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

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly held that an order denying confirmation of a bankruptcy plan can never be a final, appealable order.

CORPORATE DISCLOSURE STATEMENT

Respondent Bank of America, N.A. is a wholly-owned subsidiary of Bank of America Corporation, a publicly traded corporation (ticker symbol: BAC). Bank of America Corporation has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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Respondent Bank of America, N.A. urges the Court to grant the petition for a writ of certiorari and reverse the judgment of the court of appeals. As petitioners explain, this case presents a square, deep, and acknowledged circuit split on an important and recurring question: whether, and under what circumstances, an order denying confirmation of a bankruptcy plan is a final, appealable order.

The Tenth Circuit below held that such an order is *never* appealable as of right, reasoning that a debtor may always propose a different plan and that an order denying confirmation of a plan thus cannot be a "final," appealable order. Five other courts of appeals have

agreed. Three courts of appeals, however, have held that an order like that here, which rules that a proposed plan may not be confirmed as matter of law, is final and appealable. The division of authority is longstanding and entrenched.

The question presented is critical to the administration of both business and consumer bankruptcies, and to both debtors and creditors. The plan confirmation process is central to bankruptcy cases under both chapters 11 and 13 of the Bankruptcy Code. The rights and obligations of the parties to a bankruptcy case under those chapters turn on the provisions of the confirmed plan, and the legal rulings governing what the plan may or may not provide are thus of the utmost importance to all parties in interest—as is the ability to obtain effective appellate review of those rulings.

Moreover, the Tenth Circuit's decision is wrong. That court, and the other courts of appeals that have reached the same conclusion, have misapprehended the nature of finality analysis in bankruptcy. Unlike ordinary civil litigation, which typically terminates in a single final order resolving the claims of all parties, bankruptcy cases are far more complex. They involve not a single dispute that can be resolved with a single final order, but multiple disputes over the treatment of a wide variety of different parties with different relationships to the debtor and the estate. In the terminology of the statute governing bankruptcy jurisdiction, bankruptcy cases are made up of multiple distinct "proceedings," and district courts can hear appeals from bankruptcy court orders finally resolving such "proceedings." 28 U.S.C. § 158(a). That is, as this Court has recognized, "'orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*.'" *Howard Delivery Serv.*,

Inc. v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006).

The district court's order in this case finally resolved such a distinct proceeding and discrete dispute: whether debtors' proposed plan, which sought to override the statutory claims-allowance process and bind creditors to the valuation of their claims set out in the plan, could lawfully be confirmed. The district court correctly held that the plan was unlawful and could not be confirmed. The district court's judgment thus finally resolved the contested plan confirmation proceeding and finally adjudicated the parties' dispute over whether the plan would govern the allowed amount of creditors' claims.

In concluding that the district court's judgment was nonetheless not "final," the Tenth Circuit reasoned that, on remand, debtors could propose a different plan. But that does not alter the finality of the judgment respecting debtors' *preferred* plan. Debtors finally and permanently lost that dispute when the district court issued its order.

Indeed, if such an order is not immediately appealable, it is likely to elude review altogether. The Tenth Circuit opined that debtors can obtain review of the denial of their preferred plan by proposing a different plan and appealing from the order confirming that plan. That makes little sense. In ordinary civil litigation, an interlocutory order may merge into a final judgment and can be reviewed on appeal from that judgment. Here, however, there will be no future final judgment into which the denial of confirmation will merge. An order confirming a different plan—that is, an order *granting* the debtors the relief sought—does not logically encompass a prior order finally *denying* the debt-

ors different relief. Nor is that route to appeal remotely practical.

The upshot of the Tenth Circuit's ruling is that there will be no effective avenue for review of orders denying confirmation of a preferred plan. That outcome impedes the administration of bankruptcy cases and hurts debtors and creditors alike. As a major creditor in both business and consumer bankruptcies, Bank of America has a strong interest in the orderly and uniform development of bankruptcy law, which will be thwarted by the inability to obtain appellate review of a critical legal ruling embodied in an order denying plan confirmation.

This case is a perfect example. The question whether a chapter 13 plan may bind creditors to claim amounts set out in the plan regardless of subsequent claims-allowance proceedings is of great importance to Bank of America and other chapter 13 creditors. And it is an issue that has divided bankruptcy courts. Indeed, the bankruptcy court in this case commented that the question was very important and that lower courts needed guidance from the Tenth Circuit. Although Bank of America prevailed in the district court, that decision is not precedential. Only the Tenth Circuit can definitively resolve this issue for courts within that circuit, and Bank of America thus has a significant interest in having the Tenth Circuit decide the question. The court's refusal to do so, on the basis of a mistaken understanding of finality in bankruptcy that repudiates the rulings of three other courts of appeals, warrants this Court's review.

