Team 18

No. 23-0115

IN THE

Supreme Court of the United States

IN RE EUGENE CLEGG, INC. DEBTOR

VERA LYNN FLOYD, CHAPTER 7, TRUSTEE, PETITIONER

V.

EUGENE CLEGG, RESPONDENT

ON WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Respondent

TEAM 18
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether post-petition, pre-conversion increases in non-exempt equity in a debtor's property belong to the debtor upon conversion of a case from Chapter 13 to Chapter 7?

II. Whether a Chapter 7 trustee can sell the power to avoid and recover transfers as property of the bankruptcy estate?

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STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived in accordance with the Rules of the Duberstein Bankruptcy Moot Court Competition.

STATEMENT OF THE CASE

Factual Background

This case arises from a series of unfortunate events faced by Corporal Eugene Clegg ("Mr. Clegg" or the "Debtor"). Mr. Clegg is a distinguished military veteran who received 100% membership interest in The Final Cut, LLC ("Final Cut"), an entity that owned and operated a historic movie theater in the City of Moot. (R. at 5.) For many years, Mr. Clegg dutifully operated the movie theater and received a modest salary from Final Cut as his sole source of income. (R. at 5.) Mr. Clegg, seeking to renovate the theater, borrowed $850,000 (the "Loan") from Eclipse Credit Union ("Eclipse"), a financial institution that had only recently begun to extend commercial loans. (R. at 5.) The Debtor simultaneously executed an unconditional, unsecured personal guaranty in an unlimited amount as additional security for the Loan's repayment. (R. at 5.) However, Final Cut did not use all of the Loan proceeds as Mr. Clegg did most of the renovation work himself alongside other local veterans. (R. at 5.) The remaining Loan proceeds were donated to the Veterans of Foreign Wars (the "VFW"). (R. at 5.) Final Cut remained solvent after the donation, capitalized, and satisfying its debts. (R. at 6.)

Due to the COVID-19 pandemic, in March 2020, the Moot State governor declared a public health emergency and issued an executive order requiring everyone in the State to stay home. (R. at 6.) Consequently, the theater shut down for almost an entire year and Mr. Clegg's only source of income was gone. (R. at 6.) Subsequently, he was forced to borrow $50,000 from his mother ("Pink") to help him survive. (R. at 6.) Fortunately, the theater reopened to the public in February 2021, however, the public's attendance was not promising. (R. at 6.) Determined to help the theater succeed, Mr. Clegg decided to bypass his salary to assist Final Cut's revenue issues. (R. at 6.) Mr. Clegg's sacrifice caused him to incur credit card debt and he fell behind on his home mortgage payments serviced by Another Brick in the Wall Financial Corporation ("Servicer"). (R. at 6.) After some months of missed payments, Servicer commenced foreclosure proceedings. (R. at 6.) In an effort to save his home, Mr. Clegg turned to relief under the United States Bankruptcy Code and filed for Chapter 13 bankruptcy on December 8, 2021 ("Petition Date"). (R. at 6.) On his schedules, he listed the value of his home as $350,000, his mortgage as $320,000, and he claimed a homestead exemption of $30,000. (R. at 6.) Mr. Clegg filed a Chapter 13 plan (the "Plan") and proposed to make payments on the Plan entirely through his future earnings from Final Cut, all parties in interest were optimistic about the profitability of the theater (R. at 7.) *See* 11 U.S.C. § 1235(a)(6).

Prior to confirmation of the plan, Mr. Clegg faced an objection by the Chapter 13 trustee who claimed creditors would not receive at least as much as they would have in a hypothetical liquidation under Chapter 7. (R. at 7.) Following negotiations with the Chapter 13 Trustee, Mr. Clegg amended the Plan to increase the total payments to creditors by $20,000 over the three-year commitment period, and the Trustee agreed to not pursue an avoidance action to recover the payments made to Pink before the Petition Date. (R. at 7.) The bankruptcy court confirmed Mr. Clegg's Plan on February 12, 2022. (R. at 8.) The Plan expressly stated that all of the estate property vested in Mr. Clegg. (R. at 8.)

Mr. Clegg made payments on time under the Plan for eight months. (R. at 8.) Unfortunately, he contracted long-COVID in September 2022 and was unable to continue working at the theater. (R. at 8.) The theater permanently closed soon after which caused Eclipse to commence foreclosure proceedings against Final Cut. (R. at 8.) With his only source of income gone, Mr. Clegg could no longer make payments under the Plan. (R. at 8.) Rather than dismiss the Chapter 13 case, Mr. Clegg chose to convert his case to Chapter 7 in good faith, a fact that no party in interest has disputed. (R. at 8.) Vera Lynn Floyd (the "Trustee" or "Petitioner") was appointed as the Chapter 7 trustee. (R. at 9.) Mr. Clegg's Chapter 7 schedules stated a home value of $350,000 and disclosed the transfers to Pink. (R. at 9.) He also detailed that he intended to stay in his home and reaffirm the mortgage debt to Servicer. (R. at 9.) After Mr. Clegg mentioned that he noticed home values had increased in the years after the pandemic, the Trustee commissioned an appraisal of Mr. Clegg's home which revealed that the non-exempt equity had increased by $100,000 since the Petition Date. (R. at 9.) No party disputed the new valuation of Mr. Clegg's home, and the Trustee began marketing the home for sale. (R. at 9.) Eclipse offered to buy the home and the alleged preference claim against Pink, both of which totaled $470,000. (R. at 9.)

Procedural History

The Trustee filed a motion to sell ("Sale Motion") Mr. Clegg's home and the alleged preference claim. (R. at 9.) Mr. Clegg objected to the Sale Motion on two grounds.[1] (R. at 10.) First, Mr. Clegg claimed the post-petition, pre-conversion increase in the equity of his home should belong to him and second, that the Trustee's ability to avoid and recover transfers cannot be sold. (R. at 10.) The bankruptcy court ruled in favor of Mr. Clegg on both grounds. (R. at 10.) The Trustee timely appealed to the United States District Court for the Thirteenth Circuit and the disputes were certified for direct appeal pursuant to 28 U.S.C. § 158(d)(2)(A). (R. at 10.) The circuit court affirmed the bankruptcy court's decision. (R. at 24.) The appeal to the United State Supreme Court (this "Court") followed.

[1] All parties agreed that Clegg had standing to object. (R. at 10.)

STANDARD OF REVIEW

The questions presented are solely an issue of law, and where a court is reviewing questions of law, the appropriate standard of review is *de novo*. *In re Chicago Mgmt. Consulting Grp.*, 929 F.3d 804, 809 (7th Cir. 2019). A *de novo* standard of review tasks the reviewing court to make decisions as if it were the original trial court handling the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996). The issues here are questions of law because the parties have stipulated to the facts presented. (R. at 5.) Therefore, this Court must look at the lower court's decision as if it were the bankruptcy court.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals because the express language of the United States Bankruptcy Code (the "Bankruptcy Code") mandates that the post-confirmation, pre-conversion increase in non-exempt equity belongs to the Debtor. This Court should decide that the equity belongs to the Debtor because it is the only decision that aligns with legislative history, aid's a debtor's fresh start, and promotes the satisfaction of valid claims.

The language of §§ 348(f)(1)(A), 541(a), 522(b)(1), and 1327(b) takes the equity out of the bankruptcy estate. These sections must be read together because the Bankruptcy Code should be read as a whole. A walk-through of these Bankruptcy Code sections reveals that the estate does not include equity or assets that have been exempted from the bankruptcy estate or that have vested in the debtor after confirmation.

Legislative history also supports the position that post-confirmation increase in equity belongs to the debtor because Congress addressed a nearly identical issue in 1994. The 1994 amendments to the Bankruptcy Code reveals that Congress wanted to incentivize debtors to file for Chapter 13 over Chapter 7. Giving post-confirmation increases in equity to the Bankruptcy estate minimizes debtors' incentive to file under Chapter 13 because they would be at risk of losing assets that they could have kept in a Chapter 7.

Giving the increases in equity to debtors also promotes the fundamental principles of bankruptcy, which is to aid a debtor's fresh start and promote satisfaction of valid claims. Taking away a debtor's home puts him or her at a great disadvantage towards a fresh start after bankruptcy. Further, incentivizing debtor's to file for Chapter 13 results in greater satisfaction of claims because creditors get paid more than they would in a Chapter 7.

Regarding the power of a Chapter 7 trustee to sell the ability to avoid and recover preferential transfers, this Court should also affirm the Thirteenth Circuit Court of Appeals decision that avoidance powers cannot be sold as property of the estate. The Petitioner seeks to read the Bankruptcy Code selectively and reverse over a century of bankruptcy legislation by requesting the sale of avoidance powers. The Trustee cannot sell her avoidance powers because such a sale contravenes the Bankruptcy Code and is supported by legislative history and policy rationale.

A trustee is tasked to effectively administer the estate and maximize the recovery to creditors. Sections 547 and 550 grant a trustee with the power to avoid and recover certain transfers as part of his or her duties. The Petitioner also erroneously asserts that a trustee's avoidance powers are property of the estate. Section 541 of the Bankruptcy Code clearly distinguishes what is considered property of the estate and does not include avoidance powers. A debtor does not retain a legal or equitable interest in avoidance powers because the powers arise upon commencement of the Bankruptcy case and do not exist outside of the Bankruptcy system. As items excluded from property of the estate, a trustee's avoidance powers cannot be sold.

Additionally, the legislative history and policy reasons support that a trustee should exercise avoidance powers. The Bankruptcy Code was enacted to provide a uniform system of debt reorganization. Granting the sale of a trustee's avoidance powers would return the Bankruptcy system to a time of disorganization and unequal distribution amongst creditors. Reverting to a disorderly system undermines the careful intentions of Congress when enacting Bankruptcy legislation. In summary, the statutory language, congressional intent, and underlying reform support the interpretation that a trustee's avoidance powers cannot be sold.

ARGUMENT

This Court should uphold the decision of the United States Court of Appeals for the Thirteenth Circuit because the statutory scheme, legislative history, and the principles of bankruptcy are clear that post-petition, pre-conversion increases in equity belong to the debtor Additionally, this Court should also uphold the decision of the lower court because the Trustee's avoidance powers cannot be sold.

I. Post-Confirmation Increases in Non-Exempt Equity Belong to theDebtor.

The Bankruptcy Code is like a well-loved recipe. A good chef does not serve a dish after only completing the first step. Instead, the chef follows all of the instructions to ensure the dish is prepared correctly. When considering the meaning of a specific section the Court must look at the Bankruptcy Code as a whole to ensure it delivers the correct decision. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Therefore, this Court should consider all of the relevant sections and hold that the equity belongs to the Debtor.

A. Statutory interpretation establishes that the home and the equity left the bankruptcy estate.

A holistic approach, in this case, means analyzing all of the relevant sections of the Bankruptcy Code to avoid a limited view of any one section. This approach starts with § 348(f)(1)(A) because it governs what property of the estate is in a case converted from Chapter 13 to Chapter 7.

i. The plain language of § 348(f)(1)(A) indicates that the the equity is not a part of the bankruptcy estate.

Statutory interpretation begins with the language of the statue itself. *United States. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). When the language of the statute is plain, the courts "sole function is to enforce it according to its terms." *Id.* To determine if a statute has a plain meaning, the court must look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341 (1997). Thus, a complete statutory interpretation is a holistic endeavor. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988). A statutory provision has a plain meaning, even though it may seem ambiguous in isolation, when it is clarified by the statutory scheme of the bankruptcy code. *Id*.

Here, § 348(f)(1)(A) is clarified by §§ 541, 522 and 1327 because these statutes work together to provide a framework for what is property of the estate. Section 348(f)(1)(A) governs what is property of the estate in a case converted from Chapter 13 to Chapter 7. *See* 11 U.S.C. § 348(f)(1)(A). In such a case, property of the Chapter 7 estate consists "of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." *Id*. Section 541(a)(1) defines the phrase "property of the estate" that is used in § 348(f)(1)(A) as "property in which the debtor has legal or equitable interests." 11 U.S.C. § 541(a)(1).

Next, the court must look to § 522(b)(1) because it gives the debtor the option to exempt certain assets from the estate, such as equity in a homestead. 11 U.S.C. § 522(b)(1). Lastly, this Court must look to § 1327(b) to get a full understanding of what is property of the estate because it provides that "the confirmation of a plan vests all of the property of the estate in the debtor.." 11 U.S.C. § 1327. Thus, while § 348(f)(1)(A) may seem ambiguous at first blush, the statutory scheme of the Bankruptcy Code clarifies that property of the estate does not include property that is exempt or that has vested in the debtor.

The Petitioner will likely argue that the plain language of § 348(f)(1)(A) gives the increase in equity to the bankruptcy estate upon conversion. To reach this conclusion, the petitioner will correctly begin with the language of § 348(f)(1)(A) and then go to §541(a) to establish property of the estate. *See Matter of Castleman*, 75 F.4th 1052, 1056 (9th Cir. 2023). However, the Petitioner's argument is an incomplete analysis of the issue because it focuses only on the sections that apply in Chapter 7 cases, but ignores that "property of the estate" is defined differently in Chapter 13 cases. *Castleman*, 75 F.4th at 1061 (Tallman, J., dissenting). The petitioner's interpretation of this issue also renders § 348(f)(2) superfluous. Section 348(f)(2) provides that "property of the estate in the converted case consists of the property of the estate as of the date of conversion," as opposed to as of the date of petition, when the debtor coverts in bad faith. *See* § 522(b)(1) 348(f)(2). If this court concludes that §348(f)(1)(A) gives the bankruptcy estate the post-petition increase in equity, it would give both §§ 348(f)(1)(A) and 348(f)(2) the same meaning because the property of the estate would be valued on the conversion date, not the petition date.

ii. Increases in equity belong to the debtor because the home left the estate when the bankruptcy court confirmed the Plan

The debtor's legal and equitable interests, such as his or her home, become part of the bankruptcy estate on the petition date. § 541(a). After this, the debtor has the option to exempt equity in the home under Federal or State law. *See* § 522(b)(1). This exemption is also known as the "homestead exemption." *See In re Rogers*, 513 F.3d 212, 217 (5th Cir. 2008). Once the bankruptcy court confirms the Debtor's Plan, "all of the property of the estate vests in the debtor." § 1327. Unless the Plan provides otherwise, "the property vesting in the debtor . . . is free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. § 1327(c). This means "that the debtor owns the property outright and . . . is entitled to any post-petition appreciation." *In re Black*, 609 B.R. 518, 529 (B.A.P. 9th Cir. 2019).

The majority of bankruptcy courts that have looked at the issue of whether the equity belongs to the debtor upon conversion from a Chapter 13 to a Chapter 7 have held that the equity belongs to the debtor. *In re Pearson,* 214 B.R. 156, 164 (Bankr.N.D. Ohio 1997); *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000); *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003); *In re Page*, 250 B.R. 465 (Bankr. D. N.H. 2000); *In re Burt*, 2009 WL 2386102, at *3, 2009 Bankr. LEXIS 2384, at *16-17 (Bankr. N.D. Ala. July 31, 2009); *In re Nichols*, 319 B.R. 854, 857 (Bankr. S.D. Ohio 2004); *In re Niles*, 342 B.R. 72, 76 (Bankr. D. Ariz. 2006); *In re Lynch*, 363 B.R. 101, 107 (B.A.P. 9th Cir. 2007). In *In re Black*, the court looked at the precise issue of vesting. 609 B.R. at 529. The debtor's homestead exemption matched the value of the home listed on his schedules. *Id*. at 520. The value of the home increased significantly while the debtor was in bankruptcy and he moved to sell the home and keep the amount left over from the sale after paying his unsecured creditors. *Id*. at 521. There, the court reasoned that when the bankruptcy court confirmed the debtor's Chapter 13 Plan and the home vested in the debtor, it was no longer property of the estate. *Id*. at 529. Thus, the Court held that "the appreciation did not accrue from the estate property." *Id*.

Similar to *Black*, here there was not any non-exempt equity in the home for the Trustee to collect upon a sale since the exemption of $30,000 and mortgage of $320,000 matched the value of the home. (R. at 6.) When the bankruptcy court confirmed his Plan, all of the property of the estate under § 541, including the home, vested in Mr. Clegg. (R. at 8.) After the home vested, it was "free and clear" of any claim or interest of Servicer or Eclipse and he was entitled to the post-petition appreciation of $100,000. (R. at 9.) Thus, after the home vested, the $100,000 appreciation did not accrue from property of the esate.

The Petitioner might argue that § 348(f)(1)(A) revests all property of the estate as of the Petition Date into the Chapter 7 estate. Relying on *In re Goetz*, this argument rests on the fact that the § 1327(b) vesting provision does not apply in a Chapter 7 case. *In re Goetz* 651 B.R. 292 (B.A.P. 8th Cir. 2023). Although § 1327 does not apply in a Chapter 7 case, it applies in a Chapter

13 case. *See* § 1327(b). Mr. Clegg originally filed a Chapter 13 plan so the home vested in him under this provision while he was in the Chapter 13. (R. at 8.) Even if § 348(f)(1)(A) revests the property into the Chapter 7 estate, the value of property in the converted case is the same value it had on the Petition Date. *See In re Page*, 250 B.R. at 466; *In re Lynch*, 363 B.R. at 103. Here, the value of property of the estate as of the Petition Date comprised of the home valued at $350,000, which was never disputed. (R. at 6.) Thus, even if § 348(f)(1)(A) revests Mr. Clegg's home into the Chapter 7 estate, only the value of $350,000 is revested. (R. at 8.)

iii. Equity in property is a separate interest that is not a part of the bankruptcy estate when exempted

A bankruptcy estate "is a separate legal entity, created on (and by) the filing of a bankruptcy petition, and continuing until confirmation, conversion, or dismissal of the case." *Matter of Lopez*, 897 F.3d 663, 670 (5th Cir. 2018) (quoting *In re Herberman*, 122 B.R. 273, 278 (Bankr. W.D. Tex. 1990)). The bankruptcy estate does not include property that was exempted. *See Schwab v. Reilly*, 560 U.S. 770, 791 (2010). In *Schwab v. Reilly*, this Court covered what happens to property when a debtor claims an exemption. *Id*. This Court relied on its reasoning in *Rousey v. Jacoway*, to clarify that the "code permits the [debtor] to *withdraw from the estate* certain *interests in* property, such as his car or home*." Id*. (quoting *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005)). When an asset is withdrawn from the bankruptcy estate because it vested and the equity was exempted, increases in value of the property also go to the debtor. *In re Ayobami*, 2016 WL 828743 (Bankr. S.D. Tex. Mar. 1, 2016) (holding that an increase in value inures to the debtor's benefit).

Here, the property vested and the equity was exempted. (R. at. 8.) Mr. Clegg properly filed his bankruptcy petition on December 8, 2021 with the appropriate schedules. (R. at 6.) He listed his home and stated that it had a value of $350,000. (R. at 6.) Mr. Clegg also claimed the maximum homestead exemption amount of $30,000 and he listed his debt to Servicer for $320,000. (R. at 6.)

The record does not reflect that any creditors objected to the exemption claimed, but after some negotiation and amendments regarding other aspects, the bankruptcy court confirmed Mr. Clegg's Plan. (R. at 8.) Thus, the homestead exemption Mr. Clegg claimed withdrew the equity from the bankruptcy estate. After the equity was withdrawn from the estate, the $100,000 increase in value to the home should belong to Mr. Clegg. (R. at 9.)

The Petitioner might argue that the property is inseparable from the equity by interpreting § 541(a) to mean that the debtor's entire ownership interest is included in the estate. *Matter of Castleman*, 75 F.4th at 1052. The Petitioner might also argue that the two are inseparable because equity is the "proceeds, product, offspring, rents or profits' of the estate's original property." *Id.* at 1056. Under the Petitioner's argument, § 348(f)(1) mandates that property of the estate in the Chapter 7 case includes the estate's original property, which is inseparable from the equity. If the property is inseparable from the equity, then on conversion, the equity goes to the Chapter 7 estate along with the original property. The Petitioner's argument overlooks the fact that the property vested in the Debtor and was exempted from the bankruptcy estate. Even if this Court were to agree with the Petioner's argument that the home is inseparable from the equity, the equity still belongs to Mr. Clegg because when the bankruptcy confirmed the Plan on February 12, both the home and the equity were withdrawn from the estate and vested in him as an insperable unit. Accordingly, the $100,000 increase in non-exempt equity belongs to the debtor whether the property is considered separate from the equity or not.

B. Legislative History Supports the Interpretation that Post-Confirmation, Pre-Conversion Increase in Equity Belongs to the Debtor

The next step in this recipe is a consideration of legislative history. This Court should consider the legislative history of a statute under two situations: (1) where the court does not agree that the language of the statute is plain; and (2) where enforcing the plain meaning of a statute would produce absurd results. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Even if this Court does not agree that §348(f)(1)(A)'s plain meaning gives the equity to the debtor, enforcing the meaning proposed by the Petitioner would produce absurd results because it would give debtor's less incentive to file a Chapter 13 case.

i. The way Congress resolved the circuit split in 1994 indicates that equity should belong to debtors to incentivize Chapter 13 filings

In the years preceding this bill, circuit courts fell on two opposite ends of the spectrum when deciding what a Chapter 7 estate consists of upon conversion from a Chapter 13 (or Chapter 12) case. Some courts such as the *Lybrook* court, decided that post-petition, pre-conversion property belongs to the estate and on the opposing end, other courts such as the *Bobroff* court held that the property belonged to the debtor. *Matter of Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991); *In re Bobroff*, 766 F.2d 797, 802-803 (3rd Cir. 1985). The House Report on the § 348 amendment clearly states that Congress intended to adopt the reasoning of the 3rd circuit in *In re Bobroff*, which held that it was the "Bankruptcy Code's goal of encouraging the use of debt repayment plan rather than liquidation." *Bobroff*, 766 F.2d at 803. In *Bobroff*, the court reasoned that if debtors have to risk after-acquired property going to the creditors upon conversion to a Chapter 7, debtors will have less of an incentive to file a Chapter 13 bankruptcy Plan. *Id*. Further, the court concluded that debtors should not be put in "the same position as they would have been had the debtor never sought to repay his debts." *Id*. (quoting *In re Hannah,* B.R. 691, 692 (Bankr. E.D.N.Y. 1982).

Conversely, congress expressly invalidated the holding in *Lybrook*. The *Lybrook* court reasoned that since creditors bear the risk of a debtor's estate decreasing during a Chapter 13 plan, creditors should also get to share in the benefits if that debtor's estate experiences an increase. *In re Lybrook*, 951 F.2d at 138 (a risk for example might be a situation where a debtor's assets might depreciate while additional debts accrue, leaving a Chapter 13 original creditor at a loss).

Here, Mr. Clegg would be in a worse position than if he had never sought to repay his debts. If Mr. Clegg had known the risk that he could lose his home upon conversion to a Chapter 7, he would have had a greater incentive to file for a Chapter 7 in the first place. If Mr. Clegg had originally filed for Chapter 7, the trustee would not have moved to sell the house because there was not any non-exempt equity in the home at that time. This is clearly not the result Congress envisioned when it passed the Bankruptcy Reform Act of 1994.

Since the Bankruptcy Reform Act, circuits have split on the similar issue of whether the property of the Chapter 7 estate includes appreciation or if that appreciation goes to the debtor. *See See In re Barrera,* 22 F.4th 1217, 1222 (10th Cir. 2022); *See Castleman*, 75 F.4th at 1055. The court in *In re Barrera*, determined the issue of who is entitled to post-petition appreciation upon conversion by looking at the language of § 348(f)(1)(A) in conjunction with §1327(b). 22 F.4th at 1222-1223. The court reasoned that § 1327(b) revested the property back in the debtor and "proceeds generated from the debtors property after confirmation do not become property of the estate as the underlying property no longer belongs to the estate." *Id*. at 1223. The Court noted that the 1994 amendment to § 348 pointed to the same outcome that the language of the statutes directed: that "pre-conversion house-sale proceeds are not property of the Chapter 7 estate." *Id*. at 1225.

Conversely, the court in *Matter of Castleman*, decided this issue by looking at the plain language of 348(f)(1)(A) and ignoring legislative history. 75 F.4th at 1057. In that case, the court relied on § 541(a)(6) because it brings the house into the property of the Chapter 13 estate. *Id*. The majority reasoned that equity is inseparable from the real estate and if § 541 brought the home into the Chapter 13 estate, the equity comes with the property in a converted case. *Id*. To combat the vesting provision of § 1327, the court took the approach that property that vests is not excluded from the estate "because in other places where Congress wanted to exclude assets or interests, it does so with specificity." *Id*. Ultimately, the 9th circuit held that "Chapter 13 debtors lose post-petition appreciation in a home if the case converts to a Chapter 7". *Id*.

It would be absurd for this Court to acknowledge that Congress resolved the problem of after-acquired property through its acceptance of *Bobroff*, but at the same time refused to follow the *Bobroff* rationale that is echoed in *Barrera*, which is to incentivize debtors to file Chapter 13 plans. *Bobroff*, 766 F.2d at 797; *Barrera*, 22 F.4th at 1217. If this Court holds that post-petition, pre-conversion equity belongs to the debtor, it would undo the work congress did in 1994, which is a function vested only in the legislative branch, not in the judicial branch. By ruling in a manner inconsistent with congressional intent, the judicial branch would ignore Congress's intent and rendering their wishes superfluous.

ii. Congress addressed post-confirmation, pre-conversion equity in an instructive example

The House Report on § 348(f) included an example that clearly shows the spirit of Congress's actions. In this example, if a debtor's house gains an increase in equity due to the debtor paying down a second mortgage on the home, the debtor loses the home because the Chapter 7 trustee must sell the house for the creditors to benefit from the equity. H.R. Rep. No. 103-835, at 57 (1994), reprinted in 1994 U.S.C.C.A.N 3340, 3366. The result of this would be that debtor's would have to be cautioned of the risk that if there is an increase in equity while he or she is in a Chapter 13 case, the home would be completely lost if the case is converted to Chapter 7. *See Id*.

This example is on point with the case at hand. At the time Mr. Clegg filed for bankruptcy under Chapter 13 and claimed the homestead exemption, his equity matched the State of Moot homestead exemption limit of $30,000. (R. at 6.) Like in the example above, the non-exempt equity increased by $100,000 since the Petition Date due to market conditions. (R. at 9.) If the Trustee sold the home to Eclipse to get $100,000, Mr. Clegg would lose his home. However, if Mr. Clegg filed for bankruptcy under Chapter 7, he could have filed a motion to force the home's abandonment by the Trustee or resolved his bankruptcy case quickly to prevent its sale. *See* 11 U.S.C. § 554(b); *Castleman*, 75 F.4th at 1063 (Tallman, J., dissenting); *In re Barrera*, 620 B.R. 645, 655-54 (Bankr. D. Colo.), *aff'd*, No. BAP CO-20-003, 2020 WL 5869458 (10th Cir. BAP (Colo.) Oct. 2, 2020), *aff'd*, 22 F.4th 1217 (10th Cir. 2022). If this Court were to hold post-petition, pre-conversion appreciation goes to the Chapter 7 estate upon conversion, it would directly go against what Congress addressed in 1994 because it would incentivize debtors to file under Chapter 7 instead of Chapter 13.

The Petitioner might argue that Congress decided not to include the example addressed in the House Report because it did not intend to decide the issue of post-petition, pre-conversion equity when it amended § 348. While the example concerns equity increase from paying down a second mortgage whereas the equity in the instant case involves equity increase in property value, at its core, the problem "is similar in nature and justifies the same result." *Castleman*, 75 F.4th at 1063 (Tallman, J., dissenting). A similar result in this case justifies that this Court give Mr. Clegg the $100,000 increase in equity**.**

C. Giving Debtors the Equity Increase Promotes the Fundamental Principles of Bankruptcy

The garnish to this inquiry is that both principles of bankruptcy are advanced when debtors are given post-petition, pre-conversion increases in equity. The bankruptcy Bankruptcy Code has two competing goals. *In re T-H New Orleans Ltd.*, 188 B.R. 799, 807 (E.D. La. 1995), *aff'd sub nom., Matter of T-H New Orleans Ltd.*, 116 F.3d 790 (5th Cir. 1997). The first is aiding the debtor's fresh start and the second is the satisfaction of valid claims against the estate. *Id*.

i. Post-confirmation increases in equity should belong to the debtor to promote a fresh start

One of the principal pillars bankruptcy is to help the honest but "unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). Exemptions in bankruptcy help debtors receive their fresh start. *Schwab*, 560 U.S. at 791. Exemptions promote a fresh start by protecting the debtor from destitution and they also prevent him or her from becoming a charge on the state. *In re Belsome*, 434 F.3D 774, 777 (5th Circ. 2005) (quoting *In re Black,* 609 B.R. at 518). A discharged debtor that leaves bankruptcy with a home, car, computer, and other "tools of the trade" is more likely to improve their financial situation compared to a debtor that leaves bankruptcy with nothing. Gary E. Sullivan, *A Fresh Start to Bankruptcy Exemptions*, 2018 B.Y.U. L. Rev. 335 (2018).

Mr. Clegg did his best to keep Final Cut afloat amid a global pandemic. R. at 4. In the face of events that were out of his control, such as an executive order that mandated all individuals stay home, Mr. Clegg made the difficult decision to forego his salary to remedy Final Cut's cash flow problems. (R. at 5.) Unfortunately, without a source of income, he fell behind on his mortgage payments and filed for bankruptcy. (R. at 6.) If this Court were to hold that the increase in equity belongs to the Chapter 7 estate, this would leave Mr. Clegg in a worse position than before he filed for bankruptcy. Simply put, Mr. Clegg would be at a disadvantage in obtaining the fresh start promoted by the bankruptcy system if he is stripped of his home.

ii. Giving debtors post-confirmation increases in equity benefits creditors

A Chapter 13 reorganization plan is beneficial for both debtors and creditors. *Harris v. Viegelahn*, 575 U.S. 510, 514 (1829). It is beneficial for debtors because they are able to keep possession of some of their assets while making timely payments to creditors. *See* 11 U.S.C. §§ 1306(b), 1321-22. It is beneficial to creditors because unsecured creditors get paid more in a

Chapter 13 than they would in a Chapter 7. 11 U.S.C. § 1325(a)(4). This system of dual benefits is the reason why Congress made Chapter 13 desirable to debtors. To incentivize Chapter 13 filings, Congress created a non-waivable right to convert a Chapter 13 case to another Chapter at any time. 11 U.S.C. § 1307(a). This allows debtors to try to repay unsecured creditors more than they would receive in a liquidation, but if debtors fail to pay they are not left in a worse position "upon a good-faith conversion to Chapter 7, than if they had originally filed under Chapter 7". *Barrera*, 22 F.4th at 1221. A world where post-petition, pre-conversion appreciation goes to the Chapter 7 estate upon conversion, is a world where individual debtors are deterred from filing for Chapter 13 bankruptcy cases and creditors receive less.

Here, Mr. Clegg specifically filed for bankruptcy in an effort to save his home. (R.at 6.) To ensure his Plan satisfied § 1325(a)(4) he increased his aggregate payments to creditors by $20,000 over the three-year commitment period. (R. at 7.) *See* § 1325(a)(4). Mr. Clegg's creditor's were recovering under his plan because he timely made payments for eight months. His home appreciated in value substantially due to a nationwide increase in home values, an event that was completely out of Mr. Clegg's control when he filed for bankruptcy. (R. at 9.) This Court should not punish Mr. Clegg for attempting to pay his creditors under the Plan while at the same time wishing to remain in his own home. This Court should rule that the equity belongs to Mr. Clegg because it is the decision that most aligns with the Bankruptcy Code, legislative history, and the two pillars of bankruptcy — a fresh start and maximizing creditor recovery.

II. A Bankruptcy Trustee's Power to Avoid and Recover Transfers Under §§ 547 and 550 of the Bankruptcy Code Cannot Be Sold as Property of the Bankruptcy Estate.

Like a recipe, the Bankruptcy Code contains detailed instructions for a uniform system of bankruptcy. The "bankruptcy recipe" is very specific in its ingredients or statutory grants of authority to particular individuals and the conditions where this authority may apply. The

Bankruptcy Code does not designate a trustee's avoidance powers under §§ 547 and 550 as property of the estate, and thus a trustee cannot sell these powers under § 363. The Bankruptcy Code also does not expressly or implicitly authorize the sale of avoidance powers.

A. The Plain Language of the Bankruptcy Code Details that Avoidance Powers are Statutorily Created Powers of the Trustee and Not Estate Property

Any good recipe first lists the ingredients. In the present case, those "ingredients" are trustee's avoidance powers under §§ 547 and 550. Avoidance powers under §§ 547 and 550 allow a trustee to avoid certain pre-bankruptcy transactions (such as preferential transfers and fraudulent conveyances) and to recover the transferred property or its value for the bankruptcy estate. The judicial inquiry into the present issue must first begin with the language of the statute itself. *Lamie,* 540 U.S. at 534 (2004) (when a plain, non-absurd meaning has been applied, the Courts do not need to interpret intention, but apply the statute as read). All of the code sections relevant to this issue are clear.

i. A Bankruptcy Trustee's Duties Under § 704 Include the Exercise of Avoidance Powers.

Once appointed, a bankruptcy trustee has specific duties they must carry out to effectively administer the bankruptcy estate. A chapter 7 bankruptcy trustee's duties are set forth in § 704 of the Bankruptcy Code, which states "a trustee shall collect and reduce to money the property of the estate…and close such estate expeditiously as is compatible with the best interests of the parties in interest." 11 U.S.C. § 704(a)(1). To fulfill this duty, trustees are given powers, such as the ability to avoid and recover certain pre-petition transfers for the benefit of the bankruptcy estate. These avoidance powers are derived from §§ 544-553 of the Bankruptc Code and granted to the trustee. *See In re Snelson*, 330 B.R. 643 (Bankr. E.D. Tenn. 2005). Therefore, the ability to avoid and recover transfers is directly related to and part of the trustee's duties under § 704, as the avoidance powers aid the trustee in collecting property of the estate.

In the present case, the chapter 13 trustee had the ability to avoid and recover the pre-petition transfers Mr. Clegg made to Pink and exercised her discretion in choosing not to pursue the action in exchange for Mr. Clegg's agreement to increase aggregate payments to the creditors. (R. at 8.) If avoided, the $20,000 transfers to Pink would be returned for the benefit of the estate. Once the case was converted to a chapter 7 case, Mr. Clegg appropriately disclosed the transfers to Pink. (R. at 9.) The Trustee could avoid and recover the transfers to Pink because pursuing avoidance claims is within the range of a trustee's duties. *Houghton v. Morey (In re Morey)*, 416 B.R. 364 (Bankr. D. Mass. 2009). This ability is in alignment with the trustee's prescribed duties under § 704.

The Petitioner may assert that the ability to sell a trustee's avoidance powers is an efficient way for the Trustee to close the estate quickly while maximizing the value of the estate and in turn the recovery to creditors. This position minimizes the true role of a trustee and places greater importance on the recovery rather than the legal obligation a trustee holds. A trustee is not simply a middleman to sell anything to increase the value of the estate. Section 704 tasks the trustee to be accountable for received property, investigate the affairs of the debtor, examine proofs of claims, object to improper claims, and report and account for their findings regularly. § 704(a)(2), (4), (5), (8), (9). A trustee's duties are carefully detailed and while the administration should be efficient, it is more important that the administration be thorough. The Bankruptcy Code does not designate a trustee to simply pass off their duties so the estate can close quickly. Granting the sale of avoidance powers would undermine the purpose of the bankruptcy process and a trustee's duties.

ii. The powers to avoid and recover preferential transfers under §§ 547 and 550 are created by statute for exercise by the trustee

A Chapter 7 bankruptcy trustee's duties are set forth in § 704(a), which states "a trustee shall collect and reduce to money the property of the estate…and close such estate expeditiously as is compatible with the best interests of the parties in interest." § 704(a)(1). As part of those duties, § 547 grants a trustee the power to avoid preferential transfers of property a debtor made within ninety days, or up to one year in a transfer to an insider, prior to the petition date, subject to certain conditions. 11 U.S.C.§ 547(b).

Utilizing a plain language interpretation would find that the avoidance power is granted to the trustee as the only entity referenced in the statute. This plain language interpretation is bolstered by *Hartford Underwriter Ins. Co. v. Union Planters Bank*, where this Court determined that where the Bankruptcy Code refers to a "trustee," the reference is to only the trustee, and does not include other parties. 530 U.S. 1, 6-7 (2000). The court in *Hartford* reached its determination by reasoning that the most natural reading of the Bankruptcy Code, meaning the plain language interpretation, is a starting point to understanding the Bankruptcy Code. *Id.* at 9. Using this natural reading, only the trustee can conduct the business where they are mentioned. *Id.* at 9. Here, the Trustee would be the entity allowed to exercise avoidance powers. In reading the plain language of the statute, it is clear that avoidance powers are specific to the trustee's duties. An adverse interpretation of the statutory language would go against the natural reading of the Bankruptcy Code.

The ability to avoid and recover transfers are also considered powers because they arise upon commencement of a case, namely filing a petition for bankruptcy. *In re Hintze*, No. 12-10462-KKS, 2016 Bankr. LEXIS 4781 (Bankr. N.D. Fla. 2016). Avoidance powers are also unique to the bankruptcy system and do not exist outside of this context. *See Barnet v. Stern*, 909 F.2d 973, 981 (7th Cir. 1990) (holding that bankruptcy courts have jurisdiction over a proceeding that could only arise in a bankruptcy case). Avoidance powers do not exist without the context of bankruptcy because preferential transfers would otherwise be lawful. In the present case, the Trustee would be able to avoid the preferential transfers to Pink because they occurred before the

Petition Date. (R. at 8.) Without bankruptcy, Mr. Clegg's transfer to Pink would be a lawful transfer to a creditor and could not be recovered to enrich the bankruptcy estate.

A trustee's ability to avoid and recover transfers is a power inherently tied to the goal of creditor protection and recovery. The court in *In re Cybergenics* accurately described this noting that when a party besides the trustee is granted the ability to use avoidance powers, the party must be doing so for the estate's recovery. *In re Cybergenics Corp.*, 226 F.3d 237 (3d Cir. 2000). The court considered the grant of authority to a debtor in possession under Chapter 11 to exercise trustee avoidance powers under § 544(b). *Id*. In a Chapter 11 case, trustees and debtors in possession have "a variety of statutorily created powers, known as avoidance powers, which enable them to recover property on behalf of the bankruptcy estate." *Id*. The court reasoned that just because § 544(b) grants a debtor in possession the ability to avoid a fraudulent transfer, it does not mean that the powers belong to the debtor's estate, nor should they be construed with the "separate authority of a trustee or debtor in possession". *Id*. This simply "enables a debtor in possession to carry out its trustee-related duties." *Id*.

Applying the court's reasoning in *Cybergenics* lends a similar result. Although the present case is in consideration of the trustee themselves attempting to sell their avoidance powers, the underlying principle remains the same. The power to avoid and recover transfers is unique to the trustee's role and can only be ascribed to other parties in very particular situations. Further, parties can usually request permission from the court only after the trustee has declined or failed to pursue the avoidance. *See* 11 U.S.C. § 522(h) (the debtor may avoid the transfer if the transfer was voidable by an applicable section *and* the trustee does not attempt to avoid). The Petitioner may assert that avoidance powers are not unique to the trustee since there are mechanisms for other parties to utilize them, but that position would be inaccurate. The Cybergenics court was clear that avoidance powers are related to a trustee's *duties*, rather than the individual. Where an entity is stepping in to the role of a trustee to pursue an avoidance, then that individual is granted the ability to do so for that particular purpose. It should be noted that all other parties must receive extensive permission from the court before they are granted the ability to use avoidance powers in a particular situation. *See* 11 U.S.C. §§ 522(h), 1107.

Some bankruptcy courts have adopted the same interpretation and agree that the plain language of § 547 confers avoidance powers to the trustee. *See In re Merritt*, No. 11-18134, 2016 U.S. Dist. LEXIS 31855 (E.D. Pa. 2016); *In re IH 1, Inc.*, Nos. 09-10982 (LSS), 12-50713 (LSS), 2016 Bankr. LEXIS 4604 (Bankr. D. Del. 2016); *In re Biggs, Inc.*, 159 B.R. 737 (Bankr. W.D. Pa. 1993). Based on the strict statutory creation and the extremely detailed process other entities have to use to request permission to use avoidance powers, it is clear that avoidance powers are granted to the role of the trustee.

iii. Avoidance powers are not property of the bankruptcy estate under § 541

Section 541(a) describes that property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property" as of the commencement of the case. § 541(a)(1). Using the same plain language interpretation, § 541 is read to include property interests that existed at the time of filing the petition as property of the estate. Section 363 grants the trustee the ability to, on order from the court, sell property of the estate, subject to certain conditions. 11 U.S.C. § 363. Read in totality, a trustee has the ability to sell property of the estate.

A trustee's avoidance powers are created specifically by statute. A power created by statute is not an independent property interest that is separable from the trustee's fiduciary duty, and thus cannot be sold, assigned, or otherwise transferred to third parties. *In re Pursuit Capital Mgmt., LLC,* 595 B.R. 631 (Bankr. D. Del. 2018). The trustee's avoidance powers are assigned upon commencement of the bankruptcy, rather than a claim or interest that can be asserted at any time. Here, Mr. Clegg filed for bankruptcy on December 8, 2021. (R. at 6.) As of the Petition Date, the estate consisted of interests held at the time. The Trustee's avoidance powers also arose on the Petition Date, so it is not possible for Mr. Clegg to have retained an interest in the powers before filing. Therefore, the avoidance powers cannot be included in the estate property tabulation. The Trustee's avoidance powers cannot constitute property of the bankruptcy estate and cannot be sold.

Section 541 also fails to mention or cross-reference the avoidance powers laid out in § 547. If preferential transfers under § 547 were intended to be included as property of the estate, they would be explicitly mentioned here. Section 541 has numerous subsections that detail what is and is not considered property of the estate, and still no mention of § 547 is made. Though § 541(a)(3) cross-references the recovery power in § 550, the statute clearly states that "any *interest* in property" recovered by the trustee is construed as property of the estate. § 541(a)(1). The debtor retains no interest in the power to avoid and recover itself.

The Petitioner relies on *Pitman Farms v. ARKK Food* to support their position that avoidance powers are property of the estate that can be sold. *Pitman Farms v. ARKK Food Co., (In re Simply 19 Essentials, LLC)*, 78 F.4th 1006 (8th Cir. 2023). However, the Petitioner neglects the important context of the court's ruling. The court in *Pitman* cites *In re Moore* as the authority that fraudulent transfers are property of the estate, but the *Moore* court detailed that *state* law fraudulent transfer claims are property of the estate under 541(a). *Pitman*, 78 F.4th at 9. This distinction is key as the present case involves avoidance powers under federal law. Moore addressed the issue of fraudulent transfers but the court's rationale is applicable here. Fraudulent transfers are under § 548 and are included in the trustee's avoidance powers provisions, namely

§§ 544-553. Fraudulent and preferential transfers can often be brought about in the same case and the general treatment of trustee powers should remain the same. The power to avoid a preferential transfer under federal law has not been determined as part of the estate and therefore cannot be sold. *See In re Russell*, 927 F.2d 413 (8th Cir. 1991). The perspective that avoidance powers are property of the estate under 541 would be a potential misstatement of the law.

Avoidance powers under §§ 547 and 550 are not derived from the debtor's property interests, but rather from the trustee's statutory role as the administrator of the bankruptcy estate. The avoidance powers operate on property but are not property themselves. In Mr. Clegg's case, the Trustee has the ability to use their avoidance powers to void the $20,000 preferential transfer to Pink. (R. at 7.) The Trustee's powers are a mechanism to recover the property instead of being property itself. The Debtor does not have an independent basis to claim an interest in the avoidance powers so they cannot be read as property of the estate under § 541.

B. The Interpretation of §§ 547 and 550 is Supported by the Longstanding Legislative History of the Bankruptcy Code

The judicial inquiry extends into the legislative history when the statutory language is ambiguous or the application produces an adverse result. *United States v. Ron Pair Enters.*, 489 U.S. 235, 109 S. Ct. 1026 (1989). The Bankruptcy Code was initially enacted to provide a uniform system of bankruptcy across the United States. The trustee can be seen as the specially appointed chef that Congress gave the carefully weighed and measured ingredients to achieve the perfect recipe for bankruptcy estate administration. Many years have passed without Congress adding or subtracting from this recipe, so it is clear that the intent was for a trustee to exercise avoidance powers.

i. Pre-Bankruptcy Code practices indicate avoidance powers were intended for the trustee to exercise

Turning to the context of the Bankruptcy Act of 1898 (the "1898 Act") and the Bankruptcy Act of 1978 (the "1978 Act," and together with the 1898 Act, the "Acts") and later, the Bankruptcy Code highlights the important role of a trustee and Congress's specific grants of authority in a bankruptcy proceeding. Congress first passed the Acts to provide a structure for debtor reorganization. Regarding avoidance powers, since as early as 1938 Congress has detailed an intent for a trustee to exercise them.

Congress codified the role of the trustee in the 1898 Act to assuage concerns about consistency and fairness in a bankruptcy case. Leading up to the Acts, bankruptcy was a "free for all" with debtors favoring preferential transfers and creditors tempering themselves for losses. The ability to avoid certain transfers has existed since this time period. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372-73 (2006). Congress assigned the trustee as the holder of avoidance powers to aid in a uniform estate administration and to ensure fairness amongst creditors.

A trustee is obligated to collect money, distribute estate assets, investigate the debtor's affairs, and report to the court with the overall goal of efficiently increasing the estate value to maximize creditor recovery. § 704. Trustees were also required to get surety bonds to ensure the performance of their duties. *See In re Schooler*, 725 F.3d 498 (5th Cir. 2013). Before an impartial fiduciary was appointed to this role, inexperienced debtors were subject to accomplish this same task, which clearly led to the implementation of a trustee. When Congress enacted the 1978 Act, it did so without amending §§ 547, 550, or 704 to include any other entity in the statutory grant of avoidance powers. As the legislative body, Congress is presumed aware of the history of interpretation of the language and could amend accordingly to clarify. *Lamar, Archer & Cofrin,* *LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018). All of Congress's actions to date signal that a trustee is the intended party to wield certain powers within bankruptcy.

Here, the Trustee was appointed to administer Mr. Clegg's Chapter 7 estate. (R. at 9.) As the Trustee, she is tasked to administer the estate and granted the discretion to exercise avoidance powers. Following Congress's intent would conclude that the Trustee is the specific party in this case authorized to use avoidance powers. The treatment of a trustee's avoidance powers therefore is clear. Any interpretation outside of this conclusion would force the Courts to overreach the intent of Congress and rule outside of appropriate bounds.

ii. The canon against surplusage supports an interpretation that avoidance powers are not property of the estate

In interpreting a statute, the canon against surplusage supports a reading that will not cause the statute to be read in duplicate or to render other sections as surplus. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Section 541 does not presently contain any cross-references to § 547. Section 541 does refer to § 550 but is clear that "any *interest* in property" may be recovered, not the ability to recover itself. 11 U.S.C. § 541(a)(3) (emphasis added).

Congressional intent regarding the classification of avoidance powers in relation to estate property also presents a strong indication that these powers were not meant to be construed as property of the estate. H.R.Rep. No. 95-595 details that "revisions to the Bankruptcy Act of 1898 were necessary to clarify the property of the bankruptcy estate and eliminate state law confusion." H.R.Rep. No. 95-595, 95th Cong., 2d Sess. 175 (1977). In similarity to the statutes above, Congress did not amend § 541 to include avoidance powers as property of the estate. A later congressional report provides more insight into the fact that a debtor's interest becomes property of the estate but makes no mention of the avoidance powers, or any other powers, as property of the estate. Senate Report No. 95-989, 1978. The congressional record makes clear that avoidance powers are not property of the estate, and any further reading would force this Court to rule in a manner inconsistent with Congress's intent.

Congress has been presented with ample opportunity to amend the language of § 541. Instead of including §§ 547 and 550 as estate property, Congress has clarified § 541 instead. *See In re Rajapakse*, 346 B.R. 233 (Bankr. N.D. Ga. 2005). If avoidance powers are read to be property of the estate, a trustee can sell them, and thus would render other Bankruptcy Code sections in surplus since the powers would otherwise be accounted for as estate property. The current interpretations of §§ 547 and 550 comport with the canon against surplusage by holding the specific intent of each Code section relevant and distinct.

C. Granting Avoidance Powers to a Trustee Promotes Order in Administration and Equal Distribution amongst Creditors

In addition to the language of the statutes and the legislative history of avoidance powers, compelling public interest considerations continue the judicial inquiry. The purpose of §§ 547 and 550 is to prevent the over-enrichment of certain creditors at the expense of other creditors, and to promote a fair and unbiased distribution of the estate's assets. A trustee is the head chef tasked to follow the bankruptcy recipe by maintaining the integrity of the "recipe" and acting in the best interests of *all* the estate's creditors. Granting a trustee the ability to sell or assign the avoidance powers could mar the trustee's intended impartiality and sink back to a bankruptcy system with too many cooks in the kitchen.

i. A Trustee Must Remain as an Impartial Fiduciary and Promote Equal Distribution amongst Creditors

Congress initially created the role of the trustee to help stabilize an otherwise chaotic estate administration scheme. The bankruptcy system was flooded with different recipes, ingredients, and cooks, promoting the abuse of the bankruptcy system itself as well as debtors and creditors alike. The trustee was the appointed role to help remedy this situation. A trustee has a duty to maximize the value of the bankruptcy estate for equal distribution amongst all creditors. § 704. The duty to all creditors highlights the importance of a trustee remaining impartial in their administration of the estate.

In the present case, the Trustee has been presented with an offer from Eclipse to buy the Trustee's avoidance powers under the guise of increasing the value to the estate. (R. at 9.) Should the Trustee and the courts accept the sale, Eclipse would be able to pursue the avoidance action to its own benefit. The remaining creditors would not receive any additional recovery from the avoidance action. If the Trustee were simply to sell their avoidance powers to the highest bidder, the Trustee would no longer be impartial to *all* creditors in maximizing the distribution.

The Petitioner may assert that the distribution to creditors has been maximized as Eclipse's offer to buy the preference action against Pink would provide the creditors with a higher payment than they would have received without the sale. (R. at 9.) However, the issue presented is not an isolated one, and the potential ramifications are greater. If the Trustee was allowed to sell their avoidance powers to be best offeror, the Trustee is no longer an estate administrator, but a biased auctioneer, favoring an increase in value over their duty of equal administration. This circumvents the whole purpose of a trustee's impartiality in administration of the bankruptcy estate.

The next duty of the trustee can be summarized as to ensure equal distribution amongst all of the bankruptcy estate's creditors. In a preferential transfer, one creditor is receiving more than the others, hence the trustee's ability to avoid and recover the transfer for the estate's benefit. §§ 547, 550. The courts have also upheld the overall policy that preference provisions in the Bankruptcy Code provide a mechanism for equal distribution amongst creditors as "any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally." *Union Bank v. Wolas*, 502 U.S. 151, 160-61, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991) (citations omitted). The statutory language and legislative history support this same policy based on the strong arm nature of a trustee's avoidance powers. Granting a trustee the ability to sell their avoidance powers violates the policy of equal distribution as the distribution would be disproportionate in favor of whoever bought the avoidance powers.

In the present case, a creditor made an offer to buy the Trustee's avoidance powers, but the issue at hand is not limited to creditors. (R. at 9.) Allowing the sale of a trustee's avoidance powers welcomes third parties to the bankruptcy system while preventing rightful creditors from a more equitable distribution. Deviation from the language of the Bankruptcy Code, as well as Congress's intent, would push this Court to rule outside of appropriate bounds and ignore the strategic framework of bankruptcy to be an efficient rehabilitation mechanism for debtors and granting creditors their due. This Court should not transpose bankruptcy to a profit-based system and should instead uphold the important policy considerations of equitable distribution by an impartial fiduciary.

ii. Granting Avoidance Powers Specifically to a Trustee Prevents a Reversion Into Pre-Bankruptcy Chaos

The history of the bankruptcy system in the United States is a tumultuous one. Prior to the Acts, inconsistent laws allowed debtors to favor preferential transfers and overall bias in the estate's administration. Skeel, David A. Jr., *The Genius of the 1898 Bankruptcy Act*, University of Penn. Carey Law School (1999). The handling of claims was largely left to creditors and debtors through their attorneys, in whatever manner they chose. In essence, there were too many cooks in the bankruptcy kitchen. The unpredictable nature of the bankruptcy scheme prompted Congress to resolve these issues and enact a uniform system of bankruptcy. Since then, Bankruptcy law has been shaped into an effective vehicle for debtor rehabilitation and creditor payout, aided by the trustee. Congress's actions and reforms to the Bankruptcy Code since then have been to avoid a return to a system of chaos.

One of the purposes of 547 is to disincentivize creditors from further crippling an already unstable debtor by allowing the trustee to avoid certain transfers. *In re Smith*, 966 F.2d 1527 (7th Cir. 1992) (citations omitted). Creditors, and also third parties, would be able to purchase avoidance powers and aggressively pursue the avoidance actions to their own benefit. Allowing any third party to enter the Bankruptcy system disrupts the orderly administration of the estate and directly undermines the principle of equality amongst creditors. This reversion into chaos would unravel over a century of intentional policy considerations and return the Bankruptcy system to a bazaar for creditors.

Mr. Clegg opted to convert to a Chapter 7 case after struggling to keep up with his payments under the Plan. (R. at 8.) At the time, Mr. Clegg was indebted to at least three creditors with little to no available equity in his estate. (R. at 9.) If the sale of avoidance powers was allowed, creditors could race to bombard Mr. Clegg during his bankruptcy transition to receive a preferential transfer they can later buy out and pursue. The policy behind avoidance powers would prevent other creditors, such as Eclipse or Servicer, or even third parties from bludgeoning an already struggling debtor and the Trustee . This Court should uphold long-standing Bankruptcy policies and continue to promote organization in bankruptcy by preventing the sale of a trustee's avoidance powers.

The Petitioner may argue that the sale of avoidance powers would provide trustees with a means to maximize the value of the estate by allowing entities with more resources to pursue avoidance actions. This could potentially benefit creditors by increasing the amount of funds available for distribution from the estate. The Petitioner's argument overlooks the fact that avoidance powers were intended for a trustee to prevent a disorganized and biased system of bankruptcy, not to promote creditor payout. Mr. Clegg honestly sought relief from the Bankruptcy Code and availed himself to the scrutiny of the courts to save his home, not to be picked apart by creditors. (R. at 6.)

Prior to the 1898 Act, preferential transfers to insiders were encouraged on the basis of a moral obligation debtors had to familiar creditors. Skeel at 720. While a moral obligation to pay back debts is commendable, the legal obligation of a trustee is significantly more impactful. A trustee is required by statute to investigate the estate affairs, seek permission from the court for administration, and accurately report on their duties. § 704. Third party investors are not held to the same standards and would be allowed to use a trustee's avoidance powers as their own method of resolving claims against the debtor. A return to a variable system of bankruptcy echoes the very problems Congress sought to address in bankruptcy reform. The Court should rule in favor of an organized, transparent system of bankruptcy and deny the sale of a trustee avoidance powers.

CONCLUSION

This Court should remain congruent with the current interpretations of the Bankruptcy Code on the issues at hand. Accordingly, this Court should uphold fundamental bankruptcy principles and policy implications by affirming the decision of the Thirteenth Circuit, and hold that post-petition, pre-conversion increases in equity inure to the benefit of the debtor; and a trustee cannot sell the power to avoid and recover transfers as property of the Bankruptcy estate.