No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

QDOS, INC.,
Petitioner,
v.
MATTHEW HAYDEN, ET AL.,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As this Court has recognized, the correct delineation of the dimensions of a bankruptcy "proceeding" is a matter of considerable importance. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 587 (2020). Erroneous identification either way – of an interlocutory order as a final decision, or of a final order as interlocutory – has significant detrimental impacts upon litigation. *Id.*

The question presented is:

Whether a Bankruptcy Appellate Panel's order reversing a bankruptcy court's dismissal of an involuntary petition constitutes a final, appealable order.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner is QDOS, Inc.

Respondents are Matthew Hayden, Felice Terrigno, Jim Maddox, and Carl Wiese, as trustee for the Wiese Family Trust dated as of October 31, 2013.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner QDOS, Inc. states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

LIST OF ALL RELATED PROCEEDINGS

The following proceedings are related to the case in this Court:

1. *In re QDOS, Inc.*, No. 8:18-bk-11997-MW, U.S. Bankruptcy Court, Central District of California, Santa Ana Division. Memorandum Decision and Order dated October 31, 2018.
2. *In re QDOS, Inc.*, No. CC-18-1301-TaFS, U.S. Bankruptcy Appellate Panel of the Ninth Circuit. Judgment entered November 7, 2019.
3. *In re QDOS, Inc.*, No. 19-60066, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 30, 2020.

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QDOS, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit (Pet. App. 1a) is unreported. The decision of the Bankruptcy Appellate Panel (Pet. App. 4a) is reported at 607 B.R. 338 (9th Cir. BAP 2019). The decision of the United States Bankruptcy Court (Pet. App. 27a) is reported at 591 B.R. 843 (Bankr. C.D. Cal. 2018).

JURISDICTION

The judgment of the Ninth Circuit was entered on November 30, 2020.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Petition as filed on or before April 29, 2021 is timely pursuant to the Court's Guidance Concerning Clerk's Office Operations dated November 13, 2020 and Order dated March 19, 2020 extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

STATUTES AND REGULATIONS INVOLVED

11 U.S.C. § 303(b) provides:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

11 U.S.C. § 303(b)(1) provides:

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[1] The Bankruptcy Appellate Panel had jurisdiction over this case pursuant to 28 U.S.C. § 158(a)(3). The United States Bankruptcy Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A).

> by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

11 U.S.C. § 303(b)(2) provides:

> if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

Federal Rule of Bankruptcy Procedure 1003(b) provides:

> JOINDER OF PETITIONERS AFTER FILING. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Federal Rule of Bankruptcy Procedure 1011(c) provides:

> EFFECT OF MOTION. Service of a motion under Rule 12(b) F.R.Civ.P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F.R.Civ.P.

Federal Rule of Bankruptcy Procedure 1013(a) provides:

> CONTESTED PETITION. The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order.

Federal Rule of Civil Procedure 12(a)(4) provides:

> *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

Federal Rule of Civil Procedure 12(a)(4)(A) provides:

> if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

Federal Rule of Civil Procedure 12(b) provides:

> HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

Federal Rule of Civil Procedure 12(b)(6) provides:

> failure to state a claim upon which relief can be granted; and

Federal Rule of Civil Procedure 12(d) provides:

> RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded

> by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Federal Rule of Civil Procedure 26(f)(1) provides:

> *Conference Timing*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable— and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

INTRODUCTION

By definition there can be no more dramatic alteration of the status quo in law than reviving a dismissed case. Here, Petitioner QDOS, Inc. moved to dismiss the involuntary bankruptcy petition against it, and won. The petition was dismissed, and the case was over. Appellees appealed that result to the BAP, which ruled in Appellees' favor and revived the case. Petitioner QDOS, Inc. firmly believes that the BAP's ruling is erroneous, and for that reason QDOS, Inc. appealed to the Ninth Circuit. But the Ninth Circuit declined jurisdiction, finding that the BAP's order did not sufficiently alter the status quo to confer jurisdiction upon the Ninth Circuit.

In short, because of the BAP's ruling, a dead case lives again. But this is not a sufficiently significant alteration of the status quo to confer jurisdiction upon the Ninth Circuit? Such a conclusion comports with neither law nor reason.

Application of the relevant principles confirms that the BAP's Order alters the status quo and

sufficiently fixes the rights of the parties to constitute a final, appealable order. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686, 1692 (2015) (noting that an order is final and appealable if it "alters the status quo and fixes the rights and obligations of the parties"); *accord Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 588 (2020); *see also In re SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012) (finding that a bankruptcy order is considered final where it "resolves and seriously affects substantive rights" and "finally determines the discrete issues to which it is addressed").

A review of the procedural history in this matter evidences how the BAP's Order significantly altered the status quo and modified the rights and obligations of the parties. Prior to the BAP Order, the Bankruptcy Court's Order granted QDOS's Motion to Dismiss and "dismissed with prejudice" this involuntary petition. That was the existing "status quo" and the rights and obligations of the parties had been affixed: QDOS was no longer a prospective involuntary debtor, Appellees had no claims against QDOS in the Bankruptcy Court, and the Bankruptcy Court set a hearing and briefing pertaining to whether QDOS was entitled to reasonable attorneys' fees and costs and the extent of such entitlement.

The BAP's Order expressly modified this state of affairs, along with the parties' rights and obligations: as a result of the BAP's Order, the Bankruptcy Court's dismissal of the involuntary petition was reversed. Accordingly, the involuntary petition which was previously dismissed was reinstated. A bankruptcy court order dismissing a bankruptcy case is considered a final, appealable order, and an order affirming or reversing such a final, appealable order

is itself final and appealable. *See, e.g.*, *In re Ingram*, 460 B.R. 904, 906 (6th Cir. BAP 2011) (confirming that an order dismissing a bankruptcy case is a final appealable order); *In re Westwood Shake & Shingle, Inc.*, 971 F.2d 387, 389 (9th Cir. 2012) (noting that if the underlying bankruptcy court order is interlocutory so is the order affirming or reversing it, thus if the underlying order is final, so is the order affirming or reversing). It is hard to imagine an act that more significantly alters the status quo and affects the rights of the parties other than a complete reversal of a dismissal with prejudice. *See also In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000) ("[C]ertain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.").

Furthermore, judicial efficiency will be enhanced through appellate jurisdiction, particularly because if the BAP's Order is reversed and the Bankruptcy Court's Order is reinstated, Appellees' involuntary petition will again be dismissed with prejudice. *In re Landmark Fence Co., Inc.*, 801 F.3d 1099, 1102 (9th Cir. 2015) ("[T]he fluid and sometimes chaotic nature of bankruptcy proceedings necessitates a degree of jurisdictional flexibility."); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case . . . .") (citing *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983). Such a result would require minimal further judicial effort, merely determining the allocation of fees and costs.

Accordingly, the BAP's Order is a final, appealable order and appellate review will serve to expedite future proceedings, particularly in light of the flexibility of appealability in bankruptcy matters.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

I. Summary of Facts

QDOS, Inc. dba Direct Sports Network ("QDOS") is a digital media company which distributes sports programming with a focus on team-produced content. QDOS utilizes a variety of financing methods, including debt and equity funding.

As part of equity funding efforts in 2017, Felice Terrigno ("Terrigno") entered into a Subscription Agreement with QDOS for the purchase of QDOS common stock. Through the Subscription Agreement, QDOS agreed to sell shares to Terrigno, and Terrigno agreed to purchase those shares.

Carl Wiese, as trustee for the Wiese Family Trust dated as of October 31, 2013 ("Wiese"), and Matthew Hayden ("Hayden") loaned money to QDOS, but the specific terms and conditions of those loans were and remain disputed by the parties. Wiese and Hayden alleged that the loans contained maturity dates of January 1, 2018. QDOS alleged that Wiese and Hayden prematurely sought relief as the loans were not yet due and owing and that Wiese and Hayden participated in an August 2017 offering with a term of three years. Furthermore, the documents upon with Wiese and Hayden relied were not executed by QDOS.

Jim Maddox ("Maddox") loaned money to QDOS pursuant to a Promissory Note, as part of QDOS's financing efforts.

On April 6, 2018, Wiese and Hayden filed a Verified Complaint in the Superior Court of the State of California for the County of Orange, entitled *Carl Wiese, Trustee for the Wiese Family Trust, et al. v. QDOS, Inc.*, Case Number 30-2018-00984639-CU-BC-CJC (the "State Court Action"). On May 14, 2018, a First Amended Verified Complaint was filed for the State Court Action, with the addition of Terrigno as a plaintiff.

II. Procedural History

On May 31, 2018, Petitioners Carl Wiese, as trustee for the Wiese Family Trust dated as of October 31, 2013, Matthew Hayden, and Felice Terrigno filed an involuntary petition against a non-individual, QDOS, Inc. On June 22, 2018, QDOS filed a Notice of Motion and Motion to Dismiss Involuntary Petition, alleging that Petitioners failed to state a claim upon which relief can be granted. The hearing on QDOS's Motion to Dismiss was set for August 8, 2018.

On July 24, 2018, Petitioners Carl Wiese, as trustee for the Wiese Family Trust dated as of October 31, 2013, Matthew Hayden, and Felice Terrigno filed an Opposition to QDOS's Motion to Dismiss. On August 6, 2018 – two days prior to the hearing on QDOS's Motion to Dismiss – Jim Maddox ("Maddox") filed a Joinder in Involuntary Petition.

On August 8, 2018, the United States Bankruptcy Court, Central District of California, Santa Ana Division (the "Bankruptcy Court"), Hon. Mark S. Wallace presiding, issued an Order Setting Evidentiary Hearing as a result of Maddox's joinder, instead of making a determination on QDOS's Motion to Dismiss. The Bankruptcy Court set the evidentiary hearing for August 10, 2018, and required

appearances by Petitioning Creditors Carl Wiese, as trustee for the Wiese Family Trust dated as of October 31, 2013, Matthew Hayden, Felice Terrigno, and Jim Maddox (collectively, "Petitioning Creditors").

On August 10, 2018, the Bankruptcy Court issued an Amended Scheduling Order and Continuance of Evidentiary Hearing in an effort to accommodate Petitioning Creditors' unavailability. The Bankruptcy Court set the continued hearing for September 10, 2018 and required appearances by the Petitioning Creditors. The Bankruptcy Court further informed the parties that the Court would consider and receive evidence on the issues of "(a) whether the requirements of 11 U.S.C. § 303(b)(1), as affected by 11 U.S.C. § 303(c), have been satisfied; (b) whether the Court should dismiss this case pursuant to 11 U.S.C. § 305; and (c) whether the Court should dismiss this case as having been filed in bad faith." The Bankruptcy Court ordered that the parties may call witnesses as deemed appropriate, and that only live testimony by witnesses subject to cross-examination would be received. The Bankruptcy Court stated that a Petitioning Creditor's failure to appear would result in striking the creditor from the list of Petitioning Creditors. The Bankruptcy Court set a deadline for additional creditors to join in as petitioning creditors on or before August 31, 2018.

