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.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 11
Counsel for Petitioner

Questions Presented

I. Whether section 362 of the Bankruptcy Code and its judicially related provisions displace the FAA when the statutes are harmonious and congressional intent to displace the FAA is silent?

II. Whether the automatic stay terminates with respect to the property of a debtor's bankruptcy estate as set forth by the language provided in 11 U.S.C. § 362(c)(3)(A).

Table of Contents

Table of Authorities

Statutes

United States Supreme Court Cases

United States Courts of Appeals Cases

United States Bankruptcy Appellate Panel Cases

United States Bankruptcy Court Cases

United States District Court Cases

Other Authorities

Opinions Below

The United States Bankruptcy Court for the District of Moot and the United States Court of Appeals for the Thirteenth Circuit held in favor of the debtor, Petty, on both issues. (R. at 3). Specifically, the court found that: (I) notwithstanding a valid, prepetition arbitration agreement between parties, Section 362 of the Bankruptcy Code authorizes the bankruptcy court to exercise its discretion and determine alleged violations of the automatic stay and resulting damages (II) Wildflowers violated the automatic stay because Section 362(c)(3)(A) exclusively terminates the automatic stay with respect to the individual debtor's property and does not extend to the property of the bankruptcy estate. *Id.* On a direct appeal of both issues, the Thirteenth Circuit Court of Appeals affirmed. *Id.* This Court then granted Wildflowers Community Bank's petition for writ of certiorari. *Id*. at 1.

Statement of Jurisdiction

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

Statutory Provisions

The relevant federal laws controlling this case are attached in full in Appendix A.

Statement of the Case

Facts

Debtor, Thomas Earl Petty ("Petty"), is a former practicing attorney turned craft brewer. R. at 3. In 2002, Petty left the legal field and founded Great Wide Open Brewing Company, Inc. ("Great Wide Open") in the State of Moot. *Id.* Great Wide Open initially limited its beer sales to local restaurants and convenience stores, but over time demand for its products grew it took on an aggressive growth strategy. *Id.* at 4. From 2005 to 2012, Great Wide Open opened six locations in Moot. *Id.* Included in these six locations were a taproom in Royal Rapids, Moot featuring Petty's own small batch brewing equipment (the "Equipment") and a state-of-the-art brewhouse equip to produce 250,000 barrels of beer annually. *Id.* Nevertheless, each location produced beer. *Id.*

To finance its ambitious expansion, Great Wide Open turned to its longtime lender, Wildflowers Community Bank ("Wildflowers") and entered into a $35 million revolving credit agreement ("Credit Agreement"). *Id.* Over the history of their dealings, Wildflowers watched as Great Wide Open transformed itself into largest credits in Wildflower's loan portfolio. *Id.* Great Wide Open secured its debt to Wildflowers through providing it a first-priority lien on substantially all its assets. *Id.* Contemporaneous with the Credit Agreement, Petty also executed a personal guaranty (the "Guaranty") unconditionally guarantying repayment of his business's obligations. *Id.* Petty secured the debt by granting Wildflowers a first-priority lien on the Equipment. *Id.*

The Credit Agreement and Guaranty contained identical "Remedies" and "Arbitration" clauses. *Id.* The "Remedies" clause stated that upon a default, "Obligor grants to Wildflowers the right to enter any premises where the Collateral may be located for the purpose of repossession Collateral without the need for any prior judicial action." *Id.* Under the

"Arbitration" clause "any and all disputes, claims, or controversies of any kind between us arising out of or relation 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." *Id.*

In 2017, Great Wide Open suffered liquidity problems on top of its significant debt owed under the Credit Agreement and its above-market lease obligations for its six properties. *Id.* at 5. Great Wide Open succumbed to the financial hardships in March 2018 and made a brash decision to close three of its six locations. *Id.* Despite significance of its decision, Great Wide Open did not give Wildflowers any notice of the closures. *Id.* Wildflowers learn of the closures only after its loan officer visited the Royal Rapids Taproom and discovered a makeshift out-of-business sign taped to the door. *Id.*

The next month, Great Wide Open and Petty defaulted on their respective obligations under the Credit Agreement and the Guaranty. *Id*. As a courtesy to its loyal clients, Wildflowers sent Great Wide Open and Petty default letters. *Id.* After two months, Wildflowers filed a demand for arbitration and general state law breach of contract claim seeking repayment of the $33.2 million owed under the Credit Agreement with the American Arbitration Association. *Id.* at 6. An initial conference in the arbitration proceeding was set for July 12, 2018. *Id.* Less than twenty-four hours before initial conference, Great Wide Open terminated its employees and ceased all operations. *Id.* The next day in the Bankruptcy Court for the District of Moot, Great Wide Open filed its case for chapter 7 bankruptcy and Petty filed his petition for chapter 11 bankruptcy (the "Initial Bankruptcy Case"). *Id.* The bankruptcy court dismissed Petty's chapter 11 case on August 11, 2018 for his failed to timely file required documents, such schedules of assets and liabilities. *Id.*

Nearly five months later and just as the arbitration proceeding was about to recommence, Petty filed his second chapter 11 bankruptcy case and his plan of reorganization (the "Second Bankruptcy Case"). *Id.* at 5-6. Petty's plan included a proposal to pay his creditors forty cents to the dollar from his income over five as well as various pre-petition settlements that he had negotiated with many of his creditors. *Id.* at 6. Petty did not include Wildflowers in these negotiations, thereby leaving his longtime lender and substantial creditor in the dark. *Id.* Appearing undeterred by his recent failure in Great Wide Open, during the first day of hearings of his Second Bankruptcy Case Petty expressed to the Court his eagerness to jump back into the brewing business and revealed his latest business venture: Full Moon Fever Brewing. *Id.* Petty explained that in December 2018, he persuaded his landlord from the original Royal Rapids taproom to execute a lease allowing him to reopen that taproom and brew beer using the Equipment. *Id.*

Petty's failure to file important documents struck again when during the first thirty days of his Second Bankruptcy, he did not file a motion extending the automatic stay. *Id.* Thirty-two days after Petty filed his Second Bankruptcy Case, Wildflowers peaceably repossessed the Equipment subject to its security interest under the Guaranty. *Id*. Petty filed a motion in his Second Bankruptcy Case one week later alleging Wildflowers actions violated the automatic stay and seeking $500,000 in damages. *Id.* Wildflowers responded to Petty's motion on March 5, 2019 asserting that because Petty failed to file a motion extending the automatic stay, the it terminated thirty days after he had filed his Second Bankruptcy Case. *Id.* at 7. Citing provisions in the Guaranty, Wildflowers also argued Petty must bring these claims in arbitration. *Id*.

