No. 20-1004

IN THE SUPREME COURT OF THE UNITED STATES

WILDFLOWERS COMMUNITY BANK,

Petitioner

v.

EARL THOMAS PETTY,

Respondent.

On Writ Of Certiorari to the United States Supreme Court from the United States Courts of Appeals for the Thirteenth Circuit

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Brief of Petitioner Wildflowers Community Bank

Team 23
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362 and related judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

II. Whether 11 U.S.C. § 362(c)(3)(A) applies to property of a debtor's bankruptcy estate.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported as *In Re Earl Thomas Petty & Wildflowers Community Bank v. Earl Thomas Petty*, No. 19-0805, (13th Cir. 2020).

JURISDICTION

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

STATUTORY PROVISIONS

Federal Arbitration Act ("FAA"), 9 U.S.C

11 U.S.C. § 362(c)(3)(A)

> (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 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case;

STATEMENT OF THE CASE

This Court is being asked to reverse the decision of the United States Bankruptcy Court for the District of Moot that found that 11 U.S.C. § 362 and related judicial code provisions impliedly repealed the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. (R. at 2). Additionally, the Court is being asked to read the phrase "*with respect to the debtor*", provided in 11 U.S.C. § 362(c)(3)(A), as a termination of the entire estate, including property of a debtor's estate, when a debtor files more than one bankruptcy petition within the same year. (R. at 3).

A. Statutory and Regulatory Framework

Intersection of the Federal Arbitration Act and Bankruptcy

In 1926, Congress enacted the Federal Arbitration Act (FAA), which was designed to provide "quicker, more informal, and often cheaper resolutions for everyone involved. (R. at 8) See also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612. 1624 (2018). In 2018, the Supreme Court considered whether the National Labor Relations Act (NLRA) impliedly repealed the FAA. (R. at 9) See also *Epic*, 138 S. Ct. 1619. There, the Court determined that the NLRA does not reflect a clearly expressed and manifest intention to displace the FAA. *Id.* However, at this moment in time, the Supreme Court has not addressed issues concerning the intersection of arbitration and bankruptcy.

Section 362(c)(3)

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") in an effort to prevent bankruptcy abuses committed by serial filing debtors. (R. at 14). In fact, identical text from section 302 of the BACPA, titled

"DISCOURAGING BAD FAITH REPEAT FILINGS," ultimately became codified at 11 U.S.C. § 362(c)(3)(A). *Id*. That section provides, in pertinent part, that:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and *if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed*, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) –
>
> > (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease *shall terminate with respect to the debtor on the 30th day* after the filing of the later case....

11 U.S.C. § 362(c)(3)(A) (emphasis added) (R. at 14)

Section 362(c)(3)(B), outlines the process of determining whether a "motion of a party in interest for continuation of the automatic stay" past the thirtieth day should be granted. *See* 11 U.S.C. § 362(c)(3)(B). The party in interest is required to demonstrate that the second bankruptcy case was filed in good faith. *Id.* § 362(c)(3)(C). Section 362(c)(3), "for purposes of subparagraph (B), creates a rebuttable presumption that the case was not filed in good faith absent "clear and convincing evidence to the contrary." *Id.*

B. Factual Background and Procedural History

In eight years of business, Earl Petty had transformed Great Wide Open Brewery into one of the finest breweries in the State of Moot. (R. at 3-4). As demand for more beer swelled, Petty envisioned owning and operating Great Wide Open taprooms throughout the entire State of Moot. (R. at 4). In order to make this dream a reality, Petty needed capital to fund its expansion

plans. *Id.* So Petty then turned to its lender, Wildflowers Community Bank, who watched Great Wide-Open grow one of the largest credits in its loan portfolio. *Id.*

In September 2011, Wildflowers entered into a $35 million revolving credit agreement with Great Wide Open Brewery (the "Credit Agreement"). *Id*. In addition to the Credit Agreement, Petty contemporaneously executed a personal guaranty (the "Guaranty"). *Id.* In accordance with the Credit Agreement, Petty, in the event he could not honor his debts, respectably granted Wildflowers a first priority lien on substantially all of its assets. *Id.* Under the Guaranty, Petty unconditionally guaranteed repayment of the business's obligations. *Id.* To secure his guarantee, Petty granted Wildflowers a first priority lien on the equipment. *Id.*

Contained in both the Credit Agreement and the Guaranty are identical "Remedies" clauses, in the event Petty defaults on his loan, providing that, "Obligor grants to Wildflowers the right to enter any premises where collateral may be located for the purpose of repossessing collateral without the need for any prior judicial action." *Id.* Also, the agreements 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.*

In March 2018, Wildflowers first discovered that Great Wide Open closed three of its locations when one of its loan officers arrived at their front door, finding a sign that read, "Don't come around here no more." (R. at 5). As a result, in April 2018, Great Wide Open and Petty defaulted on their respective payment obligation under the Credit Agreement and the Guaranty. *Id.*

Wildflowers, worried this non-performing loan would soon gain the attention of federal bank regulators, sent a default letter to Great Wide Open and Petty. *Id.* On June 4, 2018, Wildflowers filed a demand for arbitration and a general state law breach of contract complaint against Petty with the American Arbitration Association. *Id.* Wildflowers sought the balance Petty then owed under the Credit Agreement, alleging approximately $33.2 million in damages. *Id.* The American Arbitration Association scheduled an initial conference in the arbitration proceeding for July 12, 2018. *Id.* That same day, Great Wide Open commenced a chapter 7 bankruptcy case and Petty filed his own chapter 11 case (the "Initial Bankruptcy Case") in Bankruptcy Court for the District of Moot. *Id.*

