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, RESPONDENT.

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

BRIEF FOR PETITIONER

JANUARY 18, 2024

TEAM NUMBER 41
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether any post-petition, pre-conversion increase in equity in a debtor's property inures to the benefit of the debtor or to the bankruptcy estate upon conversion of a case from chapter 13 to chapter 7 pursuant to 11 U.S.C. §§ 348 and 541.

II. Whether a chapter 7 trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.

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The Thirteenth Circuit Court of Appeals' decision is available at No. 22-0359 and reprinted at Record 3. The Bankruptcy Court for the District of Moot ruled in favor of Eugene Clegg. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of Eugene Clegg.

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates statutory construction of certain provisions of Title 11 of the United States Code.

The relevant portion of 11 U.S.C. § 348(f)(1)(a) provides:

> **(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.

The relevant portion of 11 U.S.C. § 363(b)(1)(A) provides:

> (**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 person 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.

The relevant portion of 11 U.S.C. § 541(a) provides:

(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.
(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.

The relevant portion of 11 U.S.C. § 550(a) provides:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, it the court orders, the value of such property, from---
(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
(2) any immediate or mediate transferee of such initial transferee.

The relevant portion of 11 U.S.C. § 545(1)(A) provides:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
(1) first becomes effective against the debtor—
(A) when a case under this title concerning the debtor is commenced.

The relevant portion of 11 U.S.C. § 546(c)(1) provides:

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods

The relevant portion of 11 U.S.C. § 547(b) provides:

(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.

The relevant portion of 11 U.S.C. § 704(a) provides:

(a) The trustee shall—
(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest.

STATEMENT OF THE CASE

This appeal arises from a concealment of property value that has adversely affected the value of an otherwise fully realized bankruptcy estate. Petitioner appeals the Thirteenth Circuit's ruling, asking this Court to ensure creditors receive equitable compensation and the bankruptcy estate's assets are properly preserved.

I. Factual History

Respondent, Eugene Clegg (the "Debtor"), is a business owner based in the City of Moot. R. at 4. Following his retirement from the United States Army in 2011, the Debtor received a 100% membership in the Final Cut, LLC ("Final Cut"), an entity that owned and operated a historic, single-screen movie theater. R. at 5.

In 2016, the Debtor caused Final Cut to borrow a commercial loan from Eclipse Credit Union ("Eclipse") of $850,000 to renovate the theater. R. at 5. The Debtor personally undertook much of the renovation work and received help from local veterans who volunteered their time. R. at 5. Due to the reduced labor costs and the appreciation towards the veterans, the Debtor donated the remaining proceeds to the Veterans of Foreign Wars ("VFW") in early 2017. R. at 5. The remaining proceeds of approximately $75,000 donated to the VFW were unbeknownst to Eclipse. R. at 5.

For the next several years, Final Cut was a profitable business. R. at 6. However, in March 2020, a public health emergency due to COVID-19 was declared by the Governor of the State of Moot, and an executive order requiring all individuals within the state to stay at home followed. R. at 6. With the temporary closing of Final Cut and the nonexistence of income, Debtor was forced to borrow, on an unsecured basis, $50,000 from his mother, Emily "Pink" Clegg ("Pink").

Final Cut reopened to the public in February 2021. R. at 6. However, the attendance failed to reach the levels experienced before the public health emergency. R. at 6. To fix Final Cut's cash flow issues, Debtor decided to forego his salary. R. at 6. Without reliable income, Debtor incurred significant credit card debt and fell behind on his home mortgage. R. at 6. After several months of failing to make mortgage payments, a foreclosure proceeding was commenced by Another Brick in the Wall Financial Corporation (the "Servicer"). R. at 6.

The Debtor sought relief under chapter 13 of the Bankruptcy Code on December 8, 2021 (the "Petition Date") to save his home. R. at 6. On Schedule A/B, the Debtor stated his home was valued at $350,000, based on an appraisal he obtained a few days before the Petition Date. R. at 6. Schedule D identified a non-contingent, liquidated, and undisputed secured debt to the Servicer amounting to $320,000. R. at 6. Contingent and unliquidated unsecured debt in an unknown amount owed to Eclipse was listed in Schedule E/F and Schedule H. R. at 6. In Schedule C, a state law homestead exemption of $30,000, the maximum amount in the State of Moot, was properly claimed by the Debtor. R. at 6-7. In the Statement of Financial Affairs, the Debtor also disclosed that he made payments to Pink within one year prior to the Petition Date in the aggregate amount of $20,000. R. at 7.

The chapter 13 plan filed by the Debtor proposed making payments to creditors over a three-year period. R. at 7. Regarding the mortgage loan, the Debtor proposed curing the prepetition arrears and making continuing monthly payments to the Servicer with the chapter 13 trustee acting as a conduit. R. at 7. The chapter 13 plan provided that the value of the Debtor's home was equal to the $350,000 amount stated in Schedule A/B. R. at 7. In addition, the plan also stated that, given the homestead exemption and the secured indebtedness, the Debtor maintained no equity in his

home as of the Petition Date. R. at 7. In order to fund the plan, the Debtor proposed solely using the future earnings derived from Final Cut. R. at 7.

In February 2022, the bankruptcy court confirmed the Debtor's plan. R. at 8. Under this confirmed plan, the Debtor made payments for eight months. R. at 8. In September 2022, the Debtor contracted long-COVID and was unable to continue work at the theater. R. at 7. In October 2022, Final Cut permanently closed, which caused Eclipse to commence foreclosure proceedings. R. at 8. Without income from Final Cut, the Debtor could no longer make payments under the plan and converted his case to a chapter 7. R. at 8.

As part of the conversion to chapter 7, Vera Lynn Floyd ("Trustee") was appointed as Trustee to administer the estate. R. at 9. During the chapter 7 section 341 meeting of creditors, Debtor mentioned that homes in his neighborhood were selling at a premium, consistent with the nationwide increase in home values following the pandemic. R. at 9. An appraisal of Debtor's home commissioned by the Trustee confirmed that the non-exempt equity in the home had increased by $100,000 since the Petition Date due to the rise in home values and the Debtor making payments on his mortgage. R. at 9, 12. In an effort to follow a trustee's duty for the benefit of creditors under 11 U.S.C. § 704(a)(1), the Trustee began marketing the home for sale. R. at 9. During this time, Eclipse offered to purchase the alleged preference claim against Pink and the home for $470,000. R. at 9. The Trustee was content with Eclipse's offer and believed it would maximize the value of the assets for the benefit of creditors of the estate, so the Trustee filed a motion (the "Sale Motion"). R. at 9. The Debtor objected to the Sale Motion on the grounds that any post-petition, pre-conversion increase in equity of his home should inure to his benefit and that the Trustee's statutory ability to avoid and recover transfers under sections 547 and 550 cannot be sold.

