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 from the
United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team Number 26
Counsel for Respondent

January 19, 2021

QUESTIONS PRESENTED

I. Does the Federal Arbitration Act irreconcilably conflict with the collective goals of 11 U.S.C. § 362 and the Bankruptcy Code generally so as to warrant the non-enforcement of the parties' arbitration agreement?

II. Does 11 U.S.C. § 362(c)(3)(A) lift the automatic stay with respect 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 available at No. 19-0805 and reprinted at Record 2.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

This action implicates statutory construction of certain provisions of Title 11 of the United States Code. The relevant statutory provisions in this case are listed below and reproduced in the Appendix.

9 U.S.C. § 2
9 U.S.C. § 3
9 U.S.C. § 4
11 U.S.C. § 101
11 U.S.C. § 105
11 U.S.C. § 362
11 U.S.C. § 521
11 U.S.C. § 541
28 U.S.C. § 1334
28 U.S.C. § 157

STATEMENT OF THE CASE

I. Factual History

Earl Thomas Petty (The "Debtor" or "Petty") quit his law practice to begin brewing beer in 2002. R. at 2. He founded Great Wide Open Brewing Company ("Great Wide Open") and, in 2005, opened a taproom with equipment that he purchased with his own money (the "Equipment"). R. at 3. Petty enjoyed success and notoriety for about a decade as his business, brainchild, and passion project blossomed. R. at 4. Due to an increasing demand for his widely popular beers, Petty decided to open four additional taprooms in college towns in 2010. R. at 4. In 2012, he opened a brewhouse with capacity to brew 250,000 barrels of his now-beloved beers annually in order to keep up with demand. R. at 4. He also continued to brew at the Royal Rapids taproom where he had purchased the Equipment. R. at 4.

To fund this growth and help fuel his success, Petty opened a $35 million revolving line of credit with Wildflowers Community Bank ("Wildflowers") secured by a first priority lien on substantially all of Great Wide Open's assets in September 2011 (the "Credit Agreement"). R. at 4. At the same time, Petty unconditionally guaranteed the business's obligations (the "Guaranty") by granting Wildflowers a first priority lien on the Equipment to secure the Guaranty. R. at 4. Both the Credit Agreement and the Guaranty had "Remedies" clauses that said, upon default, "obligor grants Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action." R. at 4. The agreements also 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." R. at 4.

Great Wide Open's financial problems began in 2017 as the popularity of craft breweries began to fade, in spite of Petty's personal success in the industry. R. at 5. Petty was unfortunately forced to close three taprooms in the wake of these problems, including the Royal Rapids taproom, in March of 2018. R. at 5. Wildflowers discovered the closure of the Royal Rapids taproom, the location of the Equipment, when a loan officer noticed the sign on the door that said, "Don't come around here no more." R. at 5. The Landlord terminated the lease for the Royal Rapids taproom around this time. R. at 5.

Continuing the misfortune, both Great Wide Open and Petty separately defaulted on payment obligations under Credit Agreement and Guaranty in April 2018. R. at 5. Wildflowers sent default letters to both parties. R. at 5. On June 4, 2018, Wildflowers filed a demand for arbitration and a state-law breach of contract complaint against Petty with the American Arbitration Association seeking $33.2M in damages; the American Arbitration Association scheduled an initial conference for July 12, 2018. R. at 5. The day before this initial conference, Great Wide Open ceased all operations and fired all its employees. R. at 5.

On July 12, 2018, Great Wide Open filed chapter 7 (the "Chapter 7 Case"). R. at 5. On the same day, Petty filed chapter 11 bankruptcy in the Bankruptcy Court for the District of Moot (the "Initial Bankruptcy Case"). R. at 5. The bankruptcy court dismissed The Initial Bankruptcy Case on August 27, 2018 because Petty failed to timely file certain documents (e.g., schedules of assets and liabilities). R. at 5. Therefore, Petty hired a new attorney, and just as arbitration was about to recommence, filed his second chapter 11 bankruptcy on January 11, 2019 (the "Second Bankruptcy Case"). R. at 5. Petty also filed a plan of reorganization that would pay his creditors, including Wildflowers, forty cents on the dollar over a period of five years and included pre-petition

settlements Petty negotiated with several creditors; no pre-petition negotiations with Wildflowers took place. R. at 6.

At first day hearings in the Second Bankruptcy Case, Petty revealed that in December 2018, he had reopened the Royal Rapids taproom, now doing business as a sole proprietor under the name of "Full Moon Fever Brewing," using the Equipment, and that the venture had been profitable in its first months of business. R. at 6. However, Petty did not file a motion to extend the automatic stay per § 362(c)(3)(B) during the first thirty days of the Second Bankruptcy Case. R. at 6. Thirty-two days after commencement of the Second Bankruptcy Case, on February 12, 2019, Wildflowers peaceably repossessed the Equipment, which was subject to the security interest Petty had granted in connection with the Guaranty. R. at 6. As a result, Full Moon Fever Brewing was forced to cease operations on February 17, 2019. R. at 7. Wildflowers returned the Equipment to Petty the day before the hearing out of "an abundance of caution." R. at 7.

II. Procedural History

One week after the repossession, Petty filed a motion against Wildflowers, claiming the repossession violated the automatic stay and seeking $500,000 in damages under § 362(k). R. at 6. Petty claimed, in support of his motion, that Wildflowers' hasty actions effectively rendered Full Moon Fever Brewing inoperative by destroying the goodwill and reputation the sole proprietorship had garnered and by making it impossible to produce beer. R. at 7. On March 5, 2019, Wildflowers responded to Petty's motion, claiming that no automatic stay existed, by way of § 362(c)(3)(A), because Petty had a prior bankruptcy case dismissed within one year of filing his second, he did not file a petition to extend the stay under § 362(c)(3)(B). R. at 7. Wildflowers also argued that, per the arbitration provision in the Guaranty, Petty was bound to bring any dispute against Wildflowers in the pending (though stayed) arbitration proceeding. R. at 7. During the liquidation of Great Wide Open in the Chapter 7 Case, the bankruptcy estate paid Wildflowers

some of the money it was owed, but Wildflowers claimed it is still owed $2.1 million under the Guaranty. R. at 7.

The Bankruptcy Court for the District of Moot ruled in favor of Petty. The court held that enforcing the arbitration agreement would conflict with § 362 of the Bankruptcy Code, so the court denied Wildflowers' motion to compel arbitration. R. at 7. The court also held that even if the automatic stay is not extended under § 362(c)(3)(B), a creditor may not take action against property of the debtor's estate, and the Equipment was indisputably property of Petty's bankruptcy estate. R. at 7. Finally, the court found that Wildflowers willfully violated the automatic stay and awarded compensatory damages in the amount of $200,000. R. at 7. Wildflowers then appealed two issues to the United States Court of Appeal for the Thirteenth Circuit. R. at 7. The court below addressed both issues pursuant to 28 U.S.C. § 158(d) and again ruled in favor of Petty by affirming the ruling in Bankruptcy Court for the District of Moot.

