No. 16-20589

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

In re: YEMISI AYOBAMI,
Debtor.

DAVID G. PEAKE,
Trustee/Appellant,

– v. –

YEMISI AYOBAMI,
Debtor/Appellee.

On Direct Appeal from the United States Bankruptcy Court
For the Southern District of Texas
Docket No. 4:15-bk-35488

BRIEF OF AMICUS CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

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RULE 28.2 CERTIFICATE OF INTERESTED PERSONS

Peake v. Ayobami., No. 16-20589

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and parties as described have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

In addition to the parties listed in Appellee's and Appellant's brief, Amici state that the additional following person may have an interest in the outcome of this case:

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Peake v. Ayobami., No. 16-20589

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Consumer Bankruptcy Rights Center, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant. **NOT APPLICABLE.**

This 20th day of December, 2016.

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

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Peake v. Ayobami., No. 16-20589

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant. **NOT APPLICABLE.**

This 20th day of December, 2016.

s/ Tara Twomey
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STATEMENT OF INTEREST OF AMICI CURIAE

The National Consumer Bankruptcy Rights Center (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 that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Harris v. Viegelahn*, 135 S. Ct. 1829

(2015); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5th Cir. 2012).

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. By allowing the debtor to retain essential property, exemptions serve the overriding bankruptcy purpose of providing the debtor with a fresh start. The Bankruptcy Code permits a debtor to exempt his or her entire interest in certain property so long as the interest does not exceed a specified value at the time of the petition. Once exempted that property interest is withdrawn from the property of the estate. The bankruptcy court's decision would subject exempt property that has been withdrawn to later administration by the trustee, in contravention of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Supreme Court's *Schwab* decision.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The facts of this case do not include any post-petition appreciation. However, the hypothetical question of who would be entitled such appreciation was raised by the bankruptcy court below, and by some of the parties on appeal. In the unlikely event that the Court reaches this question, it should adopt a bright-line rule that appreciation of assets that were not fully exempt at the time of filing inures to the benefit of the estate, while the appreciation of assets that were fully exempt at the time of filing inures to the benefit of the debtor.

This approach, which was adopted by the bankruptcy court below, is supported by the mechanics and policy of bankruptcy exemptions. It recognizes that fully exempted property has exited the estate. It further allows the debtor to obtain a fresh start without worrying for years after the bankruptcy that the estate will attempt to claw back an appreciated asset.

ARGUMENT

The oft-cited principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1838 (2015); *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). This purpose can only be achieved if debtors can restructure their affairs after bankruptcy, knowing whether they will be allowed to retain certain assets. The positions taken by the chapter 13 trustee and the United States, arguing that any

future appreciation of those assets still belongs to the estate, with no apparent time restrictions, creates uncertainty when debtors need as much clarity as possible about their financial affairs in order to move on with their lives.

To be clear, this question about who is entitled to receive postpetition appreciation of the debtor's property is an entirely hypothetical one in this case. However, should this Court reach the question, it should affirm the approach taken by the court below. This approach is most faithful to the mechanics of exempting property from the bankruptcy estate, and most consistent with long-standing bankruptcy practice before and after *Schwab*.

I. This Case Does Not Properly Bring The Question Of Post-Petition Appreciation Before The Court.

As a threshold matter, there are no facts in the instant case for this Court to address the issue of post-petition appreciation. (See Brief for Appellee, 4.) Not only has there not been any appreciation in Ms. Ayobami's case, but it is unlikely to make a difference in her Chapter 13 case anyway.

Unlike other bankruptcy chapters, an asset's primary function in a chapter 13 case is not to pay creditors. *See Brown v. Gore*, 742 F.3d 1309, 1316 (11th Cir. 2014). Instead, the asset helps guide the "best interests of the creditors" test, which simply juxtaposes the case with a hypothetical liquidation under chapter 7. This test allows confirmation of a plan only if the present value of the debtor's proposed

repayment plan is "not less than the amount that would be paid" to creditors under the hypothetical liquidation of assets in a chapter 7. *See* 11 U.S.C. § 1325(a)(4). Because this test is performed at the onset of a chapter 13 case, it does not (and could not) take future appreciation into account.

