Team 11P

No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 11P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a creditor that extends subsequent new value to a debtor after receipt of a preferential payment is barred from the full enjoyment of its 11 U.S.C. § 547(c)(4) defense if the creditor has also received a post-petition distribution pursuant to a 11 U.S.C. § 503(b)(9) claim.

II. Whether 11 U.S.C. § 365(d)(3) requires a trustee to abide by the terms of a lease for nonresidential real property and pay all obligations that become due under the lease in the window between filing the bankruptcy petition and rejecting the lease.

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OPINIONS BELOW

The Bankruptcy Court for the District of Moot ruled in the favor of Casey Jones, the chapter 7 trustee (the "Trustee") for Terrapin Station, LLC's (the "Debtor") bankruptcy estate. (R. at 3). Specifically, the Bankruptcy Court held that a seller of goods may not reduce its preference exposure under § 547(c)(4) if the value of goods sold on credit was reimbursed through a § 503(b)(9) payment; and that § 365(d)(3) allows a trustee or debtor-in-possession (the "DIP") to pay only a prorated portion of a lease's obligations that accrue in the window between filing the bankruptcy petition and rejecting the lease. *Id.* In a two-page opinion, the United States District Court for the District of Moot affirmed. *Id.* Touch of Grey Roasters, Inc. ("Touch of Grey") appealed, and the United States Court of Appeals for the Thirteenth Circuit affirmed. *Id.* This Court granted Touch of Grey's petition for writ of certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

STATUTORY PROVISIONS

The federal statutes that pertain to this case are 11 U.S.C. §§ 503(b)(9), 547(c)(4), 365(d)(3), and 503(b)(1). These provisions are included in full in Appendix A.

STATEMENT OF THE CASE

I. Facts

Touch of Grey is a coffeehouse chain headquartered in San Francisco, California, that attempted to keep afloat a local coffeehouse in Terrapin, Moot, operated by the Debtor's founder, William Tell. R. at 3. Touch of Grey is synonymous with providing certified free-trade coffee beans and other goods. *Id.* Recognizing the value that local, independent businesses provide their community, Touch of Grey sought local coffeehouses it could make into "neighborhood coffeehouses" that would only provide Touch of Grey products. *Id.* at 4. These neighborhood coffeehouses also served as hotspots for communal events like live music and poetry readings. *Id.*

In 2017, Touch of Grey sought out Tell to boost a neighborhood coffeehouse in Terrapin. *Id.* The parties reached a franchise and lease agreement (the "Lease") on July 1, 2018. *Id.* The Debtor would exclusively sell Touch of Grey's "Dark Star" products. *Id.* Additionally, Touch of Grey leased a hip, renovated warehouse to the Debtor under the terms of the Lease. *Id.* The terms of the Lease abided by industry standards and required monthly rent of $25,000 "due in advance on the first day of each month." *Id.* Terrapin Station Coffeehouse officially opened on December 1, 2018. *Id.* at 5. The Debtor experienced low sales, and by November 1, 2019, owed Touch of Grey over $700,000. *Id.* The parties entered into a forbearance agreement on December 7, 2019, which obligated the Debtor to pay $250,000 to Touch of Grey for outstanding invoices. *Id.* Less than two weeks later, the Debtor purchased $200,000 in products from Touch of Grey on credit in a December 18 invoice (the "Invoice"). Tell personally guaranteed the Invoice. *Id.* at 5–6. But on January 5, 2020, the Debtor filed a petition for relief under chapter 11 in the Bankruptcy Court for the District of Moot. *Id.* at 6. As of the petition date, the Debtor was current under the lease but owed Touch of Grey $650,000 for purchased goods. *Id.*

The Debtor filed for permission to pay Touch of Grey $200,000 as a critical vendor to be applied to the Invoice on January 19, 2020. *Id.* at 6–7. The payment was granted as a § 503(b)(9) administrative expense for the value of goods sold. *Id.* at 7. Touch of Grey continued to provide goods, but neither could prepare for the unprecedented COVID-19 pandemic. *Id.* On May 5, 2020, the Debtor chose to cease operations and filed a motion to reject the lease on May 5, effective that day. *Id.* The lease's terms obligated the Debtor to make the full payment for May rent on May 1, thus Touch of Grey moved for fulfillment of this obligation as required by § 365(d)(3). *Id.* at 7–8.

At the virtual hearing on May 29, 2020, to make things as simple as possible, Touch of Grey made no objection to the Debtor's rejection of the lease or its conversion to a chapter 7 case. *Id.* at 8. But when the chapter 7 Trustee was appointed, he instantly became hostile toward Touch of Grey. *Id.* The Trustee sought to avoid the $250,000 payment made to Touch of Grey under the forbearance agreement pursuant to §§ 547(b) and 550(a) and sought to minimize the full May rent obligation under § 365(d)(3). *Id.* But Touch of Grey asserted its affirmative defenses, in part showing the law plainly permits it to reduce its preference exposure by the $200,000 in goods sold to the Debtor under the Invoice pursuant to § 547(c)(4). Not swayed by the clear law, the Court ruled in favor of the Trustee on both issues. *See id.* at 9.

II. Procedural History

On both issues, the Bankruptcy Court for the District of Moot ruled for the Trustee. *Id.* at 3. In only a two-page opinion, the United States District Court for the District of Moot affirmed. *Id.* The Thirteenth Circuit affirmed. *Id.* This Court granted the writ of certiorari. *Id.*

STANDARD OF REVIEW

A court reviewing the grant of a motion for summary judgment applies a *de novo* standard of review. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). This non-deferential

standard of review licenses the court to determine whether the grant is appropriate as a matter of law. *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 107 (2d. Cr. 2019).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit erred in granting the Trustee's motion for summary judgment by holding the Trustee's payment pursuant to § 503(b)(9) prevented Touch of Grey from reducing its preference exposure on account of new value it extended to the debtor pre-petition. Section 547(c)(4)'s text—allowing the trustee to avoid payments made by the *debtor* on account of an otherwise unavoidable transfer—prohibits this result. Section 547(c)(4) is silent on when a debtor must make an otherwise unavoidable transfer that would deplete a creditor's subsequent new value defense. But § 547(c)(4) explicitly states that the debtor is the entity who makes otherwise unavoidable transfers in that section. Logically, a trustee's post-petition payments cannot qualify as otherwise unavoidable transfers that shrink the creditor's subsequent new value defense.

Section 547(c)(4)'s text alone limits the subsequent new value analysis to the petition date and the canons of interpretation similarly support this result. The Bankruptcy Code (the "Code") makes pains to speak with precision when addressing "the debtor" and "the trustee." Ignoring these distinctions controverts section 547(c)(4)'s plain text and illogically expands the subsequent new value analysis to payments made at any point in the bankruptcy case to the massive disadvantage of creditors. Furthermore, § 547(c)(4) should be harmoniously interpretated with its neighboring Code §§ 547(b)(4), 547(b)(5), and 546(a), which all govern the pre-petition phase.

Courts interpreting the text of § 547(c)(4) have naturally found the section's application is limited to pre-petition transfers. These courts analogize § 503(b)(9) claims to critical vendor claims and hold that neither are special exceptions to the general rule that the creditor's subsequent new value defense concerns only pre-petition transfers. Expanding § 547(c)(4)'s coverage to

post-petition transfers would diminish the overarching policy goals of §§ 547(c)(4) and 503(b)(9), which is to encourage creditors to deal with debtors in financial jeopardy. An interpretation of § 547(c)(4) that makes all § 503(b)(9) payments otherwise unavoidable transfers debilitates the cohesive protections afforded by both provisions. Thus, holding that § 503(b)(9) expenses have no bearing on the § 547(c)(4) subsequent new value defense is the only way to follow the clear text, stay in line with well-reasoned caselaw, and carry out the linked policies of those sections.