II. Procedural History

The United States Bankruptcy Court for the District of Moot ruled in favor of Debtor on both issues. First, the bankruptcy court held that any post-petition, pre-conversion increase in the equity of the home should inure to the benefit of the debtor. R. at 10. Second, the bankruptcy court held that the Trustee's statutory ability to avoid and recover transfers under sections 547 and 550 cannot be sold. R. at 10. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court's decisions. R. at 24.

STANDARD OF REVIEW

The questions presented are purely issues of law and involve statutory interpretations of the Bankruptcy Code. In reviewing cases originating in bankruptcy, issues of law are reviewed *de novo*. *Matter of Berryman Prod., Inc.*, 159 F.3d 941, 943 (5th Cir. 1998).

SUMMARY OF ARGUMENT

The Thirteenth Circuit incorrectly held that any post-petition, pre-conversion equity in Debtor's property belongs to the debtor when a bankruptcy has been converted from chapter 13 to chapter 7. First, this Court should adopt the view of the Ninth Circuit that 348(f) clearly states that the increased equity of property belongs to the estate in a conversion from chapter 13 to chapter 7. Secondly, even if the Court examines the legislative history, it does not change the outcome, and the post-petition, pre-conversion appreciation still belongs to the estate in a conversion from chapter 13 to chapter 7. Finally, adopting the Ninth Circuit's view does not deter debtors from filing under chapter 13 and ensures fair payments to creditors.

Under the Ninth Circuit's view in *Matter of Castleman*, a debtor's home is a part of the bankruptcy estate, and upon conversion from chapter 13 to chapter 7, the value of the home was

available to the trustee for the benefit of the creditors. 75 F.4th 1052, 1058 (9th Cir. 2023). The Court reached this conclusion based on the plain language of the statutes.

Section 348(f)(1)(A) states in pertinent part that the "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 possession of or is under the control of the debtor on the date of conversion. 11 U.S.C. § 348(f)(1)(A). When read along with sections 541(a)(1) and 541(a)(6) of the Bankruptcy Code, it is clear that post-petition appreciation inures to the chapter 7 bankruptcy estate and not the debtor because the equity is a characteristic of property, not property itself. Since it was a characteristic of the home, which was part of the original chapter 13 estate, it now becomes part of the converted chapter 7 estate.

Furthermore, 11 U.S.C. § 522(b)(1) governs exemptions the Debtor may claim and does not allow any excess of the statutory amount. Based on the relevant provisions of section 522, the Debtor is entitled only to exemptions in property under State law or under Federal law. The Ninth Circuit in *Wilson v. Rigby* reemphasized that a "debtor's exemptions have long been fixed at the date of filing of the bankruptcy petition." 909 F.3d 306, 308 (9th Cir. 2018). The court also held the snapshot rule "determines not only what exemptions a debtor may claim, it also fixes the value that a debtor is entitled to claim in her exemptions." *Id*. In this case, the Debtor's exemption was fixed at the prior date of the filing of the bankruptcy petition. Even if the Debtor was able to claim a further exemption, the exemption would not be feasible as the Debtor has already claimed the maximum amount for a homestead exemption in the State of Moot, which is maxed at $30,000.

Secondly, even though the plain language is unambiguous, if the Court examines the legislative history, it would not change the result. The legislative history of the 1994 amendments does not resolve any ambiguity and causes more confusion. The courts who have found ambiguity

in the statute cite to a House Report from 1994 that speaks about an amendment to fix a split amongst case law. This House Report sought to clarify "what property is in the bankruptcy estate when a debtor converts from a chapter 13 to a chapter 7." H.R. Rep. No. 103-835, at 57 (1994). The amendment resolved the issue by allowing any property acquired after the initial bankruptcy petition to not be included in the converted estate. However, this does not address equity and appreciation since these two things are characteristics of the property that cannot be claimed as separate property interests. The confusion from this House Report stems from a hypothetical contained in the report. The court in *In re Castleman* has made clear that this hypothetical does not apply to the current case and that section 348(f) does not address the effect of conversion on the paydown of secured debt during the chapter 13 case or changes in the value of pre-petition assets. *In re Castleman*, 631 B.R. 914, 919 (Bankr. W.D. Wash. 2021). This argument was also rejected by the Eighth Circuit Bankruptcy Panel because 348(f) "does not address whether debtors are entitled to retain post-petition, pre-conversion equity resulting from market appreciation, asset improvements or repairs." *In re Goetz*, 651 B.R. 292, 299 (B.A.P. 8th Cir.). Since this scenario does not address the facts of this present case and is not codified in the actual text of 348(f), it is not appropriate for the Court to read into the statute an unstated provision regarding the treatment of post-petition, pre-conversion changes in the property value.

The 2005 amendments to section 348(f) and the subsequent legislative history also do not change the outcome under *Castleman*. In 2005, Congress amended the Bankruptcy Code and altered 348 to include a provision that addressed the valuation of property under a chapter 13 case. However, this valuation would only apply to cases converted to chapter 11 or chapter 12, not chapter 7. 11 U.S.C. § 348(f)(1)(B). The amendments also did not address whether the equity must go to the debtor or the estate. Looking at the development of 348(f) and subsequent statutes, the

legislative history does not contradict the *Castleman* view and requires the Court to allow the equity to remain with the estate.

Thirdly, adopting the view in *Castleman* does not deter debtors from filing under chapter 13 and ensures fair payments to creditors. The debtor may claim that if the Court adopts the *Castleman* view, then it could lead to debtors being deterred from filing under chapter 13, which Congress did not intend to happen. However, this argument has already been rejected by the bankruptcy court in *In re Adams* because debtors still gained the benefit of chapter 7 upon conversion. 641 B.R. 147, 153-54 (Bankr. W.D. Mich. 2022). It was also held in *Adams* that allowing the equity to inure to the estate protects the debtor from "adverse consequences" of conversion to chapter 7. 641 B.R. at 156. Further, the court in *In re Goetz* points out that the underlying policy of 348(f)(1)(B) is that the parties should be in the same position as they would have been if the debtor had originally filed under chapter 7. 647 B.R. at 412.

Further, it is well known that a chapter 13 bankruptcy is better than a chapter 7 because a debtor gets to keep most of their assets, and creditors are likely to get more out of a chapter 13 than a chapter 7. Since creditors are entitled under the Bankruptcy Code to be paid fairly, then it is not against the Code to give them equity. Since Congress's purpose to promote chapter 13 was accomplished in the 1994 amendments, the Court may not try to achieve a "better policy outcome," for that is the task of Congress. *Adams*, 641 B.R. at 156 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000)).

The Thirteenth Circuit also incorrectly held that the trustee cannot sell the power to avoid and recover transfers under sections 547 and 550. First, preference actions are property of the estate that can be sold by the trustee. Secondly, the plain language of sections 547 and 550 vests clear power in the trustee for the benefit of the estate. Thirdly, sections 547 and 550 enable the trustee to

avoid and sell preferences for the preservation of the estate. Finally, preventing the sale of preferences would undermine the Code's core mission of preserving the value of the estate.

This analysis should begin with 11 U.S.C. § 541(a), which clearly states any interest in property acquired after the commencement of the case is property of the estate. The Thirteenth Circuit asserts that chapter 5 causes of action do not fall within the scope of section 541(a)(1) because they did not exist prior to the petition date but were created on the petition date. R. at 32. The majority attempts to confine preference actions to the trustee in a manner directly contradictory to the language of the Code and relevant case law. Namely, the majority references *In re Simply Essentials LLC* to state that a trustee's avoidance powers are not property of the estate. 78 F.4th 1006, 1008 (8th Cir. 2023). This reasoning is in direct contradiction to *In re Simply Essentials LLC'*s holding that estate property includes a debtor's "inchoate or contingent" interests. As Justice Barrett states in her dissent, the majority fails to recognize that section 541(a)(7) includes chapter post-petition causes of action. R. at 32. The majority ignores the reasoning in *Simply Essentials* in dismissing whether the trustee's avoidance powers themselves are property of the estate.

Secondly, the plain language of sections 547 and 550 vests clear power in the trustee for the benefit of the estate. Sections 547 and 550 are positioned within the wider framework of the Bankruptcy Code, and a preference cause of action is created under section 547(b). R. at 32 (citing *Sec. Inv'r Prot. Corp. V. Bernard L. Madoff Inv. Sec., LLC,*460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011) ("Property of the estate therefore includes any cause of action the debtor had on the petition date, as well as avoidance actions created on the petition date."). In understanding this broader context, one must look to Senate Report 95-989. Senate Report 95-989 recognizes that the purpose of section 547(b) is two-fold: (1) to promote the Bankruptcy Code's policy of equal distribution among a debtor's creditors and (2) to discourage creditors from unfairly pursuing collection efforts

against an insolvent debtor at the expense of other creditors." S. Rep. No. 95-989 (1978). Critically, the chapter 7 trustee is a fiduciary of the estate whose principal duty is to administer estate property to maximize distribution to unsecured creditors, whether priority or general unsecured. *In re Markisich*, 2023 WL 8100718 (Bankr. E.D.N.Y. 2023). Thus, the privileges enumerated in sections 547 and 550 cannot be read in a vacuum.

Reading in a broader context, it is clear that section 541's definition of property of the estate is synonymous with "interest of the debtor in property" 11 U.S.C. § 541. The estate comprises all legal or equitable interests of the debtor in property as of the case's commencement. S. Rep. No. 95-989 (1978). Therefore, avoidance actions may be sold or transferred for a specific sum. *Id.* (citing *In re P.R.T.C.*, *Inc.*, 177 F.3d 774, 781 (9th Cir. 1999)).

Thirdly, sections 547 and 550 enable the trustee to avoid and sell preferences for the preservation of the estate. In preference litigation, it is critical to ascertain when a transfer is "made" since a creditor is potentially vulnerable to avoidance only for a limited discrete time period after the making of the transfer. Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 Am. Bankr. Inst. L. Rev. 425, 429 (2005). A trustee's avoidance powers are central to that determination. Preference actions are governed by the wider framework of chapter 5 of the Bankruptcy Code. In addition to the parameters of the 2005 amendments, significant effort has been made to identify the purpose of these sections within the wider framework of the Code. Senate Report 95-989 enumerates the interconnected nature of these sections, an interconnectedness which is recognized in *United States v. Whiting Pools, Inc.* 462 U.S. 198, 204 (1983).

Finally, preventing the sale of preferences would undermine the Code's core mission of preserving the value of the estate. The trustee's ability to avoid and sell preferences is grounded in the legislative history of the Code's 1994 and 2005 amendments. Nowhere is this more evident

than in the litany of chapter 7 litigation throughout the Second, Fifth, Tenth, and Eleventh Circuits. When a debtor files a chapter 7 bankruptcy proceeding, virtually all the debtor's assets are automatically vested in the bankruptcy estate. *In re Tessmer*, 329 B.R. 776, 778 (Bankr. M.D. Ga. 2005). Once the bankruptcy petition has been filed, the trustee is the real party in interest and the only party withstanding to prosecute causes of action belonging to the estate. *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1272 (11th Cir. 2004). In being the sole party to prosecute causes of action, the trustee, above all else, is responsible for the preservation of the estate. This responsibility in certain situations necessitates the avoidance and sale of specific preferences. A power that can be transferred to individuals other than the trustee within the language of the Code for the preservation of the estate.

ARGUMENT

This Court should reverse the Thirteenth Circuit's decision because any post-petition, pre-conversion equity inures to the bankruptcy estate when a bankruptcy has been converted from a chapter 13 to a chapter 7 based on the unambiguous statutory language of the Bankruptcy Code. This Court should also reverse the circuit court's decision because the trustee can sell the power to avoid and recover transfers based on the plain language of sections 547 and 550.

I. This Court should reverse the Thirteenth Circuit and hold that any post-petition, pre-conversion equity in Debtor's property belongs to the estate when a bankruptcy has been converted from a chapter 13 to a chapter 7.

