No. 14-116

IN THE
Supreme Court of the United States

LOUIS B. BULLARD,
Petitioner,
v.

BLUE HILLS BANK,
FKA HYDE PARK SAVINGS BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF BANK OF AMERICA, N.A. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Bank of America, N.A. is one of the world's leading financial institutions. It provides individual consumers and businesses of all sizes with a full range of lending, investing, asset management, and other financial products and services.[1] In particular, the Bank is one of the largest mortgage loan originators, owners, and servicers in the United States. It originated more than $80 billion of mortgage loans and serviced a portfolio of nearly $700 billion of mortgage debt in 2014.

Given its leading role in providing and servicing mortgage loans, Bank of America regularly participates as a creditor in bankruptcy cases throughout the country. At any one time, the Bank holds or services tens of thousands of mortgage loans to borrowers in bankruptcy, including, at the time of filing, more than 40,000 such loans in cases under chapter 13 of the Bankruptcy Code. Bank of America is also regularly a creditor in chapter 13 cases on account of other types of consumer lending, as well as in chapter 11 business bankruptcies involving loans to corporations. Because the Bank does business across the country, legal rules and procedures that differ by jurisdiction—which are especially common in the chapter 13 context—can have a real and significant impact on its operations.

The question presented in this case—whether orders denying confirmation of a plan can be final and appealable—is critical to the administration of both busi-

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[1] No counsel for a party authored this brief in whole or in part, and no persons or entities other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief accompany the brief.

ness and consumer bankruptcies and is of substantial importance to Bank of America in its role as a frequent bankruptcy litigant. The plan confirmation process is central to bankruptcy cases under both chapters 11 and 13. The rights and obligations of the parties to a bankruptcy case under those chapters turn on the provisions of the confirmed plan, and the legal rulings governing what the plan may or may not provide are thus of the utmost importance to all parties in interest, including creditors—as is the ability to obtain effective appellate review of those rulings.

For that reason, the Bank urged the Court to grant review of this question and reverse the decision of the court of appeals in *Gordon* v. *Bank of America, N.A.*, No. 13-1416, in which the petition for a writ of certiorari remains pending. As in this case, the underlying dispute in *Gordon* involved an important and recurring issue of bankruptcy law on which lower courts have disagreed—whether a chapter 13 plan may override the claims-allowance process prescribed by the Bankruptcy Code and Rules. The bankruptcy court confirmed the plan, and the Bank appealed to the district court, which reversed the bankruptcy court's order. *Gordon* Pet. App. 34a. Because a district court decision is not precedential and thus cannot cure the disagreement among the lower courts, however, the Bank had a strong interest in having the Tenth Circuit resolve the question. The Tenth Circuit, like the First Circuit in this case, erroneously refused to do so, holding that the district court's order was not final and appealable because on remand the debtor could propose a different plan. *Id.* 3a, 5a.

The courts of appeals erred because they misapprehended both the nature of finality analysis in bankruptcy and the significance of an order denying confir-

mation of the debtor's preferred plan. The result of the rule those courts have adopted is that there will typically be no effective avenue for appellate review of critical legal rulings embodied in an order denying confirmation. That outcome, in turn, will thwart the orderly and uniform development of bankruptcy law, in which the Bank—as a creditor that does business in every jurisdiction—has a powerful interest.

SUMMARY OF ARGUMENT

Bankruptcy is different from ordinary civil litigation. Unlike a traditional dispute between a plaintiff and a defendant, resolved by a single final judgment, bankruptcy consists of numerous discrete "proceedings" that resolve parties' substantive rights, each of which may terminate in a final order. The bankruptcy jurisdictional provisions reflect that special characteristic of bankruptcy by granting district courts and bankruptcy appellate panels (BAPs) jurisdiction over appeals from "final judgments, orders, and decrees" entered by the bankruptcy court "in cases and *proceedings*." 28 U.S.C. §158(a), (b) (emphasis added). In turn, the courts of appeals have jurisdiction over all "final decisions, judgments, orders, and decrees" entered in such appeals. *Id.* §158(d)(1). As this Court has recognized, therefore, "'orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*.'" *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006).

An order denying confirmation of a plan finally resolves just such a distinct "proceeding" and discrete dispute. Indeed, the bankruptcy jurisdictional provisions specifically identify plan confirmation as a distinct "proceeding" in bankruptcy. 28 U.S.C. §157(b)(2)(L).

Moreover, the denial of confirmation of a plan conclusively resolves the debtor's entitlement to the relief sought in that plan. The courts that have reasoned that denial of confirmation can never be a final order—because the debtor can always propose a different plan—have been misled by inappropriate analogies to traditional civil litigation. Unlike, say, an order denying summary judgment, which reserves final adjudication of the parties' rights for trial, denial of confirmation of the debtor's preferred plan finally refuses the debtor the substantive relief sought. The debtor will have no further opportunity to obtain that relief.

Moreover, if a debtor cannot immediately appeal the denial of confirmation of his preferred plan, it is likely that he will never be able to obtain appellate review of that denial at all. Courts have identified two alternative routes to review, suggesting that the debtor can either propose a new, unwanted plan and appeal from the order confirming that plan, or invite dismissal of the bankruptcy case and appeal the dismissal. Neither option is workable. As an initial matter, such a cumbersome route to appellate review is impracticable both in consumer bankruptcies, where debtors may not have the resources to pursue it, and in business bankruptcies, where time is often of the essence. In both cases, the associated delay and waste of resources may prevent the debtor's rehabilitation altogether. And if the bankruptcy case is dismissed, the protection of the automatic stay terminates, which can also result in the failure of the debtor's rehabilitation. Moreover, we are aware of no other context in which a litigant is required to seek relief it does not want before it can appeal the denial of the relief it does want. Traditional principles of appellate review would not even permit such an appeal. Ultimately, the Rube Goldberg nature of these

"solutions" is powerful evidence that the courts that rely on them have misconceived the finality analysis in bankruptcy.

Finally, the restrictive finality rule adopted by the court below will hamper the orderly and uniform development of bankruptcy law. Bankruptcy is in many respects an "unruly" area of the law. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). One factor contributing to that unruliness is the two-tiered appellate review structure that requires a litigant to go first to the district court or BAP before having a right to review in the court of appeals. Because district court and BAP decisions are not typically regarded as precedential, and many debtors simply lack the time or resources for two levels of appeal, many important issues remain unresolved for long periods. Indeed, both in this case and in *Gordon*, the underlying merits issue is important and the subject of disagreement among the lower courts; the bankruptcy court in *Gordon* specifically noted that only a decision from the Tenth Circuit could provide the guidance lower courts required. Barring a debtor from appealing the denial of a preferred plan will only exacerbate the disarray that currently afflicts the one area of law in which uniformity is constitutionally mandated.

ARGUMENT

I. APPELLATE JURISDICTION IN BANKRUPTCY EXTENDS TO ANY FINAL ORDER ENTERED IN A DISCRETE PROCEEDING

A. The Statutory Scheme

The question of finality in bankruptcy has generated confusion among the lower courts because bankruptcy cases are not structured in the same way as tradi-

tional civil litigation. Rather than being disputes over whether a particular plaintiff should receive the relief it seeks against a particular defendant, bankruptcy cases are a complex conglomeration of proceedings in which diverse constituencies assert multiple and various claims for relief against the bankruptcy estate, against one another, and against third parties.

The statutory provisions governing bankruptcy jurisdiction reflect this reality. District courts have original jurisdiction not only over "all *cases* under title 11 [the Bankruptcy Code]" but also over "all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(a), (b) (emphasis added). District courts may refer both cases and proceedings to bankruptcy courts. *Id.* §157(a) ("Each district court may provide that any or all *cases* under title 11 and any or all *proceedings* arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." (emphasis added)). The key jurisdictional provision is the grant of jurisdiction over "proceedings"; the bankruptcy "case" is simply the umbrella that shelters the multitude of different proceedings that comprise or relate to it. *See, e.g.*, 1 Resnick & Sommer, *Collier on Bankruptcy* ¶5.08[1][b] (16th ed. 2014) ("[A] bankruptcy case is simply an aggregation of individual controversies[.]").

The statute provides a list of exemplary bankruptcy "proceedings" that give content to the concept. *See* 28 U.S.C. §157(b)(2).[2] Proceedings "arising under" the

[2] The list is intended to include "core" matters that the bankruptcy court may "hear and determine." 28 U.S.C. §157(b). In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court examined that provision and held that Congress had erred under Article III in designating certain of those matters as core, *see id.* at 2620. For

Bankruptcy Code include those asserting causes of action derived from the Code, such as a proceeding to obtain the turnover of property of the estate. *See* 28 U.S.C. §157(b)(2)(E); 11 U.S.C. §542; *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). Proceedings "arising in" a bankruptcy case include "'administrative' matters that arise only in bankruptcy cases," such as the determination of a creditor's proof of claim or—as here—a proceeding to determine whether a particular plan can be confirmed. *Wood*, 825 F.2d at 97 (emphasis omitted); *see* 28 U.S.C. §157(b)(2)(B), (L). Proceedings "related to" a bankruptcy case also include matters that do not arise under the Bankruptcy Code or in a bankruptcy case but whose resolution would nonetheless affect the bankruptcy estate—for example, a contract claim by the debtor against a third party that would increase the assets in the estate if the debtor prevailed. *See Celotex Corp.* v. *Edwards*, 514 U.S. 300, 307 n.6 (1995).

Discrete "proceedings" in bankruptcy may be initiated in one of two ways. Certain proceedings—"adversary proceedings"—may be initiated only by a complaint; adversary proceedings are essentially traditional lawsuits that take place under the umbrella of the larger bankruptcy case. *See* Fed. R. Bankr. P. 7001, 7003. Proceedings by the debtor or trustee to recover money or property from a third party, for example, are properly adversary proceedings. *Id.* 7001(1). Other discrete proceedings, which also have many of the features of traditional lawsuits, are known as "contested matters" and are typically initiated by a motion or objection. *Id.* 9014; *see id.* 9014 advisory comm. note (1983) ("Whenever there is an actual dispute, other

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present purposes, however, the point is simply that all of those matters are distinct "proceedings" in bankruptcy.

than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."). Contested matters include, for example, requests by creditors for relief from the automatic stay, disputes over the validity of a creditor's claim against the estate, and proceedings to determine whether a particular plan can be confirmed. *See id.* 3015(f) (chapter 13 plan confirmation); *id.* 3020(b) (chapter 11 plan confirmation).

