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 TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 18
Counsel for Respondent

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 362 and related statutes, does the bankruptcy court possess the discretion to adjudicate an automatic stay dispute notwithstanding a prepetition arbitration agreement when there is an inherent conflict between arbitration and the Bankruptcy Code's underlying purposes?

II. Under 11 U.S.C. § 362(c)(3)(A), does a creditor violate the automatic stay by repossessing property of the bankruptcy estate when the debtor has filed another bankruptcy petition that was dismissed in the prior year and has not moved to extend the automatic stay within thirty days?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States Bankruptcy Appellate Panel Cases

United States Bankruptcy Court Cases

Constitutional Provisions

Statutes

Other Authorities

OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot ruled for the debtor, Thomas Earl Petty, on both issues. R. at 3. Specifically, the court concluded that: (1) it had the authority to adjudicate the dispute between the parties notwithstanding a prepetition arbitration agreement they entered into; and (2) Petitioner violated the automatic stay by repossessing property of the bankruptcy estate. *Id*. The United States Court of Appeals for the Thirteenth Circuit affirmed both of these decisions. *Id.* This Court then granted certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

This appeal implicates multiple subsections of 11 U.S.C. § 362. The text of the relative provisions is attached in Exhibit A.

STATEMENT OF THE CASE

I. Factual History

In 2002, Earl Thomas Petty ("Petty") founded Great Wide Open Brewing Company ("Great Wide Open"), a craft beer brewery that sold beer to local vendors. R. at 3. In 2005, Great Wide Open started a taproom in the City of Royals Rapids, Moot. *Id*. Petty purchased brewing equipment for the taproom with his own funds. *Id.* Within a decade, Great Wide Open became one of the largest breweries in Moot, eventually opening four new taprooms in 2010. *Id.* at 4.

To meet rising demand, Great Wide Open entered into a $35 million revolving credit agreement with its lender, Wildflowers Community Bank ("Petitioner"). *Id.* Great Wide Open pledged nearly all of its assets as collateral for the agreement. *Id.* Additionally, Petty executed a personal guaranty for Great Wide Open's obligations, secured by a first priority lien on the equipment he purchased for the Royal Rapids taproom. *Id.* Each of these agreements contained arbitration clauses. *Id.* Great Wide Open used much of these funds to open a new brewhouse in 2012. *Id.* The business began brewing most of its beer at the brewhouse, but continued using the taproom locations as well, including the Royal Rapids location. *Id.*

As competition spiked in 2017, Great Wide Open began facing liquidity issues. *Id.* at 5. The business became significantly indebted to Petitioner and above-market lease obligations, causing it to abruptly close three of its taprooms in March 2018. *Id.* A month later, Great Wide Open and Petty defaulted on their agreements with Petitioner. *Id.* In response, Petitioner filed a demand for arbitration against Petty, seeking $33.2 million in damages for breach of contract

under state law. *Id.* The initial hearing was scheduled for July 12, 2018, but Great Wide Open ceased operations on July 11th. *Id.* The next day, Great Wide Open filed for Chapter 7 bankruptcy, and Petty filed for Chapter 11. *Id.* The Chapter 7 trustee liquidated Great Wide Open's assets and distributed most of the proceeds to Petitioner. *Id.* at 6. However, the bankruptcy court dismissed Petty's case on August 27th because his attorney failed to timely file multiple documents. *Id.* at 5.

In the following months, Petty re-negotiated a lease with the landlord of the Royal Rapids taproom. *Id.* at 6. Petty started a new brewing company as sole proprietor and reopened the taproom, using the same brewing equipment he bought earlier. *Id.* The taproom quickly attracted a substantial customer base, profiting during the first month of operation. *Id.* In light of this recent income, Petty negotiated settlements with many of his creditors and hired a new attorney to reorganize his remaining debts through Chapter 11. *Id.* at 6. On January 11, 2019, Petty filed the proper documentation for Chapter 11, including a reorganization plan that proposed to pay his creditors, including Petitioner, forty cents on the dollar for the next five years. *Id.* Subsequently, Petitioner filed a proof of claim alleging it was still owed $2.1 million under Petty's guaranty, despite receiving nearly all of the proceeds from the liquidation of Great Wide Open's assets. *Id.*

Thirty-two days after Petty filed for bankruptcy, Petitioner repossessed the Royal Rapid taproom's brewing equipment in which it possessed a security interest. *Id.* Petitioner neglected to obtain a court order confirming that the stay terminated with respect to the equipment. *Id.* By repossessing the equipment, Petitioner caused Petty's new business to shut down. *Id.*

II. Procedural History

Petty moved for damages under section 362(k) alleging Petitioner violated the automatic stay. *Id.* at 6. Petitioner filed a response arguing the stay no longer existed under section 362(c)(3)(A) because Petty did not move to extend the automatic stay within thirty days of filing. *Id.* at 7. Petitioner also claimed that Petty must arbitrate any claims against Petitioner. *Id.* The district court determined that arbitration would conflict with section 362. *Id.* It also found that Petitioner violated the automatic stay by repossessing property of the estate and awarded Petty $200,000. *Id.* Petitioner appealed. The Thirteenth Circuit Court of Appeals affirmed both of the district court's decisions. *Id.* at 19.

STANDARD OF REVIEW

The facts of this case are undisputed, and the issues presented to this Court are questions of law. *Id.* at 8. Accordingly, this Court reviews each issue *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly held that the bankruptcy court may deny arbitration where an inherent conflict exists between arbitration and the Bankruptcy Code's (the "Code") underlying purposes. To demonstrate that the bankruptcy court wields this discretion, the party opposing arbitration must demonstrate an inherent conflict between arbitration and the Code's applicable underlying purpose. Bankruptcy courts' authority to decide whether arbitration conflicts with the Code's objectives depends on whether the conflict involves a core or non-core proceeding and whether the claim itself emanates from federal rights the Code confers. Here, the

conflict concerns the automatic stay, a core proceeding, and Petty's claim derives entirely from the Code. Without section 362, Petty is left with neither a cause of action nor remedy for the stay violation. Thus, the bankruptcy court may decide whether arbitration would create an inherent conflict with the Code's underlying objectives.

Because the stay is a core proceeding stemming directly from the Code, bankruptcy courts must next assess whether arbitration would inherently conflict with the underlying aims of Code: (1) centralized decision-making of purely bankruptcy issues, (2) protection of creditors and reorganizing debtors from piecemeal litigation, and (3) the bankruptcy courts' undisputed power to reinforce their own orders. If arbitration would jeopardize these purposes, bankruptcy courts have discretion to refuse to allow arbitration of the at-issue claim.

Here, arbitration contravenes the goal of centralized decision-making in purely bankruptcy issues. A main objective of the stay is to centralize all claims against the debtor's property and resolve automatic stay violations in one tribunal. But in arbitration, only the parties to the arbitration may participate. Hence, it does not account for all the equities and interests at stake, undermining the Code's goal of centralized decision-making.

Arbitration also frustrates the Code's purpose of avoiding piecemeal litigation. Bankruptcy courts adjudicate disputes in a single tribunal to protect creditors and reorganizing debtors from conflicting judgments and to provide administrative ease and clarity. But arbitration silos a single dispute between a debtor and lone creditor, allowing a creditor to circumvent bankruptcy procedures. Arbitration is especially inappropriate when the dispute centers on the stay. Here, arbitrating Petty's claim would impact every other creditor even though they would be excluded from arbitration. This would force Petty's other creditors to pursue their individual

claims separately, subverting the Code's objective of avoiding piecemeal litigation in core bankruptcy proceedings.

