No. 22-1004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE DANIEL RICHARD DOLL,
Debtor.

ADAM M. GOODMAN
Appellant,
— v. —

DANIEL RICHARD DOLL,
Appellee.

On Appeal from the U.S. District Court for the District of Colorado,
Case No. 21-731

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

TARA TWOMEY
Counsel of Record
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Goodman v. Doll, No. 22-1004

Pursuant to Fed. R. App. P. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, make the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **ADAM M. GOODMAN**

This 6th day of April, 2022.

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is also a nonprofit organization that advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized to protect the rights of consumer bankruptcy debtors. NACBA files *amicus curiae* briefs in various cases seeking to protect those rights.

NCBRC, NACBA and NACBA's members have a vital interest in the outcome of this case. Many bankruptcy debtors seek to reorganize under chapter 13 of the Bankruptcy Code, rather than liquidate their assets under chapter 7. Creditors in chapter 13 cases typically see a greater return because those debtors must commit to a court-approved plan of repayment using ongoing disposable

income. Debtors must begin making those payments even before the bankruptcy court has confirmed their plans. It is not unusual, however, for chapter 13 debtors to find that they are unable to create a repayment plan that can meet the standards necessary for confirmation by the bankruptcy court.

If this Court were to reverse the decision of the District Court it would cause those debtors to lose their pre-confirmation plan payments in contravention of congressional intent and create a disincentive for debtors in general to attempt the more rigorous, yet more desirable, chapter 13 route.

CONSENT

The parties have consented to the filing of this brief.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. Bankr. P. 8017(c)(4), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, NCBRC, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The plain language of section 1326(a)(2) requires that payments made by a debtor under section 1326(a)(1)—payments proposed by the plan—are to be returned to the debtor if the plan is not confirmed. Section 1326(b) applies only to cases in which plans are confirmed, because it uses the term payments "under the plan." As this Court held in *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136, 1142-43 (10th Cir. 2021), payments "under the plan" are payments under the authority of a plan. Until a plan is confirmed, it does not provide authority for anything. For the same reason, section 586(e)(2) of title 28, which refers to "payments. . . under plans" does not apply when a chapter 13 plan is not confirmed. The purpose of that provision is solely to set the amount of the fee that is required to be paid by other provisions. The fact that Congress specifically added language authorizing payment of fees to trustees in cases under chapter 12 and subchapter V of chapter 11 in which a plan is not confirmed bolsters the conclusion that it intended different treatment of chapter 13 cases.

The legislative history of the relevant provisions supports this plain language result. When chapter 13 was first enacted, the Code did not require payments to the trustee prior to confirmation of the plan. Therefore, language originally in section 1302(e) and later moved to section 586(e)(2) of title 28 referred to the trustee taking fees from payments under a confirmed plan. When preconfirmation

payments to the trustee became required, Congress enacted section 1326(a)(2) to govern their disposition when a plan is not confirmed, and directed that they be returned to the debtor. When Congress enacted chapter 12 and subchapter V of chapter 11, it specifically prescribed different treatment for trustee fees in those cases. Congress has amended the relevant provisions numerous times and has never chosen to treat chapter 13 trustees the same as trustees in chapter 12 and subchapter V of chapter 11.

The arguments of the trustee and his amicus provide no basis for ignoring the statutes' plain language and legislative history. Section 586(e)(2), upon which they primarily rely, is intended solely to set the amount of the fee, applies only to payments under confirmed plans, and would be at best ambiguous even if it did not. Payments proposed by the plan and made under section 1326(a)(1) must include amounts that the plan proposes to pay to the trustee. The treatment of trustee fees in chapter 12 and subchapter V is different than in chapter 13 because cases under those chapters are quite different from cases under chapter 13. And the policy reasons asserted by the trustee and his amicus simply contradict reasonable choices Congress made in enacting the relevant statutes.

ARGUMENT

I. Statutory Background – Chapter 13

The Bankruptcy Code provides several avenues for people and entities weighed down by debt to repay their creditors to the extent they are able, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. Chapter 7 provides for repayment of debts by liquidating a debtor's existing non-exempt assets. *See* 11 U.S.C. § 704(a)(1). Chapter 13 provides for repayment of debts using "future income," rather than proceeds from the sale of assets. *Id.* § 1322(a)(1). Because chapter 13 is often less disruptive to debtors and can provide greater distributions to creditors, Congress has expressed a strong policy of encouraging debtors to take advantage of chapter 13 where possible and has avoided penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994); *see also* 11 U.S.C §§ 348(f), 1307, 1328(a) (permitting a debtor to convert a chapter 13 case to chapter 7 at any time, limiting the property of the estate in converted cases, and expanding discharge).