Furthermore, the Thirteenth Circuit erroneously held that Touch of Grey was entitled only to partial payment of the May 2020 rent that became due in full under the lease before the date the lease was rejected. The billing date approach in § 365(d)(3) requires timely performance by the trustee of all obligations that arise from the lease until the lease is assumed or rejected. "Obligations" are synonymous with "duties," and the statute requires the lease's duties be timely performed as they arise under the lease. If the lease is rejected, the statute does not disallow payments that are allocable in part to the post-rejection period. Such a reading requires imparting a false ambiguity onto the statute and ignoring its clear grammatical structure. The canons of interpretation resolve the alleged ambiguity in favor of the billing date approach, as there is no way to allow proration without adopting an outcome-oriented approach. Looking at § 365(d)(3) against the whole Code proves it serves a different function from other provisions on a similar matter. Finally, § 365(d)(3)'s addition to the Code changed the law to provide stability to landlords.

The overwhelming majority of caselaw agrees the billing date approach is the only permissible reading of § 365(d)(3). Courts routinely find the statute's language clear, recognizing the statute serves the distinct purpose of keeping the terms of the lease in effect between the parties until the lease is rejected. Upon rejection, there is no way to allow proration because the obligations were to be paid in full as they became due. Some courts look at "arise" on its own and go to lengths

to misconstrue it. But in reading "arise" to allow the accrual theory to result in prorated payment of obligations, courts revert to the law as it stood prior to § 365(d)(3)'s addition to the Code. Most courts understand Congress did not amend the law for nothing, therefore resulting in application of the clear language of § 365(d)(3) rather than relying on outdated law. Finally, courts continuously hold that the bright line billing date approach is essential in resolving bankruptcy disputes in a timely manner.

Section 365(d)(3) was added to the Code to ensure stability for landlords. The landlord cannot just carry on its normal course of business with the bankrupt tenant—there are a number of restrictions placed on the interaction between the two. Congress clearly provided a small protection for landlords in the form of abiding by the lease for nonresidential real property until rejection. Failing to follow the billing date approach requires abdicating the clear text of the statute and ignoring the explicit legislative history. The statute's addition to the Code provided stability to landlords and protected other tenants by ensuring they do not have to shoulder the raised costs that ensue if the bankrupt tenant got to shirk all lease obligations. Clearly, the only way to follow the law, remain consistent with a majority of caselaw, and carry out the purpose of § 365(d)(3) is to hold that the billing date approach must be followed. The May 2020 rent must be paid in full.

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED BECAUSE A POST-PETITION PAYMENT MADE PURSUANT TO A § 503(b)(9) CLAIM HAS NO BEARING ON A CREDITOR'S SUBSEQUENT NEW VALUE DEFENSE UNDER § 547(c)(4).

Section 547(b) of the Code grants the trustee authority to "avoid any transfer of an interest of the debtor in property" as a preference. 11 U.S.C. § 547(b). The trustee's authority to avoid preferences permits him to claw back certain transfers for the bankruptcy estate's sake. *See id.* § 550(a). A preference is a payment made by the debtor that "ha[s] the effect of preferring one

creditor over others." *Id.* § 547(b); *Phoenix Rest. Grp., Inc. v. Ajilon Pro. Staffing LLC (In re Phoenix Rest. Grp., Inc. I)*, 317 B.R. 491, 494 (Bankr. M.D. Tenn. 2004). A transfer that meets the "five characteristics of a voidable preference" must: "(1) benefit a creditor; (2) be on account of antecedent debt; (3) be made while the debtor was insolvent; (4) be made within 90 days before bankruptcy; and (5) enable the creditor to receive a larger share of the estate than if the transfer had not been made." *Union Bank v. Wolas*, 502 U.S. 151, 154−55 (1991). The trustee must prove each of these characteristic elements to reclaim an alleged preferential transfer. 11 U.S.C. § 550(a). The parties have stipulated that the December 7, 2019 payment by Touch of Grey to the Debtor pursuant to the parties' forbearance agreement is a preference under § 547(b). R. at 5.

Yet a trustee's establishment of the preference elements in § 547(b) is not the end of the line for a creditor whose transfer fits one of the seven defenses provided in § 547(c). *Wolas*, 502 U.S. at 154. Section 547(c)(4) provides one such defense: The subsequent new value defense. 11 U.S.C. § 547(c)(4); *see also Jet Florida Sys., Inc. v. Airport Sys., Inc. (In re Jet Florida Sys., Inc.)*, 841 F.2d 1082, 1083 (11th Cir. 1988). The subsequent new value defense provides that a trustee "may not avoid" a preferential payment: "(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor . . . (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." 11 U.S.C. § 547(c)(4). The subsequent new value defense prevents the trustee from avoiding the debtor's preferential payment to a creditor to the extent that creditor later provides new value to the debtor *if* the provision of new value meets two requirements.[1] First, the creditor's provision of

[1] Some courts impart a third requirement that the creditor's new value must remain unpaid by the debtor. *N.Y.C. Shoes, Inc. v. Bentley Int'l, Inc. (In re N.Y.C. Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989) ("Third, the debtor must not have fully compensated the creditor for 'new value' as of the date that it filed its bankruptcy petition."). The increasingly popular approach is to abide by § 547(c)(4)(B)'s ordinary meaning, which only "requires that the new value not have

subsequent new value must "not be secured by a security interest that is unavoidable in bankruptcy." *Id.* § 547(c)(4)(A). On December 18, 2019, Touch of Grey provided the Debtor with $200,000 worth of goods on credit. R. at 5. Touch of Grey's provision of subsequent new value is unsecured, so § 547(c)(4)'s first requirement is satisfied.

Second, the debtor must not have "made an otherwise unavoidable transfer to or for the benefit of the creditor on account of" the creditor's provision of subsequent new value. *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1189 (11th Cir. 2018); *see* 11 U.S.C. § 547(c)(4)(B). This second requirement is the "bone of contention" between the parties. *Wolinsky v. Cent. Vt. Tchr. Credit Union (In re Ford)*, 98 B.R. 669, 670 (Bankr. D. Vt. 1989). The parties dispute whether the trustee's post-petition transfer of $200,000 made pursuant to Touch of Grey's § 503(b)(9) claim is an "otherwise unavoidable transfer" such that Touch of Grey is prevented from reducing its preference liability by that amount. Section 503(b)(9) grants the creditor an administrative expense in bankruptcy for "the value of any goods received by the debtor within 20 days before the date of commencement of a case . . . in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9).

This Court has not considered whether the trustee's post-petition satisfaction of a creditor's § 503(b)(9) claim is an "otherwise unavoidable transfer" that prevents the creditor from reducing its preference exposure for provision of subsequent new value pre-petition. Section 547(c)(4)'s ordinary meaning, the caselaw limiting the subsequent new value analysis to pre-petition transfers, and policies protecting creditors that deal with distressed debtors all point toward limiting the subsequent new value analysis to pre-petition transfers. Therefore, this Court should reverse the

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been paid by or secured by an unavoidable transfer." *TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 383 (Bankr. N.D. Ga. 2010). The parties do not dispute that this is the correct approach. R. at 10. ("The parties have stipulated, and we agree, that new value need not 'remain unpaid' in order for a creditor to establish a defense under § 547(c)(4).").

Thirteenth Circuit and find that an otherwise unavoidable transfer made post-petition has no bearing on a creditor's subsequent new value defense.

A. Section 547(c)(4)'s Text Cabins the Operation of the Subsequent New Value Analysis to the Pre-Petition Preference Period

The starting point in ascertaining any statute's meaning is an examination of the text itself. *Perrin v. United States*, 444 U.S. 37, 43 (1979). If the statute's meaning is discernible from the text alone, the court's "sole function . . . is to enforce [the text] according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). This Court has found that a statute's language may be awkward and still give rise to a straightforward meaning. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Although § 547(c)(4) appears unwieldy at first glance, a close examination reveals that only pre-petition transfers can affect a creditor's subsequent new value defense because only those transfers are made by the debtor. *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.)*, 850 F.2d 1275, 1284 (8th Cir. 1988).

i. The Ordinary Meaning of "Debtor" in § 547(c)(4) Shows the Subsequent New Value Analysis Concerns Only Pre-Petition Transfers.

Words should be "interpreted as taking their ordinary, . . . common meaning." *Perrin*, 444 U.S. at 43. In the endeavor to interpret what a particular term within a statute means, courts may first look to the statute's own definitions section. *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). If the statute provides no definition for a particular term, the court may discern the term's meaning by looking to dictionaries to determine how the term is used in "everyday parlance." *Mohamad v. Palestinian Authority*, 566 U.S. 449, 454 (2012). In examining these sources, courts must consider the "practical considerations" at play. *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 109 (1944).

As a foundational matter, § 547(c)(4) makes no mention of the time when a creditor's otherwise unavoidable transfer must occur to effectively deplete the creditor's subsequent new value defense. *Moglia v. Am. Psych. Ass'n (In re Login Bros. Book Co., Inc.)*, 294 B.R. 297, 300 (N.D. Ill. 2003)*; MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 609 (Bankr. M.D. La. 1996). However, the lack of any temporal limitation in the section's text does little to settle the dispute as to whether post-petition payments should be included in the subsequent new value calculus. *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("But such silence, after all, normally creates ambiguity. It does not resolve it."). Of course, § 547(c)(4)'s silence does not give rise to the presumption that the subsequent new value analysis extends to evaluation of post-petition transfers. Instead of deriving § 547(c)(4)'s meaning from words that are absent from the statute, this Court should focus on the statute's ordinary meaning, which shows that the subsequent new value analysis operates up to the petition date, but no further.

The subsequent new value analysis is limited to pre-petition transfers because § 547(c)(4) exclusively addresses transfers the debtor made, not transfers the trustee made. 11 U.S.C. § 547(c)(4)(B); *Clark v. Frank B. Hall & Co. of Colo. (In re Sharoff Food Serv., Inc.)*, 179 B.R. 669, 678 (Bankr. D. Colo. 1995)*; In re Phoenix Restaurant Grp., Inc. I*, 317 B.R. at 496; *Wallach v. Vulcan Steam Forging (In re D.J. Management Group)*, 161 B.R. 5, 6 (Bankr. W.D. N.Y. 1993). The Code defines "debtor" in § 101(13) as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). Clearly, that definition makes no mention of pre-petition or post-petition activities. *Id.* But when the term "debtor" is afforded its ordinary meaning, § 547(c)(4) takes on a more limited application, with the petition date serving as the analytical cutoff. In bankruptcy, a debtor is defined as an entity "who files a voluntary petition or against whom an involuntary petition is filed." *Debtor*, *Black's Law Dictionary* (11th

ed. 2019). Of course, a debtor is the entity who initiates the bankruptcy petition that demarcates the pre-petition and post-petition periods. In mandating the trustee "may not avoid" a preference "on account of which new value *the debtor did not make* an otherwise unavoidable transfer," § 547(c)(4) specifically "refers to the pre-petition entity that transferred property [to] or engaged in business with the preference defendant." 11 U.S.C. § 547(c)(4) (emphasis added); *In re Phoenix Restaurant Grp., Inc. I*, 317 B.R. at 496. Section 547(c)(4) explicitly contemplates that the entity making a preferential transfer is a debtor, not a bankruptcy trustee. Thus, a post-petition payment made pursuant to a creditor's § 503(b)(9) claim cannot be an otherwise unavoidable transfer within the meaning of § 547(c)(4)(B), because the trustee satisfies these payments.

ii. The Canons of Interpretation Show § 547(c)(4)'s Text Refers Only to Pre-Petition Transfers.

Though the text is unambiguous, any perceived ambiguities may be resolved by using the canons of interpretation. Unsurprisingly, the canons also point to the text's clear meaning: The subsequent new value analysis is limited in application to pre-petition transfers. In line with the whole-text canon, particular provisions that are part of a larger statutory scheme should be evaluated in light of "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). While engaging in this analysis of the whole text, the court should likewise abide by the presumption of consistent usage, which memorializes the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). The surplusage canon also requires the court to give every word effect, ensuring no words are rendered "void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *see also United States v. Butler*, 297 U.S. 1, 65 (1936) ("[W]ords cannot be meaningless, else they would not have been used.").

The statute's every word is of import. This concept is amplified by the conjunctive-disjunctive canon, which establishes the word "or" is disjunctive. *United States v. Woods*, 571 U.S. 31, 45 (2013) The title-and-headings canon imparts that titles and headings are aids for "resolving an ambiguity in the legislation's text." *I.N.S. v. Nat'l Ctr. for Immigrs.' Rights, Inc.*, 502 U.S. 183, 189 (1991). Similarly, the prefatory-materials canon signifies that preambles are permissible indicators of meaning. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 217 (2012). Finally, the harmonious-reading canon purports that there is "no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Id.* at 180. Bearing in mind the differences in terminology throughout the statutory scheme, one provision must not be interpreted to defeat another.

The differences between the status of "the debtor" and "the trustee" that appear throughout the Code suggest that § 547(c)(4) only concerns debtors, limiting the section's applicability to pre-petition transfers. Phrases referring to "the debtor" as a separate entity from "the trustee" suggest a critical distinction between the two entities permeates the Code. *In re D.J. Mgmt. Grp.*, 161 B.R. at 6. This distinction is particularly apparent when considering each entity's interaction with creditors. Section 101(10) defines a "creditor" as a third entity that might have both "a claim against the debtor that arose at the time of or before the order for relief concerning the debtor" and a distinctively separate "claim against the estate." 11 U.S.C. § 101(10)(A)–(B). Section 547(a)(2) makes a similar distinction between "the debtor" and "the trustee" by indicating that the creditor must provide new value "in a transaction that is neither void nor voidable by *the debtor or the trustee*." *Id.* § 547(a)(2) (emphasis added). The disjunctive "or" in the statute's text bolsters the separate, distinct meaning of each term.

These distinctions between the debtor and the trustee highlight a broader conceptual distinction between "transfers" made by the debtor and "distributions" made by the trustee. Section 501 affords the right to "file a proof of claim and share equally in any *distribution* on that proof of claim with other creditors of the same class." *Conoco, Inc. v. Braniff, Inc. (In re Braniff, Inc.)*, 113 B.R. 745, 786 (Bankr. M.D. Fla. 1990); *see* 11 U.S.C. § 501. The trustee oversees claims distributions post-petition. *Id.* § 704(a)(5). Section 547(c)(4) expressly pertains to transfers, not distributions. *See id.* § 547(c)(4). An identical treatment for both transfers and distributions under § 547(c)(4) effectively nullifies the important distinctions between the debtor and the trustee peppered throughout the Code and accepts that "all distributions . . . are transfers" within the meaning of § 547(c)(4); *Beaulieu Liquidating Trust v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 870 (Bankr. N.D. Ga. 2020). This result directly contradicts § 547(c)(4)'s text because it only mentions transfers made by the debtor. *Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 555 (3d Cir. 2013). Ignoring distinctions between transfers and distributions balloons § 547(c)(4)'s coverage in such a way that "any payment, at any time, could defeat a new value defense." *Id.*

The harmonious-reading canon necessitates a finding that § 547(c)(4) only concerns transfers made within the preference period in a similar fashion as the preceding § 547(b). The preamble to § 547(c) blocks the trustee from avoiding a transfer "under this section." 11 U.S.C. § 547(c). Logically, a transfer "under this section" is a preference, or a transfer that satisfies the elements listed in § 547(b). Section 547(b) provides a temporal deadline for preference payments as payments made "on or within 90 days before the date of the filing of the petition." *Id.* § 547(b)(4)(A). Because §§ 547(b) and 547(c) are inextricably linked, each analysis should end at the same point: The "filing of the petition." *Id.* § 547(b)(4)(A).

