No. 13-1416

In the Supreme Court of the United States

EDWARD LEON GORDON AND DORIS JEAN GORDON,
PETITIONERS

v.

BANK OF AMERICA, N.A., ET AL., RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

STEPHEN E. BERKEN
LAW OFFICE OF
STEPHEN E. BERKEN
1159 DELAWARE STREET
DENVER, CO 80204
(303) 623-4357

JAMES A. FELDMAN
Counsel of Record
STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
AMY WAX
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
JFELDMAN@LAW.UPENN.EDU

QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Douglas B. Kiel, Standing Chapter 13 Trustee, and Stephen Lindsey Pahs were parties to the proceeding in the court of appeals. The court of appeals dismissed Mr. Pahs' appeal as moot.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction..... 1

Statutes Involved 2

Statement 2

Reasons for granting the petition..... 9

I. There is an entrenched six-to-three conflict in the circuits on the appealability of denials of plan confirmation..... 10

A. In three circuits, a debtor may immediately appeal a denial of plan confirmation..... 10

B. Six circuits require debtors to propose plans they do not want or incur dismissal in order to obtain review..... 15

C. The conflict is entrenched and warrants review 18

II. Denials of plan confirmation are final and appealable 18

A. Some orders in bankruptcy cases are final and appealable long before the bankruptcy proceeding is completed 19

B. Orders denying plan confirmation are appealable..... 23

III. The issue is important and squarely presented..... 31

Conclusion 34

TABLE OF CONTENTS

Page

Appendix A – Court of appeals opinion (Feb. 20, 2014)..... 1a

Appendix B – District court opinion (March 27, 2012)..... 11a

Appendix C – Bankruptcy court opinion (March 25, 2011) 36a

Appendix D – Statutes Involved..... 66a

TABLE OF AUTHORITIES

Cases:

Bourne v. Northwood Props., 509 F.3d 15 (1st Cir. 2007) 17

Caterpillar Inc. v. *Lewis*, 519 U.S. 61 (1996) 30

Catlin v. *United States*, 324 U.S. 229 (1945) 20

Connecticut Nat. Bank v. *Germain*, 503 U.S. 249 (1992) 20

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 30

Deposit Guar. Nat'l Bank, Jackson, Miss. v. *Roper*, 445 U.S. 326 (1980) 25

England v. *FDIC*, 975 F.2d 1168 (5th Cir. 1992) 13

Forgay v. *Conrad*, 47 U.S. 201 (1848) 22

Howard Delivery Service, Inc. v. *Zurich American Insurance Co.*, 547 U.S. 651 (2006) 22

In re Armstrong World Indus., 432 F.3d 507 (3d Cir. 2005) 13, 14

In re Bartee, 212 F.3d 277 (5th Cir. 2000) 12, 13, 18, 24, 33

In re Bullard, No. 13-9009, 2014 WL 1910868 (1st Cir. May 14, 2014) 17, 18, 33

In re Butcher, 459 B.R. 115 (Bankr. D. Colo. 2011) 32

In re Chateaugay Corp., 880 F.2d 1509 (2d Cir. 1989) 20

In re Crager, 691 F.3d 671 (5th Cir. 2012) 13

Cases---Continued:

In re Fisette, 695 F.3d 803 (8th Cir. 2012) 16

In re Flor, 79 F.3d 281 (2d Cir. 1996).....15, 16, 33

In re Gordon, No. 10-13885 EEB (Bankr. D. Colo. Feb. 26, 2010)..... 4

In re Lievsay, 118 F.3d 661 (9th Cir. 1997)..... 16

In re Lindsey, 453 B.R. 886 (Bankr. E.D. Tenn. 2011) 33

In re Lindsey, 726 F.3d. 857 (6th Cir. 2013).....14, 16, 17, 18, 33

In re Manges, 29 F.3d 1034 (5th Cir. 1994) 24-25

In re Melander, 506 B.R. 855 (Bankr. D. Minn. 2014)..... 32

In re Millers Cove Energy Co., Inc., 128 F.3d 449 (6th Cir. 1997)..... 20

In re Oakley, 344 F.3d 709 (7th Cir. 2003)..... 20

In re Pahs, No. 10-15557 EEB (Bankr. D. Colo. May 5, 2011)..... 6, 7

In re Pleasant Woods Assocs. Ltd. P'ship, 2 F.3d 837 (8th Cir. 1993)..... 16

In re Roberts, 279 F.3d 91 (1st Cir. 2002) 28

In re Saco Local Dev. Corp., 711 F.2d 441 (1st Cir. 1983).....20, 22

In re Simons, 908 F.2d 643 (10th Cir. 1990).....7, 8, 9, 16, 27

In re Taylor, 913 F.2d 102 (3d Cir. 1990)..... 20

In re Windsor on the River Assocs., Ltd., 7 F.3d 127 (8th Cir. 1993)..... 26

Cases—Continued:

In re Worthington, 507 B.R. 276 (Bankr. S.D. Ind. 2014) 32

Lewis v. *United States*, 992 F.2d 767 (8th Cir. 1993) 16, 20

Maiorino v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982) 15, 24

McDow v. *Dudley*, 662 F.3d 284 (4th Cir. 2011) 12

Mort Ranta v. *Gorman*, 721 F.3d 241 (4th Cir. 2013) 11, 12, 17, 18, 25, 32

Nobleman v. *American Savings Bank*, 508 U.S. 324 (1993) 2

Prudential Ins. Co. v. SW Boston Hotel Venture, 2014 WL 1399418 (1st Cir. Apr. 11, 2014) 17

RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*, 132 S. Ct. 2065 (2012) 29

Ritchie Special Credit Investments, Ltd. v. *U.S. Trustee*, 620 F.3d 847 (8th Cir. 2010) 20

Schwab v. *Reilly*, 560 U.S. 770 (2010) 31

United Student Aid Funds, Inc. v. *Espinosa*, 559 U.S. 260 (2010) 7, 11, 23, 26, 29

Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549 (1915) 31

Constitutional Provision:

U.S. Const. art. I, § 8, cl. 4 33

Statutes:

11 U.S.C. § 109(g)(2) 26

Statutes—Continued:

11 U.S.C. § 362(c)(2)(B) 25
11 U.S.C. § 502 3
11 U.S.C. § 502(b) 28
11 U.S.C. § 506(d)(2) 3
11 U.S.C. § 1121(c) 29
11 U.S.C. § 1129(a)(7) 25
11 U.S.C. § 1129(b)(1) 25-26
11 U.S.C. § 1307(c)(6) 28, 29
11 U.S.C. § 1321 39
11 U.S.C. § 1322 ..... 2, 5
11 U.S.C. § 1322(b)(5) 2
11 U.S.C. § 1322(b)(11) 5
11 U.S.C. § 1324 ..... 2, 3, 4
11 U.S.C. § 1324(b) 27
11 U.S.C. § 1325 2
11 U.S.C. § 1325(b) 1
11 U.S.C. § 1325(b)(1)(B) 28
11 U.S.C. § 1327(a) 3
11 U.S.C. § 1328(a) 2, 23
11 U.S.C. § 1328(a)(1) 2
11 U.S.C. §1329(a) 3, 6, 28
28 U.S.C. § 158(a)(1) 7
28 U.S.C. § 158(d)(1) 15, 18, 20, 21
28 U.S.C. § 158(d)(2) 30

Statutes—Continued:

28 U.S.C. § 1291 .....19, 20
28 U.S.C. § 1292 30

Rules

Fed. R. Bankr. P. 2003 3
Fed. R. Bankr. P. 3002(a) 3, 4
Fed. R. Bankr. P. 3002(c) 4, 27
Fed. R. Bankr. P. 3015(b) 3
Fed. R. Civ. P. 58(a) 23

Other Authorities

Black's Law Dictionary (7th ed. 1999) 21
1 Henry Campbell Black, A Treatise on the Law of Judgments (2d ed. 1902) 21
Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94 (1991) 27
1 Collier on Bankruptcy (16th ed. 2013) 26
Drake, Bonapfel & Goodman, *Chapter 13 Practice & Procedure* (2011-2 ed.) 5
Local Bankr. Form 3015-1.1, ¶ VIII (D. Colo.)..... 4-5
7 Norton Bankr. L. & Prac. 3d 1, 2
Charles Tabb, The Law of Bankruptcy (2d ed. 2009) 29
16 Wright & Miller, Federal Practice & Procedure (2d ed. 1996) 20

Edward Leon Gordon and Doris Jean Gordon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 743 F.3d 720. The opinion of the district court (App., *infra*, 11a-35a) is reported at 471 B.R. 614 (2012). The opinion of the bankruptcy court (App., *infra*, 36a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 158 and 1291 of Title 28 of the United States Code are reprinted in the appendix to this petition. App., *infra*, 66a-69a.

STATEMENT

1.a. Congress designed Chapter 13 bankruptcy proceedings to enable a debtor with regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over three or five years, with the period usually depending on the debtor's "projected disposable income." 11 U.S.C. § 1325(b). The plan lists all

priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims, typically on a *pro rata* basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once all payments have been made in accordance with the plan, all secured and unsecured debts provided for by the plan are discharged, subject to certain limited exceptions. 11 U.S.C. § 1328(a). *See Nobleman* v. *American Savings Bank*, 508 U.S. 324, 327 (1993).

Among the debts not discharged are long-term obligations, whether secured or unsecured, such as liens on a primary residence. 11 U.S.C. § 1328(a)(1); 7 Norton Bankr. L. & Prac. 3d § 153:3. The debtor can, however, use the plan to cure defaults on those debts. 7 Norton Bankr. L. & Prac. 3d § 149:10. Under 11 U.S.C. § 1322(b)(5), the plan may give the debtor a reasonable time in which to make payments to cure a default or arrears while also making regular payments on the underlying long-term debt. *Nobleman*, 508 U.S. at 330. The plan thus allows the debtor to "reinstate the original terms of an obligation." 7 Norton Bankr. L. & Prac. 3d § 149:10.

b. The debtor's obligations are established in two ways in the bankruptcy proceeding. The first is the plan confirmation process. As in Chapter 11, the bankruptcy court must hold a confirmation hearing at which creditors and other parties in interest can raise objections to the debtor's proposed plan. 11 U.S.C. §§ 1324-25. Once confirmed, the plan "bind[s] the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has

accepted, or has rejected the plan." 11 U.S.C. § 1327(a). After confirmation, the debtor, the trustee, or unsecured creditors holding allowed claims may request modification of the plan. 11 U.S.C. § 1329(a).

The second means of establishing the debtor's obligations is the claims allowance process. Unsecured creditors, whose claims are not ordinarily itemized in the Chapter 13 plan, must file proofs of claim against the debtor's estate if they want to be repaid. Fed. R. Bankr. P. 3002(a). Secured creditors, by contrast, need not file a proof of claim at any time but may do so to establish the amount owed to them. 11 U.S.C. § 506(d)(2); Fed. R. Bankr. P. 3002(a) (by negative inference). Once a creditor submits *prima facie* evidence of the amount of a claim, the debtor must object if the debtor disagrees with the creditor's submission, and the bankruptcy court must resolve the dispute, often in an adversary proceeding. 11 U.S.C. § 502.

c. Unlike in Chapter 11, plan confirmation in Chapter 13 ordinarily occurs before the deadline for filing proofs of claim. Within fourteen days of filing a Chapter 13 petition, the debtor must propose a debt adjustment plan. Fed. R. Bankr. P. 3015(b). The United States Trustee then schedules a meeting of creditors at which the debtor is examined under oath, between 21 and 50 days after the petition is filed. Fed. R. Bankr. P. 2003. Within 45 days of that meeting, the bankruptcy court must hold a confirmation hearing on the debtor's proposed plan. 11 U.S.C. § 1324. Within ninety days of the meeting of creditors, unsecured creditors must file proofs of

claim against the debtor's estate. Fed. R. Bankr. P. 3002(a), (c).

2. On February 26, 2010, petitioners filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Colorado. Bank of America ("respondent") is a secured creditor. Petitioners' debt is secured by respondent's lien of a deed of trust on petitioners' primary residence. App., *infra*, 16a.

The same day that they filed for bankruptcy, petitioners filed a proposed Chapter 13 debt adjustment plan. App., *infra*, 16a; Chapter 13 Plan Including Valuation of Collateral and Classification of Claims, *In re Gordon*, No. 10-13885 EEB (Bankr. D. Colo. Feb. 26, 2010). Although Chapter 13 plans can be used to cure defaults on long-term debt, such as petitioners' debt to respondent, petitioners' plan stated that they were not in default on that debt and owed no arrears to respondent. App., *infra*, 16a. The plan proposed only to continue making the regular payments to respondent required by the terms of the loan. App, *infra*, 59a.

