No. 20-1004

In the Supreme Court of the United States

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK,
Petitioner,

v.

EARL THOMAS PETTY,
Respondent.

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

Counsel for Petitioner
TEAM NUMBER 15

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362 repealed the Federal Arbitration Act, which requires enforcement of valid arbitration agreements between private parties in the absence of clear and manifest congressional intent to the contrary.

II. Whether 11 U.S.C. § 362(c)(3)(A) applies to property of a debtor's bankruptcy estate when the statutory language is ambiguous and Congress intended to provide effective deterrence for bad faith, serial filings.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Factual Background

Petitioner, Wildflowers Community Bank (Wildflowers), is a respected bank and lender that did business with Respondent Earl Thomas Petty. Joint Appendix at 4. Respondent is a business owner who borrowed money from Wildflowers. J.A. at 4.

Great Wide Open Brewing Company. In 2002, Respondent founded Great Wide Open Brewing Company, Inc. (Great Wide Open), a craft brewery that sold beer to local restaurants and convenience stores. J.A. at 3. In 2005, Great Wide Open launched a taproom in the City of Royal Rapids, Moot, that featured small-batch brewing equipment that Respondent purchased with his own money (the Equipment). J.A. at 3. With the increasing success of his business, Respondent began to engage in an aggressive growth strategy for the business. J.A. at 4. In 2010, Great Wide Open launched four additional taprooms in various towns in the State of Moot. J.A. at 4. Then, in 2012, Great Wide Open launched a state-of-the-art brewhouse capable of producing 250,000 barrels of beer annually. J.A. at 4. Although the majority of Great Wide Open's beer was brewed at the brewhouse, the brewery continued to brew beer at the taprooms as well. J.A. at 4.

A Right to Repayment or Repossession. Great Wide Open turned to Wildflowers to fund its expansion plans, and in September 2011, Great Wide Open entered into a $35 million revolving credit agreement with Wildflowers (the Credit Agreement). J.A. at 4. Wildflowers approved the Credit Agreement in part because Great Wide Open secured repayment of the indebtedness by granting Wildflowers a first priority lien on substantially all of its assets. J.A. at 4. At the same time, Respondent also executed a personal guaranty, whereby he unconditionally

guaranteed repayment of the business's obligations (the Guaranty). J.A. at 4. Respondent granted Wildflowers a first priority lien on the Equipment to secure his guarantee. J.A. at 4.

The Credit Agreement and the Guaranty contained identical "Remedies" clauses providing that, upon a default, "Obligor grants to Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action." J.A. at 4. Additionally, the agreements contained identical "Arbitration" clauses that provided: "any and all disputes, claims, or controversies of any kind between us arising out of or relating to the relationship between us will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by a jury trial." J.A. at 4.

The Default. In 2017, Great Wide Open began having liquidity problems. J.A. at 5. Burdened by significant debt owed under the Credit Agreement and above-market lease obligations, in March 2018, Great Wide Open closed three of its taprooms without notice to Wildflowers. J.A. at 5. Wildflowers only learned of the closures when its loan officer saw a sign stating, "Don't come around here no more." on one of the taproom's doors. J.A. at 5. Shortly after, the landlord for the Royal Rapids taproom terminated the real property lease for that location. J.A. at 5.

In April 2018, Great Wide Open and Respondent defaulted on their respective payment obligations under the Credit Agreement and the Guaranty. J.A. at 5. Wildflowers became increasingly concerned that this non-performing loan would trigger additional scrutiny from federal bank regulators. J.A. at 5. Thus, Wildflowers sent a default letter to Great Wide Open and Respondent. J.A. at 5.

Initial Request for Arbitration. On June 4, 2018, Wildflowers filed a demand for arbitration and a general state law breach of contract complaint against Respondent with the American Arbitration Association. J.A. at 5. Wildflowers sought the balance owed under the Credit Agreement, which was approximately $33.2 million. J.A. at 5. The American Arbitration Association scheduled an initial conference in the arbitration proceeding for July 12, 2018. J.A. at 5.

One day before the initial conference, Great Wide Open terminated its employees and ceased all operations, and on July 12, 2018, the business commenced a chapter 7 bankruptcy case in the Bankruptcy Court for the District of Moot. J.A. at 5. The same day, Respondent filed his own chapter 11 petition (Initial Bankruptcy Case) in the Bankruptcy Court for the District of Moot, but it was dismissed on August 27, 2018 because Respondent failed to timely file certain documents. J.A. at 5. Sometime later, Respondent began working toward reorganizing his business. He had negotiated a lease with the landlord of the original Royal Rapids taproom, and in December 2018, he reopened that taproom as a sole proprietorship doing business as "Full Moon Fever Brewing," using the Equipment that had remained there after the Royal Rapids lease terminated. J.A. at 6.

II. Procedural Background

On January 11, 2019, Respondent commenced a second chapter 11 bankruptcy case (the Second Bankruptcy Case), just as the arbitration proceeding was about to recommence. J.A. at 5-6. Additionally, Respondent filed a chapter 11 plan of reorganization that proposed to pay his creditors, including Wildflowers, forty cents on the dollar from his income over a period of five years. J.A. at 6. Respondent's plan incorporated settlements that he had negotiated pre-petition

with several of his creditors, but Respondent did not give Wildflowers the opportunity to partake in any negotiations of the sort. J.A. at 6.

During the first thirty days of the Second Bankruptcy Case, Respondent failed to file a motion to extend the automatic stay under 11 U.S.C. § 362(c)(3)(B). J.A. at 6. Consequently, thirty-two days after the commencement of the Second Bankruptcy Case, on February 12, 2019, Wildflowers sent a repossession company to the Royal Rapids taproom and peaceably repossessed the Equipment, which remained subject to its security interest granted in connection with the Guaranty. J.A. at 6. Although Respondent had failed to receive an extension of the automatic stay, he filed a motion alleging that Wildflowers violated the automatic stay when it repossessed the Equipment, and he sought $500,000 in damages under § 362(k). J.A. at 6. Respondent alleged that, in repossessing the Equipment, Wildflowers effectively shut down Full Moon Fever Brewing and destroyed the goodwill that the business had generated since opening. J.A at 7.

On March 5, 2019, Wildflowers filed a response asserting that no automatic stay existed with respect to property of the estate, including the Equipment, pursuant to § 362(c)(3)(A), because Respondent had a prior bankruptcy case dismissed within one year of the Second Bankruptcy Case. J.A. at 7. Wildflowers also pointed out that Respondent had neglected to file a motion to extend the automatic stay pursuant to § 362(c)(3)(B). J.A. at 7. Additionally, Wildflowers argued that the court should compel Respondent to bring any claims against Wildflowers in the pending, albeit stayed, arbitration proceeding because of the arbitration provision in the Guaranty. J.A. at 7.

