No. 12-5196

IN THE

# Supreme Court of the United States

STEPHEN LAW,

*Petitioner*,

v.

ALFRED SIEGEL, TRUSTEE

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONER

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Petitioner respectfully submits this supplemental brief in support of certiorari in response to the invitation brief filed by the United States as *amicus curiae*.

## INTRODUCTION

Section 522 of the Bankruptcy Code contains a detailed set of provisions governing whether and to what extent a debtor is entitled to exempt property from the bankruptcy estate. In this case, although it was undisputed that Petitioner was entitled to a $75,000 homestead exemption under § 522, the bankruptcy court nonetheless "surcharged" (*i.e.*, eliminated) Petitioner's exemption by purporting to invoke equitable authority under § 105(a) of the Code. The United States acknowledges that there is a circuit "conflict" that "might warrant this Court's review" about whether a bankruptcy court has the equitable power to deprive a debtor of exemptions that § 522 expressly grants. U.S. Br. 10. But the United States contends that issue "is not presented here" because the surcharged property happened to be used to satisfy the administrative expenses owed to the Trustee and his counsel, rather than the claims of creditors. *Id.*

The distinction proposed by the United States between surcharging to satisfy creditor claims and surcharging to satisfy administrative expenses is illusory. No court (and no litigant in this case) has ever suggested that a court's power to surcharge turns on whether the exempted property is used in part or in whole to satisfy the attorney's fees generated by litigation regarding the exemption. To the contrary, *every* court of appeals that has addressed the relationship between § 522

and § 105 has done so in the context of a claim to surcharge for the reimbursement of attorney's fees. The courts that do not allow equitable surcharges do not permit them regardless whether the surcharge is used to "satisfy pre-petition debts *or administrative expenses*." *In re Scrivner*, 535 F.3d 1258, 1264 (10th Cir. 2008) (emphasis added). And the courts, like the Ninth Circuit below, that do permit surcharging do not draw that distinction either. That is presumably why the United States concedes at the end of its brief that there may be some "overlap" between these issues. U.S. Br. 18. The reality, however, is that there is 100 percent overlap, and this case squarely presents the question of whether a bankruptcy court has the equitable power to deny debtors the exemptions the Code otherwise expressly grants them.

The United States is equally erroneous in contending that the decision below was correct on the merits. Congress expressly provided in § 522 that certain property is to be exempted from distribution in the bankruptcy estate in order to facilitate a fresh start for the debtor. Section 522 further contains nuanced and narrow exceptions to that exemption regime, including limited exceptions for bad acts on the part of the debtor. *See* 11 U.S.C. §§ 522 (k), (q). Those express exceptions would be meaningless if bankruptcy courts were free to strip debtors of exemptions whenever they believed that equity so warrants. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (equitable powers "must and can only be exercised within the confines of the Bankruptcy Code"). To be sure, a bankruptcy court has the power to order sanctions to punish litigant misconduct.

But that power does not extend to – nor is it equivalent to – surcharging exemptions that Congress has granted to a debtor. Congress has made the legislative determination that exempted property is not available to pay attorney's fees or any other administrative expense in bankruptcy, absent certain limited exceptions not present here. A court may not override that policy choice by issuing a sanctions order that takes the very property that Congress has declared exempt.

## SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. The United States is incorrect when it claims that the circuit split regarding equitable surcharges does not encompass surcharging to pay administrative expenses, such as attorney's fees for trustee's counsel.[1] To the contrary, *every* circuit that has addressed the surcharge issue has done so in the context of a surcharge used to pay, at least in part, administrative expenses, and none of the opinions has mentioned, let alone rested upon, on the creditor/administrative costs distinction the United States claims is dispositive.

