No. _____

In The
Supreme Court of the United States

FARM CREDIT SERVICES OF AMERICA, FLCA,

Petitioner,

v.

WILLIAM HOWARD TOPP, ALSO KNOWN AS BILL TOPP, DOING BUSINESS AS BILL TOPP FARM, DOING BUSINESS AS WILLIAM TOPP FARM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

One of the requirements to be met in a plan of reorganization proposed under Chapter 12 of Title 11 is that a secured creditor be paid the "present value" of its claim as of the date the bankruptcy petition was filed. 11 U.S.C. § 1225(a)(5)(B)(ii). As in cases under Chapters 11 and 13, when payments under a Chapter 12 plan to a secured creditor occur over time, an appropriate interest rate should be applied to the principal amount to arrive at the required "present value" of the claim. *See Till v. SCS Credit Corp*., 541 U.S. 465, 473–74 (2004). In *Till*, a Chapter 13 case, a plurality of this Court adopted a method to arrive at the appropriate interest on secured claims based on the state of the financial markets, circumstances of the bankruptcy estate, and the characteristic of the subject loan. 541 U.S. at 477. "Taking its cue from normal lending practices," the Court adopted the "formula approach," directing a bankruptcy court to determine first the widely-reported national prime rate at the time and, based on the circumstances, then adjust that rate based on risk, normally an enhancement between 1% to 3%. *Id*. at 480–81.

The Question Presented is whether the formula approach method set forth in *Till* should also apply in Chapter 12 bankruptcy cases.

Since *Till*, reported bankruptcy court decisions in *Chapter 12 cases*, including the Bankruptcy Appellate Panel [BAP] for the Tenth Circuit, reflect near unanimity—except for the decision at bar—in applying the

QUESTION PRESENTED—Continued

Till-formula approach to arrive at the appropriate interest rate on secured claims paid over time. *See Hall v. U.S.*, 566 U.S. 506, 516 (2012) (quoting 8 Collier ¶ 1200.01[5], at 1200–10) ("[C]hapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases.").

In the case at bar, neither Petitioner nor Respondent dispute the 2% risk enhancement applied by the Bankruptcy Court to Petitioner's secured claim. Rather, Petitioner appeals the affirmance, by the Eighth Circuit, of the Bankruptcy Court's decision to discount evidence presented at hearing of normal lending practices in the agricultural loan market and, instead, adopt the twenty-year Treasury bond rate of 1.87%, rather than the national prime rate of 3.25%, as espoused by this Court in *Till*, to arrive at the interest rate on Petitioner's Chapter 12 loan under the Respondent's Plan.

With this Petition for Certiorari, the Petitioner requests and urges this Court to review the Court of Appeals decision below in order to bring uniformity and predictability to parties and bankruptcy courts engaged in developing plans of reorganization under Chapter 12 of the United States Bankruptcy Code across the country. While perhaps, technically, a Circuit split has not arisen by virtue of the above-referenced Tenth Circuit BAP decision, the Eighth Circuit's departure from bankruptcy practice established by courts across the country for close to twenty years of

QUESTION PRESENTED—Continued

applying *Till* in Chapter 12 cases, works to undermine the justified reliance that parties in Chapter 12 cases have had about at least the basic, agreed starting point required to establish interest rates on secured claims in Chapter 12 cases. A decision by this Court to adopt, explicitly, the formula approach interest rate method in Chapter 12 cases would bring certainty to Chapter 12 cases, thereby serving the purpose of Chapter 12, which is to provide a streamlined and cost-effective path for farmers to reorganize without unnecessary and labor-intensive contested hearings on interest rates.

CORPORATE DISCLOSURE STATEMENT

Farm Credit Services of America, FLCA, is a federally chartered entity formed pursuant to the Farm Credit Act of 1971, and operates as a federal land credit association.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Bankruptcy Court for the Southern District of Iowa, the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

- *Farm Credit Services of America, FLCA v. Topp*, No. 20-01191-als12 (Bankr. Court, S.D. Iowa), order issued Sept. 16, 2021;
- *Farm Credit Services of America, FLCA v. Topp*, No. 4:21-cv-00293 (S.D. Iowa), order issued July 19, 2022;
- *Farm Credit Services of America, FLCA v. Topp*, No. 22-2577 (8th Cir.), order issued Aug. 2, 2023;
- *Farm Credit Services of America, FLCA v. Topp*, No. 22-2577 (8th Cir.), order issued Sept. 20, 2023) (denying petition for rehearing en banc).

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Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This Petition involves the dismissal of Farm Credit's appeal by the United States Court of Appeals for the Eighth Circuit, Case Number 22-2577, available at *In re Topp*, 75 F.4th 959 (8th Cir. 2023).

Farm Credit's appeal was from an opinion of the United States District Court for the Southern District of Iowa, which affirmed the United States Bankruptcy Court for the Southern District of Iowa. The District Court's opinion is available at *Farm Credit Services of Am., FLCA v. Topp*, No. 421CV00293RGEHCA, 2022 WL 2981590 (S.D. Iowa July 19, 2022).