At the outset of a bankruptcy case, debtors must file various schedules identifying assets, liabilities, income, expenses, and exemptions. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007 (describing lists, schedules, statements, and other documents that must be filed). Chapter 13 debtors must file a debt

adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. Within 30 days of the petition date, chapter 13 debtors must begin making payments to the trustee as proposed by the plan. *Id.* § 1326(a)(1)(A). If there is no objection to the plan, it is typically confirmed within two to three months of the petition date. *Id.* §§ 341, 1324(b), Fed. R. Bankr. P. 2003(a). If an objection is filed, the time for confirmation can vary significantly. Once confirmed, the chapter 13 plan is the blueprint for distribution of debtor's plan payments, and the confirmation order authorizes those payments, accordingly. 11 U.S.C § 1326(c). Upon completion of payments under the plan debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

A chapter 13 trustee, typically the standing trustee, is appointed in all chapter 13 cases. Among other things, the chapter 13 trustee is responsible for receiving debtors' payments and disbursing funds in accordance with the terms of debtors' confirmed plans. *See* 11 U.S.C. §§ 1302, 1326(c). A standing trustee is compensated through a percentage fee—generally up to a maximum of 10 percent—from all payments received under plans. 28 U.S.C. § 586(e)(1)(B). If the plan is confirmed, the trustee is to distribute payments in accordance with the plan. Section 1326(b)(2) provides that after confirmation of the plan, the trustee is to be paid the percentage trustee's fee "before or at the time of each payment to creditors under the plan." Notably, the percentage fee is collected without regards

to the actual expenses incurred or time spent on any one particular case. *See* 28 U.S.C. § 586(e)(2) (the trustee "shall collect such percentage fee from all payments received by such individual under plans ...for which such individual serve as standing trustee.").

II. The Plain Language of the Relevant Statutes Compels Affirmance of the District Court's Decision

The Bankruptcy Code and related sections of title 28 of the United States Code are carefully drafted statutes that dictate the result reached by the district court. They provide clear and cohesive instructions regarding when and how chapter 13 standing trustees may collect their fees. As the Supreme Court has held in another case involving bankruptcy fees, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 109 S. Ct. 1026, 1031 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982)).

Section 1326(a)(1)(A) provides that the debtor must commence payments not later than 30 days after the date of filing of the plan or the order for relief, whichever is earlier, in the amount *"proposed by the plan"* [emphasis supplied].

Section 1326(a)(2) specifically refers back to payments made under section 1326(a)(1)(A), *i.e.,* the payments proposed by the plan. They are to be retained by the trustee until confirmation. If the plan is not confirmed, the trustee is to return

"*any such payment,*" again referring to payments proposed by the plan, to the debtor, after deducting unpaid administrative expenses allowed under section 503(b).[1]

If the plan is confirmed, the trustee is to distribute payments in accordance with the plan. Section 1326(b)(2) provides that at this point, only after confirmation of the plan, the trustee is to be paid the percentage trustee's fee "before or at the time of each payment to creditors *under the plan."* This subsection, in turn, points to section 586(e) of title 28 to determine the amount fixed for the trustee's percentage fee.

Section 586(e) is consistent with these provisions. It sets the amount of the fees of standing trustees and provides that the standing trustee shall collect the percentage fee from payments received by the trustee "*under plans.*" The use of this language, distinguishing payments under plans from payments proposed by plans, is significant, because the Code consistently uses the phrase "payments under the plan" or similar phrases to mean payments under plans that have been confirmed. It does not include payments proposed by a plan that has not been confirmed, and therefore section 586(e) is fully consistent with section 1326(a)(2).

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[1] There is no doubt that the chapter 13 trustee's fee is not an administrative expense under section 503(b), and the trustee is not arguing that it is. *See In re Rivera*, 268 B.R. 292 (Bankr. D.N.M.), *aff'd sub nom*, *Skehen v. Miranda (In re Miranda)*, 285 B.R. 344 (B.A.P. 10th Cir. 2001).

