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January 12, 2006

Handwritten signature of Bruce A. Markell in black ink.

Hon. Bruce A. Markell
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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<p>In re:) STEVEN C. KANE dba IDEAL OFFICE) INTERIORS, INC. and LINDA SIEGEL) KANE dba OFFICE INTERIORS, INC.,) Debtor.)</p>	<p>) Case No.: BK-S-05-17401-BAM) Chapter 7) Date: November 16, 2005) Time: 2:30 p.m.)</p>
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**OPINION SUSTAINING TRUSTEE’S OBJECTION TO DEBTORS’
HOMESTEAD EXEMPTION**

The debtors in this case, Steven and Linda Siegel Kane, filed a chapter 7 bankruptcy on July 29, 2005. In their schedules, they listed a home in Las Vegas worth \$318,000, and noted that it was subject to a \$158,000 mortgage, leaving them some \$160,000 in equity. Their current schedules claim a homestead exemption in the entire amount of this equity under Nevada law.¹

The Kanes’ bankruptcy trustee, James F. Lisowski, Sr., objected to this claim of exemption. He asserts that Section 522(p) of the Bankruptcy Code, a relatively new

¹The Nevada homestead exemption is currently \$350,000. It is contained in NEV. REV. STAT. §§ 115.010.2 and 21.090.1(I). Effective October 1, 2003, the Nevada legislature increased the exemption from \$125,000 to \$200,000, 2003 NEV. STAT. Ch. 201 (S.B. 70) § 1, and, effective July 1, 2005, increased it again from \$200,000 to \$350,000, 2005 NEV. STAT. Ch. 290 (S.B. 173) § 1.

1 provision of the Code added by the Bankruptcy Abuse Prevention and Consumer Protection
2 Act of 2005,² limits the exemption to \$125,000. Specifically, the trustee asserts that Section
3 522(p) caps a debtor's homestead exemption at \$125,000 – regardless of any higher
4 exemption adopted by state law, such as in Nevada – if the debtor had not owned the
5 homestead or a predecessor homestead in the same state for at least 1,215 days before filing
6 bankruptcy.³

7 The debtors did not meet this ownership requirement. They lived in California
8 from February 1997 to December 2004. At the first meeting of creditors held under Section
9 341(a), they testified that they had purchased their Nevada property at the beginning of
10 2005. They therefore did not own their Nevada homestead (or a predecessor homestead in
11 Nevada) for the 1,215-day period required by Section 522(p). This is the crux of the
12 trustee's objection.⁴

13 The actual wording of Section 522(p), however, creates a serious interpretive
14 problem. It says that the \$125,000 cap comes into effect “as a result of [a debtor's] electing
15 . . . to exempt property under State or local law” 11 U.S.C. § 522(p). The problem is
16 with the use of the term “electing” as the triggering event: as permitted by Section
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18 ²Pub. L. No. 109-8, § 322(a), 119 Stat. 23, 74-75 (2005).

19 ³Most of the new bankruptcy law became effective on October 17, 2005 – 180 days after
20 being signed by the President – but Section 522(p) took effect when the President signed the bill on
21 April 20, 2005. *Id.*, § 1501(b)(2), 119 Stat. at 194. It therefore applies to the debtors in this case.

22 ⁴Section 522(b)(3)(A), also added by the 2005 legislation, would normally require the
23 Kanes to have resided in Nevada for at least 730 days before the filing of their petition in order to
24 claim Nevada exemptions. But unlike Section 522(p), Section 522(b)(3) was not immediately
25 effective, and its effective date, like most of the provisions of the 2005 legislation, was 180 days
after enactment, or October 17, 2005. Pub. L. No. 109-8, § 1501(a), (b)(1), 119 Stat. 23, 194
(2005). As a result, the Kanes are not precluded from claiming Nevada exemptions in this case.

1 522(b)(2), more than two-thirds of the states, including Nevada, have opted-out of the
2 federal exemption scheme. *See* NEV. REV. STAT. § 21.090.3.⁵ In this context, “opting out”
3 means that residents of those states can use only state and nonbankruptcy exemptions; put
4 another way, the exemptions found in Section 522(d) of the Bankruptcy Code are not
5 available to residents in “opt-out” states such as Nevada. In such “opt-out” states, then,
6 debtors cannot and do not “elect” anything. Since there is no election, nothing happens as
7 the “result of electing.”

8 Does this mean, as the Kanes argue, that the 1,215-day ownership requirement of
9 Section 522(p) does not apply in Nevada and that the Kanes’ homestead exemption is
10 therefore not subject to the \$125,000 cap?⁶ In the short time that Section 522(p) has been

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12 ⁵The text of this statute reads: “Any exemptions specified in subsection (d) of section 522 of
13 the Bankruptcy Act of 1978, 11 U.S.C. § 522(d), do not apply to property owned by a resident of
this State unless conferred also by subsection 1, as limited by subsection 2.”

14 ⁶In their initial briefs, the debtors argued that since Section 522(p)’s cap would reduce the
15 exemption granted by state law, it should be struck down as an unconstitutional taking in violation
16 of the Fifth Amendment. Courts have typically rejected similar claims. *See, e.g., In re Thompson*,
17 867 F.2d 416 (7th Cir. 1989) (use of Section 522(f) to strip lien off “tools of the trade” not
18 unconstitutional taking even if it incorporated state definition of such tools at variance with similar
federal definition); *Coan v. Bernier (In re Bernier)*, 176 B.R. 976 (Bankr. D. Conn. 1995) (ability of
trustee to see non-debtor’s interest in homestead owned in common with debtor not an
unconstitutional taking).

19 The court rejects the debtors’ argument for several reasons: First, there is no constitutional
20 right to file for bankruptcy. *Cf. Thomas Kelch, The Mythology of Waivers of Bankruptcy*
21 *Privileges*, 31 IND. L. REV. 897, 900 (1998) (“Not only is there no constitutional right to file
22 bankruptcy, but Congress need not even create a bankruptcy law”); *United States v. Kras*, 409 U.S.
23 434, 446 (1973) (“There is no constitutional right to obtain a discharge of one’s debts in
bankruptcy,” and a debtor who cannot pay the filing fee is not entitled to access to bankruptcy
protection). As a result, due process is satisfied when Congress enacts law in accordance with its
plenary power under Article I, Section 8 of the Constitution to establish “uniform Laws on the
subject of Bankruptcies throughout the United States.”

24 Second, state law exemptions must fall when in conflict with federal law; that is the
25 teaching of Article VI of the Constitution, the Supremacy Clause. *See, e.g.* 26 U.S.C. § 6334(a);

1 on the books, five courts have already grappled with this puzzling provision, and they have
2 reached divergent results.

3 Three of the cases involve essentially the same fact pattern that is present here:
4 debtors who did not own their homestead for at least 1,215 days in a state that opted out of
5 the federal exemption scheme, thereby making it impossible for the debtor to “elect”
6 between state and federal exemptions. Judge Mark in Florida and my colleague, Judge
7 Riegler in Nevada, conclude that under these facts, the homestead exemption is capped,
8 while Judge Haines in Arizona says that it isn’t because the debtor made no “election.” In
9 the fourth case, Judge Friedman in Florida considered the rollover of property within the
10 same state and found no cap, and in the fifth case, Judge Hale in Texas held that the
11 debtors’ increased equity in their homestead during the 1,215 days before filing was not
12 subject to the cap.

13 Judge Mark found the text of Section 522(p) ambiguous, so he looked to its
14 legislative history, which clearly shows that Congress intended for there to be a cap for all
15 debtors. He imposed one, even though the debtor had no choice between state and federal
16 exemptions. *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005). Judge Riegler found that
17 the election requirement of 522(p) was satisfied when the debtor made a decision to claim a

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19 *Drye v. United States*, 528 U.S. 49, 52 (1999) (“state law is inoperative to prevent the attachment
20 of liens created by federal statute in favor of the United States.”). Thus, there is no reason to
21 believe that homestead protections recognized under state law must be carried into the federal
22 bankruptcy code. Indeed, the Bankruptcy Act of 1841 adopted uniform federal exemptions, capped
at \$300, and did not incorporate state law. Bankruptcy Act of 1841, ch. 9, § 4, 5 Stat. 440, 443-44
(1841).

23 Finally, President Bush signed the 2005 changes to the bankruptcy law into law on April 20,
24 2005, and the Kanes had or could have had full knowledge of the provisions of the law when they
25 filed for bankruptcy in July. To their credit, the debtors did not renew or expand on this argument
in their supplemental briefs.

1 homestead exemption. That is, a debtor elects by simply claiming an exemption and
2 “electing” not to claim a homestead. She believes this to be the case even though a Nevada
3 debtor has no choice between the federal and state exemptions. Because she finds an
4 election, she finds that the cap applies. *In re Virissimo*, 332 B.R. 201 (Bankr. D. Nev.
5 2005).

6 On the other hand, Judge Haines said that though the result was odd, the text of
7 the statute is clear, and he was required to apply it unless and until Congress changed it
8 (which, he suggested, Congress should do). In the meantime, he said, if the debtor made no
9 election between state and federal exemptions, there is no cap. *In re McNabb*, 326 B.R. 785
10 (Bankr. D. Ariz. 2005).

11 Judge Friedman in Florida thought that there should be a cap, but inasmuch as the
12 debtor had rolled over a previous homestead property, he applied the “safe harbor” of
13 Section 522(p)(2)(B) which allows the homestead exemption to remain uncapped if a
14 debtor’s new homestead is simply a continuation of the debtor’s residence in the state. *In re*
15 *Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 2005). Finally, Judge Hale held that for debtors
16 who acquired their homestead more than 1,215 days before filing, the increase in their
17 equity during the 1,215 days before filing was not subject to the cap. *In re Blair*, 334 B.R.
18 374 (Bankr. N.D. Tex. 2005).

19 This court concurs with Judges Mark and Riegle – the cap applies to all debtors
20 who do not satisfy the 1,215-day rule – but for different reasons than either of them
21 advanced. Whether the text is ambiguous or not, it is still possible to consider and
22 implement what Congress unambiguously intended and to overcome the drafters’
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1 unfortunate choice of words.⁷

2 **Closing the “Mansion Loophole”**

3 Section 522(p) was intended to address the well-documented and often-expressed
 4 concern by members of Congress about the so-called “mansion loophole” by which wealthy
 5 individuals could shield millions of dollars from creditors by filing bankruptcy after
 6 converting nonexempt assets into expensive and exempt homesteads in one of the handful
 7 of states that have unlimited homestead exemptions – usually Florida and occasionally
 8 Texas. *See, e.g., Havoco of Am., Ltd. v. Hill*, 790 So.2d 1018, 1028 (Fla. 2001) (“The
 9 transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or
 10 defraud creditors is not one of the three exceptions to the homestead exemption provided in
 11 article X, section 4 [of the Florida Constitution]. Nor can we reasonably extend our
 12 equitable lien jurisprudence to except such conduct from the exemption’s protection.”).⁸

13 The history of Section 522(p) unequivocally demonstrates that Congress believed
 14 that the 2005 legislation closed that loophole, which had repeatedly been discussed and
 15 been a concern for nearly a decade. In its report in 1997, the National Bankruptcy Review

17 ⁷Section 522(p) is one of many examples of poor drafting in the new bankruptcy law, which
 18 Professor Todd Zywicki assured the Senate Judiciary Committee was “fine as it is,” adding, “There
 19 is no word that I would change in this particular piece of legislation.” SEN. JUD. COMMITTEE,
 20 *Hearing on S. 256: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 109th
 Cong., unofficial transcript (March 10, 2005).

21 ⁸The unlimited homestead exemption was a concern as early as the first American
 22 bankruptcy law, in 1800, although the concern then was that the federal law would affect the
 23 homestead of Jeffersonian plantation owners. *See* BRUCE H. MANN, *REPUBLIC OF DEBTORS:
 24 BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 196-98* (2002). It also is fairly unique; as
 noted by Professor Charles Tabb, the concept of an unlimited exemption “is unimaginable in the
 25 rest of the world.” Charles J. Tabb, *Lessons from the Globalization of Consumer Bankruptcy*, 30
 LAW & SOC. INQUIRY 763, 777 (2005).

1 Commission, which Congress had created in 1994 to review the operation of the bankruptcy
2 system and recommend changes, identified the problem and found:

3 In deferring to state law exemptions, the current system . . .
4 multiplies the opportunities for forum shopping and prebankruptcy
5 asset conversion. . . . Unlimited homesteads have led to national
6 ridicule and the efforts of some less needy and better represented
7 families to find literal and figurative shelter in generous states.⁹

8 In the years since the commission's report, during which bankruptcy bills were
9 debated yearly,¹⁰ the mansion loophole was always on legislators' minds.¹¹ See Melissa B.

10 ⁹NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL
11 BANKRUPTCY REVIEW COMMISSION FINAL REPORT, OCTOBER 20, 1997, at 124 (footnotes omitted).

12 ¹⁰Indeed, President Clinton "pocket vetoed" bankruptcy reform in 2000 at least in part
13 because it did not close the mansion loophole. See *Memorandum of Disapproval for Bankruptcy
14 Reform Legislation*, 3 PUB. PAPERS 2730, 2730-31 (Dec. 19, 2000), reprinted in 2000
15 U.S.C.C.A.N. D85 (opposing the bill because "the loophole for the wealthy is fundamentally
16 unfair and must be closed.").

17 ¹¹See, e.g., the statement by twelve members of Congress that was included as Additional
18 Views in the House Report on the proposed Bankruptcy Reform Act of 1999:

19 [W]e should start with individuals like Marvin Warner, a former ambassador
20 to Switzerland and the owner of a failed Ohio Savings & Loan, who paid off only a
21 fraction of \$300 million in bankruptcy claims while keeping his multi-million-dollar
22 horse ranch near Ocala, Florida.

23 Or Martin A. Siegel, a former Wall Street investment banker convicted of
24 insider trading. While facing a \$2.75 billion civil suit, he bought a \$3.25 million,
25 7,000-square-foot beachfront home in Ponte Vedra Beach.

Or former baseball commissioner Bowie Kuhn, whose Manhattan law firm
went into bankruptcy. After creditors seized his weekend house in the Hamptons and
were about to attach his \$1.2 million home in Ridgewood, New Jersey, Kuhn
acquired a million-dollar house in Florida with five bedrooms and five baths.

Or Dr. Carlos Garcia-Rivera, a Miami physician with no malpractice
insurance, who was named in four separate malpractice actions, filed for bankruptcy
protection, and kept a \$500,000 home with a 100-foot swimming pool.

Or the Dallas developer, Talmadge Wayne Tinsley, who filed under chapter
7 after incurring \$60 million in debts. Tinsley objected to the Texas law that
permitted him to keep only one acre of his \$3.5 million, 3.1-acre magnolia-lined

1 Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUSTON L. REV.
 2 1091, 1128-35 (2004), which contains an exhaustive review of the various homestead
 3 proposals and a perceptive analysis of the reaction to them in the press.

4 The debate culminated in 2005. During the debate on S.256, the bill that became
 5 the 2005 amendments, Representative James Sensenbrenner, Republican of Wisconsin,
 6 assured the House that the bill closed the “‘millionaire’s mansion’ loophole in the current
 7 bankruptcy code that permits corporate criminals to shield their multi-million dollar
 8 homesteads.” 151 CONG. REC. H2048 (daily ed. April 14, 2005). In the Senate, Tom
 9 Carper, Democrat of Delaware, told his colleagues: “[U]nder current law, a wealthy
 10 individual in a State such as Florida or Texas can go out, if they are a millionaire, and take
 11 those millions of dollars and invest that money in real estate, a huge house, property, and
 12 land in the State, file for bankruptcy, and basically protect all of their assets. . . . With the

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 14 estate. But that acre included a five-bedroom, six-and-a-half-bath mansion with two
 15 studies, a pool and a guest house.

16 Or the movie actor, Burt Reynolds, who declared bankruptcy in 1996,
 17 claiming more than \$10 million in debt. Reynolds kept a \$2.5 million home –
 18 appropriately named ‘Valhalla’ – while his creditors received 20 cents on the dollar.

19 The situation in Florida has become so notorious that one Miami bankruptcy
 20 judge told the New York Times, ‘You could shelter the Taj Mahal in this state and
 21 no one could do anything about it.’

22 This is a national problem that demands a uniform solution. . . . [D]ebtors
 23 who live in the 45 states that cap the exemption [. . .] are free to relocate to one of
 24 the five so-called ‘debtors’ paradises’ that have no cap at all.”

25 H.R. REP. NO. 106-123, at 378-79 (1999) (additional dissenting views of several members)
 (footnotes omitted). *See also* H.R. REP. NO. 108-40 (pt. I), at 131 (2003); H.R. REP. NO. 107-3 (pt.
 I), at 488-91 (2001) (additional dissenting views of several members) (footnotes omitted); S. REP.
 NO. 106-49, at 76 (1999) (additional views of Sen. Kohl); S. REP. NO. 105-253, at 46 (1998).

Indeed, Senators Kohl and Sessions requested and received a report from the General
 Accounting Office on the effect of unlimited homesteads. *See* GEN. ACCOUNTING OFFICE, Pub.
 No. GAO/GGD-99- 118R, *Bankruptcy Reform: Use of the Homestead Exemption by Chapter 7
 Bankruptcy Debtors in the Northern District of Texas and the Southern District of Florida in 1998*
 (1999), reprinted at <http://www.gao.gov/archive/1999/gg99118r.pdf>.

1 legislation we have before us, someone has to figure out that 2 ½ years ahead of time
 2 people are going to want to file for bankruptcy and be smart enough to put the money into a
 3 home . . .” *Id.* at S2415-16 (daily ed. March 10, 2005). These statements on the floor of
 4 both chambers were echoed in the House Report on S.256, which flatly stated that: “The bill
 5 . . . restricts the so-called ‘mansion loophole’ . . . by requiring a debtor to own the
 6 homestead for at least 40 months [1,215 days] before he or she can use state exemption law;
 7 current law imposes no such requirement.” H.R. REP. NO. 109-031 at 15-16 (2005).¹² *See*
 8 *also* Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of*
 9 *Opportunity Lost*, 79 AM. BANKR. L.J. 397, 402-06 (2005).

10 But as Section 522(p) is written and as it was enacted, the “result of electing”
 11 language effectively makes it applicable to debtors in only four states (Texas,
 12 Massachusetts, Minnesota, and Rhode Island) and the District of Columbia. These are the
 13 only jurisdictions that allow debtors to choose between state and federal exemptions and
 14 that have homestead exemptions higher than the \$125,000 federal cap.¹³ However, given

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 16 ¹²In the House, Representative Sensenbrenner placed a “Summary of Principal Provisions”
 17 of the S. 256 into the record. It said the bill
 18 [c]loses the ‘mansion loophole’ for greedy corporate culprits: Under current
 19 bankruptcy law, debtors living in certain states can shield from their creditors
 20 virtually all of the equity in their homes. In light of this, some debtors actually move
 21 to these states just to take advantage of their ‘mansion loophole’ laws. S. 256 closes
 this loophole for abuse by requiring a debtor to reside in the state for at least 2 years
 . . . [and] . . . to own the homestead for at least 40 months before he or she can use
 state exemption law.
 151 CONG. REC. H2049 (daily ed. April 14, 2005).

22 ¹³The homestead exemption in the District of Columbia is unlimited (D.C. CODE ANN. § 15-
 23 501(a)(14), and in Texas, the dollar amount is unlimited (TEX. CONST. art. 15, § 51). In
 24 Massachusetts, the homestead exemption is \$500,000 (MASS. ANN. LAWS 188, §§ 1 and 1A), and
 in Minnesota and Rhode Island it is \$200,000 (MINN. STAT. ch. 510.02 and R.I. GEN. LAWS § 9-26-
 4.1). *See, e.g., In re Maronde*, 332 B.R. 593, 597-98 (Bankr. D. Minn. 2005) (describing the
 Minnesota homestead exemption).

1 the history recounted above, it is inconceivable that Congress intended such a limited result,
2 and it is demonstrably not what members of Congress thought they were implementing
3 when they voted for the bill.

4 In the first place, as noted above, legislators were repeatedly assured that the bill
5 closed the mansion loophole, which many of them said they wanted to do. In the second
6 place, there is no discernible or feasible public policy that is served by (or was discussed)
7 linking the \$125,000 cap to a debtor's choosing between state and federal exemptions.
8 Whether a debtor elects exemptions or gets them by default is completely unrelated to the
9 problem that Congress was trying to solve – a debtor's ability to shield assets by buying a
10 homestead in a state with an unlimited exemption. As written, Section 522(p) would not
11 seem to cover Florida, where many of the mansion loophole abuses are alleged to have
12 occurred, while it does cover Massachusetts, Minnesota, Rhode Island, none of which have
13 unlimited exemptions, and the District of Columbia, which does. None of these
14 jurisdictions is known to have attracted mansion abusers.

15 Under the circumstances, this court has no doubt that the “result of electing”
16 requirement in Section 522(p) is a mistake in drafting the text of the statute. Application of
17 the plain meaning of the word “electing” in Section 522(p) would restrict the homestead
18 exemption cap to states in which debtors actually make an election between federal and
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20 The appendix to this opinion contains a table of the current homestead exemptions for each
21 state whose homestead exemption is greater than \$125,000, along with each state's status as “opt-
22 in” (the debtor has a choice) or “opt-out” (the debtor has no choice). It shows that there are five
23 opt-in jurisdictions that have homestead exemptions greater than the \$125,000 cap. In addition,
24 there are only eight opt-out states where the homestead exemption, the only homestead the debtor
25 may claim, is greater than \$125,000. Thus, if Section 522(p) is read literally, it affects only four
states and the District of Columbia. As set forth later in this opinion, there is no policy reason why
Congress should distinguish between debtors in those five jurisdictions and debtors in the rest of
the country.

1 state homestead exemptions; that is, when debtors actually have a choice between the
2 homestead exemption provided in Section 522(d)(1) and the homestead exemption (if any)
3 provided by their home state. The drafters no doubt used the word “electing” without
4 realizing that it made any difference. In fact it makes a big difference: In states that require
5 debtors to use the state exemptions, including Nevada and Florida, no election is made, and
6 thus plain meaning would dictate that the \$125,000 cap would never be triggered. The
7 mansion loophole would thus remain wide open. So the text as written, if applied strictly
8 and literally, yields a bizarre result that would seem to effectively thwart Congress’s stated
9 intent.

10 In addition, the literal text would seem to make a distinction between Texas, an
11 opt-in state where the debtor can choose between state and federal exemptions, and Florida,
12 an opt-out state where the debtor has no choice. As both Texas and Florida have been cited
13 as states where wealthy debtors have used the mansion loophole, there is no imaginable
14 reason for making this distinction and treating the two states differently. *See also* note 21
15 *infra*.

16 **Scrivener’s Error**

17 But if the word “electing” is a drafting mistake, does it fall under the “scrivener’s
18 error” doctrine that would allow this court to correct it? Or can only Congress correct its
19 drafting mistakes, particularly when the resulting wording of the statute is clear and
20 unambiguous, however perverse the result?¹⁴

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23 ¹⁴This debate is strictly about noncriminal statutes. Different rules of interpretation, as well
24 as the rule of lenity, apply for apparent drafting errors in criminal statutes. *See, e.g.*, United States
25 v. Moore, 136 F.3d 1343 (9th Cir. 1998) (criminal statute did not prohibit defendant’s conduct,
even though it was likely intended to do so, due to mistaken cross-reference in the statute’s
definitions).

1 The problem of when, how, and even whether a court can correct a legislature's
2 mistake in drafting a law – that is, when the legislature intends one thing but inadvertently
3 drafts and enacts another – goes back to the earliest cases in this country's legal history,¹⁵
4 and it has been an ongoing subject of discussion and debate.¹⁶ A key problem is that when a
5 court decides to ignore the clear words and plain meaning of a statute, there is always a
6 danger that what it thinks is a drafting mistake actually represents a substantive decision by
7 the legislature, perhaps the result of an unseen legislative compromise. In that case, rather
8 than helpfully correcting a mistake, the court might be improperly rewriting the law. If the
9 court is mistaken and the words of the statute are indeed what the legislature intended, then
10 when the court substitutes what it thinks the legislature meant for what the statute says, it
11 abandons its proper role as the legislature's agent and, not incidentally, violates the
12 separation of powers that is basic to our constitutional structure.

13 As a result, there is a strong and longstanding view that the words of a statute are
14 supreme and, if they are clear, they should be taken as fully embodying what the legislature
15 intended. If the text is not ambiguous, that is the end of the inquiry. As no less than Oliver
16 Wendell Holmes, Jr. wrote more than 100 years ago, “[W]e do not inquire what the
17 legislature meant; we ask only what the statute means.” Oliver Wendell Holmes, Jr., *The*

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19 ¹⁵*See, e.g.,* Huidekoper's Lessee v. Douglas, 7 U.S. (3 Cranch) 1 (1805), in which the
20 Supreme Court concluded that the word “residing” in a Pennsylvania statute resulted in an
21 “absurdity,” and concluded, “It is clear that they [the legislature] do not mean what they say, and
22 the question is, what did they mean to say?” *Id.* at 58. The court changed “residing” to “shall
23 reside” to straighten things out. *Id.*

24 ¹⁶The literature on this subject is enormous, to say the least. *See* WILLIAM D. POPKIN,
25 STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999).
Particularly helpful in analyzing the current case were Jonathan R. Seigel, *What Statutory Drafting
Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) and Michael
S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589 (2000).

1 *Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

2 But that is not the end of the matter. Even the strictest textualists concede that
3 sometimes a drafting error is so obvious that a court properly acts as the legislature's agent
4 by fixing it. As the Supreme Court has told us: "The plain meaning of legislation should be
5 conclusive, except in the 'rare cases [in which] the literal application of a statute will
6 produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the
7 intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair*
8 *Enters.*, 489 U.S. 235, 242 (1989), *quoting* *Griffen v. Oceanic Contractors, Inc.*, 458 U.S.
9 564, 571 (1982). More recently, the Ninth Circuit, while asserting that "legislative history
10 is irrelevant to the interpretation of an unambiguous statute," said that a court may "depart
11 from this rule, if at all, only where the legislative history clearly indicates that Congress
12 meant something other than what it said." *Perlman v. Catapult Entm't, Inc. (In re Catapult*
13 *Entm't, Inc.)*, 165 F.3d 747, 753 n. 9 (9th Cir. 1999).

14 But acknowledging that it may sometimes be necessary for a court to reform a
15 statute in order to implement the intent of the legislature does not answer the question of
16 when and under what circumstances such reformation is proper. How can a court be sure
17 that the text is not what the legislature meant?

18 Courts find it easiest to reform a statute when the suspect text makes no sense
19 whatever.¹⁷ It is somewhat harder when the text makes literal sense but it is absurd, or

23 ¹⁷*See, e.g.,* *U.S. v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004) (the statute said that "[a]ny
24 individual who violates . . . this section, shall be fined under this title or imprisoned not less than
25 10 years nor more than 20 years, *and both . . .*" (italics added). The court looked to the legislative
history to determine what Congress had intended.

1 when applying it would lead to an absurd result.¹⁸ It is hardest to do when, as in the current
2 case, the text makes sense but yields a perverse result. The more substantive the change,
3 the more wary a court must be about making it. As the Supreme Court has said, “The fact
4 that Congress may not have foreseen all of the consequences of a statutory enactment is not
5 a sufficient reason for refusing to give effect to its plain meaning.” *Union Bank v. Wolas*,
6 502 U.S. 151, 158 (1991).

7 All statutory construction begins, of course, “with the language of the statute
8 itself.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). In construing this
9 language, we assume that “Congress intends the words in its enactments to carry ‘their
10 ordinary, contemporary, common meaning.’” *Pioneer Inv. Servs. Co. v. Brunswick Assoc.*
11 *Ltd. P’ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42
12 (1979)). In the current case, the plain meaning of Section 522(p) is clear, but it is
13 demonstrable that Congress intended to close the mansion loophole even in opt-out states
14 where the debtor has no choice between state and federal exemptions. It certainly did not
15 intend to leave the loophole wide open in opt-out states.

16 **The Plain Meaning of Section 522(p) and Justice Scalia’s Test**

17 But how can a court be sure that Congress did not mean what it enacted? Justice
18 Antonin Scalia is one of the strictest, if not the strictest, textualists active today. Studying
19 his methods of statutory interpretation has a payoff for a trial court. If the methods used by
20 Justice Scalia would lead to the reformation of the statute, then the statute probably should
21 be reformed, and little time need be spent in discerning the proper or ultimate test for all

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23 ¹⁸A 1934 Louisiana law said litigants could impeach the testimony of the other side’s
24 witnesses “in any unlawful way,” which was clear but absurd. The State Supreme Court held that
25 the prefix “un” was an accident and that the legislature had meant “in any lawful way,” and that’s
the way it construed it. *Scurto v. LeBlanc*, 191 La. 136, 156, 184 So. 567, 574 (1938).

1 federal statutes.¹⁹

2 Not surprisingly, Justice Scalia's jurisprudence on this point intentionally makes
3 it very difficult for a court to revise a statute's written text or to interpret it contrary to its
4 plain meaning. Very difficult, perhaps, but not impossible. Even Justice Scalia has
5 acknowledged that a court can correct a scrivener's error, which he defines as a case "where
6 on the very face of the statute it is clear to the reader that a mistake of expression (rather
7 than of legislative wisdom) has been made."²⁰

8 In his opinions, Justice Scalia has occasionally set out the high standard that, in
9 his view, a court must meet before it may substitute legislative intent for legislative
10 enactment. In brief, he requires that two conditions be met before such variance is
11 permissible. First, the plain meaning of the statute under consideration must lack any
12 rational purpose – not just what Congress may have intended, but any plausible
13 congressional purpose. In *Holloway v. United States*, for example, Justice Scalia disagreed
14 with the majority's willingness to reform an otherwise unambiguous statute because he
15 found a "plausible congressional purpose in enacting this language – not what I necessarily
16 think was the real one." *Holloway v. United States*, 526 U.S. 1, 19 n.2 (Scalia, J.,
17 dissenting) (1999). Further, he acknowledged, "I search for a plausible purpose because a

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19 ¹⁹As Justice Scalia himself has noted, the Supreme Court has not given unambiguous
20 instructions on how to detect or treat legislative ambiguity. As he lamented in a dissent issued in
21 1992: "I have the greatest sympathy," he wrote, "for the Court of Appeals who must predict which
22 manner of statutory construction we shall use for the next Bankruptcy Code case." *Dewsnup v.*
23 *Timm*, 502 U.S. 410, 436 (1992) (Scalia, J., dissenting). One would hope that this sympathy
24 extends to bankruptcy courts as well. *See also* Lee Dembart & Bruce A. Markell, *Alive at 25? A*
25 *Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979-2004*, 78 AM. BANKR. L.J.
373, 386-93 (2004).

²⁰Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and the Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 20 (Amy Gutmann ed., 1997).

1 text without one may represent a ‘scrivener’s error’ that we may properly correct.” *Id.* So,
2 according to Justice Scalia, if there is no plausible congressional purpose in the text as
3 written, the statute is a candidate for reformation.

4 But there must be more. A second element for Justice Scalia is that the intended
5 meaning to be used must be obvious. “The *sine qua non* of any ‘scrivener’s error’ doctrine,
6 it seems to me, is that the meaning genuinely intended but inadequately expressed must be
7 absolutely clear,” he wrote. “[O]therwise we might be rewriting the statute rather than
8 correcting a technical mistake.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82
9 (Scalia, J., dissenting) (1994).

10 Applying these tests, Justice Scalia has occasionally been willing to override the
11 plain meaning of a text before him, as he was in *Green v. Bock Laundry Mach. Co.*, 490
12 U.S. 504 (1989). In that product-liability case, Green sued Bock, which had manufactured a
13 machine that injured him. At trial, Bock impeached Green’s testimony by introducing
14 evidence that he had previously been convicted of burglary and a related felony.

15 Green lost. He then appealed, arguing that the trial court had allowed the
16 impeachment evidence to be admitted without weighing its probative value against its
17 prejudicial effect. He cited Federal Rule of Evidence 609(a)(1), which specified that
18 evidence that a witness had been convicted of a felony “shall” be admitted for the purpose
19 of attacking the credibility of the witness “only if” the court determined that the
20 probativeness of the evidence outweighed its prejudice “to the defendant.”

21 Did this rule apply in a civil case? The plain language of the rule appeared to
22 establish a different standard for admitting impeachment evidence against a civil defendant
23 than against a civil plaintiff, such as Green. It seemed to require a court to weigh the
24 prejudicial effect of a witness’s testimony to a civil defendant but to allow the automatic
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1 admissibility of evidence of prior felony convictions detrimental to a civil plaintiff.

2 In a concurring opinion, Justice Scalia wrote:

3 We are confronted here with a statute which, if interpreted
4 literally, produces an absurd, and perhaps unconstitutional, result. Our
5 task is to give some alternative meaning to the word “defendant” in
6 Federal Rule of Evidence 609(a)(1) that avoids this consequence; and
7 then to determine whether Rule 609(a)(1) excludes the operation of
8 Federal Rule of Evidence 403 [which requires the weighing].

9 I think it entirely appropriate to consult all public materials,
10 including the background of Rule 609(a)(1) and the legislative history
11 of its adoption, to verify that what seems to us an unthinkable
12 disposition (civil defendants but not civil plaintiffs receive the benefit
13 of weighing prejudice) was indeed unthought of, and thus to justify a
14 departure from the ordinary meaning of the word “defendant” in the
15 Rule.

16 490 U.S. at 527.

17 As a result, Justice Scalia read the word “defendant” to mean “criminal
18 defendant.” *Id.* at 529. This variance from the plain meaning was justified because it met
19 both of his requirements: The text as written had no plausible policy purpose – in fact, it
20 may have been unconstitutional – and the correct meaning was absolutely clear from the
21 legislative history.

22 **Conclusion**

23 In the view of this court, the text of Section 522(p) meets both of Justice Scalia’s
24 requirements for correction. There is no plausible purpose in linking the 1,215-day
25 ownership requirement to a debtor’s choosing between state and federal exemptions, and
there is not a shred of evidence in the extensive legislative history going back to 1997 that
the mansion loophole was in any way connected to a debtor’s choice of exemptions.
Further, it is obvious that Congress intended to close the mansion loophole in opt-in states
as well as opt-out states. But the drafters of the legislation inartfully, unthinkingly, and, as
it turned out, incorrectly expressed that intention by using the word “electing.” They should

1 have said, “If there is a state homestead exemption,” Unfortunately, they expressed
2 that idea as, “[A]s a result of electing . . . to exempt property under State or local law.” All
3 the evidence indicates that they believed – erroneously – that the two expressions were
4 equivalent, which they are not.

5 This court is, of course, reluctant to say that although Congress enacted X it
6 actually meant Y, and it does not do so lightly. But in this case, the scrivener’s error is
7 obvious from the extensive record and from common sense: The intent of Congress is
8 crystal clear, and there is no feasible rationale or policy for enacting what the text of the
9 statute says. Indeed, strictly applying the words of Section 522(p) would actually prevent
10 Congress’s goal from being achieved.²¹ So it is proper to give the statute the meaning that
11 Congress undeniably intended.

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14 ²¹An argument might be made that the “electing” language was part of an unexpressed
15 compromise, in which Congress limited the homestead for the residents of some states but not
16 others. That argument is weak to begin with – it is difficult to believe that anything was
17 unexpressed with respect to the limitation on homesteads – but more to the point is the impact of
18 limiting the statute only to states that allow their residents to choose the exemptions in Section
19 522(d). As shown in the appendix, that would limit Texas homesteads but not Florida homesteads,
20 since Florida is an opt-out state, but Texas is not. Given the vociferousness of Texan opposition to
21 any limitation on the homestead, this rules out giving Section 522(p) its so-called plain meaning
22 because its language was the result of a silent compromise. *See, e.g.*, 145 CONG. REC. S14,481
23 (1999) (statement of Sen. Kay Bailey Hutchison, Republican of Texas, arguing that states should
24 not be bound by a “one-size-fits-all” federal approach, but instead should be able to opt out of any
25 exemption cap); Tom Hamburger, *Senate Approves Bankruptcy Legislation Provision Capping
Exemption on Home Equity May Lead to Battle with Bush, House*, WALL ST. J., Mar. 16, 2001, at
A3 (quoting Senator Hutchison as vowing to “do everything I can to fix this in conference . . . or
unfortunately I am going to have to try and kill the bill” (alteration in original)); Press Release,
*Senator Hutchison Vows Continued Effort to Preserve Texas’ Homestead Exemption: Will Work
with Conference on Final Bankruptcy Legislation*, at <http://hutchison.senate.gov/pr1201.htm> (Feb.
2, 2000) (“It is wrong to pre-empt 130 years of American history – and the rights of every state – to
go after a handful of bad actors. This is the classic government attempt to impose a one-size-fits-all
solution.”). All of these quotations are reprinted from Jacoby, *supra*, at 1138 n.208.

1 The trustee's objection is sustained, and the Kanes' homestead exemption is
2 limited to \$125,000.²² A separate order pursuant to Bankruptcy Rule 9021 will be entered.
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22 ²²Given this disposition, it is unnecessary to decide the claims that equity due to
23 appreciation accrued during the 1,215-day period preceding the commencement of the case, as well
24 as equity attributable to the principal portion of any mortgage payments made during that same
25 time, are subject to the cap regardless of the period of debtor's residency. *See In re Blair*, 334 B.R.
374 (Bankr. N.D. Tex. 2005). There is simply no evidence of any appreciation (or, for that matter,
any payments) within the short period that debtors have been Nevada residents.

Appendix

States With Homestead Exemptions Greater Than \$125,000²³

<u>Jurisdiction</u>	<u>Opt-In?</u>	<u>Homestead dollar limit</u>	<u>Citation</u>
States where a debtor makes an election between state and federal exemptions:			
D.C.	Yes	Unlimited	D.C. Code Ann. § 15-501(a)(14)
Texas	Yes	Unlimited	Tex. Const. art. 16, §§ 50 and 51, and Tex. Prop. Code §§ 41.001 and 41.002
Massachusetts	Yes	\$500,000	Mass. Ann. Laws ch 188, §§ 1 and 1A
Minnesota	Yes	\$200,000	Minn. Stat. §§ 510.02
Rhode Island	Yes	\$200,000	R.I. Gen. Laws § 9-26-4.1
States where a debtor has no choice and must use the state exemption:			
Florida	No	Unlimited	Fla. Const art. 10, § 4, and Fla. Stat. Ann. § 222.01
Iowa	No	Unlimited	Iowa Code Ann. § 561.16
Kansas	No	Unlimited	Kan. Stat. Ann § 60-2301
Oklahoma	No	Unlimited	Okla. Stat. Title 31, § 1.A.1
Nevada	No	\$350,000	Nev. Rev. Stat. §§ 115.010.2 and 21.090.1(<i>l</i>)
Arizona	No	\$150,000	Ariz. Rev. Stat. 33-1101

²³This table is limited to states whose homestead exemptions are greater than \$125,000, because that is the limit under Section 522(p). In addition, compiling a table of homestead exemptions for all states is complicated by the fact that there is no uniformity of approach to exemptions. For example, Delaware has no explicit homestead exemption, but debtors in Delaware may exempt “property having an aggregate fair market value of not more than \$25,000.” DEL. CODE ANN., tit. 10 § 4914(b). So a debtor in Delaware could arguably exempt only \$25,000 of a homestead, or, as some have read, exempt no homestead at all. Further, some states create categories of homestead exemptions, and some of those categories may permit exemptions of more than \$125,000. *See, e.g.* CAL. CODE CIV. PRO. 704.730(a)(3) (homestead of \$150,000 provided for disabled debtors, debtors over the age of 65, and debtors whose gross annual income is less than \$15,000). We do not list those states here.

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