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 THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Margaret A. Burks, a Chapter 13 Standing Trustee for the Southern District of Ohio and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

Chapter 13 has been purposefully designed by Congress in a manner to recognize, honor, and accommodate the often changing, fluid nature of individual consumer debtors' reorganizations, and chapter 13 cases are often complex and lengthy –

frequently lasting five years. As a practical matter, many such cases present issues not directly or completely resolved by the provisions of the Bankruptcy Code. It is trustees, however, much like referees in a sporting event, who provide an important and unique perspective on the issues raised not only in chapter 13 cases generally, but in this case. NACTT members experience firsthand the benefit of bankruptcy courts' powers to develop equitable solutions to complex problems and, therefore, should appropriately be involved in developing those solutions, in a manner consistent with the express provisions of the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

The NACTT urges the Court to maintain the broad equitable authority of the bankruptcy court to act in furtherance of the Bankruptcy Code and in defense of the bankruptcy process in instances of a debtor's abuse of process. The recognition of a bankruptcy court's broad equitable authority accords with congressional intent. Section 105 of the Bankruptcy Code expressly articulates two overlapping sources of equitable authority, both of which empower bankruptcy courts, in appropriate, case-specific circumstances of abuse, to surcharge a debtor's exemptions to prevent or limit the consequences of such abuse. First, § 105 unambiguously authorizes the bankruptcy court to issue "any order . . . that is necessary or appropriate to carry out the provisions" of the Code.

11 U.S.C. § 105(a). This provision empowers a bankruptcy court to surcharge a debtor's otherwise exempt property in vindication of the Code provisions demanding a debtor make a full and accurate disclosure of assets and liabilities, 11 U.S.C. § 521(a)(1), and cooperate with the trustee, 11 U.S.C. § 521(a)(3), and to protect the propriety of the exemption scheme prescribed by the Code in § 522. Second, § 105 confirms the bankruptcy court's general 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). An order surcharging a debtor's exempt property to prevent or limit damage to the estate or the bankruptcy system by a debtor's abuses of process falls squarely within this authority, and the equitable surcharge of exemptions by a bankruptcy court for volitional debtor misconduct is not in tension with the Bankruptcy Code's specification of certain limits on exemptions.

The Code's provisions curtailing exemptions are different than surcharge orders in that the former penalize proscribed actions and behavior whereas the latter compensate injured parties and effectuate the Code's distribution scheme. Because § 105 is a grant of equitable, gap-filling authority, the presence of related exemption provisions does not deprive a bankruptcy court of such authority. This point is especially compelling based on the need for equitable authority to remedy the injury arising from a debtor's abuse of the bankruptcy process. This Court recently

affirmed this principle of recognizing a bankruptcy court's authority to "take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374-75 (2007). The bankruptcy court has authority to surcharge exemptions in extraordinary cases not because the exemptions are invalid, but because the court would otherwise be powerless to prevent an abuse of process by honoring the exemptions of a dishonorable debtor.

ARGUMENT

I. Bankruptcy courts have broad equitable authority to address extraordinary cases and situations not otherwise specifically addressed in Code provisions other than 11 U.S.C. § 105.

Bankruptcy courts indisputably have equitable powers.[2] The issue before the Court in this case concerns the scope and exercise of those powers. The

[2] This Court has repeatedly described bankruptcy courts as courts of equity. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts . . . are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" (quoting *Pepper v. Litton,* 308 U.S. 295, 304 (1939)) (second alteration in original)); *see also* H.R. Rep. No. 95-595, at 359 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 (stating that, under the new Bankruptcy Code, "[t]he bankruptcy court will remain a court of equity").

NACTT urges the Court to reject an overly restrictive view of bankruptcy courts' equitable authority that would prevent courts from addressing case-specific[3] issues that arise in atypical cases, especially cases that involve abuses of process. Section 105 of the Bankruptcy Code recognizes two overlapping sources of equitable authority. First, it expressly provides the power to act in furtherance of the provisions of the Bankruptcy Code. Second, it confirms the authority to address noncompliance and abuses of process. An order surcharging a debtor's exemptions in an appropriate case is justifiable under either source of authority. The authority is grounded in § 105 of the Code.

A. The express grant of power to issue "any order . . . that is necessary or appropriate to carry out the provisions" of title 11 authorizes the surcharge of exemptions in extraordinary cases.

