No. 17-228

IN THE

Supreme Court of the United States

THE RENCO GROUP, INC., A DELAWARE CORPORATION, AND IRA LEON RENNERT,

Petitioners,

v.

LEE E. BUCHWALD, AS TRUSTEE FOR MAGNESIUM CORPORATION OF AMERICA AND RELATED DEBTOR, RENCO METALS, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Courts of Appeals acknowledge what the Trustee denies: They profoundly disagree over whether and to what extent a bankruptcy debtor has a right to a jury trial. Instead of grappling with the acknowledged split, the Trustee merely points to *Stern v. Marshall*, 564 U.S. 462 (2011), and claims that it abrogated the Sixth and Seventh Circuit rule. But *Stern* dealt with a different constitutional provision (Article III, not the Seventh Amendment) invoked by a different party (a creditor, not a debtor), and did not remotely purport to answer the question presented here. Indeed, numerous post-*Stern* lower court decisions apply the Sixth and Seventh Circuit rule, and not a single court has suggested that *Stern* had any impact on it.

Unable to credibly assert that there is no circuit split, the Trustee's main argument is that the Court should not use this case to resolve the disagreement. But this is a perfectly appropriate vehicle. The question presented—whether the Trustee has a jury trial right—determined the course of this case from the outset. The issue is also properly preserved. Renco repeatedly broadcast its intention to challenge the Second Circuit rule on the question presented, and a Court of Appeals' failure to reexamine its binding precedent has never been a barrier to certiorari review. The Court should grant the petition.

ARGUMENT

I. This Case Squarely Presents The Question Whether A Bankruptcy Debtor Has The Right To A Jury Trial.

The Trustee does not seriously dispute that, under the rule adopted in *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991), and *In re McLaren*, 3 F.3d 958 (6th Cir. 1993), he would have not been entitled to a jury trial on any of his claims.[1] Had the Second Circuit followed the *Hallahan*/*McLaren* rule instead of the contrary rule it adopted in *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), the Trustee would not have been able to demand a jury, and if he had tried, Renco would have had a basis for fully rejecting the demand at the outset. The dispute in the district court about Renco's motion to partially strike the jury demand under *Germain* would never have happened, and the Trustee's claims would have been resolved by a bench trial, rather than an indisputably incoherent jury verdict.

Most importantly for this Court's review, Renco would not have been bound by *Germain* to acknowledge the Trustee's jury trial right on his breach of fiduciary duty claims. That acknowledgment was the sole basis for the Second Circuit's harmless error holding. The question presented is thus squarely implicated by that holding, and this case

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[1] As we explain below, the Trustee errs in suggesting that the *Hallahan* rule is limited to cases involving dischargeability. *See infra* 7.

presents no obstacles to this Court's review of the widely recognized circuit split.

A. The Trustee is incorrect in contending that Renco's supposed "consent" to a jury trial precludes this Court from addressing the Second Circuit precedent that authorized the Trustee to demand a jury trial in the first place.

First, as the Trustee recognizes, Renco "consent[ed]" only to withdrawal of the reference to the bankruptcy court, and it did so in recognition of "'the [T]rustee['s] entitlement to a jury trial'" under applicable authority. Opp. 5 & n.2 (quoting C.A. App. 267). It had no choice: That Second Circuit rule bound the district court. C.A. App. 241-42.[2]

Those same constraints were in play when Renco moved to strike some—but not all—of the Trustee's claims several months before trial. Second Circuit law permitted an argument that no jury trial attached to certain claims, but foreclosed it as to others. *Id.* at 451-57 & n.1.[3] Thus the panel's conclusion that Renco

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[2] Renco's additional statement that "all of the Trustee's claims constitute 'private' claims as defined by *Stern v. Marshall*" was also not consent to a jury trial. C.A. App. 241-42. The question whether a particular claim must be adjudicated by an Article III court (at issue in *Stern*) is different from the question whether a jury trial right attaches to that claim when asserted by a bankruptcy trustee. *See infra* 8-9.

[3] The fact that Renco made an argument in its Second Circuit reply brief about the equitable character of the Trustee's breach of fiduciary duty claims does not mean that there was a basis for moving to strike the jury demand on those claims *before*

"consented" to a jury trial was based on nothing but a concession that a jury trial was unavoidable under binding precedent.

