No. 03-___

IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E)?

PARTIES TO THE PROCEEDINGS BELOW

The only parties to this proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Gerald Rousey and Betty Jo Rousey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-6a) is published at 347 F.3d 689. The Eighth Circuit's order denying the petition for rehearing and rehearing en banc by a vote of five to four (Pet. App. 36a) is unpublished. The opinion of the Bankruptcy Appellate Panel for the Eighth Circuit (Pet. App. 7a-18a) is published at 283 B.R. 265. The opinion for the Bankruptcy Court for the Western District of Arkansas (Pet. App. 19a-35a) is published at 275 B.R. 307.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2003. A timely petition for rehearing and rehearing en banc was denied on January 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 522 provides, in relevant part:

(d) The following property may be exempted under subsection (b)(1) of this section:

*****

(10) the debtor's right to receive—

*****

(E) 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, to the extent reasonably necessary for the

support of the debtor and any dependent of the debtor, unless –

> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

STATEMENT

When a debtor files a bankruptcy petition, virtually all of the debtor's property becomes part of the bankruptcy estate, which the bankruptcy trustee will convert to cash and distribute to the debtor's creditors. See 11 U.S.C. 541; *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 641 (1992). A debtor may, however, seek to retain some of his property by claiming an exemption pursuant to 11 U.S.C. 522. See *Taylor*, 503 U.S. at 641. These exemptions "permit an individual debtor to take out of the [bankruptcy] estate that property that is necessary for a fresh start and for the support of himself and his dependents." H.R. Rep. No. 95-595, at 176 (1977).

One such exemption encompasses a debtor's right to receive payments under a "stock bonus, pension, profitsharing, annuity, or similar plan or contract" so long as the receipt of the payments is "reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). The question presented by this case – a question that has given rise to an entrenched three-way split among the courts of appeals – is the extent to which payments from an Individual Retirement Account (IRA) can constitute "exempt property" under this provision. The Eighth Circuit, acknowledging a square circuit conflict, held that seemingly

all IRAs cannot as a matter of law qualify for the exemption provided by Section 522(d)(10)(E).

1. Petitioners Richard and Betty Jo Rousey are a husband and wife who jointly filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Arkansas. Pet. App. 2a. Pursuant to Section 522(d), petitioners sought an exemption for two IRAs having a total value of $55,033.48. *Id.* The IRAs had been funded entirely by the proceeds of Mr. Rousey's pension and Mrs. Rousey's 401(k) plan, which petitioners had accumulated while employed by Northrop Grumman Corporation. *Id.* at 12a. At the termination of their employment, petitioners had simply "rolled over" their pension and 401(k) plans into the IRAs.[1] *Id.*

The trustee did not object to petitioners' exemption of $10,681 of the IRAs' value pursuant to 11 U.S.C. 522(d)(5).[2] Pet. App. 24a. The trustee did, however, file a motion objecting to petitioners' exemption of the remaining $44,352.48 pursuant to 11 U.S.C. 522(d)(10)(E) and requesting turnover of this additional amount. *Id.* at 19a, 24a. The bankruptcy court sustained the trustee's motion, holding that these funds were not exempt because the IRAs were not a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id.* at 34a. It based this holding on the fact that petitioners could withdraw funds (albeit subject to a 10% tax penalty, see 26 U.S.C. 72(t)(1)), before they reached the

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[1] Petitioner Richard Rousey's IRA contained $42,915.32; petitioner Betty Jo Rousey's IRA contained $12,118.16. Pet. App. 2a.

[2] Section 522(d)(5) provides, in pertinent part, that a debtor can exempt from the bankruptcy estate his "aggregate interest in any property, not to exceed in value $975 plus up to $9,250 of any unused amount of the exemption provided" elsewhere in the subsection for the debtor's residence or a burial plot (see 11 U.S.C. Section 522(d)(1)). The bankruptcy court's ruling under Section 522(d)(5) is not before this Court.

age (59½) at which IRA holders are eligible for payments under federal law. Pet. App. 34a.[3] Furthermore, according to the court, the early-withdrawal possibility meant that payments from petitioners' IRAs would not be made "on account of illness, disability, death, age, or length of service." *Id*. at 35a.