There are a number of examples of the Code using a phrase like "payments under the plan" to mean payments under a confirmed plan. Section 1325(a)(6) requires that to be assured of confirmation the debtor "will be able [future tense] to make all payments under the plan".

Section 1325(b)(1)(B) provides that "as of the effective date of the plan," *i.e.,* the date of confirmation, the debtor must devote all disposable income to make "payments to unsecured creditors under the plan."

Section 1328(a) provides that a discharge is to be granted to a debtor who completes "all payments under the plan" and meets certain other requirements. Section 1328(b) provides for a hardship discharge if a debtor "has not completed payments under the plan" if certain circumstances exist. If these provisions were read to include plans that were proposed but not confirmed, a debtor could receive a discharge even if a plan were never confirmed.

And section 1329(a) provides for modification of a confirmed plan "before completion of payments under such plan."

The reading of "payments . . . under plans" in section 586 as applying only to payments under confirmed plans is strongly supported by this Court's recent decision in *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021), which interpreted the same phrase – "payments under the plan"—in the Bankruptcy Code:

To ascertain the better interpretation of this ambiguous term, we must focus on the context. *See Pereira*, 138 S. Ct. at 2117 (stating that the Court must draw the meaning of "under" from its context). The context here suggests that the payments are "under the plan" only if they are subject to or under the authority of the plan.

"Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan is "more natural[ly]" read as something "subject to . . . or under the authority of" the plan. *Piccadilly Cafeterias*, 554 U.S. at 39-41, 128 S. Ct. 2326.

An earlier version of the code used a similar term in a different provision, referring to a transfer "under a plan confirmed." 11 U.S.C. § 1146(c) (2000). To apply this provision, the Supreme Court considered whether a transfer could be "under" a confirmed plan if the transfer had preceded confirmation of the plan. *Piccadilly Cafeterias*, 554 U.S. at 35, 128 S. Ct. 2326. The Court answered "no," reasoning that

- the "more natural" reading of "under" suggests that the transfer must be "subject to" or "under the authority of" the plan (*id.* at 39, 128 S. Ct. 2326) and
- the transfer could not be subject to or under the authority of the plan if the plan had not yet been confirmed (*id.* at 41, 128 S. Ct. 2326).

The Supreme Court in *Piccadilly* cited a Third Circuit opinion, *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003). *E.g., id.* at 38, 40, 128 S. Ct. 2326. *Hechinger* had drawn the same conclusion:

> After considering all of these definitions [of the term "under"], we believe that the most natural reading of the phrase "under a plan confirmed" in 11 U.S.C. § 1146(c) is "authorized" by such a plan. [*See Random House Dictionary of the English Language* 1543 (unabridged ed. 1967)]. When an action is said to be taken "under" a provision at law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus,

> if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed. R. Civ. P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.
>
> On this reading, if an instrument of transfer is made or delivered "under" a plan, the plan must provide the authority for the transaction. 335 F.3d at 252; *see also In re NVR, LP*, 189 F.3d 442, 457-58 (4th Cir. 1999) (concluding that the plain meaning of "under" forecloses characterization of preconfirmation transfers as "under a plan confirmed" for purposes of 11 U.S.C. § 1146(c)).

Kinney, 5 F.4th at 1142-43.

Thus, under this Court's reasoning in *Kinney,* section 586(e), referring to payments under plans, simply has no bearing on the disposition of payments made to the trustee when a plan has not been confirmed. A plan does not provide authority to do anything until the plan has been confirmed. A payment made before confirmation is not made under the authority of the plan.

The *Kinney* decision, 5 F.4th at 1140, also relied on the principle that

> [t]o avoid interpretations incompatible with the rest of the code, we read the provisions in the context of each other. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

In this regard, Code sections 1194(a) and 1226(a) buttress the conclusion that the Code does not permit a standing chapter 13 trustee to be paid the percentage fee

from payments made with respect to a proposed, but unconfirmed, plan.[2] These provisions, unlike section 1326(a)(2), specifically provide that the trustee in other chapter 12 or subchapter V of chapter 11 may take fees before returning payments to the debtor when a plan is not confirmed. In order to read section 1326(a)(2) compatibly with these provisions under those other chapters, the omission of the differing language present in those chapters cannot be ignored. Otherwise, that language would be surplusage. As the Supreme Court recently held in *City of Chicago v. Fulton*, 141 S. Ct. 585, 591, 208 L.Ed.2d 384, 390 (2021), interpreting other provisions of the Bankruptcy Code:

> The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme. (quoting *Yates* v. *United States*, 574 U. S. 528, 543, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)).

In other words, Congress knew how to state that it intended the percentage fee to be taken before returning payments made with respect to unconfirmed plans, and it declined to do so in chapter 13 cases. Moreover, giving different treatment to such payments in cases under subchapter V of chapter 11 and under chapter 12 makes

[2] These provisions also reinforce the conclusion that the standing trustee's percentage fee is not an administrative expense under section 503.

perfect sense. Such cases are few and far between,[3] and are typically far more complex and time-consuming than chapter 13 cases. There is little ability to spread a standing trustee's compensation and expenses over hundreds, and usually thousands, of pending cases with confirmed plans, as there is for chapter 13 standing trustees.

It is not surprising, therefore, that the leading treatise on bankruptcy law concurs with the conclusion that chapter 13 standing trustees may not deduct their percentage fees before returning payments to the debtor when a chapter 13 plan is not confirmed. 8 *Collier on Bankruptcy* ¶¶ 1302.05[1][b], 1326.02[2][c] (Richard Levin & Henry J. Sommer, eds., 16th ed.).

[3] In the year ending December 31, 2021, there were only 276 chapter 12 cases filed in the entire country, of which 5 were filed in the District of Colorado. In that period, 4,836 chapter 11 cases were filed nationally, of which 68 were in the District of Colorado. Only some of those cases were filed under subchapter V of chapter 11. In contrast, 120,002 chapter 13 cases were filed nationally in the same time period, of which 1,191 were filed in the District of Colorado. *See https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2021.pdf* Indeed, the United States Trustee Program has not appointed standing trustees for cases under subchapter V of chapter 11.

III. The Legislative History Supports the Plain Language Conclusion that Section 1326(a)(2) Does not Permit Deduction of the Standing Trustee's Fee When a Plan is not Confirmed.

The legislative history of section 1326(a) and section 586 of title 28 demonstrates that Congress intended different treatment of standing trustee fees depending upon whether a plan is confirmed. It also shows a clear intent to treat chapter 13 standing trustee fees differently from trustee fees in chapter 12 and subchapter V of chapter 11.

What is now section 1326(a) was not a part of the Bankruptcy Code when the Code was first enacted in 1978.[4] The original section 1326 provided:

- **(a)** Before or at the time of each payment to creditors under the plan, there shall be paid—
  - **(1)** any unpaid claim of the kind specified in section 507(a) (1) of this title; and
  - **(2)** if a standing trustee appointed under section 1302(d) is serving in the case, the percentage fee fixed for such standing trustee under section 1302(e) of this title.
- **(b)** Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

Section 1302(e)(2) of the Code as originally enacted contained language substantially similar to the current section 586(e)(2) of title 28:

> **(2)** Such individual shall collect such percentage fee from all payments under plans in the cases under this chapter for which such individual serves as standing trustee. Such individual shall pay annually to the Treasury—

[4] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978), which enacted the Bankruptcy Code, is reprinted in Collier on Bankruptcy, Appendix Volume B, Pt. 4(a) (Richard Levin & Henry J. Sommer, eds., 16th ed.).

- **(A)** any amount by which the actual compensation of such individual exceeds five percent upon all payments under plans in cases under this chapter for which such individual serves as standing trustee; and
- **(B)** any amount by which the percentage fee fixed under paragraph (1)(B) of this subsection for all such cases exceeds—
    - **(i)** such individual's actual compensation for such cases, as adjusted under subparagraph (A) of this paragraph: plus
    - **(ii)** the actual, necessary expenses incurred by such individual as standing trustee in such cases.[5]

The Code as originally enacted did not require chapter 13 debtors to begin plan payments until a plan was confirmed, and many debtors did not begin payments to the trustee until after confirmation. *See* S. Rep. No. 65, 98th Cong., 1st Sess. at 63 (1983). Thus, the language referring to payments under plans in section 1302(e)(2) had to refer to payments under confirmed plans.

