No. 24-905

In the Supreme Court of the United States

MARTHA G. BRONITSKY, CHAPTER 13 TRUSTEE,
PETITIONER

v.

JORDEN MARIE SALDANA

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Reply brief 1
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Davis v. *Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020) 1, 4, 10
Gorman v. *Cantu*, 713 F. App'x 200 (4th Cir. 2017) 1, 10
Parks v. *Drummond (In re Parks)*, 475 B.R. 703 (B.A.P. 9th Cir. 2012) 3, 4, 5, 10
Penfound v. *Ruskin (In re Penfound)*, 7 F.4th 527 (6th Cir. 2021) 1, 2, 4
Schuler v. *Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. 2012) 3, 4, 5, 10

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.* 1, 9-11
11 U.S.C. 521(a)(1)(B)(iv) 5, 6
11 U.S.C. 541(b)(7) 2, 9, 10
11 U.S.C. 1325(a)(3) 9
11 U.S.C. 1325(b)(1) 4

Miscellaneous:

Hon. Paul R. Hage et al., *Dazed and Confused: Circuit Split Regarding Retirement Contributions in Chapter 13 Cases*, Am. Bankr. Inst. J. 26 (Mar. 2025) <https://tinyurl.com/hage-dazed-confused> 2, 10
David R. Kuney, *Time To Resolve Confusion On Pension Contributions*, 37-FEB Am. Bankr. Inst. J. 8 (Feb. 2018) 2

REPLY BRIEF

1. a. As the petition established, this case presents a fundamental question of federal bankruptcy law: whether debtors can fund their own retirement accounts rather than satisfy their unpaid debts. The case for review is undeniable. The issue is creating "havoc" in bankruptcies nationwide. Pet. 6 n.3. It affects literally "thousands" of cases. *Gorman* v. *Cantu*, 713 F. App'x 200, 206 (4th Cir. 2017) (Thacker, J., concurring in part and dissenting in part); C.A. E.R. 465 (respondent so conceding). It implicates a common feature of Chapter 13 plans, dictating where key funds are directed. It has split dozens of courts at least four separate ways. The Sixth and Ninth Circuits are squarely at odds (Pet. App. 17a n.2), while others reject *both* circuits' positions—dividing multiple panels (Pet. 6 n.1) and leaving lower courts in disarray. *E.g.*, *Penfound* v. *Ruskin (In re Penfound)*, 7 F.4th 527, 530-531 (6th Cir. 2021) (flagging "considerable confusion in bankruptcy cases nationwide," with courts "splintered" "four competing [directions]"); *Davis* v. *Helbling (In re Davis)*, 960 F.3d 346, 358 (6th Cir. 2020) (Readler, J., dissenting).

The issue has been exhaustively examined on all sides, and further percolation is pointless: dozens of courts have set up conflicting rules for a basic question under the Code, and litigants are left guessing which side of a four-way split their circuit will pick—leaving chaos and uncertainty across Chapter 13s. *E.g.*, Pet. App. 42a (citing sources); *Davis*, 960 F.3d at 351 (recognizing "disagreement"). And this is no small matter: it arises any time (in 180,000+ annual filings) a debtor has access to a 401(k) account, and it implicates the total disposition of billions in funds. *E.g.*, Pet. 6 & n.2, 18-20. It is inconceivable that courts and litigants nationwide lack a clear answer to such a fundamental question.

The existing confusion is intolerable. Until this Court intervenes, debtors' rights and creditors' recoveries will turn entirely on where a Chapter 13 case is filed, and all sides will continue wasting countless hours and resources relitigating this critical issue in "thousands" of proceedings. *E.g.*, David R. Kuney, *Time To Resolve Confusion On Pension Contributions*, 37-FEB Am. Bankr. Inst. J. 8, 8, (Feb. 2018). It is obvious why the nation's bankruptcy judges are crying out for review:

> [Section 541(b)(7)] is a provision of great importance to chapter 13 debtors and of great consternation to bankruptcy judges tasked with interpreting its meaning. * * * A significant amount of ink has been spilled by courts in dozens of opinions attempting to interpret the hanging paragraph. * * * Guidance from the Supreme Court would greatly benefit both litigants and the courts, who have now struggled with this issue for more than 20 years.

Hon. Paul R. Hage et al., *Dazed and Confused: Circuit Split Regarding Retirement Contributions in Chapter 13 Cases*, Am. Bankr. Inst. J. 26, 26, 62 (Mar. 2025) <https://tinyurl.com/hage-dazed-confused>. Put simply, "four different approaches have emerged," and "[t]hanks to the Ninth Circuit[]," "a circuit split now exists"; "[u]ntil the highest court weighs in, or Congress decides to untangle the 'gordian knot' of § 541(b)(7), bankruptcy courts will be left on their own to decipher the statutory text." *Id.* at 62.

