THE CONSEQUENCES OF A RELIC'S CODIFICATION: THE DUBIOUS CASE FOR BAD FAITH DISMISSALS OF INVOLUNTARY BANKRUPTCY PETITIONS

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"*Existing uncertainty is much like mist just too thin to be fog; one sees a little and forgets how infinitely more is hidden*."[1]

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[1] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 302 n.294 (1960).

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INTRODUCTION

From the very beginning, two concepts have coursed in the "gloomy"[2] world of debt and credit patrolled by bankruptcy law.[3] In centuries passing, the first, the doctrine of good faith,[4] has lost little potency, its endurance secured by its very mutability. In the meantime, the second notion, involuntary bankruptcy, has lost so much that it nowadays occasions ample disfavor.[5] Indeed, although the Bankruptcy Code ("Code") retains it,[6] it appears in truncated form within § 303, the involuntary proceedings once synonymous with bankruptcy itself demoted to this single section, and infrequent use has dulled the furor that it once elicited. Today, with its star having so waned, for the sake of promoting the Code's known ends,[7] dismissals of involuntary petitions due to petitioning creditors' bad faith have proliferated, a result depicted as consistent with the judiciary's treatment of similarly tainted voluntary petitions.[8]

In the process, a textual oddity has not gone entirely unnoticed: even as "bad faith" is denominated as the basis for an award of punitive damages after an involuntary petition's dismissal, nowhere in § 303 is "bad faith" or its converse, lack

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[2] *See* CHARLES WARREN, BANKRUPTCY IN THE UNITED STATES 3 (1935) (describing bankruptcy as "a gloomy and depressing subject"); *see also* H.H. Shelton, *Bankruptcy Law, Its History and Purpose*, 44 AM. L. REV. 394, 394 (1910) (describing bankruptcy law as unpopular and "neither a cheerful nor a pleasing theme, because it deals with financial disaster, and we dislike the gloom attending ruin").

[3] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws of the United States*, 3 AM. BANKR. INST. L. REV. 5, 5 (1995) [hereinafter Tabb, *History*] (observing that "[n]o corner of our society seems immune from the ubiquitous reach of bankruptcy"); *see also* Shelton, *supra* note 2, at 394 ("Bankruptcy law . . . is a distinct and an important branch of our system of jurisprudence. In its administration it is far-reaching.").

[4] *See In re* Landmark Distrib., 189 B.R. 290, 309 n.19 (Bankr. D.N.J. 1995) (quoting *In re* Elsub Corp., 66 B.R. 189, 193 (Bankr. D.N.J. 1986) (quoting BLACK'S LAW DICTIONARY 127 (5th ed. 1979))). Colloquially and traditionally, "good faith" serves as a synonym for "lack of bad faith," and "bad faith" equates to "lack of good faith." In this article, the terms "good faith" and "bad faith" are used interchangeably with "lack of bad faith" and "lack of good faith," respectively.

[5] *See* Isabella C. Lacayo, *After the Dismissal of an Involuntary Bankruptcy Petition: Attorney's Fees Awards to Alleged Debtors*, 27 CARDOZO L. REV. 1949, 1949 (2006) ("An involuntary bankruptcy petition under section 303 of the [Code] allows a creditor to force an unwilling debtor into [bankruptcy]."); *see also* Brad R. Godshall & Peter M. Gilhuly, *The Involuntary Bankruptcy Petition: The World's Worst Debt Collection Device?*, 53 BUS. LAW. 1315, 1316 (stating that involuntary bankruptcy is an ineffective debt collection device, and should be used sparingly) (citing *In re* Broshcar, 122 B.R. 705, 707–08 (Bankr. S.D. Ohio 1991)).

[6] The specific provisions of the Code, set forth in 11 U.S.C. §§ 101–1532, inclusive, are referred to in this article as "section _" or "§ _," unless otherwise noted.

[7] For these policies, *see infra* Part III.A.

[8] *See, e.g., In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 334 (3d Cir. 2015) (holding that dismissal and damages are appropriate consequences for bad faith filings); *see also In re* Manhattan Indus., 224 B.R. 195, 201 (Bankr. M.D. Fla. 1997) ("Involuntary filings must be made in good faith and consequences flow if they are not. Dismissal is one possible consequence.").

of good faith, classified as a basis for such a termination.[9] To many, such an omission bears no dispositive relevance. Resting on history, logic, and § 105, this coterie detaches bad faith from § 303's damages provision and recasts it as a general requirement implicit in § 303's jurisdictional criteria.[10] A smaller number question the cogency of these arguments. For buttress, they point to § 303's silence as to this issue and § 105's narrow reach and stress a different history.[11] In more than two decades, no agreement has been forged, and discord predominates even now.

In three substantive parts, this Article clarifies the relevant principles, resolves this dispute, and offers possible solutions. As a prefatory matter, Part I details the history behind and the overall design of § 303. Part II thereupon pinpoints this section's weighty ambiguities and the sides' divergent approaches to the absence of bad faith from the relevant provisions. Part III begins with a summary of the relevant principles of interpretation. In its second part, it shows that the utilization of bad faith to dismiss involuntary petitions cannot cohere with the text and context of § 303. Nonetheless, recognizing the important role served by the concept of bad faith, the third section of Part III tentatively proposes two approaches which would ensure the validity of applying the concept of bad faith in the future. The first method would require congressional action; the second relies on creative interpretation. For now, so long as § 303 remains unaltered and short of a new twist on a familiar term, one or more petitioning creditors' bad faith in filing an involuntary petition should never prompt its dismissal. As to this smoldering issue, courts and scholars may still quibble, but § 303, accurately explicated, commands as much. While much once reckoned prevails no more, traces of wizened truths can often linger and compel acquiescence.[12] Stripped of its encrustation, § 303 is one such artifact.

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[9] *See In re* Forever Green Athletic Fields, Inc., 804 F.3d at 333 (noting that the Code does not explicitly provide for bad faith as grounds for dismissal).

[10] *See In re* WLB-RSK Venture, 296 B.R. 509, 513 (Bankr. C.D. Cal. 2003) (explaining that Congress likely contemplated bad faith as grounds for dismissal, despite not explicitly providing for this remedy in § 303).

[11] *See In re* Basil St. Partners, LLC, 477 B.R. 846, 849 (Bankr. M.D. Fla. 2012) (arguing that § 303(b) does not require creditors to file involuntary petitions in good faith).

[12] *Cf.* MARTIN HEIDEGGER, *What Are Poets For?*, *in* POETRY, LANGUAGE, THOUGHT 92 (Albert Hofstadter trans., Harper Perennial ed. 2013) (1946) ("To be a poet in a destitute time means: to attend, singing, to the trace of the fugitive gods.").

I. CURRENT LAW: HISTORY AND TEXT

A. History of § 303

Enacted in 1542,[13] the first formal British bankruptcy law sanctioned only involuntary bankruptcy proceedings.[14] A lengthy preamble[15] betrayed the moral strain girding this conceit: while a debtor rarely deserved any reprieve, the mere existence of unpayable obligations indicative of amorality and criminality, creditors warranted some recompense for another's profligacy.[16] In this first statute originated the two great traits of all modern bankruptcy laws: the summary collection (or realization) of a debtor's assets and the distribution (or administration) of those assets for the benefit of the entire creditor body.[17] Only later would the third familiar element—the discharge and rehabilitation of the honest but unfortunate debtor, the latter no longer tarred—emerge[18] and attain near preeminence.[19] Still, in spite of centuries' worth of tinkering and experimentation dedicated to this gentler vision's

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[13] *See* Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1079–80 n.63 (2002) (laying out the timeline of the first British bankruptcy laws). Some doubt this date's verisimilitude. *See also* Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 154–55 (1982) (pointing to the Statute of Merchants from 1285 that may have been an earlier iteration of involuntary bankruptcy).

[14] *See* Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 227 (1976) (explaining that early British bankruptcy law allowed creditors to bring debtors to bankruptcy proceedings without the latter's consent).

[15] *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 330 n.24 (1991) [hereinafter Tabb, *Evolution*] (quoting this prefatory sentence, which reads "[D]ivers and sundry persons craftily obtaining into their hands great substance of other mens goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their debts or duties, but at their own wills and pleasures consume the substance obtained by the credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience . . . .")

[16] *See, e.g.*, Sandor E. Schick, *Globalization, Bankruptcy and the Myth of the Broken Bench*, 80 AM. BANKR. L.J. 219, 255 n.190 (2006) (describing original English bankruptcy laws as "quasi-criminal"); *see also, e.g.*, Craig Peyton Gaumer, *Bankruptcy Fraud: Crime and Punishment*, 43 S.D. L. REV. 527, 528–29 (1998) (noting that early English bankruptcy laws were "punitive in nature"); Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 190 (1938) (noting that the purpose of original English bankruptcy laws was to punish a "narrow class of fraudulent debtors"); Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 1 (1919) (finding Henry VIII's original bankruptcy laws were little more than criminal statutes for debtors).

[17] *See* Levinthal, *supra* note 16, at 14 ("The fundamental principle of the [English statute] was that . . . there should be a compulsory administration and distribution . . . among all the creditors."); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1101, 1103, 1108 (1833) (describing the historical context of summary collection and administration).

[18] *See, e.g.*, United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'"); *cf.* Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918) (characterizing this notion as "by no means a fundamental feature of . . . [bankruptcy] law").

[19] *See, e.g.*, Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 724 (1980) (discussing the rise of discharge proceedings during the 20th century); Frank R. Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 434 (1974) (discussing how discharge provided relief for honest debtors).

incorporation,[20] British bankruptcy retained its coercive cast, refined for criminals' derogation and victims' satisfaction, into the eighteenth and nineteenth centuries.[21]

The post-revolutionary United States initially embraced this asperity.[22] As its proponents acknowledged,[23] Congress modeled the short-lived Bankruptcy Act of 1800[24] on these British predecessors.[25] Supported by the Federalists,[26] this act sought

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[20] *See* John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 165–67 (1996) [hereinafter McCoid, *Discharge*]. In 1732, chapter 30 of the Statute of George II finally replaced this regime, previously amended in 1570, 1604, 1623, 1662, 1704, and 1711. Levinthal, s*upra* note 16, at 16–18 (tracing history).

[21] *See, e.g.*, Jason Kilborn & Adrian Walters, *Involuntary Bankruptcy as Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job*, 87 AM. BANKR. L.J. 123, 127–28 (2013) (discussing historical changes bankruptcy law has undergone); Tabb, *Evolution, supra* note 15, at 328 (discussing various changes to collection mechanisms); *see also* Albert K. Stebbins, *Constitutionality of the Recent Amendment to the Bankruptcy Law*, 17 MARQ. L. REV. 163, 165 (1933) (analyzing early and subsequent changes in England). But opposition, even in that era, flared and lingered. For instance, in 1697, Daniel Defoe attacked involuntary bankruptcy for possessing "something in it of Barbarity" and "giv[ing] loose to the Malice and Revenge of the Creditor, as well as a Power to right himself, while . . . leav[ing] the Debtor no way to show himself honest: . . . contriv[ing] all the ways possible to drive the Debtor to despair, and encourag[ing] no new Industry." Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 6 (1986).

[22] *See* Kilborn & Walters, *supra* note 21, at 128; *cf.* THE FEDERALIST NO. 42 (James Madison) ("The power of establishing *uniform laws of bankruptcy* is so intimately connected with the regulation of commerce, and will *prevent so many frauds* where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.").

[23] *See* 9 ANNALS OF CONG. 2669 (1799) ("[T]he main principles of the bankrupt system are to avoid the extension of fraud . . . . Under this law, a man's effects would be fairly looked into, and equally divided amongst all his creditors, without exception.").

[24] Bankruptcy Act of 1800, § 14, 2 Stat. 25 (repealed 1803).

[25] *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006) (stating that "[t]he Bankruptcy Act of 1800 was in many respects a copy of the English bankruptcy statute . . . ."); *In re* Murray, 543 B.R. 484, 496 n.60 (Bankr. S.D.N.Y. 2016) (commenting on the similarities between the Bankruptcy Act of 1800 and the 1732 English Act); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 533 (1996) (discussing further the similarities between the English Act and the Bankruptcy Act of 1800).

[26] Passed during the administration of John Adams, this first act was repealed in 1803 by the then dominant Democratic-Republican Party. *See* Lifetime Cmtys., Inc. v. Admin. Office of U.S. Cts. (*In re* Fidelity Mortg. Investors), 690 F.2d 35, 37 (2d Cir. 1982) (the Bankruptcy Act of 1800 was repealed in 1803); 9 ANNALS OF CONG. 2653–54 (1799) (in which Representative Albert Gallatin, of the latter party, expressed his opposition to any bankruptcy law). Thomas Jefferson, the latter party's founder, readily acknowledged his distaste for this commercial measure: "Is Commerce so much the basis of the existence of the U.S. as to call for a bankrupt law? On the contrary are we not almost agricultural? Should not all laws be made with a view essentially to the poor husbandman?" THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON, vol. VII, CORRESPONDENCE 1792–93 at 194 (Paul Leicester Ford ed. 2010) (1792), *available at* http:// oll.libertyfund.org/titles/jefferson-the-works-vol-7-correspondence-1792-1793?q=Is+Commerce+so+much+the+basis+#Jefferson_0054-07_387; *cf.* ANDREW BURSTEIN & NANCY ISENBERG, MADISON AND JEFFERSON 237 (2010) (quoting James Madison, Jefferson's ally, who attacked as enemies of the union "those who favor measures, which by pampering the spirit of speculation within and without the government, disgust the best friends of the Union"). Yet, much doubt can be raised about the veracity of Jefferson's expressed motives. *See* BURSTEIN & ISENBERG, *supra* note 26, at 528. Furthermore, even Gallatin acknowledged a bankruptcy system's advantages. BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 209 (2002). Finally, many Federalists favored bankruptcy for the same reason Jefferson opposed such legislation. For example, Chief Justice John Marshall, a Federalist, later wrote: "To punish honest insolvency, by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity, which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it." Sturges v. Crowninshield, 17 U.S. 122, 200 (1819). In fact, party alliances

to aid mostly creditors,[27] allowing for the "discharge [of the debtor's] property" on their behalf.[28] In general, it confined eligible debtors to the merchant and trader class, including bankers, brokers, factors, underwriters, and marine insurers,[29] and authorized involuntary bankruptcy proceedings.[30] To assure creditors "a fair share of debtors' assets,"[31] this law allowed mandatory liquidation be initiated upon a creditors' filing of the requisite petition in federal district court and proof of one or more "act[s] of bankruptcy" by a debtor owing a minimum of $1,000.[32] Passed by a narrow margin, legislative history exposed this statute's targets: to benefit "honest merchant[s]" laboring under "unforeseen misfortunes" traceable to fraudulent debtors, those "leviathans of speculation" whose failure for millions impoverished "the widows and orphans, the fair merchants, industrious tradesmen, and credulous friends, . . . involved in the same whirlpool."[33] According to one supporter, the law's "great principle" was that "its energies" could not "be called into operation, except in cases of fraud," against the "men going on in speculative schemes, by means of fictitious credit, imposing upon the community, and massing property by contracting debts to an immense amount, without an intention to pay, and ultimately failing, to the ruin of thousands of individuals."[34] In this portrayal, creditors loomed not as villains but as victims of debtors prone to hazarding "enterprise" and "speculation" under the influence of "a spirit of over-trading;" creditors, not debtors, suffered "great inconveniences" and "real misfortune" worthy of legal succor, these true consequences of the common debtor's shenanigans frequently overlooked due to

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cannot explain every vote, as some Federalists rebuked their party's broad support for any such legislation. MANN, *supra* note 26, at 214.

[27] *See, e.g.*, 5 ANNALS OF CONG. 2650 (1798) (describing this first law's object as "persons only who follow the business of buying and selling"); Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 668 (1935) ("The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor.").

[28] 5 ANNALS OF CONG. 2661–62.

[29] *See* Tabb, *Evolution, supra* note 15, at 346 n.144; *cf In re* Bliemeister, 251 B.R. 383, 390 n.7 (Bankr. D. Ariz. 2000) (observing that the discharge first appeared in the Statute of 4 Anne, adopted in 1705, which made it available only to traders and merchants and in involuntary proceedings).

[30] *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 103 (2001).

[31] DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 42 (2001); *cf.* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 248 (1991) (contending that "the enormous amounts of debts that . . . inland entrepreneurs, traders, shopkeepers, and market farmers" accumulated during the United States' revolutionary years were not "the consequences . . . of poverty nor of anti-commercial behavior" but symbolized "expansion and enterprise").

[32] *See* Countryman, *supra* note 14, at 228; *see also* BALLEISEN, *supra* note 30, at 101; *cf.* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 263 (1999) ("American bankruptcy jurisdiction, of course, developed from an English system."). This law's mandatory quiddity should not obscure an undernoted verity, as bankruptcy proceedings were consistently utilized by debtors themselves through a friendly creditor's helping hand. CHARLES WARREN, BANKRUPTCY IN THE UNITED STATES HISTORY 1, 20 (1935); *see also* MANN, *supra* note 26, at 223 (noting that, except for Charles Warren, few scholars acknowledged the reality of this manipulation).

[33] 9 ANNALS OF CONG. 2676 (1799).

[34] *Id.* at 2660.

these victims' numerosity.[35] For all its supporters' attempts to evade the appearance of a politically perilous foreign taint, few British proponents of a bankruptcy regime would have objected to these sentiments, "the disgrace that should attach to fraudulent bankruptcy" too often "relieved by the influence of the delinquents."[36] In a nation quickly consumed by debates over federalism and centralization,[37] these same reasons even emboldened some of this bankruptcy law's most steadfast opponents.[38]

In the United States, Daniel Defoe's iconoclastic vision—a system of voluntary bankruptcy[39]—received its first codification in the Bankruptcy Act of 1841 ("1841 Act"),[40] and garnered reaffirmation in the Bankruptcy Act of 1867 ("1867 Act").[41] Each progressively more liberal in its treatment of the unfortunate debtor,[42] the historical record surrounding the latter act's repeal revealed the advent of a new constitutional consensus: a presumption of constitutionality now attached to any proposal for legislation enshrining a right to voluntary bankruptcy and an unencumbered discharge for a certain subset of debtors.[43] Apart from this embryonic accord, however, the debate over the propriety of voluntary bankruptcy continued to fester.[44] In near unanimity, congressmen from the United States' Eastern states grudgingly conceded the wisdom of voluntary bankruptcy yet doggedly refused to

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[35] *Id.* at 2676.

[36] *Id.*

[37] Tellingly, the parties' arguments evidence this change: whereas debates had once focused on the commercial or agrarian nature of the American republic, the ones leading to the act's adoption dealt with questions of power and national authority.

[38] MANN, *supra* note 26, at 210–20, 248–50. Yet, no single cause explained the statute's repeal in 1803, as congressmen opted for cryptic references to its "existing evils" and "injurious provisions."

[39] Daniel Defoe first proposed such a system in 1697. *See, e.g.*, John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 362 (1988) [hereinafter McCoid, *Origins*]; Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1255 (2010) ("Daniel Defoe recommended that any merchant or trader demonstrating fraudulent intent either by absconding upon becoming insolvent or by failing to cooperate with the bankruptcy process should 'be guilty of Felony, and upon Conviction of the same, shall suffer as a Felon, without Benefit of Clergy.'") (internal citations omitted).

[40] *See* Act of August 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614*; see* Ali v. CIT Tech. Fin. Servs., 981 A.2d 759, 765 (Md. Ct. Spec. App. 2009) (recounting this history); *cf.* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 129, 135 (2003) (explaining the Whig Party's support for a national bankruptcy statute). For more on this law and its inspiration, see CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOLUME 5, THE TANEY PERIOD, 1836–64 129, 133–35 (Paul A. Freund ed. 1974).

[41] Act of March 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[42] *See* Tabb, *Evolution*, *supra* note 15, at 349–50, 355; *cf.* Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 668 (1935) ("[T]he tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.").

[43] *See* Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160, 184 (1991); *cf.* Shelton, *supra* note 2, at 404 (praising the Bankruptcy Act, as amended, for "throw[ing] sufficient safeguards around the granting of a discharge to prevent frauds" by the "debtor who has not honestly complied with the law by surrendering to his creditors all of his unexempt property, or who has withheld from them anything they have a right to know; who has not, in fact, dealt in absolute fairness with his creditors and the court").

[44] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 549 (2d ed. 1985); *see also* McCoid, *Origins*, *supra* note 39, at 377–78 (summarizing these concerns).

endorse a voluntary bill unaccompanied by features, characteristic of an involuntary system, directed at ensuring the equitable distribution of a bankrupt's assets.[45] Conversely, as the citizens of Southern and Western states were hard-hit by a sharp collapse in land prices, their representatives and senators fought against the inclusion of these forceful tools in any bankruptcy bill.[46] The image of the United States as purely an agrarian society uncongenial to bankruptcy, formerly assumed as true in orations both majestic and pedantic, passed into practical oblivion and tenacious myth, yet the same fears of lost masculinity, dependence, enslavement, and speculation haunted the land.[47] Examples abound. In a message to Congress dated December 1, 1873, President Ulysses S. Grant pushed for the repeal of the 1867 Act for debtors' sake, as "obstinate creditors" seemingly used it "to frighten or force debtors into a compliance with their wishes and into acts of injustice to other creditors and to themselves."[48] Nearly thirty years later, a representative pleaded for a voluntary bankruptcy bill on behalf of the "man who that follows the plow, the man that works in the factory from day to day, that he may produce, that he may live," each essential to "the business of the country" and "burdened down with debt and misfortune which ordinary wisdom did not enable them to avoid."[49] Similarly inclined, one unsuccessful reformist perceived "the only legitimate object" of bankruptcy legislation as "the relief of insolvent debtors" in 1896.[50] Two years later, on the cusp of a new era, another described voluntary bankruptcy as "the means of the redemption of the unsuccessful and fallen debtor" and denounced involuntary bankruptcy as nothing less than "a weapon in the hands of the creditor to press collections of debt harshly, to intimidate, and to destroy" and a source of "litigation and agitation."[51] In defense of the perpetration of some form of involuntary bankruptcy, its supporters co-opted these same notions—"The involuntary law is necessary to enable the creditors of a dishonest and fraudulent debtor to compel him to do as an honest debtor voluntarily does"[52]—to the anger and bewilderment of their opponents.[53] Above all, the perceptibly increasing liberality of these laws and recurrent debates, as well as the persistence of such themes through cycles of boom and bust, intimated that the United States' later systems would likely depart from the English-inspired and creditor-controlled ones so haphazardly erected and swiftly abandoned by the antebellum republic.[54]

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[45] *See* In the Matter of Gibraltor Amusements, Ltd. (*In re* Gibraltor Amusements, Ltd.), 291 F.2d 22, 27 (2d Cir. 1961) (Friendly, J., dissenting).

[46] *See* Frimet, *supra* note 43, at 186.

[47] MANN, *supra* note 26, at 255.

[48] 26 CONG. REC. 104 (1894) (quoting message of President Grant from 1972).

[49] *Id.* at 122 (statement of Rep. Cannon).

[50] 28 CONG. REC. 4607 (1896) (statement of Sen. Albaugh de Armond).

[51] 31 CONG. REC. 1869, 1908–09 (1898) (statement of Rep. Lewis).

[52] 28 CONG. REC. 4582 (1896) (statement of Rep. Connolly).

[53] *Id.* at 4616 (statement of Rep. Graff).

[54] *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 387 (2013) ("The 1898 Act also represented a clear break from the English-inspired, creditor-controlled federal systems of earlier years.").

Upon passage of the National Bankruptcy Act of 1898 ("Bankruptcy Act"),[55] "the modern era of liberal debtor treatment" launched,[56] as once venerable precepts fell.[57] Revolutionary in its solicitude for "debtors' interests,"[58] as later modified by the Bankruptcy Act of 1938 ("Chandler Act"),[59] the Bankruptcy Act allowed an involuntary case to be commenced in one of two situations.[60] If liquidation constituted their goal, three petitioning creditors whose provable claims were fixed as to liability and liquidated as to amount, aggregated $500 or more in excess of the value of the liens held by them, could file such a petition against an eligible debtor.[61] Whenever the debtor challenged the petition, the law obliged these creditors to prove the commission of an "act of bankruptcy" within four months of its filing.[62] To

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[55] *See* An Act to establish a uniform system of bankruptcy throughout the United States, Pub. L. No. 55-541, 30 Stat. 544 (1898) [hereinafter Bankruptcy Act] (repealed 1978).

[56] Tabb, *History*, *supra* note 3, at 24. Perhaps fittingly, the debate over the Bankruptcy Act seemingly represented the tipping point; the precise moment in time when bankruptcy, viewed so consistently for centuries, mutated into something else entirely. 31 CONG. REC. 1916–18 (1898). One defender maintained—"All men who come within that definition [--'the great business class, the active, energetic class, the class that gives life and energy and character to the American people'] are clamoring for a law upon the subject of bankruptcy"—and riposted: "Every provision has been made for the speedy, the cheap, and the economical administration of the estates of bankrupts." *Id.* at 1915–16. But another conceded—"Vast numbers of our people are unquestionably bankrupt, and a law should be passed that would relieve the honest but unfortunate businessman who is laboring under burdens and disabilities caused by conditions over which he has no immediate control"—and riposted:

> But . . . I could never give my consent or vote to a measure containing so many drastic provisions as I find here; . . . whereby any debtor owing them a sum of $1,000 knows not at what time he may be seized upon, dragged before a court, and left at the mercy of a Federal judge to determine whether he shall be held in custody or not.

Id. at 1917.

[57] *See* Ashton v. Cameron Cty. Water Improvement Dist., 298 U.S. 513, 535 (1936) (observing that voluntary proceedings were "resisted" for a century with "debates in Congress bear[ing] witness to the intensity of the feeling aroused by its proposal") (Cardozo, J., dissenting); *see also* Ali v. CIT Tech. Fin. Servs., 981 A.2d 759, 766 (Md. Ct. Spec. App. 2009) ("The 1898 statute applied to all classes of debtors, and provided for voluntary and involuntary bankruptcy."); *cf. In re* Pillow, 8 B.R. 404, 408 (Bankr. D. Utah 1981) (touching upon the differences between modern bankruptcy law and its eighteenth and seventeenth century progenitors).

[58] *See, e.g.*, David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 322 (1999) ("In contrast to the pro-creditor, administrative English approach, the 1898 Act favored debtors' interests in many respects.").

[59] Pub. L. No. 75-696, 52 Stat. 840 (1938). "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto; and to repeal section 76 thereof and all Acts and parts of Acts inconsistent therewith." *Id.*

[60] *See* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number is Not Too Small*, 57 BROOK. L. REV. 803, 807–09 (1991).

[61] Bankruptcy Act § 59; *see* Pirie v. Chi. Title & Tr. Co., 182 U.S. 438, 445 n.1 (1901) (citing section 59 of the Bankruptcy Act and its acts of bankruptcy); *see also* Nw. Pulp & Paper Co. v. Finish Luth Book Concern, 51 F.2d 340, 342 (9th Cir. 1931) (citing statute); Theard v. Fid. & Deposit Co. of Md., 202 F.2d 880, 883 (5th Cir. 1953) (holding that it is immaterial whether the three qualified creditors joined in the petition originally or by intervention). Notably, whereas the Bankruptcy Act once required that a debtor be insolvent for this provision's purposes, this element was later deleted. *See* Bookey v. King, 236 F.2d 871, 876 (9th Cir. 1956) (calling "[t]he omission of the clause 'who is insolvent' . . . significant").

[62] Bankruptcy Act §§ 3–4.

effectuate a reorganization under chapter X against a corporate debtor, petitioning creditors needed to establish that (1) the debtor had committed one such "act of bankruptcy," (2) a receiver or trustee had taken possession of the greater portion of the debtor's property, (3) a proceeding to foreclose a lien against the greater portion of the debtor had been brought, or (4) the debtor had been adjudged a bankrupt in a case pending under one of the Bankruptcy Act's other chapters.[63] These provisions embraced some innovations, including the adoption of the modified balance sheet test presently encoded in § 101(32)(A)[64] to define "insolvency," but ultimately predicated involuntary relief on a debtor's misconduct, conforming, rather than departing, from past American and British practice in its cynosure, if nothing else.[65] So understood, with its rigid rules, the Bankruptcy Act's involuntary formula embodied a provisional compromise between two largely conflicting goals: "[T]he need for an effective remedy for creditors to insure equal distribution of a debtor's assets" and "the need to protect debtors from being forced into bankruptcy without sufficient justification."[66]

In time, this diligently wrought framework engendered an unforeseen conundrum. In practice, many debtors manifested an extreme "reluctan[ce] to file voluntary petition until after the situation [had] become hopeless,"[67] thereby engaging in costly misbehavior redolent of "the ingenuity of fraud and stratagem" loathed and targeted by the mercantile supporters of America's earlier involuntary schemes.[68] By 1975, these business debtors' craftiness in "delay[ing] or frustrat[ing] indefinitely all efforts at bringing their financial problems under the supervision and protection of the federal bankruptcy courts for early diagnosis and correction of their financial difficulties" struck many observes as an uncontroversial yet disturbing truth.[69] Creditors, meanwhile, struggled "to allege and prove the commission of one . . . act[] of bankruptcy."[70] The cause proved easy to pinpoint: as timely insolvency comprised an essential element shared by four of those five statutorily-defined "acts of bankruptcy," and as debtors tended to jealously guard the relevant financial data

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[63] *Id.*; *see also, e.g.*, Block-Lieb, *supra* note 60, at 808–09 (citing provision).

[64] *See* 11 U.S.C. § 101(32)(A) (2012); *see also, e.g.*, Am. Nat'l Bank & Tr. Co. v. Bone, 333 F.2d 984, 986–87 (8th Cir. 1964) (utilizing a balance sheet test to show insolvency); *see also* Syracuse Eng'g Co. v. Haight, 110 F.2d 468, 471 (2d Cir. 1940) (holding that under the balance sheet test, the valuation of an asset is its fair market price).

[65] *See* Tabb, *History*, *supra* note 3, at 8 ("The premise of debtor misconduct as the basis for involuntary bankruptcy, rather than financial status, remained in place until the Bankruptcy Reform Act of 1978.").

[66] HON. JOAN FEENEY ET AL., BANKRUPTCY LAW MANUAL § 14.1 (5th ed. 2014); *see* Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 364, 367 (1999) (describing an antecedent bill proposed by Representative Joseph Bailey, a Texas Democrat, as "radical" for embracing "the concept of allowing *only* voluntary bankruptcy" and contrasting it with a second, devised by Jay L. Torrey, a St. Louis attorney, which "permitted *involuntary* bankruptcy to be filed by creditors against debtors") (emphasis in original).

[67] COMM'N ON THE BANKR. LAWS OF THE UNITED STATES, REPORT OF THE COMM'N ON THE BANKR. LAWS OF THE UNITED STATES (1973), *reprinted in Report of the Commission on the Bankruptcy Laws of the United States*, 29 BUS. LAW. 75, 98 (1973) [hereinafter COMM'N REPORT].

[68] 9 ANNALS OF CONG. 2674 (1799) (statement of Rep. Otis).

[69] Conrad K. Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99, 163 (1975).

[70] COMM'N REPORT, *supra* note 67, at 98.

for reasons noble and foul, nearly insurmountable evidentiary difficulties stymied even determined creditors.[71] As a result, "delay in the institution of proceedings for liquidation until assets . . . [were] largely depleted" grew commonplace,[72] principally "explaining the smallness of distributions in . . . business bankruptcies."[73]

Cognizant of these ills, § 303's drafters attempted "to make the . . . [Code] more effective as an instrumentality for relief at the instance of creditors."[74] Thus, this section originally struck a new balance between a debtor's renascence and creditors' return,[75] one explicitly designed to be different from that imposed by the Code's debtor-focused voluntary provisions.[76] Protection of the threatened depletion of assets and prevention of the unequal treatment of similarly situated creditors, the themes central to bankruptcy law's more coercive past, became the central policies behind the Code's involuntary petitions; other policies associated with the Code's voluntary provisions, including the honest debtor's "fresh start," receded in relative importance.[77] With care, § 303's architects honed it into, first and foremost, an extreme[78] "remedy for creditors, not debtors,"[79] sharply contrasting with the modern

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[71] *See* COMM'N REPORT, *supra* note 67, at 98 (noting that "insolvency" is "defined in the Act as insufficiency of the debtor's property at a fair valuation to pay his debts" and acknowledging that it is "frequently difficult for a debtor's creditors" to establish that the debtor is insolvent and the debtor is entitled to a jury trial to establish whether he committed an act of bankruptcy); *see* Bankruptcy Act § 3; *see also, e.g.*, West Co. v. Lea, 174 U.S. 590, 592 n.1, (1899) (citing Section 3 of the Acts of Bankruptcy statute and its five acts); In the Matter of Marshall, III (*In re* Marshall), 721 F.3d 1032, 1060–61 (9th Cir. 2013) (recounting the history of the 1898 Bankruptcy Act and the issues of "insolvency" with an involuntary petition); *cf.* Treiman, *supra* note 16, at 210 (pegging "the underlying evil of the present situation" as the fact that "insolvency is recognized as the fundamental reason for bringing a debtor into a bankruptcy court, yet the law insists on coupling this primary ground with an artificial act to be committed by a debtor") (internal quotation marks omitted). To be fair, insolvency had first appeared in the 1867 Act as an element of one of its nine statutory acts of bankruptcy. *See* John C. McCoid, II, *The Occasion for Involuntary Bankruptcy*, 61 AM. BANKR. L.J. 195, 196 (1987) [hereinafter McCoid, *The Occasion*].

[72] COMM'N REPORT, *supra* note 67, at 98, *cited in In re* Marciano, 446 B.R. 407, 419 (Bankr. C.D. Cal. 2010); Cyr, *supra* note 69, at 163–64

[73] *In re* Marciano, 446 B.R. at 419.

[74] COMM'N REPORT, *supra* note 67, at 99.

[75] *See, e.g., In re* Dino's, Inc., 183 B.R. 779, 783–84 (S.D. Ohio 1995) (adopting an "objective-subjective analysis standard" for determining bad faith in the filing of an involuntary petition); *see also* Susman v. Schmid (*In re* Reid), 773 F.2d 945, 946 (7th Cir. 1985) (discussing § 303(b)(1) of the Bankruptcy Act, amended in 1984, providing that "an involuntary case may be commenced against a debtor by three or more creditors, 'each of which is a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute'").

[76] *See* Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing "Cause" under Rule 3018(a)*, 89 AM. BANKR. L.J. 511, 546–47 (2015) [hereinafter Shachmurove, *Claims*]. Pro-debtor, of course, does not mean anti-creditor, as the Code attempts to roughly balance the rights of debtors with the prerogatives of creditors. *Id.*

[77] *See, e.g., In re* Manhattan Indus., Inc., 224 B.R. 195, 200 (Bankr. M.D. Fla. 1997); *In re* Letourneau, 422 B.R. 132, 138 (Bankr. N.D. Ill. 2010); *In re* Hentges, 351 B.R. 758, 772 (Bankr. N.D. Okla. 2006) (quoting *In re* Better Care, Ltd., 97 B.R. 405, 411 (Bankr. N.D. Ill. 1989)); *In re* Tichy Elec. Co., 332 B.R. 364, 372 (Bankr. N.D. Iowa 2005).

[78] *See In re* Tichy Elec. Co., 332 B.R. at 372 (stressing the danger of involuntary bankruptcy and how it cannot be overlooked by the courts).

[79] *In re* Letourneau, 422 B.R. at 138 (stating there is no circumstance where a debtor's filing of involuntary bankruptcy can be proper).

era's greater progressivism.[80] The byproduct of this quirk—a heightening of the "uneasy tension" already produced by the Code's protection of both creditors and debtors in its voluntary chapters[81]—has played out in this section's explication.

B. Statutory Scheme

1. Threshold Requirements

Permissible in two circumstances[82]—when either liquidation under chapter 7 or reorganization pursuant to chapter 11[83] is pursued—for reasons of undisguised policy,[84] an involuntary case may be commenced "against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced."[85] As such, prior to an involuntary matter's initiation, the target debtor must meet the minimal[86] and malleable[87] eligibility criteria to be classified as a

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[80] *See, e.g.*, Huszti v. Huszti, 451 B.R. 717, 719 (Bankr. E.D. Mich. 2011) (quoting *In re* McMeekin, 18 B.R. 177, 177–78 (Bankr. D. Mass. 1982)). To countless jurists, a simple reason, embedded in the Code entirely and sanctioned by precedent, compelled such watchfulness. *In re* McMeekin, 18 B.R. at 177–78. The "harsh effects" of such an unsuccessful filing, including "the loss of credit-standing, inability to transfer assets and carry on business affairs, and the public embarrassment," too often rendered an involuntary petition's dismissal into a hollow abyss for a person already terminally wounded by a petition's mere docketing. *Id.*; *see also, e.g.*, *In re* Lai Di Zhu, No. 10–19901PM, 2010 WL 4259553, at *3 (Bankr. D. Md. Oct. 21, 2010) (holding an alleged debtor can recover from a creditor in an involuntary bankruptcy filing); *In re* Cates, 62 B.R. 179, 180 (Bankr. S.D. Tex. 1986) (quoting *In re* Reid, 773 F.2d at 946, that "the filing of involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment," thus, the courts will scrutinize the creditor's filing carefully).

[81] *See In re* Am. Res. & Energy, LLC, 513 B.R. 371, 382 (Bankr. D. Minn. 2014) (characterizing the meaning of "bona fide dispute as to liability or amount" in 11 U.S.C. § 303 as "but one example of this tension").

[82] 11 U.S.C. § 303(a) (2012) (referring to chapter 7 or 11 of this title); *see* Toibb v. Radloff, 501 U.S. 157, 169 (1991) (Stevens, J., dissenting).

[83] *See, e.g.*, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 37 n.2 (2008); *see also* CHS, Inc. v. Plaquemines Holdings, L.L.C., 735 F.3d 231, 239 (5th Cir. 2013); *cf.* Beeman v. BGI Creditors' Liquidating Tr. (*In re* BGI, Inc.), 772 F.3d 102, 107 (2d Cir. 2014) (observing that the doctrine of equitable mootness governs "appeals arising from Chapter 11 liquidation proceedings, as well as appeals from Chapter 11 reorganization proceedings"). In some sense, this distinction is mere sophistry, as a chapter 11 plan can effectuate a debtor's liquidation as surely as a classic chapter 7 case. *See* Fla. Dep't of Revenue, 554 U.S. at 37 n.2.

[84] H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 321–22 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979) ("An involuntary case may be commenced only under chapter 7, Liquidation, or chapter 11, Reorganization.").

[85] 11 U.S.C. § 303(a); Prof'l Bus. Servs., Inc. v. Young (*In re* Young), 207 F. App'x 735, 735 n.2 (8th Cir. 2006) (quoting § 303(a)); Marlar v. Williams (*In re* Marlar), 432 F.3d 813, 815 (8th Cir. 2005) (also quoting § 303(a)).

[86] *See In re* Purpura, 170 B.R. 202, 206 (Bankr. E.D.N.Y. 1994) (describing chapter 11 as a "powerful tool . . . which can be initiated with virtual impunity," as "[a]ny person who meets the minimal eligibility requirements contained in 11 U.S.C. § 109(d) may file a chapter 11 petition"); *see also In re* Nichols, 223 B.R. 353, 359 (Bankr. N.D. Okla. 1998) (quoting *In re* Purpura, 170 B.R. at 206).

[87] *See In re* 4 Whip, LLC, 332 B.R. 670, 672 (Bankr. D. Conn. 2005) (concluding the "Code's qualification criteria are sufficiently liberal to permit an inchoate or *de facto* limited liability company . . . to be a debtor,

chapter 7 or a chapter 11 bankrupt laid down in § 109(a), (b), and (d).[88] Per these provisions, the target debtor must be a "person," whether natural[89] (and neither a farmer nor a family farmer, as painstakingly defined in § 101[90]) or a "moneyed, business, or commercial corporation."[91] These prerequisites met, an involuntary case starts once a petition is filed by: (1) "three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $15,325 more than the value of any lien on property of the debtor securing such claims held by the holders of such claim;"[92] (2) "if there are fewer than 12 such holders, excluding any employee or insider . . . and any transferee of a transfer that is voidable under [the Code], by one or more of such holders that hold in the aggregate at least $11,625 of such claims;"[93] (3) "if such person is partnership," either "by fewer than all of the general partners" or "by any general partner . . ., the trustee of such a general partner, or a holder of a claim against such a partnership" if relief was ordered "with respect to all of the general partners in such a partnership;"[94] or (4) "by a foreign representative of the estate in a foreign proceeding concerning such person."[95] Distilled, § 303(b) permits three categories of persons to file a petition: (1) unsecured creditors with undisputed, noncontingent claims, (2) general partners of a partnership debtor, and (3) foreign representatives of a debtor in a foreign proceeding.[96]

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so long as that entity had a *bona fide* business existence prior to the Petition Date").

[88] 11 U.S.C. §§ 101(41), 109(a)–(b), 109(d); *see In re* Bank of Am., N.A., No. 11-24503 MER, 2011 WL 2493056, at *5 (Bankr. D. Colo. June 21, 2011) (citing § 109(b) and 109(d)).

[89] 11 U.S.C. § 101(41) (defining "person" for the Code's general purposes to "include[] individual, partnership, and corporation, but . . . not include governmental unit"); *see* Goerg v. Parungao (*In re* Goerg), 844 F.2d 1562, 1566 (11th Cir. 1988) (citing § 101(41)).

[90] 11 U.S.C. § 101(18), 101(20); *see* In the Matter of Bernard Armstrong (*In re* Armstrong), 812 F.2d 1024, 1025 (7th Cir. 1987) (citing § 101(18)).

[91] 11 U.S.C. § 303(a). The phrase "moneyed, business, or commercial corporation" dates to the Bankruptcy Act of 1867. *See* Merrill v. Nat'l Bank of Jacksonville, 173 U.S. 131, 176, (1899). Prior to the Code, it had seemingly acquired a fixed meaning as referring purely to "corporations organized for profit." *See* In the Matter of Allen University (*In re* Allen Univ.), 497 F.2d 346, 348 (4th Cir. 1974); *cf.* Highway & City Freight Drivers, v. Gordon Transps., Inc., 576 F.2d 1285, 1291 (8th Cir. 1978) (emphasizing the paucity of illuminating case law). Courts continue to adhere to this definition. *See, e.g., In re* Residential Capital, LLC, No. 12-12020 (MG), 2013 Bankr. LEXIS 5683, at *31 (Bankr. S.D.N.Y. Dec. 11, 2013) (distinguishing between "moneyed, business, or commercial corporations or trusts" and "nonprofit entities" for purposes of § 1129(a)(14)–(16)). However, the modern test "for whether a debtor is a moneyed, business, or commercial corporation is determined by a consideration of the classification of the corporation by the state; the powers conferred upon it; and the character and extent of its main activities." *In re* Yehud-Monosson USA, Inc., 458 B.R. 750, 755 (B.A.P. 8th Cir. 2011) (internal quotation marks omitted).

[92] 11 U.S.C. § 303(b)(1); Mitchell v. Weinman (*In re* Mitchell), 554 F. App'x 756, 759 (10th Cir. 2014).

[93] 11 U.S.C. § 303(b)(2); Trusted Net Media Holdings, LLC v. Morrison Agency, Inc. (*In re* Trusted Net Media Holdings), 550 F.3d 1035, 1040 (11th Cir. 2008) (quoting § 303(b)) (emphasis in original omitted).

[94] 11 U.S.C. § 303(b)(3); *In re* Quality Laser Works, 211 B.R. 936, 940–41 (B.A.P. 9th Cir. 1997) (quoting § 303(b)(3)(A) and (B)); *In re* Roxy Roller Rink Joint Venture, 67 B.R. 479, 482 (Bankr. S.D.N.Y. 1986) (citing § 303(b)(3)(A)).

[95] 11 U.S.C. § 303(b)(4); Jefferson Tr. & Sav. Bank of Peoria v. Rassi (*In re* Rassi), 701 F.2d 627, 628 n.1 (7th Cir. 1983) (quoting § 303(b)).

[96] 11 U.S.C. § 303(b); *see In re* McMillan, 543 B.R. 808, 811 (Bankr. N.D. Tex. 2016) (holding that only

Once these facts have been established, the Code's standard for an order for relief in an involuntary case, specified in § 303(h), depends upon the target debtor's response.[97] If the petition is not "timely controverted," i.e. contested, the bankruptcy court "shall order relief against the debtor . . . under the chapter under which the petition was filed."[98] Otherwise, though only after a trial, relief will follow in one of two situations.[99] First, "the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount,"[100] "the most significant departure from . . . [pre-Code] law concerning the grounds for involuntary bankruptcy.[101] Second, "within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or

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"petitioning creditors" are parties to the contested matter); *see also In re* Moss, 249 B.R. 411, 418 (Bankr. N.D. Tex. 2000) (quoting §303(b)); McMillan v. Schmidt (*In re* McMillan), 614 F. App'x 206, 209 (5th Cir. 2015) (finding that more creditors may subsequently join the first set under § 303(c)). "The sole statutory qualification for joining is that the creditor must hold a nonexempt unsecured claim." *In re* Kidwell, 158 B.R. 203, 210 (Bankr. E.D. Cal. 1993) (construing 11 U.S.C. § 303(c)). Upon such congregation, the "joining creditor" gains the same rights as the "petitioning creditor(s);" thus, the term "petitioning creditor" in § 303 is equivalent to "an entity that files a petition under § 303(b) or one who joins the petition under § 303(c)." *In re* McMillan, 614 F. App'x at 209; *see also In re* Rosenberg, 779 F.3d 1254, 1268–69 (11th Cir. 2015) (affirming the bankruptcy court's award of fees from an entity it concluded was the "de facto petitioning creditor" though not a signatory to the original involuntary petition). The Code's legislative history stresses this equality, H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 322 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979), seemingly intended to maximize the chances for some joint efforts between discrete creditors. *See In re* Iowa Coal Mining Co., 242 B.R. 661, 699 (Bankr. S.D. Iowa 1999) (contending that "the legislative purpose of § 303 would be frustrated by allowing [a small subset of a debtors' creditors] to launch [an] involuntary proceeding without some joint effort with other creditors").

[97] *See, e.g., In re* Runaway II, Inc., 168 B.R. 193, 196 (Bankr. W.D. Mo. 1994). That these requirements can be described as "jurisdictional" does not mean they are necessary to the bankruptcy court's subject matter jurisdiction. *See, e.g., In re* Mitchell, 554 F. App'x at 760 (discussing that there is no explicit reference to § 303(b)'s requirement being jurisdictional in nature); Adams v. Zarnel (*In re* Zarnel), 619 F.3d 156, 169 n.6 (2d Cir. 2010); *In re* Trusted Net Media Holdings, LLC, 550 F.3d at 1041 (discussing § 303(b) and jurisdictional issues).

[98] 11 U.S.C. § 303(h); J.B. Lovell Corp. v. Carlisle Corp. (*In re* J.B. Lovell Corp.), 876 F.2d 96, 98 n.4 (11th Cir. 1989). While the Code technically refers to "court," every district court in the United States has adopted a standing order of reference which devolves bankruptcy adjudication unto that district's bankruptcy court.

[99] 11 U.S.C. § 303(h); McCloy v. Silverthorne (*In re* McCloy), 296 F.3d 370, 375 (5th Cir. 2002) (quoting § 303(h)); McCoid, *The Occasion*, *supra* note 71, at 195, 208–09. The Code calls for an order for relief in an involuntary petition when the "debtor is generally not paying such debtor's debts as such debts become due" and where "within 120 days before the date of the filing of the petition, a custodian . . . was appointed or took possession." *Id.* at 195.

[100] 11 U.S.C. § 303(h)(1); *see, e.g., In re* Zapas, 530 B.R. 560, 567 (Bankr. E.D.N.Y. 2015) (quoting § 303(h)(1)); Ferguson v. Baron (*In re* Baron), 593 F. App'x 356, 360 (5th Cir. 2014) ("[Section] 303(h) provides that, whenever an involuntary bankruptcy petition is filed and then timely controverted, the court, after a trial, shall order relief against the debtor in the involuntary proceeding only if, *inter alia*, 'the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount.'") (quoting § 303(h)); *In re* Speer, 522 B.R. 1, 5 (Bankr. D. Conn. 2014) (quoting § 303(h)(1)).

[101] H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 323. Pre-code law required both balance sheet insolvency and an act of bankruptcy.

took possession."[102]

Read together,[103] in the absence of a custodian's appointment, § 303(b) and (h) impose five obligations on the petitioning creditors, a quintet that must be promptly shown to a judge's satisfaction.[104] In particular, the bankruptcy court must determine whether: (1) either three or more creditors (where the total number of creditors exceeds twelve)[105] or at least one (where the total number falls below twelve),[106] once certain exclusions are made, exist; (2) the creditor(s) hold claim(s) against the target debtor that are not contingent as to liability; (3) the claim(s) are not the subject of a bona fide dispute as to liability and amount; and (4) the claim(s) total at least $15,325.[107] Finally, the court must ascertain (5) that the alleged debtor is generally not paying debts, except those subject to a bona fide dispute as to liability or amount, as they come due.[108] Articulating a "liberal approach to the commencement of an

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[102] 11 U.S.C. § 303(h)(2); *see, e.g.*, Concrete Pumping Serv., Inc. v. King Constr. Co. (*In re* Concrete Pumping Serv. Inc.), 943 F.2d 627, 629 (6th Cir. 1991) ("11 U.S.C. § 303(h) governs the issue of how and when an involuntary bankruptcy case can be commenced."); B.D. Int'l Discount Corp. v. Chase Manhattan Bank, N.A. (*In re* B.D. Int'l Discount Corp.), 701 F.2d 1071, 1073 n.4 (2d Cir. 1983); *see also* H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324 (the custodian test was deemed to be "more easily provable" than the equity insolvency test).

[103] *See, e.g.*, Roberts v. Sea-Land Servs. Inc., 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)). For more on canons of interpretation, see *infra* Part III.A.

[104] *See, e.g., In re* Brooklyn Resource Recovery, 216 B.R. 470, 478 (Bankr. E.D.N.Y. 1997); *In re* Better Care, Ltd., 97 B.R. 405, 418 (Bankr. N.D. Ill. 1989) ("The burden is upon the petitioning creditors to prove each and every element of their case . . . ."); Subway Equip. Leasing Corp. v. Sims (*In re* Sims), 994 F.2d 210, 221 (5th Cir. 1993) ("[T]he petitioning creditor must establish a prima facie case that no bona fide dispute exists.") (internal quotation marks omitted); Susman v. Schmid (*In re* Reid), 773 F.2d 945, 946 (7th Cir. 1985). Once the petitioning creditors satisfy § 303(b) and (h), the burden to prove a defense shifts to the debtor. *See In re* Mktg. & Creative Sol., Inc., 338 B.R. 300, 305 (B.A.P. 6th Cir. 2005). The creditors must do so by a preponderance of the evidence. *See, e.g., In re* Moss, 249 B.R. 411, 418 (Bankr. N.D. Tex. 2000) (citing cases); *In re* Gills Creek Parkway Assocs., L.P., 194 B.R. 59, 63 (Bankr. D.S.C. 1995) ("[T]he petitioning creditors have the burden of proving by a preponderance of evidence that the statutory requirements of § 303 have been met.") (internal quotation marks omitted).

[105] *See* Godshall & Gilhuly, *supra* note 5, at 1322. Up until 1998, the majority of involuntary cases were apparently filed by three or more creditors.

[106] *See* Godshall & Gilhuly, *supra* note 5, at 1322.

[107] *See, e.g., In re* Diamondhead Casino Corp., 540 B.R. 499, 505–06 (Bankr. D. Del. 2015); *see also In re* Marciano, 446 B.R. 407, 420 (Bankr. C.D. Cal. 2010) (although in this case, the court ruled the claims need to amount to at least $13,475).

[108] *See, e.g., In re* Diamondhead Casino Corp., 540 B.R. at 505–06; *see also In re* Marciano, 446 B.R. at 420.

involuntary case,"[109] an affirmative answer to these jurisdictional[110] questions leads to the entering of an order for relief per § 303's explicit text.[111]

2. Target Debtor's Statutory Prerogatives

Before that pivotal point is reached, however, the target debtor enjoys uniquely extensive prerogatives.[112] Empowered to answer,[113] he, she, or it may raise any number of defenses to the petition, including: (1) lack of eligibility to be a debtor under the creditor's selected chapter under the Code; (2) status as a farmer, family farmer, or nonprofit organization; (3) number of petitioning creditors; (4) nature and/or amount of each petitioning creditor's claim; (4) contingent nature of relevant claims; (5) claims subject to a bona fide dispute; (5) aggregate amount of the debts of the petitioning creditors is less than $14,425 over the amount of any security for the claim; (6) generally not paying debts as they become due; and (7) pre-petition custodian appointed.[114] For the sake of his, her, or its financial security, the target debtor may also request that the bankruptcy court require "the petitioner under this section to file a bond to indemnify the debtor for such amount as the court may later allow under subsection (i) of this section" after "notice and a hearing" and "for

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[109] *In re* Rebeor, 93 B.R. 16, 20 (Bankr. N.D.N.Y. 1988).

[110] *See* Key Mech. Inc. v. BDC 56 LLC (*In re* BDC 56 LLC), 330 F.3d 111, 118 (2d Cir. 2003) *abrogated by* Zarnel v. Zarnel *(In re* Zarnel), 619 F.3d 156, 167 (2d Cir. 2010) (finding for a "subject matter jurisdictional" requirement). *But see* Rubin v. Belo Broad. Corp. (*In re* Rubin), 769 F.2d 611, 614 n.3 (9th Cir. 1985) (describing the requirements in § 303 as "not jurisdictional in the technical sense of subject matter jurisdiction" but rather as "substantive matters which must be proved or waived for petitioning creditors to prevail in involuntary proceedings"); *see also, e.g.*, *In re* Smith, 415 B.R. 222, 238 (Bankr. N.D. Tex. 2009) (affirming that "§ 303(b)'s requirements are not jurisdictional"); *In re* Trusted Net Media Holdings, LLC, 550 F.3d at 1043 (concluding that "that the language of § 303(b) does not evince a congressional intent to implicate the bankruptcy courts' subject matter jurisdiction"); *In re* Everett, 178 B.R. 132, 144 (Bankr. N.D. Ohio 1994) (quoting *In re* Rubin, 769 F.2d at 614 n.3). Quite simply, "[t]he filing of an involuntary petition, even when the alleged debtor challenges whether the petitioning creditor's claim is valid, creates a 'case under title 11' and falls within the subject matter jurisdiction of [the] Court." *In re* AMC Investors, LLC, 406 B.R. 478, 482 (Bankr. D. Del. 2009); *see also, e.g., In re* Coppertone Commc'ns, Inc., 96 B.R. 233, 235 (Bankr. W.D. Mo. 1989) (relying on *In re* Earl's Tire Serv., Inc., 6 B.R. 1019, 1022 (Bankr. D. Del. 1980)).

[111] 11 U.S.C. § 303(h) (2012) (outlining the required relief); *cf.* Source Search Techs., LLC v. Lending Tree, LLC, No. 04-4420, 2007 WL 1302443, at *8 (D.N.J. May 2, 2007) (contrasting permissive "may" and "can" with mandatory "must"); Sabow v. United States, 93 F.3d 1445, 1452 (9th Cir. 1996) (distinguishing between "suggestive ('should')" and "mandatory ('must') terms").

[112] *Cf. In re* McMillan, 543 B.R. 808, 815 (Bankr. N.D. Tex. 2016) ("Section 303 of the Bankruptcy Code is structured as a self-contained statute to deal with all aspects of an involuntary bankruptcy.").

[113] 11 U.S.C. § 303(d) (empowering a "debtor, or a general partner in a partnership debtor that did not join the petition, [to] file an answer to a petition under this section"); *see In re* CorrLine Int'l, LLC, 516 B.R. 106, 138 (Bankr. S.D. Tex. 2014) (recognizing the right of a debtor to oppose an involuntary petition by filing an answer); *see also* H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 322 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979). Unlike (e), (f), and (g), this subsection refers to both a debtor and "a general partner in a partnership debtor that did not join in the petition." 11 U.S.C. § 303(d).

[114] *See In re* Colon, 474 B.R. 330, 361–62 (Bankr. D.P.R. 2012) (citing David S. Kennedy, James E. Bailey III & R. Spencer Clift, III, *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 6–7 (2000)).

cause."[115] While an interim trustee may be appointed upon the request of a party in interest, the target debtor may always "regain possession" upon filing "such bond as the court requires . . . ."[116] And rather helpfully, the Code has been read to necessitate no more than a minimally "sufficient bond."[117]

The Code bestows yet other statutory privileges upon the target debtor in the hope of redressing once formidable menaces.[118] Perhaps most significantly, "[n]otwithstanding [S]ection 363 . . . except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate . . . ."[119] During this so-called "gap period,"[120] "a clarification and a change from existing law" when enacted in 1978,[121] "the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor

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[115] 11 U.S.C. § 303(e); *see In re* Savannah Yacht Corp., No. 03-41547, 2003 WL26099689, at *1 (Bankr. S.D. Ga. Nov. 25, 2003) (concluding "bad faith is a determining factor in ordering a petitioning creditor to post a bond under §303(e)"). One purpose—to "discourage frivolous petitions as well as the more dangerous spiteful petitions," ones "based on a desire to embarrass the debtor . . . or to put the debtor out of business without good cause"—prompted this requirement's enactment, as "an involuntary petition may put a debtor out of business even if it is without foundation and is later dismissed." *See also* H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 323 (citations omitted); *see also, e.g.*, *In re* Apollo Health St., Inc., No. 11-22970 (NLW), 2011 WL 2118230, at *2 (Bankr. D.N.J. May 23, 2011) (citing legislative history); *In re* Kidwell, 158 B.R. 203, 218 (Bankr. E.D. Cal. 1993) (reasoning "[a] bond can have a sobering effect in a case that is off to a shaky start and that is fraught with controversy about the bona fides of the petitioners").

[116] 11 U.S.C. § 303(g); *see In re* Audio Visual Workshop, 211 B.R. 154, 157 n.2 (Bankr. S.D.N.Y. 1997) (citing §303(g)).

[117] *See* H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 322. Such a debtor bond is "conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property." 11 U.S.C. § 303(g); *see In re* Audio Visual Workshop, 211 B.R. at 157 n.2 (citing §303(g)).

[118] *See, e.g.*, Mueller v. Nugent, 184 U.S. 1, 14, (1902); Wilkinson v. Goodfellow-Brooks Shoe Co., 141 F. 218, 220 (C.C.E.D. Mo. 1905) (citing Mueller v. Nugent, 184 U.S. at 14, "[t]he filing of the petition is a caveat to the world, and in effect an attachment and injunction."). Rather poetically, Judge Gustavus Adolphus Finklenburg observed:

> Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally. No prudent person will buy from him, and no prudent person will sell anything to him on credit, even if security is offered, because all transactions between the bankrupt and third persons after the petition in bankruptcy has been filed are liable to be investigated, reviewed, set aside, or controlled as to their validity and effect in case of an adjudication.

Wilkinson v. Goodfellow-Brooks Shoe Co., 141 F. at 220.

[119] 11 U.S.C. § 303(f); *See* Hamilton v. Lumsden (*In re* Geothermal Res. Int'l), 93 F.3d 648, 651 n.1 (9th Cir. 1996) (quoting § 303(f)).

[120] *See In re* C.W. Mining Co., 440 B.R. 878, 885 n.12 (Bankr. D. Utah 2010) (defining this term); *see also, e.g.*, Jenkins v. Hodes (*In re* Hodes), 402 F.3d 1005, 1009 (10th Cir. 2005) (indicating that the "'gap-period'" is the time "between the filing of the involuntary petition and the entry of an order for relief"); *In re* Clark, 543 B.R. 16, 22 (Bankr. D. Idaho 2015) ("[P]roviding that, unless the court orders otherwise, the business of the debtor may operate following the filing of an involuntary petition and before entry of an order for relief . . . .").

[121] *See* H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 323; *see also In re* Gaudreault, 315 B.R. 1, 6 n.5 (Bankr. D. Mass. 2004) (citing legislative history).

had not been commenced."[122] Augmenting this relative autonomy by insulating such "contemporaneous exchanges for value"[123] and other "ordinary course expenses"[124] from future invalidation,[125] the Code expressly forbids any later appointed trustee from avoiding such transfers.[126] So as to improve a target debtor's chances for revival, whether or not dismissal ever occurs, "[u]pon the expiration of the statute of limitations" set forth in 18 U.S.C. § 3282[127] for a violation of two sections of this title—§ 152[128] or § 157[129]—an individual or corporate debtor may ask a bankruptcy court to "expunge any records relating to a[n involuntary] petition" upon proof of "good cause."[130] Lastly, the target debtor not only enjoys the protection of § 362's

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[122] 11. U.S.C. § 303(f); *see In re* Meltzer, 516 B.R. 504, 510 (Bankr. N.D. Ill. 2014) (citing §303(f)).

[123] *In re* Fort Dodge Creamery Co., 121 B.R. 831, 835 (Bank. N.D. Iowa 1990).

[124] *In re* Commonwealth Sprinkler Co., 295 B.R. 852, 853 (Bankr. E.D. Va. 2003); *see also, e.g., In re* Broadview Lumber Co., 168 B.R. 941, 962 (Bankr. W.D. Mo. 1994) (determining §303(f) includes transfers made "in exchange for services necessary to continue the operation of the debtor")**;** *see also, e.g.*, *In re* Interco Sys., 202 B.R. 188, 192 (Bankr. W.D.N.Y. 1996).

[125] *But see* Scott K. Brown, *Rolling in the Involuntary*, AM. BANKR. INST. J., Nov. 2012 at 54, 73 (describing the "gap period" as a "vicious animal" from which the debtor must try to "swim to safety").

[126] 11 U.S.C. § 549(b). If the transaction does not fall within the ambit of § 549(b), it can be avoided pursuant to § 549(a). 11 U.S.C. § 549(a); *see In re* Harvey Goldman & Co., 489 B.R. 657, 662 (Bankr. E.D. Mich. 2013) (citing §549(a)).

[127] 18 U.S.C. § 3282 (providing a five-year statute of limitations after the offense has occurred); *see* United States v. Marion, 404 U.S. 307, 324 n.15 (1971). This section establishes statutes of limitations for non-capital offenses. *See, e.g.*, United States v. Atiyeh, 402 F.3d 354, 367 (3d Cir. 2005) ("[C]riminal limitation statutes are to be liberally interpreted in favor of repose.") (quoting United States v. Midgley, 142 F.3d 174, 180 (3d Cir. 1998)); Benes v. United States, 276 F.2d 99, 108–09 (6th Cir. 1960) (observing that statutes of limitations in criminal actions "are construed, in contradistinction to statutes applicable to civil actions, not as statutes of repose going to the remedy only, but as creating a bar to the right of prosecution").

[128] 18 U.S.C. § 152 (punishing transfer and concealment of property belonging to the estate); *see also* Gaumer, *supra* note 16, at 531–33 (describing the history behind § 152, "[t]he most well-established bankruptcy crime statute").

[129] 18 U.S.C. § 157 (punishing bankruptcy fraud); *see also* United States v. Milwitt, 475 F.3d 1150, 1155 (9th Cir. 2007) (describing this section as "[t]he centerpiece of . . . new criminal provisions," passed in as part of the Bankruptcy Reform Act of 1994, one "intended to deter[] a person from using the bankruptcy process to further [] fraudulent schemes") (alterations in original) (internal citation omitted) (internal quotation marks omitted).

[130] 11 U.S.C. § 303(k)(3).

automatic stay,[131] one of the Code's greatest debtor devices,[132] but also may resort to § 305,[133] a potential power rarely exercised with success in other situations.[134]

Devolving unto the target debtor before any order for relief has been entered—and while a court remains statutorily focused on the petitioning creditors' eligibility and standing—the foregoing protections inlaid in and incorporated by § 303 eclipse the initial arsenal of the voluntary bankrupt.[135] True, a target debtor's position first appears fragile, and during the gap period, he, she, or it may even be bound to fulfill the fiduciary responsibilities of a debtor-in-possession.[136] Nonetheless, this assortment ameliorates some of the perils posed by such an involuntary filing. In fact, over the last four decades, as these offended debtors have exercised these abilities and creditors have wandered through the thicket of § 303(b) and (h), a complaint once trumpeted before the Code's enactment—creditors hampered and debtors' ability to conduct affairs in a "business-as-usual manner" unimpaired[137]—

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[131] 11 U.S.C. § 362(a)–(b) (applying an automatic stay to § 303 unless exempt under § 362(b)); *see In re* Barkats, No. 14-00053, 2014 WL 6461884, at *2 (Bankr. D.D.C. Nov. 17, 2014) ("[A]utomatic stay of 11 U.S.C. § 362(a)(1) . . . arose automatically upon the filing of an involuntary petition."). *But see In re* Acelor, 169 B.R. 764, 765, 765 n.4 (Bankr. S.D. Fla. 1994) (challenging that an automatic stay is afforded immediately upon filing of an involuntary case).

[132] *See* Nat'l Bank v. Panther Mountain Land Dev., LLC (*In re* Panther Mountain Land Dev., LLC), 686 F.3d 916, 927 (8th Cir. 2012) (relying on H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 340 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979) (discussing how debtors and not third parties are afforded protection under § 362(a)); *see also, e.g.*, Halo Wireless, Inc. v. Alenco Commc'ns, Inc. (*In re* Halo Wireless, Inc.), 684 F.3d 581, 586 (5th Cir. 2012) ("Congress considered the automatic stay 'one of the fundamental debtor protections provided by the bankruptcy laws.") (internal citation omitted); Reedsburg Util. Comm'n v. Grede Foundries, Inc. (*In re* Grede Foundries, Inc.), 651 F.3d 786, 790 (7th Cir. 2011) (the stay "prevent[s] a chaotic and uncontrolled scramble for the debtor's assets") (quoting Holtkamp v. Littlefield (*In re* Holtkamp), 669 F.2d 505, 508 (7th Cir. 1982)). The oft-quoted legislative history makes clear that the automatic stay serves two equal purposes: "debtor protection" and "creditor protection." H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 340.

[133] 11 U.S.C. § 305(a)(1). The court has discretion to dismiss the case after notice and hearing depending on the scenario.

[134] *See* Godshall & Gilhuly, *supra* note 5, at 1332. There is a higher probability of granting an abstention motion in an involuntary bankruptcy case than in a voluntary bankruptcy case.

[135] *See* Joseph Mullin, *Bridging the Gap: Defining the Debtor's Status During the Involuntary Gap Period*, 61 U. CHI. L. REV. 1091, 1095–97 (1994) ("Despite disagreement over the scope of the exemption [in § 303(f)], however, the intent to relieve the gap debtor from burdensome restrictions is unmistakably clear. . . . [A] gap debtor should arguably be able to transfer property . . . notwithstanding the limitations in § 362.").

[136] *Compare In re* C.W. Mining Co., 440 B.R. 878, 885–86 (Bankr. D. Utah 2010) ("Treating a debtor in an involuntary chapter 11 case during the 'gap' as a debtor in possession is not demonstrably at odds with the legislative intent, is not absurd, and does no violence to the Bankruptcy Code."), *with In re* Amerigraph, LLC, 456 B.R. 349, 356 n.13 (Bankr. S.D. Ohio 2011) ("According to other courts, the Chapter 11 involuntary debtor is not a debtor-in-possession, and does not have the powers of a trustee, until the order for relief is entered."). This restriction, one court explains, "is entirely consistent with the purpose of an involuntary case," as "[a]llowing the alleged debtor to have the stay lifted would 'frustrate the very purpose of arming creditors with the right to file an involuntary petition.'" *See In re* Sweports, Ltd., 476 B.R. 540, 545 (Bankr. N.D. Ill. 2012) (quoting *In re* E.D. Wilkins Grain Co., 235 B.R. 647, 650 (Bankr. E.D. Cal 2012)).

[137] *See* Godshall & Gilhuly, *supra* note 5, at 1336–37; *see also* Elijah M. Alper, Note, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1934–37 (2007) (summarizing these and other critiques). For one example of the worst that may befall a creditor, see

has been aired once more, the Bankruptcy Act's deficiencies seemingly revived.[138]

3. Dismissal: Standard and Consequences

Three subparagraphs govern an involuntary petition's dismissal. "Only after notice to all creditors and a hearing," a court "may" dismiss "on the motion of a petitioner,"[139] "on consent of all petitioners and the debtor,"[140] or "for want of prosecution."[141] Upon dismissal, an individual debtor may request that a court prohibit all consumer reporting agencies "from making any consumer report . . . that contains any information relating to such petition or to the case commenced by the filing of such petition."[142] Additionally, if the petition contained "any false, fictitious, or fraudulent statement," a debtor may entreat the bankruptcy court to "seal all the records of the court relating to such petition, and all references to such petition" upon his or her motion.[143] Upon proof of these deficiencies, such quarantining ensues automatically.[144]

Section 303(i) catalogues the criteria for awarding and calculating a vindicated debtor's damages.[145] If a petition is dismissed not "on consent of all petitioner and the debtor" and the latter has not "waive[d] the right to judgment under" § 303(i), the only two safe-harbors from this section's remedies, a bankruptcy court may grant judgment "against the petitioners and in favor of the debtor" for "costs" or "a reasonable attorney's fee."[146] Although all fees and costs awarded under § 303(i)(1)

Crest One Spa v. TPG Troy, LLC (*In re* TPG Troy, LLC), 793 F.3d 228, 235–36 (2d Cir. 2015) (creditor lost and had to pay attorney's fees).

[138] *See supra* Part I.A.

[139] 11 U.S.C. § 303(j)(1) (2012); *see* R. Eric Peterson Constr. Co. v. Quintek, Inc. (*In re* R. Eric Peterson Constr. Co. Inc.), 951 F.2d 1175, 1177 n.3 (10th Cir. 1991) (quoting § 303(j)(1)).

[140] 11 U.S.C. § 303(j)(2); *see* Treaty Energy Corp. v. Hallin (*In re* Treaty Energy Corp.), 619 F. App'x 443, 444 (5th Cir. 2015); *see also In re* Taylor & Assocs., L.P., 191 B.R. 374, 378 (Bankr. E.D. Tenn. 1996).

[141] 11 U.S.C. § 303(j)(3); Greene v. Glazer, 10 B.R. 1013, 1016 (Bankr. S.D.N.Y. 1981) (quoting § 303(j)(3)). The purpose of this subsection appears in the legislative history: "[T]o prevent collusive settlements among the debtor and the petitioning creditors while other creditors, that wish to see relief ordered with respect to the debtor but that did not participate in the case, are left without sufficient protection." H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUTPCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979). *See, e.g., In re* Broshear, 122 B.R. 705, 708 (Bankr. S.D. Ohio 1991); *In re* MacFarlane Webster Assocs., 121 B.R. 694, 700 n.7 (Bankr. S.D.N.Y. 1990); *In re* Wayne's Sport Haus, Ltd., 27 B.R. 521, 522 (Bankr. E.D. Mich. 1983).

[142] 11 U.S.C. § 303(k)(2). Unlike the one afforded by § 303(k)(1), this remedy is discretionary. *See also In re* Meltzer, 516 B.R. 504, 519 (Bankr. N.D. Ill. 2014) ("Since the court 'may' enter such an order, . . . relief is also discretionary.").

[143] 11 U.S.C. § 303(k)(1); *see also, e.g.*, *In re* McMillan, 543 B.R. 808, 815–16 (Bankr. N.D. Tex. 2016) (describing this right as one of four specific protections for debtors provided in § 303); *In re* Meltzer, 516 B.R. at 518–19 (limning this subsection's requirements).

[144] *See In re Meltzer*, 516 B.R. at 518–519 (relying on Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, 676 F.3d 566, 571 (7th Cir. 2012)).

[145] *See In re* Landmark Distrib., Inc., 195 B.R. 837, 848 (Bankr. D. N.J. 1996) (holding the court may grant costs and reasonable attorney's fees to an alleged debtor and against petitioning creditors when an involuntary bankruptcy petition pursuant § 303(i) is dismissed).

[146] 11 U.S.C. § 303(i)(1); *see In re* John Richards Homes Bldg. Co., 405 B.R. 192, 215 (Bankr. E.D. Mich. 2009). A less than certain criterion, "the most useful starting point for determining the amount of a reasonable

are technically discretionary,[147] the expectation that the petitioning creditor(s) must pay the debtors' attorney's fees and costs upon an involuntary case's dismissal[148] has been steadily transformed into a rebuttable presumption,[149] and no creditor, even one added post-filing, is exempt from this risk and responsibility.[150] Usually, the damages awarded pursuant to this subsection include any costs possibly "caused by the taking of the possession of the debtor's property under subsection (g) of [S]ection 1101"[151] and those reasonable fees incurred as a necessity for defending against the dismissed petition.[152] "Preparation for and attendance at the hearing on attorney's fees, costs and damages are . . . part of the matters which are occasioned as a result of an [i]nvoluntary [p]etition," one bankruptcy court expounded, and "nothing in the Code

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fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *See also* Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990) (*citing* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

[147] *See, e.g.*, DVI Receivables XIV, LLC v. Rosenberg, 500 B.R. 174, 185–86 (Bankr. S.D. Fla. 2013), *vacated in part*, 779 F.3d 1254 (11th Cir. 2015) (affirming bankruptcy courts have discretion in granting reasonable attorney's fees and costs and remanding part of the award for being premature in not considering "litigation as a whole"); *In re* Macke Int'l Trade Inc., 370 B.R. 236, 252 (B.A.P. 9th Cir. 2007) (confirming a bankruptcy court "may, in its discretion, award attorney's fees and costs" for § 305(a)(1) dismissals of an involuntary petition pursuant to § 303(i)(1)); *In re* Leach, 102 B.R. 805, 808 (Bankr. D. Kan. 1989) (stating courts, in their discretion, can grant debtors attorney's fees and costs when petitions are dismissed under § 303(i)(1)).

[148] *See* Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 707 (9th Cir. 2004) (adopting the totality of circumstances test and reaffirming this premise).

[149] *See id.*; *see also In re* DSC, Ltd., 387 B.R. 174, 182 (Bankr. E.D. Mich. 2008) (acknowledging when involuntary petitions are dismissed on "ground[s] other than consent of the parties," rebuttal presumptions are raised authorizing reasonable fees and costs); *In re* Scrap Metal Buyers of Tampa, Inc., 233 B.R. 162, 166 (Bankr. M.D. Fla. 1999) (reaffirming rebuttal presumptions are raised when involuntary petitions are dismissed). This presumption may be overcome if the petitioning creditors can demonstrate that an award of attorney's fees and costs is inappropriate given the totality of the circumstances. *See* Sofris v. Maple-Whitworth, Inc. (*In re* Maple-Whitworth, Inc.), 556 F.3d 742, 746 (9th Cir. 2009). Factors considered include: (1) the relative culpability among the petitioners; (2) the motives or objectives of individual petitioners in joining the involuntary petition; (3) the reasonableness of the respective conduct of the debtors and petitioners; and (4) other individualized factors. *Higgins*, 379 F.3d at 707–08; *see also, e.g., In re* Imani Fe, LP, No. CC-12-1111-HHaMk, 2012 WL 5418983, at *7 (B.A.P. 9th Cir. Nov. 7, 2012); *In re* Denv. Cmty. Dev. Credit Union, No. 04-23761, 2004 WL 2274961, at *2 (Bankr. D. Colo. Oct. 5, 2004); *In re* Squillante, 259 B.R. 548, 554 (Bankr. D. Conn. 2001). Notably, a divide exists over whether a debtor bears the full burden of proof or whether this presumption should be applied. *See In re* Diloreto, 388 B.R. 637, 647–48 (Bankr. E.D. Pa. 2008) (discussing this division of authority). A harmonized approach, seemingly in the majority, utilized the presumption, but allows it to be rebutted by such a circumstantial showing. *In re* Clean Fuel Tech. II, LLC, 544 B.R. 591, 601 (Bankr. W.D. Tex. 2016).

[150] Nat'l Med. Imaging, LLC v. U.S. Bank, N.A. (*In re* Nat'l Med. Imaging, LLC), 570 B.R. 147, 162 (Bankr. E.D. Pa. 2017); *In re* ELRS Loss Mitigation, LLC, 325 B.R. 604, 630, 630 n.82 (Bankr. N.D. Okla. 2005).

[151] H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979).

[152] *See, e.g., In re* Paczesny, 282 B.R. 646, 650 (Bankr. N.D. Ill. 2002) (asserting only reasonable and necessary attorney's fees under § 303(i)(1) will be awarded); *In re* Atlas Mach. & Iron Works, Inc., 190 B.R. 796, 803 (Bankr. E.D. Va. 1995) (explaining such awards are necessary in relation to "work performed in defending against the involuntary petition" and reasonable "under all the circumstances"); *In re* Val W. Poterek & Sons, Inc., 169 B.R. 896, 906–07 (Bankr. N.D. Ill. 1994) (suggesting such fees "should be" necessary and reasonable).

or case authority limits such an award to the date of dismissal."[153] To the "amorphous" calculation of costs and fees authorized by § 303(i)(1),[154] neither ill motive nor insufficient justification stands as a prerequisite,[155] these costs' reimbursement intended "to keep the putative estate whole" and "to discourage the filing of involuntary petitions to force debtors to pay on disputed debt[s]."[156] Codifying a concept dating to 1898,[157] and seen as a fee-shifting statute,[158] "the operative principle [behind § 303(i)(1) is] that one who swats at the hornet had best kill it."[159]

It is § 303(i)(2) that affords punishment for the more malign misdeeds of one or more petitioning creditors. Per its explicit language, "against any petitioner that filed the petition in bad faith," "any damages proximately caused by" the dismissed filing or "punitive damages" more generally may be assessed.[160] The damages allowed under this subsection may "be alternatively or cumulatively" assessed as to the sums tabulated for purposes of § 303(i)(1), the costs and reasonable attorney's fees listed in the latter "clearly included" within the former as "damages proximately caused by

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[153] *In re* Advance Press & Litho, Inc., 46 B.R. 700, 703 (Bankr. D. Colo. 1984); *see also, e.g.*, Orange Blossom Ltd. P'ship v. S. Cal. Sunbelt Developers, Inc. (*In re* S. Cal. Sunbelt Developers, Inc.), 608 F.3d 456, 463–64 (9th Cir. 2010) ("If the court finds that the debtor is eligible for an award of fees, then . . . the fee award presumptively encompasses all aspects of the §303 action, including proceedings on claims under §303(i)(2)."); Glannon v. Carpenter (*In re* Glannon), 245 B.R. 882, 894–95 (D. Kan. 2000) (relying on, among others, *In re Advance Press & Litho, Inc.*, 46 B.R. at 703, and *In re Landmark Distributing, Inc.*, 195 B.R. 837, 846 (Bankr. D. N.J. 1996), for support).

[154] *E.g., Higgins*, 379 F.3d at 707 (noting the totality of circumstances test is vague); *see In re* Ross, 135 B.R. 230, 237 (Bankr. E.D. Pa. 1991) (suggesting that although the totality of circumstances test is vague, Congress nonetheless intended this standard to be used in conjunction with § 303(i)(1) issues).

[155] *See, e.g., In re* Clean Fuel Tech. II, LLC, 544 B.R. 591, 606 (Bankr. W.D. Tex. 2016) (recognizing bad faith is not required to determine awards for attorney's fees and costs under § 303(i)(1)); *see also* DVI Receivables XIV, L.L.C. v. Rosenberg (*In re* Rosenberg), 779 F.3d 1254, 1265 (11th Cir. 2015) (finding nothing in § 303(i)(1) requiring debtors to prove appeals from dismissed involuntary petitions are frivolous or to prove petitioners' bad faith to recover attorney's fees and costs); *see also In re* Johnston Hawks, Ltd., 72 B.R. 361, 365 (Bankr. D. Haw. 1987) (confirming attorney's fees and costs are available without proving involuntary petitions are frivolous and where bad faith is lacking). These factors may nonetheless be considered. *See, e.g., In re* Diloreto, 388 B.R. 637, 648 (Bankr. E.D. Pa. 2008) ("[W]e believe that the presence or absence of bad faith will inform the exercise of the district court's discretion under § 303(i)."); *In re* Cadillac by DeLorean & Delorean Cadillac, Inc., 265 B.R. 574, 582 (Bankr. N.D. Ohio 2001) (noting that bad faith is not a requirement to an award of fees, but is still a relevant consideration); *In re* Atlas Mach., 190 B.R. at 803 (finding that bad faith may be taken into account when determining whether to award an attorney's fees and costs); Susman v. Schmid (*In re* Reid), 854 F.2d 156, 160 (7th Cir. 1988) (noting the use of bad faith on part of creditor in filing the involuntary petition).

[156] *See* Crest One Spa v. TPG Troy, LLC (*In re* TPG Troy, LLC), 793 F.3d 228, 235 (2d Cir. 2015). In contrast, dismissal in the best interests of creditors under § 305(a)(1) does not give rise to a claim for damages. *See* H.R. REP. NO. 95-595, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324; *see also* Koffman v. Osteoimplant Tech., 182 B.R. 115, 127 (Bankr. D. Md. 1995).

[157] *In re* Kidwell, 158 B.R. 203, 213 n.13 (Bankr. E.D. Cal. 1993).

[158] *E.g., In re* Cadillac by DeLorean & Delorean Cadillac, Inc., 265 B.R. at 581; Keiter v. Stracka, 192 B.R. 150, 160 (S.D. Tex. 1996).

[159] *In re* Kidwell, 158 B.R. at 213.

[160] 11 U.S.C. § 303(i)(2) (2012).

the filing, and, equally clearly, . . . punitive damages may be added thereto."[161] Mathematically, because damages pursuant to § 303(i)(2) must be "calculable with a reasonable degree of certainty,"[162] any monetized harms need be certain and proximate, not uncertain, contingent or speculative; "if punitive damages are warranted," moreover, "the award must be carefully tailored in light of other damages and fees awarded in the case, so that the result implements bankruptcy policy, but is not 'unduly harsh.'"[163] Such an award may recompense for, among other injuries, "loss of business during and after the pendency of the case, and so on," § 303(i)(2)'s use of "or" designated as "not exclusive" for purposes of "this paragraph" in the legislative record.[164] Consequently, a plaintiff may recover for any financial loss resulting to him, her, or it directly from the involuntary petition's prosecution and for any injuries suffered in respect of his, her, or its business.[165] Unlike § 303(i)(1), § 303(i)(2) is a punitive statute, devised and construed so as "to discourage unprincipled creditors from invoking the use of involuntary bankruptcy to serve a purpose at odds with core bankruptcy polic[ies]"[166]: two policies in particular, "[T]o protect the threatened depletion of assets" and "to prevent the unequal treatment of similarly situat[ed] creditors."[167]

II. PROBLEMS AND DIVISIONS: TEXT AND CASES

A. Statutory Ambiguities

A smattering of open-ended and undefined terms pepper § 303.[168] In contrast with other similarly plagued Code sections,[169] this section's legislative history aids little in

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[161] *In re* Ramsden, 17 B.R. 59, 61 (Bankr. N.D. Ga. 1981); *see also, e.g.*, *In re* John Richards Homes Bldg. Co., L.L.C., 291 B.R. 727, 735 (Bankr. E.D. Mich. 2003); Glannon v. Carpenter, 245 B.R. 882, 894 (Bankr. D. Kan. 2000).

[162] *In re* John Richards Homes Bldg. Co., L.L.C., 291 B.R. at 735.

[163] *In re* Atlas Mach. & Iron Works, Inc., 190 B.R. 796, 805 (Bankr. E.D. Va. 1995).

[164] H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979); *In re* RMAA Real Estate Holdings, LLC, No. 10–15244–RGM, 2010 WL 5128647, at *6 (Bankr. E.D. Va. Dec. 10, 2010).

[165] *In re* Salmon, 128 B.R. 313, 316 (Bankr. M.D. Fla. 1991) (construing § 303(i)(2) as allowing for the kind of damages permitted in a malicious prosecution case).

[166] *In re* Atlas Mach., 190 B.R. at 804 (as to punitive damages under § 303(i)(2)(B)).

[167] Marciano v. Chapnick (*In re* Marciano), 708 F.3d 1123, 1128 (9th Cir. 2013).

[168] *See, e.g., In re* Murrin, 477 B.R. 99, 106 (Bankr. D. Minn. 2012) (referring to the phrase "generally not paying such debtor's debts"); *see also In re* Tucker, No. 5:09-bk-914, 2010 WL 4823917, at *3 (Bankr. N.D. W. Va. Nov. 21, 2010) (highlighting the phrase "contingent as to liability or amount"); *In re* Food Gallery, 222 B.R. 480, 486 (Bankr. W.D. Pa. 1998) (emphasizing the phrase "generally not paying such debtor's debts"); *In re* Norris, 183 B.R. 437, 455 (Bankr. W.D. La. 1995) (referring to the phrase "generally not paying such debtor's debts"); *see also* Rimell v. Mark Twain Bank (*In re* Rimell), 946 F.2d 1363, 1365 (8th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992) (regarding "bona fide dispute"). *See* Steven J. Winkleman*, A Dispute over Bona Fide Disputes in Involuntary Bankruptcy Proceedings*, 81 U. CHI. L. REV. 1341, 1341 (2014) (referencing "bona fide dispute"); *see also* Michael J. Grindstaff & Thomas M. Hackel, Comment, *Involuntary Bankruptcy: The Generally Not Paying Standard*, 33 MERCER L. REV. 903, 903 (1982) (stressing the phrase "generally not paying such debtor's debts").

[169] 11 U.S.C. §§ 707(a), 1112(b)(1), 1208(c), 1307(c) (2012). Each of these sections uses the term "for

the resolution of these ambiguities, for barely four pages of largely opaque summation muse upon § 303.[170] With scholars and courts denied such a normally useful, albeit questionable,[171] source of guidance, frustration has grown, and interpretive uniformity simply does not typify the juridical approach to § 303.[172] Instead, more than three decades after its enactment, much nebulousness still enshrouds this one section.

1. Eligibility: Indeterminate—but Noncontroversial—Terms in § 303(b) and (h)

Two terms in utilized in § 303(b) and (h), ill-defined but at least consistently construed, underscore the nature and magnitude of this problem. First, as to the adumbration of potential "entities" under § 303(b)(1) and (2), the Code "is silent whether, or under what circumstances, the separate identity of a corporate creditor should be disregarded for § 303(b)(1) purposes."[173] Even so, in the few cases addressing this issue, corporate law's hoary rules as to agency and piercing have supplied a consistent answer. To wit, creditors with "significant interrelatedness" get separate treatment unless ordinary principles of corporation law dictate their legal conflation.[174] Second, one of the two unilluminated creditor qualifications criteria in § 303(b)—that the petitioning creditors hold claims "not contingent" as to liability[175]—has been reduced to a single widely accepted formulation:[176] claims are contingent as to liability if both (1) "the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor," and (2) "if such triggering event or occurrence was one reasonably contemplated by the debtor at the time the event giving rise to the claim occurred."[177] Pursuant to this construction, "where the

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cause," an unqualified grant of discretionary power expressly intended as such.

[170] *See* H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 321–24 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979).

[171] *See infra* Part III.A.

[172] *See* Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 294 (1993) (emphasizing the time and costs litigants suffer from a lack of judicial authority on these ambiguities). Within the Code, such an occurrence is by no means unusual. *Id.*

[173] *In re* Roselli, No. 12-32461, 2013 WL 828304, at *6 (Bankr. W.D.N.C. Mar. 6, 2013) (emphasizing very few courts have addressed this ambiguity).

[174] Subway Equip. Leasing Corp. v. Sims (*In re* Sims), 994 F.2d 210, 216–17 (5th Cir. 1993) (collecting cases).

[175] 11 U.S.C. § 303(b)(1) (2012); *see In re* Vasu Fabrics, Inc., 39 B.R. 513, 518 (Bankr. S.D.N.Y. 1984) ("[T]he holders of contingent claims are not eligible to be petitioning creditors in an involuntary petition under Code § 303(b)."). The term also appears in § 303(c). 11 U.S.C. § 303(c).

[176] *See* H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 309 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979) (defining "creditor . . . to include only holders of prepetition claims against the debtor."); *see also* Hemingway Transp., Inc. v. Kahn (*In re* Hemingway Transp., Inc.), 954 F.2d 1, 8 (1st Cir. 1992) (discussing that the word "claim" is broad).

[177] *In re* All Media Props., Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981); *see also, e.g., In re* Tamarack Resort, LLC, No. 09-03911-TLM, 2010 WL 1049955, at *2 (Bankr. D. Idaho Mar. 17, 2010) (quoting *In re* Dill, 30 B.R. 546, 549 (B.A.P. 9th Cir. 1983)); *In re* Gills Creek Parkway Assocs., L.P., 194 B.R. 59, 62–63 (Bankr. D.S.C. 1995); *In re* Galaxy Boat Mfg. Co., Inc., 72 B.R. 200, 202–03 (Bankr. D.S.C. 1986); *cf.* Reyes v. Standard Parking Corp., 461 B.R. 153, 158 (Bankr. D.R.I. 2011).

issues concerning defenses to a claim of a petitioning creditor are not clear and require adjudication of either substantial factual or legal questions, . . . [a] creditor should be recognized as qualified to join in the bringing of an involuntary bankruptcy petition."[178] While these two requirements have long been liberally understood,[179] case law, not statutory direction, has been crucial, the Code's silence often troublingly noted.[180] As shown below, the doubts partly manufactured by such reticence as to other terms' connotations have not been as easily dispelled.

2. Eligibility: Indeterminate and Contested Terms in § 303(b) and (h)

Determined as of the involuntary petition's filing date,[181] and applicable only upon satisfaction of § 303(b)'s standing requirements,[182] § 303(h)(1) first predicates the ordering of relief upon whether "the debtor is generally not paying such debtor's debts."[183] Hampered by the Code's predictable silence, "[c]ourts have struggled to reduce" it to "a workable judicial standard."[184] As a result, with the judicial majority having opted for a flexible approach riveted upon a prospective debtor's financial circumstances,[185] inconsistencies afflict the apposite jurisprudence.

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[178] *In re* All Media Props., Inc., 5 B.R. at 134 (rationalizing a creditor should not be permitted to participate in the involuntary petition where the debtor has raised the defense that the claim is clearly barred); *see also* Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988). This position is defended as consistent with § 303's well-known and obvious objectives. *See In re* North Cty. Chrysler-Plymouth, Inc., 13 B.R. 393, 398–99 (Bankr. W.D. Mo. 1981); *see also, e.g., In re* Elsub Corp., 70 B.R. 797, 813 (Bankr. D.N.J. 1987).

[179] *See In re* First Energy Leasing Corp., 38 B.R. 577, 584 (Bankr. E.D.N.Y. 1984) (arguing the liberal meaning of § 303(b) was intended to expedite the examination of the "issue of the debtor's solvency").

[180] *See* United States v. Bestfoods, 524 U.S. 51, 62 (1998); *see also* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

[181] *See* Bartmann v. Maverick Tube Corp., 853 F.2d at 1546 (finding that the bankruptcy court must determine whether creditors met their burden of proving that the debtor was failing to pay his debts once due, and such determination must be made as of the date the involuntary petition was filed); *see also, e.g., In re* Harmsen, 320 B.R. 188, 197 (B.A.P. 10th Cir. 2005); *In re* Caucus Distribs., Inc., 83 B.R. 921, 932 (Bankr. E.D. Va. 1988) (noting that the "generally not paying test" must be applied "as of the date of filing of the involuntary petition").

[182] *See In re* VitaminSpice, 472 B.R. 282, 289 (Bankr. E.D. Pa. 2012) (indicating the petitioning creditors' standing must be determined before the court examines "whether the filing of an involuntary petition is valid").

[183] 11 U.S.C. § 303(h)(1) (2012); *In re* Quinto & Wilks, P.C., 531 B.R. 594, 609 (Bankr. E.D. Va. 2015) (discussing § 303(h)(1)).

[184] *In re* Smith, 243 B.R. 169, 189 (Bankr. N.D. Ga. 1999) (noting the Code does not define the term "generally not paying").

[185] *See, e.g.*, In the Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., (*In re* Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 779 F.2d 471, 475 (9th Cir. 1985). As one bankruptcy court famously maintained, "[t]he term 'generally' was not defined in order to avoid the result suggested by the mechanical test put forth by the alleged debtors and to give the bankruptcy courts enough leeway to be able to deal with the variety of situations that will arise." *See In re* All Media Partners Inc., 5 B.R. 126, 143 (Bankr. S.D. Tex., 1980); *see also In re* Feinberg, 238 B.R. 781, 783 (B.A.P. 8th Cir. 1999); *see also, e.g., In re* Tucker, No. 5:09-bk-914, 2010 WL 4823917, at *10 (Bankr. N.D. W. Va. Nov. 21, 2010); *In re* Smith, 243 B.R. at 190 (summarizing and applying these four factors); Gen. Trading v. Yale Materials Handling Corp., 119 F.3d 1485, 1504 n.41 (11th Cir. 1997) (identifying the same factors (citing *In re* Leek Corp., 52 B.R. 311, 314 (Bankr. M.D. Fla. 1985))); *In re* H.I.J.R. Props. Denver, 115 B.R. 275, 277 (Bankr. D. Colo. 1990). Occasionally,

Typically, this analysis looks to four protean factors: (1) the number of debts unpaid each month relative to those paid, (2) the amount of delinquency, (3) the materiality of nonpayment, and (4) the nature of the debtor's conduct regarding his, her, or its financial affairs.[186] As to the first, "even though an alleged debtor may owe only one debt, or very few debts, an order for relief may be granted where such debt or debts are sufficiently substantial to establish the generality of the alleged debtor's default."[187] Courts have split on the use of a fifty percent standard in analyzing the first two factors,[188] and most appear to "rely heavily on the number and amount of the unpaid claims and compare those values with the debts the debtor is paying" in utilizing this totality test,[189] effectively engaging in "a mechanical analysis."[190] In this murky precedent, the only certainty has been a magisterial refusal to treat the mere failure of a creditor to demand payment of a debt as sufficient to excuse a debtor's failure to pay it for purposes of § 303(h)(1).[191] More fluid than the first three, the final element turns on an itinerant query: whether the debtor's financial affairs are being conducted "in a manner inconsistent with good faith and outside the ordinary course

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these four factors are split into five. *See In re* Knoth, 168 B.R. 311, 317 (Bankr. D.S.C. 1994); *see also, e.g., In re* Seventh Ave. Props., No. 312-08678, 2013 WL 655871, at *4–5 (Bankr. M.D. Tenn. Feb. 22, 2013) (citing both the four and five factor variants); *In re* Tucker, 2010 WL 4823917, at *10–11 (finding same).

[186] *In re* Reed, 11 B.R. 755, 759–60 (Bankr. S.D. W. Va. 1981).

[187] *In re* Fischer, 202 B.R. 341, 350–51 (Bankr. E.D.N.Y. 1996).

[188] *Compare In re* Amanat, 321 B.R. 30, 40 (Bankr. S.D.N.Y. 2005) (holding that a debtor who is paying less than half of his total debts is generally not paying his debts as they become due), *In re* J.B. Lovell Corp., 80 B.R. 254, 255 (Bankr. N.D. Ga. 1987) (affirming that since the debt owed to creditor amounted to well over eighty percent of debtor's outstanding liabilities, the debtor was not generally paying its debts as they became due), *and In re* Garland Coal & Mining Co., 67 B.R. 514, 522 (Bankr. W.D. Ark. 1986) (noting that although the debtor pre-petition was paying most of its creditors in number, the total debt which it was not paying as the debts became due was well over fifty percent of the outstanding liabilities), *with In re* Hill, 5 B.R. 79, 83 (Bankr. D. Minn. 1980) (holding that although debtor was paying all but three of his debts, the three not being paid constituted such an overwhelming portion of the total that the failure to pay those alone constituted "generally not paying").

[189] *In re* Murrin, 477 B.R. 99, 107 (Bankr. D. Minn. 2012).

[190] *In re* Food Gallery, 222 B.R. 480, 486 (Bankr. W.D. Pa. 1998). While a prohibition on involuntary petitions in single creditor cases once held great sway, *see, e.g.*, Nordbrock v. Brodbrock (*In re* Nordbrock), 772 F.2d 397, 399 (8th Cir. 1985) and *In re* Smith, 123 B.R. 423, 425 (Bankr. M.D. Fla. 1990), it has been steadily weakened, and much authority now exists for "the proposition that even though an alleged debtor may owe only one debt, or very few debts, an order for relief may be granted where such debt or debts are sufficiently substantial to establish the generality of the alleged debtor's default." *In re* Fischer, 202 B.R. at 350–51; *see also, e.g., In re* Roselli, No. 12-32461, 2013 WL 828304, at *10 (Bankr. W.D.N.C. Mar. 6, 2013); *In re* Food Gallery, 222 B.R. at 487–88. Logic girds this relaxation, as "[a]n alleged debtor may not be paying its debts as they become due, even if the alleged debtor is not paying only one or two creditors, when those creditors hold the overwhelming majority of debt," thereby satisfying the plain language of § 303(h)(1). *In re* Am. Cotton Suppliers, Int'l, Inc., Nos. 02-50003-7, 02-50004-7, 02-5005-7, 2002 Bankr. LEXIS 1972, at *67–68 (Bankr. N.D. Tex. Sept. 30, 2002); *accord, e.g.*, Concrete Pumping Serv., Inc. v. King Constr. Co., (*In re* Concrete Pumping Serv. Inc.), 943 F.2d 627, 630 (6th Cir. 1991).

[191] *See, e.g., In re* Tucker, No. 5:11CV38, 2011 WL 5192801, at *5 (N.D. W. Va. Oct. 31, 2011); *In re* Everett, 178 B.R. 132, 139 (Bankr. N.D. Ohio 1994) (quoting *In re* West Side Cmty. Hosp., Inc., 112 B.R. 243, 256 (Bankr. N.D. Ill. 1990)); *In re* Better Care Ltd., 97 B.R. 405, 407–08 (Bankr. N.D. Ill. 1989) (discussing that § 303(h)(1)'s test for granting an involuntary petition is that "the debtor is generally not paying the debtor's debts as such debts become due").

of business,"[192] with a few courts giving some weight to whether a debtor has involuntarily closed down.[193] Even though this probabilistic four-factor test offers some valuable guidance,[194] it treats no factor as "necessarily determinative"[195] and varies with "any unique circumstances attendant to a particular proceeding."[196] Consequently, much uncertainty hangs over its prospective application.

Two facts and a trend compound the instability propagated by this unpredictability. As common experience attests, a debtor's "total financial picture"[197] is rarely crystal clear, and stakeholders' interests invariably diverge.[198] Courts, in turn, have crafted two exceptions to the once-potent imperative that "[a] debtor must neglect more than one debt for the nonpayment to be general."[199] The first exception arises in the "exceptional case" in which "the sole creditor shows that he[she, or it] cannot possibly obtain adequate relief in the ordinary courts without resorting to the Bankruptcy Court . . . ."[200] The second applies where there is "a showing of special circumstances amounting to fraud, trick, artifice or scam;"[201] some courts have more narrowly construed this as an exception to § 303(b)(1)'s three creditor requirement.[202]

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[192] *In re* Reed, 11 B.R. 755, 760 (Bankr. S.D. W.Va. 1981).

[193] *See In re* Covey, 650 F.2d 877, 882–84 (7th Cir. 1981) (nothing that "a debtor should not be forced to pay disputed debts in order to avoid an involuntary bankruptcy"); *see also In re* 7H Land & Cattle Co., 6 B.R. 29, 31 (Bankr. D. Nev. 1980).

[194] *See In re* Concrete Pumping Serv., Inc., 943 F.2d at 630 ("The concept of generality is comparative; it has to do not with an absolute number of some kind of event but rather with the number as a proportion of possible outcomes.").

[195] *In re* CLE Corp., 59 B.R. 579, 586 (Bankr. N.D. Ga. 1986).

[196] *In re* Dakota Lay'd Eggs, 57 B.R. 648, 657 (Bankr. D.N.D. 1986); *accord In re* Tucker, No. 5:09-bk-914, 2010 WL 4823917, at *11 (Bankr. N.D. W. Va. Nov. 21, 2010) (quoting *In re* Knoth, 168 B.R. 311, 316 (Bankr. D.S.C. 1994)).

[197] *In re* Quinto & Wilks, P.C., 531 B.R. 594, 609–10 (Bankr. E.D. Va. 2015) (quoting *In re* Fischer, 202 B.R. 341, 350 (Bankr. E.D.N.Y. 1996)).

[198] *See In re* Harmsen, 320 B.R. 188, 198 (B.A.P. 10th Cir. 2005). Invariably, the presumed purposes of an involuntary petition factor into its fact-intensive application. As such filings may not be employed "as a forum for the trial and collection of an isolated disputed claim," this requirement must be construed so as to "protect the interests and desires of the creditors as a whole." *In re* Saunders, 379 B.R. 847, 857 (Bankr. D. Minn. 2007); *In re Harmsen*, 320 B.R. at 198; Crum & Forster Managers Corp. of N.Y. v. Basin Elec. Power Coop., 911 F.2d 155, 156 (8th Cir. 1990).

[199] *In re* Reed, 11 B.R. 755, 760 (Bankr. S.D. W.Va. 1981); *see also, e.g.*, Boston Beverage Corp. v. Turner, 81 B.R. 738, 749 (Bankr. D. Mass. 1987) ("In fact, a debtor's failure to pay one debt will not usually justify finding that the debtor is generally not paying his or her debts."); Bankers Tr. Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397, 399 (8th Cir. 1985) ("This case reflects efforts by a single creditor to use the Bankruptcy Court as a forum for the trial and collection of an isolated disputed claim, a practice condemned in prior decisions." (quoting *In re* Nordbrock, 52 B.R. at 372)); *In re* Axl Indus., Inc., 127 B.R. 482, 484 (Bankr. S.D. Fla. 1991) ("Generally, a court should not take jurisdiction over a two-party dispute, unless special circumstances ['amounting to fraud, trick, artifice, or scam'] exist.").

[200] *In re* 7H Land & Cattle Corp., 6 B.R. 29, 32 (Bankr. D. Nev. 1980).

[201] *In re* Fischer, 202 B.R. at 347 (citing *In re* 7H Land & Cattle Corp., 6 B.R. at 34); *cf. In re* Moss, 249 B.R. 411, 424 (Bankr. N.D. Tex. 2000) (acknowledging, but not endorsing, the possible existence of this exception).

[202] *See In re* Norriss Bros. Lumber Co., Inc., 133 B.R. 599, 608–09 (Bankr. N.D. Tex. 1991) (collecting cases "suggest[ing] that the three creditor requirement may not be applicable in the event of trick, artifice, scam, or fraud"). However, as this early case recognized in a footnote, "[o]ne court has questioned whether the alleged exception is applicable to the "three creditor requirement" as opposed to being applicable on the issue of whether the debtor is generally not paying its debts pursuant to § 303(h)(1)." *Id.* at 609 n.4. The latter

In light of the flexibility and popularity of these modern exclusions, the existence of a per se rule against single creditor initiated proceedings no longer enjoys decisive support, instead enduring withering scorn for its apparent inconsistency with the Code's text.[203] Oft-mingled,[204] these exceptions' continued viability,[205] on top of a stereotypical debtor's financial tergiversations and the oft-disparate objectives of entities who must unite to pursue a more cohesive enemy by statutory edict, now lengthens and complicates the threshold adjudication of a creditor's eligibility under § 303(b) and (h).

The product of post-1978 amendments,[206] the second standing requirement shared by these subsections' first numbered paragraphs—that the petitioning creditors hold claims that are not "the subject of a bona fide dispute as to liability or amount,"[207] and that the debtor is not generally paying "debts as they come due unless such debts are the subject of a bona fide dispute as to liability or amount"[208]—has been engulfed in debate since its codification, resulting in similar attendant delays. Without direction from the Code or its history,[209] most courts utilize the so-called *Lough* standard fashioned by one bankruptcy court:[210] "[I]f there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed."[211] Naturally, some endorse this touchstone's subsequent refinements by the United States Court of Appeals for the Seventh Circuit: "Under [the *Lough*] standard, the bankruptcy court must determine whether there is an *objective basis* for either a factual or a legal dispute as to the validity of debt," a court required to do no more

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approach seems to have gained majority support since 1991. *See also In re* Colon, 474 B.R. 330, 385 (Bankr. D.P.R. 2012) (discussing the three creditor requirement and "special exception" under § 303(b)).

[203] *See* Concrete Pumping Serv., Inc. v. King Constr. Co., (*In re* Concrete Pumping Serv., Inc.), 943 F.2d 627, 630 (6th Cir. 1991).

[204] Courts do not always neatly distinguish between these exceptions. *See* Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47, 51 n.7 (3d Cir. 1988) (referring to "truly extraordinary circumstances" only).

[205] Bruce H. White, *Exceptions to Involuntary Petition Requirements: Are You Pushing Your Luck?*, AM. BANKR. INST. J., Oct. 2001 at 32, 33.

[206] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 426(b), 98 Stat. 333, 369, 392 (1984). In 1978, § 303 did not exclude creditors' claim that were the subject of bona fide disputes. *See* Key Mech. Inc. v. BDC 56 LLC (*In re* BDC 56 LLC), 330 F.3d 111, 117 (2d Cir. 2003); *see also In re* Marciano, 446 B.R. 407, 422–25 (Bankr. C.D. Cal. 2010) (tracing the meager history of this requirement).

[207] 11 U.S.C. § 303(b)(1) (2012). Under the normal rules of statutory interpretation, "or" in the text of § 303(b)(1) would be read as disjunctive. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116–25 (2012). If so, the petitioning creditor would need to hold either a non-contingent claim or a claim not subject to a bona fide dispute. Here, however, scarce legislative history compels reading § 303(b)(1) to require a petitioning creditor's claim to be both non-contingent and indisputable. *See* 130 CONG. REC. 17,069, 17,151 (1984) (statement of Senator Baucus). Certainly, it has so been understood, as this precept, like all canons, readily yields to context. *See, e.g., In re* BDC 56 LLC, 330 F.3d at 115; Chi. Title Ins. Co. v. Seko Invs., Inc. (*In re* Seko Invs., Inc.), 156 F.3d 1005, 1007 (9th Cir. 1998); *In re* Tampa Chain Co., Inc., 35 B.R. 568, 577 (Bankr. S.D.N.Y. 1983).

[208] 11 U.S.C. § 303(h)(1); *In re* Edwards, 501 B.R. 666, 674 (Bankr. N.D. Tex. 2013).

[209] *See* Rimell v. Mark Twain Bank (*In re* Rimell), 946 F.2d 1363, 1365 (8th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992).

[210] *See In re* Smith, 243 B.R. 169, 180 (Bankr. N.D. Ga. 1999).

[211] *In re* Lough, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986).

than ascertain the "presence or absence" of any dispute."[212] Under this test's most common iterations, a debtor's refusal to concede the validity or amount of creditor's claim, without more, never suffices to defeat a creditor's standing,[213] and the debtor's subjective intent clines to no iota of relevance.[214] Similarly, extensive litigation will not, in and of itself, establish the existence of a bona fide dispute,[215] however suggestive it may be,[216] and "[a] dispute as to the amount of a claim does not negate its existence if the legal obligation to pay is present."[217] In employing this test,[218] many circuits have adopted a burden-shifting framework, first requiring that the petitioning creditor establish a prima facie case that no bona fide dispute exists and, once such a case has been established, compelling the debtor to demonstrate otherwise.[219] Tailored "to prevent a creditor from using the involuntary petition as a club to coerce a debtor to pay debts even when the debtor's reason for not paying is a legitimate dispute as to its liability,"[220] the *Lough* standard has won a firm foothold,[221] but its prominence cannot conceal the persistence of certain dubiety as to Congress' intended mandate and any specific case's likely course.[222]

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[212] In the Matter of Busick (*In re* Busick), 831 F.2d 745, 750 (7th Cir. 1987) (emphasis added); *accord, e.g.*, *In re* BDC 56 LLC, 330 F.3d at 117–18; Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp., 986 F.2d 709, 715 (4th Cir. 1993); B.D.W. Assocs. Inc. v. Busy Beaver Bldg. Ctrs., Inc., 865 F.2d 65, 66–67 (3d Cir. 1989); *see also In re* Marciana, 459 B.R. 27, 36 (B.A.P. 9th Cir. 2011) ("[W]hether there is a bona fide dispute for purposes of § 303, [a] bankruptcy court is not asked to evaluate the potential outcome of a dispute, but merely to determine whether there are facts that give rise to a legitimate disagreement over whether money is owed, or, in certain cases, how much.") (alteration in original) (internal quotation marks omitted); *see also* Winkleman*, supra* note 168, at 1351.

[213] *See In re* Tampa Chain Co., Inc., 35 B.R. 568, 576–77 (Bankr. S.D.N.Y. 1983).

[214] *See* Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988) (quoting *In re* Tikijian, 76 B.R. 304, 314 (Bankr. S.D.N.Y. 1987), stating that a debtor must present proof of a bona fide dispute once the burden shifts or else any debtor could defeat an involuntary petition merely by claiming a bona fide dispute exists); *see also In re* Red Rock Rig 101, Ltd., No. WO–07–073, 07–10477, 2008 WL 205732, at *2 (B.A.P. 10th Cir. May 10, 2008); Subway Equip. Leasing Corp. v. Sims (*In re* Sims), 994 F.2d 210, 221 (5th Cir. 1993) (quoting *In re* Rimell, 946 F.2d at 1365).

[215] *See In re* Mavellia, 149 B.R. 301, 305 (Bankr. E.D.N.Y. 1991) (discussing that courts will not view the existence of ongoing litigation alone as establishing an existence of a bona fide dispute).

[216] *See In re* Red Rock Rig 101, Ltd., 2008 WL 2052732, at *2 (finding that the mere existence of pending litigation is insufficient to establish the existence of a bona fide dispute).

[217] *In re* Braten, 74 B.R. 1021, 1023 (Bankr. S.D.N.Y. 1987).

[218] *See, e.g., In re* Sims, 994 F.2d at 221 (though it may not actually resolve the underlying dispute, the bankruptcy court may still be compelled to conduct a limited analysis of the legal issues to ascertain whether an objective legal basis for the dispute exists).

[219] *See, e.g.*, Platinum Fin. Servs. Corp. v. Byrd (*In re* Byrd), 357 F.3d 433, 438 (4th Cir. 2004); *see also In re* BDC 56 LLC, 330 F.3d at 111, 118 (adopting the 7th Circuit's "objective test" and "burden-shifting framework").

[220] *In re* Tamarack Resort, LLC, No. 09-03911-TLM, 2010 WL 1049955, at *2 (Bankr. D. Idaho Mar. 17, 2010).

[221] *See* Bailey III & Clift III, *supra* note 114, at 13. A fascinating divide exists over whether an unstayed, unpaid final judgment on appeal satisfies § 303(b). *Compare In re* Drezler, 56 B.R. 960, 967 (Bankr. S.D.N.Y. 1986), *with In re* Byrd, 357 F.3d at 438.

[222] *See* Lawrence Ponoroff, *Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute*, 65 IND. L.J. 315, 317 (1990) [hereinafter Ponoroff, *Involuntary*] ("[A]n unfortunate and ironic by-product of the 1984 Act's amendments to section 303 has been the replacement of prior judicial disagreement over the treatment of disputed debts with an even greater divergence of opinion over the guidelines for identifying the presence or absence of a bona fide dispute.").

3. Damages: Imprecisions in § 303(i)

Section 303(i) offers up its own ambiguous trio of features.

The first is structural. While § 303(i)(1) authorizes damages for "costs" or "attorney's fees" upon an involuntary petition's nonconsensual dismissal,[223] the term "bad faith" appears in § 303(i)(2), which allows for "any damages proximately caused by such a filing" or "punitive damages" against "any petitioner that filed the petition in bad faith."[224] To many, by virtue of this obvious placement, "bad faith is not a prerequisite to awarding attorney's fees and costs under § 303(i)(1)."[225] As a corollary, this subsection arguably "authorizes a standalone award of punitive damages," with a court enabled to "award actual or punitive damages, without limitation," including attorney's fees, upon "a showing of bad faith," its "sole precondition."[226] Lacking a definitive statutory anchor, however, not all courts concur with this exegesis.[227]

Second, the ever-malleable totality of the circumstances test governs the arithmetic required by § 303(i)(1)—and invites dissimilar results. Often treated like "a fee-shifting provision rather than a sanctions statute,"[228] in deciding whether to award fees pursuant to this paragraph, courts presume the debtor's entitlement to reasonable fees and costs.[229] They thereupon consider the expenses associated with

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[223] 11 U.S.C. § 303(i)(1) (2012); *see also* DVI Receivables XIV, LLC v. Rosenberg (*In re* Rosenberg), 779 F.3d 1254, 1260 (11th Cir. 2015).

[224] 11 U.S.C. § 303(i)(2); Treaty Energy Corp. v. Hallin (*In re* Treaty Energy Corp.), 619 F. App'x 443, 444 (5th Cir. 2015); Adell v. John Richards Homes Bldg. Co., L.L.C. (*In re* John Richards Homes Bldg. Co., L.L.C.), 552 F. App'x 401, 405 (6th Cir. 2013). As used in § 303(i)(1) and (2), "or" is not exclusive. *See* H.R. REP. NO. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 324 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979); *see also In re* Meltzer, 516 B.R. 504, 514 (Bankr. N.D. Ill. 2014) ("Although the statute uses the disjunctive 'or' . . . the statutory remedies are not mutually exclusive.").

[225] Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 706 (9th Cir. 2004); *accord, e.g.*, Lubow Mach. Co. v. Bayshore Wire Prods. Corp. (*In re* Bayshore Wire Prods. Corp.), 209 F.3d 100, 105 (2d Cir. 2000).

[226] Orange Blossom Ltd. P'ship v. S. Cal. Sunbelt Developers, Inc. (*In re* S. Cal. Sunbelt Developers, Inc.), 608 F.3d 456, 465 (9th Cir. 2010); *see also, e.g., In re* Macke Int'l Trade, Inc., 370 B.R. 236, 256 (B.A.P. 9th Cir. 2007); *In re* Wavelength, Inc., 61 B.R. 614, 621 (B.A.P. 9th Cir. 1986).

[227] *Cf.* Walden v. Bright Products, Inc. (*In re* Walden), 781 F.2d 1121, 1123 (5th Cir. 1986) (acknowledging that § 303(i)(2) "might be read to authorize judgment under the statute only against offending petitioner"); *In re* Merrifield Town Ctr. Ltd. P'ship, No. 09-18119, 2010 WL 5015006, at *5 (Bankr. E.D. Va. Dec. 3, 2010) (same). This discord prefigures the one over the propriety of bad-faith dismissals. *Compare In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 334 (3d Cir. 2015) (holding that bad faith petition may be dismissed), *with In re* Basil St. Partners, LLC, 477 B.R. 846, 849 (Bankr. M.D. Fla. 2012) ("[A] petitioning creditor's good or bad faith . . . is not a basis for dismissal.").

[228] *In re* S. Cal. Sunbelt Developers, Inc., 608 F.3d at 462. Not universally adopted as to § 303(i)(1), the distinction between such provisions and sanctions statutes dates to *Business Guides, Inc. v. Chromatic Commc'n Enters., Inc.*, 498 U.S. 533 (1991). In classifying Rule 11 as a sanctions law, the Court emphasized two considerations: first, Rule 11 sanctions were not tied to the litigation's outcome, and second, they shifted the costs of only a "discrete" portion of the litigation. Bus. Guides, Inc. v. Chromatic Comm'n Enters., 498 U.S. 533, 553 (1991); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 409 (1990).

[229] *In re* Kidwell, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993); *see also, e.g., In re* Skyworks Ventures, Inc., 431 B.R. 573, 576 (Bankr. D.N.J. 2010) (awarding attorney's fees and costs is the majority rule). Courts have hastened to add that a mini-trial is not required. *See, e.g., In re* Scrap Metal Buyers of Tampa, Inc., 233 B.R.

the litigation as a whole, including proceedings under § 303(i)(1).[230] Four factors commonly dominate this analysis: (1) "the merits of the involuntary petition," (2) "the role of any improper conduct on the part of the alleged debtor," (3) "the reasonableness of the actions taken by the petitioning creditors," and (4) "the motivation and objectives behind filing the petition."[231] Unsurprisingly, this yardstick has been derided as an unstructured one.[232]

Finally, § 303(i)(2)'s bad faith criterion has been buffeted by varied constructions.[233] Some courts have discerned bad faith "where the filing was motivated by an improper purpose, such as ill will, malice, embarrassment, or harassment."[234] Others have equated this term with "improper purpose," defined as "when a petitioning creditor uses involuntary bankruptcy procedures in an attempt to obtain a disproportionate advantage for itself, rather than to protect against other creditors obtaining disproportionate advantages, particularly when the petitioner could have advanced its own interests in a different forum."[235] And still more import the standard set forth in Rule 9011, read to require both an objective analysis—"An analysis under Rule 9011 inquiries into a significant objective requirement bearing on the legal justification of a claim or defense: a reasonable inquiry into the facts and the law"—and a subjective one—"[T]he bankruptcy proceeding cannot have been interposed for an improper purpose, such as to harass, to cause delay, or to increase the cost of litigation."[236] Merits aside, with courts prone to the use of "an expansive definition of bad faith"[237] and due to the concoction of at least four tests for its ascertainment,[238] this concept's very existence invites hesitation and consequent

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162, 166 (Bankr. M.D. Fla. 1999).

[230] *See In re* S. Cal. Sunbelt Developers, Inc., 608 F.3d at 462 (discussing that eligibility for fees turns on the merits of litigation as a whole, rather than on whether a "specific filing" is well founded).

[231] Higgins v. Vortex Fishing Sys. (*In re* Vortex Fishing Sys.), 379 F.3d 701, 707 (9th Cir. 2004); *see also, e.g.*, Crest One Spa v. TPG Troy, LLC (*In re* TPG Troy, LLC), 793 F.3d 228, 235 (2d Cir. 2015) (citing *In re* Taub, 438 B.R. 761, 775 (Bankr. E.D.N.Y. 2010)). A further ambiguity exists as to whether the statute permits awards of post-dismissal costs and fees. Adell v. John Richards Homes Bldg. Co. (*In re* John Richards Homes Bldg. Co.), 552 F. App'x 401, 406 (6th Cir. 2013). As to the issue of the reasonableness of requested fees, the debtor bears the burden of proof. *See, e.g., In re* Express Car & Truck Rental, Inc., 440 B.R. 422, 432 (Bankr. E.D. Pa. 2010).

[232] *See In re* Vortex Fishing Sys., 379 F.3d at 707 (acknowledging that such a test can be "somewhat amorphous").

[233] *See In re* Smith, 243 B.R. 169, 194 (Bankr. N.D. Ga. 1999) (noting that courts have created a variety of standards to ascertain bad faith).

[234] *Id.*; *see In re* Camelot, Inc., 25 B.R. 861, 864 (Bankr. E.D. Tenn. 1982); *see also, e.g., In re* Salmon, 128 B.R. 313, 315 (Bankr. M.D. Fla. 1991).

[235] *In re* K.P. Enter., 135 B.R. 174, 179 n.14 (Bankr. D. Me. 1992); General Trading v. Yale Materials Handling Corp., 119 F.3d 1485, 1501 (11th Cir. 1997).

[236] *In re* Smith, 243 B.R. at 195 (internal quotation marks omitted). For the former, a court is expected to divine what a reasonable person would have believed. *In re* Wavelength, Inc., 61 B.R. 614, 620 (B.A.P. 9th Cir. 1986); *see also, e.g., In re* Reynolds, No. 9:14-bk-10690-PC, 2014 WL 5325749, at *4 (Bankr. C.D. Cal. Oct. 20, 2014) (quoting *In re* Wavelength, Inc., 61 B.R. at 619); *In re* Mollen Drilling Co., 68 B.R. 840, 843 (Bankr. D. Mont. 1987) (quoting *In re* Wavelength, Inc., 61 B.R. at 620).

[237] *In re* MicroStructure Techs. Inc., No. 08-44074, 2009 Bankr. LEXIS 3744, at *10 (Bankr. W.D. Wash. July 17, 2009) (internal quotation marks omitted) (citing *In re* Wavelength, Inc., 61 B.R. at 620).

[238] *See, e.g., In re* Walsh, 306 B.R. 738, 742 (Bankr. W.D.N.Y. 2004) (listing four factors); *In re* Ballato, 252 B.R. 553, 558 (Bankr. M.D. Fla. 2000) (canvassing five factors). While at least two districts within the

delay.[239]

B. Divided Case Law

At first perusal, in its contour and its terminology, § 303 provokes little doubt. Partnered, § 303(b) and (h) demarcate a creditor's eligibility and standing, and § 303(i) authorizes damages and enthrones a standard for fees and costs.[240] This ostensible simplicity, however, has failed to beget a consensus as to the crucial relationship between § 303(i)(2)'s bad faith norm and § 303(b)'s and (h)'s jurisdictional minimums.[241] Instead, opposing parties have drawn support from the Code's sundry provisions, and a divergence has emerged[242] as to the extent to which "bad faith," mentioned in § 303(i)(2) alone,[243] can serve as a supplemental ground for dismissal in accordance with provision, policy, and precedent.[244]

1. Supporters' Reasons

In the minds of many, this result makes perfect sense, three justifications often adduced.

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state of Florida use the five-factor variant, the Eleventh Circuit has specifically recognized just three. *See In re* Antonini, No. 09-16850-AJC, 2012 WL 112978, at *8 (Bankr. S.D. Fla. Jan. 10, 2012).

[239] *See* Shachmurove, *Claims, supra* note 76, at 546–47; *see also, e.g.*, Phoenix Piccadilly, Ltd. v. Life Ins. Co. (*In re* Phoenix Piccadilly, Ltd.), 849 F.2d 1393, 1394–95 (11th Cir. 1988) (listing six factors); Little Creek Dev. Co. v. Commonwealth Mortg. Co. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1072–73 (5th Cir. 1986) (listing six factors); *In re* Grieshop, 63 B.R. 657, 663 (Bankr. N.D. Ind. 1986) (listing fourteen factors); *In re* Victory Constr. Co., 9 B.R. 549, 563–64 (Bankr. C.D. Cal. 1981) (listing three factors), *vacated on other grounds*, 37 B.R. 222, 228–29 (B.A.P. 9th Cir. 1984). Indeed, historically, this omnipresent term has always generated conflicting interpretations. *In re* Cannon Express Corp., 280 B.R. 450, 453 (Bankr. W.D. Ark. 20002); *In re* Apache Trading Grp., 229 B.R. 891, 892–93 (Bankr. S.D. Fla. 1999).

[240] 11 U.S.C. § 303(b), (h), (i) (2012).

[241] *See In re* Nat'l Med. Imaging, L.L.C., No. 05-12714DWS, 2005 WL 3299712, at *2 (Bankr. E.D. Pa. Oct. 31, 2005) (pointing out that divergent opinions exist regarding the relationship between § 303(i)(2) and § 303(b)).

[242] *See id.*

[243] *See In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 333 (3d Cir. 2015); *see also, e.g.*, Godshall & Gilhuly, *supra* note 5, at 1322 (arguing that the structural foundation of § 303(i) implicitly requires good faith when filing petitions).

[244] *See, e.g., In re* WLB-RSK Venture, 296 B.R. 509, 513 (Bankr. C.D. Cal. 2003) ("[T]here is no statute or controlling decision establishing that bad faith is an independent ground for dismissing an involuntary [petition]."); *In re* Ballato, 252 B.R. 553, 558 (Bankr. M.D. Fla. 2000). *But see* Basin Elec. Power Coop. v. Midwest Processing Co., 769 F.2d 483, 486 (8th Cir. 1985) ("An essential prerequisite for allowing joinder of additional creditors to cure a defective petition is that the petition was filed in good faith. If the original petition was a sham, prepared with a view of being later supported by intervention of other creditors, joinder should be denied." (quoting *In re* Rite-Cap, Inc., 1 B.R. 740, 741 (Bankr. D.R.I. 1979) (relying on *In re* Crown Sportswear, Inc., 575 F.2d 991, 993 (1st Cir. 1978) ("Intervention [as a joining creditor in an involuntary petition pursuant to former Rule 104(a)] is a matter of right unless the bankruptcy court finds the petition was made in bad faith for the purpose of improperly invoking its jurisdiction.") and Guterman v. C. D. Parker & Co., 86 F.2d 546, 548 (1st Cir. 1936) ("As to the charge of bad faith and bad motives of the petitioning creditors, the special master held that bad faith on the part of the creditors was not shown and that bad motives of petitioning creditors were not a defense, unless, perchance, it amounted to fraud on the court, which did not exist in this case."))).

First, they point to the text. Section 303(i)(2) "specifically provides that sanctions can be awarded if an involuntary [petition] is filed in bad faith."[245] Extrapolating from this reference, "it would seem to follow that Congress, in enacting § 303, contemplated the possibility of dismissal of an involuntary petition based upon bad faith."[246] Logically, there could be "no reason why the Code would permit the imposition of damages (including punitive damages) for bad-faith filings but now allow the same conduct—such as suing involuntary bankruptcy as a litigation tactic in pending proceedings—to provide a basis for dismissing the petition."[247] So depicted, this construction simply renders § 303 more coherent, its subsections more harmonious, with a minor discrepancy resolved via anodyne reasoning.

Second, as precedent across the Code's four chapters stresses, "bankruptcy petitions of *any* kind should not be employed for an improper purpose."[248] The bad faith doctrine penalizes no more than such inherently baleful objectives,[249] and it has always been invoked to dismiss voluntary petitions under chapter 7, 11, and 13 despite an absence of explicit statutory authorization.[250] As such, its application would not appear to run afoul of modern law's constricted understanding of the bankruptcy court's equitable powers.[251] Reasonably enough, the never extirpated "equitable nature of bankruptcy," embodied in § 105(a),[252] serves as a secondary buttress for this construal,[253] "bankruptcy courts . . . equipped with the doctrine of

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[245] *In re* WLB-RSK Venture, 296 B.R. at 513.

[246] *Id.*

[247] *In re* Forever Green Athletic Fields, Inc., 804 F.3d at 334; *see also* Porter v. United States (*In re* United States), No. 6:06-bk-00515-ABB, 2006 WL 2346467, at *2 (Bankr. M.D. Fla. June 1, 2006) ("Section 303 implicitly requires a petitioning creditor to act in good faith.").

[248] *In re* WLB-RSK Venture, 296 B.R. at 513 (emphasis added) (holding that a general partner filed an involuntary chapter 11 bankruptcy in bad faith, and therefore for an improper purpose, because the company had no real assets, no ongoing business to re-organize, no unsecured creditors, no cash flow to pay bills, no employees and because litigation in other courts was unavailing).

[249] *See, e.g.*, Marrama v. Citizens Bank of Mass., 549 U.S. 365, 373 (2007) (stating that the nonexclusive list of causes justifying dismissal under § 1307(c) does not mention bad faith, but recognizing that dismissal for bad faith is implicitly authorized by the words "for cause" in that section); *In re* Century/ML Cable Venture, 294 B.R. 9, 34 (Bankr. S.D.N.Y. 2003) ("While section 1112(b) states that the authority it provides—dismissal or conversion—may be granted for 'cause,' and lists one or more examples of cause, it precedes the list with the word 'includes,' and the list is not exhaustive. Cause for dismissal may be found based on unenumerated factors, including 'bad faith . . . .'"); Indus. Ins. Servs., Inc. v. Zick (*In re* Zick), 931 F.2d 1124, 1126–27 (6th Cir. 1991) ("T]he word 'including' [in § 707(a)] is not meant to be a limiting word. . . . A lack of good faith, furthermore, has been recognized in a number of bankruptcy cases as a valid cause of dismissal under § 707(a).").

[250] 11 U.S.C. §§ 707(a) 930, 1112(b), 1307(c) (2012). As an involuntary case can only be commenced under chapter 7 or chapter 11, the "for cause" standard in § 1112 and § 707 is more directly relevant to this article. Nonetheless, the same liberality characterizes its application under chapters 9 and 12, as a familiar canon regardless intimates.

[251] *See In re* WLB-RSK Venture, 296 B.R. at 513 (stating, since § 303(i)(2) seems to imply that an involuntary petition can be dismissed for bad faith, and numerous cases support the proposition, that bankruptcy petitions of any kind should not be employed for improper purposes).

[252] 11 U.S.C. § 105(a); Coie v. Sadkin (*In re* Sadkin), 36 F.3d 473, 478–79 (5th Cir. 1994) (stating the court did not abuse its discretion under § 105(a) when the court did not find any fraud on the debtor's part).

[253] *See In re* WLB-RSK Venture, 296 B.R. at 513; *cf.* Adell v. John Richards Bldg. Co. (*In re* John Richards Homes Bldg. Co.), 552 F. App'x 401, 412 (6th Cir. 2013) ("Federal courts have held that . . . [§ 105(a)]

good faith so that they can patrol the border between good- and bad-faith filings."[254] To these adherents, because the Code imputes the prerequisite of good faith into every voluntary petition,[255] their "better view" modestly extends a hallowed doctrine to all involuntary ones,[256] the filing party in an involuntary case now subjugated to the same constraints thrust upon the tendering entity in a voluntary one.[257]

Finally, supporters appeal to considerations of vital policy.[258] The filing of an involuntary petition is an extraordinary remedy, both history and reason insinuate; its consequences are great and baleful, often uncorrectable, as Congress itself accredited;[259] and "[a]llowing for the dismissal of bad-faith filings will encourage creditors to file petitions for proper reasons such as to protect against the preferential treatment of other creditors or the dissipation of the debtor's assets."[260] "By giving creditors the ability to bring a debtor into bankruptcy, Congress created a power that could be abused."[261] Given this risk, it generates little violence to bankruptcy law's quiddity to borrow another remedy, one steadily blessed by history and already wedged within the Code, so as to discourage precisely such malediction. Within this paradigm, even if § 303(b) and (h) make no mention of bad faith, this omission becomes akin to the fabled scrivener's error, and its correction is compelled by the

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authorizes bankruptcy courts to impose a variety of sanctions, including punitive damages, against litigants in response to their wrongful conduct before the court."); *In re* Mylotte, David & Fitzpatrick, No. 07-11861bif, 2007 WL 2033812, at *9 (Bankr. E.D. Pa. July 12, 2007) ("There is no principled basis to permit a bad faith involuntary bankruptcy filing.").

[254] *In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 334 (3d Cir. 2015) (holding that an involuntary chapter 7 bankruptcy was filed in bad faith and based this determination on a "totality of the circumstances" test.).

[255] *See, e.g., In re* Bock Transp., Inc., 327 B.R. 378, 381 (B.A.P. 8th Cir. 2005) (relying on the Eighth Circuit and their finding that the Code contains an implicit good faith requirement); Cedar Shore Resort, Inc. v. Mueller (*In re* Cedar Shore Resort, Inc.), 235 F.3d 375, 379 (8th Cir. 2000) ("Other circuits have similarly held that the Code contains an implicit good faith requirement."); *see also* Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1071 (5th Cir. 1986) (nothing that judicial interpretation has provided for a good faith standard for the commencement of bankruptcy proceedings).

[256] *See In re* Forever Green Athletic Fields, Inc., 804 F.3d at 334 (remarking that the court, in assessing involuntary petitions, will still use a general "good faith" filing requirement); *see also In re* Tichy Elec. Co. Inc., 332 B.R. 364, 373 (Bankr. N.D. Iowa 2005) (discussing that even though there is no explicit mention of "good faith" as a filing requirement, it is an implicit requirement and an involuntary filing must be used for proper bankruptcy purposes).

[257] *See In re* Global Ship Sys., LLC, 391 B.R. 193, 201 (Bankr. S.D. Ga. 2007) ("Instead, the traditional good faith/bad faith analysis which is equally applicable to involuntary cases as it is to voluntary cases is the basis for this ruling.").

[258] *See* KENNETH N. KLEE & WHITMAN L. HOLT, BANKRUPTCY AND THE SUPREME COURT 193–95 (2008).

[259] *See* Susman v. Schmid (*In re* Reid), 773 F.2d 945, 946 (7th Cir. 1985) (concluding that the creditors did not have standing to bring an involuntary proceeding because there was no evidence of commingling of assets).

[260] *In re* Forever Green Athletic Fields, Inc., 804 F.3d at 335 (determining that creditors may force a debtor into an involuntary filing without considering the consequences faced by the debtor); *see, e.g., In re* Quinto & Wilks, P.C., 531 B.R. 594, 607–08 (Bankr. E.D. Va. 2015); (stating that for a court to dismiss a claim for bad-faith, they need to also look at the subjective motivations of the petitioner); *In re* Global Ship Sys*., LLC*, 391 B.R. at 201–02.

[261] Rosenberg v. DVI Receivables XVII, LLC, 835 F.3d 414, 419 (3d Cir. 2016); *see also In re* Diloreto, 388 B.R. 637, 655 (Bankr. E.D. Pa. 2008) (noting the potential negative effects involuntary petitions can have on debtors, such as significant legal fees).

Code's embedded spirit and bankruptcy law's general tenor. Motivated by these interconnected ratiocinations, a sizable juridical block has felt free to dismiss an involuntary petition filed in bad faith despite § 303(i) and (b)'s silence.[262]

2. Opposition's Counters

Citing two related reasons, others deviate from this popular technique.

First, these courts note that § 303(b) and (h) exhaustively specify how a creditor's eligibility is to be determined and when an involuntary case can be commenced.[263] They then stress the obvious: "Nowhere in the eligibility requirements of § 303(b) is there any reference to the motivation of the petitioning creditor(s), or any requirement that the petitioning creditor(s) demonstrate either good faith or the absence of bad faith in filing the petition."[264] In light of this linguistic structure, "bad faith" may lead to an imposition of more than actual damages, but it cannot rightly be imported into § 303(b) and (h) and thereby transformed into a basis for dismissal without expanding upon a "comprehensive remedial scheme that [already] addresses a full range of specific remedies to protect an alleged debtor."[265] Axiomatically, of course, such a statutory rewrite amounts to a task that no court may undertake, a legislative maneuver not commensurate with a judge's more modest providence.[266] Wedded purely to pendent canons of interpretation, this minority hence reads the absence of

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[262] *See In re* Forever Green Athletic Fields, Inc., 804 F.3d at 334 (disagreeing with petitioner's argument that Congress intended something specific by excluding an explicit reference to bad faith dismissals in § 303, but including it in other provisions); *In re* Bock Transp., Inc., 327 B.R. 378, 381 (B.A.P. 8th Cir. 2005) (recognizing that even though § 303 does not explicitly mention bad faith, the Eighth Circuit has found a good faith requirement); *In re* Tichy Elec. Co., 332 B.R. 364, 373 (Bankr. N.D. Iowa 2005) (recognizing a good faith presumption in § 303); *In re* Alexander, No. 00-10500CAB, 2000 WL 33951465, at *3 (D. Vt. Aug. 29, 2000) (acknowledging that although § 303(b) does not say "good faith," bankruptcy filings need to be done in good faith); *In re* Manhattan Indus., Inc., 224 B.R. 195, 201 (Bankr. M.D. Fla. 1997) (noting that dismissal is a possible consequence of not filing a bankruptcy proceeding in good faith); *In re* U.S. Optical, Inc., No. 92-1496, 1993 WL 93931, at *3–4 (4th Cir. Apr. 1, 1993) (recognizing that some courts use an objective standard to define bad faith and others use a subjective approach); Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp., 986 F.2d 709, 716 (4th Cir. 1993) (finding a petition was filed in subjective bad faith because it was filed for an improper purpose). Unsurprisingly, such courts simultaneously grant this remedy, thus implying it is found in the Code, and an award of punitive damages, as authorized by § 303(i)(2) is granted. *See, e.g.*, Treaty Energy Corp. v. Hallin (*In re* Treaty Energy Corp.), 619 F. App'x 443, 444 (5th Cir. 2015); *In re* Cent. Park Estates, LLC, 485 B.R. 72, 75–76 (Bankr. S.D.N.Y. 2013) (citing *In re* WLB-RSK Venture, 296 B.R. 509, 515 (Bankr. C.D. Cal. 2003), and *In re* Manhattan Indus., Inc., 224 B.R. at 201).

[263] *See In re* Basil St. Partners, LLC, 477 B.R. 846, 849–50 (Bankr. M.D. Fla. 2012) (stating there is no reference to a petitioner's motivating factors in the filing of an involuntary petition; instead, bad faith should only be analyzed after an involuntary petition has been dismissed). 11 U.S.C. § 303(b), (h) (2012).

[264] *In re* Basil St. Partners, LLC, 477 B.R. at 849.

[265] *In re* McMillan, 543 B.R. 808, 815 (Bankr. N.D. Tex. 2016) (discussing the specific remedies § 303 provides to protect debtors).

[266] *See* Planned Parenthood Gulf Coast, Inc. v. Kliebert, 141 F. Supp. 3d 604, 641 (M.D. La. 2015) ("[T]o rewrite a plain statute . . . [is] a task at odds with . . . [a court's] duty to ascertain—neither to add nor to subtract, neither to delete nor to distort an enactment's final terms." (internal quotation marks omitted)); *see also, e.g.*, United States v. Louisiana, No. 3:11-cv-00470-JWD-RLB, 2016 WL 4055648, at *42 (M.D. La. July 26, 2016) (rejecting defendant's "attempt to affix an omitted phrase onto clear statutory language borrowed from other subsections").

any reference to "good faith or lack of good faith" in § 303's enumeration of an involuntary case's jurisdictional minimums and prerequisites to dismissal as establishing this doctrine's "immaterial[ity]"[267] and "irrelevan[ce]"[268] outside the confines of § 303(i)(2).[269] While the debate over whether the precise relationship between § 303(i)(2) and (i)(1) may be joined in good faith, and though § 303 fails to specify expressly the criteria for involuntary petition's dismissal, its text expressly enumerates the jurisdictional postulates and thereby implicitly delineates the sole universe of acceptable bases. Among this series, fatally and conclusively, not a whisper of those magic words, no reference to good faith's need or bad faith's weight, recurs.

Second, this coterie fixates on § 303(i)'s grammatical structure. As it highlights, this paragraph begins: "*If* the court dismisses a petition under this section other than on consent of all petitioners and the debtor . . . ."[270] Grammatically, within a full conditional sentence, "if" tends to introduce a dependent clause expressing a condition, called the protasis, either preceded or follow by a main clause in which the consequence is broadcast, the so-called apodosis.[271] Based on § 303(i)'s chosen conjunction, therefore, "a prerequisite for a claim of bad faith is that the court must have dismissed the petition";[272] dismissal must come first.[273] By this side's reckoning, this seeming disconnect—that, as a statutory matter, dismissal need precede any bad faith evaluation, and that a creditor's good faith cannot therefore be implicit in § 303(b) and (h)—in a carefully calibrated statutory subsection impliedly consigns bad faith into irrelevance in the jurisdictional analysis focused upon the propriety of a

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[267] *See In re* Mavellia, 149 B.R. 301, 303 (Bankr. E.D.N.Y. 1991) (noting that good faith or a lack thereof is immaterial for a "creditor to force a debtor with three or more creditors into involuntary bankruptcy").

[268] *See In re* WLB-RSK Venture, No. BAP CC–03–1526–MOPMA, BK LA–01–16604–TD, 2004 WL 3119789, at *6 n.13 (B.A.P. 9th Cir. Nov. 24, 2004) (affirming *In re* WLB-RSK Venture, 296 B.R. 509 (2003) on another basis while rejecting bad faith as an independent basis for dismissal).

[269] *See In re* Kennedy, 504 B.R. 815, 823–24 (Bankr. S.D. Miss. 2014) (noting that the plain language of § 303(i) only contemplates bad faith after the dismissal of an involuntary petition is dismissed to determine if a recovery for actual or punitive damages is warranted).

[270] 11 U.S.C. § 303(i) (2012) (emphasis added).

[271] RODNEY HUDDLESTON & GEOFFREY K. PULLUM, CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 736–37, 736 n.23 (2002); *see also, e.g.*, State v. Parduhn, 283 P.3d 464, 480 (Utah 2011) (confirming its understanding by relying upon this grammatical rule). Of course, "[o]nly if the consequences specified in the apodosis of . . . [a] rule [or statute] are as accessible and noncontroversial as the coverage specified in the protasis can a rule [or statute] produce significant predictability of application." Frederic Schauer, *Formalism*, 97 YALE L.J. 509, 540 (1988).

[272] *In re* Knoth, 168 B.R. 311, 315 (Bankr. D.S.C. 1994); *accord In re* Basil St. Partners, LLC, 477 B.R. 846, 849 (Bankr. M.D. Fla. 2012) (noting that dismissal of a petition is a pre-requisite to an inquiry into the creditor's bad faith).

[273] *See* Gen. Trading, Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1505 (11th Cir. 1997) (observing that "if the petition was not dismissed, . . . [the petitioning creditor] could not under the Bankruptcy Code have been subject to the bad faith inquiry"). Naturally, therefore, most bankruptcy courts have analyzed bad faith only after the involuntary petition has been dismissed. *See, e.g., In re* Antonini, No. 09-16850-AJC, 2012 WL 112978, at *7–8 (Bankr. S.D. Fla. Jan. 10, 2012) (awarding damages only after dismissing the involuntary petition); *see also In re* Lee, 252 B.R. 565, 565 (Bankr. M.D. Fla. 2000) (awarding damages only after dismissing the involuntary petition); *In re* Kearney, 121 B.R. 642, 643 (Bankr. M.D. Fla. 1990) (awarding damages only after dismissing the involuntary petition).

dismissal.[274] Stated more colloquially, bad faith cannot be a basis for dismissal if a claim based upon it does not ripen until this event occurs.[275]

In sum, "[t]he express, unambiguous language of § 303(i),"[276] when pored over in conjunction with § 303(a), (b), and (h),[277] yields one conclusion, this assemblage insists: "[A] petitioning creditor's good or bad faith in filing an involuntary petition is not a basis for dismissal."[278]

III. RESOLUTION

A. Principles of Interpretation

Whereas equity once reigned,[279] much changed on October 1, 1979.[280] On that fall date, the Code "standardize[d] an expansive (and sometimes unruly) area of law."[281] Thereafter, a new duty "to interpret the Code clearly and predictably using well established principles of statutory construction" arose.[282] Bound by this obligation, over the next thirty years, a peculiar textualism came to dictate

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[274] *See In re* Basil St. Partners, LLC, 477 B.R. at 849 (stating that the bad faith of a creditor is only relevant in determining damages after dismissal of the involuntary petition—bad faith is irrelevant in the Court's analysis on whether or not to dismiss an involuntary petition).

[275] *See, e.g., In re* Jacques, No. 09-22027 (ASD), 2010 WL 2940866, at *9 (Bankr D. Conn. July 23, 2010) (declaring that claims for bad faith are not ripe until an involuntary petition is dismissed); *see also In re* Palace Oriental Rugs, Inc., 193 B.R. 126, 129–30 (Bankr. D. Conn. 1996) ("A claim in favor of an alleged debtor for costs, attorney's fees and/or damages under section 303(i) ripens upon the dismissal of the involuntary petition.").

[276] *In re* Basil St. Partners, LLC, 477 B.R. at 850.

[277] *See* 11 U.S.C. § 303(a)–(b), (h); *see also* Farmers & Merchants State Bank v. Turner, 518 B.R. 642, 648–49 (Bankr. N.D. Fla. 2014) (denoting that bad faith is not part of the test courts use to analyze contested involuntary petitions).

[278] *In re* Basil St. Partners, LLC, 477 B.R. at 851; *see also, e.g., In re* Kennedy, 504 B.R. 815, 823–24 (Bankr. S.D. Miss. 2014) ("[T]he plain language of § 303(i)—where bad faith is mentioned—contemplates bad faith only as a requirement for the recovery of actual or punitive damages *after* the involuntary petition is dismissed." (emphasis in original)). Indeed, *Collier on Bankruptcy*, bankruptcy law's preeminent commentary, has endorsed this textual fact. *See* 2 COLLIER ON BANKRUPTCY ¶ 303.16 (16th ed. 2013). The Ninth Circuit's Bankruptcy Appellate Panel, meanwhile, has twice questioned the propriety of such dismissals. *See In re* Marciano, 459 B.R. 27, 44 (B.A.P. 9th Cir. 2011); *see also In re* WLB-RSK Venture, No. BAP CC–03–1526–MOPMA, BK LA–01–16604–TD, 2004 WL 3119789 at *6 n.13 (B.A.P. 9th Cir. Nov. 24, 2004).

[279] *See* SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455 (1940) ("A bankruptcy court is a court of equity . . . and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act."); *see also* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 6–7 (2006) (discussing the origins of "the court of equity maxim").

[280] The Code became effective on this day. *See* Maiorino v. Branford Sav. Bank, 691 F.2d 89, 89 n.2 (2d Cir. 1982) (indicating that during the transition period, between October 1, 1974 and April 1, 1984, the Code would be effective); *see also* Stewart v. Kutner (*In re* Kutner), 656 F.2d 1107, 1111–12 (5th Cir. 1981), *cert. denied,* 455 U.S. 945 (1982); Callister v. Ingersoll-Rand Fin. Corp., 673 F.2d 305, 306 (10th Cir. 1982).

[281] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

[282] *See id.*; *see also, e.g.*, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

interpretation of the Code's manifold sections,[283] its strictness tempered by older filaments of thought less openly acknowledged.[284]

As always, the analysis of a Code section commences with the explicit terms of the relevant provision.[285] In fealty to the basic principles of English grammar,[286] the familiar semantic rules[287] and the common syntactic canons[288] rate utilization at this

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[283] *See, e.g.*, Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 144 (2012) (noting "the Court's penchant for strict textualism"); *see also* John Hennigan, Rousey *and the New Retirement Funds Exemption*, 13 AM. BANKR. INST. L. REV. 777, 793 (2005) (describing *Rousey v. Jacoway*, 544 U.S. 320 (2005), as an example of the Court's "strict textualism").

[284] *See, e.g.*, Amir Shachmurove, *Sherlock's Admonition: Vindicatory Contempts as Criminal Actions for Purposes of Bankruptcy Code § 362*, 13 DEPAUL BUS. & COMM. L.J. 67, 75–78 (2014) [hereinafter Shachmurove, *Sherlock*] (explaining a modified plain meaning approach to Code interpretation through canons of construction); *cf., e.g.*, Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 5 (2010) (noting that bankruptcy courts appear to be "guided (perhaps burdened) by a legacy of strict textualism").

[285] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 235, 243, 245–46 (2010); *see also* Holloway v. United States, 526 U.S. 1, 6 (1999); United States v. Turkette, 452 U.S. 576, 593 (1981); Samson v. Western Capital Partners, LLC (*In re* Blixseth), 684 F.3d 865, 870 (9th Cir. 2012); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 953 (9th Cir. 2009) (all displaying that the analysis of a Code section always starts with the explicit terms within the provision at issue).

[286] *Cf.* United States v. Ron Pair Enters., 489 U.S. 235, 241–42 (1989) (finding support for a particular reading in the statute's "grammatical structure"); DiFiore v. Am. Airlines, Inc., 561 F. Supp. 2d 131, 135 (D. Mass. 2008) (applying basic rules of grammar); United States v. Reynoso, 239 F.3d 143, 151 (2d Cir. 2000) (Calabresi, J., dissenting) (faulting the majority for ignoring a statute's "grammatical structure").

[287] *See, e.g.*, Florida v. C.M., 154 So. 3d 1177, 1180 (Fla. Dist. Ct. App. 2015) (defining the "omitted-case canon" as "meaning nothing is to be added to what the text states or reasonably implies") (internal quotations omitted); Int'l Bhd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1108 (10th Cir. 2014) ("Under . . . [the ordinary-meaning] canon, if context indicates that words bear a technical legal meaning, they are to be understood in that sense."); United States v. Porter, 745 F.3d 1035, 1042 (10th Cir. 2014) (referring to "the so-called general-terms canon that holds that [g]eneral terms are to be given their general meaning") (alteration in original) (internal quotations omitted); United States v. Curbelo, 726 F.3d 1260, 1277 (11th Cir. 2013) ("[T]he negative implication canon, often expressed in the Latin phrase *expressio unius est exlusio alterius*, . . . applies where items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.") (internal quotations omitted); *In re* Partin, 517 B.R. 770, 773–74 (Bankr. E.D. Ky. 2014) ("When encountered in a statute, 'and' is typically construed in its ordinary conjunctive sense. . . . Deviation from this rule (i.e., changing 'and' to 'or'), only occurs when required to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of the statute.") (internal quotations omitted); United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1115 (D.C. Cir. 2009) (explaining that the word "includes" is usually considered "non-exhaustive").

[288] *See, e.g.*, City. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 262 (1992) ("[A] proviso can only operate within the reach of the principal provision it modifies," encapsulating the proviso canon); Lary v. Trinity Physician Fin. & Ins. Servs., 780 F.3d 1101, 1105–06 (11th Cir. 2015) ("Ordinarily, the scope of a subpart is limited to that subpart."); United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) (defining the "last-antecedent" canon as "say[ing] that a qualification in the last term of a series should be confined to that term" and the "series modifier canon" as "provid[ing] that a modifier at the beginning or end of a series of terms modifies all the terms"); Carroll v. Sanders, 551 F.3d 397, 399 (6th Cir. 2008) (describing the nearest reasonable referent canon, closely related to the last antecedent canon, as requiring that "[w]hen a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest appropriate word") (internal quotations omitted); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990) (bemoaning the "mini-revival of the long-eschewed punctuation canon, which presumes that Congress follows ordinary rules of punctuation and that the placement of every punctuation mark is potentially significant"). Many of these "technical, grammatical

vocation's outset, the language of the relevant provision and the terms and the structure of the pertinent section and statute first parsed.[289] The salience of these linguistic canons, however, always fluctuates, their particular pertinence demarcated by a series of related contextual tenets,[290] most especially the whole text canon from which so many others spring.[291] In this first stage of a most "holistic endeavor,"[292] these varied tools furnish the sole means of dispelling ambiguity and unearthing plainness,[293] reference made "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[294] Consequently,

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canons of construction" had once been disfavored. *See id.* at 664; Vassal Kesavan & Michael S. Paulsen*, Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 350 (2002) (noting that the punctuation canon has been renounced in statutory interpretation). With the passage of time, they may once more be eclipsed. Indeed, their invocation may, in fact, already obscure too much. Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 107 (1996) ("[T]he Court's commitment to textualism in bankruptcy cases is quite inconsistent.").

[289] *See, e.g.*, Ron Pair Enters., 489 U.S. at 241–42 (noting that the reading of a statute is mandated by its grammatical structure).

[290] *See, e.g.*, United States v. Castleman, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring in part and concurring in judgment) ("[Per] the presumption of consistent usage, . . . a term generally means the same thing each time it is used."); RadLax Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general.") (internal quotations omitted); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 231 (2008) ("The *ejusdem generis* canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the 'enumerated categories . . . which are recited just before it,' so that the clause encompasses only objects similar in nature.") (internal quotations omitted); District of Columbia v. Heller, 554 U.S. 570, 577 (2008) ("[A] prefatory clause [may be used] to resolve an ambiguity in the operative clause."); Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotations omitted); Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1062 n.7 (9th Cir. 2013) (Bea, J., dissenting) ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.") (internal quotations omitted); Sachs v. Rep. of Austria, 737 F.3d 584, 598 n.13 (9th Cir. 2013) (citing for support to "the harmonious reading canon," "the provisions of a text should be interpreted in a way that renders them compatible, not contradictory," and "the associated words canon," "associated words bear on one another's meaning") (internal quotations omitted); Amoco Prod. Co. v. Watson, 410 F.3d 722, 733 (D.C. Cir. 2005) (noting that courts should consider statutory and regulatory text as a whole); Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1371 (11th Cir. 1998) ("A fundamental canon of statutory construction directs us to interpret words according to their ordinary meaning.").

[291] *See* SCALIA & GARNER, *supra* note 207, at 167 (noting that the whole body of a text should be considered when interpreting one section of it).

[292] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988). Frequently quoted, this phrase's precise import is less than clear. *See* Morell E. Mullins*, Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEG. 1, 11 n.39 (2003) (acknowledging that the combining of factors in a text to be interpreted is difficult but not as incoherent as some people have stated).

[293] These attributes are related yet distinct. *See, e.g.*, Shachmurove, *Sherlock*, *supra* note 284, at 75 ("Analytically, plainness and ambiguity are thus disparate, albeit closely-related, concepts, and it is context that determines which of many plain denotations most impeccably fits the statutory scheme, the text thereby shown to be both plain and unambiguous."); Shachmurove, *Claims*, *supra* note 76, at 530 n.142 (explicating the distinction between connotation and denotation and ambiguity and plainness in the context of the Federal Rules of Bankruptcy Procedure). Such subtlety inheres in language itself. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988) ("Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them.").

[294] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991)); *see, e.g.*, L.S. Starrett Co. v. Fed.

even in the most stringent forms of textual interpretation, statutory milieu matters, for "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[295] Overall, reflecting an interpretive ethic anchored to linguistic concords,[296] this schematic relies on such contextual and textual evidence[297] and leans on the statute's overarching architecture for clarification and circumstantial reference.[298] If this process yields a single denotation and connotation,[299] the provision in question is unambiguous and plain,[300] controlling unless one of five exceptions applies.[301] Practically speaking, therefore, the Court's purportedly (and inconsistent)[302] textualist

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Energy Reg. Comm'n, 650 F.3d 19, 25 (1st Cir. 2011) (if we conclude that the plain language of the statute, standing alone, is ambiguous, the next step is to ask whether this ambiguity can be resolved by looking to "the specific context in which [the] language is used, and the broader context of the statute as a whole") (internal quotations omitted).

[295] United Sav. Ass'n of Tex., 484 U.S. at 371 (internal citation omitted); *see also, e.g.*, Roberts v. Sea-Land Servs. Inc., 132 S. Ct. 1350, 1357 (2012) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citing Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

[296] *See, e.g.*, United States v. Schurtz, 510 F.3d 1242, 1244 (10th Cir. 2007) (favoring "straightforward interpretation of the provision [that] makes sense of the language" despite the fact that "the linguistic conventions of the regulation are not entirely consistent"); United States v. Jackson, 480 F.3d 1014, 1019 (9th Cir. 2007) (relying on more than "our linguistic conventions to understand Congress's intentions"); *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (rejecting the use of "[a]n unadorned 'plain meaning' approach to interpretation [that] supposes that words have meanings divorced from their contexts–linguistic, structural, functional, social, historical.").

[297] *See, e.g.*, United States v. Campbell, 798 F. Supp. 2d 293, 302 (D.D.C. 2011) (noting that courts should take into account contextual and textual evidence when interpreting the text of a statute).

[298] *See, e.g.*, United States v. McLemore, 28 F.3d 1160, 1162 (11th Cir. 1994) (explaining that to interpret statutory language the court looks at the statutory scheme and not just one word or provision); *see also, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

[299] *See, e.g., In re* Asher, 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013) ("Ambiguity only exists so long as several plausible interpretations of the same statutory text, specific and different in substance, can be advanced.").

[300] *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1097 (2015) (concluding that cannons of construction should not be used when the statutory language has a clear definition and it is supported by the context); United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (noting that when interpreting the meaning of a statute, the inquiry should begin and end with the statutory language itself when the language is plain); *see also, e.g.*, Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (stating that statutory construction begins and ends with the language of the statute where the language provides a clear answer); Jian Le Lin v. United States Attorney Gn., 681 F.3d 1236, 1239 (11th Cir. 2012) (explaining that Congress's intent is clear when the language of the statute itself is unambiguous); Vanderbrook v. Unitrin Preferred Ins. Co. (*In re* Katrina Canal Breaches Litig.), 495 F.3d 191, 219 (5th Cir. 2007) (declining to employ the foregoing canons where the court would thereby be "injecting ambiguity into an otherwise unambiguous term").

[301] *See* Shachmurove, *Claims*, *supra* note 76, at 530–31 (courts do not have to follow the plain and unambiguous meaning of a statute or rule "if (1) an absurd result would follow; (2) there is clear evidence of contrary intent in reliable extrinsic sources (3) no plausible purpose would be attained; (4) an unanticipated clerical or typographical error is at fault; or (5) a conflict with a constitutional provision would result.") (internal quotations omitted).

[302] *Compare* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 370–76 (2007) (employing both traditional textualism and a form of purposivism), *with* Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549

approach to the Code has often incorporated more than "the recitation of plain meaning mantras and conclusory canons of interpretation,"[303] and its nuances dependably moderate the occasionally unforgiving formalism of syntax.[304] In the end, putting aside catchy slogans and hortatory claims, plain and unambiguous meaning arises from more than just the enacted text contextually illuminated,[305] courts relying on "ordinary, contemporary, common meanings,"[306] a statute's "obvious and dominating general purpose,"[307] and a term's exact "placement."[308]

Due to the unique history of bankruptcy law, its jurisprudence treats certain additional principles as interpretive lodestars. First, out of respect for the existence of an extensive body of pre-Code bankruptcy law, courts exhibit a marked reluctance to invalidate the applicability of certain doctrines with identifiable historical prestige in the absence of unambiguous Code text.[309] As the Court itself explained, where "the intent to override" such "prior practice" is "doubtful" based on the Code's explication,[310] "pre-Code practice" that "reflects policy considerations of great longevity and importance" will not be superseded.[311] Second, this deference extends to long-established traditions of state regulation, partly weakened by the

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U.S. 443, 448–53 (2007) (opting for a more stringent textualism).

[303] Thomas F. Waldron & Neil M. Berman, *Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 210 (2007).

[304] *See, e.g.*, Limited, Inc. v. Comm'r, 286 F.3d 324, 333–34 (6th Cir. 2002) (contrasting "a plain language interpretation" with a disfavored "hypertechnical analysis"); United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999) ("We do not look at one word or term in isolation, but instead we look to the entire statutory context."); *In re* Friesenhahn, 169 B.R. 615, 637–38 (Bankr. W.D. Tex. 1994) ("Courts are not to forge ahead under the plain meaning dogma, in '[b]lind nullification of Congressional intent.'").

[305] *See, e.g.*, King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."); United States v. Hartwell, 73 U.S. 385, 396 (1867) ("The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. . . . [T]he words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."); New Castle Cty. v. Hartford Acc. & Indem. Co., 970 F.2d 1267, 1270 (3d Cir. 1992) ("The question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner.").

[306] *See* Perrin v. United States, 444 U.S. 37, 42 (1979); *see also, e.g.*, United States v. Haun, 494 F.3d 1006, 1009 (11th Cir. 2007) (quoting *Perrin*, 444 U.S. at 42).

[307] Miller v. Amusement Enters., Inc., 394 F.2d 342, 350 (5th Cir. 1968) ("[*E*]*jusdem generis* . . . do[es] not . . . compel[] us to accord words and phrases embodied in the statute a definition or interpretation different from their common and ordinary meaning; or that the rule requires us to interpret the statute in such a narrow fashion as to defeat what we conceive to be its obvious and dominating purpose."), *cited in* United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010).

[308] Bailey v. United States, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.").

[309] *See In re* Applegate Prop., Ltd., 133 B.R. 827, 835 n.6 (Bankr. W.D. Tex. 1991) (relying on Kelly v. Robinson, 479 U.S. 36, 49–50 (1986), and Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 501 (1986)).

[310] BFP v. Resolution Tr. Corp., 511 U.S. 531, 546–47 (1994) (stating that where Congress does not explicitly overrule pre-Code practice, adherence to the "plain meaning" doctrine is not absolute); Shachmurove, *Sherlock*, *supra* note 284, at 77–80.

[311] United States v. Ron Pair Enters., 489 U.S. 235, 244–45 (1989); *see also, e.g., In re* Jack Greenberg, Inc., 189 B.R. 906, 911 (Bankr. E.D. Pa. 1995) (invoking this axiom); *In re* Luker, 148 B.R. 946, 952 (Bankr. N.D. Okla. 1992) (invoking the same axiom).

constitutional supremacy automatically imparted to federal bankruptcy law.[312] Finally, the Code should generally not be construed in such a manner as to

> expand the rights of debtors or their creditors beyond those necessary to adjust their relationship or otherwise diminish either (i) the rights or prerogatives of parties outside of the debtor-creditor relationship ("Third Parties") for the benefit of the debtor or the creditors or (ii) the nonbankruptcy rights of the debtor or the creditors for the benefit of these Third Parties.[313]

Whether explicitly admitted or implicitly undertaken, his third preference often legitimizes consideration of yet other policies entrenched in the Code or pre-Code practice, including: (1) equality of distribution; (2) facilitation of an estate's speedy disposition; (3) discouragement of a race to diligence amongst creditors; (4) disfavoring of secret liens; (5) enablement of an honest debtor's fresh start; (6) preference for effective reorganizations of businesses, farmers, railroads, and cities; and (7) and general preclusion of allowance of post-petition interest on pre-petition unsecured claims.[314] Not formal canons, these principles can tip the scale whenever an initial exegesis of a Code text yields multiple possible denotations, the language unquestionably plain yet inescapably ambiguous.[315] Thus, although not one can override the Code's plain terms,[316] whenever "plausible interpretations of the same statutory text, specific and different in substance [that] can be advanced," they help

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[312] Shachmurove, *Sherlock, supra* note 284, at 78–79 (discussing how the Code defers to "a number of 'topics and fields of law as [such] traditional areas of state concern,' including regulation of local gas franchises and hospital billing, domestic relations, and real property").

[313] Plank, *supra* note 13, at 1067.

[314] *See* KLEE & HOLT, *supra* note 258. In a most telling example, one of these policy predilections—to respect, as much as possible, the property interests created and defined by non-bankruptcy law—traces its common name ("*Butner* rule") to the pre-Code opinion in *Butner v. United States*. *See* Butner v. United States, 440 U.S. 48, 55 (1979), *cited in* Ford v. Ford Motor Credit Corp. (*In re* Ford), 574 F.3d 1279, 1286 (10th Cir. 2009) (Tymkovich, J., dissenting); *see also, e.g.*, Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("The basic federal rule in bankruptcy is that state law governs the substance of claim . . . .") (internal quotation marks omitted); *In re* Marciano, 459 B.R. 27, 53 (B.A.P. 9th Cir. 2011) (summarizing the *Butner* principle).

[315] *See* Ron Pair Enters., 489 U.S. at 244–45 ("[L]ook[] to pre-Code practice for interpretive assistance, [when] it appear[s] that a literal application of the statute would be demonstrably at odds with the intentions of its drafters." (internal quotations marks omitted)); *see also, e.g., In re* Asher, 488 B.R. 58, 67 (Bankr. E.D. N.Y. 2013).

[316] BFP v. Resolution Tr. Corp., 511 U.S. 531, 546 (1994) ("That where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary state law or prior practice." (internal quotation marks omitted)); *cf.* Barnhill v. Johnson, 503 U.S. 393, 397–98 (1992) (emphasizing that the definition of "transfer" under § 547 is a question of federal law despite the fact that state law delimits predicate concepts of property and interests in property); *In re* Pepmeyer, 275 B.R. 539, 543 (Bankr. N.D. Iowa 2002) ("The concept of transfer is controlled by [f]ederal law.").

divine the most appropriate.[317] By such means, a single meaning can be chosen,[318] "[c]ongruence among the [Code's] various provisions and bankruptcy policy" achieved.[319]

B. Application

Since 1978, a substantial number of courts have coalesced around the transfiguration of bad faith into a ground for an involuntary petition's dismissal,[320] and a smaller bloc has issued qualified declarations to the contrary.[321] For all the ink spilled, however, rules of grammar and syntax and the patent implications of the plainest terms bolsters the latter's interpretation. At the same time, the former's crucial underpinnings cannot survive similar scrutiny, as neither the apparent themes and purposes of bankruptcy law[322] nor a plain meaning's harsh or impractical results[323] can supersede unambiguous terms.[324] Ignoring these basic principles, without Congress' silence having provided the majority with the requisite

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[317] *In re* Asher, 488 B.R. at 64 ("[C]ourt[s] should consider the specific context in which that language appears and the statutory scheme's broader framework, striving to preserve the coherence and consistency of a statutory scheme."); *accord In re* Stoner, 487 B.R. 410, 418–19 (Bankr. D. N.J. 2013).

[318] *In re* Asher, 488 B.R. at 64 ("In determining its degree of ambiguity or clarity, courts are obliged not to examine statutory language in isolation."; *cf.* United States v. Rodriguez, 460 F. Supp. 2d 902, 910 (S.D. Ind. 2006) ("If the meaning of a statutory provision is ambiguous on its face . . . , and either rejecting the absurd alternate interpretations or examining the statutory context and structure as a whole does not result in a clarified meaning, then legislative history and intent may be consulted to inform the meaning of statutory language."); United States v. Ranum, 96 F.3d 1020, 1030 (7th Cir. 1996) ("[N]or do we believe that ambiguity may be found . . . whenever a creative appellant is able to posit possible alternative meanings for statutory language, no matter how tenuous or improbable.").

[319] Steven R. Nuener, *Chapter 20 and Debt Limitations: Does A Strip-Off of Junior Mortgages Resurrect the Discharged Junior Mortgage Note Obligation as an Unsecured Debt?*, AM. BANKR. INST. J., July 2012 at 20, 74.

[320] *See supra* Part II.B.1 (showing the number of circuits that have dismissed an involuntary petition filed in bad faith despite § 303(i) and (b)'s silence).

[321] *See supra* Part II.B.2 (showing a circuit split in regard to the dismissal of an involuntary petition filed in bad faith).

[322] *See* Freeman v. Quicken Loans, Inc., 566 U.S. 624, 637–38 (2012); *see also* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) ("Nor is there any merit to the petitioner's related contention that §2607(b) should not be given its natural meaning . . . ."); Peterson v. Somers Dublin Ltd., 729 F.3d 741, 749 (7th Cir. 2013); *In re* Bourne, 262 B.R. 745, 757 (Bankr. E.D. Tenn. 2001) (citing *In re* Alibatya, 178 B.R. 335, 337 (Bankr. E.D.N.Y. 1995)).

[323] *See* Lamie v. United States Tr., 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."); *see also* Cent. Tr. Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 360 (1982) ("While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.").

[324] *See* RadLAX Gateway Hotel, LLC, 566 U.S. at 649; *see also, e.g., In re* Stewart, 544 B.R. 859, 863 (Bankr. N.D. Miss. Nov. 17, 2015) (citing RadLAX Gateway Hotel, LLC, 566 U.S. 639 (2012)). Arguably, the Court has not always followed this tenet, often for the reasons cited above. *See supra* Part III.A; *see also* Dewsnup v. Tim, 502 U.S. 410, 420–22 (1992) (Scalia, J., dissenting).

justification,[325] § 303 has been rewritten, a verboten practice,[326] by the conversion of bad faith into a basis for both damages and dismissal.[327]

1. Section 303's Specific Text and Structure

In four paragraphs, § 303 sets forth a multistep procedure for the instigation of an involuntary case.[328] In accordance with this mostly self-contained section, as long as the elements in § 303(b) are checked and the target debtor falls within § 303(a)'s class, "[a]n involuntary case against a person is commenced."[329] No "may" or an equally flexible signifier, such as "in its discretion,"[330] crops up in § 303(b);[331] no other predicate conditions are set by implication or incorporation;[332] and no proviso adds any other peculiar limitation on the consequences of a creditor's compliance with these subsections.[333] Textually, therefore, once one or more of the petitioning creditors satisfy the qualifications with which it is exclusively concerned, an involuntary case should automatically begin. If the debtor professes opposition, "an order [of] relief against the debtor in an involuntary case under the chapter which the

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[325] *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

[326] *See* Rep. of Arg. v. Weltover, Inc., 504 U.S. 607, 617 (1992) ("The question, however, is not what Congress 'would have wanted' but what Congress enacted . . . ."); *see also* United States. v. LSL Biotechnologies, 379 F.3d 672, 679 (9th Cir. 2004) ("We are not willing to rewrite a statute under the pretense of interpreting it."); Stiffler v. Lutheran Hosp., 965 F.2d 137, 140 (7th Cir. 1992) ("It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking.").

[327] *See* Ardestani v. United States, 502 U.S. 129, 135–36 (1991) (stating that "[t]he strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances) (internal quotations omitted); United States v. Balint, 201 F.3d 928, 932 (7th Cir. 2000); Monterey Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 743 F.2d 589, 595–96 (7th Cir. 1984).

[328] *Cf.* McMillan v. Schmidt (*In re* McMillan), 614 F. App'x 206, 209 (5th Cir. 2015) (per curium) ("Section 303 of the Bankruptcy Code governs petitions for involuntary bankruptcy.").

[329] 11 U.S.C. § 303(b) (2012) ("An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation . . . ."); Crest One Spa v. TPG Troy, LLC (*In re* TPG Troy, LLC), 793 F.3d 228, 233–34 (2d Cir. 2015).

[330] 42 U.S.C. § 12205 ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee . . . ."); Banks v. Hit or Miss, Inc., 949 F. Supp. 569, 572 (N.D. Ill. 1996) (discussing § 12205).

[331] *See, e.g.*, United States v. Rodgers, 461 U.S. 677, 706 (1983); Sarei v. Rio Tinto, PLC, 625 F.3d 561, 565 (9th Cir. 2010); Pichler v. UNITE, 646 F. Supp. 2d 759, 768 (E.D. Pa. 2009). *But see* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000) ("Although 'may' could be read as permissive in each section, as Cortez Byrd argues, the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.").

[332] *Cf., e.g.*, Gaffney v. Bd. Of Trs., 969 N.E.2d 359, 372 (Ill. 2012) ("We will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the expressed intent of the legislature."); Demaria v. Andersen, 318 F.3d 170, 174–75 (2d Cir. 2003) (rejecting plaintiffs' argument that two subsections were interdependent and instead holding that the duo "operate independently," as "nothing in the rule" made "compliance" with one "a predicate condition" for the other's activation); City of L.A. v. United States Dep't of Commerce, 307 F.3d 859, 870–71 (9th Cir. 2002) (refusing to engraft an additional presumption unto a statute beyond the predicate conditions already expressly encoded).

[333] *See* SCALIA & GARNER, *supra* note 207, at 154–55 (discussing the proviso canon).

petition was filed" must be issued upon a creditor's propitiation of § 303(h)(1) or § 303(h)(2).[334] With the mandatory "shall"[335] written into both § 303(b) and (h), the enacted statute's explicit terms afford no discretion if the petitioning creditor satisfies these interrelated demands.[336] In contrast, based on equally unambiguous text, the filing of a petition in "bad faith" triggers liability only "[i]f the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection."[337] Unlike § 303(h) and (b), this subsection employs the telling "may,"[338] fully classifying the power to award damages as a bankruptcy court's discretionary prerogative.

In its design, § 303 appears elegantly simple. Electing blunt prose, Congress predicated the right to a punitive award on a creditor's bad faith, but, by virtue of the explicit language that it enacted, it too chose neither to make that prerogative compulsory nor essential for an award of fees and costs. It similarly decided to subject this particular entitlement's ripening to a precise condition precedent: the dismissal of the petition. However, in the paragraphs establishing the means for adjudicating a creditor's standing, § 303's jurisdictional heart, and the grounds for any involuntary petition's dismissal, no mention of bad faith appears.[339] The overt text of § 303, the starting point of all interpretation, says this much and nothing else, expressly setting forth only this "strict criteria for qualification to file and for allowance of involuntary petitions."[340]

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[334] 11 U.S.C. § 303(h) ("If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed.").

[335] *In re* Duty Free Shops Corp., 6 B.R. 38, 40 (Bankr. S.D. Fla. 1980) ("[T]he Code does not make relief discretionary and it cannot be denied on this account.").

[336] *See In re* Nabilsi, No. CC-09-1207-MkJaD, 2010 WL 6259980, at *9 (B.A.P. 9th Cir. Nov. 16, 2010) (contending that "the direction in § 303(h)" is "that the bankruptcy court may consider the merits of the petition only if the petition has been timely contested"); *In re* Key, 209 B.R. 737, 739 (B.A.P. 10th Cir. 1997) (because the alleged debtor did not respond or answer timely, the bankruptcy court was obligated to enter order of relief); *cf. In re* Ceiling Fan Distrib., Inc., 37 B.R. 701, 702 (Bankr. M.D. La. 1983) (concluding "that the debtor must be adjudicated and relief ordered unless the petition is timely controverted" pursuant to § 303(h)). Two rules bolster this construction. *See In re* Seventh Ave. Props., No. 312-08678, 2013 WL 655871, at *2 (Bankr. M.D. Tenn. Feb. 22, 2013). First, Rule 1011(b) provides: "Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 . . . and shall be filed and served within 21 days after service of the summons . . . ." FED. R. BANKR. P. 1011(b) (2016). Second, Rule 1013(b) reads: "If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief requested in the petition." FED. R. BANKR. P. 1013(b).

[337] 11 U.S.C. § 303(i)(2) ("If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment . . . against any petitioner that filed the petition in bad faith . . . .").

[338] *See, e.g., In re* Clean Fuel Techs. II, LLC, 544 B.R. 591, 601 (Bankr. W.D. Tex. 2016) ("[T]he use of the discretionary term 'may' in §303(i) has resulted in different analytical approaches being used . . . ."); *In re* Law Ctr., 304 B.R. 136, 138 (Bankr. M.D. Pa. 2003) (finding that any award under § 303(i) is discretionary).

[339] *In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 333 (3d Cir. 2015) ("[B]ecause the only mention of bad faith is in 303(i)(2) and deals with post-dismissal charges, the vast majority of litigation concerning bad faith centers on that provision.").

[340] *See* Huszti v. Huszti, 451 B.R. 717, 719 (Bankr. E.D. Mich. 2011) (quoting *In re* McMeekin, 18 B.R. 177, 178 (Bankr. D. Mass. 1982)); *see also In re* Ross, 63 B.R. 951, 961 (Bankr. S.D.N.Y. 1986) ("Undue weight cannot be placed on the nature of the claims held by the petitioners as the debtor's true protection

Several allied canons apply whenever similar discrepancies surface within a statutory section. Presumptively, Congress "act[s] intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."[341] Any other construction denudes a particular phrase of some significance and, by thus relegating enacted language into superfluity, flouts the judiciary's duty to accord any possible and reasonable weight to a statute's every word.[342] Undeniably, "redundancies across [or within] statutes are not unusual events in drafting," and if such periphrasis results despite scrupulous adherence to modernity's principal interpretive dogma, only "positive repugnance" will foreclose even such mistaken echoes' simultaneous employment.[343] And "[w]hen a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with."[344] Yet, grafting absent language onto a statutory subsection effectuates an impermissible enlargement, not an authorized extrapolation[345] or excusal of those "obvious instances of iteration to which lawyers . . . are particularly addicted."[346] Section 303's exhaustiveness,[347] as evidenced by the inclusion of multiple predicates in nearly every subsection, strengthens the case for these maxims' utilization, as "[t]he particularization and detail with which the scope of . . . [a] provision" is "specified" should more powerfully "preclude an extension of any provision by implication."[348]

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against an improvident involuntary petition lies in the independent requirement of Code § 303(h) that it be established that the debtor is generally not paying its debts as they become due."); *cf. In re* Forster, 465 B.R. 97, 99 (Bankr. W.D. Va. 2012) ("Involuntary petitions 'should be scrutinized carefully by the courts so as to avoid injustice.'" (quoting *Huszti*, 451 B.R. at 719)); Sweetwater v. Robison (*In re* Sweetwater), 884 F.2d 1323, 1328 (10th Cir. 1989) ("[T]he Bankruptcy Code is a statutory set of rules and Congress can change those rules.").

[341] BFP v. Resolution Tr. Corp., 511 U.S. 531, 537 (1994); *see also In re* Lanning, 380 B.R. 17, 22 (B.A.P. 10th Cir. 2007) (quoting Chic. v. Envtl. Def. Fund, 511 U.S. 328, 338 (1994)).

[342] *See* Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (referring to the court's duty to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive"); *see, e.g.*, Hibbs v. Winn, 542 U.S. 88, 101 (2004) (asserting that the court must follow "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it"); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); Sprietsma v. Mercury Marine, 537 U.S. 51, 62–63 (2003) (the court's "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent").

[343] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (quoting Woods v. United States, 19 Pet. 342, 363 (1842)).

[344] Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 81 (2011) (Scalia, J., dissenting).

[345] *See* Iselin v. United States, 270 U.S. 245, 251 (1926) (refusing to interpret a statute in a way that includes within the statute's scope something that Congress presumably meant to omit, which would impermissibly transcend the judicial function); *cf.* Lamie v. United States Tr., 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.") (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[346] Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting).

[347] *In re* McMillan, 543 B.R. 808, 815 (Bankr. N.D. Tex. 2016) ("Section 303 of the Bankruptcy Code is structured as a self-contained statute to deal with all aspects of an involuntary bankruptcy.").

[348] Iselin v. United States, 270 U.S. at 250; *see also, e.g.*, Koretoff v. Vilsack, 841 F. Supp. 2d 1, 15 (D.D.C. 2012) (citing *Iselin*, 270 U.S. at 250); *cf.* Logan v. United States, 552 U.S. 23, 35 (2007) (indulging, for the

One more canon reinforces these tenets' authority. Just as the explicit enumeration of certain exceptions bars a court from implying others,[349] the specifics of a subparagraph may not be transposed into the larger paragraph and the broader statute; otherwise, the specific has subsumed the general, defying logic and grammar alike.[350] Undoubtedly, the specific can rightly override the general's import within its precisely delineated radius, but its supremacy perseveres only within that range.[351] Reflecting a particular belief regarding "the judicial function,"[352] these canons essentially prohibit supplying omissions by projection or importation whenever a provision possesses a plain and unambiguous meaning.[353]

Applied to § 303, these precepts support only one interpretation. Because this section requires that an order of relief follow if the conditions in paragraphs (a), (b), and (h) are met, a good-faith filing requirement cannot be fairly imported from § 303(i)(2) into § 303(i) and into § 303 entirely. Such importation may be logical, even shrewd.[354] However, by definition, it augments the statute's painstakingly delineated statutory requirements, as no more than fulfilment of the criteria set forth in § 303's first, second, and eighth paragraphs is required before relief is entered accordance to its bare words. In "hold[ing] that bad faith provides an independent basis for dismissing an involuntary petition,"[355] a prohibited penchant has thus been indulged,

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sake of argument, "the further assumption that courts may repair such a congressional oversight or mistake").

[349] *See, e.g.*, TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); Edmond v. United States, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); Waldron & Berman, *supra* note 303, at 212 n.82 ("An [sic] maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.") (quoting BLACK'S LAW DICTIONARY 403 (6th ed. abridged)).

[350] *See* United States v. Porter, 745 F.3d 1035, 1049 (10th Cir. 2014) (citing SCALIA & GARNER, *supra* note 207, at 184 ("[T]he general/specific canon does not mean that the existence of a contradictory specific provision voids the general provision. Only its application to cases covered by the specific provision is suspended; it continues to govern all cases.")); *see also, e.g., In re* Rivera, 490 B.R. 130, 137 n.7 (B.A.P. 1st Cir. 2013) (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012) ("The general/specific canon is perhaps the most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition of permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.")). Psychology may explain the ease with which many conclude differently: "Subjects' willingness to deduce the particular from the general" is typically "matched only by their willingness to infer the general from the particular." DANIEL KAHHNEMAN, THINKING FAST AND SLOW 174 (2011).

[351] *See, e.g.*, Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) ("[A] specific provision controls over one of more general application."); Landmark Land Co. v. Office of Thrift Supervision, 948 F.2d 910, 912 (5th Cir. 1991) ("[W]e apply the basic principles of statutory construction that '[a] specific provision controls over one of more general application.'").

[352] Haitian Ctrs. Council v. McNary, 969 F.2d 1350, 1359 (2d Cir. 1991) (quoting *Iselin*, 270 U.S. at 250).

[353] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 452, 475–76 (1991) (stating that a plain statement from Congress is the most efficient way to determine the implications of a statute); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) ("[I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation.").

[354] *See In re* WLB-RSK Venture, 296 B.R. 509, 513 (Bankr. C.D. Cal. 2003) ("Since §303(i)(2) seems to imply that an involuntary petition can be dismissed for bad faith . . . §105(a) would seem to authorize the court to dismiss an involuntary based on a finding of bad faith.").

[355] *In re* Forever Green Athletic Fields, Inc., 804 F.3d 328, 330 (3d Cir. 2015).

for no court may rewrite a statute, enlarging its definite domain, to achieve a result consistent with its inlaid purposes.[356] If Congress' language is to be honored, as it should,[357] § 303(a), (b), and (h) must alone determine this threshold issue.[358] Because not one of these three subsections alludes to bad faith, only a statutory redraft allows for another end, an essential truth only legerdemain can bedim.

More than enlargement follows from fealty to a contrary route, however, for to rule differently divests other terms and phrases of their meaning. The failure to mention "bad faith" or "lack of good faith" in § 303 as a predicate for the filing of a petition or the entering of an order, as it is for the tendering of a reorganization plan,[359] would stumble into irrelevance, and the failure to classify "bad faith" as a ground for exemplary damages and for the dismissal of a petition would lose its materiality. Upon dislodging "bad faith" from § 303(i)(2), all these decisions—in fact, all statutory perches where these phrases and standards sit—would forfeit some, if not quite all, their import. As these references suggest, with Congress having written the requisite expression—"filed the petition in bad faith"—into subparagraph (i)(2), and sprinkled those pivotal two syllables (or equivalent) as conditions in other Code locations, nothing but intent foreclosed that same phrase's insertion into § 303's other subparagraphs.[360] Regardless of whether foresight actually underlay that decision, because "a[n] interpretation [which] gives effect to every clause and word of a statute" must be chosen,[361] modern precedent authorizes no other understanding,[362] and "bad faith" can have no proper role in the jurisdictional calculus relevant to the adjudication of an involuntary petition's dismissal.

2. Statutory Architecture: Intimations from Other Sections

Two other statutory features militate against an opposing construction. In direct contrast with §§ 727, 1112(b), 1208, and 1307(c),[363] no overarching provision prescribing the elements for dismissal, such as "cause" or "bad faith," graces § 303.[364]

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[356] *See In re* WLB-RSK Venture, 296 B.R. at 513 (there exists a principle that the court cannot enlarge its authority under the application of §105(a)).

[357] *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted); United States v. Nordic Vill., 503 U.S. 30, 36 (1992) (it is a settled rule that a "statute must, if possible, be construed in such fashion that every word has some operative effect"); Cushman v. Trans Union Corp., 115 F.3d 220, 225 (3d Cir. 1997) ("We strive to avoid a result that would render statutory language superfluous, meaningless, or irrelevant.").

[358] *See In re* Forever Green Athletic Fields, Inc., 804 F.3d at 333.

[359] 11 U.S.C. §§ 1129(a)(3), 1325(a)(3) (2012); *see infra* Part III.B.2.

[360] *See supra* Part III.A.

[361] Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955) (internal quotations omitted)).

[362] *Cf.* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").

[363] 11 U.S.C. §§ 707(a), 1112(b), 1208(c), 1307(c) (discussing the elements for dismissal, such as for cause or bad faith).

[364] *See id.* Instead, its lone reference to these other chapter's sections appears in § 303(a), which requires the target debtor be eligible for relief pursuant to either chapter 7 or chapter 11. *Id.* § 303(a). Logic can explain

As such, even as it places several restraints upon the debtor's behavior,[365] § 303 does not encode the most stringent remedy—dismissal for non-exhaustive "cause"—provided in the Code's every chapter as to § 303's filing entity, the case's one or more petitioning creditors.[366] Furthermore, though every other chapter includes a subsection stating the criteria for dismissal of a case, § 303 does not.[367] These two distinct elements trigger two interpretive conclusions.

First, even if to a lesser degree than the absence of bad faith in § 303(b) and (h), discounting these obvious differences by importing "bad faith" from §§ 707, 1112, 1208, and 1307[368] into § 303 not only treats these clauses as superfluous, but also ignores its express incorporation of several *other* subsections' requirements in its first two paragraphs.[369] By a sleight of hand, the explicit existence of other unreferenced sections has been rendered extraneous.[370] Whatever its justifications as a matter of policy, such an interpretive maneuver violates one of those "cardinal rule[s] of statutory construction"[371] and cannot be squared with the judicial obligation to interpret the Code "clearly" and "predictably."[372] The reading of an exception to the mandatory duty to compel relief established by § 303(h) once the prerequisites of paragraphs (b) and (h) have been clearly met, this tactic lacks validity in the face of the modern era's stricter textualism.[373]

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this omission, as the Code's other dismissal provisions establish the relevant standard for denying a discharge, the Code's greatest relief, to the filing party, i.e. the debtor.

[365] *See supra* Part I.B.2.

[366] 11 U.S.C. § 303 (including no remedy for dismissal for non-exhaustive "cause").

[367] *See id.* (containing no subsection describing the criteria for a case's dismissal).

[368] 11 U.S.C. §§ 707(a), 930(a), 1112(b), 1208(c), 1307(c) (highlighting language of bad faith and for cause); *see In re* Murray, 543 B.R. 484, 489 & n.26 (Bankr. S.D.N.Y. 2016) (discussing various provisions in the Code enabling a party to move to dismiss a case filed under its particular chapter "for cause").

[369] 11 U.S.C. § 303(a), (b).

[370] *See, e.g.*, Babbit v. Sweet Home Chapter Cmtys. for Greater Or., 515 U.S. 687, 698 (1995); Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994); United States v. Menasche, 348 U.S. 528, 538–39 (1955) (expressing the duty to give effect to every word in a statute).

[371] Williams v. Taylor, 529 U.S. 362, 404 (2000); *see also, e.g.*, New Process Steel, L.P. v. N.L.R.B. 560 U.S. 674, 680 (2010) (favoring an interpretation that "[f]irst, and most fundamentally" was "the only way to harmonize and give meaningful effect to all of the provisions" in a single section); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); Mkt. Co. v. Hoffmann, 101 U.S. 112, 116 (1879) ("[E]very part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.").

[372] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012); *see also, e.g.*, Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC, 686 F.3d 372, 375–76 (7th Cir. 2012) (citing *RadLAX Gateway Hotel, LLC*, 566 U.S. at 649, as standing for the proposition "that arguments based on views about the purpose behind the Code, and wise public policy, cannot be used to supersede the Code's provisions"); *In re* Wilkinson, 507 B.R. 742, 751 n.44 (Bankr. D. Kan. 2014) (citing RadLAX Gateway Hotel, LLC, 566 U.S. at 649); Mouton v. Toyota Motors Credit Corp. (*In re* Mouton), 479 B.R. 55, 66 (Bankr. E.D. Ark. 2012) (citing both RadLAX Gateway Hotel, LLC, 566 U.S. at 649, and *Sunbeam*, 686 F.3d at 375–76).

[373] *See* Peterson v. Somers Dublin Ltd., 729 F.3d 741, 749 (7th Cir. 2013) (quoting *RadLAX*, and declining to look beyond the plain statutory text of the safe harbor provision, encoded in § 546(e), by reading a fraud exception into the Code); *see also, e.g., In re* MCK Millennium Ctr. Parking, LLC, 532 B.R. 716, 730 (Bankr. N.D. Ill. 2015) (contrasting *Peterson*, 729 F.3d at 749, with decisions that "have held that the provision was written expansively").

Second, the role that the good faith doctrine plays in these other sections undercuts any case for its expansion into § 303. Under § 109, little is mandatory for a debtor to obtain an order for relief in a voluntary chapter 7 or 11 case.[374] In actuality, this order follows automatically, with the Code having "virtually no eligibility standards regulating who is able to seek and obtain relief."[375] So as to curtail improper filings, courts crafted the good faith standard, necessarily applicable only after an order for relief has already been entered; accordingly, the "bad faith" cudgel chastens an entity after it has experienced access to the Code's droits. Contrarily, § 303 contains "detailed rules governing the circumstances under which a petition may be granted" apart from and in addition to embracing the eligibility criteria specified in § 109 for the target debtor.[376] Significantly, moreover, a debtor's choice to contest the filing triggers an adversary confrontation, in which the creditor bears a high burden of proof.[377] As such, the invocation of the good faith standard so as to dismiss an involuntary petition prior to the entering of an order for relief necessarily ignores the order for this issue's fact-intensive adjudication explicitly set in the actual sections in which this right is implanted. There, as a matter of unambiguous prose, the order for relief comes first, the doctrine of "bad faith" weaponized only post-petition.[378] Thus, nothing but a preference for debtors over creditors, inconsistent with the Code's more equitable inclinations and § 303's enacted text and spare background,[379] can justify the use of "bad faith" to achieve dismissal before that pivotal event, essential wherever else "good faith" is implied.

Such practice simultaneously ignores one more telling fact: in involuntary cases, creditors, unlike debtors, must pass a number of hurdles prior to such an order's docketing.[380] Accordingly, the underlying justification for the good faith doctrine—to ensure that a discharge of all nonexempt debt, the Code's great privilege, is given to only those persons who have filed a petition with a valid purpose, persons who otherwise satisfy the minimal eligibility criteria for obtaining an order for relief in a

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[374] *See* 11 U.S.C. § 109 (showing the ease by which a debtor can obtain an order of relief in a voluntary chapter 7 or 11 case); *see also, e.g., In re* Shea & Gould, 214 B.R. 739, 748 (Bankr. S.D.N.Y. 1997) ("An order for relief in a voluntary bankruptcy case is entered automatically . . . .").

[375] Lawrence Ponoroff, *The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings*, 71 NEB. L. REV. 209, 268 (1992) [hereinafter Ponoroff, *Limits*].

[376] *See id.*

[377] 11 U.S.C. § 303(d) (showing that a debtor may file an answer to a petition, even though the debtor did not join in the petition); FED. R. BANKR. P. 1011(b)–(c), 1013, 1018, 7012(a) (2016).

[378] FED. R. BANKR. P. 1013 (emphasizing that the order for relief comes first in an involuntary case).

[379] *See, e.g., In re* Letourneau, 422 B.R. 132, 138 (Bankr. N.D. Ill. 2010) ("An involuntary bankruptcy is a remedy for creditors, not debtors. Its purpose is 'to protect the threatened depletion of assets or to prevent the unequal treatment of similarly situate[ed] creditors.'" (quoting *In re* Manhattan Indus., Inc., 224 B.R. 195, 200 (Bankr. M.D. Fla. 1997))); *see also In re* Macke Int'l Trade, Inc., 370 B.R. 236, 245 (9th Cir. BAP 2007) ("[T]he Bankruptcy Code is not exclusively a remedy for debtors."); *In re* Tichy Elec. Co., Inc., 332 B.R. 364, 372 (Bankr. N.D. Iowa 2005) ("The goal or purpose of an involuntary filing should be the equal distribution of assets among creditors." (citing *In re* Smith, 243 B.R. 169, 174 (Bankr. N.D. Ga. 1999))).

[380] *See* discussion *supra* Part I.B.2 (describing the multiple protections available to a debtor, which a creditor must overcome to have a successful action against such individual).

chapter 7 or 11 case—is either wholly absent or severely weakened.[381] The discharge is not sought by the target debtor in an involuntary proceeding, nor is his, her, or its benefit this principal concern of the section. In fact, the opposite is true.[382] Unlike voluntary debtors, the petitioning creditors in involuntary proceedings must master a detailed statutory schematic prior to obtaining an order for relief.[383] As already noted, the Code's exhaustiveness in this regard compels exclusivity. Less frequently realized, however, is that this same system forecloses the automatic and preliminary granting of the Code's sundry protections to the petitioning party, the creditor (one or more), while uniquely empowering the target debtor.[384] By artful and deliberate conception, unlike the petitioner in a voluntary case, any petitioner in an involuntary one always lacks access to any of the Code's privileges until he, she, or it has satisfied an arduous array of requirements. In addition to supplementing § 303's plain text, the transfiguration of bad faith into a basis for an involuntary petition's dismissal therefore mangles its roots, refashioning this equitable tool into a sword against parties whose procedural posture, i.e. creditors statutorily subject to an exhaustive eligibility system, differs from the projected targets of the original doctrine, i.e. dishonest debtors. Put another way, by their wholesale migration of "bad faith" from other sections, courts ignore this doctrine's principal rationale.[385]

For these reasons, when the nature of the Code's good-faith dismissal provisions is closely examined, this ground's incorporation into § 303 becomes increasingly questionable. For the best of motives, procedural and denotational distinctions have been disregarded. While a bad faith criterion may be a wise addition, § 303 does not contain one, and its language and structure is incongruous with §§ 707, 1112, 1208, and 1307.

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[381] *See* Ponoroff, *Limits, supra* note 375, at 269 (discussing the emerging and changing definition of bad faith by the bankruptcy courts and the need for such a definition); *see also* Linda J. Rusch, *Bankruptcy as a Revolutionary Concept: Good Faith Filing and a Theory of Obligation*, 57 MONT. L. REV. 49, 95 (1996) (stating that "[t]he search for [the] worthy debtor is at the heart of the good faith inquiry").

[382] *See* Ponoroff, *Limits, supra* note 375, at 255 (stating that "[t]he goal is to increase the wealth of the creditor body . . . . It is not as if nothing else matters necessarily, it is just that those other things are not the concern of the bankruptcy law."). *But see* Godshall & Gilhuly, *supra* note 5, at 1315 (describing the difficulties a creditor may face in obtaining a judgment against a debtor, thus putting the creditor in a "defensive role of justifying the validity of the involuntary petition").

[383] *See* Ponoroff, *Limits, supra* note 375, at 268 (stating that "unlike voluntary filings . . . section 303 contains detailed rules governing the circumstances under which a petition may be granted").

[384] *See supra* Part III.B.1 (explaining how the exhaustive text and structure of § 303 actually limits the statute's application, thus protecting the debtor and making it more difficult for the creditor to have a successful cause of action).

[385] *See* Rusch, *supra* note 381, at 55–56. Generally, these tests define "the lack of good faith" as a "cause," often relying on the non-exhaustive and non-exclusive meaning of the preposition "including." The former term, however, is not synonymous with the term actually used in § 303(i)(2), "bad faith," either lexicographically or legally. *Id.* at 56. Accordingly, reliance on these tests always requires an interpretive leap, the conflating of two distinct, if closely related phrases with presumptively different legal import.

3. Specific Context: History's Limited Guidance

Originally adopted so as to make it easier for creditors to commence involuntary cases,[386] § 303 has been amended twice with a verifiable end in mind.[387] True, legislative history cannot override the starkest text.[388] Still, "unambiguous, clear, uncontradicted, and specific legislative history" can sometimes "serve as a reliable interpretive guide."[389] While little can be decisively gleaned from § 303's opaque past, hints which confirm the plain meaning can be detected.[390]

In 1984, "[r]ecognizing that involuntary bankruptcy is a particularly severe remedy, Congress limited the circumstances in which creditors may force a debtor into such a proceeding" by tinkering with § 303(b) and (h).[391] In its first incarnation, § 303(b)(1) allowed a case to be commenced "by three or more entities, each of which is . . . a holder of a claim against such person that is not contingent as to liability;" mirroring § 303(b)(1), § 303(h)(1) required relief be ordered "if . . . the debtor is generally not paying such debtor's debts as such debts become due."[392] In 1984, the phrase "the subject of a bona fide dispute as to liability or amount" was explicitly introduced into both subsections.[393] Afterward, a petitioning creditor lacked standing to file a petition under § 303(b) if his, her, or its claim was "the subject of a bona fide dispute," and a creditor could defeat a petition under § 303(h)(1) by purging from his

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[386] *See* H.R. REP. NO. 95-595(1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 321–24 (Alan M. Resnick and Eugene M. Wypyski eds., vol. 13 1979) (explaining the substantive meaning behind the procedural changes of § 303).

[387] *Cf.* United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010) ("[W]e are not required to interpret a statute 'in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose.'" (quoting Miller v. Amusement Enters., Inc., 394 F.2d 342, 350 (5th Cir. 1968))).

[388] *See* Carcieri v. Salazar, 555 U.S. 379, 388 (2009) (looking first to the ordinary meaning of the word "now" found within the dictionary and using this meaning to determine the secondary factor of legislative intent); *see also, e.g.*, Koenig Sporting Goods, Inc. v. Morse Rd. Co. (*In re* Koenig Sporting Goods), 203 F.3d 986, 988 (6th Cir. 2000) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper.").

[389] McDow v. Smith, 295 B.R. 69, 78 n.18 (Bankr. E.D. Va., 2003); *cf.* Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write on a clean slate . . . [t]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); United States v. Rodriguez, 460 F. Supp. 2d 902, 910 (S.D. Ind. 2006) ("The standard for favoring legislative intent over the plain meaning of a statute is a high one: the plainer the statutory language, the more explicit, convincing and reliable the contrary legislative history must be to persuade a court to follow the indications in the legislative history.") (internal quotation marks omitted).

[390] *See* Torres v. Chase Bank USA, N.A. (*In re* Torres), 367 B.R. 478, 484–85 (Bankr. S.D.N.Y. 2007) (citing to legislative history for support despite the fact that the statute's plain terms "obviate consideration of its legislative history").

[391] *See* Credit Union Liquidity Serv., L.L.C. v. Green Hills Dev. Co., L.L.C. (*In re* Green Hills Dev. Co., L.L.C.), 741 F.3d 651, 655 (5th Cir. 2014).

[392] *See* BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, PUB. L. NO. 98-353, § 426(a), 98 Stat. 333, 369 (1984); *see also* Ponoroff, *Involuntary, supra* note 222, at 333–34 (discussing the disqualifications of a bona fide dispute under the 1984 amendments).

[393] *See* BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, PUB. L. NO. 98-353 at 369 (1984).

ledger any such debts, i.e. obligations "subject of a bona fide dispute."[394] Within a sparse legislative account,[395] only the statements of these emendations' sponsor, Senator Maxwell Sieben Baucus, allude to their intended purpose: "I believe this amendment . . . is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion," directly "correct[ing] a judicial misinterpretation of existing law and congressional intent" that had led to the granting of involuntary relief "even when the debtor's reasons for not paying is a legitimate and good-faith dispute over his or her liability."[396] "For the most part, section 303 has proved to be both workable and fair in practice," the Missoulian waxed, but the "existing inequities" prompted by this misuse cried for his "simpl[e]" rectification.[397]

In 2005, § 303(b)(1) and (h)(1) again underwent amendment. Now, the phrase inputted in 1984—"subject to a bona fide dispute"—was augmented by the addition of the phrase "as to liability or amount."[398] Echoing his prior stance, Montana's senior senator explained this revision's purpose in words reminiscent of his earlier peroration:

> [A]n involuntary bankruptcy action should not be employed by litigants seeking to gain more leverage than they would have if they disputed contract performance in the proper judicial forum. The respondent in a bona fide dispute over liability for a claim or the amount thereof should not be disadvantaged by the stigma and expense of an involuntary bankruptcy proceeding.[399]

Based on these few statements, in order to protect the target debtor from devastation induced by colluding creditors eager to gain an undue advantage, the claimed policy justification for the bad-faith standard's invocation, Congress tinkered with § 303(b) and (h) on two occasions by adding two different phrases to different subsections and keeping § 303 otherwise unbothered. But, having repeatedly chosen to make § 303(b)

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[394] 11 U.S.C. § 303(b)(1), (h)(1) (2012).

[395] *See* Block-Lieb, *supra* note 60, at 818 n.75; *cf. In re* Henry S. Miller Commercial, LLC, 418 B.R. 912, 923 (Bankr. N.D. Tex. 2009) (concluding that, while "the [2005] amendment to Section 303(b)(1) has minimal relevance in the context of a final, unstayed judgment[,] . . . the amendment cannot be ignored").

[396] 130 CONG. REC. S7618 (daily ed. June 19, 1984) (statement of Sen. Baucus); *see also* Ponoroff, *Involuntary, supra* note 222, at 334–35 (summarizing and explicating the import of the senator's remarks); Block-Lieb, *supra* note 60, at 853 (same).

[397] 130 CONG. REC. S7618 (daily ed. July 26, 2000).

[398] BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, PUB. L. NO. 109-8, § 1234(a), 119 Stat. 23, 204 (2005).

[399] 148 CONG. REC. S11,728 (daily ed. Nov. 20, 2002) (statement of Sen. Baucus), *cited in In re* Marciano, 446 B.R. 407, 423–24 (Bankr. C.D. Cal. 2010). Suggestively, other congressional actors argued for the extension of the "bona fide" standard in § 303 on these same grounds in later years: as codified in 1984, and as intended thereafter, "[t]he purpose of the bona fide dispute standard is to prevent . . . overcrowded bankruptcy courts from being burdened with ordinary contract performance disputes filed as involuntary cases by forum-shopping litigants," its codification essential for assuaging "the tremendous pressure to settle . . . disputed matter[s] on plaintiffs' terms, regardless of merits," placed on "compan[ies] pushed into involuntary bankruptcy." 149 CONG. REC. H7305 (daily ed. Mar. 21, 2003) (statement of Rep. Gutierrez).

and (h) alike with each such endeavor, Congress never appended a good faith filing requirement to either subsection or affixed a subsection like § 707 into § 303.

By virtue of a principle often tied to the superfluity canon,[400] two implications follow from this account.[401] First, so as to ensure § 303(b) and (h) achieved specific and narrow objectives, these paragraphs were twice explicitly amended. Due to these changes, the grounds for the dismissal of an involuntary petition were twice augmented, and more predicate conditions were added so as to permit a debtor to attack a creditor's standing, both defeating the petition and winning greater damages. Neither time, however, was a creditor's bad faith, a requirement designed to serve the same ends cited by Senator Baucus in 1984 and 2005 to explain Congress' amendments to § 303, added to the eligibility and standing criteria enumerated in § 303(b) and (h). Second, in both those years, § 303's new drafters made certain to add the identical language to both subsections. They did not pin it onto one and imply it into the other, awaiting judicial construction to perform this feat; silence held no discernible appeal when § 303's jurisdictional measures evoked concern. Rather, they inscribed the relevant changes into each paragraphs' explicit text. As this history instructs, so as to strengthen the debtor's hands, § 303 endured two specific changes in its text and structure in its first twenty-five years, Congress neither shy nor subtle in its fiddling in the interest of a debtor's defense.

Detaching bad faith from § 303(i)(2) discounts this admittedly slim past. By so doing, the courts practically amend two statutory subsections by implication that Congress changed twice expressly to include a single shared standard. Rarely dispositive in and of itself,[402] statutory silence in the face of such a consistent pattern cannot be ignored,[403] and the willingness to amend § 303 and to repeat a shared requirement in this section's every relevant paragraph is wholly inconsistent with the continued mustering of bad faith as a basis for more than damages. What Congress has not twice done in the hopes of securing a well-known end, bankruptcy courts have done by using § 105 to unfasten "bad faith" from § 303(i)(2) or transport "bad faith"

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[400] *See* Stone v. INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."), *quoted in* United States v. Quality Stores, Inc., 134 S. Ct. 1395, 1401 (2014).

[401] Caveats are in order. *See, e.g.*, United States v. Kouevi, 698 F.3d 126, 133 (3d Cir. 2012) ("Legislative history is only an appropriate aid to statutory interpretation when the disputed statute is ambiguous.") (internal citations omitted); *see also* Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) ("Decisions not to enact proposed legislation are not conclusive on the meaning of the text actually enacted.").

[402] *See* Burns v. United States, 501 U.S. 129, 136 (1991) ("As one court has aptly put it, '[n]ot every silence is pregnant.'") (quoting Ill. Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).

[403] *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 286–87 (2003) (in the face of congressional silence on civil rights statutes, "the Court has drawn the inference that it intended ordinary rules to apply.") (internal citations omitted); United States v. Bestfoods, 524 U.S. 51, 62 (1998) (despite contrary literature and with a supporting common law backdrop, "[c]ongressional silence is audible") (internal citations omitted); Elkins v. Moreno, 435 U.S. 647, 666 (1978) (Congressional restrictions on only some nonimmigrant classes indicates congressional "silence is therefore, pregnant," allowing the Court to draw inferences regarding its intent); *cf.* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

from § 707 and its kin. Although it pales in importance to text and structure in modern jurisprudence,[404] § 303's paltry history further evinces this ambition's tenuous foundation.[405]

4. Broader Context: Statutorily Relevant Asymmetries

Apart from § 303's language and specific context, the inevitable asymmetry between a creditor's purview and a debtor's knowledge, a recognition underlaying § 303,[406] raises final questions about this juridical predilection's justifiability.

In the decades prior to the Code's enactment, creditors had been repeatedly hamstrung by the evidentiary difficulties to be surmounted in proving a requisite "act of bankruptcy" under the Bankruptcy Act and had rarely made use of its involuntary bankruptcy provisions.[407] Hoping to improve creditors' anemic return, the Code "abolishe[d] the concept of acts of bankruptcy;" thereafter, "[t]he only basis for an involuntary case will be the inability of the debtor to meet its debts."[408] Ineluctably, two distinct purposes animate the Code in its entirety: "a debtor's interest in . . . restructuring its debts" and winning a fresh start, and "the creditors' interest in maximizing the value of the bankruptcy estate."[409] In concocting § 303, however, its drafters placed their emphasis upon the latter,[410] its central policy, "to protect the threatened depletion of assets or to prevent the unequal treatment of similarly situat[ed] creditors."[411] In the years since 1898, "the smallness of distribution in business bankruptcies" continued to be blamed upon "the delay in the institution of

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[404] *See supra* Part II.B.

[405] *See* Ponoroff, *Involuntary, supra* note 222, at 345 (By one scholar's dated account, the 1984 amendments did effectively discourage involuntary filings, through "complicating the petitioners' proof and adding to the statutory bases upon which a debtor might controvert and defend a petition.").

[406] *See supra* Part I.A.

[407] COMM'N REPORT, *supra* note 67, at 98.

[408] H.R. REP. No. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 323 (Alan N. Resnick & Eugene M. Wypyski eds. vol. 13 1979).

[409] *See In re* Better Care, Ltd., 97 B.R. 405, 411 (Bankr. N.D. Ill. 1989); *see also In re* Cent. Hobron Assocs., 41 B.R. 444, 451 (D. Haw. 1984) ("Creditors' interests are generally measured by whether the creditors can get adequate relief elsewhere."); David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1341, 1377 (1998) ("The Code's most important effect was to dramatically streamline bankruptcy's reorganization option," which implicates the interests of both creditors and debtors).

[410] *See In re* Better Care, Ltd., 97 B.R. at 411 ("[A]n involuntary bankruptcy can be expected to be directed primarily at the second enumerated purpose, the orderly ranking of creditor claims, without much concern for the first [, a debtor's fresh start]."); *see also, e.g., In re* Tichy Elec. Co. Inc., 332 B.R. 364, 372 (Bankr. N.D. Iowa 2005) ("The goal or purpose of an involuntary filing should be the equal distribution of assets among creditors.") (internal citations omitted).

[411] *In re* Manhattan Indus., Inc., 224 B.R 195, 200 (Bankr. M.D. Fla. 1997); *accord In re* Letourneau, 422 B.R. 132, 138 (Bankr. N.D. Ill. 2010) ("An involuntary bankruptcy is a remedy for creditors, not debtors."); *see also, e.g., In re* Hentges, 351 B.R. 758, 772 (Bankr. N.D. Okla. 2006) ("Creditors are justified in filing an involuntary bankruptcy against a debtor where exclusive bankruptcy powers and remedies may be usefully invoked to recover transferred assets, to 'insur[e] an orderly ranking of creditors' claims' and 'to protect against other creditors obtaining a disproportionate share of [a] debtor's assets.'" (quoting *In re* Better Care, Ltd., 97 B.R. at 411)).

proceedings for liquidation until assets are largely depleted."[412] Only with a more relaxed, but still stringent, involuntary system, manufactured to be an "expedit[ed] process,"[413] could a debtor's estate be "protected from the risk of depletion and determination," any "further diminution in value during the interim between the filing of the petition and the ultimate resolution of the issues raised by the petition and answer thereto" thwarted.[414]

A certain practical realization prompted this conscious choice to favor one purpose rather than another as to a whole class of proceedings in an express statutory framework. As the debtor habitually possesses more intimate knowledge of his, her, or its own financial condition, most especially its ledger of assets and debts, petitioning creditors often labor under a distinct informational disadvantage.[415] Today, as in 1978 and 1898, they always bear the greater costs and risks associated with seeking bankruptcy relief due to such difficulties of proof.[416] Of potentially questionable accuracy, this conclusion carries the patina of a congressionally-ascertained verity.[417]

Cognizant of this fact, yet still scrambling to minimize abuse, a balance was carefully struck by the Code's drafters in 1978 and refashioned in 1984 and 2005 at others' behest. Thus, § 303 forces creditors to satisfy comprehensive eligibility and standing requirements, and it leaves them liable to damages not otherwise explicitly allowed by the Code.[418] Concurrently, via various subsections, § 303 affords the target debtor with a plethora of protections,[419] including a grant of relative freedom

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[412] COMM'N REPORT, *supra* note 67, at 98; *see* McCoid, *Discharge*, *supra* note 20, at 213, 215, 217 ("The practical problems of delay and creditor access to information, perhaps coupled with the difficulties of valuation bases, provide further justification for allowing proof of such circumstances to trigger involuntary bankruptcy.").

[413] *See In re* Marciano, 446 B.R. 407, 419 (Bankr. C.D. Cal. 2010) (The inability to begin involuntary proceedings quickly interfered with the central purpose of federal bankruptcy legislation – "equitable treatment of creditors.").

[414] *See* COMM'N REPORT, *supra* note 67, at 98; *see also* Benjamin Weintraub & Alan N. Resnick, *Involuntary Petitions Under the New Bankruptcy Code*, 97 BANKING L.J. 292, 295 (1980) ("The purpose of filing an involuntary petition for liquidation is to achieve an equal distribution of the debtor's property among each class of creditors without preferential treatment. Also, an involuntary petition should result in the maximization of the debtor's estate by the accumulation of property."); *cf.* Treiman, *supra* note 16, at 214–15 (bemoaning that the abolishment of "acts of bankruptcy," which "tends to postpone involuntary bankruptcy adjudication," was "impractical at present" due to the law's "strong pro-debtor attitude").

[415] *See* Block-Lieb, *supra* note 60, at 837–39 (a petitioning creditor must be able to prove that a debtor is not paying its debts at the due date. This proof requires access to various pieces of information, which is often not readily accessible to creditors, and thus puts them at an informational disadvantage in the commencement of the suit).

[416] *See* Ponoroff, *Involuntary, supra* note 222, at 351–52 (the benefits of the involuntary bankruptcy remedy are largely negated due to the complicated process creditors must engage in to provide proof for the action, resulting in increased risk and cost); Weintraub & Resnick, *supra* note 414, at 309–11 (the inaccessibility to evidence such as debtor's books and records – which typically require a court order for access — frustrate the creditor's ability to successfully allege and prove an act of bankruptcy).

[417] *See, e.g.*, COMM'N REPORT, *supra* note 67, at 98.

[418] *See* 11 U.S.C. § 303(b)–(c) (2012).

[419] *See generally supra* Part I.B.2 (providing the prerogatives, statutory privileges, and protections afforded to debtors by the Code).

during the gap-period,[420] a § 303(e) bond requirement,[421] and a right to costs and fees as a matter of course and punitive damages for a petition filed in bad faith.[422] Unmistakably focused on peculiar hobgoblins, these sundry sections "reflect[] an intent to protect an alleged debtor from actual petitioning creditors."[423] For example, the bond requirement, Congress expected, "will discourage frivolous petitions as well as more dangerous spiteful petitions."[424] This extraordinary bequest lays bare § 303's equipoised character: having empowered creditors to coerce a debtor into bankruptcy, this section both subjects them to exhaustive standing requirements and bestows upon offended debtors prerogatives not conferred by the Code's other sections.[425] So compel § 303's strictures, products not of an artist's first sketch, but of an architect's final vision.

Using little more than equity as a cry, the rise of good faith threatens the efficient functionality of this intricate design. As the aforementioned historical record attests, certain presumed truths animated § 303's eventual contours, including creditors' often incomplete knowledge of debtors' true finances and their susceptibility to dangerous delay in initiating involuntary proceedings in the pre-Code era. Attempting to allay these problems, § 303 departed from then extant law's byzantine desiderata and streamlined the process for the filing of the necessary petition. As a consequence of this deliberate decision, the voluntary system erected by the Code embodies a balance between the Code's paramount goals, but the involuntary one favors a prompt and efficient pro rata distribution of a debtor's estate.[426] By definition capacious and indefinite, the concept of bad faith complicates, not simplifies, adjudication of a

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[420] 11 U.S.C. § 303(f) (providing that during the gap period, "any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced"); Jenkins v. Hodes (*In re* Hodes), 402 F.3d 1005, 1009 (10th Cir. 2005) (demonstrating a debtor's ability to continue with construction of his home during the "gap period" between the filing of the involuntary petition and the entry of an order for relief, despite the debtors' attempts to stop and restrict the construction); Hamilton v. Lumsden (*In re* Geothermal Res. Int'l), 93 F.3d 648, 651 n.1 (9th Cir. 1996) (defining the "gap period" and presenting the debtor's ability to control his property and assets during such period).

[421] 11 U.S.C. § 303(e) (codifying the requirement to "file a bond to indemnify the debtor for such amounts as the court may later allow"); *In re* Funnel Sci. Internet Mktg. LLC, 551 B.R. 262, 272–73 (Bankr. E.D. Tex. 2016) (compiling the basic requirements of a bond under 11 U.S.C. § 303(e)); *In re* Antar, No. 12-13288-AJC, 2012 WL 6200366, at *2 (Bankr. S.D. Fla. Dec. 12, 2012) (highlighting that the Code provides that "the Court 'may' require the petitioning creditors to post a bond upon the Court's finding of 'cause'").

[422] 11 U.S.C. § 303(i) (positing the potential costs and punitive damages that a court may grant in favor of the debtor).

[423] *In re* McMillan, 543 B.R. 808, 818 (Bankr. N.D. Tex. 2016).

[424] H.R. REP. No. 95-595 (1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 323 (Alan N. Resnick & Eugene M. Wypyski eds., vol. 13 1979).

[425] *See* Shachmurove, *Claims*, *supra* note 76, at 547–49 (summarizing a chapter 11 debtor's array of statutory prerogatives). Of course, if an order for relief is ever entered, the debtor will soon also gain access to the full range of rights bequeathed by the Code. *Id.*

[426] *See, e.g., In re* Quinto & Wilks, P.C., 531 B.R. 594, 609 (Bankr. E.D. Va. 2015) (presenting an example of an involuntary petition filed without evidence of any spite, ill will, or maliciousness in its filing); *In re* Meltzer, 516 B.R. 504, 514 (Bankr. N.D. Ill. 2014) (quoting *In re* Letourneau, 422 B.R. 132, 138 (Bankr. N.D. Ill. 2010)) ("The purpose of an involuntary bankruptcy case is 'to protect [against] the threatened depletion of assets or to prevent the unequal treatment of similarly situated creditors.'").

debtor's bankruptcy. The difficulties once involved in proving an act of bankruptcy under the Act have now been replaced with the complications implicated in addressing every possible permutation of bad faith, even as the target debtor's assets dissipate. Certainly, as a statutory matter, a bad faith filing has always exposed a creditor to liability for damages under § 303(i)(2), but the near certainty of an imminent trial on such a ground prior to any order of relief ensures the eventual path will be not be promptly crossed, a result contrary to § 303's fixed purpose. Due to an old doctrine's transfusion, therefore, creditors now find themselves reliant on a process more cumbersome than first intended, while the target debtor retains numerous powers prior to the ordering of any relief. In this regard, it is no insignificant happenstance that the Committee's concerns about the unsatisfactory dilatoriness and miserly ends of such cases[427] have reechoed in recent years.[428] As good faith has spread beyond the confines of § 303(i)(2), § 303's original statutory balance, enacted to mollify these ills, no longer endures, unstruck by juridical export,[429] as the debtor once more assumes the position reserved for bankruptcy's more favored entity due to an unratified policy.[430]

5. One Final Objection: Overemphasis on Rule 9011

Though rarely seen, one more flaw in the pro-bad faith approach traces to this standard's occasional derivation from Rule 9011(b)(1).[431] Most obviously, this reliance ignores the distinction between "bad faith" and "improper purpose," Rule 9011's actual criterion.[432] More fundamentally, such importation arguably violates

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[427] *See* COMM'N REPORT, *supra* note 67, at 98 (discussing the delay in the proceedings of a liquidation); *see also supra* Part I.A (reporting the history of 11 U.S.C. § 303 and demonstrating the problems encountered as a result of its "wrought framework").

[428] *See* Godshall & Gilhuly, *supra* note 5, at 1336–37 (stressing the shocking nature of how alleged debtors may conduct their affairs after the filing of an involuntary petition).

[429] *See, e.g.*, Block-Lieb, *supra* note 60, at 827–28 ("Congress sought to balance competing interests by repealing the 'litigation-producing' acts of bankruptcy as the grounds for initiating an involuntary case."); *see also* Ponoroff, *Involuntary, supra* note 222, at 336–37 (explaining the expansion of creditors' access to bankruptcy relief).

[430] *See, e.g.*, In the Matter of Covey (*In re* Covey), 650 F.2d 877, 882–83 (7th Cir. 1981) ("Creditors are entitled to a prompt resolution of the 'generally paying debts' question in order to prevent wasting of assets and in order to ensure that they receive all of their rights to the debtor's property afforded by the Code."). One scholar has even recommended that the standard for the commencement of an involuntary case should be expanded. *See* Block-Lieb, *supra* note 60, at 854 (declaring that the expansion of the standard is an "easy solution" to creditors' problems of proof).

[431] FED. R. BANKR. P. 9011(b)(1) (2010) (rejecting any representations made to the court for any improper purpose); Thomas M. Byrne, *Sanctions for Wrongful Bankruptcy Litigation*, 62 AM. BANKR. L.J. 109, 109 (1988) (explaining the purpose of the amended rule in eliminating ambiguities).

[432] *See* Byrne, *supra* note 431, at 115 ("A document's purpose, however, is evaluated objectively; a finding of subjective bad faith is not a prerequisite to a finding of an improper purpose.").

the Rules Enabling Act ("REA"),[433] which bars a rule's text or construction[434] from "abridg[ing], enlarg[ing], or modify[ing] any substantive right."[435] Already, § 303(a), (b), and (h) compel creditors to satisfy certain standards before an order for relief "must" be entered.[436] If one treats these requirements as exhaustive, then, the insertion of a self-evidently non-textual good faith requirement necessarily abridges a creditor's right to commence an involuntary case against the target debtor by forcing to satisfy a non-statutory obligation. So viewed, bad faith's use violates the REA, as a creditor's substantive right to obtain an order of relief against a certain debtor upon satisfaction of § 303's prerequisites has been curtailed via a rule's implicit introduction. This doctrine's fuzziness,[437] in turn, further threatens these same statutory prerogatives, for it invites courts to exercise discretion inimical to the planned scheme enacted and approved by Congress in 1978, 1984, and 2005.[438] In this sense, the good faith basis for dismissal can be perceived as akin to the effective modification of a plain statutory schematic by means of introducing a rule-based standard. Regardless of § 105's uncertain parameters,[439] such a conclusion would dictate the abandonment of this construction.[440]

C. Two Proposed Fixes: Amendment and Interpretation

Putting aside the weak case for its expansion within § 303's settled framework, the bad faith doctrine boasts a lengthy history as one of bankruptcy law's most cherished safety valves. Long before its codification, bankruptcy law assigned an honored place to this equitable concept; after all, a record marred by bad faith conduct could not but disqualify a person from membership in "the class of 'honest but

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[433] 28 U.S.C. § 2075 (2012) ("Such rules shall not abridge, enlarge, or modify any substantive right."); *see* Smart World Techs., LLC v. Juno Online Servs. (*In re* Smart World Techs. LLC), 423 F.3d 166, 181 (2d Cir. 2005) (demonstrating a lack of a conflict between a rule and statutory provision, and accordingly, applying the rule); *see also* Hicks, Muse & Co., Inc. v. Brandt (*In re* Healthco Int'l, Inc.), 136 F.3d 45, 50 n.4 (1st Cir. 1998) (applying 28 U.S.C. § 2075 in a case in which a bankruptcy court is purportedly empowered to approve settlements pursuant to Bankruptcy Rule 9019).

[434] *See* Shachmurove, *Claims*, *supra* note 76, at 540 ("[T]his section bars any construction of a rule's text that, either in theory or in practice, endangers a party's procedural or substantive bankruptcy rights, whether conferred by the Code or the Rules.").

[435] 28 U.S.C. § 2075.

[436] *See supra* Part I.B (highlighting the standing requirements and the Code's standard for an order for relief in sections 303(b) and (h)).

[437] *See In re* Victoria Ltd. P'ship, 187 B.R. 54, 62 (Bankr. D. Mass. 1995) (tracing the history of the good faith doctrine and concluding that it "is an amorphous gestalt, devoid of reasoning and impenetrable to understanding").

[438] *See* Ponoroff, *Limits, supra* note 375, at 282 n.263 ("The problem is that as the number of tests or definitions of bad faith multiplies, the exercise of judicial discretion becomes increasingly less predictable.").

[439] *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 198 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *see also, e.g.*, In the Matter of Chicago, Milwaukee, St. Paul and Pac. R.R. Co. (*In re* Chicago), M. S. P. & P.R.R., 791 F.2d 524, 528 (7th Cir. 1986) ("The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.").

[440] *See* Shachmurove, *Claims, supra* note 76, at 538–41.

unfortunate debtor[s]' that the bankruptcy laws were enacted to protect."[441] The fact that the side esteeming its inclusion overlooks certain fragilities should not obscure its utility, especially since creditors are as prone as debtors to engage in the kind of misbehavior that it seeks to castigate. This supposition, indeed, may explain the judicial willingness to unhook bad faith from § 303(i)(2), recasting an unseemly act of prestidigitation into an understandable response to an unexplained omission. To correct this gap and to comply with the modern era's regnant interpretive scheme, two routes may prove fruitful, either more defensible than today's favored approach.

1. One Section's Amendment

The simplest method[442] would be to insert a provision akin to §§ 707(a), 1112, 1208, and 1307 into the main text of § 303. Such an alteration would provide statutory legitimacy to the courts' abiding penchant to invoke bad faith; no longer would undue weight be placed on a constricted § 105, or deduction unsupported by this section's bare text. Tentatively proposed, the following amendments to § 303(h) may suffice:

Current Version of § 303(h)	**Proposed Addition**
(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if . . . (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or	(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if . . . *(1) prior to any such trial, after notice and a hearing, the petition has not been dismissed for cause; and* *(i) For purposes of paragraph (h)(1), "cause" includes:*

[441] Marrama v. Citizens Bank, 549 U.S. 365, 373–74 (2007) (citing to Grogan v. Garner, 498 U.S. 279, 286–87 (1991)). As the Court has noted, the notion dates to the nineteenth century. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[442] As the legislative history of the Code's most recent overhaul hints, this method would not be the easiest, just the most legally and constitutionally sound. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (discussing this law's tortured history); *cf.* Alper, *supra* note 137, at 1911 (noting that most critiques of this law have described it as the product of "shoddy legislative drafting").

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.	*(a) unreasonable delay by the petitioning creditors that is unfairly prejudicial to the creditors as a whole;* *(b) failure to comply with an order of the court; or* *(c) a petitioning creditor's objective and subjective bad faith.* *(ii) The petitioning creditor may avoid dismissal pursuant to paragraph (h)(1) by showing a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.* (2) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or (3) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

2. One Phrase's Construction

Alternatively, an expansive interpretation of the "bona fide dispute as to liability or amount" requirement in § 303(b) and (h) may provide a reasonable ballast upon which to base a "bad faith" dismissal of an involuntary petition. Predictably, the Code does not define this term,[443] and the legislative history indicates its sponsor's desire to prevent "litigants seeking to gain more leverage than they would have if they

[443] *See supra* Part II.A.1.

disputed contract performance in the proper judicial forum" from exploiting § 303.[444] Arguably, if one or more petitioning creditors launches an involuntary case without being able to adequately articulate and minimally prove a cognizable purpose within the Code, such as the target debtor's fresh start and a pro rata distribution of any emergent estate, the dispute has no place within the bankruptcy court. Stated differently, the dispute may be real and recognizable as such by other courts, but because its resolution cannot advance a single Code-sanctioned end, it is not actionable within its domain. In this sense, this dispute does not involve "an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other," the Code recognizing no such right, and it is neither "real" nor "actual."[445] Outside the bankruptcy court, when only non-bankruptcy law is implicated, the conflict may be honest and true. Within its jurisdiction, however, no "good faith controversy" or "honest conflict" can be said to exist if the Code regards one side's motivations as inconsistent with any form of bankruptcy relief,[446] wanting in "any genuine and objectively determinable legal merits" in the particular forum whose authority they have freely chosen to invoke.[447]

Of course, much doubt can be raised about the defensibility of this approach. Above all, it demands a broader construction of a single term than has yet been endorsed by a single court. Even so, unlike the application of a doctrine of good faith unanchored to § 303's enacted language, it relies on no more than a reading of the relevant phrase within the context of the statutory scheme. Employing the plain meanings of the germane terms, this approach does no more than construe the agglomerated phrase by reference to the "obvious and dominating general purpose"[448] of the larger statute of which it is but a part. Practical breadth aside, it looks solely "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"[449] by virtue of its mooring to a phrase

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[444] 148 CONG. REC. 23289, 23354 (2002), *cited in In re* Marciano, 446 B.R. 407, 423–24 (Bankr. C.D. Cal. 2010); *see also supra* Part I.B.3.

[445] *Dispute*, *Bona Fide*, A LAW DICTIONARY (2d ed. 1910).

[446] *Cf. In re* Ross, 63 B.R. 951, 959–60 (Bankr. S.D.N.Y. 1986) (combining the definitions of "bona fide," "claim," and "dispute" to "suggest that the phrase 'bona fide dispute' can be defined as 'honest conflict' or 'good faith controversy'").

[447] *See id.* at 960.

[448] United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010); *see also, e.g.*, Moore v. Walker Coke, Inc., No. 2:11–cv–1391–SLB, 2012 WL 4731255, at *1, *13 (N.D. Ala. Sept. 28, 2012) (quoting United States v. DuBose, 598 F.3d at 731); People v. Kelly, 66 Cal. Rptr. 3d 104, 108 (2007) ("[T]he doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the Legislature, and may be used to carry out, but not to defeat the legislative intent.") (internal quotation marks omitted); Yorkshire Vill. Cmty. Ass'n v. Sweasy, 524 N.E.2d 237, 240 (Ill. App. Ct. 1988) ("In construing language, the object of the provision must be borne in mind, and language susceptible of more than one construction should receive that which will effect its purpose rather than defeat it.").

[449] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); *see also* United States v. Rainey, 757 F.3d 234, 241 (5th Cir. 2014) (quoting *Robinson*, 519 U.S. at 341); Bosamia v. Comm'r, 661 F.3d 250, 254–56 (5th Cir. 2011) (analyzing a statute's purpose as part of its specific context); United States v. Ramos, 537 F.3d 439, 462–63 (5th Cir. 2008) (same).

actually enacted.[450] So viewed, this approach at least adheres to modern jurisprudence's interpretive dogma.

CONCLUSION

A weather-beaten relic, § 303 houses the entirety of the Code's involuntary bankruptcy system. In its paragraphs, the concept of bad faith appears only once, confined to a sentence dedicated to post-dismissal awards of punitive damages. Nonetheless, aware but indifferent to this dearth, court after court has dismissed involuntary petitions on the basis of bad faith and defend this extrapolation as consonant with reason, history, and policy. Sorely missing yet sorely needed, a properly holistic analysis of § 303 lays bare the logical debility of this approach, showing it to be untethered to the terms and purposes of this section. If an old safety valve is to be extended, a new interpretation must be pursued, or a new statute must be passed. For now, though, § 303 still dutifully honors an elder creed, acutely battered but not altogether banished from bankruptcy's well-trod halls, whatever the Code's broader ends may be. Here, as elsewhere, "the past is always with you" and "may as well be present"—and "future" too.[451]

[450] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 668 (2006) (Scalia, J., dissenting) (noting that "the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost" as to statutory meaning); Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, LLC, 615 F.3d 790, 792 (7th Cir. 2010) ("A judge's belief that Congress planned to do something different but bollixed the job does not alter what the enacted statute provides. The Constitution gives the force of law only to what is actually passed by both houses of Congress and signed by the President. What Congress meant to do, but didn't, is not the law."); United States v. Fields, 500 F.3d 1327, 1334 (11th Cir. 2007) (Carnes, J., concurring) ("We should never forget that the law is what the statute itself says after it is approved by both houses of the legislature and signed by the President."); *In re* Sinclair, 870 F.2d 1340, 1341 (7th Cir. 1989) ("The statute was enacted, the report just the staff's explanation. Congress votes on the text of the bill, and the President sign[s] that text.").

[451] Jack Womack, *Afterword to* WILLIAM GIBSON, NEUROMANCER 273 (Penguin Publ'g Grp. 2000). In more famous words, "[t]he past is never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN 85 (Chatto & Windus 1919).