No. 15-1224

In the Supreme Court of the United States

SHOLEM PERL, PETITIONER

v.

EDEN PLACE, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the pragmatic approach to finality explained in last Term's *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015), a bankruptcy court's determination that a party violated the automatic stay is subject to appeal under 28 U.S.C. § 158 if the court does not address remedies, where the only relief debtor explicitly sought for the violation was attorney's fees and costs and where, as the Ninth Circuit concluded, "the discrete issue of whether there was a stay violation . . . was the only issue litigated in the bankruptcy proceedings." Pet. App. 12a.

RULE 29.6 STATEMENT

Eden Place, LLC has no parent, and no publicly held corporation owns 10% or more of its stock.

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The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 811 F.3d 1120. The Bankruptcy Appellate Panel's opinion (Pet. App. 28a-48a) is reported at 513 B.R. 566. The bankruptcy court's order concluding that petitioner's eviction violated the automatic stay, but granting relief from the automatic stay prospectively (Pet. App. 49a-53a) is unpublished.

JURISDICTION

The court of appeals' judgment was entered on January 8, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

After petitioner defaulted on his secured promissory note, petitioner's house (the "Property" or the "Residence") was sold to respondent, a bona-fide purchaser, at a public auction foreclosing on a deed of trust. Months after respondent perfected title, petitioner refused to vacate the premises. Pet. App. 4a. Respondent brought a state-court eviction action (called an unlawful detainer action). A California state court rejected petitioner's defenses to the action for possession; judgment was entered and a writ of possession was issued in favor of respondent. The state court then, at petitioner's request, set conditions to stay further court proceedings. *Ibid.* Rather than complying with those conditions, petitioner filed a "skeletal" pro se bankruptcy petition that lacked any accompanying schedules, financial statement, or proposed plan of reorganization. *Id.* at 5a.

When the county sheriff proceeded with the eviction anyway, petitioner filed a motion against respondent to enforce the bankruptcy proceeding's automatic stay. Pet. App. 6a. Though the bankruptcy court concluded respondent had violated the automatic stay, petitioner never presented any evidence of damages from the eviction. *Ibid.* He filed nothing further in his bankruptcy proceedings, failed to appear at a creditor's meeting, and the bankruptcy case was dismissed. *Ibid.* Respondent appealed the finding it had violated the stay to the Bankruptcy Appellate Panel ("BAP"), which concluded jurisdiction was proper and affirmed. The Ninth Circuit determined that appellate jurisdiction was proper, but reversed on the merits.

The court of appeals correctly held that it had jurisdiction over this case, applying *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015), which confirmed that "[t]he rules [of finality] are different in bankruptcy." Closely following *Bullard*'s reasoning, the court of appeals concluded that the bankruptcy judge's order finding respondent had violated the automatic stay was immediately appealable because it "finally dispose[d] of a discrete dispute[] within the larger case," *id*. at 9a, 12a, namely "the *only* issue litigated in the bankruptcy proceedings and before the BAP." *Id.* at 12a (emphasis added). That decision does not conflict with the decision of any other court of appeals. *Every* case petitioner cites that purportedly conflicts with the decision below predates this Court's recent decision in *Bullard*, Pet. App. 13, and involves facts materially different than those here.

Even if the court of appeals were in disagreement, this case is not a suitable vehicle to address the question presented. Because petitioner has shown virtually no interest in these proceedings since their earliest days—he neither appeared nor filed pleadings before the BAP or the Ninth Circuit, his bankruptcy case was dismissed nearly three years ago because of his failure to appear, and to this day he has presented no evidence of damages from respondent's alleged automatic stay violation—the record in this case is poorly developed. The record is at best unclear about the relief petitioner sought; although petitioner claims for the first time before this Court that he seeks damages, he did not lift a finger to pursue damages during years of litigation, until the dissent below raised the prospect of invoking jurisdiction to eliminate the Ninth Circuit's adverse ruling on the merits. Finally, even if petitioner prevailed on his jurisdictional argument, in light of the Ninth Circuit's thorough analysis demonstrating that petitioner had no cognizable property interest under California law, it is all but certain that he could not prevail on the merits. Granting certiorari would thus be a waste of judicial resources.

The petition should be denied.

