No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Contrary to respondent's suggestion, the Bankruptcy Code answers the question presented. Congress expressly and unambiguously authorized Chapter 13 debtors to convert to Chapter 7 "at any time." 11 U.S.C. § 1307(a). When a debtor makes that conversion, it takes effect immediately and ends the Chapter 13 proceeding. *Id.*; see also 11 U.S.C. § 103(i). Any confirmed plan is then no longer "bind[ing]," and the Chapter 13 trustee cannot "make payments to creditors under the plan." 11 U.S.C. §§ 1327(a), 1326(c). The trustee's service terminates, post-petition earnings cease to be property of the estate (unless the conversion was in bad faith), and those funds belong to the debtor. 11 U.S.C. §§ 348(e)–(f), 1327(b). All of this flows directly from the Code.

As respondent would have it (Resp. Br. ("Br.") 1), however, these statutory directives have no bearing on what a trustee does with post-petition funds she is holding when a conversion to Chapter 7 takes place following plan confirmation. But respondent's attempt to avoid the statute rests on a startling and erroneous premise: After a Chapter 13 plan is confirmed, she argues, those funds are "not 'property of the estate'" at all. Br. 35, 40. Rather, she (now) says, these funds "belong to creditors." *Id.* at 15, 19, 26–27, 30–32, 35, 45. Respondent thus fashions herself *not* as a bankruptcy trustee, but rather as an "escrow agent" or "common-law trustee" who serves as a mere "conduit" of funds to which creditors have obtained property rights. *Id.* at 15–26.

That reimagining of Chapter 13 finds no footing in the Bankruptcy Code. Respondent hardly contends otherwise, and instead resorts to viewing Chapter 13's "overarching structure" through her preferred "lens" of escrow and common-law trust. Br. 1, 13, 24 n.5. But the statutes contradict that theory. At least half a dozen times, the Bankruptcy Code specifies that funds held by a Chapter 13 trustee *are* "property of the estate"—*not* property of creditors. See pp. 6–7, *infra*. And as recently as her brief in opposition, respondent acknowledged as much. See Opp. 9 ("[F]unds voluntarily paid by the Debtor (even from wages) * * * *belong to the Chapter 13 estate*.") (emphasis added).

Respondent fares no better in observing that a confirmed Chapter 13 plan is "binding" and that a Chapter 13 trustee has authority to "make payments to creditors under the plan." Br. 16–18, 29 (discussing 11 U.S.C. §§ 1326(a), (c), 1327(a)). Through the very act of conversion, a Chapter 13 plan is nullified and the trustee who administers it dismissed. Those statutes thereby cease to apply, and they do not establish that funds "belong to creditors" beforehand. Even the Fifth Circuit soundly rejected respondent's theory, recognizing that there is "no support for [respondent's] rule in the Bankruptcy Code or in any legislative history." Pet. App. 18a. On this the circuits are in agreement.[1]

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[1] See *In re Michael*, 699 F.3d 305, 312–313 (3d Cir. 2012) ("No provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors."); *Arkison* v. *Plata (In re Plata)*, 958 F.2d 918, 922 (9th Cir. 1992) ("A Chapter 13 creditor's interests do not vest until the monies

Stripped of the false premise that undisbursed funds "belong to creditors," respondent's attempt to evade the statutory text comes up well short. Section 348(f) directs that the post-petition earnings at issue here remain "property of the estate in the converted case" only upon a bad-faith conversion. Section 348(e) "terminates" the Chapter 13 trustee's "service" as the estate's representative and disbursing agent. And Section 1327(b) vests the former property of the estate in the debtor.

Not surprisingly and in any event, respondent's extra-textual approach to the question presented results in an unworkable rule unintended by Congress. Almost in passing, respondent notes that the purported escrow account for creditors is established only "following" the resolution of "contingencies in the plan regarding creditors' rights to payment." Br. 13. Fully stated, respondent's proposed rule is that "once [1] a plan is confirmed, [2] the bankruptcy court has resolved creditors' claims, and [3] any other contingencies provided for by the plan have been satisfied, the conditions of the escrow are met." *Id.* at 22. Those *post*-confirmation "conditions" are significant, and they demonstrate that "confirmation of a plan" is not the "sharp divide" respondent claims. *Id.* at 5. This case is a prime example: The "contingencies provided for by [petitioner's] plan" for the payment of unsecured creditors had not been "satisfied" when petitioner

