No. 14-116

IN THE

Supreme Court of the United States

LOUIS B. BULLARD

Petitioner,

v.

BLUE HILLS BANK, FKA
HYDE PARK SAVINGS BANK

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE G. ERIC BRUNSTAD JR. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

(continued)

Page

TABLE OF AUTHORITIES

(continued)

Page

TABLE OF AUTHORITIES

(continued)

STATUTES

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES

(continued)

Page

INTEREST OF THE AMICUS CURIAE[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at the New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches various courses on bankruptcy, secured transactions, business reorganizations and international insolvency law, commercial transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. A copy of each party's consent is filed herewith.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Wellness International Network, Ltd. v. Sharif*, 13-935 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel,*

LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 562 U.S. 61 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The purpose of this brief is to address matters that bear on the Court's determination of an important issue at the intersection of bankruptcy law and appellate jurisdiction: whether a bankruptcy court's order denying confirmation of a debtor's bankruptcy plan is final for purposes of appeal. This brief explains that, in bankruptcy, the concept of appellate finality has long been afforded a different and more capacious meaning than in other areas of federal litigation. The logic behind this well-established practice derives in significant part from consideration of the many crucial differences between the administration of bankruptcy "cases"—which begin with a petition for bankruptcy relief followed often by different kinds of discrete "proceedings" commenced by complaint, motion, or application and that end in different kinds of appealable judgments and orders—as opposed to other civil cases initiated by complaint that typically follow a more linear and streamlined trajectory to a single final

judgment. The undersigned argues that this traditional bankruptcy practice is correct and that the Court should hold that the order denying confirmation of the debtor's plan in this case is final and appealable.

STATEMENT

Petitioner Louis B. Bullard (Bullard) filed for bankruptcy relief under Chapter 13 of the Bankruptcy Code on December 14, 2010 in the United States Bankruptcy Court for the District of Massachusetts. Pet. App. 47a. Respondent Blue Hills Bank (Blue Hills) (formerly Hyde Park Savings Bank) holds a mortgage on certain real property owned by Bullard (the Property), evidenced by a promissory note in the original principle amount of $387,000 with a maturity date of June 1, 2035. Pet. App. 1a-2a. Blue Hills filed a proof of claim in Bullard's bankruptcy case in the amount of $346,006.54. Pet. App. 2a. The parties disagree as to the value of the Property, but agree that it is less than the amount of Blue Hills's claim. *Id.*

On January 17, 2012, Bullard filed his third amended plan, which is the subject of this matter (the Plan). *Id.* The Plan proposed to bifurcate Blue Hills's claim into a secured portion, equal to the value of the Property, and an unsecured portion, equal to the amount of the claim that exceeded the value of the Property. *Id.* Under the Plan, Bullard would pay a

dividend of approximately 5.26% on the unsecured portion of the claim for 60 months, and would continue to make payments on the secured portion of the claim directly to Blue Hills until the secured portion was paid in full. *Id*.

On July 24, 2012, the bankruptcy court denied confirmation of the Plan, acknowledging that courts are divided as to whether so-called "hybrid" plans such as that proposed by Bullard are valid. Pet. App. 56a. The bankruptcy court determined that the Bankruptcy Code allows debtors *either* to "modify the rights of holders of secured claims" by bifurcating the claims into secured and unsecured portions under 11 U.S.C. § 1322(b)(2) *or* to cure a default under the plan and continue making payments on the secured claim for a period exceeding five years under 11 U.S.C. § 1322(b)(5), and that these options are "mutually exclusive." Pet. App. 52a-56a, 66a.

Bullard filed a motion for leave to appeal the bankruptcy court's order to the Bankruptcy Appellate Panel (BAP) in accordance with BAP precedent holding that an order denying plan confirmation is not a final order that may be appealed as of right. Pet. App. 22a, 41a n.2. The BAP granted the motion for leave to appeal, finding that Bullard had established the criteria for an appeal of "interlocutory orders and decrees" under 28 U.S.C. § 158(a)(3). Pet. App. 22a, 45a. The BAP then affirmed the bankruptcy court's decision denying confirmation

of the Plan, while recognizing that bankruptcy courts within Massachusetts were split on the validity of hybrid plans, and that "[d]ecisions elsewhere are in disarray." Pet. App. 23a, 36a.