The provisions for appellate jurisdiction in bankruptcy matters reflect that a bankruptcy case is comprised of a multiplicity of distinct proceedings. Specifically, the statute provides that district courts—or BAPs in the circuits that have them—"have jurisdiction to hear appeals … from final judgments, orders, and decrees … of bankruptcy judges entered in cases and *proceedings* referred to the bankruptcy judges." 28 U.S.C. §158(a) (district court) (emphasis added); *accord id.* §158(b) (BAP). Any "order" of a bankruptcy court finally resolving a discrete "proceeding"—such as the "proceedings" listed in §157(b)(2)—is thus appealable as of right to the district court or BAP.

The courts of appeals, in turn, "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b)." 28 U.S.C. §158(d)(1). Accordingly, they have appellate jurisdiction over any final order of the district court or BAP entered on appeal. *Id.*[3]

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[3] By its terms, the statute seemingly provides that *any* order by a district court or BAP finally resolving a particular appeal from a final order of the bankruptcy court is appealable to the court of appeals as of right, regardless of the district court's or BAP's disposition of the appeal. *See, e.g.*, *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 449 (3d Cir. 1982) ("We hold … that when the

B. A "Proceeding" Is The Appropriate Judicial Unit For Determining Finality In Bankruptcy

Consistent with the language of the statute, this Court has recognized that an order conclusively resolving a discrete proceeding is final and appealable even if the bankruptcy case as a whole is not yet over. *See Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006). *Howard* explained that a district court's order affirming a bankruptcy court's order denying priority to a particular creditor's claim was a "final decision" under §158(d). *Id.* And the Court endorsed the leading formulation of bankruptcy finality, articulated by then-Judge Breyer for the First Circuit: "'[O]rders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*.'" *Id.* (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983)).

As *Saco* explained, "[t]raditionally, every civil action in a federal court has been viewed as a 'single judicial unit,' from which only one appeal would lie." 711

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bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order[.]"). Some courts, however, have read the statute to provide that the district court or BAP order must itself finally dispose of the underlying bankruptcy proceeding. *See, e.g.*, *In re Cascade Energy & Metals Corp.*, 956 F.2d 935, 937 (10th Cir. 1992) (holding that even if bankruptcy court order is final, district court order reversing and "remand[ing] for significant further proceedings" is not final). This Court need not decide that question in this case, since the bankruptcy court denied confirmation of the plan and the BAP affirmed (Pet. App. 2a-3a); the bankruptcy court and BAP orders thus rise or fall together for finality purposes. The question does arise in *Gordon*, since in that case the bankruptcy court confirmed the plan—an order that all agree is final and appealable—and the district court reversed, thus finally resolving the appeal. *Gordon* Pet. App. 3a-4a.

F.2d at 443. In bankruptcy, however, the relevant "judicial unit" is different. Under the Bankruptcy Act of 1898, courts of appeals had jurisdiction over appeals from any order in a "proceeding" in bankruptcy. *See id.* at 444-445 (citing Bankruptcy Act of 1898, §24(b), 30 Stat. 544, 553). "A 'proceeding' was not the overall liquidation or reorganization, but rather an individual 'matter[] of an administrative character … presented in the ordinary course of the administration of the bankrupt's estate.'" *Id.*; *accord Taylor* v. *Voss*, 271 U.S. 176, 181 (1926).

The 1978 statute did not "change this jurisdictional tradition." *Saco*, 711 F.2d at 445. Rather, "the relevant 'judicial unit' … remain[ed] the traditional 'proceeding'"—including adversary proceedings and contested matters—"*within* the overall bankruptcy case, not the overall case itself." *Id.* An order that "conclusively determines [such] a separable dispute" is thus final and appealable for bankruptcy purposes. *Id.* at 445-446; *see also, e.g.*, 16 Wright et al., *Federal Practice and Procedure* §3926.2 & n.19 (3d ed. 2014); 1 *Collier* ¶5.08[1][b].[4]

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[4] After *Saco* was decided, Congress amended the bankruptcy jurisdictional provisions to address the Article III problem identified in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), giving them the basic outlines they have today. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2171 (2014). Those amendments did not alter the provisions regarding appellate jurisdiction in any way that might suggest a departure from the principle that the "proceeding" is the appropriate unit for assessing finality. *Executive Benefits*, 134 S. Ct. at 2171-2172; *cf. supra* n.2. They simply designated some proceedings as "core" proceedings (in which Congress believed the bankruptcy court could enter final judgment) and others as "noncore" (in which the bankruptcy court could not

The use of a different "judicial unit" to determine finality in bankruptcy makes sense not only because bankruptcy cases encompass multiple distinct proceedings but also because there is typically no "final judgment" in the overall bankruptcy case from which appeal could be taken. In ordinary civil litigation, a final judgment is one that conclusively resolves the rights and obligations of all the parties, "end[ing] the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). In bankruptcy, no such singular judgment exists.

