No. 23-218

In The

Supreme Court of the United States

ADAM M. GOODMAN, CHAPTER 13, TRUSTEE,
Petitioner,

v.

DANIEL RICHARD DOLL,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

Brief of *Amici Curiae* Catherine E. Bauer, Colleen A. Brown, Leif M. Clark, Melanie L. Cyganowski, Keith M. Lundin, Bruce A. Markell, and Dennis D. O'Brien (Retired Bankruptcy Judges) in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae—Catherine E. Bauer, Colleen A. Brown, Leif M. Clark, Melanie L. Cyganowski, Keith M. Lundin, Bruce A. Markell, and Dennis D. O'Brien—are seven retired federal bankruptcy judges who served on courts across the country. In addition to collectively spending decades on the federal bankruptcy bench, several of them served on the bankruptcy appellate panels for their district, are or have been law professors, and have authored significant treatises or articles on bankruptcy. Collectively they presided over more than 100,000 bankruptcies and worked with dozens of bankruptcy trustees.

As bankruptcy judges, *Amici* saw and reviewed the work of Chapter 13 trustees in these cases. Amici respected the trustees and depended on their fair analysis and administration of the bankruptcy cases to which they were appointed. Under the Tenth Circuit's analysis, these and all other Chapter 13 trustees would not be compensated for the work they perform in evaluating non-confirmable cases. In *Amici's* experience, however, these are precisely the cases in which the work of the trustees was most important. *Amici* thus submit this brief in support of the petition for writ of certiorari, expressing their observations and concerns about the compensation of Chapter 13 trustees from the position of those who sat on the bankruptcy bench.

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[1] This *amici* brief is filed with timely notice to all parties. S. Ct. R. 37.2. No counsel for a party wrote this *amici* brief in whole or in part; nor has any person or any entity, other than the Retired Bankruptcy Judges and their counsel, contributed money intended to fund the preparation or submission of this amici brief.

SUMMARY OF THE ARGUMENT

Chapter 13 trustees are not judges, but they have quasi-judicial responsibilities. When a debtor moves to confirm a Chapter 13 plan, trustees resemble a special master or a magistrate: they sift the evidence and assess whether the debtor qualifies for relief under Chapter 13 and whether the plan proposal is fair to the creditors. The trustee then makes a recommendation that, while not binding, bankruptcy judges frequently rely on in deciding whether a plan can be confirmed.

Unlike judges, however, the cost of the trustees' services is not paid by tax dollars. Instead, Congress categorized trustees' remuneration as an administrative expense of the Chapter 13 case. This means that the evaluation and administration of Chapter 13 cases is self-funding, with the trustees' fees derived from amounts collected from the debtors that would otherwise have been used to pay the creditors.

Under Chapter 13, the debtor must immediately begin payments under the proposed plan at the time of the filing. The Chapter 13 trustee retains these fees pending the determination of whether or not a plan can be confirmed. 11 U.S.C. § 1326(a)(2) provides that if a Chapter 13 plan is confirmed, the trustee shall promptly distribute the payments as set forth in the confirmed plan. If the plan is not confirmed, the trustee must return to the debtor all monies paid all monies collected, less payments for administrative expenses allowed under 11 U.S.C. § 503(b), which provides for the payment of all of the "actual,

necessary costs and expenses of preserving the estate."

The Tenth Circuit has interpreted this statute to exclude payment of a Chapter 13 trustees' administrative expenses incurred during the period between the filing of a Chapter 13 plan and its dismissal. Around 30% of all Chapter 13 plans are not confirmed. The Tenth Circuit's ruling in this case means that trustees will be required to work without pay in about one-third of the cases to which they are assigned. That is not a reasonable interpretation of the statutory compensation scheme.

In addition to creating a hardship for the individual Chapter 13 trustees, if they cannot be paid for their work on the non-confirmed cases, the trustees will of necessity be required to allocate the costs of maintaining their staff and office facilities to those debtors who have responsibly proposed confirmable Chapter 13 plans. These expenses of administering the Chapter 13 plan are paid before payments to creditors, which could lead to the inevitable and paradoxical result that the creditors of a debtor who has successfully confirmed a plan of reorganization will end up bearing the costs incurred by debtors who tried to confirm a plan but failed.

The Tenth Circuit's ruling raises significant issues that impact about 200,000 debtors (and their creditors) annually. Thus, *Amici* encourage the Court to grant the petition for writ of certiorari.

ARGUMENT

I. Chapter 13 is the workhorse of the Bankruptcy Code

Chapter 11 of the Bankruptcy Code gets most of the headlines regarding bankruptcy reorganization and most of this Court's attention. Chapter 11 is complex and expensive, and as a result, typically only corporations and high net-worth individuals can take advantage of its provisions. Of the 387,629 bankruptcy cases filed in 2022, only 4,918 – or 1.2% - were filed under Chapter 11.[2]

Chapter 13, on the other hand, is Congress's provision for relief of ordinary wage earners in financial distress. In order to qualify for relief under Chapter 13, the debtor must be an individual with a regular source of income and his or her secured and unsecured indebtedness may not exceed a statutorily mandated limit.[3]

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[2] United States Courts, Bankruptcy Filings Drop 6.3 Percent (Feb. 6, 2023), *available at* https://www.uscourts.gov/news/2023/02/06/bankruptcy-filings-drop-63-percent#:~:text=Chapter%2011%2C%20which%20provides%20for,31%2C%202022.

[3] *Compare* 11 U.S.C. § 109(e) (defining who may be a debtor under Chapter 13) *with* 11 U.S.C. § 101(30) (defining "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13"). The current limit for all indebtedness—including mortgage debt, student loans, medical debt, auto loans and credit card debt— is $2.75 million.

On average, over 200,000 Americans file Chapter 13 each year to address problems they have, typically beyond their control, with repayment of their indebtedness.[4] The purpose of Chapter 13 is to give people who have jobs and who want to pay as much of their debt as they can a statutory pathway for doing so. Chapter 13 cases make up the vast majority of all bankruptcy cases heard by bankruptcy courts.[5]

Congress adopted the predecessor of current Chapter 13 during the Depression of the 1930s, when it became apparent that Chapter 7 bankruptcy, a liquidation model, would force working Americans in financial distress to lose their homes and their cars, and thus could not use their wages to pay down their debt.[6]

Congress has maintained Chapter 13 as the bankruptcy chapter of choice for working individuals. Unlike Chapter 11 reorganization, Congress crafted Chapter 13 to allow working American to quickly and fairly pay their debts not only from current assets, but also from future income. In this respect, Chapter 13 incorporates the following provisions, designed to simplify and expedite payments of creditors, and incentivize debtors to choose the repayment provisions of Chapter 13 over the liquidation provisions of Chapter 7:

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[4] United States Courts, Bankruptcy Filings Drop 6.3 Percent, *supra* n.2.

[5] *Id.*

[6] *See, e.g.,* Dixon and Epstein, "Where Did Chapter 13 Come From and Where Should it Go?", 10 AM. BANKR. INST. L.REV. 741 (2002).

- Chapter 13 is available only to individuals; corporations, LLCs and partnerships are not eligible, 11 U.S.C. §109(e);

- Chapter 13 debtors must immediately file a plan of rehabilitation when they file their petition, Bankr. R. 3015(b), while Chapter 11 debtors have an extendable 120-day period to file a plan, 11 U.S.C. §1121;

- In contrast to Chapter 11, Chapter 13 debtors must commence payments before confirmation and within 30 days of filing their plan, 11 U.S.C. §1326(1), whereas Chapter 11 debtors need not pay anything to creditors until after their plan is confirmed;

- Unlike in Chapter 11, the creditors in Chapter 13 do not vote on plan confirmation, 11 U.S.C. §1325. A Chapter 13 plan does not require creditor approval, and so long as the statutory requirements are met, the bankruptcy court must confirm the plan;

- As the provision of future income is both extraordinary (Chapter 7 does not require it) and fragile (Chapter 13 plans can run for up to five years), Congress provided that Chapter 13 debtors have the nearly absolute right to dismiss their case for any reason other than bad faith;[7]

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[7] 11 U.S.C. §1307(b); *Marrama v. Citizen's Bank of Mass.*, 549 U.S. 365 (2007).