On appeal, the bankruptcy appellate panel affirmed on both grounds. Pet. App. 17a. A concurring opinion, however, urged the Eighth Circuit to revisit its prior precedent holding that IRAs are ineligible to be exempt property. The concurrence emphasized that, although petitioners' retirement funds unquestionably would have been exempt had petitioners filed for bankruptcy while employed by Northrop Grumman, the same funds were no longer exemptible merely because petitioners had to roll them over when they left the company. *Id.* at 18a.

2. The Eighth Circuit affirmed, although only on one of the two grounds invoked by the lower courts. Pet. App. 5a-6a. In contrast to the bankruptcy court and the bankruptcy appellate panel, the court of appeals agreed with petitioners that an IRA is a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id*. at 5a. The Eighth Circuit recognized that, like a pension, the funds in petitioners' IRAs were "established over time as part of a long-term retirement strategy" and "serve[d] as a substitute for future earnings." *Id*. The court of appeals noted that four other circuits had found IRAs to satisfy the "similar plan or contract" test and that "dicta from the Supreme Court's opinion in *Patterson* [v. *Shumate*, 504 U.S. 753 (1992)] support this conclusion." Pet. App. 4a-5a (citing *Dettmann* v. *Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar* v. *McKown*, 203 F.3d 1188

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[3] Petitioners' IRAs met the criteria for favorable tax treatment under Section 408 of the Internal Revenue Code. See Pet. App. 26a (noting that the question for the court was how 522(d)(10)(E) "applied to IRAs that qualify for tax-exempt status under § 408").

(CA9 2000); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996)).

But based on prior Eighth Circuit precedent construing a nearly identical state exemption statute, the court of appeals held that the IRAs were nonetheless not exempt. Under that precedent, IRAs do not meet the requirement that any payments be made "on account of * * * age." 11 U.S.C. 522(d)(10)(E). "[F]uture payments from the corpus of an Individual Retirement Annuity are not 'on account of age' where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties." Pet. App. 6a (quoting *Huebner* v. *Farmers State Bank*, 986 F.2d 1222, 1225 (CA8), *cert. denied*, 510 U.S. 900 (1993)).

The court of appeals specifically "recognize[d] that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522," but nevertheless deemed itself "constrained" by circuit precedent to reject that contrary view. Pet. App. 6a.

Petitioners timely sought rehearing and rehearing en banc. Their petition was denied by a five-to-four vote, with Judges Bye, Riley, Melloy, and Smith voting to rehear the case en banc. Pet. App. 36a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided into three camps over whether and to what extent payments from IRAs can be exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E). Given the large and increasing number of personal bankruptcies and the growing popularity of IRAs, such a conflict is untenable; the question presented affects tens or even hundreds of thousands of individual bankruptcy petitions per year and fundamentally alters the lives of the people who file them. This case presents the ideal vehicle to

resolve the questions raised by the three-way circuit split: first, whether payments from IRAs are exempt; and second, whether such an exemption extends to the corpus out of which future payments will be made as well as to those payments currently being made. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

Under Section 522(d)(10)(E), a debtor is entitled to exempt from the bankruptcy estate the "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."[4] Each of the lower courts in this case has recognized that its holding that petitioners' IRAs are not exempt from the bankruptcy estate under Section 522(d)(10)(E) squarely conflicts with the law in four other circuits. See Pet. App. 6a; *id.* at 14a-15a; *id.* at 27a-28a. The Third and Eighth Circuits are the only two circuits in which debtors like petitioners are categorically denied exemptions for their future IRA payments, regardless of need. The rules in these two circuits are different, although both are equally erroneous and both would produce the same result in petitioners' case.

1. The Second, Fifth, Sixth, and Ninth Circuits have interpreted Section 522(d)(10)(E) to permit exemptions for payments from IRAs. See *Dettmann* v. *Brucher (In re*

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[4] The amount of the exemption is limited "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). Because each of the courts below held that payments from IRAs were not exempt from the bankruptcy estate pursuant to Section 522(d)(10)(E), none addressed whether the amount of the exemption petitioners sought was "reasonably necessary" for their support, and that issue is not before this Court.