Moreover, as demonstrated by the very rule that the Trustee and the panel below cited, Opp. 15; Pet. App. 4a, a party can "consent" to a jury trial in federal court only for claims "not triable of right by a jury." Fed. R. Civ. P. 39(c)(2); *see In re Palm Beach Fin. Partners, L.P.*, 501 B.R. 792, 797 (Bankr. S.D. Fla. 2013) (granting defendant's motion to strike a jury demand because the parties' "joint consent" to a jury trial was only consent "in the event" that a jury trial right existed). Where, as here, a party had a right to a jury under applicable precedent, "consent" is irrelevant. Thus the question whether the Trustee had a constitutional right to a jury trial on all his claims—the very question Renco presents to this Court—was and is antecedent to any determination regarding "consent" under Rule 39.

B. The Trustee is also incorrect in suggesting that the district court's denial of Renco's motion to strike

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trial. Renco made that argument only in response to the Trustee's new assertion on appeal that the claims were legal in nature, and the parties disputed the issue entirely on the basis of events at trial and afterwards. *See* C.A. 151 at 66 n.39 (citing jury instructions and the district court's post-trial statement as evidence of the claims' legal nature); C.A. 156 at 17-20 (citing trial statements by the Trustee's counsel to establish the claims' equitable character). At any rate, there is nothing inconsistent about Renco's decision to argue on appeal that the Trustee had no jury trial right on certain claims under Second Circuit precedent, while explicitly preserving the right to challenge the correctness of that precedent in this Court.

the jury demand counsels against granting certiorari. The district court's ruling was premised in significant part on the belief that, under *Germain*, the Trustee had a right to a jury trial. Pet. App. 13a. That is precisely the issue before this Court. Moreover, as the Trustee acknowledges, Opp. 12, the Second Circuit did not decide whether the district court abused its discretion in denying Renco's motion, or even address whether the court *had* any discretion in the first place. *See* Pet. App. 3a-4a. Those would be questions for the Court of Appeals to address in the first instance on remand, should they become relevant to the disposition of this case.

C. Finally, the Trustee errs in arguing that Renco "failed to preserve properly in the courts below the question they now seek to present." Opp. 12. Renco told the Second Circuit panel that its arguments were constrained by Second Circuit precedent, and that Renco intended to challenge the *Germain* rule before the en banc court and this Court. C.A. 150 at 63 n.9; C.A. 218-1 at 13 n.*; C.A. 222 at 2-7. As both this Court and the Second Circuit have recognized, a party is not required to present "futile" arguments foreclosed by binding precedent in order to preserve them for later review. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007); *see US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013) (addressing argument raised for the first time on appeal because circuit precedent foreclosed consideration by the district court); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 91-92 (2d Cir. 2009) (holding that failure to make an argument foreclosed by precedent does not preclude appellate review).

The Trustee does not dispute that this Court has granted certiorari in cases where a party sought to distinguish binding precedent in the court below, rather than confront it head-on. *See, e.g.*, *United States v. Manrique*, 618 F. App'x 579, 583 (11th Cir. 2015) (noting appellant's argument that precedent was "inapplicable" due to factual differences), *aff'd*, 137 S. Ct. 1266 (2017). The Court has done so even when the party seeking certiorari failed to inform the Court of Appeals—even in a footnote—of its intention to challenge the precedent in this Court. *Compare* Plaintiff-Appellant's Opening Brief at 22, *In re Lehman Bros. Sec. & Erisa Litig.*, 655 Fed. App'x 13 (2d Cir. 2016) (No. 15-1879) (stating that Second Circuit precedent "is entirely distinguishable"), *with* Petition for Writ of Certiorari at 16, *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) (No. 16-373) (stating that Second Circuit precedent is "wrong"). The fact that Renco *did* alert the Second Circuit to its intention to challenge *Germain* only confirms that there is no procedural bar to this Court's review of the important question presented.

