No. 18-2564

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re HAROLD WADE and LORRAINE WADE,
Debtors.

HAROLD WADE and LORRAINE WADE,
Appellants,
– v. –
KREISLER LAW, P.C.,
Appellee.

On Appeal from the United States Bankruptcy Court for the Northern District of Illinois, No. 1:15-bk-01035

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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CIRCUIT RULE 26.1 & DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Consumer Bankruptcy Rights Center

National Association of Consumer Bankruptcy Attorneys

(2) The names of all law firms whose partner or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

NA

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i) Identify all its parent corporations, if any; and
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Attorney's Signature: s/ Tara Twomey Date: November 6, 2018

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes: X No: ___

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STATEMENT OF INTEREST OF *AMICI CURIAE*

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. The automatic stay is one of the fundamental

benefits of bankruptcy, giving the debtor some breathing room before addressing debts, and ensuring equitable distribution of estate assets among creditors. Congress has spoken plainly in favor of retaining some of the protections of the automatic stay even upon a bankruptcy filing that follows within one year of a previous bankruptcy termination. The lower courts judicially rewrote the statute, excising half of the language in the relevant subsection, in order to reach their conclusion that the limitation in section 362(c)(3)(A) is expansive, rather than constrained to its plain text.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC or NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The automatic stay is a fundamental cornerstone of bankruptcy law. It is intended to prevent the chaotic and uncontrolled scramble for the assets of the debtor and property of the estate. Section 362(c)(3) limits the scope of the automatic stay for certain repeat bankruptcy filers. When applicable, section 362(c)(3) terminates the stay "with respect to the debtor" thirty days after filing of a case. The statutory text plainly applies to actions against the debtor personally, or the debtor's property, but leaves the stay in effect as to property of the bankruptcy estate. A majority of courts have adhered to the plain language of the statute. The minority view adopted by the bankruptcy court below finds that the stay terminates not only as to the debtor, but also as to property of the estate. This expansive view renders more than half of the subsection's statutory language meaningless. Such a significant judicial rewriting of the statute and disregard for the statutory language cannot be chalked up to "minor" redundancy or superfluity.

The justifications for departing from the plain language are illusory. Courts adopting the minority view, assert that the language

"with respect to the debtor" is needed to differentiate between spouses who are joint debtors where only one spouse has a prior filing. However, when spouses file a joint petition, it creates two cases that are jointly administered, but not substantively consolidated. The result is that the rights of the two debtors, and their creditors, may be treated separately and there is no need to "protect" a spouse from the impact of section 362(c)(3)(A). The policy reasons for departing from the plain language of the statute also fail. Termination of the stay as to the debtor personally is a substantial deterrent against abusive, successive filings, even though the automatic stay continues to apply to estate property under section 362(c)(3). Finally, the protection of the automatic stay extends beyond the debtor and serves to ensure equitable distribution of estate assets among all creditors. Preservation of the automatic stay as to property of the estate facilitates the orderly administration of estate assets by the trustee.

If Congress meant to terminate the stay in its entirety after thirty days, it would have done so in plain language, as it did in section 362(c)(4).

Importantly, however, creditors are not left without recourse. As is common, creditors may still seek relief from stay if they are not adequately protected in the bankruptcy case.

STATUTORY FRAMEWORK

The Bankruptcy Estate. Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). To achieve these dual goals, the Bankruptcy Code first creates a bankruptcy estate upon commencement of a case. 11 U.S.C. § 541(a). Section 541(a) defines the bankruptcy estate and contains a definition of property that includes all debtors' legal or equitable interests in property as of the petition date, whether tangible or intangible, real or personal. Some property, however, is specifically excluded from becoming property of the estate, 11 U.S.C. § 541(b), while some property acquired post-petition is included in the bankruptcy estate. 11 U.S.C. §§ 541(a)(3)-(a)(7), 1306. Other property

initially considered part of the bankruptcy estate may be removed from the estate and revert to the debtor through the exemption process. *See Law v. Siegel,* 571 U.S.C. 415, 417-18 (2014); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 642 (1992) (Bankruptcy Code "allows the debtor to prevent the distribution of certain property by claiming it as exempt").

The bankruptcy estate is a separate entity from the debtor. *See, e.g*, 28 U.S.C. § 1334(e) (conferring jurisdiction on the district court over property of the debtor and property of the estate); *Hall v. U.S.,* 566 U.S. 506 (2012) (distinguishing between the debtor and the estate for tax purposes).

The Automatic Stay. The automatic stay is a fundamental cornerstone of the bankruptcy system established under the Bankruptcy Code. Except in very limited circumstances, *see* 11 U.S.C. § 362(c)(4), it is triggered instantly upon the filing of a bankruptcy petition. It is intended to prevent a chaotic and uncontrolled scramble for the assets of the debtor and the property of the estate. It prevents the commencement or continuation of proceedings against the debtor and prevents creditors from creating, perfecting, or enforcing any lien against property of the debtor. *See* 11 U.S.C. §§ 362(a)(1), (a)(2). The

automatic stay also protects property of the estate by preventing the enforcement of a judgment against property of the estate or creating, perfecting, or enforcing any lien against property of the estate. 11 U.S.C. §§ 362(a)(2), (a)(4). Of the seven subsections describing the reach of the automatic stay in individual or joint cases, five apply to the debtor or to property of the debtor and three apply to the property of the estate. *See* 11 U.S.C. § 362(a)(1) (debtor), (a)(2) (debtor and estate), (a)(3) (estate), (a)(4) (estate); (a)(5) (debtor); (a)(6) (debtor); (a)(7) (debtor).

ARGUMENT

I. The Plain Meaning of Section 362(c)(3) is That the Automatic Stay of Actions Directed at Property of the Estate Remains in Effect Even if No Order Extending the Stay is Entered Within 30 Days

There are two views about what happens if section 362(c)(3) applies and if the automatic stay is not extended within 30 days after the later case is filed. The majority view, exemplified by cases such as *Holcomb v. Hardeman (In re Holcomb),* 380 B.R. 813 (B.A.P. 10th Cir. 2008), and *Jumpp v. Chase Home Finance, LLC (In re Jumpp),* 356 B.R. 789 (B.A.P. 1st Cir. 2006), holds that because section 362(c)(3)(A) states

that the stay "shall terminate *with respect to the debtor* on the 30th day after the filing of the later case" (emphasis added), the termination of the stay applies to actions against the debtor personally, or the debtor's property, but leaves the stay in effect as to property of the bankruptcy estate. 3 Collier on Bankruptcy ¶ 362.06[3][a](Richard Levin and Henry J. Sommer eds. 16th ed. 2017). That is, protection under subsections 362(a)(1), (a)(2) (with respect to the debtor), (a)(4), (a)(5), (a)(6) and (a)(7), is terminated after thirty days, while the stay continues with respect to subsections 362(a)(2)(with respect to the estate), 362(a)(3) and (a)(4). The minority view, which was adopted by the bankruptcy court below, is that the phrase "with respect to the debtor" does not refer to the scope of the stay, but only serves to preserve the automatic stay as to a spouse who is the joint debtor in the current case, but was not a joint debtor in the prior case that was dismissed. *In re Daniel,* 404 B.R. 318 (Bankr. N.D. Ill. 2009) (distinguishing between a debtor and the debtor's spouse for purposes of section 362(c)(3)). This reading is inconsistent with the manner in which jointly filed cases are administered under the Code. *See* Part IIA, *infra*.

The majority view is correct because it follows the plain meaning of the words "with respect to the debtor" used in section 362(c)(3). Applying the plain meaning of the statute results in a straightforward though brief analysis.

Under section 362(c)(3)(A), if a debtor has had a case pending within the preceding one year period that was dismissed,

> … 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[.]

11 U.S.C. § 362(c)(3)(A) (emphasis added).

Most courts have found no ambiguity in the phrase "with respect to the debtor." *See, e.g., Holcomb*, 380 B.R. at 816. Simply put "[s]ection 362(a) differentiates between acts against the debtor, against property of the debtor and against property of the estate." *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006). If Congress meant to terminate the stay in its entirety, it would have done so in plain language as it did in section 362(c)(4)(A)(i). *In re Paschal*, 337 B.R. 274, 278-79 (Bankr. E.D. N.C. 2006)

> The Supreme Court's clear directive on this topic is that "[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally

> presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200 (1993) (internal quotation marks and alterations omitted).

Jones, 339 B.R. at 365. Here, Congress included the words "with respect to the debtor" in section 362(c)(3)(A), and omitted those words from section 362(c)(4). A natural reading indicates that the scope of section 362(c)(4) is broader than that of section 362(c)(3)(A). Whereas section 362(a)(4) prevents the imposition of all the automatic stay provisions, under section 362(c)(3)(A), most of the automatic stay provisions are terminated after thirty days, except for sections 362(a)(2)(with respect to the estate), 362(a)(3) and 362(a)(4). The bankruptcy court's decision and that of the minority view gives no meaning to the words "with respect to the debtor." *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992) ("'[C]ourts should disfavor interpretations of statutes that render language superfluous."). Indeed, had Congress intended the result reached by the bankruptcy court it could have simply stated that, "the stay under subsection (a) shall terminate on the 30th day after the filing of the later case." Some courts have suggested that this "minor" superfluity is not sufficient to support the reading of the majority of courts. *Smith v. Maine Bureau of*

Revenue Services, 2018 WL 2248586, at *14 (D. Me. May 5, 2018) (*Smith II*).[1] However, as illustrated above, under the minority view nearly half the words in subsection (A) become irrelevant. Words that have significant meaning, as described below, have been judicially written out of the statute. That is not "minor" redundancy or superfluity.

Congress opted to limit the expiration of the stay to the debtor and property of the debtor, while leaving it in place as to property of the estate. This Court should not second guess Congress's intent, but rather should rely on the plain language of the statute. If that is not what Congress intended, then Congress not this Court should be the entity that rewrites the statute.

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[1] In *Smith II,* the court analogizes to *King v. Burwell*, 576 U.S. __, 135 S. Ct. 2480 (2015) and its decision on the Affordable Care Act in which the Supreme Court noted the hurried legislative process led to inartful drafting of the statutory language. *Smith II*, 2018 WL 2248586, at * 11. That analogy, and by extension, the minority view's disregard for the canon against surplusage, is inapplicable to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. Ronald (2005), which Congress considered for eight years prior to its eventual passage. *See* Bankruptcy Reform Act of 1999, H.R.833. 106th Cong. (1999).

II. There Are No Overwhelming Reasons to Depart From Applying the Plain Meaning of the Phrase "With Respect to the Debtor"

The minority view has three justifications for departing from the natural construction of the words "with respect to the debtor" which has been adopted by the majority of the courts. None of them justify a departure from the plain meaning of those words.

A. The Phrase "With Respect to the Debtor" Limits the Scope of the Termination of the Automatic Stay, Not the Person to Whom it Applies

First is the argument that the purpose of adding the language "with respect to the debtor" is to identify the person as to whom the stay no longer applies after 30 days. *See, e.g., In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009).

This construction of section 362(c)(3)(A) posits a concern by Congress for a blameless spouse who has filed bankruptcy for the first time. However, the language "with respect to the debtor" is not needed to differentiate between spouses in such situations due to the nature of a joint bankruptcy petition. When a joint petition is filed two cases are jointly administered. Joint administration decreases the costs of administration, benefitting both debtor and their creditors. 2 Collier on

Bankruptcy ¶ 302.02[1]. However, absent substantive consolidation, the rights of the two debtors, and their creditors, are the same as if two separate cases had been simultaneously filed. *Id.* at ¶ 302.01[1](b); *see In re Portell*, 557 B.R. 161, 165 (Bankr. W.D. Mo. 2016) (two estates remain separate notwithstanding joint administration). Therefore, the phrase "with respect to the debtor" would not be needed if the purpose was to preserve the automatic stay for the joint debtor who is filing bankruptcy for the first time. The termination or continuation of the automatic stay is decided by looking to the filing history of each debtor separately. Courts construing the language otherwise fail to recognize the nature of a joint bankruptcy petition.

A further flaw with the minority view's position is that section 362(c)(4) does not include the language "with respect to the debtor," even though the situation of a joint debtor who is a first-time filer can occur just as easily when the case in question is the primary debtor's third filing as in a second filing. Under the minority view, the omission in section 362(c)(4) of the language "with respect to the debtor" compels the strange result that a joint debtor who is a first time filer

forfeits the protection of the automatic stay even as to her separate property and income, merely because it is her spouse's third filing.

B. Terminating the Automatic Stay as to the Debtor is a Substantial Deterrent to Debtors Even if the Stay Continues as to Property of the Estate

The second argument is that terminating the stay only as to the debtor and the debtor's property, and not as to property of the bankruptcy estate, is not a harsh enough sanction to deter all abusive repeat filings. In *Reswick* the court opined that

> … the majority interpretation, would also render section 362(c)(3)(A) devoid of any practical effect. Very few creditors would seek to pursue only the debtor personally, or only property of the debtor.

In re Reswick, 446 B.R. 362, 368 (B.A.P. 9th Cir. 2010); *see also In re Smith*, 573 B.R. 298, 305 (suggesting the majority view would render the stay termination inconsequential).

The minority view's concern that terminating the automatic stay with respect to the debtor is not sufficiently punitive is misguided in two respects. First, it is not the province of the courts to rewrite the statute to conform to purported legislative intent. This turns on its head the assumption that legislative purpose is expressed by the ordinary meaning of the words used. *United States v. Rodgers*, 466 U.S.

475, 479 (1984). Reliance on purported legislative intent is especially suspect when it is based on the general idea that BAPCPA was unreservedly hostile to debtors. While NACBA vigorously opposed passage of BAPCPA because it contained many provisions that cut back on debtor's substantive rights and imposed unnecessary procedural burdens, BAPCPA is not a legislative Christmas tree that incorporates every creditor's wish list. Many changes were made between the first bill that proposed substantial "reform" of the Bankruptcy Code and the final version.[2] Some of the changes added even more provisions that could be construed as pro-creditor, but other changes either mitigated the effect on debtors of pro-creditor provisions, or made changes in favor of debtors.[3] Therefore it would be incorrect to use a rule of construction

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[2] For example, the "means test", which was the most controversial change enacted by BAPCPA, underwent many changes between the bill introduced in 1997 and the final act as enacted in 2005. Ronald Mann, Bankruptcy Reform and the "Sweat Box" of Credit Card Debt, 2007 U. Ill. L. Rev. 375, 383 at Table 1.

[3] Social security income is excluded from the means test due to a change in the definition of "current monthly income" in 11 U.S.C. § 101(10A)(B). *See Drummond v. Welsh,* 711 F.3d 1120, 1122 (9th Cir. 2013). Another improvement for low-income debtors is that there is now a provision for waiver of filing fees in Chapter 7 cases. *See* 28 U.S.C. § 1930(f)(1).

that the most pro-creditor interpretation that can be wrung out of BAPCPA should be adopted without a clear textual basis.

Second, the consequences of termination of the automatic stay as to the debtor and the debtor's property are greater than stated by the courts following the minority view. According to the minority view the termination of the automatic stay as to the debtor and the debtor's property is so insignificant to the debtor that this sanction would not deter a debtor from a bad faith filing. One court stated that the ability of a creditor to contact the debtor to ask for payment of a debt was small beer indeed.

> If § 362(c)(3)(A) merely allowed creditors to badger the Debtor with phone calls or obtain property of the debtor that is not property of the estate, then this section would be of no value.

In re Jupiter, 344 B.R. 754, 761-2 (Bankr. D. S.C. 2006); *see also Smith*, 573 B.R. at 300 n.3.

This does not comport with the experience of NACBA members. Aggressive collection calls are a major impetus for individuals to contact bankruptcy attorneys. Individuals who are "collection proof" because they have limited assets and their income is not garnishable nevertheless contact NACBA members seeking bankruptcy relief. Even

after being advised that they are collection proof, many debtors remain so strongly motivated to file for bankruptcy for the peace of mind and finality of a bankruptcy discharge that they plead with the attorney to file a case for them, or, against legal advice, they file for bankruptcy *pro se*.

There are also many tangible detriments when the automatic stay has been terminated as to the debtor and the debtor's property, even if it remains in effect as to property of the bankruptcy estate.

If the debtor's income was being garnished when the bankruptcy petition was filed, termination of the stay allows the creditor to have the garnishment resume if the income is wages and the debtor has filed under Chapter 7. This may occur because under 11 U.S.C. § 541(a)(6), post-petition earnings are not property of the estate in a Chapter 7 case. And some types of nonwage income, such as social security benefits, are not property of the estate in either Chapter 7 or Chapter 13 cases. However, under the Debt Collection Improvement Act, 31 U.S.C. § 3716, the United States can initiate an offset of up to 15% of otherwise exempt income of the debtor, including social security, black lung and railroad retirement benefits. The automatic stay halts such collection,

but if the stay is terminated as to the debtor, it can resume. The automatic stay also prevents interception by federal or state governments of tax refunds for non-tax debt.[4] The debtor's tax refund may not be part of the bankruptcy estate, in whole or in part, and upon termination of the stay the tax refund will be intercepted and applied to the non-tax debt before a discharge has been entered or a plan has been confirmed.

If the debtor's professional or driver's license is threatened with suspension for the failure to pay student loans,[5] when the stay is terminated as to the debtor the state agency can complete the suspension of the license so long as the debt is nondischargeable.

When applicable the termination of the stay under section 362(c)(3) has real and significant consequences for debtors.

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[4] Section 362(b)(26), which was added by BAPCPA, created an exception to the automatic stay for interception of tax refunds for tax debt if certain conditions are met, but otherwise the automatic stay applies to tax refund intercepts.

[5] According to a recent article, 20 states have laws providing for license suspension as a sanction for failure to pay student loans. Jessica Silver-Greenberg, Stacy Cowley and Natalie Kitroeff, *When Unpaid Student Loan Bills Mean You Can No Longer Work,* N.Y TIMES, Nov. 17, 2017, https://www.nytimes.com/2017/11/18/business/student-loans-licenses.html?_r=0

C. Congress Rationally Decided That the Protection of Property of the Estate in a Second Case Should Not Apply When the Debtor Has Filed a Third Case, Unless Imposed by the Court

Courts adopting the minority view have also asserted that the failure to protect property of the estate in section 362(c)(4) means that property of the estate is not protected under section 362(c)(3). *See, e.g., Vitalich v. Bank of New York Mellon*, 569 B.R. 502, 509 (N.D. Cal. 2016). The logic of these courts is flawed and ignores the other factors at play.

Whenever there are repetitive filings there is the potential for the bankruptcy to impose undue harm on one or more creditors. It was rational for Congress to decide that in a second filing the automatic stay should continue as to property of the estate even after 30 days in order to give a trustee the opportunity to thoroughly review the situation for the possible benefit of unsecured creditors, while not providing the same protection for the estate upon a third bankruptcy within a year. *In re Williams,* 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006) ("In balancing the respective interests of an individual secured creditor against creditors as a whole, Congress apparently decided that the concerns of abusive bankruptcy filings as to secured creditors were less acute in instances of

second filings within one year, as opposed to third filings."). Indeed, the trustee in a second case may be motivated to scrutinize the debtor's petition and schedules, and more closely examine the debtor because this may be the best, if not the only, chance to preserve assets for the benefit of unsecured creditors.

D. Creditors Are Not Without Recourse

Under the majority view, even though the automatic stay remains in effect as to property of the estate, creditors who can show that they are not adequately protected or that specific property is not necessary for an effective reorganization can move for relief from the automatic stay at any time after a second case is filed. 11 U.S.C. § 362(d). If a bankruptcy court does not rule on such a motion in a timely manner, the motion is considered granted, unless the parties agree that the stay should remain in effect or the court finds good cause or compelling circumstances to delay a ruling. 11 U.S.C. § 362(e). Thus adopting the majority view does not insulate the debtor from the legitimate interests of creditors.

CONCLUSION

If the automatic stay is terminated pursuant to section 362(c)(3)(A), the automatic stay continues to apply to property of the bankruptcy estate. Therefore this court should reverse the decisions of the courts below.

s/ Tara Twomey
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Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 4014 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14-point type.

s/ Tara Twomey
Tara Twomey
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae