No. 19-1004

IN THE

Supreme Court of the United States

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK, PETITIONER

V.

EARL THOMAS PETTY, RESPONDENT.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

JANUARY 19, 2021

TEAM NUMBER 21
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362 and related judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

II. Whether 11 U.S.C. § 362(c)(3)(A) applies to property of a debtor's bankruptcy estate.

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The Thirteenth Circuit Court of Appeals' decision is available at No. 19-0805 and is reprinted at Record 2. The Bankruptcy Court for the District of Moot ("Bankruptcy Court") and the United States Court of Appeals for the Thirteenth Circuit ("Thirteenth Circuit") decided in favor of Respondent Earl Thomas Petty.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

This matter concerns § 362 and related provisions of Title 11 of the United States Code.

The relevant portion of § 362(c) provides:

> **(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

STATEMENT OF THE CASE

This appeal arises out of a Respondent's continued attempts to abuse the bankruptcy system and bypass the Bankruptcy Code in a clear attempt to breach a valid and binding arbitration agreement with Petitioner without consequence. Respondent's actions are not only in conflict with Congress' intent in enacting the Federal Arbitration Act ("FAA") but also the binding precedent of this Court. As such, this case demands the immediate reversal of the Thirteenth Circuits erroneous finding concerning the two issues addressed here today: (1) that the § 362 and related provisions of the BC repeals the FAA; and (2) that BC § 362(c)(3)(A) does not apply to property of the estate.

I. FACTUAL HISTORY

A. After Respondent's Business entered into a $35 million Credit Agreement with Petitioner, Respondent and Petitioner (the "Parties") voluntarily bound themselves to arbitration agreements under both the Credit Agreement and a personal Guaranty executed by Debtor.

Respondent Earl Thomas Petty (the "Debtor") quit the practice of law and founded craft brewery, Great Wide Open Brewing Company, Inc. (the "Business") in 2002. R. at 3. At the Business' inception, Debtor purchased small batch brewing equipment (the "Equipment") with his own personal funds in effort to expand the Business. With such Equipment at the ready, Debtor opened a taproom in Royal Rapids, Moot in 2005. Id. The Business saw great success between 2005 and 2010, and Debtor decided to pursue an aggressive growth strategy by opening up four additional taprooms and a state-of-the-art brewhouse in cities across Moot. R. at 4.

To fund its aggressive expansion, in September of 2011, the Business sought and entered into a $35 million revolving credit agreement (the "Credit Agreement") with its lender, Petitioner Wildflowers Community Bank (the "Creditor" or "Wildflowers"). Id. As security against the

Credit Agreement, the Business granted Petitioner a first priority lien on substantially all of its assets. Additionally, Debtor executed a personal Guaranty (the "Guaranty") unconditionally granting repayment of the Business' obligations and further granting Wildflowers a first priority lien on Debtor's Equipment. Id. The Credit Agreement and the Guaranty contained identical "Remedies" and "Arbitration" clauses which stipulated upon a default that, (1) "Obligor grants to Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action;" and (2) "any and all disputes, claims, or controversies of any kind between us [the Parties] arising out of or relating to the relationship between us [the Parties] will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by jury trial." Id.

B. The Business encountered liquidity problems in 2017 and upon Wildflowers breach of contract complaint filed with the American Arbitration ("AAA") Association, both the Business and Debtor filed for bankruptcy on the day of the initial arbitration conference.

In March 2017, after encountering liquidity issues, the Business was forced to close three of its five taprooms and failed to notify Wildflowers of the liquidity issues nor the taproom closings. R. at 5. In April 2018, the Business and the Debtor officially defaulted on their payment obligations under both the Credit Agreement and Guaranty. Shortly thereafter, Wildflowers sent a default letter to the Business and Debtor. Id. Concerned with this substantial non-conforming loan, on June 4, 2018, Wildflowers filed a demand for arbitration and a breach of contract complaint against Debtor with the AAA seeking $33.2 million in damages, the remaining balance owed under the Credit Agreement at the time. Id. The AAA scheduled an initial arbitration proceeding conference for July 12, 2018. Id.

On the day of the July 12th initial arbitration conference, two bankruptcy petitions were filed in the Bankruptcy Court for the District of Moot (the "Bankruptcy Court"): a chapter 7 petition for the Business (the "Business Bankruptcy") and an individual chapter 11 petition voluntarily initiated by Respondent (the "First Chapter 11"). R. at 5. The Business Bankruptcy proceeded through liquidation by the chapter 7 trustee to its completion. R. at 6. However, on August 27, 2018, the First Chapter 11 case was dismissed due to Debtor's failure to file various essential and basic bankruptcy documents, including Debtor's schedule of assets and liabilities. R. at 5.

Debtor filed a subsequent chapter 11 petition (the "Second Chapter 11") on January 11, 2019, just as the arbitration proceeding was about to recommence. Id. At the first day of the Second Chapter 11 hearing, Debtor informed the Bankruptcy Court that he had since negotiated with the landlord of original Royal Rapids taproom and that opened a new profitable new brewery as a sole proprietor in December of 2018, using the Equipment still owed to Wildflowers under the Guaranty as Wildflowers had a $2.1 million claim from the unpaid balance left over after the liquidation of the Business Bankruptcy. R. at 6. Debtor additionally informed the Bankruptcy Court that he negotiated settlements with several of his creditors (though none of them Wildflowers who held a first priority lien under the Guaranty), and Debtor came prepared with a proposed plan of reorganization to pay his creditors 40 cents on the dollar from his income over the next 5 years.

C. After the automatic stay terminated in Debtor's Second Chapter 11 for Debtor's failure to file a motion to extend the automatic stay pursuant to BC § 362(c)(3)(A), Wildflowers exercised its rights under the Parties' Guaranty and collected the Equipment.

