No. 20-1004

IN THE

Supreme Court of the United States

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK, PETITIONER

V.

EARL THOMAS PETTY, RESPONDENT.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

January 19, 2021

TEAM NUMBER 28
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Under 9 U.S.C. §§ 1 *et seq*, is the Federal Arbitration Act impliedly repealed by 11 U.S.C. § 362 and related judicial code provisions?

II. Under 11 U.S.C. § 362 (c)(3)(A), does termination of the automatic stay apply to Property of the Estate by a repeat filler where the statute says, "with respect to the debtor?"

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The Thirteenth Circuit Court of Appeals' decision is available at No. 19-0805 and reprinted at Record ("R") 2. The Bankruptcy Court for the District of Moot ruled in favor of Debtor, Earl Thomas Petty on both issues. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court's ruling on both issues.

STATEMENT OF JURISDICTION

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

PERTINENT CONSITUTIONAL AND STATURORY PROVISIONS

This action implicates statutory construction of certain provisions of Title 11 of the United States Code and related judicial provisions, as well as the Federal Arbitration Act. The following are also restated in the Appendix.

The relevant portions of 11 U.S.C. §362 provide:

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

The relevant portion of 28 U.S.C. § 1334 provides:

> (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.

The relevant portion of 9 U.S.C. § 2 provides:

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

STATEMENT OF THE CASE

This appeal arises out of Petitioner's attempt to dilute the effectiveness of the Bankruptcy Code. As a result, the potential arbitration of the bankruptcy proceeding underlying this appeal threatens Respondent's ability to realize the protections he is entitled to under the Code, granting him a fresh start and safeguarding the rights of his creditors. Further, Respondent's position that when the thirty period under Section 362(c)(3)(A) lapses, the automatic stay only terminates with respect to the debtor's property but does not terminate with respect to the property of the estate is supported by the plain meaning of Section 362 and purposes of the Bankruptcy Code.

I. FACTUAL HISTORY

A. Thomas Petty successfully develops Great Wide Open Brewing Company Inc.

Debtor, Thomas Petty ("Petty"), founded a craft brewery, Great Wide Open Brewing Company, Inc. ("Great Wide Open"), in 2002. R. at 3. Great Wide Open produced craft beer and sold it to local restaurants and convenience stores in the city of Royal Rapids, Moot. *Id.* at 2-3. In 2005, Great Wide Open opened a 9,000 square foot taproom in Royal Rapids featuring small batch brewing equipment (the "Equipment"), which Petty purchased with his own money. *Id.* at 3. Over the next ten years, Great Wide Open became very successful, gaining award-winning recognition and emerging as one of Moot's largest craft breweries. *Id.* Due to the brewery's success, Petty pursued an aggressive growth strategy, which included opening four additional tap rooms and a state-of-the-art brewhouse in Moot. *Id.* at 4. A majority of Great Wide Open's beer was brewed at the brewhouse taproom. *Id.*

B. Thomas Petty enters into a revolving credit agreement with Petitioner, Wildflowers.

To fund the new business growth, in September 2011, Great Wide Open entered into a $35 million revolving credit agreement (the "Credit Agreement") with Petitioner, Wildflowers Community Bank ("Wildflowers"). *Id.* To ensure repayment of the debt, Petty granted Wildflowers a first priority lien on essentially all of its assets. *Id.* Along with the Credit Agreement, Petty also executed a personal guaranty (the "Guaranty"), promising repayment of the business obligations and granting Wildflowers a first priority lien on the Equipment. *Id.* Both the Credit Agreement and Guaranty included identical "Remedies" clauses if Petty defaulted on repayment. *Id.* The clause stated: "[o]bligor 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.* Further, the Agreement and Guaranty included the following arbitration clause: "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.*

C. Thomas Petty and Great Wide Open default on their respective payment obligations under the Credit Agreement and Guaranty.

In 2017, Great Wide Open began having financial problems which resulted in the closing of three taprooms in March 2018. *Id.* at 3. Great Wide Open did not notify Wildflowers of the closings. *Id.* Additionally, the landlord for the Royal Rapids taproom terminated its lease. *Id.* In April 2018, Petty and Great Wide Open defaulted on their payment obligations to Wildflowers under the Credit Agreement and the Guaranty. *Id.* Upon default, Wildflowers sent a default letter to both Great Wide Open and Petty. *Id.* at 5. On June 4, 2018, Wildflowers filed a demand for

arbitration and a general state law breach of contract complaint with the American Arbitration Association against Petty. *Id.* at 4. In the complaint, Wildflowers sought approximately $33.2 million in damages, alleging it was the balance owed under the Credit Agreement. *Id.* at 5. The American Arbitration Association scheduled an initial conference in the arbitration proceedings for July 12, 2018, however, one day before that date, Great Wide Open terminated its employees and ceased all operations. *Id.*

II. PROCEDURAL HISTORY

A. The Initial Bankruptcy Case.

On July 12, 2018, the same day the arbitration conference was set to take place, Great Wide Open filed a chapter 7 bankruptcy case in Bankruptcy Court for the District of Moot. R. at 5. The Great Wide Open's assets were liquidated, and Wildflowers receiving a majority the liquidation proceeds. *Id.* at 6 n. 3. On the same day Petty filed an individual chapter 11 bankruptcy case (the "Initial Bankruptcy Case") in the Bankruptcy Court for the District of Moot on July 12, 2018. *Id.* at 5. The court dismissed the Initial Bankruptcy Case on August 27, 2018 due to Petty's inability to timely file the required documents, including his schedules of assets and liabilities. *Id.*

B. The Second Bankruptcy Case.

On January 11, 2019, the same day the arbitration proceedings were scheduled to begin, Petty filed a second chapter 11 bankruptcy case (the "Second Bankruptcy Case"). *Id.* at 5-6. This second filing included a chapter 11 plan or reorganization proposing to pay his creditors—including Wildflowers—forty cents on the dollar from his income over a period of five years. *Id.* at 6. The plan also included pre-petition settlements which Petty negotiated with his other creditors. *Id.* Petty did not negotiate a settlement with Wildflowers before filing the Second

Bankruptcy Case, therefore Wildflowers filed a proof of claim asserting a remaining balance of $2.1 million under the Guaranty. *Id.* at 6 n. 3.

During the first day of hearings in the Second Bankruptcy Case, Petty indicated that he had re-opened the Royal Rapids taproom in December 2018, after negotiating a lease with the landlord, and was now doing business as a sole proprietorship, "Full Moon Fever Brewing" ("Full Moon"). *Id.* at 6. Petty also stated that he was brewing beer using the Equipment from the Great Wide Open taprooms and that Full Moon had been profitable in the first month of operations. *Id*. Though the Second Bankruptcy case was well planned, Petty failed to file a motion to extend the automatic stay under Section 362(c)(3)(B) during the initial thirty days. *Id.* On February 12, 2019, thirty-two days after the commencement of the Second Bankruptcy Case, Wildflowers repossessed the Equipment which served as a security interest on the Guaranty. *Id.*; *id.* at n. 4.

