No. 13-935

IN THE
Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent Sharif concedes that the Petition presents a split between the Seventh and the First, Fourth, Fifth, Sixth, Eighth and Tenth Circuits on Question One and between the Seventh and Sixth Circuits on Question Two. With respect to Questions Three and Four, the issues that overlap with those currently before the Court in *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200), the Court has already found that a circuit split exists. That split has deepened since the Court granted review.

Sharif also does not deny that these questions are extremely important to the Nation's bankruptcy system, nor could he credibly do so. In each of the past four years, individuals and corporations have filed more than one million bankruptcy cases.[1] The relief bankruptcy affords to parties in dire financial straits, from individuals to mega-corporations and even municipalities, is an important engine of our economic system, making the efficient operation of the bankruptcy courts important to the Nation's economy. Amira Annabi, Michèle Breton, Pascal Francois, *Resolution of financial distress under Chapter 11*, Journal of Economic Dynamics & Control December 2012, Vol. 36 No. 12, 1867-87 (2012) ("[t]he recent bailout of some major U.S.

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[1] Bankruptcy filing statistics are available at the United States Court web site found at: http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings.

companies during the latest crisis has emphasized the complex and critical impact that bankruptcy can have on the economy as a whole").

The Seventh Circuit's decision threatens the efficient operation of the bankruptcy system at its very core. As this Court held in *Central Virginia Community College v. Katz*, a "[c]ritical feature[] of every bankruptcy" is "the exercise of exclusive jurisdiction over all of the debtor's property." 546 U.S. 356, 363-64 (2006). Yet, the Seventh Circuit concluded that bankruptcy courts lack the constitutional authority to decide whether property in the debtor's possession belongs to the bankruptcy estate under 11 U.S.C. § 541(a) when that determination also requires the bankruptcy court to decide an ancillary issue of state law. The Seventh Circuit also concluded that debtors who voluntarily elect to submit themselves and their property to the bankruptcy court's jurisdiction do not consent to the entry of final judgments by the bankruptcy court on such basic bankruptcy determinations.

State law establishes most property rights. *See, e.g.*, *Butner v. United States*, 440 U.S. 48, 55 (1979). Consequently, state law permeates the fundamental decisions of virtually every bankruptcy case, such as whether a debtor will be discharged, and what claims will be allowed against the estate. By removing the bankruptcy courts' authority to decide issues arising under the Bankruptcy Code if state law plays a role in the decision, the Seventh Circuit has crippled the bankruptcy courts' ability to oversee most aspects of

bankruptcy cases and rendered the bankruptcy courts "helpless indeed." *Mueller v. Nugent*, 184 U.S. 1, 14 (1902). Thus, as a result of the Seventh Circuit's decision, debtors may take advantage of the protections of the automatic stay and the other benefits of bankruptcy while simultaneously blocking the bankruptcy courts' authority to enter judgments against them.

That the Seventh Circuit reached this conclusion, which marks a radical departure from established precedent, demonstrates the confusion that exists in the lower courts over the reach of this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Until this Court resolves the circuit splits on the questions this case raises, the validity of countless judgments made by bankruptcy courts across the country will be in doubt and litigation raising *Stern* issues will continue to dominate the lower courts' dockets, creating great inefficiencies in the bankruptcy process and significant additional costs.

Instead of addressing the merits of Petitioner's request for review, Sharif makes three arguments. *First*, he urges the Court to defer consideration of the questions this Petition raises, arguing that the Petition is premature because the Seventh Circuit remanded the case for further proceedings. Respondent's Brief in Opposition ("Opp.") 6-9.

Second, Sharif argues with respect to Question Two that he could not have consented to the entry of a final judgment by filing his petition in bankruptcy

court because he filed for bankruptcy before *Stern*. This argument is not a basis on which the Court should decline to review this case. More importantly, this argument misses the fundamental distinction between *debtors*, like Sharif, who voluntarily seek bankruptcy relief and truly have consented to proceeding in a bankruptcy court by choosing to file a petition there, and *creditors*, who have not initiated those bankruptcy cases. Opp. 9-11.

Finally, Sharif raises an argument unrelated to the questions before the Court, claiming that creditors like Wellness may not ask the bankruptcy court to make determinations about what constitutes property of the estate. Sharif's argument is incorrect as a matter of law. More importantly, it is not a basis on which to deny the Petition. Opp. 11-13.

I. The Importance Of The Questions Presented Warrants Immediate Review.

Sharif does not dispute the importance of the questions this case raises. Instead, he urges the Court to defer their consideration because these questions are presented in an interlocutory posture. Opp. 6-9. But, as the Court has made clear repeatedly, the fact that an order is interlocutory is not a reason to deny review if the case presents an important and clear cut issue of law that otherwise would qualify for the Court's review. *See, e.g.*, *Tidewater Oil Co. v. United States*, 409 U.S. 151, 152 (1972).

