No. 20-1004

IN THE

Supreme Court of the United States

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK, PETITIONER

V.

EARL THOMAS PETTY, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEEN CIRCUIT

BRIEF FOR THE PETITIONER

35P
Counsel for Petitioner

QUESTIONS PRESENTED

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 Whether 11 U.S.C. § 362 and related judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.

2. Whether the Thirteenth Circuit erred in finding that 11 U.S.C. § 362(c)(3)(A) does not apply to property of a debtor's bankruptcy estate.

TABLE OF CONTENTS

QUESTIONS PRESENTED ... i

TABLE OF CONTENTS ... ii

TABLE OF AUTHORITIES ... iv

OPINIONS BELOW ... ix

STATEMENT OF JURISDICTION ... x

STATUTORY PROVISIONS ... xi

STATEMENT OF FACTS ... 1

SUMMARY OF ARGUMENT ... 3

STANDARD OF REVIEW ... 4

ARGUMENT ... 4

I. 11 U.S.C. § 362 and Related Code Provisions Do Not Impliedly Repeal the Federal Arbitration Act. ... 4

A. The Plain Meaning and Legislative History of 11 U.S.C. § 362 and Related Code Provisions Demonstrate that Congress Did Not Intend To Repeal the FAA. ... 5

B. Section 362 and Related Judicial Code Provisions Are Reconcilable with the FAA ... 7

1. Irreconcilable Conflict Between the Statutes Must Still Be Supported by Evidence of Congressional Intent in Order To Prove that the FAA Was Impliedly Repealed ... 7

2. Even if Conflict Can Independently Constitute Sufficient Evidence of Implied Repeal, the FAA and the Bankruptcy Code Are Reconcilable ... 9

a. The Core/Non-Core Distinction Is Not Dispositive as Applied to the Present Case . 9

b. The Importance of the Automatic Stay to the Bankruptcy Code Does Not Necessarily Create an Inherent Conflict with the FAA ... 10

c. Allowing Arbitration Would Not Necessarily Jeopardize the Bankruptcy Code's Objectives ... 12

i. Arbitration Would Not Disrupt the "Fresh Start" and Proper Administration of the Bankruptcy Estate ... 12

ii. The Collective or Multiparty Nature of a Bankruptcy Dispute Does Not Preclude Arbitration ... 15

II. Section 362(c)(3)(A) Terminates the Automatic Stay in its Entirety. ... 17

A. Legislative History Supports the Minority View ... 18

1. Legislative History Supports Section 362(c)(3)(A) referring to both "Acts" and "Actions." ... 18

2. Legislative History Confirms That Section 362(c)(3)(A) Terminates the Stay Entirely. 19

B. Context Supports the Minority View ... 20

C. The Plain Language of Section 362(c)(3)(A) Supports the Minority View.................... 22

1. Section 362(c)(3)(A) Applies to “Acts” and “Actions.”... 23
2. Section 362(c)(3)(A) Terminates the Automatic Stay in Its Entirety. 24
3. Read in Light of Other Provisions in Section 362, (c)(3)(A) Favors the Minority View. 27
4. Read in Light of Other Statutes, Section 362(c)(3)(A) Favors the Minority View. . 29
5. In the Alternative, “With Respect to the Debtor” Refers to a Non-Debtor Spouse.. 30
6. The Majority View Creates Surplusage Where the Minority View Eliminates It. ... 31

CONCLUSION.. 35

APPENDIX.. 1

TABLE OF AUTHORITIES

Cases

Ackerman v. Eber (In re Eber), 687 F.3d 1123 (9th Cir. 2012).. 5

Anderson v. Credit One Bank, N.A. (In re Anderson), 884 F.3d 382 (2d Cir. 2018) 9, 10, 12

Civil Rights Cases, 109 U.S. 3 (1883) 23

Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir. 2012) 6

Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160 (2d Cir. 2000).. 10

Dominic's Restaurant of Dayton, Inc. v. Mantia, 683 F.3d 757 (6th Cir. 2012).......................... 14

Duncan v. Walker, 533 U.S. 167 (2001).. 31

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)... passim

Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Lit.), 765 F.2d 343 (2d Cir. 1985) 14

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).. 7

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000)...................... 15

In re Charles, 334 B.R. 207 (Bankr. S.D. Tex. 2005) 21

In re Daniel, 404 B.R. 318 (Bankr. N.D. Ill. 2009)... 20, 29

In re Grydzuk, 353 B.R. 564 (Bankr. N.D. Ind. 2006) 20

In re Hermoyian, 435 B.R. 456 (Bankr. E.D. Mich. 2010) 9

In re Hicks, 300 B.R. 372 (Bankr. D. Idaho 2003).. 30

In re Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006) 18, 25

In re Reswick, 446 B.R. 362 (B.A.P. 9th Cir. 2011) ... 31

In re Smith, 910 F.3d 576 (1st Cir. 2018) ... 26, 30

Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.), 118 F.3d 1056 (5th Cir. 1997) ... 10, 12

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) ... 26

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) ... 27

Matter of Stuart, 31 B.R. 18 (Bankr. D. Conn. 1983) ... 30

MBNA Am. Bank, N.A. v. Hill, the 436 F.3d 104 (2d Cir. 2006) ... 7, 12, 13, 14

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2011) ... 18

Milner v. Department of Navy, 562 U.S. 562 (2011) ... 6

Mintze v. Am. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222 (3d Cir. 2006) ... 6

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) ... passim

Morton v. Mancari, 417 U.S. 535 (1974) ... 5, 7

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) ... 4

Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.), 403 F.3d 164 (4th Cir. 2005) ... 9

Ransom v. FIA Card Services, N.A., 562 U.S. 61 (2011) ... 19

Razavi v. Comm'r of Internal Revenue, 74 F.3d 125 (6th Cir. 1996) ... 4

Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226 (5th Cir. 2019) ... 26

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) ... passim

Smith v. Maine Bureau of Revenue Services, 590 B.R. 1 (Bankr. D. Maine 2018) ... 25

Texas v. Soileau (In re Soileau), 488 F.3d 302 (5th Cir. 2007) ... 4

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) ... 16

United States Lines, Inc., 197 F.3d 631 (2d Cir. 1999) 10

United States v. Castleman, 572 U.S. 157 (2014) 26, 27, 33

United States v. Fausto, 484 U. S. 439 (1988) 5

Wachovia Bank v. Schmidt, 546 US 303 (2006) 23

Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015) 10

Whiting-Turner Contracting Co. v. Elec. Mach. Enters. (In re Elec. Mach. Enters.), 479 F.3d 791 (11th Cir. 2007) 6

Statutes

10 U.S.C. § 987 7

11 U.S.C. § 101 .... 26, 29

11 U.S.C. § 109 34

11 U.S.C. § 1141 33

11 U.S.C. § 1307 22

11 U.S.C. § 1325 .... 21, 33

11 U.S.C. § 1328 33

11 U.S.C. § 362 .... passim

11 U.S.C. § 507 24

11 U.S.C. § 522 31

11 U.S.C. § 524 24

11 U.S.C. § 541 .... 27, 32

11 U.S.C. § 551 .... 28, 29

11 U.S.C. § 554 31

11 U.S.C. § 707 .... 22, 33

11 U.S.C. § 726 25

11 U.S.C. § 727 34

12 U.S.C. § 5567 7

15 U.S.C. § 1226 6

34 U.S.C. § 21741 22

7 U.S.C. § 26 7

9 U.S.C. § 2 4

Cal. Welf. & Inst. Code § 15610.30 (West 2020) 22

N.Y. Dom. Rel. Law § 170 (McKinney 2020) 30

Other Authorities

119 Stat 23; 95 H.R. 8200, 95th Cong. (1978) 28

151 Cong. Rec. H1974-05, H1983 (2005) 18

151 Cong. Rec. H1993-01, H2062 (2005) 18

151 Cong. Rec. H2063-01, H2064 (2005) 18

3 Norton Bankr. L. & Prac. 3d Appendix 60-A § 60-A:1 30

Action, Black's Law Dictionary (11th ed. 2019) 23

Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) 19, 28

Bankruptcy Reform Act, Pub. L. 103-394, 108 Stat. 4106 (1994) (§ 603) 19

Brief for Petitioner at 8 n. 3, Smith v. Maine Revenue Servs., 910 F.3d 576 (1st Cir. 2018) (no. 18-1573) 17

Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 134 Stat. 281 (2020) 21

H.R. Rep. No. 105-540 at 80 (1998) 20

H.R. Rep. No. 109-31(I) at 138 (2005) 19, 20, 32

Leslie A. Berkoff & Theresa A. Driscoll, *In the Wake of the U.S. Supreme Court's Decision in Epic Systems , Should Core Bankruptcy Matters Be Deemed a "Clear and Manifest" Exception to the Federal Arbitration Act?* 29 No. 2 Norton J. Bankr. L. & Prac. 1 (2020)........................ 8

Miyong Mary Kang, *Is It Time to Hang the Hanging Paragraph, 11 U.S.C. § 1325(a)?*, 26 Emory Bankr. Dev. J. 49 (2009) 21

Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 Am. Bankr. L.J. 407, 429 (2012) 28, 34

Report of the Nat'l Bankr. Rev. Comm'n: The Next Twenty Years, at 279 (Oct. 20, 1997) http://govinfo.library.unt.edu/nbrc/reportcont.html 19

S. Rep. No. 105-203, at 7 (1998) 20

OPINIONS BELOW

The opinion of the bankruptcy district court is unreported. The opinion of the United States Court of Appeals for the Thirteenth Circuit (No. 19-0805) is unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The pertinent provisions of the Bankruptcy Code are reprinted in the appendix to this brief.

STATEMENT OF FACTS

Respondent, an experienced businessman and former lawyer, opened a craft brewery, Great White Open, in 2005. (R. at 3). He purchased equipment for his brewery around the same time which he, not the brewery, owned. (R. at 3 & n.2). He and his craft brewery became very successful. (R. at 3, 4). Because of his success, Respondent decided to expand his business, opening more taprooms throughout the State of Moot. (R. at 4). To support these additional taprooms, Great Wide Open opened a new high-capacity brewery. (R. at 4). To finance this brewery, Great Wide Open needed loans from Wildflowers, the petitioner. (R. at 4).

Wildflowers, a local community bank, entered into a $35 million revolving credit agreement with Great Wide Open. (R. at 4). Great Wide Open granted Wildflowers a security interest in all Great Wide Open's assets to secure the credit agreement. (R. at 4). Respondent also guaranteed the loan and granted Wildflowers a senior lien on his equipment. (R. at 4). Both the credit agreement and the guaranty gave Wildflower the right to enter any premise and repossess collateral. (R. at 4). Each agreement also contained arbitration clauses. (R. at 4).

In 2017, Great Wide Open ran into financial problems due to market shifts. (R. at 5). Great Wide Open closed three of its locations in March 2018; Wildflowers only found out when a loan officer saw a hastily scrawled sign on the door of one of the locations. (R. at 5). In April 2018, Great Wide Open defaulted on the credit agreement and Respondent defaulted on the guaranty. (R. at 5). Shortly thereafter, Wildflowers sent a default letter to both Great Wide Open and Respondent out of concern of scrutiny from regulators. (R. at 5). Wildflowers filed a demand for arbitration and a breach of contract complaint against Respondent with the American

Arbitration Association on June 4, 2018. (R. at 5). Wildflowers sought $33.2 million, the balance remaining under the credit agreement which Respondent guaranteed. (R. at 5).

The arbitration conference was scheduled for July 12, 2018; immediately before the conference, Great Wide Open terminated all employees and operations. (R. at 5). Great Wide Open then filed a Chapter 7 bankruptcy petition. (R. at 5). Respondent filed a Chapter 11 bankruptcy petition on the same day. (R. at 5). Respondent failed to timely file his schedules of assets, so the bankruptcy court dismissed Respondent's bankruptcy case. (R. at 5). Respondent fired his old bankruptcy attorney and hired a new bankruptcy attorney. (R. at 5). Respondent refiled a Chapter 11 petition on January 11, 2019, when the arbitration proceeding was about to recommence. (R. at. 5-6). This time, Respondent filed all required documents. (R. at 6). Respondent's proposed plan would give Wildflowers only 40% of its claim. (R. at 6). Respondent did not consult with Wildflowers about the small payment, but he spoke with other creditors. (R. at 6).

Respondent reopened a taproom as a sole proprietor and used the equipment that secured his guaranty to do so. (R. at 6). Respondent failed to file a motion to extend the automatic stay under § 362(c)(3)(B), so Wildflowers repossessed the equipment that secured Respondent's guaranty. (R. at 6). Respondent then filed a motion under § 362(k) to recover damages. (R. at 6). The bankruptcy court ruled in favor of Respondent. (R. at 7). Wildflowers appealed the judgment to the Thirteenth Circuit, (R. at 7), which upheld the bankruptcy court's ruling. (R. at 19.1).

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Court of Appeals for the Thirteenth Circuit and enforce the arbitration agreement between the parties. 11 U.S.C. § 362 and related Code provisions do not impliedly repeal the Federal Arbitration Act ("FAA"), making the arbitration agreement valid and enforceable. The plain meaning and legislative history of the Bankruptcy Code demonstrate that Congress did not intend to repeal the FAA. There is no evidence to suggest that Congress intended to create an inherent conflict between the Bankruptcy Code and the FAA and thus repeal the latter. Even if the existence of an inherent conflict is independently sufficient grounds to support implied repeal, no such conflict exists in the present case. The FAA and the Bankruptcy Code are reconcilable for three reasons. First, the core/non-core distinction is not dispositive. Second, the importance of the automatic stay to the bankruptcy scheme is, on its own, insufficient to create a conflict. Third, allowing arbitration would not necessarily jeopardize the Bankruptcy Code's objectives of providing a "fresh start," proper administration of the bankruptcy estate, and preserving the collective nature of a bankruptcy dispute.

In this case, Respondent, a sophisticated debtor, wishes to abuse § 362(c)(3)(A) to prevent a creditor from realizing the benefit of its security interest. Respondent urges this Court adopt a tortured reading of a statute to render it mostly useless, and out of touch with the intents of Congress. If this Court adopts Respondent's view, sophisticated parties may frustrate their creditors through abusive bankruptcy filings. If this Court agrees with Wildflowers, however, Congress' intent will be realized and creditors will be able to realize their deals.

First, the legislative history behind § 362(c)(3)(A), the provision in question, unambiguously favors Wildflowers. Statements from Congress support it and nobody in Congress suggested anything remotely close to Respondent's position. Second, context surrounding the enactment also support it. Finally, the text of the statute itself supports Wildflowers' position.

STANDARD OF REVIEW

The parties do not dispute the facts set forth herein; all disputes regard issues of law which are reviewed de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted). Under a de novo standard of review, the reviewing court decides an issue as if it were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

ARGUMENT

I. 11 U.S.C. § 362 and Related Code Provisions Do Not Impliedly Repeal the Federal Arbitration Act.

The Federal Arbitration Act (the "FAA") allows parties to enter into arbitration agreements that provide "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (citation omitted). The FAA also requires courts to treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Furthermore, the Supreme Court has interpreted this congressional mandate as creating "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). While subsequent congressional action can allow courts to decline to enforce arbitration agreements, Congress's intention must be evident from the statute's text, legislative history, or an irreconcilable conflict between arbitration and the subsequent statute.

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). In the present case, no such intent to repeal or create an exception can be divined from the statute's text, legislative history, or relationship to the FAA.

A. The Plain Meaning and Legislative History of 11 U.S.C. § 362 and Related Code Provisions Demonstrate that Congress Did Not Intend To Repeal the FAA.

The argument that a subsequent statute overrides the FAA "faces a stout uphill climb." *Epic*, 138 S. Ct. at 1624. When facing two congressional acts concerning the same topic, the Court must "strive 'to give effect to both.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A contrary congressional command may override the FAA's mandate to enforce arbitration agreements. *McMahon*, 482 U.S. at 226. However, when evaluating a claimed conflict, the Court must come armed with "the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute. *Epic*, 138 S. Ct. at 1624, (citing *United States v. Fausto*, 484 U. S. 439, 452-53, (1988)). This command "may be deduced from [the statute's] text or legislative history . . . *or* from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (emphasis added) (citation and internal quotation omitted).