STATEMENT

1. In 2009, petitioner fell behind on his promissory note payments on the Property, and ultimately defaulted. Pet. App. 30a. Years later in March 2013, after many delays petitioner caused, Bank of America foreclosed on its deed of trust and the Property was sold at public auction to respondent, a bona-fide purchaser. *Ibid.* Petitioner refused to

vacate after being served with a notice to quit, and instead filed a separate civil complaint against respondent in state court to set aside the sale. *Id.* at 4a. Respondent filed a cross-complaint for holdover damages, trespass, and interference with prospective economic advantage.[1] *Id.* at 30a.

Respondent prevailed on the unlawful detainer action to evict petitioner. On June 11, 2013, the state court entered judgment in respondent's favor and awarded damages. *Ibid.* Three days later it entered a writ of possession in favor of respondent. *Ibid.* Sometime between June 14 and June 24, the Sheriff posted an eviction notice on the Property. *Id.* at 4a. On June 19, 2013, petitioner asked the state court to stay the judgment; that court imposed conditions for entry of such a stay. *Id.* at 5a.

Instead of complying with the requirements to stay the state proceedings, the next day, petitioner filed a "skeletal" pro se bankruptcy petition. Pet. App. 5a. Petitioner did not (and never did) file any schedules, a financial affairs statement, or proposed plan of reorganization in his bankruptcy case. Pet. App. 5a. Filing of a bankruptcy petition automatically stays the "commencement" of any "action or proceeding against the debtor." 11 U.S.C. § 362(a)(1). Though petitioner did not list respondent as a creditor, it learned of the bankruptcy case through a letter from petitioner's counsel. Pet. App. 5a.

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[1] Respondent's cross-complaint is still pending; petitioner's civil action was dismissed against respondent on October 3, 2014.

On June 24, 2013, petitioner filed a notice to remove the various state court actions; later the same day, respondent sought to remand proceedings to state court. Pet. App. 32a. It also moved in bankruptcy court for relief from the stay; it also argued, alternatively, that the automatic stay did not apply to the Property because respondent had already perfected title and obtained a writ of possession before petitioner even filed his bankruptcy petition; thus, the Property was not part of petitioner's bankruptcy estate. *Ibid.* The bankruptcy court scheduled a hearing on the motion for relief from the stay.

b. While respondent's motion for relief from the stay was pending, the Sheriff evicted petitioner on June 27, 2013. Pet. App. 32a. Petitioner "left [the Property] in shambles" with "trash all over the place," and ripped out fixtures such as toilets that under California law convey to the new owner. Appellant's BAP App. 275-276. With the assistance of counsel, petitioner filed a motion to enforce the automatic stay and hold respondent in contempt of court. Pet. App. 33a. He argued that the eviction interfered with his alleged equitable possessory interest in the Property. *Id.* at 6a.

c. The bankruptcy court held that petitioner's eviction violated the automatic stay and was void. Pet. App. 52a. It determined that petitioner's "bare possessory interest, coupled with the possibility of some sort of relief" from the pending litigation, "g[a]ve the bankruptcy estate a protected interest [in the Property] that is subject to the automatic stay." Pet. App. 36a; accord *id.* at 52a. The court did not

impose contempt sanctions on respondent because petitioner "had not yet offered any evidence of damages due to the eviction." *Id.* at 37a. (Indeed, to this day, petitioner *still* has not shown any evidence of damages from the eviction.) The bankruptcy court granted respondent's motion to remand the state actions involving title to the Property to state court, and granted respondent's request for relief from the automatic stay *prospectively* "such that the parties may continue their litigation in nonbankruptcy court," but denied retroactive relief. *Id.* at 52a, 37a.

d. Despite receiving extensions to file his schedules and other required documents, petitioner "never filed anything further in his bankruptcy case." Pet. App. 38a. The bankruptcy court ultimately dismissed the case in August 2013, because of petitioner's failure to appear at a scheduled meeting of creditors. *Ibid.* After respondent had filed his notice of appeal seeking review of the bankruptcy court's liability determination, petitioner stipulated to the dismissal of his bankruptcy case with the express understanding that the bankruptcy court "and/or the Bankruptcy Appellate Panel as may be appropriate, shall retain jurisdiction of the matters relating to the [stay-violation] hearing . . . , which are now on appeal." C.A. E.R. 40-41. Petitioner's counsel stipulated that "in case we can't resolve the issues between us [regarding the alleged automatic-stay violation], . . . *the appeal would go forward* and this Court will still have jurisdiction to hear that issue of the core proceeding." Tr. of 6/30/13 status conf. 2 (emphasis added).