Bullard appealed the BAP's decision to the First Circuit, and subsequently also filed a motion with the BAP for certification of the appeal under 28 U.S.C. § 158(d)(2). Pet. App. 16a-17a. The BAP denied certification of the appeal. Pet. App. 17a. The First Circuit then issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction on the ground that the denial of plan confirmation is not a final order, as required by 28 U.S.C. § 158(a)(1) for Bullard to take an appeal as of right. Pet. App. 3a. After receiving the parties' briefing on both the jurisdictional issue and the merits, the court determined that it lacked jurisdiction to decide the appeal, all the while acknowledging that the validity of "hybrid" plans was "an important and unsettled question of bankruptcy law." Pet. App. 1a.

In reaching its conclusion, the First Circuit determined that it had jurisdiction under 28 U.S.C. § 158(d)(1) "only if the BAP's order rejecting Bullard's proposed plan is a final order," and that the BAP's order "cannot be final unless the underlying bankruptcy court order is final." Pet. App. 4a-5a. The court further observed that "because bankruptcy cases typically involve numerous controversies bearing

only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." Pet. App. 5a (quoting *Bourne v. Northwood Props., LLC (In re Northwood Props., LLC),* 509 F.3d 15, 21 (1st Cir. 2007)) (internal quotation marks omitted). The court explained that a bankruptcy order "may be final even if it does not resolve all issues in the case, 'but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.'" *Id.* (quoting *Perry v. First Citizens Fed. Credit Union (In re Perry),* 391 F.3d 282, 285 (1st Cir. 2004)). In particular, an order is not final where "an intermediate appellate court [such as the BAP] 'remands a matter to the bankruptcy court for significant further proceedings,'" but is final if remand "'leaves only ministerial proceedings,'" for resolution by the lower court. *Id.* (quoting *In re Gould & Eberhardt Gear Mach. Corp.,* 852 F.2d 26, 29 (1st Cir. 1988)).

Acknowledging that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split," the First Circuit ruled that "[a]n order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." Pet. App. 6a-7a. The Court observed that Bullard remained free to file an amended plan and, after such a filing, creditors would have the opportunity to object and the bankruptcy court

would determine whether to confirm or deny the amended plan. Pet. App. 8a. As such, the court stated that the rejection of the Plan "plainly does not finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding . . . nor are the bankruptcy court's responsibilities on remand only ministerial." Pet. App. 7a-8a.

SUMMARY OF THE ARGUMENT

It has long been widely acknowledged that 28 U.S.C. § 158, which governs appeals from bankruptcy court decisions, "establishes a 'more flexible' standard of finality than does § 1291," which governs appeals from cases initiated in the district court. *Isaacson v. Manty*, 721 F.3d 533, 537 (8th Cir. 2013). Critically, this is not simply the approach under the current bankruptcy system. Rather, a relaxed standard of finality has deep roots in the relevant bankruptcy jurisprudence dating back more than a century. As then-Judge and now-Justice Breyer recognized in 1983, from the Bankruptcy Act of 1898 onward there has been an "an uninterrupted tradition of judicial interpretation in which courts have viewed a 'proceeding' within a bankruptcy case as the relevant 'judicial unit' for purposes of finality, and a legislative history that is consistent with this tradition." *In re Saco Local Dev. Corp.,* 711 F.2d 441, 445 (1st Cir. 1983). And from the time the Bankruptcy Act gave way to the current Bankruptcy Code in 1978, courts have continued to recognize that the

concept of finality in bankruptcy "has been applied in a more pragmatic and less technical way than in other situations." *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013) (internal quotations omitted).

This more expansive concept of finality in bankruptcy makes sense when viewed in context with the unique procedures and processes of bankruptcy cases, as compared to other types of federal litigation. For example, a typical civil case in the district court "is commenced by filing a complaint with the court," Fed. R. Civ. P. 3; proceeds in a typically linear way; and then ends with a final judgment of some kind. In contrast, a bankruptcy case is commenced by filing a petition for bankruptcy relief, 11 U.S.C. §§ 301, 302, 303(a), Fed. R. Bankr. P. 1002; thereafter proceeds along many different non-linear trajectories, encompassing a variety of different kinds of discrete proceedings; and then typically ends in stages with a multiplicity of different kinds of judgments and other appealable orders resolving the different proceedings. As one treatise has explained, once a bankruptcy petition has been filed, "the Bankruptcy Code and rules contemplate separate proceedings" initiated individually either by "a complaint, motion or application for judicial action" depending on the circumstances, 7 COLLIER ON BANKRUPTCY ¶ 1109.04[1][a][i] (16th ed. rev. 2010), all of which helps explain something of the vast complexity of bankruptcy procedure.

