**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*

## RESPONDENT'S BRIEF IN OPPOSITION

TEAM R. 34
*Counsel for Respondent*

## QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362 impliedly repealed the Federal Arbitration Act, 9 U.S.C. 1 §§ 1 *et seq.*, such that a bankruptcy court may deny enforcement of an otherwise valid arbitration clause when the likely result of the arbitration would diminish the debtor's ability to reorganize?

II. Whether the termination of the automatic stay under 11 U.S.C. § 362(c)(3)(A) applies to the property of a debtor's bankruptcy estate, which would deem a creditor's repossession of that property a violation of the automatic stay, when the debtor has not requested an extension according to 11 U.S.C. § 362(c)(3)(B)?

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## OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit held for the debtor, Earl Thomas Petty, on both issues. R. at 3. The courts found that: (1) allowing private arbitration of the otherwise enforceable arbitration clause would conflict with the automatic stay and thus correctly denied the Creditor's demand for arbitration, Wildflowers Community Bank filed by the Creditor, Wildflowers Community Bank; (2) the Creditor violated the automatic stay under § 362(c)(3)(A) since the stay only terminated with respect to the debtor, and not the property of the estate. *Id*. The Thirteenth Circuit Court of Appeals affirmed on both issues. *Id*. at 19. This Court then granted the Creditor's petition for writ of certiorari. *Id*. at 1.

## STATEMENT OF JURISDICTION

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

## STATUTES INVOLVED

The relevant federal laws controlling this case are 11 U.S.C. §§ 105(a), 362 *et seq.*, 541(a), the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. The text of these provisions are attached in their entirety in Appendix A.

## STATEMENT OF THE CASE

### I. Facts

After ending his law practice in 2002 to continue brewing beer, Earl Thomas Petty ("Petty"), the Debtor and Respondent, founded Great Wide Open Brewing Company, Inc. ("Great Wide Open" and "GWO"), a craft brewery that sold beer. R. at 3. Due to GWO's success in its first three years, the company opened a 9,000 square foot taproom in the City of Royal Rapids, Moot. *Id.* Using his personal funds, Petty purchased a small batch brewing equipment for the taproom [hereinafter Equipment] of which he has maintained ownership. *Id.* Great Wide Open became a household name amongst consumers and the State of Moot's largest craft breweries for its quality production of pilsner, ale, and mead. R. at 3–4. This decade of prosperity, along with Petty's knowledge as a former practicing attorney, encouraged him to engage in a growth strategy to push the business's success to the next level. R. at 4.

Great Wide Open took its first step towards advancing the business in September 2011, when they asked its longtime lender, Wildflowers Community Bank ("Wildflowers"), to execute a $35 million revolving credit agreement (the "Credit Agreement"). R. at 4. Given the decade long prosperity of GWO, the company promised Wildflowers a first priority lien on all of its assets. *Id.* The confidence Petty held within GWO allowed him to guarantee Wildflowers that he would unconditionally repay GWO's obligations through a personal guaranty (the "Guaranty"), allowing Wildflowers a first priority lien on the Equipment. *Id.*

The Credit Agreement and the Guaranty both mirrored "Remedies" clauses that upon default of either granted Wildflowers "the right to enter any premises where collateral may be located to repossess collateral without the need for any prior judicial action." R. at 4. The Credit Agreement and the Guaranty both mirrored "Arbitration" clauses which stated that "any and all disputes, claims, or controversies of any kind between [the parties to each agreement] will be

resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in court or by a jury trial." *Id.* The next step taken by GWO was utilizing the funds received to advance the business. R. at 4. In 2012, the funds received led to the introduction of four new taprooms in the State of Moot's college towns. *Id.* Great Wide Open brewed beer at all five taprooms, and pushed its brewing capacity when it opened a brewhouse that could produce 250,000 barrels of beer annually. *Id.*

For five years, the business strategy to advance GWO went as planned and the business thrived. R. at 5. In 2007, the "craft beer craze" caused the brewing industry in the State of Moot to take off, which diminished GWO's competitive edge; Great Wide Open's liquidity problems quickly began and they closed three taprooms by March 2018. *Id.* The communication lines between GWO and Wildflowers were not strong enough to withstand the company's rapid changes. *Id.* By April 2018, GWO and Petty defaulted on their obligations. *Id.* The record does not reflect either GWO or Petty ever defaulting on a payment before this period of decline. *Id.* However, Wildflowers sternly wrote default letters to GWO and Petty because it had not received notice of GWO's efforts to survive. R. at 5. Soon after, Wildflowers sent one of its loan officers to the Royal Rapids taproom. *Id.* The officer learned that the taproom's landlord terminated the real property lease and placed a sign on the door advising vendors and consumers that GWO was no longer serving consumers at that location. *Id.*

On June 4, 2018, Wildflowers filed a demand for arbitration and a breach of contract complaint against Petty, which resulted in the scheduling of an initial conference for July 12, 2018, to prepare for the arbitration proceeding. R. at 5. Wildflowers sought $33.2 million in damages owed under the Credit Agreement between GWO and Wildflowers. *Id.* On July 11, 2018, GWO terminated its employees and stopped all business. *Id.*

## II. Procedural History

On July 12, 2018, GWO commenced a chapter 7 filing in the Bankruptcy Court for the District of Moot. That same day, in the same court, Petty filed an individual chapter 11 petition (the "Initial Bankruptcy Case"). R. at 5. The chapter 7 trustee liquidated the assets of GWO, allowing Wildflowers to receive the majority of its damages, leaving only $2.1 million left to recover for the first priority lien. R. at 6 n.3. Petty's Initial Bankruptcy Case was dismissed by the Bankruptcy Court on August 27, 2018, due to Petty's failure to file certain documents, including schedules of assets and liabilities. *Id.* Just as the arbitration proceeding was about to recommence, Petty filed his second chapter 11 bankruptcy case (the "Second Bankruptcy Case") on January 11, 2019, but this time with new counsel. R. at 5–6. Along with his Second Bankruptcy Case, Petty filed a chapter 11 Plan of Reorganization proposing to pay his creditors, including Wildflowers, forty cents on the dollar, from his income, over five years. R. at 6.

When Petty did not file a motion to extend the automatic stay under § 362(c)(3)(B) in the Second Bankruptcy Case, Wildflowers unlawfully repossessed the Equipment on February 12, 2019, shutting down the operations of Full Moon Fever Brewing by February 17, 2019. R. at 6 & n.5. This "destroyed the goodwill" of Petty's new business which was established to repay GWO's financial obligations. R. at 6. On February 19, 2019, "Petty filed a motion in the Second Bankruptcy Case alleging that Wildflowers violated the automatic stay and [sought] $500,000 in damages under section 362(k)." R. at 7. Wildflowers' response to Petty's motion asserted that "no automatic stay existed with respect to the property of the estate, the Equipment, pursuant to section 362(c)(3)(A)," and moved to enforce the arbitration Guaranty. *Id.*

The Bankruptcy Court ruled in Petty's favor, denying Wildflowers' demand for arbitration, holding that enforcing the arbitration agreement would conflict with the Bankruptcy Code, especially the provisions of the automatic stay. R. at 7. Further, the Bankruptcy Court awarded

compensatory damages of $200,000 to Petty. *Id.* Wildflowers appealed the decision to the Thirteenth Circuit to no avail. *Id.*

## STANDARD OF REVIEW

The issues addressed on appeal involve questions about the Bankruptcy Code's purpose and application, both questions of law, and must be reviewed *de novo*. *See Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). "Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter." *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

## SUMMARY OF THE ARGUMENT

First, the Thirteenth Circuit properly held that 11 U.S.C. § 362 inherently conflicts with the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*. The majority view's *McMahon* test grants a preclusive effect to federal laws from the FAA, if either the (1) text of the statute, (2) legislative history behind the statute, or (3) policy rationales support the intent to preclude the FAA. The Thirteenth Circuit correctly applied this standard to support its conclusion because *McMahon*'s holding remains in good standing. Recently, the Court in *Epic* expressed concern at using legislative history and policy to grant laws a preclusive effect over the FAA, but did not repeal the *McMahon* test. Rather, the Court only tightened its requirements for precluding federal laws from the FAA. Therefore, Petty argues that the Court should apply the *McMahon* test to preclude the Bankruptcy Code from the FAA, because the courts unanimously apply *McMahon* as the more appropriate standard instead of *Epic*'s more narrow view.

