No. 08-538

IN THE

Supreme Court of the United States

WILLIAM G. SCHWAB, ESQUIRE,
Trustee for Nadejda Reilly,

Petitioner,

v.

NADEJDA REILLY,

Respondent.

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

BRIEF SUPPORTING RESPONDENT OF AMICI CURIAE (I) NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND (II) PROFESSORS KENNETH N. KLEE, ROBERT M. LAWLESS, RICHARD LIEB AND MICHAEL D. SOUSA

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INTEREST OF AMICI CURIAE

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,200 consumer bankruptcy attorneys nationwide.[1] Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.

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. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

A number of law professors join this brief as Amici Curiae. These law professors share an interest in the efficient and proper administration of the Bankruptcy Code. The law professors party to this brief are:

Kenneth N. Klee, Professor of Law, UCLA School of Law;

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[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other an Amici or Amici's counsel made such a monetary contribution.

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INTRODUCTION

This case involves an individual debtor's chapter 7 bankruptcy filing under the United States Bankruptcy Code (the "Code"), which is set out in Title 11 of the United States Code, § 101 *et seq.* The Federal Rules of Bankruptcy Procedure (the "Rules") apply.

A chapter 7 case is a liquidation or "straight bankruptcy" case, meaning that the debtor's assets are liquidated and the proceeds are used to pay creditors' claims. It is the classic "give me my piece of the pie" case. In exchange for surrendering property to satisfy claims, debtors are granted a discharge of liability on most prepetition debts. However, not all of an individual debtor's assets are liquidated to pay claims; rather, some assets are "exempt" and do not become property of the debtor's bankruptcy estate. In other words, exempt assets are not "part of the pie" which is liquidated and then distributed. A debtor's claim of exemptions is at the heart of this case.

Permitting individual chapter 7 debtors to claim certain property as exempt serves the "fresh start" policy on which the Code is based. The items which a debtor can claim as exempt are items which are vital to a debtor's ability to get on with her life after being granted a discharge. It is essential to the fresh start policy that, at an early stage in their bankruptcy cases, debtors have a clear picture regarding whether the assets they have claimed as exempt are, in fact, exempt.

Petitioner's view of the exemption process is that there is no deadline for a trustee's challenge to exemption claims. Under this view, debtors will have no certainty regarding how to restructure their affairs. They will not, in fact, obtain a fresh start.

The practical impact of Petitioner's view of the exemption process can be demonstrated through examples involving two basic items which can be claimed as exempt: (i) an automobile and (ii) a debtor's tools of trade.

Under the federal bankruptcy exemptions available to debtors in states that have not prohibited their use a debtor can exempt an automobile with a value of up to $3,225. 11 U.S.C. § 522(d)(2). A debtor whose vehicle is exempt is able to retain and use it. A debtor needs to be able to structure her affairs knowing, after a short time, that she can keep the vehicle. She will make decisions about whether to maintain the car, whether to sell the car, whether to allow others to use the car, whether to keep a job because the car can be used to get there, or whether to look for a new job if the car can be sold and a replacement is too costly.

Under Petitioner's view of the exemption process, each and every one of those decisions will be made in a fog of uncertainty because the trustee would retain the ability to claim, months or even years later, that the car is not in fact totally exempt. How best to proceed would be unclear because the debtor will not know whether she can actually retain the asset. She will not be able to

make decisions about how to maintain the car without worrying about whether the trustee will second-guess those decisions. If she sells the car and chooses to pursue an education with the proceeds, she may later be forced to pay those proceeds back to the trustee but will no longer have the asset to liquidate in order to fund the repayment. If the vehicle is damaged, she will be concerned about whether to use any insurance proceeds to purchase a new vehicle, or whether to let those proceeds sit in a bank account, unused, until she knows whether the trustee will eventually claim the car was worth more than the exemption amount and that he is entitled to some of those proceeds. Any of these situations places a debtor in an untenable position.

Similar problems would arise where exemptions are claimed for a debtor's tools of trade. If a debtor knows that her tools of trade are exempt, she may decide to stay in her current occupation or job. She may decide to go into business for herself, or invest money in an existing business, secure in the knowledge that she has her tools of trade to work with.

If a trustee is able to attack exemptions for an extended period of time, debtors would not be able to make decisions about their tools of trade, and by extension, their livelihood, with any clarity. If replacement tools of trade are expensive, a debtor may hesitate to start her own business or invest in an existing business out of fear that if the trustee later sells the tools claimed as exempt, she would not be able to afford replacements.

Valuation problems will arise in a large number of cases. Value must be determined as of the petition date. 11 U.S.C. § 522(a)(2). If the Court accepts Petitioner's interpretation of the Code, Rules and Official Forms, trustees will often challenge a debtor's valuation after an extended period of time has passed. Valuation can be difficult enough for many debtors without the problems caused by the passage of time. Valuation contests will become more prevalent, and will deplete a chapter 7 debtor's already limited resources. Debtors are likely not to contest a trustee's arguments simply because of the expense and difficulty involved in a retrospective valuation battle. There is no justice or equity in that result.

Delay, in and of itself, is problematic to debtors. A trustee may be content to wait a long time before objecting to exemptions because there is no downside to the trustee. Indeed, valuation challenges could be brought years later, with trustees seeking to take advantage of any increase in market value by claiming that an ultimately-achieved higher value was, in fact, the value as of the petition date.[2] What should a debtor do if she needs to replace property claimed as exempt? Should the debtor sell the asset? If so, must the debtor seek relief from the bankruptcy court

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[2] *See, e.g., Klein v. Chappell (In re Chappell)*, 373 B.R. 73, 75-6 (B.A.P. 9th Cir. 2007) (exemption challenged two years after commencement and value had risen), *appeal pending*, No. 07-35704 (9th Cir).

regarding the manner in which the property can be sold? Can the trustee intervene and demand that a sale be conducted in a different manner?

These problems and issues will without question arise in chapter 7 cases. In *pro se* cases, it is fair to say that the trustee's view of the exemption process would cause problems for bankruptcy courts because *pro se* filers will not understand that exempt property isn't really exempt and that property they thought they could keep or sell, they can't. Debtors who have retained counsel will be faced with escalating legal fees which they will not be able to pay, causing additional problems in the administration of cases and potentially requiring counsel to continue a representation without compensation. Creditors and debtors alike will suffer because the efficiency which is built into the statutory design will be lost. Value will be lost.

The exemption process envisioned by the trustee is not a fresh start and will not foster the better administration of individual chapter 7 cases; rather, it is an option, protection, or even a free pass for trustees. Petitioner's arguments should be rejected.

SUMMARY OF ARGUMENT

Amici support a construction of the Code, Rules and Official Bankruptcy Forms[3] which fosters the expeditious, efficient and responsible administration of individual chapter 7 bankruptcy cases, and which is at odds with the arguments presented by Petitioner.

First, Petitioner's argument misconstrues the Code and Rules. Section 522(l) requires a debtor to file a "list of property that the debtor claims as exempt" and Rule 4003 limits the time within which objections can be made "to the list of property claimed as exempt[.]" Considered in the context of the information which must be provided in Official Form Schedule C, Petitioner's arguments cannot be reconciled with a practical, common-sense reading of § 522(l) and Rule 4003.

Second, Petitioner's argument that chapter 7 trustees should be permitted an open-ended period of time within which to take property claimed as exempt from individual chapter 7 debtors and then sell it, is inconsistent with the basic structure and purpose of chapter 7.

Chapter 7 is a comprehensive statutory framework which moves cases quickly from

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[3] Official Forms are available online. *See* http://www.uscourts.gov/bkforms/index.html ("Official Forms").

inception to discharge.[4] The statutes require compliance with these timeframes by the debtor or dismissal of the case. As part of that process, the Rules require that all parties in interest object to a debtor's list of property claimed as exempt within a short period of time. This makes sense not only because the Code and Rules mandate that chapter 7 cases move quickly, but also because the retention of exempt property is a vital component of the fresh start policy which is a bedrock principle of bankruptcy law. Exemptions enable a debtor to retain items which have been singled out for special protection. They help put individual debtors back on the road to being productive members of society, and help prevent them from becoming public charges. Petitioner's argument is inconsistent with the comprehensive and fast-moving statutory framework put in place by Congress and the Rules, as well as the importance of exemptions in achieving a fresh start.

Third, Petitioner's argument that the decision below must be reversed in order to prevent abuse of the Code ignores the significant protections which already are in place for that very purpose. There is an extended deadline for objections to fraudulently claimed exemptions. Debtors and their counsel can be sanctioned for misleading disclosures or the filing of inaccurate information. Debtors can be

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[4] Fed. R. Bankr. P. 1001 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.").

denied a discharge for abuse. Cases can be dismissed for abuse; and bankruptcy courts can also refuse to dismiss cases where mischief is afoot and dismissal is inappropriate. Federal criminal statutes can be implicated. Simply put, there is no need to create a new rule untethered to statutory text in order to prevent the abuse of which Petitioner cautions because ample and sufficient protections already exist.

For each of the foregoing reasons, Amici submit that the decision of the Court of Appeals should be affirmed.

ARGUMENT

A. A Common-Sense Reading of § 522(l), Rule 4003 and Schedule C Supports the Decision of the Court of Appeals

Amici respectfully submit that a practical, common-sense reading of the Code, Rules, and Official Form Schedule C, supports the decision of the Court of Appeals.

Rule 4003 governs the procedure both for claiming exemptions and for objections to such claims. The Rule has several components. First, subsection (a) works in tandem with Code § 522(l) to enable a debtor to claim certain property as exempt. Second, subsection (b)(1), like § 522(l), provides for objections "to the list of property claimed as exempt." Third, subsection (b)(1)

requires that such objections be filed "within 30 days after the meeting of creditors held under § 341(a) is concluded[.]"[5] An objecting party bears the burden of proving an exemption is not properly claimed, and if an objection is not timely filed, "the property claimed as exempt on such list is exempt." Fed. R. Bankr. P. 4003(c); 11 U.S.C. § 522(l); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643 (1992).

The "list of property claimed as exempt" is governed by an Official Form entitled "Schedule C – Property Claimed As Exempt."[6] This form requires a debtor to make four specific entries for each asset claimed as exempt: (i) describe the property claimed as exempt, (ii) specify the law which serves as the basis for the exemption, (iii) state the value of the claimed exemption and (iv) state the "current value of property without deducting [the] exemption."[7]

Amici submit that Schedule C is most logically read and understood as placing property claimed as

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[5] If Schedule C is amended, the time for objections runs anew. Fed. R. Bankr. P. 4003(b)(1).

[6] *See* http://www.uscourts.gov/rules/BK_Forms_1207/B_006C_1207f.pdf. Official Forms are prescribed by the Judicial Conference pursuant to Rule 9009. Fed. R. Bankr. P. 9009.

[7] *See* http://www.uscourts.gov/rules/BK_Forms_1207/B_006C_1207f. The United States (the "Government") noted three of Schedule C's four requirements, omitting reference to the "current value of property without deducting [the] exemption" requirement. U.S. Brief, p. 14.

exempt into two distinct categories: (i) property in which after the exemption is applied, there is *no* equity value left for the estate and (ii) property in which equity value *is* left after application of the exemption. This case involves the former, in that the value of the property in which Respondent claimed an exemption was listed by Respondent as being equal to the permissible exemption amount.

In cases where the value of property claimed as exempt is equal to or less than the amount of the statutory exemption, a common-sense reading of Schedule C is that the debtor claims the entire asset as exempt. 9 COLLIER ON BANKRUPTCY ¶ 4003.02[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009) ("the specificity required is that sufficient to serve the purpose of the listing, which is to permit a determination of whether the property's character and value render it exempt."). That is exactly what happened here.[8]

Petitioner argues he had no reason to object to Respondent's Schedule C because (i) the exemption amount was proper, and (ii) the amount of property claimed as exempt was not greater than the permissible exemption amount. But Petitioner's argument is built on the flawed premise that Schedule C requires a debtor to state what *portion* of an asset's total (and unstated) value is being

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[8] This case does not involve the situation where the trustee is on notice that equity exists after application of the exemption. The Court need not address that scenario in this case.

claimed as exempt, rather than requiring a debtor to state the total value of the asset. In Petitioner's view, the fact that the asset's actual value may have been higher than the scheduled amount is of no consequence because Respondent was only required to state the value of the exemption, not the value of the asset. Petitioner's argument ignores what the Official Form requires: a statement of the asset's current *total value* without deducting the exemption amount, not "the portion of the exempt asset claimed as exempt." Petitioner's argument reads "current value of property" out of the Official Form.

Moreover, if Petitioner's reading of the Official Form is correct, there would be no deadline for effectively challenging exemptions. A leading treatise on bankruptcy law identifies this problem:

> . . . if the listing were construed to claim as exempt only that portion of the property having the value stated – the provisions finalizing exemptions if no objections are filed would be rendered meaningless. The trustee or creditors could always claim that the debtor's interest in the property was greater than the value claimed as exempt and effectively still object to the debtor exempting his or her entire interest in the property after the deadline for objections had passed.

9 COLLIER ON BANKRUPTCY, *supra*, ¶4003-02[1].

Petitioner's reading of the Official Form would also render the Form useless. The basic purpose of Schedule C is to put the trustee and creditors on notice of exemption claims and the value of assets against which they are being applied. Using the information contained in the Official Form, the trustee can determine whether to: (i) challenge the exemption and liquidate the property, (ii) allow the exemption if the property's value is equal to or less than the permissible exemption, or (iii) abandon the property if there is only a marginal amount of equity. *See* TRUSTEE HANDBOOK,[9] at pp. 8-2 – 8-4 (discussing exemptions and abandonment). If the maximum value that can be listed is the permissible exemption amount, Schedule C will *never* give notice of potential equity in the asset. It will not provide information from which to determine whether to challenge an exemption and have the property liquidated. It will render the Official Form useless.

It is also reasonable to assume that Petitioner's reading of the Official Form is incorrect because if the Judicial Conference intended what Petitioner argues, there were straightforward, simple ways of phrasing the Official Form to accomplish that result. Language of limitation could easily have been used. Language to the effect of "value, up to

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[9] The United States Trustee (the "U.S. Trustee") has published a "Handbook for Chapter 7 Trustees" (hereinafter, "TRUSTEE HANDBOOK") *available at* http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf.

the amount of the permissible exemption" or "value of the portion of the property's total value which is claimed as exempt" could have been used. But the Judicial Conference did not do so; rather, it required a debtor to identify the "current value of the property without deducting [the] exemption." The only qualifications placed on the value stated is that it be current and *without* regard to the exemption amount. Rule 4003 then provides for objections "to the list of property claimed as exempt," and does not except from this Rule objections to a debtor's valuation. And there is no reason to do so because there is nothing unique to valuation objections.

Finally, Petitioner's argument that no objection is necessary to items "properly" claimed as exempt both states the obvious and creates an exception that swallows the rule. If accepted, trustees could easily argue around other requirements of the Rule and Official Form. Trustees could argue that the debtor had only exempted items "properly" categorized as tools of the trade, and could later contend that items which were not "properly" categorized could be taken and sold, even though they were explicitly noted by the debtor on Schedule C. The trustee's argument eliminates the need for virtually any objection to be filed within the timeframe contained in Rule 4003.

For each of the foregoing reasons, Petitioner's argument should be rejected based on a common-sense interpretation of § 522(l), Rule 4003 and Official Form C.

B. The Expedited Nature of Chapter 7 Cases and Importance of Exemptions Support the Decision of the Court of Appeals

i. Statistics And Statutory Timeframes

Individual debtor chapter 7 cases which closed in 2007 had an average life span, from filing to disposition, of just 124 days and a median life span of just 112 days. *See* BAPCPA Report,[10] at p. 12. That is no accident. Individual debtor chapter 7 liquidation cases, by statutory design, move quickly.[11] The Congressional imperative embodied in the statutory design which moves these cases along quickly makes sense; chapter 7 cases are by far the most frequently utilized type of bankruptcy case commenced by individual debtors. *See* Henry J. Sommer, CONSUMER BANKRUPTCY LAW AND PRACTICE, ch. 3.1 (John Rao ed., Nat'l Consumer Law Center, 8th ed. 2006) (hereinafter, "CONSUMER BANKRUPTCY LAW").

A voluntary chapter 7 case is commenced by filing a petition in the bankruptcy court. 11 U.S.C.

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[10] A 2007 report required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA Report"), *available at* http//:www.uscourts.gov/bnkrpctystats/2007/bapcpatxt.pdf.

[11] Indeed, the "Discharge in Bankruptcy" discussion on the Federal Judiciary's "Bankruptcy Basics" webpage states: "Typically, [a chapter 7 discharge is granted] about four months after the date the debtor files the petition . . . ." http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/discharge.html#when.

§ 301; Fed. R. Bankr. P. 1002(a); CONSUMER BANKRUPTCY LAW, ch. 3.2.2. The form of the petition which must be filed (and documents which must accompany it) is prescribed by an Official Bankruptcy Form. Commencement of a voluntary chapter 7 case constitutes entry of an "order for relief" under the Code. 11 U.S.C. § 301. Entry of an "order for relief" is an important point of departure in a chapter 7 case because it is the point from which time limits begin to run for a number of significant events in the case. In chapter 7 cases, an interim trustee is immediately appointed to marshal and liquidate assets and administer the bankruptcy case. 11 U.S.C. § 701.

Numerous deadlines in the Rules keep a chapter 7 case moving expeditiously, binding both debtors and trustees. Serious consequences can result when debtors miss a deadline, and that should be no less true for the trustee who, unlike the debtor, is a professional involved in hundreds of cases.

When an individual debtor commences a chapter 7 case, the debtor must file a number of documents with the petition or within 15 days thereafter. *See* Fed. R. Bankr. P. 1007(a)(1), (c). These documents include, among others: (i) a list of creditors; (ii) schedules of assets and liabilities; (iii) a schedule of executory contracts and unexpired leases; (iv) a statement of financial affairs; and (v) documents evidencing all wages earned by a debtor within sixty days prior to the commencement of the bankruptcy case. *See*, 11 U.S.C. § 521; Fed. R. Bankr. P. 1007. Included in this group of schedules is Schedule C, which identifies and values the

property a debtor claims as exempt. *See* Fed. R. Bankr. P. 4003(a); 1007; 9 COLLIER ON BANKRUPTCY, *supra,* ¶ 4003-02[1]. The chapter 7 trustee is obligated to make certain that all required schedules and statements are filed. TRUSTEE HANDBOOK, pp. 6-2, 6-8.

The deadline for filing any necessary "statement of intention" is 30 days from entry of an order for relief. 11 U.S.C. § 521(a)(2)(A). Within 30 days of qualifying as trustee, a chapter 7 trustee is required to file a complete inventory of the debtor's property (unless it has already been filed). Fed. R. Bankr. P. 2015(a)(1); TRUSTEE HANDBOOK, p. 6-4.

Individual chapter 7 debtors must pay close attention to the statutory deadlines for disclosures, or run the risk of dismissal if the requirements of Code § 521(a)(1) are not met within 45 days of the petition date. *See* 11 U.S.C. §§ 521(i); 707(a)(3).

A chapter 7 trustee must determine whether to "assume or reject" his unexpired leases for residential real property or of any personal property, or any contract, within 60 days of entry of the order for relief. 11 U.S.C. § 365(d). When a lease or contract is assumed, all monetary defaults must be cured. Bankruptcy courts can extend the 60 day deadline, but if no action is taken and the 60 day period expires, leases and contracts are deemed rejected.[12] 11 U.S.C. § 365(d).

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[12] For nonresidential real property where a debtor is lessee, she has 120 days to assume or reject. 11 U.S.C. § 365(d)(4).

Perhaps the most important event in an individual chapter 7 case, at least from the debtor's perspective, is the meeting of creditors which is conducted pursuant to Code § 341. 11 U.S.C. § 341. Although § 341 only requires that the meeting be held "[w]ithin a reasonable time after the order for relief," Rule 2003 requires that the "United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 40 days after the order for relief." Fed. R. Bankr. P. 2003(a); *see* CONSUMER BANKRUPTCY LAW, ch. 3.3. Accordingly, soon after an individual debtor chapter 7 case is commenced, the bankruptcy court will mail a notice to all creditors providing the date and time of the § 341 meeting. *See* CONSUMER BANKRUPTCY LAW, ch. 3.3.[13] In the overwhelming majority of individual chapter 7 cases, the § 341 meeting of creditors is "[t]he debtor's first, and often only, appearance at any kind of hearing" in the bankruptcy case. CONSUMER BANKRUPTCY LAW, ch. 3.4.

At least 7 days before the § 341 meeting, a chapter 7 debtor must provide the trustee copies of tax returns or transcripts of those returns for the previous year. *See* 11 U.S.C. § 521(e)(2)(A). Failure to do so can result in dismissal of the case. 11 U.S.C. § 521(e)(2)(B). At the meeting, the debtor must produce: (i) identification, (ii) evidence of a social security number (or lack thereof), (iii) evidence of current income, (iv) statements of

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[13] The notice also sets deadlines for filing claims, objecting to discharge of particular debts, or objecting to discharge generally. CONSUMER BANKRUPTCY LAW, ch. 3.3.

account, and (v) documentation of the debtor's monthly expenses. 11 U.S.C. §§ 521(h), 707(b)(2); Fed. R. Bankr. P. 4002(b).

The U.S. Trustee presides over the § 341 meeting, but generally speaking, the debtor is questioned by the interim chapter 7 trustee. Fed. R. Bankr. P. 2003(b)(1), 2002(a)(1); CONSUMER BANKRUPTCY LAW, ch. 3.4; TRUSTEE HANDBOOK, p. 7-1. The purpose of a § 341 meeting is to give creditors and the interim trustee a chance to learn about the debtor's financial affairs, but in individual cases these meetings generally require between just three and thirty minutes. CONSUMER BANKRUPTCY LAW, ch. 3.4. A debtor's testimony at a § 341 meeting is under oath. TRUSTEE HANDBOOK, p. 7-3. At this meeting, a trustee must have a debtor verify the accuracy of information contained in her schedules. *Id.* at p. 7-3. The U.S. Trustee has provided chapter 7 trustees a list of sample questions (some of which *must* be asked) to help identify assets and potential fraud or abuse. *Id.* at p. 7-5, App. A1-A4. Chapter 7 trustees are encouraged to use written questionnaires to supplement information obtained by oral examination. *Id.*[14]

In advance of a § 341 meeting, chapter 7 trustees should determine whether there are assets to be administered in the case, and whether there

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[14] *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), for an example of a trustee's investigation uncovering questionable disclosures and the subsequent pursuit of assets.

are assets which require investigation. TRUSTEE HANDBOOK, pp. 6-3, 6-5. A trustee should verify at or before the § 341 meeting the accuracy of the debtor's inventory of assets contained in Schedules A and B, as required by Rule 2015(a)(1). Fed. R. Bankr. P 2015(a)(1); TRUSTEE HANDBOOK, p. 6-4. The U.S. Trustee has created a specific form to be used by chapter 7 trustees for the purpose of identifying assets. TRUSTEE HANDBOOK, pp. 6-4, Forms – 3-7 and "Sample Case" pp. 1-7. Chapter 7 trustees are advised to seek additional information before a § 341 meeting, even if only to corroborate information which a debtor has already provided. *Id.* at p. 7-1.

Importantly, § 341 meetings may be continued or adjourned as necessary at the trustee's discretion. Fed. R. Bankr. P. 2003(e). All that a trustee must do to continue a § 341 meeting is announce an adjourned date and time at the meeting. *Id.* When a meeting is adjourned, the time period for objecting to exemptions does not begin to run because the meeting has not been concluded.

Much like entry of an order for relief is the starting point from which many time periods requiring compliance by a debtor are measured in a chapter 7 case, the date of the first § 341 meeting starts the clock ticking on a number of deadlines for actions by the trustee, U.S. Trustee and creditors. Within just 10 days of the *first* § 341 meeting (*i.e.*, regardless of whether the meeting is continued on subsequent dates) the U.S. Trustee must "file with the court a statement as to whether the debtor's

case would be presumed to be an abuse under section 707 (b)." 11 U.S.C. § 704(b)(1)(A). An individual debtor case is presumed to be an abuse of chapter 7 if any one of a number of calculations meet statutory thresholds. 11 U.S.C. § 707(b)(2). This is the "means test." Making this assessment requires analysis of a debtor's schedules and other filings. *See* 11 U.S.C. § 707(b)(2). Within just five days of when the U.S. Trustee files this statement, it must be distributed to all creditors by the bankruptcy court. 11 U.S.C. § 704(b)(1)(B). If a presumption of abuse exists, the U.S. Trustee must, within just thirty days of filing its statement, seek either to have the case dismissed or converted to another chapter. 11 U.S.C. § 704(b)(2).

The period of time within which creditors can file claims against a chapter 7 debtor also uses the first date set for a § 341 meeting as the start of the stopwatch. "[A] proof of claim is timely filed if it is filed not later than 90 days after the first date set for the [§ 341] meeting of creditors[.]" Fed. R. Bankr. P. 3002.[15] Complaints to determine the dischargeability of particular debts under § 523(c), or complaints objecting to the debtor's discharge under § 727(a) (*i.e.,* an objection to *any* discharge being granted) must be filed within 60 days of the

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[15] Rule 3002 notes exceptions, not relevant herein. However, in "no asset" cases, the clerk of court notifies creditors that claims need not be filed. Fed. R. Bankr. P. 2002(e). If assets are located to fund distributions, a subsequent notice is sent, and claims can be filed. Fed. R. Bankr. P. 3002(c)(5).

first scheduled § 341 meeting. Fed. R. Bankr. P. 4007(b), (c); 4004(a).

Finally, and as is most relevant here, the period of time within which a chapter 7 trustee or party in interest can object to a debtor's claim of exemptions begins to run from the date of the § 341 meeting. However, as compared with the timeframes above which begin to run as of the *first* date set for the § 341 meeting, Rule 4003 provides that "a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is *concluded* or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b)(1) (emphasis supplied); 9 COLLIER ON BANKRUPTCY, *supra,* ¶ 4003.03[1][a]. This makes sense because the very purpose of a § 341 meeting is to permit the trustee and creditors to obtain information, and the timeframe for objections should not begin to run until the debtor has provided the necessary information and the § 341 meeting has concluded. Because the trustee may adjourn the § 341 meeting to a specific date in the future, the trustee has complete control over when this time begins to run, and can therefore take whatever time is necessary to further investigate the value of a debtor's property. A trustee can, moreover, request an extension of the 30 day period if the request is made within the original 30 day period, as contemplated by Rule

4003(b)(1).[16] It is the scope and interpretation of Rule 4003 which is now before the Court.

ii. Discussion

Viewed through the lens of the timeframes imposed by the Rules, it is evident why individual chapter 7 cases are, on average, completed in approximately 120 days.

Within 15 days of when a chapter 7 case is commenced, a debtor must meet her basic disclosure obligations by filing a number of documents with the bankruptcy court. From early on in a case, a substantial amount of information is available for the chapter 7 trustee to analyze and question. Additional disclosures are required at or before the § 341 meeting. If an individual chapter 7 debtor fails to provide the required disclosures within 45 days of filing her petition, her case may be subject to dismissal.[17]

By no later than 40 days after an individual debtor commences her chapter 7 case, the § 341 meeting is held. Within just 10 days of the *first date set* for the § 341 meeting, the U.S. Trustee must state whether the case is presumed to be an "abuse" of the Code. This requires analysis of a debtor's schedules and disclosures.

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[16] Here, the trustee neither adjourned the § 341 meeting nor requested an extension. Indeed, this appeal stems from what might be viewed as the trustee's negligence.

[17] Upon motion, the 45 day period can be extended. 11 U.S.C. § 521(i).

At this point, there is a basic shift in focus in the case as a result of additional timeframes which the Rules put in place. The timeframes change from being deadlines by which the debtor must act, to being deadlines by which the trustee (or creditors) must act.

Within 30 days of *conclusion* of the § 341 meeting, the trustee or a creditor must object to a debtor's claimed exemptions. That the time for filing objections to exemptions runs from the *conclusion* of the § 341 meeting is important because it gives the chapter 7 trustee a high degree of control over the objection process in two ways. First, Rule 2003(e) gives the trustee virtually unfettered discretion to adjourn the meeting. All that a trustee must do to adjourn the meeting is announce (at the meeting) a specific date and time for the continued meeting. If the trustee has concerns regarding exemptions, he can simply adjourn the § 341 meeting and request additional information, keeping the clock from ticking on the deadline for filing objections. Second, if the § 341 meeting is concluded and the trustee still requires more than 30 days to investigate or challenge objections, the trustee can simply request additional time. The Rule expressly provides for such an extension.

Within 60 days of the first § 341 meeting, the trustee must file a "No Distribution Report" if there

are no assets available to fund distributions.[18] In this same 60 day period, the time for objections (i) to the dischargeability of any particular debt, or (ii) to a debtor's entitlement to any discharge, expires. As a result, within approximately 100 days from the petition date (a maximum of 40 days for the § 341 meeting and then 60 days to object), all proceedings objecting to discharge and dischargeability will have been commenced or will be barred.

When the time period for objecting to discharge (and/or for a motion to dismiss the case) has expired (and assuming no objection to discharge has been filed), Rule 4004(a)(1) requires that a bankruptcy court "shall forthwith grant the discharge[.]" Fed. R. Bankr. P. 4004(a)(1).

When viewed in this manner, it makes sense that most individual chapter 7 cases are concluded within just 120 days.

Petitioner's construction of § 522 and Rule 4003 is inconsistent with the statutory design. Congress and the Rules promulgated by this Court have put in place a framework in which individual chapter 7 cases are almost always concluded within 120 days. Within that timeframe, individual debtors can have some clarity about their finances on a going-forward basis. They have made substantial disclosures, know that there are no objections to

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[18] *See* Amended Memorandum of Understanding, April 1, 1999, available at http://www.usdoj.gov/ust/eo/rules_regulations/mar99/mou99.pdf.

discharge, have been questioned by the trustee and know that the U.S. Trustee has determined there is no presumed abuse of the Code. They are on notice of any objections to exemptions. The deadlines for everything which must be known to the debtor and the Court before granting a discharge to implement the fresh start policy of the Code, have passed. The BAPCPA Report confirms that the system works on this timeframe.

Yet, Petitioner's argument suggests – with respect to property which Congress has singled out as being entitled to special treatment – that a debtor's finances, future prospects and ability to rely upon and use property claimed as exempt must remain up in the air for an unspecified period of time while the trustee decides whether to take action. Petitioner suggests that when a chapter 7 case has progressed to the point where a bankruptcy court can determine whether to grant a chapter 7 *discharge*, individual debtors *need not even have been put on notice* about whether their car, home, furnishings, clothes, tools of trade and other items will later be taken by the trustee. How can debtors reasonably be expected to restructure their affairs in such circumstances? Petitioner's reading of the Code and Rules simply is inconsistent with the basic structure and statutory

framework within which chapter 7 individual debtor cases are processed.[19]

Petitioner's argument is also inconsistent with the concept of a fresh start. Petitioner contends that if the value of property noted in Schedule C is within the range of permissible exemptions, there is no need for the trustee to file *any* objection. The trustee can then – at whatever time the trustee chooses – demand that the debtor surrender the property claimed as exempt so that the trustee can try to sell it for a higher amount. Petitioner's rule would apply regardless of whether the value noted is above or below the permissible exemption amount. It would apply to a debtor's home, car, furnishings, clothing, etc. Petitioner's construction of the Code and Rules places *no limitation at all* upon when these demands could be made.

It simply cannot be correct that the Code and Rules, by design, put in place a statutory framework that pushes individual chapter 7 cases to conclusion in just 120 days and which requires that objections to Schedule C be filed within just 30 days of the last § 341 meeting, but at the same time place *absolutely no limitation* upon the time within which a trustee can challenge the debtor's valuation of the exempt property by selling it and, by extension, challenge the exemption itself. This

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[19] When discharge is granted, a chapter 7 case is not necessarily closed. The case will remain open while actions objecting to dischargeability are litigated.

is especially so in light of the statute's requirement that valuation be measured as of the petition date, and is underscored by the fact that, in the experience of NACBA's members, challenges to valuation are the most common type of objection to exemptions. Under Petitioner's construction of the statute, the fresh start policy is jeopardized.

C. Remedies Untethered to the Statutory Text are Unnecessary

Petitioner contends that an open-ended construction of Rule 4003 is necessary to prevent abuse of the bankruptcy process by debtors. Petitioner's argument ignores the extensive statutory framework which is already in place and which accomplishes this very goal.

In 2008, Rule 4003(b) was amended to create an exception to the 30 day objection period for property claimed as exempt. This exception applies where fraudulently claimed exemptions are at issue. The Rule provides: "The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption." Fed. R. Bankr. P. 4003(b)(2); *see* 9 COLLIER ON BANKRUPTCY, *supra*, ¶ 4003.03[1][b].

The Advisory Committee Note to this amendment reveals that the revised Rule is designed to address the very situation with which the trustee is concerned:

> Extending the deadline for trustees to object to an exemption when the exemption claim has been fraudulently made will permit the

> court to review and, in proper circumstances, deny improperly claimed exemptions, thereby protecting the legitimate interests of creditors and the bankruptcy estate.

Vol. A (Appendix) COLLIER ON BANKRUPTCY, *supra*, App. Pt. 2-249. To the limited extent exemption fraud exists, it usually involves valuation issues.[20] If Petitioner's construction of the Code and Rules is correct, there would have been no need for this amendment because before the statute was amended, there would have been *no time limitation* for challenging a debtor's valuation.

In addition to the exemption-specific fraud prevention devices in the Rules, individual chapter 7 debtors and their counsel are subject to oversight by bankruptcy courts, the U.S. Trustee, chapter 7 trustee and, as a practical matter, by creditors.

In March 2008, the Office of the Inspector General, United States Department of Justice, published a report entitled: "The United States Trustee Program's Oversight of Chapter 7 Panel Trustees and Debtors."[21] The Oversight Report discusses the U.S. Trustee's oversight of chapter 7 cases. It details the manner in which the U.S.

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[20] Somewhat more common is failure to schedule property, addressed by § 554(c), (d), which preserve unscheduled property as nonexempt estate property, even after case closure. *See* 5 COLLIER ON BANKRUPTCY, *supra*, ¶ 554.03.

[21] "Oversight Report," available at http://www.usdoj.gov./oig/reports/OBD/a0819/final.pdf.

Trustee conducts means testing, and concludes that the U.S. Trustee has "adequate controls in place to ensure that means testing was conducted on all Chapter 7 and Chapter 13 bankruptcy filings, as required by BAPCPA." Oversight Report, p. 24-29. The Oversight Report also discusses the U.S. Trustee's audit program, which is designed "to determine the accuracy, veracity, and completeness of petitions, schedules, and other information that the debtor is required to provide in cases filed under Chapters 7 or 13[.]" *See* Oversight Report, pp. 29-32. The Oversight Report concluded that the U.S. Trustee's audits were being performed "in accordance with the criteria established by the BAPCPA." Oversight Report, p. 30.

In addition to oversight by the U.S. Trustee, the Code contains a number of provisions which discourage abuse of chapter 7 by debtors, their counsel, and professionals who prepare bankruptcy petitions. These statutes help ensure that adequate and accurate information is provided in all disclosures and filings made in individual debtor chapter 7 cases.

Section 110 of the Code imposes specific penalties upon "bankruptcy petition preparers" for the negligent or fraudulent preparation of bankruptcy filings. 11 U.S.C. § 110.

Section 523 details certain debts which are not discharged in bankruptcy, including, in some circumstances, debts which are not properly scheduled. 11 U.S.C. § 523(a)(3). Similarly, debts that existed at the time of a prior bankruptcy case

in which a discharge was denied are excepted from discharge. 11 U.S.C. § 523(a)(10).

Section 707(b)(1) provides for the dismissal or conversion of a chapter 7 case if "substantial abuse" is found. 11 U.S.C. § 707(b)(1). *See* TRUSTEE HANDBOOK, pp. 6-11 – 6-13.

Code § 707(b)(4) provides bankruptcy courts the authority to require a debtor's attorney to reimburse the trustee all reasonable costs, including attorneys fees, if conversion or dismissal is granted and "the attorney for the debtor . . . violated [Rule] 9011" in commencing the case. 11 U.S.C. § 707(b)(4). Subsection (4)(B) of this statute provides that bankruptcy courts, on their own initiative, may order civil penalties against a debtor's attorney for violation of Rule 9011, and may also order the payment of a penalty to the trustee or U.S. Trustee. 11 U.S.C. § 707(b)(4)(B). Subsection (4)(D) provides that an attorney's signature on a petition is "a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with [the] petition is incorrect." 11 U.S.C. § 707(b)(4)(D). This certification is expressly noted on the Official Form petition itself.

Code § 727, entitled "Discharge," contains a number of significant provisions designed to deter fraud and abuse. It provides that a debtor cannot obtain a discharge if the debtor transfers, removes, destroys or conceals property of the estate (or permits any of these things to be done) with the intent to hinder, delay or defraud creditors or the debtor's bankruptcy estate. 11 U.S.C. § 727(a)(2).

A debtor who has concealed, destroyed, mutilated or falsified records from which the debtor's financial condition or transactions can be ascertained, can be denied a discharge. 11 U.S.C. § 727(a)(3).

A debtor who knowingly and fraudulently makes a false oath or account, presents a false claim, makes agreements to act or forbear, or withholds from the estate recorded information regarding the debtor's assets and financial affairs, can be denied a discharge. 11 U.S.C. § 727 (a)(4).

A debtor who fails to adequately explain a loss of assets, can be denied a discharge. 11 U.S.C. § 727(a)(5).

If a debtor refuses to obey an order of the court, or refuses to testify on grounds of the privilege against self-incrimination even after immunity from prosecution has been granted, she can be denied a discharge. 11 U.S.C. § 727(a)(6).

After a discharge has been granted, it can later be revoked if it was obtained through fraud or if the debtor knowingly and fraudulently fails to report the postdischarge acquisition of property which would be considered property of the estate. 11 U.S.C. § 727(d).

Code § 105(a) also applies. This statute grants broad authority to bankruptcy judges to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a); *see also Marrama,* 549 U.S. at 374-75 (2007) (discussing § 105(a)).

All documents filed in connection with a bankruptcy case are subject to the signature requirements of Rule 9011. Fed. R. Bankr. P. 9011. This includes all petitions, pleadings, written motions or "other papers" filed in a bankruptcy case, as well as all schedules and statements, and any amendments thereto. Rule 9011's signature requirements provide that each signed document carries with it a representation to the court that, after reasonable inquiry, the assertions in the document (i) are not being presented for an improper purpose, (ii) are warranted by existing law (or by a nonfrivolous argument for the extension of existing law), and (iii) have evidentiary support. *Id.* at (b).

If Rule 9011's signature requirements are violated, the bankruptcy court can award sanctions. *Id.* at (c).

The importance of the signature requirements in bankruptcy cases is underscored by explicit warnings included in the Official Bankruptcy Forms. The Official Form Voluntary Petition, Schedules and Statements caution, in the signature blocks for an individual debtor, that the debtor must sign under penalty of perjury. This warning works alongside Rule 1008, which requires that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." Fed. R. Bankr. P. 1008.

Title 18 of the United States Code is implicated by improper conduct in a bankruptcy case. *See* 18 U.S.C. §§ 152-158, 1519. These statutes provide

criminal penalties for concealing assets and making false oaths and claims. They establish penalties for bribery and embezzlement. They provide for incarceration. They make it a federal crime to commit bankruptcy fraud, or to act with knowing disregard of bankruptcy laws or rules in a bankruptcy case, as well as provide criminal penalties for the destruction or alteration of records in a bankruptcy case. *See* 18 U.S.C. §§ 152-158, 1519.

Finally, in addition to these numerous statutory remedies, bankruptcy courts are vested with the inherent power to address abusive litigation tactics and frauds perpetrated upon the court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)).

When viewed through the lens of the numerous devices which can be employed to prevent fraud and abuse of the bankruptcy system, it is submitted that Petitioner's contention that a new remedy must be created – untethered to the text of any statute or rule – should be rejected.

D. A Brief Response to Arguments Made by the United States

i. Historical Analysis

The Government argues that because Schedule C's requirement that a debtor identify the current value of property claimed as exempt was just recently (*i.e.*, in 1991) added, this information is not relevant to whether a claim of exemption is

objectionable. *See* U.S. Brief, p. 17. This argument should be rejected for each of three reasons.

First, the issue before the Court concerns the time within which a trustee can challenge a claim of exemptions, not what information is required by Schedule C. The requirements of Schedule C are beyond dispute. They are set out in plain text on the Form.

Second, the argument does not lead to the conclusion urged by the Government. Although the "current value" requirement was added to Schedule C in 1991, prior to then, debtors were required to state the value of this property on other schedules. The "value" requirement of Schedule C is nothing new, it was just moved to Schedule C from elsewhere.[22] If anything, this demonstrates that the information now in Schedule C is of increased importance to exemption claims, not less.

Third, in an historical analysis, the relevant inquiry concerns how the timeframe for objections has been treated in the past. In this regard, the basic procedures have remained constant: one party generates a list of exemptions, and another party has a limited time period within which it can object to that list. *See* Sup. Ct. Gen. Ord. 17(2) (1958); Fed. R. Bankr. P. 403 (1975); Fed. R. Bankr. P 4003. Consistent with prior practice, Rule 4003 requires that objections to exemptions be filed within a short timeframe.

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[22] Petitioner noted this at page 29, footnote 11 of its brief.

The Government's arguments should be rejected.

ii. In re Hyman

The Government's reliance upon *Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316 (1992), is misplaced. *See* U.S. Brief, pp. 19, 23, 24.

In *In re Hyman*, the value of property claimed as exempt was indisputably more than the $45,000 exemption amount. Under state exemption law the property (a home) could only be sold to satisfy claims if there was more than $45,000 in equity after liens were satisfied. *In re Hyman*, 967 F.2d at 1318-19. The debtors valued the property at $415,000, and liens against the property totaled $347,611. *Id.* at 1318. There was nonexempt equity in the property, and the debtors' schedules made this plain. Everyone was on notice of this. It was always clear that this nonexempt property, and any increase in its value, could be liquidated for the benefit of creditors.

Here, Respondent's Schedule C put all parties in interest on notice that there was *no equity* in the property claimed as exempt after application of the exemption. For this reason alone, the reasoning of *In re Hyman* is inapplicable here.

Moreover, the reasoning of *In re Hyman* is flawed. The court focused on the "relatively short" 30 day limitation in Rule 4003(b), and suggested that debtors are in control of the exemption process. *Id.* at 1319 n. 6. That is incorrect.

Although debtors typically file their own schedules, the *trustee* has complete control over the time period for objecting to exemptions. All that a trustee need do in order to prevent the 30 day period from beginning to run is adjourn the § 341 meeting according to the requirements of the Rule. Even then, trustees can seek an extension of the 30 day period. The statute expressly provides for this. Critically, neither *In re Hyman*, nor the brief *amici curiae* of the Government, recognizes the trustee's degree of control. *Id.*; U.S. Brief, pp. 23-4. They each rest upon a flawed contention.

Finally, the Government contends that a trustee's work in a chapter 7 case "generally begins" at the § 341 meeting. U.S. Brief, p. 6. This, too, is incorrect (or *should* be incorrect). *See* pp. 18-20, *supra*. The Trustee Handbook itself details a number of steps which trustees should take before a § 341 meeting. The suggestion that a trustee's work should begin at the § 341 meeting is incorrect.

iii. "Unknown"

Finally, the Government suggests that Respondent should have put "unknown" in the value column of Schedule C. This position should be rejected.

First, it ignores the fact that Schedule C affirmatively requires that debtors state the value of property claimed as exempt. If a debtor knows or has a reasonable basis for estimating this value, she is obligated, by the form, to state it. The mere fact that reasonable people might disagree regarding an item's exact value does not mean the

debtor should not state her position on what that value is.

Second, specifying "unknown" where a value is, in fact, known, would violate any one of a number of the signature requirements discussed above. It simply cannot be correct that the best way to claim an exemption is to violate those requirements.

Third, if debtors begin to use "unknown" as a matter of course in order to claim an asset as exempt, it will lead to unnecessary litigation and delay. Trustees will adjourn § 341 meetings as a matter of course. Motions to extend the time for objecting to exemptions will become standard practice. Valuation issues will become ever-present. This will increase costs. All of these things will delay the closing and resolution of cases. The use of "unknown" where a value is, in fact, known, simply is not an answer.

Finally, it cannot be forgotten that many chapter 7 debtors commence cases on a *pro se* basis. To suggest that the best way to claim an asset as exempt is to do something other than what Schedule C requires, is unfair to *pro se* litigants on many levels.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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