No. 03-1407

IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

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

REPLY BRIEF FOR PETITIONERS

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas R. Brixey
Claude R. Jones
JONES LAW OFFICE
P.O. Box 1577
Harrison, AR 72602-1577

G. Eric Brunstad, Jr.
BINGHAM MCCUTCHEN LLP
150 Federal St.
Boston, MA 02110

November 22, 2004

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REPLY BRIEF FOR THE PETITIONERS

As petitioners showed in our opening brief, Section 522(d)(10)(E) of the Bankruptcy Code protects assets in Individual Retirement Accounts (IRAs). IRAs confer on their holders the "right to receive * * * a payment * * * on account of illness, disability, death, [or] age." See Pet. Br. 14-15. The text of Section 522(d)(10)(E) squarely cross-references the section of the Internal Revenue Code that establishes IRAs. See Pet. Br. 13-14. The legislative histories of both the IRA provision and Section 522(d)(10)(E) express Congress's concern with protecting the ability of Americans to save for their retirement. See Pet. Br. 16-28.

In claiming otherwise, respondent makes a perverse argument: that Congress somehow excluded the most widely available congressionally created retirement savings vehicle – one which the statute itself calls an "individual *retirement* account," 26 U.S.C. 408 (emphasis added) – from the very bankruptcy code provision that protects a debtor's retirement savings.[1]

Petitioners have shown that the only reasonable construction of Section 522(d)(10)(E) harmonizes it with Section 408 of the Internal Revenue Code by permitting a debtor to retain that part of his or her IRA that is "reasonably necessary for the support of the debtor and any dependent of the debtor." See Pet. Br. 13-14. Indeed, in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), this Court recognized the breadth of Section 522(d)(10)(E) and stated that IRAs "could be exempted under § 522(d)(10)(E)." *Id*. at 763 & n.6. That

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[1] For ease of exposition, petitioners use the term "retirement plans" to describe plans eligible for exemption under Section 522(d)(10)(E). Payment triggers under Section 522(d)(10)(E) include "illness, disability, death, age, *or* length of service" (emphasis added). Therefore, the exemption may also be available to plans or contracts whose primary purpose is to protect their holders in other circumstances as well.

recognition has informed the near unanimous agreement among the courts of appeals, the district courts, and bankruptcy courts that funds held in an IRA are eligible for exemption. See Pet. Br. 11-12 & n.5.

Respondent's implausible conclusion rests on two false premises. First, she claims that IRAs are not really retirement-savings vehicles, because holders of IRAs can, under certain circumstances, gain access to their funds before retirement. Therefore, she asserts, IRAs operate more like "all-purpose investment kitties" than retirement plans, and the right to receive payment from an IRA is not "on account of" the factors identified in Section 522(d)(10)(E). See Resp. Br. 7, 8, 15, 22. In fact, as a legal matter, holders of IRAs have the *right* to receive payments under precisely the triggering events listed in Section 522(d)(10)(E), as well as a few other carefully delimited circumstances. Otherwise, if they seek early access to the funds, they are subject to a significant penalty. See 26 U.S.C. 72(t). The fact that someone can engage in behavior if he or she is willing to pay a substantial penalty can hardly be described as conferring a "right" to engage in the conduct.

Second, respondent claims that IRAs are somehow unique among retirement vehicles because holders may access funds in their accounts prior to reaching retirement age. Therefore, she claims, IRAs fail the statutory requirement of being a "*similar* plan or contract" to other "stock bonus, pension, profitsharing, [or] annuity" plans that do qualify for exemption under Section 522(d)(10)(E). See Resp. Br. 21-27. Here, respondent is flatly mistaken. Stock bonus plans, pensions, profitsharing plans, and annuities – the other retirement vehicles listed in Section 522(d)(10)(E) – *all* treat early withdrawals in precisely the same way that IRAs do. Respondent's argument would lead to the untenable conclusion that many of the plans Congress expressly lists in Section 522(d)(10)(E) would not themselves be exempt. See Pet. Br. 11. This reading would leave the exemption nothing but an empty shell.

The judgment below should accordingly be reversed.

I. IRAs Are Retirement Vehicles, Rather than General Savings Accounts.

The core of respondent's first argument – that IRA payments are not "on account of age" – is that IRAs are not really retirement vehicles. However, the plain-language reading of 26 U.S.C. 408 confirms that IRAs do indeed operate as retirement plans. IRAs function by permitting individuals to set aside a relatively modest amount of money each year in an account in which the money compounds on a tax-deferred basis. When an individual reaches one of the triggering events identified in 26 U.S.C. 72(t)(2) – significantly, a list of triggering events that dovetails with the list provided in Section 522(d)(10)(E) – he or she has the right to withdraw accumulated funds. IRAs are thus a quintessential retirement savings device. And they differ in significant ways from general savings accounts.

A. Congress established IRAs to enable individuals to save for their retirements.

As petitioners explained in our opening brief – and respondent acknowledges, see Resp. Br. 6 – Congress established IRAs for the important purpose of enabling more Americans to save for retirement. Specifically, Congress concluded that "the present law discriminate[d] against employees not covered by retirement plans and against the self-employed," and recognized "the need on equity grounds to grant individuals who [were] not covered by any kind of qualified pension plan some of the tax advantages associated with such plans by providing them with a limited tax deduction for their retirement savings." H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670. As Congress has revised the retirement scheme over the years, it has repeatedly emphasized the crucial role played by IRAs. See, *e.g.*, H.R. Rep. No. 107-797 (2003) (highlighting that an increase in IRA contribution limits would make it "easier for American workers to save more for retirement").[2]

Respondent seeks to avoid the conclusion that IRAs continue to be a retirement savings vehicle by pointing to two features of IRAs: first, that individuals can gain access to their funds for whatever purpose they wish if they pay a excise penalty, see, *e.g.*, Resp. Br. 15, and second, that Congress has also permitted individuals to withdraw funds from IRAs to buy a first home, go to college, or to pay for health care premiums, see *id.* 23. Neither of these arguments has merit.

Respondent's primary claim that individuals have a "right" to withdraw money from an IRA at any time, subject to what she describes as a "modest" tax penalty, Resp. Br. 23, involves a peculiar species of linguistic legerdemain. In fact, the structure of Section 72(t) of the Internal Revenue Code makes clear that Congress imposes a significant *penalty* on individuals who remove funds from an IRA without satisfying the triggering events. To say that an individual who is penalized for engaging in particular conduct has a "right" to engage in the conduct because he is willing to pay the penalty is absurd. Under respondent's logic, people have the "right"

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[2] The importance of IRAs to the American workforce is clear. For example, IRAs often constitute the sole retirement vehicle available to the self-employed. In 2002, nearly fifteen million American workers were reported as self-employed. Lynn A. Karoly & Julie Zissimopoulos, *Self-Employment Among Older U.S. Workers*, 127 U.S. DEP'T LABOR: MONTHLY LABOR REV. 7, at 24 (2004), *available at* http://stats.bls.gov/opub/mlr/2004/07/art3full.pdf. Among these self-employed individuals, the majority are nearing retirement age. In 2002, fifty-four percent were age forty-five or older – making retirement savings a particularly pressing near-term concern. *Ibid.* Similarly, a growing part of the workforce – employees who work for employers that do not provide an employer-sponsored retirement plan – find IRAs a critical mechanism for their retirement savings.

to park anywhere they please – in a handicapped parking space, in front of a fire hydrant, or even on the sidewalk – as long as they are willing to pay the ensuing parking ticket. That cannot be a correct construction of the word "right."

Nor, contrary to respondent's suggestion, is the penalty "modest." A working individual with an IRA, whose gross income is taxed at a rate of twenty-five percent, must pay a thirty-five percent federal tax on any amount she withdraws early. See 26 U.S.C. 72(t)(2). Thus, if she withdraws $50,000 from the IRA, she must pay a total of $17,500 in federal taxes – $5000 of which is purely a result of the penalty. If she waits until reaching retirement age, or otherwise qualifies for one of the other triggering events, not only will she avoid the ten percent penalty, but she will likely fall within a lower federal income tax bracket as a result of having no employment income. Thus, her withdrawal might be taxed at only a fifteen percent rate, and she would pay only $7,500 to withdraw the same $50,000 – that is fifty-seven percent less than the amount she would have paid for an early withdrawal.

