No. 19-1035

IN THE

Supreme Court of the United States

SHARON D. ROSE,

Petitioner,

v.

SELECT PORTFOLIO SERVICING, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this state-law foreclosure action, petitioner filed a complaint seeking to quiet title to real property on the theory that the statute of limitations had run and prevented respondents from foreclosing. Respondents counterclaimed for judicial foreclosure, "relying on various tolling concepts" to counter petitioner's statute of limitations assertions. Pet. App. 1a. Among other things, respondents argued that, under Texas law, the limitations period was tolled during the pendency of certain federal bankruptcy proceedings that petitioner had initiated to block foreclosure by triggering an automatic stay under 11 U.S.C. § 362(a). The Fifth Circuit agreed, rejecting petitioner's argument that tolling was inapplicable on the theory that the automatic stay in her second and fourth bankruptcy petitions had terminated as to claims against the bankruptcy estate.

The question presented is:

Did the Fifth Circuit err in holding that respondent was entitled to tolling under Texas law during the pendency of petitioner's second and fourth bankruptcy proceedings on the ground that 11 U.S.C. § 362(c)(3)(A), which terminates an automatic bankruptcy stay "with respect to the debtor," does not lift the stay as to property of the bankruptcy estate?

CORPORATE DISCLOSURE STATEMENT

Select Portfolio Servicing, Inc., is a wholly owned subsidiary of SPS Holding Corp. SPS Holding Corp. is a privately held corporation; its sole shareholder is Credit Suisse (USA), Inc. Credit Suisse (USA), Inc., is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. Credit Suisse Holdings (USA), Inc., is owned by Credit Suisse AG, which in turn is owned by Credit Suisse Group AG, a publicly traded corporation.

U.S. Bancorp is a publicly traded corporation. Its wholly owned subsidiary, U.S. Bank, N.A., as successor trustee to LaSalle Bank, N.A., on behalf of the holders of Bear Stearns Asset Backed Securities I Trust 2007-HE3, Asset-Backed Certificates Series 2007-HE3, is the real party in interest and the proper defendant in this case. *See* Pet. App. 17a & n.2; Resp. C.A. Br. i, 13.

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INTRODUCTION

This case arises from a dispute about whether respondents' right to foreclose on real property was barred by the statute of limitations under Texas law. After the mortgage on petitioner's property had been in default for several years, respondents sought to foreclose on the property. But petitioner repeatedly thwarted foreclosure proceedings. Over the course of 19 months, petitioner filed *three* separate bankruptcy petitions—each on the eve of a scheduled foreclosure sale. The petitions were pretextual, designed only to trigger an automatic stay under 11 U.S.C. § 362(a) and block each successive foreclosure sale from going forward. And they succeeded, blocking respondents' ability to foreclose on the property for years even as petitioner made no payments on the outstanding mortgage debt.

Remarkably, petitioner now claims that her dilatory tactics have run out the clock, as she contends that the statute of limitations bars respondents from foreclosing on the property. Texas law allows for tolling of this limitations period in certain circumstances, including during the time in which a bankruptcy stay is in place. But petitioner denies that tolling applies here. Citing 11 U.S.C. § 362(c)(3)(A), which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, petitioner now argues that her efforts to block foreclosure with sham bankruptcy filings were toothless. On petitioner's account, the stays in two of her bankruptcy cases expired after 30 days because of her repeat-filer status under section 362(c)(3)(A). The magistrate judge (in a report and recommendation adopted by the district

court, Pet. App. 12a-15a) chided petitioner for her repeated efforts to "gam[e] the system," and rejected her attempt "to use the shield of bankruptcy as a sword to claim that [respondents] cannot foreclose." Pet. App. 21a, 31a. The Fifth Circuit affirmed, concluding that under "the plain language" of the Bankruptcy Code, section 362(c)(3)(A) "terminates the stay only with respect to the debtor; it does not terminate the stay with respect to the property of bankruptcy estate." Pet. App. 7a.

Petitioner seeks certiorari, asserting that the Fifth Circuit's application of Texas's statute of limitations implicates an issue of federal bankruptcy law that has divided the lower courts. But the shallow circuit split that petitioner identifies does not warrant review at this time, and this state-law foreclosure action is a singularly unsuitable vehicle to address the issue in any event.

By petitioner's own count, the decision below implicates a 1-1 circuit split on an issue that only two courts of appeals have even had occasion to consider. *See Smith* v. *Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 578 (1st Cir. 2018) (describing the question as "one of first impression in the courts of appeals"). As a result, the statutory interpretation question raised by petitioner has not been fully vetted at the appellate level. For example, although petitioner divides lower-court decisions into two camps—describing a "majority approach" under which section 362(c)(3)(A) terminates the stay only as to actions against the debtor and the debtor's non-estate property, and a "minority approach" under which the stay terminates in its entirety—several bankruptcy courts have endorsed a "third interpreta-

tion." *In re Goodrich*, 587 B.R. 829, 836 (Bankr. D. Vt. 2018). Under that approach, the bankruptcy stay will *sometimes* terminate as to the estate, but only if the estate property "was the subject of a judicial, administrative, or other formal proceeding commenced prepetition." *Id.* & n.6 (collecting decisions). No circuit has considered this alternative. Likewise, the petition references *another* approach, which petitioner describes (at 26) as "the most natural reading of the statutory language." Under it, the stay terminates only as to actions against the debtor personally (not actions implicating her non-estate property). This approach, too, has not been fully evaluated at the circuit level, and the facts of this case provided no reason for the Fifth Circuit to consider it. Further percolation would also benefit this Court because the vast majority of cases that petitioner cites have arisen in chapter 13 bankruptcy proceedings. Yet the scope of section 362(c)(3)(A) has significant implications for chapter 7 bankruptcy, too—implications that the lower courts have yet to address. *See In re Thu Thi Dao*, 2020 WL 2462521, at *2 (Bankr. E.D. Cal. May 11, 2020).

This case is also a uniquely poor vehicle to review the question presented. The petition raises an issue of federal bankruptcy law that is almost invariably litigated in bankruptcy proceedings. But this is not a bankruptcy case. The case is in federal court under diversity jurisdiction, as both petitioner's action to quiet title and respondents' counterclaim for judicial foreclosure arise under Texas law. The federal issue advanced by the petition is implicated only because of how Texas courts happen to apply the limitations period in foreclosure actions. This highly idiosyn-

cratic posture would complicate review in this Court, for at least three reasons.

First, because the federal question is embedded in an issue of state common law, there is good reason to doubt whether it is dispositive. Respondents argued below that, even apart from the automatic bankruptcy stay, they would be entitled to equitable tolling under Texas law. Tolling is an equitable doctrine, and a Texas court could easily conclude that petitioner's bad-faith efforts to "gam[e] the system" in order to "thwart" foreclosure, Pet. App. 29a, 31a, justify tolling the statute of limitations *regardless* of how the bankruptcy issue presented here is resolved.

Second, the unusual posture of this case inverts litigation incentives in a manner that could distort presentation of the issues in this Court. There can be no serious doubt that if respondents had tried to carry out a foreclosure sale while one of petitioner's successive bankruptcy petitions was still pending, she would have opposed the action vigorously and argued that it was blocked by the automatic stay. But now, as petitioner opportunistically seeks to leverage the Texas statute of limitations, she wants to *restrict* the protections provided by the automatic stay for debtors. Petitioner thus plans to advance arguments regardless of whether they conflict with the interests of the overwhelming majority of bankruptcy filers—those who lack her case-specific motivations to argue against the automatic stay.

Third, additional complications are raised by completion of the foreclosure that is the subject of this litigation. *See* Order Denying Stay (No. 19A741). A decision in this Court for petitioner could only sup-

port a collateral state-law challenge to that completed foreclosure—an uncertain prospect that further counsels against discretionary review.

Petitioner's merits arguments, for their part, provide no basis for this Court's review and are unconvincing on their own terms. The Fifth Circuit's decision is supported by the plain language of the statute. Section 362(a) bars specified actions against "the debtor," "property of the debtor," or "property of the estate." Section 362(c)(3)(A), in turn, specifies that the stay "shall terminate *with respect to the debtor*" (emphasis added). Petitioner's assertion that section 362(c)(3)(A) terminates the *entire* stay reads "with respect to the debtor" out of the statute. Her arguments based on legislative history and statutory purpose—*i.e.*, that the Fifth Circuit's interpretation does not provide a strong enough sanction to discourage abusive filers like her, Pet. 29-32—provides no basis for displacing such clear text.

The Court should deny the petition.

STATEMENT

A. Petitioner Repeatedly Blocks Foreclosure Proceedings With Sham Bankruptcy Filings.

Petitioner and her then-husband bought a house in Round Rock, Texas, in 2005 with a purchase-money mortgage. Pet. App. 2a. Petitioner's husband took the house when the couple divorced in 2010, but the property was conveyed to petitioner after he defaulted on the loan. *Id.* Neither petitioner nor her ex-husband made any payments on the loan after March 1, 2011. *Id.*; *see* Pet. 9. As of 2019, the total

amount due on the loan was $278,592.89. Final Judgment and Order of Foreclosure at 2-3 (D. Ct. Dkt. No. 43).

Respondent U.S. Bank[1] is the assignee of the mortgage, and respondent Select Portfolio Servicing its servicer. Pet. App. 2a. For several years, respondents sought to foreclose on the property. Respondents first sent petitioner a notice of default on October 1, 2013. *Id.* And on March 26, 2014, respondents issued a notice of acceleration, setting a foreclosure sale for May 6 of that year. *Id.* The day before the foreclosure sale, however, petitioner sought a temporary restraining order in Texas state court to block the sale. *Id.* The court granted the TRO. *Id.* The case was then removed to federal court and, eventually, dismissed with prejudice by stipulation of the parties. *Id.*; *see Rose* v. *U.S. Bank, N.A.*, No. 1:14-cv-902 (W.D. Tex.).

Respondents sent another notice of acceleration on June 2, 2015. Pet. App. 2a. Petitioner then filed her first bankruptcy petition on January 4, 2016. Pet. App. 3a; *see In re Rose*, No. 1:16-bk-10004 (Bankr. W.D. Tex.). The case was dismissed 24 days later, on January 28, after petitioner failed to file necessary paperwork. Pet. App. 3a.

