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 R20
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a bankruptcy court's decision, under 11 U.S.C. § 362 and related judicial code provisions, to decline to enforce an arbitration agreement is an implied repeal of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

2. Whether 11 U.S.C. § 362(c)(3)(A), which provides that "the stay … shall terminate *with respect to the debtor* ...", further implies that the stay shall terminate as to property of a debtor's bankruptcy estate.

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The United States Bankruptcy Court for the District of Moot ruled in favor of Earl Thomas Petty (the "Respondent") when it held that: (1) notwithstanding the prepetition arbitration agreement entered between Respondent and Wildflowers Community Bank (the "Petitioner"), the court had authority to decide the dispute between the parties; and (2) a termination of the stay under section 362(c)(3)(A) applies only "with respect to the debtor" and not as to the bankruptcy estate. R. 3.

Respondent's request that the Bankruptcy Court certify a direct appeal to the United States Court of Appeals for the Thirteenth Circuit was granted, and the Thirteenth Circuit affirmed the Bankruptcy Court's rulings on both questions. R. 3.

Wildflowers petitioned the Court for writ of certiorari, which the Court granted. R. 1.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

United States Constitution, Art. I, § 8, cl. 4

The Congress shall have the Power To establish … uniform Laws on the subject of Bankruptcies throughout the United States.

28 U.S.C. § 1334

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

11 U.S.C. § 362(a) (in relevant part)

Except as provided …, a petition … operates as a stay, applicable to all entities, of …

(2) the enforcement, against the debtor or against property of the estate …

(3) any act to obtain possession of property of the estate …

(4) any act to create, perfect, or enforce against property of the debtor any lien …

11 U.S.C. § 362(c)(3)(A) (in relevant part)

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, …

(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;

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.

STATEMENT OF FACTS

Respondent is the founder and owner of the craft brewery Great Wide Open Brewing Company, Inc. ("Great Wide Open"). R. 3. Respondent went from brewing beer in his basement to owning one of the state's largest, award-winning craft breweries. R. 3. In 2005, Respondent opened a taproom in Royal Rapids, Moot. R. 3. Although Respondent had incorporated Great Wide Open, the brewing equipment for the Royal Rapids taproom (the "Equipment") was purchased personally by Respondent and not Great Wide Open. R. 3. Over the next decade, Great Wide Open expanded aggressively to meet increased demand. R. 3–4.

To finance the expansion, Great Wide Open entered into a revolving credit agreement (the "Agreement") with Wildflowers Community Bank, the Petitioner. R. 4. To secure repayment, Great Wide Open granted Petitioner a first-priority lien on substantially all its assets. R. 4. To further secure repayment, Respondent signed a personal guaranty (the "Guaranty") granting Petitioner a first-priority lien on the Equipment that Respondent—not Great Wide Open—had purchased for the Royal Rapids taproom. R. 3, 4.

Both the Agreement and Guaranty granted Petitioner the right to non-judicial remedies including "the right to enter any premises" to repossess collateral pledged under the Guaranty. R. 4. The Agreement and Guaranty contained arbitration clauses that provide that Respondent and Petitioner agree to resolve all disputes arising out of their relationship via mandatory, binding arbitration, and that "each party voluntarily gives up any rights to have such disputes litigated in a court or by a jury trial." R. 4.

Ultimately, competition and fading consumer interest caused Great Wide Open's growth strategy to break down. R. 5. By March 2018, liquidity problems brought on by the Agreement's debt service obligations and above-market leases forced Great Wide Open to close three of its five taprooms, including Royal Rapids. R. 3, 4, 5. In April 2018, both Great Wide Open and Respondent defaulted on the payment obligations of the Agreement. R. 5. On June 4, 2018, after sending a default letter, Petitioner filed a demand for arbitration proceedings and a general state law complaint for breach of contract against Respondent. R. 5. Petitioner demanded damages of $33.2 million, the remaining loan balance owed under the Agreement. R. 5.

The arbitration was scheduled to begin in July 2018 when Great Wide Open was abruptly forced to shut down and file for chapter 7 protection in the Bankruptcy Court for the District of Moot. R. 5. Respondent also filed an individual chapter 11 petition in the same court. R. 5. However, Respondent's individual chapter 11 was dismissed in August 2018 because Respondent's attorney failed to timely file mandatory documents. R. 5.

With new counsel, Respondent filed a second chapter 11 petition on January 11, 2019, just before the arbitration proceedings were set to resume. R. 5–6. In Respondent's second case, all required documents and a chapter 11 plan of reorganization (the "Plan") were timely filed. R. 5–6. The Plan provided that Respondent would pay Petitioner and other creditors forty cents on the dollar out of Respondent's income for the next five years. R. 6. Because Great Wide Open liquidated in its chapter 7 case, Petitioner's first-priority lien on Great Wide Open's assets entitled it to receive most of the proceeds, reducing Petitioner's claim in Respondent's chapter 11 case to $2.1 million. R. 6 n. 3.

After filing his second chapter 11 case, Respondent, operating as a sole proprietor, entered a new lease at the Royal Rapids taproom. R. 6. The Equipment, collateralized under the Guaranty, had remained in the taproom after the lease with Great Wide Open had been terminated. R. 6. Respondent reopened the taproom and began brewing beer under the name "Full Moon Fever Brewing" ("Full Moon"). R. 6. Respondent's brewing reputation made Full Moon profitable in its first month of operation. R. 6.

When Petitioner entered the taproom and repossessed the Equipment that Respondent had pledged as collateral under the Guaranty, Full Moon's profitability came to a quick end. R. 6. The repossession forced the closure of Full Moon, which ceased operations after only a month. R. 7. In response, Respondent filed a motion in his chapter 11 case alleging that Petitioner violated the automatic stay when it repossessed the Equipment from the taproom and requested damages in the amount of $500,000. R. 6.

In defense, Petitioner argued that when it repossessed the Equipment on the thirty-second day after Respondent filed his second chapter 11 case, no automatic stay existed under section 362(c)(3)(A) with respect to the property of Respondent's bankruptcy estate. R. 7. Under section 362(c)(3)(A), if a debtor's case under chapter 11 has been dismissed within the preceding year, then absent an extension of the stay by the court, the automatic stay terminates "with respect to the debtor" on the thirtieth day after the debtor files a second case. 11 U.S.C. § 362(c)(3)(A).

Petitioner also argued that pursuant to the arbitration clause in the Guaranty, Respondent was required to bring all claims against Petitioner via arbitration. R. 7. The Bankruptcy Court determined that Petitioner had violated the automatic stay and awarded Respondent $200,000 in compensatory damages. R. 7. The court held that regardless of whether a court extends the

automatic stay under section 362(c)(3)(B), the automatic stay does not terminate under section 362(c)(3)(A) with respect *to the property* of a debtor's bankruptcy estate. Consequently, the court concluded that Petitioner violated the automatic stay when it repossessed the Equipment because the Equipment was indubitably property of Respondent's bankruptcy estate. R. 7. The Bankruptcy Court also ruled in favor of Respondent and held that enforcing the arbitration clause in the Guaranty would conflict with the Bankruptcy Code and section 362. R. 7.

Petitioner directly appealed to the Circuit Court of Appeals for the Thirteenth Circuit. R. 7. The Thirteenth Circuit affirmed the decision of the Bankruptcy Court and ruled in favor of the Respondent on both issues. R. 19. Petitioner then timely petitioned for writ of certiorari, which the Court granted. R. 1.

