No. 12-5196

IN THE

Supreme Court of the United States

STEPHEN LAW,

Petitioner,

v.

ALFRED H. SIEGEL, CHAPTER 7 TRUSTEE

Respondent.

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

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author of Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Bullock v. Bank-Champaign, N.A.*, 133 S. Ct. 1754 (2013); *Rad-LAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 131 S. Ct. 716 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard*

Delivery Serv., Inc. v. Zurich American Ins. Co., 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law and has written, taught, and lectured on the subject of bankruptcy exemptions and the equitable power of bankruptcy courts. The purpose of this brief is to address matters that bear on the Court's determination of an important bankruptcy issue: whether a bankruptcy court may, pursuant to the general equitable power conferred by section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), surcharge a debtor's statutorily exempt property. In particular, this brief explains that the power bestowed on bankruptcy courts by section 105(a) does not authorize the courts to create new equitable remedies that Congress has not prescribed—and certainly not where, as here, such would actually conflict with the text of the Code. In addition, this brief explains why this case is fundamentally different from *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). The undersigned argues that the decision of the court below should be reversed and that property that is rightfully exempt under section 522 of the Bankruptcy Code, 11 U.S.C. § 522, should be deemed to belong to the debtor free and clear of all other claims, including a

trustee's claim for surcharge, except as expressly provided by statute.

STATEMENT

Petitioner filed for bankruptcy under Chapter 7 of the Bankruptcy Code on January 5, 2004. J.A. 56a. Respondent was appointed as the Chapter 7 trustee. *Id.* Petitioner's residence (the "Property") was the sole asset of the bankruptcy estate. *Id.* The schedules filed with the bankruptcy petition indicated that the Property was subject to two liens: a note and deed of trust in favor of Washington Mutual Bank in the amount of $147,156.52 and a note and deed of trust in favor of "Lin's Mortgage & Associates" in the amount of $156,929.04. J.A. 56a-57a. Petitioner claimed that the second deed of trust was security for a $168,000 loan he received from a woman named Lili Lin of China. J.A. 57a-58a. Petitioner claimed a $75,000 homestead exemption in the Property. J.A. 56a.

On January 9, 2006, Respondent filed a motion seeking to surcharge the entire $75,000 of Petitioner's homestead exemption due to Petitioner having "'engaged in exceptional circumstances of misconduct' by 'willfully and knowingly attempt[ing] to defraud his creditors by removing equity from the property.'" J.A. 138a. Respondent alleged that Petitioner "had lied about the existence and bona fides of the alleged

second mortgage on the Property held by the creditor known as Lili Lin." J.A. 57a. The bankruptcy court granted the surcharge on March 22, 2006, finding that Petitioner's conduct "has been the direct cause of … at least the bulk of the expenses that have been incurred by [Respondent] in this case …." J.A. 139a-140a. On December 29, 2006, the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") reversed the surcharge order on the grounds that Petitioner was not attempting to abuse his exemptions, nor was Respondent seeking to remedy any such abuse. J.A. 150a. Rather, "the court was merely shifting litigation expenses to the [Petitioner] in a fashion designed to punish [Petitioner] for his litigation activity." J.A. 151a. The BAP noted, however, that it "express[ed] no opinion whether specific instances of mischief by [Petitioner] in the past might support further monetary sanctions in the future, including a surcharge against his exemption." *Id.* The Ninth Circuit affirmed. J.A. 59a.

On April 24, 2008, Respondent filed a second motion seeking to surcharge Petitioner's homestead exemption alleging that: (1) the second deed of trust on the Property was nonexistent and was fraudulently and intentionally fabricated by Petitioner "to falsely encumber the Property so as to discourage its sale as part of a scheme by [Petitioner] to defraud his creditors"; (2) Petitioner had perjured himself by listing the second deed in his schedules and by submitting a

fraudulent promissory note to the court; and (3) Petitioner had created a creditor, Lili Lin of China, who either did not exist or had no interest in the Property, in order to frustrate Respondent's administration of the estate. J.A. 61a. The bankruptcy court granted the surcharge, finding that, were it not for Petitioner's misrepresentations about the fictitious loan, "ample funds would have been available to pay [Petitioner's] creditors and [Respondent's] costs." J.A. 92a-93a. Reasoning that Respondent had incurred far more than $75,000 in attorneys' fees in responding to the disputed deed, the court granted a surcharge on Petitioner's entire homestead exemption. J.A. 93a. The BAP affirmed the surcharge order. J.A. 55a. While recognizing that "[t]he Bankruptcy Code does not expressly authorize surcharges against a debtor's exemptions," the BAP cited Ninth Circuit case law holding that "a bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary to protect the integrity of the bankruptcy process and to ensure that a debtor receives as exempt property an amount no more than what is permitted by the Bankruptcy Code." J.A. 68a (*citing Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004)). The Ninth Circuit affirmed the BAP's decision on June 6, 2011. J.A. 51a-53a.

SUMMARY OF THE ARGUMENT

Pursuant to section 105(a) of the Bankruptcy Code, bankruptcy courts have the power to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a). The extent of this power is subject to the restriction that it "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). In light of this restriction, the plain language of the provisions of the Code governing the treatment of exempt property, and the important implications that exemptions have on a debtor's ability to make a "fresh start," section 105(a) cannot properly be interpreted as bestowing on the courts the power to surcharge a debtor's statutorily exempt assets under the circumstances here.

This Court recently applied section 105(a) in finding that a bankruptcy court had the power to deny a debtor's request to convert his Chapter 7 proceeding to one under Chapter 13 in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). *Marrama*, however, involved particular facts, concerns, and circumstances that are not present in this case. First, the debtor in *Marrama* sought to convert his bankruptcy proceeding specifically to deny his creditors access to certain property. Had the court lacked the au-

thority to deny the request, the court effectively would have been forced to grant the conversion, thus furthering the debtor's fraud *by its own order*. No similarly extraordinary circumstance is present here. In this case, Respondent seeks to invoke section 105(a) in order to recoup his own fees and costs—essentially converting section 105(a) into an unauthorized fee-shifting statute. Second, unlike the decision below, which relies entirely on Section 105(a) in awarding the court the power to surcharge the debtor's homestead exemption, the Court in *Marrama* found solid support for the power to deny the conversion in other sections of the Bankruptcy Code. In this case, surcharging the debtor's exempt property would affirmatively conflict with the text of the Code.

That *Marrama* should not be read to allow bankruptcy courts a broad power under section 105(a) to fashion new equitable remedies is made even more apparent in light of the Court's decisions establishing that the authority to create bankruptcy laws lies with Congress, and that the courts may not use their equitable powers to create new causes of action that Congress has declined to create. Even in cases in which a particular outcome is seemingly more beneficial to creditors and arguably more consistent with general principles of equity, courts may not invoke section 105(a) to make determinations that "run[] directly counter to Congress's policy judg-

ment." *United States v. Noland*, 517 U.S. 535, 541 (1996).

Furthermore, the plain language of section 522(l) makes clear that "[t]he debtor shall file a list of property that the debtor claims as exempt" and "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(l). Where Congress desired to carve out exceptions to this general rule, it did so unambiguously. That Congress did not carve out an exception to allow a trustee to surcharge a debtor's homestead exemption where the debtor is alleged to have acted in bad faith indicates unequivocally that Congress did not intend for such an exception to exist. Nor does it make sense to allow the surcharge in light of the purpose behind the homestead exemption as a key component of a debtor's ability to emerge from bankruptcy and make a "fresh start." The decision below should be reversed.

ARGUMENT

A. This Court's Decision In *Marrama* Does Not Grant Bankruptcy Courts The Broad Equitable Power To Surcharge a Debtor's Exempt Property.

Section 105(a) of the Bankruptcy Code grants bankruptcy courts the power to "tak[e] any action or mak[e] any determination neces-

sary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a). At issue in the present case is whether the Ninth Circuit correctly held that section 105(a) vests bankruptcy courts with the power to surcharge property that is statutorily exempt from the bankruptcy estate on the theory that the debtor's bad faith conduct during the bankruptcy proceeding caused the trustee to incur unnecessary costs. *See* J.A. 51a-53a; *accord Malley v. Agin*, 693 F.3d 28 (1st Cir. 2012). *But see Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258, 1264 (10th Cir. 2008) (surcharge on exempt property pursuant to section 105(a) was improper because the "the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate" and the court "may not read additional exceptions into the statute"). The answer is that it did not.

In its brief opposing certiorari in the present case, the United States expressed the view that the decision below is consistent with this Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), which involved an exercise of authority under section 105(a). However, while *Marrama* did rely on section 105(a) in finding that the bankruptcy court had the equitable power to deny a debtor's motion to convert his Chapter 7 case to Chapter 13 where that request was made in bad

faith, *Marrama* does not bestow on a bankruptcy court the broad and unfettered right to deny debtors rights guaranteed to them under other provisions of the Bankruptcy Code. *Marrama* is distinguishable from this case in critical respects, and extending that holding to allow a surcharge on a debtor's homestead exemption would read the decision as granting bankruptcy courts a power far broader than intended and would conflict with other precedents of the Court. First, unlike the case at hand, *Marrama* involved a debtor's bad faith attempt to use the judicial process to further his fraudulent scheme such that the bankruptcy court's ability to deny the conversion was necessary to prevent the court from itself becoming a participant in the fraud. Second, the Court in *Marrama* found independent reasons within the Bankruptcy Code supporting the bankruptcy court's power to deny the conversion that are not present in this case.

1. The *Marrama* Decision Was Necessary To Prevent the Court's Participation in the Debtor's Fraud.

In *Marrama*, the debtor filed verified schedules in his Chapter 7 case that incorrectly represented property that he owned in Maine as having no value and falsely stated that he had not transferred the property during the year preceding the filing of his petition. *Id.* at 368. In fact, the Maine property had significant value,

and the debtor had transferred the property to a trust seven months prior to filing for bankruptcy with the express intention of shielding the property from his creditors' reach. *Id.* After the Chapter 7 trustee expressed his intent to recover the Maine property as an asset of the estate, the debtor *moved the bankruptcy court* to convert his Chapter 7 case to one under Chapter 13, which would have resulted in the disenfranchisement of the Chapter 7 trustee because once a Chapter 7 case is converted, the trustee's service comes to an end. *Id.* at 369. In other words, the debtor requested and required an order from the court to perpetuate his fraudulent scheme. The bankruptcy court denied conversion on the basis that the request was made in bad faith. *Id.* at 370. In other words, the court refused to grant affirmative relief that would have furthered the debtor's plan. The debtor argued on appeal that the plain language of section 706(a) of the Bankruptcy Code, 11 U.S.C. § 706(a), conferred an absolute right to convert his case to a Chapter 13 proceeding. *Id.* This Court, however, affirmed the bankruptcy court's decision, finding that both the equitable power of the court under section 105(a) and a close reading of relevant sections of the Bankruptcy Code supported the court's ability to deny a request for conversion made in bad faith. *Id.* at 371.

In denying the conversion request, the bankruptcy judge rejected the debtor's attempt

at explaining his misstatements as "scrivener's error" and accepted the trustee's contention that the conversion was sought in bad faith. *Id.* at 369-70. In spite of the debtor's attempt to give legitimate reasons for the conversion, it was apparent to the court that the debtor was seeking the court's order in furtherance of his fraud. Had the bankruptcy court lacked the authority to deny conversion, it would have been compelled to knowingly allow a conversion sought solely to prevent the trustee from recovering the Maine property, to the detriment of the debtor's creditors. Thus, the Court's decision allowing the bankruptcy court the power to deny the conversion was critical, not only to the court's ability to "prevent an abuse of process," but to avoid the court taking affirmative action that would have furthered the fraud.

The instant case does not present the same threat to the judicial process present in *Marrama*. Respondent asks this Court to adopt a broad reading of section 105(a), not to protect the integrity of the bankruptcy court in the issuance of its orders, but to recoup the fees and costs expended in responding to Petitioner's claims regarding a fictitious deed of trust. Respondent wishes to create a novel cause of action for his own benefit, not for the benefit of the court as was the case in *Marrama*. Given the unique circumstance in *Marrama* of the need to protect the role of the court in the bankruptcy process, and

the extreme caution this Court has applied when considering a court's power to create new bankruptcy causes of action or rights, *see infra* Section B, *Marrama* should not be read as supporting the creation of a broad equitable power that the Ninth Circuit approved in this case.

2. The Court in *Marrama* Found Significant Support in the Bankruptcy Code for Its Decision.

While the Court in *Marrama* did cite section 105(a) in affirming the bankruptcy court's authority to deny a bad faith debtor's motion for conversion, the Court also found affirmative support for its decision in various sections of the Bankruptcy Code.

To begin with, the Court noted that a Chapter 7 debtor's right under section 706(a) to convert a case to a Chapter 13 proceeding "at any time" was subject to the limitation in section 706(d) that a conversion was permissible only where the debtor was properly a debtor under Chapter 13. *Id.* at 371. The Court found "at least two possible reasons why Marrama may not qualify as such a debtor." *Id.* at 372. First, the Court noted the limit imposed by section 109(e) on the amount of debt that a Chapter 13 debtor may have to qualify for Chapter 13 relief and expressed doubt as to, though did not decide, whether the debtor qualified under that limit.

Id. at 372 & nn.6, 7. Second, the Court referenced section 1307(c), which provides that a Chapter 13 proceeding may be dismissed outright or converted to a Chapter 7 proceeding "for cause." *Id.* at 373. Noting that bankruptcy courts "routinely treat dismissal for prepetition bad faith conduct as implicitly authorized by the words 'for cause,'" the Court reasoned that "a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct … is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13." *Id.* at 373-74.

Moreover, in finding that section 105(a) gave the bankruptcy court the power to deny the conversion motion, the Court was persuaded by the undisputed judicial power to either dismiss or convert a Chapter 13 case to a Chapter 7 proceeding on the basis of the debtor's bad faith. *Id.* at 375. Refusing to allow the court the discretion to deny a conversion would be illogical in light of the clearly established power to either dismiss the proceedings or to subsequently convert the case back to Chapter 7. *Id.* (stating that section 105(a) "is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and

may provide a debtor with an opportunity to take action prejudicial to creditors").[2]

In contrast to the wide textual support for denying conversion as discussed in *Marrama*, the provisions of the Bankruptcy Code offer no support for allowing a trustee to surcharge a debtor's exempt assets—indeed, as Petitioner amply explains in his brief, surcharging the debtor's exempt property is fundamentally at odds with Congress's express statutory scheme. The lower courts cited no similar statutory support of the kind present in *Marrama*, but instead relied entirely on the equitable power conveyed by section 105. A close reading of the Bankruptcy Code demonstrates precisely why such a surcharge should not be allowed. *See infra* Section C.

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[2] The First Circuit also found persuasive the bankruptcy court's "unquestioned authority to dismiss a chapter 13 petition … based upon a showing of 'bad faith' on the part of the debtor," and stated that it could "discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first place." *Id.* at 370-71 (*quoting In re Marrama*, 430 F.3d 474, 479 (1st Cir. 2005)).

B. This Court's Prior Decisions Demonstrate that the Bankruptcy Court's Equitable Powers Should Not Be Used To Create New Causes of Action or New Rights Under the Code.

That *Marrama* should not be read to allow bankruptcy courts a broad power under section 105(a) to fashion new remedies or rights is made apparent in light of this Court's clearly established restriction that a bankruptcy court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Courts may not rely on equitable considerations as a reason to create a cause of action not specifically prescribed by statute. *See Butner v. United States*, 440 U.S. 48, 54 (1979) (the court could not adopt a federal rule of equity regarding a mortgagee's right to rent where "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) ("To accord a type of relief that has never been available before … is to invoke a 'default rule,' not of flexibility, but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.")

In *Butner*, this Court addressed the bankruptcy court's limited power to grant equitable relief. 440 U.S. 48. In that case, the Court was asked to determine whether the right of a mortgagee to rents collected during the period between the mortgagor's bankruptcy and a subsequent foreclosure sale was properly determined by a federal rule of equity or by looking to applicable state law. *Id.* at 50. In rejecting the bankruptcy court's ability to create a federal equitable claim to the rents, the Court noted that the Constitution grants to Congress the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const., Art. I, § 8 cl. 4, but that Congress had chosen not to enact the rule advocated by the mortgagee. 440 U.S. at 54. Because Congress had intentionally left the determination of the relevant property rights to state law, it was beyond the scope of the bankruptcy court's equitable power to create a federal rule in conflict with that choice. *Id.*

