No. 23-560

In The

Supreme Court of the United States

KATHLEEN A. MCCALLISTER, CHAPTER 13 TRUSTEE,

Petitioner,

v.

ROGER A. EVANS & LORI A. STEEDMAN,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter 13 Trustees (NACTT) is a nonprofit organization of Chapter 13 bankruptcy trustees and practitioners.[1] The NACTT's member trustees have extensive statutory duties in the administration of Chapter 13 cases. *See* 11 U.S.C. § 1302. The trustees play a vital role in the Chapter 13 process, evaluating proposed plans, receiving payments from debtors, and making distributions in accordance with confirmed plans.

The statutory percentage fee at issue in this case is central to the work done by the NACTT's member trustees, and the allocation of the cost of that fee affects the fairness and viability of the Chapter 13 system. The trustees have a unique and important stake in the outcome of this issue, and they can provide a valuable perspective on the system, its financing, and its structure.

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[1] The NACTT states that counsel of record received timely notice of the intent to file this brief. No counsel for a party authored this brief in whole or in part and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

SUMMARY OF THE ARGUMENT

The holding below—that a standing Chapter 13 trustee must refund the trustee's statutory percentage fee in cases that do not achieve plan confirmation—presents serious concerns about due process, fairness in the allocation of the costs of Chapter 13 system, and the viability of the standing trustee system.

Standing Chapter 13 trustees play a vital role in the Chapter 13 system, and one of their principal responsibilities is to provide impartial recommendations regarding confirmation (court approval) of the plans proposed by Chapter 13 debtors. Congress has established a neutral system for funding standing trusteeships: a percentage fee on all plan payments received by the trustees. The holding below corrupts that system.

By conditioning the trustees' entitlement to certain fees on plan confirmation, it gives them a stake in the issue on which they are supposed to provide unbiased input. Because trustees serve a quasi-judicial role in this system, this unnecessary conflict of interest violates fundamental principles of constitutional due process.

The holding would also shift costs for the standing trustee system in ways that Congress surely did not intend. The ruling would exempt certain debtors from the obligation to pay the fees for their cases. But, inexplicably, this exemption would only apply to debtors who have failed to satisfy the requirements of plan confirmation. The holding would

not allocate the costs of these cases in any rational way. Some costs would shift to standing trustees, but only those who already face funding challenges due to the statutory maximum rate for the percentage fee. Some costs would shift to other debtors, but only those who have satisfied the requirement of plan confirmation—those who are most likely to be making a sincere effort under Chapter 13. And the costs would also fall to the creditors of these debtors by diminishing the limited pool of resources from which they might be paid. The Ninth Circuit's opinion does not offer any theory for why Congress would have intended to provide for an indirect transfer from these parties to the debtors who have failed to achieve plan confirmation.

The applicable statutes do not demand these results. Section 586(e)(2) of title 28 instructs standing trustees to collect a percentage fee "from *all* payments received . . . under plans." 28 U.S.C. § 586(e)(2) (emphasis added). The Ninth Circuit interpreted this language to provide for a fee only on payments under *confirmed* plans, but this interpretation suffers from serious flaws.

The most obvious problem is that it would require adding a word to the text. The statute establishes a percentage fee on all payments "under plans," yet the Ninth Circuit read it as if it provided for a fee only on payments under confirmed plans, adding a critical modifier to the text. The Ninth Circuit's interpretation also conflicts directly with the Bankruptcy Code. Section 1226(a), like § 1326(a)(2), provides for trustees to hold initial payments pending a decision on confirmation. And it provides that, if a

court does not confirm a plan, the trustee must return the payments to the debtor after deducting certain amounts, including the "percentage fee" when a standing trustee serves in the case. This reference to the percentage fee in cases that have not achieved plan confirmation is directly at odds with the Ninth Circuit's holding that § 586(e)(2) provides for such fees only on payments under confirmed plans.

Though the Ninth Circuit did not address this inconsistency, it did find support for its conclusion in the reference to the percentage fee in § 1226(a), noting the contrast with § 1326(a)(2), which does not mention the fee. But 28 U.S.C. § 586(e)(2) provides for the fee on *all* plan payments, and § 1326(a)(2) operates against this backdrop. Section 1326(a)(2) does not address the percentage fees at all, so the most reasonable interpretation is that § 1226(a) is simply more precise.

