NO. 20-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

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, EARL THOMAS PETTY

TEAM 22

COUNSEL FOR RESPONDENT

Questions Presented

1) Whether a bankruptcy court retains discretion to deny arbitration of a claim alleging a violation of 11 U.S.C § 362 when arbitration of that claim threatens the viability of the debtor's reorganization plan and the interests of other creditors.
2) Whether 11 U.S.C. § 362(c)(3)(A), when using the phrase "with respect to the Debtor," terminates the automatic stay with respect to property of the estate in addition to the debtor and property of the debtor.

Table of Contents

Questions Presented ii

Table of Contents iii

Table of Authorities v

Opinion Below ix

Statement of Jurisdiction ix

Statement of Facts 1

Standard of Review 3

Summary of Argument 3

Argument 5

I. The Bankruptcy Court Properly Exercised Its Discretion in Denying Enforcement of the Arbitration Agreement. 5

A. *Epic* Did Not Overrule *McMahon*. 5

B. The Bankruptcy Code is More Prone to Inherent Conflicts with Arbitration Because Both Focus Primarily on Altering Procedural Rights. 7

C. This Case Presents an Inherent Conflict Between Arbitration and the Bankruptcy Code. . 8

1. A Claim Regarding the Automatic Stay is a Core Proceeding That Arises from the Bankruptcy Code. 10

2. Arbitration Threatens the Viability of Petty's Reorganization Plan. 11

3. Arbitration Threatens the Interests of Petty's Other Creditors. 13

II. In the Alternative, the FAA, Enacted in 1926, Did Not Abrogate the Bankruptcy Act of 1898. 16

III. On the Merits, Section 362(c)(3)(A) Does Not Terminate the Automatic Stay with Respect to Property of the Estate in Accordance with the Statute's Plain Meaning, Policy Objectives, and Congressional Intent. 18

A. The Plain Meaning of Section 362(c)(3)(A) Shows that the Automatic Stay Does Not Terminate with Respect to Property of the Estate. 19

B. Even if the Plain Meaning Were Ambiguous, the Majority Rule Is Consistent with Congressional Intent and the Policy Objectives of the Bankruptcy Code. 23

1. Adopting the Majority Rule Reflects Congress' Intent to Balance Deterring Repeat Filings with Protecting Creditors. 24

2. The Minority Interpretation of Section 362(c)(3)(A) in the Chapter 7 Context Creates Inconsistencies that Contradict Congressional Intent. 26

C. Holding that the Automatic Stay Terminated with Respect to Petty, But Not His Brewing Equipment Gives Effect to Section 362(c)(3)(A)'s Plain Text, Policy Objectives, and Congressional Intent. 27

Conclusion 28

Table of Authorities

Cases

Anderson v. Credit One Bank, N.A. (In re Anderson), 884 F.3d 382 (2d Cir. 2018) 9, 11

Bankers Trust Co. of Ca., N.A. v. Gillcrese (In re Gillcrese), 346 B.R. 373 (Bankr. W.D. Pa. 2006) 20

Barber-Greene Co. v. Zeco Co., 17 B.R. 248 (Bankr. D. Minn. 1982) 11

Belton v. GE Capital Retail Bank (In re Belton), 961 F.3d 612 (2d Cir. 2020) 6, 7

Bohack Corp. v. Truck Drivers Local Union No. 807, Int'l Bhd. of Teamsters, 431 F. Supp. 646 (E.D.N.Y.) 17

Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356 (2006) 7, 13

City of Chicago v. Fulton, 592 U.S. ___, ___ (2021) (slip op., at 2) 15, 25

Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir. 2012) 9, 10, 11, 13

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) 5, 6, 8, 16

Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 23

Henry v. Educ. Fin. Serv. (In re Henry), 944 F.3d 587 (5th Cir. 2019) 6, 8, 9

Holcomb v. Hardeman (In re Holcomb), 380 B.R. 813 (B.A.P. 10th Cir. 2008) 18, 19, 20, 25

In re Bauer, 2020 WL 3637902 (Bankr. D.S.C. June 8, 2020) 7

In re Charles P. Young Co., 111 B.R. 410 (Bankr. S.D.N.Y. 1990) 15

In re Eber, 687 F.3d 112 (9th Cir. 2012) 9, 11, 13

In re EPD Inv. Co., LLC, 821 F.3d 1146 (9th Cir. 2016) 9, 13, 15

In re F & T Contractors, Inc., 649 F.2d 1229 (6th Cir. 1981) 13

In re Gandy, 299 F.3d 489 (5th Cir. 2002) 9, 10, 13

In re Golden, 587 B.R. 414 (Bankr. E.D.N.Y. 2018) 7

In re Haisley, 350 B.R. 48 (Bankr. E.D. La. 2006) 22

In re Harris, 342 B.R. 274 (Bankr. N.D. Oh. 2006) 22

In re Homaidan, 587 B.R. 428 (Bankr. E.D.N.Y. 2018) 7

In re Hostess Brands, Inc., 2013 WL 82914 (Bankr. S.D.N.Y. Jan. 7, 2013) 14

In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006) 20, 21, 22

In re L.M. Axle Co., 3 F.2d 581 (6th Cir. 1925) 17

In re Muskegon Motor Specialties Co., 313 F.2d 841 (6th Cir. 1963) 17

In re Parker, 336 B.R. 678 (Bankr. S.D.N.Y., 2006) 22

In re Patterson-MacDonald Shipbuilding Co., 284 F. 277 (W.D. Wash. 1922) 16

In re Relativity Fashion, LLC, 696 F. App'x 26 (2d Cir. 2017) 11, 12

In re Roach, 555 B.R. 840 (Bankr. M.D. Ala. 2016) 25

In re Roth, 594 B.R. 672 (Bankr. S.D. Ind. 2018) 7

In re Thomas, 618 B.R. 585 (Bankr. M.D. Fla., 2020) 24

In re Thu Thi Dao, 616 B.R. 103 (Bankr. E.D. Cal. 2020) 26, 27

In re Tubman, 364 B.R. 574 (Bankr. D. Md. 2007) 21, 26

In re Williams, 346 B.R. 361 (Bankr. E.D. Pa, 2006) 21, 22, 24, 25

Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.), 118 F.3d 1056 (5th Cir. 1997) 9, 10, 11, 13

Johnson v. England, 356 F.2d 44 (9th Cir. 1966) 17

Knepp v. Educ. Fin. Servs., 2018 WL 11199014 (Bankr. D.N.J. Dec. 26, 2018) 7

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Lehman v. Rosengarten, 23 F. 642 (C.C.E.D. Mich. 1885) 17

MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104 (2d Cir. 2006) 9, 11, 12, 13

Mintze v. American Gen. Fin. Servs., Inc. (In re Mintze), 434 F.3d 222 (3d Cir. 2006) 10

Moses v. CashCall, Inc., 781 F.3d 63 (4th Cir. 2015) 9, 11, 13

Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.), 403 F.3d 164 (4th Cir. 2005) 9, 10, 11, 12, 13

Razavi v. Comm'r of Internal Revenue, 74 F.3d 125 (6th Cir. 1996) 3

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Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020) 8, 10

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 19

Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226 (5th Cir. 2019) 18, 19, 20, 22

Russello v. United States, 464 U.S. 16 (1983) 22

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) 5

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Texas v. Soileau (In re Soileau), 488 F.3d 302 (5th Cir. 2007) 3

United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines, Inc.), 197 F.3d 631 (2d Cir. 1999) 10