Finally, arbitration irreconcilably conflicts with the bankruptcy court's power to enforce its own orders. Bankruptcy courts possess the requisite expertise to interpret and enforce the stay, especially where disputed section 362(c)(3)(A) has been hotly debated for years and requires extensive familiarity with bankruptcy jurisprudence. Arbitration is not adequate to address the complex legal disputes implicated in this issue or protect the substantive rights of all potentially impacted parties. Mandating arbitration here would inherently conflict with bankruptcy courts' authority to interpret and enforce the automatic stay.

Regarding the second issue presented to this Court, the Thirteenth Circuit properly held that Petitioner violated the automatic stay because section 362(c)(3)(A) does not terminate the stay as applied to actions against property of the estate. As the majority of courts have recognized, the statutory language is unambiguous. The phrase "with respect to the debtor" plainly means that the stay terminates with respect to the debtor's personal liability and assets, but continues to protect property of the estate. This interpretation is bolstered by its consistencies with the structure of the Code, specifically the other subsections of the automatic stay provision. Throughout the Code, Congress deliberately draws a distinction between the debtor, the debtor's property, and property of the estate. The statutory provisions that terminate the stay entirely plainly state such an intention. Likewise, the provisions that only modify its scope specify the categories of collection actions they affect, as does section 362(c)(3)(A). As a result, section 362(c)(3)(A) is unambiguous and should be enforced according to its terms.

Furthermore, keeping the stay in effect beyond the initial thirty days furthers the policies underlying the Code. The majority approach facilitates centralized dispute resolution and

equitable distributions to creditors, while balancing the interest in deterring serial-filing debtors. Distinctly, Petitioner's approach removes the bankruptcy court's oversight, prevents debtors from completing their repayment plans, and results in inequitable distributions to creditors. Put simply, not only does it unduly punish repeat-filing debtors, it does so to the detriment of most of their creditors, for the benefit of one or a few. While Petitioner may overemphasize snippets from the scant legislative history surrounding the enactment of section 362(c)(3)(A), these pieces cannot conclusively ascertain congressional intent on this issue. Rather, the enacted text, coupled with the purposes and policies Congress sought to address, illustrate a deterrent scheme to punish repeat-filing debtors at a graduated level based on how many times they have filed.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION TO DENY ENFORCEMENT OF THE ARBITRATION CLAUSE.

The convergence of bankruptcy and arbitration presents the issue of whether the Federal Arbitration Act ("FAA") preempts bankruptcy courts' jurisdiction, or whether bankruptcy courts may deny arbitration. Congress's command is clear: bankruptcy courts shall have jurisdiction over all civil proceedings arising under, in, or related to title 11 notwithstanding any other Act of Congress to the contrary. This Court has never decided whether bankruptcy proceedings must be arbitrated. However, many federal circuits have determined that where the Code conflicts with the FAA, the FAA may be overridden by a contrary congressional command deduced from an inherent conflict between arbitration and the Code's underlying purposes. *See, e.g.*, *In re Belton*, 961 F.3d 612, 615 (2d Cir. 2020) (holding that the FAA "may be overridden by contrary congressional intent") (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226

(1987)); *In re Henry*, 944 F.3d 587, 590 (5th Cir. 2019) (holding that Congress's purpose of displacing the FAA in some contexts may be shown by "a clearly expressed congressional intention that such a result should follow") (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)).

A. Congress expressly bestowed bankruptcy jurisdiction upon the federal courts for cases arising under, in, or related to title 11, causing an apparent impasse when the Federal Arbitration Act is implicated.

Bankruptcy cases hold special importance in American jurisprudence. The United States Constitution gives Congress the power to establish "uniform laws on the subject of Bankruptcies throughout the United States." U.S. CONST. ART. 1, § 8. cl. 4. In turn, Congress expressly granted federal district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Congress explicitly conferred this jurisdiction "notwithstanding any [other] Act of Congress." *Id.* By extension, the district courts may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 U.S.C. § 157(a). Moreover, Congress proclaimed that bankruptcy judges may "hear and determine . . . all core proceedings arising under title 11, or arising in a case under title 11. . . and may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1).

This Court's jurisprudence has solidified the intended strength and reach of the jurisdictional grant to the bankruptcy courts. Specifically, this Court noted that the language of 28 U.S.C. § 157(a) "suggests a grant of breadth," emphasizing that the "jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Regarding congressional

intent, this Court explained that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters connected* with the bankruptcy estate." *Id.* (emphasis supplied). Furthermore, this Court held that the language in section 1334(b) "must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate." *Id.* at 308.

Congress clearly relayed its purpose in granting broad bankruptcy jurisdiction through 28 U.S.C. § 1334 and § 157. These proceedings collectively mandate that federal district courts have original jurisdiction over all civil proceedings arising under, in, or related to title 11 cases, and "all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 1334(b); 28 U.S.C 157(b)(1). Congress further clarified that bankruptcy courts possess this jurisdiction despite any other act purporting to confer exclusive jurisdiction elsewhere. 28 U.S.C. § 1334(b). Unfortunately, the FAA poses a seemingly inapposite obstacle to the exercise of bankruptcy jurisdiction.

Applying the FAA to bankruptcy disputes creates an inherent conflict. The FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Hence, the FAA directly conflicts with Congress's explicit command that "notwithstanding any Act of Congress" purporting to grant exclusive jurisdiction to another forum, bankruptcy courts shall have discretion to hear and determine "all core proceedings arising under title 11." 28 U.S.C. § 1334(b); 28 U.S.C. § 157(b)(1).

This Court originally applied the FAA narrowly, recognizing that in agreeing to arbitrate, parties risk becoming bound to a legally unsound outcome. *See Wilko v. Swan*, 346 U.S. 427, 438

(1953) (holding that through the FAA, "Congress has afforded participants . . . an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."), *overruled by Rodriguez de Quijas v. Shearson*, 490 U.S. 477 (1989). But over time, the FAA has been expanded to cover disputes beyond what Congress intended. Justice O'Connor declared that "the pre-emptive effect of a federal statute is fundamentally a question of congressional intent" and cautioned that "this Court has strayed far afield in giving the [FAA] so broad a compass." *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). Justice Stevens also advised this Court against "effectively rewrit[ing] the [FAA] to give it a pre-emptive scope that Congress certainly did not intend." *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

This Court has never examined whether the FAA preempts bankruptcy court jurisdiction. But this Court has established when a federal statute may override the FAA, and many federal appellate courts offer guidance in resolving the impasse created in bankruptcy proceedings.

B. An inherent conflict between the Bankruptcy Code's underlying purposes and arbitration establishes grounds to override the FAA.

Petitioner contends that following *Epic*, the FAA preempts bankruptcy jurisdiction in all instances where there is an inherent conflict. R. at 9. This is wrong. In *Epic*, this Court enforced an arbitration agreement, holding that Congress did not intend the National Labor Relations Act (the "NLRA") to displace the FAA by allowing collective proceedings in federal court when the parties had agreed to arbitrate. *Epic*, 138 S. Ct. at 1616. This Court held that the party contending that two federal statutes cannot be reconciled must show a "clearly expressed and manifest congressional intention" for one statute to displace another. This Court reiterated its holding in

McMahon: when two federal statutes conflict, the party opposing arbitration must demonstrate that Congress intended one statute to displace the other. *Id.* at 1624; *McMahon*, 482 U.S. at 227.

Applying these rules, this Court in *Epic* held that the NLRA, specifically section 7, does not demonstrate Congress intended to displace the FAA. *Id.* at 1624. Section 7 grants "[e]mployees" the "right to self-organize, to form, join or assist labor organizations . . . and to engage in other concerted activities." *Id.* Assessing this language, this Court could not "infer a clear and manifest congressional command to displace" the FAA. *Id.* Contrast the NLRA's language with Congress's explicit command in the Code, that "notwithstanding any Act of Congress" conferring exclusive jurisdiction elsewhere, federal district courts, and by extension bankruptcy courts, retain "original jurisdiction . . . [over proceedings] arising under title 11, or arising in, or related to cases under title 11." 28 U.S.C. § 1334(b). On its face, Congress's command in the latter statutory provision is clearer than section 7 in *Epic*.