The novel theory adopted by the Ninth Circuit also presents risks of unintended consequences. It may, for example, affect determinations regarding the acceptable length of Chapter 13 plans. And it may preclude the award of compensation or reimbursement to case trustees—trustees not entitled to a percentage fee—in cases that fail to achieve plan confirmation.

ARGUMENT

Congress authorized the Department of Justice to appoint standing trustees for Chapter 13 cases. 28 U.S.C. § 586(b). These trustees serve a vital role in

the Chapter 13 system as it exists today, and Congress established a neutral mechanism to fund these trusteeships: a percentage fee on "*all* payments received by [the trustees] under plans." 28 U.S.C. § 586(e)(2) (emphasis added). The decision below would inexplicably exclude certain plan payments from this funding system. The relevant statutes do not dictate this inequitable result.

I. Trustees are critical to the Chapter 13 system, and some of their most important duties arise prior to plan confirmation.

A Chapter 13 trustee is a "private individual appointed . . . to perform a public office under the Bankruptcy Code." *In re Brookover*, 352 F.3d 1083, 1089 (6th Cir. 2003). The trustee has a quasi-judicial role, "perform[ing] a wide variety of functions previously performed by bankruptcy judges." *In re Castillo*, 297 F.3d 940, 950-51 (9th Cir. 2002), *as amended* (Sept. 6, 2002). The trustee is the representative of the bankruptcy estate and serves the interests of all creditors. *See In re Andrews*, 49 F.3d 1404, 1407 (9th Cir. 1995). The trustee, however, also has duties to debtors, including the duty to advise and assist debtors in the performance of their plans. 11 U.S.C. § 1302(b)(4).

A primary responsibility of a Chapter 13 trustee is to make post-confirmation distributions to creditors in accordance with the confirmed plan. *See In re Perez*, 339 B.R. 385, 389 (Bankr. S.D. Tex. 2006) (describing the rationale for this system), *aff'd sub nom. Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007).

"But a chapter 13 trustee 'is no mere disbursing agent.'" *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994) (quoting S. Rep. No. 95–989 at 139, *reprinted in* 5 U.S.C.C.A.N. 5787, 5925 (1978)). The trustees have significant oversight responsibilities, reviewing every aspect of the cases they administer.

These responsibilities begin soon after the filing of a petition under Chapter 13. In many cases, in fact, the most intensive period of trustee involvement is prior to confirmation of the plan.

Trustees have numerous case-opening responsibilities that consume resources at the very outset of cases, from verifying that debtors have obtained prepetition briefings on credit counseling, *see* 11 U.S.C. § 109(h), to sending notices relating to domestic support obligations, *see* 11 U.S.C. § 1302(b)(6).

The trustee's responsibilities grow as the case progresses. Soon after the filing of the petition, creditors begin filing proofs of claim, and the trustee must review each claim for potential objections, checking timeliness, validity, and applicable statutes of limitations. *See* 11 U.S.C. § 1302(b)(1) (incorporating § 704(a)(5)). Trustees must also identify potential avoidance actions under 11 U.S.C. §§ 544, 547, or 548.[2] When a debtor is engaged in business, the trustee must investigate the business and file a

[2] In some jurisdictions, confirmation of a plan may preclude a later avoidance action. *See, e.g.*, *Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1196 (11th Cir. 2013).

statement of the investigation with the Court. 11 U.S.C. § 1302(c) (incorporating duties from § 1106(a)).

The trustee's work continues as the case approaches the meeting of creditors. The trustee must evaluate the proposed plan. *See* 11 U.S.C. § 1302(b)(2)(B). This review involves assessing whether the debtor has filed the case and proposed the plan in good faith. 11 U.S.C. § 1325(a)(3), (7). It requires a determination of whether the plan provides to pay each unsecured creditor at least what the creditor would receive in a liquidation under Chapter 7, *see* 11 U.S.C. § 1325(a)(4), a determination that may require a review of public records or even an appraisal of property. The trustee must also ensure that the plan commits the debtor's "projected disposable income" under a complicated statutory formula and volumes of caselaw interpreting it. *See* 11 U.S.C. § 1325(b); *see also, e.g.*, *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Ransom v. FIA Card Services, NA*, 562 U.S. 61 (2011).

The trustee or a representative of the trustee's office generally presides at the meeting of creditors under 11 U.S.C. § 341(a). At the meeting, the trustee or the trustee's representative and any attending creditors examine the debtor regarding the debtor's financial affairs and review the debtor's proposed plan.

All these tasks occur *before* the court considers whether to confirm the debtor's plan.

Bankruptcy courts rely on standing trustees to provide the first layer of oversight. The trustees' role

is especially important at the plan confirmation stage. This Court has stated that bankruptcy courts have an independent duty to determine compliance with the Code before confirming a plan. *See United Student Aid Funds v. Espinosa*, 559 U.S. 260, 277 (2010). But bankruptcy courts have limited capacity to conduct a searching review in every Chapter 13 case. The bankruptcy courts, therefore, rely on trustees to flag any cases that raise questions. *See, e.g.*, *Briggs v. Johns*, 591 B.R. 664, 671-72 (W.D. La. 2018) (discussing the interplay between the duties of the trustee and the courts in the plan-confirmation process).

II. Linking a trustee's percentage fee to plan confirmation corrupts the system.

Congress designed a system to fund standing trusteeships in a neutral and fair way. The holding by the Ninth Circuit would undermine that system. It would give standing trustees a financial interest in a decisions on which they are supposed to provide impartial assessments. And it would shift the costs for the system arbitrarily, exempting certain cases from the fee requirements and forcing the costs of those cases on other vulnerable parties.

Unlike the fee structure for Chapter 7 trustees, which encourages trustees to liquidate property that would generate funds for the estate, the percentage fees for Chapter 13 trustees are not designed to affect the trustees' decision-making. Standing Chapter 13 trusteeships are private offices, but they are not profit-seeking. *See generally* Hon. W. Homer Drake, Jr., et al., *Chapter 13 Practice & Procedure* § 17:5

(June 2023 update). The compensation for most standing trustees is fixed by the Department of Justice, with reference to the salary and benefits of federal employees in comparable positions. And standing trustees receive a percentage fee only to the extent necessary to fund the trustee's compensation plus the "actual, necessary expenses incurred" for the operation of the trustee's office. 28 U.S.C. § 586(e)(1)(B). These operational expenses are not trivial. The Chapter 13 process is complex, and a standing trustee's duties demand dedicated resources and employees with significant expertise.

Standing trustees cannot obtain compensation for services or reimbursement of expenses from specific cases, *see* 11 U.S.C. § 326(b), so the percentage fee is critical to the operation of standing trusteeships. A holding that would tie the trustee's entitlement to the percentage fee in a specific case to the trustee's decisions in that case would thus present a conflict that Congress could not have intended. But that is exactly what the Ninth Circuit's holding would do.

One of a Chapter 13 trustee's principal responsibilities is to provide neutral and unbiased recommendations regarding confirmation of debtors' proposed plans. In performing that duty, the trustee is acting in a quasi-judicial role. *See In re Castillo*, 297 F.3d 940, 950-51 (9th Cir. 2002), *as amended* (Sept. 6, 2002). The trustee cannot act impartially in this role if the trustee's funding is dependent on the outcome of the confirmation decision. As the trustee explained in detail in her petition, the conflict the Ninth

Circuit's holding creates raises serious concerns about constitutional due process.

For some standing trustees, the conflict is immediate. The rate for the percentage fee cannot exceed 10%, *see* 28 U.S.C. § 586(e)(1)(B)(i), so standing trustees who do not handle a sufficient volume of plan payments may be unable to fully fund their trusteeships. These trustees would face the greatest conflict under the Ninth Circuit's holding because they have the most acute need for the funding that would be conditioned on plan confirmation.

But even when the conflict is more muted, the Ninth Circuit's decision would still lead to inequitable results. It would force other parties to carry the cost of administering the cases in which debtors fail to achieve plan confirmation, and it would shift these costs arbitrarily, to other vulnerable parties.

Much of the burden would fall on the debtors who *have* achieved plan confirmation and to the creditors of those debtors. That is because, when a standing trustee's percentage fee is below the rate cap, the rate adjusts to fund the trustee's approved budget. *See In re Perez*, 339 B.R. 385, 415 (Bankr. S.D. Tex. 2006) ("The percentage fee is a fraction: the numerator is the trustee's budget and the denominator is the estimated payments that the trustee will handle."), *aff'd sub nom. Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007). Exempting a subset of cases from the fee requirement, as the Ninth Circuit decision would do, would just increase the amount required from the remaining cases.

Under the Ninth Circuit's holding, the debtors who would pay the fees would be those who have satisfied the requirements of plan confirmation—including good-faith requirements under § 1325(a)(3) and § 1325(a)(7). The Ninth Circuit offers no convincing explanation why Congress would want these debtors to pay the freight for the debtors who have not satisfied these requirements.

The Ninth Circuit's holding would also unjustly shift costs to creditors. In most Chapter 13 cases, debtors do not have adequate funds to fully repay their debts. Unsecured creditors thus generally end up receiving a partial return from a pro rata distribution of available funds. Because the effect of the Ninth Circuit's holding for most trusteeships would be to increase the fees collected in confirmed cases, it would reduce the amount available to pay the unsecured creditors of these debtors. (The cost savings to debtors in cases that fail to achieve plan confirmation would be unlikely to benefit the creditors of these debtors because the funds would be returned to the debtors.)

III. The approach taken by the Court of Appeals suffers from critical flaws.

The Ninth Circuit adopted a novel interpretation of 28 U.S.C. § 586(e)(2) proposed by *amici* for the Debtors. This theory, which no other court has adopted, suffers from critical flaws.

A. The Ninth Circuit's theory fails to follow the plain meaning of the statute.

One obvious problem is that the theory does not follow the plain meaning of the statute.

Section 586(e)(2) instructs a standing trustee to collect a percentage fee from "all payments received by such individual under plans." 28 U.S.C. § 586(e)(2). The Ninth Circuit read this text as if it called for fees only on payments "under *confirmed* plans," adding a critical word to the statutory text. Congress could easily have added that modifier to § 586(e)(2), as it has done in several provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 1224(b)(4) (requiring Chapter 12 trustees to "ensure that the debtor commences making timely payments required by a confirmed plan"); 11 U.S.C. § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

The Ninth Circuit also relied on a distinction between payments under § 1326(a)(1) and payments under plans, holding that payments under § 1326(a)(1) are not payments under the plans and that § 1326(a) alone specifies the disposition of the initial Chapter 13 payments. This interpretation does not provide the neat solution the Ninth Circuit sought.

The Code requires debtors to "commence making payments . . . in the amount . . . proposed by the plan." 11 U.S.C. § 1326(a)(1). The Ninth Circuit apparently concluded that payments in accordance

with this requirement are *solely* payments pursuant to the statutory requirement and are *not* payments under the plan. (If the payments were payments under the plan, the percentage fee under § 586(e)(2) would apply.) Prior to the Ninth Circuit's decision, practitioners did not make this distinction. The way to make a payment under a proposed plan is to pay "the amount . . . proposed by the plan," as § 1326(a)(1) requires. The sensible conclusion is that the initial Chapter 13 payments are made pursuant to § 1326(a)(1) *and* the proposed plan.

The Code supports this interpretation. For example, it conditions a standard Chapter 13 discharge on the "completion . . . of all payments under the plan." 11 U.S.C. § 1328(a). The Ninth Circuit's holding would imply the bizarre result that a debtor's initial payments would not count toward a discharge.

The Ninth Circuit's conclusion that § 1326(a) alone governs the disposition of pre-confirmation payments also ignores the gaps that would be left in the guidance. Section 1326(a) provides for trustees to retain pre-confirmation payments "until confirmation or a denial of confirmation." 11 U.S.C. § 1326(a)(2). But—as in this case—a court may dismiss or convert a Chapter 13 case without either of these events occurring.[3] If Congress had designed § 1326(a) as the sole authority governing pre-confirmation payments, it surely would have provided guidance for these

[3] In the event of pre-confirmation conversion, this Court has also specifically rejected the relevance of § 1326. *Harris v. Viegelahn*, 575 U.S. 510, 520 (2015) (citing 11 U.S.C. § 103(i)).

circumstances. The reasonable conclusion is that § 1326(a) operates against a backdrop of other statutory provisions, including §§ 348 and 349 of the Bankruptcy Code and 28 U.S.C. § 586(e)(2).

The interpretation offered by the *amici* and adopted by the Ninth Circuit also rested on the conclusion that the term "under" in the phrase "payments . . . under plans" in 28 U.S.C. § 586(e)(2) does not apply to unconfirmed plans, citing decisions that have read "under" to mean "subject to" or "under the authority of." *See, e.g.*, *Klaas v. Shovlin (In re Klaas)*, 858 F.3d 820 (3d Cir. 2017). But "under" can also mean "pursuant to." *Cf.* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 737-38 (3d ed. 2011) (recommending that writers use "under" rather than "pursuant to"). And a payment can certainly be made pursuant to a proposed plan.

The interpretation offered by the Trustee adheres to the statutory text. Though the Ninth Circuit suggested that the Trustee's approach would require adding the word "irrevocably" to 28 U.S.C. § 586(e)(2)—making it instruct trustees to *irrevocably* collect the statutory percentage fee—that was not the interpretation the Trustee proposed. The Trustee argued that the statutory mandate to "collect [the] fee" describes a complete transaction. That language does not imply irrevocability, but it does imply finality in the absence of a secondary transaction like a reversal or a refund.

Other federal statutes employ this terminology. For example, the statute on funding for the Patent and Trademark Office provides that "fees . . .

shall be collected by . . . the Director" in one subsection, but it separately authorizes the Director to "refund any fee paid by mistake." 35 U.S.C. § 42(c)(1), (d). This text accords with ordinary language, recognizing that a fee that has been "collected" has been "paid" (not just conditionally deposited with the collector). As the District Court below observed: "when Congress has wanted collection to be conditional or reversible, it has specified." *McCallister v. Evans*, 637 B.R. 144, 149 (D. Idaho 2022).

B. The Ninth Circuit's interpretation of § 586(e)(2) conflicts with the Bankruptcy Code.

The Ninth Circuit's interpretation of § 586(e)(2) also conflicts with § 1226(a) of the Bankruptcy Code.

Section 1226(a), like § 1326(a)(2), instructs trustees, if a plan is not confirmed, to refund to the debtor the money received by the trustee, after deducting certain amounts. Under § 1226(a), these deductions include, "if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee." 11 U.S.C. § 1226(a). The "percentage fee" in this provision refers to the fee under 28 U.S.C. § 586(e), which establishes the percentage fee for standing trustees in cases under both Chapter 12 and Chapter 13.

But the Ninth Circuit concluded that 28 U.S.C. § 586(e)(2) provides for a percentage fee only on payments under confirmed plans. The percentage fee on unconfirmed plans referenced in § 1226(a) would

thus never exist, making that statutory language a nullity.

C. The specific reference to the percentage fee in § 1226(a) does not imply that the fee is inapplicable in Chapter 13.

The Ninth Circuit also noted the contrast between § 1226(a), which includes a specific reference to the percentage fee, and § 1326(a)(2), which does not. *See also In re Doll*, 57 F.4th 1129, 1141-42 (10th Cir. 2023). The Debtors argued that the absence of the instruction to deduct the fee in § 1326(a)(2) implies that the fee is inapplicable there. But a better interpretation is that § 1226(a) is just more explicit.

Section 586(e)(2) provides for standing trustees to collect a percentage fee on all payments received under plans, so the straightforward conclusion is that the fee diminishes the amount held under § 1326(a)(1) (and 1226(a)) immediately upon receipt of plan payments. Section 1226(a) does not contradict this; it merely acknowledges that the amount to be refunded to the debtor will not include the fee collected. The lack of specificity in § 1326(a)(2) does not imply the opposite. In fact, the approach in the analogous situation in Chapter 12 offers guidance for resolving potential ambiguity in Chapter 13.

Again, § 1326(a)(2) operates against a backdrop of other statutory provisions. This approach is evident in § 1326 itself. Subsection (a)(2) instructs trustees to hold payments pending confirmation and, upon confirmation, to "distribute any such payment in accordance with the plan as soon as practicable." 11

U.S.C. § 1326(a)(2). Interpreted the way the Debtors proposed interpreting the adjacent language, this provision would require a distribution without any deduction for the percentage fee (absent a plan provision for it). But, like the rest of the subsection, this language takes the percentage fee as a given. Subsection (b) confirms that by expressly referring to the fees on payments distributed to creditors. 11 U.S.C. § 1326(b).

D. The Ninth Circuit failed to consider the secondary effects of its holding.

The Ninth Circuit's endorsement of the idea that the phrase "under plans" is a term of art that refers only to confirmed plans may have unintended secondary effects. Congress, of course, would have to take exceptional care in revising bankruptcy laws in the future to adhere to this specialized (and far from obvious) meaning. And the holding may inadvertently settle issues under existing law that have split lower courts.

It might, for example, affect Chapter 13 plan-length requirements. Numerous courts have concluded that § 1325(b) establishes a minimum plan length. *See, e.g., In re Flores*, 735 F.3d 855, 856 (9th Cir. 2013). And the Code specifies that the "applicable commitment period" is measured "beginning on the date that the first payment is due *under the plan*." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). Courts disagree on the meaning of this provision, with some interpreting it as a reference to the first payment under § 1326(a)(1) and others concluding that the period starts with the first payment due after plan

confirmation. *See In re Humes*, 579 B.R. 557, 559-60 (Bankr. D. Colo. 2018) (describing the split of authority before concluding that the period begins on the § 1326(a)(1) due date). The Ninth Circuit's holding in this case would seem to answer that question without considering it.

The Ninth Circuit's decision might also affect determinations regarding maximum plan length. The Code prohibits a plan modification that would provide for payments to extend more than five years "after the time that the first payment under the original confirmed plan was due." 11 U.S.C. § 1329(c). Though this text refers to a confirmed plan, most courts conclude that the five-year plan-length limit begins with the first payment due under § 1326(a)(1) rather than the first payment due after plan confirmation. *See In re Profit*, 283 B.R. 567, 575 (B.A.P. 9th Cir. 2002). *See generally* Hon. W. Homer Drake, Jr., et al., *Chapter 13 Practice & Procedure* § 4.9 (June 2023 update). The Ninth Circuit's conclusion that pre-confirmation payments are not "under" the plan, however, suggests a different result.

The timing around the maximum plan length is particularly consequential because of recent cases holding that debtors cannot make plan payments at all after the five-year deadline. *See, e.g.*, *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021), *cert. denied sub nom. Kinney v. HSBC Bank USA, N.A.*, 143 S. Ct. 302 (2022).[4]

[4] Note that the *Kinney* court did not decide when the five-year period starts. *Kinney*, 5 F.4th at 1139 n.2.

The Ninth Circuit's decision might also inadvertently preclude compensation or reimbursement for case trustees in Chapter 13 cases that fail to achieve plan confirmation. In the current Chapter 13 system, standing trustees administer most cases, but case trustees are occasionally appointed (when a personal conflict prevents a standing trustee from serving, for example). Serving as a case trustee does not entitle the individual to a percentage fee; case trustees apply for fees based on the services performed and expenses incurred in the specific case. See 11 U.S.C. §§ 326(b), 330(a). But § 326(b) sets a limit on the allowable compensation and reimbursement for a case trustee of "five percent upon all payments under the plan." 11 U.S.C. § 326(b). The Ninth Circuit's holding that the phrase "under the plan" means "under the confirmed plan" would set this limit at zero in the absence of a confirmed plan. The Ninth Circuit did not consider this ramification of its holding, and it seems unlikely Congress intended it.

CONCLUSION

For the foregoing reasons, the NACTT urges the Court to grant the Trustee's petition for a writ of certiorari.

Respectfully submitted,

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Dated: December 27, 2023