjudicate the issues in the underlying motion. This is an inconsequential, form-over-substance "split" that does not merit a grant of certiorari.

Lastly, Petitioner requests relief that is futile on the merits and this Court should not spend its time on a position that cannot prevail. At the bankruptcy court, Petitioner requested stay relief to return to state court for pre-petition litigation. The bankruptcy court denied the request. Petitioner now argues that the stay relief denial was not final because the bankruptcy court did not fully adjudicate the claim. This position is inconsistent, and if adopted would allow a movant to assert a narrow basis for stay relief and then argue that denial was interlocutory when the bankruptcy court did not make findings on broader questions that were not before it.

For the reasons stated herein, this is not a case for a grant of certiorari.

ARGUMENT

Petitioner frames the question presented in its Petition as "[w]hether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1)." Petitioner then argues in its question presented that the Sixth Circuit has (i) diverted from this Court's precedent (*i.e.*, *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015)) and (ii) the Sixth Circuit (among seven other circuits) has ruled in conflict with the First and Third Circuit Courts of Appeal, which creates a circuit split. Respondent respectfully disagrees. Certiorari should not be granted because (i) the *Bullard* decision contains

a properly stated rule of law that this Court should not revisit, and otherwise the Sixth Circuit followed *Bullard*, (ii) there is not a material circuit split that supports a grant of certiorari pursuant to Rule 10, (iii) even if there is a material circuit split, the Sixth Circuit did not apply the *per se* rule that Petitioner argues is the basis for a circuit split, (iv) Petitioner's requested relief is futile based on the facts and circumstances, (v) if accepted, Petitioner's position would unfairly provide movants a windfall in virtually every stay relief proceeding and would otherwise provide stay relief movants with perverse incentives, and (vi) granting certiorari will not advance any judicial or public policy. Respondent further objects pursuant to Rule 15 based on its assertion that Petitioner has taken inconsistent or waived positions that were previously not asserted on appeal.

I. THE *BULLARD* DECISION CONTAINS A PROPERLY STATED RULE OF LAW AND SHOULD NOT BE REVISITED PURSUANT TO RULE 10.

As a threshold matter, Rule 10 of the Rules of the Supreme Court of the United States dictates that a petition for writ of certiorari will be granted only for compelling reasons, and further that "[a] petition for a writ of certiorari is rarely granted when the error consists of…the misapplication of a properly stated rule of law."

In this case, Petitioner argues that the Sixth Circuit decision is in conflict with *Bullard*, which decided that a denial of plan confirmation was not a final order. Petitioner takes no issue with *Bullard*, but instead argues that the Sixth Circuit "departed from *Bullard's* guidance by too

narrowly defining the relevant proceeding." Petitioner thereby pins its certiorari hopes in part by arguing that the Sixth Circuit misapplied "a properly stated rule of law."

To the extent Petitioner asserts that the Sixth Circuit misapplied *Bullard*, this Court should not grant certiorari pursuant to the Rule 10. *Bullard* clearly and unequivocally decided that the finality of an order denying confirmation was not a final order. *See Bullard*, 135 S.Ct. at 1696. *Bullard* did not involve relief from the automatic stay and it remains a properly stated rule of law, and therefore it should not be revisited in connection with the Petition. *See Cavazos v. Smith*, 565 U.S. 1, 11 (2011) ("The Ninth Circuit correctly described the relevant legal rules…This Court, therefore, has no law-clarifying role to play.").

Even if Petitioner concedes that *Bullard* contains a properly stated rule of law, its reliance upon *Bullard* as a basis for a grant of certiorari is inappropriate. The context of *Bullard* is important. In that case, a Chapter 13 debtor sought to confirm a plan of reorganization. The bankruptcy court denied confirmation. The debtor appealed, arguing that each proposed confirmation attempt created a separate proceeding. The First Circuit Bankruptcy Appellate Panel ruled that denial of confirmation was not a final, appealable order. The First Circuit thereafter affirmed, further citing that the bankruptcy court's order denying confirmation was not final so long as the debtor remained free to propose another plan. This Court affirmed, stating that "the relevant proceeding is the entire process of attempting to arrive at an approved plan that would allow the bankruptcy case to move forward." In affirming, this Court stated that "[o]nly plan confirmation,

or case dismissal, alters the status quo and fixes the parties' rights and obligations; denial of confirmation with leave to amend changes little and can hardly be described as final." This comment was in the context of the specific facts and circumstances surrounding the debtor's case – *i.e.*, confirmation of a plan of reorganization and what the bankruptcy court's options were in connection therewith. This comment was not establishing a hardline rule that *all* bankruptcy rulings that are not confirmation orders or dismissal orders are thereby interlocutory.