In a chapter 13 bankruptcy like this one, for example, confirmation of a plan does not end the case. The plan period lasts for three or five years, during which, among other things, claims against the debtor's estate may be asserted and resolved and the debtor makes payments to creditors. The plan may also be modified, if, for example, the debtor's disposable income increases. 11 U.S.C. §1329(a); *see id.* §1325(b)(1)(B) (providing that plan must provide for payment of all projected disposable income to nonconsenting unsecured creditors who are not paid in full). Upon completion of the plan, the debtor typically receives a discharge of certain prepetition debts dealt with in the plan. *See id.* §1328; *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). The chapter 13 trustee continues to serve for a period after the final distribution is made under the plan to facilitate any necessary wind-up; after the trustee is discharged, the court closes the case. 11 U.S.C. §§347, 350. But the order closing the case is a ministerial, administrative act that does not resolve

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enter final judgment absent the parties' consent). *Executive Benefits*, 134 S. Ct. at 2172.

any substantive rights of any of the parties.[5] Instead, those rights are resolved in the individual contested matters and adversary proceedings that make up the case.

In short, an order that finally resolves a discrete adversary proceeding or contested matter by conclusively resolving the substantive rights of a particular party is a final, appealable order in bankruptcy. This rule does not require reading the word "final" in §158 to mean anything different than it means in §1291. Only the relevant "judicial unit" differs. "[E]ach adversary proceeding or contested matter is a discrete unit and … once that unit is defined, ordinary concepts of finality apply." 1 *Collier* ¶5.08[1][b] (footnote omitted). The courts that have perceived the issue in this case as part of a battle between "'flexible'" and strict approaches to finality, *see, e.g.*, *In re Lindsey*, 726 F.3d 857, 860 (6th Cir. 2013), have thus failed to capture the issue. In bankruptcy as elsewhere, jurisdictional rules must be clear and predictable. It is not that strict finality requirements yield to pragmatic concerns in bankruptcy.

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[5] The debtor may fail to complete the chapter 13 plan, in which case the case will be converted to chapter 7 or dismissed. *See* 11 U.S.C. §1307; Administrative Office of the U.S. Courts, *2013 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, *available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/bapcpa-report-archives/2013-bapcpa-report.aspx (last visited Jan. 30, 2015) (in 2013, 45% of chapter 13 cases were closed due to completion of plan, up from 37% in 2012 and 22% in 2011). While an order of conversion or dismissal may in some instances be appealable, those orders also are not generally analogous to final judgment in traditional litigation, because they typically do not resolve the substantive rights of the parties. Following conversion, the bankruptcy proceedings continue, and dismissal usually is without prejudice to subsequent bankruptcy proceedings. 11 U.S.C. §349.

Rather, as the jurisdictional provisions reflect, the complex structure of bankruptcy cases demands a different conception of the "judicial unit" within which finality is assessed. Within that unit, finality is no more "flexible" than it is outside bankruptcy.

II. DENIAL OF CONFIRMATION OF A DEBTOR'S PREFERRED PLAN IS A FINAL ORDER UNDER §158

A. Denial Of Confirmation Finally Resolves A Discrete Proceeding And Conclusively Determines The Parties' Substantive Rights

As discussed above, the determination whether a particular plan should be confirmed is a discrete "contested matter" and a discrete "proceeding" within the bankruptcy case. *See* 28 U.S.C. §157(b)(2)(L) (including "confirmations of plans" as an example of a core bankruptcy "proceeding"); Fed. R. Bankr. P. 3015(f), 3020(c), 9014. Indeed, a contested plan confirmation proceeding, like other contested matters, has most of the features of a traditional civil lawsuit. Under Bankruptcy Rule 9014(c), parties can request documents and take depositions; they can file motions for summary judgment; and the court can conduct a trial to take evidence from witnesses and resolve disputed questions of fact. The order granting or denying confirmation of the plan is the order that finally resolves that discrete proceeding and is thus appealable as of right under §158.

Moreover, an order denying confirmation of a plan conclusively determines the debtor's substantive rights, finally denying the debtor the relief he seeks.[6]

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[6] In a chapter 13 case, only a debtor may propose a plan. 11 U.S.C. §1321. In a chapter 11 case, under certain circumstances, any party in interest may file a plan, *id.* §1121(c), and even when the debtor files the plan, other parties frequently join the debtor

In a chapter 11 or 13 case, the plan is the key document that determines the debtor's and other parties' rights. In a chapter 13 case like this one, the plan will typically specify, for example, how much a debtor must pay each month to his creditors. *See* 11 U.S.C. §1322(a). The plan may attempt to strip off secured creditors' liens. *See id.* §§1322(b)(2), 1325(a)(5). It may provide that the debtor will cure a default, and how the debtor will do so. *See id.* §1322(b)(3), (5). It may provide that the debtor will reject an executory contract or unexpired lease. *See id.* §1322(b)(7). Indeed, it may contain "any … appropriate provision not inconsistent with" the Bankruptcy Code. *Id.* §1322(b)(11). Once confirmed, the plan is binding on all parties and has res judicata effect. *Id.* §1327(a); *Espinosa*, 559 U.S. at 264; *In re Enewally*, 368 F.3d 1165, 1172 (9th Cir. 2004). A bankruptcy court's order denying confirmation of a plan—on the ground that the debtor is not committing all of his disposable income to repay creditors, that a lien cannot lawfully be stripped, or that the plan's provisions otherwise violate the Code—is a final determination that the debtor cannot obtain the particular relief he is seeking in that plan.