Contrary to Petitioner's contention, *Epic* does not overrule *McMahon*. *See In re Belton* 961 F.3d at 615 (Although *Epic* "describes an exacting gauntlet through which a party must run to demonstrate congressional intent to displace [the FAA]," and although there is a "difference in tone, the test [*Epic*] employs is substantially the same as *McMahon*'s.") (internal quotations omitted); *see also In re Henry*, 944 F.3d at 591 (*Epic* "shows that . . . *McMahon* . . . remains sound" because (1) *Epic* "cites *McMahon* for support" and (2) this Court "appl[ied] essentially the same tests for determining whether a statute overrides the FAA[]" in both cases.).

Moreover, an argument that *Epic* impliedly repealed *McMahon* is unsound. Nowhere in *Epic* did this Court purport to overrule *McMahon*. *See In re Roth*, 594 B.R. 672, 676 (Bankr. S.D. Ind. 2018) ("*Epic* is silent as to any attempt to overrule *McMahon*."); *see also Knepp v. Educ. Fin. Serv.*, No. 18-01389, slip op. at 4 (Bankr. D. N.J. Dec. 26, 2018) ("*Epic* does not

overrule or conflict with . . . *McMahon* and really, at most, refines it."). *Epic*'s silence is not outcome determinative. *In re Belton*, 961 F.3d at 616 (explaining that this Court "did not treat silence as outcome determinative [in *Epic*] - since that would have rendered much of *Epic Systems*'s analysis surplusage," and observing that *Epic* "never stated an intention to overrule *McMahon* or to render any prong of its tripartite test a dead letter."). This Court "does not normally overturn" or "dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 4 (2000). To overrule Federal Circuit Court of Appeals' decisions, this Court "must be more than merely illuminating with respect to the case before" the lower court. *In re Henry*, 944 F.3d at 591 (internal quotations omitted). As such, *Epic*'s silence with respect to *McMahon* reflects no intent to overturn *McMahon.*

Since *Epic* does not overturn *McMahon*, the next inquiry is whether a particular statute displaces the FAA. This Court has not addressed a case where the FAA and bankruptcy laws overlap, but it has articulated rules governing when a congressional command may override the FAA. *See McMahon*, 482 U.S. at 226. Although the FAA, "standing alone," mandates arbitration, it may be overridden or displaced by a "contrary congressional command," or a "clear and manifest" congressional intent. *Id.*; *Epic*, 138 S. Ct. at 1624. One may deduce this intent from a particular statute's "text, legislative history, or from an inherent conflict between arbitration and the statute's underlying purpose." *McMahon*, 482 U.S. at 227.

The Code "is silent on the issue of arbitration in this context," and the Code's legislative history is "similarly unenlightening." *In re Belton*, 961 F.3d at 616-17. However, since this Court has not treated such silence as dispositive, the party seeking to preclude arbitration must demonstrate an "inherent" or "irreconcilable" conflict between arbitration and the Code. *Id.* at 616 (discussing *Epic*); *Epic*, 138 S. Ct. at 1624; *McMahon*, 482 U.S. at 227.

1. Whether a proceeding is "core" or "non-core" guides whether arbitration would inherently conflict with the underlying purpose of the Code.

Whether a proceeding is core or non-core actuates the bankruptcy courts' authority to adjudicate bankruptcy issues. 28 U.S.C. § 157(b)(1). The core/non-core distinction drives the inquiry because arbitration and bankruptcy promulgate conflicting policies, core proceedings implicate more critical bankruptcy objectives, and thus arbitrating a core bankruptcy proceeding more likely undermines the Code's objectives. *In re U.S. Lines*, 197 F.3d 631, 640 (2d Cir. 1999); *In re Nat'l Gypsum*, 118 F.3d 1056, 1064 (5th Cir. 1997). However, non-core proceedings are less likely to create a conflict severe enough to implicitly override arbitration. *In re U.S. Lines*, 197 F.3d at 640. Thus, bankruptcy courts generally lack discretion to refuse to enforce arbitration for conflicts involving non-core proceedings. *In re Elec. Mach. Enter.*, 479 F.3d 791, 796 (11th Cir. 2007).

2. Enforcing the automatic stay is a core proceeding that bankruptcy courts have discretion to adjudicate.

Core proceedings include, but are not limited to, those enumerated in 11 U.S.C. § 157(b)(2). *In re Anderson*, 884 F.3d 382, 388 (2d Cir. 2018). A core proceeding typically "invokes a substantive right provided by title 11" or entails "a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Gruntz*, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). Bankruptcy courts maintain broad, established powers to adjudicate core proceedings because these proceedings are essential to safeguarding the "integrity" of the bankruptcy process. *In re U.S. Lines*, 197 F.3d at 640. In contrast, there is less chance of an inherent clash between the Code's purposes and an arbitration agreement where no core proceeding exists because non-core proceedings do not arise under title 11 and are not essential to debt restructuring. *Id.*

Here, Petitioner seeks to arbitrate the claim that it violated the stay. R. at 6, 7. Specifically, Petitioner argues that an arbiter should decide if the stay existed with respect to Petty's bankruptcy estate property under section 362(c)(3)(A) and if Petty is entitled to damages under section 362(k). *Id.* The stay clearly involves a core proceeding, as both the legislative history of section 362 and case law attest. The legislative history explains:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property.

H.R. Rep. No. 95–595, 95th Cong. 1st Sess. 340–2 (1977).

Various federal courts also emphasize the primacy of the stay in bankruptcy proceedings. *See, e.g.*, *Budget Serv. Co.*, *v. Better Homes of V.A., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) ("[A] proceeding to prosecute a violation of the automatic stay is a core proceeding.").

A section 362(k) damages claim, as is at issue here, can only arise in the context of a bankruptcy case. *In re Johnson*, 575 F.3d 1079, 1083 (10th Cir. 2009). A proceeding based on a claim derived straight from the Code that could arise only within a bankruptcy case is deemed "core." *In re Gruntz*, 202 F.3d at 1081; *see also In re Johnson*, 575 F.3d at 1083 (holding that a "§ 362(k)(1) proceeding . . . is a core proceeding"); *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 109 (2d Cir. 2006) (holding that actions brought under section 362 are core because "they derive directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy

case."). Through his section 362(k) claim, Petty seeks relief that only the Code provides.[1] It makes sense that a claim for the stay violation can only be vindicated within the framework that enables this unique cause of action in the first place. Thus, Petty's section 362(k) cause of action against Petitioner constitutes a core proceeding.

C. The Bankruptcy Court has discretion to deny enforcing the arbitration clause because arbitration inherently conflicts with the objectives of the automatic stay.

After establishing that a proceeding is core, the next inquiry is whether arbitration conflicts with the Code's underlying purposes implicated by the core proceeding. *McMahon*, 482 U.S. at 227; *see also In re Elec. Mach. Enter.*, 479 F.3d at 796; *In re Nat'l Gypsum*, 118 F.3d 1067; *In re Mintze*, 434 F.3d 222, 229 (3d Cir. 2006). Courts must "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149, 1161 (3d Cir. 1989). This "determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Hill*, 436 F.3d at 108. Merely concluding that a proceeding is core does not always give bankruptcy courts discretion to deny enforcement of an arbitration clause. *In re U.S. Lines,* 197 F.3d at 640. But where the cause of action "derive[s] entirely from the federal rights conferred by the Bankruptcy Code," bankruptcy courts possess substantial discretion to assess the purposes of the Code and deny arbitration. *In re Nat'l Gypsum*, 118 F.3d at 1069.

