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 P. 13
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether an inherent conflict exists between the enforcement of an arbitration agreement under the Federal Arbitration Act and the underlying purpose of the Bankruptcy Code.

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

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OPINIONS BELOW

In an unreported opinion, the Bankruptcy Court for the District of Moot found it had the authority to refuse to compel arbitration regardless of a binding, mandatory prepetition agreement between the parties, and Wildflowers had violated the automatic stay, as section 362(c)(3)(A) terminates automatic state with respect to the debtor, and not as to property of the estate. (R. at 3.) Upon Wildflowers' appeal, the bankruptcy court certified both questions for appeal to the Thirteenth Circuit Court of Appeals. (R. at 9.) Judge Campbell wrote an opinion joined by Judge Epstein affirming the bankruptcy court's decision with regard to both issues. (R. at 3.) Judge Tench, in his dissent, noted that the majority had disregarded relevant binding caselaw from this Court and misinterpreted the text of section 362(c)(3)(A), and therefore erred in affirming the decisions of the bankruptcy court on each issue. (R. at 19, 26.) The Thirteenth Circuit's opinion is reproduced in its entirety as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

7 U.S.C. § 7(n)(2) (2020) reads, in pertinent part, as follows:

> (n) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.
>
> . . .
>
> (2) Predispute arbitration agreements. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

9 U.S.C. § 4 (2020) reads, in pertinent part, as follows:

... the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement;

11 U.S.C. § 362(c)(3) (2020) reads, in pertinent part, as follows:

> (c) Except as provided in subsections (d), (e), (f), and (h) of this section—
> . . .
> (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 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], 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) [11 USCS § 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. § 541(a) (2020) reads, in pertinent part, as follows:

> (a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> (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.
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
>
> (A) under the sole, equal, or joint management and control of the debtor; or
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n), 543, 550, 553, or 723].
> (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].
> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
>
> (A) by bequest, devise, or inheritance;
> (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
> (C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7**)** Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 704(a)(10) (2020) reads, in pertinent part, as follows:

(a) The trustee shall—

. . .

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

11 U.S.C. § 707(b)(2)(D) (2020) reads, in pertinent part, as follows:

Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if—

. . .

(ii) with respect to the debtor, while the debtor is—

(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10 [10 USCS § 101(d)(1)]) of not less than 90 days; or

(II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32 [32 USCS § 901(1)]) performed for a period of not less than 90 days;

11 U.S.C. § 1302(b) (2020) reads, in pertinent part, as follows:

(b) The trustee shall—

. . .

(6) if *with respect to the debtor* there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).

28 U.S.C. § 157(b) (2020) reads, in pertinent part, as follows:

(2) Core proceedings include, but are not limited to—

. . .

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 [11 USCS §§ 1101 et seq., 1201 et seq. or 1301 et seq.] but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

28 U.S.C. § 1334(b) reads as follows:

> (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.

STATEMENT OF THE CASE AND FACTS

In 2002, Earl Petty ("Petty") started a craft brewery named Great Wide Open Brewing Company, Inc. ("Great Wide Open"). (R. at 3.) In 2005, Great Wide Open opened a taproom with small batch brewing equipment Petty purchased in Royal Rapids, Moot. (R. at 3.) Demand for Great Wide Open's beer increased as the company grew into one of the state's largest craft breweries. (R. at 3-4.) Great Wide Open began an aggressive growth strategy, opening four new taprooms in college towns across the state in 2010 and a state-of-the-art brewhouse with increased capacity in 2012. (R. at 4.) The new brewhouse brewed the majority of Great Wide Open's beer but the company continued some production at its existing taprooms. (R. at 4.)

To finance its new ventures, Great Wide Open turned to its current lender, Wildflowers Community Bank ("Wildflowers"). R. at 4. In 2011, Great Wide Open obtained a $35 million revolving credit agreement ("Credit Agreement") from Wildflowers. R. at 4. Wildflowers obtained both a security agreement on Great Wide Open's assets and a personal guaranty ("Guaranty") from Petty, where he unconditionally promised repayment of the business's obligations. (R. at 4.) The collateral for the Guaranty was a first priority lien on the equipment Petty had purchased with his own money. (R. at 4.)

Both the Credit Agreement and the Guaranty contained remedies clauses that, upon default, granted 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." (R. at 4.) Further, both agreements contained 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." (R. at 4.)

By 2017, a combination of reduced demand for craft beer and increased competition amongst brewers led to liquidity issues for Great Wide Open. (R. at 5.) In March of 2018, Great Wide Open responded to its cash flow issues and closed three of its taprooms without notice to Wildflowers. (R. at 5.) Wildflower first learned of the taproom closures when one of its agents saw a sign on the taproom door reading "Don't come around here no more." (R. at 5.) Following these closures, the landlord of the Royal Rapids location terminated the lease for the original taproom. (R. at 5.) By April of 2018, Petty and Great Wide Open had defaulted on both obligations to Wildflowers—the Guaranty and the Credit Agreement. (R. at 5.) Concerned over the possibility of default, Wildflowers filed a demand for arbitration and a general state law breach of contract complaint against Petty on June 4, 2018. (R. at 5.) Wildflowers sought damages for the remaining balance on the Credit Agreement which totaled $33.2 million. The arbitrator set the initial conference for the arbitration process for July 12, 2018. (R. at 5.)

Before the initial arbitration conference, Great Wide Open fired all its employees and ceased operations. R. at 5. On the day the conference was to be held, Great Wide Open filed a petition for a chapter 7 bankruptcy and Petty filed for a chapter 11 ("Initial Bankruptcy Case"). (R. at 5.) On August 27, 2018, the bankruptcy court dismissed Petty's chapter 11 because of his failure to timely file certain documents, including his schedules of assets and liabilities. (R. at 5.)

After obtaining new counsel, Petty refiled under Chapter 11 ("Second Bankruptcy Case") with proper documentation on January 11, 2019. (R. at 5-6.) Petty's Chapter 11 filing contained a proposal for a five-year reorganization plan which promised to pay creditors forty cents on the dollar from Petty's personal income. (R. at 6.) The reorganization plan included some negotiated settlements with creditors, but Petty made no attempt to negotiate a pre-petition settlement with Wildflowers. (R. at 6.) Due to the first priority lien included in the Credit Agreement, Wildflowers

received a majority of the proceeds from the Chapter 7 liquidation sale of Great Wide Open's assets. (R. at 6.) For the Second Bankruptcy Case, this reduced the outstanding balance owed under the Guaranty to $2.1 million. (R. at 6.)

During the initial hearings for the Second Bankruptcy Case, Petty informed the Court that he had negotiated a new lease with the landlord of the Royal Rapids taproom, and in December 2019 had resumed operations in Royal Rapids as a sole proprietorship under the name "Full Moon Fever Brewing." (R. at 6.) Petty's new venture used the brewing equipment secured by the first priority lien in the Guaranty. (R. at 3,6.) With many of his old customers patronizing the new company, Petty's Full Moon Fever Brewing was profitable for the first month of operations. (R. at 6.)

Despite using equipment that he had pledged as collateral to Wildflower in the Guaranty, Petty failed to file a motion to extend the automatic stay under § 362(c)(3)(B) during the first thirty days of the Second Bankruptcy Case. (R. at 6.) On February 12, 2019, Wildflower repossessed the equipment in the Royal Rapids taproom, as it had been thirty-two days since the initial petition was filed. (R. at 6.)

In response, Petty filed a motion in the Second Bankruptcy Case claiming that Wildflowers had violated the automatic stay and seeking $500,000 in damages under section 362(k). (R. at 6.) Full Moon Fever ceased operations on February 17, 2019. (R. at 7.) Wildflowers responded on March 5, 2019, asserting that no automatic stay existed to stop repossession because of the penalties provided under § 362(c)(3)(A) for debtors who have had a bankruptcy case dismissed within one year of filing. (R. at 7.) Further, Wildflowers argued for enforcement of the arbitration agreements Petty signed in both the Credit Agreement and Guaranty, so that any claims brought against Wildflowers must be done in the already pending arbitration proceeding. (R. at 7.)

The bankruptcy court ruled in favor of Petty on both issues. (R. at 7.) The court denied Wildflowers' request to compel arbitration due to "conflict" between the automatic stay and the FAA and held that Wildflowers violated the automatic stay because the equipment was the property of the estate, despite Petty's failure to file for an extension of the automatic stay. (R. at 7.) Wildflowers timely sought, and the bankruptcy court certified, a direct appeal of the two issues. (R. at 7.)

SUMMARY OF ARGUMENT

This case involves the arbitrability of the automatic stay, a topic which has been much discussed by circuit courts. This Court's jurisprudence has strictly mandated the lower courts to enforce arbitration agreements pursuant to Congress' intent in passing the FAA. In no uncertain terms, unless a conflict is found explicitly in the text or legislative history, or an "inherent conflict" is read between the FAA and the underlying purpose of the statute at issue, the FAA is to take precedence. Neither the text nor legislative history of the Bankruptcy Code point to an explicit repeal of the FAA, so the respondent turned to the elusive "implied repeal" to attempt to have their claim heard by a bankruptcy court.

While this Court has not issued an opinion on the arbitrability of bankruptcy processes specifically, many circuit courts have held that certain bankruptcy "core" functions are too intertwined with purpose of the Bankruptcy Code for arbitrators to handle. Although Petty's claim regarding the automatic stay is technically a "core" proceeding under 28 U.S.C. § 157(b), the specific facts of his case and nature of the automatic stay make it an arbitrable claim. First, because this case involves discrepancy about the existence of an automatic stay, it involves interpreting a statute, not issuing or enforcing a discharge injunction. Courts have long recognized bankruptcy courts' "unique powers" in issuing and enforcing their own orders, but

this statutory interpretation is well within the capabilities and jurisdiction of arbitration. Further, Petty's chapter 11 plan has already been devised and his assets were already either liquidated or spoken for under the Guaranty. Therefore, any impact of the resolution of this automatic stay claim on his chapter 11 success will be minimal. Because Petty's claim involves an automatic stay, a function of bankruptcy that does not inherently conflict with the FAA, the lower courts erred in failing to enforce the comprehensive prepetition arbitration agreement between Petty and Wildflowers.