3. The BAP affirmed. Pet. App. 28a-48a. The BAP concluded that jurisdiction was proper under 28 U.S.C. § 158. Pet. App. 38a. It then turned to the "sole issue" before it: whether under California law, petitioner "had any remaining interest in the Residence" when he filed his bankruptcy petition. *Id.* at 39a. The court first determined that "title to the Residence passed to [respondent] free and clear of any right, title, or interest of [petitioner]'s about three months before he filed his chapter 13 bankruptcy petition," *id.* at 41a, so that petitioner's "ownership interest in the Residence was eliminated prepetition." *Ibid.* However, the court concluded that petitioner's "physical occupation of the Residence conferred a possessory interest under California law that was protected by the automatic stay." *Id* at 47a.

4. The court of appeals reversed. Pet. App. 1a-21a.

a. The majority of the panel "agree[d]" with the BAP that jurisdiction was proper because "[t]he bankruptcy court's order determined the discrete issue of whether there was a stay violation, which was the only issue litigated in the bankruptcy proceedings or before the BAP." Pet. App. 8a, 12a. The majority began by noting that *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015), held that "'[t]he rules [of finality] are different in bankruptcy'" than "[i]n an ordinary civil case." *Id.* at 9a (quoting *Bullard*, 135 S. Ct. at 1692). Instead of having to show that the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *ibid.* (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-374

(1981)), under the "pragmatic" and "more flexible standard" applicable there, "[o]rders in bankruptcy cases may be appealed immediately if they finally dispose of discrete disputes within the larger case." *Ibid.* (internal quotation marks omitted).

Applying circuit precedent, the majority held that jurisdiction was proper because the order "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed," *id.* at 10a (quoting *In re SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012)), because "the bankruptcy court's determination that [respondent] violated the automatic stay is a substantive ruling with real effects," *id.* at 12a, and "[t]here is no question that the discrete issue addressed by the bankruptcy court—violation of the automatic stay—has been definitively and finally resolved." *Id.* at 13a. The majority therefore concluded that "[t]here is no question" that "[a]s a practical matter, the resolution of [the automatic stay] issue resolved the entire case and thereby qualifie[d] as a final decision under our pragmatic approach to finality in the bankruptcy context." *Id.* at 13a.

b. The majority held that respondent's actions did not violate the automatic stay. Pet. App. 21a. It concluded that "[t]he BAP correctly determined that [petitioner] had no remaining legal interest in the property" after respondent, a bona-fide purchaser, "purchased the property . . . and recorded its deed," extinguishing "any legal interest [petitioner] retained in the property." *Id.* at 15a. After a thorough analysis of California law, the majority concluded that the BAP had erred in concluding petitioner

retained an equitable interest in the property through his "unlawful possession," *id.* at 15a, because "no occupant of the premises retains any possessory interest following service of the writ of possession," *id*. at 18a. The majority reasoned that "the unlawful detainer proceedings" respondent pursued "are expressly designed to determine who has superior title to the property, including the right to immediate possession," and that "[t]he conclusion that the occupying resident retains an equitable possessory interest is inconsistent with [California law]." *Id.* at 20a. Because California law, upon the state court's entry of an eviction judgment for possession, "bestowed legal title and *all* rights of possession upon [respondent]," *id.* at 21a (emphasis in original), "the Sheriff's lockout did not violate the automatic stay because no legal or equitable interest in the property remained to become part of the bankruptcy estate," *ibid.*

c. Judge Watford dissented solely as to jurisdiction; he did not address the merits. Pet. App. 22a-27a. In his view, appellate jurisdiction was lacking because while the bankruptcy court's order had "determined liability" for violating the automatic stay, it had "left . . . unresolved the relief to be awarded." *Id*. at 23a. Judge Watford noted that an order resolving liability is final "even if it leaves a request for attorney's fees unresolved," but—citing non-bankruptcy cases—argued that "an order is not final if it determines liability but does not resolve the plaintiff's request for damages or other relief." *Id.* at 23a. Judge Watford did not dispute that the only relief petitioner explicitly sought was attorney's fees