On August 14, 2018, Petitioning Creditors served QDOS with a Request for Production of Documents, and unilaterally demanded responses by August 20, 2018, without any prior court order or approval for such expedited responses. On August 16, 2018, Petitioning Creditors filed an Ex Parte Request for Telephonic Conference re Discovery Matters, seeking

subsequent court approval for its demand of expedited responses and seeking to compel attendance of QDOS's Chief Executive Officer, Richard Gillam ("Gillam"), at the September 10, 2018 hearing.

QDOS opposed Petitioning Creditors' Ex Parte Request, and on August 24, 2018, the Bankruptcy Court issued an Order (1) Prohibiting the Filing of Additional Unauthorized Pleadings and (2) Striking Petitioning Creditors' Ex Parte Request for Telephonic Conference re Discovery Matters. In the Bankruptcy Court's August 24, 2018 Order, the Bankruptcy Court noted that "Petitioning creditors have engaged in a pattern and practice of filing unauthorized pleadings in violation of Rule 9013 and Local Rule 9013-1" including a letter to the Bankruptcy Court dated August 6, 2018 (the first unauthorized pleading), a letter to the Court dated August 9, 2018 (the second unauthorized pleading), and the Ex Parte Request (the third unauthorized pleading). The Bankruptcy Court further stated that the August 31, 2018 deadline for creditors to join the petition was "a reasonable provision preserving the petitioning creditors' ability to add new creditors while at the same time preventing the type of gamesmanship by the petitioning creditors that occurred in connection with the August 8, 2018 hearing."

In connection with QDOS's Motion to Dismiss, the parties each filed a series of briefs and supporting declarations, including Supplemental Declaration of Richard Gillam in Support of QDOS, Inc.'s Motion to Dismiss, QDOS, Inc.'s Supplemental Brief in Support of Motion to Dismiss, Supplemental Brief of Petitioning Creditors in Opposition to Motion to

Dismiss, Supplemental Declaration of Matthew Hayden re Motion to Dismiss, Supplemental Declaration of Carl Wiese re Motion to Dismiss.

On August 29, 2018, the Bankruptcy Court issued an Amendment of Amended Scheduling Order and Continuance of Evidentiary Hearing. In the Amendment, the Bankruptcy Court modified its Amended Scheduling Order such that if a Petitioning Creditor failed to appear in person at the Evidentiary Hearing and submit to cross-examination, the Court would strike any and all declarations signed by that Petitioning Creditor.

On September 18, 2018, the Bankruptcy Court issued an Order re Evidentiary Hearing on Motion to Dismiss, resetting the evidentiary hearing for October 17, 2018. The Bankruptcy Court further ordered that the four Petitioning Creditors along with Gillam were required to appear in person on October 17, 2018 and to be subject to cross-examination. The Bankruptcy Court stated that "The Court will consider and receive evidence on the following issues and matters at the evidentiary hearing: (a) whether the requirements of 11 U.S.C. § 303(b)(1), as affected by 11 U.S.C. § 303(c), have been satisfied; (b) whether the Court should dismiss this case pursuant to 11 U.S.C. § 305; and (c) whether this Court should dismiss this case as having been filed in bad faith."

On October 17, 2018, the Bankruptcy Court held the hearing on QDOS's Motion to Dismiss Involuntary Petition, and the hearing was recorded and subsequently transcribed. The Bankruptcy Court received oral testimony from Michael Tatz, Felice Terrigno, Matthew Hayden, Carl Wiese, and Richard Gillam, as well as a number of exhibits.

On October 31, 2018, the Bankruptcy Court issued a Memorandum Decision and Order on QDOS's Motion to Dismiss. The Bankruptcy Court "conclude[d] that Mr. Terrigno is not a qualified petitioning creditor under 11 U.S.C. § 303(b)(1) because he holds an interest, namely, QDOS common stock, not a claim." As to Petitioning Creditor Maddox, the Bankruptcy Court concluded that "a dispute as to a portion of a claim can be a bona fide dispute as to liability or amount", and that "a bona fide dispute exists as to the amount of the Maddox claim, and therefore that Mr. Maddox is not qualified to be a petitioning creditor in this case".

The Bankruptcy Court alternatively held that Maddox's Proof of Claim was not taken into account based upon "(1) his repeated violations [of] this Court's orders requiring him to appear, despite two re-schedulings of the evidentiary hearing, and (2) violation of QDOS's due process rights to examine him . . . .". The Bankruptcy Court thus concluded that "Petitioning Creditors have failed to meet their burden of proof and therefore the Court determines on these alternative grounds that Mr. Maddox is not qualified to be a petitioning creditor in this case." The Bankruptcy Court did not make a determination on the issues of Petitioning Creditors Wiese and/or Hayden because the elimination of Terrigno and Maddox as qualifying petitioning creditors left only two alleged petitioning creditors remaining, an insufficient number to satisfy the three-creditor rule of 11 U.S.C. § 303(b)(1). The Bankruptcy Court thus granted QDOS's Motion and dismissed the involuntary petition against QDOS with prejudice.

On November 12, 2018, Petitioning Creditors filed a Notice of Appeal and Statement of Election,

pertaining to the October 31, 2018 Bankruptcy Court Order.

On April 25, 2019, Petitioning Creditors/Appellants filed their Opening Brief and Excerpts of Record. On May 23, 2019, QDOS filed its Responsive Brief and Certificate of Service. On June 6, 2019, Petitioning Creditors/Appellants filed their Reply Brief.

On September 26, 2019, the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") heard argument on Petitioning Creditors/Appellants appeal. On November 7, 2019, the BAP issued an Opinion, Judgment, a Notice of Entry of Judgment, and a Letter and Disposition to the Bankruptcy Court. On December 3, 2019, the BAP issued a Mandate to the Bankruptcy Court.

On December 6, 2019, QDOS filed its timely Notice of Appeal from a Judgment or Order of the Bankruptcy Appellate Panel to the United States Court of Appeal for the Ninth Circuit. On March 5, 2020, QDOS filed its Opening Brief and Excerpts of the Record. On May 8, 2020, Petitioning Creditors filed their Appellees' Brief and Supplemental Excerpts of the Record. On July 26, 2020, QDOS filed its Reply Brief.

On November 30, 2020, the Ninth Circuit issued a Memorandum. On December 22, 2020, the Ninth Circuit issues a Mandate.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

As the Court addressed in *Ritzen* and *Bullard*, the lack of a uniform standard for determining what constitutes finality in the bankruptcy appeals context

undermines confidence in the bankruptcy system and may lead to inequitable, inefficient results. At a time when courts of appeals are increasing their use of sanctions against a party who prosecutes a frivolous appeal, the attorney who litigates regularly in bankruptcy matters is often left without a clue as to what a circuit court of appeals and what a particular panel within that circuit court will do with an appeal. *See Ritzen*, 140 S. Ct. at 588, 205 L. Ed. 2d at 419 ("We granted certiorari to resolve whether orders denying relief from bankruptcy's automatic stay are final, therefore immediately appealable under § 158(a)(1).") Especially in the bankruptcy context, it is more economical and efficient to resolve issues on appeal when they arise, rather than having the bankruptcy process continue to move forward—under the assumption that some particular dispute has been resolved— only to have the result of the resolution reversed much later, and events to the dispute or agreements based on that resolution potentially unwound.

In this specific context, resolution of the question of whether a Bankruptcy Appellate Panel's order reversing a Bankruptcy Court's dismissal of an involuntary petition constitutes a final, appealable order has significant practical consequences, including whether a debtor is forced to continue to litigate an involuntary petition, increasing costs and depreciating the value of assets, in after a case dismissed with prejudice is revived by an appellate court, as well as determining the manner in which adversary claims will be adjudicated, *see* 11 U. S. C. § 502 (permitting summary adjudication or estimation of amounts due in bankruptcy claims adjudication). Disposition of this issue will enable

bankruptcy courts and related appellate adjudication to avoid significant delays and even more significant inefficacies. *Bullard*, 575 U. S. at 504 ("As we see it, classifying as final all orders conclusively resolving stay-relief motions will avoid, rather than cause, "delays and inefficiencies."). These are not matters of minor detail; they can significantly increase creditors' costs. *Ritzen*, 140 S. Ct. at 590. Rather, permitting the Circuit Court's finding that such an order reversing a bankruptcy court's dismissal of an involuntary petition may, *inter alia*, delay collection of a debt or cause collateral to decline in value. *See id.*

Immediate appeal, if successful, will permit both debtors and creditors to establish their rights expeditiously outside the bankruptcy process, affecting the relief sought and awarded later in the bankruptcy case (or the avoidance of fees incurred as a result of further proceedings in the bankruptcy case). Under the Ninth Circuit's interpretation of Section 158(a) with respect to orders reversing a bankruptcy court's dismissal of an involuntary petition, debtors face an even more elementary and practical concern: if denial orders – and a Circuit court's potential reversal of the same – are not final, there will be no effective means for a debtor to obtaining appellate review of the denied proposal. In other words, the rule the Ninth Circuit applied finding such orders nonfinal would force debtors who won dismissal with prejudice to "fully litigate their claims in bankruptcy court and then, after the bankruptcy case is over, appeal and seek to redo the litigation all over again in the original court." *See id.* at 591 (internal citations omitted); *see also Bullard*, 575 U.S. at 503 (""When [a bankruptcy plan]

confirmation is denied and the case is dismissed as a result, the consequences are similarly significant."). Sometimes, a question "will be important enough that it should be addressed immediately." *Bullard*, 575 U.S. at 508. The question presented by QDOS in this appeal fits that standard.