Petty, however, failed to timely file the essential documents and, consequently, the Initial Bankruptcy Case was dismissed on August 27, 2018. *Id.* Five months later, on January 11, 2019, Petty commenced his second chapter 11 bankruptcy case (the "Second Bankruptcy Case"). *Id.* Along with filing the petition in his Second Bankruptcy Case, Petty filed a chapter 11 plan of reorganization that proposed to pay his creditors, including Wildflowers, forty cents on the dollar from his income over a period of five years. (R. at 6). Petty negotiated settlements with several of his other creditors prepetition, incorporating them into his plan. Unfortunately, Petty never attempted such negotiations with Wildflowers. *Id.*

The day the Second Bankruptcy Case commenced, Petty informed the court that he had reopened one of its locations as a sole proprietorship under the name "Full Moon Fever Brewing." *Id.* However, Petty had made a crucial mistake: Petty 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.* At the commencement of the Second Bankruptcy case, the thirty-day window to file a motion to extend the automatic stay began. *Id.* Wildflowers waited the full thirty

days, but did not take immediate action. *Id.* Rather, Wildflowers waited an extra two days before sending a repossession company to Petty's taproom on February 12, 2019. *Id.* There, the equipment was peacefully repossessed subject to the first priority lien granted by Petty to Wildflowers in relation with the Guaranty. *Id.* Shortly thereafter, Petty filed a motion in the Second Bankruptcy Case alleging that Wildflowers violated the automatic stay and seeking $500,000 in damages under section 362(k). *Id.*

On March 5, 2019, Wildflowers filed a response to the motion asserting, pursuant to section 362(c)(3)(A), that no automatic stay existed with respect to the property of the estate, including the equipment because Petty had a prior bankruptcy case dismissed within one year of the filing of the Second Bankruptcy Case. (R. at 7). Significantly, Petty also failed to file a motion seeking to extend the automatic stay pursuant to section 362(c)(3)(B). (R. at 7).

In addition, Wildflowers asserts that the arbitration provision in the Guaranty is binding. *Id.* That is, if Petty is compelled to bring any claims against Wildflowers then it must be brought in the pending arbitration proceeding. *Id.* However, the bankruptcy court ruled in favor of Petty, holding that enforcement of the arbitration agreement would conflict with the Bankruptcy Code. *Id.* Thus, Wildflowers' request to compel arbitration was denied. *Id.* In its holding, the bankruptcy court ruled on the assumption that a creditor may not take action with the respect to the property of a debtor's estate, regardless of whether the automatic stay is extended under 362(c)(3)(B). *Id.* The court found Wildflowers violated the automatic stay because the court believed the equipment was property of Petty's bankruptcy estate. *Id.* In the end, the bankruptcy court awarded Petty $200,000 in compensatory damages to be paid by Wildflowers. *Id.*

In disagreement with the court's ruling, Wildflowers timely sought a direct appeal of the two issues addressed today pursuant to 28 U.S.C. § 158(d). *Id.*

ARGUMENT SUMMARY

I. 11 U.S.C. § 362 does not impliedly repeal Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. When Congress created the FAA, they implemented a strong pro-arbitration federal. While Congress intended the FAA to be rigorously enforced, it can be overridden or impliedly repealed if the party opposing arbitration can show that Congress intended to set the FAA aside in favor of the other statutory interest. This Congressional intent can be implied from textual arguments, from the legislative history, or from an inherent conflict. If an inherent conflict exists, the court may presume that Congress intended it to set the FAA aside in favor of the other statutory interest.

In bankruptcy law, an inherent conflict exists where there is a core matter that jeopardizes an objective of the Bankruptcy Code. A core matter is something that implicates an integral component of bankruptcy. Conversely, a non-core matter is something only tangentially related to bankruptcy. If a matter is determined to be core, the court will further ask what objective of bankruptcy law is being jeopardized.

Petty is unable to do so because he is not entitled to the automatic stay violation that he alleges. Because Petty filed for chapter 11 bankruptcy twice in one year, there is a presumption that he has filed in bad faith. Congress intended to protect creditors and discourage serial bankruptcy filers by refusing to extend the automatic stay to parties who, like Petty, file more than one chapter 11 bankruptcy petition in one calendar year. Even if Petty can convince this Court that the case involves a core matter, he is unable to show that any objectives of bankruptcy law are jeopardized. Therefore, the lower court improperly concluded that it had the requisite discretion to override the FAA.

II. Regardless of whether this Court finds that the FAA was repealed, Wildflowers was well within its right to seize Petty's assets because the automatic stay protecting him under 11 U.S.C. § 362(c)(3)(A) terminated as an operation of law. This Court has often held that any statute subject to two or more meanings is ambiguous. Section 362(c)(3)(A) has been correctly understood to mean that the automatic stay protecting bankruptcy debtors terminates for both serial filers and their bankruptcy estates. However, several courts have also understood that Section to mean that the stay terminates with respect to the debtor but not the debtor's estate. The latter interpretation purports to be more faithful to the text, yet it falls utterly short of the most logical understanding of the plain language of Section 362(c)(3)(A).

When viewed within the context of the whole Statute, the stay must terminate for both the debtor and the estate. To hold otherwise not only ignores the context of the whole statute but causes Section 362(c)(3)(A) to be superfluous and fails to achieve Congress's purpose in enacting Section 362(c)(3)(A). *See* H.R. Rep. No. 109-31(I) (2005). Both the plain language of the text and the legislative history leads to the conclusion that the stay must terminate for both the serially filing debtor and the estate. Lest courts should assume unchecked legislative authority, this Court should find that Section 362(c)(3)(A) requires the stay to terminate with respect to the debtor and his bankruptcy estate.

