NO. 23-0115

IN THE

Supreme Court of the United States

OCTOBER TERM, 2023

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

Team 54
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether any post-confirmation appreciation in a debtor's property inures to the benefit of the debtor or to the bankruptcy estate upon conversion of a case from Chapter 13 to Chapter 7 pursuant to 11 U.S.C. §§ 348 and 541.

II. Whether a Chapter 7 trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.

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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

In 2011, the Debtor, Eugene Clegg ("Clegg"), a distinguished military veteran, became the owner of The Final Cut, LLC ("Final Cut"), an entity that owned and operated a historic single-screen movie theater in the City of Moot. (R. at 5). In 2016, Final Cut borrowed $850,000 from Eclipse Credit Union ("Eclipse") to renovate the theater. (R. at 5). Eclipse secured the loan with first priority liens on Final Cut's real and personal property and obtained an unsecured personal guaranty from Clegg. (R. at 5). While renovating the theater, Clegg received ample assistance from local veterans that ultimately helped to reduce labor costs. Therefore, Clegg did not have to use the full amount of the Eclipse loan. (R. at 5). Clegg then decided to donate the remaining loan funds, $75,000, to the Veterans of Foreign Wars. (R. at 5). Clegg did not make Eclipse aware that he was making this donation. (R. at 5).

Due to the COVID-19 outbreak in 2020, Final Cut was unable to operate for nearly a year. (R. at 6). Because Final Cut was unable to produce any income, Clegg borrowed an unsecured $50,000 loan from his mother, Pink. (R. at 6). The theater reopened in 2021 but, unfortunately, was unable to produce enough steady income. (R. at 6). Then, Clegg incurred significant personal credit card debt and fell behind on his mortgage payments. (R. at 6). Clegg's mortgage lender commenced foreclosure proceedings upon Clegg's house. (R. at 6).

To save his house, on December 8, 2021, Clegg sought relief under Chapter 13 of the Bankruptcy Code. (R. at 6). Clegg complied with the requirements of a Chapter 13 case and listed all his assets and debts. (R. at 6). This included a payment he made to his mother Pink within one year of the petition date in the aggregate amount of $20,000. (R. at 7). Under the Chapter 13 plan, Clegg would make payments to his creditors through income received from Final Cut over a three-year period. (R. at 7).

Eclipse eventually discovered Clegg's donation to the Veterans of Foreign Wars and sought to have Clegg's debt related to Eclipse's loan declared non-dischargeable pursuant to section 523(a)(2)(A). (R. at 7). Eclipse also objected to Clegg's amended plan as not being proposed in good faith. (R. at 8). The Chapter 13 Trustee also objected to Clegg's plan, arguing that in a hypothetical liquidation under Chapter 7, the alleged preferential transfer made to Pink would be avoided and recovered to distribute to creditors. (R. at 7).

To resolve the Chapter 13 Trustee's objection, Clegg proposed a plan amendment that increased the payments to creditors by $20,000 over the term of the plan. (R. at 7). The Trustee stipulated to the amended plan and agreed that she would not seek to avoid and recover the payments Clegg made to Pink prior to the petition date. (R. at 8). Additionally, after negotiation, Eclipse agreed to withdraw its objection and settled for an estimated claim of $150,000, of which $25,000 was deemed nondischargeable. (R. at 8). On February 12, 2022, the bankruptcy court confirmed Clegg's amended plan and entered an order approving the settlement between Clegg and Eclipse. (R. at 8). About nine months later, the theater permanently closed as it continued to underperform financially. (R. at 8). Eclipse then commenced foreclosure proceedings against Final Cut. (R. at 8).

Unfortunately, Clegg could not keep up with his payments under the confirmed plan because he was not receiving income from Final Cut. (R. at 8). Clegg then converted his case to a Chapter 7 case. (R. at 8). The court appointed the Trustee, and the conversion schedules listed Clegg's house at a value of $350,000 as of the petition date and an alleged preferential transfer to Pink. (R. at 9). Initially, the Trustee found that the estate had no assets, but after the section 341 meeting of creditors, the Trustee commissioned an appraisal of Clegg's house and determined that the house had appreciated by $100,000 since the petition date. (R. at 9).

The Trustee then began marketing the house for sale when Eclipse offered to purchase both the house and the alleged preference claim against Pink. (R. at 9). Because the Trustee felt that Eclipse's offer maximized the value of the estate's assets for the benefit of creditors, the Trustee filed a motion to sell both the house and the alleged preference claim to Eclipse under section 363(b). (R. at 9). Clegg objected to the sale motion arguing first that the Trustee could not sell his house because there was no equity available as of the petition date, and second, the Trustee's power to avoid and recover preferential transfers could not be sold. (R. at 10). The bankruptcy court sustained Clegg's objections on both grounds and denied the Trustee's motion.

The Trustee timely appealed the bankruptcy court's denial of the Sale Motion. Upon the request of the parties, the disputes were certified for direct appeal to the Thirteenth Circuit pursuant to 28 U.S.C. § 158(d)(2)(A). (R. at 10). On appeal, the Thirteenth Circuit affirmed. (R. at 10). This appeal directly follows. (R. at 10). This Court reviews interpretations of the Bankruptcy Code *de novo*. *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 28 (2014); *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1338 (11th Cir. 2017).

SUMMARY OF THE ARGUMENT

First, this Court should affirm the Thirteenth Circuit's decision affirming the bankruptcy court's order allowing Clegg to retain the appreciation in his house because section 348(f) and the overall context of the Bankruptcy Code provide that the post-petition, pre-conversion appreciation in Clegg's house inures to his benefit.

When read in context, the plain meaning of section 348(f)(1)(A) is: any asset and its value which were present as of the petition date which the debtor still retains are property of the converted estate. To hold otherwise would render section 522(a) and 348(f)(2) superfluous. Under section 348(f)(2), the debtor's converted estate is established as of the date of conversion when a conversion occurs in bad faith. To punish a bad faith conversion, property which would otherwise inure to the debtor's benefit is added to the converted estate. Conversely, section 348(f)(1)(A) establishes the converted estate of the date of filing the petition. This is meant to (1) incentivize debtors to file under Chapter 13 and (2) to reward good faith conversions after attempting to repay their debts by allowing the debtors to retain any post-confirmation appreciation and assets. If the Court allows the post-petition, pre-conversion appreciation under a good faith conversion to inure to the converted estate, then there would be no difference in outcome between sections 348(f)(1) and (f)(2).

