No. 13-299

IN THE

Supreme Court of the United States

BRANDON C. CLARK AND HEIDI K. HEFFRON-CLARK,
Petitioners,

v.

WILLIAM J. RAMEKER, TRUSTEE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether funds held in a non-spousal inherited Individual Retirement Account—which the beneficiary must withdraw according to a certain timetable without regard to age or retirement status—are "retirement funds" exempt from the claims of the beneficiary's creditors under Section 522 of the Bankruptcy Code, 11 U.S.C. §522(b)(3)(C), (d)(12).

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STATEMENT

Chapter 7 of the Bankruptcy Code permits eligible individual debtors to obtain a discharge of pre-bankruptcy debt by surrendering their property to a Chapter 7 trustee, who distributes the property to creditors. To ensure that the debtor is not left destitute post-bankruptcy, however, the Bankruptcy Code permits debtors to exempt their interests in certain specified assets from creditors' claims. *See* 11 U.S.C. §522. As relevant here, a debtor may exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under" one of various sections of the Tax Code. *Id.* §522(b)(3)(C), (d)(12).

The question presented here is whether funds held by a debtor in a non-spousal inherited Individual Retirement Account (an "inherited IRA") are "retirement funds" that are exempt from creditors' reach under Section 522. As the Seventh Circuit held below (Pet. App. 7a), the question is not a close one, and the answer is no: Funds held in a non-spousal inherited IRA are not retirement funds because the beneficiary need not—and, indeed, *cannot*—save the funds tax-deferred for his or her retirement.

Specifically, the beneficiary of an inherited IRA, unlike the owner of a typical IRA, may withdraw any amount of money from the account at any time without a tax penalty. Moreover, the beneficiary may not make any additional contributions to the inherited IRA, may not roll over its contents to another IRA, and is *required* to withdraw all the inherited IRA's funds on a certain timetable without regard to the beneficiary's age or retirement status. In short, funds in a non-spousal inherited IRA may be used freely for purposes of present consumption and are not set aside for anyone's retirement. Accordingly, they are not "retirement funds" exempt from creditors' claims.

Only two courts of appeals have addressed this question. And although those two courts have reached different outcomes, it would be premature for this Court to intervene now. The Fifth Circuit addressed the issue first and reached the wrong conclusion, failing to give more than cursory consideration to the federal tax rules that govern inherited IRAs and make them entirely different in form and substance from traditional IRAs. Now that the Seventh Circuit has persuasively explained why the nature of inherited IRAs compels the conclusion that they do not contain anyone's "retirement funds," other courts of appeals are likely to follow suit. And the Fifth Circuit—which has not yet had the opportunity to decide whether to hear the issue en banc—may very well, when that opportunity arises, revisit the issue and reach the correct result on its own. Because this split may thus heal itself, further percolation is necessary to determine whether this issue warrants this Court's review.

A. Chapter 7 Bankruptcy And Exemptions

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). Chapter 7 of the Code does so by allowing an eligible individual debtor to file a bankruptcy petition that creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). A trustee is then appointed to liquidate estate property and distribute any proceeds to the debtor's creditors. *Id.* §§701, 704(a)(1). In return, the debtor obtains a discharge of his or her pre-petition debt (subject to certain narrow exceptions). *Id.* §§523, 727. The discharge "prohibit[s] creditors from attempting to collect or to recover the debt." *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447 (2004); *see* 11 U.S.C. §524.

To permit the debtor to obtain or retain certain life or work necessities, the Code allows a debtor to "exempt" his or her interest in certain property, typically up to a set amount, from being made part of the bankruptcy estate and distributed to creditors. 11 U.S.C. §522(b); *Rousey* v. *Jacoway*, 544 U.S. 320, 325 (2005). Unless a debtor's State has opted out of the federal scheme, a debtor may choose either state-law exemptions, supplemented by certain federal exemptions, or the federal exemptions set out in the Bankruptcy Code.

Id. §522(b)(1); *Owen* v. *Owen*, 500 U.S. 305, 308 (1991). Under the federal exemptions, for instance, a debtor may exempt up to $22,975 of equity in a residence, 11 U.S.C. §522(d)(1), and up to $3,675 of equity in a motor vehicle, *id.* §522(d)(2). Because "every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to … creditors," the exemptions Congress has chosen reflect a careful balance between the interests of debtors and creditors. *Schwab* v. *Reilly*, 130 S. Ct. 2652, 2667 (2010).