STANDARD OF REVIEW

The questions presented are based on the statutory interpretation of the Bankruptcy Code and the Federal Arbitration Act. As such, the issues before this Court are pure issues of law. Therefore, the standard of review for this appeal is *de novo*. *In re Hyman*, 502 F.3d 61, 65 (2d Cir. 2007).

SUMMARY OF THE ARGUMENT

When the law of arbitration mixes with the law of bankruptcy, an inherent conflict exists between the policy favoring the enforcement of arbitration agreements and the policy favoring centralization in bankruptcy. In certain circumstances, such as a dispute over the violation of the

automatic stay, the parties' pre-petition arbitration agreement must yield to the bankruptcy court's jurisdiction. There exists statutory evidence that Congress expressly authorized federal courts to hear core matters related to a bankruptcy case notwithstanding the Federal Arbitration Act or any contractual agreement to arbitrate. Further, precedent establishes an inherent conflict between § 362 and the Federal Arbitration Act. More specifically, the language of § 362, the congressional intent, and the threat to fundamental bankruptcy rights and policies of the Bankruptcy Code evinces such a conflict. Finally, arbitration of the automatic stay would affect non-party creditors' rights in a non-judicial forum, which thwarts the policy of collective reorganizations in bankruptcy.

The plain language of § 362(c)(3)(A) terminates the automatic stay as to the debtor, and specifically excludes any reference to property of the estate. The majority approach closely follows the language of the statute and rejects adding words to the statute that do not exist. Instead, the majority approach relies on clues from other parts of the Bankruptcy Code that show that Congress knew how to distinguish between "property of the estate," "debtor," and "debtor's property" and did not do so in § 362(c)(3)(A). Furthermore, the majority approach also recognizes Congress' ability to terminate the stay in its entirety. Looking at the next section of the statute, which was promulgated at the same time, it is clear that Congress knew how to terminate the entire stay and deliberately choose not to in § 362(c)(3)(A). Adopting the minority approach would require the Court to abandon the plain text of the statute and add words to the Code that do not exist. In order for the Court to deviate from the plain language, the Court would need to rely on comprehensive and persuasive legislative history that supports the minority interpretation.

Yet, the legislative history surrounding § 362(c) of the Bankruptcy Code is scant and inconclusive. Any argument that can be made—if one can be made at all with so little evidence to rely on—that Congress intended for § 362(c)(3)(A) to lift the stay with regard to both the

debtor and the debtor's estate should be struck down. Such an argument would run directly contrary to the plain, unambiguous language of the statute. In light of the inconclusive legislative history, the statute's plain meaning must be respected and upheld.

ARGUMENT

I. The Inherent Conflict Between the Federal Arbitration Act and § 362 Requires Non-Enforcement of the Parties' Arbitration Agreement.

The Bankruptcy Code and other related judicial provisions make clear that arbitration would frustrate the effective enforcement of the automatic stay. Arbitration is indeed favored in our judicial system. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983). The Federal Arbitration Act (FAA) mandates the enforcement of valid arbitration agreements. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Congress has instructed the courts to enforce agreements to arbitrate according to their terms. 9 U.S.C. § 2. So long as the making of the agreement for arbitration is not in issue, Congress mandates that the court shall make an order directing the parties to proceed with arbitration. 9 U.S.C. § 4. However, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. Such a command "may be deduced from [the statute's] text or legislative history . . . or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227.

The fundamental character of the Bankruptcy Code is the centralization of multiple parties affected by the reorganization. The FAA, rather, is the opposite. Some disputes present a conflict of "near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir.

1999). With centralization in mind, the two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). Arbitration frustrates these two important purposes when the enforcement of the automatic stay is at issue.

A. The jurisdictional statutes provide evidence that arbitration of an automatic stay violation is incompatible with bankruptcy proceedings' collective nature.

The jurisdictional provisions regarding the federal courts indicate that this Court should closely scrutinize any challenge to the bankruptcy courts' jurisdiction, especially when the automatic stay is involved. Federal district courts have both original and exclusive jurisdiction over all cases arising under Title 11 of the U.S. Code. 28 U.S.C. § 1334(a). The district courts often exercise discretion in transferring a case falling under the Bankruptcy Code to the bankruptcy courts. 28 U.S.C. § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."). The bankruptcy court is then empowered to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section . . . ."). 28 U.S.C. § 157(b). Hence, Congress has authorized the bankruptcy courts to enter a final judgment on bankruptcy-related claims, namely, those labeled by Congress as "core." *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34 (2014).

The broad authority vested in the bankruptcy courts, especially over matters unique to bankruptcy, was intentional by Congress. Congress created the bankruptcy courts to hear "all legal obligations of the debtor, no matter how remote or contingent . . . ." *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202 (4th Cir. 1988). Specifically, § 1334 provides the bankruptcy court the

ability to determine for *itself* whether it should abstain from exercising jurisdiction. *See* 28 U.S.C. § 1334(c)(1) (emphasis added). By stripping the bankruptcy courts of this statutorily assigned discretion, especially in cases that arise out of the Bankruptcy Code such as the automatic stay, Congress' intent is frustrated. Though there is no mention of the FAA in § 1334, rules of construction suggest that the statute was enacted with full knowledge of the FAA. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("'[W]e assume that Congress is aware of existing law when it passes legislation . . . .'" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))). Congress had the opportunity to limit the bankruptcy courts' discretion in enforcing arbitration agreements either in the FAA itself or the amendments, yet it chose not to do so.

Additionally, § 105 of the Bankruptcy Code states that where it has jurisdiction, the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). This provides evidence that there are circumstances, such as the enforcement of the automatic stay, in which the bankruptcy court could enter an order denying the enforcement of the parties' prepetition arbitration agreement to carry out the provisions regarding the automatic stay and other related provisions. *See Cuvrell v. Mazur* (*In re F&T Contractors*), 649 F.2d 1229, 1232 (6th Cir. 1981) ("The decision to compel or deny arbitration is discretionary with the bankruptcy judge."). These equitable powers are well-placed because "bankruptcy courts . . . rule correctly most of the time." *Bullard v. Blue Hills Bank,* 135 S. Ct. 1686, 1695 (2015).

Finally, permitting arbitration of alleged violations of the court's authority "would leave non-judicial third parties to punish abuse of the judicial system." *In re Grant*, 281 B.R. 721, 725 (Bank. S.D. Ala. 2000). This Court should closely examine any challenge to the bankruptcy court's

discretion in enforcing arbitration agreements, especially in regard to the automatic stay, because Congress has made clear that its intent is for the bankruptcy court's jurisdictional powers to be extensive when provisions of the Bankruptcy Code are at issue.