ARGUMENT

I. 11 U.S.C. § 362 and related judicial code provisions do not impliedly repeal the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

11 U.S.C. § 362 and related judicial code provisions do not impliedly repeal the FAA, 9 U.S.C. §§ 1 et seq.

11 U.S.C.A. § 11, or the Bankruptcy Code, was created by Congress to ensure an efficient and cost-effective way for debtors to resolve disputes with their creditors. The Honorable Judge Joan N. Feeney, et al., Bankruptcy Law Manual § 11.3, (5th ed. 2020). Chapter 11 bankruptcy helps the debtor sell all property of their estate and distribute the proceeds from the sale to their creditors. *Id*. An important and unique benefit of Chapter 11 bankruptcy is that upon filing a petition for an automatic stay, the court will mandate the protection of all assets of the debtor's estate from debt collection and lien enforcement. 11 U.S.C. § 362(a). The purpose of the stay is to help centralize all disputes concerning the property of the debtor's estate to prevent creating unnecessary and "uncoordinated proceedings in other arenas," *SEC v. Miller*, 808 F.3d 623, 630 (2d Cir.2015); citing *In re U.S. Lines, Inc*., 197 F.3d 631, 640 (2d Cir.1999). However, the stay is only automatic post-petition in the case of a debtor's first bankruptcy filing. 11 U.S.C. § 362(c)(3)(B). The Bankruptcy Code mandates that if an original Chapter 11 bankruptcy case was dismissed less than one calendar year prior to filing a second, the debtor in the second Chapter 11 bankruptcy case has 30 days to file a motion for continuation of the stay. *Id*. This is to protect creditors from serial bankruptcy filers. *Id*. Compliance with all aspects of the Bankruptcy Code is imperative, and includes the necessity for the debtor to file all necessary documents in a timely manner to avoid the potential consequence of dismissal. 11 U.S.C. § 1112(e).

In 1958, Congress established the FAA which integrated a pro-arbitration federal policy, *MBNA American Bank, N.A. v. Hill*, 436 F.3d 104, 107 (2d Cir.2006); citing *Moses H. Cone Mem'l Hosp. v. Mercury Constru. Copr.*, 103 S.Ct. 927, 941 (1983), and mandated that contractual arbitration agreement be rigorously enforced. *In re Mintze*, 434 F.3d 222, 229 (3d Cir.2006); citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). More specifically, the FAA details that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If an issue before the court is arbitrable, the court has a duty to stay the proceedings to allow the previously agreed upon arbitration to commence. *Hill*, 436 F.3d at 108; citing *Shearson/AM.Expess,Inc., v. McMahon*, 482 U.S. 220, 225 (1987).

The FAA mandate, like all statutory directives, can be overridden or impliedly repealed by a Congressional desire to do so. *Mintze*, 434 F.3d at 229. The party opposing arbitration must show that Congress intended to set aside the FAA mandate in favor of prioritizing other statutory rights, illustrating that arbitration is the rule, not the exception. *McMahon*, 482 U.S. at 227; *see also Hill*, 436 F.3d at 108. Such intent can be deduced from said statute's "text or legislative history, of from 'an inherent conflict between arbitration and the statute's underlying purposes.'" *Hill*, 436 F.3d at 108; citing *McMahon*, 482 U.S. at 227. If an inherent conflict exists, the court can conclude that Congress intended to set the FAA aside and may decline to enforce the arbitration agreement. *Hill*, 436 F.3d at 108. It is important to note, however, that the power to override the FAA mandate does not imply a hierarchy of superior law. *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1145, 1161 (3d Cir.1989).

Conflicts between the FAA and the Bankruptcy Code, while common, are not always *inherent* conflicts. *Hill*, 436 F.3d at 108 (emphasis added). Arbitration is a naturally

decentralized proceeding, encouraging a less-formal alternative to dispute resolution. *In re U.S. Lines, Inc*., 197 F.3d at 640. Bankruptcy law is commonly recognized as a centralized proceeding offering structure and efficiency to debtors. *Id*.; *but see Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d at 1157. This decentralized/centralized conflict is often described by many courts as "a conflict of near polar extremes," but varies in intensity on a case by case basis. *Id*.

Proceedings that involve a conflict that merely relates to bankruptcy is known as a non-core bankruptcy matter. *Hill*, 436 F.3d at 108; citing *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir.2000). The presumption in favor of arbitration will usually trump these lesser interests of adjudicating non-core bankruptcy matters. *Hill*, 436 F.3d at 108.

Conversely, a proceeding that involves more pressing bankruptcy concerns are known as core bankruptcy matters. *Id*. Core bankruptcy matters grant bankruptcy courts the jurisdiction to make a full adjudication. *Mintze*, 434 F.3d at 229. With the capacity to fully adjudicate, bankruptcy courts would have more discretion to refuse to compel arbitration, but not absolute discretion. *Hill*, 436 F.3d at 108. If the proceedings appear to implicate a core bankruptcy matter, there is an additional step called the *McMahon* standard, *Mintze*, 434 F.3d at 231, requiring the party opposing arbitration to further show that the matter would jeopardize an objective of the Bankruptcy Code. *Hill*, 436 F.3d at 108.; citing *In re U.S. Lines Ins.*, 197 F.3d at 640. Such objectives that cannot be jeopardized are (1) purely bankruptcy issues, (2) the necessity to protect creditors and the reorganization efforts of debtors from piecemeal litigation, and/or (3) the need for bankruptcy courts to enforce their own orders. *Hill*, 436 F.3d at 108; citing *Matter of National Gypsum Co.*, 118 F3d 1056, 1069 (5th Cir.1997). If one of these objectives appears to be jeopardized by the conflict, the Court may conclude that Congress intended to override the

FAA's pro-arbitration federal policy, and can refuse to compel the agreement to arbitrate. *Hill*, 436 F.3d at 108.

The determination of a core/non-core bankruptcy matters is a question of law, *Mintze*, 434 F.3d at 228; citing *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d at 1152; therefore, any previous determinations are not binding on this Court. *Mintze*, 434 F.3d at 228. The core/non-core determination only establishes the authority of the court; it does not stipulate that if a matter is found to be a core bankruptcy matter that it must therefore refuse to compel the agreement. *Id.*

A plaintiff's case must be based on a right created by the Bankruptcy Code, or risk the determination that the matter is a non-core issue. *Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987). In *Matter of Wood*, the plaintiffs filed a petition for Chapter 11 bankruptcy and were later charged with wrongfully issuing additional stock in their names. *Id*. at 91. The bankruptcy judge denied a motion to dismiss for lack of subject matter jurisdiction, and on appeal the district court held that the matter was a non-core proceeding and dismissed it for lack of subject matter jurisdiction. *Id*. at 91- 92. On appeal from the district court, the appellate court affirmed the holding, finding that the issue presented was not based on any right created by bankruptcy law but rather was a non-core, state contract action. *Id*. at 97.

Furthermore, the 11 U.S.C. § 362(a) automatic stay, while important, is not inherently jeopardizing to Bankruptcy Law. *Hill*, 436 F.3d at 110. As illustrated in *Hill,* MBNA American Bank ("MBNA") moved to dismiss claims brought in a class action suit against it for unjust enrichment. *Id.* at 106. Hill, a participant in the class action, alleged claims that the court found properly characterized as "core." *Id.* at 109. However, the court did not find that her claim would seriously jeopardize the objectives of the Bankruptcy Code, and therefore arbitration was entirely

appropriate. *Id.* The court concluded this from evidence that (1) arbitration would not interfere with the distribution of Hill's estate, (2) that the connection between Hill's claim and the underlying bankruptcy was weak, and (3) that because there is no indication from the statute that formal litigation is the only appropriate forum, a stay can be appropriately resolved in arbitration. *Id.* at 110.

Conversely, creditors who knowingly acquire and retain property of a bankruptcy estate after the commencement of a Chapter 11 bankruptcy case are in violation of the stay. *In re Chugach Forest Products, Inc.*, 23 F.3d 241, 246 (9th Cir.1994); citing *In re Abrams*, 127 B.R. 239, 242 (9th Cir.1991). In *Chugach*, logging corporation Chugach Timber and Forest Products hired Northern Stevedoring & Handling to load logs and lumber onto a vessel for transport. *In re Chugach Forest Products, Inc.*, 23 F.3d 246. at 243. Before Northern Stevedoring was paid for the work, Chugach declared bankruptcy under Chapter 11. *Id.* Northern Stevedoring went to district court and filed an *in rem* complaint to arrest the vessel used by Chugach to transport logs and lumber. *Id.* When the vessel was seized, Chugach claimed that Northern Stevedoring had violated the automatic stay under 11 U.S.C. § 362(a) of the Bankruptcy Code and sought sanctions. *Id.* The court found that Northern Stevedoring had only seized the vessel, not the actual property of Chugach's estate (the logs and lumber). *Id.* at 246. Further, Northern Stevedoring had done this using a court order, so to return the property would be to violate that court order. *Id.* The court acknowledged that had Northern Stevedoring not obtained this court order, that it would be in violation of the stay. Id.

Overall, a statute's underlying purpose is preserved when the potential litigant's cause of action is sufficiently and effectively served by arbitration. *Picard v. Credit solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir.2009); quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

Inc., , 473 U.S. 614, 626 (1985). As illustrated in *Picard*, the potential litigant sued a debt settlement company when she deemed the company failed to provide its promised services. *Id*. at 1251-52. The litigant argued that 15 U.S.C. § 1679c(a) created an inherent conflict between arbitration and the Credit Repair Organization Act ("CROA") thus invalidating the arbitration clause in her consumer agreement with the company and entitling her for formal litigation. *Id.* at 1253. After reading CROA in its entirety, the court concluded that, like two parallel train tracks, both arbitration and formal litigation could sufficiently serve the needs of the potential litigant. *Id.* Therefore, the potential litigant failed to demonstrate the inherent conflict and the court upheld the arbitration agreement. Id. 1256.

In the present case, the majority from the court below argues that the automatic stay granted in bankruptcy cases is fundamental to the Bankruptcy Code and that this indicates a core proceeding. R. at 11. Further, the lower court determined that this permits it to refuse to compel arbitration. R. at 11-12. All these statements, while generally true, are not applicable to the facts of this case for two reasons. First, Petty had no right to an automatic stay as this is his second chapter 11 bankruptcy filing within one calendar year, and he missed the 11 U.S.C. § 362(c)(3)(B) 30-day deadline for second-time bankruptcy filers. Petty is therefore not entitled to the stay he claims has been violated. Second and alternatively, if the issue is determined to be core, Petty cannot satisfy the *McMahon* standard and therefore cannot activate the necessary judicial discretion to refuse to compel arbitration. Without the ability to refuse to compel arbitration, there is no palatable argument that the FAA is impliedly repealed or overruled by the Bankruptcy Code. Therefore, the appellant prays this court will reverse the ruling of the lower court in favor of compelling arbitration.

A. The issue before the court is Non-Core, therefore Petty cannot activate the judicial discretion necessary to impliedly repeal the FAA, 9 U.S.C. §§ 1 et seq.

Petty filed a chapter 11 bankruptcy petition on or around July 12, 2019. R. at 5. This case was dismissed on or around August 27, 2019 due to Petty's failure to timely file his schedules of assets and liabilities. *Id*. Presumably to prevent similar mis-filings, Petty commenced a second chapter 11 bankruptcy case on or around January 11, 2019, with the help of a newly hired attorney. *Id*. Because the second case was filed within one calendar year of the original bankruptcy case, Petty's right to the automatic stay was limited to 30 days post-petition, unless Petty filed for the 11 U.S.C. § 362(c)(3)(B) extension. Despite Petty's decision to hire an attorney, he *still* missed this 30-day filing deadline. R. at 6. Petty's right to the stay expired with this deadline.

On or around February 12, 2019, two days after the expiration of the 30-day filing deadline, Wildflower sent a repossession company to repossess the equipment that comprised the security interest granted by the Guaranty. R. at 6. The fact that Wildflower waited exactly 32 days to repossess indicates that Wildflower was aware of 11 U.S.C. § 362(c)(3)(B) extension. When Petty filed a motion alleging that Wildflower violated the automatic stay, Petty claimed a right that had not existed for him since the dismissal of his first bankruptcy case on or around August 27, 2019. Petty's second bankruptcy filing was within one year of the previous one. Even if Petty was filing in good faith, there is a presumption that he is a serial bankruptcy filer, which 11 U.S.C. § 362(c)(3)(B) specifically sets out to prevent. Petty even hired an attorney to protect himself from the consequences of a misfiling, and even this didn't help him. A missed deadline was the nail in the coffin of his first bankruptcy case, and there are no facts present to suggest the court can or should ignore that precedent in this instance. Therefore, Wildflower was completely

within their right to repossess the equipment that belonged to them after the expiration of the 30 days.

Like in *Matter of Wood*, Petty has no claim that arises out of the Bankruptcy Code applicable in this case. Perhaps he would if he had timely filed the petition to extend the automatic stay, but the 30-day filing period expired. There is no exception in the Bankruptcy Code that would permit Petty to renew the availability of the stay. Without an actual claim to any right outlined in the bankruptcy code, this case is merely related to bankruptcy and would therefore be non-core. The lower court misplaced emphasis on the idea that the automatic stay is important to bankruptcy law, without analyzing the applicability to the issue before it. Non-core issues do not give courts the discretion necessary to refuse to compel arbitration, and the federal policy in favor of arbitration should have prevailed. The appellant prays the court will recognize this distinction and reverse the lower court's finding.

B. In the alternative, the issue before the court is Core, but cannot satisfy the *McMahon* standard and therefore cannot activate the judicial discretion necessary to impliedly repeal the FAA, 9 U.S.C. §§ 1 et seq.

In the event that this court finds the matter to be core, the court should still find in favor of the appellant because Petty is unable to satisfy the *McMahon* standard and therefore cannot activate the judicial discretion necessary to impliedly repeal the FAA, 9 U.S.C. §§ 1 et seq. As Petty has technically alleged a violation including the automatic stay, the court may find that a sub-issue of this case is to determine whether the automatic stay is a core or non-core issue. As precedent illustrates, the automatic stay issue is so important to the Bankruptcy Code making it a core bankruptcy matter. *See Hill*, 436 F.3d at 109.

Even if an issue is determined core by the court, the party opposing arbitration still has to satisfy the *McMahon* standard, showing that the issue would jeopardize an objective of the

Bankruptcy Code. *Mintze*, 434 F.3d at 231; citing *In re U.S. Lines, Inc*., 197 F.3d at 640. Main objectives of the Bankruptcy Code include (1) protecting purely bankruptcy issues, (2) the necessity to protect creditors and reorganization efforts of debtors from piecemeal litigation, and/or (3) the need for bankruptcy courts to enforce their own orders. *Hill*, 436 F.3d at 109; citing *Matter of National Gypsum Co.*, 118 F3d at 1069. In the present case, none of these objectives are jeopardized by Wildflower's actions in repossessing the equipment after the expiration of the 30-day filing period. Therefore, the judge did not have the discretion to refuse to compel the arbitration agreement.

1. The issue does not jeopardize a purely bankruptcy issue.

First, this issue is not a purely bankruptcy issue. As illustrated in *Hill*, the court used three indicators to determine whether the issue was a purely bankruptcy issue. These factors included (1) whether arbitration would interfere with the distribution of debtor's estate, (2) whether the connection between the claim and the underlying bankruptcy was weak, and (3) whether a stay can be appropriately resolved in arbitration because there is no indication from the statute that a stay needs to be formally litigated. *Hill*, 436 F.3d at 110.

To address the indicators in order, arbitration would not interfere with the distribution of Petty's estate. Like the creditor in *Hill*, Wildflower returned all property taken from Petty before the commencement of this action. R. at 7, n.6. Further, like the petitioner in *Hill*, Petty does not require the stay to aid in his reorganization process. In *Hill*, the bankruptcy case had closed and the petitioner had been discharged; therefore the petitioner no longer needed the protection provided by the stay in order to achieve her "fresh start." *Hill*, 436 F.3d at 110. In this case, Petty's bankruptcy case has not yet concluded, but the 30-day filing window on the stay has. Once Petty defaulted on his obligation to pay Wildflower, the first priority lien on Petty's

equipment was triggered. It was Wildflower's right per the guarantee to repossess the equipment at the appropriate time, which in the present case, was after the expiration of the 11 U.S.C. § 362(c)(3)(B) 30-day filing period. Petty no longer had a right to the equipment, regardless of whether it was sitting idle in a warehouse or actively being used in a new business endeavor. If the stay were still in effect, it would protect Petty's assets while the reorganization efforts proceeded. The reorganization efforts would include finding buyers for the equipment and giving the money to Petty's creditors, including Wildflower. The repossession essentially performed the same action of settling Petty's debt to Wildflower by honoring the lien on Petty's equipment per the Guaranty. Because the stay would perform essentially the same action as the appropriately timed repossession, Petty no longer needs the protections of the stay.

Next, the connection between Petty's claim and his underlying bankruptcy is weak. As explained *supra*, Petty missed the 11 U.S.C. § 362(c)(3)(B) 30-day filing deadline for second time bankruptcy filers. Petty was never entitled to the automatic stay guaranteed to first time filers, nor has he attempted to rebut the presumption that he has filed in bad faith. Petty has alleged a violation to a right he does not have. Like the petitioner in *Hill*, this claim is not integral or even relevant to Petty's individual bankruptcy proceeding.