Applying the *McMahon* test, Congress implies that § 362 has a preclusive effect from the FAA, because the bankruptcy courts have original jurisdiction over all bankruptcy matters. First, the Code's text is more specific than the FAA, reflecting Congress's attempt to give the Code a

preclusive effect. Second, the legislative history suggests Congress intended for the automatic stay to have a preclusive effect. Third, § 362 inherently conflicts with the FAA due to its policy concerns: the collective nature of bankruptcy proceedings is at odds with the two-party dispute of arbitration and enforcing the arbitration clause would diminish Petty's ability to reimburse other creditors. Therefore, the Thirteenth Circuit sufficiently applied the *McMahon* test requirements.

Second, Petty contends that the Thirteenth Circuit properly held the automatic stay remains in effect with respect to the property of the estate, absent an extension according to §§ 362(c)(3)(A) and 362(c)(3)(B). To properly analyze whether § 362(c)(3)(A) applies to the property of the estate, Petty utilizes the canons of statutory interpretation. The plain meaning of § 362(c)(3)(A) makes any inclusion of the property of the estate into the text, "with respect to the debtor," improper. The Bankruptcy Code clearly articulates the automatic stay's provisions and the various circumstances under which they terminate for repeat filers. Bolstering his argument, Petty demonstrates using clear and convincing evidence that he filed his Second Bankruptcy Case in good faith. Additionally, Petty highlights that the plain reading of the statute shows the thirty-day period of § 362(c)(3)(B) to be procedural, and less relevant to the extension of the stay when the debtor has proven his good faith filing beyond the preponderance of the evidence. Therefore, the Thirteenth Circuit appropriately extended the automatic stay with respect to the property of the estate.

However, if the Court did not uphold Petty's plain reading analysis, he implores the Court to consider the Bankruptcy Code's policy. Petty concedes that he did not comply with § 362(c)(3)(B), which would have allowed for him to articulate why the extension of the entire stay should have been granted in his Second Bankruptcy Case. Regardless, the Bankruptcy Court would have verified that the Equipment's protection under the automatic stay speaks to the very congressional intent of the Code to protect the debtor and its creditors under § 362(c)(3)(A).

Further, Petty closes his analysis of §§ 362(c)(3)(A) and 362(c)(3)(B) beseeching the court to protect the partial termination provisions afforded by the automatic stay to repeat filers. The automatic stay aims to help debtors, like Petty, who are not abusers of the system, but victims of the system's time-sensitive requirements.

## ARGUMENT

### I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT 11 U.S.C. § 362 IMPLIEDLY REPEALED THE FEDERAL ARBITRATION ACT

The issue before the Court is whether the Bankruptcy Code's automatic stay (11 U.S.C. § 362 *et seq.*) impliedly repealed the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) ("FAA"). And in turn, whether that the bankruptcy court had discretion to decline to enforce the arbitration clause in the Guaranty. R. at 3. The goal of the bankruptcy code is to "centralize the resolution of pure bankruptcy issues, to protect creditors and debtors from piecemeal litigation, and to emphasize the undisputed power of a bankruptcy court to enforce its orders." *Henry v. Educ. Fin. Servs. (In re Henry)*, 944 F.3d 587, 591 (5th Cir. 2019) (citing *Matter of Nat'l Gypsum*, 118 F.3d 1056, 1069 (5th Cir. 1997)). However, the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Petty contends that the Bankruptcy Code impliedly repealed the FAA.

While the FAA "establishes a federal policy favoring arbitration," any statutory directive may override the FAA's mandate by a contrary congressional command. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232–233 (2013) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("[L]ater enacted statute[s]...can sometimes operate to amend or even repeal an earlier statutory provision," though "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to

repeal [is] clear and manifest.'"). A party suggesting that two statutes conflict to such a degree that one displaces the other bears the 'heavy burden' of showing "a clearly expressed congressional intention" that one statute displaces the other. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Given this rule, Petty has the burden of proving "that Congress intended to preclude a waiver of judicial remedies [enforcement of arbitration agreements] for the particular claim at issue." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987).

The *McMahon* court held that the intent to preclude the enforcement of an arbitration agreement must be *"*clear and manifest*." Epic*, 138 S. Ct. at 1632. In the absence of express provisions, the Court concluded that "Congress has instructed that arbitration agreements like those before [the Court] must be enforced as written," thereby criticizing the *McMahon* dissent for "retreat[ing] to policy arguments." *Id.* Ultimately, the Court disfavors repeals of conflicting statutes by implication and often holds that "Congress will specifically address" pre-existing law when it suspends its normal operations concerning a later statute. *Id*. at 1613.

The Court uses a three-prong test ("the *McMahon* test") to determine Congress' intent to override another federal law and address its strong presumption against repealing conflicting statutes by implication. *See McMahon*, 482 U.S. at 227. *McMahon* clearly articulates the order in which to examine the statutes under each prong: (1) the textual prong, examining the text of the statutes; (2) the legislative history prong, looking to the legislative history supporting the statutes; and (3) the inherent conflicts prong, determining whether "an inherent conflict between arbitration and the underlying purposes [of the statute]" exists. 482 U.S. at 227 (citing *Dean Witter Reynolds Inc,* 470 U.S. at 217) ("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."). The result

of the *McMahon* test has led the courts of appeals to hold that neither the text nor the Bankruptcy Code's legislative history reflects a congressional intent to preclude arbitration in the bankruptcy context. *See, e.g.*, *EDP Inv. Co., LLC v. Rund (In re EPD Inv. Co.)*, 821 F.3d 1146, 1151–52 (9th Cir. 2016); *Allegaert v. Perot*, 548 F.2d 432, 438 (2nd Cir. 1977); *Moses v. CashCall, Inc.*, 781 F.3d 63, 71, 72, 73 (4th Cir. 2015); *Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1058 (5th Cir. 1997); *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1020 (9th Cir. 2012). These courts rely primarily on the inherent conflicts prong to give the Bankruptcy code a preclusive effect over the FAA. *Id*.

However, these courts fail to consider that the bankruptcy courts have original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." John R. Hardison, *Express Preclusion of the Federal Arbitration Act for Al Bankruptcy-Related Matters*, 93 ST. JOHN L. REV. 627, 659 (2019) (quoting 28 U.S.C. § 1334(b) (2018)). Moreover, the brief, but relevant, legislative history behind the automatic stay suggests that Congress intended to give the Bankruptcy Code a preclusive effect over the FAA. *Id*. Therefore, the Court should rule in favor of Petty after conducting a thorough analysis of the facts in this case under the *McMahon* test, which remains good standing.

### A. Petty's argument that the automatic stay impliedly repealed the Federal Arbitration Act is evident under the *McMahon* test which remains the controlling standard.

#### *i. The Court in Epic did not repeal the McMahon test.*

Petty asks the Court to apply the *McMahon* test because it remains the controlling standard used by the courts. Contrarily, Wildflowers asks this Court to apply the *Epic* test, even though it did not repeal the *McMahon* test. *See Epic*, 138 S. Ct. at 1612. The Supreme Court "does not normally overturn, or…dramatically limit, earlier authority 'sub silentio.'" *Shalala v. Ill. Council on Long Term Care Inc.*, 529 U.S. 1, 18 (2000). Decisions by the Court remain binding until

overturned, "regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–253 (1998). Therefore, it is the "Court's prerogative alone to overrule one of its prior precedents." *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). Furthermore, as recently recognized by two sister courts of appeals, *Epic* did not overrule *McMahon*. *See Belton v. GE Cap. Retail Bank (In re Belton)*, 961 F.3d 612, 616–17 (2d Cir. 2020) ("*Epic* [] never stated an intention to overrule *McMahon* or render any prong of its tripartite test a dead letter."); *Henry*, 944 F.3d at 591–92.

In *Henry*, Wells Fargo moved to compel arbitration and argued that *Epic* overrules *McMahon* because the former "expressly rejected the use of legislative history." 944 F.3d at 592. Petty asks this Court to adhere to its rationale set forth by the *McMahon* test because *Epic* did not discontinue its validity. See *Belton*, 961 F.3d at 616–17; *Id*. *Henry* reasoned that "[w]hile *Epic* [] says that 'legislative history is not the law; the statement clarifies that the legislative history upon which the dissent relies does not trump the "[l]inguistic and statutory context" identified by the majority. *Id.* That is not the same as saying that legislative history can never be relevant when interpreting a statute." *Id*. The court in *Henry* relied on the third inherent conflicts prong of the *McMahon* test and determined that the Bankruptcy Code's purpose included centralizing the resolution of pure bankruptcy issues, protecting creditors and reorganizing debtors from piecemeal litigation, and protecting a bankruptcy court's undisputed power to enforce its orders. *Id*. (citing *National Gypsum*, 118 F.3d at 1069). The court insisted that statutory-purpose analysis remained a valid and useful tool for determining whether a given statute displaced the FAA. *Id.*

Under this principle, the court in *Belton*, GE Capital Bank argued that *Epic* required "a text-first approach that cannot be satisfied by reference only to statutory purpose." *Belton*, 961

F.3d at 615. However, the court disagreed. *Id.* It ruled that *Epic*'s impact on *McMahon* clarified 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 from there." *Id.* at 616. That is, where there is no statutory directive or supporting legislative history to repeal another federal law impliedly, the purpose of the law suggests an inherent and irreconcilable conflict. *Id.* The court will resolve the dispute in favor of the text or context surrounding it. *Id.*

The court in *Belton* rejected the notion that a repudiation of the use of legislative history in *Epic* silently repealed *McMahon's* irreconcilable conflicts test based on the Court's ruling in *Bosse v. Oklahoma*, 137 S. Ct. 1, 3 (2016). In *Bosse*, the Court unanimously rejected a 'sub silentio' repeal argument in a criminal context. *Id.* at 5. It held that it was explicitly up to the Court, not lower courts, to overturn precedent. *Id.* In his concurrence, Justice Thomas held that because the Court did not "expressly" mention that it was overturning precedent, it would not presume that a subsequent ruling did so. *Id.* (Thomas, J., concurring).

Here, as correctly held by the Thirteenth Circuit, *Epic* never directly stated an intention to overrule *McMahon*. Wildflowers asks the Court to conclude that, without expressly mentioning any contention, *Epic* overruled existing precedent exempting core matters under the bankruptcy code. The result would be unconscionable. Moreover, it would significantly compromise the ability to interpret Supreme Court rulings going forward.

Further, the dissent focuses on the fact that the majority below did not say the word "irreconcilable." R. at 20. However, simply because the majority did not use the term does not change the fact that the Majority correctly applied the law, concluding that arbitration of Petty and Wildflowers' contract would irreconcilably conflict with the Bankruptcy Code. The inherent conflicts prong applied by the Majority led them to conclude that the FAA and Bankruptcy code's

purposes inherently conflict. R. at 11. Therefore, the bankruptcy court and the Thirteenth Circuit correctly applied the inherent conflicts prong because the Court has not, on its own accord, indicated that it no longer applies.

#### *ii. Courts unanimously apply the McMahon three-prong test before, and after, the Epic decision.*

Decisions of other circuits confirm that the *McMahon* test, and by extension the inherent conflicts prong, applied by the bankruptcy court in this case, remains viable. All courts of appeals have relied on the inherent conflicts prong of the *McMahon* test. *See e.g., In re EPD Inv. Co.*, 821 F.3d at 1151–52; *Allegaert*, 548 F.2d at 438; *CashCall*, 781 F.3d at, 71, 72, 73; *Nat'l Gypsum Co.*, 118 F.3d at 1058. The Fifth and Second Circuits used the inherent conflicts prong after *Epic*. *See e.g.*, *In re Belton*, 961 F.3d at 614 (denying arbitration in a chapter 7 case where debtors filed adversary proceedings against creditors for violation of discharge order); *Henry*, 944 F.3d at 591 (same result in chapter 13). In the Third Circuit, Judge Alito noted that under a "long-standing exception to the general rule" requiring enforcement of an arbitration award, the "automatic stay provision of the Bankruptcy Code promotes a public policy sufficient to preclude enforcement of an award that violates its terms or interferes with its purposes." Hardison, su*pra* at 650 (citing *Acands, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 258–59 (3d Cir. 2006)).

Here, by restricting the use of legislative history, Wildflowers and the Dissent attempt to change the application of the law and engage in judicial activism. The court in *Epic* did not overrule the inherent conflicts standard. Instead, it tightened its ruling as interpreted by numerous circuits. Therefore, the Thirteenth Circuit correctly ruled that the bankruptcy court had the discretion to deny private arbitration, ruling in line with the vast majority of other courts.

### B. Jurisdictional grant to the bankruptcy courts operates as an express exemption from the FAA.

Congress expressly indicated that § 362 has a preclusive effect on the FAA in its grant of original jurisdiction over all bankruptcy matters to bankruptcy courts. Article I of the United States Constitution grants Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Courts interpret that power to "include[] the power to discharge the debtor from his contracts and legal liabilities." More importantly, the "grant to Congress involves the power to impair the obligation of contracts." *Ry. Lab. Execs. Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (quoting *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902)). Although the jurisdictional provisions of securities laws were not at issue, the Court suggested that a statutory grant of jurisdiction by itself is insufficient to override the FAA and preclude arbitration. *McMahon*, 482 U.S. at 227; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513–14 (1974); *Rodriguez de Quijas*, 490 U.S. 477, 482 (1989); Hardison, su*pra* at 642.

Also, "generalities" in an earlier federal statute, like the FAA, "should not lightly be construed to frustrate a specific policy embodied in a later federal statute," such as § 362. *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (quoting *Massachusetts v. United States*, 333 U.S. 611, 635 (1948) (Jackson, J., dissenting)). The more specific and comprehensive the provisions of the statute, the more it reflects Congress's accommodation of the policy objections to "enforce liens," and the more it "represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield too many different sorts of interests." *Id.* at 532.

In *McMahon*, the Court held that the Exchange Act of 1934 did not override the FAA, since the act provides that district courts "shall have exclusive jurisdiction of violations of this title…and of all suits in equity and actions at law brought to enforce any liability or duty created by this title." 482 U.S. at227. In *Scherk*, the Court distinguished the Securities Act from the Exchange Act,

determining that the Securities Act provides an express private cause of action while the Exchange Act only implies the right. 417 U.S. at 513–14. The Court pointed to the exclusive jurisdiction provision in the Exchange Act to support its holding that the Exchange Act did not supersede the FAA. *Id.*

The Court further distinguished the Exchange Act from the Securities Acts in *Rodriguez,* reasoning that the "only conceivable distinction" was that the Exchange Act provided exclusive federal jurisdiction while the Securities Act did not. *Id.* The Court highlighted that the Securities Act's anti-waiver provision was "in every respect the same as that" in the Exchange Act found not to conflict with the FAA in *McMahon*. *Rodriguez,* 490 U.S. at 482. The Court suggested that the Securities Act's grant of concurrent jurisdiction reflected a congressional decision to give plaintiffs a choice over the forum and enforcing arbitration agreements, as a form of "forum-selection clause." Hardison, su*pra* at 641.

Here, it should follow that the jurisdictional provisions of the bankruptcy code operate as an express preclusion from the requirements under the FAA. As determined in *McMahon, Scherk,* and *Rodriguez,* Congress's grant of jurisdiction in the Exchange Act is a distinguishable characteristic that supports precluding the act from the FAA. Likewise, the Court should view the Bankruptcy Code's jurisdictional grant as an express preclusion from the FAA. Interpreting the clause to the effect would more concretely establish the power of bankruptcy court when confronted with motions to compel arbitration, as the record shows here. As the Court determined in *Romani* regarding the tax code, the subsequent passage of the Bankruptcy code, combined with its specificity and breadth, suggests that the Code requires similar preclusive treatment. Furthermore, the lower courts correctly denied Wildflowers' demand for arbitration, because the

bankruptcy code's language is more specific, reflecting Congress's attempt to give the bankruptcy code a preclusive effect over the FAA.

**C. The legislative history behind the automatic stay impliedly repealed the FAA.**

The legislative history behind § 362, although sparse, suggests Congress intended for the automatic stay to have a preclusive effect over the FAA. The House Report for the Bankruptcy Reform Act of 1978 states that the automatic stay under § 362(a) "is broad [and] all proceedings are stayed, *including arbitration*, license revocation, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals." H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97, at 340 (1977) (emphasis added); *see also* S. REP. NO. 95–989, at 50 (1978) ("The scope of this paragraph is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals."). Further, Congress acknowledges that

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. REP. NO. 95-595, at 340–41.

Most notably, courts have concluded that the automatic stay under 11 U.S.C. § 362(a) applies to arbitration, even though there is no express reference to arbitration in the statute. Section 362(a)'s legislative history makes clear that the broad language stays "the issuance or employment of process, of a judicial, administrative, or other action or proceeding." Hardison, su*pra* at 645 (citing 11 U.S.C. § 362(a)(1) (2018).) While references to the old Bankruptcy code's legislative history is persuasive authority in this matter, Congress suggests that the stay under § 362 deserves a preclusive effect from the FAA. Congress intended the FAA "to place an arbitration agreement

'upon the same footing as other contracts.'" *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing H.R. REP. NO. 95–595, at 43–48 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6004–09); Hardison, supra at 645. "[T]he Bankruptcy Code of 1978 and its jurisdictional provisions title 28, were intended by Congress 'to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (1984).

**D. Arbitration for section 362 claims inherently conflict with the policy rationales supporting the Bankruptcy Code**

"[B]ankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution." *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (1999) (internal citations omitted). Therefore, courts reverse bankruptcy decisions refusing to compel arbitration of core bankruptcy matters and grant motions to arbitrate for core claims because arbitration would not interfere with or affect the estate's distribution. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 109–10 (2d Cir. 2006) (internal citation omitted). The automatic stay protects the debtor's estate because it stays arbitration, even though there is no express reference to arbitration in the statute. *See* 11 U.S.C. § 362(a)(1) (2018).

Notably, where the resolution of the arbitrable claims directly implicated matters central to the Bankruptcy Code's purposes, decisions to deny arbitration are reviewed for abuse of discretion and often upheld. *See, e.g., In re U.S. Lines, Inc.*, 197 F.3d at 641 (core insurance claims were integral to bankruptcy court's ability to preserve and equitably distribute assets of the estate where debtor faced mass tort actions); *In re Gandy*, 299 F.3d 489, 495–99 (5th Cir.2002) (core claims represented most of the debtor's estate; the claims concerned the equitable distribution of the assets among creditors and one of the remedies sought was not available in arbitration); *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 170 (4th Cir. 2005)

(bankruptcy court's conclusion that arbitration of the claims would "substantially interfere with [the debtor's] efforts to reorganize"). Therefore, the policy supporting the Code inherently conflicts with arbitration, satisfying the inherent conflicts prong of the *McMahon* test.

### *i. The 'collective' nature of bankruptcy proceedings is at odds with arbitration*

Arbitration is a two-party proceeding, whereas the bankruptcy code is a central proceeding suggesting an inherent conflict with the goals of the bankruptcy code, which are to "centralize the resolution of pure bankruptcy issues, protect creditors and debtors from piecemeal litigation, and emphasize the undisputed power of a bankruptcy court to enforce its own orders." *Henry*, 944 F.3d at 591 (citing *Nat'l Gypsum*, 118 F.3d at 1069). Moreover, The Bankruptcy Code "balances a debtor's fresh start with 'a maximum and equitable distribution for creditors' through an orderly, centralized process.'" *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting). The nature of these two proceedings is structured quite differently.

The Court has observed that arbitration agreements are executed in anticipation of a two-party dispute. *See Epic*, 138 S. Ct. 1612 (2018) (finding that parties contract "in favor of individualized arbitration procedures of their own design."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("arbitrators [do] not have the 'general authority to invoke public laws that conflict with the bargain between the parties."). Conversely, a bankruptcy case constitutes a collective, multi-party proceeding that balances a debtor's fresh start with a maximum distribution to creditors. *White Mountain*, 403 F.3d at 170. In *White Mountain,* the court found that an ongoing arbitration proceeding in bankruptcy litigation would:

> (1) make it very difficult for the debtor to attract additional funding because of the uncertainty as to whether Phillips's claim was debt or equity, (2) undermine creditor confidence in the debtor's ability to reorganize, (3) undermine the confidence of other parties doing business with the debtor, and (4) impose additional costs on the estate and divert the attention and time of the debtor's management (even though the debtor was not a named party in the arbitration).

*In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 170–71. Using precedent, this Court should find for Petty that the Code has a preclusive effect on the FAA.

Here, as noted by the majority, the Guaranty was only executed by Wildflowers and Petty in anticipation of a two-party dispute. R. at 11. According to the arbitrator's terms, contrary to the Code, the resolution of this dispute would not consider the interests of other creditors and would not allow them an opportunity to be heard. Wildflowers argues that the court should enforce arbitration even when it will result in piecemeal litigation. R. at 21. However, that argument is only relevant where the federal law's purpose in question is not to prevent that type of confusing process. Based upon *White Mountain*, the Court should find that arbitration in this case (1) would make it very difficult for Petty to attract additional funding because of the uncertainty as to whether Petty could become operational again; (2) undermine creditor confidence in the Petty's ability to reorganize; (3) undermine the confidence of other parties doing business with Petty; and (4) impose additional costs on his estate and divert Petty's attention and time away from his reorganization efforts. Therefore, the arbitration guarantee executed by Wildflowers and Petty in anticipation of a two-party dispute conflicts with the goals of the automatic stay and the bankruptcy code. R. at 11. Petty's other creditors would be drastically affected by Wildflowers' action with no way to secure redress. Thus, this court should affirm the Thirteenth Circuit's ruling and find that § 362 of the Bankruptcy Code impliedly repealed the FAA.

### *ii. Arbitration inappropriately diminishes Petty's ability to reorganize and reimburse other creditors*

Enforcing the arbitration clause will affect Petty's ability to pay back other creditors. First, the bankruptcy court did not abuse its discretion in denying private arbitration. Where the result of arbitration will affect the debtor's ability to reorganize, bankruptcy courts properly exercise discretion to deny motions to compel arbitration. *Anderson v. Credit One Bank, N.A. (In re*

*Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018) ("If the bankruptcy court determines that arbitration would create a 'severe conflict' with the purposes of the Bankruptcy Code, it has the discretion to conclude that 'Congress intended to override the Arbitration Act's general policy favoring the enforcement of arbitration agreements.'" *Id.* (quoting *Hill,* 436 F.3d at 108 (2d Cir. 2006)).

Specifically, courts correctly use this discretion when the result of arbitration harms the debtor's ability to reorganize. *In re White Mountain Mining*, 403 F.3d at 164 (debtor satisfied *McMahon*'s inherent conflicts prong because ordering international arbitration would substantially interfere with the corporation's reorganization efforts by subjecting the debtor to strenuous costs from piecemeal litigation in conflict with the bankruptcy purpose of centralized disputes.)

Furthermore, if the only court that may offer a contempt remedy is the bankruptcy court issued the discharge, the logic applies for similar "core" matters like the automatic stay. Therefore, this Court should find that the Thirteenth circuit correctly denied Wildflowers' demand for arbitration. *In re Belton*, 961 F.3d at 614; *accord Crocker v. Navient Sols., L.L.C.* (*In re Crocker*), 941 F.3d 206, 216–17 (5th Cir. 2019) ("returning to the issuing bankruptcy court to enforce an injunction is required at least in order to uphold 'respect for judicial process.'"); *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012) ("[T]he court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order.").

However, some courts have held that where a reorganization plan has not been confirmed, arbitration would not interfere with the bankruptcy reorganization process. *In re Friedman's Inc.*, 372 B.R. 530, 543–44 (Bankr. S.D. Ga. 2007) (rejecting a trustee's argument that centralized litigation and preventing multiple forums and judicial efficiency required denial of arbitration and reasoning that such common bankruptcy purposes would swallow the whole because they are present in every bankruptcy case); *In re Cooley*, 362 B.R. 514, 522 (Bankr. N.D. Ala. 2007)

(allowing arbitration where the court had not yet confirmed the chapter 13 plan, finding that arbitration would have little impact on the debtor's ability to reorganize).

Yet, whether or not the plan is confirmed is not dispositive. Arbitration inherently conflicts with the bankruptcy courts jurisdiction over core bankruptcy matters, including the automatic stay under § 362. In *Belton,* for example, the court relied on precedent, *Anderson*, to hold that arbitration inherently conflicted with the enforcement of a discharge order because: (1) the discharge injunction was "integral" to the bankruptcy process; (2) "the claim [concerned] an ongoing bankruptcy matter that require[d] continuing court supervision;" and (3) "the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code." *Belton*, 961 F.3d at 615 (citing A*nderson,* 884 F.3d at 390).

Wildflowers and the Tench Dissent cite *Hill* to argue that "arbitration of suit seeking damages for alleged stay violation would not conflict with [§362]." 436 F.3d at 110–11. However, in that case, the court did not foreclose the possibility that there could be a conflict that would allow the court to deny arbitration. *Id*. In *Hill,* a chapter 7 debtor, Hill, filed an adversary proceeding against a creditor bank that had extended a consumer loan to the debtor. *Id*. at 104. Hill alleged that the creditor's continued monthly withdrawals from the debtor's bank account after Chapter 7 filing constituted a willful violation of the automatic stay. *Id*. The bankruptcy and district courts recognized that "Code § 362(h) presents a conundrum in the context of a conflict between the jurisdiction of bankruptcy courts and arbitral fora," *Id*. at 109. The court concluded that the bankruptcy court was the most appropriate forum for Hill's § 362(h) cause of action, reasoning that 362(h) is "strictly a product of the Bankruptcy Code, derived from the rights of a debtor, and recovery under it inures to the debtor rather than to the bankruptcy estate." *Id*. ("[A]llow[ing] arbitration to go forward would seriously jeopardize the objectives of the Code because the

automatic stay serves the same function as an injunction."). However, the appellate court reversed, finding that arbitration of the debtor's claim would not seriously jeopardize the Bankruptcy Code's objectives. The court reasoned first that Hill's estate was entirely administered. The court already discharged Hill's debts, so she no longer requires protection of the automatic stay, and resolution of the claim would not affect her bankruptcy estate. Second, as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration. Finally, the court reasoned that "a stay is not so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions."

However, Petty's case is entirely distinguishable from the debtor's in *Hill*. There, Hill's bankruptcy case was closed, and her debt had been discharged, so her claim's resolution could not affect ongoing reorganization. Furthermore, arbitration, in that case, would not conflict with the objectives of the automatic stay because Hill "no longer require[d] the protection of the stay to ensure her fresh start." *Id*. at 104. Arbitration would not jeopardize the purposes served by 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. *Id*. at 109.

Furthermore, because the case was a chapter 7 case liquidation, there was no reorganization. Therefore, any damages the court might award for the § 362(h) claim would be Hill's personal property and would not be part of her bankruptcy estate. *Id*. at 110. The court specifically held that "these factors distinguish Hill's case from cases where appellate courts have held that bankruptcy courts had the discretion to refuse to stay proceedings pending arbitration." *Id*.

Instead, Petty is in a similar position to the debtors in *Belton* and *Anderson*. Instead of recovering damages for a violation of a discharge injunction under § 541, he claims a violation of

the automatic stay under § 362. Both the automatic stay and violations of discharge injunctions are core bankruptcy proceedings. Likewise, in both Petty's case and the debtors' case in *Belton*, the remedy is the court that issued the discharge order – the bankruptcy court. R. at 7.

Furthermore, damages received from potential violations of the automatic stay fall into the same category. Petty planned to use the proceeds from the adversarial proceeding to fund his reorganization. R. at 13. If Wildflowers successfully seizes the equipment, they will significantly reduce the bankruptcy estate's ability to pay back other creditors, much like the parties in the recent decision after *Epic.* Notably, other creditors could not object to a ruling in arbitration that harms their reimbursement, the automatic stay's very purpose. Therefore, the courts below were correct not to enforce the arbitration clause because it violated the automatic stay. Because the text, history, and purpose of the Bankruptcy code conflict with the FAA, the Court should affirm the lower court's ruling and find that the automatic stay in particular impliedly repealed the FAA.

## II. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT WILDFLOWERS VIOLATED THE AUTOMATIC STAY WHICH REMAINED IN EFFECT WITH RESPECT TO PROPERTY OF THE ESTATE

Once the Court affirms the ruling that 11 U.S.C. § 362 impliedly repealed the FAA, it can answer whether § 362(c)(3)(A) of the Code applies to the property of the estate. In determining whether § 362(c)(3)(A) applies to property of the estate, the Court's *de novo* standard of review requires an examination of the automatic stay and its application, according to historical canons of statutory interpretation. The Court will find that the stay was not terminated with respect to the property of the estate, and consequently hold that Wildflowers violated the automatic stay when it unlawfully repossessed the Equipment.

Petty lays the foundation for this finding by showing that § 362(c)(3)(A)'s plain meaning and unambiguous interpretation only applies to the debtor, and does not implicate the property of the estate, which is explicitly protected under § 362(a)(3). Petty shows clear and convincing

evidence that he filed the Second Bankruptcy Case in good faith; given the circumstances of his good faith filing, Petty demonstrates how not requesting an extension of the automatic stay under § 362(c)(3)(B) is superfluous. However, he argues that if the Court deems the thirty-day period relevant, it should not compare the Debtor with those who have had the opportunity to articulate to courts why their requests for extensions of automatic stays should be granted. Finally, Petty highlights that a partial termination of the automatic stay under § 362(c)(3) supports the congressional intent of the Code to protect debtors during a period of vulnerability.

### A. The statutory interpretation of Section 362(c)(3)(A) terminates the stay only with respect to the debtor and does not implicate the property of the estate

The text of § 362(c)(3)(A) is unambiguous and clear to affirm the Thirteenth Circuit's holding that the automatic stay terminated with respect to Petty and not the Equipment. R. at 16–19. In *Lamie v. United States Trustee*, solidified the widely applied rule that "[w]hen the statute's language is plain [unambiguous and clear], the sole function of the court[]…is to enforce it according to its terms." 540 U.S. 526, 534–39 (2004) (internal citations and quotations omitted); *see also* R. at 16. The Court reasoned that doing so would be inappropriate. *Lamie*, 540 U.S. at 534–39; *see also* Michael Miller, *Untangling the Web of § 362(c)(3)(A) and Its Legislative History*, 39 AM. BANKR. INST. J. 22, 22 (Apr. 2020). Petty argues that § 362(c)(3)(A) is unambiguous and clear. Therefore, Petty asks the Court to use the rule set by *Lamie* in its analysis to conduct a plain reading of the text, admonish the Petitioner's reliance on precedent that incorrectly applies the canons, and affirm that, if necessary, the legislative history still supports a plain reading of the text.

#### *i. A plain reading of Section 362(c)(3)(A), along with canons of statutory interpretation, indicates that the provision does not apply to the property of the estate*

In this case, the Court should exercise its practice of a plain reading when the text of a bankruptcy provision is unambiguous and clear. *Lamie*, 540 U.S. at 534–39. To conduct a plain reading, the Court must revisit the exact text of § 362(c)(3)(A). *Johnson* was "the first case to hold that the stay does not in fact lift as to property of the estate" when the debtor has moved for an extension of the stay. Laura B. Bartell, *Staying the Serial Filer – Interpreting the New Exploding Stay Provision of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 207 (2008); *see also In re Johnson*, 335 B.R. 805, 806–07 (Bankr. W.D. Tenn. 2006). "When read in conjunction with [§ 362(c)(1)], the court finds that the plain language of § 362(c)(3)(A) dictates that the 30-day time limit only applies to 'debts' or 'property of the debtor' and not to 'property of the estate'[,]" because the property defined in § 541 [of the Code] "remain[s] property of the estate until the case is discharged or dismissed." *In re Johnson*, 335 B.R. at 806; *see also* Bartell, *supra*, at 207. Many district courts adhered to this standard. Two months later, the *Jones* court conducted a similar plain reading, emphasizing that there is little need to look at legislative history because the text is unambiguous and clear. *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006). Even if the court were to examine the legislative history, a narrow interpretation of the property of the estate would be appropriate. *Id.* Further, the court found the narrow interpretation necessary for plans under chapter 11 and chapter 13, as well as chapter 7 proceedings. Bartell, *supra*, at 208 (quoting *In re Jones*, 339 B.R. at 365). *Johnson* and *Jones* were among many cases to lay the foundation for conducting a plain reading of § 362(c)(3)(A).

Recently, *In re McGrath* held that even though the "[d]ebtors did not move with enough alacrity to extend the automatic stay…the stay was only terminated for actions against them personally, not for actions to foreclose on estate property." 621 B.R. 260, 267 (Bankr. D. New Mexico 2020). The debtor in *McGrath* filed a second bankruptcy case within a year of dismissal

of a chapter 13 case due to their inability to comply with court deadlines. *Id.* at 260. But when the court dismissed the debtor's initial bankruptcy case, the debtor filed their second bankruptcy case under the guise of the same counsel, whereas Petty took measures to ensure that counsel would not further jeopardize his protections and progress after the initial bankruptcy case. *Id.* at 261. Additionally, the court in *McGrath* discussed how one should read the provision:

> If an individual debtor files a 7, 11, or 13 case and had been a debtor in another case that was dismissed within a year prior, then the automatic stay in the second case shall terminate 30 days post-petition for actions on a debt, on property securing a debt, or on a lease; provided, however, that the termination only applies to actions against the debtor, not against estate property.

621 B.R. at 264 (emphasis omitted).

The *McGrath* court held that (1) Congress intentionally limited the scope of stay termination in § 362(c)(3)(A) to "with respect to the debtor," because it intentionally and explicitly terminates the stay in its entirety in § 362(c)(4)(A)(i), which addresses debtors who have filed more than twice in a short period of time; (2) a partial termination of the automatic stay supports the goal of benefitting creditors when the debtor has not abused the bankruptcy system; (3) rewriting the statute using little legislative history when the text is unambiguous and clear is "dubious" and frowned upon; and (4) the limited relief provided by the stay is not the only remedy for the creditor who can simply seek a motion for relief from the stay. *Id.* at 265–266. Respondent asks this Court to analyze the facts of this case using a similar analysis.

First, this Court should adhere to the plain reading of § 362(c)(3)(A), which is unambiguous and clear. Second, this Court ought to consider that a partial termination of the automatic stay supports the goal of protecting every party involved and supporting a debtor's plan of reorganization; Petty would have the opportunity to use the Equipment to secure his plan of reorganization, to the benefit of all creditors, including Wildflowers. Third, Wildflowers'

interpretation of the statute through legislative history is dubious and frowned upon, not only because the language is unambiguous and clear, but the Petitioner relies on legislative history attached to the evolution of the bill and not the reports supporting the 2005 version of the Code. Lastly, the Court has the onus of addressing that Wildflowers could have sought alternative methods for relief, like *McGrath* noted, but instead chose the limited relief that could be provided by the stay. *McGrath* further incentivizes this Court's need to adequately correct the Petitioner's reliance on precedent.

### *ii. The precedent upon which the Petitioner rests its argument's foundation allows for a gross misinterpretation of the statute's plain reading and must be corrected.*

Wildflowers, along with Circuit Judge Tench's dissent, relies heavily on the holding of *Smith*, which this Court should admonish against and rectify. R. at 28–32 (Tench, J., dissenting); *Smith v. Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581 (1st Cir. 2018), *aff'g* 590 B.R. 1, 19 (D. Me. 2018), *aff'g* 573 B.R. 298, 299–300 (Bankr. D. Me. 2017). *Smith* challenged the majority interpretation of § 362(c)(3)(A). A debtor filed a petition under chapter 13, the court dismissed that petition, and terminated the automatic stay under § 362(c)(3)(A). It held that "no party in interest moved for an order extending the stay under section 362(c)(3)(B)," 573 B.R. at 299, 301.

Notably, the court supported its holding through the legislative history of "with respect to the debtor," completely ignoring the rule established by *Lamie*—the plain language controls when the text of a Code provision is unambiguous and clear—which is highly inappropriate. *Smith,* 573 B.R. at 299, 302. This Court ought to avoid making similar errors in statutory interpretation of the Code's provision, and Petty highlights how to avoid these traps. Every appellate court reviewing *Smith* claimed that the text of § 362(c)(3)(A) was not ambiguous, rather its application ambiguously limited the termination of the stay. *See In re Smith,* 910 F.3d at 581, *aff'g* 590 B.R.

at 19, *aff'g* 573 B.R. at 299–300. To justify this so-called "ambiguity" in application, the court first interprets the "phrase [to encompass] any property securing…debt" and second, "construes 'with respect to the debtor' to define which debtor is [a]ffected by this provision" supporting a spousal exclusion theory. *Smith*, 573 B.R. at 302, *aff'd*, 910 F.3d at 582.

*Smith* grossly misinterpreted the statute's text to fit its agenda. Analogous to Petty in this case, the debtor in *Smith*, correctly argued that "[t]he location of the phrase 'property securing such debt' after 'the stay under subsection (a)' and the combination of the phrase with 'with respect to a debt'…indicate that the clause summarizes the actions stayed in 'subsection (a).'" *Smith*, 910 F.3d at 582. But the court countered, stating "[t]hat [the] subsection stays actions against both property of the debtor and property of the estate, so the phrase cannot establish that § 362(c)(3)(A) terminates the stay for actions against debtor property but not for actions against estate property." *Id.* However, this was a determination built upon a poor plain reading, especially in conjunction with other canons of statutory interpretation. The court should have examined the text of both §§ 362(a) and 362(c), using a plain reading, along with other canons such as the logic of *maxim expressio unius est exclusio alterius* ("[w]here Congress includes particular language in one § of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotations and alterations omitted). Another cardinal canon that should have been used is the whole act rule which implores the court to read the statute in its entirety. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *see also* R. at 16. Using these canons, the court would have seen that the Code explicitly dictates the different types of debt and the termination of the automatic stay to the debtor, its property, and the property of the estate, under various

circumstances, as noted by recent Fifth Circuit precedent. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230–31 (5th Cir. 2019).

The *Jones* court stated that "[s]ection 521 of the Code also distinguishes between the property of the estate and property of the debtor…[and if] Congress had intended that the automatic stay would terminate under § 362(c)(3)(A) as to property of the estate, it would have specifically said so, as it did in § 521(a)(6)." 339 B.R. at 364. Congress understood the differences between property securing debt; Congress used its authority to decide when each type of property was no longer protected when a debtor had numerous bankruptcy filings. *Rose*, 945 F.3d at 230–31. "Reading the [] adjacent subsections [of §362(c)(3)(A)] to mean the same things makes no sense." *In re McGrath,* 621 B.R. at 265. Further, like the Fifth Circuit, the First Circuit in *Smith* should have "declined to read in such language" that was not present:

> After recognizing that § 362(a) operates as a stay to certain actions in three separate categories, the language in § 362(c)(3)(A) becomes clear. In §362(c)(3)(A), Congress stated that "the stay under [§362(a)]…shall terminate *with respect to the debtor*." There is no mention of the bankruptcy estate…Moreover, "Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute." Section 362(c)(4)(A)(i)—which discusses debtors who have had two or more cases pending in the prior year—does not include the limiting language in § 362(c)(3)(A)…Accordingly, for debtors falling under § 362(c)(4)(A)(i), the automatic stay is terminated in its entirety. In contrast, Congress chose to use a qualifier in § 362(c)(3)(A). This can only be interpreted as "impl[ying] a limitation upon the scope of the termination of the automatic stay."

*Rose*, 945 F.3d at 230–31 (internal citations omitted) (emphasis in original). The Thirteenth Circuit supports the Fifth Circuit's interpretation in contrast to the First Circuit's reading. R. at 17 ("Congress could have terminated the stay in its entirety in section 362(c)(3)(A), as it did in section 362(c)(4)(A)(i), by simply deleting the phrase 'with respect to the debtor.'" (citing *Accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 556 U.S. 639, 645 (2012) to highlight that Congress

uses language to identify and address specific issues. Petty has established that *Smith* was a gross misinterpretation of § 362(c)(3)(A) and should not be cited.

Additionally, the Court should denounce the minority view's spousal exclusion theory to support its misinterpretation. *Smith* purports that "with respect to the debtor" is written so as to "not apply to the refiling debtor's first-time filing spouse in a joint case." Miller, *supra*, at 23; *see also Smith*, 573 B.R. at 302 (internal quotations and citations omitted). However, the same court that set precedent in favor of the minority view, also considered the spousal exclusion theory "implausible…since joint bankruptcies are jointly administered but keep the rights of the two debtors separate." *Id.* at 23 (citing *Smith*, 910 F.3d at 584–85). "Therefore, the minority view fails to get to a plain reading that its view terminates the entire stay, especially in light of the fact that the term 'estate' appears nowhere in the text of § 362(c)(3)(A)," and the spousal exclusion theory is unsupported. Miller, *supra*, at 23 (citing *Smith*, 910 F.3d at 581). Petty urges the Court to rectify the faulty reasoning and misuse of interpretative canons regarding the statute's plain reading by Wildflowers. Another error of *Smith* was its reliance on legislative history to infer that "with respect to the debtor" accounted for property of the estate.

### *iii. The legislative history of section 362(c)(3)(A) supports Petty's argument in spite of Wildflowers' inappropriate utilization in its argument*

Petty has emphasized that it is improper for this Court to implement legislative history into its statutory interpretation of a provision of the Code. However, this Court's precedent must keep lower courts from unnecessarily relying on legislative history to prevent judicial activism. The minority view, exhibited in *Smith*, often uses legislative history ***to not focus*** on the various provisions preventing repeat and abusive filings of different extremities, ***but to provide justification for its interpretation*** of legislative intent, which is unnecessary for an unambiguous and clear provision. Miller, *supra*, at 80–81 (emphasis added). "[I]t seems a dubious practice to

use 'legislative history' to rewrite a statute, as the *Smith* court did, [and] [d]eleting the phrase 'with respect to the debtor' based on alleged legislative intent seems ill-advised." *In re McGrath*, 621 B.R. at 266. There are two rules generally followed by this Court with respect to legislative history. First, when the interpretation of a statute is unambiguous and clear the legislative history is irrelevant. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); R. at 18. Second, the Court should not stray too far from the statute's text when the legislative history is inconclusive. *Id.* Yet, the minority view "backtracks to eight years before BAPCPA to look at *proposed* and *unenacted* pieces that start in 1994 with the Bill Clinton administration and the 104th Congress, then ends in 2005 with the George W. Bush administration and the 109th Congress. As one court put it, tracing back the eight-year proposed legislative history of BAPCPA is torturous." Miller, *supra*, at 80 (citing *Smith*, 910 F.3d at 589–90; *In re Daniel*, 404 B.R. 318, 327–29 (Bankr. N.D. Ill. 2009)).

Analogous to the facts in this case, *In re Scott-Hood* examined a repeat bankruptcy filer's assertion that the automatic stay had terminated thirty days after the order for relief with respect to the debtor and debtor's property, and not the property of the estate, under § 362(c)(3)(A). 473 B.R. 133, 133 (Bankr. W.D. Tex. 2012). The court held that if the debtor did not timely apply for an extension of the stay, the automatic stay only terminated after thirty days with respect to the debtor. *Id.* The court emphasized that "[i]n a statutory construction case, the beginning point must be in the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished[.]" *Id.* at 137 (quoting *In re Candor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010). Furthermore, the court aimed to access legislative history in case the plain reading was at odds with the intent of the drafters. *Id.*

To the court's surprise, "there was no conference report, no senate committee report, and no floor statements, [with] the House Report [being] a mere regurgitation of the statute's language." *Scott-Hood*, 473 B.R. at 137 n.2. As any court should under these circumstances, the court chose to "parse the language of the statute" and examine the text in its entirety; instead of a fishing expedition like the minority view conducted in *Smith*, the court held that "section 362(c)(3)(A) terminates the stay only with respect to the debtor individually [and] it does not terminate with respect to property of the estate. *Id.* at 137–38, 140. Respondent implores the court to consider *Scott-Hood's approach* to this case, since the statute is unambiguous and the legislative history is inconclusive. The Court will find that Wildflowers violated the automatic stay, which applied to the Equipment, because there is no textual support in the statute indicating that the stay had terminated with respect to the property of the estate and courts' have properly declared the legislative history as inconclusive. Therefore, Petty has executed an appropriate plain reading of § 362(c)(3)(A) and encourages the Court to rule out any presumption that Petty was working to abuse the Code. Respondent asks the Court to contemplate the clear and convincing evidence that Petty's filed his Second Bankruptcy Case in good faith.

**B. Petty's good faith filing debunks the Court's bad faith presumption through a showing of clear and convincing evidence**

Petty rebuts the presumption that he did not file his Second Bankruptcy Case in good faith. Section 362(c)(3) presumes that cases are not filed in good faith if any one of the circumstances listed in § 362(c)(3)(C) is present. 11 U.S.C. §362(c)(3)(C). To combat this presumption the debtor must show clear and convincing evidence by a preponderance of the evidence. *Id*. Various tests have been used to define a showing of "good faith" when the text does not explicitly address a standard. Bartell, *supra*, at 209–10; *Gier v. Farmers State Bank (In re Gier)*, 986 F.2d 1326, 1328–29 (10th Cir. 1993); *McKinnon v. Prime South Bank (In re McKinnon)*, 378 B.R. 405, 413–15

(Bankr. S.D. Ga. 2007) (highlighting factors specific to chapter 11). In fact, "courts have developed their own 'totality of the circumstances' factors to be used in interpreting 'good faith' under § 362(c)(3)," which include (1) when the later petition was filed, (2) what led to the debt in the petition, (3) explanation of the previous case's dismissal, (4) the effects of the debtor's actions on stayed creditors, (5) potential motive for filing again, (6) the debtor's personal and financial circumstances, and (7) potential objection from the trustee or creditors. *Id.* at 210.

Very few courts have opined on the good faith showing after *McKinnon*. This allows the Court to infer that it is still good law and should be applied when a court examines the bad faith of a repeat filer. This Court should analyze, and rule on, the facts of this case using *McKinnon*, which focused on a chapter 11 debtor who sought the court's approval of a motion to extend the automatic stay under § 362(c)(3)(B). 378 B.R. at 407. The distinguishing factor in *McKinnon* is the debtor's property is at issue as opposed to the property of the estate. However, similar to Petty, the debtor showed how circumstances had changed since his first petition's dismissal. This included changes in his finances, executed payoff agreements, and efforts to plant crops to work out additional payment plans with remaining creditors, which pointed to a showing of a good faith filing. *Id.* at 407–08.

Applying the factors used by district courts, the court identified the following circumstances: (1) the debtor had more than one asset, (2) the debtor had fewer unsecured creditors than secured creditors, (3) the debtor's individual chapter 11 did not speak to how many employees he had, (4) the foreclosure proceedings were in process but did not begin until after the dismissal of the first case, (5) the debtor's financial problems would not be easily resolved but would be worsened if the creditor was allowed to foreclose on the debtor or repossess the interest in the real estate, (6) the debtor genuinely believed that he would be able to execute payment arrangements

with his creditors debunking the theory that the debtor "inten[ded] to delay or frustrate" the creditor's rights as to the property, and (7) the debtor was still working to submit a plan. *McKinnon*, 378 B.R. at 413–414. The court held that the debtor's chapter 11 was filed in good faith by a preponderance of the evidence. *Id*.

Comparably, Petty's circumstances serve as clear and convincing evidence that his chapter 11 was filed in good faith beyond a preponderance of the evidence. If the Court follows the framework set forth in *McKinnon*, it would be difficult to overlook the improvements in Petty's circumstances since his first petition; moreover, Petty's main asset in the filing is the Equipment, which places even greater emphasis on the asset factor noted in *McKinnon*, because this asset is essential to his plan of reorganization and can have a large impact on his payment agreement with other creditors. Given that Wildflowers was able to recover ninety-three percent of damages sought in the chapter 7 proceedings, along with Petty compensating and executing payment agreements with its other creditors, he quickly debunks the theory that he "intended to delay or frustrate" creditors. Working to protect the property of the estate is truly rooted in the importance of the Equipment as an asset essential to Petty's Plan of Reorganization. In fact, Petty began using the Equipment to repay his debts, but Wildflowers' unlawful repossession hindered this successful effort. Further, Petty's inability to request an extension of the automatic stay in his initial bankruptcy case within the thirty-day period is irrelevant given the totality of the circumstances showing Petty's good faith filing.

### C. If the Court determines that the thirty-day period is relevant, it should still grant Petty's request to honor the automatic stay with respect to the property of the estate

Respondent's case goes above and beyond the usual contention between the split authority because it also questions interpretation of § 362(c)(3)(A) when a court has not issued an extension of the automatic stay and the thirty-day period has passed according to § 362(c)(3)(B). R. at 7.

This distinction matters, because the Court must decipher congressional intention for second-time filers for whom the court has not granted or denied an extension of the automatic stay. The Court in this case must be keen to the unfortunate position in which the debtor has found itself, before prohibiting the protections intended for debtors under the automatic stay. Distinguishably, there are debtors who have not been found in the same circumstances as Petty, and have worked to abuse the system begging courts to interpret § 362(c)(3)(A) even after a court has properly terminated the stay.

Though the debtor in *Johnson* was granted its motion to extend the automatic stay, the court understood the implications of its ruling on the thirty-day period found in the text of the statute. 335 B.R. at 805. The court held that "[w]hen read in conjunction with [§ 362(c)(1), the court finds that the plain language of § 362(c)(3)(A) dictates that the 30-day time limit only applies to 'debts' or 'property of the debtor' and not to 'property of the estate.' Bartell, *supra,* at 207 (quoting *In re Johnson,* 335 B.R. at 806). In this case, Wildflowers took action against Petty's Equipment without first seeking relief, which is enough to be in violation of the automatic stay. R. at 7; *see also Johnson*, 355 B.R. at 807. In fact, Wildflowers took it upon itself to decide that no automatic stay existed with respect to the property of the estate, simply because Petty had been unable to file a motion seeking to extend the automatic stay. The debtor in *Johnson* was able to debunk any presumption of a bad faith filing of the second bankruptcy when he testified at the hearing for his motion seeking to extend the automatic stay and demonstrate his efforts for plan payment. *Id.* at 806. Here, Petty missed his opportunity to explain that in good faith he missed the thirty day period because he was working diligently to wrap up the chapter 7, revive his cash flow, and operationalize his plan of reorganization. Even still, Petty's case had not been dismissed or discharged, which would make any motion to extend the stay with respect to the property of the

estate superfluous, because "[the automatic stay] remains in effect until the debtor's case is dismissed or discharged." *Johnson,* 355 B.R. at 807.

"Due to the severe consequences that may follow from a violation of the stay, a safe rule for creditors is to assume that the automatic stay does apply to the contemplated conduct and to proceed accordingly." 4 *Collier on Bankruptcy* ¶ 38.02[4]. Here, Wildflowers assumed the exact opposite. Reliance on *Collier on Bankruptcy* is not abnormal practice; it is instead quite commonly used by practitioners and courts. *See* LexisNexis Litigation Resource Community Staff, *U.S. Supreme Court Cites to Collier On Bankruptcy In Hamilton v. Lanning*, LexisNexis: Legal News Room – Litigation (June 23, 2010), *https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/posts/u-s-supreme-court-cites-to-collier-on-bankruptcy-174-in-hamilton-v-lanning*. With this, Respondent asks this Court to contemplate the aforementioned arguments with great weight.

**D. Partial termination of the stay with respect to the property of the estate supports Congress's intent to provide debtors with safeguards during periods of vulnerability**

Overall, a plain reading of § 362(c)(3)(A) supports the policy goals of the Bankruptcy Code. "Achieving a better policy outcome…is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 13–14 (2000); *see also* R. at 18. When the Court makes decisions as to the law of the land it should account for the impact of its reasoning. Recently, the *In re Thu Thi Dao* court stated "[i]t is axiomatic that the automatic stay protects multiple interests. At a minimum there is the interest of the estate and the interest of the debtor…Thus, in stay relief matters, courts commonly address those interests separately and may grant relief as to one or the other or both." 616 B.R. 103, 105 (Bankr. E.D. Ca. 2020). On this basis, the court held that if a partial termination was not considered in the application of § 362(c)(3)(A) it would be "at odds with basic chapter 7 administration that Congress would not

have intended such dramatic consequences without unambiguous explanation." *Id.* at 116–17. In sum, the policy of the automatic stay is to protect the debtors, and § 362(c)(3)(A) aims to protect debtors under various chapters proceedings of the Code under this section. It is safe for the Court to use the plain reading of the section to support congressional intent to protect debtors through partial terminations of the automatic stay in different circumstances.

Here, a partial termination of the automatic stay supports the congressional intent of the Code to provide debtors with safeguards during a period of vulnerability. "Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words, 'with respect to the debtor' in that section are entirely plain; a plain reading of those words makes sense and is entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code." *In re Jones*, 339 B.R. at 363. Further, the court retains the power to impose a stay when § 362(c)(3) lifts the automatic stay under § 105. In conclusion, the Respondent has adequately demonstrated that the automatic stay was not terminated with respect to the property of the estate, and the Court must therefore find that Wildflowers violated the automatic stay when it repossessed the Equipment.

## CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed. The court properly held that 11 U.S.C. § 362 inherently Conflicts and thus impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. Furthermore, the court properly held Wildflowers violated the automatic stay which remained in effect with respect to property of the estate. Therefore, Respondents respectfully request this Court to affirm the decision of the Thirteenth Circuit.

# APPENDIX A

**9 U.S.C.A. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.**

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

**9 U.S.C.A. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.**

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**11 U.S.C.A. § 105. Power of Court.**

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

**11 U.S.C.A. § 362 (2012). 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.

….

(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;

**11 U.S.C.A. § 541. Property of the Estate.**

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.