B. A proceeding regarding the violation of the automatic stay is a core proceeding that must be adjudicated by the bankruptcy courts.

1. The three-prong inquiry set out in *Shearson/American Express v. McMahon* is a sound precedent for upholding the non-enforcement of the parties' arbitration agreement.

There may be conflicts appropriate for resolution pursuant to the FAA, but the automatic stay is not one of them. This Court provided a framework in *Shearson/American Express v. McMahon* for the bankruptcy courts to decide whether it is appropriate to enforce an arbitration agreement between the parties. 482 U.S. at 227. In *McMahon*, this Court considered the arbitrability of private securities fraud claims under the Securities Exchange Act of 1934, as well as claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and devised a three-prong test that is still solid precedent today. *Id*. at 222.

In creating this test, this Court explained that the FAA may be overridden by a contrary congressional command, though the burden is on the party claiming that an agreement to arbitrate a statutory claim is not enforceable. *Id.* at 227. This party must prove such congressional intent to override the FAA from either 1) the text of the statute, 2) the legislative history of the statute, or 3) an inherent conflict between arbitration and the purposes of the statute. *Id.* Using this test as a guide, this Court found that the claims under the Securities Exchange Act of 1934 and RICO were arbitrable, and subsequent bankruptcy courts and circuit courts have found the test helpful in setting aside the parties' prepetition arbitration agreements where certain bankruptcy claims are at issue. *Id.* at 238, 242.

The first two prongs of the *McMahon* test—the text of § 362 and its legislative history—support overriding the FAA when a dispute over the automatic stay occurs in bankruptcy. Section 362(a) of the Bankruptcy Code aims to centralize the debtor's assets and protect those assets from creditors seeking to collect—a crucial tool in any bankruptcy reorganization. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.01 (16th ed. 2020). The language of § 362 encompasses the broad powers of the bankruptcy courts to preserve the integrity of the reorganization: "Except as provided in subsection (b) of this section, a petition [for bankruptcy protection] . . . operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative or other action or proceeding against the debtor . . . ." 11 U.S.C. § 362(a)(1). The legislative history of § 362(a) also demonstrates the important intention that the automatic stay, a fundamental right, should be resolved by the bankruptcy courts. Indeed, the "automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws." H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

2. The jurisdictional nature of the automatic stay proceeding evinces an inherent conflict with the FAA.

In addition to the text and legislative history of § 362, the purpose of the statute is in inherent conflict with the FAA. The third prong of the *McMahon* test, whether there is an "inherent conflict" between arbitration and the purpose of § 362, is arguably the most compelling factor in the bankruptcy court's decision to decline the enforcement of the arbitration agreement. When the bankruptcy court is determining whether there is an inherent conflict between the FAA and § 362, the jurisdictional distinction between a "core" versus "non-core" proceeding is a helpful and appropriate threshold test to aid bankruptcy courts in deciding whether to enforce the parties' arbitration agreement.

The Bankruptcy Code provides that some specific proceedings are core proceedings by providing examples in § 157(b). 28 U.S.C. § 157(b)(2)(A)-(P). There are also broader categories of proceedings that may also be considered core. 28 U.S.C. § 157(b)(2)(A), (O). In contrast to core proceedings (those inherent in the Bankruptcy Code), proceedings are "non-core" if they do not depend on the Bankruptcy Code for their existence and could proceed in another court. *Battle Ground Plaza, LLC v. Ray* (*In re Ray),* 624 F.3d 1124, 1131 (9th Cir. 2010). If a claim is non-core, the court generally lacks discretion and must refer the claim to arbitration, assuming there is an enforceable agreement to arbitrate and the claim falls within the scope of that agreement. *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156 (3d Cir. 1989); *In re U.S. Lines, Inc*., 197 F.3d at 640. However, in core proceedings, the bankruptcy court has the discretion to deny enforcement of an arbitration agreement. *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.*), 403 F.3d 164, 169 (4th Cir. 2005); *In re U.S. Lines*, 197 F.3d at 640; *Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1067–68 (5th Cir. 1997).

A claim predicated in the enforcement and alleged violation of the automatic stay is a core proceeding. The Bankruptcy Court has jurisdiction over core proceedings, including "matters concerning the administration of the estate." 28 U.S.C. § 157(b)(2). Enforcement of the automatic stay is essential to the orderly and equitable administration of the estate. *In re Ionosphere Clubs Inc.*, 124 B.R. 635, 638 (Bankr. S.D.N.Y. 1991); *In re Ames Dep't Stores, Inc.*, 542 B.R. 121, 141 (Bankr. S.D.N.Y. 2015).

Further, Petty filed a motion alleging that Wildflowers violated the automatic stay and sought damages under § 362(k). R. at 6. A 362(k)(1) proceeding is a core proceeding because it derives directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy case. *Johnson v. Smith* (*In re Johnson*), 575 F.3d 1079, 1083 (10th Cir. 2009). Hence, the claims

at issue are core proceedings that gave the bankruptcy court discretion to deny enforcement of the arbitration of the automatic stay dispute.

The core/non-core distinction is a significant first step in deciding whether to enforce an arbitration agreement. It gives the bankruptcy courts a stepping-stone in considering whether the dispute before them implicates important bankruptcy rights, which are subject to their jurisdiction rather than the parties' arbitration agreement. The Ninth Circuit explained that the "[r]ationale for the core/non-core distinction is that non-core proceedings are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration, whereas core proceedings implicate more pressing bankruptcy concerns." *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012) (citing *In re U.S. Lines*, 197 F.3d at 640). Other circuits have also used the core/non-core distinction as a first step in approaching the question of arbitrability. *See Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382, 387 (2d Cir. 2018); *Mintze v. Am. Gen. Fin. Servs., Inc.* (*In re Mintze*), 434 F.3d 222, 231 (3d Cir. 2006); *In re White Mountain Mining Co.*, 403 F.3d at 169-70; *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc.* (*In re Elec. Mach. Enters. Inc*)., 479 F.3d 791, 796 (11th Cir. 2007).

3. Arbitration of the automatic stay inherently conflicts with the bankruptcy court's responsibility of protecting important bankruptcy rights.

Of course, this Court should not solely rely on the core/non-core distinction alone as the basis for resolving the arbitrability of the automatic stay violation. *See In re Thorpe Insulation Co.*, 671 F.3d at 1021 ("We agree that the core/non-core distinction, though relevant, is not alone dispositive."). In exercising its discretion over whether arbitration provisions ought to be denied effect when core proceedings are involved, the bankruptcy court must still "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing

an arbitration clause." *Hays & Co.*, 885 F.2d at 1161. The circuit courts, employing the *McMahon* framework, have found inherent conflict with the FAA in a number of ways. These courts have found inherent conflict by determining which proceedings implicate important bankruptcy rights, considering the competing policy concerns of the Bankruptcy Code and FAA, and deciding which proceedings involve claims derived directly from the Bankruptcy Code. These examples provide ample justification for denying arbitration of the automatic stay dispute in the present case.