This case involves the scope of the Section 522 exemption—available to all debtors, whether they elect state or federal exemptions—for "retirement funds" held in certain tax-exempt retirement accounts. Under that provision, a debtor may exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. §522(b)(3)(C), (d)(12). The purpose of the exemption is to ensure that bankruptcy does not drain personal resources necessary for retirement.[1] Both parties agree that Section 522 permits debtors to exempt funds held for their own retirement

[1] Congress added the exemption at issue here in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. Before then, courts of appeals had divided as to whether IRAs were exempt under a separate provision allowing a debtor to exempt his or her "'right to receive … a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service.'" *Rousey*, 544 U.S. at 323-324; *see* 11 U.S.C. §522(d)(10)(E). While Congress was considering a legislative fix to resolve this question, this Court held that non-inherited IRAs were exempt under Section 522(d)(10)(E) because such IRAs "confer a right to receive payment on account of age." *Rousey*, 544 U.S. at 334-335.

in traditional IRAs, which are exempt from taxation under Section 408 of the Tax Code. The question here is whether funds held in *inherited* IRAs—which, as described in detail below, differ in crucial ways from traditional IRAS—are likewise exempt.

B. IRAs And Inherited IRAs

A traditional Individual Retirement Account "is a personal saving plan" that provides certain "tax advantages for setting aside money for retirement." IRS, *Publication 590: Individual Retirement Arrangements (IRAs)* 3 (2013) (Publication 590); *see* 26 U.S.C. §408(a). The attributes of an IRA reflect Congress's objective that such accounts be used as a "substitute for wages" in retirement and not as "mere savings accounts." *Rousey*, 544 U.S. at 329. The owner of an IRA thus may contribute money to the account over the course of his or her lifetime. Such contributions are generally tax-deductible, 26 U.S.C. §219(a), and the assets held in an IRA are not taxed until they are distributed, *id.* §408(e)(1).

IRA owners retain a nonforfeitable right to the balance held by the IRA, 26 U.S.C. §408(a)(4), but "[t]hat right is restricted by a 10-percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 59½," *Rousey*, 544 U.S. at 327; *see* 26 U.S.C. §72(t)(1). The penalty on premature withdrawals, by "deterr[ing] … early access to IRAs," *Rousey*, 544 U.S. at 327, is consistent with Congress's intention that IRAs be used for retirement purposes, not for present consumption. By law, IRA owners can begin to make penalty-free withdrawals after age 59½, but they "must begin to withdraw funds" at age 70½, a time when "they are likely to be retired and lack wage income." *Id.* at 331; *see* 26 C.F.R. §1.408-2(b)(6). Recent statistics show that approximately 75% of households taking withdrawals from traditional IRAs contain at least one retired individual. *See* Investment Company Institute, *ICI Research Perspective* 20 (Dec. 2012), *available at* http://www.ici.org/pdf/per18-08.pdf. Only seven percent of households that own a traditional IRA and are headed by an individual under 59 took withdrawals. *Id.*

The characteristics of an IRA change substantially when an IRA owner dies. In that case, the owner's interest in the IRA passes to a beneficiary. *See* Publication 590 at 18. If the beneficiary is a spouse, the spouse can elect to treat the IRA as his or her own, roll the IRA over into an existing IRA, or treat himself or herself as a non-spousal beneficiary. *See id.* If the named beneficiary is not a spouse of the decedent (or if the spouse elects a non-spousal beneficiary designation), the Tax Code treats the account as an "inherited" IRA. 26 U.S.C. §408(d)(3)(C)(ii).

An inherited IRA differs fundamentally from a traditional IRA. A beneficiary of an inherited IRA may defer paying taxes on the inherited funds for a specified amount of time, thus avoiding a potentially large tax bill at the time of the original owner's death. But in crafting the rules governing inherited IRAs, Congress made it clear that such accounts were not themselves intended as retirement vehicles. A person who inherits an IRA receives only a beneficial interest and does not own the account. *See* Joint Committee on Taxation, *Technical Explanation of H.R. 4, The "Pension Protection Act of 2006"* at 178 (2006); Publication 590 at 18. Accordingly, the beneficiary cannot, for example, make additional contributions to the account and may not roll the account over into a separate IRA. Publication 590 at 18. Regardless of age or retirement status, a beneficiary may elect to receive distributions from the account immediately without paying any tax penalty. 26 U.S.C. §72(t)(2)(A)(ii).