- In Chapter 13, the discharge is granted only after completion of the debtor's three-to-five year payment plan, 11 U.S.C. §1328(a), while under Chapter 11, the debtor receives a discharge much earlier, upon plan confirmation. 11 U.S.C. §1141(d)(1)(A).

In short, in Chapter 11 cases, the debtor proposes a plan of reorganization, and the court relies on the creditors of the debtor to inform the court of deficiencies in the proposed plan with their objections to plan confirmation and their vote. In a Chapter 13 case, however, it is the Chapter 13 trustee who has the primary responsibility of advising the court of any deficiencies in the proposed plan. The bankruptcy bench relies on the Chapter 13 trustee to perform this important function carefully and neutrally.

II. Chapter 13 trustees play an important role in the administration of bankruptcy cases

The job of assessing Chapter 13 filings to assure that they comply with the applicable statutory requirements—and then administering the payments under a confirmed Chapter 13 plan—is statutorily assigned to an appointed trustee. The trustee must review the proposed plans, analyze documents (such as pay statements, tax returns and the like) to ensure that the debtor qualifies for Chapter 13 relief and that the repayment scheme the debtor has proposed is fair to the creditors. The trustee must then negotiate any revisions that are necessary for compliance and must prepare a recommendation for the bankruptcy judge

as to the confirmability of the proposed Chapter 13 plan. Unlike Chapter 11 cases, Chapter 13 creditors do not get to vote on whether or not the plan is acceptable. Accordingly, the review and analysis performed by the trustee is of particular importance in a Chapter 13 case.

Debtors file on average 200,000 Chapter 13 cases each year, which must be reviewed and ruled upon by about 350 bankruptcy judges.[8] Of these 200,000 cases, approximately 30% do not result in a confirmed plan.[9] In some cases, confirmation fails because the debtor does not meet the statutory requirements of Chapter 13. In other cases, however, the debtors may have elected to take advantage of the automatic stay provisions of Chapter 13 to prevent foreclosure of their houses or repossession of their cars while negotiating affordable repayment terms with those primary creditors. After solving those problems, the debtors

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[8] Statistics on file at us.courts.gov state the following numbers of Chapter 13 cases filed in each of the past five years, as follows: 2018, 290,146; 2019, 286,979; 2020, 156,377; 2021, 120,002; and 2022, 157,087. United States Courts, Bankruptcy Filings Drop 6.3 Percent, *supra* n.2; United States Courts, Status of Bankruptcy Judgeships – Judicial Business 2021, *available at* https://www.uscourts.gov/statistics-reports/status-bankruptcy-judgeships-judicial-business-2021#:~:text=As%20of%20September%2030%2C%202021,number%20as%20one%20year%20earlier.

[9] From 2007 through 2013, 25% of Chapter 13 cases were dismissed without confirmation, and another 4% were converted to Chapter 7. *See* Ed Flynn, *Chapter 13 Case Outcomes by State*, ABI JOURNAL, August 2014, at 40.

may then no longer need the protections of Chapter 13 and have the absolute right to then dismiss the case.

The Chapter 13 trustees assigned to the cases that do not result in a confirmed plan nonetheless have a statutory obligation to evaluate the debtor's filings in every case and advise the bankruptcy judge as to the confirmability of the proposed Chapter 13 plan. Their work on the non-confirmed cases is especially important to the careful and orderly administration of Chapter 13. Weeding out non-compliant plans is important to the protection of the creditors.

In a Chapter 13 bankruptcy, debtors' Chapter 13 plan sets the terms of debtors' obligations to their creditors. The plan determines how much income debtors pay to the estate, what debtor property will be liquidated, which liens will be modified or extinguished, and which creditors will receive payment and in which amounts. *See, e.g.*, 11 U.S.C. § 1322. If debtors succeed in confirm a plan and make all their payments, they can expect a full Chapter 13 discharge with all its advantages. *See* 11 U.S.C. § 1328(a). But if no plan is confirmed, debtors face conversion to Chapter 7 or dismissal.

Plan confirmation may be challenged by creditors who believe that the plan does not adequately compensate them in light of the debtor's income and assets. Specifically, debtors' proposed plans may falter because they claim more expenses than they spend, propose paying a creditor more or less than what is required, list nonexempt property as

exempt, miscalculate their projected disposable income (a term of art that reduces projected future wages by reasonable household expenses to determine the amount that must be paid to unsecured creditors to accomplish confirmation of a plan), or incorrectly list the outstanding balance on a debt.

The trustee plays a central role in any such challenge. Trustees are required by law to "investigate the financial affairs of the debtor," 11 U.S.C. § 704(a)(4); *id.* § 1302(b)(1). Thus, they must undertake a careful analysis of the debtor's proposals and documents, in the end advising the bankruptcy court regarding the fairness of the proposed plan. Trustees preside over the meeting of creditors where debtors are first questioned about their plans, debts, and assets. Whether or not any creditor objects to a proposed plan, trustees must "appear and be heard" before the plan is confirmed. *Id.* § 1302(b)(2).

Citing this appear-and-be-heard requirement, one bankruptcy treatise states the trustee "*advises the court* in connection with . . . the debtor's proposed plan." GINSBERG & MARTIN ON BANKRUPTCY § 4.01 & n. 229 (emphasis added). Another treatise explains, "Courts *rely* to some extent upon the chapter 13 trustee's recommendation regarding whether a plan . . . should be approved." 1 COLLIER ¶ 6.14 (emphasis added). Some courts have held that, when a trustee recommends confirmation, it lessens or even satisfies the debtor's burden of persuasion on particular questions. *See, e.g.*, *In re Hines*, 723 F.2d 333, 334 (3d Cir. 1983); *In re Foley*, No. 07-16433BF, 2008 WL 5411070, at *7 (Bankr. E.D. Pa. Oct. 2, 2008) (unpublished).

Under this statutory scheme, the trustee's role in confirmation—sifting the evidence, assessing the merits, and recommending a course of action to a judge who takes the recommendation seriously—resembles the work of a special master or a magistrate judge hearing a dispositive motion. Thus, although Chapter 13 trustees are not judges, they have quasi-judicial responsibilities.

Unlike judges, however, trustees are not supported by tax dollars. To pay their staff and expenses, they collect a percentage fee out of the payments that debtors are required to make under Chapter 13. *See* 11 U.S.C. § 586(e). It is difficult to even imagine a statutory scheme in which any other quasi-judicial officer was compensated or reimbursed for administrative expenses from the proceeds generated only by successful cases.[10] And that is not how the compensation scheme for Chapter 13 trustees should be interpreted here.

This is an important issue, affecting on average 200,000 debtors per year, not to mention hundreds of thousands of their creditors. It deserves review by this Court to determine whether the statutory scheme permits Chapter 13 trustees to be compensated for the work they perform in cases that do not result in a confirmed plan, or whether they should be required to work for free or to otherwise allocate the costs of

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[10] Imagine a magistrate judge whose office only gets paid when cases go to trial, and who might have to lay off clerks if she recommends granting too many 12(b)(6) motions. The idea is absurd—but it is roughly the situation facing underfunded trustees if the Tenth Circuit's decision stands.

maintaining their staff and office facilities to those debtors who have responsibly proposed confirmable Chapter 13 plans.