In addition to the jurisdictional nature of this dispute, the dispute over the violation of the automatic stay involves important bankruptcy rights which this Court should not allow to be resolved through arbitration—more evidence of an inherent conflict between § 362 and the FAA. The Fifth Circuit devised a rule that proceedings involving bankruptcy rights are not presumptively arbitrable. *In re Gypsum*, 118 F.3d at 1068. In *In re Gypsum*, successors to the chapter 11 debtor brought a declaratory judgment proceeding against the debtor's liability insurer seeking to recover certain pre-confirmation debts for violating the discharge injunction imposed by § 524(a). *Id.* at 1060. The insurer filed a motion to stay in favor of arbitration, which the bankruptcy court denied. *Id.* The Fifth Circuit determined that the proceeding concerning whether the court's Confirmation Order precluded the insurer's claim was a "core" proceeding under 28 U.S.C. § 157(b)(2)(B) & (C). *Id.* However, the Fifth Circuit acknowledged that "[t]he core/non-core distinction conflates the inquiry set forth in *McMahon* and *Rodriguez* with the mere identification of the jurisdictional basis of a particular bankruptcy proceeding." *Id.* at 1067. Rather, the basis for the court's decision was the characterization of a violation of § 524(a) as a violation of bankruptcy rights—the action was created by the Bankruptcy Code, not derived by the debtor. *Id.* at 1071. Thus, the court held that this particular action involved adjudicating bankruptcy rights that are "completely divorced

from" the debtor's pre-bankruptcy rights, and as such, these bankruptcy rights must be adjudicated by the bankruptcy court. *Id.*

The automatic stay is the ultimate example of a bankruptcy right that the bankruptcy court must protect. The automatic stay is so central "to an orderly bankruptcy process that actions taken in violation of the stay are void and without effect." *In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992). While there is no specific legislative history on § 362(k), the overall intent behind the automatic stay emphasizes the importance of the bankruptcy courts' ability to adjudicate its violation. By expressly creating a cause of action for debtors to seek damages in the case of a willful violation of the stay, Congress created a tool for debtors to defend their right to the automatic stay's protection. But such defensive action "can be carried out, of course, only if injured debtors are actually able to sue to recover the damages that § 362(k) authorizes." *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015).

There is also evidence of an inherent conflict between § 362 and the FAA in the statutes' competing policy concerns. The Second Circuit has broadly applied *McMahon's* test to address the competing policy objectives of the FAA and Bankruptcy Code in *In re U.S. Lines, Inc.* 197 F.3d at 641. There, the court considered whether the proceeding was "integral to the bankruptcy court's ability to preserve and equitably distribute" the estate. *Id.* The debtor and its successor-in-interest, a reorganization trust, sought a declaratory judgment establishing the rights of the trust under insurance contracts to which the pre-bankruptcy debtor was a party. *Id.* at 634-35. The insurers filed a motion to compel arbitration per the insurance contracts' arbitration agreement, but the bankruptcy court denied the motion. *Id.* at 635. The Second Circuit first decided that the declaratory action was "core." *Id.* at 638. The court then determined that the power to override the parties' arbitration agreement was discernible both in the jurisdictional powers of the bankruptcy

court (the core/non-core distinction) as well as the objectives of the Bankruptcy Code. *Id.* at 640. Particularly, the Second Circuit considered that the bankruptcy courts have broad jurisdictional powers which allow them to maintain the integrity of the reorganization process as well as powers under § 105(a) to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. *Id.* Thus, these powers evince congressional intention that bankruptcy is a centralized process, which would be impeded by arbitration. *Id.* Hence, in weighing the competing policies of preserving parties' prepetition arbitration agreements with the importance of the bankruptcy court's ability to preserve and equitably distribute the Trust's assets, the Second Circuit held that the bankruptcy court acted within its discretion by denying arbitration. *Id.* at 641.

Similarly, the automatic stay is central to federal bankruptcy relief. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (1986) (declaring that the automatic stay is a fundamental debtor protection). The automatic stay clearly implicates a Bankruptcy Code provision and is not simply derived from the parties' pre-petition agreement. *See Startec Global Communications Corp.*, 300 B.R. 244, 253-254 (Bankr. D.Md. 2003) (declining to order arbitration of a stay violation case on the basis that "the automatic stay is the single most important protection afforded to debtors by the Bankruptcy Code."). Arbitration of such an important factor in the centralization of bankruptcy would impede the bankruptcy court's role in effecting a fair and efficient reorganization. *See Shugrue v. Air Line Pilots Ass'n, Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 989 (2nd Cir. 1990).

It is true that the Second Circuit has previously held that disputes surrounding the Bankruptcy Code's automatic stay provision are proper for adjudication in arbitration. *M.B.N.A. Am. Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006). However, the facts of *Hill* are distinguishable

from the present case. In *Hill*, the estate had already been distributed and the bankruptcy process had been completed; therefore, subsequent proceedings were determined to have no effect on the administration of the estate. *Id.* at 110. Conversely, Mr. Petty had just commenced the Second Bankruptcy Case and had filed a Chapter 11 plan for reorganization to pay Wildflowers as well as his other creditors. R. at 6. The *Hill* Court distinguished the debtor's situation from that of debtors—such as Mr. Petty—directly involved in ongoing bankruptcy proceedings where compelling arbitration of those debtors' claims would clearly affect the distribution of an estate. *Id.* at 110.

4. *McMahon's* three-prong inquiry is compatible with this Court's recent decision in *Epic Sys. Corp. v. Lewis*.

This Court's recent decision in *Epic Systems* does not undermine the Court's test in *McMahon*. The *Epic* Court stated that Congress' intention to render a federal statutory claim non-arbitrable must be "clear and manifest." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). The Court concluded that the statute at issue, the National Labor Relations Act, does not reflect a clearly expressed and manifest intention to displace the FAA *Id.* at 1632. However, *Epic* does not subvert the principles laid out by this Court in *McMahon*. There is nothing in the *Epic* decision text that provides any evidence that this Court intended to overrule *McMahon*.