As required by the District of Colorado's local rules, petitioners used the model form for their Chapter 13 bankruptcy plan—Local Form 3015-1.1. That form contains a "modification rule" which would have required petitioners to submit a modified plan to account for claims allowed after plan confirmation.[1] Petitioners marked the modification rule

[1] "The debtor must file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation. . . . The modification will be filed no

"NOT APPLICABLE" in their proposed plan. App., *infra*, 45a-46a.

Drawing on Section 1322 of the Bankruptcy Code, which allows a plan to include "any other appropriate provision not inconsistent with [the Code]," 11 U.S.C. § 1322(b)(11), petitioners included what the courts below termed "non-standard language" in their plan. That language required secured creditors to object to plan confirmation if they disagreed with the amount of their claims listed in the plan. In the absence of any objection, the plan would have *res judicata* effect and would not be subject to modification. *See* App., *infra*, 37a-38a. Unless they objected, secured creditors would forfeit their opportunity to contest the plan's terms, including, in this case, the absence of arrears on petitioners' mortgage. App., *infra*, 38a-39a.[2] Without the object-or-forfeit provision, secured creditors could ignore the bankruptcy proceeding entirely and compel petitioners to pay the full amount of any lien and arrears even after discharge. *See* Drake, Bonapfel & Goodman, Chapter 13 Practice & Procedure § 8.2, at 452, 467-68 (2011-2 ed.).

3. No creditors, including respondent, filed an objection to petitioners' Chapter 13 plan. App., *infra*, 16a. The bankruptcy court, however, *sua sponte* re-

---

later than one year after the petition date. Failure of the debtor to file the modification may be grounds for dismissal." Local Bankr. Form 3015-1.1, ¶ VIII (D. Colo.).

[2] Secured and priority claims must each be listed and valued in a Chapter 13 plan, but individual unsecured claims need not be, since unsecured creditors must file proofs of claim in a process unchanged by the object-or-forfeit provision.

quested briefs and oral argument on whether the object-or-forfeit provision conflicted with the Bankruptcy Code and whether the local modification rule conflicted with the Bankruptcy Code. App., *infra*, 35a.[3] The court observed that "[c]ourts are split" on the validity of the object-or-forfeit rule and similar approaches around the country, App., *infra*, 48a, and it outlined the positions other courts had taken, App., *infra*, 48a-60a. At a hearing in the companion *Pahs* case, the court observed that "this [i]s a very important issue for very, very many plans," and added that "hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area." Resp. C.A. Mem. Br. 7 (quoting bankruptcy court).

The bankruptcy court concluded that the local modification rule was invalid because it conflicted with 11 U.S.C. § 1329(a), which authorizes only "the debtor, the trustee, or the holder of an allowed unsecured claim"—but not the court acting *sua sponte*—to modify a plan. App., *infra*, 46a. The court held that the object-or-forfeit provision was valid, because "[i]f a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed or valued in a certain way, the creditor may not ignore the confirmation process just because the claims bar

---

[3] Identical object-or-forfeit provisions were included in Chapter 13 plans proposed in three other cases. The bankruptcy court initially requested briefs and oral argument in one of them, *In re Pahs*, No. 10-15557 EEB (Bankr. D. Colo. May 5, 2011). The court ultimately deemed the briefs filed in *In re Pahs* as filed in this case and, after deciding this case, entered similar orders in each of the other cases. App., *infra*, 36a n.1.

date has not expired." App., *infra*, 63a. The court therefore confirmed petitioners' Chapter 13 plan. App., *infra*, 64a.

4. Respondent appealed to the district court, taking the position that it remained entitled to contest the amount of arrears owed by petitioners because it could still file a proof of its secured claim at any time. App., *infra*, 17a. The district court had jurisdiction to hear respondent's appeal under 28 U.S.C. § 158(a)(1), which gives the court jurisdiction over "final judgments, orders, and decrees" of the bankruptcy court. App., *infra*, 13a.[4] Confirmation of a plan is considered a final order in bankruptcy proceedings. *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010). The district court reversed the bankruptcy court's decision, holding that the local rule is valid, App., *infra*, 29a-30a, that the object-or-forfeit provision is not, App., *infra*, 31a-33a, and that the plan accordingly could not be confirmed, App., *infra*, 34a.

5. Petitioners appealed to the Tenth Circuit. That court had previously held that an order denying confirmation of a proposed Chapter 13 plan is not a final, appealable order.[5] *In re Simons*, 908 F.2d 643, 645 (10th Cir. 1990). The court had held

---

[4] The district court consolidated respondent's appeal with the Standing Chapter 13 Trustee's appeal in *In re Pahs*. App., *infra*, 12a.

[5] Pahs also appealed the decision of the district court, but because Pahs failed to make payments under his plan while the appeal was pending, his bankruptcy case was dismissed, making his appeal of the district court decision moot. App., *infra*, 2a-3a.

that to be final and appealable, an order in a bankruptcy case must "leav[e] nothing for the court to do but execute the judgment" and must not "contemplate[] significant further proceedings in the bankruptcy court." *Id.* *Simons* held that an order denying confirmation does not satisfy that standard, because the debtor "may always propose another plan for the bankruptcy court to review for confirmation." *Id.*

The Tenth Circuit requested briefing on whether it had jurisdiction to hear the appeal. Respondent and the Trustee filed a joint brief in support of jurisdiction. They argued that *Simons* "departs from [the Tenth Circuit's] own precedent . . . , it conflicts with decisions of the Third and Fifth Circuits, it is unfair to debtors, and it stymies efficient use of judicial resources." Resp. C.A. Mem. Br. 10 (available at 2012 WL 1898996). They explained that "finality in bankruptcy is a pragmatic concept, not an inflexible one." *Id.* at 20. In their view, the finality determination should turn on whether the court order "finally resolves the discrete legal questions at issue" as well as on questions of fairness and judicial economy. *Id.* at 20-21. Petitioners filed a notice stating that they "concur in the conclusions reached by [respondent and the Trustee] and would otherwise adopt the position taken by [respondent and the Trustee] as their own." Notice of Concurrence, at 1.

The Tenth Circuit held that it "cannot overrule *Simons*," App., *infra*, 6a, and therefore held it did not have jurisdiction to hear petitioners' appeal. The court stated that, as in *Simons*, "significant further proceedings" remained in this case because petition-

ers are free to revise their proposed plan. App., *infra*, 5a. The Tenth Circuit acknowledged the circuit conflict on whether denials of plan confirmation are appealable, but stated that it "[saw] no reason to ask the en banc court to reexamine *Simons* at this time." App., *infra*, 7a n.2. The court determined that the only avenues for considering the issue sought to be appealed would be "on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition or proceeding." App., *infra*, 6a (quoting *Simons*, 908 F.2d at 645).[6]

REASONS FOR GRANTING THE PETITION

There has been an increasingly entrenched and acknowledged conflict in the courts of appeals on the appealability of denials of plan confirmation since at least 2000, and four circuits have weighed in on the issue in the last year alone. The issue, which is exceptionally important to bankruptcy practice nationwide, is squarely presented in this case and warrants this Court's review.

The court of appeals purported to rely on the principle that an order denying confirmation is not final and appealable because such an order contemplates further merits proceedings. But precisely the same thing is true of *grants* of plan confirmation, which this Court and others have uniformly held appealable. Parties have never been required to wait until the completion of all proceedings on the mer-

[6] The Tenth Circuit declined to remand to allow petitioners to seek certification of an interlocutory appeal. App., *infra*, 9a-10a.

its—three to five years until discharge in a successful Chapter 13 case—before an order in a bankruptcy case is final and appealable.

The Tenth Circuit's holding unjustifiably burdens cash-strapped debtors, who must pursue time-consuming, cumbersome, and uncertain avenues to obtain appellate review, and it wastes judicial resources. Indeed, although the issue involves debtors' rights to appeal, the Chapter 13 Trustee and even Bank of America, a creditor in this case and in many others, agreed (and argued vigorously below) that the court of appeals should reverse its own precedent and hold that debtors may appeal denials of plan confirmation. Further review is warranted.

I. THERE IS AN ENTRENCHED SIX-TO-THREE CONFLICT IN THE CIRCUITS ON THE APPEALABILITY OF DENIALS OF PLAN CONFIRMATION

Three circuits recognize that a denial of plan confirmation, like a grant of plan confirmation, is appealable under settled principles of finality that have long governed bankruptcy cases. The Tenth Circuit in this case agreed with five other circuits that have held that denials of plan confirmation are not appealable. Only this Court's review can resolve the conflict.

A. In Three Circuits, a Debtor May Immediately Appeal a Denial of Plan Confirmation

The Third, Fourth, and Fifth Circuits allow debtors to appeal an order denying confirmation, rather than requiring them "to suffer dismissal or to waste

resources on an amended plan before obtaining appellate review." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 250 (4th Cir. 2013).

1. In *Mort Ranta*, a divided panel of the Fourth Circuit held that an order denying confirmation of a Chapter 13 plan was "a final order for purposes of appeal even if the case has not yet been dismissed." 721 F.3d at 248. The court of appeals "conclude[d] that the bankruptcy court's denial of confirmation and the district court's affirmance are final orders" and that therefore "appellate jurisdiction [was] proper." 721 F.3d at 250. The court noted that it had long permitted *grants* of plan confirmation to be appealed by creditors or trustees, and "[b]y the same token, we have a long history of allowing appeals from debtors whose plans are *denied* confirmation." *Id*. at 245. Recognizing that the issue "has divided other circuits," the court concluded that "the bankruptcy court's denial of [the debtor's] proposed plan and the district court's affirmance are final orders for purposes of appeal." *Id*. at 246.

The court acknowledged that some other courts had treated denial of plan confirmation as nonfinal because "the debtor may propose an amended plan before the case is dismissed" on remand. 721 F.3d at 247. But the court noted that "the same can be said of a confirmation order," because "[e]ven after a plan is confirmed, the debtor is always free to propose a modification to the plan, which could substantially modify the terms of repayment and the rights of creditors." *Id*. at 248. Yet confirmation orders have always been held appealable. *See United Student Aid Funds,* 559 U.S. at 269.

The court also explained that "a contrary rule could leave some debtors 'without any real options.'" 721 F.3d at 248 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). Without the ability to appeal the denial of plan confirmation, the debtor would be "forced to 'choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal.'" *Id.* (quoting *Bartee*, 212 F.3d at 283). Filing an involuntarily amended plan "would waste 'valuable time and scarce resources,'" *id.* (quoting *McDow* v. *Dudley*, 662 F.3d 284, 287 (4th Cir. 2011)), and "the procedural oddity of allowing a debtor to appeal the confirmation of his or her own proposed plan raises questions regarding standing." *Id.* at 248 n.10. The alternative of dismissal risks losing the automatic stay that protects the debtor's estate and could "preclude[] [the debtor] from filing another bankruptcy petition for six months." *Id.* at 248. The court concluded that "as a practical matter, it makes little sense to deny debtors immediate appellate review simply because the case has not yet been dismissed and the debtor could propose an amended plan." *Id.*

2. In *Bartee*, the Fifth Circuit similarly held that a denial of confirmation of a Chapter 13 plan was appealable, because it "conclusively determined the substantive rights at issue and ended the dispute" over them. 212 F.3d at 283-84. The court explained that a bankruptcy court order is final and appealable if it is "a 'final determination of the rights of the parties to secure the relief they seek,' or a final disposition 'of a discrete dispute within the larger bankruptcy case.'" *Id.* at 282. Because the record did

"not contain any indication that the bankruptcy court intended to take any further action on the objection to the claim or the objection to confirmation," *id.* at 283, the court held that the order was final and appealable, *id.* at 284. *See also In re Crager*, 691 F.3d 671, 675 (5th Cir. 2012) (holding that a denial of confirmation that finally resolves "a discrete dispute" is final and appealable).

The Fifth Circuit in *Bartee* viewed its conclusion as "all but compelled by considerations of practicality," since without a right to appeal, "the debtor is left without any real options in formulating his plan." 212 F.3d at 283. The court recognized that other courts of appeals had held that denials of plan confirmation were not appealable. *Id.* at 282 n.6. But the court explained that it had "long rejected adoption of a rigid rule that a bankruptcy case can only be appealed as a single judicial unit at the end of the entire bankruptcy proceeding." *Id.* at 282 (internal quotation marks omitted). Indeed, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them." *Id.* at 282-83 (quoting *England* v. *FDIC*, 975 F.2d 1168, 1171 (5th Cir. 1992)). Reversing such orders only after the termination of the entire case "would waste exorbitant amounts of time, money, and labor." *Id.* at 283 (quoting *England*, 975 F.2d at 1171).

