No. 21-1448

IN THE

Supreme Court of the United States

DUSTIN JADE WELLS,

Petitioner,

v.

KATHLEEN A. MCCALLISTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Trustee does not dispute that "there is a circuit split" (BIO 2) among the First, Fifth, and Ninth Circuits about whether a debtor's homestead exemption vanishes if the debtor sells his homestead during the pendency of bankruptcy proceedings and does not reinvest the proceeds in another homestead. The Trustee also does not dispute that the Ninth Circuit's main contribution to this split—*In re Jacobson*, 676 F.3d 1193 (9th Cir. 2012), which the panel deemed controlling in the decision below, *see* Pet.App.3a–4a—is both much maligned and well entrenched. To the contrary, she concedes that "the *Jacobson* opinion has been questioned by many Courts," and that "[w]hen the Ninth Circuit was provided an opportunity to grant an en banc hearing in [this case] and reverse the precedent in *Jacobson*, the Ninth Circuit denied the request." BIO 18. Only this Court, accordingly, can correct the Ninth Circuit's error and resolve the *Jacobson* split.

The Trustee seeks to sidestep that split by arguing that it only implicates Chapter 7 cases. But the Ninth Circuit found *Jacobson* "control[ling]" in *this* Chapter 13 case. Pet.App.3a. And it suggested no basis for treating Chapter 13 cases and Chapter 7 cases differently. Moreover, the First Circuit has deemed the *Jacobson* rule cases "unpersuasive" in both contexts. *In re Rockwell*, 968 F.3d 12, 23 (1st Cir. 2020) (rejecting *Jacobson*, 676 F.3d 1193 (Chapter 7), and *In re Frost*, 744 F.3d 384 (5th Cir. 2014) (Chapter 13)). And while the Fifth Circuit has distinguished between Chapter 7 and Chapter 13 in applying the *Jacobson* rule, that only underscores the Courts of Appeals' broader "confusion about how [homestead

sale] proceeds . . . work[] in the bankruptcy realm." *In re DeBerry*, 884 F.3d 526, 528 (5th Cir. 2018).

This case is a good vehicle for resolving the *Jacobson* split. This issue is frequently recurring and critically important. And *Jacobson*'s "vanishing exemption" rule—which the Ninth Circuit applies in Chapter 7 and 13 cases alike—is inconsistent with text and precedent, and yields absurd results. Certiorari should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED.

The Trustee does not dispute that the Ninth Circuit's decision in *Jacobson* lies at the center of an acknowledged circuit split. Nor could she. As the Ninth Circuit admits, *Jacobson*'s "vanishing exemption" rule is an "outlier." *In re Anderson*, 988 F.3d 1210, 1214 n.4 (9th Cir. 2021). Only the Fifth Circuit applies a similar rule—and even then, only in Chapter 13 cases. *Compare Frost*, 744 F.3d 384 (applying "vanishing exemption" rule in Chapter 13 context), *with DeBerry*, 884 F.3d 526 (rejecting "vanishing exemption" rule in Chapter 7 context). And the First Circuit has squarely rejected the "vanishing exemption" rule altogether. *Rockwell*, 968 F.3d at 23.

There can be no question, moreover, that the *Jacobson* split is entrenched. Although the Ninth Circuit recognizes that *Jacobson* has "been criticized, questioned, and rejected by many," the court nevertheless continues to insist "that the rule . . . announced in *In re Jacobson* remains good law." Pet.App.4a, 5a. And "[w]hen . . . provided an opportunity to grant an en banc hearing . . . and

reverse the precedent in *Jacobson*, the Ninth Circuit denied the request." BIO 18; *see* Pet.App.65a.

Unable to dispute the existence of the *Jacobson* split, the Trustee tries narrow its scope by insisting that it "has only arisen in Chapter 7 cases." BIO 2, 11–12. But of course *this* is a Chapter 13 case. Nevertheless, the Ninth Circuit's disposition began and ended with *Jacobson*. *See* Pet.App.3a ("[O]ur decision[] in [*Jacobson*] . . . control[s]."). Because the Ninth Circuit based its decision on *Jacobson*, the only question presented here is whether *Jacobson*'s "vanishing exemption" rule is wrong. And that question cuts to the core of the *Jacobson* split.

Moreover, while *Rockwell* (which began as a Chapter 13 petition) arrived to the First Circuit in a Chapter 7 posture, *see* 968 F.3d at 20; Pet. 19, the First Circuit expressly rejected not only *Jacobson* itself, but also the Fifth Circuit's Chapter 13 "vanishing exemption" case, *Frost*. In particular, the First Circuit acknowledged the *Rockwell* trustee's "reli[ance] upon the Fifth Circuit's approach in . . . *Frost*, where a Chapter 13 debtor exempted his homestead pursuant to Texas's vanishing homestead law and then did not reinvest the proceeds within the required time limit." *Rockwell*, 968 F.3d at 23. It then expressly dismissed both *Frost* and *Jacobson* as "unpersuasive." *Id.* And its reasons for doing so apply equally to Chapter 13 and Chapter 7: "Neither of these cases," the First Circuit reasoned, "addresses the Code's valued 'fresh start' principles as articulated in *Harris*[*v. Viegelahn*, 575 U.S. 510 (2015)], or the Supreme Court's admonishments in *Law*[*v. Siegel*, 571 U.S. 415 (2014)], that courts reach the result required by the text of the Bankruptcy Code." *Id.*

Although the First Circuit did not *hold* that the *Jacobson* rule does not apply to Chapter 13 (because it had no occasion to do so), its reasoning was perfectly clear.

In any event, the Trustee herself (like the Ninth and First Circuits) offers no reason why the rule should be different in Chapter 13 cases than it is in Chapter 7 cases. And while the Fifth Circuit does appear to distinguish between the two contexts, it has offered no principled basis for doing so. *See* Pet. 17–19. Instead, it developed an after-the-fact justification for its Chapter 13 decision in *Frost* that was "never mentioned" in *Frost* itself. *Id.* at 19. And that *post hoc* reasoning depends on implausibly characterizing homestead proceeds as newly "acquired" property, even though "they are property a debtor *already had*, albeit now in liquidated form." *Id.* To be sure, this Court will be free at the merits stage to consider whether anything in the text of Chapter 13 affects the analysis. But what matters here is that there is a clear and entrenched circuit split on the question presented. And the decision below—which happened to arise in the Chapter 13 context—tees up that question perfectly.

II. THE ISSUE IS RECURRING AND IMPORTANT.

Facing down an acknowledged circuit split, the Trustee suggests that the question presented arises infrequently and is, in any event, unimportant. *See, e.g.*, BIO 3. She is wrong on both scores.

The frequency with which this issue arises is apparent, first and foremost, from even a cursory review of the U.S. and federal reports. This is the second cert petition raising this issue in just two

years. *See Hull v. Rockwell*, 141 S. Ct. 1372 (2021) (No. 20-499). There are at least five Court of Appeals decisions on point from the past decade: *Wells* (2021), *Rockwell* (2020), *DeBerry* (2018), *Frost* (2014), and *Jacobson* (2012). And bankruptcy courts—most of which reject *Jacobson*'s "vanishing exemption" rule—confront this issue all the time. *See, e.g.*, *In re Montanez*, No. 18bk24734, 2020 WL 1644286, at *6 (Bankr. N.D. Ill. Apr. 1, 2020); *In re Hampton*, 616 B.R. 917, 921, 922 (Bankr. S.D. Fla. 2020); *In re Thomas*, No. 17-43661-MER, 2018 WL 3655654, at *3 (Bankr. D. Minn. July 31, 2018). The question presented is thus at least as recurrent as numerous bankruptcy questions that have merited the Court's review in the past. *See, e.g.*, *Harris*, 575 U.S. at 516 (granting certiorari to resolve 1-1 split); *Law*, 571 U.S. at 420 (same); *Clark v. Rameker*, 573 U.S. 122, 126–27 (2014) (same); *see also Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557 (1990) (granting certiorari "[t]o address a conflict among Bankruptcy Courts").

Nevertheless, the Trustee claims (without citation) that this issue arises only rarely because, "[i]f an individual . . . determine[s] they need to sell their home for a higher and better use . . . , it is typically done before a bankruptcy is filed or after the bankruptcy is completed." BIO 19. But even assuming that the Trustee's assertion is accurate, it is entirely consistent with the proposition that those same individuals "face difficult decisions about whether to sell their homes during the pendency of their bankruptcies." Pet. 2–3. Indeed, if debtors *do* typically sell their homes before their petitions are filed—or else hold off until after their bankruptcies

are completed—the very uncertainty this petition seeks to resolve may very well be to blame. The important point is that debtors *should not have to* sell their homes before filing a bankruptcy petition or else be forced to wait until bankruptcy proceedings have concluded. The fact that many debtors still make the difficult decision to sell their homes during the pendency of bankruptcy notwithstanding the *Jacobson* split only underscores the importance of this issue.

The Trustee also insists that this issue is unimportant because "most bankruptcy cases are Chapter 7s," and "[t]he average duration a no asset Chapter 7 case remains open is around four months." BIO 19. But the *Jacobson* split implicates Chapter 7 and Chapter 13 cases alike. *See* Pet. 15–23; *supra* 2–4. In any event, the very data on which the Trustee relies (drawn from the Epiq Bankruptcy Analytics platform) confirms that more than 100,000 individual-debtor Chapter 13 bankruptcies have been filed so far this year (with nearly 150,000 Chapter 7 bankruptcies filed during the same period). Epiq Bankruptcy Analytics, *Filings: Summary*, https://analytics.aacer2.net/reports (last accessed Sept. 17, 2022). And the average Chapter 13 case takes *almost three years* to resolve. *Id.*

Out of ammo, the Trustee falls back on a recommendation that debtors like Wells just dismiss their bankruptcy cases to avoid forfeiting the proceeds of their homestead sales under *Jacobson*. BIO 3, 20. But that recommendation is unrealistic for the many debtors who choose bankruptcy as a last resort. In any event, the Trustee's recommendation gets bankruptcy law exactly backwards. Bankruptcy is

supposed to allow "overburdened debtors . . . to gain discharge of their financial obligations, and thereby a 'fresh start.'" *Harris*, 575 U.S. at 513. Congress's goal, in other words, was to give debtors a meaningful path to redemption, not scare them away from it with threats of forfeiture. The Trustee's effective acknowledgment that *Jacobson* forces debtors to choose between obtaining a bankruptcy discharge and keeping the sale proceeds of their *exempt* homesteads only confirms the need for this Court's intervention.

III. THE NINTH CIRCUIT'S RULE IS WRONG.

Finally, the Trustee's merits arguments—to which she devotes most of her opposition brief—do little to prop up *Jacobson*'s much-criticized rule.

For starters, the Trustee all but ignores the statutory text. Wells' petition demonstrated, in considerable detail, that *Jacobson*'s "vanishing exemption" rule is directly at odds with multiple provisions of the Bankruptcy Code. *See* Pet. 27–30. The Trustee apparently has no answer to Wells' textual arguments. And that should be all—or at least most—of the ballgame. *See, e.g.*, *See Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) ("[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (citation omitted)). Moreover, the fact that the Trustee identifies nothing the text of Chapter 7 or Chapter 13 that bears on the answer to the question presented confirms that the distinction on which she so heavily relies is, in fact, without a difference.

The Trustee also seems to have nothing to say about the inexplicable and "perverse result[s]" of the

Jacobson rule, which even the Ninth Circuit frankly acknowledged. Pet.App.7a ("Applying *In re Jacobson*'s rule in a case like this one leads to arguably peculiar results. . . . We see no justification in federal law, state law, or logic for that result."); *see also* Pet. 31–33 (laying out the absurd consequences of the *Jacobson* rule). Instead, she tries to build absurdity arguments of her own, claiming that a world without *Jacobson* would be "an arena for abuse." BIO 21. In particular, the Trustee appears to worry about "the many debtors who do not make good sound financial decisions," *id.*—and indeed, absent *Jacobson*, could "burn [their sale proceeds] in the street if [they] like[]," *id.* at 22. Respectfully, Wells very much doubts that any debtor would sell his *homestead* only to "burn" the proceeds. Indeed—and as the Trustee here well knows—Wells himself planned to use the proceeds of his homestead sale (with the bankruptcy court's approval) to pay his largest creditor. And in all events, the point is that the Bankruptcy Code leaves it to the debtor to decide.

The Trustee's remaining arguments are both confused and incorrect.

First, she accuses Wells of "mischaracteriz[ing]" this Court's decision in *Law*. BIO 12. But she never explains the nature of the supposed mischaracterization. And as the First Circuit recognized in *Rockwell*, *Jacobson*'s "vanishing exemption" runs afoul of the "the Supreme Court's admonishments in *Law*[] . . . that courts reach the result required by the text of the Bankruptcy Code." *Rockwell*, 968 F.3d at 23; *see also* Pet. 21–22.