The instant case pushes to the forefront the current split in authority over the correct interpretation of 11 U.S.C. § 362(c)(3)(A). This section of the Bankruptcy Code creates a framework for terminating the automatic stay for debtors who have filed and had their cases dismissed within the last year. The automatic stay exists to provide some protection for debtors and for the preservation of collateral. Thus, it reasons that a provision dedicated to the termination of the automatic stay would remove the protections afforded to the debtor and grant relief to the creditor. Looking at the language and construction of section 362(c)(3)(A) as well as the Legislature's purpose in enacting the BAPCPA amendments it is clear that this section must apply to the property of the bankruptcy estate.

This court should not adopt the position taken by the court below as there is no plain reading of section 362(c) that limits the termination of the automatic stay to the debtor alone. The lower court relies on the phrase "with respect to the debtor" to infer that the termination of the stay only applies to the debtor and not the estate. Relying on the language to infer such meaning is insufficient because it ignores the ambiguity created by the impreciseness of section 362(c). A literal reading of this statute would lead to an absurd result in which this provision rarely. As such this court must read the statue as a whole to understand the meaning of the phrase in question. By

reading section 362(c)(3)(A) as applying to the debtor *and* the property of the estate this court can avoid making certain phrases within the statute meaningless and give effect to the statue as a whole—not a single phrase in isolation.

This interpretation is also congruent when considering the policy reasons for enacting BAPCPA and the practical effects of both interpretations. In the House Report accompanying the 2005 amendments Congress makes clear that it wished to prevent and deter the use of repeat filings. Debtors often used the automatic stay as a shield, filing a petition to prevent creditors from laying claim to assets and then dismissing the case when the risk of foreclosure or repossession was over. Interpreting section 362(c)(3)(A) to terminate the automatic stay for both debtor and property of the estate accomplishes this goal as it prevents the repeat shielding of assets using the automatic stay. Any other interpretation leaves this provision toothless, as the assets of the debtor remain protected as property of the estate even though the court has cause for terminating the stay. Accordingly, we ask this court to reverse the lower courts' decisions on both regards as there is no irreconcilable differences between the automatic stay and the Federal Arbitration Act and that section 362(c)(3)(A) applies to property of the estate.

ARGUMENT

II. THE ARBITRATION AGREEMENT BETWEEN PETTY AND WILDFLOWERS MUST BE ENFORCED BECAUSE 11 U.S.C. § 362 AND ITS RELATED CODE PROVISIONS DO NOT IMPLICITY REPEAL THE FAA.

In 1926 Congress passed the FAA, a codification of its confidence in arbitration as a cheap and speedy alternative to court proceedings. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). The FAA mandates court enforcement of valid arbitration agreements with very few and very specific exceptions. 9 U.S.C. § 4 (2020). This Court has designated arbitration under the FAA as the rule, with a court's discretion not to enforce arbitration agreements a rare exception. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). Under Supreme Court jurisprudence the FAA's effect may only be changed by contrary congressional command. *Id.* at 226.

"Congressional command" to override the FAA may be inferred in three ways: 1) the text of the allegedly conflicting statute, 2) the history of the legislation of the statute, or 3) an implied repeal in the form of "inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227. No evidence in the language of the Bankruptcy Code nor the historical context of its legislation lead to a finding that it was intended to overrule the FAA. Congress purposely did not give bankruptcy courts sole jurisdiction over bankruptcy claims. 28 U.S.C. § 1334 (b) explicitly states that bankruptcy courts have original, but not exclusive, jurisdiction over cases arising under or related to Title 11. 28 U.S.C. § 1334(b) (2020). Noting that "when it wishes to," Congress is fully capable of and has previously overridden the FAA in favor of subsequent statutes, this Court declared silence on arbitration a telltale sign that there was no congressional intent to override. *Epic*, 138 S. Ct. at 1626. For example, the Commodity Exchange Act strictly declares pre-dispute arbitration agreements arising under section 326

unenforceable. 7 U.S.C. § 26(n)(2). Congress included no similar provision in the Bankruptcy Code. The lack of any telling verbiage or legislative context adds to the presumption that Congress did not intend for the automatic stay to oust the FAA.

The issue therefore lies in the supposed existence of an "implied repeal." This Court has not left room for confusion in the matter of implied repeals. Recently the Supreme Court held that the FAA and federal statutes must be enforced concurrently unless there exists a "clear and manifest" congressional intent which makes this impossible. *Epic*, 138 S. Ct. at 1617. This Court has already heard several cases claiming Congressional intent to subvert the FAA in favor of statutes with topics as crucial and complex as employment discrimination, consumer protection, antitrust and anti-racketeering, and has rejected every one. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *McMahon,* 482 U.S. 220, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477 (1989).

While the Supreme Court has not yet ruled on the arbitrability of claims arising under the Bankruptcy Code, it is a well-litigated subject in the circuit courts. Several circuit courts have looked to the definition of "core proceeding" under 28 U.S.C. § 157(b) to answer a preliminary question of whether bankruptcy courts have the discretion to refuse to enforce an arbitration agreement. Bankruptcy courts generally do not have the authority to deny arbitration of "non-core" proceedings but may possess discretion if sufficient conflict is found between the FAA and the purpose of the code section at issue. The court may have had some discretion in deciding whether to mandate arbitration because Wildflowers and Petty's dispute is centered on uncertainty regarding an automatic stay— a "core" proceeding under 28 U.S.C. § 157(b).

The 2nd Circuit summed up the test for abuse of discretion by bankruptcy courts as follows: “the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Federal Arbitration Act or that arbitration of the claim would "necessarily jeopardize" the objectives of the Bankruptcy Code.” *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (4th Cir. 2006) (quoting *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Protection & Indem. Ass’n* (*In re United States Lines, Inc.),* 197 F.3d 631 (2d Cir. 1999).

This Court has not weighed in on the importance of this core versus non-core distinction, however, this categorization does not materially change the outcome in this matter. For Petty’s Guaranty to fit into the narrow category of implied repeals, this Court must still find that the statutes conflict or that it would be impossible to enforce the arbitration clause without threatening the underlying purpose of section 362 of the Bankruptcy Code.

A. There is no intentional congressional conflict between enforcing arbitration under the FAA and the Bankruptcy Code.

The FAA was passed in order to legitimize arbitration as a flexible means for disputes to avoid the courtroom where possible. This Court heard a case regarding the arbitrability of employees’ claims arising under the National Labor Relations Act in *Epic Sys. Corp. v. Lewis* and renewed its disfavor for reading implied repeals into Congressional statutes. This Court instructed that when faced with Congressional statutes alleged to speak on the same subject, courts are not to “pick and choose,” but to “give effect to both,” in the absence of clear and manifest congressional intent. *Epic*, 138 S. Ct. at 1617 (Quoting *Morton v. Mancari*, 417 U.S. 535 (1974)). Given the sanctity of arbitration in legislation and judicial interpretation, and the gravity of the automatic stay in bankruptcy, if possible, the FAA and the Bankruptcy code should be read in harmony.

Petty, a former practicing lawyer presumably with full knowledge of the contracts he entered into, seeks to renege on a promise to arbitrate any and all disputes arising out of his promise to pay Wildflowers back in full. Frankly, the most foreseeable type of dispute arising from this creditor/debtor relationship is a default on Petty's part. This risk was specifically accounted for in the Guaranty and Credit Agreement. To allow Petty out of a seemingly ironclad arbitration clause simply because the topic of the arbitration arises under the Bankruptcy Code is inconsistent with prior decisions issued by this Court. Further, in passing the FAA, Congress intended that claims based on statutory rights must still be arbitrated. The duty to enforce arbitrations, "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226. It is not Wildflowers' position that arbitration should displace the automatic stay, but rather that arbitration is the capable and proper forum for the dispute. *Mitsubishi Motors Corp*., 473 U.S. at 628 ("by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

B. Arbitration does not jeopardize the purpose of the automatic stay under the Bankruptcy Code.

Notwithstanding the complete lack of textual basis for conflict and the Supreme Court's refusal to certify a statutory exception to the FAA rule, circuit courts have carved out a policy-based exception to arbitrability for claims arising under the Bankruptcy Code. The circuit methods are fairly diverse, but generally bankruptcy courts' use of discretion is upheld when sufficient evidence in the "nature of the claim and specific facts of the case" is found to create an inherent conflict between an arbitration and the objectives of the Bankruptcy Code. *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). The bankruptcy objectives supposedly threatened by

arbitration are 1) "the goal of centralized resolution of purely bankruptcy issues, 2) the need to protect creditors and reorganizing debtors from piecemeal litigation, and 3) the undisputed power of a bankruptcy court to enforce its own orders." *E.g., Ins. Co. of N. Am.* v. *NGC Settlement Trust & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056 (5th Cir. 1997). Courts have often trusted arbitrators to affect an outcome consistent with these goals. *See In re Chorus Data Systems, Inc.*, 122 B.R. 845 (Bankr. D.N.H. 1990), *Hill*, 436 F.3d 104 (2006), *Cibro Petroleum Prods., Inc.* v. *City of Albany* (*In re Winimo Realty Corp.*), 270 B.R. 99 (S.D.N.Y. 2001).

The nature of Petty's claim and the facts specific to this case are not in severe conflict with the objective of the automatic stay. To rule in the present case that Petty and Wildflower's prepetition arbitration agreement is to be ignored merely because the automatic stay is a "core bankruptcy issue" would be to extend the discretion of the bankruptcy courts far past congressional intent. *See U.S. Lines* 197 F.3d at 640 ("a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration.").

1. Wildflowers and Petty's unique relationship and contract provisions lessen the effect of non-centralization of Petty's bankruptcy claims.

Although bankruptcy is a multi-party "collective" process, Petty and Wildflower (but not other stakeholders in the bankruptcy proceeding) contracted to resolve their two-party disputes. The majority decision supposes that this would harm other creditors with skin in the chapter 11 reorganization efforts because of the "collective" nature of bankruptcy and the fact that the arbitration is non-binding on other creditors. In *Phillips v. Congelton, L.L.C.*, the Fourth Circuit Court of Appeals affirmed the bankruptcy court's discretion not to enforce a bankruptcy clause. *Phillips v. Congelton, L.L.C* (*In re White Mt. Mining Co., L.L.C.*), 403 F.3d 164 (4th Cir. 2005). White Mountain Mining, a coal-mining business which had received over $10 million in funding

from a single creditor sought determination in arbitration that the funding constituted contributions to capital and not loans "due and owing" from White Mountain. *Id.* at 167. Meanwhile the creditor filed an adversary proceeding asserting the contrary. *Id.* The categorization of these funds as debt or equity had extreme bearing on White Mountain's ability to create a chapter 11 plan. *Id.* The company could not even begin to construct its plan without knowing the classification. *Id.* While centralizing these disputes concerning White Mountain's legal obligations was especially important in this suit, it is not so critical here. As previously mentioned, Petty's plan has already been designed, save for his plan to pay Wildflowers in full. He is to pay his creditors forty cents on each dollar of his income for the next five years in conjunction with paying settlements negotiated prepetition with each creditor except for his largest, Wildflowers. The damages that Petty believes he is due will not change his chapter 11 plan nor the amount due.

This non-binding Fourth Circuit Court's emphasis on the merits of centralizing chapter 11 claims and fear of putting debtors through "piecemeal" litigation goes directly against this Court's direction that Congress' intent in writing the FAA "require(s) that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

2. <u>The automatic stay under section 362 of the Bankruptcy Code is an arbitrable issue.</u>

The majority decision below conflates the facts of this case and the nature of Petty's claim with circuit court cases involving arbitrability of discharge injunctions and the authority of bankruptcy courts to enforce their own orders. A dispute involving the existence of a stay created *automatically* by section 362 is not so central to the purposes and policies of the Bankruptcy Code that it is too lofty a subject for arbitrators to handle. In a1997 decision, the Fifth Circuit

Court ultimately decided that the bankruptcy court was correct in refusing to compel arbitration of a violation of discharge injunction but declined to find all core proceedings inherently non-arbitrable. *See, e.g., In re Nat'l Gypsum Co.*, 118 F.3d 1056 (1997). While the Fifth Circuit Court's statements are certainly not binding on this Court, they provide a logical interpretation of Supreme Court caselaw and congressional intent. The *Gypsum* court stated that the core versus non-core distinction was too expansive to be used as a means to decide sole jurisdiction for bankruptcy courts, and that "certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *Id.* at 1067. Therefore, even when dealing with core bankruptcy proceedings, the standard is that of inherent conflict set by this Court in *McMahon*, not a mere effect on the bankruptcy process.

Unlike many of its sister circuits, the Second Circuit Court of Appeals has heard cases regarding bankruptcy courts' discretion in enforcing arbitrability of both discharge injunctions and automatic stays, and coherently distinguished the two. In *Anderson*, a dispute arose because of a credit card company's refusal to remove a "charge-off" classification from a debtor's account. *In re Anderson*, 884 F.3d at 385. After the company had marked the account as a loss, sold his debt to a third-party debt buyer, and reported the loss to credit reporting agencies, the debtor filed his chapter 7 case. *Id.* Although he was discharged of all dischargeable debts, the credit card company refused to notify the reporting agencies of the change from the debt's "charge-off" classification to "discharged," presumably to encourage payment of a debt already discharged in chapter 7. *Id.* The credit card company sought to have the debtor's violation of discharge injunction claim sent to arbitration per the credit card agreement, but the bankruptcy court refused. *Id.* The circuit court affirmed the bankruptcy court's ruling and held that because

discharge is “the paramount tool used to effectuate the central goal of bankruptcy” to provide debtors a fresh start, it was not arbitrable. *Id.* at 390. The opinion further recognized “the undisputed power of a bankruptcy court to enforce its own orders” as a conflict between the purpose of the Bankruptcy Code and the function of the discharge injunction. *Id.*

The very same court interpreted the arbitrability of the automatic stay in *Hill* quite differently. The debtor in *Hill*, similar to the debtor in *Anderson*, had already filed and had her chapter 7 case fully administered. *Hill*, 436 F.3d 104. MBNA American Bank continued to withdraw monthly loan payments from the debtor’s account after she filed her chapter 7 case. *Id.* at 106. The debtor filed an adversary proceeding alleging that the bank was unjustly enriched because it “willfully” violated the automatic stay provision under § 362(h) of the Bankruptcy Code, and the bank filed a motion to compel arbitration pursuant to its credit agreement with the debtor. *Id.* The bankruptcy court refused to compel arbitration and the district court affirmed the bankruptcy court’s discretion. *Id.* at 109. The circuit court disagreed, stating that the automatic stay, "which arises by operation of statutory law" is not "so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions." *Id.* at 110. Although discharge injunctions and automatic stays are both statutory and standard parts of every bankruptcy proceeding, the difference lies in the unique powers of bankruptcy courts to interpret and enforce the injunctions only they may issue, where arbitrators are certainly capable of interpreting and enforcing a federal statute.

This distinction is particularly relevant to the present case. Like in *Hill*, there are very few moving parts in Petty’s bankruptcy filing. Petty’s claim arose from confusion about the expiration of an automatic stay. Wildflowers has since returned the Equipment that was repossessed as it awaits a decision from an arbitrator. Petty has already liquidated his business

assets in chapter 7, proposed his reorganization plan under chapter 11, and settled with his other creditors. Additionally, the automatic stay involves a moderately ordinary statutory interpretation instead of the administration of a discharge or enforcement of a bankruptcy court order. This Court has been steadfast in its commitment to enforcing the FAA where possible, this case should be no exception.

II. FOR REPEATED FILINGS, SECTION 362(C)(3)(A) TERMINATES THE AUTOMATIC STAY WITH RESPECT TO THE DEBTOR AND THE PROPERTY OF THE ESTATE.

The Bankruptcy Code serves two masters, it must balance the debtor's need for a successful reorganization and fresh start with ensuring the fair and prompt repayment of creditors. *Fustolo v. 50 Thomas Patton Drive, LLC*, 816 F.3d 1, 6 (1st Cir. 2016). The automatic stay plays a role in this balancing act as it attempts to provide some protection to debtors while also ensuring the property of the estate does not go to waste. A powerful tool, the Code was reformed in 2005 using the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") to ensure this tool is not misused by repeat bankruptcy filers to keep creditors away from pledged collateral. Given this backdrop, this Court must interpret section 362(c)(3)(A) as terminating the automatic stay for both the debtor and the property of the estate.

A. <u>The language and construction of 362(c)(3)(A) implies that the automatic stay for both entities must be terminated.</u>

An indispensable principal of statutory interpretation, "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). The issue with the 2005 BAPCPA amendments is that very rarely does the plain language of the

revisions allow for unambiguous interpretation. Only two years after the changes, Judge Waldon noted that "there is little consensus on much of the enacted text of BAPCPA" due to the extensive prevalence of minority and majority opinions on many of its notes. The Honorable Thomas F. Waldron, Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 Am. Bankr. L.J. 195, 195 (2007). The revisions in section 362 hold the unique honor of standing atop what is already a difficult and cumbersome statutory scheme. *In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) (calling the interpretation of 362(c)(3)(A) a puzzler due to the conflicting interpretations and that a literal reading would mean the statute only applies in the most exceedingly rare circumstances in practice).

While the mere fact that courts disagree on the meaning of a statutory provision does not render that provision ambiguous, one does not have to look far within the BAPCPA amendments to understand that there likely is no common sense literal interpretation of the law as written. Within subsection (c), following the "plain meaning" of the language almost assuredly leads to an absurd result when applied to the statute as a whole. *See Paschall* at 278. The section provides, in relevant part;

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

(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) (2020) (emphasis added).

In bankruptcy law, a case is not filed—a petition is. Further, this subsection uses the present tense "is" to refer to the debtor. Read literally, this would require an individual to currently have a case pending against him or her for this section to take hold. Finally, given the requirement that a case must be pending within a one-year period, the court in *In re Paschal* notes that "taken all together, the section only applies to individuals who have had three cases pending in one calendar year: one case that has been dismissed, one case that is still pending when the petition at issue is filed, and the new case that is before the court for determination." 337 B.R. at 277.

Given the issues with trying to understand what the plain language demands here, it seems nearly impossible to ascertain a plain meaning given the use of the words in question within the rest of the BAPCPA amendments. Looking to the broad array of revisions made in 2005, the notorious five words "with respect to the debtor" are always surplusage. See 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, 430 (2012). Prior to the BAPCPA amendments, there was no inclusion of the phrase at question, "with respect to the debtor" used to create some distinction between debtor and estate. Thus, there is nowhere in the previous Code to point to in order to draw meaning for this new phrase. However, when looking at where the phrase appears in the revisions, it appears that its inclusion is filler, and that the phrase itself is absolutely meaningless. Section 1302 of the Code covers the appointing of a trustee and subsection 1302(b)

dictates what notice a trustee must give to the holder of claims of domestic support obligations. The section reads, in relevant part;

(b) The trustee shall—

(6) if *with respect to the debtor* there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).

11 U.S.C. § 1302(b) (emphasis added).

Here the phrase "with respect to the debtor" is meaningless. For whom else other than the debtor's domestic support obligations would an appointed trustee concern themselves with? The statue may as well read, "if there is a claim for a domestic obligation." Analysis of this language in other areas of BAPCA yields similar results. The exact issue is repeated in section detailing the duties of a trustee, stating "if *with respect to the debtor* there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d). 11 U.S.C. § 704(a)(10) (2020) (emphasis added). This mistake is further compounded in section 707(b)(2)(D) which provides that a court may not dismiss or convert a case if;

(ii) *with respect to the debtor*, while the debtor is—

(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days;

11 U.S.C. § 707(b) (2020) (emphasis added).

Again, the phrase is extraneous as this subsection is concerned with debtors and active-duty service. To whom or to what else could it apply to? To read section 362(c)(3)(A) as applying only to the debtor and not property of the estate places far too much emphasis on the phrase "with respect to the debtor." To do so overlooks the poor drafting within the section and tries to impose a logical rule on a phrase that carries no meaning. As such, this Court must go

beyond the plain language of the automatic stay termination provision to consider what the phrase should mean consider the statutory scheme as a whole.

The panel below notes that, "viewed in isolation, the language of the statute is plain and unambiguous." (R. at 17). The emphasis on isolating this subsection is because only when one ignores the other sections of 362(c) does Respondent's interpretation make sense. As the Supreme Court held in *Dolan v. Postal Service*, "the definition of words in isolation is not necessarily controlling in statutory construction. . . [i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." 546 U.S. 481, 486 (2006).

This Court's approach in *Dolan* is prudent when considering the Respondent's analysis of section 362(c). Respondent contends that the phrase "with respect to the debtor" unambiguously means that the stay only terminates in regard to the debtor, however this interpretation is at odds with the other subsections of the statutory scheme. Section 362(c)(3)(A) provides, in relevant part;

(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) (2020) (emphasis added).

As the court in *Reswick* points out, the opening clause of subsection (A) becomes surplusage if 362(c) only terminates the automatic stay with regard to the debtor. *In re Reswick*, 446 B.R. 362, 367 (B.A.P. 9th Cir. 2011). The entire phrase, "with respect to any action taken with respect to a debt or property securing such debt," would be read out of the statute as there is no need to reference the underlying property securing such debt if the stay is only lifted with regard to the debtor. Further, the reference to property securing the debt in the introduction phrase indicates that the stay makes no distinction between debtor and property of the estate. *See In re Smith*, 910 F.3d 576, 582 (1st Cir. 2018). This is supported by the language in the provision that creates the estate, which also does not make such distinctions between debtor and property of the estate. Because section 541(a) provides that "all legal or equitable interests of the debtor in property" become property of the estate, it follows that creating a distinction between the two would be at odds with Code's own section creating the estate. 11 U.S.C. § 541(a) (2020).

Section 362(c)(3)(A) must be read as applying to both the debtor and property of the estate. To interpret otherwise would over-emphasize the words "with respect to the debtor" while ignoring the language and structure of the section as a whole. Section 362(c)(3)(a) itself references the underlying property as a whole when it notes that the stay itself applies to the property securing the underlying debt. Elevating form over substance in this manner ignores the language within 362(c) which would become surplusage upon terminating the stay only with regard to the debtor. This Court should interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent. In doing so, it is clear that the automatic stay must terminate with regard to the property of the estate.

B. Given the purpose of the BAPCPA amendments, section 362(c)(3)(A) requires that the automatic stay must terminate for both the debtor and the property of the estate.

The Supreme Court often consults legislative history in bankruptcy decisions to ensure that its interpretations are consistent with Congress's purposes. *See, e.g.*, *Appling*, 138 S. Ct. at 1763-64; *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 71, 131 (2011); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010). The BAPCPA amendments were drafted after years of consideration, with the goal of discouraging repeat filings and abuse of the bankruptcy system. *Milavetz*, 559 U.S. at 231-32 (stating BAPCPA aimed to correct perceived abuses of the bankruptcy system). The first indicia of these efforts began with a report from the Bankruptcy Review Commission and the Subsequent House Report in 1999. While section 362(c) would not be added until 2005, these reports evince the legislature's intent and clue us in to the true meaning of section 362(c)(3)(A).

The first attempt to change the Bankruptcy Code to deal with the issue of serial filers came in 1999. The House Judiciary Committee issued Report No. 105-540, on H.R. 3150, title "The Bankruptcy Reform Act of 1998." This included section 121, titled "Discouraging bad faith repeat filings." This section contained almost identical language to the eventual revisions made by Congress in the 2005 BAPCPA revisions. For purposes of legislative intent, it is important to note that Congress drafted this legislation partly in response to a report from the National Bankruptcy Review Commission detailing issues of abuse amongst serial filers. The report stated,

Some debtors file for chapter 13 . . . on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their cases, only to file again when the mortgagee or landlord brings another legal action to seize control of the

property. The ability to file repeatedly for chapter 13 relief increases a debtor's leverage in negotiations with creditors. In regions where this problem is particularly acute, judges have devoted significant time and resources to developing tools to address this problem.

Nat'l Bankr. Review Comm'n, Report of the National Bankruptcy Review Commission, § 1.5.5, 278-79 (Oct. 20, 1997).

The clear concern here from both the reviewing commission and the House Committee is the use of the automatic stay to hide assets in the event of a default. Respondent's interpretation of section 362(c)(3)(A) applies only to the debtor, and not the assets of the estate. Given that the assets are moved into the estate upon commencement of the case, it is meaningless for creditors to obtain stay relief against only the debtor. For this section to have any weight in dealing with problems addressed by Congress, the stay must be lifted for property of the estate.

By 2005, the House Judiciary Report accompanying the passage of BAPCPA contained multiple sections intended to bolster creditors' rights in the face of repeat filings. *H.R. Rep. No*. 109–31(I), at 2. The purpose of the bill was to "ensure the system is fair to both debtors and creditors" by including provisions intended to deter serial and abusive bankruptcy filings. *Id.* at 3. Provision 102—Discouraging Bad Faith of Repeat Filings—details section 362(c) as allowing the Code to terminate the stay of a chapter 7, 11, or 13, if such case was dismissed within one year. *Id.* at 69. To accomplish the goal of discouraging bad faith repeat filings, the section must actually do something that would dissuade a debtor not to do so. If the estate is left untouched by stay relief, the intended goal of multiple filings is realized and the property is protected from creditors until such time that the debtor needs to refile the petition.

Based on the House Report in 2005 and its progeny in 1999, it is clear that the goal of this legislation is to provide creditors with protection in the case of repeat filings. To give these

words effect, one must look at the practical effect of both interpretations of section 362(c)(3)(A). If the stay is only eliminated regarding the debtor, all property of the debtor that became property of the estate is rendered untouchable. 11 U.S.C. 541(a) (2020). As the portion of the stay that protects estate property is the most valuable to both the debtor and to a creditor, allowing 362(c)(3)(a) to apply to the property of the estate was clearly within the stated goals of Congress when enacting BAPCPA. *See In re Smith*, 910 F.3d 576, 590 (1st Cir. 2018).

The clear weight of the legislative history is further supported when one considers the practical effects of the two interpretations of section 362(c)(3)(a). The position that respondent encourages this court to adopt is illogical and totally at odds with the purpose of BAPCPA in offering creditors a tool against repeat and serial filers. Upon commencement of a case, section 541(a) dictates that "all legal or equitable interests of the debtor in property" become property of the estate. 11 U.S.C. § 541 (2020). In the instant case, Petty's business has entered a chapter 7 liquidation and Petty himself attempted to reorganize under a chapter 11. While the proceeds of the chapter 7 addressed some of the outstanding debts, Petty still owed Wildflowers $2.1 million. As Petty had purchased the equipment himself, it became property of the estate upon filing the chapter 11 petition. If the automatic stay is only lifted with regard to Petty, Wildflowers claim on the equipment Petty had pledged using a first priority lien would effectively be blocked as the equipment is property of the estate—not Petty's.

This is not uncommon across either chapter 11 or chapter 13 proceedings. The creditor moves for stay relief on *estate* property because that is where the valuable assets lie. As noted in the Commission Report, "some debtors file for chapter 13 . . . on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their cases, only to file again when the mortgagee or landlord brings another

legal action to seize control of the property." *Nat'l Bankr. Review Comm'n, Report of the National Bankruptcy Review Commission*, § 1.5.5, 278-79 (Oct. 20, 1997). The automatic stay was wielded improperly to attack attempts to seize property because the property was protected as property of the estate. If the underlying purpose of the amending legislation is to prevent the misuse of shielding property, then section 362(c)(3)(A) must apply to property of the estate. Lifting the stay only with regard to the debtor is meaningless as his property is currently not his—it is property of the estate.

In looking beyond the language of section 362(c)(3)(A), it is clear that the automatic stay must terminate for property of the estate. Looking to legislative history behind the BAPCA amendments it is clear that Congress meant to deal with the issue of misuse of the automatic stay by serial filers. These BAPCPA amendments provide a mechanism for creditors to obtain stay relief when a debtor has filed multiple organizations within the same year. The Bankruptcy Code attempts to balance the fresh start and reorganization prospect of the debtor, while promptly maximizing the repayment to creditors. The BAPCPA amendments where added to give tools to creditors, and in recognizing this purpose, section 362(c)(3)(A) must be read to terminate with regard to the debtor and the estate. Stay relief only with regard to the debtor is meaningless when all of the debtors' property is property of the estate. If 362(c) does not apply to property of the estate, the provision is near worthless in discouraging serial filings.

CONCLUSION

The Supreme Court has been steadfast in acknowledging that the FAA supersedes other legislation unless Congress commands otherwise. Absent conflict between the FAA and another Code provision this FAA will supersede and allow for binding arbitration. No such inherent conflict between the FAA and automatic stay provision of the Bankruptcy Code exists so this

Court should allow for arbitration to proceed. Further, section 362(c)(3)(A) must apply to property of the estate. Given the statutory construction and purpose behind BAPCPA it is clear that in this case Petty cannot be allowed to shield property by claiming the automatic stay does not terminate in regard to estate. To limit 362(c)(3)(A) in such a way would render the statute meaningless in deterring and preventing abuse of the Code. Accordingly, this Court should reverse the decision below.