No. 21-599

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

For all but two pages of its brief, the Government forcefully argues why the decision below is both wrong and creates a circuit split. As the Government explains, the Tenth Circuit misinterpreted critically important provisions of the Bankruptcy Code that govern when a chapter 13 bankruptcy plan can be declared complete. S.G. Br. 9-19. The decision below adopts a "rigid and unforgiving rule" with "absurd and inequitable results." *Id.* at 8. It is a rule that "conflicts with" and is "incompatible with" that of the Third Circuit, *id.* at 19, and some of the country's most active bankruptcy courts.

Despite all that, the Government contends that this Court should let these serious errors of statutory interpretation go—leaving Ms. Kinney and tens of thousands of chapter 13 debtors in the Tenth Circuit (plus others in like-minded bankruptcy courts) subject to different rules than debtors in other parts of the country. There is no good reason to let the admitted circuit split fester, especially given the importance of the statutory provisions at issue. The decision below has far greater impact than the Government lets on. And there is no further "clarifying" to be done by the Tenth Circuit. That court has staked its path, diverging from the rule applied in the Third Circuit and elsewhere.

This Court's review is necessary to unify the federal courts' understanding of when hundreds of thousands of present and future chapter 13 debtors can be rewarded the fresh start that the Code promises. The writ of certiorari should be granted.

ARGUMENT

I. There is no good reason for letting the admitted circuit split fester.

The Government, Petitioner, Respondent, and the courts below all agree on one thing: federal courts are divided over when a chapter 13 bankruptcy proceeding can be declared a success and the debtor rewarded with the most coveted "completion discharge" of her debts. *See* 11 U.S.C. §1328(a). But the Government takes a surprising turn, arguing that split of authority does not warrant this Court's review. S.G. Br. 20-21. The Government is wrong. The question presented is worthy of this Court's review now.

A. The question presented implicates arguably the two most important provisions of chapter 13 of the Bankruptcy Code. The Tenth Circuit misinterpreted chapter 13's discharge provision—governing when a years-long chapter 13 proceeding *must* be declared a success—and its dismissal provision—governing when such proceedings *may* be declared a failure. *See* 11 U.S.C. §§1307(c), 1328(a). Confusing the two, the Tenth Circuit announced a new rule about when chapter 13 proceedings *may never* be declared a success and *must* dismissed, stripping bankruptcy courts of the discretion vested in them by Congress. As the Government ably explains, debtors in the Tenth Circuit must now attain a level of perfection in bankruptcy that is neither required by the Code nor required by other courts or bankruptcy trustees in other parts of the country. S.G. Br. 9-19.

Consider the following example. A debtor has a five-year chapter 13 plan. She makes 59 monthly payments of $2,000 each. Then for her very last payment, she pays $1,000 on time and pays the remaining $1,000 three weeks after the plan's five-year mark. If that debtor lives in Pittsburg, Kansas, she cannot get her completion discharge. Bound by the Tenth Circuit's decision below, the bankruptcy court would have *no* discretion to grant the discharge. Pet.App.7-8a, 16-17a, 21-22a. That is because the decision below misinterprets the Code to mean that her late payment is not a payment "under the plan" for purposes of Section 1328(a)'s discharge provision and, correspondingly, it is a *per se* "material default" for purposes of Section 1307's dismissal provision. Pet.App.16-17a, 21-22a; *accord* S.G. Br. 7-8 (describing Tenth Circuit's categorical rule). Because of the Tenth Circuit's decision, the bankruptcy court's only options are to dismiss her case or—only if she is eligible—convert her case to a chapter 7 liquidation. Pet.App.16-17a, 21-22a.[1] Even though the debtor paid $119,000 on time and cured the remaining $1,000, she does not get her fresh start. Disbursements to creditors will not be made. Everyone starts back at square one. A new plan must be confirmed, and the five-year clock begins again.

But imagine if that hypothetical debtor instead lived in Pittsburgh, Pennsylvania. The bankruptcy court there would have discretion to grant her the completion discharge. *See In re Klaas*, 858 F.3d 820,

[1] Only some debtors are eligible for chapter 7 bankruptcy and, even then, it is a "tough" alternative to chapter 13. Pet.App.19a n.7. Among other downsides, fewer debts are dischargeable and debtors risk losing their homes. *Id*.

