No. 12-5196

In The

# Supreme Court of the United States

STEPHEN LAW, PETITIONER,

*v.*

ALFRED SIEGEL, TRUSTEE.

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

## BRIEF FOR BANKRUPTCY LAW SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONER


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## BRIEF FOR BANKRUPTCY LAW SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONER

The bankruptcy law scholars listed below respectfully submit this brief as amici curiae in support of petitioner.[1]

## INTEREST OF AMICI CURIAE

Amici curiae are all professors and scholars of bankruptcy law from law schools throughout the Nation. Amici are not affiliated with any parties in this case. Rather, amici's interest is in the development of bankruptcy law and the sound administration of the bankruptcy system.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 105 of the Bankruptcy Code is a general grant of equitable power, permitting bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). But by its express terms, Section 105 is not a font of unlimited power to do whatever the bankruptcy court deems fair and equitable. Rather, its grant is limited to the power "to carry out" other provisions of the Bankruptcy Code.

Those other provisions specifically address the issue here—whether and when a debtor's exempt property may be surcharged because of the debtor's misconduct. In Section 522 of the Bankruptcy Code, Congress enacted a carefully drawn scheme in which it laid out in arduous detail exactly which property a debtor may claim as exempt, precisely what limitations may be imposed on those exemptions, and even what exceptions may be made to those limitations. None of Section 522's provisions indicates that exempt property may be limited through a surcharge.

To the contrary, Section 522(c) provides categorically that exempt property cannot be used to satisfy creditors' claims against the debtor. 11 U.S.C. § 522(c). And Section 522(k) provides that exempt property "is not liable for payment of any administrative expense." *Id.* § 522(k). Congress created certain narrow exceptions to the absolute prohibition on the

use of exempt property, none of which is implicated here.

Congress also enacted specific statutory provisions concerning the penalties and remedies that may be imposed for debtor misconduct. For example, fraudulently shielding property from the estate gives rise to denial of a discharge of the debtor's debts and may expose the debtor to criminal penalties. None of the specific punitive or remedial statutes enacted by Congress provides for a surcharge of the debtor's exempt property.

This Court repeatedly has held that specific statutory provisions govern general ones. Congress already turned its attention to the issues at hand and made specific policy choices. Section 105's general grant of equitable authority should not be read to allow circumvention of those specific provisions.

Rather, Section 105 is correctly understood as a method for enforcing substantive rights found in other provisions of the Bankruptcy Code. For example, the Bankruptcy Code requires debtors and nondebtors alike to turn over estate property to the trustee upon the commencement of the bankruptcy case. Section 105 authorizes the issuance of an injunctive order compelling compliance with the turnover provisions.

The key takeaway of this and other proper uses of the bankruptcy court's equitable powers is that they further, rather than contravene, other Code provisions. That is not true of a surcharge of the debtor's

exempt property. The Bankruptcy Code places exempt property off limits, with only particular exceptions, but a surcharge allows exempt property to be reached even where those exceptions do not apply. Whether such a surcharge should be allowed to punish or compensate for debtor misconduct should be left to Congress, not to case-by-case assessments by individual bankruptcy courts under Section 105.

## ARGUMENT

### A. Section 105 Cannot Be Used To Circumvent The Code Provisions Specifically Addressing Exemptions And Debtor Misconduct

#### *1. The power granted under Section 105 is limited expressly to carrying out other provisions of the Bankruptcy Code*

As this Court has cautioned, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). The starting point for interpreting Section 105 therefore is with the language of the statute itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

While Section 105(a) grants bankruptcy courts equitable authority, that grant of power expressly is limited. 11 U.S.C. § 105(a). By its terms, Section 105(a) grants bankruptcy courts the authority to "issue any order, process, or judgment that is *necessary or appropriate to carry out the provisions of this title*," i.e., the Bankruptcy Code. *Ibid.* (emphasis added).

That express limitation tethers the scope of Section 105's equitable authority to other provisions of the Bankruptcy Code.

Thus, by its plain terms, "section 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand." *Jamo v. Katahdin Fed. Credit Union* (*In re Jamo*), 283 F.3d 392, 403 (1st Cir. 2002). Instead, "[t]he authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code." *Ibid.* Put another way, Section 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (footnote omitted).