By contrast, bankruptcy courts lack discretion to deny arbitration if no statutory claim derives from the Code. *In re Mintze*, 434 F.3d at 231-32 (holding that where the debtor failed to raise *any* statutory claims created by the Code, arbitration did not conflict with the Code's underlying purposes); *see also Hill*, 436 F.3d at 109 (holding that arbitration would "not

[1] Specifically, section 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1).

seriously jeopardize the objectives" of the Code because the debtor's estate had already been fully administered and debts discharged so that she no longer required protection of the stay, and because the purported class action "lack[ed] the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration").

As previously discussed, the cause of action here is whether Petitioner violated the stay and must pay damages. A claim for a stay violation does not exist outside the context of a bankruptcy case. Instead, it derives entirely from "the federal rights conferred by the Bankruptcy Code," specifically section 362. *In re Nat'l Gypsum*, 118 F.3d at 1069. Because Petty's claim here is "derived entirely from the federal rights conferred by the Bankruptcy Code," the bankruptcy court has "significant discretion" to analyze whether arbitration conflicts with the objectives of the Code. *Id.*

One must first identify the Code's objectives to analyze whether arbitration would generate an inherent conflict. These objectives include (1) "the goal of centralized decisionmaking of purely bankruptcy issues"; (2) "the need to protect creditors and reorganizing debtors from piecemeal litigation"; and (3) "the undisputed power of a bankruptcy court to enforce its own orders." *Id.*; *In re Henry*, 944 F.3d at 591; *In re Anderson*, 884 F.3d at 389. When arbitration jeopardizes these objectives, bankruptcy courts may refuse to enforce arbitration agreements. *Hays*, 885 F.2d at 1161. It does so here.

1. Requiring arbitration inherently conflicts with the Code's goal of centralizing decision-making in purely bankruptcy issues.

A main objective of the stay is centralized decision-making. *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990). In fact, the primary purpose of the stay is to "allow[] the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the

bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Id*. Centralization prevents the "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *In re Hotlkamp*, 669 F.2d 505, 508 (7th Cir. 1982). In turn, section 362 facilitates the Code's policy of centralization by preserving the estate. *In re Ionosphere Clubs, Inc.*, 922 F.2d at 989.

Because the stay promulgates the Code's purpose to centralize decision-making, arbitrating a conflict stemming directly from a stay violation would thwart this central aim. This is because disputes implicating both the Code and the FAA "present conflicts of 'near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution.'" *Hill*, 436 F.3d at 108 (*quoting In re U.S. Lines*, 197 F.3d at 640); *see also Janvey v. Alguire*, 847 F.3d 231, 239 (5th Cir. 2017) (holding that "[a]rbitration decentralizes, deconsolidates . . . and interferes with equal distribution of assets.") (internal quotations omitted); *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1023 (9th Cir. 2012) (reasoning that "[e]ven if conducted expeditiously," arbitration "prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization.").

Here, Petitioner seeks to arbitrate its stay violation which, if proven, entitles Petty to damages under section 362(k). R. at 6-7. In fact, this is the *only* claim Petitioner seeks to arbitrate. *Id.* The stay's prohibitions apply to all creditors, not just Petitioner. 11 U.S.C. § 362(a). The purpose of the stay is not only to protect the debtor, but also creditors. H.R. Rep. No. 95–595, 95th Cong. 1st Sess. 340–2 (1977). The stay accomplishes this by preventing creditors from taking individual action against the debtor's property. Rather, it facilitates an ordered process that treats creditors equitably. *Id.* However, one creditor's stay violation dismantles this orderly

process and may impact all creditors subject to the stay. *Id.* For example, when Petitioner repossessed estate property in violation of the stay, Petitioner damaged Petty's ability to use the estate property to complete his payment plans with other creditors. Thus, resolution of Petitioner's violation affects every other creditor as well.

In situations like this case, arbitration fails to consider interests of parties not subject to the agreement because only parties to the agreement may participate in arbitration. Marianne B. Culhane, *Limiting Litigation Over Arbitration in Bankruptcy*, 17 Am. Bankr. Inst. L. Rev. 493, 495-96 (2009). By excluding all other creditors, arbitration frustrates the Code's purpose in providing orderly and inclusive centralization of bankruptcy estate disputes. *In re Sky Grp. Int'l, Inc.*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989). In contrast, the bankruptcy courts' "quintessential duties" are to provide a "central forum for litigation." *In re Acis Capital Mgmt, L.P.*, 600 B.R. 541, 560 (Bankr. N.D. Tex. 2019). This collective forum permits "central aggregation of property," which promotes "the effectuation of the fundamental purposes of the Bankruptcy Code . . . the equality of distribution of assets among similarly situated creditors." *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9, 31 (Bankr. S.D.N.Y. 2012). In bankruptcy proceedings, interested parties may intervene or be joined to ensure equitable distribution. Culhane, *supra*, at 495-96. Distinctly, arbitration precludes these options, and naturally the protection they provide. *Id.*

Notwithstanding harm to other creditors from decentralizing bankruptcy proceedings, Petitioner seeks to marshal a privately-made, two-party arbitration agreement that would subject every other creditor to the arbitrator's decision regarding the stay. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). This effort contravenes the objective of centralizing decision-making in bankruptcy disputes. Because requiring the parties to arbitrate the alleged violation of

the stay inherently conflicts with the Code's goal of centralized decision-making, the bankruptcy court has discretion to deny arbitration

2. Requiring arbitration inherently conflicts with the Code's purpose in protecting creditors and debtors from piecemeal litigation.

Another "principal purpose" of the Code is to avoid "piecemeal litigation and conflicting judgments." *Moses v. Cashcall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015); *see also In re Henry*, 944 F.3d at 591; *In re Nat'l Gypsum*, 118 F.3d at 1069; *In re Eber*, 687 F.3d 1123, 1131 (9th Cir. 2012). Bankruptcy courts further this purpose by adjudicating disputes in a single forum to promote "[e]ase and centrality of administration," which are fundamental aspects of bankruptcy law. *In re French*, 440 F.3d 145, 154-55 (4th Cir. 2006). Distinctly, arbitration disrupts the bankruptcy process and adds "costs, time, and frustration" by removing a "specific claim between the debtor and a specific creditor." *In re Wade*, 523 B.R. 594, 606 (Bankr. W.D. Tenn. 2014). Moreover, arbitration enables a creditor to "bypass carefully established procedures in order to force an unwilling debtor to litigate a number of actions in a number of forums merely because [a creditor's] contract[] happen[s] to include a standard arbitration clause." *In re FRG*, 115 B.R. 72, 75 (Bankr. E.D. Pa. 1990). This predicament imperils a debtor's resources in direct obstruction of the "breathing space and fresh start" policy undergirding the stay. *Id.*; *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

Here, the arbitration Petitioner seeks is a two-party dispute that would bind only Petty and Petitioner. R. at 4. Yet arbitration is "inadequate to protect the substantive rights" of Petty's other creditors, especially since the claim concerns a stay violation. *McMahon*, 482 U.S. at 229. The stay is "fundamental" to a bankruptcy case, enabling the bankruptcy court to "harmonize" all parties' interests while "preserving the debtor's assets for repayment and reorganization."

Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494, 503 (1986); *In re Gruntz*, 202 F.3d at 1081. A bankruptcy court's adjudication of the stay ensures "fair and equitable distribution and treatment among the debtor's creditors." *In re F & T Contractors, Inc.*, 649 F.2d 1229, 1232 (6th Cir. 1981). But siloing a lone creditor's claim through arbitration, like Petitioner attempts to do here, conflicts with an important purpose of the stay: even-handed distribution and treatment among the debtor's creditors to avoid piecemeal litigation. *In re Wade*, 523 B.R. at 605; *Moses*, 781 F.3d at 72. Only the bankruptcy court can further that purpose.

Moreover, arbitration is particularly inappropriate where "the determination [in arbitration] would affect the amount, existence and priority of claims to be paid out of the general funds and, thus, involve the interests of other creditors." *In re F & T Contractors, Inc.*, 649 F.2d at 1232. In *In re F & T*, the Sixth Circuit Court of Appeals upheld a bankruptcy court's refusal to arbitrate a contract dispute because the arbitrator's decisions would have impacted other creditors' claims, even though those creditors could not participate in arbitration. *Id.* Similarly here, Petty's Chapter 11 reorganization plan proposed to pay his creditors, including Petitioner, forty cents on the dollar over five years. R. at 6. Yet Petitioner strives to "jump the line" and circumvent this bankruptcy plan by arbitrating its contention that it did not violate the stay when it repossessed Petty's equipment. *In re Ampal-Am. Israel Corp.*, 502 B.R. 361, 369 (Bankr. S.D.N.Y. 2013). Arbitrating this claim impacts the rights and claims of Petty's other creditors, even though those creditors would be banned from participating in the very proceeding that would determine their rights and claims. *In re F & T*, 649 F.2d at 1232. This would force such creditors to pursue their own claims separately, impugning the goal of avoiding piecemeal litigation in core bankruptcy proceedings.

3. Requiring arbitration would inherently conflict with the bankruptcy court's power and proficiency to enforce its own orders.

The stay is a bankruptcy-specific legal mechanism that arbitration cannot adequately address, so requiring arbitration would create an irreconcilable conflict with the bankruptcy court's power to interpret and enforce its own orders. *See, e.g.*, *In re Sky Grp.*, 108 B.R. at 89 (concluding that "[r]elief from stay must be *authorized by the Bankruptcy Court*."). Where a cause of action is founded entirely upon a right conferred by the Code, bankruptcy courts possess marked discretion to decide whether arbitration would conflict with a bankruptcy court's "undisputed power to carry out its own orders." *In re Nat'l Gypsum*, 118 F.3d at 1069; *see also In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002); *In re Anderson*, 884 F.3d at 390; *In re Eber*, 687 F.3d at 1127; *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999). Unsurprisingly, bankruptcy courts maintain singular proficiency in construing their own injunctions and deciding when their orders have been violated. *In re Anderson*, 884 F.3d at 390. Congress granted extensive leeway to bankruptcy courts to "enforce their own orders, specifically granting these specialty courts the power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the bankruptcy code.'" *Id.* (quoting 11 U.S.C. § 105(a)); *see also In re Kalikow*, 602 F.3d 82, 96 (2d Cir. 2010) (reasoning that the "statutory contempt powers given to a bankruptcy court under § 105(a) complement the inherent powers of a federal court to enforce its own orders.").

That the automatic stay applies the moment a debtor files for bankruptcy does not make it any less an "order" or "process" that the bankruptcy court has power to enforce. Specifically, the "statutory basis" of the stay and its "similarity" among bankruptcy cases does not preclude bankruptcy courts from "alone possess[ing] the power and unique expertise" to interpret and

enforce the stay. *In re Anderson*, 884 F.3d at 390. This is especially true where the statutory provision in dispute, section 362(c)(3)(A), has been hotly debated in federal bankruptcy courts for years and requires substantial bankruptcy knowledge.[2]

In particular, how a tribunal interprets and applies section 362(c)(3)(A) entails massive repercussions for debtors and creditors alike. Dana L. Robbins, *Dicing It Up: Does a Sliver of the Automatic Stay Remain for Repeat Debtors?*, 93-APR Fla. B.J. 43, 43 (Mar./Apr. 2019). Bankruptcy judges possess the specialized expertise required to equitably determine complex and contentious bankruptcy disputes, especially for issues that involve a circuit split like the issue here. *See, e.g.*, *In re Stewart*, 741 F.2d 127, 132 (7th Cir. 1984); *see also In re Inofin, Inc.*, 488 B.R. 259, 261 (Bankr. D. Mass. 2013) ("Bankruptcy Judges . . . possess specialized knowledge . . . and familiarity with similar cases."); *In re Maynard*, 269 B.R. 535, 542 (Bankr. D. Vt. 2001) (noting that bankruptcy judges retain "specialized expertise and experience" to fulfill their "roles as guardians of the integrity of the bankruptcy system"). In comparison, arbitration is "inadequate" to address the divisive legal dispute implicated in this case and to "protect the substantive rights at issue." *McMahon*, 482 U.S. at 221. Because bankruptcy judges possess specialized knowledge and experience to "interpret[]" and "enforce" the courts' "order[s], process[es], or judgment[s]," particularly when adjudicating a proceeding involving the automatic stay, mandating arbitration inherently conflicts with bankruptcy courts' discretion

[2] Much ink has been spilled in analyzing section 362(c)(3)(A). "Courts . . . have split over the meaning of section 362(c)(3) . . . [with] a majority of courts . . . holding that the automatic stay is lifted only 'with respect to the debtor,' as opposed to property of the estate." Lance Miller & Michelle M. Miller, *Repeat Filers under BAPCPA: A Legal and Economic Analysis*, 2008 Ann. Surv. of Bankr. L. 20 (2008). The phrase "with respect to the debtor" has "caused a split among courts." Dana L. Robbins, *Dicing It Up: Does a Sliver of the Automatic Stay Remain for Repeat Debtors?*, 93-APR Fla. B.J. 43, 43 (Mar./Apr.2019); Baxter Dunaway, *Discouraging bad faith repeat filings: §§ 362(c)(3) and (4)*, 2 L. Distressed Real Est. § 28:18.30 (Nov. 2020) ("There is a split on whether section 11 U.S.C.A. § 362(c)(3)(A) terminates the automatic stay with regard to the debtor, property of the debtor, *and* property of the estate, or only with regard to the debtor and property of the debtor.").

to enforce their own orders. *In re Anderson*, 884 F.3d at 390. This inherent conflict attests to Congress's intention to preclude waiver of bankruptcy jurisdiction. *McMahon*, 482 U.S. at 227.

Because of the inherent conflict between arbitration of a core proceeding—the automatic stay—and the Code's underlying purposes, the bankruptcy court has discretion to deny enforcement of the arbitration clause. Accordingly, this Court should affirm.

II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT PETITIONER VIOLATED THE AUTOMATIC STAY BY REPOSSESSING PROPERTY OF THE BANKRUPTCY ESTATE.

When a bankruptcy petition is filed, an automatic stay arises and prohibits creditors from collecting debts outside the bankruptcy case proceedings. 11 U.S.C. § 362. Section 362(a) of the Code provides which collection actions are forbidden, and "differentiates between acts against the debtor, against property of the debtor, and against property of the estate." *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006); *see* 11 U.S.C. § 362(a)(1)-(8). Of the seven subsections detailing the scope of the stay in consumer cases, five apply to the debtor or the debtor's property and two apply to property of the estate. *See* 11 U.S.C. § 362(a)(1) (debtor); (a)(2) (both); (a)(3) (estate); (a)(4) (estate); (a)(5) (debtor); (a)(6) (debtor); (a)(7) (debtor). However, section 362 also lists certain instances where the stay terminates partially or completely. *See* 11 U.S.C. § 362(c).

At issue here, section 362(c)(3)(A) provides that when a debtor's second petition is filed within one year of the dismissal of a previous petition, the stay shall terminate "with respect to the debtor" thirty days later, absent an order extending the stay. 11 U.S.C. § 362(c)(3)(A). The majority of courts interpreting this provision have concluded that it only lifts the stay "with respect to" actions taken against the debtor or the debtor's property, but property of the estate remains protected. *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir.

