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 17
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a seller of goods is entitled to reduce its preference exposure pursuant to 11 U.S.C. §547(c)(4) by the value of goods sold even though the debtor in possession paid for such goods in full pursuant to 11 U.S.C. § 503(b)(9)?

II. Whether a trustee must timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) by paying rent due prior to the rejection of an unexpired non-residential real property lease but allocable to the period after the effective date of rejection?

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot ruled for Casey Jones (the "Trustee") as the chapter 7 trustee for the bankruptcy estate of Terrapin Station, LLC (the "Debtor") and against Touch of Grey Roasters, Inc. ("Touch of Grey") on both issues on appeal. (R. at 3). Specifically, the court held that: (1) the creditor, Touch of Grey, was not entitled to reduce its preference exposure pursuant to 11 U.S.C. §547(c)(4) by the value of goods that it sold to the Debtor during the twenty days prior to the commencement of the case because the Debtor in possession paid for such goods in full postpetition pursuant to 11 U.S.C. § 503(b)(9); and (2) the creditor, Touch of Grey, as landlord over the Debtor's lease in an unexpired non-residential real property lease, was not entitled to rent due under the lease after the monthly rent was due, but prior to the effective date of rejection under 11 U.S.C. § 365(d)(3). *Id.* The United States District Court for the District of Moot affirmed on both issues. *Id.* Likewise, the United States Court of Appeals for the Thirteenth Circuit affirmed on both issues. This Court then granted certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 365(a) reads, in pertinent part, as follows:

> **(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.

11 U.S.C. § 365(d)(3) reads, in pertinent part, as follows:

(3) 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.

11 U.S.C. § 503(b)(9) reads, in pertinent part, as follows:

(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(c)(4) reads, in pertinent part, as follows:

(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;

STATEMENT OF THE CASE

This appeal arises out of the Trustee's wrongful attempt to limit Touch of Grey's right to retain preferential payments that are subject to a valid new value defense, and the Trustee's wrongful attempt to limit Tough of Grey's right to be paid its postpetition rent claim. The Court should reverse the court below as requested herein.

I. Statement of the Facts

The Debtor, a local coffeehouse, was founded by William Tell in 2005. Touch of Grey is an international coffee company, with over 1,900 corporate-owned and franchised coffeehouses. The Debtor became a franchisee of Touch of Grey in 2018. The franchise agreement between the parties required the Debtor to purchase products from Touch of Grey and otherwise comply with the obligations of a Touch of Grey franchisee. In addition to the franchise agreement, the Debtor and Touch of Grey entered into a twenty-five-year Lease Agreement (the "Lease") for a new location. Under the Lease, the Debtor was required to pay rent on the first of day of each month.

Despite early success, the Debtor struggled throughout 2019. By September, it was unable to pay its debts as the came due but remained current on its rent obligations. On December 5, 2019, Touch of Grey sent the Debtor a notice of default partially due to $700,000 in unpaid invoices for products that Touch of Grey sold to the Debtor. On December 7, 2019, the parties entered into a forbearance agreement under which Touch of Grey agreed to forbear from terminating the franchise agreement, in exchange for: (i) a payment of $250,000 from the Debtor to satisfy in part the outstanding invoice, (ii) reaffirmation of its rent obligations under the lease, and (iii) a release of any claims or cause of action against Touch of Grey. The Debtor made the $250,000 payment to Touch of Grey the same day. Touch of Grey and the Debtor continued to do business during the 90 days prior to the Petition Date (the "Preference Period") in an effort to avoid termination of the

franchise agreement. Following the Debtor's $250,000 payment, and during the Preference Period, Touch of Grey sold the Debtor an additional $200,000 worth of products.

The Debtor commenced its bankruptcy case on January 5, 2020 (the "Petition Date"). After the Petition Date, the Debtor obtained permission from the Bankruptcy Court to make a $200,000 payment pursuant to Section 503(b)(9) to Touch of Grey for prepetition products. On May 5, 2020, when reorganization efforts failed, the Debtor ceased operations.

II. Procedural History

At a hearing on May 29, 2020, the Debtor announced its intention to convert from a chapter 11 to a chapter 7 case under the Section 1112(a) of the Bankruptcy Code. The bankruptcy court entered an order converting the case and appointing the chapter 7 Trustee for the Debtor's estate. At the same hearing, the bankruptcy court granted the Debtor's motion to reject the lease and franchise agreements, effective as of May 5, 2020. The court did not rule on Touch of Grey's pending motion to compel payment of the May rent, but instead issued an order requiring additional briefing on the issue.

Following this hearing, the Trustee objected to Touch of Grey's motion to compel payment of the entirety of rent owed for May, arguing that such relief was inequitable because of the brief time that the Debtor occupied the premises. The Trustee also commenced an adversary proceeding against Touch of Grey pursuant to Section 547(b) to recover the $250,000 payment that Terrapin Station made to Touch of Grey during the Preference Period.

Touch of Grey answered, asserting that it was entitled to reduce any preference exposure by the $200,000 in goods that it sold to the Debtor pursuant to Section 547(c)(4). In lieu of litigation, the parties attempted resolve their disputes through mediation, to no avail. At a July 23, 2020, status conference, the parties stipulated that they would file cross-motions for summary

judgment since the subsequent new value dispute was purely a legal issue. The parties also stipulated to hold a hearing on Touch of Grey's request for payment of the May rent at the same time as the summary judgment hearing.