Because of its relatively linear structure, the traditional rule in ordinary civil litigation is that (with narrow exceptions) an appeal as of right may be taken only from a "decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In contrast, because of its relatively fragmented and non-linear structure, a similar rule in bankruptcy would be both impractical and prejudicial, rendering many matters unreviewable, or reviewable only at the cost of great inefficiency and waste. Instead, the practice in bankruptcy has long been to treat the resolution of discrete *proceedings* within a case as individual matters for finality purposes because "a bankruptcy case usually involves many decisions by the bankruptcy judge" on a variety of issues that are, by themselves, "undeniably final" in the sense that they resolve discrete controversies that, by themselves, are roughly analogous to the adjudication of a traditional lawsuit. *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 94 (2d Cir. 1982) (Lumbard, J. dissenting).

A relaxed concept of finality is also critical because, in enacting section 158, Congress plainly intended the parties to have a right of appellate review from the decisions of bankruptcy judges. A more rigid concept of

finality would undermine this intent by, in effect, rendering many decisions unreviewable, either owing to the passage of time, the exhaustion of resources (particularly of insolvent debtors), insurmountable expense and delay, or other intervening events. In turn, the absence of effective appellate review would inevitably have deleterious effects on the administration of the rights of the parties, the orderly development of the law, and the implementation of the policies that the Bankruptcy Code advances. In this case, Bullard wishes to confirm his preferred Chapter 13 plan, make his payments, and obtain his "fresh start" in the form of his bankruptcy discharge following substantial completion of his plan. Whether he is entitled to do this turns on the resolution of a disputed question of law. Denying Bullard the opportunity to have this question authoritatively resolved at this juncture undeniably burden's his efforts to obtain bankruptcy relief. Indeed, it effectively cripples them. Absent appellate review, his only recourse is either to dismiss his case and seek review from the dismissal order, or pursue the absurdity of returning to the bankruptcy court to obtain confirmation of an alternative plan that he does not want, and then appeal from the order confirming that second plan so that he might then finally obtain a ruling on whether his initial, preferred plan should have been confirmed. The historic, relaxed concept of

finality in bankruptcy exists precisely to avoid such an anomaly.

The traditional standard also serves the important purpose of helping ensure the review of bankruptcy court decisions in Article III tribunals. Bankruptcy judges are not Article III judges, and robustly available appellate review is important to facilitate meaningful access to the Article III judiciary. *See, e.g., In re Schwartz-Tallard*, 765 F.3d 1096, 1112 (9th Cir. 2014) (Wallace, J., dissenting) ("[I]f Congress vests 'essential attributes' of the judicial power to an Article I adjunct that is not subject to searching review by an Article III court and that can issue binding and enforceable final judgments, the enacting law also violates the Constitution." (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85-86 (1982))). For these reasons, the decision below rejecting the appealability of the denial of confirmation of Bullard's plan should be reversed.

ARGUMENT

I. Appellate Finality In Bankruptcy Has Long Been Treated More Flexibly Than In Other Contexts.

The appealability of a bankruptcy court decision is governed by 28 U.S.C. § 158. It has long been accepted that section 158 "establishes

a 'more flexible' standard of finality than does § 1291," which governs appeals from judgments and orders of the district courts generally. *Isaacson v. Manty*, 721 F.3d 533, 537 (8th Cir. 2013); *see also Mort Ranta v. Gorman*, 721 F.3d 241, 256 (4th Cir. 2013); *In re Saco Local Dev. Corp.,* 711 F.2d 441, 444-45 (1st Cir. 1983) (Breyer, J.). Historically, this flexible approach dates back at least to cases under the Bankruptcy Act of 1898. *See, e.g., In re Brissette*, 561 F.2d 779, 782 (9th Cir. 1977); *Path-Science Labs., Inc. v. Greene Cnty. Hosp.* (*In re Greene Cnty. Hosp.*), 835 F.2d 589, 591-92 (5th Cir. 1988) ("When a baseball umpire makes a difficult call, the text of the applicable rule is not as important as simply knowing how to play the game. Similarly, to understand the text of the current provisions of the bankruptcy law, it is necessary to understand how the game was played prior to the Bankruptcy Reform Act of 1978."). Review of that jurisprudence illustrates the depth of both Congress's and the judiciary's commitment to recognizing the appealability of bankruptcy court orders like the one at issue in this matter.

A. Finality In Bankruptcy Has Long Been A Flexible Concept To Facilitate Meaningful Appellate Review.

Section 24(a) of the former Bankruptcy Act of 1898 governed appellate jurisdiction over

bankruptcy orders issued under the Act. Section 24 provided that:

> The United States courts of appeals ... are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy either interlocutory or final and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact.

11 U.S.C. § 47(a) (repealed 1978).

As an historical matter, courts read this provision as authorizing *interlocutory* appeals as of right to the circuit courts from "proceedings in bankruptcy," but allowing appeals as of right only from *final* orders in "controversies in proceedings in bankruptcy." 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3926.2 (3d. ed. rev. 2014); *see also In re Brissette*, 561 F.2d at 781-82 ("Section 24(a) ... gave appeals from final judgments in proceedings the same status as controversies on appeal, but also liberalized the opportunity for appellate review of proceedings by making it available on an interlocutory basis.").

The distinction between "proceedings" and "controversies" proved difficult to define with precision and offered little conceptual clarity. *See United States v. Durensky (In re Durensky),* 519 F.2d 1024, 1027 (5th Cir. 1975) ("Unfortunately, the distinction between 'proceedings' and 'controversies' has long eluded concise and easily ascertainable definition. . ."); *see also In re Imperial '400' Nat., Inc.*, 391 F.2d 163, 168 (3d Cir. 1968) ("The distinction between a 'controversy arising in proceedings in bankruptcy' and 'proceedings in bankruptcy,' from which it must be determined whether an interlocutory order may be the subject of appeal, has often been characterized as being hairline thin and the classification depends on an analysis of each case.").[2]

What became clear over time, however, was that section 24(a) allowed the possibility of a large number of interlocutory appeals. *In re Greene Cnty. Hosp.*, 835 F.2d at 592. Motivated by a desire to avoid piecemeal appeals, the courts developed a "trivial order" exception to the broad statutory authorization under section 24(a). *Id.*

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[2] One way of dividing "proceedings" from "controversies" was to distinguish between questions regarding administration of the estate (proceedings) and questions as to whether certain property ought to be brought into the estate (controversies). *See United Kingdom Mut. S.S. Assur. Assoc. v. Liman,* 418 F.2d 9, 10 (2d Cir. 1969).

This exception imported notions of finality into the statutory requirement for appeal from orders in proceedings in bankruptcy, and orders were held to be trivial when they failed to finally resolve the relevant rights at issue. *Id.*; *see also In re Durensky,* 519 F.2d at 1028-1029 (district court's order remanding to bankruptcy court for decision on merits after rejecting jurisdictional challenge held to lack finality); *In re Bacchus,* 718 F.2d 736, 738 (5th Cir. 1983) (district court order which did not definitively dispose of merits of homestead classification issue held non-final and not ripe for appeal); *United States v. O'Donnell (In re Abingdon Realty Corp.)*, 634 F.2d 133, 135 (4th Cir. 1980) (where district court did not decide the issue of whether IRS claim had been compromised the district court had "declined to determine the rights and duties of the parties" and thus the order was non-final for purposes of appeal); *Good Hope Refineries, Inc. v. Brashear,* 588 F.2d 846, 848 (1st Cir. 1978) (where district court dismissed appeal without prejudice for failure to timely transmit record, appeal to Court of Appeals from district court's decision would be dismissed on basis of "trivial order" rule because district court order merely required further proceedings on the merits).

Thus, the availability of a right of appeal came to turn on whether the underlying order possessed a "definitive operative finality." *In re Durensky*, 519 F.2d at 1029. Of particular note,

"[t]his requirement of 'definitive operative finality' rendered the distinction between controversies and proceedings substantially less important," and "[i]n proceedings as well as controversies, the order had to be final *with respect to the rights at issue*." *In re Greene Cnty. Hosp.*, 835 F.2d at 593 (emphasis added); *see also City Nat'l Bank & Trust Co.* (*In re Charmar Inv. Co.*), 475 F.2d 560, 562-63 (6th Cir. 1972) (order deciding parties' status as creditors held final for purposes of appeal); *Roberts v. United States* (*In re Roberts*), 906 F.2d 1440 (10th Cir. 1990) (hearing appeal from order determining dischargeability of a debt); *Appel v. Gable* (*In re B & L Oil Co.*), 834 F.2d 156 (10th Cir. 1987) (hearing appeal from order transferring venue of turnover proceeding).