Second, the Trustee argues that *Jacobson* is actually consistent with this Court's holding in *White v. Stump*, 266 U.S. 310, 313 (1924), that "the date when a bankruptcy petition is filed" is the "point of time" at which "the status and rights of the bankrupt . . . are fixed." BIO 13–14. As the Trustee tells it, *Jacobson* simply holds that "the *entire* state law applicable on the filing date"—both the homestead exemption and the proceeds provision—are fixed at that point in time, regardless whether there are any actual proceeds to speak of. *Id.* at 15–16. But as Wells' petition explains (and the Trustee simply ignores), the Code's exemption provision, 11 U.S.C. § 522(b)(3)(A), refers to "State or local law that is applicable on the date of the filing of the petition." Pet. 29. And a proceeds provision "is not 'applicable on the date of the filing' where the debtor has not yet sold his homestead." *Id.*

Indeed, the *Jacobson* rule effectively guts *White*'s "time of filing" principle (sometimes called the "snapshot" rule)—even outside the homestead context—because almost every exemption is conditional in some sense. *See In re Konnoff*, 356 B.R. 201, 209 (B.A.P. 9th Cir. 2006) (Pappas, Bankr. J., concurring) ("All sorts of state law exemptions are subject to all sorts of conditions which must be satisfied based upon the facts as they exist when the exemption is claimed, not later."). For example, "tools used in a debtor's trade or profession are [often] exempt." *Id.* (citing Arizona law). And the logical implication of *Jacobson* is that, if a debtor changes occupations after filing for bankruptcy, he loses the tool exemption and the trustee may "seize the formerly exempt tools for liquidation[.]" *Id.* Whereas

that result (dictated by *Jacobson*) is plainly irreconcilable with *White*, the First Circuit's rule gives the "snapshot" rule full effect. *Rockwell*, 968 F.3d at 18.

Third, the Trustee argues (BIO 14–15) that the *Jacobson* rule is consistent with this Court's decision in *Myers v. Matley*, 318 U.S. 622 (1943). In *Myers*, a debtor who owned and "was residing [at her home] when the petition in bankruptcy was filed" was permitted to claim a homestead exemption even though she had not yet filed a "homestead declaration" required by Nevada law. *Id.* at 623–24. Despite the Trustee's attempts to glean support from that holding, it, too, only further undermines *Jacobson*. As the *Myers* Court emphasized, "the right to make and record the necessary declaration of homestead existed in the [debtor] at the date of filing the petition." *Id.* at 628. Here, by contrast, the only "present right of exemption" (*id.* at 626) Wells enjoyed on the date of filing was the exemption in his homestead. No proceeds existed, so the proceeds provision could not "present[ly]" apply. *Id.* at 627. Accordingly, the *Jacobson* rule runs headlong into *Myers*' statement that "the bankrupt's right to a homestead exemption becomes fixed . . . and cannot thereafter be enlarged or altered by anything the bankrupt may do." *Id.* at 628.

Finally, although the Trustee acknowledges Judge Pappas's sharp criticism of the "vanishing exemption" rule in *Konnoff*, she complains that Wells "fails to tell this Court" about an unpublished (and heretofore uncited) order from 11 years earlier in which Judge Pappas appeared to apply that rule in a Chapter 13 case. BIO 16–17 (citing *In re Mulliken*,

No. 92-3939, 1995 WL 70335 (Bankr. D. Idaho Feb. 8, 1995)). But out of "respect [for] binding precedent," Judge Pappas applied that rule in *Konnoff*, too. 356 B.R. at 208 (Pappas, J., concurring). He simply wrote separately there to explain his belief that "*Golden*'s premise—that state law restrictions on exemptions that arise from facts occurring after the filing of a bankruptcy case are effective—deserve[d] reconsideration." *Id.* That opinion makes Judge Pappas' view on the "vanishing exemption" rule—which admits of no distinction between Chapter 7 and Chapter 13—loud and clear. *Id.* ("[E]xemption rights should be determined, finally, based upon the facts existing on the date the bankruptcy petition is filed."). And Judge Pappas is far from that rule's only critic. *See, e.g.*, Pet.App.5a (acknowledging that the *Jacobson* rule has been "criticized, questioned, and rejected by many"); Pet. 13 (citing cases, articles, and treatises).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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