No. 20-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK, PETITIONER

v.

EARL THOMAS PETTY, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

Team P. 29
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a mutual agreement requiring a creditor and debtor to resolve disputes through arbitration is enforceable under the Federal Arbitration Act, notwithstanding Section 362 of the Bankruptcy Code.

II. Whether the automatic stay is terminated in its entirety only with respect to the debtor and the debtor's property under Section 362(c)(3)(A) of the Bankruptcy Code.

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The United States Bankruptcy Court for the District of Moot answered both questions presented in favor of the Debtor. The United States Court of Appeals for the Thirteenth Circuit affirmed the judgment of the Bankruptcy Court in finding that (1) the bankruptcy court had the authority to decide the dispute between Debtor and Creditor, notwithstanding the pre-petition arbitration agreement that the parties entered in to, and (2) section 362(c)(3)(A) results in termination of the automatic stay only "with respect to the debtor" and not as to property of the estate. The Thirteenth Circuit Court of Appeals' opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

This case involves the interpretation 9 U.S.C. § 2 of the Federal Arbitration Act and 11 U.S.C. § 362 of the Bankruptcy Code. The relevant statutory provisions are set forth in the Appendices below.

STATEMENT OF THE CASE

This appeal arises out of Respondent's attempt to evade a binding arbitration agreement, inconsistent with the Federal Arbitration Act, and Respondent's abuse of the automatic stay, inconsistent with the Bankruptcy Abuse Prevention and Consumer Protection Act.

I. Factual History

Respondent, Earl Thomas Petty ("Petty"), is a former attorney who began brewing his own beer in the late 1990s. R. at 3. In 2002, he quit his practice and founded Great Wide Open Brewing Company, Inc. ("Great Wide Open"). *Id.* The company was to be a craft brewery that sold beer to local restaurants and convenience stores. *Id.* In 2005, Petty opened a 9,000 square foot taproom in the City of Royal Rapids featuring small batch brewing equipment ("Equipment") that Petty purchased with his own personal funds. *Id.* Great Wide Open's reputation grew and they began producing several highly rated and award-winning beers. *Id.* In response to this new found success, Petty decided that he wanted to expand the business and engaged in an aggressive growth strategy by opening four new taprooms in 2010. *Id.* at 4. Additionally, Petty opened a state-of-the-art brewhouse in 2012 that had the capacity to produce 250,000 barrels of beer annually. *Id.*

A. The Debtor enters into a Credit Agreement with Wildflowers and agrees to resolve all disputes through arbitration.

In order to fund the expansion, Great Wide Open went to Wildflowers Community Bank ("Wildflowers"). *Id.* In September 2011, Great Wide Open entered into a $35 million revolving credit agreement with Wildflowers (the "Credit Agreement"). *Id.* In order to secure repayment, Great Wide Open granted Wildflowers a first priority lien on substantially all of its assets. *Id.* Additionally, Petty executed a personal guaranty in which he unconditionally guaranteed repayment of the business's obligations (the "Guaranty") and granted Wildflowers a first priority lien on the Equipment to secure it. *Id.*

Both the Credit Agreement and the Guaranty had "Remedies" clauses that provided that, upon a default, "Obligor grants to Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action." *Id.* The agreements also included an arbitration clause, which provided:

> any and all disputes, claims, or controversies of any kind between us arising out of or relating to the relationship between us will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by jury trial.

Id. In fact, both parties to this dispute agree that the pre-petition arbitration clause at issue is both enforceable and sufficiently broad to encompass all aspects of their dispute. R. at 10.

