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

JANUARY 19, 2021

TEAM NUMBER 1
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 362 and related judicial code provision, is the Federal Arbitration Act, 9 U.S.C. §§ 1 *et. seq.* impliedly repealed when there is no "inherent conflict" between the Bankruptcy Code and the Federal Arbitration Act, neither Congress nor the Courts have abrogated the Federal Arbitration Act, arbitration does not jeopardize the proceedings, and these facts do not demand precedent to be overridden?

II. Under 11 U.S.C. § 362(c)(3)(A) does the automatic stay apply to property of a debtor's bankruptcy estate when the plain meaning interpretation is more consistent with the rules of statutory construction and produces less absurd results while being supported by congressional intent?

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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 19-0805. The bankruptcy court decided in favor of debtor Earl Thomas Petty. On direct appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of debtor Earl Thomas Petty on both issues.

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 Title 11 of the United States Code. There is a further balance in reading the language of the Code and recognizing its harmony to the Federal Arbitration Act. The following are also restated in the Appendix.

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. § 362(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 an erroneous reading of the relevant provisions of the Bankruptcy Code harming Petitioner and Creditor Wildflowers. As a result, the proceeding underlying the appeal is an attempt to correct the Thirteenth Circuit's error.

I. FACTUAL HISTORY

A. Petty, Great Wide Open Brewing Co. Inc., and Wildflowers enter into a credit line extension and arbitration agreement.

Respondent and Debtor Earl Thomas Petty (Petty) is the owner of Great Wide Open Brewing Company, Inc. (GWO or Great Wide Open), a craft brewery. R. at 3. In 2005, GWO opened a taproom where Petty purchased small batch brewing equipment (Equipment). R. at 3. Seeing its success, GWO opened additional taprooms and a brewhouse, however, to fund these ventures GWO turned to its lender, Petitioner and Creditor Wildflowers Community Bank (Wildflowers). R. at 4. In 2011, GWO and Wildflowers entered into a $35 million revolving credit agreement (Credit Agreement). R. at 4. In exchange for the credit, GWO granted Wildflowers "a first priority lien on substantially all its assets," and Petty effectuated a personal guaranty (Guaranty) to unconditionally guarantee repayment of GWO's obligations. R. at 4. To secure the Guaranty, "Petty granted Wildflowers a first priority lien on the Equipment." R. at 4. Both the Credit Agreement and Guaranty contained a "Remedies" clause where, upon 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. 4 Moreover, both the agreements had arbitration clauses. R. at 4.

Unfortunately, in 2017, GWO began having liquidity problems and, in March 2018, had to close three of its taprooms, which Wildflowers was not given notice of. R. at 5. The following month, April 2018, GWO and Petty defaulted on each of their payment obligations under the Credit

Agreement and Guaranty. R. at 5. Wildflowers sent a default letter to GWO and Petty and, on June 4, 2018, filed a general state law breach of contract and demand for arbitration seeking $33.2 million in damages. R. at 5. An initial conference was scheduled by the American Arbitration Association (AAA) for July 12, 2018. R. at 5. The day before the conference, GWO ceased all operations and terminated its employees. R. at 5.

B. Petty and Great Wide Open Brewing Co. Inc. file for a Chapter 11 and 7 bankruptcy, respectively.

On July 12, 2018, GWO filed for Chapter 7 bankruptcy in the Bankruptcy Court for the District of Moot. R. at 5. GWO's assets were liquidated by the Chapter 7 trustee of which Wildflowers received the majority of the proceeds. R. at 6. On the same day, Petty commenced his own Chapter 11 petition (Initial Bankruptcy Case). R. at 5. On August 27, 2018, the court dismissed Petty's Initial Bankruptcy Case because of failure to file certain documents. R. at 5.

C. Petty refiles for a Chapter 11 bankruptcy while continuing business.

Petty retained a new attorney and, right before the arbitration proceeding was to commence, filed his second Chapter 11 bankruptcy case (Second Bankruptcy Case) on January 11, 2019. R. at 5-6. In addition to the Second Bankruptcy Case, Petty filed a Chapter 11 case proposing to pay Wildflowers and other creditors "forty cents on the dollar" over a period of five years[1]. R. at 6. No negotiations were attempted with Wildflowers even though Petty negotiated with several other of his creditors. R. at 6.

During the first hearing in the Second Bankruptcy Case, Petty notified the court that he reopened GWO's first taproom in December 2018 as a sole proprietorship. R. at 6. Moreover, Petty announced he was using the Equipment, which Wildflowers had a lien on, to produce beer. R. at

[1] Wildflowers filed a proof of claim asserting the remaining balance of $2.1 million was owed under the Guaranty. R. at 6.

6. Petty's Second Bankruptcy Case was not without error either as "Petty failed to file a motion to extend the automatic stay under section 362(c)(3)(B) during the first thirty days." R. at 6. Thus, on February 12, 2019, thirty two days after the filing of the Second Bankruptcy Case, Wildflowers peaceable repossessed the Equipment that was subject to its security interest outlined in the Guaranty. R. at 6.

Petty, one week later, filed a motion alleging Wildflowers violated the automatic stay and sought $500,000 in damages. R. at 6. Petty alleged that when Wildflowers repossessed the Equipment subject to the security interest after the automatic stay expired it effectively shut down Petty's business. R. at 7. Wildflowers responded to the motion on March 5, 2019 and asserted that no automatic stay existed regarding the property of the estate under section 362(c)(3)(A) and that Petty should be compelled to arbitrate because of the Guaranty. R. at 7.

II. PROCEDURAL HISTORY

The bankruptcy court ruled in favor of the Debtor on both issues. R. at 7. On direct appeal, the three-judge panel of the Court of Appeals for the Thirteenth Circuit affirmed holding that 1) arbitration conflicts with the goals of bankruptcy's automatic stay, and 2) section 362(c)(3)(A) does not apply to property of a debtor's bankruptcy estate. R. at 13, 19.

STANDARD OF REVIEW

Both issues on appeal are based on interpretations of the Bankruptcy Code, which is pure law. Thus, the standard of review is de novo. *In re Wiredyne*, 3 F.3d 1125, 1126 (7th Cir. 1993).

SUMMARY OF THE ARGUMENT

Bankruptcy law governs the conduct of debtors and creditors throughout a bankruptcy proceeding, and its overall aim is to balance the interests of debtors and creditors. It does so by providing debtors "breathing room" under the stay and a "fresh start" through the discharge of

their debts. Similarly, it provides creditors protection by preventing the raiding of the debtor's assets by a single creditor and provides equal recoupment upon the settlement of the bankruptcy estate in an amount that reflects the specific debtor's ability. Recently, the Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), and the predominant purpose of this amendment was to prevent abuses of the bankruptcy system. Meanwhile, arbitration is an alternative dispute resolution method that resolves disputes by utilizing an arbitrator. Many agreements include arbitration clauses because of its ease, timeliness, and reduction of transactional costs when conflict arises. Arbitration avoids the long and demanding process that is the grueling experience of the legal system. Even though arbitration and bankruptcy may intersect, no conflict exists between them.

Both bankruptcy and arbitration are governed by statute – the Bankruptcy Code[2] and the Federal Arbitration Act (FAA), respectively. While these two areas may cross paths at times, they do not conflict with one another and have the ability to conjunctively apply absent a very particular set of facts that do not arise here. The party opposing arbitration has the burden of showing that congress intended to override the FAA. As there is no congressional command to do so, it must be determined whether arbitration inherently conflicts with the Bankruptcy Code's underlying purpose. Such a conflict must be "clear and manifest." In other words, there is a strong presumption that Congress does not typically repeal the FAA by implication.

First, there is no inherent conflict between the FAA and the Code. Statutory conflicts must be clear and manifest. This indicates a presumption against the use of ancillary provisions to override an existing statutory scheme. Rather, courts should give power to both statutes when possible. Precedent has rightfully and consistently rejected the argument that the existence of

[2] The Bankruptcy Code is in 11 U.S.C. §§ 101 *et seq.* Sections of the Code are identified as "section ____."

multiple parties to a proceeding, who are not bound by the arbitration agreement, creates an irreconcilable conflict. Thus, Wildflowers being one creditor among many in the bankruptcy proceeding does not create an inherent conflict. Two Supreme Court cases, *Epic* and *McMahon*, support this assertion.

Moreover, the complexity of bankruptcy does not create a conflict that would implicitly repeal the FAA. The argument that an arbitrator is unable to hear cases that may become complex or that would affect the rights of others parties has been rejected in several contexts. The same must be done here. Congress passed the FAA to give teeth to a strong federal policy in favor of arbitration. As such, it is the sole decision of Congress what is and is not arbitrable. The reasoning that arbitrators might usurp the jurisdiction of the bankruptcy court or are unqualified to hear bankruptcy issues raises concerns of preferred public policy.

Second, Congress has not repealed the FAA for the Code, and the courts have not read in a conflict. Congress, aware of the procedures for creating and repealing laws, chose to remain silent. Similarly, the Supreme Court had multiple opportunities to illustrate a conflict between federal statutes and the FAA but chose not to. The Thirteenth Circuit improperly searches for conflict between the statues by creating a fabricated hierarchy. This holding ignores the numerous instances in which Congress could have, but chose not to, require a specific dispute resolution process in the bankruptcy context.

Lastly, arbitration does not jeopardize the bankruptcy proceeding in this case. The jeopardization of a proceeding is a fabricated prong that serves to impede rather than supplement the *Epic* and *McMahon* precedent. Even if this prong were precedent, Petty's pecuniary interest in damages is not so closely related to his bankruptcy proceeding that arbitration would adversely affect his Chapter 11 reorganization. Thus, a holding in favor of compelling arbitration would

expeditiously resolve the issue before the court, while also protecting both the integrity of the bankruptcy process and the interests of all creditors involved.

Returning to the process of a bankruptcy proceeding, when a bankruptcy petition is initially filed the automatic stay goes into effect immediately. The purpose of the stay, which is governed by section 362, is to give debtors breathing room from their creditors who are attempting to collect from them. During this initial breathing period, creditors may not collect anything and the debtor is afforded the opportunity to exempt certain property while surrendering the remaining property to the bankruptcy estate.

The automatic stay serves as one of the primary conduits to the bankruptcy process. Without it, there simply would not be adequate creditor protection to facilitate the orderly process that bankruptcy law seeks to achieve. Nor would the debtor adequately be provided relief from their creditors without the stay's protection. Thus, the stay is not anymore creditor-friendly than it is debtor-friendly, but rather the stay serves a neutral function within a bankruptcy proceeding. There are ways to lift the stay on motion to the court and there are times when the stay terminates automatically by operation of law. Here, at issue is section 362(c)(3)(A), which automatically terminates the stay after 30 days for a debtor with a proceeding in the preceding 12-month period who has not made a showing of good faith as to their creditors. The specific language creating the controversy between the approaches "with respect to the debtor" is included in but does not expound on the provision's meaning. As the issue currently sits, there are two competing approaches to the construction of the provision "with respect to the debtor." The minority approach, being supported by a more complete analysis of the provision's meaning, is the correct view which should be adopted by the Thirteenth Circuit.

The minority approach's interpretation is supported by the plain language of the statute as it does not require additional language to be read into the provision and it serves an important function in clarifying the person the termination of the stay applies to. The language of the statute is unambiguous in terminating the entire stay applicable to not only the debtor and the debtor's property, but also property of the bankruptcy estate. The language serves to specify the debtor that the stay terminates to and not the property that the stay terminates to. Meanwhile, the majority approach adds in extra language that is nowhere to be found within the provision. The majority approach would attempt to interpret the provision by looking to the language of sections 362(a) and 362(c)(4)(A)(i) to infer what Congress did or did not intend in drafting the provision, instead of looking at the language of the provision itself. Thus, based on the simple plain meaning of the language "with respect to the debtor" the minority approach's interpretation that this identifies the debtor to whom the stay is terminated correctly interprets section 362(c)(3)(A) as terminating the stay in its entirety which includes property of the bankruptcy estate.

The minority approach produces much less absurd and senseless results compared to that of the majority approach. Under the majority's approach only the debtor has a reason to seek an extension of the stay because the consequences for failing to show good faith are de minimus. Additionally, the majority approach renders other provisions of the statute virtually meaningless, most offensively section 362(c)(3)(A) itself. These considerations create a system that contradicts the purpose of the Code and the BAPCPA. Lastly, the majority approach attempts to reinforce its construction by comparing its effects on a chapter 7 case, however this is inappropriate as the abuse Congress sought to redress regarding refilings was specifically a chapter 13 issue.

If this court is unconvinced by the plain language of section 362(c)(3)(A) then the court must look to the legislative history behind the BAPCPA. Congressional intent is consistent only

with the minority approach and even often is contradicted by the majority approach. Because the statute is either ambiguous or that it has "competing interpretations" the plain meaning cannot be derived by the statutory text alone. The history of the BAPCPA points to sections 362(c)(3) and 362(c)(4) as specifically being designed to deter abusive successive filings by a bad faith debtor. Only the minority approach achieves this. Further, the majority approach is in direct contradiction to congressional intent by affording the greatest protection of bankruptcy to a bad faith debtor by allowing the stay to continue as to property of the bankruptcy estate. Accordingly, the minority's interpretation which prevents abusive re-filings by terminating the stay in its entirety is the correct approach.

As discussed, the minority approach which terminates the automatic stay in its entirety after thirty days of a second petition within a 12-month period is the correct approach to adopt. Here, Wildflowers did not take action against property of the bankruptcy estate until after the stay was automatically terminated by operation of law by section 362(c)(3)(A). Accordingly, Wildflowers did not violate the section 362(a) stay.

ARGUMENT

The Court should reverse the Thirteenth Circuit's holding that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* repeals the Code's automatic stay, 11 U.S.C. § 362, and other related judicial codes. Additionally, this court should reverse the Thirteenth Circuit's holding that 11 U.S.C. § 362(c)(3)(A) does not apply to a debtor's bankruptcy estate.

I. THE THIRTEENTH CIRCUIT INCORRECTLY RULED THAT 11 U.S.C. § 362 AND RELATED JUDICIAL CODE PROVISIONS IMPLIEDLY REPEAL THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1 *ET SEQ.*

The purpose of the Federal Arbitration Act (FAA) is to make resolving disputes easier. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). An arbitration agreement under the FAA

"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. This part of the FAA is commonly referred to as the Savings Clause and "allows courts to refuse to enforce arbitration agreements" but only under "generally acceptable contract defenses, such as fraud, duress, or unconscionability." *Epic*, 138 S. Ct. at 1622 (2018).

The language of the Savings Clause reflects the liberal policy that favors arbitration agreements. *Id.* at 1621. In fact, the FAA "requires *rigorous* enforcement of arbitration agreements." *Mintze v. Am. Fin. Servs., Inc. (In re Mintze),* 434 F.3d 222, 229 (3d Cir. 2006) (emphasis added). Even though there is a strong federal policy favoring arbitration, it can be overcome in three ways: the text of the statute; the legislative history; or, "from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

In the context of a bankruptcy proceeding, courts have differentiated on whether to compel arbitration for core or non-core proceedings; however, the distinction between core or non-core does not "affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement." *In re Mintze*, 434 F.3d at 229-31. ("Bankruptcy courts lack[] the authority and discretion to deny [an applicable arbitration clause's] enforcement, *unless* the party opposing arbitration can establish congressional intent . . . to preclude waiver of judicial remedies of the statutory rights at issue."). An automatic stay is indisputably an integral part of a bankruptcy proceeding that arises under bankruptcy; accordingly, the automatic stay is a core proceeding. 28 U.S.C. § 157. A proceeding being core is not dispositive because what matters more is if there is text, history, or an inherent conflict that would displace the FAA. *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1068-69 (5th Cir. 1997); *McMahon*, 482 U.S. at 227.

A. The precedent under *Epic* and *McMahon* does not produce an "inherent conflict" that would repeal the Federal Arbitration Act regardless of the characteristics of bankruptcy proceedings as multi-party or complex.

An *implicit* reading of any federal law that would override the congressional command to honor arbitration agreements cannot satisfy the requirement that an irreconcilable conflict be clear and manifest; the conflict must be explicit. *Epic*, 138 S. Ct. at 1624. The text of the FAA requires courts to enforce arbitration agreements because such agreements "shall be valid," and courts "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. §§ 2, 4. In short, courts are to "enforce arbitration agreements as written." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (Thomas, J., concurring); §§ 2, 4.

When looking at two statutes, in this case the Bankruptcy Code and the FAA, there must be an "irreconcilable statutory conflict" that is "clear and manifest." *Epic*, 138 S. Ct. at 1624. In other words, "an inherent conflict" must be found between the FAA and the Code; however, absent this "inherent conflict" between the FAA and the Code, both the FAA and Code must be given effect. *McMahon*, 107 S. Ct. at 2338. The court below overlooks the high standard of "*irreconcilable statutory conflict*," as enunciated in *Epic*, and imposes its own forced interpretation. 138 S. Ct. at 1624 (emphasis added).

Part of the promotion of enforcement of arbitration is expressed by the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (citations omitted).Yet, this policy is grounded in the "unmistakably clear congressional purpose that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

The FAA can be "overridden by contrary congressional command, which can be shown by the statute's text, legislative history, or underlying purpose." *McMahon*, 482 U.S. at 2337-38. In *McMahon,* customers of Shearson, a brokerage firm, sued under the Exchange Act, RICO Act, and state law. 107 S. Ct. at 2335-36. However, all customers had an arbitration agreement with Shearson, which attempted to compel arbitration. *Id.* at 2336. The court held that both the Exchange Act and RICO claims were arbitrable, and, more importantly, the court held that the Arbitration Act "mandates enforcement of agreements to arbitrate statutory claims," highlighting the strong "federal policy favoring arbitration." *Id.* at 2337, 2343, 2345-46 (citations omitted). The court reasoned that the customers "must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act," but they were unsuccessful in doing so as the court found that "Congress did not intend for § 29(a) to bar enforcement of all predispute arbitration agreements." *Id.* at 2338, 2343.

In order to displace one statute for another, the Code for the FAA, the proponent has the burden of showing "a *clearly expressed* congressional intention." *Epic*, 138 S. Ct. at 1624 (emphasis added). In *Epic*, employees sued their employer for violation of the Federal Labors Standards Act (FLSA), but the parties had entered into an arbitration agreement. 138 S. Ct. at 1619-20. The Court held the arbitration agreements to be enforceable, reasoning that "a congressional command requir[es the court] to enforce, not override, the terms of the arbitration agreements." *Id.* at 1616, 1623. Moreover, the court emphasized its history of refusal to "conjure conflicts between the Arbitration Act and other federal statutes." *Id.* at 1627.

1. <u>The multiparty characteristic of a bankruptcy proceeding does not create an inherent conflict repealing the FAA</u>.

The duty to compel arbitration is not overridden when a party bound by an agreement raises a claim founded on statutory rights. *McMahon*, 482 U.S. at 226. Here, the Thirteenth Circuit reads

Epic in conjunction with pre-*Epic* precedent. To overcome this, the Thirteenth Circuit first points to the multi-party nature of bankruptcy proceedings. However, precedent has consistently rejected the argument that the existence of additional parties to an action, who are not bound by the arbitration agreement, constitutes an inherent conflict. *See McMahon, 482 U.S. at 238* (rejecting the argument that RICO suits are not arbitrable); *Epic, 138 S. Ct. at 1623* (rejecting the argument that individualized arbitration agreements should be set aside where it would frustrate a potential class action.)

Petty and the Thirteenth Circuit attempt to contravene precedent rejecting that multi-party suits do not create an inherent conflict. The FAA plainly requires arbitration agreements to be enforced even in instances of multiple parties, such as in Securities Law or Labor and Employment Law. The same is occuring here as Wildflowers is one of Petty's creditors. Securities Law claims can reach scores of parties, but arbitration still must be enforced. There is no difference in the multiparty aspect between bankruptcy law or other areas of law. Ignoring the precedent established by this court runs afoul of judicial integrity and allows for the court to discriminate between certain areas of law whether arbitration is to be enforced or not. This court need not explore legislative intent, history, or the policy favoring arbitration as precedent reigns. The Thirteen Circuit's reliance on persuasive authority ignores congressional command and rules in favor of the Thirteen Circuit's preferred public policy. This is contrary to established law under *Epic* and *McMahon*, which requires a conjunctive reading establishing that an inherent conflict has to be clear and manifest; that is not the case here.

Arbitration agreements may bind the debtors' agents to the same extent as the debtor. *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (1989). In *Hays*, the debtor claimed that Merrill Lynch had lost his company a significant sum of money by churning

his accounts. *Id.* at 1150. When the debtor filed for Chapter 11 bankruptcy, Merrill Lynch sought to compel arbitration. *Id.* The Third Circuit held that the trustee was bound by the agreement to the same extent as the debtor since they "perceive no adverse effect on the underlying purposes of the Code from enforcing arbitration." *Id.* at 1161. The court emphasized that they can "no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over [the FAA]." *Id.*

The Thirteenth Circuit again references the multi-party nature of bankruptcy by illustrating that other creditors to the dispute are not bound by the arbitration agreement. While this is true, the Third Circuit stated,"the mere existence of creditors in the core bankruptcy proceeding who *might* be indirectly affected by the arbitration agreement who were not parties to the Customer Agreement does not require denial of [Petitioner's motion to compel arbitration]." *Id.* at 1154. Every financial alteration might affect a bankruptcy proceeding, which will affect other creditors, but the multi-party nature is not enough to create a conflict.

Wildflowers, while the largest, is not the only creditor to Petty, but this does not foreclose arbitration. Even though *Hays & Co.* was a non-core proceeding, *Epic* established that a proceeding being non-core is not a dispositive factor. Moreover, federal statute does not distinguish the kind of bankruptcy proceeding. 28 U.S.C. § 651. Wildflowers has a valid security interest in the equipment free from the incumbrance of other creditors. While other creditors may be present, Wildflowers' claim for arbitration need not be denied solely on that factor. The value of arbitration in securities law or bankruptcy law is not for this court to decide, as a fabricated hierarchy of areas of law contravenes logic and precedent. Instead, Wildflowers seeks to resolve the adversarial proceeding in arbitration pursuant to the terms of the agreement between the parties.

Lastly, the Thirteenth Circuit asserts that the automatic stay is so sacred and fundamental to bankruptcy that it "transcends" two-party arbitration but does little to explain how. R. at 12. The arbitration between Wildflowers and Petty seeks to protect the equipment to allow for an equitable distribution of the debtor's assets, upholding a primary purpose of bankruptcy law. The automatic stay and arbitration agreement can both be enforced despite multiple parties since each are grounded in statute and present no conflict with one another.

Wildflowers being one creditor amongst other creditors in a Bankruptcy proceeding does not create an inherent conflict. Thus, the FAA and the Code can coexist to allow for Wildflowers' enforcement of the arbitration clause with Petty.

2. The complexity of a bankruptcy proceeding does not produce an inherent conflict repealing the FAA.

The Thirteenth Circuit points to the complexity of Bankruptcy proceedings and expresses concern that compelling arbitration "would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." R. at 13 (quoting *Phillips v. Congelton, L.L.C. (In re White Mt. Mining Co., L.L.C.)*, 403 F.3d 164, 169 (4th Cir. 2005)). This reasoning alleges that arbitrators would be usurping the bankruptcy courts' jurisdiction and determining bankruptcy issues even though they are not qualified to do so. Other circuits have consistently rejected this line of reasoning. First, in *McMahon*, the Supreme Court held that claims brought under RICO and the Securities Exchange Act, two equally complex areas, were appropriate for arbitration. 107 S. Ct. at 222-23. Second, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 632, 634 (1985), the Supreme Court explicitly rejected the complexity argument with regard to the arbitrability of international commercial transactions stating that the "potential complexity [of antitrust matters] should not suffice to ward

off arbitration," and neither does "an arbitration panel [] pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes."

The argument of complexity originates from a student note on public policy in the Harvard Law Review. *White Mt. Mining Co.,* 403 F.3d at 169-70. This reasoning is inconsistent with the plain meaning of the FAA's Savings Clause, which does not require searching for implicit reason to deny arbitration since courts are required to enforce arbitration agreements. Further, this reasoning ignores that Congress had the opportunity to exclude adversarial bankruptcy proceedings from arbitration in the passing of Title 28; instead, Congress explicitly chose to *include* adversarial bankruptcy proceedings. 28 U.S.C. § 651(b). The Thirteenth Circuit imposed its own interpretation of what the law *should* be as opposed to what precedent has established the law is. Creating alternate interpretations of law when none exist "runs afoul of the rule that congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Epic*, 138 S. Ct. at 1627 (quoting *Whitman v. Am. Trucking Assn., Inc.* 531 U.S. 457, 468 (2001)). The complexity of bankruptcy barring arbitrators from involvement is not found on solid ground based off of precedent or law.

The Petitioner does not argue that the parties have the right to privately negotiate and contract whatever they wish but that the policy judgements of Congress and existing Court precedent support a holding in favor of enforcing the arbitration agreement.

B. Congress's ability to repeal the FAA but silence in 11 U.S.C. § 362 and this Court's refusal to read a conflict between the FAA and other statutes does not repeal the FAA, even impliedly, in 11 U.S.C. § 362.

Congress does not "hide elephants in mouseholes," meaning Congress "knows exactly how to" require a specific dispute resolution process and will do so explicitly. *Whitman*, 531 U.S. at 468; *Epic*, 138 S. Ct. at 1627. Meanwhile, the Supreme Court has "heard and rejected efforts to

conjure conflicts between the [FAA] and other federal statutes." *Epic*, 138 S. Ct. at 1627. Thus, neither Congress nor this Court have been willing to override the FAA when given the opportunity.

1. Congress knows how to override the FAA but chose not to.

There are multiple instances where Congress has required a specific dispute resolution process. 29 U.S.C. § 216(b) ("An action to recover . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction."); 29 U.S.C. § 626 ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief."); 42 U.S.C. § 2000e-5 ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.").

Conversely, there are instances where Congress "knows how to override the [FAA] when it wishes." *Epic*, 138 S. Ct. at 1626; *See also* 15 U.S.C. § 1226 ("[A]rbitration may be used to settle such controversy."); 7 U.S.C. § 26 ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); 12 U.S.C. § 5567 ("[N]o predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."); 10 U.S.C. § 987 (Outlawing arbitration in specific circumstances regarding extending consumer credit.).

Unlike the aforementioned examples, "when [Congress] has restricted the use of arbitration in other contexts, [Congress] has done so with [] clarity." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012). Here, Congress is silent on arbitration in the Code even though Congress knows how to annul the FAA. There is no mention in the Code of any overriding of arbitration in

the context of an automatic stay. Thus, based on Congress's silence here and its ability to void the FAA in certain contexts, both the FAA and Code are meant to coexist.

2. The Supreme Court has had multiple opportunities to find conflict between the FAA and the Code but has consistently chosen not to.

This Court has heard multiple cases but has "rejected *every*" effort to find a conflict between the FAA and other statutes. *Epic*, 138 S. Ct. at 1627.

First, in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 231 (2013), respondents had American Express cards and were subject to arbitration but sued for federal antitrust laws. The court refused to "invalidate the arbitration agreement at issue" reasoning that there was no "contrary congressional command" and the "effective vindication exception" did not apply here. *Id.* at 235-36.

Second, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), the court had to resolve the question of whether the Age Discrimination in Employment Act (ADEA) "can be subjected to compulsory arbitration pursuant to an arbitration agreement." The court held that the ADEA could be subjected to arbitration because the petitioner did not meet his burden showing Congress "intended to preclude the arbitration of claims under [the ADEA]." *Id.* at 23, 35.

Third, in *CompuCredit Corp. v Greenwood*, 565 U.S. at 95, respondents sued for violations of the Credit Repair Organizations Act (CROA) despite an arbitration provision. Reasoning that the "CROA is silent on whether claims under the Act can proceed in an arbitrable forum," the court held, "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 104.

Lastly, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478-79 (1989), petitioners, who agreed to an arbitration agreement, sued under violations of the Securities Act. The court held that the arbitration agreements were enforceable because of the "prevailing

uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions." *Id.* at 484-86.

Based on all the precedent, this court cannot "faithfully turn the other way here." *Epic*, 138 S. Ct. at 1627. Thus, the Code and the FAA are meant to work conjunctively, which permits the arbitration agreement between Wildflowers and Petty to be enforced.

C. The Thirteenth Circuit misconstrues *Epic* and *McMahon* and creates its own additional "inherently jeopardize" prong under *Hill*, but even under that prong the agreement between Wildflowers does not present a conflict.

There is a strong policy that favors the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Yet, bankruptcy and arbitration pull in opposite directions; bankruptcy proceedings like the automatic stay under section 362 are brought under a single all-encompassing umbrella that resolves disputes holistically "so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *United States Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re United States Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir. 1999). Meanwhile, arbitration "advocates a decentralized approach towards dispute resolution." *Id.* With these policies in mind, only under a specific set of facts can courts disregard the plain meaning of the FAA, history, and policy favoring arbitration.

Courts can "override an arbitration agreement" when arbitration would "necessarily jeopardize" the Code's objectives, which is shown by a "particularized inquiry" of the claim and facts. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006). In *Hill*, MBNA, after being notified of Hill's bankruptcy, withdrew a payment from Hill's account. *Id.* at 106. Hill filed this action as a result while MBNA appealed the lower court's order denying its "motion to stay or dismiss an adversary proceeding," which was "based on an arbitration clause." *Id.* The Second Circuit reversed, holding that the bankruptcy court erroneously stayed the pending arbitration. *Id.*

The court reasoned that arbitration of the claim "would not *seriously jeopardize* the objectives of the Bankruptcy Code because": the claim was a class action, so it was not integral to the individual proceeding; a stay is not "so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions"; and the estate had been distributed so there was no need for "the protection of the stay." *Id.* at 110.

Under a certain set of facts an arbitration could jeopardize a bankruptcy proceeding; however, the case between Petty and Wildflowers is not one of those instances. Presently, the equipment that Wildflowers took pursuant to a contractual agreement has been returned pending the decision of the arbitrator, which is similar to *Hill* where *MBNA* overdrew Hill's account. Both creditors attempted to avoid jeopardizing the process by acting in good faith and returning the disputed property. Petty is attempting to block his creditor from an agreed upon arbitration pursuant to an agreement despite arbitration not damaging the bankruptcy process. Yet, the Thirteenth Circuit and Petty assert that arbitration will adversely interfere with Petty's ability to reorganize. There has been no indication how arbitration would seriously jeopardize the proceeding. In fact, arbitration often "involves less delay and expense" and does not offend the purposes underlying bankruptcy laws." *Hays & Co.*, 885 F.2d at 1159; *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (stating that the FAA "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'" (quoting H.R. Rep. No. 68-96, at 1-2 (1924)). Based on the advantages to arbitration as illustrated by courts and Congress, Petty raises a faux concern regarding delay and expense. Thus, in order to protect not only Wildflowers' and Petty's interests but the entire bankruptcy proceeding, this Court must compel arbitration.

Petty also contravenes the entire underlying purpose of the BAPCPA, which was to prevent abuse. Pub. L. No. 109-8, 119 Stat. 23 (2005). Petty had full opportunity to liquidate in Chapter 7 bankruptcy and subsequently chose to usurp the equipment, notwithstanding the guaranty, and began an entirely new business. Petty's proceeding is premised upon his ability to use damages from this suit to fund his reorganization in bankruptcy for his business, which evidences Petty's guile. Analogous to *Hill*, there is a lack of connection between the damages Petty seeks from Wildflowers and Petty's Chapter 11 reorganization. According to the Thirteenth Circuit, "Petty's motion to enforce the automatic stay and recover damages from Wildflowers is critical to his ability to reorganize under the Bankruptcy Code, discharge his debts, and obtain a fresh start." R. at 13. Thus, the connection between this pecuniary interest in damages and the Chapter 11 proceeding is attenuated at best.

Hill created the potential for a factual situation where bankruptcy court may decline to compel arbitration. However, the factual situation before us introduces an entirely new prong to *Epic* and *McMahon* premised on the idea of jeopardizing the proceeding, which is not the case between Wildflowers and Petty. This additional prong unnecessarily complicates the established test and allows the court to legislate from the bench. Holding that arbitration is not compelled would serve to create more uncertainty of where this Court's FAA jurisprudence intersects with adversarial bankruptcy proceedings.

II. THE THIRTEENTH CIRCUIT INCORRECTLY RULED THAT THE STAY DOES NOT TERMINATE IN ITS ENTIRETY UNDER SECTION 362(C)(3)(A), WHICH WOULD INCLUDE THE PROPERTY OF THE BANKRUPTCY ESTATE.

Section 362(c)(3)(A) lies in the larger section of 362, which addresses the automatic stay. *See generally* 11 U.S.C.§ 362. This section was added via amendment by Congress in the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA). Pub. L. No. 109-8, 119 Stat. 23 (2005). The goal of the BAPCPA was to prevent the bankruptcy process from being abused,

which encompasses addressing abuses of the automatic stay. *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581 (1st Cir. 2018).

Courts are currently split as to the true meaning of the language contained within section 362(c)(3)(A). What is clear is the provision applies to individual debtors who have been the subject of a bankruptcy case within the preceding year and it operates to automatically terminate the protections of the section 362(a) automatic stay. However, two major lines of thought have emerged: the majority view, which holds that "the provision to terminate the stay as to actions against the debtor and the debtor's property but not as to actions against property of the bankruptcy estate"; the minority view, which "reads the provision to terminate the whole stay."[3] *In re Smith*, 910 F.3d at 581. The two approaches differ based on their conflicting interpretations of the subsection's language "with respect to the debtor." 11 U.S.C. § 362(c)(3)(A). The Fifth Circuit, consistent with the majority approach, finds the language "with respect to the debtor" to be clear and ends its inquiry of the issue there. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019). In contrast, the First Circuit, consistent with the minority approach, bases its interpretation of "with respect to the debtor" on the "provision's text, the statutory context, and Congress's intent in enacting BAPCPA . . . ." *In re Smith*, 910 F.3d at 591.

This court should adopt the minority approach which terminates the stay in its entirety as to the debtor, the debtor's property, and property of the estate. First, the minority approach's plain meaning of "with respect to the debtor" is more consistent with rules of statutory interpretation.

[3] There is a third approach, known as the *Bender* approach, that holds "the stay terminates as to the debtor's property and property of the estate, but only if the property was the subject of a judicial, administrative, or other formal proceeding commenced prepetition." *In re Goodrich*, 587 B.R. 829, 836 (Bankr. Va. 2018) (citing *In re Bender*, 562 B.R. 578 (Bankr. E.D.N.Y. 2016). This approach was not addressed below, so it will not be addressed here as well.

Second, the minority approach produces far less absurd and senseless results. Finally, the minority approach is the only approach that is consistent with the congressional intent of the BAPCPA.

A. The minority approach's plain meaning interpretation of "with respect to the debtor" is more consistent with the rules of statutory construction than the majority approach.

When beginning an interpretation of the Bankruptcy Code, the Supreme Court starts with "the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989)). Here, the court must determine whether the language "with respect to the debtor" is ambiguous or unambiguous, which is done by examining: the "language itself, the specific context in which the language is used, and the broader context as a whole." *Estate of Smith v. United States*, 103 Fed. Cl. 533, 548 (U.S. 2012). When a provision in the Bankruptcy Code is unambiguous, "the plain language controls, so long as the literal application of the provision does not produce an absurd result or one that is 'demonstrably at odds with intentions of its drafters.'" *Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 759, 793 (1st Cir. BAP 2006) (citing *United State v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989).

The minority approach correctly interprets the plain meaning of the subsection's language "with respect to the debtor" because the language identifies the individual debtor to whom the entire stay will terminate. *See e.g.*, *In re Daniel*, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009). In short, the phrase "with respect to the debtor" pinpoints the specific debtor that the stay applies to, not what the stay encompasses. Absent this specifying language section 362(c)(3)(A) could erroneously be interpreted to terminate the automatic stay in its entirety for a first-time filer in a joint case if the other individual debtor to the joint case had a pending bankruptcy case within the preceding 1-year period dismissed; instead, including the specifying language, "with respect to the

debtor," correctly limits the termination of the stay in a joint case only to the second time filing debtor and not the first-time filing debtor. Accordingly, the minority construction abides by the general statutory interpretation rule that "effect should be given to every party of a statute." *Mason v. United States*, 260 U.S. 545, 554 (1923). Moreover, the minority approach's construction serves to differentiate between the person, not the property, that the termination of the stay applies to which makes sense as the provision refers to "a single or joint case." *In re Goodrich*, 587 B.R. 829, 843 (Bankr. D. Vt. 2018). This finds further ground as *"*several provisions regarding joint cases added to the Code by BAPCPA distinguish between 'the debtor' and 'the debtor's spouse.'" *In re Daniel*, 404 B.R. at 326 (citing 11 U.S.C. §§ 101(10A), 707(b)(7), and 1325(b)).

In contrast, the majority approach incorrectly purports the plain meaning of section 362(c)(3)(A)'s language "with respect to the debtor" to limit the automatic termination of the stay with respect to property of the debtor and not with respect to property of the estate. *See e.g.*, *In re Jumpp*, 356 B.R. at 793. This approach fails. Nowhere in its language does section 362(c)(3)(A) distinguish between the debtor, the debtor's personal property, and the debtor's bankruptcy estate property. The majority approach infers that because the drafters distinguish between actions in three categories in section 362(a) but failed to do so in section 362(c)(3)(A), the drafters did not intend to terminate the entire stay. As the Fifth Circuit articulated, "[t]here is no mention of the bankruptcy estate, and we decline to read in such language." *Rose*, 945 F.3d at 230. However, the majority approach is self-contradictory as it declines to read in "property of the estate" but is required to read in "with respect to the debtor [and property of the debtor]." *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 366 (9th Cir. BAP 2011). As the Ninth Circuit Bankruptcy Appellate Panel stated, this contradiction "undermines the persuasiveness of [the majority approach's] 'plain language' argument." *Id.* at 369. Moreover, the First Circuit Court has reasoned

if the plain meaning of section 362(c)(3)(A) were to be appropriately derived by comparison to section 362(a) it "cannot establish that [section] 362(c)(3)(A) terminates the stay for actions against debtor property but not for actions against estate property[;] [i]ndeed, it suggests the opposite." *In re Smith*, 910 F.3d at 582 ("The location of the phrase 'property securing such debt' after 'the stay under subsection (a)' and the combination of the phrase with 'with respect to a debt' and 'with respect to any lease' indicate that the clause summarizes the actions stayed in "subsection (a).")

In supporting its construction of the provision, the majority approach next points to section 362(c)(4)(A)(i) in which Congress expressly stated the entire stay would not take effect. 11 U.S.C. § 362(c)(4)(A)(i). The majority approach suggests because section 362(c)(4)(A)(i) terminates the stay in its entirety and Congress chose to use a qualifier in section 362(c)(3)(A) that Congress must have intended to limit the "scope of the termination of the automatic stay." *Rose*, 945 F.3d at 231; *See e.g.*, *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013). However, by construing section 362(c)(4)(A)(i) as terminating the stay is to make a fundamental misunderstanding of the section as it does not "terminate the stay." Instead, section 362(c)(4)(A)(i) prevents the stay from ever coming into existence. Accordingly, there is no need for section 362(c)(4)(A)(i) to "differentiate between protecting the debtor or property of the estate, because after a third filing, no stay will go into effect and thus there is no need to make such a distinction." *In re Reswick*, 446 B.R. at 372 (citing *Nelson v. George Wong Pension Trust (In re Nelson)*, 391 B.R. 437 (9th Cir. BAP 2008)).

Accordingly, the minority approach's interpretation is not only unambiguous based on a plain reading of the text, but it does not annex additional language as the majority approach admittedly or not is required to do. Further, in trying to find support for its interpretation by looking

to sections 362(a) and 362(c)(4)(A)(i) the majority only emphasizes the inadequacy of its construction. As a result, the statute should be read as the minority approach, which terminates the stay in its entirety.

B. The minority plain meaning approach to section 362(c)(3)(A) produces less absurdities and senseless results.

The Supreme Court will regularly consider whether an unambiguous interpretation of a provision "produces an objectively absurd result, and may consult congressional purpose, including legislative history." *In re Goodrich*, 587 B.R. at 841; *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2157 (2016). In weighing competing interpretations of the BAPCPA, the Supreme Court has advised mindfulness of "congressional purpose" and to "consider whether a particular reading of the statute will produce 'absurdities' or 'senseless results' not intended by Congress." *In re Goodrich*, 587 B.R. at 841 (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 345-46 (2010); *Hamilton v. Lanning*, 560 U.S. 505, 520-21 (2010); *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 78 (2011)). In light of the absurdities and senseless results that the majority's approach would create, the Thirteenth Circuit should adopt the minority's approach as "no other solution yields as sensible a result." *In re Goodrich*, 587 B.R. at 846 (quoting *Milavetz, Gallop & Milavetz, P.A.*, 559 U.S. at 245).

The most problematic absurdity created by the majority's interpretation of section 362(c)(3)(A) as terminating the automatic stay as to the debtor and the debtor's property but not to property of the estate is "only the debtor has an incentive to continue the stay." *In re Goodrich*, 587 B.R. at 846. The majority view makes the operation of the remaining subsections "so small that the statute would become almost meaningless." Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 AM. BANKR.

L.J. 407, 409 (2012) (As of 2012 there was not a single case in which a creditor filed to extend the automatic stay in a jurisdiction that adopted the majority view.) Remarkably, in adopting the majority approach, one bankruptcy court noted that it "recognizes that [the majority's] plain reading of section 362(c)(3), while unambiguous, may render section 362(c)(3)(A) virtually meaningless." *In re Moon*, 339 B.R. 668, 672 (Bankr. N.D. Ohio 2006). Moreover, the majority's interpretation is illogical as the subsection that immediately follows, section 362(c)(3)(B), allows for "a party in interest" in addition to the debtor to move to extend the stay - except that the trustee and creditors "would have no reason to seek an extension of the stay simply to prevent assessments of personal liability against the debtor or collection actions against non-estate property that could not benefit them in any event.'" *Id.* (quoting *In re Daniel*, 404 B.R. 318, 323 (Bankr. N.D. Ill. 2009)).

When a bankruptcy case is commenced an estate is created that consists of all legal and equitable interests, meaning that the majority of the debtor's property becomes part of the estate. 11 U.S.C. § 541; *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992). A creditor may be able to bring a claim and obtain a judgment, but that judgment is unlikely to be paid on as even the debtor's property "acquired after the filing of the case, such as post-petition earnings," are protected. *In re Daniel*, 404 B.R. at 323. On close inspection, the majority's interpretation is almost certain to result in an Article III "case and controversy" that lacks standing due to this redressability defect. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. E, Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("In order to have "Standing" "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision.'")). Alternatively, these additional complaints against the debtor or the debtor's non-estate property

will find their way as judgments into a later filed bankruptcy petition and ultimately be discharged, having existed only to drain the court of its resources.

Without explanation, the majority's interpretation of section 362(c)(3)(A) senselessly renders the subsequent subsection's hearing and show of good faith requirement unnecessarily burdensome and without significant purpose. *In re Goodrich*, 587 B.R. at 846. On a motion to extend the stay, section 362(c)(3)(B) provides "notice and a hearing" to be completed within thirty days to ensure the second bankruptcy is filed "in good faith as to the creditors." This provision creates an added burden to the movant on a motion to extend the stay that logically would dictate be met with a substantial benefit on a successful showing of good faith. However, under the majority approach there are extremely limited consequences for failing to demonstrate good faith as to the creditors. *See In re Smith*, 910 F.3d 576, 587 (1st Cir. 2018) ((1) certain governmental creditors can collect tax refunds for non-tax debts, (2) certain governmental creditors can pursue exempt property to satisfy non-dischargeable tax debts, (3) certain governmental creditors can suspend a debtor's driver's license, and (4) creditors can make collection calls.) Consequently, the "extraordinary amount of work on the part of the moving parties and the courts, only to have no meaningful penalty if the stay is not extended" makes no sense. *In re Jupiter*, 344 B.R. 754, 761 (Bankr. D.S.C. 2006); *In re Goodrich*, 587 B.R. at 846 ("This Court finds the *Jupiter* rationale persuasive.") Rather than the expedited hearing serving as a meaningful creditor protection, the majority interprets the provision to provide a hearing which senselessly drains the limited resources of the parties in interest and the court without serving any significant purpose to the proceeding.

Notwithstanding a bankruptcy appellate panel's support for the minority view in *In re Reswick*, recently the majority view was adopted in the same circuit after an analysis of section

362(c)(3) application to "chapter 7 expos[ing] the *absurdity* of extending [section] 362(c)(3)(a) to property of the estate." *In re Thu Thi Dao*, 616 B.R. 103, 107 (Bankr. E.D. Cal. 2020) (emphasis added). The court reasoned an adoption of the minority view would mean "Congress intended to strip chapter 7 trustees of automatic stay protection for property of the estate but [did] not say anything about it." *Id.* at 109. The court supports this alleged absurdity statistically as chapter 7 cases comprise the majority of all filings. 2019 Annual Report of U.S. Courts, Table F-2 (Bankruptcy cases commence – 12-month Period Ending March 31, 2019. Total all chapters: 772,646. Chapter 7: 477,106 (61.75%). Chapter 11: 6,891 (.009%). Chapter 13: 288,039 (37.03%)). However, this is an inaccurate conclusion as it is improper to base an interpretation of section 362(c)(3)(A) on its application to a chapter 7 case because it was drafted to address particular chapter 13 debtor abuse concerns. As the court concedes, "[t]he serial filing problem was mainly a chapter 13 issue." *In re Thu Thi Dao*, 616 B.R. at 108 (addressing a debtor's right to 'dismiss a case as of right' under a chapter 13, compared to defaulting on fees or failing to file schedules to gain dismissal under a chapter 7). In fact, a 1997 bankruptcy commission "flagged repeat filings as a chapter 13 problem and suggested limiting the automatic stay so as to discourage non meritorious petitions. . ." *Id.* at 108 (Nat'l Bankr. Rev. Comm'n. Report (Oct. 20, 1997) § 1.5.5, p. 279 & nn. 732-33, available at https://govinfo.library.unt.edu/nbrc/report/08consum.pdf). The commission's suggestion informed the language, proposed originally in 1998 by the House and Senate Judiciary Committee, that later "became the basis for enactment of [section] 362(c)(3)." 616 B.R. at 108; *see* H.R. Rep. No. 105-540, at 80 (1998) (H.R. 3150, 105th Cong. § 121); S. Rep. No. 105-253, at 39 (1998) (S. 1301, 105th Cong. § 303) ("Bankruptcy Amendments of 2005").

That the actual language of section 362(c)(3)(A) originated out of congressional concern for abusive repeat chapter 13 filers makes the court's interpretation, which relies on a belief that

congress was addressing deleterious effects on chapter 7 cases in its language "with respect to the debtor," misguided. Moreover, the intent to address abusive refiling of chapter 13 cases, but not chapter 7 cases, is evidenced by the statute's own debtor reporting requirements which track prior chapter 13 filings, but not chapter 7 filings. 11 U.S.C. § 159(c)(3)(F)(iii). In sum, the court in *In re Thu Thi Dao* erred in basing its interpretation on the coincidence of chapter 7 cases comprising the majority of bankruptcy filings, and ignoring the abuse which congress intended section 362(c)(3)(A) to cure.

C. If this court were to find section 362(c)(3)(A) is ambiguous or has "competing interpretations," legislative history indicates that the minority view is most consistent with congressional intent.

If this court were to find that the text of section 362(c)(3)(A) does not have a "clear reading" it would be appropriate to consult BAPCPA's legislative history. *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 582 (1st Cir. 2018); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989). Further, even where a statute is not outright declared ambiguous by the court, where BAPCPA provisions have "competing interpretations" the Supreme Court has "adopted the interpretation that more faithfully complied with congressional intent." *In re Goodrich*, 587 B.R. at 840; *See Ransom*, 562 U.S. at 78; *Milavetz*, 559 U.S. at 245; *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1763-64 (2018).

Currently, there are two primary interpretations of section 362(c)(3)(A), each having wide support in the bankruptcy courts and authority in the circuit court. *In re Smith*, 910 F.3d at 591 (adopting the minority view); *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 231 (5th Cir. 2019) (adopting the majority view). Certainly, that two primary interpretations exist suggests ambiguity in the statute which would require a consideration of congressional intent to decipher the statute's correct meaning. *See Vitalich v. Bank of New York Mellon*, 569 B.R. 502, 509

(N.D.Cal. 2016) (This Court agrees that both [the minority and majority approach] are reasonable and thus that the plain reading approach . . . does not resolve the question . . . [t]he Court therefore seeks guidance in the statutory structure and the legislative history.") Absent a declaration of ambiguity, it is absolutely undeniable that concerning the provision's language "with respect to the debtor" there are "competing interpretations" which by itself mandates the same consideration of congressional intent. Accordingly, being sufficiently grounded by either section 362(c)(3)(A)'s ambiguity or the competing plain meaning interpretations of the provision, any interpretation adopted by the Supreme Court must be supported by the congressional intent of the BAPCPA.

Nevertheless, recent court adoptions of the majority view still rely on that the statute has a single plain meaning and willfully ignore the congressional intent from their interpretation. *See Rose*, 945 F.3d at 231 ("[W]e are not unsympathetic to other courts' conclusions that a contrary interpretation may better serve the BAPCPA's policy goals."); *In re Smith*, 596 B.R. 872, 878 (Bankr. E.D. Tenn. 2019) ("[A]n appealing argument that the language does not carry out the legislative intention of deterring serial filers."). In ending its analysis at a plain meaning interpretation and refusing to consult legislative history, the majority view denies even the possibility that the provision's language "with respect to the debtor" has more than one meaning. In fact, in addition to the majority and minority approaches, bankruptcy case law points at least two additional possible interpretations that have not been adopted by a court. *In re Goodrich*, 587 B.R. at 842-43; *See also In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) ("The language of the statute is susceptible to conflicting interpretations. . .."). One such unadopted approach, which like the minority, terminates the entire stay automatically after 30 days, suggesting "the phrase 'with respect to the debtor' means nothing at all; it is adscititious and the result of sloppy draftsmanship which permeates all of BAPCPA." Peter E. Meltzer, *Won't You Stay a Little*

Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A), 86 AM. BANKR. L.J. 407, 408-09 (2012) (This approach finds support as the phrase was not used in the Code prior to the BAPCPA and, with the exception of § 362(c)(3)(A), in those sixteen other provisions where it now appears it adds nothing of substance.) Ultimately, irrespective of the correct interpretation of the phrase "with respect to a debtor," it is not sufficient to end the analysis at a plain meaning argument as the majority has.

The congressional intent behind the BAPCPA can be best understood by beginning with the historical context in which the amendment was enacted. Every single bankruptcy act of the United States, with the exception of the 1978 Act and the BAPCPA, has been in response to major economic crises. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 567-68 (2005). This bears consideration for during an economic crisis one would expect Congress to legislate in the direction of offering greater debtor relief and protection just like the majority's debtor-friendly construction of section 362(c)(3)(A). Instead, in the absence of economic crises, the BAPCPA sought to "correct perceived abuses of the bankruptcy system" like the minority's construction of section 362(c)(3)(A) achieves. *Milavetz*, 559 U.S. at 231-32.[4]

The BAPCPA can actually be traced in origin back to the Bankruptcy Reform Act of 1994 where Congress established The National Bankruptcy Review Commission to review the state of the bankruptcy system. Pub. L. No. 103-394, §§ 601-10, 108 Stat. 4106, 4147-50. Among the Commission's chief concern was a failure to "meaningfully restrict abuse re-fillings or misuse of the automatic stay . . . ." Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 487-88 (2005) (quoting the Report

[4] The 1978 Act sought to codify the bankruptcy laws of the United States into Title 11. An Act to establish a uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, 92 Stat 2549 (1978).

of the National Bankruptcy Review Commission, at ch. 5.). Additionally, there was the concern bankruptcy was being used by some as "just another tool of financial management," passing on the costs to creditors and "bill-paying Americans." Report of the National Bankruptcy Review Commission, at ch. 5 (Oct. 20, 1997) (dissenting view at 6). The 1978 Act was perceived to drive up the cost of consumer credit by both allowing a bad-faith debtor to discharge under a chapter 7 despite the ability to repay creditors more under chapter 13 and allowing a bad-faith debtor to circumvent their creditors by way of the section 362(a) automatic stay through abusive re-filings. Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention Consumer Protection Act (Apr. 20, 2005) (President George W. Bush, "This has made credit less affordable and less accessible, especially for low-income workers who already face financial obstacles. . .."). Accordingly, the BAPCPA was enacted with the congressional goal of decreasing the cost of consumer credit by passing creditor-friendly provisions; namely the "means test," addressing a debtor's ability to repay creditors, and "provisions [such as sections 362(c)(3)-(4)] intended to deter serial and abusive bankruptcy filings." H.R. Rep. No. 109-31(I), at 2 (2005); *See also*, Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 242 (2015).

Section 302, titled as "Discouraging Bad Faith Repeat Filings," added sections 362(c)(3) and 362(c)(4) to the Code. *In re Curry*, 362 B.R. 394 (Bankr. N.D. Ill. 2007); *see* Pub. L. No. 109-8, § 302 (2005). By "meaningfully penaliz[ing] a debtor who files multiple bankruptcy cases within a year and fails to show a good faith basis for doing so," the minority approach is "consistent with congressional intent." *In re Goodrich*, 587 B.R. at 845 (*quoting In re Jupiter*, 344 B.R. 754, 761 (Bankr. D.S.C. 2006)). Under the minority's interpretation, the interests of all parties are balanced and an opportunity for them to be heard is offered with notice at an expedited hearing.

11 U.S.C. § 362(c)(3)(B). The repeat filing debtor is protected by the entire benefit of the stay for thirty days and may extend that period on a showing of good faith, and the creditors are protected by terminating the entire stay automatically after thirty days absent a party in interest showing of good faith as to the creditors. *In re Goodrich*, 587 B.R. at 845. Thus, under the minority approach a first-time filer will always be presumed to be acting in good faith as to their creditors and receive the entire benefit of the stay; however, on a repeat petition that presumption flips and an affirmative showing of good faith is required within thirty days in order to continue receiving the benefit of the stay. Further, that the presumption has flipped is only reinforced by section 362(c)(4) which states the automatic stay "shall not go into effect upon the filing [of a petition in a third bankruptcy case within a 12-month period]." 11 U.S.C. § 362(c)(4)(A)(i). By the third filing of a petition in a 12-month period the debtor can be thought of as having already consumed the benefit of the stay twice, originally on the debtors first petition and again for a thirty-day period on the debtor's second petition. This reflects that Congress gave great weight to the requirement of a good faith showing as Congress withholds the stay in its entirety for a debtor on a third petition until they overcome the presumption that they have filed their most recent petition in bad faith. The Ninth Circuit Bankruptcy Appellate Panel has noted that "[c]learly, Congress could, and did, intend the consequences of repeat filings to be different, and potentially more severe, as the number of successive filings increase. *Nelson v. George Wong Pension Trust (In re Nelson)*, 391 B.R. 437, 452 (9th Cir. BAP 2008). In sum, the minority approach "better 'advances BAPCPA's objectives' by serving as a significant deterrent to bad-faith repeat filers." *In re Goodrich*, 587, B.R. at 845; *See also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 71 (2011) (finding the government's interpretation "advances BAPCPA's objectives.").

In contrast, under the majority approach there is insufficient "practical effect in deterring repeat filings" which directly conflicts with the congressional intent behind the BAPCPA. *In re Goodrich*, 587 at 845. Creditors are not adequately protected because any threat made to collect against the debtor personally or the debtor's non-estate property is "hollow . . . because [section] 1306 broadly incorporates nearly all of a debtor's valuable pre- and post-petition property." *In re Jupiter*, 344 B.R. 754, 762 (Bankr. D.S.C. 2006). The majority approach does "not advance the goal of deterring a debtor's second filing. . . ." *In re Reswick*, 446 B.R. at 373. Under the majority's interpretation creditors gain absolutely nothing under section 362(c)(3) because so long as the stay remains applicable to the property of the estate creditors have no avenue for recoupment.

To the extent the courts adopting the majority approach's plain meaning have reviewed legislative history, albeit unnecessary in their view, they urge it "is consistent with the policies behind bankruptcy law." *Vitalich*, 569 B.R. at 509-10 (quoting *In re Rinard*, 451 B.R. 12, 19 (Bankr. C.D.Cal. 2011). They point to bankruptcy law's policy of equitable distribution for creditors arguing that lifting the stay in its entirety opens the risk of a creditor looting the estate and receiving more than their equitable share. *Id.* A court supporting the majority's construction stated its interpretation is not inconsistent as it addresses "Congress's need to balance the interests of creditors secured by estate property with other creditors. . .." *In re Roach*, 555 B.R. 840, 847 (Bkrtcy. M.D.Ala. 2016). However, it is entirely unrealistic that Congress would address the concern for equitable distribution to creditors by "offering protection to creditors of a repeat filer with one prior case . . . while offering no protection to creditors of a repeat filer with two or more prior cases under [section] 362(c)(4)." *Vitalich, 569 B.R. at 510.* In attempting to cure this defect the majority approach tries to suggest Congress believed second filings to be less "acute" than

third filings, but the reality is the legislative history does not reflect this. *Roach, 555 B.R. at* 847 (citing *In re Williams, 346 B.R. 361, 369 (Bankr. E.D.Pa 2006)).*

In declining to interpret section 362(c)(3)(A) as terminating the stay against property of the estate the majority's interpretation is "contrary to the clear legislative history, [does] little to discourage bad faith, successive filings, and would create, rather than close, a loophole in the bankruptcy system by allowing these debtors to receive the principal benefit of the automatic stay. . . ." *In re Jupiter*, 344 B.R. at 762.

CONCLUSION

The Bankruptcy Code and Federal Arbitration Act can conjunctively function. Moreover, the minority interpretation of section 362(c)(3)(A) is the correct interpretation of the Code. For the foregoing reasons, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals.

APPENDIX

9 U.S.C. § 2

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.

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11 U.S.C. § 362(c)(3)(A)

(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;