In *Tidewater Oil*, for example, the Court granted review of a Ninth Circuit order declining to hear an interlocutory appeal under 28 U.S.C. § 1292(b) because the decision "raise[d] an important question of federal appellate jurisdiction" and there was a circuit split. 409 U.S. at 153; *accord F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160 (2004) (granting *certiorari* of interlocutory order "to resolve a split among the Courts of Appeals" regarding the Sherman Act); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (granting certiorari of interlocutory order "to resolve the conflict" among the circuits regarding removal under 28 U.S.C. § 1441); *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (granting *certiorari* of interlocutory order where decision below "is clearly erroneous under our precedents").

The Court also has granted review of interlocutory orders that present the same or similar issues as a case already pending before the Court where granting review would allow the Court to address those issues "in a wider range of circumstances." *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 260 (2003) (granting review "so that this Court could address the constitutionality of the consideration of race admissions in a wider range of circumstances").

Further, there are instances where the interlocutory nature of the order makes review particularly appropriate. For example, this Court has granted *certiorari* where doing so "is

fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Land v. Dollar*, 330 U.S. 731, 734n.2 (1947) (same). In *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964), the Court granted review because it determined that "the eventual costs, [to the parties] will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." Likewise, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949), this Court granted *certiorari* because while "[t]he judgment of the Court of Appeals was not a final one, . . . we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" The Court also has recognized that the effect of some interlocutory orders are "immediate and irreparable," and therefore "any review by this Court . . . must be immediate to be meaningful." *Fed. Power Comm'n v. Transcont'l Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

All of these considerations justify immediate review of the Seventh Circuit's decision in this case. Sharif does not dispute that there is a circuit split on each of the four questions this case presents and that these questions are pure legal questions about the constitutional and statutory authority of the bankruptcy courts to hear and decide property of the estate determinations where the debtor holds the property.

Moreover, any proceedings that occur on remand will not change or further develop the record with respect to these purely legal questions. The Seventh Circuit issued two final constitutional decisions here, neither of which will change during or after the remand: first, that bankruptcy courts lack the constitutional authority to enter final judgments against debtors deciding whether property in the debtor's possession belongs to the bankruptcy estate under § 541 (the issue raised in Question One); and second, that bankruptcy courts may not exercise the judicial power of the United States to enter final orders against debtors who voluntary consented to proceed in the bankruptcy court by filing a bankruptcy petition (the issue raised in Questions Two and Three). The Seventh Circuit also has concluded that there is a gap in 28 U.S.C. § 157 that precludes bankruptcy courts from recommending findings of fact and conclusions of law in matters that are denominated as core under § 157, but outside of the bankruptcy court's constitutional authority to decide (the issue raised in Question Four). Pet. App. 53a-54a.

Nothing that happens on remand will alter those fundamental constitutional and statutory determinations. The Seventh Circuit remanded only "for further proceedings consistent with the instructions set forth in this opinion." *Id.* at 66a. Those instructions directed the district court to decide only whether the § 541 claim was core and fell within the statutory gap or non-core and outside of the gap. *Id.* at 54a. Whichever way that analysis

comes out, it will not change the Seventh Circuit's holding that bankruptcy courts no longer have the constitutional authority to enter final judgment orders deciding whether property in the debtor's possession belongs to the bankruptcy estate. Thus, the Seventh Circuit's constitutional and statutory conclusions are truly final in the sense that those rulings are now law of the case and cannot be altered below. Because, as Sharif concedes, these questions are important questions on which the circuits are split, the Court should address them now.

In addition, the analysis that the Seventh Circuit directed the district court to perform on remand is, at most, only tangentially related to the Seventh Circuit's conclusion that there is a statutory gap in § 157 and should not preclude this Court from granting the Petition for two reasons. First, as with its constitutional conclusions, the Seventh Circuit has conclusively ruled that there is a statutory gap in § 157. The district court's analysis of how that gap applies in this case will not alter the Seventh Circuit's underlying legal determination that the gap exists. Deciding this important question of statutory interpretation now also avoids the delay and expense of additional proceedings below, which could be quite extensive if the district court concludes that § 541 determinations are core proceedings. *Gillespie*, 379 U.S. at 152-53.

Second, the statutory gap question is not the primary focus of Wellness's Petition as that issue is already before the Court in *Executive Benefits*, 133

S. Ct. at 2880. Wellness seeks review of that question (listed as Question Four) only to the extent that the Court does not reach that issue in *Executive Benefits* or, if it does decide the issue, to allow the Court to remand this case to the Seventh Circuit to re-address the issue in light of the Court's ruling in *Executive Benefits*.

The overlap of issues with *Executive Benefits* is another reason to grant Wellness's Petition. As explained in Wellness's Petition, the Court may not reach both of the questions presented in *Executive Benefits*. Pet. 31-32. This case would allow the Court the opportunity to address those important questions in "a wider range of circumstances." *Gratz*, 529 U.S. at 260. Accordingly, granting review is appropriate under this Court's precedent.