Perhaps most significantly, a beneficiary of an inherited IRA *must* begin to receive distributions from the account within a certain time following the previous owner's death. 26 U.S.C. §§408(a)(6), 401(a)(9)(B); 26 C.F.R. §1.408-2(b)(7); *see* Bennett *et al.*, *Taxation of Distributions From Qualified Plans* ¶17.07[4][b][iii] (2012) ("The restrictions on inherited IRAs have the effect of requiring a non-spouse beneficiary to begin receiving taxable distributions from the IRA in accordance with the Code's minimum required distribution rules."). Specifically, if an IRA owner dies before the age of 70½, a non-spouse beneficiary generally must either withdraw the entire balance of the account within five years or take annual minimum distributions from the account beginning one year following the owner's death. 26 C.F.R. §1.408-8; Cartano, *Taxation of Individual Retirement Accounts* §32.02[A][1] (2013).

C. Factual Background And Proceedings Below

1. In 2000, Ruth Heffron established an IRA with her daughter, petitioner Heidi Heffron-Clark, as the beneficiary. C.A. App. 30 (Joint Statement of Facts ¶5). When her mother died in 2001, Ms. Heffron-Clark transferred the funds from her mother's IRA to an inherited IRA. *Id.* at 31 (¶¶6-7). The year-end value of the inherited IRA in 2001 was approximately $453,000. *Id.* (¶11). Beginning in 2002, Ms. Heffron-Clark—who was not retired—began to take monthly distributions from the inherited IRA, as she was required to do under the Tax Code. *Id.* (¶9). When Ms. Heffron-Clark and her husband, petitioner Brandon Clark, filed for Chapter 7 bankruptcy in 2010, the inherited IRA was

valued at approximately $293,000 (Pet. App. 10a), reflecting in part the required withdrawals Ms. Heffron-Clark had made before bankruptcy.[2]

In bankruptcy, petitioners claimed that the inherited IRA was exempt and thus beyond the reach of creditors under Section 522 of the Bankruptcy Code. Respondents—Chapter 7 Trustee William J. Rameker and petitioners' judgment creditors, Resul and Zinije Adili d/b/a Kegonsa Plaza—objected, arguing, among other things, that the inherited IRA does not contain "retirement funds." C.A. App. 97-103. The bankruptcy court sustained the objections, reasoning that retirement funds are those held for the owner's retirement, meaning a "'withdrawal from one's position or occupation or from active working life.'" Pet. App. 29a. The bankruptcy court concluded that petitioners' inherited IRA "does not contain *anyone's* 'retirement funds'" because the mother was deceased and her daughter was receiving "distributions … while both" she and her husband "continued to work." *Id.* at 29a-30a. The court reasoned that its conclusion was consistent with Congress's purpose in exempting IRAs from bankruptcy, which was to "permit debtors to retain amounts saved for their retirement and not sums inherited from their parents," *id.* at 30a-31a, and with the fundamentally different attributes of IRAs and inherited IRAs, *id.* at 31a.

2. The district court disagreed and upheld the exemption. Pet. App. 21a. The court believed the question could not "be resolved by looking at the plain

[2] Ms. Heffron-Clark continued to withdraw funds from her inherited IRA following the filing of her bankruptcy petition, including a withdrawal of $10,500 in November 2010. C.A. App. 31 (Joint Statement of Facts ¶12).

meaning of the statute," and it questioned "[a]s a policy matter" why "inherited funds should be exempt from bankruptcy just because they were held by the decedent in the form of an IRA and not as stock or gold bullion." *Id.* at 19a, 21a. Nevertheless, the court held that the funds in inherited IRAs could be deemed "retirement funds" under Section 522 because at one point in time they had been Ms. Heffron-Clark's mother's retirement funds. *Id.* at 20a-21a.

3. The Seventh Circuit reversed the district court's decision. Pet. App. 1a, 7a. Focusing on the attributes of an inherited IRA under federal tax law, the court of appeals explained that, unlike a typical IRA, "an inherited IRA is a time-limited tax-deferral vehicle, … not a place to hold wealth for use after the new owner's retirement." *Id.* at 2a. The court reasoned that by the time of petitioners' bankruptcy "the money in the inherited IRA did not represent *anyone's* retirement funds" but was a "pot of money" petitioners could use (and were using) "for current consumption." *Id.* at 4a.