Due to the Equipment being repossessed, Petty was forced to shut down Full Moon on February 17, 2019. *Id.* at 7; *id.* at n. 5. Petty then filed a motion in the Second Bankruptcy Case claiming Wildflowers violated the automatic stay and sought $500,000 in damages. *Id.* at 6. In response, on March 5, 2019, Wildflowers filed a motion asserting that under Section 362(c)(3)(A), no automatic stay existed with respect to property of the estate, which included the Equipment. *Id.* at 7. Wildflowers returned the Equipment to Petty the day before the hearing. *Id.*

C. The Bankruptcy Court ruled in favor of Petty and Wildflowers appealed.

The bankruptcy court denied Wildflowers's request to compel arbitration, holding that "enforcing the arbitration agreement would conflict with the Code, and Section 362 in particular." *Id.* Further, the court held that under Section 362(c)(3)(B), a creditor may not take action with respect to property of a debtor's estate. *Id.* Petty was awarded compensatory damages

in the amount of $200,000. *Id.* Pursuant to 28 U.S.C. § 158 (d), Wildflowers sought a direct appeal of the two issues. *Id.*

STANDARD OF REVIEW

The questions presented are based on interpretation of the Bankruptcy Code[1] and relevant federal law, therefore making them pure issues of law. Thus, the standard of review for this appeal is de novo. Texas v. Soileau (In re Soileau), 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

The U.S. Constitution empowers Congress to establish a system of bankruptcy law, providing both debtors and creditors a centralized forum to settle complex financial disputes. In doing so, Congress has created special rights and protections for interested parties in a bankruptcy case that are unique to bankruptcy law. Arbitration of disputes under bankruptcy law preclude these special rights and protections that Congress so clearly and manifestly provided to creditors and debtors. Additionally, termination of the automatic stay—even when a debtor fails to file a motion to extend— following a repeat filing applies only to property of the debtor and not to property of the estate.

This Court has held that in enacting the Federal Arbitration Act ("FAA"), Congress declared a national policy favoring arbitration. To overcome the enforcement of an arbitration agreement, a party must establish congressional intent to supersede the FAA's mandate with respect to the party's statutory claims. Shearson/Am. Express, Inc. v. McMahon explained that such congressional intent can be discerned from: (1) the statute's text, (2) the statute's legislative history, or (3) an inherent conflict between arbitration and the given statute's underlying

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

purposes. In Epic Systems, this Court did not abrogate its decision in McMahon but did further elucidate the showing required to overcome the enforcement of an arbitration agreement. Epic makes plain that implied repeal of the FAA is incredibly rare, requiring the contrary congressional command be clear and manifest. However, "rare" does not mean "impossible," and the case before this Court presents one such "rare" circumstance.

Section 362 of the Bankruptcy Code, and related judicial provisions, impliedly repeal the FAA as the FAA presents an inherent conflict to the clear and manifest congressional commands present in the Code. Though this Court has encouraged the enforcement of arbitration agreements, Congress, in 28 U.S.C. § 1334, chose to place all matters arising in, and related to, a bankruptcy case within the jurisdiction of the district courts. Congress explicitly granted this authority notwithstanding another act of Congress, including the FAA. Through § 1334, Congress clearly and manifestly commanded district courts to oversee bankruptcy proceedings, including the interpretation of the automatic stay at issue in this case. § 157 clearly designates the automatic stay as a core proceeding over which bankruptcy courts have exclusive jurisdiction. The automatic stay is one of the most unique, and powerful, features of bankruptcy as it is essential to the protection of both debtors and creditors. Arbitration of an issue so central to the function of bankruptcy would strip away the powers of bankruptcy courts to carry out provisions of the Code as afforded in Section 105.

Likewise, the arbitration of a dispute between two parties at the exclusion affected third parties is an inherent conflict with Section 362 and other judicial provisions of the Code. A unique, and defining, characteristic of bankruptcy proceedings is that they are multi-party disputes. The automatic stay is a clear example of this multi-party aspect of bankruptcy as it prevents creditors from taking unilateral action against encumbered property and ultimately

protects such property for benefit of all parties involved. Additionally, it provides unique rights and protections not found in other legal proceedings including arbitration. Arbitration, in direct contrast, is primarily a two-party conflict resolution process that fails to provide for the rights and protections afforded to other interested parties by the Code. Arbitration may exclude other interested parties and arbitrators' decisions generally cannot bind these third parties. Arbitration thus produces an inherent conflict with the Code and its primary principle of providing a central forum to resolve a debtors' financial issues. Additionally, arbitration may not provide for the important rights Congress clearly and manifestly provided for in the Code such, asset management and notice to third parties. Lastly, arbitration regarding the disposition of a bankruptcy provision presents an inherent conflict with the Code as it interferes with bankruptcy courts' ability to oversee bankruptcy cases and other matters affecting the estate, which Congress provided clear commands for throughout the Code and primarily in Section 105.

It is also imperative that this Court hold that termination of the automatic stay following a debtor's repeat filing without a motion to continue applies only to property of the debtor and not to the property of the estate. The Thirteenth Circuit correctly held that Section 362(c)(3)(A) results in termination of the automatic stay only "with respect to the debtor" and thus the protections of the stay continue to apply to property of the estate. This holding represents the view held by a majority of courts and ought to be affirmed in this case. First, traditional methods of statutory construction require Section 362(c)(3)(A) to apply solely to property of the debtor. A plain reading of "with respect to the debtor" provides clear evidence of Congress's intent to terminate the stay as to property of the debtor only. This plain reading is especially appropriate given the statute is unambiguous. Congress uses the term "property of the estate" 117 times in the Code, thirteen of which are found in Section 362. Congress knows how and when to use the

term “property of the estate,” and its choice not to include it in does not imply that they forgot or intended for judges to interpret it as an omission. A plain reading of this statute, and a holding that “with respect to the debtor” refers exclusively to property of the debtor, is compatible with the central principles of bankruptcy, including allowing debtors to get a fresh start, protecting the rights of creditors and providing them with a centralized forum for their claims.

In the case before this Court, the Equipment was property of the estate and thus the automatic stay regarding the Equipment was not terminated upon thirty days after Debtor’s subsequent filing. The Equipment, which Petty purchased with his own money, was part of his chapter 11 reorganization plan. The Equipment allowed his new business to prosper and therefore was essential to his fresh start and repayment of creditors. Because the Equipment constituted property of the chapter 11 bankruptcy estate, and not the debtor, Section 362(c)(3)(A) did not terminate the stay with regard to this property. As such, Wildflower’s repossession of the Equipment was in direct violation of the Code.

ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeals's decision that Section 362 and related judicial code provisions inherently conflict with the FAA. Further, this Court should affirm that Section 362(c)(3)(A) terminates the automatic stay, with respect to property of the debtor only.

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT SECTION 362 AND RELATED JUDICIAL CODE PROVISIONS IMPLIEDLY REPEAL THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 ET. SEQ.

The FAA, adopted by Congress in 1925, provides that written agreements to submit disputes to arbitration "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. Congress intended for the FAA to not only reduce common law hostility towards arbitration, but to also create a more efficient form of dispute resolution. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (stating the FAA creates a "quicker, more informal and often cheaper resolution for everyone involved."). This Court held that in enacting the FAA, Congress declared a national policy favoring arbitration. *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1983); *see also* Dobbins v. Hawk's Enters., 198 F.3d 715, 717 (8th Cir. 1999) (stating "from this strong policy flows a 'broad principle of enforceability' of arbitration provisions"); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (stating the FAA establishes a "liberal federal policy favoring arbitration agreements"). Although public policy has established that a court must "rigorously enforce" arbitration agreements, it need not do so when "a countervailing policy manifests itself in another federal statute." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); *see* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir.1989) (stating arbitration clause should be enforced unless "[its] effect would

seriously jeopardize the objectives of the Code"); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (explaining "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command").

