No. 21-_____

In The
Supreme Court of the United States

MARGARET L. KINNEY,

Petitioner,

v.

HSBC BANK USA, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted to resolve the conflict among the courts of appeals as to whether a bankruptcy court may deny a motion to dismiss and/or grant a completion discharge when there remains, at the end of that plan term, a shortfall that the debtor is willing and able to cure within a reasonable time or whether such a payment made after the five-year period of a Chapter 13 plan is not a payment "under the plan" but an impermissible modification after the plan ended?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RELATED PROCEEDINGS

United States Bankruptcy Court—District of Colorado

In re Margaret L. Kinney, Bankruptcy Case No. 13-27912 EEB

Order Granting Motion to Dismiss Case Prior to Entry of Discharge,
November 22, 2019—Docket No. 101

Judgment (on Order Granting Motion to Dismiss Case,
November 22, 2019—Docket No. 102

Order Denying Motion to Reconsider,
November 22, 2019—Docket No. 103

Judgment (on Order Denying Motion to Reconsider),
November 22, 2019—Docket No. 104

United States Bankruptcy Appellate Panel—Tenth Circuit

Margaret L. Kinney v. HSBC Bank, USA, BAP Case No. CO-19-047

United States Court of Appeals—Tenth Circuit

Margaret L. Kinney v. HSBC Bank, USA, Misc. Case No. 20-700

Margaret L. Kinney v. HSBC Bank, USA, Case No. 20-1122

Opinion Affirming Decision to Dismiss Case—July 23, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Margaret Kinney ("Petitioner" or "Ms. Kinney") respectfully requests issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published at 5 F.4th 1136 (10th Cir. 2021), and is reproduced at Pet. App. 1.

The decision of the United States Bankruptcy Court for the District of Colorado is reproduced at Pet. App. 25.

JURISDICTION

The court of appeals entered Judgment on July 23, 2021. *See* Pet. App. 1. The court had jurisdiction under 28 U.S.C. § 158(d). The jurisdiction of this Court is under 28 U.S.C. § 1254(1).

RELEVANT STATUTES INVOLVED

The following statutory provisions[1] are relevant to this matter: 11 U.S.C. §§ 1307, 1322, 1325, 1328, and 1329.[2]

PRELIMINARY STATEMENT

Section 1328(a) mandates that a bankruptcy court "shall" issue a discharge upon completion of all payments under the plan. The statutory term "all payments under the plan" has been in place in section 1328(a) since the Bankruptcy Code ("the Code") became effective in 1978, but it had not previously been construed as a basis for dismissal without discharge where direct payments were in arrears until 2014 in the opinion of *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014). *In re Gibson*, 582 B.R. 15, 18 (Bankr. C.D. Ill. 2018). Since then, there has been a recent trend in which a number of courts are now favoring dismissal without discharge as a punitive remedy for a debtor's failure to pay all of their direct mortgage payments or are late in doing so. *Id.* The Tenth Circuit has determined that a late mortgage payment made by debtors in Chapter 13 bankruptcy cases after the due date for the last payment under the plan is not a payment "under the plan" because the plan no longer exists at that time. *See* Pet. App. 11, 13. Thus, a debtor

[1] All references to "section" or "§" are to Title 11 of the Bankruptcy Code unless specified otherwise.

[2] The relevant portions of these provisions are reproduced in Petitioner's Appendix. *See* Pet. App. 52-58.

that falls behind at the end of the plan cannot make a "cure" payment within a reasonable time afterwards and receive a discharge. In the past, trustees had a practice of holding Chapter 13 cases open beyond the sixty-month plan term in order to allow debtors to cure arrearages. Pet. App. 27, 31, 43. Notwithstanding, the Tenth Circuit concluded that a payment made after the expiration of the plan is an impermissible modification after the five-year term of the plan ended.

The Third Circuit, and a majority of the lower courts that have considered the issue, have taken a contrary view such that a default in plan payments may be cured within a reasonable time after the 60 months have expired. The Seventh and Eleventh Circuits, in dicta, have also approved of a reasonable time to allow for a cure in payments. The reasoning behind the majority approach is based on the belief that the debtors are not seeking to extend the plan, but rather, they are only curing a default on already scheduled payments. Commentators have also weighed in favor of allowing the plan to be completed within a reasonable time after the stated term where the debtor has been substantially complying with the plan.

The question also raises administrative problems for trustees. When is the final payment made under the plan? When initiated by electronic means, when mailed, when received, or when posted? What is a trustee to do with a payment received after the due date for the last payment? Return it to the debtor? Pay the creditors pursuant to the plan?

The Code does not define "under the plan," but according to the Tenth Circuit, the "more natural" reading of "under" suggests that it refers to something that must be "subject to" or "under the authority of" the plan. Pet. App. 9 (citing to *Florida Dept. of Rev. v. Piccadilly*, 554 U.S. 33, 40-41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008)). Similarly, in Chapter 11, and within 11 U.S.C. § 1146(c), the term "under a plan confirmed" has been held to mean "made pursuant to the authority conferred by such a plan,. . . ." *In re Hechinger Inv. Co. of Del., Inc.* 335 F.3d 243, 254 (3d Cir. 2003).

In *Piccadilly*, this Court found that an exemption could not be claimed because the transfer occurred before a plan was confirmed so the transfer could not be subject to or under the authority of the plan. *Piccadilly*, 554 U.S. at 40-41. The court below asserts that the late payment by Ms. Kinney could not be subject to or under the authority of the plan because the plan had expired and was no longer in existence.

