23-2212

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE EDWARD JOHNSON,
Debtor.

MARILYN O. MARSHALL, Trustee
Appellant,
— v. —
EDWARD JOHNSON,
Debtor-Appellee.

Direct Appeal from the United States Bankruptcy Court For the Northern District of Illinois
Bankruptcy Case No.22-04449
The Honorable Timothy A. Barnes

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

September 25, 2023

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Appellate Court No: 23-2212

Short Caption: Marshall v Johnson

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The National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
None

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Attorney's Signature: /s/ James J. Haller Date: September 25, 2023

Attorney's Printed Name: James J. Haller

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Rules

Legislative History

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is also a nonprofit organization that advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized to protect the rights of consumer bankruptcy debtors. NACBA files *amicus curiae* briefs in various cases seeking to protect those rights.

Both NACBA and NCBRC have filed amicus briefs advocating for the rights of consumer bankruptcy debtors. *See, e.g Lac du Flambeau Band of Lake*

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) amici curiae affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other amici and their counsel made any monetary contribution toward the preparation or submission of this brief.

Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023;. Taggart v. Lorenzen, 139 S. Ct. 1795 (2019); *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *In re Fulton*, 843 F. App'x 799 (7th Cir. 2021); *In re Wade*, 926 F.3d 447 (7th Cir. 2019); and *In re Dennis*, 927 F.3d 1015 (7th Cir. 2019). Both NACBA and NCBRC have also filed amicus briefs in the two circuit courts of appeals that have ruled on the issues in this appeal. *See Evans v. McCallister (In re Evans),* 69 F.4th 1101 (9th Cir. 2023) and *Goodman v. Doll (In re Doll)*, 57 F.4th 1129 (10th Cir. 2023).

NCBRC, NACBA and NACBA's members have a vital interest in the outcome of this case. Many bankruptcy debtors seek to reorganize under chapter 13 of the Bankruptcy Code, rather than liquidate their assets under chapter 7. Creditors in chapter 13 cases typically see a greater return because those debtors must commit to a court-approved plan of repayment using ongoing disposable income for three- to five-year terms. Debtors must begin making those payments even before the bankruptcy court has confirmed their plans. It is not unusual, however, for chapter 13 debtors to find that they are unable to create a repayment plan that can meet the standards necessary for confirmation by the bankruptcy court.

If this Court were to reverse the decision of the bankruptcy court, it would cause those debtors to lose some of their pre-confirmation plan payments in

contravention of congressional intent, and create a disincentive for debtors in general to attempt the more rigorous, yet more desirable, chapter 13 route.

CONSENT

The Appellee has consented to the filing of this brief. Appellant has not responded to Amici and therefore Amici will file a motion to allow this brief filed contemporaneously with this brief.

SUMMARY OF ARGUMENT

As two courts of appeals have held, the plain language of section 1326(a)(2) of the Bankruptcy Code requires that payments made pursuant to a *proposed* chapter 13 plan are to be returned to the debtor if the plan is not confirmed. Section 1326(b), which relates to distributions by the trustee, applies only to cases in which plans are confirmed, because it uses the term payments "under the plan." The Supreme Court and at least two courts of appeals have interpreted payments "under the plan" or similar phrases to mean payments under the authority of a plan. Until a plan is confirmed, it does not provide authority for anything. For this reason, section 586(e)(2) of title 28, which refers to "payments…under plans" does not apply when a chapter 13 plan is not confirmed. The purpose of that provision is solely to set the amount of the fee that is required to be paid by other provisions. The fact that Congress specifically added language authorizing payment of fees to trustees in cases under chapter 12 and subchapter V of chapter 11 in which a plan is not confirmed bolsters the conclusion that it intended different treatment of chapter 13 cases.

The legislative history of the relevant provisions supports this plain language result. When chapter 13 was first enacted, the Code did not require payments to the trustee prior to confirmation of the plan. Therefore, language originally in section 1302(e) and later moved to section 586(e)(2) of title 28 referred to the trustee

taking fees from payments under a confirmed plan. When preconfirmation payments to the trustee became required, Congress enacted 11 U.S.C. § 1326(a)(2) to govern their disposition when a plan is not confirmed, and directed that they be returned to the debtor. When Congress enacted chapter 12 and subchapter V of chapter 11, it specifically prescribed different treatment for trustee fees in those cases. Congress has amended the relevant provisions numerous times and has never chosen to treat chapter 13 trustees the same as trustees in cases under chapter 12 and subchapter V of chapter 11.