Brucher), 243 F.3d 242, 242 (CA6 2001) ("The sole question presented in this appeal is whether an Individual Retirement Account (IRA) can be excluded from a bankruptcy estate * * * pursuant to 11 U.S.C. § 522(d)(10)(E). Following the reasoning of three other courts of appeals, we answer the question 'yes.'"); *Farrar* v. *McKown (In re McKown)*, 203 F.3d 1188, 1190 (CA9 2000) ("We thus hold, like our sister circuits, that an IRA qualifies for exemption under statutory language tracking 11 U.S.C. § 522(d)(10)(E)."); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78-80 (CA2 1997) (holding IRAs exempt under a New York state statute "similar in all respects material to our inquiry" to Section 522(d)(10)(E)); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 376 & n.1 (CA5 1996) (concluding that "IRAs are exempt under [Section 522(d)(10)(E)]" with the possible exception of some unspecified "specially tailored IRAs"). To the best of petitioners' knowledge, every bankruptcy court in the remaining circuits that has addressed the question whether IRAs can be exempt under Section 522(d)(10)(E) or a similar state exemption[5] has joined the majority position in recognizing an exemption for IRAs.[6]

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[5] In states like Arkansas that do not opt out of the federal bankruptcy exemption scheme, courts apply 11 U.S.C. 522(d)(10)(E) directly. In states that have chosen to opt out of the federal scheme under 11 U.S.C. 522(b)(1), a debtor may assert exemptions set out in state law and in federal non-bankruptcy laws. See *id.* § 522(b)(2). In these states, the question presented in this case will arise when – as is frequently the case – the state exemption law either incorporates or parallels the federal provision; in such cases, courts have treated the interpretation of such state statutes as being inextricably intertwined with the interpretation of Section 522(d)(10)(E). See, *e.g.*, Pet. App. 6a (following the Eighth Circuit's decision in *Huebner*, 986 F.2d 1222, which interpreted an Iowa statute); *McKown*, 203 F.3d at 1189 (interpreting the California statute by following federal precedent because with respect to the IRA exemption issue, "this California

By contrast, the Eighth Circuit holds that IRAs are categorically excluded from exemption.[7] See Pet. App. 6a.

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exemption is materially identical to the federal exemption"); *Dubroff*, 119 F.3d at 78 (interpreting the New York statute by following federal precedent because the two statutes were "similar in all respects").

[6] In the First Circuit, see, *e.g.*, *In re Marsella*, 188 B.R. 731, 732 (Bankr. D.R.I. 1995) (adopting majority position on Section 522(d)(10)(E)); *In re Yee*, 147 B.R. 624, 625-26 (Bankr. D. Mass. 1992) (same); and *In re Bates*, 176 B.R. 104, 109 (Bankr. D. Me. 1994) (adopting majority position on Section 522(d)(10)(E) in applying similar state statute). In the Fourth Circuit, see, *e.g.*, *In re Outen*, 220 B.R. 26, 27-31 (Bankr. D.S.C. 1998) (en banc bankruptcy court) (reversing the court's previous adherence to the Third Circuit rule and adopting the majority position for a state statute "nearly identical" to Section 522(d)(10)(E)). In the Seventh Circuit, see, *e.g.*, *Am. Honda Fin. Corp.* v. *Cilek (In re Cilek)*, 115 B.R. 974, 987-89 (Bankr. W.D. Wis. 1990) (adopting majority position on Section 522(d)(10)(E)). In the Tenth Circuit see, *e.g.*, *In re Garrison*, 108 B.R. 760, 768 (Bankr. N.D. Okla. 1989) (explaining that state exemption law which did not cover IRAs could be amended to include IRAs "by enacting a statute somewhat like present 11 U.S.C. § 522(d)(10)(E)"). In the Eleventh Circuit, see, *e.g.*, *In re Suarez*, 127 B.R. 73, 81 (Bankr. S.D. Fla. 1991) (adopting majority position on Section 522(d)(10)(E) and related state statutes); and *Dionne* v. *Harless (In re Harless)*, 187 B.R. 719, 728 (Bankr. N.D. Ala. 1995) (noting that Section 522(d)(10)(E) "exempts payments under IRAs from the bankruptcy process"). In the D.C. Circuit, see *In re Burkette*, 279 B.R. 388, 393 (Bankr. D.D.C. 2002) (adopting the majority position on Section 522(d)(10)(E), without directly addressing whether the tax penalty for early withdrawal of IRAs satisfies the "on account of * * * age" provision).

