No. 21-599

# In the Supreme Court of the United States

MARGARET L. KINNEY, PETITIONER

v.

HSBC BANK USA, N.A.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT

JAMIE G. SILER*
JAMES P. ECKELS
TYLER S. GURNEE
Murr Siler & Accomazzo, P.C.
1999 Broadway, Ste. 3100
Denver, CO 80202
(303) 534-2277
jsiler@msa.legal
jeckels@msa.legal
tgurnee@msa.legal

*Counsel for Respondent*
** Counsel of Record*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, HSBC Bank USA, N.A. incorporates by reference the corporate disclosure statement that appears in the brief in opposition. No amendments are needed to make that statement current.

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## INTRODUCTION

The United States correctly concluded the certiorari petition should be denied.

It is undisputed that the question presented arises incredibly infrequently. Although over one hundred thousand Chapter 13 cases are filed each year, the issue has only been addressed 16 times in over four decades. Further, only two courts of appeals have ever addressed this issue. The parties and the government cannot even agree on what the Tenth Circuit actually held. And no one defends the Third Circuit's approach—a non-exclusive multi-factor test that would lead to unpredictable results. Worse yet, resolving the question presented would not change the outcome here: The bankruptcy court below found that petitioner would not prevail under the Third Circuit's approach, and neither petitioner nor the government argues otherwise.

On the merits, the government answers a different question than the one addressed by the courts below or presented in the petition. The government focuses on whether petitioner's default was material and suggests that in cases involving an immaterial default, bankruptcy courts have discretion to grant a discharge after the plan ends in default. But this case does not involve an immaterial default. Petitioner conceded below that her default was material; the bankruptcy court found the default to be material; petitioner did not appeal the finding of materiality; and the court of appeals decided the case on that basis. Thus, regardless of what might happen in a case involving an immaterial default, it would not help petitioner here. The Court therefore should deny certiorari.

## ARGUMENT

### A. This Case Is Not Certworthy

The government correctly concludes that the Court should deny certiorari.

1. The government recognizes (U.S. Br. 19-20) that there is no disagreement within the circuits warranting this Court's review, as only two circuits have actually addressed the question presented. Pet. 9-10; Br. in Opp. 6-7; U.S. Br. 8, 19-20. (While petitioner asserts the Seventh and Eleventh Circuits issued "related" decisions, Pet. Supp. Br. 7, she previously admitted the relevant language in those decisions is "dicta," Pet. 10.) So at most, there is a "shallow circuit split." U.S. Br. 21.

Further, as the government acknowledges (U.S. Br. 19), the two cases involved materially different facts. As a result, it is unclear whether the Third and Tenth Circuit's approaches would be very different in practice. *See* Br. in Opp. 9. Indeed, the bankruptcy court in this case viewed its decision as consistent with the Third Circuit's decision in *Klaas*. Pet. App. 50; *see* Br. in Opp. 10-11.

2. According to the government, the difference, if any, between the two circuit's respective approaches is even murkier. In the government's view, the Tenth Circuit's decision could be read two ways, either as automatically denying a discharge for any default not cured by the end of the five-year plan period, or as only denying a discharge if the default is material—but only the former would be erroneous. U.S. Br. 9 (arguing the court "erred to the extent that it held" the first way); *id.* at 20-21 (acknowledging the decision "could be read" the second way). The government then ultimately concludes that "the full scope of the Tenth

Circuit's decision is unclear"—making it ill-suited for this Court's review. *Id.* at 8, 21.

Alone, the fact that the parties and government cannot even agree on what the Tenth Circuit actually held is a good reason to deny certiorari. Petitioner says the Tenth Circuit adopted a "*per se*" rule that any missed payment is a material default. Pet. Supp. Br. 10-11. Respondent notes the Tenth Circuit did no such thing, noting only that petitioner's default was material based on the particular facts here, and holding that her material default supported a dismissal. Br. in Opp. 4-5. And the government says the Tenth Circuit's decision is not clear on this point. U.S. Br. 19-20. Under the circumstances, the government rightly suggests this Court should give the Tenth Circuit "an opportunity to clarify the scope of the decision." *Id.* at 21.