Similarly, in *Ahlers*, the Court reversed the Eighth Circuit's approval of a reorganization plan that allowed the respondent debtors to retain an interest in their property over the objection of the petitioning creditors on the grounds that the plan violated the Bankruptcy Code's absolute priority rule. 485 U.S. at 201-02 (citing 11 U.S.C. § 1129(b)(2)(B)(ii)). In response to the

respondents' argument that the plan should be affirmed on equitable grounds, this Court noted that although "[t]he Court of Appeals may well have believed that petitioners or other unsecured creditors would be better off if respondents' reorganization plan was confirmed," it was the petitioners' "prerogative under the Code," to object to the plan and the courts were obligated, upon such an objection, to abide by the rules set forth in the Code. *Id.* at 207.

The Court's decisions on equitable subordination also demonstrate that, where Congress has clearly established the rights of debtors and creditors in the express provisions of the Bankruptcy Code, it is not for the courts to alter those rights on the basis of equitable considerations. *See United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996) (subordination of government's claim to those of other general unsecured creditors was improper because the "categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination"); *United States v. Noland*, 517 U.S. 535, 541 (1996). In *Noland*, the Court rejected an attempt to subordinate the IRS's claim for a post-petition, non-compensatory tax penalty, which was entitled to priority as an administrative expense. 517 U.S. at 536. In spite of the Sixth Circuit's reasoning that the subordination of the government's claim to the

claims of other creditors who had suffered actual losses served equitable principles, the Court reversed the subordination because it "r[an] directly counter to Congress's policy judgment that a postpetition tax penalty should receive the priority of an administrative expense." *Id.* at 541. Because "Congress could have, but did not, deny noncompensatory, postpetition tax penalties the first priority given to other administrative expenses," the Court reasoned that "bankruptcy courts may not take it upon themselves to make that categorical determination under the guise of equitable subordination." *Id.* at 543.

Following soon after *Noland*, the debtor in *CF & I* sought to subordinate a claim by the IRS for tax liability incurred due to the debtor's failure to make required contributions to pension plans so that it would be junior to other general unsecured claims. 518 U.S. at 217. In spite of the lower courts' finding that "[d]eclining to subordinate the IRS's penalty claim would harm innocent creditors rather than punish the debtor," *id.* at 228 (citation omitted), this Court found that a reordering of the statutory priority that Congress had established was an improper exercise of the court's equitable power. *Id.* at 229.

The decision below in this case is directly in conflict with the concept, established by this line of cases, that a bankruptcy court may not exercise its equitable power to create remedies or

rights that are outside those allowed by the governing statutory regime. Allowing Respondent to surcharge Petitioner's homestead exemption creates a new cause of action on behalf of the trustee that extends far beyond, and conflicts with, "the confines of the Bankruptcy Code." *Ahlers*, 485 U.S. at 206. In exercising its power to establish the bankruptcy laws, Congress could have created an exception to the general rule that exempt property is unreachable by the bankruptcy estate to allow a surcharge on a bad faith debtor's exempt property. However, a bankruptcy court's equitable power may not be used to create such a remedy where Congress has declined to do so. *Noland*, 517 U.S. at 543; *Butner*, 440 U.S. at 54.

Furthermore, the fact that the lower courts' interpretation of section 105(a) would allow Respondent to recover fees and costs incurred because of Petitioner's bad faith conduct is not reason to allow the judicial creation of a new remedy or right that Congress has not authorized. This Court has made clear that, even where principles of equity weigh in favor of one approach, that approach is prohibited where it would allow the court to effectively make legislative determinations that Congress opted not to make. *CF & I*, 518 U.S. at 229.

C. A Surcharge on Exempt Property of the Kind at Issue Here Conflicts with the Plain Language of the Bankruptcy Code and with the Purpose Behind Bankruptcy Exemptions.

In construing and applying the Bankruptcy Code, "[t]he starting point … is the existing statutory text." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Further, "when the 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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted); *see also Rake v. Wade*, 508 U.S. 464, 471 (1993); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). As this Court has explained, a cardinal presumption is that Congress "says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 254. Consistent with this proposition, courts must generally refrain from engrafting limitations on provisions of the Code that do not appear in its text. *E.g., Lamie*, 540 U.S. at 537-38; *United States v. Locke*, 471 U.S. 84, 95 (1985) (courts do not have "carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do").