2019).[3] Yet despite its plain language, some courts interpret the provision to terminate the stay entirely. *See, e.g.*, *In re Smith*, 910 F.3d 576 (1st Cir. 2018). Abiding by sound canons of statutory construction, the Thirteenth Circuit Court of Appeals correctly adopted the majority approach. Accordingly, this Court should affirm.

A. The plain language of section 362(c)(3)(A) provides that the automatic stay remains in effect with respect to property of the bankruptcy estate.

When interpreting a statute, courts must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). That analysis is guided "by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Id.* at 341. Thus, a provision may be unambiguous despite being unclear when read in isolation, poorly drafted, or ungrammatical. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2005); *cf. In re Price*, 370 F.3d 362, 369 (3d Cir. 2004) ("[A] provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive."). If a plain meaning is ascertainable, it should be enforced accordingly. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 1, 6 (2000). Hence, this Court's inquiry begins with determining whether section 362(c)(3)(A) has an unambiguous meaning. It does.

1. <u>The plain meaning of the phrase "with respect to the debtor" modifies the language terminating the scope of the automatic stay in section 362(c)(3)(A).</u>

[3] *Accord In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); *In re Thu Thi Dao*, 616 B.R. 103, 113-14 (Bankr. E.D. Cal. 2020); *In re Wood*, 590 B.R. 120, 125-26 (Bankr. D. Md. 2018); *In re* Roach, 555 B.R. 840, 848 (Bankr. M.D. Ala. 2016); *In re Rinard*, 451 B.R. 12, 18-20 (Bankr. C.D. Cal. 2011); *In re Alvarez*, 432 B.R. 839, 840-43 (Bankr. S.D. Cal. 2010); *In re Dowden*, 429 B.R. 894, 903 (Bankr. S.D. Ohio 2010); *In re Jones*, 339 B.R. 360, 364 (Bankr. E.D.N.C. 2006); *In re Hollingsworth*, 359 B.R. 813, 814 (Bankr. D. Utah 2006); *In re Williams*, 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006); *In re Simonson*, 2007 WL 703542, at *1-2 (Bankr. D.N.J. Mar. 2, 2007); *In re Stanford*, 373 B.R. 890, 894-95 (Bankr. E.D. Ark. 2007); *In re Robinson*, 427 B.R. 412, 414 (Bankr. W.D. Mich. 2010); *In re Taylor*, 2007 WL 1234932, *4-5 (Bankr. E.D. Va. Apr. 26, 2007); *In re Rice*, 392 B.R. 35, 38 (Bankr. W.D.N.Y. 2006); *In re Tubman*, 364 B.R. 574, 582-83 (Bankr. D. Md. 2007); *In re Graham*, 2008 WL 4628444, at *2-3 (Bankr. D. Or. Oct. 17, 2008).

If a debtor had a bankruptcy case pending within the previous year that was dismissed, the text of the Code provides: "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case." 11 U.S.C. § 362(c)(3)(A) (emphasis added). Canons of statutory interpretation, specifically the plain meaning rule, *expressio unius est exclusio alterius*, and the rule against superfluities, illustrate that the phrase "with respect to the debtor" unambiguously lifts the stay as applied to the debtor and the debtor's property, but does not affect property of the estate.

The phrase "with respect to" plainly denotes a limitation of applicability. *In re McGrath*, 621 B.R. 260, 264 (Bankr. D. Mex. 2020). When the Code does not define a word or phrase, this Court presumes Congress intended the ordinary meaning. *Ransom v. FIA Card Servs., N. A.,* 562 U.S. 61, 69, (2011). In ordinary usage, "respect" may be defined as "a relation or reference to a particular thing or situation." *Respect*, *Merriam-Webster Online Dictionary* 2020 https://www.merriam-webster.com/dictionary/with%20respect%20to (Jan. 5, 2020). The term may be qualified and become more expansive or limited. *See Lamar, Archer, Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (reasoning that "respecting" may be defined broadly and be synonymous with "relating to"). In turn, the phrasal preposition "with respect to" references the subject it precedes with particularity, but does not expand to related subjects as "respecting" potentially would. *See In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008).

In section 362(c)(3)(A), Congress uses the phrase "with respect to" four times to permit certain previously-stayed actions. *See* 11 U.S.C. § 362(c)(3)(A). The first three instances modify types of actions: "with respect to action[s] taken with respect to a debt or property securing such debt or with respect to any lease." *Id.* As used here, "action taken" means a formal action or

proceeding taken against the debtor. *In re Paschal,* 337 B.R. 274, 279–80 (Bankr. E.D.N.C. 2006). The phrase is then used a fourth time to modify the scope of the automatic stay: "shall terminate with respect to the debtor." 11 U.S.C. § 362(c)(3)(A). Hence, the provision lifts the stay for actions against "debt or property securing such debt . . . with respect to the debtor" but does not mention estate property. *In re Jones*, 339 B.R. at 365. The Code's Rules of Construction bolster this interpretation by providing that "'claim against the debtor' includes claim[s] against property of the debtor," but likewise never mentions estate property. 11 U.S.C. § 102(2). In light of a fundamental interpretative canon, *expressio unius est exclusio alterius*, or "expressing one item of [an] associated group or series excludes another left unmentioned," Congress's decision to reference two categories of stayed actions, and not the third, implies the exclusion is deliberate. *See Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002). Therefore, since Congress omitted "property of the estate" from section 362(c)(3)(A), this Court should not infer it.

Put simply, the plain language of section 362(c)(3)(A) lifts the stay against the debtor and property of the debtor but does not affect property of the estate. Accordingly, the majority of courts have found the provision to be unambiguous. *See, e.g.*, *In re Holcomb*, 380 B.R. at 816 ("[W]e see no ambiguity in the language of the statute."); *In re Jones*, 339 B.R. at 365 ("It is abundantly clear from the plain language of § 362(c)(3)(A) that the stay that terminates under that section is not the stay that protects property of the estate."); *In re Rinard*, 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011) ("There are no fuzzy words; there are no hanging paragraphs; there are no words requiring a dictionary.").

Petitioner may contend "with respect to the debtor" means the stay remains intact for a refiling debtor's first-time filing spouse in a joint case, but this ignores the nature of a bankruptcy petition and contradicts the canon against superfluities. *See, e.g.*, *In re Reswick*, 446

B.R. 362, 369-71 (B.A.P. 9th Cir. 2011). Merely because a provision is susceptible to different interpretations does not mean it is ambiguous, especially when the alternative meaning would render a word or phrase superfluous. *In re Price*, 370 F.3d at 369. Since joint debtors' estates are kept separate even if they are administered together, adding the phrase "with respect to the debtor" is unnecessary to protect a debtor's spouse. *In re Portell*, 557 B.R. 161, 165 (Bankr. W.D. Mo. 2016). Even the first Circuit admitted that absent the phrase "with respect to the debtor," the provision would still clearly not affect the non-repeat-filing spouse. *In re Smith*, 910 F.3d 576, 585 (1st Cir. 2018). Instead, the First Circuit deemed the phrase to be superfluous, running afoul of its "duty to 'give each word [of a statute] some operative effect' where possible." *Duncan v. Walker*, 533 U.S. 167, 175 (2001) (quoting *Walters v. Metro. Ed. Enters.*, 519 U.S. 202, 209 (1997)); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Courts should disfavor interpretations of statutes that render language superfluous."). It is not merely "possible," but natural, to read the phrase as modifying the scope of the stay while not terminating it entirely.

2. <u>The statutory scheme of section 362 illustrates that Congress intentionally omitted property of the estate from subsection (c)(3)(A).</u>

Even if section 362(c)(3)(A) is somewhat ambiguous when read in isolation, neighboring provisions clarify it. *Rose,* 945 F.3d 226, 231 (5th Cir. 2019); *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."). A contextual analysis of section 362, and the Code

generally, illustrates that when Congress intends for a provision to affect property of the estate, it writes that intent plainly.

The relevant context of section 362 begins with the scope of the automatic stay in subsection (a). 11 U.S.C. § 362(a). This subsection prohibits three categories of collection actions: those against "the debtor," "property of the debtor," and "property of the estate." *See* 11 U.S.C. § 362(a). Later, subsection (c) lists circumstances that terminate the stay, whether partially or entirely. 11 U.S.C. § 362(c). It first provides, "the stay of any act *against property of the estate* under subsection (a) continues . . . until such property is no longer property of the estate." 11 U.S.C. § 362(c)(1) (emphasis added). Notably, Congress specifically references which category of actions subsection (c) may affect while mirroring the terminology used in subsection (a). *Id.* Likewise, subsection (c)(3)(A) explicitly references two of the three categories, "the debtor" and "property securing [the debtor's] debt," but never mentions estate property. *Rose*, 945 F.3d at 230 ("There is no mention of the bankruptcy estate, and we decline to read in such language."). In short, Congress specifies plainly which categories the provisions terminating the stay address. *See In re Holcomb*, 380 B.R. at 316. ("Nowhere in § 362 does Congress use the phrase 'with respect to the debtor' as incorporating the debtor, the debtor's separate property, and property of the estate."). Congress continued doing so in section 362(c)(3)(A) by specifying the two categories it applies to; inferring a third contradicts the structure of section 362.

Perhaps even more clarifying is the language Congress employs when terminating the stay entirely. Subsection (c)(4)(A)(i) terminates the stay completely for debtors who have had two or more pending cases in the prior year: "the stay under subsection (a) shall not go into effect upon the filing of the case." 11 U.S.C. § 362(c)(4)(A)(i). Unlike subsection (c)(3)(A), this

subsection contains no limiting language like "with respect to the debtor," but instead references the entire stay as defined by subsection (a). *Id.* Yet Petitioner argues these two neighboring, simultaneously-enacted subsections use such vastly different language to reach the same result, terminating the stay entirely. As one court put it, "[r]eading the two adjacent subsections to mean the same thing makes no sense." *In re McGrath*, 621 B.R. at 265. A more reasonable explanation for Congress enacting a different subsection featuring different language is that Congress intended a different result. *In re Paschal*, 337 B.R. at 279; *see also In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013) ("Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute."); Lisa A. Napoli, *The Not So Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 Am. Bankr. L. J. 749, 767 (2005) ("Had the drafters of this provision intended that the whole of the automatic stay would terminate, they could have easily just referenced § 362(a) as they did in § 362(c)(4)(A).").

As this Court has reiterated, "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 disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Congress included "with respect to the debtor" in subsection (c)(3)(A) and omitted the phrase from the next subsection. If Congress intended to terminate the stay entirely in subsection (c)(3)(A), it would have used the same, plain language it used in the next subsection.

Still, the dissent criticized the majority for unnecessarily distinguishing the debtor's assets and property of the estate, reasoning that most of a debtor's assets are often property of the estate. R. at 29. But the Code draws the same distinction consistently. For instance, section 362(h)(1) describes a circumstance in which the stay "is terminated with respect to personal

property of the estate *or of the debtor* securing in whole or in part a claim . . . and such property shall no longer be property of the estate." 11 U.S.C. § 362(h)(1) (emphasis added). Notably, courts adopting the minority approach neglect to explain the textual "asymmetry" between subsections (c) and (h). *In re Thu Thi Dao*, 616 B.R. 103, 109 (Bankr. E.D. Cal. 2020). Moreover, Congress dedicated an entire subsection of the Code detailing what property of a debtor's is or is not estate property. *See* 11 U.S.C. § 541(b). Even outside of the Code, Congress differentiates the two. *See, e.g.*, 28 U.S.C. § 1334(e)(1) ("The district court [in a bankruptcy case] . . . shall have exclusive jurisdiction - (1) of all the property, wherever located, of the debtor as of the commencement of such case, *and of property of the estate*.") (emphasis added). Again, this demonstrates that when Congress intends for a subsection to affect property of the estate, it effectuates that intent through clear language.

In sum, section 362(c)(3)(A) has a clear, plain meaning that is especially unambiguous when read contextually. In drafting the Code, Congress was deliberate in stating which provisions apply to property of the estate. By not doing so in section 362(c)(3)(A), Congress demonstrated its intent to leave the stay as applied to estate property intact.

B. The purposes and policies underlying the Bankruptcy Code confirm the plain meaning of section 362(c)(3)(A).

Specifically in interpreting the Code, this Court considers its objectives and policies as a whole before declaring a provision ambiguous. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). At its core, the Code aims to provide debtors a "fresh start" while "obtaining a maximum and equitable distribution for creditors." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563-64 (1994) (citations omitted) (Souter, J., dissenting). The automatic stay facilitates these goals by giving debtors "breathing room" to rearrange their finances and preserving the estate so bankruptcy courts may

centralize disputes. *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003). If the stay is terminated, the estate becomes subject to "disorderly, piecemeal dismemberment" through uncoordinated proceedings, jeopardizing both of these fundamental policies. *Id.*; *SEC v. Miller*, 808 F.3d 623, 630 (2d Cir. 2015). While the majority approach upholds these policies, Petitioner's standard circumvents each of them in favor of select creditors. *In re Holcomb*, 380 B.R. at 816.

In Chapter 11 and 13 cases, preserving the bankruptcy estate is often necessary for debtors to conduct reorganization and repayment plans. *In re Jones*, 339 B.R. at 365. The automatic stay protects such property that is often necessary to generate income, enabling debtors to get back on their feet and pay creditors. *Id.*; *In re McGrath*, 621 B.R. at 266. Conversely, the instant case illustrates how the minority approach contradicts these functions. After suffering economic hardship for a year, Petty began profiting through using the taproom equipment. R. at 6. Based on this success, Petty proposed a repayment plan that included all of his creditors. *See id.* Yet Petty's ability to complete this plan was short-lived. By repossessing the equipment, Petitioner stripped Petty of his ability to generate income. *Id.* at 7. Not only does this exacerbate Petty's economic turmoil, but it also hinders his ability to pay the other creditors. There is nothing unique about this case; estate property is often necessary for debtors to complete repayment plans, such as an automobile. *In re McGrath*, 621 B.R. at 266. In the event that it is unnecessary, creditors may move for relief from the stay under section 362(d). *Rose*, 945 F.3d at 231. In turn, the minority approach needlessly burdens most creditors for the benefit of a few.

Perhaps even more inequitable is how the minority approach impacts Chapter 7 creditors. In Chapter 7 cases, the stay is vital for the trustee to be able to collect the estate and distribute

dividends equitably. *In re Thu Thi Dao*, 616 B.R. at 111. Lifting the stay would prevent the trustee from executing these duties, dismembering the estate in a disorderly, piecemeal manner outside the bankruptcy court's oversight. *Mann*, 316 F.3d at 3. This would also enable creditors to collect estate property exceeding their security interests, to the detriment of other creditors that would otherwise receive dividends from liquidation. *In re Holcomb*, 380 B.R. at 816. This absurd result sheds light on why not a single case adopting the minority approach involves a Chapter 7 trustee attempting to preserve estate property. *See In re Thu Thi Dao*, 616 B.R. at 110. It makes little sense to strip the trustee of such a fundamental protection—along with other creditors' likelihood of repayment—merely because the debtor had one case dismissed in the previous year. *Id.* at 11.

C. The history and purpose of BAPCPA support the majority interpretation.

A statute's plain meaning controls "in all but the most extraordinary of cases." *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010). Only if the text is clearly at odds with the drafters' intent, or if the language is unclear, will resorting to other sources such as legislative history be helpful. *Id.* Even then, legislative history may not control, especially when it contradicts the statutory text. *Paschal*, 337 B.R. at 278. Since section 362(c)(3)(A) is unambiguous and clear, emphasizing legislative history is inappropriate. *See Lamie*, 540 U.S. at 534. Even if it were ambiguous, however, the unenacted legislative history Petitioner relies upon contradicts the text, intent, and purpose exhibited by the enacting Congress.

1. <u>Legislative history does not demonstrate Congress intended to terminate the stay entirely.</u>

Section 362(c)(3)(A) was enacted through the Bankruptcy Abuse Prevention and Consumer Act of 2005 ("BAPCPA"). Publ. L. No. 109-8. Notably, BAPCPA features sparse

legislative history and only contains one House Judiciary Committee Report that primarily mirrors the text. *See* H.R. Rep. No. 109-31(1) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88. It lacks other traditional legislative pieces such as a Senate committee report, conference reports, or even floor statements. *See id.*; Thomas J. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 Am. Bankr. L.J. 195, 214 (2007). As a result, "[l]egislative history is virtually useless as an aid to understanding the language and intent of BAPCPA." *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Az. 2005).

Still, the minority view asserts section 362(c)(3)(A) is ambiguous and engages in the "dubious practice" of using legislative pieces to rewrite the provision. *In re McGrath*, 621 B.R. at 266. Rather than relying upon the proposed statutory language, minority courts overemphasize part of the section-by-section analysis from the House Judiciary Committee Report. *See, e.g.*, *In re Smith*, 910 F.3d at 582. In part, the Report states that Section 362(c)(3)(A) "amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a Chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period." H.R. Rep. No. 109-31(1) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88.

As the Thirteenth Circuit recognized, the Report's brief summary of section 362(c) is "anything but conclusive." R. at 18. It only glosses over subsection (c) as a whole, which contains multiple provisions addressing repeat-filing debtors. *See* 11 U.S.C. § 362(c) Moreover, it never mentions the repeat-filing debtor's spouse scenario Petitioner interprets "with respect to the debtor" to mean. *See* H.R. Rep. No. 109-31(1) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88. Hence, if deemed reliable at all, this Report contradicts Petitioner's explanation of the phrase's

inclusion. Additionally, the Report neglects to explain the "tortured and confusing language" of section 362(c)(3)(A), or why Congress did not replace it with the straightforward language from the Report. *In re Scott-Hood*, 473 B.R. 133, 137 (Bankr. W.D. Tex. 2012). Instead, the House passed the Senate Bill without amending it. 151 CONG. REC. H2074-76 (daily ed. Apr. 14, 2005). As such, it should be enforced according to its terms.

In any event, the Report is an unreliable source for gauging Congress's intent. This Court has warned against selectively choosing isolated legislative pieces to reach a result at odds with statutory text. *Exxon Mobile Corp. v. Allapatah Servs. Inc.*, 545 U.S. 546, 568 (2005). Since such reports are not subject to Article I requirements, reliance upon them "may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id*. at 569. Put simply, this Report from a small committee is not only inconclusive, but a poor vehicle for ascertaining the intent of the 109th Congress.

2. The majority approach rationally furthers BAPCPA's purpose of deterring abusive bankruptcy filings.

Since relevant legislative sources are sparse, courts adopting the minority approach overemphasize proposed, unenacted materials from the eight-year period preceding BAPCPA's enactment. *See, e.g.*, *In re Daniel*, 404 B.R. 318, 327–29 (Bankr. N.D. Ill. 2009). In 1998, the House and Senate Judiciary Committees issued reports containing sections titled "Discouraging Bad Faith Repeat Filings" that substantially reflected section 362(c)(3)(A), including the phrase "with respect to the debtor." *See* House Judiciary Comm. Report No. 105-540, on H.R. 3150, § 121, pp. 15-16; Senate Judiciary Comm. Report No. 105-253, S. 1301, § 303. Several other

legislative materials with the same language were proposed, but not enacted, in years thereafter. *See, e.g.*, 2002 House Conference Report No. 107-617, pp. 53-56; 2003 Judiciary Committee Report No. 108-40, pp. 36-38. Courts adopting the minority approach cite these materials and contend lifting the stay entirely accords with Congress's intent to deter serial, abusive bankruptcy filings. *E.g.*, *Smith*, 910 F.3d at 590.

Although BAPCPA purported to deter abusive bankruptcy filings, this history provides nothing helpful. Not only is tracing this eight-year history "torturous," but it cannot legitimately discern the congressional intent behind section 362(c)(3)(A). *In re Quevedo*, 345 B.R. 238, 243 (Bankr. S.D. Cal. 2006). First, "[e]xtrinsic materials have a role in statutory interpretation only to the extent that they shed a reliable light on the *enacting* legislature's understanding of the otherwise ambiguous terms." *Exxon*, 545 U.S. at 568 (emphasis added). Thus, pieces of failed legislation from five different Congresses have no meaningful role in assessing what the *enacting* legislature later intended. Michael Miller, *Untangling the Web of § 362(c)(3)(A) and its Legislative History*, 39 Am. Bankr. Inst. J. 22, 81 (2020). Even if they did, the proposals aiming to deter abusive filings were not limited to section 362(c)(3)(A), but also contained language that later became sections 362(c)(4)(A)(i) and 362(d)(4). *Id.* at 80. While all three provisions aimed to deter abusive filings, Congress enacted different degrees of punishment based on the potential of filing abuse. *Id.* at 81; *In re Williams*, 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006). A second-time filer, whose first case may have been dismissed for non-abusive reasons like Petty's, is less likely to be abusing the bankruptcy process compared to a debtor who is filing for the third or greater time in the same year. *Id.* As such, the former should enjoy greater stay protections than the latter. *Cf. In re Smith*, 910 F.3d at 586 (reasoning that Congress intended harsher consequences for a third-time filer compared to a second-time filer).

One may argue the minority approach deters serial filers as BAPCPA intended, but the majority approach still accomplishes this goal without prejudicing creditors. Of the seven subsections of collection actions the stay prohibits in consumer cases through section 362(a), the majority approach terminates five of them. In application, it reasonably deters repeat filings by allowing creditors to commence or continue lawsuits, garnish wages, enforce judgments against exempt property, pursue collection efforts, and take similar actions the stay otherwise prohibits. *In re Williams*, 346 B.R. 361, 367 (Bankr. E.D. Pa. 2006). Allowing these collection actions has real implications for the debtor and the debtor's property, yet balances the interests of creditors who benefit from the stay's protection of estate property. *Id.* In sum, the majority approach deters abusive bankruptcy filings without unduly punishing debtors who merely file twice, while still protecting creditors abusive filings would otherwise harm.

The text of section 362(c)(3)(A), the policies underlying it, and its legislative history all demonstrate that Congress intended to keep the automatic stay in effect as applied to property of the estate. Accordingly, this Court should affirm.

CONCLUSION

The Thirteenth Circuit properly held that the FAA inherently conflicts with the Code and thus a bankruptcy court may decline to enforce an arbitration agreement. Additionally, the court properly held that Petitioner violated the automatic stay because the stay with respect to property of the estate remained in effect when Petitioner repossessed estate property. For all these reasons, this Court should affirm the decision of the Thirteenth Circuit.

APPENDIX A

U.S. CONST. ART. 1, § 8. cl. 4.

The Congress shall have power . . . To constitute tribunals inferior to the Supreme Court

11 U.S.C. § 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-
. . . .
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
. . . .
(c) Except as provided in subsections (d), (e), (f), and (h) of this section—
(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
. . . .
(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;
. . . .
(4) (A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case;

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

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

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

(A) matters concerning the administration of the estate;

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

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

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

9 U.S.C. § 2 Validity, irrevocability, and enforcement of agreements to arbitrate

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