3. In *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005), a divided panel of the Third Circuit held that a denial of confirmation of a Chapter 11 plan is appealable. The court noted that

"[b]ecause bankruptcy proceedings are often protracted, and time and resources can be wasted if an appeal is delayed until after a final disposition," it had recognized the "policy . . . to quickly resolve issues central to the progress of a bankruptcy." *Id.* at 511. The court applied a four-factor test to determine that the denial of confirmation was final and appealable; the test considers "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *Id.*

Under those four factors, appeal would be permitted here. Denial of confirmation here will have an impact on the assets of the bankruptcy estate, because the estate will be subject to claims for arrears if petitioners are forced to file the plan without the object-or-forfeit clause. There is no need for further fact-finding on remand, because the dispute over the validity of the object-or-forfeit clause is purely a matter of law. The appeal here, like the one in *Armstrong*, "would require [the appellate court] to address a discrete question of law that would have a preclusive effect on certain provisions of the Plan," 432 F.3d at 511, since no plan with an object-or-forfeit provision could be confirmed under the district court's decision. Finally, either of the alternatives to permitting appeal now—appealing confirmation of a later and undesired plan or appealing a dismissal now—would be inefficient and wasteful, and would possibly fail to bring the issue to the appellate court in any event.

B. Six Circuits Require Debtors to Propose Plans They Do Not Want or Incur Dismissal in Order to Obtain Review

The Tenth Circuit in this case joined five other circuits that have held that an order denying confirmation of a debtor's plan is nonfinal and nonappealable.

1. In *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel of the Second Circuit held, in a Chapter 13 case, that an "order denying confirmation of the proposed plan is interlocutory only and hence not appealable," because "for all we know, the bankruptcy court may very well confirm another plan" that does not include the contested provision. *Id.* at 90-91. In *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996), the Second Circuit later acknowledged that "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." Nonetheless, *Flor* too held that the mere fact that it "cannot not rule out the possibility that an alternate plan may be confirmed" precluded appeal of a denial of plan confirmation. *Id.*

2. The Sixth Circuit has also held that "a decision rejecting . . . confirmation [of a] plan is not a final order appealable under" 28 U.S.C. § 158(d)(1), the statute specifically addressing appeals to the courts of appeals in bankruptcy cases. *In re Lindsey*, 726 F.3d. 857, 859 (6th Cir. 2013). In *Lindsey*, confirmation of the debtor's Chapter 11 plan had been denied on the ground that it violated the absolute-priority rule. The Sixth Circuit held that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.* at 859. Because the

debtor in *Lindsey* could propose a new plan, to which the creditors could object, the remand involved "[f]ar more than a few ministerial tasks[.]" *Id.* The court of appeals noted that it "join[ed] four other circuits" that at that time did not permit appeals of denials of plan confirmation, while "[t]hree other circuits have gone the other way." *Id.*

3. The Eighth Circuit too has held that "a bankruptcy court order that 'neither confirms a plan nor dismisses the underlying petition, is not final.'" *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (quoting *Lewis* v. *United States*, 992 F.2d 767, 772 (8th Cir. 1993)). The court concluded that the denial of a Chapter 11 plan confirmation was not final and appealable, because "the bankruptcy court has remaining tasks that are not purely mechanical or ministerial, such as considering any amended plan that may be proposed, or determining how to dispose of the case if no confirmable plan is proposed." *Id.* *Accord In re Fisette*, 695 F.3d 803, 805-06 (8th Cir. 2012).

4. In *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997), the Ninth Circuit rejected the contention of both parties that it had jurisdiction of an appeal from a denial of plan confirmation, categorically holding that "a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." In reaching that conclusion, the court cited *Flor*, *Pleasant Woods*, and the Tenth Circuit's decision in *Simons*. *Id.*

5. Finally, the First Circuit recently held in a Chapter 13 case that "[a]n order of an intermediate appellate tribunal [*i.e.*, a district court or bankruptcy

appellate panel] affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." *In re Bullard*, No. 13-9009, 2014 WL 1910868 at *3 (1st Cir. May 14, 2014); *see id.* at 14. The court acknowledged that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." *Id.* at *2. The court aligned the circuits in precisely the split discussed above; it cited the Tenth Circuit's decision in this case; and it extensively discussed the opposing views of the Sixth Circuit in *Lindsey* and the Fourth Circuit in *Mort Ranta*. *Id.* at *2-*3 & n.4, *4-*5.

The First Circuit in *Bullard* noted that "[t]he analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed," as occurred in the instant case. 2014 WL 1910868 at *5 n.9. But in each of the cases the court cited for that proposition, *Bourne* v. *Northwood Props.*, 509 F.3d 15 (1st Cir. 2007), and *Prudential Ins. Co.* v. *SW Boston Hotel Venture*, 2014 WL 1399418 (1st Cir. Apr. 11, 2014), there was a discrete issue separate from, but crucial to, plan confirmation on which the court held that appeal was proper. In each case, the court of appeals first decided that separate issue. In each case, the court then went on to reverse the intermediate appellate court's holding that the plan could not be confirmed, on the ground that the ruling on the separate issue "eviscerated [the] entire premise" of the intermediate appellate court's denial of plan confirmation. *Bullard*, 2014 WL 1910868 at *5 n.9. In the instant case, there is no discrete issue separate from the denial of

plan confirmation on which appeal could be taken. Therefore, in light of the balance of the First Circuit's reasoning, which relied heavily on that of the Sixth Circuit in *Lindsey*, it appears that the First Circuit would hold that the instant case is not appealable.

C. The Conflict is Entrenched and Warrants Review

In the last year alone, four courts (the Tenth Circuit here, the Fourth Circuit in *Mort Ranta*, the Sixth Circuit in *Lindsey*, and the First Circuit in *Bullard*) have addressed the question presented and come to conflicting conclusions. The courts of appeals have repeatedly acknowledged the conflict and expressly addressed the rationales offered by sister circuits. *See Mort Ranta*, 721 F.3d at 246; *Bartee*, 212 F.3d at 282; *Lindsey*, 726 F.3d at 859; *Bullard*, 2014 WL at *3-*5; App., *infra*, 7a n.2. The conflict extends to Chapter 11 and Chapter 13 cases, and no court has distinguished between them in considering the appealability of plan denials. Only this Court's review can resolve the conflict.

II. DENIALS OF PLAN CONFIRMATION ARE FINAL AND APPEALABLE

Denials of plan confirmation are final decisions subject to appeal. A long line of decisions has established that finality in bankruptcy is a broader concept than finality in ordinary civil litigation. Congress recognized that principle when it enacted 28 U.S.C. § 158(d)(1), the statute specifically addressing bankruptcy appeals, whose terms ("final decisions, judgments, orders, and decrees") are significantly

broader than the terms of 28 U.S.C. § 1291 ("final decisions"), which authorizes appeals from district court in *all* cases. Unlike other forms of litigation, bankruptcy proceedings in successful Chapter 13 cases ordinarily continue for three or five years before the court issues a single, final judgment that terminates the case (*i.e.*, the debtor's discharge). Yet no court has suggested that all appeals in bankruptcy cases must wait until that time.

Precluding appeals from denials of plan confirmation could insulate a host of potential legal errors from review and harm debtors. A debtor would be able to obtain review only by invoking a cumbersome and doubtful appeal-your-own-plan procedure or an equally difficult procedure in which the debtor would move for a voluntary dismissal and then appeal from the grant of the debtor's own motion. Either of those avenues prolongs the appeals process to the detriment of cash-strapped debtors, as well as creditors who also have a vital interest in avoiding waste of the limited resources available in the bankruptcy estate. The same rationale that would preclude appeal of *denials* of plan confirmation would require reversal of the long-settled rule that *grants* of plan confirmation are appealable, since grants of plan confirmation too contemplate further proceedings on the merits of the bankruptcy case.

A. Some Orders in Bankruptcy Cases Are Final and Appealable Long Before the Bankruptcy Proceeding is Completed

"Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordi-

nary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[7] In ordinary civil cases, a final, appealable judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Orders in bankruptcy, however, are considered final for purposes of appeal where "they finally dispose of *discrete disputes within the larger case*," even though there may be more left for the bankruptcy court to do. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.). This broader concept of finality in bankruptcy proceedings is supported by the language of 28 U.S.C. § 158(d)(1), which governs bankruptcy appeals, as well as by this Court's holdings and the actual practice of the lower courts.

1. Sections 1291 and 158(d)(1) of Title 28 each independently authorize appeal of bankruptcy cases. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 1291 provides general authority for appeals of "final decisions of district courts" in bank-

---

[7] The courts of appeals have uniformly accepted that "[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation." *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989); *see, e.g.*, *Ritchie Special Credit Investments, Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *Lewis*, 992 F.2d at 772; *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990).

ruptcy and other cases. Section 158(d)(1), however, authorizes appeal in broader terms, providing for appeal from "final decisions, judgments, orders, and decrees" of district courts and of bankruptcy appellate panels. Congress's use of a broader phrase in the provision expressly addressed to bankruptcy appeals—which contains several, sometimes overlapping components ("final decisions, *judgments, orders, and decrees*")—demonstrates a broader notion of finality in bankruptcy and a broader array of judicial actions subject to appellate review.

Moreover, the term "order" in Section 158(d)(1) specifically encompasses a broader array of judicial acts than the term "decision" found in both statutes. A "decision" is "[a] judicial determination after consideration of the facts and law." Black's Law Dictionary 414 (7th ed. 1999). An "order," however, is defined more broadly as "the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." *Id*. at 1123 (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)). Congress's extension of appeal rights to final "orders," in addition to "decisions," in bankruptcy cases reflects its determination that appellate review should be available on a broader basis in bankruptcy proceedings than in other civil proceedings.

2. This Court's decisions confirm that the nature of bankruptcy proceedings warrants greater availability of appellate review than in other civil cases. Long before the modern Bankruptcy Code, this

Court in *Forgay* v. *Conrad*, 47 U.S. 201 (1848), allowed an appeal from an order requiring the transferee of certain fraudulently transferred assets to deliver them to the bankruptcy trustee. Further proceedings to assess the accounts and rents on the transferred assets still remained, and therefore even the narrow dispute between the trustee and the transferee that was part of the bankruptcy case had not been finally resolved. *Id.* at 203. But the Court held that appeal was nonetheless proper. *Id.* at 204.

Under the current Bankruptcy Code, this Court in *Howard Delivery Service, Inc.* v. *Zurich American Insurance Co.*, 547 U.S. 651 (2006), held that denial of priority status to a claim holder in bankruptcy was a final decision subject to appeal. While that ruling was just a step in the bankruptcy proceeding, the Court noted that it "effectively concluded the dispute between [the debtor] and [the particular creditor]" as a practical matter. *Id.* at 657 n.3. The Court in *Howard Delivery* relied on then-Judge Breyer's opinion for the First Circuit in *Saco*, which explained that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*).

3. The very nature of bankruptcy cases supports a broader rule of appealability than in other civil cases. Ordinary civil litigation usually ends with a single, final judgment that is relatively easy to identify and that terminates the proceedings on the mer-

its. *Cf.* Fed. R. Civ. P. 58(a) (requiring that "[e]very judgment must be set out in a separate document"). By contrast, the "merits" of a bankruptcy case are not finally decided until the court conclusively determines what property belongs to the estate, how that property will be distributed among the debtor and various claimants and interest holders, and whether the debtor is, in the end, entitled to a discharge. In a successful Chapter 13 case, the court does not grant such a discharge until the debtor has made all required payments, usually for a period of three or five years. 11 U.S.C. § 1328(a); *see United Student Aid Funds*, 559 U.S. at 264. By that time, the debtor's payments have been distributed to creditors in a process that would be difficult to undo, and numerous other disputes have been resolved. It would be absurd to contend that all appeals in Chapter 13 cases must wait until the end of that three- or five-year period, and no court has so held.

B. Orders Denying Plan Confirmation Are Appealable

Orders finally denying confirmation of a given plan, like orders that finally grant plan confirmation, are appealable. They finally resolve a discrete dispute that frequently is decisive for the balance of the bankruptcy case. The debtor should not be required to engage in cumbersome and doubtful procedural maneuvers to obtain appellate review of a plan denial. Such a requirement, imposed by the Tenth Circuit and the courts that have agreed with it, places an unjustifiable hurdle in the paths of debtors and may effectively preclude their ability to obtain *any* review of meritorious claims.

1. As a practical matter, precluding appeals of denials of plan confirmation would likely foreclose review of some legal errors altogether. Under the Tenth Circuit's rule, a debtor would have only two ways to obtain appellate review of the denial of plan confirmation. The debtor could move for confirmation of an amended plan that does not include the supposedly offending provision (if such a plan is available) and then appeal the bankruptcy court's grant of the debtor's own motion to confirm. Alternatively, the debtor could dismiss the case and appeal the dismissal. As the Fifth Circuit recognized in *Bartee*, both choices are "fraught with unintended inefficienc[y] . . . and other appellate pitfalls." 212 F.3d at 282 n.6.

Requiring the debtor to undertake the unusual procedure of moving for confirmation of an alternative plan (if one is available), and then seeking to appeal the court's grant of the debtor's own motion, poses particular obstacles. Functionally, it may take months for a new, less attractive plan to be confirmed and then appealed; even if successful, the appeal could vindicate the debtor's legal position only "long after the [denied] plan c[ould] be revived." *Maiorino*, 691 F.2d at 95 (Lumbard, J., dissenting).[8]

---

[8] In the Chapter 11 context, there is a risk that the appeal-your-own-plan stratagem would be completely unavailable under the doctrine of "equitable mootness." As the Fifth Circuit has explained, equitable mootness is based on "a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994). Accordingly, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation

Moreover, the extra costs of filing a new plan and appealing confirmation of that plan would preclude many debtors from bringing meritorious challenges to faulty decisions; after all, debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. Finally, allowing the debtor to appeal a plan adopted on the debtor's own motion is in some tension with the underlying principle that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 333 (1980) (citations omitted); *see Mort Ranta*, 721 F.3d at 248 n.10.

Similarly, voluntary dismissal, which would be necessary if no other confirmable plan were available or acceptable to the debtor, could cause the debtor to lose the benefit of the automatic stay, which prohibits creditors from acting to collect debts owed from the property held by the debtor or the estate. *See* 11 U.S.C. § 362(c)(2)(B).[9] Loss of that protection

---

of the plan such that the effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *Id.* Under any of the various standards by which courts of appeals have applied equitable mootness, the execution of a confirmed plan could operate to preclude appeal by a debtor seeking to change or revoke a plan on the ground that an earlier plan should have been confirmed.

[9] Denial of a debtor's reorganization plan could destroy prospects for acceptance of a plan entirely. For example, confirmation of a Chapter 11 reorganization plan requires, among other things, either that all classes of creditors whose rights are affected—"impaired"—by the plan vote in favor of its confirmation, *see* 11 U.S.C. § 1129(a)(7), or that at least one class of impaired creditors vote in favor of the plan, provided that the plan

could in turn change the debtor's financial circumstances substantially, favor certain creditors over others, and undermine the very purpose of filing for bankruptcy. *See* 1 Collier on Bankruptcy ¶ 1.05[1], p. 1-19 (16th ed. 2013). The dismissal could also jeopardize the debtor's ability to file a subsequent petition. *See* 11 U.S.C. § 109(g)(2) (providing that no person may be a debtor within 180 days of a voluntary dismissal following a creditor's request for relief from the automatic stay).

2. This Court held in *United Student Aid Funds*, 559 U.S. at 269, and the Tenth Circuit here recognized, *see* App., *infra*, 4a, that *grants* of plan confirmation are appealable as of right. There is no basis to treat *denials* of plan confirmation any differently.

a. The court of appeals believed that a denial of plan confirmation is not final because "the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation." App., *infra*, 6a. In the court's view, because the denial of confirmation therefore does not "end[] the litigation on the merits, leaving nothing for the court to do but execute the

---

"does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Thus, if the court erroneously rejects the only plan sufficiently agreeable to the classes of creditors required to vote for plan confirmation, the debtor could be left without any realistic alternative to dismissal or conversion. *Cf. In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 133 (8th Cir. 1993) (dismissing Chapter 11 debtor's case where it was "apparent that there [was] no plan Debtor could propose which the only impaired creditor . . . would approve").

judgment" and "contemplates significant further proceedings in the bankruptcy court," it is not final. *Id*. (quoting *Simons*, 908 F.2d at 644-45). That logic, however, applies equally to grants of plan confirmation, and would overturn the settled rule permitting appeals of such grants.

"[T]he confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). For example, in a Chapter 13 case, unsecured creditors must file claims in order to receive a portion of the debtor's periodic payments under the plan. But while the court has 45 days after the first meeting of creditors to hold a plan confirmation hearing, *see* 11 U.S.C. § 1324(b), creditors have 90 days after the first meeting to file their claims, *see* Fed. R. Bankr. P. 3002(c). Accordingly, "in the typical Chapter 13 case, . . . the plan is confirmed well *prior to* any deadline for filing proofs of claim." App., *infra*, 41a.

Such claims, filed after plan confirmation, are plainly themselves filings on the "merits" of the bankruptcy case, since such claims may affect the debtor's payments, the discharge, and the distribution of the debtor's assets.[10] Moreover, if a creditor's

---

[10] When a new claim is allowed, either the amount each creditor will receive will decrease (if the already-confirmed plan provides for pro rata payments to unsecured creditors), or the amount the debtor must pay will increase (if the already-

claim is contested, the court "after notice and a hearing" must generally "determine the amount of such claim." 11 U.S.C. § 502(b). Such a hearing is also obviously a hearing on the "merits" of the Chapter 13 case.

The conclusion is inescapable that, under the court of appeals' test, a grant of plan confirmation is not final; it does not "end[] the litigation on the merits, leaving nothing for the court to do but execute the judgment" and it does "contemplate[] significant further proceedings in the bankruptcy court." App., *infra*, 6a. Accordingly, under the reasoning adopted by the court of appeals, grants of plan confirmation, just like denials of plan confirmation, would not be appealable—contrary to the holdings of this Court and the uniform view of the lower federal courts.

b. Even aside from the claims process, plan confirmation contemplates a great deal of further litigation on the merits of the bankruptcy case. For instance, under 11 U.S.C. § 1329(a), debtors, creditors, or the trustee in a Chapter 13 case may seek to modify a confirmed plan. Additionally, in Chapter 13 cases, a debtor receives no discharge of debts until all plan payments have been made, which will ordi-

