Team 48

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
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

JANUARY 18, 2024

TEAM NUMBER 48
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Under 11 U.S.C. §§ 348 and 541, does the post-petition, pre-conversion increase in equity in a debtor's property inure to the benefit of the debtor upon conversion of a case from chapter 13 to chapter 7?

II. Does 11 U.S.C. § 547 prevent a trustee from selling, as property of the bankruptcy estate, the ability to avoid and recover transfers?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

UNITED STATES SUPREME COURT CASES

STATUTES

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

This appeal stems from Petitioner's attempt to obtain more than authorized by the Bankruptcy Code[1] in the assessment of the Debtor's assets to the detriment of the Debtor and similarly situated creditors. Petitioner's appeal threatens the Bankruptcy Code's integrity by encroaching on the appropriate distribution of assets in lieu of the more equitable and fundamental approaches contemplated by the Code.

I. Factual Background

Eugene Clegg (the "Debtor") filed for chapter 13 bankruptcy, facing the unprecedented challenges imposed by the COVID-19 pandemic. R. 4. One year after Mr. Clegg retired as a distinguished military serviceman, his mother, Emily Pink Clegg ("Pink"), transferred to Mr. Clegg her 100% membership interest in The Final Cut, LLC ("Final Cut"). *Id.* at 5. Final Cut is a historic, single-screen movie theater in the City of Moot. *Id.* At the time of the transfer, Final Cut had no liabilities, and it was consistently profitable each year. *Id.*

In 2016, Final Cut borrowed $850,000 (the "Loan") from Eclipse Credit Union ("Eclipse") to renovate the theater. *Id.* To reduce labor costs, Mr. Clegg personally undertook much of the renovation work on the theater with the help of volunteer veterans. *Id.* For the next three years, Final Cut was profitable. *Id.* at 6. In March 2020, the Governor for the State of Moot declared a public health emergency due to the global COVID-19 pandemic and issued an executive order requiring all individuals to stay at home. *Id.* It was thus impossible for Final Cut to operate for nearly one year. *Id.* Overnight, Mr. Clegg lost his only source of income. *Id.* at 5–6. While the theater reopened in February 2021, the customers did not return. *Id.* at 6. Faced with devastating

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[1] Specific sections of the Bankruptcy Code are identified herein as "section ___." The Bankruptcy Code is sometimes referred to herein as "the Code." Unless otherwise indicated, all statutory citations are to the Bankruptcy Code.

financial impacts and continuing uncertainties in light of the COVID-19 pandemic, Mr. Clegg decided to forego his salary to help remedy Final Cut's cash flow problems. *Id.* Without a source of income, Mr. Clegg fell behind on his mortgage payments, forcing the loan service provider to commence foreclosure proceedings. *Id.* Subsequently, Mr. Clegg filed for chapter 13 bankruptcy on December 8, 2021 (the "Petition Date"). Only days before the Petition Date, Mr. Clegg's home was valued at $350,000 based on an appraisal. R. 6.

After weeks of post-petition negotiation, Mr. Clegg filed a nearly consensual chapter 13 plan (the "Plan"). R. 7–8. The Plan provided a proposal to pay creditors over a three-year period. *Id.* at 7. The Plan also provided that Mr. Clegg maintained no equity in his home as of the Petition Date. *Id.* The bankruptcy court confirmed the Plan and expressly provided that all property of the estate vested in the Debtor. *Id.* at 8. Mr. Clegg timely made payments under the confirmed Plan until he suffered from the COVID-19 virus. *Id.* Mr. Clegg met an insurmountable challenge as the COVID-19 pandemic forced Final Cut to permanently close. *Id.* Without an income from Final Cut, Mr. Clegg could no longer make payments under the Plan, leading him to convert his case to chapter 7. *Id.* In his statement of retention, Mr. Clegg made it clear that he intended to reaffirm the mortgage debt and remain in his home. *Id.* at 9. Petitioner concluded that the bankruptcy estate lacked assets until Mr. Clegg mentioned the likelihood that his home increased in value due to the COVID-19 pandemic. *Id.* Petitioner had Mr. Clegg's home appraised which confirmed that the non-exempt equity in it had increased by $100,000 since the Petition Date. *Id.* This increase in equity prompted Petitioner to market Mr. Clegg's home for sale. *Id.* Eclipse offered to purchase both the home and the alleged preference claim against Pink for a total of $470,000. *Id.* Petitioner then filed a motion to sell both the home and the alleged preference claim to Eclipse under section 363(b).

II. Procedural Background

The bankruptcy court faced two issues in this case and ruled in favor of Mr. Clegg on both. R. 10. First, the court held that any post-petition, pre-conversion increase in the equity of his home should inure to Mr. Clegg's benefit. *Id.* Second, the court held that Petitioner's statutory ability to avoid and recover transfers cannot be sold. *Id.* Petitioner timely appealed directly to the Thirteenth Circuit which affirmed the bankruptcy court's rulings on both issues. *Id.* at 24.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly ruled in favor of Mr. Clegg when it held first, that post-petition, pre-conversion increase in the equity of exempt property must inure to the benefit of the Debtor pursuant to section 348(f), and second, that a chapter 7 trustee cannot sell the power to avoid and recover transfers under sections 547 and 550 because such conferred power is not property. Petitioner brings this appeal to frustrate the Bankruptcy Code's plain language to reap the benefits of bankruptcy at the cost of the Debtor and a creditor class. By affirming the Thirteenth Circuit, this Court can fulfill Congress's intent to provide a "fresh start" to overburdened debtors—a policy so fundamental to the Bankruptcy Code.

Petitioner's appeal seeks to circumvent section 348(f)'s plain meaning to obtain a recovery that he is not entitled to. The plain meaning of the statute is ambiguous, and this Court should further inquire into the context of the statutory scheme and its legislative history to ascertain an interpretation. If this Court were to inquire further, as the Thirteenth Circuit correctly did, the statutory scheme and legislative history require the same conclusion: granting Petitioner the benefit of a post-petition, pre-conversion increase in value of Mr. Clegg's property is inconsistent with the statutory context and Congress's policy goals instilled in the Bankruptcy Code.