Finally, as explained by the court in *Hill*, there is nothing in the Bankruptcy Code that suggests the bankruptcy court is uniquely suited to interpret and enforce the Code. *Hill*, 436 F.3d at 110. In fact, it is presumed that arbitration is an appropriate forum for all federal statutory claims per the pro-arbitration federal policy. *Id*. As the court in *Hill* succinctly explains, the automatic stay is an important aspect of the Bankruptcy Code; however, there is nothing in the Code that suggests it should be categorically exempt from arbitration. *Id*.

Because Petty is unable to show that the automatic stay is a purely bankruptcy issue, nor has he rebutted the presumption that he has filed in bad faith, this factor does not weigh in favor of satisfying the *McMahon* standard.

2. This issue does not jeopardize the protection of creditors and reorganization efforts of debtors from piecemeal litigation.

Second, this issue does not jeopardize the protection of creditors and reorganization efforts of debtors from piecemeal litigation. As illustrated by *Chugach*, only creditors who knowingly acquire and retain property of a bankruptcy estate after commencement of a bankruptcy case are in violation of the stay. *In re Chugach Forest Products, Inc.*, 23 F.3d at 246.

In the present case, Wildflower acquired the equipment only after waiting for the expiration of the 11 U.S.C. § 362(c)(3)(B) 30-day filing period. To reiterate, Petty is not entitled to the automatic stay granted to first time bankruptcy filers. Further, Wildflower has a valid first-priority lien on the equipment that it peacefully repossessed, regardless whether it was sitting idle in a warehouse or actively being used in a business endeavor. Petty's new business, Full Moon Fever Brewing, depended on equipment that Petty was fully aware could be repossessed as a result of his ongoing bankruptcy proceedings. There was a non-zero percent chance that repossession could occur, and it is not Wildflower's fault that its peaceful and appropriate repossession of equipment, that it was entitled to, interfered with the business endeavor. Additionally, once Petty commenced this action, Wildflower gave everything back to Petty "out of an abundance of caution." R. at 7, n.4. Like the court in *Chugach* explained, only creditors that acquire and retain the property of a bankruptcy estate after the commencement of a Chapter 11 bankruptcy case are in violation of the stay. *n re Chugach Forest Products, Inc.*, 23 F.3d at 246, citing *In re Abrams*, 127 B.R. at 242. Wildflower may have acquired the property of Petty's estate after the commencement of his Chapter 11 bankruptcy case, but not only was it within its

right to do so, but it did not retain the equipment. Despite its status as an unpaid creditor looking for adequate resolution, Wildflower is obviously trying to abide by the Bankruptcy Code while also pursuing its desire to collect Petty's debt.

If anything, the present action has created the exact piecemeal litigation that the bankruptcy code was created to prevent. Petty has no right to the equipment nor the automatic stay. Further, Wildflower should not be held liable for Petty's decision to use equipment that he knew may be repossessed as explicitly detailed in the guarantee, to open Full Moon Fever Brewing. R. at 6. After the expiration of the 11 U.S.C. § 362(c)(3)(B) 30-day filing period, Wildflower was within its right to commence repossession. Therefore, in creating additional, baseless litigation, this factor does not weigh in favor of satisfying the *McMahon* standard.

3. This issue does not jeopardize the necessity for bankruptcy courts to enforce their own orders.

Third, this issue does not jeopardize the necessity for bankruptcy courts to enforce their own orders. Like found by the court in *Picard*, arbitration is an entirely appropriate forum that can sufficiently serve the needs of this present case. Like parallel train tracks, both forums will get Petty where he needs to go for resolution of his bankruptcy claim.

Like explained in *Picard*, the lack of any language within the statute addressing arbitration places no limitations on its applicability. *Picard*, 564 F.3d 1255. Therefore, because the Bankruptcy Code does not address or explicitly restrict the forum in bankruptcy cases to formal litigation, arbitration is an appropriate forum. The lower court insists that arbitration is not appropriate in this case because Petty's other creditors did not sign an agreement to arbitrate, and it would be therefore unfair to drag them into such proceedings. The federal policy in favor of honoring agreements to arbitrate requires rigorous enforcement, and is not outweighed by the mere fact that other creditors exist. *In re Mintze*, 434 F.3d 229. As explained in the record, most

of Petty's other creditors had been permitted to engage in pre-petition settlements, an option not offered to Wildflower. R. at 6. If Petty was dealing with his creditors one by one, then permitting Wildflower and Petty to negotiate their agreement in arbitration rather than in a formal litigation setting would not involve the other creditors, would best comply with the Guaranty, and would effectively serve the needs of the parties. Like parallel train tracks, arbitration and formal litigation would both be acceptable forums in this case, *Hill*, 436 F.3d at 108; citing *McMahon*, 483 U.S. at 226; therefore, allowing this issue to go to arbitration will not jeopardize the bankruptcy courts' ability to enforce their own orders. Without proof that arbitration is an inadequate forum to address the issues of this case, this factor cannot weigh in favor of satisfying the *McMahon* standard.

Without being able to satisfy the *McMahon* standard, the core matter would not activate the judicial discretion necessary to refuse to impliedly repeal the FAA, 9 U.S.C. §§ 1 et seq.

II. The automatic stay under Section 362(c)(3) terminates with respect to both the debtor and the estate.

Regardless of whether the FAA was impliedly repealed, the automatic stay in Section 362(c)(3)(A) terminates for both the debtor and the bankruptcy estate.

