No. 11-40377

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

In re ROBERT GREGG CHILTON AND JANICE ELAINE CHILTON,
Debtors.

CHRISTOPHER MOSER,
Trustee-Appellant
— v. —

ROBERT GRESS CHILTON AND JANICE ELAINE CHILTON,
Debtors-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS-APPELLEES

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July 1, 2011

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Moser v. Chilton, 11-40377

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Pursuant to 5th Circuit Local Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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29(c)(5) CERTIFICATION

Pursuant to Rule 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

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Dated: July 1, 2011

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting 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. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed amicus curiae briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Schwab* v. *Reilly*, 560 U.S. —, 130 S. Ct. 2652 (2010); *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998); *In re Wilborn,* 609 F.3d 748 (5th Cir. 2010).

The NACBA membership has a vital interest in the outcome of this case. Whether an Individual Retirement Account inherited from someone other than the spouse of the debtor is exempt from property of the debtor's estate is an issue that continues to arise frequently in consumer bankruptcy proceedings throughout the United States, including within the geographic limits of the Fifth Circuit. Moreover, to the knowledge of NACBA, this case is the first case to reach the briefing stage at the U.S. Court of Appeals level. NACBA believes that the district court in this case reached the correct result in recognizing an exemption for the inherited IRA at issue

here. NACBA files this brief to show why the district court's ruling was correct and to address the various unpersuasive arguments to the contrary advanced by the trustee.

CONSENT

This brief is being filed with the consent of all parties.

SUMMARY OF ARGUMENT

As the vast majority of courts that have considered the question presented in this case over the past several years have concluded, an Individual Retirement Account inherited from someone other than the spouse of the debtor may be exempted from the debtor's estate pursuant to the plain language of the Bankruptcy Code and the Internal Revenue Code.

The result that the district court reached in this case, holding the debtor properly exempted an inherited IRA from the debtor's estate, accords with the vast majority of courts to recently address the issue, and for good reason. Application of the plain language of the Bankruptcy Code is mandatory here because it does not produce an utterly absurd result demonstrably at odds with legislative intent. *See United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (construing Bankruptcy Code). In the absence of such a result, a court is not empowered to depart from the outcome

that the language of the applicable statutes dictates. *In re Camp (Camp* v. *Ingalls)*, 631 F.3d 757, 761 (5th Cir. 2011).

The trustee's portrayal of the district court's decision as failing to reflect Congress's likely intent is not based on the express language of the statutes in question—which provide the clearest guide to Congress's intent—nor on any legislative history accompanying those statutes. Rather, the trustee's logic amounts to the following unpersuasive syllogism: (a) because Congress intended to exempt from the estate money that the debtor himself or herself saved for retirement in an IRA, it necessarily follows that (b) Congress did not intend to exempt from the estate money contained in an inherited IRA that does not represent funds saved for the debtor's own retirement. As a simple matter of logic, conclusion "(b)" does not follow from premise "(a)."

Even if this Court could focus solely on policy arguments to the exclusion of the statutory language that compels affirmance, which of course this Court cannot and should not do, the trustee's arguments overlook two central policies favoring the debtor's side of this argument. First, when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Congress intended to expand the protection for tax–favored retirement plans by enacting standard federal exemptions to take the place of the patchwork of state law exemptions that sometimes did not suffice to exempt inherited IRAs from the debtor's estate. And, second, exempting the funds contained in inherited IRAs from a debtor's estate is

entirely logical when one considers that the money contained in an inherited IRA becomes available to the debtor over time, according to a distribution formula specified in tax law. Thus, money contained in an inherited IRA is appropriately exempted from the debtor's estate in accordance with the plain language of the Bankruptcy Code and Internal Revenue Code and the policy of BAPCPA to coordinate those bodies of law.

ARGUMENT FOR *AMICUS CURIAE*

I. The Plain Language of the Relevant Statutes, Pertinent Bankruptcy Court and District Court Rulings, and the Recent Decision of the Eighth Circuit Bankruptcy Appellate Panel All Support the Affirmance of the District Court's Order.

The U.S. District Court for the Eastern District of Texas correctly recognized as exempt from the debtor's estate the funds contained in an Individual Retirement Account that debtor Janice Chilton inherited from her mother, Shirley Jean Heil. The district court reasoned that such funds qualify as exempt pursuant to the plain language of 11 U.S.C. § 522(d)(12), where the debtor has elected the federal exemptions under subsection 522(b)(2), as the debtors-appellees did here. (For debtors who elect their state exemptions, the Code grants the same protection to

IRAs under subsection 522(b)(3)(C).[1]) Each of those subsections of the Bankruptcy Code exempts from the debtor's estate "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."

There is no dispute that the funds in question were in one of the specified accounts while Janice Chilton's mother was alive, nor is there any legitimate dispute that the funds were transferred, by means of a lawful and appropriate trustee–to–trustee transaction, into one of those specified accounts when the IRA was inherited by Janice Chilton as the result of her mother's death. *See In re Johnson*, 2011 WL 1674928, at *3 (Bankr. W.D. Wash. May 4, 2011) ("Under the [Internal Revenue Code], an inherited IRA may be transferred via a direct trustee–to–trustee transfer without any tax consequences. 26 U.S.C. § 408(d)(3)."). The transfer did not affect their exempt status under the Bankruptcy Code. 11 U.S.C. § 522(b)(4)(C). Moreover, the funds at issue remained in that tax exempt transferee account, as of the date of filing of the petition.

Furthermore, there is no dispute that the money contained in the inherited IRA constituted "retirement funds" when that money was originally deposited into the

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[1] Pursuant to 11 U.S.C. § 522(b)(1), an individual debtor is entitled to exempt from property of the estate, at the debtor's option, either the property covered by subsection 522(b)(2) (which in turn references property specified under subsection 522(d)) or the property listed in subsection 522(b)(3). The former election is referred to as choosing "federal exemptions"; the latter, "state exemptions."

IRA. It is the trustee's argument that the money contained in the inherited IRA does not constitute "retirement funds" *of Janice Chilton*, and that therefore the money does not qualify for the specified exemption. This argument, however, has been rejected by the Eighth Circuit's Bankruptcy Appellate Panel—the only appellate tribunal so far to have addressed the question—and nearly every other federal district court and bankruptcy court to have recently considered it.

All of those courts have reasoned that so long as the money in an inherited IRA was originally contributed as "retirement funds" (which, by definition, is necessarily so in cases of this kind), and so long as the money is now contained in one of the specified tax exempt accounts (which is indisputably the fact here and was also true in the other referenced rulings), an inherited IRA is exempt from the debtor's bankruptcy estate under the plain language of the Bankruptcy Code. *See* 26 U.S.C. ("Internal Revenue Code" or "IRC") § 408(e)(1) (recognizing that "*Any* individual retirement account is exempt from taxation under this subsection ...."); 11 U.S.C. § 522(d)(12) (exempting from the debtor's bankruptcy estate "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section . . . 408 . . . of the Internal Revenue Code of 1986"), § 522(b)(4)(C) (funds do not cease to qualify for exemption under subsection (b)(3)(C) or (d)(12) if directly transferred from one account that is tax-exempt under IRC § 408 to another). Nothing in subsection 522(b)(4)(C) requires that the account into which the funds are transferred be one established or maintained for the transferee's retirement, nor that

the funds in that account necessarily have been saved by the transferee in contemplation of her retirement. All that the statute requires is that the transferee account be one which is "exempt from taxation under" certain Internal Revenue Code provisions. There is no dispute that Chilton's account, into which her late mother's retirement funds were transferred, was in fact tax exempt under these provisions of tax law.

Those two statutory provisions—subsection 408(e)(1) of the Internal Revenue Code and subsection 522(d)(12) of the Bankruptcy Code—speak directly to the question presented in this case. Applying the plain language of those two statutes, the district court in this case correctly ruled that the IRA that Janice Chilton inherited from her mother is exempt from Ms. Chilton's bankruptcy estate.

The trustee's argument to the contrary, that an inherited IRA receives its tax-exempt status under 26 U.S.C. § 402(c)(11)(A)(i), which is not one of the Internal Revenue Code sections specified in 11 U.S.C. § 522(b)(3)(C) and (d)(12) (Br. at 25), is simply wrong. Subsection 402(c)(11)(A) deals with distributions *into* IRAs "from an eligible retirement plan described in paragraph (8)(B)(iii)" of subsection 402(c), that is, from "a qualified trust"; it does not deal with IRA-to-IRA transfers. Where the transfer is *from* an IRA, as here, the source account is listed separately and specifically in paragraph (8)(B)(i), not (8)(B)(iii), so subsection 402(c)(11), by its terms, does not apply. Rather, section 408(e)(1) of the Internal Revenue Code, which 11 U.S.C. § 522(d)(12) does expressly mention as the source for tax exemption, provides the tax

exemption by its express terms: "*Any* individual retirement account is exempt from taxation under this subsection...." Because an inherited IRA, under tax law, is simply a type of IRA, § 408 necessarily applies to inherited IRAs, and thus § 522(d)(12)'s requirement of a listed tax exemption is satisfied for purposes of establishing an exclusion for an inherited IRA from the debtor's estate.

As the Eighth Circuit's Bankruptcy Appellate Panel correctly recognized when construing the requirements of § 522(d)(12), the statute in question here:

> imposes two requirements before a debtor may claim an exemption under that section: (1) the amount the debtor seeks to exempt must be retirement funds; and (2) the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code set forth therein.

Doeling v. *Nessa* (*In re Nessa*), 426 B.R. 312, 314 (B.A.P. 8th Cir. 2010). In *Nessa*, the court recognized that both statutory conditions were met. The funds remained tax-exempt and thus protected upon transfer following their inheritance, the Eighth Circuit BAP further ruled. 426 B.R. at 315. That ended the matter, as it should here.

In *Nessa*, the court proceeded to reject the precise arguments on which the trustee so heavily relies in seeking reversal in this case:

> The bankruptcy court correctly determined that the amounts in the inherited account were "retirement funds". The Trustee does not dispute the bankruptcy court's determination that, the amounts in the Debtor's father's IRA were his retirement funds prior to his death. He suggests, however, that to retain their status as retirement funds under section 522(d)(12) in the Debtor's inherited account, the contents of the inherited account would have to have been contributed by the Debtor or be part of the Debtor's retirement plan. Bankruptcy Code section 522(d)(12) makes no such distinction. Section 522(d)(12) requires that

> the account be comprised of retirement funds, but it does not specify that they must be the debtor's retirement funds. The Trustee's definition of retirement funds would impermissibly limit the statute beyond its plain language. *U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'") (citation omitted). In accordance with the terms of Bankruptcy Code section 522(d)(12), even though the contents of the Debtor's inherited account were the Debtor's father's retirement funds, not the Debtor's own retirement funds, they remain in form and substance, "retirement funds."

Id. at 314–15 (footnote omitted). *See also Ransom* v. *FIA Card Services, Inc.*, 562 U.S. —, 131 S. Ct. 716, 723-24 (2011) (language of Bankruptcy Code is starting point; "ordinary meaning" determines significance of undefined words and phrases); *Rousey* v. *Jacoway*, 544 U.S. 320, 329-30 (2005) (same; discussing pre-BAPCPA exemption for IRAs).

In a footnote at the conclusion of the quotation set forth immediately above, the Eighth Circuit's Bankruptcy Appellate Panel acknowledged that the bankruptcy court in this very case had accepted the improperly narrow understanding of the term "retirement funds" that the trustee is now urging this Court to adopt. *See In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. 2010). Of course, the bankruptcy court's ruling in this case has since been reversed by the U.S. District Court for the Eastern District of Texas in the decision that is now the subject of the trustee's appeal to this Court. *See Chilton* v. *Moser*, 444 B.R. 548 (E.D. Tex. 2011). The "Discussion" section of the district court's ruling in *Chilton* begins by noting that "[t]he court has found five cases, all issued since the Bankruptcy Court's March 5, 2010 opinion in this case, in which

an inherited IRA was found to be exempt under either Section 522(d)(12) or Section 522(b)(3)(C)." *Id.* at 551.

Relying on the ruling in *Nessa*, *supra*, as well as the similar holdings reached in *In re Tabor*, 433 B.R. 469 (Bankr. M.D. Pa. 2010), *aff'd sub nom. Bierbach* v. *Tabor*, No. 10–cv–1580 (M.D. Pa. Dec. 2, 2010) (unreported) (*appeal pending*, No. 10-4660 (3d Cir.)); *In re Thiem*, 2011 WL 182884 (Bankr. D. Ariz. Jan. 19, 2011); *In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. Aug. 30, 2010); and *In re Kuchta*, 434 B.R. 837, 843 (Bankr. N.D. Ohio 2010), the district court in this case correctly recognized that funds held in an inherited IRA do not lose their original status as "retirement funds" under federal law due to the transfer from one tax exempt account to another and that an inherited IRA remains tax exempt under 26 U.S.C. § 408(e)(1), which expressly provides that "[a]ny individual retirement account is exempt from taxation . . . ." *Chilton*, 444 B.R. at 552. A recent ruling of the Bankruptcy Court for the Western District of Washington also reached the same result as did the district court in this case. *See In re Johnson*, 2011 WL 1674928 (Bankr. W.D. Wash. May 4, 2011).

The legal analysis contained in the decisions listed in the preceding paragraph provide strong support for affirmance of the district court's ruling in this case based on the plain language of the Bankruptcy Code and the Internal Revenue Code. There is no foundation in the statutory language to support any different result.

II. The Trustee's Arguments for Reversal Cannot Overcome the Plain Language of the Governing Statutory Provisions.

The trustee's main argument on appeal is that the reasons for exempting inherited IRAs from a debtor's bankruptcy estate are not as compelling as the reasons for exempting IRAs into which the debtor himself or herself has contributed the debtor's own money earmarked for retirement. But this Court's role, of course, is not to reconsider or question the policy choices that Congress has made as reflected in legislation that has been enacted. *See Schwab* v. *Reilly*, 560 U.S. —, 130 S. Ct. 2652, 2667 (2010) (construing § 522(*l*); "none of Reilly's policy arguments can overcome the Code provisions"); *Florida Dept. of Revenue* v. *Piccadilly*, 554 U.S. 33, 52 (2008) (Chapter 11 case; "It is not for us to substitute our view of … policy for the legislation which has been passed by Congress.") (quoting earlier cases); *In re Sandoval (Lowe* v. *Sandoval)*, 103 F.3d 20, 23 (5th Cir. 1997) (argument "that policy reasons justify departing from the plain language of the statute is unpersuasive"); *In re England (Pritchard* v. *U.S. Trustee)*, 153 F.3d 232 (5th Cir. 1998) (rejecting Trustee's policy arguments in favor of plain language reading of pertinent Code section).

Moreover, the trustee's argument falls far short of establishing that the result the plain language of the relevant statutes dictates is so absurd or illogical that the language must be disregarded in favor of some other result that Congress somehow had in mind but nevertheless failed to legislate. *See Camp,* 631 F.3d at 761 ("we cannot say that our straightforward interpretation of the plain language of § 522(b)(2)

and Florida's opt-out statute is absurd merely because it might increase the potential for limited forum shopping"). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain,* 503 U.S. 249, 253-54 (1992).

To begin with, the validity of the trustee's policy argument is far from clear. When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress elected to expand the protection for tax–favored retirement plans by enacting standard federal exemptions to supplement the patchwork of state law exemptions that sometimes did not suffice to exempt IRAs from a debtor's estate. Thus, Congress's decision to enact BAPCPA must be understood as intending to provide an exemption for all IRAs regardless of the availability of any exemption under applicable state law so that they would not be affected by bankruptcy. This legislative judgment to leave such accounts unaffected by bankruptcy was also implemented through several other BAPCPA provisions designed to insulate federal-tax-protected plans in bankruptcy cases. *See*, *e.g.*, 11 U.S.C. §§ 362(b)(19), 523(a)(18), 541(b)(7), 1322(f). Congress could hardly have been clearer that it simply did not want accounts of this sort to be affected in any way by bankruptcy.[2]

[2] Where Congress did desire a limitation to exist, it imposed one expressly. Thus, for example, subsection 522(n) places an aggregate cap of about $1.17 million on the protection granted in bankruptcy to any individual debtor's IRAs.

Moreover, numerous recent court rulings have recognized an exemption for inherited IRAs under BAPCPA, and yet there has been no resulting outcry from Congress to overrule or clarify existing statutory law to eliminate the exemption now widely recognized as available for inherited IRAs. No bill has even been introduced to reverse those results. In other words, Congress has the power to overrule judicial decisions if those decisions are incorrectly applying a statute to reach results that Congress in fact did not intend. Congress's failure to attempt to overrule those decisions should therefore be viewed as a sign that the case law reached the correct result or that Congress is, at a minimum, willing to accept the outcome of those rulings.

In arguing that one must look to the characteristics of the property in the hands of the debtor (Br. at 17), the trustee cites exclusively to an Alabama bankruptcy court's statement of that proposition in *In re Navarre*, 332 B.R. 24, 31 (Bankr. M.D. Ala. 2004). But the bankruptcy court's ruling in that case cited no authority for that supposedly critical proposition, and the actual holding in that case was merely that under Alabama law (rather than federal law, which is what is at issue in this appeal) an inherited IRA does not qualify for an exemption. *See id.* As explained above, Congress's enactment of BAPCPA was intended to make the availability of exemptions for inherited IRAs uniform, replacing of the patchwork of conflicting state law exemptions that had previously governed that inquiry.

The trustee's argument based on the "retirement purpose" of the account would severely undermine the Congressional intent of exempting IRAs. Under the trustee's proposed approach, if the original contributor of the retirement funds into an IRA were to decide five years later to take the unwise step of withdrawing half of the IRA's value to take a luxury vacation while still years from retirement age, the full value of the IRA could not be excluded from the contributor's own bankruptcy estate if the contributor filed for bankruptcy protection before having made the planned withdrawal. The trustee's approach would lead to litigation in almost every case about whether the debtor's subjective intent when contributing funds to an IRA was really to save for retirement and remained so thereafter.

After all, even the debtor who originally contributed funds into an IRA is not necessarily required actually to use those funds for retirement; IRS rules explain how and with what consequences those funds may be borrowed against or even withdrawn and spent. Yet there is no serious argument that such a debtor cannot exclude the full amount of his or her own IRA, as it stands at the time of filing. The mere fact that an IRA is inherited by the heir of the original contributor does not detract from the fact that the funds were originally contributed (and thus earmarked) as retirement funds. Those funds remain "retirement funds" for purposes of 11 U.S.C. § 522(d)(12) even in case of an inherited IRA. Indeed, the very characterization of the account as an "inherited individual retirement account," a characterization that Congress itself has opted to apply—*see, e.g.,* 26 U.S.C. §§ 219(d)(4), 402(c)(11)(A), 408(d)(3)(C)—confirms

that the account consists of "retirement funds"; the "R" in IRA, after all, still stands for "retirement." In other words, an Individual Retirement Account necessarily contains "retirement funds," and Congress's decision to use the term "inherited IRA" preserves the recognition that such an inherited account continues to consist of "retirement funds."

The trustee next argues (Br. at 18) that § 522(d)(12) would contain a redundancy or duplication in requiring, for an exemption to apply, both that an account consists of "retirement funds" and be one of the specified types of accounts that are exempt from taxation under various specified subsections of the Internal Revenue Code. But any minor redundancy which may exist is not fatal to the statutory construction which otherwise follows from the plain language. While the inference that a word in the statute may be superfluous should be avoided if possible, *In re Pierrotti (Pierrotti* v. *IRS)*, 2011 WL 2465482, *2 (5th Cir., June 22, 2011), that canon cannot always be given determinative weight. *See, e.g., Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. —, 131 S.Ct. 2238, ___ & n.8 (2011). The choice by Congress to emphasize the kind of funds with which it was concerned does not warrant a wholesale judicial narrowing of the exemption.

Next, the trustee (Br. at 20) would have this Court conclude that the Supreme Court's decision in *Rousey* v. *Jacoway*, 544 U.S. 320 (2005), somehow informed Congress's intent in using the words "retirement funds" in § 522(d)(12). *Rousey*, however, did not involve the meaning of the words "retirement funds" in any federal

statute. In recognizing that IRAs "provide income that substitutes for wages earned as salary or hourly compensation," *Rousey*, 544 U.S. at 531, the Supreme Court did not hold or purport to hold that only when an IRA can serve that purpose is an exemption available under bankruptcy law. Indeed, the statute at issue in this case, although before Congress and on its way to passage, was not changed in any relevant respect after the Court issued its ruling in *Rousey*. Most important, the Supreme Court's ruling in *Rousey* did not purport to define the meaning of the words "retirement funds," and it is not plausible that the *Rousey* decision somehow informed Congress's intentions when Congress used the words "retirement funds" in § 522(d)(12).

Finally, the trustee argues that if this Court were to affirm the district court's ruling, "this Court [would] overturn subsequent opinions from multiple jurisdictions." (Br. at 23). To begin with, in a footnote to that passage, the trustee cites only to two decisions, and those two decisions merely denied exemptions to inherited IRAs under state, rather than federal, law. Thus, this Court's holding that federal law exempts inherited IRAs from a debtor's estate will not "overturn" earlier bankruptcy court rulings that state law did not confer such an exemption. In any event, it is hardly unusual that the impact of a correct decision from this Court, which sets precedent binding throughout the Circuit, would have the effect of overturning at least some prior lower-court decisions that were wrongly decided.

The trustee, it is readily apparent, would prefer to maintain the earlier patchwork of state law exemptions because apparently under Texas law a plausible argument exists that an inherited IRA should not be exempt from a debtor's bankruptcy estate.[3] But, as explained above, when Congress enacted BAPCPA, Congress decided under its bankruptcy power to replace the preexisting state law patchwork with a uniform federally defined exemption for IRAs. And, under the plain language of the statutes that Congress enacted, an inherited IRA is exempt from the property of the debtor's estate.

The money at issue in this case was outside the reach of Chilton's creditors before the inheritance occurred, and it remains outside the reach of her creditors to the extent that the debtor chooses to adhere to the time schedule for minimum withdrawals as prescribed by the tax laws. *See* IRC § 408(a)(6); 26 C.F.R. § 1.408-8, adopting *id.* § 1.401(a)(9)-1 *et seq.* (schedule of required distributions); IRS Pub. 590 ("Individual Retirement Arrangements (IRAs)"), at 33-44 (Feb. 2011 rev.). Insufficient withdrawals incur a 50% penalty tax; *see* IRC § 4974(a), Pub. 590, at 44, 55. Congress acted logically in deciding to exempt funds contained in an inherited IRA from the

[3] Even so, this Court has long recognized that Texas exemptions, when invoked in bankruptcy, are to be liberally construed in favor of the debtor. *See, e.g., In re Walden (Walden* v. *McGinnes)*, 12 F.3d 445, 448 (5th Cir. 1994); *In re Volpe (NCNB Texas Nat'l Bank* v. *Volpe)*, 943 F.3d 1451, 1453 (5th Cir. 1991)). Whether that rule of construction extends as well to federally defined exemptions remains an open question in this Circuit. *See In re Evert (Milligan* v. *Evert)*, 342 F.3d 358, 366-67, 371 (5th Cir. 2003). *Amicus* NACBA submits that consistent with the overall policy of the Code to allow debtors a fresh start, it should apply.

bankruptcy estate of a debtor to the same extent that those funds remain tax–exempt in the inherited or transferee account at the time bankruptcy protection is sought. *See* 11 U.S.C. § 522(b)(4)(C). Although Congress certainly could have enacted a more limited exemption covering only IRAs transferred from a spouse, that is not what Congress in fact did. Because the plain language of the statutory provisions that Congress enacted properly controlled the district court's ruling, and because the plain language of those statutes does not produce a result that is either absurd or illogical, this Court should affirm the bankruptcy court's ruling in this case.

CONCLUSION

For the reasons set forth above, and for the reasons advanced in the Brief for Appellees, *amicus curiae* the National Association of Consumer Bankruptcy Attorneys respectfully requests that the district court's ruling be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 4609 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2011, I electronically filed the foregoing document with the Clerk of the Court for Fifth Circuit Court of Appeals.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following parties: NONE

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Addendum

Sections from the Bankruptcy Code, 11 U.S.C.

§ 522. Exemptions

(a) In this section—

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)

(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is—

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of

1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).
(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:
(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.
(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that—
(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and
(ii)
(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or
(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.
(D)
(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.
(ii) A distribution described in this clause is an amount that—
(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and
(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.
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(d) The following property may be exempted under subsection (b)(2) of this section:
(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal

property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542 (d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to—

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

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(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed $1,000,000 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—

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(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401,

403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—
(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or
(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414 (d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

§ 541. Property of the estate
(b) Property of the estate does not include—
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(7) any amount—
(A) withheld by an employer from the wages of employees for payment as contributions—
(i) to—
(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;
except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325 (b)(2); or
(ii) to a health insurance plan regulated by State law whether or not subject to such title; or…

§ 1322(f)

(f) A plan may not materially alter the terms of a loan described in section 362 (b)(19) and any amounts required to repay such loan shall not constitute "disposable income" under section 1325.

Sections from the Internal Revenue Code, 26 U.S.C.

§ 219. Retirement savings

(d) Other limitations and restrictions

(1) Beneficiary must be under age 701/2

No deduction shall be allowed under this section with respect to any qualified retirement contribution for the benefit of an individual if such individual has attained age 701/2 before the close of such individual's taxable year for which the contribution was made.

(2) Recontributed amounts

No deduction shall be allowed under this section with respect to a rollover contribution described in section 402 (c), 403 (a)(4), 403 (b)(8), 408 (d)(3), or 457 (e)(16).

(3) Amounts contributed under endowment contract

In the case of an endowment contract described in section 408 (b), no deduction shall be allowed under this section for that portion of the amounts paid under the contract for the taxable year which is properly allocable, under regulations prescribed by the Secretary, to the cost of life insurance.

(4) Denial of deduction for amount contributed to inherited annuities or accounts

No deduction shall be allowed under this section with respect to any amount paid to an inherited individual retirement account or individual retirement annuity (within the meaning of section 408 (d)(3)(C)(ii)).

§ 402(c)(8)

…(8) Definitions

For purposes of this subsection—

(A) Qualified trust

The term "qualified trust" means an employees' trust described in section 401 (a) which is exempt from tax under section 501 (a).

(B) Eligible retirement plan

The term "eligible retirement plan" means—

(i) an individual retirement account described in section 408 (a),

(ii) an individual retirement annuity described in section 408 (b) (other than an endowment contract),

(iii) a qualified trust,

(iv) an annuity plan described in section 403 (a),

(v) an eligible deferred compensation plan described in section 457 (b) which is maintained by an eligible employer described in section 457 (e)(1)(A), and

(vi) an annuity contract described in section 403 (b).

If any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A), an eligible retirement plan with respect to such portion shall include only another designated Roth account and a Roth IRA.

§ 402(c)(11)

(11) Distributions to inherited individual retirement plan of nonspouse beneficiary

(A) In general

If, with respect to any portion of a distribution from an eligible retirement plan described in paragraph (8)(B)(iii) of a deceased employee, a direct trustee-to-trustee transfer is made to an individual retirement plan described in clause (i) or (ii) of paragraph (8)(B) established for the purposes of receiving the distribution on behalf of an individual who is a designated beneficiary (as defined by section 401(a)(9)(E)) of the employee and who is not the surviving spouse of the employee—

(i) the transfer shall be treated as an eligible rollover distribution,

(ii) the individual retirement plan shall be treated as an inherited individual retirement account or individual retirement annuity (within the meaning of section 408 (d)(3)(C)) for purposes of this title, and

(iii) section 401 (a)(9)(B) (other than clause (iv) thereof) shall apply to such plan.

(B) Certain trusts treated as beneficiaries

For purposes of this paragraph, to the extent provided in rules prescribed by the Secretary, a trust maintained for the benefit of one or more designated beneficiaries shall be treated in the same manner as a designated beneficiary.

§ 408. Individual retirement accounts

(a) Individual retirement account

For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in [1] section 402 (c), 403 (a)(4), 403 (b)(8), or 457 (e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219 (b)(1)(A).

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.
(3) No part of the trust funds will be invested in life insurance contracts.
(4) The interest of an individual in the balance in his account is nonforfeitable.
(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.
(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401 (a)(9) and the incidental death benefit requirements of section 401 (a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

§ 408(d)

(d) Tax treatment of distributions
(1) In general
Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.
(2) Special rules for applying section 72
For purposes of applying section 72 to any amount described in paragraph (1)—
(A) all individual retirement plans shall be treated as 1 contract,
(B) all distributions during any taxable year shall be treated as 1 distribution, and
(C) the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins.
For purposes of subparagraph (C), the value of the contract shall be increased by the amount of any distributions during the calendar year.
(3) Rollover contribution
An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).
(A) In general
Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—
(i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or
(ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).
For purposes of clause (ii), the term "eligible retirement plan" means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402 (c)(8)(B).
(B) Limitation
This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time

during the 1-year period ending on the day of such receipt such individual received any other amount described in that subparagraph from an individual retirement account or an individual retirement annuity which was not includible in his gross income because of the application of this paragraph.
(C) Denial of rollover treatment for inherited accounts, etc.
(i) In general In the case of an inherited individual retirement account or individual retirement annuity—
(I) this paragraph shall not apply to any amount received by an individual from such an account or annuity (and no amount transferred from such account or annuity to another individual retirement account or annuity shall be excluded from gross income by reason of such transfer), and
(II) such inherited account or annuity shall not be treated as an individual retirement account or annuity for purposes of determining whether any other amount is a rollover contribution.
(ii) Inherited individual retirement account or annuity An individual retirement account or individual retirement annuity shall be treated as inherited if—
(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, and
(II) such individual was not the surviving spouse of such other individual.
(D) Partial rollovers permitted
(i) In general If any amount paid or distributed out of an individual retirement account or individual retirement annuity would meet the requirements of subparagraph (A) but for the fact that the entire amount was not paid into an eligible plan as required by clause (i) or (ii) of subparagraph (A), such amount shall be treated as meeting the requirements of subparagraph (A) to the extent it is paid into an eligible plan referred to in such clause not later than the 60th day referred to in such clause.
(ii) Eligible plan For purposes of clause (i), the term "eligible plan" means any account, annuity, contract, or plan referred to in subparagraph (A).
(E) Denial of rollover treatment for required distributions
This paragraph shall not apply to any amount to the extent such amount is required to be distributed under subsection (a)(6) or (b)(3).
(F) Frozen deposits
For purposes of this paragraph, rules similar to the rules of section402 (c)(7) (relating to frozen deposits) shall apply.
(G) Simple retirement accounts
In the case of any payment or distribution out of a simple retirement account (as defined in subsection (p)) to which section 72 (t)(6)applies, this paragraph shall not apply unless such payment or distribution is paid into another simple retirement account.
(H) Application of section 72
(i) In general If—
(I) a distribution is made from an individual retirement plan, and
(II) a rollover contribution is made to an eligible retirement plan described in section 402 (c)(8)(B)(iii), (iv), (v), or (vi) with respect to all or part of such distribution,
then, notwithstanding paragraph (2), the rules of clause (ii) shall apply for purposes of applying section 72.
(ii) Applicable rules In the case of a distribution described in clause (i)—
(I) section 72 shall be applied separately to such distribution,
(II) notwithstanding the pro rata allocation of income on, and investment in, the contract to distributions under section 72, the portion of such distribution rolled over to an eligible retirement plan described in clause (i) shall be treated as from income on the contract (to the extent of the aggregate income on the contract from all individual retirement plans of the distributee), and

(III) appropriate adjustments shall be made in applying section 72 to other distributions in such taxable year and subsequent taxable years.
(I) Waiver of 60-day requirement
The Secretary may waive the 60-day requirement under subparagraphs (A) and (D) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.

§ 408(e)

(e) Tax treatment of accounts and annuities
(1) Exemption from tax
Any individual retirement account is exempt from taxation under this subtitle unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

§ 4974(a)

(a) General rule
If the amount distributed during the taxable year of the payee under any qualified retirement plan or any eligible deferred compensation plan (as defined in section 457(b)) is less than the minimum required distribution for such taxable year, there is thereby imposed a tax equal to 50 percent of the amount by which such minimum required distribution exceeds the actual amount distributed during the taxable year. The tax imposed by this section shall be paid by the payee.