No. 20-1004

IN THE

Supreme Court of the United States

October Term, 2020

IN RE EARL THOMAS PETTY,

Debtor,

WILDFLOWERS COMMUNITY BANK,

Petitioner,

v.

EARL THOMAS PETTY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

12R
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the Bankruptcy Code and related Judicial Code provisions demonstrate congressional intent to limit waiver of the judicial bankruptcy forum for proceedings involving a violation of the automatic stay.

II. Whether the automatic stay is terminated in its entirety or only against the debtor and property of the debtor, but not against property of the estate, when 11 U.S.C. § 362(c)(3)(A) is triggered to apply against a debtor.

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The United States Bankruptcy Court for the District of Moot held for the Debtor, Earl Thomas Petty ("Petty"), on both issues. R. at 3. Specifically, the bankruptcy court found that (I) it had the authority to decide the dispute between Petty and Wildflowers Community Bank ("Wildflowers") notwithstanding the prepetition arbitration agreement that the parties entered into; and (II) section 362(c)(3)(A) results in a termination of the automatic stay only "with respect to the debtor" and not as to property of the estate. *Id.* The bankruptcy court certified both issues for direct appeal to this Court pursuant to 28 U.S.C. § 158(d). *Id.* The Thirteenth Circuit Court of Appeals affirmed on both issues, finding that (I) arbitration is clearly at odds with the underlying purposes of the Code and related Judicial Code provisions; and (II) the plain meaning of section 362(c)(3)(A) must be enforced, such that the automatic stay only terminates "with respect to the debtor" and not with respect to property of the estate. *Id.* at 13, 18. This Court then granted Wildflower's petition for *writ of certiorari*. *Id.* at 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant federal laws controlling this case are 11 U.S.C. § 362 and 28 U.S.C. §§ 157 and 1334. The text of these provisions are attached in their entirety hereto as **Appendix A**.

STATEMENT OF THE CASE

I. FACTS

Respondent, Petty, is an entrepreneur and small business owner who founded the popular craft brewery Great Wide Open Brewing Company, Inc. ("Great Wide Open"). R. at 3. Petty founded Great Wide Open in 2005 and invested his own money to purchase the brewing equipment he needed to run the brewery (the "Brewing Equipment"). *Id.* Petty used the Brewing Equipment to make award-winning and popular products such as the pilsner "American Girl," the high-hop India Pale Ale "Damn the Torpedoes," and a honey mead called "Honey Bee." *Id.* It was these great drinks that made Great Wide Open such a popular attraction in the State of Moot. *Id.* Given its popularity, Great Wide Open grew rapidly, adding four additional locations to its business by 2010 and a new high-capacity brewhouse in 2012. *Id.* at 4.

To fund this wide-reaching expansion Great Wide Open consulted with its banker, Petitioner, Wildflowers, and obtained a $35 million revolving credit agreement from Wildflowers. *Id.* The agreement was secured principally by a first-priority lien against Great Wide Open's assets. *Id.* Secondarily, Petty personally guaranteed repayment on behalf of his business. *Id.* To secure his guarantee Petty granted a first-priority lien against the Brewing Equipment. *Id.* Both agreements included arbitration clauses for disputes arising under the agreements. *Id.*

Unfortunately, the craft beer industry overall began to falter and Great Wide Open faced increased competition as the market matured. *Id.* at 5. Consequently, Great Wide Open downsized in March 2018 by closing three locations in an effort to stay afloat. *Id.* These attempts proved unsuccessful and Great Wide Open and Petty defaulted on their agreements in April 2018. *Id.* Wildflowers then moved to initiate arbitration on the credit agreements in June 2018. *Id.* Before arbitration could commence, Great Wide Open ceased all remaining operations and filed a Chapter

7 bankruptcy case on July 12, 2018. *Id.* Petty filed a Chapter 11 bankruptcy case contemporaneously. *Id.*

Petty's initial bankruptcy counsel failed to make timely filings in his initial Chapter 11 case and on August 27, 2018 that case was dismissed. *Id.* at 5. During this time Petty was working to negotiate payment plans with his creditors. *Id.* at 6. Among those he was negotiating with was the landlord for the original Great Wide Open location. *Id.* Through these negotiations Petty was able to reopen at that original location in December 2018 as a sole proprietor under the business name "Full Moon Fever Brewing." *Id.* Full Moon Fever Brewing utilized the Brewing Equipment in order to produce beer and generate revenue for Petty to pay his creditors. *Id.* Petty was able to utilize his experience producing award winning beers in the past to make Full Moon Fever Brewing profitable in its first month and attract many of Great Wide Open's former patrons to his new business. *Id.*

One month later Petty, with new counsel, filed a second Chapter 11 bankruptcy petition on January 11, 2019. *Id.* With this petition Petty proposed to pay forty cents on the dollar to every creditor, including Wildflowers. *Id.* On the filing of this new petition a new automatic stay was created pursuant to 11 U.S.C. § 362(a) and an estate was created pursuant to 11 U.S.C. § 541(a). Because this petition was filed within one year of Petty's initial filing section 362(c) applied and the automatic stay, by default, ran for only thirty days after the initial filing. Petty's new counsel failed to request an extension of that stay and consequently it expired with respect to the debtor on the thirtieth day after Petty's new filing. *Id.* It is undisputed, however, that the Brewing Equipment was property of the estate created under section 541(a) and not property of the debtor. *Id.* at 7. Despite this fact, and without seeking confirmation from the bankruptcy judge, Wildflowers sent

its repossession company to Full Moon Fever Brewing and repossessed the Brewing Equipment on the thirty-second day after the petition's filing. *Id.*

Without the necessary equipment to make beer, Full Moon Fever Brewing had no choice but to close. *Id.* at 6–7. It shut its doors on February 17, 2019, destroying the goodwill Petty had been able to salvage since reopening in December 2018, and disrupting the proposed payment plan. *Id.* at 7. Petty filed a complaint in his Chapter 11 bankruptcy case seeking $500,000 in damages under section 362(k) for Wildflowers' willful violation of the automatic stay. *Id.* at 6–7.

II. PROCEDURAL HISTORY

On July 12, 2018 (the "First Petition" date), Petty sought the protection of the court under Chapter 11 of the Bankruptcy Code. R. at 5. That case was dismissed on August 27, 2018 due to Petty's counsel failing to file forms in a timely manner. *Id.* On January 11, 2019 (the "Second Petition" date), Petty again sought protection of the court under Chapter 11, but this time filed the requisite forms. *Id.* at 5–6. After Wildflowers violated the automatic stay on February 12, 2019, Petty filed a motion for damages one week later. *Id.* at 6–7. Wildflowers moved to compel arbitration under Petty and Wildflowers' credit agreement. *Id.* The bankruptcy court declined to compel arbitration and awarded $200,000 in damages for the willful violation of the automatic stay. *Id.* at 7. Wildflowers appealed directly to the Thirteenth Circuit, which affirmed. *Id.* This appeal followed.

STANDARD OF REVIEW

The facts in this case are not disputed by the parties. *Id.* at 8. This case involves two questions of statutory interpretation. Statutory interpretation is a matter of law. As such, this Court's standard of review is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit reached the proper decision on both questions presented in this case. First, the Thirteenth Circuit correctly concluded that the Bankruptcy Court for the District of Moot had authority to decide the dispute between Petty and Wildflowers notwithstanding the prepetition arbitration agreement because the Bankruptcy Code and related Judicial Code provisions demonstrate a clear and manifest congressional intent to override the Federal Arbitration Act's command of arbitration. This Court has instructed that if Congress intended to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes; nothing in this Court's recent jurisprudence has altered that analysis. The emphasis of the analysis is simply that Congress's intent to override the Arbitration Act must be clear and manifest so that judges cannot act as policymakers picking and choosing between statutes. In this case there is no room for judges to pick and choose, the Bankruptcy Code's text and legislative history, as well as its underlying purposes, clearly and manifestly demonstrate that Congress intended to limit waiver of the judicial bankruptcy forum provided by the Code—the district courts sitting in bankruptcy—for proceedings involving a violation of the automatic stay.

