No. 24-905

In the Supreme Court of the United States

MARTHA G. BRONITSKY, CHAPTER 13 TRUSTEE,
Petitioner,

v.

JORDEN MARIE SALDANA,
Respondent.

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

BRIEF OF AMICUS CURIAE ACA INTERNATIONAL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether, under the Bankruptcy Code, debtors can voluntarily contribute to their own retirement accounts rather than pay back unsecured creditors – and if so, when and in what amount such contributions are permissible.

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INTEREST OF AMICUS CURIAE[1]

ACA International ("ACA") represents approximately 1500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs over 113,000 people worldwide. The accounts receivable management industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost.

Many of ACA's members engage in credit granting and debt collection activities across the country and are therefore responsible for compliance with applicable federal and state laws governing those practices. Creditors, as well as those collecting debts on their behalf, rely on the consistent and uniform application of the Bankruptcy Code to guide collection efforts during and after bankruptcy proceedings.

Under the current circuit split, as well as the four competing applications of the Bankruptcy Code employed across the country, ACA's members have and will continue to be negatively impacted by the inconsistent application of the Bankruptcy Code, including the Ninth Circuit's approach which prioritizes debtors' ability to fund their retirement accounts at the expense of unsecured creditors, who already face significantly reduced recoveries when consumers file bankruptcy.

[1] All parties were given timely notice of this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

The current state of affairs, complicated further by the Ninth Circuit's decision, thus undermines the efficiency, fairness, and balancing of creditor and debtor interests that Congress strove to achieve in enacting the Bankruptcy Code and on which ACA members rely.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case solidifies a deep circuit split on a recurring issue of national importance, making this question a critical one for this Court's review. *See* Sup. Ct. R. 10(a).

First, the Ninth Circuit's decision undermines and threatens the uniform and consistent application of the Bankruptcy Code across the country. Second, the decision disturbs the balance of interests between debtors and creditors that Congress intended when it developed the Bankruptcy Code. Third, the question of whether a debtor can make voluntary contributions to a retirement account at the rather than repaying unsecured creditors to their detriment is a recurring issue that will likely arise in nearly every Chapter 13 Bankruptcy filed in this country. Fourth, inconsistent application of the Bankruptcy Code will have lasting detrimental implications on both creditor underwriting models, as well as the account receivable and asset buyer industries, harming a significant sector of the American economy, as well as consumers and small businesses.

Furthermore, the Ninth Circuit's decision conflicts with the application of the Bankruptcy Code employed by the Sixth Circuit, creating a circuit split that requires this Court's attention. Notably, the Ninth Circuit's decision even contravenes and

ultimately reverses prior authority issued by the Ninth Circuit Bankruptcy Appellate Panel. Given the recurring nature of this issue, which is likely to arise in the majority of the hundred thousand Chapter 13 Bankruptcies filed each year, this case is perfectly situated for this Court's review.

To ensure fairness to consumers, creditors, debt collectors, asset buyers, and numerous other interested parties, ACA and its members need this Court to clarify the intent of Congress as it relates to post-petition voluntary retirement contributions and whether such contributions are excluded from the definition of disposable income. Determining the appropriate standard will ensure uniform application in Chapter 13 Bankruptcies across the country, thereby creating consistency and certainty for both debtors and creditors regardless of where they are geographically located.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION HAS SOLIDIFIED A SPLIT IN THE APPLICATION OF THE BANKRUPTCY CODE, CAUSING MULTIPLE PROBLEMS OF NATIONAL SIGNIFICANCE.

The Ninth Circuit's recent decision solidified a growing split in authority regarding whether, under Chapter 13 of the Bankruptcy Code, debtors can voluntarily contribute to their own retirement account, diverting funds that may otherwise be available for distribution to unsecured creditors. With the Ninth Circuit's recent decision, there are now four competing interpretations of the Bankruptcy Code being employed across this country, creating significant

confusion for creditors, debtors, trustees, and other interested parties.

A. **The Ninth Circuit's Decision Undermines the Uniformity and Consistent Application of the Bankruptcy Code.**

Chapter 13 of the Bankruptcy Code is a uniform system designed to balance debtor and creditor interests and resolve any arising disputes. *See Clark v. Rameker*, 573 U.S. 122, 129 (2014). As Judge Wynn from the Fourt Circuit has observed, the Bankruptcy Code is characterized by the "comprehensive and particularly federal nature of bankruptcy law." *Guthrie v. PHH Mortg. Corp.,* 79 F.4th 328, 349 (4th Cir. 2023) (Wynn, J., concurring in part and dissenting in part), *cert. denied*, 144 S. Ct. 1458 (2024).

Congress commands the express power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. And it has done so: "Congress has wielded [its bankruptcy] power by creating comprehensive regulations on the subject and by vesting exclusive jurisdiction over bankruptcy matters in the federal district courts." *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 425 (6th Cir. 2000). Through the Bankruptcy Code, Congress created an integrated system in which it "intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with." *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202 (4th Cir. 1988).

1. Four Competing Applications of the Bankruptcy Code Cause Inconsistency Across the Country.

The Ninth Circuit's decision further solidifies a four way split in the way that Bankruptcy Courts around the country are applying the disposable income rules under Chapter 13. Section 541 of the Bankruptcy Code defines what constitutes property of the estate for purposes of identifying residual disposable income that may be used to repay unsecured creditors as part of a Chapter 13 plan. The Code specifically excludes from the definition of "property of the estate" amounts that an employer withholds from employee wages that are then contributed to certain employee benefit plans, deferred compensation plans, and tax-deferred annuities. 11 U.S.C. § 541 (b)(7)(A). However, it is not clear whether voluntary contributions to employer-managed retirement plans constitute "disposable income" under Section 1322(B)(2). The Ninth Circuit recognized the varying approaches before penning its decision, but did not alleviate any of the confusion and conflicting approaches over the relevant Code provisions. Instead, it drove an even bigger wedge into the split.

The first group of courts to consider this issue have held that voluntary contributions to a 401(k) are *always* disposable income. *In re McCullers*, 451 B.R. 498, 504 (Bankr. N.D. Cal. 2011); *In re Prigge*, 441 B.R. 667, 676-77 (Bankr. D. Mont. 2010) (abrogated by *In re Saldana*, 122 F.4th 333 (9th Cir. 2024)); *see also In re Aquino*, 630 B.R. 499, 608-09 (Bankr. D. Nev. 2021) (following *Prigge*)). Importantly, the Ninth Circuit's Bankruptcy Appellate Panel has been employing this approach for over a decade. *Parks v.*

Drummond (In re Parks), 475 B.R. 703 (B.A.P. 9th Cir. 2012).

Conversely, the second group has held that voluntary 401(k) contributions are *never* disposable income, regardless of whether any contributions were made prior to filing bankruptcy, so long as the contributions are made in good faith. The first case to follow this view was *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006). Other decisions following the policy in *Johnson* include: *In re Perkins*, 2023 WL 2816687 (Bankr. S.D. Tex. Apr. 6, 2023) (allowing 401(k) plan contributions up to the amount allowed by the IRS); *In re Egan*, 458 B.R. 836, 850-52 (Bankr. E.D. Pa. 2011); see *In re Gibson*, 2009 WL 2868445, at *2-3 (Bankr. D. Idaho Aug. 31, 2009); *In re Mati*, 390 B.R. 11, 15-17 (Bankr. D. Mass. 2008); *In re Devilliers*, 358 B.R. 849, 864-65 (Bankr. E.D. La. 2007); *In re Leahy*, 370 B.R. 620, 623-24 (Bankr. D. Vt. 2007); *In re Shelton*, 370 B.R. 861, 865-66 (Bankr. N.D. Ga. 2007); *In re Nowlin*, 366 B.R. 670, 676 (Bankr. S.D. Tex. 2007), *aff'd*, 2007 WL 4623043 (S.D. Tex. Dec. 28, 2007), *aff'd*, 576 F.3d 258 (5th Cir. 2009); *In re Njuguna*, 357 B.R. 689, 690 (Bankr. D.N.H. 2006). The Ninth Circuit follows this analysis.

However, the Sixth Circuit took a different approach leading to two additional, but slightly varied applications. After acknowledging prior rejections of *Johnson* and *Prigge* in earlier cases, the Sixth Circuit held "the bankruptcy code's text does not permit a Chapter 13 debtor to use a history of retirement contributions from years earlier as a basis for shielding voluntary post-petition contributions from unsecured creditors. This is true even if the consumer had no ability to make further contributions in the six

months preceding filing; the code makes no exception for such circumstances." *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 534 (6th Cir. 2021), *see also Seafort v. Burden (In re Seafort)*, 669 F. 3d 662 (6th Cir. 2012) (holding that income made available when the debtors' 401(k) loan repayments were fully repaid was projected disposable income properly committed to the debtors' respective Chapter 13 plans for distribution to the unsecured creditors and not for voluntary retirement contributions).

Accordingly, under the Sixth Circuit rationale, the third group of courts has held that voluntary retirement contributions are not disposable income if they were made regularly prior to the filing of the bankruptcy petition so long as the prepetition contributions were equal to or greater than the amount sought to be excluded from the disposable income post-petition. *Seafort*, 669 F. 3d at 667-671.

The fourth group, in what is sometimes called the "CMI Interpretation," has held that voluntary retirement contributions are not disposable income if they were made regularly prior to the filing of the bankruptcy petition based on the hanging paragraph in Section 541(b)(7)(A) of the Bankruptcy Code. This group construes this paragraph as excluding the consumer's prepetition contributions from the calculation of their current monthly income but only allows the consumer to voluntarily contribute the average of their retirement contributions from the six months prior to filing for bankruptcy.

In the case below, the Bankruptcy Court and the District Court held that that voluntary contributions to a 401(k) are always disposable income. *See* App., *infra*, 36(a), 56(a). This meant that such funds had to

be considered in formulating the repayment plan for unsecured creditors. However, the Ninth Circuit, in a 2-1 panel split, not only reversed both lower court decisions but engaged in a complete 180 degree course change, holding that voluntary contributions are never disposable income regardless of whether the debtor ever made voluntary retirement contributions prior to filing bankruptcy. *See* App., *infra*, 12(a).

The consequence of this is that both debtors and creditors across the country have different rights and privileges under the Bankruptcy Code depending on where the petition is filed. This creates not only a challenging and inconsistent, but fundamentally unfair legal landscape for debtors and creditors alike. It also undermines Congress's intent in creating the Bankruptcy Code: uniform application across the country.

While debtors in California can now shield a portion of their disposable income from creditors by making voluntary post-petition contributions to a retirement account even if they never made a single contribution pre-petition, debtors in Michigan are not afforded the same opportunity. Conversely, creditors who extended funds to debtors that live in California, as well as third party debt collectors or asset buyers, can expect a significant reduction in their ability to collect outstanding debts even in Chapter 13 Bankruptcy, which is specifically designed to promote better creditor recoveries. The negative consequence of this economic reality and perverse incentive is discussed in more detail below.

B. <u>The Ninth Circuit's Decision Disturbs the Balance of Interests that Congress Intended when Creating the Bankruptcy Code.</u>

The Bankruptcy Code necessarily involves a balancing of interests: the competing aims of giving debtors a "fresh start" while protecting creditors' rights to repayment. *Bartenwerfer v. Buckley*, 598 U.S. 69, 143 S. Ct. 665, 214 L. Ed. 2d 434 (2023); *see also Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015) ("bankruptcy provides consumers with a fresh start and creditors with an equitable distribution of the debtor's assets"). Indeed, as the Fourth Circuit explained, "a principal purpose of the Bankruptcy Code is to provide debtors and creditors with 'the prompt and effectual administration and settlement of the [debtor's] estate.'" *Id.* (quoting *Katchen v. Landy,* 382 U.S. 323, 328 (1966) (alternation in original).

"[A] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code . . . demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 510 (9th Cir. 2002) (quoting *MSR Expl., Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 914 (9th Cir. 1996)).

Importantly, even the Ninth Circuit recognizes that Congress created the Bankruptcy Code to address these competing interests and *only* Congress can modify them. In fact, the Ninth Circuit recently held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within

the confines of the Bankruptcy Code." *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, 895 F.3d 633, 641 (9th Cir. 2018) (citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)). In so holding, the Ninth Circuit expressly stated that "[t]he legislative branch, not the courts, is the appropriate place to balance conflicting policy interests and adjust the Bankruptcy Code accordingly if it is warranted." *Id.*

1. Chapter 13 Bankruptcy is Intended to Promote Recovery for Unsecured Creditors.

Often referred to as a wage earner bankruptcy, Chapter 13 bankruptcy provides relief to individuals with regular income. This Chapter is most frequently used by debtors with sufficient monthly disposable income to make some payments to their creditors over time in exchange for protecting their assets from liquidation.

Chapter 13 bankruptcy is mostly beneficial to debtors with valuable assets like significant equity in a home or car that, if the debtor were to file for Chapter 7, the home or car would likely to be sold for payment to creditors. Often filed to stave off foreclosure, Chapter 13 allows debtors to save their homes and cars, if they can cure any past due payments and continue making monthly payments over the course of a three to five year repayment plan.

A debtor's Chapter 13 plan describes the amount of disposable income the consumer intends to pay toward their creditors, including amounts that various classes of creditors are to receive during the three- or five-year plan period. Most plans of repayment provide for the debtor to pay creditors less than the full

amounts owed to them. In practice, an approved plan will provide for payment of unsecured debt by applying the consumer's disposable income, pro rata over the plan period, so long as unsecured creditors receive at least as much under the plan as they would under Chapter 7 liquidation. 11 U.S.C. § 1325.

Given the current four way split on the treatment of post-petition voluntary retirement contributions and whether such contributions are considered disposable income, the balance of interests between creditors and debtors has been significantly disturbed in the Chapter 13 context.

Chapter 13 Bankruptcy, as compared to Chapter 7 Bankruptcy, is designed to promote and increase recoveries for unsecured creditors. However, in those regions, including the Ninth Circuit, where courts have allowed debtors to divert funds that would have otherwise gone to repaying creditors, to their retirement accounts, this purpose of promoting creditor recovery is eviscerated.

In a Chapter 7 Bankruptcy, the consumer's assets are liquidated to pay creditors. But in Chapter 13, the debtor is able to retain their assets so long as they have enough disposable income to pay creditors a portion of what is owed pursuant to a plan that the debtor must perform on over the course of several years. But under the Ninth Circuit's decision, there is now an incentive for debtors to make voluntary contributions to their retirement accounts, while also protecting their assets.

Creditors will recover potentially nothing. This will undoubtedly cause further objections to plan

confirmation and corresponding delays in the efficient administration of the bankruptcy proceeding.

Contrary to the intended goal of the Bankruptcy Code, and Chapter 13 specifically, the current split in authority on the treatment of voluntary retirement contributions has, and will continue to make, the Chapter 13 process longer and more expensive, undermining Congressional goals related to effective and prompt administration of creditor and debtor rights.

In those jurisdictions where consumers are able to make any amount of voluntary contribution to a retirement account, creditors will see negligible recoveries, if they are able to collect anything at all. And even in those courts where the consumer is limited in their contributions to some amount based on prior contributions, there will be voluminous litigation in adversary proceedings to determine and verify what those prepetition amounts were.

Finally, the Ninth Circuits adoption of an ambiguous "good faith" standard will create further conflict as various courts grapple with what constitutes a good faith contribution to a retirement account, when it is made at the expense of unpaid creditors. Undoubtedly, creditors and debt collectors who see such contributions as an improper transfer designed to shield funds from creditors will not have the same view of "good faith."

This issue of post-petition voluntary retirement contributions further opens the door to other potential diversions of funds away from creditors in the Chapter 13 context. Allowing post-petition 401(k) contributions creates an opportunity for debtors to assert that an IRA or other pre-tax contribution could arguably

be exempt from Bankruptcy Court governance as well. The more that is allowed to be paid outside of the Bankruptcy Court and/or Chapter 13 repayment plan, the more opportunity arises for debtors to abuse the bankruptcy process.

Given that each of these issues exacerbate the four competing interpretations now employed by courts across the country, ACA, its members, and numerous other interested parties need this Court's guidance on the correct path forward.

C. Applying the Bankruptcy Code to Voluntary Retirement Contributions is a Consistently Recurring Issue Requiring this Court's Clarification.

Allowing the Ninth Circuit's decision to go unreviewed will allow inconsistent application of the Bankruptcy Code in the frequently recurring issue of voluntary retirement contributions in a Chapter 13 Bankruptcy. This inconsistent application will impact thousands of Chapter 13 Bankruptcy cases nationwide.

As discussed above, Chapter 13 Bankruptcy is a process generally only available to those debtors who have enough disposable income to pay their debts and allows them to avoid selling their assets to pay off their debts. In 2024, there were over one hundred ninety-five thousand Chapter 13 Bankruptcy filings in the United States. *See U.S. Courts, Federal Judicial Caseload Statistics: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2024*, Tbl. F-2,

<https://tinyurl.com/chapter-13-cases-2024>. The Ninth Circuit alone has approximately 15,000 Chapter 13 Bankruptcy petitions filed each year. *Id.* According to United States Courts data, total bankruptcy filings rose 16.2 percent in the twelve-month period ending September 30, 2024, compared with the previous year. *Id.*

Given that virtually every Chapter 13 Bankruptcy will encounter this issue of whether voluntary retirement contributions constitute disposable income that should be used to repay unsecured creditors, Americans need clarity from this Court about what is permitted under the Bankruptcy Code. Without that clarity, the inconsistent application of the Bankruptcy Code will continue in potentially each of the nearly two-hundred thousand cases filed each year nationwide.

Moreover, even if this issue might not have arisen in every Chapter 13 Bankruptcy previously, the Ninth Circuit's decision provides a roadmap and incentive for debtors to invest in their retirement accounts at the expense of their creditors. This financial incentive will spark similar challenges as litigants chase the Ninth's Circuit's framework and seek its expansion to other Circuits.

Simply put, the question at issue here—whether voluntary retirement contributions constitute disposable income that should be used to repay unsecured creditors—comes up again and again, day after day, in courtrooms across the country. Courts below are left with four options to answer that question. *See infra* Sec. II.A. Because that answer is entirely dependent on the proper construction of the Bankruptcy Code, the Court has an opportunity to answer a purely

statutory question with impacts on tens of thousands of cases every year. The Court should seize that opportunity and settle the question for lower courts and litigants.

D. The Ninth Circuit's Decision Creates Economic Harm to Large Swaths of the Creditor, Debt Collection, and Asset Buyer Industries.

In addition to the harm that the inconsistent application of the Bankruptcy Code generates for individual debtors and creditors, failure to promptly resolve the four way split will damage the credit, debt collection, and asset purchasing markets generally. This will, in turn, reduce access to affordable credit which directly harms American consumers and small businesses.

1. Unsecured Creditors Should Not be Paid Based on Geography.

As a threshold matter, debtor and creditor rights under the Bankruptcy Code should not depend on the state in which the consumer is located. As detailed at length above, Congress intended for the Bankruptcy Code to be uniformly applied, as well as to balance the competing interests of both debtors and creditors.

An efficient credit market depends on a certain degree of predictability when it comes to evaluating credit risk, determining the cost of credit, and making underwriting decisions. If lenders and service providers generally cannot make risk based predictions related to the potential for losses in consumer bankruptcy, they will be less likely to lend altogether. And even when they do lend, the cost of credit will be

higher to offset the unknown risk that, in some jurisdictions, there will likely be zero recovery if the consumer enters Chapter 13 Bankruptcy.

Promoting an efficient credit market that serves the needs of American consumers and small businesses is a matter of national importance and ACA and its members need this Court's guidance to provide certainty in the application of the Bankruptcy Code, regardless of where the petition is filed.

2. The Ninth Circuit's Decision Incentivizes Diversion of Funds Away from Creditors.

If the Ninth Circuit's decision is permitted to stand, it will promote perverse incentives among debtors in Chapter 13 Bankruptcy. The Ninth Circuit's approach allows debtors to shield funds that could otherwise be used to pay unsecured creditors by permitting these debtors to divert the funds into an employer managed retirement account.

While the Sixth Circuit and some lower courts have cabined this ability to verifiable contributions that were consistently made pre-petition, the Ninth Circuit's decision includes no such limitation. Consequently, debtors in the Ninth Circuit are not only permitted but encouraged to make such voluntary contributions in the maximum amount possible, thereby shielding rightfully-owed money for their future selves, while creditors recover potentially nothing.

The opportunity to shield assets by making these voluntary contributions could tempt many debtors and will likely encourage forum shopping for many of those considering filing bankruptcy. Debtors, and especially those who can afford counsel familiar with

this issue, will opt to move to a state within the Ninth Circuit and file bankruptcy there so that they can take advantage of this significant disposable income exclusion.

3. The Ninth Circuit's Decision Negatively Impacts the Credit Granting Industry.

As noted above, efficient credit markets require consistency in the law and a certain degree of corresponding predictability regarding the ability recover loaned funds. When potential recoveries change drastically because of inconsistent applications in the law, creditors react to mitigate that risk. Given the competing interpretations of the Bankruptcy Code discussed here, creditors lack certainty about how their claims will be treated in a consumer Chapter 13 Bankruptcy.

As it currently stands in the Ninth Circuit, creditors may be denied a recovery altogether even if they would have received partial payment before the panel issued its decision below. Even pennies on the dollar, when compounded thousands of times will have a material impact on the economy, as well as the Bankruptcy process.

Now, creditors will be forced to account for this legal uncertainty and attendant recovery risk in their underwriting. The riskiest borrowers will suffer most, when lending is curtailed in California or other states sitting in the Ninth Circuit to make up for losses.

While these changes to underwriting and risk assessment are based on only those debtors who ultimately file for Chapter 13 Bankruptcy, there is no way to know who those individuals are on the front end.

The result is that all consumers pay the price of increased credit in an inefficient market.

4. The Ninth Circuit's Decision Negatively Impacts the Debt Collection and Asset Buyer Industry.

The widespread and recurring economic harm generated by this issue is not limited to creditors and consumers who need to borrow funds. The conflicting standards employed across the country harm creditors and the accounts receivable industry, which in turn harms everyone in a credit-based economy.

ACA's debt collector and asset buyer members will greatly suffer if the likelihood of recovery is diminished by the Ninth Circuit's interpretation of the Bankruptcy Code.

II. THE SUPREME COURT SHOULD ADDRESS THE NINTH CIRCUIT'S DECISION TO HARMONIZE THE CONFLICT IT CREATES WITH OTHER CIRCUITS AND GUIDANCE FROM THE BANKRUPTCY APPELLATE PANEL.

The Ninth Circuit's decision solidifies a split in circuit authority. The Supreme Court's review would allow it to harmonize conflicting decisions in a way that promotes consistent application of the Bankruptcy Code, as well as creating certainty in the legal system upon which consumers and creditors alike can rely.

A. The Ninth Circuit's Decision Directly Conflicts with Authority Established by the Sixth Circuit and Numerous Lower Courts.

The Ninth Circuit's decision solidifies a stark, four way split that first divides courts on whether Chapter 13 debtors can make any voluntary retirement contributions *at all*, and then further divides courts regarding when and in what amount such contributions (if any) might be permissible.

The Ninth Circuit, in the instant case, *In re Saldana*, 122 F.4th 333 (2024), adopted the *Johnson* approach, *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Ga. 2006), and rejected the Sixth Circuit's approach outlined in *Davis v. Rameker (In re Davis)*, 960 F.3d 346 (6th Cir. 2020) and *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527 (6th Cir. 2021). Both the Ninth and Sixth Circuits rejected the approach in *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010) and all three approaches differ from the so-called CMI Interpretation in *Seafort v. Burden (In re Seafort)*. 437 B.R. 204 (B.A.P. 6th Cir. 2010). This chaos over a question of federal statutory interpretation is both unnecessary and unsustainable.

All four approaches conflict with one another. The Ninth Circuit held that voluntary 401(k) contributions are *never* disposable income, meaning unsecured creditors may never access that money in a Chapter 13 Bankruptcy. This clearly conflicts with the Sixth Circuit's decision in *In re Penfound*, which held that voluntary 401(k) contributions are not disposable income if they were regularly made prior to the bankruptcy filing. Both approaches conflict with the *In re*

Prigge approach that would find 401(k) contributions to *always* be disposable income. Finally, all three approaches differ substantially from the CMI Interpretation that allows debtors to continue 401(k) contributions equal to the contributed sum averaged over the preceding six month period.

The Ninth Circuit's decision in *In re Saldana* only accentuated the conflict. The Ninth Circuit's decision expressly *rejected* the Sixth Circuit's approach and made no attempts to smooth out the circuit split. In fact, the dissent in *In re Saldana*, authored by Judge Callahan, repudiated the Ninth Circuit's approach specifically in favor of the Sixth Circuit's approach in *In re Penfound*.

The circuit split is not merely one of statutory interpretation. The effects are practical and real. The result of the split is that in California (the Ninth Circuit), debtors may always contribute to 401(k) plans (because the contributions are not disposable income), while in Ohio (the Sixth Circuit), debtors may only contribute to 401(k) plans when contributions were regularly made prior to bankruptcy.

Consider an example. An ACA member seeks to collect debts owed to a small business by two debtors, one in California and one in Ohio. The debtors, who filed for Chapter 13 Bankruptcy only recently, have never contributed to a 401(k), but intend to protect assets by doing so now. The bankruptcy court uses the statutory framework to calculate the debtor's disposable income, coming up with $1,000 in disposable income for each debtor. In Ohio, because the debtor has never before contributed to a 401(k), the ACA member *can* collect on unpaid debts from the $1,000 disposable income. In California, the ACA member *cannot* collect

because the $1,000 is contributed to a 401(k) (meaning the California debtor, practically speaking, has no disposable income). In Ohio, the small business that sought to collect the debt will be paid; in California, it will not.

The differences between the Ninth and Sixth Circuit approaches are intractable; they cannot be harmonized. The two approaches read the Bankruptcy Code entirely differently and result in different economic outcomes. The conflict between these approaches is clear, stark, and immediately requires this Court's attention.

B. The Ninth Circuit's Decision is Also Incompatible with Prior Authority from the Bankruptcy Appellate Panel within the Ninth Circuit.

The Ninth Circuit's decision in *In re Saldana* repudiated thirteen years of standing precedent in the Ninth Circuit and overruled the Ninth Circuit Bankruptcy Appellate Panel ("BAP") decision in *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (B.A.P. 9th Cir. 2012). The holdings of the two cases—*In re Saldana* and *In re Parks*—are more than just incompatible; the cases represent the two extreme sides of the issue presented before the Court. The Ninth Circuit's dramatic vacillation from one extreme to the other shows how urgently this Court's guidance is needed.

The holding in *In re Parks* found that all voluntary retirement contributions were disposable income and thus available for payment to unsecured creditors under a Chapter 13 plan. This holding followed the rule initially set out in *In re Prigge*, 441 B.R. at 676-77. Practically speaking, this meant that debtors

could not escape credit obligations by voluntarily contributing funds to a retirement account—regardless of whether or not the debtor had previously voluntarily contributed funds. The Ninth Circuit's rule in *In re Saldana* took the opposite approach and held that any amount of funds (up to the legal maximum) contributed to a retirement account were excluded from disposable income and unavailable to creditors.

Another example is illustrative. Consider two ACA members seeking to collect for small business clients. One ACA member operates under the BAP rule, while the other operates under the Ninth Circuit's rule. Under the BAP regime, the ACA member could collect on the income that otherwise would have been contributed to a retirement account. Under the Ninth Circuit's rule in *In re Saldana*, the ACA member would not be able to collect on income voluntarily contributed to a retirement account because that income would be considered non-disposable income. The change from *In re Parks* to *In re Saldana* is the difference between some collection and no collection. For one account, that amount may not be large—but aggregated over thousands of accounts, the difference in collections is substantial.

The practical shift (from some collection to no collection) reflects the Ninth Circuit's legal shift from one extreme to the other. For over a decade, the Ninth Circuit followed the BAP's approach in *In re Parks* finding voluntary contributions to be disposable income. The departure to now find voluntary contributions to *never* be disposable income is swift and sharp. The varying interpretations of the Bankruptcy Code have divided circuits amongst each other and themselves. This Court's clarity is needed.

C. **Only this Court Can Provide Clarity Regarding the Intent of Congress.**

The conflict between lower courts is clear and delineated, largely due to the fact that this issue is sufficiently litigated. Remarkably, nearly every court that considers this issue regurgitates a familiar routine lamenting the chaos, reviewing the four, divergent options, and choosing a side. The question is ripe for this Court's review. This Court is primed to settle the question and provide the clarity needed to restore the intent of Congress in drafting the Bankruptcy Code. The effective, efficient administration of the Bankruptcy Code requires "ensuring that debtors devote their full disposable income to repaying creditors." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 78 (2011). This Court—and this Court alone—can settle the inter-circuit debate and return the Bankruptcy Code to its core mission.

CONCLUSION

This case warrants Supreme Court review. It presents a deep circuit split on a recurring issue of national significance, including inconsistent application of the comprehensive federal Bankruptcy Code, which is intended to fairly and expeditiously adjudicate the interests of *both* debtors and creditors. Because debtors and creditors alike rely on the consistent application of the Bankruptcy Code and fair and balanced interpretations of their rights thereunder, this Court should grant certiorari and review the decision of the Ninth Circuit.

Respectfully submitted,

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