II. The Circuits Are Irreconcilably Split On The Question Presented.

A. The circuit split is well-established and requires this Court's resolution.

Despite the Trustee's protestations, the Courts of Appeals themselves fully recognize their disagreement over whether and to what extent a debtor has a right to a jury trial. The Fifth Circuit expressly "agree[d] with the [Seventh Circuit's] result in *Hallahan*, but not its reasoning with regard to why the

debtor had no right to a jury trial." *In re Jensen*, 946 F.2d 369, 374 (5th Cir. 1991). And when the Third Circuit adopted the Second Circuit's rule, it explained that "[t]he Second Circuit's opinion in [*Germain*] follows the reasoning of neither *Hallahan* nor *Jensen*" and that "[t]he waiver theory of *Hallahan* [was] rejected by *Jensen* and *Germain*." *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1250-51 (3d Cir. 1994).

According to the Trustee, the circuits are wrong to believe they are disagreeing with each other. He argues that the Sixth and Seventh Circuit also discussed factors unique to dischargeability proceedings, so that those courts "broadly and unnecessarily" held that debtors have no jury right when they voluntarily submit their case to bankruptcy court. Opp. 19. Of course, the Trustee cannot erase the split by wishing the Sixth and Seventh Circuits ruled on narrower grounds than they did. Nor can the Trustee dispute that the vast majority of courts even outside the Sixth and Seventh Circuits follow *Hallahan's* rule. Pet. 18 & n.10.

The Trustee's quibbles with the precise contours of the rule the Fifth Circuit announced in *Jensen* are also irrelevant. He claims that *Jensen* does not hold that "filing any claim eliminates jury-trial rights … to all claims." Opp. 21. But that is exactly how the Second and Third Circuits interpret *Jensen*. *See Germain*, 988 F.2d at 1330 ("[Under *Jensen*] once a proof of claim is filed, both the creditor and debtor are assumed to have waived their right to a jury trial."); *Billing*, 22 F.3d at 1251 ("[Under *Jensen*] either the

creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed.").

And the Fifth Circuit in *Verizon* cited *Jensen* approvingly, never suggesting any disagreement with that case. *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409 (5th Cir. 2014). In any event, even if the Trustee were correct in his interpretation of Fifth Circuit law, that only means that the Fifth Circuit is aligned with the Second and Third Circuits against the Sixth and Seventh Circuits—not that no split exists. Nothing the Trustee says undermines the point that this split "cries out for resolution." Pet. 17.

B. *Stern v. Marshall* does not impact the circuit split.

The Trustee does not identify any basis for expecting the Sixth and Seventh Circuits to abandon the *Hallahan/McLaren* rule on the theory that it is abrogated by *Stern v. Marshall*. In *Stern*, the Court addressed a challenge by a creditor to the bankruptcy court's constitutional authority to enter judgment on a counterclaim. 564 U.S. at 469. *Stern* says nothing—not even "by implication," Opp. 18—about the Seventh Amendment consequences of a debtor's invocation of the bankruptcy court's equitable authority through the filing of a bankruptcy petition.

More specifically, *Stern* focuses on the relationship between a particular cause of action and the claims allowance process. 564 U.S. at 499. Though *Stern* looked to Seventh Amendment cases as informing that analysis, *id.* at 495-97, *Hallahan* (and therefore *McLaren*) relied on a separate, categorical reason why

the debtor there did not have a right to a jury trial: By filing for bankruptcy, the debtor "voluntarily submitted his case to bankruptcy court," and for that reason "lost any Seventh Amendment jury trial right he might have asserted." 936 F.2d at 1505-06. That reasoning is not affected by *Stern*'s claim-specific analysis. In other words, even if one reads *Stern* broadly to suggest that a *creditor* loses its jury trial right only when the claim at issue "stems from the bankruptcy itself [or] would necessarily be resolved in the claims allowance process," Opp. 20 n.12, that view does not contradict a rule where the debtor loses its jury right when it files for bankruptcy in the first place.