The only other decision addressing this issue, *In re Klaas*, 858 F.3d 820 (3d Cir. 2017), is no better. First, neither the government nor petitioner actually defends the Third Circuit's approach in *Klaas*. Under that approach, whether a debtor who has "materially" defaulted on her plan payments obtains a completion discharge depends on a non-exclusive, multi-factor test. Br. in Opp. 7 & n.5; *see Klaas*, 858 F.3d at 832. Such an undefined approach would be burdensome to administer and provide none of the needed certainty to debtors and creditors. Not surprisingly, no other court of appeals has gone that route.

Rather than defend that approach, the government focuses on an entirely different question not litigated below: when a debtor's default should be considered "material." U.S. Br. 18; *see* p. 6*, infra.* Petitioner, in turn, also does not defend the Third Circuit's approach. *See* Pet. 18-27; Pet. Supp. Br. 7. Thus, while petitioner strenuously argues this Court

should grant review, she provides the Court no way to rule for her on the merits.

This Court typically waits for issues to be developed and aired in the courts of appeals before granting review. That allows the Court to consider a variety of different facts and legal approaches, and understand the practical implications of different approaches.[1] That is especially true in bankruptcy cases. *See, e.g.*, *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1778 n.1 (2022) (granting review after 3-2 circuit split); *Chicago v. Fulton*, 141 S. Ct. 585, 590 n.1 (2021) (4-2 split). Here, based on the undeveloped analysis in the lower courts and the government's uncertainty about the Tenth Circuit's approach, it would be especially imprudent to grant further review at this time.

3. The government observes the question presented has been "litigated infrequently." U.S. Br. 19. The term "infrequently" is generous. Despite the one-hundred-thousand-plus Chapter 13 cases filed each year, petitioner and the government identify only 16 cases that have addressed the issue, and only two circuit cases which have directly addressed it—a miniscule percentage of the millions of Chapter 13 cases filed in the past four decades. *See id.* at 20; Pet. 10-12; Pet. App. 7 n.3; Pet. Supp. Br. 7 n.4, 8 n.5.

If the question presented recurs with any frequency, then the issue will soon reach another court of appeals. If the issue does not recur often, there is no need for this Court's review. *See* Sup. Ct.

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[1] *See, e.g.*, *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 988 (2017) (Thomas, J., dissenting); *California v. Carey*, 471 U.S. 386, 399-400 (1985) (Stevens, J., dissenting).

R. 10(a). In either case, it is too soon for the Court to expend its limited resources on this issue now.

Petitioner contends (Pet. Supp. Br. 6-7) the Court should grant review simply because a large number of Chapter 13 cases are filed each year. But the question is whether there are many cases raising *this particular issue*, not whether there are many Chapter 13 bankruptcy cases. *See, e.g.*, *Clay v. United States*, 537 U.S. 522, 524 (2003). If petitioner's view were correct, it would mean that the Court should grant certiorari every time a petition presents a question about the Federal Rules of Civil Procedure, or personal jurisdiction, or Article III standing, simply because a large number of civil cases are filed in the federal courts each year. Petitioner's statistics about the numbers of bankruptcy cases thus undercut, rather than support, her position. While petitioner thinks this issue *should* recur often, the volume shows it does not.

Further, if the issue presented in the petition arose regularly and was crucial to the administration of Chapter 13 bankruptcy plans, the government (with the benefit of the experience of the Executive Office for U.S. Trustees) would say so. The fact that the government says the opposite confirms the question presented here does not warrant the Court's review at this time.

4. Petitioner's case has one other insurmountable problem—she would lose even under the Third Circuit's approach. That is not conjecture; the bankruptcy court considered the issue and found that the circumstances in *Klaas* simply "are not present here." Pet. App. 50. The brief in opposition noted this holding (Br. in Opp. 11), and neither the government nor petitioner has disagreed. Thus, although petitioner contends (Pet. Supp. Br. 3) that debtors in

Kansas and Pennsylvania might be treated differently, it is clear *she* would not prevail in either place, which is another reason her case provides an exceptionally poor vehicle for further review.

**B. The Court Of Appeals' Decision Is Correct**

The government's merits discussion misses the mark by focusing on whether a debtor's default is material, rather than on whether a debtor who has materially defaulted can make plan payments after the plan ends. In this case, petitioner never disputed that her default was material, and thus the Tenth Circuit correctly upheld the bankruptcy court's dismissal of her case.

1. The government focuses on when a debtor's failure to make plan payments is considered a "material" default, suggesting that if a debtor makes plan payments after a plan's term ends, a court could find that the default is not material and grant a completion discharge. U.S. Br. 18. The government says that "to the extent that" the court of appeals treated every missed payment as a material default, it erred. *Id.* at 9.

But the parties agree not every missed payment will lead to dismissal or conversion. As the government correctly notes, a court may dismiss or convert a Chapter 13 case over the debtor's objection only when there is sufficient "cause," U.S. Br. 3 (quoting 11 U.S.C. § 1307(c)), and a "material" default provides sufficient cause, *id.* at 7.

The problem with the government's approach is that it does not fit this case. Here, petitioner never disputed below that her late mortgage payments constituted a material default, or that the five year plan period had ended. Further, petitioner did not have "a small outstanding balance" (U.S. Br. 8), miss

"a" singular payment (*id.* at 7, 8, 10, 11, 12), or make "a calculation error . . . [that] was not her fault" (*id.* at 17) as she and the government imply. She knowingly missed several mortgage payments before and after her repayment plan ended, worth thousands of dollars. Pet. App. 46.

Respondent moved to dismiss because petitioner's missed payments constituted "a material default." Mot. to Dismiss 2-3, Bankr. Ct. ECF No. 82 (Dec. 27, 2018); *see* Pet. App. 27. Petitioner (who has been represented by counsel throughout these proceedings) did not dispute that she was in default or that the default was material. *See* Response to Mot. to Dismiss 1, Bankr. Ct. ECF No. 84 (Jan. 9, 2019); *see* Br. in Opp. 3.

The bankruptcy court considered the circumstances and concluded petitioner's failure to timely submit mortgage payments "*constitutes a material default* of the plan." Pet. App. 32 (emphasis added). And in denying reconsideration, the bankruptcy court reiterated that the case involves "a material plan default." *Id.* at 39; *see* U.S. Br. 21.

Similarly, at the Tenth Circuit, there was no dispute that petitioner's multiple missed mortgage payments "constituted a material default." Pet. App. 4. The court therefore limited its analysis to cases involving material defaults, and framed the issue as whether a bankruptcy court can grant a discharge when a Chapter 13 debtor had an "ongoing material default when the plan ended." *Id.* at 5 (bolding omitted). And the court expressly limited its holding to material defaults: "Given Ms. Kinney's material default, the plan's expiration left the bankruptcy court without authority to grant a discharge. We thus affirm dismissal of the Chapter

13 bankruptcy case." Pet. App. 22; *see, e.g.*, *id.* at 7, 12, 13; *see also* U.S. Br. 6.

Petitioner now contends the courts below erred in finding her default "material." Pet. Supp. Br. 11 & n.6. But she did not argue that issue below, despite many opportunities. She did not argue it in response to the Bank's motion to dismiss, *see* Response to Mot. to Dismiss 1, Bankr. Ct. ECF No. 84 (Jan. 9, 2019), or in her motion for reconsideration of the bankruptcy court's dismissal order, *see* Mot. to Reconsider, Bankr. Ct. ECF No. 95 (Mar. 20, 2019). She also did not raise the issue in her appellate brief to the Tenth Circuit. The Bank's response brief noted this omission, Resp. C.A. Br. 25 n.5 ("[Petitioner] d[id] not argue in her brief that the three missed mortgage payments were immaterial."), and petitioner did not file a reply brief. While petitioner asserted that her default was "minor" (Pet. 17), she still did not argue in the petition that the courts below erred in finding a "material" default that justifies dismissal under the Code. It is too late for her to start arguing about materiality now. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *see also* Sup. Ct. R. 14(1)(a).

Petitioner also contends the bankruptcy court made an "error of law" because it held that any failure to make a plan payment is material, and that the court of appeals likewise treated any missed payment as "a *per se* material default." Pet. Supp. Br. 10-11. Neither court took that rigid approach. The bankruptcy court considered the number of petitioner's missed payments, the fact that the payments were anticipated, her explanation for missing the payments, and how long it took after the plan ended for petitioner to tender the payments. *See* Pet. App. 45-46. Notably, the bankruptcy court "le[ft] open the possibility" that it may well have granted a

completion discharge under different facts, such as the facts in *Klaas*. *Id.* at 50. The court of appeals then took the case as it came to the court, with materiality decided and not appealed. The Tenth Circuit therefore did not hold that "a mere failure to make a plan payment is . . . automatically a material default," as the government suggests, U.S. Br. 7.

This is not the right case to answer questions about when a default is material, because that issue simply was not litigated. Petitioner can hardly fault the Tenth Circuit for not accepting an argument she never made. And the most the government can say is that the Tenth Circuit's approach to materiality is "unclear" and may be erroneous (depending on how the decision is read). U.S. Br. 20-21.

2. On the question it actually decided, the Tenth Circuit is correct. The court considered whether a debtor may obtain a completion discharge after she materially defaults on plan payments, admits her default, and then seeks to make up the payments after the plan period ends. Pet. App. 2, 5. The court correctly answered that question "no."

The Code addresses the beginning, middle, and end of a Chapter 13 plan. In the beginning, a plan may not be confirmed if it would last beyond five years. *See* 11 U.S.C. § 1322(d)(1)-(2). Then, after a plan is confirmed, the Code allows plan modifications to extend or reduce the time for making payments, *id.* § 1329(a)(2), but again specifies the court "may not approve a period that expires after five years after" the first plan payment, *id.* § 1329(c). Finally, at the end of the plan, Section 1328(a) requires a court to grant a discharge if the debtor has made all payments "under the plan," *id.* at § 1328(a), or allows a court to dismiss a case for cause, including for a "material default," *id* at § 1307(c)(6).

Read against the backdrop of the other related Code sections that govern the plan's length, the language "under the plan" in the Code's discharge provision means "within the five years specified for the plan." Br. in Opp. 12-14. If there were any doubt Congress intended this five-year limit, Congress resolved it by providing only a few specific exceptions to the five-year rule. Those include the provisions authorizing hardship discharges, 11 U.S.C. § 1328(b), and authorizing special relief for debtors facing COVID-19 hardships, *id.* §§ 1328(i), 1329(d). Those provisions, along with the requirement of a hearing to determine any material default supporting dismissal or conversion, provide ways to address the government's concerns about potentially harsh results (U.S. Br. 8, 16-17).

It would be contrary to the statutory scheme for courts to create new, *ad hoc* exceptions to the five-year rule and limited exceptions crafted by Congress. Indeed, petitioner's view would allow her to wait until after the plan period expires, and then do exactly what the Code forbids during the life of the plan—extend her payments beyond five years.

The government contends (U.S. Br. 11-15) that the Bankruptcy Code provides flexibility to permit a completion discharge for a debtor who has an immaterial default and then cure that default after the plan ends. But the government never answers the central question in this case—*when* a debtor must make the payments to obtain a completion discharge. It never explains what time period is allowed (other than calling it a "brief period" "shortly after" the plan's five-year term ends, *id.* at i, 16) or how a court is supposed to go about deciding when late payments should be accepted. In fact, the government says not every late payment should be accepted; "in some

cases," the "lateness" of a payment "make[s] dismissal or conversion for material default or prejudicial delay appropriate." *Id.* at 14.

The government's brief raises more questions than it answers. But there is no need to delve into those merits questions here. The materiality of petitioner's default is established and was not appealed; petitioner would not prevail under any circuit's approach; and there is no urgent need for this Court's review of the question presented.

## CONCLUSION

For the foregoing reasons and for those stated in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMIE G. SILER*
JAMES P. ECKELS
TYLER S. GURNEE
Murr Siler & Accomazzo, P.C.
1999 Broadway, Ste. 3100
Denver, CO 80202
(303) 534-2277
jsiler@msa.legal
jeckels@msa.legal
tgurnee@msa.legal

*Counsel for Respondent*
** Counsel of Record*

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