Language similar to current section 1326(a), which first required payments to the trustee before confirmation, was enacted by section 318 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 § 318 (1984). In enacting it, Congress also prescribed what would happen to those

[5] This language remains in effect as section 1302(e)(2) in the judicial districts in Alabama and North Carolina, where the United States Trustee Program was never adopted. For United States Trustee districts, the language was moved to section 586(e)(2) of title 28 by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 §§113, 228 (1986). *See* Pub. L. No. 99-554, § 302(d) (1986), as amended by the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, *reprinted in* Collier on Bankruptcy, Appendix Volume F, Pt. 41(q)(ii) (Richard Levin & Henry J. Sommer, eds., 16th ed.), which removed the October 1, 2002, deadline for Alabama and North Carolina to elect to participate in the United States Trustee Program.

payments if a plan were not confirmed, using language similar to the current section 1326(a)(2), requiring the payments to be returned to the debtor. In other words, Congress did not contemplate these preconfirmation payments being treated the same as under section 1302, which provided for the trustee's fee to be deducted from payments under the plan. The same logic must carry over to section 586(e)(2) of title 28, to which the section 1302 standing trustee fee language was moved.

Moreover, Congress has amended section 1326(a) and other relevant Code provisions several times since 1984 without changing the language regarding the disposition of preconfirmation payments when a plan was not confirmed:

In 1986, Congress not only moved the language about standing trustee fees to title 28; it also enacted section 1226(a), which, in contrast to section 1326(a), specifically provides for chapter 12 standing trustees to collect fees from preconfirmation payments when a plan is not confirmed. Pub. L. No. 99-554 § 255 (1986). Had Congress intended for chapter 12 and chapter 13 fees to be treated the same, it would have so stated at a time it was amending provisions that applied to both chapters.

In 1994, Congress amended section 1326(a)(2) to require payments to creditors to begin as soon as practicable after confirmation. Pub. L. No. 103-394 (1994).

In 2005, Congress, again amended section 1326(a)(2), *inter alia,* by adding the words "due and owing to creditors,"[6] but did not change its language with respect to payments of chapter 13 trustee fees. Pub. L. No. 109-8 (2005). And in 2019, Congress enacted section 1194(a), which, in contrast to section 1326(a), specifically provides for chapter 11 subchapter V trustees to collect fees from preconfirmation payments when a plan is not confirmed. Pub. L. No. 116-54 (2019).

Congress has thus had numerous opportunities to amend section 1326(a) to enact the result the trustee desires. It has repeatedly declined to do so, even when it enacted contrasting language for chapter 12 and subchapter V trustees. And it did not do so after courts had ruled that chapter 13 standing trustees could not be paid their fees if a plan was not confirmed. *E.g., In re Rivera*, 268 B.R. 292 (Bankr. D.N.M.), *aff'd sub nom*, *Skehen v. Miranda (In re Miranda)*, 285 B.R. 344 (B.A.P. 10th Cir. 2001); *In re Ward*, 132 B.R. 417 (Bankr. D. Neb. 1991) (rejecting United States Trustee's interpretation).

The legislative history could not be more clear in demonstrating Congress' intent that chapter 13 standing trustees may not collect their fees when a plan is not confirmed.

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[6] The 2005 amendments added section 1326(a)(1)(B) and (C), requiring, for the first time, preconfirmation payments to certain creditors.

IV. The Other Arguments Raised by the Trustee and his Amicus Provide No Justification for Departing from the Code's Plain Language

The appellant and his amicus raise a number of arguments for reversal of the district court's decision. None of them has merit.

First, they argue that section 586(e)(2) of title 28 supports payment of the trustee's fee when a plan is not confirmed. However, neither the briefs nor the decisions they rely upon seem to have given meaning to section 586(e)(2)'s limitation to payments under plans. As discussed above, payments made with respect to a proposed but unconfirmed plan are not payments under the plan. Contrary to the suggestion made in the trustee's brief (p.8), this Court did not decide that question in *Foulston v. BDT Farms (In re BDT Farms)*, 21 F.3d 1019 (10th Cir. 1994). That case involved a different issue, how the amount of the fee was computed with respect to a confirmed plan under chapter 12.

