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 a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Chapter 13 standing trustees are the bedrock of our nation's bankruptcy system. In 2023 alone, these trustees facilitated the fair and efficient processing of over 178,000 cases. To put this in concrete terms, consider the following order arising from a debtor's bad-faith filing of a Chapter 13 case. *See In re Neal*, No. 2:22-bk-51185, slip op. (Bankr. S.D. Ohio Nov. 28, 2023) (ECF No. 335). The debtor in *Neal* insisted that the standing trustee who administered the case was "not entitled" to collect a user fee from the debtor because the court dismissed the case "before confirmation of a plan" and, as a result, "allowing the [t]rustee to deduct his statutory fee would constitute unjust enrichment." *Id.* at 6. The bankruptcy court disagreed: "regardless of the dismissal of the debtor's case before reaching [plan] confirmation, the trustee performed his role for over a year before the case was dismissed on account of the debtor's bad faith." *Id.* at 6-7 (internal capitalization omitted).

What exactly did the trustee do in *Neal*? The trustee "conducted the §341 meeting of creditors, reviewed and analyzed the debtor's schedules and other filings, analyzed the numerous plans proposed by the debtor, determined whether the plans met the criteria for confirmation, prepared and filed appropriate [Chapter 13] documents, and undertook other activities." *Id.* This led the bankruptcy court to conclude: "if the [standing] trustee is not allowed his statutory fee, the only party who might arguably be unjustly enriched … is the debtor, by virtue of receiving the benefit of the trustee's services for over a year without compensation." *Id.* at 7.

Yet, in Petitioner's case, the Tenth Circuit holds that the Bankruptcy Code dictates exactly this result under 11 U.S.C. §1326(a)(2), requiring trustees to return collected user fees to debtors whenever the court dismisses a Chapter 13 case before confirming a debtor's plan—even in bad-faith cases like *Neal*. The Tenth Circuit reads away 28 U.S.C. §586(e)(2)'s plain command that standing trustees "shall collect" user fees from "all payments" the trustee "receive[s] … under plans" in a Chapter 13 case—categorical text making no exception for payments received before plan confirmation or for unconfirmed plans. Respondent Daniel Doll (Debtor) nevertheless urges the Court to deny certiorari here because of Doll's confidence in the correctness of the Tenth Circuit's decision and because there is no circuit split. But Doll does not dispute "the importance of the problem" that non-collection of user fees in unconfirmed cases poses to the "orderly administration" of the nation's uniform bankruptcy law—a situation the Court has found readily merits certiorari. *See Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 276-77 (1940).

A. The Court should grant review to resolve the proper funding of Chapter 13 standing trustees, which has functionally split the circuits and now threatens the bankruptcy system's uniform operation.

Bankruptcy courts and district courts are deeply divided—and have been for years—on whether the Bankruptcy Code allows standing trustees to collect user fees in Chapter 13 cases dismissed before plan confirmation. Pet.27; Pet.App.15a n.7. Respondent does not dispute this, instead emphasizing there is no

circuit split (as of yet) on the question presented. BIO.21-23. Respondent's analysis is unavailing for two reasons. **First**, while a formal circuit split does not exist yet on the question presented, a functional one does exist that is treating identical standing trustees and Chapter 13 debtors differently contrary to the uniformity requirement of the Constitution's Bankruptcy Clause. **Second**, Respondent overlooks that just this term, the Court granted review of a bankruptcy case despite the lack of any circuit split because the case raised a seminal question about the official collection and refund of fees essential to the bankruptcy system—the same basic issue here. *See* Gov't Cert. Pet., *Office of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, No. 22-1238 (U.S. filed June 23, 2023)*, granted* (U.S. Sept. 29, 2023).

The "functional equivalent of a circuit split" exists when a federal court of appeals "tell[s] the parties that [a] statute compels one result" while "federal courts in another jurisdiction tell the same parties that the same statute compels the opposite result." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 155 (D.C. Cir. 1994) (Mikva, C.J., dissenting). The Tenth Circuit's decision fits this bill. This state of affairs stems from the "absence" of any "[legal] prohibition on serial filings of … Chapter 13 petitions." *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991). Debtors may dismiss their Chapter 13 cases "at any time." 11 U.S.C. §1307(b). "[D]ismissal of a case … does not prejudice the debtor with regard to the filing of a subsequent petition …." *Id.* §349(a). Debtors are then free to refile in a new jurisdiction after occupying a domicile in the new jurisdiction for at least 180 days. *See* 28 U.S.C. §1408(1).

Now imagine a debtor who files a Chapter 13 case in the Northern District of Texas. By court rule, this district tells debtors that 28 U.S.C. §586(e)(2) compels trustee collection of user fees in all Chapter 13 cases regardless of plan confirmation. Pet.28-29 & n.27. The debtor thus receives no fee refund upon voluntarily dismissing his case two years later—time that the debtor spent proposing one non-confirmable plan after another, consuming inordinate amounts of the trustee's limited resources. The debtor then moves across the border to Oklahoma and, a year-and-a-half later, refiles his Chapter 13 case in the Eastern District of Oklahoma. The Tenth Circuit's decision tells this exact "same" debtor that §586(e)(2) "compels the opposite result" in his case, affording no authority for trustees to collect user fees in Chapter 13 cases dismissed before plan confirmation. So the debtor pays no user fees upon voluntarily dismissing his case after spending another two years proposing one non-confirmable plan after another. *Transaero, Inc*, 30 F.3d at 155 (Mikva, C.J., dissenting).

This functional circuit split does not end there. At bottom, the Tenth Circuit's decision below and the Ninth Circuit's matching decision in *In re Evans*, 69 F.4th 1101 (9th Cir. 2023) bar trustees in 15 states from collecting "a fee . . . that applies to debtors" in 35 other states—i.e., the states that are governed by the remaining federal courts of appeals with no circuit decision conditioning payment of user fees on plan confirmation. *Siegel v. Fitzgerald,* 142 S. Ct. 1770, 1780 (2022). This reality defies the uniformity requirement of the Constitution's Bankruptcy Clause given the complete lack of "any material difference between debtors across those States." *Id.*

Respondent suggests the Court should tolerate this discrimination in the name of issue percolation. BIO.23. But the question presented has percolated for over a decade, generating a deep body of caselaw. Pet.28-29 & n.27. Respondent fails to explain why continued percolation is necessary—especially given Respondent's professed confidence in the Ninth and Tenth Circuits' decisions. Respondent also ignores that at this point, lower courts are simply picking sides. Consider *In re Baum*: "[t]he court has reviewed and carefully considered the conflicting cases on this subject, which contain exhaustive discussions of the issue. The court agrees with the trustee's position, for the reasons stated in the *Nardello*, *Soussis*, and *Harmon* cases." 650 B.R. 852, 860 (Bankr. E.D. Mich. 2023) (some internal capitalization omitted).

Office of the U.S. Trustee v. John Q. Hammons Fall 2006, LLC, No. 22-1238 (U.S.), in turn, affirms that when circuit decisions imperil the bankruptcy system's uniform operation, review is warranted—even when no circuit split exists. In *Hammons*, the U.S. Trustee asked the Court to review whether the government must grant refunds of "increased fees" collected from Chapter 11 debtors in violation of the Bankruptcy Clause. Gov't Cert. Pet. i, *Hammons*, No. 22-1238 (U.S.). But all the circuits to reach the point (the 2nd, 10th, and 11th) agreed that the government must refund the collected fees. The U.S. Trustee still asked the Court to grant review—and the Court did so—because "a nationally uniform" standard was at stake. Gov't Cert. Reply 11, *Hammons*, No. 22-1238 (U.S. filed Aug. 9, 2023). Here too: trustee collection and refunds of user fees in Chapter 13 cases equally requires a nationally uniform standard. *Id.*

B. The Court should grant review to correct the Tenth Circuit's conditioning of trustee funding on plan confirmation, which belies the trustee disinterestedness required by the Bankruptcy Code and due process.

Respondent's main argument against review is Respondent's strong belief in the correctness of the Tenth Circuit's interpretation of 28 U.S.C. §586(e)(2) and 11 U.S.C. §1326(a)(2). BIO.9-21. Needless to say, Petitioner strongly disagrees with this argument and believes that the decisions in *Nardello*, *Soussis*, and *Harmon*—as well as the district court's decision in *Evans*—prove the Tenth Circuit got it wrong. Pet.35. A few examples suffice to show why Respondent's parroting of the Tenth Circuit's analysis should not carry the day on the question of certiorari.

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Respondent echoes the Tenth Circuit's analysis that §586(e)(2) does not mandate trustee collection of user fees in all Chapter 13 cases, but instead merely "'addresses *the source of funds*' available to pay" user fees. BIO.16. Such analysis elides §586(e)(2)'s plain text and how Congress has used the same text across the U.S. Code. Section 586(e)(2) states that trustees "shall collect" user fees from "all payments received … under plans" in Chapter 13 cases. When Congress enacted §586(e)(2) in 1978, the ordinary meaning of "collect" (when used in a monetary context) was the same as it is today: "to receive payment." BLACK'S LAW DICTIONARY 238 (5th ed. 1979); *see* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY 403 (1996). Section 586(e)(2) thus dictates that trustees shall take payment of ("collect") user fees from "all" plan payments—before or after confirmation.

Congress's use of "shall collect" in many other user-fee statutes confirms this view.[1] Take 28 U.S.C. §1915(b)(1). This statute directs that when it comes to civil litigation filed by prisoners, "[t]he court shall … collect … an initial partial filing fee" from "the prisoner's account." Based on this text, courts have ruled without difficulty that §1915(b)(1) "makes no provision for return of fees … in the event that an appeal is withdrawn." *Goins v. DeCaro*, 241 F.3d 260, 261 (2d Cir. 2001). Courts have not construed "shall collect" in §1915(b)(1) as merely identifying a source of funds for a fee (i.e., the prisoner's account).

Respondent also echoes the Tenth Circuit's view that 11 U.S.C. §1326(a)(2) must bar fee collection in Chapter 13 cases dismissed before plan confirmation because other Bankruptcy Code provisions direct fee collection when plans are not confirmed. BIO.16. Close review of the latter provisions tells a different story. 11 U.S.C. §1226(a)(2) provides that "[i]f a plan is not confirmed" in a Chapter 12 case, the trustee "shall return" a debtor's pre-confirmation "payments to the debtor … after deducting … the percentage fee fixed for such standing trustee" as is "serving in the case." But according to Respondent's own advocacy, the Code fixes no percentage fee for trustees who administer cases dismissed before plan confirmation: §586(e)(2) applies only to "*confirmed* plans." BIO.18 n.6. Respondent's interpretation of §586(e)(2) renders §1226(a)(2)'s fee-deduction mandate a nullity.

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[1] *E.g.*, 15 U.S.C. §2665(d)(7) ("[T]he Administrator **shall collect** user fees …."); 16 U.S.C. §1824(d)(7) ("The Secretary **shall collect** a fee …."); 30 U.S.C. §28*l* ("[T]he Bureau of Land Management **shall collect** … fees …."); 38 U.S.C. §8109(c)(3) ("The Secretary **shall collect** … parking fees ….").

11 U.S.C. §1194(a)(3) raises the same problem for Respondent. Governing cases under subchapter V of Chapter 11, §1194(a)(3) provides that "[i]f a plan is not confirmed," the trustee "shall return" the debtor's pre-confirmation "payments … after deducting … any fee owing to the trustee." Under Respondent's advocacy, however, the trustee is owed no fee in this context as §586(e)(2) does not allow the collection of any percentage fee absent plan confirmation. As with §1226(a)(2), Respondent's view of §586(e)(2) renders §1194(a)(3)'s fee-deduction mandate a nullity.

Respondent's comparative reading of §1226(a)(2) §1194(a)(3), and §1326(a)(2) also runs afoul of this Court's rejection of "a 'canon of donut holes.'" *Bostock v. Clayton Cnty., Ga.,* 140 S. Ct. 1731, 1747 (2020). As the Court has explained, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule"—versus treating "Congress's failure to speak directly to a specific case that falls within a more general statutory rule [as] creat[ing] a tacit exception." *Id.* Section 586(e)(2)'s plain, broad text requires collection of a "fee" from "all payments received" while §1326(a)(2) directs trustees to return "payments"—not any fee. Nothing about the text of §1226(a)(2) or §1194(a)(3) changes this fact.

Many other errors pervade the Tenth Circuit's decision here and Respondent's tedious defense of it. But it is important not to lose sight of the bigger picture that makes certiorari essential in this case: the decision below sets the Bankruptcy Code's user-fee collection provisions at war with the Code's requirement of trustee disinterestedness and the due-process requirement of trustee disinterestedness in

the plan-confirmation context. Pet.29-31, 35. By conditioning trustee funding on plan confirmation, the Tenth Circuit's decision gives standing trustees an improper financial stake in the outcome of cases they are bound to impartially administer.

