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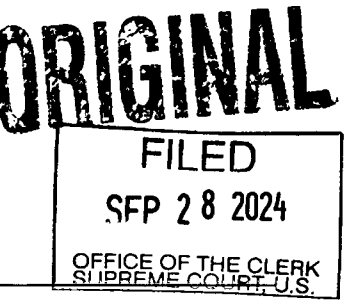

SUPREME COURT OF THE UNITED STATES

Andrew John Delaney,

Petitioner,

v.

Gregory Messer, In his capacity as Trustee,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Andrew J. Delaney
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QUESTIONS PRESENTED

Whether the Court should resolve the split between the United States Court of Appeals for the Ninth Circuit, *In re Victoria Station, Inc.* and *In re: Aspen Skiing Co. v. Cherrett (In re Cherrett)*, and the United States Court of Appeals for the Second Circuit in this case, *Delaney v. Messer*, as to whether a bankruptcy court's denial of a debtor's motion to voluntarily dismiss a chapter 7 case under § 707(b) of the Bankruptcy Code is a final appealable order pursuant to 28 U.S.C. § 158.

Whether treating the denial of a motion to dismiss as a non-final order violates the Bankruptcy Code by forcing the debtor to potentially wait years until the bankruptcy case is over, at which point the issue will be moot because the case will end in either a discharge or a dismissal.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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PETITION FOR WRIT OF CERTIORARI

Andrew John Delaney respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix to the petition at 3 and is unpublished.

The order of the district court appears at Appendix to the petition at 14 and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided the petitioner's case was August 8, 2024.

A timely petition for rehearing was denied by the United States court of appeals on the following date: September 6, 2024, and a copy of the order denying rehearing appears at Appendix at 2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), the petitioner having timely filed this petition for a writ of certiorari within ninety days of the circuit court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 109

11 U.S.C. chapter 7

28 U.S.C. § 158

28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

The issue in this petition is whether a bankruptcy court's denial of a debtor's motion to voluntarily dismiss a chapter 7 case under § 707(b) of the United States Code (the "Bankruptcy Code") is a "final order" pursuant to under 28 U.S.C. § 158.

28 U.S.C. § 158 (a) provides that the district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees.

Although not specifically provided for in § 707(a) of Title 11 of the Bankruptcy Code, a debtor may move for dismissal of a voluntarily filed case under chapter 7. Under 11 U.S.C. § 707(a), a court may dismiss a chapter 7 bankruptcy case for cause. A chapter 7 debtor has the *right* to voluntarily dismiss his own chapter 7 case, although the right is not absolute.

The petitioner is a disabled pro se senior who had an excellent credit history for over 40 years. He only had $44,000 in unsecured credit card debt from two financial institutions. He should never have filed for chapter 7 in the first place and has no interest in bankruptcy or a discharge. He has agreed to repay the two creditors.

The petitioner is a United States citizen who was judicially determined by the United States Court of Appeals for the Eleventh Circuit, after an evidentiary hearing in the United States District Court for the Southern District of Florida, to have been a resident and domiciliary of the Republic of the Philippines for decades. *Delaney v. Daily Journal Corp.*, Case No. 22-10788 (11th Cir. 2022). He is not a resident of the United States and is not eligible for bankruptcy. 11 U.S.C. § 109.

The petitioner filed for bankruptcy based on incorrect legal advice from Upsolve, Inc. ("Upsolve"), which has a pending appeal against it filed by the New York State attorney general the Hon. Letitia A. James for unauthorized practice of law. *Upsolve, Inc. v. James*, Case No. 0:22-cv-01345 (2d Cir. filed June 22, 2022).

Starting only two months after he filed for chapter 7, the petitioner immediately moved to voluntarily dismiss the case. The petitioner believes he could better obtain a fresh start outside of bankruptcy. The bankruptcy court denied the petitioner's motion stating that the debtor's "fresh start" was "not the standard" in deciding a motion to dismiss. Actually, the debtor's fresh start *is* not only the standard but the *central* consideration in whether a bankruptcy court should grant a debtor's motion to dismiss.[1]

The petitioner filed five motions to voluntarily dismiss the chapter 7 case all of which were denied by the bankruptcy court. There was no reason to deny it. The petitioner filed the motion immediately after filing for chapter 7, neither creditor had taken collection actions against the petitioner prior to the filing, neither creditor objected to discharge or to the dismissals, and there was no issue of abuse of the automatic stay, which the petitioner had moved to lift but which the trustee requested him to withdraw.