SUMMARY OF THE ARGUMENT

The filing of a bankruptcy petition under the United States Bankruptcy Code (hereafter the "Bankruptcy Code" and "Code") brings the affairs of a debtor and his creditors into the jurisdiction of the United States Bankruptcy Courts. The filing of the bankruptcy petition results in the immediate and automatic occurrence of several events. An estate is created for the debtor, and subject to exception, an automatic stay imposes a moratorium on any action that may affect possession of estate property or seek to determine *in personam* liability of the debtor. The aim and the result of the automatic stay is to preserve the status quo so that the centralized forum of the bankruptcy court can adjudicate the adjustment of relations between the debtor and creditors.

The Federal Arbitration Act (the "FAA"), passed prior to the Bankruptcy Code, provides for the binding resolution of private, contractual disputes in an arbitral forum. However, for the bankruptcy court to perform its functions as intended by Congress and prescribed in the

Constitution, the FAA must be impliedly repealed when arbitration inherently conflicts with the automatic stay and related provisions of the Bankruptcy Code.

Additionally, Section 362(c)(3) of the Code provides several conditionals upon the effect of the automatic stay for a repeat filer. Specifically, section 362(c)(3)(A) provides that the automatic stay shall terminate "with respect to the debtor." Petitioner urges the Court to rewrite the statute to terminate the stay with respect to both the debtor and the bankruptcy estate property. The position is atextual and nonsensical: the debtor cannot hope for a successful reorganization and discharge if the stay under section 362(c)(3)(A) does not additionally extend to property of the bankruptcy estate—as it would under section 362(a).

First, the automatic stay ensures that the corpus of the debtor's bankruptcy estate remains intact so the debtor can have the best possible opportunity for a discharge and fresh start. The FAA inherently conflicts with the clear and manifest intent of the Congress to create uniform bankruptcy laws. When arbitration disturbs the centralizing force of the automatic stay and undermines the debtor's discharge, the FAA is impliedly repealed by section 362 and related provisions of the Bankruptcy Code.

Both the statutory text of the Code and the legislative history support the irreconcilable conflict between the Code and the FAA. Under *Shearson/American Exp. Inc. v. McMahon*, 482 U.S. 220, 227 (1987), lower courts have defined the limits of their discretion to deny enforcement of bankruptcy matters that intersect with arbitration and there is no need for the Court to create a bright-line rule.

Further, the Court's existing FAA jurisprudence can be distinguished. The fundamental nature of bankruptcy and the purpose of the Bankruptcy Code—including the multi-party nature of bankruptcy and the legitimate interest of efficiency—make the Bankruptcy Code an outlier

amongst statutes that conflict with the FAA. The lower courts already recognize the FAA's implied repeal in certain contexts and must retain their discretion under *McMahon*'s inherent conflict framework to continue to deny enforcement of arbitration clauses that implicate the automatic stay and threaten the discharge and collective proceedings in bankruptcy.

Lower courts have recognized that not all claims are arbitrable and have demonstrated they know where their discretion ends. The lower courts also recognize that the Bankruptcy Code does not fit the Court's predisposition to favor arbitration distinctly because of bankruptcy's need to centralize the multiparty adjustment of the debtor's relationship with creditors. Section 362 impliedly repeals the FAA—at a minimum.

The automatic stay may also preclude the FAA. As it concerns the enforcement of the automatic stay at the outset of the case, Congressional intent is clear and manifest. Congress wrote that section 362(a) intends to stay all proceedings, including arbitration. Moreover, Congressional intent is explicit in the language of 28 U.S.C. § 1334. The district courts have exclusive jurisdiction over property of the bankruptcy estate, including determining whether the automatic stay applies to specific property. More, language as explicit as that in section 1334, such as "notwithstanding any other Act of Congress" has been noted by the Court to exemplify clear examples of Congressional intent.

The Bankruptcy Code impliedly repeals the FAA because the two statutes are in inherent conflict and only implied repeal in favor of the Bankruptcy Code can resolve this statutory conflict of near polar extremes. Should a doubt remain over inherent conflict, the legislative history and the text of the Bankruptcy Code provide clarity. The Bankruptcy Code impliedly repeals the FAA so that arbitration cannot interfere with the automatic stay when the debtor's successful rehabilitation and discharge, and the rights of all creditors are at stake.

Second, the plain text, surrounding provisions, and the fundamental policy goals of the federal bankruptcy system confirm that when a debtor has had a case under chapter 11 dismissed within the preceding year, on the thirtieth day after the second case is filed, section 362(c)(3)(A) terminates the automatic stay solely *with respect to the debtor*.

The plain text of section 362(c)(3)(A) is clear. The phrase "with respect to the debtor" unambiguously limits the stay's termination to the debtor and his property and implicitly excludes what is not mentioned—the property of the estate. Moreover, the application of the statute's plain text does not lead to an absurd result. While the stay's termination is certainly narrow under section 362(c)(3)(A), the statute should be construed according to its plain meaning—not re-written by the Court to give meaning to words not there.

Even if section 362(c)(3)(A) is ambiguous, reference to the legislative history is inconclusive at best. The only piece of legislative history relevant to section 362(c)(3)(A) is a 2005 House Report that merely recites the statutory language. Such vague and limited legislative history cannot replace the plain language of the statute. Moreover, the plain text interpretation of section 362(c)(3)(A) is bolstered by the surrounding provisions of the Code. Section 362 in its entirety demonstrates that Congress knew how to distinguish between the debtor, the debtor's property, and the property of the estate. For previous one-time filers, Congress deliberately terminated the stay with respect to the debtor alone, preserving the stay of actions against estate property in accordance with section 362(c)(1).

Congress also clearly knew how to terminate the automatic stay in its entirety. For debtors with two or more cases dismissed within the preceding year, section 362(c)(4)(A)(i) provides that the stay shall not go into effect upon the filing of the latter case. Viewed together,

sections 362(c)(3)(A) and 362(c)(4)(A)(i) suggest a tiered response to filings commensurate with the number of cases a debtor has filed. To read section 362(c)(3)(A) as Petitioner suggests would eviscerate this carefully crafted tiered system by baselessly reading two adjacent but distinct Bankruptcy Code provisions as functional equivalents—wreaking havoc on the plain language canons of interpretation.

Interpreting section 362(c)(3)(A) in accordance with its plain text leads to outcomes entirely consistent with the federal bankruptcy system's fundamental policy goals of providing debtors with a fresh start through the discharge and obtaining maximum and equitable distribution for creditors. To deprive a debtor of his chance at successful reorganization by completely terminating the stay solely because one prior case was dismissed on a procedural technicality would be an absurd result. Not only because the result is at odds with this foundational policy goal, but also because the result is inconsistent with Congress's goal of restraining serial-filers from abusing the bankruptcy system in bad faith. Additionally, maintaining the stay as to the estate property protects creditors by ensuring that a single, secured creditor is not prioritized over all other creditors with an interest in the estate, consequently depriving them of an equitable share in the estate.

For the foregoing reasons, the Court should affirm the Court of Appeals for the Thirteenth Circuit and hold that section 362 and related provisions of the Bankruptcy Code impliedly repeal the FAA and that section 362(c)(3)(A) applies the automatic stay to property of the bankruptcy estate.