Notably, the statutes at issue in *Epic* are the Fair Labor Standards Act and the National Labor Relations Act. *Id.* at 1620. This Court should consider that the Bankruptcy Code is unique from the statutes discussed in *Epic*. There are important features of a bankruptcy case that, by their very nature, require adjudication by the federal courts—notably, the exercise of exclusive in rem jurisdiction by a federal court over all of the property of a debtor. *See Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

Recent decisions by the Fifth and Second Circuits explain how *McMahon* and *Epic* can be harmonized. In determining whether the enforcement of a discharge injunction was arbitrable, the Fifth Circuit explained that the "[w]hile the Supreme Court's decision in *Epic Systems* has a different tone, the test it employs is substantially the same as *McMahon's*." *Henry v. Educ. Fin. Serv.* (*In re Henry*), 944 F.3d 587, 592 (5th Cir. 2019). The court explained that *Epic* does not abrogate the use of legislative history in determining whether to enforce the parties' arbitration agreement. *Id.* at 592. Rather, *Epic* clarifies that legislative history simply may not trump the linguistic and statutory context of the statute itself. *Id.* Likewise, the Second Circuit echoed the Fifth Circuit's interpretation of *Epic*. *In re Belton v. G.E. Capital Retail Bank*, 961 F.3d 612 (2d Cir. 2020). Rather than interpreting *Epic Systems* as overriding *McMahon*, the Second Circuit explained that *Epic* merely requires "a text-first approach that cannot be satisfied by reference only to statutory purpose." *Id.* at 616. *Epic* merely emphasizes that multiple factors must be considered before the bankruptcy court can decline enforcement of the arbitration agreement. Even though the *Epic* decision uses the language "clear and manifest," there is no evidence in the decision that the "inherent conflict" standard could not be used to satisfy that requirement in *Epic*.

C. Arbitrating the automatic stay will infringe upon other creditors' rights to the detriment of the entire reorganization.

Finally, the automatic stay affects more parties than those that are part of the arbitration agreement. Allowing arbitration of the violation of the automatic stay would violate a fundamental principle of the bankruptcy process—the collective treatment of all of a debtor's creditors at one time. *See Owens v. L.V.N.V. Funding, L.L.C.*, 832 F.3d 726, 732 (7th Cir. 2016). The bankruptcy courts' ability to assure equality of treatment among creditors will be seriously threatened if other courts—or other dispute forums—are permitted to construe the application of the stay. *See In re Baldwin-United Corp. Litigation*. 765 F.2d 343, 349 (2d Cir. 1985). The insolvent estate is finite

and distributed pro rata to creditors, so the arbitrator's valuation of one creditor's claim affects the recovery of other creditors as well. Marianne B. Culhane, *Limiting Litigation Over Arbitration in Bankruptcy*, 17 Am. Bankr. Inst. L. Rev. 493, 497 (2009). Bankruptcy proceedings are generally the last and only opportunity for creditors to assert their claims and share in the limited remaining assets of a bankruptcy debtor. John R. Hardison, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 St. John's L. Rev. 627, 631 (2019).

Suppose this Court overturns the bankruptcy court's decision to decline arbitration. In that case, a creditor who was never a party to Mr. Petty and Wildflower's agreement may still have their recovery determined by the arbitration. Thus, requiring arbitration would potentially undermine the rights of these non-parties. *See Allegaert v. Perot*, 548 F.2d 432 (2d Cir. 1977) (holding a bankruptcy matter non-arbitrable when it would potentially affect the rights of non-parties to the arbitration agreement). Mr. Petty has other creditors whose rights are at stake as well. R. at 6. Hence, the parties' arbitration agreement must yield to the bankruptcy court's jurisdiction in this case.

II. Section 362(c)(3)(A) Does Not Terminate the Automatic Stay with Respect to Property of the Bankruptcy Estate and the Majority Interpretation Properly Enforces the Intentions of Congress.

Bankruptcy laws afford parties rights and privileges not found anywhere else in the law. When a debtor files bankruptcy, bankruptcy law creates an estate which, with some narrow exceptions, comprises all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). Through the miraculous powers of bankruptcy law, the debtor's property is siphoned into the bankruptcy estate no matter where the property is located or by whom it is held. *Id*.

Similarly, by operation of bankruptcy law, § 362 automatically imposes a stay of actions (with limited exceptions) which prevent creditors or claimants from fighting over a debtor's assets. *See* 11 U.S.C. § 362(a). This powerful operation of law serves to ensure a fair distribution of the debtor's assets and is important to bankruptcy proceedings. *See Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003) (evaluating the role of the automatic stay in bankruptcy proceedings). But Congress recognized that this uniquely powerful protection may be abused by serial-debtors attempting to hide from persistent creditors. *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61 (2011) (acknowledging that Congress recognized abuses of the bankruptcy system). Accordingly, Congress enacted the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (BAPCPA) to curb bankruptcy abuses committed by serial-debtors and included a limitation on the automatic stay granted to debtors in § 362(a). That section reads:

> (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 debtor or property securing such debt or with respect to any lease *shall terminate with respect to the debtor* on the 30th day after filing of the later case…

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

The interpretation of the statute has been disputed among the courts. The majority view, accepting the plain language of § 362(c)(3)(A), concludes that the automatic stay terminates as to the debtor and occasionally the debtor's property, but not property of the estate. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019) (concluding that the automatic stay does not terminate with respect to the bankruptcy estate); *In re Holocomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008) (concluding that the majority approach better serves the goals of bankruptcy and adopting the rule that the automatic stay terminates as to the debtor and debtor's property); *In re*

Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006) (concluding that the relevant phrase terminates the stay with respect to the debtor and the debtor's property but not property of the estate); *In re Williams*, 346 B.R. 361 (Bankr. E.D. Pa. 2006) ("...[L]iens against the debtor's property may be created, perfected, and enforced….").

On the other hand, the minority view interprets the phrase "with respect to the debtor" in § 362(c)(3)(A) as ambiguous and concludes that the automatic stay terminates in its entirety. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d at 230 (summarizing the split); *Smith v. Maine Bureau of Revenue Services*, 910 F.3d 576 (D. Me. 2018); *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *In re Jupiter*, 344 B.R. 754 (Bankr. D. SC 2006). To bolster its argument that the statute is ambiguous, the minority view relies on shallow legislative history surrounding the BAPCPA and concludes that the provision terminates the stay in its entirety in order to apparently align with legislative intent. *Rose*, 945 F.3d at 230.

Yet, a simple reading of § 362(c)(3)(A) leads to the simple conclusion that the automatic stay, awarded to debtors, debtors' property, and property of the estate in bankruptcy terminates as to the debtor and the debtor's property—and not the property of the estate—on the 30th day following the filing of a second bankruptcy case. 11 U.S.C § 362(c)(3)(A).

A. The majority approach is correct because § 362(c)(3)(A) does not mention property of the estate and does not harm creditors or produce an absurd result.

