No. _____

In the Supreme Court of the United States

JAN M. SENSENICH, CHAPTER 13 TRUSTEE,

Applicant,

v.

PHH MORTGAGE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

APPLICATION FOR A 45-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit

Applicant Jan M. Sensenich ("Sensenich" or "Trustee") respectfully seeks a 45-day extension from January 31, 2022, to and including March 17, 2022, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit in the above-captioned matter.

Sensenich's present deadline to file a certiorari petition is January 31, 2022.[1] The Second Circuit issued its precedential judgment in this consolidated matter on

[1] Ninety days after the Second Circuit's November 1, 2021 denial of Sensenich's timely rehearing petition is Sunday, January 30, 2022, which Supreme Court Rule 30.1 then advances to the next day: Monday, January 31, 2022.

August 2, 2021. Then, on November 1, 2021, the Second Circuit denied Sensenich's timely rehearing petition. This time-extension application is being filed on January 19, 2022—more than 10 days before Sensenich's certiorari petition is due. S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Copies of the Second Circuit's precedential opinion and subsequent denial of rehearing are included with this application. *See* Appendix (cited as "App.").

The following grounds support this time-extension application:

1. This case is about the ability of bankruptcy courts—and the standing chapter 13 trustees who serve them—"to enforce obedience" to the court's "lawful orders, judgments, and processes." *Ex parte Robinson*, 86 U.S. 505, 511 (1873). This subject is of paramount importance. As the Court has emphasized in recent years, "it is no exaggeration to say that without the distinguished service" of bankruptcy judges, the "work of the federal court system would grind nearly to a halt." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015).

2. In a precedential decision, the Second Circuit by a 2-1 vote reversed a bankruptcy judge's imposition of a trustee-requested punitive fine against a home-mortgage creditor that violated the same bankruptcy rule an undisputed 75 times across three different bankruptcy cases. *See* App.37-40 (panel dissent). The panel majority justified this holding on grounds that split the circuits, abridge this Court's rulings, and imperil the fair operation of the bankruptcy system.

3. The bankruptcy system exists "to aid the unfortunate debtor by giving him a fresh start in life." *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). Chapter 13

of the Bankruptcy Code achieves this by allowing debtors with regular income to discharge their debt after "successful completion of a payment plan approved by the bankruptcy court." *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007).

4. A chapter 13 bankruptcy also specially enables debtors to "save their homes" from foreclosure proceedings. *In re Hoggle*, 12 F.3d 1008, 1010 (11th Cir. 1994); *see* 11 U.S.C. §1322(b)(5). Chapter 13 empowers debtors to cure past defaults and achieve current mortgages based on "the exact amount" they owe and any later changes to this amount—especially creditor "assessment of fees." Fed. Bankr. R. 3002.1 (2011 Note). Successful chapter 13 debtors may then rest assured that after completing their plans, they will not lose their homes due to surprise creditor claims of unpaid fees. *In re Thongta*, 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012).

5. Bankruptcy Rule 3002.1 safeguards this promise to chapter 13 debtors. Adopted in 2011 with the Court's approval, Rule 3002.1 requires home-mortgage creditors to provide debtors timely notice of any incurred fees, enabling bankruptcy courts to monitor the propriety of such fees. *See* Fed. Bankr. R. 3002.1(c). The rule also enables bankruptcy courts to penalize non-compliant creditors by disallowing evidence of non-noticed fees and/or "award[ing] other appropriate relief, including reasonable expenses and attorney's fees." Fed. Bankr. R. 3002.1(i).

6. Applicant Jan M. Sensenich is the chapter 13 standing trustee for the District of Vermont. App. 3. Standing trustees are "private individual[s] appointed by the Executive Branch to perform a public office under the Bankruptcy Code." *In re Brookover*, 352 F.3d 1083, 1089 (6th Cir. 2003); *see* 28 U.S.C. § 586(b). Chapter 13

standing trustees "handl[e] practically all problems" arising from administration of chapter 13 payment plans. *In re Gorski*, 766 F.2d 723, 726 (2d Cir. 1985); *see* 11 U.S.C. § 1302(b) (trustee duties). These duties include enforcing Bankruptcy Rule 3002.1. They also include addressing "egregious conduct" by debtors or creditors—especially when such conduct "strikes at the heart of the integrity and transparency of the bankruptcy system." *In re Andreas*, 373 B.R. 864, 876 (Bankr. N.D. Ill. 2007) ("The trustee in a Chapter 13 case works with everyone and for no one.").

7. Respondent PHH Mortgage Corporation ("PHH") is "one of the largest sub-servicers of residential mortgages in the United States." App.35 (panel dissent). Between 2014 and 2016, in three chapter 13 cases managed by Trustee Sensenich, PHH asserted unpaid fees in violation of Rule 3002.1. App.38–40 (panel dissent). PHH sent 25 mortgage statements in each case listing the improper fees despite having promised to take "remedial steps" after a previous $9,000 bankruptcy-court fine in one of these cases for sending incorrect mortgage statements. *Id.*

8. The Trustee fortunately caught PHH's Rule 3002.1 violations before they caused any harm to the debtors involved. App.40 (panel dissent). The Trustee then asked the bankruptcy court to impose punitive sanctions sufficient to deter future PHH violations. *Id.* After three years of litigation—including a district court appeal—the bankruptcy court imposed (as relevant here) a $75,000 fine, payable to the Trustee, for PHH's 75 violations of Rule 3002.1. App.10–11.

9. PHH timely appealed the bankruptcy court's punitive sanction to the district court. The Trustee then pursued Second Circuit review of PHH's appeal

under 28 U.S.C. § 158(d)(2)—a "discretionary review mechanism[]" that Congress enacted to expedite circuit court review of "important legal questions" in bankruptcy cases. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 508 (2015). The Trustee sought direct review so the Second Circuit could resolve "the scope and type of punitive sanctions" that bankruptcy courts "may impose." 2d. Cir. Dkt. 70 at 39. The Second Circuit granted the Trustee's discretionary-review petition. App.10–11.

10. On August 2, 2021, a divided Second Circuit panel issued a precedential decision reversing the bankruptcy court's punitive sanction. App.3–4.

11. The panel majority held that Rule 3002.1 does "not authorize punitive monetary sanctions" under any circumstance, App.3—a conclusion that defies the rule's use of the phrase "appropriate relief" as well as the Court's recent, dispositive framework for interpreting this phrase in *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). The panel majority's interpretation of Rule 3002.1 has since divided bankruptcy courts and elicited widespread criticism.[2] *See, e.g., Blanco v. Bayview Loan Serv., LLC*, No 20-10078, 2021 Bankr. LEXIS 2502, at *65–66 (Bankr. S.D. Tex. Sept. 14, 2021) ("This Court respectfully disagrees with the [*Gravel*] majority . . . .").

12. The panel majority also refused to uphold the bankruptcy court's Rule 3002.1 sanction as a permissible exercise of inherent judicial power. App.28–32; *see*

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[2] *See, e.g.,* Alison Frankel, *Ex-Judges Want En Banc 2nd Circuit to Review Chapter 13 Sanctions Ruling*, REUTERS (Sept. 27, 2021), https://reut.rs/33pjLfn ("Six retired federal bankruptcy judges warned . . . that the very integrity of the Chapter 13 bankruptcy system has been undermined . . . ."); Bill Rochelle, *Second Circuit Makes Taggart Applicable to All Contempt Citations in Bankruptcy Court*, AM. BANKR. INST. (Aug. 5, 2021), https://bit.ly/3Eb0HPg ("Even for egregious, repeated violations of Bankruptcy Rule 3002.1, the bankruptcy court may only award recovery of economic losses, never punitive damages.").

Chambers v. NASCO, Inc., 501 U.S. 32, 49 (1991) ("inherent power" applies "even if procedural rules exist which sanction the same conduct"). The panel majority held itself powerless to apply the inherent-power doctrine as the bankruptcy court only "alluded to its inherent power." App.28–29. The panel majority thereby abrogated the settled rule that "if [a] decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*. 302 U.S. 238, 245 (1937). Based on this settled rule, four other circuits have applied the inherent-power doctrine to affirm bankruptcy sanctions even when the bankruptcy court did not cite the doctrine. *See Issacson v. Manty*, 721 F.3d 533, 537–39 (8th Cir. 2013); *In re Mroz*, 65 F.3d 1567, 1571, 1574, 1576 (11th Cir. 1995); *FE&B, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1218, 1223–24 (3rd Cir. 1995); *In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1085–86, 1090 (10th Cir. 1994).

13. The panel majority also refused to affirm the Rule 3002.1 sanction as a proper inherent-power sanction because the bankruptcy court did not find that PHH acted in "bad faith," App.28–29—a conclusion that exacerbates a "split among the circuits and even within some circuits evidencing confusion about . . . sanctions under the inherent power[] doctrine." *United States v. Seltzer*, 227 F.3d 36, 41 (2d Cir. 2000). The panel majority's demand for a bad-faith finding divides the Second Circuit from its own precedent (*Seltzer*) and that of other circuits establishing that a "court need not find bad faith" for sanctions enforcing "the orderly and expeditious disposition of cases"—for example, sanctions penalizing a party's violation of court rules (like Rule 3002.1). *Id.* (collecting cases); *see also, e.g., In re Charbono*, 790 F.3d

80, 87–88 (1st Cir. 2015) (holding that a bankruptcy court's inherent-power sanction did not require a bad-faith finding and citing *Seltzer* for this view).

14. Judge Bianco dissented from the panel majority's analysis of the Rule 3002.1 sanction. *See* App.34–69. Judge Bianco established that the panel majority's interpretation of Rule 3002.1 contravened the Rule's plain text, structure, history, and purpose, rendering "a bankruptcy court powerless to levy *any sanction*" against a "serial violator" of Rule 3002.1. App.34–35. Judge Bianco also confirmed that the bankruptcy court "explicitly invoked" the inherent-power doctrine, making this a proper basis to affirm the Rule 3002.1 sanction (or to remand for error correction). App.59. Judge Bianco finally explained that the panel majority's decision would "undoubtedly hamper the ability of bankruptcy courts . . . to provide deterrence and to protect debtors from predatory practices [of creditors] that interfere with the 'fresh start' for debtors that is a fundamental purpose of bankruptcy protection under Chapter 13"—and of Rule 3002.1 as well. App.34–35.

15. The Trustee timely petitioned for rehearing. App.70. On November 1, 2021, the Second Circuit denied the Trustee's rehearing petition. *Id.*

16. The Second Circuit's precedential decision here raises at least two important questions that merit Supreme Court review. First, whether Bankruptcy Rule 3002.1 allows "punitive monetary sanctions" as "appropriate relief"—especially against a "serial [Rule] violator." Second, whether appellate courts are prohibited from applying the inherent-power doctrine to affirm rule-enforcing sanctions unless the sanctions order substantively discusses the doctrine and finds bad faith.

17. Given the importance of the above questions, the Trustee respectfully seeks a 45-day extension of his deadline to file a certiorari petition.

18. Good cause exists to grant this request. The Trustee's appellate counsel-of-record, Mahesha P. Subbaraman, has been subject to many competing obligations between November 2021 and January 2022. These obligations have included:

- Presentation of oral argument in *McCallister v. Evans (In re Evans*), No. 4:20-cv-112 (D. Idaho) (argument heard Nov. 8, 2021);
- Preparation of an amicus brief in *Energy Policy Advocates v. Ellison*, No A20-1344 (Minn.) (brief filed Nov. 9, 2021);
- Presentation of a continuing legal education (CLE) course for Minnesota attorneys on developments in Fourth Amendment law (Nov. 30, 2021);
- Preparation of an opening brief for Appellant Carter Justice in *Justice v. Marvel, LLC*, No. A20-1318 (Minn.) (brief filed Dec. 20, 2021); and
- Preparation of an opening brief for Appellants Mark McAfee and Farm-to-Consumer Legal Defense Fund in *McAfee v. U.S. Food & Drug Admin.,* No. 21-5170 (D.C. Cir.) (brief filed Jan. 7. 2022).

19. Current competing obligations on Mr. Subbaraman's time include: (1) preparation of an opening brief in *In re Estate of Figliuzzi*, No. A21-1035 (Minn.) (brief due Feb. 14, 2022); and (2) preparation of a response/reply brief in *Justice v. Marvel, LLC*, No. A20-1318 (Minn.) (brief due on or before Mar. 21, 2022).

20. Based on the above obligations, Mr. Subbaraman is unable to prepare an adequate certiorari petition in this case absent the requested time extension. Mr. Subbaraman is a solo practitioner with no partners, associates, or legal support staff. Mr. Subbaraman is further representing the Trustee *pro bono*.

Trustee Sensenich thus respectfully asks the Court to extend his time within which to file a certiorari petition to and including March 17, 2022.

Respectfully submitted,

Dated: January 19, 2022

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