A. Where an inherent conflict with the FAA is present, arbitration of the claim is improper.

To overcome the enforcement of an arbitration agreement, a party must establish that Congress has, either expressly or impliedly, precluded arbitration of the subject matter at issue. McMahon, 482 U.S. at 226 (noting FAA repeal possible in the face of a contradictory congressional command). This Court, in McMahon, stated a party can demonstrate that a "contrary congressional command" exists by making a showing of Congress's intent to "limit or prohibit waiver of a judicial forum for a particular claim. . . deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227; *see* Green/Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000) ("In determining whether statutory claims may be arbitrated […] ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). Therefore, McMahon established a three-prong test to determine Congress's intent: (1) a statute's text; (2) its legislative history; or (3) an inherent conflict between arbitration and the statute's purpose. McMahon, 482 U.S. at 226-27. This is known as the McMahon test.

The Code, enacted years after the FAA, contains no textual reference to the FAA nor explicit direction regarding the treatment of arbitration and bankruptcy law. H.R. Rep. No.95-595, 95th Cong., 2nd Sess. P.L. 598 (1978) (codified as 11 U.S.C. §§ 101, et seq; H.R. Rep. No. 401, 68th Cong., 2nd Sess. (1925) (codified as 9 U.S.C. § 2); *see* Berkoff & Driscoll, *In the Wake of the U.S. Supreme Court's Decision in* Epic Systems, *Should Core Bankruptcy Matters Be Deemed a "Clear and Manifest" Exception to the Federal Arbitration Act?* 29 No. 2 J.

BANKR. L. & PRAC. NL Art. 5 (2020). Additionally, there is little guidance found in the legislative history of the Code. 11 U.S.C. §§ 101, et seq.; *see* Berkoff & Driscoll, *supra.* Therefore, the inquiry of whether the Code repeals the FAA rests on the McMahon test, asking "whether arbitrating the dispute in question would pose an irreconcilable conflict with the Code." In re U.S. Lines, Inc., 197 F.3d 631, 640 (2d Cir. 1999) (citing Hays & Co., 885 F.2d at 1161) (stating the inherent conflicts test, when applied to a bankruptcy action, asks "whether any underlying purpose of the Code would be adversely affected by enforcing an arbitration clause"); United States v. Fausto, 484 U.S. 439, 452-53 (1988) (holding that the party asserting another enactment cannot be harmonized with the FAA has the "heavy burden" of establishing "an irreconcilable conflict"). If arbitration would dilute the purposes and objectives of the Code, then arbitration should not be enforced. Hays & Co., 885 F.2d at 1161. For these reasons, the Second Circuit's application of the inherent conflicts test is instructive.

i. The holding in Epic does not abrogate McMahon.

As the Thirteenth Circuit held, Epic did not overrule McMahon and courts have continued to apply the McMahon test to refuse enforcement of an arbitration agreement. *See* R. at 9; In re Belton v. GE Capital Retail Bank (In re Belton), 961 F.3d 612, 616-17 (2d Cir. 2020) (stating Epic never overruled McMahon); Henry v. Educ. Fin. Serv. (In re Henry), 944 F.3d 587, 591-92 (5th Cir. 2019) (recognizing the test in Epic is substantially the same as McMahon); In re Golden, 587 B.R. 414, 428 (Bankr. E.D.N.Y. 2018) (denying arbitration because discharge violations inherently impede a debtor's ability to achieve a fresh start); Homaidan v. SLM Corp. (In re Homaidan), 587 B.R. 428, 441 (Bankr. E.D.N.Y. 2018) (denying arbitration because compelling debtor to arbitrate its claims "would inherently conflict with the Code's objections of providing fresh start"). In analyzing the FAA in relation to the National Labor Relations Act

(NLRA), the Epic Court ruled that Congress's intent to repeal must be "clear and manifest." Epic Sys., 138 S. Ct. at 1624 (citing Fausto, 484 U.S. at 439, 452-53). The Epic Court expressed a strong presumption against implied repeal under its standard. *See id.* ("[R]epeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute."). Though Epic viewed statutory silence as "probative evidence" of Congress' intention that the FAA replaced relevant statutory provisions, the Second Circuit's ruling (and this Court's denial of cert.) in Anderson v. Credit One Bank, N.A. (In re Anderson), reveals that silence is not outcome determinative. 884 F.3d 382, 392 (2d Cir. 2018); *see* In re Belton, 961 F.3d at 618 (understanding that if Epic recognized silence as outcome determinative it "would have rendered much of Epic's analysis surplusage"). Therefore, Epic does not require a "text-first approach," which means that an inherent conflict—even absent an explicit statutory directive for repeal—may satisfy the "clear and manifest" requirement. *See* In re Belton, 961 F.3d at 615 (recognizing Appellant's view of Epic as requiring textual approach); Berkoff & Driscoll, *supra* ("The cases decided in the bankruptcy context since Epic Systems reinforce the vitality of McMahon's inherent conflict test.").

The test set forth in Epic is comprehensibly the same as that set forth in McMahon. *See* In re Henry, 944 F.3d at 592; In re Belton, 961 F.3d at 616. The "clear and manifest" standard set out in Epic does not overrule McMahon, rather it clarifies how to define an inherent conflict required to establish an implied repeal of the FAA under McMahon. Furthermore, in deciding Epic, this Court never stated an intention to abrogate McMahon, even citing to it twice in the majority opinion. Epic Sys., 138 S. Ct. at 1627 (explaining other cases have also grappled with lack of specific statutory discussion of arbitration); *see* In re Belton, 961 F.3d at 616 (stating Epic doesn't "render any prong of [the McMahon] tripartite test a dead letter"). Since its ruling

in 1987, this Court continues to not only cite to McMahon, but also applies the McMahon test– indicating that it remains good law. *See e.g.*, American Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98-101 (2012); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). Therefore, just as the Thirteenth Circuit did, this Court should adopt the conjunctive reading of McMahon and Epic.

ii. Disagreement among the circuits regarding what determines an inherent conflict has given rise to the need for a clear ruling from the Supreme Court, affirming the Second and Thirteenth Circuit's Approach.

Circuit courts have yet to reach a consensus as to what constitutes an inherent conflict so clear and manifest under the Code that it repeals the FAA. Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Between Bankruptcy and Arbitration Through an Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 622 (2008) ("In order properly to address this 'inherent conflict,' the bankruptcy court must be called upon to analyze the enforceability of an agreement to arbitrate guided by the policy underpinnings of the bankruptcy jurisdictional scheme, the context of a particular bankruptcy case and the subject matter of the particular claim."). The Code's inability to provide guidance based on its text and legislative history has resulted in confusion regarding the interpretation and application of the McMahon test. Leventhal & Elias, *Competing Efficiencies: The Problem of Whether and When to Refer Disputes to Arbitration in Bankruptcy Cases,* 24 AM. BANKR. INST. L. REV. 133, 144 (2016). However, recently, the Second Circuit in Anderson and Belton[2] expounded upon the McMahon test, properly adding an initial inquiry into whether the matter is core or non-core before asking whether there is an underlying conflict with the purpose of the Code. *See* Anderson

[2] On October 9, 2020, Petitioner, GE Capital Bank, filed a petition for Writ of Cert. This Court has yet to respond. By affirming the Thirteenth Circuit in this case, this Court will have answered the question presented in In re Belton's petition.

844 F.3d at 389; In re Belton, 961 F.3d at 617. This is the approach to the McMahon test that the Court should adopt in this case.

In contrast, the Fourth, Nineth and Eleventh Circuits have exclusively considered whether a matter is core or non-core when addressing the presence of an inherent conflict between the Code and the FAA. Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005) (examining whether "Congress intended to limit or preclude the waiver of the bankruptcy forum for core proceedings"); Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011, 1021 (9th Cir. 2012) (noting that a bankruptcy court has "discretion" to deny arbitration in core proceedings, but generally not in non-core proceedings); Whiting–Turner Contracting Co. v. Elec. Mach. Enters., Inc., (In re Elec. Mach. Enters., Inc.), 479 F.3d 791, 796-97 (11th Cir. 2007). The rationale for distinguishing between core and non-core proceedings is that a non-core proceeding likely will not to be impacted by arbitration, whereas core proceedings "implicate more pressing bankruptcy concerns." In re U.S. Lines, 197 F.3d at 640.

Further still, the Third Circuit finds that the core/non-core distinction is not determinative of a court's discretion to deny the enforcement of arbitration, but rather a mere jurisdictional guide. In re Mintze, 434 F.3d 222, 229 (3d Cir. 2006) (stating that core/non-core distinctions determine whether bankruptcy court has jurisdiction to make full adjudication); Hays and Co., 885 F.2d at 1154 (finding that in a three-petition claim, some claims, even non-core claims, remain within bankruptcy while others were arbitrable). While the matter in Mintze was core, the Third Circuit held that the FAA could displace the Code in both core and non-core matters. Mintze, 434 F.3d at 229.

However, simply distinguishing between core and non-core cannot be where the analysis ends. *See* In re Nat'l Gypsum Co., 118 F.3d 1056, 1067 (5th Cir. 1997) ("Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code."); In re Henry, 944 F.3d at 590-91 (including the question of whether "requiring arbitration would conflict with the purposes of the Bankruptcy Code"). In Gypsum, the Fifth Circuit expressly rejected a "per se core-non-core rule" and questioned whether arbitrating a particular core matter would conflict with the purpose of the Code. In re Nat'l Gypsum Co., 118 F.3d at 1067-69. The Fifth Circuit concluded that only those core claims arising from the Code contain a strong enough potential for conflict between the Code and the FAA to allow bankruptcy courts to use their discretion in deciding the enforcement of arbitration. *Id*.; *see* Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act,* 117 HARV. L. REV. 2296, 2300-01(2004) (stating that Gypsum and Hays formed the foundation in finding an inherent conflict.).

In analyzing whether the Code impliedly repeals the FAA, this Court should hold that the distinction between core and non-core matters alone is not controlling. The Second Circuit in Anderson and Belton was correct in splitting the analysis into two parts: first, whether the matter is core or non-core; and second, whether arbitration of the claim conflicts with the underlying purposes of the Code. *See* Anderson, 844 F.3d at 388-89; In re Belton, 961 F.3d at 617. Anderson and Belton properly interpret the commands set out in both McMahon and Epic, while providing much needed clarity to courts on how the McMahon test is applied.

B. Congress impliedly repealed the FAA when it authorized federal courts to hear all matters related to a bankruptcy case "notwithstanding any act of Congress" in 28 U.S.C. § 1334(b).

The U.S. Constitution grants Congress the authority to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. 1 § 8, cl. 4. Congress exercised this authority in 28 U.S.C. § 1334(a) by conferring original and exclusive jurisdiction over all cases under title 11 to the district courts. COLLIER ON BANKRUPTCY ¶ 362.03 (Richard Levin & Henry J. Sommer eds., 16th ed.) (citing In re Blevins Elec. Inc., 185 B.R. 250, 254 (Bankr. E.D. Tenn. 1995) (defining case as the "umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take[s] place")). Further, § 1334(b) grants district courts, "notwithstanding any act of Congress" original, but not exclusive, jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Additionally, § 1334(e) provides that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *Id.* at § 1334(e)(1). These explicit grants of jurisdiction evidence Congress's clear and manifest command that bankruptcy proceedings be handled by the courts and not by an arbitrator. In satisfaction of Epic and McMahon together, this explicit and direct grant of jurisdiction to the courts amounts to nothing short of a clear and manifest command that courts hear these proceedings, regardless of other federal statutory law—including the FAA.

i. Claims arising under Section 362 are core proceedings which Congress demands be handled by the federal courts and thus, arbitration of these claims would be in direct conflict with the Code.

This jurisdictional scheme, created by the 1984 amendments to the Code, distinguishes between civil proceedings arising *under* the code, which are deemed "core" matters, and those

related to a bankruptcy case, which are deemed "non-core.". 28 U.S.C. § 157(b)(2) (emphasis added) (defining core proceedings and providing nonexclusive list of typical ones); Birney, *supra*, at 647. The statutory claims in this case are based on Section 362 of the Code rendering them a core proceeding and therefore creating an inherent conflict between arbitration and bankruptcy law. R. at 6-7; *cf.* Herrington v. Wells Fargo Bank (In re Herrington), 374 B.R. 133, 141 (Bankr. E.D. Pa. 2007).

28 U.S.C. § 157 clearly designates that "[c]ore proceedings include, but are not limited to…motions to terminate, annul, or modify the automatic stay." 28 U.S.C. § 157(b)(2)(G). Disputes regarding the automatic stay, provided for in Section 362 of title 11, like the one in this case, clearly represent a proceeding arising *under* the Code over which Congress provided an explicit grant of jurisdiction to the district courts. While the circuits are split as to the dispositive nature of the core/non-core distinction, the Section 362 claims in this case satisfy the approaches taken across the circuit given the essentiality of the automatic stay to bankruptcy. As a core proceeding, arbitration of the automatic stay would present an inherent conflict with a clear and manifest congressional command that proceedings core to the Code be heard and determined by the district courts. *See e.g.*, In re Thorpe Insulation Co., 671 F.3d at 1021 . Further, not only is the automatic stay a core proceeding in which arbitration would be a direct violation of Congress's jurisdictional grant, the purpose of the automatic stay is also undermined by arbitration, presenting yet another inherent conflict. This is important given some circuit courts see core status as non-dispositive and require a further showing that arbitration of a core proceeding would conflict with the purpose of the Code itself. *See* In re Nat'l Gypsum Co., 118 F.3d at 1067-69; *see also* Anderson, 844 F.3d at 388-89; In re Belton, 961 F.3d at 617. The automatic stay is one of the most important and fundamental components of bankruptcy law—

providing protection to debtors and creditors alike. S. Rep. No. 95-989, 95th Cong., 2d Sess. 54 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5840. [*hereinafter* S. Rep. No. 95-989] Arbitration of a stay issue between two parties, such as Petty and Wildflowers, to the exclusion of all other interested parties, is a direct and irreconcilable conflict with the Code's construction and purpose. The automatic stay is not party specific. 11 U.S.C. §362(a) (providing for a stay "applicable to all entities"). Therefore, an arbitration judgement regarding the stay, which can only enjoin the parties subject to the arbitration, would directly contradict the explicit language of Congress that the automatic stay applies to "all entities."

ii. This Court should adopt the *Anderson* and *Belton* approach which properly interprets the commands set out in both *McMahon* and *Epic* while providing much needed clarity to both creditors and debtors alike seeking to refuse enforcement of an arbitration agreement.