Zimmerman v. Cont'l Airlines, Inc., 712 F.2d 55 (3d Cir. 1983) 18

Statutes

11 U.S.C. § 103(c) 26

11 U.S.C. § 341(a) 26

11 U.S.C. § 362 10

11 U.S.C. § 362(a) 20, 24

11 U.S.C. § 362(a)(2) 21

11 U.S.C. § 362(c)(1) 21

11 U.S.C. § 362(c)(2) 21

11 U.S.C. § 362(c)(3) 18, 24, 27

11 U.S.C. § 362(c)(3)(A) 18, 19, 20, 21, 22, 23, 24, 25, 27, 28

11 U.S.C. § 362(c)(3)(B) 22

11 U.S.C. § 362(c)(3)(C) 26

11 U.S.C. § 362(c)(4) 21, 24

11 U.S.C. § 362(c)(4)(A)(i) 21

11 U.S.C. § 362(h)(1) 21

11 U.S.C. § 704(a) 26

28 U.S.C. § 157(b)(2)(G) 10

Bankruptcy Act of 1898 § 26a 16

Fed. R. Bankr. P. 2018 14

Fed. R. Bankr. P.2003(a) 26

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H.R. Rep. No. 109-31(1) (2005) 18, 23

H.R. Rep. No. 95-595 (1977) 13

S. Rep. No. 95-989 (1977) 15

Opinion Below

Wildflowers Community Bank v. Petty, Case No. 19-0805 (13th Cir. 2020)

Statement of Jurisdiction

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

Statement of Facts

Petitioner Earl Thomas Petty ("Petty") is owner and founder of a craft brewery company, Great Wide Open. ER at 3. After Great Wide Open's initial success, Petty opened five taprooms and a state-of-the-art brewhouse, which produced many highly rated and award-winning products. *Id.* at 3–4.

As a result, Petty decided to expand Great Wide Open's business. In September 2011, he entered a $35 million revolving credit agreement with respondent, Wildflowers Community Bank ("Wildflowers"), secured by a first priority lien on substantially all of Great Wide Open's assets. *Id.* at 4. Along with the credit agreement, Petty executed a personal guaranty for repayment of the company's obligations, granting Wildflowers a first priority lien on brewing equipment he had purchased with his own money. *Id.* at 3–4. Both the credit agreement and guaranty contained identical "Arbitration" clauses that provided: "any and all disputes, claims, or controversies of any kind between us arising out of or relating to the relationship between us will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by jury trial." *Id.* at 4.

In the summer of 2018, the market for craft beer contracted and Great Wide Open commenced a Chapter 7 liquidation.[1] *Id.* at 5–6. Due to Wildflowers' first priority lien on substantially all of Great Wide Open's assets, Wildflowers collected $31.1 million, the majority of the proceeds and nearly all of its $33.2 million claim. *Id.* at 5, 6 n.3. Petty also filed for bankruptcy Chapter 11 reorganization, which was dismissed for administrative reasons. *Id.* at 5.

In December 2018, Petty reopened one of his taprooms as a sole proprietorship doing business as Full Moon Fever Brewing. *Id.* at 6. This comeback was made possible only because

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific chapters of the Bankruptcy Code are identified herein as "Chapter __" and specific sections of the Bankruptcy Code are identified herein as "section __."

of Petty's brewing equipment. *Id.* Indeed, in the first month of operations, Full Moon Fever Brewing was profitable. *Id.*

In January 2019, Petty commenced a second Chapter 11 reorganization. *Id.* But Petty made a simple mistake: he failed to file a motion to extend the automatic stay under section 362(c)(3)(B) during the first thirty days of the second bankruptcy case. *Id.* Indeed, almost immediately after the end of that grace period, on February 12, 2019, Wildflowers pounced. *Id.* Without notifying the bankruptcy court, Wildflowers repossessed Petty's brewing equipment to satisfy the $2.1 million remaining on its initial $33.2 million claim. *Id.* Wildflowers' seizure effectively closed and destroyed the profitable Full Moon Fever Brewing business. *Id.* at 6–7.

Petty and Wildflowers then filed opposing motions. *Id.* at 6–7. Petty argued that Wildflowers violated the automatic stay by repossessing the brewing equipment, and he sought $500,000 in damages under section 362(k). *Id.* Wildflowers responded that the automatic stay had expired with respect to the equipment, pursuant to section 362(c)(3)(A), and also argued that Petty's claim against Wildflowers was subject to arbitration. *Id.* at 7. The bankruptcy court ruled in Petty's favor, finding that compelling arbitration would conflict with the Bankruptcy Code. *Id.* Additionally, the court found that Wildflowers violated the automatic stay because the brewing equipment was property of the bankruptcy estate and thus still protected by the stay. *Id.*

In March 2020, following Wildflowers appeal, the Thirteenth Circuit affirmed the bankruptcy court's decision. *Id.* at 2. Wildflowers appealed again and this Court granted certiorari.

Standard of Review

Since the parties do not dispute the facts and the dispute involves only questions of law, the standard of review is *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Accordingly, this Court should decide the issues as if it were the original court assigned to the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

Summary of Argument

After recovering nearly its entire secured claim, Wildflowers seized Petty's beer brewing equipment without leave from the bankruptcy court. As a result, Petty's taproom business closed. Now Wildflowers argues that (1) whether the seizure violated the automatic stay should be arbitrated and (2) the seizure did not violate the automatic stay because the stay had terminated with respect to the brewing equipment. Were Wildflowers to prevail, it could foreclose on the brewing equipment, ending Petty's taproom business for good and leaving his other creditors with nothing in the bankruptcy.

The Thirteenth Circuit's judgment denying both claims was correct. First, the Thirteenth Circuit was correct to affirm the lower court's denial of arbitration because, here, arbitration inherently conflicts with the Bankruptcy Code. First, the claim—concerning the creditor's alleged violation of the automatic stay—arises from the Bankruptcy Code itself. Second, since the creditor seized the debtor's most valuable and essential business equipment, arbitration threatens the debtor's ability to generate revenue and engage in a successful reorganization. Third, the interests of other creditors could be adversely impacted by arbitration, since their potential recovery is predicated on the debtor retaining possession and use of his brewing equipment. Therefore, this Court should deny enforcement of the arbitration agreement.

Alternatively, this Court should deny arbitration because, unlike other statutes, the Bankruptcy Act of 1898 predated the Federal Arbitration Act of 1926 ("FAA"), and the FAA did not evince an intent to abrogate pre-existing bankruptcy practice whereby referees had discretion to deny arbitration of bankruptcy claims. Accordingly, the FAA's instruction to compel enforcement of arbitration agreements does not apply to claims arising in bankruptcy cases.

Second, the Thirteenth Circuit was correct to hold that the seizure violated the automatic stay under section 362(c)(3)(A). That provision provides that for first-time repeat filers the automatic stay terminates only "with respect to the Debtor." Since Petty's brewing equipment was property of the estate, it was protected by the automatic stay and Wildflowers' seizure violated the statute.

That conclusion is evident from the plain meaning of the statute, both from its text and context, which distinguishes between the debtor and property of the estate. And it is also evident from Congress' intent and the policies underlying the provision: to balance deterring serial filings with protecting creditors from actions brought against property of the estate. Because terminating the stay with respect to property of the estate would jeopardize the debtor's reorganization and threaten the interests of other creditors, such an interpretation violates Congress' intent and central tenets of the Bankruptcy Code. Moreover, interpreting section 362(c)(3)(A) to apply only with respect to the debtor still provides a creditor with individual recourse. The creditor, including Wildflowers here, can bring *in personam* actions against the debtor and enforce judgments against non-estate property. Accordingly, the Thirteen Circuit's interpretation of section 362(c)(3)(A) punishes the debtor without punishing the other creditors.