For example, in *Brissette* the court held that a decision about the status of exempt property was final for purposes of appeal. It explained its rationale in the context of the practical consequences of the effect on the bankruptcy estate:

> Although the exemption decision is technically interlocutory, it is frequently the final resolution of the rights of the parties for practical purposes. Erroneous determinations that property is nonexempt encourage creditors to press claims and to divide assets only to be told

> on appeal that there is nothing to divide. Of greater moment, however, the bankrupt may be thereby deprived of the necessities of life which Section 6 [of the former Act] was designed to preserve to him during the pendency of the action. On the other hand, an erroneous decision of exemption will leave property in the hands of the bankrupt and subject to dissipation without the appropriate satisfaction of any creditor. Exemption disputes, therefore, are akin to other "proceedings" in which interlocutory review eliminates unnecessary litigation.

561 F.2d at 782-83.

B. Concepts of Finality Under The Code's Jurisdictional Provisions Have Followed The Same Path.

Two important and enduring concepts emerged from the foregoing jurisprudence, namely the concept of "the proceeding as the relevant jurisdictional unit and the concept of finality as a prerequisite to appealability of bankruptcy orders." *In re Greene Cnty. Hosp.*, 835 F.2d at 593. The drafters of the current Bankruptcy Code and its accompanying jurisdictional provisions had these concepts in

mind when they abolished the distinction between controversies and proceedings, and made the requirement of finality explicit. *Id.* As then-Judge and now-Justice Breyer explained in *In re Saco Dev. Corp.,* 711 F.2d at 444-46.

> Although Congress has defined appellate bankruptcy jurisdiction in terms . . . similar to those appearing in other jurisdictional statutes . . . the history of prior federal law and the 1978 Act convinces us that Congress did not intend the word "final" here to have the same meaning—at least not with respect to the application of the traditional "single judicial unit rule." . . . Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case . . . . [There is] a longstanding Congressional policy of appealability, an uninterrupted tradition of judicial interpretation in which courts have viewed a "proceeding" within a bankruptcy case as the relevant "judicial unit" for purposes of finality, and a legislative history that is consistent with this tradition[.]

See also Smith v. Revie (*In re Moody*), 817 F.2d 365, 367-68 (5th Cir. 1987); Richard B. Levin, *Bankruptcy Appeals,* 58 N.C. L. REV. 967, 985 (1980) (also concluding that the relevant unit for appellate purposes is a discrete proceeding in bankruptcy).

Concerning the more precise dimensions of the bankruptcy finality requirement in cases under the Code, many courts have recognized that the concept "has been applied in a more pragmatic and less technical way than in other situations."[3] *Mort Ranta*, 721 F.3d at 246 (internal quotations omitted); *Brown v. Pa. State Emps. Credit Union* (*In re Brown*), 803 F.2d 120, 122 (3d Cir. 1986) (courts "must consider finality

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[3] *See, e.g., Official Unsecured Creditors' Comm. v. Michaels* (*In re Marin Motor Oil, Inc.*), 689 F.2d 445, 449 (3d Cir. 1982) (construing finality "less narrowly" under the Bankruptcy Code than under section 1291 in light of the "traditional rule" under the Bankruptcy Act allowing interlocutory appeals in proceedings in bankruptcy, and noting that while the Code abolished the distinction between "proceedings" and "controversies" and "substituted a finality requirement, it did not specify how finality should be interpreted. Since appellate courts have had long experience with relatively liberal appeal rules in many bankruptcy matters, and since these rules have not proved unduly burdensome, we need be somewhat less concerned about the dangers of interpreting finality in appeals under section 1293(b) slightly more broadly than in appeals under section 1291.").

functionally in bankruptcy"). For example, courts have held final and appealable a variety of orders that resolve a specific dispute within the larger case, even though roughly analogous matters would not be considered final in a traditional lawsuit outside the bankruptcy setting. *See, e.g., McDow v. Dudley*, 662 F.3d 284, 286-90 (4th Cir. 2011) (denial of trustee's motion to dismiss bankruptcy case as abusive); *Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F.2d 239, 241 (4th Cir. 1987) (denial of request by claimants for appointment of trustee); *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (order fixing venue).