The "basic and unexceptional rule" of statutory interpretation is to evaluate the plain meaning of the text in the disputed statute. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 468, 476 (1992). Correctly understanding the plain meaning of the text in a statute also requires reading the statute as a whole. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Following these basic rules, where the language of the statute is plain and does not imply an absurd result or

interpretation, the language must be enforced according to its terms. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

Though a careful parsing of the language of § 362(c)(3)(A) reveals a plain and unambiguous meaning, the language of the statute is not very artfully drafted and requires some effort to understand its mechanics. *In re Scott-Hood*, 473 B.R. 133, 137 (Bankr. W.D. Tex. 2012) ("A plain meaning approach to [§ 362(c)(3)(A)] is difficult, though not impossible."). The minority approach contends that the necessity of parsing the language somehow means that the statute is ambiguous. However, poor drafting that makes a statute "awkward[] and even ungrammatical . . . does not make it ambiguous." *Lamie*, 540 U.S. at 534. A careful reading reveals that the majority interpretation is correct and should be adopted by this Court. The statute at issue distinguishes between three different types of stay actions: (1) "with respect to a debt", (2) "with respect to . . . property securing such debt", or (3) "with respect to any lease . . .". *Id*. at 138; 11 U.S.C. § 362(c)(3)(A). To clearly understand the language, these three specific types of property must be analyzed in order. The Bankruptcy Court in the Western District of Texas artfully performed this exercise in *In re Scott-Hood* when deciding whether a creditor may enforce its rights against property of the estate under non-bankruptcy law. 473 B.R. at 135-40.

When breaking down the meaning of the first category, the court explained that "debt" is defined as "liability on a claim" in § 101(12) of the Bankruptcy Code. 11 U.S.C. § 101(12). Further, the court noted that "claim" is defined in the Code as "any right to payment." 11 U.S.C. § 101(5); *Scott-Hood*, 473 B.R. at 138. Thus, the court concluded, the first instance terminates the stay for any action regarding any liability on any right to payment, i.e., any action regarding any debt. *Scott-Hood*, 473 B.R. at 138. Evidently, this category in the statute explicitly does not include property of the estate, so the minority approach cannot be justified by this part of the statute.

The court moved on to the second category which refers to "property securing such debt." 11 U.S.C. § 362(c)(3)(A). Colloquially, the court explained this is called collateral, and this category thereby covers all the property that stands as collateral for debt. *Scott-Hood*, 473 B.R. at 138. This designation notably does not encompass as much property as the "property of the estate" designation. *Id*. The court aptly recognized that the phrase "property securing such debt" does not include unencumbered property that might belong to either the estate or the debtor. *Id*. Similar to the first category, the logical conclusion is that this category also does not include property of the estate and again, the minority approach cannot be justified by this part of the statute.

Finally, the court reviewed the third category which refers to "any lease." 11 U.S.C. § 362(c)(3)(A). This designation seemingly refers to all the normal remedies associated with enforcing a lease. *Scott-Hood*, 473 B.R. at 138. In conclusion, the court opined that there are three categories in § 362(c)(3)(A) that will no longer be protected by the automatic stay after 30-days: debts, collateral, and leases. *Id*.

Next, following the language of the statute, the court recognized that the phrase "shall terminate" defines to whom the termination of the stay applies and when it terminates. 11 U.S.C. § 362(c)(3)(A). Employing common statutory interpretation skills, the court correctly concluded that the stay terminates 30 days after the filing of the second case "with respect to the debtor." *Id*. At first consideration, it may seem as though this interpretation does not include actions against the debtor's property. However, the court explains that because the debtor's property necessarily stands as collateral for a debt of the debtor, the stay with respect to the debtor's property is also terminated. *Scott-Hood*, 473 B.R. at 140; *Jones*, 339 B.R. at 365 ("At a minimum, the stay would therefore terminate 'with respect to the debtor' as it relates to a debt of the debtor and to property 'securing such debt.'").

Thus, reading the statute in totality and using simple methods of statutory interpretation, the court concluded that the statute clearly prescribes the following: The stay terminates as to actions with respect to debts, property securing such debts (collateral), and leases, but only insofar as those actions are pursued with respect to the debtor and the debtor's property. *Scott-Hood*, 473 B.R. at 138; *see also In re Bender*, 562 B.R. 578, 583 (Bankr. E.D.N.Y. 2016) (concluding that the stay is lifted to allow proceedings to go forward as to debt, property securing such debt, and leases).

As a result of this plain reading of the statute, termination of the automatic stay in § 362(c)(3)(A) still allows creditors and other claimants to pursue or continue to pursue any claims against the debtor or debtor's property. *In re Williams*, 346 B.R. at 368 (summarizing the types of actions that may be taken against the debtor and the debtor's property). All the while, the property of the estate is still protected by the stay to ensure a fair distribution of the rest of the debtor's assets among creditors. *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006) ("No other portion of the automatic stay, including the stay relating to property of or from the estate, was effected"); *In re Scott-Hood*, 473 B.R. at 139 (describing how § 362(c)(3(A) prevents creditors from enforcing debts against a trustee and unencumbered property of the estate in chapter 7 and 13 bankruptcies).

1. Other sections of § 362 demonstrate that Congress knew how to terminate the stay in its entirety and did not do so in § 362(c)(3(A).

The operation of the statute becomes clearer when looking at the language that effectuates the automatic stay. Most notably, § 362(a) implements the automatic stay and creates three categories to which the stay applies: against the debtor, the debtor's property, and the property of the bankruptcy estate. *Rose*, 945 F.3d at 230 (citing *In re Smith*, 910 F.3d 576, 580 (1st Cir. 2018)); *see* 11 U.S.C. § 362(a)(1)-(8); *see also In re Jones*, 339 B.R. at 364 (describing instances in § 362

where Congress distinguishes between automatic stay subjects). The distinction between these three types of stays demonstrates Congress' ability and desire to signal that these three stays have different meanings and should be treated as such. Accordingly, when Congress uses the phrase "with respect to the debtor" in § 362(c)(3)(A), it is clear that it deliberately excluded the phrase "property of the estate" from the statute. *Rose v. Select Portfolio Servicing Inc.*, 945 F.3d at 230. Any other reading of § 362(c)(3)(A) would require the court to add "property of the estate" into the statute where Congress neither intended to add such language, nor used its drafting powers to effectuate such a broad sweeping termination of the automatic stay. *Id.*

The Court of Appeals of the Fifth Circuit, the Bankruptcy Appellate Panel of the Tenth Circuit, and various bankruptcy courts each called attention to statutes throughout the Bankruptcy Code that indicate Congress' ability to distinguish between the three categories of property protected by the stay. *See Rose*, 945 F.3d at 230-1 (listing relevant provisions); *Holocomb*, 380 B.R. at 816 (noting that § 362(a) differentiates between the three categories); *Jones*, 339 B.R. at 363-4 (itemizing provisions that use different language than § 362(c)(3)(A)); *In re Roach*, 555 B.R. 840, 845-6 (Bankr. M.D. Ala. 2016) (highlighting word choice differences throughout § 362(a) and (b)). These sections include provisions such as § 362(c)(1), which explains that "the stay of an act against *property of the estate* under subsection (a) . . . ." continues until the property is no longer property of the estate. 11 U.S.C. § 362(c)(1) (emphasis added). Likewise, § 362(c)(2), following its predecessor, declares that "the stay of *any other act* under subsection (a) . . . continues until the earliest of—" three distinct events. 11 U.S.C. § 362(c)(2) (emphasis added). In these two sections, Congress specifically portioned off property of the estate in subsection (c)(1) and then delegated the rest of the stayed subjects (the debtor's property and the debtor) to the limitations laid out in subsection (c)(2). Congress' separation of the stayed subjects and use of qualifiers can

only be interpreted as implying limitation on the scope of the termination of the automatic stay. *In re Williford*, 2013 WL 3772840 at *3 (Bankr. N.D. Tex. July 17, 2013).

