No. 11-40950

IN THE

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF KANSAS

In re CARRIE LYNN ROLIN

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR'S POSITION

NATIONAL ASSOCIATION OF
CONSUMER
BANKRUPTCY ATTORNEYS

BY

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TABLE OF CONTENTS

Table of Authorities

Cases

Constitutions

Federal Statutes

State Statutes

STATEMENT OF NATURE OF CASE AND INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,800 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys.

Amicus and its members have a vital interest in this case. The Bankruptcy Code permits individual debtors to exempt certain property from the bankruptcy estate pursuant to state law, thereby putting that property beyond the reach of the trustee and creditors. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start. The trustee has challenged the constitutionality of Kansas' exemption for earned income tax credit in bankruptcy cases. The trustee's argument strikes at the heart of debtor's fresh start by seeking to deny her the benefit of an exemption properly enacted by the State of Kansas and made applicable to debtors by Congress through section 522(b)(3)(A).

STATEMENT OF FACTS

When she filed for bankruptcy relief, debtor, Carrie Lynn Rolin, claimed an exemption in her earned income tax credit under Kan. Register 2011 (Senate Bill No.

12) April 14, 2011 (hereinafter 2011 S.B. 12), a Kansas exemption law in effect at the time she filed her bankruptcy petition. Kansas law allows a debtor in bankruptcy to exempt one year's right to receive earned income tax credits allowed pursuant to state and federal tax laws. The Trustee asserts in her Objection that Kansas' bankruptcy-specific earned income tax credit exemption violates the Supremacy Clause as well as the uniformity requirement of the Bankruptcy Clause, and that, if allowed to stand, the exemption would be an unconstitutional delegation of Congress' legislative power.

STATEMENT OF QUESTION PRESENTED

Whether the State of Kansas' earned income tax credit exemption, 2011 S.B. 12, which is applicable only to debtors in bankruptcy, violates the Supremacy Clause or the Bankruptcy Clause of the United States Constitution, or whether it is an unconstitutional delegation of legislative power by Congress.

ARGUMENT

I. Kansas' Bankruptcy-Specific Exemption Functions Consistently with Congress's Power to Establish Uniform Bankruptcy Laws.

A. The Uniformity Requirement of the Bankruptcy Clause does not Apply to State Laws

The Chapter 7 Trustee objected to Ms. Rolin's earned income tax credit exemption claim asserting that Kansas' bankruptcy-specific exemption contravenes the Bankruptcy Clause of the U.S. Constitution. The Bankruptcy Clause grants to Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4.

States and the federal government have concurrent jurisdiction in the area of defining exemptions that are to be applied in bankruptcy cases. *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983). By its express language the Bankruptcy Clause refers only to Congress's authority to enact uniform bankruptcy laws. Thus, the Bankruptcy Clause is inapplicable to state legislation. *In re Jones*, 428 B.R. 720, 729 n.9 (Bankr. W.D. Mich. 2010).

Laws are "uniform" when they operate the same way throughout the country even though application of state laws may cause variations in results from state to state. *In re Urban*, 375 B.R. 882 (B.A.P. 9th Cir. 2007). Therefore, the Bankruptcy Clause is not violated by Congress' adopted of state exemptions, whether specific to bankruptcy debtors or applicable to the general population of the state, because the federal bankruptcy law operates the same way throughout the country. Under the Bankruptcy Clause, the states themselves have no obligation to create uniformity in their exemption laws.

B. Congress may Incorporate State Property Law into Federal Statutes without Violating the Bankruptcy Clause.

The Bankruptcy Code permits a Kansas debtor to exempt from the bankruptcy estate "any property that is exempt under federal law . . . or State or local law that is applicable on the date of the filing of the petition." 11 U.S.C. § 522(b)(3)(A). The Trustee argues that Congress could not authorize enforcement of 2011 S.B. 12 under section 522(b)(3)(A) because to do so would give effect to a bankruptcy law that was not "uniform." Thus, the Trustee's argument hinges on what is meant by a "uniform" bankruptcy law under Article I, section 8, clause 4, of the Constitution. Under current Supreme Court precedent Congress may defer to state property laws without compromising its obligation to enact uniform bankruptcy laws.

Section 522(b)(3)(A) operates consistently with the Bankruptcy Code's general approach of allowing state law to determine property rights in bankruptcy cases. *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankruptcy estate to state law."). *See also In re Stephens*, 402 B.R. 1, 5 (B.A.P. 10th Cir. 2009) (property rights historically created and defined by state law). Courts have repeatedly rejected arguments asserting that Congress violated the Bankruptcy Clause's uniformity requirement by incorporating state law into the Bankruptcy Code. *See, e.g.*, *Herrin v. GreenTree-AL, L.L.C.*, 376 B.R. 316, 321 (S.D. Ala. 2007) (applying state law to determine real property interests subject to modification under 11 U.S.C. § 1322(b)(2) does not violate the Bankruptcy Clause); *In re Simon*, 311 B.R. 641 (Bankr. S. D. Fla. 2004) (construing fine and penalty discharge exception under state laws not contrary to Bankruptcy Clause). State property laws are frequently incorporated into federal law despite the fact that their inclusion may cause operation of the federal law to lead to disparate results from state to state and within states.

The Tenth Circuit has specifically found that incorporation of state exemption laws which apply only to debtors in bankruptcy do not violate the uniformity requirement of the Bankruptcy Clause. *See In re Kulp*, 949 F.2d 1106, 1109 n.3 (10th Cir. 1991) ("The *In re Mata*, [115 B.R. 288 (Bankr. D. Colo. 1990)] and *In re Lennen,* [71 B.R. 80 (Bankr. N.D. Cal. 1987)] cases confuse the geographical uniformity doctrine with the well-established principle that states may pass laws which do not conflict with the federal scheme. . . . In this case, we have no conflict because 11 U.S.C. § 522 expressly delegates to states the power to create bankruptcy exemptions."); *In re Walker*, 959 F.2d 894, 900-901 (10th Cir. 1992) (bankruptcy-specific exemptions do not violate Bankruptcy Clause).

C. The Standard for what Is a Uniform Law Under the Bankruptcy Code Has Been Expanded By Supreme Court Cases Decided after *Hanover*.

To support her view that bankruptcy-specific exemptions are an exception to the foregoing precedent the Trustee relies heavily upon the 1902 Supreme Court decision in *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). The *Hanover* court upheld the Bankruptcy Act's reliance on state exemption laws. *Id.* at 189-90. In validating the use of state exemptions in federal bankruptcy cases, the Court rejected the contention that the practice violated the uniformity requirement of the Bankruptcy Clause. *Id.* In the Court's view, the federal law's reliance on state laws having uniform geographic application within a state satisfied the constitutional uniformity requirement.

Ignoring the basic holding of *Hanover*, the Trustee has seized upon one sentence in the opinion as an endorsement of her position in this appeal. In approving the use of state exemptions, the *Hanover* court stated, "We concur in this view and hold that the system is, in a constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditor if the bankrupt[cy] law had not been passed." *Hanover*, 186 U.S. at 190. *See also In re Schafer*, 455 B.R. 590 (B.A.P. 6th Cir. 2011); *In re Pontius,* 421 B.R. 814 (Bankr. W.D. Mich. 2009)(interpreting *Hanover* to limit state exemption schemes to that which would give to the trustee what creditors could obtain outside of bankruptcy).

The trustee's reliance on this sentence in *Hanover* is misplaced. In *Hanover* the Supreme Court approved an existing practice under federal law in which debtors could claim the exemptions applicable under the law of the state where they had lived for the greater portion of the preceding six months. *Hanover,* 186 U.S. at 189. In approving the exemption scheme then in effect, the court was not declaring all other exemption systems unconstitutional under the Bankruptcy Clause. The question of uniformity based on a class definition rather than geography was not before the *Hanover* court.

The *Hanover* Court's characterization of uniformity does not reflect the current law. In two later decisions the Supreme Court supplemented the *Hanover* Court's "geographic uniformity" standard for determining uniformity under the Bankruptcy Clause. *Railway Labor Executive Ass'n v. Gibbons*, 455 U.S. 457 (1982); *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974). In these cases the Court recognized an alternative basis for assessing whether a law complied with the Bankruptcy Clause's uniformity requirement. If the bankruptcy law in question applied to debtors differently over a common geographic area, it could nevertheless withstand constitutional challenge if it treated the debtors differently based on a reasonable classification.

Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982), is the only case in which the Supreme Court struck down a bankruptcy statute because it did not comply with the Bankruptcy Clause. Congress enacted the statute in question in *Gibbons* in order to regulate labor relations of a single insolvent railroad. Because the statute applied to only one entity it was "nothing more than a private bill." *Gibbons*, 455 U.S. at 471. A private bill could not possibly apply uniformly to a class of similarly situated entities. In striking down the law the Court summarized the limited situations in which it was appropriate to invalidate a statute under the Bankruptcy Clause:

> Prior to today, the Court has never invalidated a bankruptcy law for lack of uniformity. The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner.

Id. at 469. Recognizing that lack of geographic uniformity is not fatal to a bankruptcy law the *Gibbons* Court said, "[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473.

Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102 (1974), involved a challenge to legislation creating a special insolvency reorganization system for regional railroads. Certain railroads challenged the statute as violating the Bankruptcy Clause's uniformity requirement because it treated debtors differently based on geographic location. The Supreme Court rejected this contention. The Court concluded that the bankruptcy laws, like laws pertaining to duties and excise taxes, may designate an "evil to be remedied" and adopt classifications for addressing the problem. *Id.* at 160-61 (*quoting The Head Money Cases*, 112 U.S. 580, 594-95 (1884)). Despite disparate geographical impact, legislation may be uniform if the classifications apply to defined parties as necessary to address a particular government objective.

The Constitutional provision applicable to laws establishing duties and excise taxes sets a higher standard for uniformity than the Bankruptcy Clause.[1] *See Schultz v. U.S.*, 529 F.3d 343, 355 (6th Cir. 2008). Nevertheless, even under this stricter standard, the Supreme Court has recognized alternatives to the geographic uniformity standard. *See United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (federal oil production excise tax exemption that preferred one geographic area over all others upheld as reasonably based classification).

After reviewing post-*Hanover* Supreme Court decisions, the Seventh Circuit concluded that "the [Bankruptcy] Clause forbids only two things: The first is arbitrary regional differences in the provisions of the Bankruptcy Code. The second is private bankruptcy bills – that is, bankruptcy laws limited to a single debtor – or the equivalent." *Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996). Where *Gibbons* was a clear

[1] Congress is empowered to lay and collect "all Duties and Excises (which) shall be uniform throughout the United States." U.S. Const. Art. 1, sec. 8 cl. 1)."

example of private legislation, *St. Angelo v. Victoria Farms, Inc.,* 38 F.3d 1525 (9th Cir. 1994) is a case involving the other scenario, a fundamentally arbitrary regional classification under the bankruptcy laws. The *Victoria Farms* court struck down a provision of federal bankruptcy legislation that delayed implementation of various aspects of the U.S. Trustee program in only two states. No rationale was proffered as to why these two states had been singled out for different treatment, leading the court to conclude that the classifications were arbitrary and therefore not uniform.

In *Schultz v. U.S.*, 529 F.3d 343 (6th Cir. 2008), the Sixth Circuit also had occasion to review the development of the "geographic uniformity" standard under the Bankruptcy Clause. *Schultz* involved a Bankruptcy Clause challenge to the means-testing standards enacted in 2005. These amendments applied a federally mandated set of standards, which varied from state to state based on federal data, to determine chapter 13 debtors' disposable income. The debtors claimed that the system failed the "geographic uniformity" test. Construing the uniformity standard as modified by *Blanchette*, the court concluded that the BAPCPA means testing provisions functioned as a uniform law. The court concluded, "Congress is allowed to distinguish among classes of debtors, and to treat categories of debtors differently, whether it be through the incorporation of varying state laws 'affecting dower, exemptions, the validity of mortgages, priorities of payment and the like.' " *Id.* at 352 (*quoting Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

Other courts have analyzed the post-*Hanover* Supreme Court decisions in the same way. In construing the Bankruptcy Clause, a bankruptcy appellate panel for the Ninth Circuit rejected an argument for geographic uniformity that relied heavily on *Hanover*. *See, e.g., In re Urban*, 375 B.R. 882, 890 (B.A.P. 9th Cir. 2007) (finding that the *Hanover* Court's "bright line" rule requiring identical distribution to creditors inside and outside of bankruptcy within the same geographic area had been modified by the addition of more flexible standards based on classification of debtors along non-geographic terms); *In re Applebaum*, 422 B.R. 684, 692 (B.A.P. 9th Cir. 2009) ("The concept of uniformity requires that federal bankruptcy laws apply equally in form (but not necessarily in effect) to all creditors and debtors, or to 'defined classes' of debtors and creditors," (*quoting Gibbons*, 455 U.S. at 473)); *In re Chandler,* 362 B.R. 723, 728-29 (Bankr. N.D. W.Va. 2007) ("Geographical uniformity and class uniformity are separate concepts, and when a law is applied to a specified class of debtors, the uniformity requirement is met, so long as the law applies uniformly to that defined class of debtors.").

That there is no requirement that debtors claiming exemptions in a single geographic area be treated the same inside and outside of bankruptcy is aptly illustrated by the case of *In re Varanasi*, 394 B.R. 430 (Bankr. S.D. Ohio, 2008). There, the court approved application of the New Hampshire homestead exemption to an Ohio resident who, had he fulfilled the post-BAPCPA residency requirement of section 522(b)(3)(A), would otherwise have been limited to the same Ohio homestead exemption applicable to other Ohio residents. As the bankruptcy trustee in *Varanasi* did not recover what a creditor would have received in a non-bankruptcy action, this disparate treatment of neighbors would clearly not conform to the *Hanover* holding as characterized by the Trustee and yet, the Ohio bankruptcy court rejected a challenge based upon this disparity. *Id.* at 439. The court noted that in amending section 522(b)(3)(A) Congress created "a specific class of debtors based on whether they have relocated from one state to another within a defined period of time." *Id. See also In re Jones*, 428 B.R. 720, 729 n. 8 (Bankr. W.D. Mich. 2010) (discussing the "mansion loophole" establishing an extended domiciliary requirement that must be satisfied before a debtor can claim the state homestead exemption); *In re Applebaum*, 422 B.R. 684, 690 (B.A.P. 9th Cir. 2009).

As these cases clearly demonstrate, the contemporary uniformity standard for state exemption schemes, unlike the geographical uniformity scheme approved in *Hanover* , *does* allow for disparate treatment of debtors residing in the same geographical area. Under this rule a trustee will not always take the same property in bankruptcy that a creditor in the same state would take absent the bankruptcy. Thus, it is clear that federal bankruptcy laws may incorporate state exemption laws that are not geographically uniform so long as the laws distinguish among defined classes of debtors in the same geographic area. While *Amicus* does not concede that the Bankruptcy Clause applies to state legislation, even if it did, the Kansas statute at issue here, which applies uniformly to all Kansas debtors in bankruptcy, passes that test.

II. Allowing States to Create Their Own Bankruptcy-Specific Exemptions Is Not an Unconstitutional Delegation of Legislative Power.

Though presented as a uniformity argument, the Trustee argues that Congress is limited in its power to reference state bankruptcy-specific laws by the constitutional prohibition against delegation of legislative power. Citing *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000), the trustee argues that the opt-out power given to the states in section 522(d) consists of the "power to forbid" use of federal exemptions rather than the "power to create" bankruptcy-specific exemptions. The court in *In re Wallace*, 347 B.R. 626 (Bankr. W.D. Mich 2006) takes this one step further. In discussing bankruptcy exemptions the *Wallace* court acknowledged that Congress "can reference state law for purposes of defining the scheme it has chosen," but went on to state that what Congress could not do under the Constitution was "delegate . . . to the states . . . the power to actually decide what is to be the appropriate scheme." *Id.* at 635.

There, the court devised the following analysis, which the trustee quotes with approval:

> [I]t is within Congress' discretion under the Bankruptcy Clause to decide what is to be the set of exemptions available to debtors seeking bankruptcy relief. Congress can create its own scheme. It can establish more than one scheme. It can reference state law for purposes of defining the scheme it has chosen. For that matter, Congress could reference the laws of Kazakstan to define the bankruptcy exemption scheme if it were to so choose. What Congress cannot do under the Constitution is delegate to Kazakstan, to the states, or to any other entity the power to actually decide what is to be the appropriate scheme. That power is reserved under the Constitution for the exclusive exercise of Congress.

Wallace, 347 B.R. at 635; Trustee's Brief at 15. *See also Schafer*, 455 B.R. 590, *Pontius,* 421 B.R. 814.

By conflating the prohibition against unconstitutional delegation of legislative power with the Bankruptcy Clause uniformity requirement, neither the trustee nor the courts applying the language of unconstitutional delegation examine the issue with any degree of deliberation. While, as the *Wallace* court found, there is certainly a practical difference between enacting legislation and forbidding certain choices of law, there is no basis for imposing that distinction on state exemption laws. The trustee is mistaken as to Congress' power to permit states to enact legislation concerning exemptions. There is no limit in section 522(b)(3)(A) or in the Supreme Court's consistent interpretation of Congress' legislative power that limits states to the power to "forbid" and precludes the power to "enact" as the courts in *Pontius*, *Schafer*, and *Wallace* found.

Article 1, section 1, of the U.S. Constitution provides "all legislative Powers herein granted shall be vested in a Congress of the United States." This is not a prohibition against delegation. *Iske v. United States*, 396 F.2d 28, 31 (10th Cir. 1968) (delegation in the area of drug regulation permitted despite broad deference afforded state laws). "This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving v. United States*, 517 U.S. 748 (1996) (*quoting Wayman* v. *Southard*, 10 Wheat. 1, 42 (1825)). There are many areas where, despite Congress' plenary power and a requirement of uniformity, broad freedom is accorded the states to affect federal law. *See, e.g., Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946)(Congress may permit states to apply tax on out-of-state insurance companies despite Congress' plenary power in the area of taxation and interstate commerce and its regulation of insurance); *Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589, 602 (1931) ("The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity.").

The *Hanover* Court specifically found that Congress' reference to state exemption scheme in bankruptcy was not an unconstitutional delegation of legislative power. *Hanover*, 186 U.S. at 190 ("Nor can we perceive in the recognition of the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. *In re Rahrer,* 140 U. S. 545, 560, sub nom. *Wilkerson v. Rahrer*, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865."). *See also In re Shumaker*, 124 B.R. 820, 826 (Bankr. D. Mont. 1991) (citing *Prudential* for the conclusion that bankruptcy-specific exemptions do not constitute unconstitutional delegation of legislative power).

The above-quoted portion of the *Wallace* opinion, while rhetorically colorful, lacks logic. The court acknowledges that Congress can "reference" state law for purposes of defining a bankruptcy exemption scheme. At the same time it says that Congress cannot "delegate" to the states the "power to decide what is to be the appropriate scheme." The statement begs the question: How can Congress "reference" a scheme of state exemptions unless a state has first decided what the scheme of state exemptions to be referenced will be? Obviously, states have the power to enact and amend their own exemptions, and under section 522(b)(3)(A) Congress unquestionably authorized states to supply the exemption scheme that will be recognized in bankruptcy cases.

The trustee relies on the 1920 case of *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), for her contention that bankruptcy-specific exemptions are an unconstitutional delegation of legislative power. In that case, the plaintiff sought compensation under New York's Worker's Compensation Law for the death of her husband while working as a bargeman on the Hudson River. In finding that a principle purpose behind the maritime laws was to create uniformity, the Court held that Congress could not allow states to apply their own worker's compensation laws in maritime cases, stating: "since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will." *Id.* at 160.

Like *Hanover, Knickerbocker* has been limited in its scope and superseded by subsequent congressional enactments and Supreme Court decisions. *Askew v. American Waterways Operators*, 411 US. 325, 338 (1973) (referring to *Knickerbocker* as an example of "isolated instances where 'state law must yield to the needs of a uniform federal maritime law' and acknowledging that there are many instances in which states may legislate in the area of maritime law.); *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4th Cir. 1944) (Despite the apparently restrictive holding in *Knickerbocker*, Congress may make laws placing maritime injuries within jurisdiction of state worker's compensation commission).

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the Court drew a distinction between Congress delegating legislative power to the states and Congress merely incorporating evolving state laws. In that case, the Court upheld a state law that taxed out-of-state insurance companies at greater rates than in-state companies after it was challenged as violating the Commerce Clause and attacked on the bases of lack of uniformity in interstate tax laws and unconstitutional delegation of legislative power.

The Court summarily disposed of Prudential's argument that Article I, Section 8, cl. 1, of the Constitution requiring that taxes "be uniform throughout the United States," prevented Congress from affirmatively permitting states to impose taxes that discriminate against interstate commerce. The Court stated, "The . . . contention that Congress' 'adoption' of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner." *Prudential,* 328 U.S. at 438 n. 51. *See also Waterfront Comm'n of New York Harbor v. Constr. & Marine Equip. Co.,* 928 F.Supp. 1388, 1404 (D. N.J. 1996) (citing *Prudential* for the proposition that "While Congress may not delegate to the states power to legislate in areas that are reserved to Congress, such as interstate Commerce Clause powers, it may by federal legislation, adopt and incorporate by reference, state laws which exist or which may exist in the future."); *In re Sullivan*, 680 F.2d 1131, 1137 (7th Cir. 1982) (applying reasoning in *Prudential* to uphold bankruptcy-specific exemptions against unconstitutional delegation challenge).

Likewise, the court in *Wallace* and those courts following it, have confused Congress' power to consent to state legislation in the area of bankruptcy exemptions and its power to legislate. Arguments such as those offered by the Trustee and the court in *Wallace* offer inconsistent and illogical views of the congressional power exercised in section 522(b)(3)(A). They avoid the question of the validity of this exercise by writing new text into the Bankruptcy Code which allows reference to general state exemption laws while prohibiting reference to bankruptcy-specific exemption laws. There is simply no basis in logic or in statutory construction for this distinction. Congress acted well within its constitutional authority in enacting section 522(b)(3)(A) and the application of 2011 S.B. 12 is perfectly consistent with the existing text of the Code.

The reach of the federal exclusivity doctrine espoused by the Trustee and the bankruptcy courts in *Wallace,* and the cases following its reasoning is extraordinary. If followed consistently, it would disrupt the interplay between state and federal law that has always been a cornerstone of American bankruptcy practice. The attempt to interject this doctrine into the sphere of bankruptcy exemptions is particularly inappropriate.

III. State Bankruptcy-Specific Exemptions Do Not Violate the Supremacy Clause.

State law is preempted to the extent that it falls within a field that Congress has evidenced an intent to occupy. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190, 203-04 (1983). Or, if Congress has not completely displaced state regulation in a given area, state law may be preempted if it actually conflicts with federal law in such a way that it is impossible to comply with both state and federal law. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). Finally, a state law that stands as an obstacle to the accomplishment of the purposes and objectives of Congress is preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Perez v. Campbell,* 402 U.S. 637, 652 (1971) (state law preempted if it "frustrates the full effectiveness of the federal law."); *In re Vasko*, 6 B.R. 317, 323 (Bankr D. Ohio 1980) ("The state law must in its effect, obstruct the basic objectives of the federal law.")

A. Congress Has not so Occupied the Area of Bankruptcy Exemptions as to Preempt 2011 S.B. 12.

Given the role that Congress expressly allocated to state-created exemption laws in bankruptcy, the Trustee cannot pass the threshold to begin a Supremacy Clause challenge. Significantly, Congress placed no limits on the content of state law exemptions to be recognized in bankruptcy cases. *Owen v. Owen*, 500 U.S. 305, 308

(1991); *Sheehan v. Peveich*, 574 F.3d 248, 252 (4th Cir. 2009); *Storer v. French*, 58 F.3d 1125, 1128-29 (6th Cir. 1995). To the contrary, Congress provided in the Bankruptcy Code that a debtor may exempt from the bankruptcy estate "any property that is exempt under federal law . . . or State or local law that is applicable on the date of the filing of the petition." 11 U.S.C. § 522(b)(3)(A).

A provision expressly authorizing use of state exemption laws in bankruptcy cases has been an integral feature of federal bankruptcy law since the nineteenth century. *See In re Schafer*, 455 B.R. 590, 2011 WL 564 *14-15 (B.A.P. 6th Cir., Feb. 24, 2011) (discussing prior federal bankruptcy statutes and their exemption schemes). By its plain language section 522(b)(3)(A) allows a Kansas bankruptcy debtor to claim as exempt "any property" that is exempt under Kansas law. There is no textual support for an insertion of qualifiers into this plain text of the Code. With section 522(b)(3)(A) Congress did not limit its grant of authority to the states to fashion the exemption laws to be recognized in bankruptcy cases.

Case law has consistently acknowledged that Congress deliberately chose not to preempt state law in the area of defining the exemptions to be allowed in bankruptcy cases. Section 522(b)(3)(A) "allows the States to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his creditors." *Owen v. Owen*, 500 U.S. 305, 306 (1991). Thus, Congress expressly authorized states to "preempt" federal law. *See In re Kulp*, 949 F.2d 1106, 1109 n.3 (10th Cir. 1991) (no conflict because Congress expressly delegated the power to create bankruptcy exemptions to states); *In re Stephens*, 402 B.R. 1 (B.A.P. 10th Cir. 2009) ("Rather than preempting the [exemption] area, Congress expressly authorizes the states to 'preempt' the *federal* legislation.") (quoting *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983), *cert. denied* 464 U.S. 983 (1983)). Likewise, the *Rhodes* court emphasized that through section 522(b) Congress "vested in the states the ultimate authority to determine their own bankruptcy exemptions." *Rhodes,* 705 F.2d at 163. *Accord Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995). *See also Sheehan v. Peveich*, 574 F.3d 248 (4th Cir. 2009) *cert. denied sub nom Sheehan v. Jackson*, 130 S. Ct. 1066 (2010) ("There can be no preemption, however, where Congress 'expressly and concurrently authorizes' state legislation on the subject"); *In re Sullivan*, 680 F.2d 1131, 1137 (7th Cir. 1982) (to say that state exemption provisions are in conflict with the language of the [Bankruptcy] Code "is simply inaccurate").

In accordance with Congress' clear edict to the contrary, it cannot reasonably be concluded that Congress has completely occupied the area of bankruptcy exemptions.

B. The Trustee cannot show an actual conflict between 2011 S.B. 12 and the Bankruptcy Code nor does the Kansas Exemption Frustrate the Purpose behind the Federal Law.

Given the range of exemptions that are routinely enforced in bankruptcy cases nationally, it cannot be seriously argued that Kansas' law actually conflicts with or interferes with the operation of federal bankruptcy laws. *In re Applebaum*, 422 B.R. 684, 691(B.A.P. 9th Cir. 2009) ("There is no conflict between the purposes and goals of the Bankruptcy Code and the California bankruptcy-only exemption statute. Simply because the exemptions differ from the federal exemptions (or from its non-bankruptcy counterpart), does not mean that such differences create a conflict that impedes the accomplishment and execution of the Bankruptcy Code.")

In view of section 522(b)(3)(A)'s plain language, there can be no conflict between use of state-created exemptions and the federal law. *Rhodes,* 705 F.2d at 163 ("It is equally axiomatic, however, that Congress has not preempted an area wherein it has legislated when it expressly and concurrently authorizes the state legislatures to disregard or opt-out of such federal legislative area. In such instance, rather than preempting the area, Congress expressly authorizes the states to 'preempt' the *federal* legislation."(emphasis in original)); *In re Sullivan,* 680 F.2d 1131, 1137 (7th Cir. 1982).

Given the Code's clear language, the Trustee can only struggle to create the appearance of a conflict between the operation of the federal and state exemption provisions. She cites extensively to the dissent in *Applebaum*. Though the trustee quotes almost the entire dissent, the conclusion drawn by the dissenting judge is succinctly stated:

> The legislative history shows that none of the key players proposed or even considered expanding states' exemption-making powers to include an additional power to legislate exemptions only applicable in bankruptcy, other than to allow states to adopt (or not) the bankruptcy-only exemption offered by Congress in §522(d). The only conclusion that one can draw from this examination is that Congress never intended § 522(b) to authorize states to enact bankruptcy-only exemptions.

Applebaum, 422 B.R. at 697 (dissenting opinion).

This reasoning does not bear scrutiny as it begs the very question at issue here. The dissent's position is premised upon a state's presumed lack of power to enact bankruptcy-specific exemptions. If the states were prohibited from enacting bankruptcy-specific exemptions prior to 1978, it might be reasonable to assume that congressional silence on the issue would carry forth that prohibition. But there was no such prohibition. And Congress' silence on the issue does not create one.

Another of the Trustee's tactics is to characterize the Kansas law as something other than an exemption law. For example, in her Brief the Trustee endorses a distinction drawn by the Indiana bankruptcy court in *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000), a decision striking down a bankruptcy-specific state exemption. The Trustee provides the following quote from the court:

> Controlling the distribution of assets between a debtor and its creditors goes to the heart of the bankruptcy process. That process begins with the parties' entitlements as they exist under non-bankruptcy law and then proceeds to adjust them in order to accomplish the objectives of the statute. The law's willingness to recognize state created, non-bankruptcy entitlements in bankruptcy proceedings is very different from allowing states to create bankruptcy entitlements. If a state law tried to increase the distribution to particular creditors, by doubling the amount due in the event of bankruptcy, we would not hesitate to condemn it. A state law that increases the amount due the debtor in the event of bankruptcy, by increasing the exemptions it may claim, should be no different. Recognizing otherwise applicable state exemptions in bankruptcy proceedings is not the same as allowing states to create exemptions just for those proceedings. The first situation simply recognizes non-bankruptcy entitlements. It allows debtors to protect the same property in bankruptcy that they could keep from creditors outside of bankruptcy. The second directly controls the distribution of assets between debtors and

> creditors and, thus, how the consequences of bankruptcy are allocated between them.

Cross, 255 B.R. at 34 (emphasis added) (quoted at Trustee's Brief p. 28-29). This purported distinction between "otherwise applicable state exemptions" and state bankruptcy- specific exemptions does not withstand examination. In fact, all exemptions applied in bankruptcy, whether bankruptcy-specific or not, directly control the distribution of assets between debtors and creditors. The Trustee and the *Cross* court describe a distinction without a difference and call it a "conflict."

According to *Cross*, bankruptcy-specific exemptions would make it possible for states to pass extreme laws, allowing either no exemptions at all in bankruptcy or exempting all of a debtor's property from the bankruptcy estate. Yet, the *Cross* court concluded: "Indiana can create any exemptions it wants or no exemptions whatsoever. What it may not do, however, is create (or deny) exemptions solely because of bankruptcy." *Id.* at 36. Clearly, states do not need bankruptcy-specific exemptions to bring about the dire consequence of all-or-nothing exemptions in bankruptcy cases. As the *Cross* court recognized, states, as a matter of their general law, can create any exemptions they want, or none at all, and these can be applied in bankruptcy cases. It is the effect of state exemption statutes, not their appearance in the form of bankruptcy-specific exemptions, that creates incentives or disincentives for debtors or creditors to get involved in a bankruptcy proceeding. *In re Jones*, 428 B.R. at 729.

Finally, the Trustee relies upon the pre-Code decision in *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929)[2] for the proposition that Congress completely occupies the field of bankruptcy. *Pinkus* involved a debtor who filed for relief under an Arkansas insolvency law. The state statute in question purported to operate as a full-service bankruptcy law, setting out a scheme for liquidation of assets, distribution to creditors, and discharge of debts. The debtor was barred from obtaining a discharge of debts under the federal Bankruptcy Act because he had obtained a federal bankruptcy discharge within the past six years. Therefore, he filed for relief under the state law and obtained a discharge of his debts. The state law clearly conflicted with the federal Bankruptcy Act by discharging debts that could not be discharged under the federal law. The Supreme Court held that the state law discharge was invalid as contrary to the controlling federal law.

At one point in its Supremacy Clause analysis the *Pinkus* court stated, "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." *Id.* at 265. The state "laws" the court was addressing were entire insolvency systems that operated tangentially to the federal system, paying out creditors and granting discharges in contravention of federal law.

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[2] Though the trustee cites *Pinkus* in her argument relating to the Bankruptcy Clause, she concludes that "The Supreme Court, therefore, held that the provisions of the state insolvency act were 'within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded.'" As the court noted in *Kulp*, 949 F.2d at 1109, these arguments confuse preemption with uniformity principles.

The Trustee in the instant case never discusses the nature of the comprehensive state law at issue in *Pinkus*. Unlike the situation in *Pinkus*, section 522(b)(3)(A) invites states to "complement" federal bankruptcy law. They are invited to do so by formulating their own bankruptcy exemptions. States that accept this invitation are not obstructing the basic objectives of the federal law; they are furthering those objectives. The sentence from *Pinkus* referring to the prohibition against "complementing" federal bankruptcy law is an outdated characterization of the relevant constitutional test, applicable in a vastly different context, and predating Bankruptcy Code section 522(b)(3)(A) by several decades. Section 522(b)(3)(A) invites states to "complement" federal bankruptcy law. They are invited to do so by formulating their own bankruptcy exemptions. States that accept this invitation are not obstructing the basic objectives of the federal law; they are furthering those objectives.

Conclusion

For the foregoing reasons, amicus urges this Court to deny the trustee's objection to Ms. Rolin's claimed exemption for her earned income tax credit and find that the state bankruptcy-specific exemption statute does not violate the U.S. Constitution.

Proof of Service

I hereby certify that on this November 3, 2011, a true and correct copy of the Brief Amicus Curiae of the National Association of Consumer Bankruptcy Attorneys in Support of Debtor's Position was electronically filed with the court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system, and was deposited in the U.S. Mail, first class, postage prepaid and properly addressed to the following parties' and/or counsel's addresses on the matrix generated by the Court's CM/ECF system who do not receive notice electronically via CM/ECF: none.

s/Jill A. Michaux

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