No. 21-828

IN THE
# Supreme Court of the United States

THE ESTATE OF OMAR FONTANA, ET AL.,
*Petitioners*,

v.

ACFB ADMINISTRAÇÃO JUDICIAL LTDA – ME,
ACTING BY AND THROUGH ANTONIA VIVIANA SANTOS DE OLIVEIRA CAVALCANTE, THE TRUSTEE OF DEBTOR TRANSBRASIL S.A. LINHAS AÉREAS,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT


GREGORY S. GROSSMAN
NYANA ABREU MILLER
SEQUOR LAW, P.A.
1111 Brickell Avenue
Suite 1250
Miami, Florida 33131
(305) 372-8282

DEREK T. HO
*Counsel of Record*
ELIANA MARGO PFEFFER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@kellogghansen.com)


February 2, 2022

## QUESTION PRESENTED

Whether the Eleventh Circuit — in the only court of appeals decision since this Court's opinion in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) — correctly held that a discovery order in a Chapter 15 bankruptcy proceeding was not a final appealable order based on the fact-specific conclusion that the discovery sought was merely a preliminary step in implementing a Brazilian court's freezing order.

## RULE 29.6 STATEMENT

Respondent ACFB Administração Judicial LTDA – ME, acting by and through Antonia Viviana Santos de Oliveira Cavalcante, the Trustee of Debtor Transbrasil S.A. Linhas Aéreas, has no parent company, and no publicly held corporation owns 10% or more of its stock.

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES**

## INTRODUCTION

As the court below found based on a thorough review of the record, the bankruptcy court's discovery order in this case was not a "stand-alone" order but rather a preliminary step in identifying and freezing petitioners' U.S. assets. This case thus does not present the question petitioners ask this Court to resolve: "whether a stand-alone discovery order entered in a Chapter 15 case is final and appealable." Pet. i. Also, there is no disagreement among the circuits on that question: the court below, in *dicta*, agreed with the Second Circuit that a stand-alone discovery order likely would be appealable, but found that "that's not the case we have," App. 13a.

That decision does not warrant review for three reasons. First, the Eleventh Circuit did not create a circuit split. It distinguished the Second Circuit's decision in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), on its facts. Second, the decision below correctly applied this Court's recent decision in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020). Fact-bound error correction is not warranted. Third, serious mootness concerns would make this case a poor vehicle for resolving the question presented, even if it were actually raised by this case and sufficiently important for this Court to resolve.

## STATEMENT

### A. Factual Background

In 2002, the Brazilian airline Transbrasil S.A. Linhas Aéreas ("Transbrasil") was placed into involuntary bankruptcy in Brazil. After several years of litigation in Brazil, respondent, the trustee of the Transbrasil bankruptcy estate ("Trustee" or "respondent"), moved for recognition of the Brazilian bankruptcy under Chapter 15 of the U.S. Bankruptcy

Code in the United States Bankruptcy Court for the Southern District of Florida ("Bankruptcy Court"). The Bankruptcy Court granted the application, thus giving respondent (among other things) the right to seek discovery in U.S. court.

In 2017, as evidence mounted that petitioners had siphoned large amounts of money out of the company while they were at the company's helm, a Brazilian appeals court extended the bankruptcy litigation to include petitioners (and several additional parties not relevant to this case). It also issued an order freezing petitioners' assets until the Brazilian bankruptcy court resolved the underlying case (the "Freeze Order").

In a subsequent order in December 2018, the Brazilian appeals court directed the Trustee to seek relief in the U.S. Bankruptcy Court "to enforce the [Freeze Order] on the assets located in" the United States. App. 19a. Pursuant to that directive, in January 2019, respondent issued subpoenas to several U.S. financial institutions to identify the extent of petitioners' property in the United States. Consistent with the Brazilian court's December 2018 order, the Trustee explained that the discovery was sought "to aid in the implementation of the Freeze Order" in the United States. *Id.*

**B. Procedural Background**

1. *The Bankruptcy Court's Discovery Order*

Petitioners moved in the Bankruptcy Court for a protective order seeking to block respondent's third-party subpoenas. The Bankruptcy Court denied the motion. In holding that petitioners' financial affairs were discoverable, it noted that these records would inform the Trustee of assets hidden in the United States that might be subject to the Freeze Order.