Furthermore, this conclusion would also allow for the absurdity of two different property valuations of the same property in the same bankruptcy. Both sections 348(f)(1)(A) and 522(a) use the language "as of the date of the filing of the petition." As sections 348(f)(1)(A) and 522(a) have near identical language, the same interpretation should be afforded throughout. For the homestead exemption and determining the assets of the Chapter 13 estate, Clegg's house was valued at $350,000 under section 522(a). Therefore, as Clegg's house was valued at $350,000 under section 522(a) at the beginning of the bankruptcy, it would be absurd to value the house at $450,000 for the converted estate while the valuation for the continued homestead exemption remains at $350,000.

Next, the plain language of the statute as well as the statutory and legislative history show that the post-confirmation appreciation in equity is excluded from the converted estate. However, when read out of context, some courts interpret section 348(f)(1)(A) in a vacuum to mean that the asset – regardless of its value at the petition date – which is still in the debtor's possession is part of the converted estate. Because the statute is "capable of being understood in two or more possible senses or ways," *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (quoting Ambiguous, Webster's Ninth New Collegiate Dictionary (1985)), the statute is ambiguous when read out of context and resorting to statutory and legislative history is appropriate. In the legislative history, Congress adopts the reasoning found in *In re Bobroff*. As *Bobroff* excludes post-petition assets from the converted estate to place creditors into the same place they would have been had a Chapter 7 case originally been filed, this excludes any appreciation from the converted estate.

Lastly, this furthers the Congressional intent to incentivize debtors to attempt repayment under Chapter 13 rather than straight liquidation. As a creditor will likely recover more under Chapter 13, Congress rewards the attempt at repayment by allowing the debtor to retain any appreciation should repayment fail and a conversion occur. For these reasons, this Court should affirm the decision of the Thirteenth Circuit on this issue.

Next, the avoidance powers are not interests in property that a debtor possesses as of the commencement of the case or after the commencement of the case. A debtor must have a pre-petition property interest under applicable non-bankruptcy law for that property interest to be included as part of its bankruptcy estate. Avoidance actions are generally not created by any state law. Instead, the power a trustee has to avoid and recover certain transfers is *only* created by federal law through the Bankruptcy Code. But even though the avoidance actions are grounded in federal law, those actions are plainly "powers" a trustee possesses that are not "interests." Because sections 547 and 550 are not "interests in property," a debtor cannot possess them as of the commencement of the case nor can it "acquire" them after commencement of the case to constitute property of the estate under section 541(a)(1).

Last, legislative history, the purpose behind the avoidance powers, and pre-Code practice all show that Congress did not intend for the trustee to be able to sell those powers. Because the plain meaning, history, and purpose behind sections 547 and 550 show that Congress did not intend for a creditor to be able to buy a trustee's avoidance powers, this Court should affirm judgment of the court below.

ARGUMENT

I. Clegg's post-confirmation appreciation in asset value belongs to Clegg rather than to the converted bankruptcy estate.

This Court should affirm the Thirteenth Circuit's decision that the post-confirmation appreciation in Clegg's house belongs to Clegg. Section 348(f)(1)(A)) provides: "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." 11 U.S.C. § 348(f)(1)(A). Since its enactment, diverging interpretations over the meaning of "property of the estate" have emerged. Some courts, such as the Tenth Circuit in *In re Barrera*, read the statute in its context and concluded therefore that all post-petition, pre-conversion assets inure to the benefit of the debtor. *In re Barrera*, 22 F.4th 1217, 1226 (10th Cir. 2022); *see also In re Pruneski*, 343 B.R. 714, 717 (M.D. Fla. 2006) ("[T]he property of the estate and the Debtor's equity in the two (2) 1998 Ford Windstars is determined as of the filing date of the Chapter 13 Petition, and not the date on which the Debtor's case was converted to a Chapter 7 case. Therefore, the Debtor, on the date of filing his Chapter 13 Petition, had no equity in the two automobiles."). Meanwhile, other courts, such as the Ninth Circuit in *Matter of Castleman*, have held that the post-petition, pre-conversion assets inure to the benefit of the converted estate. *Matter of Castleman*, 75 F.4th 1052, 1058 (9th Cir. 2023). However, these latter courts which interpret the statute to allow pre-conversion assets to inure to the converted estate read section 348(f)(1)(A) out of context of the rest of the Bankruptcy Code.

When reading the statute with the rest of the Bankruptcy Code and the legislative history, the post-confirmation appreciation in Clegg's house does not belong to the converted Chapter 7 estate. First, Clegg keeps the appreciation value in the house under section 348(f)(1)(A) because Clegg's rights in the house, including his equity in the house, are determined as of the petition date. Furthermore, any other interpretation would render sections 348(f)(2) and 522(a) superfluous. If Congress intended for post-confirmation, pre-conversion appreciation 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 and would render that provision essentially moot. Similarly, the language within sections 348(f)(1)(A) and 522(a) are nearly identical in that they determine the value of the estate's assets as of the petition date. It would lead to an absurd result to interpret the property valuations differently.

Second, even if the meaning of 'property of the estate' within section 348(f) is ambiguous, the Court can resort to the legislative history and structure of the Code to interpret Congress' intent. As the legislative history makes clear, section 348(f) was meant to resolve a circuit split over the property of the estate upon conversion and to provide a punishment for bad faith conversions. Thus, the only interpretation to accomplish this end is for the appreciated value of Clegg's house to be excluded from the converted Chapter 7 estate.

A. Clegg retains the post-confirmation appreciation because to hold otherwise would render other sections of the Bankruptcy Code superfluous.

The Court must begin its interpretation of section 348(f)(1)(A) by reading the statute in its context as it relates to other provisions of the bankruptcy code. *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019) ("Under the whole text canon, courts should consider the entire text of a statute, in view of its structure and of the physical and logical relation of its many parts, when interpreting any particular part of the text.") (cleaned up). Section 348(f)(1)(A)'s plain language limits the estate's interest in property to the value of such interests as of the petition date. *See generally In re Wegner*, 243 B.R. 731, 734 (Bankr. D. Neb. 2000) ("Section 348(f)(1)(B) assures that property of a successor Chapter 7 case excludes the amount by which property appreciates during the pendency of a Chapter 13 case."). When section 348(f)(1)(A) refers to "property of the estate," it means the property as of the petition date, along with all its attributes including value. *See In re Barrera*, 620 B.R. 645, 653 (Bankr. D. Colo. 2020), aff'd 2020 Bankr. LEXIS 2756 (B.A.P. 10th Cir. 2020) (finding that a proper interpretation of "property" under section 348(f)(1)(A) "is the property as it existed on the petition date, with all its attributes including the amount of equity that existed on that date.") (emphasis in original); *Leo v. Burt (In re Burt)*, No. 09-40016-JJR, 2009 Bankr. LEXIS 2384 at *5 (Bankr. N.D. Ala. July 31, 2009) ("Section 348(f)(1)(A) establishes the original chapter 13 petition date as the date on which a hypothetical inventory is to be conducted to determine what property will be in the estate of the converted case."). To the extent that those attributes change during the debtor's Chapter 13 case – due to payments on debt secured by the asset, improvements to the asset, or market conditions effecting the asset's value – those changes are disregarded for determining the estate's interest and the debtor's interest upon conversion. To hold otherwise would render other code sections, including importantly, section 348(f)(2), superfluous.

The Trustee encourages the Court to remove section 348(f)(1)(A) from its context to conclude that the post-confirmation appreciation inures to the estate's benefit. However, a "[t]ext out of context is mere pretext." *TTM Sys., Ltd. v. KMC Trading*, No. 91-15999, 1993 U.S. App. LEXIS 480, at *3 (9th Cir. Jan. 6, 1993). In this case, if the Court adopts the Trustee's interpretation of section 348(f)(1)(A), then two other sections of the Bankruptcy Code will be rendered superfluous or absurd. "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." *Duncan v. Walker*, 599 U.S. 167, 174 (2001). First, if post-confirmation appreciation in a house belongs to the converted estate, then the punishment for bad faith conversions found in section 348(f)(2) will be rendered superfluous. Second, if the appreciation inures to the converted estate, then there will be two different valuations of the same piece of property within the bankruptcy case.

1. Section 348(f)(2) would be meaningless if the debtor did not retain the post-confirmation appreciation.

Throughout the Bankruptcy Code, Congress has refused to reward fraud or bad faith conversions by statutorily penalizing such actions. *In re Brown*, 953 F.3d 617, 623 (9th Cir. 2020). When Congress amended section 348 by adding subsection (f), Congress meant both to resolve the circuit split regarding the property of the converted estate and to add a provision to punish bad faith conversions from Chapter 13 to Chapter 7. *Harris v. Viegelahn*, 575 U.S. 510, 517 (2015). Specifically, section 348(f)(2) punishes a bad faith conversion by including property acquired after confirmation to the converted Chapter 7 case. *Id.* at 518. This notion pairs perfectly with section 348(f)(1) which allows a debtor to retain the post-confirmation appreciation. *Id.* at 515.

This is especially true when reading the language of the two sections together. Under section 348(f)(1)(A), property of the converted estate "shall consist of property of the estate, as of the date of filing of the petition." 11 U.S.C. § 348(f)(1)(A). Section 348(f)(2), on the other hand, determines property of the converted estate "shall consist of the property of the estate as of the conversion." 11 U.S.C. § 348(f)(2). "The import being that as a consequence of converting in bad faith, the debtor will lose the benefit of any equity accumulated by way of his or her Chapter 13 payments." *In re Robinson*, 472 B.R. 854, 857 (M.D. Fla. 2012) (cleaned up). Thus, the context of section 348(f), when taken as a whole, indicates that when a Chapter 13 debtor converts to Chapter

7 in good faith, the property and value of the assets of the converted estate are determined as of the petition date. *Id.* ("[A]t the time of their filing of the petition, the Debtors had no equity in either vehicle. The accumulated equity in the subject automobiles, acquired by payments made pursuant to Debtors' Chapter 13 Plan, is not property of the Chapter 7 estate pursuant to 11 U.S.C. § 348(f)."). If this Court were to hold that section 348(f)(1) requires that the estate receive the post-confirmation appreciation and that section 348(f)(2) also requires that the estate receive the post-confirmation appreciation, then section 348(f)(2) would be "inoperative or superfluous, void, or insignificant." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1285 (D.C. Cir. 1983) (stating that courts should construe statutes, where possible, so that no provision is rendered "inoperative or superfluous, void or insignificant.") (internal quotations omitted).

2. If Clegg did not retain the post-confirmation appreciation, then section 522(a) and section 348(f)(1)(A) would absurdly establish two different dates for valuing the same property.

Next, allowing the estate to retain the post-conversion appreciation in house value would lead to an absurd result because two sections of the Code with substantially similar language would be read differently and lead to different results. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). Sections 348(f)(1)(A) and 522(a)(2) share nearly identical language for determining the valuation date of property of the estate.

Specifically, section 522(a)(2) values the debtor's assets for purposes of determining a debtor's exemptions on the petition date. 11 U.S.C. § 522(a)(2). That statute states, "value means fair market value as of the date of the filing of the petition." *Id*. This date is referred to as the "snapshot" rule "because the debtor's financial situation is frozen in time, as if someone had taken a snapshot of it." *In re Rockwell*, 968 F.3d 12, 17 (1st Cir. 2020). "When the snapshot rule applies to an asset and the snapshot is 'complete,' the asset will retain whatever status (i.e., exempt or part of the estate) it had when the debtor filed for bankruptcy and cannot be altered by circumstances that change later." *In re Rockwell*, 968 F.3d at 17. Even when a debtor converts his case from Chapter 13 to Chapter 7, under section 522(a)(2), the petition date still controls the value of the assets for purposes of determining the debtor's exemptions. *In re Marcus*, 1 F.3d 1050, 1051 (10th Cir. 1993) (holding that a debtor's exemptions are determined as of the original petition date and not the date when the case is converted from Chapter 13 to Chapter 7).

Applying these rules in this case, under section 522(a)(2), the value of Clegg's house at the petition date was valued at $350,000, and Clegg could claim an exemption in accordance with applicable law, based on this value. (R. at 6). Once this valuation was determined, the value of Clegg's house, whether it appreciated or depreciated throughout the bankruptcy, froze at $350,000 for purposes of Clegg's exemption. *In re Rockwell*, 968 F.3d at 17. This same valuation carried over upon conversion to Chapter 7. *Hall v. United States*, 566 U.S. 506, 519 (2012).

Likewise, section 348(f)(1)(A) also contains the "as of the date of the filing of the petition" language. 11 U.S.C. § 348(f)(1)(A). Because this language is identical to that found in section 522(a), the same reasoning should be applied in both provisions. *Hall*, 566 U.S. at 519. Since it is assumed that Congress is aware of existing law when it passes legislation, it is assumed that Congress was aware of the current interpretation of the phrase "as of the date of the filing of the petition" as used in section 522(a). *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). As this section has long since been used as a snapshot rule, it can be presumed that Congress intended for section 348(f)(1)(A) to act as a snapshot rule for good faith conversions. *Id.* Thus, the house, whose value does not change with circumstances under a snapshot rule, should remain valued at $350,000 in the converted estate.

To do otherwise would create an absurdity where two vastly different valuations could be made on the same piece of property within the bankruptcy estate. In this case, it is the difference of $100,000 in value of the same property. (R. at 9). Specifically, should the Trustee's interpretation of section 348(f)(1)(A) be applied, the house would be valued at $350,000 for the homestead exemption and $450,000 for the converted estate. *Id.*

B. Section 348(f)(1)(A)'s statutory history and legislative history supports the conclusion that Clegg retains the post-confirmation appreciation.

Although section 348(f)(1)(A) is unambiguous when read with sections 348(f)(2) and 522(a), some courts have read the statute in a vacuum and interpret it differently. Because multiple interpretations of the same statute exist, the statutory and legislative history is instructive for divining the intent of Congress.

1. There are two competing interpretations of section 348(f)(1)(A).

Though the phrase "property of the estate" is unambiguous when read in context, diverging interpretations of the phrase have occurred. If a statute is "capable of being understood in two or more possible senses or ways," *Chickasaw Nation*, 534 U.S. at 90 (quoting Ambiguous, Webster's Ninth New Collegiate Dictionary (1985)), then resorting to statutory and legislative history to interpret the statute is appropriate. Some courts correctly hold that when section 348(f)(1)(A) uses the phrase "property of the estate" it is referring to both the asset and the attributes of that asset as of the petition date (in this case, Clegg's house with a value of $350,000). *See generally Pisculli v. T.S. Haulers, Inc. (In re Pisculli)*, 426 B.R. 52, 63 (E.D.N.Y. 2010) (holding creditors are not entitled to postpetition appreciation in converted Chapter 7), *aff'd*, 408 F. App'x 477 (2nd Cir. 2011); *In re Burt*, 2009 Bankr. LEXIS 2384, at *5 (same); *In re Pruneski*, 343 B.R. at 717.

Other courts, however, wrongly conclude that "property of the estate" means merely the asset (in this case, Clegg's house, regardless of the value on the conversion date). *See Kakos v. Stevenson (In re Kakos)*, 2015 U.S. Dist. LEXIS 118243 (E.D. Mich. Sept. 4, 2015) (holding that equity in real estate created by large post-petition payment belongs to Chapter 7 estate); *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 647-48 (B.A.P. 9th Cir. 2000) (concluding that upon conversion from chapter 11 to Chapter 7, appreciation belongs to estate); *Potter v. Drewes (In re Potter)*, 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999) (holding that the estate's interest in the converted case is the entire asset, including any changes in value that occur post-petition); *In re Peter*, 309 B.R. 792 (Bankr. D. Or. 2004) (determining that equity created by pay down of liens in Chapter 13 belongs to Chapter 7 trustee). To resolve this potential ambiguity, this Court should consider both the statutory and legislative history. *See generally Chhetri v. U.S.*, 823 F.3d 577, 587 (11th Cir. 2016) (distinguishing between statutory history and legislative history).

2. Section 348's development shows that post-conversion appreciation inures to Clegg's benefit.

To remedy this circuit split over the post-petition property, Congress added section 348(f) to the Bankruptcy Code. *In re Barrera*, 22 F.4th at 1220. With section 348(f), Congress adopted the Third Circuit's reasoning in *Bobroff* and rejected the Seventh Circuit's reasoning in *Lybrook*. *See, e.g. In re Standiferd*, No. 07-1076, 2008 Bankr. LEXIS 4024 at * 7 n. 8 (Bankr D.N.M. Dec 17, 2008); *In re LaFlamme*, 397 B.R. 194, 201 (Bankr. D.N.H. 2008) ("The House Report explicitly adopted the reasoning of *In re Bobroff* as the result it wanted to reach by adding § 348(f)."). In *In re Bobroff*, the Third Circuit reasoned that "if debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13 . . . a try will be greatly diminished." 766 F.2d 797, 799 (3d Cir. 1985). Furthermore, the Third Circuit saw no reason why the creditors should not be placed back in the same position as they would have been had the debtor originally filed under Chapter 7. *Id.*

Conversely, the Seventh Circuit had reasoned that including post-petition property in the converted estate would "discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." *Matter of Lybrook*, 951 F.2d 137 (7th Cir. 1991). By expressly overruling the Seventh Circuit's reasoning, Congress incentivized debtors to file under Chapter 13. *In re Nichlos*, 319 B.R. 854, 856 (Bankr. S.D. Ohio 2004) ("Congress was concerned that transferring the benefits made by a debtor by diligently making payments under a chapter 13 plan to the unsecured creditors if the case converted to one under chapter 7 'would create a serious disincentive to chapter 13 filings.'"). But not only did the statute itself change to provide that post-confirmation appreciation inures to the debtor's benefit, the legislative history also makes clear that Congress had this intent.

3. The legislative history is clear that Congress intended for debtors to retain post-confirmation appreciation.

The legislative history of section 348(f) plainly shows that post-confirmation appreciation inures to the debtor's benefit upon conversion to Chapter 7. *See* H.R. Rep. 103-835, 57 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3366. The legislative history states that Congress' primary impetus in enacting section 348(f) was to clarify how property acquired by Chapter 13 debtors post-petition was to be treated upon converting to Chapter 7. *Id*. The legislative history also provides an example to drive the point home as follows:

> 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 of 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.

H.R. Rep. No. 103-835, at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366. When providing this example, Congress made clear that it intended to "avoid penalizing debtors for their chapter 13 efforts by placing them in the same economic position they would have occupied if they had filed chapter 7 originally." *In re Fobber*, 256 B.R. 268, 278 (Bankr. E.D. Tenn. 2000). Both the statutory and legislative histories resolve any ambiguity in section 348(f)(1)(A).

Both histories point to allowing a debtor such as Clegg to retain his post-confirmation appreciation so that – upon conversion – the debtor would be in the same position as on the petition date. Therefore, this Court should affirm the Thirteenth Circuit's decision.

C. Allowing a debtor to retain the post-confirmation appreciation is in accord with the policy of Chapter 13 of encouraging debtors to file under Chapter 13 rather than Chapter 7.

Not only do the statute's text and history dictate the result, but section 348(f)(1)(A)'s policy and purpose do as well. *In re Michael*, 699 F.3d 305 (3d Cir. 2012). In *Michael*, the Third Circuit explained that the fundamental policy behind section 348(f)(1) is to encourage the use of Chapter 13. *Id*. at 315. A debtor filing under Chapter 13 typically proposes to use his post-petition assets to pay creditors with assets the creditors would have no right to receive in a Chapter 7 case – such as his disposable income. *In re Barrera*, 22 F.4th at 1220. If the debtor is unable to complete a confirmed Chapter 13 plan and this Court adopts the Trustee's position, payment from post-confirmation asset appreciation by the Chapter 13 Trustee would result in creditors receiving property of the debtor that they would not be entitled to receive in distribution had the debtor filed for Chapter 7. Such an outcome disincentivizes debtors from electing to file under Chapter 13. *See Michael*, 699 F.3d at 315 (*citing In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985)). The policy goals of section 348(f) should not disincentivize filing a Chapter 13 case by penalizing debtors should the case convert to Chapter 7. The Thirteenth Circuit recognized this policy, and this Court should affirm.

D. The Court should not rely on the reasoning found in *Matter of Castleman* because its primary source and reasoning is misguided.

The Trustee erroneously relies on *Matter of Castleman* when interpreting section 348(f)(1)(A). 75 F.4th at 1058. In *Castleman*, the Ninth Circuit stated that the text of 348(f) is unambiguous when read in tandem with section 541(a). *Id.* at 1056. However, this interpretation is erroneous. As its primary source for interpreting "property of the estate," the Ninth Circuit relied on its previous decision in *Wilson v. Rigby*, 909 F.3d 306 (9th Cir. 2018). *Matter of Castleman*, 75 F.4th at 1056. As *Wilson* was a Chapter 7 case on the petition date and never converted from Chapter 13, it is not applicable when determining "property of the estate" under a conversion. *In re Barrera*, 22 F.4th at 1223 ("The Trustee cites a long list of cases that he insists establishes that proceeds gained post-petition are property of the estate. But the cases he relies on are distinguishable."). Due to the different treatment of property of the estate under both Chapter 13 and Chapter 7, *Castleman* is not a reliable source when dealing with a converted estate. *Id.*

Secondly, the court in *Castleman* states that the meaning of section 348(f)(1)(A) is unambiguous when it dictates that the estate is entitled to any post-conversion appreciation but comes to that conclusion by ignoring the statutory context. "Statutory language cannot be construed in a vacuum. 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 Treas.*, 489 U.S. 803, 809 (1989). Courts do not read statutes one phrase at a time, ignoring the rest. *Id.* Instead, the best reading of one statutory phrase is often determined by context – by the words Congress uses before, or after, a particular phrase. *See id*. By failing to consider the context of section 348(f)(1)(A), the Ninth Circuit and the Trustee look over the superfluidities and absurdities that their misinterpretation introduces. And it also ignores the legislative history and purpose of section 348(f). Therefore, *Matter of Castleman* should not be persuasive in this case as its primary sources of reasoning are inherently flawed for a case dealing with property of a converted estate.

II. A chapter 7 trustee's avoidance powers do not constitute property of the bankruptcy estate that the trustee can sell.

This Court should affirm the Thirteenth Circuit's decision that the Trustee's power to avoid and recover transfers does not constitute property of the bankruptcy estate for three reasons. First, the plain meaning of sections 547 and 550 shows that Congress intended only that trustees be able to exercise the powers of avoidance and recovery. Second, section 541(a) of the Bankruptcy Code, which defines property of the bankruptcy estate, does not include a trustee's avoidance and recovery powers. Last, legislative history and the purpose behind Chapter 5 causes of action show that Congress did not intend for a trustee's avoidance and recovery powers to be part of the estate.

Numerous courts that have considered this issue have held that a trustee cannot sell the avoidance powers. *See United Capital Corp. v. Sapolin Paints, Inc. (In re Sapolin Paints, Inc.)*, 11 B.R. 930, 937 (Bankr. E.D.N.Y. 1981); *In re Carragher*, 249 B.R. 817, 820 (Bankr. N.D. Ga. 2000); *In re Vogel Van & Storage, Inc.*, 210 B.R. 27, 32 (N.D.N.Y. 1997), *aff'd*, 142 F.3d 571 (2d

Cir. 1998). It makes sense that Congress intended for only a trustee to exercise the avoidance powers because a trustee is "appointed and trained by the United States Trustee and must have certain qualifications to be appointed." *In re McGuirk*, 414 B.R. 878, 879 (Bankr. N.D. Ga 2009). Creditors do not possess the same knowledge or expertise as a trustee. *See id.* This "well-settled principle" follows the fundamental goal of the avoidance powers, to promote equal distribution among creditors, because a trustee is ultimately the one that forces a creditor "to share its valuable right with other unsecured creditors." *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics)*, 226 F.3d 237, 244 (3d Cir. 2000) (citing Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L.Rev. 725, 749 (1984)).

