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 APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM NUMBER 17
COUNSEL FOR PETITIONER

JANUARY 19, 2021

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 362, can a bankruptcy court decline to enforce arbitration where there is no inherent irreconcilable conflict between the Bankruptcy Code and the Federal Arbitration Act, the underlying proceeding is one that arises out of statutory law, and the result would not undermine the objectives of the automatic stay?

II. Whether 11 U.S.C. § 362(c)(3)(a), which Congress enacted to prevent serial filers terminates the automatic stay in its entirety including a debtor's bankruptcy estate?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 19-0805 and reprinted at Record 2. The bankruptcy court decided in favor of Earl Thomas Petty. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the decision in favor of Earl Thomas Petty.

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates statutory construction of certain provisions of Titles 9 and 11 of the United States Code.

The relevant portion of 9 U.S.C. § 2 provides:

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

The relevant portion of 11 U.S.C. § 365(c)(3)(A) provides:

> (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;

STATEMENT OF THE CASE

This appeal arises out of Respondent's attempt to manipulate the Bankruptcy Code to avoid arbitration and erroneously extend the protection of the automatic stay. As a result, the bankruptcy proceeding underlying this appeal threatens to jeopardize the Petitioner's contractual rights bargained for by both parties.

I. FACTUAL HISTORY

Earl Thomas Petty is a former practicing lawyer who is engaged in the craft brewing business in the late 1990s. R. at 3. In 2002, Petty quit the law profession in pursuit of expanding his brewing venture and founded Great Wide Open Brewing Company, Inc. ("GWO"), selling craft beer to local restaurants and convenience stores. R. at 3. In 2005, GWO opened a taproom in Royal Rapids, Moot which featured brewing equipment in a 9,000 square foot space. R at 3. Petty purchased the brewing equipment (the "Equipment") with his own money. In the following decade, Petty found great initial success as GWO went from a small taproom brewing modest batches to one of the state's largest craft breweries, winning several awards for his highly rated products such as its pilsner, ale, and mead. R. at 3–4.

In 2010, with this success and high demand for GWO products, GWO opened four more taprooms around the state. R. at 4. Just two years later, it opened a "state of the art brewhouse" that was to produce 250,000 of barrels of beer annually. R. at 4. In September 2011, Petty entered into a $35 million revolving credit agreement (the "Agreement") with Wildflowers Community Bank ("Wildflowers"). R. at 4. To secure this agreement, GWO granted a first priority lien on substantially all of its assets. R. at 4. Petty granted a first priority lien on the Equipment to secure a personal guaranty (the "Guaranty") to repay the business's obligations. R. at 4.

This Agreement and Guaranty contained identical clauses for "Remedies" and "Arbitration." R. at 4. The "Remedies" clause states 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." R. at 4 (internal quotation marks omitted). The "Arbitration" clause states, "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 (internal quotation marks omitted).

In 2017, GWO began experiencing liquidity issues stemming from increased competition in the craft beer market as well as a decline in craft beer demand. R. at 5. In March 2018, GWO shuttered three of its taprooms due to the significant debt it had incurred, and in April 2018, GWO and Petty defaulted on their respective obligations under the Agreement and Guaranty. R. at 5. After sending a default letter to GWO and Petty, on June 4, 2018, Wildflowers filed a demand for arbitration and a general state law breach of contract claim complaint with the American Arbitration Association seeking $33.2 million in damages, the remaining balance owed. R. at 5.

On July 11, 2018, one day before the initial conference, GWO ceased all operations. R. at 5. GWO and Petty respectively filed for Chapter 7 and Chapter 11 bankruptcy. R. at 5. Petty's case (the "Initial Case"), however, was dismissed on August 27, 2018 due to Petty's failure to timely file documents. R. at 5. On January 11, 2019, Petty filed a second Chapter 11 bankruptcy case (the "Second Case"), right before recommencement of arbitration. R. at 5–6. Properly filing the second time, Petty filed a reorganization plan proposing to pay his creditors, including Wildflowers, forty cents on the dollar from the next five years of his income. R. at 6.

This plan also included prepetition settlements Petty negotiated with several of his creditors, although none were attempted with Wildflowers. R. at 6. Reopening the Royal Rapids taproom in December 2019, Petty stated he had a new venture going as Full Moon Fever Brewing ("Full Moon"). R. at 6. Petty operated the taproom using the Equipment and reported seeing many customers returning and a profitable first month. R. at 6.

