

No. 06-20879

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In the Matter of: TERESA LAUDERDALE,

Debtor,

TERESA LAUDERDALE,

Appellant,

v.

IMOGEN S. PAPADOPOULOS,

Appellee.

On Appeal from the United States District Court for
the Southern District of Texas, No. 4:06-CV-2284

REPLY BRIEF OF THE APPELLANT

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INTRODUCTION

Papadopoulos does not dispute that the traditional, common-law definition of child “support” excludes a custodial parent’s debt to a guardian *ad litem*. Instead, she contends that when Congress exempted debts “for alimony to, maintenance for, or support of” the debtor’s “spouse or child” from discharge in bankruptcy (11 U.S.C. § 523(a)(5) (2004)), Congress used the word “support” in a lay rather than the legal sense.

There are many reasons why Papadopoulos’s reading of Section 523(a)(5) of the Bankruptcy Code is mistaken. For starters, she overlooks the long-standing rule that when Congress uses a legal term of art—such as “support”—Congress intends that technical, legal meaning. She also ignores the fact that the Supreme Court long ago held that Congress was referring to the common-law obligation of “support” when it enacted the bankruptcy code provision that became Section 523(a)(5). *See Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). And she fails to consider that exempting the debt from discharge would force Lauderdale to turn over twenty months’ worth of child-support checks to Papadopoulos—which would harm the very children whom Section 523(a)(5) was intended to protect.

Because Papadopoulos cannot defend the lower courts’ interpretation of Section 523(a)(5) on the merits, she insists that this Court is foreclosed from revisiting it by two prior decisions. But the first case—*Dvorak v. Carlson (In re*

Dvorak), 986 F.2d 940 (5th Cir. 1993)—involved a debtor who was a *noncustodial* parent; the Court did not consider whether a *custodial* parent’s debt to a guardian *ad litem* constitutes child “support.” And the second case—*Rogers v. Morin (In re Rogers)*, 189 F. App’x 299 (5th Cir. 2006) (per curiam)—is non-precedential and did not consider the arguments raised here. Accordingly, neither is an obstacle to correcting the error below.

ARGUMENT

I. The District Court’s Interpretation Of “Support” Is Irreconcilable With The Plain Meaning of Section 523(a)(5).

As explained in the opening brief (at 15–19), the settled legal meaning of the term “support” at common law excludes a custodial parent’s debts to providers of goods and services to her children. Because she is the custodial parent, Lauderdale’s debt to Papadopoulos therefore is not child “support” exempted from discharge by Section 523(a)(5).

Papadopoulos does not disagree that the debt in this case falls outside the traditional definition of child “support.”¹ Instead, she contends—like the district

¹ Papadopoulos suggests that one case provides a “[m]odern conception of the rule” that differs from the common-law rule. Br. of Papadopoulos at 21 n.2 (citing *Brennan, Fabriani & Novenster v. Akamine (In re Akamine)*, 217 B.R. 104, 108 (S.D.N.Y. 1998)). She is mistaken. To be sure, that court noted that a debt for “legal fees incurred in child custody and support litigation” could constitute “support” under New York law of the “former spouse” who incurred them. *Akamine*, 217 B.R. at 108. But the court concluded that it “need not decide”

court assumed—that Congress used the term “support” in an “ordinary” sense that covers the debt at issue. Br. of Papadopoulos at 18–20. And she asserts that Lauderdale is estopped from arguing the point by a concession in the opening brief. *Id.* at 22–24. Neither of her contentions has merit.

A. Congress Used The Term “Support” In Section 523(a)(5) In Its Technical Legal Sense, Which Excludes A Custodial Parent’s Debt To A Guardian *Ad Litem*.

Papadopoulos’s assertion that Congress used the word “support” in Section 523(a)(5) in a lay rather than a legal sense is mistaken for at least six reasons.

1. To begin with, Papadopoulos’s denial that Congress was using the word “support” as a legal term of art runs headlong into the canon of statutory interpretation that “[w]here 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.” *Field v. Mans*, 516 U.S. 59, 69 (1995) (alterations in original; internal quotation marks omitted).

whether a custodial parent’s legal fees from a custody hearing could be deemed to be “support” of the child. *Id.* And the cases that court cited for the contours of the duty of support all involved noncustodial parents or the obligation to pay the attorneys’ fees of an ex-spouse awarded alimony. See *Dravecko v. Richard*, 196 N.E. 17, 18 (N.Y. 1935); *Kern v. Kern (In re Kern)*, 319 N.Y.S.2d 178, 191 (N.Y. Fam. Ct. 1970); *Essner v. Homyak (In re Homyak)*, 40 B.R. 99, 103 (Bankr. S.D.N.Y. 1984).

That interpretive rule is controlling here. To our knowledge, no court has ever doubted that this rule applies to Section 523(a)(5). *See, e.g., Pauley v. Spong (In re Spong)*, 661 F.2d 6, 9 (2d Cir. 1981) (“Congress could not have intended that federal courts were to formulate the bankruptcy law of alimony and support in a vacuum, precluded from all reference to the reasoning of the well-established law of the States.”). And Papadopoulos points to nothing in the statute that “dictates” that Congress did not “mean[] to incorporate the established meaning” (*Field*, 516 U.S. at 69 (internal quotation marks omitted)) of the term “support.”

2. In fact, the plain language of Section 523(a)(5) confirms that Congress was using “support” in a legal rather than a colloquial sense. Congress grouped “support” with “alimony” and “maintenance,” which are legal terms of art. 11 U.S.C. § 523(a)(5) (2004). “Support” therefore also should be taken in its legal sense. “The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning.” *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (internal quotations marks omitted).

Moreover, other parts of Section 523(a)(5) make clear that Congress intended the legal meaning of “support.” In particular, subsection 523(a)(5)(B) provides that “a liability designated as alimony, maintenance, or support” may be discharged “unless such liability is actually in the nature of alimony, maintenance, or support.” 11 U.S.C. § 523(a)(5)(B) (2004). A “liability” would be designated

as “support” only in the legal sense of the word. And Congress would not instruct courts to scrutinize debts to make sure that they are “actually in the nature of * * * support” if “support” were not intended to have a precise legal definition.²

3. In addition, as we explained, the history of Section 523(a)(5) confirms that Congress was using the term “support” in the common-law sense. Section 523(a)(5) stems from a 1903 statute codifying several decisions that recognized implicit exceptions for debts for familial-support obligations imposed by common law from discharge in bankruptcy. Opening Br. at 19–20. Numerous courts and treatise writers have concluded that Congress intended to incorporate the limitations on those common-law obligations—including the very limitation at issue here. *Id.* at 21–24.

² Papadopoulos asserts that we failed to specify which term in Section 523(a)(5)—“alimony, maintenance, or support”—incorporates the limitations of the common-law doctrine of necessities that exclude the debt at issue here. Br. of Papadopoulos at 20–21. According to the decisions applying the act that became Section 523(a)(5), those limitations are incorporated by the terms “maintenance” and “support.” *See, e.g., In re Ostrander*, 139 F. 592, 592 (E.D.N.Y. 1905); *Wintrode v. Connors*, 35 N.E.2d 1018, 1019 (Ohio Ct. App. 1941); *Schellenberg v. Mullaney*, 98 N.Y.S. 432, 432 (App. Div. 1906). “[A]limony” is “[t]he general obligation to support” one’s spouse “made specific by the decree of the court of appropriate jurisdiction” to pay money “as the circumstances of the parties may require.” *Audubon v. Shufeldt*, 181 U.S. 575, 577 (1901). In any event, “Congress, needless to say, is permitted to use synonyms in a statute.” *Tyler v. Cain*, 533 U.S. 656, 664 (2001). Because Section 523(a)(5) is intended to cover domestic-support obligations awarded by all fifty states, Congress understandably used overlapping legal terms in order to ensure complete coverage.

Papadopoulos suggests that this history is contradicted by the “clear text” of Section 523(a)(5). Br. of Papadopoulos at 21 (internal quotation marks omitted). But she does not explain how. And she does not explain why this Court can disregard the Supreme Court’s decision embracing this history in construing the 1903 precursor to Section 523(a)(5) to incorporate the common law. *See Wetmore*, 196 U.S. at 77.

Papadopoulos alternatively contends that by looking to this history, Lauderdale is improperly using the views of a “subsequent Congress” to “infer[] the intent of an earlier one.” Br. of Papadopoulos at 22 (internal quotation marks omitted). She has it backwards. Lauderdale is using the views of the Congress that enacted the 1903 Act to explain its meaning, and then showing that none of the later Congresses that amended that Act until it became Section 523(a)(5) altered that meaning. Opening Br. at 20–21. There is nothing wrong with that mode of analysis. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:3 (7th ed. Supp. 2011) (“The legal history of a statute, including prior statutes on the same subject, is a valuable guide to determine what object an act is supposed to achieve.”) (footnotes omitted).

4. Another reason for rejecting Papadopoulos’s definition of “support” is that it would effectively read that word out of the statute, as all goods and services provided to a debtor’s dependents can be said to “benefit” them. Opening Br. at

11. And it would also make the separate discharge exception in Section 523(a)(15)—covering certain debts arising out of divorce and custody proceedings that are not for “support”—unnecessary.³ *Id.* at 12.

Papadopoulos does not dispute the exceptionally broad sweep of “support” under her and the lower courts’ view. She merely points out that it is not so all-encompassing as to be completely devoid of meaning. In some “rare” situations—such as sports bets and debts to third parties that get assigned to the child—the debt would not be for a benefit to the child and thus not for “support.” Br. of Papadopoulos at 19. The fact that Papadopoulos has to resort to off-the-wall hypotheticals to identify how the word “support” would not be completely superfluous does not commend her reading of the statute.⁴

At the very least, her expansive definition of “support” would make the terms “alimony” and “maintenance” in Section 523(a)(5) extraneous. All alimony

³ Section 523(a)(15) exempts from discharge all divorce-related debts to the debtor’s dependents that are “not of the kind described in [Section 523(a)(5)],” unless either (i) paying the debt would require using income or assets “reasonably necessary” to support the debtor or his or her dependents, or (ii) the benefits of discharging the debt to the debtor “outweigh[] the detrimental consequences” to the party owed the debt. 11 U.S.C. § 523(a)(15) (2004).

⁴ Papadopoulos also suggests that Section 523(a)(15) would not be a nullity, because “spouses and former spouses often owe each other all kinds of debts that are not for each other’s support.” Br. of Papadopoulos at 19–20. But under her reading of “support,” precious few debts would not already be discharged under Section 523(a)(5).

and maintenance for a spouse would necessarily benefit that spouse and hence “support” him or her, in Papadopoulos’s and the lower courts’ view.

5. Yet another reason for rejecting Papadopoulos’s “ordinary” definition of the term “support” is that it is unsupported. Papadopoulos identifies no authority outside the bankruptcy context deeming a custodial parent’s debt to a guardian *ad litem* to be child support. She does note that Texas law requires guardians *ad litem* to advance “the best interests of the child.” TEX. FAM. CODE § 107.002(a). But she fails to mention that Texas law—as well as the law of every other state—does *not* accord a custodial parent’s obligation to pay the fees of a guardian *ad litem* the status of child “support.” See *Ex parte Hightower*, 877 S.W.2d 17, 21 (Tex. Ct. App.—Dallas 1994, orig. proceeding); see also Opening Br. at 17–18. And no federal statute regulating child-support obligations does either. Opening Br. at 25–27. Moreover, in common parlance, child support is money the custodial parent *receives* to pay for the child’s expenses—not money a custodial parent *owes* to third parties.

