No. 23-15825

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: MICHAEL A. LEITE; ANDREA C. CARVALHO,
Debtors,

UNITED STATES OF AMERICA,

Appellant,

v.

ROBERT A. MACKENZIE, Chapter 7 Trustee,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE APPELLANT

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GLOSSARY

Bankruptcy Act	Bankruptcy Act of 1898 (as amended) (former 11 U.S.C.)
Bankruptcy Court	United States Bankruptcy Court for the District of Arizona
Br.	Appellee's brief filed by the trustee
Code	Bankruptcy Code (11 U.S.C.)
District Court	United States District Court for the District of Arizona
ER	Excerpts of record
Government	United States of America, appellant
IRS	Internal Revenue Service
Op. Br.	Appellant's opening brief filed by the Government
Trustee	Robert A. Mackenzie, appellee

INTRODUCTION

This case involves the intersection of the Bankruptcy Code and the Internal Revenue Code. In interpreting the two together, this Court "will not lightly assume that Congress intended to subordinate the efficacy of the federal tax laws to other considerations." *Battley v. United States* (*In re Berg*), 121 F.3d 535, 537 (9th Cir. 1997).

The question presented is how sale proceeds encumbered by a federal tax lien should be allocated—following lien avoidance under 11 U.S.C. § 724(a)—between the unavoided tax portion of the tax lien and the avoided penalty portion of the same tax lien.[1] Standing alone, the text of § 724(a) does not provide an answer. And reading the plain text in isolation—as the trustee attempts to do—ignores the fact that Congress did not write the current Bankruptcy Code "on a clean slate." *See Dewsnup v. Timm*, 502 U.S. 410, 417, 419 (1992) (citation omitted).

Precedent indicates this Court must look to statutory history and legislative history because it is presumed that Congress intended the Code to be interpreted in a way that is consistent with preexisting

[1] Unless otherwise indicated, statutory references are to the Bankruptcy Code (11 U.S.C.).

bankruptcy law and practice, *i.e.*, pre-Code practice. *See, e.g.*, *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas and Elec. Co.* (*In re PG&E Corp.*), 46 F.4th 1047, 1057-58 (9th Cir. 2022) (citing *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998)); *Pac. Gas & Elec. Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003). And here, pre-Code practice disallowed government penalties but still ensured that the tax portions of secured tax claims were paid in full, *see Simonson v. Granquist*, 369 U.S. 38 (1962), an approach at odds with the pro rata approach adopted below. The trustee's answering brief provides no answer to our statutory interpretation arguments.

In addition, as demonstrated with examples in our opening brief (Op. Br. 32-34), the pro rata approach does not simply protect the estate from being diminished by the payment of penalties (as the trustee contends) but instead the pro rata approach goes perniciously further and actually creates a windfall for the estate. And, bizarrely, the worse the debtor's misconduct, the more the estate benefits at the expense of the principal, tax portion of the very same tax lien. While the trustee asserts that the pro rata approach does not create a windfall, he does not rebut our examples that demonstrate how the windfall arises.

Thus, the trustee's arguments do not resolve the interpretive and practical problems peculiar to the pro rata approach.

ARGUMENT

The lower courts erred by not first allocating proceeds to the tax portion of the lien before any proceeds were allocated to the avoided penalty portion of the lien

A. The Bankruptcy Code was not written on a clean slate, and thus the modern text must be read in light of pre-Code practice

The trustee repeatedly puts forward his own interpretations of § 724(a) based on his "plain language" reading of the Code (Br. 3; *see* Br. 4, 6, 9-10, 17, 23-24) in a vacuum without any reference to pre-Code practice. Indeed, he goes so far as to argue that "§ 724 should not be judicially amended again" (Br. 9), thereby implying that anything beyond merely reading the text of the Code is judicial amendment. But the text of § 724(a) does not directly answer the question of how to allocate sale proceeds between the non-penalty and penalty portions of a lien after the penalty portion of the lien has been avoided under § 724(a). Nor does the text of 11 U.S.C. § 551, the related preservation provision. And the trustee does not engage in the sort of meaningful statutory analysis required by precedent.

Proper interpretation of the Bankruptcy Code requires courts to not just read the text of the Code in isolation but also to consider the relevant statutory and legislative history. *See Dewsnup*, 502 U.S. at 417 ("Were we writing on a clean slate, we might be inclined to agree . . . . But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule . . . ."); *id.* at 419 ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' " (citation omitted)); *id.* at 419 (suggesting that "however vague the particular language . . . a major change in pre-Code practice" would be expected to be "the subject of at least some discussion in the legislative history"); *see also Hall v. United States*, 566 U.S. 506, 523 (2012) (resolving a bankruptcy case based on a "pre-existing scheme [that] was in turn premised on antecedent, decades-old understandings" that created relevant "background norms" for construing the modern Code). This Court has held that when interpreting the Bankruptcy Code, courts must "presume, absent clear indications to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting the Bankruptcy Code in 1978 or in amending it in

1984." *Pac. Gas & Elec. Co.*, 350 F.3d at 943; *see In re PG&E Corp.*, 46 F.4th at 1057-58.

Based on this precedent, this Court should interpret § 724(a) in light of the relevant pre-Code practice related to its predecessor section, Bankruptcy Act Section 57j, former 11 U.S.C. § 93(j) (1976 ed.), which disallowed all government claims for noncompensatory penalties, but ensured that the principal, tax portions of government liens were still paid. The Supreme Court explained in *Simonson v. Granquist*, 369 U.S. 38 (1962), that the purpose of Bankruptcy Act Section 57j was to prevent the bankruptcy estate from being diminished by governmental (noncompensatory) penalty claims—even when such penalty claims were secured by liens—because the enforcement of penalties would not punish the debtor but punish innocent creditors. *Id.* at 41-42. Nothing suggests that Congress intended § 724(a) to change the substantive result in *Simonson*. Instead, the new rule in § 724(a) was simply meant to extend the protections offered to the estate from *public* noncompensatory claims (penalties) to now cover *private* noncompensatory claims as well. *See* H.R. Rep. No. 95-595, at 382 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6338; *see also* 11 U.S.C.

§ 726(a)(4). Thus, if § 724(a) is first properly construed in light of the relevant pre-Code practice, it becomes clear that the lower courts erred in adopting a pro-rata approach that conflicts with § 724(a) (largely premised on the residual equitable authority provided in 11 U.S.C. § 105).

And, quite notably, when deciding how the Internal Revenue Code and the Bankruptcy Code interact, this Court has said that courts should "not lightly assume that Congress intended to subordinate the efficacy of the federal tax laws to other considerations." *Berg*, 121 F.3d at 537. Yet that is precisely what the courts below did here when adopting the pro rata approach. They allowed the avoided penalty portion of a tax lien to unnecessarily diminish the collection on the principal, tax portion of the same tax lien—and treated such gratuitous reductions in the collection of tax far too lightly.

The trustee provides no real answer to our statutory interpretation arguments; in fact, he entirely fails to respond. Perhaps the closest he comes is when he says (Br. 5) that "[t]he arguments raised by the IRS are the same arguments that it made to the district court," and "[t]he IRS has not demonstrated why the district court was wrong." But the Government has in fact shown how the lower courts erred in failing to first properly interpret § 724(a) in light of pre-Code practice, as required by precedent, *see In re PG&E Corp.*, 46 F.4th at 1057-58, and thereby also improperly adopted an allocation approach which diminished the effectiveness of the federal tax liens far too lightly, *see Berg*, 121 F.3d at 537.

B. The District Court agreed with and affirmed the Bankruptcy Court's determination that only the penalty portion of a tax lien may be avoided using § 724(a)

The trustee faults (Br. 1-3) the Government's statement (Op. Br. 4) that the issue in this case concerns the allocation of sale proceeds following *partial* lien avoidance rather than *entire* lien avoidance. The trustee states that the District Court held that the tax lien at issue was entirely avoided under § 724(a), and contends that this "holding" was correct. (Br. 1-3.) The trustee further contends (Br. 22-23) that even if partial avoidance is correct, that would make no difference. There are multiple problems with the trustee's arguments.

As a starting point, the trustee is wrong to state that the District Court held that the tax lien was avoided in its entirety using § 724(a). The District Court did not so hold. What the District Court actually did was affirm the Bankruptcy Court's order that "[t]he tax lien was avoided under § 724(a) '*to the extent of the penalties and interest on the penalties* . . . ." (ER-44 (emphasis added); *see* ER-32, ER-64 (Bankruptcy Court orders); *see also* ER-46 ("The bankruptcy court concluded that (1) because the Trustee avoided the Penalties and preserved the Penalties-related portion of the Tax Lien . . . .").) In so doing, the District Court also recognized that the Bankruptcy Court held that "[t]he 'unavoided portion of the tax lien' remained attached to the Proceeds." (ER-44; *see also* ER-11.).) Later in its opinion, the District Court again acknowledged that the tax lien had "both avoidable and unavoidable components." (ER-48.) Furthermore, the District Court was careful to note that lien avoidance might avoid only a "portion of the lien," as it did in this case. (ER-55; *see also* ER-58 (holding that the allocation of the refund might change the "Taxes and Penalties portions" of a tax lien, meaning there was still a separate tax portion of the lien).) Thus, in making this argument, the trustee is mistaken about what the District Court held.[2]

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[2] Perhaps the trustee has confused the holding of the District Court here (in *Leite*) with the erroneous holding of the district court in

(continued...)

The trustee also argues (Br. 22-23) that partial versus entire lien avoidance makes no difference, but this too is mistaken.[3] Whether a lien is partially or entirely avoided matters because avoiding an entire tax lien would render the related tax claim fully unsecured and not entitled to any distribution on account of a lien, pro rata or otherwise. A party whose entire lien is avoided is no longer a secured creditor under § 506(a). Here, the lower courts correctly recognized that lien avoidance under § 724(a) was only partial—that § 724(a) only allows the penalty portion of a tax lien to be avoided.

United States v. Warfield (*In re Freeman*), No. 21-cv-08274, ___ F. Supp. 3d ___, 2023 WL 2665735 (D. Ariz. March 28, 2023), *appeal pending*, No. 23-15827 (9th Cir.).

[3] The trustee also argues (Br. 23) that *Official Unsecured Creditors Comm. of Sufolla, Inc. v. U.S. Nat'l Bank of Oregon* (*In re Sufolla, Inc.*), 2 F.3d 977 (9th Cir. 1993), *superseded by statute on other grounds, as recognized in In re Adamson Apparel, Inc.*, 785 F.3d 1285 (9th Cir. 2015), does not support the proposition that sometimes lien avoidance in bankruptcy is only partial. But that is exactly what this Court said. *Id.* at 982 (explaining that the "to the extent" language in 11 U.S.C. § 550 "simply recognizes that transfers sometimes may be avoided only in part").

C. A pro rata allocation results in an improper windfall to the estate, and that windfall is unrelated to the trustee's attempt to maximize the sale price of the property

Naturally, the trustee is the hero of his own story. As such, he argues (Br. 6; *see also* Br. 3-4) that his zealous administrative efforts resulted in an increased sale price for the property he sold. We do not quarrel with his assumption; a private sale price will usually exceed any foreclosure sale price. But this is irrelevant to the allocation question at hand.

The trustee has a fiduciary duty to increase the value of the estate. To pay for those efforts, 11 U.S.C. § 506(c) provides him the right to surcharge a secured creditor's property interest for "necessary costs and expenses . . . to the extent of any benefit to the holder of such claim . . . ." But there is a large and notable difference between (1) charging a secured creditor for reasonable (and court approved) costs and expenses under § 506(c) and (2) instead fundamentally changing the allocation of secured interests in the underlying collateral—a question that turns on the interpretation of § 724(a) (and implicates § 506(a)). So, the trustee's focus on his own actions increasing the size of the estate is beside the point. The question this Court must resolve is how to properly allocate the recovered proceeds after lien avoidance under § 724(a) between the unavoided tax portion of a tax lien and the avoided (and preserved) penalty portion of the same tax lien.[4] To answer this question this Court must first properly construe § 724(a).

The trustee also asserts that the pro rata approach adopted below does not create a windfall for the estate (Br. 5-6), but he does not rebut the discussion presented in our opening brief—which demonstrates how the windfall arises. And as shown with multiple examples (Op. Br. 32-34), the pro rata approach does not simply protect the estate from being diminished by the payment of penalties (as the trustee asserts). But rather it goes perniciously further and creates a windfall for the estate at the expense of the secured creditor's recovery of principal. As the amount of the penalty portion of a tax lien increases (as penalties accrue over time), the security for the principal portion of the same tax lien would be further reduced under a pro-rata allocation. This means

[4] The trustee assumes as part of his counter-narrative against the existence of a windfall (Br. 6) that the penalty lien he avoided is secured—but whether the penalty lien is in fact secured by collateral is an allocation question. (*See* Br. 6 (arguing that "penalties that are secured by liens on estate property should be paid to unsecured creditors")). Unsecured penalty liens are not entitled to be allocated any proceeds.

that the greater the debtor's misconduct (and the longer it continues), the less the Government ultimately recovers for its original tax debt on the very same tax lien—a bizarre result. The same is also true for some private secured creditors, who will recover less on the principal portion of their secured debts and mortgages simply because noncompensatory claims also arose. (*See* Op. Br. 34.)

Put simply, the pro rata approach does not merely return the estate to the position it would have occupied had a penalty not been incurred, as the trustee contends. The trustee acknowledges (Br. 20) that the purpose of recovering transfers is to "restore the estate to the position it would have occupied had the property not been transferred." But the trustee fails to acknowledge that the pro rata approach does not do so. Instead, the pro rata approach improves the estate's position by creating a subtle windfall for the estate at the expense of the principal portion of the secured creditor's secured debt.

We do not dispute that proceeds should be allocated to an avoided penalty lien if there are sufficient proceeds—particularly before any proceeds are allocated to a junior lien. But the penalty portion of an avoided tax lien should not be held to be on an equal footing with the principal portion of the same tax lien such that it diminishes the amount of actual tax paid on the same lien.

D. The trustee is wrong about 11 U.S.C. § 725

The trustee takes issue (Br. 18-19) with the Government's argument (Op. Br. 37-39) that § 725 is the provision in Chapter 7 that perhaps most embodies the special status of secured creditors and ensures they are paid first from their collateral. But once again, the trustee puts forward a jaundiced textual reading that ignores precedent. In addition to relying on a leading treatise, our opening brief (Op. Br. 39) relied on a recent Supreme Court decision that specifically interpreted § 725 as we contend. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 457 (2017) ("Secured creditors are highest on the priority list, for they must receive the proceeds of the collateral that secures their debts. 11 U.S.C. § 725."). That authority alone should put the point beyond objection. If more authority is required, at least two other circuits have said the same. *See Old W. Annuity & Life Ins. Co. v. Apollo Grp.*, 605 F.3d 856, 865 (11th Cir. 2010); *Monarch Air Serv, Inc. v. Solow* (*In re Midway Airlines, Inc.*), 383 F.3d 663, 669 (7th Cir. 2004).

The trustee argues (Br. 18) that the legislative history supports his contentions as to § 725. But he cherry-picks the source he is quoting. In fact, even the case quoted by the trustee acknowledged that the legislative history also says § 725 was enacted " 'in lieu of a section that would direct a certain distribution to secured creditors.' " *Aspen Data Graphics, Inc. v. Boulton* (*In re Aspen Data Graphics, Inc.*), 109 B.R. 677, 681 (Bankr. E.D. Pa. 1990) (quoting H.R. Rep. No. 95-595, at 382-83 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6338-39). The Ninth Circuit Bankruptcy Appellate Panel has recently acknowledged the same thing. *Kurtin v. Ehrenberg* (*In re Elieff*), 637 B.R. 612, 627 (B.A.P. 9th Cir. 2022), *aff'd*, No. 22-60008, 2023 WL 2203564 (9th Cir. Feb. 24, 2023).

The trustee's unsupported contentions also suggest that he fails to grasp the Government's point. We agree with the trustee that the estate should receive an "appropriate share" (Br. 18) of the sale proceeds. But we disagree as to what that appropriate share is. The point is that it is a fundamental bankruptcy principle that secured creditors are paid first from their collateral. To be consistent with that principle, the avoided penalty portion of a lien should not be paid before the principal portion of the very same lien is paid.

E. The trustee's other arguments also lack merit

1. The trustee's assertion that the Government contends that it can decide how to allocate tax lien collateral in this situation (Br. 19) is wrong. Instead, our argument is that there is only one way to allocate the proceeds of a tax lien with an avoided penalty portion that is consistent with the statutory history (*i.e.*, the pre-Code practice) and that does not unnecessarily diminish the efficacy of the federal tax liens (and treat such reduction far too lightly). That is a tax-first allocation.

2. The trustee criticizes (Br. 11-12) the recent *Hutchinson* opinion from the Bankruptcy Court for the Eastern District of California, which adopted a tax-first allocation method. *See In re Hutchinson*, No. 17-bk-12272, 2022 WL 1021843, at *4 (Bankr. E.D. Cal. Apr. 1, 2022), *appeal pending*, No. EC-22-1078 (B.A.P. 9th Cir.). In particular, the trustee questions the *Hutchinson* court's recognition of the Bankruptcy Code's clear policy of subordinating noncompensatory (penalty) claims to all other claims in Chapter 7 cases. In doing so, the trustee argues (Br. 11) that "[t]he word 'subordinated' appears nowhere in either statute"—

meaning nowhere in either 11 U.S.C. §§ 724(a) or 726(a)(4). But his criticisms miss the mark.

The trustee's hypertextual argument overlooks the caselaw and legislative history, both of which recognize that the clear purpose of § 726(a)(4) was to subordinate all penalty claims to the payment of all other unsecured claims. *See, e.g.*, *Gill v. Kirresh* (*In re Gill*), 574 B.R. 709, 716 (B.A.P. 9th Cir. 2017) (explaining that § 726(a)(4) subordinates noncompensatory claims); *Holloway v. I.R.S.* (*In re Odom Antennas, Inc.*), 340 F.3d 705, 708 (8th Cir. 2003) (same); *see also* H.R. Rep. No. 95-595, at 383 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6339 (stating that § 726(a)(4) makes a change from the prior Bankruptcy Act; whereas some penalties had previously been "disallowed entirely" they are now all "simply subordinated here" to other claims). Thus, the reasoning of the *Hutchinson* court is fully consistent with the caselaw and legislative history that the trustee disregards.

The trustee continues his argument (Br. 11) by asserting that § 726 does not address how secured claim holders will be paid. But that is not quite true. While § 726 is a distribution provision that almost exclusively addresses distributions for unsecured claims, § 726(a)(4) actually goes slightly further and addresses the payment of "any allowed claim, whether secured or unsecured" that is for a noncompensatory claim of the types described. Thus, contrary to the trustee's argument, § 726(a)(4) makes clear that even a secured claim of the type described should not be paid ahead of unsecured creditors. Congress's policy decision on this point was then reinforced by the related avoidance provision in § 724(a), which generally ensures that any such liens are also avoided—thus losing their secured status to the extent of avoidance.

The trustee continues his criticism of the *Hutchinson* opinion by block-quoting (Br. 12-15) from the district court decision in this case. But the trustee's block quote involved analysis of the Government's previously asserted alternative argument based on § 724(b), which the Government has not renewed in this appeal. The block-quotation and its reasoning regarding § 724(b) are now irrelevant because it addressed an argument not at issue in this appeal, which is solely focused on § 724(a).

As shown in our opening brief (Op. Br. 24-36), the District Court did not properly interpret § 724(a) based on pre-Code practice (as required) and then improperly relied on 11 U.S.C. § 105(a) to adopt a pro rata allocation method in conflict with § 724(a) (as properly interpreted). The District Court also too lightly dismissed the negative effect the pro rata approach would have on tax collection and the efficacy of tax liens. Had the court first correctly interpreted § 724(a), then it would have concluded that a tax-first allocation approach was proper. Indeed, the bankruptcy court in *Hutchinson* has since reached that conclusion. *See Hutchinson*, 2022 WL 1021843, at *4.

3. The trustee also cites two other opinions that rejected the Government's § 724(b) argument that all tax portions of all liens must be paid before any avoided penalty portions of those liens. (Br. 15-17 (citing *United States v. Hutchinson (In re Hutchinson)*, 615 B.R. 596, 602 (E.D. Cal. 2020), *vacated as moot*, No. 20-16331, 2020 WL 5551702 (9th Cir. Sept. 15, 2020), and *I.R.S. v. Baldiga (In re Hannon)*, 619 B.R. 524 (D. Mass. 2020)).) But again, the trustee has not tailored his legal analysis to the arguments at issue in this appeal. Neither the vacated district court opinion in *Hutchinson* nor the district court opinion in *Hannon* resolved the same § 724(a) allocation questions presented to

this Court.[5] Indeed, the phrase "pro rata" is not even used once in either of those opinions.

4. The trustee further argues (Br. 17) that the Government seeks "a *de facto* amendment" of the Bankruptcy Code. But the trustee's argument ignores our main point, which is that the Code—and particularly § 724(a)—requires statutory interpretation and was not written on a clean slate. We are not asking this Court to amend the Code but to properly interpret the Code, as required, in light of its statutory history and pre-Code practice. *See Pac. Gas & Elec. Co.*, 350 F.3d at 943.

5. Two more points made by the trustee warrant a specific response. The trustee disagrees (Br. 2) with some of the legal background presented by the Government, and he objects (Br. 5, 10) to this Court's recent opinion in *United States v. Warfield* (*In re Tillman*),

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[5] The closest either opinion comes is dicta in a footnote in the vacated *Hutchinson* opinion that suggests that the avoided penalty portions of liens should not be considered junior to the unavoided tax portions. *Hutchinson*, 615 B.R. at 607 n.10. But read in context, this is responding to the § 724(b) argument that all tax portions of all liens were in front of all penalty portions—not to the arguments presented here regarding interpretation of § 724(a) based on pre-Code practice and focused only on priority of the tax portion within the same lien.

53 F.4th 1160 (9th Cir. 2022). But the trustee misstates the law and fails to recognize that his arguments are at odds with this Court's published *Tillman* opinion.

First, the trustee contends, contrary to the explanation in our opening brief (Op. Br. 6-7), that a debtor's property exemptions under 11 U.S.C. § 522 do not actually remove property from the bankruptcy estate. (Br. 2).[6] The trustee's assertion is simply wrong and foreclosed not only by *Tillman*, but also by earlier circuit and Supreme Court precedent.[7] *See, e.g.*, *Tillman*, 53 F.4th at 1163, 1168 & n.2; *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1142 (9th Cir. 2016) (stating that exemptions remove property from the estate); *Woodson v. Fireman's Fund Ins. Co.* (*In re Woodson*), 839 F.2d 610, 616 n.8 (9th Cir. 1988) (same); *Owen v. Owen*, 500 U.S. 305, 308 (1991) (describing exempt property as "withdrawn" from the estate).

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[6] Whether exemptions remove property from the estate is irrelevant to this case since this case does not involve exemptions. But it seems important to correct the trustee's erroneous assertion.

[7] The trustee later acknowledges in a footnote that *Tillman* held that an exemption removed property from the estate. (Br. 10 n.1.) But he does not mention this in his "legal framework" section. (Br. 1-3.)

Similarly, the trustee asserts (Br. 2) that he is not trying to "increase" the property of the bankruptcy estate by avoiding a lien—and indeed, that he "cannot 'increase' the estate." But this assertion too is untenable. The Code is clear that transfers of property, such as liens, that are preserved or recovered by the trustee become property of the estate—and thus, by definition, are not included in the estate until that happens. *See* 11 U.S.C. §§ 541(a)(3)–(4), 550, 551. *Tillman* makes this very point. *See Tillman*, 53 F.4th at 1164, 1167; *see also Nat'l Bank of Alaska, N.A. v. Erickson* (*In re Seaway Express Corp.*), 912 F.2d 1125, 1128 (9th Cir. 1990) (stating that some property is "brought into the estate by the trustee's avoidance powers"). Similarly, the Supreme Court has made clear that avoided liens and transfers are "originally not within the estate." *Owen*, 500 U.S. at 309. Thus, the trustee is indeed trying to increase the property of the estate by avoiding a transfer and preserving transferred property.

At the very least, the trustee is not accurately describing the law on these points.

CONCLUSION

For the reasons above, the District Court's judgment affirming the Bankruptcy Court should be reversed, and the case should be remanded with instructions that all of the sale proceeds of $38,643 should be allocated to the tax portion of the federal tax lien.

Respectfully submitted,

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DECEMBER 14, 2023

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United States v. Warfield (*In re Freeman*), No. 23-15827 (9th Cir.) raises the same issue and is currently pending before this Court.

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