Debtor, being a repeat filer under BC § 362(c)(3)(B), failed to file a motion to extend the automatic stay within 30-days of the Second Chapter 11. R. at 6. As a result, two days after

termination of the automatic stay, Wildflowers sent a repossession company to Full Moon to peacefully collect the Equipment pursuant to the Parties' Guaranty's Remedies clause. Id. One week later, Debtor filed a motion seeking $500,000 in damages from Wildflowers under BC §362(k) alleging Wildflowers willfully violated the automatic stay. Id. On March 5, 2019, Wildflowers filed a motion in response asserting that no automatic stay existed when it repossessed the Equipment in accordance with the Guaranty because Debtor was a repeat filer who failed to file the aforementioned automatic stay extension motion. R. at 7. Additionally, Creditor argued in its March 5, 2019 motion that in accordance with the Parties' valid and binding agreements to arbitrate, Debtor must be compelled to bring any claims Debtor has against Creditor in the arbitration proceeding presently stayed due to Debtor's bankruptcy filing. R. at 7. The Bankruptcy Court ruled in favor of Debtor on both issues R. at 7. On appeal, the Thirteenth Circuit Court of Appeals affirmed both of the Bankruptcy Court's rulings. Namely, (1) that BC § 362 and related provisions of the Code impliedly repealed the FAA; and (2) that BC § 362(c)(3)(A) does not apply to property of the estate. R. at 7

II. PROCEDURAL HISTORY

The Bankruptcy Court and ruled in favor of Debtor on both issues holding that (1) the Bankruptcy Court had the authority to decide the dispute between Debtor and Creditor notwithstanding a valid pre-petition arbitration agreement that the Parties entered into; and (2) BC § 362(C)(3)(A)'s reference to termination of the Code's automatic stay does not apply to termination of property of the estate. On appeal, the Thirteenth Circuit affirmed the Bankruptcy Court's decision on both issues.

STANDARD OF REVIEW

The questions presented in this case are based on statutory interpretation of the Bankruptcy Code, and consequently are simply issues of law. As such, this is a *de novo* standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

SUMMARY OF THE ARGUMENT

The matter before the Court today centers around two areas of federal law, the Bankruptcy Code and the Federal Arbitration Act ("FAA"). Both of which have valid policy concerns and important underlying functions. On one hand, the Bankruptcy Code seeks to relieve debtors of certain crippling financial obligations they are unable to pay while simultaneously ensuring creditors maximum recovery in an efficient manner. On the other hand, the FAA seeks to create an affordable and expeditious dispute resolution mechanism, while honoring the contractually bargained for agreements of sophisticated parties. The problem concerning these two statutes arises when bankruptcy courts feel it is up to their discretion to disregard the FAA and fail to enforce arbitration. Courts have regularly declined arbitration against the FAA's mandate and the clear instructions of this Court simply because they feel certain policies of the Bankruptcy Code, such as the automatic stay, somehow speak to Congress' intent to repeal the FAA. However, this could not be farther from the truth. This Court not only continuously instructs courts to enforce valid arbitration agreements according to their terms, but also, this Court regularly notes that when Congress wishes to repeal a prior statute, they will explicitly say so. Further, it is not up to the judiciary to create the law. Thus, this case demands the immediate reversal of the Thirteenth Circuits erroneous finding concerning the two issues addressed here today: (1) that the § 362 and related provisions of the BC repeals the FAA; and (2) that BC § 362(c)(3)(A) does not apply to property of the estate because neither of these propositions are correct.

Regarding the first issue, § 362 specifically does not repeal the FAA, and the Thirteenth Circuit erred in finding otherwise because nothing in the Bankruptcy Code nor legislative history speaks to Congress' intent to repeal the FAA, and this Court's binding *Epic* precedent, which spells out the test for repealing the FAA, was not even considered by the court, let alone satisfied. Other justifications for reversing the Thirteenth Circuit's holding include the fact that while the Automatic Stay is important, it is not so sacred that it cannot be overcome. Indeed, the Bankruptcy Code itself lists instances where the Automatic Stay may be lifted, terminated or outright precluded in some instances.

Regarding the second issue this case presents, the Thirteenth Circuit's holding is flawed for three reasons: (1) the court struggled to find an unambiguous plain meaning to Bankruptcy Code § 362(c)(3)(A) as the statute is clearly poorly drafted and there is no aspect of the statute that has a strong enough textual mandate to support the court's technical reading; (2) The legislative history of the statute shows a clear congressional intent to end the stay in its entirety after 30 days; (3) when applied in reality, the majority ready robs the statute of any practical ability to deter repeat filings whereas ending the stay in its entirety allows the statute to properly function.

The circuit court reads Bankruptcy Code § 362(c)(3)(A) to include an end to the stay as to the debtor and their property, but not property of the estate. The court reasons strains their way to a plain meaning reading on this section by relying on the canon of expressio unius to state that if Congress had wanted the termination to include property of the estate they would have included language to do so. This does not work for two reasons: Bankruptcy Code § 362(c)(3)(A), along with the rest of the BAPCPA, is poorly drafter so much so that the normal assumptions about congress that allow the canons to function no longer apply. For this reason,

the court should rule that the statute is ambiguous due to poor drafting. If the court decides conclude the act was sufficiently drafted the majority's reading still does not work as "with respect to the debtor" is not a strong enough textual mandate for their reading because with respect to is a broadening term that would include things related to the debtor. This group of related things does include the debtor's property, but the property of the estate is also very related to the debtor as well, yet, the majority finds a way to distinguish between the two without any language in the statute giving an indication the two were meant to be treated differently.

The context of the legislation supports ending the stay in its entirety for three reasons: legislative history, other congressional attempts to prevent abuse, and other parts of the statute. Bankruptcy Code § 362(c)(3)(A) was hardly an isolated statute, as congress had attempted to pass substantially similar language through the Bankruptcy Reform Act of 1998, but instead represents the culmination of a much longer history of attempting to prevent serial filings through a termination of the stay after thirty days. This extended history has made no mention of any modified stay like the circuit court decided to impose. Congress also has a long history of creating provisions to address perceived abuses in the bankruptcy system and this amendment is no different than the other times where congress solved bankruptcy abuses by removing aspects of bankruptcy from those that would abuse it. Bankruptcy Code § 362(c)(4)(A) shows the next step after Bankruptcy Code § 362(c)(3)(A) and as a result implies the furthest extreme on the serial filer punishment scale where Bankruptcy Code § 362(c)(3)(A) should be the middle and courts have ruled that ending the stay in its entirety creates a more appropriate middle point punishment.

When applied in the real world, the majority interpretation of Bankruptcy Code § 362(c)(3)(A) makes the statute practically meaningless. While there are some very limited

actions that the majority interpretation allows to continue, these actions are not ones that a creditor would likely ever desire to take as the property creditors are interested in is almost exclusively going to own the estate. In addition to this, the serial chapter 13 debtor, likely the very type congress was trying to deter from filing, is completely immune to Bankruptcy Code § 362(c)(3)(A) under the majority interpretation because chapter 13 leaves practically no property left to the debtor as opposed to the estate. When the stay is removed in its entirety, Bankruptcy Code § 362(c)(3)(A) is allowed to successfully deter the serial filer even in chapter 13. The circuit court did mention concerns that a removal of the stay like this in chapter 7 would be disastrous as the trustee is powerless to protect the estate from a race to the courthouse that will likely benefit one creditor to the detriment of the others. These worries are misplaced as a non-good faith debtor does not deserve a perfect administered estate and the race to the court house is not the code favoring a debtor but simply leaving them as they were before the debtor attempted to use the stay to disrupt them.

ARGUMENT

I. The Thirteenth Circuit Erred in Holding Bankruptcy Code § 362 and Related Provisions (the "Automatic Stay") Impliedly Repealed the Federal Arbitration Act ("FAA").

In 1924, Congress enacted the Federal Arbitration Act (the "FAA") with the purpose of creating a more expeditious and affordable dispute resolution mechanism outside of litigation, eliminating judicial interference, honoring the enforcement of sophisticated parties' agreements to arbitrate and quashing centuries of judicial hostility towards arbitration agreements by placing such agreements on the same level as other contracts. *See* 9 U.S.C. § 2; *see also Scherk v. Alberto–Culver Co*., 417 U.S. 506 (1974); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 Am. Bankr. Inst. L. Rev. 503, 511 (2009).

Though the purposes of the FAA were clear, historically, enforcement of arbitration agreements was met with hesitation and hostility. This was largely a result of English courts not wanting to give up their power to resolve disputes. H.R. REP. NO. 96, *supra* note 10 at 1-2, *see also Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991). To rectify this, the Supreme Court held that the FAA represents "a federal policy favoring arbitration," and thus, instructed courts to follow suit. *Moses H. Cone Mem. Hospital v. Mercury Construction Corp.* 460 U.S. 1, 24 (1983); *see also Southland Corporation v. Keating*, 465 U.S. 1, 10 (1984). Ever since, courts have been ordered by this Court to "rigorously enforce" arbitration agreements pursuant to the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Some post-FAA federal statutes have appeared so contrary to the FAA in terms of opposing overarching policies, however, that judges have declined to compel arbitration despite this Court's specific directive to the contrary. This is precisely the matter before the Court today. Both the Bankruptcy Court and the Thirteenth Circuit held that despite Petitioner and Respondent's valid arbitration agreement, the bankruptcy judge was better positioned to hear this dispute than the arbitrator. This decision is not only against Congress' intent in passing the FAA, but also this Court's binding precedent. As such, for the reasons outlined below, the Thirteenth Circuit's decision must be reversed.

A. The Thirteenth Circuit failed to follow Supreme Court precedent, and thus, committed reversible error.

In 2018, this Court's *Epic Sys. Corp. v. Lewis* holding made clear that only an "*irreconcilable conflict*" between the two federal statutes that was "*clear and manifest*" could justify a court's failure to enforce the contractually bargained for arbitration provisions of valid agreements. 138 S. Ct. 1612 (2018). Such irreconcilable conflict, this Court said, constitutes a "stout uphill climb" for the party seeking to avoid arbitration. *Id*. at 903.

Echoing the Thirteenth Circuit's dissenting opinion, given the fact that the majority failed to even utter the phrase "irreconcilable conflict" in its opinion, it cannot possibly be said that the court achieved this "uphill climb." It is clear from the majority's focus on pre-*Epic* case law that the court failed to analyze the particular facts of this case against the purposes of both the Bankruptcy Code and the FAA in an attempt to reconcile the very conflicts that pushed the court to find that the automatic stay repeals the FAA. This is because, truthfully, there is no irreconcilable conflict between the Bankruptcy Code and the FAA.

Further, the Thirteenth Circuit specifically shot down Petitioner's argument that Epic overruled McMahon, instead asserting *Epic* and *McMahon* must be read harmoniously. However, as stated above, the Thirteenth Circuit undoubtedly failed to read the two cases harmoniously when determining that an inherent conflict exists between the Bankruptcy Code and the FAA because, if so, the court would not have relied on pre-*Epic* case law to justify their erroneous conclusion nor would the court have failed to mention "irreconcilable conflict" the very name of the standard they are applying.

This Court in *Epic* stated that the NLRA does not "offer a conflicting command" to override the FAA and continued to elaborate by saying this was an important consideration when supporting the claim that Congress did not intend to override the FAA. *Id*. at 1620. The facts in the case at hand align with this court prior ruling. There is not a single provision in the Bankruptcy Code that one can point to that would offer a conflicting congressional command to override the FAA.

B. Congress' silence in the Bankruptcy Code regarding the FAA evidences its intent not to repeal the FAA.

In Epic, this Court reminded lower courts of the strong presumption against implicit repeals stating that Congress "will specifically address pre-existing law when it wishes to

suspend its normal operations in a later statute." 138 S. Ct. 1612, 1621, 1624 (2018). We know from other bodies of legislation that Congress is perfectly aware of how to repeal the FAA, and we can plainly see that they have not elected to do so in any type of bankruptcy proceeding. *See e.g.* Sarbanes Oxley Act (SOX) 18 U.S.C. §1514A(e)(2); 7 U.S. Code § 26(n)(2); H.R.1423 - Forced Arbitration Injustice Repeal Act; 18 USC 1514A(e)(2).