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are distributed."); *Resendez* v. *Lindquist*, 691 F.2d 397, 398 (8th Cir. 1982) (referring to plan payments as "property of the estate in the possession of the Chapter 13 trustee").

converted to Chapter 7. *Id.* at 22. Thus petitioner would win *even under respondent's rule.*

Finally, respondent's approach is contrary to congressional goals underlying Chapter 13, Chapter 7, and the debtor's right to choose whether and when to convert between them. It is clear—not "fanciful" (Br. 42)—that continuing payments to creditors out of debtors' post-petition earnings following conversion would deter debtors from choosing or continuing to proceed under Chapter 13. See Pet. Br. 23–26. Respondent also readily admits (at 43–44) that her reading would treat undisbursed funds differently in a case that ends in conversion than in one that ends in dismissal. She does not explain why her preferred escrow and trust analogies are effective in the former but not the latter. And respondent is wrong that the funds at issue are a "*quid pro quo*" (Br. 46) that the Chapter 13 debtor irrevocably commits to his Chapter 13 creditors for the privilege of trying to repay them *as much or more* than they would receive in a Chapter 7 case. Returning any undisbursed plan payments to the debtor who converts his case out of Chapter 13 in good faith is the natural and intended effect of Congress's decision to let debtors make such a conversion "at any time." 11 U.S.C. § 1307(a).

I. Chapter 13 Plan Payments Are Property Of The Estate And Do Not "Belong" To Creditors Before They Are Distributed

Respondent's entire argument depends on a demonstrably false premise: that a debtor's post-confirmation payments to a Chapter 13 trustee are not property of the estate, but instead belong to

creditors. In this view, a Chapter 13 trustee holds property *of the creditors* "effectively" in an escrow account or common-law trust. *E.g.*, Br. 15. That conception of Chapter 13 is unmoored from the Bankruptcy Code.

A. Plan Payments To Chapter 13 Trustees Are "Property Of The Estate"

Respondent's argument that trustees have the authority to make post-conversion distributions to creditors flows from her assertion that "the funds at issue here—post-confirmation payments made to a trustee for the purpose of distribution to creditors—are *not* 'property of the estate.'" Br. 35; see also *id.* at 40. Those funds, respondent says, "belong to creditors," *id.* at 15, 26–27, 30–32, who "obtain a property interest in those payments once made" to the trustee, *id.* at 46. That is a new argument, and it is wrong.

For starters, respondent's brief in opposition in this Court, and both of her briefs in the court of appeals, acknowledged that "funds voluntarily paid by the Debtor (even from wages) * * * *belong to the Chapter 13 estate*." Opp. 9 (emphasis added); Resp. C.A. Br. 23 (same); Resp. C.A. Reply Br. 4 (same); accord Resp. C.A. Reply Br. 3 ("In this case, Debtor's wages were part of the bankruptcy estate up until conversion."); *id.* at 7 ("In the case at bar, Debtor's wages were (and still are) part of the estate up until conversion."). Respondent's new argument is waived. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004) (citing S. Ct. R. 15.2).

As for the merits of respondent's new position, she had it right the first, second, and third time. The

Bankruptcy Code says, repeatedly, that a Chapter 13 trustee holds "property of the estate." For example:

- Under Chapter 13, "earnings from services performed by the debtor after commencement of the case" are "[p]roperty *of the estate*." 11 U.S.C. § 1306(a)(1) (emphasis added). There is no exception for such earnings that are placed in the Chapter 13 trustee's possession. By contrast, either a debtor or a trustee can have "possession of the property *of the estate*" depending on the terms of "a confirmed plan or order confirming a plan." 11 U.S.C. § 1306(b) (emphasis added).
- Creditors in a Chapter 13 case make claims *against the estate*. See 11 U.S.C. § 502(e)(1)(A) (referring to a "creditor's claim against the estate"); 11 U.S.C. § 502(j) (referring to "payment or transfer from the estate" to "a holder of an allowed claim"). In respondent's view, a creditor's claim is against "escrowed" funds.
- Chapter 13 trustees are the "representative *of the estate*." 11 U.S.C. § 323(a) (emphasis added). Respondent would make them the representative *of the creditors*.
- Chapter 13 trustees are authorized to "make [a] deposit or investment of the money *of the estate* for which [the] trustee serves," subject to statutory safeguards. 11 U.S.C. § 345 (emphasis added); see also J.A. 46. Under respondent's theory, Chapter 13 trustees lack authority to deposit post-confirmation payments into a bank account (or their authority to do so emanates from some other source, unconstrained by Section 345's explicit safeguards).