---

confirmed plan provides for payment in full or by a fixed percentage of the amount owed to each creditor). *See*, *e.g.*, *In re Roberts,* 279 F.3d 91, 92-93 (1st Cir. 2002) (payment of tax claims in full and percentage of unsecured claims). Indeed, in the latter situation, an increase in the amount owed by the debtor, who is already paying "all of [her] projected disposable income" to the trustee under the plan, *see* 11 U.S.C. § 1325(b)(1)(B), could cause the debtor to default and result in conversion to Chapter 7 or dismissal for cause. 11 U.S.C. § 1307(c)(6).

narily occur three to five years after plan confirmation. *See* p. 23, *supra.* Even after plan confirmation, if the debtor fails to make payments, a court may dismiss or convert a case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1274-75 (2d ed. 2009); 11 U.S.C. § 1307(c)(6). All of those proceedings are on the merits of the bankruptcy case, and all are expected to occur in the usual course after plan confirmation. The fact that further proceedings on the merits will occur after a plan is confirmed does not preclude appeal of an order confirming a plan, and it therefore should not preclude appeal of an order denying plan confirmation either.

c. Treating denials of plan confirmation as nonfinal also has significant and unfortunate consequences for the development of bankruptcy law. In Chapter 13 cases, only debtors may propose plans. *See* 11 U.S.C. § 1321.[11] A rule that debtors are precluded from appealing *denials* of plan confirmation, while *grants* of plan confirmation are appealable as of right, *see United Student Aid Funds*, 559 U.S. at 269, creates an unfair asymmetry. In addition, such disparate treatment may lead in the long run to the development of bankruptcy precedents only through creditors' appeals, which may predictably result in a creditor-favorable bias in bankruptcy law.

---

[11] While the Bankruptcy Code provides that in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, *see* 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

4. Finally, the existence of a mechanism for certified interlocutory appeals in 28 U.S.C. § 158(d)(2) (or in the narrower 28 U.S.C. § 1292) does not affect the availability of an appeal as of right from the denial of plan confirmation. Under Section 158(d)(2), the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2). If the court of appeals then provides authorization, appeal is permitted.

Although the certified-appeal mechanism of Section 158(d)(2) provides a useful safety valve to permit appeals in appropriate cases, it is highly restricted as compared to appeals as a matter of right. Indeed, this Court has recognized that certified interlocutory appeals were generally designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978)). Section 158(d)(2) provides no help in cases that do not qualify under its various provisions, nor does it substitute for appeal of right in cases in which the debtor is simply unable to convince his adversaries or the courts involved that the case satisfies Section 158(d)(2)'s standards.

III. THE ISSUE IS IMPORTANT AND SQUARELY PRESENTED

The question whether a debtor can appeal the denial of a proposed bankruptcy plan is vitally important to debtors and creditors. That issue was the sole basis for the Tenth Circuit's decision in this case, and it is ripe for this Court's review. A rule barring appeals of plan denials thwarts the Bankruptcy Code's interest in promptly granting a fresh start to debtors and prevents clarifying intervention by the courts of appeals.

1. For at least a century, this Court has noted the role of the bankruptcy system in getting people back on their feet promptly and fairly. *See Williams* v. *U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). More recently, this Court has emphasized the need to "facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 793-94 (2010).

The rule embraced by the Tenth Circuit will impede resolution of bankruptcy proceedings by barring immediate appeal when a plan is rejected. That rule forces cash-poor debtors to pursue a complicated, lengthy, and expensive litigation strategy if they want to obtain review of the legal rulings leading to the denial. *See* pp. 24-26, *supra*.

2. Barring appeals at the time a bankruptcy plan is rejected can lead to ongoing uncertainty in the law. This case is a prime example. Referring to the validity of the object-or-forfeit rule, the bankruptcy court in this case observed that "this [i]s a very important issue for very, very many plans," and added

that "hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area." Resp. C.A. Mem. Br. 7-8 (quoting bankruptcy court). In fact, both Bank of America (a creditor) and the Trustee agreed with petitioners and argued that the court of appeals had jurisdiction to review the issue. Despite the bankruptcy court's observation that "[c]ourts are split" on the object-or-forfeit rule around the country, App., *infra*, 48a, and the fact that a different division of the same court reached the opposite conclusion, *In re Butcher*, 459 B.R. 115, 129 (Bankr. D. Colo. 2011), the Tenth Circuit held that it was unable to resolve the purely legal question presented to it.

Indeed, many of the cases in the courts of appeals cited above similarly involved pure issues of law on which authority is split. In circuits permitting appeal of denials of plan confirmation, the appellate courts were able to resolve the issue, to the benefit of the parties to the case and other future cases. For example, on review of denial of plan confirmation in *Mort Ranta*, the Fourth Circuit reversed a bankruptcy court decision on whether social security payments could be included in income. It thereby set the case on a proper footing on an issue of law that has arisen elsewhere, with conflicting results.[12]

---

[12] *See*, *e.g.*, *In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable."); *In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan.").

Mort Ranta, 721 F.3d at 253-54. Similarly, the Fifth Circuit in *Bartee* noted the "magnitude and evenness of the split in authority, . . . extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it, but was able to resolve the issue on appeal of the denial of plan confirmation. 212 F.3d at 289. Those decisions each facilitated sound resolution of the case, while providing guidance on the issue for the district and bankruptcy courts in the circuit.

On the other hand, *Flor* involved "a disputed issue that [wa]s a question of first impression" and that was left unresolved by the Second Circuit's refusal to review the denial of plan confirmation. 79 F.3d at 284. The Sixth Circuit in *Lindsey* rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule, 726 F.3d at 858—an issue on which courts had expressed opposing views that had been canvassed by the bankruptcy court. *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011). The First Circuit in *Bullard* noted that the underlying question on which appeal was sought was "an important and unsettled question of bankruptcy law." 2014 WL 1910868 at *1; *see id.* at *2 n.1 ("a difficult, unsettled question"). This Court's review is essential to enable the courts of appeals to resolve important issues of bankruptcy law, to the benefit of debtors, creditors, and the judicial system itself.

3. Uniformity in this area is particularly important in light of the Constitution's grant to Congress of authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis add-

ed). At present, debtors in the Third, Fourth, and Fifth Circuits may appeal an order denying confirmation, while their peers in the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits may not. The law in the remaining circuits leaves both debtors and creditors uncertain. Review of this important question of federal law is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN E. BERKEN
LAW OFFICE OF
STEPHEN E. BERKEN
1159 DELAWARE STREET
DENVER, CO 80204
(303) 623-4357

JAMES A. FELDMAN
Counsel of Record
STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
AMY WAX
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
JFELDMAN@LAW.UPENN.EDU