The trustee's arguments provide no basis for ignoring the statutes' plain language and legislative history. 11 U.S.C. § 586(e)(2), upon which the trustee primarily relies, is intended solely to set the amount of the fee, applies only to payments under confirmed plans, and would be at best ambiguous even if it did not. Payments proposed by the plan and made under 11 U.S.C. § 1326(a)(1) must include amounts that the plan proposes to pay to the trustee. The treatment of trustee fees in chapter 12 and subchapter V is different than in chapter 13 because cases under those chapters are quite different from cases under chapter 13. And the policy reasons asserted by the trustee simply contradict reasonable choices Congress made in enacting the relevant statutes.

ARGUMENT

I. Statutory Background – Chapter 13

The Bankruptcy Code provides several avenues for people and entities weighed down by debt to repay their creditors to the extent they are able, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. Chapter 7 provides for repayment of debts by liquidating a debtor's existing non-exempt assets. *See Id.* § 704(a)(1). Chapter 13 provides for repayment of debts using "future income" in most cases, rather than proceeds from the sale of assets. *Id.* § 1322(a)(1). Because chapter 13 is often less disruptive to debtors and can provide greater distributions to creditors, Congress has expressed a strong policy of encouraging debtors to take advantage of chapter 13, where possible, and has avoided penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994); *see also* 11 U.S.C. §§ 348(f), 1307, 1328(a) (permitting a debtor to convert a chapter 13 case to chapter 7 at any time, limiting the property of the estate in converted cases, and expanding discharge).

At the outset of a bankruptcy case, debtors must file various schedules identifying assets, liabilities, income, expenses, and exemptions. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007 (describing lists, schedules, statements, and

other documents that must be filed). Chapter 13 debtors must file a proposed debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. Within 30 days of the petition date, chapter 13 debtors must begin making payments to the trustee as proposed by the plan. *Id.* § 1326(a)(1)(A). If there is no objection to the plan, it is typically confirmed within two to three months of the petition date. *Id.* §§ 341, 1324(b), Fed. R. Bankr. P. 2003(a). If an objection is filed, the time for confirmation can vary significantly. Once confirmed, the chapter 13 plan is the blueprint for distribution of debtor's plan payments, and the confirmation order authorizes those payments. 11 U.S.C. § 1326(c). Upon completion of payments under the plan debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

A chapter 13 trustee, typically the standing trustee, is appointed in all chapter 13 cases. Among other things, the chapter 13 trustee is responsible for receiving debtors' payments and disbursing funds in accordance with the terms of debtors' confirmed plans. *See* 11 U.S.C. §§ 1302, 1326(c). A standing trustee is compensated through a percentage fee—generally up to a maximum of 10 percent—from all payments received under plans. 28 U.S.C. § 586(e)(1)(B). If the plan is confirmed, the trustee is to distribute payments in accordance with the plan. Section 1326(b)(2) provides that after confirmation of the plan, the trustee is to be paid the percentage trustee's fee "before or at the time of each payment to

creditors under the plan." Notably, the percentage fee is collected without regard to the actual expenses incurred or time spent on any one particular case. *See* 28 U.S.C. § 586(e)(2) (the trustee "shall collect such percentage fee from all payments received by such individual under plans ...for which such individual serve as standing trustee.").

II. The Plain Language of the Relevant Statutes Compels Affirmance of the Bankruptcy Court's Decision

The Bankruptcy Code and related sections of title 28 of the United States Code are carefully drafted statutes that dictate the result in the case before this Court. They provide clear and cohesive instructions regarding when and how chapter 13 standing trustees may collect their fees. As the Supreme Court has held in another case involving bankruptcy fees, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 109 S. Ct. 1026, 1031 (1989) (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982)).

Section 1326(a)(1)(A) provides that the debtor must commence payments not later than 30 days after the date of filing of the plan or the order for relief, whichever is earlier, in the amount *"proposed by the plan."* [emphasis supplied].

Section 1326(a)(2) specifically refers back to payments made under section 1326(a)(1)(A), *i.e.,* the payments proposed by the plan. They are to be retained by

the trustee until confirmation. If the plan is not confirmed, the trustee is to return "*any such payment,*" again referring to payments proposed by the plan, to the debtor, after deducting unpaid administrative expenses allowed under 11 U.S.C. § 503(b) and amounts previously paid[2] or due and owing to creditors.[3]

As the Court of Appeals for the Ninth Circuit held in *Evans v. McCallister* (*In re Evans*), 69 F.4th 1101 (9th Cir. 2023):

> Accordingly, prior to confirmation, a trustee does not "collect" or "collect and hold" fees under Section 586, but instead "retains" payments "proposed by the plan" pursuant to Section 1326(a)(2). See § 1326(a)(2) ("[P]ayment[s] made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation.") If a plan is not confirmed, Section 1326(a) requires return of "any such payments"—again referring to payments "proposed by the plan"—to the debtor, after deducting amounts previously paid and due and owing to creditors. Id. If a plan is confirmed, the trustee is to distribute payments in accordance with the plan. Id. §1326(a)(2).

Id. at 1107.

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[2] The trustee misreads the words "previously paid" as applying to payments to the trustee. These words refer to payments required to be made to creditors before confirmation. The entire phrase, "not previously paid and not yet due and owing to creditors pursuant to paragraph (3)", was added to the Code in 2005 when, as discussed in Part III, debtors for the first time were required to make certain preconfirmation payments to creditors. There was nothing that changed in 2005 that would have required preconfirmation payments of the trustee's fees.

[3] There is no doubt that the chapter 13 trustee's fee is not an administrative expense under 11 U.S.C. § 503(b), and the trustee has not argued that it is. *See In re Rivera*, 268 B.R. 292 (Bankr. D.N.M.), *aff'd sub nom. Skehen v. Miranda* (*In re Miranda*), 285 B.R. 344 (B.A.P. 10th Cir. 2001).

Section 1326(b)(2) provides that at this point, only after confirmation of the plan, the trustee is to be paid the percentage trustee's fee "before or at the time of each payment to creditors *under the plan.*"[4] This subsection, in turn, points to 28 U.S.C. § 586(e) to determine the amount fixed for the trustee's percentage fee. As the Court of Appeals for the Tenth Circuit held in *Goodman v. Doll* (*In re Doll*), 57 F.4th 1129 (10th Cir. 2023):

> Relevant here, § 586(e)(2) only addresses the source of funds that may be accessed to pay standing trustee fees. It requires a Chapter 13 standing trustee to "collect" his fee from "all payments received . . . under plans" for which he acts as trustee.
>
> It is 11 U.S.C. § 1326(a) that addresses those Chapter 13 payments and what happens to that money, including, importantly, what happens to such payments if a Chapter 13 plan is not confirmed.

Goodman v. Doll (In re Doll), 57 F.4th at 1140.

Viewed as a whole, it is clear that 28 U.S.C. § 586 is intended to address the relationship between the United States Trustee Program and case trustees, including the Program's setting the percentage standing trustee fees in section 586(e), while the Bankruptcy Code determines what happens in individual bankruptcy cases.

[4] The trustee misreads this language as authorizing payments before confirmation. However, because it refers to payments under the plan, it cannot be operative until it is known that there *will be* payments under the plan, *i.e.*, that the plan has been confirmed.

28 U.S.C. § 586(e) sets the amount of the fees of standing trustees and provides that the standing trustee shall collect the percentage fee from payments received by the trustee "*under plans.*" The use of this language, distinguishing payments under plans from payments proposed by plans, is significant, because the Code consistently uses the phrase "payments under the plan" or similar phrases to mean payments under plans that have been confirmed. It does not include payments proposed by a plan that has not been confirmed, and therefore section 586(e) is fully consistent with section 1326(a)(2).

There are a number of examples of the Code using a phrase like "payments under the plan" to mean payments under a confirmed plan. Section 1325(a)(6) requires that to be assured of confirmation the debtor "will be able [future tense] to make all payments under the plan".

Section 1325(b)(1)(B) provides that "as of the effective date of the plan," *i.e.,* the date of confirmation, the trustee or a creditor may object if the debtor's plan would not devote all disposable income to make "payments to unsecured creditors under the plan."

Section 1328(a) provides that a discharge is to be granted to a debtor who completes "all payments under the plan" and meets certain other requirements. Section 1328(b) provides for a hardship discharge if a debtor "has not completed payments under the plan" if certain circumstances exist. If these provisions were

read to include plans that were proposed but not confirmed, a debtor could receive a discharge even if a plan were never confirmed.

And section 1329(a) provides for modification of a confirmed plan "before completion of payments under such plan."

This reading of "payments…under plans" in section 586 as applying only to payments under confirmed plans is strongly supported by decisions of the Supreme Court and at least two courts of appeals that have held that phrases like "payments under the plan" mean payments under the authority of the plan.