Congressional intent to limit waiver of the judicial bankruptcy forum is evident in the text and legislative history of the Code, specifically the bankruptcy jurisdictional statute, 28 U.S.C. § 1334. As a textual matter, section 1334(b) brings all bankruptcy-related litigation within the purview of the district court, and, by reference, the bankruptcy courts, irrespective of congressional statements to the contrary in the context of other specialized legislation. Section 1334 was clearly meant to override the Arbitration Act. That Congress intended section 1334 to give bankruptcy courts comprehensive—and exclusive—jurisdiction over proceedings involving a violation of the

automatic stay notwithstanding a prepetition arbitration agreement is supported by the specific context in which that language is used, and the broader context of the statute as a whole. Section 1334 is central to the intricate bankruptcy process crafted by Congress and allowing a privately-negotiated arbitration agreement to divest a bankruptcy court of its jurisdiction to hear a core proceeding would undermine other critical statutory protections provided in the Code.

The underlying purposes of the Code further support the conclusion that Congress intended to limit waiver of the judicial bankruptcy forum in proceedings involving a violation of the automatic stay. First, arbitration of Petty's section 362 claim would seriously jeopardize the important purposes of the automatic stay: providing debtors with a fresh start, protecting the assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate. Second, Petty's section 362 claim is integral to the success of his reorganization plan. If the plan fails, he will be forced into liquidation. Finally, it would be detrimental to the bankruptcy system to require compulsory arbitration of a proceeding involving a violation of the automatic stay because enforcement of the automatic stay is fundamental to protecting the dignity of the bankruptcy court.

For these reasons, this Court should affirm the Thirteenth Circuit's decision regarding the conflict between the Arbitration Act and the Bankruptcy Code.

Second, The Thirteenth Circuit correctly held that the plain meaning of section 362(c)(3)(A) narrowed the scope of the termination of the automatic stay to only termination "with respect to the debtor." This correct reading is confirmed by looking to the text itself, context, canons of statutory construction, and precedent.

The only fair construction of section 362(c)(3)(A) comes from the fact that the phrase "with respect to the debtor" immediately follows the phrase "shall terminate," which references the

termination of the automatic stay. Consequently, "with respect to the debtor" must act as a modifier upon how the automatic stay terminates. The majority approach to section 362(c)(3)(A) correctly interprets this phrase contextually in conjunction with section 362(a) which lists all actions to be stayed upon a debtor's filing of a petition. The sub-provisions of section 362(a) are categorized as follows: stays as to actions against property of the estate, against property of the debtor, and against the debtor. Thus, when section 362(c)(3)(A) terminates the stay "with respect to the debtor" and "with respect to property secured by such debts," it must mean the stay does not terminate as to property of the estate, using the canon of construction *expressio unius est exclusio alterius*.

The two minority approaches both offer unsatisfactory explanations for the role "with respect to the debtor" plays within section 362(c)(3)(A). The first view claims the phrase clarifies that the automatic stay will only terminate against the debtor and not against the debtor's non-serially filing spouse. This view is a strained reading of the text, given the distance of the phrase "with respect to the debtor" from "single or joint debtor" that this view argues the phrase describes. The second minority approach, adopted by the First Circuit in particular, argues that "with respect to the debtor" is superfluous. This explanation is unacceptable given this Court's presumption against superfluities and the fact that there is a plain meaning interpretation offered by the majority approach. This minority approach primarily rests upon a scholarly article that contains many erroneous methods of reasoning in arriving at its conclusion that "with respect to the debtor" is filler language.

Thus, the majority approach stands as the only viable interpretation for section 362(c)(3)(A). This plain meaning interpretation must hold because the Absurdity Doctrine is not applicable here, nor is the text demonstrably at odds with clear congressional intent. Specifically,

there exist strong policy reasons that weigh in favor of the majority approach. For example, this approach strengthens the possibility of a successful fresh start for the debtor. Also, section 362(d) already provides a way for creditors to terminate the automatic stay entirely should the debtor's petition have been filed in bad faith. For these reasons, this Court should affirm the Thirteenth Circuit's decision regarding the interpretation of section 362(c)(3)(A).

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY CONCLUDED THAT THE BANKRUPTCY COURT HAD AUTHORITY TO DECIDE THE DISPUTE BETWEEN PETTY AND WILDFLOWERS NOTWITHSTANDING THE PREPETITION ARBITRATION AGREEMENT BECAUSE THE BANKRUPTCY CODE AND RELATED JUDICIAL CODE PROVISIONS DEMONSTRATE A CLEAR AND MANIFEST CONGRESSIONAL INTENT TO OVERRIDE THE FEDERAL ARBITRATION ACT'S COMMAND OF ARBITRATION.

In *Epic Systems Corp. v. Lewis*, this Court "concluded that the [Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA")] and other federal statutes must be read harmoniously such that only an '*irreconcilable conflict*' between two statutes that is '*clear and manifest*' would justify not giving effect to the FAA's 'command' of arbitration." *Wildflowers Community Bank v. Earl Thomas Petty* (*In re Petty*), No. 19-0805, at 20 (13th Cir. Mar. 4, 2020) (Tench, J., dissenting) (emphasis in original) (quoting *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)). No doubt the *Epic* Court wanted to emphasize the "stout uphill climb" a party faces when arguing that a statute overrides the FAA, *Epic Sys. Corp.*, 138 S. Ct. at 1624; the Court underscored that point when it declared that "[its interpretive] rules aiming for harmony over conflict . . . grow from an appreciation that it's the job of Congress by legislation, not [the] Court by supposition, both to write the laws and repeal them," *id.* In reaching that conclusion, however, *Epic* did not purport to abrogate or otherwise overrule *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). *McMahon* explained that "if Congress did intend to limit or prohibit waiver of a judicial

forum for a particular claim, such an intent will be deducible from the statute's text or legislative history . . . or from an inherent conflict between arbitration and the statute's underlying purposes." 482 U.S. at 227 (citation and internal quotation omitted). Nothing in *Epic* undermines *McMahon*'s three-pronged analysis. On the contrary, the *Epic* Court cited *McMahon* approvingly, *Epic Sys. Corp.*, 138 S. Ct. at 1627, and looked at the text, history, and purposes of the statute at issue just as the *McMahon* Court did, *id.* at 1624–28. It would be odd, in fact, to assume that *Epic* displaced *McMahon* given that "[t]he Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), especially when the earlier authority has served as the doctrinal foundation for numerous lower court decisions, *see, e.g.*, *Continental Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1020 (9th Cir. 2012); *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc.* (*In re Elec. Mach. Enters., Inc.*), 479 F.3d 791, 795–96 (11th Cir. 2007); *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *Phillips v. Congleton* (*In re White Mountain Mining Co.*), 403 F.3d 164 (4th Cir. 2005); *Ins. Co. N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056, 1065 (5th Cir. 1997); *Hays and Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 885 F.2d 1149, 1156 (3d Cir. 1989).