The plain language of section 348(f) is ambiguous because the statute is silent regarding the distribution of an increase in the value of a debtor's assets and whether such increase is property of the estate in a converted case. Therefore, consideration of the canons of statutory construction, the context of the Code, and legislative history is proper. This analysis reveals that any post-petition, pre-conversion increase in value of exempt property must inure to the benefit of the debtor. To hold otherwise would render section 348(f)(2) superfluous. Petitioner's interpretation would create inconsistent and unreliable outcomes based on the same statutory language in sections 348(f)(1)(A) and 522(a)(2). Conversely, the Thirteenth Circuit's holding better promotes the Code's policy to provide a "fresh start" to the honest debtor; it properly balances the interests of debtors and Congress. Congress's purpose in incentivizing chapter 13 filings support the Thirteenth Circuit's holding that Mr. Clegg is entitled to any post-petition, pre-conversion increase in equity in his home.

The Code's purpose is further promoted by the Thirteenth Circuit's holding that a chapter 7 trustee cannot sell its power to avoid and recover transfers under sections 547 and 550. Section 541(a)'s plain language uncovers Congress's desire to prohibit a trustee from selling the power to pursue avoidance actions because such powers are not property. Rather, avoidance actions are inalienable statutory powers. Even if this Court considers avoidance powers as property, they cannot constitute property of the estate under section 541 because the statute reference property once recovered, not the avoidance action itself. Nonetheless, holding that avoidance powers are property of the estate will render the express language of section 503 superfluous. Additionally, permitting a trustee to sell an avoidance action would neglect the Code's primary policy of orderly, equitable distribution among a class of creditors.

This Court should affirm the Thirteenth Circuit on both issues.

ARGUMENT

I. A post-petition, pre-conversion increase in the equity of property inures to the benefit of the debtor, not the chapter 7 estate, upon a good faith conversion.

"A *wholly voluntary alternative* to Chapter 7, Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to five- year period." *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015) (emphasis added). Chapter 13 of the Code, known as the "repayment" chapter, holds the most benefits for both creditors and debtors, which has prompted Congress to enact statutes that incentivize debtors to pursue successful reorganization over liquidation. *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217, 1220 (10th Cir. 2022). One such incentive includes the non-waivable right for a chapter 13 debtor to convert his or her bankruptcy case to another chapter at any time. *Id.*; *see* 11 U.S.C § 1307(a). Generally, when a debtor participates in his repayments to creditors but ultimately is unsuccessful, he is permitted to convert his chapter 13 repayment to a chapter 7 liquidation. Converting from chapter 13 to chapter 7 "does not commence a new bankruptcy case. The existing case continues along another track. . . without 'effect[ing] a change in the date of the filing of the petition.'" *Harris*, 575 U.S. at 515 (citing 11 U.S.C. § 348(a)).

With the freedom to convert a bankruptcy case, controversy surfaced among circuits regarding whether a debtor who converted from a chapter 13 to chapter 7 and acquired property post-filing, pre-conversion would constitute "property of the estate." *See In re Lybrook*, 951 F.2d 136 (7th Cir. 1991) (adopting an approach to benefit the estate when a case is converted from chapter 13 to 7); *see also In re Bobroff*, 766 F.2d 797 (3rd Cir. 1985) (adopting an approach to benefit the debtor when converting from chapter 13 to 7). The strikingly opposite holdings from two circuits encouraged Congress to resolve the split by enacting section 348(f) in the pre-Bankruptcy Reform Act of 1994, which specifically addresses conversion from chapter 13 to 7.

H.R. REP. NO. 103-834, at 42–43 (1994). Since its enactment, section 348(f)(1)(A), the default provision for conversion, has remained unchanged, even with the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which was passed to reform the bankruptcy process. *See In re Hodges*, 519 B.R. 445, 448 (2014).

Generally, section 348(f) guides a bankruptcy conversion for a chapter 7 trustee on what assets may be liquidated for the benefit of the estate, which should only include the property that the debtor had on the date of the chapter 13 filing. Therefore, section 348(f)(1)(A) serves as a notification to the debtor that all property at the time of the chapter 13 filing may be up for liquidation upon a failure to complete the plan payments and convert to chapter 7. Section 348(f)(1)(A) provides an advantage to good faith debtors to maintain the same time of filing privilege for a conversion if changed on good faith; while section 348(f)(2) ensures that a bad faith debtor receives sufficient consequences by pushing the date of determination for property of the estate to the latter date of conversion, allowing the debtor's newly acquired property to be available for liquidation.

However, despite Congress's attempts to resolve the issue with chapter conversion, the circuit split deepened concerning whether property interests acquired post-petition, pre-conversion are property of the estate or belong to the benefit of the debtor under section 348(f). Petitioner urges this Court to gloss over the statute's language and arbitrarily conclude that the appreciation in Mr. Clegg's property should inure to the benefit the estate. However, the text of sections 348(f)(1)(A) and 522(a)(2), the relevant legislative history, and Congress's purpose in incentivizing chapter 13 filings support the Thirteenth Circuit's holding that Mr. Clegg, not the chapter 7 estate, is entitled to any post-petition, pre-conversion increase in equity in his home.

A. The Thirteenth Circuit correctly interpreted section 348(f)(1)(A) because its plain meaning and statutory scheme reveal Congress's intent to place a chapter 13 debtor in a favorable position upon conversion.

To prevent discouraging chapter 13 filings out of concerns that assets acquired after filing might be at risk during a chapter 7 conversion, Congress clarified the conversion process by enacting section 348. The ultimate goal of statutory construction is to give effect to "the will of Congress." *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 570 (1982). To breathe life into Congress's intent, the courts must look to traditional rules of statutory interpretation, which first requires examining the plain language of the statute. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). Further, to fully understand a provision, courts must "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).

Although section 348(f) serves as a guide for debtors who may convert from a chapter 13 to 7, the plain language, alone, fails to give specific indications as to what constitutes "property of the estate" for the time between petition and conversion. Therefore, to ensure the correct adoption, courts must not only look to the language provided by Congress in section 348 but also to the language and provisions Congress enacted throughout the Code.

1. The plain meaning of § 348(f)(1)(A) requires this Court to look beyond its ambiguous language to fully execute Congress's desired outcome for converted bankruptcy cases.

A statute is ambiguous if it is "capable of being understood in two or more ways." *Chickasaw Nation v. U.S.*, 534 U.S. 84, 90 (2001) (quoting Webster's Ninth New Collegiate Dictionary 77 (1985)). Courts must "look to the provisions of the whole law and to its object and policy" when ascertaining statutory meaning. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal citations omitted).

Section 348(f)(1)(A) states "property of the estate in [a] 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." 11 U.S.C. § 348(f)(1)(A). In looking at the temporal language referenced in section 348(f), Congress plainly states the calculation for what constitutes property of the estate should be "as of the date of filing the petition." *Id.* The language therefore plainly directs a court, trustee, debtor, and creditors to focus on the time the petition was filed to know and predict what can be included within the "the property of the estate" if the case is converted from a chapter 13 to 7.

Despite the distinct language enacted by Congress, some courts focus on the definition of "property of the estate" to automatically give the estate the benefit from any windfall during a conversion, regardless of good or bad faith actions by the debtor. The language used by Congress in both sections 348(f)(1)(A) and 541(a) focus on what property of estate is included for a case converted from chapter 13 to 7; however, the language is bare of any indication as to how courts are to "deal with increases in the value of a debtor's assets and whether the increase is property of the estate in a converted case." Morgan Decker & Matthew Barr, *Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought*, 2022 ANN. SURV. BANKR. L. 12, 2 (2022). The language of section 348(f) and 541(a) fail to include any reference to equity or proceeds, alike, which had not existed at the time of the chapter 13 filing and approval and could only have become available as "property of the estate" until after the filing but before the debtor converted to a chapter 7. *See In re Boyum*, 2005 WL 2175879, at *2 (Bankr. D. Or. Sept. 6, 2005).

Petitioner's argument that the vague language of sections 348(f)(1)(A) and 541(a) require an increase in equity to inure to the benefit of the estate fails because it ignores the time restraint of "as of the date of filing the petition" on "property of the estate." *See* 11 U.S.C § 348(f)(1)(A). If this Court gives full meaning to both the definition of "property of the estate" and the time restraint, then it is impossible to include an appreciation of equity because it was not available or in existence on the Petition date. Congress's intent is best served if this Court expands beyond the minimal statutory language and evaluates the context around section 348(f)(1)(A). This Court should consider section 348(f) in context and the causes of the statute's enactment to affirm the Thirteenth Circuit's holding that the benefit of post-petition, pre-conversion appreciation belongs to the debtor.

2. The proper canons of statutory construction demand that a post-petition, pre-conversion increase in equity of exempt property belongs to the Debtor.

The Thirteenth Circuit correctly utilized Congress's enactment of section 348(f)(2) and properly compared the same language used in section 522(a)(2) to reach a decision in accordance with Congress's intention. Upon examining a statute's plain language, courts must ensure that the words used are given clear meaning and "no part will be rendered inoperative or superfluous, void or insignificant." *Hibbs v. Winn,* 542 U.S. 88, 101 (2004). Petitioner, the lower court's dissent, and the Ninth Circuit in *In re Castleman* beg courts to focus solely on the language of section 348(f) while ignoring how it operates in conjunction with the statutory scheme. This stance only damages the Code's integrity by rendering its provisions absurd. Although Mr. Clegg argues the plain language tilts in favor of giving appreciation to benefit the debtor based on the language of section 348(f)(1)(A), Mr. Clegg builds strong support for his interpretation through the court's tools of statutory construction to provide the necessary context to section 348(f)'s language.

a) Granting post-petition, pre-conversion appreciation to the Debtor aligns with the canons of statutory construction to ensure that section 348(f)(2) is not rendered superfluous.

Courts must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). The Thirteenth Circuit correctly utilized Congress's addition of section 348(f)(2) to clarify how a good faith debtor deserves the equity acquired post-petition because holding otherwise would place the good faith debtor in a same or similar position as a bad faith debtor. Prior to the enactment of section 348(f), the circuit split was due to, in part, the court's fears that debtors would convert cases in bad faith. *See In re Lybrook*, 951 F.2d 136, 136 (7th Cir. 1991) (holding in favor of the estate because the chapter 13 debtor inherited property before confirming the plan so the debtor converted the case to chapter 7 with the hopes of keeping the inheritance away from creditors). Thus, to prevent such actions by a debtor during conversion, Congress added section 348(f)(2), which serves to place a debtor who converts in bad faith into a worse position than had he acted properly, in good faith. For that reason, the meaning of section 348(f)(1)(A) can be elucidated by referencing section 348(f)(2).

Section 348(f)(2) provides courts some discretion to order all property held by the debtor at the time of the conversion from chapter 13 to chapter 7 to be considered property of the estate if the debtor converts in bad faith. *Salvador v. McGranahan (In re Salvador)*, No. 2:05-cv-1107-GEB, 2006 WL 3300770, at *3 (E.D. Cal. Nov. 14, 2006). The "bad faith" debtor is punished for the purposes of liquidation by calculating the property of the estate at the later date of the conversion. 11 U.S.C. § 348(f)(2). In comparison, the default, good faith provision, asserts that the good faith debtors should expect their "property of the estate" to remain the same from at the date of the petition when converting to chapter 7. *See In re Page*, 250 B.R. 465, 466 (Bankr. D.N.H. 2000). Essentially,

> Congress has given the debtor who attempts to repay his debts in chapter 13, albeit unsuccessfully, a sort of guarantee that he will be no worse off for having tried a repayment plan, as long as he converts in good faith. This guarantee comes in the form of allowing the debtor to retain his post-petition assets, which of course he would never had to contribute if he had originally filed a chapter 7 case.

In re Barrera, 22 F.4th 1217, 1220–21 (10th Cir. 2022). Therefore, if the debtor chooses repayment, but ultimately is unsuccessful, the good faith debtor has a guarantee that he will not be worse for trying a repayment plan. *Id.* Indeed, "the purpose of § 348(f) [was] to ensure equity acquired during a Chapter 13 bankruptcy [would] not go into the resulting Chapter 7 estate upon conversion . . . unless there is bad faith." *In re Hodges*, 518 B.R. 445, 451 (Bankr. E.D. Tenn. 2014).

If "Congress intended for post-petition assets to be property of the estate upon conversion from a chapter 13 case without exception, section 348(f)(2) could not punish debtors for converting a case in bad faith." *In re Harmon*, 2022 WL 20451952, at *6 (Bankr. E.D. La. June 9, 2022). However, in adopting Mr. Clegg's interpretation, any "valuation of the debtors' residence that was made in a chapter 13 case applies in the chapter 7 case upon conversion" unless section 348(f)(2) applies. *See Kendall v. Lynch (In re Lynch),* 363 B.R. 101, 103 (B.A.P. 9th Cir. 2007) (holding that the benefit belongs to the debtor because reverting and changing the valuation would create a serious disincentive for debtors who attempt chapter 13). Holding otherwise would render Congress's qualifier for bad faith debtors irrelevant, punishing both good faith and bad faith debtors who convert to chapter 7 and acquire appreciation in the same manner.

b) The presumption of consistent usage canon commands that the parallel language of 348(f)(1)(A) and 522(a)(2) are given the same effect.