The underlying order of the United States Bankruptcy Court for the Southern District of Iowa is available at *In re Topp*, No. 20-01191-ALS12, 2021 WL 4237321 (Bankr. S.D. Iowa Sept. 16, 2021).

Each of the foregoing opinions and orders have been reproduced in the appendix to this petition.

JURISDICTION

This case commenced with the filing of a petition for relief by the Respondent under Chapter 12 of Title 11 of the United States Code on June 12, 2020, in the United States Bankruptcy Court for the Southern District of Iowa. The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. section 157. Farm Credit is a creditor in the bankruptcy case, having filed its proof of claim on July 14, 2020, in the amount of $595,538.53, secured by perfected first-priority liens in certain real estate. The treatment of Farm Credit's claim in the bankruptcy case, confirmation of the Respondent's plan, and proceedings adjusting the Respondent-creditor relationship are all core proceedings under Title 11 over which the Bankruptcy Court had jurisdiction. *See* 28 U.S.C. § 157(b)(2)(B), (b)(2)(L), (b)(2)(O).

The United States District Court for the Southern District of Iowa had jurisdiction under 28 U.S.C. § 158 to hear Farm Credit's appeal of the Bankruptcy Court's September 16, 2021 order. The United States Court of Appeals for the Eighth Circuit had jurisdiction to hear Farm Credit's appeal of the District Court's July 19, 2022 Order pursuant to 28 U.S.C. § 158(d)(1).

The Eighth Circuit entered judgment on August 2, 2023. That court denied Petitioner's timely filed petition for en banc rehearing on September 20, 2023. This petition is timely filed within ninety days from September 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Title 11 of the United States Code, generally.

In particular,

11 U.S.C. § 1222(b)(9):

The plan may . . . provide for payment of allowed secured claims consistent with section 1225(a)(5) of this title, over a period exceeding the period permitted under section 1222(c); and,

11 U.S.C. § 1225(a)(5):

Except as provided in subsection (b), the court shall confirm a plan if . . .

(5) with respect to each allowed secured claim provided for by the plan—

> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the Respondent under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the Respondent surrenders the property securing such claim to such holder;

STATEMENT OF THE CASE

A. Procedural Background

The Respondent is a farmer in Monroe County, Iowa, where he raises crops and livestock. Petitioner, Farm Credit Services of America, FLCA ("Farm Credit"), provided financing for the Respondent's farm operation. In 2017, the Respondent experienced an adverse state court judgment arising from a supplier dispute and, on June 12, 2020, facing the consequences of execution on the 2017 judgment, the Respondent decided to file for relief under Title 11 of the United States Code, Chapter 12.

On July 14, 2020, in the bankruptcy case, Farm Credit filed a claim in the amount of $595,538.53, secured by perfected first priority liens in certain real estate. On March 1, 2021, the Respondent filed his initial proposed Chapter 12 Plan of Reorganization. There, the Respondent proposed to pay Farm Credit the value of its secured claim through a restructured loan to be amortized over 20 years at 3% interest, with an annual payment date of December 20. On March 18, 2021, Farm Credit filed an Objection to the Plan, which, among other things, included an objection to the proposed interest rate of only 3% on Farm Credit's restructured loan, instead of an interest rate of 2% above the prime rate of 3.25%, per *Till*, resulting in a total rate requested by Farm Credit of 5.25%. The Respondent's interest rate calculation started with the twenty-year Treasury bond rate of 2.11% (on date of proposed plan) with a slight a risk adjustment (rounding to 3%),

based on a pre-*Till* formula often used in the Eighth Circuit Chapter 12 cases derived from a 30-year old case, *U.S. v. Doud*, 869 F.2d 1144 (8th Cir. 1989). On June 18, 2021, the Respondent filed his proposed, modified Chapter 12 Plan of Reorganization. There, the Respondent still maintained the original, proposed interest rate of 3% was sufficient.

On June 22, 2021, the Bankruptcy Court held a plan confirmation hearing to address objections to the Plan, including Farm Credit's objection to the proposed interest rate. Subsequently, by its Sept. 16 Order, the Bankruptcy Court overruled Farm Credit's objection, confirmed the plan, and ordered an interest rate of 4% on the twenty-year Farm Credit loan, adding a 2% percent risk adjustment on the then 1.87% twenty-year Treasury bond rate, and rounding to 4%. Neither party appeals from the bankruptcy court's application of an additional 2% risk factor enhancement.

B. Plan Hearing Evidence

At the June 21 evidentiary plan hearing, Robert Ellingson, Account Resolution Officer for Farm Credit, employed by the company for forty-three years, testified that his duties included dealing with stressed credit and calculating the interest rate Farm Credit should apply to restructured loans. Over the course of his employment, he had worked for Farm Credit in towns and cities across Iowa. Mr. Ellingson explained that the Respondent had five pre-petition loans with Farm Credit, with terms ranging from three, six, or

twelve years to maturity. The twenty-year restructured loan under the bankruptcy plan required Farm Credit to obtain the required funding for the new, restructured loan. Mr. Ellingson testified that Farm Credit, in order to effectuate and fund the plan loan, would be required to borrow money at the prime rate, which as of the day of hearing was 3.25%. Mr. Ellingson testified that Farm Credit could not borrow money at the then Treasury bond rate of 2.1 or 2.14%. Mr. Ellingson further testified that the Respondent, under the consolidation of the pre-petition loans into, effectively, one loan, to pay Farm Credit's claim over time, at Farm Credit's proposed 5.25% interest, the Respondent would still be saving $20,000.00 in principal and interest over the course of the twenty-year repayment period, compared to payments under the existing, separate contracts. At hearing, the Respondent did not offer any evidence to contradict Farm Credit's presentation of the nature of the local, agricultural loan market relevant to the circumstances of the parties. Mr. Ellingson further opined about the cost of the twenty-year loan to Farm Credit under current market conditions, the inverse nature of interest the longer the loan term, and that, in fact the loan built on the prime rate would actually be the same in or outside of bankruptcy for the Respondent.

C. The Legal Dispute

Before *Till*, bankruptcy courts in the Eighth Circuit largely relied on the 1989 case, *U.S. v. Doud*, 869 F.2d 1144, when faced with developing the appropriate

interest rate for the treatment of secured claims in Chapter 12 cases. In *Doud*, a Chapter 12 case, the Eighth Circuit explained that courts should apply the same general analysis in both Chapter 12 and Chapter 11 cases (anticipating this Court's plurality approach in *Till*) to arrive at an appropriate rate:

> The appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration for the quality of the security and the risk of subsequent default.

Doud, 869 F.2d at 1146 (quoting *In re Monnier Bros.*, 755 F.2d 1336, 1339 (8th Cir. 1985)). This first involves finding a suitable "riskless" base rate, then adding, if necessary, any increase to that rate based on risk factors in a particular case. In post-*Till* cases, bankruptcy courts in the Eighth Circuit viewed the application of the interest-rate-method in *Till* as entirely consistent with *Doud*. *See*, *e.g.*, *In re Torelli*, 338 B.R. 390, 396 (Bankr. E.D. Ark. 2006) (beginning with the prime rate under *Till* in a Chapter 12 bankruptcy, but citing *Doud* for the formula: the "appropriate rate should consist of a risk-free rate plus additional interest to compensate a creditor for risks posed by the plan").

The legal dispute arose in this case when the Respondent urged the bankruptcy court not only to adopt the method for arriving at an interest rate reflected in

Doud, but also argued that *Doud* required the bankruptcy court to use the same base, riskless rate the *Doud* court used *in 1989*, which was the Treasury bond rate for the same length of the period of the proposed loan term under the plan. *Doud*, 869 F.2d at 1145–46. Farm Credit disagreed and urged the Bankruptcy Court to consider this Court's analysis in *Till*, which determined that the appropriate riskless rate was the national prime rate, because it reflects the current "financial market's estimate of the amount commercial bank would charge a creditworthy commercial borrower." 541 U.S. at 478–79.

What Farm Credit appeals from is the Eighth Circuit's affirmance of the Bankruptcy Court's decision to begin its interest rate construction with the yield on a twenty-year Treasury bond rather than the national prime rate. The Bankruptcy Court was correct that *Doud* has not been formally abrogated or set aside, but the Bankruptcy Court's reading that *Doud* would allow a base rate predicated on the Treasury bond rate read *Doud* too narrowly. In Chapter 12 cases since 2004, when *Till* was decided, in and outside of this Circuit, bankruptcy courts have started with the prime interest rate. *Doud* and *Till* are not incompatible. Indeed, as the bankruptcy cases cited below from the Eighth Circuit indicate, the application of the prime interest rate (reflecting the market for agriculture loans and modern commercial lending practices) in Chapter 12 bankruptcy matters under *Till* is consistent and harmonious with the holding and analysis in *Doud*. But now, the prime national rate is the "riskless rate"

where a commercial lender starts in developing an interest rate for borrowers.

In an earlier ruling under Chapter 11, *In re Riverbend Leasing, LLC*, the same Bankruptcy Court here analyzed the appropriateness of applying the national prime rate in *Chapter 11* cases. 458 B.R. 520 (Bankr. S.D. Iowa 2011). There, the Bankruptcy Court determined *Till* as the best approach to arriving at a fair and reasonable interest rate in Chapter 11 cases:

> [U]nlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the resulting "prime plus" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor's circumstances or its prior interactions with the Respondent. For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.

