OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CONNECTICUT NATIONAL BANK, Petitioner v. THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.

CASE NO: 90-1791

PLACE: Washington, D.C.

DATE: January 21, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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CONNECTICUT NATIONAL BANK, :

Petitioner :

v. : No. 90-1791

THOMAS M. GERMAIN, TRUSTEE FOR :

THE ESTATE OF O'SULLIVAN'S :

FUEL OIL CO., INC. :

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Washington, D.C.

Tuesday, January 21, 1992

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 11:45 a.m.

APPEARANCES:

JANET C. HALL, ESQ., Hartford, Connecticut; on behalf of the Petitioner.

THOMAS M. GERMAIN, ESQ., Hartford, Connecticut; on behalf of the Respondent.

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P R O C E E D I N G S

(11:45 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-1791, Connecticut National Bank v. Thomas M. Germain.

Ms. Hall, you may proceed.

ORAL ARGUMENT OF JANET C. HALL

ON BEHALF OF THE PETITIONER

MS. HALL: Thank you, Mr. Chief Justice, and may it please the Court:

The issue presented on review in this case is the applicability of section 1292(b) of title 28 to an appeal to the courts of appeals from an order entered by the district court. The district court's order is an interlocutory order, and it was entered while sitting in review of a bankruptcy court order entered in an adversary proceeding.

The plain meaning of the words of section 1292(b) apply in this instance. We have an order of the district court in a civil action which has been certified. Therefore, there should be found under 1292(b) jurisdiction in the court of appeals to entertain the petition.

In addition, section 1292(b) had been applied to bankruptcy cases prior to 1978. It had been applied both

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subsection (b) since 1958, and prior to that, what is now subsection (a) concerning injunctive orders had been applied in the bankruptcy context previously.

To reach the conclusion --

QUESTION: How much weight do you think those pre-bankruptcy code enactment provision -- cases have?

MS. HALL: I believe they're important, Mr. Chief Justice, because they demonstrate that there was an existing scheme, which recognized jurisdiction in the courts of appeals under section 1292 as well as other sections which granted jurisdiction of bankruptcy cases.

QUESTION: But the bankruptcy court was tied much more closely to the district court before the enactment of the Bankruptcy Code, wasn't it?

MS. HALL: That is correct, although, the bankruptcy court is still described in the '84 legislation as a unit of the district court. And because of Marathon, it must rest on the Article 3 power of the district court. Although the system has changed, it is not that great a difference in that the House's view of creating Article 3 independent courts never prevailed in Congress.

These cases, pre-1978, teach us that there was recognized jurisdiction and existing jurisdictional scheme under 1292, as well as other sections, and that therefore, to reach the result that the court of appeals below

reached would require you to conclude that Congress intended to take away that jurisdictional grant, that discretionary, interlocutory appellate power, and that it intended to treat bankruptcy cases in a manner different than it treats all other civil actions.

Now this is a dramatic result to be reached, particularly in the face of no evidence to support such a result or such a conclusion. And it makes no sense to conclude that Congress would intend to do that when there was before Congress no particular problem faced by 1292 interlocutory appeals in the bankruptcy context, there was not abuse alleged or pointed to, no problem identified that would be a basis or a reason for making this change.

QUESTION: Ms. Hall, why do you suppose Congress enacted section 158(d) if the courts of appeal already had jurisdiction? Why did they need it? And is it just superfluous in your view?

MS. HALL: In part it was needed because of initially the House's desire to create the bankruptcy appellate panels. In section 1293, which is the origin of 158(d), the House wrote section 1293 in order to create two additional bases in the courts of appeals that had not previously existed. That is, final decisional review of appeals from bankruptcy panels, which of course were new creations, and also to permit the consensual direct appeal

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on final orders only directly from the bankruptcy court, which had been a desire of the House.

When section 158(d) was written in 1984, it took both 1293 as well as other sections -- 1482, concerning bankruptcy panels, and 1334, which concerned the district court -- appeals up from the bankruptcy court to the district courts -- and put them together in 158.

To answer the second part of your question directly, there is a redundancy. Other than the grant of jurisdiction to the bankruptcy panels, which appears in (d), (d) is repetitive in part of the grant of jurisdiction to the courts of appeals under 1291.

However, a mere redundancy where there is no conflict between the provisions, in other words, you can apply both 158(d) to a core jurisdiction to the courts of appeals, and you can apply 1291, and achieve this exact same result. There will be jurisdiction on final decisions in the courts of appeals.