This Court must hold that any post-petition, pre-conversion equity in Debtor's property belongs to the chapter 7 estate when there has been a conversion from chapter 13. The Bankruptcy Code is clear, based on the plain language, that "any property of the estate at the time of the original filing [of the chapter 13] that is still in debtor's possession at the time of conversion once again becomes part of [the chapter 7] bankruptcy estate." *Matter of Castleman*, 75 F.4th 1052, 1058 (9th

Cir. 2023). This interpretation is in accord with the legislative history and does not contradict the intent of Congress.

A. This Court should adopt the *Castleman* view that 348(f) clearly states that the increased equity of property belongs to the estate in a conversion from chapter 13 to chapter 7.

This Court should adopt the Ninth Circuit view in *Castleman* that the increased equity should go to the chapter 7 estate in this case. There is a split in the case law between the Ninth and Tenth Circuit about whether the increased equity should go to the debtor or the estate. The Tenth Circuit has held that proceeds from the sale of a debtor's home belong to the debtor, and not the estate, upon conversion from chapter 13 to chapter 7 bankruptcy. *In re Barrera*, 22 F.4th 1217, 1226 (10th Cir. 2022). However, the Ninth Circuit has held a debtor's home is a part of the bankruptcy estate, and upon conversion from chapter 13 to chapter 7, the value of the home was available to the trustee for the benefit of the creditors. *Matter of Castleman*, 75 F.4th at 1058. This Court should adopt the conclusion reached in *Castleman* that the value of the home is part of the chapter 7 estate because the plain language supports such a conclusion.

In interpreting the Bankruptcy Code, the first step is to determine "whether the language [of a statute] has a plain and unambiguous meaning with regard to the particular dispute." *Castleman*, 75 F.4th at 1055 (quoting *Hawkins v. Franchise Tax Bd. Of Cal.*, 769 F.3d 662, 666 (9th Cir. 2014). If the plain meaning is unambiguous, it controls, and no further inquiry is necessary. *Hawkins*, 768 F.3d at 666; *Puerto Rico v. Franklin Cal. Tax-Free Tr*., 579 U.S. 115, 125 (2016); *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997).

i. Sections 348 and 541 unambiguously show the property of the estate includes any post-petition, pre-conversion appreciation of the Debtor's estate.

Section 348(f)(1)(A) states in pertinent part that the "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)(A). The term "property of the estate" is a term of art that appears throughout the Bankruptcy Code and may not have a hard and fast meaning when read in isolation. However, this does not mean that the term is ambiguous. "Statutory construction… is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The Ninth Circuit found clarity on this phrase when it turned to other provisions of the Bankruptcy Code, specifically sections 541(a)(1) and 541(a)(6). The former provides that when a debtor files for bankruptcy, it creates an estate which includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The estate also includes all "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." 11 U.S.C. § 541(a)(6).

The Ninth Circuit concluded that the broad language in sections 541(a)(1) and 541(a)(6) meant that post-petition appreciation inures to the chapter 7 bankruptcy estate and not the debtor. *Matter of Castleman*, 75 F.4th at 1056. The bankruptcy court in *In re Goetz* found the relevant provision of section 541(a), when read with section 348(f), clarified that this "broad definition [of property] captures the debtor's entire ownership interest in each asset that exists on the petition date without fixing the estate's interest to the precise characteristics the asset has on that date." 647 B.R. 412, 416 (Bankr. W.D. Mo. 2022). Bankruptcy courts have further held that value and equity cannot be separate from the property and, therefore cannot, be after-acquired property since it is an inseparable characteristic of the property. *Matter of Castleman*, 75 F.4th at 1056. The bankruptcy court in *In re Adams* further clarified that the purpose of section 541 is meant to "aggregate to the

greatest extent possible, albeit with some exceptions, every stitch of property belonging to a debtor so that it can be used to pay claims." 641 B.R. at 151.

Sections 348(f)(1)(A) and 541(a) clearly show that property of the estate consists of all property at the time of the original filing of the chapter 13 bankruptcy. At the time of the initial filing in this case, Debtor possessed a house that was initially worth $350,000. R. at 6. There was a lien on the house for $320,000, and Debtor had a homestead exemption worth $30,000. *Id*. After this valuation, Debtor's chapter 13 plan was confirmed, and he proceeded to make payments under the plan until various circumstances prevented him from making payments. R. at 8. For these reasons, Debtor converted to chapter 7. *Id*. Between his initial filing under chapter 13 and his conversion to chapter 7, Debtor made payments on the mortgage. R. at 12. During this time, there was also a rise in home market prices, which ultimately led to the value of Debtor's home increasing by $100,000. R. at 9.

Under section 348(f)(1)(A), the house was part of the initial chapter 13 bankruptcy estate, and upon conversion, became part of the chapter 7 estate. Further, the Ninth Circuit and other lower courts have recognized the value of the home is not a separate piece of property. Rather, value and equity are characteristics of property and cannot be separated. Since the home was always part of the estate, the value was also part of the estate. Regardless of any equity that may have accumulated post-petition, it is an inseparable part of the home in question and, therefore, cannot be deemed after-acquired property.

The Thirteenth Circuit argued in the majority below that to include the appreciation into the bankruptcy estate would deter debtors from initially filing a chapter 13 and render section 348(f)(2) of useless. R. at 13. However, the statute is not rendered useless for two reasons. First, when the Debtor files a chapter 13, all the property they currently possess is considered property of the

bankruptcy estate. 11 U.S.C. § 348(f)(1)(A). This means that the house is a part of the chapter 13 estate, as well as all other property Debtor had at the time of filing. As the Ninth Circuit and other courts have shown, the value of the property cannot be separated from the property, and therefore, it is also included in the estate.

Secondly, section 348(f)(2) provides, "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. § 348(f)(2) (emphasis added). This section does not apply to the appreciation of the value of a home, because the value cannot be separated from the home. The appreciation in the home, therefore, cannot be deemed an after-acquired property and is not considered in a 348(f)(2) bad faith analysis. This interpretation does not render 348(f)(2) invalid because this section still applies if the Debtor, for example, bought a new car during the chapter 13 bankruptcy and converted to a chapter 7. If the debtor acted in bad faith, then the car would become part of the chapter 7 estate.

In this case, the Debtor converted in good faith, and any after-acquired property he may have gained is not part of the chapter 7 estate. R. at 8. All the property he had at the initial petition date is part of the converted chapter 7 estate, which includes the value attached to all his property. Debtor will still retain his homestead exemption, which is an interest in his home, and upon the sale of the home, will receive the $30,000 he exempted. Further, Debtor is entitled to exempt only that which federal or state law allows him to exempt, and it is too late for him to exempt the increased equity in his property.

ii. Section 522 governs exemptions the Debtor may claim and does not permit any excess of the amount allowed.

Based on relevant provisions of section 522, the Debtor is entitled only to those exemptions listed in paragraph two (2) or three (3) of section 522. 11 U.S.C. § 522(b)(1). Paragraph two (2)

allows for the Debtor to claim exemptions in property under State law, while paragraph three (3) allows the Debtor to claim exemptions under Federal law. 11 U.S.C. § 522(b)(2)-(3). In this case, Debtor opted for the State law exemption in the State of Moot.

In the Ninth Circuit, the court in *Wilson v. Rigby* reemphasized that a "debtor's exemptions have long been fixed at the date of filing of the bankruptcy petition." 909 F.3d at 308. The court also held the snapshot rule "determines not only what exemptions a debtor may claim, it also fixes the value that a debtor is entitled to claim in her exemptions." *Id*. In this case, since the Debtor claimed his exemption at the initial filing, his exemptions are finalized, and cannot be altered or taken from him. Even if the Debtor was allowed to claim a further exemption upon conversion to another chapter, the State of Moot only allows a homestead exemption of $30,000, which Debtor claimed the full amount, and is twice as much as the amount offered under federal law.[1] The Debtor therefore has received all the benefits provided to them under the law and cannot ask the Court to create additional rules that are not provided by the Bankruptcy Code.

B. Even if the Court examines the legislative history, it does not change the outcome, and the post-petition, pre-conversion appreciation still belongs to the estate in a conversion from chapter 13 to chapter 7.

Even though the plain language is unambiguous, if the Court examines the legislative history, it does not change the result. The Circuits have split because of the alleged ambiguity and have turned to the legislative history for clarity. The Tenth Circuit looked to the legislative history of the 1994 amendments of the Bankruptcy Code to provide context behind the statutory construction of section 348. *Barrera*, 22 F.4th at 1225. Relying upon this analysis, the Tenth Circuit concluded that "the pre-conversion house-sale proceeds are not property of the chapter 7 estate."

[1] Under federal law, debtors may only claim up to $15,000 in real and/or personal property. 11 U.S.C. Sec. 522(d)(1)

Id. However, upon further inspection, the legislative history has been misrepresented and caused confusion among the courts.

i. The legislative history of the 1994 amendments do not resolve any ambiguity and have caused more confusion.

Courts who find ambiguity in the statute, including the majority below, point to the House Report from 1994 that mentioned an amendment to fix a split in the case law. The House Report, in pertinent part, said that the amendment would clarify "what property is in the bankruptcy estate when a debtor converts from a chapter 13 to a chapter 7." H.R. Rep. No. 103-835, at 57 (1994). The amendment resolved the issue because now any property acquired after the initial bankruptcy petition would not be included in the converted estate. This does not address equity and appreciation because these two things are characteristics of property that cannot be claimed as separate property interests.

The confusion has been injected by the lower courts when they cite to the hypothetical contained in the House Report. The bankruptcy court in *In re Castleman* found that this hypothetical does not apply. This example describes the risk of losing a homestead to sale by a chapter 7 trustee due to equity created by payments on secured debt during the chapter 13 case. The bankruptcy court held that section 348(f) does not address the effect of conversion on the paydown of secured debt during the chapter 13 case or changes in the value of pre-petition assets. *Castleman*, 631 B.R. at 919.

The Eighth Circuit Bankruptcy Panel rejected the same argument that the majority made in the Thirteenth Circuit because 348(f) "does not address whether debtors are entitled to retain post-petition, pre-conversion equity resulting from market appreciation, asset improvements or repairs." *Goetz*, 651 B.R. at 299. If the Court were to accept this type of argument, it would require the Court to "read this clarification into the statute." *Id*.

Since this scenario does not address the facts of this present case and is not codified in the actual text of section 348(f), it is not appropriate for the Court to read into the statute an unstated provision regarding the treatment of post-petition, pre-conversion changes in the property value. *Id*. Therefore, since the plain language of section 348(f)(1)(A) is not contradictory to the intent of the drafters, the equity inures to the benefit of the estate.

ii. The 2005 amendments to section 348(f) and the subsequent legislative history do not change the outcome under Castleman.

In 2005, Congress amended the Bankruptcy Code. Specifically, Congress amended section 348 to include a provision that addressed the valuation of property under a chapter 13 case and that the valuation would apply only in cases converted to a chapter 11 or chapter 12, but not in a chapter 7. 11 U.S.C. § 348(f)(1)(B). The 2005 amendments did not address whether the equity must go to the debtor or the estate. On the contrary, section 348(f)(1)(B) strengthens the Petitioner's argument because section 348(f)(1)(B) refers to the valuation of the property and does not apply to exemptions.

In *In re Cofer*, the court held that section 348(f)(1)(B) does not apply to exemptions because they are "frozen" per the snapshot rule. 625 B.R. 194, 199 (Bankr. D. Idaho 2021). Further, in *In re Adams*, the court denied Debtor's argument that section 522 governs the value of the exemption. 641 B.R. at 152. The court found that the value of the exemption does not govern the value of the estate's interest, which the exemption claim depends on. *Id*. Section 348(f) says that such valuation does not come over into the chapter 7 case, and the Code does not allow the exemption to be altered upon conversion. *Id*. at 153.

Therefore, looking back at the development of 348(f) and subsequent statutes, the legislative history does not contradict the *Castleman* view and requires the Court to allow the equity to remain with the estate.

C. Adopting the *Castleman* view does not deter debtors from filing chapter 13 and ensures fair payments to creditors.

The Petitioner recognizes that one purpose of the Code is to give the debtor a fresh start. However, that is not the only purpose. Many courts have recognized that one of the purposes behind the Bankruptcy Code is to provide and ensure fair payment to creditors. *See, e.g., Copley v. United States*, 959 F.3d 118, 125 (4th Cir. 2020); *In re Kunz*, 489 F.3d 1072, 1074-1075 (10th Cir. 2007), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006).