Id. at 535 (quoting *Till*, 541 U.S. at 479–80). The Bankruptcy Court then concluded: "*This analysis would appear to be equally applicable to cases arising under Chapters 11, 12 or 13*." *Id*. (emphasis added). The Court added "the formula approach as enunciated in *Till*" is "consistent with the precedent in this Circuit." *Id*. at 538 (specifically mentioning the consistency with *Doud* in footnote 19). The Bankruptcy Court's decision in

Riverbend Leasing followed national trends since *Till* was decided. *See* Jeremy R. Fischer, *Protecting Present Value Do Extended Plan Payments Require Periodic Adjustments to the Till Cramdown Interest Rate?*, 36 Am. Bankr. Inst. J. 16, 17 (July 2017) ("Since the *Till* ruling, bankruptcy courts have debated the applicability of the formula approach outside the chapter 13 context, but have often used the approach based on the Court's statement, 'We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate' under §§ *1129*(a)(7)(A)(ii), (a)(7)(B), (a)(9)(B)(i), (a)(9)(C), (b)(2)(A)(i)(II), (b)(2)(B)(i) and (b)(2)(C)(i); 1173(a)(2); *1225*(a)(4) and (a)(5)(B)(ii); 1228(b)(2); and *1325*(a)(5)." (citing and quoting *Till*, 541 U.S. at 474) (emphasis added); *see also* Hon. Homer Drake, Jr. and Karen D. Visser, *The Chapter 12 repayment plan—Generally*, *Bankr. Prac. for Gen. Prac.* § 14:9 (Thomson Reuters 2022) ("The provisions of Chapter 12 dealing with the repayment plan are modeled closely after, and are substantially similar to, the corresponding provisions of Chapter 13.").

Since 2004, with the exception of *In re Fuelling*, 601 B.R. 665 (Bankr. N.D. Iowa 2019) (an inapposite case cited by Respondent) bankruptcy courts sitting in the Eighth Circuit have consistently applied the *Till* analysis to set the appropriate interest rate in Chapter 12 cases. *See Torelli*, 338 B.R. at 396. *Torelli* appears to have been the first bankruptcy court sitting in the Eighth Circuit (so, very familiar with *Doud*) to address *Till* in the context of Chapter 12. There, the court set

out and applied the *Till* analysis to the proposed loan terms:

> the method adopted by the Supreme Court in *Till* was the "formula" or "prime-plus" approach that begins with the national prime rate reported daily in the press. *Id.* at 1961. The Court observed that "[b]ecause bankrupt Respondents typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly." *Id.* In adjusting the prime rate, courts should consider such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. *Id. See also In re Doud*, 869 F.2d 1144, 1146 (8th Cir.1989) (*stating that appropriate rate should consist of a risk-free rate plus additional interest to compensate a creditor for risks posed by the plan*) (citing *In re Monnier Bros.*, 755 F.2d 1336, 1339–40 (8th Cir. 1985)).

Torelli, 338 B.R. at 396 (emphasis added). Neither party in *Torelli* argued for the *Doud* rate calculation. *Id*., at 396 n.1. The U.S. Bankruptcy Court for the District of Nebraska has also consistently applied *Till* in Chapter 12 cases. *See In re Elkhorn Crossing*, No. BK16-80782, 2016 WL 6875893, at *2 (Bankr. D. Neb., Nov. 21, 2016); *In re Whitten*, 2012 WL 4839119, at *3 (Bankr. D. Neb., Oct. 10, 2012) ("While the creditor in the present case is not excited about the current global financial situation and the resulting low prime rate, the formula interest rate as proposed by Respondents

is appropriate under *Till")*; *In re Schreiner*, 2009 WL 924418, at *2 (Bankr. D. Neb., Mar. 30, 2009).

Outside the Eighth Circuit, courts around the country have consistently applied *Till* in Chapter 12 cases. *See*, *e.g.*, *In re Woods*, 465 B.R. 196, 207–08 (B.A.P. 10th Cir. 2012*), vacated other grounds*, 743 F.3d 689 (10th Cir. 2014); *In re Prescott*, No. 11–10789, 2011 WL 7268057, at *2 (Bankr. S.D. Ga. Dec, 21, 2011) (finding *Till* appropriate in Chap. 12 cases); *In re Hudson*, No. 208–09480, 2011 WL 1004630, at *6 (Bankr. M.D. Tenn. Mar. 16, 2011) (applying *Till* in a chapter 12 case). Some of those cases have been aware of and cited to *Doud*, but applied the national prime rate under *Till*. *In re Johnson*, 581 B.R. 289, 298 (W.D. Wis. Bankr. 2018); *In re Standley*, No. 11–62373–12, 2013 WL 1191261, at *5 (Bankr. D. Mont. Mar. 22, 2013); *In re Tamcke*, No. 09–60833–12, 2010 WL 231751, at *9 (Bankr. D. Mont. Jan. 14, 2010); *In re Wilson*, 378 B.R. 862, 885–86 (Bankr. D. Mont. 2007). In a November 22, 2021 decision, the Bankruptcy Court for the District of Colorado joined the consensus treatment of *Till* in Chapter 12 cases, writing:

> The Debtor contends that "altering the interest rate of a loan is common practice in bankruptcy reorganizations, and the eighteen perfect default interest rate is punitive and should be reasonably reduced." But what is the standard? The Supreme Court answered the critical question of how to select an appropriate interest rate for cram down in *Till v. SCS Credit Corp.*, 541 U.S. 465, 476, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), a case relied

> upon by the Debtor. Although *Till* emanated from a Chapter 13 proceeding, the Supreme Court suggested that the same analysis also should be used in Chapter 12. *Id*. at 474, 124 S. Ct. 1951 (listing series of similar bankruptcy provisions, including Section 1225(a)(5)(B)(ii), and observing that "Congress intended bankruptcy judges . . . to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions.")