Moreover, the question presented on appeal here involves a matter of public importance and a question of law that neither the circuit court nor the Supreme Court has specifically addressed, and involves an immediate appeal from an order that may materially advance the progress of the case or proceeding in which the appeal is taken – thereby increasing the importance of appellate jurisdiction and uniformity. *See* 28 U.S.C. § 158(d)(2)(A)(i)-(iii). The flexible finality doctrine has been in a state of flux. Historically, a majority of circuits would analyze (i) whether the specific order in question materially impacted or determined a substantive issue that would have material impact on, a party's substantive rights and (ii) whether appeal could be meaningfully postponed. *See e.g., England v. Fed. Deposit Ins. Corp. (In re England)*, 975 F.2d 1168, 1171 (5th Cir. 1992) (holding that an order granting or denying an exemption is a final order); *United States v. Durensky (In re Durensky)*, 519 F.2d 1024, 1029 (5th Cir. 1975) (holding that the right of appeal turned on whether the order possessed "definitive operative finality"). Application of the flexible finality doctrine led to a variety of results. *See, e.g., In re Ross-Tousey*, 549 F.3d 1148, 1152-53 (7th Cir. 2008) (holding that an order denying a motion to dismiss a chapter 7 case for abuse under the means test is a final order); *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 837 (9th Cir. 2008) (holding that a determination on

whether the appellant had a conflict of interest and therefore was statutorily precluded from serving as a chapter 7 trustee was a final order); *In re BH&P, Inc.*, 949 F.2d 1300, 1307 (3d Cir. 1991) (same); *Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987) (holding that a factual determination in an order denying a debtor's motion to remove a trustee had preclusive effect in a subsequent proceeding); *In re Olson*, 730 F.2d 1109 (8th Cir. 1984) (holding that an order overruling an objection to a claim is a final order); *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444-46 (1st Cir. 1983) (holding that an order determining creditor priority is a final order); *City Nat'l Bank & Trust Co. v. Charmar Inv. Co. (In re Charmar Inv. Co.)*, 475 F.2d 560, 563 (6th Cir. 1973) (holding, under the Bankruptcy Act, that an order that determined the movants did not qualify as creditors was final for the purpose of appeal because it conclusively determined the parties' status as creditors). A minority of circuits, however, have categorically rejected the flexible finality doctrine. *See, e.g., In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013); *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982).

Although the Court addressed some aspects of the finality doctrine in *Bullard* and *Ritzen* to define the outer contours of how the flexible finality doctrine applied in bankruptcy, its analysis and decisions in those cases focused on the nature of the proceeding from which the putative appeal would arise, rather than the actual impact of the order. Those two concepts — the nature of the proceeding and the impact on the legal status quo — are not necessarily congruent. Unlike in garden variety civil litigation, a party's substantive rights may be impacted at different stages throughout the bankruptcy process

and in different ways; it is the character of the bankruptcy court's order that has traditionally mattered, not the procedural context in which it arises. *See England*, 975 F.2d at 1171; *In re Bartree*, 212 F.3d 277, 283 (5th Cir. 2000). Although the Court partially clarified its holding in *Bullard* through its holding in *Ritzen*, the impact of *Bullard* is still being felt, such that further clarification in this case is warranted. *Cf. Germeraad v. Powers*, 826 F.3d 962 (7th Cir. 2016) (Seventh Circuit refused to extend *Bullard* in determining that an order denying a motion to modify a confirmed chapter 13 plan was a final, appealable order); *but cf. Wolff v. Sender (In re Wolff)*, No. 16-016 (B.A.P. 10th Cir. July 18, 2016) (unpublished) (Tenth Circuit BAP held that, under *Bullard*, a bankruptcy court order that (i) approved the employment of a property broker and (ii) determined that certain of the debtors' properties were property of the estate was not a final, appealable order). With respect to reversal of a bankruptcy court's dismissal of an involuntary petition, a clear answer is needed. *See S.S. Body Armor I. Inc.*, 18-2558, 2019 BL 234018 (3d Cir. June 25, 2019) (Third Circuit takes a "relaxed, pragmatic, and functional view of finality" such that a denial of a stay that was "not technically a final judgment" was indeed final in a "practical sense" because external factors would render the appeal moot and prevented the court from later reaching the merits absent a stay).

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case concerns a "discrete, controlling question of law" that is "not heavily dependent on the particular facts of a case." *Weber v. United States*, 484 F.3d 154, 158 (2d Cir. 2007). The issue presented

here is narrow and applies to a specific, recurring pattern of cases in which an appellate court issues an order reversing a bankruptcy court's dismissal of an involuntary petition. Resolution of this case has tremendous precedential value while minimizing potential confusion or likelihood of disparate applications between or among Circuit courts.

Notably, the Court has recently addressed similar, equally discrete issues of the finality doctrine within the bankruptcy context to delineate specific rules and general guidance to debtors and creditors. *See generally Bullard*, 575 U.S. 496 (bankruptcy court's order denying confirmation of a proposed repayment plan with leave to amend is not a "final" order that the debtor can immediately appeal); *Ritzen*, 140 S. Ct. 582 (bankruptcy court's order unreservedly denying relief from the automatic stay constitutes a final, immediately appealable order). Likewise, the Court has addressed several contours of the finality doctrine outside the bankruptcy context. *See Daimler AG v. Bauman*, 571 U. S. 117, 124–125 (2014) (dismissal for want of personal jurisdiction ranks as a final decision); *United States v. Wallace & Tiernan Co.*, 336 U. S. 793, 794–795, n. 1 (1949) (dismissal for improper venue, or under the doctrine of forum non conveniens, constitutes final decision); *see also* 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§3914.6, 3914.12 (2d ed. 1992 and Supp. 2019) (collecting cases on appealability of dismissal without prejudice to filing in another forum). Because the Court has not yet weighed in on the particular issue addressed by this appeal, but has made rulings on other issues touching on the same issue of law within and outside of the bankruptcy context, it should accept this appeal both to clear confusion and to

maintain uniformity in the issue of finality and appealability. *See Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U. S. 863, 868 (1994) ("As we have held in another context, "the issue of appealability" should "be determined for the entire category to which a claim belongs.").