Respondents sought to foreclose on the property several other times between 2016 and 2018. Pet. App. 3a. But in each instance, petitioner filed a

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[1] Petitioner misnamed U.S. Bancorp as a defendant in this action; as explained above, the proper defendant and real party in interest is its subsidiary, U.S. Bank, N.A. See p. i, *supra*.

bankruptcy petition on the eve of the scheduled foreclosure sale, thwarting respondents' efforts. *Id.* This story repeated itself three separate times:

- On September 1, 2016, respondents sent a notice of acceleration, setting an October 4, 2016, foreclosure sale. Pet. App. 19a. Petitioner filed her second bankruptcy petition on October 3, 2016—the day before the scheduled sale. *Id.*; *see In re Rose*, No. 1:16-bk-11151 (Bankr. W.D. Tex.). That matter was discharged on January 25, 2017. Pet. App. 19a.
- On April 3, 2017, respondents sent another notice of acceleration, setting a June 6, 2017, foreclosure sale. Pet. App. 19a. On June 5, 2017—the day before the scheduled sale—petitioner filed her third bankruptcy petition. *Id.*; *see In re Rose*, No. 1:17-bk-10698 (Bankr. W.D. Tex.). That matter was dismissed on July 26, 2017, on petitioner's own motion. Pet. App. 19a.
- On January 5, 2018, respondents sent a final notice of acceleration, setting a March 6, 2018, foreclosure sale. Pet. App. 19a. On March 2, 2018—four days before the scheduled sale—petitioner filed her fourth bankruptcy petition. *Id.*; *see In re Rose*, No. 1:18-bk-10230 (Bankr. W.D. Tex.). That matter was dismissed on May 21, 2018, on petitioner's own motion. Pet. App. 19a.

In short, within the span of just 19 months, petitioner filed three bankruptcy petitions to block legitimate foreclosure sales from going forward.

B. The District Court And Fifth Circuit Reject Petitioner's Argument That Her Dilatory Tactics Entitle Her To A Permanent Windfall.

While her fourth bankruptcy matter was still pending, petitioner brought this action against respondents in state court, seeking to quiet title to the property. Pet. App. 3a. Respondents removed the action to federal court based on diversity jurisdiction and counterclaimed for judicial foreclosure. *Id.*

In the ensuing action, petitioner contested respondents' right to foreclose on several grounds. As relevant here, petitioner asserted that respondents were barred from foreclosing on the property under Texas's four-year statute of limitations. Pet. App. 3a; *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.035. Respondents countered that Texas common law tolls the statute of limitations during a bankruptcy stay. Defs.' Mot. for Summary Judgment at 11 (D. Ct. Dkt. No. 33). In addition, respondents argued that "equitable tolling should be applied . . . based on [petitioner's] filing of two lawsuits and four bankruptcies for the sole purpose of stalling foreclosure." *Id.* at 17.

1. Adopting the magistrate judge's recommendation, the district court granted summary judgment to respondents, rejecting petitioner's efforts to bootstrap her earlier delay into a permanent victory. Pet. App. 12a-15a. Taking the date of respondents' first notice of acceleration as the date on which respondents' foreclosure claim accrued, the court noted that the statute of limitations would have run on March 26, 2018, absent tolling. Pet App. 15a n.1, 27a. The court relied, however, on Texas common

law to toll the statute of limitations during the four bankruptcy stays, which was sufficient to defeat petitioner's challenge to timeliness. Pet. App. 26a.

In reaching that conclusion, the district court rejected petitioner's argument that the automatic stay in her second and fourth bankruptcy suits terminated after 30 days under section 362(c)(3)(A). Pet. App. 26a-27a. "After reviewing both the plain language of the statute itself, as well its narrow context within section 362 and its broader context within the Bankruptcy Code," the court concluded "that section 362(c)(3)(A) terminates the stay only with respect to the debtor individually, with respect to the debtor's exempt property that stands as collateral for a debt of the debtor, and with respect to certain leases." Pet. App. 28a. "It does not," the court wrote, "terminate with respect to property of the estate." *Id.* Applying that interpretation to this case, the court held that "the stay did not terminate with respect to" the real property in dispute, and the statute of limitations was tolled during the pendency of [petitioner]'s four bankruptcy filings." *Id.*

The district court also commented more broadly that it was "clear . . . that [petitioner] was abusing the bankruptcy system to stop the planned foreclosures." Pet. App. 29a. The court thus reasoned that "[i]t would be inequitable to allow her to successfully claim that those automatic stays" that she had triggered "did not apply to the Property because she had been abusing the system." *Id.* As the court explained, petitioner should not be rewarded for "gaming the system" by "us[ing] the intended shields of litigation and bankruptcy as a sword." Pet. App. 31a (brackets and quotation marks omitted).

The district court entered a final judgment and order of foreclosure in respondents' favor. Pet. App. 15a; *see* D. Ct. Dkt. No. 43. The court also "caution[ed] [petitioner] . . . that further machinations to prolong this litigation or delay foreclosure proceedings could and likely will be met with sanctions." Pet. App. 31a.

2. The Fifth Circuit affirmed. Pet. App. 1a-11a.[2] Accepting that "Texas common law tolls the statute of limitations during a bankruptcy stay," Pet. App. 5a, the court turned to petitioner's argument that section 362(c)(3)(A) had lifted the stays initially triggered by her second and fourth bankruptcy petitions. Canvassing what the court identified as the two leading approaches, the court explained that "[t]he majority view . . . interprets the provision to terminate the stay as to actions against the debtor but not as to actions against the bankruptcy estate." *Id.* By contrast, "[t]he minority view . . . reads the provision to terminate the whole stay." *Id.* (quotation marks omitted). "[A]fter reviewing the plain language of the provision and the context of the provision within § 362," the Fifth Circuit "adopt[ed] the majority position." Pet. App. 7a.

The Fifth Circuit based its decision on the "clear" text of the statute. Pet. App. 7a. The court observed that section 362(a) identifies "three categories" of actions that can be stayed: actions "against the debtor," actions against "the debtor's property," and actions

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[2] The Fifth Circuit denied petitioner's motion to stay execution of the district court's judgment pending appeal. *See* C.A. Order (Oct. 24, 2019).

against "property of the bankruptcy estate." *Id.* (quotation marks omitted). Yet in section 362(c)(3)(A), "Congress stated that 'the stay under [§ 362(a)] . . . shall terminate *with respect to the debtor*.'" Pet. App. 8a (alterations in original). Noting that "[t]here is no mention of the bankruptcy estate" in section 362(c)(3)(A), the court "decline[d] to read in such language." *Id.*

The Fifth Circuit reinforced its interpretation by looking to the broader statutory structure. As the court observed, "[s]ection 362(c)(4)(A)(i)—which discusses debtors who have had two or more cases pending in the prior year [rather than one]—does not include the limiting language in § 362(c)(3)(A)." *Id.* Instead, that section "merely states that 'the stay under subsection (a) shall not go into effect upon the filing of the later case'"—in other words, "the automatic stay is terminated in its entirety." *Id.* The court reasoned that the distinct language used in section 362(c)(4)(A)(i) shows that "Congress knew how to terminate the entire stay" when it wanted to do so, and must have intended a different result when it included the words "with respect to the debtor" in section 362(c)(3)(A). Pet. App. 8a-9a.

Finally, the Fifth Circuit concluded that the policy arguments raised by petitioner did not displace the statute's plain meaning. Pet. App. 9a-10a. In reaching that conclusion, the court also indicated that some of the policy concerns identified by petitioner were unpersuasive on their own terms. For example, the Fifth Circuit was "not convinced that t[he] plain meaning interpretation" of the statute it adopted would "substantially harm[] creditors" because "even if the automatic stay remains in effect

with respect to the bankruptcy estate . . . creditors can still obtain judicial relief under § 362(d) if circumstances demand it." Pet. App. 9a.[3]

3. Following the Fifth Circuit's decision, a foreclosure sale was set for January 7, 2020. *See* Application for Stay at 5 (No. 19A741). Petitioner sought a stay in this Court pending disposition of her petition for certiorari. *See generally id.* Justice Alito denied the application, and the property was conveyed at a foreclosure sale.

REASONS FOR DENYING THE PETITION

I. The Shallow, 1-1 Circuit Split Identified By Petitioner Does Not Warrant This Court's Review.

Petitioner asserts (at 19) that this case implicates a "recurring, significant issue that warrants this Court's review." But the question presented has only recently reached the courts of appeals—just two circuits have construed section 362(c)(3)(A). And those courts have yet to weigh in on critical aspects of the statute, including to address possible interpretations raised in the lower courts that are not presented here. At best, petitioner has identified a shallow and recent split that warrants further percolation.

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[3] Section 362(d) empowers a party in interest to seek relief from the automatic stay. Of particular relevance, section 362(d)(4) allows a creditor to seek relief from the stay as it pertains to real property if "the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved . . . *multiple bankruptcy filings* affecting such property." 11 U.S.C. § 362(d)(4) (emphasis added).

A. The Asserted Split Is Both Shallow And Recent.

As petitioner acknowledges (at 13-14 & n.2), there is only a 1-1 circuit split on the question whether section 362(c)(3)(A) lifts the stay for claims against the bankruptcy estate. The First Circuit addressed the issue in a December 2018 opinion, which noted that the question was "one of first impression in the courts of appeals." *Smith* v. *Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 578 (1st Cir. 2018). The only other circuit decision to address the issue is the decision below.[4]

This Court ordinarily awaits a "well-developed conflict among circuits" before considering a question—routinely declining to take up an issue "until more than two courts of appeals have considered [the] question." Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 4.4(B) (11th ed. 2019) (quotation marks omitted). Petitioner argues (at 14 n.2) for a bankruptcy-specific exception to that practice, but the three examples she highlights do not establish a special rule. In the bankruptcy context—no less than any other—the Court typically awaits a deeper and better-established split before granting certiorari. *See, e.g.*, Pet. for Cert. in *City of Chicago* v. *Fulton*, No. 19-357, at 15 (identifying a split between the Second, Seventh, Eighth, Ninth and Eleventh Cir-

[4] Petitioner gestures (at 16) at dicta from the Second and Fourth Circuits. But as petitioner recognizes, those courts have not actually addressed the question presented. *See Adams* v. *Zarnel (In re Zarnel)*, 619 F.3d 156, 163 (2d Cir. 2010); *Tidewater Fin. Co.* v. *Williams*, 498 F.3d 249, 259 (4th Cir. 2007).

cuits, and the Tenth and D.C. Circuits), *cert. granted*, 140 S. Ct. 680 (2019).

