Team 14

No. 23-0115

IN THE

Supreme Court of the United States

IN RE EUGENE CLEGG, DEBTOR

VERA LYNN FLOYD, CHAPTER 7 TRUSTEE,

Petitioner,

v.

EUGENE CLEGG, DEBTOR,

Respondent.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM NUMBER 14
COUNSEL FOR RESPONDENT

JANUARY 18, 2024

QUESTIONS PRESENTED

I. Under 11 U.S.C. §348, when a debtor converts their case from a chapter 13 to a chapter 7 in good faith, do post-petition, pre-conversation increases in home equity accrue to the benefit of the debtor, or do they fall under 11 U.S.C. §541 as property of the estate, disregarding the distinction between conversions made in good faith and bad faith.

II. Does a trustee's statutory power to avoid pre-petition preferential payments, bestowed by 11 U.S.C. §547, constitute property of the debtor's estate under 11 U.S.C. §541 that may be sold to a vindictive creditor?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived in accordance with the Rules of the Duberstein Bankruptcy Moot Court Competition.

STATEMENT OF THE FACTS

I. FACTUAL BACKGROUND

Corporal Eugene Clegg ("Eugene"), a distinguished U.S. Army veteran, transitioned honorably to civilian life in 2011. (R. at 5.) He then acquired full ownership in The Final Cut, LLC ("Final Cut"), a historically significant single-screen movie theater in Moot City, Moot, from his mother, Emily "Pink" Clegg. (R. at 5.) This allowed him to earn a modest living. (R. at 5.) From the time of transfer until 2016, Final Cut operated debt-free. (R. at 5.) Until the COVID-19 pandemic, Final Cut consistently turned profits. (R. at 5, 6.)

In 2016, Final Cut secured an $850,000 loan from Eclipse Credit Union ("Eclipse") to renovate the historic theater. (R. at 5.) The loan was backed by a first-priority lien on Final Cut's assets and Eugene's uncapped personal guarantee. (R. at 5.) Eugene personally led much of the renovation, aided by local veterans who volunteered their services. (R. at 5.) This collaboration resulted in the project finishing in early 2017, with a savings of $75,000. (R. at 5.) Eugene donated this surplus to the Veterans of Foreign Wars as a gesture of gratitude to the local veterans. (R. at 5.) However, he did not inform Eclipse, a financial institution professing a community ethos, of this donation, made while Final Cut was solvent. (R. at 5.)

The community well-received the renovations, and Final Cut remained profitable until the outbreak of the COVID-19 pandemic. (R. at 5 & n.3, 6.) In March, 2020, the State of Moot issued pandemic-related restrictions, forcing Final Cut to close for nearly a year. (R. at 6.) This unforeseen event caused Eugene to lose his only source of income. (R. at 6.) He borrowed $50,000 from his mother, Pink, to maintain his livelihood. (R. at 6.)

Final cut reopened in February, 2021. (R. at 6.) Despite a media campaign to increase business, attendance failed to return to pre-pandemic levels. (R. at 6.) Eugene sacrificed his modest salary to keep his business alive. (R. at 6.) This caused him to incur a significant amount of credit card debt and fall behind on his home mortgage payments. (R. at 6.) Eventually, the mortgage servicer, Another Brick in the Wall (the "Servicer"), began foreclosure proceedings. (R. at 6.)

II. PROCEDURAL HISTORY

Faced with the imminent loss of his home, Eugene filed for chapter 13 bankruptcy on December 8, 2021. (R. at 6.) In his schedules, Eugene appraised his home at $350,000 and acknowledged a $320,000 lien owed to the Servicer. (R. at 6.) He claimed a $30,000 state homestead exemption on the remainder. (R. at 6-7.) Eugene also disclosed his personal guarantee to Eclipse, which was contingent, unliquidated, and for an indeterminable amount because Final Cut had not yet defaulted. (R. at 6.) He also disclosed $20,000 of payments made to his mother for the loan taken during the pandemic. (R. at 7.)

Per his duties, Eugene filed a chapter 13 play to repay creditors over three years. (R. at 7.) This plan was to be financed exclusively through the earnings of Final Cut, with expectations that its profit margins would rebound to pre-pandemic levels. (R. at 7.) To prevent the loss of his home, the plan outlined Eugene would rectify his overdue mortgage payments and maintain ongoing monthly payments to the Servicer via the trustee. (R. at 7.)

During the initial meeting with creditors, Eclipse learned about Eugene's donation of Final Cut's renovation loan proceeds to veterans in need, causing a commotion. (R. at 7.) In a retaliatory move, Eclipse filed adversary proceedings to declare Eugene's personal guarantee as non-dischargeable and, uniquely among creditors, contested Eugene's plan for lack of good faith. (R. at 8.) Through mediation led by the trustee, a settlement was achieved wherein Eclipse agreed to drop its objections in return for a projected claim of $150,000, of which $25,000 would be non-dischargeable. (R. at 8.) As the debt was contingent, the trustee was to hold Eclipse's distributions in reserve. (R. at 8, n.7) The bankruptcy court approved this settlement. (R. at 8.)

The trustee also objected to the plan. (R. at 7.) The trustee maintained that due to Eugene's pre-petition payments to his mother, the plan fell short of providing creditors with the equivalent of a Chapter 7 payout. (R. at 7.) To rectify this, Eugene amended his plan, increasing the total payments to creditors by $20,000, matching the amount of the questioned pre-petition payments to Pink. This was in exchange for the trustee's agreement not to initiate any avoidance actions against Pink. (R. at 8.) The bankruptcy court eventually confirmed Eugene's revised plan on February 12, 2022, which included the settlement terms with the trustee. (R. at 8.)

Eugene diligently managed his plan obligations for eight months, but circumstances forced him to shut down Final Cut. (R. at 8.) Long-COVID health issues significantly diminished his capacity to work, and the theater continued to suffer from low attendance. (R. at 8.) These challenges led to Eugene defaulting on the plan. (R. at 8.) Eugene opted for chapter 7 conversion in lieu of dismissal. (R. at 8.) Upon conversion, the trustee reported distributing $10,000 to the Servicer and returned the reserved funds for Eclipse to Eugene. (R. at 8-9.)

Eugene managed plan payments for eight months. (R. at 8.) However, long-COVID health effects and reduced theater attendance forced him to shut down the theater. (R. at 8.) Consequently, Eugene defaulted on his chapter 13 plan, leading to a chapter 7 bankruptcy conversion. (R. at 8.) Following the conversion, the trustee distributed $10,000 to the servicer and returned the reserved funds for Eclipse to Eugene. (R. at 8-9.) With Final Cut permanently closed, it defaulted on its loan obligations to Eclipse, who foreclosed on its assets. (R. at 8.)

Vera Lynn Floyd ("Petitioner") assumed the role of chapter 7 trustee. (R. at 9.) Eugene's chapter 7 schedules mirrored those from his chapter 13 filing, with the notable addition of a $200,000 debt to Eclipse arising from Final Cut's default rendering due Eugene's guarantee. (R.

at 9.) In a renewed effort to preserve his home, Eugene submitted a statement of intention to reaffirm his mortgage debt. (R. at 9.)

Based on the schedules, Eugene's estate was initially perceived by Petitioner to be largely assetless. (R. at 9.) However, during the creditors' meeting, Petitioner learned that home values had increased in Eugene's neighborhood post-pandemic and ordered a new appraisal. (R. at 9.) This revealed an unexpected $100,000 rise in non-exempt equity since the chapter 13 petition date. (R. at 9.) To capitalize on this increase in equity, Petitioner began marketing the home for sale. (R. at 9.)

Fueled by spite and a desire for recompense, Eclipse proposed to buy Eugene's home and, in a more aggressive step, sought to purchase the Petitioner's statutory right to sue Eugene's mother over alleged preferential pre-petition payments. (R. at 9.) Despite Eclipse's motives, Petitioner considered this offer beneficial for maximizing the estate's value. (R. at 9.) She filed a Sale Motion with the bankruptcy court to secure approval for selling these "estate assets" to Eclipse as property of Eugene's estate. (R. at 9.)

Eugene objected to the sale. (R. at 10). He maintained that the increase in home equity should accrue for his benefit and that Petitioner's ability to recover alleged preferential payments was a statutory power that could not be sold. (R. at 10.) The bankruptcy court found for Eugene on both objections and denied Petitioner's Sale Motion. (R. at 10.) Petitioner timely appealed, and the Thirteenth Circuit affirmed in favor of Eugene on both issues.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's holdings that (1) upon a good faith conversion from a chapter 13 to a chapter 7 bankruptcy, Section 348(f) entitles a debtor to post-petition pre-conversion increases in equity; and (2) that trustee avoidance powers are not part of the bankruptcy estate and therefore cannot be sold pursuant to 11 U.S.C. §363(b).

I.

The treatment of pre-conversion and post-petition increases in home equity during the transition from Chapter 13 to Chapter 7 bankruptcy is quite clear. Under the Code, debtors are entitled to retain any appreciation in home equity occurring after the initiation of bankruptcy but before the conversion to Chapter 7 under section 348(f)(1). While the petition date may not change, the treatment of the case does, and rules for a chapter 13 bankruptcy no longer govern the case. Given that the definition of estate property under section 541(a) only includes legal and equitable interests as of the commencement of the case, an appreciation that occurs post-petition is necessarily precluded from the estate.

This interpretation is consistent with the snapshot rule, which evaluates the debtor's financial status at the time of filing. The snapshot rule freezes the debtor's interests in time at the commencement of the bankruptcy case to determine exemptions. Ruling in favor of Petitioner would create wildly different property valuations for the purpose of exemptions and liquidation. Such absurd rulings ought to be rejected.

Examining the legislative history further supports this interpretation. The intent behind the bankruptcy code was to strike a balance between the debtors' rights and the bankruptcy process's overarching goals. Allowing debtors to retain post-petition increases in home equity incentivizes active participation in Chapter 13 repayment plans, contributing to the effectiveness of the bankruptcy system in facilitating financial rehabilitation and equitable debt resolution. This approach is in harmony with the bankruptcy code's historical context and legislative purpose, reinforcing its role in promoting fair and just outcomes for all parties involved.

II.

This Court should affirm the Thirteenth Circuit's holding that Petitioner's avoidance powers are statutorily created powers vested in the trustee exclusively, which cannot be sold for the benefit of the estate. In chapter 7 proceedings, a trustee is appointed to maximize value for the estate and liquidate its assets for the benefit of a debtor's creditors. One essential function which allows a trustee to maximize value for an estate is the trustee's avoidance powers. Which allow trustees to recover certain payments made by the debtor pre-petition for the benefit of the estate.

This Court ought to recognize that allowing the sale of avoidance powers is both absurd in concept and in result. Even in the case of a trustee, the avoidance powers are conditional in their use, requiring they be used for the benefit of the estate. A creditor who attempts to use the power for their own recovery would never be able to use them.

In addition, trustees need these powers to be effective fiduciaries for the bankruptcy estate. Allowing a creditor to buy the trustee's avoidance power runs the risk of enabling larger creditors to protect their own preference payments to the detriment of every other creditor in their class.

Moreover, allowing creditors to exercise these powers gives them access to initiate a virtually unlimited amount of litigation to slow down a debtor's journey to a fresh start. Such a possibility runs counter to the bankruptcy code's general policy of giving an honest, but unfortunate debtor a break from the hounding of creditors so that the debtor may get their affairs in order and begin repayment of their debts.

Creditors being unable to use the avoidance powers they buy is the best-case scenario should this Court rule in favor of Appellant. In the worst case, vengeful creditors would be able to harass debtors in endless adversary proceedings, while at the same time protecting their own preference payments via buyout, all to the detriment of every other creditor in a case. Appellant's interpretation risks undermining large policy goals of the bankruptcy code, while at the same time making no sense in the context of the avoidance power as it is defined in the bankruptcy code.

ARGUMENT

This Court should affirm the Thirteenth Circuit's decision that a debtor who converts in good faith from chapter 13 to chapter 7 does not forfeit his right to re-affirm his home mortgage because of post-petition, pre-conversion increases in home equity. This Court should also affirm the circuit court's decision that the statutory powers granted to Chapter 7 trustees are not considered "property of the estate" to be auctioned to the highest-bidding creditor.

I. PETITIONER'S SALE MOTION WAS PROPERLY DENIED WITH RESPECT TO EUGENE'S HOME BECAUSE EQUITY THAT ACCRUES IN THE DEBTOR'S PROPERTY POST-PETITION BELONGS TO THE DEBTOR WHERE THEY ACT IN GOOD FAITH.

This Court should affirm the Thirteenth Circuit's decision and hold that under 11 U.S.C. § 348 and 541, increases in equity in a debtor's property arising after the petition date but before the conversion belongs to the debtor so long as the debtor acts in good faith. The filing of a petition under chapter 13 of the United States Bankruptcy Code (the "Code") creates an "estate" that generally consists of all the debtor's property. *See* 11 U.S.C. § 541(a)(1). In a chapter 7 case, the debtor's non-exempt property is liquidated by a trustee and used to pay creditors, after which an individual debtor receives a discharge of all, or nearly all, of their remaining debts. 11 U.S.C. 704(a)(1); *see also Harris v. Viegelahn*, 575 U.S. 510, 512-13 (2015).

Many debtors, however, elect to file under Chapter 13 to reorganize their affairs to cure past due payments on assets—like their home—to preserve assets that cannot be protected with exemptions under chapter 7. *Id.* In these cases, the debtor must get the court to approve a plan re-paying creditors over a three-to-five year period after which all, or nearly all, remaining debts are discharged. *Id.* However, in exchange for a debtor retaining title to their property, Congress has provided protections for unsecured creditors requiring they be paid at least as much as would be recovered in a hypothetical chapter 7 case. 11 U.S.C. § 1325(a)(4). As a chapter 13 is ideal for debtors and creditors, Congress has attempted to incentivize chapter 13 filings by granting debtors an unrestricted right to convert their case to a chapter 7, or dismiss the case entirely, should the debtor be unable to complete their plan. 11 U.S.C. § 1307(a) and (b).

The issue before this Court arises when a debtor's property increases in equity after the initial chapter 13 case commenced but before the debtor converted the case to a chapter 7. When such increases occur, whether it be from market appreciation, a reduction in secured claims as a result of the debtor's plan payments, or both, the question is whether sections 348 and 541 include the increased equity in the property of the converted estate, or whether the debtor is entitled to the increase.

Courts confronting this question are divided on whether post-petition pre-conversion increases in equity belong to the debtor or the estate. The Thirteenth Circuit joined the majority of courts who have recognized that post-petition appreciation in a debtor's property belongs to the debtor upon a good faith conversion to a chapter 7. *See, e.g.*, *In re Cofer*, 625 B.R. 194 (Bankr. D. Idaho 2021); *In re Barrera,* 620 B.R. 645, 649-54 (Bankr. D. Colo. 2020) ("*Barrera I")*, *aff'd*, *In re Barrera,* No. BAP CO-20-003, 2020 LEXIS 2756 (B.A.P. 10th Cir. Oct. 2, 2020) ("*Barrera II*"), *aff'd*, 22 F. 4th 1217 (10th Cir. 2022) ("*Barrera III*"). Other courts have held the opposite, finding that post-petition pre-conversion nonexempt equity belongs to the bankruptcy estate upon conversion. *See, e.g.*, *Goetz v. Weber (In re Goetz)*, No. 22-6009 (B.A.P. 8th Cir. 2023) (post-petition, pre-conversion nonexempt equity belongs to the bankruptcy estate upon conversion of a chapter 13 case to a chapter 7 case), *In re Castleman*, 75 F. 4th 1052 (9th Cir. 2023).

This Court should adopt the reasoning of the Thirteenth Circuit. The text of the Code, the legislative history behind the enactment of relevant provisions within, and the fundamental purposes of bankruptcy all support granting good faith debtors who must convert to a chapter 7 or face dismissal with post-petition pre-conversion increases in equity.

A. Sections 348 and 541 Unambiguously Express that Estate Property Is Limited to Assets Existing as of the Petition Date, with Section 348(f)(2) Expanding this Scope Exclusively in Instances of Bad Faith Conversion.

The Thirteenth Circuit correctly recognized that good faith debtors are entitled to post-petition pre-conversion equity increases under the Code's plain scriptures. Statutory interpretation begins with the language of the statute itself. *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019). *Accord Griffin v. Oceanic Contractors,* 458 U.S. 564, 569 (1982) (holding a court's "task is to give effect to the will of Congress, and where its' will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive'") (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016) (looking to the plain text of the Bankruptcy Code when analyzing a question of statutory interpretation).

As this Court recognized in *United States v. Ron Pairs Enterprises, Inc.*, "[a]s long as a statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute, and the sole function of the court is to enforce that language according to its terms." 489 U.S. 235, 240-41 (1989). The plain language of Sections 348 and 541 of the Code mandates that post-petition pre-conversion increases in equity in a debtor's property accrue to the good faith debtor's benefit.

1. Sections 348 and 541 explicitly limit estate property to assets existing on the petition date, expanding only in bad faith conversions per section 348(f)(2).

Generally, property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). While some courts treat post-petition, pre-conversion increases in equity as an inseparable attribute of the debtor's legal interest in property that initially becomes part of the bankruptcy estate, doing so disregards the phrase "as of the commencement of the case" in section 541(a)(1) and the scope of the converted estate as outlined in section 348(f). *See, e.g.*, *In re Goetz*, at 418 (holding that the debtor's post-petition equity in their residence was inseparable from the residence itself), *Shields v. Adams (In re Adams)*, 453 B.R. 774 (Bankr. N.D. Ala. 2011) (same).

When a case under chapter 13 is converted to another chapter of the bankruptcy code, the inquiry must begin by looking at section 348, titled "Effect of Conversion," as it is the provision setting forth the scope of what property of the converted estate entails. 11 U.S.C. § 348(f). The text of section 348(f) sets forth two scopes for determining what becomes property of the converted estate when a case under chapter 13 converts to another chapter of bankruptcy. 11 U.S.C. § 348(f).

The first scope, section 348(f)(1), dictates that when a case under chapter 13 is converted to any other chapter, "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that *remains* in the possession of or is under the control of the debtor on the date of conversion[.]" 11 U.S.C. § 348(f)(1) (emphasis added). Though conversion may occur months or even years after the initial filing of the petition commencing the chapter 13 case, the bankruptcy code explicitly states in section 348(a) that conversion from one chapter to another does not change the date of the filing of the petition, the commencement of the case, or the order for relief. 11 U.S.C. § 348(a); *see generally* 11 U.S.C. § 301(a).

Thus, under a plain reading of section 348(f)(1)(A), in order for the debtor's property to constitute "property of the estate" in the converted case, it must have been property of the estate at the time the initial petition was filed and continue to be in the possession or control of the debtor on the date of conversion. *Viegelahn*, 135 S. Ct. at 1837 ("[a]bsent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor 'as of the date' the Original Chapter 13 petition was filed.)*; see also, e.g.*, *In re Cofer*, 625 B.R. at 202 (finding that post-petition appreciation is not part of the converted estate because it did not exist on the petition date).

Further, section 348(f)(1) expressly states, "[e]xcept as provided in paragraph (2)", and in so doing, identifies the only circumstance in which an alternative scope is applied to determine property of the converted estate. 11 U.S.C. § 348(f)(1). Section 348(f)(2) provides that *if the debtor converts in bad faith,* the scope of what is included is enlarged to include property of the estate "*as of the date of conversion*." 11 U.S.C. § 348(f)(2) (emphasis added). This alternative scope penalizes debtors by depriving them of the protection ordinarily extended to interests obtained post-petition but pre-conversion. *See, e.g.*, *Viegelahn*, 575 U.S. at 516 (holding that property of the converted estate under section 348(f)(1)(A) does not include a debtor's post-petition wages that have yet to be distributed at the time conversion).

Apparent in how courts have labeled it, "post-petition, pre-conversion" increases in equity do not arise until after the petition date, and thus are not included as property of the estate. If post-petition, pre-conversion interests in the debtor's property were already included in the property of the estate when a debtor converts from chapter 13 to another chapter, section 348(f)(2) would be unnecessary. *See In re Harmon*, 2022 WL 20451952, at 6 (Bankr. E.D. La. June 9, 2022); *see also Harris*, 575 U.S. at 518; *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (another part of the statutory scheme should not be rendered superfluous as a result of the court's interpretation). Section 348(f)(2) would be rendered superfluous if property interests are reevaluated at the time of conversion in every case, regardless of the debtor's intentions for converting. Including post-petition appreciations in equity in the property of the estate treats all debtors who convert their chapter 13 case to another chapter as if they have converted their case in bad faith.

Eugene sought relief under chapter 13 *in an effort to save his home*. (R. at 6.) For the interest in the $100,000 in appreciated non-exempt equity to "remain" in Eugene's possession on the date of conversion, He would have had to possess it when the initial chapter 13 petition was filed. It is undisputed that on the Petition Date, December 8, 2021, the appraised value of Eugene's home was $350,000. (R. at 6.) Due to the secured claim of $320,000, there was only $30,000 in equity, all of which Eugene could claim as exempt under the State of Moot's homestead exemption. (R. at 6-7.)

Three months after the petition date, the Bankruptcy Court confirmed Eugene's plan, reiterating that there was no non-exempt equity in the home for the Trustee to distribute to creditors. (R. at 6-7.) Upon confirmation of the plan, the property of the estate vested in Eugene under Section 1327(b). (R. at 8.) Thus, from the petition date when Eugene's home became the property of the estate until the time the home left the estate, Eugene had no legal or equitable interest in what would later accrue into $100,000 in equity due to the unprecedented market appreciation following the COVID-19 pandemic. The interest in the unforeseeable equity did not exist on the date of the petition and, thereby, does not become part of the bankruptcy estate by the scope set by the plain language of section 348(f)(1)(A).

The equity in Eugene's home accrued sometime between the date of confirmation when the home vested in Eugene and the date of the 341 meeting in the chapter 7 case; as such, it would only become the property of the estate in the converted case if Eugene converted his case in bad faith, whereby the scope of included property would include property *as of the date of conversion*. *See* 11 U.S.C. § 348(f)(2).

The text of sections 348 and 541 reflects Congress's intention that—absent bad faith—property of the converted estate is limited in scope to that which existed on the date the petition was filed. Including post-petition appreciations in value in the property of the converted estate when the debtor converts the case from chapter 13 to chapter 7 in good faith would disregard the plain meaning of section 348(f)(1)(A) and render section 348(f)(2) superfluous.

2. Integrating post-petition, pre-conversion property interests into the estate contradicts the bankruptcy code and leads to absurd outcomes.

In addition to conflicting with the plain language of sections 541 and 348(f)(1), including post-petition, pre-conversion interest in property of the estate in the converted case would be inconsistent with the remainder of the bankruptcy code, especially section 522(a)(2).

As this Court stated in *Crandon v. United States*, "in determining the meaning of [a] statute, we look not only to the particular statutory language but to the design of the statute as a whole and its object and policy." 494 U.S. 152, 158 (1990) (internal citations omitted); *see also Bittner v. United States*, 143 S. Ct. 713, 721 (2023) (looking beyond the language in the statutes to provide "other contextual clues[.]"); *Republic of Sudan*, 139 S. Ct. at 1056-7, 1060 (giving a statute its most natural meaning that harmonizes the various provisions and avoids the oddities created by alternative interpretations).

The Tenth Circuit's interpretation that section 348(f)(1) limits property of the estate in the converted case to property that existed on the petition date is consistent with the remainder of the bankruptcy code. Many provisions of the code "freeze" the debtor's financial affairs to the status at of the date of the filing of the petition. 11 U.S.C. §§ 362(a)(4), 522(a)(2), 541, *see also Barrera I,* 620 B.R. at 649-53; *Wilson v. Rigby*, 909 F. 3d 306, 308 (9th Cir. 2018) ("the filing date of a bankruptcy petition determines the law governing exemptions and freezes the value of exemptions that the debtor may claim"); The "snapshot" rule found in section 522(a)(2) freezes a debtor's financial situation at the petition date to determine the value of assets when claiming exemptions. 11 U.S.C. § 522(a)(2); *See also White v. Strump,* 266 U.S. 310, 313 (1924).

The Ninth Circuit's Interpretation of section 348(f)(1) purported by Petitioner includes interests that do not arise until *after* the filing of the petition and would result in inconsistent valuations of home equity: one standard for exemption determinations and another for creditor liquidation purposes. This difference in valuation would cause many debtors who convert from chapter 13 to chapter 7 to be unable to take full advantage of the federal or state-provided exemptions.

Further, post-confirmation, when property vests in the debtor under section 1327(b), it "is free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. § 1327(c). Including post-petition, pre-conversion increases in property of the estate when the debtor has not converted from chapter 13 to chapter 7 in bad faith, puts the property within arm's reach of calculating creditors clamoring for involuntary conversions. This absurdly results in Chapter 13 no longer providing relief to debtors with assets at risk in a chapter 7 liquidation. Rather, debtors hedge their bets for three to five years, hoping their homes do not appreciate, their stock portfolios do not take off, and they do not pay off *too* much of secured claims that a company layoff or an unforeseen medical emergency put them in two-steps back from where they started.

B. Section 348(f) Precisely Aims to Exclude Post-Petition, Pre-Conversion Equity Increases from the Estate.

The plain language and remaining statutory scheme of the Code support Eugene's position, but should this Court disagree, the legislative history behind the enactment of section 348(f) unambiguously reflects that post-petition appreciations in value that arise during a debtor's chapter 13 case do not become part of the bankruptcy estate when the case is converted to chapter 7 in good faith.

When the meaning of a statute is ambiguous, or following the plain meaning leads to "absurd or futile results, the court must look beyond the words to the purpose of the statute." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940). *Accord Robinson v. Shell Oil Co.*, 519 U.S.337, 345 (1997) (finding a statute ambiguous if it is "capable of being understood by reasonably well-informed persons in two or more different senses") Further, "[e]ven when the plain meaning does not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, the court follows that purpose, rather than the literal words." *Id.*; *Ron Pairs Enterprises*, 489 U.S. at 242 (Considering whether a literal application would undermine the framer's intent or conflict with other sections of the Code and whether contrary views were suggested by the legislative history); *United States v. Wilson*, 503 U.S. 329, 334 (1992).

Congress specifically enacted subsection (f) to section 348 to address the split in authority regarding what comprises property of a chapter 7 estate when a case is converted from chapter 13. The House Report regarding the enactment of §348(f)(1) specifically rejects the Petitioner's interpretation:

> This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7….Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not apply to

> chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.
>
> These later courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating [an additional] $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the [increased] $10,000 in equity for the unsecured creditors and the debtor would lose the home.
> This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F. 2d 136 (7th Cir. 1991) [a case including after-acquired property in the chapter 7 estate] and adopts the reasoning of *In re Bobroff*, 766 F. 2d 797 (3rd Cir. 1985) [a case assigning the increased equity to the debtors].

H.R. REP. NO. 103-835, AT 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. This report clarifies not only that Congress intended to limit what constitutes property of the estate to the property the debtor had as of the petition date but also makes it evident that Congress considered equity arising in a debtor's property post-petition separate from equity exiting as of the commencement of the case.

The cautionary tale foretold in the House Report focuses on the post-petition creation of equity in a home the debtor owned when the chapter 13 case began. Recognizing that the holding in cases like *Matter of Lybrook* would allow Trustees to sell a debtor's home to obtain equity that accrued post-petition but before a voluntary or involuntary conversion to chapter 7, Congress added subsection (f) to section 348. Subsection (f) sets forth the two scopes for determining what constitutes property of the converted estate discussed above. This addition was meant to assure debtors that should they voluntarily repay some or all of their debts in a chapter 13 case, they would not end up worse off than if they had initially liquidated under chapter 7. *See Barrera I,* No.

BAP CO-20-003, 2020 Bankr. LEXIS 2756 at 14 ("It is safe to say few debtors would appreciate the prospect of having their home sold out from under them if a chapter 13 does not pan out.")

The legislative history behind the enactment of subsection (f) to section 348 is concrete evidence of the Legislature's intent that post-petition, pre-conversion increases in equity do not accrue to the benefit of the estate in a case converted from chapter 13 in good faith. *Kendall v. Lynch (In re Lynch)*, 363 B.R. 101 (B.A.P. 9th Cir. 2007); *See also In re Cofer*, 625 B.R. at 202. Subsection (f) was explicitly added to protect Debtors like Eugene, who, as the Thirteenth Circuit Court noted, has never been accused of converting his case in bad faith. (R. at 8.) Holding that post-petition, pre-conversion increases in equity are property of the estate, even when debtors have converted from chapter 13 to chapter 7 in good faith, would authorize the very conduct that the enactment of section 348(f) was enacted to curtail.

C. Incorporating Post-Petition, Pre-Conversion Equity Gains Contravenes the Core Principles of the Bankruptcy Code.

Affirming the Thirteenth Circuit promotes the Code's fundamental purposes; doing otherwise would undermine them. The fundamental purpose of the Bankruptcy Code is to "grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).

Depriving debtors of the equity that arises after filing the petition, whether its source is appreciation or the pay down of secured liens provided for by the plan, effectively punishes them for attempting to repay creditors through chapter 13. The interpretation taken by the Petitioner and the Ninth Circuit disincentivizes debtors from filing chapter 13 cases, and by doing so, they risk losing assets that would be fully protected if they were to file a Chapter 7 case initially. Such an interpretation would no longer provide debtors with a path to financial recovery but instead, simply create another route upon which the vengeful creditor could deprive and harass the honest but unfortunate debtor.

II. Petitioner's Sale Motion was Properly Denied With Respect to Avoidance Powers Because Such Powers Cannot Constitute Property of an Estate.

This Court should uphold the Thirteenth Circuit's holding that a trustee's avoidance powers exist to protect the integrity of an estate, not serve as mere assets within it. In chapter 7 proceedings, the trustee's primary role is to gather the debtor's unencumbered pre-petition assets for equitable distribution among creditors. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017); 11 U.S.C. §701 *et seq.* Trustees are endowed with avoidance powers, which allow them to reverse preferential transactions that reduce the estate's value. *Begier v. IRS*, 596 U.S. 53, 58 (1990); 11 U.S.C. §547(b). This structure ensures bankruptcy serves its dual purposes: providing debtor relief while ensuring a fair distribution system for unsecured creditors to share the burden of a debtor's insolvency proportionately. *Hill v. Akamai Tech, Inc. (In re MS55, Inc.)*, 477 F.3d 1131, 1134 (10th Cir. 2007).

Capitalizing on Eclipse's efforts to humiliate Eugene, a war veteran, Petitioner has agreed to sell her statutory power under 11 U.S.C. §547(b) to Eclipse. (R. at 9.) This move could enable Eclipse to pursue the recovery of what they allege were preferential payments that Eugene made to his mother before declaring bankruptcy, which were made to repay her for the financial support she gave her son during the COVID-19 pandemic. (*See* R. at 6, 7). Petitioner contends that the Code authorizes this sale because, under limited circumstances, a trustee may sell "property of the estate" outside the ordinary course of business. (R. at 9); *see generally* 11 U.S.C. §363(b).

Courts across the country have rebuked such efforts, recognizing that trustee avoidance powers are fiduciary functions vested in the trustee to manage an estate, not assets at auction for the highest-bidding creditor. *See, e.g.*, *Off. Comm. of Unsecured Creditors of Cybergenics Corp.*

v. Chinery (In re Cybergenics Corp.), 226 F.3d 237 (3d Cir. 2000); *In re Clements Mfg. Liquidation Co., LLC*, 558 B.R. 187 (E.D. Mich. 2016); *Kelley v. Opportunity Fin., LLC (In re Petters Co., Inc.)*, 550 B.R. 438 (Bankr. D. Minn. 2016); *In re McGuirk*, 414 B.R. 878 (Bankr. N.D. Ga. 2009); *Moyer v. ABN Amro Mortg. Grp., Inc. (In re Feringa)*, 376 B.R. 614 (Bankr. W.D. Mich. 2007); *Winnecour v. Christiana Bank & Tr. Co. (In re Wagner)*, 353 B.R. 106 (Bankr. W.D. Pa. 2006); *Foster Dev. Corp. v. Morning Treat Coffee Co., Inc. (In re Morning Treat Coffee Co., Inc.)*, 77 B.R. 62 (Bankr. M.D. La. 1987); *Robinson v. First. Fin. Cap. Mgmt. Corp. (In re Sweetwater)*, 55 B.R. 724 (D. Utah 1985), *aff'd in part, rev'd in part on other grounds*, 884 F.3d 1323 (10th Cir. 1989).

To justify the sale, Petitioner and Justice Barrett's dissent rely on a patchwork of circuit court decisions, finding, for inconsistent reasons, that a trustee's procedural powers are included as property of a bankruptcy estate. *See, e.g.*, *Pitman Farms v. ARKK Food Co. LLC (In re Simply Essentials, LLC)*, 78 F.4th 1006, 1011 (8th Cir. 2023) (holding Chapter 5 avoidance actions are property of the estate under 11 U.S.C. §541(a)(1) and (7)); *Simantob v. Claims Prosecutor LLC (In re Lahijani)*, 325 B.R. 282, 287 (B.A.P. 9th Cir. 2005) ("[w]hile there is some disagreement among courts about the exercise by others of the trustee's bankruptcy-specific avoiding power causes of action, the Ninth Circuit permits such actions to be sold"); *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 258 (5th Cir. 2010) (finding the trustee may sell causes of action inherited from creditors under 11 U.S.C. §544(b) because they exist outside of bankruptcy, declining to address if the same result would be reached under actions existing within bankruptcy).

These courts conflate a debtor's pre-petition interests with a trustee's post-petition duties, and stretch the definition of "property of the estate" to encompass any cause of action a trustee may exercise in performing these fiduciary functions. Such a stance dilutes the trustee's authority and skews the level playing field by enabling cash-rich creditors to purchase an outsized influence in bankruptcy outcomes. This Court should reject this erroneous interpretation to prevent the distortion of the Code's plain text and equitable framework, clarifying that the trustee's avoidance powers are not an asset to exploit but rather an indispensable tool upholding the trustee's duty to manage an estate fairly.

A. The Right to Avoid Preferential Transactions is Unambiguously a Power Bestowed on the Trustee, Not Property of the Estate as Defined Under Section 541(a).

The Thirteenth Circuit correctly recognized that a trustee's statutory power to recover pre-petition preferential payments within bankruptcy is not encompassed within the ambit of property of the estate under Section 541(a). As discussed *supra*, the "prime directive" of statutory interpretation is ascertaining a statute's plain meaning. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1825 (2020) (quoting W. Eskridge, *Interpreting Law* 33, 34-35 (2016)). When a statute's meaning is unambiguous, the "sole function of the courts" is to "enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

It is undisputed that only property of the estate can be sold pursuant to 11 U.S.C. 363(b). *In re Stein*, 281 B.R. 845, 848 (Bankr. S.D.N.Y. 2002). As the party attempting to classify certain assets as part of the estate, Petitioner "bears the burden of showing" that her bankruptcy-related powers are property of the estate. *MacKenzie v. Neidorf (In re Neidorf)*, 534 B.R. 369, 372 (B.A.P. 9th Cir. 2015); *see also Seaver v. Klein-Swanson (In re Klein-Swanson)*, 488 B.R. 628, 633 (B.A.P. 8th Cir. 2013).

The Code identifies nine specific subcategories of property that may be considered "of the estate." 11 U.S.C. §541(a)(1)-(a)(9). Both the Petitioner and J. Barrett's dissent reference four of these subcategories—(a)(1), (a)(3) and/or (4), and (a)(7)—asserting that they encompass a trustee's bankruptcy-related powers. However, because none of these categories support the idea that special bankruptcy-related powers entrusted to a fiduciary of the estate are "of the estate," Petitioner has not met the burden of demonstrating that the Code authorizes her sale. This Court should thereby uphold the denial of Petitioner's Motion to Sell.

1. The trustee's avoidance powers are outside the scope of Section 541(a)(1) because they are remedial post-petition interests that do not accrue for the benefit of the debtor.

The Thirteenth Circuit correctly recognized that Section 541(a)(1) plainly distinguishes between a debtor's pre-petition interests and the post-petition powers of a trustee. Section 541(a)(1) brings into the estate "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). While this has been recognized as "broad," it is not without limits. *See, e.g.*, *Walters v. Littman (Matter of Wagenknecht)*, 871 F.3d 1209, 1213 (10th Cir. 2020) (excluding loan proceeds used to repay creditor that the debtor had no control over). Indeed, within statute's plain text, the Code sets two simple limitations regarding its scope. *See* 11 U.S.C. §541(a)(1). First, the property must be "of the debtor," and second, the debtor's interest in the property must be established prior to the "commencement of the case." Under these limitations, a trustee's potential post-petition power to recover property no longer held by the debtor satisfies neither criterion.

Under the first limitation, the property in question must be "of the debtor." 11 U.S.C. §541(a)(1). This Court has recognized that the phrase "of the debtor" is an operative portion of the statute, reflecting the general bankruptcy rule that "[t]he estate cannot possess anything more than the debtor itself did <u>outside of bankruptcy</u>." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019) (emphasis added); *see also Bd. of Trade of Chi. v. Johnson*, 264 U.S. 1, 15 (1924) (establishing general rule). Indeed, as recited by this Court:

> Whatever limitations on the debtor's property apply outside of bankruptcy apply inside of bankruptcy as well. A debtor's property

> does not shrink by happenstance of bankruptcy, but it does <u>not</u> expand either.

Mission Prod., 139 S. Ct. at 1663 (citing D. Baird, *Elements of Bankruptcy* 97 (6th ed. 2014) (cleaned up, internal quotations omitted). This phrasing and the general rule that a debtor's assets do not expand after filing a bankruptcy petition indicates that the estate only encompasses the assets and rights the debtor held at the time they filed for bankruptcy, *notwithstanding* the bankruptcy filing. Plainly, at the commencement of the bankruptcy case, Eugene had no cause of action to recover the $20,000 he paid to his mother.

To circumvent this fact, Petitioner, J. Barrett's dissent, and the Eighth Circuit have creatively argued that because "the debtor has an inchoate interest in the avoidance actions prior to the commencement of the bankruptcy proceedings," a trustee's avoidance actions are part of the estate. *In re Simply Essentials*, 78 F.4th at 1009. However, this contravenes the notion that the property of the estate under Section 541(a) is understood to constitute the property of the debtor, *notwithstanding* bankruptcy. *Mission Prod.*, 139 S. Ct. at 1663. The filing of a petition is not meant to affect the debtor's pre-petition interests, and the simple act of filing cannot, therefore, be used to add inchoate interests based on what a trustee "may" do. *See* 11 U.S.C. §547(b).

Moreover, this assertion misconstrues the role of avoidance powers concerning the interests of the debtor. Avoidance powers are not assets or rights owned or may be exercised by the debtor, but statutory tools granted to the trustee to "help implement the core principles of bankruptcy." *Merit. Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 370 (2018). Rather than serve the debtor, avoidance powers exist to remediate the debtor's pre-petition behavior, undoing transactions that affect the "equality of distribution" among unsecured creditors. *Id.*; *see also Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (holding avoidance powers exist to undo transactions that "unfairly or improperly deplete . . . assets or dilute the claims against those assets."). Avoidance powers are thus tools designed to combat the debtor's interest in, e.g., repaying a close relative at the expense of a bank. *See Union Bank*, 502 U.S. at 162. Far from constituting property interests for the debtor, a trustee's avoidance powers are remedial measures exiting to correct estate imbalances caused by the debtor.

Furthermore, the cause of action could never be asserted by the debtor, precluding any inchoate property interest from arising. Unlike the debtor or a creditor, a bankruptcy trustee "is a representative and fiduciary of the estate." *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 844 (9th Cir. 2008); 11 U.S.C. §323. Trustees are given chapter 5 powers as fiduciaries to conserve estate assets and maximize distributions to creditors. *United States ex rel. Block v. Aldrich (In re Rigden)*, 795 F.2d 727, 730 (9th Cir. 1986). The only time the Code permits a party to step into the shoes of a creditor occurs in the chapter 11 context with a debtor in possession, wherein the debtor is provided a trustee's special powers but also assumes their fiduciary duties. *Peterson v. Sanches (In re Mack Indus., Ltd.)*, 606 B.R. 313, 319 (Bankr. N.D. Ill. 2019); *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989); *see also* 11 U.S.C. §1107(a). There is simply no equivalent of this grant in the context of chapter 7. *Peterson*, 606 B.R. at 320-21. Not only is it "beyond doubt" that chapter 7 debtors are precluded from exercising the rights or duties of a chapter 7 trustee under the Code, chapter 7 debtors "lack standing to raise many issues in chapter 7 cases unless" the estate is in surplus, which is indisputably not at issue here. *Id.*; *see also In re Andreuccetti*, 975 F.2d 413, 417 (7th Cir. 1992).

From this, there is no support that the Code would permit Eugene to file an avoidance action against his mother in or outside of bankruptcy, nor is there support that such a cause of action would benefit Eugene. Instead, the property interest is granted solely to the trustee, acting as fiduciary of the estate, to remediate the debtor's conduct in accord with their duty to maximize estate assets. There is no statutory basis for asserting that a trustee's powers can be equated to constitute the debtor's property rights.

Secondly, as *remedial* powers, a trustee's cause of action does not arise or accrue until a bankruptcy petition is filed and the trustee is appointed. *In re Adams*, 453 B.R. at 780. By clearly stating that the estate includes interests "*as of* the commencement of the case," the statute establishes a temporal boundary. *Id.*; 11 U.S.C. §541(a)(1). It confines the estate to what the debtor possesses at the onset of the bankruptcy, excluding developments that arise subsequently, except as otherwise provided in other subsections of Section 541(a). *Id.* The trustee's powers, activated only after the bankruptcy filing, are outside the scope of the debtor's interests at the case's initiation. Although critical for the fair administration of the bankruptcy estate, these powers are tools that come into play after the estate has been defined and do not retroactively become part of the debtor's pre-petition interests. *Id.*

Lastly, Eugene's interpretation of §541(a)(1) is supported by the plain meaning of §541(a)(3). §541(a)(3) deals largely with recovered property through avoidance actions brought by the trustee, "Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title." 11 U.S.C. §541(a)(3). Clearly, this section is intended to include property recovered using avoidance powers into the bankruptcy estate, even if it is recovered post-petition, side stepping any challenges under section 541(a)(1). However, the only interest belonging to the bankruptcy estate identified in this section is the property recovered using avoidance powers, not the avoidance power itself. If the bankruptcy estate was meant to include the avoidance power, this subsection could have easily been rewritten to include all property interests identified in the cross-referenced sections, or the code could have identified §547, which outlines the avoidance power itself. 11 U.S.C. §547. Reading for the plain meaning of §541, it clearly does not include the avoidance power outlined in Section 547.

Under plain terms, Section 541(a)(1) cannot be read to encompass a trustee's statutory rights. Instead, the only reasonable interpretation of the statute is that it confers onto the trustee the right to avoid an action "in the interest" of the bankruptcy estate. It is not a right for the benefit of the debtor, any particular creditor, or even the trustee. The Plain text and statutory intent are clear.

2. Neither Section 541(a)(3) or (a)(4) encompass a trustee's avoidance actions because it solely governs property a trustee actually recovered or avoided.

The Thirteenth Circuit properly recognized that the plain text of Sections 541(a)(3) and (4) do not encompass chapter 5 avoidance actions, only the property recovered from them. Sections 541(a)(3) and (4) include in the estate "[a]ny interest in property that the trustee *recovers* under section . . . 550 . . . of this title," and "[a]ny interest in property preserved for the benefit of or ordered transferred to the estate under section . . . 551 of this title." 11 U.S.C. §§541(a)(3) and (4). Section 550 permits a trustee to recover an avoided transfer for the benefit of the estate. *See* 11 U.S.C. §550 *et seq.* Section 551 preserves avoided transfers, but "only with respect to property of the estate." 11 U.S.C. §551. However, as with Section 541(a)(1), these statutes limit the extent of the property interest recognized that that "recovered" or "preserved."

The statutory phrases, "any interest in property the trustee recovers" and "any interest in property preserved...or ordered transferred," unambiguously refer to tangible property interests that are actually recovered or transferred, not to hypothetical or prospective rights. *Barclay v. Swiss Fin. Corp. Ltd. (In re Bankr. Est. of Midland Euro Exch. Inc.)*, 347 B.R. 708, 719 (Bankr. C.D. Cal. 2006); *see also French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006); *Fed. Deposit Ins. Corp. v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992);

Murrieta v. Fehrs (In re Fehrs), 391 B.R. 53, 71 (Bank. D. Idaho 2008); *In re Feringa*, 376 B.R. at 625 n. 10; Dunes *Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 303, 304-05 (D.S.C. 2000); *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989).

Further, the purpose and objective of chapter 5 avoidance powers indicate congressional intent to prevent debtors from inappropriately divesting assets that rightfully belong to the bankruptcy estate. *Palmer & Palmer, P.C. v. U.S. Tr. (In re Hargis)*, 887 F.2d 77, 79 (5th Cir. 1989). This goal is inherently linked to the recovery or preservation of actual assets, not merely the right to pursue such recovery. *See In re Saunders*, 101 B.R. at 305. The power of chapter 5 lies in its ability to *restore* to the estate assets that were improperly removed. *See Palmer*, 887 F.2d at 79. This adheres to the practical and functional aspect of the bankruptcy process, which is focused on the tangible management and redistribution of the debtor's assets. *Id.*

Congressional intent, as interpreted by the judiciary, reinforces this understanding. *See In re French*, 440 F.3d at 152. The decision in *In re French* illustrates that Congress exhibited a clear intention to permit the avoidance of transfers of foreign property that, while not initially part of the estate, should have been. This interpretation suggests that Congress's focus was on the recovery of actual assets rather than on the potential or theoretical right to recover assets. There is a lack of statutory support for the inclusion of a mere right to exercise avoidance powers within the ambit of property interests under the Bankruptcy Code. This perspective is crucial because it aligns with the broader legislative framework of the Bankruptcy Code, which prioritizes the concrete and equitable distribution of the debtor's assets. In summary, a harmonious reading of the statutory text, supported by case law and legislative intent, leads to the conclusion that Sections 541(a)(3) and (4) pertain to realized, not potential, property.

Under this statutory provision, the property recovered by the causes of action, not the trustee's powers themselves, form the inclusion of "property of the estate." Defunct case law, and creative readings of the statute should not change this result.

3. Section 541(a)(7) cannot constitute property of the estate because they exist contemporaneously with the estate to correct improper pre-petition conduct.

The Thirteenth Circuit correctly held that trustee avoidance powers do not constitute property of the estate pursuant to Section 541(a)(7) of the Code. Section 541(a)(7) allows the estate to encompass "any interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §541(a)(7). This cannot include chapter 5 avoidance powers because they are always tools that exist *upon* the filing of a bankruptcy petition, not potential causes of action that arise subsequent to it.

At the outset, it is prudent to acknowledge that Petitioner and Justice Barrett's dissent make conflicting arguments about the nature of chapter 5 property rights. The dissent cannot seriously contend that a trustee's chapter 5 avoidance powers are both an "inchoate interest of the debtor" that were always property of the estate, and, be interests "that the estate acquires *after* the commencement of the case" (*Compare* R. at 32 n. 23 *with* R. at 33.) (emphasis added). The truth is simple. Chapter 5 avoidance powers are available to the estate contemporaneously with the filing of a chapter 7 bankruptcy petition. They are not causes of action that give rise to a contingent interest in potential avoidance actions, they are tools available upon the filing of bankruptcy for a trustee to maximize estate assets. The fact that Petitioner and the dissent read these statutes to conclude that a trustee's avoidance powers are both pre- and post-petition causes of action demonstrates their disinterest in the text and scope of the statutes at issue.