III. Chapter 13 trustees deserve to be compensated for pre-confirmation services

Chapter 13 trustees derive most of their income from the administration of a confirmed plan. Given the number of confirmed cases that are the responsibility of any given trustee at any point in time, "this often involves a massive accounting operation, with many thousands of checks being issued for millions of dollars annually by the trustee's office." 1 COLLIER ¶ 6.14. Conducting this operation often requires a "large staff," *id.*, and both the trustee and the staff are paid entirely from the percentage fees the trustee deducts from debtors' payments. *See* 11 U.S.C. § 586(e). But when we say "paid by debtors," what we really mean is "paid by debtor's creditors" as the cost of having repayment of the debt owed to them administered by the trustee.

Under Chapter 13, a debtor is required to make payments under his proposed plan from the date of the filing of the Chapter 13 petition. 11 U.S.C. §1326(a)(1). If the plan is confirmed, the trustee retains possession of these interim fees and uses them to first, pay the trustee fees allowed under the Bankruptcy Code and second, to pay the creditors in the amounts provided for in the Chapter 13 plan. If the plan is not confirmed, the trustee must return the interim fees to the debtor, "after deducting any unpaid claim allowed under section 503(b)." 11 U.S.C. § 1326(a)(2).

It is the fees that are collected by a Chapter 13 trustee between the date of the petition and the date on which the proposed plan is not confirmed that are at issue here. This case is a good example of trustees doing their work to ensure that only plans that are compliant with the Bankruptcy Code are confirmed. The debtor in this case made four failed attempts to confirm a plan. In each case, the trustee evaluated the debtor's proposals and determined that they did not comply with the statutory requirements; that is, they were in some way inadequate or unfair to the creditors of the debtor's estate. The trustee was then required to attend four different hearings on plan confirmability. The total amount of fees collected by the trustee was $2,596.70. But because the plan was not confirmed, the Tenth Circuit held that the trustee could not retain that fee, even though the trustee's careful work discovered the portions of the debtor's proposed plans that were noncompliant with the Bankruptcy Code.

Under the Tenth Circuit's ruling, trustees will only collect their fees if a plan is confirmed. So in this case and in the other 30% of unconfirmed Chapter 13 cases, debtors would get back all of the money they had deposited and the Chapter 13 trustees would get nothing. Whether a plan is confirmed or not, however, a Chapter 13 trustee must expend significant amounts of time evaluating a case to determine whether the proposed plan complies with the statutory requirements for confirmation under Chapter 13. That is a great deal of effort statutorily required from people who may not be compensated for it.

Without revenue from the unconfirmed cases, some Chapter 13 trustees may struggle to fund their offices, making it difficult for them to continue to provide their valuable services to the bankruptcy courts. More importantly, however, trustees must continue to pay themselves and their staff, regardless of whether a plan is confirmed or not. If trustees cannot be compensated for their work on an unconfirmed plan, the fees collected from compliant debtors are in part underwriting the costs of the debtors who tried, but failed, to comply with the requirements of Chapter 13. This is fundamentally unfair to both the trustees and to the debtors who propose compliant and responsible Chapter 13 repayment plans and their creditors.

This cost spreading could lead to the inevitable and paradoxical result that the creditors of a debtor who has successfully confirmed a plan of reorganization will end up bearing the costs incurred by debtors who tried to confirm a plan but failed. The cost-spreading costs compliant Chapter 13 debtors millions. Most of that money will come out of the pockets of unsecured creditors in the form of reduced distributions in cases with confirmed plans.

This is not a small problem. Each year, there are Chapter 13 trustees evaluate 200,000 on average.[11] If thirty percent of them are not confirmed, that means that the trustees will not be compensated for their work on 60,000 cases. If the average administrative costs for the up-front work in setting up and

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[11] United States Courts, Bankruptcy Filings Drop 6.3 Percent, *supra* n.2.

evaluating each of those cases is, hypothetically, $500, that means that $30,000,000 of unrecovered costs must be absorbed in the fees collected from the successful cases.

In light of all of these factors, the Tenth Circuit's strict statutory construction makes no sense. It would require the conclusion that Congress intended that the Chapter 13 trustees would perform their duties without compensation in a significant number of cases, which does not comport with the important statutory duties assigned to those trustees. Given the breadth, depth, and importance of the Chapter 13 trustee's responsibilities to the administration of the bankruptcy process as a whole, a plain reading of Section 1326(a)(2) would permit the trustee's expenses related to unconfirmed plans to be treated as an administrative expense under Section 503(b) of the Bankruptcy Code. This reading would allow Chapter 13 trustees to be compensated for all of their services, and would allocate the costs and expenses of the Chapter 13 trustee program across all of the cases filed and not just those cases where a plan is confirmed. This would be a much more logical, not to mention fairer, application of the statute.

The proper interpretation of the Chapter 13 trustee's compensation is an important issue that affects hundreds of thousands of wage-earning debtors and their creditors every year. It deserves the careful consideration of this Court.

IV. Due Process requires quasi-judicial officers to be disinterested

As this Court explained, "[O]fficers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." *Tumey v. Ohio,* 273 U.S. 510, 522 (1927).

In *Tumey*, a man had been convicted and fined by a mayor sitting ex officio as a judge. *Id.* at 515. However, the mayor was also responsible for the town's budget, which received a share of the fines he awarded. *Id.* at 533. This created a conflict of interest: "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). Due process did not permit him to sit as judge. *Id.*

The *Tumey* doctrine applies in civil as well as criminal cases. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). It applies in administrative as well as judicial proceedings. *See Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973).

So far as *Amici* have found, no court has ever considered whether chapter 13 trustees are quasi-judicial officers subject to *Tumey*'s disqualification rule. Further, the meaning of "quasi-judicial" under *Tumey* is narrower than the definition of "quasi-judicial" that the Ninth Circuit applied to trustees in *Castillo*—specifically, *Castillo*'s definition of "quasi-judicial" sometimes includes prosecutors, while *Tumey*'s usually does not. *See Marshall v. Jerrico Inc.*, 446 U.S. 238, 248 (1980); *Curry v. Castillo* (*In re*

Castillo), 297 F.3d 940, 950 (9th Cir. 2002).

But prosecutors represent only one side of a dispute; prosecutors do not advise courts, and courts do not "rely" on their recommendations. Unlike prosecutors, trustees owe statutory duties to all parties in a bankruptcy, to the court, and to the administration of the case as a whole. *See* 11 U.S.C. §§ 704(a), 1302(b). They should be considered quasi-judicial officers under *Tumey*, the expenses attributable to their work should be shared across all Chapter 13 cases, and not unfairly imposed on the debtors with confirmable plans.

CONCLUSION

Amici support the petition for writ of certiorari because the Tenth Circuit's decision creates two unpalatable results: First, it means that a Chapter 13 trustee will not be compensated for the significant efforts each trustee puts into evaluating the filings of Chapter 13 debtors and their supporting documents, in the very cases where such review and analysis is the most important, *i.e.* in the filings that do not actually qualify for Chapter 13 relief. Second, it leads to the unfair and indeed absurd result that the estates of *successful* Chapter 13 debtors would be subsidizing the costs of administering the filings of debtors who cannot propose a confirmable plan.

For the reasons set forth herein, the Tenth Circuit's interpretation of the Bankruptcy Code's payment scheme is incorrect and unfairly places the cost of administering all Chapter 13 cases on those debtors (and their creditors) who have proposed

confirmable plans. This is neither a fair nor a desirable outcome. This Court should grant the petition for writ of certiorari to examine this important issue that directly and adversely affects over-100,000 debtors with confirmed plans (and their creditors) each year.

Respectfully submitted,

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