As the United States recounts, the Tenth Circuit has held that § 105 does not authorize equitable surcharges. "[B]ecause the surcharge of exempt property is inconsistent with the Code's provisions [in § 522] . . . [w]e therefore hold that the bankruptcy court exceeded its equitable authority under § 105(a) in authorizing the surcharge of the debtor's exempt assets." *In re Scrivner*, 535 F.3d at 1265. The United States claims, however, that this holding is limited to surcharges used to return exempted property "to creditors." U.S. Br. 10.

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[1] The United States stands alone in its view. Respondent has conceded that the surcharge at issue here is the subject of a circuit split. Br. of Resp't at 10.

The United States fails to discuss the relevant part of *Scrivner*'s holding. In *Scrivner,* the bankruptcy court had granted "an order of contempt and to surcharge the debtors' exemptions in the amount of $17,424.75 *plus interest, costs, and attorneys' fees.*" 535 F.3d at 1262 (emphasis added). That is, in the underlying motion, the trustee successfully asked the bankruptcy court to surcharge the debtor's exemptions in an amount equal to the debtor's undisclosed income *plus* attorney's fees incurred in litigating the surcharge issue. On appeal, the Tenth Circuit did *not* hold that the surcharge was appropriate to the extent it was used to pay attorney's fees incurred in restoring property to the estate. Instead, it categorically rejected the use of § 105(a) to surcharge to satisfy administrative expenses or the claims of creditors. The court explained that § 522 already "contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts *or administrative expenses*" and thus "we may not read additional exceptions into the statute." *Id.* at 1264 (emphasis added). The Tenth Circuit specifically cited § 522(k) for this proposition, which states that "[p]roperty that the debtor exempts under this section *is not liable for payment of any administrative* expense" except in two narrow circumstances not present here or in *Scrivner.* Thus, contrary to the United States' statement that the case below is "the first court of appeals decision" to address this issue, U.S. Br. 17, the Tenth Circuit has expressly held that equitable surcharging is impermissible even where the surcharge was used to pay the attorney's fees of trustee's counsel.

The cases on the other side of the split likewise do not distinguish between surcharging to pay administrative expenses and surcharging to reimburse creditors. The Ninth Circuit, of course, does not draw such a distinction. In this case, it affirmed a surcharge to pay the attorney's fees of Trustee's counsel, and in doing so it cited *Latman v. Burdette* as authority, Pet. App. A, at 2, in which the Ninth Circuit authorized an equitable surcharge that was, at least in part, used to satisfy the claims of unpaid creditors. 366 F.3d 774 (9th Cir. 2004). The First Circuit did not draw the distinction the United States contends is critical either. In *Malley*, the trustee filed a motion to surcharge the "Debtors' Exempt Property by $27,491.00, being the total of the value of the Non-Exempt Funds *plus the Trustee's law firm's fees and administrative costs and expenses* in pursuing the Non-Exempt Funds' turnover."[2] Chapter 7 Trustee's Motion, *In re Malley*, Case No. 10-14835-JNF (Bankr. D. Mass. Mar. 18, 2011) ("Motion"). The First Circuit affirmed the surcharge categorically, again without any suggestion that its analysis differed to the extent the surcharge was used to satisfy creditors and compensating trustee's counsel. *Malley v. Agin*, 693 F.3d 28, 30 (1st Cir. 2012).

[2] Notably, the *Malley* trustee cited the Bankruptcy Appellate Panel opinion in *Scrivner* as authority for the proposition that it was entitled to costs and fees because that court had upheld "the [bankruptcy] court's award of reasonable attorney's fees incurred by the trustee in bringing the surcharge motion and the fees and costs associated with liquidating the exempt asset." Motion ¶ 23 (citing *In re Scrivner*, 370 B.R. 346, 354 (10th Cir. BAP 2007)). As discussed above, the Tenth Circuit subsequently reversed the Bankruptcy Appellate Panel on this point and held that exemptions could not be surcharged to satisfy attorney's fees incurred in litigating debtor misconduct.

The lower courts are equally divided on the question of surcharges, and like the circuit courts, they do not distinguish between the purpose for which the surcharge is used. *Compare In re Dunn*, No. 05-09708-8-JLR, 2010 WL 2721201, at *2 (Bankr. E.D.N.C. July 7, 2010) ("The court would be inclined to surcharge the exempt asset for the expenses incurred by the trustee in bringing this action, but the majority construction of 11 U.S.C. § 522(k) does not permit the court to surcharge an exempt asset for administrative expenses under circumstances other than those provided by the Code." (citing *Scrivner*)) *and In re Vaughn*, No. B.R. 08-64071-MGD, 2008 WL 7880893, at *4-6 (Bankr. N.D. Ga. Nov. 25, 2008) (same) *with In re Spiers*, No. B.R. 11-32345, 2013 WL 319785, at *7 (Bankr. W.D.N.C. Jan. 28, 2013) (allowing surcharge to pay administrative expenses); *In re Price*, 384 B.R. 407, 411 (Bankr. E.D. Va. 2008) (same); *In re Swanson*, 207 B.R. 76, 80-81 (Bankr. D.N.J. 1997) (same).

The United States also contends that it is relevant that Petitioner "did not squander or ultimately withhold non-exempt assets from the estate," U.S. Br. 16-17, but whether the assets were ultimately returned to the estate cannot make a difference. Petitioner was found to have falsely encumbered an asset and to have imposed costs on the estate in doing so. On those grounds, the bankruptcy court deprived Petitioner of the exemption on the asset to which he was otherwise entitled, explaining that "were Debtor to receive his homestead exemption, the financial consequences of Debtor's misconduct would fall most heavily upon Debtor's creditors, including Trustee and his attorneys." Pet. App. B, at 10. That rationale

applies equally where the estate is harmed by a debtor's failure to turn over property and where the debtor causes the estate to incur additional legal fees. In both cases, the surcharge is an attempt to make the estate whole for shortcomings that it would not have suffered but for the debtor's supposed bad acts. Indeed, the distinction proposed by the United States makes little sense given that administrative expenses may have priority over the claims of unsecured creditors. *See* 11 U.S.C. § 507. Surcharging otherwise exempt property of the debtor to pay administrative expenses thus increases the estate and may leave additional property to satisfy the claims of creditors with lower priority.

The United States is thus simply wrong when it contends that this Petition does not present the issue on which the courts of appeal and lower courts are split. Had Petitioner filed for bankruptcy in Utah instead of California, the bankruptcy court would not have been able to surcharge Petitioner's assets to compensate Trustee's counsel, or for any other purpose. Only this Court can resolve this split, and it should do so in this case.

2. The United States is also incorrect when it urges that the Ninth and First Circuits have correctly interpreted § 105(a) to permit bankruptcy courts to strip debtors of exemptions that § 522 provides them. The exemption provisions of the Bankruptcy Code are one of the primary ways in which in the Code achieves its objective of providing debtors with a "fresh start." *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) (noting that "[t]o 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"). And Congress has set out in substantial detail when those exemptions are available, along with the (highly) limited circumstances in which a debtor should be deprived of them. Notably, Congress has expressly stated that exempt assets *are not* to be used to pay administrative expenses except in specified circumstances. 11 U.S.C. § 522(k). And Congress has further expressly specified the type of culpable conduct that warrants depriving a debtor of his exemptions. For example, Congress has stated that a debtor's exemptions cannot exceed $125,000 if the debtor owes any money arising from "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)(1)(B).

The United States' position thus amounts to saying that although Congress has decreed that even a debtor who owes a debt on a wrongful death judgment is *still* entitled to claim exemptions up to $125,000, a bankruptcy court may *entirely* deprive a debtor of his exemptions if it finds that equity so warrants.[3] As the Tenth Circuit correctly observed, "[t]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [a statute] mandates would be tantamount to judicial legislation and is something that

[3] Indeed, even the wrongful death debtor is entitled to exemptions in excess of $125,000 if the exemption is "reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(q)(2). In contrast, the bankruptcy court was allowed to strip Petitioner of his entire homestead exemption under the Ninth Circuit's rule.

should be left to Congress, not the courts." *Scrivner*, 535 F.3d at 1263 (quotation marks omitted; alteration in original).

The United States contends that the Tenth Circuit's view "would render largely superfluous Section 105(a)'s general authorization to issue orders 'necessary or appropriate to carry out provisions of the' Code." U.S. Br. 15. But of course the United States' interpretation would give the bankruptcy court the authority to override, not "carry out," the express and specific provisions of the Code. *Scrivner*, 535 F.3d at 1264 ("Because the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate, we may not read additional exceptions into the statute."); *see also* Reply Br. of Pet'r at 7-8 (explaining how the Ninth Circuit's rule undermines legislative choices about the circumstances in which exemptions are allowed). Section 105(a) serves an important role in ensuring that a bankruptcy court may issue orders – either on its own motion or sua sponte – necessary to enforce the protections and obligations the Bankruptcy Code creates. Section 105(a) cannot be read to create a free-floating power to undertake whatever actions the bankruptcy court finds equitable despite express prohibitions to the contrary elsewhere in the Code.

Nor is the reasoning of the Ninth Circuit vindicated by this Court's decision in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). *Maramma* dealt with the authority of a bankruptcy court to decline to convert a debtor's Chapter 7 case to Chapter 13. Although the Bankruptcy Code allows debtors to convert their cases "at any time," 11 U.S.C. § 706, this Court held that a bankruptcy court had the

equitable authority under § 105 to decline to convert a case where it found that the debtor had fraudulently concealed assets. 549 U.S. at 375. Central to this Court's reasoning was the fact that it was undisputed that a court faced with such a debtor had the authority to convert the case back to Chapter 7 in light of the debtor's fraud. Thus, § 105 was used only 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." *Id.* (emphases added); *id.* at 376 (court had authority to issue a "prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13"). Here, § 105 is not being used to deprive debtors of exemptions that would ultimately be taken away from them under the Code; it is being used to deprive them of exemptions to which they are otherwise entitled. Thus, while *Marrama* approved the use of § 105 to enforce the Bankruptcy Code's grant of power to bankruptcy courts, the decision below used § 105 to override the Code's express limits on that power. *Norwest*, 485 U.S. at 206 (equitable powers of bankruptcy court "must and can only be exercised within the confines of the Bankruptcy Code"); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940) ("A bankruptcy court . . . is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act").

3. In a final argument, the United States contends that even if the bankruptcy court lacked the authority to surcharge Petitioner's exemption, that determination does not warrant review because the bankruptcy court *could* have simply imposed a $75,000 sanction on Petitioner for litigation misconduct. U.S. Br.

18. Although this Court has not yet squarely decided the question, Petitioner does not dispute that bankruptcy courts, like Article III courts, may well possess substantial inherent authority to sanction litigation misconduct, and they indisputably have been granted certain express powers to sanction. *See Marrama*, 549 U.S at 375-76; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); Fed. R. Bankr. P. 9011 (equivalent of Fed. R. Civ. P. 11).

But the court below did not impose a traditional sanctions order on Mr. Law for litigation misconduct. Instead, it surcharged Mr. Law's exempt property, and the two orders are not equivalent.[4] A sanctions order awarding costs or fees creates a post-petition debt that the trustee may pursue (even after discharge) in accordance with applicable collection law. Importantly, exempt property is not available to satisfy such debts. *See, e.g.*, Fed. R. Civ. P. 64(a); Cal. Code Civ. P. § 487.020(a); *cf.* 11 U.S.C. §§ 522(c), (k) (allowing creditors to take exempted property in specified circumstances not present here). Conversely, the effect of surcharging exempted property is that it is returned to the estate, such that it *is* immediately available to satisfy creditors, including the trustee and counsel. Surcharging an exemption thus gives creditors access to exempted property in a way that a sanctions order awarding attorney's fees or costs does not. And in doing so, the surcharge order frustrates the legislative policy judgment reflected in the carefully