These outcomes, and the historically broad approach to finality that generated them, support a finding of finality in this matter. As the court in *Mort Ranta* noted when faced with the identical question now before the Court:

> [T]he bankruptcy court order clearly resolved a discrete issue, indeed, the only issue, in Mort Ranta's bankruptcy case—that is, whether his proposed Chapter 13 plan merits confirmation . . . Nothing in either [the bankruptcy or district court] orders indicates that any issues concerning the proposed plan remained for the bankruptcy court's consideration.

721 F.3d at 247 (holding that denial of confirmation can be a final order for purposes of appeal even if the case has not yet been dismissed, and finding this conclusion "all but compelled by considerations of practicality"); *see also In re Armstrong World Indus., Inc.,* 432 F.3d 507, 511 (3d Cir. 2005) (holding that a denial of confirmation of a plan of reorganization was a final order for purposes of appeal, in part due to "practical considerations in the interests of judicial economy"); *In re Bartee*, 212 F.3d 277, 281-284 (5th Cir. 2000) (stating the relevant inquiry as whether "the order was intended to serve as a final denial of the relief sought by the debtor" and finding district court order final where there was nothing left for the debtor to do but seek either dismissal or confirmation of a plan the debtor did not want).

II. Bankruptcy Cases Differ Significantly From Other Kinds Of Federal Litigation, Requiring A Different Standard Of Finality That Recognizes The Appealability Of The Denial Of Confirmation Of Plans Like The One At Issue Here.

A capacious concept of finality in bankruptcy makes particular sense when viewed in context with how the administration of bankruptcy cases typically proceed, in contrast with other kinds of federal litigation. In most civil cases in the district court, the case typically

"is commenced by filing a complaint…." Fed. R. Civ. P. 3. It then usually proceeds in a relatively linear way to a singular "final" judgment appealable as of right to the relevant court of appeals. 28 U.S.C. § 1291. This Court has defined a "final" decision for purposes of section 1291 as one "that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment,'" as well as "a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1992) (internal citations omitted). The "narrow class of decisions" that are final even though they do not ultimately terminate the litigation "comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.*

In contrast, a bankruptcy case is commenced by filing a petition for bankruptcy relief under one of the several Chapters of the Code. 11 U.S.C. §§ 301, 302, 303(a); Fed. R. Bankr. P. 1002. Thereafter, administration of the case typically follows a path quite different from other forms of federal litigation. Among other things, it is a "commonplace notion that the 'case' triggered by a bankruptcy petition is

an 'umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant.'" *Term Loan Holder Comm. v. Ozer Group, LLC* (*In re Caldor Group*), 303 F.3d 161, 168 (2d Cir. 2002) (quoting *Sonnax Indus. v. Tri Component Prods. Corp.* (*In re Sonnax Indus.*), 907 F.2d 1280, 1283 (2d Cir. 1990)). In colloquial terms, the bankruptcy "case" is "'the whole ball of wax,'" *id.* (quoting 7 COLLIER ON BANKRUPTCY ¶ 1109.04[1][a][i] (15th ed. rev. 2001)), but the real action lies in the administration of the many different kinds of "proceedings" within a case, many of which look and function like individual lawsuits in their own right.

As explained in one treatise, encompassed within the bankruptcy case are "discrete judicial proceedings . . . commenced by a request in a form of pleading, such as a complaint, motion or application for judicial action." 7 COLLIER ON BANKRUPTCY 1109.4[1][a][i] (16th ed. rev. 2010). Under the Code and its corresponding rules, separate and distinct proceedings exist for a diverse range of bankruptcy matters, including confirmation of a debtor's proposed Chapter 13 plan. 11 U.S.C. § 1325, Fed. R. Bankr. P. 3015. By way of a brief illustration, other discrete proceedings within a bankruptcy case include such things as (1) a motion seeking approval of the assumption of an unexpired lease or executory contract, 11 U.S.C. § 365; Fed. R. Bankr. P. 6006; (2) a motion seeking the

approval of a settlement agreement between the estate and others, Fed. R. Bankr. P. 4001(d), 9019; and (3) adversary proceedings that more closely resemble traditional lawsuits, such as those to recover preferential or fraudulent transfers, which are commenced by filing a complaint, 11 U.S.C. §§ 547, 548, Fed. R. Bankr. P. 7001, 7003.