Section 362(b)(2)(B) also uses qualifiers to highlight that the stay does not apply to "the collection of a domestic support obligation from *property that is not property of the estate*[.]" 11 U.S.C. § 362(b)(2)(B) (emphasis added). Similarly, in another realm of the Bankruptcy Code, § 521(a)(6) confirms Congress' ability to distinguish between the subjects of the automatic stay by providing that if the debtor does not reaffirm or redeem property within 45 days after the first meeting of the creditors, the automatic stay will terminate as to "the *personal property of the estate or of the debtor*." 11 U.S.C. § 521(a)(6) (emphasis added); *see In re Jones*, 339 B.R. at 364. Unlike these other sections of the Bankruptcy Code that use broad language to apply to all property, § 362(c)(3)(A) uses narrow language to single out the debtor and the debtor's property and therefore cannot be read to expand the termination of the automatic stay as the minority view suggests. Congress deliberately targets specific problems with specific solutions. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). When read in its entirety and according to the plain language of the statute, there can only be one conclusion: Congress intended to solve a problem by terminating the stay with respect to the debtor and the debtor's property, and specifically excluded any other type of termination. *In re Gillcrese*, 346 B.R. 373, 376 (Bankr. W.D. Penn. 2006) (". . . Congress limited the termination of the automatic stay in § 362(c)(3)(A) to the enumerated items.").

Finally, to further evidence Congress' ability to correctly terminate the stay, this Court need only look to the subsequent section: § 362(c)(4)(A)(i). Using strikingly similar introductory language to that of the section at issue in this case, Congress featured its ability and desire to terminate the stay in its entirety:

> [I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter 7 after dismissal under section 707(b), *the stay under subsection (a) shall not go into effect upon the filing of the later case*…

11 U.S.C. § 362(c)(4)(A)(i) (emphasis added).

In this section, the language completely excludes the automatic stay from the successive bankruptcy case. "Congress did not use similar language in § 362(c)(3)(A)." *In re Williford*, 2013 WL 3772840 at *3. No part of § 362(c)(3)(A) mentions or even alludes to property of the estate. Tellingly, these two sections were promulgated together. *In re Williams*, 346 B.R. at 368. This timing makes it even more abundantly clear that Congress knew how to terminate the entire stay and could have done so yet chose not to act.

2. The majority interpretation does not produce an absurd result because creditors have other ways to protect or satisfy their claims.

Creditors may argue that this interpretation would lead to unsavory or even absurd results. While this may not be the result that creditors want, it does not significantly harm them. *Rose*, 945 F.3d at 231 (". . . [W]e are not convinced that this plain meaning interpretation substantially harms creditors."). There are two ways in which a creditor may abide by the remaining stay on actions while also seeking to protect their interests: (1) file a motion for relief from the stay, and (2) take action against the unprotected assets. *Id*. First, under § 362(d), if a creditor believes that a debtor is abusing the automatic stay, the creditor may file a motion for relief from the stay. *Id*.; 11 U.S.C. § 362(d). This motion must be heard within 30 days of filing and will be granted to the creditor unless the debtor can provide adequate protection. *Id*. Thus, if circumstances demand relief from the automatic stay, a bankruptcy court may grant a creditor its desired relief. *Id*.

Likewise, there are many different actions a creditor may bring against a debtor and the debtor's property, even with the automatic stay in place with respect to the property of the estate. First, judgments may be enforced against the debtor because § 362(a)(2) is no longer applicable; second, creditors may proceed with collection actions because § 362(a)(6) no longer protects the debtor; finally, liens against the debtor's property may be created, perfected, and enforced since § 362(a)(5) no longer applies. *In re Williams*, 346 B.R. at 167. Moreover, an eviction notice can also be brought against a debtor with respect to a lease. *In re Roach*, 555 B.R. at 848 (citing *Bankers Trust Co. of Cal. v. Gillcrese (In re Gillcrese)*, 346 B.R. 373, 377 (Bankr. W.D.Pa. 2006)) (internal quotations omitted). Finally, a suit against the debtor can be instituted based on a note the debtor signed. *In re Gillcrese*, 346 B.R. at 377.

The language of § 362(c)(3)(A), its surrounding statutes, and the remaining remedies for satiating creditors shows that Congress intended to gently punish second-time filers by offering creditors a limited menu of options for satisfying their various claims. The majority interpretation provides that limited menu of options. The minority approach, by attempting to terminate the automatic stay in its entirety, would provide creditors with a buffet of punitive measures that the language of the statute does not justify. The language of § 362(c)(3)(A) is difficult to parse upon first read, but when broken down to its plain meaning, the language is clear. "If the statutory language is plain, the Court must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 474 (2015). To enforce § 362(c)(3)(A) according to its terms, this Court should elevate the majority interpretation to the only interpretation.

B. The legislative history lacks the substance to support Wildflowers' argument that this Court should deviate from the plain language or reject congressional intent.

1. The scant relevant legislative history does not support broadening the plain meaning of § 362(c)(3).

As the court below correctly recognized, a clear and unambiguous provision such as this one forgoes the need to examine legislative history. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 803 n.3 (1989); *Lamie*, 540 U.S. at 526; *Rose*, 945 F.3d at 230 ("We believe the language in § 362(c)(3)(A) is clear."). Even if the statute was ambiguous, the relevant legislative history for § 362(c)(3) is neither expansive nor persuasive enough to permit the improper deviation from the unambiguous (though admittedly dense) text of this provision that Petitioner advocates. In such a case, this Court should not "deviate from the result suggested by the structure of the statute itself." *Jeffers v. U.S.*, 432 U.S. 137, n.26 (1977).