[7] The Eighth Circuit has suggested that it might apply a different rule to an IRA that included a provision absolutely barring any withdrawal prior to the age-triggered commencement of payments. See Pet. App. 6a. Yet, so far as petitioners have been able to discern, such IRAs do not exist; it appears that *all* IRAs allow early withdrawal subject to a tax penalty. See Internal

The court of appeals concluded that IRAs permitting tax-penalized withdrawal at any time as specified in the Internal Revenue Code, see 26 U.S.C. 72(t)(1), do not dispense payments "on account of illness, disability, death, age, or length of service." Pet. App. 6a.

Finally, the Third Circuit applies yet another rule. That court excludes "future payments" from IRAs from exemption but permits exemptions for "present payments" – that is, payments received by persons who have already reached the statutory age (59½) that entitles them to withdraw funds from their IRAs. Thus, in the Third Circuit, debtors under age 59½ lose their IRAs, while those aged 59½ and older may keep them to the extent reasonably necessary for financial support. See, *e.g.*, *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21, 23 (CA3 1983); see also *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991) (noting that "as a present entitlement," the debtor's IRA was "susceptible to possible exemption under § 522(d)(10)(E)"). In *Clark*, the court considered whether payments from a different kind of retirement savings plan – a Keogh account – were exempt. That court reasoned that an exemption for "present" but not "future" payments was appropriate because Congress's concern with giving debtors a "fresh start" did not extend to their "long-term security." 711 F.2d at 23. Since then, the Third Circuit's bankruptcy courts

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Revenue Serv., *Publication 590 (2003), Individual Retirement Arrangements (IRAs)*, ch. 1, *available at* http://www.irs.gov/publications/p590/index.html ("You *can withdraw or use your traditional IRA assets at any time*. However, a 10% additional tax generally applies if you withdraw or use IRA assets before you are age 59½." (emphasis added)). See also *Carmichael*, 100 F.3d at 379 (noting that penalized withdrawal is "statutorily applicable to *any* IRA") (emphasis in original). In any event, even if the Eighth Circuit's assumption that some IRAs do not allow withdrawal is in fact correct, such plans are clearly a rare exception to the rule, and the theory that Congress intended to limit the IRA exemption to this very narrow category finds no support either in the statutory text or in the legislative history. See *infra* at 15-17.

have consistently applied this holding to IRAs, on the ground that the statutory language at issue in *Clark* was virtually indistinguishable. See, *e.g.*, *In re Scholl*, No. 97-32805WS, 1998 Bankr. LEXIS 1059, at *9 (Bankr. E.D. Pa. Aug. 26, 1998) (holding, citing *Clark*, that the "controlling case law in this circuit * * * does not permit an IRA to be exempted * * * when the debtor is not currently receiving income therefrom"); *In re Velis*, 123 B.R. 497, 510 (D.N.J.) (citing *Clark* in applying to both Keogh plans and IRAs the rule that "a § 522(d)(10)(E) exemption is applicable only where a debtor has a present, as opposed to a future, right to receive the pension and retirement benefits at issue"), *aff'd in part, rev'd in part*, *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991).

2. This three-way circuit split will not resolve itself without this Court's intervention. The Eighth Circuit has refused to reconsider its adherence to its unique position. Although the panel had acknowledged the circuit split and admitted that the contrary view of the Second, Fifth, Sixth, and Ninth Circuits "may be more consistent with the purposes of § 522," Pet. App. 6a, the Eighth Circuit nevertheless denied rehearing en banc by a five-to-four vote, *id.* at 36a.