In this case, for instance, the debtor sought to confirm a so-called "hybrid" plan, under which his mortgage lender's lien would effectively be stripped down to the current value of his house and he would make payments going forward over the remaining life of the

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as plan proponents. For simplicity, this brief refers to debtors throughout, but it is important to note that in the chapter 11 context, the rule adopted below will also frustrate other parties in their attempts to obtain appellate review of important adverse legal rulings.

mortgage only on the reduced amount. Pet. App. 2a.[7] The lender objected that such a plan was unlawful, and the bankruptcy court and BAP agreed. *Id.* 2a-3a. Those rulings finally resolved the question whether the debtor was legally entitled to that substantive relief under the Bankruptcy Code.

The First Circuit below nonetheless held that the BAP's order was not final because "the debtor remains free to propose an amended plan." Pet. App. 7a. For that reason, the court concluded, the order did not "'finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.'" *Id.* But the court's conclusion does not follow from its premise. The dispute over confirmation of the hybrid plan was itself a "discrete dispute." Procedurally, it was a discrete contested matter and a distinct "proceeding." Although the debtor could file a new plan, that would initiate a new request for relief, a new contested matter (if confirmation were opposed), and a new and separate proceeding. And substantively, denial of confirmation conclusively denied the debtor the ability to strip his mortgage lender's lien in the way he was proposing, finally disposing of all the issues pertaining to the discrete dispute over the confirmability of the hybrid plan. A new plan could not seek that relief again.

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[7] Chapter 13 debtors may not modify the rights of holders of claims "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2); *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 327-331 (1993). The house at issue in this case, however, is a two-family house, Pet. App. 20a, and the First Circuit has held (we believe wrongly) that the anti-modification provision of §1322(b)(2) does not apply to multi-family houses in which the debtor occupies only one unit, *id.* 53a; *Lomas Mortg., Inc.* v. *Louis*, 82 F.3d 1, 7 (1st Cir. 1996).

Some courts have analogized orders on plan confirmation to orders on motions to dismiss or motions for summary judgment—appealable if granted, but not if denied. *See, e.g.*, *Lindsey*, 726 F.3d at 861. But that comparison actually illuminates why the denial of plan confirmation is a final order. In ordinary civil litigation, when a court finds that the complaint states a claim, the litigation proceeds to discovery on that claim; similarly, when a court denies summary judgment, it does so because genuine issues of material fact about the pending claims remain for trial. There is no equivalent progression after the denial of a proposed plan; there will be no later trial or other proceeding in which the debtor will have another opportunity to have his right to the relief he seeks adjudicated. Rather, the denial of confirmation is more closely analogous to the *grant* of judgment in favor of the party objecting to confirmation. The debtor has sought relief against a creditor and the court has finally determined that the debtor is not entitled to that relief. If one substitutes "plaintiff" for "debtor" and "defendant" for "creditor," it becomes quite clear that the denial of confirmation finally resolves a discrete dispute.

B. If Denial Of Confirmation Is Not Final And Appealable, There Will Be No Reliable Avenue To Review Of The Court's Legal Ruling

Courts have suggested two ways in which a debtor, barred from appealing the denial of confirmation itself, could later obtain appellate review of the legal rulings embodied in the order denying confirmation. Even the court below characterized those options as "unappealing." Pet. App. 9a. In fact, they are entirely unworkable.

First, a debtor may supposedly propose a plan he does not want, and then appeal from the bankruptcy court's order confirming the alternative plan. *See Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000). But that option would require a debtor to waste significant time and resources in pursuit of *unwanted* relief simply to obtain review of an issue that could have been reviewed immediately. Such a cumbersome route to appellate review is impracticable in consumer bankruptcies, where debtors are likely to lack resources to pursue it. It may be even more impracticable in many business bankruptcies, where the plan is often the result of a deal among multiple parties, and the significant delay and cost caused by proposing a new, unwanted plan, soliciting creditors' votes on that plan, litigating its confirmation, and then appealing the confirmation of the unwanted plan could well scuttle the debtor's prospects for reorganization. Even if the debtor eventually obtains review by this tortuous route, it may come too late, since changing circumstances may prevent the debtor from reinstating the preferred plan. Moreover, in both consumer and business bankruptcy cases, the fact may be that there is no other confirmable plan to propose. *See Mort Ranta*, 721 F.3d at 247 (in some bankruptcy cases, denial of confirmation of a particular plan is not just "a discrete issue" but "the only issue"); *Bartee*, 212 F.3d at 283 (denial of confirmation of the debtor's preferred plan may leave the debtor "without any real options in formulating [a new] plan").

Second, the debtor may request or otherwise invite dismissal of the bankruptcy case. *Mort Ranta*, 721 F.3d at 248; *Bartee*, 212 F.3d at 283. (If there is no other plan that can practically be proposed, this will be the debtor's only option.) This option has equally absurd

consequences. In addition to wasting time and resources in the same way as proposing an unwanted plan, dismissal of the bankruptcy case will terminate the automatic stay that is one of the chief protections afforded to debtors by the Code. *See* 11 U.S.C. §362. Without the automatic stay in place, the debtor's prepetition creditors are free to foreclose on any security interests and to pursue collection proceedings against the debtor, taking away the breathing space that is necessary for either the business or consumer debtor to craft a viable plan for rehabilitation. "Frequently, the purpose of filing a chapter 13 case is to save a house from foreclosure or a vehicle from repossession and sale.... If the case gets dismissed as a result of the denial of confirmation, the whole purpose of the case may be frustrated[.]" *In re Zahn*, 367 B.R. 654, 659 (B.A.P. 8th Cir. 2007) (Mahoney, J., concurring), *rev'd*, 526 F.3d 1140 (8th Cir. 2008).[8]

In addition, both of these paths create the procedural awkwardness of requiring a party to appeal from an order *awarding* the party the relief it asked for—something that is never required, and rarely even permitted, in ordinary civil litigation. There are substantial questions as to whether such a route would even be open to the debtor. Traditional principles of appellate review would not permit a debtor to appeal from an order granting the debtor's own request for confirmation of an alternate plan. *See*, *e.g.*, *In re Shkolnikov*, 470

[8] Although the debtor could theoretically seek a stay of the dismissal pending appeal, to do that he would have to demonstrate a likelihood of success on appeal, *see, e.g.*, *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987), as well as convince the bankruptcy court to stay an order the debtor himself invited. The possibility of a stay pending appeal is thus no substitute for the protections of the automatic stay.

F.3d 22, 24 (1st Cir. 2006) ("It is an abecedarian rule that a party cannot prosecute an appeal from a judgment in its favor.").[9] Similarly, an appeal from an order granting the debtor's request to dismiss the case (in lieu of proposing an unwanted plan) runs contrary to the rule many courts have adopted against "an appeal from a final judgment that resulted from a voluntary dismissal." *Druhan* v. *American Mut. Life*, 166 F.3d 1324, 1325 & n.4, 1327 (11th Cir. 1999); *cf. Fairley* v. *Andrews*, 578 F.3d 518, 521-522 (7th Cir. 2009) ("Litigants aren't aggrieved when the judge does what they want.").[10]

Even if the debtor is able to appeal from an order confirming a new plan or dismissing the bankruptcy case, it is not clear that the appeal would encompass review of the earlier order denying confirmation of the debtor's preferred plan. An order denying confirmation of one plan does not logically "merge" either with a later order confirming a different plan or with an order granting dismissal of the case. An order denying a defendant's motion to dismiss, for example, can sensibly be said to "merge" into a final judgment for plaintiff because the judgment for plaintiff is necessarily premised on the conclusion that the defendant was not entitled to

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[9] The Eighth Circuit BAP concluded that a debtor did not have standing to pursue such an appeal, *Zahn*, 367 B.R. at 657-658, although that decision was later reversed, 526 F.3d at 1141. The Fourth Circuit has expressed serious doubts. *Mort Ranta*, 721 F.3d at 248 n.10.

[10] Refusing to propose a new plan and waiting for the bankruptcy court to dismiss the case suffers from similar difficulties. Many courts have held that an appeal from a dismissal for failure to prosecute does not permit review of interlocutory rulings prior to dismissal. *See, e.g.*, *John's Insulation, Inc.* v. *L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (collecting cases).

judgment as a matter of law. *See, e.g.*, *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (prohibition on immediate review of interlocutory orders applies to orders that "are but steps toward final judgment in which they will merge"). By contrast, an order denying confirmation of a debtor's preferred plan is not a "step[] toward," and bears no necessary logical relation to, a later order confirming an unwanted plan or granting dismissal. By taking either of those paths, the debtor may well thus lose altogether the opportunity to obtain the relief originally sought.

III. Recognizing A Debtor's Right To Appeal The Denial Of Plan Confirmation Will Promote The Orderly Development Of Bankruptcy Law

A. The Structure Of Appellate Review In Bankruptcy Makes Obtaining Binding Guidance More Difficult Than In Other Areas Of Law

1. Bankruptcy appeals have an unusual two-tier structure. As a rule, the district courts and BAPs are the first courts of appellate review, and there is no appeal as of right to the court of appeals until the district court or BAP has ruled. Those courts' decisions, however, are not generally treated as precedential. And further review in the courts of appeals, which can of course issue binding precedent, is relatively rare because successive appeals are costly and time-consuming. As a result, the district courts and BAPs have generated a large and inconsistent body of case law that bankruptcy courts typically consider themselves free to decline to follow. A restrictive view of finality will only make it more difficult to secure review by the courts of appeals and thus to obtain an authoritative statement of the law.

Most district judges do not consider themselves bound by principles of *stare decisis* to follow the decision of another district judge. *See Threadgill* v. *Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ("[T]here is no such thing as 'the law of the district.'"). Many bankruptcy judges have asserted by extension that they also are not required to follow district court decisions—or, for that matter, BAP decisions, since the BAP sits in lieu of a district court.[11] Moreover, even if BAP decisions are binding on bankruptcy courts, the Article I judges of the BAPs presumably cannot issue decisions that bind the Article III judges of the district courts. *Bank of Maui* v. *Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990). Thus, a bankruptcy litigant dissatisfied with existing BAP precedent may always attempt to circumvent it by opting to appeal instead to the district court. 28 U.S.C. §158(c)(1).

There is no question that the courts of appeals and this Court may "say what the law is" in a manner that binds bankruptcy judges. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But the "time and expense consumed in two successive appeals" discourages many parties from seeking review in the courts of appeals. Hennigan, *The Appellate Structure Regularized*, 102 Dick. L. Rev. 839, 846 (1998); *see* McKenna & Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 Am. Bankr. L.J. 625, 630 (2002) (only approximately 20% of appeals to the district court are further ap-

[11] *See, e.g.*, *In re Romano*, 350 B.R. 276, 277-281 (Bankr. E.D. La. 2005) (discussing "'considerable disagreement'" about the *stare decisis* effect of BAP and district court decisions and ultimately refusing to follow district court precedent); *In re Rinard*, 451 B.R. 12, 20-21 (Bankr. C.D. Cal. 2011) (refusing to follow BAP precedent).

pealed to the courts of appeals). Even for those litigants who would pursue a second appeal, the additional time required means that the underlying dispute may settle or otherwise become moot before the court of appeals can render a decision. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. Rev. 1063, 1070 (1994).

As a result, bankruptcy law is systematically "less settled than … other areas of law," McKenna & Wiggins, 76 Am. Bankr. L.J. at 655, despite the Constitution's mandate that bankruptcy law be "uniform," U.S. Const. art. I, §8, cl. 4. Indeed, the profusion of opinions by district courts and BAPs that bankruptcy judges do not regard as binding may actually *increase* the uncertainty in the law, providing many opinions to cite but little consensus. *See* Hennigan, 102 Dick. L. Rev. at 844 (the "volume of initial appeals produces a large and inconsistent body of non-binding caselaw"). The basic task of "know[ing] what the law is" is thus more difficult when litigating in bankruptcy court. McKenna & Wiggins, 76 Am. Bankr. L.J. at 649; *see* Maddock, Note, *Stemming the Tide of Bankruptcy Court Independence*, 2 Am. Bankr. Inst. L. Rev. 507, 515-516 (1994) (lack of authoritative precedent "renders the law less predictable" and "serves to hinder attorneys in their efforts to counsel clients and negotiate settlements"). The relative dearth of binding precedent in turn contributes to the "unruly" nature of bankruptcy law. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012).

Bank of America is involved in bankruptcy cases and proceedings throughout the country and routinely experiences these practical difficulties. The Bank must contend with a patchwork of different and sometimes conflicting case law and local rules governing the tens

of thousands of bankruptcy cases in which it participates as a creditor. The resulting inefficiency and potential confusion burdens both creditors and debtors.

The Court's resolution of the question presented in this case will not resolve the many practical difficulties that flow from the dual layers of appellate review in bankruptcy, but those difficulties should be borne in mind in addressing the question presented. A restrictive finality rule that fails to account for the special characteristics of bankruptcy litigation will only exacerbate the difficulty of obtaining binding guidance from the courts of appeals and foster the uncertainty that pervades bankruptcy law.

2. Congress recognized these problems when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. The House Committee Report observed that, "[i]n addition to the time and cost" of two layers of appellate review, "decisions rendered by a district court as well as a [BAP] are generally not binding and lack stare decisis value." H.R. Rep. No. 109-31, at 148 (2005); *see Weber* v. *U.S. Trustee*, 484 F.3d 154, 158 & n.1 (2d Cir. 2007) (legislative history shows "widespread unhappiness at the paucity of settled bankruptcy-law precedent").

In BAPCPA, Congress took a step toward facilitating the creation of settled bankruptcy precedent by creating an avenue for appeals to be taken directly from final or interlocutory orders of a bankruptcy court to a court of appeals. BAPCPA §1233(a), 119 Stat. at 202-204 (codified at 28 U.S.C. §158(d)(2)). Under that provision, the courts of appeals have discretion to hear appeals directly from orders otherwise appealable to a district court or BAP in limited circumstances. Such an

appeal is available only upon certification by the bankruptcy court, district court, or BAP (or by all parties) that the appeal satisfies any of three criteria. 28 U.S.C. §158(d)(2)(A)(i)-(iii) ((i) order involves a question of law as to which there is no controlling authority or a matter of public importance; (ii) order involves a question of law requiring resolution of conflicting decisions; or (iii) immediate appeal would materially advance the progress of the case or proceeding).[12]

While an improvement, the procedure for direct review created by BAPCPA cannot itself solve the problems described above. It therefore provides no reason to adopt the First Circuit's restrictive view of finality or to discount the difficulty that view would create in obtaining binding precedent from the courts of appeals. Even when the parties agree or persuade a lower court that a particular appeal meets the statute's requirements for direct review, the courts of appeals retain discretion to decline to hear the appeal. *See* 28 U.S.C. §158(d)(2) (courts of appeals must "authorize[] the direct appeal"); *Weber*, 484 F.2d at 161 (declining to hear appeal and noting that "Congress has explicitly granted [the courts of appeals] plenary authority to grant or deny leave to file a direct appeal, notwithstanding the presence of one, two, or all three of the threshold conditions").