B. The Debtor encounters financial problems and reneges on the Credit Agreement.

Great Wide Open's success was short lived and it soon found itself saddled by large amounts of debt. R at 5. Without giving notice to Wildflowers, great Wide open closed three of its taprooms in 2018, including Royal Rapids, which had its lease terminated by the landlord shortly thereafter. *Id.* Wildflowers only learned of the closing when one of its loan officers noticed a sign on the door of Royal Rapids taproom, which read, "Don't come around here no more." *Id.* Shortly after the closings, Great Wide Open defaulted on its payment obligations under the Credit Agreement and the Guaranty. *Id.*

On June 4, 2018, Wildflowers filed a demand for arbitration, consistent with the arbitration clause found within the credit agreement, and a general state law breach of contract complaint against Petty with the American Arbitration Association. *Id.* Wildflowers sought the balance then owing under the Credit Agreement which was $33.2 million. *Id.* The American Arbitration Association scheduled the initial conference in the arbitration proceeding for July 12, 2018. *Id.* On the day before the initial conference, Great Wide Open terminated all of its employees and ceased all operations. *Id.*

C. The Debtor files for bankruptcy and seeks to sidestep the parties binding arbitration agreement.

On the day of the initial arbitration conference, Great Wide Open filed for chapter 7 bankruptcy and Petty filed his own chapter 11 petition (the "Initial Bankruptcy Case") in the Bankruptcy Court for the District of Moot. *Id.* On August 27, 2018, the Initial Bankruptcy Case was dismissed by the bankruptcy court because of Petty's failure to timely file certain documents. *Id.* After obtaining a new lawyer, Petty commenced his second chapter 11 bankruptcy case (the "Second Bankruptcy Case") on January 11, 2019, just as the arbitration proceeding was about to recommence. R. at 6. Without even attempting to negotiate with Wildflowers, Petty filed a chapter 11 plan of reorganization that proposed to pay his creditors, including Wildflowers, forty cents on the dollar from his income over a period of five years. *Id.* at 6.

At the first hearing on the Second Bankruptcy Case, Petty communicated to the court that he had negotiated a new lease with the landlord of the Royal Rapids taproom. He had reopened that taproom in December 2019 and was doing business as "Full Moon Fever Brewing." *Id.* In order to produce the beer, he was using the Equipment, which had not been removed since his original lease was terminated and Great Wide Open went out of business. However, there was one major omission in his second bankruptcy case. *Id.* Although required by statute, Petty did not file a motion to extend the automatic stay under section 362(c)(3)(B) during the first thirty days of the Second Bankruptcy case. *Id.* At that point Wildflowers had obtained all but $2.1 million from the liquidation of Great Wide Open's chapter 7 bankruptcy case. *Id.* Because of this and pursuant to the security interest granted in connection with the Guaranty, Wildflowers sent a repossession company and peaceably repossessed the Equipment. *Id.* They did so on February 12, 2019 which was thirty-two days after the commencement of the Initial Bankruptcy Case. *Id.* One week after the Equipment was repossessed, Petty filed a motion in the Second Bankruptcy Case alleging that

Wildflowers violated the automatic stay and sought $500,000 in damages under section 362(k). *Id.*

Wildflowers responded to the motion on March 5, 2019 and asserted that no automatic stay existed with respect to property of the estate pursuant to section 362(c)(3)(A), because Petty had a prior bankruptcy dismissed within one year of filing the Second Bankruptcy Case. *Id.* at 7. Believing they were correctly interpreting Section 362(c)(3)(B), Wildflowers noted that Petty had not filed a motion to extend the stay, which meant they had the right to reposes the Equipment. *Id.* Additionally, Wildflowers pointed to the arbitration clause in the Guaranty which required Petty to bring any claims against Wildflowers in the pending arbitration proceeding. *Id.*

II. Procedural History

The bankruptcy court ruled in favor of Petty on both issues and awarded him $200,000 in compensatory damages. R. at 3. On appeal, a three-judge panel from the Court of Appeals for the Thirteenth Circuit affirmed the decision of the bankruptcy court on both issues, holding that (1) the bankruptcy court had the authority to decide the dispute between Petty and Wildflowers Community Bank notwithstanding the pre-petition arbitration agreement that the parties entered in to, and (2) Section 362(c)(3)(A) results in termination of the automatic stay only "with respect to the debtor" and not as to property of the estate. *Id.*