The meaning of "payments under the plan" was recently analyzed by the Tenth Circuit Court of Appeals in *Kinney v. HSBC Bank USA, N.A.* (*In re Kinney*), 5 F.4th 1136, 1142-43 (10th Cir. 2021), which interpreted the same phrase – "payments under the plan"—in section 1328(a) of the Bankruptcy Code to mean authorized by the plan:

> To ascertain the better interpretation of this ambiguous term, we must focus on the context. *See Pereira*, 138 S. Ct. at 2117 (stating that the Court must draw the meaning of "under" from its context). The context here suggests that the payments are "under the plan" only if they are subject to or under the authority of the plan.
>
> "Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan is "more natural[ly]" read as something "subject to . . . or under the authority of" the plan. *Piccadilly Cafeterias*, 554 U.S. at 39-41, 128 S. Ct. 2326.

The *Kinney* court looked to an earlier Supreme Court case, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326 (2008), that had considered the meaning of "under" in the phrase "under a plan confirmed" in chapter 11 of the Bankruptcy Code:

> An earlier version of the code used a similar term in a different provision, referring to a transfer "under a plan confirmed." 11 U.S.C. § 1146(c) (2000). To apply this provision, the Supreme Court considered whether a transfer could be "under" a confirmed plan if the transfer had preceded confirmation of the plan. *Piccadilly Cafeterias*, 554 U.S. at 35, 128 S. Ct. 2326. The Court answered "no," reasoning that
>
> > • the "more natural" reading of "under" suggests that the transfer must be "subject to" or "under the authority of" the plan (*id.* at 39, 128 S. Ct. 2326) and
> > • the transfer could not be subject to or under the authority of the plan if the plan had not yet been confirmed (*Id.* at 41, 128 S. Ct. 2326).
>
> The Supreme Court cited a Third Circuit opinion, *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003). *E.g.*, *id.* at 38, 40. *Hechinger* had drawn the same conclusion:
>
> > After considering all of these definitions [of the term "under"], we believe that the most natural reading of the phrase "under a plan confirmed" in 11 U.S.C. § 1146(c) is "authorized" by such a plan. [*See Random House Dictionary of the English Language* 1543 (unabridged ed. 1967)]. When an action is said to be taken "under" a provision at law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed. R. Civ. P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.

> On this reading, if an instrument of transfer is made or delivered "under" a plan, the plan must provide the authority for the transaction. 335 F.3d at 252; *see also In re NVR, LP*, 189 F.3d 442, 457-58 (4th Cir. 1999) (concluding that the plain meaning of "under" forecloses characterization of preconfirmation transfers as "under a plan confirmed" for purposes of 11 U.S.C. § 1146(c)).

Kinney, 5 F.4th at 1142-43.

The Third Circuit recently reaffirmed this interpretation in *Klaas v. Shovlin* (*In re Klaas*), 858 F.3d 820, 830 (3d Cir. 2017), a chapter 13 case dealing with the phrase "payments under the plan":

> [W]e have previously interpreted the nearly identical phrase "under a plan confirmed" as used in 11 U.S.C. § 1146(c) to simply mean "made pursuant to the authority conferred by such a plan," *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 254 (3d Cir. 2003), and we assume "identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860, 106 S. Ct. 1600, 89 L. Ed. 2d 855 (1986).

Thus, under the reasoning of these cases, 28 U.S.C. § 586(e)(2), referring to payments under plans, simply has no bearing on the disposition of payments made to the trustee when a plan has not been confirmed. A plan does not provide authority to do anything until the plan has been confirmed. A payment made before confirmation is not made under the authority of the plan.

The Supreme Court has also held, in interpreting the Bankruptcy Code, that "[t]o avoid interpretations incompatible with the rest of the code, we read the provisions in the context of each other." *United Sav. Ass'n of Tex. v. Timbers of*

Inwood Forest Assocs., 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988). In this regard, 11 U.S.C. §§ 1194(a) and 1226(a) buttress the conclusion that the Code does not permit a standing chapter 13 trustee to be paid the percentage fee from payments made with respect to a proposed, but unconfirmed, plan.[5] These provisions, unlike 11 U.S.C. § 1326(a)(2), specifically provide that the trustee in a case under chapter 12 or subchapter V of chapter 11 may take fees before returning payments to the debtor when a plan is not confirmed. In order to read section 1326(a)(2) compatibly with these provisions under those other chapters, the omission of the differing language present in those chapters cannot be ignored. Otherwise, that language would be surplusage. As the Supreme Court recently held in *City of Chicago v. Fulton*, 141 S. Ct. 585, 591, 208 L.Ed.2d 384, 390 (2021), interpreting other provisions of the Bankruptcy Code:

> The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme. (quoting *Yates* v. *United States*, 574 U. S. 528, 543, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)).