A bankruptcy estate is created whenever a bankruptcy case is filed. 11 U.S.C. § 541(a). With few exceptions, all legal and equitable property interests belonging to the debtor at the time of the commencement of the bankruptcy case, regardless of where they are located or who holds the interests, comprise the contents of the estate. 11. U.S.C. § 541(a)(1). Generally, a bankruptcy petition protects the debtor and the estate by staying any actions by creditors. 11 U.S.C. § 362(a). However, Congress simultaneously provided protections for creditors against debtors who abuse bankruptcy protections by serially filing for bankruptcy in bad faith. 11 U.S.C. § 362(c)-(d).

The case at hand turns on the meaning of the phrase "shall terminate with respect to the debtor" in Section 362(c)(3)(A). That section provides

> (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 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case;

11 U.S.C. § 362(c)(3)(A) (emphasis added). A slim majority of courts have interpreted Section 362(c)(3)(A) to mean that the stay terminates with respect to the debtor only. *See e.g. Rose v Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019). Nearly all of the remaining courts have found the statute ambiguous and held that the automatic stay terminates after thirty days with respect to the debtor *and* the debtor's estate. *See, e.g., Smith v State of Maine Bureau of Revenue Servs.,* 910 F.3d 576 (1st Cir. 2018).

When resolving discrepancies in the interpretation and application of a statute, courts first begin with the plain meaning of the statute. *U.S. v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). Where the statutory language is clear, courts should go no further than applying the statute as written. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). However, where the language of the statute is not clear, courts look to canons of construction, public policy, and legislative history to discern the most faithful

and accurate meaning of the statute. *See e.g. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 67 (1995) (demonstrating the Court's practice of applying multiple tools of construction to interpret a statute.).

First, when viewed in the context of the whole statute, the automatic stay in Section 362(c)(3)(A) terminates with respect to both the debtor and the estate. Second, legislative history further clarifies Congress's intent that the automatic stay under Section 362(c)(3)(A) terminates with respect to both the debtor and the estate.

A. Within the context of the whole statute, the automatic stay terminates with respect to both the debtor and the bankruptcy estate.

The plain language in Section 362(c)(3)(A) is ambiguous and subject to more than one possible meaning. The language at issue indicates that "the stay . . . shall terminate with respect to the debtor." § 362(c)(3)(A). On one hand, it is easy to mechanically read "the stay . . . shall terminate with respect to the debtor" in isolation of the whole statute to mean that the stay is terminated only with respect to the debtor himself and not the bankruptcy estate. § 362(c)(3)(A). However, when construing the phrase "the stay . . . shall terminate with respect to the debtor" in light of the whole statute, it is abundantly clear that the word "debtor" applies to a serially filing debtor and his estate. § 362(c)(3)(A); *In Re Earl Thomas Petty & Wildflowers Community Bank v. Earl Thomas Petty*, No. 19-0805, (13th Cir. 2020) (Tench, dissenting); *Smith v State of Maine Bureau of Revenue Servs. (In re Smith),* 910 F.3d 567 (1st Cir. 2018).

The context of the whole statute supports the interpretation that "the stay . . . shall terminate with respect to the debtor" means a serially filing debtor and his estate. *See* § 362(a), (c). In general, Section 362(a) creates a presumption that the stay shall apply to both the debtor

and the estates. § 362(a). That presumption is reflected throughout the entire statute. *See e.g.* §362(c)(1),(2).

Section 362(c) addresses the unique instances where a debtor files multiple petitions which are dismissed within the same year. § 362(c)(3), (4); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010). First, Section 362(c)(1),(2) reflects the general rule that the stay protects the bankruptcy estate while a case is pending until it is either closed or dismissed. § 362(c)(1),(2). Next, Section 362(c)(3) applies to "single or joint cases" against a debtor who previously filed a petition that was dismissed within the preceding year. § 362(c)(3). This Section specifically establishes that when a debtor previously filed a petition within the same year and the previous petition was dismissed, the stay "shall terminate with respect to the debtor." § 362(c)(3)(A). If a debtor refiles a bankruptcy petition within one year of dismissal of the first petition, he must rebut the presumption of bad faith within 30 days of filing to keep the stay in effect. § 362(c)(3)(A), (B). Finally, Section 362(c)(4) addresses debtors who have filed two or more petitions that were dismissed within the preceding year. § 362(c)(4). In such a case, filing a new bankruptcy petition will not enact a stay to protect the debtor or the estate. *Id.*

Given the structure of Section 362(c), the phrase "shall terminate with respect to the debtor" in Section 362(c)(3)(A) does not distinguish between the debtor and his estate. *See In re Smith,* 573 B.R. at 302. On the contrary, "in respect to the debtor" clearly delineates which debtor is impacted by the provision. *Id.; In re Petty*, No. 19-0805 (Tench, dissenting). Accordingly, only a debtor who previously filed a petition within the previous year and the previous petition was dismissed is impacted by Section 362(c)(3)(A). This important distinction performs Congress's intended goal – to protect debtors while also preventing serial filers from

abusing bankruptcy protection against creditors. *See Milavetz,* 559 U.S. at 231-32; *In re Smith*, 910 F.3d at 590.

In the case at bar, Petty meets the definition of a serial filer under Section 362(c)(3)(A). He filed his chapter 7 bankruptcy petition on July 12, 2018, which was dismissed due to his failure to file timely. R. at 5. Petty also filed his chapter 11 bankruptcy petition the same day, which was also dismissed. In January 2019, Petty again filed bankruptcy petitions, thereby invoking the application of Section 362(c)(3)(A). To secure the protective stay as a serial filer, Petty would have needed to rebut the presumption of bad faith under Section 362(c)(3)(B), which he failed to do. R. at 6. Per the plain meaning of the law, Petty's stay was terminated thereby denying protections for *his* bankruptcy estate because he was considered a serial filer. Unfortunately for Petty, he failed to rebut the bad faith presumption within the 30-day period mandated under Section 362(c)(3)(A). R. at 6. Per the language of the statute, Petty's stay was terminated, thereby exposing Petty and the estate to actions by Wildflowers. Accordingly, Wildflowers was well within their right to seize assets of the bankruptcy estate since the stay expired.