SUMMARY OF THE ARGUMENT

The Federal Arbitration Act ("FAA") was created by Congress nearly a century ago in order to mandate that courts treat arbitration agreements as "valid, irrevocable, and enforceable." Since its inception courts have rigorously and thoroughly enforced arbitration agreements including those for claims that allege a violation of a federal statute. By enacting the FAA, Congress intended for parties to a contract to be allowed speedy arbitration procedures that are not

subject to delay and obstruction in courts. When there is no clearly expressed Congressional command to the contrary, the FAA must be read harmoniously with federal statutes. As articulated by this Court, a contrary Congressional command is deducible from the text or legislative history of a statute or from an inherent conflict between arbitration and the statute's underlying purpose. Additionally, a contrary Congressional command must be "clear and manifest" and the party opposing arbitration of a dispute bears the heavy burden of showing "a clearly expressed Congressional intention" that such a result should follow. Nowhere in Section 362's text or legislative history does it indicate that Section 362 supersedes the FAA.

The Thirteenth Circuit disregarded the fact that, whenever possible, statutes must be read harmoniously such that only and an "irreconcilable conflict" between two statutes would give rise to a finding that the FAA has been displaced. No irreconcilable conflict exists between Section 362 and the FAA because, while the automatic stay is an important tool in bankruptcy, it is not more important than other statutory claims brought before this Court. Further, bankruptcy courts are not in a unique position to hear automatic stay disputes because both federal and state courts have concurrent jurisdiction to interpret the scope of Section 362. Even if the FAA and Section 362 cannot be read harmoniously, the FAA should be given priority because any perceived conflicts between the two Acts would not seriously jeopardize the objectives of bankruptcy law. Finally, allowing the parties to proceed in the exact manner that they contracted for pre-petition ultimately preserves important separation of power principal and aligns with the strong federal policy favoring arbitration.

The automatic stay has long been a tool in bankruptcy proceedings that protects both debtors and creditors. However, Congress saw a need to hold debtors accountable when they are deemed to be abusing the bankruptcy process. For that reason, Congress amended Section 362(c)

when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Section 362(c)(3)(A) was added to provide for termination of the automatic stay in certain situations where debtors were getting bad faith bankruptcy filings dismissed and then turning around and filing again within a one-year period. The Thirteenth Circuit erroneously adopted the interpretation of Section 362(c)(3)(A) to mean that the stay was terminated as to actions against the debtor and the debtor's property but not as to actions against property of the bankruptcy estate. This decision, however, conflicts with the internal text of Section 362(c)(3)(A), ignores the context of Section 362(c)(3) as a whole, and, most egregiously, flies in the face of the purpose and policy behind the enactment of the BAPCPA. Because the minority view is the correct interpretation of Section 362(c)(3)(A) and is the most consistent with the statutory scheme and intentions of Congress, the Thirteenth Circuit's decision should be reversed, and the automatic stay should be terminated *in its entirety*.

When Section 362(c)(3)(A) is read in the context of the statutory scheme as a whole, it supports the termination of the automatic stay in its entirety. The Supreme Court has made it clear that words and phrases of a particular statute are not to be read in isolation because the meaning of statutory language depends on context. This becomes even more important when there is clear ambiguity in a statute as evinced by the circuit court split on how to interpret Section 362(c)(3)(A). In adopting the majority view, the Thirteenth Circuit went outside the bounds of traditional statutory interpretation and moves sharply away from the purpose of the BAPCPA amendment.

Because of the ambiguous language in Section 362(c)(3)(A), legislative history must be consulted in order to interpret its purpose. The Supreme Court noted that the enactment of the BAPCPA was done with the intention to "correct abuses of the bankruptcy system" by deterring serial abusive bankruptcy filings. The interpretation of Section 362(c)(3)(A) that the Thirteenth

Circuit adopted prevents the BAPCPA from being able to serve the purpose that Congress intended.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code, and, as such, are pure issues of law. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Therefore, the standard of review for this appeal is *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

ARGUMENT

This Court should reverse the Thirteenth Circuit Court of Appeals' decision and hold that (1) the Federal Arbitration Act and 11 § U.S.C. 362 of the Bankruptcy Code can be interpreted harmoniously and (2) 11 U.S.C. § 362(c)(3)(A) should be interpreted to terminate the automatic stay with respect to the property of the estate.

I. The FAA unambiguously mandates enforcement of arbitration agreements in claims brought under Section 362 of the Bankruptcy Code.

The United States Arbitration Act, also known as the Federal Arbitration Act ("FAA"), was adopted in 1925 and directed courts to treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA facilitates non-judicial dispute resolution through arbitration. Michael J. Lichtenstein & Sara A. Michaloski, *The Enforcement of Arbitration Agreements in Bankruptcy Proceedings*, Pratt's Journal of Bankr. Law (2017). According to the United States Supreme Court, the FAA establishes "a liberal federal policy favoring arbitration agreements." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397 (1967). When the FAA was drafted by Congress, not only did Congress require courts to respect and enforce dually entered into arbitration agreements, but it also directed courts to respect parties' chosen arbitration

procedures.[1] Thus, courts must rigorously and thoroughly enforce arbitration agreements and that holds true for claims that allege a violation of a federal statute. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013).

Essentially, by enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The FAA applies, with equal force, to claims brought under both federal and state law, where the parties are bound by contract. *Id*. Congress sought to ensure that parties to a contract are allowed speedy arbitration procedures that are not subject to delay and obstruction in courts. *Prima Paint Corp.*, 388 U.S. at 400. Moreover, the Court has emphasized that when a party makes the bargain to arbitrate, it is only fair that they are held to it. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

While the FAA clearly evinces Congress' intention to favor arbitration, where Congress giveth, Congress may also taketh away. Thus, one slight exception exists if the FAA's mandate has been "overridden by a contrary Congressional command" within the federal statute at the center of the claim. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). However, the Court has made clear time and time again that a party seeking to suggest that two statutes, like Section 362 and the FAA, cannot be harmonized, faces a stout uphill battle. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018). Like every other case brought before this Court,[2] no such

[1] *See* 9 U.S.C. § 3 (directing courts to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"); § 4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement").

[2] The Supreme Court has heard and rejected numerous efforts to find a conflict between the FAA and other federal statutes. Every such effort has been unsuccessful (save one temporary exception since overruled). These statutes include the Sherman Anti-Trust Act, the Clayton Acts, the Age Discrimination in Employments Acts, the Credit Repair Organizations Act, the Securities Act of 1933 and 1934, and the Racketeer Influenced and Corrupt Organizations Act. See, e.g., *Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228 (2013); *Green Tree Fin. Corp.–Ala. v. Randolph*, 531

exception to the FAA is applicable here. Because both parties to this dispute agree that the pre-petition arbitration clause at issue is both enforceable and sufficiently broad to encompass all aspects of their dispute, Respondent is in no position to reasonably argue that an irreconcilable conflict exists between the FAA and the Bankruptcy Code, absent a clearly expressed Congressional command. R. at 10.

A. Absent clearly expressed Congressional intent to the contrary, the FAA and Section 362 of the Code should be interpreted harmoniously.

Courts seeking to harmonize a particular statute and the FAA often rely on the test articulated in *Shearson/Am. Exp., Inc. v. McMahon*. Leslie A. Berkoff & Theresa A. Driscoll, *In the Wake of Epic Systems, Should Core Bankruptcy Matters be Deemed a Clear and Manifest Exception to the FAA?* 29 No. 2 J. Bankr. L. & Prac. NL Art. 5 (2020). Under *McMahon*, the FAA's requirement can be overridden by a "contrary Congressional command" deducible from (1) the text or legislative history of a particular statute or (2) from an inherent conflict between arbitration and the statute's underlying purpose. 482 U.S at 226. This analysis has become known as the "inherent conflicts test." Berkoff & Driscoll, *supra*. However, over three decades after *McMahon* was decided, the Court warned that only in rare cases will a court find a conflict between the FAA and another statute. *See Epic*, 138 S. Ct. at 1616.

