NO. 23-0115

IN THE

Supreme Court of the United States

OCTOBER TERM, 2023

IN RE EUGENE CLEGG, DEBTOR,

VERA LYNN FLOYD, CHAPTER 7 TRUSTEE, PETITIONER

V.

EUGENE CLEGG, RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team Number 30

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a post-petition, pre-conversion appreciation in the value of exempt property belongs to the debtor upon a good-faith conversion from Chapter 13 to Chapter 7 pursuant to section 348(f)(1)(A).

II. Whether a Chapter 7 Trustee can sell an avoidance action pursuant to section 363(b)(1) when the avoidance action is not property of the estate.

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Cpl. Eugene Clegg ("Mr. Clegg") is a veteran with a distinguished career in the United States Army. (R. 5.) After retiring from the Army in 2011, Mr. Clegg's mother, Mrs. Clegg, transferred to Mr. Clegg the entirety of her membership interest in her small business, The Final Cut, LLC, ("The Final Cut") a historic, single-screen movie theater. *Id.* Mr. Clegg's sole source of income was the modest salary he received from running the business. *Id.* At the time of the transfer, the family business was profitable and had no liabilities. *Id.*

In 2016, Mr. Clegg caused The Final Cut to borrow $850,000 from Eclipse Credit Union ("Eclipse") for renovations to the business. *Id.* Eclipse secured its loan with a first priority lien on all The Final Cut's property. *Id*. Mr. Clegg, demonstrating his commitment and investment in The Final Cut, personally guaranteed the loan from Eclipse. *Id*. Mr. Clegg and a group of local veterans collaborated responsibly on the renovations. Their prudent use of resources allowed them to reduce labor costs and spare $75,000 of the loan. *Id*. Mr. Clegg, extremely appreciative of the help from the veterans, donated the remaining $75,000 to the Veterans of Foreign Wars ("VFW") in early 2017. *Id*. The public took great pride in the renovations to the theater, and The Final Cut continued to be profitable for the next three years. (R.6.)

Unfortunately, in March 2020, the COVID-19 pandemic struck. *Id.* The governor of Moot mandated that all individuals stay at home. *Id.* Without patronage, The Final Cut was forced to shut down for a year. *Id.* The shutdown caused Mr. Clegg to lose his income. Fortunately, his mother came to his aid by loaning Mr. Clegg $50,000 to pay his bills. *Id.*

The theater reopened in February 2021. *Id.* However, despite Mr. Clegg's best efforts to attract guests, attendance failed to reach pre-pandemic levels. *Id.* Mr. Clegg selflessly chose to forgo his yearly salary to save his family business. *Id.* Without any income, though, Mr. Clegg fell behind on his mortgage payments, and the Servicer commenced foreclosure proceedings on his home. *Id.*

Attempting to save both his home and family business, Mr. Clegg sought relief under Chapter 13 of the Bankruptcy Code on December 8, 2021. *Id.* His home was appraised days before the petition date at $350,000. *Id.* He identified a secured debt to the Servicer and included contingent and unliquidated unsecured debt in an unknown amount to Eclipse. *Id.* Mr. Clegg also disclosed that he made a repayment to his mother in the amount of $20,000. (R. 7.)

Mr. Clegg proposed to make payments to his creditors over a three-year period. *Id.* To save his home, he would make monthly payments to the Servicer. *Id.* The plan provided that the value of his home was $350,000 and that he maintained no equity in his home as of the Petition Date. *Id.* Mr. Clegg intended to fund the plan through future earnings from The Final Cut, which all parties believed would again be profitable. *Id.*

Eclipse, for the first time since loaning The Final Cut money in 2016, learned of Mr. Clegg's donation to VFW during the meeting of the creditors. *Id.* Eclipse was livid and, in response, commenced an adversary proceeding seeking to have the debt related to the loan declared non-dischargeable. *Id.* Additionally, the Chapter 13 trustee objected to Mr. Clegg's plan for failing to include the repayment to his mother in the distribution to his creditors. *Id.*

In an effort to compromise, Mr. Clegg resolved the objection by amending the plan to significantly increase the aggregate payments to creditors by $20,000. *Id.* Despite this remedy, Eclipse objected to the plan as not being proposed in good faith. (R. 8.) After weeks of negotiation, Eclipse agreed to withdraw its objection in exchange for an estimated claim in the amount of $150,000, of which $25,000 was deemed non-dischargeable even in the event of conversion. *Id.*

On February 12, 2022, the court confirmed the plan, approving and incorporating the Eclipse settlement, and provided that all property vested in Mr. Clegg. *Id.* Mr. Clegg made timely payments to his creditors for the first eight months of the plan. *Id.* Mr. Clegg then contracted COVID in September 2022. *Id.* His symptoms persisted, making Mr. Clegg too sick to work, yet another blow to the theater. *Id.* With a continued lack of patronage and Mr. Clegg unable to work, the theater was forced to permanently close in October 2022. *Id.* Eclipse immediately commenced foreclosure proceedings. *Id.* With no income to make payments, Mr. Clegg converted his bankruptcy case in good faith to Chapter 7. *Id.*

A new trustee (the "Trustee") was appointed to administer the Chapter 7 estate. (R. 9.) The documents of the estate ascribed a value of $350,000 to Mr. Clegg's home as of the Petition Date and disclosed the repayment from Mr. Clegg to his mother. *Id.* The Trustee also disclosed Mr. Clegg's indebtedness to Eclipse. *Id.* Mr. Clegg made a statement of intention which indicated his intent to reaffirm the mortgage debt that he owed to the Servicer and remain in his home. *Id.*

The Trustee initially concluded that the estate was bereft of assets. *Id.* However, Mr. Clegg disclosed that homes in his neighborhood were selling at a premium. *Id.* Because of this information, the Trustee commissioned a new appraisal of the home. *Id.* The appraisal confirmed that non-exempt equity in the house had increased by $100,000 since the Petition Date. *Id.* The trustee marketed the home for sale and Eclipse offered to purchase the home for $450,000 and the alleged $20,000 preference claim for $20,000. *Id.* The Trustee filed a motion to sell the home and the alleged preference claim (the "Sale Motion") to Eclipse. *Id.*

Mr. Clegg objected to the Sale Motion. (R. 10.) First, Mr. Clegg argued that any post-petition, pre-conversion increase in equity in the home should inure to his benefit. *Id.* The Trustee could then not sell the home because there was no equity in the home as of the Petition Date. *Id.*

Second, Mr. Clegg argued that the Trustee's ability to avoid and recover transfers under sections 547 and 550 cannot be sold to Eclipse. *Id.* The bankruptcy court ruled in favor of Mr. Clegg on both objections and denied the Trustee's Sale Motion. *Id.* The Trustee timely appealed the court's ruling. *Id.* The United States Court of Appeals for the Thirteenth Circuit affirmed the decision of the bankruptcy court. (R. 24.) The Supreme Court of the United States granted certiorari. (R. 2.)