A. Sections 547 and 550, pursuant to their plain and ordinary language, grant only the trustee the right to exercise those powers, and therefore the trustee cannot sell those powers to another party.

Eclipse cannot assert the avoidance and recovery powers provided by sections 547 and 550 of the Bankruptcy Code because those powers are reserved only for the trustee. Where the language enacted by Congress is plain, this Court's sole function "is to enforce [the language] according to its terms" to avoid decisions rendered solely on public policy. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("Achieving a better policy outcome . . . is a task for Congress, not the Courts.") (citations omitted). When interpreting a statute, this Court recognizes that Congress "says in a statute what it means and means in a statute what it says." *Id.* at 6 (citation omitted). And as a "cardinal principle of statutory construction", this Court reads a statutory provision giving effect to "every clause and word of a statute" so that no term or provision becomes inoperative or superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

1. Sections 547 and 550 expressly state that only the trustee is authorized to exercise the powers of avoidance and recovery.

"Where a statute names the parties granted [the] right to invoke its provisions such parties only may act." *Hartford*, 530 U.S. at 6-7 (quoting 2A N. Singer, Sutherland on Statutory Construction § 47.23 p. 217 (5th ed. 1992)); *see also Lamie v. U.S. Tr.*, 540 U.S. 526 (2004) (holding that because a debtors' attorney is not one of the four categories of specified people that may be awarded compensation under section 330(a)(1), the debtors' attorney could not recover compensation unless they are employed as authorized by the cross-reference to section 327); *In re Cooper*, 405 B.R. 801, 803-04 (Bankr. N.D. Tex. 2009) (holding that a trustee has the exclusive authority to bring avoidance actions under Chapter 5 of the Bankruptcy Code and that a creditor has "no independent right to bring such an action."). Here, sections 547 and 550 only mention the trustee as having the powers to avoid and recover preferential transfers. Therefore, the trustee is the only party that may take such actions. To hold otherwise expands the meaning of the words that Congress used in the statute.

When Congress granted a trustee with the avoidance and recovery powers, it did so with the knowledge and understanding that "trustee" has a particular meaning in the bankruptcy context. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'"). Especially in a Chapter 7 case, a trustee has a unique role in bankruptcy proceedings, and recognizing that fact, Congress intended to provide a trustee and only a trustee with certain unique power. *See Hartford*, 530 U.S. at 7; *In re Cybergenics*, 226 at 243 ("A paramount duty of a trustee . . . in a bankruptcy case is to act on behalf of the bankruptcy estate . . . for the benefit of the creditors."). By employing the term "trustee" as the party that can pursue avoidance and recovery actions, Congress intended that only a trustee could exercise such powers. When considering that it is the trustee – and not any other party – that Congress authorized to bring each Chapter 5 cause of action, it reinforces this conclusion. *See* 11 U.S.C. § 544(a) ("The trustee shall have . . . the rights and powers . . . ."); 11 U.S.C. § 544(b) ("[T]he trustee may avoid any transfer . . . ."); 11 U.S.C. § 545 ("The trustee may avoid . . . ."); 11 U.S.C. § 547(b) ("[T]he trustee may . . . avoid . . . ."); 11 U.S.C. § 548(a)(1) ("The trustee may avoid . . . ."); 11 U.S.C. § 549 ("[T]he trustee may avoid . . . ."); 11 U.S.C. § 550(a) ([T]he trustee may recover, for the benefit of the estate . . . .").

Because Congress specifically used the term "trustee" in sections 547 and 550 when it enacted the Bankruptcy Code and because it used similar and identical phrases throughout the rest of the avoidance power provisions, the plain and ordinary language prevents this Court from allowing any party other than a trustee to exercise the powers in sections 547 and 550. *See Hartford*, 530 U.S. at 7. Therefore, no other party may exercise those powers. *See Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.") (quotation omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93-94 (2012) (stating that the "judicial power" should not be used "to supply words . . . that have been omitted").

2. Creditors have an adequate method to obtain recovery and relying on *Whiting Pools* to allow avoidance actions to be part of the bankruptcy estate is an inaccurate interpretation of section 541(a)(1).

Bankruptcy courts are "courts of equity with the power to apply flexible equitable remedies in bankruptcy proceedings." *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 242 (6th Cir. 2009) (citing *Young v. United States*, 535 U.S. 43, 50 (2002)). While the trustee is exclusively empowered to pursue avoidance actions, there are times where the trustee unjustifiably refuses to do so. Anecdotally, the system "breaks down" when this occurs. *In re Trailer Source, Inc.*, 555 F.3d at 242. But a creditor has a sufficient and adequate recourse for situations such as these through derivatively asserting a trustee's avoidance powers for the benefit of the estate. *See id.* at 242 (citation omitted). The bankruptcy court may authorize a creditor to sue derivatively where the trustee is "unable or unwilling" to do so. *In re Racing Services, Inc.*, 540 F.3d 892, 898 (8th Cir. 2008) *see* 11 U.S.C. § 503(b)(3)(B); *In re Cybergenics Corp.*, 330 F.3d at 563. By giving a creditor the ability to derivatively assert an avoidance action, courts further the important bankruptcy policy of equal distribution among creditors. *See Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). But even though a creditor may derivatively bring suit, that does not mean they have the power to buy the avoidance powers from a trustee. Enabling Eclipse to buy the power to avoid the debtor's preference transfer for its own benefit directly contradicts the fundamental goal of the avoidance powers – to maximize and promote equal distribution among all creditors.

Furthermore, the Court in *United States v. Whiting Pools* did not find that avoidance actions could be part of the bankruptcy estate through section 541(a)(1). 462 U.S. 198, 205 n.10 (1983) ("We do not now deicide the outer boundaries of the bankruptcy estate."). In that case, the Court stated that "[section] 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *Id.* at 205. First, this is dicta created by the Court that does not amount to the conclusion that it was referring to avoidance actions. Second, avoidance actions are a creation the Bankruptcy Code, not "made available." *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 371-72 (2006); *In re Schwartz*, 383 B.R. 119, 126 (B.A.P. 8th Cir. 2008). Therefore, even though the Court in *Whiting Pools* broadens the scope of property of the bankruptcy estate, it only shows that the estate has no property interest in the avoidance actions because the estate lacked the initial possession of the actions. 462 U.S. at 205.

The opinion in *Whiting Pools* does not show that avoidance powers are included as property of the bankruptcy estate that can be sold, and where a creditor fears that the trustee may not pursue an avoidance action on their behalf, a bankruptcy court may authorize it to bring suit derivatively.

B. The avoidance powers are not estate property.

To be considered estate property, the avoidance powers must fall within one of the provisions provided in section 541 of the Bankruptcy Code. 11 U.S.C. § 541. The avoidance powers are not property of the estate under section 541(a)(1) as of the case's commencement and are not property of the estate acquired after the case's commencement under section 541(a)(7).

1. A debtor has no interest in avoidance actions as of the commencement of the case to constitute property of the estate under section 541(a)(1).

The avoidance powers are not property of the estate under section 541(a)(1). Where Congress chooses to "use[] certain language in one part" of the Bankruptcy Code and "different language in another[,]" it is clear that "different meanings were intended" by the different language. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004) (citing 2A N. Singer, Statutes and Statutory Construction § 46;06, p. 194 (6th rev.ed.2000). Section 541(a) defines property of the estate by providing that the "estate is comprised of all the following property, . . . all legal or equitable interests of the debt in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In contrast, section 547(b) specifically authorizes a trustee to exercise its avoidance power on preference transfers. *See* 11 U.S.C. § 547(b) ("[T]he trustee may . . . avoid any transfer of an interest of the debtor in property[.]"). By intentionally choosing to enumerate what constitutes property of the estate in one provision and a trustee's rights and powers in multiple others, Congress intended that a trustee's power to avoid a preference transfer is not part of the bankruptcy estate. Additionally, since a trustee's avoidance powers are not explicitly included in section 541, they are not property of the bankruptcy estate. This is further shown by including in estate property the funds recovered under section 550. *See* 11 U.S.C. § 541(a)(3) (cross referencing section 550). If the power to avoid preferential transfers were estate property, then the proceeds of those powers would be estate property under section 541(a)(6) which in effect would make section 541(a)(3) superfluous. *See id.* § 541(a)(6).

Further, Congress clearly could have chosen to include a cross-reference to section 547 in section 541(a) as it made other cross-references within section 541 and in over fifteen other sections of the Bankruptcy Code. *See* 11 U.S.C. §§ 303, 349, 362, 502, 521, 522, 546, 550-552, 749, 746, 901, 926,1521,1523. Because 541(a) lacks a cross-reference to section 547, there is a presumption that Congress intentionally chose to exclude a trustee's power to avoid preferential transfers as property of the bankruptcy estate.

The avoidance powers are also not interests in property because they are not rooted in state or federal law. Without any property interest based on federal law, state law generally creates a debtor's property interests in a bankruptcy estate. *See Butner v. United States*, 440 U.S. 48, 55 (1979). A trustee's Chapter 5 avoidance powers are not created by state law because they are solely powers created by Congress throughout the Bankruptcy Code. *See* 11 U.S.C. §§ 544 – 553. And because these provisions are simply "powers" created by federal law and not "interests in property," a debtor cannot possess them before or upon the filing of a bankruptcy petition. *See In re Teleservices Grp., Inc.*, 463 B.R. 28, 34 (Bankr. W.D. Mich. 2012) ("Although the recovery of an avoided transfer certainly augments the estate, the trustee's ability to actually avoid the transfer is not an interest acquired from the debtor, but rather a power that derives from the Code itself."); *see also FDIC v. Hirsch*, 980 F.2d 125, 132 (2d Cir. 1992). Because a debtor does not have an "interest in property" in an avoidance action, the avoidance powers cannot be an asset of the estate under section 541(a)(1) to be sold.

Additionally, if the avoidance powers were assets – like other claims that a debtor may own pre-petition – then a Chapter 7 trustee would be subject to the same defenses to which the debtor is subject. When a trustee commences an action based on a debtor's pre-petition claim that becomes property of the estate under section 541, the defendants in such action can assert the same defenses against the trustee that the defendants could have asserted against the debtor. *See Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006) (holding that if a claim that belonged to the debtor "would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense.").

However, it is nearly universal that a trustee's avoidance powers are not subject to such defenses. *Corzin v. Fordu (In re Fordu)*, 209 B.R. 854, 863 (B.A.P. 6th Cir. 1997) ("[C]ourts have consistently recognized that the Trustee may pursue fraudulent or preferential transfers despite the fact that the debtor was a knowing and willing participant to such conveyances."); *Wagner v. Wilson (In re Vaughan Co.)*, Nos. 11-10-10759 JA, 12-01142 J, 2013 Bankr. LEXIS 978, at *21 (Bankr. D.N.M. Mar. 11, 2013) ("[T]he Court is persuaded that the doctrine of *in pari delicto* does not apply to the Trustee's avoidance action claims."). *See also Tese-Milner v. Beeler (In re Hampton Hotel Investors, L.P.)*, 289 B.R. 563, 580 (Bankr. S.D.N.Y. 2003) ("The rights to avoid such transfers, and to recover them for the benefit of the estate, are expressly conferred by federal law on the trustee. . . . It would be turning the *Wagoner* Rule and concepts of *in pari delicto* on their heads to hold that the trustee lacks standing to recover such payments."). Because the trustee is subject to certain defenses when asserting a debtor's pre-petition claims, but not subject to those same defenses when asserting Chapter 5 claims, the Chapter 5 claims cannot be estate property.

2. The avoidance powers are not interests in property that are acquired after the commencement of the case under section 541(a)(7).

Section 541(a)(7) does not allow a debtor to bring in avoidance actions as an interest in property acquired after the commencement of the case for multiple reasons. Pursuant to section 541(a)(7), the bankruptcy estate includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). For an avoidance action to be included in estate property under section 541(a)(7), the avoidance action must first be an "interest in property." *Id*. Second, the avoidance action must be "acquired" at some point "after the commencement of the case."*d.* The trustee's preference power does not satisfy either of these two statutory requirements.

Section 541(a)(7), like section 541(a)(1), only allows "interests in property" to be included in the property of the estate. As explained above, avoidance actions are not "interests in property" but are instead "rights" and "powers" statutorily given to the trustee to exclusively possess. *See Hartford*, 530 U.S. at 7; *In re Teleservices Grp., Inc.*, 463 B.R. at 34; *see also Hirsch*, 980 F.2d at 132; *In re McGuirk*, 414 B.R. at 879. Additionally, the avoidance powers are also not "acquired" but are simply created by operation of law. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (explaining that where a term in a statute is undefined, the Court gives it its ordinary meaning). "Acquired" in the ordinary sense relates to obtaining something "as a result of" a certain event or is "attained as a new or added characteristic." *See* "Acquired," https://www.merriam-webster.com/dictionary/acquired. Avoidance actions are not "new" or "added" powers that are "obtained" by any event or exchange of consideration. They are simply powers statutorily created by Congress and given only to the trustee to exercise.

Last, a trustee's avoidance powers under section 547 do not arise after the commencement of the case to satisfy section 541(a)(7). Instead, the avoidance powers arise upon the commencement of the case. *See In re Hospitality Investment Corp.*, 283 B.R. 451, 455 (Bankr. E.D. Mich. 2002); *In re Northern Acres*, 52 B.R. 641, 647 (Bankr. E.D. Mich. 1985) (explaining that the language "as of the commencement of the case" in section 544(a) brings in only property that was property on the day of the petition); *see e.g., In re Bracewell*, 454 F.3d 1234, 1242 (11th Cir. 2006) (stating that Congress created a temporal requirement when it added "as of the commencement of the case" to section 541(a)(1)). The language in section 541(a)(7) is plain and unambiguous. The scope of property that may be included in the bankruptcy estate pursuant to section 541(a)(7) distinctly provides for "any interest in property that the estate acquires *after* the commencement of the case." 11 U.S.C. § 541(a)(7). Using the terms "after" and "upon" as synonymous and interchangeable disregards the plain meaning of the language Congress enacted. *See Lamie*, 540 U.S. at 38; *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Because section 541(a)(7) explicitly includes only interests in property acquired *after* the commencement of the case, the avoidance powers cannot be brought in as property of the bankruptcy estate as they arise *upon* the commencement of the case.

Section 541(a)(7) does not allow for avoidance actions to be brought into the bankruptcy estate because they are not "interests in property," and even if they are, they are not "acquire[d] after the commencement of the case." 11 U.S.C. § 541 (a)(7).

C. The legislative history and purpose for the avoidance powers support the conclusion that the avoidance and recovery powers are not estate assets.

Pre-Bankruptcy Code practice and the purpose behind the avoidance powers show that Congress did not intend for the avoidance powers to be sold or exercised by anybody but a trustee. The bankruptcy policy also supports this conclusion. First, viewing the avoidance powers in relation to the entirety of the Bankruptcy Code, a determination that a trustee may sell its power to avoid and recover transfers as part of the bankruptcy estate would ultimately clash with multiple other sections of the Code that render them incomprehensible. *See, e.g.,* 11 U.S.C. §§ 349(b)(1)(B), (2), 502(d), (h), 522(h)(1). Next, the purpose behind Congress granting a trustee the statutory power to avoid and recover preferential transfers is clear. The entire purpose of bankruptcy is to provide creditors equal distribution of a debtor's debts. *See Wolas*, at 161. Chapter 7 of the Bankruptcy Code appoints a single person to perform duties to that end, a trustee. *See id.* at 152; *In re McGuirk*, 414 B.R. at 879. As a fiduciary, the trustee is uniquely situated to ensure that each creditor gets their equal share of the estate. *See In re Cooper*, 405 B.R. at 812. If the trustee could sell the avoidance actions, then the maximization of the estate potentially falls victim to the pragmatism and expediency of a reasonable bidder. The Bankruptcy Code does not contemplate such a scenario. *See id.* at 812-13 (explaining that allowing an individual creditor to act in the place of a Chapter 7 trustee would result in a creditor "hijacking" the avoidance powers that Congress did not intend).

Moreover, by allowing a trustee to avoid preferential transfers prior to the filing of the petition, courts and the debtor itself are afforded protection from creditors rushing to obtain a recovery. *See Wolas*, at 161 (citation omitted). In connection, granting a neutral party like a trustee with avoidance powers furthers the policy goal of equal distribution. *See id.*; *In re Cybergenics*, 226 F.3d at 244 ("[E]mpowering the trustee . . . to avoid a transaction by pursuing an individual creditor's cause of action . . . is at the heart of the avoiding powers.").

The plain language of the avoidance power provisions, in relation to the entirety of the Bankruptcy Code itself, shows that a trustee has the exclusive power to avoid and recover preferential transfers and that those powers cannot be sold to an individual creditor. The purpose of the Bankruptcy Code and legislative history further establish that Congress did not intend for avoidance actions to be assets of the estate that can be sold.

Sections 547 and 550, taken with consideration of the entire Bankruptcy Code, show that Congress intended for a trustee to have exclusive authority over the ability to avoid and recover preference transfers. Additionally, the avoidance powers themselves are not "interests in property" that the debtor possesses to be part of the bankruptcy estate under section 541(a)(1) or section 541(a)(7). Last, the purpose and policy of the Bankruptcy Code mandate that the avoidance powers are not included as property of the bankruptcy estate that can be sold by a trustee to a creditor. Accordingly, this Court should affirm the judgment of the court below.

CONCLUSION

This Court should affirm the decision of the Thirteenth Circuit as any other decision would be antithetical to the Bankruptcy Code. As to the post-confirmation appreciation, any decision other than awarding the appreciation to Clegg renders sections 348(f)(2) and 522(a) superfluous and absurd by obscuring the plain meaning of section 348(f)(1)(A). Furthermore, though some courts have held otherwise, the statutory and legislative histories of section 348(f)(1)(A) clearly provide for the appreciation to inure to Clegg. Next, as to the avoidance powers, the text of sections 547 and 550 themselves renders that only a trustee has the unique ability to avoid and recover preferential transfers. Additionally, a trustee cannot sell its avoidance powers to an individual creditor because the powers are not interests in property to be considered assets of the bankruptcy estate. Holding that a creditor may not buy the power to avoid and recover preferential transfers is directly in line with the fundamental goals of bankruptcy.