The issue before today's Court is similar to that faced by the Second Circuit in Anderson where it refused to compel arbitration of a core proceeding, stating that arbitration would seriously jeopardize the debtor's right to a fresh start–the very purpose of the Code. 884 F.3d at 388-89 (holding that Section 524(a)(2), discharge injunction, is integral and essential to the Code). In Anderson, a credit card account holder sought to bring an adversary proceeding against a bank for violating the Section 524(a)(2) discharge injunction. *Id*. at 388. The bank then moved to compel arbitration in accordance with the mandatory arbitration provision contained in the account agreement. *Id.* In refusing to enforce arbitration, the court first determined that debtor's claim constituted a core proceeding, then applied the McMahon test to determine whether arbitration of the claim presented an "inherent conflict" with the Code.[3] *Id.* at 389-90. Importantly, the Second Circuit noted that it reached this conclusion in part because "the

[3] The court reached this holding without considering the first two factors of the McMahon test, the Code's text or legislative history. Anderson, 844 F.3d at 388-89.

equitable powers of the bankruptcy court to enforce its own [core claims] are central to the structure of the Code." *Id.* at 390. Just as the right to discharge, the automatic stay also "represents the zenith of bankruptcy rights," therefore compelling arbitration would seriously jeopardize this core proceeding. In re Belton, 961 F.3d at 622. Applying the Anderson and Belton approach to this case, the Court would hold that (1) an issue regarding Section 362 is a core matter, and (2) that arbitrating this claim would be in direct conflict with the purpose of Section 362 and other provisions of the Code.

While prior to Anderson the Second Circuit did hold that there was no inherent conflict between the automatic stay and the FAA in Hill, Hill recognized that an inherent conflict between the FAA and Section 362 *could exist* under the right circumstances. *See* MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108-09 (2d Cir. 2006). Most importantly, the facts in this case are distinguishable from those presented in Hill. *See id.* at 109 (enforcing parties' arbitration agreement and sending debtor's Section 362 claim for violation of the automatic stay to arbitrator). Unlike the debtor in Hill, whose adversary proceeding was filed after her bankruptcy case was closed and discharged, Petty's motion to enforce the automatic stay and recover damages from Wildflowers is key to his reorganization under the Code, discharge of his debts, and his ability to obtain a fresh start. *Compare* R. at 6-7 (explaining impact stay has on debtor's ability to rebuild life) *to* Hill, 436 F.3d at 109 (rejecting notion automatic stay was key to debtor's ability to obtain a fresh start). Given that the circumstances in the case before the Court evidence the essentiality of the stay to the Petty's reorganization, the facts are so distinguishable from those in Hill that they render the FAA an inherent conflict with Section 362.

Like the discharge injunction in Anderson, the automatic stay is a unique component of bankruptcy cases and provides rights and protections not found in other legal proceedings

including arbitration. *See* Anderson, 884 F.3d at 390; Nat'l Century Fin. Enters., Inc. v. Nat'l Century Fin. Enters., Inc. (In re. Nat'l Century Fin. Enters., Inc.), 423 F.3d 567, 573-74 (6th Cir. 2005) (holding automatic stay clearly constitutes core proceeding). The Anderson court, in declining to compel arbitration of a Section 524 claim, stated that "a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." See Anderson, 884 F.3d at 389 (citing In re Nat'l Gypsum Co., 118 F.3d at 1069). Therefore, it is clear that the automatic stay is comparable to a discharge and cannot be subject to arbitration. The automatic stay protects debtors during this crucial time of financial realignment. If debtors do not have the confidence that they will be protected by the automatic stay during this time, then "what is the [bankruptcy] process worth at this point?" Appellee's Brief, Anderson v. Credit One Bank, N.A., No. 16-2496, 2017 WL 4805150 (2d Cir. 2017), *9.

C. The arbitration of a dispute between two parties at the exclusion of other affected third parties is an inherent conflict with Section 362 and other judicial provisions of the Bankruptcy Code.

A unique, and defining, characteristic of bankruptcy proceedings is that they are not two-party disputes. *See* John R. Hardison, *Express Preclusion of the Federal Arbitration Act for all Bankruptcy-Related* Matters, 93 ST. JOHN'S L. REV. 627, 631 (2019) (emphasizing unique, multi-party nature of bankruptcy proceedings); *see also* 11 U.S.C. §§ 307 (granting trustee right to be heard on any issue in any case arising under the Code), 1106 (providing for duties and authorities of an appointed examiner), 1109 (providing right to be heard to SEC and wide range of other interested parties). Section 1109(b) explicitly provides that "[a] party in interest, including the

debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on *any* issue in a case under this chapter." 11 U.S.C. § 1109(b) (emphasis added). Bankruptcy cases are meant to provide equitable solutions to both debtors and all their creditors; with the bankruptcy courts undertaking a delicate and complicated balancing act. FEENEY, HON. JOAN N. ET AL. BANKRUPTCY LAW MANUAL, § 2.21 (5th ed.) (Dec. 2020 Update) (recognizing bankruptcy courts as ones of equity). Bankruptcy provides creditors a refuge from the individualistic "rat race" of state collection remedies by offering a collective process where creditors have rights to be heard on matters beyond their single claim. FEENEY, *supra*, at § 7.1 (noting importance of collective nature of bankruptcy proceedings); *see* 11 U.S.C. § 362 (providing for automatic stay upon filing of bankruptcy petition).

The automatic stay is a clear example of this multi-party aspect of bankruptcy and an essential component of the Code's protections to both debtors and creditors. *See* 11 U.S.C. § 362 (stating automatic stay stays almost all proceedings against debtor regardless of claimant). As emphasized in the legislative history, "[t]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws[;]" stopping all collection efforts. S. Rep. No. 95-989 at 5840 (describing importance and purpose of automatic stay). Importantly, the automatic stay protects debtors and creditors alike evidencing the complex multi-party nature of bankruptcy proceedings. *See* St. Paul Fire & Marine Ins.Co. v. Labuzan, 579 F.3d 533, 540 (5th Cir. 2009) (discussing who the automatic stay protects); *see also* COLLIER, *supra*, at ¶ 362.03 (pointing out broad reach of automatic stay's protections).

Conversely, arbitration is primarily a two-party conflict resolution process that fails to provide for the rights and protections afforded to other interested parties by the Code. *See*

Hardison, *supra*, at 670 (describing typical arbitration dynamic). Arbitration may exclude other interested parties and cannot bind these third parties as an order issued by a judge in a bankruptcy proceeding would. Kraken Invs. Ltd. v. Jacobs (In re Salander O'Reilly Galleries, LLC), 475 B.R. 9, 24 (S.D.N.Y. 2012) (explaining creditors are not bound by arbitration agreements from which their claims are not derivative); *cf.* Hays & Co. , 885 F.2d at 1154-55 . This is an inherent conflict with the Code and its primary goal to provide a central forum to resolve a debtors' financial issues. *See* FEENEY, *supra*, at § 2.31 (explaining bankruptcy process intends to provide clear, central process to coordinate all related proceedings); *see also* In re U.S. Lines, Inc., 197 F.3d at 640 (recognizing one core bankruptcy goal is to centralize to provide efficient reorganization unimpeded by uncoordinated proceedings in other arenas). Such inherent conflict is especially problematic when arbitration is deciding issues regarding the automatic stay given a key aspect of the stay is its impact on all interested parties and not just the two litigants in the arbitration itself. *See* 11 U.S.C. § 362(a) (laying outreach of automatic stay).