Moreover, given its express tether to the rest of the Code, Section 105 cannot be read in isolation. It must be construed in light of "the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Indeed, that would be true even in the absence of such an express limitation. As this Court has observed in the context of the Bankruptcy Code, "[s]tatutory construction * * * is a holistic endeavor." *Ibid.*

As explained below, other provisions of the Code reflect Congress's creation of a specific, comprehensive scheme that would be undermined were Section

105(a) construed to grant bankruptcy courts authority to create their own ad hoc limitations on exempt property.

### *2. Congress comprehensively detailed when exemptions may be limited in Section 522*

a. In Section 522 of the Bankruptcy Code, Congress established a carefully structured scheme concerning the exemptions a debtor may claim and the specific limitations that may be placed on those exemptions. 11 U.S.C. § 522. These enumerated limitations do not include a surcharge for misappropriation (or, as in this case, attempted misappropriation) of non-exempt property of the estate.

Section 522 sets forth specific provisions governing which property may be claimed as exempt. *Id.* § 522(b)-(j). In particular, property is exempt under Section 522(b)(3) to the extent it is exempt under state or federal nonbankruptcy law. *Id.* § 522(b)(1), (3). Alternatively, in States that have not opted out of the federal exemptions, the debtor may choose to apply the federal exemption scheme. *Id.* § 522(b)(1)-(2), (d). For example, the federal exemption allows the debtor to exempt, inter alia, up to $22,975 for the debtor's homestead and up to $3,675 for a motor vehicle. *Id.* § 522(d)(1), (2).

Through a multitude of particular, carefully chosen provisions, Congress also specified the exact circumstances in which the exemptions may be limited. 11 U.S.C. § 522(g)(1)(B), (n)-(q). Many of these provisions deal with extremely specific and varying

instances of debtor misconduct, and they detail precisely how the exemption may be limited for each type of misconduct.

For example, Congress specifically addressed when and to what extent a bankruptcy court can limit the homestead exemption, the exemption at issue here. Section 522 imposes a $155,675 cap on the amount of the homestead exemption if "the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title." *Id.* § 522(q)(1)(A). The $155,675 cap also applies if "the debtor owes a debt arising from" (1) "any violation" of federal or state securities laws, (2) "fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security," (3) "any civil remedy under section 1964 of title 18," which pertains to the Racketeer Influenced and Corrupt Organizations Act, or (4) "any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years." *Id.* § 522(q)(1)(B).

But the Code does not just set forth these limitations on the homestead exemption. It also specifies a circumstance in which these limitations do not apply: the cap "shall not apply to the extent the amount of an interest" in a homestead "is reasonably necessary for the support of the debtor and any dependent of the debtor." *Id.* § 522(q)(2). Thus, even if a debtor has been convicted of a felony under circumstances

that "demonstrate[ ] that the filing of the case was an abuse of the provisions" of the Bankruptcy Code, *id.* § 522(q)(1)(A), the debtor can claim his entire homestead exemption to the extent "reasonably necessary for the support" of himself or any dependent, *id.* § 522(q)(2).

b. These detailed provisions strongly suggest that Congress did not give bankruptcy courts authority to substitute their own conception of equity for Congress's specific policy choices. If Section 105(a) were read to allow bankruptcy courts to create exceptions beyond the express provisions of Section 522, that would not be "carry[ing] out" the provisions of the Code. 11 U.S.C. § 105(a). It would be contravening them.

Indeed, that occurred here. The bankruptcy court permitted the trustee to surcharge exempt property to recover administrative expenses the trustee incurred because the debtor attempted to misappropriate non-exempt assets. Pet. App. 7, 13. But Section 522(k) already speaks to that situation. It provides that, except in two specific instances, "[p]roperty that the debtor exempts under this section is *not* liable for payment of any administrative expense." 11 U.S.C. § 522(k) (emphasis added).

Section 522 likewise speaks directly to the use of exempt property to compensate for the debtor's failure to turn over or fully account for non-exempt property. Section 522(c) provides that, except for certain particular exceptions, "property exempted under

this section is *not* liable during or after the case for any debt of the debtor that arose * * * before the commencement of the case." *Id.* § 522(c) (emphasis added). In addition, where the trustee recovers property for the estate, Section 522(g) governs whether an exemption may cover the recovered property. That section provides that a debtor may exempt property recovered by the trustee only if "the debtor did not conceal such property." *Id.* § 522(g)(1)(B).

Section 522 also details when and how exemptions must be claimed and disputed. Section 522(*l*) requires the debtor to "file a list of property that the debtor claims as exempt." *Id.* § 522(*l*). Once the debtor's list is filed, interested parties have 30 days to object to the list of claimed exemptions. Fed. R. Bankr. P. 4003(b)(1). Section 522(*l*) sets forth an absolute rule that "[u]nless a party in interest objects, the property claimed as exempt on such list *is exempt*." 11 U.S.C. § 522(*l*) (emphasis added). This Court has construed Section 522(*l*) strictly, concluding that courts have "no authority" to allow an objection to a claimed exemption after the 30-day period. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-645 (1992). That is so even if the exemption was claimed in bad faith. *Ibid.* These strict requirements would be undermined if bankruptcy courts could use Section 105(a) to allow a surcharge against exemptions that were not timely challenged.

Moreover, allowing the trustee to surcharge the debtor's exemptions would contravene Section 522 in yet another way. Section 522(c) specifies a number of

exceptions for the claims of particular creditors that *can* be enforced against the debtor's exempt property. These include nondischargeable domestic support obligations, nondischargeable tax debts, valid lien claims, debts for fraud in connection with student loans and scholarships, and nondischargeable fiduciary defalcation or willful and malicious injury debts owed to a federal regulatory agency liquidating a bank. *See* 11 U.S.C. § 522(c)(1)-(4). By specifying particular nondischargeable debts that *are* enforceable against the debtor's exempt property, Section 522(c) gives these creditors a privileged repayment right relative to all other pre-bankruptcy creditors.

An exemption surcharge, however, would abrogate these creditors' repayment privilege, by allowing all other pre-bankruptcy creditors recourse against the debtor's exempt assets through the trustee's exemption surcharge. Indeed, it actually would subordinate these creditors' right to repayment, "leav[ing] § 522(c) creditors to look to the remains [of] the debtor's exempt assets after the trustee has satisfied his surcharge." *In re Scrivner*, 370 B.R. 346, 355 n.1 (B.A.P. 10th Cir. 2007) (Clark, Bankr. J., dissenting), *rev'd*, 535 F.3d 1258 (10th Cir. 2008). Such an exemption thus would "defeat the statutory treatment of § 522(c) creditors by reducing § 522(c) creditors to a second priority behind the trustee's surcharge." *Ibid.*

### *3. Congress specifically addressed penalties for bankruptcy misconduct and remedies for recovering property of the estate*

Not only did Congress expressly address exceptions for exempt property, it also specifically provided penalties for wrongful conduct, including attempting to misappropriate non-exempt property. The enumeration of these penalties suggests Congress itself has determined the consequences for such behavior.

First and foremost, such conduct provides grounds for disallowing the debtor a discharge. Section 727(a) of the Bankruptcy Code provides for denial of discharge where, inter alia, the debtor "has transferred, removed, destroyed, mutilated, or concealed" property "with intent to hinder, delay, or defraud a creditor or an officer of the estate"; where "the debtor knowingly and fraudulently, in or in connection with the case * * * made a false oath or account" or "presented or used a false claim"; or where "the debtor has refused, in the case * * * to obey any lawful order of the court." 11 U.S.C. § 727(a)(2), (4), (6).

Moreover, such conduct may give rise to criminal penalties. It is a federal crime to commit fraud in bankruptcy cases, including "knowingly and fraudulently conceal[ing] from" the trustee "any property belonging to the estate of a debtor," or "mak[ing] a false or fraudulent representation [or] claim" in connection with a bankruptcy case "for the purpose of executing" or "attempting" to execute "a scheme or artifice to defraud." 18 U.S.C. §§ 152, 157.

Additionally, Rule 1008 of the Federal Rules of Bankruptcy Procedure requires petitions, lists, and schedules to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury, which is a criminal offense. Fed. R. Bankr. P. 1008; *see* 28 U.S.C. § 1746; *see also* Fed. R. Bankr. P. 9011(c) (providing for sanctions for misrepresentations in bankruptcy court filings).

The Bankruptcy Code also provides remedies for the trustee to restore to the estate misappropriated property, for the payment of both creditors' claims and the estate's administrative expenses. Through the Code's express turnover, avoidance, and recovery provisions, the trustee can recover property of the estate from the debtor or others in possession of property of the estate or to whom property of the estate has been transferred. 11 U.S.C. §§ 542, 549, 550. The trustee is entitled to recover the property itself, or the bankruptcy court may enter a money judgment for "the value of such property." *Id.* §§ 542(a), 550(a). Such a money judgment may properly issue against a debtor who has misappropriated property of the estate, and the debtor's post-bankruptcy income and assets could be used to satisfy the judgment. *See* 11 U.S.C. § 727(a)(2), (5), (b); Fed. R. Civ. P. 64(a); Fed. R. Bankr. P. 7064, 9014(c). The debtor's exempt property, however, is not available to satisfy such a judgment. *See* 11 U.S.C. § 522(c), (k).

### *4. Section 105's general grant of authority cannot be used to circumvent the Code's specific provisions*

These detailed and carefully tailored provisions concerning exemptions and debtor misconduct cannot be circumvented by resort to the general provisions of Section 105(a).

a. This Court repeatedly has held that in construing a statute, "'the specific governs the general.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). "That is particularly true where," as here, "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *Ibid.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

Where Congress has turned its attention to a specific situation, and provided a carefully drawn provision to address it, a party cannot evade that specific provision by resorting to a more general one, especially one with fewer restrictions. *See, e.g.*, *Hinck v. United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007)). This is true "[h]owever inclusive may be the general language of a statute." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). The general provision "'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Ibid.* (quoting *D. Ginsberg &*

*Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Rather, "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel*, 132 S. Ct. at 2071.

Thus, in *D. Ginsberg & Sons*, this Court concluded that a general grant of authority worded similarly to Section 105 did not apply. There, the Bankruptcy Act provision at issue granted bankruptcy courts the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title." *D. Ginsberg & Sons*, 285 U.S. at 206. Other provisions of the Bankruptcy Act, however, specifically established a "general exemption of bankrupts from arrest," providing only a "carefully guarded exception * * * as to those about to leave the district to avoid examination." *Id.* at 207-208. This Court held that those "[s]pecific terms prevail." *Id.* at 208. It thus rejected the "contention that the general language * * * grants additional authority in respect of arrests of bankrupts." *Ibid.*

b. As in *D. Ginsberg & Sons*, other statutory provisions here explicitly address whether and to what extent exemptions may be limited, as well as the penalties that a bankruptcy court may order for debtor misconduct. Surcharging an exemption for misconduct is not among the specific limitations on exemptions that Congress decided to enact. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to

be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Thus, "[h]owever inclusive" the general language of Section 105 may be, it cannot be read to permit a surcharge of exempt property. *Fourco Glass Co.*, 353 U.S. at 228.

Indeed, there is evidence that Congress meant for Section 522's explicit limitations on exemptions to be the only ones. The 1973 Commission on the Bankruptcy Laws of the United States proposed the original version of what ultimately became Section 522(c). In explaining this provision, the Commission stated that "[t]he right to use the exemption is unqualified; it does not depend on whether the debtor receives a discharge and is not forfeited by 'bad conduct' of the debtor." Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. II, at 128 (1973) (proposed § 4-503 note 2). Indeed, that is the very nature and purpose of debtor exemptions, to place certain property beyond the reach of judgment creditors.

c. That Section 105(a) is not a free-ranging grant of authority to do equity is bolstered by this Court's decision outside the bankruptcy context in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). There, the Court held that courts could not impose an equitable remedy for an individual's misconduct by relying on a general grant of authority, where that remedy contravened a particular statutory scheme. *Id.* at 374-377.

The petitioner in *Guidry*—the head of a local union chapter and trustee of the chapter's pension fund—was convicted of embezzlement from the union in violation of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). *Id.* at 367-368. The pension plans then refused to pay the petitioner his benefits, and the petitioner sued. *Id.* at 368. The union intervened and brought claims against the petitioner, which resulted in a money judgment in the union's favor. *Ibid.* The district court imposed a constructive trust, ordering that the petitioner's benefits be paid to the union rather than to the petitioner, until the union's judgment was satisfied. *Id.* at 369-370.

In imposing the constructive trust, the district court relied on the general remedial provisions of the LMRDA, which allowed the court to order "'appropriate relief for the benefit of the labor organization.'" *Id.* at 374 (quoting 29 U.S.C. § 501(b)). But a specific provision of the Employee Retirement Income Security Act of 1974 ("ERISA") addressed whether pension benefits could be assigned to another entity, such as the union. *Id.* at 376. That specific statute mandated that "benefits provided under the plan may not be assigned or alienated." *Id.* at 367 n.1 (quoting 29 U.S.C. § 1056(d)(1)).

Invoking the canon that a specific statutory provision controls over a general one, this Court rejected the use of the general LMRDA provision to impose a constructive trust. *Id.* at 375-376. The Court explained: "We do not believe that congressional

intent would be effectuated by reading the LMRDA's general reference to 'other appropriate relief' as overriding an express, specific congressional directive that pension benefits not be subject to assignment or alienation." *Id.* at 376.

The Court also concluded that it would not be "appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition." *Ibid.* That is because the specific ERISA provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Ibid.* "If exceptions to this policy are to be made, it is for Congress to undertake that task." *Ibid.*

The Court explained that allowing a general equitable exception to circumvent a specific congressional policy choice "would be especially problematic in the context of an antigarnishment provision." *Ibid.* The very purpose of such a provision is "to hinder the collection of a lawful debt," and by definition it reflects a decision that "certain broad social policies sometimes take[ ] precedence over the desire to do equity between particular parties." *Ibid.* If any exception to that policy choice is to be created, it "should be left to Congress." *Id.* at 377.

The rationale of *Guidry* applies fully here. Like the statutory exemption here, the ERISA anti-alienation

provision at issue in *Guidry* is essentially a means of exempting property from the claims of creditors. The provision "prohibits the garnishment of pension benefits as a means of collecting a judgment." *Id.* at 369; *see* 11 U.S.C. § 541(c)(2) (providing that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable" in the debtor's bankruptcy case); *Patterson v. Shumate*, 504 U.S. 753 (1992) (relying upon *Guidry* and holding that a debtor's ERISA-qualified pension benefits are excluded from the debtor's bankruptcy estate under Section 541(c)(2) by virtue of ERISA's anti-alienation provision).

As it did with ERISA's anti-alienation provision, Congress made a considered policy choice to make exempt property categorically unavailable to satisfy creditors' claims against the debtor or a trustee's administrative expenses. 11 U.S.C. § 522(c), (k). With only narrow exceptions inapplicable here, Congress decided that exempt property "is not liable." *Ibid.* Thus, as in *Guidry*, exempt property cannot be reached by creditors, even if the debtor has engaged in certain malfeasance.

Although that choice might seem in particular cases to cause inequitable results, it was Congress's choice to make. Bankruptcy courts' equitable powers under Section 105(a) may not be exercised "at the level of policy choice at which Congress itself operated in drafting the Code." *United States v. Noland*, 517 U.S. 535, 543 (1996). If any exception is to be

created, "it should be left to Congress." *Guidry*, 493 U.S. at 377.

### B. A Correct Construction Of Section 105 Preserves A Bankruptcy Court's General Equitable Powers To Carry Out Other Bankruptcy Code Provisions

Properly confining Section 105 to preclude surcharges against exempt property due to debtor misconduct does not render Section 105 a dead letter, by any means. Its grant of equitable authority is still quite potent in many respects. But in each instance involving Section 105's correct use, Section 105 simply provides the procedural means for enforcing substantive rights that the Bankruptcy Code itself already affords. That is, as its text expressly provides, Section 105 authorizes orders that are "necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a).

For example, Section 105 gives bankruptcy courts the power to enforce the statutory obligation to turn over all of the debtor's property to the trustee. Under Section 521 of the Bankruptcy Code, the debtor is required to "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate." 11 U.S.C. § 521(a)(4). Section 542(a) imposes a similar obligation on any entity (including the debtor) "in possession, custody, or control" of property of the estate to "deliver to the trustee, and account for, such property

or the value of such property." *Id.* § 542(a). Nowhere does the Bankruptcy Code, however, specifically authorize the bankruptcy court to issue an order directing turnover of property of the estate or sanctioning noncompliance with such a turnover order.

Section 105 is the general grant of authority to issue the turnover order, and Sections 521 and 542 are the statutory provisions appropriately enforced thereby. *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 Bankr. L. Letter No. 8, at 4-5 (Aug. 2013). Where an entity refuses to comply with its turnover obligations, an injunctive order compelling a turnover is necessary and appropriate "to carry out" Sections 521(4) and 542(a). *See Maggio v. Zeitz*, 333 U.S. 56, 62-63 (1948) (turnover order under Section 105's predecessor statute "has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act"). Such use of the Section 105(a) power thus furthers, rather than contravenes, other Code provisions.

Similarly, orders are appropriate under Section 105 to preserve property within the bankruptcy court's jurisdiction. The bankruptcy court has "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of [the] case, and of property of the estate." 28 U.S.C. § 1334(e); *see id.* § 157. It has long been understood that bankruptcy courts have the equitable power to issue orders to prevent dissipation of the bankruptcy estate's property or to preserve the bankruptcy

court's jurisdiction over such property. *See Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648 (1935); *Steelman v. All Continent Corp.*, 301 U.S. 278 (1937).

