No. 13-1416

IN THE

Supreme Court of the United States

EDWARD LEON GORDON, *et al.*,

Petitioners,

v.

BANK OF AMERICA N.A., *et al.*,

Respondents.

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

MOTION AND BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PETITIONERS

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MOTION OF PUBLIC CITIZEN, INC., AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Public Citizen, Inc., and the National Association of Consumer Bankruptcy Attorneys respectfully move for leave to file a brief as amici curiae in support of the petitioners. Counsel of record for the parties received timely notice of amici curiae's intent to file this brief as required by this Court's Rule 37.2(a). Petitioner and respondent Bank of America, the real parties in interest, have consented in writing to the filing of this brief. Respondent Douglas B. Kiel, the bankruptcy trustee, has not responded to the request for consent.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents the interests of its members in litigation, including through amicus curiae briefs. Protection of the rights of consumer litigants, such as the Chapter 13 debtors whose procedural rights are at issue in this case, has long been an important interest of Public Citizen.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization of more than 3,500 consumer bankruptcy attorneys practicing throughout the country. NACBA is dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bank-

ruptcy debtors, and to those ends it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. In particular, NACBA submits amicus curiae briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case. NACBA also strives to influence the national conversation on bankruptcy laws and debtors' rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

The issue in this case—whether consumer debtors in bankruptcy proceedings may appeal from denials of plan confirmation—directly implicates the interests of the consumers whose rights Public Citizen and NACBA support. This frequently recurring issue has divided the courts of appeals. Courts, like the court below, that have denied debtors the right to appeal from the denial of plan confirmation have unfairly disadvantaged debtors relative to creditors, who are able to appeal adverse determinations with respect to plan confirmation. And those courts have placed unnecessary obstacles in the way of the expeditious determination of the rights of debtors and creditors alike. Public Citizen and NACBA believe that the submission of this brief will assist the Court in understanding the importance of this issue and the need for review by this Court.

Public Citizen and NACBA therefore respectfully request that they be granted leave to file the accompanying brief as amici curiae in support of the petitioner.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other:

INTEREST OF AMICI CURIAE[1]

As set forth in the accompanying motion for leave to file this brief, Public Citizen, Inc., and the National Association of Consumer Bankruptcy Attorneys (NACBA) submit this brief in support of the petition for a writ of certiorari because the Tenth Circuit's decision presents an important bankruptcy issue that has divided the lower courts and demands this Court's attention, and because the Tenth Circuit's resolution of that issue is likely to harm consumer debtors whose interests Public Citizen and NACBA support.

REASONS FOR GRANTING THE WRIT

I. There Is a Persistent and Well-Developed Conflict Among the Circuits.

This case provides the Court with an opportunity to resolve a long-standing and entrenched conflict among the circuits over whether the denial of confirmation of a bankruptcy plan is an appealable final order under 28 U.S.C. § 158. The conflict involves not only divergent outcomes, but also explicit disagreement among the courts of appeals over the reasoning that has led to the conflicting results. *See*, *e.g.*, *Mort Ranta v. Gordon*, 721 F.3d 241, 247–48 (4th Cir. 2013) (criticizing the reasoning of decisions of circuits hold-

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[1] As explained in the accompanying motion, counsel of record for the parties received timely notice of amici curiae's intent to file this brief as required by this Court's Rule 37.2(a), but counsel for one respondent, the bankruptcy trustee, did not respond to a request for written consent to the filing of the brief. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief.

ing confirmation denials unappealable); *In re Bullard*, __ F.3d __, 2014 WL 1910868, at *2–3 (1st Cir. May 14, 2014) (rejecting the reasoning of decisions allowing appeals).