In re NRS Props., LLC, 2021 WL 5628646, 2021 WL 5628646, at *21–22 (Bankr. D. Colo. Nov. 22, 2021) (citing *In re Woods*, 465 B.R. 196 (10th Cir. BAP 2012), *vacated other grounds*, 743 F.3d 689 (10th Cir. 2014), *In re Torelli*, 338 B.R. 390 (Bankr. E.D. Ark. 2006), and *In re Graves Farms*, No. 18-10893, 2019 WL 1422891 (Bankr. D. Kan. Mar. 28, 2019).

In the only Chapter 12 decision the Bankruptcy Court cited in its Sept. 16 Order, *In re Key Farms, Inc*., No. 19-02949-WLH12, 2020 WL 3445425 (Bankr. E.D. Wash. June 23, 2020), that bankruptcy court *also began* its interest rate analysis with the prime rate under *Till*. There, the court had no qualms about applying the interest rate procedure and reasoning in *Till*, a Chapter 13 case, to a Chapter 12 case, explaining: "[T]he relevant statutory language in chapter 12 essentially tracks the chapter 13 language, chapter 12 is a hybrid form of bankruptcy relief that has more structural features in common with chapter 13 than with chapter 11. . . ." *Id*. at *4; *see also* Alexandra Power Everhart Sickler, *Betting on the Farm: Feasible*

Chapter 12 Plans, 95 Am. Bankr. L.J. 279, 305 (2021) ("Most bankruptcy courts apply the *Till* interest rate [in Chapter 12], applying its prime-plus formula approach. Relevant to repayment terms, several cases suggest courts should consider the term of the original note and customary repayment methods in deciding whether the proposed payment term is reasonable.").

The only bankruptcy court analysis in this Circuit that relied on a Treasury bond base rate since 2004 is found in the case *In re Fuelling*, 601 B.R. 665 (Bankr. N.D. Iowa 2019). There, however, the parties appeared to stipulate to an interest rate acceptable to them, and neither raised the question of whether the prime rate was a viable option; the Court did not address or analyze the base-rate question.

Under *Till* and *Doud*, the descriptions of the approach taken to arrive at an appropriate interest rate by a bankruptcy court are strikingly similar. Under *Doud*, "Eighth Circuit law provides that the 'most appropriate interest rate is the *current market rate for similar loans made in the region at the time*.'" *In re Michels*, 301 B.R. 9, 16 (Bankr. N.D. Iowa 2003), *aff'd*, 305 B.R. 868 (B.A.P. 8th Cir. 2004) (quoting *In re Szudera*, 269 B.R. 837, 843 (Bankr. D.N.D. 2001) (emphasis added)). In *Till*, the Supreme Court explained:

> Taking its cue from *ordinary lending practices*, the approach begins by looking to the national prime rate, reported daily in the press, *which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial*

> *borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default*.

Id. at 478–79 (emphasis added). Further, a bankruptcy court, in crafting an interest rate, may consider the length of the original notice and the creditor's customary repayment periods for similar loans. *In re Elkhorn Crossing*, 2016 WL 6875893 at *2 (applying *Till* in Chapter 12 and citing *In re Torelli*, 338 B.R. at 397).

Despite the evidence presented by Farm Credit, the Bankruptcy Court appeared in its ruling to go out of its way to justify an interest rate based on the Treasury bond yield. The Court compared the Treasury bond rate, citing *Black's Law Dictionary*, with the prime rate—contrasting the two for the purposes of this analysis. Sept. 16 Order at 3 (Add. FC App. 105) (citing *In re Sparks*, 346 B.R. 767, 772 (Bankr. S.D. Ohio 2006) (a chapter 13 case applying prime rate under *Till* in a consumer case)). The language quoted by the Bankruptcy Court in *Sparks* was used to support that the idea that prime rate is only used "to price short-term business loans," while the Treasury bond is for longer term loans. The quoted portion in *Sparks* is without attribution to its source. *Sparks* at 346 B.R. at 772. Certainly, *Sparks* does not stand for the principle that the prime rate is only used for short terms business loans, as shown by the cases cited herein that apply the prime rate to commercial loans from fifteen to thirty years in Chapter 11 and 12 cases. In fact, the discussion in *Sparks* involved the proper place to find the

national prime rate. As Mr. Ellingson explained, for understanding the purposes of the cost of funds to a lender and what the financial market relies upon to set rates, the comparison to the Treasury bond yield and prime rate is not apt.