While not explicitly overruling *McMahon*, *Epic* casts serious doubt on the inherent conflict approach by holding unambiguously that a contrary Congressional command must be "clear and manifest" and the party opposing arbitration of a dispute bears the heavy burden of showing "a clearly expressed Congressional intention" that such result should follow. *Id*. at 1617. Thus, *Epic* presents a text-first analysis, which most clearly aligns with the Court's pre-*Epic* precedent. For

U.S. 79 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

example, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that a party opposing arbitration *must* show that "Congress intended to preclude a waiver of a judicial forum for the claims at issue." 500 U.S. 20, 26 (1991) (emphasis added). Moreover, the Court has made it clear that if Congress intended for a statute, like Section 362 to supersede the FAA, "that intention will be deducible from the statute's text or legislative history." *Mitsubishi,* 473 U.S. at 628.

When there is a question of whether an exception to the FAA exists, courts should keep in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer,* 500 U.S. at 26. *Epic* confirms that the FAA supersedes the Bankruptcy Code, like many other statutory challenges heard and rejected by the Court. Thus, when the Thirteenth Circuit held that Section 362 "impliedly repealed" the FAA, it did so without regard to Supreme Court jurisprudence or the test articulated in *Epic*. Instead, the Thirteenth Circuit turned a blind eye to the Court's most recent decision and essentially, as Judge Tench pointed out in the dissent, went on a "fishing expedition for a conflict, and ultimately concludes that a conflict exists because the automatic stay created by Section 362 is integral to the bankruptcy process." R. at 23. While such an argument in favor of avoiding the parties' dually agreed upon arbitration agreement might be tempting, "policy arguments cannot and should not obscure what statutory text makes clear." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018). Therefore, the Court should reverse the Thirteenth Circuit and hold that the FAA and Section 362 can and should be read together harmoniously.

1. Both the Code's statutory text and its legislative history contain no reference to the FAA.

Congress will speak with great clarity when overriding the FAA. *Epic*, 138 S. Ct. at 1634 (Ginsburg, J., dissenting) ("Our decisions have increasingly alerted Congress to the utility of drafting provisions with meticulous care."). When confronted with two Acts of Congress, a court

is not at liberty to "pick and choose among Congressional enactments" and must strive "to give effect to both." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Notably, several circuits addressing the issue have acknowledged that neither the text nor the legislative history of the Bankruptcy Code reflects a Congressional intent to preclude arbitration in the bankruptcy context. *See In re Thorpe Insulation Co*., 671 F.3d 1011, 1020 (9th Cir. 2012)*; Whiting–Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796 (11th Cir.2007); *In re Mintze*, 434 F.3d 222, 230 (3d Cir. 2006). While the Thirteenth Circuit erroneously opined that the FAA is implicitly displaced by Section 362, appeals of the FAA by implication are heavily disfavored because courts must assume that Congress will specifically address when the FAA should be discarded by a later statute. *United States v. Fausto*, 484 U.S. 439, 452 (1988). Most revealing, not a glimmer of hope evincing express Congressional intent to override the FAA exists in either the Code's explicit statutory text or legislative history.