There is further no reason to conclude that Congress would wish to treat bankruptcy appeal different because the purpose served by 1292(b), in particular when it was enacted, the purpose it sought to address is just as pertinent in bankruptcy cases as it is in all other civil cases.

The limited discretionary appeal that was

granted to the courts of appeals under 1292(b) was designed to provide a specific benefit. That is, when the district court certifies that the issue at hand was a controlling issue of law, as to which there was substantial disagreement as to the correct answer, and a result or a decision immediately might advance the termination of the litigation, the courts of appeals were to entertain such requests to hear these appeals. And only if the court of appeals agreed in its discretion to hear it would an appeal be entertained.

Two benefits are achieved here. Potentially, there is an advancement of the instant litigation that is the subject of the 1292(b) case, but in addition what you achieve is the addressing at the circuit level, not at a district court level, but at the circuit level, of an important, presumably unsettled issue of law.

QUESTION: You also achieve a second interlocutory appeal. You were mentioning earlier that there's no conceivable reason why they would have put this in with the purpose that your opponent asserts. But the very plausible reason, as the briefs point out, is it's a terrible thing for a lawyer to have to go through two interlocutory appeals. You have to go from the bankruptcy court to the district court, all the way up to the court of appeals. That's a lot of trouble.

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QUESTION: I would agree with you it's two steps, Your Honor. However, those two steps also find a place in the appeal from a final order of a bankruptcy court. It is inherent in the nature of the scheme that Congress settled upon, finally in 1984, that its desire to refer bankruptcy matters primarily and principally to the bankruptcy court, and yet keep them attached to a district court, necessarily results in that.

QUESTION: Yeah, but Congress might have felt that once is enough to have to go through all of that, and that the usual reasons for allowing interlocutory appeal, when there's only one, are out weighed by the fact that you'd have to do it double if you do it in this area. I mean, it's at least a plausible reason.

MS. HALL: It is plausible, Your Honor, and it is something Congress could have done. It is my position that it did not do so here. In order to reach the conclusion that that is the path Congress chose, you must conclude, as the Second Circuit's reasoning went, that because of this mere redundancy, which is an affirmance of the grant of jurisdiction, that we must conclude that 158(d) is exclusive, in essence, is the stop in interlocutory appeals. And that, therefore, if it is exclusive of 1291, it necessarily is exclusive of 1292.

Well, of course, 158(d) does not say that,

unlike, for example, the Expediting Act. It does not say these are the only appeals, it merely makes an affirmative statement of appellate jurisdictional grant.

Therefore, you must find an implied appeal. And implied repeals are drastic and rare results, as taught by the precedents in this Court. And I would submit that in this case, the requirements of meeting such a test of implied repeal are woefully lacking.

First, there is no irreconcilability, as I pointed out before. 158(d), the part it shares in common with 1291, provides for exactly the same result. So they are not irreconcilable. Second, the second alternative, which requires that the later enacted statute be comprehensive and be a substitute for the earlier alleged to be repealed statutes, also does not pertain here. Clearly, 158(d) is not a comprehensive substitute for 1291 and 1292. Otherwise we are left with no general grant of jurisdiction to the courts of appeals from decisions of the district court.

Even if, however, we were to get by one of these two requirements for implied repeals, we are still met with the problem of where is the evidence of Congress' clear and manifest intent to repeal this jurisdictional grant in 1292(b). It is not in the language of the statute. It is not in the purpose of the act. Nor can it

be found in the legislative history. This is a case where we have in the legislative history two reports, both written before this section was crafted. Neither of those reports support a conclusion of a clear and manifest intent to stop the process of interlocutory appeals short of the court of appeals and to strip them of this discretionary power to hear an interlocutory appeal.

Now the Second Circuit found an intent by Congress in this same legislative history. I would suggest, however, that the second circuit took a course which this Court has counselled against strongly and has disfavored, and that is that the Second Circuit relied upon new, unexplained intermediate steps going back and forth between the House and the Congress, and also upon silence, the absence of words in 158(d). Neither of those have been found in the past to support a finding or a demonstration of clear and manifest intent.

The trustee here is faced with a difficult problem. If he urges on this Court that you must support his position and find that the redundancy in 158(d) requires the result that 1292 will no longer will apply in bankruptcy cases, and at the bottom of that position is the redundancy, then he must answer the question of what is to be done with the language found in section 305 of the Bankruptcy Code, as enacted by Congress in 1990.

