No. 21-1448

IN THE

# Supreme Court of the United States

DUSTIN JADE WELLS,

*Petitioner*,

v.

KATHLEEN A. MCCALLISTER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER


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## INTRODUCTION

The Government's brief underscores many of the reasons certiorari is warranted here. The Government agrees that the Ninth Circuit "erred in concluding that an individual debtor, whether in Chapter 7 or 13, forfeits an already-established homestead exemption by selling the homestead and failing to satisfy a proceeds exemption." U.S. Br. 9. It recognizes the "anomalous" and illogical results of the Ninth Circuit's "vanishing exemption" rule. *See id.* at 13. It agrees that the Trustee's interpretation of this Court's precedents is "incorrect." *Id.* at 15. And it even acknowledges the existence of an entrenched split on this important issue. *See id.* at 20.

So why does the Government nevertheless recommend that this Court deny certiorari? Solely because this is a Chapter 13 case, not a Chapter 7 one. *See id.* at 8, 16–21. According to the Government, that fact cuts against certiorari for two reasons. *First*, because the Ninth Circuit did not expressly address the "potential[]" relevance of a Chapter 13-specific provision, 11 U.S.C. § 1306. *Id.* at 8. *Second*, because the two Chapter 13 cases that have addressed this issue—the decision below and *In re Frost*, 744 F.3d 384 (5th Cir. 2014)—both endorse the "vanishing exemption" rule. *See* U.S. Br. 18.

Neither reason withstands scrutiny. While the Government complains that the Court of Appeals did not discuss § 1306, *the Government itself recognizes* that § 1306 makes no difference to the Question Presented. *See id.* ("Nothing in Section 1306 explicitly refers to—let alone overrides—the snapshot approach in Section 522(c), which applies to both Chapter 7 and

Chapter 13 bankruptcies . . . ."). It is therefore unsurprising that the decision below does not discuss that provision. And it is certainly no reason to deny certiorari. The Government is right that § 1306 is irrelevant to the Question Presented. *See* Pet. 19; U.S. Br. 18–19. But this Court need not take Wells' (or the Government's) word for it. It is free to consider at the merits stage whether § 1306 supports the "vanishing exemption" rule. And it would by no means be writing on a blank slate in so doing, as that purely legal issue was fully aired by the Fifth Circuit in *In re DeBerry*, 884 F.3d 526, 530 (5th Cir. 2018).

The Government's suggestion that the Court assess the split by looking only at Chapter 13 cases is a strange one, too. It happens to be true that two of the three Court of Appeals decisions endorsing the "vanishing exemption" rule were Chapter 13 cases, *see* Pet.App.2a–8a; *Frost*, 744 F.3d at 385–91; *but see In In re Jacobson*, 676 F.3d 1193 (9th Cir. 2012), and that the two decisions rejecting the rule were Chapter 7 cases, *see In re Rockwell*, 968 F.3d 12 (1st Cir. 2020); *In re DeBerry*, 884 F.3d 526. But, again, *the Government itself agrees* that that distinction makes no difference. *See* U.S. Br. 8–9, 18–19. And the Ninth Circuit did not rely on it, either. That is why the Question Presented—as framed both by Wells and by the Government, Pet. i; U.S. Br. i—is not Chapter-specific. And it is why the split on the Question Presented is best characterized as 1-1-1. *See* Pet. 15–22. In any event, the consensus view in Chapter 13 cases is simply wrong by the Government's own lights. *See id.* at 8–14.

If anything, the Chapter 13 posture makes this petition a better vehicle, not a worse one. If this Court

takes up the Question Presented in a Chapter 7 case, it will have no opportunity to consider whether § 1306 calls for a different result in the Chapter 13 context. That means it would have to grant two successive petitions on the vanishing exemption issue to correct the lower courts' error. The waste of resources that would entail is bad enough, given that § 1306 is so clearly irrelevant. But what's worse is that this Court may not get another chance to take up a Chapter 13 case, because any Chapter 13 debtor faced with the prospect of a homestead sale would have strong incentives to convert to Chapter 7 to avoid forfeiting the proceeds. *See* Pet. 24. And that would be an unfortunate result, indeed, given that "[p]roceedings under Chapter 13 can benefit debtors and creditors alike." *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015).

There is an entrenched and acknowledged split on the "vanishing exemption" rule. The Government agrees that the rule is just as wrong in Chapter 13 cases as it is in Chapter 7 cases. This issue is important and recurring. And this case is an ideal vehicle for ridding the Federal Reporter of *Jacobson*'s folly once and for all. Certiorari should be granted.

## ARGUMENT

### I. THE GOVERNMENT'S BRIEF CONFIRMS THAT CERTIORARI IS WARRANTED.

The bulk of the Government's brief favors certiorari. Rightly so. When a debtor files a bankruptcy petition and claims an exemption, the exempt property "cease[s] to be 'liable . . . for any debt . . . that arose . . . before commencement of the case.'" U.S. Br. 10 (quoting 11 U.S.C. § 522(c)). "[T]he relevant question" is thus "whether a debtor's

already-established entitlement to an exemption on the petition filing date is affected by post-petition events." *Id.* at 12. "[P]ursuant to the usual 'snapshot' analysis applicable under Section 522(c)"—which applies to both Chapter 7 and Chapter 13 bankruptcies—"the answer to that question is no." *Id.* at 12–13.

That makes this an easy case, as the Government agrees. "[T]here is no dispute that [Wells] was entitled to claim the Idaho homestead exemption on the day he filed his Chapter 13 bankruptcy petition." *Id.* at 10. His home thus "ceased to be 'liable . . . for any debt of [his] that arose . . . before commencement of the case.'" *Id.* (quoting 11 U.S.C. § 522(c)). And "[u]nder the ordinary operation of the snapshot rule, a later sale of the exempt property during the bankruptcy does not affect a debtor's entitlement to the homestead exemption." *Id.* As a result, Wells' interest in his homestead "was and continued to be exempt under Section 522(c)" regardless of its subsequent sale. *Id.*

As the Government recognizes, that common sense application of the snapshot rule "avoids the 'arguably peculiar results' that the Ninth Circuit conceded would flow from its contrary holding." *Id.* at 13. Most peculiar, the "vanishing-exemption" rule results in "anomalous distinctions between States like Idaho (which exempt both a still-owned homestead and the proceeds from selling a homestead) and the federal government and other States (which exempt only the still-owned homestead)." *Id.* "Although the latter grant no protection 'whatsoever in sales proceeds,' it is undisputed that a debtor in those jurisdictions who owns a home at the time of filing for

bankruptcy will retain the homestead exemption's protection even if the home is then sold during the pendency of the bankruptcy." *Id.* (citing cases). "As the Ninth Circuit acknowledged, it is difficult to justify 'in federal law, state law, or logic' a result that is less debtor-friendly simply because a State has chosen to be more generous by exempting not only currently owned homesteads but also the proceeds from recent homestead sales." *Id.*

The Government also agrees that the Trustee is "incorrect" (U.S. Br. 15) in arguing that this Court's decisions in *White v. Stump*, 266 U.S. 310 (1924), and *Myers v. Matley*, 318 U.S. 622 (1943), justify the Ninth Circuit's "vanishing exemption" rule. Those decisions "provide no support" for that rule because they hold only that, "when determining whether a debtor is entitled to claim a state-created exemption, the court must consider the contours of that particular exemption as defined by state law." U.S. Br. 16. But where (as here) state law provides an unconditional homestead exemption to which a debtor is entitled on the date he files, a post-petition sale does not cause that exemption to vanish. *See id.*

Finally, the Government agrees that Wells identifies "a 1-to-2 split" implicating the "vanishing exemption" rule the Ninth Circuit first endorsed in *Jacobson* and applied in the decision below. *Id.* at 20. *Jacobson* held that homestead sale proceeds "lose their exempt status" if they are not reinvested in a new homestead within the applicable statutory window. 676 F.3d at 1198. The First Circuit "has rejected *Jacobson* as 'unpersuasive,'" because a "'homestead exemption taken on the day [the debtor] filed for bankruptcy must be viewed as unchanging,

even in the face of his later sale of the property.'" U.S. Br. 20 (quoting *Rockwell*, 968 F.3d at 12). And "[t]he Fifth Circuit agrees," at least in the Chapter 7 context. *Id.* (citing *In re DeBerry*, 884 F.3d 526).

## II. THE FACT THAT THIS CASE ARISES UNDER CHAPTER 13 MAKES IT A BETTER VEHICLE, NOT A WORSE ONE.

The Government nevertheless declines to recommend a grant because this case arises under Chapter 13 rather than Chapter 7. *See* U.S. Br. 16–17. The Government seems to think that matters for two reasons. *First*, the Government observes that the decision below does not discuss 11 U.S.C. § 1306, a Chapter 13-specific provision that could conceivably (but, even according to the Government, in fact does not) bear on the Question Presented. *See id.* at 17–19. *Second*, the Government observes that both courts to have considered the "vanishing exemption" rule in the Chapter 13 context reached the same (but, even according to the Government, erroneous) result. *See id.* at 19–21. Both observations are true but irrelevant. This Court *can*—and in fact *should*—take up the Question Presented in a Chapter 13 case. And it should do so now.

**A.** As the Government seems to recognize, the decision below does not address § 1306 for the simple reason that "the Ninth Circuit believed that *all* debtors in all States with proceeds exemptions are required to comply with the terms of those exemptions if they sell their homestead during the pendency of the bankruptcy, regardless of whether they filed under Chapter 7 or Chapter 13." U.S. Br. 19 (emphasis added). Wells and the Government submit that the

opposite is true—*i.e.*, that *no* debtors are required to comply with the terms of proceeds exemptions if they sell their homestead during the pendency of the bankruptcy, regardless of the Chapter under which they file. *See* Pet. 19, 27–33; Reply 1, 4, 7–11; U.S. Br. 8–9. But the important point is that neither position turns on § 1306.

Section 1306, after all, simply provides that the property of a Chapter 13 debtor's estate includes property that "the debtor acquires after the commencement of the case." 13 U.S.C. § 1306(a)(1). Proceeds from the post-petition sale of an exempt property, however, "are not 'property . . . acquire[d] after the commencement of the case'; they are property a debtor *already had*, albeit now in liquidated form." Pet. 19 (citation omitted); *see In re Kerr*, 199 B.R. 370, 374 & n.12 (Bankr. N.D. Ill. 1996). Moreover, "[n]othing in Section 1306 explicitly refers to—let alone overrides—the snapshot approach in Section 522(c), which applies to both Chapter 7 and Chapter 13 bankruptcies, and which provides that property validly exempted at the time of filing remains exempted despite subsequent developments." U.S. Br. 18.

That the decision below does not discuss a provision that does not "refer[ ] to—let alone override[ ]"—the statutory principle that governs this case is no reason to decline review. U.S. Br. 18. To be sure, the Fifth Circuit in *DeBerry* referenced § 1306 in distinguishing its prior ruling in *Frost*. 884 F.3d at 530. But even there, § 1306 seemed to be little more than a fig leaf offered to justify that court's departure from circuit precedent. Indeed, neither of the two Chapter 13 cases (the decision below and *Frost*) even

mentioned, much less relied on, § 1306 in endorsing the "vanishing exemption" rule. Nevertheless, the argument that § 1306 has something to do with the Question Presented was aired in *DeBerry*. The Trustee is free to press that and any other Chapter 13-specific arguments before this Court. *See generally* BIO 1–3, 9–11, 16–17, 19–20 (distinguishing between Chapter 7 cases and Chapter 13 cases). And Wells respectfully submits that the Court will have no trouble swiftly rejecting them.

**B.** On the split, the Government's attempt to narrow this Court's focus to Chapter 13 cases is similarly misguided. While the Government correctly observes that the two cases rejecting the "vanishing exemption" rule happened to arise in the Chapter 7 context, the Government agrees with Wells that the rule should be exactly the same in the Chapter 13 context—and for exactly the same reasons. *See* U.S. Br. at 8–9 ("The Court of Appeals Erred In Concluding That An Individual Debtor, Whether In Chapter 7 Or Chapter 13, Forfeits an Already-Established Homestead Exemption By Selling The Homestead and Failing to Satisfy a Proceeds Exemption."); 18–19 ("Nothing in Section 1306 explicitly refers to—let alone overrides—the snapshot approach in Section 522(c), which applies to both Chapter 7 and Chapter 13 bankruptcies . . . ."). That is why the Question Presented, as framed both by Wells and by the Government, encompasses cases arising under both Chapters. *See* Pet. i; U.S. Br. i. And it is why the relevant split is, as Wells explained, 1-1-1: The Ninth Circuit answers the Question Presented "yes"; the Fifth answers "sometimes"; and the First answers "no." *See* Pet. 15–23; Reply 2–4. Again, the Fifth

Circuit is the only court to have distinguished between Chapter 7 and Chapter 13; it did so only post hoc; and while Wells, the Government, and the Ninth Circuit agree that the distinction makes no difference, this Court is certainly free to adopt the Fifth Circuit's rule if it disagrees.

In any event, the consensus in Chapter 13 cases is around what even the Government agrees is the incorrect rule. *See* U.S. Br. at 8–9; 18–19. That the Courts of Appeals are 0 for 2 in the Chapter 13 context is a reason to grant review, not decline it.

**C.** In fact, a Chapter 13 case is the ideal vehicle for answering the Question Presented. If this Court takes a Chapter 7 case, it will have no opportunity to consider whether § 1306 warrants a different result in the Chapter 13 context. As a result, the rejection of the "vanishing exemption" rule in a Chapter 7 case would leave undisturbed the erroneous Chapter 13 rulings in the Fifth and Ninth Circuits—just as the Fifth Circuit left *Frost* undisturbed when it decided *DeBerry*, *see* 884 F.3d at 530, and just as the First Circuit purported to leave open the Chapter 13 question in *Rockwell*, 968 F.3d at 22 n.7. That means this Court would have to take up the "vanishing exemption" rule *twice* if it grants certiorari in a Chapter 7 case. If it grants in a Chapter 13 case, by contrast, it can swiftly dispose of any argument regarding § 1306 and vanquish the much-maligned "vanishing exemption" rule once and for all. *See, e.g.*, Pet.App.5a (acknowledging that the *Jacobson* rule has been "criticized, questioned, and rejected by many"); Pet. 13 (citing cases, articles, and treatises criticizing the rule).

The time to do that is now, because if the Court denies certiorari here, the "vanishing exemption" rule may evade review in the Chapter 13 context altogether. The "vanishing exemption" rule is now settled law in the Ninth Circuit for both Chapter 7 and Chapter 13 bankruptcies. So if the decision below stands, all debtors in that jurisdiction will have to delay selling their homesteads or dismiss their bankruptcy petitions to avoid forfeiting their sale proceeds. *See* Reply 5–7. And in any other jurisdiction, Chapter 13 debtors facing the prospect of a homestead sale will have every incentive to convert to Chapter 7 to avoid the same result. *See* Pet. 24. In so doing, they will not only insulate the vanishing exemption from review in the Chapter 13 context, but they will also unnecessarily forfeit the many benefits Chapter 13 otherwise provides. *See id.*; *Harris*, 575 U.S. at 514 ("Proceedings under Chapter 13 can benefit debtors and creditors alike.").

## CONCLUSION

Certiorari is warranted now. The petition should be granted.

April 12, 2023

Respectfully submitted,

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