In the meantime, the Ninth Circuit's approach is a license for debtors in the nation's largest circuit to max out their 401(k)s while paying nothing to unsecured creditors—even without making a single prefiling 401(k) contribution. Contra *Penfound*, 7 F.4th at 531 (rejecting this approach); *Schuler* v. *Burden (In re Seafort)*, 669 F.3d

662, 663 (6th Cir. 2012) (same); *Parks* v. *Drummond (In re Parks)*, 475 B.R. 703, 709 (B.A.P. 9th Cir. 2012) (same). The urgent need for immediate review is obvious.

b. This case is the perfect vehicle for resolving the confusion. Pet. 22-23. The issue is a pure question of law. C.A. E.R. 451 (respondent: "one, clean legal issue"). There is no actual record of any contributions. The limited record establishes the opposite: respondent left blank her prefiling 401(k) contributions—listing it as "0.00" (*id.* at 262); she claimed a $601 deduction for two 401(k) *loans*, but not contributions (*id.* at 184-185, 262); and she later added a $484 "*go-forward*" contribution (*id.* at 176)—suggesting it was *not* made in the past. No court engaged in actual fact-finding below—because *no fact-finding was necessary* under the bankruptcy court's disposition. Pet. App. 58a (no voluntary contributions permitted—rendering any past contributions irrelevant).[1]

While respondent bizarrely tries to manufacture a new record on appeal (more on this below), even her belated showing is obviously deficient. Opp. 5-6 & n.1. She never says how much she contributed at the "'fixed point'" when she filed for bankruptcy (read: her final March/April 2022 paystub) (Pet. App. 17a), and she never disclosed her *total contributions* for the six-month pre-bankruptcy period—making it impossible to calculate her "six-month [pre-bankruptcy] average" (*id.* at 18a). Both figures are essen-

[1] Respondent faults petitioner for not contesting the (non-existent) facts under the Sixth Circuit's standard. Opp. 8, 14. Short answer: it was premature to litigate a fact issue under a standard *no court below had adopted*. Under *Parks*, the prevailing rule for over a decade precluded *any* voluntary contributions. Pet. App. 57a-58a. Had the lower courts adopted the Sixth Circuit's position, the case would have turned to appropriate fact-finding under that new standard.

tial to prevail under the Sixth Circuit's competing approach.[2] While respondent insists she contributed *something*, her selective showing is insufficient—even were her new material in the actual record.

This backdrop ideally frames the question presented:

**If no contributions are allowed (*Seafort* and *Parks*), petitioner wins.

**If any contributions are allowed (Ninth Circuit and *Johnson*), petitioner loses.

**If past contributions limit future contributions (*Davis* and *Penfound*), a remand is necessary to determine respondent's past contributions (if any). Under this approach, respondent's "go-forward" contributions would be capped at either the amount "fixed" on her petition date (*Seafort BAP*) or her "six-month [pre-bankruptcy] average" (the CMI interpretation). *E.g.*, Pet. App. 17a-19a. Either way, respondent would lose if she failed to contribute in the March/April pay period or if her six-month average fell short of her $484/month request.[3]

The legal standard is therefore outcome-determinative. This Court can resolve the pure question of law, and the case can be remanded for appropriate fact-finding under that standard. If respondent actually made past contributions, she can establish the facts under whatever

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[2] *E.g.*, *Penfound*, 7 F.4th at 532 (describing *Seafort BAP*: "to the extent a debtor is making recurring 401(k) contributions "at the time" of filing, she may continue to do so post-petition"; "a debtor may not begin, resume, or otherwise increase the amount of such contributions post-filing"); *ibid.* (describing the so-called CMI approach: "'a debtor [may] deduct from her disposable income the average amount she contributed to her 401(k) each month in the six months preceding her bankruptcy'").

[3] The bankruptcy court was required to reject respondent's plan unless it applied "all" of her "disposable income" to "unsecured creditors." 11 U.S.C. 1325(b)(1); Pet. App. 6a. Any excess 401(k) contribution would undermine her proposed plan.

standard this Court adopts—if past contributions are ultimately relevant. There is no reason to put the cart before the horse and ask how the facts might be resolved before anyone knows which of the four conflicting standards is correct.[4]

This case perfectly tees up the full range of options; it hard to imagine a better vehicle for resolving this exceptionally important question.

2. Because respondent has no legitimate basis for resisting review, she instead tries to kick up dust. Her first move is to conjure up a new record—insisting she "made pre-petition contributions" and thus "would prevail in both the Sixth and Ninth Circuits." Opp. 14. This is meritless on every level.

a. Respondent first blames her lack of record evidence on petitioner. She says the "local rules" required her to "substantiate [her proposed] retirement contributions" by "upload[ing] her pay stubs to petitioner's secure portal rather than filing them with the court." Opp. 5 (citing Am. Gen. Order 32). This is frivolous.

The Order does not set out some global rule for all issues that *happen* to involve paystubs. It has a single purpose: "[a] debtor satisfies *the filing requirement described in 11 U.S.C. § 521(a)(1)(B)(iv)* by providing the required payment advices" "directly to the trustee." Am.

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[4] Respondent says petitioner urged "the Ninth Circuit to reject the Sixth Circuit's approach." Opp. 14. This is misleading: petitioner urged the court to affirm under *Seafort* and *Parks* (forbidding voluntary contributions)—and thus to reject all *three* conflicting approaches as inferior. Petitioner (understandably) focused on the Ninth Circuit BAP theory that governed for a decade and drove both holdings below. C.A. Pet. Br. 14-15. But petitioner never conceded she would lose under the Sixth Circuit's position. And to be clear: while petitioner intends to take the same position now (voluntary contributions are prohibited), she will support the Sixth Circuit's approach as a fallback.

Gen. Order 32(1). It is limited to "satisf[ying]" that specific requirement. It has nothing to do with creating a proper record over contested fact issues in other concrete disputes—which respondent would know by simply skimming Section 521(a) (setting out debtors' initial duties—things like filing "list[s] of creditors" and "schedule[s] of assets and liabilities").

If a debtor wishes to propose a plan with voluntary contributions, it is the debtor's burden to create the necessary record. If respondent wishes to prevail under the Sixth Circuit's approach, she had to establish she was actively contributing at the petition's filing (*Seafort BAP*) or establish contributions for the entire "six-month [pre-bankruptcy] period" (CMI). Nothing in Section 521(a)(1)(B)(iv)'s "filing requirement"—or General Order 32—excuses respondent from making a proper showing to substantiate her proposed plan. As the record now stands, there is no basis for thinking respondent would indeed prevail under the Sixth Circuit's position—reinforcing this as an optimal vehicle.

b. Because the record is deficient below, respondent tries to avoid review with non-record evidence—reproducing two "examples" of paystubs and asserting, vaguely, that "she has made regular [401(k)] contributions." Opp. 4-6, 14.

Respondent's limited showing is most conspicuous for what it does *not* say. There is no tally of specific amounts contributed each month. There is no mention of her total contributions over the relevant six-month period. There is no confirmation she contributed at the "'fixed point'" of her bankruptcy filing (March/April). There is no representation she contributed consistent amounts each month—and her contributions varied in the only two "ex-

amples" provided. There is no evidence of any actual contributions in the *three months* before her April bankruptcy.

This is not how someone with actual proof responds. If respondent truly contributed $484/month for the entire six-month pre-bankruptcy period, she would have happily reproduced paystubs from each month. Or at least stated each month's total. Or at a minimum provided the March/April paystub coinciding with her petition's filing. Instead, her non-record evidence is seemingly (and obviously) tailored to *avoid* the necessary showing—presumably because she cannot make it.

The best example: respondent could have easily included her March/April paystubs, but she instead cherry-picked two random statements from months earlier. And those statements were apparently selected for a reason: by choosing pay periods that start off the new year (one ending January 1 and the other January 15), respondent avoided disclosing the *actual amounts contributed the entire year*. Those paystubs reveal two non-redacted numbers: the contribution during the pay period and the year-to-date contribution. By limiting her "examples" to the first two in January, respondent ensured she would not reveal the amounts, if any, contributed *in any other period*. Had she simply included the most relevant prefiling paystub (March/April), she would have disclosed her full contributions dating back to January 1. Her failure to do so is telling—especially when there is no discernible reason for randomly choosing two statements ending in January for a six-month period extending from October through March.[5]

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[5] There is a reason petitioner cannot make her own affirmative showing: petitioner no longer has access to respondent's paystubs.

This curious behavior is ultimately consistent with the only actual record evidence—which suggests no contributions at the time of filing ("0.00").[6] But whatever respondent's thinking, one thing is clear: there is no evidence of any contribution at the "fixed" moment of filing, and no basis for calculating a six-month prefiling average. The upshot: respondent has offered zero reason to think she prevails under the Sixth Circuit's standard—and certainly offered no reason to short-circuit this Court's review of this profoundly important question.

c. Anyhow, respondent's efforts to avoid review are *twice* misplaced.

First, she is making the wrong argument at the wrong time. At best, this is an alternative ground for affirmance. The Ninth Circuit resolved this case on the question presented alone; it was pure statutory construction, and there were no independent holdings. Pet. App. 5a (confirming "sole question" on appeal). Respondent's factual arguments were not resolved in the courts below, and there is no need for this Court to resolve them here. Respondent is free to argue the facts on remand should this Court grant and adopt the Sixth Circuit's approach. But

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Those paystubs were purged automatically upon plan confirmation per standard office procedure. Respondent alone has access to the relevant facts, and she (for whatever reason) appears unwilling to provide them.