II. Sharif's Merits-Based Argument On Question Two Is Not A Basis On Which To Deny The Petition.

Sharif also argues that the Court should not grant review of the second question—whether Article III permits the bankruptcy courts to exercise the judicial power of the United States over claims against a debtor where the debtor has consented to the exercise of such power by voluntarily filing for bankruptcy relief. Opp. 9-11. Sharif contends that he could not have consented to the bankruptcy court's entry of a final judgment because consent requires the waiver of a known right and he did not know he had a basis to object because the Court

decided *Stern* after the bankruptcy court ruled against him. *Id.*

Sharif's argument reflects a fundamental misunderstanding of the question Wellness asks this Court to review. The issue here is *not* whether Sharif failed to raise a timely objection to the bankruptcy court's entry of a final judgment in the bankruptcy court before that court entered judgment against him (although he did not timely object). Instead the issue is whether, by filing a bankruptcy petition in the first instance, a debtor consents to the entry of final judgments by the bankruptcy court on those matters that are central to the bankruptcy process, such as determining whether property in the debtor's actual or constructive possession is estate property.

Stern, which addressed whether, by filing a proof of claim, a *creditor* consents to the entry of final judgment by the bankruptcy court, is far removed from the issue of *debtor* consent. 131 S. Ct. at 2614. As explained in Wellness's Petition, the controlling decision of this Court is not *Stern* but *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986). Pet. 27-31. *Schor* held that a party who files suit in a non-Article III forum consents to a final adjudication by that forum. 478 U.S. at 849-50. *Schor* preceded the filing of Sharif's bankruptcy petition by 23 years.

Sharif, who voluntarily filed for bankruptcy to stay contempt proceedings pending against him,

chose to proceed in bankruptcy court when he saw an advantage in doing so. Pet. App. 6a. As explained in Wellness's Petition, having voluntarily chosen the bankruptcy court, Sharif is no different from the litigants in *Schor*, who chose to file suit in an Article I forum. Pet. 30-31. Granting *certiorari* here to decide the question whether bankruptcy courts may enter final judgments against voluntary debtors is critical to the efficient administration of bankruptcy cases and to ensure uniformity across the circuits.

III. Sharif's Standing Argument Is Not A Basis On Which To Deny Review.

Sharif contends that the Court should not grant review because a creditor like Wellness lacks standing to bring a declaratory judgment action against the debtor asking the bankruptcy court to decide whether the debtor's property belongs to the bankruptcy estate. Opp. 11-13. As an initial matter, Sharif has waived his right to make this argument by not raising it until he was before the Seventh Circuit. *See generally* Adv. Proc. 09-00770 (Bankr. N.D. Ill.); Case 10-C-5303 (N.D. Ill.); No. 12-1349, Dkt. 13 at 9 (7th Cir.) (raising standing argument for first time in opening brief). Consequently, the Seventh Circuit properly declined to address the argument. *Coleman v. Hardy*, 690 F.3d 811, 818 (7th Cir. 2012).

Sharif's standing argument also lacks merit. To make his standing argument, Sharif likens Wellness's § 541 claim *against the debtor* to an alter

ego claim against a stranger to the debtor and then relies on a lone Seventh Circuit decision which holds that as a general rule only a trustee in bankruptcy may bring an alter ego claim against a stranger to the debtor. Opp. 11-13. Sharif's argument depends on a complete mischaracterization of Wellness's § 541 claim. Unlike the creditors in *Koch Refining v. Farmers Union Central Exchange*, 831 F.2d 1339 (7th Cir. 1987), the decision Sharif cites, Wellness is not suing a third party on a claim belonging to the estate. Instead, Wellness sued the debtor Sharif for a declaration that Sharif's alleged trust was a sham; a declaration that benefits all creditors of the estate. (Adv. Proc. 09-00770, Dkt. 1. ¶¶30-33 (Bankr. N.D. Ill.)). Sharif himself described the claim as one brought under federal law—§ 541. No. 12-1349, Dkt. 29 at 30-31 (7th Cir.).

The fact that Wellness alleged the trust was a sham because Sharif failed to comply with trust formalities does not transform the claim into a state law alter-ego action. Moreover, as a creditor, Wellness has an economic interest, and is a person aggrieved, by Sharif's claim that the property he held is not estate property. Thus, Wellness had standing. *See Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (a "sufficient likelihood of economic injury" establishes standing); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988) ("[a]s a general rule, creditors have standing to appeal orders . . . disposing of property of the estate because such orders directly affect the creditors' ability to receive payment of their claims").

CONCLUSION

For the foregoing reasons, the Court should grant the Petition, or, alternatively, hold this case pending its resolution of *Executive Benefits*.

Respectfully submitted,

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