After briefing and oral argument, the bankruptcy court ruled in favor of the Trustee on both issues. On the issue of the rejection damages, the court ruled that Section 365(d)(3) only required the Debtor to pay rent for the days it occupied the premises and granted Touch of Grey an administrative expense in the amount of $4,032.26.

In the adversary proceeding, the court found in favor of the Trustee and entered a judgment in the amount of $250,000. The court held that Touch of Grey could not use the value of goods as new value to reduce its preference exposure because the Debtor paid for the goods postpetition. Touch of Grey appealed the bankruptcy court's order.

Touch of Grey timely appealed both decisions to the United States District Court for the District of Moot. The district court affirmed on both issues. Thereafter, Touch of Grey timely appealed to the United States Court of Appeals for the Thirteenth Circuit. The Circuit Court affirmed the decisions of the bankruptcy court. Thereafter, Touch of Grey petitioned this Court for a writ of certiorari to the Circuit Court. This Court granted Touch of Grey's petition.

III. Standard of Review

This Court reviews interpretations of the Bankruptcy Code *de novo*. *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1338 (11th Cir. 2017); *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 28 (2014).

SUMMARY OF THE ARGUMENT

The Circuit Court erred by ruling for the Trustee on both issues. First, the Circuit Court erred in concluding that post-petition payments made pursuant to 11 U.S.C. §503(b)(9) constitute

"otherwise unavoidable transfer." Second, the Circuit Court erred by applying the "proration" method to determine the debtor's obligations prior to rejection under 11 U.S.C. § 365(b)(3). Accordingly, the judgment below should be reversed.

Regarding the first issue, Section 547(c)(4) allows a creditor to reduce preference exposure by new value against a previously received preference if the debtor does not pay for the new value with an "otherwise unavoidable transfer." The Circuit Court's conclusion that post-petition payments made pursuant to Section 503(b)(9) constitute "otherwise unavoidable transfers" which remove the value of the underlying goods from the subsequent new value defense falls flat considering the text, context, and policy goals of the Bankruptcy Code. Under the Circuit Court's holding, the Debtor's estate receives a double recovery, and the creditor suffers a double loss.

Section 503(b)(9) was enacted to shield trade creditors who so frequently have been burned in bankruptcy by debtors who purchase goods when bankruptcy is imminent and that payment for the goods will not be tendered. Administrative expenses pursuant to Section 503(b)(9) are simply pre-petition unsecured claims that were granted priority in payment pursuant to the statute as amended by BAPCPA and, as a result, are frequently paid in full. The fact that a trade creditor, like Touch of Grey, happens to get paid post-petition pursuant to Section 503(b)(9) for pre-petition new value does not negate the fact that it acted to provide assistance to a distressed debtor. It is incorrect to interpret the subsequent new value defense in Section 547(c)(4) in a manner that would result in Section 503(b)(9) being used as a sword against such creditors.

The potential for a double loss discourages creditors from transacting business with distressed entities and frustrates the purpose of Section 547(c)(4). If creditors are forced to choose between asserting an administrative expense and preserving its right to assert its full new value defense, they will cease to do business with their customers that fall on hard times. This will only

propel troubled companies into bankruptcy more quickly, frustrating the very purpose of the new value defense.

The issue regarding post-petition payments and the new value defense is one that continues to divide courts. The Circuit Court rests its reasoning on a single case that does not concern post-petition payments. But the growing majority of courts that have considered this issue have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense. This Court should analyze, interpret, and apply Section 547(c)(4) as written, in context, and in a manner that accurately reflects Congressional intent.

Regarding the second issue presented to this Court, the Circuit Court erred by applying the "proration" approach to determine the Debtor's obligations prior to rejection under 11 U.S.C. § 365(d)(3). The interpretation of any statute begins with the language of the statute itself and, in this case, the language of the statute plainly and unambiguously supports usage of the "billing date" approach. The language of § 365(d)(3) reads, in pertinent part, as follows: "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."

Here, the Debtor's obligation in question is rent due under an unexpired commercial (nonresidential) lease agreement. According to the terms of the Lease entered into by the parties, rent is to be due in full at the beginning of each month so that the landlord will receive full rent in advance. Under the Lease, the full amount of rent for the month of May became due on May 1, 2020. The Debtor rejected the Lease on May 5, 2020. The language of § 365(d)(3) plainly states that the landlord (in this case, Touch of Grey) is entitled to the full amount of the Debtor's obligations under the Lease. The full month's rent that became due on May 1, 2020 is one of these

obligations. The language of the statute alone settles this issue in Touch of Grey's favor and the Court need not inquire further.

Additionally, although the plain language of the statute itself is enough to reverse the Circuit Court's decision, both the statutory and legislative history of § 365(d)(3) support usage of the billing date approach. Section 365(d)(3) was enacted by Congress to ease commercial landlord's concerns about the lack of a "temporal boundary" and the lack of a requirement of payment until the rejection of the lease under § 365(a). The enactment of § 365(d)(3) addressed both of these concerns and was primarily enacted to be favorable to commercial landlords.

In addition, the little legislative history on § 365(d)(3) that exists supports usage of the billing date approach. The sole legislative history comes from Senator Hatch and repeats the language of the statute while expressing Congress' desire to alleviate the concerns of commercial landlords by requiring debtors to pay the full amount of their rent obligations that become due under the lease prior to the time of rejection.

Lastly, equitable concerns of fairness are remedied through adoption of the billing date approach. By utilizing freedom of contract, the parties to a nonresidential lease can protect their interests by negotiating when rent is to become due under a lease agreement. The billing date approach ensures that the knife can "cut both ways" as landlords may pay the price of a lease agreement that allows rent to be due at the end of each month.

Accordingly, the Circuit Court's decision should be reversed.

ARGUMENT

The Circuit Court erred by ruling for the respondent on both issues. First, the Circuit Court erred by ruling that Touch of Grey is not entitled to reduce its preference exposure by the value of the goods paid pursuant to 11 U.S.C. § 503(b)(9). Second, the Circuit Court also erred by applying

the "proration" method to determine the rent Touch of Grey was owed prior to rejection under 11 U.S.C. § 365(b)(3).

First, Section 547(b) allows a trustee to avoid a preferential transfer of an interest in the debtor's property to a creditor if the trustee can demonstrate, among other things, that the transfer was made on or within ninety days before the petition date. *See* 11 U.S.C. § 547(b), (g). In practice, when a debtor makes a payment to a creditor shortly before its bankruptcy filing, the payment results in such creditor, like Touch of Grey, being preferred over other creditors who did not receive a payment. But a trustee's ability to avoid a preferential transfer under Section 547(b) is limited by the defenses available to creditors under Section 547(c).

Under Section 547(c)(4) a creditor can offset new value against prior preference payments when, in relation to the 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 Court must inquire as to whether the Debtor's payment to the creditor was an otherwise unavoidable transfer. "The double negative in § 547(c)(4)(B) is unnecessarily confusing but the statute means that the new value defense is available, despite payment, if the payment was an avoidable transfer, *i.e.*, preference or fraudulent transfer." *Musicland Holding Corp. v. Best Buy Co., Inc.*, (*In re Musicland Holding Corp.*), 462 B.R. 66, 71 (Bankr. S.D.N.Y. 2011). The Circuit Court erred due to their unwillingness to recognize the holding of the growing majority of courts: "where an otherwise unavoidable transfer is made after the filing of a bankruptcy petition, it does not affect the new value defense." *Friedman's Liquidating Tr. v. Roth Staffing Cos., LP* (*In re Friedman's Inc.*), 738 F.3d 547, 549 (3d Cir. 2013).

When determining whether the language of a statute is plain and unambiguous, a court should begin their analysis by reading the language of the statute. The statute must be read as a

whole, since the meaning of statutory language, plain or not, depends on context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Circuit Court attempts to take the text of Section 547(c)(4) out of context to fit its flawed reasoning. But as the Supreme Court continues to recognize, "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used...." *See id*.

I. The plain language of Section 547(c)(4) closes the preference window at the filing of the petition, limiting the Section 547(c)(4) defense to new value supplied and payments made prepetition.

The plain language of Section 547(c)(4) creates a temporal requirement by closing the preference window at the petition date and limiting the Section 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy. *See Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC* (*In re Phoenix Rest. Grp., Inc.*), 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004). In the absence of explicit statutory pronouncement, very few courts have held that preference analysis need not be cut off at the petition date, but the court in *In re Quantum Foods LLC* recognized that "none of these courts has made a convincing contextual argument and the law and reasoning in favor of confining preference calculations to the preference period is sufficiently weighty." *See Off. Comm. of Unsecured Creditors v. Tyson Foods, Inc.* (*In re Quantum Foods, LLC*), 554 B.R. 729, 733 (Bankr. D. Del. 2016).

"The filing of a bankruptcy petition is understood to be a fundamental demarcation point between two different entities: (a) the debtor, and (b) the trustee/debtor in possession." (R. at 23) (Weir, J., dissenting). The ability to assert a Section 503(b)(9) claim only arises after the filing of the bankruptcy petition. *See Commissary Operations, Inc. v. Dot Foods, Inc.* (*In re Commissary Operations, Inc.*), 421 B.R. 873, 877 (Bankr. M.D. Tenn. 2010). "In fact, at the time the goods are

shipped to the debtor, the claimant does not even know it is shipping within the 11 U.S.C. § 503(b)(9) period." *Id*. "The term "new value," as used in § 547(c)(4), is a specific defense to a preference claim and only has meaning or applicability in the context of a preference analysis which, as articulated by the Third Circuit, is limited to the preference period." *In re Quantum Foods, LLC*, 554 B.R. at 733. It makes no sense to refer to any claim arising outside of the preference period as a new value defense, because this defense necessarily involves pre-petition activity. *See id*. Juxtaposition of the term "post-petition" and the term "new value defense" is incongruous. *See id*.

Additionally, many courts addressing the issue have agreed with the Eighth Circuit's conclusion that the specific words in the text of § 547(c)(4) — "new value to or for the benefit of the debtor" — "imply that subsequent advances of new value are only those given pre-petition, because any post-petition advances are given to the debtor's *estate*, not to the debtor." *Zayler v. Miken Oil, Inc.,* (*In re Slamdunk Entrs., Inc.*), 2021 WL 389081 at * 28 (Bankr. E.D. Tex. Jan. 29, 2021); *see also Bergquist v. Anderson–Greenwood Aviation Corp.* (*In re Bellanca Aircraft Corp.*), 850 F.2d 1275, 1284 (8th Cir. 1988). "As such, goods that are paid for post-petition pursuant to Section 503(b)(9) actually remain unpaid by "the debtor" for purposes of calculating the Section 547(c)(4) new value defense." (R. at 23) (Weir, J., dissenting). The Third Circuit also asserts this reasoning.

Most recently a court out of the Fifth Circuit explained that "the vast majority of courts that have considered this issue have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense." *In re Slamdunk Entrs., Inc.*, 2021 WL 389081 at *28; *see also Burtch v. Prudential Real Estate & Relocation Servs.* (*In re AE Liquidation, Inc.*), 729 Fed. App'x 153, 156 (3rd Cir. 2018); *Wiscovitch-Rentas v. PDCM Assocs.*

(*In re PMC Mktg. Corp.*), 518 B.R. 150, 157 (B.A.P. 1st Cir. 2014) ("Although the United States Court of Appeals for the First Circuit has not weighed in on this issue, an "emerging trend" among other courts,…is that "the new value defense is available, despite payment, if the payment was an avoidable transfer."); *Rice v. Hill & Hill Farms P'ship* (*In re Turner Grain Merch., Inc.*), 596 B.R. 49, 72 (Bankr. E.D. Ark. 2018) ("advances of new value must have been made prepetition."); *Dery v. Karafa* (*In re Dearborn Bancorp, Inc*.), 583 B.R. 395, 429 (Bankr. E.D. Mich. 2018); *In re Graves*, 2012 WL 4026811 at * 2 (Bankr. M.D.N.C. 2012) ("[P]ost-petition goods or services provided to a debtor do not qualify as "new value" for purposes of new value exception to a preferential transfer claim."); *Kaye v. Accord Mfg., Inc.,* (*In re Murray, Inc.*), No. 05–0732, 2007 WL 5595447 at *2 (Bankr. M.D. Tenn. June 6, 2007) ("[T]he trustee fail[ed] to account for the substantial body of case law 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."); *Field v. Maryland Motor Truck Assoc. Workers Comp. Self-Ins. Group* (*In re George Transfer, Inc.*), 259 B.R. 89, 96 (Bankr. D. Md. 2001). This is hardly minority reasoning.

The Circuit Court relied on the reasoning from *In re Beaulieu Group*, which declines to follow *Friedman's* because the court was persuaded the Eleventh Circuit would be more likely to find that the lack of a temporal limit was intentional. *See Beaulieu Liquidating Tr. v. Fabric Sources, Inc.* (*In re Beaulieu Grp., LLC*), 616 B.R. 857, 873 (Bankr. N.D. Ga. 2020). However, post-petition payments by the debtor on account of the new value were not at issue in *BFW Liquidation. See id.* at 867. And "[t]he Eleventh Circuit did not express any view on the propriety of the holding in *Friedman's*." *Id*. at 868. The court in *Beaulieu Group* opined that if Congress intended a temporal requirement, they would have added one. Similar to the way the court in *In re Phoenix Rest. Group*, asserted that had "Congress intended § 547(c)(4)(B) to account for payments

made post-petition, the section would have included something like an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor." *See* 317 B.R. at 497. And similar to the way the court in *In re Commissary Operations, Inc.*, pointed out that nothing in the plain language of 11 U.S.C. § 503(b)(9) or 11 U.S.C. § 547(c)(4) indicates any Congressional intent to offset the intended benefits that 11 U.S.C. § 503(b)(9) confers upon sellers through a reduction of available new value in defending a preference action. *See* 421 B.R. at 879. Viewing the statute as a whole, as is, "the most natural and only consistent reading of Section 547(c)(4) is that the preference window closes on the petition date." *See* (R. at 22) (Weir, J., dissenting).

A. The context of the statute indicates that the petition date is the cutoff for analysis of the new value defense.

In *Friedman's* the Third Circuit noted that the rules of statutory construction required the court to examine the statute within the context of the Bankruptcy Code itself. *See* 738 F.3d at 554. Under the contextual approach, the court determined that it was not Congress' intent for the new value determination to be without temporal restraint. *See id.* ("If we read the statute in this manner, the time period involved would be totally open-ended such that any payment, at any time, could defeat a new value defense."). Rather, the intent of the statute was to establish a creditor's preference exposure as of the bankruptcy petition date. *See id*. at 554–58. When read in context, there are several indicators in the Bankruptcy Code evidencing that the petition date serves as a hard stop for analysis of the new value defense.

First, as noted by the court in *Friedman's*, Section 547 is titled "Preferences" suggesting that it concerns transactions occurring during the preference period, which is by definition pre-petition. *See In re Friedman's Inc.*, 738 F.3d at 555. Additionally, the Bankruptcy Code defines "claim" as a "right to payment." *See* 11 U.S.C. § 101(5). The right to a Section

503(b)(9) administrative claim for goods shipped within the preceding 20 days is solely cognizable in bankruptcy. In other words, the ability to assert a Section 503(b)(9) claim only arises after the filing of the bankruptcy petition. *See In re Commissary Operations, Inc.*, 421 B.R. at 877. Therefore, a preference "right to payment" or administrative expense claim under Section 503(b)(9) necessarily arises only post-petition, such that the value is not included in calculating the Section 547(c)(4) new value defense.

Second, when context is considered, calculation of preference liability must be limited to prepetition activity because the statute of limitations for filing a preference action generally begins to run on the petition date. *See* 11 U.S.C. § 546(a). "The fact that the statute of limitations for a preference avoidance action under Section 547 generally begins on the petition date suggests that the calculation of preference liability should remain constant post-petition." *In re Friedman's Inc.*, 738 F.3d at 556. It would be illogical for Congress to have triggered the commencement of a limitations period on the petition date while simultaneously leaving open the possibility that the injury to the estate could fluctuate after that time. As noted in *Friedman's*, if Congress had intended to allow for post-petition transactions to affect the impact on the estate, it likely would have crafted a different statute of limitations. 738 F.3d at 556.

Third, recognizing that the window for a Section 547(c)(4) analysis closes on the petition date is consistent with the hypothetical liquidation test required under Section 547(b)(5). Notably, although not explicit in the language of the statute, courts have held that this test should be performed as of the petition date. *See In re Friedman's*, 738 F.3d at 556. If the analysis of an "otherwise avoidable transfer" for purposes of Section 547(c)(4) could be extended to include events occurring post-petition, the relevant time frame for that aspect of the statute would be incompatible with Section 547(b)(5).

And fourth, if courts allow post-petition payments to affect the preference analysis, it would seem logical also to consider post-petition extensions of new value to be available as a defense; however, a majority of courts have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense. *See In re Friedman's*, 738 F.3d at 556. The text cannot be taken out of context. And taking the context of statute into consideration further confirms that the petition date serves as a hard stop for preferences, thereby rendering anything occurring post-petition, including a transfer that satisfies an administrative expense under Section 503(b)(9), inconsequential to a new value defense.

B. Forcing creditors to choose between asserting an administrative expense and preserving its right to assert its full new value defense, is contrary to Congressional intent and the underlying policy goals of the Bankruptcy Code.

The preference section was enacted to prevent creditors from racing to the courthouse to dismantle a financially distressed debtor. *See Kaye v. Blue Bell Creameries* (*In re BFW Liquidation*), 899 F.3d 1178, 1193 (11th Cir. 2018). And the preference defenses were enacted to encourage creditors to continue doing business with such debtors under usual practices. *See In re Beaulieu Group, LLC*, 616 B.R. at 875. Section 547(c)(4) was not enacted to ensure equitable treatment of creditors, rather it is intended to encourage creditors to deal with troubled businesses. *See In re Bellanca Aircraft Corp.*, 850 F.2d at 1280; *see also Roberds, Inc. v. Broyhill Furniture* (*In re Roberds, Inc.*), 315 B.R. 443, 468 (Bankr. S.D. Ohio 2004) ("The policy behind the subsequent new value defense is to encourage trade creditors to continue dealing with troubled businesses by providing them a level of protection from their preference exposure."). More importantly, this defense was created to ameliorate the unfairness of allowing a trustee to avoid all payments to a creditor during the preference period without giving any corresponding credit for advances of new value that benefitted the debtor. *See Miller v. JNJ Logistics, LLC* (*In re Proliance*

Int'l, Inc.), 514 B.R. 426, 430 (Bankr. D. Del. 2014). As Judge Weir noted, anyone familiar with bankruptcy law would agree that bankruptcy preference laws are routinely inequitable.

Section 503(b)(9) has similar policy goals as Section 547(c)(4). It seeks to encourage trade creditors to continue to extend credit to a debtor potentially heading for bankruptcy, while also discouraging abuse by debtors who seek to acquire goods at a time when it is known that bankruptcy is imminent and that payment for the goods will not have to be tendered. *See In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009). The fact that a trade creditor, like Touch of Grey, happens to get paid post-petition for new value pursuant to Section 503(b)(9), does not negate the fact that it acted to provide assistance to a distressed debtor. "Protecting the creditor who extends revolving credit to the debtor is not unfair to the other creditors of the bankrupt debtor because the preferential payments are replenished by the preferred creditor's extensions of new value to the debtor." *See In re Slamdunk Entrs., Inc.*, 2021 WL 389081 at *27 (quoting *Laker v. Vallette* (*In re Toyota of Jefferson, Inc.*), 14 F.3d 1088, 1091 (5th Cir. 1994)). And without the preference exception, a creditor who continues to extend credit to the debtor, perhaps in implicit reliance on prior payments, would merely be increasing his bankruptcy loss. *See id*. Forcing creditors to choose between asserting an administrative expense and preserving its right to assert its full new value defense, will chill their willingness to do business with troubled entities. *See In re Commissary Operations, Inc.*, 421 B.R. at 879. Additionally, requiring creditors to make this choice in essence deprives sellers of goods of the benefits Congress conferred upon them when it enacted 11 U.S.C. § 503(b)(9). Preference laws require creditors to disgorge payments if they have been improperly preferred, but Congress clearly intended creditors, such as Touch of Grey, to receive preference for supporting the debtor's reorganization efforts pre- and post-petition date.

The Fifth Circuit recognized that the purpose of the subsequent new value defense is to protect creditors who have furnished and been paid for ongoing supplies or revolving credit to a debtor in distress, because such transactions fortify the debtor's business and may avert bankruptcy. *See In re Slamdunk Entrs., Inc.*, 2021 WL 389081 at *27. Ultimately and importantly, the extensions of new value do not harm existing creditors. *See id*. But under the rationale of the Circuit Court, Touch of Grey's good faith gesture to support the Debtor's post-petition reorganization efforts by selling goods on credit in exchange for immediate payment of its undisputed Section 503(b)(9) administrative expense results in a $200,000 increase in its preference exposure, which is a substantial harm. Because the underlying policies of the two sections are almost identical, Section 503(b)(9) should not be interpreted in a manner that would cause harm to trade creditors who support a debtor by reducing their subsequent new value defense that existed prior to BAPCPA.

The Circuit Court refused to "endorse" what they characterize as a "double dip" by Touch of Grey because "it would be such a radical departure from a fundamental and well-settled tenet of bankruptcy law." *See* (R. at 15). The response to that assertion is analogous to the holding in *In re George Transfer Inc.*, and found in "H.R.Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S.Code Cong. & Admin. News, 1280, quoted by Judge Patricia A. Clark in Sharoff Food: "[The subsequent advance rule, Section 547(c)(4)] 'was not enacted to ensure equitable treatment of creditors, but rather is intended to encourage creditors to deal with troubled businesses.' " *See* 259 B.R. at 96. Affirming this holding will not achieve equity, it will frustrate Congressional intent and discourage creditors from doing business with struggling debtors because they know they will be punished.

II. The Circuit Court also erred because the language of 11 U.S.C. § 365(d)(3) unambiguously states that the Trustee must fulfill all obligations of the Debtor, including May 2020's full month's rent according to the Lease.

In addition to erring in its conclusion that Touch of Grey is not entitled to reduce its preference exposure by the value of the invoice paid pursuant to 11 U.S.C. § 503(b)(9), the Circuit Court also erred by applying the "proration" method to determine the rent Touch of Grey was owed prior to rejection.

At the heart of this issue lies the Lease between the Debtor and Touch of Grey. According to the Lease, rent was "due in advance on the first day of each month." (R. at 4). The Debtor filed for bankruptcy on January 5, 2020. *Id.* at 6. Then, on May 5, 2020, the Debtor moved to reject the lease under 11 U.S.C. 365(a). *Id.* at 7. The issue of whether Touch of Grey is entitled to a full month's rent for May 2020 is simply resolved as the language of the 11 U.S.C. § 365(d)(3) is quite clear: "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." (emphasis added). Therefore, under § 365(d)(3), Touch of Grey is entitled the full value of rent that became due on May 1, 2020 according to the terms of the Lease.

Interpretation of § 365(d)(3) begins with the language of the statute itself. *See Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021) (Barrett, J.) ("But we state where we always do: with the text of the statute."); *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020) (Gorsuch, J.) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019) (Alito, J.) ("[W]e begin where all such inquiries must begin: with the language of the statute itself."); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (Sotomayor, J.) ("[O]ur inquiry begins with the statutory text, and ends there as well."); *King v. Burwell*, 576

U.S. 473, 474 (2015) (Roberts, J.) ("If the statutory language is plain, the Court must enforce it according to its terms."); *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 283 (2011) (Kagan, J.) ("We begin, as in any case of statutory interpretation, with the language of the statute."); *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (Thomas, J.) ("[W]e must apply the statute according to its terms."); *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (Breyer, J.) ("We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute."); *Bostock*, 140 S. Ct. at 1823 (Kavanaugh, J., dissenting) ("Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result.").

Under 11 U.S.C. § 365, a bankruptcy trustee, or debtor, may assume or reject an unexpired lease. Generally, as is the case here, the bankruptcy trustee will reject an unexpired lease if they determine that the lease is not a good deal for the estate going forward. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). Rejection means that the debtor no longer intends to be bound by the terms of the lease and, accordingly, constitutes a breach of the agreement. *Id.*; *In re Penn Traffic Co.*, 534 F.3d 373, 378 (2nd Cir. 2008).

Here, the language of § 365(d)(3) is unambiguous and quite plainly states that the trustee must perform all obligations of the debtor until the time of rejection. *See In re Krystal Co.*, 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996) ("The most natural reading of § 365(d)(3) leads to the conclusion that Congress meant to require payment of all the debtor's obligations *falling due under its lease* until such time as the debtor rejects the lease in question.") (emphasis added). While not defined in the bankruptcy code, the word "obligation" means a legal duty to do something. *See* BLACK'S LAW DICTIONARY 491 (2d ed. 2001). Those courts that have adopted the "billing date approach" recognize the plain meaning of § 365(d)(3). *See, e.g., In re Koenig Sporting Goods,*

Inc., 203 F.3d 986 (6th Cir. 2000); *In re Thinking Machines Corp.*, 67 F.3d 1021, 1024 (1st Cir. 1995) ("This provision requires the trustee, *inter alia*, to pay rent under the lease at the contract rate unless and until he rejects it, and gives the landlord what amounts to a preference—in the form of an administrative claim—for such avails."). Furthermore, Congress chose the word "obligation," as opposed to another word, such as "claim" to express their desire for tenants to honor their obligations under the lease. *In re DeCicco of Montvale, Inc.*, 239 B.R. 475, 480 (Bankr. D.N.J. 1999) (While Congress certainly knew how to use the word claim, they chose instead to use the word obligation."). By utilizing the plain meaning method of statutory interpretation, this Court should adopt the billing date approach because it is assumed Congress enacted the statute, and used the word "obligation," according to the plain meaning of both. *Id.*

A. Statutory history promotes usage of the billing date approach as § 365(d)(3) was enacted to promote creditor security.

While it is true that common bankruptcy practice applied the proration method prior to the enactment of § 365, it is assumed that Congress enacted the statute with this knowledge in mind and intended a change in the law. *See Guerrero-Lasprilla*, 140 S. Ct. at 1072 ("We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute."); *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)) ("changes in statutory language generally indicate an intent to change the meaning of the statute."); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012) ("[A] change in the language of a prior statute presumably connotes a change in meaning.").

After successful lobbying efforts by landlords, Congress enacted § 365(d)(3) to ease the concerns of those leasing commercial property. *See In re Thinking Machines*, 67 F.3d at 1024 (discussing, in detail, the creditor-friendly nature of the statute). The main concern of commercial landlords was § 365(a)'s lack of "temporal boundaries within which a trustee had to assume or

reject an unexpired lease" and the fact that debtors in possession were not required to pay rent under the lease agreement. *Id.* With the enactment of § 365(d)(3), the law changed in favor of commercial landlords as debtors in possession are now required to pay the full rent owed under the lease agreement until the agreement is assumed or rejected. *Id.*; *In re Petrie Retail, Inc.*, 233 B.R. 256, 259 (S.D.N.Y. 1999) ("Section 365(d)(3) addresses this problem by entitling the landlord to collect the full rent fixed in the lease for the period between petition and rejection.").

B. Legislative history supports usage of the billing date approach under § 365(d)(3).

Although the language of § 365(d)(3) is unambiguous, and therefore renders an inquiry into legislative history unnecessary, the legislative history supports usage of the billing date approach. While expansive legislative history on § 365(d)(3) is lacking, courts recognize that the statute was enacted to provide for further protection of landlords. *See Nat'l Terminals Corp. v. Handy Andy Home Imp. Ctrs., Inc.*, 222 B.R. 149, 155-56 (N.D. Ill. 1997); *see also In re Krystal Co.*, 194 B.R. at 161. ("That § 365(d)(3) was designed to protect the landlord rather than the estate by disarming § 503(b)(1)'s practices and procedures may be readily seen in the legislative history of § 365(d)(3)."). In fact, "virtually all courts" understand that § 365(d)(3) was enacted to reduce the burdens of landlords by requiring debtors to comply with the terms of the lease in the time prescribed by the lease. *See In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210–211 (3rd Cir. 2001). ("The bill [will require] the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This . . . will insure that debtor-tenants pay their rent , , , on time pending the trustee's assumption or rejection of the lease.") (quoting the sole legislative history of the Act found in the statements of Senator Hatch).

C. Caselaw nearly unanimously supports adoption of the billing date approach and circuit splits are to be avoided absent extraordinary circumstances.

To quote from the lower court's dissenting opinion, the authorities relied on by the majority are indeed a "mystery." In the case of *In re Furr's Supermarkets, Inc.*, relied on by the majority, the court quoted the language of Judge Posner in the Seventh Circuit when adopting the "proration" approach. 283 B.R. 60, 66–67 (B.A.P. 10th Cir. 2012). However, the "proration" approach adopted *In re Furr's Supermarkets* differs in kind than the one suggested by the lower court. In *In re Furr's Supermarkets*, the court adopted the following statement by Judge Posner: "To give relief to landlords, Congress passed Section 365(d)(3), which . . . allows them during that awkward postpetition prerejection period to collect *the rent fixed in the lease*." *Id.* at 67 (quoting *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125 (7th Cir. 1998) (emphasis added). In footnote seven of the lower court's opinion, the majority attempts to illustrate each side of the "proration" vs. "billing date" debate but this illustration lacks strength. For example, for the reason mentioned above, the majority's citation to Judge Posner's opinion in *In re Handy Andy* actually contradicts their position. The opinion explicitly states, and makes rather clear, that landlords are to receive the full value of the lease prior to the rejection period. The only other authority cited to by the lower court in support of the proration method are a couple of dissenting opinions from cases that adopted the billing date approach.

The Seventh Circuit later clarified that the sort of "proration" described by Judge Posner in *In re Handy Andy* does, in fact, differ from the "proration" approach at issue in this case. *See HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 798 (7th Cir. 2003) (discussing the difference between the two types of "proration"). Further, *HA-LO Industries* explicitly states that *In re Handy Andy* actually supports usage of the billing date approach in this situation. *See id.* ("We therefore find *Handy Andy* supports our conclusion that §365(d)(3) requires HA-LO to pay

its November 2001 rent *in full* on November 1, the postpetition and prerejection day on which such payment was due to CenterPoint *under the terms of the lease*.") (emphasis added).

In contrast, the billing date approach has wide support from the various circuit courts, as noted by the dissent. *See, e.g., In re Burival*, 613 F.3d 810, 810 (8th Cir. 2010) ("Section 365(d)(3) is unambiguous and requires payment, in full, of post-petition, pre-rejection rent obligations in unexpired leases of nonresidential real property."); *HA-LO Indus.*, 342 F.3d at 799; *In re Montgomery Ward*, 268 F.3d at 205; *In re Koenig Sporting Goods*, 203 F. 3d at 986 ("Most courts agree that § 365(d)(3) is intended to require debtors to pay their rent obligations in full and without proration as they come due during the prerejection period."). In fact, all circuit courts that have addressed this issue have adopted the billing date approach. In the absence of a compelling reason to do so, which it did not have because the language of § 365(d)(3) unambiguously supports the billing date approach, the Circuit Court should not have adopted the proration method.

The various circuit courts have time and time again expressed the necessity of avoiding the creation of a circuit split. *See, e.g., United States v. Thomas*, 939 F.3d 1121, 1130 (10th Cir. 2019) (quoting a great number of circuit courts on the necessity of avoiding a circuit split); *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("As a general matter, we do not create conflicts among the circuits without strong cause. We adhere to this view because federal law (unlike state law) is supposed to be unitary."); *Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 675 (7th Cir. 1995) ("We do not create conflicts among the circuits without strong cause."); *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017); *United States v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017); *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012); *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Wagner v. PennWest Farm Credit, ACA*, 109 F.3d

909, 912 (3d Cir. 1997). The Circuit Court's adoption of the proration method, applied to these facts, lacks support and creates an unnecessary circuit split. *See In re Burival*, 613 F.3d at 813.

Therefore, it is imperative that this Court read §365(d)(3) as it is plainly written and adopt the billing date approach to this scenario. *See Burwell*, 576 U.S. at 474 ("If the statutory language is plain, the Court must enforce it according to its terms."). Under the statute, the Debtor was obligated to pay a full month's rent on November 1, 2020, and Touch of Grey is entitled to this payment. Application of the proration approach deviates from the language of the statute and infringes upon the freedom of contract.

D. Adherence to the "billing date" approach promotes both equity and fairness in addition to promoting freedom of contract.

In addition to serving as the proper result under the statutory language of § 365, adoption of the "billing date" method promotes equity and fairness. This is because, as mentioned by the dissent, the rigid billing date method can "cut both ways." *See, e.g., In re Appletree Markets Inc.*, 139 B.R. 417, 417 (Bankr. S.D. Tex. 1992).

Consider, for example, that the Debtor and Touch of Grey had entered into a lease agreement that required the Debtor to pay a full month's rent on the last day of each month. Under these facts, the Debtor would have owed May's rent on May 31, 2020. In this scenario, had the trustee chosen to reject the lease on May 30, 2020, the landlord would face the consequences of the contractual agreement by being unable to collect a full month's rent despite the fact the Debtor enjoyed the full privileges of the lease for that month. While this result may seem unfair, it encourages landlords to carefully consider the terms of lease agreements. *See also Bostock*, 140 S. Ct. at 1823 (Kavanaugh, J., dissenting) ("Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result.").

By requiring a tenant to provide a full month's rent in advance on the first day of each month, as Touch of Grey did here, landlords can provide themselves with protection against this situation through the freedom of contract. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937) ("[T]he power to abridge [the freedom of contract] could only be justified by the existence of exceptional circumstances."). If Congress finds itself discontent with the results that come with the unambiguous language of § 365(d)(3), it is Congress' duty alone to effectuate any change they desire. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The purpose of § 365(d)(3) is to prevent commercial landlords from being situated in a place of uncertainty in their status in the estate. *See In re Koenig Sporting Goods*, 203 F.3d at 989. By adopting the billing date approach to § 365(d)(3), this Court can ensure that debtors in situations like this can be in control over their obligations. *HA-LO Indus.*, 342 F.3d at 800 ("In this case, involving a month-to month, payment-in-advance lease, where the debtor had complete control over the obligation, we believe that equity as well as the statute favors full payment [to the creditor].").

In addition, by adopting the billing date approach, the landlord does not obtain any inherent benefit at the expense of the debtor. While it is true that, in theory, Touch of Grey could have re-leased the premises for nearly an entire month if the lease were rejected on May 2, 2020, (and, as a result, received "double rent") this is unlikely to be the true result in practice. First, the landlord will not receive a windfall because it is the trustee, and not the landlord, that controls the rejection date. *See In re Koenig Sporting Goods*, 203 F.3d at 990 ("No such facts or inequities are present in this case. While the debtor characterized [the creditor's] receipt of a full month's rent for December 1997 as a 'windfall,' we disagree. Rather, [the creditor] would receive that to which it is entitled under §365(d)(3) and the debtor is obligated to pay *under the lease*.") (emphasis added).

Second, although some properties might be easily re-leased within a short time window, it is easy to imagine properties with high price tags that might be nearly impossible to re-lease in such a short time span such as a large commercial building in Manhattan. While this Court is limited to deciding cases and controversies between specific parties, the precedent that results from its decisions are binding on all who find themselves in a similar situation in the future.

Consider, for example, the situation presented in *HA-LO Industries*. In that case, the Seventh Circuit applied the billing date approach to a lease that obligated the debtor to pay rent on November 1 that was rejected on November 2. 342 F.3d at 801. Looking to *Koenig Sporting Goods* for guidance, the court considered policy and equity when holding that the billing date approach is appropriate under §365(d)(3). *Id.* at 799 ("[The debtor] argues that policy considerations, equity, and 'common sense' compel adoption of the proration method in this context. We disagree.") (quoting *In re Koenig Sporting Goods*, 203 F.3d at 986). Much like the debtor in *HA-LO Industries*, the debtor in *In re Koenig Sporting Goods* rejected a lease on December 2 when the full month of rent became due on December 1 under the lease agreement. 203 F.3d at 987. Similarly, finding the language of § 365(d)(3) to be clear and unambiguous, the court applied the billing date approach and held that the creditor was entitled to the full month of rent for December as per the contract between the parties.

Here, the Debtor and Touch of Grey entered into a contractual agreement via the Lease Agreement that required the Debtor to pay a full month's rent in advance on the first day of each month. Therefore, under the contract, the Debtor was obligated to pay Touch of Grey the full amount of rent for May on May 1, 2020. Applying the plain language of the statute, Touch of Grey is fully entitled to this obligation and the billing date approach should be used. Any contrary reading of the statute ignores the language of the statute and fails to consider crucial policy and

equity considerations such as the necessity of preserving freedom of contract. *See Bostock*, 140 S. Ct. at 1749 ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end.") Because the language of the statute and both policy and equity considerations support usage of the billing date approach, this Court should reverse the decision below.

CONCLUSION

This Court should reverse the decision of the Thirteenth Circuit Court of Appeals.