No. 21-0909

In the Supreme Court of the United States

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 43
Counsel for Petitioner
Oral Argument Requested

QUESTIONS PRESENTED

Since the enactment of the Bankruptcy Code in 1978, this Court has stressed that courts considering issues of statutory construction of the Bankruptcy Code must "look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). The circuit court's decision, over a dissent, misapplied this Court's context-focused analysis and ignored the purposes of the Bankruptcy Code and the reasons behind congressional enactment of certain Code provisions. This Court's reversal on both issues will once and for all recognize the protections Congress afforded to creditors and landlords in enacting these provisions of the Bankruptcy Code. Section 547(c)(4) prevents trustees from avoiding transfers "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." 11 U.S.C. § 547(c)(4). Section 365(d)(3) requires that "[t]he trustee . . . 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." 11 U.S.C. § 365(d). The questions presented are as follows:

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).

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The opinion of the United States Court of Appeals for the Thirteenth Circuit affirming the district court is unpublished and is incorporated in the record on appeal (hereinafter, "R."). The opinion of the United States District Court for the District of Moot affirming the bankruptcy court is unpublished and is not reproduced in the record. The opinion of the United States Bankruptcy Court for the District of Moot granting summary judgment to Respondent is unpublished and is not reproduced in the record.

STATUTORY PROVISIONS INVOLVED

Pertinent portions of 11 U.S.C. §§ 365, 503, and 547 are reprinted in an appendix to this brief. App., *infra*, 1a–2a.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

The Parties. In 2005, William Tell ("Tell") founded Terrapin Station, LLC ("Debtor") under which he opened a coffeehouse in the town of Terrapin, Moot. (R. at 3). While the coffeehouse was initially successful, business became quickly stagnant. (*See* R. at 3–4). Touch of Grey Roasters, Inc. ("Petitioner") is an international coffee company with over 1,900 coffeehouses around the world. (R. at 3). In 2017, in an effort to expand to new markets, Petitioner decided to open a series of new "neighborhood coffeehouses." (R. at 4). While the neighborhood coffeehouses would be franchised, they would not be branded under Petitioner's name. *See id.* Petitioner approached Debtor with a franchise offer and Debtor accepted. *Id.*

The Venture. In order to facilitate its new franchise, Petitioner purchased warehouse space (the "Premises") and leased the space to Debtor. *Id.* On July 1, 2018, the two parties, as tenant and landlord, entered into a lease agreement (the "Lease") for the Premises. *Id.* In relevant part, the Lease required that Debtor pay a monthly rent in the amount of $25,000 "due in advance on the first day of each month." *Id.* The parties also entered into a franchise agreement whereby Debtor would exclusively sell Petitioner's new "Dark Star" branded products. *Id.* The new business opened on December 1, 2018, but quickly faced financial difficulties. (*See* R. at 5).

***The Subsequent Agreement and Purchase*.** By November 1, 2019, Debtor owed Petitioner over $700,000 for purchased "Dark Star" goods. *Id.* Petitioner sent Debtor a notice of default on December 5, 2019. *Id.* Two days later, the parties entered into a forbearance agreement wherein Petitioner agreed to forbear from terminating the franchise in exchange for a $250,000 payment from Debtor on the outstanding invoices for Dark Star products, a reaffirmation by Debtor of its obligations under the Lease, and a release of any claims that Debtor had against Petitioner. *See id.* Soon later, Debtor purchased an additional $200,000 worth of "Dark Star" products at set forth on

an invoice dated December 18, 2019 (the "Invoice"). *Id.*

The Bankruptcy Petition. On January 5, 2020 (the "Petition Date"), Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. (R. at 6). At the time of the Petition Date, Debtor owed Petitioner $650,000 for purchased goods. *Id.* Debtor made clear its intentions to reorganize and reaffirmed its willingness to continue selling "Dark Star" branded products as required under the franchise agreement. *See id.* Two weeks later, Debtor filed a motion requesting authority to pay Petitioner the $200,000 owed under the Invoice, arguing that Petitioner was a "critical vendor." *Id.* The Bankruptcy Court permitted the payment as an administrative expense under section 503(b)(9). (R. at 7).

The Failed Reorganization. Debtor's reorganization efforts were quickly cut short by the COVID-19 pandemic. *See id.* On May 5, 2020, Debtor permanently ceased operations and returned the keys to the Premises to Petitioner. *Id.* The next day, Debtor filed a motion to reject the Lease and the franchise agreement with Petitioner effective May 5, 2020. *Id.* Petitioner moved to compel payment of the May 2020 rent, due under the Lease on May 1st. *Id.* At a hearing on the motion, Debtor requested to convert its chapter 11 case to a case under chapter 7. (R. at 8). Casey Jones, Chapter 7 Trustee ("Respondent"), was appointed without objection by either party. *Id.* The court granted Debtor's motion to reject the Lease and the franchise agreement, effective May 5, 2020. *Id.*

The Procedural History. Both parties filed cross-motions for summary judgment on the "new value" defense issue. (R. at 9). After hearing argument on the motions, as well as on Petitioner's request for payment of rent, the Bankruptcy Court ruled in favor of Respondent on both issues. *Id.* The Bankruptcy Court first held that section 365(d)(3) only required Respondent to pay rent for the five days that Debtor had occupied the Premises prior to rejection, rather than rent for the entire month of May 2020. *Id.* Next, the Bankruptcy Court held that Petitioner could

not use the value of the goods reflected on the Invoice as new value to reduce its preference exposure given that the Invoice was paid pursuant to section 503(b)(9). *Id.* The district court and the court of appeals, over dissent, both affirmed. (R. at 9; 21). This appeal followed.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit incorrectly held that section 547(c)(4) of the Bankruptcy Code precludes a defendant from asserting new value for goods subject to a satisfied administrative expense under section 503(b)(9).

The text and context of section 547(c)(4) support a temporal limitation on the preference analysis, cutting off post-petition payments from the calculation of a creditor's "new value" defense. Section 547(c)(4) includes multiple textual indications supporting this limitation. First, the provision is included in a section of the Code that address pre-petition transfers, rather than in section 549 that addresses trustee avoidance of post-petition transfers. Second, the provision's multiple uses of the word "transfer" all carry pre-petition connotation. Third, a temporal limitation on the preference analysis on the petition date is necessary for section 547(c)(4) to be compatible with surrounding Code provisions: the "hypothetical liquidation test" of section 547(b)(5) and the "improvement in position" test of section 547(c)(5) are both calculated on the petition date. Similarly, the statute of limitations for a preference avoidance action runs on the petition date. Extending the preference analysis window to include post-petition payments would place section 547(c)(4) in conflict with surrounding Code provisions. Lastly, extending the preference analysis past the petition date implies the permissibility of considering post-petition extensions of new value, even when the lower courts have overwhelmingly rejected such extensions. If Congress had intended to preclude section 503(b)(9) payments from the calculation of a creditor's new value defense, it would have said so clearly. In sum, the statutory construction of section 547(c)(4) does

not support the Thirteenth Circuit's reading of the statute.

A temporal limitation on the preference analysis also comports with the legislative history and purposes behind sections 547(c)(4) and 503(b)(9). Pre-Bankruptcy Code case law, derived from English bankruptcy law, regularly used a clear line of demarcation at the petition date to cut off a trustee's avoidance powers. The legislative history behind section 547(c)(4) shows silence on the part of Congress addressing this pre-Code practice. Further, Congress did not limit section 547(c)(4) when it enacted section 503(b)(9) via the 2005 BAPCPA amendments. Analyzing the purposes behind either Code provisions further eschew the notion that creditors receive a windfall through Petitioner's reading of the text. Both Code provisions were enacted to encourage creditors to continue doing business with financially-ailing individuals and entities. The Thirteenth Circuit's construction of section 547(c)(4) would almost certainly freeze that business.