Section 305 concerns orders of the bankruptcy court to dismiss or suspend a bankruptcy proceeding.

QUESTION: Where is this in your brief, Ms. Hall?

MS. HALL: Your Honor, it is addressed, I believe, as the last point, at pages 34 and 35.

QUESTION: Thank you.

MS. HALL: Roman numeral VI.

When that was initially enacted, again in 1984 with the new Bankruptcy Code, the provision read that decisions of the -- of the bankruptcy court, excuse me, to suspend or to dismiss a proceeding, shall not be taken by way of appeal to the courts of appeals. There were some litigations surrounding this -- that section, in particular the question of whether a denial of such a motion would be appealable, even though the statute said the granting would not.

In 1990 --

QUESTION: Does one of the footnotes on 34-35 set forth the statute you're talking about verbatim?

MS. HALL: It does, Your Honor. It does, Your Honor, it sets it forth as it now appears after the 1990 amendment, with the additional language in italics.

QUESTION: That's the one on footnote on -- the last part of your footnote 41?

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MS. HALL: Yes, Your Honor, on the bottom of page 34 and then up to 35.

QUESTION: Thank you.

MS. HALL: The amendment in 1990 that Congress passed was to amend 305, first to make it clear that a denial of such a motion would also not be appealable. But in addition, to specifically iterate the sources of court of appeals jurisdiction, which could not be availed in order to take an appeal under 305.

When they listed those sections, and this is of course an order of the bankruptcy court, clearly, by its own terms 305 says bankruptcy court. And second, it could clearly be an interlocutory order. For example, a denial of a motion to suspend, thus the case continues with the interlocutory. When Congress was specifically addressing the question of the source of jurisdiction in the courts of appeals in bankruptcy cases, it said such appeals in this instance -- not this case, I'm sorry -- section 305 -- would not be permitted under 158(d) or 1291 or 1292. Thus, when Congress means to restrict the jurisdiction of the courts of appeals in a bankruptcy situation, it says it expressly.

The language of that amendment is directly contrary to the position the trustee urges on this Court. What is the Court to do with the Congress' statement,

clear recognition, that an appeal under 1292 is to be permitted in bankruptcy matters coming up from the bankruptcy court, except in certain specific instances, 305 being one and 1334(c) being another, and the Remand Statute being the third that was amended in 1990.

As I've indicated, in conclusion, the plain words of 1292(b) would provide discretionary jurisdiction to the courts of appeals in this case below. 158(d) does not require a different result. It is not a clear statement by the Congress that it meant to change an existing jurisdictional grant to the courts of appeals. The words of the statute do not support such a result, the purpose of the Bankruptcy Code does not support such a result, and the legislative history is silent.

Thus, this Court ought to interpret the plain words of the statute, 1292, to find jurisdiction in the Courts of appeals, and to conclude that 158(d) does not plainly express a congressional intent to alter the pre-existing jurisdictional grant to the courts of appeals.

I would, therefore, ask this Court to reverse the Second Circuit of Appeals, to remand the case to the Second Circuit for consideration of Connecticut National Bank's petition for a leave to appeal.

Mr. Chief Justice, if there are no further questions, I would request to reserve the balance of my

time.

QUESTION: Very well, Ms. Hall.

Mr. Germain, we'll hear from you after our noon recess.

(Whereupon, at 12:00 noon, oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

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AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Germain, we'll hear from you.

ORAL ARGUMENT OF THOMAS M. GERMAIN

ON BEHALF OF THE RESPONDENT

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

I believe, and it's the respondent's position, that his whole case revolves around the fact that if the petitioner's position is accepted, there was no reason for Congress to enact section 158(d) insofar as it applied to district court jurisdiction.

And the first thing I would like to do is address myself to Justice O'Connor's question that was directed to the attorney for the petitioner. When Justice O'Connor asked what reason there would be for the passage of this statute, opposing counsel indicated that 158(d) did cover the situation for appeals of the bankruptcy panels created in section 158(b).

I would suggest that first of all, that is no reason for including district court jurisdiction in section 158(d). And in fact, it raises a situation in which if the petitioner's argument is accepted, a strange situation is created in that 1292, which is relied upon by

the petitioner for circuit court jurisdiction of interlocutory appeals for the district court, does not cover such decisions by that bankruptcy panel created in section 158(b).

So you have a situation where if the petitioner's argument is accepted, you may have review by the circuit court of appeals for interlocutory orders from the district court. But if there is a district in which the bankruptcy panel under 158(b) has been created, 1292 under its plain language would not cover that situation. And in fact, that was recognized by the Second Circuit in its decision in this case.