The Sixth Circuit understood *Bullard*. The Sixth Circuit did not pluck out this Court's language of "[o]nly plan confirmation, or case dismissal, alters the status quo and fixes the parties' rights and obligations" and apply it out of context. Instead, it relied upon the thrust of this Court's ruling that recognized long-standing precedent that has treated orders in bankruptcy cases as immediately appealable "if they finally dispose of discrete disputes within the larger case[.]" *Bullard*, 135 S.Ct. 1688, *quoting Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651, 657, n.3. The Sixth Circuit's conclusion when faced with this question presented by Petitioner was well reasoned. The United States Code, 28 U.S.C. § 158(a), provides for the appealability of a bankruptcy court's decision if it (i) is a final judgment, order, or decree, and (ii) was entered in a case or proceeding. These two issues will be taken in reverse order.

Proceeding. Pursuant to 28 U.S.C. § 158(a), the Sixth Circuit first relied in part on 28 U.S.C. § 157(b)(2) that expressly refers to stay relief as a core "proceeding." Importantly, though, the Sixth Circuit acknowledged *Bullard* and expressly intended its opinion to be consistent therewith:

> The Supreme Court used similar logic in *Bullard*, though it was careful to warn that this "hardly clinches the matter" because § 157's "purpose is not to explain appealability." *Rightly so, and we do not assume that being listed as a "core proceeding" in § 157(b)(2) is either necessary or sufficient to be an appealable proceeding under § 158(a).*

Jackson Masonry, 906 F.3d at 501 (citations and quotations omitted) (emphasis added).

Finality. The Sixth Circuit immediately cited *Bullard* in its analysis of whether the stay relief hearing was final. *Id.*, *quoting Bullard*, 135 S.Ct. at 1692 ("The finality of a bankruptcy order is determined 'first and foremost' by whether it 'alters the status quo and fixes the rights and obligations of the parties.'"). The Sixth Circuit then ruled that a stay relief proceeding is a "judicial unit" and is over once a denial is issued. *Id.* In doing so, it recognized that the plan confirmation process in *Bullard* was inherently different than the stay relief proceeding in the case at bar: "A stay-relief motion asks its own discrete question, and this question is finally answered by either a grant or a denial." *Id.* at 502. To reach this conclusion, the Sixth Circuit extrapolated from *Bullard* to conclude as follows: "In conclusion, a stay-relief denial ends a proceeding, fixes the rights of the parties, and has significant consequences for them. Under *Bullard*, it qualifies as a final order." *Id.* at 503.

Nothing in the Sixth Circuit's opinion suggests it departed from *Bullard* as Petitioner argues. Certiorari should not be granted because (i) *Bullard* is properly

stated law and should not be revisited pursuant to Rule 10, and (ii) even if *Bullard* is not the properly stated applicable law at issue here, the Sixth Circuit did not misapply this Court's ruling.

II. THERE IS NOT A MATERIAL CIRCUIT SPLIT THAT SUPPORTS A GRANT OF CERTIORARI.

Petitioner argues that there is an irrevocable circuit split on "whether an order denying a request for relief from the automatic stay is always final and appealable." Petition, at 8. Petitioner's use of the term "always" effectively concedes the point that no circuit court has decided that a denial of stay relief is a non-final, interlocutory order. Instead, as Petitioner correctly articulates and cites, seven circuits – the Second Circuit, Fourth Circuit, Fifth Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit – are all on the same page: that denials of stay relief are always final and appealable. The Sixth Circuit ruled in the case at bar that denials of stay relief are final and appealable (consistent with the above-referenced circuits), but that there are exceptions if the order does not finally resolve the issues presented in the stay relief motion (consistent with the Third Circuit – *see Moxley v. Comer (In re Comer)*, 716 F.2d 168, 174 n. 11 (3rd Cir. 1983) and *Matter of West Elecs.*, 852 F.2d 79, 82 (3rd Cir. 1988)). The alleged "split" is the result of the immaterial distinction above, and the First Circuit that merely decided finality of a denied stay relief motion depends upon whether the determination was fully developed such that the denial definitely decided the issues between the parties. *See Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 31-33 (1st Cir. 1994); *Pinpoint IT Servs., LLC v. Rivera (In re Atlas IT Export Corp.)*, 761 F.3d 177, 184 (1st Cir. 2014).

This is not a true conflict or split; instead, it is a distinction without a material difference. This reality is evidenced by the fact that Petitioner only cited cases in which the alleged circuits in conflict agreed that denials of stay relief in the subject cases were actually final and appealable orders. Petitioner does not cite to a case in which a circuit court has determined that a denial of relief from the automatic stay was a final and appealable order. The lack of a true, meaningful split with practical consequences on actual parties before this Court demonstrates that this is not the test case to grant certiorari.

III. EVEN IF THERE IS A MATERIAL CIRCUIT SPLIT, THE SIXTH CIRCUIT DID NOT APPLY THE *PER SE* RULE THAT PETITIONER ARGUES IS THE BASIS FOR A CIRCUIT SPLIT.

Notwithstanding the foregoing, Petitioner asks this Court to grant certiorari to resolve the immaterial "split" and ultimately conclude that, like the First Circuit, the lower courts should conduct an analysis of the case circumstances to determine finality. Petitioner incorrectly argues that the Sixth Circuit is lumped with the seven circuits that categorically determine that denials of stay relief are final and appealable.

The Sixth Circuit indeed stated that "[a] stay-relief motion asks its own discrete question, and this question is finally answered by either a grant or a denial." *Jackson Masonry*, 906 F.3d at 502. But unlike the seven circuits that categorically determine that denials are final and appealable, the Sixth Circuit expressly acknowledged there are exceptions to the categorical rule. *Id.* ("As with many rules, there are exceptions."). Specifically, the Sixth

Circuit excepted from the categorical rule any case where denial was without prejudice "if it appears that changing circumstances could change the stay calculus." *Id.* In other words, the Sixth Circuit decided that changing circumstances (*i.e.*, circumstances that do not resolve all the rights and obligations at issue in the stay relief proceeding) would result in an order that was not final and appealable. In essence, the Sixth Circuit did not apply a categorial rule, and decided the issue of finality only after review of the bankruptcy court's order that the relief indeed resolved all the rights and obligations at issue. The bankruptcy court did what Petitioner is effectively arguing this Court to require of lower courts. Certiorari is therefore not warranted.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE RELIEF IS FUTILE BASED ON PETITIONER'S STAY RELIEF REQUEST.

Getting past the fact that the split is immaterial, and further getting past the fact that the Sixth Circuit did not blindly apply a categorical rule, it is nevertheless necessary to further explain why this case is not appropriate for granting certiorari by looking at Petitioner's original requested relief in bankruptcy court. In its original motion for relief from the automatic stay, Petitioner simply requested the bankruptcy court to lift the stay to allow pre-petition state court litigation to continue in state court. *See* Stay Relief Motion to Bankruptcy Court, *In re Jackson Masonry, LLC*, Case No. 3:16-bk-02065, Docket No. 57, at 18 ("Accordingly, this Court should lift the automatic stay to allow the Ritzen Lawsuit to proceed."); *Id.* at 23 ("Accordingly, this Court should lift

the stay to allow the Ritzen lawsuit to proceed."). When the bankruptcy court denied stay relief, it finally resolved the rights and obligations – whether the state court should adjudicate Petitioner's claim – of the parties regarding the issue before it. All issues raised by Petitioner were fully adjudicated. This Court should not grant certiorari when the Petitioner does not have a basis in law or fact to prevail.

V. PETITIONER'S ARGUMENT WOULD LEAD TO UNFAIR RESULTS AND ALLOW STAY RELIEF MOVANTS TWO BITES AT THE APPLE.

Finally, on appeal to the Sixth Circuit, Petitioner asserted the denial of stay relief was not final because the order "did not adjudicate ***if*** such claim existed or ***how*** such claim was to be determined." *See* Brief of Appellant to Sixth Circuit, *Ritzen Group, Inc. v. Jackson Masonry, LLC*, Case No. 18-5157, Docket No. 16, at 28-32. But, as stated above, Petitioner did not even request this relief from the bankruptcy court. Petitioner cannot claim that an order lacks finality because it does not resolve all the rights and obligations at issue *when Petitioner did not even assert those rights at the bankruptcy court level*. In addition, such relief from the bankruptcy court of adjudicating *if* such claim existed or *how* such claim was the be determined *was the exact opposite relief Petitioner actually sought* (*i.e.*, proceeding in state court to resolve its claims). This Court should not be used as a forum to effectively give stay relief movants two bites at the apple: once when originally filing its motion for stay relief, and the second time if/when it loses on the adjudication of the merits.

VI. PETITIONER'S POLICY ARGUMENT IS NOT PERSUASIVE AND GRANTING CERTIORARI WILL NOT IMPACT THE ADMINISTRATION OF JUSTICE.

Petitioner argues that if denials of stay relief are deemed final orders, then there will be widespread consequences, to include that "long-held notions of flexible finality could give way to more stringent, paint-by-numbers application of finality in bankruptcy." Petition, at 28. The opposite is true. As held by the lower courts, abandoning the well-established bright-line rule "would replace a simple, predictable rule with a vague, unpredictable one," and "would leave the parties forever guessing about when they needed to file an appeal, always at the risk of waiting too long and losing their rights or appealing too early and wasting their time." *In re Jackson Masonry, LLC*, Case No. 3:17-cv-00806, Case No. 3:17-cv-00807, 2018 WL 55837 at *5 (M.D. Tenn. Jan. 25, 2018), *available at* Petition, Appendix B at 37a. In short, more litigation, more time, more expense, more judicial resources, and more uncertainty would result. This concern was echoed by the dissent in *Atla*s, the case on which Petitioner's argument is largely based, which stated:

> All told, the majority's approach transforms what was until today a non-issue into fodder for briefing and analysis in the nascent sub-sub-specialty of Appellate Jurisdiction over Bankruptcy Court Orders Denying Relief From Stay. Unless that area draws only counsel who, unlike me, are able to confidently and accurately anticipate how the fine nuances of the majority's exception will apply in future

> cases, we will receive more briefing on losing jurisdictional objections, and no less briefing on the merits. *Atlas*, 761 F.3d at 191.

VII. OBJECTION TO PETITION BASED ON SUPREME COURT RULE 15.

Rule 15(2) makes it clear that a brief in opposition should address any perceived misstatement, and the failure to do so could render the objection waived.

Petitioner asserts that denial of stay relief motions are not final because the issue of "good faith" permeates a bankruptcy case. *See* Petition, at 18-25. Petitioner's stay relief motion to the bankruptcy court requested relief on the basis that the bankruptcy case was filed in bad faith (which the bankruptcy court rejected, *see generally* Denial Order appended to Petition). But Petitioner abandoned this argument on appeal to the Sixth Circuit. On appeal to the Sixth Circuit, Petitioner sought review of the bankruptcy court's order denying stay relief by asserting that the bankruptcy court was clearly erroneous by not granting stay relief based on the factual allegation of Respondent's alleged bad faith. *See generally,* Brief of Appellant to Sixth Circuit, *Ritzen Group, Inc. vs. Jackson Masonry*, Case No. 18-5157, Docket No. 16. Petitioner never argued that its requested stay relief (based in part on bad faith grounds) was also a basis for asserting that the order was not final. *Id.* at 26-32. Now, in its Petition, Petitioner argues for the first time that its allegation of bad faith is relevant to the issue of finality and not just on the merits of granting stay relief pursuant to 11 U.S.C. § 362. *See* Petition, at 18-25. Petitioner has waived this position and this Court should not consider it when deciding whether to grant certiorari.

CONCLUSION

The bottom line here is simple: this is not the case to grant certiorari. First, there is not a material split. Second, even if the split is material, the Sixth Circuit acted consistently with the First Circuit and Third Circuit by not applying a categorial rule. Third, the relief sought by Petitioner at the bankruptcy court level was fully and uncompromisingly resolved, and therefore was final. Fourth, Petitioner requests this Court to provide stay relief movants a windfall, namely by allowing a movant to request narrow stay relief (*e.g.*, litigating in state court) to a bankruptcy court and then arguing that the issue is not final because the bankruptcy court did not provide relief beyond the scope of the requested relief (*e.g.*, fully adjudicating the claim in bankruptcy court).

For the foregoing reasons, the judgment below should be affirmed and this Court should not grant the Petition.

Respectfully submitted,

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