Finally, lower courts that have incorrectly held that section 547(c)(4) precludes the use of post-petition payments of section 503(b)(9) claims to reduce their preference exposure rely on two flawed policy reasonings: double dipping and equal creditor treatment. The "double dipping" argument is flawed because it incorrectly implies that creditors are being paid twice for goods or services that are not being delivered. The "equal creditor treatment" argument is likewise flawed for two reasons. First, by calling foul to the disparity in creditor treatment under section 547(c)(4), the Thirteenth Circuit ignored a plethora of other Code provisions with exceptions that have withstood similar equal creditor treatment arguments. Second, equal creditor treatment concerns classes of creditors. Section 547(c)(4) creditors are not treated similarly to other unsecured creditors for the very reason that Congress gave them priority status over other creditors.

Next, the Thirteenth Circuit incorrectly held that section 365(d)(3) of the Bankruptcy Code does not require the trustee to satisfy obligations allocable to the post-rejection period of an

unexpired lease for non-residential real property.

The plain text of section 365(d)(3) requires a trustee to perform "all obligations" of a debtor that "arise" from a lease prior to its rejection or assumption. Common usage of the terms "obligations" and "arise" show that "obligations"—agreements to do a certain thing for a particular person—"arise," or originate from a certain point, as defined in an agreement between parties. Here, the Debtor's "obligations" as defined by the Lease required Debtor to pay a certain amount of rent for the Premises on the first day of every month. The "obligation" arose on May 1, 2020, and Respondent was required to perform as the Lease was not rejected until May 5, 2020. Additionally, the canon of statutory construction favoring narrow construction of exceptions disfavors the Thirteenth Circuit's reading. Section 365(d)(3) already contains two explicitly delineated exceptions—sections 365(b)(2) and 503(b)(1)—neither of which support the Thirteenth Circuit's creation of a third exception for prorating performance. Lastly, ambiguities in the provision recognized by the Thirteenth Circuit below can be rejected through simple textual analysis of the provision's words, in particular its temporal modifications of a trustee's requirement to "perform" all obligations of a debtor.

That reading of section 365(d)(3) also comports with the legislative history and purposes behind the Code provision. Section 365(d)(3) was enacted to address inequities within the Code concerning the treatment of landlords. The legislative history unequivocally shows that Congress intended section 365(d)(3) to mandate timely performance of rent payments to landlords for property, utilities, security, and other services. The Thirteenth Circuit's reading would not only incentivize trustees to avoid payment but unnecessarily frustrate Congress's clear intent to protect creditors. Lastly, Petitioner's reading would not run counter to section 365(d)(4), despite what the court below charged, because both provisions set similar temporal requirements to trustee

performance. Moreover, in both instances, the decision to assume or reject the lease rests solely with the trustee. Had the trustee rejected the lease prior to May 1, 2020, performance of the debtor's obligations would have been avoided under the plain text of section 365(d)(3).

There is no support for the proration approach adopted by the Thirteenth Circuit in the Code's text or history. First, the text of section 365(d)(3) does not permit a continual accrual of rent payments in the sense that the obligation to pay rent arises over time. Rather, the obligation arises as defined by the agreement between the parties. Second, by focusing on the "current payment" for "current services" pre-amendment practice, proration courts ignore Congress's clear intent to address inequities in creditor treatment that previously allowed trustees broad power to not make rent payments while creditors continued to provide services to debtors. Furthermore, arguments that full performance would constitute a "windfall" for creditors fall flat because Congress contemplated that precise result and nevertheless adopted the Code provision as written. The Thirteenth Circuit's adoption of the proration approach not only ignored the text of the Bankruptcy Code and history but also created a circuit split where none previously existed.

Lastly, the COVID-19 pandemic further accentuates the need for the creditor protections afforded under section 365(d)(3). Even within the last two years, courts have split between siding with landlords or debtors when landlords have attempted to recover rent payments. While some courts have correctly applied section 365(d)(3) as written, the courts that sided with debtors impermissibly stretched their powers under section 105(a) passed their natural limits.

ARGUMENT

The Constitution grants Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The Thirteenth Circuit's incorrect interpretations of sections 365(d)(3) and 547(c)(4) of the Bankruptcy Code build upon

an already inconsistent case law on two important issues of bankruptcy: the new value defense and performance on leases of nonresidential, real property. A careful examination of "the text, history, and purpose[s] of the Bankruptcy Code" leaves no support for the decision below. *See Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). In reversing, this Court has the opportunity to make bankruptcy law uniform once more.

I. PAYMENT OF A SECTION 503(b)(9) CLAIM DOES NOT AFFECT THE "NEW VALUE" DEFENSE CALCULATION UNDER SECTION 547(c)(4).

Generally, trustees can "claw back" creditor payments made within the 90-day period before the bankruptcy filing. *See* 11 U.S.C. § 547(b). Creditors have a variety of defenses under section 547(c) which include, relevant to the issue before the Court, the "new value" defense under section 547(c)(4). The provision contemplates a transfer made

> (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). In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress amended the Bankruptcy Code to include section 503(b)(9). *See* Pub. L. No. 109-8, 119 Stat. 23, § 1227 (2005). The provision entitles creditors to an administrative expense for the value of goods received by (or sold to) the debtor in the ordinary course of its business within twenty days before the petition date. 11 U.S.C. § 503(b)(9). The question is whether a creditor can assert a new value defense under section 547(c)(4) if the creditor has received an administrative expense claim under section 503(b)(9) predicated upon that same recitation of value. Courts are nearly evenly split on the issue. *See In re Friedman's Inc.*, 738 F.3d 547, 553 (3d Cir. 2013) (collecting cases). This "constitutional quagmire" on a core bankruptcy question requires immediate resolution from this Court. *See In re Clinton Nurseries, Inc.*, 998 F.3d

56, 66 n.9 (2d Cir. 2021). The plain text of section 547(c)(4), as well as the context, history, and policies behind the provision, in addition to a wide array of case law, all support a conclusion drawing the line for preference analysis on the petition date. Accordingly, the judgment of the court of appeals should be reversed.

A. The Text and Context of Section 547(c)(4) Unambiguously Draws the Line of Preference Analysis at Pre-Petition Transactions.

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989)). "Statutory construction is a holistic endeavor, and this is especially true in the Bankruptcy Code." *Off. Comm. of Unsecured Creditors of Cybergenics Corp.*, 330 F.3d 548, 559 (3d Cir. 2003). Context is therefore key. *See Friedman's Inc.*, 738 F.3d at 554. Here, as numerous courts have recognized, a contextual analysis makes the plain meaning of section 547(c)(4) clear: "deliveries entitled to § 503(b)(9) claim status are not disqualified from constituting new value" under section 547(c)(4). *In re Commissary Operations, Inc.*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010).

First, section 547(c)(4) was enacted within a section of the Code titled "Preferences". While hardly decisive, the preference period is by definition "pre-petition," and would be the most sensible place to for this Court to draw the line for preference analysis. *See Friedman's Inc.*, 738 F.3d at 555. Contextually, this title is important. Post-petition transactions that can be avoided after the commencement of the case are covered under another section of the Code: section 549, rather than section 547. *See* 11 U.S.C. § 549(a)(1). It follows that Congress intended to keep the two provisions distinct. Post-petition payments, outside of the scope of section 547 and governed by section 549, are not to be included in the "new value" defense calculation.