As discussed *supra*, powers such as those under 11 U.S.C. §547(b) are remedial powers to correct imbalances in the estate. *See Merit. Mgmt.*, 583 U.S. at 370. Thus, definitionally, these powers exist upon filing to correct imbalances in the estate because the causes of action relate to a debtor's pre-petition conduct. Unlike the property subject to Section 541(a)(1), the causes of action do not exist prior to the bankruptcy estate. Unlike the property contemplated by Section 541(a)(7), they do not arise after the case commences, because fundamentally, they relate to conduct that pre-exists the estate, sometimes by several years.

Petitioner and J. Barrett's dissent rely on a sole case from the United States Supreme Court that interpreted prior Code provisions, now superseded, to hold a chapter 5 avoidance claim constitutes "property of the estate." (*See* R. at 32); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 37 (1992). However, Courts have widely regarded this language as dicta, noted it occurred in a vastly different context than a chapter 7 debtor, sovereign immunity for government entities, and the court itself acknowledged that its analysis was not "the only reading[]" of the statute. *Nordic Vill.*, 503 U.S. at 37. Additionally, under this prior iteration of the Code, it was also well-established that trustee avoidance powers were not able to be sold or assigned. *See, e.g.*, *United Capital Corp. v. Sapolin Paints, Inc. (In re Sapolin Paints, Inc.)*, 11 B.R. 930, 937 (Bankr. E.D.N.Y. 1981) (collecting cases).

In sum, contradictory definitions of the bankruptcy act reveal an intention to get to a result, not get to the core of the statute's plain meaning. This Court must consider the purpose, text, and scheme of the statute in relation to all others. This Court must thereby affirm the Thirteenth Circuit's reading of the plain language of the statute.

B. The Right to Avoid Preferential Transactions is Unambiguously a Power Bestowed on the Trustee, Not Property of the Estate as Defined Under Section 541(a).

Appellant contends that even without statutory support, this Court must rule to allow the sale of avoidance powers or risk potential recoveries for the estate vanishing into thin air, a public policy consideration. These concerns should be ignored as irrelevant. When a plain meaning exists, that meaning is enforced even in the face of judicial policy concerns, except in the most extreme cases. *Lamie* v. *U.S. Tr.,* 540 U.S. 526, 534 (2004). However, absent any protests on legislating from the bench, public policy in this case favors Respondent.

First, creditors do not need the full avoidance power of the trustee to bring avoidance actions. While the trustee is the only entity vested with the power to avoid certain pre-petition transfers. *Hartford Underwriters Ins. Co.,* 530 U.S. at 6-7 (Holding that when trustee in mentioned in the code it refers to trustee exclusively). However, creditors can derivatively assert avoidance powers for the value of the estate. 11 U.S.C. § 503. This ensures that all creditors benefit from an assertion of avoidance power. Meanwhile, Appellant wishes to sell trustee avoidance powers to a single creditor, to be used for the benefit of said creditor, not the estate. Not only would the trustee lose the ability to pursue any avoidance actions yet to be discovered, but any recover of a pre-petition payment would no longer benefit the estate, marking a loss for every other creditor in the bankruptcy estate. The sale of avoidance powers does not help creditors, it helps a single creditor at the expense of the vast majority of creditors in a single case.

Second, a blanket rule that permits trustees to sell their chapter 5 avoidance powers invites abuse of the process by creditors. As much has been recognized even by courts in circuits which would permit such a sale. In this case, the facts strongly indicate that Eclipse wants to use their newly bought avoidance powers to punish Eugene, a war veteran, for donating loan proceeds to other war veterans. (*See* R. at 9.) To do so, Eclipse moved to purchase Eugene's home, over his attempt to reaffirm the debt, and to add insult to injury, moved to buy a cause of action to sue his mother. (R. at 8-9.) Eclipse's actions do not indicate a disinterested creditor moving for the benefit of the estate as would a trustee, but a creditor seeking to humiliate the debtor for default. Fundamentally, it is the policy of bankruptcy to balance relief provided to a debtor with maximizing estate assets. It is abhorrent to the policy of bankruptcy to allow a trustee's duty to maximize estate assets to come at the abuse of the process itself, and allow a creditor, under the guise (and perhaps the incidental effect) of maximizing the estate value to pursue vindictive interests.

These circumstances signify the difference between Eugene's public policy arguments and those of the Petitioner. Appellant argues that, should this Court rule in favor of Respondent, some hypothetical creditor in the future is going to lose some sum certain by disallowing them from pursuing the recovery of a pre-petition payment that a hypothetical trustee would choose not to go after. A possibility of a minor loss to a creditor which does not yet exist, conditioned on the fact that the potential loss is both of value to the estate and that a trustee will choose not to pursue it.

The abuse of a transferred avoidance power delegitimizes the entire bankruptcy scheme, undermining objectives of the bankruptcy code so a wealthy enough creditor can bully whoever displeases them with endless litigation and financial hardship. However, this isn't some far off possibility conditioned on several statutory safeguards failing. Eugene's public policy concerns have presented themselves in the present case through Eclipse's behavior. The harm is apparent. Courts that permit the sale of trustee avoidance powers have recognized this reality. *See, e.g.*, *In re Metro. Elec. Mfg. Co.*, 295 B.R. 7, 14 (Bankr. E.D.N.Y. 2003) ("If the outright purchase of the trustee's statutory rights are allowed, [a creditor] will use the trustee's rights to further his own agenda, and it will not benefit the Debtor's estate.") This Court ought to consider the policy implications in the instant case before considering the hypothetical scenarios posed by Petitioner, and rule in favor of Eugene.

Lastly, if a trustee's avoidance powers are truly property of the estate, they would vest into the debtor where they were not exercised or sold. 11 U.S.C. § 554. This is patently absurd, as it would allow a debtor, upon receiving a discharge, to initiate avoidance proceedings against creditors while the debt originally owed is discharged. Under Petitioner's interpretation, a hypothetical debtor could go after avoidable transfers made prepetition for the debtor's own benefit. This is not only nonsensical but also encourages prepetition transfers.

Based on the foregoing, in a policy comparison, Eugene's reading better effectuates the goals the purposes of chapter 7 bankruptcy. This Court should affirm.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests the Court affirm the Thirteenth Circuit's holding that under 11 U.S.C. §547(b), post-petition, pre-conversion equity accrues for the benefit of a good faith debtor. This Court should also affirm the Thirteenth Circuit's holding that a trustee's special statutory powers to avoid preferential payments cannot be sold as property of a debtor's estate.

APPENDIX

11 U.S.C. § 348 Effect of Conversion

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.
(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

> **(A)** property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;
> **(B)** valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and
> **(C)** with respect to cases converted from chapter 13—
>
> > **(i)** the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of the filing of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and
> > **(ii)** unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.

(f)(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

. . .

11 U.S.C. § 541 Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> **(1)** Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
> **(2)** All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
>
> > **(A)** under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

. . .

11 U.S.C. § 363 Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365 the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.
(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.
(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C. § 547(b) Preferences

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS §§ 101 et seq.].

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $7,575.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.