The Third Circuit's view is similarly entrenched. That court has held its position for twenty-one years, even in the face of sharp criticism from its own bankruptcy courts. See, *e.g.*, *In re Gralka*, 204 B.R. 184, 189 (Bankr. W.D. Pa. 1997) ("Unfortunately for the debtors, they do not presently possess the right to receive payment from their IRAs * * * pursuant to existing Third Circuit precedent."); *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996) ("While I find that * * * the Debtors have a 'right to payment' in the IRA which falls squarely within the provisions of 11 U.S.C. 522(d)(10)(E), * * * I am stifled in that pursuit by a clear and unambiguous decision of the Third Circuit.").

The Third and Eighth Circuits have become intractable outliers; every other court in the other ten circuits that has

considered the question has taken a contrary position.[8] In each of these jurisdictions, the question whether IRA funds are exempt to the extent reasonably necessary is settled. Because the circuit split is now entrenched, this Court's intervention is required.

3. This case provides an ideal vehicle to resolve the three-way circuit split. Both the distinction drawn by the Eighth Circuit and that drawn by the Third are outcome determinative here. In the Eighth Circuit, whether payments from an IRA are exempt turns on whether the IRA's holder has access to the account prior to reaching the age at which he or she becomes statutorily entitled to payments. Since petitioners' IRAs allow tax-penalized early withdrawal, this distinction was outcome determinative in petitioners' case. In the Third Circuit, the key distinction is between "present" payments – those to which the IRA holder is already entitled by virtue of being over the age of 59½ – and "future" payments; only the former are exempt. Although different from the Eighth Circuit rule, the Third Circuit rule would produce the same result in this case – petitioners, both under age 59½ when the exemption was requested, would lose in either circuit.[9]

Furthermore, there are unlikely to be many cases that proceed through the appellate process and present this Court with a vehicle with which to resolve the question presented. Most debtors, already in financial straits, will lack the means to pursue the issue to this point, including seeking rehearing

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[8] See *supra* note 6 (listing cases).

[9] Although petitioner Richard Rousey is now 60 years old, petitioner Betty Jo Rousey is now 57 years old. See Petitioners' C.A. App. 54, 66 (listing ages). Thus, even if their *present* ages rather than their ages at the time they filed their bankruptcy petition were dispositive, this Court would still have to pass on the validity of the Third Circuit's rule in order to determine whether Mrs. Rousey's IRA is exempt.

en banc, particularly in the face of well-established circuit precedent.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over whether and to what extent IRAs are exempt from bankruptcy estates merits this Court's attention in light of the question's importance. Tens or even hundreds of thousands of people every year are likely affected by the resolution of this issue. In 2003 alone, over 1.1 million Chapter 7 individual bankruptcy petitions were filed in the United States. Admin. Office of the U.S. Courts, *News Release: Bankruptcy Filings Up for Calendar Year*, Feb. 25, 2004, *available at* http://www.uscourts.gov/Press_Releases/pr02252004.pdf. IRAs are increasingly ubiquitous: 33.3% of American households hold a traditional IRA, and 7.5% hold an employer-sponsored IRA. See Investment Co. Inst., *Fundamentals: Investment Company Institute Research in Brief* fig. 1 (2003), *available at* http://www.ici.org/shareholders/ret/fm-v12n3.pdf. As far as petitioners are aware, all of these IRAs allow tax-penalized early withdrawal, see *supra* note 8, and are therefore nonexempt under the Eighth Circuit's rule. Additionally, since the median age of IRA holders is 52 for traditional individual IRAs and 46 for employer-sponsored IRAs, see Investment Co. Inst., *supra*, at fig. 2, the expected payments from most IRAs would be considered "future payments" and thus nonexempt under the Third Circuit rule as well.

Not only does the issue affect a great number of people, but the effect on each individual is substantial. An IRA typically represents an enormous investment in one's future: owners of traditional IRAs have set aside a median amount of $30,000 in their accounts. Investment Co. Inst., *supra*, at fig. 2. Since other forms of retirement savings, like pension plans, are available only through employers, IRAs represent one of the very few methods of retirement savings open to

self-employed individuals or small-business employees.[10] Thus, a person may be left without most or all of his or her retirement savings based on the double misfortune of going through bankruptcy and living in a circuit that interprets the federal statute to deny an exemption for IRAs. In the Eighth Circuit, this serious deprivation will occur as a result of a precedent that the panel decision in this case recognized as likely contrary to the purpose of the statute. See Pet. App. 6a. In the Third Circuit, the deprivation will occur as a result of a precedent with no basis in the text of the statute and so erroneous a rationale that courts in the circuit bemoan it. See, *e.g.*, *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996).

It is not surprising that, in light of the foregoing, "whether an individual retirement account ('IRA') qualifies for the section 522(d)(10)(E) exemption has been frequently litigated." Bankr. Exemption Manual § 5.11 (2003 ed.); see also Andrew M. Campbell, Annotation, *Individual Retirement Accounts as Exempt Property in Bankruptcy*, 133 A.L.R. Fed. 1, § 2(a) (1996) ("[T]here has been considerable litigation concerning the application of § 522(d)(10)(E) and state exemption statutes modeled upon it to IRAs."). The exemptions listed in Section 522(d)(10)(E) are relevant to litigation in the bankruptcy courts in most states,[11] many all

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[10] In some cases, as here, the IRA funds were formerly part of a pension plan or 401(k). Pension funds are explicitly exempted from the bankruptcy estate by Section 522(d)(10)(E), but when a worker with a pension or 401(k) plan leaves his job, he may (depending on the plan's rules) be required to "roll" the plan's funds into an IRA if he wishes to maintain a retirement savings account. The Eighth Circuit's rule illogically treats those same funds as non-exempt based solely on the fortuity that they are held in one form rather than another.

[11] See *supra* note 5 (explaining that some states use the federal exemptions directly and many others use Section 522(d)(10)(E) indirectly by incorporating or paralleling its language).

of which have published opinions on the issue.[12] The frequency with which the question presented has been litigated is testimony to the great number of people affected and the significance of the effect, and thus the need for this Court to definitively resolve the issue.

Beyond the fact that similarly situated debtors are treated differently across circuits, the longstanding circuit split causes additional unfairness and uncertainty. For example, individuals who, like petitioners, find themselves forced to roll over a pension plan or 401(k) into an IRA at the termination of their employment will suddenly find their retirement funds no longer eligible for bankruptcy exemption. Individuals who put money into an IRA while living in jurisdictions that allow for the exemption, expecting the funds to be protected if they ever have to file for bankruptcy, will have their expectations frustrated if they subsequently move to a jurisdiction that denies the exemption and later file for bankruptcy there. And individuals aware of the conflict among the circuits may be wary of investing in an IRA at all because of the possibility of moving into a jurisdiction that denies the exemption. This uncertainty frustrates Congress's purpose in enabling the creation of IRAs: to encourage retirement savings. Only this Court can bring proper and final resolution to this important and heavily litigated issue.

III. Individual Retirement Accounts Are Eligible for Bankruptcy Exemption Under Section 522(d)(10)(E).

Certiorari is also warranted because the decision below is wrong on the merits. IRAs fall squarely within the exemption defined by Section 522(d)(10)(E). A straightforward application of the statute reveals that, as a matter of law, an IRA confers "the right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or

[12] See *supra* note 6 (listing cases).

contract on account of illness, disability, death, age, or length of service."

The statute's text and structure make clear that IRAs are included within the exemption that Section 522(d)(10)(E) defines. Specifically, after identifying a group of plans and contracts that qualify for exemption, Section 522(d)(10)(E)(iii) then *denies* exemptions to certain plans and contracts that do *not* "qualify under section * * * 408 of the Internal Revenue Code." Section 408 is the provision that defines IRAs. See 26 U.S.C. 408(a), (c). Under settled principles of statutory construction, Section 522(d)(10)(E) must include at least some plans defined under Section 408; the explicit exclusion of plans that do not fall within Section 408 from the exemption would otherwise constitute mere surplusage. As the Ninth Circuit pointed out in *Farrar v. McKown*, 203 F.3d 1188, 1190 (CA9 2000), "[t]here could be no reason for legislators to exclude *non-qualifying* IRAs from the exemption, as the exception does, unless they intended that *qualifying* IRAs could be exempt. Indeed, there could be no reason even to mention Section 408, the IRA section, unless 'similar plan or contract' included them" (emphases added). Accord *Carmichael v. Osherow*, 100 F.3d 375, 378 (CA5 1996); *Dettmann v. Brucher*, 243 F.3d 242, 243 (CA6 2001); *Dubroff v. First Nat'l Bank of Glens Falls*, 119 F.3d 75, 77-78 (CA2 1997).