Because the inherited IRA did not contain "savings reserved for use after [its] owner[] stop[ped] working," it did not contain retirement funds. Pet. App. 7a. The Seventh Circuit recognized that the Fifth Circuit had reached a different result in *In re Chilton*, 674 F.3d 486 (5th Cir. 2012), but it did not "think the question close," concluding that "inherited IRAs represent an opportunity for current consumption, not a fund of retirement savings," and thus are not "retirement funds" under the Bankruptcy Code. *Id.*[3]

[3] The panel circulated its opinion to all active members of the court prior to issuance, none of whom requested en banc review. Pet. App. 7a. The court separately denied petitioners' request for rehearing en banc and panel rehearing. *Id.* at 8a.

REASONS FOR DENYING THE PETITION

The Seventh Circuit correctly resolved the question presented. Although one panel of the Fifth Circuit had previously reached a contrary conclusion, that court has yet to consider whether to hear the issue en banc, and no other court of appeals has yet considered the issue at all. There is accordingly every opportunity for this shallow split to heal itself, and this Court's intervention now is not needed.

I. THE DECISION BELOW IS CORRECT

As the Seventh Circuit noted, the question presented here is not a close one, and the court of appeals correctly resolved it. Indeed, the petition barely suggests otherwise. The text, history, and purpose of Section 522 compel the conclusion that it does not exempt funds in an inherited IRA. Such funds may be used freely for present consumption—and, indeed, *must* be withdrawn from the account according to a specified timetable—without regard to the beneficiary's age or employment status. Accordingly, they are not "retirement funds."

1. The interpretation of the Bankruptcy Code begins "'where all such inquiries must begin: with the language of the statute itself.'" *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011). The text of Section 522 fully supports the Seventh Circuit's ruling. The Bankruptcy Code does not define "retirement funds." Courts must therefore look to the "ordinary meaning" of that phrase. *Id.* A "fund" is defined as, among other things, "a sum of money or other resources[,] the principal or interest of which is set apart for a specific objective or activity." *Webster's Third New International Dictionary Unabridged* 921 (1976).

Retirement is the "act of retiring or state of being retired," *Id.* at 1939, and "retire" means "to withdraw from office, public station, business, occupation, or active duty," *id.* Thus, retirement funds are resources to be used after one has ceased employment, commonly as wage substitutes. *See Rousey* v. *Jacoway*, 544 U.S. 320, 331-332 (2005) (finding that funds held in traditional IRAs typically "substitute[] for wages" in retirement).

Funds held in an inherited IRA simply are not "retirement funds" within the ordinary meaning of that phrase. Notwithstanding their name, inherited IRAs have nothing to do with anyone's retirement. Rather, they are simply vehicles for providing temporary tax-deferred status to inherited assets that would otherwise be subject to immediate taxation.

A comparison to traditional IRAs makes that point clear. The owner of a traditional IRA may contribute up to a certain amount each year. 26 U.S.C. §§408(a)(1), 219(b)(1), (b)(5). Taxes on the contribution amount will be deferred until the funds are withdrawn. *Id.* §408(e)(1). Funds in a traditional IRA may be rolled over to a new IRA without any tax penalty, provided certain requirements are met. *Id.* §408(d)(3). Before age 59½, an IRA owner may not withdraw funds from the IRA, absent exceptional circumstances, without paying a substantial tax penalty. *Id.* §72(t)(1). Reflecting that funds in an IRA are designed to be used for the owner's retirement, the owner *may* begin taking distributions from an IRA at age 59½ without penalty, *id.* §72(t)(2)(A)(i), and *must* begin taking distributions at age 70½, Publication 590 at 34.

None of these defining characteristics of a traditional IRA is true of an inherited IRA. The beneficiary of an inherited IRA may not make any contributions to the inherited IRA, tax-deferred or otherwise. Publication 590 at 18. The beneficiary may not roll over the funds into his or her own IRA. *Id.*; 26 U.S.C. §408(d)(3)(C). The beneficiary may withdraw all the funds in the inherited IRA immediately without any tax penalty, regardless of the beneficiary's age or retirement status. 26 U.S.C. §72(t)(2)(A)(ii). And the beneficiary *must* begin taking distributions from the inherited IRA promptly, again without regard to age or retirement status. *Id.* §§408(a)(6), 401(a)(9)(B); 26 C.F.R. §1.408-8. In short, as the Seventh Circuit held, "an inherited IRA is a time-limited tax deferral vehicle … not a place to hold wealth for use after the new owner's retirement." Pet. App. 2a.

This case well illustrates the point. As explained above, although still employed, petitioner Ms. Heffron-Clark began taking distributions from the inherited IRA in January 2002, one year following Mrs. Heffron's death, and has made substantial withdrawals from the account for more than a decade. In fact, she has continued to make withdrawals even after filing for bankruptcy, including a withdrawal of $10,500 one month after so filing. *See supra* pp.7-8 & n.2. Under these circumstances, it makes no sense to call the money in the inherited IRA "retirement funds," or to permit petitioners to withhold those funds from their creditors.

In fact, treating money in an inherited IRA as "retirement funds" would disserve the purposes of the Bankruptcy Code. *Cf. Ransom*, 131 S. Ct. at 725 ("consideration of BAPCPA's purpose strengthens our reading of the term 'applicable'"). The Code's exemptions are not designed "to provide a windfall to debtors but … to provide them with the necessaries by which to live and make a living." 3A Singer & Singer, *Statutes and Statutory Construction* §70:5 (7th ed. 2010). Here, the specific object of the exemption for "retirement funds" is plain: to shield from creditors funds in IRAs and other common retirement savings vehicles so that debtors do not lose their retirement savings in bankruptcy.[4] Congress expressed no intent to permit debtors to withhold from their creditors inherited funds that are not set aside for the debtor's (or anyone's) retirement.

Exempting funds in inherited IRAs—"liquid asset[s] which may be accessed … without penalty," *In re Sims*, 241 B.R. 467, 470 (Bankr. N.D. Okla. 1999)—would grant debtors an irrational windfall. In this case, for example, when Ms. Heffron-Clark inherited her mother's IRA, she could have simply withdrawn the entire balance and invested or otherwise used the money received. No one would contend *that* money was exempt. That she instead chose to put the funds in an inherited IRA, thus allowing the money to grow tax-free (until withdrawn), should make no difference. The money may still be used for current consumption, just like money in a savings account, and indeed may *not* be saved for retirement in the manner permitted by a traditional IRA. Treating such funds as exempt from creditors would "threaten[] to convert a fresh start into a free pass" and disrupt the careful balance between the interests of debtors and creditors struck by the

[4] *See* H.R. Rep. No. 109-31 pt. 1, at 63-64 (2005); 151 Cong. Rec. S2459, S2462 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) ("This bill creates new legal protections for a large class of retirement savings in bankruptcy."); 151 Cong. Rec. E704 (daily ed. Apr. 19, 2005) (statement of Rep. Moore) (stating that BAPCPA "upholds the Supreme Court's recent ruling" in *Rousey* and that "IRAs now join 401(k)s, Social Security, and *other benefits tied to age, illness or disability* that are afforded protection under bankruptcy law").

bankruptcy exemptions. *Schwab* v. *Reilly*, 130 S. Ct. 2652, 2667 (2010).[5]

2. Petitioners raised two closely related contrary arguments below, neither of which is persuasive. First, petitioners argued that the money in the inherited IRA was in fact "set aside" for retirement purposes by its original owner. *See* Appellees' C.A. Br. 9; *see also In re Chilton*, 674 F.3d 486, 489 (5th Cir. 2012). Second, they contended that Section 522(b)(3)(C) is not expressly limited to the "debtor's" interest in the exempted property. *See* Appellees' C.A. Br. 10-13; *see also Chilton*, 674 F.3d at 489; *In re Nessa*, 426 B.R. 312, 314-315 (B.A.P. 8th Cir. 2010).

As an initial matter, even if the funds held in an inherited IRA did represent *someone's*, though not the debtor's, retirement funds, Section 522 of the Bankruptcy Code still would not shield those funds. Under the Bankruptcy Code, the debtor is limited to exempting his or her own interest in property, because only the debtor's interests in property form part of the bankruptcy estate that is created when the debtor files for bankruptcy. 11 U.S.C. §541(a)(1). Thus, it makes no sense to say that a debtor could exempt property from the bankruptcy estate because someone else could claim an interest in the property as "retirement funds."