That *Epic* did not find that the NLRA conflicted with the FAA—just as *McMahon* found that RICO and the Exchange Act had not conflicted with the FAA—does not alter *McMahon*'s instruction to look to all aspects of the statute to determine whether an inherent conflict exists. *Epic* simply stressed that Congress's intent to override the FAA must be "clear and manifest" so that judges cannot act as policymakers picking and choosing between statutes. *Epic Sys. Corp.*, 138 S. Ct. at 1624. Although finding such "clear and manifest" congressional intent will most often require express statutory language, *see Epic Sys. Corp.*, 138 S. Ct. at 1627 ("the absence of

any specific statutory discussion . . . is an important and telling clue"), *Epic* left open the possibility that an irreconcilable conflict between arbitration and a statute's underlying purposes could leave courts with no choice but to refuse to compel arbitration. Indeed, both circuit courts that have considered *Epic*'s impact on *McMahon* in the bankruptcy context have concluded that *McMahon*'s "inherent conflict" prong remains independently viable. *See Henry v. Educ. Fin. Serv.* (*In re Henry*), 944 F.3d 587, 592 (5th Cir. 2019); *Belton v. GE Capital Retail Bank* (*In re Belton*), 961 F.3d 612, 616 (2d Cir. 2020) ("[W]e see *Epic Systems* as clarifying that where two of *McMahon*'s factors clash, a court should resolve the dispute in favor of the statutory text and any contextual clues derived therefrom."). Of course, the most decisive evidence of congressional intent to override the FAA exists where a statute's text, legislative history, and underlying purposes all indicate that parties may not freely waive a judicial forum for a particular claim.

For the reasons stated below, the Bankruptcy Code's[1] text and legislative history, and its underlying purposes, *all* clearly and manifestly demonstrate that Congress intended to limit waiver of the judicial bankruptcy forum provided by the Code—the district courts sitting in bankruptcy—for proceedings involving a violation of the automatic stay. Petitioner's assertion that the FAA requires a bankruptcy court to compel arbitration of such proceedings cannot be reconciled with the intricate bankruptcy process crafted by Congress or the Code's underlying purposes. Accordingly, this Court should affirm the Thirteenth Circuit's conclusion that the Bankruptcy Court for the District of Moot had the authority to decide the dispute between Petty and Wildflowers notwithstanding the prepetition arbitration agreement.

[1] The Bankruptcy Code (the "Code") is set forth in 11 U.S.C. §§ 101 *et seq.* Specific chapters of the Code are identified herein as "Chapter __" and specific sections of the Code are identified herein as "section __." References to the Code also include related provisions set forth in the Judicial Code, 28 U.S.C. §§ 1 *et seq.*

A. The text and legislative history of the Code clearly and manifestly demonstrate that Congress intended to limit waiver of the judicial bankruptcy forum provided by the Code for proceedings involving a violation of the automatic stay.

Although several circuit courts have summarily concluded that neither the text nor the legislative history of the Code reflects a congressional intent to preclude arbitration in the bankruptcy setting, *In re Eber*, 687 F.3d 1123, 1129 (9th Cir. 2012); *In re Thorpe Insulation*, 671 F.3d at 1020; *In re Elec. Mach. Enter., Inc.*, 479 F.3d at 796; *Mintze v. Am. Gen. Fin. Servs., Inc.* (*In re Mintze*), 434 F.3d 222, 231 (3d Cir. 2006); *but see In re White Mountain Mining Co.*, 403 F.3d at 169 (recognizing a counter-argument "that the statutory text giving bankruptcy courts core-issue jurisdiction reveals a congressional intent to choose those courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims"), Respondent respectfully contends that congressional intent to override the FAA is clearly and manifestly expressed in the comprehensive grant of bankruptcy jurisdiction to the federal district courts under section 1334 of the Judicial Code.

The bankruptcy courts derive their jurisdiction from section 1334 of the Judicial Code. Section 1334 provides, in part, that "*notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (emphasis added). Section 157(a) of the Judicial Code, in turn, provides that the district courts may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 U.S.C. § 157(a). Thus, section 1334(b) brings all bankruptcy-related litigation within the purview of the district court, *and, by reference, the bankruptcy courts*, irrespective of congressional statements to the contrary in the context of other specialized legislation. 1 Collier on Bankruptcy ¶ 3.01 (16th 2020). For example, in *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir.

1995), the Federal Circuit was required to reconcile the jurisdiction of the United States Court of Federal Claims over contract disputes to which the Federal Government is party with the power of the United States District Court, sitting in bankruptcy, to bring all matters affecting the bankrupt's estate into one proceeding. *Id.* at 1570–71. Quality, a government contractor, had brought suit against the Government in the Court of Federal Claims pursuant to the Tucker Act and the Contract Dispute Act of 1978 (the "CDA"), and those claims were subsequently transferred to the District Court for the Northern District of Alabama, sitting in bankruptcy, when Quality petitioned for protection under Chapter 11. *Id.* at 1571. The Government then moved to transfer the contract dispute back to the Court of Federal Claims, arguing, among other things, that the Tucker Act, in conjunction with the CDA, purports to make the Court of Federal Claims the exclusive trial court for hearing disputes over government contracts that fall under the CDA. *Id.* at 1571, 1572–73. The District Court denied the Government's motion, and the Government duly appealed. *Id.* at 1571–72. The Federal Circuit held that the bankruptcy court's refusal to abstain from hearing the contract dispute was a matter committed to the sound discretion of the court. Importantly, the Federal Circuit was persuaded by the fact that, although the bankruptcy court and Court of Federal Claims had concurrent jurisdiction over the dispute, "[d]istrict courts sitting in bankruptcy have traditionally had broad powers, including authority for 'the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto.'" *Id.* at 1573.

Like an "Act of Congress that confers exclusive jurisdiction on a court," the FAA is an Act of Congress essentially granting exclusive authority to arbitral tribunals to settle controversies within the scope of an arbitration agreement. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an [arbitration] agreement . . . the court in which such suit is pending . . . *shall* . . . stay the trial of the

action until such arbitration has been had in accordance with the terms of the agreement." (emphasis added)). It makes sense, therefore, to conclude that Congress intended the FAA to fall within the scope of section 1334's "notwithstanding" clause. *See, generally*, John R. Hardinson, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 St. John's L. Rev. 627 (2019); Patrick M. Birney, *Reawakening Section 1334: Resolving The Conflict Between Bankruptcy And Arbitration Through An Abstention Analysis*, 16 Am. Bankr. Inst. L. Rev. 619 (2008); *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 Harv. L. Rev. 2296 (2004). It would be nonsensical, on the other hand, to conclude that a bankruptcy court retains discretion to refuse to abstain from hearing a contract dispute where Congress has conferred exclusive jurisdiction to hear such disputes on another court, but that the FAA mandatorily deprives a bankruptcy court of jurisdiction in favor of an arbitral tribunal when a dispute (including a dispute derived exclusively from the Code such as a violation of the automatic stay) is within the scope of a privately-negotiated arbitration agreement.

It is true that section 1334 does not literally mention the FAA or arbitration and refers instead to statutes conferring exclusive jurisdiction on other "courts," but a statute must be interpreted not only by reference to the statutory language, "but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015); *see also* Hardinson, *supra*, at 9, 636–38 (quoting *Epic*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting)) (noting that Congress's use of specific language of preclusion in recent statutes should not imply that its use of more general language in the past did not express an intent to supersede the FAA because the more recent statutes were "enacted during

the time [the Supreme Court's] decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum").

First, the Code is at its heart a forum selection statute reflecting Congress' judgment that bankruptcy-related issues are best resolved in a centralized, collective, multi-party proceeding. The legislative history makes clear that Congress intended to grant the bankruptcy courts comprehensive jurisdiction "so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)) (emphasis added); H.R. Rep. No. 95-595, at 43–48 (1977) (report on the Bankruptcy Reform Act of 1978). Indeed, Congress was particularly concerned with diminishing the basis for litigation of jurisdictional issues, "which consume[] so much time, money, and energy of the bankruptcy system," and fostering the development of "a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates," H.R. Rep. No. 95-595, at 46 (1977), both of which concerns are undercut by requiring parties to extensively litigate whether a certain proceeding should be decided by a bankruptcy judge or an arbitrator.

