

No.

In the Supreme Court of the United States

WALTER W. KELLEY, AS TRUSTEE FOR THE BANKRUPTCY
ESTATE OF RICKY WAYNE BRACEWELL,
Petitioner,

v.

RICKY WAYNE BRACEWELL,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The commencement of a bankruptcy case creates an estate consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case,” and of “[p]roceeds * * * of or from property of the estate.” 11 U.S.C. § 541(a)(1), (a)(6). In interpreting the predecessor to § 541, this Court held that a financial interest acquired by the debtor after the commencement of bankruptcy constitutes property of the bankruptcy estate if “it is sufficiently rooted in the pre-bankruptcy past.” *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). The question presented in this case is:

Whether a crop bailout payment received by the debtor pursuant to legislation enacted by Congress after the debtor’s filing for bankruptcy, but predicated entirely upon pre-petition events, is property of the bankruptcy estate under this Court’s decision in *Segal* and 11 U.S.C. § 541(a)(1) or (a)(6).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Eleventh Circuit (App., *infra*, 1a-43a) are reported at 454 F.3d 1234. The district court's opinion (App., *infra*, 44a-64a) is reported at 322 B.R. 698. The bankruptcy court's opinion and order (App., *infra*, 65a-73a) are reported at 310 B.R. 472.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2006. On September 12, 2006, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 27, 2006. On October 10, 2006, Justice Thomas further extended the time for filing a petition for a writ of certiorari to and including November 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 11 U.S.C. § 541(a) provides:

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

STATEMENT

Filing a bankruptcy petition under the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, triggers the creation of an estate comprising, *inter alia*, the debtor's legal or equitable interests in property as of the commencement of the case and proceeds of or from property of the estate. 11 U.S.C. § 541(a)(1), (a)(6). The central issue in this case is whether a crop bailout payment authorized by Congress after a debtor files for bankruptcy, but predicated entirely upon the debtor's pre-petition crop losses, constitutes part of the estate against which creditors – including those who lent money to grow the crops – may recover.

In *Segal v. Rochelle*, 382 U.S. 375 (1966), this Court established a test to determine whether financial interests acquired post-petition but predicated on pre-petition events became property of the bankruptcy estate under the former Bankruptcy Act. In that case, the debtors had suffered significant losses before they filed their bankruptcy petition, but they did not become entitled to a tax refund under the Internal Revenue Code until after bankruptcy had commenced. This Court determined that the tax refund, although paid post-petition and legally not available to the debtors until after the petition date, belonged to the bankruptcy estate: “[W]e believe [the loss-carryback refund claim] is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts’ ability to make an unencumbered fresh start that it should be regarded as ‘property’” of the estate. *Id.* at 380. The tax refund should be included within the bankruptcy estate, the Court further explained, because the debtors had completed all conduct necessary to trigger entitlement to the refund (payment of taxes in previous years and incurring losses in the year of bankruptcy) at the time they filed for bankruptcy protection. *Ibid.* That the debtors could not claim the refund until after the petition date did “not disqualify [the] interest as ‘property.’” *Ibid.*

Since *Segal*, this Court and numerous lower courts have continued to apply *Segal*'s "sufficiently rooted" test to ascertain whether interests that become available to debtors post-petition belong to the bankruptcy estate. See, e.g., *Kokoszka v. Belford*, 417 U.S. 642, 645-648 (1974); *United States v. Kennedy*, 2000 WL 1720962, at *4 (2d Cir. 2000) (unpublished); *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000); *In re Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1 (6th Cir. 1995) (unpublished); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984); *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552, 557-558 (D. Conn. 2003); *Hoseman v. Weinschneider*, 277 B.R. 894, 899 (N.D. Ill. 2002), *aff'd* on other grounds, 322 F.3d 468 (7th Cir. 2003); *In re Tomaiolo*, 2002 WL 226133, at *3 (D. Mass. 2002) (unpublished); *In re Doemling*, 127 B.R. 954, 957 (W.D. Pa. 1991).

The courts of appeals are divided on whether *Segal*'s "sufficiently rooted" test remains the law under the present Bankruptcy Code, which was enacted in 1978. In the instant case, the Eleventh Circuit joined the Fifth Circuit in answering that question in the negative. App., *infra*, 12a; see *In re Burgess*, 438 F.3d 493, 498 (5th Cir. 2006) (*en banc*); see also *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002) (limiting *Segal* to tax refunds). Four other circuits continue to apply *Segal*'s sufficiently rooted test after the passage of the Bankruptcy Code. See *Kennedy*, 2000 WL 1720962, at *4; *Shearin*, 224 F.3d at 351; *Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1; *Ryerson*, 739 F.2d at 1426.

The instant case presents but one example of the variety of contexts in which *Segal*'s test applies. Here, after the debtor filed for bankruptcy, Congress authorized a bailout for farmers with certain crop losses but tied eligibility to the debtor's pre-petition activities. More particularly, a debtor's entitlement to a payment turned on his having planted crops in a covered pre-petition year, and the amount of the payment was measured by the debtor's pre-petition crop losses. Thus, payments were predicated entirely upon prior conduct. Under

Segal, the crop bailout payment would belong to the bankruptcy estate as it is “sufficiently rooted in the pre-bankruptcy past” to constitute estate property. 382 U.S. at 380.

A. The Bankruptcy Court And District Court Proceedings

1. In November 2000 and May 2001, respondent Ricky Wayne Bracewell planted 223 acres of seed wheat and approximately 374 acres of seed cotton. App., *infra*, 2a. Drought conditions during 2001 resulted in a substantially reduced crop yield. *Ibid.* Respondent had incurred significant farm-related debts to produce the crop, and the low yield left respondent unable to meet his financial obligations to his creditors. *Ibid.*

Respondent filed a Chapter 12 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Georgia on May 29, 2002. App., *infra*, 2a. Under Chapter 12 of the Bankruptcy Code, which at the time of respondent’s bankruptcy was available only to family farmers with regular annual income, a debtor proposes a plan of reorganization that pledges some part of three years of post-petition income in exchange for the restructuring of his debts. See 11 U.S.C. § 1222(a)(1), (c). If the debtor successfully makes all the payments required under the plan, he receives a discharge of the debts provided for in the plan. See *id.* § 1228(a). In contrast to Chapter 12, a Chapter 7 debtor receives a discharge of debts as of the date of the commencement of bankruptcy and generally has no post-petition obligations to his pre-petition creditors. See *id.* § 727(b) (providing a Chapter 7 debtor with a discharge of “all debts that arose before the date of the order for relief”).

While respondent’s Chapter 12 case was pending, several members of Congress pursued well-publicized efforts to enact legislation that would compensate farmers like respondent for

drought-related crop losses.¹ App., *infra*, 22a. On July 26, 2002, Senator John Thune introduced the Emergency Farmer and Rancher Assistance Act of 2002, H.R. 5310, 107th Cong., which proposed financial payments to farmers with weather-related crop losses in 2001 and 2002, but Congress recessed before enacting the legislation. App., *infra*, 22a-23a. Respondent converted his case to Chapter 7 on January 2, 2003 (*id.* at 2a), at which time the bankruptcy court appointed petitioner as the Chapter 7 trustee of respondent's bankruptcy case.

Shortly thereafter, Congress continued its efforts to compensate farmers for crop losses. Those efforts culminated in the passage of the Agricultural Assistance Act of 2003, Pub. L. No. 108-7, div. N, Tit. II, 117 Stat. 538, on February 20, 2003. App., *infra*, 3a. As with the legislation introduced in 2002, the Act authorized emergency financial assistance to farmers with weather-related crop losses in 2001 or 2002. The law allowed farmers to receive a payment based on losses incurred in one of the two years. Respondent applied for his payment on January 30, 2004, electing to use his pre-petition 2001 crop losses to calculate his entitlement under the relief program. *Ibid.* He received \$41,566. *Ibid.*

¹ Over the past several decades, such bailouts were relatively common. The Disaster Payments Program, a federal program in place from 1973 to 1981, paid out more than \$3.4 billion to farmers with crop losses. Bruce L. Gardner, *American Agriculture in the Twentieth Century: How It Flourished and What It Cost* 228 (2002); E.C. Pasour, Jr. & Randal R. Rucker, *Plowshares and Pork Barrels: The Political Economy of Agriculture* 231 (2005). After the Program formally ended in 1981, Congress authorized *ad hoc* funding for bailout payments from 1988 to 1994, and again from 1998 through 2001. Gardner, *supra*, at 229; Pasour & Rucker, *supra*, at 232. The regularity of these payments led one commentator to conclude that "farmers have come to depend on both crop insurance and disaster payments, which together allow for covering up to 95 percent of the value of their crops." Gilbert M. Gaul, Dan Morgan & Sarah Cohen, *Farmers' Bumper Crop of Federal Dollars: Subsidized Insurance and Disaster Payments*, Wash. Post, Oct. 15, 2006, at A1.

2. Petitioner (the bankruptcy trustee) filed a motion with the bankruptcy court seeking a determination of whether the crop bailout payment belonged to the bankruptcy estate. Petitioner argued for inclusion of the disaster payment in the bankruptcy estate either as property of the estate under 11 U.S.C. § 541(a)(1)² or as proceeds of estate property under 11 U.S.C. § 541(a)(6). For purposes of the motion's resolution, the parties stipulated to the facts. App., *infra*, 2a.

The bankruptcy court issued its memorandum opinion on May 20, 2004 (App., *infra*, 65a-72a), and ruled that the bailout payment constituted property of the estate under § 541(a)(1). *Id.* at 72a. The court recognized that, at the commencement of the case, respondent retained “the *right* to the 2001 crop disaster payment, however contingent it may have been.” *Id.* at 71a. That contingent right, which included the right to all government disaster payments tied to the pre-petition crops, vested upon passage of the Agricultural Assistance Act of 2003. *Id.* at 71a-72a. The court reasoned that the right to receive the disaster payment did not depend on future post-petition activities on the respondent's part, but rather “stemmed from an inchoate right he acquired pre-petition.” *Id.* at 72a. The court noted the inequity of permitting respondent to benefit personally from the disaster

² 11 U.S.C. § 541(a)(1) includes in the bankruptcy estate “all legal or equitable interests of the debtor in property as of the commencement of the case.” Respondent's bankruptcy case began as a Chapter 12 proceeding, thus triggering 11 U.S.C. § 1207(a)(1), which supplements the estate with “all property of the kind specified in such section [541] that the debtor acquires after the commencement of the case but before the case is * * * converted to a case under chapter 7.” Accordingly, the bankruptcy estate in this case expanded to include post-petition property acquired until conversion to Chapter 7 on January 2, 2003. Because respondent did not receive the crop disaster payment at issue in this proceeding until 2004, after the date of the Chapter 7 conversion, § 1207 had no immediate effect on the issue presented here. See App., *infra*, 3a n.1. Accordingly, petitioner will refer to the date of the Chapter 7 conversion as the petition date.

payment “while avoiding paying the creditors whose extension of credit funded the 2001 crop.” *Ibid.*

The bankruptcy court did not, however, include the bailout payment in the estate under § 541(a)(6). App., *infra*, 71a. It held that proceeds under § 541(a)(6) must flow from property in existence on the petition date and that, in this case, the diminished 2001 crop did not generate proceeds because it did not exist at the commencement of the case. *Ibid.*

3. Respondent appealed to the United States District Court for the Middle District of Georgia. The district court treated petitioner’s brief in opposition as a cross-appeal of the bankruptcy court’s ruling that the crop bailout payment was not proceeds of estate property under § 541(a)(6). App., *infra*, 47a. The district court ruled that the payment belonged to the debtor individually and not to the bankruptcy estate under either § 541(a)(1) or (a)(6).

While acknowledging this Court’s opinion in *Segal*, the district court distinguished that case on the ground that the loss-carryback refund in *Segal* arose from rights created by Congress prior to the commencement of the debtor’s bankruptcy. The district court noted that several bankruptcy court decisions had held *Segal* on point when faced with similar facts, but the district court deemed them unpersuasive. App., *infra*, 50a-51a. Instead, the district court agreed with opinions of the Eighth Circuit Bankruptcy Appellate Panel, *In re Vote*, 261 B.R. 439, 444 (B.A.P. 8th Cir. 2001), *aff’d*, 276 F.3d 1024 (8th Cir. 2002), and the Fifth Circuit, *In re Burgess*, 392 F.3d 782, 786 (5th Cir. 2004), *aff’d*, 438 F.3d 493 (5th Cir. 2006) (*en banc*). The district court held that, as of the petition date, respondent had only a mere hope that the crop losses would result in a government payment, which did not amount to a cognizable property interest under § 541(a)(6). App., *infra*, 55a. The district court held that that the property interest did not come into existence until Congress provided for relief in 2003, so that “growing crops and suffering crop loss—no matter how sufficiently rooted to the

pre-bankruptcy past—are of no legal significance and create no right.” *Ibid.*

On the issue of whether the crop disaster payment came into the estate as proceeds under § 541(a)(6), the district court affirmed on substantially the same reasoning offered by the bankruptcy court. App., *infra*, 57a-61a. To the extent that its construction of the Code would yield absurd and unfair results, the district court concluded, petitioner’s claim should be presented to Congress, not the courts. *Id.* at 61a-63a.

B. The Court of Appeals’ Decision

Petitioner appealed to the Eleventh Circuit, which affirmed by a divided panel opinion. Relying on prior circuit precedent regarding property interests arising from a legal malpractice claim, *In re Witko*, 374 F.3d 1040, 1043-1044 (11th Cir. 2004), the court of appeals held that respondent’s right to the bailout payment did not arise until the Act’s enactment on February 20, 2003, approximately fifty days after respondent’s decision to convert to a Chapter 7 proceeding. App., *infra*, 3a-4a, 7a. The court also deemed persuasive the opinions of the Fifth and Eighth Circuits in *Burgess* and *Vote*. In addition, the court of appeals rejected this Court’s opinion in *Segal*, holding that the Bankruptcy Code superseded that case. *Id.* at 12a (“The *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property.”).

The Eleventh Circuit adopted the reasoning of the district court on the question whether the bailout payment came into the bankruptcy estate as proceeds under § 541(a)(6). Like the district court, the Eleventh Circuit deemed its holding on the § 541(a)(1) issue controlling on the § 541(a)(6) claim. Because it ruled that respondent had no property interest in the bailout payment as of the petition date, the bankruptcy estate “did not include an interest that could generate proceeds.” App., *infra*, 18a. The court of appeals also held that the

bailout payment did not relate back to the low 2001 crop yield, and accordingly, was not “proceeds” of that crop.

Judge Pryor dissented. He would have held the crop bailout payments to be property of the estate under either § 541(a)(1) or (a)(6). App., *infra*, 22a. He concluded that the enactment of the Bankruptcy Code did not overrule *Segal*. Pointing to the consistency of the statutory text both before and after *Segal*, courts’ continued reliance on *Segal*, and the Bankruptcy Code’s legislative history, Judge Pryor would have held that *Segal*’s sufficiently rooted test remained in force. *Id.* at 28a. He also observed that two opinions of this Court, both of which held that payments predicated on post-petition legislation belonged to the bankruptcy estate, counseled in favor of including the payments at issue here. *Id.* at 29a-33a (discussing *Williams v. Heard*, 140 U.S. 529 (1891), and *Milnor v. Metz*, 41 U.S. (16 Pet.) 221 (1842)). Judge Pryor concluded that, as of the petition date, respondent enjoyed “a contingent property interest that ripened into a gain post-petition due to legislation enacted by Congress.” *Id.* at 33a. As this contingent property interest arose wholly from respondent’s pre-petition activities, and “legislation compensated him for that pre-petition loss, [respondent’s] crop disaster payment was ‘rooted in the prebankruptcy past,’” and came into the estate under § 541(a)(1). *Id.* at 37a (quoting *Segal*, 382 U.S. at 380).

But even if the payment were not included by operation of § 541(a)(1), Judge Pryor further explained, it constituted proceeds of estate property under § 541(a)(6). App., *infra*, 22a. After showing that the disaster payment would be “proceeds” under Georgia’s Uniform Commercial Code (“UCC”), Judge Pryor demonstrated that the Bankruptcy Code’s definition of proceeds, which is widely acknowledged to be broader than the UCC’s definition, encompasses the bailout payment at issue here. *Id.* at 38a. The majority’s reasoning, Judge Pryor argued, “leads to an absurd result.” *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided As To Whether The Bankruptcy Code Of 1978 Superseded *Segal's* "Sufficiently Rooted" Test

The prior Bankruptcy Act provided that the estate included "the title of the bankrupt as of the date of the filing of the petition * * * to all of the following kinds of property wherever located." 11 U.S.C. § 110(a) (1964). In *Segal v. Rochelle*, 382 U.S. 375, 380 (1966), this Court held that an interest "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start * * * should be regarded as 'property.'" Congress later passed the Bankruptcy Code of 1978, which states that property of the bankruptcy estate consists of "all legal or equitable interests of the debtor * * * as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Second, Fourth, Sixth, and Ninth Circuits have held that *Segal's* test survived the passage of the Code. The Fifth and Eleventh Circuits, conversely, have held that it did not.

1. In *Segal*, this Court held that a financial interest sufficiently rooted in the pre-bankruptcy past should be treated as property of the bankruptcy estate even if the interest did not come to complete fruition until after the bankruptcy petition was filed. 382 U.S. at 380. There, the debtors filed voluntary bankruptcy petitions, and the trustee of their bankruptcy estates later sought and obtained loss-carryback tax refunds based on the debtors' pre-petition activities. *Id.* at 376. The Internal Revenue Code, which created these refunds, expressly provided that claims for the refunds could not be made until the end of the year. *Id.* at 377-378. Accordingly, although the losses underlying the refunds occurred before the debtors filed for bankruptcy, the claim for the refunds could not be made until after they filed for bankruptcy.

The Court addressed whether the loss-carryback tax refunds were “property” when the debtors filed for bankruptcy. 382 U.S. at 376. Recognizing the impossibility of categorically defining “property,” the Court held that the tax refunds were “property” for purposes of § 541(a)(1)’s predecessor provision. *Id.* at 379. The Court stated that the “main thrust of § 70a(5) [of the Bankruptcy Act] is to secure for creditors everything of value the bankrupt may possess in alienable or leivable form when he files his petition.” *Ibid.* Additionally, “the term ‘property’ has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.” *Ibid.* The counterbalancing policy for this definition, the Court explained, is that bankruptcy also seeks “to leave the bankrupt free after the date of his petition to accumulate new wealth in the future.” *Ibid.*

The Court held that the loss-carryback refund claim was “sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts’ ability to make an unencumbered fresh start that it should be regarded as ‘property’ under § 70a(5).” 382 U.S. at 380. It rejected the debtors’ argument that they could not have claimed the refund until the end of the year because “postponed enjoyment does not disqualify an interest as ‘property.’” *Ibid.* Moreover, the Court observed that “two key elements point[ed] toward realization of a refund at the time the bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss.” *Ibid.* Those facts made the claim “sufficiently rooted in the pre-bankruptcy past,” and the refunds therefore were included in the bankruptcy estates.

Segal thus rejected a formalistic approach to defining property for purposes of bankruptcy. Instead of relying on arbitrary legal deadlines, the Court adopted a flexible, fact-driven analysis. The Court, moreover, instructed that the

Bankruptcy Act's "own purposes must ultimately govern" "[w]hether an item is classed as 'property.'" 382 U.S. at 379.

2. The Second, Fourth, Sixth, and Ninth Circuits have held that *Segal's* sufficiently rooted test survived the passage of the Bankruptcy Code. See, e.g., *United States v. Kennedy*, 2000 WL 1720962, at *4 (2d Cir. 2000) (unpublished) ("[T]he compensation defendant received under the non-competition agreement was 'rooted in the pre-bankruptcy past.'"); *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000) (affirming application of *Segal's* sufficiently rooted test); *In re Williams Bros. Asphalt Paving Co.*, 1995 WL 316799, at *1 (6th Cir. 1995) (unpublished) (same); *In re Ryerson*, 739 F.2d 1423, 1426 (9th Cir. 1984).

In *Ryerson*, for example, the Ninth Circuit held that payments for services performed prior to bankruptcy were includable in the bankruptcy estate because they were sufficiently rooted in the pre-bankruptcy past. 739 F.2d at 1426. The court explained that "[a]mong the debtor's legal interests that become a part of the bankruptcy estate under the Code are his choses in action and claims against third parties as of the commencement of the case." *Id.* at 1425. Indeed, the Ninth Circuit broadened *Segal's* sufficiently rooted test in favor of creditors by explaining that "[t]he Code follows *Segal* * * * but eliminates the requirement that [post-petition property] not be entangled with the debtor's ability to make a fresh start." *Id.* at 1426.

Several circuits that have not specifically employed the sufficiently rooted test have nonetheless cited *Segal* and have relied on its broad construction of property without any suggestion that the Code somehow supplanted the sufficiently rooted test. See, e.g., *In re Watman*, 458 F.3d 26, 33 (1st Cir. 2006) (noting that *Segal* instructs that property "should be interpreted 'most generously'" (quoting *Glosband v. Watts Detective Agency*, 21 B.R. 963, 971 (D. Mass. 1981) (quoting *Segal*, 382 U.S. at 379)); *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 211 (3d Cir. 2006) (quoting *Segal*); *Watson v. H.J.*

Heinz Co., 101 Fed. App'x 823, 825 (Fed. Cir. 2004) (same); *In re Yonikus*, 996 F.2d 866, 869 & n.3 (7th Cir. 1993) (same); *In re Barowsky*, 946 F.2d 1516, 1518 (10th Cir. 1991) (“When Congress enacted section 541 of the Bankruptcy Act of 1978, it affirmatively adopted the Supreme Court’s analysis of property that was contained in *Segal*.”) (footnote omitted). Moreover, even without explicitly relying on the sufficiently rooted test, some courts continue to use the flexible approach that underlies *Segal*. See, e.g., *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988) (“In deciding what constitutes property under § 541, we are mindful of the trustee’s interest in reaching all assets of the debtor contrasted with the debtor’s interest in accumulating wealth post-petition.”) (citing *Segal*, 382 U.S. at 379).

3. The Fifth and Eleventh Circuits have reached the exact opposite conclusion, holding that the passage of the Bankruptcy Code overruled *Segal*’s sufficiently rooted test. See App., *infra*, 12a (“‘*Segal*’s ‘sufficiently rooted’ test did not survive the enactment of the Bankruptcy Code.”) (quoting *In re Burgess*, 438 F.3d 493, 498 (5th Cir. 2006) (*en banc*)); *Burgess*, 438 F.3d at 498 (same). In the decision below, the Eleventh Circuit rejected *Segal* wholesale. It stated that, when Congress “overhauled the Bankruptcy Code in 1978,” it intended § 541(a)(1) to restrict “property of the estate to that which existed ‘as of the commencement of the case.’” App., *infra*, 12a (citation omitted). Accordingly, it asserted that “*Segal* * * * told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property.” *Ibid*.

The Fifth Circuit’s *en banc* decision in *Burgess*, while conceding that Congress “specifically approved of *Segal*’s result,” nonetheless rejected the sufficiently rooted test outright. 438 F.3d at 498. It argued that “[t]he enactment of the Bankruptcy Code undertook to obviate th[e] analytical conundrum” of the sufficiently rooted test. *Id.* at 499 (quoting *In re Goff*, 706 F.2d 574, 578 (5th Cir. 1983), over-

ruled on other grounds by *Patterson v. Shumate*, 504 U.S. 753 (1992)) (emphasis omitted). Consequently, the court refused to apply the fact-driven approach of *Segal* and determined that crop bailout payments were not property of the estate.³

In sum, in the Second, Fourth, Sixth, and Ninth Circuits, *Segal*'s sufficiently rooted test remains in force. The Fifth and Eleventh Circuits, and perhaps also the Eighth,⁴ no longer follow *Segal*'s approach. This question has divided the courts of appeals, and this Court's intervention is necessary to resolve this conflict.

II. The Eleventh Circuit's Rejection Of *Segal* Conflicts With This Court's Decisions And The Text And History Of The Bankruptcy Code

1. This Court has never held or suggested that the Bankruptcy Code superseded any part of *Segal*. Indeed, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court suggested the contrary. In that case, the Second Circuit (per Judge Friendly) had rejected a "rigid" reading of

³ Chief Judge Jones (joined by six other judges) dissented, arguing that "[t]here is little or no support for [the majority's] conclusion" that *Segal* was superseded by the Bankruptcy Code. *Burgess*, 438 F.3d at 512 (Jones, C.J., dissenting). She explained that the case would be "straight-forward under [*United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983)], *Segal* and *Williams [v. Heard*, 140 U.S. 529 (1891),]" because at the time of the debtor's crop loss "there was 'an expectancy of interest,' 'a possibility coupled with an interest,' that the crop loss could be compensable in the future [and] [t]hat potential * * * is a property right * * * sufficiently rooted in the prebankruptcy past as to become property of the bankruptcy estate." *Burgess*, 438 F.3d at 512.

⁴ The Eighth Circuit would appear to agree (at least in part) with the Fifth and the Eleventh Circuits' rejection of *Segal*. In *In re Vote*, 276 F.3d 1024 (8th Cir. 2002), the court limited *Segal* to tax refunds and held that the sufficiently rooted test does not apply when crop bailout legislation is passed after a debtor files for bankruptcy. It argued that reliance on the sufficiently rooted test would violate the Code's intention not "'to expend [*sic*] the debtor's rights against others more than they exist at the commencement of the case.'" *Id.* at 1026 (quoting S. Rep. No. 95-989, at 82 (1978)).

§ 541(a)(1) and explained that that section was intended to “preserve or enlarge” the definition of “property of the estate” under the old Act. See *United States v. Whiting Pools, Inc.*, 674 F.2d 144, 150 n.10 (2d Cir. 1982). In affirming, this Court adopted Judge Friendly’s reasoning and explained that, while “‘as of the commencement of the case’ * * * could be read to limit the estate to those ‘interests of the debtor in property’ at the time of the filing of the petition,” it instead is “a definition of what is included in the estate, rather than as a limitation.” *Whiting Pools*, 462 U.S. at 203. That is, § 541 does not impose a strict temporal limitation, but instead provides only a starting point for the definition of “property.” Although not addressing *Segal* directly, this Court thus affirmed that a similarly flexible and expansive definition should apply to § 541(a)(1).

Moreover, the fact-driven test of *Segal* and *Whiting Pools* accords with this Court’s long-established precedent. See *Williams v. Heard*, 140 U.S. 529 (1891); *Milnor v. Metz*, 41 U.S. (16 Pet.) 221 (1842). As Judge Pryor explained in dissent below: “These precedents establish that property rights are ‘created by reason of losses having been suffered,’ * * * not by later legislation that provides compensation for those losses.” App., *infra*, 29a-30a (quoting *Williams*, 140 U.S. at 541).

In *Williams*, a debtor who had insured ships during the Civil War filed for bankruptcy; five years after his discharge in bankruptcy, Congress passed legislation that compensated him for losses incurred during the Civil War and before he filed for bankruptcy. 140 U.S. at 530. This Court ruled that those payments were part of the bankruptcy estate because “[t]here was * * * at all times a possibility that the government would” decide to compensate him for his losses. *Id.* at 541. The Court added that the payments “were rights growing out of property, rights, it is true, that were not enforceable until after the passage of the [legislation]. But the act of congress did not create the rights. They had existed

at all times since the losses occurred.” *Ibid.* Similarly, in *Milnor*, this Court included compensation for overtime services that the debtor performed pre-petition in the bankruptcy estate, even though Congress passed the legislation giving rise to the compensation post-petition. 41 U.S. at 225-227. The Court’s reasoning in *Williams* and *Milnor* supports *Segal* and directly contradicts the Eleventh Circuit’s decision.

2. The text and legislative history of the 1978 Bankruptcy Code demonstrate that it did not intend to overturn or weaken *Segal*. “The normal rule of statutory interpretation is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.” *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Prot.*, 474 U.S. 494, 501 (1986); see also *United States v. Noland*, 517 U.S. 535, 539 (1996) (same). Accordingly, one would expect Congress to have spoken clearly if its purpose was to reject *Segal*. Quite the opposite is the case.

The Bankruptcy Code only insignificantly modified the statutory text defining property. The old Act encompassed “as of the date of the filing of the petition * * * all of the following kinds of property wherever located.” 11 U.S.C. § 110(a) (1964). The new Code used similar temporal language: “of all the following property, wherever located and by whomever held: * * * all legal or equitable interests of the debtor * * * as of the commencement of the case.” *Id.* § 541(a)(1). “When Congress amends the bankruptcy laws, it does not write ‘on a clean slate,’” *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), and it is difficult to see how Congress could have intended the minor changes in the text of the 1978 Code to effect the significant shift in the definition of property that would result from the rejection of *Segal*’s sufficiently rooted test.

Moreover, “this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.” *Dewsnup*, 502 U.S. at 419. Far from suggesting that Congress wished to undermine *Segal*, the legislative history confirms the contrary. Congress intended the Code to define the bankruptcy estate expansively: “[T]he estate is comprised of all legal or equitable interest of the debtor * * * as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property * * * and all other forms of property currently specified in section 70a of the Bankruptcy Act.” S. Rep. No. 95-989, at 82 (1978); H.R. Rep. No. 95-595, at 367 (1977). Most importantly, the Code’s drafters specifically stated that “[t]he result of [*Segal*] is followed.” S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 367. Indeed, Congress’s express affirmation of *Segal* stands in stark contrast to its overruling of two other decisions of this Court through § 541. S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 368. (“[Section 541(a)(1)] has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903),” and “*Lines v. Frederick*, 400 U.S. 18 (1970).”). There thus can be little doubt that Congress did not purport to displace *Segal* by enacting the Code, and nothing suggests that the Code otherwise intended to discard the sufficiently rooted test.

III. The Eleventh Circuit’s Holding That Crop Disaster Payments Are Not “Proceeds * * * Of Or From Property Of The Estate” Under 11 U.S.C. § 541(a)(6) Conflicts With Lower Court Opinions

The Eleventh Circuit’s decision contradicts the conclusions of several sister circuits in finding that crop disaster payments are not “[p]roceeds * * * of or from property of the estate” under § 541(a)(6). As established in § 541(a), “property of the estate” includes any property that meets the requirements of *any* of the subsections (a)(1)

through (a)(7). While § 541(a)(1) discusses one category of “property of the estate”—“legal or equitable” property interests of the debtor “as of the commencement of the case”—§ 541(a)(6) expands upon the term to include “[p]roceeds * * * of or from property of the estate.” In short, § 541(a)(6)’s proceeds provision provides an alternate basis for finding that a given item is “property of the estate” under the Bankruptcy Code.

A. The Eleventh Circuit’s Decision That Crop Bailout Payments Are “Assistance” Rather Than “Proceeds” Conflicts With Other Courts’ Determinations That Bailout Payments Are “Proceeds Of That Crop”

Contradicting several of its sister circuits, the Eleventh Circuit below concluded that crop bailout payments do not constitute “proceeds” under § 541(a)(6) because they are not given in exchange for the ruined crop. Specifically, the Eleventh Circuit stated that it did not accept the notion that “the payments are proceeds because they relate back to a pre-petition crop.” App., *infra*, 18a. The court held that any compensation that the debtor received directly from disposition of the pre-petition crops would be “proceeds of property of the estate,” but stated that “Congress did not purport to purchase the ruined crops of farmers like Bracewell. Instead, Congress provided *assistance* to farmers like him because of losses they had suffered in the past.” *Ibid*. The court therefore equated the crop bailout payments to a mere gift or handout from the government rather than a payment in *compensation* for the farmer’s loss. Since the bailout payments did not act as compensation for the failed crops, the court reasoned, they could not be proceeds of property of the estate. *Ibid*. (“Because this assistance was not given in exchange for property of the estate, it is not proceeds of property of the estate.”).

The Eleventh Circuit’s holding conflicts with decisions of the Seventh, Ninth, and Tenth Circuits, which all would hold

that crop bailout payments are “proceeds” of the failed crop, rather than mere gifts from the government. The Tenth Circuit identified a well-established distinction, ignored by the court below, between crop bailout payments and “payments-in-kind” (“PIK”) (payments, sometimes in the form of actual crops, given to farmers by the government in return for *not* planting a crop and performing certain other obligations). *In re Schneider*, 864 F.2d 683, 684-686 (10th Cir. 1988); see *infra* note 6. While crop bailout payments are proceeds of the failed crop, PIK arise from contractual rights. *Schneider*, 864 F.2d at 685. The *Schneider* court held that PIK arising from a contract between the debtor and the government were not necessarily “proceeds” of a crop under § 541(a)(6), because the payments arise from accounts or intangibles. *Ibid.*⁵ Conversely, the court stated that “[a]gricultural entitlement payments which result from the actual disposition of a planted crop are proceeds of that crop.” *Ibid.*⁶

⁵ The regulations governing the PIK program required “an executed contract [as] a prerequisite to participation,” *Schneider*, 864 F.2d at 686, and the PIK contract required the debtor to provide certain services (including limiting the amount of wheat planted, using good soil conservation techniques, and controlling erosion) in exchange for payment. *Id.* at 685-686.

⁶ Cases cited by *Schneider* make clear that crop bailout payments, such as the one here, are included in the *Schneider* court’s definition of “entitlement payments which result from the actual disposition of a planted crop.” See, e.g., *In re Schmaling*, 783 F.2d 680, 683 (7th Cir. 1986) (contrasting PIK payments with “proceeds of an existing, failed crop”); *In re Munger*, 495 F.2d 511, 513 (9th Cir. 1974) (abandonment payments are “proceeds” of the abandoned crop); *In re Kruger*, 78 B.R. 538, 541 (Bankr. C.D. Ill. 1987) (“there was a disposition through the abandonment [of the crop], and the subsidy was paid as a result of the abandonment”). Other cases confirm that crop bailout payments result from the disposition of a planted crop. *Burgess*, 438 F.3d at 516 (Jones, C.J., dissenting) (reading *Schneider* to state that “agricultural entitlement payments arising from lost crops ‘are proceeds of that crop’ under § 541(a)(6)”; *In re White*, 1989 WL 146417, at *5 (Bankr. N.D. Iowa 1989) (unpublished) (“A ‘disposition’ of the crop occurred

The Seventh Circuit addressed a very similar issue in *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986). *Schmaling* involved a contract dispute between a creditor bank and the debtor, after the debtor had signed a security agreement with the bank. *Id.* at 681. Under the Uniform Commercial Code (“UCC”), a security interest includes “proceeds” of collateral. *Id.* at 682 n.2. The court noted that a PIK could not be considered “proceeds of anything” under the UCC because there was never any crop grown to begin with. *Id.* at 683. The court contrasted PIK with payments that were “proceeds of an existing, failed crop,” implying that payments resulting from a failed crop, such as the ones at issue in this case would be considered “proceeds” of that crop under the UCC. *Ibid.* (“The right to the PIK entitlement was a general intangible, not proceeds of an existing, failed crop—or proceeds of anything.”).⁷

The Ninth Circuit addressed the “proceeds” issue in the context of federal abandonment payments in *In re Munger*, 495 F.2d 511 (9th Cir. 1974). In *Munger*, the debtor began growing a sugar beet crop, only to apply for abandonment payments, which the federal government gave to farmers who agreed to abandon certain crops. The issue in that case was whether the subsequent abandonment payments were

when part of the Debtor’s unmatured crops were damaged or destroyed by weather conditions. * * * The Debtor’s entitlements under the Act were received in connection with that disposition.”).

⁷ Although *Schmaling* involves the UCC rather than § 541(a)(6), this distinction, if anything, only strengthens the argument that crop disaster payments should be considered “proceeds” under § 541(a)(6). Several courts have noted that the definition of “proceeds” under the UCC is narrower than that used in § 541(a)(6). See, e.g., *Am. Bankers Ins. Co. v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996); *In re Farmpro Servs., Inc.*, 276 B.R. 620, 626 (D.N.D. 2002); *In re Ring*, 169 B.R. 73, 76 (Bankr. M.D. Ga. 1993), aff’d, 160 B.R. 692 (M.D. Ga. 1993); *White*, 1989 WL 146417, at *3. Therefore, if crop disaster payments are “proceeds” under the UCC, they must also be considered “proceeds” under the broader definition of § 541(a)(6).

“proceeds” of the abandoned crop within the meaning of the California version of the UCC. The court held that abandonment payments “are within a broad reading of ‘proceeds,’” *id.* at 513, and that “[n]ot to include such payments within the term ‘proceeds’ would be to raise distinctions of form over the realities underlying this financing transaction, a result contrary to the intent of the Uniform Commercial Code.” *Ibid.*

Several district and bankruptcy courts, adopting the approach of the Seventh, Ninth, and Tenth Circuits, have specifically held that crop bailout payments are “proceeds” under § 541(a)(6). See, e.g., *In re Farmpro Servs., Inc.*, 276 B.R. 620, 624 (D.N.D. 2002); *In re Lemos*, 243 B.R. 96, 101 (Bankr. D. Idaho 1999); *In re Ring*, 169 B.R. 73, 77 (Bankr. M.D. Ga. 1993), *aff’d*, 160 B.R. 692 (M.D. Ga. 1993) (“The purpose of the disaster payments is to compensate the Debtor for crop losses. Since the [failed] crops and their proceeds are property of the estate and the disaster payments are merely the substitute for the proceeds of the crops, then it logically follows that the disaster payments are also property of the estate.”); *In re White*, 1989 WL 146417, at *4 (Bankr. N.D. Iowa 1989) (unpublished) (“*Subsidy payments actually take the place of crops that have been planted but fail, and accordingly, are considered to be proceeds of growing crops.*”) (quoting *In re Mattick*, 45 B.R. 615, 617 (Bankr. D. Minn. 1985)). Moreover, the courts in *Ring* and *White* specifically cited *Schmaling* in support of their holdings that crop disaster payments are “proceeds.” See *Ring*, 169 B.R. at 75; *White*, 1989 WL 146417 at *5. The *Ring* court also cited *Schnieder* to support its holding. *Ring*, 169 B.R. at 75.

The approach articulated by the Seventh, Ninth, and Tenth Circuits also conforms with the generally understood meaning of “proceeds.” Proceeds are “what is produced by or derived from something * * * by way of total revenue: the total amount brought in.” *Webster’s Third New International Dictionary* 1807 (Philip Babcock Gove, ed., 1993); see also

Black's Law Dictionary 1242 (Bryan A. Garner, ed., 8th ed. 2004) (defining proceeds as “[t]he value of land, goods, or investments when converted into money”). Thus, “proceeds” exist when there is an established nexus to a specific item or property interest that produced the proceeds.

The Seventh, Ninth, and Tenth Circuit precedents support this definition. On the one hand, PIK are not proceeds, because they are payments not to grow a crop; there is no specific link to any particular interest or property beyond the contract obligation itself. On the other hand, as the Ninth Circuit held in *Munger*, abandonment payments are proceeds of a particular crop when that crop is destroyed in order to receive the payments. Similarly, crop bailout payments such as the one at issue here are “proceeds” of the failed crop because there is a direct link between the payment and the specific, failed crop. If the respondent here had never planted the crop, he would not have had a right to the payout, so the payout resulted from the existence of the crop itself.

Finally, Congress intended for the term “proceeds” in § 541(a)(6) to have a very broad meaning, extending even beyond the ordinary definitions of the word. See *In re Rossmiller*, 1996 WL 175369, at *2 (10th Cir. 1996) (unpublished); *In re Hanley*, 305 B.R. 84, 86-87 (Bankr. M.D. Fla. 2003). As used in the statute, the term “proceeds” encompasses “all proceeds of property of the estate,” *Rossmiller*, 1996 WL 175369, at *2, or “any conversion in the form of property of the estate.” *Hanley*, 305 B.R. at 87. Since the crop bailout payments at issue here comport with the dictionary definition of proceeds, they qualify as “proceeds” under the extremely broad language of § 541(a)(6).

In concluding that crop bailout payments were merely “assistance” payments that were “not given in exchange for property of the estate,” App., *infra*, 18a, the Eleventh Circuit ignored the greater weight of authority, which established that such payments are indeed “proceeds” of the failed crop under § 541(a)(6) or comparable provisions of the UCC. This

Court's intervention is necessary to resolve the conflict and correct the Eleventh Circuit's error.

B. The Eleventh Circuit Erroneously Concluded That The Term "Property Of The Estate" In § 541(a)(6) Meant Property Fulfilling The Requirements Of § 541(a)(1)

The Eleventh Circuit made the further erroneous assertion that the failed crops themselves are not "property of the estate" under § 541(a)(6). In reaching this conclusion, the court of appeals appears to have wrongly equated the term "property of the estate" in § 541(a)(6) with the language in § 541(a)(1), which lists only one narrow category of items that are considered "property of the estate" under the Bankruptcy Code. The court wrote, "[i]f [respondent] had no right or interest that constituted property within the meaning of § 541(a)(1) at the commencement of the case, then the payment he later received cannot be proceeds of property of the estate under § 541(a)(6)." App., *infra*, 19a (quoting *Burgess*, 438 F.3d at 499). That is wrong. See *supra* pp. 17-18 (explaining that subsections (a)(1) through (a)(7) define different subspecies of "property of the estate" under § 541(a)).

The Eleventh Circuit's assertion conflicts with the Tenth Circuit's opinion in *Schneider*. By asserting that crop bailout payments are "proceeds of that [failed] crop" under § 541(a)(6), the *Schneider* court implicitly recognized that the failed crop must be considered "property of the estate" under the statute. Otherwise, the court's statement that the bailout payments are "proceeds" would be irrelevant. Similarly, the district and bankruptcy courts following the *Schneider* rule have uniformly concluded that crop bailout payments that are "proceeds" of the failed crops are also "proceeds * * * of or from property of the estate" under § 541(a)(6). See, e.g., *Farmpro Servs.*, 276 B.R. at 624; *Lemos*, 243 B.R. at 101; *Ring*, 169 B.R. at 77; *White*, 1989 WL 146417, at *4. For those courts, the logical step required to reach this

conclusion—finding that the failed crops were “property of the estate” under § 541(a)(6)—seemed so elementary as to deserve little or no discussion. The court in *Ring*, for example, simply concluded, “since the crops and their proceeds are property of the estate and the disaster payments are merely the substitute for the proceeds of the crops, then it logically follows that the disaster payments are also property of the estate.” *Ring*, 169 B.R. at 77. The court in *White* also concluded with little comment that the crop bailout payments “qualify as crop ‘proceeds’ under * * * 541(a)(6)” and that “such ‘proceeds’ are included in the bankruptcy estate under * * * section[] 541,” leaving unstated the conclusion that the crops therefore must logically be considered “property of the estate,” as defined in § 541(a)(6). *White*, 1989 WL 146417, at *6.

The conclusion implicit in *Schneider*, and in the various district and bankruptcy court cases following *Schneider*’s rule, is that “property of the estate” in § 541(a)(6) must be interpreted broadly to include either a contingent interest in future crop bailout payments (see *supra* p. 11), or to include property (the failed crops) that existed at a point *before* the debtor filed for bankruptcy, but perhaps did not exist *at the exact moment the debtor filed for bankruptcy*. This conclusion conflicts with the Eleventh Circuit’s statement that, in order for § 541(a)(6) to apply, debtors must first satisfy § 541(a)(1) by having an “interest in property *at the commencement of the bankruptcy case* that could mature into the crop disaster payment.” App., *infra*, 19a (emphasis added).

A more accurate reading of § 541(a)(6) defines “proceeds * * * of or from property of the estate” as proceeds from property owned by the debtor at or before the time that the debtor filed for bankruptcy. As explained above (*supra* pp. 23-24), that definition is consistent with the *Schneider* opinion and with holdings from several district and bankruptcy courts. That interpretation of § 541(a)(6) also

makes perfect sense, treating proceeds of property of the estate in a consistent manner, regardless of when the event occurred that ultimately resulted in the proceeds.

Respondent's crops were his property at the time they were planted and growing. During the ensuing drought, the crops in question presumably were destroyed, so this "property" did not physically exist at the time respondent filed for bankruptcy. Under the proper interpretation of § 541(a)(6), respondent's failed crops are "property of the estate," because they belonged to respondent before he filed for bankruptcy. As a result, if the crop bailout payments at issue are proceeds of the failed crop, they are also "[p]roceeds * * * of or from property of the estate" under § 541(a)(6), and therefore they belong to respondent's estate.

IV. The Decision Below Contravenes The Fundamental Objectives Of The Bankruptcy Code

The Eleventh Circuit's rule is contrary to the purposes of the Bankruptcy Code. This Court has often relied upon "the substantive effect, design, object, or policy of the statute as a whole" to interpret the terms of the Bankruptcy Code. 3B Norman J. Singer, *Statutes and Statutory Construction* § 77A:7 (6th ed. rev. 2003); see, e.g., *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991); *Whiting Pools*, 462 U.S. at 204; *Butner v. United States*, 440 U.S. 48, 55 (1979); *Segal*, 382 U.S. at 379. Among the purposes of the Bankruptcy Code are (1) to protect the security interests of creditors; (2) to prevent a race to the courthouse; (3) to prevent a party from receiving an undeserved windfall "merely by reason of the happenstance of bankruptcy"; and (4) to prevent debtor fraud. See App., *infra*, 24a, 37a (Pryor, J. dissenting) (quoting *Butner*, 440 U.S. at 55). The decision below directly contradicts each of those important fundamental goals of the Code, and this Court should grant review in order to correct this error.

1. The Fifth and Eleventh Circuits' rejection of *Segal's* sufficiently rooted test fails adequately to protect the security interests of creditors by denying them access to funds based on the arbitrary date of filing by the debtor. That result, rather than preserving creditors' security interests, impairs the creditors' valid security interest in crops damaged by natural disasters. App., *infra*, 24a (Pryor, J., dissenting). Although the interests of creditors are always "impair[ed]" any time a rule excludes property from the estate, that result is especially suspect where, as here, the creditors' interest was the very basis for the very crops that later yielded the bailout payment. *Ibid.*; see also *id.* at 72a. By ignoring the creditors' interests, the Fifth and Eleventh Circuits violated a foundational policy of the Code.

2. The Eleventh Circuit's rule also would encourage farmers to "race to the courthouse," in violation of another fundamental goal of the Bankruptcy Code. App., *infra*, 24a (Pryor, J., dissenting); see *Wolas*, 502 U.S. at 161. As Judge Pryor argued below, instead of discouraging a creditors' race to the courthouse, the Eleventh Circuit panel's decision "*encourages* debtors who are farmers to race to the courthouse." App., *infra*, 24a (Pryor, J., dissenting) (emphasis added). Under the Eleventh Circuit's rule, farmers would be encouraged to race to file or to convert cases under Chapter 7 before crop bailout bills are enacted by Congress. *Ibid.* Thus, a rejection of *Segal's* "sufficiently rooted" test will encourage farmers to enter their own "race of diligence" to deprive creditors of their valid property interests in crop bailout payments. *Wolas*, 502 U.S. at 161 (internal quotations omitted).

That result is not merely speculative. Congress has provided relief every year between 1988 and 1994, and again in 1998, 1999, 2000, and 2001, in the form of crop bailouts for crops lost to natural disasters or weather conditions. Bruce L. Gardner, *American Agriculture in the Twentieth Century: How It Flourished and What It Cost* 229 (2002); E.C. Pasour,

Jr. & Randal R. Rucker, *Plowshares and Pork Barrels: The Political Economy of Agriculture* 232 (2005). A farmer with failed crops would thus have every reason to believe that Congress would provide relief at some later date for severe weather-related losses he incurred. If he files bankruptcy before such relief is formally enacted, he will avoid having to pay his creditors with the profits received from the crop bailout program. It is in his best interest, then, to avoid the cooperation between debtors and creditors envisioned by the Code and to instead file for bankruptcy before any bailout payments are officially granted.

Nor would the race to the courthouse induced by the Eleventh Circuit's rejection of *Segal*'s sufficiently rooted test be limited to situations involving bankrupt farmers. *Segal* requires a flexible, fact-driven analysis to determine what is property of the estate, and thus sets no rigid legal deadline to serve as a basis for a race to the courthouse. See *Segal*, 382 U.S. at 380. However, a rejection of the *Segal* rule could open the floodgates in other situations where payments or interests that are tied clearly to the pre-bankruptcy estate would be excluded if only the bankrupt files before some enabling legislation is passed or other legal formality occurs.⁸

⁸ For example, the Internal Revenue Service's recent decision to refund telephone toll excise taxes provides the opportunity for a debtor otherwise contemplating bankruptcy to time the filing of bankruptcy to ensure that the refund inures to its own benefit. For more than a century, the IRS collected a 3% excise tax on toll telephone calls under the purported authority of 26 U.S.C. § 4251(a)(1). In recent years, numerous taxpayers filed suit seeking refunds of the excise tax on the argument that the IRS had misconstrued its authority to collect the tax. Every circuit court to decide the issue agreed with the taxpayer and ordered a refund. See *Reese Bros., Inc. v. United States*, 447 F.3d 229 (3d Cir. 2006); *Fortis, Inc. v. United States*, 447 F.3d 190 (2d Cir. 2006); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005); *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005); see also *Honeywell Int'l, Inc. v. United States*, 64 Fed. Cl. 188 (2005). In June 2006, the IRS acquiesced to these rulings

Thus, the decision below could have the same harmful effect in numerous other areas.

3. The lower court's ruling would allow a farmer to receive an undeserved windfall, in violation of yet another fundamental purpose of the Code. See *Butner*, 440 U.S. at 55 (quoting *Lewis v. Manufacturers Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961)). That is, where two debtors are similarly situated, and the only thing distinguishing them is the date of filing of bankruptcy, they should not receive different treatment in a way that would grant one an unfair benefit based only on an arbitrary distinction. See App., *infra*, 37a (Pryor, J, dissenting) (maintaining that where a debtor is allowed "selectively to exclude property from the debtor estate by choosing the most advantageous date to file for bankruptcy" he receives "a windfall * * * at the expense of creditors").

Thus, two debtors filing bankruptcy the day before and the day after a crop bailout plan is formally passed by Congress will receive different treatment under the Eleventh Circuit's rule: the earlier-filing farmer will receive a windfall where he is able to keep the money from the bailout payments, while the later-filing farmer will have to include the payments as property of his estate. The first farmer would be allowed to "selectively * * * exclude" the same crop bailout payment from his estate that will rightfully become a part of the estate of the second debtor. App., *infra*, 37a. A farmer who took advantage of this loophole would reap the unearned windfall even if the farmer had gained knowledge of the crop bailout payment, whether legally or illicitly, and

and agreed to refund three years worth of excise taxes paid. See I.R.S. Notice 2006-50, 2006-25 I.R.B. 1141 (June 19, 2006). A strategic debtor who filed for bankruptcy protection in anticipation of acquiescence by the IRS could withhold the entire excise tax refund from the estate because the IRS formally authorized the refund post-petition, even though the regulation provides for a refund of taxes paid entirely prior to the commencement of bankruptcy.

even if he in fact encouraged the passage of the legislation. A farmer privy to such information would have a “head start” in the race to the courthouse encouraged under the rule espoused below. *Wolas*, 502 U.S. at 162. “[T]he decision of the majorit[ies]” in the Fifth and Eleventh Circuits therefore “grants debtors who are farmers a windfall” in violation of the purposes of the Bankruptcy Code. App., *infra*, 37a.

4. The holding of the court of appeals below also conflicts with the fundamental purpose of the Bankruptcy Code to prevent debtor abuse. App., *infra*, 37a (Pryor, J., dissenting). The Code has many provisions that deny the debtor the right to select what property will and will not be part of the estate. See *id.* at 37a (citing Bankruptcy Code provisions). Under the decision below, whether a creditor receives payments associated with failed crops rests entirely with the debtor, who can “choos[e] the most advantageous date to file for bankruptcy”—even with one who knows and intends to file bankruptcy for the express purpose of denying his creditors access to funds that would otherwise be rightfully theirs. *Ibid.* Thus even a debtor with intent to defraud will be allowed to reap the windfall and deprive his creditors of their due based on the lower court’s ruling.

5. The effects of the lower court’s failure to respect these fundamental purposes of the Bankruptcy Code could be far-reaching. The Bankruptcy Code provides creditors certain rights, “including the right to adequate protection,” which “replace the protection afforded by possession.” App., *infra*, 42a (Pryor, J., dissenting) (quoting *Whiting Pools*, 462 U.S. at 207). Where a rule such as that adopted below gives a farmer the right to “selectively * * * exclude property from the debtor estate,” a creditor may be wary when asked to loan money to farmers in the future, since he can no longer rely on the Bankruptcy Code to adequately protect his security interest. *Ibid.* The result will be that creditors either decline to lend money to farmers under certain circumstances, or lend money at higher rates to protect against the risk of future loss.

See Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 Emory L.J. 1193, 1287 n.15 (1998) (stating that increases in costs of credit as a result of excluding certain property from property of the estate will be passed on to borrowers). Although this will not necessarily adversely affect the farmer whose initial actions led to the change in credit availability or rates, other farmers will bear the costs that will result from his actions. Furthermore, those adverse effects would not be limited to situations where the debtor was a farmer; indeed, the rejection of *Segal's* sufficiently rooted rule could threaten borrowers' access to funds in any number of circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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