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Thirteenth Circuit Court of Appeals because the Bankruptcy Code and the legislative history of section 348(f) require that debtors retain post-petition, pre-conversion appreciation in home equity. Section 348(f)(1)(A) must be interpreted in light of its relationship to other provisions because the Code was meant to function as a comprehensive, problem-solving tool. The vesting of property in the debtor pursuant to section 1327(b) indicates that the debtor retains all interests in property upon confirmation of the Chapter 13 plan. This conclusion is consistent with the plain language of section 348(f) because Mr. Clegg's appreciation in home equity was not present as of the date of his Chapter 13 filing. Subjecting the appreciation to the converted estate would also create significant disharmony among other relevant provisions, such as sections 348(f)(2) and 522(a)(6).

While Mr. Clegg need not rely on legislative history, Congress's intentions when enacting section 348(f) confirm that post-petition, pre-conversion appreciation in home equity must belong to the debtor. The factually similar example provided by Congress in the legislative history explicitly rejects conversion outcomes that disincentivize Chapter 13 filings. Chapter 13 debtors cannot be placed in a worse position by converting their case than they would have been had they filed for Chapter 7 initially. By depriving debtors of their property interests in post-petition appreciation, the Court punishes Chapter 13 debtors who attempted to diligently repay their creditors. Given the benefits of Chapter 13 for debtors and creditors alike, there is a strong public interest in encouraging the repayment of debt as opposed to liquidation. For these reasons, Mr. Clegg's interpretation of section 348(f) fits squarely with long-standing principles of statutory interpretation, legislative history, and Chapter 13 policy.

Additionally, this Court should affirm the courts below because a Chapter 7 Trustee's power to sell assets of a debtor is limited to assets that are included in property of the estate pursuant to section 541. Section 547 grants to the Trustee a statutory power to avoid certain transfers of property. The statutory power to avoid transfers of property is not itself property. The debtor has no interest in such power before the filing of bankruptcy. Therefore, the power to avoid transfers of property does not become part of the debtor's estate pursuant to section 541 and cannot be sold pursuant to section 363(b).

Attempts to provide a statutory or legal basis for the sale of avoidance actions by a Chapter 7 Trustee fail. *In re Simply Essentials* was wrongly decided and cannot provide guidance to this Court on the issue before it. The *Simply Essentials* court committed three legal errors in its attempt to articulate a statutory and legal basis for the sale of avoidance actions by a Chapter 7 Trustee. First, the Eighth Circuit misapplied this Court's precedent. Next, the court mishandled section 541 of the Bankruptcy Code. Finally, the court improperly invoked the doctrine of derivative standing.

Therefore, because a sale of avoidance actions by the Chapter 7 Trustee is foreclosed by the plain text of sections 363 and 541, and because the Eighth Circuit's decision cannot provide guidance to the Court on the issue before it, this Court should affirm the judgment of the Thirteenth Circuit and hold that, based on a plain reading of the Bankruptcy Code, a Chapter 7 Trustee cannot sell its statutorily granted authority to avoid certain transfers of property.

ARGUMENT

I. The Bankruptcy Code and the Legislative History of Section 348(f) Require that Debtors Retain Post-Petition, Pre-Conversion Appreciation in Home Equity.

Section 348(f) when "read in conjunction with the remainder of the Bankruptcy Code" requires that post-petition, pre-conversion appreciation in home equity belongs to the debtor. *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052, 1057 (9th Cir. 2023) (Tallman, J., dissenting). A holistic interpretation of section 348(f) aligns with Congress's intention to incentivize Chapter 13 filings by placing debtors, such as Mr. Clegg, in no worse of a position by converting their cases than they would have been had they filed for Chapter 7 initially. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

A. Sections 1327(b) and 348(f) of the Bankruptcy Code Require that Chapter 13 Debtors Retain their Post-Petition, Pre-Conversion Appreciation in Home Equity.

The Bankruptcy Code (the "Code") is intended to function as a "comprehensive scheme" that "deliberately target[s] specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (holding that the Code is "to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context."). Thus, 11 U.S.C. § 348(f)'s relationship with other relevant provisions cannot be ignored for the sake of simplicity when the very purpose of the Code was to use these provisions in harmony to solve specific problems. *Castleman*, 75 F.4th at 1060 (Tallman, J., dissenting) ("By adopting the trustee's preferred interpretation of section 348(f), the majority sacrifices the text of the bankruptcy statutes on the altar of simplicity.").

1. Section 1327(b) Vests the Post-Petition Appreciation in Home Equity in the Debtor upon Confirmation of a Chapter 13 Plan as a Matter of Law.

Mr. Clegg is entitled to retain the post-petition, pre-conversion appreciation in his home equity pursuant to the vesting language of section 1327(b). The root of this issue originates in the conflicting interpretations of what constitutes property of the estate under 11 U.S.C. §§ 1306 versus 1327. Section 1306(a) states that all property remains property of the estate until "the case is closed, dismissed, or converted." 11 U.S.C. § 1306(a). This provision incorporates section 11 U.S.C. § 541(a), which provides that an estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(a)(6) further indicates that the estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate[.]" The Trustee interprets these provisions to mean that any post-petition, pre-conversion appreciation in equity must refill the estate upon conversion to Chapter 7. However, section 348(f)'s inclusion of "the phrase property of the estate should be defined by looking to the broader context of the [Bankruptcy Code] as a whole." *Castleman*, 75 F.4th at 1060 (internal quotation marks omitted).

