No. 23-0115

IN THE

Supreme Court of the United States

IN RE EUGENE CLEGG, DEBTOR

VERA LYNN FLOYD, CHAPTER 7 TRUSTEE, PETITIONER

V.

EUGENE CLEGG, RESPONDENT.

On Writ of Certiorari for the Thirteenth Circuit Court of Appeals

Brief for the Respondent

Team 22
Counsel for Respondent

QUESTIONS PRESENTED

1. In this de novo review under 11 U.S.C. §§ 348 and 541, does a post-petition, pre-conversion increase in equity inure to the benefit of the estate, when the case was converted from chapter 13 to 7, and the property is the Debtor's exempt homestead?
2. In this de novo review under 11 U.S.C. §§ 547 and 550, does the Trustee have the ability to sell their preferential transfer avoidance powers, when the sale is not specifically allowed by statute, and the buyer is an interested creditor, acting for their sole benefit, to the detriment of other creditors?

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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 FACTS

I. Procedural History

This matter arises out of a chapter 13 petition filed by the debtor Cpl. Eugene Clegg's ("Debtor," "Clegg") on December 8, 2021 (the "Petition Date") with the United States Bankruptcy Court for the District of Moot. R. 3, 6. Eight months later, the Debtor requested in good faith that the court convert the case from chapter 13 to chapter 7. R. 8. The bankruptcy court ordered this conversion. *Id*.

The chapter 7 trustee, Vera Lynn Floyd (the "Trustee"), then approached the bankruptcy court to sell the Debtor's home to increase equity after the petition date. R. 4. The Trustee also requested to "sell the right to avoid and recover alleged preferential transfers" made by the Debtor to his mother, Emily "Pink" Clegg ("Pink"). *Id*. The Trustee filed a motion (the "Sale Motion") to sell the home and the alleged preference claim to Eclipse Credit Union ("Eclipse"). R. 10. The Debtor objected to both requests on two grounds, and the parties stipulated that the Debtor had standing to object to the sale on both grounds. R. 4, 10.

The bankruptcy court ruled in favor of the Debtor on both objections and denied the Sale Motion. *Id*. The Trustee timely appealed the court's ruling. *Id*. The Trustee, Pink, and Eclipse stipulated to "toll any statute of limitations with respect to the preference action pending resolution" of the appeal. *Id*. The disputes were certified for direct appeal to the United States Court of Appeals for the Thirteenth Circuit, pursuant to 28 U.S.C. § 158(d)(2)(A). R. 3, 10.

On March 10, 2023, the appellate court ruled in favor of the Debtor and affirmed the bankruptcy court's decision. R. 3.

II. Facts of the Case

The Theater

Following a distinguished military career, veteran and debtor Cpl. Clegg retired in 2011. R. 5. Keeping the business in the family, Clegg's mother Pink transferred her 100% membership interest in The Final Cut, LLC ("Final Cut") to Clegg. Final Cut was a successful business that had no liabilities, and consistently generated a profit at the time of transfer. *Id.* Final Cut owns and operates a historic movie theater in the City of Moot. *Id*. Clegg took only a modest income from Final Cut, which was his main source of income for years. *Id*. Clegg personally renovated the theater, doing the work alongside other veteran volunteers, which reduced the labor costs of the renovation. *Id*. The theater began renovation in 2016, and reopened afterward in early 2017. *Id*. Thanks to the hard work of Clegg and the volunteers, the theater became a source of great pride for the community, and Final Cut remained profitable for three more years. R. 5–6.

In March 2020, during the COVID-19 crisis, the theater became unable to operate for approximately a year due to the Governor for the State of Moot's executive stay-at-home order. R. 6. Then, in February 2021, the theater reopened. *Id*. Despite a media campaign, theater attendance lagged behind pre-pandemic levels. *Id*. Clegg selflessly forwent his salary to help Final Cut survive. *Id*.

The Loan

To renovate the theater, Clegg caused Final Cut to borrow $850,000 (the "Loan") from community-based financial institution Eclipse, which had recently begun extending their loan opportunities to the commercial field. R. 5. In return, Eclipse was granted "first priority liens on Final Cut's real and personal property," and the liens were properly perfected. *Id*. For further security, Clegg executed an unconditional, unsecured personal guaranty in an unlimited amount. *Id*.

Clegg, grateful for the savings he received from the local veterans' volunteering, donated approximately $75,000, the remainder of the Loan, to a veteran's charity, Veterans of Foreign Wars (the "VFW"), in early 2017. *Id*. Eclipse was unaware of the donation at that time. *Id*.

Clegg's Pandemic Misfortune

On September 8, 2020, due to the theater's forced closure cutting off his income, Clegg had to borrow $50,000, unsecured, from Pink. R. 6. When the theater reopened and the pandemic still affected attendance rates, Clegg's sacrifice of his salary left him without a reliable income, and he fell into significant credit card debt and fell some months behind on his mortgage payment. *Id*. Clegg's mortgage was financed by Another Brick in the Wall Financial Corporation (the "Servicer"). *Id*. The Servicer began foreclosure proceedings following Clegg's missed payments. *Id*.

Clegg's Relief

On December 8, 2021, to save his home from foreclosure, Clegg sought relief under chapter 13 of the Bankruptcy Code (the "Code") via petition. *Id*. Days before the petition date, Clegg had his home appraised; $350,000 was the determined value, which is undisputed. *Id*. Clegg stated this on Schedule A/B. *Id*. Clegg thus identified a "non-contingent, liquidated and undisputed secured debt" to the Servicer of $320,000 in Schedule D. *Id*. He also, in Schedule C, properly claimed a state law homestead exception of $30,000, as per the maximum amount allowed by the State of Moot. R. 6-7.

Clegg disclosed further that he made payments totaling $20,000 to Pink within one year prior to the Petition Date. R. 7. He also included a "contingent and unliquidated unsecured debt in an unknown amount" owed to Eclipse in Schedules E/F and H. R. 6.

Clegg's filed chapter 13 plan proposed making payments to creditors over a period of three years. R. 7. This follows the national model chapter 13 plan prescribed for use by the District of Moot. *Id*.

To address the mortgage, Clegg proposed "to cure the prepetition arrears and make ongoing, continuing monthly payments to the Servicer with the chapter 13 trustee acting as a conduit." *Id*. This was pursuant to 11 U.S.C. §§ 1322(b)(5) and 1326(c). *Id*. The plan was based on the previously determined value of Clegg's home, and due to the secured indebtedness and homestead exemption, stated that Clegg maintained no equity in his home as of the Petition Date. *Id*. Clegg intended to fund this plan through future income from Final Cut; all parties in interest agreed Final Cut was re-approaching profitability. *Id*.

Problems With the Plan

Eclipse learned of Clegg's donation to VFW at the creditor's meeting, and was upset by it. *Id*. Eclipse promptly and timely commenced an adversary proceeding, seeking to have Clegg's Loan-related debt declared non-dischargeable under § 523(a)(2)(A) of the Bankruptcy Code. *Id*.

Further, the chapter 13 trustee objected to Clegg's plan, claiming it failed to satisfy § 1325(a)(4), which "requires each creditor to receive under the plan no less than it would otherwise receive in a hypothetical liquidation under chapter 7." *Id*. The trustee argued that the alleged preferential transfers to Pink would be recovered and distributed to creditors in a liquidation. *Id*. Clegg, to resolve the trustee's concern, amended the plan: he increased aggregate payments to creditors by $20,000 over the applicable commitment period. *Id*.

Execution of the Plan

The plan was settled, and the chapter 13 trustee agreed not to seek to avoid and recover payments made to Pink before the Petition Date. R. 8. Eclipse initially objected to Clegg's plan, arguing it was not proposed in good faith, but after further weeks of negotiation, all three parties reached a resolution. *Id*.

Eclipse agreed to withdraw their objection to the plan in exchange for "an estimated claim in the amount of $150,000, of which $25,000 was deemed non-dischargeable even in the event of conversion." *Id*. As Eclipse's claim was an estimate subject to reconsideration, the settlement also provided that the chapter 13 trustee would hold any distributions for Eclipse in reserve. *Id*. This was pursuant to 11 U.S.C. § 502(c). *Id*. The bankruptcy court confirmed Clegg's plan including the settlement with the chapter 13 trustee, and entered an order approving the settlement between Clegg and Eclipse. *Id*.

For eight months, Clegg made timely payments under the plan. *Id*.

Further Effects of the Pandemic

In September 2022 Clegg contracted long-COVID, and was unable to continue his work at the theater; the theater's business, too, suffered continually from the effects of the pandemic. *Id*. The theater permanently closed in October 2022, causing Eclipse to begin foreclosure proceedings against Final Cut. *Id*.

After the theater's closure Clegg had no income from Final Cut, and could not make any more payments under his plan. *Id*. To remedy this, Clegg chose to convert his case to chapter 7, pursuant to 11 U.S.C. §§ 348 and 1307. *Id*.

Conversion to Chapter 7

The bankruptcy court entered a generic order to convert the case to chapter 7; no parties objected to Clegg's good faith in deciding to convert. *Id*. Under the previous plan, the chapter 13 trustee had distributed $10,000 to the Servicer. R. 8-9. Further, under conversion, the trustee returned to Clegg the funds that had been held in reserve for Eclipse. R. 9.

A new Trustee, Floyd, was appointed to administer Clegg's chapter 7 estate. *Id*. The Trustee initially concluded the estate was functionally bereft of assets. *Id*. In the conversion schedules and documents, Clegg's house was still valued at $350,000, the preferential transfers to Pink were disclosed again, and Clegg was stated to be indebted to Eclipse by approximately $200,000. *Id*. That debt value was decided due to Clegg's deficiency regarding his guarantee of the Loan after foreclosure, completed by Eclipse post-conversion. *Id*. Clegg's statement of intention was to "reaffirm the mortgage debt that he owed to the Servicer and remain in his home." *Id*.

Home Equity Increase and Sale

The Trustee then commissioned a new appraisal of Clegg's home following Clegg's observation that homes in his neighborhood had been selling at a premium. *Id*. Post-pandemic, there was also a nationwide increase in home values. *Id*. The new, undisputed appraisal found that the non-exempt equity in Clegg's home had increased by $100,000 since the Petition Date. *Id*.

The Trustee, in accordance with his duties under 11 U.S.C. § 704(a)(1) to benefit the creditors, began marketing Clegg's house for sale. *Id*. Eclipse offered to purchase the house and the alleged preference claim against Pink for $470,000 in total. *Id*. The Trustee filed the Sale Motion to sell both to Eclipse, believing that Eclipse's offer maximized the assets' value. *Id*.

Clegg Objects

Clegg objected to the sale to Eclipse on the ground that "any post-petition, pre-conversion increase in the equity of his home should inure to his benefit." R. 10. The argument stated there was no equity available for the estate as of the Petition Date, and therefore the Trustee could not sell the house. *Id*. Clegg also argued that the Trustee's statutory ability to avoid and recover transfers under sections § 547 and § 550 cannot be sold. *Id*.

The bankruptcy court denied the Sale Motion, ruling in favor of Clegg on both objections. *Id*. The Trustee appealed the decision, and the appellate court ruled in favor of Clegg. *Id*.

SUMMARY OF THE ARGUMENT

The respondent, the debtor, should rightfully own any post-petition, pre-conversion increase in equity in their home, and a trustee's avoidance powers cannot be sold because they are not property of the estate.

Firstly, the statutory construction of § 348 is unclear: the meaning of "property" in the section is left ambiguous, and when statutory language is ambiguous and applied differently across jurisdictions, courts look to the legislative history and congressional intent of the statute's construction. In this section, the statute did not clearly state that a post-petition, pre-conversion increase in equity would inure to the estate. Neither the legislative history nor congressional intent behind this § 348 indicate the equity would go to the estate.