One public policy point offered by courts is that debtors should get the benefit from increased equity because they should not be punished for pursuing a claim under chapter 13. *Barrera*, 22 F.4th at 1217. The debtor may claim that if the Court adopts the *Castleman* view, then it could lead to debtors being deterred from filing chapter 13, which Congress did not intend to happen. However, in *In re Adams*, the bankruptcy court denied this argument because debtors still benefited from chapter 7 upon conversion. 641 B.R. at 153-54. Further, the court in *In re Goetz* points out that the underlying policy of section 348(f)(1)(B) is that the parties should be in the same position as they would have been if the debtor had initially filed a chapter 7. 647 B.R. at 412. The value of the property cannot be separated from the home and, therefore, is not an after-acquired property that goes to the debtor. It was always a part of the property and, therefore, a part of the chapter 7 estate. Any actual property or assets that were acquired post-petition would still be exempt from the chapter 7 estate.

It was also held in *In re Adams* that allowing the equity to inure to the estate protects the debtor from "adverse consequences" of conversion to chapter 7. 641 B.R. at 156. For example, in *In re Lang,* the court had to decide whether the debtor had to account for value lost in the depreciation of a vehicle. 437 B.R. 70, 71 (Bankr. W.D. N. Y. 2010). The debtor filed a petition under chapter 13, creating an estate that included her car. *Id*. The car, at the time of filing, was

worth $9,650. Debtor remained in chapter 13 until she exercised her right to convert under chapter 7. *Id*. The car had depreciated in value and was only worth $7,250 at the time of conversion. *Id*. at 72. The chapter 7 trustee then filed a motion to compel the debtor to surrender the car and pay for any shortfall in the price of the vehicle. *Id*. The court, relying on section 348(f)(1)(A), found that the vehicle was part of the estate and that only the depreciated vehicle was available for administration, and "any lost depreciation is simply no longer an asset of the estate." *Id*.

If this Court were to interpret the Code to mean that any appreciation in equity belongs to the Debtor, then the Debtor would be responsible to the estate for any value lost in the property that would become part of the chapter 7 estate. This is antithetical to the purpose of the Bankruptcy Code, which is to give the debtor a fresh start.

Further, it is well known that a chapter 13 bankruptcy is better than a chapter 7 because a debtor gets to keep most of their assets, and creditors are likely to get more out of a chapter 13 than a chapter 7. Since creditors are entitled under the Bankruptcy Code to be paid fairly, it is not against the Code to give them equity. Since Congress's purpose to promote chapter 13 was accomplished in the 1994 amendments, the Court may not try to achieve a "better policy outcome," for that is the task of Congress. *Adams*, 641 B.R. at 156 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000)). This point is emphasized by the interpretation adopted by *Castleman*, which "is perfectly congruent with the overall policies [...] the bankruptcy system seeks and presumably with the legislative intent behind other restrictions imposed when Congress enacted § 348(f) and amended the same to include § 348(f)(2)." Morgan Decker and Matthew Barr, *Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought*, 2022 Ann. Surv. of Bankr. Law 12 (2022). This view also allows "potential

debtors their fresh start while providing some accountability and limitation on what a debtor can keep and protect while discharging their debts." *Id*.

Based on the reasons given, this Court should reverse the Thirteenth Circuit and adopt the *Castleman* view because it does not conflict with the policy goals of Congress and ensures fair payment to creditors.

II. This Court should reverse the Thirteenth Circuit's finding that the trustee cannot sell the power to avoid and recover transfers under sections 547 and 550.

This Court must hold that a trustee may sell the power to avoid and recover transfers under sections 547 and 550 of the Bankruptcy Code. Under section 547(b), a 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, avoid any transfer of an interest of the debtor in property. 11 U.S.C. § 547(b). Furthermore, under section 550, the trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property from the initial transferee of such transfer or any immediate or mediate transferee of such initial transferee. 11 U.S.C. § 550(a).

A. Preference actions are property of the estate that can be sold by the trustee.

Preference actions are property of the estate that can be sold by the trustee because the plain language of section 541(a)(7) vests any interest in property acquired after the commencement of the case as property of the estate. 11 U.S.C. § 541(a)(7). The Thirteenth Circuit asserts that chapter 5 causes of action do not fall within the scope of section 541(a)(1) because they did not exist prior to the petition date but were created on the petition date. R. at 32. However, as Justice Barrett states in her dissent, the majority fails to recognize that section 541(a)(7) includes chapter post-petition causes of action. *Id.* at n.23.

Section 541(a) accounts for the practical reasons for preference sales enumerated in sections 547(b) and 550. Estate property includes a debtor's "inchoate or contingent" interests. *Simply Essentials,* 78 F.4th at 1008. In *In re Simply Essentials LLC*, the court examined whether the purpose of a trustee's avoidance powers, including a preference statute, is to discourage creditors from engaging in unusual collection practices that help to dismember the debtor and hasten its slide into bankruptcy and to facilitate the goal of equal distribution among creditors. *Id.* The court noted the United States Supreme Court's decision in *Whiting Pools*, recognized section 541(a)(1) should be read "to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *Id.* (quoting *United States v. Whiting Pools Inc.*, 462 U.S. 198, 205 (1983)). These other provisions include the timing of a preferential transfer.

Debt is "antecedent," within the meaning of the preference provision, if it is incurred before the alleged preferential transfer. *In re Miniscribe Corp.*, 123 B.R. 86 (Bankr. D. Colo. 1991). In *In re Miniscribe Corp*., the court recognized that an avoidable preference must meet all five elements set forth in section 547(b). Under section 547(b), 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 any interests of the debtor in property: to or for the benefit of the creditor; for or on account of an antecedent debt owed by the debtor before such transfer was made; made while the debtor was insolvent; made on or within 90 days before the date of the filing of the petition or between 90 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 that enables such creditor to receive more than such creditor would receive. 11 U.S.C. § 547(b). These avoidance privileges also require a broad reading within the meaning of section 550(a).

The bankruptcy trustee is not precluded from recovering a preferential transfer unless the transfer is scheduled for distribution to holders of unsecured claims; to the contrary, section 550(a) speaks of the benefit to the bankruptcy estate, which denotes the set of all potentially interested parties, rather than any particular class of creditors. *In re NETtel Corp., Inc.*, 364 B.R. 433 (Bankr. D.D.C. 2006).

In this case, the majority misaligns the debtor's discharge interest with the trustee's obligations to preserve the estate's value. The majority ignores the reasoning in *Simply Essentials* in dismissing whether the trustee's avoidance powers are property of the estate and the ability for the trustee to sell preferences.

B. The plain language of sections 547 and 550 vests clear power in the trustee for the benefit of the estate.

Sections 547 and 550 are positioned within the wider framework of the Bankruptcy Code, and a preference cause of action is created under section 547(b). R. at 32 (citing *Sec. Inv'r Prot. Corp. V. Bernard L. Madoff Inv. Sec., LLC,*460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011) ("Property of the estate therefore includes any cause of action the debtor had on the petition date, as well as avoidance actions created on the petition date."). Guidance for statutory liens under section 545 prescribes the purposes for 547 avoidance privileges.

Section 545 provides further evidence of a trustee's unique ability to avoid and sell preference actions. Under section 545, the trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien first becomes effective against the debtor when the debtor becomes insolvent. 11 U.S.C. § 545. These statutory liens, when read in the context of preference actions as a whole, provide more accurate descriptions of the variability in the discharge of preference actions than those provided by the majority.

Even though a chapter 7 debtor-taxpayer may be relieved of personal liability on an underlying tax debt resulting from bankruptcy discharge, an Internal Revenue Service (IRS) lien in the debtor's real property survives that discharge and cannot be avoided by the debtor even when that debtor lacks equity in the property. *In re Mulligan*, 234 B.R. 229 (Bankr. D.N.H. 1999). In *In re Mulligan*, the court determined that the plaintiff had standing to avoid the defendant's lien because those avoidance powers, in certain instances, allow the debtor to stand in the shoes of the trustee. *Id.* at 233. The court recognized that section 545(2) permits a trustee *or* debtor to take the position of a hypothetical bona fide purchaser and claim the same defenses to the statutory liens on the debtor's property as such a purchaser could claim. *Id.* at 234 (citing *In re Cleary,* 210 B.R. 741, 744 (Bankr. N.D. Ill. 1997)).

i. Section 547(b)'s requirements are rooted in section 704's obligations of a trustee and section 363's collateral definition.

Senate Report 95-989 recognizes that the purpose of section 547(b) is two-fold: (1) to promote the Bankruptcy Code's policy of equal distribution among a debtor's creditors and (2) to discourage creditors from unfairly pursuing collection efforts against an insolvent debtor at the expense of other creditors." S. Rep. No. 95-989 (1978)

The primary duties of a trustee under section 704 prescribe the trustee's ability to recover interest on the sale of a debtor's interest in property. Section 704(a) prescribes that the trustee shall collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest. 11 U.S.C. § 704(a)(1).

The chapter 7 trustee is a fiduciary of the estate whose principal duty is to administer estate property to maximize distribution to unsecured creditors, whether priority or general unsecured. *In re Markisich*, 2023 WL 8100718 (Bankr. E.D.N.Y. Nov. 20, 2023). In *In re Markisich*, the trustee

claimed that the estate was entitled to recover the value of the estate's interest in property and that the trustee had authority to sell the defendants' undivided interests in sale proceeds. *Id.* The court recognized that in chapter 7 cases, the trustee is responsible for managing the assets of the estate to maximize the distribution to creditors. *Id.* at *16. Applying the language of section 704(a)(1), the court further noted that a fiduciary of the estate may be obligated to use section 363(h) to sell an estate's undivided interest in property for the benefit of its creditors, including a family's home. *Id.* This fiduciary obligation is equally apparent when viewed in the context of section 363(b).

Section 363(b)(1) grants a trustee the discretion to sell property of the estate in furtherance of obligations outlined in section 704. The trustee may sell assets that are property of the estate, including causes of action belonging to the estate. *In re Moore*, 608 F.3d 253 (5th Cir. 2010). A shortage of estate assets to 'bankroll' litigation that may represent the only realistic chance for creditor recoveries may require the sale of claims to general cash. *Id.* Additionally, a party in interest may object to the amount of a claim, including one that is nondischargeable, without commencing an adversary proceeding. *In re Wylie*, 654 B.R. 446 (Bankr. E.D.N.Y.). Thus, it is clear that the privileges discussed in *Moore* and *Wylie* allow the obligations laid out in 541(a) to be understood in the same context as sections 363 and 704.

ii. Section 541's definition of "property of the estate" is synonymous with "interest of the debtor in property" in section 547(b).

A transfer of interest of the debtor in property will include a transfer of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 547(b). According to Senate Report No. 95-989, section 541(a)(1) states that the estate comprises all legal or equitable interests of the debtor in property as of the case's commencement. S. Rep. No. 95-989 (1978). To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the

debtor are not effective against the estate. *Id.* Therefore, section 541 is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. *City of Chicago, Illinois v. Fulton*, 592 U.S. 154, 156 (2021).

Causes of action owned by the trustee are intangible items of property of the estate that may be sold. *In re Lahijani*, 325 B.R. 282, 287 (B.A.P. 9th Cir. 2005). In *In re Lahijani*, the court rejected an argument that the avoiding power causes of action cannot be sold to one who would not exercise the powers for the benefit of all creditors. *Id.* at 288. The court's rejection followed the Ninth Circuit's general holding that avoidance actions may be sold or transferred for a specific sum. *Id.* (citing *In re P.R.T.C.*, *Inc.*, 177 F.3d 774, 781 (9th Cir.1999)).

Courts generally authorize a sale when it is justified upon the articulation of a sound business purpose justification: sound business reason or emergency justifies a pre-confirmation sale; the sale has been proposed in good faith; adequate and reasonable notice of the sale has been provided to interested parties; and the purchase price is fair and reasonable. *In re MCSGlobal Inc.*, 562 B.R. 648, 654 (Bankr., E.D. Va. 2017). The sound business purpose is readily apparent when viewed in the context of the Trustee's powers related to the preservation of the Debtor's estate.

In the present case, the majority attempts to confine value as only the "interest in property that the trustee actually recovers. R. at 22. This view directly contradicts *Fulton's* finding that the interest includes all legal and equitable rights of the debtor in property. Furthermore, the majority's view directly contradicts *Lahijani's* recognition that the transfer of interest includes a value that can be transferred for a specific sum. The value of these avoidance privileges are the backbone of sections 547 and 550.

C. Sections 547 and 550 enable the trustee to avoid and sell preferences for the preservation of the estate.

Preference actions are governed by the wider framework of chapter 5 of the Bankruptcy Code. In addition to the parameters of the 2005 amendments, significant effort has been made to identify these sections' purpose within the Code's wider framework. Senate Report 95-987 enumerates the interconnected nature of these sections, which is recognized by *Whiting Pools.*

i. This power is evident in the 2005 amendments to the Code.