829-30 (3d Cir. 2017). There, a late payment would not be a *per se* material breach, let alone *require* dismissal. It would be up to the bankruptcy court to decide whether the debtor adequately cured the late payment, just as it would be up to the bankruptcy court to decide whether the debtor adequately cured any other late payment made in any other month. What matters in Pittsburgh, Pennsylvania, like many jurisdictions and consistent with the Code's text, is that the debtor completed all of her payments.

As the example shows, the Tenth Circuit's rewriting of the Code's discharge and dismissal provisions jeopardize the ultimate goal of all chapter 13 debtors: to obtain the fresh start offered by Section 1328(a)'s completion discharge. There is no basis for ignoring the Tenth Circuit's wrong turn, leaving in place two different versions of these most important discharge and dismissal provisions depending on where a chapter 13 debtor lives.

B. The Government also fails to acknowledge that allowing the split to fester affects droves of present and future debtors. Nationwide, there are presently hundreds of thousands of Americans in chapter 13 bankruptcy. In the past five years, more than 1 million individuals filed new chapter 13 cases.[2] Tens of

[2] 2017 BAPCPA Report Table 1D, bit.ly/3KzTewV (285,680 chapter 13 cases commenced nationwide; 11,780 commenced in the Tenth Circuit); 2018 BAPCPA Report Table 1D, bit.ly/3B23OJW (282,995 chapter 13 cases commenced nationwide; 11,401 commenced in the Tenth Circuit); 2019 BAPCPA

thousands of those debtors reside in the Tenth Circuit—now subject to its atextual rule for completing a chapter 13 bankruptcy—and tens of thousands more reside in other circuits or districts applying text-abiding rules. The chapter 13 trustee in Ms. Kinney's case (one of two standing trustees in the district of Colorado) was alone managing roughly 3,500 active chapter 13 cases when Ms. Kinney's appeal was pending.[3]

In short, the Tenth Circuit's rule shutters not only Ms. Kinney's chapter 13 bankruptcy proceedings. It affects any of the tens of thousands of debtors who, at some point over the five-year life of a chapter 13 plan, fall short of perfection. Perfection is the exception among debtors, not the rule. *See, e.g.*, Chapter 13 Trustee C.A. Br., *supra* n.3, at 9 ("Throughout the course of a debtor's 60-month plan, all 60 payments rarely come in exactly on time every month."); Pet.App.43a (describing "long-established and widely followed practice of allowing debtors to cure plan defaults after the five-year plan term ended," including because "creditors were better off receiving delayed payments rather than no more payments with a dismissal"); S.G. Br. 16-17. There is no basis for leaving

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Report Table 1D, bit.ly/3RtDTAk (276,855 chapter 13 cases commenced nationwide; 11,303 cases commenced in the Tenth Circuit); 2020 BAPCPA Report Table 1D, bit.ly/3ReV8Wo (151,569 chapter 13 cases commenced nationwide; 6,994 commenced in the Tenth Circuit); 2021 BAPCPA Report Table 1D, bit.ly/3R14813 (116,198 chapter 13 cases commenced nationwide; 5,302 commenced in the Tenth Circuit).

[3] C.A. Br. of *Amicus Curiae* Chapter 13 Trustee at 1 (filed May 22, 2020).

the fate of so many chapter 13 debtors (and creditors) better or worse off because of where debtors live.

C. In response, the Government posits that the question presented "appears to have been litigated infrequently." S.G. Br. 19. That ignores that every chapter 13 case will end with an application of Section 1328's discharge provision or Section 1307's dismissal provision—the two provisions misinterpreted by the Tenth Circuit here. That also ignores the sheer number of individuals in chapter 13 bankruptcy proceedings in any one district, let alone circuit. Again, the Tenth Circuit's rule governs tens of thousands of chapter 13 cases filed in the circuit, including thousands of active chapter 13 cases in Colorado alone. *See* BAPCPA Tables, *supra* n.2; Chapter 13 Trustee C.A. Br., *supra* n.3, at 1 (noting one of two standing trustees oversaw nearly 3,500 active cases in 2020 in Colorado).