Respondent's second claim – that the existence of other payment triggers means that IRA payments cannot be "on account of" the factors listed in the statute – is equally flawed. A retirement plan exemptible under Section 522(d)(10)(E) is one for which the right to payment arises "on account of illness, disability, death, age, or length of service." Petitioners have demonstrated that four of these triggers are identical to those that provide holders of an IRA with an unfettered right to withdraw their funds. See Pet. Br. 14-15 (comparing tax treatment of IRAs under 26 U.S.C. 72(t)(2) with 11 U.S.C. 522(d)(10)(E)). The fact that petitioners may also have the right to withdraw funds for three other reasons – to purchase a first home, to pay for higher education, and to cover some medical insurance – is irrelevant. As respondent herself realizes, the list of triggering factors in Section 522(d)(10)(E) is non-exclusive. See Resp. Br. 15 (noting that "[a] right to receive a payment from a traditional pension plan may * * * arise ‘on account of age’ even if it may also in certain specific circumstances arise ‘on account of’ other factors”); see also *id.* 17; *Dettman* v. *Brucher (In re Brucher)*, 243 F.3d 242, 244 (CA6 2001) (“[Section 522(d)(10)(E)] does not require that the payment be made ‘solely’ on account of age.”); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 379 (CA5 1996) (“The language of the subject section does not express a requirement that the right to receive a payment under a ‘similar plan or contract’ be conditioned ‘only’ or ‘solely’ or ‘exclusively’ on one of the five listed events.”).

This is necessarily the case, because all of the other plans listed in Section 522(d)(10)(E) – stock bonus, pension, profitsharing, and annuity plans – confer the right to receive payment for reasons other than those enumerated in the statute. See, *e.g.*, 26 U.S.C. 72(t)(2)(C), 72(t)(3)(A) (providing that *non*-IRA retirement plans allow “[p]ayments to alternate payees pursuant to qualified domestic relations orders”).

In short, whatever else is true of IRAs, they clearly are savings vehicles that provide their holders with the “right to receive * * * a payment * * * on account of illness, disability, death [or] age,” and thus fall squarely within the plain language of Section 522(d)(10)(E). Therefore, funds in an IRA are eligible for exemption in bankruptcy as long as the funds also meet the other strictures of Section 522(d)(10)(E) – the funds must be “reasonably necessary for the support of the debtor and any dependent” and the IRA must comply with Section 408 of the Internal Revenue Code.

B. IRAs differ in important material respects from savings accounts.

Respondent contends that IRAs resemble ordinary savings accounts “far more closely” than they resemble the other retirement plans listed in Section 522(d)(10)(E). Resp. Br. 21. She draws an unsupportable distinction between IRAs on the one hand and plans that provide “future wages” on the other. *Id.* 21-22. This contention disregards the very function of an IRA. See, *e.g.*, H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670 (noting that "the objective" of provisions to strengthen IRAs was "to encourage adequate provision for retirement needs"); *Dettman*, 243 F.3d at 243 ("IRAs, similarly, are 'substitutes for future earnings * * *.'"); *Carmichael*, 100 F.3d at 378 ("IRAs too are substitutes for future earnings in that they are designed to provide retirement benefits to individuals.").

Contrary to respondent's claims, even the most basic features of an IRA make clear they in no way "operate * * * like a traditional savings account." Resp. Br. 22:

1. *A circumscribed right to withdraw funds.* IRAs permit withdrawals, without severe tax penalties, only on very narrow grounds enumerated by statute: principally, on account of illness, disability, the death of the account holder, or when the account holder reaches age 59½. 26 U.S.C. 72(t)(2). On the other hand, traditional savings accounts permit penalty-free withdrawals for *any* reason at *any* time. IRAs' restrictions on withdrawal, and the resulting tax penalty, make clear that IRAs were designed to provide retirement funds for older individuals, not to serve as substitutes for a savings account. See *Carmichael*, 100 F.3d at 378 ("The age limitation on withdrawal illustrates Congress' intent to provide income to an individual in his advanced years.").

2. *A strictly limited right to deposit funds.* As with other retirement plans, federal law imposes tight restrictions on contributions to IRAs. See Internal Revenue Serv., Traditional IRAs, *at* http://www.irs.gov/publications/p590/ch01.html#d0e1417 (specifying IRA contribution limits). Currently, individuals may contribute no more than $3000 annually to an IRA. *Ibid.* In contrast, there are no limits on the amount of money an individual can deposit in a standard savings account.

3. *The right to accept "rollover" funds from other retirement vehicles.* Unlike any general savings account, IRAs accept rollover funds from other retirement plans without incurring tax liability. In fact, almost half of all traditional IRAs – including the IRAs in this very case – are composed, at least in part, of funds that have been rolled over from other employer-sponsored retirement plans See *IRA Ownership in 2003*, 12 INVESTMENT CO. INST. RESEARCH IN BRIEF 3, at 8 (2003), *available at* http://www.ici.org/statements/fundamentals/fm-v12n3.pdf. This rollover feature, unavailable in a savings account, embodies Congress's goal of "facilitat[ing] portability of pensions." H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038. The ease of transfer plainly shows that IRAs serve a function identical to that of other plans listed in Section 522(d)(10)(E).