There are parts of the same statute, such as § 348(f)(2), that do intend to punish debtors who convert their cases in bad faith, where the property of the estate as of the date of conversion is considered the property of the estate in the converted case. There is no reason to use

§ 348(f)(1) to impose the rule of (f)(2) when the (f)(2) rule was written specifically for creditors converting their cases in bad faith. To use § 348(f)(1) in place of (f)(2) would render (f)(2) superfluous, which is against the goals of statutory enforcement. Further, the context for (f)(2) was written to be "bad faith." Clegg, in good faith, converted his case. § 348(f)(1) should not be applied as if it were (f)(2). § 348(f)(1)(A) specifications, then, appear to protect the debtor by stating that the property of the estate is just the property, determined and agreed in value, as of the date of filing the petition.

The legislative history of § 348(f)(1) implies that Congress meant to protect debtors in an equity case such as this. § 348(f)(1)(A) was created to help settle a split between courts on this issue, and a House Report on its creation provides a hypothetical with similarities to the instant case. The hypothetical defines "property" as it existed at the petition date. Additionally, following public policy goals indicates that the Bankruptcy Code means to keep the increase in equity with the debtor when the increase is post-petition and pre-conversion. The Bankruptcy Code aims to encourage repayment plans and support chapter 13 cases. If chapter 13's conversion to chapter 7 were hindered by an incorrect interpretation of § 348, that would disincentivize the proper solutions under chapter 13.

Secondly, under the plain language of § 541 and pre-Bankruptcy Code practice, avoidance powers are not considered property of the estate. § 547(b) specifically states that avoidance powers are to be used by the trustee. Therefore, their sale would not be compliant, because someone other than the trustee would use them. Also, if allowed, the sale of avoidance powers would clash with multiple existing sections of the Code. This is harmful to the overall efficacy and enforcement of the Code. Pre-Bankruptcy Code cases from the U.S. Supreme Court do not allow the sale of avoidance powers; they are not considered property of the estate. Since the Code's creation, no piece of the Code has specified that avoidance powers may be sold, and Congress has not indicated a departure from common practice.

For these and the following reasons, this court should affirm the judgement of the appellate court.

STANDARD OF REVIEW

This case raises two questions of law and statutory interpretation. R. 2. Questions of law are reviewed *de novo*. *In re Hill*, 811 F.2d 484, 485 (9th Cir. 1987). Bankruptcy court decisions containing questions of law are reviewed *de novo*. *Matter of Berryman Prod., Inc.*, 159 F.3d 941, 943 (5th Cir. 1998). When a court reviews an issue *de novo*, the court "determines questions of fact and law as though the reviewing court was the original trial court." *Bd. of Cnty. Comm'rs of Lawrence Cnty., Ohio v. L. Robert Kimball & Assocs.*, 860 F.2d 683, 686 (6th Cir. 1988).

ARGUMENT

I. Any Post-Petition, Pre-Conversion Increase in Equity in the Debtor's Home Belongs to the Debtor Following Conversion from Chapter 13 to Chapter 7.

A. Statutory Language of 11 U.S.C. § 348(f).

The chapter 7 Trustee's (the "Trustee") claim is barred because their interpretation of § 348(f)(1)(A) is incomplete. A thorough examination of § 348(f)(1)(A), considering its context, legislative history, and public policy goals, reveals that the chapter 7 property of estate in converted cases excludes any increase in equity in the Debtor's home after the initial filing of the case.

At issue in today's case is the application of 11 U.S.C. § 348(f), which provides as follows:

> (f) (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

> (A) property of the estate in the converted case shall consist 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;
>
> . . .
>
> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

11 U.S.C. § 348(f)(1)(A), (f)(2).

B. The Trustee's Claim That Their Interpretation Is Supported by the Plain Language of § 348(f)(1)(A) is Flawed, Given Their Narrow Reading of the Statute.

The Trustee's limited approach to interpreting § 348(f)(1)(A) neglects the broader context of the statutory scheme and Bankruptcy Code. "Interpretation of a statute must begin with the statute's language." *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa,* 490 U.S. 296, 300 (1989). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). "[A]s long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240–41 (1989).

1. There is an Inherent Ambiguity in Defining "Property" Under § 348(f)(1)(A).

When circuits are divided over the interpretation of the same statutory provisions, the existence of the split suggests the statute is ambiguous. "A statute is ambiguous if it is reasonably susceptible to more than one interpretation ... or capable of being understood in two or more possible senses or ways." *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.,* 764 F.3d 1199, 1226 (10th Cir. 2014). Courts nationwide have adopted two different approaches when interpreting § 348(f). Most courts that have faced the issue presented today have reached an identical conclusion as the Thirteenth Circuit. For example, in *In re Barrera*, the court explained that it is "reasonable to interpret this statute as a reference to the property *as it existed* on the petition date … [because § 522] defines 'value' as the fair market value '*as of the date of the filing of the petition'"*. *In re Barrera*, 620 B.R. 645, 651 (Bankr. D. Colo. 2020). Conversely, a minority of courts have held that a post-petition, pre-conversion increase in equity in the Debtor's property insures to the benefit of the chapter 7 estate. For example, in *In Re Goins,* the court held for the trustee under the reasoning that "the cases under Section 541(a)(6) are applicable because the equity attributable to the post-petition appreciation of the property is not separate." *See In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Virginia 2015). However, it is crucial to note that several cases relied on in *Goins* had materially different fact patterns because they were chapter 7 cases with no conversions. *See e.g.*, *In re Hyman,* 967 F.2d 1316, 1318 (9th Cir. 1992); *In re Reed,* 940 F.2d 1317, 1323 (9th Cir. 1991); *In re Potter*, 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999).

The existence of conflicting interpretations of 11 U.S.C. § 348(f)(1) among various courts nationwide, with a majority favoring debtors and a minority favoring trustees, suggests ambiguity within the statute. This emphasizes the need for a more in-depth examination because "[i]f the terms are ambiguous, [the Court] may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history." *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008).

C. The Fundamental Principles of Statutory Construction Demonstrate That the Chapter 7 Estate Does Not Include Post-Petition, Pre-Conversion Property Interests.

The guiding principles of statutory construction unequivocally establish that any post-petition, pre-conversion increase in equity the Debtor's home insures to the Debtor. "A fundamental rule of statutory construction requires courts to give effect to every word, clause, and provision in a given statute so that no part of the statute would be rendered insignificant, inoperative, or superfluous." *In re Sullivan*, 596 B.R. 325, 333 (Bankr. N.D. Tex. 2019). The U.S. Supreme Court has consistently employed the canon against surplusage in bankruptcy cases, using it as a guiding aid in statutory construction. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."); *City of Chi., Ill. v. Fulton,* 592 U.S. 154, 159 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Clark v. Rameker,* 573 U.S. 122, 130 (2014) ("[The] inquiry urged by petitioners would render a substantial portion of 11 U.S.C. § 522(b)(3)(C)'s text superfluous.").

1. If the Trustee's Interpretation Is Adopted, § 348(f)(2) Is Superfluous.

The Trustee's interpretation of section 348(f)(1) treats the Debtor's property similarly to a bad faith conversion case, rendering section 348(f)(2) superfluous. Under § 348(f)(2), "If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." 11 U.S.C. § 348(f)(2). Essentially, § 348(f)(2) punishes debtors who convert from Chapter 13 to Chapter 7 in bad faith by requiring relinquishment of any post-petition, pre-conversion property that was otherwise available to the debtor under a good faith conversion.

In the absence of evidence indicating bad faith in today's case, the Trustee's interpretation not only unjustly punishes the Debtor but also violates fundamental principles of statutory construction by disregarding the distinctions between good and bad faith conversions under § 348(f)(2). If Congress intended to treat all debtors uniformly, regardless of whether they converted in good or bad faith, it would obviate the need for § 348(f)(2). *See In re Harmon*, No.

18-10579, 2022 BL 502910, at *8 (Bankr. E.D. La. June 9, 2022) ("In essence, '[t]hose debtors who convert from Chapter 13 to Chapter 7 in bad faith are punished because their otherwise immune post-petition interests are available for liquidation and distribution to creditors.'"). To adhere to Congress' decision to differentiate between the treatment of good and bad faith debtors in § 348(f)(2), this Court should allocate any post-petition, pre-conversion equity increase in the disputed property to the debtor.

Contextualizing § 541(a)(6) and (7) with § 348(f)(1)(A) fails to address the precise issue at hand. § 541(a)(6) provides that "[p]roceeds product, offspring, rents, or profits of or from property of the estate, except such as earnings from services performed by an individual debtor after the commencement of the case" are property of the estate. 11 U.S.C. § 541(a)(6). First, § 541(a)(6) provides no clarity on what happens to an estate upon a chapter 13 conversion to a chapter 7. Second, Congress expressed its intent to exclude post-petition, pre-conversion appreciation in the debtor's property by penalizing bad faith conversion in § 348(f)(2). *See* 11 U.S.C. § 348(f)(2). Likewise, § 541(a)(7) does not explain the outcome of the bankruptcy estate conversion, but solely indicates that newly acquired interest in property becomes part of the existing estate. *See* 11 U.S.C. § 348(f)(2). Hence, contextualizing § 348(f)(1)(A) with § 541(a)(6) and (7) still renders § 348(f)(2) meaningless, thereby violating a fundamental rule of statutory construction.

2. The Trustee's Interpretation Conflicts With § 522(a)(2).

Granting any post-petition, pre-conversion increase in equity property to the debtor aligns with the valuation of the Debtor's estate under 11 U.S.C. § 522(a)(2). "[T]he cardinal [rule is] that a statute is to be read as a whole . . . since the meaning of the statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991). The language used in § 522(a)(2) establishes value relating to exemptions "as the date of the filing of the petition" which is identical to the language used in § 348(f)(1)(A). *See* § 522(a)(2); § 348(f)(1)(A). The Eighth Circuit affirmed in *David. G. Waltrip, L.L.C. v. Sawyers,* that when assessing a debtor's 11 U.S.C. § 522(f) motion to avoid a judicial lien against their home, "the value of a debtor's homestead is determined based on the property's fair market value as of the petition date." *In re Sawyers,* 2 F.4th 1133, 1138 (8th Cir. 2021).

The *Sawyers* court acknowledges the Bankruptcy Code's mandate for courts to adhere to the "snapshot" rule. This rule entails assessing a debtor's financial status on the day of filing for bankruptcy, disregarding any post-filing developments, to uncover what assets are exempted from the bankruptcy estate. *See In re Rockwell*, 968 F.3d 12, 18 (1st Cir. 2020).

In accordance with the rules of statutory construction, this court should refer to the petition date for accessing the value of the Debtor's home. § 522 applies to both chapter 13 and chapter 7, as per 11 U.S.C. § 103(a), and conversion does not initiate a new bankruptcy. *See* 11 U.S.C. § 103(a). The Trustee's interpretation of § 348(f) creates a conflict within the Bankruptcy Code because § 522 mandates property valuation at the original petition date and § 348(f) determines what constitutes property of estate upon good and bad faith conversions.

D. The Legislative History of § 348(f) Indicates Congress Intended to Protect Debtors Upon Conversion to Chapter 7.

The legislative history indicates that Congress foresaw today's issue. When "the statute is ambiguous, [courts] look to the legislative history and the underlying public policy of the statute." *United States v. LaHue,* 170 F.3d 1026, 1028 (10th Cir. 1999). "[The] two divergent views highlight an underlying ambiguity in § 348(f)(1)(A)." *In re Barrera,* 620 B.R. 645, 650.

1. The Legislative Context Surrounding § 348(f) Highlights Congress's Clear Intent for Debtors to Retain Any Property Interests Arising Post-Petition but Pre-Conversion.

Congress has expressed its intention to exclude post-petition, pre-conversion property interests from becoming part of the Chapter 7 Estate. In 1994, Congress amended § 348, implementing subsection (f)(1). *See id.* at 647. This amendment was enacted to address what property constitutes property of a chapter 7 estate when a debtor converts from a chapter 13 to chapter 7. *See id.*

When considering § 348(f)'s legislative history, House Report 103-835 is relevant in determining the estate's interest in equity in debtor's property amassed during the post-petition, pre-conversion period. House Report 103-835 specifies that § 348(f)(1)(A) was enacted to: "[c]larify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." H.R. REP. NO. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. The legislative history also includes a hypothetical that mirrors the issue at hand:

> These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

Id.

When examining the legislative history, it is evident Congress intended that any post-petition, pre-conversion increase in equity of the Debtor's home to be excluded from the chapter 7 estate. In reference to the legislative history's hypothetical scenario, the court in *Barrera* explains that "[i]f Congress was intending its use of the term 'property' in § 348(f)(1)(A) to refer to the entirety of the home itself, without regard to any post-petition changes to it, then these statements certainly do not convey that thought." *In re Barrera,* 620 B.R. 645, 653. Rather, the legislative history "reflect[s] that a proper interpretation of 'property' is the property *as it existed on the petition date*, with all its attributes, including the amount of equity that existed on that date." *Id*. This implies that Congress intended for the increase in the equity of the home occurring after the filing of the petition but before conversion to be recognized as distinct from the home itself. The legislative history suggests Congress aimed to ensure that a debtor opting for a repayment plan would not face a worse outcome than if they had initially filed for Chapter 7. *See id.* at 653 ("If a debtor filed a chapter 7 case, and his trustee did not sell his home, then he would enjoy the future increase in value … in the years following his chapter 7 filing.") Since the legislative history demonstrates that Congress anticipated the issue presented today, it is undeniable that any post-petition, pre-conversion increase in equity of the Debtor's home is property of the debtor and not the chapter 7 bankruptcy estate.

Despite Congress clearly anticipating today's issue, a minority of courts have arrived at an alternative conclusion, deviating from the explicit and instructive legislative history. *See In re Goins,* 539 B.R. 510, 516 (Bankr. E.D. Va. 2015) ("The [hypothetical] in the legislative history to Section 348 . . . arguably sheds light on the 'paydown' cases, i.e., the cases where the Debtor creates equity by paying down secured debt during the course of the case."); *See also In re Goetz,* 651 B.R. 292, 299 (B.A.P. 8th Cir. 2023) (the legislative history "does not specify that debtors are entitled to retain equity resulting from payments during the Chapter 13 case"). The *Goins* court's analysis of the legislative history is too narrow as to conclude that the drafters differentiated between equity created by mortgage payments and equity created by appreciation.

This misses the mark because § 348(f)(1)(A) was enacted to "equalize the treatment a debtor would receive under a Chapter 13 case converted to Chapter 7, with the treatment that debtor would have received if he had originally filed under Chapter 7." *In re Evans*, 464 B.R. 429, 440 (Bankr. D. Colo. 2011). Similarly, the court in *Goetz*, albeit for different reasons, fails to give due consideration to the instructive insights provided by the legislative history. In *Goetz*, the court concluded that "statutes are often the result of compromise, we decline to accept [the debtor's] invitation to assume that Congress intended that debtors may retain post-petition pre-conversion market appreciation and equity resulting from debt payments without language articulating this intent." However, courts can refer to legislative history, "where the legislative history clearly indicates that Congress meant something other than what it said." *See Perlman v. Catapult Ent., Inc.*, 165 F.3d 747, 753 (9th Cir. 1999). The hypothetical provided by the legislative history explicitly demonstrates that Congress intended to solve today's issue with the enactment of § 348(f). Thus, the flawed reasoning in *Goins* and *Goetz* disregards the legislative intent behind § 348(f), undermining the legislative goal.

E. The Debtor's Interpretation of § 348(f) Is in Accordance with the Overarching Policy Goals of the Bankruptcy Code.

Lastly, the Debtor's interpretation harmoniously aligns with the overarching policy objectives of the Bankruptcy Code, which aim to promote the use of debt-repayment plans rather than liquidation. As indicated above, Congress has explicitly expressed its intent to encourage chapter 13 filings. *See* H.R. REP. NO. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. ("to hold otherwise would create a serious disincentive to chapter 13 filings."). If debtors take on the gamble that the increase in home equity that occurred during their attempt at chapter 13 repayment will insure to the benefit of the estate if their chapter 13 plan proves unsuccessful, the incentive to initially file chapter 13 will be significantly diminished. *See In re Barrera*, 620 B.R. 645, 653.

Instead, when a chapter 13 plan does prove unattainable, "no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts." *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982). Here, the Debtor's actions demonstrate his commitment to fulfilling his financial obligations. Initially, the debtor diligently adhered to the chapter 13 three-year payment plan. Unforeseen circumstances, such as contracting Covid-19 and the closure of his theater, rendered it impossible for the debtor to fulfill his payment plan obligations. The debtor made a good faith decision to convert the case to chapter 7. In light of these circumstances, rewarding such efforts is consistent with the spirit of chapter 13 and the broader goals of the bankruptcy code. "[A]llowing the debtor to keep the pre-conversion increase in equity does not render the chapter 7 estate worse off; it merely prevents the chapter 7 trustee from reaping a windfall. It allows the fundamental bargains of chapter 7 and 13 to remain in place." *In re Barrera,* 620 B.R. 645, 654. Thus, this court should hold that post-petition, pre-conversion increase in equity in the Debtor's home should be administered to the debtor, as doing so aligns with the policy goals of the Code.

II. The Trustee's Avoidance Powers Are Not Property of the Estate, Thus They Cannot Be Sold to Eclipse.

The Trustee cannot sell the power to avoid the debtor Clegg's preferential transfer because avoiding powers are not property of the estate as defined by Bankruptcy Code 11 U.S.C. § 541(a) ("§ 541(a)").

> ***Property of the Estate Definition***: § 541(a) defines property of the estate as:
> **(a)** The . . . estate is comprised of all the following property, wherever located and by whomever held:

> **(1)** Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
> **(2)** All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
> > **(A)** under the sole, equal, or joint management and control of the debtor . . .
>
> **(3)** Any interest in property that the trustee recovers under section 329(b), 363, 543, 550, 553, or 723 of this title.
> **(4)** Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
> **(5)** Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
> > **(A)** by bequest, devise, or inheritance . . .
>
> **(6)** Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
> **(7)** Any interest in property that the estate acquires after the commencement of the case. . . .

Preferential Transfers: § 547(b) defines the power to avoid preferential transfers as:

> **(b)** Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—
> > **(1)** to or for the benefit of a creditor;
> > **(2)** for or on account of an antecedent debt owed by the debtor before such transfer was made;
> > **(3)** made while the debtor was insolvent;
> > **(4)** made—
> > > **(A)** on or within 90 days before the date of the filing of the petition; or
> > > **(B)** between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> >
> > **(5)** that enables such creditor to receive more than such creditor would receive if—
> > > **(A)** the case were a case under chapter 7 of this title. . . .

The federal courts are deeply divided on whether avoidance powers constitute property of the estate. *In re Clements Mfg. Liquidation Co., LLC*, 558 B.R. 187, 188–89 (Bankr. E.D. Mich. 2016). If avoidance powers are property of the estate, the trustee can sell them, according to 11

U.S.C. § 363(b)(1) ("§ 363(b)(1)"). Creditors may want these powers to claw-back preferential transfers given to rival creditors. *See In re Pro. Inv. Props.*, 955 F.2d 623, 625–26 (9th Cir. 1992). But this would prevent the estate from evenly distributing the money amongst the remaining creditors, which is the central purpose of the Code. *Begier v. IRS*, 496 U.S. 53, 58 (1990).

The plain language, context, and legislative history of the Code indicate avoidance powers are not property of the estate. First, the plain language of 11 U.S.C. § 547(b) ("§ 547(b)") provides that only the "trustee" can wield avoidance powers. Second, the statutory context suggests that even if the trustee could sell avoidance powers, other provisions would be rendered superfluous or lead to absurd results. *See, e.g.*, 11 U.S.C. §§ 349(b)(1)(B), (2), 502(d), (h), 522(h)(1). Third, the Code's legislative history provides that a core purpose of § 547(b) is equality of distribution, which is defeated if a creditor can avoid a transfer for their sole benefit. *Microage Inc. v. Mitsubishi Elec. & Elecs. USA, Inc.*, 288 B.R. 855, 860 (Bankr. D. Ariz. 2003). Fourth, even if the Code did allow sale of avoidance powers, creditors are not permitted to use them to the detriment of other creditors. *In re Pro. Inv. Props.*, 955 F.2d at 625–26.

A. The Plain Language of § 541, Property of the Estate, Indicates Avoidance Powers Cannot Be Sold.

The plain language of § 547(b) is clear—only the trustee can use preference avoidance powers. The U.S. Supreme Court held, "As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citation omitted).

A plain language reading of § 541(a)(1) indicates avoidance powers are not property of the estate, thus they cannot be sold. § 541(a)(1) provides, "The estate . . . is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The most straightforward interpretation of this—which has been agreed upon by multiple jurisdictions—is the estate is limited to the debtor's pre-petition property interests. *Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery* (*Cybergenics Corp.*), 226 F.3d 237, 239 (3d Cir. 2000); *Clements*, 558 B.R. at 189. Avoidance powers cannot be pre-petition property interests because they do not spring into being until the petition is filed. *See* § 541(a).

Lending further support, the plain language of § 541(b)(7) also shows avoidance powers are not property of the estate. § 541(b)(7) provides, "[t]he estate . . . is comprised of . . . [a]ny interest in property that the estate acquires after the commencement of the case. . . ." The key phrase "acquires" is not defined by the Code, but the U.S. Supreme Court held, "[w]hen a term goes undefined in a statute, we give the term its ordinary meaning." *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citation omitted). Avoiding powers are not "acquire[d]" in the ordinary meaning of the word, rather they are animated when the petition is filed. *See* § 547(b). Thus, the estate does not "acquire" avoidance powers.

Importantly, § 541 does not mention § 547, the preferential avoiding power, making it even more improbable that Congress meant to include it in "property of the estate." It is clear Congress knew how to cross-reference statutes, as they did so in a laundry list of other statutes. *See* 11 U.S.C. §§ 303, 349, 362, 502, 521, 522, 546, 550–552, 749, 746, 901, 926, 1521, 1523. The fact that Congress did not reference § 547 in § 541 is one of the most obvious indicators that preferential avoiding powers are not property of the estate, as Congress could have easily referenced § 547 to avoid any confusion.

B. The Plain Language of § 547, the Avoiding Powers, Shows Avoidance Powers Cannot Be Sold.

Furthermore, a plain language reading of § 547(b) also does not support that avoiding powers are property of the estate. This issue was addressed in a pivotal bankruptcy case, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6–7 (2000). In *Hartford*, the debtor purchased worker's compensation insurance from the petitioner Hartford during a chapter 11 reorganization. *Id.* at 4. When the reorganization failed, the case was converted to chapter 7. *Id.* Hearing of this conversion, Hartford endeavored to recover premiums by invoking 11 U.S.C. § 506(c) ("§ 506(c)"), claiming it could recover because the premiums were necessary expenses. *Id.* at 5. But the Court disagreed, holding that according to the plain language of 506(c), only the trustee has the right of recovery. *Id.* at 6–7. § 506(c) provides: "(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. . . ." Critically, § 506(c) only names the "trustee" as having the right of recovery.

In a similar vein, § 547(b) expressly provides that the "trustee" has avoidance powers; but does not provide that anyone else does. Read in the most straightforward way, § 547(b) means only the "trustee" can avoid transfers. *Cf. Hartford*, 530 U.S. 1, at 6 (holding that administrative expenses can only be used by the "trustee," because no one else was named by § 506(c)). Yet Eclipse may counter the statute does not specifically exclude creditors. *See id.* at 6. Even so, when a statute specifically authorizes someone to take a particular action, that is hardly the place to consider the authorization nonexclusive. *Id.* at 6–7; *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 486 (1985). If Congress wanted § 547(b) to be nonexclusive, it is more expected they would have simply written "one may recover," rather than "[t]he trustee may recover." Thus, the plain language indicates the trustee cannot sell preferential avoidance powers, because only the trustee can utilize them.