Therefore, the judgment of the Thirteenth Circuit should be affirmed.

Argument

I. The Bankruptcy Court Properly Exercised Its Discretion in Denying Enforcement of the Arbitration Agreement.

In the nearly one hundred years that the Federal Arbitration Act of 1926 ("FAA") and Bankruptcy Code—first enacted in 1898—have coexisted, no court has wholly stripped bankruptcy courts of their discretion to decide whether arbitration agreements can be enforced. This long history is consistent with this Court's command in *Shearson/Am. Express, Inc. v. McMahon* that arbitration is not required when it presents an inherent conflict with another "statute's underlying purposes." 482 U.S. 220, 227 (1987).

The petitioner and dissent below argue that *McMahon*—and nearly one hundred years of case law preserving the symbiosis between the FAA and Bankruptcy Code—was overturned by the Supreme Court in *Epic Sys. Corp. v. Lewis*, a case that only favorably cited *McMahon* and had nothing to do with bankruptcy. 138 S. Ct. 1612 (2018). They are mistaken. *Epic* did not covertly overrule *McMahon* and a century worth of bankruptcy law. And the FAA can, and in this case does, inherently conflict with the Bankruptcy Code and its underlying purposes. Thus, bankruptcy courts retain limited discretion to determine whether certain arbitration agreements can be enforced, and the decision below should be affirmed.

A. *Epic* Did Not Overrule *McMahon*.

In *Shearson/Am. Express, Inc. v. McMahon*, the Supreme Court held that the FAA "mandates enforcement of agreements to arbitrate statutory claims," but that "mandate may be overridden by a contrary congressional command." 482 U.S. at 226. In *McMahon*, the Court articulated three ways for a party to show Congress' intent that the FAA does not apply to a statutory claim: "the statute's text[,] or legislative history, or . . . an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227 (internal citations omitted). Applying

McMahon in the bankruptcy context, lower courts have consistently used the "inherent conflict" prong to determine whether a bankruptcy court retained discretion to deny enforcement of an arbitration agreement. Andre Albertini, *Arbitration in Bankruptcy: Which Way Forward?*, 90 AM. BANKR. L.J. 599, 607 (Fall 2016).

In 2018, this Court decided *Epic Sys. Corp. v. Lewis*, which held that the text of a provision in the National Labor Relations Act did not manifest Congress' "clear and manifest" intent that the statute abrogate the FAA. 138 S. Ct. at 1624. Accordingly, the Court enforced the arbitration clause. *Id.* at 1632. As applied to bankruptcy cases, three Courts of Appeals, including the Thirteenth Circuit below, agree that *Epic* did not overrule *McMahon*. *See Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 591 (5th Cir. 2019); *Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612, 615–16 (2d Cir. 2020).

As the Fifth Circuit observed post-*Epic*, *McMahon* "remains sound" for three reasons. *In re Henry*, 944 F.3d at 591. First, *Epic* itself favorably cites to *McMahon*. *Id.* Second, "*McMahon* and *Epic Systems* apply essentially the same tests for determining whether a statute overrides the FAA's command to enforce arbitration agreements." *Id. McMahon* requires Congressional intent "be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purpose." *Id.* at 592 (internal citations omitted). And *Epic* requires Congressional intent to be "clear and manifest." *Id.* Any difference between "deducible" and "clear and manifest" is not "an unequivocal direction" to overrule *McMahon*. *Id.* Third, while *Epic* instructs that when "linguistic and statutory context" and legislative history conflict, the linguistic and statutory context wins, this does not overrule *McMahon*. *Id.* Instead, as the Second Circuit observed, *Epic* merely clarifies "that where two of *McMahon*'s factors clash, a court should

resolve the dispute in favor of the statutory text and any contextual clues derived therefrom." *In re Belton*, 961 F.3d at 616 (citing *In re Henry*, 944 F.3d at 592).

Bankruptcy courts agree. *See, e.g.*, *In re Roth*, 594 B.R. 672, 676 (Bankr. S.D. Ind. 2018) ("Because *Epic* is silent as to any attempt to overrule *McMahon*, the Court will treat *McMahon* as good law and will apply it to the matter at hand."); *Knepp v. Educ. Fin. Servs.*, 2018 WL 11199014, at *4 (Bankr. D.N.J. Dec. 26, 2018) ("[T]he clear and manifest standard in *Epic* does not overrule or conflict with the three-prong test in *McMahon* and really, at most, refines it."); *In re Homaidan*, 587 B.R. 428, 440 (Bankr. E.D.N.Y. 2018) (noting that *McMahon*'s "inherent conflict" test "is akin to" the method the Supreme Court used in *Epic*); *In re Golden*, 587 B.R. 414, 424 (Bankr. E.D.N.Y. 2018) (same); *In re Bauer*, 2020 WL 3637902, at *3 (Bankr. D.S.C. June 8, 2020) (applying the *McMahon* test). No court has found that *Epic* overruled *McMahon*.

Put simply, *Epic* not only failed to explicitly overrule *McMahon*, but its reasoning is also comfortably compatible with *McMahon*. Accordingly, the court should apply *McMahon*'s "inherent conflict" test to the case at hand.

B. The Bankruptcy Code is More Prone to Inherent Conflicts with Arbitration Because Both Focus Primarily on Altering Procedural Rights.

There is "strong tension between" the FAA and the Bankruptcy Code, "two congressional statutory schemes of equal dignity, whose policies compete with one another." Albertini, *supra*, at 599. The FAA "advocates a decentralized approach towards dispute resolution," while "the Bankruptcy Code exerts an inexorable pull towards centralization for the expeditious and coordinated management of the bankruptcy case." *Id.* at 602 (internal citations omitted).

By claiming that there is "no more of a conflict here than in *Epic*, *Gilmer*, *Mitsubishi*, and *McMahon*," ER at 25, the dissent ignores "the singular nature of bankruptcy courts' jurisdiction," *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 369 n. 9 (2006). In *Epic*, this Court looked to

the statutory text and legislative history prongs, not the inherent conflict prong, to determine if the NLRA abrogated the FAA. *Epic*, 138 S. Ct. at 1617–18, 1627; *see also In re Henry*, 944 F.3d at 592. Thus, the *Epic* analysis is distinct and irrelevant to this case.

Moreover, *McMahon*, *Mitsubishi*, and *Gilmer* held that a substantive private right of action—created by statute—was subject to arbitration. John R. Hardison, *Express Preclusion of the Federal Arbitration Act for all Bankruptcy-Related Matters*, 93 ST. JOHN'S L. REV. 627, 638–643 (2019). But the purpose of bankruptcy is not merely—or even primarily—about creating substantive rights of action; rather, Congress enacted the Bankruptcy Code as a procedural tool to adjudicate substantive rights. *Id.* Further, as this Court recognized just last year, the automatic stay is a central feature in effectuating bankruptcy's "discrete procedural sequence." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020) ("Adjudication of a[n automatic] stay-relief motion . . . occurs before and apart from proceedings on the merits of creditors' claims: The motion initiates a discrete procedural sequence."). This illustrates that the heart of the Bankruptcy Code, like arbitration, is the procedural rights it creates, not the substantive rights. And as borne out by case law, there is a far greater potential for conflict between arbitration and a procedural scheme than between arbitration and the substantive right statutes that this Court has considered previously.

C. This Case Presents an Inherent Conflict Between Arbitration and the Bankruptcy Code.

Circuit courts unanimously agree that arbitration can—in defined circumstances—interfere with effectuating the purposes of the Bankruptcy Code: the "centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders."[2] *Ins. Co. of N. Am. v.*

NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.), 118 F.3d 1056, 1069 (5th Cir. 1997); *see also Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 389 (2d Cir. 2018), *cert. denied subnom.* 139 S. Ct. 144 (2018); *In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1150 (9th Cir. 2016); *Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015); *In re Eber*, 687 F.3d 1123, 1127 (9th Cir. 2012); *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1022 (9th Cir. 2012); *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164 (4th Cir. 2005); *In re Henry*, 944 F.3d at 591; *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002). Though circuit courts diverge on how to determine whether such a conflict exists, three factors have emerged from the case law that consistently support denying arbitration: (1) whether the claim subject to arbitration arises from the Bankruptcy Code; (2) whether arbitration would threaten the reorganization of a Chapter 11 debtor; and, (3) whether the rights of other creditors, who are not parties to the arbitration and therefore would be excluded from the arbitration, would be threatened by the arbitration.

While it is possible these factors could conflict in a particular case and give courts pause as to how to balance them, that is not at issue in this case because each factor clearly points to the same result: this Court should deny enforcement of the arbitration agreement. Petty's claim that Wildflowers violated the automatic stay arises from the bankruptcy code; arbitration of that claim—which will determine who controls Petty's most valuable and essential business asset—strikes at the heart of Petty's ability to reorganize as a Chapter 11 debtor; and, the rights of Petty's other creditors—most notably their ability to capture any value in the reorganization—are

[2] Because the automatic stay "arises by operation of statutory law and not by any affirmative order of the bankruptcy court," the bankruptcy court's power to enforce its own orders is not at issue in this case. *See MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110 (2d Cir. 2006).

undeniably threatened by an arbitration proceeding that would not consider their interests. This case is the paradigmatic example of an inherent—and clear and manifest—conflict between arbitration and the Bankruptcy Code.

1. A Claim Regarding the Automatic Stay is a Core Proceeding That Arises from the Bankruptcy Code.

To determine whether an inherent conflict exists between arbitration and bankruptcy, many courts look first to see whether the claim arises from the Bankruptcy Code itself and whether it involves a core bankruptcy proceeding. *In re Thorpe Insulation Co.*, 671 F.3d at 1022–23; *In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 169; *United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir. 1999); *In re Nat'l Gypsum Co.*, 118 F.3d at 1067–68; *Mintze v. American Gen. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 229 (3d Cir. 2006).

Here, Petty's case is straightforward and unambiguous. The automatic stay "derives exclusively from the provisions of the Bankruptcy Code," *In re Nat'l Gypsum Co.*, 118 F.3d at 1067, because the injunction is only triggered by the filing of the bankruptcy petition and dissolves at the close of the bankruptcy case. 11 U.S.C. § 362. And motions concerning the automatic stay are core proceedings. 28 U.S.C. § 157(b)(2)(G) ("Core proceedings include. . . motions to terminate, annul, or modify the automatic stay"); *Ritzen*, 140 S. Ct. at 590; 1 COLLIER ON BANKRUPTCY ¶ 3.02 (Richard Levin & Henry J. Sommer eds., 16th ed.). Accordingly, Petty's claim that Wildflowers violated the automatic stay arises under the Bankruptcy Code and involves a core proceeding, signifying that compelling arbitration is inappropriate in this case. And the Court need not resolve any lower court disagreement on whether this factor is strictly necessary. *Compare In re Nat'l Gypsum Co.*, 118 F.3d at 1066 (requiring the claim arise from the Code); *Mintze*, 434 F.3d at 231 (same); *In re Gandy*, 299 F.3d at 495–96 (same) *with Thorpe*, 671 F.3d at

1022 (considering whether the claim arises from the Code as a factor in the inherent conflict analysis); *In re Eber*, 687 F.3d at 1130–31 (same); *In re Anderson*, 884 F.3d at 390 (same) *and with Moses*, 781 F.3d at 70 (requiring the claim be constitutionally core).

2. Arbitration Threatens the Viability of Petty's Reorganization Plan.

Courts recognize bankruptcy judges' discretion to deny arbitration when arbitration of the claim would prevent the debtor from carrying out the reorganization plan, because "[t]he fundamental purpose of chapter 11 is rehabilitation of the debtor." *In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 167 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1983)); *see Moses*, 781 F.3d at 72 (denying arbitration because it "could directly impact . . . [the debtor's] plan for financial reorganization"); *In re Nat'l Gypsum Co.*, 118 F.3d at 1066–67 (denying arbitration of declaratory judgment claim concerning the § 524(a) discharge injunction because it was "central to [the debtor's] confirmed reorganization plan."). This is especially true in cases where arbitration interferes with a debtor's ability to generate revenues that are integral to a successful reorganization. *In re Relativity Fashion, LLC*, 696 F. App'x 26, 30 (2d Cir. 2017) (denying arbitration when doing so would risk "revenues integral to the Plan"). On the other hand, a bankruptcy court can enforce an arbitration agreement when doing so does not threaten the viability of the reorganization plan. *Hill*, 436 F.3d at 108; *see Barber-Greene Co. v. Zeco Co.*, 17 B.R. 248, 250 (Bankr. D. Minn. 1982) (granting arbitration because there was no concern about the "effect [of arbitration] upon the issue of reorganization").

For example, in *White Mountain*, the Fourth Circuit denied arbitration of a creditor-initiated adversary proceeding seeking classification of certain prepetition advances as debt or equity because it "would substantially interfere with [the debtor's] efforts to reorganize" as "resolution of the debt-equity issue was critical to the debtor's ability to formulate a plan of

reorganization." 403 F.3d at 169–70. The court was concerned that compelling arbitration would "(1) make it very difficult for the debtor to attract additional funding . . . (2) undermine creditor confidence in the debtor's ability to reorganize, (3) undermine the confidence of other parties doing business with the debtor." *Id.* at 170.

Comparatively, in *Hill*, a court enforced an arbitration agreement that did not threaten the debtor's reorganization. *Hill*, 436 F.3d at 108. The court noted that when a Chapter 7 debtor's claim for violation of the automatic stay is brought after the debtor's "estate has . . . been fully administered and her debts have been discharged . . . [the debtor] no longer requires protection of the automatic stay and resolution of the claim would have no effect on her bankruptcy estate." *Id.*

Here, arbitrating Wildflowers' violation of the automatic stay threatens Petty's ability to reorganize because Petty cannot brew beer without the brewing equipment. ER at 6–7. Before Wildflowers seized the equipment in violation of the automatic stay, Petty, pursuant to the reorganization plan, had reopened the Royal Rapids taproom by producing beer using the equipment. *Id.* at 6. "[M]any of [Petty's] loyal customers had started patronizing [that] taproom, and . . . the venture had been profitable in its first month of operations." *Id.* Moreover, Petty's business is "known for producing several highly rated and award-winning" beers—produced using the equipment. *Id.* at 3–4.

Like *White Mountain*, arbitrating the automatic stay violation would "undermine the confidence of [creditors and] other parties doing business with [Petty]" in Petty's ability to reorganize because without the equipment, Petty cannot brew beer for the taproom. *In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 170. And if the beer is not flowing, neither is the revenue that is integral to Petty's reorganization. *See In re Relativity Fashion, LLC*, 696 F. App'x at 30. Finally, unlike *Hill*, Petty is a Chapter 11 debtor, the bankruptcy case is ongoing, and the automatic

stay is still in effect. Taken together, these facts show that Petty's reorganization—and the revenue essential to that reorganization—is threatened by arbitration. Therefore, in this case, arbitration conflicts with the underlying purpose of the Bankruptcy Code.

3. Arbitration Threatens the Interests of Petty's Other Creditors.

Another factor in favor of denying arbitration is if arbitration of the claim would harm the interests of creditors who are not parties to the arbitration. "A bankruptcy judge does not abuse his discretion when he refuses to compel arbitration where the determination in such a proceeding would affect the amount, existence and priority of claims to be paid out of the general funds and, thus, involve the interests of other creditors." *In re F & T Contractors, Inc.*, 649 F.2d 1229, 1232 (6th Cir. 1981). This reflects "the prime bankruptcy policy of equality of distribution among creditors of the debtor," H.R. Rep. No. 95-595, at 178 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138, which in turn "prevent[s the creditors'] race to the courthouse to dismember the debtor." 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he equitable distribution of [the debtor's] property among the debtor's creditors" is "[a] critical feature[] of every bankruptcy proceeding." *Katz*, 546 U.S. at 363–64; *see also In re Thorpe Insulation Co.*, 671 F.3d at 1022–23; *In re EPD Inv. Co., LLC*, 821 F.3d at 1150; *In re Eber*, 687 F.3d at 1125; *In re Gandy*, 299 F.3d at 500; *Hill*, 436 F.3d at 108; *In re Nat'l Gypsum Co.*, 118 F.3d at 1069; *Moses*, 781 F.3d at 63; *In re White Mountain Mining Co., L.L.C.*, 403 F.3d at 170. So when the bankruptcy case has closed and all debts have been discharged, there is no concern that the estate will not be distributed equally to creditors if the claim is subject to arbitration. *Hill*, 436 F.3d at 110.

"[W]hen assets are limited, distribution becomes relative and, thus, contractual relationships that were originally bilateral become *ipso facto* multilateral by the happenstance

of bankruptcy." Albertini, *supra*, at 604. The determination of pre-petition contractual rights can "increase one creditor's pro-rata share in the estate while simultaneously decreasing the pro-rata shares of others." *Id.* at 604–05. Compelling arbitration for a given claim can advantage one creditor over others—perverting bankruptcy's procedural protections—and "thereby menacing the equality of treatment of creditors." *Id.* at 605; *see also* Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 525 (2009) ("[C]ourts worry about the potential for decisions made in arbitration to skew the bankruptcy process by favoring one creditor over others. This is partly a substantive concern—a creditor should not receive more than its fair share—but also reflects concerns about process, specifically a reluctance to allow decisions affecting the estate to be made without the input of other creditors."). Creditor interest and intervention—the "Right to Be Heard"—in debtor disputes is so important to bankruptcy proceedings that it is explicitly provided for in the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 2018 ("[T]he court may permit any interested entity to intervene generally or with respect to any specified matter.").

In other words, "the Code's central concern for equality among like creditors is undermined whenever a second core-claims adjudicator exists." *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2308 (May 2004). That reasoning caused one court to note that "it is hard to see how Congress would have meant to turn over [a] . . . determination, in which . . . other parties in interest would have the right to intervene . . . to an arbitration panel in a two-party dispute." *In re Hostess Brands, Inc.*, 2013 WL 82914, at *4 (Bankr. S.D.N.Y. Jan. 7, 2013) (internal citation omitted).

For example, in *EPD*, the court denied arbitration of a disallowance claim because it "amount[ed] to millions of dollars and constitute[d] a sizeable portion of the estate, making the

delays, extra expense, and preclusive findings arising from arbitration more likely to adversely impact the claims of other creditors." *In re EPD Inv. Co., LLC*, 2014 WL 12597148, at *6 (C.D. Cal. Aug. 29, 2014), *aff'd*, 821 F.3d 1146 (9th Cir. 2016). Similarly, the bankruptcy court in *Charles P. Young* denied arbitration because the "creditor body . . . has a vital interest in the debtor's estate [and would not be] allowed to participate in the arbitration proceeding." *In re Charles P. Young Co.*, 111 B.R. 410, 418 (Bankr. S.D.N.Y. 1990).

Here, if an arbitrator were to grant Wildflowers relief from the automatic stay, there would be no way to brew beer and no path for Petty to reorganize. ER at 6–7. Petty's creditors would receive even less than the forty cents on the dollar that Petty had proposed for the plan. *Id.* at 6. And unlike those other creditors, Wildflowers has already satisfied nearly all of its initial claim. After Great Wide Open's Chapter 7 bankruptcy case, Wildflowers recovered $31.1 million of its $33.2 million claim against Great Wide Open and Petty. *Id.* at 5, 6 n.3.

Wildflowers' seizure of the equipment, without notifying the bankruptcy court, is precisely what the automatic stay—bankruptcy's procedural keystone—is meant to prevent: a race by creditors "to pursue their own remedies against the debtor's property" where "[t]hose who acted first . . . obtain payment of the claims in preference to and to the detriment of other creditors." S. Rep. No. 95-989, at 49 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835. "The automatic stay . . . benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others." *City of Chicago v. Fulton*, 592 U.S. ___, ___ (2021) (slip op., at 2); *see also* Julian Ellis, *A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings*, 92 AM. BANKR. L.J. 141, 147 (2018) (The automatic stay "protect[s] creditors from one another" by "foreclose[ing] the opportunity for creditors independently to pursue prepetition debts that are subject to the jurisdiction and authority

of the bankruptcy court, absent obtaining express relief from the court."). Thus, Petty's other creditors are threatened by arbitration, and a bankruptcy court should deny it.

While there may be cases where arbitration does not create an inherent conflict with the Bankruptcy Code, it is not this one. Petty's claim against Wildflowers arises from the Bankruptcy Code itself, and the claim—which seeks to protect Petty's most valuable and essential asset—is critical to Petty's successful reorganization and the interests of his other creditors. Therefore, this case presents an inherent—and clear and manifest—conflict between arbitration and the Bankruptcy Code, and the Thirteenth Circuit was correct in holding that the bankruptcy judge retained discretion to deny arbitration accordingly.

II. In the Alternative, the FAA, Enacted in 1926, Did Not Abrogate the Bankruptcy Act of 1898.

Epic instructs that when "approaching a claimed conflict," the court "come[s] armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." 138 S. Ct. at 1624. So, when Congress enacted the FAA in 1926—nearly 30 years after the Bankruptcy Act of 1898 ("the Act")—without explaining how the new law affected existing bankruptcy practices regarding arbitration agreements, the FAA did not abrogate the Act or those practices.

In pre-FAA cases, bankruptcy referees had discretion to enforce or deny agreements to arbitrate. Bankruptcy Act of 1898 § 26a ("the trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate"); *see also Arbitration of Controversies*, COLLIER ON BANKRUPTCY ¶ 612 (Frank B. Gilbert & Fred E. Rosbrook eds., 12th ed., 1921) ("The granting of the order [allowing parties to arbitrate] is discretionary[.]"); *In re Patterson-MacDonald Shipbuilding Co.*, 284 F. 277 (W.D. Wash. 1922), *aff'd*, 292 F. 700 (9th

Cir. 1923) ("[T]he parties proceeded in harmony with the contract provisions" for arbitration after "the master held . . . either party had a right to arbitration."); *In re L.M. Axle Co.*, 3 F.2d 581, 582 (6th Cir. 1925) ("[T]he trustee, the bankrupt, or any creditor who has proved his debt may file a petition for authority to settle any debts or other claims due or belonging to the estate of the bankrupt.") (internal citations omitted); *Lehman v. Rosengarten*, 23 F. 642, 644 (C.C.E.D. Mich. 1885) ("[The debtor] could not submit controversies to arbitration, or settle such controversies by agreement, except under the direction of the court."). And nothing in the FAA clearly or manifestly indicated that Congress wished to overturn that practice.

After the FAA was enacted, bankruptcy referees continued to exercise discretion on whether to enforce arbitration agreements, confirming that courts did not believe the FAA abrogated the Act in regard to arbitration. *See, e.g.*, *Bohack Corp. v. Truck Drivers Local Union No. 807, Int'l Bhd. of Teamsters*, 431 F. Supp. 646, 653–54 (E.D.N.Y.), *aff'd*, 567 F.2d 237 (2d Cir. 1977) ("[I]n ordering arbitration a bankruptcy judge can[not] relinquish to the arbitrator decisions that touch on special bankruptcy interests."); *L. O. Koven & Bro., Inc. v. Local Union No. 5767, United Steelworkers of Am., AFL-CIO*, 381 F.2d 196, 203, 205 (3d Cir. 1967) ("[Q]uestions involving an interpretation of the Bankruptcy Act should be decided by the [bankruptcy] court[.]"); *Johnson v. England*, 356 F.2d 44, 49, 52 (9th Cir. 1966) ("The appellants have not called to our attention any case holding that ordinary bankruptcy proceedings should be suspended to permit a processing of complaints" in arbitration); *In re Muskegon Motor Specialties Co.*, 313 F.2d 841, 842–43 (6th Cir. 1963) ("Whether the bankruptcy court should surrender its jurisdiction to another tribunal involved the exercise of judicial discretion.").

To be sure, the Bankruptcy Act of 1898 was replaced by the Bankruptcy Reform Act of 1978. But the later statute altered the Bankruptcy Act of 1898 by expanding bankruptcy courts'

jurisdiction. *Zimmerman v. Cont'l Airlines, Inc.*, 712 F.2d 55, 58–59 (3d Cir. 1983); *see also* S. Rep. 95-989, at 17 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5803 ("A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court[.]"). Congress clearly intended to enlarge bankruptcy courts' procedural powers, including the discretion to deny arbitration when necessary.

Therefore, according to *Epic,* the absence of a congressional command in the FAA leads to the conclusion that the bankruptcy courts' pre-FAA practice regarding arbitration survived the FAA's enactment. Thus, the bankruptcy judge in this case was within his discretion to deny the enforcement of the arbitration agreement.

III. On the Merits, Section 362(c)(3)(A) Does Not Terminate the Automatic Stay with Respect to Property of the Estate in Accordance with the Statute's Plain Meaning, Policy Objectives, and Congressional Intent.

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it created section 362(c)(3), which altered the automatic stay for first-time repeat filers. H.R. Rep. No. 109-31(1), 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138. Specifically, it requires certain repeat filing debtors to petition the bankruptcy court to extend the automatic stay beyond 30 days. 11 U.S.C. § 362(c)(3). Otherwise, after 30 days, the stay terminates "with respect to the debtor." *Id.* at § 362(c)(3)(A).

The majority of courts, including the Thirteenth Circuit, agree that section 362(c)(3)(A) affects the automatic stay with respect to the debtor only. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 229–30 (5th Cir. 2019); *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813, 815 (B.A.P. 10th Cir. 2008). This view follows the plain meaning of the statute, shown through the text of the provision and its context. It also comports with the congressional intent and policy objectives underlying the provision.

However, the minority rule, articulated by the petitioner and the dissent below, argues that section 362(c)(3)(A) not only applies "with respect to the debtor," but it also applies to property of the estate. *See Smith v. State of Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581, 591 (1st Cir. 2018); *In re Holcomb*, 380 B.R. at 815. The minority rule ignores the plain meaning of the statute and contradicts both Congressional intent in enacting BAPCA and the policies underlying the Bankruptcy Code. Therefore, this Court should affirm the interpretation adopted by the majority of courts and the Thirteenth Circuit.

A. The Plain Meaning of Section 362(c)(3)(A) Shows that the Automatic Stay Does Not Terminate with Respect to Property of the Estate.

When addressing questions of statutory interpretation, the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Section 362(c)(3)(A) provides that if a case is filed by an individual debtor under Chapter 7, 11, or 13 and the debtor had another case pending within the preceding year that was dismissed, "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case[.]" 11 U.S.C. § 362(c)(3)(A). This provision has a plain and unambiguous meaning for three reasons.

First, the plain text of "shall terminate with respect to the debtor" unambiguously supports the majority interpretation that the stay terminates *only* with respect to the debtor, and not the estate. *Rose*, 945 F.3d at 230. "There is no mention of the Estate in the text. There are no fuzzy words; there are no hanging paragraphs; there are no words requiring a dictionary." *Rinard v. Positive Invs., Inc. (In re Rinard)*, 451 B.R. 12, 20, 24 (Bankr. C.D. Cal. 2011) (applying the plain meaning rule to hold that the automatic stay was not terminated with respect to property of the

estate under § 362(c)(3)(A)); *See also Bankers Trust Co. of Ca., N.A. v. Gillcrese (In re Gillcrese)*, 346 B.R. 373, 376 (Bankr. W.D. Pa. 2006) ("Even though the provision may be 'awkward, and even ungrammatical . . . that does not make it ambiguous on the point at issue.'") (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)). Thus, since the text is unambiguous, the plain meaning must be followed.

While section 362(c)(3)(A) does not state "with respect to the debtor *and the debtor's property*" and "no court has read section § 362(c)(3) as terminating the stay only for actions against the debtor," ER at 29, the language "and the debtor's property" is unnecessary to terminate the stay of actions against the debtor's property. Section 362(c)(3)(A) states "the stay under subsection (a) with respect to any action taken *with respect to a debt or property securing such debt* . . . shall terminate with respect to the debtor." 11. U.S.C. § 362(c)(3)(A) (emphasis added). Because "with respect to the debtor" modifies the termination of the stay of actions taken "with respect to a debt or property securing such debt," property of the debtor securing a debt is affected by the stay termination. *In re Jones*, 339 B.R. 360, 365 (Bankr. E.D.N.C. 2006).

Second, the context of section 362(c)(3)(A) supports the plain meaning and majority interpretation. Under section 362(c)(3)(A), "the stay under subsection (a) . . . shall terminate with respect to the debtor." *Id.* Section 362(a), in turn, automatically stays certain actions taken in three categories: against the debtor, 11 U.S.C. § 362(a)(1), (2), (6), against the property of the debtor, 11 U.S.C. § 362(a)(5), and against the property of the estate, 11 U.S.C. § 362(a)(2), (3), (4). Therefore, as section 362(c)(3)(A) operates to partially terminate the automatic stay in section 362(a), the plain language "with respect to the debtor" operates to include two categories of actions taken—against the (1) debtor and the (2) debtor's property—and excludes the remaining category of actions taken, against property of the estate. *Rose*, 945 F.3d at 230; *In re Holcomb*, 380 B.R. at

816 (noting that "with respect to the debtor" is not used in any other provision of § 362 as incorporating the debtor, the debtor's property, and the property of the estate); *In re Williams*, 346 B.R. 361, 367 (Bankr. E.D. Pa, 2006) (noting the property of the estate is distinct from the debtor and the debtor's property).

Third, there is no textual indication that Congress intended section 362(c)(3)(A) to terminate the automatic stay with respect to property of the estate. Congress knows how to include language that clearly applies to property of the estate. Section 362(a)(2) applies the automatic stay to "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case." 11 U.S.C. § 362(a)(2). Likewise, section 362(c)(1) provides the length of the stay for "acts against property of the estate," 11 U.S.C. § 362(c)(1), while section 362(c)(2) provides a different length of the stay for "any other act." 11 U.S.C. § 362(c)(2). *In re Jones*, 339 B.R. at 364. Similarly, section 362(h)(1) specifies that "the stay . . . is terminated with respect to personal property of the estate or of the debtor[.]" 11 U.S.C. § 362(h)(1). Thus, if Congress intended the automatic stay to terminate with respect to property of the estate, it would have included language indicating such. *See In re Jones*, 360 B.R. at 364; *In re Tubman*, 364 B.R. 574, 583–84 (Bankr. D. Md. 2007).

Congress also knows how to terminate the stay in its entirety. Section 362(c)(4), which was enacted concurrently with section 362(c)(3), limits the automatic stay when the debtor had two or more cases dismissed within the preceding year. 11 U.S.C. § 362(c)(4). The provision simply provides that "the stay under subsection (a) shall not go into effect upon filing of the later case[]" without any limiting language of "with respect to the debtor." 11 U.S.C. § 362(c)(4)(A)(i). "[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." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation omitted). Section 362(c)(4) is routinely interpreted as precluding the automatic stay in its entirety. Thus, the inclusion of "with respect to the debtor" in section 362(c)(3) indicates its application does not terminate the stay in its entirety. *Rose*, 945 F.3d at 231; *In re Williams*, 346 B.R. at 368; *In re Harris*, 342 B.R. 274, 279–280 (Bankr. N.D. Oh. 2006).

Perhaps under the Thirteenth Circuit's interpretation of section 362(c)(3)(A) "substantially all of a debtor's assets will be property of the estate[]" and the statutory scheme for extending the stay under section 362(c)(3)(B) will "rarely come into play[.]" ER at 29. Such a result does not indicate that the interpretation is incorrect. That a particular application of a statute is unlikely does not render section 362(c)(3)(A) and section 362(c)(3)(B) inconsistent. *In re Jones*, 339 B.R. at 364.

Finally, "with respect to the debtor" cannot be interpreted as distinguishing between joint debtors, rather than between the debtor and property of the estate, because "[j]oint bankruptcy petitions are jointly administered but generally keep the rights of the two debtors separate." *In re Smith*, 910 F.3d at 584–85; *see also In re Williams*, 533 B.R. 557, 563 (Bankr. N.D. Texas, 2015) ("Bankruptcy courts analyze each debtor separately for the purposes of the automatic stay."); *In re Parker*, 336 B.R. 678, 681 (Bankr. S.D.N.Y., 2006) (noting that § 362(c)(3) and § 362(c)(4) both "focus on, and apply to, the acts of the specific debtor, rather than joint debtors in the aggregate[]"); *In re Haisley*, 350 B.R. 48, 50–51 (Bankr. E.D. La. 2006) (applying "section 362(b)(4) to each Debtor separately[]"); *Stancil v. Bradley Inv., LLC (In re Stancil)*, 473 B.R. 478, 483 (Bankr. D.D.C. 2012) (holding that the individual debtor of an improper joint petition retained the benefit of the automatic stay). Thus, "even without the addition of 'with respect to the debtor,' it would be clear that § 362(c)(3)(A) is inapplicable to the non-repeat-filing spouse." *In re Smith*,

910 F.3d at 585. Taken together, section 362(c)(3)(A)'s plain meaning and context lead to only one conclusion: the majority rule is correct, and the automatic stay terminates only "with respect to the debtor."

B. Even if the Plain Meaning Were Ambiguous, the Majority Rule Is Consistent with Congressional Intent and the Policy Objectives of the Bankruptcy Code.

Only when the plain meaning is ambiguous do courts look to congressional intent to interpret the statute. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). And while the plain meaning of section 362(c)(3)(A) is not ambiguous, the congressional intent underlying section 362(c)(3)(A) similarly supports the majority view that the statute does not terminate the automatic stay with respect to property of the estate.

BAPCPA's stated purpose is "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 109-31(1), at 2 (2005, *reprinted in* 2005 U.S.C.C.A.N. 88, 89. The true "heart of [BAPCPA's] consumer bankruptcy reforms," *id.*, is not serial filings, as the dissent stated, ER at 31. Rather, it is "the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 109-31(1), at 2 (2005) *reprinted in* 2005 U.S.C.C.A.N. 88, 89. The provisions aimed at deterring serial bankruptcy filings are merely "also . . . include[d]." *Id.*

Given that peripheral goal, the Thirteenth Circuit's interpretation reflects Congress' intent to balance deterring repeat filings with protecting creditors. Comparatively, the minority interpretation espoused by the dissent punishes creditors for the debtor's actions by allowing a single creditor to race to the courthouse, bring an action against property of the estate, and prevent

that property from being used as part of a reorganization plan or from being equitably distributed among all of the creditors.

1. Adopting the Majority Rule Reflects Congress' Intent to Balance Deterring Repeat Filings with Protecting Creditors.

When read as applying only "with respect to the debtor," section 362(c)(3)(A) penalizes and places responsibility on debtors by terminating the automatic stay only with respect to them. Offending debtors are vulnerable to *in personam* proceedings by secured creditors and acts against non-estate property. *In re Williams*, 346 B.R. at 369–70; *see also In re Thomas*, 618 B.R. 585, 587–88 (Bankr. M.D. Fla., 2020) (finding no violation of the automatic stay when a creditor refused to cash a check for the debtor unless the debtor repaid its debt owed to the creditor, due to § 362(c)(3)).

Likewise, the Thirteenth Circuit's interpretation of section 362(c)(3)(A) comports with Congress' intent that "the consequences of repeat filings to be different, and potentially more severe, as the number of successive filings increase." *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 373 (9th Cir. BAP, 2011) (internal quotation omitted). The negative consequences of repeat filings increase as the number of previous filings increases. When the debtor had no bankruptcy cases dismissed in the preceding year, the automatic stay applies to the debtor, the debtor's property, and property of the estate. 11 U.S.C. § 362(a). When the debtor had one bankruptcy case dismissed in the preceding year, the automatic stay terminates with respect to the debtor and the debtor's property within 30 days. 11 U.S.C. § 362(c)(3). When the debtor had two or more bankruptcy cases dismissed in the preceding year, no stay is imposed automatically with respect to the debtor, the debtor's property, or the property of the estate. 11 U.S.C. § 362(c)(4); *see also In re Reswick*, 446 B.R. at 372–73. The majority interpretation of section 362(c)(3)(A) provides an appropriate penalty for debtors who had one case dismissed within the preceding

year—harsher than if they did not have another case dismissed and more lenient than if they had two or more cases dismissed. *See In re Roach*, 555 B.R. 840, 847–48 (Bankr. M.D. Ala. 2016); *see also* Michael Miller, *Untangling the Web of § 362(c)(3)(A) and Its Legislative History*, 39 AM. BANKR. INST. J. 22 (Apr. 2020) (finding that the legislative history supports the majority view since Congress intended for "a graduated method of preventing successive filings," including the intermediate method provided by the plain meaning of section 362(c)(3)(A)).