Simply put, an individual who wanted to access funds with the ease of a savings account would open one. He or she would not instead subject the funds to the strict contribution and withdrawal restrictions associated with IRAs.

C. Petitioner's case aptly demonstrates the critical function of IRAs in retirement.

Petitioners' treatment of their accounts is consistent with the understanding of an IRA as a retirement plan rather than as a general savings vehicle. Despite the grave financial need that eventually led to their filing for bankruptcy, petitioners did not touch their IRAs. If IRAs were not retirement funds in practice, petitioners would not have treated theirs like one: they would have spent the funds prior to filing for bankruptcy and would not now be seeking exemption. See, *e.g.*, *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991) (stating that "the very existence of a bankrupt debtor's savings account is indeed a rarity").

There is no question that petitioners' IRAs constituted their sole source of retirement income. See Pet. App. 5a. This was not by choice: as a result of their involuntary layoff, petitioners were forced to "roll over" their accumulated retirement savings from their 401(k) plans – which would have been exempt even under respondent's cramped reading of the Bankruptcy Code – into IRAs. Pet. Br. 2.[3] Petitioners' experience is hardly unique. In the year 2000, for example, more than four million taxpayers rolled more than $225 billion into traditional IRAs from other pension plans and annuities. Peter J. Sailer & Sarah E. Nutter, *Accumulation and Distribution of Individual Retirement Arrangements, 2000*, 2004 INTERNAL REV. SERV. STATISTICS OF INCOME BULLETIN, at 121, *available at* http://www.irs.gov/pub/irs-soi/00retire.pdf.

Congress simply could not have wished to exempt certain retirement plans, yet to deny exemption to the *very same* assets once they are, for reasons beyond individuals' control, rolled over to IRAs. Indeed, individuals who have been laid off from their jobs (and forced to roll their pension savings into IRAs) are particularly likely to become bankrupt. As petitioners articulated in their opening brief, Pet. Br. 19, respondent's reading of the statute would "create a trap for the unwary," *Carmichael*, 100 F.3d at 378, punishing debtors for employing what is often their only available retirement vehicle.

II. IRAs Satisfy the "Similar Plan or Contract" Criterion of Section 522(d)(10)(E).

The core of respondent's second argument is that an IRA is not a "similar plan or contract" to the other retirement

[3] Respondent's reliance upon *Andersen* v. *Ries*, 259 B.R. 687 (B.A.P. CA8 2001), as evidence that petitioners could have invested in a more "retirement-like" account is plainly refuted by the facts of that case. Respondent erroneously states that the debtor in *Andersen* was "unable to access the corpus of the annuity prior to a specified time." Resp. Br. 32. In fact, the debtor in *Andersen* "*had the right to withdraw the funds prior to the time she began receiving payments*," and her withdrawal rights ceased only when her retirement payments commenced. 259 B.R. at 692 (emphasis added).

vehicles listed in Section 522(d)(10)(E) because "IRAs, *unlike any of the other plans listed in the statute*, permit the holder to have unrestricted access to the funds for any reason at all, subject only to a 10 percent tax penalty." Resp. Br. 15 (emphasis added).[4] This statement is plainly wrong: *all* of the other plans listed in the statute have the same tax structure, and thus IRAs are unquestionably "similar" to these plans.

A. IRAs are in all relevant respects similar to the other plans listed in Section 522(d)(10)(E).

As noted above, IRAs were created for the purpose of providing retirement vehicles to a wider class of individuals. See Pet. Br. 16-22; *supra*, at 3-6. This similarity of purpose has resulted in their nearly identical treatment under federal law. Internal Revenue Code Section 4974(c) defines "qualified retirement plans by incorporation" to include IRAs along with every other plan listed in Section 522(d)(10)(E): stock bonus plans, pension plans, profitsharing plans, and annuities. See also 26 U.S.C. 401(a). Each of these plans permits the holder to set aside a limited amount of pre-tax income for withdrawal at a later time. Pet. Br. 15; see also 26 U.S.C. 219 (specifying the permissible level of tax-exempt contributions to retirement plans during any given tax year).