Additionally, arbitration may not provide for the important rights unique to bankruptcy proceedings such as notice to third parties and judges' duties. *See* Hardison, *supra*, at 669 (highlighting crucial conflict between arbitration and statutory provisions of the Code); *see also* 11 U.S.C. §§ 342 (providing special notice requirements to creditors), 105 (empowering judges in bankruptcy cases with wide discretion in the handling of the cases before them). For example, Section 105 gives bankruptcy judges wide discretion in the expeditious administration of their duties. *See generally* 11 U.S.C. § 105. Arbitration disrupts this authority—interfering with judges' ability to issue deadlines, ensure proper reporting, "issue any order, process, or judgment that is necessary or appropriate to carry

out the provisions of this title, etc. *See id*. (stating various special duties of bankruptcy judges). This presents an inherent conflict with the Code as the courts' ability to oversee bankruptcy cases and other matters affecting the estate, especially regarding the enforcement of the automatic stay, is "essential to the integrity and proper functioning of the bankruptcy system." *See* Hardison, *supra*, at 673.

II. TERMINATION OF THE AUTOMATIC STAY FOLLOWING A DEBTOR'S REPEAT FILING ONLY APPLIES "WITH RESPECT TO THE DEBTOR[S] [PROPERTY]" AND NOT AS TO PROPERTY OF THE ESTATE.

The Thirteenth Circuit correctly held that Section 362(c)(3)(A) results in termination of the automatic stay only "with respect to the debtor" and thus the protections of the stay continue to apply to property of the estate. R. at 3. In general, Section 362 of the Code asserts that upon commencement of a bankruptcy case, a stay is automatically triggered. 11 U.S.C. § 362. Because the automatic stay is one of the most fundamental of debtor protections, as established by Congress, it follows that Congress intended those protections to apply to different bankruptcy interests. Midlantic Nat. Bank v. New Jersey Dept. of Env't Prot.,474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989 at PINCITE); *see* St. Paul Fire & Marine Ins. Co., 579 F.3d at 540. "Without [the stay], certain creditors would be able to pursue their own remedies against the debtor's property." St. Paul Fire & Marine Ins. Co., 579 F.3d at 541 (quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97).

While there is a split in authority regarding whether Section 362 (c)(3)(A) applies to both property of the debtor and property of the estate, most courts agree that the statute terminates the stay as to property of the debtor only – not to property of the estate. *See* Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749 (2005) (discussing scope of § 362(c)(3)(A)). What is

property of the debtor versus property of the estate is defined within the code, specifically within Section 541. *See* 11 U.S.C. § 541 (defining property of the estate). This Court should follow the majority approach since it is mandated by the plain language of the statute, and it is consistent with well-established bankruptcy policies and principles.

A. Traditional methods of statutory construction require section 362(c)(a)(3) to apply solely to property of the debtor.

Traditional methods of statutory construction require the termination of the stay to apply solely to property of the debtor and not to property of the estate. "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); *see* BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (discussing cannons of statutory interpretation). Under Section 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, 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).

Further, "[i]t is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004); *see* United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (emphasizing that when "[t]he language before [them] expresses Congress' intent . . . reference to legislative history and to pre-Code practice is hardly necessary."); Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,

530 U.S. 1, 6 (2000) (stressing role of courts to enforce terms of statute). Only if the statute is ambiguous or unclear, should the court consider legislative history to interpret its meaning. *See* Garcia v. United States, 469 U.S. 70, 75 (1984); *see also* Ross v. Hotel Employees, 266 F. 3d 236, 245 (3d Cir. 2001). The Thirteenth Circuit was correct to uphold the lower court's ruling that the *with respect to the debtor* majority approach is not only the correct reading of the statute, but it is also compatible with the central principles of bankruptcy: allowing debtors to obtain a fresh start, protecting the rights of creditors and providing them with a centralized forum for their claims. Marrama v. Citizens Bank, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting Grogan v. Garner, 498 U.S. 279, 286, 287, (1991)); *see* In re Murray, 543 B.R. 484, 495 (S.D.N.Y. 2016); *see also* FEENEY, *supra*, at § 14:1 ("In fact, bankruptcy in Anglo-American law began exclusively as a creditor's remedy for the orderly distribution of the debtor's assets.").

i. When the text is unambiguous, the inquiry must end.

All statutory interpretation begins with the language of the statute, and when it is unambiguous, the inquiry ends. Ron Pair Enters., 489 U.S. at 241 (ending dispute when statute language is plain); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted) (emphasizing that, in interpreting a statute, a Court should always turn to one cardinal canon: "when the words of a statute are unambiguous, then . . . judicial inquiry is complete"); Kelley v. City of Albuquerque, 375 F. Supp. 2d 1183, 1191 (D.N.M. 2004) (explaining statutory interpretation); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 n. 3 (2010). "A Code provision is not rendered ambiguous merely because courts disagree as to its meaning." In re Wages, 479 B.R. 575, 582 (Bankr. D. Idaho 2012) (citing Reswick v. Reswick

(In re Reswick), 446 B.R. 362, 370 (9th Cir. B.A.P. 2011)); *see* In re Brooks, 550 B.R. 19, 25 (Bankr. W.D.N.Y. 2016).

In this case, after reading Section 362(c)(3)(A) the inquiry must end. As such "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." In re Vega, 2012 Bankr. LEXIS 1702, *1 (Bankr D.C.P.R. 2012). Here, the statute specifically says "with respect to the debtor" which are terms used consistently throughout the Code in reference to debtor's property and not property of the estate. Gustafson v. Alloyd Co., 513 U.S. 561, 567-69 (1995) (discussing the presumption of consistent usage); 11 U.S.C. § 102(2) (titled "Rules of construction," defining claim against the debtor to include "claims against property of the debtor"). Certainly, the term "property of the debtor" means what it says. Accordingly, because Section 362(c)(3)(A)'s language is unambiguous, the statute must be enforced "according to its terms." *See* King v. Burwell, 576 U.S. 473, 516 (2015) (Scalia, J., dissenting).

The 2005 amendments to the Code, which include Section 362(c)(3)(A), provide more protections for debtors and creditors alike, however, this addition does not give the dissent and Petitioner the authority to "read the [scope of the statutory provision] differently." *See* R. at 26 (Tench, J. dissenting). Both Petitioner and dissent rely on the distinctions between 362(c)(3) and 362(c)(4), suggesting that the 362(c)(3) provision only applies to joint cases, where one debtor spouse is not a repeat filer, to protect their property "from the limitations . . . of the stay." *Id*. at 30 (Tench, J. dissenting). However, this reading is incorrect, as Section 362(c) specifically states "if a single *or* joint case." See 11 U.S.C. § 362(c) (emphasis added). Even more compelling is that if Congress wanted to provide termination of the stay to only apply in joint cases, they would have said so, but here they did not.

While the dissent contends that legislative history supports an interpretation that would include terminating the stay with respect to *property of the estate*, the Code's legislative history is inconsistent with that analysis. R. at 26. Legislative history may be examined when either the statutory language is unclear, meaning open to more than one interpretation, or when a literal reading of the statute produces an absurd result at odds with congressional intent. Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930); Mitchell v. United States (In re Mitchell), 977 F.2d 1318, 1320 (9th Cir. 1992); Lamie, 540 U.S. at 534 (discussing absurdity exception). In this case, the literal language of the statute is unambiguous, therefore the section's legislative history is irrelevant in dispelling the judicial theory that the terms mean to include *property of the estate* with *property of the debtor*. It is inappropriate to examine the section's legislative history to ensure the section is construed according to Congress's—and not the courts'—will. This Court must find that the text of Section 362(c)(3)(A) is not ambiguous.

ii. The plain language of Section 362(c)(3)(A) precludes including property of the estate with property of the debtor.