As *Mort Ranta* and *Bullard* illustrate, the competing arguments over the issue have been thoroughly fleshed out in the opinions of the courts of appeals on the opposing sides of the split, which, as the court in *Bullard* put it, "cover[] the terrain" of the issue. 2014 WL 1910868, at *2. Moreover, as the decision below illustrates, the courts of appeals that have chosen a side on this issue are sticking to their guns. The Tenth Circuit in this case adhered to the position it took in 1990 in *Simons v. FDIC (In re Simons),* 908 F.2d 643 (10th Cir. 1990) (per curiam). In so doing, the court noted that the courts of appeals were divided even in 1990 and that it saw no reason to reconsider its views despite the persistence of that split. *See* Pet. App. at 7a, n.2. Other courts have likewise made clear their adherence to their positions in the face of the disagreement. *See*, *e.g.*, *In re Crager*, 691 F.3d 671, 674–75 & nn. 1–2 (5th Cir. 2012) (following *Bartee v. Tara Colony Homeowners Ass'n* (*In re Bartee*), 212 F.3d 277, 282 (5th Cir. 2000)); *Mort Ranta*, 721 F.3d at 245 ("[W]e have a long history of allowing appeals from debtors whose proposed plans are denied confirmation[.]").

This case, moreover, is unquestionably an appropriate vehicle for resolving the conflict. The issue was presented below and was outcome-determinative; adoption of the view taken by other circuits would have allowed the appeal to proceed. Presented with such an opportunity for resolving a question that has

long divided the federal courts of appeals, this Court should unhesitatingly grant certiorari.[2]

II. The Issue Is Important.

The mature and widespread conflict over a recurring issue of federal jurisdictional law is reason enough for the Court to grant certiorari. The justification for review is all the more powerful because the issue is also very important from the standpoint of consumer debtors in Chapter 13 bankruptcy.

The economic hardships of the past half-decade, including high unemployment, the precipitous drop of the stock market in 2008, and the collapse and slow recovery of the real estate market in many parts of the country, left the household finances of many consumers reeling. Among the direct results was a surge in consumer bankruptcies. Although the tepid economic recovery has brought filings down from their recession-era peak in 2010, Chapter 13 filings still averaged nearly 400,000 per year from 2009 through 2013, with overall bankruptcy filings (the great majority of which are nonbusiness cases) averaging well over one million each year.[3] The number of filings seems likely to decline further in 2014, but bankrupt-

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[2] Should a petition for certiorari be filed in the *Bullard* case (which amici understand is likely), that case, too, would be an appropriate vehicle for deciding the issue. If petitions are filed in both cases, the Court should grant certiorari in one and hold the other pending decision of the question.

[3] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013, U.S. Bankruptcy Courts*, Tables 6 & 7, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-bankruptcy-courts.aspx.

cy still affects hundreds of thousands of consumers annually.

The significance of the bankruptcy system, particularly in times of economic trouble, heightens the importance of resolving unsettled questions of bankruptcy law and procedure. This Court's docket reflects its recognition of the desirability of resolving important issues of bankruptcy law: The Court has decided significant bankruptcy cases in each of the past ten Terms, with more than one bankruptcy case receiving plenary consideration in most of those years.

The issue in this case is of particular importance to the consumer debtors whom the bankruptcy laws were created to assist in "obtain[ing] a fresh start." *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005). For a debtor in a Chapter 13 proceeding, whether a proposed plan will be approved is typically the critical decision in the case, and a definitive rejection of a plan represents an effectively final decision that the resolution of the matter sought by the debtor will be unavailable. *See Mort Ranta*, 721 F.3d at 247–49; *In re Bartee*, 212 F.3d at 282–83. The ability to obtain a prompt appeal of such a critical ruling, before the debtor has been forced to expend additional scarce financial resources in further proceedings in the bankruptcy court, is of great importance to debtors.

For like reasons, creditors are uniformly permitted to appeal orders *granting* plan confirmation. *See*, *e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). Such orders are treated as final even though, just like orders *denying* confirmation, they do not finally terminate bankruptcy proceedings. Rather, following plan confirmation, bankruptcy proceedings continue, with many determinations as to claims yet

to be made, and with the possibility of plan revisions or modifications proposed by any party, *see Mort Ranta*, 721 F.3d at 248, until the issuance of a discharge order, which reflects the final termination of the proceedings. The treatment of confirmation orders as final thus does not reflect that they are somehow different in kind from orders denying confirmation, but rather manifests the flexible and pragmatic approach to finality that nearly all the courts of appeals have held appropriate under 28 U.S.C. § 158. *See In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996).