Even beyond this general rule, a number of other potential case developments could resolve the question of appreciation. The confirmed chapter 13 plan could vest all non-exempt property of the estate back in the debtor, free of any creditor claims. *See* 11 U.S.C. § 1327(b)-(c). The case could be dismissed, which would "revest[] the property of the estate in the entity in which such property was vested immediately before the commencement of the case." 11 U.S.C. § 349(b)(3). Or, the property could be sold at a gain, which would then open up questions about whether the chapter 13 plan could and should be modified to account for the gain. However, plan modification is governed by 11 U.S.C. § 1329, not by any rules governing the appreciation of estate property.

In short, the issue of property appreciation is not presented by the facts of this case, and therefore need not be addressed by this Court. However, if the Court reaches the question of the treatment of appreciation it should adopt a bright-line rule that appreciation of assets that were fully exempt at the time of filing inures to the benefit of the debtor.

II. Fully Exempt Property Exits The Bankruptcy Estate.

In order to understand why the postpetition appreciation of fully exempt property should inure to the benefit of the debtor, it is important first to understand what the bankruptcy estate is, and how exempted property leaves the estate.

"The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property." *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985) (citing 11 U.S.C. § 541). The scope of this estate is broad, including "all of the debtor's legal and equitable interests 'wherever located and by whomever held,'" as long as the interest exists at "commencement of the case." *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493, 496 (5th Cir. 2006) (en banc) (internal citations omitted).

However, this bankruptcy estate is "subject to the debtor's right to reclaim certain property as 'exempt.'" *Schwab v. Reilly*, 560 U.S. 770, 774 (2010); *see* 11 U.S.C. § 522(l). "Property exempted under § 522 is removed from the estate for the benefit of the debtor." *IRS v. Luongo (In re Luongo)*, 259 F.3d 323, 335 (5th Cir. 2001); *see also Schwab*, 560 U.S. at 775-76; *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."). Thus, it is well-established in this Circuit and elsewhere that, "[w]hen a claimed exemption is upheld by the bankruptcy court, it is no longer property of the estate." *Sherk v. Tex. Bankers Life*

& Loan Ins. Co. (In re Sherk), 918 F.2d 1170, 1174 (5th Cir. 1990) *abrograted on other grounds by Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *see also Pasquina v. Cunningham (In re Cunningham)*, 513 F.3d 318, 323 (1st Cir. 2008); *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."); *Abramowitz v. Palmer*, 999 F.2d 1274, 1276 (8th Cir. 1993); *In re Yonikus*, 996 F.2d 866, 870 (7th Cir. 1993) ("after an asset is property of the estate… it can still past out of the estate (thus out of the reach of creditors) as a qualified exemption").

The ability to remove fully exempt property from the bankruptcy estate is an important part of the debtor's fresh start. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) ("To help the debtor obtain a fresh start, the Bankruptcy Code permits him to *withdraw from the estate* certain interests in property."); *see also Schwab*, 560 U.S. at 791 ("exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start,'"). Exemptions "enabl[e] the debtor to emerge from bankruptcy with adequate and necessary possessions," *In re Farr*, 278 B.R. 171, 175 (B.A.P. 9th Cir. 2002) (citing H. R. Rep. No. 95–595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087), and thus "maintain an

appropriate standard of living as he or she goes forward after the bankruptcy case," *id* (quoting 4 Collier on Bankruptcy ¶ 522.01, p. 522-10 (15th ed.)); *see also In re Demeter*, 478 B.R. 281, 292 (Bankr. E.D. Mich. 2012) ("the exemption scheme under § 522(d) is crucial to, and an integral part of a debtor's 'fresh start.'").

In order to determine what property is exempt, and thus withdrawn from the estate, this Court looks to "the facts and law in existence on the date that the debtor filed his bankruptcy petition. This is known as the 'Snapshot Rule,' and it 'holds that all exemptions are determined at the time the bankruptcy petition is filed, and that they do not change due to subsequent events.'" *Brown v. Sommers (In re Brown)*, 807 F.3d 701, 708 (5th Cir. 2015) (quoting *Viegelahn v. Frost (In re Frost)*, 744 F.3d 384, 386 (5th Cir. 2014)); *see also In re Colliau*, 552 B.R. 158, 163 (Bankr. W.D. Tex. 2016).[1] Thus, "once the exemption is established, it is permanent, and not subject to later review." *Colliau*, 552 B.R. at 163 (citing 11 U.S.C. § 522(c)).

This Circuit's "Snapshot Rule" is also reflected in the text of the Bankruptcy Code. The dollar-limited federal exemptions outlined in Section 522 are all measured by "value," which is generally defined as "fair market value as of the date of the filing of the petition." 11 U.S.C. § 522(a)(2) (defining "value") & (d)

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[1] This Snapshot Rule has deep roots in bankruptcy practice that even pre-date the current Bankruptcy Code. *See White v. Stump*, 266 U.S. 310, 313 (1924) ("the point in time which is to separate the old situation from the new in the bankrupt's

(federal exemptions). This scheme clearly indicates congressional intent for final determinations to be made about exemptions using valuations as of the filing date. Otherwise, what else could the term "value" possibly mean in the context of exemptions, and why else would Congress peg it to the market at a particular point in time? Thus, for example, the federal homestead exemption, *see* 11 U.S.C. § 522(d)(1) ("[t]he debtor's aggregate interest, not to exceed $23,675 in value…") could be reformulated as "[t]he debtor's aggregate interest, not to exceed $23,675 in fair market value as of the date of the filing of the petition." As long as the debtor's interest is less than $15,000 at commencement of the bankruptcy, then it is fully exempt and removed entirely from the estate.

The policy to make final value determinations early in the case is also reflected in the fast-moving process for objections. For dollar-limited exemptions, the most common objection involves whether the property is worth more than the exemption. If the trustee believes that the property is not fully exempt (because it is worth more than the debtor's estimate), then the trustee must file an objection, 11 U.S.C. § 522(l), and must do so quickly, *see* Fed. R. Bankr. P. 4003(b)(1) (30-day deadline); *Taylor*, 503 U.S. at 643-44. This process would apply regardless of whether the debtor exempted 100% of fair market value or a fixed dollar amount. The trustee here effectively seeks to override these rules, create an exception for valuation objections, and have unlimited time to make such objections. Neither the

Code nor the rules, both of which promote efficient finality, contemplate that the chapter 13 trustee will have an indefinite amount of time to object to valuations, and seek to reclaim that property as part of the estate.

Because fully exempt property exits the bankruptcy estate, it makes sense that the debtor is responsible for any subsequent depreciation, but also reaps the benefit of any future appreciation, of the property. As discussed next, this rule has deep roots in bankruptcy practice.

III. Appreciation Of Fully Exempt Property Inures To The Debtor, While The Appreciation Of Property That Is Not Fully Exempt Inures To The Estate.

The question of who benefits from the postpetition appreciation of a particular asset should be guided by whether the property remained in the estate (i.e., was not fully exempted), or whether it was withdrawn from the estate (i.e., by exemption). If an asset is withdrawn from the estate, and thus returned to the debtor, then any changes in value should go to the debtor. This approach best fits with established bankruptcy practice, including *Schwab* and Fifth Circuit precedent.

First, "[t]he Code provides that the 'value' of property sought to be exempted 'means fair market value' on the date the petition for bankruptcy was filed," and "not a later date on which the asset may be worth a lot more." *Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 902 (7th Cir. 2000) (citing 11 U.S.C. §

522(a)(2)); *see also* 5 Collier on Bankruptcy ¶ 522.03[2] at 522-23 (16th ed.) ("when exemptions are claimed, the fact that the value of the property that the debtor seeks to exempt has changed since the filing of the petition will not affect the amount of property that the debtor may exempt."). It is important to note that the "fair market value" of an asset already takes into account the probability that the asset will either rise or fall in value. For example, if the marketplace believes that a company's stock will be much more valuable next year, its current "fair market value" will include a premium for that expectation. If the marketplace is convinced that the stock will take a nosedive, then that risk will be reflected in a much lower "fair market value."

Judge Posner cited this simple economic analysis in his *Polis* decision. As he described:

> Often property appreciates in a wholly unexpected fashion. A lottery ticket that turns out against all odds to be a winner is merely the clearest example. A debtor who exempted a painting thought to be worthless in a market sense, having a purely sentimental value, might discover the day after his discharge from bankruptcy that it had suddenly increased in value because other paintings by the artist had just been bought by the Metropolitan Museum of Art; the creditors could not reach it, provided that until then its fair market value had in fact been slight. Common stock that had traded at $ 100 a share on the date the petition for bankruptcy was filed might a month later be worth $ 1,000, and again the creditors would be out of luck if the debtor had exempted her shares by claiming the personal property exemption for them.

Polis, 217 F.3d at 902-3. Thus, as long as a debtor can exempt the full "fair market value" of an asset, which already includes some adjustment for risk, it makes sense that any future changes in value (whether up or down) fall to the debtor. In fact, this practice was widely followed long before *Schwab* was decided. *See In re Solly*, 392 B.R. 692, 696 (Bankr. S.D. Tex. 2008) (debtor entitled to appreciation in proportion to the percentage of value that was exempt at petition; suggesting that appreciation of an asset that was 100% exempt would inure entirely to the debtor); *Mullis v. Aggeorgia Farm Credit, ACA (In re Jones)*, 357 B.R. 888, 897 (Bankr. M.D. Ga. 2005) ("If the debtor has exempted an asset in full, he is entitled to the benefit of any appreciation in the value of that asset and must suffer the loss if its value depreciates."); *see also Novak v. Kosakowski*, No. 3:11-CV-1549 (RNC), 2013 U.S. Dist. LEXIS 180564, at *4 (D. Conn. Dec. 26, 2013) (citing *Polis*, and noting that any future increase in value of an annuity fell to the debtor after it was fully exempted); *In re Peterman*, 358 B.R. 801, 806 (Bankr. D. Colo. 2006) ("The debtor from that day forward can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property.") (quoting *Taylor v. Freeland & Kronz (In re Davis)*, 938 F.2d 420, 425 (3rd Cir. 1991)).

Different approaches – in the minority – have faced sharp criticism. For example, Judge Pappas reluctantly followed a different approach in *Konnoff*, but

only out of respect for precedent that he believed was wrongly decided. As he explained in his concurring opinion:

> I adhere to the notion that exemption rights should be determined, finally, based upon the facts existing on the date the bankruptcy petition is filed. To conclude otherwise means the debtor's rights in a bankruptcy case are necessarily in limbo until that case concludes. This in turn may motivate a trustee to postpone closing the case as long as there is any prospect that the debtor's circumstances may change.

Ford v. Konnoff (In re Konnoff), 356 B.R. 201, 208-209 (9th Cir. B.A.P. 2006) (Pappas, J., concurring).

Judge Pappas' concern with assets "in limbo" is a palpable concern in the world of consumer bankruptcy. *See also Polis*, 217 F.3d at 903 ("If the assets sought to be exempted by the debtor were not valued at a date early in the bankruptcy proceeding, neither the debtor nor the creditors would know who had the right to them."). For example, if given enough time, the debtor's interest in a home – usually a debtor's most important asset – will appreciate, whether through market forces or by paying down the mortgage. It is unfathomable that a chapter 13 trustee would be allowed to lie in wait for years for that day to come, leaving the homeowner debtor's long-term housing in doubt. Such a result would be the antithesis of a fresh start. Simply put, "[t]he efficacy of the fresh start policy requires finality that allows a debtor to rebuild his life without fear of lingering creditors." *Cunningham*, 513 F.3d at 324.

The *Schwab* decision reinforced this long-standing practice from *Polis* and other cases. In creating a distinction between a dollar-value exemption, and an exemption of 100% of fair market value, the Supreme Court expressly approved a route for "the debtor to exempt the full market value of the asset." *Schwab*, 560 U.S. at 793. By definition, such an exemption would assign any subsequent fluctuations in value to the debtor. Otherwise, how would such an exemption be any different than a dollar-value exemption? Importantly, the *Schwab* Court also noted that this route resolved "clouded-title concerns" similar to those voiced by Judges Pappas and Posner. *See id*. at 794 (addressing concern that "a debtor would never have the certainty of knowing whether or not he or she may keep her exempted property until the case had ended").

Although this Circuit has not answered this precise question, the *Polis* approach best fits this jurisdiction's precedent. For example, the Bankruptcy Court for the Western District of Texas recently found that this question was answered squarely by the "Snapshot Rule" as applied in this Circuit. *See Colliau*, 552 B.R. at 162-63 (citing *Brown*, 807 F.3d at 708). The *Colliau* Court looked to the value of a home as of the petition date, noting that "the Debtors' equity is below the cap imposed by subsection 522(p) and so the bankruptcy estate had no interest in the property on the petition date. Whether the property appreciates in value in the

months and years to come is irrelevant because the exemption removed the property from the estate as of the petition date." *Id*.

Further, this Court has held that a chapter 13 debtor, through adequate protection payments, is responsible for postpetition depreciation in an underwater asset. *See Chase Manhattan Bank USA NA v. Stembridge (In re Stembridge)*, 394 F.3d 383, 387-88 (5th Cir. 2004). At least one bankruptcy court in this Circuit has questioned whether Trustee's position on future appreciation can be reconciled with this Court's *Stembridge* decision. *See In re Moore*, 442 B.R. 865, 867 n.3 (Bankr. N.D. Tex. 2010). After all, if a debtor is responsible for depreciation in an asset that could be fully exempted, then any fluctuations in value in the other direction should also fall on the debtor.

Other approaches are not only a poor fit against this background of bankruptcy procedure, but they can also be downright unworkable. For example, the *Salazar* decision, criticized by the court below, opined that the trustee can simply object to the *Schwab*-endorsed exemption of 100% of fair market value, and thereby keep any future appreciation of the asset. *See In re Salazar*, 449 B.R. 890, 900 (Bankr. N.D. Tex. 2011).[2] Such a method invites a flood of objections by trustees, based not on any facts in existence at the time of the objection, but based

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[2] As laid out extensively in this brief, the *Salazar* Court reached the wrong decision in any event, even looking past the feasibility of its proposed procedure.

purely on speculation – or plain optimism – that an asset may someday increase in value. Incorporating these hypothetical objections into routine exemptions frustrates the efficiency sought by the Bankruptcy Code. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 508 (1986) (Reqhnquist, J., dissenting) (describing expedient estate administration as an overriding purpose of bankruptcy).

In its *amicus curiae* brief, the United States uses flawed reasoning to ask this Court to depart from the bankruptcy court and above authority. First, the U.S. argues that, despite its language, an exempted interest of 100% of fair market value only removes a certain dollar amount from the estate. (Brief for United States, 26.) Not only does this contract the plan meaning of "100% of fair market value" as contemplated by *Schwab*, but it also ignores that this Circuit has defined the term "interest" for exemption purposes much more broadly than just a dollar value in equity. *See Wallace v. Rogers*, 513 F.3d 212, 222 (5th Cir. 2008). Second, the Ninth Circuit's *Gebhart* decision, relied upon by the U.S., relied on cases interpreting California's state law exemptions. *See In re* Gebhart, 621 F.3d 1206, 1211 (9th Cir. 2010). Further, much of its underlying authority has been criticized by well-respected jurists within that Circuit. *Compare id.* (cases cited)*, with Konnoff*, 356 B.R. at 208 (Pappas, J., concurring) (cases cited). It is doubtful that *Gebhart* can be reconciled with the less controversial law in the Fifth Circuit. *See*

Moore, 442 B.R. at 867 n.3.

Finally, any implication that the *Polis* approach affords an unjustifiable windfall to the debtor lacks merit. As shown above, "that possibility is [already] built into the valuation scheme that the Bankruptcy Code uses to determine whether a debtor has exceeded her exemption." *Polis*, 217 F.3d at 902; *In re Lantz*, 446 B.R. 850, 859-61 (Bankr. N.D. Ill. 2011) ("This result is not fundamentally unfair."). Indeed, the risk of an upside can hardly be seen as a windfall when the debtor also bears the risk of any downside. *See, e.g.*, *Stembridge*, 394 F.3d at 387-88.

In summary, fully exempt assets exit the bankruptcy estate by operation of law. It should follow that any subsequent changes in value of such an asset belong to the debtor, not the estate. Should the Court reach this question, it should affirm the straightforward rule of laid out by the bankruptcy court below.

CONCLUSION

The Court should affirm the decision of the bankruptcy court below. As discussed in depth in the debtor's brief and the brief for the U.S. Trustee, the claim of exemption for "100% of fair market value" is an appropriate claim of exemption. Furthermore, while not presented squarely by the facts of this case, if the Court addresses the effect of post-appreciation of fully exempt assets it should conclude that appreciation of assets that were fully exempt at the time of filing inures to the benefit of the debtor. Conversely, appreciation of assets that were not fully exempt at the time of filing inures to the benefit of the estate.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 5th Cir. R. 29.3 because this brief contains 4,296 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 20, 2016. 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.

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