[6] Respondent brushes aside her own factual representation ("0.00") by saying "the Ninth Circuit clarified" it "was a 'mistake[].'" Opp. 6 n.1. Respondent is confused. As previously explained (Pet. 13 n.6), this was a casual remark in passing in the background section of the opinion. It was irrelevant to the court's analysis and holding. The court cited no record evidence in support—because none exists. Appellate courts do not engage in fact-finding, and the Ninth Circuit did not pretend to do otherwise here. If respondent hopes to prevail under the Sixth Circuit standard, she will have to offer relevant proof and obtain formal findings on remand.

she cannot dodge review of an important legal question based on her own prediction of how lower courts might resolve future evidentiary disputes.

Second, respondent misunderstands the legal sweep of the Ninth Circuit's holding. That court set a rule unbounded by past contributions. That eliminates the procedural need to make an evidentiary showing on remand (past contributions are irrelevant), and it eliminates the substantive check on future contributions: under the decision below, respondent could allocate any upward changes in income to her future self while leaving unsecured creditors out to dry; under the Sixth Circuit's contrary rule, her contributions would remain capped at past levels. Pet. 23. That alone ensures any choice between the Ninth and Sixth Circuits' standards would not be academic.

3. Respondent suggests the circuit conflict may not exist. Opp. 10-14. This is not credible, and no one agrees with respondent.

The Sixth and Ninth Circuits did not adopt the same standard by *rejecting* each other's analysis. Pet. 16-18. Nor did the Ninth Circuit authorize voluntary contributions with one hand (Section 541(b)(7)) only to immediately repudiate them with the other (Section 1325(a)(3)'s good-faith requirement). Contra Opp. 12-13. Quite the contrary: the majority below confirmed "'[d]ebtors do not lack good faith "merely for doing what the Code permits them to do."'" Pet. App. 16a. Respondent's fanciful theory aside (Opp. 13), not a single court, anywhere, has embraced *Johnson* but held good faith is a backdoor to the opposite result. There is no reason to postpone review to see if the implausible ever occurs.[7]

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[7] Nor is "good faith" an administrable check: it benefits no one to invite thousands of "'fact-intensive examination[s] of the "totality of

Finally, circuit-level authority may not yet "adopt[] petitioner's proposed rule" (Opp. 13-14), but it was endorsed by a unanimous panel in dicta (*Seafort*), controlled in the Ninth Circuit BAP for over a decade (*Parks*), and has been accepted by countless experts and judges—including Judge Readler (*Davis*) in a "lengthy and thoughtful dissent." Hage, J., *supra*, at 27 n.23. Respondent has an obvious incentive to minimize the split, but the conflict is deep and entrenched. There is no chance it will dissipate on its own.[8]

4. The issue's importance is self-evident, but respondent insists petitioner "exaggerates" the stakes. Opp. 15. This is absurd. Even if "only" one-third of debtors have 401(k)s, this would still affect *60,000 annual cases*. That is hardly minor, and the amounts at issue are significant—given the license to max out the IRS statutory limit ($20,000+) at the expense of unsecured debt. The magnitude is breathtaking, which is why key stakeholders are crying out for guidance.

In any event, the constant litigation over the basic ground rules wastes time for all participants. Trustees and creditors have no idea whether to object. Debtors are uncertain which contributions they can make (and at what

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the circumstances"" (*ibid.*) to decide if a case-specific exception exists to the Ninth Circuit's categorical rule. The Code either allows voluntary contributions or not—and it either cabins those contributions or not. Good faith may have some role in extreme cases, but it will not answer how best to read Section 541(b)(7).

[8] Citing *Gorman*, respondent says her case would "come out the same in the Fourth Circuit." Opp. 11. This is baffling: *Gorman* expressly did *not* "resolve th[e] statutory issue." 713 F. App'x at 203. But the panel did flag the split (*ibid.*), and Judge Thacker did acknowledge its "importan[ce]" and impact on "thousands" (*id.* at 206).

level). Bankruptcy judges struggle to predict what reviewing circuits will later do. And plans may need to be unwound (somehow) when anyone guesses wrong. Bankruptcy involves limited time and scarce resources. It demands efficiency and certainty. A "splintered," four-way conflict frustrates the process and desperately requires resolution.[9]

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JUNE 2025

[9] Respondent jumps the gun with an extended discussion of the merits. Suffice it to say: respondent is wrong. Her views are at odds with the Code's text, structure, history, and purpose. And there is a reason judges and experts alike disagree with her across the board.