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[1] According to St. John's University School of Law, "The most important factor that the bankruptcy court takes into account in considering the debtor's voluntary motion to dismiss his own bankruptcy case is 'whether the debtor is able to secure an effective fresh start' outside of bankruptcy. *See Smith v. Geltzer (In re Smith)*, 507 F.3d 64, 72 (2d. Cir. 2007) ('Smith')." In "Can a Consumer Debtor Voluntarily Dismiss Own Chapter 7 Bankruptcy Case?," 8 St. John's Bankr. Research Libr. No. 26 (2016) at 4.

The petitioner appealed the bankruptcy court's denial of the petitioner's fifth motion to dismiss.

The whole purpose of chapter 7 is to provide the debtor with a "fresh start". According to the Department of Justice Handbook, the trustee is not allowed to proceed with a chapter 7 case where only the trustee and his lawyers will benefit, as is the case here.[2]

On appeal, the district court conceded that: "The Second Circuit has not definitively ruled that a bankruptcy court's denial to dismiss a bankruptcy petition constitutes a final order." APX at 34. Nevertheless, the district court ruled that the denial of the petition's motion to dismiss was not a final appealable order and treated his appeal as a motion for leave to file an interlocutory appeal which it then proceeded to deny.

The United States Court of Appeals for the Second Circuit (the "Second Circuit") directed the parties "to brief, among any other issues, whether the bankruptcy court's order denying Appellant's motion to dismiss his bankruptcy petition was a final, appealable order." APX at 13.

The petitioner argued that his appeal to the Second Circuit was of a final judgment, order, or decree. The petitioner cited to the Second Circuit's *own*

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[2] The DOJ Handbook for Chapter 7 Trustees clearly states: "A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. The trustee must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case. 28 U.S.C. § 586."
https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials/

precedents where it treated the denial of a debtor's motion to dismiss as a final order and reversed the bankruptcy court. *Smith v. Geltzer (In re Smith)*, 507 F.3d 64 (2nd Cir. 2007). In *In re Smith*, the Second Circuit held that: "However, we also hold on the present record that the Court exceeded the bounds of its allowable discretion in denying the debtor's motion to dismiss." *See also In re Barbieri v. RAJ Acquisition Corp.*, 199 F.3d 616 (2nd Cir. 1998). The Second Circuit never explained why it was reaching the opposite conclusion as to finality in *Delaney* as it did in *In re Smith*.

This Court has held that a bankruptcy court decision is final when it definitively disposes of "a discrete procedural unit within the embracive bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020).

The approach to finality under 28 U.S.C. § 158 is "pragmatic". *In re Perl*, 811 F.3d 1120 (9th Cir. 2016). It is a more flexible standard than under 28 U.S.C. § 1291.

Thus, there is a now a split in the circuit courts. The United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") has found an order denying a motion to dismiss a case under § 707(b) to be final. *In re: Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060 (9th Cir. 2017). *In re Cherrett* is particularly applicable here since one of the issues in the *Delaney* case is the petitioner's eligibility to file for chapter 7: "Here, the bankruptcy court's order resolved the Cherretts' ability to file a Chapter 7 bankruptcy petition.... We thus hold that the bankruptcy court's order denying Aspen's motion to dismiss under §

707(b) was final and appealable to this court." *Id.* at 1065-66. *See also In re Victoria Station, Inc.*, 840 F.2d 682, 683 (9th Cir. 1988).

Due to the petitioner's inability to appeal the denial of his motions to dismiss, the trustee has been able to drag out the petitioner's chapter 7 case for *four years*.

The procedural history is that on December 23, 2020, Upsolve, a non-attorney bankruptcy firm, filed a chapter 7 petition on behalf of the petitioner in the bankruptcy court.

Starting two months after Upsolve filed the petition, on March 12, 2021, September 21, 2021, November 24, 2021, February 28, 2022, and June 22, 2022 (this case), the petitioner filed five motions to voluntarily dismiss the chapter 7 case, all of which were denied by the bankruptcy court.

On August 8, 2022, the bankruptcy court denied the petitioner's fifth motion to dismiss. APX at 40.

On August 10, 2022, the petitioner filed a notice of appeal of the bankruptcy court's order dated August 8, 2022 to the district court.

On March 20, 2023, the district court denied the petitioner's "interlocutory appeal". APX at 14.

On March 24, 2023, the petitioner filed a notice of appeal to the Second Circuit.

On April 13, 2023, the Second Circuit consolidated the petitioner's four bankruptcy appeals as 23-434 (L), 23-436, 23-439, and 23-442.

On July 12, 2023, the Second Circuit ordered case 23-434 (this case) to proceed and further ordered that: "The parties are directed to brief, among any other issues, whether the bankruptcy court's order denying Appellant's motion to dismiss his bankruptcy petition was a final, appealable order." APX at 13.

On August 8, 2024, the panel issued its opinion that it lacked appellate jurisdiction and dismissed the petitioner's appeal. APX at 3.

On September 6, 2024, the Second Circuit denied the petitioner's petition for rehearing en banc. APX at 2.

On September 13, 2024, the Second Circuit issued the mandate. APX at 1.

REASONS FOR GRANTING THE PETITION

I. The bankruptcy court's denial of a motion to dismiss is a final order.

The issue of whether a bankruptcy order is a "final order" and appealable has, until now, resulted in fairly consistent jurisprudence across the circuits. This is based on the circuit courts looking to each other to create a more or less uniform federal bankruptcy law system. For example, dismissal of a bankruptcy case, *In re Anderson*, 397 B.R. 363, 365 (6th Cir. BAP 2008) (chapter 7), an order on objection to exemption, and relief or modification of the automatic stay are final. On the other hand, an order denying disqualification of counsel, an order denying removal of a trustee for cause, and an order withdrawing or declining to withdraw a reference are non-final. The consequence of inconsistency in the circuits is that a debtor will be treated differently depending on where he or she files the case. Also, it will be important to debtors to know whether or not they will be able to voluntarily dismiss the case before they make the decision to file.

II. There is now a split between the Second Circuit and the Ninth Circuit.

Up until now, all of the caselaw, including in the Second Circuit, was that the denial of a motion to dismiss is a final order. But now, the Second Circuit has not followed the Ninth Circuit's precedents and, without stating so directly, overturned its own precedents. In *In re Smith*, the Second Circuit held that it was a final order. In *Delaney*, it held that it wasn't.

III. *Ritzen* supports review of this case.

In 2020, this Court stepped in to hold that a bankruptcy court order granting or denying relief from the automatic stay is a final order that is immediately appealable. *Ritzen supra.*

Given that there was a circuit split, the Court granted certiorari.

The issue the Court addressed was: "Does a creditor's motion for relief from the automatic stay initiate a distinct proceeding terminating in a final, appealable order when the bankruptcy court rules dispositively on the motion?"

In answering "yes", this Court analyzed what constitutes a "final decision" that is immediately appealable in the context of a bankruptcy case. A bankruptcy case involves numerous "individual controversies" that would exist as independent lawsuits if they were not being adjudicated as part of a bankruptcy proceeding. In a bankruptcy proceeding, discrete controversies are often definitively resolved while the overall bankruptcy case remains pending. This Court explained that a blanket rule that prevented immediate appeals of discrete, controversy-resolving decisions in bankruptcy cases would, for a number of reasons, unduly delay such proceedings.

The issue is similar here. As in *Ritzen*, allowing the petitioner's appeal to proceed will allow the creditors to establish their rights quickly outside the bankruptcy process and would avoid delays, rather than cause them.

IV. The case presents an issue of national importance.

500,000 Americans file for chapter 7 every year. Yet the Second Circuit's decision in *Delaney* closes yet another door on the rights of debtors. The

Bankruptcy Code clearly intended that debtors should have the right to appeal orders on motions to dismiss before they are moot.

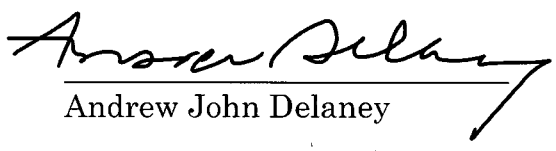
If the *Delaney* decision stands, a debtor in the Second Circuit will effectively never be able to appeal the denial of a voluntary dismissal of a chapter 7 case. This is because a chapter 7 case ends in either a discharge or a dismissal, so that the issue will be moot by the time the case is concluded and deemed to be "final".

Finally, if chapter 7 is truly beneficial to debtors, there is no reason why it has to be "shoved down their throats" against their will. It goes against the definition of a "voluntary" proceeding. The petitioner believes that he would better achieve a fresh start outside the bankruptcy process, which has damaged him while benefitting the "nonparties" trustee and his lawyers. He should at least be able to appeal as important an order as the denial of his motion to dismiss. Clearly, that has been the view of the Ninth Circuit and, until this case, the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Andrew John Delaney

Dated: October 9, 2024

CERTIFICATE OF WORD COUNT

Case No.

Case Name: Andrew John Delaney, Petitioner, v. Gregory Messer, In his capacity as Trustee, Respondent.

Title: Petition for Writ of Certiorari

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 2,522 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of October 2024.

Respectfully submitted,
/s/Andrew J. Delaney
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