The harmonious-reading canon similarly prevents a reading of § 547(c)(4) that would controvert the analysis performed under § 547(b)(5)'s "hypothetical liquidation test." *In re Friedman's Inc.,* 738 F.3d at 555; 11 U.S.C. § 547(b)(5). Section 547(b)(5) permits the trustee to avoid a preferential payment if the payment "has the effect of giving the creditor a recovery in excess of the recovery that would have been available under a liquidation procedure." *See* Norton Bankr. L. & Prac. § 66:12 (3d. ed. 2021). In conducting a hypothetical liquidation test, the court "determine[s] what the creditor would have received in a liquidation case if the transfer had not been made." *Id.* The court bases its determination on the facts as of the petition date. *Id* ; *Neuger v. United States (In re Tenna Corp.)*, 801 F.2d 819, 824 (6th Cir. 1986). Section 547(b)(5), similar to § 547(c)(4), has no temporal guidelines. 11 U.S.C. § 547(b)(5). Still, § 547(b)(5) is limited to a pre-petition application for practical purposes. *Palmer Clay Prods. Co. v. Brown*, 297 U.S. 227, 229 (1936) (holding that Congress did not intend to "introduce the impractical rule" of requiring hypothetical liquidation determinations after distributions to each creditor). This Court should not create interpretive inconsistencies (and, in effect, confusion) between neighboring sections by a holding that § 547(c)(4) must account for post-petition payments. Instead, this Court should impose the pre-petition limitations of § 547(b)(5) on its neighbor, § 547(c)(4).

In a similar fashion to the harmonious readings of §§ 547(b)(4) and 547(b)(5), this Court should interpret § 547(c)(4) in light of the statute of limitations for preferences codified in § 546(a). The statute of limitations "for filing a preference avoidance action . . . begins to run on the petition date." *In re Friedman's Inc.,* 738 F.3d at 555; *see* 11 U.S.C. § 546(a). It defies logic that Congress would start the clock on a statute of limitations period and leave it open to account for later injuries in the same stroke. *In re Friedman's Inc.,* 738 F.3d at 556. Additionally, a holding that accepts this illogical result would create a duplicative remedy. Section 549 already provides for post-petition

remedies by permitting the "trustee to avoid a transfer of property of the estate that occurs after the commencement of the case." 11 U.S.C. § 549(a).

Lastly, an examination of the statutory scheme also includes an analysis of titles and headings. Section 547's title, "Preferences," demonstrates the section administers transfers "occurring during the preference period." *In re Friedman's Inc.,* 738 F.3d at 555. Section 547(b) limits the preference period to "90 days before the date of the filing of the petition." 11 U.S.C. § 547(b)(4)(A). Sound reason suggests that § 547(c)(4) only allows for reduction of a creditor's subsequent new value defense based on transfers that occur during this pre-petition period.

B. Other Courts Interpreting § 547(c)(4) Have Restricted the Subsequent New Value Analysis to Pre-Petition Transfers

Some courts have held that because a § 503(b)(9) claim is "both authorized by the [c]ourt and by the . . . Code," it is an otherwise unavoidable transfer within the meaning of § 547(c)(4)(B). *Circuit City Stores, Inc. v. Mitsubishi Digit. Elecs. Am., Inc. (In re Circuit City Stores, Inc.)*, 2010 WL 4596022, at *8 (Bankr. E.D. Va. Dec. 1, 2010); *see also TI Acquisition, LLC v. S. Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010); *In re Beaulieu Grp., LLC*, 616 B.R. at 878. Of course, this position presupposes that the § 547(c)(4) subsequent new value analysis extends past the petition date to cover post-petition payments made by the trustee to the creditor. Other courts stop short of this proposition. These courts have held that the subsequent new value analysis is only relevant and applicable to evaluating pre-petition transfers. *In re Friedman's Inc.*, 738 F.3d at 549; *Commissary Ops., Inc. v. Dot Foods, Inc. (In re Commissary Ops., Inc.)* 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010); *In re Phoenix Rest. Grp., Inc. I*, 317 B.R. at 497. These courts agree that certain post-petition transfers should have no bearing on a creditor's subsequent new value defense. This court should join in this line of analysis

with respect to § 503(b)(9) claims by holding these claims are irrelevant for purposes of a creditor's subsequent new value defense.

i. Section 503(b)(9) Claims are Analogous to Critical Vendor Claims, Which Have No Bearing on the Subsequent New Value Defense.

No courts of appeal have directly addressed the specific question of whether a trustee's satisfaction of a creditor's post-petition § 503(b)(9) claim prevents that creditor from reducing its preference exposure in line with its § 547(c)(4) defense. Jennifer L. Maffett-Nickelman, *Can A Creditor Have Its § 503(b)(9) Cake and Eat It, Too?*, 35 Am. Bankr. Inst. J. 16, 16 (2016). Still, courts have considered § 547(c)(4)'s interaction with other modes of post-petition transfers. *See In re Friedman's Inc.,* 738 F.3d at 553, 560; *Phoenix Rest. Grp., Inc. v. Proficient Food Co. (In re Phoenix Rest. Grp., Inc. II)*, 373 B.R. 541, 553 (Bankr. M.D. Tenn. 2007); *Kaye v. Accord Mfg., Inc. (In re Murray, Inc.)*, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007) (all examining the effect of post-petition critical vendor claims on a creditor's subsequent new value defense). At least one court has held that § 503(b)(9) claims have no bearing on the creditor's subsequent new value defense by drawing on other courts' analyses of "analogous . . . critical vendor claims." *In re Commissary Ops., Inc.*, 421 B.R. at 878.

The Code does not define the term "critical vendor." Critical vendors supply goods to the debtor that the "debtor can freely use" with no strings attached. *Id.* Bankruptcy courts have discretion to grant critical vendor claims that "approve payment of pre-petition obligations to critical vendors." *In re TI Acquisition, LLC*, 429 B.R. at 382. Although these payments are made subject to court order, courts have found that these payments should not restrict a critical vendor's access to full enjoyment of the subsequent new value defense. *In re Friedman's Inc.,* 738 F.3d at 560; *In re Commissary Ops., Inc.*, 421 B.R. at 878; *In re Phoenix Rest. Grp., Inc. II*, 373 B.R. at 553; *In re Murray, Inc.*, 2007 WL 5595447, at *2. Because a critical vendor engages in some

degree of risk in providing these goods, courts have found these creditors should not be blocked from reducing their preference exposure on account of post-petition payments. A creditor who provides the debtor with goods during the § 503(b)(9) period is engaging in the same perilous exercise as a critical vendor. R. at 10. ("Although this case was approved pursuant to § 503(b)(9), one must acknowledge that the circumstances surrounding such payment mirror a critical vendor payment."). Furthermore, the Code makes clear that § 503(b)(9) creditors should be afforded an elevated post-petition status that is more concrete than the special protections sometimes afforded for critical vendors. *In re Commissary Ops., Inc.*, 421 B.R. at 878. Therefore, creditors with § 503(b)(9) claims should be afforded at least similar privileges as critical vendors by the courts.

Courts have also evaluated the effects of reclamation claims on a creditor's subsequent new value defense, finding that a creditor's right to reclaim goods it extends to the debtor bars the creditor from reducing its preference exposure on account of extending those goods. *In re Phoenix Rest. Grp., Inc. II*, 373 B.R. at 547; *see also* 11 U.S.C. § 546(c). Some courts have found fully funded § 503(b)(9) claims analogous to reclamation claims rather than critical vendor claims. [2] *In re TI Acquisition, LLC*, 429 B.R. at 384; *see also In re Circuit City Stores, Inc.*, 2010 WL 4596022, at *9. However, reclamation claims differ critically from § 503(b)(9) claims. Unlike critical vendors and § 503(b)(9) creditors, who provide the debtor goods on credit, creditors who supply debtors with goods subject to a reclamation claim have "kept strings on those goods." *In re Commissary Ops., Inc.*, 421 B.R. at 877. A creditor with a reclamation claim on the goods it supplies to the debtor can recover the goods at its option, either before or after the debtor's filing.

[2] These courts, however, conflate the issue of whether a particular mode of post-petition payment should prevent a creditor from reducing its preference exposure with the separate issue of whether a creditor's new value claim must "remain unpaid." The parties have stipulated that new value claims need not remain unpaid for use in a creditor's subsequent new value defense. R. at 10. It is therefore irrelevant whether a debtor has set aside funds in trust to satisfy a § 503(b)(9) claim or fully paid that claim for purposes of evaluating the subsequent new value defense.