6. Finally, even if there were any doubt as to the meaning of “support” in Section 523(a)(5), that doubt should be resolved in Lauderdale’s favor. Exceptions to discharge are “strictly construed against the creditor” and “in favor of [the] debtor so that the debtor may be afforded a fresh start.” *Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997). Unless the term

“support” were given its settled legal meaning, parents could never obtain a “fresh start” in bankruptcy. Virtually all household expenses can be said to benefit the child and thus would qualify as “support” under Papadopoulos’s expansive definition.

Papadopolous asserts that this interpretive rule is canceled out by the principle that “[u]nless positively required by direct enactment the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the” parent to “maintain and educate his * * * children.” *Jones v. Jones (In re Jones)*, 9 F.3d 878, 880–81 (10th Cir. 1993) (quoting *Wetmore*, 196 U.S. at 77) (cited by Br. of Papadopoulos at 17 n.1). But Papadopoulos has it backwards. Were this Court to adopt her interpretation of Section 523(a)(5), Lauderdale’s ability to support her children financially would be devastated. *See* Opening Br. at 30–31. It is not the discharge but the *failure* to discharge the debt that would undercut Lauderdale’s “obligation” to “maintain and educate” her “children.” *Jones*, 9 F.3d at 880–81 (quoting *Wetmore*, 196 U.S. at 77).

* * * * *

In sum, Papadopoulos’s assertion that Congress did not use the word “support” in Section 523(a)(5) in its established legal sense—which excludes a

custodial parent's debt to a guardian *ad litem*—cannot be squared with the text, history, or purpose of the statute.

B. Lauderdale Has Not Conceded That Section 523(a)(5) Must Be Construed To Deem This Debt To Be “Support.”

Papadopoulos asserts that Lauderdale is estopped from denying that the debt at issue is “support” by the concession in the opening brief that this Court’s decision in *Hudson* is binding on this panel. Br. of Papadopoulos at 22–24. Papadopoulos again is wrong.

Lauderdale had argued below that Section 523(a)(5) did not exempt her debt to Papadopoulos for the independent reason that the debt was not “to” Lauderdale’s children, as Section 523(a)(5) requires. RE 10, 23. That argument is foreclosed by *Hudson*, 107 F.3d at 356. Accordingly, in the opening brief, Lauderdale merely preserved the point for further review. Opening Br. at 5 n.3.

Papadopoulos now seeks to re-write this concession about whether the debt at issue is “to” a “child of the debtor” (which Lauderdale *did* make) into a very different concession that the identity of the “payee” of a debt is wholly irrelevant to whether the debt constitutes “support” (which Lauderdale most certainly did *not* make). Br. of Papadopoulos at 22–24. The opening brief speaks for itself.

Moreover, Papadopoulos misunderstands our interpretation of “support” as turning entirely on whether the payee is a third party. To the contrary, when the debtor is a noncustodial parent, debts to third parties for necessities qualify as

support. *See* Opening Br. at 21–24 (citing cases and treatises). When the debtor is the custodial parent, they do not. *See id.* at 16, 22–24 (same). Thus, whether a debt constitutes “support” turns on the custodial status of the payor, what the debt is for, and the identity of the payee.

In any event, Papadopoulos does not contend that *Hudson* itself is dispositive of this appeal. Lauderdale’s acknowledgment that this panel is bound by *Hudson* therefore cannot be dispositive of this appeal either.

In sum, Papadopoulos’s assertion that Lauderdale’s arguments are foreclosed by her concession about *Hudson* is baseless.

II. This Court Has Yet To Decide Whether A Custodial Parent’s Debt For Part Of A Guardian *Ad Litem*’s Fee Constitutes “Support” Under Section 523(a)(5).

Because Papadopoulos cannot defend the merits of the lower courts’ interpretation of Section 523(a)(5), she insists that this Court is compelled to affirm the ruling below by this Court’s decisions in *Dvorak* and *Rogers*. Br. of Papadopoulos at 12–16. She is mistaken on both counts.

A. The *Dvorak* Court Construed “Support” In Section 523(a)(5) In The Context Of A Debtor Who Is A Noncustodial Parent.

Papadopoulos points out that in *Dvorak*, this Court stated that a debt for “fees charged by” a guardian *ad litem* constitutes “support” under Section 523(a)(5) because they “were incurred during a court hearing that was for [the child’s] benefit and support.” 986 F.2d at 941 (cited by Br. of Papadopoulos at

12). This “essential reasoning” of the decision, in Papadopoulos’s view, adopts a “*debt-focused* test that makes the pay[or]’s identity legally irrelevant.” Br. of Papadopoulos at 13–14. But the debtor in *Dvorak* was a *noncustodial* parent. 986 F.2d at 941. Accordingly, as we have explained, deeming his debt to constitute “support” makes perfect sense: The common law would require a noncustodial parent to pay those fees as part of his duty to support his child, and exempting that debt from discharge would protect the custodial parent from having to pay it herself. *See* Opening Br. at 15–17, 29–30.

By contrast, when (as here) the debtor is the *custodial* parent, exempting the debt from discharge under Section 523(a)(5) makes no sense. As we have explained, neither state nor federal law treats a custodial parent’s obligation to pay guardian *ad litem* fees as child support. *Id.* at 15–19, 25–27. And exempting the debt from discharge would require Lauderdale to turn over the child-support payments she received to Papadopoulos, thus impoverishing the very children whom Section 523(a)(5) was intended to help. *Id.* at 30–31.

Because the debtor in *Dvorak* was a noncustodial parent, the Court did not consider whether a custodial parent’s debt for guardian *ad litem* fees also constitutes “support” under Section 523(a)(5). Papadopoulos is simply quoting broad language out of the context in which it was used in *Dvorak* and trying to elevate it into a holding on an issue that was not before the Court. This Court has

repeatedly rebuffed other litigants’ attempts to pass off out-of-context statements from prior decisions as holdings on issues that were in fact not decided. *See, e.g., United States v. Darrington*, 351 F.3d 632, 635 & n.4 (5th Cir. 2003) (prior reference to right as “fundamental” not a holding that “any governmental restrictions on this right must meet a constitutional strict scrutiny test”); *Holden v. Connex-Metalna Mgmt. Consulting GmbH*, 302 F.3d 358, 365 n.9 (5th Cir. 2002) (prior statement “that *Fasullo* is ‘no longer good law’” in context “refer[ed] only to” one of “*Fasullo*’s separate holding[s]”); *Nichols v. Lewis Grocer*, 138 F.3d 563, 567 (5th Cir. 1998) (“Nichols reads our holding in *Burns* out of context.”). Papadopoulos’s gambit is no different.

B. *Rogers* Is Non-Precedential And Did Not Consider The Arguments Raised Here.

Papadopoulos’s reliance on *Rogers* (at 14–16) is equally misplaced.⁵

In *Rogers*, a custodial parent had falsely accused her ex-husband of child molestation and was ordered to pay the fees of her ex-husband’s attorneys and the guardian *ad litem* because of the ex-husband’s “successful defense of the sexual abuse claim and establishment of reasonable visitation rights.” *Rogers*, 189 F.

⁵ Papadopoulos claims that we overlooked *Rogers* in our opening brief. Br. of Papadopoulos at 14. In fact, we addressed it in footnote 9 on page 33.

App'x at 300. This Court affirmed the determination that the debt was nondischargeable “support” under Section 523(a)(5). *Id.* at 304.

Rogers does not bind this Court. To begin with, that decision is an unpublished per curiam decision and expressly “non-precedential.” *Rogers*, 189 F. App'x at 300 n.*; *see also* 5TH CIR. R. 47.5.

Moreover, the debtor in *Rogers* did not argue—as Lauderdale does here—that a custodial parent’s debt to a guardian *ad litem* is not child support under either the traditional common-law or the modern definitions of that term and hence is not “support” under Section 523(a)(5). Rather, the decision reflects that the debtor merely “contend[ed] that the bankruptcy court and district court erred in determining that the debt was in the nature of support because those courts did not employ the factors set out in *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 279 (5th Cir. 1994).” *Rogers*, 189 F. App'x at 301. In *Dennis*, this Court had suggested that bankruptcy courts deciding “whether a divorce obligation constitutes alimony, maintenance, or support” should look to whether the divorce court considered such “factors” as “the parties’ disparity in earning capacity, their relative business opportunities, their physical condition,” and so forth in imposing the obligation. 25 F.3d at 279. The *Rogers* court concluded that those factors were obviously irrelevant when “support of a child” is at issue. 189 F. App'x at 301. The debtor in *Rogers* thus gave this Court no reason to doubt that *Dvorak* was

controlling. That failure of advocacy resulting in an unpublished decision is of little guidance here.

Papadopoulos notes that in arguing for a discharge, the debtor in *Rogers* also “‘identifie[d] as an unusual circumstance the fact that she was awarded custody.’” Br. of Papadopoulos at 16 (quoting *Rogers*, 189 F. App’x at 303). The debtor was referring to *Lowther v. Lowther (In re Lowther)*, 321 F.3d 946 (10th Cir. 2002), in which the Tenth Circuit held that a custodial parent’s debt to a guardian *ad litem* may be discharged under Section 523(a)(5) if failing to do so “‘would clearly affect [the custodial parent’s] ability to financially support the child.’” *Id.* at 949.

To the extent that Papadopoulos suggests that this Court rejected *Lowther* in *Rogers*, she is mistaken. In fact, this Court stated that “‘we decline to decide whether to endorse or reject the Tenth Circuit’s rationale.’” *Rogers*, 189 F. App’x at 304. The Court explained that it did not need to reach the issue because the debtor had “‘failed to identify facts to support her special circumstances argument.’” *Id.*

By contrast, the record here clearly shows “‘specific facts of actual hardship’” to Lauderdale’s children if her debt to Papadopoulos were not discharged. For instance, Lauderdale’s annual take-home income when she filed for bankruptcy was minimal; she earned less than \$10,000 a year, and she received only an

additional \$1,500 a month in child-support payments. *See* Chapter 7 Bankruptcy Petition at 19, *In re Lauderdale*, No. 05-92128 (Bankr. S.D. Tex. Oct. 14, 2005).

On the other side of the ledger, her expenses are great. Lauderdale's debt to Papadopoulos is \$12,529.44. RE 22. Because it has been accruing 10 percent interest since August 2002 (*id.* at 25–26), that amount has grown to over \$29,500.⁶ And Lauderdale's divorce decree requires her to pay \$750 per month for the cost of an armed guard if her ex-husband were to exercise his visitation rights. Even if Lauderdale had no expenses and were to surrender all of her child-support payments to Papadopoulos, it would take her twenty months to pay this debt. Thus, Lauderdale has "identif[ied] facts to support her special circumstances argument." *Rogers*, 189 F. App'x at 304.

CONCLUSION

The order of the district court should be reversed and remanded with instructions that Lauderdale's debt to Papadopoulos be discharged.

⁶ The formula for annually compounding interest is $A=P(1 + r)^n$, where P is the principal, r is interest rate, and n is the number of years. The product of \$12,529.44 and the sum of 1 plus .1 to the ninth power is \$29,543.76.

Respectfully submitted,

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NOVEMBER 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2011, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. That system caused all registered users to be served. I also emailed the brief in PDF format to counsel for all parties required to be served at the following addresses:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B)(i), and Fifth Circuit Rule 32.2, because—according to the word-count facility in Microsoft Word—the brief contains 3,946 words.

2. This brief complies with the typeface requirements of FED. R. APP. P.32(a)(6) because the brief has been prepared using Microsoft Word in a proportionally spaced typeface in Times New Roman with 14 point typeface.

s/ Kevin Ranlett
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