QUESTION: Yes, but isn't there an answer to that? Namely, that you've got a decision by three judges there, so the need for further review is somewhat less than if you had just one judge passing on it. I mean, presumably you have three people who have decided the issue, and not providing for review from that doesn't seem to me necessarily means they didn't intend to provide the review that preexisted from a normal district court decision.

MR. GERMAIN: I believe, first of all, that there is still a review by the district court. And I don't know whether the fact that's one judge or three judges would be that important. And secondly, that still

doesn't respond to the situation that 158(d) does also include district court jurisdiction. If in fact it was Congress' intent when it passed 1578(d) just to provide for appeals from the panels created in 158(b), there would have been no reason to include the district court in that section.

QUESTION: It would not have been necessary?

MR. GERMAIN: That's correct.

QUESTION: But why would they repeal the normal 1292(b) review? What's the point of doing that? I don't really quite understand what's at work here?

MR. GERMAIN: Well, there is no specific reason that was set forth by Congress in the legislative history. That's conceded; it's just not there. But I think there are reasons. You're dealing with in section 158, no the general jurisdiction of the court that -- or the district court that's covered by 1292, but you're dealing with bankruptcy matters. First of all, there is a recognized policy in bankruptcy matters to encourage their expeditious administration.

QUESTION: Right.

MR. GERMAIN: And in fact, if you permit interlocutory -- appeals of interlocutory orders to the circuit court of appeals, that policy may be restricted because --

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QUESTION: It's entirely up to the court of appeals. They can turn down the appeal in 10 days. Isn't it a 10-day decision -- I forget -- the 1292(b)? Don't they act on a petition within 10 days?

MR. GERMAIN: Certainly, but it may have been Congress' intent that they didn't even want to subject the bankruptcy court administration or the bankruptcy court estate to the possibility that that would have to undergo this additional review by the circuit court of appeals.

QUESTION: Yes, but on the other side of the coin, every now and then there is a very important issue that arises in an interlocutory posture. And if you can't review -- get it reviewed by the court of appeals until you finish the entire bankruptcy proceeding, maybe that's counterproductive in some cases.

MR. GERMAIN: Certainly. In any individual case, no matter what rule you adopt, you're going to have individual cases where that rule may not apply.

QUESTION: Then why doesn't it make more sense to say, well, leave it to the discretion of the court of appeals, and they can identify those that are important and dismiss those that are just dilatory?

MR. GERMAIN: First of all, I think this case is still governed by the fact that there is no reason -- I don't know whether you have to get into intent, even,

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because there is no reason for 158(d) to be passed, if in fact it wasn't meant to restrict the appellate court review.

Of the reasons that I addressed the --

QUESTION: Well, if that was the reason, they surely could have done it more direct language than they did. You don't normally restrict by authorizing. I mean, it speaks in terms of authorizing review, not foreclosing review.

MR. GERMAIN: That's correct, but it speaks only to final orders judgments in section 158(d). There is no reference to an interlocutory order in that.

QUESTION: No, because it's already authorized. That's why --

MR. GERMAIN: In fact, if they wanted to have these type of appeals of interlocutory orders, they simply either could have included the language of interlocutory orders in that section, or simply not have passed it at all. And in fact, even though the Court's argument may have some possibility, I think it's much more likely, given the structure of the statutes and the language that are contained in it, that in fact this was intended not as a repeal of section 1292, but as more of a preemption of it to handle appeals in the specific matter.

QUESTION: Partial repeal.

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MR. GERMAIN: Partial repeal, preemption, whatever it is that -- petitioner's brief speaks a great deal about the high standard that the Court has to find when a statute repeals another statute and doesn't do it explicitly. I don't think that's the case in this situation. In fact, 1291 and 1292 cover a lot of situations that don't involve bankruptcy. And in fact, if the respondent's position in this case is accepted as far as what the meaning of 158(d) is, you're not going to have a repeal of section 1291 or 1292. It's still going to apply to all of those situations that don't involve bankruptcy. All you're talking about --

QUESTION: Yes, but it's partial repeal to the extent that 1292(b) applied in bankruptcy before.

MR. GERMAIN: It may be just a matter of semantics, whether it's repeal or preemption.

QUESTION: Well, you don't normally talk about one Federal statute preempting another Federal statute. It either repeals it or it doesn't.