Under the presumption of consistent usage canon, when Congress uses the same language in similar statutes, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428

(1973). Petitioner's plea is for section 348 to require the benefit of post-petition, pre-conversion increases in equity to become property of the estate. If courts adopt this argument, the Code will be left with a different outcome for the same language within the Code that refers to the same piece of property. In an effort to give "the honest but unfortunate debtor. . . a new opportunity in life," Congress enacted a series of exemptions for debtors to take advantage of during the bankruptcy process. *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); 11 U.S.C. § 522. One example available to debtors is the homestead exemption, which permits a debtor to retain a certain amount of equity in their home, for a varying amount depending on the governing state law.

In calculating a debtor's homestead exemption, section 522(a)(2) or the "snapshot" rule determines that the exemptions will be calculated at the time the debtor files for bankruptcy, and the amount would become frozen in time as though someone took a snapshot of it. *See Rockwell v. Hull (In re Rockwell)*, 968 F.3d 12, 17 (1st Cir. 2020). Section 522's "as of the date of filing of the petition" implements a freeze from the time the debtor files for bankruptcy in determining the value, which applies to the determination of a property exemption. 11 U.S.C. § 522(a)(2). Similarly, section 348 calculates property of the estate for a conversion from chapter 13 to 7 "as of the date of filing of the petition." 11 U.S.C. § 348(f)(1)(A). Such language used by Congress and interpreted by the courts to freeze the time for evaluation is remarkably identical to the language also used by Congress in section 348(f)(1)(A) to determine what constitutes property of the estate for a conversion.

Therefore, in evaluating Petitioner's argument in conjunction with both sections, Mr. Clegg's home would hold a value of $350,000 for purposes of the homestead exemption. By contrast, under the same language, Petitioner would also like this Court to value Mr. Clegg's home for the purposes of liquidation at $450,000. The different interpretations of the same language serve only to misconstrue the Code as well as harm debtors and creditors who will be unable to consistently rely on the same language to reach the same interpretations. Just as section 522(a)(2) stops the valuation for purposes of the exemption, the Code would be best served to similarly stop the expansion of what is included as the property of the estate at same time, the date of the filed petition as specifically stated in both provisions.

Petitioner's approach removes any firmness for the parties to know what may be available during a conversion. In addition, Petitioner's approach leaves the debtor in a state of wonder about whether or not their participation in a chapter 13, whose efforts work to the benefit of creditors, will ultimately lead to negative impact on themselves if they are unsuccessful in completing the plan's payments and work to disincentivize debtors from attempting repayment over liquidation. In contrast, Mr. Clegg's interpretation will place him in no worse condition than had he started with liquidation for his efforts in trying to pursue a repayment plan. Therefore, a debtor should not be discouraged from honestly attempting a chapter 13 reorganization, especially when the language gives no indication into expanding property of the estate into equity gained only after filing the petition and when reading otherwise would only serve to create multiple definitions for the same language within the Code.

B. The statute's legislative history shows that Congress intended for the Debtor to receive the benefit of any post-petition, pre-conversion increase in value of property.

The Thirteenth Circuit correctly interpreted section 348(f) because Congress intended debtors to enter into chapter 13, freely convert between chapters with a non-waivable right for the debtors and do so without repercussions. 11 U.S.C. §1307(a). Petitioner's position disregards established canons of statutory construction by arguing that section 348(f) should be construed arbitrarily without regard to any context. R 16. Congress created section 348(f) to resolve disputes among circuits to place the debtor in a favorable position when acting in a good faith during conversion; however, Petitioner requests this Court to rely on the Ninth Circuit's approach from *In re Castleman*. *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052 (9th Cir. 2023). In reaching its decision, the Ninth Circuit failed to properly consider the context of section 348(f) and its language within the Code and puts all the focus solely on the words of the section. *Id.* at 1060–63; R. 14. While Petitioner is correct that the analysis stops at the language when there is a plain and unambiguous meaning, that is far enough from reality for section 348(f) when the question involves a property's post-petition, pre-conversion appreciation of equity. Therefore, this Court must look at the progression of bankruptcy law and Congress's actions in creating and developing the "Effect of Conversion" provision of section 348(f).

Prior to 1994, circuits had minimal guidance on how to handle property after conversion, which provided that the conversion does not change the filing of the petition but failed to mention any direction on what property should or should not be included as "property of the estate." 11 U.S.C. § 348(a). Due to the lack of congressional action, circuits split on the approaches for what property was "property of the estate," and it led to two leading approaches from the Seventh and Third Circuits. Therefore, section 348(f)'s enactment "sought to encourage debtors to reorganize their affairs through chapter 13 rather than to immediately liquidate their property under chapter 7" while, also, resolving the circuit split on who should benefit from post-petition, pre-conversion property acquisitions. *Warren v. Peterson,* 298 B.R. 322, 326 (N.D. Ill. 2003).

1. **Congress's adoption of the Third Circuit's approach unveils its intent to benefit the debtor as opposed to the estate.**

Leading up to Congress's enactment of section 348(f), the circuits produced starkly different outcomes on defining what constitutes property of the estate and who receives the benefit: the debtor or the estate. The Seventh Circuit held that any property acquired by the debtor after a chapter 13 filing became property of the estate. Therefore, if a case converts to chapter 7, the property remains property of the chapter 7 estate to the debtor's detriment. *In re Lybrook*, 951 F.2d 136 (7th Cir. 1991). The *Lybrook* Court reasoned that to hold otherwise would tempt debtors to engage in "strategic, opportunistic behavior that hurts creditors . . . ." *Id.* at 137. Out of fear for potential debtor abuse, the Seventh Circuit held to benefit the creditors.

Conversely, the Third Circuit held that property acquired post-chapter 13 filing, pre-chapter 7 conversion is not property of the chapter 7 estate but inures to the benefit of the debtor. *In re Bobroff*, 766 F.2d 797 (3d. Cir. 1985). If a debtor attempts reorganization under chapter 13 but ultimately is unsuccessful in finishing the plan to result in a conversion to chapter 7 later, then the debtor and his creditors should be in the same position as though the debtor never made such an attempt. The Third Circuit focused on the Code's goal of encouraging debtors to attempt debt repayment plans rather than direct liquidation. In expressly overruling the *Lybrook* approach, Congress enacted section 348(f) which embraced the *Bobroff* opinion and shed light on the Code's goal to encourage debt repayment over liquidation.