Second, although section 1334's grant of jurisdiction is not exclusive *per se*, parties are not at full liberty to litigate in alternate forums without first seeking stay relief or permission from the bankruptcy court. *See* 11 U.S.C. § 362(d); 28 U.S.C. § 1334(c)(1). In contrast to the statutes at issue in several of this Court's other FAA cases, it is clear from the legislative history discussed above, that Congress did not intend non-exclusivity to "advance the objective of allowing [debtors and creditors] a *broader* right to select the forum for resolving disputes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (finding that compulsory arbitration was not improper for claims brought under the ADEA) (emphasis added). On the contrary, Congress

sought to sharply narrow the forums available for resolving bankruptcy-related disputes. Non-exclusivity is simply "a necessary prerequisite to the power of the district court granted in [section 1334(c)], to abstain from hearing certain types of proceedings." 1 Collier on Bankruptcy ¶ 3.01 (16th ed. 2020). Section 1334(c) *permits*, but does not require, the court to abstain from hearing a core proceeding if, in the court's discretion, abstention is "in the interest of justice." § 1334(c)(1). Nonetheless, it is well-established that once jurisdiction is vested in the district court (and, by reference, in the bankruptcy court), the court should abstain from exercising jurisdiction only reluctantly. Birney, *supra* at 9, 671 (citing *Colo. River Water Conservation Dist. v. United* States, 424 U.S. 800, 813 (1976)). The reluctance to abstain from the exercise of jurisdiction is particularly important in bankruptcy:

> An important and beneficial attribute of bankruptcy is its inclusiveness. It gathers all assets of, and claims against, a debtor within one tribunal for administration, liquidation and adjustment . . . . To maintain this inclusiveness, a bankruptcy court has a duty to exercise jurisdiction in matters arising under the Code or arising in a bankruptcy case, unless the court finds abstention is in the best interest of the parties and the estate, and will not jeopardize the rights, remedies, safeguards and legitimate expectations provided under the Code to the parties in interest. In short, a bankruptcy court should be reluctant to relinquish its jurisdiction over core proceedings, unless there is a specific showing abstention will better serve the parties in interest and the estate.

Id. at 672 (quoting *In re Cook*, 384 B.R. 282, 296 (Bankr. N.D. Ala. 2008)).

Finally, while a case is under the district court's jurisdiction, the bankruptcy court administers the case and adjudicates contested matters and adversary proceedings according to the provisions of the Code and the Federal Rules of Bankruptcy Procedure (the "Rules"). These provisions are primarily of procedural importance and, consistent with the collective, multi-party nature of the proceeding, generally ensure to creditors and interested parties the right to notice and to participate in matters affecting the estate. *See, e.g.*, 11 U.S.C. § 342 (notice); § 1109 (right to be heard); Fed. R. Bankr. P. 2002 (certain required notice); Fed. R. Bankr. P. 9019 (compromise

and arbitration). Moreover, a bankruptcy court has specialized knowledge and a vested interest in ruling in a manner that makes the bankruptcy system functional. *In re Walker*, 551 B.R. 679, 693 (Bankr. M.D. Ga. 2016) (citing H.R. Rep. No. 95-595, at 20 (1977)). Thus, unlike the statutes at issue in several of this Court's other FAA cases, the judicial bankruptcy forum, in and of itself, is an essential feature of the Code that parties should not be permitted to waive absent compelling circumstances. *See, e.g.*, *McMahon*, 482 U.S. at (concluding that arbitration is adequate to vindicate substantive Exchange Act claims). To hold that a privately-negotiated arbitration agreement may deprive a bankruptcy court of its jurisdiction to hear a core proceeding would undermine the statutory scheme Congress enacted for the resolution of bankruptcy cases. For instance, section 1109 provides that "a party in interest, including . . . a creditors' committee . . . [or] a creditor . . . may raise and may appear and be heard on any issue in a [Chapter 11] case." 11 U.S.C. § 1109. However, it is quite possible that creditors who are not parties to an arbitration agreement could be barred from participating in arbitration altogether. Such a result is entirely inconsistent with the collective, multi-party nature of the bankruptcy process, and demonstrates the importance of Congress's decision to vest the district court (and, by reference, the bankruptcy courts) with comprehensive jurisdiction to resolve all matters connected with the bankruptcy estate.

In this case in particular, the FAA's command of arbitration cannot be reconciled with the text and legislative history of the Code. When Petty filed his second Chapter 11 petition, it triggered the automatic stay and vested the district court (and, by reference, the bankruptcy court) with comprehensive jurisdiction to administer Petty's estate. Petty then filed a plan of reorganization that proposed to pay his creditors, including Wildflowers, forty cents on the dollar from his income over a period of five years. The plan was predicated, however, on the ongoing

operation of Full Moon Fever Brewing. Thus, when Wildflowers repossessed the Brewing Equipment in violation of the automatic stay—effectively shutting down Full Moon Fever Brewing—it spoiled the plan and devastated Petty's ability to successfully reorganize. Consequently, the recovery of creditors other than Wildflowers was seriously jeopardized. Those creditors therefore had a significant interest in appearing and being heard in the proceeding to determine a violation of the automatic stay. Yet, in arbitration, they would be deprived of their essential right to participate in matters affecting the estate. What's more, if arbitration were compelled, the creditors' recovery in bankruptcy would be contingent upon an arbitrator's ruling despite the fact that they were neither parties to the arbitration agreement, nor did they consent to arbitration. Congress clearly did not intend this result. Rather, it is clear and manifest from the text and legislative history of the Code that Congress intended the district court (and, by reference, the bankruptcy courts) to be the exclusive forum for the resolution of all bankruptcy-related litigation unless the court decides that it is in the interest of justice to abstain from hearing the matter. As discussed below, the underlying purposes of the Code further support this conclusion. Therefore, this Court should affirm the Thirteenth Circuit's conclusion that the Bankruptcy Court for the District of Moot had the authority to decide the dispute between Petty and Wildflowers notwithstanding the prepetition arbitration agreement.

B. <u>The underlying purposes of the Code clearly and manifestly demonstrate that Congress intended to limit waiver of the judicial bankruptcy forum provided by the Code for proceedings involving a violation of the automatic stay.</u>

The circuit courts have uniformly held that a bankruptcy court may decline to compel arbitration of a core bankruptcy proceeding if the court determines that arbitration of the proceeding would inherently conflict with the underlying purposes of the Code. *See In re Thorpe*

Insulation Co., 671 F.3d at 1021 (listing cases). As the Second Circuit explained in *MBNA America Bank, N.A. v. Hill*,

> [t]his determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. . . . If a severe conflict is found, then the court can properly conclude that, with respect to the particular Code provision involved, Congress intended to override the [FAA's] general policy favoring the enforcement of arbitration agreements.

Hill, 436 F.3d at 108 (citation and internal quotation omitted).

The proceeding at issue in this case—whether a certain action constitutes a violation of the automatic stay—is indisputably a core proceeding. *See Hill*, 436 F.3d at 109 ("Actions brought under [section 362] are . . . core proceedings because they derive directly from the [Code] and can be brought only in the context of a bankruptcy case."). Indeed, "[t]he automatic stay and entitlement to remedies for its violation . . . create the foundation of debtor protection to be provided through the offices of the specialized bankruptcy court." *Walker v. Got'cha Towing & Recovery, LLC* (*In re Walker*), 551 B.R. 679, 688 (Bankr. M.D. Ga. 2016) (quoting *Merrill v. MBNA Am. Bank* (*In re Merrill*), 343 B.R. 1, 9 (Bankr. D. Me. 2006)).

Hill is the only circuit court case squarely addressing a purported conflict between arbitration and the automatic stay. In that case, Hill, a Chapter 7 debtor, filed a putative class action on behalf of herself and others similarly situated, alleging violations of section 362(h). *Hill*, 436 F.3d at 106. Applying *McMahon*'s "inherent conflict" prong, the Second Circuit first concluded that "arbitration of Hill's section 362(h) claim would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start, protecting the assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate." *Id.* at 109. However, the Second Circuit itself acknowledged that the specific facts of that case distinguished it from "other cases where appellate courts have held that the bankruptcy courts had discretion to refuse to stay proceedings pending arbitration." *Id.* at 110 (Hill's bankruptcy case

was closed and she had been discharged; Hill no longer required protection of the stay to ensure her fresh start; any damages awarded would become Hill's personal property). The Court noted that "[i]n those cases, resolution of the arbitrable claims directly implicated matters central to the purposes and policies of the [Code]." *Id.*

Consonant with those cases finding that resolution of the arbitrable claims would directly implicate matters central to the purposes and policies of the Code, compelling arbitration of Petty's section 362 claim would "substantially interfere with [Petty's] efforts to reorganize." *See In re White Mountain Mining Co.*, 403 F.3d at 170. Specifically, staying the bankruptcy proceeding to permit arbitration of the claim would result in unnecessary delays and increased costs. Notably, time is especially critical to Petty's reorganization efforts: the longer Petty is inhibited from beginning to produce beer again, the less likely it is that he will be able to salvage the goodwill of his previous breweries. In addition, the arbitral tribunal and governing law and procedures selected by Wildflowers are likely to be advantageous to Wildflowers, as opposed to a neutral bankruptcy judge. Ultimately, these critical factors could reduce the value of the estate available to pay the creditors and undermine the creditors' confidence in Petty's ability to successfully reorganize. If Petty's plan of reorganization were to fail, he would be forced into liquidation.

Further, requiring the bankruptcy court to compel arbitration would divest the court of its responsibility to protect the assets of the estate. Section 1334(e) of the Judicial Code provides that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). A stay violation regarding estate property (such as alleged here) falls within the exclusive jurisdiction over estate property granted by Congress in section 1334(e) to the district in which the debtor's case is

pending. To strip the court of discretion to adjudicate this stay violation and place the fate of the Brewing Equipment in the hands of an arbitral tribunal would accordingly undermine section 1334(e).

Most importantly, compelling arbitration of a proceeding involving a violation of the automatic stay is inconsistent with centralized decision-making. "As reflected in [section 1334], congressional policy favors having all matters related to and affecting the bankruptcy proceeding heard in a centralized federal court with notice to all interested parties." Hardinson, *supra*, at 9, 670. Centralization is important "not only for efficiency's sake, but to ensure the indirect rights of other interested parties are taken into account and protected. . . . Bankruptcy ensures a more equitable distribution [than individual creditor collection efforts outside of bankruptcy] by including creditors and parties with an interest in the estate in the resolution of [bankruptcy proceedings]." *Id.* In contrast, the two parties to an arbitration agreement may not adequately represent the interests of the other affected parties in a bankruptcy proceeding. Moreover, as previously discussed, creditors and other affected parties may not be entitled to the same procedural protections in arbitration—if they are permitted to participate in arbitration at all—and could find their recovery contingent upon an arbitrator's ruling despite the fact that they were neither parties to the arbitration agreement, nor did they consent to arbitration. *See* discussion *supra*, at 11–13.

The *Hill* Court also found that "the fact that Hill filed her section 362(h) claim as a putative class action further demonstrate[ed] that the claim is not integral to her individual bankruptcy proceeding." *Hill*, 436 F.3d at 110. In this case, however, Petty's claim was not filed as a class action. Petty is a paradigmatic honest, but unfortunate, individual debtor. His business was hampered by unforeseen market changes, resulting in financial difficulties. He has since made

substantial efforts to reorganize and restart operations. This Chapter 11 case is crucial to those efforts. It cannot be said, therefore, that resolution of Petty's section 362 claim lacks a close connection to the purposes of the Code—resolution of the claim is integral to the success of Petty's plan of reorganization.

Lastly, the *Hill* Court concluded that "[the automatic stay], which arises by operation of statutory law and not by an affirmative order of the bankruptcy court, is [not] so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions." *Id.* However, a violation of the automatic stay constitutes contempt of the court. *In re Walker*, 551 B.R. at 692 (denying motion to compel arbitration of stay violation). "[The] contempt powers are fundamental to protecting the dignity of the bankruptcy court." *Id.* "To say that the automatic stay is not an individually crafted order and that . . . violation claims need not necessarily be brought in the court where the violation occurred ignores the meaning of a 'case' and a 'proceeding' and the vested interest a court has in punishing those who disobey its orders." *Cline v. First Nationwide Mortg. Corp.* (*In re Cline*), 282 B.R. 686, 695 (W.D. Wash. 2002). Furthermore, although non-bankruptcy courts may interpret the scope of the automatic stay in non-bankruptcy proceedings, *see, e.g.*, *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012), they do so only to determine whether litigation pending before them is subject to the stay, not to determine whether a violation of the stay has occurred, and certainly not to determine damages resulting from a violation of the stay. Determining whether a violation of the stay has occurred, and the resulting damages, is the province of the district court sitting in bankruptcy. Indeed, "the requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in

bankruptcy court or with leave of the bankruptcy court." *In re Crown Vantage, Inc.*, 421 F.3d 963, 971 (9th Cir. 2005).

The detrimental impact of traveling too far down the slippery slope and requiring compulsory arbitration of a proceeding involving a violation of the automatic stay can easily be imagined. What would happen if a second bank—also having a security interest in Petty's property and an arbitration agreement—repossessed property in the same manner as Wildflowers? Could separate arbitral tribunals reach different results on the complicated interpretational issue surrounding section 362(c)(3)(A)? And would the bankruptcy court then be required to enforce both arbitral decisions? Plainly, Congress thought it better to have issues so integral to the functioning of the bankruptcy system decided by the bankruptcy courts in a centralized, collective, multi-party proceeding. Thus, the underlying purposes of the Code clearly and manifestly demonstrate that Congress intended to limit waiver of the judicial bankruptcy forum for proceedings involving a violation of the automatic stay. Therefore, this Court should affirm the Thirteenth Circuit's conclusion that the Bankruptcy Court for the District of Moot had the authority to decide the dispute between Petty and Wildflowers notwithstanding the prepetition arbitration agreement.

II. THE THIRTEENTH CIRCUIT PROPERLY CONCLUDED THAT SECTION 362(c)(3)(A), WHEN TRIGGERED, TERMINATES THE AUTOMATIC STAY FOR THE DEBTOR AND THE DEBTOR'S PROPERTY, BUT NOT FOR PROPERTY OF THE ESTATE.

Section 362(c)(3)(A) poses an interpretational question that over fifty different bankruptcy courts have addressed. The question revolves around one phrase: "*with respect to the debtor*." The majority view, which the Thirteenth Circuit adopted, imports the natural meaning into that phrase. There are two minority views. The first, adopted by the dissenting opinion of the Thirteenth Circuit, strains to read "with respect to the debtor" in a manner that better comports

with those respective courts' policy rationales. The second disregards the phrase entirely, finding it to be superfluous. The first minority view contorts the grammatical structure of section 362(c)(3) to conform to presupposed congressional intent. The latter view mistakes cluttered verbiage for ambiguous meaning, and thus inappropriately widens the scope of interpretational sources to irrelevant pieces of legislative history.

For the reasons stated below, the majority view is the best interpretation of section 362(c)(3)(A). Textual and contextual considerations, canons of statutory construction, and precedent all lead to the interpretation most bankruptcy courts have followed. Additionally, the majority view does not produce an absurd result, nor is it demonstrably at odds with congressional intent. Policy reasons also weigh in favor of a moderate interpretation of section 362(c)(3)(A).