However, there is no mention of the FAA anywhere in the Bankruptcy Code. Even the word "arbitration" does not appear in the Bankruptcy Code. The legislative history of the Bankruptcy Code makes only a single passing reference to arbitration.[1] *Ackerman v. Eber (In re Eber)*, 687 F.3d 1123, 1129 (9th Cir. 2012) (The court found "no evidence in the text of the

[1] The Senate Report states only: "The scope of . . . Section 362(a)(1) is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings." S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978).

Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA in the Bankruptcy Code."); *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1020 (9th Cir. 2012) ("Neither the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy setting."); *Whiting-Turner Contracting Co. v. Elec. Mach. Enters. (In re Elec. Mach. Enters.)*, 479 F.3d 791, 796 (11th Cir. 2007) ("[W]e find no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code."); *Mintze v. Am. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 231 (3d Cir. 2006) ("We find no evidence of such intent [to override the FAA] in either the statutory text or the legislative history of the Bankruptcy Code."). Even though legislative history can potentially "illuminate ambiguous text" and, in the present case, the legislative history does make a single reference to arbitration, the Supreme Court has stated that it won't allow "ambiguous legislative history to muddy clear statutory language." *Milner v. Department of Navy*, 562 U.S. 562, 572, (2011). In the present case, the legislative history is ambiguous and the absence of arbitration from the text is a clear statement in and of itself. Ultimately, the text and legislative history of the Bankruptcy Code do not support the contention that the FAA was impliedly repealed.

This absence of evidence not only requires the opposition to turn elsewhere to support his argument in favor of implied repeal, it, in fact, actively undermines his claim. Congress has repeatedly shown that it is fully capable of overriding the Arbitration Act when it wishes—by stating, for example, (with regard to the Motor Vehicle Franchise Contract Arbitration Fairness Act) that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain conditions are met, 15 U.S.C. § 1226(a)(2) or (with regard to the Commodity Exchange Act and Consumer Financial Protection Act) that "[n]o predispute arbitration agreement shall be

valid or enforceable" in other circumstances, 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2); or (with regard to the Military Lending Act) that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U.S.C. § 987(e)(3). The fact that no similar language is present in the Bankruptcy Code weighs heavily against the claim that Congress intended to repeal the FAA as applied.

B. Section 362 and Related Judicial Code Provisions Are Reconcilable with the FAA.

This Court's ruling in *Epic* has produced two diverging theories on the implied repeal of the FAA. One interpretation of the case is that *Epic* altered, clarified, or otherwise overruled the test employed in *McMahon* and established that irreconcilable conflict between a statute and the FAA must be supported with clear and manifest congressional intent. *See, e.g., MBNA Am. Bank, N.A. v. Hill*, the 436 F.3d 104 (2d Cir. 2006). The other interpretation holds that the *McMahon* test remains fully in effect and that congressional intent is deducible from the mere presence of inherent conflict between the statutes. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Under either interpretation, arbitration remains appropriate in the present case.

1. Irreconcilable Conflict Between the Statutes Must Still Be Supported by Evidence of Congressional Intent in Order To Prove that the FAA Was Impliedly Repealed.

In order to demonstrate that two statutes are irreconcilable and therefore the latter repeals the former, the moving party bears the burden of showing "a clearly expressed congressional intention" that such a result should follow. *Epic*, 138 S. Ct. at 1624 (internal citations omitted). In other words, the moving party must demonstrate not only that the statutes cannot be harmonized, but also that congress had a "clear and manifest" intention that they conflict. *Morton*, 417 U.S. at 551. As stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, "[w]e must assume that if Congress intended the substantive protection afforded by a given statute to include protection

against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." 473 U.S. 614, 628 (1985). Opposing counsel bears the burden of proof on this matter but cannot meet it since neither the text nor the legislative history discuss arbitration or Congress's intent for the Bankruptcy Code to override the FAA in the event of a reconcilable conflict. As the *Epic* Court put it: the later statute "does not even hint at or wish to displace the FAA—let alone accomplish that much clearly and manifestly, as our precedents demand." 138 S. Ct. at 1624.

Earlier cases like *Gilmer* and *McMahon* would seem to imply that any one of three indicators (the later statute's text, the legislative history, or an irreconcilable conflict between the later statute and the FAA) independently constitute sufficient evidence of implied repeal. Specifically, *McMahon* held that congressional intent to impliedly repeal a statute may be "deducible . . . from an inherent conflict between arbitration and the statute's underlying purposes." 482 U.S. at 227. Put differently, the existence of an inherent conflict was sufficient to allow courts to deduce congressional intent. However, more recent cases, such as *Mitsubishi* and *Epic* (the most recent Supreme Court position on the matter and, therefore, the most persuasive), take the view that even irreconcilable conflict must be supported by "clear and manifest" congressional intent. *Epic*, 138 S. Ct. at 1624; *Mitsubishi*, 473 U.S. at 628. Because *Epic* requires a "text-first analysis" and "clear and manifest" contrary congressional command, there is reason to "doubt . . . the continued vitality of *McMahon's* 'inherent conflict' approach. Leslie A. Berkoff & Theresa A. Driscoll, *In the Wake of the U.S. Supreme Court's Decision in Epic Systems , Should Core Bankruptcy Matters Be Deemed a "Clear and Manifest" Exception to the Federal Arbitration Act?* 29 No. 2 Norton J. Bankr. L. & Prac. 1, 1 (2020). In fact, the distinction between *McMahon's* 'deducible from the presence of inherent conflict' standard and *Epic's* 'clear and

manifest expression of intent' standard is so great so as to be considered a completely separate test.

2. Even if Conflict Can Independently Constitute Sufficient Evidence of Implied Repeal, the FAA and the Bankruptcy Code Are Reconcilable.

Even if congressional intent for statutory conflict or for the Bankruptcy Code to override the FAA is not a necessary element for proving implied repeal, arbitration must be enforced since it is entirely reconcilable with the Bankruptcy Code. Firstly, the core/non-core distinction employed by lower courts is not dispositive in the current case. Secondly, the importance of the automatic stay to the statutory scheme of the Bankruptcy Code does not necessarily create a conflict with the FAA. Thirdly, the "fresh start" provided by the automatic stay and proper administration of the bankruptcy estate are not disturbed by arbitration in the present case. Finally, the collective or multiparty nature of a bankruptcy dispute does not preclude arbitration.

a. The Core/Non-Core Distinction Is Not Dispositive as Applied to the Present Case.

The Supreme Court has not elucidated an explicit test of what constitutes irreconcilable conflict; however, several circuits have interpreted *McMahon* as suggesting that the distinction between core and non-core proceedings is a favorable indicator of whether a provision of the Bankruptcy Code conflicts with the FAA. *See, e.g.*, *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018), *cert. denied subnom.* 139 S. Ct. 144 (2018); *Whiting-Turner*, 479 F.3d at 796; *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 169 (4th Cir. 2005); *In re Hermoyian*, 435 B.R. 456, 463-64 (Bankr. E.D. Mich. 2010).

Congress has articulated "a nonexclusive list of 16 types of proceedings" that may be considered "core" to bankruptcy law in 28 U.S.C. § 157(b)(2). *Wellness Intern. Network, Ltd. v.*

Sharif, 135 S. Ct. 1932, 1940 (2015). Core proceedings are those that involve "more pressing bankruptcy concerns." *In re United States Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999). Conversely, non-core bankruptcy matters are those that are simply "related to" bankruptcy cases. *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 166 (2d Cir. 2000).

This distinction, however, is not dispositive, is without clear Supreme Court precedent, and does little to advance the opposition's argument. Generally, bankruptcy courts lack discretion to preclude enforcement of arbitration clauses when a proceeding is non-core. *See*, *e.g.*, *Anderson*, 884 F.3d at 388. Even if a proceeding *is* core, the bankruptcy court may not have discretion to override an arbitration agreement if the provisions of the Bankruptcy Code does not "inherently conflict" with the FAA and does not necessarily jeopardize the objectives of the Bankruptcy Code. *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.),* 118 F.3d 1056, 1068-69 (5th Cir. 1997). Since the very question that the core/non-core test is designed to answer (is the conflict irreconcilable?) requires asking an almost identical question (is the conflict inherent?), the core/non-core distinction sheds no light on this case.

b. The Importance of the Automatic Stay to the Bankruptcy Code Does Not Necessarily Create an Inherent Conflict with the FAA.

Since the core/non-core distinction cannot resolve this case, the Court must return to the inquiry of whether an irreconcilable conflict exists between the FAA and the Bankruptcy Code. In addressing this question, courts have considered the importance of the provision to the objectives of the overall statutory scheme, though this Court has cautioned that "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*, 138 S. Ct. at 1624. This Court has

established a high threshold to meet this test and the automatic stay, while certainly central to the Bankruptcy Code, cannot be said to be irreconcilable with the FAA. "In fact, this Court has rejected every such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act." *Id.* at 1627.

In *Mitsubishi*, the Court was confronted with a claimed conflict between the Federal Arbitration Act and the Sherman Act, which contained a treble-damages provision providing a private cause of action. The Court noted that antitrust laws are of fundamental importance to the preservation of American democratic capitalism and "without doubt, the private cause of action plays a central role in enforcing [the antitrust] regime." *Mitsubishi*, 473 U.S. at 635. The treble-damages provision of the Sherman Act was, in other words, a "chief tool" in the antitrust enforcement regime because it posed a "crucial deterrent to potential violators." *Id.* The role of treble damages is certainly at least as central to the antitrust regime as the automatic stay is to the bankruptcy regime. Additionally, the private cause of action in antitrust suits and the automatic stay are both voluntary option rights that a party possesses and willing gives up when signing an arbitration agreement. Yet, the *Mitsubishi* Court refused to hold that the Sherman Act and the FAA were irreconcilable. First, the costs of judicial activism were too high; second, the arbitrator could provide an adequate and effective remedy for the parties and ensure that the legitimate interests of the antitrust regime had been addressed; and third, judicial scrutiny of arbitration decisions (though limited) is sufficient to ensure that arbitrators comply with the countervailing statutory requirements. *Id.* at 628. This test was reiterated in *McMahon*, where the Court held that

an agreement to arbitrate was only unenforceable where the arbitral forum would prove "inadequate to enforce the statutory rights" at issue. 482 U.S. at 229.

c. Allowing Arbitration Would Not Necessarily Jeopardize the Bankruptcy Code's Objectives.

i. Arbitration Would Not Disrupt the "Fresh Start" and Proper Administration of the Bankruptcy Estate.

In 2006, the 2nd Circuit addressed the question of inherent conflict with the FAA as applied specifically to the automatic stay in a bankruptcy proceeding. *Hill*, 436 F.3d 104. The court stated that bankruptcy courts may have discretion to override arbitration if arbitration *necessarily* jeopardizes objectives of the Bankruptcy Code. *Id.* at 108. The objectives relevant to this inquiry include the goals of providing debtors with a "fresh start," the "centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Gypsum*, 118 F.3d at 1069. Additionally, this inquiry required a particularized investigation "into the nature of the claim and the facts of the specific bankruptcy." *Anderson*, 884 F.3d at 389.

In *Hill*, the debtor filed adversary proceedings against the creditor as a putative class action on behalf of herself and others similarly situated, alleging violation of the automatic stay and unjust enrichment. 436 F.3d at 106. At the time of the action, the debtor's estate had been fully administered and her debts discharged, so the automatic stay no longer provided any protection to the debtor. Additionally, the assets repossessed by the creditor were returned to the debtor prior to the commencement of the action. *Id.* at 109

The *Hill* court concluded from these facts that: (1) arbitration would not affect the administration of the bankruptcy estate; (2) the debtor's claims lacked direct connection to her

own restructuring; and (3) a non-bankruptcy court would be capable of interpreting and enforcing the provisions of the stay. *Id.* Consequently, the court ruled that the FAA did not inherently conflict with the Bankruptcy Code.

In both *Hill* and the present case, the debtor alleges that the creditor violated the automatic stay and seeks damages, while the creditor seeks to compel arbitration. *Id.* at 106 and R. at 6. As was the case in *Hill*, the creditor returned the assets that had been repossessed. The harm of the alleged violation of the automatic stay, therefore, was either fully mitigated or fully actualized. The issue, then, to be resolved by either the arbitrator or the bankruptcy court relates to the violation of the automatic stay itself. *Id.*; R. at 7. Regardless of whether the dispute is resolved before an arbitrator or a bankruptcy court, the damages that might be awarded would not be part of the bankruptcy estate. Thus, the effect on the debtor's "fresh start" and the administration of the bankruptcy estate would be the same, regardless of whether the issue was resolved in a bankruptcy or an arbitral forum. The argument that the "fresh start" provided by the automatic stay is unaffected by the decision to arbitrate is furthered by the fact that Petty had already negotiated prepetition with several of his creditors and renegotiated the lease with the landlord of the Royal Rapids taproom. (R. at 6). The effect on the "breathing spell" provided by the automatic stay has already been largely utilized and would not be affected by the decision to arbitrate rather than consider claims in bankruptcy court.

The second consideration in *Hill*–the fact that the debtor filed her claim as a class action–is not applicable here and its absence does not tip the scales heavily one way or another. The third element–the capability of a non-bankruptcy court to interpret and enforce the provisions of the stay–is both applicable and extremely salient. The arbitrator of § 362(h) claim would be required to interpret and enforce statutory law rather than an order of the bankruptcy court and

"there is no indication from the statute that any dispute relating to an automatic stay should categorically be exempt from resolution by arbitration." 436 F.3d at 110.

In fact, courts have routinely held that bankruptcy and non-bankruptcy courts have concurrent jurisdiction to interpret the scope of the automatic stay. *See, e.g.*, *Dominic's Restaurant of Dayton, Inc. v. Mantia,* 683 F.3d 757, 760 (6th Cir. 2012) ("The court in which [a non-bankruptcy] proceeding is pending . . . has jurisdiction to decide whether the proceeding is subject to the stay."); *Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Lit.)*, 765 F.2d 343, 347 (2d Cir. 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of [a federal court] is an issue of law within the competence of both the court within which the litigation is pending ... and the bankruptcy court . . . ."). It would logically follow that an arbitrator could address the scope of the automatic stay with the same degree of aptitude as a bankruptcy court. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. As stated in *McMahon*, the question is whether a plaintiff would be able to "vindicate [their] statutory cause of action in the arbitral forum." 482 U.S. at 240. As the *Mitsubishi* Court astutely observed, arbitration might, in fact, be uniquely well-equipped to address the present case because it offers flexibility, expediency, and cost savings to the participants. 473 U.S. at 628. This is particularly relevant to the inquiry at hand because the rapid administration of a judgement would clarify where the parties stand without disturbing the countervailing objectives mentioned above.

ii. The Collective or Multiparty Nature of a Bankruptcy Dispute Does Not Preclude Arbitration.

Policy considerations cannot outweigh clear text. "[Courts] do not sit to assess the relative merits of different approaches to various bankruptcy problems . . . . Achieving a better policy outcome . . . is a task for Congress, not the courts" and "potential complexity should not suffice to ward of arbitration." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000); *Mitsubishi*, 473 U.S. at 633. Nonetheless, the 13th Circuit raised the policy-based argument that the Guaranty is a binding agreement executed in anticipation of a two-party dispute, yet bankruptcy cases can involve multiple parties, some of whom may not be bound by the arbitration agreement. R. at 11-12. Thus, it is possible that one creditor who did not enter an arbitration agreement may nonetheless find her recovery contingent upon an arbitrator's ruling regarding the debtor and another creditor. This has the potential to transform the creditor-versus-debtor conflict into a creditor-versus-creditor competition.

One problem with this observation is that the potential for a multiparty proceeding is present at almost any intersection between bankruptcy and arbitration, regardless of how significant the conflict is. If the mere possibility of implicating multiple parties could suffice to dispel arbitration, then *no* bankruptcy proceeding could ever be waived by arbitration. Thus, it cannot, by itself, be a useful or dispositive indicator of when the two statutes inherently conflict and when they can be reconciled. Since it would be an absurd result to conclude that all bankruptcy proceedings are immune to waiver by arbitration, courts must, as discussed above evaluate the particular bankruptcy provision at issue (in this case the automatic stay) and the facts of the specific bankruptcy. *See Mitsubishi*, 473 U.S. at 626 (evaluating whether the policy underlying the treble

damages provision of the Sherman Act was inherently in conflict with the FAA); *Hill*, 436 F.3d at 108.

The facts of the present case weigh heavily in favor of allowing arbitration. Firstly, the creditor and the debtor in the present case are sophisticated parties with the capacity to contract freely. This sets the present case somewhat apart from *Hill* and *Anderson*, where the debtors were a student and a private credit card holder, respectively. Wildflowers and Petty agreed to arbitration prior to any financial distress. Under the most basic contract principles, that agreement should be given effect. *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 (1972) (stating that "the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."). Though this doesn't entirely dispel with concerns about the race to the assets of the bankruptcy estate, it is important to recognize the countervailing interests at stake and the ability of sophisticated parties to effectively allocate risks.

Secondly, Great Wide Open granted Wildflowers a first priority lien on substantially all of its assets. R. at 4. Thus, when it comes to the administration or disposition of the bankruptcy estate, Wildflowers will be first in line. There is no real concern about the race to the assets of the bankruptcy estate because Wildflowers is the predetermined winner. Arbitration, would not, therefore, disrupt the collective or multiparty nature of the bankruptcy proceeding when it concerns the debtor and a creditor with a first priority lien on the assets in question.

Even if Wildflowers were not the first priority lienholder, arbitration would still not disrupt the objectives of a multiparty proceeding in the present instance because the choice is not between either enforcement of a bankruptcy right or arbitration, but between the different fora in which the applicability of the bankruptcy right is adjudicated. Here, the issue to be submitted to arbitration

is the scope and applicability of the automatic stay. R. at 7. As discussed above, the debtor is not relinquishing substantive rights in favor of arbitration, but rather vindicating their statutory rights in the arbitral, rather than bankruptcy, forum. *Mitsubishi*, 473 U.S. at 628; *McMahon,* 482 U.S. at 240. Because the rights of the debtor remain the same, there is not a substantial impact on third-party creditors. Thus, arbitration of the present case can provide an adequate and effective remedy for the parties without jeopardizing the objectives of the Bankruptcy Code. Therefore, the present case does not give rise to an irreconcilable conflict between the FAA and the Bankruptcy Code and the parties' dispute should be resolved through arbitration.

All of this is not to say that an irreconcilable conflict between the FAA and the Bankruptcy Code could not arise under some different set of circumstances. Perhaps policymakers may desire a bright-line rule of where the Bankruptcy Code supersedes the FAA or seek clarity on whether an inherent conflict exists if arbitration of a bankruptcy claim would implicate or adversely affect non-contracting third parties. However, providing policy benefits to future litigants cannot come at the expense of doing justice in the present case. Doing so would risk transforming judges into policymakers, significantly impinge upon Congress's powers, and decrease legislative accountability.

II. Section 362(c)(3)(A) Terminates the Automatic Stay in its Entirety.

Section 362(c)(3)(A) provides that, when a debtor had a case dismissed within the past year, the automatic stay terminates, "with respect to the debtor" thirty days postpetition. 11 U.S.C. § 362(c)(3)(A). Respondent urges this Court to adopt the so-called "majority view,"[2] which

---

[2] The majority view has been steadily losing ground in the courts, with a similar number of courts falling on either side in recent years. Brief for Petitioner at 8 n. 3, Smith v. Maine Revenue Servs., 910 F.3d 576 (1st Cir. 2018) (no. 18-1573).

believes this provision only terminates the automatic stay against the debtor. This Court should accept the more coherent view, however, which terminates the automatic stay in its entirety. If this Court decides in favor of Respondent, debtors will be able to file abusively, and there will be little Creditors can do to resolve this. First, legislative history unambiguously endorses Wildflowers' position. Second, context also shows that § 362(c)(3)(A) applies to both the debtor and its estate. Third, the plain language answers that yes, it terminates in total. For those reasons, this Court should adopt the more coherent view, the minority view, and find that § 362(c)(3)(A) terminates the automatic stay in its entirety.

A. Legislative History Supports the Minority View.

1. Legislative History Supports Section 362(c)(3)(A) referring to both "Acts" and "Actions."

Some argue that the difference in the use of "acts" and "actions" in § 362 are indicative of an intent to only terminate the automatic stay with regards to legal actions. This is an incorrect conclusion. *E.g. In re Paschal*, 337 B.R. 274, 280 (Bankr. E.D.N.C. 2006). Legislative history is relevant in interpreting a statute. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2011). Congresspeople referred to several kinds of "actions." 151 Cong. Rec. H2063-01, H2064 (2005) ("military actions"); 151 Cong. Rec. H1993-01, H2062 (2005) ("legal actions"); 151 Cong. Rec. H1974-05, H1983 (2005) ("illegal actions"). "Action" is a word that varies in meaning based on context, and in the context of § 362(c)(3)(A) there is no context that limits it to only legal proceedings. If this Court limits it to apply only to legal proceedings, the courts would fill with litigation to recover property and undermine the purpose of the provision. This Court should not read the statute to narrowly apply only to legal proceedings as that would undercut its purpose and render it much less powerful.

2. *Legislative History Confirms That Section 362(c)(3)(A) Terminates the Stay Entirely.*

Congress intended BAPCPA to limit abusive filings. First, its name is the "Bankruptcy Abuse Prevention and Consumer Protection Act." Pub. L. No. 109-8, 119 Stat. 23 (2005). While there is no purpose section in BAPCPA, the name should speak for itself. This Court has acknowledged that the purpose of BAPCPA is "to ensure that [debtors] repay creditors the maximum they can afford." *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 71 (2011) (citing H.R. Rep. No. 109-31 pt.1, p 2 (2005)). Legislative statements also confirm this. H.R. Rep. No. 109-31(I) at 138 (2005) ("[BAPCPA] amends § 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days . . . if such individual was a debtor in a previously dismissed case pending within the preceding one-year period."). The legislative history clearly favors the minority view.

In 1994, Congress created a commission to evaluate and propose new laws to resolve "issues and problems" in the Bankruptcy Code. Bankruptcy Reform Act, Pub. L. 103-394, 108 Stat. 4106 (1994) (§ 603). This commission mentioned Respondent's conduct in this case — repeated filing to delay process—as a problem. Report of the Nat'l Bankr. Rev. Comm'n: The Next Twenty Years, at 279 (Oct. 20, 1997) http://govinfo.library.unt.edu/nbrc/reportcont.html ("Others file on the eve of a foreclosure . . . for the sole purpose of delaying . . . legal process."); *see* (R. at 5-6). The fact that Debtor filed bankruptcy only with legal action about to occur is one of the key issues Congress wanted to protect against. (R. at 5-6). Respondent waited several months between his first and second petitions. (R. at 5). This is not a case where the debtor immediately fixed his clerical error, Respondent sought to prevent Wildflowers, among other

creditors, from using any of their remedies. Respondent's conduct is the kind of abusive conduct that Congress sought to prevent.

Early proposed legislation in the House stated essentially what the minority view proposes. H.R. Rep. No. 105-540 at 80 (1998). Likewise, the Senate Judiciary Committee proposed a similar provision under the title "Discouragement of Bad Faith Repeat Filings." S. Rep. No. 105-203, at 7 (1998). Similarly, the Judiciary Committee criticized people like Debtor, saying that "many of the worst abuses of the bankruptcy system involve individuals who repeatedly file . . . with the sole intention of using the automatic stay." *Id.* at 27-28; (R. at 5-6.) These provisions eventually morphed into the slightly less artful § 362(c)(3)(A), but are clearly intended to do the same thing. *See* H.R. Rep. No. 109-31(I) at 138 (2005) ("[BAPCPA] amends § 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days . . . if such individual was a debtor in a previously dismissed case pending within the preceding one-year period."). A slight alteration in the language should not be read to completely turn the meaning on its head. Congress' legislative intent from its earlier proposed bills and statements clearly favor the minority view. Moreover, nothing in the legislative history suggests that Congress desired the majority view's reading. *In re Daniel*, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009). There would have to be a large reversal in intent in a short time frame from wishing to prevent Respondent's specific conduct and endorsing it. *See* H.R. Rep. No. 109-31(I) at 138 (2005); (R. at 5). Because legislative history supports the minority view, this Court should adopt it.

B. Context Supports the Minority View.

This Court may find § 362(c)(3)(A) may be ambiguous. It would certainly not be the first to do so; the 2005 amendments to the Bankruptcy Act are generally seen as clumsy, *see*, *e.g.*, *In*

re Grydzuk, 353 B.R. 564, 567 (Bankr. N.D. Ind. 2006) (discussing unclarity of § 1328(f)(1)), but the plain text of § 362(c)(3)(A) still supports the minority view. Congress is very likely aware of the Bankruptcy Code's inartful drafting, because of provisions such as the "hanging paragraph," which is clearly erroneous and discussed heavily. § 1325(a) (hanging paragraph); *e.g.*, Miyong Mary Kang, *Is It Time to Hang the Hanging Paragraph, 11 U.S.C. § 1325(a)?*, 26 Emory Bankr. Dev. J. 49 (2009). Even with this knowledge, they have not fixed the hanging paragraph. *E.g.*, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 134 Stat. 281 (2020). This Court should take the sometimes inartfully drafted nature of the 2005 amendments into consideration when interpreting § 362(c)(3)(A).

Concerns of harshness of this provision are overstated. In general, a debtor has the ability to rebut any presumptions of abuse. § 362(c)(3)(C). One test evaluates whether the new case is likely to result in a discharge, whether the creditor believes it was filed in good faith, and other factors. *In re Charles*, 334 B.R. 207, 219 (Bankr. S.D. Tex. 2005). This is not onerous. Moreover, even were it onerous to an average debtor, Respondent is no average debtor. First he ran a successful business for almost twenty years. (R. at 3, 5). The expertise and business skills he learned as a businessman surely would help him understand issues of business, such as bankruptcy. Even were that not the case, he was a lawyer before that, so he is able to understand filing deadlines and what needs to be done in a bankruptcy. (R. at 3). If there is any harshness, it would apply to Wildflowers. Respondent is attempting to cleverly hide his assets behind the automatic stay to prevent recovery. (R. at 7). Wildflowers will be unable to receive the benefit of its bargain without lifting the automatic stay, because Respondent's plan only gives Wildflowers 40% of what it is

owed. (R. at 6). In general, and especially in this case, there is no harshness on Respondent by enforcing § 362(c)(3)(A) against him.

The minority view's reading is good public policy. If the point of § 362(c)(3)(A) is to prevent repeated abusive filing, it makes little sense to punish someone else who is not an abusive filer. While a spouse may know of abusive filing, and the joint case may further the abuse, there are other mechanisms through which a court can resolve abuse. *E.g.*, §§ 707(b)(3); 1307(c). And, in light of § 362(c)(3)(A), a court is more likely to find a repeat filing hidden behind a joint bankruptcy to be abusive. It is also unlikely that Congress desired to punish someone for the actions of their spouse, especially in the marital context. Spousal abuse can be easily concealed, and Congress, as well as many state legislatures have taken action against financial abuse. *E.g.*, 34 U.S.C. § 21741(1)(B); Cal. Welf. & Inst. Code § 15610.30 (West 2020). Because Congress generally does not desire to punish one for another's acts and reading this provision otherwise would allow for spousal abuse, it is preferred to read this provision as differentiating between spouses.

C. The Plain Language of Section 362(c)(3)(A) Supports the Minority View.

Even if this Court does not find legislative history or the context surrounding § 362(c)(3)(A) compelling, this Court should read § 362(c)(3)(A) as terminating the stay in its entirety for the following reasons. First, there is no distinction in § 362(c)(3)(A) between "acts" and "actions." Second, the plain text of § 362(c)(3)(A) also supports the minority view. Third, reading § 362(c)(3)(A) with other provisions in § 362(c) and in other bankruptcy statutes further support the minority view. Additionally, "with respect to the debtor" can refer to a serial-filing

debtor's first-time filing spouse. Finally, the majority view creates more surplusage than the minority view.

1. Section 362(c)(3)(A) Applies to "Acts" and "Actions."

Section 362(c)(3)(A) terminates the automatic stay "with respect to any action taken" against the debtor. Section 101 does not define act or action. While "act" and "action" are used slightly differently within § 362, § 362(c)(3)(A) was created after other provisions. The difference in terms is a "coincidence of statutory codification." *Wachovia Bank v. Schmidt*, 546 US 303, 304 (2006). Congress, when it created § 362 originally and when it created the 2005 amendments were different, and the slight difference in wording should not be read as dispositive. There is little difference in the wording, and therefore this Court should not read in a difference.

Black's Law Dictionary defines "action" as both "the process of doing something" and "a civil or criminal judicial proceeding." *Action*, Black's Law Dictionary (11th ed. 2019). Other areas of the law use action as a process of doing something. *E.g.*, *Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited."). Further, if Congress wanted to limit "action" to legal actions only, they could have used simpler, clearer, language such as "legal action." Because "acts" and "actions" are interchangeable, this Court should not read a distinction into them.

Numerous places in §362 refer to "act." These provisions refer to "obtain[ing] possession of property"; or "creat[ing], prefect[ing], or enforc[ing]" liens; or "collect[ing], assess[ing], or recover[ing] a claim." §§ 362(a)(3)-(5). One can do all the preceding acts through a judicial proceeding. Wildflowers did not, but could have, obtained an order confirming the termination of the automatic stay as well, which would not have affected Respondent's rights. § 362(j). Because

one may act in these ways in a legal proceeding or outside of one, this Court should not read "acts" as only pertaining to informal actions.

Section 362(k) allows for damages for violation of the automatic stay, and § 362(k)(2) limits damages for those violations done in good faith. While (k)(2) uses the phrase "action taken," that does not clearly mean that it refers to narrowly defined legal proceedings. The automatic stay prevents both legal proceedings and mere "acts." *E.g.* § 362(a)(1). Limiting only legal actions taken in good faith makes little policy sense, as these are the least likely to be abusive.

While the Bankruptcy Code in two other places uses action taken to refer to legal actions, that does not mean that "action taken" refers only to legal actions. §§ 507(a)(8) ("for a hearing and an appeal of any collection action taken"); 524(g)(6) ("Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court"). Section 507(a)(8) refers to government agencies, and section 524(g)(6) refers to courts; legal actions are the kinds of acts that these bodies take. Additionally, § 507(a)(8) qualifies the kind of action taken to "collection action" which demonstrates that Congress knows how to limit the kind of action taken. Even if this refers to legal actions only, "legal action" is not defined within § 101. Repossessing secured property could be considered a legal action: secured property is secured because of some legal document. Wildflowers did not merely take property, they relied upon their security interest to enforce their rights. (R. at 6). Because one can perform an "action" in a formal proceeding or outside of one, this Court should not read "action" to be limited to formal proceedings.

2. Section 362(c)(3)(A) Terminates the Automatic Stay in Its Entirety.

Section 362(c)(3)(A) states that the automatic stay terminates for a debtor who had a "single or joint case" that was dismissed, and then was a debtor in a subsequent "single or joint

case" within one year. This creates a distinction between the debtor and other debtors in a subsequent filing to which only one debtor is a repeat-filer. This allows the debtor a brief period to establish that this secondary bankruptcy filing would be in good faith. The minority view, which is more coherent, only requires one distinction, which is plausible on its face.

The majority view on the other hand requires different distinctions. The first distinction is between the debtor's person and property based on the "with respect to the debtor" language. *See* § 362(c)(3)(A). The second distinction likewise rests on the same language to distinguish between non-estate property and estate property. This is incoherent because it relies on one set of reasoning to distinguish between the debtor's person and property, and rejects that reasoning to distinguish between non-estate property and estate property. *See Smith v. Maine Bureau of Revenue Services*, 590 B.R. 1, 12 (Bankr. D. Maine 2018) ("[I]t is difficult to see how a possible reference to only one of the applications . . . can be read to apply to two of them") (quoting *Daniel*, 404 B.R at 323). Because these contradictory readings are required to understand the majority view, this Court should not adopt the majority view.

Section 362(c)(3), when read through the majority view's shortsighted textualism, implies that there must be three bankruptcy cases before the automatic stay is terminated: first, the dismissed case; second, a presently existing case; and third, a new case. Only in that new case would the automatic stay not apply after the thirty-day period. *Cf. Paschal*, 337 B.R. at 277 n.2 (noting that under a literalist reading, § 362(c)(4) requires four cases within one year). This would almost certainly never happen; in a Chapter 7, a debtor could have three months before the automatic stay would terminate naturally and distribution would occur. § 726. Using this shortsighted textualism is improper, and it is seemingly necessary for the majority view because it

rejects coherence and common sense to focus on solely the text of the statute. For that reason, this Court should not accept the majority view.

Section 362(c)(3)(A) references the stay under subsection (a). Subsection (a) applies the stay to both the debtor and the estate. Congress, if it wanted the majority view's interpretation, could have referenced the specific provisions that reference only the debtor: (a)(5)-(8). But the language of the statute states that the stay terminates, not only to specific provisions. Moreover, § 362(c)(3)(A) states that "with respect to a debt" and "any lease" does not specify that it must belong to the debtor and not the debtor's estate. This Court should not limit § 362(c)(3)(A)'s language to only apply to the debtor's property because Congress did not do so.

Read literally, as Respondent requests this Court do, this provision is ridiculous. The only thing this provision would allow would be equitable remedies against specifically the debtor. *See* § 101(5)(B). Moreover, "courts have typically extended equitable relief only sparingly," so a literal reading is made even more implausible. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 90 (1990). And, "no court" reads § 362(c)(3)(A) in this way. *In re Smith*, 910 F.3d 576, 582 (1st Cir. 2018). This is not a straw argument made to be knocked over: the majority view is based upon a literalist reading, *see*, *e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019), this possibility must also be contended with. If the literalist meaning is to hold, then this incredibly narrow interpretation must be the interpretation adopted by this Court. Section 362(c)(3)(A) would be useless under the plain meaning urged by Respondent. It would not even extend to allowing suits for the things not included in the estate under § 541(b), like withheld wages. And because Congress presumptively does not pass useless laws, *United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia J., concurring), then this law cannot be read using

only the literalist meaning asserted by Respondent. Underneath Respondent's argument lies the ability for debtors—especially sophisticated debtors, like Respondent—to abuse the bankruptcy process to frustrate creditors. The best reading is to include the debtor's and the debtor's estate's property in the termination provision of § 362(c)(3)(A).

3. *Read in Light of Other Provisions in Section 362, (c)(3)(A) Favors the Minority View.*

Statutes are "to be read as a whole" because statutory language "depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Reading § 362(c)(3)(A) in its proper context clarifies that the automatic stay terminates in its entirety.

That § 363(c)(4) prevents the stay from coming into effect at all rather than just not applying to the debtor should favor the minority view. Sections 363(c)(3) and (4) are incredibly similar. They each have subsections relating to good faith. (c)(3)(C), (4)(D). One subsection was likely a template for the other. With the uselessness of the plain text in Respondent's reading of § 362(c)(3)(A) in mind, it should be read to achieve the same thing as (c)(4), which is to terminate the stay entirely. Even if (c)(4) should be harsher than (c)(3)(A), the majority view's position still renders (c)(3)(A) useless. These provisions are incredibly similar and should achieve similar ends. Read considering (c)(4), (c)(3)(A) should terminate the stay entirely, not just the stay with regards to the debtor's property.

Because almost all a debtor's property becomes part of the bankruptcy estate under § 541(a) and § 1115, § 362(c)(3)(A) would effectively do nothing under the majority view. Under the majority view a creditor may pursue expired leases, withheld wages, but not much more. § 541(b). Obviously, this would net the creditor very little, if anything. Congress does not create

"useless laws" so this Court should not make this law useless. *Castleman*, 572 U.S. at 178 (Scalia J., concurring).

The mere fact that § 362(a) refers to the stay applying to both the debtor's estate and the debtor itself should not be dispositive. Congress created § 362(c)(3)(A) in 2006, while § 362(a) has remained almost unchanged since 1978. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, PL 109–8, April 20, (2005); 119 Stat 23; 95 H.R. 8200, 95th Cong. (1978). BAPCPA is large and this makes it less likely that members of Congress would notice a minor detail in those five words. That the plain text differs in two different paragraphs in different subsections created decades apart has little probative value in determining the meaning of the statute.

Section 362(j) likewise suggests that the stay is terminated in its entirety. The text states that a court may issue an order to confirm that, under 362(c), "the automatic stay has been terminated." § 362(j). It does not include the language "with respect to the debtor." *Id.* Nor does it mention only the debtor's property. *Id.* Given this subsection, it seems unlikely that the statute lifts the automatic stay against only the debtor, and not the estate as a whole. It is "very difficult" to justify Respondent's majority approach with the surrounding provisions of the statute. Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 Am. Bankr. L.J. 407, 429 (2012). Because other provisions within § 362(c)(3)(A) support the minority view, this Court should adopt it.

4. *Read in Light of Other Statutes, Section 362(c)(3)(A) Favors the Minority View.*

While "with respect to" accompanies both the debtor and the estate in § 521(a)(7), this should not mean that the revocation of the automatic stay only applies to the debtor. Throughout the Bankruptcy Code, § 521(a)(7) is the only provision that mentions both the debtor and the estate following a "with respect to." Moreover, Congress was clearer in § 551 when it said "any transfer avoided . . . is preserved for . . . the estate but only with respect to property of the estate." § 551. This shows a greater specificity than was contained in other provisions. *E.g.*, § 362(c)(3)(A). Moreover, Congress intended the stay to terminate entirely, not just against the debtor. *Paschal*, 337 B.R. at 278 ((quoting E-2 *Collier on Bankruptcy* App. Pt. 10(b) at App. Pt. 10-333 (15th ed. Rev. 2005)) (quoting report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256 (April 8, 2005)). The lack of specificity in § 362(c)(3)(A), when contrasted with the specificity in other statutes, favors the minority view.

Additionally, this Court should read § 362(c)(3)(A) as terminating with respect to both debtor and estate because there is no clear limitation on the statute that it only applies to the debtor. Of the other sections of the Bankruptcy Code, there are limitations that are plain. *E.g.*, § 551 ("any transfer avoided . . . is preserved for the benefit of the estate *but only with respect to property of the estate*") (emphasis added). The Bankruptcy Code can be precise when Congress desires it to be. *See*, *e.g.*, § 101(5) (defining "claim" with precision). Because the Bankruptcy Code is not precise in defining § 362(c)(3)(A) as supporting the majority view, this Court should not read it as precise and therefore should adopt the minority view.

5. *In the Alternative, "With Respect to the Debtor" Refers to a Non-Debtor Spouse.*

The Bankruptcy Code allows for debtors to file jointly with their spouse. § 302. Section 362(c)(3)(A) refers to "*a single or joint case* filed by or against a *debtor*" and that the stay terminates "with respect to the debtor." § 362(c)(3)(A). The obvious inference here is that it would not terminate with respect to the joint debtor when that debtor did not have a previously pending case. *See Daniel*, 404 B.R. at 326. It would only terminate with respect to the repeat-filer.

There are several other provisions that distinguish between the debtor and the debtor's spouse. For example, § 707(b)(7)(B) takes great pains to lay out when a spouse's income will be included in the means test when that spouse is separated. This demonstrates a great concern for the peculiarities of joint bankruptcies. The timeline in which someone who is contemplating filing bankruptcy and pending divorce is quite narrow, so in a divorce this reading is unlikely to be abused. *See e.g.,* 3 Norton Bankr. L. & Prac. 3d Appendix 60-A § 60-A:1 (Chapter 7 bankruptcies often last six months); N.Y. Dom. Rel. Law § 170 (McKinney 2020) (period of six months before divorce may begin). Because language in other statutes distinguish between a debtor's spouse and the debtor, that is likely what the text in this statute was created to do; therefore, this Court should read this provision to apply only to a first-time debtor-spouse.

Joint bankruptcies keep the rights of the two debtors separate in most cases. *E.g.*, *Smith*, 910 F.3d at 584-85. There are many important distinctions. *E.g.*, *In re Hicks*, 300 B.R. 372, 376 (Bankr. D. Idaho 2003) (property of one debtor-spouse cannot pay the debts of the other); *Matter of Stuart*, 31 B.R. 18, 19 (Bankr. D. Conn. 1983) (creditors must file debts against each spouse they have claims against). This language separating the first-time debtor-spouse from the serial

filing spouse is in line with the general structure of the Bankruptcy Code. While § 362(c)(4)(A)(i) does not use "with respect to the debtor," that does not foreclose this reading. First, § 362(c)(4)(A)(i) does not clearly foreclose a similar reading in its own context, because it too is ambiguous. Moreover, neither § 362(c)(4)(A)(i) nor (c)(3)(A) distinguish between the property of the debtor or the property of the estate. The automatic stay referenced within it could apply to either the debtor or both the debtor and the debtor's spouse. Even if not, § 362(c)(4)(A)(i) is meant to be harsher than § 362(c)(3)(A). The purpose of both provisions is to prevent abusive filing. There are instances wherein one may err while filing in good faith, as § 362(c)(3)(C) allows. In this case, Respondent is a sophisticated party and had a lawyer the first time, so it is unlikely he filed in good faith the second time. (R. at 5). He was a lawyer, so he is surely aware of the maxim "ignorance of the law is no excuse." (R. at 3). Moreover, he is a businessman and should be well aware of the helpfulness legal counsel can bring him. Even if the initial filing was a mistake, the good faith factors do not excuse "mere inadvertence or negligence." § 362(c)(3)(C)(i)(II)(aa). Because the Bankruptcy Code generally distinguishes between a debtor and their spouse, it is wise to read § 362(c)(3)(A) as referring to a first-time debtor-spouse.

6. The Majority View Creates Surplusage Where the Minority View Eliminates It.

Courts are "reluctan[t] to treat statutory terms as surplusage." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The canon against surplusage, if applicable in this case, does not advise against interpreting "with respect to the debtor" to keep the automatic stay applicable to the estate. Better applied, it would make "with respect to the debtor" surplusage because otherwise the whole statute becomes essentially without value. Exempt property would still be viable for a debtor because it is unreachable by creditors regardless of the automatic stay. § 522(c). Not only would

§ 362(c)(3)(A) apply to almost no property, but in practice, nobody will take advantage of it. Legal proceedings are expensive and creditors are unlikely to spend money pursuing a valueless claim. This reading does not improperly insert new words into the statute, rather, it removes words from it properly.

One set of words the majority view renders useless is "property securing such debt." *See In re Reswick*, 446 B.R. 362, 380 (B.A.P. 9th Cir. 2011). Because the only property that the debtor can have is not something any creditor can pursue, *see* § 522(3), is useless to the estate, *see* § 554(a), or likely with little value, *see* § 541(b), this provision would become meaningless. In essence, a creditor actually may not actually pursue any "property securing such debt" because it is estate property and not something the debtor possesses. The property must be estate property too, because anything that has enough value to secure a debt will be in the estate. § 541(a)(1). The majority view makes this part of the statute surplusage, in its pursuit to limit surplusage. This is because any property that secures a debt will not be in the debtor's possession after the bankruptcy petition is filed. *See id.* In short, if a debtor has any property of value that secures a debt, that becomes part of the estate. If the stay terminates only for the debtor, then a creditor cannot pursue the estate property securing such a debt, which renders those words useless.

In reading § 362(c)(3)(A) to include only the debtor, and not the estate, the Court must ignore the effort Congress took in defining "bad faith" in § 362(c)(3)(C), which provides bad faith factors. This is a very complicated section, as there are six nested subsections. § 362(c)(3)(C)(i)(II)(aa)-(cc). Congress likely would not go through the effort in creating this many subsections if it had no use at all. Additionally, § 362(c)(3)(C) provides a detailed process for determining whether the automatic stay should apply to the debtor. Moreover, legislative

history refers to terminating the stay in total. H.R. Rep. No. 109-31(I), at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138; H.R. Rep. No. 105-540 at 80 (1998). But, if the majority view holds, this provision becomes almost useless. Likewise, § 362(j) would be useless for a creditor.

Not only would creditors likely not take advantage of the stay expiring, but debtors would be even more unlikely to take advantage of § 362(c)(3)(B) to allow them to extend the stay. Again, if the stay applies only to the debtor, and not the debtor's property, there would be very little reason for the debtor to extend the stay. The only reason a debtor would ask to extend the stay is if they wished to exempt property, which, again, is likely only in a Chapter 7.

Statutes are incredibly hard for Congress to pass and it is unlikely they would create an almost inapplicable statute. Congress is unlikely to pass a useless bill, so it is unlikely that the text refers to only the debtor, and not the estate. *Castleman*, 572 U.S. at 178 (Scalia J., concurring) ("Congress presumably does not enact useless laws."). This Court should read this statute so that way it retains its usefulness.

Under the majority's interpretation, the provision is harsh *only* under a Chapter 7, while it has little to no effect on a Chapter 11 or 13. Further, Chapter 7 provides explicit methods for a judge to prevent abusive filing, § 707(b), where reorganizations do not carry the same stringency, so it is less likely that a debtor could abuse a filing in a Chapter 7 than a reorganization. Section 707(b) calls a judge's attention to abuse, where in other provisions a judge must rely on their equitable powers under section 105, which are more freeflowing. If Congress wanted to prevent a debtor from filing a Chapter 7 bankruptcy within one year of a previous case being dismissed, they surely could have done so. Congress created several other provisions making it harsher. *See*,

e.g., § 707(b)(2). Further, if this provision was meant to only affect Chapter 7, which it would under the majority view, Congress would likely have placed it in Chapter 7, and not put it in § 362.

Chapter 7 was not the only Chapter Congress wanted to make harsh either. Chapter 13 is less forgiving post-BAPCPA as well. If a Chapter 13 debtor is to fail the Chapter 7 means test, their plan must last five years. § 1325(a) (hanging paragraph), (b)(4)(ii). A Chapter 13 discharge is no longer as strong as it once was. § 1328(h). In Chapter 11, Congress exempted fraudulent tax returns from discharge. § 1141(d). These show an underlying intent to make bankruptcy harder on the debtor, regardless of which Chapter they are in. Making a disproportionately harder burden on Chapter 7 debtors is out of line with the rest of BAPCPA, which does not have it out for Chapter 7 debtors exclusively.

"With respect to a debtor" appears in several other provisions in BAPCPA. In these cases, there would be no change in meaning with removing "with respect to a debtor." *See* Meltzer, *supra* at 434-35. Section 109(h)(3)(B) is one such example. The text reads "[w]ith respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements for paragraph (1) . . . ." § 109(h)(3)(B). This is the case in several other provisions. *See e.g.*, § 727(a)(11). This lends credibility to the idea that "with respect to the debtor" is surplusage. Because the legislative history, context of the statute, and the plain text itself support the minority view, this Court should adopt the minority view when interpreting § 362(c)(3)(A).

CONCLUSION

For the foregoing reasons, Wildflowers, the petitioner, respectfully requests that this Court overturn the Thirteenth Circuit's judgment.

Respectfully submitted,

35P
Counsel for the Petitioner

APPENDIX

11 U.S.C. § 362(c)
(c)Except as provided in subsections (d), (e), (f), and (h) of this section—
(1)the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2)the stay of any other act under subsection (a) of this section continues until the earliest of—
(A)the time the case is closed;
(B)the time the case is dismissed; or
(C)if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;
(3)if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
(A)the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
(B)on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and
(C)for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—
(i)as to all creditors, if—
(I)more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;
(II)a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—
(aa)file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);
(bb)provide adequate protection as ordered by the court; or
(cc)perform the terms of a plan confirmed by the court; or
(III)there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter

7, 11, or 13 or any other reason to conclude that the later case will be concluded—

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

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

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

(4)

(A)

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

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

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

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

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

(i)as to all creditors if—

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

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

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

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