MR. GERMAIN: Yes, but --

QUESTION: It preempts State law or other things.

MR. GERMAIN: In this case, the fact that it's only a partial repeal an not a total repeal, as that involved the cases that we cited by the petitioner in

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support of the statutory rule of interpretation, I think, would limit the effect or limit the burden that the respondent has in order to overcome that.

QUESTION: Mr. Germain, it seems to me another response to the seeming anomaly of not being able to take an interlocutory appeal from the bankruptcy panel, although you can take it from the district court under the petitioner's interpretation, is that you wouldn't be before the bankruptcy panel, except voluntarily. You have to accede to the jurisdiction of the bankruptcy panel, and when you do, you know that one of the things that goes along with it is that you can't get an interlocutory appeal. Why isn't that fair enough?

MR. GERMAIN: That's correct, Your Honor, but that still wouldn't resolve the situation where if this issue was important enough --

QUESTION: No, right, you'd still be left with the fact that you could not take an interlocutory appeal. But still the fact that it's been voluntarily assumed is a basis for distinguishing that from the appeal from the district court.

MR. GERMAIN: It may be, but it still doesn't answer the question of why 158(d) includes district court jurisdiction in addition to the jurisdiction for the interlocutory panels.

Another reason that was relied upon a great deal by the petitioner in this case was the fact that the clear language of the statute itself would support its position, that 1292 does provide for interlocutory appeal of district court orders. In fact, I would suggest to the Court that this standard, or this rule of interpretation, doesn't apply in this case. Normally, when that rule of interpretation is applied to a statute, you're talking about considering factors outside of statutory language when interpreting a statute, such as legislative history.

In fact, in this case, what the petitioner is asking you to do is not to ignore legislative history or factors outside of the statutory language, but is actually asking you to ignore other statutes itself. The interpretation that is advanced by the respondent in this case is not based upon, or not relied primarily upon legislative history outside factors. It's relied upon 12 -- the language of 1292, when that is considered with the plain language of section 158(d). The whole basis of the argument advanced by the respondent is based upon the fact that there was no reason for Congress to pass 158(d) as far as it applied to district court jurisdiction if 1292 is going to apply also.

This is not a situation where you're trying to bring things in outside of the plain language of the

statute in order to advance an interpretation, but you're relying upon other statutes that is contained in the United States Code. What the petitioner asks you to do is to take 1292, set it aside by itself, and read it without any relation to any of the other statutes. And I think the rule of interpretation that is advanced to support that is not relevant to that particular situation.

QUESTION: How do you read it in relation to 305(c)?

MR. GERMAIN: 305 -- I think the argument that's made by the petitioner in their case is that 305(c) is inconsistent with the respondent's position. I don't think that's correct. 305 concerns orders for abstention, and it's clear that Congress did not want those type or orders appealed to the circuit court of appeals.

The cases that have considered 158(d) as far as it relates to 1292 have made it clear that 158(d) does not limit appeals to the circuit of appeals in a situation where the district court is acting as the original court of jurisdiction for a bankruptcy matter. In fact, the district court would be entitled, as the original court of jurisdiction, to enter an order under 305.

So if it was the intent of Congress not to permit these appeals, in order to cover a situation where the district court was acting as the original court of

jurisdiction, they would have had to include 1291 and 1292 in there in addition to 158. So in fact, including those in there is not inconsistent with the respondent's position. It's simply to cover the situation when the district court is sitting as the original court of jurisdiction for a bankruptcy matter.

Another amended basis of the petitioner's arguments in this case is the fact that it would be unreasonable for Congress, or to expect Congress to have wanted to accomplish this by the passage of 158(d) because of the way or because of the result that they would result in. The fact that there are matters that are important enough that you may want interlocutory review of appellate -- of interlocutory orders by the bankruptcy court, you're not going to have that if the respondent's position is accepted.

I would suggest that when you look at the law concerning what concerns or what involves a final decision in the bankruptcy matter, and also the fact that court of appeals does have the right to obtain jurisdiction over these type of orders by writ of mandamus that any detrimental effect by the adoption of the respondent's position, as far as how this statute is interpreted, is going to be limited.

Bankruptcy matters are generally different than

regular litigation matters in that you don't have two parties that are --

QUESTION: Mandamus is an extraordinary remedy, though, Mr. Germain. You know, our cases say it's not available to correct ordinary errors at all. I mean, I don't think -- the fact that mandamus is available would make it a substitute for the right of appeal that the petitioner claims exists.

MR. GERMAIN: Absolutely not. It would not be a substitute. What I believe that the respondent is arguing in this case is that there is reasons, other reasons that Congress may have wanted to limited the review by the court of appeals of these interlocutory orders, and that in an extraordinary situation where this would cause a great injustice, that writ is available. If there were policy reasons where Congress would do this, then it would be reasonable for Congress to adopt section 158 and give it the interpretation that's advanced by the respondent. I think the Court would be concerned about an extraordinary situation where that would cause a great injustice. And in that situation, the writ of mandamus would be available to remedy it.

But I am not advancing the argument that this is a substitute in any situation. That wouldn't make any sense. If Congress wanted to limit these, certainly

saying that there is a substitute for it would be completely counter to my arguments. What this is is that a concern that there may be an extraordinary situation that would cause a great injustice can be resolved by that.

QUESTION: Of course, that isn't the test for mandamus under our cases, an extraordinary situation that would cause great injustice. People may feel that that's what it in fact works out to be, but certainly that's not the stated test. It's a lack of jurisdiction or something approaching that, isn't it?

MR. GERMAIN: Well, I think effect of the result of the failure to have that appeal is a consideration in issuing a writ of mandamus, even though that is not the only consideration. And as again, I'm not advancing this as substitute for appellate court jurisdiction of interlocutory orders. It's simply a minimization of any substantial detriment that may result from in fact not providing for this appellate court review.

I would again further suggest that we are only speaking about the appellate review of interlocutory orders. This is not a denial of either the court of appeals or this Court in order to review these decisions of the bankruptcy court. It simply means that you have to wait to the end of the case in order to do that. And

there are good reasons for doing that.

Even though it is recognized by the Court that there are reasons for permitting appeals of interlocutory orders, it was also recognized that there is a cost to this. This cost may be magnified in a situation where you have a bankruptcy estate, where there are important policies for encouraging expeditious administration of it.

And in fact, by only permitting review or appellate review of final decisions rather than interlocutory decisions, you have situations where because of many reasons these reviews may not become necessary for the bankruptcy estate, or a situation where if the bankruptcy estate is forced to appeal this issue, at least it can go up to the level and have all of the issues resolved, rather than trying to do it on a piecemeal basis.

In this case, if there is a final decision in this and there is a subsequent appeal, the bankruptcy estate would have been forced to go up through the appellate process twice, instead of simply having all of the issues presented at one time, with the saving of time and expense to the bankruptcy estate.

And again, I don't think that my argument is really necessary -- it's necessary to find that these policy reasons are valid, or in fact, stronger than any

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policy reasons that are advanced by the petitioner. Really, the basis of the argument is based upon the fact that there was no reason for 158(d) to be passed if you accept the petitioner's interpretation of.

These policy reasons that I'm presenting to the Court are simply to counter the arguments presented by the petitioner and suggested in other cases or in other court of appeals that have considered this issue, that in fact it may be unreasonable to find the interpretation advanced by the respondent because there is no reason for it. There are reasons for it, and therefore, I think that even though the basis of it is the structure of 158(d) and the fact that there's no reason to have passed it without -- if the petitioner's argument is accepted, these arguments do counter the petitioner's argument and the court of appeal arguments that are presented, that there was no reason for doing it.

QUESTION: Do you contend, Mr. Germain, that section 158 covers the subject from orders of bankruptcy judges, more or less from A to Z, so that you no longer need 1291 or 1292 when you're talking about -- you can just read 158?

MR. GERMAIN: No, it does apply -- well, it does apply to all orders that are issued by bankruptcy judges. 158(a) says that all orders by bankruptcy judges have to

be appealed to the district court, whether they are interlocutory or final orders. The question is -- and all ordered by the bankruptcy court are covered by that.

The question is, is then once you get to the district court, what happens after that? Now the argument by the petitioner is that 1291 and 1292 would cover that, as well as 158(d), and there's -- if you just consider that without -- if 158(d) had never been passed, there may have been some merit to that argument. You go from the bankruptcy court to the district court under 158(a), then 1291 and 1292 take over and govern the further appeals of that. And in fact if Congress has never passed 158(d), that would be the obvious system that you would adopt under the language of the statute. The problem with it is, is that instead of just leaving that the way it was, Congress in fact did pass 158(d).

QUESTION: Do you think 158(d) wholly supersedes 1291 and 1292 when you're talking appeal from bankruptcy orders from the district court and the court of appeals?

