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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,
10 Appellant,

11 v.

12 Lawrence J. Warfield, et al.,
13 Appellees.
14

No. CV-20-08204-PCT-DWL

ORDER

15 **INTRODUCTION**

16 In 2015, Sandra J. Tillman (“Debtor”) purchased a house valued at \$475,000 in
17 Prescott, Arizona. Bank of America (“BofA”) and the Internal Revenue Service (“IRS”)
18 held secured claims on the house arising from, respectively, a mortgage and a pre-
19 bankruptcy tax penalty lien.

20 In 2019, Debtor filed a petition for Chapter 7 bankruptcy and claimed a \$150,000
21 homestead exemption in the house under Arizona law. The Trustee instituted an adversary
22 proceeding to avoid the IRS’s tax lien and preserve the lien for the benefit of the bankruptcy
23 estate. The government and Debtor objected, arguing that the Trustee could not avoid the
24 lien or, in the alternative, that the avoided lien could not be preserved for the benefit of the
25 estate and, instead, should fall within Debtor’s homestead exemption and be preserved for
26 her benefit. The Trustee filed a motion for summary judgment, which the government and
27 Debtor opposed. The bankruptcy court, after allowing supplemental briefing and holding
28 oral argument, issued a detailed order granting summary judgment to the Trustee.

1 The government now seeks review of the bankruptcy court’s order. For reasons
2 explained below, that order is affirmed.

3 **BACKGROUND ON BANKRUPTCY CODE PROVISIONS**

4 I. Exemptions

5 “An estate in bankruptcy consists of all the interests in property, legal and equitable,
6 possessed by the debtor at the time of filing, as well as those interests recovered or
7 recoverable through transfer and lien avoidance provisions.” *Owen v. Owen*, 500 U.S. 305,
8 308 (1991), *superseded by statute on other grounds as recognized in In re Ehlen*, 202 B.R.
9 742, 744-45 (Bankr. W.D. Wis. 1996). *See also* 11 U.S.C. § 541. In some circumstances,
10 however, a debtor may exempt property, which serves to remove it from the bankruptcy
11 estate. *In re Heintz*, 198 B.R. 581, 585 (9th Cir. BAP 1996). In other words, the debtor
12 generally retains exempt property, and it cannot be used to satisfy the claims of unsecured
13 creditors in the bankruptcy proceeding. *Owen*, 500 U.S. at 308 (“An exemption is an
14 interest withdrawn from the estate (and hence from the creditors) for the benefit of the
15 debtor.”); *Heintz*, 198 B.R. at 585 (“Once property is exempted, its status as property of
16 the estate is terminated and the property is ultimately revested in the debtor.”). “The federal
17 exemptions in the Bankruptcy Code were enacted to ensure that a debtor coming out of the
18 bankruptcy process retains sufficient possessions to obtain a fresh start.” *In re Butcher*,
19 189 B.R. 357, 369 (D. Md. 1995). *See also Matter of Hahn*, 5 B.R. 242, 244 (Bankr. S.D.
20 Iowa 1980) (the “basic purposes for exemption laws” are to “provide a debtor enough
21 money to survive,” to “protect his dignity and his cultural and religious identity,” to “afford
22 a means of financial rehabilitation,” to “protect the family unit from impoverishment,” and
23 to “spread the burden of the debtor’s support from society to his creditors”).

24 Although § 522 of the Bankruptcy Code enumerates the exemptions available to a
25 debtor in bankruptcy, § 522(b)(1) authorizes state legislatures to “opt out” of the § 522
26 exemption scheme and provide their own exemption schemes. “If a State opts out, then its
27 debtors are limited to the exemptions provided by state law.” *Owen*, 500 U.S. at 308.
28 Arizona, like many other states, has opted out of the § 522 exemptions and provides its

1 own to Arizona residents. A.R.S. § 33-1133(B). Among other things, Arizona provides a
2 homestead exemption that permits a resident to exempt her “interest in real property . . . in
3 which [she] resides,” up to \$150,000 “in value.” *Id.* § 33-1101(A)(1).

4 Section 522 also “places limitations on a debtor’s ability to shield exempted
5 property from liability for pre-petition tax debts.” *In re Wright*, 156 B.R. 549, 554 (N.D.
6 Ill. 1992). For example, “exempted property remains liable for certain nondischargeable
7 pre-petition tax debts.” *Id.* A “properly filed tax lien is unavoidable in bankruptcy;
8 exempted property on which the IRS has properly filed a tax lien remains liable for any
9 debt secured by that lien.” *Id.* (collecting cases). *See also* 11 U.S.C. § 522(c)(2)(B)
10 (“[P]roperty exempted under this section is not liable during or after the case for any debt
11 of the debtor that arose . . . before the commencement of the case, except . . . a debt secured
12 by a lien that is . . . a tax lien, notice of which is properly filed.”).

13 II. Avoidance

14 Under § 724(a) of the Bankruptcy Code, a trustee may “avoid” a “lien that secures
15 a claim of a kind specified in section 726(a)(4),” such as a lien for pre-petition tax
16 penalties.¹ When a trustee avoids a lien, it is essentially transformed into an unsecured
17 claim, which maintains a lower priority in the distribution of bankruptcy estate assets. *See,*
18 *e.g., In re Gill*, 574 B.R. 709, 717 (9th Cir. BAP 2017) (“[I]t is clear by operation of
19 §§ 724(a) and 726(a)(4) that a penalty which is secured by a tax lien is automatically
20 demoted in a chapter 7 case from the highest priority to the lowest priority, payable only
21 after general unsecured creditors are paid in full.”); 6 Collier on Bankruptcy ¶ 724.02[6]
22 (“In enacting section 724(a), . . . Congress made a policy determination that payment of
23 claims for penalties or punitive damages should be subordinated to payment of general
24 unsecured claims.”).

25 _____
26 ¹ Section 726(a)(4) concerns, among other things, “payment of any allowed claim,
27 whether secured or unsecured, for any fine, penalty, or forfeiture.” A lien for pre-petition
28 tax penalties appears to fall within the bounds of § 726(a)(4). *See, e.g., In re Hutchinson*,
579 B.R. 860, 862 (Bankr. E.D. Cal. 2018) (“Section 726(a)(4) encompasses a broad
spectrum of fines, penalties, and forfeitures, including tax penalties.”); 6 Collier on
Bankruptcy ¶ 726.02[4] (16th ed. 2012) (“[S]ection 726(a)(4) includes prepetition tax
penalties if they are not compensation for actual pecuniary loss.”).

1 III. Preservation

2 Under § 551 of the Bankruptcy Code, “[a]ny transfer avoided under section
3 522 . . . or 724(a) . . . is preserved for the benefit of the estate but only with respect to
4 property of the estate.”² In essence, this permits the trustee to recover the value of the
5 avoided claim and use it to “increase the assets of the estate for distribution to creditors.”
6 *Heintz*, 198 B.R. at 585. *See also* 11 U.S.C. § 541(a)(4) (“[The bankruptcy] estate is
7 comprised of . . . [a]ny interest in property preserved for the benefit of . . . the estate under
8 section . . . 551 . . .”). Section 551 “serves as a ‘follow-up’ provision explaining how
9 assets and property avoided under other Code provisions should be handled.” *Jurista v.*
10 *Amerinox Processing, Inc.*, 492 B.R. 707, 774 (D.N.J. 2013).

11 “Once a trustee recovers an asset for the estate through one of the transfer or lien
12 avoidance provisions, § 551 automatically preserves the asset for the estate.” *Heintz*, 198
13 B.R. at 584. *See also In re Tribble*, 290 B.R. 838, 844 (Bankr. D. Kan. 2003) (“As this
14 Court reads § 551, upon avoidance of [the] lien . . . , the lien is *automatically* preserved for
15 the benefit of the estate.”). “The rationale behind the automatic preservation rule for
16 transfers and liens avoided by a trustee in bankruptcy is that the estate should benefit from
17 each avoidance rather than promoting the priority of unavoidable junior secured interests
18 who would otherwise improve their positions at the expense of the estate.” *Matter of*
19 *DeLancey*, 94 B.R. 311, 313 (Bankr. S.D.N.Y. 1988). In other words, when a trustee
20 avoids a lien, preservation allows the trustee to occupy the priority of the avoided lien and
21 use that priority to distribute estate assets to unsecured creditors. *In re Haberman*, 516
22 F.3d 1207, 1210 (10th Cir. 2008) (“[T]he trustee, on behalf of the entire bankruptcy estate,
23 in some sense steps into the shoes of the former lienholder, with the same rights in the
24 collateralized property that the original lienholder enjoyed. Likewise, the trustee, on behalf
25 of the entire estate, assumes the original lienholder’s position in the line of secured
26 creditors; in this way, Congress sought to assure that the avoidance of a lien doesn’t simply

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28 ² The term “transfer” includes the “creation of a lien.” 11 U.S.C. § 101(54). *See also*
In re Haberman, 516 F.3d 1207, 1210 & n.4 (10th Cir. 2008) (classifying liens as a subset
of transfers); 5 Collier ¶ 551.02[1] (“Section 551 preserves only ‘transfers’ and ‘liens.’”).

1 benefit junior lienholders who would otherwise gain an improved security position and
2 might, when the estate is limited, prove the only beneficiaries of the trustee's actions.”).
3 Without preservation, junior lienholders would jump in priority, be able to obtain a greater
4 share of the estate, and leave less available for distribution to unsecured creditors. *In re*
5 *Seibold*, 351 B.R. 741, 746 (Bankr. D. Idaho 2006) (“[Section 551] operates to preserve an
6 avoided lien for the benefit of the bankruptcy estate so as to permit the trustee to step into
7 the position of the creditor whose lien has been avoided, thereby preventing a junior lien
8 holder (or a debtor) from improving its position at the expenses of a debtor's unsecured
9 creditors.”).

10 BACKGROUND

11 I. Factual Background And Bankruptcy Proceedings

12 On June 30, 2015, Debtor purchased a house located at 154 W. Soaring Ave. in
13 Prescott, Arizona (the “Property”) valued at \$475,000. (Doc. 11-3 at 23.)

14 In February 2018, the IRS assessed penalties against Debtor for failing to timely file
15 her 2015 tax return—despite having received a six-month extension to do so—and for not
16 sufficiently pre-paying her tax liabilities through withholdings or deposits. (Doc. 11-5 at
17 24-25.) The initial penalties totaled over \$18,000. (*Id.* at 25.)

18 On December 24, 2018, the IRS recorded a notice of federal tax lien against Debtor
19 and the Property (the “Tax Lien”). (*Id.*)

20 On January 30, 2019, Debtor filed a voluntary petition for Chapter 7 bankruptcy.
21 (Doc. 11-3 at 23.) In her petition, Debtor disclosed the IRS's claim on the Property and
22 claimed a \$150,000 exemption in the Property. (*Id.* at 23-24.)

23 On February 27, 2019, Debtor filed a motion to compel abandonment of the
24 Property. (*Id.* at 24.)³ Debtor argued that “there was no equity in the Property above her
25 homestead exemption.” (*Id.*)

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27 ³ When estate property is abandoned, the property is removed from the estate and
28 taken by one having interest in the property, such as the debtor or a secured creditor. The
purpose of abandonment is to allow the trustee to remove property from the estate that is
“burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11
U.S.C. § 554(a).

1 On April 19, 2019, the Trustee filed an objection to Debtor’s claimed exemptions.
2 (*Id.*) The bankruptcy court later denied this objection, allowing Debtor’s homestead
3 exemption in the Property and “clarifying that the homestead exemption is subordinate to
4 BofA’s mortgage lien and the Tax Lien.” (*Id.*)

5 On July 3, 2019, the Trustee moved to list and sell the Property. (*Id.*) Debtor
6 objected. (*Id.*) The bankruptcy court “held a preliminary hearing at which time [it]
7 encouraged the parties to continue (or revitalize) settlement discussions.” (*Id.*)

8 On December 27, 2019, BofA moved for relief from the automatic stay so it could
9 foreclose its lien on the Property. (*Id.*) The Trustee objected because his motion to sell
10 the Property was still pending, and Debtor objected because she “claimed to be current on
11 her payments and . . . BofA’s interests were adequately protected.” (*Id.* at 24-25.)

12 On February 21, 2020, the Trustee instituted an adversary proceeding in which he
13 sought a “declaration that the Trustee can avoid the Tax Lien under § 724(a) and that the
14 value of the avoided Tax Lien is preserved for the benefit of the estate.” (*Id.*) The IRS
15 answered the complaint and “disput[ed] Trustee’s ability to avoid the Tax Lien for the
16 benefit of the estate.” (*Id.*) Debtor intervened and answered the complaint, arguing that
17 “her allowed homestead exemption remove[d] the Property from [the] bankruptcy estate
18 and any recovery from the avoided Tax Lien belong[ed] to” her. (*Id.*)

19 On March 26, 2020, the Trustee again moved for the bankruptcy court’s approval
20 to sell the Property, to which the IRS objected. (*Id.*) On April 7, 2020, the bankruptcy
21 court held a hearing, during which the “parties advised the [bankruptcy court] that there
22 was no pending buyer.” (*Id.*)

23 On April 10, 2020, the Trustee filed a motion for summary judgment, to which the
24 IRS and Debtor filed responses and the Trustee filed a reply. (*Id.* at 25-26.) The
25 bankruptcy court later authorized the submission of a sur-reply and sur-sur-reply. (*Id.* at
26 26.)

27 On July 9, 2020, Debtor filed a motion for the bankruptcy court to approve a sale of
28 the Property. (Doc. 11-10 at 1-4.)

1 On July 17, 2020, the bankruptcy court issued its order granting summary judgment
2 to the Trustee. (Doc. 11-3.)

3 On July 22, 2020, the bankruptcy court held a hearing on the sale motion (Doc. 11-
4 12) and approved the sale the next day (Doc. 11-9 at 1-4).

5 The Property sold for \$475,000, and \$26,771 was set aside for the current balance
6 on the Tax Lien. (Doc. 11-8 at 13, 15.)

7 II. The Bankruptcy Court's Decision

8 As noted, the bankruptcy court issued an order granting summary judgment to the
9 Trustee. (Doc. 11-3.) The court addressed the following issues: (1) whether the Trustee
10 could “avoid the Tax Lien under § 724(a) and preserve the value of the avoided Tax Lien
11 for the benefit of the bankruptcy estate under § 551”; (2) if so, whether Debtor could “claim
12 the avoided Tax Lien as exempt pursuant to § 522(g)”; and (3) whether the IRS could
13 “satisfy its unsecured (but possibly nondischargeable) claim from the exemption proceeds
14 from the sale of the Debtor’s homestead.” (*Id.* at 26.)⁴

15 A. **Avoidance And Preservation Of The Tax Lien**

16 The bankruptcy court began by noting that the IRS “holds a secured claim of the
17 kind specified in § 726(a)(4),” *i.e.*, payment for a pre-petition penalty. (*Id.* at 28.) Debtor
18 and the IRS argued that, because Debtor claimed an exemption in the Property, the Property
19 was “removed from the bankruptcy estate” and the Trustee thus could not preserve the
20 avoided Tax Lien under § 551, as § 551 permits a trustee to preserve an avoided lien “only
21 with respect to property of the estate.” (*Id.*) The bankruptcy court disagreed, concluding
22 that a “debtor cannot exempt [an] asset in its entirety from the estate” because a debtor’s
23 exemption—including a homestead exemption—only removes the debtor’s interest in the
24 asset up to the permitted value. (*Id.* at 28-29.)

25 The bankruptcy court then discussed *In re Heintz*, 198 B.R. 581 (9th Cir. BAP
26 1996), in which the BAP held that a judgment lien avoided by the trustee was preserved

27 ⁴ The bankruptcy court did not address the third issue in its order, stating that the issue
28 was not ripe because there were “no sale proceeds yet available for seizure by the IRS.”
(Doc. 11-3 at 38.)

1 for the benefit of the estate, notwithstanding that the debtor had exempted the property that
2 was the subject of the lien. (*Id.* at 29.) Although *Heintz* did not end the bankruptcy court’s
3 analysis,⁵ the court concluded that *Heintz* “tell[s] us that property cannot be exempted from
4 a bankruptcy estate unless it is first property of the estate.” (*Id.*) Accordingly, because
5 “the Property was property of this estate at the commencement of Debtor’s bankruptcy case
6 . . . § 551 applie[d] to the Trustee’s efforts to avoid the IRS’s Tax Lien.” (*Id.* at 30.)

7 The bankruptcy court also noted that there was “another reason why the Property
8 [was] property of [the] bankruptcy estate for § 551 purposes, even after the Court allowed
9 the Debtor’s exemption on the Property.” (*Id.*) The court interpreted Arizona’s homestead
10 exemption, A.R.S. § 33-1101(A), to exempt “only the Debtor’s *interest* in the Property and
11 then only to the extent of the *value* of that interest, up to \$150,000.” (*Id.*) But the value of
12 Debtor’s exemption “at all times[] was no greater than the value of the Property, less the
13 voluntary BofA lien granted by the Debtor against the Property and less the involuntary
14 lien held by the IRS.” (*Id.*) In other words, Debtor’s exemptible interest in the Property
15 did “not include the value of the Property which [was] encumbered by BofA’s lien” and,
16 because tax liens are effective against even exempt property, Debtor’s exemptible interest
17 in the Property also did not include the value of the Property which was encumbered by
18 the Tax Lien. (*Id.* at 31-32.) Debtor’s exemption was therefore “third in line, behind
19 BofA’s 1st lien and the 2nd position occupied by the IRS’s Tax Lien.” (*Id.* at 32.) Given
20 this backdrop, the bankruptcy court concluded that the Trustee could avoid the Tax Lien
21 under § 724(a). (*Id.* at 32-33.)

22 B. Debtor’s Exemption

23 The next question before the bankruptcy court was “whether the avoided IRS Tax
24 Lien is preserved for the benefit of the estate or the Debtor and what rights [were] held by
25 the IRS after its Tax Lien was avoided.” (*Id.* at 33.) The bankruptcy court noted that,
26 under § 522(g), a debtor may exempt property recovered by the trustee under § 551 “so

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28 ⁵ Among other things, the bankruptcy court noted that *Heintz* “did not address the
interplay between § 551” and portions of § 522. (*Id.* at 29 n.46.)

1 long as the debtor did not conceal the property” and the lien was “not voluntarily created
2 by the debtor.” (*Id.*) The bankruptcy court acknowledged that both conditions seemed to
3 be satisfied here, as Debtor neither voluntarily granted the Tax Lien nor concealed the
4 Property. (*Id.* at 34.)

5 Nevertheless, the bankruptcy court reasoned that § 522(c)(2)(B) “limits a debtor’s
6 right to invoke § 522(g) when a lien is avoided, and the property preserved by the trustee
7 is a tax lien.” (*Id.* at 35.) In reaching this conclusion, the bankruptcy court relied on *In re*
8 *DeMarah*, 62 F.3d 1248 (9th Cir. 1995), in which the Ninth Circuit held that a debtor could
9 not avoid a tax lien and preserve the avoided lien for his own benefit under § 522(h). The
10 bankruptcy court acknowledged that this case involves a different statutory subdivision,
11 § 522(g), but reasoned that *DeMarah*’s assessment of § 522(h) was instructive because
12 both provisions contain the same limiting language (*i.e.*, “to the extent that the debtor could
13 have exempted such property”). (*Id.*)

14 The bankruptcy court also acknowledged another “difference between *DeMarah*
15 and [this] case”—namely, that this case involves an attempt by “the Trustee, not the
16 Debtor,” “to avoid the Tax Lien and preserve the avoided lien for the benefit of the estate’s
17 creditors and not for the benefit of the Debtor.” (*Id.* at 36.) The bankruptcy court
18 concluded, however, that when read together, *DeMarah* and the language of § 522(c)(2)(B)
19 compel the conclusion that a debtor cannot “co-opt a tax lien otherwise avoidable under
20 § 724(a).” (*Id.*) The court noted that to “hold otherwise would enable a Debtor to
21 wrongfully fail to pay her tax bill and then use § 522(g) to claim the avoided tax penalty
22 lien for herself and to the detriment of her creditors.” (*Id.* at 36-37.)

23 Last, the bankruptcy court rejected the IRS’s and Debtor’s argument that the
24 Trustee’s proposed approach would require Debtor to “in effect[] pay twice on the IRS
25 claim because the IRS [would] be able to then seize homestead sale proceeds to the extent
26 those proceeds would otherwise be exempt.” (*Id.* at 37-38.) The court noted that the “Tax
27 Lien position against the Property never attached to the Debtor’s homestead exemption,”
28 so if it “so happens that the IRS’s now unsecured claim is also nondischargeable, it is no

1 different than any other nondischargeable claim which will need to be paid by the Debtor.”
 2 (*Id.* at 38.)

3 STANDARD OF REVIEW

4 In the bankruptcy context, “[a] reviewing court will affirm a grant of summary
 5 judgment only if it appears from the record, after viewing all evidence and factual
 6 inferences in the light most favorable to the nonmoving party, that there are no genuine
 7 issues of material fact and that the moving party is entitled to prevail as a matter of law. A
 8 bankruptcy court’s grant of summary judgment is reviewed *de novo*.” *In re Pioneer Tech.,*
 9 *Inc.*, 107 B.R. 698, 700 (9th Cir. 1988) (citations omitted).⁶

10 ANALYSIS

11 I. Whether The Trustee Can Avoid The Tax Lien

12 A. **Whether Debtor’s Exemption Was Initially Property Of The Estate**

13 As noted, the bankruptcy court concluded that the Trustee could invoke § 551—the
 14 provision of the Bankruptcy Code authorizing the preservation of an avoided tax lien for
 15 the benefit of a bankruptcy estate—because “the Property [was] property of this bankruptcy
 16 estate for § 551 purposes, even after the Court allowed the Debtor’s exemption on the
 17 Property.” (Doc. 11-3 at 30.) In Part A of its opening brief, the government challenges
 18 the bankruptcy court’s conclusion on this issue. (Doc. 11 at 14-22.) More specifically, the
 19 government accuses the bankruptcy court of improperly grafting a temporal element onto
 20 § 551 and applying a principle of “once property of the estate, always property of the estate
 21 for purposes of § 551” that is “inconsistent with the Bankruptcy Code and related case
 22 law.” (*Id.*) In a related vein, the government argues that the bankruptcy court erred in
 23 relying on *Heintz*, which it characterizes as outdated and non-precedential, and suggests
 24 that upholding the bankruptcy court’s approach would result in a parade of horrors,
 25 including allowing unsecured creditors to reach exempt assets they would otherwise be

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 27 ⁶ The government requested oral argument. (Docs. 11, 14.) This request is denied
 28 because the “facts and legal arguments are adequately presented in the briefs and record,
 and the [Court’s] decisional process would not be significantly aided by oral argument.”
 Fed. R. Bankr. P. 8019(b)(3).

1 unable to reach and preventing debtors from receiving the fresh start that the bankruptcy
2 process promises. (*Id.*) The Trustee responds that the bankruptcy court rightly decided the
3 issue and that *Heintz* is on point. (Doc. 13 at 1-6.) The Trustee further argues that the
4 government’s arguments are, at bottom, policy arguments more appropriately directed to
5 Congress. (*Id.*) The government replies that the Trustee conflates the distinct questions of
6 “whether exempt interests in property should be deemed ‘property of the estate’” and “the
7 nature and extent of the exemption, *i.e.*, what is the specific interest that is exempted.”
8 (Doc. 14 at 3-10.)

9 The bankruptcy court correctly determined that the avoided tax lien was property of
10 the estate and, therefore, could be preserved by the Trustee for the benefit of the estate
11 under § 551. In *Owen*, the Supreme Court confirmed that property that is exempted is
12 nevertheless initially the property of the bankruptcy estate. The Court stated that “[n]o
13 property can be exempted (and thereby immunized [against liability under § 522]) . . .
14 unless it first falls *within* the bankruptcy estate” and noted that “[s]ection 522(b) provides
15 that the debtor may exempt certain property ‘from property of the estate’; obviously, then,
16 an interest that is not possessed by the estate cannot be exempted.” *Owen*, 500 U.S. at 308.
17 In short, as the BAP noted in *Heintz*, “the fact that property is removed from the estate after
18 a case is commenced, through exemption or some other means, does not change the fact
19 that it was property of the estate as of the commencement of the case.” 198 B.R. at 585.
20 *See also In re Rains*, 428 F.3d 893, 906 (9th Cir. 2005) (acknowledging the “well settled
21 rule that property cannot be exempted unless it is first property of the estate”) (quoting
22 *Heintz*). Debtor thus could not have exempted any interest in the Property if the Property
23 had not first been considered property of the estate under § 541.

24 The crux of the government’s argument is that § 551 does not look to property’s
25 status as of the petition date because it does not contain an express “temporal requirement,”
26 whereas Congress has included express temporal requirements in other Bankruptcy Code
27 provisions. *See, e.g.*, 11 U.S.C. § 506(a)(2) (“[V]alue with respect to [a debtor’s] personal
28 property securing an allowed claim shall be determined . . . as of the date of the filing of

1 the petition”). This is, in essence, an *expressio unius* argument. Although this
2 argument has surface appeal, it overlooks that “[s]tatutory construction . . . is a holistic
3 endeavor.” *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S.
4 365, 371 (1988). The *expressio unius* canon “does not apply unless it is fair to suppose
5 that Congress considered the unnamed possibility and meant to say no to it,” and the “canon
6 can be overcome by contrary indications that adopting a particular rule or statute was
7 probably not meant to signal any exclusion” because the “background presumptions
8 governing [the subject at issue] are a highly relevant contextual feature.” *Marx v. Gen.*
9 *Revenue Corp.*, 568 U.S. 371, 381 (2013) (internal quotation marks omitted). Here, the
10 relevant background presumptions and details suggest that Congress didn’t include an
11 express temporal requirement in § 511 because other features of bankruptcy law already
12 dictate that the property of the bankruptcy estate is assessed at the commencement of the
13 case—and, thus, including verbiage to that effect in § 511 would have been redundant. As
14 the BAP in *Heintz* noted, “property of the estate” is a defined term in the Bankruptcy Code.
15 198 B.R. at 585. Although § 551 does not have a temporal restriction in it, § 541—which
16 defines “property of the estate”—does: it includes “all legal and equitable interests of the
17 debtor in property *as of the commencement of the bankruptcy case.*” *Id.* § 541(a)(1)
18 (emphasis added). “When a term used in a statute is defined by that statute or by any other
19 relevant statutory provision, [courts] generally presume that definition applies to the
20 statute’s use of the term” unless “interpreting a term consistently with its statutory
21 definition would . . . lead to obvious incongruities or would destroy one of the major
22 [congressional] purposes.” *United States v. Olson*, 856 F.3d 1216, 1223 (9th Cir. 2017)
23 (third alteration in original) (citation and internal quotation marks omitted). The Court thus
24 presumes that Congress intended for the term “property of the estate” in § 551 to mean
25 what it says in § 541.

26 The government has not offered any persuasive reason to depart from this
27 presumption and interpret “property of the estate” differently across the two different Code
28 provisions. The government argues that “several Code provisions suggest that exempt

1 property always belongs to the debtor, from the start, albeit conditionally” and cites
2 § 522(b), arguing that it does “not exempt the property ‘out of the estate’ at some point in
3 the future” but rather “exempt[s] property ‘from property of the estate’ in the first place.”
4 (Doc. 11 at 18.) This argument fails because the Supreme Court has adopted an
5 interpretation of this provision that forecloses the government’s interpretation: “Section
6 522(b) provides that the debtor may exempt certain property ‘from property of the estate’;
7 obviously, then, an interest that is not possessed by the estate cannot be exempted.” *Owen*,
8 500 U.S. at 308.

9 The government also cites § 522(c), which provides that “property exempted under
10 [§ 522] is not liable during or after the case for any debt of the debtor,” arguing that this
11 language connotes that exempt property maintains its exempt status from the outset of the
12 case, rather than after the deadline to object passes. This argument is too clever by half,
13 because it fails to consider that a debtor can only exempt what is rightfully hers—the legal
14 and equitable interest she carried into bankruptcy, which extends only to her unencumbered
15 equity in the asset and no further. As the Supreme Court explained in *Owen*:

16 [I]f a debtor holds only bare legal title to his house—if, for example, the
17 house is subject to a purchase-money mortgage for its full value—then only
18 that legal interest passes to the estate; the equitable interest remains with the
19 mortgage holder. And since the equitable interest does not pass to the estate,
20 neither can it pass to the debtor as an exempt interest in property. Legal title
will pass, and can be the subject of an exemption; but the property will
remain subject to the lien interest of the mortgage holder.

21 500 U.S. at 308-09 (citation omitted). Admittedly, this portion of *Owen* rested partly on
22 § 541(d), which is not at issue in this appeal, but *Owen*’s reasoning is nevertheless
23 instructive in evaluating the character of the Tax Lien. It is clear that the “paramount right
24 to collect taxes of the federal government overrides a state statute providing for
25 exemptions.” *Leuschner v. First W. Bank & Tr. Co.*, 261 F.2d 705, 708 (9th Cir. 1958).
26 In other words, it is well established that exemptions provided under state law are
27 ineffective against federal tax liens. *Id.* See also *United States v. Heffron*, 158 F.2d 657,
28 659 (9th Cir. 1947) (“Against [federal tax] liens, exemptions prescribed by State laws are

1 ineffective. Bankruptcy does not invalidate such liens or prevent their enforcement.”)
2 (footnote omitted); *United States v. Howard*, 2008 WL 4471333, *8 (D. Ariz. 2008) (noting
3 that it is “well-settled that homestead exemptions under state law are ineffective against
4 federal tax liens” and collecting cases). Here, the Tax Lien attached to Debtor’s equity
5 interest in the Property, which meant that, upon bankruptcy, the homestead exemption that
6 otherwise could have served to remove Debtor’s interest in the Property from the property
7 of the estate was ineffective to allow Debtor to reclaim that portion of the interest
8 encumbered by the Tax Lien. Thus, even assuming without deciding that the government’s
9 interpretation of § 522(c) is correct, Debtor could not claim an exemption for the value of
10 the Property encumbered by the Tax Lien.⁷

11 This conclusion finds ample support in the relevant case law. In *Gill*, the BAP
12 “conclude[d] that the Code expressly authorized [the] Trustee to avoid, subordinate and
13 preserve the penalty portion of the IRS’s tax lien for the benefit of the estate’s unsecured
14 creditors.” 574 B.R. at 716. Although the court did not expressly address whether the tax
15 lien was property of the estate, the court noted that “[e]nforcement of penalties against a
16 debtor’s estate serves not to punish the delinquent taxpayers, but rather their entirely
17 innocent creditors.” *Id.* The government’s cited cases do not hold otherwise. In *In re*
18 *Covington*, 368 B.R. 38 (Bankr. E.D. Cal. 2006), for example, the debtor owed a domestic
19 support obligation but claimed exemptions in a \$1,000 bank deposit and an automobile.
20 *Id.* at 40. The trustee objected to the claimed exemptions and sought to liquidate the exempt
21 property to pay the domestic support obligation. *Id.* The bankruptcy court disagreed and
22 analogized the domestic support obligation to a nondischargeable tax claim, noting that
23 “[w]hen a debtor exempts property, it is effectively removed from the estate.” *Id.* If,

24 ⁷ The government argues that the version of Federal Rule of Bankruptcy Procedure
25 4003(b)(2) in effect when *Heintz* was decided, which provided that a trustee had 30 days
26 to file an objection to a claimed exemption, means that *Heintz* “sought to solve a problem
27 that . . . should no longer exist,” because Rule 4003(b)(2) now permits a trustee to file an
28 objection to a claimed exemption up to one year before the close of bankruptcy
proceedings. (Doc. 11 at 14-15.) This argument is unpersuasive. The BAP did not assign
any significance to Rule 4003(b)(2) in its ruling that an exemption was “property of the
estate” for purposes of § 551. At any rate, for the reasons already explained, Debtor’s
claimed exemption did not extend to the value of the Property encumbered by the Tax Lien.

1 however, the “property declared exempt by the debtor has value beyond the exemption
2 amount, or if it appreciates beyond the exemption amount after the petition is filed, the
3 nonexempt amount or appreciation is property of the estate that may be administered by
4 the trustee.” *Id.* at 40 n.1. Notably, the trustee did not provide any authority “indicating
5 that he may liquidate *otherwise exempt property* because the debtor happens to owe a
6 nondischargeable tax claim.” *Id.* at 41 (emphasis added). Unlike the exempt property in
7 *Covington*, Debtor’s exemption here did not extend to the full value of the Property
8 encumbered by the Tax Lien, and the *Covington* court made clear that value in the asset
9 “beyond the exemption amount” *was* property of the estate.

10 Finally, the government contends that allowing trustees to avoid penalties would
11 permit them to “step into the shoes of penalty liens against any and all exempt assets subject
12 to federal tax liens and other special liens,” such as retirement accounts. (Doc. 11 at 20-
13 22.) But it is not this Court’s role to decide hypothetical cases with different facts or weigh
14 policy arguments about how statutes should be written. The plain language of §§ 551, 541,
15 and 522, as well as Supreme Court precedent interpreting them, compel the conclusion that
16 any interest held by Debtor in the Property was property of the bankruptcy estate from the
17 commencement of bankruptcy proceedings and that Debtor’s interest did not extend to the
18 value of the Property encumbered by the Tax Lien. The bankruptcy court did not err in
19 reaching this conclusion.

20 This does not end the inquiry. In Part B of its brief, the government argues that a
21 tax lien doesn’t exist in a different position than the debtor’s exemption and instead exists
22 conterminously with the exemption. (Doc. 11 at 22-30.) The Trustee disagrees (Doc. 13
23 at 6-9), and both parties cite authorities they view as supporting their positions. Although
24 it is a close call, the Court agrees with the bankruptcy court that Debtor’s homestead
25 exemption was third in line behind the Tax Lien, rather than existing alongside the Tax
26 Lien.

27 The government emphasizes the language of § 522(c)(2)(B), which provides that
28 “property exempted under this section . . . is not liable during or after the case for any debt

1 of the debtor that arose . . . before the commencement of the case, except . . . a debt secured
2 by a lien that is . . . a tax lien, notice of which is properly filed.” The government argues
3 that the statute’s use of the words “property exempted” means that “property can be
4 ‘exempted’ and remain liable for a debt secured by ‘a tax lien’ at the same time” and that,
5 if “exemptions apply only after tax liens are accounted for, § 522(c)(2)(B) would have little
6 meaning.” (Doc. 11 at 24-25.) In the Court’s view, this reads too far into the statute. The
7 Court interprets this provision as merely providing that a creditor can reach exempt
8 property after bankruptcy proceedings to satisfy its claim. *See, e.g.*, 6 Collier ¶ 724.02[5]
9 (“Section 522(c)(2)(B) provides that properly filed tax liens continue to encumber exempt
10 property after case closure.”). One purpose of this provision is to prevent debtors from
11 avoiding tax liens under other portions of § 522. *Id.* (“Courts are nearly uniform in holding
12 that section 522(c)(2)(B) prevents debtors from avoiding tax penalty liens under section
13 522(h).”). *See also Demarah*, 62 F.3d at 1251-52. Sections 522(g) and (h) are instructive.
14 Section 522(h) provides that a debtor may avoid a transfer “to the extent that the debtor
15 could have exempted such property under subsection (g)(1) if the trustee had avoided [the]
16 transfer” under certain conditions, and section 522(g) permits a debtor to exempt property
17 that the trustee recovers “to the extent that the debtor could have exempted such property”
18 under certain conditions. The government’s interpretation of § 522(c)(2)(B) would render
19 §§ 522(g) and (h) superfluous. “One of the most basic interpretive canons [is] that a statute
20 should be construed so that effect is given to all its provisions, so that no part will be
21 inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U.S. 303,
22 314 (2009) (cleaned up). If a tax lien exists conterminously with a debtor’s exemption
23 (*i.e.*, encumbering the exemption rather than the debtor’s pre-bankruptcy equity in the
24 asset), then §§ 522(g) and (h) would be unnecessary because any transfer avoided under
25 § 522(h) or any property that the trustee recovered that the debtor could exempt under
26 § 522(g) would automatically revert to the debtor as an exemption. The Court views the
27 better interpretation of § 522(c)(2)(B) as simply preventing a debtor from escaping liability
28

1 for tax liens after bankruptcy.⁸

2 Other courts agree that tax liens are not conterminous with a debtor's exemptions.
3 For example, in *Gill*, the debtor claimed a \$40,000 homestead exemption in a property
4 valued at \$500,000. 574 B.R. at 712. The property was subject to a \$371,000 mortgage
5 and secured tax claims totaling \$161,530, including over \$48,000 in tax penalties. *Id.* at
6 711-12. The debtor sought to have the property abandoned because there was not sufficient
7 value beyond the secured claims and the debtor's exemption to distribute to unsecured
8 creditors. *Id.* at 712. Although the court did not directly address whether the tax lien
9 coincided with the debtor's exemption, the court did suggest that the lien occupied a
10 different sphere than the exemption. The court noted that, because the bankruptcy court
11 found there was "substantial value" for the "estate's unsecured creditors with [the]
12 Trustee's sale of the Residence free and clear of the IRS's lien," "it implicitly determined"
13 that the Trustee could avoid the tax lien for penalties and if the "court had not determined
14 so, the[] Debtor's claimed homestead exemption would have exhausted the remaining
15 equity after paying [the mortgage holder], leaving nothing for unsecured creditors and
16 making abandonment appropriate." *Id.* at 716. As the Trustee points out (Doc. 13 at 7-8),
17 if it were true that tax liens attached solely to a debtor's exemption, there would have been
18 no need to avoid the tax lien or abandon the property because there would have been a
19 substantial amount of value left in the property even after satisfying the debtor's homestead
20 exemption.

21 Similarly, in *In re Bolden*, 327 B.R. 657 (Bankr. C.D. Cal. 2005), the debtor claimed
22 a \$50,000 homestead exemption in a property that was valued at \$925,000. *Id.* at 659-60.

23
24 ⁸ The government's cited cases support this unremarkable view. *See, e.g., In re*
25 *Ruppel*, 368 B.R. 42, 44 (Bankr. D. Or. 2007) (Section 522(c)(1) "provides that
26 notwithstanding [an asset's] exempt status, exempt property *remains liable for those*
27 *debts*") (emphasis added); *Covington*, 368 B.R. at 41 ("Section 522(c)(1) does not provide
28 for the disallowance of an exemption. Rather, it provides that property exempted by the
debtor is *nonetheless liable* for a domestic support obligation.") (emphasis added); *In re*
Reed, 127 B.R. 244, 246 (Bankr. D. Haw. 1991) ("Every court that has discussed section
522(c)'s exception for properly filed tax liens has come to the same conclusion: a properly
filed tax lien attaches to the debtor's otherwise exempt property and *survives bankruptcy.*")
(emphasis added).

1 The IRS had “eight secured tax liens against the property totaling \$1,324,632.52.” *Id.* at
2 659. The debtor argued that the trustee needed to abandon the property because the sale
3 would not satisfy the liens on the property. *Id.* at 661. The court noted that the “homestead
4 exemption does not have precedence over the tax liens” and that “[g]enerally, a debtor is
5 not entitled to claim a homestead exemption on property that is subject to an IRS levy.”
6 *Id.* at 662-63. “In other words, § 522(c)(2) neutralize[d] [the debtor’s] claim that he is
7 entitled to collect on his homestead exemption claim here [even though there was] no
8 timely objection” to his exemption claim. *Id.* The court then concluded that the trustee
9 could avoid the tax penalty liens and preserve them for the benefit of the estate under § 551,
10 notwithstanding the debtor’s claimed homestead exemption. *Id.* at 663-64. These cases
11 suggest that secured tax liens occupy a different place in line than the debtor’s claimed
12 exemption, and the value of the debtor’s exemption is determined by how much value the
13 debtor has in the asset unencumbered by other liens.

14 The government’s cited cases do not compel a different result. In *In re Bird*, 577
15 B.R. 365 (10th Cir. BAP 2017), the Tenth Circuit BAP held that debtors could “claim valid
16 homestead exemptions, notwithstanding a lack of equity in the Homesteads.” *Id.* at 383.
17 However, as the Trustee points out, the BAP’s decision was decided based on Utah law,
18 and the government has not argued that the result would be the same in this circuit or under
19 Arizona law. And in *In re Selander*, 592 B.R. 729 (Bankr. W.D. Wash. 2018), a debtor
20 claimed a \$125,000 homestead exemption in a property that was subject to a judgment lien
21 and tax liens and was sold for \$825,000. *Id.* at 730-32. The parties entered into an
22 agreement that the sale of the property would be “strictly conditioned” upon the debtor
23 receiving the full \$125,000 for his homestead exemption. *Id.* at 731. The IRS objected to
24 the sale because paying the homestead exemption would “ignore[] the existence of tax liens
25 that [it] assert[ed] would take priority over [the homestead] exemption.” *Id.* The trustee
26 and the IRS ultimately “resolved the objection with a stipulation authorizing the sale of the
27 Residence but reserving the issue of whether the Debtor or the IRS was entitled to the
28 \$125,000 in sale proceeds allocated for the Homestead Exemption.” *Id.* After the sale, the

1 trustee filed a motion “requesting that the Court authorize distribution of the Homestead
2 Exemption to the IRS, pursuant to its Notice of Federal Tax Lien against the property, but
3 only after significant reductions for the costs of sale and administrative expenses.” *Id.* at
4 732. Accordingly, the question before the bankruptcy court was whether the trustee could
5 “use the tax lien subordination provisions of § 724(b) to pay administrative expenses
6 associated with the sale of real property from a debtor’s allowed exemption in homestead
7 proceeds still subject to the tax lien.” *Id.* The IRS argued that the “subordination provision
8 of § 724(b) [did] not apply . . . because of the exempt nature of the \$125,000 in proceeds
9 subject to the tax lien.” *Id.* The trustee, on the other hand, argued that “the superior interest
10 of the IRS in the Homestead Exemption funds allow[ed] him to use the subordination
11 provisions of § 724(b) notwithstanding the claimed exemption.” *Id.*

12 The government here makes much of the fact (Doc. 11 at 26) that the bankruptcy
13 court said that “in certain circumstances a tax lien may in fact exist on property that is not
14 otherwise subject to the interests of creditors.” *Id.* at 734. But the question facing the
15 *Selander* court was markedly different than the question facing this Court—in *Selander*,
16 the “situation . . . [was] that of an IRS lien relying on a debtor’s homestead exemption *for*
17 *its very existence*,” but no similar situation is present here. *Id.* (emphasis added). Also
18 different is that the parties *agreed* that the debtor would receive the full \$125,000
19 homestead exemption, so it is logical that the IRS would argue and the bankruptcy court
20 would hold that the tax lien attached to the debtor’s exemption and would survive
21 bankruptcy under § 522(c)(2)(B). *Id.* at 735 (“Debtor’s Homestead Exemption removed
22 the value of \$125,000 from the estate but such exemption was powerless to eliminate the
23 interest of the IRS in those funds claimed with the exemption.”). Another “[u]nique”
24 feature of *Selander*, not present here, was “the fact that Debtor’s Homestead Exemption
25 [was] superior to [the judgment] lien but not the statutory tax lien.” *Id.* at 733. But here,
26 as explained above, Debtor’s claimed exemption in the Property falls in line after the Tax
27 Lien—the Tax Lien attached to Debtor’s pre-bankruptcy equity in the Property. The
28 bankruptcy court did not err in holding that the Tax Lien occupied a higher priority than

1 Debtor's homestead exemption.

2 II. Whether The Avoided Lien Is Preserved For The Benefit Of The Estate

3 Because the Trustee could avoid the Tax Lien under § 724(a), the next question is
4 whether the Trustee could preserve the avoided Tax Lien for the benefit of the estate (as
5 opposed to the Debtor recovering the value of the avoided lien under § 522(g)). The
6 government argues that the bankruptcy court erred in holding that Debtor could not recover
7 the avoided tax lien under § 522(g) because the “test under § 522(g) is whether . . . the
8 Debtor could have exempted the property had there never been a tax lien—and there is no
9 doubt she could.” (Doc. 11 at 31-38.) The Trustee argues that the government has no
10 standing to argue that Debtor could recover the avoided tax lien and that the Ninth Circuit's
11 decision in *DeMarah* forecloses Debtor's ability to do so. (Doc. 13 at 9-11.)

12 Unless Debtor is able to recover the avoided lien under § 522(g), the self-executing
13 nature of § 551 means that the avoided lien is automatically preserved for the benefit of the
14 estate. *See, e.g., In re Trout*, 609 F.3d 1106, 1108 (10th Cir. 2010) (calling § 551 an
15 “automatic preservation of avoided transfer for benefit of the estate”); *In re Van de Kamp's*
16 *Dutch Bakeries*, 908 F.2d 517, 519 (9th Cir. 1990) (“[T]he legislative history stresses the
17 automatic nature of preservation under section 551.”); *In re Kavolchych*, 164 B.R. 1018,
18 1023-24 (S.D. Fla. 1994) (“[P]reservation under § 551 is an automatic consequence of
19 avoidance of a lien . . .”). “The rights and ability of a debtor to avoid liens on property
20 claimed as exempt or to claim the benefits of liens avoided by the trustee on exempt
21 property are governed exclusively by [§ 522]. Once the lien has been avoided by the
22 trustee, the debtor must come within one of subsections [in § 522] in order to avoid the
23 operation of [§ 551].” *In re Dipalma*, 24 B.R. 385, 387 (Bankr. D. Mass. 1982). *See also*
24 *5 Collier on Bankruptcy* ¶ 551.02[2] (16th ed. 2012) (“[T]he preservation of an avoided
25 transfer for the benefit of the estate under section 551 is subject to any preservation for the
26 benefit of an individual debtor regarding exempt property under section 522(g) and (i)(2).
27 This, however, does not allow a debtor to exempt property subject to the trustee's preserved
28 lien position, unless such preserved lien was otherwise avoidable under section 522.”).

1 Although the government’s argument has some force, and the outcome might be
2 different if the Court were writing on a blank slate, *DeMarah* compels the result that Debtor
3 cannot recover the avoided Tax Lien under § 522(g). In *Demarah*, the debtor “failed to
4 pay various federal income taxes, employment taxes, and the interest and penalties
5 associated with them,” so the IRS filed a tax lien “against all of DeMarah’s property.” 62
6 F.3d at 1249. The debtor then filed for bankruptcy and declared all of his property exempt
7 under § 522. *Id.* On appeal, the issue was whether the debtor could avoid the tax lien
8 under § 522(h). *Id.* at 1250-51.⁹ The parties didn’t dispute that DeMarah met most of the
9 requirements of § 522(h): “[h]e did not attempt to conceal any property and the trustee did
10 not attempt to set aside the tax liens,” nor was the “attachment of a tax lien a voluntary
11 transfer of property.” *Id.* The court also agreed that “§ 522(h) would normally allow
12 DeMarah to avoid a lien that secures a claim for noncompensatory penalties.” *Id.* at 1251.
13 The question was therefore whether the “transferred property [was] of a kind that the debtor
14 would have been able to exempt from the estate if the trustee (as opposed to the debtor)
15 had avoided the transfer.” *Id.* at 1250. The debtor argued that, because he “would have
16 been able to exempt his property from the estate if the trustee had recovered the transfer
17 . . . the last condition [was] met.” *Id.* at 1251. The Ninth Circuit disagreed. Although the
18 court acknowledged that the debtor’s “argument would be powerful, even conclusive, if
19 § 522(h) existed in a vacuum,” the court emphasized that a different statutory provision,
20 § 522(c), limited a debtor’s ability to avoid a tax lien. *Id.* Thus, the “fact that DeMarah
21 may [have] been able to exempt the property that is subject to the tax lien from the
22 bankruptcy estate does not mean that he [could] remove the lien itself, or that portion of it
23 which secure[d] the penalty.” *Id.* The “explicit language” of § 522(c)(2)(B) “belie[d] any
24

25 ⁹ Section 522(h) provides, in relevant part: “The debtor may avoid a transfer of
26 property of the debtor . . . to the extent that the debtor could have exempted such property
27 under subsection (g)(1) of this section if the trustee avoided such transfer” and if the trustee
28 could have avoided the transfer but did not attempt to do so. Section 522(g) in turn provides
that “[n]otwithstanding sections 550 and 551 . . . the debtor may exempt . . . property that
the trustee recovers under section . . . 551 . . . to the extent that the debtor could have
exempted such property under subsection (b) . . . if such property had not been transferred”
and if the transfer was involuntary and the debtor did not “conceal such property.”

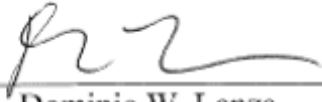
1 argument that the debtor [could] escape a part of the tax lien.” *Id.* at 1252. The court
2 additionally noted that “Congress could logically have wanted to allow tax penalties to be
3 avoided if that would benefit unsecured creditors” while “at the same time . . . eschew[ing]
4 benefiting debtors who had incurred those penalties by failing to pay their taxes.” *Id.*
5 “Congress created avoidances of noncompensatory penalties to protect unsecured creditors
6 from the debtor’s wrongdoing,” but “if DeMarah were allowed to avoid the penalties
7 creditors would not be protected; instead, DeMarah would gain the benefit of avoiding the
8 penalties he incurred by not paying income and employment taxes.” *Id.*

9 Although *DeMarah* addressed § 522(h) and not § 522(g), which is relevant here, its
10 holding is nevertheless instructive given that one of the requirements a debtor must meet
11 to avoid a transfer under § 522(h) is that the debtor could have exempted the property under
12 § 522(g)(1). In other words, the Ninth Circuit necessarily ruled that the debtor would have
13 been unable to exempt the property from the estate under § 522(g). Accordingly, *DeMarah*
14 compels the conclusion that Debtor may not exempt the Property under § 522(g). *See also*
15 6 Collier ¶ 724.02[4] (“The scope of section 724(a) is limited to property of the estate. . . .
16 For instance, if a lien for a penalty . . . has attached to property that is exempt and not part
17 of the debtor’s chapter 7 estate, section 724 cannot be used by the debtor to avoid the
18 lien.”); *id.* ¶ 724.02[5] (“Courts are nearly uniform in holding that section 522(c)(2)(B)
19 prevents debtors from avoiding tax penalty liens under section 522(h).”).

20 Accordingly,

21 **IT IS ORDERED** that the grant of summary judgment to the Trustee is **affirmed**.
22 The Clerk of Court is directed to enter judgment accordingly and to close this case.

23 Dated this 16th day of April, 2021.

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Dominic W. Lanza
United States District Judge