No. 14-116

In The
Supreme Court of the United States

LOUIS B. BULLARD,

Petitioner,

v.

HYDE PARK SAVINGS BANK,

Respondent.

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

HYDE PARK SAVINGS BANK'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent is Hyde Park Savings Bank. There are no parent corporations or publicly held companies owning 10% of the Respondent's stock.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent, Hyde Park Savings Bank, urges the Court to grant the petition for a writ of certiorari and affirm the judgment of the First Circuit Court of Appeals. As the Petitioner explains, this case presents an acknowledged circuit split on an important and recurring question: whether an order denying confirmation of a bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1).

The First Circuit held that the denial of confirmation of a debtor's proposed Chapter 13 plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1) so long as the debtor remains free to propose an amended plan. By its holding, the First Circuit joined five other appellate circuits in holding that the denial of confirmation of a proposed bankruptcy plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1).

The question presented herein is critical to the administration of bankruptcy proceedings in both the business and consumer context as corporate Chapter 11 plans are also implicated by this question. The granting of the petition for a writ of certiorari will end the split between the appellate circuits and ensure uniformity throughout the country as to whether an order denying confirmation of a bankruptcy plan is a final order that is appealable pursuant to 28 U.S.C. § 158(d)(1). In the event that the Court grants the Petitioner's request for certiorari, the Court should

resolve this critical question by affirming the decision of the First Circuit and the majority of the other circuits that have considered this question.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ENTRENCHED SPLIT BETWEEN THE CIRCUITS WITH RESPECT TO WHETHER THE DENIAL OF CONFIRMATION OF A BANKRUPTCY PLAN IS APPEALABLE.

As the Petitioner correctly outlines in his petition, there is an entrenched split between the circuits with respect to whether an order denying the confirmation of a proposed bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1). Currently the majority of the circuits, the First, Second, Sixth, Eighth, Ninth, and Tenth, have held that an order denying confirmation of a Chapter 13 – or a Chapter 11 – bankruptcy plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1). *In re Bullard*, 752 F.3d 483 (1st Cir. 2014); *Maiorino v. Bradford Savings Bank*, 691 F.2d 89 (2d Cir. 1982); *Lewis v. United States,* 992 F.2d 767, 772 (8th Cir. 1993); *In re Simons*, 908 F.2d 643 (10th Cir. 1990);[1]

[1] The Tenth Circuit recently re-affirmed its holding in *In re Simons* in *In re Gordon*, which is subject to a pending Petition for Certiorari. *In re Gordon,* 743 F.3d 720, 723-725 (10th Cir. 2014).

In re Lievsay, 118 F.3d 661 (9th Cir. 1997) (denial of a Chapter 11 plan is not a final order); *In re Lindsey,* 726 F.3d 857 (6th Cir. 2013) (denial of a Chapter 11 plan is not a final order). Conversely, a minority of circuits, the Third, Fourth, and Fifth, have held that an order denying confirmation of a Chapter 13 – or a Chapter 11 – bankruptcy plan is, or may be considered, a final appealable order pursuant to 28 U.S.C. § 158(d)(1).[2] *Mort Ranta v. Gorman,* 721 F.3d 241 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re Armstrong World Indus., Inc.,* 432 F.3d 507 (3d Cir. 2005) (denial of Chapter 11 plan was final appealable order).

Since several of the circuits have considered whether the denial of plan confirmation is a final appealable order in the last two years and reached different conclusions – each while acknowledging the existence of the split – only this Court can resolve the split and create uniformity amongst the circuits and issue a binding mandate as to whether denial of plan

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[2] In *In re Bartee,* the Fifth Circuit's analysis of whether the denial of plan confirmation is a final order is consistent with the majority of the circuits that have held that the denial of plan confirmation is not a final order. *In re Bartee* 212 F.3d at 284. In *In re Bartee,* the Court, however, was confronted with a case with an unusual procedural posture where the bankruptcy court titled its denial as "Final Order" and gave no indication that there would be any further proceedings. *Id.* In its holding the Fifth Circuit stated, "if the order addressed an issue that left the debtor able to file an amended plan (basically to try again) – appellate jurisdiction would be lacking." *Id*.

confirmation is a final order that is appealable pursuant to 28 U.S.C. § 158(d)(1).

II. DENIALS OF PLAN CONFIRMATION ARE NOT FINAL AND APPEALABLE ORDERS.

Denials of plan confirmation are not final and appealable orders. Typically, when a plan is denied the court will ordinarily grant the debtor a period of time to propose a new plan or face dismissal of the petition. Since the debtor is free to propose a new plan, which restarts the entire confirmation process, the denial of confirmation is not a final order pursuant to 28 U.S.C. § 158(d)(1). As such, the majority of the circuits have held that the denial of plan confirmation is not final and appealable as there are still significant further proceedings to be undertaken by the bankruptcy court.

1. When confirmation of a proposed bankruptcy plan is denied there are still significant further proceedings that must be undertaken in the debtor's bankruptcy – not just ministerial tasks. After denial of confirmation, the debtor must propose a new plan, potentially face a new round of objections from creditors and the bankruptcy court still must decide whether to confirm the plan or once again sustain the objection(s) of the creditor(s).[3] *In re Bullard,* 752 F.3d

[3] Alternatively, a debtor may choose not to propose a new plan and either voluntarily dismiss the petition or allow the

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at 486-487 *citing In re Lindsey,* 726 F.3d at 859; *In re Gordon*, 743 F.3d 720, 723 (10th Cir. 2014). These actions are not simply ministerial, but substantive actions that go to the core of the administration of any Chapter 11 or 13 bankruptcy. As such, the denial of plan confirmation cannot be considered a final appealable order – a rule that a majority of the circuits have adopted.

Moreover, the conclusion that the denial of plan confirmation is not a final order is consistent with the principal that "finality" is more flexible in the context of bankruptcy. "Flexible Finality" applies when treating something as a final order will "finally dispose of all the issues pertaining to a discrete dispute within a larger proceeding." *In re Bullard* 752 F.3d at 485-486 *quoting Perry v. Fed. Credit Union,* 391 F.3d 282, 285 (1st Cir. 2004). Since the denial of plan confirmation is not a discrete dispute within the context of a larger proceeding, the denial of the plan cannot be considered a final order even under the more flexible standard of finality utilized in bankruptcy. *Id.*

2. If denials of plan confirmation were treated as final appealable orders pursuant to 28. U.S.C. § 158(d)(1), it "would clog the appellate dockets with issues that could, and should, be decided elsewhere." *See In re Bullard,* 752 F.3d at 489. Indeed, even if the Court were to adopt a more case by case permissive

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bankruptcy court to dismiss the petition for failure to submit a new proposed plan.

standard of finality "the parties and the courts would be bogged down in extended jurisdictional analyses before even approaching the merits" – which is not the traditional function of appellate courts. *Id.*

3. Additionally, there already exists a mechanism for appellate review of the denial of plan confirmations when the denial involves unsettled or conflicting questions of the law – certification pursuant to 28 U.S.C. § 158(d)(2).[4] Pursuant to 28 U.S.C. § 158(d)(2) the Bankruptcy Court, the BAP, or the District Court may certify a question under the following three circumstances:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

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[4] Additionally, 28 U.S.C. § 158(a)(3) permits interlocutory review of certain non-final bankruptcy orders. In this case, the Petitioner already sought, and received, interlocutory review of the Bankruptcy Court's denial of confirmation of his proposed bankruptcy plan pursuant to 28 U.S.C. § 158(a)(3).

> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

As such, there is an existing statutory framework that allows for permissive appellate review of novel issues of law or where a split of authority exists. In *In re Bullard,* the First Circuit relied, in part, on the existence of the certification process to support its holding that the denial of plan confirmation is not a final order. *In re Bullard,* 752 F.3d at 487; *see also In re Lindsey* 726 F.3d at 861. Accordingly, there is no need to treat the denial of confirmation of all bankruptcy plans as final orders when a procedure already exists for an aggrieved party to seek appellate review if there is a truly unsettled or conflicting question of law.

CONCLUSION

The Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 16, 2014