In preference litigation, it is critical to ascertain when a transfer is "made" since a creditor is potentially vulnerable to avoidance only for a limited discrete time period after making the transfer. Tabb, *The Brave New World of Bankruptcy Preferences*, at 429. A trustee's avoidance powers are central to that determination.

The congressional goal of encouraging reorganization and Congress' choice of protecting secured creditors indicate that Congress intended a broad range of property, including property for which a creditor has a secured interest, to be included in the estate. *Whiting Pools, Inc.*, 462 U.S. at 204. In *Whiting Pools*, the court stated that section 541(a) acts "as a definition of what is included in the estate, rather than as a limitation" and held that property of the estate includes "any property made available to the estate by other provisions of the Bankruptcy Code," including "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced." R. at 32, 33 (quoting *Whiting Pools, Inc.*, 462 U.S. at 198).

The majority attempts to utilize *Whiting Pools* to show that additional avoidance powers cannot be conveyed to anyone other than the trustee. The majority reasons that sections 547 and 550 cannot be read synonymously with section 541 in determining these avoidance powers. Such a limiting view, however, is not in keeping with the spirit and intent of other relevant sections of the Code.

ii. The trustee's rights and powers are limited by sections 546 and 548.

Section 546 clearly outlines how preference transfers must be treated. The transfer must enable the creditor to whom or for whose benefit it was made to receive a greater percentage of his claim than he would receive under the distributive provisions of the Bankruptcy Code. 11 U.S.C. § 546. According to Senate Report 95-989, "The purpose of the subsection is to protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection." S. Rep. No. 95-989 (1987) at 5838. As the Senate report clearly states, sections 547 and 550 are further supported by section 548.

Under section 548, the trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within two years before the date of filing of the petition. 11 U.S.C. § 548. According to Senate Report 95-989, section 547 substantially modifies present law. It modernizes the preference provisions and conforms them more with commercial practice and the Uniform Commercial Code. S. Rep. No. 95-989 (1978) at 5876. Senate Report 95-989 further recognizes the extensive historical origins of the Bankruptcy Code's lineage: "This section is derived in large part from section 67(d) of the Bankruptcy Act…Its history dates from the statute of 13 Eliz. c. 5 (1570)." *Id.* The trustee may avoid fraudulent transfers or obligations if made with actual intent to hinder, delay, or defraud a past or future creditor. *Id.* If a transferee's only liability to the trustee is under section 548, and if the transferee takes for value and in good faith, then section 548(c) grants the transferee a lien on the property transferred or other similar protection. *Id.*

D. Preventing the sale of preferences would undermine the Code's core mission of preserving the value of the estate.

The trustee's ability to avoid and sell preferences is grounded in the legislative history of the Code's 1994 and 2005 amendments. Nowhere is this more evident than in the litany of chapter 7 litigation throughout the Second, Fifth, Tenth, and Eleventh Circuits. When a debtor files a chapter 7 bankruptcy proceeding, virtually all the debtor's assets are automatically vested in the bankruptcy estate. *Tessmer*, 329 B.R. at 778. This automatic vesting underlies the purpose of the trustee's privileges.

The Bankruptcy Code's definition of estate created upon filing of bankruptcy is very broad and includes causes of action belonging to the debtor at the commencement of the case. *Matter of Swift*, 129 F.3d 792, 795 (5th Cir. 1997). Therefore, section 541(a)(1) creates an estate consisting of all legal or equitable interests of the debtor in property as of the start of the case, including causes of action belonging to the debtor at the case's commencement. *Id.* at 795. When viewed in the context of the timeliness of action, the court noted that this exclusivity comes with broad powers for preserving the estate. *Id.* This power is further apparent in the broad scope of preferential transfers.

A trustee's ability to recover property transferred by preferential transfer or its value is not limited to possessory property interests and applies to non-possessory liens. *In re Trout*, 609 F.3d 1106 (10th Cir. 2010). In *In re Trout*, the trustee appealed a decision by the bankruptcy court that the estate was not entitled to recover the value of real property after the trustee had avoided preferences to preserve liens on the property. *Id.* The trustee argued that the court was obligated to award recovery to the estate under section 550(a), whether as return of property or the equivalent value of the property. *Id*. at 1109. The court disagreed, finding recovery under section 550 to be permissive, not mandatory. *Id.* However, the court did not agree with the bankruptcy court's

restrictive interpretation in one critical aspect: section 550 recovery privileges require additional action by the trustee. *Id.* at 1110 (citing *In re Burns*, 322 F.3d 421 (6th Cir. 2003)).

Generally speaking, pre-petition causes of action are property of the chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue them. *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1272 (11th Cir. 2004). As a result, in a chapter 7 case, property not administered in the bankruptcy proceedings, including property never scheduled, remains the property of the estate. *Id.* at 1272.

Generally, the case law above illustrates the holistic analysis required to understand the trustee's powers and obligations for preserving the estate. The majority attempts to dismiss policy considerations, arguing that unforeseen consequences of statutory enactment are not a sufficient reason for refusing to give effect to the [statute's] plain meaning. R. at 22, 23 (citing *Dodd v. United States*, 545 U.S. 353, 359-60 (2005). Such a statement is disingenuous and discredits the purpose of the Code: to be read as a whole for the preservation of the bankruptcy estate. The majority recognizes that allowing creditors to pursue personal vendettas to be utilized by a neutral trustee would compromise the integrity of the bankruptcy system while simultaneously recognizing Congress' "prescient" accounting for the creditor's ability to recover via a derivative assertion of avoidance powers. R. at 23. The majority ignores the purpose underlying the trustee's avoidance privileges to create an exception for a single debtor, which will adversely affect debtors and creditors. Therefore, the court should reverse the Thirteenth Circuit's decision that sections 547 and 550 do not grant the trustee powers to avoid and recover transfers.

CONCLUSION

This Court should reverse the decision of the Thirteenth Circuit Court of Appeals and hold that (1) any post-petition, pre-conversion increase in equity in a debtor's property inures to the

benefit of the bankruptcy estate upon conversion of a case from chapter 13 to chapter 7 pursuant to 11 U.S.C. §§ 348 and 541, and (2) a chapter 7 trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.