Withdrawal from each of these "qualified retirement plan[s]," including IRAs, is governed by Internal Revenue Code Section 72(t), which enforces the use of these plans as "retirement" vehicles by limiting the right to receive a payment to a narrow set of circumstances. Outside of the enumerated circumstances, any withdrawal from *any* of these retirement vehicles incurs a ten-percent tax penalty on top of the tax rate normally applicable to the holder's gross income. See 26 U.S.C. 72(t)(1); see also *supra*, at 5. The purpose of this penalty is "[t]o discourage the use of pension funds for

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[4] As noted *supra*, at 4-5, the very idea that access can be "unrestricted" when it is "subject * * * to a 10% tax penalty" is a non sequitur.

purposes other than normal retirement * * *." Internal Revenue Serv., Tax Topic 558, *at* http://www.irs.gov/taxtopics/tc558.html; see Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 403-04 (1999) (stating that Internal Revenue Code provisions dealing with pension plans "apply penalties for distributions prior to retirement, but do not actually prohibit such distributions").

Individuals thus can and do make early withdrawals, not only from IRAs, but also from other qualified retirement plans when authorized by the plan. The primary document completed by taxpayers each year – Form 1040 – expressly anticipates and provides for such withdrawals. The instructions for that form explain how certain individuals who "received an early distribution from (a) an IRA *or other qualified retirement plan*, [or] (b) *an annuity* * * *" can assess their ten-percent penalty. See Internal Revenue Serv., 2003 1040 Instructions, *available at* http://www.irs.gov/pub/irs-pdf/i1040.pdf, at 39 (emphasis added); see also Internal Revenue Serv., Form 5329, *available at* http://www.irs.gov/pub/irs-pdf/f5329.pdf (providing an alternate way to disclose withdrawals from "*a qualified retirement plan* (including an IRA)" before age 59½) (emphasis added); Internal Revenue Serv., Frequently Asked Questions – 5.3 Pensions and Annuities: Distributions, Early Withdrawals, 10% Additional Tax, *at* http://www.irs.gov/faqs/faq5-3.html (explaining the protocol for those who "cash in a pension plan while in [their] thirties").

Tax-penalized early withdrawal thus cannot form the basis for finding IRAs to be dissimilar from pension plans, stock bonus plans, profitsharing plans, and annuities. Nothing in the tax code prohibits accessing funds from *any* of these plans at any time, provided that the holder is willing to pay a tax penalty. Respondent's reading of Section 522(d)(10)(E) as precluding exemption for plans with such a feature would eviscerate the statute by effectively disqualifying the very plans and contracts listed in Section 522(d)(10)(E) from eligibility for exemption.[5] See also Pet. Br. 11.

B. Respondent's "similarity" analysis is legally unsupportable.

Respondent's suggestion that IRAs are somehow dissimilar from the retirement vehicles listed in Section 522(d)(10)(E) suffers not only from the factual error detailed above, but also from two additional legal flaws.

First, respondent errs by asserting that "traditional pension plans" are the benchmark to which IRAs must be compared to determine their similarity. See, *e.g.*, Resp. Br. 7-8. As a textual matter, "pension plans" are not the entire comparison set – the comparison set explicitly includes annuities, profitsharing, and stock bonus plans as well. As a legal matter, "traditional pension plans" are largely outside Section 522(d)(10)(E) altogether because their treatment in bankruptcy is governed by Section 541(c)(2), as this Court held in *Patterson* v. *Shumate*, 504 U.S. 753 (1992) (determining that ERISA-qualified plans are categorically excluded from a debtor's estate under Section 541(c)(2)). Only non-ERISA qualifying pension plans fall within Section 522(d)(10)(E) in the first place, and so the relevant question is whether IRAs are similar to these plans.

Second, respondent errs by suggesting that "similarity" requires IRAs to be identical in every detail to each of the other listed retirement vehicles. As this Court has explained,

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[5] For example, respondent's reading of the statute would exclude from exemption the right to receive a payment under the New York City Police Department pension plan, because that plan allows for early (and tax-penalized) withdrawal. See Letter from Patrick J. Lynch, President, Patrolmen's Benevolent Ass'n of the City of New York, Inc., to Delegates and Members (Mar. 1, 2002), *available at* http://www.nycpba.org/tadam/archive/02/tadam-020301-90.html (indicating the availability of tax-penalized early withdrawal from the NYPD pension plan).

in deciding whether two things are "similar," the answer depends only on *relevant* commonalities and distinctions, for "[s]imilarity is not identity but resemblance between different things." *United States* v. *Raynor*, 302 U.S. 540, 547 (1938). Thus, in construing a statute that required customs duties on an enumerated category of goods and "all goods of similar description," the Court stated that "[t]he statute does not contemplate that [the] goods * * * shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, [the specified goods.]" *Greenleaf* v. *Goodrich*, 101 U.S. 278, 283 (1879).

Here, along every relevant dimension, IRAs resemble the other plans and contracts listed in Section 522(d)(10(E). IRAs are like the other listed plans with respect to their primary purpose: to enable Americans to save for their retirement. IRAs are like the other plans with respect to the list of events that trigger a right to withdraw funds: "illness, disability, death, [and] age." IRAs are like the other plans with respect to distinctive tax treatment under the Internal Revenue Code. Respondents have pointed to *no* relevant dissimilarity between IRAs and the other savings vehicles listed in Section 522(d)(10)(E).

C. The legislative history upon which respondent relies confirms that IRAs are similar to the other plans listed in Section 522(d)(10)(E).

The very legislative history identified by respondent, see Resp. Br. 24-26, in fact reinforces the view that an IRA is a "similar plan or contract" for purposes of Section 522(d)(10)(E). As petitioners explained in our opening brief, the language originally proposed for Section 522(d)(10)(E) would have exempted only retirement assets held in plans established under 26 U.S.C. 401(a), which governs "pension, profit-sharing, and stock bonus plans." But Congress explicitly broadened the language to cover plans defined in

Sections 403 (annuities) and 408 (IRAs) as well. See Pet. Br. 27-28.

Respondent reads this legislative history precisely backward, somehow seeing Congress's *refusal to limit* Section 522(d)(10)(E) to Section 401(a) plans as a wholesale rejection of the idea that identical treatment under the Internal Revenue Code is an indicator of plan similarity. Respondent provides no evidence in either the text or the legislative history for this assertion. Not only does her position defy logic – because tax preference is the very essence of IRAs and other congressionally recognized retirement savings vehicles – but it ignores the final language adopted by Congress, which explicitly mentions IRAs *in addition to* plans qualified under Section 401(a). See 11 U.S.C. 522(d)(10)(E)(iii).

Respondent concedes, as she must, that the explicit mention of IRAs in Section 522(d)(10)(E)(iii) means that "some section 408 plans must be eligible to qualify for the section 522(d)(10)(E) exemption." Resp. Br. 28 (capitalization omitted). But she seeks to avoid the force of this concession by suggesting that only IRAs that contain provisions that *no existing IRA has ever contained* can qualify for exemption. She gives no reason for supposing Congress meant to protect a null set. And she compounds her error by misreading what she calls the "unless" clause.[6] Respondent

[6] Section 522(d)(10)(E) makes funds in a plan or contract eligible for exemption "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."

argues that because the "unless" clause applies only to employer-established plans, it does not support the argument that all IRAs are exempt. See Resp. Br. 32-33. What respondent fails to understand is that because the "unless" clause is phrased in the conjunctive, it necessarily means that an individual retirement account that *does* satisfy the criteria for preferential tax treatment under Section 408, which all standard IRAs do,[7] is eligible for exemption under Section 522(d)(10)(E). Nothing in the text or legislative history suggests that that eligibility exists only for Section 408-qualified IRAs established under the auspices of an employer. The only plausible reading of the statute is that both individually created and employer-sponsored IRAs qualify for exemption under Section 522(d)(10)(E) as long as they qualify for preferential tax treatment under Section 408.

III. Respondent's Reliance on the Treatment of IRAs Outside of Bankruptcy Is Misplaced.

Respondent's final argument is that because *federal* law does not protect IRAs from the reach of creditors outside the bankruptcy context, IRAs should not be protected within bankruptcy either. Resp. Br. 33-35. This argument rests on a serious misreading of two of this Court's decisions, *Patterson* v. *Shumate*, 504 U.S. 743 (1992), and *Field* v. *Mans*, 516 U.S. 59 (1995).

To be sure, *Patterson* did recognize that pension plans governed by ERISA are protected, in bankruptcy and out, from the reach of creditors. But that very fact removed ERISA-governed pension plans from the ambit of Section 522(d)(10)(E) altogether, triggering their treatment instead under Section 541(c)(2). See *Patterson*, 504 U.S. at 759-60. Nothing about the fact that a retirement vehicle does not

[7] Indeed, compliance with Section 408 is what makes an individual's act of saving for retirement into an "Individual Retirement Account" as opposed to simply an informal retirement savings practice.

qualify for *exclusion* from the debtor's estate under Section 541(c)(2) determines whether it can qualify for *exemption* under Section 522(d)(10)(E). Indeed, *Patterson* makes precisely that point with respect to IRAs:

> [Section] 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than § 541(c)(2) excludes. For example, pension plans established by governmental entities and churches need not comply with Subchapter I of ERISA, including the antialienation requirement of § 206(d)(1). See 29 U. S. C. §§ 1003(b)(1) and (2); 26 CFR § 1.401(a)-13(a) (1991). So, too, pension plans that qualify for preferential tax treatment under 26 U. S. C. § 408 (individual retirement accounts) are specifically excepted from ERISA's antialienation requirement. See 29 U. S. C. § 1051(6). Although a debtor's interest in these plans could not be excluded under § 541(c)(2) because the plans lack transfer restrictions enforceable under "applicable nonbankruptcy law," that interest nevertheless could be exempted under § 522(d)(10)(E).

Patterson, 504 U.S. at 762-63 (footnote omitted). Thus, far from undermining petitioners' argument, *Patterson* reinforces it.

Respondent recognizes that *state* law, as opposed to federal law, often provides IRAs with protection from creditors, both outside and inside bankruptcy. Indeed, Arkansas law itself provides such protection. Ark. Code Ann. 16-66-220 (Supp. 2003) provides, in pertinent part, that an individual's "right to the assets held in or to receive payments, whether vested or not * * * under an individual retirement account * * * is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986."[8]

[8] Arkansas did, at one time, opt out of the federal exemptions in favor of its state exemptions, which contained an exemption for

Faced with the reality that "many states have amended their exemption statutes over the past 15 years so as to exempt IRAs" from creditors' judgments outside of bankruptcy, Resp. Br. 34; see also Dilley, *supra*, app. at 439-46 (listing state protection of IRAs outside of bankruptcy), respondent seeks to avoid the force of this point by arguing that in 1978, when Congress enacted the Bankruptcy Code, states did not provide such out-of-bankruptcy protection for IRAs, and thus Congress must not have intended to protect them within bankruptcy. Resp. Br. 34-35.

Respondent's sole support for her argument is this Court's decision in *Field* v. *Mans*, 516 U.S. 59 (1995). See Resp. Br. 35. But she flatly misunderstands the fundamental nature of this Court's inquiry in *Mans*. *Mans* concerned Section 523(a)(2)(A) of the Bankruptcy Code, which provides, in pertinent part, that a debtor is not entitled to discharge in bankruptcy "from any debt * * * for money, property, [or] services * * * to the extent obtained by * * * false pretenses, a false representation, or actual fraud * * *." The question before the Court in *Mans* was how to construe the phrase "actual fraud": did it require proof that the creditor reasonably relied on any misrepresentation or was it enough for the creditor simply to meet the less stringent standard of

IRAs. See Ark. Code Ann. 16-66-218(b)(16) (providing for exemption of up to $20,000 of contributions to an IRA). But after the Arkansas Supreme Court held that Art. 9, § 2 of the Arkansas Constitution acts as a cap on the dollar amount of exemptible property, courts in bankruptcy proceedings have refused to permit the exemption of property in excess of the cap. See, *e.g.*, *Federal Sav. & Loan Ins. Corp.* v. *Holt (In re Holt)*, 894 F.2d 1005 (CA8 1990); *In re Giller*, 127 B.R. 215 (Bankr. W.D. Ark. 1990); *In re Hudspeth*, 92 B.R. 827 (Bankr. W.D. Ark. 1988). Thus, Arkansas amended its law to permit a debtor to choose between the exemptions contained in 11 U.S.C. 522(d) and "the property exemptions provided by the Constitution and the laws of the State of Arkansas * * *." 1991 Ark. Acts 345 (codified as Ark. Code Ann. 16-66-217 (Supp. 2003)).

showing justifiable reliance? The Court noted that the "substantive terms" in Section 523(a)(2)(A) "refer to common-law torts," 516 U.S. at 69, and thus applied the "well established" rule "that where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Ibid.* (quotation marks omitted). In determining that meaning, the Court looked to the common law meaning of "'actual fraud' as it was understood in 1978 when [the relevant] language was added to § 523(a)(2)(A)." *Id.* at 70.