Because the statute is unambiguous the Court must look to its plain meaning which, in this case, supports precluding property of the estate with property of the debtor. The correct reading of Section 362(c)(3)(A)'s plain text does not include property of the estate when the stay ends. Courts should not attempt to manipulate the section's plain language by reading into the section, terms that are not there. Ron Pair Enters., 489 U.S. at 241 (discussing role of court when terms are plain); United States v. Locke, 471 U.S. 84, 94-96 (1985) (cautioning against going against plain meaning of terms). To give effect to the "plain meaning" of this statutory provision, the automatic stay, with respect to the debtor should terminate while the stay with respect to property of the state should remain in effect. Napoli, *supra*, at 767 (discussing statute's plain meaning). Even if the statute is ambiguous, the applicable (and sparse) legislative history is not

conclusive as to what Congress was thinking about. Merely saying that it does, does not complete the leap of logic that property of the estate be encumbered by termination of the stay in repeat filings.

Here, the phrase "with respect to the debtor" refers specifically to property of the debtor and does not include property of the estate. Congress, through its various subsections of 362(a), deliberately and specifically chose language to ensure the protection of: the debtor, the debtor's property, and property of the estate. *See* 11 U.S.C. § 362(a)(1)-(8); FEENEY, *supra*, at § 7:4. For example, under Section 362, upon the filing of a bankruptcy petition, Section 362(a)(1) stays pre-bankruptcy actions "against the debtor;" subparagraph (a)(2) stays enforcement of judgements "against the debtor or against property of the estate"; subparagraph (a)(3) stays actions regarding possession of "property of the estate"; (a)(4) enjoins actions to create or perfect liens "against property of the estate," (a)(5) against the debtor; (a)(6) stays collections against the debtor. Section 362(c)(3)(A) states that upon thirty days after the filing, the stay expires as to "debt or property securing such debt" but only "with respect to the debtor." It is clear that in using these specific words within Section 362, Congress knew what it intended in each subsection, and how to terminate the stay as to each category of property. If Congress wanted to include "property of the estate" within the ambit of 362(c)(3)(A), they would have written so. Napoli, *supra*, at 767 (discussing statute's scope).

> [A] thorough examination of case law on § 362(c)(3) shows that over time, many districts focused on a technicality in the drafting of § 362(c)(3) and have found, based on the plain language of the statute, that it applies only to the property of the debtor, and not to the property of the estate. In these districts, § 362(c)(3) is essentially useless to creditors. *See* Sara Sternberg Greene, Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers, 89 Am. Bankr. L.J. 241, 252 n.47 (2015). FINAL REPORT OF THE ABI COMMISSION, ABI COMMISSION, 69 (2019) (https://perma.cc/X5F8-VNAS).

It thus follows that Section 362(c)(3)(A) does not intend to terminate the stay as to property of the estate. Therefore, Section 362(c)(3)(A) should not and cannot be read to include terms that are not there. Congress uses the terms "property of the estate" 117 times in the code, 13 of which are in its exclusive section, Section 362. *See generally* 11 U.S.C. §§ 101 et seq. Surely Congress knows how and when to use the terms "property of the estate," and thus did not simply forget to include it or intend for judges across the nation to interpret this omission as being part of the terms. Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 230 (5th Cir. 2019) ("Congress kn[ows] how to terminate the entire stay.").

iii. Construction of Section 362(c)(3)(A) does not lead to an absurd result.

Further, construction of Section 362(c)(3)(A) as written does not lead to an absurd result. *See generally* Lamie, 540 U.S. at 534-38; Kelley, 375 F. Supp. 2d at 1223. The "absurdity" exception to the plain language rule is a tool used to carry out Congress's intent—not to override it. Kelley, 375 F. Supp. 2d at 1223. In bankruptcy, "through orderly and centralized liquidation or through reorganization or rehabilitation, creditors of equal priority receive ratable and equitable distributions designed to serve 'the prime bankruptcy policy of equality of distribution among creditors of the debtor.'" COLLIER, *supra*, at ¶ 1.01[1] (quoting Union Bank v. Wolas, 502 U.S. 151, 161 (1991), in turn quoting H.R. Rep. No. 595)); In re Murray, 543 B.R. at 495 ("[B]ankruptcy was created as a collective remedy, to achieve *pari passu* distribution amongst creditors—not as a single creditor's judgment enforcement device.").

Interpreting the statute to include property of the estate would produce absurd results within Section 362(c)(3)(A) and override Congress's intent. Section 362(c)(3)(A) applies in all bankruptcy cases, including the present chapter 11 case. By allowing creditors to proceed after thirty days against the debtor and his property (unless a court provides otherwise), but not

property of the estate, ensures both the debtor and creditors' interests are contemplated. This is evident when Congress explicitly included protections for the debtor, property of the debtor, and property of the estate within Section 362. *See supra* Part II.A.iii.; 11 U.S.C. § 362. If this Court rules otherwise, there would be significant negative effects throughout the different bankruptcy filings. For example, if Section362(c)(3)(A) is read to include property of the estate, such property may be lost in chapter 7 liquidations, and chapter 13 reorganizations. In chapter 7, this may diminish the property available for the benefit of creditors by reducing or eliminating their repayment from the sale of property. In chapter 13, terminating the stay as to property of the estate may prevent the debtor from his fresh start as well as his ability to repay creditors as part of his reorganization plan. While it is true that Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to stop repeat fillings, Section 362(c)(3)(A) was specifically drafted to allow actions against debtor property only, not property of the estate. *See* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64 (2011) (allowing amongst these, suits against the debtor). Consequently, including property of the estate in this statute would require including property of the estate in other parts of the Code where it does not exist or where it may adversely impact the rights of debtors and creditors, producing an absurd result not intended by Congress. *See* 11 U.S.C. §§ 362(b)(2)(B), (c)(1), (c)(2) (enumerating stay protections); *see also id.* at § 521(a)(6) (highlighting property of the debtor). *But see* 11 U.S.C. § 521(a)(2)-(7) (mentioning property of estate eleven times).

iv. The Equipment was property of the estate and thus the automatic stay did not terminate upon Debtor's failure to file a motion to extend.

Wildflowers violated the automatic stay when it repossessed the Equipment. R. at 3. The filing of a bankruptcy petition commences a case and creates an estate. 11 U.S.C. § 541(a); *see also* FEENEY, *supra*, at § 7:43 (explaining when property of the estate ceases to be such).

Property of the estate includes all property of the estate as listed in Section 541 as well as "all legal and equitable interests of the debtor at the date of the commencement of the case and certain interests acquired by the debtor after the commencement of the case." 11 U.S.C. § 541 (demonstrating how the automatic stay works in tandem to achieve certain purposes of bankruptcy); *see* COLLIER, *supra* ¶ 1306.02 (explaining property of the estate) Jumpp v. Chase Home Fin., LLC (In re Jumpp) 356 B.R. 789, 794 (2006) (recalling which actions are stayed and differentiating between debtor, property of the debtor, and property of the estate).

Under Section 541, this Equipment is property of the estate and not of the individual debtor. Petty purchased the Equipment with his own money and was using that same Equipment to brew beer to sell through Full Moon. R. at 6. Additionally, this Equipment was never claimed as exempt under Section 522 for the same reason; Petty needed this Equipment to continue his business and to repay his creditors per his chapter 11 reorganization plan. R. at 5-6; 11 U.S.C. § 522 (announcing which property may be exempt). Section 1129 of the Code specifies the strict elements of chapter 11 plan confirmation, including the best interests of creditors test and feasibility of the plan. 11 U.S.C. § 1129 (a)-(e). Under the best interests test, the plan must pay at least the liquidation value of property of the estate to creditors, which Petty could not do if Wildflowers repossessed the Equipment. 11 U.S.C. § 1129(a)(7) (defining best interest test). Moreover, under Section 1129's feasibility requirement[4] a debtor must prove, and the court must find that the plan is feasible. 11 U.S.C. § 1129(a)(11) (defining feasibility test). The feasibility test requires a plan proponent to show that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in

[4] While the term "feasibility" is not defined in the Code, subsection (a)(11) contains the feasibility standards.

the plan." 11 U.S.C. § 1129(a)(11). Without the Equipment, Petty's reorganization plan is not feasible.

Instead of taking unilateral action, Wildflowers could have sought relief via Motion for Comfort to ensure there was no stay in place as to the Equipment.[5] R. at 6. n. 4; 11 U.S.C. § 362(d) (postulating motions for relief from stay); *see also* FEENEY, *supra,* at § 7:4 ("Because it is not always clear whether an action comes within the scope of the stay or within an exception, prudence dictates that, if there is doubt, a party should seek relief from the stay or obtain a court determination before proceeding to take action against the debtor, property of the debtor, or property of the estate."). Instead, Wildflowers took a risk knowing there was a split in authority regarding a potential violation of the stay. Wildflowers sole purpose for repossessing the Equipment was to achieve a favorable position over other similarly situated creditors. This action by Wildflowers undeniably falls short of one of the primary goals of bankruptcy—providing a process for the benefit of multiple creditors, not just one.

B. The majority view is the appropriate solution to the circuit splits regarding the stay's protection of property of the estate.

i. This Court should adopt the approach held by the majority of courts in that the stay does not terminate with respect to property of the estate.

While there is disagreement among the circuit, a majority of courts have reached the correct interpretation of Section 362(c)(3)(A)[6] including the First, Third, Fifth, Ninth and Tenth Circuits. Under this "majority" view, Section 362(c)(3)(A) terminates the automatic stay only with respect to the debtor and debtor's property but *not* with respect to property of the estate. *See, e.g.*, Rose, 945 F.3d at 229 (explaining majority view). These courts reason that there is no

[5] Wildflowers later returned the equipment out of concern. R.at 7 n. 6.
[6] More than fifty courts adopted the majority approach, and forty support the minority. R. at 15 n. 10.

ambiguity to the terms "with respect to the debtor" and that if "Congress meant to terminate the stay in its entirety, it would have done so in plain language as it did in § 362(c)(4)(A)(i)". Holcomb 380 B.R. 813, 815-16 (10th Cir. BAP 2008)*; see* Jumpp v. Chase Home Fin. LLC (In re Jumpp) 356 B.R. 789, 793-96 (B.A.P. 1st Cir. 2006); Witkowski v. Knight (In re Witkowski), 523 B.R. 291, 297 (B.A.P. 1st Cir. 2014); Taylor v. Slick, 178 F.3d 698 (3d Cir. 1999); Rose, 945 F.3d at 230; In re Holcomb, 380 B.R. at 816 (10th Cir. BAP 2008); In re Roach, 660 F.2d 1316, 1318-19 (9th Cir. 1981).

In contrast, the "minority" view postulates that the automatic stay terminates in its entirety, that is, with respect to the debtor, debtor's property, *and* property of the estate. *Id.* at 230 (explaining minority view). The minority reasons that the term "with respect to the debtor" is ambiguous because "it appears to run contrary to the statutory scheme'. . . [and]. . . the term 'property of the estate' incorporates virtually all property. Only property that is abandoned or exempt or otherwise is excluded from the definition 'property of the estate."' Holcomb 380 B.R. 813 at 815.

The First Circuit has vacillated among views. In Jumpp, it adopted the majority view reasoning that when "viewed in isolation, the language itself is unambiguous. . . [the] context . . . comports with other provisions of [S]ection 362. . . ." and that Section 362 is meant to penalize debtors and their property, while "prov[iding] potential options to creditors. 356 B.R. at 793-96; *see* In re Witkowski, 523 B.R. at 297 (following In re Jumpp reasoning). However, in Smith v. State of Me. Bureau of Revenue Servs. (In re Smith) the court reversed its own decision in Jumpp, holding that that based on the provision's text, the statutory context, and Congress's intent in enacting BAPCPA, Section 362(c)(3)(A) "terminates the entire automatic stay—as to actions against the debtor, the debtor's property, and property of the bankruptcy estate—after 30-

days for second-time filers.". 910 F.3d 576, 578 (1st Cir. 2018). The Ninth Circuit, likewise, has adopted both views in different cases. *Compare* In re Reswick, 446 B.R. at 365-66 (adopting minority view) *to* In Re Roach, supra (following majority view). Ultimately, the majority's approach is correct. Courts adopting the minority approach purport to, like the dissenting opinion in the Thirteenth Circuit's decision, "read the statute differently," resulting in mere speculation that favors a single creditor-friendly agenda. This Court should follow the majority view as it is "better reasoned and more faithful to the language of the statute and the policies behind the Bankruptcy Code." Holcomb 380 B.R. 813 at 816.

ii. Adoption of the minority view, which reads "property of the estate" into Section 362(c)(3)(A), equates to judicial legislating and is thus inappropriate.

If legislators meant for property of debtor to be included under Section 362(c)(3)(A), they would have expressly stated it. While they did not include property of the estate in Section 362(c)(3)(A), Congress did write a whole section about what the stay protects in Section 362. Therefore, when Congress wants to say, "property of the estate", it knows how to. Interpreting "with respect to the debtor" to include "property of the estate," would significantly change the application of the statute as it relates to rights of both debtors and creditors alike. Bankruptcy's main goal is to allow the equitable distribution of debtors' assets to pay debts to creditors. Likewise, creditors are entitled to a distribution of debtors' assets. BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994) ("[a]t the core of bankruptcy law is the policy of 'obtaining a maximum and equitable distribution for creditors.'"); In re Holcomb, 380 B.R. at 814 (emphasizing importance of distribution for creditors). It is up to Congress to achieve better policy outcomes, not the courts. *See* Hartford Underwriters Ins. Co., 530 U.S. at 13 ; *see also*

Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) ("[a]chieving a better policy outcome. . . is a task for Congress, not the courts.").

The statute includes what Congress intended it to, property of the debtor. By enacting this statute, Congress intended to ultimately protect creditors by safeguarding property of the estate for their benefit. It also indirectly protects debtors, such as Petty, by allowing them the fundamental opportunity to use non-exempt property in their reorganization plan—even in a second filing. *See* H.R. Rep. No. 595 (stressing automatic stay as fundamental to the reorganization process). In the case of a second filling, as in this case, secured creditors like Wildflowers would still need to seek court approval to terminate the stay in order to recover estate property used as collateral. 11 U.S.C. § 362(d); Final Report, *supra*, AT 214 (highlighting that creditors may seek relief from the stay); *see also* BAPCPA, Pub. L. 109-8 (2005) (codified as11 U.S.C. § 362(c)(3)).

CONCLUSION

The automatic stay is by far one of the most important protections Congress granted in bankruptcy. Arbitration, while helpful in many facets of legal disputes, when applied to bankruptcy law contravenes the jurisdictional control Congress granted district courts and goes against Congressional statutory and policy intent. Therefore, arbitration has no place in bankruptcy. This case is a perfect example of how important the automatic stay and other judicial provisions of the Code are in protecting a debtor's and creditor's interests. For the reasons stated above, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals on both issues.

APPENDIX A

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;

. . .

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

. . .

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

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

. . .

(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.

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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.