Further, the majority approach protects creditors from other creditors, thereby achieving one of the primary purposes of bankruptcy law: "the policy of obtaining a maximum and equitable distribution for creditors." *Holcomb*, 380 B.R. at 816 (internal quotation omitted). *See City of Chicago v. Fulton*, 592 U.S. ___, ___ (2021) (slip op., at 2) ("The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others."). Under the majority interpretation of section 362(c)(3)(A), the automatic stay continues to protect property of the estate from an attack by a single creditor looking to earn a windfall at the expense of other creditors. *See In re Rinard*, 451 B.R. at 20. In turn, property of the estate is evaluated to determine if there is equity in the property that may be liquidated and distributed to creditors, or if the property will be beneficial to reorganization efforts. *See In re Williams*, 346 B.R. at 369; *Holcomb*, 380 B.R. at 816. Thus, it is the creditors, rather than the debtor, who benefit primarily from protecting property of the estate. ER at 29.

The middle ground provided by section 362(c)(3)(A) punishes the debtor by allowing creditors to continue actions against the debtor and even enforce judgments against non-estate property. But it does not punish creditors by turning bankruptcy into an inequitable, inefficient, first-come, first-served run on the property of the estate. Therefore, by terminating the automatic

stay with respect to the debtor, but not the estate, the Thirteenth Circuit's interpretation furthers the purposes of the Bankruptcy Code to maximize the value of and equitably distribute property of the estate.

2. The Minority Interpretation of Section 362(c)(3)(A) in the Chapter 7 Context Creates Inconsistencies that Contradict Congressional Intent.

The statutes governing the automatic stay—including section 362(c)(3)—are generally applied across all bankruptcy chapters. 11 U.S.C. § 103(c); 1 COLLIER ON BANKRUPTCY ¶ 1.05 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[T]he [automatic] stay will be triggered in any case under the Code[.]"). Yet no court has adopted the minority rule in a Chapter 7 context, and courts faced with Chapter 7 cases have rejected the minority rule, even when contrary to the Bankruptcy Appellate Panel decision in their circuit. *See, e.g.*, *In re Rinard*, 451 B.R. at 12; *In re Thu Thi Dao*, 616 B.R. 103 (Bankr. E.D. Cal. 2020). That is because applying the minority rule to Chapter 7 would "establish[] a regime in terms of time and proof that is impossible for a Chapter 7 trustee to satisfy." *Id.* at 117.

In a Chapter 7 case, a trustee, rather than the debtor, is appointed to control property of the estate. 11 U.S.C. § 704(a). Under the minority rule, in order to protect property of the estate, within 30 days a trustee would have to establish with "clear and convincing evidence" both that the debtor filed in good faith and that the case will end in discharge. 11 U.S.C. § 362(c)(3)(C); *In re Tubman*, 364 B.R. at 580–81) (holding that hearings not completed within 30 days are ineligible for extension of stay). The trustee gathers evidence about the debtor through the meeting of the creditors. 11 U.S.C. § 341(a). The meeting date is set independently by the U.S. Trustee and must occur between 20 and 60 days after case commencement. Fed. R. Bankr. P. 2003(a). Thus, in cases where the meeting of the creditors is set by the U.S. Trustee 30 days or more after case commencement, the Chapter 7 trustee would be deprived of its ability to equitably distribute

property of the estate, a fundamental power of trustees and protection for creditors, due to the actions of the debtor. *In re Thu Thi Dao*, 616 B.R. at 111. No other provision subjects property of the estate, central to the bankruptcy process, to such a high evidentiary standard under a timeline that is difficult at best and impossible at worst.

Even if the petitioner could point to a Chapter 13 case where the minority rule may apply without inconsistency, there is no such case in the Chapter 7 context. And, if the minority rule cannot be applied generally across all bankruptcy chapters, it must fail because section 362 applies to every case. Further, "[e]very Chapter 11 and 13 case has the potential to be converted to Chapter 7 by court order." *In re Thu Thi Dao*, 616 B.R. at 116. Therefore, the Thirteenth Circuit was correct to adopt the majority rule, the only interpretation of section 362(c)(3) that can be applied consistently across all chapters of the bankruptcy code.

C. Holding that the Automatic Stay Terminated with Respect to Petty, But Not His Brewing Equipment Gives Effect to Section 362(c)(3)(A)'s Plain Text, Policy Objectives, and Congressional Intent.

This case aptly demonstrates how the Thirteenth Circuit's interpretation of section 362(c)(3)(A) comports with the statute's plain meaning and furthers Congress' intent in enacting the BAPCPA. Petty's only significant asset is the brewing equipment, property of the estate that Wildflowers seized without asking the bankruptcy court's leave. ER at 5, 6–7. Petty's reorganization plan—reopening his tap rooms and using the equipment to brew beer—depends upon his continued use of the equipment. *Id.* at 6–7. Before Wildflowers seized the equipment, Petty had reopened a taproom, using the equipment to brew beer, and generated a profit. *Id.* at 6. As a result of Wildflowers seizing the equipment, Petty's taproom failed. *Id.* at 7. Under the minority rule, Wildflowers will foreclose on the equipment, Petty's reorganization plan will fail,

and Petty's other creditors will receive nothing in the bankruptcy. Only the interests of Wildflowers, who satisfied nearly its entire claim in Petty's Chapter 7 bankruptcy case, are served.

In contrast, under the Thirteenth Circuit's holding, the equipment remains protected by the automatic stay, and Petty can use the equipment to generate profits, which will benefit all creditors, including Wildflowers. Moreover, Petty is still punished for his failure to extend the automatic stay under section 362(c)(3)(A). For example, Wildflowers can continue its arbitration proceedings against Petty—regarding Petty's breach of contract on the guaranty—and even enforce a judgment against property outside of the estate. This punishment is proportional to Petty's accidental filing error and targets Petty, as the offending actor, specifically.

Thus, as the plain text of section 362(c)(3)(A) commands, punishment is meted out "with respect to [Petty,] the debtor." And, consistent with the intent of BAPCPA and the policies undergirding the Bankruptcy Code, the value of the Petty's estate—and the beer and profits flowing from it—can still be protected by the automatic stay and maximized for equitable distribution among creditors. Therefore, the Thirteenth Circuit was correct to join the majority of courts in holding that section 362(c)(3)(A) only terminates the automatic stay "with respect to the debtor."

Conclusion

This Court should affirm the judgment of the Thirteenth Circuit. First, in this case, there is an inherent conflict between arbitration of an automatic stay violation and the underlying purposes of the Bankruptcy Code. Alternatively, even if *Epic* applies, the FAA did not abrogate the pre-existing bankruptcy practice whereby referees had discretion to deny arbitration of bankruptcy claims. Therefore, the bankruptcy judge in this case correctly denied arbitration. Second, by the plain meaning of the statute, Congressional intent, and underlying bankruptcy

policies, the automatic stay terminates only with respect to the debtor under 11 U.S.C. §362(c)(3)(A). Accordingly, the automatic stay protected Petty's brewing equipment, and Wildflowers violated the statute when it seized the equipment. For the foregoing reasons, the Thirteenth Circuit's judgment should be affirmed.

Respectfully Submitted,

Team 22

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