Despite the statute's specific inclusion of IRAs, the Third and Eighth Circuits nevertheless have drawn erroneous distinctions to exclude IRAs from exemption. Contrary to the Third Circuit's suggestion in *Clark*, *see* 711 F.2d at 23, the language of Section 522(d)(10)(E) does not distinguish between "present payments" and "future payments," nor does anything in the provision's text, structure, or legislative history suggest that Congress intended to draw any time- or age-based distinctions. "The language of the section does not include words like 'presently,' 'currently,' or 'immediately,'" *Carmichael*, 100 F.3d at 379, nor does it include any other indication of intent to exclude future payments. Indeed, such

an exclusion would be at odds with the statute's express inclusion of pension plans, profitsharing plans, and annuities, all of which involve an entitlement to future payments. The provision's legislative history explicitly states that "paragraph (10) exempts certain benefits that are akin to *future* earnings of the debtor." H.R. Rep. 95-595, at 362 (1977) (emphasis added). Like the other plans listed in the statute, "IRAs too are substitutes for future earnings." *Carmichael*, 100 F.3d at 378.

It is similarly unsupportable for the Eighth Circuit to exclude IRAs from exemption simply because holders may make early withdrawals subject to a tax penalty. Pet. App. 6a. The "right to receive payments" from an IRA is unquestionably triggered by four events – "age 59½," "death," "being disabled," or "medical care," see 26 U.S.C. 72(t)(2)(A)(i)-(iii) ; *id.* § 72(t)(2)(B)[13] – that precisely parallel four of the five alternative conditions for exemption set out in Section 522(d)(10)(E): "illness, disability, death, age, or length of service." Tax-penalized early withdrawal cannot be a basis for concluding that a plan does not qualify for exemption. Such withdrawal is not only a feature of all IRAs, but also of all the other instruments listed in the statute: stock bonuses, pensions, profitsharing plans, and annuities. See 26 U.S.C. 72(t) (permitting early withdrawal for "qualified retirement plans," which 26 U.S.C. 4974(c) defines to include all of the above-listed plans). The Eighth Circuit opinion is silent regarding whether its holding – requiring that a plan specifically bar early withdrawal in order to qualify for exemption – applies to these other types of plans as well as to

[13] Petitioners have a right to receive payments without penalty starting at the age of 59½, and are *required* to accept payments when they reach the age of 70½. See, *e.g.*, Petitioners' C.A. App. 58 ¶¶ 7, 10(A) (setting forth plan rules). Both of these features of petitioners' IRAs are statutory. See 26 U.S.C. 72(t) (penalizing withdrawal before age 59½); *id.* § 408(a)(6) (requiring payments after age 70½, as explained in 26 C.F.R. 1.408-8).

IRAs, but either way its reasoning is unjustified. Either the Eighth Circuit holds IRAs nonexemptible on the basis of a statutory feature they share in common with exemptible plans, or it holds that *no plan of any type* qualifies for exemption unless it contains an unheard-of provision barring early withdrawal. The first possibility is patently illogical, and the second creates an unprecedented rule so restrictive that it would effectively eviscerate the entire exemption. Cf. *Carmichael*, 100 F.3d at 379 (stating that "[n]o philosophical or economic distinction that would preclude an IRA's exemptibility can be drawn between relevant features of profitsharing plans and similar features of IRAs" and that profitsharing and other listed plans are "per se exemptible").

Because it conflicts with both the plain language and the intent of Section 522(d)(10)(E), the decision of the Eighth Circuit in this case should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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