The Bankruptcy Court did not consider the evidence before it regarding the "current market rate for similar loans made in the region at the time," *In re Michels*, 301 B.R. at 16, much less heed the instruction given in *Till* to take its cue from "ordinary lending practices," which now "begins by looking to the national prime rate." *Till*, 541 U.S. at 478–79. The Bankruptcy Court, without testimonial or evidentiary support, as discussed above, stated the prime rate is only for short-term business loans. That is simply not the case. The prime rate under *Till* is used in Chapter 11 and in Chapter 12 cases across the country involve long-term commercial loans. For instance, the contract term approved by the same Bankruptcy Court in *Riverbend Leasing*, cited above, was for fifteen years. 458 B.R. at. 525; *see also*, *e.g.*, *In re Torelli*, 338 B.R. at 397 (overruling proposed 20-year term in Chapter 12 for reasons unrelated to base prime rate); *In re Elkhorn Crossing*, 2016 WL 6875893, at *3 (fifteen-year loan in Chapter 1); *In re Whitten*, 2012 WL 4839119, at *4 (overruling proposed 25-year term in Chapter 12 for reasons unrelated to base prime rate); *In re Prescott*, WL 7268057, at *3 (applying interest rate built on *Till*-derived prime rate for twenty-five years and explaining doing so is consistent with cases approving

thirty-year loans, citing *Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 357 (11th Cir. 1989); *In re O'Farrell*, 74 B.R. 421, 423 (Bankr. N.D. Fla. 1987)).

The Bankruptcy Court erred by ignoring the evidence before it of the financial and commercial business world that the Respondent and Farm Credit inhabit, resulting in an interest rate on Farm Credit's loan repayment that is actually lower than the existing pre-petition contract rate of the Respondent's loans of 4.85%, and much less than a rate that reflects the heighted risk of non–payment by a commercial borrower in bankruptcy, as recognized in both *Doud* and *Till*. As Mr. Ellingson testified, the result of the Bankruptcy Court's decision punished Farm Credit by forcing it to fund the restructured loan at 3.25%, thereby only leaving an enhancement of .75% for any risk associated with the loan, rather than the 2% percent provided for even under *Doud*. The Bankruptcy Court gave no consideration to the length of the original notes and Farm Credit's customary repayment periods for similar loans.

Farm Credit submits that the Bankruptcy Court's holding on the outdated interest rate model based on the Treasury bond yield in the 1980s, is exactly contrary, in fact, to the *Doud*'s market rate holding predicated on real world factors. A view into the financial world in existence in the 1980s can be found in the case the *Doud* bankruptcy court relied upon, *In re Fisher*, 29 B.R. 542 (Bankr. D. Kan. 1983). Like *Till*, *Fisher* was a Chapter 13 case, adopted for use in a Chapter 12 case. Accordingly, any argument by Appellee that *Till*

is inapposite for Chapter 12 cases because it is a Chapter 13 case does not hold water. *See In re Key Farms, Inc.*, 2020 WL 3445425, at *4 ("[T]he relevant statutory language in chapter 12 essentially tracks the chapter 13 language, chapter 12 is a hybrid form of bankruptcy relief that has more structural features in common with chapter 13 than with chapter 11. . . .").

More importantly, for this case, the discussion found in *Fisher* reveals a world (and commercial-loan market)—now almost forty years ago—vastly different than our own, a world with soaring interest rates to fend off rampant inflation. Then, some bankruptcy courts were applying pre-petition contract terms to set discount rates for plan payment terms as high as 25.98%, 14.34%, a range from 12.6% to 17.91%, and 22.55%. *In re Fisher*, 29 B.R. at 546. Rejecting the contract-rate approach, and since the secured claim was owned by the Internal Revenue Service, the *Fisher* court looked to the statutorily mandated IRS rates at the time—it was 16%. *Id*. When the Fishers' plan was confirmed the IRS rate was 20% and the prime rate was 16%, but those numbers moved drastically over short periods. *See id*. at 547 (explaining that when the Fishers filed their plan six months before confirmation, the IRS rate was 12% and the prime rate 16.84%). The court concluded the IRS rate was not an accurate reflection of present value, nor the fluctuating rates in the market suitable to address the relative lack of risk in the typical Chapter 13 case. *Id*. at 549. The reasons for the *Fisher* court's decision to adopt the Treasury

rate[1] are instructive. To do so, the *Fisher* court relied on an analysis done by an Illinois bankruptcy court, *In re Willis*, 6 B.R. 555 (Bankr. N.D. Ill. 1980), and concluded that, rather than starting with a pre-petition contract rate and adjusting that number down for factors peculiar to Chapter 13 cases (less risk, no administrative costs to service the loan, etc.), it would make more sense to begin with a low, riskless rate and add risk components. *See In re Fisher*, 29 B.R. at 549 ("*The result should be and is the same*.") (emphasis added). Also important, is that the creditor was a governmental unit, not a lender to corporations like "Bell Telephone or General Motors Corporation," so a *governmental* Treasury rate was appropriate. *Id*. As did the *Doud* bankruptcy court, the *Fisher* court looked to the market for benchmarks that would assure a present value for the creditor involved. In *Doud*, the creditor was the Farm Home Administration [FmHA]. *See In re Doud*, 74 B.R. at 872 (applying the Treasury bond plus rate to pay a claim based on an emergency FmHA loan, but the contract rate to the remaining FmHA loans).