Second, the word "transfer," which appears three times throughout section 547(c), is used

with pre-petition connotation. To begin, "[t]he trustee may not avoid under this section a transfer. . . ." 11 U.S.C. § 547(c). Next, "to or for the benefit of a creditor, to the extent that, after such transfer,. . . ." *Id.* at § 547(c)(4). Lastly, ". . . the debtor did not make an otherwise unavoidable transfer. . . ." *Id.* at § 547(c)(4)(B). This Court has previously recognized "a presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, the meaning of "otherwise unavoidable transfer" in section (c)(4)(B) is necessarily pre-petition as Congress used "transfer" twice prior with similar temporal connotations. The first mention of "transfer" necessarily refers to transactions during the preference period as transactions outside of the preference period would not be avoidable by creditors under section 547. Similarly, the second mention of "transfer" refers to transactions that meet the requirements of a new value defense preference, which includes the requirement that the transaction have been made during the prepetition preference period. It follows that the third mention of "transfer", in the context of an "otherwise unavoidable transfer," refers to an unavoidable transfer made pre-petition. Had Congress intended another result, it would have specified so in the text of section 547(c)(4)(B).

The Thirteenth Circuit below relied on the definition of transfer in section 101(54)(D) to argue that the term "includes any distribution, including a payment to satisfy an administrative expense." (R. at 13). Not so. The Code defines transfer to mean "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with— (i) property; or (ii) an interest in property." 11 U.S.C. 101(54)(D). While this definition is broad and certainly may include administrative expense payments, a "transfer" under section 547(c)(4) nevertheless must meet the requirements under that provision, namely the temporal limitations imposed in the text. In this case, Debtor's "parting with" of "property" via an administrative expense payment was not

a "transfer" within the meaning of section 547(c)(4) because it occurred post-petition.

Additionally, the Thirteenth Circuit below argued that the use of the word "debtor" in section 547(c)(4) does not limit the section to pre-petition transfers. Again, not so. The petition date, as correctly recognized by the dissent below, is the "fundamental demarcation point" between the "debtor" and the "debtor in possession." (R. at 23). Section 547 provides that a trustee can avoid any "transfer of an interest of *the debtor*." 11 U.S.C. § 547(b) (emphasis added). Likewise, the new value defense governs "transfers" that give "new value to or for the benefit of *the debtor*." *Id.* § 547(c)(4) (emphasis added). This is key because everything that occurs after the petition date affects not the debtor but rather the debtor's estate. 11 U.S.C. § 541. And any post-petition advances are given not to the debtor but rather to the estate. *See id.* Likewise, any debts incurred post-petition are attributable not to the debtor but to the estate. *See id.* And a debtor that becomes a debtor in possession has all the rights and powers of a trustee, including operation of a debtor's business. *See* 11 U.S.C. §§ 1107, 1108. Each entity is distinct within the Code. It would not make sense for a "debtor" under section 547(c)(4) to also be a "trustee," thereby rendering the definition of "new value" under section 547(a)(2) superfluous. *See* 11 U.S.C. § 547(a)(2) (defining "new value" as "money . . . services . . . new credit . . . or release by a transferee of property" not previously "void nor voidable *by the debtor or the trustee*.") (emphasis added). This Court regularly rejects interpretations that inject superfluity into statutes and should continue to do so here. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (recognizing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

Third, the "hypothetical liquidation test" pursuant to section 547(b)(5) must be performed at the petition date, further supporting that date as the cutoff for calculating new value. This Court has previously espoused that "[w]hether a creditor has received a preference is to be determined

. . . by the actual effect of the payment as determined when bankruptcy results." *Palmer Clay Prods. Co. v. Brown*, 297 U.S. 227, 229 (1936). Post-Bankruptcy Code case law and other sources recognize that section 547(b)(5) was enacted by Congress to codify this Court's holding in *Palmer*. *See In re Falcon Prods., Inc.*, 381 B.R. 543, 548 (B.A.P. 8th Cir. 2008); *also* 5 Collier on Bankruptcy ¶ 547.03 (16th ed. 2013). Accordingly, the Thirteenth Circuit's reading of section 547(c)(4) would be inconsistent with section 547(b)(5)'s operation.

Fourth, the statute of limitations for a preference avoidance action runs on the petition date. *See* 11 U.S.C. § 546. Section 546 provides that an action under sections 544, 545, 547, 548, or 553 "may not be commenced after . . . the later of (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election of the first trustee." *Id.* The filing of the petition constitutes an order for relief in a voluntary case. 11 U.S.C. § 301(b). Congress could have written section 546 a different way, thereby creating a wholly different statute of limitations, had it intended for post-petition payments to affect the calculation of new value. *See Friedman's Inc.*, 738 F.3d at 556. Permitting post-petition payments to affect the calculation of new value would needlessly create unnecessary tension within the various parts of the Code. As is widely recognized, this Court regularly avoids interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision. *See Young v. UPS*, 135 S. Ct. 1338, 1352 (2015) ("a statute ought, upon the whole, to be so construed that . . . no clause is rendered . . . void") (internal quotation marks omitted) ; *see also* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1198 (5th ed. 2014). This Court should adopt Petitioner's more natural reading of the Code and refuse to read tension into the text where there is none.

Fifth, the Thirteenth Circuit's reading runs counter to the "improvement in position" test

in section 547(c)(5). The "improvement in position" test is used to "determine whether the secured creditor is in a better position than it would have been had bankruptcy been declared ninety days earlier." *Matter of Clark Pipe & Supply Co., Inc.*, 893 F.2d 693, 698 (5th Cir. 1990); *In re Qualia Clinical Serv., Inc.*, 652 F.3d 933, 937 (8th Cir. 2011) (discussing statutory language). Generally, "[s]ection 547(c)(5) prevents a secured creditor from improving its position at the expense of an unsecured creditor during the 90 days prior to filing the bankruptcy petition." *Clark Pipe*, 893 F.2d at 698 (quoting *In re Ebbler Furniture & Appliances, Inc.*, 804 F.2d 87, 89 (7th Cir. 1986)). Importantly, section 547(c)(5) sets the date for calculating improvement of position on the date of filing the petition. 11 U.S.C. § 547(c)(5). It follows that section 547(c)(4) would also have a similar temporal limitation, in light of surrounding provisions all with the same triggering date.

Sixth, the Thirteenth Circuit's reading of section 547(c)(4) implies the permissibility of considering post-petition extensions of new value, even when courts have overwhelmingly rejected such extensions. *See, e.g.*, *Friedman's Inc.*, 738 F.3d at 557; *accord* 4 Norton Bankruptcy Law and Practice 3d § 66:36 (2013) ("[P]ostpetition extensions of unsecured credit to the debtor are not encompassed by § 547(c)(4) and may not be utilized to protect prior preferential transfers."). And this makes sense: protecting potentially conflicting interests of other creditors requires not extending the new value defense post-petition. Accordingly, courts have uniformly read into the statute the petition date as a cutoff. This logic necessarily applies in the reverse. If the petition date is the cutoff for creditors seeking post-petition extensions, the petition date is likewise the cutoff for debtors seeking to include post-petition transfers in the preference analysis.

The contextual clues within section 547(c) and surrounding Code provisions all point towards the conclusion that the preference window fixes any analysis of preferential payments on the petition date. Petitioner's transfer of goods to Debtor occurred within the ninety days prior to

the bankruptcy petition. The administrative expense payment occurred post-petition and outside of that window. Respondent cannot use the section 503(b)(9) payment to defeat Petitioner's new value defense. Accordingly, the judgment of the court of appeals should be reversed.

B. The History and Purposes of Section 547(c)(4) Support the Petition Date Cutoff.

"Reliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010). Nevertheless, this Court may look to the purposes and history of both sections 503(b)(9) and 547(c)(4) for further support. Of particular interest, pre-Bankruptcy Code practice, specifically rooted in English law, supported a clear line between pre- and post-petition avoidance powers. Furthermore, the legislative history of section 547(c)(4) is devoid of any congressional action repudiating this pre-Code practice, silence that is not indicative of Congress's intention to reject that petition date line. Lastly, the purposes behind section 547(c)(4)—and the Bankruptcy Code as a whole—are best supported through Petitioner's reading of the provision.

1. *Pre-Bankruptcy Code history*

Pre-Bankruptcy Code law supports cutting off the preference analysis at the petition date. "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). Accordingly, this Court has indicated that courts should be "reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice." *In re Denby-Peterson*, 941 F.3d 115, 130 n.77 (3d Cir. 2019); *In re McCoy*, 666 F.3d 924, 930 (5th Cir. 2012).

Our bankruptcy system dates back to English bankruptcy law. Importantly, English bankruptcy law effected a "cleavage" on the date of the filing of a bankruptcy petition to assess the condition of the estate. *Everett v. Judson*, 228 U.S. 474, 479 (1913); *accord Sexton v. Dreyfus*,

219 U.S. 339, 345 (1911) (the rule of cleavage "simply fixes the moment when the affairs of the bankrupt are supposed to be wound up."). Put another way, as Justice Holmes described the English system in *Sexton*: "everything stops at a certain date." 219 U.S. at 344. Here, as there, that date is the date of the filing of the bankruptcy petition. Importantly, the trustee's avoiding powers under English law derivative from creditors were also limited to such rights as existed as of that date. *See Lewis v. Mfrs. Nat. Bank of Detroit*, 364 U.S. 603, 606 (1961). This history is instructive as it would require Congress, in its legislative history developed in the enactment of section 547(c)(4), to explicitly reject such pre-Code practice. Congress, however, did no such thing.

2. *Legislative history*

The lack of legislative history in the development of sections 503(b)(9) and 547(c)(4) repudiating the pre-Code practice of limiting trustee avoidance powers at the petition date should not affect a "major change" to permit post-petition payments by a debtor to affect a creditor's new value defense. The predecessor to section 547(c)(4) was section 60(c) of the Bankruptcy Act of 1898. *See* S. Rep. No. 95-989, at 88 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5874; *see also* 11 U.S.C. § 547 note (2012) (Senate Report No. 95-989) ("The four exception codifies the net result in section 60c of current law."). Section 547(c)(4) has not been amended since it was enacted in 1978. *See* 11 U.S.C. § 547 note (2012) (Amendments).

Section 60(c) provided:

> If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid *at the time of the adjudication in bankruptcy* may be set off against the amount which would otherwise be recoverable from him.

11 U.S.C. § 96(c) (1976) (emphasis added). "At the time of the adjudication in bankruptcy" was historically understood as the period after the filing of the bankruptcy petition. *See Davis v. P. R. Sales Co.*, 304 F.2d 831, 833 (2d Cir. 1962). This Court has instructed to "not read the Bankruptcy

Code to erode past bankruptcy practice absent a clear indication that Congress indicated such a departure." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 454 (2007). At a minimum, the deep split in authority on the issue shows that Congress did not give "a clear indication" regarding a potential departure from prior bankruptcy practice. *See id.* Accordingly, section 60(c)—that derived its statutory authority on the distinction between pre- and post-petition actions—remains instructive today.

Tellingly, when section 503(b)(9) was added to the Code via BAPCPA, Congress did not amend section 547(c)(4) to include language "reducing new value by the amount of any § 503(b)(9) claim." *Commissary Operations*, 421 B.R. at 879. If anything, this Court should favor a reading that "accords more coherence" between the statutory provisions, permitting creditors use of both Code sections. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Congress has had several opportunities since the original enactment of section 547(c)(4) to amend the provision in a way that is compatible with the Thirteenth Circuit's reading. It did not do so in 1984, via the Bankruptcy Amendments and Federal Judgeship Act. It did not do so in 2005 via section 503(b)(9). It did not do so in 2019 via the four amendments signed by then-President Trump. And it did not do so via the COVID-19 Bankruptcy Relief Extension Act of 2021. This Court should not read Congress's silence as approving consideration of post-petition payments in the "new value" calculation.

3. *Purposes behind Bankruptcy Code provisions*

In addition to the historical analysis, there is no purpose recognized behind the Code provisions in question that indicate that Congress intended to create conflict between sections 503(b)(9) and 547(c)(4). The Thirteenth Circuit's interpretation of the statute puts creditors in a disadvantageous position. Either the creditor chooses to assert—and recover—a section 503(b)(9) claim or the creditor chooses to preserve their right to assert a subsequent new value defense under

section 547(c)(4) that includes the very goods delivered to the debtor within the 20 days prior to the bankruptcy filing implicated under section 503(b)(9).

The Thirteenth Circuit's interpretation of section 547(c)(4) runs directly counter to the identified congressional policy goals behind both Code provisions. *See In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009) ("[Section 503(b)(9)] seeks to encourage trade creditors to continue to extend credit to a debtor potentially heading for bankruptcy."); *In re Phoenix Rest. Grp., Inc.*, 373 B.R. 541, 547 (M.D. Tenn. 2007) (section 547(c)(4) was enacted to "encourage the creditor to continue to do business with the troubled debtor and to ensure that the creditor who contributes new value . . . is not later deemed to have depleted the bankruptcy estate to the disadvantage of other creditors."). The Thirteenth Circuit's reading of the Code provisions will almost surely guarantee that creditors will be less willing to do business with financially insecure entities. Further, the reading will simultaneously deprive creditors of the benefits conferred upon them by Congress under section 503(b)(9). This Court should reject such a reading.

"Reliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz*, 559 U.S. at 236 n.3. Nevertheless, a thorough examination of section 547(c)(4)'s predecessor, legislative history, and purposes all support the Petitioner's reading of the text of section 547(c)(4) that fixes any analysis of preferential payments on the petition date. Debtor's section 503(b)(9) administrative expense payment, by its nature, occurred post-petition and outside of that window and, accordingly, cannot be used to defeat Petitioner's new value defense. Thus, the judgment of the court of appeals should be reversed.

C. This Court Should Reject the Contrary Policy Reasonings of Lower Courts.

The most on-point case this Court can rely upon in regard to the section 547(c)(4) issue is the United States Bankruptcy Court for the Middle District of Tennessee's decision in *In re*

Commissary Operations, Inc. There, the creditors of Commissary Operations, Inc., sought administrative expense claims under section 503(b)(9). *Commissary Operations, Inc.*, 421 B.R. at 875. The trustee sought to recover allegedly preferential transfers and creditors sought to use the administrative expense claims to reduce their preference exposures under the new value defense. *Id.* The bankruptcy court granted partial summary judgment, reasoning that "deliveries entitled to § 503(b)(9) claim status are not disqualified from constituting new value for purposes of 11 U.S.C. §§ 547(a)(2) and 547(c)(4)." *Id.* at 879. In doing so, the bankruptcy court examined the text of section 547(c)(4), the congressional purposes behind both sections, and the policies behind the Bankruptcy Code to reach the correct decision: section 547(c)(4) does not preclude a defendant from asserting new value for goods subject to section 503(b)(9). *See id.* at 877–79.

Nevertheless, while many courts correctly hold that section 547(c)(4) does not preclude asserting new value for section 503(b)(9) transfers, several courts have disagreed. *See, e.g., In re Beaulieu Grp., LLC,* 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020). These decisions are based on two policies: (1) preventing creditors from double dipping and (2) ensuring equal creditor treatment. However, the arguments behind both policies are flawed and fail to justify a departure from the Code's clear text and supporting legislative history.

1. *Double Dipping*

The first set of policy arguments are based on the idea of "double recovery". *See In re Circuit City Stores, Inc.*, 515 B.R. 302, 314–15 (Bankr. E.D. Va. 2014). As the majority below stated, "[w]e cannot endorse Touch of Grey's attempted 'double dip' given that it would be such a radical departure from a fundamental and well-settled tenet of bankruptcy law." (R. at 14). Strong language aside, this reasoning should be rejected as it not only untrue but counter to the very overarching Bankruptcy Code principles that the Thirteenth Circuit charges Petitioner with

violating.

"[R]eference to a creditor's 'double dipping' is misleading because it implies that the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice." *Friedman's Inc.*, 738 F.3d at 559. This policy fails in this case for two reasons. First, it is factually incompatible with what occurred here. Debtor purchased goods from Petitioner during the preference period. (R. at. 5). After the filing of the petition, Debtor paid Petitioner for those goods. (R. at 6–7). That money was solely for the goods provided by Petitioner. One cannot describe such a transaction as "unjust enrichment." Second, when Petitioner sold goods to Debtor, Petitioner was not aware that Debtor was going to file for bankruptcy. Plainly, it is well within the purposes of the Code to allow creditors like Petitioner to remain in business with debtors (through extensions of credit or the sale/delivery of goods) while also benefiting from the protections afforded by both sections 503(b)(9) and 547(c)(4). A holding to the contrary would disadvantage creditors who cannot predict the timing behind the initiation of a debtor's bankruptcy. This Court should reject the "double dipping" policy arguments for creating such an impossible burden on creditors.

2. *Equal Creditor Treatment*

The second set of policy arguments are based on the idea of "equal treatment of creditors". *See In re Furr's Supermarkets, Inc.*, 485 B.R. 672, 734 (Bankr. D.N.M. 2012). Similar to the "double dipping" policy argument that serves as a basis for contrary decisions, this policy argument is flawed and should be rejected for several reasons.

First, "equality" in creditor treatment is called into question by the Bankruptcy Code itself, a system riddled with exceptions concerning creditor treatment. *See, e.g.*, 11 U.S.C. § 362(b) (exceptions to the automatic stay); § 365(b) (exceptions to breach of executory contract

provisions); § 522 (general exemptions); § 523 (exceptions to discharge); § 541(b) (exceptions to property of the estate); § 547 (exceptions to preferences); *see also* Fed. R. Bankr. P. 4003. Not to mention the inequality in treatment when it comes to such things as aircraft leases or shopping center leases, *Friedman's Inc.*, 738 F.3d at 560, or the inequality in creditor treatment concerning wage orders (*In re Primary Health Sys., Inc.*, 275 B.R. 709, 709 (Bankr. D. Del. 2002)). "Inequality per se is not to be avoided; indeed, reasoned and justified inequality sometimes prevails, usually based on what is in the best interest of the estate." *Friedman's Inc.*, 738 F.3d at 560. Rejecting the plain text of section 547(c)(4) in light of the Code's many exceptions because it would create an inequality in creditor treatment is akin to one using an umbrella in a hurricane: severely misguided.

More importantly, however, the equal treatment of creditors under the Bankruptcy Code is not one of equal treatment of *all* creditors but rather one of *similar* creditors. *See In re Tribune Co.*, 972 F.3d 228, 232 (3d Cir. 2020) (fairness "regulates priority among classes of creditors having higher and lower priorities"). And, like above, Code provisions support this class differentiation. *See* 11 U.S.C. § 361 (secured creditors receive adequate protection payments); § 363 (secured creditors have a say in the use of cash collateral); § 507 (tax and wage claimants have priority over general unsecured creditors). Section 503(b)(9) claimants, like the Petitioner here, have statutory priority over general unsecured creditors. Said creditors are, by Congress's own dictate, *not* similarly situated to general unsecured creditors. Accordingly, courts that allow post-petition payments to affect the new value defense calculation ignore the congressionally created priority status of certain creditors under the guise of "equal treatment". This Court should end this trend once and for all.

The plain language of section 547(c)(4), in light of context within the provision and within section 547 as a whole, is unambiguous: any analysis of preferential payments is fixed as of the

petition date. Moreover, an analysis of the provision's pre-Code history, legislative record, and the purposes behind both Code provisions also support this unambiguous reading. Further, the policy reasonings that serve as basis for contrary lower court decisions are flawed for several reasons and should be rejected. In light of Petitioner's more natural reading of section 547(c)(4), Respondent cannot use Debtor's post-petition section 503(b)(9) administrative expense payment to defeat Petitioner's new value defense under section 547(c)(4). Accordingly, the judgment of the court of appeals should be reversed.

II. SECTION 365(d)(3) REQUIRES PERFORMANCE IN FULL OF ALL OBLIGATIONS THAT ARISE FROM A LEASE PRIOR TO ITS REJECTION.

The second issue before the Court presents another split of authority on an equally important issue of bankruptcy law: the extent of a trustee's performance on obligations arising prior to rejection of a lease of real property. The Bankruptcy Code grants trustees, subject to court approval, the power to assume or reject executory contracts and unexpired leases. 11 U.S.C. § 365(a). Pertinent here, in situations concerning unexpired leases of nonresidential real property, the trustee has 60 days from the date of the order for relief to assume or reject the lease. *Id.* § 365(d)(4). As a matter of law, inaction means rejection. *Id.*

Section 365(d)(3) mandates that "[t]he 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." 11 U.S.C. § 365(d)(3). The question is in what manner rent payments due prior to the rejection of a lease but allocable to the post-rejection period must be paid. The Thirteenth Circuit prorated Respondent's obligations for the period between rejection and when the rental payment became due. However, the plain text and the statutory history of section 365(d)(3) require otherwise. Further, in prorating Respondent's obligations, the

Thirteenth Circuit created a circuit split where none previously existed, basing its decision on a theory unsupported in text and history. Finally, in light of the COVID-19 pandemic still widespread around the globe, creditors in the United States need strong reaffirmance from this Court of the protections afforded to them under section 365(d)(3). As all facets of traditional statutory interpretation—text, history, purpose, and policy—support performance in full, the judgment of the court of appeals should be reversed.

A. The Plain Language of Section 365(d)(3) Requires Performance in Full.

We again "begin[] with the language of the statute itself." *Ron Pair Enters.*, 489 U.S. at 241. A syntactical reading of this statute renders its meaning clear: a trustee must perform "all the obligations of the debtor" that arise "after the order for relief" prior to the lease being "assumed or rejected." This Court need not look further than the text itself to resolve the inquiry on this issue.

1. *The trustee must perform "all obligations" arising prior to assumption or rejection.*

"The clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms." *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001). Thus, the only question is the nature of the "obligation" under the lease and when that obligation "arises" in the section 365(d)(3) context.

The Bankruptcy Code does not define what an "obligation" is. We therefore accord the term its "ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Obligation means a "formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract." Obligation, *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. This definition follows common understanding: when one receives a service, such as when dines at a restaurant, one has a legal "obligation" to pay the bill. Similarly, here, the Debtor had an "obligation" pursuant to a "formal,

binding agreement . . . to pay a certain amount" for the services he received from "a particular person"—here, Petitioner—under the terms of the Lease. (*See* R. at. 4).

This definition of "obligation" is supported in practice: obligations—and by extension, rights—are defined by contract to which individuals are party. *See Weyant v. Phia Group LLP*, 17 CIV. 8230 (LGS), 2021 WL 5998400, at *3 (S.D.N.Y. Dec. 20, 2021). The definition of "obligation" also permits parties to determine the scope of their obligations by placing their own definitions on what each party is legally required to perform. *See id.* This definition of "obligation" is also consistent with the definition of obligation as used in other federal statutes. For example, the Fraud Enforcement and Recovery Act of 2009 ("FERA") defines obligation as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3).

The definition of "arises" is likewise undefined in the Code. Arise commonly means "[t]o originate; to stem (from)" or "[t]o result (from)" something. Arise, *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. Here, "arise", in the context of section 365(d)(3) is naturally read as encompassing "all the obligations" that "arise from" an "unexpired lease." Thus, when used with its ordinary meaning, "an obligation arises when one becomes legally obligated to perform." *Montgomery Ward*, 268 F.3d at 209.

It is also important to address the other potential syntactical ambiguity within section 365(d)(3): Congress's use of the word "from". The potential ambiguity arises out of a question of whether "arises from" modifies "the order of relief" or whether the term modifies "unexpired lease" within section 365(d)(3). Should the statute be read as requiring a trustee to fulfill all the obligations arising "from . . . the order of relief," then it would follow that the order of relief

contains certain obligations that pertain to the creditor. First, this logical conclusion is often untrue in the bankruptcy context. Second, that reading renders the inclusion of "unexpired lease" superfluous, an impossible reading in light of the fact that section 365 directly pertains to executory contracts and unexpired leases. Third, as explained at length below, such a reading runs counter to the legislative history of section 365(d)(3) that directly speaks to "obligations" derived from leases rather than orders of relief. Thus, the only possible reading of "from" as used in section 365(d)(3) is that the trustee must "perform" all the "obligations" of a debtor that "arise from" the "unexpired lease." Plainly, the phrase "and after the order for relief" simply modifies that rule temporally to require the "obligations of the debtor" that must be performed by the trustee to have arisen post-petition, rather than pre-petition. Congress's odd placement of "arises from" does not, by itself or within the broader context of section 365(d)(3), render the provision ambiguous.

Putting everything together reveals section 365(d)(3)'s plain meaning. The obligation that the Debtor owed to Petitioner—that is, the obligation that the Trustee must perform if unrejected—was the payment of the rent for May 2020: $25,000. (R. at 4). The obligation, as it did every month, was "due in advance on the first day of each month," and thus arose on that date. *Id.* The obligation arose on May 1, 2020, after the order of relief pursuant to Debtor's petition filed on January 5, 2020. (R. at 5). And the obligation arose *prior to* the rejection of the Lease on May 5, 2020. (R. at 7) (emphasis added). The parties agreed to the terms of the contract which defined each party's obligations to the other. (R. at 4). Since the obligation arose prior to the rejection of the lease, the plain text of section 365(d)(3) requires Respondent to perform it.

2. *The only exceptions to full performance have already been defined in the text.*

Two textual clues make clear the operative breadth of section 365(d)(3). First, the text provides that "all the obligations of the debtor" shall be performed "except those specified in

section 365(b)(2).” Second, the text defines “all the obligations” as those “arising from and after the order for relief” until the trustee acts to assume or reject the lease “notwithstanding section 503(b)(1) of this title.” As used in section 365(b)(2), “except” and “notwithstanding” are words that indicate that what follows is a specific exception that “puts certain limits” on a more general rule “set forth elsewhere” in the Code. *See Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 217 (1998); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (2012) (“A dependent phrase that beings with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers.”). Here, the more general rules come in the forms of section 365(b)(2)—which serves to defeat certain provisions as a matter of public policy—and 503(b)(1)—which serves to bar allowing administrative expenses for an enumerated list of items under the Code.

This Court has cautioned that an “exception” is “usually read . . . narrowly in order to preserve the primary operation of the provision.” *Marachich v. Spears*, 570 U.S. 48, 60 (2013). The Thirteenth Circuit’s statutory construction of the provision runs counter to that rule. That interpretation would read an *additional* exception into the plain text of the statute—one that permits for proration of obligations—an exception that plainly would “swallow the rule”. *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 530 (2009). The more natural reading of the statute thus goes like this: a trustee shall perform all obligations except those barred under sections 365(b)(2) and 501(b)(3).

This additional exception would render the already enumerated list of exceptions superfluous. This Court has recognized that the Code’s “meticulous—not to say mind-numbingly detailed—enumeration of exceptions . . . confirm that courts are not authorized to create additional exceptions.” *Law v. Siegel*, 571 U.S. 415, 424 (2014). Congress has already spoken into the statute

two clear exceptions to a trustee's requirement of full performance. Reading in a third, that allows a trustee to prorate its obligations to a creditor that arise from a lease such as the one in question here, would fail "to give independent effect to the statute's enumeration of the specific" Code provisions to which section 365(b)(3) is already excepted from. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001).

B. A Historical Analysis Supports Performance in Full.

Section 365(d)(3) was not added to the Bankruptcy Code until the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333 (1984). Prior to enactment of section 365(d)(3), the Code provided little recourse to landlords. A trustee could wait at least sixty days to determine whether to accept or reject a lease of real property, regardless of whether it was residential or commercial. 11 U.S.C. § 365(d)(1) (1983). During that time, regardless of whether the Debtor occupied the premises, landlords had little recourse other than seeking payment via an administrative claim. C. Alan Gauldin, *The Commercial Real Estate Landlord's Rights to Receive Post-Petition Rental Payments Under Section 365(d)(3) of the Bankruptcy Code*, 14 U. ARK. LITTLE ROCK L.J. 491, 493 (1992). The Code required landlords to follow a strict notice and formal hearing procedure pursuant to section 503(b)(1) while also placing the burden on landlords to show the necessity of such expenses. Joshua Fruchter, *To Bind or Not to Bind–Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 AM. BANKR. L.J. 437, 437 (1994). And recovery was limited to only a "reasonable value". *See id.* at 438; *see also In re Dant & Russell, Inc.*, 853 F.2d 700, 707 (9th Cir. 1988) (". . . that amount should not exceed the fair and reasonable rental value."). Finally, notwithstanding the burdens against landlords, courts also had the discretion not only hold a debtor liable only for a *pro rata* portion of the rent but also delay payment to the landlord until confirmation of the plan. Aaron H. Stulman, *Stub Rent Under Section*

365(d)(3): A Call for a Unified Approach, 36 DEL. J. CORP. L. 655, 659 (2011).

Congress addressed those concerns in the enactment of section 365(d)(3) by allowing for timely payment of rent obligations without a showing of actual and necessary benefit to the estate under section 503. *See* Josef S. Athanas & Scott A. Semenek, *Pro-ration of Rent Dead in Third and Sixth Circuits–Landlords Won the Battle, But Will They Lose the War?*, 19 BANKR. DEV. J. 123, 126 (2002); *Montgomery Ward*, 268 F.3d at 210 ("Virtually all courts have agreed that [section 365(d)(3)] was intended to alleviate the above described burdens of landlords by requiring timely compliance with the terms of the lease."). Key pieces of the legislative record show Congress intended section 365(b)(3) to provide protections for landlords. Congress recognized that a key problem under the pre-1984 amendments was requiring landlords "to provide current services—the use of its property, utilities, security, and other services—without current payment." 130 Cong. Rec., H.R. Conf. Rep. 98-882 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 598–99. As Senator Orrin Hatch then explained, addressing Congress's proposed solution:

> The bill would lessen these problems by requiring 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 timely performance requirement will insure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

Id.; *see also In re Pac.-Atl. Trading Co.*, 27 F.3d 401, 404 (9th Cir. 1994) (emphasizing section 365(d)(3)'s legislative history). Most courts agree that section 365(d)(3) was designed "to allow landlords to receive the benefit of their lease bargains." *See In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 68 (Bankr. S.D.N.Y. 2004).

Furthermore, the decision below creates unnecessary tension with the purposes behind the enactment of section 365(d)(3). Section 365(d)(3) "shift[s] the burden of indecision to the debtor: the debtor must now continue to perform all the obligations of its lease or make up its mind to reject it before some onerous payment comes due during the prerejection period." *In re Koenig*

Sporting Goods, Inc., 203 F.3d 986, 989 (6th Cir. 2000). The Debtor here had full control of when to reject the Lease. It did so on May 5, 2020, four days after the rent for May 2020 became due under the Lease. (*See* R. at 7). The Debtor could have rejected the Lease on April 30, 2020, avoiding payment for the month of May, but for whatever reason chose not to do so. Affirming the decision below prorating the Debtor's obligations to Petitioner under the Lease would only shift the burden back onto Petitioner, contrary to the explicit purposes behind the enactment of section 365(d)(3).

Consider further violations of the plain text of section 365(d)(3). Adopting the proration approach would only serve to frustrate Congress's clear intent behind enacting the statute and give trustees an "incentive" to not "comply with the prompt payment mandate" of section 365(d)(3). *In re Wash. Bancorporation*, 125 B.R. 328, 329 (Bankr. D.D.C. 1991). In fact, trustees that know they could avoid full performance would likely disobey the law, hold the money, and force creditors like the Petitioner to come after it in bankruptcy court. "The statute ought not be interpreted in a fashion that will encourage frustration of the congressional intent." *Id.* Congress's unambiguous language, along with the congressional record, supports full performance by trustees.

Lastly, the Thirteenth Circuit argued that section 365(d)(3) necessarily supports the proration approach because of Congress's complimentary enaction of section 365(d)(4). (R. at 19). There, the Code requires that "the trustee shall immediately surrender that nonresidential real property to the lessor" if the lease is not rejected by a set date. 11 U.S.C. § 365(d)(4). This Code provision does not give the Thirteenth Circuit the great latitude it seeks. Quite to the contrary, the provision is in line with section 365(d)(3): just as the trustee must perform certain obligations that occur *after* rejection, the trustee must perform certain obligations that occur *before* rejection. The Thirteenth Circuit argued that "the trustee should no longer be obligated to pay for unused and

unoccupied real property that has been returned to the landlord." (R. at 19). Quite true, had such rejection occurred prior to the time of performance. The Debtor here had the opportunity to reject the Lease before the May 2020 payment became due under the terms of the agreement. It did not do so. Because "the statute favors full payment," (*Koenig*, 203 F.3d at 989), the judgment of the court of appeals should be reversed.

As before, "[r]eliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz*, 559 U.S. at 236 n.3. Nevertheless, a thorough examination of section 365(d)(3)'s legislative history and Congress's intended purposes behind the enactment of the Code provision supports the conclusion that a trustee is required to perform all obligations as they arise under a lease.

C. Neither the Text nor History Support the Contrary "Proration" Approach.

In deciding this issue, this Court is faced with two dueling approaches to section 365(d)(3): the "billing date" approach and the "proration approach". The "billing date" approach looks at the date rent becomes due and payable under the lease. *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 210 (3d Cir. 2001). In contrast, the "proration approach" prorates the rent for the time before and after rejection, requiring only the portion prior to rejection be paid. *See El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 69–70 (B.A.P. 10th Cir. 2012). In affirming the Bankruptcy Court, the Thirteenth Circuit adopt the "proration approach". In doing so, the Thirteenth Circuit created a circuit split where none previously existed and based its decision on a theory unsupported in text and history.

1. *The Thirteenth Circuit unnecessarily created a circuit split where none previously existed.*

The Thirteenth Circuit below correctly noted that a "slight majority" of courts adopt the

"proration" approach to section 365(d)(3). (R. at. 16). However, in adopting this "slight majority" approach, the circuit court ignored a uniformity in decisions from its sister circuits, all rejecting proration arguments in the section 365(d)(3) context. *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, 799 (7th Cir. 2003); *Montgomery Ward*, 268 F.3d at 210; *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 990 (6th Cir. 2000); *see also In re Pac.-Atl. Trading Co.*, 27 F.3d 401, 404 (9th Cir. 1994). It is telling that the decision below recognizes the newly created split, arguing in a footnote that the circuit court was "duty-bound to conduct [its] own independent analysis." (R. at 17 n.7). Telling too that the circuit court relies on several dissenting opinions and the Seventh Circuit's decision in *Handy Andy Home Improvement* in support of its fictitious split in circuit authority. *See id.* That case, however, is unavailing as it concerned debt that accrued *pre-petition*, well outside the scope of section 365(d)(3). *See Matter of Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125, 1126 (7th Cir. 1998) (emphasis added).

The Sixth Circuit's decision in *Koenig*, as recognized by the dissent below, is the most on point decision to the case at bar. *Koenig* concerned the appeal of a sports retailer debtor from the Sixth Circuit's Bankruptcy Appellate Panel finding Koenig liable for a full month of rent to its creditor, Morse Road Company ("Morse"). 203 F.3d at 987. Just as here, the two parties entered into a leasing agreement that required a set payment of rent on the first day of every month. *Compare id. with* (R. at 4). Koenig voluntarily filed for Chapter 11 bankruptcy and then rejected the leasing agreement effective on December 2nd, a day after rent was due on December 1st. *Id.* at 988. Morse filed a request with the bankruptcy court seeking payment of the rent for the full month of December. *Id.* The bankruptcy court granted the request, the bankruptcy appellate panel

affirmed, and Koenig appealed to the Sixth Circuit. *See id.* There, the Sixth Circuit affirmed once more, reasoning that the statute unambiguously required performance in full and that equity, in light of the legislative history behind section 365(d)(3), supported creditor protection. *See id.* at 988–990. This Court need not look further than a factually on point decision finding the statutory text unambiguous and the legislative history fully supporting the intent behind that text.

2. *The approach used by the "slight majority" is unsupported in text or history.*

Admittedly, on a purely numerical inquiry, more individual courts have adopted the proration approach to rent payment under section 365(d)(3).[1] *See In re McCrory Corp.*, 210 B.R. 934, 940 (S.D.N.Y. 1997). These decisions argue that the text of section 365(d)(3) is ambiguous, and that the legislative history did not indicate a departure from pre-Bankruptcy Code practice. Lastly, proration courts argue that the billing date approach creates bad policy under the Code. Just as the text is unambiguous, history and policy are equally unsupportive of the proration approach. This Court should not adopt it.

Looking first, as we always do, to the text. The Thirteenth Circuit below, similar to other proration courts, argued that word "arise" is ambiguous within the context of section 365(d)(3) because something can "continue to accrue," thereby arising. (R. at 17). Not so. Rent payments, particularly the one in question here, do not accrue over the span of time. Under the Lease, the Debtor was not obligated to pay an increasing amount of rent every day he resided on the Premises over the course of a month. Rather, he was obligated to pay a lump sum payment up front on the first day of the month. (*See* R. at 4). Defining the term "arise" as something that accrues in the context of leases under section 365(d)(3) would create an absurd result contrary to the ordinary

[1] This is not to say that courts in the circuits that have not resolved the issue do not adopt the billing date approach. Quite the opposite, in fact, is true. *See, e.g.*, *In re R.H. Macy & Co., Inc.*, 152 B.R. 869, 872–74 (Bankr. S.D.N.Y. 1993) (Second Circuit); *In re Appletree Mkts., Inc.*, 139 B.R. 417, 418–21 (Bankr. S.D. Tex. 1992) (Fifth Circuit); *In re Duckwall–ALCO Stores, Inc.*, 150 B.R. 965, 974–76 (D. Kan. 1993) (Tenth Circuit).

meaning and usage of the term.

Additionally, the Thirteenth Circuit below, just as other proration courts, argued that the phrase "until such lease is assumed or rejected" further supports the conclusion that section 365(d)(3) is ambiguous on its face because the phrase could either modify the term "perform" or the term "obligations". (R. at 18). Here, again, the Thirteenth Circuit stretches to find ambiguity where none exists. If one were to remove the dependent clauses in the provision, the Code would be left with "the trustee shall timely perform all obligations of the debtor . . . until such lease is assumed or rejected". "Until such lease is assumed or rejected" thus plainly modifies the term "perform" by setting a temporal limitation on when one can cease to "perform" the "obligations". Insofar as the text may modify "obligations", such an argument fails because the "obligations" are determined not by the rejection of the lease but rather by what was in the lease in the first place.

This reading is also supported by Congress's inclusion of the word "timely" in the text of section 365(d)(3). As before, a trustee must "timely perform all the obligations of the debtor. . . ." 11 U.S.C. § 365(d)(3). In common usage, "timely" means "[w]ithin a specified deadline." Timely, *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. It follows that "timely" therefore modifies the word "perform" by requiring the trustee (or debtor in possession) to "perform" the obligations "within a specified deadline." The converse reading, adopted by those who find ambiguity in the text, would say that the word "timely" modifies "obligations." But the "obligations" are no more "timely" within the context of section 365(d)(3) than the "obligations" cease upon rejection. "Until such lease is assumed or rejected" creates the same temporal modification to "perform" as "timely." Thus, a trustee must "timely perform" until he or she assumes or rejects the lease. Here, "timely" performance required payment in full on May 1, 2020.

Looking next at history, proration courts argue that section 365(d)(3) was enacted to not

"deviate from the pre-amendment practice of prorating lease obligations pending rejection." *McCrory*, 210 B.R. at 939. Historically, proration courts argue, this approach required "current payment" for "current services," and that section 365(d)(3) was not enacted in a way that would "grant" landlords a "windfall at the expense of other creditors." *Id.* at 939–40. To the contrary, the legislative history of section 365(d)(3) makes clear the amendment's intended purpose of rejecting the "current payment" for "current services" approach. As Senator Hatch described the legislation, "[t]he bill would lessen . . . problems by requiring the trustee to perform *all* the obligations of the debtor under a lease of nonresidential real property *at the time required in the lease*." 130 Cong. Rec., H.R. Conf. Rep. 98-882 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 598–99 (emphasis added). This approach makes further sense when taking the proration approach on its face. Rather than providing "current payment" for "current services," the proration approach allows for payment *for a part* of the services *after they are provided* as the payment would not come until by court order after rejection (emphasis added). In contrast, the billing date approach would best effectuate the terms of leases that require full payment on the first day of every month, thereby ensuring payment for services rendered by a landlord to his or her tenant.

Looking lastly to policy, proration courts argue that payment in full constitutes a "windfall" for landlord creditors. *McCrory*, 210 B.R. at 940. Again, any potential "windfall" is triggered not by the creditor but by the debtor or trustee failing to reject the lease in a timely period. As mentioned previously, the debtor could have avoided payment of the May 2020 rent had he rejected the lease at any point prior to or on April 30th. He chose not to do so. Further, this alleged "windfall" is precisely what Congress contemplated in enacting section 365(d)(3): Congress "provided special treatment for nonresidential landlords," in granting them a priority over other creditors. *See In re Burival*, 406 B.R. 548, 553 (B.A.P. 8th Cir. 2009). Lastly, as the dissent below

correctly points out, the billing date approach is based in equity in protecting both the interests of creditors and debtors alike: claims under section 365(d)(3) that arise prior to the petition do not fall within the scope of the provision, even if a portion of the rent sought was during the post-petition, pre-rejection period. *See In re Oreck Corp.*, 506 B.R. 500, 506 (Bankr. M.D. Tenn. 2014).

The proration courts below incorrectly find ambiguity in the text of section 365(d)(3) where none exists. After finding ambiguity by torturing the text of section 365(d)(3), proration courts ignore key pieces of the provision's legislative history and fashion far-reaching policy arguments in support of their atextual statutory constructions. This Court should not follow suit.

D. The COVID-19 Pandemic Further Accentuates the Need for Creditor Protection.

The COVID-19 pandemic turned the lives of billions of people around the world upside down as the virus quickly spread globally starting in November 2019. Described as a "once in a lifetime" pandemic, COVID-19 has not only caused a devasting loss of life but also decimated the nation's economy and played a large role in hundreds if not thousands of bankruptcy proceedings in the last two years, as well as spurring congressional action in the form of the COVID-19 Bankruptcy Relief Extension Act of 2021. *See* Pub. L. 117-5, 135 Stat. 249 (Mar. 27, 2021). But while the pandemic undoubtedly made it more difficult for individuals and companies to meet their housing and commercial lease payment obligations, it also accentuated the financial stress that landlords were facing nationwide. Landlords lost important rent payments and, with them, livelihoods.

Courts have been split in how they have addressed section 365(d)(3) issues since the inception of the COVID-19 pandemic. Some courts have sided with landlords. *See, e.g.*, *In re CEC Entm't, Inc.*, 625 B.R. 344, 353 (Bankr. S.D. Tex. 2020) ("Section 365(d)(3) unambiguously requires that debtors timely perform obligations under commercial leases."). These courts

emphasize that "commercial real property lessees must continue to perform after filing for bankruptcy" because "the text and the intent of § 365(d)(3)" clearly require "debtors timely perform obligations under commercial leases." *Id.* at 352–53. Indeed, the bankruptcy court in *CEC Entm't* noted that the legislative history behind section 365(d)(3) "display[ed] empathy for the plight of a lessor who . . . is forced to extend credit to the bankruptcy estate." *Id.* at 352.

Other courts have sided with debtors. *See, e.g., In re Pier 1 Imps., Inc.*, 615 B.R. 196, 203 (Bankr. E.D. Va. 2020). The bankruptcy court in *Pier 1* reasoned that "[i]f a debtor fails to perform its obligations . . . all a Lessor has is an administrative expense claim under § 365(d)(3), not a claim entitled to superiority." *Id.* at 202. Using this reasoning, the bankruptcy court granted the debtor a deferral of rent payments to a future date. *See id.* at 201. This represents an extraordinary departure from the plain text of section 365(d)(3) and Congress's mandate. Bankruptcy courts that have permitted rent deferments during the COVID-19 pandemic have done so under the bankruptcy courts' powers in section 105(a) of the Bankruptcy Code. *See, e.g., id.* at 201 n.7. Section 105(a) permits a bankruptcy court to "issue any order, process, or judgment that is necessary and appropriate" to protect the bankruptcy case. 11 U.S.C. § 105(a). However, section 105(a) powers do not permit courts to contravene the unambiguous language of Code provisions. Indeed, section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)). The Bankruptcy Code "does not permit" courts "to equitably alter" a debtor's "rent obligations" under an unexpired lease of nonresidential real property. *CEC Entm't*, 625 B.R. at 353. COVID-19 should not become a catalyst to encroach upon the rights of landlords and force them to subsidize economic losses caused by the pandemic when

the Code requires tenants meet their payment obligations.

In light of the unambiguous statutory text of section 365(d)(3), lower courts cannot stretch their powers under section 105(a) to contravene Congress's clear mandate. In the interest of landlords that deserve the protections granted to them by Congress under the Bankruptcy Code, the judgment of the court of appeals should be reversed.

CONCLUSION

As this Court previously explained, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In this case, Congress hid no elephants, choosing rather to speak unambiguously by both drawing the preference analysis line at the petition date, thereby leaving post-petition payments by a debtor out of the calculation of a creditor's "new value" defense, and by requiring performance in full by trustees for obligations arising from and prior to the rejection of leases on nonresidential real property. Plain text aside, contextual clues, as well as broad evidence in pre-Bankruptcy Code and legislative history, support Congress's clear intentions in both provisions. Further, the purposes of both provisions are best supported through these readings. The Thirteenth Circuit below held otherwise, finding elephants where there were none, basing its decisions on slim majority approaches that lack support in text, history, or policy. For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

TEAM 43
Counsel for Petitioner

APPENDIX

11 U.S.C. § 365 provides in pertinent part:

Executory contracts and unexpired leases

(d)

* * * * *

(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.

11 U.S.C. § 503 provides in pertinent part:

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—

* * * * *

(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 provides in pertinent part:

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.