No. 20-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK, PETITIONER

v.

EARL THOMAS PETTY, RESPONDENT.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

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 Whether 11 U.S.C. § 362 and related judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.

2. Whether 11 U.S.C. § 362(c)(3)(A) applies to property of a debtor's bankruptcy estate.

Recommended for Full Text Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

IN RE EARL THOMAS PETTY,

CASE NO. 19-0805

DEBTOR.
_____/

WILDFLOWERS COMMUNITY BANK,

APPELLANT,
V.

EARL THOMAS PETTY,

APPELLEE.
_____/

Direct Appeal from the United States
Bankruptcy Court for the District of Moot

Decided: March 4, 2020

Before: Campbell, Epstein and Tench, Circuit Judges

_____

OPINION

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Campbell, Circuit Judge:

This appeal arises out of the individual chapter 11 bankruptcy case of Earl Thomas Petty ("Petty"). It involves two important and disputed issues of bankruptcy law. The first issue requires us to determine whether section 362 of the Bankruptcy Code[1] and certain judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), such that a

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific chapters of the Bankruptcy Code are identified herein as "chapter __" and specific sections of the Bankruptcy Code are identified herein as "section __."

bankruptcy court has authority to determine violations of the automatic stay and resulting damages notwithstanding a valid prepetition arbitration agreement between the parties. Second, we are asked to determine whether, in a case involving an individual debtor who had a bankruptcy case pending and dismissed within one year prior to a subsequent bankruptcy filing, the automatic stay terminates with respect to property of the estate pursuant to section 362(c)(3)(A) absent the entry of an order from the bankruptcy court extending the stay within thirty days after the later filing.

The Bankruptcy Court for the District of Moot ruled in favor of Petty on both questions, concluding that: (i) it had the authority to decide the dispute between Petty and Wildflowers Community Bank ("Wildflowers") notwithstanding the prepetition arbitration agreement that the parties entered into, and (ii) section 362(c)(3)(A) results in termination of the automatic stay only "with respect to the debtor" and not as to property of the estate. Upon the request of Wildflowers, the bankruptcy court certified both issues for direct appeal to this court pursuant to 28 U.S.C. § 158(d), noting that conflicting case law exists with respect to both issues. Having considered the compelling arguments of the parties, we affirm the bankruptcy court on both issues.

Factual Background and Procedural History

Petty, a former practicing lawyer, began brewing beer in his basement in the late 1990s. In 2002, Petty quit the practice of law and founded Great Wide Open Brewing Company, Inc. ("Great Wide Open"), a craft brewery that sold beer to local restaurants and convenience stores. In 2005, Great Wide Open opened a 9,000 square foot taproom in the City of Royal Rapids, Moot that featured small batch brewing equipment that Petty purchased with his own money (the "Equipment").[2] Over the next decade, Great Wide Open evolved into one of the State of Moot's largest craft breweries, known for producing several highly rated and award-winning products,

[2] At all times relevant to this matter, the Equipment was owned by Petty.

including its popular "American Girl" pilsner, its high-hop India pale ale, "Damn the Torpedoes," and its "Honey Bee" mead.

As demand for Great Wide Open's products increased, Petty decided to engage in an aggressive growth strategy for the business. In 2010, Great Wide Open opened four additional taprooms in college towns in the State of Moot. Continuing this strategy in 2012, Great Wide Open unveiled a state of the art brewhouse, which had the capacity to produce 250,000 barrels of beer annually. Although the majority of Great Wide Open's beer was brewed at the brewhouse, the brewery continued to brew beer at the taprooms as well, including the Royal Rapids taproom.

Needing capital to fund its expansion plans, Great Wide Open turned to its lender, Wildflowers, who had watched Great Wide Open become one of the largest credits in its loan portfolio. In September 2011, Great Wide Open entered into a $35 million revolving credit agreement with Wildflowers (the "Credit Agreement"). To secure repayment of the indebtedness, Great Wide Open granted Wildflowers a first priority lien on substantially all of its assets. Contemporaneous with the execution of the Credit Agreement, Petty executed a personal guaranty whereby he unconditionally guaranteed repayment of the business's obligations (the "Guaranty"). Petty granted Wildflowers a first priority lien on the Equipment to secure his guarantee.

The Credit Agreement and the Guaranty contained identical "Remedies" clauses providing that, upon a default, "Obligor grants to Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action." Additionally, the agreements contained identical "Arbitration" clauses that provided: "any and all disputes, claims, or controversies of any kind between us arising out of or relating to the relationship between us will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by jury trial."

Great Wide Open started having liquidity problems in 2017, as competition in the craft brewing industry increased and the "craft beer craze" began to wane. Saddled by significant debt owed under the Credit Agreement and above-market lease obligations, Great Wide Open closed three of its taprooms in March 2018 without notice to Wildflowers. Indeed, Wildflowers learned that the taprooms had closed only when its loan officer saw a sign on the door of the Royal Rapids taproom advising vendors and patrons, "Don't come around here no more." Shortly thereafter, the landlord for the Royal Rapids taproom terminated the real property lease for that location.

Great Wide Open and Petty defaulted on their respective payment obligations under the Credit Agreement and the Guaranty in April 2018. Concerned that this non-performing loan would trigger additional scrutiny from federal bank regulators, Wildflowers sent a sternly-worded default letter to Great Wide Open and Petty. On June 4, 2018, Wildflowers filed a demand for arbitration and a general state law breach of contract complaint against Petty with the American Arbitration Association. Wildflowers sought approximately $33.2 million in damages, which it alleged was the balance then owing under the Credit Agreement. The American Arbitration Association scheduled an initial conference in the arbitration proceeding for July 12, 2018.

One day before the initial conference, Great Wide Open terminated its employees and ceased all operations. On July 12, 2018, the business commenced a chapter 7 bankruptcy case in the Bankruptcy Court for the District of Moot. That same day, Petty filed his own chapter 11 petition (the "Initial Bankruptcy Case") in the Bankruptcy Court for the District of Moot. The Initial Bankruptcy Case was dismissed by the bankruptcy court on August 27, 2018 due to Petty's failure to timely file certain documents, including his schedules of assets and liabilities.

Petty hired a new bankruptcy attorney. He commenced his second chapter 11 bankruptcy case (the "Second Bankruptcy Case") on January 11, 2019, just as the arbitration proceeding was

about to recommence. This time, Petty filed all of the required documents. Along with the filing of the petition in his Second Bankruptcy Case, Petty filed a chapter 11 plan of reorganization that proposed to pay his creditors, including Wildflowers, forty cents on the dollar from his income over a period of five years. Petty's plan incorporated settlements that Petty had negotiated pre-petition with several of his creditors. No such negotiations were attempted with Wildflowers.[3]

At the first day hearings in the Second Bankruptcy Case, Petty advised the court that he had negotiated a lease with the landlord of the original Royal Rapids taproom and that he had reopened that taproom in December 2019 as a sole proprietorship doing business as "Full Moon Fever Brewing." Petty proudly stated that he was producing beer again using the Equipment, which had remained in the taproom after the landlord terminated its lease with Great Wide Open. Petty reported that many of Great Wide Open's loyal customers had started patronizing his new taproom, and that the venture had been profitable in its first month of operations.

As well planned as the Second Bankruptcy Case appeared to be, it suffered from one significant omission. Petty failed to file a motion to extend the automatic stay under section 362(c)(3)(B) during the first thirty days of the Second Bankruptcy Case. Thirty-two days after the commencement of the Initial Bankruptcy Case, on February 12, 2019, Wildflowers sent a repossession company to the Royal Rapids taproom and peaceably repossessed the Equipment, which remained subject to its security interest granted in connection with the Guaranty.[4]

One week later, Petty filed a motion in the Second Bankruptcy Case alleging that Wildflowers violated the automatic stay and seeking $500,000 in damages under section 362(k).

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[3] The assets of Great Wide Open were liquidated by the chapter 7 trustee in its bankruptcy case. Because Wildflowers had a lien on substantially all of Great Wide Open's assets, it received the majority of the proceeds from such liquidation. Upon receipt of such funds, Wildflowers filed a proof of claim in the Second Bankruptcy Case asserting a remaining balance owed under the Guaranty in the amount of $2.1 million.

[4] Wildflowers could have requested an order from the bankruptcy court under section 362(j) seeking confirmation that the stay had terminated with respect to the Equipment. It did not to do so.

According to Petty, when Wildflowers repossessed the Equipment, it effectively shut down Full Moon Fever Brewing and destroyed the goodwill that the business had generated since opening.[5]

Wildflowers filed a response to the motion on March 5, 2019, asserting that no automatic stay existed with respect to property of the estate, including the Equipment, pursuant to section 362(c)(3)(A), because Petty had a prior bankruptcy case dismissed within one year of the filing of the Second Bankruptcy Case. Petty, Wildflowers noted, had neglected to file a motion seeking to extend the automatic stay pursuant to section 362(c)(3)(B).[6] Wildflowers also argued that Petty should be compelled to bring any claims against Wildflowers in the pending, albeit stayed (due to the bankruptcy filings) arbitration proceeding, because of the arbitration provision in the Guaranty.

The bankruptcy court ruled in favor of Petty. It held that enforcing the arbitration agreement would conflict with the Bankruptcy Code, and section 362 in particular. It therefore denied Wildflowers' request to compel arbitration. Additionally, the bankruptcy court held that, regardless of whether the automatic stay is extended under section 362(c)(3)(B), a creditor may not take action with respect to property of a debtor's estate. Because the Equipment was indisputably property of Petty's bankruptcy estate, the bankruptcy court found that Wildflowers willfully violated the automatic stay. After carefully considering the proofs, the bankruptcy court awarded compensatory damages to Petty and against Wildflowers in the amount of $200,000.

Wildflowers timely sought, and the bankruptcy court certified, a direct appeal of the two issues we address today pursuant to 28 U.S.C. § 158(d).[7]

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[5] Full Moon Fever Brewing ceased operations on February 17, 2019.

[6] Wildflowers caused the Equipment to be returned to Petty the day before the hearing out of an abundance of caution.

[7] Wildflowers did not appeal the bankruptcy court's award of damages or its damages calculation. However, the parties stipulated on the record that Petty is not entitled to any damages if we conclude that the automatic stay was not in effect as to property of the estate. Thus, the sole question with respect to issue two involves the scope of the automatic stay.

Discussion

I. Legal Standard

The parties do not dispute the facts as set forth herein. Rather, the issues that we address in this direct appeal involve questions of law. Thus, our review is *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

II. Section 362 and Related Judicial Code Provisions Inherently Conflict with the Federal Arbitration Act

Nearly a century ago, Congress enacted the FAA, which was intended to provide "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (citation omitted). Congress instructed courts to enforce agreements to arbitrate according to their terms. 9 U.S.C. § 2. So long as the "making of the agreement for arbitration … is not in issue, the court *shall* make an order" directing the parties to proceed with arbitration. 9 U.S.C. § 4 (emphasis added).

While a court must "rigorously enforce agreements to arbitrate…," it need not do so where a countervailing policy manifests itself in another federal statute. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). In *Shearson/Am. Express, Inc. v. McMahon*, the United States Supreme Court explained that "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." 482 U.S. 220, 226 (1987). Such a command "may be deduced from [the statute's] text or legislative history … *or* from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227 (emphasis added) (citation and internal quotation omitted). The party opposing arbitration bears the burden of showing "that

Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (citation omitted).

Just over two years ago, the Supreme Court considered whether the National Labor Relations Act impliedly repealed the FAA. *Epic*, 138 S. Ct. at 1619. The Court concluded that the NLRA does not reflect a clearly expressed and manifest intention to displace the FAA. *Id*. at 1632. In the process, the Court reiterated the strong presumption against implicit repeals, as "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id*. at 1624 (citation and internal quotation omitted).

Relying on certain pronouncements in *Epic*, Wildflowers argues that courts no longer have discretion to decline to compel arbitration where an inherent conflict exists. According to Wildflowers, *Epic* rendered *McMahon* a dead letter, at least with respect to inherent conflicts, by restoring Congress's original intent when it enacted the FAA. We, however, have a much different view of the relationship between *McMahon* and *Epic*. First, as recently recognized by two of our sister circuits, *Epic* did not abrogate or otherwise overrule *McMahon*. *See Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612, 616-17 (2d Cir. 2020); *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 591-92 (5th Cir. 2019).

Second, we note that *McMahon* remains entirely consistent with the liberal policy in favor of arbitration. *McMahon* requires the "enforcement of agreements to arbitrate statutory claims" including, presumably, statutory rights under the Bankruptcy Code. *McMahon*, 482 U.S. at 226. To accomplish this goal, *McMahon* places the burden of demonstrating an inherent conflict on the party opposing arbitration, signifying that arbitration under the FAA is the rule, not the exception. *Id*. at 227. Instead of eroding the FAA, as Wildflowers contends, we interpret *McMahon*, when

read in conjunction with *Epic*, to reinforce the strict mandates of the FAA. We therefore decline to depart from *McMahon*, which continues to serve as binding precedent.

Against this backdrop, we turn to the delicate intersection of arbitration and bankruptcy. Applying *McMahon*, our sister circuits have overwhelmingly concluded, and we agree, that neither the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy context. *See, e.g.*, *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1020 (9th Cir. 2012) (collecting cases); *but see* John R. Hardison, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 St. John's L. Rev. 627 (2019).[8] Thus, the issue before us is whether an inherent conflict exists between arbitration and the underlying purpose of the automatic stay, such that the bankruptcy court had discretion to decline to enforce the arbitration clause in the Guaranty.

When deciding whether an inherent conflict exists between the FAA and the Bankruptcy Code, courts have relied, in large part, on the distinction between core and non-core proceedings under 28 U.S.C. § 157(b). *See, e.g.*, *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018), *cert. denied subnom.* 139 S. Ct. 144 (2018); *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796 (11th Cir. 2007); *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 169 (4th Cir. 2005); *In re Hermoyian*, 435 B.R. 456, 463-64 (Bankr. E.D. Mich. 2010). Where a proceeding is non-core, a bankruptcy court generally lacks the discretion to preclude enforcement of the arbitration clause and the inquiry ends. *See, e.g.*, *In re Anderson*, 884 F.3d at 388. Conversely, it is widely accepted that in core proceedings a bankruptcy court has discretion to deny enforcement of an arbitration clause where the FAA and the Bankruptcy Code inherently

[8] To their credit, the parties to this appeal agree that the arbitration clause in the Guaranty is both enforceable and sufficiently broad in scope to encompass all aspects of their dispute.

conflict. *See, e.g.*, *In re Thorpe Insulation Co.*, 671 F.3d at 1021. To be clear, the core nature of any proceeding is by no means dispositive. *See, e.g.*, *id*. Even when a proceeding is core, a bankruptcy court must still analyze whether arbitration of the proceeding would result in an inherent conflict. *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1068-69 (5th Cir. 1997).

At issue in this appeal is the automatic stay, a substantive right of extraordinary magnitude derived directly from, and available only under, the Bankruptcy Code. *See, e.g.*, *Amedisys, Inc. v. Nat'l Century Fin. Enters., Inc. (In re. Nat'l Century Fin. Enters., Inc.)*, 423 F.3d 567, 573-74 (6th Cir. 2005). The legislative history recognizes the critical nature of the automatic stay:

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

H.R. Rep. No. 95-595, at 340-41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97. In light of the foregoing, we can say with absolute certainty that the dispute before us today constitutes a core proceeding under 28 U.S.C. § 157(b).

With this threshold inquiry decided, we next consider whether enforcement of the arbitration clause in the Guaranty inherently conflicts with the underlying purpose of the automatic stay. For several reasons, it is abundantly clear that Congress intended to override the FAA when it enacted section 362. First, it is important to keep in mind that the Guaranty was only executed by Wildflowers and Petty in anticipation of a two-party dispute. A bankruptcy case, however, is far from a two-party dispute. *See, e.g.*, 11 U.S.C. §§ 307, 323, 704, 1106, 1109, 1183, 1202, 1302; *see also* Fed. R. Bankr. P. 2018. It constitutes a collective, multi-party proceeding that balances a debtor's fresh start with a maximum distribution to creditors. *See In re White Mountain Mining*

Co., L.L.C., 403 F.3d at 170. We are mindful of this initial, albeit non-dispositive, incongruity between arbitration proceedings and bankruptcy cases.

Second and somewhat relatedly, an agreement to arbitrate generally does not bind non-parties, including creditors and other parties in interest in bankruptcy cases. *See, e.g.*, *Kraken Invs. Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC)*, 475 B.R. 9, 24 (S.D.N.Y. 2012); *cf. Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (trustee required to arbitrate all prepetition causes of action). Because creditors and other parties in interest cannot be compelled to arbitrate, the collective nature of bankruptcy inherently conflicts with the FAA.

Third, the automatic stay is one of the most sacred and fundamental protections under the Bankruptcy Code, as it protects debtors and creditors alike. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 540 (5th Cir. 2009); *see also* 3 COLLIER ON BANKRUPTCY ¶ 362.03 (Richard Levin & Henry J. Sommer eds., 16th ed.). Because of its overarching purpose, the automatic stay transcends traditional two-party disputes that are typically subject to arbitration. Acknowledging the critical role that the automatic stay plays in any bankruptcy case, Wildflowers directs us to *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006), where the Second Circuit found no inherent conflict between section 362 and the FAA. Although we find *Hill* to be well-reasoned and quite persuasive, we also find it to be factually distinguishable.

Hill was premised on the fact that resolution of the dispute "would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start, protecting assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate." *Hill*, 436 F.3d at 109 (citation omitted). More to the point, *Hill* recognized that an inherent conflict between the FAA and section 362 could exist under the right circumstances. *Id.* at 108.

In contrast to *Hill*, Petty's motion to enforce the automatic stay and recover damages from Wildflowers is critical to his ability to reorganize under the Bankruptcy Code, discharge his debts, and obtain a fresh start. According to Petty, he intends to use any proceeds from his damages claim against Wildflowers to fund his chapter 11 plan of reorganization. *See* 11 U.S.C. §§ 1115, 1129. It is therefore apparent to us that resolution of this dispute will have a direct, pecuniary impact on Petty, his estate, and its creditors.

Finally, certain other intangibles evidence an inherent conflict between the FAA and section 362. For example, if we were to compel arbitration for automatic stay disputes, we "would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 169 (citation and internal quotations omitted); *accord Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1695 (2015) ("[B]ankruptcy courts … rule correctly most of the time."). Consequently, we would deprive creditors of an opportunity to monitor and oversee litigation that serves as a key component of Petty's reorganization and their potential recoveries. Rather than forcing Petty to recommence an arbitration proceeding still in its infancy, we believe the better approach is to permit him to immediately prosecute his claims in the bankruptcy court, as he did, so as not to further delay his rehabilitation and, ultimately, his fresh start. *See In re Patriot Solar Grp., LLC*, 569 B.R. 451, 460-61 (Bankr. W.D. Mich. 2017). The bankruptcy court is best positioned to efficiently and expeditiously adjudicate disputes like the one at issue in this appeal.

In sum, we hold that arbitration is clearly at odds with Congress's intent to centralize disputes, promote participation from all stakeholders, and ensure that a debtor's reorganization efforts continue unabated in bankruptcy. Accordingly, the bankruptcy court did not err when it exercised its discretion to decline to enforce the agreement to arbitrate.

III. Notwithstanding Section 362(c)(3), the Automatic Stay Continues to Apply to Property of the Estate

Upon the filing of a bankruptcy case, an estate is created by operation of law. 11 U.S.C. § 541(a). With few exceptions, the bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case, regardless of where the property is located and by whom it is held. 11 U.S.C. § 541(a)(1).

Section 362, like section 541, arises by operation of law when a bankruptcy case is commenced. It automatically imposes a stay of post-petition actions, with certain exceptions. 11 U.S.C. § 362(a). In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), wherein it sought to curb bankruptcy abuses committed by serial filing debtors pursuant to section 362(c)(3). That section provides, in pertinent part, that:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) –
>
> > (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease *shall terminate with respect to the debtor* on the 30th day after the filing of the later case….

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

Section 362(c)(3)(A) limits the scope of the automatic stay when an individual debtor has been the subject of a pending bankruptcy case within the preceding year. The bankruptcy court may extend the automatic stay, upon the motion of a party in interest, as to any or all creditors before the expiration of the thirty day period. 11 U.S.C. § 362(c)(3)(B). The party in interest moving to extend the automatic stay must rebut a presumption that the later case was not filed in good faith by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(B)-(C).

We are called upon to decide whether the automatic stay remains in effect with respect to property of the estate absent an extension under section 362(c)(3)(B). Wildflowers asserts that, upon the expiration of the thirty day period in section 362(c)(3)(A), the automatic stay terminated not only with respect to Petty, but also with respect to the Equipment, which constitutes property of Petty's estate. Therefore, Wildflowers argues, it did not violate the automatic stay as a matter of law when it repossessed the Equipment more than thirty days after Petty commenced the Second Bankruptcy Case. Petty, of course, disagrees. He maintains that the bankruptcy court correctly determined that the automatic stay remained in effect as to the Equipment because section 362(c)(3)(A) references only the debtor, and not "property of the estate." Thus, he argues, Wildflower's repossession of the Equipment violated the automatic stay.[9]

We are confronted with an issue that has almost evenly divided the courts.[10] A slight majority of courts, including one of our sister circuits, have applied the plain meaning to conclude that property of the estate remains subject to the automatic stay, even in the absence of an extension under section 362(c)(3)(B). *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc*., 945 F.3d 226 (5th Cir. 2019). Conversely, a minority of courts, again including one of our sister circuits, find ambiguity in the statute. Relying on canons of construction, loose legislative history and policy considerations, the minority approach interprets section 362(c)(3)(A) to mean that the automatic stay terminates in its entirety thirty days after the commencement of a case. *See, e.g.*, *Smith v. State of Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018).

[9] Although we need not address as part of this appeal which particular subsection of section 362(a) was violated, we cannot help but note that Wildflowers' repossession of the Equipment seems to implicate section 362(a)(3). *See 27th Ann. Conrad B. Duberstein Nat'l Bankr. Moot Court Competition Problem*, 28 No. 1 Norton J. Bankr. L. & Prac. Art. 1 (Feb. 2019).

[10] A cursory review of published and unpublished decisions reveals that more than fifty courts have adopted the majority approach, whereas approximately forty courts find the minority approach more persuasive. *See, e.g.*, *In re Goodrich*, 587 B.R. 829, 835 n.4-5 (Bankr. D. Vt. 2018) (collecting non-exhaustive list of cases).

We believe the majority approach is the better interpretation of the statute. Not surprisingly, our starting point is the statute itself. As the Supreme Court has repeatedly reminded us, "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal citations and quotations omitted). Section 362(c)(3)(A), by its own terms, terminates the automatic stay only "with respect to the debtor." Viewed in isolation, the language of the statute is plain and unambiguous.

Of course, we are mindful that a statute should not be read in isolation. A "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (citations omitted). Our plain meaning interpretation of section 362(c)(3)(A) is reinforced by section 362(a), which stays actions not only against the debtor, but also against the debtor's property and property of the estate. *See* 11 U.S.C. § 362(a)(1)-(8). Other sections of the statute support the distinction between a stay with respect to the debtor and a stay with respect to property of the estate. *See, e.g.*, 11 U.S.C. § 362(b)(2)(B), (c)(1), (c)(2); *see also* 11 U.S.C. § 521(a)(6). Section 362(c)(3)(A), on the other hand, makes no mention of property of the estate, leading to the inescapable conclusion that Congress intentionally omitted any reference to it from that subsection. After all, Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001) (citations omitted).[11]

Even if, as Wildflowers contends, the phrase "with respect to the debtor" could be construed as ambiguous, it is clear from section 362(c)(4)(A)(i) that Congress knew how to

[11] We are unpersuaded by Wildflowers' argument that Congress used the phrase "with respect to the debtor" to distinguish between joint debtors, one of whom may not have had a case dismissed within the year prior to the commencement of the current case. Such an argument is misplaced given the plain meaning of the text. *See In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006) (rhetorically asking, "[h]ow could [the text] be any clearer?").

terminate the automatic stay in its entirety. *See Rose*, 945 F.3d at 230-31. Unlike section 362(c)(3)(A), section 362(c)(4)(A)(i) does not contain *any* limiting language. Through its silence, section 362(c)(4)(A)(i) provides that the automatic stay does not go into effect with respect to the debtor, property of the debtor, or property of the estate. Congress could have terminated the stay in its entirety in section 362(c)(3)(A), as it did in section 362(c)(4)(A)(i), by simply deleting the phrase "with respect to the debtor." *Accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Congress has "deliberately targeted specific problems with specific solutions"). But it did not do so, thereby indicating an intent to curb abuse differently. *See, e.g.*, *In re Harris*, 342 B.R. 274, 279-80 (Bankr. N.D. Ohio 2006) (citations omitted).

Resilient and undeterred by the text of the statute, Wildflowers argues that the majority approach produces a result at odds with congressional intent. *See United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 242 (1989). According to Wildflowers, a partial termination of the automatic stay would be contrary to Congress's acknowledged goal with BAPCPA - to stop abusive bankruptcy filings. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 64 (2011). We do not believe that the majority approach produces a result demonstrably at odds with that intent. Returning to the overall statutory scheme, it is not hard to discern why Congress deliberately drafted section 362(c)(3)(A) to include only the debtor:

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

In re Williams, 346 B.R. 361, 367-69 (Bankr. E.D. Pa. 2006); *accord Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020).

Our conclusion is further shaped by the minority approach itself, which is wholly dependent on an improper enlargement of section 362(c)(3)(A). By importing the non-existent phrase "with respect to property of the estate" into the text of section 362(c)(3)(A), the minority approach "[rewrites] the law under the pretense of interpreting it." *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting). As the Supreme Court has repeatedly reminded us, "[a]chieving a better policy outcome … is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). We must therefore decline Wildflowers' invitation to replace congressional authority with judicial activism.

Notwithstanding the plain meaning of the text, Wildflowers tries a different tack by suggesting that the true meaning of section 362(c)(3)(A) is somehow ascertained by consulting the legislative history. Wildflowers' argument suffers from two fatal flaws. First, legislative history is irrelevant to the interpretation of an unambiguous statute like section 362(c)(3)(A). *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). Second, where legislative history is inconclusive, a court should not "deviate from the result suggested by the structure of the statute itself." *Jeffers v. United States*, 432 U.S. 137, 156-57 & n.26 (1977). Here, the legislative history to section 362(c)(3)(A) is anything but conclusive. It states only that section 362(c)(3)(A) "amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period." H.R. Rep. No. 109-31, pt. 1, at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138.[12] That's it. Given this scant explanation, we are not persuaded that the legislative history should have any bearing on the issue before us.

[12] Wildflowers strains to rely on more tangential legislative history, none of which is particularly instructive with respect to section 362(c)(3)(A). *See, e.g.*, Michael Miller, *Untangling the Web of § 362(c)(3)(A) and Its Legislative History*, 39 Am. Bankr. Inst. J. 22 (Apr. 2020) (discussing legislative history).

We must also acknowledge that the majority approach is consistent with the purposes and policies of the Bankruptcy Code. For the second time today, we stress that the Bankruptcy Code balances a debtor's fresh start with "a maximum and equitable distribution for creditors" through an orderly, centralized process. *BFP v. Resolution Trust Corp*., 511 U.S. 531, 563 (1994) (citations omitted) (Souter, J., dissenting). The majority approach achieves this objective by ensuring that creditors cannot dismember the estate by repossessing property that might be used to benefit Petty and his creditors.

Lastly, while numerous courts throughout the country have adopted the majority approach in the context of chapter 11 and chapter 13 reorganizations, few carefully examine the disastrous consequences that the minority approach would have on trustees and, ultimately, creditors in liquidations under chapter 7. When the role of a chapter 7 trustee is considered in connection with section 362(c)(3)(A), it becomes even more apparent that the minority approach favors one creditor to the detriment of all others. *See In re Thu Thi Dao*, 616 B.R. 103, 109-116 (Bankr. E.D. Cal. 2020). We cannot subscribe to an interpretation so clearly at odds with one of the most fundamental tenets of bankruptcy law.

Conclusion

For the reasons set forth herein, we AFFIRM the decisions of the bankruptcy court below.

TENCH, Circuit Judge, dissenting:

Seeking to salvage the role of bankruptcy courts notwithstanding a clear and unambiguous agreement between the parties that their disputes will be resolved not in court, but in arbitration, the majority ignores recent Supreme Court precedent that clarifies the preeminence of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). Additionally, the majority twists the language of

section 362(c)(3) in order to impose an automatic stay that, under the statute, no longer exists. While I appreciate the policy concerns raised by my colleagues, our job as judges is to apply the law as written by Congress and as interpreted by the Supreme Court. *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("[courts] do not sit to assess the relative merits of different approaches to various bankruptcy problems…. Achieving a better policy outcome … is a task for Congress, not the courts."). As such, I respectfully dissent from both of the conclusions reached by the majority.

I. Recent Supreme Court Precedent Regarding the Scope of the FAA Mandates that the Parties' Disputes Must be Resolved in Arbitration

In *Epic Sys. Corp. v. Lewis*, the Supreme Court reminded us that an agreement between sophisticated parties such as these to arbitrate their disputes is sacrosanct:

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.

138 S. Ct. 1612, 1627 (2018) (internal citations omitted). The Court concluded that the FAA and other federal statutes must be read harmoniously such that only an "*irreconcilable conflict*" between two statutes that is "*clear and manifest*" would justify not giving effect to the FAA's "command" of arbitration. *Id.* at 1624 (emphasis added).

Notwithstanding the foregoing, the majority today holds that section 362 impliedly repeals the FAA's mandate of arbitration. Invoking pre-*Epic* case law, the majority adopts an atextual approach and concludes that the Bankruptcy Code implicitly repeals the FAA because of the importance that bankruptcy law places on the automatic stay. However, the majority fails to identify any true "irreconcilable conflict." Indeed, the phrase is not even used in the majority

opinion. Rather, the opinion consists mostly of policy-based arguments. While the automatic stay is undoubtedly an important concept, there is no indication in the Bankruptcy Code, let alone "clear and manifest" evidence, that Congress intended to displace arbitration for disputes regarding the automatic stay. Indeed, such disputes are just as amenable to resolution in arbitration. Because the recent Supreme Court precedent points so strongly in favor of arbitration of the disputes between Petty and Wildflowers, I do not see how I can faithfully turn the other way here.

Congress passed the FAA in 1926. The FAA directs courts to treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. It represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA is intended to enforce private agreements to arbitrate while encouraging the "efficient and speedy resolution" of disputes. *Dean Witter Reynolds, Inc., v. Byrd*, 470 U.S. 213, 221 (1985). A court must therefore "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation…." *Id.*

To appreciate the current state of the law in this area, one must understand the progression of recent Supreme Court authority. In 1987, the Supreme Court ruled that a court could decline to enforce an arbitration agreement if a "congressional command" to override the FAA was evidenced by a federal statute. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Congressional intent, the Court stated, may be discerned from the statutory text, legislative history, or "an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227.

Subsequent to *McMahon*, several of our sister circuits have held that bankruptcy courts may decline to compel arbitration for matters deemed "core" pursuant to 28 U.S.C. § 157 if arbitration of such matters would create an "inherent conflict" or a "severe conflict" with the purposes of the Bankruptcy Code. *See, e.g., Whiting-Turner Contracting Co. v. Elec. Mach.*

Enters., Inc. (In re Elec. Mach. Enters., Inc.), 479 F.3d 791, 799 (11th Cir. 2007); *but see Mintze v. American Gen. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 229 (3d Cir. 2006) ("The core/non-core distinction does not, however, affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement.").

That approach, which relies primarily on *McMahon*, was displaced by the Supreme Court's more recent opinion in *Epic*. In *Epic*, employers and employees entered into employment contracts that provided for individualized arbitration proceedings to resolve employment disputes. Employees attempted to bring class action proceedings under the Fair Labor Standards Act, arguing that the National Labor Relations Act ("NLRA") mandated that employees have the right to act collectively, and that such mandate took such agreements out of the purview of the FAA.

The Supreme Court held that the arbitration agreements required that such disputes be sent to arbitration. On the issue of whether the NLRA displaced the FAA, the Court stated:

> A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. *The intention must be "clear and manifest."* And, in approaching a claimed conflict, we come armed with the [strong presumption] that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.

Epic, 138 S. Ct. at 1624 (emphasis added) (citations omitted). Ultimately, the Court held that the NLRA does not "offer a conflicting command" to override the FAA. *Id.* at 1619. In doing so, the Court emphasized that the absence of any specific statutory discussion of arbitration in the NLRA "is an important and telling clue that Congress has not displaced the [FAA]." *Id.* at 1627.[13]

[13] The Supreme Court arguably took a step even further in favor of arbitration in its recent opinion in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019), wherein it held that the threshold question of whether a dispute is arbitrable must be sent to arbitration, even in cases where the underlying dispute appears to be frivolous.

Today, the majority justifies its holding by invoking *McMahon* and its progeny. But like the NLRA, which was at issue in *Epic*, the Bankruptcy Code and its legislative history are both silent with respect to the arbitrability of disputes arising under that statute. The Bankruptcy Code's silence is contrasted with other federal statutes, such as the Commodity Exchange Act, where Congress expressly repealed the FAA. *See* 7 U.S.C. § 26(n)(2). Congress's silence evidences that it did not intend to override or repeal the FAA. *See Epic*, 138 S. Ct. at 1626 (noting that "Congress has … shown that it knows how to override the [FAA] when it wishes").

Because the Bankruptcy Code is silent with respect to arbitrability, the majority strains to conclude that an inherent conflict exists between arbitration and the purposes of section 362. The majority goes on a fishing expedition for a conflict, and ultimately concludes that a conflict exists because the automatic stay created by section 362 is integral to the bankruptcy process, bankruptcy cases are collective, multi-party proceedings, and resolution of the dispute between Wildflowers and Petty may impact the interests of Petty and his creditors alike. In addition to being contrary to *Epic*, the majority's approach is flawed for multiple reasons.

First, it is a creation of the judiciary that is found nowhere in the statute. Important separation of powers principles counsel in favor of restraint when determining whether the FAA was implicitly repealed. Looking solely to policy concerns and the perceived purpose of the automatic stay in bankruptcy gives rise to the very dangers that the Supreme Court warned of in *Epic*: "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be.*" *Id.* at 1624 (emphasis in original). It is the job of Congress, not this court, to write the laws and repeal them.

Second, despite the importance of the automatic stay in bankruptcy proceedings, it cannot credibly be argued that the automatic stay is so important that all disputes involving the automatic

stay must be adjudicated by bankruptcy courts. Even in *McMahon*, the Supreme Court explained that, when "text and legislative history fail to reveal any intent to override the provisions of the [FAA]," any conflict between the relevant statute and the FAA must be "irreconcilable." *McMahon*, 482 U.S. at 239. There, the Court held that the plaintiffs' RICO claims could be arbitrated, notwithstanding the important "deterrent" and "remedial" interests of that statute, because there was no reason to think plaintiffs would be unable to "vindicate [their] statutory cause of action in the arbitral forum." *Id.* at 240.

Clearly, it cannot be said that the FAA and section 362 are "irreconcilable." Congress did not give exclusive jurisdiction to the federal courts to adjudicate disputes regarding the scope of the automatic stay. *See* 28 U.S.C. § 1334(b).[14] To the contrary, it is generally accepted that non-bankruptcy courts have concurrent jurisdiction to interpret the scope of the automatic stay and routinely do so. *See, e.g.*, *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012) ("The court in which [a non-bankruptcy] proceeding is pending … has jurisdiction to decide whether the proceeding is subject to the stay."); *Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Lit.)*, 765 F.2d 343, 347 (2d Cir. 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of [a federal court] is an issue of law within the competence of both the court within which the litigation is pending … and the bankruptcy court…."). Certainly, an arbitrator is equally capable of addressing the scope of the automatic stay. In fact, arbitration may be particularly useful in cases such as this, as arbitration is often more expedient and cost-effective than litigation.

In any event, nothing in the majority's analysis demonstrates an "irreconcilable conflict" such that section 362 must be viewed as displacing or repealing the FAA's command of arbitration.

[14] Contrast section 362 with 28 U.S.C. § 1334(e), which provides that federal courts "shall have exclusive jurisdiction" over, among other things, property of the estate.

The Supreme Court has set an appropriately high threshold for an irreconcilable conflict; indeed, as *Epic* explained, the Court has "rejected *every* … effort" to find a conflict between the FAA and another federal statute. *Epic*, 138 S. Ct. at 1627 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust laws); *McMahon*, 482 U.S. at 242 (RICO). It certainly cannot be said that the policy issues raised with respect to the automatic stay are any more significant than the policies of ensuring workers' rights as in *Epic*; preventing age discrimination as in *Gilmer*; or enforcing the antitrust and racketeering laws as in *Mitsubishi Motors* and *McMahon.*

Instead of heeding the direction from the Supreme Court to look for "clear and manifest" intent or an "irreconcilable conflict," the majority employs the judicially created core/non-core test utilized by many pre-*Epic* courts. As noted, this core/non-core test is nowhere found in the statute or in Supreme Court jurisprudence. Even if the core/non-core distinction were relevant, the Second Circuit Court of Appeals, in a case with facts similar to the present case, required arbitration of alleged willful violations of the automatic stay in *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110-11 (2d Cir. 2006) (arbitration of suit seeking damages for alleged stay violation would not conflict with Bankruptcy Code).

At the end of the day, the majority's holding is nothing more than a thinly veiled attempt to preserve the role of bankruptcy courts to adjudicate core matters notwithstanding a binding arbitration agreement. Implicit in the majority's analysis is the concern that if automatic stay disputes must be sent to arbitration, then perhaps many other bankruptcy disputes (such as the resolution of claims, preference actions or violations of the discharge injunction) must also be sent to arbitration. Parties could effectively contract themselves out of the bankruptcy courts. While I

appreciate this concern, I am bound to follow the precedent created by the Supreme Court. Bankruptcy courts and their supporters should raise their concerns with Congress.

II. Section 362(c)(3) Terminates the Automatic Stay as to Property of the Estate

Because my colleagues have affirmed the bankruptcy court's determination that the parties' dispute regarding the scope of section 362(c)(3) should be determined by the courts, and not an arbitrator, I am compelled to weigh in on such issue. Admittedly, it is a challenging one. On balance, however, based on the text of the statute, the context and the purpose of the statute as evidenced by the legislative history, I conclude that when the stay terminates under section 362(c)(3)(A), section 362(a) ceases to protect property of the estate. As such, Wildflowers did not violate the automatic stay when it repossessed the Equipment.

In 2005, Congress amended the Bankruptcy Code to, among other things, deter repeat bankruptcy filings. As part of those amendments, it enacted section 362(c)(3)(A).[15] In that subsection of section 362, Congress provided that for debtors who have more than one bankruptcy petition pending within the same year, the stay terminates "with respect to the debtor" thirty days after the filing of a subsequent bankruptcy petition. The majority interprets the phrase "with respect to the debtor," to effect a termination of the stay as to the debtor and the debtor's property only, and not as to property of the estate. I read the statute differently. I believe that the phrase "with respect to the debtor" does not limit the stay's termination to property of the debtor and the debtor's non-estate property. Rather, section 362(c)(3)(A) terminates the stay in its entirety.

[15] A commission impaneled by the American Bankruptcy Institute, a highly respected organization of bankruptcy professionals, to study the reform of consumer bankruptcy law recently recommended that section 362(c)(3) be repealed in its entirety because it does not offer effective relief to creditors and generates unnecessary litigation. *See* American Bankruptcy Institute Commission on Consumer Bankruptcy, 2017-2019 Final Report and Recommendations 65-70 (2019).

In reaching this conclusion, I am guided by certain canons of statutory construction. First, "[t]he task of resolving the dispute over [the interpretation of a statute] begins where all such inquiries must begin: with the language of the statute itself." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Nevertheless, "statutory construction ... is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Additionally, when a statute is ambiguous, it is appropriate to consult legislative history as an interpretive aid. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). "[C]ommon sense suggests that [statutory interpretation] benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.'" *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (quoting *United States v. Fisher*, 2 Cranch 358, 386 (1805)).

The general rule in bankruptcy is that the filing of a bankruptcy petition automatically stays collection actions against the debtor, the debtor's property and property of the bankruptcy estate. *See* 11 U.S.C. § 362(a) (setting forth eight categories of actions or proceedings against the debtor, its property or property of the estate that are automatically stayed). As noted, section 362(c)(3)(A) limits the automatic stay in a repeat filer case on the thirtieth day after the filing of the later case. The remainder of section 362(c)(3) sets forth a detailed scheme for determining whether a "motion of a party in interest for continuation of the automatic stay" beyond the thirtieth day should be granted. Specifically, section 362(c)(3)(B) provides for an expedited process whereby a party in interest can demonstrate that the second bankruptcy filing was in good faith. 11 U.S.C.

§ 362(c)(3)(B). A presumption exists that the subsequent case was not filed in good faith absent "clear and convincing evidence to the contrary." 11 U.S.C. § 362(c)(3)(C).

While repeat filers with a single case dismissed within the last year are subject to section 362(c)(3), repeat filers with two or more cases dismissed within the last year are subject to section 362(c)(4), which provides: "the stay under [section 362(a)] shall not go into effect upon the filing of the later case." 11 U.S.C. § 362(c)(4)(A)(i). In other words, debtors who have filed more than one case during the preceding year are not entitled to any stay at all. Instead, such debtors have thirty days from their petition date to request that the stay "take effect" by showing that the most recent case was filed "in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(4)(B).

Regrettably, one cannot honestly review the statutory language of section 362(c)(3) and conclude that the text, standing alone, resolves this issue. As the First Circuit Court of Appeals noted in *Smith v. State of Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581 (1st Cir. 2018), the statute's "meaning is not plain." *See also St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 144 n.1 (D. Mass. 2013) (stating that section 362(c)(3) is "at best, particularly difficult to parse and, at worst, virtually incoherent."); *In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) ("In an Act [BAPCPA] in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out.").[16] Although a number of interpretations of the statute have been advanced, no interpretation is entirely satisfactory.

The majority approach purports to rely on the plain language of the phrase "with respect to the debtor" to conclude that the stay terminates only with respect to the debtor and the debtor's

[16] As one court noted, "Courts and analysts have been nearly unanimous in their criticism of BAPCPA's drafting and structure." *In re Goodrich*, 587 B.R. 829, 834 n.3 (Bankr. D. Vt. 2018) (citing *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) ("Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturing defect."); *In re Steinhaus*, 349 B.R. 694, 706 (Bankr. D. Idaho 2006) ("[I]t appears unmistakable that Congress drafted, or allowed to be drafted by others and then enacted, provisions with 'loose' and imprecise language.")).

property. There are many problems with this approach. First, it must be noted, the statute does not reference the debtor *and* the debtor's property. It merely references the debtor. The majority approach, therefore, "requires one to read into the statute words that are not there … [by] expand[ing] the phrase 'with respect to the debtor' to say 'with respect to the debtor and the debtor's property.'" *In re Goodrich*, 587 B.R. at 843 (citing *In re Bender*, 562 B.R. 578, 583-84 (Bankr. E.D.N.Y. 2016)); *In re Smith*, 910 F.3d at 582 (noting that "no court has read" section 362(c)(3) as terminating the stay only for actions against the debtor).

The majority approach suffers from a second defect. In most cases, substantially all of a debtor's assets will be property of the estate. Given the foregoing, the majority approach illogically allows debtors who are unable to demonstrate that they filed the new case in good faith to nevertheless receive the primary benefit of the automatic stay. *See In re Smith*, 573 B.R. 298, 306 (Bankr. D. Me. 2017) ("It makes little sense to conclude that Congress meant to protect most, if not all, of a debtor's property – by virtue of its status as property of the estate – in a case that was, at least presumptively, not filed in good faith."). Additionally, because most property ordinarily protected by the stay constitutes property of the estate, the detailed scheme for adjudicating extension requests under section 362(c)(3)(B) makes little sense as such process would rarely come into play and, thus, would be rendered virtually meaningless. *See Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 368 (9th Cir. B.A.P. 2011) (reasoning that the majority approach is "difficult to reconcile" with the rest of § 362(c)(3)); Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(C)(3)(A)*, 86 Am. Bankr. L.J. 407, 409 (2012) ("it is exceedingly rare for a creditor to move for stay relief other than as against estate property."); Laura B. Bartell, *Staying the Serial Filer – Interpreting the New Exploding Stay Provision of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 226

(2008) ("the practical consequences" of adopting the majority approach are "hard to reconcile with the notion that Congress intended a severe punishment for serial filers.").

The better interpretation of the statute – and the one underlying the minority approach – reads the phrase to distinguish between the repeat-filing debtor and the debtor's spouse, who is not a repeat filer, in a joint case. *See, e.g., In re Daniel*, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009). As the bankruptcy court in *In re Smith* cogently stated:

> [The minority approach] is consistent with the opening provisions of section 362(c)(3). In relevant part, subsection (c)(3) states that subparagraph (A) applies "if a single or joint case is filed by or against a debtor under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1–year period but was dismissed[.]" 11 U.S.C. § 362(c)(3). When subparagraph (A) applies, "the stay under subsection (a) ... terminate[s] with respect to the debtor on the 30th day after the filing of the later case[.]" The "debtor" with respect to whom the stay terminates under subparagraph (A) must be the same "debtor" who had a "single or joint case" dismissed and then reappeared in another "single or joint case ... under chapter 7, 11, or 13" within one year of the dismissal of the prior case. The statute does not say that the stay terminates as to the spouse of such a debtor if the spouse was not also a repeat filer. The Court therefore "construes ... 'with respect to the debtor' to define which debtor is effected by this provision, with reference to [the prefatory language of] § 362(c)(3)."

573 B.R. at 302. In other words, the phrase "with respect to the debtor" is a direct reference to the serially filing spouse, thereby protecting the newly-filing spouse's person and property from the limitations on the automatic stay occasioned by section 362(c)(3)(A).

While the minority approach's interpretation of the statutory language may not be ideal, it is more consistent with the broader context of the statute than is the majority approach. In seeking to deter repeat filings in BAPCPA, it seems clear that Congress meant to address three different scenarios along a spectrum in section 362(c). In the first and most common scenario, where no prior filing exists within one year, the stay generally remains in existence throughout the bankruptcy case. 11 U.S.C. § 362(c)(1), (2). In the second scenario, where the debtor has filed one prior bankruptcy case in the year before the petition date, a warning shot is fired. The

automatic stay is applicable for only thirty days absent an order from the court extending the stay after finding that the second filing was done in good faith. 11 U.S.C. § 362(c)(3). In the third scenario, applicable to the most egregious situations where the debtor has filed multiple bankruptcy cases in the year before the petition date, the automatic stay does not go into effect at all absent an order from the court based on a showing of the debtor's good faith. 11 U.S.C. § 362(c)(4). *See In re Smith*, 910 F.3d at 586-88 (suggesting that the statute describes a "system of progressive protections"). Viewed in this context, it makes sense that "protections for second-time filers should fall" within a sensible middle ground on the spectrum. *Id.*

Finally, given the ambiguous nature of the statutory language, it is useful to consider section 362(c)(3)'s legislative history. Such legislative history supports the minority view, and "puts extra icing on a cake already frosted." *See Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting). At the outset, the Supreme Court has acknowledged, "Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010). "[S]erial … bankruptcy filings," in particular, were the abuses at "[t]he heart of [BAPCPA's] consumer bankruptcy reforms." H.R. Rep. No. 109–31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

The text that would become section 362(c)(3) was included in section 302 of BAPCPA, titled "DISCOURAGING BAD FAITH REPEAT FILINGS." The House Report accompanying the legislation described the provision as "amending section 362(c) of the Bankruptcy Code to *terminate the automatic stay within 30 days* in a chapter 7, 11, or 13 … case pending within the preceding one year period." H.R. Rep. No. 109–31(I), at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138 (emphasis added). Notably, nothing in the House Report suggests that it was Congress' intention that section 362(c)(3) would terminate only a small portion of the

automatic stay. Indeed, "[d]uring the seven years [prior to BAPCPA] in which a provision for termination of the automatic stay [for repeat filers] was pending in Congress, none of the several committee reports that discussed the provision ever suggested that the phrase drew a distinction" between actions against the debtor, the debtor's property and property of the estate. *See In re Daniel*, 404 B.R. at 329; *see also In re Goodrich*, 587 B.R. at 846-47; *In re Smith*, 573 B.R. at 302-03 (concluding that Congress's intention to terminate the automatic stay in its entirety in repeat filer cases dates back as far as the 1994 National Bankruptcy Review Commission).

The minority approach is far more consistent with the congressional intent behind section 362(c)(3) since its interpretation of the statute meaningfully penalizes a debtor who files multiple cases within a year and fails to show a good faith basis for doing so. *See In re Jupiter*, 344 B.R. 754, 760-61 (Bankr. D.S.C. 2006). It affords the repeat-filing debtor a thirty day breathing period, and the opportunity to extend the automatic stay through section 362(c)(3)(B), but protects creditors from repeat filers by terminating the stay as to the crown jewels of the estate after that initial thirty day period if the debtor cannot demonstrate that the recent filing was in good faith. This outcome better advances BAPCPA's clear objectives. *See In re Goodrich*, 587 B.R. at 845.

In summary, interpreting section 362(c)(3)(A) to terminate the entire automatic stay is more consistent with the statute, its context and congressional intent. As such, I respectfully dissent.