In re TI Acquisition, LLC, 429 B.R. at 381. A § 503(b)(9) creditor has no similar assurances. First, a § 503(b)(9) creditor has no "lien on the goods" that provides a right "to demand the return of such goods" at any point. *Id.* Second, a § 503(b)(9) claim is "solely cognizable in bankruptcy" and eventually "vulnerable to nonpayment by an insolvent estate." *Id.* A reclamation claim is in a class of its own because of the protection it affords the creditor; § 503(b)(9) claims cannot be forced into the same mold.

ii. Courts Interpreting § 547(c)(4) Refuse to Recognize a Creditor's Post-Petition Provision of New Value for Purposes of the Subsequent New Value Defense.

Because courts have denied creditors the benefit of reducing their preference exposure on account of post-petition extensions of new value, a fair interpretation of § 547(c)(4) would also deny the trustee the benefit of clawing back post-petition payments to creditors for the benefit of the estate. There is a substantial body of caselaw holding that "a defendant in a preference action is not entitled to the benefit of new value provided to the bankruptcy estate after the petition date." *In re Murray, Inc.*, 2007 WL 5595447, at *2 (collecting cases). In light of this widely accepted principle, it would be nonsensical—and punitive—for this Court to hold that post-petition payments "remain in play" to reduce a creditor's subsequent new value defense when the creditor won't receive credit for any new value it extends to the debtor after the petition is filed. *Id.*

C. The Complementary Policies and Purposes of §§ 547(c)(4) and 503(b)(9) Require Limiting the Subsequent New Value Analysis to Pre-Petition Transfers

Sections 547(c)(4) and 503(b)(9) are complements, each enacted as safeguards for creditors who deal with financially troubled debtors. *In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009); *see Roberds, Inc. v. Broyhill Furniture (In re Roberds, Inc.)*, 315 B.R. 443, 463 (Bankr. S.D. Ohio 2004). Creditors will deal with unstable debtors on the brink of bankruptcy knowing that their interests are protected in both pre-petition transactions (through § 547(c)(4)) and post-petition priority (through § 503(b)(9)). Because these sections cooperate in achieving the

same overarching goal, this Court should not interpret § 547(c)(4) in a manner that defeats the post-petition benefits afforded by the interrelated § 503(b)(9). A holding that ignores the reciprocal benefits afforded by each of these sections at different points throughout the bankruptcy case essentially "force the creditor to choose between asserting a § 503(b)(9) claim and preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing." *In re Commissary Ops., Inc.*, 421 B.R. at 879. No matter what decision the creditor makes in the face of this dilemma, it loses one of its rights in bankruptcy. The threat of this loss would certainly chill creditors extending new value to entities on their "slide into bankruptcy." *In re Phoenix Rest. Grp., Inc. I*, 317 B.R. at 497.

The talismanic policy goals that underlie § 547's preference scheme are as follows:

> First, by permitting the trustee to avoid pre-bankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.

In re Friedman's Inc., 738 F.3d at 577. The preference avoidance scheme discourages creditors from circling the debtor at the first whiff of financial distress. Thus, the scheme promotes the debtor's chances for "rehabilitation" rather than bankruptcy. *In re N.Y.C. Shoes, Inc.*, 880 F.2d at 680 (discussing the Code's advancement of policies "avoiding unnecessary bankruptcies"). As a supplement to the preference avoidance scheme, the subsequent new value defense incentivizes creditors to continue dealing with debtors facing bankruptcy. *Prinate Consulting Grp., LLC v. Styron LLC (In re Newpage Corp.)*, 2014 WL 4948421, at *3 (Bankr. D. Del. Oct. 1, 2014).

Creditors who take a chance on the debtor are afforded protection for extending new value because that new value will benefit all creditors in the event the debtor files for bankruptcy. *Id.*

In bankruptcy, "some creditors are treated more equally than others." *In re Friedman's Inc.,* 738 F.3d at 560 ("If it is a rule in bankruptcy that all creditors must be treated equally, surely the exceptions swallow the rule."); *see also Primary Health Sys., Inc. v. Med. Mut. of Ohio (In re Primary Health Sys., Inc.)*, 257 B.R. 709, 709 (Bankr. D. Del. 2002). Some courts have found that a creditor permitted the full value of its § 547(c)(4) defense and an administrative claim under § 503(b)(9) improperly receives elevated treatment compared to fellow creditors. *In re Circuit City Stores, Inc.*, 2010 WL 4596022, at *9; *In re TI Acquisition, LLC*, 429 B.R. at 385. Congress, not the courts, decide which creditors should enjoy an elevated status based on calculated policy judgments. Congress made its intent clear in § 547(c)(4)'s legislative history by stating the provision "was not enacted to ensure equitable treatment of creditors, but rather . . . to encourage creditors to deal with troubled businesses." H.R. Rep. No. 595, at 1280 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6138.

Another criticism launched against allowing a creditor to enjoy its full subsequent new value defense—after payment of an administrative claim under § 503(b)(9)—is that the creditor is "double dipping" by taking advantage of both remedies. *In re Commissary Ops., Inc.*, 421 B.R. at 875. This criticism is faulty because it rests on an implication that the creditor is being paid twice or getting more than it gave. *In re Friedman's Inc.*, 738 F.3d at 559. Of course, this is rarely the case when creditors are providing goods to floundering debtors on credit. In this case, for instance, the debtor paid Touch of Grey for goods and services actually provided pre-petition. R. at 5. Touch of Grey received no windfall or overpayment. Furthermore, it is a mischaracterization to say that a payment pursuant to § 503(b)(9) depletes the bankruptcy estate. *In re Beaulieu Grp., LLC*, 616

B.R. at 875. The creditor's extension of new value "replenished the estate during the preference period, and therefore aided the debtor in avoiding bankruptcy to whatever extent possible." *In re Friedman's Inc.*, 738 F.3d at 559. Thus, the exchange serves the interest of *all* creditors in the event the debtor files bankruptcy.

II. THE THIRTEENTH CIRCUIT ERRED BECAUSE THE FULL MONTH'S RENT IS DUE AS AN OBLIGATION UNDER THE LEASE IN ACCORDANCE WITH THE TERMS OF § 365(d)(3)

Upon filing a bankruptcy petition, the trustee or debtor-in-possession (the "DIP") is saddled with all the obligations of the debtor as the case is administered. 11 U.S.C. § 323(a). The petition also creates an estate for the trustee to administer, which includes any interest the debtor has in property. *Id.* § 541(a)(1). As it relates to an unexpired lease for nonresidential real property, the trustee or DIP has the power to either assume or reject the lease. *Id.* § 365(a). In the post-petition, pre-rejection period, the plain text of the Code dictates a bright line billing date approach to the lease, requiring the trustee or DIP to pay in full all obligations due under the lease as they become due. *Id.* § 365(d)(3). Because § 365(d)(3) ensures that during this period, the debtor upholds the benefit of the bargain actually made with the landlord—not one the debtor wishes he made. Yet the Thirteenth Circuit depends entirely on the "spirit" of the Code to find ambiguity where none persists, ultimately adhering to an "accrual" theory and flouting the most basic tenets of statutory interpretation. *See* R. at 17. But Congress does not write spectral laws to be interpreted by Ghostbusters—it writes laws for the judiciary to interpret in their ordinary meaning.

Accordingly, obligations that come due under the terms of a lease for nonresidential real property in the post-petition, pre-rejection period must be paid in full for three critical reasons. First, the billing date approach is required by both the ordinary meaning of § 365(d)(3) and the proper application of the canons of interpretation, which clearly resolve the incorrect ambiguity

the Thirteenth Circuit forced onto the provision. Second, a majority of circuit courts hold that the billing date approach is the only reading compatible with the text. Third, the policy behind the amendment that added § 365(d)(3) to the Code was premised upon providing greater security to lessors, which is only accomplished by the billing date approach. Because the May 2020 rent became due under the lease during the post-petition, pre-rejection period, § 365(d)(3) requires the rent be paid in full. R. at 4.

A. The Billing Date Approach is the Only Textually Permissible Reading of § 365(d)(3)

In determining what a statute means, the starting point must always be the text. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the language proves unambiguous, the text is also where the quest for meaning ends. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This must be so since our system of governance consists of coequal branches; the role of the judiciary is strictly to interpret statutes—not to make them. *N.Y. Cnty. Nat'l Bank v. Massey*, 192 U.S. 138, 146 (1904). Further, congressional intent is evidenced only by the words passed into law as a result of legislative compromise. *Ron Pair Enters., Inc.*, 489 U.S. at 241. If Congress did not intend for its laws to mean what they are fairly read to mean, it is Congress's constitutional role alone to make any correction it deems necessary—regardless of what a particular judicial body may prefer. *Lamie*, 540 U.S. at 542. No matter the method by which § 365(d)(3) is given its fair meaning, the result is the same: The lease's billing date determines when obligations are due in full. As an initial matter, the ordinary meaning of § 365(d)(3)'s unambiguous language compels this result. Further, since the Thirteenth Circuit insists an ambiguity exists, the canons of interpretation mandate that pseudo-ambiguity be resolved in accordance with the billing date approach. Finally, the 1984 amendments to the Code were designed with the specific purpose of following the billing date approach.

i. The Ordinary Meaning of § 365(d)(3) Explicitly Requires Post-Petition, Pre-Rejection Obligations be Paid as they Become Due.

The guiding principle behind giving text its ordinary meaning is that the "legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Equally important is that "Congress intends the words in its enactments to carry their ordinary, . . . common meaning." *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 388 (1993) (internal quotation omitted). This Court directs that the Code's ordinary meaning should not be departed from without substantial justification. *Ron Pair Enters., Inc.*, 489 U.S. at 242. Section 365(d)(3) provides in part: "The trustee shall timely perform all the obligations of the debtor, . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3).

Quite sensibly, "obligation" in § 365(d)(3) bears its ordinary meaning. "Obligation" is not defined in the Code. *See id.* § 101. Black's Law Dictionary defines "obligation" as a "formal, binding agreement or acknowledgement of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp[ecially], a duty arising by contract." *Obligation*, *Black's Law Dictionary* (11th ed. 2019). In so doing, Black's Law Dictionary also cites "duty" as a synonym of "obligation," which is defined as a "legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right." *Duty*, *Black's Law Dictionary* (11th ed. 2019). These "obligations of the debtor" are those specified "under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). Clearly, an obligation as contemplated by § 365(d)(3) is any duty the terms of the lease impart upon the lessee, such as the duty to pay rent on the contractually determined basis.

Answering when those obligations under the lease must be paid is just as simple—paying them when they become due is the only answer if the "arising from" phrase is given its ordinary meaning. "Arising" is not defined in the Code. *See id.* § 101. Fortunately, it too has a simple definition. Black's Law Dictionary defines "arise" as "to originate; to stem (from)." *Arise*, *Black's Law Dictionary* (11th ed. 2019). Thus, the obligations must originate from something—but what? Clearly, in the context of the provision, the present participial phrase "arising from and after the order for relief under any unexpired lease" modifies those aforementioned "obligations" plainly into those duties *that originate from the lease's terms*. Since the obligations under the lease all become unmatured rights to payment upon execution, they only truly arise when the lease's terms render them matured. Otherwise, all obligations under the lease would be pre-petition claims. The only obligations § 365(d)(3) is concerned with are those that mature in the post-petition, pre-rejection window. Therefore, § 365(d)(3) compels the trustee or DIP to remain confined by the terms of the lease in that post-petition period until the lease is rejected

The final piece of § 365(d)(3)'s language requires the obligations be paid in full when the lease dictates they are due, regardless of how administrative expenses are otherwise paid out. The superordinating word "notwithstanding" of course means "despite; in spite of." *Notwithstanding*, *Black's Law Dictionary* (11th ed. 2019). The "notwithstanding" provision refers to § 503(b)(1) of the Code, which caps administrative expenses to those that are "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Since commas isolate the words between them, the "notwithstanding" provision specifically refers back to the initial language of § 365(d)(3): "The trustee shall timely perform all obligations of the debtor." *Id.* § 365(d)(3). Accordingly, § 365(d)(3) mandates that in spite of the § 503(b)(1) cap, the obligations due under the lease do not have their contractually agreed upon terms minimized. When § 365(d)(3) states

those obligations are paid "until such lease is assumed or rejected," it completely forecloses the possibility of reading "until" in a temporal and theoretical way that allows payment of only the portion of those obligations allocable to the actual time the estate used the property. Reading "until" as cutting off payment of the portion of obligations allocable to the post-rejection period is simply not allowed by § 365(d)(3)'s plain "notwithstanding section 503(b)(1)" language.

Putting it all together, § 365(d)(3) requires the trustee or DIP to perform all the lease's agreed upon duties that become due in the post-petition, pre-rejection period, no matter what the Code says about otherwise capping lease payments. The ultimate fallacy in any reading of § 365(d)(3) that imparts a misguided accrual theory onto the plain text can be shown with a simple analogy. Consider the following: "After I get home, I will pay all the bills that anyone places on the kitchen table until I leave." Quite sensibly, this means that when I get home, I will pay whatever bills are put on the kitchen table while I am home—but once I leave, I will stop paying bills. This cannot be read as "After I get home, I will pay the portion of the bills I can attribute to the time between when I walked through the front door and out the back." Similarly, reading § 365(d)(3) as requiring anything other than performing obligations as they become due pre-rejection requires a court to assume Congress wanted something other than what the words it passed into law mean, presumably by utilizing a congressional crystal ball to find the hidden meaning behind clear text. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370 (1925) (internal quotation marks omitted).

ii. The Canons of Interpretation Show § 365(d)(3) Requires Following the Billing Date Approach.

The ordinary meaning of § 365(d)(3) is clear and evident, yet the Thirteenth Circuit erroneously took an outcome-oriented approach and insisted that § 365(d)(3) is ambiguous. *See* R. at 17–18. Even if a statute is "awkward" and "ungrammatical," that alone is not enough to deem it ambiguous. *Lamie*, 540 U.S. at 534. When an ambiguity is forced onto plain text, it may be assumed—without conceding—that there is an ambiguity, only to allow use of the canons of interpretation to resolve the alleged ambiguity. *See King v. Burwell*, 576 U.S. 473, 500–01 (2015) (Scalia, J., dissenting).

The trick to using the canons lies in knowing which are the most appropriate, while remembering the words of the text are the paramount concern. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 56 (2012). Here, the text must first be observed with the presumption that consistent wording mandates consistent meaning, and a change in wording requires a change in meaning. *Cohen v. De La Cruz*, 523 U.S. 213, 220 (1998). When some readings attempt to enlarge the text, the omitted-case canon states that matters not covered should be treated as not covered. *See Lamie*, 540 U.S. at 538. In understanding the text's structure, the grammar canon gives words the meaning required by proper grammar and usage, and it couples well with the punctuation canon, which permits punctuation as an indicator of meaning. *See Ron Pair Enters., Inc.*, 489 U.S. at 241–42. After examining the singular provision, the whole-text canon requires courts to read a provision within the context of the full Code. *Mont v. United States*, 139 S. Ct. 1826, 1833–34 (2019). All the while, the surplusage canon states that whenever possible, every word and provision should be given effect, and the canon is at its apex when interpreting pieces of the same statutory scheme. *Marx v. Gen Revenue Corp.*, 568 U.S. 371, 386 (2013). Together, these canons resolve the alleged ambiguities in favor of the text's clear billing date approach.

Because Congress chose the ordinary legal term "obligations" instead of the Code's defined terms of "claim" or "debt," the presumption of consistent usage is overcome, instead instructing that a change in wording requires a change in meaning. The Code defines "claim" as a "right to payment" or a "right to an equitable remedy for breach of performance." 11 U.S.C. § 101(5). Next, the Code says that a "debt" is a "liability on a claim." *Id.* § 101(12). Congress knows what both of those terms mean and is purposeful on when and how it uses them. In fact, § 365 itself uses "claim" twice, but purposefully not in § 365(d)(3). *See id.* §§ 365(n)(2)(C)(ii), 365(o). The lack of consistent usage requires a change in terms ("obligations") to come with a change in meaning from "claim" or "debt." The jurisprudence on when a claim arises is of no use on this point (and besides, § 365(d)(3) is concerned only with the date on which obligations arise *under the lease's terms*). Further, since "claim" is the operative word in the Code's definition of "debt," the two should be read together. Yet those terms have a clear distinction: Creditors have claims while debtors have debts. If § 365(d)(3) required the trustee to "timely perform all the *debts* of the debtor," then paying only those portions of the liability that theoretically accrued would be vaguely justifiable. But it does not say that. Since "obligation" has a clearly defined legal meaning that is wholly separate from the Code's definitions of "claim" and "debt," the lack of consistent wording requires giving "obligation" its ordinary legal meaning.

