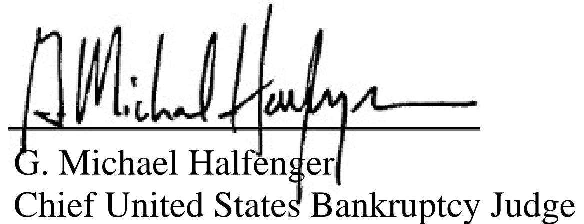
THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: September 16, 2019



G. Michael Halfenger
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Patrick Souter and
Hope Souter,

Debtors.

Case No. 19-21582-gmh
Chapter 13

ORDER DENYING CONFIRMATION AND DISMISSING CASE

Section 1325(a) of the Bankruptcy Code provides that "the court shall confirm a plan" in a case under chapter 13 if, among other things, "the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308." 11 U.S.C. §1325(a)(9). Patrick and Hope Souter, the debtors in this chapter 13 case, did not file all applicable tax returns as required by 11 U.S.C. §1308. See ECF No. 71, at 1–2. The Souters did not file their 2017 federal income tax returns with the Internal Revenue Service, as applicable nonbankruptcy law required, within the period specified in 11 U.S.C. §1308—i.e., by the day before the date on which the meeting of creditors was first scheduled to be held under 11 U.S.C. §341(a) or within any additional period afforded by the chapter 13 trustee and the court. See §1308(a) & (b).

On August 14, 2019, the court ordered the debtors to explain how the court can confirm a plan in this case notwithstanding their failure to comply with §1308 considering the court's recent holding in *In re Long*, another chapter 13 case, that "if a debtor fails to comply with §1308, then §1325(a)(9) unambiguously bars the court from confirming the debtor's debt-adjustment plan." Decision at 9–10, *In re Long*, No. 19-20186 (Bankr. E.D. Wis. 2019), ECF No. 38, https://www.wieb.uscourts.gov /opinions/?file&id=510. The court also ordered the debtors, if they do not contend that the court can confirm a plan in this case, to show cause why the court should not dismiss or convert this case. After all, "[i]f the court cannot confirm the plan, continuing the case under chapter 13 serves no legitimate purpose, and the court should dismiss it or convert it to a case under another chapter of the Bankruptcy Code." *Id.* at 11. On September 12 the debtors filed a written response to the court's August 14 order.

The debtors primarily dispute *Long*'s conclusion that "[§]1325(a) generally provides that, subject to provisions not at issue here, 'the court shall confirm a plan if' (**and only if**) all of the conditions described in its nine paragraphs are met." *Id.* at 9 (emphasis added) (citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277–78 & n.14 (2010)). The debtors contend that, unless someone objects, the court can confirm a plan in this case even though they did not (and cannot now) satisfy §1325(a)(9) because they failed to file all of their applicable tax returns as required by §1308. The debtors' contention has textual support. Section 1325(a) provides that "a court shall confirm a plan if" the subsection's requirements are met, not that a court may confirm a plan "only if" those requirements are met. Compare §1325(a), with 11 U.S.C. §1129(a) ("The court shall confirm a plan **only if** all of the following requirements are met . . . ." (emphasis added)), and *id.* §1191(a) ("The court shall confirm a plan under this subchapter **only if** all of the requirements of section 1129(a), other than paragraph (15) of that section, . . . are met." (emphasis added)).

The Supreme Court has repeatedly read §1325(a) to permit confirmation **only if**

all of the subsection's requirements are met. Most recently, the Court, in *United Student Aid Funds, Inc. v. Espinosa*, explained that "§ 1325(a)(1) instructs a bankruptcy court to confirm a plan **only if** the court finds, *inter alia*, that the plan complies with the 'applicable provisions' of the Code." 559 U.S. at 277 (emphasis added). Similarly, in *Johnson v. Home State Bank*, the Court wrote:

> A bankruptcy court is authorized to confirm a plan **only if** the court finds, *inter alia*, that "the plan has been proposed in good faith," § 1325(a)(3); that the plan assures unsecured creditors a recovery as adequate as "if the estate of the debtor were liquidated under chapter 7," § 1325(a)(4); that secured creditors either have "accepted the plan," obtained the property securing their claims, or "retain[ed] the[ir] lien[s]" where "the value . . . of property to be distributed under the plan . . . is not less than the allowed amount of such claim[s]," § 1325(a)(5); and that "the debtor will be able to make all payments under the plan and to comply with the plan," § 1325(a)(6).

501 U.S. 78, 87–88 (1991) (emphasis added) (alterations in original).

Espinosa and *Johnson* specifically discuss confirmation requirements relevant to those cases—in *Espinosa*, the requirement in §1325(a)(1) that the plan must comply with other applicable Code provisions, and in *Johnson*, the creditor-protective requirements found in paragraphs (3)–(6) of §1325(a). *Espinosa* and *Johnson* describe the requirement or requirements at issue in those cases as one or more among others ("*inter alia*") that must be satisfied before the court can confirm a plan under §1325(a), thus indicating that a bankruptcy court must find that **all** of the requirements specified in §1325(a) have been satisfied before confirming a chapter 13 plan.