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[5] Moreover, unlike many other exemptions, Section 522(b)(3)(C) imposes no dollar limit on the permitted exemption. Thus, exempting inherited IRAs from bankruptcy could allow debtors to shield substantial amounts of money from creditors, even though debtors could, immediately following bankruptcy, simply withdraw those funds without penalty. Such a construction of the Bankruptcy Code would make little sense. That is particularly so because, unlike a spousal inherited IRA, the statute imposes no restriction on who may be a beneficiary.

In any event, both of petitioners' arguments fail for an even more basic reason: When petitioners claimed their exemption, "the money in the inherited IRA did not represent *anyone's* retirement funds." Pet. App. 4a. When petitioners filed for bankruptcy, the inherited IRA was neither petitioners' nor the original owner's retirement funds: The money was not being saved for anyone's retirement. It should make no difference that, before Mrs. Heffron's death, the money was for her retirement. What matters is how the money is being used now. No one would doubt that if an IRA owner takes money out of the IRA and gives it to the owner's children, who then deposit it in a normal savings account, the money does not constitute "retirement funds" exempt from creditors in bankruptcy. The money, although formerly "set apart" for retirement purposes, is no longer. Because Mrs. Heffron's former retirement funds are now held by her daughter *not* as retirement savings, but as funds available for current consumption, the same result obtains here.

Petitioners' contrary reading renders the requirement that the exempted funds be "retirement funds" superfluous. The statute limits the exemption's scope to "[1] retirement funds [2] to the extent that those funds are in a fund or account that is exempt from taxation under" one of enumerated sections of the Tax Code, each of which addresses retirement accounts. 11 U.S.C. §522(b)(3)(C), (d)(12). Under petitioners' theory, *any* money in one of the enumerated tax-exempt accounts would necessarily qualify as "retirement funds" because the funds were at some point set aside for someone's retirement. On that reading, however, the "retirement funds" limitation would do no work. Indeed, the debtors in *Chilton* candidly acknowledged that their reading rendered the phrase "retirement funds" "surplusage." Appellees' Br. 10, No. 11-40377, *In re Chilton* (5th Cir. June 24, 2011). That interpretation countermands the "'cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012); *see Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009).[6]

II. THE RECENT AND UNDEVELOPED CONFLICT IN THE FEDERAL COURTS DOES NOT WARRANT REVIEW

A. The Shallow One-One Split Between The Fifth And Seventh Circuits Is Likely To Resolve Itself Without This Court's Intervention

As petitioners observe, prior to the Seventh Circuit's decision below, a panel of the Fifth Circuit had reached the contrary conclusion, holding that inherited IRAs are exempt under Section 522. *Chilton*, 674 F.3d at 488-489. That shallow division of authority, however, does not warrant this Court's intervention. Other courts of appeals are likely to follow the Seventh Circuit's cogent analysis. Moreover, the Fifth Circuit has not yet had the opportunity to consider the issue en

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[6] 11 U.S.C. §522(b)(4)(C) does not help petitioners' case. That provision simply states that a trustee-to-trustee transfer of "retirement funds" does not deprive the funds of protection solely "by reason of such direct transfer." Such transfers are commonplace outside the inherited IRA context. For example, the owner of an IRA can make a direct trustee-to-trustee transfer of funds from one IRA to another without incurring tax liability. *See* Publication 590 at 22; 26 U.S.C. §401(a)(31). Section 522(b)(4)(C) means that such a transfer alone does not affect whether the funds are exempt. It has no relevance to this case, in which the funds at issue were no longer anyone's "retirement funds" at the time they were transferred from Ms. Heffron-Clark's deceased mother's IRA to Ms. Heffron-Clark's inherited IRA.

banc and is likely to correct its error when it does have that opportunity.

Last year, the Fifth Circuit became the first appellate court to address the question here—at the time, an issue "of first impression for [the Fifth Circuit] and [its] sister circuits." *Chilton*, 674 F.3d at 488. The panel held that inherited IRAs are exempt under Section 522, reaching that conclusion in three quick paragraphs. *See id.* at 488-489. Relying heavily on the authority of a bankruptcy appellate panel decision, *Nessa*, 426 B.R. at 312, the Fifth Circuit panel concluded that the phrase "'retirement funds' can include the funds that others had originally set aside for their retirements, as with inherited IRAs." *Id.* at 489. In the panel's view, the "plain meaning" of Section 522 dictates that funds in inherited IRAs, which by definition cannot be saved in that account for retirement, are nonetheless "retirement funds." *Id.*

The Fifth Circuit's cursory analysis likely will not fare well in other appellate courts, particularly read next to the Seventh Circuit's decision. The court's opinion is most notable for the key aspects of the issue it fails even to address. For example, the relevant part of the opinion does not contain a single citation to the federal statutory or regulatory provisions that define the differences between IRAs and inherited IRAs. The Fifth Circuit panel opinion does not mention, much less account for, the distinctions between a spousal inherited IRA and a non-spousal inherited IRA. Nor does the court acknowledge that its interpretation of "retirement funds" would render that phrase surplusage because it would require treating every dollar in any retirement vehicle listed in Section 522 as a "retirement fund," regardless of the permitted use of the money at the time of bankruptcy. Finally, the Fifth Circuit panel does not even hazard a guess as to why Congress would have intended such an irrational windfall for debtors who happen to inherit non-spousal IRAs, allowing them to use a pot of money for present consumption, while simultaneously shielding it from creditors in bankruptcy.

Intervention by this Court now—to address a question decided by only two circuits, where one side of the split has simply failed to address important aspects of the question—would be premature. Given the significant gaps in the Fifth Circuit's analysis and with the benefit of the Seventh Circuit's opinion, there is every reason to expect that the courts of appeals will resolve this thin disagreement absent this Court's review. And, significantly, the trustee in *Chilton* did not seek en banc reconsideration, so the full Fifth Circuit has not yet had the chance to pass on the question. In the wake of the Seventh Circuit's decision, which not only disagrees with the Fifth Circuit panel's opinion but underscores the serious flaws in it, the Fifth Circuit may well take the issue en banc and correct its error. At the least, there is no reason for the Court not to give the courts of appeals the opportunity to settle this issue themselves.

Recognizing that this Court ordinarily would not intervene to referee a recent, one-one split, petitioners contend that "[t]here is … considerable uncertainty about when, if ever, the Court would have another opportunity to resolve the question presented." Pet. 17. Petitioners' speculation is unsupported.[7] In *Rousey*, for

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[7] Petitioners posit (Pet. 16) that parties in bankruptcy proceedings "often lack the financial resources to pursue protracted litigation," but at least in this context that is difficult to square with the fact that the very split on which petitioners rely arose in the last two years, with successive appellate decisions. Furthermore, whatever theoretical disincentives may exist for appeals in a

example, this Court addressed whether "debtors can exempt assets in their [IRAs] from the bankruptcy estate pursuant to § 522(d)(10)(E)." 544 U.S. at 322. In doing so, the Court explained that it was addressing a "division among the Courts of Appeals" that arose when the Eighth Circuit broke with four of its sister circuits that had recently addressed the same question. *Id.* at 325. The fact that, prior to *Rousey*, five circuits had, in relatively quick succession, addressed a similar question to that presented here contradicts petitioners' suggestion that the issue is unlikely to recur. Similarly, in *Patterson* v. *Shumate*, 504 U.S. 753, 757 & n.1 (1992), this Court addressed the status of ERISA-qualified pensions in bankruptcy, thus "resolv[ing] [a] conflict among the Courts of Appeals" involving a four-four circuit split. Those examples demonstrate concretely that cases involving Chapter 7 exemptions and retirement vehicles have had little difficulty "percolat[ing] up to the courts of appeals" (Pet. 16) or coming to this Court based on mature divisions among the circuits. Petitioners' call for this Court to rush to resolve an undeveloped split based on speculation that another opportunity may never arise runs contrary to historical fact.[8]

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typical Chapter 7 case, the divide between the Fifth and Seventh Circuits, although shallow, will provide powerful incentives for parties to appeal those issues in other circuits.

[8] Indeed, even the decisions of this Court cited by petitioners elsewhere as examples of the Court's willingness to decide bankruptcy issues (*see* Pet. 15) further undermine petitioners' apparent position that this Court must either decide the issue now in the face of a one-one split or not at all. *See Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013) (noting "lower courts ha[d] long disagreed" on the issue, citing as examples cases from the First, Fourth, and Ninth Circuits); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n.1 (2012) (noting a circuit split involving the Eighth, Ninth, and Tenth Circuits); *Ransom*, 131 S. Ct. at 723 &

B. The Seventh Circuit's Disagreement With Bankruptcy Court Decisions Does Not Warrant This Court's Review

Faced with a shallow one-one circuit split, petitioners understandably seek to deepen the conflict, arguing that, "[r]emarkably, the Seventh Circuit's decision conflicts … with every other valid lower-court decision to have considered the issue." Pet. 11. Of course, disagreement between bankruptcy courts and an appellate court is hardly remarkable, and certainly would not justify this Court's review in the ordinary course. *See* Gressman *et al.*, *Supreme Court Practice* 503 (9th ed. 2007) (the Court "usually declines to review appellate decisions that conflict with federal district court decisions"). District courts and appellate courts sit to ensure correct and uniform resolution of bankruptcy issues. And there is no reason to doubt that this structure of review will resolve this issue appropriately.