By reading *Doud* to stand for a number rather than a methodology, Respondent missed the point of Farm Credit's objection to the Plan. That is why Mr. Ellingson's testimony is relevant, as it supports the

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[1] The *Doud* bankruptcy court would adopt the Treasury bond to reflect and match the lengthier term of farm loans. *In re Doud*, 74 B.R. 865, 868 (Bankr. S.D. Iowa 1987), *aff'd sub nom. U.S. v. Doud*, CIV. 87-577-B, 1987 WL 46813 (S.D. Iowa Dec. 4, 1987), *aff'd*, 869 F.2d 1144 (8th Cir. 1989).

adoption of the base prime rate as the discount rate *currently* used in the market where Farm Credit and the Respondent find themselves, and so consistent with the formula approach of *Till*. While the Respondent devoted attention to the Treasury bond rate found in *Doud*, he ignored the *Doud* bankruptcy court's common-sense assessment of risk applicable in Chapter 12 cases, and the reasons for an interest rate on plan payments, *i.e.* "the unpredictable nature of the agricultural economy itself, and, in the event of a plan failure and dismissal of a case, the additional collection costs creditors would not normally incur with nonagricultural Respondents (*e.g.*, participation in mandatory statutory mediation under Iowa law)."

The Respondent offered no explanation why bankruptcy courts, deciding Chapter 12 cases since *Till*, several in the Eighth Circuit, have had no issue building an interest rate on long-term claim payoffs on the base prime rate. *See*, *e.g.*, *In re Torelli*, 338 B.R. 390 (specifically mentioning *Doud*); *In re Elkhorn Crossing*, 2016 WL 6875893; *In re Whitten*, 2012 WL 4839119; *In re Schreiner*, 2009 WL 924418, at *2 The Respondent does not, and cannot, assert these courts are in open revolt and refuse to follow Eighth Circuit precedent. Rather, the simpler explanation is that they found no inconsistency between the holdings in *Doud* and *Till*, and understood the *current* commercial, agricultural loan market. The same holds true for those courts outside this Circuit. *See*, *e.g.*, *In re NRS Properties*, 634 B.R. 395, 423–24 (Bankr. D. Colo. 2021).

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Decision Undermines National Post-*Till* Court Consensus.

This Tenth Circuit's pre-*Till* observation is still apt: "Judges are neither bankers nor lenders and do not have the expertise to set interest rates." *See In re Hardzog*, 901 F.2d 858, 860 (10th Cir. 1990) (explaining, but "Bankruptcy Courts, counsel, lenders, and borrowers should have a familiarity with current interest rates on like-type loans and when a dispute arises, the market rate should be easily susceptible of determination by means of a hearing where each party is given the opportunity to submit evidence concerning the current market rate of interest for similar loans in the region."). After *Till*, the Tenth Circuit BAP recognized that strict market rate approach found in *Hardzog* was replaced by the formula approach. *In re Woods*, 465 B.R. 196, 207–08 (B.A.P. 10th Cir. 2012*), vacated other grounds*, 743 F.3d 689 (10th Cir. 2014) (applying the formula approach in Chapter 12). Nonetheless, what the *Hardzog*, *Till*, and even *Doud* cases have in common is the conviction that the actual market conditions faced by parties in a Chapter 12 case must mean something. Bankruptcy Courts in Chapter 12 cases cannot be free to arrive at interest rates unmoored from the evidence in the case that provides a clear picture of how the current agricultural loan market works for the type of loan being considered. In affirming the Bankruptcy Court's adoption of an interest rate unsupported by the

evidence, the Eighth Circuit strayed not only from the national consensus post-*Till* to apply the formula approach in Chapter 12 cases, but ironically from its own approach found in *Doud*, which directed a bankruptcy court to look to the market to begin it analysis.

In the case at bar, the Eighth Circuit partially excuses the Bankruptcy Court's non-reliance on *Till*, because this Court, in *Till*, never directly addressed the choice between the national prime rate and Treasury bond rate as a starting place for the appropriate discount rate as the Bankruptcy Court was required to do. *In re Topp*, 75 F.4th 959, 962 (8th Cir. 2023). That is true. The Eighth Circuit assumed this Court, in *Till*, discussed the prime rate simply because that was what the formula-approach proponents used. *Id*. Well, for good reason, and it is the same reason the Treasury rate was never considered. The formula approach is based on real, actual market lending practices, while the Treasury rate has nothing to do with modern lending practices in the vehicle loan market, as in *Till*, or in the agricultural lending market here. Like the Bankruptcy Court, the Eighth Circuit studiously ignored the evidence presented in the case that, among other things, Farm Credit could not even obtain the funds necessary for the Chapter 12 loan at the Treasury rate.