The text of section 1327 requires that post-petition appreciation in home equity vests in the debtor upon confirmation of his Chapter 13 plan. This provision reads, in relevant part:

> **(b)** Except as otherwise provided in the plan or the order confirming the plan, *the confirmation of a plan vests all of the property of the estate in the debtor.*
>
> **(c)** Except as otherwise provided in the plan or in the order confirming the plan, *the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.*

Id. (emphasis added). Once the estate is terminated, "the home [is] no longer 'property of the estate' and therefore **any appreciation in its value is not '[p]roceeds . . . of or from property of the estate.'**" *Castleman*, 75 F.4th at 1062 (Tallman, J., dissenting) (emphasis added); *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217, 1224 (10th Cir. 2022) (holding that section 1327(b)'s vesting language meant "that proceeds generated from the sale of the house were . . . not 'proceeds . . . of or from property of the estate.'"). When Mr. Clegg confirmed his Chapter 13 plan on February 12, 2022, his home and any appreciation in home equity derived from that property belonged to him as a matter of law pursuant to section 1327(b). *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 502–03 (2015) (holding that "confirmation 'vests all of the property of the [bankruptcy] estate in the debtor,' and renders that property 'free and clear of any claim or interest of any creditor provided for by the plan.'") (citations omitted).

Section 1327(b)'s vesting requirement governs over section 1306(a) because it better aligns with the defining features of Chapter 13. *Castleman*, 75 F.4th at 1061 (Tallman, J., dissenting); *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015) ("Chapter 13 works differently. A wholly voluntary alternative to Chapter 7, Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation."). In Chapter 7, section 541(a)(1) "sweeps in all the debtor's property upon filing and [it] is promptly liquidated to pay creditors." *Castleman*, 75 F.4th at 1061 (Tallman, J., dissenting). Conversely, in Chapter 13, "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." *See* § 1306(b). In order to fund a reorganization plan, the debtor uses future income to pay creditors over the next three to five years. *See* 11 U.S.C. §§ 1321–22.

The vesting of property in the debtor upon plan confirmation is representative of the "bargain" that defines Chapter 13 by allowing debtors to forego future income in exchange for retention of assets. *Castleman*, 75 F.4th 1052 at 1061 (citing *Black v. Leavitt (In re Black)*, 609 B.R. 518, 529 (B.A.P. 9th Cir. 2019). Thus, "the debtor owns the property outright and . . . is entitled to any post-petition appreciation." *Id.; McDonald v. Burgie (In re Burgie)*, 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999) ("The chapter 13 deal permits a debtor to retain all prepetition property, including earnings, assets, money in the bank and real estate."). The bargain cannot be honored if the Trustee receives a windfall by "reap[ing] the benefit of both the debtor's non-exempt assets and his chapter 13 postpetition income." *In re Barrera*, 620 B.R. 645, 654 (Bankr. D. Colo. 2020). Because the debtor has bargained to "once again [be] the owner of the property," pre-conversion appreciation in home equity belongs to the debtor as a matter of law pursuant to section 1327(b). *Castleman*, 75 F.4th at 1061 (Tallman, J., dissenting).

The vesting of property in the debtor upon plan confirmation also aligns with what Professor Seymour describes as a "light-touch" approach to bankruptcy. Johnathan M. Seymour, *The Limited Lifespan of the Bankruptcy Estate: Managing Consumer and Small Business Reorganizations*, 37 EMORY BANKR. DEV. J. 1, 6 (2020). In other words, bankruptcy courts should adopt interpretations that make Chapter 13 cost-effective and accessible instead of acting as "gatekeepers on post-confirmation activities" because "most debtors do not seek bankruptcy protection because of financial mismanagement or for strategic reasons." *Id.* at 6, 59. This is certainly true in Mr. Clegg's case considering the COVID-19 crisis made his plan infeasible through no fault of his own. Finally, in Chapter 11 bankruptcies, courts "have not hesitated to conclude that the overall structure of the Code makes clear that the bankruptcy estate terminates upon confirmation." *Id.* at 33 (collecting cases). This well-established principle in Chapter 11 is instructive because Chapter 13 is the "personal reorganization counterpart to the better-known Chapter 11." *Id.* (internal quotation omitted). Thus, it would "make[] sense" that the estate terminates after plan confirmation in Chapter 13 as well. *Id.*

The Trustee contends that once a Chapter 13 bankruptcy is converted to a Chapter 7 case, Chapter 13 provisions cease to apply. *See* 11 U.S.C. § 103(j). However, "[c]ourts will reject a statutory interpretation that . . . would defeat the plain legislative intention." *See Charleston Cty. Assessor v. Univ. Ventures, LLC*, 427 S. Ct. 273, 286 (2019). As discussed in Section B *infra*, when section 348(f) was enacted, it was Congress's clear intention to ensure that debtors would not be in a worse position by converting to Chapter 7 than they would have been had they filed for Chapter 7 in the first place. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994

U.S.C.C.A.N. 3340, 3366. Depriving a debtor of the equity created through secured payments and market conditions would render the opposite outcome. Thus, Congress has provided sufficient legislative indication to reject the proposition that Chapter 7 provisions take precedence over Chapter 13 provisions in these circumstances.

2. *The Plain Language of Section 348(f)(1)(A) Requires that Post-Petition, Pre-Conversion Appreciation in Home Equity Belongs to the Debtor Because it was Not Property of the Estate on the Date of Filing.*

Under section 348(f)(1)(A), property that did not exist at the time of filing is not subject to the converted Chapter 7 estate. Section 348(f)(1)(A) states, in relevant part, that "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." (emphasis added). The plain language of section 348(f)(1)(A) explicitly restricts the converted estate from including any property that was not property of the Chapter 13 estate at the time of filing. The purpose of restricting the estate to such property at the time of filing is to ensure that a debtor is not worse off by converting simply because he opted to voluntarily pay his creditors under Chapter 13. *Castleman*, 75 F.4th at 1059 (Tallman, J., dissenting). (citing *Brown v. Barclay (In re Brown)*, 953 F.3d 617, 620 (9th Cir. 2020)). Thus, section 348(f)(1)(A) places the debtor "where he would have been, had he filed in Chapter 7 initially." *Id.*

When Mr. Clegg filed his Chapter 13 bankruptcy petition on December 8, 2021, his home was worth $350,000. Before he converted his case to Chapter 7, the value of his non-exempt equity in the home appreciated by $100,000 since December 8, 2021. Because the $100,000 increase in home equity was not present on that date, it is not subjected to the bankruptcy estate upon a Chapter 7 conversion. Thus, section 348(f)(1)(A) aligns harmoniously with the conclusion that section 1327(b) vests the property of the estate in the debtor upon confirmation. Indeed, one could split hairs as to whether appreciation is inseparable from the property from which it is derived. However, the legislative history of section 348(f) once again puts this inquiry to rest. The goal of section 348(f) is not to make distinctions regarding after-acquired property, but to place Mr. Clegg in the same position he would have been if he filed Chapter 7 initially. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

3. Allowing Post-Petition, Pre-Conversion Equity to be Subject to the Chapter 7 Estate would Render Significant Disharmony among Other Provisions.

Post-petition, pre-conversion appreciation in home equity belongs to the debtor because section 348(f)(1)(A) cannot be interpreted without regard for its relationship to sections 348(f)(2) and 522(a)(2). Section 348(f)(2) provides that if a debtor converts a Chapter 13 bankruptcy to Chapter 7 in bad faith, then the property in the converted case will be the property of the estate as of the date of conversion as opposed to the date of filing. Congress intended to deter bad-faith conversions by giving courts the discretion to deprive bad-faith debtors of after-acquired property that otherwise would have vested in them in a good-faith filing. *Barrera*, 22 F.4th at 1221. If post-petition, pre-conversion appreciation is always the property of the converted estate, then section 348(f)(2) serves no purpose because there would no longer be a distinction between good and bad faith filings. *Kendall v. Lynch (In re Lynch)*, 363 B.R. 101, 107 (B.A.P. 9th Cir. 2007). "Harmonizing the inharmonious is a tall order. And courts must do so in light of a Supreme Court's recent reminder that [t]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *In re Elassal*, 654 B.R. 434, 438 (Bankr. E.D. Mich. 2023) (internal quotation marks omitted) (citing *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021)). Because Mr. Clegg's conversion from Chapter 13 to Chapter 7 was made in good faith, his circumstances fit squarely within the very purpose that section 348(f)(2) exists to serve, namely, incentivizing good faith filings by allowing debtors to retain their after-acquired property.

The Trustee's interpretation of section 348(f)(1)(A) would create absurd disparities in valuations under 11 U.S.C. § 522(a)(2). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1828 n.65 (2020) (citing Antonin Scalia & Bryan Garner, READING LAW 235 (2012)). The rule against absurdity is "an implementation of (rather than . . . an exception to) the ordinary meaning rule." *Id.* (citing William N. Eskridge, INTERPRETING LAW 72 (2016)). According to section 522(a)(2), "'value' means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." Like section 348(f)(1)(A), section 522(a)(2) relies on the petition date as a reference point. This is often referred to as the "snapshot rule," which requires that the debtor's exempt assets are frozen in time. *Rockwell v. Hull (In re Rockwell)*, 968 F.3d 12, 17 (1st Cir. 2020). If the snapshot rule is not similarly applied to section 348(f)(1)(A), then Mr. Clegg's home would be valued at $350,000 for purposes of his homestead exemption and $450,000 for purposes of his Chapter 7 conversion. The absurdity created by the Trustee's interpretation of section 348(f)(1)(A) bolsters the conclusion that post-petition, pre-conversion appreciation must belong to the debtor.

B. Section 348(f)'s Legislative History Confirms that Congress Intended for Debtors to Retain their Post-Petition, Pre-Conversion Appreciation in Home Equity.

Section 348(f)'s legislative history affirms the conclusion that post-petition, pre-conversion appreciation belongs to the debtor. When "reasonable judicial minds disagree" over the meaning of a provision, there must be some ambiguity that warrants a "need" for legislative history. *Castleman*, 75 F.4th at 1064 (Tallman, J., dissenting); *County of Washington* v. *Gunther*, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting) ("It [is] well settled that the legislative history of a statute is a useful guide to the intent of Congress."). In general, "[b]ankruptcy courts . . . have followed the Congressional intent evidenced by the legislative history." *In re Compos*, 768 F.2d 1155, 1157 (10th Cir. 1985). The vesting language in section 1327(b), as well as the plain text of section 348(f)(1)(A), make clear that post-petition, pre-conversion appreciation does not belong to the Chapter 7 estate. Thus, Mr. Clegg "need not rely on . . . legislative history" to prove that he is entitled to retain the appreciation in his home equity. *Barrera*, 22 F.4th at 1225. However, the legislative history behind section 348(f) bolsters the conclusion that post-petition, pre-conversion appreciation in home equity belongs to the debtor.

1. *Congress Explicitly Adopted the Reasoning of* Bobroff *and, thus, Intended that After-Acquired Property be Retained by the Debtor.*

In 1994, Congress enacted section 348(f) through the Bankruptcy Reform Act to resolve the issue of whether post-petition, pre-conversion after-acquired property in Chapter 13 was subject to a converted Chapter 7 estate. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. At the time, some courts allowed debtors to retain their interest in after-acquired property pursuant to the vesting language in section 1327(b), while others contended that Chapter 7 provisions mandated the property be subject to the converted estate. *Id.* Congress sought to resolve the circuit split by adopting the reasoning of *In re Bobroff*, which held that an after-acquired tort claim belonged to the debtor as opposed to the converted Chapter 7 estate because the claim arose during the Chapter 13 bankruptcy. *Id.*; *Bobroff v. Continental Bank* (*In re Bobroff*), 766 F.2d 797, 802–03 (3d Cir. 1985). The decision to endorse the reasoning in *Bobroff* over other lines of cases was motivated by the objective of encouraging debtors to seek repayment of their debts under Chapter 13 as opposed to liquidation. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. Allowing after-acquired property to transfer into the Chapter 7 estate would leave debtors worse off by converting to Chapter 7 than they would have been had they filed for Chapter 7 initially. *Id.* This would essentially punish debtors for attempting to repay their creditors and disincentivize Chapter 13 filings. *Id.*

Congress also emphasized the distinction between good and bad faith filings when it stated that section 348 "gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case." *Id.* Congress's endorsement of the reasoning in *Bobroff*, combined with the distinction between good and bad faith conversions, reaffirms the notion that, absent a bad faith filing, courts must ensure that the Chapter 7 estate reflects a "snapshot of the estate at the filing of the original Chapter 13 petition" to encourage Chapter 13 filings. Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, § 316.1 (4th ed. 2004).

2. The Factual Similarities between the Example Provided in Section 348(f)'s Legislative History and Mr. Clegg's Case Confirm that Congress Intended for an Appreciation in Home Equity to Belong to the Debtor.

In demonstrating why after-acquired property must belong to the debtor, Congress provided an example with significant factual similarities to Mr. Clegg's case. The example states the following:

> 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 $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 $10,000 in equity for the unsecured creditors and the debtor would lose the home.*

Id. (emphasis added). The *Barrera* court interpreted this example to mean that sale proceeds from a Chapter 13 debtor's home acquired post-petition but pre-conversion belonged to the debtor because it aligned with Congress's objective to incentivize Chapter 13 filings. *Barrera*, 22 F.4th at 1222–27. Allowing post-petition, pre-conversion appreciation to be captured by the converted Chapter 7 estate would put Mr. Clegg in a worse position than he would have been had he filed for Chapter 7 initially. The prospect of losing all appreciation in home equity from both market increases *and* secured payments would certainly discourage debtors from opting for Chapter 13. This is precisely the sort of outcome that Congress sought to avoid. Thus, these indications from Congress confirm that post-petition, pre-conversion appreciation in home equity belongs to the debtor as opposed to the converted Chapter 7 estate.

The factual distinctions between *Barrera* and Mr. Clegg's bankruptcy do not invalidate Congress's intention to avoid punishing debtors for attempting to pay their creditors under Chapter 13. The former dealt with proceeds from the sale of a home that the debtors no longer owned. *Barrera*, 22 F.4th at 1229. "While admittedly an increase in value to real property is not the same as after-acquired property as that term is traditionally defined under bankruptcy law, it is similar in nature and justifies the same result." *In re Niles*, 342 B.R. 72, 76 (Bankr. D. Ariz. 2006). Whether the after-acquired property is sales proceeds or home equity, the purpose of this example was to demonstrate that Congress rejects conversion outcomes that leave Chapter 13 debtors worse off than they would have been had they filed a Chapter 7 case initially. *See* H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. Thus, the aforementioned distinctions do not detract from Congress's intent to incentivize Chapter 13 filings. *Id.*

Finally, the Ninth Circuit's recent opinion refusing to consider the legislative history of section 348(f) in *In re Castleman* does not warrant a departure from the clear legislative intentions of Congress. This opinion is based on Ninth Circuit precedent that (1) does not involve a Chapter 7 conversion; and (2) relies on arguments that predate the current form of section 348(f)(1)(A). *See Wilson v. Rigby*, 909 F.3d 306, 309 (9th Cir. 2018) (determining whether the Chapter 7 trustee or the debtor was entitled to an increase in equity where a Chapter 7 conversion was not at issue); *Schwaber v. Reed (In re Reed)*, 940 F.2d 1317, 1323 (9th Cir. 1991) (holding that post-petition increases in equity are Chapter 7 property based on an outdated version of section 348(f)(1)(A)).

C. Allowing Debtors to Retain Post-Petition, Pre-Conversion Appreciation in Home Equity Aligns with the Public Interest in Promoting Creditor Repayment under Chapter 13.

Mr. Clegg's interpretation of section 348(f) is reinforced by the well-established policy incentive to encourage debtors to file for Chapter 13 as opposed to Chapter 7. *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 523–24 (B.A.P. 6th Cir. 2000) ("Logic and equity, as well as policy considerations, are factors that may be considered when interpreting the Bankruptcy Code."). Chapter 13 encourages the reorganization of individual debtors by allowing them to offer future income to creditors in exchange for shielding key assets, such as homes and cars, from liquidation. *Harris*, 575 U.S. at 514. In doing so, creditors "usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation." *Castleman*, 75 F.4th at 1059 (Tallman, J., dissenting). There is a "public interest" in promoting these outcomes under Chapter 13 because it minimizes the "waste, hardship and social and economic disruptions usually attendant upon liquidating bankruptcy proceedings under Chapter 7." Robert J. Volpi, *Property of the Bankruptcy Estate After a Conversion from Chapter 13 to Chapter 7: The Need for a Definite Answer*, 68 IND. L.J. 489, 490, 508 (1993) (citing H.R. Rep. No. 1195, 96th Cong., 2d Sess. 25 (1980)). This incentive extends to appreciation rooted in these protected assets because it aligns with the goal of encouraging debtors to file for Chapter 13.

Congress incorporated this principle into section 348(f) by seeking to remove a "serious disincentive to file chapter 13 filings." *In re Michael*, 699 F.3d 305, 314–15 (3d Cir. 2012) (quoting H.R. Rep. No. 835, 103d Cong., 2d Sess. 57 (1994)). Few debtors would find it prudent to file a Chapter 13 bankruptcy if any appreciation derived from both market changes *and* secured payments were subject to the Chapter 7 estate upon conversion. Mr. Clegg opted for Chapter 13 and made timely payments to his creditors for nearly a year. Unfortunate circumstances outside Mr. Clegg's control made his plan infeasible. Instead of dismissing his Chapter 13 case, Mr. Clegg converted his case in good faith to Chapter 7. Mr. Clegg, a veteran, is the epitome of the honest, but unfortunate debtor and should not be punished for attempting to diligently pay his creditors.

Chapter 13 debtors do not receive a windfall by retaining their interests in post-petition, pre-conversion appreciation in home equity. *Barrera*, 620 B.R. at 654. Generally, in a Chapter 7 bankruptcy, "the trustee will not have the opportunity to realize significant postpetition increases in home equity due to either prompt closure of the case or the debtor's filing of a timely motion to abandon." *Id.* If Mr. Clegg had filed for Chapter 7 initially, the appreciation in his home equity likely would have occurred *after* his theoretical Chapter 7 discharge. Thus, the converted Chapter 7 estate is no worse off. If anything, depriving Mr. Clegg of the appreciation in his home equity would bestow a windfall upon the Trustee by allowing the Chapter 7 estate to "reap the benefit of both the debtor's non-exempt assets and his Chapter 13 postpetition income." *Barrera*, 620 B.R. at 654. Thus, Mr. Clegg's interpretation does not disadvantage the converted Chapter 7 estate, it simply "allows the fundamental bargains of chapter 7 and 13 to remain in place." *Id.*

Indeed, it is "beyond [the courts'] province to rescue Congress from its drafting errors, and to provide for what [the judiciary] might think . . . is the preferred result." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004). Yet, Mr. Clegg is not requesting that the Court predict policy outcomes or correct inconsistencies in the Code. He is, instead, asking the Court to make a determination that fits squarely with the plain language of section 348(f), its legislative history, and Chapter 13 policy. If anything, the Trustee calls for the Court to make predictions and corrections because its interpretation of section 348(f)(1)(A) not only renders section 348(f)(2) superfluous and section 522(a) absurd but contradicts the very purpose of Chapter 13. For these reasons, Mr. Clegg's interpretation of section 348(f)(1)(A) better aligns with the policy incentives that have existed in Chapter 13 since its inception.

II. Because the Preference Action is Not Property of the Estate, the Trustee Cannot Sell It.

A. The Trustee Can Only Sell Estate Property.

The plain text of 11 U.S.C. § 363 grants the Chapter 7 Trustee authority to sell property of the estate. This authority extends only to assets that are property of the estate. *The Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 258 (5th Cir. 2010). Assets outside the estate cannot be sold by the Trustee. Thus, since the Trustee can only sell property of the estate, the threshold question is whether preference actions are property of the estate. *In re Stein*, 281 B.R. 845, 848 (Bankr. S.D.N.Y. 2002).

B. The Preference Action in this Case is Not Estate Property.

Section 541 provides at least three indications that preference actions are not property of the estate. *See* 11 U.S.C. § 541. First, temporal distinctions exclude avoidance actions from estate property. Second, the meaning of "property" within section 541 does not encompass avoidance powers. Third, section 541(a)(3) contrasts property with the power to avoid transfers and omits the power to avoid transfers from the estate.

1. *The Estate Includes Property that the Debtor Has at the Time the Case Commences and Property that the Debtor Acquires after the Case Commences, but Avoidance Powers are Neither.*

i. Because the Debtor Does not Possess the Power to Avoid Transfers at the Time the Bankruptcy Case Commences, Avoidance Powers are Not Estate Property.

The power to avoid and recover transferred property arises at the time of filing by operation of Federal law; the debtor does not possess this power before filing. A debtor's property does not expand as a result of bankruptcy. *Mission Prod. Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652, 1663 (2019). Thus, if property is not owned by the debtor at the time of filing, it does not become property of the estate. *Pearlman v. Reliance Ins. Co.,* 371 U.S. 132, 135 (1962). This also applies to causes of action, which must belong to the debtor as of the commencement of the bankruptcy case. *Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996). Therefore, the power to avoid and recover property is not part of the bankruptcy estate because "[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy." *Mission Prod.*, 139 S. Ct. at 1663.

ii. The Estate Does Not Acquire an Interest in Avoidance Powers after the Commencement of the Bankruptcy Case.

Section 541(a)(7) reaches interests in property that the estate acquires after the commencement of the case. The power to avoid transfers, however, arises by operation of law at the moment of filing, not at some indeterminate point thereafter, and is not, therefore, captured by section 541(a)(7). Even if avoidance powers are labeled "causes of action," *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989), they are not acquired by the estate after the commencement of the case and, thus, fall outside the scope of section 541(a)(7).

2. *The Meaning of "Property" in Section 541 Does Not Encompass Avoidance Powers.*

The Bankruptcy Code does not define "property." Section 541 does not provide rules for determining whether the debtor has an interest in property. *In re 100 Lindbergh Blvd. Corp.*, 128 B.R. 53, 57 (Bankr. E.D.N.Y. 1991). Generally, State law creates and defines property interests. *Butner v. United States*, 440 U.S. 48, 55 (1979). Federal law, on the other hand, determines what is included within the estate. *In re CII Parent, Inc.*, No. 22-11345, slip op. at *5 (Bankr. D. Del. Apr. 12, 2023). Avoidance powers are features of Federal law and, thus, do not fit within the general scope of the term "property" as used in section 541. Avoidance powers are granted to the Trustee by Federal law and operate on property interests that are defined by State law. Thus, avoidance powers are of a different kind than the property interests generally described in section 541.

3. *Section 541(a)(3) Distinguishes Property and Avoidance Actions.*

Section 541(a)(3) describes property that becomes estate property because it has been recovered. This necessarily contrasts the power to avoid with the property recovered. It is the power to avoid (and recover) that acts on property. The power and that on which it acts are not the same. *Begier v. I.R.S.*, 496 U.S. 53, 58 (1990) ("[T]he purpose of the avoidance *provision* is to preserve *property* . . . that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.") (emphasis added). Thus, section 541(a)(3) includes in the estate property recovered[1] pursuant to an avoidance action, but does not include the

[1] Section 541(a)(3) also captures the *right* to recover a transfer of property that has been avoided. *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992). Exercise of section 547's avoidance power is a condition precedent to recovery under section 550, thus the power to avoid a transfer and the right to recover property are not the same. The latter is included in estate property by section 541(a)(3), but the former is not.

avoidance power itself in the estate. The statute envisions the power and that on which it operates, but expressly includes the latter and not the former.

Therefore, because the Trustee can only sell estate property, and because avoidance actions are not estate property, the Trustee cannot sell avoidance actions.