In other words, Congress knew how to state that it intended the percentage fee to be taken before returning payments made with respect to unconfirmed plans, and it declined to do so in chapter 13 cases. Moreover, giving different treatment to such payments in cases under subchapter V of chapter 11 and under chapter 12

[5] These provisions also reinforce the conclusion that the standing trustee's percentage fee is not an administrative expense under 11 U.S.C. § 503.

makes perfect sense. Such cases are few and far between,[6] and are typically far more complex and time-consuming than chapter 13 cases. There is little ability to spread a standing trustee's compensation and expenses over hundreds, and usually thousands, of pending cases with confirmed plans, as there is for chapter 13 standing trustees.

It is not surprising, therefore, that the leading treatise on bankruptcy law concurs with the conclusion that chapter 13 standing trustees may not deduct their percentage fees before returning payments to the debtor when a chapter 13 plan is not confirmed. 8 *Collier on Bankruptcy* ¶¶ 1302.05[1][b], 1326.02[2][c] (Richard Levin & Henry J. Sommer, eds., 16th ed.). The interpretation of these provisions by the courts in *Evans* and *Doll* provides the only way they can be read together as a cohesive statutory scheme.

[6] In the year ending June 30, 2023, there were only 147 chapter 12 cases filed in the entire country, of which two were filed in the Seventh Circuit. In that period, 5,986 chapter 11 cases were filed nationally, of which 186 were in the Seventh Circuit. Only some of those cases were filed under subchapter V of chapter 11. In contrast, 173,362 chapter 13 cases were filed nationally in the same time period, of which 18,346 were filed in the Seventh Circuit. *See https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0630.2023.pdf* Indeed, the United States Trustee Program has not appointed standing trustees for cases under subchapter V of chapter 11.

III. The Legislative History Supports the Plain Language Conclusion that Section 1326(a)(2) Does not Permit Deduction of the Standing Trustee's Fee When a Plan is not Confirmed.

The legislative history of section 1326(a) and section 586 of title 28 demonstrates that Congress intended different treatment of standing chapter 13 trustee fees depending upon whether a plan is confirmed. It also shows a clear intent to treat chapter 13 standing trustee fees differently from trustee fees in chapter 12 and subchapter V of chapter 11.

What is now section 1326(a) was not a part of the Bankruptcy Code when the Code was first enacted in 1978.[7] The original section 1326 provided:

- **(a)** Before or at the time of each payment to creditors under the plan, there shall be paid—
  - **(1)** any unpaid claim of the kind specified in section 507(a) (1) of this title; and
  - **(2)** if a standing trustee appointed under section 1302(d) is serving in the case, the percentage fee fixed for such standing trustee under section 1302(e) of this title.
- **(b)** Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

Section 1302(e)(2) of the Code as originally enacted contained language substantially similar to the current 28 U.S.C. 586(e)(2):

> **(2)** Such individual shall collect such percentage fee from all payments under plans in the cases under this chapter for which such individual serves as standing trustee. Such individual shall pay annually to the Treasury—

[7] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978), which enacted the Bankruptcy Code, is reprinted in Collier on Bankruptcy, Appendix Volume B, Pt. 4(a) (Richard Levin & Henry J. Sommer, eds., 16th ed.).

- **(A)** any amount by which the actual compensation of such individual exceeds five percent upon all payments under plans in cases under this chapter for which such individual serves as standing trustee; and
- **(B)** any amount by which the percentage fee fixed under paragraph (1)(B) of this subsection for all such cases exceeds—
    - **(i)** such individual's actual compensation for such cases, as adjusted under subparagraph (A) of this paragraph: plus
    - **(ii)** the actual, necessary expenses incurred by such individual as standing trustee in such cases.[8]

The Code as originally enacted did not require chapter 13 debtors to begin plan payments until a plan was confirmed, and debtors typically did not begin payments to the trustee until after confirmation. *See* S. Rep. No. 65, 98th Cong., 1st Sess. at 63 (1983). Thus, the language referring to payments under plans in section 1302(e)(2) had to refer to payments under confirmed plans.

Language similar to current section 1326(a), which first required payments to the trustee before confirmation, was enacted by section 318 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 § 318

[8] This language remains in effect as section 1302(e)(2) in the judicial districts in Alabama and North Carolina, where the United States Trustee Program was never adopted. For United States Trustee districts, the language was moved to section 586(e)(2) of title 28 by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 §§113, 228 (1986). *See* Pub. L. No. 99-554, § 302(d) (1986), as amended by the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, *reprinted in* Collier on Bankruptcy, Appendix Volume F, Pt. 41(q)(ii) (Richard Levin & Henry J. Sommer, eds., 16th ed.), which removed the October 1, 2002, deadline for Alabama and North Carolina to elect to participate in the United States Trustee Program.