The Government is wrong about the "shallowness of the split." S.G. Br. 20. The disagreement is not merely between the Third and Tenth Circuits; although that alone would be sufficient to grant certiorari given the importance of the question of statutory interpretation presented. *See, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 141 S. Ct. 2882 (2021) (granting certiorari to resolve disagreement between Fifth and Eleventh Circuits regarding Title VI damages); *Nichols v. United States*, 577 U.S. 972 (2015) (granting certiorari to resolve disagreement between Eighth and Tenth Circuits regarding SORNA, over the Government's recommendation that the Court deny review).

The split of authority instead implicates hundreds of thousands of debtors in courts across the country. In particular, contrary to the Tenth Circuit's rule, every bankruptcy court in the Third Circuit may permit a debtor to cure a default at the end of a five-year period. *See In re Klaas*, 858 F.3d at 829-30. In related circumstances, the Seventh Circuit has similarly read section 13 of the Code to permit a debtor to cure defaults and complete the bankruptcy process, without an illusory five-year cut-off. *See Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir. 2016) (agreeing that debtors can make payments after five-year mark "to cure a default"); *see also In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994) (rejecting a "rigid default rule" for related code provisions "under which a payment tendered one day late would result in an immediate, incurable default"). Collectively, nearly 200,000 debtors have filed chapter 13 petitions in these circuits in the past five years. *See* BAPCPA Tables, *supra* n.2. Those debtors will be subject to different ground rules for discharge-versus-dismissal at the end of the chapter 13 proceedings than debtors in the Tenth Circuit.

The Government also completely ignores the confusion that has long percolated in some of the country's busiest bankruptcy courts. Many apply the Third Circuit's rule,[4] while others have taken the same

[4] *See, e.g.*, *In re Hill*, 374 B.R. 745, 749-50 (Bankr. S.D. Cal. 2007); *In re Henry*, 343 B.R. 190, 192-93 (Bankr. N.D. Ill. 2006); *In re Aubain*, 296 B.R. 624, 634 (Bankr. E.D.N.Y. 2003); *In re Brown*, 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003); *In re Harter*, 279 B.R. 284, 287-88 (Bankr. S.D. Cal. 2002); *In re Black*, 78 B.R. 840, 842-43 (Bankr. S.D. Ohio 1987).

"rigid and unforgiving" and textually unfounded approach (S.G. Br. 8) as the Tenth Circuit.[5] Courts in the Eastern District of New York, Northern and Southern Districts of California, the Northern District of Illinois, and the Southern District of Ohio—collectively responsible for nearly 125,000 new chapter 13 cases filed in the last five years—have taken differing sides on the question presented. This Court's review is likewise warranted to bring uniformity in those courts.

This is no shallow split. Denying certiorari means tens of thousands of chapter 13 debtors with cases currently pending in the Tenth Circuit and like-minded bankruptcy courts will remain subject to erroneously stringent standards for completing chapter 13 bankruptcy plans. Meanwhile, tens of thousands of other debtors in other jurisdictions may have the Code applied to them as written. The Tenth Circuit should not be left to fix itself, leaving all of those debtors hanging in the balance.

II. There is no other way to read the Tenth Circuit's decision.

Finally, the Government argues that the Tenth Circuit should be left to clarify its decision, presumably through *en banc* review. There is no clarifying left to be done by the Tenth Circuit. The decision below staked its path. The court acknowledged the

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[5] *See, e.g.*, *In re Hanley*, 575 B.R. 207, 217-19 (Bankr. E.D.N.Y. 2017); *In re Ramsey*, 507 B.R. 736, 739 (Bankr. D. Kan. 2014); *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); *In re Jackson*, 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995); *In re Woodall*, 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987).

longstanding split of authority about when a chapter 13 debtor completes payments "under the plan," 11 U.S.C. §1328(a), and rejected the rule applied by the Third Circuit and other bankruptcy courts. Pet.App.7a n.3; *see also id.* 15a (acknowledging Third Circuit's differing interpretation of relevant Code provisions and purposes).