This Second Case, however, was missing a motion to extend the automatic stay under § 362(c)(3)(B) during the first thirty days of the case. R. at 6. On February 12, 2019, Wildflowers repossessed the Equipment subject to the security interest in connection with the Guaranty. R. at 6. A week later, Petty filed a motion seeking $500,000 in damages under § 362(k) for violation of the automatic stay, claiming the repossession effectively shut down Full Moon and destroyed its goodwill with its clientele. R. at 6–7. On March 5, 2019, Wildflowers filed a response asserting the automatic stay's protection did not extend to the estate's property pursuant to § 362(c)(3)(A) because Petty had a prior bankruptcy case dismissed within one year of the Second Case and failed to file a motion to extend the stay. R. at 7. Wildflowers also asserted that any claims against it, although stayed, must be resolved pursuant to the arbitration agreement. R. at 7. Wildflowers demanded the violation be arbitrated pursuant to the Guaranty; the bankruptcy court and the Thirteenth Circuit, however, declined to compel arbitration, deeming the Code's objectives greater than the Federal Arbitration Act's (the "FAA") mandate to enforce arbitration. R. at 7, 19.

II. PROCEDURAL HISTORY

The bankruptcy court ruled in favor of Petty and denied arbitration, holding that enforcing the agreement would conflict with the Bankruptcy Code (the "Code"), particularly § 362. R. at 7. It also held that a creditor may not take action with respect to property of a

debtor's estate, regardless of whether the automatic stay is extended under § 362(c)(3)(B). R. at 7. Finding the Equipment to be the property of the bankruptcy estate, the bankruptcy court found Wildflowers in violation of the automatic stay and award compensatory damages of $200,000. R. at 7. On March 4, 2020, the United States Court of Appeals for the Thirteenth Circuit affirmed the decision of the bankruptcy court. R. at 2, 19.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation and application of the Bankruptcy Code and the Federal Arbitration Act, and as such, are pure issues of law. Therefore, the standard of review for this appeal is de novo. *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1576 (11th Cir. 1995).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals erred when it affirmed the bankruptcy court's decision and held that 11 U.S.C. § 362 and related judicial provisions impliedly repealed the Federal Arbitration Act ("FAA") because there is no irreconcilable conflict between the Bankruptcy Code and the Federal Arbitration Act. Congress enacted the Federal Arbitration Act to provide parties with a more efficient and cheaper alternative to litigation.

The Bankruptcy Code does not impliedly repeal the Federal Arbitration Act because there needs to be a clear express and manifest intention to override the FAA. Here, there is no express and manifest intention to override the FAA. When determining if a conflict exists, courts have to decide whether the conflict is a core or noncore proceeding. If there is a noncore proceeding, bankruptcy courts cannot reject arbitration. If there is a core proceeding, a bankruptcy courts must find that arbitration conflicts with the objectives of the Bankruptcy Code.

The Bankruptcy Code's objectives include providing a debtor with a fresh start and protecting the assets of the estate. Here, the Bankruptcy Code's objectives are not harmed when compelling arbitration because Petty and Wildflowers both agreed to compel arbitration. Congress intended to avoid waiving judicial remedies and this proceeding can heard without the need for a bankruptcy judge. Petty does not need the automatic stay's protection for the Equipment because the claim would not affect the bankruptcy estate.

The Thirteen Circuit Court of Appeals also erred when it affirmed the bankruptcy court's decision and held that 11 U.S.C. § 362(c)(3)(a) applied to a debtor's bankruptcy estate because the plain language of the statute and the legislative history support the view that the debtor's bankruptcy estate is included. 11 U.S.C. § 362 of the Bankruptcy Code creates an immediate automatic stay when a bankruptcy petition is filed. The automatic stay prevents a debtor's creditors from enforcing a judgment against a debtor or against property of the estate, taking an act to seek possession of property of the estate, or acting to create or enforce a lien.

However, the automatic stay contains many sections that provide exceptions to the automatic stay. § 362(c)(3)(a) provides that the stay under § 362(a) terminates with respect to any debtor "who had a 'single or joint case' dismissed and then reappeared in another 'single or joint case…under Chapter 7, 11, or 13' within one year of the dismissal of the previous case." There are two interpretations of § 362(c)(3)(a), including the majority and the minority approach. The minority approach is the correct interpretation because the words "with respect to the debtor" means termination of the stay completely which is supported by the text itself, the surrounding language, and legislative history of the statute.

The plain language of § 362(c)(3)(a) including "with respect to the debtor" and "property securing such debt" supports the view that § 362(c)(3)(a) applies to the debtor's bankruptcy

estate because this language should be read broadly and all encompassing. The surrounding text also supports this view because § 362(c)(B) allows that "any party in interest" can extend the stay and creditors would not have an incentive to extend the stay if § 362(c)(3)(a) did not extend to the debtor's bankruptcy estate.

Congress' intent and the legislative history also supports the minority view because Congress intended to add § 362(c) to correct perceived abuses of the bankruptcy system including bad faith serial filings. If § 362(c)(3)(a) did not include property of the debtor's estate then this would not help with discouraging bad faith, serial filings which would not correct any perceived abuses in the bankruptcy system.

Therefore, the Court should reverse the Thirteenth Circuit on both decision for the reasons stated above.

ARGUMENT

This Court should reverse the Thirteenth Circuit Court of Appeals' decision to preclude arbitration in cases where the underlying bankruptcy proceeding's arbitrability is harmonious with the objectives of the Bankruptcy Code. This Court should further reverse the circuit court's decision to not extend the automatic stay to the property of a debtor's bankruptcy estate.

I. THE THIRTEENTH CIRCUIT ERRED IN FINDING THAT 11 U.S.C § 362 AND RELATED JUDICIAL PROVISIONS IMPLIEDLY REPEALED THE FEDERAL ARBITRATION ACT.

Congress enacted the Federal Arbitration Act with the purpose of providing parties with a "prompt, economical and adequate solution of controversies" in lieu of litigation. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 479–80 (1989) (internal quotation marks omitted); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (Congress intended the FAA to provide a "quicker, more informal, and often cheaper" avenue of dispute resolution). Congress mandated that arbitration agreements "shall be valid, irrevocable, and enforceable." 9

U.S.C. § 2 (2020). In doing so, Congress intended the FAA to "reverse the longstanding judicial hostility to arbitration agreements," representing a "clear congressional rejection of judicial skepticism regarding the utility of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1160 (3d Cir. 1989). Indeed, this Court has recognized that in enacting the FAA, Congress established a "liberal federal policy favoring arbitration agreements." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

The Code does not impliedly repeal the FAA because this Court requires a finding of a contrary congressional command with respect to the FAA and any supposedly competing statute claiming to override the FAA. *Epic*, 138 S. Ct. at 1624; *see Greenwood*, 565 U.S. at 98 ((Courts must enforce arbitration agreements unless the FAA's mandate is "overridden by a contrary congressional command" (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). Such a command may be deduced from the statute's text or legislative history, or an "inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227. The party opposing arbitration has the burden of showing that Congress intended to "preclude a waiver a waiver of judicial remedies." *Id.* Here, no such command exists because the Code makes no express mention of precluding arbitration. Further, no such conflict exists because the Code's objectives are not impaired nor are any fundamental rights interfered with if arbitration were enforced. Therefore, the Code does not impliedly repeal the FAA.

A. There is No Irreconcilable Conflict Between the Bankruptcy Code and the Federal Arbitration Act.

"Neither the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy setting," so the remaining factor is

an implied repeal through an inherent conflict between the FAA and the Code. *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1020 (9th Cir. 2012); *see In re Elec. Mach. Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007) ("no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code"); *see also In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006) ("no evidence of such intent [to preclude arbitration] in either the statutory text or the legislative history of the Bankruptcy Code").

An implied repeal, however, is heavily disfavored and requires an "irreconcilable conflict" which shows a "clear and manifest" congressional intention. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009); *Epic*, 138 S. Ct. at 1624. There is a strong presumption against implicit repeals because "Congress will specifically address" existing law when deciding to suspend that law's normal operations with a later statute. *Epic*, 138 S. Ct. at 1617 (internal quotation marks omitted). This Court has held that "repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change . . . but repeal by implication of a legal disposition *implied by a statutory text* is something else." *United States v. Fausto*, 484 U.S. 439, 452 (1988) (emphasis added). Most telling, this Court has rejected "*every* such effort [to find a conflict] to date (save one temporary exception since overruled)," covering statutes from the Sherman and Clayton Acts, 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 (citing *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc. v.*

McMahon, 482 U.S. 220 (1987)). The Bankruptcy Code is no exception in the absence of explicit statutory text precluding arbitration.