As is relevant here, section 522(l) unambiguously provides that "[t]he debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. … Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(l). Absent a timely objection, exemptions are final and exempt property is unreachable by the trustee or creditors unless a specific exception of the Bankruptcy Code applies.

Petitioner exempted his homestead for the full amount allowed by applicable California state law, Cal. Civ. P. Code § 704.730, and received that property free and clear of the creditors' claims, which right under California law is to be construed liberally in favor of the debtor. *See, e.g., Wells Fargo Fin. Leasing, Inc. v. D&M Cabinets*, 99 Cal. Rptr. 3d 97, 104 (Cal. Ct. App. 2009) ("[T]he homestead law is not designed to protect creditors. ... This strong public policy requires courts to adopt a liberal construction of the law and facts to promote the beneficial purposes of the homestead legislation to benefit the debtor [and his family].") (citations omitted). Not only is there no exception that allows a surcharge on Petitioner's homestead exemption, but the fees that Respondent seeks to recoup are an "administrative expense" under section 503 of the Code. 11 U.S.C. § 503(b)(4). Pursuant to section 522(k), exempt property simply "is not liable for payment of any administrative ex-

pense," other than in circumstances not applicable here. 11 U.S.C. § 522(k).

Moreover, as the Court has explained, the provisions of the Bankruptcy Code are properly construed "holistically," taking into account the structure of the Code as a whole, the relationship between its various provisions, and Congress's collective and systematic choice of words. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 369-71 (1988) (construing several sections of the Bankruptcy Code together and observing that "[s]tatutory construction…is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law") (citations omitted). The Court has made clear that "[w]here 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) (*quoting Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

Where Congress intends to create exceptions to the general rule that exempt property is beyond the reach of the estate, it does so unambiguously. *E.g.*, 11 U.S.C. § 522(c), (k), (q). These exceptions do not include a surcharge for a

debtor's alleged bad faith during the course of the bankruptcy proceedings, and a court may not create such an exception of its own accord. Moreover, the exceptions to the general rule set forth in section 522(q) further clarify that Congress could not have intended that a debtor's bad faith in filing his bankruptcy petition could result in a forfeit of the homestead exemption. Under section 522(q), a debtor exempting property under state or local law is prohibited from claiming more than $125,000 on his or her homestead if (1) "the debtor has been convicted of a felony … which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions" of the Bankruptcy Code or (2) the debtor owes a debt resulting from a violation of federal or state securities laws; fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of a security registered under the federal securities laws; or "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." 11 U.S.C. § 522(q). Congress places such importance on the preservation of the homestead exemption that it made the measured decision to allow a person *convicted of a felony* in connection with his or her bankruptcy case to claim up to $125,000 in spite of his or her *criminal* conduct. It follows, therefore, that a debtor cannot be deprived of his entire homestead exemption for the significantly less serious

offense of misrepresenting the value of his assets on his bankruptcy schedules or otherwise acting in bad faith.

Finally, even if it were not clear from the text of the Bankruptcy Code that a surcharge on a debtor's homestead exemption is improper, allowing such a surcharge is entirely at odds with the Code's fundamental "fresh start" policy. To begin with, exemptions in bankruptcy cases are clearly part of the fundamental bankruptcy concept of a "fresh start." *Rousey v. Jocaway*, 544 U.S. 320, 325 (2005) ("To help the debtor obtain a fresh start, the Bankruptcy Code permits him to withdraw from the estate certain interests in property, such as his car or home, up to certain values."). As explained in the House Report accompanying section 522 of the Code:

> The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his non-exempt property, the debtor will not be left destitute and a public charge… [T]he bill continues to recognize the states' interest in regulating credit within the states, but enunciates a bankruptcy policy favoring a fresh start…. Bankruptcy exists to pro-

> vide relief for an overburdened debtor.

H.R. REP. NO. 595, 95th Cong. 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087. Because this fresh start value is fundamental to the administration of bankruptcy, procedures that burden the debtor's exemption entitlements should be construed narrowly. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

Respondent advocates a broad reading of section 105(a) that would burden a debtor's claim to the statutory homestead exemption in a manner that is clearly contrary the text of the Bankruptcy Code and the relevant purposes that underlie it. The decision of the Ninth Circuit accepting Respondent's position is fundamentally unsound.

CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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