Apparently recognizing the weakness of the asserted 1-1 circuit split, petitioner relies heavily on district and bankruptcy court decisions. *See* Pet. 16-19; Pet. App. 33a-38a. Not only do these decisions fail to establish any circuit precedent, but petitioner overstates the number of courts that have weighed in on the issue. In some of petitioner's cases, for example, the court did not rule on the question of how to read section 362(c)(3)(A). *See In re McKeal*, 2014 WL 6390712, at *3 & n.1 (Bankr. N.D. Ohio Nov. 14, 2014) (describing the majority and minority approaches but "tak[ing] no position on the scope of the automatic stay").[5] In others, the court's interpretation was irrelevant to its decision. *See In re Robinson*, 427 B.R. 412, 414 (Bankr. W.D. Mich. 2010) (explaining that neither rule would help the debtor, because the property in question was not part of the bankruptcy estate).[6] In still others, it is not clear that the relevant interpretative issue under section 362(c)(3)(A) was disputed.[7]

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[5] *See also, e.g.*, *In re Houchins*, 2014 WL 7793416, at *3 (Bankr. N.D. Ga. Oct. 29, 2014) (hypothesizing what rule a creditor *would have* followed *if* it had decided to take action).

[6] *See also, e.g.*, *In re Matthews*, 2013 WL 1385221, at *4-5 (Bankr. E.D. Va. Apr. 3, 2013) (adopting the majority approach but ultimately finding the question moot in light of the court's decision to dismiss the entire case).

[7] *See In re McGrath*, 2011 WL 2116992, at *1 (Bankr. E.D. Va. Jan. 25, 2011); *In re Montoya*, 333 B.R. 449, 461 n.21 (Bankr. D. Utah 2005).

Petitioner also pads her tally by citing decisions that merely applied earlier precedent from the applicable jurisdiction,[8] as well as decisions that are no longer good law in a circuit, *see* Pet. App. 33a (citing four decisions within the First Circuit that have been abrogated by *Smith*). These efforts to run up the numbers of bankruptcy and district court decisions provide no basis for this Court's review.

B. The Court Would Benefit From Further Percolation On The Interpretive Dispute.

Granting certiorari to determine the proper reading of section 362(c)(3)(A) would be premature, because there are important aspects of the question that the courts of appeals have yet to consider. Further percolation would thus benefit this Court's ultimate review, should it later decide that the question is cert-worthy.

1. Petitioner implies that there are just two approaches to interpreting section 362(c)(3)(A)—the

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[8] *See Ortola* v. *Ortola* (*In re Ortola*), 2011 WL 7145793, at *4-5 (B.A.P. 9th Cir. Dec. 16, 2011) (applying an earlier decision of the circuit's bankruptcy appellate panel); *In re Whitescorn*, 2013 WL 1121393, at *2 (Bankr. D. Or. Mar. 14, 2013) (same); *In re Hart*, 2012 WL 6644703, at *3 n.14 (Bankr. D. Idaho Nov. 23, 2012) (same); *In re Carpenter*, 2010 WL 3744337, at *2 (Bankr. E.D.N.C. Sept. 15, 2010) (applying earlier decision from the same district); *In re Burnette*, 2009 WL 961807, at *2 (Bankr. E.D.N.C. Apr. 2, 2009) (same); *In re Markoch*, 583 B.R. 911, 914 (Bankr. W.D. Mich. 2018) (same); *In re Adams*, 2012 WL 1596720, at *3 (Bankr. D.S.C. May 7, 2012) (same); *cf. In re Drakeford*, 2007 WL 2142842, at *1 (Bankr. M.D. Fla. Jan. 17, 2007) (stating a rule with no analysis or citation).

"majority" approach, adopted by the Fifth Circuit, and the "minority" approach, adopted by the First Circuit in *Smith*. *See* Pet. 13-19. That is incorrect: there are other ways to read the statute that lower courts have put forward, but that have not been developed by the courts of appeals.

First, several decisions have rejected *both* the so-called "majority" and "minority" interpretations of section 362(c)(3)(A), and instead endorsed a third approach laid out in *In re Bender*, 562 B.R. 578 (Bankr. E.D.N.Y. 2016). Under *Bender*, "the stay terminates as to the debtor's property and property of the estate, but only if the property was the subject of a judicial, administrative, or other formal proceeding commenced prepetition." *In re Goodrich*, 587 B.R. 829, 836 & n.6 (Bankr. D. Vt. 2018). At least three other bankruptcy court decisions have followed this approach. *See id.* (collecting cases).[9] But no circuit court has considered it.

Second, the petition acknowledges another interpretive question lurking in the statute that courts have not fully considered. According to petitioner, "the most natural reading of the statutory language" is one that limits the termination of the stay *exclusively* to actions against the debtor *personally*—thus excluding suits against the debtor's non-estate property, as well as suits against the estate. Pet. 26. Petitioner insists that the Fifth Circuit rejected this "most natural reading" of section 362(c)(3)(A), *id.*,

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[9] Another court found *Bender* persuasive, but felt bound by *stare decisis* to an alternative rule. *See In re Dev*, 593 B.R. 435, 446 (Bankr. E.D.N.C. 2018).

but that is wrong. The Fifth Circuit had no occasion to consider the question because the only dispute here is whether the stay terminated as to the bankruptcy estate: all parties agree that petitioner's house was part of the bankruptcy estate. *See* Pet. App. 11a.[10] Other courts have likewise declined to address whether the stay continues as to the debtor's property when the relevant dispute did not require an answer. *See, e.g.*, *In re Gillcrese*, 346 B.R. 373, 377 n.3 (Bankr. W.D. Pa. 2006) ("[T]his court is not called upon to determine whether § 362(c)(3)(A) reaches property of the debtor."). The Court may wish to wait for a case in which this distinction matters, so that it can fully answer the interpretive dispute—or at least wait until a court of appeals in the "majority" camp has addressed the issue.

2. Review of the question presented would also be premature because both the First and Fifth Circuit's decisions—and almost all the lower court decisions that petitioner cites—involve chapter 13 bankruptcy proceedings. But the Court's interpretation of section 362(c)(3)(A) would also apply to chapter 7 and chapter 11 cases. *See* 11 U.S.C. § 362(c)(3) ("[I]f 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 . . . ."). One bankruptcy court recently noted that the "minority" approach advocated by petitioner here would "work[] havoc in chapter 7." *In re Thu Thi*

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[10] Petitioner contends (at 26 n.4) that the Fifth Circuit's interpretation "collapses the distinction between the two non-estate categories." The better reading of the Fifth Circuit's decision is that it did not address any such distinction because it is irrelevant to the resolution of this case.

Dao, 2020 WL 2462521, at *1 (Bankr. E.D. Cal. May 11, 2020); *see id.* at *2 (reasoning that courts adopting the minority approach have exhibited "chapter 13 tunnel vision" that "disregard[s] implications . . . for chapter 7 trustees"). As that court explained, the effects of lifting the stay are different in chapter 7 (where estate property is controlled by a trustee) than in chapter 13 (where the debtor typically retains possession of estate property). *See id.* at *2-13. This Court would benefit from additional consideration of the "chapter 7 implications" of petitioner's argument, *id.* at *2, which no court of appeals has addressed. *See, e.g.*, *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) ("[T]he experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.").

II. This Case Is A Poor Vehicle In Which To Address The Question Presented.

This case is also an exceptionally poor vehicle to address the scope of section 362(c)(3)(A). The issue petitioner raises involves a question of bankruptcy law, but this is not a bankruptcy case. Instead, this case involves a dispute over Texas foreclosure law, and it is in federal court only on the basis of diversity jurisdiction. Pet. App. 3a. The decision below implicates the dispute about section 362(c)(3)(A)'s scope in a highly indirect way: the federal question is embedded in a state-law dispute about the application of Texas's statute of limitations to respondents' efforts to foreclose on the property. Moreover, unlike in almost every other case in which the statutory question has arisen, here *the debtor* is arguing against

the automatic stay, as she insists that her bad-faith bankruptcy filings did not prevent respondents from pursuing foreclosure actions. For several reasons, this highly unusual posture would substantially complicate this Court's review. In addition, the post-judgment sale of the underlying property further reduces the suitability of this case as a vehicle.

1. This is a state-law foreclosure dispute. "[A]s the timing of the facts" in this case "make obvious," petitioner filed her serial bankruptcy petitions in order to "thwart[] [respondents'] attempts to foreclose." Pet. App. 21a; *see* pp. 6-7, *supra*. Now, in a dramatic turnabout, petitioner argues that her efforts to frustrate respondents' rights should be ignored because the automatic stay supposedly terminated under section 362(c)(3)(A). More specifically, petitioner asserts that respondents cannot claim the benefit of equitable tolling under Texas law, and, as a result, are barred from foreclosing on the property. In short, the parties' dispute does not arise under section 362(c)(3)(A) or federal bankruptcy law—the federal statute enters the case indirectly, in litigation over an affirmative defense to state-law claims.

This posture is exceedingly rare. Of the 69 cases listed in petitioner's Appendix D, *just one* involved a state-law tolling question—an intermediate state appellate court decision. *See LSF9 Master Participation Trust* v. *Sanchez*, 450 P.3d 413 (N.M. Ct. App. 2018); *see generally* Pet. App. 33a-38a.[11] The fact

[11] Petitioner identifies one other case in which the scope of section 362(c)(3)(A) arose in a collateral action rather than in the bankruptcy proceeding itself. In *In Abernathy, LLC* v. *Smith*,

that this posture is so unusual is no surprise, because it turns on the specifics of one state's foreclosure laws. States employ a variety of approaches to foreclosure and to determining the timeliness of foreclosure actions. Some states require judicial foreclosures, while in other states lenders may (and typically do) carry out foreclosures without bringing a court action. *See* 1 Baxter Dunaway, THE LAW OF DISTRESSED REAL ESTATE App. 13A (Dec. 2019) (collecting different states' approaches). Some states have adopted relatively short limitations periods, *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.035 (four years), while other states have much longer periods, *see* Cal. Civ. Code § 882.020(a) (up to "60 years after the date the instrument that created the security interest was recorded" in certain circumstances). Some states toll the statute of limitations during an automatic bankruptcy stay, *see* Pet. App. 5a, 26a, while others do not, *see USX Corp.* v. *Schilbe*, 535 So. 2d 719, 719 (Fla. 2d Dist. Ct. App. 1989) (explaining that, under Florida law, the automatic bankruptcy stay does not toll the time to bring a foreclosure action). As relevant here, the automatic bankruptcy stay is likely to arise in litigation over foreclosure only in a subset of jurisdictions that (1) follow a judicial-foreclosure model, (2) have relatively long statutes of limitations, and (3) give effect to bankruptcy stays as a matter of state law.

2014 WL 4925654 (N.D. Ga. Sept. 30, 2014), the plaintiff sought a declaration that the defendant's foreclosure proceedings had been undertaken in violation of an automatic bankruptcy stay. *Id.* at *2. Unlike the present case, that suit did not involve a question of state-law tolling.

In contrast to the present case, the overwhelming majority of decisions listed in petitioner's Appendix D are from bankruptcy proceedings. The issue of whether section 362(c)(3)(A) terminates the stay as to estate property almost always arises on a debtor's motion to extend (or confirm the existence of) the automatic stay, or a creditor's motion to terminate (or confirm the nonexistence of) the stay. *See, e.g.*, *Thu Thi Dao*, 2020 WL 2462521, at *6 (observing that the question typically arises on a motion under section 362(j), in which "a chapter 13 debtor, tainted by serial filer status, resists a creditor's motion for confirmation that the automatic stay has terminated").[12] In that posture, the debtor usually argues for the majority rule, seeking a construction of the statute that preserves the stay to the maximum extent possible. *See, e.g.*, *In re Jones*, 339 B.R. 360, 362 (Bankr. E.D.N.C. 2006) ("The debtor contends that the stay only terminates under § 362(a)(3)(A) as to 'actions taken' against the debtor and not as to property of the debtor or as to property of the estate.").

This case, of course, is flipped. In order to advance a limitations defense, petitioner argues *against* the existence of an automatic stay that applied to claims against the estate—stays that she initiated specifically to block foreclosure. That unusual posture would complicate this Court's review.

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[12] *See also, e.g.*, *In re Johnson*, 335 B.R. 805, 805 (Bankr. W.D. Tenn. 2006) (debtor motion to continue automatic stay); *In re Jones*, 339 B.R. 360, 361 (Bankr. E.D.N.C. 2006) (same); *In re Rice*, 392 B.R. 35, 36 (Bankr. W.D.N.Y. 2006 (creditor motion to confirm termination of stay); *In re Curry*, 362 B.R. 394, 395 (Bankr. N.D. Ill. 2007) (same).

First, because the issue of section 362(c)(3)(A)'s scope is embedded in a dispute over Texas equitable tolling law, the statutory question may not be dispositive. To be sure, as the Fifth Circuit recognized (Pet. App. 5a), if a bankruptcy stay is in place, then the limitations period is tolled under Texas law as a matter of course. *See, e.g.*, *Peterson* v. *Tex. Commerce Bank-Austin, N.A.*, 844 S.W.2d 291, 294 (Tex. App.—Austin 1992) ("[W]hen a claimant is prohibited from bringing suit by the Bankruptcy Code's automatic-stay provision, the statute of limitations is tolled until the stay is lifted."). But the converse does not follow. Even if, in retrospect, the better reading of section 362(c)(3)(A) is that the stay became void during petitioner's second and fourth bankruptcy proceedings, a Texas court could hold that general principles of equity warrant tolling to prevent petitioner from benefiting from her abuse of the system. Pet. App. 29a.

Under Texas law, equitable tolling is available "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadlines to pass." *Czerwinski* v. *Univ. of Tex. Health Sci. Ctr. at Hous. Sch. of Nursing*, 116 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2002). That rationale would almost certainly apply here, given the district court's unchallenged finding that petitioner "abus[ed] the bankruptcy system to stop the planned foreclosures." Pet. App. 29a. As the district court recognized, "[i]t would be inequitable to allow [petitioner] to successfully claim that th[e] automatic stays did not apply to the Property." *Id.* As a result, the question of federal bankruptcy law raised by the petition likely is not dispositive: *re-*

gardless of how section 362(c)(3)(A) is interpreted, Texas law likely would not allow petitioner to shield herself from foreclosure by filing repeat bankruptcy petitions and then arguing that respondents should have assumed the risk of contempt by bringing a foreclosure action while those proceedings were still pending.

Second, the posture here would likely distort presentation of the issues to the Court. Debtors typically argue in favor of a stay protecting the estate. Indeed, the automatic stay is "[p]erhaps the main reason U.S. debtors file for bankruptcy." Steven L. Seebach, *Bankruptcy Behind the Great Wall: Should U.S. Businesses Seeking to Invent in the Emerging Chinese Market Be Wary?*, 8 TRANSNAT'L LAW. 351, 373 n.142 (1995) (citing Robert L. Jordan et al., BANKRUPTCY 26 (4th ed. 1995)). The prospect of a stay unquestionably was the reason that *petitioner* repeatedly filed for bankruptcy, as she tried "to avoid foreclosure" on her property after years of failing to make any payments on the outstanding mortgage. Pet. App. 2a, 21a, 31a. Yet now, petitioner contends that the decision below is wrong because the Fifth Circuit's approach is *too favorable* to debtors. *See* Pet, 29-31. Indeed, without any trace of irony, petitioner argues that the Court should adopt her view of section 362(c)(3)(A) in order to "discourage[e] bankruptcy abuse" and "bad faith repeat filings," Pet. 30 (capitalization omitted)—which is precisely the wrongful conduct that *she* engaged in, Pet. App. 21, 31a.

The upshot is that petitioner plans to advance arguments regardless of whether they conflict with the interests of the overwhelming majority of debtors.

As a result, merits briefing in this case may fail to provide the Court with a full and accurate perspective of the practical implications of the statutory interpretation that petitioner advances. The Court should await a more representative presentation of the issues.

3. Finally, this case is a poor vehicle for review because it involves a foreclosure dispute regarding a property that has now been foreclosed. As discussed, p. 12, *supra*, the property at issue in this suit was conveyed at a foreclosure sale after Justice Alito denied petitioner's last-minute request for a stay. Although the sale does not formally moot petitioner's claims, *see* Pet. App. 1a (requesting a declaratory judgment), it makes the prospect of meaningful relief far more speculative.

Even if petitioner (1) prevailed in this Court, *and* (2) prevailed on remand to defeat alternative tolling theories, she would still be several steps removed from any concrete relief. At that point, petitioner would have to bring an action for wrongful foreclosure. Under Texas law, the remedy for wrongful foreclosure usually consists of (1) rescission of the sale, or (2) "damages in the amount of the value of the property less indebtedness." *Diversified, Inc.* v. *Gibraltar Sav. Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988). Petitioner's ability to obtain either form of relief is speculative. There may be no damages available, since the sale price for the property was less than the amount owed on the loan. And a claim for rescission is subject to equitable defenses, which may be available depending on the status of the property at the time of a follow-on action. *See, e.g.*, *Saravia* v. *Benson*, 433

S.W.3d 658, 666 (Tex. App.—Houston [1st Dist.] 2014). This Court generally resolves legal questions only "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). Resolution of the interpretive dispute raised by petitioner "can await a day when the issue is posed less abstractly." *Id.*

III. The Fifth Circuit's Decision Is Correct.

Petitioner devotes a substantial portion of her petition to challenging the Fifth Circuit's decision, which she acknowledges is consistent with the "majority" approach in the lower courts. *See* Pet. 25-32. This preview of petitioner's merits arguments provides no basis for granting certiorari, and it is unpersuasive in any event. As the Fifth Circuit explained, its interpretation follows from the "plain language" of the statute. Pet. App. 7a.

Section 362(c)(3)(A) states, in relevant part, that:

> [T]he 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.

11 U.S.C. § 362(c)(3)(A) (emphasis added). By its clear terms, this provision does *not* terminate the stay in its entirety—it only terminates the stay "with respect to the debtor." Petitioner's alternative interpretation—which construes section 362(c)(3)(A) to terminate the stay as to *all individuals and property* (including estate property)—reads those words out of the statute. It thus runs afoul of this the Court's

"duty to give each word [of a statute] some operative effect where possible." *Duncan* v. *Walker*, 533 U.S. 167, 175 (2001) (quotation marks omitted).

The broader statutory structure further confirms the Fifth Circuit's interpretation. As all parties agree, the very next subsection of the statute, section 362(c)(4)(A)(i), terminates the stay *in its entirety* for debtors who have had two or more cases pending in the prior year (rather than only one). The subsection accomplishes this result by stating that, for such a repeat filer, "the stay under subsection (a) shall not go into effect upon the filing of the later case." This clear language shows that Congress knew how to terminate the *entire* stay when it wanted to; it simply chose a different approach in section 362(c)(3)(A). *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (brackets omitted)).

For her part, petitioner does not really rely on the text of section 362(c) to defend her interpretation. Rather than advance an affirmative textual reading, she instead tries to poke holes in the Fifth Circuit's opinion. Pet. 26-29. But the primary critique that she offers—*i.e.*, that the Fifth Circuit supposedly rejected "the most natural reading of the statutory language" by holding that the stay would terminate as to the debtor's non-estate property, Pet. 26-27—mischaracterizes the Fifth Circuit's decision, for the reasons explained above, *see* pp. 16-17, *supra*.

Petitioner then retreats from the text to advance arguments based on congressional purpose, as she insists that the "minority" view better vindicates Congress's intent of disincentivizing abuse of the bankruptcy system by serial filers like her. *See* Pet. 29-32. But these policy arguments cannot overcome the unambiguous text of the statute. *See Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018). And they are also overstated. Contrary to petitioner's suggestion (at 28-31) that the sanction imposed by section 362(c)(3)(A) is "meaningless" under the Fifth Circuit's interpretation, partially lifting the stay "*does* penalize the debtor and *does* provide potential options to creditors," *Jumpp* v. *Chase Hone Fin., LLC (In re Jumpp)*, 356 B.R. 789, 796 (B.A.P. 1st Cir. 2006), *abrogated by Smith*, 910 F.3d 576 (emphasis added). Even if the stay remains in place as to estate property, courts have noted that:

> termination of the stay with respect to the debtor means that [1] suits against the debtor can commence or continue postpetition because section 362(a)(1) is no longer applicable; [2] judgments may be enforced against the debtor, in spite of section 362(a)(2); [3] collection actions may proceed against the debtor despite section 362(a)(6); and [4] liens against the debtor's property may be created, perfected and enforced regardless of section 362(a)(5).

Id. Petitioner may view these consequences (among others) as "arbitrary." Pet. 31. But her conveniently adopted policy views for how best to deter bankruptcy abuse provide no basis for overriding the statute's clear text.

In short, the Fifth Circuit's interpretation of section 362(c)(3)(A) is well supported, and petitioner advances no compelling argument for this Court to grant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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