The first sentence of § 105 provides an express grant of power to bankruptcy courts to "issue any

[3] The case-by-case nature of equitable authority supports the application of an "abuse of discretion" standard of review on appeal. *See In re Racing Servs., Inc*., 540 F.3d 892, 901 (8th Cir. 2008) (noting that "equitable determinations . . . warrant[ ] considerable deference from a reviewing court" and that "[s]uch deference ensures that bankruptcy courts will neither feel constrained from flexibly exercising their equitable powers . . . nor fear unenlightened second-guessing by the court of appeals.").

order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).[4] Carrying out the provisions of the Code requires consideration of the Code in its entirety. Surcharge orders, in appropriate cases, support specific Code provisions and the broader distribution scheme of the Code as a whole.

The provisions of § 522 that grant exemptions are interconnected with other Code provisions, such as the debtor's duties to disclose assets and liabilities completely, 11 U.S.C. § 521(a)(1); to cooperate with the trustee, 11 U.S.C. § 521(a)(3); and to surrender to the trustee all property of the estate and any recorded information relating to property of the estate, 11 U.S.C. § 521(a)(4). These other provisions are central to the Code's proper distribution scheme and to the exemption framework within it. *See In re Marrama*, 430 F.3d 474, 478 (1st Cir. 2005) ("The [bankruptcy] statutes are designed to insure that complete, truthful, and reliable information is put forward at the

[4] This Court recognized the importance of the bankruptcy court's appropriate use of the power granted in § 105(a) in *United States v. Energy Resources Co., Inc.*, stating that this "statutory directive[ ] [is] consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." 495 U.S. 545, 549 (1990). The bankruptcy court in this case did not overstep the bounds of exercising this authority because it acted for the sole purpose of maintaining the carefully designed balance between the rights of the debtor and his creditors, which Congress has made clear it intends as a primary principle of the Bankruptcy Code.

outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. . . . [T]he successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." (internal quotation marks omitted)), *aff'd sub nom. Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). When a debtor's efforts to manipulate the proper exemption framework under § 522 involve direct contravention of other Code provisions, a surcharge of the debtor's exemptions to vindicate those other Code provisions and the Code's intended distribution scheme serves to carry out the provisions of the Code as whole.

Justice Souter, sitting by designation, followed this approach in *Malley v. Agin*, 693 F.3d 28 (1st Cir. 2012). He recognized that the grant of exemptions in § 522 represents only an aspect of the distribution scheme under the Code. Based on the finding that the debtor had distorted the scheme by disposing of nonexempt property, the First Circuit affirmed the Bankruptcy Court's surcharge of exempt property as a permissible effort to approximate the distribution that would have occurred but for the debtor's distortion of the process. *See id*. at 30 ("[T]his line of reasoning does not enlarge the court's authority beyond 'carry[ing] out the provisions' of the code. When the concealed assets have disappeared, as the $25,000 seems to have done, surcharge is an appropriate and necessary way to vindicate § 521, requiring honest disclosure of non-exempt assets, and § 522, regulating

the determination of legitimate exemptions for the debtor's benefit.").

The case below involves the same type of remedy. The Bankruptcy Court found that the debtor had engaged in a concerted effort to "preserve Debtor's equity in his residence beyond what he was entitled to exempt as a homeowner" that represented "a fraud on his creditors and the court." *Law v. Siegel (In re Law)*, No. CC-09-1077-PaMkH, 2009 WL 7751415, at *4 (B.A.P. 9th Cir. Oct. 22, 2009). The court surcharged the exemption in an effort to limit the distortion from the debtor's manipulation of the exemption scheme. Because the court found that the direct harm to the estate from the debtor's actions exceeded the value of the exemption, the court denied the full exemption. This type of surcharge is in furtherance of provisions of the Code as a whole. *Cf. Bird v. Crown Convenience (In re NWFX, Inc.)*, 864 F.2d 588, 590 (8th Cir. 1988) ("The overriding consideration in bankruptcy . . . is that equitable principles govern. Equitable principles must be directed toward the care and preservation of the estate." (citations omitted)).

Recognizing this type of authority does not imply that bankruptcy courts have unfettered power to override congressional decisions. On the contrary, the proper exercise of this authority requires the courts to act in furtherance of Congress's legislative choices. It is precisely the fact that Congress has carefully balanced the rights of creditors and debtors in the provisions of the Bankruptcy Code that justifies

recognizing court authority to address the extraordinary cases in which a party disturbs the balance.

The grant of equitable authority to act as "necessary or appropriate to carry out the provisions" of title 11 permits courts to evaluate specific provisions in the context of the entire Code. This Court has noted that statutory construction is a "holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inglewood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). This guidance has particular force in the context of a grant of equitable powers to carry out the provisions of the Code. *Cf. Lend Lease v. Briggs Transp. Co. (In re Briggs Transp. Co.)*, 780 F.2d 1339, 1343 (8th Cir. 1985) ("Essential to any analysis of the meaning of and policy behind any section of the bankruptcy code is the recognition that a bankruptcy court is a court of equity. Bankruptcy courts do not read statutory words with a computer's ease, but operate under the overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.").

The legislative history of § 105 also provides a strong indication that Congress intended to grant bankruptcy courts broad equitable power. One of the stated purposes of § 105 was to permit bankruptcy courts to "stay actions not covered by the automatic stay." H.R. Rep. No. 95-595, at 342, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298. *Amici* in support of the Petitioner agree that "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)." (Br. for Bankr. L. Scholars

as *Amici Curiae* Supporting Pet'r at 23.) Yet an expansion of the automatic stay beyond what the Code expressly provides is plainly not an implementation of any specific Code provision. Instead, this type of order supports a broader conception of the Code and the system the bankruptcy courts administer. Section 105 may not provide courts wide latitude to act in furtherance of perceived objectives of the Code, but Congress clearly intended to grant bankruptcy courts the power to act, on a case-by-case basis, in support of the system embodied in the specific Code provisions. *See* H.R. Rep. No. 95-595, at 342, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298 ("The court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.").

Indeed, though some courts suggest that the exercise of § 105 power must be in support of *specific* Code provisions, *see, e.g.*, *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003), this Court has implied that bankruptcy courts may act under § 105 in furtherance of the Code's purposes. *See United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990) (citing § 105 in approving a chapter 11 plan provision "not explicitly authorize[d]" by the Code, but nonetheless consistent with the "traditional understanding" of bankruptcy court authority). Other courts have recognized this broader authority directly. *See, e.g.*, *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) ("[Bankruptcy] courts

are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain."); *Morgan v. United States (In re Morgan)*, 182 F.3d 775, 779-80 (11th Cir. 1999) ("Although we conclude that § 108(c) is insufficient to toll the three-year priority period [under § 507(a)(8)(A)(i)], we find support for tolling the priority period in 11 U.S.C. § 105(a). . . . Due to congressional intent, which favors allowing the government sufficient time to collect taxes, and the fear that taxpayers may abuse the bankruptcy process in order to avoid paying taxes, we hold that the equities will generally favor the government in cases such as this.").

A proper surcharge of a debtor's exemptions carries out specific Code provisions requiring disclosure and cooperation with the trustee in § 521, so determining whether the surcharge in this case represents an abuse of discretion does not demand a conclusion that bankruptcy courts have the authority to act purely in furtherance of bankruptcy objectives. But the case law in support of that broader authority confirms the relevance of the Code's overall design in assessing the significance of specific Code provisions.

B. The equitable power to prevent abuses of process provides authority to surcharge exemptions to mitigate the actual harm caused by a debtor's abuses of process.

Section 105 also plainly recognizes bankruptcy courts' broad authority to take action to address abuses of process. It states:

> No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making 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). Even if, as Petitioner contends, this provision is merely a rule of construction, it provides a statutory imprimatur on the conclusion reached by numerous courts – including this Court – that bankruptcy courts have inherent authority to address abuses of process.[5] *See, e.g.*, *Marrama v.*

[5] The Petitioner argues that this sentence refers only to the exercise of the authority specifically granted in the first sentence of § 105. This construction does not lead to a materially different assessment of bankruptcy courts' powers. Instead, it implies that Congress intended the first sentence as a broad grant of power that encompasses "action . . . to prevent an abuse of process." Regardless of whether this authority is inherent authority confirmed by the Code or equitable power specifically granted by the Code, the salient point is that bankruptcy courts have the authority to address abuses of the process.

Citizens Bank of Mass., 549 U.S. 365, 375-76 (2007) (noting "the inherent power of every federal court to sanction abusive litigation practices" that courts would have "even if § 105 had not been enacted"); *Knight v. Luedtke (In re Yorkshire, LLC)*, 540 F.3d 328, 332 (5th Cir. 2008) ("It is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct."); *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("Civil contempt authority [under § 105(a)] allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction). The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics.").

When a debtor's efforts to retain property beyond that available under the Code's exemption framework are sufficiently improper to constitute an abuse of process, an order surcharging the debtor's exemptions falls squarely within the authority to take "any action . . . to prevent an abuse of process." *See Malley v. Agin*, 693 F.3d 28, 30 (1st Cir. 2012) ("If § 105(a) was not meant to empower a court to issue an order like the one before us, it is hard to see what use Congress had in mind for it."). The authority to address abuses of process represents a power to "protect the integrity of the bankruptcy process." *Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004). A "fundamental canon of

the Bankruptcy Code" is that "a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims." *In re Marrama*, 430 F.3d 474, 477 (1st Cir. 2005), *aff'd sub nom. Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). "[B]ankruptcy courts have broad authority to act in a manner that will prevent injustice or unfairness in the administration of bankruptcy estates." *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 340 (3d Cir. 2006); *see also Pepper v. Litton,* 308 U.S. 295, 307-08 (1939) ("[I]n the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done. . . ."); *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 235 (3d Cir. 2004) ("Bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process." (internal quotation omitted)). The power to protect the process does not give bankruptcy courts free rein to substitute their own notions of equity for the legislative decisions embodied in the Bankruptcy Code, but it does provide bankruptcy courts the power to act to prevent or limit the harm to other parties from a debtor's abuse of the exemption framework. *See Latman*, 366 F.3d at 785 ("[T]he surcharge remedy protected the . . . creditors by preventing the [debtors] from sheltering more assets

than permitted by 11 U.S.C. § 522."); *Onubah v. Zamora (In re Onubah)*, 375 B.R. 549, 556 (B.A.P. 9th Cir. 2007) ("[T]he surcharge was calculated to compensate the estate for the actual damage inflicted by [the debtor's] misconduct.").

In this case, the lower courts clearly recognized the distinction. The Bankruptcy Appellate Panel and the Court of Appeals, in fact, reversed the Bankruptcy Court's first surcharge order because the evidence in the record was insufficient to distinguish the surcharge from a punishment of the debtor for his litigation tactics. *See Law v. Siegel (In re Law)*, No. CC-09-1077-PaMkH, 2009 WL 7751415, at *2 (B.A.P. 9th Cir. Oct. 22, 2009) (describing prior proceedings). In support of the second surcharge order, the Bankruptcy Court made detailed findings of fact regarding the debtor's abuses. *Id*. at *4. Based on the record, the appellate courts reviewing the second surcharge order agreed that "the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process." *Law v. Siegel (In re Law)*, 435 Fed. App'x 697, 698 (9th Cir. 2011); *see also Law*, 2009 WL 7751415 at *8 ("To protect the integrity of the bankruptcy system, and to prevent Debtor from reaping a benefit from his actions to the prejudice of his creditors, the bankruptcy court was justified in deciding that Debtor not receive his homestead exemption under these facts."). The authority to prevent an abuse of process recognized in § 105 provides the authority

to craft the type of compensatory[6] remedy the Bankruptcy Court applied in this case, a surcharge on exemptions to prevent (or, in this case, to limit) the actual harm to the estate from the debtor's abuse of process.

II. Neither the Bankruptcy Code's specification of limitations on exemptions nor its provision of sanctions for certain abuses precludes the surcharge of exemptions under the Code's general equitable authority.

Bankruptcy courts' equitable powers provide an important method of filling gaps in the Code. *See Ameriquest Mortg. Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 44 (1st Cir. 2008) ("[Section] 105(a) has been referred to as a 'catch-all' provision, effectively filling gaps in the bankruptcy code in order to 'preserv[e] the integrity of the bankruptcy system.'" (quoting *Cuevas-Segarra v. Contreras*, 134 F.3d 458, 459 (1st Cir.