Holding appeals by debtors from denials of plan confirmation to a more stringent standard of finality than appeals by creditors from orders confirming plans systematically disadvantages litigants whom the bankruptcy laws were designed to protect. The late Judge Lumbard, in dissent, succinctly summarized the unfairness of such a rule when the Second Circuit first drew the distinction between appeals of confirmation orders and orders denying confirmation:

> Only the debtor may propose a Chapter 13 plan. … Therefore the debtor is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation. The effect of today's holding is that when creditors lose and a plan is confirmed, creditors may appeal immediately as of right; when debtors lose and a plan is rejected, they may appeal only by leave of the district court. Their only alternative is to wait until a less favorable plan is confirmed, which may be months away, or until the bankruptcy court dismisses the case or dissolves the automatic stay, which the debtors will try to postpone for as long as possible. In either event, a bank-

> ruptcy court ruling which is final as to a plan of arrangement will be reviewable long after it is made, perhaps long after the plan can be revived. Congress enacted Chapter 13 to aid consumer debtors; we should not delay their access to relief on appeal.

Maiorino v. Branford Sav. Bank, 691 F.2d 89, 95 (2d Cir. 1982) (Lumbard, J., dissenting).

This case illustrates the disparity well. Whether the plan at issue was properly subject to confirmation depends on resolution of a disputed legal issue that itself has divided bankruptcy courts: Can a plan include a provision requiring a creditor to object to confirmation if it disagrees with the plan's listing of the amount of its claim, on pain of forfeiting its claim for a larger amount if it fails to object? Respondent Bank of America was able to appeal—to the district court, under 28 U.S.C. § 158(a)(1)—the bankruptcy court's confirmation of a plan that included such a provision because confirmation is considered final under section 158. But when the district court held that the plan could *not* be confirmed because of its inclusion of the object-or-forfeit provision, the debtor could not appeal the very same issue, at the same stage of the case, to the court of appeals.

Neither the bankruptcy court's order confirming the plan nor the district court's order denying confirmation, of course, marked the actual termination of the bankruptcy proceedings. Nonetheless, both orders ruled definitively on the lawfulness of the plan. And the importance of a conclusive appellate resolution of the issue, both from the standpoint of the parties and from the broader point of view of the need for clarification of a significant issue of bankruptcy law, re-

mained the same after the district court had ruled—as evidenced by the fact that both Bank of America and the bankruptcy trustee urged the court of appeals to treat the district court's order as final and accept the appeal. Yet solely because it was the debtor rather than the creditor to whom the order on appeal was adverse, the order was treated as non-final and unappealable.

The prospect that a debtor might be able to obtain review of an order denying confirmation later, either by appealing a subsequent order confirming another plan or by dismissing the bankruptcy proceedings voluntarily and then appealing, hardly suffices to correct the imbalance. As an initial matter, it is difficult to see why either of those options is preferable, from the standpoint of appellate jurisprudence, to recognizing the finality of an order denying plan confirmation. Both possible avenues for appeal involve the debtor appealing an action he has asked the bankruptcy court to take, and neither provides a straightforward path to review of an earlier denial of plan confirmation.

The possibility that a debtor may appeal the confirmation of a new plan that he later proposes is problematic because appeals of favorable rulings are, to say the least, not highly favored by the law. "It is an abecedarian rule that a party cannot prosecute an appeal from a judgment in its favor." *Elkin v. Metro. Prop. & Cas. Ins. Co. (In re Shkolnikov)*, 470 F.3d 22, 24 (1st Cir. 2006). It would be, at a minimum, a procedural oddity to allow (let alone require) a party to appeal an otherwise proper ruling entered at his own request—that is, confirmation of a new plan—on the ground that, at an earlier stage of the litigation, the

court erred by not taking a different action. Ordinarily, "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939).

As for the option of obtaining a voluntary dismissal and then appealing, appeals of voluntary dismissals are the subject of an exceedingly complicated and not entirely consistent jurisprudence. *See*, *e.g.*, *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999) (refusing to permit review of interlocutory order through appeal of a voluntary dismissal with prejudice); *Palmieri v. Defaria*, 88 F.3d 136 (2d Cir. 1996) (same); *Fletcher v. Gagosian*, 604 F.2d 637 (9th Cir. 1979) (same). Subjecting debtors to the uncertainties of that doctrine to obtain review of an order that definitively rejects a plan makes little sense.

Moreover, both the appeal-from-later-confirmation and voluntary dismissal possibilities pose serious practical obstacles for debtors. Even assuming that developing an acceptable and confirmable alternative plan would be possible—which in some instances it would not—it would take time and involve the expenditure of resources of the parties and the court. That expenditure might well drain the resources of a cash-strapped debtor enough to render financially impossible a meritorious appeal that could have been taken earlier. Even if that did not occur, the activity aimed at confirmation of the unwanted plan would be so much wasted effort if, after appeal, the denial of confirmation of the earlier plan were overturned and the earlier plan were reinstated.

As for voluntary dismissal, that possibility would require the debtor to surrender a vitally important attribute of bankruptcy proceedings: the protection against demands of creditors outside the bankruptcy process (including the critical protection against foreclosure on the debtor's home) while proceedings are pending. *See* 11 U.S.C. § 362 (automatic stay provision); *see also id.* § 1301(a) (protection against collection of consumer debts from co-debtors). Absent a discretionary stay from the appellate court, that protection would end when the bankruptcy case was dismissed. *Id.* § 362(c)(2)(B). And even if the dismissal permitted immediate refiling of a new bankruptcy proceeding,[4] the automatic stay in such a proceeding would be limited to 30 days under 11 U.S.C. § 362(c)(3)(A), because the debtor would have had a prior case dismissed within the preceding year.

In short, other avenues of appeal theoretically available to a debtor denied plan confirmation involve serious practical obstacles to effective review. The important interest in providing fair opportunities for debtors as well as creditors to appeal effectively final rulings before the ultimate termination of bankruptcy proceedings would be served by granting review in this case and reversing.

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[4] Outside the bankruptcy context, a voluntary dismissal without prejudice to refiling generally does not support an appeal. *See*, *e.g.*, *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495 (5th Cir. 2004).

III. Allowing Appeals of Orders Denying Plan Confirmation Would Not Overburden the Courts.

Treating denials of plan confirmation as appealable final orders is highly unlikely to overburden the courts. Although the overall number of bankruptcy filings exceeds the total number of civil and criminal case filings in the federal court system by a factor of about three to one,[5] bankruptcy appeals constitute only a minute portion of the workload of the district courts and courts of appeals. The federal district courts received approximately 2,000 bankruptcy appeals in 2013, out of about 285,000 civil case filings,[6] and the federal courts of appeals (including bankruptcy appellate panels) received fewer than 2,000 bankruptcy appeals, out of over 56,000 appeals overall.[7]

Given the very small number of bankruptcy appeals generally, the marginal increase that would result from recognizing the finality of orders denying

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[5] In 2013, there were 1,107,699 new bankruptcy filings, as compared to 375,870 new civil and criminal case filings in the district courts. *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013*, *Caseload Highlights*, http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx.

[6] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013*, *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012 and 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf.

[7] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013*, *U.S. Courts of Appeals*, Tables 2 & B-1, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx.

plan confirmation seems extremely unlikely to overwhelm the courts. Indeed, the courts that most clearly recognize the finality of such orders for purposes of appeal—the Fourth and Fifth Circuits—experience very small numbers of bankruptcy appeals, roughly in line with numbers in other circuits.

Specifically, the Fourth Circuit received 56 bankruptcy appeals in 2013, the Fifth Circuit 125, and the Third Circuit, which also recognizes the appealability of at least some confirmation denials, 67. By contrast, the First Circuit had 35, the Second Circuit 84, the Sixth Circuit 56, the Eighth Circuit 41, the Ninth Circuit 273, and the Tenth Circuit 31.[8] The numbers of bankruptcy appeals appear roughly proportionate to the overall caseloads of the respective circuits.

These figures reflect that debtors in bankruptcy generally lack resources to multiply proceedings by taking unnecessary appeals and that they place a high value on obtaining expeditious approval of workable plans that will allow discharge of their debts. Given these circumstances, placing needless barriers in the way of appeals by debtors—barriers not faced by creditors in like circumstances—is not required to prevent overburdening the appellate courts.

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[8] Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013*, *Table B-3: U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2009 Through 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf. These figures do not include appeals to Bankruptcy Appellate Panels, which exist only in circuits that do *not* allow appeals from confirmation orders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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