1. A bankruptcy court must find a claim to be a core proceeding and contain an inherent conflict to refuse to compel arbitration.

In finding conflicts, courts distinguish between core and noncore proceedings in deciding which claims must go to arbitration. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006). A determination of whether a proceeding is core or noncore turns on the nonexhaustive list in the Code as well as the form and substance of the proceeding. 28 U.S.C. § 157 (2020); *In re G.A.D., Inc.*, 340 F.3d 331, 336 (6th Cir. 2003). A core proceeding must invoke a "substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy." *In re G.A.D., Inc.*, 340 F.3d at 336 (citing *Sanders Confectionery Prods., Inc., v. Heller Fin., Inc.*, 973 F.2d 474, 483 (6th Cir.1992)). On the other hand, a noncore proceeding is a matter that merely relates to bankruptcy. *Hill*, 436 F.3d at 108.

Bankruptcy courts do not have the discretion to reject arbitration when it comes to noncore proceedings. *Id.* Courts have held that the presumption in favor of arbitration "trumps the lesser interest of bankruptcy courts in adjudicating" noncore proceedings. *Id.*; *see In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999) ("conflict is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration"). Bankruptcy courts are given more latitude concerning core proceedings to refuse to compel arbitration. *Hill*, 436 F.3d at 108. Even core proceedings, however, must have an inherent conflict for bankruptcy courts to override arbitration agreements. *Id.*; *In re U.S. Lines, Inc.*, 197 F.3d at 640 (A core proceeding status will not automatically give bankruptcy courts discretion to stay arbitration). Where there is a core proceeding, a bankruptcy court still must analyze whether arbitration of the proceeding "necessarily jeopardize the objectives of the

Bankruptcy Code." *In re U.S. Lines, Inc.*, 197 F.3d at 640 (citing *Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997)).

2. The Bankruptcy Code's objectives to centralize bankruptcy issues, provides a fresh start, and protect estate assets are unharmed through arbitration.

An irreconcilable conflict determination turns, in part, on an inquiry into the underlying nature of the claim and the facts of the specific bankruptcy with respect to the objectives of the automatic stay. *Hill*, 436 F.3d at 108; *see Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997). These objectives include the centralization of purely bankruptcy issues, providing debtors with a fresh start, and protecting the assets of the estate. *Hill*, 436 F.3d at 109. In *Hill*, the Second Circuit's inquiry involved factors such as the progress of the estate's administration, the debtor's necessity of the automatic stay, the effect of the claim on the estate, and any reorganization efforts. *Id.*

Similarly, there is no inherent irreconcilable conflict here because the Code's objectives are left intact when compelling arbitration. In *Green Tree Fin. Corp.-Alabama v. Randolph*, this Court held that whether arbitration is appropriate requires a two-part inquiry as to "whether the parties agreed to submit their claims to arbitration" and if Congress "evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue." 531 U.S. 79, 90 (2000). Here, it is undisputed that Petty and Wildflowers intended to submit their claims to arbitration. As sophisticated parties, Petty and GWO both entered into separate agreements containing arbitration clauses encompassing all disputes, claims, and controversies of any kind. These clauses acknowledge that each party voluntarily relinquishes any right to litigate disputes in court or by jury trial. These arbitration agreements can be inferred to include bankruptcy proceedings and bankruptcy courts. Moreover, this Court has held that an "arbitration agreement's silence on [a] subject, and that fact alone is plainly insufficient to render it

unenforceable." *Id.* at 91. Likewise, the mere fact these clauses did not specifically enumerate claims and courts in the bankruptcy context does not render them unenforceable, especially when it was specifically drafted to cover all forms of controversies.