However, the lower court found that the phrase at issue ought to be construed so as to separate the debtor from the estate. R. at 3. Not only does such a construction stray from the clear purpose and context of the statute, but it requires the Court to ignore the greater context of the statute and infer words that are not present in the statute. Although the majority of the lower court in this case attempted to support Petty's argument by suggesting that Section 362(b)(2)(B) demonstrated Congress's intent to separate the debtor and the estate in Section 362(c)(3)(A), that contention is unfounded. Section 362(b)(2)(B) applies to a debtor who owes domestic support obligations, whereas Section 362(c)(3)(A) applies to serial filing debtors. Moreover, Section

362(b) is a list of exceptions to subsection (a) – hardly a substantial piece of evidence supporting the majority's interpretation. In its attempt to construe every word in the statute with some meaning, the lower court has instead rejected Congress' choice of words for its own. *See Ransom v FIA card Servs. N.A.* 562 U.S. 61, 81, (2019) (Scalia, dissenting) ("The canon against superfluity is not a canon against verbosity."). The majority's reasoning, therefore, requires courts to assume unconstitutional legislative authority to rewrite the statute to affect the most advantageous policy preference.

Moreover, to interpret Section 362(c)(3)(A) as Petty proposed necessarily produces absurd results that render a portion of the text meaningless. When a debtor files a bankruptcy petition, all of his related property interests and assets are assumed by the bankruptcy estate as soon as a bankruptcy case is filed by or against a debtor. 11 U.S.C. 541(a)(1). Accordingly, the debtor no longer has actionable property assets outside of the bankruptcy estate. *Id.* Thus, if the stay is lifted with respect to the debtor personally, creditors still cannot seek repayment from the debtor since he has no assets. Furthermore, such an interpretation signals to debtors that they can abuse the bankruptcy protections available by filing multiple petitions in bad faith and still protect their property from creditors. Certainly, Congress never intended such a result, which has only been affected because some lower courts took the liberty of rewriting the meaning of Section 362(c)(3)(A). *See* H.R. Rep. No. 109-31(I) at 69 (2005). Therefore, we respectfully urge this Court to find that the stay under Section 362(c)(3)(A) terminates with respect to both the debtor and his estate.

B. Legislative history further clarifies that the automatic stay terminates with respect to both the debtor and the estate.

Many Courts have determined §362(c)(3)(A) terminates the entire automatic stay. *In re Smith*, 910 F.3d at 591. For example, in *Smith*, the court addressed the scope of the ambiguous phrase, "with respect to the debtor" contained in the statute. *Id.* In reliance on legislative history and Congressional intent, the court in *Smith* determined the phrase "with respect to the debtor" speaks to both the debtor, the debtor's property, and the property of the bankruptcy estate. *Id.* To ensure that its interpretations parallel Congress's original intent, the Supreme Court has regularly relied on legislative history in bankruptcy cases. *See e.g. Milavetz,* 559 U.S. at 231-32.

The Supreme Court has recognized, "Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system." *Milavetz,* 559 U.S. at 231-32. Moreover, the text that became §362(c)(3) originated in section 302 of the BAPCPA, titled "DISCOURAGING BAD FAITH REPEAT FILINGS." *In re Dev*, 593 B.R. 435, 439 (Bankr. E.D.N.C. 2018). The House Judiciary Committee report accompanying the legislation noted that the purpose of the bankruptcy reforms was to "deter serial abusive bankruptcy filings." *In re Smith,* 910 F.3d at 589-90. Section 362(c)(3)(A) was among these reforms. *Id.* In addition, the report describes the provision as "amending section 362(c) of the Bankruptcy Code to *terminate the automatic stay within 30 days* of a chapter 7, 11, or 13… case pending within the preceding one-year period." H.R. Rep. No. 109-31(I), at 69 (2005). The legislative history of §362(c)(A) provides that Congress purposely designed the amendment to deter bankruptcy abuse and, specifically, "Discourage Bad Faith Repeat Filings." *Smith*, 910 F.3d at 590. An example of this would include filing for the benefit of the automatic stay without a genuine reason. The Court in *Smith* suggests that, "[t]he portion of the stay that is most valuable to a bankruptcy petitioner, just as to a creditor, is the portion that protects estate property." *Id.* Therefore, the purpose of deterring

abuse and bad faith filings is best fulfilled by interpreting §362(c)(3)(A) to terminate the entire stay—including estate property. *Id.*

Further evidence comes from legislation dating before the BAPCPA enactment. In 1998, Congress sought to reform the Bankruptcy Code. Included was an amendment "essentially identical" to §362(c)(3)A). *In re Reswick*, 446 B.R. 362, 372 (B.A.P. 9th Cir. 2011). Even though that legislation was ultimately vetoed, courts will look at its purposes due to its consistency with the language at issue. *Smith,* 910 F.3d at 590. The 1998 report shows that Congress designed the amendment to "reduce abuses of the bankruptcy system by reducing the incentive to file for bankruptcy repeatedly without completing the bankruptcy process." S. Rep. No. 105-253, at 39 (1998). Hence, the 1998 amendment is "identical" to §362(c)(3)(A). One minor difference between the two texts exists: the 1998 proposed amendment was to apply to third-time filers and subsequent filers; §362(c)(3)(A) applies to second-time filers. Therefore, if Congress wished to change the language's meaning in the 1998 proposal, the change should have been noted somewhere in the BAPCPA's legislative history. However, Congress made no such change. Thus, the only reasonable conclusion is that the stay terminates with respect to the debtor and his estate under Section 362(C)(3)(A).

CONCLUSION

For the foregoing reasons we respectfully request that this Court find that the FAA was not implicitly repealed and that the automatic stay terminates with respect to both the repeat filer and his estate.