There is no carveout in § 365(d)(3) for portions of obligations allocable to the post-rejection period, and the omitted-case canon prevents courts from adding words to a statute it does not contain, lest they subsume the role of Congress. The omitted-case canon prevents courts from adding to a statute words that are not in it, such that matters not covered by the statute are simply not covered. *See Lamie*, 540 U.S. at 538. Passing words into law is a job strictly for Congress. *See* U.S. Const. art. 1. When § 365(d)(3) requires the trustee or DIP to "timely perform all the

obligations of the debtor," it states no distinction for when those obligations are or are not entirely allocable to the post-petition, pre-rejection period. Reading that distinction into the statute requires either explicit addition of an unstated exception (i.e., "all the obligations of the debtor, *except those portions allocable to the post-rejection period*") or doing backflips to misinterpret the plain text.

The grammar and punctuation canons disallow the backflips of misconstruction, such that the terms of § 365(d)(3) cannot be read to mean what their structure disallows. Commas isolate. In this instance, the present participial phrase beginning with "arising from" is set off with commas and serves two important roles. First, it modifies what "obligations" § 365(d)(3) is concerned with by delineating a timetable—those obligations "arising from and after the order for relief under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). Second, it restrains itself by requiring "arising" to be understood only in context of the words that follow before the next comma. Appropriately, then, the obligations "arising" are limited to those "from and after the order for relief *under any unexpired lease of nonresidential real property*." *Id.* The text mandates the lease's terms determine *what* obligations arise and *when* they arise. Interpreting "arise" all on its lonesome may lead one to theorize that obligations only "arise" piece-by-piece with each passing second of the clock. But that is not the reading permitted by the clear grammatical structure of § 365(d)(3). Further, regardless of if the adverbial phrase "until such lease is assumed or rejected" is read as modifying "obligations" or the "arising from" phrase, the result is the same since the "arising from" phrase cannot be decoupled from its modification of "obligations" in the first place: "Perform obligations *arising under the lease until rejection*" and "*Until rejection, perform obligations* arising under the lease" mean the same thing.

While the whole-text canon requires reading § 365(d)(3) alongside other provisions, § 365(d)(3) serves a distinct role in the structure of the Code, and other provisions do not restrain

its scope. Section 365(d)(3) is concerned only with the period of time post-petition but pre-rejection. *Id.* That is different than other provisions of the Code. For instance, if the lease is rejected, § 365(g) gives the lessor a breach of contract claim effective as of the date before filing the petition. *Id.* § 365(g). Section 502(g) treats post-rejection damages as general unsecured claims, and § 502(b)(6) places a cap on a lessor's § 502(g) post-rejection damages claim. *Id.* §§ 502(b)(6), 502(g). Sections 365(g), 502(g), and 502(b)(6) are distinct in the most obvious way: Those provisions are concerned strictly with damages *post*-rejection, while § 365(d)(3) is concerned solely with the window after petition but *pre*-rejection. That post-rejection damages claims are subject to a cap and are only general unsecured claims in no way changes the plain text of § 365(d)(3). If anything, the limitation on damages from the rejection and resulting placement in the creditor line ought to show the heightened importance of § 365(d)(3)'s bright line billing date approach to prevent lessees from shirking the lease's obligations before rejecting it. Finally, if those three sections were to restrain § 365(d)(3)'s meaning, then the "timely perform" language in § 365(d)(3) would be rendered surplusage since there would be nothing for the trustee to perform if the § 365(d)(3) obligations were prorated and only unsecured claims.

Another provision of the United States Codes requires trustees to "manage and operate the property in his possession as such trustee . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b). Absent any state law that permits changing contractually agreed upon rental obligations into piecemeal daily or even hourly rent obligations, an accrual theory has no legal footing. The trustee must abide by the private law created between lessor and lessee and pay obligations as they become due under the lease. All in

all, nothing in the Code requires giving § 365(d)(3) anything other than its ordinary meaning, and any reading attempting to do so inevitably causes intra-Code conflict.

iii. The Statutory History Proves § 365(d)(3) Embodies the Billing Date Approach.

One final point on § 365(d)(3)'s clear and purposeful language merits discussion: It was not added to the Code until 1984, and its addition changed the law on this subject. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Prior to 1984, lessors were burdened with proving to the estate that they provided an actual and necessary expense. *See In re Telesphere Commc'ns, Inc.*, 148 B.R. 525, 531–32 (Bankr. N.D. Ill. 1992). At that point, lessors only received a prorated amount in line with the accrual theory. *Id.* The 1984 amendment to the Code expressly changed that, totally abrogating the then-correct proration payment so that lessors were better protected and received the full payment for obligations in the lease as they became due. *In re Comdisco, Inc.*, 272 B.R. 671, 675 (Bankr. N.D. Ill. 2002). Proving those obligations are actual and necessary to preserve the estate is no longer necessary and is foreclosed by § 365(d)(3)'s "notwithstanding" provision. 11 U.S.C. § 365(d)(3). "[I]t is for Congress, not this Court, to make the rules. Reading a proration requirement into § 365(d)(3) . . . would be the same as reading § 503(b)(1) into it and would directly violate the Congressional dictate." *In re Comdisco, Inc.*, 272 B.R. at 675. Appropriately, then, § 365(d)(3) must fully embody the bright line billing date approach, lest Congress's amendment be for naught.

B. Circuit Courts Continuously Hold § 365(d)(3) Explicitly Requires Following the Billing Date Approach

Virtually every court called upon to determine whether § 365(d)(3) requires rent obligations be paid in full when they become due in the post-petition, pre-rejection period has answered that question with a resounding "Yes." *See Burival v. Roehrich (In re Burival)*, 613 F.3d 810, 812 (8th Cir. 2010); *HA-LO Indus., Inc. v. CenterPoint Props. Tr.*, 342 F.3d 794, 800–01 (7th

Cir. 2003); *In re Cukierman*, 265 F.3d 846, 853 (9th Cir. 2001); *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 990 (6th Cir. 2000); *see also Paul Harris Stores, Inc. v. Mabel L. Slater Realty Tr.*, 148 B.R. 307, 313 (Bankr. S.D. Ind. 1992) (compiling twenty-two cases from twenty-two jurisdictions in accord). These results are correct for a number of reasons. First, the billing date approach is the "most natural reading of § 365(d)(3)." *In re Krystal Co.*, 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996). Second, the policy behind § 365(d)(3) is clearly meant to provide greater protection to lessors. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 211. Third, applying the bright-line rule allows for consistency in bankruptcy administration. *In re Cukierman*, 265 F.3d at 851.

"The plain and unconditional language of [§ 365(d)(3)] demands that a trustee promptly pay the full amount of rent due under a nonresidential real property lease during the . . . period pending assumption or rejection." *In re Pac.-Atl. Trading Co.*, 27 F.3d 401, 404 (9th Cir. 1994). The language places the ball in the trustee's court; until a slam-dunk rejection, the time spent idly dribbling is costly and cannot freeze the shot-clock. Since the language of § 365(d)(3) is clear and unambiguous, any attempt to reduce the obligations due under the terms of the lease must rely solely on § 503(b)(1), which § 365(d)(3) plainly excepts. *See In re Burival*, 613 F.3d at 812. Obviously, the "notwithstanding § 503(b)(1)" provision must mean "factors such as fair market value, extent of occupation, and benefit to the estate [are] considered irrelevant in computing the amounts owed." *See Paul Harris Stores, Inc.*, 148 B.R. at 313. Given that those considerations are meritless by § 365(d)(3)'s own terms, the proration approach completely lacks a textual leg to stand on. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 209.