C. *In re Simply Essentials* Was Wrongly Decided and Does Not Control in this Case.

The *Simply Essentials* court was faced with a common bankruptcy problem: the Chapter 7 estate lacked the funds to pursue very valuable avoidance claims. *Pitman Farms v. ARKK Food Co., LLC (In re Simply Essentials, LLC)*, 78 F.4th 1006, 1007 (8th Cir. 2023). The court solved this problem by allowing the Chapter 7 Trustee to sell the avoidance actions, but, in so doing, the court committed three legal errors. First, the court misapplied *United States v. Whiting Pools*. 462 U.S. 198 (1983). Next, the court misinterpreted the mechanics of section 541. Finally, the court improperly invoked the doctrine of derivative standing. Thus, *Simply Essentials* cannot be followed in this case.

1. The Simply Essentials *Court Misapplied* Whiting Pools.

The *Simply Essentials* court looked to *Whiting Pools* for the proposition that the scope of estate property under section 541(a) is broad. *Simply Essentials*, 78 F.4th at 1008–09. *Whiting Pools* unquestionably teaches that the scope of estate property is broad. However, the facts of *Whiting Pools* are too dissimilar to provide guidance to the *Simply Essentials* court. *See Simply Essentials*, 78 F.4th at 1009 (noting that "*Whiting Pools* does not speak directly to the property at issue in this case[.]"). Appeals to *Whiting Pools* in the present case are likewise inapposite.

i. The Holding of *Whiting Pools* Sheds No Light on the Analysis in this Case.

In *United States v. Whiting Pools*, a tax lien attached to the debtor's property, which the IRS seized the day before the debtor filed for protection under Chapter 11. 462 U.S. at 200–01.

The debtor sought to have the IRS return the seized property to the estate pursuant to 11 U.S.C. § 542(a) for use in the reorganization. *Id.* at 201. Thus, the precise issue in *Whiting Pools* was whether a secured creditor's possessory interest in the debtor's property could be overcome by section 542(a) to facilitate the debtor's reorganization. Indeed, the Court held that "the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization." *Id.* at 209. At all relevant times in *Whiting Pools*, before and after the petition date, only the debtor owned the property in question. Ownership never transferred to the IRS. *Id.*; *see also United States v. Nordic Village*, 503 U.S. 30, 39 (1992) (discussing *Whiting Pools* and the return of property "in which the debtor retained ownership.").

Thus, *the question of whether the seized property was part of the debtor's estate was never at issue*. The Court only considered how the turnover provision resolved an apparent conflict between estate property and a secured creditor's possessory interest. Therefore, because *Whiting Pools* never contemplated the "only issue" raised on appeal in *Simply Essentials, Whiting Pools* does not support the holding of *Simply Essentials*. *See Simply Essentials*, 78 F.4th at 1008 (stating that "[t]he only issue on appeal is the legal question of whether avoidance actions can be sold as property of the estate.").

2. The Simply Essentials *Court Erred in its Treatment of Section 541.*

The *Simply Essentials* court committed two errors in its treatment of section 541.

i. The *Simply Essentials* Court Misstated How Estate Property is Determined.

As demonstrated *supra*, only what the debtor possesses at the time of filing can the estate possess in bankruptcy. *See Mission Prod.*, 139 S. Ct. at 1663 ("[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy.").

The *Simply Essentials* court, however, misconstrued the workings of section 541 with respect to property of the estate: "[b]ecause debtors have the right to file bankruptcy . . . and the Trustee may file avoidance actions to recover property, the debtor has an inchoate interest in the avoidance actions prior to the commencement of bankruptcy proceedings. Therefore, avoidance actions are property of the estate[.]"). 78 F.4th at 1009. This logic amounts to: because the debtor possessed ***x*** before filing, and because the Trustee will be able to do ***y*** after filing, therefore ***y*** is property of the estate. This analysis collapses under a plain reading of section 541.

Without a bankruptcy filing, the debtor's interest in avoidance actions is not inchoate, it is *nonexistent*. A debtor-in-possession or Trustee would never be able to exercise the avoidance power enumerated in 11 U.S.C. § 547 prior to a bankruptcy filing. Thus, the debtor does not possess any avoidance power as of the commencement of the case and, therefore, the avoidance power does not become property of the estate.

ii. The Court's Use of Section 541(a)(7) is Precluded by the Text of Section 541(a) and the Canon against Surplusage.

In the alternative, the *Simply Essentials* court attempted to use section 541(a)(7) to fit avoidance powers into the property of the estate. 78 F.4th at 1009. This attempt fails for two reasons.

First, section 541(a)(7) includes interests that the estate acquires after the commencement of the case. For example, if the trustee enters into a contract after the commencement of the case, the estate's interest in that contract becomes property of the estate. 5 *Collier on Bankruptcy* ¶ 541.16 (16th ed. 2023). The post-petition exercise of a power granted to the Chapter 7 Trustee by Federal statute is not an interest in property that the estate acquires. Indeed, the Chapter 7 Trustee exercises the power *on behalf of* the estate. The Trustee does not acquire this power in the way the Trustee enters into a post-petition contract. Thus, avoidance powers are not envisioned by section 541(a)(7).

Second, if section 541(a)(7) converts avoidance actions to estate property, then section 541(a)(3) is certainly surplusage. If avoidance actions become estate property, the property recovered by avoidance actions (or, "proceeds") is certainly estate property pursuant to section 541(a)(6). Section 541(a)(3) would serve no purpose.

Rather than interpret the statute in a manner that avoids surplusage, the *Simply Essentials* court preferred to designate its case as one in which the canon against surplusage does not apply. Simpler explanations prevail, and a more reasonable interpretation avoids surplusage.

3. The Simply Essentials *Court Improperly Invoked the Derivative Standing Doctrine.*

Finally, the court dismissed the argument that "avoidance actions belong to the Trustee . . . and are not property of the estate[,]" by invoking the derivative standing doctrine and appealing to Eighth Circuit precedent. The invocation of derivative standing was improper and its appeal to precedent is inapposite.

i. Derivative Standing Did Not Apply in *Simply Essentials* and Does Not Apply in this Case.

This Court granted the petition for a Writ of Certiorari to resolve the question of whether a section 547 avoidance action can be sold by a Chapter 7 Trustee, which was also the singular question addressed in *Simply Essentials*. 78 F.4th at 1008 ("[t]he only issue on appeal is the legal question of whether avoidance actions can be sold as property of the estate."). The derivative standing doctrine has no bearing on the answer to this question.

Derivative standing "addresses the question of whether Congress intended to confer exclusive authority to file an action to avoid preferential or fraudulent transfers . . . on a trustee or debtor-in-possession, or whether a creditor might have standing to file such an action." *Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Grp., Inc.)*, 66 F.3d 1436, 1438 (6th Cir. 1995). The issue arises because, "under both the Bankruptcy Act and the Bankruptcy Code, Congress authorized the trustee to bring an avoidance action to recover a fraudulent transfer." *Id*. at 1443. In Chapter 11, where the debtor-in-possession has all the rights and powers of a Trustee, courts can confer standing derivatively on a creditor, instead of the debtor-in-possession, to avoid preferential transfers if certain criteria have been satisfied. *Id*. at 1438. Courts have developed specific (and varying) requirements that must be satisfied before derivative standing is granted. *See, e.g., Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 100 (2d. Cir. 2001).

Thus, in a Chapter 11 reorganization, courts can grant a creditors' committee derivative standing for the sake of efficiency. *Id*. Similarly, a debtor-in-possession can stipulate to representation by an unsecured creditors' committee when there is a close identity of interests because "coordinat[ing] litigation responsibilities . . . can be an effective method for the DIP to manage the estate and fulfill its duties." *Liberty Mut. Ins. Co. v. Official Unsecured Creditors' Comm. of Spaulding Composites Co. (In re Spaulding Composites Co. Inc.),* 207 B.R. 899, 904 (B.A.P. 9th Cir. 1997). Derivative standing is appropriate in Chapter 11 is appropriate to the extent that it "further[s] Congress's intent that a debtor's assets be marshaled and preserved when to do so would further the goal of reorganization." *Gibson Grp., Inc.*, 66 F.3d at 1442.

Some courts apply similar logic to Chapter 7[2] cases: "[b]ecause the Trustee has standing, [the recipient of fraudulent transfers] would still be exposed to him for the full amount of the

[2] In this context, Chapters 7 and 11 are quite different. The Trustee has a unique role in Chapter 7. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). But, "nothing could be further from the truth in Chapter 11, where trustees rarely exist." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 560 (3d Cir. 2003) (en banc). In a Chapter 7 case, a derivative standing analysis must

fraudulent transfer even if [the secured creditor] did not have standing." *Glinka v. Murad (In re Housecraft Indus. USA, Inc.)*, 310 F.3d 64, 71 (2d Cir. 2002). Grants of derivative standing are often motivated by necessity. *See Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 244 (6th Cir. 2009) ("a trustee in Chapter 7 proceedings may decline to pursue meritorious and potentially sizeable claims simply because there are inadequate funds in the estate to pay litigation expenses."). Critically, the secured creditor "is not replacing the Trustee as a claimant; it is simply assisting him with the litigation." *In re Housecraft*, 310 F.3d at 71.

Derivative standing, then, has to do with a party in pursuit of a claim acting as an extension of the Trustee or debtor-in-possession and nothing to do with the *sale* of estate property by a Chapter 7 Trustee. The question of whether an avoidance action can be *sold* hinges on whether the action is property of the estate. Whether or not an avoidance action can be sold is not a component of derivative standing analysis because the avoidance action is not sold, it is simply pursued by a party that obtains standing derivatively to pursue it. Just as the invocation of derivative standing did nothing to advance the analysis in *In re Simply Essentials*, the doctrine provides no guidance to this Court on the issue before it.

ii. The *Simply Essentials* Court Misapplied Eighth Circuit Precedent.

Because the derivative standing doctrine does nothing to advance the issue of whether an avoidance action can be sold, the appeal to *In re Racing Services, Inc.* (a Chapter 7 derivative standing case) by the *Simply Essentials* court was inapposite. In *PW Enters. v. N.D. Racing Comm'n (In re Racing Servs.)*, the Eighth Circuit articulated four requirements a creditor must

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account for the differences between the chapters. *See, e.g., In re Cooper*, 405 B.R. 801 (Bankr. N.D. Tex. 2009), *In re Pursuit Capital Mgmt., LLC*, 595 B.R. 631 (Bankr. D. Del. 2018), *In re Harrold*, 296 B.R. 868, 872 (Bankr. M.D. Fla. 2003) ("the issue in this case is whether any creditor in a Chapter 7 bankruptcy case may exercise the avoidance powers afforded to the Chapter 7 Trustee[.]").

meet to establish derivative standing. 540 F.3d 892, 900 (8th Cir. 2008). The *Simply Essentials* court made no attempt to analyze whether those criteria are satisfied because there was no creditor in *Simply Essentials* seeking a grant of derivative standing.[3] Thus, *In re Racing Services, Inc.* has little to do with the issue addressed in *Simply Essentials.*

4. In re Simply Essentials *was Wrongly Decided and Provides No Guidance for this Court regarding the Sale of Avoidance Actions by a Chapter 7 Trustee.*

Therefore, because the Eighth Circuit misapplied *Whiting Pools*, erred in its handling of section 541, and improperly invoked the doctrine of derivative standing, *In re Simply Essentials* cannot provide guidance regarding whether avoidance actions can be sold by a Chapter 7 Trustee. Furthermore, to the extent the dissent below relies on *In re Simply Essentials*, the dissent's argument cannot be credited.

CONCLUSION

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold that (1) post-petition, pre-conversion appreciation in home equity belongs to the debtor pursuant to the plain language of section 348(f), its legislative history, and Chapter 13 policy, and (2) because section 541 does not include in the estate the statutory power to avoid preferential transfers, the Chapter 7 Trustee cannot sell the power to avoid preferential transfers.

[3] Likewise, in the present case, the record is silent with respect to whether Eclipse even could satisfy any of the requirements to establish derivative standing. Nevertheless, such analysis is not required in this case since the Trustee's Sale Motion is impermissible under sections 541 and 363.