Specifically, the discovery sought was relevant to the Trustee's "veil-piercing and extension claims" and "may affect the administration of the Transbrasil estate." App. 52a. The bank records might also disclose "the involvement of other participants in the scheme" and "reveal the purchase, sale or use of assets that are currently held by the [petitioners] and which may be subject to the Freeze Order." *Id.*

Petitioners moved for reconsideration, which the Bankruptcy Court denied.

2. *The District Court's Dismissal*

Petitioners appealed both the Bankruptcy Court's denial of their motion for a protective order and the denial of their motion for reconsideration (collectively, the "Discovery Order") to the district court under 28 U.S.C. § 158(a), which permits appeals of final bankruptcy orders. The court concluded that it lacked appellate jurisdiction because the Discovery Order was not final. While agreeing that the Second Circuit's reasoning in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), "ha[d] merit," the court found *Barnet* "not dispositive" on the facts of this case. App. 24a. The court pointed to the Eleventh Circuit's prior decision in this same bankruptcy case, which had found that an order refusing to quash certain other third-party subpoenas was not final and appealable. The Eleventh Circuit specifically rejected the contention that the discovery orders were stand-alone because there were "no further steps to be taken" once the discovery dispute was adjudicated. App. 20a-21a (citing Jurisdictional Order, *Marigrove, Inc. v. Pinto*, No. 15-11596 (11th Cir. Aug. 7, 2015)). The district court also denied petitioner's motion for reconsideration.

3. *The Decision Below*

In an unpublished opinion, the Eleventh Circuit dismissed petitioners' appeal for lack of jurisdiction. First, the court reviewed the framework for finality of bankruptcy court orders set out in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020), and noted that, ordinarily, discovery is "'merely a preliminary step' to obtain information for use in some other proceeding" and discovery orders are therefore the quintessential "'disputes over minor details about how a bankruptcy case will unfold.'" App. 9a (quoting *Ritzen*, 140 S. Ct. at 590). Thus, to determine whether an order in a bankruptcy case is final, a court must first "'define' the 'appropriate procedural unit for determining finality.'" App. 7a (quoting *Ritzen*, 140 S. Ct. at 588-89).

The Eleventh Circuit then thoroughly considered this Court's analysis in *Ritzen* of whether a bankruptcy court's order denying relief from an automatic stay was a final order:

> Under the automatic stay, the "filing of a bankruptcy petition automatically halts efforts to collect prepetition debts from the bankrupt debtor outside the bankruptcy forum." However, a creditor may move for relief from the automatic stay (a "stay-relief motion") when the creditor has a claim against the debtor's estate. In *Ritzen Group*, the debtor argued that an order denying a stay-relief motion is a final order because the relevant proceeding for determining finality is the stay-relief motion. The creditor, in turn, argued that the relevant proceeding is the creditor's claim against the debtor's estate, so a ruling on the stay-relief

> motion is only "a first step" in the claim proceeding and thus not final.
>
> The Supreme Court agreed with the debtor and held that "the appropriate 'proceeding' is the stay-relief adjudication." As a result, the Court held that an order denying a stay-relief motion is a final order. It reasoned that an "order ruling on a stay-relief motion disposes of a procedural unit anterior to, and separate from," the creditor's claim and "initiates a discrete procedural sequence." Stated differently, the Supreme Court viewed the stay-relief motion and the creditor's claim as two "discrete" or "separate" proceedings and thus held that an order on the stay-relief motion is a final order in that separate proceeding. However, in doing so, the Supreme Court also cautioned that courts should not view "disputes over minor details about how a bankruptcy case will unfold" as separate proceedings.

App. 8a (citations omitted).

Applying *Ritzen*'s reasoning to the facts before it, the Eleventh Circuit held that the appropriate procedural unit was the implementation of the Freeze Order. The discovery was "not 'discrete' or 'separate' from the proceeding for which the discovery is sought." App. 9a (quoting *Ritzen*, 140 S. Ct. at 589). Rather, "the record [wa]s clear" that the Discovery Order was "'merely a preliminary step' to obtain information for use in" implementing the Freeze Order. *Id.* (quoting *Ritzen*, 140 S. Ct. at 590).