A. Section 362(c)(3)(A) terminates the automatic stay only "with respect to the debtor" and not against property of the estate because the plain meaning of the statute produces such a result.

Section 362(c) was one of the many provisions added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCPA"). This Court recognized that Congress enacted the BAPCPA, among other reasons, "to correct perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231–32 (2010). Congress sought to correct one such abuse—repeated filings within a short period of time to prevent creditor collection efforts—by limiting the scope and length of the automatic stay. Section 362 broadly deals with the automatic stay, and the BAPCPA introduced alterations to this section to create those limitations.

Sections 362(c)(3)–(4), added by the BAPCPA, are the primary ways Congress chose to "curb bankruptcy abuses committed by serial filing debtors." *In re Petty*, No. 19-0805, at 14. Section 362(c) begins by describing the actor whom it intends to regulate: a debtor who files a

petition yet had a different bankruptcy case that was pending within the "preceding 1-year period but was dismissed." 11 U.S.C. § 362(c)(3). If those conditions are met, then section 362(c)(3)(A) states that: "the stay . . . with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease *shall terminate with respect to the debtor* on the 30th day after the filing of the later case." § 362(c)(3)(A) (emphasis added). The reason for this early termination is because the "[second] case is presumptively filed not in good faith." § 362(c)(3)(C). A debtor or any "party in interest" may make a motion for continuation of the automatic stay "only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." § 362(c)(3)(B).

While section 362(c)(3) applies to the second-time debtor, section 362(c)(4) applies to any debtor who has had two or more cases pending and dismissed within the previous year. § 362(c)(4). In this instance, the automatic stay never goes into effect. Any party in interest may make a motion to demonstrate that the later filing is in good faith, upon which the stay would be reinstated. § 362(c)(4)(B).

The interpretational question at hand is what the phrase "with respect to the debtor" in section 362(c)(3)(A) means. Most courts that have considered this issue have held that if section 362(c)(3) is triggered, and the debtor does not rebut the presumption of bad faith or otherwise extend the automatic stay, the automatic stay terminates against the debtor and the debtor's property, but not against the property of the estate. *See, e.g.*, *In re Goodrich*, 587 B.R. 829, 835 n. 4–5 (Bankr. D. Vt. 2018) (listing opinions that have addressed the issue).

This Court has made it clear that any interpretational analysis of a statute must enforce the plain meaning of the text "at least where the disposition required by the text is not absurd." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Underlying this principle is the normative canon

of statutory construction that "Congress acts intentionally and purposely [in its] inclusion or exclusion" of words. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Section 362(c)(3)(A) on its own terms terminates the automatic stay for "any action taken . . . with respect to the debtor." Syntactic and semantic closeness determines which verb or noun a prepositional phrase describes. *See* The Chicago Manual of Style, § 5.178 (17th ed. 2017) ("A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies . . . ."). "With respect to the debtor" is a compound prepositional phrase that immediately follows the verb "shall terminate." If "with respect to the debtor" did not describe that verb, it is unclear what other part of the provision that phrase could describe. Given this Court's presumption against superfluities, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2012); *King v. Burwell*, 576 U.S. 473, 475 (2015), the choice between "with respect to the debtor" carrying no meaning and it describing "shall terminate" is no choice at all. As one bankruptcy court put it, "how could ['with respect the debtor'] be any clearer?" *In re Jones*, 336 B.R. 360, 363 (Bankr. E.D.N.C. 2006).

Petitioner's first argument is that "with respect to the debtor" describes not the verb immediately preceding it, but rather the "single or joint case" introductory phrase of section 362(c)(3). *See* § 362(c)(3). Thus, the phrase in question is reduced from a limitation on the automatic stay to a clarification that the automatic stay terminates for the debtor but not for the spouse of a debtor who did not have a preceding case that was pending but dismissed. However, this reading effectively turns the phrase "with respect to the debtor" into superfluous "filler." *In re Smith*, 910 F.3d 576, 585 (1st Cir. 2018). This is so because the penalty imposed by section 362(c)(3)(A) would only apply to repeat filers regardless of the existence of the phrase "with respect to the debtor." After all, jointly filed cases never intermingle the substantive rights of parties in bankruptcy—joint administration is only a tool to combine multiple dockets into one,

combine notices of creditors to different estates, and produce other procedural cost-saving measures. *See* Fed. R. Bankr. P. 1015(b). No reasonable reading of section 362(c)(3)(A) would seek to impose its penalty upon a newly-filing spouse of a repeat filer. Given that "with respect to the debtor" should describe the verb it immediately follows, this minority interpretation wrongly imports additional language into the statue. The language "and property of the bankruptcy estate" does not immediately follow "with respect to the debtor," yet the minority interpretation reads the text as though it does. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019) ("[W]e decline to read in ['and property of the bankruptcy estate']").

There is little question why this minority view strains to read "with respect to the debtor" in such a peculiar way. Those subscribing to this view have made an *a priori* policy judgment that section 362(c)(3)(A) should carry more impact than the plain meaning affords it. They then search in the text for a reading that would grant the desirable policy outcome. In so doing, they "rewrite[] the law under the pretense of interpreting it," *King v. Burwell*, 576 U.S. 473, 516 (2015) (Scalia, J., dissenting), and look to vague notions of congressional intent (or worse yet, their own policy judgments) before attempting any interpretation of the text itself.

Petitioner's argument in the alternative is that "with respect to the debtor" is mere superfluity. The First Circuit came to this conclusion in *In re Smith*, 910 F.3d at 585. That court's argument was premised on a study performed by Peter Meltzer which found that all instances of the phrase "with respect to the debtor" in the Bankruptcy Code were added by the BAPCPA. *See* Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 Am. Bankr. L.J. 407, 408–09 (2012). In total, the phrase was added to the Code seventeen times. That article distinguished between "stand-alone" and "non-stand-alone" uses of the phrase, with "stand-alone" meaning nothing more than if the phrase was

deleted from its respective provision, that provision would still carry meaning. *Id.* at 431. In other words, non-stand-alone instances of the phrase have a relative clause attached to it.[2] Meltzer proceeded to assign value to this distinction, finding that each one of the ten stand-alone phrases could arguably be seen as filler. *Id.* at 430–31. Furthermore, since there were no instances of "with respect to the debtor" serving the function of distinguishing between property of the estate and property of the debtor, it would be unreasonable to conclude that the phrase serves that function in section 362(c)(3)(A). *Id.* at 430–31.

There are two problems with Meltzer's argument. First, even if Meltzer's observations as to the value of *other* instances of "with respect to the debtor" were true, that would say nothing of the value that phrase has within section 362(c)(3)(A). The phrase does not contain specialized terminology that would create an expectancy of consistency across the Code. "With respect to" is a generic compound prepositional phrase, and "the debtor" may very well be the most common phrase in all of the Bankruptcy Code. Thus, it is erroneous to look to other uses of the phrase in assigning value to this particular one—rather, context must dictate its meaning. Second, Meltzer's distinction between stand-alone and non-stand-alone uses of the phrase "with respect to the debtor" is arbitrary and does nothing to inform the reasonable reader of the value of that phrase in context. Even if all stand-alone uses happen to be filler, Meltzer never addresses the value of the non-stand-alone uses. Since that distinction is arbitrary, this reasoning would carry value only if Meltzer proved that all non-stand-alone phrases were filler as well. He fails to do so.