STATEMENT

1. *Bankruptcy cases, proceedings, and appeals.* The question of finality in bankruptcy has generated confusion among the lower courts because bankruptcy cases are not structured in the same way as traditional civil litigation. Rather than being disputes over whether a particular plaintiff should receive the relief it seeks against a particular defendant, bankruptcy cases are a complex conglomeration of proceedings in which diverse constituencies assert multiple and various claims for relief against the bankruptcy estate, against one another, and against third parties.

The statute governing bankruptcy jurisdiction reflects this reality. It provides that district courts have jurisdiction (which may be referred to bankruptcy courts) not only over "all *cases* under title 11 [the Bankruptcy Code]" but also over "all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b) (emphases added); *see also id.* § 157(a) (permitting referral). There are a wide variety of such proceedings, ranging from a dispute over whether a creditor's claim against the estate should be allowed to the estate's breach-of-contract or fraudulent-transfer claim against a third party to—as here—a dispute over whether a plan should be confirmed. *Id.* § 157(b)(2) (listing exemplary bankruptcy "proceedings"). In short, a bankruptcy "case" is nothing more than an umbrella that shelters a multitude of different "proceedings," or—as the leading case on bankruptcy finality put it—"*discrete disputes*."

In re Saco Local Dev. Corp., 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.).[1]

Accordingly, a final and appealable order in a bankruptcy case is one that finally resolves any bankruptcy "proceeding." Indeed, the statute governing appellate jurisdiction expressly so provides. The statute confers jurisdiction on district courts to hear "appeals … from final judgments, orders, and decrees … of bankruptcy judges entered in cases *and proceedings* referred to the bankruptcy judges." 28 U.S.C. § 158(a) (emphasis added). In turn, the courts of appeals "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under" § 158(a). *Id.* § 158(d)(1). Because "a 'proceeding' within a bankruptcy case [is] the relevant 'judicial unit' for purposes of finality," *Saco Local*, 711 F.2d at 445, "orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*," *id.* at 444; *accord Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006).[2]

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[1] Such discrete disputes can be either "adversary proceedings," which are initiated by a complaint and are essentially separate lawsuits within the bankruptcy case, *see* Fed. R. Bankr. P. 7001, 7003, or "contested matters," which are initiated by a motion, *see id.* R. 9014. A fraudulent-transfer suit, for instance, must be brought in an adversary proceeding, *see id.* R. 7001(1), while claims-allowance and plan-confirmation proceedings are contested matters.

[2] For finality purposes, the analysis of a bankruptcy court's denial of plan confirmation and a district court order reversing a bankruptcy court's grant of plan confirmation—at issue in this case—is essentially the same. *See Howard Delivery*, 547 U.S. at 657 n.3 (applying *Saco Local* analysis to hold that a district court decision affirming the bankruptcy court's denial of priority status to a particular claim was final within the meaning of § 158(d)).

2. *The chapter 13 plan and claims-allowance process.* Chapter 13 of the Bankruptcy Code permits individual debtors with a regular income to propose a plan for repaying their secured and unsecured debts over a three- or five-year period and to obtain a discharge of certain debts upon completion of the plan. The bankruptcy court may confirm the plan after holding a hearing and determining—among other things—that the plan complies with all applicable provisions of the Bankruptcy Code. 11 U.S.C. §§ 1324, 1325(a)(1).[3]

Although mortgage debt on a principal residence is not discharged in a chapter 13 bankruptcy, 11 U.S.C. § 1322(b)(2), many chapter 13 debtors use their plans to cure pre-bankruptcy defaults under their mortgage loans, repaying the arrearages over the period of the plan, *id.* § 1322(b)(5).

Creditors assert claims against a debtor by filing a proof of claim, 11 U.S.C. § 501(a), which is deemed allowed unless a party in interest objects, *id.* § 502(a). In chapter 13 cases in which the creditor's claim is secured by the debtor's principal residence, the proof of claim will typically set out the amount necessary to cure any prepetition default. Proofs of claim must be filed within 90 days of the meeting of creditors required by § 341(a) of the Bankruptcy Code (which occurs at the outset of the bankruptcy case). Fed. R. Bankr. P. 3002(c); *see also id.* R. 9006(c)(2) (forbidding bankruptcy court from reducing the 90-day period).

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[3] Chapter 11 cases, typically business reorganizations, also center on the formulation and confirmation of a plan. 11 U.S.C. §§ 1121-1129. Although in chapter 13 cases only debtors may propose a plan, *id.* § 1321, in a chapter 11 case, under certain circumstances, any party in interest may file a plan, *id.* § 1121(c).

The underlying merits issue in this case arises because, in chapter 13 cases, a hearing on plan confirmation must be held no later than 45 days after the first meeting of creditors. 11 U.S.C. § 1324(b). As a result, it is common in chapter 13 cases for plans to be confirmed well before the deadline for filing proofs of claim.

In the usual course, therefore, a chapter 13 plan must estimate any arrearages on long-term debt before proofs of claim are filed or allowed. To address this problem, most jurisdictions have enacted local rules or model chapter 13 plan provisions designed to ensure that the amount of arrearages stated in an allowed proof of claim controls over any contrary amount in a chapter 13 plan. *See In re Butcher*, 459 B.R. 115, 136-139 (Bankr. D. Colo. 2011) (surveying practice in U.S. jurisdictions). In the District of Colorado, where this case arose, the model chapter 13 plan includes a provision, mandated by local rule, requiring debtors to "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." Bankr. D. Colo. Local Form 3015-1.1 pt. VIII; *see also* Bankr. D. Colo. Local Rule 3015-1(a)(1) ("Colorado Rule").

3. *The debtors' plan.* The debtors in this case, Edward Leon Gordon and Doris Jean Gordon, have a first mortgage loan on their principal residence serviced by Bank of America. The Gordons filed a chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of Colorado.

In their proposed plan, the debtors did not include the required provision for modifying the plan to accommodate claims liquidated after plan confirmation.

Pet. App. 45a-46a. Instead, the plan included two "non-standard" provisions. Those provisions "essentially warn[ed] secured creditors that, if they do not object to the plan's proposed treatment of their liens and/or the amount of arrearages stated, then the plan will have a *res judicata* effect as to both their lien and claim amount." *Id.* 36a. The plan stated that debtors had no arrearages on their mortgage with Bank of America.

By pronouncing that arrearage estimates in the plan are binding notwithstanding a later-allowed proof of claim in a different amount, the debtors' plan sought to preempt the statutory claims-allowance process and to shift the burden imposed by the Bankruptcy Code: Rather than debtors having the burden to object to a proof of claim, under debtors' plan, a creditor would have the burden of objecting to the estimated amount of its claim and would have to do so well before the statutory deadline for filing its proof of claim.

4. *The bankruptcy court decision.* Over the objections of Bank of America and the chapter 13 trustee, the bankruptcy court held that the non-standard provisions were lawful and confirmed the debtors' plan. The court reasoned that because a plan has "*res judicata* effect," it may permissibly bind creditors to its estimate of their claims and thus sidestep the statutory claims-allowance process. Pet. App. 64a-65a. The court also held that the Colorado Rule was invalid because it constituted a *sua sponte* plan modification by a bankruptcy court, which in the court's view was not permitted under the Bankruptcy Code. *Id.* 47a-48a. While the bankruptcy court ruled in the debtors' favor, the court recognized that the issue was both important and unresolved within the circuit, commenting at the hearing that "this [i]s a very important issue for very, very many plans," and expressing the hope that "whoever

loses will take this one up all the way to the Circuit because we really need some guidance in this area that has become so tortured and so unclear." Tr. 2, Dkt. 50 *In re Pahs*, No. 10-15557, (Bankr. D. Colo. Nov. 4, 2010) (hearing in case consolidated with *Gordon* that was later dismissed).

5. *The district court decision.* Bank of America appealed to the district court, which held that the non-standard language in the debtors' proposed plan "conflict[ed] with the claims processing procedures and other requirements of the [Bankruptcy] Code and the Rules" and that the Colorado Rule was valid. Pet. App. 33a-34a. Accordingly, the district court "reverse[d] the order[] of the bankruptcy court approving the non-standard language and confirming the plan[] of the debtors containing that non-standard language" and remanded the case to the bankruptcy court. *Id.* 34a, 35a.

6. *The Tenth Circuit decision.* Debtors appealed to the Tenth Circuit, which requested briefing on its jurisdiction to entertain the appeal. As explained above, although Bank of America prevailed in the district court, it has a strong interest in having this issue resolved at the court of appeals level. The Bank filed a jurisdictional brief acknowledging that the court had previously held that an order denying confirmation of a debtor's proposed bankruptcy plan is not final and appealable. *See In re Simons*, 908 F.2d 643, 645 (10th Cir. 1990) (per curiam). Bank of America nonetheless urged the court to overrule that precedent,[4] noting the contrary decisions of the Third and Fifth Circuits, and ex-

[4] Under Tenth Circuit practice, a panel of the court may overrule a prior precedent if all active judges agree. *See, e.g.*, *United States* v. *Duncan*, 242 F.3d 940, 947 n.10 (10th Cir. 2001).

plaining that the district court's decision finally resolved the discrete dispute regarding confirmation of the debtors' proposed non-standard plan. Debtors filed a joinder in Bank of America's brief.

The Tenth Circuit dismissed the appeal, holding that it had "no jurisdiction to consider this appeal because it is not taken from a final appealable decision." Pet. App. 3a. In doing so, the court relied on its prior decision in *Simons*. *Id.* 5a-7a. In *Simons*, the bankruptcy court had denied confirmation of the debtors' chapter 13 plan, and the district court affirmed. Without considering whether the denial of confirmation finally resolved a discrete dispute within the bankruptcy case, the *Simons* court held that the district court's judgment was not final, reasoning that "so long as the bankruptcy proceeding itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation, a prospect which negates any determination of finality." 908 F.2d at 645 (citation omitted). And it opined that "the rejection of debtors' proposed plan may yet be considered on appeal from a final judgment either confirming an alternative plan or dismissing the underlying petition or proceeding." *Id.* (citations omitted).

The *Gordon* court acknowledged that "*Simons* is contrary to the law of some other circuits." Pet. App. 7a. n.2 It commented that "the circuits currently remain divided on this issue," with the Second, Sixth, Eighth, and Ninth Circuits applying a "rigid[]" finality standard and the Third, Fourth, and Fifth Circuits a standard that permitted appeals from denial of confirmation. *Id.* But the court declined to revisit *Simons*, explaining that "[i]t seems to us that *Simons* is based upon sound principles of finality and we see no reason

to ask the en banc court to re-examine *Simons* at this time." *Id.* 8a.

REASONS FOR GRANTING THE WRIT

This case presents an important question affecting the administration of both business and consumer bankruptcies: whether an order denying confirmation of a bankruptcy plan can ever be final and appealable under 28 U.S.C. § 158. There is a square circuit split on the issue—the Third, Fourth, and Fifth Circuits have held that such orders may be final, while the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits have held to the contrary. Only this Court can resolve this deep and entrenched division of authority.

Moreover, the rule adopted by the Tenth Circuit below, and by the other circuits that have reached the same conclusion, is unsound. It fails to account for the distinctive characteristics of bankruptcy cases and the broader scope of appellate jurisdiction in bankruptcy, which extends to final orders entered in any bankruptcy "proceeding[.]" 28 U.S.C. § 158(a). It will also effectively prevent many plan proponents from obtaining review of rulings that bar them from confirming their preferred plans. And it will impede the development of a uniform bankruptcy law, necessary to the operations of creditors, like Bank of America, who do business in every jurisdiction. Indeed, in this very case, the Tenth Circuit's overly restrictive view of bankruptcy appellate jurisdiction prevented it from reaching and resolving an important substantive issue of chapter 13 law on which lower courts are divided. This Court should grant review.

I. THIS CASE PRESENTS A SQUARE, DEEP, AND ENTRENCHED CIRCUIT SPLIT RIPE FOR RESOLUTION BY THIS COURT

As petitioners have explained (Pet. 10-18), the courts of appeals are sharply divided on the question presented here.

A. The Third, Fourth, And Fifth Circuits

The Third, Fourth, and Fifth Circuits have held that the denial of confirmation can be a final, appealable order. In doing so, those courts have recognized that discrete proceedings—not the bankruptcy case as a whole—are the relevant units for determining finality in bankruptcy appeals. And they have explained that if denials of confirmation are not appealable, the parties will frequently have no effective avenue for obtaining appellate review of key legal rulings determining their rights.

In *In re Bartee*, for example, the Fifth Circuit held that a bankruptcy court order denying confirmation of a plan that proposed to strip a secured creditor's lien and a district court order affirming the denial were final and appealable. 212 F.3d 277, 281-284 (5th Cir. 2000). The court explained that the denial of confirmation was "a final disposition 'of a discrete dispute within the larger bankruptcy case'" because it was "a final denial of the relief sought by the debtor"—*i.e.*, confirmation of the lien-stripping plan. *Id.* at 282, 283. Moreover, the court noted that its conclusion was "all but compelled by considerations of practicality," since "[i]f an appeal is impermissible, Debtor must 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.* at 283. The Fifth Circuit recognized that other circuits had held that an or-

der denying confirmation of a plan was not final, but rejected that rule, observing that it was "undesirable" because it could well prevent debtors from ever obtaining review of such orders. *Id.* at 282 & n.6.

In a similar decision, the Third Circuit ruled that a district court's order reversing the confirmation of a chapter 11 plan, on the ground that the plan violated the absolute-priority rule, was final and appealable. *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 510-511 (3d Cir. 2005). The court noted that the district court's ruling presented "a discrete question of law that would have a preclusive effect on certain provisions of the Plan" and that would "likely affect the distribution of assets" to creditors. *Id.* at 511. It also observed that deferring an appeal would waste time and resources and that "practical considerations in the interests of judicial economy require that we hear this appeal now." *Id.*

Most recently, the Fourth Circuit held that an order denying confirmation of a chapter 13 plan was final and appealable. *Mort Ranta* v. *Gorman*, 721 F.3d 241 (4th Cir. 2013). The Fourth Circuit acknowledged the circuit split. *Id.* at 246. It explained that "[t]he argument against treating a denial of confirmation [as] final for purposes of appeal rests primarily on the fact that the debtor may propose an amended plan before the case is dismissed." *Id.* at 247. (Indeed, that was the Tenth Circuit's reasoning in this case. *See* Pet. App. 5a.) Finding that argument unpersuasive, the court noted that it "appears to be grounded upon standard finality principles, … rather than the more flexible approach to finality traditionally applied in bankruptcy proceedings," in which an order is final if it finally resolves a discrete dispute. *Mort Ranta*, 721 F.3d at 247; *see id.* at 246.

Like the Fifth Circuit, the court also explained that "a contrary rule could leave some debtors 'without any real options.'" *Id.* at 248. Either the debtor would have to dismiss his own bankruptcy, which would terminate the automatic stay and leave the debtor vulnerable to foreclosure and collection actions, or he would have to "propose an unwanted plan" and "waste 'valuable time and scarce resources.'" *Id.* Because "confirmation of [the debtor's] proposed plan was finally denied," such a tortuous path to appeal would make no sense. *Id.* at 250.

B. The First, Second, Sixth, Eighth, Ninth, And Tenth Circuits

By contrast, the First, Second, Sixth, Eighth, and Ninth Circuits have held—as did the Tenth Circuit in this case—that an order denying plan confirmation can never be final. Each court employed a very similar analysis, concluding that the debtor's ability to submit a new plan rendered such an order non-appealable.

The Second Circuit was the first to reach that conclusion. In *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel held non-final a bankruptcy court's order denying confirmation of a chapter 13 plan that attempted to reinstate a foreclosed mortgage. The court reasoned that "[s]o long as the petition is not dismissed, it is open to the debtor to propose another plan, and for all that an appellate court would know in any given case such a plan might well be acceptable to the parties or bankruptcy judge concerned." *Id.* at 91.[5]

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[5] *Maiorino* involved a now-repealed provision that permitted parties, by agreement, to take appeals from bankruptcy court orders directly to the court of appeals, 691 F.2d at 89, and the major-

In dissent, Judge Lumbard noted that "[u]nlike an ordinary suit, which terminates in a final judgment, a bankruptcy case usually involves many decisions by the bankruptcy judge which are undeniably final and appealable… [A] single bankruptcy 'case' involves many 'proceedings,' *each* of which terminates in a 'final decision.'" *Id.* at 94 (Lumbard, J., dissenting) (citing House and Senate Reports on 1978 Act). Here, the bankruptcy court's order was "a *final* rejection of a plan" and should be appealable. *Id.* And he warned that the court's ruling "may have serious substantive consequences," since it could delay review of a bankruptcy court ruling on a plan until "long after the plan can be revived." *Id.* at 95.

The Tenth Circuit followed *Maiorino* in its brief decision in *In re Simons*. 908 F.2d 643, 645 (10th Cir. 1990) (per curiam). Reasoning that "an order is not final unless it ends the litigation on the merits, leaving nothing for the court to do but execute the judgment," the court agreed with *Maiorino* that "so long as the bankruptcy proceeding itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation, a prospect which negates any determination of finality." *Id.* at 644-645 (citation omitted).

The Eighth Circuit in turn relied on *Maiorino* and *Simons* to hold that an order denying confirmation of a chapter 13 plan and ordering the debtor to submit a revised plan with terms prescribed by the bankruptcy court was not final. *Lewis* v. *United States*, 992 F.2d

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ity also expressed concern that a contrary ruling would result in "the parties['] run[ning] to the court of appeals for higher advice" "at every stage of the bankruptcy proceedings," *id.* at 91.

