No. 19-1035

IN THE
Supreme Court of the United States

SHARON D. ROSE,
Petitioner,

v.

SELECT PORTFOLIO SERVICING, INC.; US BANCORP,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

REPLY ON PETITION FOR CERTIORARI

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Respondents do not dispute that there is a clear, widening, and well-recognized circuit conflict on the question presented; that the question presented is important and frequently recurring; that the Fifth Circuit's decision squarely turns on the answer to the question presented; and that were this Court to grant certiorari it could fully resolve an important question of bankruptcy law over which two circuit courts and over seventy bankruptcy and district courts have diverged since 2006.

Unable to raise a single legitimate issue regarding the existence of the conflict or its clean presentation here, Respondents' arguments against certiorari are wholly unavailing. Getting the normal "percolation" argument backwards, Respondents acknowledge that there is widespread disagreement over the question presented yet ask this Court to wait until the courts are in even *further* disarray—and thus federal bankruptcy law even less uniform—before granting certiorari. That argument, unpersuasive on its own terms, makes even less sense in the face of a square conflict between the circuits and a greater than 50-20 split in the lower courts in cases addressing chapters 7, 11, and 13 bankruptcies.

Respondents' purported "vehicle" issues fare no better. As both the district court and Fifth Circuit's decisions demonstrate, the fact that the Petitioner and Respondents' dispute originated in a state-law foreclosure action has *zero* relevance as regards the question presented. Respondents' own arguments make this clear. Respondents' novel claim that Texas principles of equitable tolling might render the question presented not outcome determinative is not only flatly

wrong based on the very case Respondents cite, but also waived—Respondents never raised this argument below and thus not surprisingly neither the Fifth Circuit nor the district court ever addressed it. Next, the fact that Petitioner is supposedly arguing for a position "normally" raised by a creditor, and Respondent a position "normally" raised by a debtor, is a red herring. As the briefing before this Court demonstrates, both parties are represented by able counsel vigorously arguing their positions. Finally, and for good reason, Respondent does not actually argue that this case is moot, and the fact that Petitioner might have to go through additional procedural steps on remand from this Court to receive her Property or damages makes this case no different from others upon which this Court has ruled.

The petition for certiorari should be granted.

I. THERE IS A CLEAR AND PERSISTENT CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As Respondents concede, there is a "1-1 circuit split on the question whether section 362(c)(2)(A) lifts the stay for claims against the bankruptcy estate." BIO 13.[1] Respondents also concede that this important issue frequently confronts lower courts across the country, and that the lower courts have been in disarray on this question for nearly fifteen years. In the face of this

[1] Respondents are not alone in acknowledging a clear circuit split. *See, e.g.*, *In re Thu Thi Dao*, No. 20-20742-C-7, 2020 WL 2462521, at *1 (Bankr. E.D. Cal. May 11, 2020) ("The circuits are divided."); *In re Trail Mgmt., LLC*, 612 B.R. 242, 243 n.2 (Bankr. M.D. Fla. 2020) (noting that "a circuit split exists").

entrenched conflict of authority, Respondents' two arguments against granting certiorari are wholly unpersuasive.

First, Respondents assert that the split is too "shallow" to warrant this Court's review. BIO 12. But when circuit splits on important questions are clear, and there is no reasonable prospect of convergence, this court grants certiorari *regardless* of the number of courts of appeals that have weighed in. That is particularly true in bankruptcy cases—not because of some "bankruptcy-specific exception" to this Court's normal practice, BIO 13, but because there is no reason for federal bankruptcy law to mean different things, and thus impose different financial obligations for debtors and creditors, in different States. *See* Pet. 14 n.2 (collecting bankruptcy cases with 1-1 circuit conflicts in which this Court recently granted certiorari).

In any event, this Court's practice of granting certiorari "on an issue that only two courts of appeals have even had occasion to consider" exists outside the bankruptcy context as well. BIO 2; *see, e.g.*, *Rubin v. Islamic Rep. of Iran*, 137 S. Ct. 2326 (2017) (1-1 conflict); *Nichols v. United States*, 136 S. Ct. 445 (2015) (1-1 conflict); *Ocasio v. United States*, 135 S. Ct. 1491 (2015) (1-1 conflict). And, of course, this Court grants certiorari on issues with nationwide import even where there is no circuit conflict whatsoever. *See, e.g.*, *FNU Tanzin v. Tanvir*, 140 S. Ct. 550 (2019); *Allen v. Cooper*, 139 S. Ct. 2664 (2019); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Respondents' citation to a single grant of certiorari where more than two courts of appeals had considered the question is neither here nor there. BIO 13-14.

Respondents also quibble with the precise number of lower-court decisions taking a position on the question presented. But Respondents' efforts to identify decisions that "merely applied earlier precedent" and those for which the court's answer to the question presented was not dispositive miss the point. BIO 14-15. All of those cases demonstrate that the conflict is clear and entrenched. In fact, Respondents' brief proves that Petitioner's "tally" is an *underestimate* of the lower-court disarray, as Respondents cite cases preceding this petition that Petitioner did not count, BIO 16, and cases that have taken a position on the question since this petition was filed, *see, e.g.*, *In re Thu Thi Dao*, 2020 WL 2462521, at *1, *13 (recognizing that the split implicates "50+ cases" on one side and "20+ cases" on the other and ultimately siding with the majority view). These decisions provide further evidence—were any needed—of the widespread confusion that would be eliminated by the Court deciding this case.

Second, despite their acknowledgment that the question presented has stymied lower courts for fifteen years, Respondents argue that the conflict requires even more "percolation." BIO 15. Normally, a percolation argument relies on the prospect of the conflict resolving itself without this Court's intervention. Here, however, Respondents bizarrely assert that certiorari on the question should be delayed to allow for *greater disarray* in the interim. Conceding that there is no reason for the answer to the question presented to be different in different jurisdictions, Respondents nonetheless argue that the potential for a *third* or even a *fourth* interpretive approach in future lower-court cases makes the question less deserving of resolution now. BIO 16-

17. Respondents get it exactly backwards: the existing split of authority means identically situated parties are treated vastly differently on a critical issue of bankruptcy law. *See* Pet. 21-22. Respondents' argument only demonstrates that the situation will get worse if certiorari is denied.

Respondents' suggestion that this Court should wait until lower courts have had additional occasions to consider the question presented in chapter 7 and 11 bankruptcy proceedings is equally unpersuasive. Courts have *already* addressed the question—and diverged—in exactly those contexts. Indeed, judges have embraced the majority and minority approaches in chapter 7 cases, *see, e.g.*, *Rinard v. Positive Investments, Inc. (In re Rinard)*, 451 B.R. 12 (Bankr. C.D. Cal. 2011) (majority); *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009) (minority), *and* in chapter 11 cases, *see, e.g.*, *In re Williford*, No. 13-31738, 2013 WL 3772840 (Bankr. N.D. Tex. July 17, 2013) (majority); *Vitalich v. Bank of New York Mellon*, 569 B.R. 502 (N.D. Cal. 2016) (minority). If something about chapter 7 or chapter 11 bankruptcies gave courts special insight into the proper interpretation of § 362(c)(3)(A), those cases would hold the key. Instead, courts are just as hopelessly divided in chapter 7 and 11 cases as they are in chapter 13 cases.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO ACHIEVE UNIFORM RESOLUTION OF THIS IMPORTANT QUESTION.

Respondents' heated rhetoric aside, what is notable about the claim that this case presents an "exceptionally poor vehicle" is what Respondents do *not* say. BIO 18. Respondents never dispute that the question presented

was raised and ruled on at every stage of this case, and was entirely outcome-determinative below. Nor do they dispute that a ruling in Petitioner's case would resolve this deeply entrenched conflict once and for all. Instead, the "vehicle" arguments Respondents raise are makeweights.

At the outset, Respondents observe that the parties' dispute over the meaning of the federal bankruptcy provision at issue was presented to the federal courts via removal of a state-law foreclosure suit. BIO 18-20. But Respondents do not even attempt to argue that the centrality of the question presented is at all affected by this procedural context. Indeed, each of the decisions below turned entirely on the meaning of 11 U.S.C. § 362(c)(3)(A); the undisputed parameters of state law simply played no role in the courts' analysis of that question. Repeatedly referring to this case as a "state-law foreclosure dispute" does not convert the single dispositive issue presented by the case—one of federal law on which the circuits are split—into something else. BIO 19.[2] To the contrary, this posture creates an unusually strong vehicle, because parties in bankruptcy proceedings are financially disincentivized from enduring the delay necessary to appeal to circuit courts, and debtors' frequent lack of counsel means that lower-court records will rarely be this clean. *See* Pet. 25.