Crucially, the First Circuit's conclusion relied solely upon Meltzer's article and a dissatisfaction with other textual arguments regarding section 362(c)(3)(A). *In re Smith*, 910 F.3d

[2] For example, section 704(b)(1) would be an example of a non-stand-alone phrase: "With respect to a debtor who is an individual in a case under this chapter . . . ." Meltzer uses section 362(c)(3)(A) as an example of a stand-alone instance, where the provision would still carry meaning if "with respect to the debtor" were eliminated.

at 585. But Meltzer's article was flawed and failed to rebut this Court's strong presumption against superfluities. The First Circuit rejected a plain meaning argument for section 362(c)(3)(A) that gave effect to every phrase, choosing instead to inject its own meaning to achieve the policy outcome it found most proper. *Id.* at 581–83.

Thus, of the three options, the majority view alone comports with a natural reading of the provision. Of course, this alone does not resolve the interpretational difficulty posed by section 362(c)(3)(A). Context must always be consulted in the interpretation of any statutory provision. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.").

Context informs the reasonable reader as to the difference between a stay to be terminated against a debtor and their property but not against the estate in bankruptcy. Sections 362(a)(1)–(8) list all collective actions that creditors may not perform by virtue of the automatic stay. The actions described in the list specify what entity the creditor may not perform an action against. For instance, section 362(a)(3) stays "any act to obtain possession of *property of the estate* . . . ."[3] § 362(a)(3). Contrast this with section 362(a)(6), which stays "any act to collect . . . a claim *against the debtor* . . . ." § 362(a)(6). Section 362(a)(5) stays "any act to create, perfect, or enforce against *property of the debtor* . . . ." § 362(a)(5). All told, section 362 establishes three kinds of entities that creditors may not act against: the debtor, property of the debtor, and property of the estate. *In re Smith*, 910 F.3d at 580.

Section 362 distinguishes between the above three categories in other sub-provisions. Section 362(b)(2)(B) states that no stay shall apply against "the collection of a domestic support obligation from property *that is not property of the estate* . . . ." 11 U.S.C. § 362(b)(2)(B). Sections

[3] This appears to be the part of the automatic stay that Wildflowers violated when it took possession of Respondent's Equipment.

362(c)(1)–(2) distinguish between property of the estate and the "stay of any other act" for purposes of determining how long the automatic stay should apply against the respective classification. § 362(c)(1)–(2). Throughout section 362 it is clear that Congress understood this distinction and how to use it. It was not mere happenstance that section 362(c)(3)(A) limited the termination of the automatic stay to only the debtor and debtor's property.

The petitioner asserts that the majority view adds its own language of "and property of the debtor" to the statute, as no majority-leaning court has held that section 362(c)(3) terminates the automatic stay only against the debtor. But reference to the debtor's property is found in section 362(c)(3)(A). The language of the provision makes clear that the stay terminates "with respect to a debt or property securing such debt . . . with respect to the debtor." The first phrase acts in conjunction with the second to establish the exact parameters of the automatic stay termination—it terminates only with respect to the debtor and the debtor's "property securing such debt." *In re Scott-Hood*, 473 B.R. 133, 137 n.2 (Bankr. W.D. Tex. 2012). Many courts and commentators have noted the grammatical inefficiency of this provision. *See, e.g., In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) ("In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out."). Yet it would be a mistake to confuse complex language with ambiguity.

In addition to text and context establishing plain meaning, canons of statutory construction and precedents can aid in the interpretation of a provision. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (accurate analysis "depends upon reading the whole statutory text, considering the purpose and context of the statute and consulting any precedents or authorities that inform the analysis."). Two canons of statutory construction are impactful when considering

section 362(c)(3)(A): *expressio unius est exclusio alterius* and the presumption against superfluities.

Expressio unius est exclusio alterius stands for the proposition that the expression of one or more items implies an exclusion of other items. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Constructed*, 3 Vand. L. Rev. 395, 405 (1950). This canon is inapplicable when non-exhaustive examples are provided, but is useful when a list narrows the scope of a broader term. In this instance, there are only three types of stays given by section 362(a)—stays against property of the estate, stays against property of the debtor, and stays against the debtor. Thus, when a provision terminates the stay but specifies that it is "with respect to the debtor," *expressio unius est exclusio alterius* is triggered to exclude "property of the estate" from automatic stay termination under section 362(c)(3). *In re Paschal*, 337 B.R. at 279 (Bankr. E.D.N.C. 2006).

Interestingly, the phrase "with respect to the debtor" does not modify the stay termination in section 362(c)(4)(A)(i). Section 362(c)(4) limits the stay as to repeat filers who have had two or more cases pending and dismissed within the last year. When that condition is triggered, "the [automatic stay] *shall not go into effect* upon the filing of the later case . . . ." § 362(c)(4)(A)(i). There is no limiting language here that modifies the extent of the automatic stay. This contrast is poignant when one considers that both limitations of the stay were placed into law by the BAPCPA. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 302(3), 119 Stat. 23. These were not disparate Congresses but one and the same Congress that enacted both subsections. So, the *expressio unius* canon is strengthened—Congress understood how to completely terminate the automatic stay, because it did so in section 362(c)(4)(A)(i). It simply chose not to under section 362(c)(3). *See, e.g.*, *In re Holcomb*, 380 B.R.

813, 816 (B.A.P. 10th Cir. 2008); *In re Jumpp*, 356 B.R. 789, 795 (B.A.P. 1st Cir. 2006); *In re Harris*, 342 B.R. 274, 279 (Bankr. N.D. Ohio 2006) ("Had Congress intended § 362(c)(3)(A) to completely terminate the automatic stay, it could have used the same straightforward language it used in § 362(c)(4)(A)(i).").

The second relevant canon here is the presumption against superfluities. As this Court has stated, "a cardinal principal of statutory construction" is that "a statute ought, upon the whole, . . . be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167 (2001). While the canon is not "absolute," *Lamie*, 540 U.S. at 536, this Court has set forth a framework in *Marx*, 568 U.S. at 385–86, to determine the strength of the presumption. The "canon against surplusage 'assists only where a competing interpretation gives effect to every clause and word of a statute.'" *Marx*, 568 U.S. at 385 (quoting *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 106 (2011)). Of the competing interpretations for section 362(c)(3)(A), only one—the majority view—is able to give reasonable effect to every prepositional phrase. *Marx* also noted that superfluity is not rare in statutes, but it only mentioned this in relation to "statutes addressing costs." *Marx*, 568 U.S. at 385. *King v. Burwell* provided another example where redundancies could weaken the presumption against superfluities, wherein it noted that the Affordable Care Act mistakenly created three separate Sections each called Section 1563. 576 U.S. at 491. But in the present case, there was no such clear mistake by Congress. There is no indication that "with respect to the debtor" means anything other than its plain meaning when considered in conjunction with the three-pronged stay described in section 362(a). There is a difference between complex language (which section 362(c)(3)(A) is) and redundant language (which it is not).

Finally, it is worth noting that most bankruptcy courts have sided with the majority view, and bankruptcy courts "rule correctly most of the time." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1695 (2015). The majority of cases follow a uniform theory in determining the plain meaning of the statute and accordingly do not reference legislative history. *See, e.g.*, *In re Holcomb*, 380 B.R. 813 (10th Cir. B.A.P. 2008); *In re Gillcrese*, 346 B.R. 373 (Bankr. W.D. Pa. 2006); *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006); *In re Pope*, 351 B.R. 14 (Bankr. D.R.I. 2006). The minority set of cases follows no such ordering. Each case appears to create its own legal theory on section 362(c)(3)(A). Some interpret "with respect to the debtor" as the Thirteenth Circuit dissent did, *see, e.g.*, *In re Daniel*, 404 B.R. 318, 326–27 (Bankr. N.D. Ill. 2009); *In re Furlong*, 426 B.R. 303, 307 (Bankr. C.D. Ill. 2010), while others find ambiguity and rule according to what they find congressional intent to be. *See e.g.*, *In re Smith*, 910 F.3d at 589–90. Many lean heavily on legislative history, including legislative history on the Consumer Bankruptcy Reform Act of 1998, under which section 362(c) was not passed. *See, e.g.*, *In re Reswick*, 446 B.R. 362, 371–72 (9th Cir. B.A.P. 2011); *In re Daniel*, 404 B.R. at 327–29; *In re Dev*, 593 B.R. 435, 444–45 (Bankr. E.D.N.C. 2018).