767, 771-772 (8th Cir. 1993); *see also In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (dismissing appeal of order denying confirmation of chapter 11 plan). The court reasoned that "[i]n this situation where the bankruptcy [court] has neither confirmed a plan nor dismissed the underlying petition, … the debtor has not been precluded from submitting another plan for the court to consider." 992 F.2d at 773. And it commented that "delay should not burden either party from obtaining relief," since after "a final confirmation or dismissal," either party "may then appeal from the final disposition of the bankruptcy proceeding." *Id.*

Similarly, in *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997) (per curiam), the Ninth Circuit held "that a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." The court cited the prior court of appeals decisions but otherwise provided no analysis of the issue. *Id.* at 662-663.

The Sixth Circuit likewise has held that a decision denying confirmation of a chapter 11 plan, on the ground that the proposed treatment of a creditor's claim was unlawful, is not a final order. *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013). The court agreed with the Second, Eighth, Ninth, and Tenth Circuits' reasoning that such an order cannot be final because "[u]nless [the debtor] abandons his petition, he may, indeed must, propose another confirmation plan," which "the bankruptcy court may or may not exercise its discretion to confirm." *Id.* at 859. The court acknowledged that the Third, Fourth, and Fifth Circuits had reached a contrary conclusion, but rejected those courts' analysis. *Id.* at 859-860. It opined that a different, more "'flexible'" approach to finality in bankruptcy was unnecessary because the provisions for interlocutory re-

view with court approval provided ample flexibility. *Id.* at 860.

Finally, the First Circuit recently held that the "order of an intermediate appellate tribunal 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*, 752 F.3d 483, 486 (1st Cir. 2014), *petition for cert. filed*, No. 14-116 (U.S. July 30, 2014). The court acknowledged that "[the debtor's] options may be unappealing at this stage in the game," but like the Sixth Circuit noted that the debtor could have sought a permissive interlocutory appeal. *Id.* at 487-488.

* * *

In sum, the split is deep and persistent. The courts of appeals have consistently acknowledged the division of authority, but have continued to reach sharply different conclusions. *Compare* Pet. App. 7a n.2 (acknowledging split and concluding order is not final); *Bullard*, 752 F.3d at 486 (same); *Lindsey*, 726 F.3d at 859 (same), *with Mort Ranta*, 721 F.3d at 246-248 (acknowledging split and concluding order is final); *Bartee*, 212 F.3d at 282 n.6 (same). Only this Court can resolve the conflict presented here, and this case is an ideal opportunity for it to do so.

II. THE TENTH CIRCUIT'S POSITION IS INCORRECT

The position adopted by the Second Circuit in *Maiorino* and reflexively repeated by five other courts of appeals, including the Tenth Circuit below, is wrong. It is wrong, first, because it disregards the special characteristics of bankruptcy reflected in the statutory provisions governing bankruptcy appeals—which expressly provide that any order finally resolving a bankruptcy

"proceeding" is appealable as of right. And it is wrong, second, because it is thoroughly unworkable: It will effectively preclude appellate review of many bankruptcy court decisions governing debtors' and creditors' rights and obligations.

A. The Tenth Circuit Disregarded The Structure Of Bankruptcy Proceedings And The Text Of The Statute Governing Bankruptcy Appeals

The Tenth Circuit conducted its finality analysis as if this case were an ordinary piece of civil litigation. It relied on a "general principle[] regarding finality": that "an order is not final unless it ends the litigation on the merits, leaving nothing for the court to do but execute the judgment." Pet. App. 6a. And it concluded that "[s]o long as the bankruptcy proceeding [*i.e.*, the bankruptcy case] itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan …, a prospect which negates any determination of finality." *Id.*

But the "general principle[]" on which the court relied simply does not apply in bankruptcy cases, which are not unitary suits resolved by a single final judgment that "ends the litigation." As discussed above, *see* pp. 5-6, bankruptcy cases are instead an amalgamation of multiple distinct "proceedings," or "discrete disputes," each of which may terminate in a final order. *See Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006); *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.). Consequently, it is incorrect to reason, as the Tenth Circuit did, that as long as the bankruptcy case "itself" has not been terminated, an order denying confirmation cannot be final. The bankruptcy case is not the correct "judicial unit" for purposes of finality analysis. Rather,

as *Saco Local* explains, "the relevant 'judicial unit' [is] … the … 'proceeding' *within* the overall bankruptcy case, not the overall case itself." 711 F.2d at 445. And a bankruptcy court (or district court) order that finally resolves such a "proceeding" is a final, appealable order. *See id.* at 444; *Howard Delivery*, 547 U.S. at 657 n.3.

That basic fact about the nature of bankruptcy proceedings is reflected in the statutory provisions governing bankruptcy jurisdiction and appeals. Section 1334 of the Judiciary Code confers jurisdiction on district courts both over bankruptcy "cases," 28 U.S.C. § 1334(a) and, separately, over "civil *proceedings* arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]," *id.* § 1334(b); *see generally Stern* v. *Marshall*, 131 S. Ct. 2594, 2603-2604 (2011) (discussing bankruptcy jurisdiction). And section 157(a) permits district courts to refer both "cases" and "proceedings" to bankruptcy courts. 28 U.S.C. § 157(a).

District courts—and bankruptcy appellate panels in the circuits that have them—"have jurisdiction to hear appeals … from final judgments, orders, and decrees … of bankruptcy judges entered in cases *and proceedings* referred to the bankruptcy judges." *Id.* § 158(a) (emphasis added) (district courts); *see id.* § 158(b) (bankruptcy appellate panels). In turn, courts of appeals "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b)." *Id.* § 158(d)(1). Thus, orders by either bankruptcy or district courts that finally resolve a distinct "proceeding" are final and appealable under the terms of the statute.

Section 157(b)(2) sets out a list of "[c]ore proceedings" that illuminates what constitutes a distinct "proceeding" within a bankruptcy case. The statute provides, for instance, that "[c]ore proceedings include" "allowance or disallowance of claims against the estate," "proceedings to determine, avoid, or recover fraudulent conveyances," and "confirmations of plans." 28 U.S.C. § 157(b)(2)(B), (H), (L). In short, a dispute over confirmation of a plan, along with many other discrete disputes within the larger case, is a distinct "proceeding."

Indeed, "proceeding" is a term of art in bankruptcy that dates back at least to the 1898 Bankruptcy Act. *See Saco Local*, 711 F.2d at 444-445. As *Saco Local* explained, under the Act, "[a] 'proceeding' was not the overall liquidation or reorganization, but rather an individual 'matter[] of an administrative character … presented in the ordinary course of the administration of the bankrupt's estate.'" *Id.* (emphasis omitted) (quoting *Taylor* v. *Voss*, 271 U.S. 176, 181 (1926)). "Proceedings" thus include individual adversary proceedings and contested matters within the bankruptcy case. *See id.* at 445. A dispute over confirmation of a plan is a contested matter, *i.e.*, a request for relief initiated by a motion, *see* Fed. R. Bankr. P. 9014, and fits squarely within the historical meaning of "proceeding."

Against this backdrop, it is readily apparent that an order of a bankruptcy or district court that finally denies confirmation of the debtor's preferred plan—and thus finally denies the debtor the relief sought—resolves a distinct proceeding. While it is true that a debtor may later propose a different plan, a motion seeking confirmation of a different plan is a request for different relief, a separate contested matter, and a separate proceeding. The final denial of the debtor's pre-

ferred plan is a "final" order in a "proceeding" and thus appealable.

B. The Tenth Circuit's Rule Is Unworkable

A rule that the denial of confirmation can never be final also poses insuperable practical difficulties—precisely the difficulties that underlie the choice of a different judicial unit of finality in bankruptcy. Even the courts that have adopted such a rule have at times acknowledged that it leaves the debtor (or, in a chapter 11 case, other plan proponents) with, at best, "unappealing" options for obtaining review of what may be the central legal ruling in the debtor's bankruptcy case. *Bullard*, 752 F.3d at 487. At worst, the rule will prevent review of such critical legal rulings altogether.

As the Fourth and Fifth Circuits have explained, if a debtor cannot appeal the denial of confirmation of his preferred plan, he is forced either to propose a plan he does not want and appeal from the order confirming that plan or else dismiss his own bankruptcy case and appeal from the dismissal. *Mort Ranta*, 721 F.3d at 248; *Bartee*, 212 F.3d at 283. Neither option is workable.