Concededly, whether §1325(a) allows a court to confirm a plan if some but not all of its requirements are met was not specifically at issue in either *Espinosa* or *Johnson*. In *Espinosa* the Court held that a bankruptcy court should not confirm "a Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship", in violation of 11 U.S.C. §§523(a)(8) & 1328(a)(2), "even if the creditor fails to object, or to appear in the proceeding at all" because such a plan does not comply "with

the ‘applicable provisions’ of the Code”, as §1325(a)(1) requires. 559 U.S. at 276–77.

In *Johnson* the Court held that a debtor can provide for a mortgage lien in a chapter 13 plan after the personal obligation that the lien secured is discharged in a chapter 7 case because “the mortgage lien . . . remains a ‘claim’ against the debtor”. See 501 U.S. at 80. The lien holder argued that construing “claim” to include “merely the remainder of an obligation for which the debtor’s personal liability has been discharged in a Chapter 7 liquidation” would permit abusive “[s]erial filings under Chapter 7 and Chapter 13”. *Id.* at 87. The Court rejected the implication that “Congress intended the bankruptcy courts to use the Code’s definition of ‘claim’ to police the Chapter 13 process for abuse”, citing “the full range of Code provisions designed to protect Chapter 13 creditors”, including that “[a] bankruptcy court is authorized to confirm a plan **only if** the court finds, *inter alia*, that ‘the plan has been proposed in good faith’”. *Id.* at 87–88 (emphasis added) (quoting §1325(a)(3)).

Still, the Court’s construction of §1325(a) in *Espinosa* and *Johnson* “provides the best . . . guide to what the law is,” and this court is duty-bound to follow it. *Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994). As the Seventh Circuit has explained, the Supreme Court expects the lower courts to follow its explications of the law, even when those formulations might not be essential to the Court’s holding:

> The Court can hear only a small portion of all litigated disputes; it uses considered dicta to influence others for which there is no room on the docket. Appellate courts that dismiss these expressions and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court’s marching orders) and frustrate the evenhanded administration of justice by giving the litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.

United States v. Bloom, 149 F.3d 649, 652 (7th Cir. 1998).

Since *Espinosa* and *Johnson*, the Seventh Circuit and this court have stated that a debtor must demonstrate compliance with §1325(a)’s requirements before the court can

confirm a chapter 13 plan. *Marshall v. Blake*, 885 F.3d 1065, 1081 (7th Cir. 2018) ("Before the court may confirm a bankruptcy plan, the debtor must . . . show the requirements in § 1325(a) have been met."), overruled on other grounds by *In re Wade*, 926 F.3d 447 (7th Cir. 2019); *In re Foley*, No. 18-29998, 2019 WL 3933616, at *2 n.3 (Bankr. E.D. Wis. Aug. 19, 2019) ("[T]he bankruptcy court has an independent duty to ensure that a proposed plan satisfies all confirmation requirements."). The debtors in this case have not countervailed the clear weight of relevant authority, suggesting, as *Long* concludes, that §1325(a)'s requirements are mandatory, not discretionary.*

The debtors also dispute *Long*'s conclusion that §1325(a)(9) requires compliance with §1308's timing provisions and suggest that "the court may confirm a plan in this case" because "the 2017 tax return was filed before the hearing on confirmation". ECF No. 73, at 2. The debtors do not offer any new arguments with respect to this issue but instead cite the trustee's briefs in *Long*. See *id.* The court addressed the trustee's arguments in *Long* and will not address them again here.

Accordingly, IT IS ORDERED that **confirmation of the plan is denied**, pursuant to 11 U.S.C. §1325(a)(9), based on the debtors' failure to file all applicable tax returns as required by 11 U.S.C. §1308, and, because the court cannot confirm a plan in this case and the debtors have not shown cause why the court should convert the case instead of dismissing it, **this case is dismissed** for cause under 11 U.S.C. §1307(c).

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* An unpublished order of the Seventh Circuit from 2005 states in dicta that "if the requirements of § 1325(a) are met, the bankruptcy court must confirm the plan, but if they are not met (but § 1322(a) is satisfied), the bankruptcy court still has the discretion to confirm the plan." *In re Burgess*, 143 F. App'x 692, 695 (7th Cir. 2005) ("Section 1325(a), therefore, is not mandatory, but only discretionary."). Circuit Rule 32.1 provides, "No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding." And clearly contrary statements in *Espinosa*, *Johnson*, and *Marshall* deprive this order of any persuasive value it might have in the absence of the Circuit Rule.