However, Congress has never shied away from expressly telling a court when it chooses to displace the FAA. There are, in fact, numerous instances of Congress specifically addressing preexisting law when it wishes to suspend the FAA's normal operation in a later statute. For example, the Consumer Protection Act concisely states "no pre-dispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this Section." 12 U.S.C. § 5567(d)(2). Similarly, Congress showcased its intent to override the FAA in the Military Lending Act, which asserts "no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member." 10 U.S.C. § 987(e)(3). What is more, Congress has never amended the Bankruptcy Code to include explicit repeals of the FAA. In contrast, Congress amended the provisions of the Commodity Exchange Act and the Sarbanes-Oxley Act in 2010 to expressly make unenforceable any pre-dispute

arbitration clause. 7 U.S.C. § 26(n) and 18 U.S.C. § 1514A(e). Section 362 was enacted in 1978, over 50 years after the FAA, thus, it is no coincidence that language regarding arbitration is notably absent from both its statutory text and its legislative history. Berkoff & Driscoll, *supra*.

Respondent will likely argue that a repeal of the FAA by implication is necessary here despite clear Congressional direction to the contrary. However, Congress does not "alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions – it does not hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 468 (2001). The party seeking to avoid arbitration in *Epic* made a similar argument concerning the National Labor Relations Act ("NLRA"). *Epic Sys. Corp.*, 138 S. Ct. at 1622. There, the Court rejected the notion that the FAA could be repealed by implication without any statutory reference to arbitration and stressed that "the absence of any specific statutory discussion of arbitration is an important and telling clue" that Congress has not displaced the FAA. *Id*. at 1627. Furthermore, the Court in *CompuCredit Corp. v. Greenwood*, found the issue dispositive, holding unambiguously that, because the Credit Repair Organization Act ("CROA") is silent on whether claims can proceed in an arbitral forum, "the FAA requires the arbitration agreement to be enforced according to its terms." 565 U.S. 95, 104 (2012). In reaching this conclusion, the Court noted that at the time the CROA was enacted, arbitration clauses in contracts were no rarity. *Id*. at 103. Thus, if Congress meant to prohibit these provisions in the CROA, it would have been placed on notice and acted accordingly. *Id*.

Similarly, if Congress wished to allow Section 362 to supersede the FAA, it would have undoubtedly done so here, either in its original text or in an amendment. Yet, both the statutory text and legislative history of the Code, like the CROA, remain free from any such language whatsoever. Moreover, because of the regularity of arbitration provisions in contracts like the one

at issue here, there is no reason to believe that Congress has not had ample opportunity to restrict such an agreement, if of course, it intended to do so.

2. The FAA and Section 362 are not in "irreconcilable conflict" with one another.

Bypassing the fact that there is no clear and manifest conflict between the FAA and Section 362 in the Code's statutory text or legislative history, the Thirteenth Circuit focused almost exclusively on the second prong of *McMahon*, incorrectly concluding that an inherent conflict exists between arbitration and Section 362's underlying purpose. R. at 11. However, whenever possible, statutes must be read harmoniously such that only an "irreconcilable conflict" between two statutes would give rise to a finding that the FAA has been displaced. *Epic*, 138 S. Ct. at 1624; *see* also *McMahon*, 482 U.S. at 239 ("when text and legislative history fail to reveal any intent to override the provisions of the FAA, any conflict between the relevant statute and the FAA must be irreconcilable."). Although the lower court essentially ignored *Epic*, other courts have recently concluded that *Epic* and *McMahon* can be read together congenially. *Henry v. Educ. Fin. Serv.*, 944 F.3d 587, 592 (5th Cir. 2019) ("the test employed is substantially the same"); In *In re Belton v. GE Capital Retail Bank*, for example, the Second Circuit opined "we see *Epic* as clarifying where two of *McMahon's* factors clash, a court should resolve the dispute in favor of the statutory text . . . but that does not undermine the fact that an inherent conflict is sufficient to displace the Arbitration Act." 961 F.3d 612, 617 (2d Cir. 2020). However, the Second Circuit also noted that *Epic* serves as a reminder that "a statute's purpose cannot circumvent its text." *Id.*

Even assuming that *Epic* did not abrogate *McMahon*, the underlying purpose of Section 362 and the FAA are in no way irreconcilable. While the automatic stay is certainly an important tool in bankruptcy, there is no evidence to suggest Congress intended for it to usurp the FAA. Respondent will likely rely on circuit decisions disfavoring arbitration when the issuing court is