(1984). In enacting it, Congress also prescribed what would happen to those payments if a plan were not confirmed, using language similar to the current 11 U.S.C. § 1326(a)(2), requiring the payments to be returned to the debtor. In other words, Congress did not contemplate these preconfirmation payments being treated the same as under 11 U.S.C. § 1302, which provided for the trustee's fee to be deducted from payments under the plan. The same logic must carry over to 28 U.S.C. § 586(e)(2), to which the section 1302 standing trustee fee language was moved. Moreover, Congress has amended section 1326(a) and other relevant Code provisions several times since 1984 without changing the language regarding the disposition of preconfirmation payments when a plan was not confirmed.

In 1986, Congress not only moved the language about standing trustee fees to title 28; it also enacted section 1226(a), which, in contrast to section 1326(a), specifically provides for chapter 12 standing trustees to collect fees from preconfirmation payments when a plan is not confirmed. Pub. L. No. 99-554, § 255 (1986). Had Congress intended for chapter 12 and chapter 13 fees to be treated the same, it would have so stated at a time it was amending provisions that applied to both chapters.

In 1994, Congress amended section 1326(a)(2) to require payments to creditors to begin as soon as practicable after confirmation. Pub. L. No. 103-394 (1994).

In 2005, Congress, again amended section 1326(a)(2), *inter alia,* by adding the words "not previously paid and not yet due and owing to creditors pursuant to paragraph (3),"[9] but did not change its language with respect to payments of chapter 13 trustee fees. Pub. L. No. 109-8 (2005). In fact, the House Report reiterated that *"[i]f the plan is not confirmed, the trustee must return to the debtor payments not yet due and owing to creditors."* H.R. Rep. No. 109-31, Pt.1, 109th Cong., 1st Sess. 73-74 (2005).

And in 2019, Congress enacted section 1194(a), which, in contrast to section 1326(a), specifically provides for chapter 11 subchapter V trustees to collect fees from preconfirmation payments when a plan is not confirmed. Pub. L. No. 116-54 (2019).

Congress has thus had numerous opportunities to amend section 1326(a) to enact the result the trustee desires. It has repeatedly declined to do so, even when it enacted contrasting language for chapter 12 and subchapter V trustees. *Evans, supra*, 69 F.4th at 1109; *Goodman v. Doll (In re Doll), supra*, 57 F.4th at 1143. And it did not do so after courts had ruled that chapter 13 standing trustees could not be paid their fees if a plan was not confirmed. *E.g., In re Rivera*, 268 B.R. 292 (Bankr. D.N.M.), *aff'd sub nom*, *Skehen v. Miranda (In re Miranda)*, 285 B.R. 344

[9] The 2005 amendments added section 1326(a)(1)(B) and (C), requiring, for the first time, preconfirmation payments to certain creditors.

(B.A.P. 10th Cir. 2001); *In re Ward*, 132 B.R. 417 (Bankr. D. Neb. 1991) (rejecting United States Trustee's interpretation).

The legislative history could not be more clear in demonstrating Congress' intent that chapter 13 standing trustees may not collect their fees when a plan is not confirmed.

IV. The Other Rationales Relied Upon by the Trustee and by Courts Supporting the Trustee's Position Provide No Justification for Departing From the Code's Plain Language

The trustee and courts supporting the trustee's position give several other justifications for their decisions. None of them has merit.

First, they argue that section 586(e)(2) of title 28 supports payment of the trustee's fee when a plan is not confirmed. However, neither the trustee nor the other decisions reaching that conclusion considered the appellate decisions, discussed above, that have interpreted the phrase "under the plan" and similar phrases. Payments made with respect to a proposed but unconfirmed plan are not payments under a plan because they are not authorized by a plan. An unconfirmed plan cannot authorize anything; it is merely a proposal.

The trustee's brief strains to reconcile the conflict between its interpretation of section 586(e)(2) and Code section 1326(a)(2), a conflict that does not exist if "payments. . . under plans" is properly read as payments under confirmed plans. It first argues that the word "collect" in section 586(e)(2) is unambiguous, meaning

to take as a payment, and that section 586(e)(2) therefore resolves the question. This argument fails to recognize that the clear language of section 1326(a)(2) conflicts with that interpretation of section 586(e)(2). It also ignores the fact that, even if the provision applied to unconfirmed plans, the word "collect" is certainly not unambiguous. In fact, the first definition of the word in many dictionaries is "to bring together into one body or place",[10] "to gather together; assemble",[11] or "to get (things) from different places and bring them together."[12]

Seeking to bolster the argument that "collect" is unambiguous, another decision on the subject, the nonprecedential, and now overruled, opinion in *McAllister v. Harmon (In re Harmon)*, 2021 Bankr. LEXIS 1960 (B.A.P. 9th Cir. July 20, 2021), made much of the fact that Congress did not say the trustee is to "collect and hold" preconfirmation payments. *Id.* at *21. But the statute also does not say the trustee is to collect preconfirmation payments and "take them as payment of trustee fees." It is easy to add words that would clarify an ambiguous word in one way or the other, but the exercise does not resolve what the ambiguous word means.

The trustee also argues that section 1326(a)(2) does not require return of preconfirmation payments that would be allocated to the standing trustee's fee,

[10] https://www.merriam-webster.com/dictionary/collect
[11] https://www.dictionary.com/browse/collect
[12] https://www.britannica.com/dictionary/collect

despite the fact that Code section 1326(a)(2) requires the return of "such payments" – the payments proposed by the plan. The trustee attempts to explain away this problem by arguing that section 1326(b) could apply to preconfirmation payments to creditors, but section 1326(b) applies only to confirmed plans since its opening language refers to "payment to creditors under the plan." A standing trustee can be paid her percentage fee only after confirmation. *Evans, supra* at 1107. As noted in the discussion of legislative history above, it uses language that existed before there was any obligation for debtors to make preconfirmation payments to the trustee or preconfirmation payments to creditors. It is section 1326(a)(2) which specifically provides directions regarding what is to happen if a plan is not confirmed.

The trustee also argues that the payments that must be returned to the debtor under section 1326(a)(2), which explicitly refers back to the payments under section 1326(a)(1)(A) "proposed by the plan", do not include the trustee's fee and only include payments intended for creditors. But if that were true, then the debtor would have no obligation to make any payments toward the trustee's fee prior to confirmation, since section 1326(a)(1) is the only source of an obligation to make preconfirmation payments proposed by the plan. In fact, the language regarding funds "previously paid," relied upon by the trustee in supporting this argument,

was added long after the enactment of section 1326(a)(2), in 2005, when debtors first became obligated to make certain preconfirmation payments to creditors.[13]

The trustee in this case simply brushes away the fact that her argument renders provisions in chapters 11 and 12 surplusage, stating that chapter 11 and chapter 12 "do not operate in the same fashion." Similarly, the now-overruled *Harmon* decision, which also agreed with the trustee's position, casually dismissed the issue of surplusage that would be created by its interpretation, stating that "because § 1326 was enacted prior to § 1194 and § 1226, the weight of any negative inference is greatly reduced." *McAllister v. Harmon (In re Harmon)*, 2021 Bankr. LEXIS 1960, at *22-25 (B.A.P. 9th Cir. July 20, 2021). This statement is misleading at best because, as discussed above, section 1326 was amended twice after section 1226 was enacted, and Congress did not change its wording to conform to section 1226, even in the wake of decisions that rejected the trustee's position. The *Harmon* court also held that reading section 1326 as proposed by the debtor "would create its own surplusage." *Id.* at *20. As also discussed above, this latter statement is simply wrong. If section 586(e) is correctly read as setting the amount of the trustee's fee to be paid from payments under confirmed plans, it is completely consistent with section 1326. As discussed above, contrary to the

[13] In the case before the court, the debtor made preconfirmation adequate protection payments pursuant to section 1326(a)(1)(C). Because these were not payments required by a confirmed plan, they were not payments under a plan.

Harmon court's statement that no provision other than section 586 provides for payment of the trustee's fee, section 1326(b) provides for precisely that, stating "there shall be paid. . .(2). . .the percentage fee for such standing trustee fixed under section 586(e)(1)(B) of title 28. . ." Again, this language shows that the purpose of section 586(e) is to "fix" the percentage amount of the fee.

In addition, the decisions supporting the trustee's position make policy arguments which, even if correct, could not overcome the plain language of the statutes. They argue that the trustee performs valuable services in chapter 13 cases in which a plan is not confirmed, such as in this case, and those services should be compensated. This argument misconstrues the scheme for compensating chapter 13 standing trustees. Chapter 13 standing trustees are not compensated based on the amount of time devoted to a particular case. Rather, the compensation and costs of the chapter 13 trustee are spread over all of the cases where chapter 13 debtors have plans confirmed and usually achieve the primary benefits of chapter 13: discharge of debts, cure of mortgage defaults, and payment of creditors. In some individual debtors' cases, the trustee must do a great deal of work but, because the debtor has a low income and therefore makes low payments, the trustee's fees are small. In other cases, the trustee may do little work but, because the debtor has a higher income, the payments are much higher. Congress could have chosen to charge trustee fees for cases where a plan is not confirmed and the debtor receives

little benefit from the bankruptcy, but it chose to charge trustee fees only in cases where creditors receive distributions and the debtor usually receives the intended benefits of chapter 13.[14] Paying trustee compensation based on distributions to creditors also conforms to the usual method of compensating trustees. *See, e.g.,* 11 U.S.C. § 326(a)(compensation of chapter 7 and chapter 11 trustees other than standing trustees under subchapter V of chapter 11).

The *Harmon* court also pointed to 28 U.S.C. § 1930(e) which uses the word "collect" to limit the filing fees that can be collected by the clerk. But this subsection, like section 586(e)(2), does not compel the payment of the filing fees. That task is accomplished by section 1930(a), (b), and (c), just as section 1326(b) provides for the payment of trustee fees after confirmation of a plan. So the word "collect" in section 1930(e) does not have the meaning the *Harmon* court ascribes to it. Section 1930(e) merely serves as a limitation on the amount that can be collected, much like section 586(e).

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[14] The trustee also argues that when a plan is denied confirmation the debtor sometimes has an opportunity to seek confirmation of an amended plan, and that the debtor's argument would require section 1326(a)(2) to be read to mandate return of payments when confirmation of the earlier plan is denied. Besides the fact that this argument does not apply to the case before the court, the simple answer to it is that as long as the debtor is seeking confirmation of a plan, the case would not be considered a case in which a plan is not confirmed. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 506, 135 S. Ct. 1686, 1694 (2015)(" A decision that does not resolve the entire plan consideration process—denial—is . . . not appealable.") As the Supreme Court said in *Bullard,* "'It ain't over till it's over.'" 575 U.S. at 503, 135 S. Ct. at 1693.

Lastly, some of the decisions supporting the trustee's position seek to invoke deference to the Handbook for Chapter 13 Standing Trustees published by the Executive Office for United States Trustees. This argument fails for several reasons. First, any deference to an administrative agency can only be invoked if a statute does not answer the question at issue. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 861-62, 104 S. Ct. 2778, 2791, 81 L. Ed. 2d 694, 714 (1984) (even agency regulations cannot override statute's plain language). That is not the case here; the statute is perfectly clear. Second, the Handbook does not rise even to the level of a regulation; it has not been promulgated after notice and comments under the Administrative Procedure Act. It can be changed, and has been changed, at the whim of the Executive Director of the program. Prior to 2012, it did not permit trustees to take their percentage fees when a plan was not confirmed. *See Evans, supra* at 1109-1110. Third, the Handbook states that the fee is not to be retained by the trustee if a plan is not confirmed and the prevailing law in the court where the trustee serves requires its return.[15] Rather than the courts deferring to the agency, the agency is deferring to the courts.[16]

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[15] The Handbook states at pp. 2-3 – 2-4: If the plan is dismissed or converted prior to confirmation, the standing trustee must reverse payment of the percentage fee that had been collected upon receipt if there is controlling law in the district requiring such reversal or if (after consultation with the United States Trustee) the standing trustee determines that there are other grounds for concern in the district.

[16] It is notable that the United States Trustee Program has not seen any need to argue that the bankruptcy court decision is incorrect. In fact, the amicus briefs

CONCLUSION

For all of the above reasons, the decision of the bankruptcy court should be affirmed. The plain language of the relevant statutes, and the legislative history of those provisions, make clear that Congress did not intend that standing trustees can take their fees from cases in which a chapter 13 plan is not confirmed.

Respectfully submitted,

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submitted in support of the debtors in both *Evans* and *Doll* were signed by the new Executive Director of that program, Tara Twomey.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and Cir. Rule 29 because this brief contains 6,123 words, excluding parts exempted by Fed. R. App. P. 32(f).

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STATEMENT UNDER FED. R. APP. P. 29(a)(4)(E)

1. No party's counsel authored this amicus curiae brief in whole or in part.

2. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

3. No person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on September 25, 2023. I certify that all participants are registered as CM/ECF users and will receive service via the appellate CM/ECF system.

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