No. 05-996

IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS AND MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus curiae National Association of Consumer Bankruptcy Attorneys respectfully submits this brief in support of petitioner.[1]

The plain language of 11 U.S.C. § 706(a) grants the debtor an unqualified one-time right to convert a chapter 7 bankruptcy case to chapter 13. The question presented in this case is whether, notwithstanding this clear statutory language, a court may nevertheless prevent a debtor from converting his case from chapter 7 to chapter 13 on account of prior bad faith. While bankruptcy courts are by no means powerless to root out "bad faith" misuses of the bankruptcy process, the text of the statute does not permit the court to prevent a debtor from exercising this one-time right to convert a case—a right that Congress has unambiguously con-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus curiae*, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Blanket consent for the filing of *amicus* briefs has been lodged with the Clerk of the Court by both parties.

ferred. The judgment below affirming the bankruptcy court's denial of a motion to convert should therefore be reversed.

INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Bankruptcy Attorneys ("NACBA"), incorporated in 1992, is a non-profit organization of more than 3,100 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 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 also advocates nationally on issues that cannot adequately be addressed by individual member attorneys. NACBA has filed several *amicus curiae* briefs in this Court in cases involving the rights of consumer bankruptcy debtors. *See, e.g.*, *Till* v. *SCS Credit Corp.*, 541 U.S. 465 (2004); *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004); *Lamie* v. *United States Tr.*, 540 U.S. 526 (2004); *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998). NACBA also participated as *amicus* in this case below.

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individual low- and moderate-income wage earners. In many instances, these individuals file voluntary cases under chapter 7 in order to discharge their debts and obtain a fresh start. For a variety of reasons, some of these debtors later elect to repay some or all of their debts by exercising the right to convert their cases to chapter 13 pursuant to 11 U.S.C. § 706(a)—the provision at issue in this case. In doing so, debtors represented by NACBA members are doing nothing more than exercising the rights that Congress granted to them in the clearest possible terms.

STATUTORY PROVISIONS

11 U.S.C. § 706(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this ti-

> tle at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

STATUTORY BACKGROUND

The Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, provides two sets of procedures through which debtors can obtain bankruptcy protection: liquidation, which generally proceeds under chapter 7; and reorganization, which is governed by chapters 11, 12, and 13.[2] The three reorganization chapters are similar in structure, and their variances are explained by the different types of debtors for which they were each intended.[3]

The choice that most debtors in bankruptcy face is thus between liquidation in chapter 7 and gradual repayment under the reorganization chapter that applies to them. This choice can be a matter of great importance and is likely to reflect the unique concerns of each particular debtor. The decision is essentially whether to keep one's assets and propose a plan for using them, together with future earnings, to pay one's creditors over time or whether to relinquish virtually all of one's assets now in exchange for a fresh start.

A. Liquidation And Reorganization

Chapter 7 provides for the liquidation of a debtor's assets, whether the debtor is an individual or a business entity.

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[2] While as a technical matter a chapter 13 bankruptcy does not provide for reorganization, "a term used exclusively in reference to chapter 11," chapter 13 "is in fact quite similar to chapter 11, with which it shares many concepts." 8 *Collier on Bankruptcy* ¶ 1300.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006). "Chapter 12 . . . in turn was modeled largely on chapter 13." *Id.*

[3] Although there are exceptions, chapter 11 generally governs corporate debt reorganization, chapter 12 provides special protections for family farms and fishermen, and chapter 13 governs reorganization of debts by individuals with steady income and moderate liabilities. *See* 11 U.S.C. § 109. *Cf. Toibb* v. *Radloff*, 501 U.S. 157 (1991) (chapter 11 primarily intended for corporate reorganizations, but individual debtor nevertheless eligible to seek chapter 11 protection under plain language of statute).

In a chapter 7 liquidation case, a trustee will be appointed whose duty it is to protect and maximize the value of the bankruptcy estate and then to reduce that property to cash for distribution to the creditors. *See* 11 U.S.C. §§ 701-704. The bankruptcy estate comprises all the debtor's assets as of the bankruptcy filing, *see id.* § 541, except that individual debtors are allowed to keep certain exempt assets, *see id.* § 522. In essence, the chapter 7 debtor turns all non-exempt property over to the trustee and, in exchange, is typically granted a discharge of pre-bankruptcy debts. *See id.* § 727. Over the course of the liquidation, the trustee will investigate the financial affairs of the debtor, *see id.* § 704(a)(4), ensure that the debtor complies with his duties in the case, *see e.g.*, *id.* § 704(a)(3), and finally dispose of the estate's property in whatever way the trustee deems consistent with the best interests of the creditors, *id.* § 363.

Though certain categories of debt (such as debts for money obtained by fraud, debts for willful and malicious injury, etc.) are nondischargeable, *see* 11 U.S.C. § 523(a), and in some cases an individual debtor who abuses the bankruptcy process may be denied a discharge altogether, *see id.* § 727(a), in the typical case, an individual debtor will leave this process unencumbered by pre-bankruptcy debt, but with only those limited assets that the law deems exempt from the bankruptcy estate. *See Rousey* v. *Jacoway*, 544 U.S. 320, 325 (2005) (noting that exemption of certain assets from the bankruptcy estate helps to effectuate the debtor's fresh start).

While the goal of a chapter 7 proceeding is to obtain a discharge following the liquidation of the debtor's assets, the reorganization chapters seek to avoid liquidation by allowing the debtor to adopt a plan providing for the use of current assets and future income to satisfy the prepetition claims of creditors. The premise is that creditors may well be better served if the debtor can use existing assets to generate future income that is committed under a plan of reorganization to repaying the creditors. *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 454 (1999) (describing "the two recognized policies underlying

Chapter 11" as "preserving going concerns and maximizing property available to satisfy creditors"). The centerpiece of reorganization is thus the confirmation of a plan that is consistent with the manifold statutory requirements. And because the essential premise of reorganization is that forestalling liquidation can benefit the creditors, all plans are subject to the central requirement that every creditor receive at least as much under the terms of the plan as he would in a chapter 7 liquidation. *See* 11 U.S.C. §§ 1129(a)(7), 1325(a)(4).

In addition to benefiting the creditors in this way, chapter 13 reorganization provides substantial benefits for individual debtors that may induce them to reorganize rather than to liquidate. If the chapter 13 plan is confirmed by the bankruptcy court, and the debtor makes all the required payments, the debtor's remaining debts will be discharged, including certain debts that section 523(a) would render nondischargeable in a chapter 7 proceeding. *See* 11 U.S.C. §§ 1325-1326, 1328. In addition to this somewhat broader discharge, chapter 13 allows the debtor to keep those prebankruptcy assets not consumed in making the payments required by the plan. *See id.* § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."); *id.* § 1327(b)-(c).

Notwithstanding these key differences, liquidation and chapter 13 reorganization proceedings share many features. A trustee is also appointed in chapter 13, and that trustee has the same duties of financial investigation and protection of estate value as does a chapter 7 trustee. *See* 11 U.S.C. § 1302(b) (incorporating many chapter 7 powers by reference). The chapter 13 trustee has the added obligation of overseeing the debtor's repayments and advising the court and the debtor on issues related to the plan. *Id.* Although the chapter 13 debtor retains the power to control the property of the estate, a power that is given over to the trustee in chapter 7, *id.* § 1303, the debtor must generally make the same filings under both chapters and must open up his financial affairs to the same extent, *see id.* § 521 (setting forth numerous duties of the debtor, most applicable regardless of

the governing chapter); Fed. R. Bankr. P. 4002(a)(3) (requiring full disclosure of all property available to the estate).

Furthermore, in both chapter 7 and chapter 13 cases, a debtor who fails to make full and complete disclosure or who acts in bad faith risks dismissal of the bankruptcy or denial of a discharge—among the ultimate bankruptcy sanctions. *See* 11 U.S.C. §§ 707(a), 1307(c) (both allowing dismissal "for cause").[4]

B. Conversion Among Chapters

Each of the relevant chapters of the Bankruptcy Code contains a provision governing conversion to the other chapters. Each begins with substantially the same language: "The debtor may convert a case under this chapter to a case under [another chapter] at any time . . . ." 11 U.S.C. § 706(a); *see also id.* §§ 1112(a), 1208(a), 1307(a). Each of the non-corporate chapters also provides that "[a]ny waiver of the right to convert a case . . . is unenforceable." *Id.* § 706(a); *see also id.* §§ 1208(a), 1307(a) (same).

Each of these conversion provisions also provides for conversion on a motion filed by any "party in interest" in the bankruptcy case (such as a trustee, a creditor or any other entity that may be affected by the bankruptcy). 11 U.S.C. § 1109(b). In contrast to the provisions granting *the debtor* the right to convert, the party-in-interest provisions provide that "*[t]he court* may convert" the case, and only after notice and a hearing. *Id.* § 706(b) (emphasis added); *see also id.* §§ 1208(d), 1307(c). While the debtor may convert a case for any reason, conversion on a motion by another party in interest typically requires a showing of "cause." *See id.* § 1112(b)(1) ("if the movant establishes cause"); *id.* § 1208(d) ("upon a showing that the debtor has committed fraud"); *id.* § 1307(c) ("for cause").

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[4] Because the central feature of a chapter 13 proceeding is the confirmation of a plan, failure to confirm a plan is tantamount to a dismissal of the case without a discharge. *See* 11 U.S.C. § 1307(c)(5) (allowing dismissal for failure to confirm a plan); *id.* § 1328 (predicating discharge on confirmation of a plan). Furthermore, confirmation of the plan is subject to an explicit good-faith filing requirement. *See id.* § 1325(a)(3).

The Bankruptcy Code does impose certain structural restrictions on the debtor's right to convert. Conversion to a new chapter is forbidden in all cases if the debtor is plainly ineligible for relief under that chapter. *See* 11 U.S.C. §§ 706(d), 1112(f), 1208(e), 1307(g). Debtor conversions out of chapter 7 are also limited to instances in which the case has not previously been converted. *Id.* § 706(a). And a debtor who has converted his case to chapter 13 lacks the right—enjoyed by debtors who filed under chapter 13 in the first instance—to dismiss the bankruptcy without providing other parties-in-interest with notice and the right to be heard. *Id.* §§ 1307(b), (c).

Thus, the Bankruptcy Code affords the chapter 7 debtor *one* unrestricted opportunity to convert his case to a different chapter, but severely constrains his options once he has done so. The debtor who converts once may not dismiss his case, *see* 11 U.S.C. §§ 1208(b), 1307(c), and must either proceed under his current chapter or return to chapter 7 and stay there. Such post-conversion restrictions prevent any misuse or manipulation of the initial opportunity to convert. In sum, as the legislative history makes clear, the debtor has a "*one-time* absolute right of conversion" to any chapter for which he qualifies. S. Rep. No. 95-989, at 94 (1978) (emphasis added); *see also* H.R. Rep. No. 95-595, at 380 (1977).

ARGUMENT

I. THE PLAIN MEANING OF SECTION 706(a) IS THAT THE DEBTOR IS ENTITLED TO EXERCISE A ONE-TIME RIGHT OF CONVERSION NOT SUBJECT TO JUDICIAL DISCRETION

When construing the Bankruptcy Code, just as when construing any statute, "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (quotation omitted).

It is presumed that Congress "says in a statute what it means and means in a statute what it says." *Connecticut*

Nat'l Bank v. *Germain*, 503 U.S. 249, 254 (1992). Accordingly, the plain meaning of the statutory language controls unless it yields a result so anomalous as to be "absurd." *Lamie*, 540 U.S. at 534.

A. The Word "May" In Section 706(a) Permits Conversion By The Debtor Subject Only To Those Limitations Expressly Stated In The Statute

The plain language of section 706 affords the debtor a one-time, absolute right to convert his case from chapter 7 to chapter 11, 12, or 13. Section 706(a) provides that "[t]he debtor *may* convert a case under this chapter to a case under chapter 11, 12, or 13 of this title *at any time*." 11 U.S.C. § 706(a) (emphases added). The ordinary definition of "may" is "to be allowed or permitted to." *American Heritage Dictionary of the English Language* 1112 (3d ed. 1996). *See also* 9 *Oxford English Dictionary* 501 (2d ed. 1998) (defining "may" as expressing, *inter alia*, "ability or power," and the "absence of prohibitive conditions"). As this Court has recently noted, "[t]he word 'may' customarily connotes discretion." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005). As used in section 706(a), "may" therefore means that the debtor has been granted a permissive right to convert his chapter 7 case at his own discretion.

This reading of the word "may" is consistent with the commonsense meaning of the phrase in the statute. If, for example, one neighbor tells another, "You may use my rake at any time," the ordinary understanding of this statement is that the first neighbor is granting the other neighbor permission to use the rake at the latter's discretion. Similarly, the plain meaning of "[t]he debtor may convert . . . at any time" is that Congress is granting the debtor permission to convert his bankruptcy case, at his sole discretion. If the neighbor (or Congress) had meant to condition use of the rake (or the right to convert) on the satisfaction of other conditions, the expectation is that they would have said so in granting permission to use it.

The court of appeals, however, construed the word "may" in section 706(a) as "suggest[ing] conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion." Pet. App. 34. The Sixth Circuit has interpreted "may" similarly in this context, noting that "may" can mean "might" or be "used to express possibility." *Copper* v. *Copper* (*In re Copper*), 426 F.3d 810, 816 (6th Cir. 2005) (quotation omitted). In other words, these courts have held that rather than using "may" to give the debtor the right to decide whether to convert, Congress was merely indicating the objective possibility that conversion might come to pass—"may" being used as it would in the phrase "it may rain tomorrow." *See* Pet. App. 34. ("In other words, the debtor 'may' succeed . . . but not necessarily . . . .").

Here, however, that usage is a strange one. Although the expression of possibility is one acceptable definition of the word "may," *see, e.g.*, *American Heritage Dictionary* 1112, it makes little sense in the context of section 706(a)—or almost any other statute, for that matter. Legislative bodies rarely enact into law their general observations about possibility or otherwise speculate about what "may" happen. Rather, statutory language serves to declare the rights and obligations of various parties.[5] It would be odd indeed to think that the statement "the debtor may convert . . . at any time" was merely Congress's way of noting that, from time to time, conversions have been known to occur.

Nor is the reading of "may" as expressing speculative possibility consistent with the commonsense understanding of the statutory phrasing. Returning to the example cited earlier—"You may use my rake at any time"—it would be

[5] Perhaps for this reason, most of this Court's cases interpreting the word "may" have focused on whether it merely permits a government actor to take an action where relevant conditions are satisfied or whether it *requires* the actor to do so. *See, e.g.*, *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193 (2000); *United States* v. *Rodgers*, 461 U.S. 677 (1983). We have not identified any case in which this Court, in construing statutory language, has adopted the view that "may" implies objective possibility, rather than permission.

bizarre to think that this statement means, "It is possible that at some point in the future you will use my rake." Likewise, the most reasonable and commonsense interpretation of "may" as used in section 706(a) is that it affords the debtor a permissive right to convert his case, rather than simply observing that a conversion is theoretically possible.

B. A Comparison Of Section 706(a) With Other Provisions Of The Bankruptcy Code Confirms That The Debtor's Right Of Conversion Is Absolute

The court of appeals suggested that, contrary to the ordinary usage, Congress's use of the phrase "[t]he debtor may convert" was intended to subject the debtor's decision to judicial override. It reached this result by comparing the language of section 706(a) to the language of section 1307(b), which provides: "On request of the debtor at any time . . . the court shall dismiss a case under this chapter." The court of appeals reasoned that, had Congress intended to make the debtor's decision to convert under section 706(a) "absolute," it would have used the phrase "the court shall convert," rather than the phrase "the debtor may convert." *See* Pet. App. 33-34.

There are two basic difficulties with this argument. First, comparisons to other provisions of the Bankruptcy Code that are more closely related to section 706(a) yield the opposite conclusion. Second, there is every reason to believe that the phrases contrasted by the court of appeals are in fact synonymous.

1. The most significant error in the court of appeals' comparison between sections 706(a) and 1307(b) is that the two provisions do not refer to the same topic. In addition to being located at a great remove from section 706(a), section 1307(b) concerns *dismissal*, not conversion.[6]

[6] The distinction is important because, unlike conversion, the Bankruptcy Code never treats "dismissal" as an activity for a party rather than a court. On the language of the Code, conversion "may" be undertaken both by parties, *see, e.g.*, 11 U.S.C. § 706(a), and by courts acting at the

A more appropriate set of statutory comparisons confirms that, as the plain language suggests, section 706(a) grants the debtor an absolute right to convert a case from chapter 7 to chapter 13. Section 706(a) attaches the permissive "may" to the word "debtor," rather than to the word "court" or to any other party in interest. This is in stark contrast to section 706(b), which provides that "[o]n request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."[7] The contrast between these two statutory neighbors is striking: unlike section 706(a), section 706(b) attaches the permissive "may" to the bankruptcy court rather than the debtor, and it requires notice and a hearing before the court may act. Therefore, if in section 706(a) Congress had intended to codify the court of appeals' view that the bankruptcy court *may*—but is not required to—grant the conversion, it would have structured section 706(a) just like the very next provision of the Bankruptcy Code.

Comparing section 706(a) to another of the Bankruptcy Code's conversion provisions, 11 U.S.C. § 1112(d), is also instructive. That section provides:

> The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
>
> (1) the debtor requests such conversion;

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behest of a party in interest, *see, e.g.*, *id.* § 706(b). In contrast, the Bankruptcy Code nowhere states that a debtor "may dismiss" his case; nor do the Federal Rules of Bankruptcy Procedure ever make dismissal effective without a court order. *Compare* Fed. R. Bankr. P. 1017(f)(1)-(2), 9013, 9014 (governing dismissal under all sections) *with* Fed. R. Bankr. P. 1017(f)(3) (making conversions from chapters 12 and 13 effective "without court order when the debtor files a notice of conversion").

[7] This provision refers only to conversions to chapter 11 and not to chapter 12 or 13 because conversion to the individual reorganization chapters is *solely* at the discretion of the debtor. *See* 11 U.S.C. § 706(c) ("The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.").

> (2) the debtor has not been discharged under section 1141(d) of this title; and
>
> (3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

Id.

The differences between this provision and section 706(a) illustrate two crucial points. First, as with section 706(b), when Congress intended that the court retain discretion to deny conversion, it used language that emphasized the *court's* role (i.e., "The court may convert . . .") rather than that of the *debtor* (i.e., "The debtor may convert . . ."). Second, section 1112(d)(3) shows that when Congress intended the conversion right to be constrained by *equitable* considerations, it made that limitation explicit in the text.

In sum, a comparison between section 706(a) and either of these provisions is more telling than the one employed by the court of appeals, and provides compelling structural evidence that section 706(a)'s right to convert was indeed intended to be absolute.

2. More fundamentally, the alternate phrasings of sections 706(a) and 1307(b)—"[t]he debtor may convert" and "the court shall [convert]"—represent a distinction without a difference. The court of appeals stated that "the phrase 'shall dismiss' is unquestionably a comparatively stronger imperative than 'may convert.'" Pet. App. 45 n.2. But that analysis misses the fundamental point that "may" and "shall" are used in these two provisions to refer to *different entities*—debtors and courts. Congress's repeated preference for the crisp wording "[t]he debtor may convert . . . at any time," over the tangled phrase "[o]n request of the debtor at any time . . . the court shall [convert]," might easily have been a mere choice of style.

Notably, chapter 13's legislative history strongly suggests that the phrasings of sections 706(a) and 1307(b) are synonymous. Section 1307(a) is a near carbon copy of section 706(a). *See* 11 U.S.C. § 1307(a) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title

at any time."). Yet the Senate Report for section 1307 treats sections 1307(a) and 1307(b) as conferring equally unqualified rights to convert and to dismiss. *See* S. Rep. No. 95-989, at 141 ("Subsections (a) and (b) confirm, *without qualification*, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy case under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed." (emphasis added)). Thus, even if the comparison advanced by the court of appeals between sections 706(a) and 1307(b) were apt, it is clear that Congress intended these two structures to afford the same unqualified right to the debtor.

C. According To The Canon Of *Expressio Unius*, Congress's Express Provision Of Two Exceptions To The Debtor's Absolute Right Of Conversion Indicates The Absence Of Unexpressed Exceptions

The maxim that "inclusion of one thing indicates exclusion of the other" cements the plain meaning of section 706(a) as vesting discretion to convert in the debtor, unrestrained by any unwritten good-faith requirement. Section 706 provides that there are two, and only two, limitations on the debtor's right to convert: (1) the debtor may convert "if the case has not been converted" before, 11 U.S.C. § 706(a); and (2) the debtor may convert only if he is eligible for the new chapter, *id.* § 706(d). Absent some contrary indication, Congress's inclusion of certain prohibitive conditions implies the absence of others. *See Raleigh & Gaston R.R. Co.* v. *Reid*, 80 U.S. (13 Wall.) 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."). Indeed, the Court has recently rejected the contrary assertion in the context of the Bankruptcy Code. *See Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) ("This theory—that the expression of one thing indicates inclusion of others unless exclusion is made explicit—is contrary to common sense and common usage."); *see also Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohi-

bition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

One of the clearest applications of *expressio unius* is that when Congress makes explicit exceptions from general rules, the absence of inexplicit exceptions is strongly implied. Thus, in *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected the proposition that there were implicit exceptions to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, codified at 28 U.S.C. § 1679, in part because the Act provided certain *explicit* exceptions. 499 U.S. at 166-167. As this Court stated in a striking parallel: "Congress' express creation of these two exceptions convinces us that the [court of appeals] erred in inferring a third exception . . . ." *Id.* at 167.

Another example of the proper application of the canon is provided by this Court's opinion in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), which concerned employee use of compensatory time. The statute at issue stated that certain state employees would be permitted to use accrued compensatory time upon request "if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5). In light of this language, the Court stated that "the proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in § 207(o)(5)." 529 U.S. at 583.

The same is true here: given Congress's enumeration of certain conditions under which conversion will not be permitted, "the proper *expressio unius* inference is that a [court] may not . . . deny [a debtor's conversion] for a reason other than that provided in § [706]." *See also Toibb* v. *Radloff*, 501 U.S. 157, 161 (1991) ("[W]e are loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11, because Congress took care in § 109 to specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code. . . . Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did

not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.").

Furthermore, the *expressio unius* maxim has its greatest force where, as here, it is eminently reasonable to assume that Congress considered the particular unwritten exception or condition at issue and specifically intended not to include it. *Cf. Andrus*, 446 U.S. at 616-617 (noting that canon is appropriate in absence of contrary legislative intent). Congress intended section 706(a) to provide a "one-time *absolute* right of conversion of a liquidation case to a reorganization," S. Rep. No. 95-989, at 94 (emphasis added), and so the legislative intent is fully in line with the reading called for by application of the canon. *See also infra* Section II.

Moreover, Congress has shown that it knew full well how to craft the kind of good-faith exception that the court of appeals read into the statute and did not do so in section 706(a). Throughout the Bankruptcy Code—including in the provision immediately following section 706—Congress has specified that a court may prevent a debtor from exercising certain rights "for cause," a phrase that has uniformly been construed to include bad faith. *See, e.g.*, 11 U.S.C. §§ 707(a), 1112(b), 1208(c), 1307(c); *see also In re SGL Carbon Corp.*, 200 F.3d 154, 160-161 & n.9 (3d Cir. 1999) (construing "cause" in section 1112(b) to include bad faith); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996) ("for cause" under section 1307(c) includes bad faith).

The Bankruptcy Code also makes a number of explicit references to good faith, as well as to the consequences of bad-faith conduct. *See, e.g.*, 11 U.S.C. § 1129(a)(3) (confirmation of chapter 11 plan only if "[t]he plan has been proposed in good faith"); *id.* § 1225(a)(3) (same for chapter 12); *id.* § 1325(a)(3) (same for chapter 13).[8] Congress's failure to in-

[8] *See also* 11 U.S.C. § 707(b)(1) (dismissal for "abuse of the provisions of this chapter"); *id.* § 727(a), (d) (listing numerous bad acts for which discharge may be denied or revoked); *id.* § 1208(d) (conversion to chapter 7 for "fraud"); *id.* § 1228(d) (revocation of discharge obtained "through fraud"); *id.* § 1230(a) (revocation of confirmation if "procured by fraud");

clude any of this kind of language in section 706(a) thus reflects a deliberate choice not to include a good-faith requirement for exercising the right to convert. *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quotation omitted)).

In view of both the enumerated exceptions to the right conferred in section 706(a), and the absence of any language mentioning "good faith" or "cause" in that provision, it must be presumed that Congress did not mean to include a bad-faith exception as grounds for withholding conversion.

D. Section 105(a) Of The Bankruptcy Code Does Not Support The Court Of Appeals' Reading

Rather than simply giving effect to the plain meaning of the statute, the court of appeals erroneously held that the petitioner was required to provide "evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process." Pet. App. 33. The only statutory source to which the court of appeals pointed for this "presumptive power" was section 105(a) of the Bankruptcy Code, which the court of appeals dubbed an "anti-abuse provision" that "looms large" in its construction of the statute. *Id.*

Section 105(a), however, merely provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*." 11 U.S.C. § 105(a) (emphasis added). The provision was drawn from the All Writs Act and merely "preserves" the powers traditionally exercised in equity. *See, e.g.*,

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id. § 1304(b) (chapter 13 debtor engaged in business must operate subject "to such limitations or conditions as the court prescribes," as well as certain restrictions imposed on bankruptcy trustees in the operation of businesses); *id.* § 1328(e) (revocation of discharge obtained "through fraud"); *id.* § 1330(a) (revocation of confirmation order for fraud).

Palmer v. *United States (In re Palmer)*, 219 F.3d 580, 582 n.2 (6th Cir. 2000).

Whatever equitable powers section 105(a) may preserve, it neither provides a basis for disregarding the plain meaning of the Bankruptcy Code nor establishes a "clear statement" rule under which bankruptcy courts serve as "roving commission[s] to do equity" unless Congress expressly limits their authority. *United States* v. *Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Rather, as the very text of section 105(a) indicates, any equitable powers it confers "must and can only be exercised within the confines of the Bankruptcy Code." *Northwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988); *see also United States* v. *Noland*, 517 U.S. 535, 543 (1996) (denying power of bankruptcy court to equitably subordinate tax penalties contrary to the congressional schedule of priorities and noting that "[t]he [equity] chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule" (second alteration in original) (quotations omitted)); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224-225 (3d Cir. 2004) (noting that while it might be efficacious to use section 105(a) to expand the jurisdiction of the bankruptcy court, "the exercise of bankruptcy power must be grounded in *statutory* bankruptcy jurisdiction" (emphasis added)).

Here, as set forth above, the language of the Code grants a debtor the absolute right to convert a case from chapter 7 to chapter 13, subject only to clear *statutory* exceptions. That plain language is controlling. The court of appeals thus proceeded from the wrong starting point in requiring the petitioner—or more, Congress—to rebut the bankruptcy court's "presumptive power" to deny conversion. Rather, any "presumptive power" must stem from the text of the Bankruptcy Code, and the burden of persuading the court to reject "the most natural reading" of the statute, even for reasons of "equity," is "exceptionally heavy." *Hartford Underwriters*, 530 U.S. at 9 (quotation omitted).

E. The Code's Express Mechanisms For Checking Bad-Faith Proceedings In Chapter 13 Further Imply The Absence Of An Unexpressed Bad-Faith Exception To The Right To Convert

A judicially created good-faith requirement for conversion, rooted in principles of "equity," is even less appropriate where, as here, Congress has provided specific mechanisms for addressing the problem of bad faith. The court of appeals concluded that, because a case can ultimately be reconverted to chapter 7 by reason of bad faith, it would be "pointless spinning of judicial wheels" to allow the debtor an unqualified right of initial conversion. Pet. App. 39. But just the opposite is true. The presence of this alternative statutory mechanism for protecting the interests of creditors is a reason to follow—not disregard—the clear statutory mandate. *See generally Seminole Tribe* v. *Florida*, 517 U.S. 44, 74 (1996) (refusing to apply a judicially created remedy "[w]here Congress has created a remedial scheme"); *Schweiker* v. *Chiliky*, 487 U.S. 412 (1988) (same).

Chapter 13 contains several express provisions that are specifically intended to protect creditors from debtors who would misuse the chapter 13 process. For example: (1) the court always has the option of reconverting a case to chapter 7; (2) the best-interest test ensures that no chapter 13 plan can be confirmed unless creditors will receive at least as much as they would under chapter 7; and (3) the chapter 13 trustee exercises the same powers of financial investigation and oversight as does the chapter 7 trustee.

1. If a court believes that a conversion has been undertaken in bad faith, the court may convert the case back to chapter 7. Section 1307(c) allows a case to be converted to chapter 7 by the court "for cause," which has consistently been construed to include bad faith. *See In re Lilley*, 91 F.3d 491 ("for cause" under section 1307(c) includes bad-faith filings). Accordingly, under the statutory scheme as drafted by Congress, a debtor has one opportunity to convert the case and attempt to persuade the court that he will propose a plan in good faith to the benefit of all. *Cf.* 11 U.S.C. § 1307(c); Fed. R. Bankr. P. 1017(f)(1), 9014 (both requiring

notice and a hearing before the court may convert back to chapter 7).

It is of course the case that a debtor's efforts in this regard may fail, and if so, the case may well be converted back to chapter 7. But the process that the court of appeals described as "wheel spinning" is just an alternative means to serve the same policy objectives as the judicially created bad-faith exception—and it is the one that Congress has sanctioned. Because the statute provides a means of achieving these objectives, it is inappropriate to invent an extra-statutory means to accomplish the same purpose. Rather, the statute should simply be construed according to its plain and unambiguous terms. *See Lamie*, 540 U.S. at 534.

2. The best-interest test also provides powerful assurance that a debtor cannot convert a case to chapter 13 in order to evade his creditors. Under sections 1325(a)(4) and 1328(b)(2), a repayment plan cannot be confirmed, nor a discharge granted, unless each unsecured creditor will receive a payment greater than or equal to the amount he would have received upon immediate liquidation in chapter 7.[9]

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[9] Even secured creditors—who may oppose the delay caused by conversion because each passing day causes depreciation in the value of the assets securing their claims—are "adequately protected" against debtor delay by the doctrine of adequate protection. *See, e.g.*, *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) ("It is common ground that the . . . interest [in secured property] is not adequately protected if the security is depreciating during the term of the stay."); *Metropolitan Life Ins. Co.* v. *Morel Holding Corp.* (*In re Morel Holding Corp.*), 75 F.2d 941, 942 (2d Cir. 1935) (Hand, J.) (discussing adequate protection and introducing the concept of the "indubitable equivalen[t]," now codified at 11 U.S.C. § 361(3)). Under the doctrine of adequate protection, a debtor who seeks to use a secured creditor's collateral while endeavoring to reorganize must provide some assurance to those secured creditors that, if the plan fails and assets are eventually liquidated, creditors will be compensated for the depreciation of the collateral that occurs between the bankruptcy filing and the ultimate liquidation. This assurance often takes the form of periodic payments (that compensate for the depreciation) and ensures that the debtor is not using up the property of his creditors in the course of a failed repayment scheme. *See also* 11 U.S.C. § 1326(a)(1)(C) (provision added to Bankruptcy Code with the 2005 amendments providing a creditor holding a claim secured by per-

Conversion to chapter 13 thus cannot function as an effective means for a debtor to evade his creditors because, by definition, discharge in chapter 13 is impossible unless the debtor will pay his creditors at least as much as they would have received in an immediate liquidation.

3. Finally, although the court of appeals implied that a debtor might attempt to convert to chapter 13 to evade the searching eye of the bankruptcy trustee, *see* Pet. App. 30, it is worth noting that chapter 13 trustees exercise the same essential powers as chapter 7 trustees, including the power to investigate the debtor's financial affairs and to oppose discharge if advisable, *see* 11 U.S.C. § 1302(b)(1) (incorporating most powers of the chapter 7 trustee by reference). Although the new trustee will not have the ability to dispose of the property of the estate, the debtor will be no more able to hide assets from the chapter 13 trustee than from the chapter 7 trustee. And if such hidden assets are found, then reconversion back to chapter 7 is an available remedy.

In sum, chapter 13 provides a host of mechanisms to protect creditors from the risk that a debtor will abuse the right of conversion. The availability of these clear and express protections provides a strong structural basis for adhering to Congress's text, rather than inventing a new protection that cannot be reconciled with the plain language of the statute.

II. THE LEGISLATIVE HISTORY OF SECTION 706(a) CONFIRMS THAT CONGRESS DID NOT INTEND FOR THE DEBTOR'S RIGHT TO CONVERT TO BE SUBJECT TO JUDICIAL DISCRETION

Because the clear text of section 706(a) provides that a debtor's right to convert is not subject to judicial override, the Court's inquiry need not proceed beyond this point. *See Lamie*, 540 U.S. at 534. But even if there were some ambiguity in the text of section 706(a), the statute's legislative history makes absolutely plain that Congress did not intend

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sonal property with "adequate protection" during the period in which a chapter 13 debtor is making payments under a plan).

to condition the debtor's right to convert on the approval of the bankruptcy court.

The relevant committee reports state:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts.

S. Rep. No. 95-989, at 94; *see also* H.R. Rep. No. 95-595, at 380. One would be hard-pressed to create a clearer statement of congressional intent to place the conversion decision in the hands of the debtor, unrestrained by the court. That the congressional committees described the debtor's conversion right as "absolute" and noted that he should "always" be given the chance to repay his debts is compelling evidence that Congress intended there to be no limitations on the debtor's right to convert beyond those present in the text of the statute itself.[10]

The court of appeals' attempts to explain away this clear legislative intent to create an "absolute" right of conversion under section 706(a) are unconvincing. First, the court of appeals reasoned that Congress's reference to an "absolute right of conversion" could not be taken literally because the

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[10] The contrast between the Senate Report's descriptions of sections 706(a) and 706(b) is also instructive. Contrary to the description of section 706(a) as vesting an "absolute" right in the debtor, the Report's interpretation of the language of section 706(b), "[o]n request of a party in interest . . . the court may convert," is that:

> [s]ubsection (b) permits the court, on request of a party in interest and after notice and a hearing, to convert the case to chapter 11 at any time. *The decision whether to convert is left in the sound discretion of the court*, based on what will most inure to the benefit of all parties in interest.

H.R. Rep. No. 95-595, at 380 (emphasis added). *See also id.* at 405 (similar contrast in chapter 11 history); S. Rep. No. 95-989, at 117 (same); *id.* at 141 (similar contrast in chapter 13 history).

provision itself limits conversion to instances where the case has not been converted previously. Pet. App. 37. But Congress did not describe the right merely as "absolute," but as a "one-time absolute" entitlement. *See* S. Rep. No. 95-989, at 94. Nor is this argument strengthened by the existence of the caveat in section 706(d), limiting conversion to cases in which the debtor is eligible to be a debtor under the new chapter. The Senate Report also mentioned the eligibility requirement of section 706(d), implying that when it called the right in section 706(a) "absolute," Congress understood that statement to be subject to the obvious qualification that the debtor be eligible to proceed under the new chapter.

It is clear, therefore, that Congress was well aware of (a) the one-time-only limitation and (b) the eligibility limitation, and nevertheless clearly stated that—subject to only those two limitations—the right to conversion was "absolute." By doing so, it rejected the possibility that other unexpressed limitations on the right to convert might be judicially imposed.

The court of appeals also sidestepped the clear meaning of section 706(a)'s legislative history by misinterpreting the last sentence, which states, "The policy of the provision is that the debtor should always be given the opportunity to repay his debts . . . ." S. Rep. No. 95-989, at 94. The court of appeals imported into this sentence the view that section 706(a)'s conversion right applies only to "honest debtors." Pet. App. 38. But as was true with respect to the statutory text itself, a good-faith exception to the "always" applicable "opportunity" would have been easy to note, and its absence is therefore telling. In short, nothing in the legislative history—any more than in the text itself—supports the court of appeals' judicially created limitation on the right to conversion. Indeed, the legislative history is decisively to the contrary.

III. CONGRESS HAD LEGITIMATE POLICY REASONS FOR ALLOWING AN ABSOLUTE RIGHT OF CONVERSION EVEN UNDER CIRCUMSTANCES WHERE PRIOR BAD FAITH HAS BEEN SHOWN

As the recent amendments to the Bankruptcy Code demonstrate, creditors will often prefer that a debtor convert a chapter 7 case to chapter 13. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. A principal purpose of those amendments was to require debtors who might otherwise file for a chapter 7 bankruptcy to propose a chapter 13 plan that would require the use of post-bankruptcy income to repay pre-bankruptcy debt. Section 706(a)'s "absolute" right of conversion facilitates this process. It could therefore represent a reasonable congressional judgment that the potential benefits of a good-faith chapter 13 plan far outweigh the harms of merely allowing the debtor to propose one—especially in light of the many mechanisms set forth in chapter 13 to protect the rights of creditors.[11]

The substantive effect of reading section 706(a) to mean what it says is to provide a debtor one opportunity to persuade both the creditors and the court that he should be entitled to proceed in chapter 13. To be sure, there is no assurance at all that the debtor will succeed in those efforts. And if the debtor is unable to propose an acceptable plan or is found to abuse the opportunity in any respect, the court has the unquestioned authority promptly to return that debtor to chapter 7. But the effect of the statutory language is to give the debtor one fair chance to propose a plan—a plan that must be to the benefit of the creditors and may well be to the benefit of all. It is therefore not mere "spinning of judicial wheels" to allow such a plan to be proposed, even if the court may not ultimately accept it.

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[11] In fact, because the debtor cannot use estate property to pay his bankruptcy attorney unless he proceeds in chapter 13, *see Lamie*, 540 U.S. 526, a debtor might be unable to obtain counsel who could formulate a chapter 13 plan absent the ability to convert a chapter 7 case.

While a debtor whose conversion would otherwise be denied on "bad faith" grounds may certainly face an uphill battle in proposing his plan, the statute Congress wrote plainly provides individual debtors with one opportunity to do so. There is no basis for the courts to strip it away.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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