If a debtor (or other plan proponent) chooses the former option, he wastes significant time and resources in pursuit of unwanted relief simply in order to obtain review of an issue that could have been reviewed immediately. Such a cumbersome route to appellate review is impracticable both in consumer bankruptcies, where debtors may lack resources to pursue it, and in business bankruptcies, where time is often of the essence. Even if the debtor eventually obtains review by this tortuous route, it may come too late, since changing circumstances may prevent the debtor from reinstating

his preferred plan. If a debtor chooses the latter option—as he may be forced to do if there is no workable alternative plan to propose—he loses the benefit of the automatic stay, 11 U.S.C. § 362, in addition to wasting time and resources. And both options create the procedural awkwardness of requiring a party to appeal from a judgment awarding the relief it asked for—something that is never required, and rarely even permitted, in ordinary civil litigation.[6]

The Rube Goldberg nature of these "solutions" is itself powerful evidence that the courts that rely on them have misconceived the finality analysis in bank-

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[6] The Second, Eighth, Ninth, and Tenth Circuit decisions holding denial of confirmation non-final failed altogether to engage with these difficulties. *See Lewis*, 992 F.2d at 771 (concluding, without explanation, that "[i]n this situation, delay should not burden either party from obtaining relief"); *Maiorino*, 691 F.2d at 91 (analyzing rule "as a matter of policy" but considering only burden on appellate courts); *Simons*, 902 F.2d 643 (failing to consider the practical implications of denying review); *Lievsay*, 118 F.3d at 662-663 (same). The First and Sixth Circuits at least acknowledged them, but failed to offer a persuasive response. The First Circuit in *Bullard* observed that "[the debtor's] options may be unappealing at this stage in the game" but noting that the debtor could have sought a permissive interlocutory appeal. 752 F.3d at 487-488. Of course, such an appeal, which rests entirely in the courts' discretion, is no substitute for appeal as of right. The Sixth Circuit in *Lindsey* opined that even if the debtor is forced to propose a second plan, "that leaves even odds that the court of appeals will either approve the plan (and end the case then and there) or reject the plan but announce a rule of law that will allow final (and usually prompt) resolution of the case." 726 F.3d at 860-861. But the court provided no basis for its breezy assumption that an appeal from confirmation of an unwanted plan would result in a rule of law that would allow final, let alone prompt, resolution of the bankruptcy. Nor did the court acknowledge that many debtors would be unable to appeal at all if forced to take such a cumbersome route.

ruptcy. Led astray by analogies to ordinary civil litigation, those courts have failed to appreciate the nature of an order denying confirmation of a plan. Interlocutory orders in traditional civil litigation—say, an order denying a motion to dismiss—either merge into a final judgment and can be reviewed on appeal from that judgment or else become moot. Here, however, there is no subsequent order into which a denial of confirmation of the debtor's preferred plan can logically be said to merge. An order granting confirmation of a different plan does not logically encompass an earlier denial of confirmation of the debtor's preferred plan. Nor will confirmation of a different plan, or dismissal of the case on the debtor's motion, moot the denial of confirmation of the earlier plan. The relief the debtor sought has been finally denied, and the only sensible rule is to permit the debtor to seek review of that final denial immediately.

More broadly, barring such appeals will thwart the orderly development of bankruptcy law and the resolution of the many divisions of authority that currently infect the one area of law in which uniformity is constitutionally mandated. *See* U.S. Const. art. 1, § 8, cl. 4. Petitioners' discussion (Pet. 32-33) shows that many of the court of appeals decisions addressing the finality of denial of confirmation involved underlying merits decisions on important, novel, or disputed legal questions. That is certainly true here. The underlying merits question in this case—whether debtors can override the claims-allowance procedure in their plans—is of great importance to all chapter 13 creditors as well as to debtors. There is a division of authority on the question. And the bankruptcy court expressed a need for the Tenth Circuit's guidance—guidance the court was

unable to give because of the jurisdictional rule it adopted.

All of this is not to say, of course, that considerations of practicality or policy can ever overcome the jurisdictional limitations imposed on courts by Congress. While some courts have described the debate over bankruptcy finality as a battle between "'flexible'" and strict approaches, *see, e.g.*, *Lindsey*, 726 F.3d at 860, that fails to capture the issue. It is not that strict finality requirements yield to pragmatic concerns in bankruptcy. Rather, the complex structure of bankruptcy cases demands a different conception of the "judicial unit" within which finality is assessed, and the statute governing appellate jurisdiction in bankruptcy reflects that. The practical difficulties inherent in the Tenth Circuit's approach demonstrate not that the statutory limits ought to be evaded, but that they have been misconstrued. This Court should grant review to correct that misconstruction and to resolve the deep and abiding schism it has generated.

CONCLUSION

The Court should grant the petition for a writ of certiorari and appoint counsel to defend the judgment below.

Respectfully submitted.

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