The Eleventh Circuit distinguished the facts of this case from *Barnet*, where there was no indication "that any proceedings other than discovery were contemplated in th[e] Chapter 15 case." App. 12a. The

court agreed that, if this were a Chapter 15 proceeding established "solely to obtain discovery for use in a foreign bankruptcy case, then the discovery might not be 'merely a preliminary step' in some other Chapter 15 proceeding." App. 12a-13a. Because the discovery in that situation would be "the *only* proceeding," it "may be a final order that is immediately appealable, as the Second Circuit held in *Barnet*." App. 13a. "But again," the court emphasized, "*that's not the case we have*. Instead, the discovery orders here were 'merely a preliminary step' in the Freeze Order proceeding." *Id.* (emphasis added).

## REASONS FOR DENYING THE PETITION

### I. There Is No Circuit Split On The Question Presented

The decision below did not depart from the Second Circuit's conclusion in *Barnet* that a discovery order is final and appealable where the discovery order is "stand-alone" — *i.e.*, where discovery is the only relief sought in the Chapter 15 proceeding. In fact, it *agreed* with the Second Circuit's conclusion (in *dicta*).

The reason the Eleventh Circuit reached a different result from *Barnet* is because it found, "[o]n this record," that the Discovery Order here was not a stand-alone order but rather "'a preliminary step' in the Freeze Order proceeding." App. 10a (quoting *Ritzen*, 140 S. Ct. at 590); *see* App. 12a ("In our view, this difference matters.").

Petitioners challenge that factual conclusion, but those fact-bound arguments do not warrant this Court's review. Despite framing the question presented as a purely legal one, the petition (at 11) acknowledges that it seeks fact-bound error correction:

> In *Barnet*, the Second Circuit treated the discovery order in question as one that, on its own, finally resolved a discrete dispute in the Chapter 15 case—a dispute over discovery. In the decision below, the Eleventh Circuit refused to do the same, instead treating the discovery orders in question like discovery orders in ordinary civil litigation—as part and parcel of some other potential proceeding.

The real question presented — whether the court below properly characterized the Discovery Order as stand-alone or part of a broader proceeding — is fact-bound and not worthy of this Court's review.

Petitioners' remaining arguments are likewise fact-bound. They contend (at 12), for example, that the Discovery Order was a stand-alone order because "the Trustee had not already commenced an adversary proceeding against Petitioners seeking some form of substantive relief against them." But, as the Eleventh Circuit concluded, "the record is clear that the Trustee sought the discovery in part to aid in implementing the Freeze Order." App. 12a.

Petitioners also contend (at 12) that the mere "possibility" of a *future* proceeding should not be sufficient to make a discovery order nonfinal. But that, again, merely challenges the appeals court's factual conclusion that the Discovery Order was a "preliminary step" in the implementation of the *existing* Freeze Order. That record-specific determination raises no broader legal issues warranting this Court's intervention.

Petitioners say (at 12-13) that the decision below "disagreed" with certain aspects of *Barnet*'s reasoning. But petitioners mischaracterize the decision below, and, in any event, mere differences in

*reasoning* are not a basis for this Court's intervention. Petitioners suggest, for example, that the court below rejected *Barnet* on the ground that it predated *Ritzen*, but, to the contrary, it merely noted that certain aspects of *Barnet*'s analysis were "irrelevant" under *Ritzen*'s analysis, App. 12a.

Petitioners also (at 13) overread *Barnet*. *Barnet* involved unusual facts. *See* 737 F.3d at 241 ("This case presents an unusual jurisdictional thicket."). The *Barnet* court concluded that the discovery order in that case was final because "there will never be a final resolution on the merits beyond the discovery relief itself." *Id.* at 244. That case-specific premise explains *Barnet*'s analogy to discovery orders under 28 U.S.C. § 1782(a) and automatic relief orders implemented pursuant to 11 U.S.C. § 1520, which also leave nothing more for the court to do. *See id.* ("[t]he same reasoning [regarding appealability of § 1782 orders] applies *in this context*," where there will be "no further action by the Bankruptcy Court") (emphasis added). *Barnet* nowhere held that *all* discovery orders in *every* Chapter 15 case are standalone orders. Rather, *Barnet* is fully consistent with the Eleventh Circuit's conclusion that a discovery order in a Chapter 15 case "is ordinarily" — *but not always* — "a 'preliminary step' of a larger proceeding." App. 12a n.8.

Finally, further percolation is warranted given the undisputed absence of any post-*Ritzen* circuit split. The decision below is the only court of appeals decision to address the finality of bankruptcy court discovery orders since *Ritzen*. The Second Circuit has not had an opportunity to apply *Ritzen* to discovery orders or consider whether *Ritzen* affects the continued vitality of *Barnet*'s holding or reasoning.

Moreover, far from raising an issue of urgent importance, the small number of appellate decisions on the question presented indicates that this Court's intervention is not urgently required.

## II. The Court Below Correctly Applied *Ritzen*

Fact-bound error correction is not warranted because the Eleventh Circuit correctly applied *Ritzen* in deciding that the Discovery Order was not final and appealable. In *Ritzen*, this Court noted that, ordinarily, parties in civil litigation may appeal only the "final decisions of the district courts." 28 U.S.C. § 1291; *see Ritzen*, 140 S. Ct. at 586. A "final decision" is "an order that resolves the entire case." *Id.* This limited right ensures that appellate courts are not overwhelmed by "'piecemeal, prejudgment appeals'" that "'undermin[e] efficient judicial administration and encroac[h] upon the prerogatives of district court judges.'" *Id.* (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)) (brackets in *Ritzen*).

In bankruptcy litigation, however, the right of appeal is slightly broader. Appeals are governed by 28 U.S.C. § 158(a) and are permitted from "final judgments, orders, and decrees" that are "entered in cases and proceedings." "By providing for appeals from final decisions in bankruptcy 'proceedings,'" in addition to bankruptcy "cases," Congress recognized that some bankruptcy orders "'finally dispose of discrete disputes'" the same way that "final judgments, orders, and decrees" dispose of civil litigation cases. *Ritzen*, 140 S. Ct. at 587 (quoting *Bullard*, 575 U.S. at 501). To determine whether an order in a bankruptcy case is final, a court should therefore "inquire 'how to define the immediately appealable "proceeding."'" *Id.* at 589 (quoting *Bullard*, 575 U.S. at 502).

In *Ritzen*, this Court determined that the appropriate proceeding was the stay-relief adjudication because it had several hallmarks of a discreet proceeding: it initiated a "discrete procedural sequence," the applicant's "qualification for relief turn[ed] on [a] statutory standard," and the resolution of those types of motions "do[] not occur as part of the adversary claims-adjudication process." *Id.* Additionally, the stay-relief motion's counterpart in civil litigation — an order "denying a plaintiff the opportunity to seek relief in its preferred forum" — "often qualif[ies] as final and immediately appealable." *Id.* at 590. And permitting immediate appeal "will permit creditors to establish their rights expeditiously outside the bankruptcy process, affecting the relief sought and awarded later in the bankruptcy case." *Id.* at 591. The Court also noted that lower courts should not view "disputes over minor details about how a bankruptcy case will unfold," such as an order resolving a motion for an extension of time, as a separate, discrete proceeding. *Id.* at 590.

The Eleventh Circuit correctly applied *Ritzen* in holding that the Discovery Order, unlike the stay-relief motion in *Ritzen*, was not a "discrete proceeding." Discovery disputes — even in non-Chapter 15 proceedings — are "ordinarily not 'discrete' or 'separate' from the proceeding for which the discovery is sought." App. 9a (quoting *Ritzen*, 140 S. Ct. at 589). This case is no exception: "[o]n this record," discovery was merely a step in obtaining information necessary to implement the Freeze Order. App. 10a; *see also id.* ("[T]he record belies the . . . assertion that the Bankruptcy Court has 'nothing left to do' in this Chapter 15 proceeding."). The implementation of the Freeze Order was thus the appropriate procedural unit under *Ritzen*.

Petitioners argue (at 17) that the Eleventh Circuit departed from *Ritzen* in relying on the mere possibility that "the Trustee might make use of the discovery it obtained to commence some other proceeding within the Chapter 15 case." But, as explained above, the Eleventh Circuit did no such thing. It found that the Discovery Order was part and parcel of an *ongoing* proceeding to implement the Freeze Order. As with its argument for a circuit split, petitioners' argument for error correction is, in reality, a disagreement with the Eleventh Circuit's findings based on the record in this case.