A. The only way to understand the Tenth Circuit's decision is as one that announces a categorical rule: A debtor cannot obtain a completion discharge if the debtor makes any portion of any payment more than five years after her plan payments began. *Accord* S.G. Br. 7-8. According to the Tenth Circuit, the plan is no longer in "existence" at that point, so any final cure of a late payment cannot be deemed a payment made "under the plan," 11 U.S.C. §1328(a), for purposes of successfully ending the bankruptcy proceeding. Pet.App.12a; *see* Pet.App.16a (plan must be "in effect"); Pet.App.22a ("plan's expiration"). A bankruptcy court in the Tenth Circuit has *no discretion* to award a completion discharge in such circumstances. *E.g.*, Pet.App.12a (explaining bankruptcy court retains discretion when "permitting modification of the plan before it has ended" and when "granting a hardship discharge" but not after the five-year mark). So even if a Tenth Circuit debtor makes good on any remaining payment shortly after the five-year mark, the bankruptcy court can only dismiss or convert the case to a chapter 7 liquidation. *See* Pet.App.12a, 16-17a. Despite years of payments, the debtor and all of her creditors must start over.

As the Government explains, that is not what the Bankruptcy Code says. S.G. Br. 9-19. The Tenth Circuit's interpretation of the statute is "rigid and unforgiving," lending itself to "absurd and inequitable results." *Id.* at 8.

B. But then the Government suggests that the Tenth Circuit might (or might not) later clarify that it didn't mean what it said in the decision below. Specifically, the Government speculates that passing references to "material default" in the decisions below might be a way of limiting the reach of the admittedly erroneous rule. S.G. Br. 20-21. It is not.

1. As an initial matter, any finding that Ms. Kinney materially defaulted would have been predicated on an error of law—the misinterpretation of the relevant Code provisions for discharge and dismissal. The bankruptcy court erroneously thought its hands were tied by the Code, leaving the only option to declare a material default. *See, e.g.*, Pet.App.38a. Such errors of law always warrant reversal. *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law….").

2. Put another way, there is no way to disentangle references to "material default" from the errors of statutory interpretation. The two are one in the same. There was no finding in the courts below that Ms. Kinney materially defaulted *as a factual matter* based on the particulars of her underpayment at the end of the five years—for example, because late payments were

egregiously large or egregiously late.[6] Rather, when Ms. Kinney and any other debtor must cure or clean up an underpayment after the five-year mark, there is a *per se* material default. The conception of "material default" in the decisions below is a categorical one based on a misunderstanding of Section 1328(a)'s discharge provision and Section 1307's dismissal provision. The courts below would *always* declare any underpayment at the five-year mark a "material default" because they believed (wrongly) that they could not grant a discharge, even if the underpayment had been cured. *See, e.g.*, Pet.App.17a, 22a, 38a.

All said, the discussion of "material default" in the courts below is just another vantage point from which to view the Tenth Circuit's error of statutory interpretation. Even if such late payments could be declared "material defaults" for purposes of Section 1307's dismissal provision, the Code does not tie courts' hands. The very purpose of Section 1307's dismissal provision is to leave bankruptcy courts with discretion in those circumstances. As the Third Circuit and other courts have recognized, and what the Tenth Circuit gets so wrong, is that bankruptcy courts retain discretion to grant the debtor her fresh start so long as the debtor

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[6] Here, the late payments were less than $3,000—a tiny fraction of thousands paid over the life of the plan—and were paid less than three months after the five-year mark. Pet.App.27a & n.1, 46a. In far more egregious circumstances, other courts have declined to dismiss for a material default and have instead permitted debtors to complete the plan payments. *See, e.g.*, *In re Hill*, 374 B.R. at 747 (exercising discretion to permit debtor to cure roughly $16,000 underpayment); *In re Brown*, 296 B.R. at 21-22 (exercising discretion to permit debtor an additional year to cure underpayment).

completes her payments, for the benefit of the debtor and her creditors alike.

CONCLUSION

The decision below is indisputably wrong and indisputably conflicts with other courts' interpretation of chapter 13's discharge and dismissal provisions—critically important Code provisions that set the ground rules for when a debtor succeeds or fails in getting the fresh start that the Code promises. When a debtor can get that fresh start is a question of statutory interpretation that demands a uniform rule. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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