C. Both the Statutory and Pre-Bankruptcy Code Context of Avoidance Powers Show Avoidance Powers Cannot Be Sold.

The statutory and pre-Bankruptcy Code context surrounding preferential avoiding powers further indicates avoidance powers cannot be sold. The U.S. Supreme Court held, "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Furthermore, when examining statutory context, interpretations of the Code leading to superfluous or absurd results should be avoided. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 245–46 (2010).

1. If Avoiding Powers Are Property of the Estate, Several Code Provisions Are Rendered Contradictory or Superfluous.

Conflict with Property of the Estate Provision: § 541(a)(3) would also be rendered superfluous if avoiding powers can be sold. § 541(a)(3) restricts property of the estate to, "interest in property that the trustee recovers." This is a clear manifestation of Congress' intent because it specifically limits property of the estate to what is actually recovered. *See id.* Yet avoidance powers are not recovered from anyone, they are statutorily created. *Kouichi*, 566 U.S. at 566. The Trustee might contend that because the U.S. Supreme Court held in *Nordic Vill.* that § 550 is "property of the estate," other chapter 5 provisions are property of the estate as well. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 37 (1992). But this statement was merely dictum. *See id.* (holding that the lawsuit was resolved regardless of whether § 550 was property of the estate). Furthermore, *Nordic Vill.* was superseded by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Conflict with Claim Allowance Provision: Yet another conflicting provision is § 502(d). According to § 502(d), the court will disallow a claim from an entity that received a preferential transfer, unless they turn the property over to the estate. In other words, a creditor cannot double-dip; if they got their money back pre-petition, they cannot make a claim against the estate. *See id.* But if the trustee can sell avoiding powers, does that mean the same creditor can buy the powers to prevent anyone else from avoiding the transfer, thus shielding their questionable pre-petition transfer? This would sap the preferential avoidance powers of their strength, as a creditor who receives a preferential transfer could insulate it from avoidance. Neither the Code nor its legislative history clears up this ambiguity, which also circumvents the Code's policy of ensuring equal distribution to all creditors.

Conflicts with Exemption Provisions: Another provision complicating matters is § 522(g)(1). Under § 522(g)(1), if there is an involuntary transfer of exempt property to a third-party, and the trustee avoids it, the debtor can exempt the property and recover it. This is because it never should have been taken from the debtor to begin with. *See id.* But if the trustee can sell avoidance powers, what happens if someone buys the avoidance power, and the property goes to them? Does the exemption ability bestowed on the debtor by (g)(1) allow them to reach property that is now with the buyer? The Code does not resolve this question. *See id.*

Casting further doubt on whether avoidance powers can be sold, § 522(h) creates an ambiguity similar to § 522(g)(1). § 522(h) also allows avoidance of an involuntary transfer of exempt property to a third-party, but in a situation where the trustee never attempted recovery. So, if the trustee never tried to avoid the transfer, and the creditor still has the property, the debtor can still exempt it. *See id.* Yet, does 522(h) require that no purchaser of avoiding powers avoid the transfer, or merely the trustee? *See id.* What if a buyer tries to avoid it but fails? Can the debtor still exempt the property? This situation is also not addressed by the Code. *See id.* Thus, it is implausible Congress intended to allow the sale of avoidance powers because it renders multiple Code provisions superfluous or incomprehensible.

2. Pre-Bankruptcy Code Practice Did Not Consider Avoidance Powers to be Property of the Estate.

The context of pre-Bankruptcy Code practice also indicates avoidance powers cannot be sold. The U.S. Supreme Court held, "[courts should] not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (citation omitted). For hundreds of years before the Bankruptcy Code was enacted in 1978, it was widely accepted that the trustee could not sell avoidance powers. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372–73 (2006); *Grass v. Osborn,* 39 F.2d 461, 461 (9th Cir. 1930). Presumably Congress was aware of this centuries-long practice, but when the Code was passed in 1978, Congress did not make any material changes indicating avoidance powers could be sold. *Compare* 11 U.S.C. §§ 547, 550 *with* Bankruptcy Act of 1898, ch. 541, sec 50, 30 Stat. 562 (codified as amended at 11 U.S.C. § 96 (1958)); *Katz*, 546 U.S. at 372–73. Thus, because there is no clear indication Congress intended a departure from prohibiting the sale of avoidance powers, the Code should not be interpreted as such.

D. Selling Avoidance Powers Is Inconsistent with the Code's Policy Objectives.

1. Selling Avoidance Powers Creates Inconsistencies with Two Policy Objectives: Equality of Distribution and Preventing a Creditors' Race to Recover.

Allowing avoidance powers to be sold runs contrary to the purposes of the Code. As the U.S. Supreme Court held, "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property." *Begier*, 496 U.S. 53 at 58. Another policy of the Code is to prevent a rat race to take the debtor's assets. *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991). The U.S. Supreme Court also held, "the Bankruptcy Act should always be construed in a way to carry out its purposes and to care for the situations created by it." *In re Consupak, Inc.*, 87 B.R. 529, 541 (N.D. Ill. 1988) (citation omission).

Equality of Distribution: If the Trustee can sell the power to avoid the preferential transfer in Clegg's case, it will conflict with the Code's policy of equal distribution. In keeping with this policy, in *Cybergenics Corp.* the court held avoidance powers are not property of the estate that can be used by a creditor. *Cybergenics Corp.*, 226 F.3d at 244–46. In 1994, the debtor Cybergenics was sold in a leveraged buyout, and owed $60 million in debt. *Id.* at 239. Then in 1996, the bankruptcy court ordered the company to be auctioned, and it was sold for $2.65 million. *Id.* Consequently, the Committee of Unsecured Creditors filed suit, alleging the 1994 sale was a fraudulent transfer. *Id.* at 240. The court held avoidance powers could not be used by the creditors, because a main purpose of the § 547(b) is to ensure equality of distribution. *Id.* at 244–46.

Here, Eclipse is also trying to use avoidance powers for its sole benefit, and so it should be prohibited. *See id.* The Trustee may counter the Eighth Circuit held debtors have a contingent interest in avoidance actions because they can file bankruptcy and the trustee can avoid a preferential transfer. *Pitman Farms v. ARKK Food Co., LLC* (*In re Simply Essentials, LLC*), 78 F.4th 1006, 1009 (8th Cir. 2023). But the problem with this theory is it conflates avoidance powers with property interests; an avoidance power is merely an instrumentality used to recover a property interest, not a property interest itself. *See* § 547(b). Another issue with this theory is it would not apply in a chapter 7 case like Clegg's because there is no debtor-in-possession in a chapter 7 case. § 704(a)(1). Thus, a debtor could not have a contingent pre-petition interest in an avoidance action because once the bankruptcy petition is filed, the property would be moved beyond the debtor's grasp, and would go to the estate.

Chapter 7 also requires either equality of distribution, or maximization of the estate's value. *See* 11 U.S.C. § 704 ("§ 704"). Here, if Eclipse recovers the money, the other creditors will not receive anything from the preferential transfer avoidance. The Trustee may counter that the parties agreed the price of the avoidance power sale was reasonable, and the estate would not owe any further administrative expenses, so the value of the estate is maximized. *See* R. 9; *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). But by taking this action, the other creditors lose their chance at recovery, which conflicts with the central purpose of bankruptcy itself, equality of distribution. *See Begier*, 496 U.S. at 58.

Race to Recover Assets: Another core purpose of the Code is to prevent creditors from racing to recover assets from the debtor before they can file bankruptcy. *Cybergenics Corp.*, 226 F.3d at 244–46. This policy is circumvented if the trustee can sell the avoiding powers, because a creditor who missed their chance to recover their money pre-petition can simply buy the avoiding powers and recover their money anyway. So, the race to recover assets is actually extended post-petition rather than avoided, because now the creditors will be locking horns over buying the cause of action from the trustee.

2. Congress Provided Derivative Standing, an Alternative to Selling Avoidance Powers, to Ensure Equality of Distribution.

To help ensure equality of distribution, the Code allows a creditor to use derivative standing to assert a trustee's avoidance powers. *See, e.g.*, 11 U.S.C. § 503(b)(3)(B), (b)(4). But the Trustee may argue that sometimes a trustee cannot afford to pursue an avoidance action, and selling it would allow the estate to recover something rather than nothing. *See Duckor Spradling & Metzger v. Baum Tr.* (*In re P.R.T.C., Inc.*), 177 F.3d 774, 776 (9th Cir. 1999). But this incentivizes creditors to buy the preferential transfer and selfishly keep the proceeds for themselves. This is why Congress' allowance of derivative standing is far more appropriate; it allows a creditor who can afford to pursue the avoidance action to recover money to be distributed evenly. *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc.* (*In re Trailer Source, Inc.*) 555 F.3d 231, 238–45 (6th Cir. 2009). If Congress intended to allow avoidance powers to be sold, it would not have much reason to allow derivative standing, because creditors would be incentivized to simply buy the preferential transfer and keep the proceeds.

E. Even If a Creditor Could Buy Avoidance Powers, They Could Only be Used to Benefit All Creditors, Not Just Eclipse.

Although several circuits have held avoidance powers can be sold to a creditor, they have also limited the use of avoidance powers to situations that would benefit all creditors. *Pro. Inv.*, 955 F.2d at 626; *In re Sweetwater,* 884 F.2d 1323, 1327-28 (10th Cir. 1989). The Ninth Circuit held a creditor can exercise the avoiding powers, "[i]f a creditor is pursuing interests common to all creditors." *Pro. Inv.*, 955 F.2d at 626.

In *Texas General*, a sale of avoidance powers was denied because it was not in the best interest of all the creditors. *In re Tex. Gen. Petrol. Corp.*, 58 B.R. 357, 358 (Bankr. S.D. Tex. 1986). In 1983, the debtor, Texas General Petroleum Corp., ("TGP") filed chapter 11 bankruptcy. *Id.* TGP then assigned its mineral rights interests to Marmid Energy Co., ("Marmid"). *Id.* Marmid subsequently tried to buy the avoidance power, to shore up the preferential transfer it received. *Id.* Yet the court held this was impermissible as the avoidance would be for Marmid's sole benefit. *Id.* Here too, the creditor Eclipse is buying the preferential transfer claim for its own benefit. R. 9. Thus, even if this Court holds avoidance powers can generally be sold, they should not be sold to Eclipse because it would not ensure equal distribution.

Furthermore, in *Duckor*, the Ninth Circuit also held that a creditor can only use the trustee's bankruptcy powers to benefit all creditors. *Duckor*, 177 F.3d 774 at 782–83. Two debtors, PRTC and Braunstein Int'l Corp., filed chapter 7 and the cases were consolidated. *Id.* at 776. Neither debtor had significant assets other than the right to sue various individuals. *Id.* But the estate lacked sufficient funds to pursue those suits, and the bankruptcy court permitted the assignment of the estate's right to sue to the creditor Baum Trust. *Id.* Baum Trust's use of the avoidance powers resulted in a 50% recovery for the remaining creditors, which the court held was permissible because the creditors were getting something rather than nothing. *Id.* Here, however, if Eclipse is allowed to exercise the avoiding powers to recover the preferential transfer, the remaining creditors will get nothing. Thus, even if Eclipse can buy the avoiding powers, Eclipse is prohibited from using them in this case.

CONCLUSION

For these reasons, respondent Cpl. Eugene Clegg requests that the U.S. Supreme Court affirm the judgment of the U.S. Court of Appeals for the Thirteenth Circuit, entered against the Trustee Vera Lynn Floyd.

January 18, 2024 — Respectfully submitted,

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