ARGUMENT

The filing of a petition for chapter 11 reorganization invokes the powerful effects of the automatic stay. By staying all proceedings against the debtor and property of the newly created bankruptcy estate, section 362 and related provisions of the automatic stay begin a proceeding that reorganizes debts and provides the debtor with a discharge. A reorganization in bankruptcy succeeds, in part, because the automatic stay—from the outset—centralizes all disputes concerning the property of the debtor's bankruptcy estate. The Founders inscribed in the Constitution an intent to create a uniform, federal bankruptcy law that centralized disputes in bankruptcy lest individual creditors race to the courthouse (or arbitrator) and carve up the property of the debtor's estate piecemeal. U.S. Const. art. 1, § 8, cl. 4. While the FAA serves the worthwhile policy goal of enforcing contracts, bankruptcy is about the *modification* of contracts. The conflicting—near polar-opposite—policy goals cannot be reconciled absent recognition that section 362 impliedly repeals the FAA.

Like other exceptions and exclusions to the automatic stay, section 362(c)(3)(A) limits the protections of the automatic stay for repeat filers. Rather than provide the entirety of the automatic stay's protections, section 362(c)(3)(A) limits the stay so that it partially lifts on the 30th day after the case is filed, unless the debtor can show the second case was filed in good faith. Here, the Bankruptcy Code could not be clearer. Should the debtor not file a motion for an extension before the 30th day or fail to show good faith, the stay "shall terminate *with respect to the debtor*." 11 U.S.C. § 362(c)(3)(A) (emphasis added). Nevertheless, the stay does not terminate with respect to the property of the debtor's bankruptcy estate—only to the debtor.

Accordingly, the Court should hold in favor of the Respondent and affirm the ruling of the Court of Appeals for the Thirteenth Circuit.

I. THE FAA IS IMPLIEDLY REPEALED BY SECTION 362 AND RELATED PROVISIONS OF THE BANKRUPTCY CODE BECAUSE THE FAA INHERENTLY CONFLICTS WITH THE CLEAR AND MANIFEST INTENT TO CREATE UNIFORM BANKRUPTCY LAWS.

The Court should affirm the Court of Appeals for the Thirteenth Circuit and rule in favor of the Respondent because section 362 and related provisions inherently conflict with, and therefore impliedly repeal, the FAA.

The concept of implied repeal can be traced back four centuries to Lord Edward Coke's decision in *Dr. Foster's Case*. (1614) 77 Eng. Rep. 1222, 1232 (K.B). This Court developed the concept by requiring "a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy." *Wood v. U.S.*, 41 U.S. 342, 363 (1842). The concept has been fine-tuned by the Court to require two statutes be "clearly incompatible." *Credit Suisse Securities (USA) LLC v. Billings*, 551 U.S. 264, 275 (2007).

The Court has also linked implied repeal to the expansion of arbitration under the FAA with an adjacent concept that requires "an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227. Nevertheless, repeals by implication are disfavored such that "[r]epeal is to be regarded as implied only if necessary to make the [newer statute] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Contrary to the Petitioner's assertion, *McMahon*'s inherent conflict rule remains good law, on all fours with precedent and applicable to the instant case.

The Court should confirm that, due to the inherent conflict between the FAA and the Bankruptcy Code, as the more recent statute, the Bankruptcy Code impliedly repeals the FAA. This interpretation is supported by the statutory language and legislative history. Moreover, *McMahon* has empowered the lower courts to apply the law in a discretionary, case-by-case

analysis of the facts that furthers the Congressional intent to promote the successful rehabilitation of debtors and equal treatment of creditor claims under the centralized administration of the Bankruptcy Courts. Applying the fundamental policies and purposes of the Bankruptcy Code, the Courts of Appeals have independently developed similar approaches to enforcing arbitration agreements in bankruptcy. The lower courts have already defeated any reasonable argument for a bright-line approach to arbitration in bankruptcy by their well-founded and established lattice of jurisprudence, which has recognized the Court's guidance.

This Court recently held in *Epic Sys. Corp. v. Lewis*, that for a statute to displace the FAA, there must be "clearly expressed congressional intention" that is "clear and manifest." 138 S. Ct. 1612, 1624 (2018). However, lower courts have found in the Court's holding that *Epic* did not explicitly abrogate or overturn *McMahon*, 482 U.S. 220. *See In re Belton v. GE Capital Retail Bank*, 961 F.3d 612, 615–16 (2d Cir. 2020), *petition for cert. filed*. Further, *Epic*'s silence on *McMahon*'s implied repeal doctrine is revealing because the Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care Inc.*, 529 U.S. 1, 18 (2000). Indeed, two Courts of Appeals have held that *McMahon* "remains sound" after *Epic*. *See Henry v. Educ. Fin. Serv.* (*In re Henry*), 944 F.3d 587, 591 (5th Cir. 2019); *see also Belton*, 961 F.3d at 616 (*Epic* clarifies how to resolve a clash between two *McMahon* factors)

Petitioner's insistence on elevating *Epic* and discarding *McMahon* to require a textualist interpretation of section 2 of the FAA's "shall be valid" language belies the fact that none of the *McMahon* factors—statutory text, legislative history, or inherent conflict—definitively favor Petitioner's position. 9 U.S.C. § 2. To find the FAA's "shall be valid" mandate to be overridden, *Epic* requires "a clearly expressed congressional intention." 138 S. Ct. at 1623–24. *McMahon*

requires "a contrary congressional command." *McMahon*, 482 U.S. at 226–27. While the Fifth Circuit acknowledged that *Epic* "has a different tone [than *McMahon*], the test it employs is substantially the same." *Henry*, 944 F.3d at 592; *Belton*, 961 F.3d at 615–16 (quoting *Henry* in agreement). A command *is* a clearly expressed intention. So, it must be correct—two Circuit Courts agree—to hold that *McMahon* remains good law.

The analysis for inherent conflict and implied repeal of the FAA performed by the lower courts is well-established, consistent, and leads to equitable results that accord with the policies of the Bankruptcy Code and the FAA. If anything, the Court should clarify that *Epic* further supports the lower courts application of *McMahon*'s inherent conflict test in protecting the specialized policies and purposes of bankruptcy: the debtor's fresh start discharge and equitable distribution to creditors. Especially recognizing that "the goal of centralized resolution of purely bankruptcy issues" is the *sine qua non* of uniform bankruptcy laws that preceded and continue to animate the Bankruptcy Code. *Henry*, 944 F.3d at 591 (citing *Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056, 1069 (5th Cir. 1997)).

A. *McMahon*'s "Inherent Conflict" Test is Successfully and Consistently Applied by the Lower Courts.

When two statutes irreconcilably conflict, "[i]t is the Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic*, 138 S. Ct. at 1619; *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) (if there is no ambiguity present in the statutory text "a court's analysis must end with the statute's plain language."). When Congress intends to limit the FAA, that intent "will be deducible from [the statute's] text or legislative history," or in the alternative from "an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citations omitted). Lower courts have

struggled to find clear direction from the text, and so generally, have moved right past it toward *McMahon*'s inherent conflict analysis.

No Circuit Court—including the Thirteenth Circuit while holding in favor of the Respondent—has found evidence of implied repeal of the FAA in the Bankruptcy Code's text or legislative history. *See* R. 10; *see also, e.g.*, *Belton*, 961 F.3d at 617. Rather, Circuit Courts have glossed over the clues in the statutory text and legislative history because they have been rightly drawn to the overwhelming evidence of inherent conflict—*McMahon*'s third factor. Nevertheless, the statutory text of the Code and the legislative history support the irreconcilable conflict between the Bankruptcy Code and the FAA. *See, e.g.*, John R. Hardison, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 St. John's L. Rev. 627 (2019). Lower courts have mostly looked to the text and legislative history of the Bankruptcy Code to inform the statutory-purpose analysis required to assess inherent conflict. *See, e.g., In re Nat'l Gypsum Co.*, 118 F.3d at 1068–70 (purpose and provisions of Bankruptcy Code inform courts' discretion to refuse to enforce otherwise-valid arbitration provision).