Procedural History

On July 12, 2018, Petty filed his first petition for relief under Chapter 11 of the United States Bankruptcy Code. R. at 5. The United States Bankruptcy Court for the District of Moot dismissed the Initial Bankruptcy Case on August 24, 2018 as Petty's did not file required documents. *Id.* On January 11, 2019 Petty once again sought protection of the court under chapter 11; this time Petty filed both his petition and a chapter 11 plan of reorganization. *Id.* at 5–6. Wildflowers repossessed the Equipment on February 12, 2019, thirty-two days after Petty filed his Second Bankruptcy Case. *Id.* Petty, then filed a motion in the Second Bankruptcy Case alleging Wildflowers violated the automatic stay and sought $500,000 in damages under section 362(k). Wildflowers timely responded to Petty's motion on March 5, 2019 asserting: (1) under section 362(c)(3)(A) the automatic stay terminated with respect to the Equipment after the thirty days after Petty filed his Second Bankruptcy Case and (2) Petty should be compelled to bring these claims in arbitration pursuant to the parties' agreement. *Id.* at 7. The Bankruptcy Court for the District of Moot found in favor of Petty on both issues. *Id.* On direct appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed on both issues. *Id.*

Summary of the Argument

The Thirteenth Circuit incorrectly found that Section 362 of the Bankruptcy Code and its related judicial provisions displaces the FAA. This Court should reverse the Thirteenth Circuit's holding and find that the FAA mandates enforcement of the parties' arbitration agreement. To displace the FAA, the party opposing arbitration bears the heavy burden of showing that the federal statute contains a "clear and manifest" congressional intent to displace the FAA or an "irreconcilable conflict" exists between the purposes of the two statutes. If the party opposing arbitration fails to show either congressional intent or a conflict, the Court must read the two statutes as a harmonious whole. If the two statutes may be read harmoniously, the FAA demands enforcement of the parties' arbitration agreements without any discretion by the courts.

Section 362 of the Bankruptcy Code is silent with regards to arbitration. Therefore, Congress's silence is a telling sign that it did not intend for the Bankruptcy Code to displace the FAA. Further, Section 362 and the FAA are harmonious because an arbitral forum has concurrent jurisdiction to hear automatic stay disputes. Additionally, the Bankruptcy Code's purposes will not be jeopardized by allowing enforcement of parties' pre-petition arbitration agreements. As such, the FAA mandates enforcement of the parties' arbitration agreement. In upholding the FAA, this Court respects the integrity of Congress, the courts, and the parties.

Additionally, the District of Moot incorrectly held in the event that a debtor has had one bankruptcy proceeding dismissed within a year of the subsequent filing, section 362(c)(3)(A) continues to apply to the property of the estate. Accordingly, this Court should reverse the decision of the District of Moot for two reasons. First, the language of the provision is poorly drafted and ambiguous as to whether "with respect to the debtor" applies to property of the debtor, property of the bankruptcy estate, or both. Second, the overall purposes and policies of

the Bankruptcy Code and BAPCPA are more properly safeguarded by a no exclusion interpretation.

Generally, the automatic stay applies to a debtor upon the filing of a bankruptcy petition. This stay, under section 362(a), attaches to the property of the debtor and the property of the bankruptcy estate if the debtor has not filed bankruptcy and that action be dismissed within one calendar year of the subsequent filing. Debtors with one prior dismissed bankruptcy petition are governed by section 362(c)(3)(A), which terminates the stay after a thirty-day period absent a judicially granted motion to extend by a party in interest. Similarly, if a debtor has two more more prior dismissed bankruptcy petitions are governed by 362(c)(4), which prevents the attachment of the automatic stay to the debtor and the bankruptcy estate, absent a judicially granted motion to apply the automatic stay within the first thirty days of the filing.

While there are multiple "plausible" interpretations for section 362(c)(3)(A), two have emerged as the predominant interpretations. These are the no exclusion interpretation and the estate-property exclusion. The former holds that the automatic stay terminates as to the property of the debtor and property of the bankruptcy estate under 362(c)(3)(A). The latter stands for the notion that the automatic stay terminates as to property of the debtor, leaving the stay in place for the bankruptcy estate.

Generally, when the issue is statutory interpretation, the analysis begins with the language itself. Here, section 362(c)(3)(A) says that the stay terminates "with respect to the debtor." While proponents of the estate-property exclusion us this provision as an indication of a plain meaning, when read in conjunction with other provisions in the statute, it is rendered ambiguous. Because the provision is ambiguous, the court may look to legislative history and other relevant canons of statutory interpretation. The legislative history clearly indicates that

Congress intended the provision to terminate the automatic stay as to the property of the bankruptcy estate.

There are multiple canons of statutory interpretations that can apply here. The paramount canons are a statute must be read as a whole and the presumption against ineffectiveness. While "with respect to the debtor" looks facially unproblematic, if this Court adopts the estate-property exclusion, section 362(c)(3)(A) will be demonstrably at odds with other provisions of the statute. Similarly, if this court adopts the estate-property exclusion, the statute will be largely ineffective, and not effectuate the will of the legislature.

Further, the no exclusion interpretation of 362(c)(3)(A) is consistent with Congress's policy goals in the overall purposes and policies of BAPCPA. BAPCPA arose out of frustrated creditors being adversely impacted by debtors which abused the bankruptcy code to maintain the protections of the automatic stay. Thus, Congress passed BAPCPA to combat such abuses. If this court adopts the estate-property exclusion, section 362(c)(3)(A) cannot enact congressional intent. While the overall purpose of the Bankruptcy Code is to provide a "fresh start" to debtors, this Court should recognize that Congress intended section 362(c)(3)(A) to serve as a creditor protection mechanism

The no exclusion interpretation of section 362(c)(3)(A) better facilitates the underlying policy to rehabilitate the debtor. This conclusion is buttressed by the legislative history and relevant canons of statutory construction.

Standard of Review

The parties do not dispute the facts of this case. *Id.* at 8. The Thirteenth Circuit's holdings that Section 362 of the Bankruptcy Code grants the bankruptcy court authority to exercise its discretion in determining whether to adjudicate a violation of the automatic stay or

send such claim to arbitration and that under section 362(c)(3)(A) of the Bankruptcy Code the automatic stay terminates with respect to the individual debtor's property and not in respect to the bankruptcy estate are questions of law. Thus, the standard of review is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

Argument

I. The Federal Arbitration Act requires bankruptcy court to enforce arbitration agreements because Section 362 does not reflect Congress's intent to displace the FAA with the Bankruptcy Code.

The Federal Arbitration Act ("FAA") is sacred. In 1925, Congress enacted the FAA seeking to reverse centuries of judicial hostility towards arbitration agreements and ensure that arbitration agreements are enforced with the same judicial rigor as other private agreements. *See*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). The FAA states arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Further, the Supreme Court recognizes the FAA as Congress' declaration of a liberal federal policy favoring the enforcement of arbitration agreements. *See* Moses *H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA's language generally leaves no room for a court to exercise its discretion in determining whether to compel arbitration; rather, the court must honor the parties' agreement and enforce it to its terms.[1] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Despite its Congress' clear command that parties' arbitration agreements are be enforced, the FAA has faced many challenges alleging that it is impliedly repealed by other federal

[1] Although the FAA generally requires a court to compel parties to arbitration pursuant to their agreement, the statute provides a "savings clause" which states if a party can assert grounds that exist in law or equity for revocation of a contract, the party may refute the contract. 9 U.S.C. § 2. Courts typically recognize common contracts defenses such as fraud, duress, or unconscionability. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

statutes. The Supreme Court has heard these challenges and has rejected every attempt to read artificial conflicts into the FAA and other federal statutes. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) (collecting cases). Most recently, the Court affirmed FAA's preeminence in *Epic Sys. Corp. v. Lewis*., finding that the National Labor Relations Act ("NLRA") does not impliedly appealed the FAA. *Epic Sys. Corp.,* 138 S. Ct. at 1632 (2018). Thus, the *Epic* adds yet another case to the Court's mountain of precedent rejecting claims that other federal statutes displace the FAA. *Id.*

The *Epic* majority outlined the analysis a court must use to determine whether a federal statute displaces the FAA. *Id.* The party opposing arbitration bears the heavy burden of showing a "clear and manifest" congressional intent to displace FAA; absent a showing of "clear and manifest" congressional intent to displace the FAA, the party opposing arbitration must show an "irreconcilable conflict" between the statute and the FAA. *Id.* Furthermore, the Court comes "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." *Id.* at 1624 (quoting *United States v. Fausto*, 484 U.S. 439, 452–53 (1988)).).

The Court is clear, whether a statute displaces the FAA must be analyzed under the Court's standard in *Epic*. In the present case, the Thirteenth Circuit turned a blind eye to *Epic*'s binding precedent and instead, incorrectly based its decision on pre-*Epic* case law and judicially-created rules. Applying *Epic* to the case at hand leads to only one conclusion: section 362 of the Bankruptcy Code does not override the FAA. The text and legislative history surrounding section 362 lack a "clear and manifest" congressional intent to displace the FAA. Furthermore, there is no inherent conflict between section 362 and the FAA such that the two are

irreconcilable. Thus, the court lacked authority to exercise discretion on whether to compel the parties to arbitration.

A. *Recent Supreme Court precedent demonstrates Congress commitment the FAA to be binding over the Bankruptcy Code.*

In 2018, the Supreme Court again struck down a challenge that a federal statute overrode the FAA confirming the FAA's preeminence. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). To displace the FAA, the party opposing arbitration must show either: (1) "clear and manifest" congressional intent in the federal statute's text or legislative history to override the FAA or (2) an "irreconcilable conflict" between the purposes of the two statutes in play. *Id.* at 1624. In *Epic*, the Court examined the NLRA's text and legislative history but ultimately concluded that no such intent, much less a clear and manifest intent to override the FAA existed in NLRA. The Court then analyzed whether irreconcilable conflict existed between the NLRA and FAA. The *Epic* majority reiterated that it is the Court's duty to read statutes as "harmonious whole rather than at war with one another" and warned that allowing judges to "pick and choose between statutes" risks transforming judges from those who interpret law to those who make the law. *Id.* at 1619, 1624. Unless the party opposing arbitration can show Congress' clear and manifest intent to displace the FAA or an irreconcilable conflict existing between two statutes, the Court is bound to enforce parties' arbitration agreements.

1. The text of Section 362 lacks evidence of Congress's "clear and manifest" intent to displace the FAA.

All cases involving the Code that pose a question of statutory interpretation must begin with an analysis of the language itself. *Toibb v. Radloff*, 501 U.S. 157, at 160–61 (1991). Thus, the first step in this analysis is to examine the text of section 362. While section 362 sets out lengthy, detailed provisions pertaining to the automatic stay, it makes no explicit mention

arbitration. *See* 11 U.S.C. § 362. This silence is telling because "absence of any specific statutory discussion of arbitration… is an important and telling clue that Congress has not displaced the FAA." *Epic*, 138 S. Ct. at 1627 (citing *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 227 (1987); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 at 103–04 (2012); *Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 234 (2013)) (emphasis added). Congress undoubtedly knows exactly how to draft a statute mandating certain dispute resolution procedures or requiring disputes to be heard in particular forums. *Epic*, 138 S. Ct. at 1617 (citing 29 U.S.C. §§ 216(b), 626; 15 U.S.C. § 1226(a)(2)). As Justice Scalia candidly stated, "Congress does not hide elephants in mouse holes" and the FAA is an elephant that will not fit into the Code's mouse hole. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Additionally, the Court's finding that the text of the NLRA did not contain a clear and manifest congressional intent to override the FAA in *Epic* bolsters support that Congress did not clearly and manifestly intend to override the FAA in section 362. Like section 362 of the Code, the statutory provision at issue in *Epic*, section 7 of the NLRA, is silent on arbitration. *Compare* 11 U.S.C. § 362, *with* 29 U.S.C.S. § 157. As the Court in Epic explained, not only does Section 7 fail to "express approval or disapproval of arbitration," it fails to even *hint* at a wish to displace the FAA. *Epic* 138 S. Ct. at 1624. Looking at the detailed used language in Section 7 of the NLRA the Court noted Congress' silence on arbitration was intentional because that it was hard to fathom why Congress would take sure care to regulate all the other matters mentioned in Section 7 yet remain mute about arbitration alone….". *Id.* at 1626 (2018). As a result, the Court quickly concluded that the language of Section 7 of the NLRA fell far short of the clear and manifest congressional intent required to displace the FAA. Applying the Court's reasoning in

Epic, section 362's silence on arbitration falls far short of the clear and manifest congressional intent required to displace the FAA.

In addition to no mention of arbitration its text, section 362 lacks adequate legislative history evidencing Congress' clear and manifest intent to displace the FAA. While legislative history is not the law, it can provide helpful clues to determine congress' intent when it enacted a particular statute. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396–97 (1951) ("we do not inquire what the legislature meant; we ask only what the statute means"). Surveying section 362's legislative history reveals a sheer lack of evidence showing Congress' clear and manifest intent to override that this provision override the FAA's robust authority. Viewing Congress' silence regarding arbitration in section 362 through a different lens, there is nothing in the text or legislative history of Section 362's that forecloses arbitrating alleged automatic stay violations.

2. Application of the FAA is harmonious with the purpose of the Bankruptcy Code.

Not only does section 362 lack a "clear and manifest" congressional intent to displace the FAA, there is no "irreconcilable conflict" between the purposes of section 362 and the FAA. Absent a showing of "clear and manifest intent," *Epic* requires the party opposing arbitration to show an "irreconcilable conflict" between the two statutes. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Showing an "irreconcilable statutory conflict" between two statutes is a "stout uphill climb" because when confronted with two Acts of Congress allegedly touching on the same topic, the court is not at liberty to pick and choose among the congressional enactments and must instead strive to give effect to both. ***Morton v. Macari*, 417 U.S. 535, 551 (1974).**

To date, the Supreme Court has refused to "manufacture conflicts" between the FAA and any federal statute.[2] *Epic Sys. Corp.*, at 1627. These decisions cumulate in a mountain of precedent demonstrating the Court's commitment to honoring Congress' strong will favoring arbitration as it is expressed in the FAA. *See e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013)(finding no conflict between the Sherman Act and the FAA); Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20 (holding the Age Discrimination in Employment Act does not displace the FAA); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012)(finding no conflict between the Credit Repair Organizations Act and the FAA). To illustrate, in *Italian Colors*, the Supreme Court rejected the argument that because the Sherman Act made no mention of class actions or arbitration, it inherently conflicted with the FAA. *Italian Colors Rest.*, 570 U.S. at 239. Additionally, the Court refused to find an inherent conflict between the Credit Repair Organizations Act and FAA based on the Credit Repair Organizations Act's use of words such as "right to sue" and used "action". *CompuCredit Corp.*, 565 U.S. at 104. Taken together, the mass of existing case law in which the Court refused to find an inherent conflict between the FAA and other federal statutes emphasizes the severity of alleged conflict needed to override the FAA.

A statute's policy goals are not to be conflated with an irreconcilable conflict within the statute. The Supreme Court in *Green Tree Fin. Corporation-Alabama v. Randolph* upheld the parties' arbitration agreement and stated, "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000).

[2] See epic discussing precedent.

(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985)). Further, in *Mitsubishi Motors*, the Court found that the Anti-Trust statute would continue to serve both its remedial and deterrent function in the arbitral forum because it provided the parties an effective mechanism for vindicating their statutory rights. *Mitsubishi Motors Corp.*, 473 U.S. at 634. In doing so, the Court clarified that absent an irreconcilable conflict, a statute's "fundamental importance" does not displace the FAA. *Id.* at 637. Although Congress' policy decisions may be debatable, the when law is clear is left no room to question Congress' intent.

The Court is not at liberty to override Congress' policy judgments. Rather the Court is to honor those policy judgments and when faced with two conflicting statutes and attempt to give meaning to them both. *Morton v. Macari*, 417 U.S. 535, 551 (1974). It is long understood that this is Congress' job by legislating to write and repeal laws. Thus, the Court is bound to give effect to all of Congress's work, not just the parts it may prefer. *Epic Sys. Corp.*, at 1632. To do otherwise would violate the fundamental principle of separation of powers set forth in the structural Constitution.

The FAA and Section 362 can be read harmoniously. Section 362 is the sets out the code's provisions governing the automatic stay. The automatic stay is an important mechanism in bankruptcy law which contributes to a debtor's ability to obtain a fresh start after their case is discharged as well as promotes fairness amongst competing creditors. Nevertheless, Congress' important policy reasons for enacting a statute do not give rise to an irreconcilable conflict between the statute and the FAA. Congress did not vest exclusive jurisdiction to hear automatic stay claims upon federal bankruptcy courts. 28 U.S.C. §1334(b). Non-bankruptcy courts have concurrent jurisdiction to decide automatic stay issues. *Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012). This indicates that deciding a violation of the

automatic stay is not the type of decision which only a specialized, bankruptcy judge can make. Arbitrators are fully capable of determining the statutory issues before it and are more than equipped to handle a complex issues. *Mitsubishi Motors Corp*,. at 633–34 (1985). Arbitration is not a foreign concept in the bankruptcy setting; rather, it has maintained a presence in bankruptcy for over 100 years. *See* National Bankruptcy Act of 1898, ch. 541, § 26 (1898) (allowing a trustee, with direction of the court, to submit a controversy to arbitration); FED R. BANKR. P. 9019 (1993) (authorizing the court to submit matters to arbitration upon stipulation of the parties).

The Court has spoken; *Epic* provides the correct, applicable analysis when a party seeks to displace the FAA. To displace the FAA, the party opposing arbitration must show either (1) clear congressional intent in a statute's text or legislative history or (2) an irreconcilable conflict between each statute's purpose. Unless these requirements are met, the Court must enforce the parties' arbitration agreement and lacks judicial discretion. Because Section 362 fails the *Epic* analysis, the bankruptcy court lacked discretion in deciding whether to compel arbitration.

B. Because the requirements to displace the FAA are clear, relying on judicially created rules does not warrant a court's exercise of discretion in compelling arbitration.

1. Following the Court's decision in *Epic*, the "core" and "noncore" distinction is immaterial in determining whether a statute irreconcilably conflicts with the FAA.

Epic is the most recent time the Supreme Court has spoken on this issue and made clear *Epic* is the rule. Nevertheless, courts such as the Thirteenth Circuit, continue to turn a blind eye to Epic's binding precedent and apply a *Pre-Epic* test. *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 227 (1987). Under the dated, *McMahon* analysis, "The party opposing arbitration has the burden of showing Congress intended to "limit or prohibit waiver of a judicial forum for a particular claim." *Id*. The "intent" may be derived from statutory text or legislative history, or

an "inherent conflict" between the statute's purpose and the FAA. *Id.* Under the *McMahon* analysis, if congressional intent cannot be found, the party opposing arbitration can show that an "inherent conflict" exists between the purposes of the two federal statutes. *Id*. However, *Epic* sets forth the correct application of the law; *Epic* controls.

As last attempt to give the bankruptcy court discretion, the Thirteenth Circuit majority relies on a Pre-*Epic*, judicially created, "core" and "noncore" distinction which it uses to amplify the power of the bankruptcy courts. *See Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1021 (9th Cir. 2012). The Thirteenth Circuit majority ignores *Epic*'s mandate of showing an "irreconcilable conflict" and claims the bankruptcy court has discretion to deny arbitration solely based on the fact the matter is "core." *Id.* The core and noncore distinction is a judicially created rule, superfluous in determining whether an "irreconcilable conflict" exists. Bankruptcy proceedings are divided into core and non-core categories. 28 U.S.C. § 157(b) (*see Mintze v. Am. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 228 (3d Cir. 2006)). The type of proceeding "may determine the ultimate authority of the bankruptcy court." *Id.* In a core proceeding, the bankruptcy court has "comprehensive power to hear, decide and enter final orders and judgments" as well as "make findings of fact and conclusions of law." *Id.* at 228-29) (citing *Halper v. Halper*, 164 F.3d 830, 836 (3d Cir. 1999)). On the contrary, non-core proceedings limit the bankruptcy's authority to only make "proposed findings of fact and proposed conclusions of law." *In re Mintze*, 434 F.3d 222, 229.

The core and non-core distinction was first introduced as an issue by the lower courts before the *Epic* decision, but has since been consistently held as unimportant. *Id.* The Third Circuit illustrated the irrelevancy of the core and noncore distinction when determining the weight of the FAA. *Id.* Regardless if the issue is core or noncore, the bankruptcy court may

only deny enforcement of an arbitration agreement if an irreconcilable conflict exists. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Circuits hold that the FAA and Bankruptcy Code do not produce an "inherent conflict," even when the matter at hand was deemed a "core" proceeding. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1160 (3rd Cir. 1989) (see also *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1067 (5th Cir. 1997)). The Fifth Circuit in *In re Nat'l Gypsum Co.,* stated, "Certainly not all core bankruptcy proceedings are premised on the provisions of the [Bankruptcy] Code that 'inherently conflict' with the FAA; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." 118 F.3d at1067.

2. Even if the Court applies the core and noncore distinction, an irreconcilable conflict still does not exist and the court lacks discretion.

Although the core and noncore distinction is important to establish the authority of the bankruptcy court in full adjudication, it is immaterial to deciding whether a bankruptcy court has the discretion to void arbitration agreements. *See In re Mintze*, 434 F.3d at 229 (3d Cir. 2006). Even if this Court were to adopt the core and noncore analysis, circuits such as the Seventh Circuit have held that an inherent conflict must first be shown before the bankruptcy court has any discretion to reject arbitration. *Selcke v. New England Ins. Co.*, 995 F.2d 688, 691 (7th Cir. 1993).

Further, in *Hays*, the Third Circuit was relying on the *Pre-Epic*, *McMahon* standard and held that once the *McMahon* standard is met, the question of discretion may be determined. 885 F.2d at 1156. In other words, pre-*Epic*, a *McMahon* analysis must be completed to determine whether a court has the discretion to deny arbitration. In *Hays*, the Third Circuit applied the *McMahon* standard but denied distinguishing between core and noncore proceedings. *Id*

Instead, the Third Circuit correctly distinguished between "causes of action derived from the debtor and bankruptcy actions that the Bankruptcy Code created for the benefit of the creditors of the estate." *In re Mintze*, at 230. The Third Circuit stated that a core proceeding does not "automatically give a bankruptcy court the discretion to deny arbitration." *Id*. The Third Circuit continued, "An adversary proceeding involving debtor-derivative, non-core matters would not "seriously jeopardize the objectives of the Code." *Hays*, at 1160.

Post-*Hays*, other courts have consistently held that the core and noncore distinction is insignificant. The Bankruptcy Court for the Eastern District of Michigan in *In re Barkman, Inc.* held, "For purposes of determining whether Congress intended to carve out an exception to [the FAA], the core/non-core distinction would seem to be of only indirect significance." *James P. Barkman, Inc. v. Granger Constr. Co. (In re James P. Barkman, Inc.)*, 170 B.R. 321, 323 n.1 (Bankr. E.D. Mich. 1994). The Fifth Circuit in In re Nat'l Hypsum Co. stated,

> The core/non-core distinction conflates the inquiry set forth in McMahon . . . with the mere identification of the jurisdictional basis of a particular bankruptcy proceeding. Certainly not all core bankruptcy proceedings are premised on provisions of the Code that "inherently conflict" with the [FAA]; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code.

In re Nat'l Gypsum Co., 118 F.3d 1056, 1067 (5th Cir. 1997). The Fifth Circuit further stated, "In the most common type of creditor-initiated core proceeding--a motion for relief from the automatic stay--bankruptcy courts regularly have permitted arbitration to continue (or commence) in spite of the presence of core bankruptcy jurisdiction." *Id.* In *In re Statewide Co.*, the creditor sought relief from an automatic stay to resolve the claim under the parties' arbitration agreement. *In re Statewide Realty Co.*, 159 B.R. 719, 722 (Bankr. D. N.J. 1993). The Bankruptcy Court for the District of New Jersey shed light on the core and noncore difference by stating, "The fact that the matter before the court is a core proceeding does not mean that arbitration is inappropriate. The

description of a matter as a core proceeding simply means that the bankruptcy court has the jurisdiction to make a full adjudication." *Id.* at 724. The Bankruptcy Court continued to clarify the *Hays* opinion by stating, the discussion in *Hays* regarding core and non-core proceedings is not read by this court as suggesting that core proceedings may not be subject to arbitration. Rather it appears that the *Hays* court sought to distinguish between actions derived from the debtor, and therefore subject to the arbitration agreement, and bankruptcy actions in essence created by the Bankruptcy Code for the benefit ultimately of creditors of the estate, and therefore not encompassed by the arbitration agreement. *Id.*

The Second Circuit spoke directly to this issue in *MBNA Am. Bank, N.A. v. Hill* has addressed this precise issue. In *Hill*, the Second Circuit was tasked with deciding whether Section 362(h) of the Bankruptcy Code conflicts with the FAA. *MBNA AM. Bank, N.A. v. Hill*, 436 F.3d 104, 106 (2d Cir. 2006). More specifically, MBNA filed a motion seeking to stay or dismiss the adversary proceeding in favor of the parties' agreed arbitration clause. *Id.* In *Hill*, the Second Circuit contented that §362 was considered a "core" matter in the bankruptcy setting, but found that even though it was "core," arbitration was still the appropriate forum. *Id.* at 109. Because the purpose of the Bankruptcy Code, Chapter 11 specifically, is to "protect creditors and reorganize debtors," bankruptcy courts are best suited to handle distributions of the estate. *Id.* However, statutes such as Section 362 do not directly deal with estate distribution. As the *Hill* Court stated, "District courts have often reversed bankruptcy decisions refusing to compel arbitration of core bankruptcy matters and granted motions to arbitrate core claims on the grounds that arbitration would not interfere with or affect the distribution of the estate." *Id; see also*, *Cibro Petroleum Prods., Inc. v. City of Albany (In re Winimo Realty Corp.)*, 270 B.R. 99 (S.D.N.Y. 2001); *Pardo v. Akai Elec. Co. Let. (In re Singer Co. N.V.)*, No. 00 Civ. 6793 LTS

(S.D.N.Y. Aug. 27, 2001). The *Hill* Court firmly held, "An arbitrator of a §326(h) claim would be asked to interpret and enforce a statute, not an order of the bankruptcy court." *Hill*, 436 F.3d at 110. In other words, automatic stay claims are not within the exclusive jurisdiction of bankruptcy courts. 28 U.S.C. §1334(b). Although the automatic stay provisions are important under the Bankruptcy Code, "there is no indication from the statute that any dispute relating to an automatic stay should categorically be exempt from resolution by arbitration." *Id.*

Because Respondent cannot show an "irreconcilable conflict" exists, the bankruptcy court lacks the discretion to determine the enforcement of the arbitration agreement, despite the fact Section 362 is deemed "core" for bankruptcy purposes.

C. Application of the FAA over the Bankruptcy Code protects the integrity of Congress, our courts, and the parties.

Congress' duty is to create the law. The court's duty is to interpret the law. Congress enacted the FAA to "ensure that private arbitration agreements are enforced according to their terms." *Volt Info. Scis. V. Bd. Of Trs.*, 489 U.S. 468 (1989). The Supreme Court in *Epic* laid out the framework. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). This precedent is binding and to go against this precedent is to question the Supreme Court's integrity as well as Congress. Congress intentionally enacted the FAA with its goals and purposes in mind. As the *Epic* majority stated, "These [arbitration] rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsel's restraint." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889, 902 (2018). Further, precedent shows that the FAA requires courts to "enforce the bargain of the parties to arbitrate and not substitute [its] own views of economy and efficiency for those of Congress." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, at 217. (citing *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 646 (CA7 1981)) (1985).

Both the Code and FAA further a common goal: protection of the parties. Under the Code, bankruptcy courts are entrusted with "broad equitable powers to balance the interests of the affected parties" and promote reorganization. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-528 (1984). Under the FAA, federal courts are required to ensure the parties' requested method of claim dispute be honored and carried out in an expeditious manner. Parties' pre-petition contractual rights must be honored. The Third Circuit in *Hays* stated, "[P]rivate parties who contract for arbitration, as a more efficient method of dispute resolution, shall not have their bargains frustrated." *Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 885 F. 2d 1149, 1160 (3d Cir. 1989). The *Hays* Court reached the conclusion that federal courts "can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over the [FAA]." *Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 885 F. 2d 1149, 1161 (3d Cir. 1989).

Although Section 362 is a fundamental protection under the Code, this provision was intended to protect a debtor in compliance with the Code. The Thirteenth majority claims a factual distinction between these facts and the *Hill* facts because arbitration in this case would jeopardize Respondent's ability to reorganize, discharge his debts, and obtain a fresh start. (Pet. pgs. 12-13). Respondent jeopardized his own Section 362 protections by failing to file a simple motion to extend the automatic stay. Sending the Section 362 claim to arbitration allows the Petitioner to satisfy its debts that linger from a long contractual relationship and most importantly, protects the integrity of parties' pre-petition contractual rights.

The FAA is not the Code's competitor. The Thirteenth Circuit majority relies on the flawed *McMahon* analysis which dealt with an entirely different question than the one before the Court. Take away the rigid application, arbitration law already bears doctrines that will allow for

the robust enforcement of arbitration clauses while protecting the policies animating the bankruptcy system. Arbitration is a private method for quickly resolving disputes and "has significant flexibility that, if utilized, can make arbitration a useful and positive component of a rational bankruptcy scheme, and one that does not compromise bankruptcy's goals."

Binding precedent mandates that the parties' arbitration agreement be honored, and it is in the best interests of the parties to use the speedy method of arbitration to settle their automatic stay dispute, without interference from the bankruptcy court.

II. In the case of a repeat filing, 11 U.S.C. § 362(c)(3)(A) eliminates the automatic stay as to the property of the debtor and the property of the bankruptcy estate.

Generally, when a debtor files for bankruptcy, he or she is protected by the automatic stay. The automatic stay prevents creditors from seeking the collection of debt until the case is discharged by the bankruptcy court. Furthermore, the automatic stay provisions serve to effectively stop all creditor collection efforts, end harassment of the debtor, and maintain the status quo between the debtor and his creditors. *Witkowski v. Knight*, 523 B.R. 291, 296 (B.A.P. 1st cir. 2014) (citing *Zeoli v. RIHT Mortg. Corp.*, 148 B.R. 698, 700 (Bankr. D.N.H. (1993)) This protection applies to both property of the debtor and property of the bankruptcy estate. *See* 11 U.S.C. § 362(a).

The automatic stay is neither absolute, nor truly "automatic." While in the case of a first-time filer, the automatic stay *automatically* applies, the code sets out specific exceptions to this general rule. *Id.* For example, the stay does not automatically go into effect in the cases of debtors who frequently, or serially, file for bankruptcy. *See*, *e.g.*, 11 U.S.C. § 362(c)(3)(A); 11 U.S.C. § 362(c)(4). In the subsequent case of a debtor who has had one case dismissed within the preceding one-year period, the automatic stay goes into effect only for thirty days. 11 U.S.C. § 362(c)(3)(A). In these cases, the code provides the option for a party in interest to extend the

stay beyond thirty days. 11 U.S.C. § 362(c)(3)(B). Moreover, when a debtor has had two cases dismissed within a year of a subsequent filing, the stay does not automatically apply absent a court order. 11 U.S.C. 362(c)(4). Thus, the term "automatic stay" is a bit of a misnomer as it does not always afford a debtor absolute protection from his correctors nor does it always apply to a bankruptcy case automatically.

Section 362(c)(3)(A) provides that thirty days after the filing of a debtor's subsequent bankruptcy petition, the automatic stay terminates "with respect to the debtor." Courts disagree on whether section 362(c)(3)(A) applies only to the property of the debtor or both the property of the debtor and the bankruptcy estate. *Compare Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789, 792 (B.A.P. 1st Cir. 2006) (holding that "the automatic stay does not terminate with respect to property of the estate."), *with Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 591 (B.A.P. 1st Cir.) (holding that section 362(c)(3)(A) terminates the automatic stay in its entirety on the 30th day after the petition date). The "with respect to the debtor" language contained in section 362(c)(3)(A) gives rise to various competing interpretations. As the United States Bankruptcy Court for the Eastern District of Illinois recounted, "[T]here are at least four different interpretations of stay termination 'with respect to the debtor' that can be supported—and challenged—with contextual arguments. These interpretations are known as the 'all-property' exclusion, the 'estate-property' exclusion, the 'no exclusion' interpretation, and the 'spousal exclusion.' *In re Daniel*, 404 B.R. 318, 321 (Bankr. E.D. Ill. 2009). Although courts recognize four plausible interpretations of the language contained in section 362(c)(3)(A), two interpretations dominate this issue: the "no exclusion" interpretation and the "estate-property" distinction. *Id.* While the majority of courts, including the Thirteenth Circuit, adopt the "estate-property" exclusion, this interpretation overlooks section

362(c)(3)(A)'s ambiguous text. Because Section 362(c)(3)(A) is on its face ambiguous, taking together an analysis of the plain language, a survey of the legislative history, the conclusions drawn from utilizing canons of construction, clarifies that "with respect to the debtor" also applies to the bankruptcy estate.

A. Because the phrase "in respect to the debtor" in section 362 is ambiguous, analyzing the provisions plain language and legislative history while utilizing canons of statutory construction evidence that the phrase applies to property of the debtor and of the bankruptcy estate.

Questions of statutory construction require courts to begin their analysis with the language of the statute itself. If upon reading of the statute's text, the court concludes the statutory language is plain and clear the court is to enforce the statute according to its terms. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6 (2000)). The language of section 362(c)(3)(A) is far from plain and clear:

> [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor as 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)—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. (*emphasis added)*.

Reading through section 362 demonstrates that the issue of whether "with respect to the debtor" applies to only the property of the debtor, or the property of the debtor *and* the property of the bankruptcy estate is unavoidable. While the starting point of statutory interpretation is the language itself, rarely is it the only tool utilized. Thus, when the language is ambiguous, other analysis is necessary. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (noting that a court

must consider the language itself, the specific context in which that language was used, and the broader context of the statute as a whole).

1. The phrase "with respect to the debtor" in section 362(c)(3)(A) is ambiguous and warrants utilizing its legislative history and other relevant canons of construction to discern Congress' intent.

Courts have consistently struggled with interpreting "with respect to the debtor" in the context of section 362. Although case law makes note of the various competing interpretations of the phrase "with respect to the debtor," courts' disagreement on the meaning of a statutory provision does not automatically render that provision ambiguous. *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 371 (B.A.P. 9th Cir. 2011). Rather, a statute is ambigious when it is, "capable of being understood by reasonably informed persons in two or more different senses." *Id.* (citing *Ileto v. Glock. Inc.*, 421 F. Supp. 2d 1274, 1285–86 (C.D. Cal. 2006). However, the two competing interpretations of section 362(c)(3)(A) directly conflict with one another. For example, the 1st Circuit adopted the "no exclusion" interpretation in *In re Smith,* and found that "11 U.S.C. § 362(c)(3)(A) terminates the entire stay thirty days after the filing of a second petition." *In re Smith*, 910 F.3d at 578. On the other hand, the 5th Circuit incongruously adopted the "estate-property" exclusion, holding that "with respect to the debtor" applies only to the property of the debtor. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019). These two interpretations are fundamentally different and cannot coexist. A court applying the "estate-property" exclusion stops its analysis at the language itself. In contrast under the "no-exclusion" interpretation "with respect to the debtor" is an ambiguous term and analyzed with section's 362 legislative history and in context with the rest of the statute the automatic stay also terminates with respect to the property of the bankruptcy estate. *See In re Reswick*, 446 B.R. at 362. The "estate property" exclusion and the "no exclusion" interpretation

are directly at odds with one another. This demonstrates the phrase "the respect to the debtor" is ambiguous.

2. The legislative history of section 362(c)(3)(A) confirms that Congress intended the automatic stay to terminate with respect to both the property of the debtor and the property of the bankruptcy estate.

In cases which the literal application of a statute produces a result demonstrably at odds with the intentions of its drafters, the intention of the drafters, rather the statute's literal language controls. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). To properly ascertain the intent of a statute's drafters, the court looks to the statute's legislative history. *See Fla. Power & Light Co. v. Lorian*, 470 U.S. 729, 737 (1985). Prior to the enactment of section 362(c)(3)(A), the stark increase in serial bankruptcy filings caused significant problems for bankruptcy courts. Debtors would file multiple bankruptcy petitions for the express purpose of obtaining the benefits of the automatic stay. In essence, these debtors manipulated the automatic stay to delay the action of a creditor or creditors. *In re Reswick*, 446 B.R. at 371 (citing Robert Lefkowitz, *The Filing of a Bankruptcy Petition in Violation of 11 U.S.C. § 109(g): Does it Invoke the Automatic Stay?,* 26 CARDOZO L. REV. 297, 297–98 (2004)). Before Congress passed BAPCPA, debtors abused the bankruptcy system to frustrate a secured creditors' attempts to foreclose on their collateral. *See* H.R. Rep. No. 105-540, 1998 WL 254742.

Congress intended section 362(c)(3)(A) to serve as a countermeasure to abusive bankruptcy filings. According to the 9th Circuit Bankruptcy Appellate Panel, "[t]he legislative history demonstrates that Congress intended to deter successive bankruptcy filings by imposing stricter limitations on the power of the automatic stay as subsequent bankruptcy cases are filed." *In re Reswick*, 446 B.R. at 371. To combat the abuse of filings, Congress created a National Bankruptcy Review Commission tasked with investigating issues within

the bankruptcy process and devising solutions to the uncovered issues. At the end of its investigation, the Commission suggested that Congress should legislate that the automatic stay, "not go into effect in certain successive filings of bankruptcy case." *See* Bankruptcy Reform Act of 1994, *Pub. L. 103-394, 108 Stat. 4106*, §§ 602-03 (Oct. 22, 1994). Following the release of the Commission's report, the House Judiciary Committee issued a report on "The Bankruptcy Reform Act of 1998." Section 121 of this proposed act's language was nearly identical to section 362(c)(3)(A), even providing for termination of the automatic stay "with respect to the debtor." The report indicated that Section 121's purpose was to combat such abuses of the bankruptcy code. H.R. Rep. No. 105-540, at 80 (1998). Simultaneously, the Senate Judiciary Committee issued a report on the proposed "Consumer Bankruptcy Reform Act of 1998." Section 303 of that bill was similarly identical to the text of section 362(c)(3)(A), including "with respect to the debtor." The Committee justified the provision by saying, "[This provision] would greatly reduce abuses of the bankruptcy system by reducing the incentive to file for bankruptcy repeatedly without completing the bankruptcy process." S. Rep. No. 105-253, at 39 (1998). Despite the statute's confusing drafting, that Congress consistently affirmed that it intended section 362(c)(3)(A) as a meaningful deterrent for debtors who may file successive bankruptcy petitions for the sole purpose of frustrating creditors.

3. Utilizing canons of statutory construction resolves the ambiguity and shows that "with respect to the debtor" includes property of the bankruptcy estate.

Apply relevant canons of statutory construction supports a finding that section 362(c)(3)(A) should be interpreted as to apply the no-exclusion interpretation. As Chief Justice Marshall aptly stated, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived…" *United States v. Fisher*, 2 Cranch 358, 386 (1805). Included

in "everything from which aid can be derived" are canons of statutory construction as these canons give common sense guidance to courts aiding in interpreting the meaning of a specific statute.

This Court read "with respect to the debtor" in the greater context of the statute itself. A statute is not to be read in isolation, rather, its meaning is to be looked for in all parts together and in relation to the end in view. The Court emphasizes that it is the "cardinal rule" of statutory construction that "a statute is to be read as a whole, since the meaning of the statutory language, plain or not, depends on text." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Looking at the text of 11 U.S.C. §362(c)(4)(i),

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

What Congress has done in this provision is clear—punish debtors who continue to file bankruptcy petitions within the same year. Section 362(c)(4) does not use the phrase "with respect to the debtor." However, this provision states that if certain criteria are met, the stay does not go into effect at all (unless a party in interest completes the given process for application of the automatic stay). *See* 11 U.S.C. § 362(c)(4). The provision does not say "the stay does not go into effect *for the property of the bankruptcy estate*," but that it initially does not apply at all. When viewed in the context of section 362(c)(4), section 362(c)(3)(A) must also be interpreted as making no distinction between property of the debtor and property of the bankruptcy estate.

The no-exclusion interpretation is consistent with other provisions of section 362 that were added by BAPCPA. For example, section 362(j) provides a summary method for parties in interest to confirm that the stay has been terminated. 11 U.S.C. § 362(j). This provision also

makes no distinction between the automatic stay for the property of the debtor and the property of the bankruptcy estate. If this Court adopts the estate-property extinction, section 362(j) would be inconsistent with section 362(c)(3)(A) as section 362(j) does not create a distinction between the property of the debtor and property of the estate. *In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006).

Additionally, Section 362(c)(3)(B) creates a path for a party in interest to move to extend the automatic stay as to all creditors so long as a hearing is held within thirty days of the petition being filed and was filed in good faith. 11 U.S.C. § 362(c)(3)(B). If this court adopts the estate-exclusion interpretation, it essentially renders section § 362(c)(3)(B) meaningless. This provision allows for a party in interest to file a motion to extend the automatic stay. It also provides for an expedited hearing and maintains a high burden of proof for the motion to be granted. *See* 11 U.S.C. 362(c)(3)(B). An estate-exclusion interpretation renders this provision meaningless for creditors. BAPCPA includes provision in order to provide some measure of protection to parties in interest. For example, a creditor may file a motion to extend the automatic stay past the thirty day mark. A secured creditor might go through this process if it is seeking to protect the property by which it is secured. Because the bankruptcy estate consists of whatever property that could potentially be used to pay creditors, there would be no reason for a creditor to file a motion to extend the automatic stay if the stay was only going to expire as to the property of the debtor. *In re Daniel*, 404 B.R. 318, 322 n. 3 (Bankr. N.D. Ill. 2009) (citing to 11 U.S.C. 541(a)(1)). Thus, if this court adopts an estate-property exclusion interpretation, it would be violating the presumption against ineffectiveness, which maintains that a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored. The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not

hindered. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL 63 (2012).

B. The no-exclusion interpretation of 362(c)(3)(A) is consistent with Congress's policy goals in the overall purposes and policies of BAPCPA.

Even prior to the adoption of the current iteration of the Bankruptcy Code, courts have recognized that a central purpose of a bankruptcy proceeding is to allow a debtor to have a "fresh start" when discharged. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991). Legislative history makes clear that BAPCPA operates as a creditor protection mechanism. BAPCPA, including section 362(c)(3)(A), which arose as a response to continued abuses of the bankruptcy code. *See* H.R. Rep. No. 105-540, 1998 WL 254742. While BAPCPA exists as a safeguard against fraudulent serial-filings, specifically when a debtor has multiple cases filed within a year of each other, there still exists a safeguard for debtors to enjoy the protections of the automatic stay. *See* 11 U.S.C. 362(c)(3)(B) (providing a framework in which a debtor may seek to extend the protection of the stay in the event the debtor has one prior dismissed bankruptcy filing within a year of the subsequent filing); 11 U.S.C. 362(c)(4) (providing a framework in which a debtor may seek to have the stay protection apply in the event the debtor has two or more prior dismissed bankruptcy filings within a year of the subsequent filing). Further, if this Court finds for the estate-property exclusion, the purpose of section 362(c)(3)(A) is largely undermined.

1. Section 362(c)(3)(A) works in tandem with BAPCPA to operate as a powerful and necessary creditor protection mechanism.

When weighing the various methods of interpretations surrounding section 362(c)(3)(A), this court should balance the overall purposes and policies of the bankruptcy code with the purposes and policies of BAPCPA. As noted, the bankruptcy code exists to assist an honest debtor toward the end goal of a "fresh start." *Grogan*, 498 U.S. at 286 (1991). While the court must consider

the debtor, it also must consider the needs of a creditor. Section 362(c)(3)(A) has been recognized by multiple courts as an "important creditor protection." *See Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813 (B.A.P. 10th Cir. 2008) (explaining that the duration of the stay affects whether "the policy of 'obtaining a maximum and equitable distribution to creditor' can be realized"). Bankruptcy is not *solely* about making the process easy for the debtor, another chief concern of bankruptcy is, "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period…" 1 COLLIER ON BANKRUPTCY P 1.01 (16th 2020). Generally, a creditor is involved in a bankruptcy proceeding involuntarily. Typically, a creditor gets involved in a bankruptcy proceeding because an individual or organization that owes the creditor *something*.[3]

In the case at bar, in which Wildflowers Community Bank maintains a priority lien on "substantially all" of its assets in order to secure the $35,000,000 credit agreement, as well as maintaining another priority lien on Petty's Equipment.[4] R. at 4. If this Court adopts the estate-property exclusion, Wildflowers will not be able to take action against the very property which secures the debt that Petty and Great Wide Open owe Wildflowers. Thus, this limitation on serial-filing debtors is vital to creditors.

4. The Bankruptcy Code's goals are not limited to only providing the debtor with a fresh start.

Since the code exists to provide a quick and efficient path to relief for a debtor, BAPCPA also mirrors this policy. The code, specifically in section 362 makes mention of "parties in interest." In section 1109(b) the code provides us with a list of which parties are considered

[3] The word "something" is used here to denote that there are many different ways in which a creditor could be involuntarily brought into a bankruptcy action. The debtor could owe money, the creditor could have a lien on something in the estate, etc. COLLIER ON BANKRUPTCY P 1.01 (16th 2020).

[4] Great Wide Open and Petty defaulted on both of their obligations under the Credit Agreement and the Guaranty in April 2018. R. at 5

parties in interest, "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee…" 11 U.S.C. 1109(b). It should be noted that this is not an exhaustive list, therefore it is possible that more parties than listed could qualify as a party in interest. 11 U.S.C. 102(3) (stating that "includes" and "including" are *not* limiting).

There are multiple provisions of 362(c) that make mention of "parties in interest." The legislation creates a back-channel in which a serially-filing debtor *could* still qualify for the automatic stay. The code, pursuant to section 362(c)(3)(B), enables a party in interest to file a motion to extend the automatic stay in the event that the debtor has a prior dismissed bankruptcy filing within one-year. *See* 11 U.S.C. § 362(c)(3)(B). This process requires notice, an expedited hearing within the applicable thirty-day automatic stay, and the party in interest must demonstrate that the filing is in good faith. *Id*. If this court adopts the estate-property extinction, this provision would be inoperative. *In re Jupiter*, 344 B.R. at 860–61 (Bankr. D. S.C. 2006). The court in *Jupiter* found that it would be "illogical" for Congress to enact a provision that would require moving parties to satisfy a high burden of proof and require courts to hear these motions on expedited basis, "only to have both the process and the end result meaningless and of no utility if property of the estate remains protected by the automatic stay…" *Id*. Likewise, 11 U.S.C. § 362(c)(4) includes a similar back channel for a party in interest to move for the automatic stay to be applied to the debtor, property of the debtor, and property of the bankruptcy estate in the event that a debtor has two or more prior bankruptcy filings within one year of the current filing.[5]

[5] Section 362(c)(4) asserts that, under these circumstances, the automatic stay does *not* apply to the debtor, debtor's property, or bankruptcy estate unless the same motion, with the same good-faith requirement, is granted to a party in interest. 11 U.S.C. 362(c)(4).

2. Without finding that the no exclusion interpretation is the appropriate interpretation of 362(c)(3)(A), creditors are devoid of any meaningful recourse to serial-filing debtors.

When a bankruptcy petition is filed, the bankruptcy estate consists of all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held. It also includes all interests of the debtor and the debtor's spouse in community property that is under the sole, equal, or joint management and control of the debtor at the time of filing. *See* 11 U.S.C. 541(a). Thus, if the automatic stay does not terminate as to the bankruptcy estate, there is only a modicum of actionable property for a creditor since the only property that the debtor personally maintains is whatever he or she earns post-petition. *In re Daniel* 404 B.R. 318, 321 (Bankr. N.D. Ill. 2009) (noting that the "estate of a debtor in bankruptcy consists of property that can potentially be used to pay creditors. Under 11 U.S.C.S. § 541(a)(1), it includes all legal or equitable interest of the debtor in property as of the commencement of the case…"). In adopting the no exclusion interpretation, like the First Circuit, this Court would uphold the policy behind section 362(c)(3)(A), maintaining the deliberate deterrent qualities of the statute.

Conclusion

Because arbitration is harmonious with purposes of Section 362, the FAA mandates enforcement of the parties' pre-petition arbitration agreement. Additionally, section 362(c)(3) must to terminate the automatic stay as to both property of the individual debtor and property of the bankruptcy estate to preserve the integrity of Congress' intent and further the policies of the Bankruptcy Code. For the foregoing reasons, Petitioner respectfully requests that this Court *reverse* the Thirteenth Circuit's decisions on both issues and find in favor of Petitioner.

Apendices

APPENDIX A

9 USC §2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

APPENDIX B

11 U.S.C. § 102(3)

Rules of Construction.

. . . .

(3) "includes" and "including" are not limiting

. . . .

APPENDIX C

11 U.S.C. § 362(a)

Automatic Stay

(c) Except as provided in subsection (d), (e), (f), and (h) of this section—

. . . .

(c)(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)—

(c)(3)(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;

(c)(3)(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

. . . .

(c)(4) (A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

. . . .

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

APPENDIX D

11 U.S.C. § 541(a)

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of al of the following property, wherever located and by whomever held:

(a)(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

APPENDIX E

11 U.S.C. § 1109(b)

Right to be heard

. . . .

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, and equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

APPENDIX F

28 U.S.C. §1334(b)

Bankruptcy cases and proceedings

. . . .

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

APPENDIX G

28 U.S.C. §157(b)(1)

Procedures

. . . .

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.