The trustee and his amicus strain to reconcile the conflict between their interpretation of section 586(e)(2) and Code section 1326(a)(2), a conflict that does not exist if "payments. . . under plans" is properly read as payments under confirmed plans. They first argue that the word "collect" in section 586(e)(2) is unambiguous, meaning to take as payment, and that section 586(e)(2) "stands on its own." This argument seems to recognize that section 1326(a)(2) conflicts with the trustee's interpretation of section 586(e)(2). It also ignores the fact that, even if

the provision applied to unconfirmed plans, the word "collect" is certainly not unambiguous. In fact, the first definition of the word in many dictionaries is "to bring together into one body or place,"[7] "to gather together; assemble,"[8] or "to get (things) from different places and bring them together."[9] Seeking to bolster the argument that "collect" is unambiguous, the briefs argue that Congress did not say "collect and hold." But the statute also does not say "collect and take as payment." It is easy to add words that would clarify an ambiguous word in one way or the other, but the exercise does not resolve what the ambiguous word means.

Rather amazingly, the briefs also argue that no other provision provides for payment of the standing trustee's fee, despite the fact that Code section 1326(b)(2) does exactly that (once a plan is confirmed). The trustee attempts to explain away this problem by arguing that section 1326(b) could apply to preconfirmation payments to creditors, but section 1326(b) applies only to confirmed plans since it refers to "payment to creditors under the plan." As noted in the discussion of legislative history above, it uses language that existed before there was any obligation for debtors to make preconfirmation payments to the trustee or preconfirmation payments to creditors. It is section 1326(a)(2) which provides specific directions as to what is to happen if a plan is not confirmed.

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[7] https://www.merriam-webster.com/dictionary/collect
[8] https://www.dictionary.com/browse/collect
[9] https://www.britannica.com/dictionary/collect

They then argue that the payments made pursuant to section 1326(a)(1)(A) "proposed by the plan," *i.e.,* the payments encompassed by section 1326(a)(2), do not include the trustee's fee and only include payments intended for creditors. But if that were true, then the debtor would have no obligation to make any payments toward the trustee's fee prior to confirmation, since section 1326(a)(1) is the only source of an obligation to make preconfirmation payments. In fact, the language regarding payments "due and owing to creditors," relied upon by the trustee in making this argument, was added long after the enactment of section 1326(a)(2), in 2005, when debtors first became obligated to make certain preconfirmation payments to creditors.

The trustee's brief's attempts to deal with the differences between section 1326(a)(2), on the one hand, and sections 1194(a) and 1226(a) on the other, actually undercut the trustee's arguments. The trustee argues that the different language reflects the fact that chapter 12 and subchapter V of chapter 11 are different from chapter 13. But those differences are precisely the reason that fees are treated differently in those chapters. As argued above, if they were treated the same, the language in sections 1194(a) and 1226(a) would be surplusage. The trustee also argues it would be unfair to treat non-standing trustees appointed under section 1302 differently than standing trustees by paying them when a plan is not confirmed. However, they are not treated differently. Under section 326(b), a

trustee appointed under section 1302(a) is entitled to compensation, *not to exceed five percent of all payments under the plan*. As discussed above, if a plan is not confirmed there are no payments under the plan and 5% of zero is zero. In fact, trustee payments in all chapters have traditionally been based on disbursements to creditors. *See* 11 U.S.C. § 326(a) (chapter 7 and chapter 11 other than under subchapter V). Sections 1194(a) and 1226(a) are the exceptions to this rule and have different language that clearly delineates that different treatment.

The trustee also argues that the result he desires is supported by a local bankruptcy rule and a local bankruptcy form plan. However, a local bankruptcy rule must be consistent with the statute. Federal Rule of Bankruptcy Procedure 9029(a)(1). A local bankruptcy form similarly cannot constrict debtors' rights by requiring terms that are inconsistent with the statute. *Diaz v. Viegelahn (In re Diaz)*, 972 F.3d 713 (5th Cir. 2020); *In re Sisk*, 962 F.3d 1133 (9th Cir. 2020).

In addition, the trustee and its amicus make two policy arguments which, even if correct, could not overcome the plain language of the statutes. They first argue that the trustee performs valuable services in chapter 13 cases in which a plan is not confirmed, such as in this case, and those services should be compensated. This argument misconstrues the scheme for compensating chapter 13 standing trustees. Chapter 13 standing trustees are not compensated based on the amount of time devoted to a particular case. Rather, the compensation and costs of

the chapter 13 trustee are spread over all of the cases where chapter 13 debtors have plans confirmed and usually achieve the primary benefits of the chapter: discharge of debts, cure of mortgage defaults, and payment of creditors. In some individual debtors' cases, the trustee must do a great deal of work but, because the debtor has a low income and therefore makes low payments, the trustee's fees are small. In other cases, the trustee may do little work but, because the debtor has a higher income, the payments are much higher. Congress could have chosen to charge trustee fees for cases where a plan is not confirmed and the debtor receives little benefit from the bankruptcy, but it chose to charge trustee fees only in cases where the debtor usually receives the intended benefits of chapter 13.