MR. GERMAIN: Yes. To the -- two reasons for that. It supersedes 1291, which really doesn't have great effect, because basically all it does is repeat 1291. You can't obtain the same thing that's stated in 1291 because you do appeals of final judgments and orders from the bankruptcy court that go up to the district court.

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My argument is, is that it supersedes 1292 because it didn't mention interlocutory orders in that. They both -- it is relevant because first of all they found it necessary to repeat 1291. It wasn't Congress' intent to replace the system that was set up by 1291 and 1292 by 158. It wouldn't have been any reason to repeat 158, because 1291 would have covered it, and therefore, the natural presumption of that is that 1292 also doesn't apply. And since interlocutory orders aren't provided in 158(d), you don't have jurisdiction for those type of cases.

QUESTION: Mr. Germain, can I ask you a question? I'm not sure I completely understand either the statute or what you were telling me about it. With respect to 158(b)(1), the panel, the section authorizes appeals to panels consisting of three bankruptcy judges, what is your view as to where an appeal from an order by the panel of three judges goes?

MR. GERMAIN: As far as a final judgment, it would go to the Second Circuit.

QUESTION: Go to the court of appeals.

MR. GERMAIN: That's correct. And that's provided for in 158(d).

QUESTION: So it is correct that 158(d) was necessary to take care of appeals from that panel?

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MR. GERMAIN: That's correct.

QUESTION: And that goes -- and there's -- ironically, though, that is treated as an order of the district court, is it, when the three-judge -- three-bankruptcy-judge panel resolves an appeal from --

MR. GERMAIN: I don't think it's necessary to find that. 158(d) says any orders that are entered under 158(a) or 158(b) can be appealed to the circuit court of appeals.

QUESTION: Right. So you don't really have to decide whether it's a direct appeal from bankruptcy judges or from the district court.

MR. GERMAIN: That's correct. It is authorized specifically --

QUESTION: But it does go directly to the court of appeals.

MR. GERMAIN: Yes, it's clear that 158(d) does provide for that.

QUESTION: That's what I thought.

QUESTION: Well, for purposes of 1292(b), if the interlocutory appeal is heard by the bankruptcy panel, I take it you do have some problem with 1292(b) because it requires certification by a district judge.

MR. GERMAIN: Well, that's correct. I mean, the plain language of 1292(b) only applies to district court.

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Now there was a position raised by this Court that the fact that it's voluntary may be reason why we don't allow appeals to the court of appeals, but the fact is, is that 1292(b) clearly by the plain language of it would not provide for the interlocutory -- appeal of an interlocutory order up to the circuit court of appeals.

Further support for the respondent's position is also found in the legislative history of section 158's predecessor, section 1293. Even though 1293 never became effective during the time that it was enacted, in fact, it is clear from the courts that have considered it that 1293 was basically a predecessor of 158, and that the legislative history, in cases interpreting that, can be applied to 158.

The legislative history was specifically set out in detail in the Second Circuit Court of opinion, which noted that in fact the version of that statute immediately prior to its passage did not have any provision as it was contained in section 158(d), which provided for the appeal to the circuit court of appeals of only final judgments, orders, or decrees. And in fact, that was added later on.

I would suggest to the Court that though this is no where near as important as the original argument for my interpretation, the fact that there was no reason to pass 158(d) if you provide for appellate coverage under 1292,

it adds further support to the respondent's position.

And if there are no further questions from the Court, I --

QUESTION: I have only one small question. Do you have bankruptcy appellate panels on the second circuit?

MR. GERMAIN: No, we do not.

QUESTION: Thank you, Mr. Germain.

MR. GERMAIN: Thank you, Mr. Chief Justice.

QUESTION: Ms. Hall, you have 15 minutes remaining.

REBUTTAL ARGUMENT OF JANET C. HALL

ON BEHALF OF THE PETITIONER

MS. HALL: Thank you, Mr. Chief Justice.

First, in response to some questions about the bankruptcy appellate panels. In addition to them being consensual courses of appeal for the litigants, there's another important aspect of the bankruptcy appellate panels, which the district court decision does not give us. And that is they are constituted or meant to be constituted on a circuit-wide basis. They are created by the circuit, and presumably their decisions have precedential value on a circuit-wide basis, which is, as I pointed out in my argument, a benefit of the 1292(b) appeal. That in the very limited circumstance of a very

important question, the benefit to be achieved from 1292(b) is not only to advance the litigation that's before the court of appeals, but also to attempt to settle an unsettled question of law which will have precedential value on a circuit-wide basis.