B. <u>The plain meaning result of the text should not be departed from because the result is neither absurd nor is it demonstrably at odds with congressional intent</u>

There are two standards by which this Court has stated a departure from the plain meaning of the statute is warranted. First, the Absurdity Doctrine provides that the plain meaning of the text should not control where the consequences of the interpretation are absurd. *See Caminetti v. United States*, 242 U.S. 470, 490 (1917). There is a strong presumption against absurdity—the result must be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowinshield*, 17 U.S. 122, 203 (1819). Second, this Court has stated that exceptional circumstances may counsel departure from the text where there is "a clearly expressed

legislative intention to the contrary." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, there must be strong evidence that Congress intended a result other than what the text yields. *See, e.g., United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (The plain meaning must be "demonstrably at odds with the intentions of the drafters.").

Neither of these principles are applicable here. As to the Absurdity Doctrine, it cannot fairly be stated that the result of the plain meaning reading creates a reprehensible result. The petitioner argues that sections 362(c)(3)–(4) operate as a progressive punishment system for repeat filers. However, they erroneously conclude that since section 362(c)(3) applies to a debtor in the middle ground between a first-time filer and a third-time (or more) filer, then the punishment must also be a halfway measure. *See, e.g., In re Smith*, 910 F.3d at 586 (calling the minority approach the "most sensible middle ground"). However, a progressive punishment system does not require that each punishment be equidistant from the next. The majority reading creates a system where the first punishment under section 362(c)(3) operates as a warning shot: the next filing will come with much stronger repercussions.

The minority approaches presumably conclude that a complete termination of the automatic stay is the only sensible result because of the more limited benefit a partial termination would convey to creditors. However, that a plain language reading of the statute yields a debtor-friendly result is hardly evidence that the reading is absurd. And it is clear that the majority approach does produce tangible results that favor creditors to the detriment of the debtor. Courts have noted that partial termination provides a tangible benefit to the creditor in the form of *in personam* collective efforts against the debtor. *See In re Gillcrese*, 346 B.R. 373, 377 (Bankr. W.D. Pa. 2006). Creditors may secure personal judgments against the debtors and then execute those judgments outside the bankruptcy process. Other courts have noted eviction proceedings,

lawsuits, and garnishments as tangible consequences of a partial termination. *See, e.g.*, *In re Jumpp*, 356 B.R. at 796–97; *In re Roach*, 555 B.R. 840 (Bankr. M.D. Ala. 2016). The majority interpretation also allows for governmental creditors to take certain actions, such as collecting tax refunds for non-tax debts or pursuing exempt property to satisfy non-dischargeable tax debts. *In re Smith*, 910 F.3d at 587. It is certainly not the case that these tangible effects are worthless.

The majority approach is also not at odds with clearly expressed congressional intent. The minority view cites various pieces of legislative history in arguing that the plain meaning is contrary to such intent.[4] However, most of the legislative history cited is irrelevant as it is legislative history of the Consumer Bankruptcy Reform Act of 1998 (the "CBRA"), which never passed. That Act contained section 121, entitled "Discouraging Bad Faith Repeat Filings," which reads: "In the subsequently filed bankruptcy case, the automatic stay terminates 30 days following the filing date of the case." Given that this language is similar to section 362(c)(3)(A), the minority approach takes the legislative history with regard to section 121—which never passed—and imputes it to section 362(c)(3)(A).

There are at least two problems with imputing that legislative history to section 362(c)(3)(A). First, no legislative history produced by the 105th Congress in 1998 may be imputed to the 109th Congress. Even if the statutory language was exactly the same, and the comments made by the earlier Congress exhibited clear intent, those comments are irrelevant because that was not the Congress which voted and passed the language. *In re Scott-Hood*, 473 B.R. 133, 137 n.2 (Bankr. W.D. Tex. 2012). Second, the minority approaches ignore the context of section 121 of the CBRA. That legislation did not include any language approximating section 362(c)(4). In

[4] It is questionable whether resorting to legislative history is appropriate here, given the plain language of the text. One bankruptcy court noted as much, finding that the legislative history was "not controlling." *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006).

other words, section 121 of the CBRA functioned as the catch-all punitive provision for *all* repeat filers. BAPCPA modified this structure by splitting the punitive measures into sections 362(c)(3) and 362(c)(4). This single fact makes the CBRA fundamentally different in how it attempted to regulate repeat filers—thus, any legislative history from it cannot be imputed to the BAPCPA's section 362(c)(3).

There is good reason why the minority approaches resorts to the 1998 CBRA legislative history: the BAPCPA legislative history on section 362(c)(3)(A) is practically nonexistent. The only piece of legislative history is a regurgitation of the statutory text. H.R. Rep. No. 109–31(l), at 2 (2005). This Court has held that where the legislative history is inconclusive, the "result suggested by the structure of the statute itself" should stand. *Jeffers v. United States*, 432 US. 137, 156–57 (1977). Given the inconclusive nature of the legislative history of section 362(c)(3)(A), this Court should adhere to the plain meaning of the statute.

C. The plain meaning result of the text is supported by strong policy rationale.

In the event that this Court finds section 362(c)(3)(A) to be ambiguous, the tangible effect of a partial termination is a more favorable result from a policy perspective. It serves a useful purpose as a warning to the debtor not to make repeated filings that lack a good faith basis. The minority approach inappropriately favors one creditor to the detriment of the trustees and other creditors. *In re Thu Thi Dao*, 616 B.R. 103, 109–116 (Bankr. E.D. Cal. 2020). The minority approach also creates an internal redundancy with the Code since creditors may seek relief from the automatic stay under section 362(d) if a debtor is abusing the stay. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 231 (5th Cir. 2019). The majority approach, on the other hand, prevents dismemberment of the estate, and thus promotes the chief aim of the bankruptcy process: a fresh start for the honest but unfortunate debtor.

CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed. The court correctly concluded that the bankruptcy court did not err when it declined to enforce the prepetition arbitration agreement. Furthermore, the court accurately interpreted the plain meaning of section 362(c)(3)(A) when it concluded that the automatic stay terminated under that provision only "with respect to the debtor" and that the stay remained with respect to property of the estate. Therefore, Respondent respectfully requests that this Court affirm the decision of the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

> **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> **(4)** any act to create, perfect, or enforce any lien against property of the estate;
>
> **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
>
> **(8)** the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

> **(1)** under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> **(2)** under subsection (a)--
>
> > **(A)** of the commencement or continuation of a civil action or proceeding--
> >
> > > **(i)** for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

> **(A)** an audit by a governmental unit to determine tax liability;
>
> **(B)** the issuance to the debtor by a governmental unit of a notice of tax deficiency;
>
> **(C)** a demand for tax returns; or
>
> **(D)** the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final

judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

> **(A)** to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee

Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act); and

(29) under subsection (a)(1) of this section, of any action by--

(A) an amateur sports organization, as defined in section 220501(b) of title 36, to replace a national governing body, as defined in that section, under section 220528 of that title; or

(B) the corporation, as defined in section 220501(b) of title 36, to revoke the certification of a national governing body, as defined in that section, under section 220521 of that title.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

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(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages

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28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

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28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

> **(2)** Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

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(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

> **(1)** of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>
> **(2)** over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

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