The present case simply does not implicate the rule of construction used in *Mans*.[9] First, respondent fails to identify any "substantive ter[m]" in Section 522(d)(10)(E) whose meaning depends on the common law. To the contrary, to the extent that Section 522(d)(10)(E) refers to any terms defined elsewhere, it refers only to provisions of the Internal Revenue Code. Second, the very fact that Section 522(d)(10)(E) protects "similar plan[s] or contract[s]" as well as an enumerated list is powerful evidence that rather than freezing the universe of protected plans as of 1978, Congress understood that other methods of retirement savings might

[9] Indeed, even *Mans* did not adopt the argument respondent claims it supports. As this Court noted at least three times, the common law meaning of "actual fraud" prevalent in 1978 was *the same* as the common law meaning in 1995. See *Mans*, 516 U.S. at 70 ("Then, *as now*, the most widely accepted distillation of the common law of torts was the Restatement (Second) of Torts (1976).") (emphasis added); *id.* at 71 (referring to "the edition of Prosser's Law of Torts available in 1978 (*as well as its current successor*)") (emphasis added); *id.* at 72 (noting that various "authoritative syntheses surely spoke (*and speak today*) for the prevailing view of the American common-law courts") (emphasis added). Thus, *Mans* itself did not even present the question of how to treat post-enactment changes in state statutory law.

emerge and that, to the extent they were "similar" to "stock bonus, pension, profitsharing, [or] annuity" plans, they too should be eligible for exemption. Indeed, shorn of respondent's specious rule of statutory construction, the treatment of IRAs by non-bankruptcy law in the states, to the extent it is relevant at all, supports petitioners' position. Respondent concedes, as she must, that many states have amended their laws to protect IRAs from non-bankruptcy creditors to the same extent that they protect other forms of retirement savings. Resp. Br. 34; see also Dilley, *supra*, at 439-46. This trend reflects petitioners' core point: that IRAs are similar to other retirement vehicles, and thus should be treated the same way by Section 522(d)(10)(E).

IV. The Exemption of IRAs Will Not Provide a Windfall to Debtors Because Section 522(d)(10)(E) Only Allows Exemptions to the Extent that They Are "Reasonably Necessary."

Respondent asserts that IRAs should not be analogized to other retirement plans because they could "be used for purposes that have little connection to the holder's retirement." Resp. Br. 22 (quotation marks omitted). This alarmist argument is simply meritless given Section 522(d)(10)(E)'s explicit limitation on eligibility for exemption. Funds in a debtor's IRA are exempt *only* "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).[10]

[10] For example, the court in *In re Burkette* noted eleven factors that courts examine in determining reasonable necessity: "(1) Debtor's present and anticipated living expenses; (2) Debtor's present and anticipated income from all sources; (3) *Age of the debtor* and dependents; (4) Health of the debtor and dependents; (5) Debtor's ability to work and earn a living; (6) Debtor's job skills, training and education; (7) Debtor's other assets, including exempt assets; (8) Liquidity of other assets; (9) Debtor's ability to save for retirement; (10) Special needs of the debtor and dependents; (11)

Thus, if a bankruptcy court concludes that the funds are likely to be used for any other purpose, it will require that those funds be turned over to the trustee for distribution to creditors.

For example, one of the major factors that courts have examined in determining whether funds in an IRA should be exempt is the age of the debtor. Petitioners in this case are at or near the end of their employable years and thus have no realistic ability to re-accumulate their retirement savings. On the other hand, courts have limited or refused an exemption when it has been invoked by younger debtors, who are further from retirement. See Pet. Br. 31-32 (citing examples).

As the Fifth Circuit correctly stated, a "bankruptcy court's authority and obligation to determine the extent to which funds are necessary * * * work as a safeguard to prevent debtors from stashing away assets in fraud of creditors, thereby ensuring that the proverbial shield cannot be used as a sword." *Carmichael*, 100 F.3d at 380. Thus, Section 522(d)(10)(E) is entirely capable of preventing the danger that respondent hypothesizes.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

Debtor's financial obligations, e.g., alimony or support payments." 279 B.R. 388, 394 (Bankr. D.D.C. 2002) (emphasis added).

Respectfully submitted,

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas R. Brixey
Claude R. Jones
JONES LAW OFFICE
P.O. Box 1577
Harrison, AR 72602-1577

G. Eric Brunstad, Jr.
BINGHAM MCCUTCHEN LLP
150 Federal St.
Boston, MA 02110

November 22, 2004[11]

[11] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Eric J. Feigin, David B. Sapp, and Mara Silver. Clinic members Michael P. Abate, Daniel S. Goldman, C. Lee Reeves, and Sean Tonolli also participated.