As to Congress's intention to preclude waiving judicial remedies, the need to centralize purely bankruptcy issues is unnecessary because this objective presupposes the fact that only "the bankruptcy court is uniquely able to interpret and enforce [the automatic stay's] provisions." *Hill*, 436 F.3d at 110. This Court has repeatedly denounced generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Randolph*, 531 U.S. at 89–90 (internal quotation marks omitted); *see Rodriguez de Quijas*, 490 U.S. at 481 (suspicion that arbitration weakens statutory law protections has "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes"); *but see In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 169 (4th Cir. 2005) ("Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge"). The automatic stay itself arises by operation of statutory law, not by an affirmative order of the bankruptcy court, and can be handled by an arbitrator because it is simply a task of federal statutory interpretation and enforcement. *Hill*, 436 F.3d at 110. Here, no such issue exists with respect to making debtor-creditor rights contingent upon an arbitrator's ruling because this proceeding can be properly and effectively heard by an arbitrator without the express need for a bankruptcy judge's wisdom. Arbitration is an "appropriate and competent forum" for such federal statutory claims. *Id.*; *cf. McMahon*, 482 U.S. at 242 (RICO claims may be effectively addressed in an arbitral forum).

Moreover, despite bankruptcy's purpose as a forum for all parties in interest to participate, this Court has held that "even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts at conciliation through arbitration." *Epic*, 138 S. Ct. at 1627. This Court stressed that the "absence of any specific statutory discussion of arbitration . . . is an important and telling clue that Congress has not displaced the [FAA]." *Id.* In *Epic*, this Court held that enforcing *individual* arbitration agreements was appropriate even against an attempted class action under the National Labor Relations Act. *Id.* at 1632 (emphasis added). Not only did Congress intend to require courts to enforce arbitration agreements, but it also required courts to "respect and *enforce parties' chosen arbitration procedures*" such as staying litigation pending arbitration and proceeding arbitration in the manner provided for in the agreement. *Id.* at 1621 (emphasis added). In addition, Petty has demonstrated his ability to defy the Code's collective action objectives himself through his filed reorganization plan. Petty worked out individual prepetition settlements with several of his creditors; when he filed for Chapter 11, he incorporated these settlements into his reorganization plan without respect to other creditors, proving that individual attempts at conciliation can be permitted in the bankruptcy context in the case at hand. Wildflowers, however, received no such opportunity to meet with Petty.

Concerning the assets of his estate, Petty does not need the automatic stay's protection for the repossessed Equipment because this claim would not affect the bankruptcy estate. Although Petty can argue this Equipment is necessary to an effective reorganization, he also asserted that he had to shut down Full Moon, losing all the goodwill and reputation built in the brief time it was open, ceasing continuation of any reorganization efforts. Just as the Second Circuit held that the stay's protection was unnecessary because Hill's estate had been fully

administered, it is no longer needed here because the reorganization had to stop as well. In addition, the likelihood of the reorganization effort's success was slim because of the condition's surrounding Petty's decision to close most of his taprooms in 2017. The craft beer market was in straits because of a large increase in competition as well as a large decline in demand for craft beers.

Moreover, this Equipment is encumbered by a first priority lien pursuant to a security agreement with Wildflowers. Petty entered this agreement to secure his personal Guaranty to repay his business's obligations, namely, the Credit Agreement. In *Acands, Inc. v. Travelers Cas. & Sur. Co.*, the Third Circuit overturned an arbitration award and held that arbitration should have been halted by the automatic stay because of the negative impact it could have on the bankruptcy estate and the award would *diminish* the property of the estate. 435 F.3d 252, 259 (3d Cir. 2006) (emphasis added). Even if Petty were able to show such an inherent conflict, Wildflowers could simply petition the bankruptcy court for relief from the automatic stay to foreclose on the Equipment anyway. As a property subject to a security interest, other creditors would not be able to use it as proceeds from the estate in the event of liquidation nor would Petty be able to prevent Wildflowers from lifting the stay with respect to the Equipment because it had ceased operations and could not provide adequate protection.

II. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THAT 11 U.S.C. § 362(C)(3)(A) DOES NOT APPLY TO PROPERTY OF A DEBTOR'S BANKRUPTCY ESTATE

§ 362 of the Bankruptcy Code addresses the automatic stay within a bankruptcy case. The automatic stay prevents a debtor's creditors from seeking to enforce a judgment against a debtor or against property of the debtor's estate, taking any act to obtain possession of property for the estate, or taking any act to create or enforce a lien. 11 U.S.C. § 362. Generally, § 362(c)

provides that the automatic stay will continue and stay any act against property of the estate until the case is closed or dismissed. 11 U.S.C. § 362(c). However, § 362 does have many provisions limiting the automatic stay. Specifically, § 362(c)(3)(A) says that the stay under § 362(a) terminates with respect to any debtor "who had a 'single or joint case' dismissed and then reappeared in another 'single or joint case…under Chapter 7, 11, or 13' within one year of the dismissal of the previous case." 11 U.S.C § 362(c)(3)(a).

There is currently a split between courts as to whether § 362(c)(3)(A) terminates the entire automatic stay or just the stay with regards to the debtor. Courts differ as to whether to apply § 362(c)(3)(A) to property of the debtor's bankruptcy estate. There are two interpretations of the statute, the minority approach and the majority approach. The majority approach holds that the statute does not apply to the debtor's bankruptcy estate reasoning that the language does not specifically say "debtor's bankruptcy estate." *See Rose v. Select Portfolio Servicing Inc.*, 945. F. 226, 227 (5th Cir. 2019). However, the correct approach is the minority approach, holding that the statute does apply to the debtor's bankruptcy estate because the phrase "with respect to the debtor" must be analyzed in the context of § 362(c) as a whole. *See In Re Reswick,* 446 B.R. 362, 386 (9th Cir. B.A.P. 2011).

The minority approach is the correct interpretation of § 362(c)(3)(A). § 362(c)(3)(A) is not ambiguous, so the plain language of the statute controls. The plain language states the phrase "with respect to the debtor" and this illustrates that any subject relating to the debtor should be included, including the debtor's bankruptcy estate. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1760 (2018). Alternatively, if § 362(c)(3)(A) is considered ambiguous, the policy and legislative history behind § 362(c)(3)(A) supports the minority approach.

Wildflowers did not violate the automatic stay when it repossessed the equipment. When the stay terminates under § 362(c)(3)(A), § 362(a) stops protecting the property of the estate. § 362 says that for debtors who have more than one bankruptcy petition pending within the same year, the stay terminates "with respect to the debtor" thirty days after filing of a subsequent bankruptcy petition. "With respect to the debtor" means termination of the stay entirely, not just property of the debtor and debtor's non-estate property. § 362(c)(3)(A) terminates the stay entirely.

A. The Plain Language Of § 362(c)(3)(A) And Surrounding Language Supports The Minority View.

When interpreting a statute, the examination always begins with the language. *Cmty for Creative Non-Violence v. Reid,* 440 U.S. 730, 739 (1989). Resolving the dispute over the interpretation of a statute must begin with the language of the statute itself. *See U.S. v. Ron Pair Enters.*, Inc. 489 U.S. 235, 241 (1989). If a statute's language is not ambiguous, the sole function of the courts is to enforce it according to the context of the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Ambiguity of statutory language is determined by looking at the language of the text itself, the context, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Starting with the language of the text itself, § 362(c)(3)(A) states:

> "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 plain language of § 362(c)(3)(A) illustrates that "respect to the debtor" applies to property of a debtor's bankruptcy estate. *In re Smith,* 910 F.3d 576, 582 (1st Cir. 2018). When the statutory language includes the phrase "relating to," this should be read expansively and includes any

subject that has a connection or reference to the topics the statute enumerates. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1760 (2018); *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 378-390, (1992).

§ 362(c)(3)(A) terminates the stay under subsection (a) and subsection (a) stops three acts, (1) against the debtor personally, against property of the estate, and against property of the debtor. § § 362(a)(1); 362(a)(5); 362(a)(2). Since § 362(c)(3)(A) references subsection (a), this would extend to all three of the acts covered by the stay. In *In re Wade*, the debtors had a previous Chapter 13 case that was dismissed and then they filed a subsequent petition less than a year later. *In re* Wade, 592 B.R. 672, 674 (Bank. N.D. Ill. 2018). Debtors filed a motion to extend the automatic stay, but the judge was not sitting that day and it was stricken from the call, so the automatic stay was terminated under § 362(a) and the creditors obtained a state court judgment on the debtors. *Id.* The court held that the words "with respect to the debtor" includes property of the debtor's bankruptcy estate. *Id.* at 676. The court reasoned that since the automatic stay applies to actions "against the debtor," "against property of the debtor," and "against property of the estate," there is no reason that "with respect to the debtor" only applies to two out of the three categories. *Id.*

Further, the automatic stay's primary focus when it says "property securing such debt" is focusing on estate property. In *In re Goodrich*, the court adopted the minority approach saying that § 362(c)(3)(A) terminates the stay entirely, against both the debtor's property and property of the estate. *In Re Goodrich*, 587 B.R. 829, 847 (Bankr. D. Vermont 2018). The court reasoned that the most straightforward reading of the text and specifically the phrase "property securing…debt" encompasses both property of the estate and property of the debtor. *Id.* at 842.

"Property securing such debt" comes after the "stay under subsection (a) "and subsection (a) stays actions against both property of the debtor and property of the estate. *Id.* at 834.

Here, Wildflowers did not violate the automatic stay when it repossessed Petty's equipment because the statutory text of § 362(c)(3)(A) supports the contention that this applies to the debtor's bankruptcy estate. Similar to the debtors in *In re Wade* where the automatic stay terminated and the court held that the automatic stay terminated against the debtor's bankruptcy estate, Petty's automatic stay terminated because Petty did not extend the automatic stay and the stay should also terminate against the equipment.

The majority approach ignores the surrounding text of § 362(c)(3)(A). Lehnert, Kimberly, Termination of the Stay for Successive Filers: Interpreting § 362(c)(3), Emory Bankruptcy Developments Journal, 29 Emory Bankr. Dev. J. 243, 277 (2012). The majority approach does not consider the phrase "debtor or property securing such debt." *See In re Reswick*, 446 B.R. at 386. This phrase directly considers estate property and to ignore this phrase would ignore an important portion of § 362(c)(3)(A). *Id.* In *Rose v. Select Portfolio Servicing Inc.*, a mortgagor brought an action stating that the statute of limitations had expired on defendants' power to foreclose on the home. *Rose v. Select Portfolio Servicing Inc.*, 945. F. 226, 227 (5th Cir. 2019). The court held that § 362(c)(3)(A) does not apply to a debtor's bankruptcy estate and therefore the statute of limitation did not bar defendants from foreclosing. *Id.* at 231. The court reasoned that "with respect to the debtor" does not mention the bankruptcy estate in a plain reading of the statute. *Id.* at 230.

§ 362(c)(3)(A) is also not ambiguous when looking at the language within § 362(c)(3) as a whole. If the phrase "respect to the debtor" did not include a debtor's bankruptcy estate, § 362(c)(3)(B) would not hold true. Only the debtor would be interested in extending the stay, and

§ 362(c)(3)(B) says "any party in interest" can extend the stay. *In re Jones*, 338 B.R. 360, 364 (Bankr. E.D. NC 2006). Reading § 362(c)(3)(A) in conjunction with § 362(c)(3)(B) further supports the minority approach. *In re Daniel,* 404 B.R. 318, 323 (N.D. Ill. 2009. In *In re Daniel*, the debtor filed a chapter 13 case, and the case was dismissed and less than a month later, the debtor filed another chapter 13 petition. *In re Daniel,* 404 B.R. 318, 320 (N.D. Ill. 2009). The debtor did not receive an extension of the automatic stay and the bank moved to foreclose on the mortgage. *Id.* at 320. The court upheld the minority view and said that if the phrase "with respect to the debtor" excluded estate property, then the provision in § 362(c)(3)(B) allowing parties in interest to seek an order extending the stay would virtually be meaningless and ruled in favor of the bank. *Id.* at 323. The court reasoned that there would be no reason to want an extension of the stay just to prevent assessments of personal liability against the debtor or collection actions against non-estate property that would not benefit them. *Id.*

Here, if the phrase "respect to the debtor" did not include the Petty's bankruptcy estate, it would be inconsistent with § 362(c)(3)(B). Similar to the debtor in *In re Daniel* where the debtor failed to extend the automatic stay, and the court held that the stay did not apply to the bank's foreclosure, the debtor here failed to extend the automatic stay and Wildflowers should have been able to repossess the equipment. If § 362(c)(3)(A) did not apply to the debtor's bankruptcy estate, then only Petty would be interested in extending the automatic stay under 362(c)(3)(B), Wildflowers would not be interested, and this would not make sense with the language of 36(c)(3)(B).

B. If The Statute Is Considered Ambiguous, The Context Of Code § 362(c)(3)(A) Supports The Legislative History Of The Statute And Congress's Intent Because It Prevents Serial And Bad Faith Filing.

If a statute is ambiguous, the Court may resort to legislative history to determine the meaning of the statute. *See U.S. v. Ron Pair Enters.*, *Inc.*, 489 U.S. 235, 242 (1989). If § 362(c)(3)(A) is considered ambiguous, the policy behind the section supports the minority view. *See In Re Reswick,* 446 B.R. 362 at 386.

Congress added § 362(c) to the code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to correct perceived abuses of the bankruptcy system. *Vitalich v. Bank of N.Y. Mellon*, 569 B.R. 502, 509 (D.N.D. Cal. 2016). Congress's intent in implementing § 362(c) was to prevent three scenarios. *In re Smith,* 910 F.3d at 576. The first scenario is where no previous filing exists within one year, the stay generally will remain throughout the entire bankruptcy case. 11 U.S.C. §§ 362(c)(1); 11 U.S.C. §§ 362(c)(2). The second scenario is where the debtor has filed one previous bankruptcy case in the year before the petition date, the automatic stay is only applied for thirty days unless the court enters an order for an extension. 11 U.S.C. § 362(c)(3). The third scenario is where the debtor has filed multiple bankruptcy cases in the year before the petition date, the automatic stay does not go into effect at all. 11 U.S.C. § 362(c)(4). The court looks to the intent of the BAPCPA which added § 362(c)(3)(A). *Id.* at 580-581. Nothing in the House Report suggests that it was Congress' intent to have § 362(c)(3) terminate a portion of the automatic stay, there were no committee reports preceding BACPA that suggested there was a distinction between actions against the debtor, debtor's property, and property of the estate. *In re Daniel*, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009).

§ 362(c)(3)(A) was also implemented to deter serial filings, specifically bad faith serial filings. *In re Smith*, 910 F. 3d at 590. In *In re Smith*, a debtor filed a chapter 13 case less than one year after the dismissal of his previous Chapter 13 petition. *Id.* at 579. No interested party

requested order to extend the stay under § 362(c)(3)(B) and subsequently, the stay was terminated under § 362(c)(3)(A) on January 27, 2017. *Id.* The Court of Appeals for the First Circuit held that the automatic stay was terminated against the debtor personally, against property of the estate, and property of the debtor. *Id.* at 591. The court reasoned that Congress did not intend to preserve protection for property of the estate past the thirty-day window and intended to prevent serial filings and abusive bankruptcy filings when it implemented BAPCPA. *Id.* at 589; *see In re Jupiter*, 334 B.R. 754, 757 (Bankr. D.S.C. 2006) (court holding that § 362(c)(3)(A) applies to a debtor's bankruptcy estate and a contrary interpretation would be at odds with Congress's intent to deter bad faith and successive filing because the intent was to terminate all protections of the automatic stay).

Here, the court should consider the legislative history of § 362(c)(3)(A) if the statute is considered ambiguous. Similar to the debtor in *In re Smith* where the debtor filed a chapter 13 case less than one year after the dismissal of his first petition and the court took into account the legislative history of the statute when deciding the outcome, the debtor here filed a second chapter 11 petition less than one year after his previous chapter 11 petition was dismissed and the court should account for the legislative history of the statute.

The majority approach would not be consistent with Congress's intent. It would make Congress's intent of implementing § 362(c)(3)(A) pointless. *In re Jupiter* at 757. If § 362(c)(3)(A) did not include property of the debtor's estate, it would not assist in discouraging bad faith, serial filings. *Id.* It would make the other sections of 362(c) useless because then creditors would not be able to pursue any debt that is owed to them. *In re Harris*, 342 B.R. 274, 278 (Bank. N.D. Ohio 2006). If § 362(c)(3)(A) allowed creditors to keep bothering the debtor

with phone calls or obtain property of the debtor that is not property of the estate, § 362(c)(3)(A) would be useless. *In re Jupiter* at 761–62.

CONCLUSION

In conclusion, 11 U.S.C § 362 and related judicial code provisions did not repeal the Federal Arbitration Act and § 362(c)(3)(A) should be interpreted using the minority approach and should apply to property of a debtor's bankruptcy estate. For the reason articulated above, we respectfully ask this Court to reverse the Thirteenth Circuit's decision.