At best, the inconclusive legislative history surrounding this provision provides little guidance. As an article published in the American Bankruptcy Institute Journal points out, "[t]he legislative history surrounding BAPCPA is very sparse and contains nothing more than a singular House Report from 2005, most of which is nothing more than a regurgitation of BAPCPA's text." Michael Miller, *Untangling the Web of S 362(c)(3)(a) and Its Legislative History*, Am. Bankr. Inst. J. 22 (2020). The house report explains that § 362(c)(3)(A) "amends § 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period." H.R. Rep. No. 109-31, pt. 1, at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138. Another House Report relied upon by Petitioner from 1977 explains that Congress intended the stay to provide the "debtor a breathing spell from his creditors." H.R. Rep. No. 95-595, at 340-41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

Neither of those broad statements supports the minority view's contention that § 362(c)(3)(A) should be read to mean that the lift on the automatic stay applies to both the debtor and the debtor's estate. The first report merely summarizes the amendment made to this section of the Bankruptcy Code. Moreover, the statute references only the "individual *if such individual was a debtor*" and does not reference the debtor's estate. H.R. Rep. No. 109-31, pt. 1, at 69 (emphasis added). The second report simply states a vague policy goal of providing some relief to the debtor. Lifting the stay against the estate, rather than solely lifting the stay against the debtor, does not accomplish this goal. This Court should not supplant the straightforward language of the statute with a misguided interpretation that the vague language in the House Reports somehow evidences Congress' intent to lift the stay with respect to the estate though the language of the statute indicates otherwise.

While Congress did intend to curb abusive bankruptcy filings by enacting the BAPCPA, the plain language interpretation does not undercut that goal. *See Ransom v. FIA Card Services, N.A.*, 562 U.S. at 131 (2011). The *Harris* court addressed how the scant legislative history of this provision illuminates its meaning in light of this policy goal. *In re Harris*, 342 B.R. at 279-80. Pointing to the graduation of penalties against a debtor evident in § 362(c)(3) and § 362(c)(4), the *Harris* court reasoned that Congress chose to differentiate the stay against the debtor from the stay against the estate. *Id*. The *Harris* court interpreted the differing language in § 362(c)(3) and (c)(4) as indicating Congressional intent for (c)(3) to apply only to the debtor's property and for (c)(4) to apply more broadly to the property of the estate. *Id*. This analysis, adopted by the majority of courts, appropriately acknowledges the legislative history while adhering to the plain language meaning of the statute.

2. The congressional intent, evident from the text of the statute, best aligns with the majority view.

Further, adopting the majority view would not deviate from congressional intent. The majority interpretation still prevents debtors from abusing the protective automatic stay by providing creditors with a gradient of relief from the stay rather than the blunt all-or-nothing approach suggested by Petitioner. As the Tenth Circuit recognized, at the core of bankruptcy law is the policy of "obtaining a maximum and equitable distribution for creditors." *See Holocomb*, 380 B.R. at 816 ("The minority approach circumvents this policy by allowing a single creditor, who may be oversecured, full access to property that would otherwise be property of the estate.").

As in other parts of the Bankruptcy Code, Congress intended to balance the interests of the debtor against those of creditors, yet the minority approach would yield entirely to the interests of the creditors. *See id*. By lifting the stay solely with respect to a debtor, who has previously filed bankruptcy within one year without filing an extension of the stay, while leaving the stay against the estate intact, the statute fires a sort of warning shot against abusive filings. As the *In re Williams* court found, "by permitting creditors to proceed after thirty days (unless directed otherwise by court order) against the debtor and the debtor's property, but not against property of the estate, Congress has balanced competing interests." *In re Williams*, 346 B.R. at 368. The minority approach would deprive debtors entirely of the protections of the automatic stay. Such a result would run contrary to congressional intent.

The majority approach aligns with the general policies and goals of the Bankruptcy Code. As this Court noted in *Ritzen Group*, "[t]he stay serves to 'maintai[n] the status quo and preven[t] dismemberment of the estate' during the pendency of the bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020) (quoting 1 COLLIER ON BANKRUPTCY ¶5.08[1][b], p. 5–43 (16th ed. 2019)). The minority approach would gut a debtor of this core

protection merely because the debtor filed for bankruptcy within the previous year and did not file a motion to extend the stay. Such a result conflicts with congressional intent (as evidenced by the language of the provision) to balance the interest of the debtor against those of the creditor(s). This Court correctly recognized in *Ritzen Group* that a key component of the success of any bankruptcy filing is the protection of the estate. *Id*. Congress clearly recognized the significance of that protection and therefore chose to apply the automatic lift of the stay under § 362(c)(3) *only* to the property of the debtor, leaving the property of the estate protected.

"[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) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir.1972)). Other parts of statute show that Congress is capable of making the distinction between the debtor and the debtor's estate. *See, e.g*., 11. U.S.C. § 362(b)(2)(B); (c)(1), (c)(2) and 11 U.S.C. § 521(a)(6). In § 362(c), Congress conspicuously makes no mention of the estate - just the debtor, indicating an intent to lift the stay *solely* with respect to the debtor. If Congress meant to lift the stay as to the debtor's estate, they would—and could— have done so. *See Williams*, 346 B.R. at 368.

CONCLUSION

Parties may not contract away fundamental rights in bankruptcy, especially those that affect the entire reorganization. The FAA must yield to the bankruptcy court's jurisdiction to adjudicate matters concerning the automatic stay. Additionally, the plain language of § 362(c)(3)(A) is clear and should be enforced according to its terms. The little legislative history available is not robust

enough to support the argument that the plain meaning of the statute should be rejected. For the reasons stated, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

Team R.26
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APPENDIX

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

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

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be

dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

11 U.S.C. § 101 Definitions

In this title the following definitions shall apply:
(1) – (4) [omitted]

(5) The term "claim" means—

(A)right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B)right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(6) – (11) [omitted]

(12) The term "debt" means liability on a claim.
(13) – (55) [omitted]

11 U.S.C. § 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

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

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) [omitted]

(2) under subsection (a)—

(A) [omitted]

(i) – (v) [omitted]

(B)of the collection of a domestic support obligation from property that is not property of the estate;

(C) – (G) [omitted]

(3) – (29) [omitted]

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A)the time the case is closed;

(B)the time the case is dismissed; or

(C)if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(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;

(B) – (C) [omitted]

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case

refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) – (D) [omitted]

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1)for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2)with respect to a stay of an act against property under subsection (a) of this section, if—

(A)the debtor does not have an equity in such property; and

(B)such property is not necessary to an effective reorganization;

(3)with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A)the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B)the debtor has commenced monthly payments that—

(i)may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii)are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4)with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A)transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B)multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of

interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e) – (j) [omitted]

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l) – (o) [omitted]

11 U.S.C. § 521 Debtor's Duties

(a) The debtor shall—

(1) – (5) [omitted]

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A)enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B)redeems such property from the security interest pursuant to section 722; and

(7) [omitted]

(b) – (j) [omitted]

11 U.S.C. § 541 Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1)Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) – (7) [omitted]

(b) – (f) [omitted]

28 U.S.C. § 157. Procedures

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

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

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

(A) matters concerning the administration of the estate;

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

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

(D) orders in respect to obtaining credit;

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

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

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

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

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

(J) objections to discharges;

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

(L) confirmations of plans;

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

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

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

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

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

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

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

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

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.