The scattershot collection of published and unpublished bankruptcy court decisions cited by petitioners is not to the contrary. Without exception, those cases are based on a single erroneous decision of a bankruptcy appellate panel in 2010. In *Nessa*, 426 B.R. at 314, the court concluded, in a few paragraphs of analysis, that inherited IRAs are exempt because Section 522 "requires that the account be comprised of retirement funds, but it does not specify that they must be the *debtor's* retirement funds." The court concluded that, though the money was not set aside for the debtor's "retirement," the funds were "retirement funds" under Section 522. *Id.* at 314-315.

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n.4 (noting a three-one circuit split involving the Fifth, Seventh, Eighth, and Ninth Circuits).

It is doubtful that the *Nessa* analysis—which has been criticized by commentators[9]—will withstand future review by federal courts. *Nessa* is contrary to the text, purpose, and history of Section 522 and fails to consider the crucial distinctions in economic form and substance between IRAs and inherited IRAs. Before the Seventh Circuit's decision, bankruptcy courts reflexively followed the lead, and repeated the errors, of *Nessa*.[10] But, faced with the significant analytical shortcomings in *Nessa* and *Chilton* brought to light by the Seventh Circuit's decision, it is unlikely that federal district or appellate courts will further propagate an errant interpretation of Section 522. Of course, if ordi-

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[9] *See, e.g.*, Cymrot & Lassman, *Inherited IRAs: Exemption Issues under the Code*, 30 Am. Bankr. Inst. J. 1, 67 (2011) ("The court's view in *Nessa* is not persuasive. An inherited IRA is akin to a revocable gift or inheritance that the beneficiary may acquire upon the donor's death."); *see also* Shumway, *Is an Inherited IRA a Retirement Account and Therefore Exempt?*, NABTalk: J. of the Nat'l Ass'n of Bankr. Trs. 36, 37 (Spring 2012) ("Congress never intended an 'Inherited IRA' to be anything more than a structured settlement fund for an inheritance.").

[10] *See* Pet. App. 26a ("[m]ost subsequent cases rely on … *Nessa*"); *In re Kuchta*, 434 B.R. 837, 843-844 (Bankr. N.D. Ohio 2010) (citing and "agree[ing] with the reasoning and result in *Nessa*"); *In re Weilhammer*, 2010 WL 3431465, at*4-5 (Bankr. S.D. Cal. Aug. 30, 2010) (similar); *Bierbach* v. *Tabor*, 2010 WL 8914472, at *1-2 (M.D. Pa. Dec. 2, 2010) (similar); *In re Mathusa*, 446 B.R. 601, 603-604 (Bankr. M.D. Fla. 2011) (similar); *In re Thiem*, 443 B.R. 832, 843-844 (Bankr. D. Ariz. 2011); *In re Johnson*, 452 B.R. 804, 807-808 (Bankr. W.D. Wash. 2011) (similar); *In re Cutignola*, 450 B.R. 445, 451-452 (Bankr. S.D.N.Y 2011) (similar); *In re Kalso*, 2011 WL 3678326, at *2 (Bankr. E.D. Mich. Aug. 19, 2011); *In re Hamlin*, 465 B.R. 863, 872-873 (B.A.P. 9th Cir. 2012) (similar); *In re Seeling*, 471 B.R. 320, 322-323 (Bankr. D. Mass. 2012) (following *Chilton* and *Nessa*); *In re Bauer*, 2013 WL 2661835, at *1-2 (Bankr. D.S.C. June 13, 2013) (similar); *In re Trawick*, 2013 WL 4574533, at *14-15 (Bankr. C.D. Cal. Aug. 29, 2013) (similar).

nary appellate channels prove insufficient to settle this issue correctly, certiorari might be appropriate later. But there is no cause for this Court to intervene now on the assumption that those ordinary channels of review will fail at their task.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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