2. Congress enacted the 1994 Bankruptcy Amendment to avoid the disincentive to Chapter 13 filings.

In 1994, Congress adopted section 348(f) to clarify the Code and resolved the split about what property is part of the estate when a debtor converts from chapter 13 to 7 by "overrul[ing] the holding in cases such as *Matter of Lybrook* . . . and adopt[ing] the reasoning of *In re Bobroff* . . . ." H.R. REP. NO. 103-834, at 42–43 (1994). Further, the House of Representatives' Committee on the Judiciary Report on the Bankruptcy Act of 1994 included a specific hypothetical to further portray Congress's intent with section 348(f) to place the debtor in a favorable position when equity increases over the course of a chapter 13 case. *Id.* at 57.

The hypothetical depicted a chapter 13 debtor whose home had no available equity at the time of filing his chapter 13 petition, exactly like Mr. Clegg. *Id.; R. 6.* The hypothetical continued to describe if the chapter 13 debtor acquired equity in the home after making payments during his chapter 13 but subsequently needed to convert to chapter 7, he could run the risk of losing his home due to the newly acquired equity, which would create "a serious disincentive to chapter 13 filings." *Id.* Therefore, Congress's enactment of section 348(f) works to prevent such a punishment onto the debtor. To hold otherwise would require debtors to be counseled about the risk of losing their home if they gain equity after a chapter 13 filing, yet such a proposal is precisely what Petitioner requests this Court to do.

C. Policy reinforces the interpretation that a debtor is entitled to post-petition, pre-conversion appreciation under section 348(f).

Bankruptcy serves to provide "a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass*., 549 U.S. 365, 367 (2007). When a debtor enters into bankruptcy and elects to file for a repayment plan which serves to benefit of all parties, that same debtor "should not be discouraged from honestly attempting a Chapter 13. . . ." *In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997). Therefore, once conversion becomes the next step for a debtor, the "spirit of section 348(f)(1)(A) is best captured by a rule that property acquired by the Chapter 13 estate or by the debtor after the Chapter 13 petition does not become property of the Chapter 7 estate at a good-faith conversion. . . [and the] method of acquisition after the Chapter 13 petition should not matter." *In re Woodland*, 325 B.R. 583, 586 (citing Keith M. Lundin, Lundin on Chapter 13, § 316.1, at 316-1, LundinOnChapter13.com (last visited Oct. 16, 2023).

Mr. Clegg sought protection from a chapter 13 filing because a global pandemic altered his financial situation for the worse. R. 6. After eight months of contributing to his plan, Mr. Clegg grew sick from COVID-19 and unable to work and, ultimately, unable to make the required payments to his plan. *Id.* at 8. Through no fault of his own, Mr. Clegg faced either a dismissal of his case leaving him without any protection or liquidation. *Id.* In choosing conversion, Mr. Clegg became the good faith debtor who section 348(f)(1)(A) sought to protect and benefit. R. 8, n.8; *see In re Harmon*, 2022 WL 20451952, at *6. Notwithstanding the Code's well-established policy, Petitioner aims to force Mr. Clegg out of his home while treating him like a bad-faith debtor.

Regardless of an actual increase in equity or not, it serves the most benefit to the Code to give an advantage to the debtor who, in good faith, participated in the bankruptcy, attempted a chapter 13 repayment, but ultimately converted to chapter 7. As shown in *In re Jackson*, when a case converted from chapter 13 to 7 and upon conversion, the trustee argued that the debtor's property had a significantly higher worth than what was originally included in the chapter 13 schedule. *In re Jackson*, 317 B.R. 511 (Bankr. N.D. Ill. 2004). The trustee applied to the court for attorneys to assist in the sale of the debtor's home for the estate. *Id.* at 512. However, the court held against the trustee and stated that it would "approve a sale only if [the debtor's] scheduled value was inaccurate and there was actual equity available to creditors at the start of the chapter 13 case, or if [the trustee] establishes that [the debtor's] conversion was in bad faith. . ." *Id.* at 518.

Limiting the property of the estate in a converted case is one of cornerstones to support the goal of section 348(f) to "equalize the treatment a debtor would receive under a chapter 13 case that converted to a chapter 7 case with the treatment the debtor would receive if he filed a chapter 7 originally." *In re Pearson*, 214 B.R. at 164. If property of the estate is not limited, then a debtor would be greatly discouraged from attempting a repayment plan because if the debtor enters into a repayment, acquires property while making attempts towards repayment, and ultimately fails the chapter 13, then the debtor would have to liquidate the estate as determined at the time of filing the chapter 13, in addition to, the debtor's earned equity acquired after such date. *See In re Boyum*, No. 04-31695-ELP7, 2005 WL 2175879, at *2 (Bankr. D. Or. Sept. 6, 2005) ("[Section] 348(f)(1)(A) specifically limits the property of the estate . . . to the extent that appellant acquired equity in the [property] after filing her chapter 13 petition, such equity is not property of the estate upon conversion to Chapter 7."). As such, debtors would find themselves incentivized to go straight to liquidation and guarantee that the creditors receive less, especially any unsecured creditors.

A change in appreciation for a piece of property that was included on the original chapter 13 petition should not become property of the chapter 7 estate because such appreciation could never have been available on the original petition filing date. To hold otherwise would punish a debtor for attempting a repayment plan which goes directly against what Congress's intent in passing section 348(f) in 1994 which remained unchanged during the 2005 bankruptcy law restructuring.

When a chapter 13 repayment plan is unsuccessful, "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." *Hannan v. Kirschenbaum* (*In re Hannan)*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982). Therefore, it would be erroneous to adopt Petitioner's interpretation of section 348(f) because, despite the section intent to incentivize debtors, such an interpretation would require courts to read in a penalty for not filing for liquidation from the start. If Mr. Clegg's ignored the goals of Congress in pushing for repayment with a chapter 13 bankruptcy and had instead filed immediately for chapter 7 liquidation, Mr. Clegg would not be forced to sell his own home and his creditors would be left with less money in their pockets.

II. A Chapter 7 Trustee cannot sell the power to avoid and recover transfers under sections 547 and 550 because such power is not property of the estate.

The Thirteenth Circuit correctly interpreted sections 547 and 550 to hold that a chapter 7 Trustee cannot sell the ability to avoid and recover fraudulent transfers. The avoidance powers are not property of the estate under section 541(a) because the avoidance powers are not property—indeed, a power conferred is not a property right. But even if the avoidance powers are property, the powers are not property of the estate under section 541(a)(1)-(7). Regardless, avoidance actions are not alienable because such a rule would contravene well-established Bankruptcy law and policy. If this Court does find that the avoidance powers may be sold, this Court should adopt the rule that prohibits sale of avoidance actions to creditors that will pursue the transfer for their own benefit.

A. Section 541(a)'s plain language reveals Congress's intent to preclude a Trustee from selling the power to pursue avoidance actions.

Avoidance actions are not property of the estate under section 541(a) for two reasons. First, a trustee's avoidance powers are not property at all. Rather, the avoidance powers are statutorily granted by the Bankruptcy Code ("the Code"). Second, even if this Court considers the avoidance powers property, the powers are not property of the estate under subsections 541(a)(1)-(7). While subsections (a)(2), (a)(5), and (a)(6) are not at issue, avoidance powers are not property of the estate under the general, catch-all provisions of subsections (a)(1) and (a)(7). The powers are not within the scope of subsection (a)(1) because the powers are not interest, legal nor equitable, of the debtor. Further, the powers are not property of the estate under subsection (a)(7) because the powers arise upon the commencement of the case, rather than at some point after. Likewise, under specific provisions within subsection (a)(3) and (a)(4), the property recovered from a trustee exercising their avoidance powers are considered property of the estate. However, the property recovered is distinct from the power to avoid itself, and therefore, the power to avoid is not contemplated by subsections (a)(3) and (a)(4). For these reasons, this Court should find that the avoidance action is not property at all nor is the power property of the estate. Thus, the chapter 7 trustee's transfer of the avoidance power in this case cannot stand.

1. Avoidance actions are inalienable statutory powers and therefore cannot be characterized as property.

An avoidance action cannot be property of the estate because the action, which derives from a trustee's *power* to avoid and recover, is not property at all. The Code and its legislative history refer to avoidance actions as powers of a trustee. For example, section 546(b)(1) references sections 544, 545, and 549 as the "rights and *powers* of the trustee[.]" 11 U.S.C. § 546(b)(1) (emphasis added); *see also* 11 U.S.C. § 926 (titled "Avoiding powers"); S. REP. NO. 95-989, at 86–90 (1978) ("Debtor's avoiding powers under proposed sections 544, 545, 547, and 548 . . . "). Courts agree with this interpretation. *See, e.g., Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinley, (In re Cybergenics Corp.)*, 226 F.3d 237, 245 (3d Cir. 2000) ("The avoidance power itself, which we have analogized to the power of a public official to carry out various responsibilities in a representative capacity"); *Moyer v. ABN Amro Mortg. Grp., Inc. (In re Feringa)*, 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007) ("The avoiding powers are not 'property' but a statutorily created *power* to recover property.") (quoting *In re Sweetwater*, 55 B.R. 724, 731 (D. Utah 1985), *rev'd on other grounds*, 884 F.2d 1323 (10th Cir. 1989)). Therefore, because avoidance actions are a statutory power of a trustee, the avoidance action is not property, and thus, cannot be property of the estate. This Court should affirm the Thirteenth Circuit's holding that Petitioner cannot sell the power to avoid and recover transfers.

2. Even if the power of a trustee to pursue an avoidance action is considered property, it does not constitute property of the bankruptcy estate.

Even if this Court concludes that avoidance powers may be property, the powers are not property of the estate under section 541. Section 541 broadly defines the estate as property or an interest in property "wherever located and by whomever held[.]" 11 U.S.C. § 541(a); *Patterson v. Shumate*, 504 U.S. 753, 757 (1992) (noting section 541 was intended to be broad). At issue are subsections 541(a)(1)-(7) as these sections establish what constitutes property of the estate. However, subsections (a)(2) and (a)(5), which contemplate property of the spouse or property transferred through estate planning mechanisms, are not at issue. Further, few—but none successfully—argue that avoidance actions are property of the estate under subsection (a)(6).

a) The vast language of subsections 541(a)(1) and (a)(7) does not extend to characterize avoidance actions of property of the estate.

Subsection 541(a)(1) provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Thus, two inquiries arise: first, whether the avoidance action is a "legal or equitable interest *of the debtor*[,]" and second, whether the avoidance action arises "as of the commencement of the case." 11 U.S.C. § 541(a)(1). However, the second inquiry becomes unnecessary in light of the first because the trustee is the only person that can exercise the avoidance powers. *See infra* section II.B.1. Therefore, the debtor cannot possess or have any interest in an avoidance action itself. Further, Petitioner's argument, relying on *In re Simply Essentials, LLC*, fails when considering the debtor no longer possessed an interest in the property subject to the avoidance action following the transfer to Pink. *See Pitman Farms v. ARKK Food Co. (In re Simply Essentials, LLC)*, 78 F.4th 1006 (8th Cir. 2023) (holding that a debtor retains an interest in property transferred prepetition).

Additionally, because the avoidance action arises upon the commencement of the case, the avoidance action does not fall within the scope of subsection (a)(7), which includes in the estate "[a]ny interest in property that the estate acquires *after* the commencement of the case." 11 U.S.C.

§ 541(a)(7); *see also In re Brown*, 2004 WL 5846460 at *2 (Bankr. N.D. Ga. 2004) (noting avoidance actions arise with the commencement of a bankruptcy case). Further, the avoidance action is a power created by operation of law, rather than an interest acquired. Thus, the avoidance powers are not property of the estate under the general subsections (a)(1) or (a)(7). Therefore, the Court must find that Petitioner's sale of the avoidance action to Eclipse cannot stand.

b) The ability to recover property under an avoidance action does not render the avoidance action itself property of the estate.

Similarly, subsections (a)(3) and (a)(4) do not render avoidance actions property of the estate because these sections reference the property once recovered rather than the avoidance action itself. Subsection (a)(3) provides that the estate includes "[a]ny interest in property that the trustee recovers under section . . . 550[.]" 11 U.S.C. § 541(a)(3). Section 550 concerns the property recovered only after a trustee exercises its avoidance powers. 11 U.S.C. § 550. Further, subsection (a)(4) provides "[a]ny interest in property preserved for the benefit of or ordered transferred to the estate under section . . . 551[.]" 11 U.S.C. § 541(a)(4). Section 551 concerns "any transfer avoided[.]" 11 U.S.C. § 551. Construing the intent of Congress, property recovered through avoidance actions must be property of the estate, which is undisputed. Yet, this contention still does not contemplate the avoidance action itself. *See Schroeder v. Rouse (In re Redding),* 247 B.R. 474, 477 (B.A.P. 8th Cir. 2000) (noting property "may be avoidable by the trustee and recoverable from the son under §§ 548 and 550, but that does not make it property of the estate."). This is because a trustee's power is to "avoid *and* recover." The use of "and" demands bifurcation of the avoidance power from the recovery. *See* R. 18. ("To be clear, avoidance is a condition precedent to recovery under section 550(a)" (citing 11 U.S.C. § 550(a)). Thus, while the property recovered under an avoidance action may be property of the estate, the avoidance action itself is not property of the estate under subsection (a)(3) or (a)(4).

B. Under the proper canons of statutory construction, avoidance actions cannot be sold without rendering the statutory scheme superfluous.

Even if this Court considers avoidance action property of the estate, this Court should affirm the Thirteenth Circuit and adopt the long-standing belief that the avoidance action cannot be sold because Petitioner is the only party that can assert an avoidance action. However, if this Court seeks another less stringent rule, this Court should adopt the rule stating the avoidance action cannot be sold to a creditor who will use the avoidance action for its own benefit, rather than for the benefit of the estate. *See, e.g.*, *In re Greenberg*, 266 B.R. 45, 51 (Bankr. E.D.N.Y. 2001) (holding a trustee may sell an avoidance action when doing so would benefit the estate). The Court should adopt this rule because it best serves the goals of Bankruptcy Code and provides the most equitable outcome for a class of creditors. Lastly, this section argues that allowing the free sale of avoidance actions would render other provisions of the Code establishing derivative standing superfluous.

1. Prohibiting the sale of a Chapter 7 trustee's avoidance powers comports with the established policy that only a trustee may assert an avoidance action.

The power to assert an avoidance action is a well-established principle, recognized by the pre-Code practices. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372–73 (2006) (citations omitted). Since the pre-Code era, through the enactment of the Bankruptcy Act and continuing under the current Bankruptcy Code, both the legislative history and the statutory language show no deviation from this well-established principle. *See Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 721–22 (2018) (noting the judiciary presumes intentionality when Congress uses materially the same language). Therefore, this Court should conclusively recognize that Petitioner cannot sell an avoidance action because only a trustee has the power to avoid under the Code. *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (holding the Court should not accept Code interpretations that result in a major change from pre-Code practice unless legislative history indicates otherwise).

Lower courts have demonstrated an unwillingness to deviate from this well-established principle. For example, in *In re Conley*, two creditors filed for permission to file a complaint against the debtor and the debtor's family members, asserting that the debtor executed an unlawful transfer to insiders that must be avoided under 11 U.S.C. § 547. 159 B.R. 323, 324 (Bankr. D. Idaho 1993). The trustee sold the avoidance action to the creditors, stipulating that any amount recovered would go to the two creditors first, with the remainder going to the estate. *Id.* Applying the general rule that "[s]ections 547 and 548 limit standing to assert actions under their respective sections to the trustee[,]" the court held that the creditors lacked standing to assert the avoidance action because neither of the two recognized exceptions apply. *Id.* First, the Court noted that an avoidance action may be transferred to an appointed "representative of the estate" pursuant to 11 U.S.C. § 1123(b)(3)(B); second, the court noted that an avoidance action may be sold or assigned, with the Court's permission, when "a trustee or debtor in possession wrongfully refuses to bring an action under section 547 or 548[.]" *Id.* The Court buttressed its holding that the creditors lacked standing to bring the avoidance action by pointing to the policies underlying the Code, which the Court described as being "for the benefit of the estate" and "not intended to serve as weapons for secured creditors to battle among themselves for priority status." *Id.* at 325. Following *In re Conley*, courts continue to recognize this well-established principle. *See, e.g.*, *In re McGuirk*, 414 B.R. 878, 879 (Bankr. N.D. Ga. 2009) ("avoidance powers . . . are unique statutory powers intended to benefit the estate, not a single creditor."); *In re Barkany*, No. 8-14-72941-las, 2021 WL 4272589, at *8 (Bankr. E.D.N.Y. Sept. 20, 2021) (noting a single creditor exercising avoidance powers "contravenes basic principles of bankruptcy law").

Moreover, the plain meaning of the Code and its purpose demand that the power to assert an avoidance action is limited to a trustee. Sections 544 and 547 confer the avoidance powers upon a trustee. 11 U.S.C. §§ 544(b)(1) (avoidance of any transfer by debtor that an actual creditor of debtor could avoid); 547(b)(4)(A)-(B) (avoidance of preferential transfers). Section 544(b)(1) permits a trustee to "avoid any transfer of an interest of the debtor in property[.]" 11 U.S.C. § 544(b)(1). Section 547(b)(4)(A)-(B) permits a trustee to avoid transfers made within ninety days before the filing of the petition or, if the transfer was made to an insider, within one year before the filing of the petition. 11 U.S.C. § 547(b)(4)(A)-(B). Upon avoidance, the Code permits a trustee to recover the transferred property for the benefit of the estate. 11 U.S.C. § 550(a).

At issue in this case is *who* may exercise the power to avoid and recover. The plain meaning of the Code demands that only a trustee may exercise this power. *See* 11 U.S.C. §§ 544(a), 547(b) (each section specifically states "the trustee may . . ."). Like the avoidance power sections, other parts of the Code utilize, "the trustee may" language. *See, e.g.*, 11 U.S.C. § 506(c) ("The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving . . . such property"). For example, in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, the Supreme Court considered who may use section 506(c). 530 U.S. 1, 3 (2000). The Court found that only a trustee could use the provision for two reasons. First, the Court reasoned that the statute's use of "the trustee may" designated a specific action to a particular party, which the Court presumed intentional given Congress' use of "a party in interest" or "an entity" in other sections clearly intended to be broader. *Hartford Underwriters Ins. Co.*, 530 U.S. at 7. Second, the Court opined that a trustee's "unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others." *Id.* Therefore, because Congress conferred the powers as "the trustee may[,]" this Court must interpret the plain meaning of such language under sections 544, 547, and 548 as exclusively conferring the avoidance powers to a trustee.

Taken together, these avoidance action statutes serve two primary purposes. First and foremost, "the power to avoid preferential transfers ensures that each creditor in the same class will receive the same pro rata share of the debtor's estate[;]" and second, "the avoidance power 'reduces the incentive to rush to dismember a financially unstable debtor' by allowing the trustee to recoup last-minute payments to creditors." *Butler v. David Shaw, Inc.*, 72 F.3d 437, 441 n.6 (4th Cir. 1996) (citing *In re Smith*, 966 F.2d 1527, 1535 (7th Cir. 1992)). Permitting the sale of the avoidance action to a single creditor undermines the more important intended purpose of the avoidance powers, which is to ensure equality of transfer. *See Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991) (noting the equality of distribution is the more important of the two purposes). This is because the single creditor—here, Eclipse—would receive a different share of the recovery compared to other creditors in the same class. Thus, allowing the sale of the avoidance action to Eclipse will contravene a long-held policy of Bankruptcy law: equality of distribution. *See Bailey v. Glover*, 88 U.S. 342, 346 (1874) ("It is obviously one of the purposes of the Bankrupt[cy] law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution."). Therefore, this Court should conclusively adopt the approach that avoidance actions cannot be sold or assigned. In doing so, this Court should find that Petitioner's sale to Eclipse cannot stand.

2. Even the courts that permit the sale of avoidance powers consider whether the proposed assignment is in the best interest of the estate.

A trustee's role as a fiduciary prevents a trustee from selling the avoidance powers. The Code requires Chapter 7 trustees to collect all property of the estate and reduce said property to its monetary value. *See* 11 U.S.C. § 704(a)(1) (requiring a trustee to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest"). The crux of the numerous duties required of a trustee is that trustee must maximize the value of the estate. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) (noting several of the trustee's duties, one of which includes asset maximization).

The Code tasks trustees, a representative of the estate, with maximizing the value of the estate. *See id. See also* 11 U.S.C. § 323(a) ("The trustee . . . is the representative of the estate."). Thus, the trustee's role is much like the role of a fiduciary in other contexts. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000) (using the term 'fiduciary' to describe a trustee's duties). Because a trustee is a fiduciary, and because a trustee's fiduciary duties apply to all secured creditors, selling an avoidance action to a single creditor cannot maximize the estate for *all* creditors.

For example, the Court in *In re Greenberg* held that "the trustee's authority to pursue [avoidance actions] may be properly assigned to [a creditor] provided that such authority is limited to the pursuit of claims on behalf of the estate and that any recovery is equitably distributed to [the debtor's] creditors under the trustee's supervision." *In re Greenberg*, 266 B.R. 45, 51 (Bankr. E.D.N.Y. 2001). Significantly, in *In re Greenberg*, the creditor wishing to pursue the avoidance action held 99% of the claims against the estate, which the Court opined minimized "the appearance of impropriety[.]" *In re Greenberg*, 266 B.R. at 51. Therefore, *Greenberg* stands for the proposition that sale of avoidance actions, if permitted, must be examined to ensure that recovery is "for the benefit of the estate[,]" rather than a single creditor. *See id.* at 51 ("Bankruptcy courts are properly hesitant to authorize the sale . . . of a trustee's avoidance powers or causes of action . . . to a single creditor. Assignments of the trustee's unique statutory powers, if not carefully scrutinized and narrowly circumscribed, may too easily result in the improper delegation and dilution of the trustee's primary duty”).

Here, the Chapter 7 trustee’s sale of the preference action must be rejected because the buyer, Eclipse, will be using the Petitioner’s power for its personal gain. Unlike in *In re Greenberg*, Eclipse does not own 99% of the claims against estate. *Greenberg*, 266 B.R. at 51. In fact, the record reflects multiple claimants including credit card companies, debtor’s mortgage servicer, debtor’s mother Pink, in addition to Eclipse. R. 6. Further, Petitioner's fiduciary responsibility to all creditors is paramount, placing Eclipse's personal gain at the periphery of concern. Notably, this sale does not purport to allow Eclipse to pursue the action in a derivative manner, but rather, Eclipse will be acting “*for its own benefit*.” R. 23. Allowing Eclipse to obtain the avoidance action for its own benefit is the antithesis of the Code, which requires recovered avoidance proceeds bused “for the benefit of the estate.” 11 U.S.C. § 550(a). Thus, this Court cannot allow a creditor to pursue the bankruptcy estate’s avoidance action for its own benefit. To prevent this denigration of the Code, this Court should affirm the Thirteenth Circuit, in holding that a trustee cannot sell an avoidance action to a creditor that will pursue the claims for its own benefit.

3. Interpreting the Code to permit the sale of avoidance powers will render section 541(a)(3) superfluous.

In holding that Petitioner cannot sell its avoidance powers, the Thirteenth Circuit relied on proper canons of statutory construction to conclude that to hold otherwise would render section 541(a)(3) superfluous. *See* 11 U.S.C. § 503(b)(3)(B), (b)(4). *See also City of Chicago 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.”) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”). Because Congress established a mechanism for creditors to assert a trustee's avoidance powers derivatively under 11 U.S.C. § 503(b)(3)(B), the ability to sell avoidance actions is unnecessary. Section 503(b)(3)(B) permits the compensation of creditors, with court approval, when the creditors recover property for the benefit of the estate. 11 U.S.C. § 503(b)(3)(B). Consequently, an avoidance action falls within the scope of section 503 because the avoidance action seeks to recover “property transferred or concealed by the debtor[.]” *Id. See also Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 240 (6th Cir. 2009) (“An avoidance action pursuant to § 544(b) . . . falls within the scope of § 503(b)(3)(B) as an action to recover “property transferred ... by the debtor.”). Like the principle that avoidance actions cannot be sold, section 503 derives from well-established principles dating back well before the current code or even its predecessor, the Bankruptcy Act. *In re Trailer Source, Inc.*, 555 F.3d at 240–41. *See also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372–73 (2006) (recognizing the prohibition on sale of avoidance actions as a well-established, pre-Code policy).

Petitioner’s argument—purportedly rooted in asset maximization—fails when considering derivative standing under the Code because derivative standing serves the same function. Essentially, the practice of derivative standing achieves all the goals and resolves the issues that a trustee contends can be addressed through the sale of avoidance claims. This approach accomplishes these objectives without the concerns associated with an unrestricted sale of avoidance claims, such as the perception of impropriety. *See In re Bargdill*, 238 B.R. 711, 721 (Bankr. N.D. Ohio 1999) (citation omitted) (noting creditors’ fears of being defrauded in a preference action are tempered when the creditor acknowledges that the action is brought by a neutral party [the trustee], rather than a "another creditor with ulterior motives"). Congress unmistakably intended for bankruptcy estates to recover assets fraudulently transferred by the debtor. *See In re Trailer Source, Inc.*, 555 F.3d at 242. However, the appropriate avenue for such recovery is through derivative standing, rather than disrupting well-established bankruptcy law and policy that prohibits the sale of avoidance actions. Thus, this Court should affirm the Thirteenth Circuit and reject a rule permitting a truste to sell avoidance actions.

CONCLUSION

For the reasons listed above, this Court should find in favor of the Respondent, Mr. Eugene Clegg, and affirm the decision of the Court of Appeals for the Thirteenth Circuit.