No. 20-1376

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE JULIO CESAR BARRERA AND MARIA DE LA LUZ MORO,
Debtors.

SIMON E. RODRIGUEZ
Appellant
— v. —

JULIO CESAR BARRERA AND MARIA DE LA LUZ MORO,
Appellees

On Appeal from the U.S. Bankruptcy Appellate Panel
of the Tenth Circuit,
BAP No. CO-20-003

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEES AND SEEKING AFFIRMANCE OF THE BANKRUPTCY APPELLATE PANEL'S DECISION

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January 14, 2021

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Rodriguez v. Barrera, et al.

Pursuant to Fed. R. App. P. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, make the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **SIMON E. RODRIGUEZ**

This 14th day of January, 2021.

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization that advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized to protect the rights of consumer bankruptcy debtors. NACBA files *amicus curiae* briefs in various cases seeking to protect those rights.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Each year hundreds of thousands of bankruptcy debtors file petitions under Chapter 13 committing to long-term repayment plans using future income. Because of the advantages to all parties and in acknowledgment of the burden on debtors' future income, Congress has taken steps to incentivize Chapter 13 over

Chapter 7 including providing that a debtor who tries and fails to maintain a Chapter 13 payback plan, may convert his case to Chapter 7 without penalty. Upon conversion, the bankruptcy estate consists of those property interests the debtor had at the petition date and still possesses. If this Court were to adopt the trustee's position here, where no bad faith is alleged, honest but unsuccessful Chapter 13 debtors would be significantly penalized for trying Chapter 13 instead of proceeding directly to Chapter 7. This would contravene Congress's intention to encourage debtors to file under Chapter 13.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. Bankr. P. 8017(c)(4), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, NCBRC, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In Chapter 7 bankruptcy, a debtor's pre-petition, non-exempt assets are liquidated to pay creditors. In Chapter 13, on the other hand, the debtor commits post-petition income for a period of three to five years to the payment of current debts with creditors receiving at least as much as they would have received had the debtor filed under Chapter 7. Chapter 13 has the advantages that creditors typically receive more than they would have under Chapter 7, and debtors are able to retain assets, like a house or car, which would have been liquidated in Chapter 7. For that reason, Congress has incentivized debtors to pursue Chapter 13 by, among other things, giving debtors the non-waivable option to convert from chapter 13 to Chapter 7 if they are unable to meet their Chapter 13 plan obligations.

When a case is converted from Chapter 13 to Chapter 7, the Chapter 7 bankruptcy estate consists of debtor's legal and equitable interests in property as they existed at the time of the original petition date so long as they are still in the debtor's possession or control at the time of conversion. 11 U.S.C. § 348(f)(1)(A). Significantly, interests acquired post-petition, including property appreciation due to factors such as pay-down of a mortgage, property improvement, or market forces, are not part of the converted estate. Only when a debtor is found to have

converted in bad faith are post-petition legal and equitable property interests considered part of the converted estate.

The bankruptcy court and the bankruptcy appellate panel correctly found that, where, as here, the debtors sold their exempt homestead interest post-petition but pre-conversion, the proceeds from that sale do not become part of the Chapter 7 estate. The trustee's argument to the contrary asks this Court to treat the debtors' conversion from Chapter 13 to Chapter 7 as if it were done in bad faith even though bad faith was neither alleged nor found in the courts below. The trustee's position, if followed, would run counter to the text of section 348(f) and contravene Congress's purpose when enacting that provision to resolve a circuit split in favor of cases finding that, upon conversion, the Chapter 7 estate consists of the debtor's property interests on the petition date. Any other holding would result in disincentivizing debtors from attempting Chapter 13.

ARGUMENT

I. Statutory Framework

The Bankruptcy Code provides several avenues for people and entities weighed down by debt to repay their creditors to the extent they are able, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. This case involves two options Congress has provided for individual debtors—

Chapter 7 and Chapter 13. Chapter 13, the chapter under which Debtors, Julio Cesar Barrera and Maria de la Luz Moro, originally filed, provides for repayment of debts from their future earnings. Chapter 7, by contrast, provides for repayment of debts by liquidating a debtor's existing non-exempt assets. Because Chapter 13 is often less disruptive to the debtor and can provide greater relief to creditors, Congress has long sought to encourage debtors to take advantage of that option where possible. Among other things, Congress has permitted debtors who pursue Chapter 13 to later convert to Chapter 7 without penalty.

A. Chapter 7

In a bankruptcy under Chapter 7, debts are paid by liquidating the debtor's non-exempt assets. Filing a bankruptcy petition under any chapter creates an "estate." 11 U.S.C. § 541(a). Subject to certain exceptions listed in section 541(a), the Chapter 7 estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case"—that is, the debtor's pre-petition assets. *Id.* § 541(a)(2). The Debtor may then exempt certain property, thereby removing the asset from the estate. *Id.* § 522(b); *Owen v. Owen*, 500 U.S. 305, 308 (1991) ("An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor").

Chapter 7 provides for appointment of a trustee, 11 U.S.C. §§ 701, 702, who

collects and sells the *non-exempt* estate property, *id.* § 704(a)(1), and distributes the proceeds to creditors in accordance with the priorities set by the Bankruptcy Code, *id.* § 726. Following that, for a consumer debtor, most debts are discharged. *Id.* § 727. Chapter 7 bankruptcy thus gives the debtor a fresh start, but sometimes at the price of losing a home or other non-exempt assets.

A. Chapter 13

Chapter 13 is a debt restructuring program available to certain debtors with steady income. 11 U.S.C. § 109(e). It differs from Chapter 7 in key respects. Most importantly, Chapter 13 permits debtors to repay debts using their "future income," rather than proceeds from the sale of their assets. *Id.* § 1322(a)(1). The Chapter 13 estate includes, in addition to a debtor's non-exempt assets at the time of filing, post-petition property interests that the debtor acquires or earns "after commencement of the case, but before the case is … converted to a case under chapter 7…" *Id.* § 1306(a). It is from the debtor's post-petition earnings that creditors typically are paid.

Under Chapter 13, distributions to creditors are made pursuant to a payment plan the debtor prepares. *Id.* § 1321. The plan must provide for submission of part of the debtor's "future earnings … to the supervision and control of the [Chapter 13] trustee"; the trustee, in turn, distributes the money to creditors according to the

confirmed plan. *Id.* §§ 1322(a)(1), 1326(c). To obtain confirmation from the bankruptcy court, the plan must provide for paying each unsecured creditor at least as much as it would have received under a Chapter 7 liquidation. *Id.* § 1325(a)(4).

Chapter 13 offers significant advantages over Chapter 7 to debtors and creditors alike. Because creditors are paid out of the debtor's future earnings, the debtor is able to keep possession of existing assets, 11 U.S.C. § 1306(b)—most importantly, a house or car—and protect those assets from liquidation. Creditors also benefit. By law, the confirmed plan must give them at least as much as they would receive under a Chapter 7 liquidation. *Id.* § 1325(a)(4), (5). And creditors often receive more under a Chapter 13 repayment plan, particularly where a debtor has regular income but no assets subject to liquidation. In light of those advantages, Congress has expressed a strong policy of encouraging debtors to take advantage of Chapter 13 where possible. See *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 395 (1966); H.R. Rep. No. 103-835, at 57 (1994).

B. Conversion from Chapter 13 to Chapter 7

Consistent with its policy of encouraging debtors to choose Chapter 13, Congress has made it easy for debtors to fall back on Chapter 7. The Bankruptcy Code grants a Chapter 13 debtor the non-waivable right to convert a Chapter 13 case to a Chapter

7 case "at any time." 11 U.S.C. § 1307(a).[1]

Conversion "does not commence a new bankruptcy case." *Collier on Bankruptcy* ¶ 348.02 (Richard Levin and Henry J. Sommer, eds. 16th ed.) Rather, it *transforms* the debtor's pending case from one under Chapter 13 into one under Chapter 7. See 11 U.S.C. § 348(a) (conversion "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief"). Conversion significantly changes how the case proceeds thereafter.

First, conversion transforms the estate from a Chapter 13 estate to a Chapter 7 estate. A Chapter 13 estate includes interests in property and earnings acquired post-petition while a Chapter 7 estate generally does not. The statute addresses that incongruity by providing 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," provided that property "remains in the possession of or … under the control of the debtor on the date of conversion." *Id.* § 348(f)(1)(A). Thus, after conversion, the estate generally consists of the same legal and equitable interests in property that would have been included in the estate had the debtor filed under Chapter 7 so long as the property interest remains in possession or under the control of the debtor. It excludes legal

[1] A Chapter 13 debtor likewise may dismiss the case "at any time." 11 U.S.C. § 1307(b).

and equitable interests in property the debtor acquired after filing the Chapter 13 petition.

Congress created an exception to that general rule for "bad faith" conversions. If the debtor converts in bad faith—*e.g.*, if the debtor "fraudulently conceal[s] significant assets," *Marrama* v. *Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007)—the Chapter 7 estate will consist of the debtor's legal and equitable interest in property "as of the date of conversion," 11 U.S.C. § 348(f)(2). Thus, only where a debtor acts in bad faith are post-petition legal and equitable interests in property considered "property of the estate in the converted case" and subject to distribution to creditors after conversion. *Id.*

II. The Bankruptcy Code Requires That Proceeds from the Sale of Debtors' Homestead Interest Are Not Property of the Estate After a Good-Faith Conversion To Chapter 7

The text, structure, and history of the relevant Bankruptcy Code provisions all point to the same conclusion: That the proceeds from the sale of the Debtors' homestead interest are not property of the Chapter 7 estate in the converted case. Had the Debtors filed their original case under Chapter 7, the Chapter 7 trustee would not have been able to liquidate the property for the benefit of creditors because the

Debtors' entire interest in the property was exempt.[2] As a no asset case, the Debtors would have received a discharge in approximately three to four months and moved on. Years later, the Debtors would have been able to sell their property, just as they have done here, and keep the sale proceeds. Instead, the Chapter 7 Trustee here seeks to penalize Debtors for attempting, but ultimately failing to complete a Chapter 13, by seeking the sale proceeds that he would not have been entitled to had the Debtors first filed a Chapter 7.

A. Estate Property in a Good Faith Conversion from Chapter 13 to Chapter 7 Excludes Property No Longer in the Debtor's Possession or Control.

[2] The effect of the exemption is to remove the debtor's interest in exempt property from the property of the estate. *Owen v. Owen*, 500 U.S. 305, 308 (1991) ("An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor"); *In re Bell*, 225 F.3d 203, 216 (2d Cir. 2000) ("It is well-settled law that the effect of . . . exemption is to remove property from the estate and vest it in the debtor."); *Gamble v. Brown (In re Gamble),* 168 F.3d 442, 444 (11th Cir. 1999) ("Once the property is removed from the estate [through exemption], the debtor may use it as his own."). *See also Ogunwo v. American Nat. Ins. Co*., 936 P.2d 606, 609 (Colo. App. Mar. 6, 1997) (proceeds of exempt property belong to the debtor not the bankruptcy estate).

There is no dispute as to the value of the property as of the date of the petition or that all of the Debtors' interest in the property was exempt at the time. *In re Barrera*, Case No. 16-13216, Order Denying Motion for Turnover of Sale Proceeds, at p.4 (Bankr. D. Colo. Jan. 13, 2020) ("*Barrera* Decision").

"When the statute's language is plan, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000) (internal citations omitted). As relevant, section 348(f) 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*.

Like many debtors, the Debtors here sought to cure a pre-petition arrearage on their mortgage through their Chapter 13 plan. *Barrera* Decision, at p.1. And, like many debtors, the Debtors here were unsuccessful in saving their home. Instead, after two years in Chapter 13, the Debtors sold their homestead rather than face foreclosure. Subsequently, the Debtors converted their case from Chapter 13 to Chapter 7. At the time of conversion, the Debtors did not have possession or control over the homestead property—i.e., the "physical thing which is a subject of ownership." *Cf. In re Hayes*, Case No. 15-27027, (Bankr. D. Colo. Mar. 28, 2019) at p.11. The Debtors had no further "rights to control and dispose of that thing." *Id.* Because the Debtors no longer had possession or control of the homestead property, it could not be property of the Chapter 7 estate upon conversion.

In re Goins, 539 B.R. 510, 515-16 (Bankr. E.D. Va. 2015) and *Hayes* cited by the Chapter 7 Trustee are both distinguishable because in both cases the Debtors remained in possession and control of the "property." In *Goins*, the chapter 7 trustee in the converted case sought to sell the debtor's *non-exempt* property and capture the increased value of the debtor's equity. *See Goins*, 539 B.R. at 511, 512 n.4. The Chapter 7 trustee in *Hayes* similarly sought to sell the Debtors' property, which remained in the possession and control of the Debtors. *See Hayes*, Case. No 15-20727, at p.2. The *Hayes* court concluded that the statute's reference to "property" unambiguously referred to the "physical thing which is a subject of ownership." *Id.* at 11. The Trustee in this case glosses over this distinction, *see* Trustee Br. at 6, and argues that appreciation is part of the homestead property that was property of the estate on the date the chapter 13 petition was filed, *see* Trustee Br. at 9, while at the same time disregarding the fact that the Debtors no longer have possession or control of that homestead property. *Collier on Bankruptcy* ¶ 348.07[1].

Applying the plain language of the statute and in the absence of bad faith, the fact that the Debtors no longer have possession or control of the property, should be dispositive and result in affirmance of the lower court decisions, albeit on different grounds.

B. Post-petition Appreciation Is Also Not Property of the Chapter 7 Estate Upon Good Faith Conversation from Chapter 13 to Chapter 7.

A chief distinction between Chapter 7 and Chapter 13 is that, under Chapter 7, creditors are paid using *pre-petition* assets, if any, while under Chapter 13 creditors are usually paid using *post-petition* income. Congress preserved that distinction in cases that are converted from Chapter 13 to Chapter 7. It provided that the estate property in the converted Chapter 7 case is determined "as of the date of filing of the petition," 11 U.S.C. § 348(f)(1)(A), and that "the date of the filing of the petition" continues to be the date of the original Chapter 13 filing, *id.* § 348(a). Accordingly, once a debtor converts his case to Chapter 7, the property of the estate includes only those legal and equitable interests that the debtor had on the date of the petition. *Id.* Interests acquired after the petition date, such as wages earned by the debtor and appreciation, regardless of whether it results from pay down of a mortgage, property improvements, or market forces, are excluded from the chapter 7 estate.

Congress created one narrow exception to that rule, providing that, "if the debtor converts a case under chapter 13 … in bad faith," the estate property "shall consist of the property of the estate *as of the date of conversion*." 11 U.S.C. § 348(f)(2) (emphasis added). The result is to punish bad-faith conversions by making

otherwise-immune post-petition earnings and other post-petition property interests available for liquidation and distribution to creditors after conversion to Chapter 7.

Here, the Trustee has not alleged bad faith. Instead, the Trustee argues that even though the Debtors are no longer in possession or control of the actual homestead property, the proceeds from the sale of that property, including funds that represent the appreciation in the property since the petition date, must be considered property of the Chapter 7 estate in the converted case. According to the Trustee, this is true, even if a Chapter 7 Trustee would not have been able to liquidate the homestead property if the case had originally been filed under Chapter 7. The Trustee asserts that post-petition appreciation inures to the benefit of the estate, but relies almost exclusively on cases that were filed under chapter 7 and held open long enough for the property to appreciate. *See* Trustee Br. at 17-18, citing *Wilson v. Rigby*, 909 F.3d 306 (9th Cir. 2018) (filed as Chapter 7 case); *In re Orton*, 687 F.3d 612 (3d Cir. 2012) (filed as Chapter 7 case); *In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010) (filed as Chapter 7 case); *Hyman v. Plotkin*, 967 F.2d 1316 (9th Cir. 1992) (filed as Chapter 7 case); *In re Prospero*, 107 B.R. 732 (Bankr. C.D. Cal. 1989) (filed as Chapter 7 case); *In re Celentano,* No. 10-22833 NLW, 2012 WL 3867335 (Bankr. D.N.J. 2012) (filed as Chapter 7 case); *In re Paolella*, 85 B.R. 974 (Bankr. E.D. Pa. 1988) (filed as Chapter 7 case). These cases are not applicable in cases converted from

Chapter 13 to Chapter 7. Nor does the proposition that appreciation inures to the estate necessarily hold true in Chapter 13. *See In re Baker*, 620 B.R. 655 (Bankr. D. Colo. 2020) (based on Chapter 13 plan that vested all property of the estate in the debtor upon confirmation, appreciation in the property's value did not belong to the estate).

The Bankruptcy Court and the Bankruptcy Appellate Panel properly concluded that the post-petition sale proceeds were not part of the Debtors' Chapter 7 estate in a case converted from Chapter 13. Section 348(f) makes clear that post-petition property interests should be distributed to creditors after conversion to Chapter 7 *only if the debtor converted in bad faith*. The Trustee's argument defies that design and asks this Court to effectively subject Debtors to the penalty for bad-faith conversion without any finding—or even allegation—of bad faith. That is flatly inconsistent with the framework Section 348(f) prescribes, and it will discourage debtors from pursuing Chapter 13, rather than encouraging them as Congress intended.

III. The History of Section 348 Confirms that Congress Intended Undistributed Funds in a Chapter 13 Estate To Belong to the Debtor Following Conversion

Section 348's legislative history shows that Congress recognized that allowing creditors to reach post-petition interests in a converted case would often penalize debtors who first pursue Chapter 13 compared to those who initially proceed under Chapter 7. Consistent with its longstanding policy of promoting use of Chapter 13 wherever possible, Congress sought to eliminate that disincentive. The decisions below are in harmony with that congressional purpose.

Congress enacted section 348(f) in 1994 to "clarify 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 23, 57. Before the 1994 Amendments, federal courts had divided over whether post-petition property became part of the Chapter 7 estate upon conversion from Chapter 13. Congress identified *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991), and *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985), as illustrative of the split. See H.R. Rep. No. 103-835, at 57.

In *Lybrook*, the Seventh Circuit held that the entire Chapter 13 estate became part of the Chapter 7 estate upon conversion, and therefore post-petition property interests were available for liquidation and distribution to creditors. 951 F.2d at 136-138. The court determined that Section 348, as it then existed, left the court at a

"semantic impasse." *Id.* at 137. Troubled by the possibility of "strategic, opportunistic behavior" by debtors using conversion to shield post-petition property from creditors, the court concluded that "the only cure is to rule that the Chapter 13 estate passes unaltered into Chapter 7 upon conversion." *Id.* at 137-138. Thus, in *Lybrook*, land the debtor had inherited after his Chapter 13 filing, but before conversion to Chapter 7, was deemed part of the Chapter 7 estate and subject to liquidation—even though it would not have been had the debtor originally filed under Chapter 7.

In *Bobroff*, by contrast, the Third Circuit held that post-petition property did *not* become part of the converted Chapter 7 estate. 766 F.2d at 799-800, 803. That result, the court explained, "is consonant with the Bankruptcy Code's goal of encouraging use of debt repayment plans rather than liquidation." *Id.* at 803. "If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." *Id.* Contrary to the Seventh Circuit's policy rationale in *Lybrook*, the Third Circuit concluded that "when chapter 13 does prove unavailing no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to

repay his debts." *Id.*

In the 1994 Amendments, Congress came down squarely and broadly in favor of debtors who give Chapter 13 a try. It "reject[ed] cases such as *Matter of Lybrook*, and adopt[ed] the reasoning of *In re Bobroff*." H.R. Rep. No. 103-835, at 57 (citations omitted). Importantly, the statutory amendment was not simply about "pay down" cases as the Trustee suggests. *Lybrook* was not such a case. Instead, in endorsing *Bobroff*, Congress recognized that *Lybrook*'s rule allowing creditors to reach post-petition assets after conversion to Chapter 7 would pose a "serious disincentive to chapter 13 filings." *Id.; see also Collier on Bankruptcy* ¶ 348.07[1].

At the same time, Congress was not deaf to the Seventh Circuit's concerns—echoed in the decision below—that debtors might use conversion "opportunistic[ally]" to stymie their creditors. *Lybrook*, 951 F.2d at 137. Congress included Section 348(f)(2), the "bad faith" exception, as an essential component of the revised statutory scheme. As the House Report explains, section 348(f)(2) "gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case." H.R. Rep. No. 103–835, at 57. Absent bad faith, however, Congress intended that legal and equitable interest in property acquired post-petition be off-limits to creditors after conversion from

Chapter 13 to Chapter 7.

Allowing the Chapter 7 Trustee to reap the benefits of increased equity after conversion defies that congressional intent. It creates a "serious disincentive to chapter 13 filings," H.R. Rep. No. 103-835, at 57, by exposing more of an honest debtor's assets to creditors but offering no discernible benefit to the debtor. If a debtor proceeds under Chapter 7, he will keep his exempt property and will surrender his non-exempt property, but his loss will be limited to non-exempt property. If the debtor proceeds under Chapter 13, he might save his property, but if he cannot make payments under the plan, he may lose his property that was otherwise exempt and previously not subject to liquidation by the trustee.

The decisions of the Bankruptcy Court and Bankruptcy Appellate Panel put creditors in precisely the same position as they would have been had the Debtors never sought to repay their debts in chapter 13. *See Bobroff*, 766 F.2d at 803. By contrast, the Trustee seeks to penalize the Debtors, by taking what he could not have if the case had been filed under Chapter 7. This Court should decline the Trustee's invitation to create the same disincentives to Chapter 13 that Congress explicitly sought to abolish in 1994.

CONCLUSION

This Court should find that, in the absence of bad faith, upon conversion from chapter 13 to chapter 7, the proceeds from the Debtors' post-petition sale of their exempt homestead interest do not become part of the chapter 7 bankruptcy estate. The Court should affirm the decisions below.

Respectfully submitted,

s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because: It contains 4,413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32 because: It has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

Further, pursuant to 10th Cir. R. 25.5, all required privacy redactions have been made; any required copies to be submitted to the court will be exact copies of the version submitted electronically; and, the electronic submission was scanned for viruses with the most recent version of Norton Anti-Virus Plus, and is free of viruses.

s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Tenth Circuit Court of Appeals by using the Appellate CM/ECF system on January 14, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/ Tara Twomey
Tara Twomey
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