Additionally, petitioners assert (at 16) that the Eleventh Circuit's reasoning would have led to the denial of stay relief in *Ritzen* being deemed nonfinal, because the denial meant that there would be further proceedings in the bankruptcy court. But as the Eleventh Circuit correctly explained, *Ritzen*'s key conclusion was that the further proceedings in bankruptcy court were "discrete" from the proceedings over the stay. *See* App. 8a ("[T]he Supreme Court viewed the stay-relief motion and the creditor's claim as two 'discrete' or 'separate' proceedings and thus held that an order on the stay-relief motion is a final order in that separate proceeding.") (quoting *Ritzen*, 140 S. Ct. at 589). In this case, by contrast, the Discovery Order was not "discrete" or "separate" from the proceeding for which the discovery was sought (*i.e.*, the implementation of the Freeze Order). App. 9a. There is no inconsistency with *Ritzen*.

Petitioners also argue (at 17) that the Eleventh Circuit failed to heed *Ritzen*'s admonition that a bankruptcy court order may be final and appealable even if it is "potentially pertinent to other disputes in the bankruptcy case." 140 S. Ct. at 591. To quote

*Ritzen*, "[t]hat argument is misaddressed." *Id.* That portion of *Ritzen* dealt with the contention that an order that resolves a discrete proceeding within the bankruptcy case "should nonetheless rank as non-final where . . . the bankruptcy court's decision turns on a *substantive* issue that may be raised later in the litigation." *Id.* (emphasis added); *see id.* (addressing petitioner's claim that the stay order was nonfinal because it relied on bad faith, "an issue that could have been urged again later in the bankruptcy case"). The Court rejected the argument, because "Section 158(a) asks whether the order in question terminates a procedural unit separate from the remaining case, not whether the bankruptcy court has preclusively resolved a substantive issue." *Id.* Here, the Eleventh Circuit concluded that the Discovery Order did *not* "terminate[] a procedural unit separate from the remaining case." It therefore never addressed — and certainly never endorsed — the separate fallback argument rejected in the quoted passage of *Ritzen*.

Finally, petitioners (at 17-18) contend that the decision below "conflicts with this Court's contextual focus on whether the order in question involved the application of discrete statutory criteria." The assertion is puzzling: *Ritzen* did not hold that the applicability of discrete statutory criteria is sufficient to make an order final and appealable. Nor would that have made any sense: many orders involving the application of discrete statutory criteria are nonfinal. For example, when a bankruptcy court refuses to confirm a repayment plan that a debtor can further amend, it applies discrete, statutory criteria. *See* 11 U.S.C. § 1325. Yet this Court has held that such orders are nonfinal. *See Bullard*, 575 U.S. at 503-05.

In short, the Eleventh Circuit carefully and correctly applied *Ritzen* to the facts of this case. Petitioners' criticisms of the decision below are meritless, and, in any event, their request for fact-bound error correction does not warrant this Court's intervention.

## III. This Case Is Not An Appropriate Vehicle To Address The Question Presented

As the Eleventh Circuit noted, there is a serious question whether this case is moot. *See* App. 5a n.5. After the Bankruptcy Court denied petitioners' protective-order motion, the subpoena recipients produced all the requested documents to the Trustee. The Trustee then examined those documents, discovered additional entities that might have useful information in effectuating the Freeze Order, and subpoenaed them as well. The Trustee has thus obtained and used the information it sought through the subpoenas.

Because, on these facts, this Court could not grant petitioners any effective relief, petitioners' appeal is moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (mootness when an event occurs during the pendency of an appeal "that makes it impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see C & C Prods., Inc. v. Messick*, 700 F.2d 635, 636-37 (11th Cir. 1983) (dismissing appeal as moot because plaintiff's "sole assignment of error is that the district court erred in modifying the protective order to permit [a third party] to utilize the discovery materials," but the materials had been released to the third party and "no order from this court can undo that situation"); *Protectmarriage.com-Yes on 8*

*v. Bowen*, 752 F.3d 827, 835 & n.3 (9th Cir. 2014) (finding that a court could not remedy a party's alleged harms because the information that party sought to keep private had been disseminated to third parties); *Doe No. 1 v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012) (holding that a court cannot grant effective relief to a person seeking to keep information secret once information has been made widely available). Accordingly, this case is not a proper vehicle for deciding the question presented, even if it were raised by the petition and warranted review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY S. GROSSMAN
NYANA ABREU MILLER
SEQUOR LAW, P.A.
1111 Brickell Avenue
Suite 1250
Miami, Florida 33131
(305) 372-8282

DEREK T. HO
*Counsel of Record*
ELIANA MARGO PFEFFER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@kellogghansen.com)

February 2, 2022