and costs, nor did he dispute the majority's observation that petitioner had never "offered evidence of damages," *id.* at 6a. He likewise acknowledged that "the bankruptcy court never held the [damages] hearing because [petitioner] failed to appear at a scheduled creditor's meeting, and the bankruptcy court dismissed his . . . case altogether," *id.* at 22a. He nevertheless concluded that because petitioner's motion included a boilerplate request for "all appropriate relief," *id.* at 24a, it "included a *potential* award of compensatory and punitive damages," *id.* at 23a-24a (emphasis added). Citing acknowledged "dicta" in circuit precedent, he concluded that "an order finding a violation of the automatic stay and postponing a determination of *damages* . . . is not final." *Id.* at 25a-26a.

5. On remand and after full briefing and argument, the bankruptcy court declined to stay its proceedings pending the disposition of the petition for a writ of certiorari. Dkt. 92, at 2. The same day, the bankruptcy court denied petitioner's request for sanctions and "vacated in its entirety" the previous finding that respondent had violated the automatic stay. Dkt. 93, at 2-3 (Apr. 11, 2016). Petitioner appealed that decision, but the appeal was dismissed by stipulation, reserving any rights available if this Court grants relief. The denial of the stay order and vacatur of the finding that respondent violated the automatic stay is now final barring review by this Court.

REASONS FOR DENYING THE PETITION

A. The Decision Below Correctly Applied *Bullard*'s Flexible Finality Standard For Bankruptcy Cases To The Unique Facts Of This Case

Petitioner contends that the rule announced in *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976)—i.e., that a district court order finding liability but postponing determination of the appropriate relief is not final under 28 U.S.C. § 1291—is fully applicable, without any modification, to bankruptcy proceedings. Pet. 13-15. Petitioner's argument thus relies on applying finality principles for appealing district court decisions under § 1291 to the distinct context of appeals from bankruptcy court orders under 28 U.S.C. § 158.

As this Court recognized last Term in *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015), however, finality "rules are different in bankruptcy." *Id.* at 1692; cf. Pet. 11 (claiming "[b]ankruptcy proceedings are a *little* different" (emphasis added)). Because a "bankruptcy case involves an aggregation of individual controversies, ... Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Bullard*, 135 S. Ct. at 1692. Accordingly, the concept of "finality" in bankruptcy "is *considerably* more flexible than in an ordinary civil appeal taken under 28 U.S.C. § 1291." *Schaumburg Bank & Trust Co., N.A.* v. *Alsterda*, 815 F.3d 306, 312 (7th Cir. 2016) (citing *Bullard*, 135 S. Ct. at 1691-1692) (emphasis added). The additional flexibility available under § 158 is evident from

comparing the text of § 158 and § 1291. While § 1291 only creates appellate jurisdiction over the "final decisions" of district courts, § 158(a) and (c) allow all "final judgments, *orders*, and *decrees*" of a bankruptcy court to be appealed to the district court or a bankruptcy appellate panel, and then "all final decisions, judgments, orders, and decrees" entered by the district court or the bankruptcy appellate panel can be appealed to a federal court of appeals, 28 U.S.C. § 158(a), (c), (d) (emphasis added).

The bankruptcy court order finding an automatic-stay violation here amply satisfies the finality standard this Court articulated in *Bullard*. The order did not only "finally dispose of [a] discrete disput[e]." *Bullard*, 135 S. Ct. at 1692. As the court below explained, the order "definitively and finally resolved" the "only issue litigated in the bankruptcy proceedings." Pet. App. 12a-13a. The June 28, 2013 hearing at which the district court found the automatic stay had been violated was the only meaningful event in the bankruptcy case. After that hearing, petitioner essentially abandoned the proceedings. He did not press a claim for "damages," much less "present evidence" that he had incurred any damages from the automatic-stay violation. Pet. 6. Nor did he ever file the schedules, financial affairs statement, or proposed reorganization plan required to complete his "skeletal" bankruptcy petition. Pet. App. 5a, 38a. Petitioner failed to appear for the scheduled meeting of creditors under 11 U.S.C. § 341. *Id.* at 38a. And crucially, petitioner stipulated to the dismissal of his bankruptcy case with the express understanding that the bankruptcy court "and/or the Bankruptcy