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[2] This Court has recognized as much by granting certiorari in cases presenting federal questions triggered by state-law ground rules. *See, e.g.*, *Bartlett v. Strickland*, 552 U.S. 1256 (2008) (granting certiorari on a question about the interpretation of the federal Voting Rights Act in a case arising under North Carolina law).

Unable to identify any reason why the parties' state-law causes of action would have any effect on the Court's adjudication of this appeal, Respondents make the inconsequential point that it is "unusual" for a debtor to take the position that § 362(c)(3)(A) terminates the entire scope of the automatic stay. BIO 21. This observation is the basis for the remaining "vehicle" arguments in Respondents' brief, all of which are fatally flawed.

First, Respondents claim that the answer to the question presented may not be dispositive in Petitioner's case because "a Texas court could hold that general principles of equity warrant tolling" regardless. BIO 22. That is patently false. Remarkably, in the span of a single page, Respondents variously assert that this general-principles-of-equity point "may," "could," "likely," and "would almost certainly" apply. *Id.*[3] Respondents' uncertain assessment of the strength of their argument is hardly surprising: until their brief in opposition in this Court, Respondents *never* once made an argument based on this alleged proposition of Texas law, and indeed none of the three opinions below even suggested that an alternative argument based on "general principles of equity" was before the court. Respondents' "principles of equity" argument—even were it correct—is indisputably waived and has no

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[3] Respondents trace this purported argument to the words "equitable tolling" in a section of their district court brief about the length of the limitations period—*not* the length of tolling—and without reference to any legal authority whatsoever. BIO 8. This "passing reference" does not preserve an equitable tolling argument. *Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 140 (5th Cir. 2016).

relevance before this Court or in any subsequent proceeding. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 140 (5th Cir. 2016).

In any event, Respondents waived this argument for good reason: it is frivolous. The sole case Respondents cite in support of this purported principle "[u]nder Texas law" is a Texas case *refusing* to apply equitable tolling, and quoting the *federal* standard announced in a case that *itself* refused to apply these equitable principles. BIO 22 (citing *Czerwinski v. Univ. Tex. Health Sci. Ctr. At Hous. Sch. of Nursing*, 116 S.W.3d 119, 123 (Tex. App. 2002) without noting that the quoted excerpt was itself quoting *Rowe v. Sullivan*, 967 F.2d 186, 192 (5th Cir. 1992)). That federal case *itself* quotes an opinion which declines to apply equitable tolling, and traces the doctrine to two cases from the 1940s and 1950s that permit equitable tolling where the defendant's affirmative "misrepresentation" was what caused the filing deadlines to pass. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.4 (1990). This trail of cases *refusing* to apply equitable tolling, finally leading to two more-than-70-year old non-Texas cases involving misrepresentation—something Respondents do not even allege Petitioner engaged in—demonstrate just how meritless Respondents' waived alternate ground is.

Second, Respondents assert that Petitioner's argument in favor of a position that would not help the "majority of debtors" would somehow result in a flawed presentation of the "statutory interpretation" question before this Court. BIO 23-24. This type of "flipped" positioning of the litigants is hardly uncommon in this

Court. *Id.* 21; *see, e.g.*, *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 139 S. Ct. 2614 (2019) (granting certiorari where the appellant was arguing against the right to an immediate appeal); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 915 (2019) (granting certiorari where the private-party petitioner was arguing against government disclosure of information to private parties under FOIA). But even more important, Petitioner's argument as to the proper interpretation of § 362(c)(3)(A) has been vigorous and consistent at every stage of this case, *see* Pet. 23-25, and Respondents' brief makes clear that they too will ably represent their own position regardless of whether it conflicts with that of the "majority of" creditors, BIO 23.

Third, Respondents correctly recognize that this case is "not formally moot," BIO 24—by which they actually mean not moot at all. Nonetheless, Respondents contend that certiorari should be denied because of the possibility that Petitioner would need to engage in additional litigation on remand from this Court to actually recover the Property or damages. *Id.* A ruling in Petitioner's favor would give her the indisputable right to a remedy for Respondents' time-barred foreclosure action. That renders the question presented outcome dispositive in exactly the way this Court has always required. The fact that Petitioner might then need to take additional procedural steps on remand to obtain that remedy does not distinguish this case from numerous cases before the Court, including cases in which the Court has recently granted certiorari. *See, e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019) (ruling in a bankruptcy case where prevailing "may not make [the petitioner]

better off" because the petitioner would have to "seek the unwinding of prior distributions" in subsequent proceedings (internal quotation marks omitted)); *Lozman v. City of Riviera Beach*, 568 U.S. 115, 120 (2013) (deciding whether a structure qualified as a "vessel" even after the structure was sold).

III. THE FIFTH CIRCUIT'S DECISION IS INCORRECT.

Even if the Fifth Circuit's decision were correct, that would not be a reason to deny certiorari in the face of an undisputed circuit split. But Respondents' brief preview of their merits argument only confirms that the Fifth Circuit's decision was wrong.

Rather than articulate an interpretation that "follows from the 'plain language' of the statute," BIO 25, Respondents merely *repeat* the language of the statute and then proceed under the assumption that the Fifth Circuit's interpretation is supported by the statute's text, *id.* Their brief does not even attempt to read the words "with respect to the debtor" to mean what their position requires: as a reference to actions against the debtor personally *and* actions against the property of the debtor, but *only* to the extent that the debtor's property is not housed in the debtor's bankruptcy estate. Nor do Respondents offer any justification for the tension this interpretation would create with the text of §§ 362(c)(1)-(2), 362(c)(3)(B)-(C), 362(j), and 346(b). *See* Pet. 27-29.[4] In contrast,

[4] Respondents' own structural argument, that "Congress knew how to terminate the *entire* stay when it wanted to," BIO 26, is unavailing for two reasons. *First*, it is equally true that Congress

Petitioner's commonsense interpretation of the phrase—to refer to the three categories of actions which *all* relate to the debtor—creates none of these structural conflicts.

Next, Respondents undersell Petitioner's legislative history evidence as merely showing that her position "better vindicates Congress's intent." BIO 27. In reality, among a mountain of additional legislative history evidence favoring Petitioner's reading, the House Report accompanying § 362(c)(3)(A) squarely answers the question presented: Congress drafted this provision to "terminate the automatic stay" as a whole. Pet. 29-30 (quoting H.R. Rep. No. 109–31(I), at 69 (2005), 2005 U.S.C.C.A.N. 88, 138); *see also In re Smith*, 910 F.3d 576, 589-91 (1st Cir. 2018). Petitioner's reading is not only a "better" reflection of Congress's purpose; it is the *only* reading compatible with legislative intent. Pet. 29-31.

Finally, Respondents frame the policy consequences of their position in misleadingly broad terms. BIO 27. But as the First Circuit correctly recognized, their reading of the statute yields only the following results:

> (1) certain governmental creditors can collect tax refunds for non-tax debts, (2) certain governmental creditors can pursue exempt property to satisfy non-dischargeable tax debts,

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knew how to clearly make the distinction that *Respondents'* reading of the provision requires, because it did so in the subsections immediately preceding § 362(c)(3)(A). Pet. 27 (quoting 11 U.S.C. § 362(c)(1) & (2)). *Second*, the same language Respondents point to in § 362(c)(4)(a)(1) to distinguish § 362(c)(3)(A)—"the stay under subsection (a)"—appears verbatim in § 362(c)(3)(A).

(3) certain governmental creditors can suspend a debtor's driver's license, and (4) creditors can make collection calls.

In re Smith, 910 F.3d at 587; *see* Pet. 31-32. Respondents do not even try to defend the notion that Congress meant to impose this arbitrary collection of consequences for second-time filers alone, much less that it would have used the words "with respect to the debtor" to accomplish this result. That is because these necessary implications of Respondents' position are impossible to defend.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 8, 2020