[6] Courts reviewing objections to exemptions have imposed similar limitations on exemptions to compensate the estate for costs incurred due to the debtor's delay in disclosing information or claiming exemptions. *See, e.g., Cecil v. Sweeney (In re Cecil)*, 63 Fed. App'x 666, 667 (4th Cir. 2003) ("[W]e conclude that the bankruptcy court acted well within its equitable powers in conditioning exemption of the award on a partial payment of the trustee's attorneys fees and costs."); *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 789 (B.A.P. 9th Cir. 2000) ("[T]he bankruptcy court could have conditioned the allowance of the amended exemptions so as to prevent any prejudice to third parties.").

1998))). Though these powers do not give a bankruptcy court authority to override clear legislative decisions in the Code, an overly restrictive approach risks denying the authority Congress recognized in § 105 to supplement the specific provisions of the Code. *Cf. Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) ("It is in precisely this situation [when the intended system breaks down] that bankruptcy courts' equitable powers are most valuable. . . ."). The gap-filling nature of the equitable authority – especially the authority to prevent abuses of process – makes the equitable authority particularly applicable in the instances in which the Code provides an incomplete solution or addresses related but distinct issues.

Section 522 does contain provisions imposing specific limitations on exemptions, but these provisions serve different purposes than surcharges of exemptions do. Subsection (q) of § 522, for example, imposes a cap on exemptions in certain circumstances, including when the court finds that "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." 11 U.S.C. § 522(q)(1)(A). This provision penalizes a general abuse. An abuse in the *filing* of a case is not directly related to a debtor's claim of exemptions. Congress simply used the exemptions to impose a penalty for the abuse. A surcharge order, on the other hand, serves a compensatory

function, preventing or limiting the actual harm from abuses specifically relating to the exemption scheme.

Section 522 also provides for the reduction of a homestead exemption to the extent its value is attributable to property the debtor "disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt." 11 U.S.C. § 522(o). Again, this provision operates differently than an equitable surcharge of exemptions. With § 522(o), Congress made a policy decision that debtors should not reap the benefit of certain pre-bankruptcy conversions of non-exempt property to exempt homestead property. These conversions – though arguably offensive – were not clearly contrary to the provisions of the Code or clearly abuses of process. *See, e.g.*, *Clark v. Wilmoth (In re Wilmoth)*, 397 B.R. 915, 920 (B.A.P. 8th Cir. 2008) (noting that, although the "Eighth Circuit had already held that under some circumstances, shifting non-exempt assets into exemptions pre-bankruptcy would result in the denial of the exemption or discharge, . . . other courts had not uniformly applied the same analysis and some had allowed the exemptions almost regardless of intent"). The fact that Congress imposed this limitation on exemptions, therefore, is not an

indication that Congress intended to foreclose courts' equitable authority with respect to exemptions.[7]

Though distinguishable from equitable surcharges of exemptions, the statutory sanctions against exemptions also belie the suggestion that exemptions are sacrosanct. Subsection (o), in particular, provides a clear indication that Congress disapproves of manipulations of the exemption scheme and a demonstration that Congress does not view a reduction (or even elimination[8]) of a homestead exemption as unthinkable or incompatible with the bankruptcy system.

The Code's specification of sanctions for certain abuses also provides no basis for concluding that

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[7] This Court generally "assume[s] that Congress is aware of existing law when it passes legislation." *Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) (internal quotation marks omitted). The Tenth Circuit had not decided *Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258 (10th Cir. 2008), at the time Congress added subsection (o), so at the time of the enactment, the only circuit-level decisions concerning the surcharge of exemptions authorized surcharges. In this environment, Congress might well have concluded that no need existed for a specific authorization for surcharges that courts had already found to be valid exercises of equitable authority.

[8] Petitioner describes subsection (o) as a cap, but in a case in which the value of the debtor's homestead that is attributable to non-exempt property the debtor fraudulently converted to homestead property equals or exceeds the exemption, the effect of subsection (o) would be to eliminate the exemption in its entirety. Petitioner does acknowledge this possibility in a footnote. (Br. of Pet'r at 30 n.9.)

courts lack authority to impose other remedies for abuses of process pursuant to their equitable authority. Though the Code provides for a denial of a chapter 7 discharge if a debtor "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account," 11 U.S.C. § 727(a)(4), this sanction represents a penalty for misbehavior and in no way indicates a circumscription of the bankruptcy court's equitable authority to prevent or limit the harm of the misbehavior to other parties, as authorized under § 105. If this were not so, then the similar provision for denial of discharge for a debtor's refusal "to obey any lawful order of the court, other than an order to respond to a material question or to testify," 11 U.S.C. § 727(a)(6)(A), would preclude a court from taking other actions to enforce its lawful orders, such as imposing civil sanctions. Plainly, federal courts are not impotent in the face of outright defiance of their lawful orders. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates." (internal quotation marks omitted)); *Caldwell v. Rainbow Magazine, Inc. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996) ("By providing that bankruptcy courts could issue orders necessary 'to prevent an abuse of process,' Congress impliedly recognized that bankruptcy courts have the inherent power to sanction that *Chambers* recognized exists within Article III courts."). The Court, in fact, has specifically held that "a federal court [is not] forbidden to sanction

bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." *Chambers*, 501 U.S. at 50.