[4] Indeed, it is clear that the bankruptcy court was drawing a distinction between surcharging and sanctioning Mr. Law. The court entered two separate orders, one order surcharging Mr. Law's homestead exemption of $75,000, and the second order imposing sanctions on Mr. Law for violations of his discovery obligations in the amount of $3,520. Pet. App. B, at 2.

constructed system of exemptions to give debtors "a new opportunity in life and a clear field for future effort." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see Rousey*, 544 U.S. at 325.[5]

The United States thus misses the mark in claiming that a federal court's inherent authority to issue sanctions orders trumps state law provisions declaring certain property exempt from execution of a money judgment. *See* U.S. Br. 20. It is *federal law* that requires bankruptcy courts to give effect to state law exemptions. *See* 11 U.S.C. § 522(d); *Owen v. Owen*, 500 U.S. 305, 306 (1991) ("The Bankruptcy Code allows the *States* to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his creditors." (emphasis added)). The question here is whether, as a matter of federal law, Congress intended to give bankruptcy courts the equitable power to make available to creditors property that Congress has expressly said is exempt from distribution in § 522. This Court should

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[5] Thus, the government's argument that what happened below is simply a matter of setoff (or offset), in which the bankruptcy court authorized the Trustee to keep the $75,000 of Petitioner's homestead exemption rather than ordering that the money be paid to Petitioner while simultaneously imposing a sanctions order requiring Petitioner to pay the Trustee $75,000, rests on a false premise. *See* U.S. Br. 20. Exempted property cannot be used for setoff. The "long-standing rule in California and most other jurisdictions is that where a creditor cannot levy on exempt property, he cannot obtain a setoff against that property either." *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1182 (9th Cir. 1997); *see also In re Ter Bush*, 273 B.R. 625, 631-32 (Bankr. S.D. Cal. 2002) (finding that California courts would not permit setoff against the homestead exemption because the "homestead exemption is highly valued in the State of California from a public policy point of view"). Because exempted property is not available to the estate, the court may not order that it be paid to the Trustee to offset a sanctions order charging the debtor for the Trustee's litigation expenses.

resolve that question and resolve it in favor of upholding the exemption scheme set out in § 522 for the reasons stated above.

In sum, a bankruptcy court may use its considerable powers to issue sanctions orders, and the threat of such an order levying attorney's fees or other punishments represents a significant deterrent to improper behavior. But it is equally clear that a bankruptcy court may not, as it did here, order a debtor to use its exempted property to pay those sanctions.[6] That policy judgment has already been made by Congress, which "has balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors." *Schwab v. Reilly*, 130 S. Ct. 2652, 2667 (2010). Whether a court chooses to label its order a sanction or a surcharge, the choice that really matters is the one Congress made in declaring certain property beyond the reach of creditors, and the United States is wrong to suggest otherwise.

## CONCLUSION

The petition for certiorari should be granted.

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[6] Of the cases the government cites in support of its argument, only one arises in the bankruptcy context, and that case expressly acknowledges that its holding is contrary to the weight of authority. *See In re Ward*, 210 B.R. 531, 536 (Bankr. E.D. Va. 1997) (acknowledging that the "general rule in Virginia is that a creditor may not exercise a right of setoff against exempt property," but permitting setoff nonetheless).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Matthew S. Hellman, hereby certify that I am a member of the Bar of this Court, and that I have this 28th day of May, 2013, caused three copies of the Supplemental Brief of Petitioner to be served via overnight mail to:


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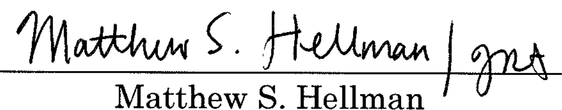

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