Appellate Panel as may be appropriate, shall retain jurisdiction of the matters relating to the [stay-violation] hearing . . . , which are now on appeal." C.A. E.R. 40-41. Indeed, petitioner's counsel explicitly stated that the agreement stipulated that "in case we can't resolve the issues between us [regarding the alleged automatic-stay violation], . . . *the appeal would go forward*." Tr. of 6/30/13 status conf. 2 (emphasis added). In other words, petitioner *agreed* that the bankruptcy appellate panel could exercise jurisdiction over respondent's then-pending appeal of the bankruptcy court's stay-violation order. That stipulation demonstrates that, contrary to petitioner's *post hoc* effort to create a certworthy issue, petitioner at the time shared the Ninth Circuit's understanding that the stay-violation order "resolved the only issue in the case," thus providing a proper basis for appellate jurisdiction under § 158.

The bankruptcy court's stay-violation order was also a final, appealable order under § 158 because it "alter[ed] the status quo and fixe[d] the rights and obligations of the parties." *Bullard*, 135 S. Ct. at 1692. The bankruptcy court ruled that respondent's eviction of petitioner violated the automatic stay and was thus "void." Pet. App. 52a. As a result, the court ordered respondent to provide petitioner "access to" the premises from which he had been evicted for a period of at least two weeks—a period during which the bankruptcy court contemplated petitioner could attempt to challenge the foreclosure of the home in state court. *Ibid.*; see also C.A. E.R. 160-164 ("[T]he eviction is void, the notice telling [petitioner] not to go back [into the home] is void."). The court's order

purporting to invalidate an eviction carried out by a state sheriff and to require respondent to allow petitioner access to property respondent had lawfully purchased amounted to an injunction that would be immediately appealable even if issued by a district court in non-bankruptcy litigation. See 28 U.S.C. § 1292(a); see also *Wetzel*, 424 U.S. at 744 (noting that if district court "had granted injunctive relief," order "would have been appealable under § 1292(a)(1)"). It certainly constituted an immediately appealable "final . . . orde[r]," 28 U.S.C. § 158(a), under the "flexible" rules applicable to bankruptcy proceedings. *Schaumburg Bank*, 815 F.3d at 312.

Finally, although the bankruptcy judge raised the possibility of damages for respondent's purported automatic-stay violation, *e.g.*, C.A. E.R. 149-150, the only monetary compensation *petitioner* expressly requested in his motion to enforce the automatic stay was an award of "attorneys' fees and costs," C.A. E.R. 214; see also *id.* at 215 (noting counsel's hourly rate and number of hours spent on motion).[2] After the bankruptcy court issued its stay-violation finding, petitioner did nothing to provide "evidence of damages," leaving only his request for attorneys' fees and costs pending. Pet. App. 37a. As even the dis-

[2] The *only* possible basis for a damages claim would the motion's boilerplate request for "such other and further relief as may be just and proper." C.A. E.R. 214; see also Pet. App. 24a. But courts are generally "reluctant . . . to read a damages claim into [a] boilerplate prayer for 'such other relief as the Court deems just and proper.'" *Thomas R.W. ex rel. Pamela R.* v. *Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (quoting *Fox* v. *Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 141-142 (2d Cir. 1994)).

sent below recognized, "an order resolving the merits of a dispute is final, even if it leaves a request for attorney's fees unresolved." Pet. App. 23a; see also *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200-203 (1988) (unresolved request for attorney's fees or costs "does not prevent judgment on the merits from being final"). Because the only form of monetary relief petitioner expressly requested—"attorneys' fees and costs," C.A. E.R. 214—does not undermine the finality of the order at issue, the decision below correctly held that the bankruptcy court's stay-violation order was final and immediately appealable under 28 U.S.C. § 158.[3]

B. No Circuit Split Exists

Petitioner incorrectly asserts that the Ninth Circuit "broke ranks with its sister circuits," Pet. 2, in accepting jurisdiction over respondent's appeal. Fatal to petitioner's claimed circuit split is the fact that the purported "chorus of circuit court[]" decisions petitioner cites is composed entirely of cases decided *before* this Court's recent decision in *Bullard*. Pet. 12-13. Moreover, the Ninth Circuit is the *only* court

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[3] Although this Court in *Bullard* held that a bankruptcy court's rejection of a proposed Chapter 13 repayment plan is not a final, appealable order when the debtor is granted leave to amend the plan, that holding is fully consistent with the decision below because "[d]enial of [plan] confirmation with leave to amend . . . changes little." *Bullard*, 135 S. Ct. at 1693. Here, by contrast, the bankruptcy court's stay-violation order "resolved the only issue in the case, and seriously affected substantive rights," including by invalidating respondent's eviction of petitioner and requiring respondent to grant petitioner access to property that it had lawfully purchased. Pet. App. 13a.

of appeals to have applied *Bullard* to facts similar to those presented in this case. The different results achieved in different cases merely reflect courts' fact-bound application of the flexible finality standard for bankruptcy proceedings to the particular cases before them. They do not indicate disagreement over legal principles that would warrant this Court's review.

1. Decided just over a year ago, *Bullard* provides important new guidance on appellate jurisdiction over bankruptcy court orders. It clarifies that while in "ordinary civil litigation" a "party can typically appeal as of right only from [a] final decision" by "which a district court disassociates itself from a case," the "rules are different in bankruptcy." *Bullard*, 135 S. Ct. at 1691-1692 (internal quotation marks omitted). As *Bullard* explains, "orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes* within the larger case." *Id.* at 1692 (emphasis added)

In claiming a circuit split, petitioner relies entirely on pre-*Bullard* cases applying *Wetzel*'s rule for finality for ordinary civil cases under § 1291. See Pet. 12. But the decision below "t[ook] its cues from this Court's decision in *Bullard*," *id.* at 13, in applying "a pragmatic approach" to finality focusing on the particular facts surrounding the order before it, Pet. App. 9a. Because the decisions petitioner cites did not have the benefit of this Court's recent guidance that jurisdictional "rules are different in bankruptcy" than in "ordinary civil litigation" subject to § 1291, *Bullard*, 135 S. Ct. at 1691-1692.

As the Seventh Circuit—one of the courts petitioner claims diverges from the Ninth Circuit,

Pet. 12—recently noted, *Bullard* emphasizes that "[f]inality in a bankruptcy appeal is *considerably more flexible* than in an ordinary civil appeal." *Schaumburg Bank & Trust*, 815 F.3d at 312 (citing *Bullard*; emphasis added). Consistent with the decision below, *Bullard* may lead courts of appeals to reject bright-line rules such as the one petitioner offers—i.e., the purported reservation of damages questions always defeats finality (even if damages are available only because of a general boilerplate request for "such other . . . relief as may be just")—and instead engage in a more "pragmatic" assessment of whether the order "finally determines [a] discrete issue" and "seriously affects substantive rights." Pet. App. 9a-10a (quoting *SS Farms, LLC* v. *Sharp* (*In re SK Foods, L.P.*), 676 F.3d 798, 802 (9th Cir. 2012)). As a result, further percolation may demonstrate that there is no conflict among the courts of appeals; at minimum, it will more clearly define any disagreement that may exist. It would be premature for the Court to intervene at this time.

2. The pre-*Bullard* cases on which petitioner relies in claiming a split are plainly distinguishable. Contrary to petitioner's contention, see Pet. 10, 13, the decision below did *not* hold that the rule announced in *Wetzel* is categorically inapplicable to bankruptcy proceedings. Instead, it engaged in a "pragmatic" assessment of the facts of the particular case before it and concluded that the bankruptcy court's stay-violation order was final because it "resolved the only issue in the case, and seriously affected substantive rights." Pet. App. 12a-13a. No

decision petitioner cites conflicts with that fact-bound holding.