The canon of statutory interpretation that "the specific governs over the general" does not demand a different result. The argument that the existence of specific statutory provisions in a category as amorphous as abuse prevention precludes courts' exercise of general equitable authority to address other unspecified abuses conceives of the "specific" far too broadly. The application of the general/specific cannon in this manner would eviscerate the grant of power § 105 contains. Section 105 recognizes equitable authority to supplement the specific provisions of the Code. In this context, Congress clearly did not intend to foreclose the application of the "general" rule in every broad area that the Code contains "specific" provisions. *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2072 (2012) ("[T]he general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction."); *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) ("To apply a canon properly one must understand its rationale. This Court has understood the present canon ('the specific governs the general') as a warning against applying a general

provision when doing so would undermine limitations created by a more specific provision.").[9]

The power to address abuses of process is particularly important, and the need for broad equitable authority is greatest in cases involving abuses of process. This Court recently affirmed this principle in the case of *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). Despite statutory language and legislative history suggesting that individual chapter 7 debtors have an unqualified right to a first-time conversion of their cases to chapter 13, the Court concluded that neither the statutory text nor the legislative history "limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor." *Id*. at 374-75. The Court's holding in *Marrama* recognizes that bankruptcy courts' equitable authority to prevent abuses of process is a broad power that overlays the entire Code. Even

[9] In the *Varity* case, the Court gave effect to a "general" provision, recognizing it as a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [the statute] does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). The relationship between § 105 and other provisions of the Bankruptcy Code is akin to the "catchall" the Court described in *Varity*. Though the Code contains specific provisions addressing certain issues and providing certain remedies at a legislative level, § 105 indicates that Congress also intended bankruptcy courts to have the authority to address case-by-case issues not specifically governed by other Code provisions.

when the Code provides direction for typical cases of "honest but unfortunate" debtors, bankruptcy courts retain power to act to prevent abuses of process in the atypical cases.

The NACTT urges the Court to confirm that bankruptcy courts have broad powers to fashion case-specific remedies consistent with the Bankruptcy Code in extraordinary cases. The bankruptcy courts' broad equitable authority is particularly important in the chapter 13 cases the NACTT's member trustees administer. For example, courts have applied the powers of § 105 to address abusive repeat filings. *See, e.g.*, *Cusano v. Klein (In re Cusano)*, 431 B.R. 726, 737 (B.A.P. 6th Cir. 2010) (affirming a two-year bar on re-filing under § 105 and citing cases); *In re Gonzalez-Ruiz*, 341 B.R. 371, 384 (B.A.P. 1st Cir. 2006) (affirming a grant of prospective "*in rem*" stay relief, applicable to specific property in future bankruptcy cases). Courts have cited § 105 for purposes as varied as imposing a deadline for a debtor to file a state income tax return, as required by a local rule, *see Howard v. Lexington Invs., Inc.*, 284 F.3d 320, 323 (1st Cir. 2002), and appointing an elderly and incompetent debtor's wife as his next friend "in order to aid in the administration of th[e] case," *see In re Myers*, 350 B.R. 760, 764 (Bankr. N.D. Ohio 2006). Though apparently not the subject of any reported cases, bankruptcy courts also frequently fashion equitable remedies to deal with delinquencies in chapter 13 cases short of dismissing or converting the cases, such as placing the cases on "probation," subject to

dismissal without further hearing upon notice of subsequent default. Chapter 13 cases are complex and routinely extend over five-year periods. Matters not directly addressed by the Code are virtually inevitable. Section 105 demonstrates that Congress intended bankruptcy courts to have equitable authority to handle some of these matters. The NACTT urges the Court to affirm that authority and avoid unnecessary harm to the bankruptcy system.

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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