The Bankruptcy Code's legislative history demonstrates that Congress recognized this distinction between a bankruptcy "case" and the many "proceedings" within it. As stated in the Senate Report accompanying the Code:

> Everything that occurs in a bankruptcy case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case. Likewise, the term proceeding includes issues which may arise after a case is closed ….

S. REP. NO. 95-989, at 153-54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939-40; *see also* H.R. REP. NO. 95-595, at 444 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6399 (noting that the term

"proceeding" "is broad in scope, and covers all disputes that are finally determined by a bankruptcy judge in or related to a bankruptcy case," and includes "final orders in what are now referred to as contested matters, adversary proceedings, and plenary suits"). Moreover, as noted by Judge Lumbard in his dissent in *Maiorino v. Branford Sav. Bank*—a case that also addressed the appealability of orders denying confirmation of plans—"[g]iven this legislative history, the familiar words which limit our jurisdiction to 'final judgments, orders and decisions' should not be read to allow only appeals from the termination of a 'case' by either confirmation or dismissal." 691 F.2d 89, 94 (2d Cir. 1982) (Lumbard, J., dissenting).

As indicated, some proceedings in bankruptcy do function like typical litigations in federal court, namely adversary proceedings. Rule 7001 sets forth ten specific categories of adversary proceedings, such as "a proceeding to recover money or property" or "a proceeding to determine the dischargeability of a debt." Fed. R. Bankr. P. 7001. These types of proceedings, each commenced by a complaint, have been appropriately described as "separate lawsuits within the context of a particular bankruptcy case and have all of the attributes of a lawsuit." 10 COLLIER ON BANKRUPTCY ¶ 7001.01 (15th ed. rev. 2009). Likewise, the rules governing adversary proceedings closely mirror the Federal Rules of Civil Procedure and, in fact, many of

these rules are directly incorporated into the adversary proceeding setting under the provisions of Part VII of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7002, advisory committee note. As in other kinds of cases, a litigant in an adversary proceeding may file a counterclaim, Fed. R. Bankr. P. 7013, move to dismiss or for summary judgment, Fed. R. Bankr. P. 7012(b), 7056, and conduct discovery, Fed. R. Bankr. P. 7026-7037. Furthermore, bankruptcy rules 7054 and 7058 expressly adopt rules 54 and 58 of the Federal Rules of Civil Procedure, which govern the court's entry of a "judgment," defined as "a decree and any order from which an appeal lies." Consequently, it is unsurprising that the concept of appellate finality in the context of orders arising out of adversary proceedings has been traditionally aligned with the same concept in non-bankruptcy civil litigation, such that an order in an adversary proceeding is not typically "final" unless it "ends the litigation on the merits" or belongs to the "narrow class of decisions that do not terminate the litigation," but that must be treated as final to "achiev[e] a healthy legal system." *Digital Equipment Corp.*, 511 U.S. at 867.

Confirmation of a debtor's Chapter 13 plan, however, does not involve an adversary proceeding. Instead, it involves a contested motion. *See* Fed. R. Bankr. P. 3015(f), 9014. In a proceeding involving a contested motion there

is no complaint, and the rules contemplate a specialized type of order if the proceeding concludes with the confirmation of the plan. *See* Fed. R. Bankr. P. 3020(c). Although some of the Federal Rules of Civil Procedure apply in a proceeding on a contested motion, not all of them do, *see* Fed. Rule Bankr. P. 9014(c), and the matter is further regulated by other provisions of Part IX of the Federal Rules of Bankruptcy Procedure, *see, e.g.,* Fed.R. Bankr. P. 9013.

Critically, just as the confirmation of a debtor's plan may involve the "final" determination of the substantive rights of the parties, so, too, may the *denial* of confirmation of the debtor's plan, as in this case. In practical effect, the denial of confirmation in cases like this amounts to the dismissal of the discrete confirmation proceeding involving the failed plan. Thereafter, if the debtor wishes to propose a different plan, a new confirmation proceeding is required with new deadlines, an opportunity for objections, and a separate hearing. *See* Fed. R. Bankr. P. 3015. Because the resolution of discrete proceedings in bankruptcy cases are typically (and properly) treated separately for purposes of finality and appealability, the denial of confirmation of a plan terminating the confirmation proceeding on *that* plan should be considered final and appealable, just like the dismissal of a lawsuit in other litigation contexts.