The Eighth Circuit then appears to accuse Farm Credit of wanting to have its cake and eat it, too, when all Farm Credit asks is for the *Till* formula approach to be applied. *See id*. at 962–63 ("In agreeing with the bankruptcy court's 2% adjustment, Farm Credit wants

to keep the risk factor constant while choosing between a risk-free rate (treasury) and a *some*-risk rate (prime). This is backwards—the starting point will influence the risk adjustment. We see no legal significance to whether a court starts with a risk-free rate and adds *full* risk or starts with a *some*-risk rate and adds some more. If the court properly follows the formula approach, the ultimate discount rate, not the starting point, is what matters."). A fair-minded reading of the record is that Farm Credit not contesting the 2% increase was not a waiver of its argument that the overall rate was incorrect. Rather, Farm Credit was simply agreeing 2% was the appropriate risk enhancement in the case regardless of the base rate, even though there was no basis in law or fact for the Treasury rate to be applied in this case. It has been Farm Credit's position all along that the appropriate, total interest rate should be 5.25%.

The Eighth Circuit avers that *Doud* and *Till* were "not cases about particular starting rates," but rather about "the proper approach to satisfying the plan-confirmation requirement that secured creditors receive at least **"the value, as of the effective date of the plan,"** of their claims." *Id*. at 962. Yet, the practical effect of *Till* for close to twenty years of bankruptcy cases, was that parties *could* rely on the "starting rate" as the prime national rate, as an objective, fair basis for plan development. By its decision to approve a Bankruptcy Court replacing its own judgment over the actual market's lending practices, the Eighth Circuit has been severely undermined what had become the

consensus post-*Till*, inviting more and unnecessary contested hearings on interest rates.

The three cases cited by the Eighth Circuit as evidence of courts adopting the Treasury rate, rather than the prime rate, only underscore the reality that the use of the formula approach since *Till* was decided is the rule in Chapter 12 cases. Only one case was a Chapter 12 case, *In re Fuelling*, 601 B.R. at 674. There, *Till* was never referenced, much less analyzed in the Chapter 12 context. The other two cases referenced were Chapter 13 cases in which the courts, openly ignored the directive in *Till* to use the formula approach, *In re Vasquez*, No. 12-30834, 2012 WL 3762981, at *2 (Bankr. S.D. Tex. Aug. 29, 2012) and *In re Thomas*, No. 13-44201-13, 2014 WL 1761954, at *1 (Bankr. W.D. Mo. May 1, 2014). Indeed, the author of the *In re Vasquez* decision, was named by his fellow Texas bankruptcy judges and reminded that "bankruptcy courts are required to use the prime rate as the starting point for determining what the cramdown interest rate should be in a Chapter 13 case." *In re Turcotte*, 570 B.R. 773, 775–76 (Bankr. S.D. Tex. 2017). Again, the Bankruptcy Court's decision to adopt the Treasury bond rate rather than national prime rate as the base rate in this case is the only post-*Till* Chapter 12 decision, in or outside the Eighth Circuit, to not adopt the national prime rate as the starting point to build an interest rate to protect the present value of a secured lender's claim.

II. The Question Presented Warrants the Court's Review In This Case

Whether the formula approach set out in *Till* should also apply in Chapter 12 cases is an issue that only this Court can decide. Doing so will ratify the practice that is already established in bankruptcy courts nationwide, where the issue of the appropriate discount rate starting point has been addressed. With the Eighth Circuit's clear statement that *Till* need not be applied, or that it is so fractured an opinion that it cannot be said to be controlling, in Chapter 12 cases, then the Eighth Circuit's decision has simply added another, unnecessary step in arriving at the appropriate interest rate on secured claims. That decision is also in direct conflict with at least the Bankruptcy Appellate Panel for the Tenth Circuit, which has approved the formula approach as the proper method in Chapter 12 cases there. *In re Woods*, 465 B.R. 196 (B.A.P. 10th Cir. 2012)

CONCLUSION

The Eighth Circuit's decision with respect to the method for determining the interest rate payment on claims in bankruptcy in Chapter 12 cases undermines this Court's decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), and strongly calls for this Court's review to provide the needed direction for bankruptcy courts sitting in Chapter 12 cases across the country. Only this Court can clarify and provide nation-wide

certainty to parties involved in Chapter 12 cases to effectuate the purpose of Chapter 12, which is to provide farmers a streamlined and cost-effective means of reorganization. Otherwise, what had been the uniform application of *Till* in Chapter 12 cases will devolve into *ad hoc*, case-by-case, interest rate decisions by bankruptcy courts untethered from the agricultural loan market in which Chapter 12 parties find themselves. Accordingly, the Petitioner requests the Court revisit *Till* and expressly apply the plurality approach there to the treatment of secured claims in Chapter 12 cases.

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Respectfully submitted,

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