No. _____

In The
Supreme Court of the United States

ROBERTSON B. COHEN, in his
Capacity as the Chapter 7 Trustee,

Petitioner,

v.

ANDREA CHERNUSHIN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK A. LARSON
Counsel of Record
LARSON LAW FIRM, LLC
950 Spruce Street, Ste. 1C
Louisville, Colorado 80027
Telephone: (303) 228-9414
Facsimile: (303) 265-9124
E-mail: mark@larsonlawyer.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Opinion renders 11 U.S.C. § 541 subordinate to state property law and contravenes Congressional intent in enacting § 541 and the Supremacy Clause of the United States Constitution.

2. Whether the Tenth Circuit ignored United States Supreme Court precedent and created a circuit split by holding that a post hoc temporal and qualitative assessment in property rights can dispossess the bankruptcy estate.

3. Whether Fed.R.Bankr.P. 1016 has the force of a federal statute and mandates that the death of the Debtor shall not abate a liquidation case under chapter 7 of the Code.

PARTIES TO THE PROCEEDING

The petitioner is Robertson B. Cohen, in his capacity as the Chapter 7 Trustee.

Respondent is Andrea Chernushin. In the lower courts the defendant parties included two creditors with deeds of trust in the real property: The Judy T. Cox Revocable Trust and The Allen E. Cox Revocable Trust. The creditors have been paid in full on the debt obligations and no longer have any interest in the dispute.

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PETITION FOR WRIT OF CERTIORARI

Robertson B. Cohen, in his official capacity as the Chapter 7 Trustee, respectfully petitions for a writ of certiorari to review the opinion preceding the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 911 F.3d 1265 (10th Cir. 2018) and reproduced at App. 1-19. The opinion of the United States District Court for the District of Colorado is reported at 584 B.R. 567 (D.Colo. 2018) and reproduced at App. 20-30. The opinion of the United States Bankruptcy Court for the District of Colorado is not published and is reproduced at App. 31-39.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 21, 2018; it denied panel and *en banc* rehearing on January 15, 2019. App. 40-41.

This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction was proper in the District Court under 28 U.S.C. §§ 1331 and 1334, and in the Tenth Circuit under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 4:

> The Congress shall have power . . . To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

U.S. Const. art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Relevant portions of 11 U.S.C. §§ 363, 521, 541, Bankruptcy Rule 1016, and C.R.S. § 38-31-101 are reproduced at App. 42-48.

STATEMENT OF THE CASE

A. The Bankruptcy Proceeding

On August 17, 2015, the Debtor filed a bankruptcy petition under Chapter 13 of the bankruptcy code and on October 1, 2015, voluntarily converted his Chapter 13 petition to a Chapter 7 petition. App. 21. The Debtor's spouse, the Respondent, did not file or

join the bankruptcy petition. App. 2. The Petitioner was appointed the Chapter 7 Trustee of the bankruptcy estate. App. 21. The Debtor's property listed in his schedules includes a parcel of real property that was a second home or vacation property. *Id.* The vacation property is non-exempt property held by the Debtor and his wife as joint tenants with right of survivorship under C.R.S. § 38-31-101. App. 24. On June 9, 2016, approximately 10 months after the petition date, the Debtor committed suicide. App. 21.

Following the Debtor's suicide, the Petitioner continued performing his statutory duties under the bankruptcy code and Fed.R.Bankr.P. 1016. App. 21. It is not disputed by the Respondent that while the Debtor was alive the vacation property was property of the Debtor's bankruptcy estate subject to the control of the Trustee and overseen by the bankruptcy court. App. 25. Therefore, it is not disputed that prior to the Debtor's suicide the bankruptcy estate had the right to sell the vacation property pursuant to 11 U.S.C. § 363(h).

On June 15, 2016, the Petitioner filed an adversary complaint to authorize sale of the vacation property pursuant to 11 U.S.C. § 363(h) and Fed.R.Bankr.P. 7001(3). App. 21. The Respondent filed her answer to the adversary complaint asserting that state law regarding joint tenancy with right of survivorship stripped the bankruptcy estate of standing to pursue the relief requested; that the vacation property was no longer property of the Debtor's bankruptcy estate. App. 21. On April 3, 2017, the bankruptcy court denied the

Petitioner's motion for partial summary judgment and granted the Respondent's cross motion for summary judgment. App. 31-39. The Bankruptcy Court ruled that state property law on joint tenancy with rights of survivorship, C.R.S. § 38-31-101, stripped the vacation property out of the bankruptcy estate. App. 37-38.

B. The Appellate Court Proceedings

The Petitioner timely appealed the bankruptcy court's decision to the United States District Court for the District of Colorado. On January 26, 2018, the District Court affirmed the Bankruptcy Court decision. App. 20-30. The District Court held that under Colorado state law regarding joint tenancy, C.R.S. § 38-31-101, the Debtor's interest in the vacation property terminated upon his death and so too did the bankruptcy estate's interest in that property. App. 27.

The Petitioner timely appealed to the United States Court of Appeals for the Tenth Circuit. On December 21, 2018, the Circuit Court affirmed the decision of the District Court and the Bankruptcy Court. App. 1-19. The Tenth Circuit determined that *Butner v. U.S.*, 440 U.S. 48 (1979)[1] mandates that state property law is applied to determine property of the bankruptcy estate. App. 4-5. The Circuit Court applied state property law, C.R.S. § 38-31-101, and a temporal and a qualitative assessment 10 months after the petition

[1] *Butner v. U.S.*, 440 U.S. 48 (1979) is a decision interpreting the Bankruptcy Act of 1898 which was revised and replaced in 1978.

date, to strip the bankruptcy estate of its right to the vacation property. App. 5-6.

C. Summary of the Argument

A central and immediate issue in every bankruptcy proceeding involves a determination of property of the bankruptcy estate and any applicable exemptions. 11 U.S.C. §§ 541 and 522. In the Bankruptcy Act of 1978, Congress overhauled the bankruptcy code to clarify and simplify bankruptcy proceedings. One of the critical changes broadened and liberalized the property included in the bankruptcy estate. Congress specifically sought to eliminate state law issues that did little to further the bankruptcy policy of distribution of the debtor's non-exempt property to creditors. 11 U.S.C. § 541 broadly includes all the debtor's property into the bankruptcy estate.

The Tenth Circuit ignored this Court's snapshot rule set forth in *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275 (1915) and *White v. Stump*, 266 U.S. 310, 313 (1924). It also decided an important federal question in a way that conflicts with relevant decisions of the United States Courts of Appeals for the Fifth, Eighth, and Ninth Circuits.

The Tenth Circuit Opinion provides for an ongoing, post hoc, temporal and qualitative analysis of state property law affecting the bankruptcy estate property. This Court's precedent under *Butner* requires application of state property law and the snapshot rule limits application of state law to the facts and law existing on

the petition date. The Tenth Circuit Opinion misapplies *Butner* and disregards the snapshot rule to allow temporal and qualitative assessments ad infinitum. Allowing state property law to intercede during the pendency and administration of the bankruptcy estate violates the Supremacy Clause of the United States Constitution.

The Tenth Circuit Opinion changes the plain meaning of Fed.R.Bankr.P. 1016 to render its decision. Rule 1016 requires a debtor's bankruptcy estate to continue unaffected by the death of the debtor. The Opinion states that Fed.R.Bankr.P. 1016 is a mere procedural rule and adds the word "proceedings" in its interpretation to change the plain meaning of the rule. App. 9.

REASONS FOR GRANTING THE PETITION

This case is a superior vehicle for resolving a circuit conflict on a well-defined legal issue of exceptional importance to bankruptcy practice throughout the country. The Tenth Circuit has created a new doctrine that is contrary to the plain meaning of federal statutes, Supreme Court precedent, and multiple United States Courts of Appeals including the Fifth, Eighth, and Ninth Circuit Courts.

This Court should resolve this issue immediately. It is not common for a debtor to die during a bankruptcy proceeding, but the precedent that a debtor can benefit his family by committing suicide should not

remain as binding authority. This Court's snapshot rule will be in question throughout the Tenth Circuit while continuing to be applied in other Circuits in breach of the requirement for uniform laws on bankruptcy throughout the United States. U.S. Const. art. I, § 8, cl. 4. It may be decades before this Court has another opportunity to remedy this misapplication of the law and the splintered approach to a central tenet of bankruptcy law.

I. Congress Intended for 11 U.S.C. § 541 to Apply to All Bankruptcy Petitions on the Petition Date Applying State Law as Needed and Thereafter Reserving Issues of Liquidating Bankruptcy Estate Property to Federal Bankruptcy Law.

A bankruptcy proceeding pursuant to 11 U.S.C. § 101 *et seq*. is, in its simplest form, "an adjudication of interests claimed in a res." *Katchen v. Landy*, 382 U.S. 323, 329 (1966). The filing of a bankruptcy petition pursuant to 11 U.S.C. § 301 creates a bankruptcy estate. 11 U.S.C. § 541(a). The filing of a bankruptcy petition renders all of the debtor's property to the bankruptcy estate that is controlled by the bankruptcy court. *See* 11 U.S.C. § 541(a); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992).

In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911), this Court determined that, "[t]he exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as *in custodia legis*

from the filing of the petition." *Id.* at 307. Property of the bankruptcy estate must be held "intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings." *Id.* The Tenth Circuit Opinion violates the plain and simple directive from this Court that the property of the bankruptcy estate must remain intact, *in rem*, and *in custodia legis*.

A. The Opinion Ignores § 541(a)'s Plain and Unambiguous Directive and Bankruptcy Jurisprudence Effective for More Than 100 Years.

The federal bankruptcy code is controlling in the dispute over property of the bankruptcy estate. "The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount." *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) (citing U.S. Const. art. I, § 8, cl. 4). This Court has characterized the Bankruptcy Clause as expansive:

> From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power. . . . And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field

> whose boundaries may not yet be fully revealed.

Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 668, 671 (1935); *see also U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) ("Congress intended a broad range of property to be included in the estate.").

The bankruptcy estate created by filing a bankruptcy petition is comprised of all the debtor's property wherever located and by whomever held. 11 U.S.C. § 541(a); *Taylor v. Freeland & Kronz*, 503 U.S. at 642 ("When a debtor files a bankruptcy petition, all of his property becomes property of a bankruptcy estate. *See* 11 U.S.C. § 541."). Property of the bankruptcy estate includes all the debtor's legal or equitable interests in property. 11 U.S.C. § 541(a)(1). The bankruptcy estate includes all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is under the sole, equal, or joint management and control of the debtor. 11 U.S.C. § 541(a)(2). *See Mueller v. Nugent*, 184 U.S. 1, 14 (1902) ("[T]he filing of the petition is a caveat to all the world, and in effect an attachment and injunction, *International Bank v. Sherman*, 101 U.S. 407, and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 71e, with actual or constructive possession, and placed in the custody of the bankruptcy court.").

The United States bankruptcy code was revised effective 1978. The Bankruptcy Act of 1978 clarified

property of the bankruptcy estate to be more inclusive. *Goff v. Taylor* (*In re Goff*), 706 F.2d 574, 578 (5th Cir. 1983). Property of the bankruptcy estate includes all property in which a debtor has a "legal or equitable interest," 11 U.S.C. § 541(a)(1), including jointly held property, 11 U.S.C. § 541(a)(2). The congressional record makes clear that the filing of a voluntary petition is the seminal act that severs the rights of others to affect property of the bankruptcy estate.

> Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5869; *see also* H.R. Rep. No. 95-595, p. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324. "The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action (*see* Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." H.R. Rep. No. 95-595, p. 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; S. Rep. No. 95-989, p. 82 (1978), *reprinted in* U.S.C.C.A.N. 1978, pp. 5868, 6323.

Revisions to the Bankruptcy Act of 1898 were necessary to clarify the property of the bankruptcy estate and eliminate state law confusion. The Bankruptcy Act of 1898 was:

> a complicated melange of references to State law, and [did] little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts. H.R.Rep. No. 95-595, 95th Cong., 2d Sess. 175 (1977), reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6136. See S.Rep. No. 95-989, 95th Cong., 2d Sess. 82, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5868.

Goff v. Taylor, 706 F.2d at 578 (internal quotes omitted). "The sweeping scope of this automatic inclusion was intended to remedy much of the old Acts perceived deficiencies." *Id.* The Tenth Circuit Opinion drags the bankruptcy code back into the previously remedied "complicated melange of references to State law." *Id.*

Applying § 541 this Court has clearly stated that, "[w]hen a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate . . . subject to the debtor's right to claim certain property as 'exempt,' § 522(*l*)." *Schwab v. Reilly*, 560 U.S. 770, 774 (2010); *see also Taylor v. Freeland & Kronz*, 503 U.S. at 642. The Tenth Circuit Opinion creates significant confusion with respect to the intrusion of state property law into the bankruptcy estate. This Court has explained that it is the date of filing when "the status and rights of the bankrupt, creditors and the trustee . . . are fixed." *White v. Stump*, 266 U.S. at 313; *see also Owen v. Owen*, 500 U.S. 305, 314 n.6 (1991). The plain meaning of "fixed" does not allow for a post hoc re-evaluation of the qualitative limitation.

Congress could have easily included language to limit the bankruptcy estate's rights to the life of the debtor; it did not. No section of the bankruptcy code limits any aspect of the bankruptcy estate to the life of the debtor. The Tenth Circuit Opinion ignores the plain meaning in federal bankruptcy law which plainly provides that determination of bankruptcy estate property is made "as of the commencement of the case . . . . " 11 U.S.C. § 541(a). 11 U.S.C. § 363(h) provides for sale of jointly held property that the debtor had "at the time of the commencement of the case." The Tenth Circuit Opinion's presumption that Congress intended to limit property rights of the bankruptcy estate after the petition date to empower state law in bankruptcy estate administration juxtaposed with the plain meaning of § 541, is incongruous. The overwhelming body of case law follows the plain meaning of § 541 that property of the bankruptcy estate is determined on the petition date, and thereafter the bankruptcy estate property is governed by federal bankruptcy law. A post hoc temporal and qualitative assessment is sui generis.

On the bankruptcy petition date, the commencement of the case, the vacation property was both temporally and qualitatively property of the bankruptcy estate. This Court's review of the congressional intent of § 541 begins with the plain language of the statute. *Artis v. District of Columbia*, ___ U.S. ___, 138 S.Ct. 594, 603 (2018) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.' *Moskal v. U.S.*,

498 U.S. 103, 108 (1990)."); *Lamie v. U.S.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

The bankruptcy code is replete with authority enabling the trustee to obtain, retain, and liquidate property of the bankruptcy estate. *See, e.g.*, 11 U.S.C. §§ 343, 554(a), and 549. The bankruptcy trustee also has powers of a lien creditor. 11 U.S.C. § 544 is referred to as the "strong-arm" clause because it "confers on a trustee in bankruptcy the same rights that an ideal hypothetical lien claimant without notice possesses as of the date the bankruptcy petition is filed." *In re Charles*, 323 F.3d 841, 842 (10th Cir. 2003); *see also* 11 U.S.C. § 544. Under all governing law, the bankruptcy estate's rights in the vacation property cannot be terminated absent a voluntary act taken by the trustee to abandon the property of the bankruptcy estate and an order of the bankruptcy court. 11 U.S.C. § 554. The Tenth Circuit Opinion does not give § 541 its plain and unambiguous meaning and creates confusion among the Circuit Courts that requires clarification.

B. The Supremacy Clause of the United States Constitution Prohibits State Property Law from Interceding After the Petition Date.

The Supremacy Clause of the United States Constitution explicitly states, "[t]his Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause therefore invalidates state laws which "interfere with, or are contrary to," federal laws. *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824). This Court explained:

> Congress may, of course, expressly preempt state law, but "[e]ven without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances." First, "state law is naturally preempted to the extent of any conflict with a federal statute." Second, we have deemed state law preempted "when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively."

Kurns v. R.R. Friction Prod. Corp., 565 U.S. 625, 630 (2012) (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)).

Pursuant to the Supremacy Clause federal bankruptcy law preempts any conflicting state law. *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (state laws, to the extent that they conflict with the laws of Congress on the subject of bankruptcies, are suspended to the extent of actual conflict). It is improper and inconsistent with the significant weight of authority interpreting the doctrine of federal preemption to apply state property law, post hoc, in the place of governing federal law. Federal law requires the debtor to surrender to the trustee "all property of the estate." 11 U.S.C. § 521(a)(4). Property of the bankruptcy estate is determined on the petition date, and thereafter the bankruptcy property must be administered pursuant to the bankruptcy code. "In Chapter 7 bankruptcies, debtors must surrender to the trustee-in-bankruptcy all their assets, 11 U.S.C. § 541, but may reclaim for themselves exempt property, § 522." *Schwab v. Reilly*, 560 U.S. at 795.

Under all governing precedent, C.R.S. § 38-31-101 is expressly, naturally, and impliedly preempted by the bankruptcy code where the statutes are in conflict. "State law may be preempted by an express congressional statement, by federal occupation of the field, or by direct conflict with federal law." *Integrity Management Int'l, Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 487 (10th Cir. 1987) (citing *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986)).

Congress is empowered by the Constitution to pass uniform laws and state laws must give way to

federal law. Stated otherwise, state law is subordinated, "to the extent of actual conflict," with the bankruptcy system. *Butner v. U.S.*, 440 U.S. at 54. The bankruptcy code provides the trustee with rights and authority over property of the bankruptcy estate, and application of C.R.S. § 38-31-101(5)(b)[2] is in direct conflict if applied to divest the bankruptcy estate of those rights and authority. App. 47.

C. Federal Rule of Bankruptcy Procedure 1016 Mandates that the Bankruptcy Continue Unabated After the Death of the Debtor.

Federal Rule of Bankruptcy Procedure 1016 provides that a debtor's bankruptcy estate continues unaffected by the death of the debtor. Fed.R.Bankr.P. 1016 states:

> Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same

[2] C.R.S. § 38-31-101(5)(b) provides that a petition in bankruptcy by a joint tenant shall not sever a joint tenancy. The statute does not merely define property rights and what is transferred to the bankruptcy estate on the petition date, it is an attempt to affect the administration of bankruptcy. Premised upon *Butner*, the State of Colorado passed this statute to specifically and impermissibly overturn *Hahn-Martinez v. Slifco* (*In re Slifco*), No. 06-cv-01781-EWN, 2007 WL 1732782 (D. Colo. June 14, 2007) which interpreted federal law to sever a joint tenancy upon the filing of bankruptcy.

> manner, so far as possible, as though the death or incompetency had not occurred.

This Court and Congress have the power to promulgate rules of bankruptcy procedure with the force of law. *See* 28 U.S.C. § 2075; *In re Morrissey*, 717 F.2d 100, 104 (3d Cir. 1983); *Brooks Fashion Stores, Inc. v. Mich. Emp't Sec. Comm'n* (*In re Brooks Fashion Stores, Inc.*), 124 B.R. 436, 440 (Bankr. S.D.N.Y. 1991) ("The Bankruptcy Rules were promulgated by the Supreme Court pursuant to authority granted by Congress in 28 U.S.C. § 2075. As such, the Rules have the force of law."). Pursuant to Fed.R.Bankr.P. 1016 the bankruptcy estate has the right and authority under federal law to liquidate the property of the bankruptcy estate as though the death had not occurred. The Tenth Circuit Opinion ignores the plain meaning of Fed.R.Bankr.P. 1016.

The Tenth Circuit Opinion states that Fed.R.Bankr.P. 1016 is a mere procedural rule and adds the word "proceedings" in an attempt to change the plain meaning of the rule. App. 9. It is illogical for the rule to require that a debtor's death "shall not abate a liquidation case under chapter 7 of the Code" without also requiring that the property of the bankruptcy estate remain unaffected by death. The Tenth Circuit Opinion's interpretation negates the phrase "as though the death or incompetency had not occurred" from Fed.R.Bankr.P. 1016. *Brown v. Sommers (In re Brown)*, 807 F.3d 701, 709 (5th Cir. 2015) (refusal to enforce state law effective on death of the debtor "would be most consistent with Rule 1016's admonition to administer the case as if Debtor had never passed away").

The Tenth Circuit Opinion ignores bankruptcy jurisprudence by effectively ruling that state-law overrules the bankruptcy code's well-established requirements of liquidation. 11 U.S.C. § 704. That holding is both egregiously incorrect and in conflict with other Circuit Courts of Appeal and this Court, warranting this Court's review.

The Tenth Circuit Opinion's blue-penciling of Fed.R.Bankr.P. 1016 is concocted for the sole purpose of changing the plain meaning of the Rule for application to the case to achieve a desired outcome. The Tenth Circuit Opinion creates confusion with respect to this Court's right to make plain and unambiguous rules respecting bankruptcy. *In re Goldberg*, 98 B.R. 353, 358 (Bankr. N.D. Ill. 1989) ("The bankruptcy case will therefore proceed in rem with respect to the property of the estate. . . .").

II. The Court Should Grant Certiorari To Resolve Whether the Misapplication of *Butner* Contravenes this Court's *White* precedent, Creating a Circuit Split in the Process, by Holding that a Qualitative Assessment may be Conducted Post Hoc.

The Tenth Circuit Opinion fails to apply United States Supreme Court precedent and creates for the first time a split between the Tenth Circuit and the Supreme Court and other circuits. The Tenth Circuit Opinion follows *Butner v. U.S.*, 440 U.S. at 55 for the requirement that "[p]roperty interests are created and

defined by state law." *Id.*; App. 4-5. The Tenth Circuit Opinion fails to apply longstanding precedent of *White v. Stump*, 266 U.S. at 313 and *Bailey v. Baker Ice Machine Co.*, 239 U.S. at 275, for the snapshot rule that has been continually reaffirmed by this Court and the Circuit courts. Application of *Butner* and *White* mandates that the property of the bankruptcy estate is fixed at the petition date and cannot be altered by post hoc assessment.

Butner addressed a conflict in the circuits involving the rights of a mortgagee to collect rents during the pendency of the bankruptcy estate. *Butner* explained that while generally property interests are created by state law, federal law will apply where "some federal interest requires a different result[.]" *Id*. at 55. *Butner* does not stand for the proposition that the courts must perform a post hoc, ongoing and continuous, qualitative assessment of the property of the bankruptcy estate. Such a position is contrary to all applicable precedent. The federal interest in liquidation of bankruptcy estate property and distribution to creditors requires a different result. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. at 307.

A. This Court's Established Doctrine Requires that Property of the Bankruptcy Estate is Determined on the Petition Date When a Snapshot is Taken of the Property Rights.

This Court defined the date of cleavage, the snapshot rule, in *White v. Stump*, 266 U.S. 310 (1924). In *White*, the debtor filed a bankruptcy petition which included a parcel of land but no homestead exemption was claimed. *Id.* at 310-11. After the petition was filed the debtor's spouse sought to claim the parcel of land under the homestead exemption. *Id.* at 311. The trustee objected to the claim of exemption. *Id.* This Court determined that "the state laws existing when the petition is filed the measure of the right to exemptions." *Id.* at 312. The date of filing is the point at which "the status and rights of the bankrupt, the creditors and the trustee . . . are fixed." *Id.* at 313, citing *Bailey v. Baker Ice Machine Co.*, 239 U.S. at 275 and *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. at 307. As this Court held in *White*, "the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed." *Id.* at 313. The petition date is when the "bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court." *Id.*, quoting *Bailey v. Baker Ice Machine Co.*, 239 U.S. at 275.

The *White* and *Bailey* decisions follow the reasoning in *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. at 307 where this Court wrote:

> It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as *in custodia legis* from the filing of the petition. It is true that, under § 70a of the Act of 1898, the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings.

See also Myers v. Matley, 318 U.S. 622, 628 (1943) ("In conformity to the principle announced in *White v. Stump* that the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be

enlarged or altered by anything the bankrupt may do . . . ").

The Tenth Circuit Opinion improperly found that the bankruptcy estate was attempting to obtain greater rights than the debtor had on the petition date. App. 7. This is objectively false under the bankruptcy code and the snapshot rule. *Goff v. Taylor*, 706 F.2d at 578 n.10 ("While the existence of a 'legal or equitable interest' may turn upon state nonbankruptcy law, once it is determined that such an interest exists, it automatically becomes property of the estate under Sec. 541 of the Code."). On the petition date the Debtor was alive and possessed all of the rights and interests of a joint tenant with right of survivorship. A temporal and qualitative assessment makes clear that the vacation property is property of the bankruptcy estate. The Respondent admitted that the bankruptcy estate includes the vacation property. App. 25. Application of § 541, the snapshot rule, and Fed.R.Bankr.P. 1016 renders the subsequent expiration of the Debtor's life irrelevant in determining the property of the bankruptcy estate.

B. The Circuit Court Disregarded this Court's Snapshot Rule Applicable in Bankruptcy Proceedings and in Conflict With Other Circuits.

The Tenth Circuit Opinion's application of Colorado state property law to intercede into an ongoing bankruptcy proceeding improperly limits the scope

and breadth of the bankruptcy code. The Tenth Circuit Opinion creates a split among the circuits, disregards Supreme Court precedent and the snapshot rule, and ignores the plain meaning of 11 U.S.C. § 541(a).

The United States Court of Appeals for the Fifth Circuit follows this Court's snapshot rule. In *Brown v. Sommers*, 807 F.3d 701 (5th Cir. 2015), the court was faced with a debtor, with a non-filing spouse, who died during the pendency of the bankruptcy. *Id.* at 704. After the death of the debtor, the spouse attempted to amend the exemptions to include an allowance allowed under the Texas Estates Code. *Id.* at 706-07. The Fifth Circuit, following the snapshot rule, determined that "eligibility for a state law exemption under § 522 is determined by the facts and law in existence on the date that the debtor filed his bankruptcy petition." *Id.* at 708. The debtor was alive on the petition date, and under the snapshot rule the petition date is the operative date for determining property and exemptions of the bankruptcy estate. *Id.* at 708. *Brown* reaffirms the snapshot rule and the holding in *In re Zibman*, 268 F.3d 298, 301 (5th Cir. 2001) (Section 541(a)(1) defines property of the bankruptcy estate broadly and includes those legal or equitable interests the debtor has "as of the commencement of the case.").

The United States Court of Appeals for the Eighth Circuit similarly follows this Court's snapshot rule. In *Armstrong v. Peterson* (*In re Peterson*), 897 F.2d 935 (8th Cir. 1990), the unmarried debtor filed a voluntary Chapter 7 bankruptcy proceeding and died approximately nine months after the petition date. *Id.* at

935-36. The Chapter 7 trustee in the case attempted to argue that the debtor's homestead exemption lapsed when he died during the pendency of the bankruptcy. *Id.* at 936. The Eighth Circuit, citing to *White*, held that, "only the facts existing on the date of filing are relevant to determining whether a debtor qualifies for a claimed exemption." *Id.* at 937.

> [L]ogic supports our conclusion that only the facts existing on the date of filing a petition should be examined to determine a debtor's right to exemptions . . . it makes sense to apply the law applicable on the filing to the facts and circumstances existing on the date of filing. It would be asymmetrical and cause confusion to apply the law existing on the date of filing to facts which arose sometime after the petition was filed.

Id. at 938.

The United States Court of Appeals for the Ninth Circuit similarly follows this Court's snapshot rule. In *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193 (9th Cir. 2012), the debtor had a parcel of property and timely claimed a homestead exemption on the property. *Id.* at 1197. The property was sold during the pendency of bankruptcy and the homestead was transferred to the debtor. *Id.* The California homestead statute required that the homestead proceeds be reinvested into a new homestead within six months. *Id.* The debtor failed to reinvest the homestead proceeds. *Id.* The United States Court of Appeals for the Ninth Circuit followed the snapshot rule as set forth by this

Court in *White*. *Id.* at 1199. The Ninth Circuit held that the state law as it existed on the petition date is determinative. *Id.* The homestead proceeds from the sale belong to the bankruptcy estate. *Id.* at 1197.

The Opinion from the United States Court of Appeals for the Tenth Circuit ignores the snapshot rule required by this Court. The Opinion creates an ever-changing landscape for bankruptcy estate administration rather than an unambiguous application of the snapshot rule on the bankruptcy petition date. A key principle of bankruptcy law is to "collect and reduce to money the property of the estate" for payment to creditors. 11 U.S.C. § 704(a)(1); *Payne v. Wood*, 775 F.2d 202, 204 (7th Cir. 1985) ("Anything properly exempted passes through bankruptcy; the rest goes to the creditors."). As a result of the Tenth Circuit Opinion, property of the bankruptcy estate is not held intact, *in rem*, and *in custodia legis*. The loss and dispossession of the bankruptcy estate property is a detriment to the creditors and contrary to applicable law.

C. The Questions Presented Are Exceptionally Important And Warrant a Writ of Certiorari.

This case presents an ideal vehicle for the Court to provide clear rules of federal bankruptcy law; to revisit *Butner* and Congress's significant change in the law. Issues involving the snapshot rule are applicable in multiple contexts in addition to cases involving death of a debtor. The Tenth Circuit Court's outlier

decision implicates questions of significant importance to the proper functioning of the federal bankruptcy laws. There is a compelling need for uniformity in interpretation and application of the plain meaning of the bankruptcy code. This Court's snapshot rule is also an important doctrine for determining the date of cleavage between property of the bankruptcy estate and the post-petition property of the Debtor. Finally, this Court's right to issue clear and unambiguous Federal Rules of Bankruptcy Procedure should not be abridged. State property law has an important role in bankruptcy on the petition date only, but it cannot override federal statutes in violation of the Supremacy Clause.

A post hoc assessment of the property of the bankruptcy estate will cause significant disruption to the orderly marshalling of the bankruptcy estate's property and liquidation for the benefit of creditors. 11 U.S.C. § 704(a)(1). The property of the bankruptcy estate may be subject to multiple and ceaseless qualitative assessments applying post hoc changes. The Tenth Circuit Opinion is a divergence from the multi-decade jurisprudence of bankruptcy that is important for this Court to clarify. A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is necessary.

CONCLUSION

The petition for Writ of Certiorari should be granted.

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Respectfully submitted,

MARK A. LARSON
Counsel of Record
LARSON LAW FIRM, LLC
950 Spruce Street, Ste. 1C
Louisville, Colorado 80027
Telephone: (303) 228-9414
Facsimile: (303) 265-9124
E-mail: mark@larsonlawyer.com

Counsel for Petitioner