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[12] By providing that direct appeal may be warranted where it would "materially advance the progress of the *case or proceeding* in which the appeal is taken," 28 U.S.C. §158(d)(2)(A)(iii) (emphasis added), the BAPCPA amendments confirm the same textual distinction drawn elsewhere in the bankruptcy jurisdictional statutes between "the case" on the one hand and a "proceeding" on the other. *See supra* pp.5-8.

More broadly, the availability of interlocutory review cannot substitute for an appeal as of right from what is properly regarded as a final order denying confirmation of a plan. The district courts and BAPs have the discretion to accept appeals from interlocutory orders of the bankruptcy court, but must grant leave for such an appeal. *See, e.g.*, 28 U.S.C. §158(a)(3) (granting district courts appellate jurisdiction over certain "interlocutory orders and decrees" but only "with leave of the court"); Fed. R. Bankr. P. 8001(b), 8003 (procedures for obtaining leave). Most courts have applied the §1292(b) standard in determining whether to hear such appeals. *See In re Calpine Corp.*, 356 B.R. 585, 592-593 (S.D.N.Y. 2007); 28 U.S.C. §1292(b) (permitting interlocutory appeals where district court certifies "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"). Courts of appeals, in turn, may grant leave for appeals from interlocutory orders of the district courts in bankruptcy appeals under §1292(b). *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 251-252 (1992).

In both instances, the would-be appellant must satisfy a strict standard, including demonstrating that there is "substantial ground for difference of opinion" as to the question presented—something district courts may not always be eager to acknowledge. And in both instances, the party seeking to appeal must obtain leave of the court. In appeals from the bankruptcy court the party must obtain leave of the district court or BAP, 28 U.S.C. §158(a)(3); Fed. R. Bankr. P. 8003, and in appeals from the district court the party must obtain leave from both the district court and the court

of appeals, 28 U.S.C. §1292(b); Fed. R. App. P. 5. There is no guarantee that leave will be forthcoming in the typical case in which a bankruptcy court refuses to confirm a proposed plan. And even if leave is granted in some cases, requiring a debtor to secure leave to appeal what should be regarded as a final order will merely add yet another barrier to appellate review and to the orderly development of the law.

B. Treating An Order Denying Plan Confirmation As Non-Final Frustrates The Development Of Bankruptcy Law

The rampant uncertainty and disagreement in bankruptcy law—exacerbated by the restrictive view of finality the court below endorsed—harms creditors as well as debtors. The Court need look no further than *Gordon* for a case in which the failure to treat an order denying confirmation as final prevented the court of appeals from hearing and resolving a question of significant importance to debtors and creditors alike.

Gordon presented the question whether a chapter 13 plan may override the process for adjudication of creditors' claims set out in the Bankruptcy Code and Rules. *Gordon* Pet. App. 12a. The debtor proposed a plan that estimated the amount of secured creditors' claims and stated that, if a creditor did not object to the plan, the estimated amount would be binding even if the creditor's claim was subsequently allowed in a different amount. *Id.* 20a-21a. Such a practice would override the statutory claims-allowance process and improperly shift burdens: Rather than debtors having the burden to object to a proof of claim, as the Bankruptcy Code provides, *see* 11 U.S.C. §502(a), a creditor would have the burden to object to the estimated

amount of its claim, and would have to do so well before the statutory deadline for filing its proof of claim.

Although the bankruptcy court confirmed the plan in *Gordon* (Pet. App. 12a), the court recognized that the issue was unresolved, stating at the confirmation hearing that "this [i]s a very important issue for very, very many plans … [a]nd hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area that has become so tortured and so unclear." Tr. 2, *In re Pahs*, No. 10-15557, Dkt. 50 (Bankr. D. Colo. May 31, 2011) (case consolidated with *Gordon*); *see also In re Butcher*, 459 B.R. 115, 131 (Bankr. D. Colo. 2011) (holding such a plan unlawful). The district court reversed the bankruptcy court's order, but the Tenth Circuit's refusal to entertain the debtor's appeal means that the issue remains unresolved, and the bankruptcy courts have not received the necessary guidance.

Gordon is no outlier. Other significant and divisive bankruptcy issues linger unresolved as a result of the restrictive view of finality some courts of appeals have adopted. *See, e.g.*, *Lindsey*, 726 F.3d at 858 (finding no appellate jurisdiction to consider the question whether the absolute priority rule applies to individual chapter 11 cases, an issue that has divided lower courts); *In re Fisette*, 695 F.3d 803, 805 (8th Cir. 2012) (finding no appellate jurisdiction to consider the question whether a chapter 13 debtor who is ineligible for a discharge may strip off underwater junior liens on his property—a question that "has divided bankruptcy courts" and "apparently has not been addressed by any circuit court"); Pet. Br. 43-44. In this case, too, the First Circuit recognized that the underlying issue of the permissibility of "hybrid" plans was "an important and unsettled question of bankruptcy law." Pet. App. 1a. Adopting

the First Circuit's view of finality will thus frustrate the development of uniform and predictable bankruptcy precedent and worsen the "unruly" nature of the law in this area. *RadLAX*, 132 S. Ct. at 2073.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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