In *Piccadilly*, the date of the transfer was easily determined to have occurred prior to the date of confirmation. Such is not the case here. The Code is silent as to when a Chapter 13 plan "ends." While the court may not confirm a plan that provides for payments beyond a 60-month period, nothing in the Code mandates dismissal of a case with a confirmed plan that ends up needing some extra time to complete. The Code does not provide a specific end date of a plan; rather, it just provides that a debtor must propose a plan with monthly installments for a period not to

exceed five years. It does not state that the plan ends at that specific time nor does it state that a late installment cannot be made after that period has passed.

In *Piccadilly*, this Court was not persuaded by Piccadilly's contextual arguments that the phrase "under a plan confirmed" in § 365(g)(1), should be read to mean "in accordance with." Yet that is exactly the interpretation being given by the Tenth Circuit, i.e., since the payments were late, they could not be "in accordance with" the plan; therefore, the debtor is not entitled to a discharge because she did not complete all of her payments "under the plan." But clearly the late payments were made "under the authority of" the plan. They were not made as an additional 61st payment nor were they made as new payments; rather, they were merely payments that should have been made timely but were not. As such, they were still payments that were "subject to" or "governed by" the plan.

Since Ms. Kinney completed all payments required to be made under the plan, the court below should have entered a discharge rather than dismiss her case.

STATEMENT OF THE CASE

This case presents an important issue concerning payments made by debtors in Chapter 13 bankruptcy cases after the due date for the last payment under

the plan, which is now the subject of an entrenched circuit split.

Petitioner, Margaret Kinney ("Petitioner" or "Ms. Kinney") filed her petition under Chapter 13 on October 25, 2013. Her initial plan payment was due "not later than 30 days after the date of the filing of the plan or the order for relief," or November 24, 2013. 11 U.S.C. § 1326(a)(1). The bankruptcy court calculated her final payment as being due no later than November 24, 2018. Pet. App. 26.

An amended Chapter 13 plan was filed on May 23, 2014, and confirmed on May 27, 2014. Ms. Kinney's confirmed plan required her to pay the Trustee a total of $26,059 over 60 monthly payments in various amounts, including $11,980 in priority taxes owing to the IRS, and to continue making her monthly mortgage payments directly to Respondent, HSBC Bank ("HSBC"). At the time of filing and on the date of confirmation of her plan, Ms. Kinney was current with her mortgage payment owing to HSBC.

On March 27, 2018, Ms. Kinney was involved in an automobile accident that was not her fault. The accident caused traumatic injuries resulting in multiple surgeries. Ms. Kinney continued to receive wages from her employer and made her final plan payment to the Trustee on November 2, 2018. Ms. Kinney incurred out-of-pocket expenses that were not reimbursed by her insurance carrier, so she fell behind in making her mortgage payments right before the last payments due under her plan.

On December 27, 2018, HSBC filed a motion to dismiss based on Ms. Kinney's failure to make monthly mortgage payments for September, October, and November 2018, as well as the payment due for December, which payment was not due until after the final plan payment due on November 23, 2018.

On February 8, 2019, Ms. Kinney brought her payments current with HSBC by tendering the amount due for the three mortgage payments for September, October, and November of 2018. Pet. App. 27. In doing so, Ms. Kinney cured her post-petition default and sought a discharge under § 1328(a) based upon her completion of payments under the plan.

On February 27, 2019, the bankruptcy court entered an Order Dismissing Case Prior to Entry of Discharge. Pet. App. 25. Relying upon the decision of *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), the court granted HSBC's motion to dismiss holding that the Code does not permit additional time to cure plan arrearages after the plan has ended. As such, dismissal without entry of discharge was appropriate. The bankruptcy court allowed Ms. Kinney time to convert her case to Chapter 7. Pet. App. 33. On November 22, 2019, the bankruptcy court entered an Order denying Petitioner's motion to reconsider. Pet. App. 37. The court issued its order granting the motion to dismiss and entered a separate judgment dismissing the case. Pet. App. 35, 36, 51.

On March 25, 2020, the appeal was certified directly to the Tenth Circuit Court of Appeals.

On July 23, 2021, the Tenth Circuit entered its opinion affirming the decision of the bankruptcy court and dismissing the case. *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021). Pet. App.1. This Petition then followed.

REASONS FOR GRANTING THE PETITION

This case involves the interplay between several sections of the Bankruptcy Code, and the differing interpretations given to them by several courts of appeals and by numerous bankruptcy courts below. In this case, the Tenth Circuit held that a debtor is entitled to a discharge only if she has made all of her payments during the existence of the Chapter 13 plan, whether they be plan payments to the Trustee or mortgage payments paid directly to the lender. Ms. Kinney was three months late in making her mortgage payments that were due under the plan, so the bankruptcy court found that her failure to timely pay her mortgage payments during the five-year applicable commitment period constituted a material default of the plan and was cause for dismissal. 11 U.S.C. § 1307(c)(6). The failure to make all plan payments also prevented the entry of a Chapter 13 discharge. 11 U.S.C. § 1328(a) (requiring the court to grant a discharge only after "completion by the debtor of all payments under the plan."). The Tenth Circuit affirmed.

The court's decision is based on the false assumption that no plan exists at the precise moment after the final plan payment is due, as if the plan were a light bulb being turned off, a train having left the station, or a patient expiring on the operating table. Nowhere in the Code is there a provision that automatically "ends" a Chapter 13 after the plan duration has been reached or that a bankruptcy court cannot grant a discharge if a debtor is behind in payments immediately (two seconds later) after the end of the five-year term but cures the default within a reasonable time thereafter.

Certiorari is warranted because the decision below conflicts with the decisions of other courts of appeals that have allowed a Chapter 13 debtor a reasonable amount of time to cure a default in payments required under the plan. The decision below also deepens a divide among the lower courts regarding the proper interpretation of the Code. Under the standard adopted by the Third Circuit, Ms. Kinney would have been allowed a discharge after making a late mortgage payment two and one-half months after the late payment was due under the plan. Under the minority view adopted by the Tenth Circuit, however, Ms. Kinney was denied a discharge and her case was dismissed, thus nullifying five years of payments in an effort to repay her taxes and to keep her house from foreclosure. This Court's review is necessary to resolve this conflict.

The Third Circuit and a majority of the courts that have considered the issue have taken a contrary view

such that a default in plan payments may be cured within a reasonable time after the 60 months have expired. The Third Circuit concluded that a bankruptcy court has the necessary discretion under § 1307 to allow a debtor to cure a plan arrearage after the end of the plan term. *In re Klaas*, 858 F.3d 820 (3d Cir. 2017). The Seventh and Eleventh Circuits, in dicta, have also approved of a reasonable time to allow for a cure in payments. *See Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir. 2016); *see also In re Hoggle*, 12 F.3d 1008, 1010-11 (11th Cir. 1994) (reading the statutory scheme to permit the cure of any defaults, even those occurring post-confirmation, falls within the letter and spirit of the statutory scheme, according the flexibility Congress intended for homeowners in proposing and modifying their Chapter 13 plans).

Many bankruptcy courts have followed the reasoning given by the Third Circuit. *See*, *e.g.*, *In re Henry*, 368 B.R. 696 (N.D. Ill. 2007); *In re Hill*, 374 B.R. 745, 749-50 (Bankr. S.D. Cal. 2007); *In re Brown*, 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003) (noting that "while the court may not confirm a plan which is to run for more than 60 months, nothing in the Code mandates dismissal of a case with a confirmed plan which ends up needing some extra time to complete"); *In re Aubain*, 296 B.R. 624 (Bankr. E.D.N.Y. 2003) (allowing debtor to cure a default on already-scheduled payments, even where the 60-month time period had elapsed); *In re Harter*, 279 B.R. 284, 287-88 (Bankr. S.D. Cal. 2002) (allowing debtor to complete Chapter 13 plan within a reasonable time period beyond the

maximum five-year plan period provided in § 1322); *In re Black*, 78 B.R. 840 842-43 (Bankr. S.D. Ohio 1987) (finding that "while Congress' intention to prohibit lengthy plans is evidenced in its legislative history, case precedent and § 1322(c) cannot serve as statutory support for the dismissal of a properly-confirmed plan whose payments have continued beyond five years"); *Touroo v. Terry (In re Touroo)*, No. 18-13365, 2019 WL 2590751 (E.D. Mich. June 25, 2019); *see also* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th ed., § 343.1 at ¶ 2, Sec. Rev. July 22, 2004, www.Ch13online.com (noting that the bankruptcy code is silent with respect to when the completion of all payments under the plan occurs for purposes of discharge under § 1328(a)).

Other bankruptcy courts have granted motions to dismiss where payments will continue beyond the five-year limit imposed in § 1322(d), refusing to allow a debtor to make payments past the end of the five-year plan term and deeming the end of the term to be a "drop dead date." *See In re Humes*, 579 BR 557, 563 (Bankr. D. Colo. 2018); *Christensen v. Black (In re Black)*, 292 B.R. 693, 699-700 (10th Cir. BAP 2003); *In re Grant*, 428 B.R. 504, 507-08 (Bankr. N.D. Ill. 2010); *In re Goude*, 201 B.R. 275, 277 (Bankr. D. Or. 1996) ("Since the maximum time allowed to complete the payments under a Chapter 13 plan has expired, this case must be dismissed."); *In re Roberts*, 279 B.R. 396 (1st Cir. BAP 2000) (debtor's failure to pay IRS tax claims in full within five years warranted dismissal under § 1307); *In re Jackson*, 189 B.R. 213, 214 (Bankr.

M.D. Ala. 1995) (pointing to the clear language of 11 U.S.C. § 1322(d)); *In re Woodall*, 81 B.R. 17 (Bankr. E.D. Ark. 1987) (granting motion to dismiss where claims for post-petition taxes extended the payments of a Chapter 13 plan beyond five years).

The reasoning behind the majority approach is based on the belief that the debtors are not seeking to extend the plan, but rather, they are only curing a default on already scheduled payments. The Tenth Circuit has adopted a more hardline approach and refused to allow a debtor to make payments past the end of the five-year plan term, deeming the end of the term to be a "drop dead date."

This position is inconsistent with the underlying purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005, Pub.L. No. 109-8, 119 Stat. 23.

Under BAPCPA, Congress adopted the means test to help ensure that debtors who can pay creditors do pay them. The flexibility permitted in the formulation of Chapter 13 plans represents a central element in the implementation of the Congressional goal to encourage expanded use of Chapter 13. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 64, 131 S.Ct. 716, 721, 178 L.Ed.2d 603 (2011).

Permitting the cure of such defaults best accords with Congressional intent to permit homeowners to utilize its flexible provisions for debt relief without sacrificing their homes. The decision below stands at odds with this Court's reasoning. The decision of the

Tenth Circuit would deny the late payments made by debtors being paid to secured creditors, which would lead to foreclosures of their homes. The decision also ignores the Trustee's long-standing practice of leaving Chapter 13 cases open past the five-year period to permit a debtor to cure an arrearage, especially where the amount is small. Pet. App. 27, 31, 43. One of the tenets of statutory construction is that a statute is not to be read as eroding past practices absent a clear indication from Congress. *Hamilton v. Lanning*, 560 U.S. 505, 517, 130 S.Ct. 2464, 2476, 177 L.Ed.2d 23 (2010).

Certiorari is further warranted because the question presented is a vitally important issue of federal law. The order of discharge is essential to the successful operation of the bankruptcy system. Its proper construction materially affects the rights of debtors and creditors alike, as well as the integrity of the bankruptcy estate and the bankruptcy court's exclusive jurisdiction. It is likewise a recurring issue ripe for resolution.

Finally, the decision below is wrong. The standard adopted by the court below impairs the orderly functioning of the bankruptcy process and skews the treatment of creditors, creating an unwarranted and unauthorized result that is clearly at odds with Congress's carefully crafted system, as well as years of bankruptcy precedent. For these reasons, Ms. Kinney respectfully requests that this Court grant certiorari in this matter.

I. The Court Should Grant Certiorari Because The Federal Courts Of Appeals And Lower Courts Are Divided Over Whether A Chapter 13 Debtor Can Obtain A Discharge When Making A Late Payment After the 60th Month Of The Plan.

Ms. Kinney's late mortgage payment was made on February 8, 2019, after the last day of the 60-month plan, which the bankruptcy court calculated as November 24, 2018. Pet. App. 26. The Tenth Circuit held that the bankruptcy court does not have discretion to grant a completion discharge where the debtor failed to make all of her mortgage payments before the due date of the last payment required under the plan. To allow such a payment after the expiration of the plan would be an impermissible modification after the five-year term of the plan ended. Pet. App. 2.

The Tenth Circuit opinion conflicts with an opinion from the Third Circuit Court of Appeal and with dicta in an opinion from the Seventh Circuit. The Third and Seventh Circuits both have found discretion to allow a Chapter 13 debtor to cure a minor default after the final plan payment is due under the confirmed plan. *In re Klaas*, 858 F.3d 820; *Germeraad v. Powers*, 826 F.3d at 968; *see also In re Hoggle*, 12 F.3d 1008, 1010 (11th Cir. 1994) (modification of plan allowed because plain meaning of § 1322(b)(5) permits cure of "any" default whether occurring prior to the filing of the petition or subsequent to confirmation of the plan) (emphasis added).

In *Klaas*, the court stated: "The relevant question here, however, is whether a bankruptcy court may deny a motion to dismiss and/or grant a completion discharge when there remains at the end of that plan term a shortfall that the debtor is willing and able to cure?" *Klaas*, 858 F.3d at 828.

A Chapter 13 case concludes in one of three ways: discharge pursuant to § 1328, conversion to a Chapter 7 case pursuant to § 1307(c), or dismissal of a Chapter 13 case "for cause" under § 1307(c). In a Chapter 13 case, the court "shall" grant the debtor a discharge "as soon as practicable after completion by the debtor of all payments under the plan." 11 U.S.C. § 1328(a).

If debtors are in default, then several things of consequence could occur: the bankruptcy court has the discretion, for cause, to deny the debtors a discharge, dismiss the bankruptcy case, or convert the case to Chapter 7. *See* 11 U.S.C. §§ 1307(c)(6), 1328.[3] The bankruptcy court might, as it did in *Klaas*, allow the debtors to cure their default by paying the late payment within a reasonable time and to grant a completion discharge under section 1328. Although this payment would be made outside of the five-year period, it would be a payment made to cure a default under the terms of the confirmed plan, i.e., payment

[3] Alternatively, the court may grant a "hardship discharge" of some of the debts if (1) the debtor cannot make all payments due to "circumstances for which [the debtor] should not justly be held accountable," (2) a certain amount of property has already been distributed under the plan, and (3) modification under § 1329 "is not practicable." 11 U.S.C. § 1328(b).

made because the debtors did not timely make the payments "provide[d] for" by the plan in the first place. *See* 1 Hon. W. Homer Drake, Jr., et al., *Chapter 13 Practice and Procedure*, § 11:15 at 1131 (2d ed. 2015) ("[W]hen a debtor is close to completing her plan payments and needs a reasonable additional time to do so, courts have permitted the debtor to cure the defaults and consummate the plan. The reasoning is that the five-year restriction applies to the scheduling of the payments in the confirmed plan and does not prohibit cure of those payments outside the scheduled time. . . .").

The Code permits the curing of any default. 11 U.S.C. §§ 1322(b)(3), (5). According to the decision below, to allow the late payment would be an impermissible modification of the plan. At least four circuit courts of appeals have held that the concept of "cure" is different than "modify." The Second Circuit has observed that, "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions." *DiPierro v. Taddeo*, 685 F.2d 24, 26-27 (2d Cir. 1982). The *DiPierro* court noted that "[w]e do not read 'curing defaults' under (b)(3) or 'curing defaults and maintaining payments' under (b)(5) to be modifications of claims." *Id*. at 27. The Seventh Circuit has given a similar meaning to the term "cure. It observed that "[t]he terms 'modify' and 'cure' are nowhere defined in the Code. However, it is clear that Congress intended 'cure' to mean something different from 'modify.'" *Matter of Clark*, 738 F.2d 869, 871-72 (7th Cir. 1984). Significantly, the *Clark* court

also observed that, "[o]rdinarily, the means by which one cures a default is by paying all amounts due and owing. . . . Thus, the plain meaning of 'cure,' as used in § 1322(b)(3) and (5), is to remedy or rectify the default and restore matters to the *status quo ante*." *Id*. at 872 (emphasis added); *see also In re Metz*, 820 F.2d 1495, 1497 (9th Cir. 1987) (interpreting "cure" provisions of Chapter 13 as permitting "the debtor to 'cure' (i.e., pay or bring current) arrearages on the debt and thereby reinstate the debt"). A "cure" merely reinstates a debt to its pre-default position, or it returns the debtor and creditor to their respective positions before the default. *See In re Litton*, 330 F.3d 636 (4th Cir. 2003).

In this case, Ms. Kinney did in fact make all of her mortgage payments within two and one-half months afterwards. This short time for Ms. Kinney to make her late mortgage payments, which were required to be paid under the plan, was a cure of a default and not an impermissible modification of the plan.

The cases that require mandatory dismissals conflict with the discretion given to courts to dismiss a case under § 1307. There, a bankruptcy court may, but is not required to, dismiss a case when there is a material default. When a default becomes "material" is not defined in the Code. Since dismissal is discretionary under § 1307, the instant case should not have been dismissed for a minor default. And minor was the default—three missed mortgage payments out of 60, representing a small fraction of the required payments. Furthermore, such payments were made

within a short time after the end of the plan. While the Tenth Circuit characterized the default as "material" in the case at bar, the court did not look to § 1307(c) for guidance as to when a material default occurs even though it mentioned "material" at least nine times in its decision. Pet. App. 1-24.

This Court should grant certiorari to resolve the conflict among the courts of appeals and other courts as to whether a debtor is allowed a reasonable time to cure a minor default in order to obtain a discharge, especially after Ms. Kinney made all 60 of her plan payments and promptly cured such default shortly thereafter.

II. The Tenth Circuit's Interpretation Of The Code Conflicts With The Policy Behind BAPCPA In Affording Flexibility Permitted In Repayment Plans To Encourage Homeowners To Save Their Homes Through Chapter 13.

The Tenth Circuit opinion creates a result that diverges from the purpose of BAPCPA. That purpose was to ensure that plans did not "deny creditors payments that the debtor could easily make." *Hamilton v. Lanning*, 560 U.S. at 517, 130 S.Ct. at 2476 (referring to mechanical approach); *see also Ransom v. FIA Card Services, N.A.*, 562 U.S. at 64, 131 S.Ct. at 729 (describing "BAPCPA's core purpose [as] ensuring that debtors devote their full disposable income to repaying creditors"); *Baud v. Carroll*, 634 F.3d 327, 356 (6th Cir.

2011), *cert. denied*, 565 U.S. 1110, 132 S.Ct. 997, 181 L.Ed.2d 732 (2012) (*Lanning* requires courts to "apply the interpretation that has the best chance of fulfilling BAPCPA's purpose of maximizing creditor recoveries.").

By denying a debtor the ability to make a late payment at the end of a five-year plan, the Tenth Circuit effectively denies secured creditors the payments that are due to them under the plan. Permitting a cure of post-confirmation defaults best accords with Congressional intent to permit homeowners to utilize its flexible provisions for debt relief without sacrificing their homes. In doing so, unsecured creditors suffer no harm as a result of the mortgage payment default. If a debtor can cure a default in making a late payment for the 30th installment, there is no reason to reject a late payment made after the 60th and final payment to be made under the plan.

The Tenth Circuit's interpretation of the statutory scheme would result in a rigid default rule under which a payment tendered one day late would result in an immediate, incurable default. Such rigidity runs counter to Chapter 13's inherent flexibility and the Chapter's purpose to permit expanded use by homeowners.

Like § 1322(d), § 1329(c) does not expressly contain a drop-dead date after which the case must be dismissed if a late payment is made beyond the 60 months. There is authority for accepting a "cure" of plan payments within a reasonable time after the plan

term has expired, in order to prevent the dismissal of the case. *See* 8 *Collier* on Bankruptcy, ¶ 1322.17[2] at 1322-55 (Richard Levin & Henry J. Sommer eds. 16th ed. 2019) (Section 1322(d) focuses on the payment provided for by the plan, and if the debtor is substantially complying with the plan, the court should allow the plan to be completed within a reasonable period of time); *In re Black*, 78 B.R. at 842 (§ 1322 has no provision for dismissal).

The debtor is not proposing to lower monthly payments, extend the repayment period, or make the obligation conditional. Instead, the debtor is seeking to reinstate the original contract with a minor delay in payment. A Chapter 13 plan is a contract between the debtor and the debtor's creditors. *In re Mrdutt*, 600 B.R. 72, 77 (9th Cir. BAP 2019). The order confirming a Chapter 13 plan, upon becoming final, represents a binding determination of the rights and liabilities of the parties as specified by the plan. 8 *Collier on Bankruptcy, supra*, ¶ 1327.02.

What happens to the doctrine of substantial performance? When a debtor has made all payments, albeit the last partial or full payment is late, the debtor has substantially performed under the contract, i.e., the confirmed plan. The bankruptcy court below asked this very question: "If a debtor has 'substantially' completed with her plan but, due to unexpected events, she has been unable to complete her plan by the end of the five years, may she extend the time to complete the plan?" Pet. App. 47. Substantial performance is the standard used under common law to evaluate the

performance of contracts. The parties performing the contract must meet the standard of substantial performance of the contract only, and performance, therefore, does not have to be perfect. Unlike the Uniform Commercial Code, there is no perfect tender rule in the Code.

Certiorari is warranted because the decision below conflicts with this Court's precedents regarding the underlying policy behind Chapter 13 cases. The Tenth Circuit failed to adopt the interpretation of § 1307 that is not only more consistent with the language of the statute than the competing interpretation, but is also consistent with the legislative history and the overriding purpose of BAPCPA as recognized by this Court.

III. The Tenth Circuit's Interpretation Of The Code Produces A Result That Conflicts With Other Provisions Of The Code.

A Chapter 13 case begins with the filing of a plan by the debtor. § 1321. Sections 1322 and 1325 of the Bankruptcy Code describe the plan's contents and what is necessary for confirmation, § 1329 allows for modification of a confirmed plan, § 1328 sets forth the requirements for discharge, and § 1307 sets forth how a Chapter 13 plan concludes.

"The goal of a Chapter 13 bankruptcy is to aggregate the debtor's outstanding debts, create a repayment plan for those debts, and prescribe the

order, manner, and terms of repayment." *In re Dukes*, 909 F.3d 1306, 1316 (11th Cir. 2018).

After filing a voluntary petition for relief, a Chapter 13 debtor must propose a "plan" that provides for the payment of future earnings to cover claims on the debtor's estate. §§ 1321, 1322(a)-(c). The plan may provide for the curing of any default. § 1322(b)(3). The plan also may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due. § 1322(b)(5).

If the debtor and the debtor's spouse have combined current monthly income above the median income for the state in which they reside, the debtor's plan may not provide for payments over a period that is longer than five years. § 1322(d)(1). If income is below the median, then the plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years. § 1322(d)(2)(C).

Section 1325 of the Code sets forth the circumstances in which the bankruptcy court "shall" confirm a debtor's proposed repayment plan and those in which it "may not" do so. §§ 1325(a), (b). "If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the

plan— . . . the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." § 1325(b)(1)(B). *See Baud v. Carroll*, 634 F.3d at 336-38 (describing split of decisions and collecting cases).

A debtor's applicable commitment period is defined in § 1325(b)(4), which states that the "applicable commitment period" shall be three years for debtors whose income is below the median, or not less than five years if their income is above the median. § 1325(b)(4). The period may be shorter if all unsecured claims are paid in full. § 1325(b)(4)(B).

A plain reading of §1325(b) does not lead to the conclusion that a plan must last for three to five years. Rather, § 1325(b) merely states that a debtor must contribute to the plan all projected disposable income that the debtor receives during the applicable time frame, either three or five years. The Sixth, Eighth, Ninth, and Eleventh Circuits hold that the applicable commitment period determines the minimum duration that a plan must have to be confirmable under § 1325(b)(1)(B). *Baud v. Carroll*, 634 F.3d at 344; *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 660 (8th Cir. 2008); *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 880 (11th Cir. 2010); and *In re Flores*, 735 F.3d 855, 858 (9th Cir. 2013) (*en banc*).

These sections only set forth the duration that a plan may provide for installment payments to be made under the plan. They say nothing about the plan's termination date or whether a late "cure" payment can be made shortly afterwards. As such, it is not clear that Congress intended to prohibit a late payment being made after the five-year period.

The Code is also silent with respect to when the completion of all payments under the plan occurs for purposes of discharge. Section 1328 provides, in relevant part, that "as soon as practicable after '*completion by the debtor of all payments under the plan*,' . . . the court shall grant the debtor a discharge of all debts provided for by the plan. . . ." 11 U.S.C. § 1328(a) (emphasis added). The mandate under this section creates a statutory entitlement in favor of the debtor. *West v. Costen*, 826 F.2d 1376, 1379 (4th Cir. 1987) (once debtor's payments are completed, bankruptcy court has no choice but to grant a discharge). Some courts have construed "completion by the debtor of all payments under the plan," to occur at the time the debtor tenders to the trustee all of the payments under the confirmed plan that the debtor was required to pay to the trustee. *In re Rivera*, 599 B.R. 335, 340-42 (Bankr. D. Ariz. 2019). Other courts have construed the phrase to also require the debtor to complete all of the direct payments made to mortgage lenders during the plan. *Matter of Kessler*, 655 Fed.App'x 242 (5th Cir. 2016).

Plan completion occurs when the debtor has paid the percentage owed to each class of creditors as

provided in the plan. *In re Sunahara*, 326 B.R. 768, 776 (9th Cir. BAP 2005), citing *In re Chancellor*, 78 B.R. 529, 530 (Bankr. N.D. Ill. 1987) (the most sensible definition of "completion of payments" is that point of time at which the debtors have completed their obligation to each class of creditors as provided for in their plan). The substance of a plan looks to the nature of the debtor's obligation to creditors, not to the number of payments proposed. Furthermore, "payment" is the discharge of an obligation, not meeting a schedule of payments. *Id.*

Section 1328 does not have an express requirement that such payments shall be made within the five years or that such payments must be timely made, including the last payment. As to hard deadlines, Congress and the courts know how to impose or set a strict deadline when it wants to do so. For example, the Code sets a specific time frame for filing a plan (§ 1321; Fed.R.Bankr.P. 3015) (with petition or within 14 days after petition is filed); for filing an adversary (§§ 523, 727, Rule 4007(c)) (60 days from the creditor meeting); for filing proof of claim (Rule 3002(b)) (70 days after filing of petition to file proof of claim); for filing motion to dismiss for abuse (§ 707(b)) (60 days after first date set for meeting of creditors); and for filing a credit counseling certificate (§ 109(h)) (5 calendar days after filing of petition).

The Code sets no finite and absolute deadline to tender a final payment under a confirmed plan. Although the Tenth Circuit did not expressly adopt a drop-dead provision, as other bankruptcy courts have,

a strict and literal interpretation of the decision would suggest that a court would find that a mortgage or plan payment made one minute after the due date for the last payment was not "under the plan," so a discharge could not be entered because the Debtor did not comply with the terms of the plan.

Such a holding would not only be contrary to the policy underlying BAPCPA of granting a fresh start to an unfortunate debtor, but also, it would be grossly unfair to the debtor. The failure to timely make the final mortgage payments was not the result of a scheme to defraud or an intent to deceive anyone and unsecured creditors suffered no harm as a result of the mortgage payment default. Respondent only suffered a minor delay in receiving its payment and it still has its full rights under its original loan indebtedness documents. One commentator writes:

> [a]lthough not considered in the circuit's opinion, barring a debtor from curing plan defaults seems grossly unfair for someone who has diligently made payments for five years, to the best of her or his ability. Indeed, if the debtor might be entitled to a hardship discharge, why not allow the debtor to cure defaults and ensure her right to a discharge?

William Rochelle, *Circuits Split On Allowing Debtors To Cure Chapter 13 Plan Defaults After Five Years*, Rochelle's Daily Wire, American Bankruptcy Institute (July 29, 2021), https://www.abi.org/newsroom/daily-wire/circuits-split-on-allowing-debtors-to-cure-chapter-13-plandefaults-after-five."); *see also* Ken Siomos,

Denying Chapter 13 Discharges for Direct-Payment Defaults, 38 Am. Bankr. Inst. J., No. 6, June 2019, at 24; Brett Weiss, *Fail to Make Direct Payments to Secured Creditors? Discharge Ok*, 38 Am. Bankr. Inst. J., No. 5, May 2019, at 29; David Cox, *Don't Move the Goalposts: Section 1328 Should Not Deny Discharge to Debtor Who Completes Payments to Trustee, But is Behind on Direct Payments*, 37 Am. Bankr. Inst. J., No. 5, May 2018, at 20.

There is no indication in the Code that Congress intended to deny a Chapter 13 debtor a discharge under the circumstances of the case before this Court. Accordingly, this Court should grant certiorari to review the decision of the Tenth Circuit.

IV. The Question Presented Is Exceptionally Important.

Certiorari is warranted because resolution of this question has far-reaching implications upon thousands of present and future Chapter 13 cases not only in the Tenth Circuit, but in courts across the country. Under the Tenth Circuit opinion, debtors' ability to obtain a fresh start will be impaired, creditors may be deprived of funds they otherwise would receive, and it may have a chilling effect on Chapter 13 bankruptcy filings.

The completion of a Chapter 13 case is a long and difficult task for debtors. According to the ABI, as of 2017, only 38.8 percent of Chapter 13 cases resulted in

a discharge.[4] If debtors are not allowed a discharge just because they are late in making the 60th and final payment of a plan, the ultimate result will be fewer discharges being granted and more homes being lost in foreclosure. The present conflict results in a debtor being denied a discharge in one district with a debtor under similar facts and circumstances being granted a discharge in another district. Dismissal of a Chapter 13 case after five years of payments is both disheartening and a draconian—and unnecessary—measure.

The standard adopted by the court below impairs the orderly conclusion of Chapter 13 plans and skews the treatment of debtors whose five-year effort to reorganize their respective financial affairs is thwarted by an over-technical and mistaken misinterpretation of the Code. An order of discharge is essential to the successful conclusion of a Chapter 13 plan. It is an acknowledgement of the debtor's long diligence over a half-decade to complete their plan with the reward being an order of discharge.

The question is also of extreme importance in the proper administration of Chapter 13 cases across the country. The lower court's decision will create new problems in making a determination as to when the final payment will be considered to have been made. For example, a debtor's payment is initiated using

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[4] Ed Flynn, *Success Rates in Chapter 13*, AMERICAN BANKRUPTCY INSTITUTE (Aug. 2017), https://insolvencyintel.abi.org/i/861236-success-rates-in-chapter-13/1?.

electronic means on June 10; the debtor's payment is posted a day or two later, say June 12; the debtor's payment is then "held" for 15 days. Which date is to be used? Since the Code does not address the question of when a payment has been made, the Tenth Circuit's restrictive view would lead to differing interpretations as to whether a final payment was made before the expiration of the five-year period, with the order of discharge hanging in the balance.

V. This Case Is A Particularly Suitable Vehicle For Resolving The Question Presented.

This case is a particularly suitable vehicle for considering the question because it showcases the reasons why the Tenth Circuit's decision would have a devastating impact on numerous Chapter 13 cases pending across the country.

The Third Circuit refused to interpret the phrase "all payments under the plan" to mean "all timely payments under the plan," because even a late payment would still be made "under" or pursuant to the authority conferred by the plan. *In re Klaas*, 858 F.3d at 830; *see also Germeraad v. Powers*, 826 F.3d at 968. Furthermore, § 1328 does not impose any requirement that the plan payments, including the last payment, be "timely." Section 1307(c), however, provides that a court has discretion to convert or dismiss a case, which is in the best interests of creditors and the bankruptcy estate, for cause, for "failure to file a plan ***timely*** under section 1321 of this title." § 1307(c)(3)

(emphasis added). That same section also applies upon the debtor's "failure to commence making ***timely*** payments under section 1326 of this title." § 1307(c)(4). Congress could have inserted the term "timely" in § 1328, but it chose not to do so. Under the lower court's ruling, the deadline of a Chapter 13 plan as completely unbending and adamantine—if one day past the 60th month of a confirmed plan is one day too many, what does it matter whether the default is "material?"

Moreover, the Tenth Circuit's dismissal of the case based on a material default ignores the statutory discretion given to bankruptcy courts even where there is a material default. The court decided to dismiss the case based solely on the fact that the debtor missed three mortgage payments near the end of her five-year plan. Such reasoning suggests that any missed or late payment would be a material default, thus warranting a dismissal of the case. Such is contrary to the flexibility meant to be provided by the Code.

VI. The Tenth Circuit's Decision Is Wrong.

In this case, the Tenth Circuit's refusal to allow a curative payment rather than dismiss the case was premised on an errant legal conclusion—specifically, that debtors are not entitled to an order of discharge under § 1328(a) where they have failed to complete all of their payments within the 60-month term of the plan. The Tenth Circuit's holding that the plan ends on such date is wrong. There is nothing in the Code that says a Chapter 13 plan "ends" on the day of the last

payment due date. As the bankruptcy court below stated: "It would seem to be a simple matter then to calculate the end of a plan's term. If the plan is a five-year plan and it began on January 27, 2012, then it should end on January 26, 2017. Surprisingly, however, trustees and secured lenders often disagree as to the ending date. This dispute arises because the due date for the regular post-petition secured debt payments may differ from the due date for the debtor's payments to the trustee." *See In re Humes*, 579 B.R. at 561.

The holding also flies in the face of a long tradition of allowing debtors a brief amount of time to shore up any deficiencies in their Chapter 13 proceeding after the expiration of the five-year period.

While § 1322(c) instructs the court on the maximum length which it may approve for payments under a Chapter 13 plan, § 1322(c) contains no provision for dismissal of a Chapter 13 plan whose payments extend past a five-year period, but which otherwise complied with the duration limitations at the time of confirmation. *See In re Henry*, 368 B.R. at 193 (citing to *In re Black*). Thus, while Congress's intention to prohibit lengthy plans is evidenced in its legislative history, case precedent and the Code, § 1322(c) cannot serve as statutory support for the dismissal of a properly-confirmed plan whose payments have continued beyond five years. *Id.*

In *In re Black*, the court found that § 1322(c) does not provide for dismissal of a Chapter 13 plan, confirmed within the parameters of § 1322(c), whose

payments will exceed, or have exceeded, a five-year period. The court also found that cause does not exist under § 1307(c) to warrant dismissal or conversion of debtors' case. Taking into consideration the fact that the debtors were only a few months short of completing a plan which would pay all general unsecured claims a 100% dividend, and the fact that the amended plan was substantially completed, the court concluded that cause did not exist to dismiss or convert debtors' case. *In re Black*, 78 B.R. at 842.

The comments in *Black* and the cases that have followed its reasoning have been available since 1987. *See In re Harter*, 279 B.R. at 288 ("The court adopts the reasoning of *Black* and holds § 1322(d) does not contain a 'drop dead' provision that mandates dismissal of the case after five years."). In 2005, Congress completed an overhaul of the Code. If Congress were unhappy with the conclusions in *Black* and wished to close what it considered a loophole, it had ample opportunity to do so when it enacted BAPCPA in 2005, but it chose not to do so. In *Henry*, the court stated that it would follow the more recent trend that rejects *Jackson* and *Woodall* and allow debtors to continue making payments that stretch beyond 60 months if the plan can be completed within a reasonable period of time. *In re Henry*, 343 B.R. at 193; *see also In re Brown*, 296 B.R. at 22 ("the court rejects this draconian interpretation of the Bankruptcy Code").

The intention behind plan term limits to protect debtors from being indentured servants suggests that it would be inconsistent to utilize such language to

knock out a debtor's plan for relief. This is not a case wherein the legislative history behind plan term limitations sought to "protect debtors from involuntary servitude." Preventing involuntary servitude is a worthy objective but dismissing a case because the final payment was a few days, or even a few months, late does not further this goal. Such is true especially here, where Ms. Kinney has made five years' worth of payments on her plan.

Looking at the statutes, case law, and legislative history, the Tenth Circuit should not have affirmed the dismissal of Ms. Kinney's case. The sections for confirmation and modification are separate and distinct from § 1307, which governs conversion and dismissal. And the discretionary nature of § 1307 is inconsistent with the court's suggestion that the bankruptcy court was required to dismiss the case.

CONCLUSION

Ms. Kinney respectfully requests that this Court issue a writ of certiorari.

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Respectfully submitted,

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