The trustee and its amicus also argue that following the statutory language rewards abuse of the system, and that "good debtors" will end up paying the costs of "bad debtors" who get a "free ride."[10] This argument first seriously impugns the many debtors who, trying to save their homes or pay creditors in chapter 13, simply cannot keep up with their payments. Unlike in this case, the vast majority of these debtors are in lower-income households and have a desperate need for

[10] In making this argument, the trustee cites 11 U.S.C. § 1307(c)(2). However, that provision only permits dismissal for failure to pay fees required under chapter 123 of title 28, *i.e.,* filing fees. If anything, that limitation also suggests that trustee fees and filing fees are not treated the same.

return of the payments they have made.[11] They are not abusers of the system; they are families who have already suffered more than their share of misfortune. The result urged by the trustee would punish all debtors whose cases are dismissed and who have made payments to the trustee.

Second, the Supreme Court has made clear that the bankruptcy court cannot ignore the language of the Code in order to sanction debtors who have engaged in bad conduct. In *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 188 L.Ed.2d 146 (2014), the Court noted that bankruptcy courts have other tools to punish abuses by debtors, such as Federal Rule of Bankruptcy Procedure 9011, the counterpart of Federal Rule of Civil Procedure 11. In cases that are dismissed, the court may utilize Code section 349 to dismiss a case with prejudice or with prejudice for a specified period of time. *See, e.g., In re Frieouf*, 938 F.2d 1099 (10th Cir. 1991); 3 Collier on Bankruptcy ¶ 349.02[2] (Richard Levin & Henry J. Sommer, eds., 16th ed.).

Lastly, the trustee and its amicus seek to invoke "*Chevron* deference," to the Handbook for Chapter 13 Standing Trustees published by the Executive Office for United States Trustees. This argument fails for several reasons. First, *Chevron* deference, or any deference to an administrative agency, can only be invoked if a

[11] The trustee's brief notes that "the instant case was not the standard chapter 13 case" (p.3) but, of course, the result in this case would apply to all chapter 13 cases.

statute does not answer the question at issue. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 861-2, 104 S. Ct. 2778, 2791, 81 L.Ed.2d 694, 714 (1984). That is not the case here; the statute is perfectly clear. Second, the Handbook relied upon by the trustee states that the fee is not to be retained by the trustee if a plan is not confirmed and the prevailing law in the court where the trustee serves requires its return.[12] Rather than the courts deferring to the agency, the agency is deferring to the courts. Third, the Handbook is not a regulation and has not been promulgated after notice and comments under the Administrative Procedure Act. It can be changed, and has been changed, at the whim of the Executive Director of the program. And finally, the doctrine of *Chevron* deference itself has been called into question. *See* Nicholas Bagley, *Chevron deference at stake in fight over payments for hospital drugs*, SCOTUS blog (Nov. 29, 2021, 9:28 AM), https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs/

[12] The Handbook states at pp. 2-3 – 2-4: If the plan is dismissed or converted prior to confirmation, the standing trustee must reverse payment of the percentage fee that had been collected upon receipt if there is controlling law in the district requiring such reversal or if (after consultation with the United States Trustee) the standing trustee determines that there are other grounds for concern in the district.

CONCLUSION

For all of the above reasons, the decision of the district court should be affirmed. The plain language of the relevant statutes, and the legislative history of those provisions, make clear that Congress did not intend that standing trustees can take their fees from cases in which a chapter 13 plan is not confirmed.

Respectfully submitted,

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because: It contains 5,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32 because: It has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

Further, pursuant to 10th Cir. R. 25.5, all required privacy redactions have been made; any required copies to be submitted to the court will be exact copies of the version submitted electronically; and, the electronic submission was scanned for viruses with the most recent version of Norton Anti-Virus Plus, and is free of viruses.

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Tenth Circuit Court of Appeals by using the Appellate CM/ECF system on April 6, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae