Team 52

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.

Brief for Respondent

Team 52
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether sections 348(f)(1)(A) and 541 of Title of the United States Code (the "Bankruptcy Code") entitle Cpl. Clegg to the post-petition, pre-conversion increase in his home's equity upon his good faith conversion of his bankruptcy case from chapter 13 to chapter 7, when the value of his home at the Petition Date, coupled with the homestead exemption, did not produce any equity?
2. Whether, in the context of a conversion, a newly appointed trustee has the authority to sell an avoidance power as part of the estate, considering that this power was unforeseeable at the time of the initial bankruptcy filing and was not regarded as property of the estate as of the conversion date under section 363?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Background:

Cpl. Eugene Clegg (ret.) ("Cpl. Clegg" and the "Debtor"), a distinguished veteran of the United States Army, lives in the City of Moot. Record ("R.") at 5. A year after retiring in 2011, Cpl. Clegg received his mother's 100% membership interest in Final Cut, LLC ("Final Cut"). *Id.* Through this transfer, Cpl. Clegg also gained ownership and operation of a historic, single-screen movie theater. *Id.* Well-visited by the citizens of the City of Moot, the theater generated consistent net profit each year. *Id.* To renovate the theater with an ornate ceiling and other renovations, Cpl. Clegg borrowed $850,000 (the "Loan") through Final Cut from Eclipse Credit Union ("Eclipse"). *Id.* This loan was Final Cut's first liability. In addition to granting Eclipse a properly perfected "first priority lien on Final Cut's real and personal property," he also executed an unconditional, unsecured personal guaranty in an unlimited amount. *Id.* Eager to aid in the renovation of a beloved city gem, Cpl. Clegg's fellow local veterans volunteered their time. *Id.* Their assistance reduced labor costs to the extent that Cpl. Clegg did not exhaust the proceeds of the loan. *Id.* Cpl. Cleggs was so grateful for their assistance that in early 2017, he donated the remaining proceeds, approximately $75,000, to the Veterans of Foreign Wars. *Id.*

Shortly after the renovations, Final Cut enjoyed three profitable years due to the civic pride citizens of the City of Moot displayed through their regular attendance. *Id.* However, in March 2020, due to the COVID-19 pandemic, the Governor issued a stay-at-home order, which closed the theater's doors for nearly a year. R. at 6. No one could have predicted COVID-19 would plague the economy in such a cruel manner. *Id.* Stuck between a rock and a hard place, on September 8, 2020, Cpl. Clegg turned to his mother, Pink, to borrow an unsecured loan of $50,000. *Id.* Despite the theater reopening in February 2021, the show did not go on as planned, and attendance did not

match pre-pandemic numbers. *Id.* Despite the theater being Cpl. Clegg's sole source of income, he sacrificed his salary to redistribute the money into Final Cut and curve the financial downturn the theater experienced. *Id.*

Cpl. Clegg found himself drowning in a sea of debt when his community no longer poured into the doors of his hometown theater. *Id.* Once Cpl. Clegg fell behind on his home mortgage payments, the Wall Financial Corporation (the "Servicer") commenced foreclosure proceedings. *Id.* To evade homelessness, Cpl. Clegg sought to save his home by filing chapter 13 bankruptcy. *Id.*

Procedural:

On December 8, 2021 (the "Petition Date"), Cpl. Clegg filed chapter 13 bankruptcy. R. at 6. Based on an appraisal of his home from a few days before the Petition Date, Cpl. Clegg reported on Schedule A/B that the value of his home was $350,000. *Id.* No one disputed the value of the home. *Id.* On Schedule D, Cpl. Clegg reported "a non-contingent, liquidated and undisputed secured debt to the Servicer" of $320,000. *Id.* Schedule C exempted the $30,000 equity through the state law homestead exemption.[1] R. at 6 -7. Schedule E/F and Schedule H identified "a contingent and unliquidated unsecured debt in an unknown amount owed to Eclipse." *Id.* Lastly, Cpl. Clegg reported an aggregate of payments of $20,000 he made to Pink within one year of the Petition Date on his Statement of Financial Affairs. R. at 7.

On February 12, 2022, after a rocky journey, the bankruptcy court confirmed the chapter 13 plan for a three-year period. *Id.* Cpl. Clegg saved his home because the homestead exemption removed the equity in his home. R. at 7-8. All parties were confident in Final Cut's ability to regain profitability; therefore, Cpl. Clegg funded the plan solely through his future earnings from Final

[1] The maximum homestead exemption in the State of Moot is $30,000. R. at 6-7.

Cut. R. at 7. However, this endeavor to reorganize his debts soon took a turn for the worse once Eclipse learned of Cpl. Clegg's donation to the veterans who volunteered their time to renovate the beloved hometown theater. *Id.* Furious about Cpl. Clegg's donation, Eclipse initiated an adversary proceeding against Cpl. Clegg seeking non-dischargeability of the Loan debt.[2] *Id.* Additionally, Eclipse objected to the plan under the allegation that Cpl. Clegg did not propose it in good faith; however, after weeks of negotiations, Eclipse withdrew its objection once Cpl. Clegg agreed to grant it a claim of $150,000; $25,000 of which is non-dischargeable. R. at 8. To intensify matters, the chapter 13 trustee, under section 1325(a)(4), objected to the plan, believing that under a hypothetical chapter 7 liquidation, a trustee would recover the alleged preferential transfers to Pink and distribute the assets to creditors. R. at 7. Cpl. Clegg amended the plan and agreed to pay an additional $20,000 to the creditors. *Id.* Satisfied with this amendment, the chapter 13 trustee forfeited her right to avoid and recover the prior payments made to Pink. R. at 8.

Once all parties agreed to the plan and Cpl. Clegg's plan gained confirmation, he faithfully made payments until COVID-19 further wreaked havoc on his life. *Id.* Cpl. Clegg suffered from long COVID, which caused him to permanently close his theater. *Id.* Without income from Final Cut, Eclipse commenced foreclosure proceedings against Final Cut. *Id.* Unable to appease his creditors alone, the crushing debt forced Cpl. Clegg to convert to chapter 7. *Id.* During the eight months of payment, the Servicer received $10,000 in payments, and the chapter 13 trustee released all the payments reserved for Eclipse to Cpl. Clegg. *Id.* Matters continued to worsen for Cpl. Clegg. The chapter 7 trustee (the "Trustee") sought to appraise and sell Cpl. Clegg's home. Id. The Trustee wanted to sell Cpl. Clegg's home because of the post-petition date increase in value of $100,000. R. at 9. Motivated by the home's value increase since the Petition Date, Eclipse proposed

[2] This declaration of dischargeability is under section 523(a)(2)(A).

purchasing Cpl. Clegg's home and the alleged preference claim the prior chapter 13 trustee had forgone. *Id.* In compliance, the Trustee eagerly filed a motion (the "Sale Motion") to sell Cpl. Clegg's home and the alleged preference claim to Eclipse. *Id.* Cpl. Clegg objected to the Sale Motion. Id. He argued that the Trustee could not sell his home because any post-petition, pre-conversion increase in equity belonged to him since the equity did not exist on the Petition Date. *Id.* He also argued that the Trustee could not sell the preferential transfer claim under sections 547 and 550 because the avoidance power, in this case, is not "property of the estate". *Id.* After the bankruptcy court ruled in favor of Cpl. Clegg on both objections, the Trustee appealed to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court's ruling, and now, the Trustee appeals to the Supreme Court of the United States. R. at 4.

SUMMARY OF THE ARGUMENT

Where the term "property of the estate" may be broad, courts should not read it to stretch the purpose and policy of the Bankruptcy Code beyond the textual constraints provided. All post-petition, pre-conversion increases in equity of Cpl. Clegg's home, following a chapter 13 to chapter 7 conversion, belongs to Cpl. Clegg. Key to this argument is the interpretation of Bankruptcy Code sections 348, 541, and 522, with a central reliance on 11 U.S.C. § 348(f)(1)(A). Without a bad faith conversion, property acquired after the chapter 13 petition date should not benefit the estate upon conversion to chapter 7. Equally important as the Bankruptcy Code, the legislative history and intent explain that chapter 13 aims to incentivize filings and protect debtors from losing post-petition, pre-conversion property. Equitable considerations also play a pivotal role, emphasizing fairness and justice and opposing any disincentives for prospective chapter 13 debtors. In the

instant case, Cpl. Clegg also asserts that the Bankruptcy Code preempts the Trustee from selling the avoidance power.

The Bankruptcy Code itself preempts such action. These powers are not inherently "property of the estate," and the absence of explicit language in the Bankruptcy Code prevents avoidance powers from being considered estate property or eligible for sale under section 363. The recently held view that avoidance powers are automatically deemed "property of the estate" under Section 541(a)(1) challenges the position that chapter 5 causes of action were not ascertainable at the Petition Date. Moreover, even if avoidance actions are generally considered estate property, Cpl. Clegg argues that the Trustee is preempted from selling this specific avoidance action. Sections 348, 546, and 1327 demonstrate that the chapter 7 trustee's attempt to assert the avoidance power is time-barred and contradicts the binding nature of a confirmed plan under section 1327.

ARGUMENT

We urge this Court to affirm the Court of Appeals for the Thirteenth Circuit's decision because under section 348 post-petition, pre-conversion increases in equity belong to the debtor. We also urge this Court to affirm the Court of Appeals for the Thirteenth Circuit's decision because a trustee cannot sell avoidance powers under section 547 where the Bankruptcy Code restricts those powers solely to them.

I. CPL. CLEGG IS ENTITLED TO THE POST-PETITION, PRE-CONVERSION INCREASE IN EQUITY OF HIS HOME BECAUSE UNDER SECTION 348, INCREASES IN EQUITY ARE AFTER-ACQUIRED PROPERTY.

Case law spanning at least twenty years has attempted to discern what constitutes "property of the estate." Equally determinative in that analysis is a temporal component qualifying when that property became, if at all, "property of the estate." Pre-petition, post-petition, and pre-conversion

properties do not always end up in the same place, nor in the same place at the same time. A chapter 13 debtor who fails to repay their debts after the confirmation of the plan has limited options: conversion, hardship discharge, or dismissal. 11 U.S.C. §§ 348, 349, 523, 1307. In this case, Cpl. Clegg, unable to deal with his creditors without the bankruptcy court's aid and an offer of a hardship discharge, decided to convert his chapter 13 case into a chapter 7 case. Because interests in the estate's property and how a trustee disseminates the assets differ between the two chapters, the conversion of Cpl. Clegg's case is controlled by section 348. 11 U.S.C. § 348. Despite section 348 providing 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 . . .," there remains confusion and conflict between courts as to why post-petition, pre-conversion increases in equity belong to the benefit of debtors, such as Cpl. Clegg.

A. Sections 101, 348, 522, and 541 do not Provide a Clear Answer as to Whether the Post-petition, Pre-conversion Increase in Equity belongs to Cpl. Clegg.

Because Eugene Clegg did not convert his chapter 13 case to chapter 7 in bad faith, he has the right to all post-petition, pre-conversion increases in equity of his home. 11 U.S.C. § 348(f)(1)(A) and (f)(2); *In re John*, 352 B.R. 895, 898 (Bankr. N.D. Fla 2006); *In re Golden*, 528 B.R. 803 (Bankr. D. Colo. 2015); *In re Slack*, 290 B.R. 282 (Bankr. D.N.J. 2003); *In re Hodges*, 518 B.R. 445 (Bankr. E.D. Tenn. 2014); *In re Robinson*, 472 B.R. 854, 856 (Bankr. M.D. Fla. 2012); *Warren v. Peterson*, 298 B.R. 322, 324-25 (N.D. Ill. 2003).[3] The Bankruptcy Code's sections 348(f)(1)(A) and (f)(2) state that property acquired after the chapter 13 petition date does not inure to the benefit of the estate upon conversion to chapter 7. *Harris v. Viegelahn*, 575 U.S. 510 (2015). Nevertheless, courts differ over whether home equity increases that occur after the

[3] *In re Sargente*, 202 B.R. 1023, 1026 (Bankr. S.D. Fla. 1996); *In re Jones*, 77 B.R. 541 (1987); *In re Salvador*, No. 2:05-CV-1107-GEB, 2006 WL 3300770, at *4 (E.D. Cal. Nov. 14, 2006); *In re Boyum*, No. 05-1044-AA, 2005 WL 2175879, at *2 (D. Or. Sept. 6, 2005); *Leo v. Burt* (*In re Burt*), 2009 WL 2386102 (Bankr. N.D. Ala. July 31, 2009).

chapter 13 petition date belong to the "property of the estate." *See, e.g.*, *Castleman v. Burman* (*In re Castleman*), 75 F.4th 1052, 1055 n.3, 1058 (9th Cir. 2023) (collecting cases) (Tallman, J., dissenting); *Goetz v. Weber* (*In re Goetz*), 651 B.R. 292, 302 (B.A.P. 8th Cir. 2023), appeal docketed, No. 23-2491 (8th Cir. June 23, 2023); cf. *Rodriguez v. Barrera* (*In re Barrera*), 22 F.4th 1217, 1222 (10th Cir. 2022).

While statutory interpretation begins with the statute's language, courts must also read the Bankruptcy Code holistically and in a manner that considers its broader statutory context. Sections 348(f)(1)(A) and (f)(2) do not stand alone. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The court in the Trustee's most relied on case, *In re Castleman*, acknowledges that the phrase "property of the estate," as used in section 348(f) and other sections of the Bankruptcy Code, is a term of art. *Matter of Castleman*, 75 F.4th at 1056. Therefore, a debtor, trustee, or court cannot effectively or properly apply section 348(f)(1)(A) without reading it in conjunction with sections 101, 348, 522, and 541. However, limiting interpretation to the four corners of the Bankruptcy Code has led to much debate between circuits as to whether the phrase "property of the estate" in section 348(f)(1)(A) covers post-petition, pre-conversion equity increases in property. Merely considering the Bankruptcy Code in its broader statutory context creates confusion as to whether post-petition, pre-conversion increases belong to the debtor or the estate. When combined with and limited by the time requirements of section 348, these secondary statutes do not offer guidance on how courts should classify non-exempt equity that is not actualized nor accumulated on the petition date. Hence, this Court should rely on section 348's legislative history and the purpose and goals of Congress when enacting the relevant Bankruptcy Code sections to gain insight into the meaning of "property of the estate" and how it pertains to post-petition, pre-conversion increases in equity.

i. Section 101

Before assessing sections 348, 522, and 541, the meaning of a word or phrase is most clear in section 101 - Definitions. Despite Congress expressly defining terms mentioned in the Bankruptcy Code under section 101, "property of the estate" nor "equity" is defined under this section. 11 U.S.C. § 101. However, Congress was not silent about how courts should handle equity when there is an increase after the chapter 13 case petition date. The answer is most clear in H.R. Rep. No. 103-835 at 57 (1994) – section 348(f)(1)(A)'s legislative history. However, before relying on the legislative history, an assessment of sections 348, 522, and 541 will show consideration of legislative history is imperative.

ii. Sections 348 and 522

In pertinent part, 11. U.S.C. § 348 reads as follows:

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

11 U.S.C. § 348(f)(1)(A), (f)(1)(b), (f)(2).

While the interpretation of section 348(f) should not be left solely to the language of the text, if the interpretation is limited to the text, then the most plausible interpretation is that "property of the estate, as of the date of filing of the petition" does not include the increase in equity that occurs during the chapter 13 case. The Trustee relies on cases that solely focus on the

language of section 348(f)(1)(A) without consideration of the legislative history or the entire statute. Statutes must be read as a whole to understand how to properly apply them. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Failure to read section 348(f) as a whole blurs the understanding that post-petition, pre-conversion increase in equity belongs to the debtor. Therefore, courts should also rely on section 348(f)(1)(B) in their interpretation. *In re Jackson*, 317 B.R. 511, 512 (Bankr. N.D. Ill. 2004).

In *In re Jackson*, after three years, the debtor converted her chapter 13 case to chapter 7. *In re Jackson*, 317 B.R. at 512. Her condominium received a value at the filing of her chapter 13 case, and the bankruptcy court confirmed the plan. *Id.* Upon conversion, the chapter 7 trustee asserted that the condominium's value was substantially more than listed on the chapter 13 schedules. *Id.* The trustee then "sought approval to hire counsel to help him sell the home." *Id.* While the court granted the trustee's application to hire counsel, the court articulated that approval of the application did not equate to approval of the sale of the debtor's home. *Id.* Rather, the approval aided in the assessment of the true value of the home at the time of the chapter 13 case. *Id.* Relying on section 348(f)(1)(B) in their interpretation of section 348(f)(1)(A), the court held that since the petition date of the chapter 13 case dictates the valuation of property in the chapter 7 case, then increases in the value after the chapter 13 petition date are property of the debtor. *Id.*; *In re Slack*, 290 B.R. at 286 (holding that post-confirmation, pre-conversion increase in value belongs to the debtor because, in the converted case, the property's value is that as of the chapter 13 petition date); *In re Wegner*, 243 B.R. 731, 744-35 (Bankr. D. Neb. 2000) (same). The court supported their interpretation of section 348(f)(1) by acknowledging that "Congress wanted to encourage debtors to try chapter 13 before liquidating assets in chapter 7. Accordingly, the debtor receives credit for the progress made during the chapter 13 case, even if the case converts later."

In re Jackson, 317 B.R. at 512; *In re Wegner*, 243 B.R. at 734 (explaining that "The legislative history [] states that equity created during the chapter 13 case is not property of the estate.").

Non-exempt equity only belongs to the property of the estate if it existed at the chapter 13 petition date; however, the court in *In re Jackson* explained that there is no direction on whether a judicial declaration determines the valuation mentioned in section 348(f)(1)(B). The *In re Jackson* court held that a judicial assessment must explicitly determine the valuation, but other courts, such as *Warren*, do not agree.[4] While the courts in *Warren* and *In re Jackson* do not agree on whether the implicit or explicit value determination of a property is binding on a trustee, they both agree that the value of the property and the non-exempt equity is limited to that which existed on the chapter 13 petition date; therefore, a chapter 7 trustee cannot use any increase in equity that occurs after the filing as property of the estate nor as a means of determining sale of property. *In re Jackson*, 317 B.R. at 512; *Warren*, 298 B.R. at 326. Despite these differences, the court in *In re Jackson* recognizes that "... it is the assurance that debtors may keep any increase of their property during the chapter 13 case that promotes reorganization over liquidation." *Id.* at 516.

Because Cpl. Clegg's home existed at the time of filing section 522(a)(2) defines the value of his home as the "fair market value as of the date of the filing of the petition." 11 U.S.C. § 522(a)(2). This section is known as the "snapshot" rule because it freezes the value of the debtor's assets in time. *Rockwell v. Hull* (*In re Rockwell*), 968 F.3d 12, 17 (1st Cir. 2020). Despite the confusion surrounding section 348(f)(1)(B), section 522 defines what value is proper for the chapter 13 valuation. The Trustee relies on *In re Castleman* to muster up a lackluster argument against the "snapshot" rule. R. at 14. They claim that there is not a difference between the value of the home and the equity. *Id.*; *see In re Castleman,* 75 F.4th at 1056. However, this argument is

[4] "The problem here is determining whether Jackson's house was actually "valued" by the court during the chapter 13 case." *In re Jackson*, 317 B.R. 511, 513 (Bankr. N.D. Ill. 2004).

not persuasive because *In re Castleman* relies on cases that predate the enactment of the current section 348(f)(1)(A), where conversion was not at issue, and *In re Castleman* ignores the relationship between sections 348(f)(2) and 522.[5] To ignore the "snapshot" rule and other sections, like the Trustee asks this Court to do, would lead to an absurd result and produce different valuations of one property because home values are constantly changing.[6] Fairness in applying exemptions, discharges, and other aspects of the Bankruptcy Code requires uniformity. Therefore, one value cannot apply to the homestead exemption while a different value determines what occurs after conversion.

Cpl. Clegg's home received two appraisals, one of which occurred a couple of days before the Petition Date. R. at 6. Based on the appraisal, Cpl. Clegg reported on Schedule A/B that the fair market value of his home on the Petition Date was $350,000. R. at 6. The Trustee conducted a second appraisal, confirming that the home's value increased to $450,000. R. at 9. However, this second appraisal did not occur until after the conversion. R. at 9. Unlike the trustee in *In re Jackson*, the Trustee did not assert that the value reported on the chapter 13 schedule was incorrect – no one disputed the initial home valuation. R. at 6. Both parties acknowledge that the second appraisal assessed the increase in value, and no parties disputed the original or secondary values of the home. *Id.*; R. at 9. The Trustee wants to sell Cpl. Clegg's home to access the increase in equity; however, they cannot do this because according to section 348(f)(1)(B), valuations used in the chapter 7 case to determine liquidation must be the same as the chapter 13 valuations. The issue here is not the home's value on the Petition Date; instead, the issue is if the increase in the home's value after the Petition Date belongs to the estate. Because the Trustee is not challenging the chapter 13 value,

[5] *See Schwaber v. Reed* (*In re Reed*), 940 F.2d 1317, 1323 (9th Cir. 1991); *Wilson v. Rigby*, 909 F.3d 306, 309 (9th Cir. 2018).
[6] *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (holding that plain language should apply as long as it does not create an absurd result).

simply asking to claim the increase in equity, they cannot liquidate Cpl. Clegg's home.[7] The increase in equity only exists if this Court uses the value of the second appraisal, which is not the value of the home on the Petition Date. If there was a debate as to the home's value on the Petition Date, then the Court could assess the home's historic value.[8] However, whether this Court accepts the value provided on Cpl. Clegg's Schedule A/B or requires an assessment of the historic value, section 348(f)(1)(B) requires that increases in equity that occurs after the accepted chapter 13 valuation of Cpl. Clegg's home belongs to him, not the estate. Therefore, the Trustee cannot sell Cpl. Clegg's home because the increase in equity occurred post-petition.

As stated before, courts must read section 348(f) as a whole; therefore, courts should also consider the impact of section 348(f)(2) on how Congress views property acquired after the chapter 13 petition date. 11 U.S.C. § 348(f)(2). This section only requires the after-acquired property to become part of the chapter 7 estate if the "debtor converts a chapter 13 case in bad faith." 11 U.S.C. § 348(f)(2). Section 348(f)(2) serves as a punishment for dishonest debtors and is one of the only attempts of Congress to discourage a debtor from comfortably converting or originally pursuing chapter 13. Additionally, this penalty only applies to dishonest debtors; therefore, this section shows Congress would not have made a distinction between debtors and the protection of assets upon conversion if they intended to include increases in equity as property of the chapter 7 estate. Upholding the view of the Trustee would render section 348(f)(2) superfluous.[9]

iii. Section 541

[7] "If not, § 348(f)(1)(B) would not block a chapter 7 trustee from showing that a debtor's home was worth more at the start of the chapter 13 case than the amount assigned in the debtor's schedules." *In re Jackson*, 317 B.R. at 513.

[8] "Bankruptcy courts are well-equipped to value property at any stage of the proceeding and are often called upon to do so . . . Valuations under § 506(a) may be 'made under chapter 7's redemption provision, 11 U.S.C. § 722, and chapter 13's cramdown provision, 11 U.S.C. § 1325(a)(5)(B)." *In re Jackson*, 317 B.R. at 517.

[9] A court's interpretation should not "render superfluous another part of the same statutory scheme." *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021).

An increase in equity is a legal interest of the debtor; however, the $100,000 increase in equity did not exist on the Petition Date. Section 541(a)(1) defines property of the estate as "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1); *In re Jackson*, 317 B.R. at 518 (stating that creditors are only entitled to the equity at the commencement of the chapter 13 case, and debtors are entitled to any thereafter increases in equity).

While equity is a legal interest of the debtor, the dispositive fact is that the increase in equity did not exist until after the Petition Date. Therefore, the answer needed is not merely if equity is property of the estate. If equity existed on the Petition Date, then according to section 541(a)(1), it is property of the estate. However, the facts of this case deal with increases in equity that occur after the Petition Date and where equity did not exist during the Petition Date. Equity can only exist when a debtor pays down on their mortgage or when the home's value appreciates after purchase. On the Petition Date, the value of Cpl. Clegg's home was $350,000, and the Servicer had a secured debt of $320,000 (the purchase value). R. at 6. The $30,000 difference, which would have been equity, was exempt by the state law homestead. R. at 6-7. In other words, non-exempt equity did not exist at the time Cpl. Clegg filed chapter 13. R. at 7. Therefore, the $100,000 increase in equity did not exist on the Petition Date because equity did not develop until years after the COVID-19 pandemic and the Petition Date. Because the increase in equity did not exist on the Petition Date, it does not fit within the definition of section 541(a)(1).

Section 541(a)(6) does not apply to an increase in equity because equity is not the same as proceeds, products, and profits. "Home equity is the value of a homeowner's interest in their home, and it is determined by the property's current market value minus any liens that are attached to

that property."[10] In other words, equity is an intangible interest in value, while proceeds, products, and profits are money that occurs upon the home's sale. While equity can create proceeds, products, and profits upon the sale of a home, equity itself is not proceeds, products, and profits. Even if the definitions of those terms included equity, the increase in equity after the petition date would not be property of the estate. *In re Golden*, 528 B.R. at 810 (holding that the proceeds from the sale belonged to the debtor because increases in equity of the debtor's home post-confirmation, pre-conversion occurred after the chapter 13 valuation and after the home vested in the debtor); *see Bullard v. Blue Hills Bank*, 575 U.S. 496, 502-03 (2015); *In re Niles*, 342 B.R. 72 (Bankr. D. Ariz. 2006) (holding that even proceeds exceeding the statutory homestead exemption belonged to the debtor because the estate revested in the debtor upon commencement of the chapter 13 case).[11] An increase in equity also does not fall under the definition of section 541(a)(7) – "Any interest in property that the estate acquires after the commencement of the case." – because when read with sections 348(1)(A) and (2), these sections serve as limitations on what a trustee can include in property of the estate and 541(a)(7) can only be achieved upon a bad faith conversion. Section 348(f) is more specific than section 541; therefore, section 348(f) governs section 541 when resolving inconsistency. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . .."). Limited by sections 348(1)(A) and (2), categorizing property of the estate as property the debtor had "as of the date of filing of the petition" instead of after-acquired property, unless debtor

[10] Cornell Law School, *Home Equity Legal Information Institute* (2022) https://www.law.cornell.edu/wex/home_equity (last visited Dec 27, 2023)

[11] *In re Nichols*, 319 B.R. 854, 856-57 (Bankr. D.D. Ohio 2004) (equating "earnings . . . used to 'purchase' equity in existing assets" to debtor purchasing new assets with earnings received after the petition date and articulating that 541(a)(6) excludes earnings and property obtained with those earnings.)

converts in bad faith, resolves the conflict with section 541(a)(7)'s definition. 11 U.S.C §348(1)(A), (2).

No other sections apply to the post-petition, pre-conversion increase in equity. After breaking these sections down, the answer to the question at hand remains unclear. Amidst all this confusion, Congress shines a light on how courts should interpret section 348(f)(1)(A) as it pertains to post-petition, pre-conversion increases in equity should be handled. Because there remains a split between the circuits, it is imperative that courts look beyond the language of the Bankruptcy Code and dive into the legislative history that establishes Congress's intent when enacting section 348(f). Therefore, Cpl. Clegg urges this Court to consider the legislative history of section 348(f)(1)(A) to determine that the post-petition, pre-conversion increase in value of his home creates equity that belongs to him.

II. CONGRESS WROTE SECTION 348 TO PROMOTE THE FILING OF CHAPTER 13 BY SECURING FOR THE DEBTOR EQUITY INTERESTS INCURRED AFTER THE PETITION DATE, IN CASE OF CONVERSION.

"Legislative history and congressional policy are helpful guides to determining the intent of Congress only when a statute is unclear." *In re John*, 352 B.R. at 898. In 1994, Congress added section 348 to the Bankruptcy Code in the Bankruptcy Reform Act of 1994. H.R. Rep. No. 103-835 at 1 (1994). This addition incentivized chapter 13 filings and protected debtors from penalizations for converting to chapter 7. *In re Robinson*, 472 B.R. at 856; *In re Nichols*, 319 B.R. at 856; *In re Jackson*, 317 B.R. at 513; *Warren*, 298 B.R. at 324-25.[12] Courts who have relied on section 348(f)'s legislative history have held that post-petition, pre-conversion increase in equity belongs to the debtor, not the estate. *In re Hodges*, 518 B.R. at 447-49; *In re Robinson*, 472 B.R.

[12] *Burt v. Burt* (*In re Burt*), Adv. No. 09-40016-JJR, 2009 Bankr. LEXIS 2384, 2009 WL 2386102, at *2-6 (Bankr. N.D. Ala. July 31, 2009).

at 856; *Kendall v. Lynch* (*In re Lynch*), 363 B.R. 101, 106-07 (9th Cir. BAP 2007); *In re Pruneskip*, 343 B.R. 714, 717 (Bankr. M.D. Fla. 2006); *In re Woodland*, 325 B.R. 583, 586 (Bankr. W.D. Tenn. 2005); In *re Nichols*, 319 B.R. at 856.[13]

House Report 103-835 addresses how the chapter 7 estate does not include post-petition, pre-conversion property interests: "This amendment would clarify the [Bankruptcy] Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." H.R. Rep. No. 103-835, at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366. Congress explained through a hypothetical: "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.* This hypothetical means that the Trustee's argument leads to an outcome that would discourage debtors from filing chapter 13 - an outcome contrary to Congress's goals. Furthermore, the legislative history explains that the amendment of the section overruled the holding in *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) by adopting the reasoning in *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). *Id.* Coupling the legislative comments along with the purpose of chapter 13 shows that Congress intended for post-petition, pre-conversion increase in equity to benefit the debtor. *In re Barrera*, 620 B.R. 645, 653 (Bankr. D. Colo. 2020), *aff'd sub nom*. *Rodriguez v. Barrera* (*In re Barrera*), 2020 WL 5869458, at *5-7 (B.A.P. 10th Cir. Oct. 2, 2020), *aff'd*, *In re Barrera*, 22 F.4th at 1219.

There are several drawbacks to chapter 13 compared to chapter 7, and section 348 serves as protection from and an incentive to overlook these drawbacks. First, chapter 13 is less successful than chapter 7 because only 40% - 70% of debtors complete chapter 13 compared to the 95%

[13] *In re Boyum* 2005 WL 2175879 (D. Or. Sept. 6, 2005); *Leo v. Burt* (*In re Burt*), 2009 WL 2386102 (Bankr. N.D. Ala. July 31, 2009).

success rate for chapter 7.[14] Second, chapter 13 is more expensive than chapter 7, and debtors pay roughly 2.5 times more to file chapter 13.[15] Third, in chapter 13, debtors must give up a substantial disposable income to discharge their unsecured debts.[16] Fourth, trustees can abandon loans if the asset secured by the loan is less than the loan, which leaves the burden on the debtor to deal with the creditor.[17]

Despite the drawbacks of filing chapter 13, Congress urges debtors to file for chapter 13 instead of chapter 7. *In re Robinson*, 472 B.R. at 856; *In re Nichols*, 319 B.R. at 856; *In re Jackson*, 317 B.R. at 513; *Warren*, 298 B.R. at 324-25. To offset the drawbacks of filing chapter 13, Congress provided incentives and protections to encourage debtors to file chapter 13. Some of these incentives and protections include: (1) allowing debtors who desire to keep significant assets, like their home or car, the chance to modify the loan and retain their property;[18] (2) reorganization of debts allows the debtor to pay the debt over extended periods and can also lower payments and the amount owed to the debtor; [19] (3) completion of the plan entitles the debtor to a broader list of discharges than chapter 7; and[20] (4) instead of receiving a dismissal or a conversion upon failure to meet chapter 13 plan payments, a court can grant a "hardship discharge" when the debtor fails

[14]American Bankruptcy Institute, *Chapter 13 Success Rate Greater Than Credit Counseling Plans American Bankruptcy Institute* (2022), https://www.abi.org/feed-item/chapter-13-success-rate-greater-than-credit-counseling-plans#:~:text=Chapter%2013.,Credit%20Counseling%20Payment%20Programs. (last visited Dec 23, 2023).

[15] Edward J. Janger, *Consumer Bankruptcy and Race: Current Concerns and a Proposed Solution*, 33 LOY. CONSUMER L. REV. 329 (2021); On average, attorneys charge debtors $2,500 - $3,000 for chapter 13 and $1,000 for chapter 7. Braucher, Jean and Cohen, Dov J. and Lawless, Robert M., *Race, Attorney Influence, and Bankruptcy Chapter Choice* (January 20, 2012). Journal of Empirical Legal Studies, Forthcoming, Arizona Legal Studies Discussion Paper No. 12-02, Illinois Public Law Research Paper No. 11-17, Available at SSRN: https://ssrn.com/abstract=1989039 or http://dx.doi.org/10.2139/ssrn.1989039.

[16] Edward J. Janger, *Consumer Bankruptcy and Race: Current Concerns and a Proposed Solution*, 33 LOY. CONSUMER L. REV. 329 (2021).

[17] *Id.* at 331.

[18] *Id.* at 333.

[19] United States Courts, *Chapter 13 - Bankruptcy Basics*, United States Courts, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Dec 20, 2023).

[20] United States Courts, *Discharge in Bankruptcy - Bankruptcy Basics United States Courts*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics (last visited Dec 20, 2023).

to make payments because of circumstances out of their control.[21] Section 348(f)(1)(A) serves as a protection to encourage chapter 13 debtors who may fear they cannot complete the chapter 13 plan and will need to convert to chapter 7.

Congress did not want the fear of losing property acquired after filing chapter 13, including equity, to disincentivize prospective chapter 13 debtors or punish diligent debtors who made payments under chapter 13 upon conversion. *In re Nichols*, 319 B.R. at 856- 57; 3 Collier on Bankruptcy P 348.07 (15th ed. rev'd 2004); *In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997) (stating that the purpose of section 348(f) "was to equalize treatment a debtor would receive if he had filed a chapter 7 originally"); *In Kendall v. Lynch* (*In re Lynch*), 363 B.R. 101, 107 (9th Cir. BAP 2007) (explaining that debtor retention of increases in equity is reflected in the legislative purpose of sections 348(f) and (f)(2) because it encourages chapter 13 over chapter 7).

As courts of equity, Bankruptcy Courts have a special interest in interpreting and applying sections of the Bankruptcy Code in a manner that does not adopt the Trustee's tough luck argument. Equity promotes fairness and justice and "aids the diligent." Congress gave the chapter 13 debtor who converts to chapter 7 under good faith a guarantee that they will be no worse off upon conversion than they would have been if they originally filed for chapter 7. *In re Barrera*, 620 B.R. at 648. To allow creditors to fare better and the debtors who diligently paid their debts under chapter 13 to fare worse than if they originally filed chapter 7 would conflict with equity. The Trustee's argument promotes this unfairness by asking this Court to use the home's most recent value and the equity that did not exist on the Petition Date. Had Cpl. Clegg went against the desires of Congress and originally filed chapter 7, then his home would not have been a liquidated asset because the homestead exemption removed all the equity that existed on the Petition Date.

[21] *Id.*

Attempting to be an honest debtor, Cpl. Clegg poured into the chapter 13 estate[22] because he understood that those who accumulate debt must be held accountable, but they must not be buried under their debt and lose everything they diligently worked to maintain under chapter 13. Finding in favor of the Trustee would create this exact outcome and punish Cpl. Clegg and other debtors alike for a series of unforeseeable and unfortunate events. This punishment does not align with the purpose of the Bankruptcy Code and does not promote equity. Therefore, the Trustee cannot sell Cpl. Clegg's home because post-petition, pre-conversion increase in equity belongs to the debtor when they do not convert in bad faith.

Courts should not read the Bankruptcy Code out of context, and when the answer is not found plainly written in the text, courts should allow the soul and spirit of the Bankruptcy Code, through the reliance of legislative history, to guide them to an interpretation that does not offend equity by leaving an honest and good debtor in a worse position had they filed a different chapter.

III. THE BANKRUPTCY CODE PREEMPTED THE TRUSTEE'S ABILITY TO SELL THE AVOIDANCE POWER.

There is little, if any, debate as to what avoidance powers are. These powers include avoiding property transfers, statutory liens, preferential transfers, fraudulent transfers, and unauthorized post-petition transfers. *See generally* 11 U.S.C. §§ 544-553. Specific to this case is the right for the chapter 7 trustee to sell the power to avoid a pre-petition transfer to a creditor. 11 U.S.C. § 547. Additionally, there is little argument as to why a trustee should be able to avoid and recover preference payments. As the majority and dissent in the Court of Appeals for the Thirteenth Circuit agreed, the intent is to redirect payments that typically went to a creditor before the petition

[22] Chapter 13 payments distributed to creditors cannot be recovered. *In re John*, 352 B.R. 895, 898 (Bankr. N.D. Fla 2006).

date into the bankruptcy estate for the benefit of the creditors and estate. Circuit courts have ruled on both sides whether preference causes of action generally are property of the estate. Those in opposition to Mr. Clegg's position, rely on sections 541(a)(1) and 541(a)(7) to argue that avoidance actions are property of the estate that the debtor had an inchoate right to upon the petition date. Make no mistake, the Bankruptcy Code is absent any language, either in sections 1302, 1306, or 541, permitting avoidance powers to either be construed as property of the estate or to be sold under section 363. As discussed below, and while maybe generally accepted, the preference cause of action in this case is not one that the Trustee can sell as property of the estate.

A. The Avoidance Powers Under Section 547 are not "Property of the Estate" Because the Bankruptcy Code Statutorily Grants Them to a Trustee.

In either chapter 13 or chapter 7 of the Bankruptcy Code, a trustee is appointed to administer the bankrupt's estate. 11 U.S.C. §§ 702, 1302. Note that neither of these sections charges any other person with carrying out these charges. "Where a statute . . . names the parties granted [the] right to invoke its provisions, . . . such parties only may act." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, (2000) (citing 2A N. Singer, Sutherland on Statutory Construction § 47.23, p. 217 (5th ed.1992) (internal quotation marks omitted)). The avoiding powers found within sections 544-553 state that the person charged with carrying out the powers is the trustee.[23]

The Code explicitly allows trustees to pursue avoidance actions, using their avoidance powers.[24] "In a chapter 7 case, only the chapter 7 trustee has standing to pursue the avoiding

[23] *See* 11 U.S.C.A. §§ 544 ("The trustee shall have … the rights and powers of, or may avoid …"); 545 ("The trustee may avoid …"); 547 ("… the trustee may avoid …"); 548 ("… the trustee may avoid …"); 549 ("… the trustee may avoid …"). See also 11 U.S.C.A. § 323 ("The trustee … is the representative of the estate.").
[24] Hon. Joan N Feeney & Michael J Stepan, *Bankruptcy Law Manual* Chapter 9:2 (2023).

powers, and thus, a chapter 7 debtor and creditors in a chapter 7 case lack standing to bring an avoidance action."[25] There are certain situations such as when a trustee is unable or unwilling to do so, may creditors may seek approval from the court to bring such actions.[26] Contrary to what the Trustee argues, most circuits agree when determining what avoidance powers are. "The Eighth Circuit has determined that the statutory language of section 548 expressly confers avoidance powers exclusively on the trustee." *LaBarge v. Benda* (*In re Merrifield*), 214 B.R. 362, 365 (8th Cir. BAP 1997) (citing *In re Lauer*, 98 F.3d 378, 388 (8th Cir.1996) ("Section 548 by its terms provides that certain transfers by the debtor prior to bankruptcy may be voided only by 'the trustee.'"); *see also* (*Realty Portfolio, Inc. v. Hamilton* (*In re Hamilton*), 125 F.3d 292, 296 (5th Cir. 1997) ("Section 1303 does not include trustees' section 544 strong-arm avoidance powers . . . [and] no specific statutory provision generally authorizing chapter 13 debtors to exercise trustees' avoidance powers [exists]."). They are powers that are given only to the trustee by way of explicit congressional intent.[27] And absent explicit language asserting otherwise, such as by way of plan, abandonment, creditor rights,[28] or derivative standing, the textual provisions should not be given any other meaning than what is ascribed.[29] *In re MPF Holdings US LLC*, 701 F.3d 449, 455 (5th Cir. 2012). There is no disagreement between circuits that the Bankruptcy Code only grants avoidance powers to a trustee. Absent language in the Bankruptcy Code to the contrary, this Court should not deviate from that generally understood meaning. Since these are powers conferred upon

[25] *Id.*
[26] *Id.*
[27] "As a creature of statute, the trustee possesses only those powers conferred upon him by the [Bankruptcy] Code, and he alone can exercise those rights to the exclusion of all others." *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 859 (10th Cir. 1986).
[28] *See Matter of Vitreous Steel Products Co.*, 911 F.2d 1223, (7th Cir. 1990).
[29] "There is express statutory authority for the appointment of a third party to pursue the avoiding powers post-confirmation under the provisions of a confirmed chapter 11 plan." *See supra* note 3.

the trustee in order to administer and effectively carry out the estate process, these powers cannot become property of the estate. That interpretation is not found anywhere in the Bankruptcy Code.

The dissent in the Court of Appeals for the Thirteenth Circuit argues that this Court should abandon that precedent and hold that avoidance powers are property of the estate based on the language this Court has supplied in previous cases, holding that avoidance transfers are causes of actions.[30] They reference *Nordic Village* and *Whiting Pools*[31] for the proposition that a cause of action is a sellable claim. The correlation of those cases to this one on its face seems clear for the dissent, but both cases are not within the reach of what this case asks this Court to resolve.

In *Nordic Village*, this Court was faced with only the question of whether "§ 106(c) of the Bankruptcy Code waives the sovereign immunity of the United States from an action seeking monetary recovery in bankruptcy?" *United States v. Nordic Vill.*, Inc., 503 U.S. 30, 31 (1992). A corporate officer made a payment to the IRS during the bankruptcy case. *Id.* at 31. The chapter trustee sought to recover those post-petition payments made to the IRS. *Id.* This Court did not explicitly grapple with whether avoidance powers under Sections 544-553 are considered property of the estate. *Id.* at 32. Instead, it primarily discussed the interpretation of Section 106(c) of the Bankruptcy Code and the waiver of sovereign immunity for monetary claims against the government. *Id.* This case focused on the application of Section 106(c) to the specific case involving the recovery of a post-petition transfer, with less attention to the broader issue of whether avoidance powers constitute property of the estate. *Id.* at 33. But even where that is taken at face value, determining preference avoidance transfers are causes of actions or claims does not answer whether the power to assert and enforce such cause of action is (1) property of the estate that (2)

[30] R. at 31. "*See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989) (describing the "right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2)" as a "statutory cause of action.").
[31] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, (1983)

the trustee can sell under section 363. *Id.* Discussing 541(a)(1) and 541(a)(7) in-depth below should lead this Court to the only logical conclusion that avoidance powers are not textually property of the estate and should not be for policy concerns.

B. Section 541(a)(1) Only Covers the Debtor's Ascertainable or Foreseeable Interests, as There was no Pre-petition Legal or Equitable Interest in the Trustee's Avoidance Powers.

The beginning of section 541 of the Bankruptcy Code states, in relevant part, that upon the commencement of a voluntary case, the estate comprises potentially all of the debtor's property "wherever located and by whomever held." 11 U.S.C. § 541. Subsections (1) through (7) then delineates the carefully enumerated ways in which property can become property of the estate. *Id.*

Although "property of the estate" is intended to be broad, it is not limitless. In other words, section 541 does not allow anything and everything to be property of the estate, *followed* by exclusions. Instead, that section constructs limited ways in which property, in general, can become "property of the estate" for bankruptcy proceedings and purposes.

The Trustee argues that section 541(a)(1) provides most if not all of the guidance and reference for ruling that chapter 5 causes of action are property of the estate that *the chapter 7 trustee* can sell. R. at 9. A large controlling portion of their argument centers on the conclusion that chapter 5 causes of action are "property of the estate" under section 541 and thus can be sold under section 363. *Id. See* 11 U.S.C. § § 363, 541. They make the presumption that Cpl. Clegg had an interest in the powers of the Trustee to sell these causes of action because Cpl. Clegg had the right to file for bankruptcy proceedings. R. at 31. In other words, the Trustee contends that Cpl. Clegg had an inchoate right in the powers of the Trustee. For the reasons proffered below, and irrespective of whether the right is inchoate or contingent, that argument fails when the right is not initially ascertainable.

The Trustee argues that *In Re Simply Essentials* should control this Court's decision, where the judge in that case held that chapter 5 preference cause of actions are property of the estate. *In Pitman Farms v. ARKK Food Co.* (*In re Simply Essentials, LLC*), 78 F.4th 1006, 1011 (8th Cir. 2023). Although some merit lies in the ability of other parties to exercise the powers, that should not and does not make them property of the estate. The circuit judge argued that based on the notion that creditors can seek derivative standing to bring the avoidance actions for the benefit of the estate, it is not a trustee's power.[32] *Id.* at 1011. In addition to that rationale, the judge in *In Re Simply Essentials* also found that debtors' pre-bankruptcy right to file avoidance actions (stemming from their right to file bankruptcy in general) gives them an inchoate or contingent interest in such actions, making them property of the estate under section 541(a)(1). *Id.* Interestingly enough, this Court made clear that the text of the Bankruptcy Code need not state "only" or any other language to restrict this power to only the Trustee.[33] *Hartford Underwriters*, 530 U.S. 1 at 8. A serious overstep in the Trustee's analysis led their belief they could sell this action. The avoidance power of the Trustee was not actualized, ascertainable, nor foreseeable on the Petition Date.

In *In re Schmitz*, the Ninth Circuit addressed the inchoate rights in bankruptcy in 2001. *Sliney v. Battley* (*In re Schmitz*), 270 F.3d 1254 (9th Cir. 2001). A fisherman filed for chapter 7 bankruptcy in 1992, a year and a half before the existence of regulations establishing post-filing quota rights. *Id.* at 1255. The North Pacific Fisheries Management Council had been considering

[32]"*In re Racing Services, Inc*., we held that while trustees have the first opportunity to bring avoidance actions, other creditors may seek permission to obtain derivative standing to bring the avoidance actions on behalf of the estate when a trustee is "unable or unwilling" to do so. 540 F.3d 892, 898 (8th Cir. 2008). Whether the avoidance action is brought by the trustee or by a creditor, the action is brought for the benefit of the estate and therefore belongs to the estate." *In re Simply Essentials*, 78 F.4th at 1008.

[33] Many provisions of the Bankruptcy Code that do not contain an express exclusion cannot sensibly extend to all parties in interest. See, e.g., § 363(b)(1) (providing that "[t]he trustee, after notice and a hearing, may use, sell, or lease ... property of the estate"); § 364(a) (providing that "the trustee" may incur debt on behalf of the bankruptcy estate); § 554(a) (giving "the trustee" power to abandon property of the bankruptcy estate).

the quota-based but did not bring it into effect until 1994, during bankruptcy. *Id.* The trustee sought to recover those quota fishing shares based on the catching history pre-bankruptcy. *Id.* On appeal, Judge Silverman ruled this not to be property of the estate. *Id.* at 1258. In its analysis, the court placed significant emphasis on the farmer's mental outlook at the time of his bankruptcy filing, highlighting the court's use of terms such as "hope" and "expectation." *Id.* at 1257. The court stated, "On the date that Schmitz filed his petition, he might have had a hope, a wish and a prayer that the Secretary would eventually implement the plan then under consideration." *Id.* The absence of concrete regulations at the petition date did not confer property status to his fishing quota rights within the bankruptcy estate. *Id.* at 1258.

Contrast with *In Re Dittmar*, where the court addressed whether stock increase rights introduced in an agreement pre-bankruptcy but that did not become an agreement until after the bankruptcy filing were property of the estate. *Parks v. Dittmar* (*In re Dittmar*), 618 F.3d 1199, 1209 (10th Cir. 2010). Debtors were former employees who entered into a collective bargaining agreement (CBA which induced them to agree to the benefit of stock increase rights (SAR)). *Id.* at 1204. The Tenth Circuit found the right to be contingent even though they did not actualize until some later point. In signing the CBA, the workers relied on slide shows and mock-ups demonstrating the realization of the stock increase. *Id.* This is because "[w]e believe the SARs created by the CBA are more akin to . . . contingent pre-petition property . . . than mere expectancies . . . ." *Id.* at 1209.

Similarly, in this case, the court should treat property of the estate akin to the fisherman's quoting rights. This Court can go back in time and point to a fixed moment when the right of a future chapter 7 trustee's avoidance powers began. That is not possible in the present case because Cpl. Clegg did not foresee or ascertain his future property right maturing. In other words, this

Court should hold the proposition that even if Cpl. Clegg had hope or expectation that should not bind the future property as property of the estate. The Trustee would like this Court to conclude that even though Cpl. Clegg had no foreseeable intention or desire to file chapter 7 or convert to chapter 7, Cpl. Clegg had a pre-petition interest in that *specific* alleged property of the estate. However, it was this Court that made it clear in *Segal* that property of the kind in section 70(a)(5) depends on whether such property "is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start . . . ."[34] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). If this Court were to conclude that chapter 5 causes of action are property of the estate under 541(a)(1), then that would allow for almost anything to be property of the estate (notwithstanding the exceptions provided by the Bankruptcy Code) without a sufficient tie to pre-bankruptcy past or an ascertainable property right pre-bankruptcy.

In the alternative, the Trustee references section 541(a)(7) as support for why these powers should be deemed property of the estate. It states, " [a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7).

C. Even if Avoidance Actions are Generally Property of the Estate, the Trustee was Preempted from Selling this Avoidance Action.

Should this Court find the chapter 7 avoidance powers property of the estate, section 541(a)(7) is the only other permissible section, as it includes "any interest in property the estate acquires after the commencement of the case . . . ." 11 U.S.C. § 541(a)(7). Allowing the Trustee a new attempt to assert the same claim, cause of action, property of the estate, or avoidance power

[34] This case pre-dated the Bankruptcy Act of 1978, where section 541 references the same property, and this Court has held section 541 to read the same.

sufficiently takes the reading of the Bankruptcy Code beyond what Congress wrote and outside the scope of its purpose and policy.

Upon the confirmation of a plan, Cpl. Clegg's position is that sections 348, 546, and 1327, when read together, preclude this property from being sold. As previously mentioned, with respect to the first issue, the Bankruptcy Code identifies how to treat property of the estate in a converted case. Section 348(f) outlines the effect of a conversion on the property of the estate. Here, Cpl. Clegg filed for bankruptcy in December of 2021. It was not until the conversion that Cpl. Clegg acquired the avoidance actions. Now, this Court may ultimately find that Cpl. Clegg had an interest on the Petition Date; however, he did not remain in control or in possession of that right as of the date of conversion. Noted in the record, Cpl. Clegg, the chapter 13 trustee, and all noticed creditors settled their disputes and objections and reduced it to writing. R. at 8. More importantly, all parties agreed and waived the right for the trustee to sell the avoidance action. *Id.* Put another way, they all agreed not to allow the transfer of the alleged property of the estate. Not only that, but all creditors had an opportunity to object to the proposed plan. R. at 7-8. Ultimately, the bankruptcy court confirmed in February 2022. R. at 7. A year and some months later, a new trustee wishes to sell the property that all parties previously in the case,[35] agreed not to sell.

Section 546 presents another challenge to selling this avoidance power. Section 546 states that actions under specific bankruptcy sections (544, 545, 547, 548, or 553) must be initiated within two years after the order for relief or one year after the appointment or election of the first trustee, whichever is later, and not after the closure or dismissal of the case. 11 U.S.C. § 546(a). Based on the undisputed facts above, Cpl. Clegg was appointed a chapter 13 trustee over a year prior to the Petition Date, now the chapter 7 trustee wishes to sell the avoidance power. R. at 9. A plain reading

[35] R. at 12 (citing *Harris v. Viegelahn*, 575 U.S. 510, 515 (2015) ("[t]he existing case continues along another track . . . without 'effect[ing] a change in the date of the filing of the petition.'").

of that Bankruptcy Code would conclude that the Trustee could not assert such avoidance power since, following the conversion, the timing had passed, barring the execution of avoiding the pre-petition transfer. If that is the case, the Trustee should also be barred from selling the power to a creditor. Sell of the power gives the creditor another chance at avoiding a transfer from over two years ago.

Lastly, section 1327 of the Bankruptcy Code establishes that a confirmed plan *binds* all parties, including the debtor and creditors. Unless stated otherwise, the plan transfers all estate property to the debtor upon confirmation. 11 U.S.C. § 1327. In the instant case, Cpl. Clegg and creditors were informed that the Trustee agreed not to sell this alleged property, and all parties, including Eclipse, concurred with this decision. R. at 8. Cpl. Clegg's contribution was equivalent to what the chapter 13 trustee would have recovered from the avoided transfer, and this contribution went into the confirmed plan. *Id.*

This contribution makes sense for practical reasons. Cpl. Clegg filed chapter 13 in good faith and anticipated making payments from the future earnings of Final Cut. R. at 7. Cpl. Clegg faithfully made payments for eight months following the confirmation of the plan. R. at 8. Close to $5,000 in aggregate payments were paid by Cpl. Clegg to the creditors and Eclipse. Should this Court now find the avoidance power to be property of the estate, after all parties of interest agreed not to seek the transfer, this Court would inadvertently only enrich the same creditor who purchased the cause of action.

Perhaps speculative, the lower courts may have ruled differently if Eclipse only wished to contribute one dollar for the preference action. The chapter 7 trustee wishes to offer policies that favor them, irrespective of policies that would also favor Cpl. Clegg. *In re Bracewell*, 454 F.3d at 1240 (*citing Artuz v. Bennett*, 531 U.S. 4, 10, (2000) ("Whatever merits these and other policy

arguments may have, it is not the province of this Court to rewrite the statute to accommodate them .... [T]he text ... may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398, (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). This Court should carefully analyze the Bankruptcy Code and apply it to the facts in this case. The only reasonable inference would preclude this chapter 7 trustee from selling the avoidance power found in section 547.

CONCLUSION

For the aforementioned reasons, we ask this Court to affirm the Court of Appeals for the Thirteenth Circuit's decision and hold (1) that increases in equity that occur after the petition date belong to the debtor, and (2) that a trustee cannot sell an avoidance power solely given to them through the Bankruptcy Code.