Respondent offers four ineffective responses:

1. Respondent notes that Congress created the U.S. Trustee Program to "distance trustees' functions from the court's judicial function." BIO.35. But it is equally true that while pursuing this goal, Congress assigned several quasi-judicial functions to trustees, including an express duty to "appear and be heard" on "[plan] confirmation." 11 U.S.C. §1302(b)(2); *see In re Castillo*, 297 F.3d 940, 950-51 (9th Cir. 2002). Respondent's argument also tacitly concedes the Tenth Circuit's decision subverts Congress's design, as this decision makes trustee funding depend on the court's judicial function (plan confirmation).

2. Respondent observes the Court's due-process decisions concerning pecuniary interests "involve[] paying the *decisionmaker*." BIO.20. On this basis, Respondent concludes that since bankruptcy judges decide plan confirmation, due process raises no bar to paying trustees based on plan confirmation. *Id.* This reasoning collapses on two levels. First, trustees are decisionmakers when it comes to plan confirmation: they "must either recommend confirmation or object to confirmation," and courts generally defer to this decision. *In re Escarcega*, 573 B.R. 219, 234 (B.A.P. 9th Cir. 2017). Respondent does not dispute this—or that paying trustees based on confirmation stands to bias trustees in making this pivotal decision.

Second, due process does not countenance the biasing of judicial or quasi-judicial actors even when the ultimate decisionmaker is someone else. Imagine Congress enacts a new law subsidizing the offices of federal magistrates in full by requiring collection of a $1,000 filing fee from plaintiffs in every civil case. The law also states that magistrates may not collect the fee unless a plaintiff wins summary judgment. It is unlikely that the Court would find this law accords with due process insofar as district judges decide summary judgment while magistrates are limited to issuing non-binding recommendations on the point. *See* 28 U.S.C. §636(b)(1). The reason why is simple: "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 135-36 (1955).

3. Respondent argues that Petitioner's analysis means all trustee funding violates due process since this funding comes from debtors' payments, making trustees financially interested in every debtor they oversee. BIO.20. Respondent misperceives what due process forbids, which is a pecuniary interest *in the outcome of a case*—not a pecuniary interest in a fee paid by every litigant regardless of case outcome. A federal court cemented this point a century ago in explaining why court fees are valid while laws giving county auditors a 4% interest in assessments against taxpayers violate due process. *See Meyers v. Shields*, 61 F. 713 (C.C.N.D. Ohio 1894). Court fees are valid because "[t]he magistrate or probate judge has the same fees taxed for his compensation whether one party prevails or the other …." *Id.* at 726-27. By contrast, under the Tenth Circuit's decision here, trustees receive user fees only if the debtor wins plan confirmation. Due process prohibits this.

4. Respondent observes that the constitutional-avoidance doctrine does not apply when statutory text is clear. BIO.21. Such analysis presumes that Petitioner's due-process-compliant interpretation of the relevant text is not plausible—a view refuted by all the courts that agree with Petitioner's reading. Pet.27. Constitutional avoidance thus remains a key consideration here, justifying certiorari because the Tenth Circuit's interpretation of the relevant text raises a "multitude of constitutional problems." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

C. At a minimum, the Court should call for the views of the Solicitor General and hold the petition until the Second Circuit issues its forthcoming decision in *Soussis*.

"[A] standing Chapter 13 trustee's [user] fees and expenses … come within the jurisdiction of the … Attorney General." *In re Savage*, 67 B.R. 700, 705 (D.R.I. 1986). The AG fixes each trustee's user fee by (*inter alia*) "project[ing] the amount of funds" that a trustee will handle "during the upcoming year." *Id.* at 706. The Tenth Circuit's decision complicates the AG's ability to execute this duty, requiring the AG to guess how many of a trustee's cases will end in pre-confirmation dismissals that prohibit fee collection. Under these circumstances, the Court should ask the Solicitor General to file a brief in this case.

Also, to the extent a formal circuit split matters here, the Court should hold this petition until the Second Circuit issues its forthcoming decision in *In re Soussis*, No. 22-155 (2d Cir.). *Soussis* concerns the same question presented by this petition and was

argued nearly a year ago (on February 15, 2023). The Second Circuit is bound to rule any day now and may well create a circuit split in doing so. *Cf.* Gov't Cert. Reply 11-12, *Hammons,* No. 22-1238 (U.S. filed Aug. 9, 2023) (advising same "hold this petition" course under similar procedural circumstances).

CONCLUSION

The Court should grant Goodman's petition.

Respectfully submitted,

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