The proof lies in what courts have done in the six years since *Stern*: They have continued to follow *Hallahan* and *McLaren*.[4] The Trustee does not cite a single example of a court concluding that *Stern* affected

[4] There are numerous examples. *See, e.g.*, *In re DiPiero,* 553 B.R. 122, 132 (Bankr. N.D. Ill. 2016) ("*Hallahan* is still good law in this circuit."); *In re Smiley*, 559 B.R. 215, 217 (Bankr. N.D. Ind. 2016) (citing *Hallahan* for the proposition that the "debtor waived any right to jury trial by choosing to file bankruptcy"); *Irvin v. Faller*, 531 B.R. 704, 710-11 (W.D. Ky. 2015) (finding no jury right based on *Hallahan* and *McLaren*); *In re Neves*, 500 B.R. 651, 661-62 (Bankr. S.D. Fla. 2013) (finding no jury right based on *Hallahan* and *McLaren*); *In re Felice*, 480 B.R. 401, 435 (Bankr. D. Mass. 2012) ("I agree with the reasoning set forth in the Seventh Circuit's decision in *Hallahan*, adopted by the Sixth Circuit in *In re McLaren*."). Courts have also ruled that a creditor abandons his jury trial right when he files a proof of claim—a situation more analogous to that in *Stern*—with no apparent concern that *Stern* forecloses this rule. *See, e.g.*, *Pearson Educ., Inc. v. Almgren*, 685 F.3d 691, 694 (8th Cir. 2012); *Vlastelica v. Novoselsky*, No. 15-CV-0910, 2015 WL 6393968, at *3 (E.D. Wis. Oct. 21, 2015); *In re Eshler*, No. 16-61659, 2017 WL 213810, at

those decisions. His suggestion that *Stern* will have a "significant impact" on the present circuit split has already been disproven. Opp. 17.

C. The Sixth and Seventh Circuits are on the correct side of the split.

The Trustee asserts that certain causes of action do not affect the claims-allowance process, and therefore this case must be "resolve[d] … in the Trustee's favor … under *Germain*." Opp. 23. But an argument that the Second Circuit is right while the Sixth and Seventh Circuits are wrong only serves to demonstrate the existence of the split.

In any event, the Sixth and Seventh Circuits are correct that a debtor "cannot claim a right to jury trial because … he voluntarily submitted his case to bankruptcy court." *Hallahan*, 936 F.2d at 1505; *see McLaren*, 3 F.3d at 960. The Trustee simply ignores statements from this Court, as in *Langenkamp v. Culp*, that a party has "no Seventh Amendment right to a jury trial" when it "subject[s] [it]self to the bankruptcy court's equitable power." 498 U.S. 42, 44-45 (1990); *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989) (parties who submit themselves to the bankruptcy court's equitable jurisdiction "subject[] themselves to all the consequences that attach to an appearance").

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*3 (Bankr. N.D. Ohio Jan. 18, 2017); *In re Holzhueter*, No. 16-13134-11, 2017 WL 3050487, at *7 (Bankr. W.D. Wis. July 18, 2017).

Instead, the Trustee mischaracterizes the petition as arguing that no party has a jury right for claims that "become part of the bankruptcy estate." Opp. 23. This strawman misses the point of *Hallahan* and *McLaren*: When a *debtor* avails itself of the bankruptcy court's equitable jurisdiction by filing for bankruptcy, *that debtor* gives up its right to a jury trial. This holding is wholly consistent with this Court's precedent for the reasons explained in the petition. Pet. 24-28. The Trustee's citations to *Granfinanciera* and *Stern* are irrelevant because neither involved a debtor's insistence on a jury trial. *See id.*

The Trustee also misapprehends the nature of bankruptcy jurisdiction in asserting that "the Trustee's claims were no longer subject to *any* bankruptcy jurisdiction" after the withdrawal of reference. Opp. 24. All bankruptcy cases *begin in district court*, which has original jurisdiction as a court of equity for all bankruptcy related proceedings. 28 U.S.C. § 1334. The nature of the district court's jurisdiction does not change when a case bounces down to the bankruptcy court and back up. It is the bankruptcy *proceedings* that are equitable, not the bankruptcy *court*.[5] When a debtor institutes such proceedings, he abandons his right to a jury trial.

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[5] For these reasons, other courts have recognized that *Picard v. Katz*, 825 F. Supp. 2d 484 (S.D.N.Y. 2011)—the one district court case the Trustee cites, Opp. 24 n.14—is simply wrong. *In re Pearlman*, 493 B.R. 878, 889 (Bankr. M.D. Fla. 2013); *see U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, No. 3:10-cv-1842-G, 2012 WL 987539, *5 (N.D. Tex. Mar. 21, 2012) (discussing errors in *Picard*'s reasoning).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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