Moreover, the issue presented in this appeal will have a wide-ranging effect that will ripple through bankruptcy and Circuit courts, promoting efficiency and uniformity among the Circuits as to the rights of debtors and creditors litigating involuntary petitions and define the legal effect of a bankruptcy court's dismissal of such involuntary petitions. Such clarification will affect the manner in which adversary claims such as involuntary petitions will be adjudicated and help to inform the parties decisions of how to litigate (and appeal) such petitions. Importantly, resolution of this straightforward question of procedure will significantly affect costs incurred by successful debtors in involuntary petition litigation. *See Ritzen*, 140 S. Ct. at 590 ("These are not matters of minor detail; they can significantly increase creditors' costs."). On the other hand, like the issue presented in *Ritzen*, an unsuccessful creditor's right to immediate appeal, if successful, will "permit creditors to establish their rights expeditiously outside the bankruptcy process, affecting the relief sought and awarded later in the bankruptcy case." *Id.* at 591. Without further clarification from the Court, the rule the Ninth Circuit promulgated below would force debtors who achieved dismissal with prejudice of involuntary petitions who later were reversed by an appellate court "to fully litigate their claims in bankruptcy court and then, after the bankruptcy case is over,

appeal and seek to redo the litigation all over again in the original court." *Id.* This is neither practical nor uniform among the Circuit – making this appeal an ideal vehicle for the Court to address these concerns and to guide lower courts in the application of recent Supreme Court decisions addressing similar finality applications in the bankruptcy context.

III. THE NINTH CIRCUIT'S DECISION WAS INCORRECT.

Finally, the Ninth Circuit's decision merits review because it is wrong, as set forth in greater detail below.

A. The Bankruptcy Appellate Panel's Order Is An Appealable Order.

Application of the relevant principles confirms that the BAP's Order alters the status quo and sufficiently fixes the rights of the parties to constitute a final, appealable order. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686, 1692 (2015) (noting that an order is final and appealable if it "alters the status quo and fixes the rights and obligations of the parties"); *accord Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 588 (2020); *see also In re SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012) (finding that a bankruptcy order is considered final where it "resolves and seriously affects substantive rights" and "finally determines the discrete issues to which it is addressed").

A review of the procedural history in this matter evidences how the BAP's Order significantly altered the status quo and modified the rights and obligations of the parties. Prior to the BAP Order, the Bankruptcy Court's Order granted QDOS's Motion to Dismiss and "dismissed with prejudice" this involuntary petition. That was the existing "status

quo" and the rights and obligations of the parties had been affixed: QDOS was no longer a prospective involuntary debtor, Appellees had no claims against QDOS in the Bankruptcy Court, and the Bankruptcy Court set a hearing and briefing pertaining to whether QDOS was entitled to reasonable attorneys' fees and costs and the extent of such entitlement.

The BAP's Order expressly modified this state of affairs, along with the parties' rights and obligations: as a result of the BAP's Order, the Bankruptcy Court's dismissal of the involuntary petition was reversed. Accordingly, the involuntary petition which was previously dismissed was reinstated. A bankruptcy court order dismissing a bankruptcy case is considered a final, appealable order, and an order affirming or reversing such a final, appealable order is itself final and appealable. *See, e.g.*, *In re Ingram*, 460 B.R. 904, 906 (6th Cir. BAP 2011) (confirming that an order dismissing a bankruptcy case is a final appealable order); *In re Westwood Shake & Shingle, Inc.*, 971 F.2d 387, 389 (9th Cir. 2012) (noting that if the underlying bankruptcy court order is interlocutory so is the order affirming or reversing it, thus if the underlying order is final, so is the order affirming or reversing). It is hard to imagine an act that more significantly alters the status quo and affects the rights of the parties other than a complete reversal of a dismissal with prejudice. *See also In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000) ("[C]ertain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.").

Furthermore, judicial efficiency will be enhanced through this Court's jurisdiction, particularly because if the BAP's Order is reversed and the Bankruptcy Court's Order is reinstated, Appellees' involuntary petition will again be dismissed with prejudice. *In re Landmark Fence Co., Inc.*, 801 F.3d 1099, 1102 (9th Cir. 2015) ("[T]he fluid and sometimes chaotic nature of bankruptcy proceedings necessitates a degree of jurisdictional flexibility."); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case . . . .") (citing *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983). Such a result would require minimal further judicial effort, merely determining the allocation of fees and costs. Accordingly, the BAP's Order is a final, appealable order and appellate review will serve to expedite future proceedings in this matter, particularly in light of the flexibility of appealability in bankruptcy matters.

B. Section 303(b)(1)'s Numerosity Requirement Was Correctly Applied By the Bankruptcy Court.

The BAP incorrectly considered the record and requirements of Section 303, as the uncontroverted evidence demonstrated that QDOS had far more than twelve qualified claim holders. Contrary to the BAP's Opinion, the declaration of Richard Gillam, QDOS's CEO, was not the only information that QDOS provided about its creditors: Gillam testified that QDOS had "between 40 and 50" claim holders, entities that QDOS owed money to and did not dispute those claims, and the Bankruptcy Court thus

expressly found that Section 303(b)(2) was inapplicable.

Section 303(b)(1) requires "three or more entities" to join an involuntary petition if a debtor has twelve or more such creditors. It was thus the proper purview of the Bankruptcy Court to determine how many creditors QDOS had as a jurisdictional matter because if QDOS had twelve or more creditors, but only two joined the petition, then the Bankruptcy Court would be precluded from hearing the involuntary petition. *See generally In re Petro Fill, Inc.*, 144 B.R. 26, 29 (Bankr. W.D. Pa. 1992) (noting that "contested involuntary petition[s] must be carefully scrutinized because such an action is extreme in nature and carries with it serious consequences for the alleged debtor, such as a loss of credit standing, interference with its general business affairs, and public embarrassment"). While single creditor involuntary petitions are possible, such petitions are permitted only in the case where there are fewer than twelve creditors, in an attempt to alleviate the potential for abuse by creditors. 11 U.S.C. § 303(b)(2); *In re Skye Marketing Corp.*, 11 B.R. 891, 897 (Bankr. E.D. N.Y. 1981).

Petitioning Creditors had the "burden of proving that [they] satisfied the jurisdictional requirements of § 303(b)" and the burden "to show that no bona fide dispute exists." *In re Charon*, 94 B.R. 403, 406 (Bankr. E.D. Va. 1988); *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2001); *In re Colon*, 474 B.R. 330, 387 (Bankr. D. P.R. 2012). Petitioning Creditors failed to present any evidence to satisfy the statutory requirement of Section 303(b)(1), and instead, QDOS presented evidence of far more than twelve claim holders. *See Atlas Machine & Iron*

Works v. Bethlehem Steel Corp., 986 F.2d 709, 715-716 (4th Cir. 1993) (finding that the petitioner has the burden of proving compliance with statutory requirements for an involuntary petition). Furthermore, the BAP acknowledged that "we have evidence in the record of 11 creditors exclusive of Mr. Terrigno and Mr. Maddox", that "[i]t seems likely that more exist," and that testimony asserted that QDOS "had 40 to 50 creditors."

Petitioning Creditors thus failed to satisfy their burden on the jurisdictional requirements of Section 303(b), and it was proper for the Bankruptcy Court to impose Section 303(b)(1) as a result of the evidence presented by QDOS. Furthermore, it was proper for the Bankruptcy Court to consider matters outside of the pleadings pursuant to Federal Rule of Civil Procedure 12(d) and Federal Rule of Bankruptcy Procedure 7012, which permit courts to treat Rule 12(b)(6) motions as motions for summary judgment. The BAP's claim that the Bankruptcy Court was using "shorthand" when treating the proceedings in this manner disregarded these procedures and the materials permissible for review by a trial court pursuant to Rule 12 and specifically Rule 12(d).

Upon proper consideration of the matters both inside and outside of the pleadings, and with the parties having had ample opportunity to present pertinent materials, the Bankruptcy Court implicitly found no genuine dispute as to the number of QDOS's creditors by granting QDOS's motion. The BAP did not find any abuse of discretion by the Bankruptcy Court in making this determination – the BAP instead overlooked or disregarded the undisputed record when it claimed QDOS failed to present evidence about its creditors. Such an error warrants

reversal as the Bankruptcy Court applied the correct law and procedure to the evidence presented in these proceedings.

C. No Trial Occurred For This Matter.

This issue presents itself less as a result of an express ruling by the BAP, and instead because of the BAP's mischaracterization of the underlying procedures followed by the Bankruptcy Court. It is true that the Bankruptcy Court considered matters extrinsic to the pleading – as expressly permitted by Rule 12(d) and ample legal authority – yet the BAP's apparent understanding was that such consideration inherently turned the Rule 12(b)(6) motion into a *trial*. *See, e.g.*, *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007) (noting that a court has "discretion to accept and consider extrinsic materials offered in connection with" a motion to dismiss). The BAP offered no authority for this leap in logic and procedure, which was in direct contrast to the Bankruptcy Court's express statements. It is shocking that the BAP's Opinion did not once mention Rule 12(d), which provides for consideration of "matters outside the pleadings." In this light, though, it is less surprising that the BAP misconstrued the Bankruptcy Court's proceedings as the BAP overlooked this critical component of Rule 12.

The Bankruptcy Court did not make this egregious error. In ordering the *evidentiary hearing*, the Bankruptcy Court stated that "[t]o the extent necessary to permit the Court to properly receive evidence in connection with the motion to dismiss, the Court will treat the motion to dismiss as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(d) and Federal Rule of Bankruptcy

Procedure 7012." Throughout the Bankruptcy Court's Order on the Motion to Dismiss, the Bankruptcy Court consistently and correctly referred to the hearing as an "evidentiary hearing" and never claimed that the matter was a "trial". Yet inexplicably the BAP claimed, "The bankruptcy court correctly recognized that it could not resolved the issues without a trial" and misclassified the Bankruptcy Court's express statements by reading them "as shorthand."

Pursuant to these accepted procedures, the Bankruptcy Court properly received oral evidence, to the extent necessary, just as it could receive written evidence in connection with a motion for summary judgment. Contrary to the BAP's conclusion, accepting matters extrinsic to the pleadings does not convert a motion to dismiss into a trial; Rule 12(d) establishes that such acceptance means the motion to dismiss is treated as a summary judgment motion. *See, e.g.*, *Hamilton Materials, Inc.*, 494 F.3d at 1207 (noting that a court has "discretion to accept and consider extrinsic materials offered in connection with" a motion to dismiss). Having permitted the parties to present evidence and having received such evidence, the Bankruptcy Court implicitly determined that no triable issue of material fact existed as to the number of QDOS's creditors and as to the purported claims of Maddox and Terrigno, and the Bankruptcy Court thus granted QDOS's motion.

The Bankruptcy Court followed the standard procedural path and did not "leap over" any procedural elements: QDOS filed a Rule 12(b)(6) motion as an initial, permitted action and the Bankruptcy Court ruled on that motion consistent with Rule 12(b), 12(d), and the Bankruptcy Rule

counterparts. The Bankruptcy Court did not negate the requirement of an answer and creditor list as those requirements never came into effect in this case because the Bankruptcy Court granted QDOS's Rule 12(b)(6) motion and dismissed the involuntary petition. No trial was necessary, no trial occurred, and the BAP's determinations to the contrary were in error.

D. QDOS Was Not Required To File An Answer Or A Rule 1003(b) List.

Similar to the BAP's incorrect determination that the Bankruptcy Court held a "trial", the BAP's determination pertaining to an answer and Bankr. Rule 1003(b) incorrectly stated that "the bankruptcy court implicitly denied QDOS's Civil Rule 12(b)(6) motion." The Bankruptcy Court made the exact opposite ruling: it granted QDOS's motion. As such, Rule 12(a)(4)(A)'s provisions did not apply because the Bankruptcy Court neither denied the motion nor postponed its disposition until trial. QDOS was accordingly never required to file an answer. *Modrowski v. Pigatto*, 712 F.3d 1166, 1170 (7th Cir. 2013) ("[S]erving a Rule 12 motion tolls the deadline for a defendant to file an answer . . . .").

A plain reading of Bankr. Rule 1003(b) confirms that a list of creditors is only required "[i]f the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors." (emphasis added). By definition, a Rule 12(b) motion is neither an answer nor a pleading. Fed. R. Civ. P. 7(a); *Parker v. United States*, 110 F.3d 678, 682 (9th Cir. 1997); *Gates v. Syrian Arab Republic*, 646 F.3d 1, 5 (D.C. Cir. 2011). Tenets of statutory construction confirm that this unambiguous language is conclusive, and that Congress meant Bankr. Rule

1003(b) to apply only to answers. *See Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102, 108 (1980) ("We begin the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ."). If Congress intended Bankr. Rule 1003(b) to require a list of creditors when an answer, a pleading, or a motion averring the existence of 12 or more creditors was filed, it could have so stated. It chose not to, and courts must adhere to the unambiguous language of the law. *See Montana Dep't of Revenue v. Blixseth*, 581 B.R. 882, 889 (D. Nev. 2017) (finding that Fed. R. Bankr. P. 1003(b) "did not apply because [the alleged debtor] filed a motion to dismiss the involuntary petition, not an answer").

A Rule 12(b) motion tolls the time for filing an answer. Fed. R. Civ. P. 12(a)(4)(A); *Modrowski v. Pigatto*, 712 F.3d 1166, 1170 (7th Cir. 2013) ("[S]erving a Rule 12 motion tolls the deadline for a defendant to file an answer . . . ."). Federal Rules of Bankruptcy Procedure 1011(c) and 7012(a) mirror this standard and contemplates a two-step process, as is typical with Rule 12(b) motions: if the Rule 12(b) motion is denied, the time for filing and serving a responsive pleading – an answer – is extended.

Again, since QDOS's Rule 12(b)(6) motion was not denied, the deadline for QDOS to file an answer never materialized. The BAP disregarded these procedures and tenets of statutory construction to strain its analysis, relying upon a purportedly "sensible solution" that defies the language of the law and determining that QDOS was required to file an answer and a Bankr. Rule 1003(b) list, despite the Bankruptcy Court's express granting of QDOS's motion to dismiss.

Thus, the Bankruptcy Court properly determined that QDOS was not required to file an answer (as the Bankruptcy Court properly dismissed the involuntary petition based upon the lack of a sufficient number of joining qualified creditors) and that QDOS was not required to file a list of creditors (as QDOS did not file an answer). Accordingly, the BAP erred in finding that QDOS was required to answer and file a Bankr. Rule 1003(b) list.

E. Discovery Was Premature And Petitioning Creditors Were Not Entitled To Any Such Discovery.

The BAP's Opinion correctly states that "discovery is generally inappropriate while a Civil Rule 12(b)(6) motion is pending." *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012) ("[W]hen a plaintiff presses an implausible claim, lack of access to evidence does not save the complaint."); *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (noting that a court may "stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief"). Rule 26(f) was not implicated and no initial disclosures were required nor exchanged as there was never any scheduling conference ordered by the Bankruptcy Court given the early stage of the

proceedings. *See* Fed. R. Civ. P. 26(f)(1) (noting that the parties must confer "at least 21 days before a scheduling conference is to be held . . . .").

Despite correctly identifying the legal standard, the BAP erred based upon its incorrect presumption that the Bankruptcy Court "implicitly" denied QDOS's motion to dismiss and concluded that a trial was necessary. The Bankruptcy Court expressly *granted* QDOS's Rule 12(b)(6) motion to dismiss and never found that a trial was necessary. The Rule 12(b)(6) motion remained pending until it was granted; it was never denied nor was its determination postponed, and Petitioning Creditors' delayed attempt to seek discovery while the motion was pending was inappropriate. Discovery would not and could not have remedied the fact that Maddox and Terrigno were not qualified creditors, and discovery was thus wholly premature and inappropriate as Petitioning Creditors brought an implausible claim.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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