Indeed, one of the most widely accepted uses of Section 105 is to enjoin actions that are not stayed by the Bankruptcy Code's automatic-stay provision, Section 362(a). Under Section 362(a), the filing of a bankruptcy petition automatically stays any action against the debtor or any act to obtain possession of property of the estate. 11 U.S.C. § 362(a). But other actions might not be automatically stayed and yet still adversely affect administration of the debtor's bankruptcy case. Congress specifically contemplated that bankruptcy courts would issue Section 105 injunctions "to stay actions not covered by the automatic stay," with the courts determining "on a case-by-case basis whether a particular action which may be harming the estate should be stayed." S. Rep. No. 95-989, at 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837; *see* H.R. Rep. No. 95-595, at 341-342 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298. Through Section 105, Congress thus gave bankruptcy courts the authority to issue injunctions under traditional equitable principles. Such injunctive orders may be necessary to prevent interference with appropriate administration of the debtor's bankruptcy case. *See* Collier on Bankruptcy ¶ 105.04 (16th ed. 2013) (citing, inter alia, *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995)).

Even where the automatic stay does apply, bankruptcy courts may issue injunctions under Section 105 to enforce it. That may be necessary if, for example, there is a dispute as to whether the automatic stay applies to a particular action. *See, e.g.*, *FDIC v. Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125 (2d Cir. 1992). Such an order specifically enjoining the action at issue is necessary "to carry out" Section 362.

And Section 105 may come into play if a party refuses to comply with the bankruptcy court's turnover order or stay order. Such a party may be held in civil contempt, and Section 105(a) is widely considered a statutory source of the bankruptcy court's civil contempt power. *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 916-917 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 n.1 (6th Cir. 2000); *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 446 (1st Cir. 2000). And that civil contempt power is also the means by which bankruptcy courts enforce both of the Bankruptcy Code's automatic statutory injunctions—the Section 362 stay that arises upon commencement of a bankruptcy case, and the Section 524 discharge injunction that permanently enjoins collection of discharged debts. 11 U.S.C. §§ 362(a), 524(a)(2); *see* Collier on Bankruptcy ¶¶ 362.12[2], 524.02[2][c].

As another example, Section 105 also may be a source of power for bankruptcy courts to appoint estate representatives, such as a Chapter 11 creditors committee, to pursue a derivative avoidance action on

behalf of the estate. Several provisions of the Bankruptcy Code give the trustee the power to avoid certain transfers or obligations of the debtor. 11 U.S.C. §§ 544-549. The avoidance sections of the Bankruptcy Code provide that the "trustee" has the authority to avoid, *e.g.*, *id.* § 544(a), but the "trustee" simply means "the representative of the estate," *id.* § 323(a). In Chapter 11 cases, the debtor-in-possession is the representative of the estate and serves the role of "trustee." In certain circumstances, however, the normal agents of the corporate debtor-in-possession (i.e., the board of directors) have a conflict of interest in determining whether the corporation will bring a particular cause of action—e.g., an action against directors. When such a conflict arises outside the bankruptcy context, corporate law recognizes that a shareholder may bring a derivative action on behalf of the corporation.

When such a conflict arises in a bankruptcy case in the context of an avoidance action, the bankruptcy court's equitable powers under Section 105 may permit the court to appoint another entity, such as a creditors committee, to act as estate representative to pursue the avoidance action. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.*), 330 F.3d 548, 567-569 (3d Cir. 2003) (en banc); Ralph Brubaker, *Creditor/Committee Derivative Litigation: Of Textualism And Equitable Powers*, 22 Bankr. L. Letter No. 11 (Nov. 2002). Such an order thus may be necessary or appropriate to carry out the statutory avoidance powers.

The point of each of these examples is two-fold. First, rejecting the Ninth Circuit's expansive reading of Section 105 will leave significant circumstances in which a bankruptcy court appropriately may exercise its Section 105 powers to carry out another Code provision. Second, use of Section 105 to surcharge a debtor's exempt property is different in kind from the type of equitable powers that bankruptcy courts have long exercised. Such an order contravenes Section 522. Section 105 has never been viewed as a tool to circumvent Congress's carefully adopted choices, and it should not be so viewed now.

## CONCLUSION

For the reasons set forth above and in petitioner's brief, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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