The bankruptcy panels do satisfy that purpose, and thus the fact that the appeal stops with the bankruptcy appellate panel at the interlocutory level is at least understandable and distinct from the suggestion that it should stop at the district court level, which not only doesn't offer a panel or appellate review, but is of little precedential value -- in fact none, I would suggest -- beyond the case before the district court.

QUESTION: The standard by which a court of appeals decides to accept submission under 1292(b), it's whether the issue would be dispositive in the particular case, isn't it? A controlling question of law?

MS. HALL: That is the standard by which the district court must first certify the appeal to even be considered by the court of appeals. Yes, Mr. Chief Justice. The court of appeals then has, in the words of the statue, discretion to take the appeal, presumably if it does not think it's a controlling issue of law which will advance the litigation, it will not exercise that discretion.

QUESTION: But there's nothing indicating that a court of appeals must look for something of general importance in that question is there, beyond the particular case?

MS. HALL: Only in the words of the statute which address the fact that it not only be controlling, which presumably speaks in terms of that litigation, but that it be a question as to which it is unsettled. In other words, the words, I believe are, that there are substantial grounds for difference of opinion.

QUESTION: So you say that means beyond that case it should be something of general importance.

MS. HALL: It has a benefit. Yes, Your Honor.

Second, to pick up on a point made by my opponent in response to a question, Justice, about section 305. He -- his response concerned the abstention orders which are district court orders, and therefore, it does make sense that the amendment in 1990 to the abstention section, which is 1334(c), would include 1291 and 1292. Most courts have felt that 1291 and 2 are still in place for district-court originated bankruptcy cases.

However, that does not address the section 305, which is the dismissal or suspension orders, which are clearly orders that can be entered by a bankruptcy court. When a case has been referred to it, certainly in the

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first instance, a motion to dismiss that case would be decided by the bankruptcy court. And that would be under 305.

And Congress, in 305, just as in 1334, amended in 1990 to add the words: appeals to the courts of appeals under 158(d), 1291, 1292. It's a clear expression that when Congress addressed the issue of appellate review in a bankruptcy case originating in the bankruptcy court, it thought that an appeal would lie under 1292, and therefore, when it wished to bar appeals, it needed to list 1292.

QUESTION: And 305 applies only to bankruptcy courts, not to district courts.

MS. HALL: I don't think that's exactly correct. I believe that you could have a case in the district court that had not been referred under 157(c).

QUESTION: Well, then that would explain why you had to refer to both 158(d) and 1295 and 1292, for those cases that might arise -- might be coming up from the district court. I mean, all you need is some case to explain the reference to 1291 or 1292.

MS. HALL: That's correct, Your Honor. 305 would -- could be a district court order.

The issue -- the respondent's position rests primarily on the redundancy, the appearance of the words:

and district court. Those first appeared in section 1293. And although they were not explained when they appeared, if you look at the structure of 1293 when enacted and when drafted, which is set forth at page 24 and 25 of my brief, you will see that the district court reference gets inserted by the Senate in subpart (b) of 1293. Subpart (a) addresses decisions of the bankruptcy appellate panels. Decisions is the words found in 1291 of title 28, and are usually meant to refer to final decisions. When the word district court was entered in (b), it could be argued that they added it because the phrases final judgment, order, and decree did not appear in title 28 anywhere in referring to district court decisions.

Now it's also unnecessary because rule 54 makes the word judgment encompass all decisions, orders, and decrees. But that could explain a need to -- or a perceived need to insert the words district court. It is clearly, as it appears in 158, a redundancy. However, it is an unexplained redundancy. It is not addressed by the Congress. It does not explicitly state it's meant to repeal anything. And such unexplained reconcilable redundancies, not irreconcilable -- we don't have a different result under 1291 and 158(d) -- do not support a finding of a congressional intent to repeal a preexisting jurisdictional grant to the courts of appeals.

If this is not a repeal pro tanto of 1291 and 1292, then that jurisdictional grant found in those two sections is still in effect and still applicable, and that the appeal below should be entertained. There has been no showing that Congress meant to repeal that jurisdictional grant. Certainly 158 and its mere affirmance of existing jurisdiction does not supply that intent.

If there are no further questions, thank you very much, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hall.

The case is submitted.

(Whereupon, at 1:28 p.m, the case in the above-entitled matter was submitted.)

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BY Michelle Sanders

(REPORTER)