III. Treating The Denial of Bullard's Plan As Non-Final Presents Serious Problems For The Administration Of Bankruptcy Cases.

The approach taken by the court below rejecting the appealability of the denial of confirmation of Bullard's plan creates a series of problems that undermine the proper and fair administration of the bankruptcy process. Lacking a right to take an immediate appeal, Bullard must either (1) propose an amended, unwanted plan, only thereafter to appeal from any order confirming that plan in order to seek to reinstate the original plan, or (2) dismiss the case and then appeal from the dismissal order. *See, e.g., Gordon v. Bank of America, N.A.*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*. Such an anomalous outcome burdens the debtor, puts him at a serious disadvantage in comparison to creditors, and undermines the policies and purposes of the Bankruptcy Code, including the efficient administration of bankruptcy cases and the expeditious grant of the debtor's "fresh start." Moreover, the decision below impairs access to judicial review on appeal in an Article III tribunal, which has particular implications in bankruptcy.

One of Congress's main purposes in enacting the Bankruptcy Code was to afford the honest but unfortunate debtor the opportunity to expeditiously and efficiently settle his debts and

achieve a "fresh start" through his completion of the bankruptcy process. H.R. REP. NO. 595, at 4 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 ("This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor."); *id.* at 118 ("This bill attempts to cure [prior] inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting the consumer debtors that have occurred both in the bankruptcy court and out."); *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006) (observing as one of the "[c]ritical features of every bankruptcy proceeding" Congress's ambition of providing the honest but unfortunate debtor "the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts").

Rather than advance this critical goal, the decision below undermines it by limiting and/or delaying Bullard's access to appellate review. Bankrupt debtors, who generally operate with extremely limited resources, typically can ill afford to spend time or money pursuing the confirmation of a secondary plan for the sake of being able to take an appeal of the denial of confirmation of the original plan. Moreover, allowing review of plan confirmation, but not denials, puts the debtor at a marked disadvantage in comparison to creditors. In Chapter 13, it is the debtor who always proposes the plan. 11 U.S.C. §§ 1121, 1321; H.R. REP. NO. 595, at 428 (1977), *reprinted in* 1978

U.S.C.C.A.N. 5963, 6384 ("The debtor has the exclusive right to propose and file a plan."). Consequently, the Chapter 13 debtor "is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation." *Maiorino*, 691 F.2d at 95 (Lumbard, J. dissenting). Allowing appeals from decisions confirming plans, but not from denials, leads to the inequitable result that creditors may appeal an unfavorable decision regarding a plan's validity as of right, but "when debtors lose and a plan is rejected, they may appeal only by leave of the district court[or bankruptcy appellate panel]," or "wait until a less favorable plan is confirmed, which may be months away, or until the bankruptcy court dismisses the case or dissolves the automatic stay." *Id.* This is the case even where the issue on which the debtor seeks review is one recognized as "an important and unsettled question of bankruptcy law." Pet. App. 1a. Among other problems, such a lopsided set of circumstances is not only unfair, it can only result in the lopsided and unhealthy development of the law of bankruptcy.

An immediate right of appeal in this case is also important for another reason: to ensure that debtors, and not just creditors, have access to review in an Article III tribunal. Bankruptcy judges are not Article III judges, and a robustly available right of appeal to an Article III tribunal is one of the essential attributes of the constitutionality of the bankruptcy system. *In re*

Schwartz-Tallard, 765 F.3d 1096, 1112 (9th Cir. 2014) (Wallace, J., dissenting) ("[I]f Congress vests 'essential attributes' of the judicial power to an Article I adjunct that is not subject to searching review by an Article III court and that can issue binding and enforceable final judgments, the enacting law also violates the Constitution."); *Chemical Bank v. Togut (In re Axona Int'l Credit & Commerce Ltd.*, 924 F.2d 31, 35 (2d Cir. 1990) ("Article III review of bankruptcy court decisions removes any constitutional concerns presented by the predecessor section [to the current Bankruptcy Code]").

The decision below hampers rather than promotes review in an Article III court of the decisions of the bankruptcy courts. For this additional reason, it is fundamentally unsound.

CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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