In several cases petitioner cites, the injured party *expressly requested* actual or punitive damages for violation of the automatic stay. Here, by contrast, petitioner only expressly requested "attorneys' fees and costs" in his motion to enforce the automatic stay, C.A. E.R. 214, and never presented evidence of other damages, despite the bankruptcy court's invitation to do so. See pp. 5-6, *supra*; cf. *Guy* v. *Dzikowski* (*In re Atlas*), 210 F.3d 1305, 1308 n.5 (11th Cir. 2000) ("trustee prayed for 'actual and punitive damages'"); *Shimer* v. *Fugazy* (*In re Fugazy Exp., Inc.*), 982 F.2d 769, 773-774, 776 (2d Cir. 1992) (accounting remained to be completed to determine revenues received from license obtained in violation of automatic stay); *Calcasieu Marine Nat'l Bank* v. *Morrell* (*In re Morrell*), 880 F.2d 855, 856 (5th Cir. 1989) (debtor explicitly sought "damages, including costs and attorney's fees, and *punitive damages*" and bankruptcy court indicated debtor could recover "$130 in charges" incurred from automatic-stay violation (emphasis added)); *Brown* v. *Pa. State Emps. Credit Union* (*In re Brown*), 803 F.2d 120, 121 (3d Cir. 1986) (although district court indicated "it did not believe punitive damages were appropriate," it left "determination of damages" to bankruptcy court on remand). Because an order may qualify as "final" even if it leaves a request for attorney's fees and costs unresolved, see pp. 14-15, *supra*, cases in which the debtor actively pursued actual or punitive damages beyond attorney's fees and costs are inapposite.

Further, two cases on which petitioner relies in claiming a circuit split (one of which is unpublished and thus without precedential effect) involved bankruptcy orders that *resolved* the issue of damages; it was the bankruptcy appellate panel or district court on *appeal* that reopened the issue. See *Knaub* v. *Rollison* (*In re Rollison*), 566 Fed. Appx. 679, 680-681 (10th Cir. 2014) (non-precedential decision holding that court of appeals lacked jurisdiction where bankruptcy appellate panel rejected bankruptcy court's method of measuring damages and remanded for bankruptcy court to "tak[e] . . . evidence" and determine damages under different standard);[4] *Brown*, 803 F.2d at 121-123 (bankruptcy court refused to award damages but district court reversed and remanded on damages issue). The issue in those cases was *not* the finality of the bankruptcy court order, but the finality of the *bankruptcy appellate panel's or district court's* order. Consistent with the decision below, which recognized that different considerations apply when the bankruptcy appellate panel or district court remands for further consideration by the bankruptcy court, Pet. App. 10a-12a, the Ninth Circuit has refused to exercise jurisdiction over a district court order remanding an issue to the bankruptcy court for "further fact-finding." *Sahagun* v. *Landmark Fence Co.* (*In re Landmark Fence Co.*), 801 F.3d 1099, 1101

[4] *Rollison* is also distinguishable because it did not involve the assessment of damages for an automatic-stay violation; instead, it involved the far more complicated issue of assessing the damages stemming from the debtor's misrepresentations regarding his ability to build a home to replace a defective home he had previously built. 566 Fed. Appx. at 680.

(9th Cir. 2015). Because *Rollison* and *Brown* address the distinct issue of court of appeals jurisdiction over a bankruptcy appellate panel's or district court's remand order, no conflict exists between those decisions and the decision below.

The remaining two court of appeals cases on which petitioner relies addressed issues not presented here. *United States Abatement Corp.* v. *Mobil Exploration & Producing U.S., Inc.* (*In re U.S. Abatement Corp.*), 39 F.3d 563, 566-568 (5th Cir. 1994), addressed the distinct question whether a bankruptcy court could reconsider and vacate a contempt order after a notice of appeal from that order had been filed. And *In re Behrens*, 900 F.2d 97, 98-100 (7th Cir. 1990), did not involve an alleged violation of the automatic stay triggered by a bankruptcy petition's filing; instead, the bankruptcy court held a creditor in contempt for violating a final discharge order. Because discharge orders are governed by separate statutory provisions not at issue here, see 11 U.S.C. § 524, no split exists between *Behrens* and the decision below.