Ultimately, the bankruptcy court ruled in favor of Respondent, holding that enforcing the arbitration agreement would conflict with the Bankruptcy Code and, particularly, § 362. J.A. at

7. Thus, it denied Wildflowers's request to compel arbitration. J.A. at 7. Additionally, the bankruptcy court held that, regardless of whether the automatic stay is extended under § 362(c)(3)(B), a creditor may not take action with respect to property of a debtor's estate. J.A. at 7. Therefore, because the Equipment was property of Respondent's estate, the bankruptcy court found that Wildflowers violated the automatic stay. J.A. at 7. Wildflowers then appealed to the Thirteenth Circuit Court of Appeals, where that court affirmed the bankruptcy court's decision. J.A. 3. This Court granted Wildflowers's petition for writ of certiorari on both issues.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals incorrectly held both that the bankruptcy court had discretion to overrule the parties' valid arbitration agreement and that a creditor may only take action with respect to the property of the debtor, and not his estate, when the debtor failed to extend the automatic stay under § 362(c)(3)(B). Further, the lower court's decision misapplies existing law because (1) 11 U.S.C. § 362 does not expressly or impliedly repeal the Federal Arbitration Act (FAA) and (2) § 362(c)(3)(A) terminates the automatic stay with respect to both the debtor's property and the property of the estate. As such, this Court should reverse the Thirteenth Circuit's decision and find in favor of Wildflowers on both counts.

Congress enacted the FAA to ensure enforcement of valid and enforceable contracts throughout the judiciary. Over time, substantial precedent has established the principle of favoring private arbitration agreements, and, notably, neither party, in this case, challenges the validity of the arbitration agreement in question. This Court has established that the party opposing arbitration has the burden of showing that Congress meant to preclude application of the FAA to the particular claim at issue via a three-factor test concerning (1) the text of the statute in question, (2) its legislative history, and (3) whether an inherent conflict exists between

arbitration and the underlying purposes of the statute. Since then, no party challenging the FAA's application has ever met that burden, and this case does not prove to be an exception. Upon further analysis, each of the three factors strongly point towards enforcement of the arbitration clause in question, which is only bolstered by Congress's explicit preference for private agreements over implied repeals. Overall, § 362 of the Bankruptcy Code does not expressly or impliedly repeal the FAA. Therefore, the bankruptcy court did not have the discretion to overrule the parties' valid arbitration agreement.

Although precedent indicates that the three-factor test is controlling, the lower court mistakenly turned to the outdated "core vs. non-core proceeding" test to override the FAA and refuse to compel arbitration. Generally, policy concerns caution against turning to the core/non-core analysis when the absence of conflict is already clear. Nevertheless, even if applying the core-proceeding test was proper, the determination that the automatic stay is a core proceeding would not be dispositive because the lower court would also have to find that there is an inherent conflict between arbitration and the general purpose of bankruptcy law. Considering that the three-factor test above already contemplated this analysis, Respondent, nonetheless, fails to show that an inherent conflict exists, ultimately invalidating the finding that arbitration is inapplicable.

Further, the bankruptcy court may deny enforcement of an arbitration agreement only when it has made a sufficient finding that enforcing the agreement would inherently conflict with the Bankruptcy Code. Here, however, the bankruptcy court failed to engage in any analysis, for it simply invalidated the agreement without explaining why any inherent conflict exists. Ultimately, the bankruptcy court erroneously exercised its discretion, and the parties' agreement should control their dispute because 11 U.S.C. § 362 does not repeal the FAA.

Moreover, regardless of the correct legal forum for this dispute, § 362(c)(3)(A) is meant to terminate the automatic stay entirely, thus allowing Wildflowers to legally seize Respondent's Equipment in accordance with the Guaranty. Section 362(c)(3)(A)'s ambiguous language has caused some controversy as to its proper interpretation, leaving courts nearly evenly divided. While some have adopted the majority approach, interpreting § 362(c)(3)(A) apart from the rest of the statute's language as encompassing only the debtor's property, others have adopted the minority approach. The minority approach interprets the statute holistically to mean that the stay terminates entirely, encompassing both property of the estate and of the debtor.

When interpreting a statute, phrases should not be read in isolation but in harmony with the full statutory provision. Moreover, when varying reasonable interpretations arise, courts may consult the statute's legislative history to determine Congress's intended meaning. Applying these recognized canons of construction, understanding § 362(c)(3)(A) to mean that the automatic stay terminates as to both property of the estate and of the debtor gives every word of the statute meaning and is most consistent with congressional intent, as reflected in the statute's legislative history. Furthermore, it is likely that the questioned phrase within § 362(c)(3)(A) does not refer to property classifications at all but, instead, indicates that the automatic stay terminates only with respect to serial filers in a joint action. Thus, § 362(c)(3)(A) is meant to terminate the automatic stay with respect to both property of the estate and of the debtor.

STANDARD OF REVIEW

The standard of review is *de novo*. The issues before this Court are pure questions of law. Thus, because the parties only present questions of law, *de novo* is the appropriate standard of review. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under *de novo*

review, this Court decides the issues as if it were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

ARGUMENT

This Court should reverse the Thirteenth Circuit's holding that the bankruptcy court had the authority to decide the dispute between Respondent and Wildflowers, notwithstanding the pre-petition arbitration agreement that the parties entered. This ruling is erroneous because Respondent cannot establish an inherent conflict between the FAA and the Bankruptcy Code, as required by this Court, to establish that 11 U.S.C. § 362 repeals the FAA. Additionally, this Court should reverse the Thirteenth Circuit's holding that § 362(c)(3)(A) results in termination of the automatic stay only with respect to the debtor's property and not as to property of the estate. This holding is erroneous because terminating the stay entirely, as opposed to partially, allows harmony with § 362(c)(3)(A)'s surrounding provisions, and such an interpretation is consistent with congressional intent as reflected in the statute's legislative history.

I. The Bankruptcy Court did not have the discretion to overrule the parties' private arbitration agreement because 11 U.S.C. § 362 did not expressly or impliedly repeal the FAA.

The FAA, passed nearly a century ago, states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By requiring enforcement of valid arbitration clauses, Congress clearly expressed its favoritism for private contracts and the ability of knowledgeable parties to control the resolution of their disputes. Congress passed the FAA to combat the "perception that courts were unduly hostile to arbitration" and to ensure "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). While efficiency and low costs were key reasons for the passage of the FAA, the sanctity

of individual agreements was the major driving force behind the Act: Congress sought to place arbitration agreements on the same footing as other private contracts. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Thus, once a court decides that an arbitration agreement is valid, the presumption lies in favor of enforcement, regardless of the legal context. *See Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796 (11th Cir. 2007) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

In *Epic Sys. Corp. v. Lewis*, this Court reinforced the "liberal federal policy favoring arbitration agreements" and cemented the FAA's distinct role in the nation's adjudicatory proceedings. 138 S. Ct. at 1621 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). By the express language of the FAA, where the "making of the agreement for arbitration . . . is not in issue, the court shall make an order" compelling arbitration. 9 U.S.C. § 4. Here, Respondent does not challenge the validity of the arbitration agreement; rather, he attempts to argue that the legal context of bankruptcy law commands that the court ignore the arbitration agreement. J.A. at 10. Specifically, Respondent and the opinion below believe the automatic stay to be too vital to the underlying bankruptcy proceeding to be resolved in arbitration. J.A. at 11. This argument reflects a misunderstanding of years of precedent establishing the dominance of the FAA.

In attempting to override the FAA, Respondent faces a heavy burden—one that no party has yet overcome in any previous challenge to federal statute. The party opposing arbitration has the burden of proving "that Congress intended to preclude a waiver of judicial remedies for [the particular claim] at issue." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

No party has yet convinced this Court that Congress possessed intent to waive arbitration absent express language. In fact, "this Court has rejected every such effort to date," in statutes such as "the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act." *Epic,* 138 S. Ct. at 1627. In the case before the Court, the Bankruptcy Code deserves no special treatment. Like every other important federal statute, it is subject to the commands of the FAA absent any clear congressional intent to the contrary.

Respondent fails to meet the heavy burden imposed by this Court's precedent and cannot show an inherent conflict between the FAA and the Bankruptcy Code sufficient to invalidate his arbitration agreement with Wildflowers. Further, the determination that the particular bankruptcy matter at issue here, the automatic stay, is a core proceeding is not dispositive. Rather, the inherent conflict test still controls, and Respondent cannot displace the heavy burden from his shoulders. Therefore, this Court should reverse the holding of the Thirteenth Circuit and require enforcement of the parties' valid agreement to arbitrate in accordance with clear congressional intent.

A. Respondent failed to meet the heavy burden of showing that the Bankruptcy Code repealed the FAA, which expressly requires enforcement of valid arbitration agreements unless there is clear and manifest congressional intent otherwise.

In *Shearson/Am. Express, Inc. v. McMahon,* this Court looked to three factors to analyze whether a federal statute, supplying the context for the underlying lawsuit, repealed the FAA and, therefore, whether the parties could avoid an otherwise valid arbitration clause. 482 U.S. at 227. Courts must find that either (1) "the text of the statute," (2) "its legislative history," or (3) "an inherent conflict between arbitration and the underlying purposes [of the statute]" show that

Congress intended to repeal the FAA. *In re Elec. Mach. Enters., Inc.*, 479 F.3d at 796 (quoting *McMahon*, 482 U.S. at 795-96). Here, the first two factors can be easily resolved from the explicit text available. In fact, the majority opinion below held that these factors did not lead to a repeal of the FAA. J.A. at 10. For the third, and most often contested, factor to be determinative, there must be an irreconcilable conflict between the federal statute and the FAA, which in turn must be shown by Congress's "clear and manifest intent" to repeal the FAA. *Epic*, 138 S. Ct. at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Because Respondent cannot show that an irreconcilable conflict exists between the FAA and 11 U.S.C. § 362, this Court, using the *McMahon* test, should hold that § 362 of the Bankruptcy Code did not expressly or impliedly repeal the FAA. The arbitration agreement between Respondent and Wildflowers must, therefore, control their dispute.

In upholding the heavy burden to establish a repeal, this Court has stated that "repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Epic*, 139 S. Ct. at 1624 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 439, 452-53 (1988)). Therefore, the Court should proceed with extreme caution when it considers reading a repeal into a federal statute, especially the FAA. In fact, this Court has held that the initial presumption for the trial court, rather than assuming intent to repeal, should be that it lacks the discretion to refuse to compel arbitration, regardless of the underlying dispute. *See Byrd*, 470 U.S. at 217-18. As stated by this Court, "the Act, both through its plain meaning and the strong federal policy it reflects, 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." *Id.* at 217 (quoting *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 646 (7th Cir. 1981)). Even if a court can show a

potential irreconcilable conflict, the analysis is still, at its base, a balancing act, comparing Congress's express intent with, here, the general goals of bankruptcy law. As this Court has acknowledged, that balance should start with great weight on the side of Congress and, therefore, arbitration. *Epic*, 138 S. Ct. at 1624. In this case, as with many others, the greater weight lies with the FAA, despite the importance of the underlying issue of the automatic stay.

1. Based on the text of the statute, the Bankruptcy Code did not repeal the FAA.

Under the first *McMahon* factor, the Bankruptcy Code lacks any direct language requiring an automatic stay dispute to be handled in judicial proceedings rather than an arbitration forum. Although 11 U.S.C. § 362 mentions claims arising out of "judicial, administrative, or other action[s] or proceeding[s]," the section is silent as to the resolution of the automatic stay in one forum or another and, therefore, does not require resolution in a bankruptcy court. In contrast to the text in this section of the Bankruptcy Code, Congress has expressly overridden the FAA by speaking "to the procedures for resolving 'actions,' 'claims,' 'charges,' and 'cases' in statute after statute." *Epic*, 138 S. Ct. at 1626 (citing 29 U.S.C. §§ 216(b), 626; 42 U.S.C. §§ 2000e–5(b), (f)(3)-(5)). For example, in the Fair Labor Standards Act, Congress explicitly provided that an employer can be held liable for a violation of the act "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). By expressly limiting the adjudication of Fair Labor Standards claims to federal and state courts, and providing no possibility for resolution via arbitration, Congress expressly overrode the FAA in this act. *Epic*, 138 S. Ct. at 1626. Notably, the Bankruptcy Code lacks any language limiting resolution of disputes to the courts. Similar to the National Labor Relations Act at issue in *Epic*, 11 U.S.C. § 362 "does not even hint at a wish to displace the Arbitration Act." *Id.* at 1624. This strongly

implies that Congress had no intent to repeal the FAA in this section of the Bankruptcy Code, and therefore, the FAA should apply with full force in the bankruptcy context.

Further, this Court has often noted that silence cannot be taken as intent to repeal. *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001). It is a well-known, established canon of statutory construction that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id*. Therefore, a repeal cannot be read into the language of the Bankruptcy Code where it simply does not exist. Even further, the majority opinion below conceded that the Code contains no express language that would allow the courts to read a repeal into the statute. J.A. at 10. Looking at the text of § 362, Congress did not explicitly repeal the FAA, and therefore, Respondent cannot rely on this *McMahon* factor to evade the arbitration agreement.

2. Legislative history for both the Bankruptcy Code and the FAA is silent as to any conflict between their provisions, showing that Congress did not intend to repeal the FAA.

Under the second *McMahon* factor, the legislative history in both the Bankruptcy Code and the FAA are silent as to any repeal, implying that Congress did not intend to displace the FAA here. While the legislative history concerning the automatic stay discusses its importance for the debtor in bankruptcy proceedings, it says nothing about arbitration or the FAA. *See* H.R. Rep. No. 95-595, at 340-41 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97. Therefore, as with the text of the statute itself, no hidden meaning can be gleaned from Congress's words where it does not exist. *See Whitman*, 531 U.S. at 468. In comparison to the FAA's legislative history, which "establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate," the Bankruptcy Code's silent legislative history cannot support a repeal of the FAA. *Byrd*, 470 U.S. at 219. Even further, the

appellate court below found that this *McMahon* factor did not support Respondent's argument. J.A. at 10. Thus, the only remaining avenue whereby Respondent can meet its heavy burden of overriding the FAA is through the third and final *McMahon* factor.

3. No inherent conflict exists between arbitration and the underlying purposes of the Bankruptcy Code such that arbitration is not an appropriate forum for resolution of the automatic stay.

Under the third *McMahon* factor, no inherent conflict exists between the mandates of the FAA and the purposes of the Bankruptcy Code such that arbitration is not feasible for automatic stay disputes. To overcome Congress's preference for arbitration, Respondent must demonstrate through the "clear and manifest intent" of Congress that an "inherent conflict" exists between the purposes of the FAA and the statute at issue. *Epic*, 138 S. Ct. at 1624. In searching for such a conflict, Respondent must not overstep the years of precedent where this Court has consistently urged "rigorous enforcement" of arbitration clauses, regardless of the alleged issues arising out of the arbitration process. *See Byrd*, 470 U.S. at 221 (rejecting inefficiencies of bifurcated proceedings as a reason to avoid arbitration, even if result is piece-meal litigation). Even if the resulting proceedings are more inefficient than if they were litigated, the bankruptcy court simply does not have the discretion to refuse to enforce arbitrations agreements where there is no inherent conflict between the bankruptcy code and the FAA. *Id.* Here, Respondent cannot show an inherent conflict in the context of the automatic stay and, therefore, cannot evade his arbitration agreement with Wildflowers. *See Epic*, 138 S. Ct. at 1617.

While Respondent and the lower court argue that the automatic stay requires speedy resolution that is only accessible via expert judges in bankruptcy court, this represents a misunderstanding of both Congress's goals for passing the FAA and the forum of arbitration itself. As a primary consideration, the fact that the present claim arises directly from a statutory right created in the Bankruptcy Code does not immediately eliminate the FAA's general

mandate. As this Court noted in *McMahon*, "the duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." 482 U.S. at 226. Therefore, simply because the Bankruptcy Code creates the automatic stay and delineates its procedures does not necessarily diminish the duty to enforce an arbitration agreement or create an inherent conflict. *Id*. (holding that FAA provides no basis for skewing arbitration mandate by pointing to statutory rights). Even unique bankruptcy matters, with their source solely in the Bankruptcy Code, can be addressed by arbitrators, such that the existence of a bankruptcy issue alone does not create a conflict with the FAA. *See MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110 (2d Cir. 2006).

Additionally, many courts and commentators have rejected the argument that bankruptcy matters are too complex for arbitration and that, therefore, Congress could not have intended the FAA to apply in this context. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). Arbitration "has significant flexibility that, if utilized, can make arbitration a useful and positive component of a rational bankruptcy scheme," rather than impeding the progress of bankruptcy proceedings. Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 525 (2009). Arbitrators, while not experts in bankruptcy law, can consult experts in deciding important matters. In fact, the "arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Mitsubishi*, 473 U.S. at 633. Although passing on an important subject like the automatic stay to an arbitrator may have caused consternation in the court below, such an act is actually Congress's direct mandate. *Id*. Absent a showing by the bankruptcy court to the contrary, "there is no basis for assuming the forum inadequate or its selection unfair." *Id*.

In this case, the bankruptcy court provided no reason for finding that arbitration was inadequate, thus failing to establish any inherent conflict between arbitration and the Bankruptcy Code.

Further, neither a party's nor a court's lack of faith in the arbitration process is a sufficient reason to avoid enforcement; like many others, bankruptcy issues can readily be solved via arbitration. *See McMahon*, 482 U.S. at 229. Thus, Respondent cannot show an inherent conflict between arbitration and the general goals of bankruptcy law merely out of fear that arbitration will not suffice. This is further supported by the fact that other courts, such as lower courts of general jurisdiction, can and do decide bankruptcy issues, such as the automatic stay, on their own, demonstrating that other bodies can decide these complex issues. *Erti v. Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Lit.)*, 765 F.2d 343, 347 (2d Cir. 1985); *see* 28 U.S.C. § 1334(b). Nevertheless, even if lower courts did not have jurisdiction over these issues, "a finding of jurisdiction does not, in itself, demonstrate that the FAA inherently conflicts with the Bankruptcy Code." *In re Elec. Mach. Enters., Inc.*, 479 F.3d at 796. Because jurisdictional concerns do not demonstrate a problem with the arbitration forum, Respondent, again, fails to meet his burden of showing an inherent conflict between the statutes.

Finally, with respect to the argument that arbitration agreements are only fitting for two-party disputes, this Court has held that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). While the opinion below raises the concern that the use of two-party arbitration will harm outside parties, this concern has never sufficed to override the FAA's direct mandate. *Id*. Rather, even where outside creditors may have an interest in the underlying dispute, the central factual dispute between the parties, usually a breach of contract action, can still be arbitrated. *See*

In re Olympus Healthcare Grp., Inc., 352 B.R. 603, 611 (Bankr. D. Del. 2006). This concept is applicable even where the underlying proceeding is a core proceeding, such as the automatic stay. *Id*. (finding the presence of factual disputes sufficient to warrant arbitration, despite turnover proceeding). Therefore, applied to the facts here, Wildflowers's breach of contract claim against Respondent and the related automatic stay issue can both be arbitrated. Further, arbitration decisions are not final and may be brought before a court of general jurisdiction for review, thus providing outside creditors the opportunity to later contest any decision made by the arbitrator. *See* Kirgis, *supra*, at 526. Therefore, on no basis of complexity or the nature of bankruptcy law can the Bankruptcy Code be read to create an inherent conflict and, thus, impliedly repeal the FAA.

Because all three *McMahon* factors point clearly towards enforcement of this arbitration clause, and because Congress explicitly favors such private agreements over implied repeals, § 362 of the Bankruptcy Code did not expressly or impliedly repeal the FAA. Thus, the arbitration agreement between Respondent and Wildflowers should control their dispute.

B. Despite the majority's distinction between core and non-core proceedings, the automatic stay does not warrant a repeal of the FAA.

While the *McMahon* analysis seems to provide a clear answer under the controlling precedent, Respondent and the court below instead turn to the "core vs. non-core proceeding" test to override the FAA and refuse to compel arbitration in the automatic stay context. Notably, the dissenting opinion below found that the *Epic* decision displaced this core-proceeding test and mandated that the courts must instead look only to the *McMahon* analysis. J.A. at 22. Rather than focus on any distinction between core and non-core, the dissent explains that this Court, in *Epic*, relied only on the "clear and manifest" intent of Congress and whether a "conflicting command" existed in opposition to the FAA. J.A. at 22; *see also Epic*, 138 S. Ct. at 1624. Therefore, the

only relevant inquiry is whether an inherent conflict exists between the Bankruptcy Code and the FAA, which, as explained above, cannot be shown.

However, even if *Epic* did not do away with the core-proceeding test, the same result is reached, and the determination that the automatic stay is a core proceeding is still not dispositive. After making a "core" determination, lower courts must still engage in the inherent conflict analysis and determine that an irreconcilable conflict exists before overriding a valid arbitration agreement. *Hill*, 436 F.3d at 108. As demonstrated above, Respondent cannot show an inherent conflict exists because the automatic stay is not so vital that it can never be arbitrated.

1. The automatic stay is concededly a core proceeding; however, such a determination is not dispositive, and the FAA still governs these disputes.

Courts have previously turned to the core vs. non-core analysis to determine whether an inherent conflict exists between the statute at issue and the FAA. To be labeled a core proceeding, the matter at issue must "invoke substantive rights created by federal bankruptcy law" or arise only in bankruptcy. *Id.* at 108-09 (citing *Banque Nationale de Paris v. Murad* (*In re Housecraft Indus. USA, Inc.*), 310 F.3d 64, 70 (2d Cir. 2002)); *see also Matter of Wood*, 825 F.2d 90, 96-7 (5th Cir. 1987). In contrast, a non-core proceeding is "one that could exist outside of bankruptcy." *In re Elec. Mach. Enterprises, Inc.*, 479 F.3d at 797. By both the Bankruptcy Code's language and a general understanding of bankruptcy proceedings, the automatic stay is concededly a core proceeding.

Nevertheless, simply labeling a subject "core" does not, by itself, repeal any congressional mandate to arbitrate disputes where a valid agreement exists. *Hill*, 436 F.3d at 110. Even where a proceeding is core, based on explicit statutory rights, submitting to a valid arbitration agreement does not entail giving up those rights. Rather, it involves agreeing to have them resolved in a different setting. *See McMahon*, 482 U.S. at 229–30. Therefore, the burden is

still on Respondent's shoulders to prove that an "irreconcilable conflict" exists between the requirements of the Bankruptcy Code and the FAA. *Epic*, 138 S. Ct. at 1624. As this Court has warned, "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." *Id*. Because no such conflict exists under the current law and an understanding of the automatic stay, the parties' arbitration agreement should still control their dispute.

In *MBNA Am. Bank, N.A. v. Hill*, the Second Circuit held that an automatic stay dispute could be arbitrated despite the label "core proceeding" because no inherent conflict existed between the underlying purpose of the automatic stay and the FAA. 436 F.3d at 109. In *Hill*, a debtor with MBNA American Bank filed an adversary proceeding against the bank for violating the automatic stay put in place during her Chapter 7 bankruptcy proceedings. *Id.* at 106. MBNA filed a motion to compel arbitration of the dispute, according to the credit account agreement the parties had previously entered. *Id*. In reviewing whether the bankruptcy court validly denied MBNA's motion, the Second Circuit held that, although bankruptcy courts are "more likely" to have discretion to override the FAA when the proceeding is core, that is not the end of the analysis. *Id*. at 108. The court recognized the concerns surrounding the intersection of arbitration and bankruptcy, noting that it had to square may seem as two polar extremes: the strong preference for centralization of bankruptcy disputes versus the decentralization of arbitration proceedings favored in the FAA. *Id*. Despite this alleged conflict, however, the court concluded that arbitration is appropriate, even in the context of the automatic stay. *Id*. at 109.

Central to its decision that arbitration must be compelled, in *Hill*, the Second Circuit determined that the automatic stay is not so vital that it cannot be resolved via arbitration. *Id*. Rather, the court found that "there is no indication from the statute that any dispute relating to an

automatic stay should categorically be exempt from resolution by arbitration." *Id*. at 110. Thus, when considering the heavy balance already weighing in favor of arbitration, the automatic stay in *Hill* did not warrant a rejection of the explicit federal policy laid out in the FAA. Similarly, Respondent's dispute with Wildflowers, concerning the violation of the automatic stay put in place for Respondent's bankruptcy proceedings, can be resolved via arbitration. As the Second Circuit noted in *Hill*, arbitration does not "necessarily jeopardize" the resolution of the automatic stay issue. *Id*. at 108 (quoting *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc.* (*In re U.S. Lines, Inc.*), 197 F.3d 631, 640-41 (2d Cir. 1999)). Therefore, because the automatic stay can be readily resolved via arbitration, no inherent conflict exists, and the bankruptcy court lacks the discretion to avoid arbitration in this context.

Further, the bankruptcy court below did not provide the specific detail in its decision necessary to override the FAA and exercise discretion in this case. "Only if the bankruptcy court actually makes a sufficient finding that enforcing an arbitration agreement would inherently conflict with the Bankruptcy Code does it have the discretion to deny enforcement of the arbitration agreement." *In re Elec. Mach. Enters., Inc.*, 379 F.3d at 799 (citing *In re National Gypsum*, 118 F.3d 1056, 1067 (5th Cir. 1997)). Court after court has overturned bankruptcy courts below who, in denying arbitration, incorrectly asserted their authority over bankruptcy matters to the disadvantage of arbitration agreements. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155 (3d Cir. 1989) ("deficiency in the court's opinion renders the exercise of its discretion essentially unreviewable and would alone justify a remand"). Rather than making the core distinction and immediately finding that the proper discretion exists, bankruptcy courts must still engage in a thorough inherent-conflict analysis. *Mintze v. American Gen. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 231 (2006). As the Third

Circuit stated in *Mintze*, "[t]he core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement." *Id.* at 229. Rather, "where an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to deny its enforcement, unless the party opposing arbitration can establish congressional intent to preclude the waiver of judicial remedies for the statutory rights at issue." *Id.* at 231. The bankruptcy court below did not engage in this analysis; instead, it simply exercised its discretion in invalidating the arbitration agreement without explaining why the Bankruptcy Code conflicts with the FAA. J.A. at 7. Existing case law requires much more than such a conclusory statement. *See, e.g.*, *In re Olympus Healthcare Grp., Inc.*, 352 B.R. at 607. Thus, the bankruptcy court should not have overruled the parties' arbitration agreement, and as such, the agreement should control the parties' dispute.

2. Reading an implied repeal into this section of the Bankruptcy Code creates a slippery slope unintended by Congress, whereby any subject arguably coined a "core proceeding" can be removed from arbitration.

Even if Respondent were to overcome the heavy burden of showing that an inherent conflict exists in this case based on the core v. non-core distinction, such a finding could create a slippery slope, whereby the FAA eventually becomes a nullity in the bankruptcy context. As courts have consistently stated, their primary goal is to enforce arbitration wherever applicable, regardless of any negative opinions concerning arbitration. *See Byrd*, 470 U.S. at 221. Thus, if a simple label of "core proceeding" could overturn Congress's clear intention to favor arbitration in all circumstances, the Act as a whole would lose much of its efficacy by allowing courts to pick the interpretation that most suited the current circumstances. As this Court has noted, "[a]llowing judges to pick and choose . . . risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Epic*, 138 S. Ct. at 1624 (emphasis in original). Moreover, if Congress had intended the automatic stay, because of its core nature, to

be so vital that it should not be arbitrated, it would have explicitly stated so. *See Whitman*, 531 U.S. at 468. Section 362, however, makes no mention of such importance or restriction. *See* 11 U.S.C. § 362.

Even further, under the core test, typical non-core proceedings could arguably be deemed "core" in some cases, based on the facts at hand and good lawyering. Allowing this to happen in non-core proceedings, where many bankruptcy judges would normally not find an inherent conflict between the Bankruptcy Code and arbitration, is going too far, yet it could be the direct result of a decision to deny arbitration today. Therefore, this Court should follow the guidelines it laid out in cases such as *Epic* and *McMahon* and avoid conflict where it does not exist so as to reinforce the explicit mandate of Congress in the FAA. To do otherwise would essentially grant bankruptcy courts power specifically left for Congress, enabling them to nullify the FAA in bankruptcy proceedings as they see fit, based on arbitrary distinctions.

For the reasons mentioned above, Respondent cannot meet the burden of showing § 362 of the Bankruptcy Code repealed the FAA. Therefore, this Court should reverse the Thirteenth Circuit's decision and find that the bankruptcy court should have compelled arbitration between the parties.

II. 11 U.S.C. § 362(c)(3)(A) terminates the automatic stay with respect to the debtor's property and property of the estate.

Regardless of whether arbitration is the correct legal forum for this dispute, Wildflowers did not violate 11 U.S.C. § 362(c)(3)(A) when it seized Respondent's equipment in accordance with the parties' agreement because the automatic stay terminated with respect to the debtor, the debtor's property, and the property of the estate. J.A. at 6. Although the ambiguity in § 362(c)(3)(A)'s language has led to varying interpretations, its meaning becomes clear when courts defer to congressional intent and apply the proper canons of statutory construction.

Concerned that debtors were abusing the bankruptcy system to avoid their financial obligations, Congress enacted 11 U.S.C. § 362 to deter serial bankruptcy filers. Section 362(c)(3)(A) specifically addresses termination of the automatic stay, stating:

> 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). The phrase "with respect to the debtor" has caused controversy among the courts, where interpretation of the phrase is nearly evenly divided. Overall, the majority of bankruptcy courts have accepted the "minority approach." The minority approach interprets § 362(c)(3)(A) to mean that the automatic stay will terminate on the 30th day after filing with respect to the debtor, the debtor's property, *and* the property of the estate. The "majority approach," on the other hand, reads the phrase "with respect to the debtor" in isolation as only terminating the automatic stay with respect to the debtor and the debtor's property. *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019).

Courts have unanimously accepted that interpretation begins "with the language of the statute itself." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). At the same time, it must be noted that "statutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). In other words, courts must not read phrases in isolation but in a manner harmonious with the full statutory provision. *Id*. Additionally, when a statute's language is ambiguous because there is more than one reasonable interpretation, courts commonly consult legislative history to determine the meaning of the statute. *See generally Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985).

When § 362(c)(3)(A) is read in isolation, several reasonable interpretations emerge based on the language alone. When the statute is read holistically and paired with legislative history,

however, it becomes clear that the minority approach to interpreting § 362(c)(3)(A) is correct: the statute terminates the automatic stay with respect to the debtor, the debtor's property, and property of the estate. The majority approach focuses too narrowly on the single phrase "with respect to the debtor," when, in fact, it should consider its meaning within the statute as a whole. In doing so, it is unlikely that the phrase "with respect to the debtor" references property classifications at all. Rather, a more reasonable interpretation of the phrase is that the automatic stay terminates only with respect to serial filers in a joint action. Therefore, this Court should reverse the Thirteenth Circuit's decision and hold that § 362(c)(3)(A) results in termination of the automatic stay in its entirety and not only with regard to the debtor and the debtor's property.

A. The plain language of 11 U.S.C. § 362(c)(3)(A) is ambiguous.

Section 362(c)(3)(A)'s text, alone, is ambiguous. If the phrase "with respect to the debtor" is a reference to property classifications, it indicates that the automatic stay terminates only with respect to the debtor, and not to the majority's added category of the debtor *and* the debtor's property. However, "no court has read the provision that way." *Smith v. State of Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 582 (1st Cir. 2018) (citing *In re Reswick*, 446 B.R. 362, 367-88 (B.A.P. 9th Cir. 2011)). Indeed, such an interpretation would lead to absurd results because it would not terminate the stay for any property at all. This reading runs contrary to congressional intent, as Congress created the automatic stay to protect property interests. *See generally In re Smith*, 573 B.R. 298, 302 (Bankr. D. Me. 2017). Thus, the phrase "with respect to the debtor" requires additional context to ascertain its meaning.

Understanding these deficiencies in the language, the majority approach's proponents purport to use strict construction in interpreting the phrase "with respect to the debtor" as encompassing the debtor and the debtor's property. However, such interpretation "requires one

to read into the statute words that are not there . . . by expand[ing] the phrase 'with respect to the debtor' to say 'with respect to the debtor and the debtor's property.'" *In re Goodrich*, 587 B.R. 829, 843 (Bankr. D. Vt. 2018) (citing *In re Bender*, 562 B.R. 578, 583-84 (Bankr. E.D.N.Y. 2016)). In response, proponents of the majority approach have attempted to argue that the phrase "with respect to," "generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *In re Smith*, 910 F.3d at 582. This analysis ultimately fails, however, because it does not explain why the phrase "with respect to" expands the language in § 362(c)(3)(A) to include property of the debtor but not property of the estate. *Id*. If the phrase referred to property classifications at all, the majority approach's explanation would further support the minority position because property of the estate, like property of the debtor, is a matter relating to the debtor.

1. Reading the statute as a whole, 11 U.S.C. § 362(c)(3)(A) reasonably includes termination of the debtor's property and property of the estate.

The minority approach harmonizes each part of the statute, whereas the majority approach ignores and even reads some provisions as surplusage. For instance, courts adopting the majority position fallaciously point out that if Congress wanted to differentiate between "property of the debtor" and "property of the estate," it would have done so as it has in other statutory provisions. Nevertheless, the fact that § 362(c)(3)(A) does not mirror the language typically used to distinguish these property classifications is not dispositive. Just because Congress did not explicitly differentiate between "property of the debtor" and "property of the estate" like it has in other parts of the statute does not necessarily mean that it meant to preclude either of them. After all, the majority approach relies on the phrase "with respect to the debtor" to mean "property of the debtor," but Congress has never before used this phrase in reference to property of the debtor. 11 U.S.C. § 362(a). In fact, § 362(a), which creates the automatic stay,

does not contain the phrase "with respect to the debtor" at all. *Id*. Rather, it refers to actions "*against* the debtor," "*against* property of the debtor," and "*against* property of the estate." *Id.* (emphasis added). The majority approach, then, is similarly incongruous by its own logic because it assigns meaning to a phrase that has never been used in the proposed context. If Respondent's logic is applied to his interpretation as well, then the phrase "with respect to the debtor" does not represent a property classification at all, and there is no reason this Court should read a limitation to the termination of the automatic stay.

Reading beyond the isolated phrase, it is possible Congress did indicate language within § 362(c)(3)(A) that encompasses property of the debtor and property of the estate. Before the words "with respect to the debtor" appear in § 362(c)(3)(A), the statute qualifies initial coverage of the automatic stay "with respect to any action taken with respect to a debt or property securing such debt . . . ." In stating that the stay covered "the debt or property securing such debt," the statute encompasses property of the debtor and property of the estate. 11 U.S.C. § 362(c)(3)(A). Though this reading of the prefatory clause is imprecise, it embraces the language's reference to property types, whereas the phrase "with respect to the debtor," by itself, mentions no property at all. Consequently, the minority interpretation is the most likely and more reasonable reading.

The majority approach ignores the qualifying language and, instead, focuses solely on the phrase "with respect to the debtor," which is thoroughly inconclusive as a statement of property classification. Such interpretation renders the statute "internally inconsistent" because "the opening clause . . . would be surplusage." *In re Reswick*, 446 B.R. 362, 368 (B.A.P. 9th Cir. 2011). Importantly, courts should avoid reading surplusage into a statute. *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883). Thus, this Court should look beyond the single phrase itself, and interpret the statute as a whole, much like the minority approach does.

Respondent is further thwarted by his own logic: that is, where Congress expressly includes language in one section of the statute but omits it in another, it is presumed to have done so purposely. In § 362(c)(3)(B), Congress indicated that it knew how to differentiate between certain creditors, a practical effect of the majority's construction, but it chose not to do the same in § 362(c)(3)(A). Section 362(c)(3)(B) states in relevant part:

> the court may extend the stay in particular cases *as to any or all creditors* . . . 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. (emphasis added).

11 U.S.C. § 362(c)(3)(B). Congress differentiated between certain creditors by extending the stay "as to any or all creditors." *Id*. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the… exclusion." *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993). Respondent's construction of § 362(c)(3)(A) requires a differentiation in creditors because reading the phrase "with respect to the debtor" to include the debtor's property would allow only certain government creditors an opportunity to collect upon a limited expiration of the automatic stay. Congress clearly knew how to limit which creditors would be exempt, as it expressly did so in § 362(c)(3)(B). Section 362(c)(3)(A) provides no such distinction but, instead, states that the automatic stay will terminate "with respect to the debtor." Staying actions against the debtor, but not the debtor's property, would devoid the statute of purpose, so the majority approach requires more meaning than the phrase allows. In so doing, it deviates from the direct language of the statute and does not use the strict construction Respondent purports to apply. In contrast, the minority approach avoids such problems because, in terminating the automatic stay entirely, no creditor differentiation is required, and all the statute's language is given effect.

Moreover, Respondent erroneously relies on a single, inconclusive phrase, even though statutory construction is a holistic endeavor, and courts should avoid reading conflict within the statute. *See generally United Sav. Ass'n of Tex*, 484 U.S. at 371. Reading the phrase "with respect to the debtor" to limit the extent to which the stay terminates conflicts with the rest of the statute. Section 362(c)(1), (2), and (4) all address the automatic stay in gross. *See* 11 U.S.C. §§ 362(c)(1), (2), (4). Congress would not single-handedly shrink the parameters of the automatic stay in § 362(c)(3)(A) with such an unclear phrase when all the corresponding statutory provisions provide no such limitation. *See Whitman*, 531 U.S. at 468 ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."). Thus, although not explicitly shown within § 362, the minority approach best interprets the statute in a holistic manner, allowing § 362(c)(3)(A) to exist harmoniously with its surrounding provisions.

The majority approach also seems to contradict § 362(c)(3)(B), which provides "an opportunity not only to the debtor but to any other 'party in interest' to seek an extension of the stay beyond thirty days." *St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 144 (D. Mass. 2013). If the phrase "with respect to the debtor" is read to mean only the debtor and the debtor's property, only the debtor would be motivated to seek an extension beyond the thirty days. *Id*. If, however, the phrase also encompasses property of the estate, the termination provision in § 362(c)(3)(A) affects the property interests of any other party in interest, and the statute is read harmoniously. *Id*.

Furthermore, when Congress has intended to distinguish between property of the debtor and property of the estate, it has done so explicitly. *See* Petition for Writ of Certiorari at 37, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (2019) (No. 19-50598), *cert. denied*, 141 S. Ct.

158 (2020) (citing 11 U.S.C. § 346(b); 11 U.S.C. §§ 362(c)(1) & (2); *see also* 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, 435 (2013). Respondent's construction requires a finding that, for the first time, Congress has not explicitly distinguished between property of the debtor and property of the estate. Respondent provides no basis for such a finding beyond an erroneous construction of one phrase read in isolation. In contrast, Wildflowers's construction of § 362(c)(3)(A) provides a harmonious reading of the statute in light of the surrounding statutory provisions and the plain meaning of the phrase, "with respect to the debtor."

B. The minority approach is more consistent with congressional intent.

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) to correct "perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 231-32 (2010). The automatic stay, a cornerstone of bankruptcy law, protects debtors from enforcement or collection actions by their creditors. 11 U.S.C. § 362(a). Before BAPCPA, the automatic stay did not expire until judicial action ended the case or modified the stay. *See In re Smith*, 910 F.3d at 581. Now, after BAPCPA, the automatic stay is subject to two types of repeat filers: those who have filed a single case in the previous year and those who have filed two or more cases in the previous year. *Id*.

Under § 362(c)(4), debtors who have had two or more bankruptcy cases dismissed in the previous year are ineligible for the automatic stay unless, within 30 days of filing, they can show that the most recent case was filed "in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(4)(B). In contrast, debtors who have had only one previous bankruptcy case dismissed in the past year are entitled to an automatic stay for 30 days after filing. 11 U.S.C. § 362(c)(3). Moreover, the debtor must demonstrate that the second bankruptcy filing was in good faith to

continue receiving the benefit of the automatic stay after the expiration of 30 days. 11 U.S.C. § 362(c)(3)(B). This progressive scale indicates that Congress meant for BAPCPA to prevent repeat, bad-faith filers from abusing the bankruptcy system. However, terminating only a limited portion of the automatic stay would not achieve the objective of deterring such filers because the vast majority of their property would remain protected from creditors under that construction.

Furthermore, "Congress would [not] have 'draw[n] such seemingly arbitrary distinctions' between second-time and other repeat filers." *In re Smith*, 910 F.3d at 587 (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018)). Congress intended to deter bad faith repeat filings and implemented a scale to do so. If one has not filed a bankruptcy case in the previous year, the automatic stay applies in gross. If one has had at least two bankruptcy cases dismissed in the previous year, the automatic stay similarly applies in gross, if it applies at all. Why, then, would repeat filers with a single dismissal in the previous year be entitled to only a partial termination of the automatic stay? This middle category of repeat filers should reflect exactly what it is: a medium on the spectrum. As such, it should deter bad faith filers while providing good faith filers "an opportunity . . . to retain the full impact of the stay even if their life circumstances led them to need a second bite at the bankruptcy apple." *In re Goodrich,* 587 B.R. at 847. To hold otherwise creates arbitrary distinctions that Congress surely could not have intended in light of the legislative history. In the interest of avoiding arbitrary distinctions and remaining true to the statute's legislative history, then, this Court should find that § 362(c)(3)(A) terminates the automatic stay in its entirety, as Congress intended.

1. Congress intended to correct misuse of the bankruptcy system by deterring serial filers.

When a statute is ambiguous, courts may consult legislative history to determine congressional intent. *See Lorion*, 470 U.S. at 737. Additionally, this Court "often consults

legislative history in bankruptcy decisions to ensure that its interpretations are consistent with Congress's purposes." *In re Smith*, 910 F.3d at 589 (citing *Appling*, 138 S. Ct. at 1763-64; *Ransom v. FIA Card Sers., N.A.*, 562 U.S. 61, 71 (2011); and *Milavetz*, 559 U.S. at 236 n.3). Because the plain language of § 362(c)(3)(A) is ambiguous, it is appropriate to look to legislative history in discerning congressional intent. House Reports accompanying § 362(c)(3)(A) reveal that Congress intended to seriously curtail repeat abusers within the bankruptcy system. Because this Court should interpret the statute in a manner that most effectuates congressional intent, any interpretation of § 362(c)(3)(A) inimical to this goal cannot suffice. In providing an effective deterrent for bad faith, repeat filers, the minority approach advanced by Wildflowers best furthers Congress's purpose in enacting BAPCPA.

The House report accompanying § 362(c)(3)(A) states that "serial . . . bankruptcy filings," in particular, were the abuses at "[t]he heart of [BAPCPA's] consumer bankruptcy reforms." H.R. Rep. No. 109-31(I), 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. Additionally, a 1998 House report for an amendment that mirrored the language of § 362(c)(3)(A) described the purpose of the Act in stating, "[s]ome debtors file successive bankruptcy cases to prevent secured creditors from foreclosing on their collateral." *In re Smith*, 910 F.3d at 590; H.R. Rep. No. 105-540, 80 (1998). By enacting § 362(c)(3)(A), Congress sought to prevent these debtors from avoiding their financial obligations by playing the bankruptcy system and invoking the automatic stay. *Ackell*, 490 B.R. at 145. By terminating the automatic stay in its entirety under § 362(c)(3)(A), Congress best achieves this goal because it removes the incentive to file for bankruptcy as a method of dodging creditors. It is also telling that throughout the legislative process, "none of the witnesses, over the multiple days of testimony and through written statements, expressed an understanding that the stay termination

contemplated in section 121 only applied to a debtor and the debtor's non-estate property." *In re Goodrich*, 587 B.R. at 847. Therefore, an interpretation resulting in only partial termination of the automatic stay would not only strike against the principal requirement of giving effect to congressional intent, it would also fail to correct the very evil Congress sought to remedy: serial abuses in the bankruptcy system.

Furthermore, the 2005 House Report accompanying § 362(c)(3)(A) is entitled "Discouraging Bad Faith Repeat Filings." *See* H.R. Rep. No. 109-31(I), 69. The Report is "emblematic of Congress's intention to 'correct perceived abuses of the bankruptcy system.'" *In re Goodrich*, 587 B.R. at 845 (citing *Milavetz*, 559 U.S. at 231-32). It specifically describes § 362(c)(3)(A) as "amending section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 . . . case pending within the preceding one-year period." H.R. Rep. No. 109-31(I), 69. Though this explanation of § 362(c)(3)(A) provides little explicit direction, it is notable that the House Report states the purpose of the statute is "to terminate the automatic stay." *Id.* The report does not say that the statute's purpose is to terminate *some portion of the stay* or to provide *a limited termination* of the automatic stay. This reading of H.R. Rep. No. 109-31 is also compatible with Congress's overarching purpose in enacting BAPCPA: to deter bad-faith filers from abusing the bankruptcy system through repeat filings. Thus, the statute's accompanying house report reasonably indicates that § 362(c)(3)(A) terminates the automatic stay in its entirety.

2. The minority approach more accurately effectuates the statute's purpose.

Finding that, under § 362(c)(3)(A), the stay terminates only as it relates to the debtor's property would thwart congressional intent because it would not provide any real deterrence to repeat filing. Indeed, such a construction would prevent most creditors from collecting upon

termination of the limited stay. As the *Bender* court noted, "[u]pon the filing of a bankruptcy petition, 'property of the estate' includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' Only exempt property [under 11 U.S.C. § 522], or property that has been abandoned [11 U.S.C. § 544], or property that is specifically excluded from the property of the estate" would remain. 562 B.R. 578, 583 (Bankr. E.D.N.Y. 2016) (citing 11 U.S.C. § 541(a)). Thus, any creditor that has collateral in a "legal or equitable interest of the debtor in property as of the commencement of the case" would not be able to collect – this covers virtually all creditors. *Id*.

If Congress truly wanted to discourage bad-faith, serial filers in bankruptcy actions, the majority's construction of § 362(c)(3)(A) cannot be correct. The only consequence the statute would have under the majority's construction is outlined in *Smith*: "(1) certain governmental creditors can collect tax refunds for non-tax debts, (2) certain governmental creditors can pursue exempt property to satisfy nondischargeable tax debts, (3) certain governmental creditors can suspend a debtor's driver's license, and (4) creditors can make collection calls." 910 F.3d at 587. This in no way allows the statute to meet its intended purpose and draws arbitrary distinctions only for the aforementioned creditors. If Congress wanted to terminate the stay as to these four specific actions, "it likely would have enumerated those actions rather than signifying them with the nebulous 'with respect to the debtor.'" *Id*. From a practical standpoint, any argument that § 362(c)(3)(A) terminates the stay as to only certain government creditors leaves the statute impotent.

The legislative history underlying § 362(c)(3)(A) "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 372. The

minority approach best reflects this progressive scale. It provides a deterrent for repeat filers by eliminating the automatic stay with respect to the debtor's property and property of the estate; such an interpretation gives the statute teeth. Additionally, this Court found that Congress enacted BAPCPA to "ensure that [debtors] repay creditors the maximum they can afford." *Ransom v. FIA Card Sers., N.A.*, 562 U.S. 61, 64 (2011). Under the majority approach, this objective is impossible, as most creditors would be incapable of collecting debts even when the debtor files a second case in bad faith. *In re Smith*, 573 B.R. at 306; *see also In re Keeler*, 561 B.R. 804, 808 (Bankr. N.D. Ga. 2016) ("The Majority Approach . . . allows debtors who are unable to demonstrate they filed the new case in good faith to nevertheless receive the benefit of the automatic stay"*)*. The minority approach, however, prudently considers this interest by providing "a potent, *across-the-board* limitation on the stay when a debtor files a case within one year of having had another bankruptcy case dismissed (emphasis added)." *In re Goodrich*, 587 B.R. at 847.

C. The phrase "with respect to the debtor" in 11 U.S.C. § 362(c)(3)(A) addresses repeat filers in a joint action.

Though the phrase "with respect to the debtor" is wholly deficient as a method of property classification, it is instructive as a differentiation between filers in a joint action. When the statute is read as a whole, the latter interpretation presents the most sensical reading of the statute, and statutes must be read holistically. *See generally United Sav. Ass'n of Tex.*, 484 U.S. at 371. Section 362(c)(3) states in relevant part that subparagraph (A) applies "if a single or joint case is filed by or against a debtor under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed[.]" 11 U.S.C. § 362(c)(3). This prefatory language proposes the only circumstance where the phrase "with respect to the debtor" is effective and true to its wording: the debtor being the serial filer in a

joint action. Thus, the phrase "with respect to the debtor" is likely intended to draw a distinction between the offending serial-filing debtor and other parties in interest, not different classifications of property. *Ackell*, 490 B.R. at 145. The fact that the phrase "with respect to the debtor" does not mention property at all further supports this interpretation. Whenever Congress has wanted to distinguish between property classifications in the Bankruptcy Code, it has explicitly done so. Petition for Writ of Certiorari at 17, *Rose*, 945 F.3d 226, (No. 19-50598). Respondent "ignore[s] the significance of the prefatory language, which essentially sets up the problem to be solved." *Ackell*, 490 B.R. at 145.

Therefore, 11 U.S.C. § 362(c)(3)(A)'s statement "with respect to the debtor" is not a limitation on *what* will be subject to continued protection under the automatic stay but on *who*. Because the phrase likely does not reference property classifications at all, an interpretation of § 362(c)(3)(A) as providing only a limited termination of the automatic stay falls short. Indeed, any construction finding that termination of the stay is limited relies solely on the ambiguous phrase. Given the conclusions established by the literal meaning of the words, the surrounding statutory provisions, and the legislative history of 11 U.S.C. § 362(c)(3)(A), this Court should adopt the minority approach and reverse the holding of the Thirteenth Circuit Court of Appeals.

CONCLUSION

The Thirteenth Circuit Court of Appeals incorrectly affirmed the bankruptcy court's decision because, in doing so, it misapplied existing law, as (1) 11 U.S.C. § 362 did not repeal the FAA and (2) Congress intended for § 362(c)(3)(A) to terminate the automatic stay with respect to both property of the debtor and of the estate. Thus, this Court should reverse the holding of the Thirteenth Circuit Court of Appeals.