The only way to abide by § 365(d)(3)'s terms is to "look to the terms of the lease to determine both the nature of the 'obligation' and when it 'arises,'" so it follows that the trustee must "perform the lease *in accordance with its terms*." *Id.* (emphasis added). The text does not present a different outcome when some of the payment is allocable to the post-rejection period, and there is no difference. "That the obligation relates to a future event does not mean that it does not arise *immediately*." *In re Comdisco, Inc.*, 272 B.R. at 676 (emphasis added). This must remain true even in situations where the lease is rejected shortly after the lease's terms obligate the payment of rent. Courts have held the clear language of § 365(d)(3) still wins the day, even when the lease is rejected *one day* after payment is due. *See HA-LO Indus., Inc.*, 342 F.3d at 798; *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988.

Section 365(d)(3) enforces a policy that helps provide stability to lessors in the form of payments due during the narrow post-petition, pre-rejection window, which was a purposeful departure from prior practice. Payment of obligations under § 365(d)(3) "is not designed to preserve the estate," but "rather the vulnerable landlord." *In re Krystal Co.*, 194 B.R. at 163. The 1984 amendment shifted the "burden of indecision to the debtor." *Id.* at 164. And since "Congress made the provision for trustee compliance broad," it can only be understood as ensuring "immediate payment of lease obligations so that the landlord is not left providing uncompensated services." *In re Cukierman*, 265 F.3d at 851. Rejection of a lease ostensibly acts as a sword that slices all future obligations under that lease into a general unsecured claim. *See* 11 U.S.C. §§ 365(g), 502(b)(6), 502(g). The role of § 365(d)(3) is to provide a shield for lessors to receive the full obligations due under the lease before rejection—reading § 365(d)(3) any other way turns the shield into dust and Congress's democratically enacted law into a suggestion.

Some courts erroneously distort "arising" to overcome § 365(d)(3)'s intended effect. *See, e.g.*, *El Pase Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 69–70 (B.A.P. 10th Cir. 2012). But "[c]ourts adopting the accrual theory believe this ["arising"] language allows them to adhere to pre-1984 (pre-section 365(d)(3)) practice of prorating." *In re Krystal Co.*, 194 B.R. at 163. Congress clearly changed the law. Further, trying to imbue high-level theory into the simple word "arises" is a job better suited for the academy—it is a squabble inappropriate for the everyday practitioner on the front lines of the case. Some courts also incorrectly allow proration when it comes to taxes, resulting in other courts stretching those holdings to apply to rent obligations. *See, e.g.*, *Child World, Inc. v. Campbell/Mass. (In re Child World, Inc.)*, 161 B.R. 571, 576 (S.D.N.Y. 2004). But again, § 365(d)(3) makes no difference when obligations are rent or taxes, and writing the distinction into the text is clear error. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 212 ("[T]here is no basis in the text for distinguishing [taxes] from rent and numerous other obligations of tenants."). As a bright line, § 365(d)(3) cuts both ways; neither the fact that a lessor will benefit in some situations and a lessee benefit in others is enough to alter § 365(d)(3). *See Wolas*, 502 U.S. at 158 ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

A bright-line rule brings consistency that is necessary to administering the bankruptcy estate. Interpreting § 365(d)(3) as such is imperative, as "bankruptcy trustees must know which lease obligations they are required to perform in a timely fashion." *In re Cukierman*, 265 F.3d at 851. The simplicity required by the statute ultimately greatly helps resolve bankruptcy cases expeditiously. *See In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991). Without clarity in this area of the law, disputes regarding the innerworkings of a

proration theory will arise: "Acting either in good-faith uncertainty about the contours of such a rule or in a bad-faith effort to evade their contractual responsibilities, trustees would have an incentive to withhold performance of lease obligations." *In re Cukierman*, 265 F.3d at 851. Clearly, all signs point toward the billing date approach as the only one consistent with the text and the overwhelming majority of case law.

C. Only the Billing Date Approach Aligns with the Purposeful Policy and Congressional Intent of § 365(d)(3)

Landlords are in a particularly vulnerable position with their tenants who file bankruptcy, as whatever rights the landlord under the lease or applicable law are irrelevant once the lessee files his petition. *See HA-LO Indus., Inc.*, 342 F.3d at 799. Landlords cannot evict their bankrupt tenants, and unlike other creditors, landlords may only deal with the debtor based on the terms imposed by the court. *See Robinson v. Chi. Hous. Auth.*, 54 F.3d 316, 317–18 (7th Cir. 1995). The post-petition, pre-rejection period imposes an awkward twilight zone that the landlord must navigate. *See HA-LO Indus., Inc.*, 342 F.3d at 799. But in that twilight zone, before totally escaping to another dimension via rejection, landlords are accorded their expected payments due under the lease because of § 365(d)(3). Otherwise, landlords must extend credit to the estate during that period. *In re Telesphere Commc'ns, Inc.*, 148 B.R. at 529. Because it is sound policy to give that certainty to the heavily constrained landlord, "[v]irtually all courts have agreed that [the 1984 amendment] was intended to alleviate" some of the landlord's burdens. *In re Montgomery Ward Holding Corp.*, 268 F.3d at 210.

The legislative history regarding § 365(d)(3)'s addition to the Code is sparse, but it speaks volumes and quiets any debate over its purpose. Senator Orrin Hatch made the principal statements on the matter, noting a few critical points. First, § 365(d)(3) is meant to remedy the problem landlords face when "forced to provide current services—the use of property, utilities, security,

and other services—without current payment. No other creditor is put in this position." 130 Cong. Rec. S8887, 8895 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S.C.C.A.N. 5762. Additionally, "a second and related problem is that during the time the debtor has vacated [the] space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease." *Id.* Quite erroneously, some courts impart hyper-literalism onto Senator Hatch's use of the word "current," finding that this singular word in a discussion overrides § 365(d)(3)'s text, allowing them to ignore the amendment and keep applying a proration theory. *See, e.g.*, *In re Furr's Supermarkets, Inc.*, 283 B.R. at 66–67. Clearly, the landlords are at the front and center of § 365(d)(3)'s purpose, and Senator Hatch's statements show the provision is meant to bring a clear departure from the proration theory commonly applied by courts at the time.

Second, § 365(d)(3) is meant to remedy the problem of lessees avoiding their obligations under the lease in that post-petition, pre-rejection period. In Senator Hatch's words, "the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor." Cong. Rec. S8887, 8895 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S.C.C.A.N. 5762. When the lease's terms remain in effect during that period, this problem is avoided. The policy plainly enacted by § 365(d)(3) is therefore meant to not only provide stability to landlords and remedy the issues created by the uneasy alliance the landlord and bankrupt lessee find themselves in, but also to help ensure other tenants are not forced to carry the bankrupt lessee's burden.

CONCLUSION

A decision limiting the subsequent new value analysis to the preference period is the only correct holding; such a decision would comport with § 547(c)(4)'s ordinary meaning, align with

the disposition of other post-petition payments in bankruptcy, and promote the flow of credit to debtors in financial straits. Additionally, holding the full month's rent is due under the billing date approach is the only way to abide by the plain terms of § 365(d)(3), provide consistency with the overwhelming majority of caselaw, and carry out the statute's purposeful policy. Therefore, this Court should reverse the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 503. Allowance of Administrative Expenses.

. . .
(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate including—

. . .

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

. . .

11 U.S.C. § 547. Preferences.

. . .
(c) The trustee may not avoid under this section a transfer—

. . .

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

. . .

11 U.S.C. § 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

. . .

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

. . .

(3)(A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period, except as provided in subparagraph (B). This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section.

Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(B) In a case under subchapter V of chapter 11, the time for performance of an obligation described in subparagraph (A) arising under any unexpired lease of nonresidential real property may be extended by the court if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic until the earlier of--

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; or

(ii) the date on which the lease is assumed or rejected under this section.

(C) An obligation described in subparagraph (A) for which an extension is granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).

. . .