C. Policy-based arguments do not warrant the Bankruptcy Code's repeal of the FAA.

The court relied primarily on policy based arguments that lack merit under the law to justify their alleged "abundantly clear" inherent conflict determination. Such policy arguments include: (1) that the Guaranty executed by Petitioner and Respondent was only in anticipation of a two party dispute; (2) arbitration agreements generally do not bind non-parties, including creditors and other interested parties in bankruptcy proceedings; (3) the Automatic Stay is one of the most sacred and fundamental protections under the Code as it protects both debtors and creditors alike; and (4) compelling arbitration for Automatic Stay disputes makes debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the case, consequently, depriving creditors of the opportunity to monitor and oversee litigation that serves as a key component of both Respondent's reorganization and their potential recoveries. R. at 11-13. All four of these arguments lack merit, fail to correctly apply this Court's binding *Epic* and *McMahon* precedent, and conflict with the clear intent of Congress. These four erroneous reasons for the Thirteenth Circuit's finding of inherent conflict between the Code and the FAA are addressed below.

1. Contrary to all commonsense and without any support from the record, the Thirteenth Circuit concludes that the Guaranty executed by Petitioner and Respondent was only executed in anticipation of a two-party to support a finding of inherent conflict with the FAA.

Despite the clear instruction of this Court and of Congress to lower courts that they must enforce valid arbitration agreements, the Thirteenth Circuit justified its contrary decision to keep the case in the Bankruptcy Court based on the unsupported idea that Petitioner and Respondent only executed the Guaranty in anticipation of a two-party dispute. This line of reasoning is unsupported by the evidence, and quite frankly, all commonsense. Nothing in the record indicates the Guaranty was only executed in anticipation of a two-party dispute. To the contrary, this transaction involved two sophisticated parties, a financial institution and a former practicing attorney and business owner who entered into a substantial $35 million Credit Agreement together, which even required a personal Guaranty to secure repayment. For the Thirteenth Circuit to assert that these two sophisticated parties did not even consider the possibility of Respondent's "aggressive expansion plans" failing, and as a result, his need to file for bankruptcy as he had a $35 million Credit Agreement hanging over his head is absurd.

The court's unsupported assertion was merely an attempt to exert excessive control over this case and abuse their discretion by utilizing an unsupported policy-based rationale for finding an inherent conflict between the FAA and the Bankruptcy Code. Indeed, this Court has specified the limited role courts should play in choosing whether or not to compel arbitration stating the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 218 (1985). Scholars have additionally found it to be unequivocally clear that absent a contrary congressional command, "there is no basis for the substantial discretion placed in courts" because "if a valid arbitration clause exists, arbitration must be ordered." *See* Note, *Jurisdiction in Bankruptcy*

Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act, 117 HARV. L. REV. 2296, 2304 (2004).

For argument's sake, in the alternative, even if the Parties did enter into the Guaranty only ever anticipating two party disputes, nothing in the Bankruptcy Code precludes arbitration from their doing so. Again, to the contrary, the Bankruptcy Code allows contractual obligations in anticipation of two party disputes to interfere with the estate in other ways. For instance, under § 365(a) trustees are permitted to assume or reject executory contracts and in *NLRB v. Bildisco & Bildisco*, this Court held that such a contract, if not assumed, "is not an enforceable contract" of the estate and rejection of the contract is deemed a pre-petition breach of contract "subject to damages." 465 U.S. 513, 532 (1984). Since the Bankruptcy Code allows executory contracts executed in anticipation of two-party disputes to interfere with the estate, there should be nothing precluding arbitration in anticipation of only two-party disputes, regardless of its impact on the estate.

2. The Thirteenth Circuit incorrectly gave weight to the fact that arbitration agreements generally do not bind non-parties, such as other creditors in interest, to erroneously support a finding of inherent conflict.

Despite no support from the record, and the fact that Supreme Court precedent holds that the liberal policy favoring arbitration is so strong that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Hagerstown,* 277 B.R. at 197 (citing *Moses H. Cone,* 460 U.S. at 20; *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221 (1985)). As such, just because arbitration generally does not bind non-parties, that is not to say that an inherent conflict exists between the FAA and the Bankruptcy Code. This is even more so true when you consider the particular facts of this case, which the Thirteenth Circuit failed to do. Here, we are talking about

a creditor with a first priority lien on Equipment purchased by Debtor with his personal funds who has a $2.1 million priority claim. By allowing Wildflowers to exercise its contractual rights, that is one less creditor other creditors will need to share in Debtor's reorganization with, thus benefiting the other creditors. Further, as the Third Circuit majority attempted, we cannot allow our courts to make decisions based on what a Debtor alleges they will do with a damage award that they are not even entitled to. It is the courts job to interpret the law, not twist the language of the law in favor of a debtor abusing the bankruptcy system to get out of a binding arbitration agreement

3. The mere fact that the Automatic Stay is deemed sacred is not sufficient to warrant repeal of the FAA.

In its majority opinion, the Thirteenth Circuit largely relied on the idea that the Automatic Stay is "a substantive right of extraordinary magnitude" and "one of the most sacred and fundamental" bankruptcy protections available to conclude an inherent conflict exists between the FAA and the Code. R at. 20. Petitioner does not disagree with the importance of the Automatic Stay. Indeed, the Automatic Stay serves a dual purpose. On one hand, it gives debtors a breathing spell from creditor collection efforts, harassment, and foreclosure, permitting the debtor to attempt a liquidation or reorganization in hopes of a discharge relieving them of the debts that drove them to bankruptcy. And on the other hand, the Automatic Stay creates an orderly priority system that protects creditors from what is known as "the race to the courthouse" whereby creditors would otherwise rush to file their claims upon learning of the debtors' bankruptcy, and as a result other creditors would be negatively impacted in terms of their claim recovery. Again, Petitioner does not disagree with the vitally important purposes of the Automatic Stay and the Bankruptcy Code in general.

Where the Thirteenth Circuit erred, however, is by stating the sacred and fundamental nature of the Automatic Stay is premised on the fact that it "protects debtors and creditors alike," despite only analyzing arguments in favor of debtor protection. The Fourth Circuit in *In re White Mountain Mining Co. (In re White)* committed the same error by focusing only on those policies protecting bankruptcy proceedings while completely ignoring the strong congressional policies and precedent favoring arbitration. Courts have cautioned this type of analysis, holding that the creditor-protection provisions of the Automatic Stay can be made meaningful only by judges who are equally sensitive to the need for creditor protection as to the need for protecting the debtor's right to reorganize. *In Re Timbers of Inwood Forest Associates, Ltd.* (1987) at 373. The Thirteenth Circuit failed to express such an equal sensitivity to creditor protection needs just as *In re White* had.

Additionally, even Congress recognized in structuring the Bankruptcy Code that despite the importance of the Automatic Stay, some circumstances warrant lifting, terminating or outright barring the Automatic Stay. 11 U.S. C. § 362(b). For instance, Code § 362(d)(1) permits creditor relief from the Automatic Stay "for cause" including lack of adequate protection of an interest in property of such party in interest. Here, Petitioner squarely falls within the type of creditor Congress sought to protect when enacting this provision. Petitioner, a financial institution seeking to recover Equipment as collateral rightfully owed to it under a personal Guaranty executed by Respondent, which is notably currently being used by Respondent in his business affairs, is eligible to file a "for cause" motion for stay relief. That said, while the Automatic Stay is "sacred" as the Thirteenth Circuit states, nothing in the Bankruptcy Code nor legislative history reflects Congress' intent to allow the Automatic Stay's importance to trump other important policies.

D. Functional and Policy arguments for why Arbitration is a perfectly adequate forum in which to hear the issues at hand.

Aside from the various legal reasons why this Court must reverse the Thirteenth Circuit's decision in this case and find that no inherent conflict exists between the FAA and the Code, there are additionally numerous functional and policy-based reasons. For instance, dangers of not enforcing arbitration agreements discouragement of international business transactions. The Supreme Court considered this problem in *Scherk,* concluding that not enforcing arbitration agreements in the international context "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international agreements." *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 517 (1974), *quoted in* Neufeld, *supra* note 14, at 533.

Predictability that comes from arbitration of international business transactions turns to uncertainty and inconsistency when arbitration is precluded under the Code. See Lindsay Biesterfeld, Note, *Parties to International Commercial Arbitration Agreements Beware: Bankruptcy Trumps Supreme Court Precedent Favoring Arbitration of International Disputes*, 2006 J. Disp. Resol. 289. The Supreme Court has tried to remedy this in cases such as *Mitsubishi* declaring that international arbitration agreements would be enforced even when a different result would be reached in a domestic tribunal. *Id.* at 281. Yet, by creating such an arbitrary distinction between international or domestic cases, the question of whether the Automatic Stay repeals the FAA is essentially swept under the rug and saved for another day. Thus, frustrating the FAA's mandate and causing uncertainty among courts regarding what exactly it means to "rigorously enforce" arbitration agreements. See *In re United States Lines, Inc*., (faced with whether to compel foreign arbitration of the trustee's adversary proceeding, after deeming the proceeding as "core," the Second Circuit refused to compel arbitration fearing that compelling

arbitration would leave the estate unfruitful.) 197 F.3d at 638–41. Furthermore, such an international versus domestic arbitration distinction treats domestic parties less favorably than foreigners in their own jurisdictions. See Polina Kushelev, *An International Approach to* Breaking the Core of the Bankruptcy Code and FAA Conflict, Emory Bankruptcy Developments Journal, Vol 28, 383.

Commentators have also argued that the policy arguments for enforcing arbitration should apply equally in the domestic context as in the international context because it ultimately affects all business transactions the same. Accordingly, arbitration in domestic cases should also be freely granted so as to be on par with their international equivalents. *Id.* (citations omitted). The present case is a business transaction between a bank and a business owner. Petitioner should not be treated less favorably than other creditors simply because it is not a foreign bank. Allowing such uncertainty to occur and yield such varying and absurd results is surely against both the intent of Congress in enacting the FAA, and this Court's warning in Epic of "allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Epic.* 1624.

II. THE THIRTEENTH CIRCUIT ERRED BY INCORRECTLY FINDING THE *WITH RESPECT TO THE DEBTOR* LANGUAGE IN 11 U.S.C. § 362(c)(3)(A) DOES NOT INCLUDE PROPERTY OF THE STATE

Given the significant role that the Automatic Stay plays in protecting debtors from virtually all creditor attempts to collect or solicit payment in bankruptcy proceedings, it is no surprise that debtors remain eager to take full advantage of the Automatic Stay in any way the law permits them to. In line with this, history shows debtors have pursued repeated filings merely to access the stay, which has historically been a major problem in this country prior to Congress' enactment of § 362(c)(3)(A) of the Bankruptcy Abuse Prevention and Consumer

Protection Act of 2005 ("BAPCPA"). *See* Laura B. Bartell, *Staying the Serial Filer—Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 202 (2008). To combat such abuse of the bankruptcy system, the Automatic Stay terminates "*with respect to the debtor*" thirty days after the petition is filed if a debtor had a prior case dismissed within one year of filing the subsequent petition, unless the Automatic Stay is extended by the court upon motion of a party in interest within the 30-day Automatic Stay period. 11 U.S.C. § 362(c)(3)(A). The moving party is tasked with the requirement of rebutting the presumption against them under § 362(c)(3)(B) that their latter filing was not filed in good faith by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(B)-(C).

Since the provisions enactment, however, courts have struggled to interpret whether the provision's reference to "*with respect to the debtor*" applies to property of the estate when a party fails to file the aforementioned motion to extend the stay. Some courts have found the language does not include property of the estate, thus the 30-day termination is only applicable with respect to the debtor and the debtor's property. *See Holcomb v. Hardeman (In re Holcomb),* 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008). To the contrary, other courts have correctly held that the relevant language of the § 362(c)(3)(A) terminates the Automatic Stay in its entirety, including with respect to the debtor, the debtor's property and property of the estate. *See Reswick v. Reswick (In re Reswick),* 446 B.R. 366, (B.A.P. 9th Cir. 2011). Currently, courts are almost evenly divided on the issue with a slight majority favoring the approach that the serial filer provision does not apply to property of the estate. R. at 15. That said, for the below reasons this Court must reverse the Thirteenth Circuit's decision incorrectly finding that §362(c)(3)(A) because the statute is poorly drafted, and therefore cannot support a plain meaning interpretation like most of the majority courts use.

A. **The language "*with respect to the debtor*" in 11 U.S.C. § 362(c)(3)(A) is ambiguous in isolation and requires further context beyond the plain meaning rule to accurately interpret the provision.**

The Thirteenth Circuit struggled to apply a plain meaning rule to interpret the statute's "*with respect to the debtor*" language and ultimately erred. Interpreting "*with respect to the debtor*" does not warrant full use of canons of construction because the Bankruptcy Code is poorly drafted. In *King v. Burwel*, this Court dealt with poorly drafted legislation when examining the phrase, "*established by the state*" in 26 U.S.C. § 36(B). 576 U.S. 473 (2015). In *King,* this Court determined that when a statute is ambiguously drafted, canons of construction are likely not a useful tool to unveil the meaning of a statute. 576 U.S. 473, 486-493 (2015). The Court reinforced this idea in *Chickasaw Nation v. United States,* finding that the canon against surplusage, which requires courts to give meaning to each word in a statute, is not always applicable in circumstances where the language is "inadvertently inserted into the statute." 534 U.S. 84, 85 (2001).

The First Circuit expounded on the idea that canons are not always applicable in *Smith*, finding that cannons of construction are based on the assumption that Congress drafted the language of the statute with precision. *In re Smith*, 910 F.3d 576, 584 (1st Cir. 2018). Poor drafting removes the assumptions that allow a court to use canons to interpret statutes properly. *Id*. Academics and judges alike have written about the quality of draftsmanship in the BAPCPA, and their conclusion has been that the statute as a whole, with special mention given to 362(c)(3)(A), was poorly drafted. *See* Peter E. Meltzer, *Won't You Stay A Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code S 362(c)(3)(a),* 86 Am. Bankr. L.J. 407, 444 (2012) (showing that after conducting surveys of all seventeen of the times "*with*

respect to the debtor" was mentioned, aside from § 362(c)(3)(A), all mentions failed to provide any additional meaning to the sections they appear in) 86 Am. Bankr. L.J. 407, 431- 436 (2012).

Despite clear evidence that the statute at issue in this case was poorly drafted, the Thirteenth Circuit arrived at their conclusion based on their reliance on canons in their interpretation of the language in the statute; particularly, the canon of *expressio unius, exclusio alterius*. The canon of *expression unius* explains that when one or more things of a certain class are explicitly mentioned, anything else in that class is implicitly excluded. *Whitman v. Am.Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). A canon like *expressio unius*, that relies so heavily on proper drafting, should not apply to interpreting a statute that is improperly drafted. While no court has ruled on the "*with respect to the debtor*" language in § 362(c)(3)(a), it would be improper to apply the canon of *expressio unius* when interpreting this statute. Because the statute is ambiguous without the use of canons, there is not a strong enough textual mandate to warrant a plain meaning interpretation.

When it comes to interpreting statutory language, confusion around even one word is sufficient to preclude using the plain meaning rule. *See United States v. Reorganized CF & I Fabricators of Utah, Inc.* 518 U.S. 213, 224 (1996). In *BFP v. Resolution Tr. Corp.*, this Court considered whether a property's fair market value constituted "reasonably equivalent value" and decided that if Congress intended to depart from its long history of fraudulent transfer law, it required a stronger textual mandate than "reasonably equivalent value" to do so. 511 U.S. 531, 532 (1994). The Court has also strained to find plain meaning with a hyper-textualist application of plain meaning in *United States v. Ron Pair Enterprises, Inc.* where the majority of the court interpretation of plain meaning came from their interpretation of a single comma. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 250 (1989).

The Thirteenth Circuit strained to find a plain meaning interpretation because the textual mandate, much like that in *BFP*, is simply not strong enough. The Thirteenth Circuit's reads "*with respect to the debtor*" to include the debtor and their property while excluding the property of the estate. Miller, *Untangling the Web of S 362(c)(3)(a) & Its Legislative History*, Am. Bankr. Inst. J. 22, 22 (2020). This is a strained reading of the statute, as it alters the words, effectively adding "and the debtor's property" when the statute makes no mention of the debtor's property. *In re Goodrich*, 587 B.R. 829, 843 (Bankr. D. Vt.2018).

Similarly, "with respect to" is an ambiguously broadening term that includes things relating to the subject. *In re Smith*, 910 F.3d 576, 583-4 (1st Cir. 2018). This broadening effect can be interpreted as including the debtor's property; however, it can also be interpreted as including the estate's property. *Id*. Despite this, the Thirteenth Circuit decided to include the debtor's property without including the estate's property, although the statute itself does not provide a textual mandate to make this distinction. In contrast to § 362(c)(3)(A), the above section, § 362(a), clearly possesses the mandate to make these distinctions as it describes what actions are prevented by the stay including acts: "against the debtor", "against property of the debtor", and "against property of the estate". *Id.* If Congress had intended to make the distinction that the Thirteenth Circuit made in § 362(c)(3)(A), it would have used a stronger textual mandate than "*with respect to the debtor*" as it did in 11 U.S.C. 362(a). Consequently, this Court should find that the Thirteenth Circuit erred in their finding that § 362(c)(3)(A) does not include the property of the estate.

B. The legislative history of § 362(c)(3)(A) shows a clear Congressional intent to terminate the stay in its entirety after 30 days of a repeat filer's subsequent filing.

Congress intended to terminate the Automatic Stay in its entirety through its enactment of § 362(c)(3)(A) to rectify Bankruptcy Code abuse stemming from serial filers. At the outset,

House Report 109-31 states that the purpose of the BAPCPA is to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. REP. 109-31(I), 2, 2005 U.S.C.C.A.N. 88, 89. The history report also states early on that the heart of this reform was 707(b), which was intended to ensure max recovery for creditors. *Id*. The First Circuit in *In Re Smith* concluded that this House Report evidenced a complete termination of the Automatic Stay as Congress specified therein that their amendments to§ 362(c)(3)(A) were to "terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period." *In Re Smith,* 910 F.3d 576, 590 (1st Cir. 2018).

It is worth noting, that this was not the first time Congress had discussed changing the Automatic Stay in order to prevent serial filings from occurring. In attempting to pass the Bankruptcy Reform Act of 1998, both the House and the Senate considered language that is almost identical to that of the current 362(c)(3)(A). *See* Peter E. Meltzer, *Won't You Stay A Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code S 362(c)(3)(a),* 86 Am. Bankr. L.J. 407, 410-413 (2012). In both reviews of the language, Congress made it clear that the Automatic Stay was to terminate within 30 days of the second filing, rather than within one year. *Id*. None of these considerations of ending the Automatic Stay considered excluding estate property from that Automatic Stay termination under § 362(c)(3)(A). *Id*. Given the extensive legislative history, the enactment of the current 362(c)(3)(A) was the result of a prolonged effort to prevent repeat filings through termination of the Automatic Stay on the 30th day after the second filing.

Congressional intent here is in line with other amendments to the Bankruptcy Code that seek to punish abuse of the bankruptcy system. In *Milavetz*, this Court stated that, even before the enactment of the Bankruptcy Code, Congress had a history of trying to prevent bankruptcy abuses or any actions taken "in contemplation of bankruptcy" to manipulate bankruptcy protections. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 241, 130 S.Ct. 1324, 1335, 176 L.Ed.2d 79 (2010). In 1984, Congress amended § 109(g) in line with its prior attempts to curb serial filings by making serial filers ineligible to file bankruptcy petitions when they had a bankruptcy case dismissed within 180 days of their second filing. In 1990, Congress amended the Bankruptcy Code to correct a loophole missed when Congress passed the 1984 serial filing amendments. The loophole permitted serial filers to file chapter 13 in order to discharge debts related to drunk driving crimes. Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of S 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 202-3 (2008). 707(b) is at the heart of the BAPCPA and was created to make debtors more accountable by preventing them from going into chapter 7 to avoid paying creditors what they would otherwise be obligated to pay in chapter 13. H.R. REP. 109-31(I), 2, 2005 U.S.C.C.A.N. 88, 89. § 522(b)(1) prevents spouses from gaining too many exemptions by requiring them to choose between federal and state exemptions and in addition to this § 522(b)(3)(A) further prevents exemption-shopping by creating a domicile test to determine which state exemptions are applicable to each debtor. 11 U.S.C. 522(b)(1), 11 U.S.C. 522(b)(3)(a). With this backdrop, § 362(c)(3)(A) fits perfectly within congress's history of alterations to the code to prevent debtors from manipulating bankruptcy protections.

The other half of the BAPCPA's legislation to prevent repeat filing is § 362(c)(4)(A), which states that any individual who has filed for a third bankruptcy within the same year has 30

days to prove to the court that the filing was in good faith in order to get the stay to apply. *In re Reswick*, 446 B.R. 362, 372 (B.A.P. 9th Cir.2011). Combined with § 362 (c)(3)(a), the two create a system where each subsequent filing increases the difficulty of getting the automatic stay. With § 362 (c)(3) giving the debtor 30 days to preserve the stay and § 362 (c)(4) giving the debtor 30 days to obtain it. *Id* at 372-373. Unlike (c)(3)(A), (c)(4)(A) does not contain any language like "with respect to the debtor" and instead just states that the automatic stay does not go into effect. 11 U.S.C. 362(c)(3)(a). The Thirteenth Circuit took this difference in language to conclude that if Congress had intended to end the automatic stay in its entirety under § 362 (c)(3)(A) then they would not have used the phrase "with respect to the debtor". This argument is unpersuasive for two reasons: firstly, § 362 (c)(3)(A) was drafted before § 362 (c)(4)(A), and secondly, § 362 (c)(3)(A) applies to second-time filers and is a natural punishment to fit between the full year of the automatic stay on a first filing and having to earn the stay on a third filing.

The Thirteenth Circuit's reliance on the differences in drafting between the two sections is based on the idea that Congress had drafted each with the other in mind; however, that may not necessarily be true. In discussing the differences between the two sections, Bartell notes that Congress's supposed failure to use the language in § 362 (c)(4)(A) that clearly prevents the stay or place the phrase "with respect to the debtor" in § 362 (c)(4)(A) are not intentional differences between the two sections, but rather a result of the fact that Congress had finished drafting § 362 (c)(3)(A) before beginning § 362 (c)(4)(A). Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of S 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 221 (2008). Congress simply was unable to make § 362 (c)(3)(A) parallel to a statute that had yet to exist. Even without the "with respect to the debtor" language, courts have interpreted § 362 (c)(4)(A) to only apply to the serial filer in a joint bankruptcy filing as both it and § 362

(c)(3)(A) are concerned primarily with individuals. *In re Parker*, 336 B.R. 678, 680-681 (Bankr. S.D.N.Y.2006). In *Smith*, the court decided that protections for second time filers, as opposed to first or third, should be in the middle. *In re Smith*, 910 F.3d 576, 586 (1st Cir.2018). The court weighed the majority and minority interpretations of § 362 (c)(3)(A) and decided that having § 362 (c)(3)(A) eliminate the stay in its entirety after an opportunity to keep it was a more-sensible middle ground than having a mostly intact automatic stay as contemplated by the majority interpretation. *Id*.

C. By failing to include property of the estate in § 362(c)(3)(A)'s termination, the entire function of the provision loses its value.

In the 2005 House Report, Congress mentioned some large concerns that led to their decision to amend the Bankruptcy Code; two of which, while not commenting specifically on § 362 (c)(3)(A), present a clear picture of what Congress expected to address: economic concerns and the level of abuse present in the system. H.R. REP. 109-31(I), 3-5, 2005 U.S.C.C.A.N. 88, 90-91. In considering the economic consequences of bankruptcy filings, Congress noted that the amount of bankruptcies had grown significantly in the past seven years, growing from just over 1 million bankruptcy filings in 1998 and to roughly 1.6 million in 2004. *Id*.

Congress further noted that the amount of debt discharged by debtors during proceedings had grown large enough to represent a 400 dollar "tax" from creditors adjusting their prices to account for bankruptcy losses. *Id.* Congress also commented on how widespread the abuses really were in the bankruptcy system: "despite the view of opponents of bankruptcy reform that abuse in the system is not widespread and that most bankruptcy filings result from causes beyond debtors' control, such as family illness, job loss or disruption, or divorce, the Committee concluded that reforms were nevertheless necessary." *Id.* These two aspects make it clear that

Congress was concerned with a small amount of filers increasing costs for the average American with repeat filings. In addition to this, the presumption of bad faith in 11 U.S.C. 362(c)(3) shows that Congress believed the intervening factors that the opponents of the reform refer to would be something the debtor would be able—and would have—to prove in court.

Furthermore, Congress's attempt to pass the Bankruptcy Reform Act of 1998, wherein the House considered a National Bankruptcy Review Commission's report about the widespread use of repeat filings by Chapter 13 debtors to indefinitely delay creditors, shows the intent to curb abuse of bankruptcy filings. Meltzer, *Won't You Stay A Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code S 362(c)(3)(A)*, 86 Am. Bankr. L.J. 407, 411 (2012). While Congress intended the stay removal legislation to affect all of the chapters equally, the history of the recent attempts at bankruptcy reform identify, as a primary target, a relatively small group of Chapter 13 debtors who have disproportionally affected the costs that bankruptcy imposes on creditors.

In their analysis of § 362 (c)(3)(A), the bankruptcy court in *In re Williams* identified several areas where the statute would still be able to operate under the majority interpretation: "suits against the debtor can [still] commence or continue post-petition because section 362(a)(1) is no longer applicable; judgments may [still] be enforced against the debtor, in spite of section 362(a)(2); collection actions may [still] proceed against the debtor despite section 362(a)(6); and liens against the debtor's property may [still] be created, perfected and enforced regardless of section 362(a)(5)." *In re Williams*, 346 B.R. 361, 367 (Bankr. E.D. Pa.2006). These areas of operation described by the *Williams* court are more theoretical than practical; as the Ninth Circuit made clear in *In Re Reswick* when it stated that "very few creditors would seek to pursue only the debtor personally or only property of the debtor". *In re Reswick*, 446 B.R. 362, 368 (B.A.P.

9th Cir. 2011). In addition to this, there are no known cases where a jurisdiction that explicitly adopted the majority approach actually denied a motion to extend the stay despite the high burden to prove good faith. Courts have allowed such motions not because debtors have been able to meet that burden but rather because creditors have not opposed the motions. Meltzer, *Won't You Stay A Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code S 362(c)(3)(A)*, 86 Am. Bankr. L.J. 407, 443 (2012). Furthermore, the group identified as the primary target of the legislation, the serial Chapter 13 debtor, is unaffected by the majority interpretation of the statute as a debtor's Chapter 13 estate contains substantially all of their property. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of S 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 226 (2008). In sum, the majority interpretation renders § 362 (c)(3)(A) mostly pointless as the property that creditors are interested in is shielded, regardless of whether the filing was in good faith, and whatever few opportunities to pursue the debtor that remain are inapplicable to the type of serial filings Congress most wanted to prevent.

Under the minority interpretation, the practical concerns that occur under the Thirteenth Circuit's reading are eliminated as the automatic stay is removed in its entirety. However, the Thirteenth Circuit identified a concern that the effects of the minority interpretation would be disastrous in a Chapter 7 bankruptcy as the trustee would not be able to perform their job and a single creditor would benefit from a relief from the stay to the detriment of the others. The court in *In re Thu Thi Dao* makes the argument that a chapter 7 trustee deprived of their main tool, the automatic stay, would not be able to administer the debtors property as the estate would be emptied by creditors before they would be able to do so. *In re Thu Thi Dao*, 616 B.R. 103, 109-116 (Bankr. E.D.Cal. 2020). The court in *Dao* presents *In re Rinard* and that court's analysis as

illustrative of what could happen under the minority interpretation in chapter 7. *Id* at 109. In *Rinard*, the court mentions two policy concerns that informed their decision: "a fresh start for an honest debtor and equal treatment among classes of creditors." *Id* at 115.

While the argument presented by the court in *Dao* is ostensibly persuasive, it ultimately misses the point for two reasons: the debtors subject to § 362(c)(3)(A) are not honest, and the race to the courthouse contemplated. The presumption inherent in the serial filing provision is that the debtor filed the second bankruptcy "not in good faith". Absent an approved motion to extend the stay, that presumption of bad faith remains. 11 U.S.C. 362(c)(3)(C). As a result of this, it would make little sense to consider the repeat filer an honest debtor deserving of a fresh start. Secondly while it is true that a race to the courthouse may happen after the stay has ended due to § 362(c)(3)(A), this litigation and its results are not favoritism. Ending a stay only does one thing, allows litigation to resume and this resumption simply means that the creditors, as to their litigation, are put back in the position they were before the stay was imposed. This means that the creditor who was in the best position before the stay returns there rather than being placed there by the court. In sum, a repeat chapter 7 filing under the minority interpretation would be a very difficult one for a chapter 7 trustee to administer and one creditor may come out of the litigation more well off than the others; however, these results do not contravene bankruptcy policy, as there is no honest debtor involved and the winner of the bankruptcy litigation was simply put back in the place they would have been had the serial filer not attempted to delay them with the second filing.

CONCLUSION

Creditors are often seen as villains in the bankruptcy process, however, the Bankruptcy Code protects them because their ability to survive losses from honest debtors is important for the bankruptcy process to work. In this case the court will find no honest debtors, but instead a debtor attempting to use the bankruptcy process to escape its obligations. For the reasons stated, this Court should reverse the decision of the Thirteenth Circuit on both issues.