This well-crafted balance struck by the lower courts has adapted to and survived the Court's seminal holding in *Stern v. Marshall*, 564 U.S. 462 (2011), that limited the authority of Bankruptcy Courts to enter final judgment on certain matters. Lower courts have exercised their discretion to enforce arbitration agreements in a judicious and measured manner. In *Moses v. CashCall, Inc.*, the Fourth Circuit demonstrated that courts have a sure grasp of the boundaries of a court's discretion to deny arbitration. 781 F.3d 63 (4th Cir. 2015). While partially affirming and partially reversing the District Court's decision to deny enforcement of an arbitration clause, the Fourth Circuit parsed *Stern* and explained the nuanced treatment Bankruptcy Courts must

give to arbitration clauses that concern statutorily and constitutionally core claims versus those statutorily core but *constitutionally* non-core claims. *Id.*, at 70–72.

Under *McMahon's* framework, lower courts are clear on where their discretion must end concerning both core and non-core matters that intersect with arbitration. *Moses*, 781 F.3d at 83 (Gregory, J., concurring) ("a bankruptcy judge's dominion over non-core claims is limited by Article III, § 1 of the Constitution … [and the] Code itself limits a bankruptcy judge's authority to hear certain state law matters."); *see also MBNA America Bank, N.A. v. Hill*, 436 F. 3d 104, 108 (2d Cir. 2006) (Because the presumption in favor of arbitration trumps, courts generally do not have discretion to refuse to compel arbitration of non-core matters). Still, there is no bright-line rule for non-core claims because "courts are required to inquire into … the facts … to determine whether enforcing arbitration would inherently conflict with the purposes of the bankruptcy code." *Moses*, 781 F.3d at 74. In denying certiorari on a similar question, the Court may have already recognized the impracticalities of trying to draw a line and the consequent necessity of vesting discretion with the Bankruptcy Courts. *Credit One Bank, N.A., v. Anderson* (*In re Anderson*), 129 S. Ct. 144 (2018) (mem.), *denying cert. to* 884 F.3d 382 (2d Cir. 2018).

The Court need not establish any bright-line rules now—the Thirteenth Circuit correctly recognized the Court's holding in *Epic* did not conflict with *McMahon*'s inherent conflict analysis when it found that the Bankruptcy Code impliedly repealed the FAA. The lower courts each recognized that the purpose of the automatic stay is central to the fundamental twin objectives of bankruptcy: provide the "honest but unfortunate" debtor with a fresh start in the form of a discharge, and creditors with an equitable distribution of estate assets. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Bankruptcy channels divergent areas of law into a single, collective proceeding where all creditors can be heard. Allowing creditors to peel away certain

disputes from the centralized bankruptcy forum also disenfranchises other creditors and fatally undermines bankruptcy's twin objectives.

B. The Court's Existing FAA Jurisprudence Can Be Distinguished Because of the Fundamental and Overarching Policy Objectives of the Bankruptcy Code.

The Court has so far "rejected *every* such effort to date" to find the FAA impliedly repealed by any other statute. *Epic*, 138 S. Ct. at 1627. Thus, the Bankruptcy Code's implied repeal of the FAA is faced "with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored.'" *Id.* at 1624. Still, the nature and purpose of the Bankruptcy Code, including the multi-party nature of bankruptcy and the legitimate interest of efficiency, make the Bankruptcy Code an outlier. In fact, the clash between the Bankruptcy Code and the FAA "presents a conflict of near polar extremes: bankruptcy policy reflects an inexorable pull toward centralization while arbitration policy advocates a decentralized approach towards dispute resolution." *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999) (citation omitted). Further, the Bankruptcy Code generally prohibits the enforcement of *ipso facto* contract clauses that modify or terminate an executory contract because of a bankruptcy petition. *In re Lehman Brothers Holdings Inc.*, 970 F.3d 91, 98 (2d Cir. 2020). Similarly, arbitration clauses, like *ipso facto* clauses, present a fundamental assault on the animating purpose of uniform bankruptcy law: the centralization of collective proceedings in order to provide debtor relief and creditor distribution.

1. *The Automatic Stay Facilitates Fundamental Bankruptcy Policies Including the Discharge.*

The policy of centralization is preeminent and "especially critical in chapter 11 cases." *Phillips v. Congelton, L.L.C.* (*In re White Mountain Mining Co., L.L.C.*), 403 F.3d 164, 170 (4th Cir. 2005). Disputes in chapter 11 are centralized "[t]o protect debtors and their creditors from piecemeal litigation . . . so that reorganization can proceed efficiently, unimpeded by

uncoordinated proceedings in other arenas." *Id.* (internal citations and quotations omitted). Ultimately, centralization facilitates statutory discharge, which is "the central goal of bankruptcy: providing debtors a fresh financial start." *Anderson,* 884 F.3d at 390.

The discharge and automatic stay are fundamentally linked. *See* 11 U.S.C. § 362(c)(2)(C) (notwithstanding whether a case is closed or dismissed, stay continues until discharge is granted or denied). In two Circuit Court cases, creditors sought to arbitrate a violation of the Bankruptcy Court's discharge order. *Belton,* 961 F.3d at 614–15; *Henry,* 944 F.3d at 591. The Fifth Circuit examined *Epic* and affirmed that "bankruptcy courts have discretion to refuse to compel arbitration of a discharge injunction." *Henry,* 944 F.3d at 591. Putting a finer point on *McMahon*'s inherent conflict test, the Fifth Circuit held that bankruptcy courts may decline to enforce arbitration when (1) "the proceedings must adjudicate statutory rights conferred by the Bankruptcy Code" and (2) "if requiring arbitration would conflict with the purposes of the Bankruptcy Code." *Id.* at 590–91. The court further recognized that the "debtor's right to be free from collection efforts for discharged debts is a creature of the Bankruptcy Code. 11 U.S.C. § 524(a)." *Id.*, at 591. Similarly, the Second Circuit recognized after *Epic* that its own precedent had not been abrogated: "*Anderson* controls the issue before us." *Belton,* 961 F.3d at 617.

"Like the automatic stay, the discharge injunction is the equivalent of a court order." 4 Collier on Bankruptcy P 524.02 (16th 2020). The automatic stay facilitates discharge by fending off at the onset of the debtor's case the type of piecemeal arbitration proceedings that would render the discharge functionally useless. Alongside centralization, "the need to protect creditors and reorganizing debtors from piecemeal litigation" informs the lower court's analysis of inherent conflicts between the Bankruptcy Code and the FAA. *In re McCollum,* 621 B.R. 655, 658 (Bankr. N.D. Miss. 2020) (citing *Nat'l Gypsum Co.*, 118 F.3d at 1069). The automatic stay

and related provisions of the Code express critical policies that require centralization of the debtor's reorganization proceedings so that the debtor can efficiently reach the adjudication of creditor claims for the ultimate grant or denial of the statutory discharge.

The unique adjudicatory conditions mandated in the Bankruptcy Code, by virtue of the statute's goals and policies, set it apart from other statutes that clash with the FAA. Judicial enforcement of the automatic stay *at outset of the case* underpins the policies of the debtor's discharge and equitable distribution to creditors that Congress expressed when enacting the Bankruptcy Code. Lower courts recognize the Code impliedly repeals the FAA and must retain their discretion under *McMahon*'s inherent conflict framework to deny enforcement of arbitration clauses that implicate enforcement of the automatic stay and threaten the discharge.

2. The Code is Distinguishable from Statutes the Court Found Did Not Impliedly Repeal the FAA.

The FAA was designed, in part, "to place arbitration agreements 'upon the same footing as other contracts . . .." *Scherk v. Alberto-Culver*, 417 U.S. 506, 511 (1974) (citation omitted). Section 2 is "the FAA's substantive command that arbitration agreements be treated like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). However, successful chapter 11 reorganization, like Respondent's, explicitly depend on the modification of contracts, *see, e.g.,* 11 U.S.C. §§ 365, 1123, 1124, because the "very purpose of bankruptcy is to modify the rights of debtors and creditors." *White Mountain Mining*, 403 F.3d at 169 (internal citation and quotation omitted).

The FAA's placement of arbitration agreements on parity with all other contracts creates an inescapable conflict between the Bankruptcy Code and the FAA. In bankruptcy, a contract (to arbitrate) is subject to modification, possibly including rejection. *See* Andre Albertini, *Arbitration in Bankruptcy: Which Way Forward?*, 90 Am. Bankr. L. J. 599, 620 (2016); *see also*

American Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (text of the FAA "reflects the overarching principle that arbitration is a matter of contract"). Consequently, the Bankruptcy Code's adjustment of contracts, "in which Congress chose to stay and ultimately abrogate individual contracts rights" is central to the goal of the discharge. *In re Belton*, No. 12-23037 (RDD), 2014 WL 5819586, at *4 (Bankr. S.D.N.Y. Nov. 10, 2014). This abrogation of individual contracts rights to facilitate the debtor's rehabilitation is unique to the Bankruptcy Code, distinguishing it from the Court's existing FAA implied repeal jurisprudence.

Bankruptcy proceedings are inherently multi-party proceedings. While "[i]t goes without saying that a contract cannot bind a nonparty," an approved plan of reorganization and a discharge can. *See Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (Bankruptcy is included in statutory schemes excepted from rule against nonparty preclusion). Further, the goal of equitable treatment of creditors, albeit sorted into classes by status and vulnerability, "necessarily converts a series of bilateral contractual relations into a multilateral relationship." *See* Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 Harv. L. Rev. 2296, 2307 (2004).

This multilateral procedural posture sets the Bankruptcy Code apart from "statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the [RICO] Act" that the Court has found do not conflict with the FAA. *Epic*, 138 S. Ct. at 1627 (citations omitted). While the Court noted that "even a statute's express provision for collective legal actions does not necessarily mean it precludes" bilateral arbitration, *id.*, the Bankruptcy Code provides for procedural mechanisms such as the automatic stay and substantive outcomes like the discharge, which can accomplish their statutory purposes *only* under

centralized, collective proceedings enforced by the automatic stay. *See, e.g.*, 11 U.S.C. § 341 (prescribing meeting of creditors); *see also* 11 U.S.C. §§ 501, 502 (process of centralizing the filing and allowance of all creditor claims and interests against the debtor); *see generally* 11 U.S.C. §§ 1121–1129 (plan confirmation is inherently a collective proceeding).

Allowing individual creditors to remove *all* claims to an arbitral forum undermines the bankruptcy system created by Congress and protected by the Constitution. Lower courts have recognized that not all claims are arbitrable and have demonstrated that the courts can determine where their discretion ends. *See Hill*, 436 F.3d at 108 (Bankruptcy court discretion is limited even in core proceedings unless the Code is in "inherent conflict" with the FAA, or "that arbitration of the claim would 'necessarily jeopardize' the objectives of" the Bankruptcy Code.). The Thirteenth Circuit did not exaggerate in noting that the adjudication of the automatic stay violation before the bankruptcy court "is critical to [Respondent's] ability to reorganize under the Bankruptcy Code, discharge his debt and obtain a fresh start." R. 13. In contrast, the Second Circuit recognized in *Hill* that although the automatic stay violation claim was a core proceeding, its discretion was limited because the debtor had been discharged, and therefore, arbitrating the claim "would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start, protecting the assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate." *Hill*, 436 F.3d at 108 (citation omitted).

Because of its policy goals, the Bankruptcy Code stands apart from statutes such as the Sherman or RICO Act, and does not fit the Court's predisposition to favor arbitration. Bankruptcy's multiparty adjustment of the debtor's relationship with creditors cannot accommodate shunting *all* two-party disputes into secondary arbitral forums.

C. Section 362 Impliedly Repeals the FAA but the Automatic Stay May Also Preclude the FAA.

In its decision, the Thirteenth Circuit omitted the statutory text and legislative history of the Bankruptcy Code and its subsequent reforms in considering whether Congress intended to preclude arbitration in bankruptcy. R. 10 (citing *Cont'l Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1020 (9th Cir. 2012), *cert denied*., 568 U.S. 815 (collecting cases)). The Court's long-standing precedent is clear, and reiterated in *Epic*, that "the intention of the legislature to repeal must be clear and manifest." *Town of Red Rock v. Henry*, 106 U.S. 596, 602 (1883); *see also Epic*, 138 S. Ct. at 1632–33 (Thomas, J. concur.) (Reiterating position that under plain meaning of FAA, only "grounds for revocation of a contract are those that concern the formation of the arbitration agreement." (internal quotations omitted)). In both the text and legislative history, however, are evidence of Congressional intent to preclude arbitration. *See* Hardison, *supra* at 650.

1. The Legislative History of Section 362.

The lower court noted that "legislative history recognizes the critical nature of the automatic stay." R. 11. More can be said with respect to arbitration, specifically because Congress wrote that section 362(a), which "defines the scope of the automatic stay" intends that "[a]ll proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceedings in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals." H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6297; S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5836; *see also In re Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989) (citing same).

The legislative history makes explicit that Congress intended that the automatic stay would halt an arbitration. Even more, section 362(a)(1)'s plain meaning conveys Congress' intent that the automatic stay would even forbid an arbitration's commencement. 11 U.S.C. § 362(a)(1); *see also Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). If not so, several more troubling questions would emerge: if arbitration is merely stayed and the FAA not repealed, should the court allow arbitration to cause part of the bankruptcy to fall behind and delay the entire process? If arbitration *shall* proceed, must stay relief always and absolutely be granted in favor of arbitration? Most troubling, will the FAA require trustees to arbitrate in disparate proceedings causes of action intended to be centralized in the bankruptcy court?

2. The Explicit Language in 28 U.S.C. § 1334.

Additionally, it is curious that the dissent chose to highlight 28 U.S.C. § 1334 as evidence opposing implied repeal. R. 24. "The statute includes the phrase 'notwithstanding any Act of Congress,' clearly showing that the statute is intended to displace at least *some* other acts of Congress." Hardison, *supra* at 651 (emphasis in original). It is true that Congress did not give exclusive jurisdiction to the district courts over proceedings arising under, in or related to cases under title 11. 28 U.S.C. § 1334(b). Still, Congress did give exclusive jurisdiction over "all property, wherever located, of the debtor *as of the commencement of the case*." 28 U.S.C. § 1334(e) (emphasis added). The filing of a petition commences the case. 11 U.S.C. § 301(a). The commencement of the case creates an estate. 11 U.S.C. § 541(a). And a petition operates as a stay against the debtor and property of the estate. *See generally* 11 U.S.C. § 362(a)(2)–(5). Congressional intent is clear: the district courts have exclusive jurisdiction over property of the estate and whether the automatic stay applies to property of the estate.

The contrary authority offered to rebut this assertion is unavailing. *See* R. 24 ("non-bankruptcy courts have concurrent jurisdiction to interpret the scope of the automatic stay."). Rather, it is the *district* courts that have exclusive jurisdiction over the case and certainly a district court with jurisdiction to decide matters under title 11 could interpret whether the stay applies to a pendant matter. *See Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012) (District court where proceeding is pending has jurisdiction over whether proceeding is stayed). Naturally, each district court has exclusive (from state courts) but concurrent (with other district courts) jurisdiction to interpret the extent of the automatic stay.

Further, the Court has pointed to nearly identical language to exemplify "less obtuse" examples of Congressional intent. *See CompuCredit Corp v. Greenwood*, 565 U.S. 95, 103–104 (2012) (citing to language in 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law…arbitration may be used"); *c.f.* 28 U.S.C. § 1334(b) ("notwithstanding any Act of Congress…"); *see also Epic*, 138 S. Ct. at 1626 ("Congress has likewise shown that it knows how to override the [FAA] when it wishes," then citing to language in 15 U.S.C. § 1226(a)(2) beginning "[n]otwithstanding any other provision of law."). The intent of the language of "notwithstanding any Act of Congress" is already clear to the Court.

Even if it is not clear, the legislature's motivation for uniform bankruptcy laws can be linked back to the Founders. James Madison wrote that the

> power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The Federalist No. 42 (James Madison) (Clinton Rossiter ed., 1961).

The Bankruptcy Code, passed by Congress more than 50 years after the FAA, cannot achieve its statutory purpose to adjudicate debtor and creditor relationships in a centralized

forum absent implied repeal of the FAA. The purposes of the statutes are in inherent conflict and only implied repeal in favor of the Bankruptcy Code can resolve this statutory conflict of near polar extremes. The Bankruptcy Code's fundamental policies, including the automatic stay's preemptive protection of the pending rehabilitation of the debtor via the discharge, lead to no other conclusion. The petition brings about the automatic stay, which ends the race to disparate fora so that a central, single forum can adjudicate the reorganization of the debtor's relations with creditors. This implied repeal of the FAA in favor of the Bankruptcy Code already "prevent[s] so many frauds where the parties or their property may lie or be removed into different [judicial or quasi-judicial forums]." *Id.*

Even if any doubt remains over inherent conflict, the legislative history and the text of the Bankruptcy Code are clear—Congress intended by its words to preclude the FAA from interfering with the automatic stay when the debtor's successful rehabilitation and discharge are at stake. Here the inquiry may end. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (internal quotations in original).

For the foregoing reasons, section 362 and its related judicial provisions of the Code impliedly repeal the FAA.

II. SECTION 362(C)(3)(A) TERMINATES THE AUTOMATIC STAY ONLY WITH RESPECT TO THE DEBTOR, NOT PROPERTY OF THE BANKRUPTCY ESTATE.

The Court should affirm the Court of Appeals for the Thirteenth Circuit and rule in favor of the Respondent because section 362(c)(3)(A) terminates the automatic stay only "with respect to the debtor" upon the thirtieth day after a debtor's second bankruptcy case is filed within a year. 11 U.S.C. § 362(c)(3)(A); *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir.

2019). Therefore, Petitioner violated the automatic stay when it entered Respondent's taproom and repossessed the Equipment.

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005 in order to "correct perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 231–32 (2010). These amendments arose out of concern that some debtors were gaming the federal bankruptcy system by "using repetitive filings of bankruptcy cases to exploit the automatic stay as a delay tactic . . . without actually intending to complete the bankruptcy process." *In re Thu Thi Dao*, 616 B.R. 103, 107 (Bankr. E.D. Cal. 2020). To restrict and deter abusive filers, Congress placed limitations on the automatic stay. *See* 11 U.S.C. §§ 362(c)(3)(A), 362(c)(4)(A)(i). Section 362(c)(3)(A) provides that if a debtor's case under chapter 7, 11, or 13 was dismissed within the previous year, the automatic stay under section 362(a) "shall terminate *with respect to the debtor*" on the thirtieth day after the second case is filed absent an extension under section 362(c)(3)(B). 11 U.S.C. § 362(c)(3)(A) (emphasis added).

Despite the clear and unambiguous text of section 362(c)(3)(A), a split has developed between the Circuit Courts. A majority of courts hold that the plain language of the phrase "with respect to the debtor" limits the termination of the automatic stay to the debtor and the non-bankruptcy property. *See Rose*, 945 F.3d at 230; *In re Holcomb*, 380 B.R. 813, 815–16 (B.A.P. 10th Cir. 2008); *In re Harris*, 342 B.R. 274, 280 (Bankr. N.D. Ohio 2006). In contrast, some courts have departed from the statute's plain text and hold that the stay terminates in its entirety as to both the debtor and bankruptcy estate property. *See In re Smith*, 910 F.3d 576, 591 (1st Cir.

2018); *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *In re Daniel*, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009).

The majority interpretation—that the termination of the stay is limited to the debtor— is correct for two reasons. First, section 362(c)(3)(A) unambiguously terminates the automatic stay only with respect to the debtor and the debtor's property, not the property of the estate. Even if ambiguous, the applicable legislative history is inconclusive and should not substitute for the statute's plain text. Moreover, the plain meaning of this provision best comports with the surrounding provisions of the Bankruptcy Code. Second, the plain meaning interpretation balances Congress's concern regarding abusive filers with the fundamental policy goals of the federal bankruptcy system—namely, providing a fresh start to debtors via the discharge and ensuring maximum and equitable distribution among creditors.

A. The Plain Text of Section 362(c)(3)(A) Unambiguously Terminates the Automatic Stay Only with Respect to the Debtor.

The plain text of section 362(c)(3)(A) clearly and unambiguously terminates the automatic stay only with respect to the debtor and the debtor's property. *See* 11 U.S.C. § 362(c)(3)(A). The Court has repeatedly noted that its interpretation of the Bankruptcy Code begins by consulting the statute's plain language. *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 69 (2011). When the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Caminetti*, 242 U.S. at 485. Because there is no ambiguity here, the inquiry into the meaning of section 362(c)(3)(A) both begins and ends with the text itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989); *see also*

Conn. Nat'l Bank, 503 U.S. at 254 ("When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'")

Section 362(c)(3)(A) clearly states that the automatic stay "shall terminate *with respect to the debtor* on the 30th day after the filing" of the later case within the preceding one-year period. 11 U.S.C. § 362(c)(3)(A) (emphasis added). The inclusion of the phrase "with respect to the debtor" implicitly excludes what is not mentioned in the provision—namely, the bankruptcy estate. *See Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Further, the phrase "with respect to the debtor" serves as a limitation on the verb "terminate," therefore limiting the application of the automatic stay. *See* 11 U.S.C. § 362(c)(3)(A); *see also* Kimberly Lehnert, *Termination of the Stay for Successive Filers: Interpreting § 362(c)(3)*, 29 Emory Bankr. Dev. J. 243, 278 (2012) (applying these textual canons of interpretation to section 362(c)(3)(A)). Given the explicit limitations in the plain text of the statute, section 362(c)(3)(A) cannot be read to terminate the entire automatic stay.

Even if section 362(c)(3)(A) is not as punitive of a measure for abusive filers as some creditors may hope, interpreting this provision to terminate the automatic stay only with respect to the debtor does not render it absurd. *See In re Scott-Hood*, 473 B.R. 133, 140 (Bankr. W.D. Tex. 2012) ("The fact that the scope of relief is less robust than creditors who lobbied for this legislation might have hoped for . . . is no reason to conclude that the statute is 'truly absurd.' It has meaning. It just doesn't have the meaning that the creditor wants it to have."). So long as a statute's plain language is not absurd, it is the court's job to enforce its plain meaning. *Lamie v.*

U.S. Tr., 540 U.S. 526, 534 (2004). Although the Court recognized in *Stern v. Marshall* that courts do not have the right to apply the plain text of a statute when the text violates the Constitution, applying the plain text here raises no such issue. *See Stern*, 564 U.S. at 477–78 (The avoidance canon "does not give [the court] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." (internal quotations omitted)). Because the text clearly and unambiguously terminates the automatic stay only with respect to the debtor, the Court should reject Petitioner's attempt to re-write section 362(c)(3)(A). *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 13–14 (2000) ("Congress says in a statute what it means and means in a statute what it says there . . . [a]chieving a better policy outcome . . . is a task for Congress, not the courts.") (internal quotations omitted).

B. The Legislative History of Section 362(c)(3)(A) is Inconclusive and the Plain Text Interpretation Best Comports with the Surrounding Provisions of the Bankruptcy Code.

The legislative history relevant to section 362(c)(3)(A) is too insubstantial to substitute for the plain text. Further, the plain meaning interpretation of section 362(c)(3)(A) best comports with the remainder of section 362 of the Bankruptcy Code.

1. The Legislative History of Section 362(c)(3)(A) Cannot Substitute for the Plain Text of the Statute.

Because the plain text of section 362(c)(3)(A) is unambiguous and consistent with its surrounding statutory scheme, the Court need not consult legislative history to aid in its interpretation. *See Garcia v. U.S.*, 469 U.S. 70, 75 (1984); *see also Ross v. Hotel Emps. and Rest. Emps. Int'l Union,* 266 F.3d 236, 245 (3d Cir. 2001) ("Only if the statute is ambiguous or unclear should a court consider legislative history for interpretive guidance."). Even if there was an

ambiguity in the statute, the relevant legislative history is inconclusive and "creates more confusion than clarity" regarding Congress's intent in enacting the BAPCPA amendment. *See Lamie*, 540 U.S. at 539.

Legislative history relevant to section 362(c)(3)(A) is limited—the sole piece of legislative history regarding this provision appears in a 2005 House Report. *See* H.R. Rep. No. 109-31(I), at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138. Yet, this Report merely summarizes the statutory language, and gives no insight into the legislature's intent. *Scott-Hood*, 473 B.R. at 137 n. 2; *see also In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (stating that BAPCPA's legislative history "does not provide an example of the kind of problem or abuse it was intended to correct, nor a citation to a case whose result it sought to alter.").

Therefore, it is not appropriate for the Court to rely on BAPCPA's sparse legislative history in place of the statute's plain text. What is clear, however, is that the plain language interpretation of the statute best comports with both the surrounding provisions of the Bankruptcy Code and the overarching policy of the bankruptcy laws. *See In re Rinard*, 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011).

2. The Plain Text Interpretation of Section 362(c)(3)(A) is Strengthened in Light of the Surrounding Provisions of the Code.

The plain meaning interpretation of section 362(c)(3)(A) is further strengthened when viewed in context with the rest of section 362. *Holcomb*, 380 B.R. at 816. A statutory provision should not be read in isolation. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Rather, it should "be read as a whole, since the meaning of statutory language, plain or not,

depends on context." *Id.*; *see also Davis*, 489 U.S. at 809 (statutes must be "read in their context and with a view to their place in the overall statutory scheme").

The entirety of section 362 indicates Congress knew how to differentiate between acts against the debtor, the debtor's property, and acts against the property of the estate. *See Holcomb*, 380 B.R. at 816. Section 362(a) distinguishes between stays of actions "against the debtor," stays preventing "enforcement of a judgment against the debtor or against property of the estate," as well as "any act to obtain possession of property of the estate or of property from the estate." 11 U.S.C. § 362(a)(1)–(3). Additionally, section 362(c)(1) provides "the stay of an act against property of the estate . . . continues until such property is no longer property of the estate." 11 U.S.C. § 362(c)(1). Congress knew how to distinguish in section 362(a) between acts against the debtor, the debtor's property, and the bankruptcy estate; it is also clear that the phrase "with respect to the debtor" limits the termination of the stay solely to the debtor and non-bankruptcy property, leaving the stay in place with respect to the estate property, in accordance with section 362(c)(1). *See In re Johnson*, 335 B.R. 805, 806–07 (Bankr. W.D. Tenn. 2006).

Section 362(c)(4)(A)(i) further points to a congressional intent to terminate the stay under section 362(c)(3)(A) only with respect to the debtor, not with respect to estate property. Under section 362(c)(4)(A)(i), for debtors having had more than two cases dismissed within the preceding year, "the stay . . . shall not go into effect upon the filing of the later case." 11 U.S.C. § 362(c)(4)(A)(i). Notably, there is no qualifying language in this provision, which immediately follows section 362(c)(3). *See* 11 U.S.C. § 362(c)(4)(A)(i). Rather, for this class of repeat filers, the automatic stay terminates completely. *Rose*, 945 F.3d at 231.

When viewed in conjunction with section 362(c)(4)(a)(1), section 362(c)(3)(A) shows that Congress intended to place a limitation on the automatic stay by inserting the language "with respect to the debtor," supporting a congressional intent to penalize repeat filers depending on how many prior cases a debtor has had within the preceding year. *Harris,* 342 B.R. at 279; *see also Rose,* 945 F.3d at 230 *(quoting 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.'"). For debtors such as Respondent, who had one case dismissed within the year, the automatic stay terminates thirty days after filing the subsequent case with respect to the debtor—not the property of the estate. *See Harris,* 342 B.R. at 279–80; *see also Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Overlooking the above, the dissent—along with other courts following the minority interpretive approach—argues that the phrase "with respect to the debtor" clarifies that the stay terminates only with respect to the serially-filing debtor, not their spouse. *See, e.g., Daniel*, 404 B.R. at 326; *Reswick*, 446 B.R. at 369–70; *In re Jupiter,* 344 B.R. 754, 759 (Bankr. D.S.C. 2006). Although section 362(c)(3) uses the introductory phrase "[i]f a single or joint case is filed," this interpretation calls for Congress to direct what is already the result under the statute; the rights of each debtor are kept separate in cases that are jointly administered. *See Smith*, 910 F.3d at 584–85; *see also In re Kosenka,* 104 B.R. 40, 43 (Bankr. N.D. Ind. 1989) (noting that each spouses' separate estate is protected by two different automatic stays). This interpretation would render the phrase "with respect to the debtor" superfluous, and the Court has held that

statutes should not be interpreted to be meaningless if any other result is possible. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (construe statutes "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). It is meaningless to direct a result that will necessarily occur. It is meaningful, however, to tier the application of the stay according to how many cases a debtor has had dismissed within the preceding year.

C. The Plain Text Interpretation of Section 362(c)(3)(A) Most Effectively Balances Congress's Concern About Abusive Filers with the Overarching Policy Goals of the Federal Bankruptcy System.

To best align with the primary goals of the federal bankruptcy system, the Court should interpret 362(c)(3)(A) as terminating the stay only with respect to the debtor and not bankruptcy estate property. *See Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (stating that the Court will not "read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure"). This interpretation best comports with the federal bankruptcy system's goals of providing a fresh start to honest debtors and ensuring equal distribution among creditors. *Rinard*, 451 B.R. at 19.

A complete termination of the automatic stay defeats the bankruptcy system's overarching policy of providing a complete discharge and fresh start for honest debtors in cases where the debtor has only had one previous case dismissed within the preceding year. A fundamental right afforded to debtors is the protection provided by the automatic stay. *Midlantic Nat. Bank v. N.J. Dept. of Env'tal Prot.*, 474 U.S. 494, 503 (1986). The automatic stay occurs upon filing a petition for bankruptcy—halting all creditors' debt collection efforts and enabling the Bankruptcy Court to "centralize all disputes . . . so that that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings." *S.E.C. v. Miller*, 808 F.3d 623, 630 (2d

Cir. 2015); *see* 11 U.S.C. § 362(a); *see also Mann v. Chase Manhattan Mortg. Corp.*, 315 F.3d 1, 3 (1st Cir. 2003) (concluding that the stay protects the debtor's assets from "disorderly, piecemeal dismemberment of the debtor's estate outside the bankruptcy proceedings"); *Thu Thi Dao*, 616 B.R. at 111 (explaining that keeping the stay intact is "crucial in enabling the chapter 7 trustee to perform the duty to collect and reduce to money the property of the estate").

Although the plain language of the statute evidences a congressional intent to partially limit this protection out of concern that serial filers were abusing the system, Congress did so by imposing different penalties depending on how many cases a debtor had dismissed within the previous year—reserving the harshest punishment for those with a greater number of prior dismissals. *See* 11 U.S.C. § 362(c)(4)(A)(i) (stating that the stay shall not go into effect for debtors with two or more dismissed cases within the previous year); s*ee also Harris*, 342 B.R. at 279 (noting the tiered penalty system).

Given that Congress enacted BAPCPA to restrict debtors from serially abusing the bankruptcy system at the expense of their creditors, it would be absurd to read section 362(c)(3)(A) as terminating the stay completely after thirty days in cases involving debtors such as Respondent who only had one prior case dismissed for a procedural defect—especially when these amendments caused a slew of cases to be dismissed for reasons other than abuse. *See, e.g.*, 11 U.S.C. § 109(h)(1) (requiring that debtors receive a briefing regarding "the opportunities available for credit counseling" from an approved agency). Applying Petitioner's proposed interpretation to the facts of this case best illustrate this absurdity. Here, the Bankruptcy Court dismissed Respondent's initial chapter 11 case on a technicality—the failure to timely file documents such as his schedules of assets and liabilities. R. 5. However, after hiring a new

attorney and timely filing his second case, Respondent was able to successfully reopen the taproom and begin the process of rehabilitating the business; that is until Petitioner repossessed the Equipment and effectively shut down the business—and ended the reorganization. R. 5–7.

According to Petitioner, Congress intended to completely terminate the stay under section 362(c)(3)(A) such that Petitioner was justified in repossessing the Equipment at the expense of Respondent's right to rehabilitation and a fresh start. *See* R. 6. But the failure of Respondent's attorney to timely file certain required documents is not the gamesmanship and bad faith abuse about which Congress was concerned when amending the Code. *See Thu Thi Dao*, 616 B.R. at 107. Respondent did not engage in serial abuse and intended to complete his reorganization. *See* R. 5. Denying a debtor, like Respondent, his viable business because one case was dismissed within the past year on a procedural technicality leads to an absurd outcome that is inconsistent with BAPCPA's intent to restrain bad faith abuse of the bankruptcy process, and the Bankruptcy Code's goal of a debtor's fresh start. *See Ransom*, 562 U.S. at 64.

Additionally, interpreting section 362(c)(3)(A) as only terminating the stay with respect to the debtor best balances the bankruptcy system's goal of obtaining maximum and equitable distribution for creditors with Congress's intent to limit and deter serial-filing debtors from abusing the system. *See BFP v. Resolution Tr. Corp*., 511 U.S. 531, 263 (1994) (noting this fundamental policy consideration) (Souter, J., dissenting). The property of the estate generally consists of "all legal or equitable interests of the debtor" as well as any interest preserved for the benefit of the estate. 11 U.S.C. § 541(a). Consequently, maintaining the automatic stay with respect to the property of the estate is a vital protection for all creditors. *In re McGrath*, 621 B.R. 260, 266 (Bankr. D.N.M. 2020); *see Thu Thi Dao*, 616 B.R. at 116.

By allowing Petitioner's approach to prevail, the Court would effectively incentivize a creditor race to the courthouse—the very issue Congress sought to correct by instituting the automatic stay. *See* H.R. Rep. No. 95-595, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297; *see also Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991) (explaining the stay's protections). If section 362(c)(3)(A) lifts the stay as to the property of the estate, it would upset the freeze applicable to all creditors only in a way in which secured creditors could benefit. *McGrath*, 621 B.R. at 266. This approach prioritizes the secured creditor over all other creditors who otherwise would have had a chance at a favorable return if the automatic stay remained in force with respect to bankruptcy estate property and the debtor was afforded an opportunity to reorganize. *See id; see also Thu Thi Dao*, 616 B.R. at 116 (stating that in a chapter 7 case where the trustee is not able to protect the estate property, "the foreclosing creditor could obtain a windfall by way of obtaining title through a nonjudicial foreclosure at the expense of other creditors"). Protecting the property of the estate through the automatic stay is therefore in the best interest of creditors because staying action against the estate most effectively secures creditors' interest through a coordinated and efficient process. *See Ransom*, 562 U.S. at 64 (stating that a core purpose of BAPCPA is to ensure that "debtors who *can* pay creditors *do* pay them") (emphasis in original).

Petitioner's assertion that Congress intended to impose such strict timing and burden of proof requirements merely because the debtor had one previous case dismissed within the year is inconsistent with the policy goal of obtaining a maximum and equitable distribution for creditors. Under Petitioner's view, debtors are limited to a thirty-day timeline to bring a motion to extend the stay as to the estate property under a "clear and convincing" burden of proof that the case

was filed in good faith. *See* 11 U.S.C. § 362(c)(3)(B)–(C). Along with this high burden of proof, this thirty-day period imposes an "impossibly short deadline" for debtors to protect their interest in the estate property. *See Thu Thi Dao*, 616 B.R. at 112. Such strict requirements are specifically at odds with the chapter 7 process—resulting in the statute having inconsistent effects across chapters 7, 11, and 13. *See id.*

It is fundamental that provisions which apply in chapters 7, 11, and 13 should be interpreted "to avoid dysfunction in all applicable chapters." *Id.* Petitioner's interpretation not only rejects the statute's plain meaning but leads to outcomes entirely inconsistent among these chapters and at odds with the fundamental policies of the federal bankruptcy system—an interpretation that clearly does "the most violence to the text." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring). Therefore, the Court should interpret this statute according to its plain language and hold that section 362(c)(3)(A) terminates the stay with respect to the debtor, but not to the property of the estate.

CONCLUSION

For the foregoing reasons, the judgment of the Thirteenth Circuit Court of Appeals should be affirmed.