- Chapter 13 trustees must make a final report and account that covers their "administration *of the estate*." 11 U.S.C. § 704(a)(9), *incorporated by* 11 U.S.C. § 1302(b)(1) (emphasis added); see Ch. 13 Standing Trustee's Final Rpt. & Account, *In re Harris*, No. 10-50655, Doc. 36 (Bankr. W.D. Tex. Dec. 6, 2011) (accounting for respondent's "administration of the estate" by detailing the receipt and disbursement of post-confirmation plan payments).
- Chapter 13 trustees shall dispose of "any remaining property *of the estate*" ninety days "after the final distribution under section * * * 1326." 11 U.S.C. § 347(a) (emphasis added); see also J.A. 48. In respondent's world, however, once a plan is confirmed there *is* no "remaining property of the estate" in the trustee's possession.[2]

Those statutes squarely contradict respondent's novel theory. Perhaps that explains why the

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[2] Respondent notes (Br. 37 n.8) that courts have taken different approaches to how plans and confirmation orders go about designating that property remains in the estate after confirmation, rather than vesting in the debtor under the default rule in Section 1327(b). Most courts have held that whenever a confirmed plan provides for payments to a trustee it "otherwise provide[s]" for those funds to remain property of the estate. 11 U.S.C. § 1327(b). A minority has held that such a provision does not, without more, trump Section 1327(b)'s debtor-vesting default rule, meaning that such payments are property of the debtor upon confirmation. But that is not an issue here; the confirmation order provided for *all* property of the estate to *remain* property of the estate *until conversion*. J.A. 48. In any event, *no* approach to Section 1327(b) characterizes plan payments as property *of the creditors*.

National Association of Chapter 13 Trustees (NACTT), as *amicus curiae*, stops short of endorsing respondent's position that plan payments "belong" to creditors and are not "property of the estate." See NACTT Br. 15 (arguing that the Fifth Circuit correctly held that "creditors need not hold 'vested rights' to funds in order to have claims to the funds that are superior to the debtor's"); see also *id.* at 2 ("A chapter 13 trustee * * * is empowered to * * * collect property of the estate.").

Not surprisingly, moreover, respondent provides no meaningful authority for her supposedly "common sense" and "plain English" belief that earnings made "property of the estate" by Section 1306(a)(2) lose that character once transferred to a Chapter 13 trustee under a confirmed plan. For that remarkable proposition, respondent relies entirely (at 36) on the dissenting opinion in *In re Michael* (which itself acknowledged that Chapter 13 "creditors receive money paid into the Chapter 13 estate," 699 F.3d at 320), and an inapposite analogy to *Clark* v. *Rameker*, 134 S. Ct. 2242 (2014).[3] It would work a massive change to bankruptcy law if property of the estate ceased to belong to the estate simply because a bankruptcy trustee had taken possession of it under a confirmed plan.

Respondent also contends that *undistributed* plan payments must "belong" to creditors because

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[3] Like AFSA's milk-and-bread analogy (AFSA Br. 20–21), respondent's analogy to *Clark* assumes the answer it seeks by treating a Chapter 13 trustee as a mere conduit for funds that "belong to creditors," rather than as a bankruptcy trustee who possesses property of the estate.

petitioner does not claim to be able to recapture lawfully *distributed* funds. See Br. 28–29. But respondent cites no authority for the notion that conversion must render the Chapter 13 proceedings void *ab initio* to be effective as to undistributed property. To the contrary, once a Chapter 13 trustee has lawfully distributed property of the estate to creditors who hold allowed claims, those funds are no longer property of the estate and the bankruptcy court's jurisdiction over those funds ends. That does not mean, however, that creditors have property rights over funds not distributed to them that remain in the estate.

Finally, *amici* suggest that plan payments from post-petition earnings are not property of the estate because Section 1322(b)(8) allows creditors to be paid out of either property of the estate or property of the debtor. NACTT Br. 7. That option (which facilitates direct debtor disbursements) does not affect how the Code defines which is which, however, and nothing in Section 1322(b)(8) suggests that payments to creditors come out of escrowed "property of the creditors."

B. Sections 1326 And 1327(a) Do Not Authorize Chapter 13 Disbursements After Conversion To Chapter 7

Respondent and her *amici* cite two Code provisions purportedly showing that plan payments in the possession of the trustee "belong" to creditors, not to the estate: (1) Section 1327(a), which makes confirmed plans "binding," and (2) Section 1326, which authorizes trustees to make payments to creditors under the plan. Br. 17–18, 20, 24.

According to respondent, those provisions make the Chapter 13 trustee "an agent who is bound to carry out the terms and conditions of a contract between the debtor and his creditors." *Id.* at 19.

But that argument has a critical flaw: Sections 1326 and 1327(a) *cease to apply* when a debtor converts his case to Chapter 7. Section 103(i) of the Bankruptcy Code provides that "Chapter 13 of [Title 11]" (*i.e.*, 11 U.S.C. §§ 1301–1330) "applies only in a case *under such chapter*." 11 U.S.C. § 103(i) (emphasis added). When petitioner converted his case to Chapter 7, it immediately became a case "under" Chapter 7 to which the relevant portion of *that* chapter (*i.e.*, 11 U.S.C. §§ 701–728) applied. See 11 U.S.C. § 103(b).

Indeed, the principal consequence of conversion is to immediately terminate the Chapter 13 proceeding. "It is well settled," the court of appeals acknowledged, "that upon conversion to Chapter 7, 'the chapter 13 plan and the order confirming that plan are no longer in force.'" Pet. App. 18a (quoting *In re Doyle*, 11 B.R. 110, 111 (Bankr. E.D. Pa. 1981)); see also *In re Michael*, 699 F.3d at 313. Thus, the confirmed plan is no longer "bind[ing]" (§ 1327(a)), and the trustee no longer has any statutory authority to "make payments to creditors under the plan" (§ 1326(c)).[4]

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[4] Respondent's *amici* argue that Section 1326(a)(2)'s final sentence applies to *post*-confirmation plan payments, not just to the *pre*-confirmation payments referred to in the paragraph's preceding sentence (and then referenced by the final sentence's phrase "such payments"). NACTT Br. 8–11; AFSA Br. 8–12. That is mistaken, as the court of appeals held below. See Pet.

Respondent's argument appears to be that because Sections 1326 and 1327 *did* apply when the debtor made his plan payments, they somehow *continue* to govern what the trustee does with those funds after conversion. See Br. 17–18. Not so. That is antithetical to the very notion of conversion. Plan provisions that *had* governed a trustee's disbursements to creditors do not continue to apply in the converted case any more than do plan provisions that *had* governed the debtor's obligation to make payments to the trustee. Respondent would effectively graft onto Section 103(i) new language to make Chapter 13 applicable not only to cases proceeding "under such chapter," but also to cases converted to another chapter until funds held by the former trustee in the former chapter have been disbursed. That is not the statute that Congress wrote or intended.

Respondent also has it exactly backward when arguing (at 17, 29) that Chapter 13 debtors' ability to pay creditors directly supports her theory. Instead, it further demonstrates that property rights shift to creditors only upon *disbursement*. Petitioner's confirmed plan, for example, required him to "direct pay" his future mortgage payments to Chase (as opposed to payments on his arrears, which the trustee would make). J.A. 34. Until petitioner *made* such payments, the funds did not "belong" to Chase.

App. 14a–18a. Section 1326(c) is what authorizes trustees to distribute post-confirmation plan payments to creditors "under the plan." In any event, whether Section 1326(a) or (c) applied to the funds at issue *during* the Chapter 13 proceeding, *neither* of them applied after conversion to Chapter 7.

There is no reason for a different rule when the trustee, instead of the debtor, is the plan's disbursing agent.

Respondent cites Sections 1328(a) and 1329(a) as evidence that "it is the time at which the debtor pays the trustee that is legally significant." Br. 31. Yet respondent ignores Section 348(f)(1)(C), which makes clear that it is the "date" and "time of conversion" that is the "legally significant" event insofar as ending payments to creditors in the Chapter 13 case. See NACBA Br. 21–22. This provision fixes the status of certain creditors in a converted case based on whether they had been "paid in full" or "fully cured" as of the "date" or "time of conversion." Respondent, however, would have it that disbursements to creditors in Chapter 13 continue *after* that "date" and "time," leading to anomalous results unintended by Congress.

In short, respondent's analogy from Chapter 13 to the common law of escrow and trust falls flat. A salient feature of escrow is its irrevocability. There is no "deposit in escrow" where "the depositor reserves a power of revocation." *Restatement (Second) of Trusts* § 32 cmt. d (1959). But Congress made Chapter 13 plans *revocable* by the debtor—granting him an absolute right to convert to a Chapter 7 proceeding "at any time." 11 U.S.C. § 1307(a); see also NACTT Br. 5 ("The debtor has the power to terminate a plan at virtually any time."). Likewise, under the law of trusts, the apt analogy (if any) is to the *revocable* trust settlor's right to obtain trust property upon exercising his right to revoke. See generally Mary F. Radford, George G. Bogert, & George T. Bogert, *The Law of Trusts and Trustees*

§ 1000 (3d ed. 2006); *Restatement (Third) of Trusts* § 63 (2003).

II. The Bankruptcy Code Requires That Chapter 13 Trustees Return Undistributed Post-Petition Earnings To The Debtor Upon Conversion

Respondent is wrong to say that "[n]o provision of the Bankruptcy Code answers" the question presented. Br. 1. Congress has authorized debtors to convert from Chapter 13 to Chapter 7 "at any time," 11 U.S.C. § 1307(a), and prescribed effects of such a conversion that resolve this case. Replacing those statutes with respondent's "escrow" regime of contingent creditor property rights would violate those statutory directives and, in any event, prove unworkable.

A. Respondent Cannot Evade The Statutory Effects Of Conversion

1. *Section 348(f).* Respondent contends that Section 348(f) "has no bearing on the question presented." Br. 33. To support that view, respondent rehashes the theory that post-petition earnings paid to a Chapter 13 trustee after plan confirmation "belong to creditors." Br. 35–36.

As we have explained, however, respondent's property-rights argument lacks any basis in the Bankruptcy Code. See pp. 4–12, *supra*. Plan payments held by the Chapter 13 trustee *are* "property of the estate * * * on the date of conversion." 11 U.S.C. § 348(f)(1)(A). If a conversion to Chapter 7 is made in bad faith, those funds become "property of the estate in the converted case"

under the unambiguous terms of Section 348(f)(2). In those circumstances, the Chapter 13 trustee is obligated to turn over those funds to the Chapter 7 trustee for administration and potential disbursement to creditors. Fed. R. Bankr. P. 1019(4). If the conversion is made in good faith, by contrast, post-petition earnings that are among the "property of the estate on the date of conversion" do not become "property of the estate in the converted case." 11 U.S.C. § 348(f)(1)(A).

The message to debtors is clear: Convert in good faith and post-petition earnings held in the estate are yours; convert in bad faith and those funds remain in the estate and available to your creditors. There is no basis to suppose that Congress intended post-petition earnings saved from the statute's bad-faith-conversion penalty to be disbursed to creditors all the same by a terminated Chapter 13 trustee. For the same reason, it is unpersuasive to argue, as respondent does (at 33), that Section 348(f) "simply does not address" what happens to "post-confirmation, pre-conversion payments" after a good-faith conversion.[5]

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[5] Respondent is wrong (Br. 33–34) that Congress's intent was limited to addressing the facts of two cases specifically cited in a House report. The stated legislative intent was to correct an error made in cases "such as" those, see Pet. Br. 23–26, one of which expressly relied on cases adopting respondent's approach to post-petition plan payments, see *In re Lybrook*, 951 F.3d 136, 138–139 (7th Cir. 1991) (discussing *Resendez*, 691 F.2d at 398–399). In any event, the text of Section 348(f) contains no exception for post-petition earnings held by the Chapter 13 trustee.

2. *Section 348(e).* By its terms, this provision prohibits the trustee from, as respondent contends, conducting business as usual: "Conversion * * * terminates the service of any trustee * * * serving in the case before such conversion." 11 U.S.C. § 348(e). In respondent's view, that "sheds absolutely no light" on whether Chapter 13 trustees should keep disbursing money to creditors after conversion of a case (and according to the terms of an inoperable Chapter 13 plan). Br. 39. That is implausible.

Respondent's "service," as she explains it, is that of a "disbursing agent of * * * payments to creditors." Br. 18; see also *id.* at 19 ("[A] trustee serves as a disbursing agent with respect to plan payments."). Petitioner disputes that funds the trustee disburses "belong" to creditors before they are disbursed, but not that the trustee acts as a disbursing agent. See Pet. Br. 27. That *is* the "service" that "terminates" upon conversion. See, *e.g.*, *Black's Law Dict.* 1576 (10th ed. 2014) (defining "service" as "[t]he official work or duty that one is required to perform"). As the bankruptcy court put it, "the trustee can no longer be functioning as the trustee, and, therefore can no longer be functioning as the disbursing agent." Pet. Br. 10 (citation omitted). That does not take the statute "too literally" (Pet. App. 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)); it affords the statute its plain meaning.

It is no answer, as respondent contends, that the trustee cannot "keep" undistributed funds after conversion and has to give them to someone. Br. 39. Section 348(e) is not silent on who that "someone" is—or at least on who it is *not*. The effect of Section 348(e) is to remove the Chapter 13 trustee as the

"representative of the estate" (11 U.S.C. § 323(a)) against which creditors assert their claims. It terminates the Chapter 13 trustee's authority and obligation to continue disbursing property to those creditors. At that point, any "property of the estate" must be turned over to the new Chapter 7 trustee, who takes over and becomes responsible for any future disbursements to creditors. Fed. R. Bankr. P. 1019(4). A Chapter 13 trustee cannot continue her "service" as a disbursing agent merely by recasting it as a post-conversion "administrative duty." The specific delineation by statute and rule of the trustee's limited administrative duties after conversion (see Br. 38) counsels *against* understanding Congress to have also conveyed this additional—and substantial—power on the "terminate[d]" trustee.

3. *Section 1327(b).* Respondent fails to square her view with the fact that confirmation "vests all of the property of the estate in the debtor" "[e]xcept as otherwise provided in the plan or in the order confirming the plan." 11 U.S.C. § 1327(b). Respondent proceeds, once again, from the flawed premise that petitioner's wages were "not property of the estate" and had already vested *in creditors*. Br. 40–41. But see pp. 4–12, *supra*. Likewise, respondent contends (as did the court of appeals) that when the plan and order provided for payments to the trustee, it made it so that such funds *never* vested in the debtor under Section 1327(b). Contra *In re Michael*, 699 F.3d at 313; *Nash* v. *Kester (In re Nash)*, 765 F.2d 1410, 1414 (9th Cir. 1985). But there is no reason to read a provision dealing with *possession* of property of the estate as governing whether such property can vest in the debtor at conversion.

A debtor's confirmed plan and confirmation order cease to be effective at conversion. So, too, do any exceptions they contain to vesting property of the estate in the debtor under Section 1327(b). That is exactly how the plan and order worked in petitioner's case. The "order confirming the plan" (11 U.S.C. § 1327(b)) stated that "[s]uch property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, *conversion*, or discharge" (J.A. 48 (emphasis added)). Under Section 1327(b) and that order, debtor's post-petition earnings vested in him when he converted his case to Chapter 7.

B. Respondent's Approach Impractically Depends On The Trustee's Resolution Of Post-Confirmation "Contingencies" And "Conditions"

Respondent's proposed rule is that "once [1] a plan is confirmed, [2] the bankruptcy court has resolved creditors' claims, and [3] any other contingencies provided for by the plan have been satisfied, the conditions of the escrow are met." Br. 22. Those second and third conditions are significant, and they prove respondent's view to be unworkable.

First, as those conditions demonstrate, respondent's approach does not make plan confirmation an on/off switch for creditors' purported property rights to undisbursed funds. As respondent acknowledges, Chapter 13 trustees can make payments only to creditors "holding *allowed* claims." Br. 7 (emphasis added); see also J.A. 27, 47. The claims-allowance process can be lengthy, however, and it often continues well after the bankruptcy

court has confirmed a plan. Br. 7.; see also Fed. R. Bankr. P. 3002(c) (providing most creditors 90 days from the initial meeting of creditors to file proofs of claims). Respondent admits that, under her approach, a trustee would still "be required to await the conclusion of that process to determine the amount each creditor is entitled to receive under the plan." Br. 7. There is no support in the Code for having *property rights* turn on the vagaries of that process.

What is more, the twists and turns of claims allowance would render respondent's rule unwieldy in practice. To take just a few examples: Do creditors obtain property rights to undisbursed funds when their proofs of claims are filed (and "deemed allowed," 11 U.S.C. § 502(a)), then lose them when an objection is filed (see *ibid.*), only then to regain those rights if the objection is denied? Do undisbursed funds "belong" to a creditor who by happenstance filed a proof of claim moments before the debtor's notice of conversion because that claim is momentarily "deemed allowed" even though no one—including the trustee—had a chance to object? What about the creditor whose proof of claim was subject to a frivolous objection pending at the time of conversion—is he out of luck? In a significant understatement, the NACTT points out (at 33) that "[t]he Fifth Circuit * * * did not provide clear guidance for determining the details of the creditors' 'superior' claim to the undistributed funds." Neither does respondent.

Indeed, this case shows why the "contingencies" built into respondent's rule are fatal to her position. Petitioner's confirmed plan provided for the payment

of unsecured claims only "as funds become available after secured and priority claims have been paid in full." J.A. 30. When petitioner converted his case, however, his secured creditors had *not* been "paid in full." Chase had received relief from the automatic stay, but that did not resolve its claim or amount to its payment "in full." See NACTT Br. 27 n.9. Even under respondent's proposed rule, therefore, the "contingencies in the plan regarding [unsecured] creditors' rights to payment" had not been satisfied when petitioner converted his case to Chapter 7.[6]

III. Post-Conversion Distributions Penalize Debtors, And Respondent's Contrary Policy Rationale Is Misguided

Respondent's post-conversion distribution penalized petitioner for not having converted to Chapter 7 as soon as Chase obtained relief from the stay. That penalty was unsupported by the Code and undermined Congress's intent in giving the debtor control over when to make a good-faith conversion. No "bargain" petitioner had with his creditors demands a different result.

1. Respondent finds it "fanciful" that her rule might "influence" debtors against electing to make

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[6] Nine days *after* petitioner converted to Chapter 7, respondent filed a recommendation to "treat[]" Chase's $5,574.53 claim as "allowed" in the exact amount Chase had already been paid ($1076.79). See Trustee's Recommendations Concerning Claims, *In re Harris*, No. 10-50655, Doc. 34 (Bankr. W.D. Tex. Nov. 30, 2011), at 1–2. But cf. 11 U.S.C. § 348(e). Having thus rendered Chase's claim "paid in full" *post*-conversion, respondent disbursed funds to unsecured creditors the next day.

their future income "property of the estate" under Chapter 13 instead of protecting it under Chapter 7. Br. 42. It is not. Debtors generally elect to proceed under Chapter 13 only if they believe that, by devoting future income to the estate, they will be able to obtain a discharge of their debts without liquidating assets. That goal proves elusive in a majority of cases, however, so debtors' right to withdraw future income from the estate "at any time" by converting to Chapter 7 is an important inducement to attempt Chapter 13 in the first place.

What is more, respondent ignores that her rule would adversely "influence" whether debtors *maintain* their Chapter 13 case when the going gets tough. Here, for example, petitioner stuck with Chapter 13 for a year after Chase obtained relief from the stay. Pet. App. 4a. As respondent explains, debtors in those circumstances "commonly reach agreements with their mortgage servicers to modify their mortgage loans," and then obtain corresponding "plan modification[s]." Br. 10; see also NACTT Br. 27 n.9. It is in all parties' interest to encourage such efforts. See Br. 46. If a debtor knows that the plan payments he makes while trying to salvage his Chapter 13 proceeding will be lost if he fails, he will have good reason not to take the risk. There is no dispute in this case that if petitioner had converted his case immediately when Chase obtained relief from the stay, the $4,319 at issue would be his today.

2. Respondent tacitly concedes (at 43–44) that her proposed rule would have Chapter 13 trustees treat undistributed funds "differently" upon conversion than upon dismissal. But cf. Opp. 20–21. There is no justification for that anomaly.

First, respondent cannot explain why a debtor's payments to the Chapter 13 trustee "belong to creditors" in "escrow" when the Chapter 13 case ends *in conversion*, but not when it ends *in dismissal*. The fact is, undistributed funds are property of the estate in either case, and they are restored to the debtor unless there is "bad faith" (upon conversion, see § 348(f)) or "cause" (upon dismissal, see § 349(b)).

Second, respondent's reliance (at 43) on "state-law remedies" available to creditors after dismissal does not help. If petitioner had dismissed his case and received his undistributed plan payments, he could have used those funds to pay non-dischargeable debt (like student loans) or post-petition obligations. That is the same use to which petitioner could have put those funds if they had been refunded to him upon conversion. In practical terms, the end result would be the same. There is no basis for believing that petitioner's unsecured creditors could have "attach[ed]" the funds at issue upon dismissal and ended up in the same position they were in after respondent's post-conversion disbursements.[7]

3. The $4,319 at issue was not petitioner's "*quid pro quo*" for any "benefits" his Chapter 13 creditors provided to him. Br. 46; see also *id.* at 27–28 & n.6. As we have explained (Pet. Br. 45–46), those

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[7] Respondent mistakenly assumes, moreover, that any Chapter 7 filing by a debtor following voluntary dismissal of a Chapter 13 case would be prevented as "[b]ad-faith gamesmanship." Br. 44 n.12. Exercising rights that the statute affords is not bad faith. Cf. 3 *Collier on Bankruptcy* § 348.07, at 348-25 (16th ed., Alan N. Resnick & Henry J. Sommer eds., 2012).

creditors had no "benefits" to give. They stood to receive nothing in petitioner's no-asset Chapter 7 case, so they *gave up* nothing while petitioner pursued an unsuccessful attempt to repay them under Chapter 13.

More generally, debtors and creditors alike benefit from good-faith attempts to pay claims under Chapter 13 rather than liquidation under Chapter 7.[8] A Chapter 13 debtor's obligation—the "bargain" he makes under that Chapter—is to fund his estate on a monthly basis out of his disposable income. Those funds become *available* for disbursement to creditors under a confirmed plan (subject to its contingencies). But nothing in Chapter 13 makes those funds a sort of monthly Chapter 13 subscription fee to creditors who stand to *gain* from the debtor's voluntary election of such a proceeding. Contra NACTT Br. 17–18 (analogizing a debtor's plan payments to life-insurance premiums).

4. Respondent's concern that refunding post-petition plan payments to debtors on conversion will lead to creditor "demands for daily distributions" and an "'administrative nightmare'" is unfounded. See Br. 30 (quoting *In re Redick*, 81 B.R. 991, 886 (Bankr. E.D. Mich. 1987)). Respondent provides no evidence that the sky has fallen in any of the many jurisdictions where petitioner's reading of the statute

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[8] Br. 46 ("[C]hapter 13 is intended to be advantageous for debtors and creditors alike."); AFSA Br. 4 ("[U]nsecured creditors often receive more under a Chapter 13 plan than in a Chapter 7 liquidation"); NACTT Br. 7 ("Congress favors Chapter 13 because it promises better results for both debtors *and* creditors.").

has prevailed for some time. That is not surprising. Nothing in bankruptcy law obligates Chapter 13 trustees to accede to demands for distributions so frequent that they become "*de minimus*" while imposing an unreasonably "skyrocket[ing]" cost. *Ibid.* (same).

5. Finally, even if respondent and her *amici* had the better of these policy arguments, they would still be making them to the wrong branch of government. Congress authorized debtors to convert from Chapter 13 to Chapter 7 "at any time," and Congress provided for post-petition earnings to remain "property of the estate in the converted case" only when such a conversion was made in bad faith. The natural consequence of those policy choices is to give debtors—not creditors, and not trustees—control over the timing of conversion. In the end, respondent's quarrel is with Congress.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment should be reversed.

Respectfully submitted.

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MARCH 2015