C. This Case Is A Poor Vehicle To Address The Question Presented

This case represents a poor vehicle for addressing the alleged circuit split. To begin with, petitioner's desultory prosecution of his bankruptcy case, including his complete lack of involvement in the *two* appeals resolved before new appellate counsel brought the case to this Court, has left the record undeveloped and fraught with outcome-determinative factual questions. Most prominent of the unresolved issues is whether petitioner even sought relief besides

attorney's fees. While petitioner now argues that the order below was nonfinal because the bankruptcy court did not determine the amount of damages to which he was entitled, that is, to respondent's knowledge, the *first time in any court* petitioner has made that argument, and the petition for a writ of certiorari is the *first document* petitioner has ever filed that explicitly stated that he sought damages. In petitioner's motion to enforce the stay, he asked only for "reasonable attorneys' fees and costs in connection with the enforcement of the automatic stay." While petitioner's motion included a catch-all request for such "other and further relief as may be just and proper," C.A. E.R. 214, it is well established that courts are reluctant to read requests for damages into such general boilerplate requests. See n.2, *supra*.

The poor state of the record results entirely from petitioner's litigation choices. Petitioner never lifted a finger to seek to introduce evidence of damages though the bankruptcy judge invited him to do so. Nor did petitioner avail himself of any opportunity to clarify what he meant by his general request for "other and further relief." Although the Ninth Circuit specifically directed "the parties [to] be prepared to address . . . [w]hether the bankruptcy court's June 28, 2013 order was a final order over which this court has appellate jurisdiction," C.A. Dkt. 21, at 1, until his petition for a writ of certiorari, petitioner never raised any objection to the finality of the order or the propriety of appellate jurisdiction. Indeed, petitioner stipulated to the dismissal of his bankruptcy case with the express understanding that "the

appeal would go forward." Tr. of 6/30/13 status conf. 2; accord C.A. E.R. 40-41 (stipulating that the bankruptcy court "and/or the Bankruptcy Appellate Panel as may be appropriate, shall retain jurisdiction of the matters relating to the [stay-violation] hearing").

While respondent submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) arguing that the order was final because the only relief that petitioner "seeks to recover . . . are attorneys' fees and costs," C.A. Dkt. 22, at 2, petitioner filed *nothing* to suggest that he was pursuing a damages claim, nor did he even appear for argument. Given petitioner's failure to develop the factual record supporting the argument he now advances, the Ninth Circuit majority understandably concluded that "the only issue" before it was "the discrete issue of whether there was a stay violation" and nothing more. Pet. App. 12a. Having failed to develop the record (or even to advance his current arguments) in the courts below, it is far too late for him to do so for the first time in his petition for a writ of certiorari. This is a "Court of review, not first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). "Federal courts are not run like a casino game in which players may enter and exit on pure whim." *In re Lam*, 192 F.3d 1309, 1311 (9th Cir. 1999).

Moreover, even if this Court were to grant certiorari and conclude that the Ninth Circuit lacked jurisdiction, it would not change the outcome in this case. The Ninth Circuit has now resolved the underlying merits issue: Under California law, squatters have no cognizable property interest in premises they occupy

at the time they file for bankruptcy, so respondent did not violate the automatic stay. Pet. App. 21a. That holding was plainly correct: California law, as authoritatively construed by the California Court of Appeal, provides that (with exceptions not relevant here) issuance of a writ of possession in an unlawful detainer action extinguishes all of an occupant's property rights so that no interest remains to be subject to the automatic stay. See Cal. Code Civ. Proc., § 715.050 ("Except with respect to enforcement of a judgment for money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding."); see also *Lee* v. *Baca,* 73 Cal. App. 4th 1116, 1120 (1999) (holding that tenants lost any legal or equitable interest in apartment so that, by time tenants commenced bankruptcy case, Sheriff's execution of the writ of possession would not have affected "property of the estate" of the debtor). Even if this Court were to vacate the judgment of the Ninth Circuit on jurisdictional grounds, there is no reason to believe that the bankruptcy court on remand would disregard the Ninth Circuit's thorough exposition of California law and its conclusion that petitioner had no valid claim to damages. Even if it did and the bankruptcy court imposed damages, there is no reason to believe that the Ninth Circuit would reach a different conclusion on appeal from an indisputably final decision that decided both liability and damages. It would be a waste of judicial resources to vacate the decision below based on jurisdictional concerns petitioner first raised *only after* he had lost

on the merits, when the effect of such action would only be to postpone entry of an identical judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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