"uniquely positioned" to assess the plaintiff's claim. *See In re Anderson*, 884 F.3d 382, 389 (2d Cir. 2018) (holding that the Code supersedes the FAA because contempt proceedings under Section 524 involve considerations a bankruptcy court is in the best position to evaluate). Nevertheless, whether such statutory violation of the Code exists in the context of the automatic stay is routinely adjudicated *outside* of bankruptcy court. 28 U.S.C. 1334(b) clearly grants district courts concurrent jurisdiction over proceedings arising in or related to a bankruptcy case. In *Gilmer,* the Court found that Congress' grant of concurrent jurisdiction over Age Discrimination in Employment Act ("ADEA") claims to state and federal courts supported the conclusion that Congress did not intend to preclude arbitration of such claims, "because arbitration agreements, like the provision for concurrent jurisdiction, serve to advance the objective of allowing claimants a broader right to select the forum for resolving disputes." 500 U.S. at 26.

Similarly, both federal and state courts have concurrent jurisdiction to interpret the scope of the automatic stay. Carlos J. Cuevas, *The Rooker-Feldman Doctrine and the Automatic Stay*, Am. Bankr. Inst. J., (2002). In *Baldino v. Wilson*, the Third Circuit stated, "the court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but whether the proceeding pending before it is subject to the automatic stay." 116 F.3d 87, 90 (3rd Cir. 1997); *See also Erti v. Pain Webber Jackson & Cutis Inc.,* 765 F.2d 343, 347 (2nd Cir. 1985) (holding that federal courts have jurisdiction to decide whether the automatic stay applies). If a state court renders an incorrect determination concerning the automatic stay, then the decision must then be appealed within the state judicial system, rather than to a bankruptcy court. Jonathan P. Friedland, *Jurisdiction to Enforce the Stay*, Commercial Bankr. Litig. § 6:5 (2021).

Moreover, under the Rooker-Feldman doctrine, which provides that lower federal courts lack subject matter jurisdiction over a case if their actions would result in the reversal or

modification of the state court judgment, bankruptcy courts lack jurisdiction to collaterally review a state court determination on the issue. *In re Ivani*, 308 B.R. 132, 135 (Bankr. E.D.N.Y. 2004). The same conclusion may be reached under doctrines of res judicata and collateral estoppel. *Id*. Like the ADEA claim in *Gilmer*, the automatic stay clearly allows claimants to litigate outside of bankruptcy court. This belies *any* conflict between Section 362 and arbitration of Respondent's claim, let alone an irreconcilable one.

In contrast to the automatic stay, courts have found that other sections of the Code require bankruptcy courts to retain exclusive jurisdiction. *See In re Williams*, 244 B.R. 858, 866 (S.D. Ga. 2000) ("The function of 28 U.S.C. § 1334(e) is clear—to ensure that only one court administers the bankruptcy estate of a debtor."). Thus, this undermines any notion that bankruptcy courts possess unique expertise, or exclusive jurisdictional power to adjudicate automatic stay disputes. If state and federal courts are poised to hear challenges brought under Section 362, so too are arbitrators. Although "Congress adopted the Arbitration Act in an effort to counteract judicial hostility to arbitration," *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019), the Thirteenth Circuit's denial of arbitration is driven precisely by the opposition Congress feared, given that both state and federal courts and even arbitrators already decide automatic stay disputes.

Additionally, the Code's important underlying purpose does not create irreconcilable conflict with the FAA. While it is certainly true that the automatic stay is "a substantive right of extraordinary magnitude," the lower court's reasoning that an inherent conflict exists between Section 362 and the FAA is simply not in line with Supreme Court precedent. R. at 11. The party seeking to avoid arbitration in *Gilmer*, for example, argued that age discrimination claims "further important social policies." 500 U.S. 20 at 27. There is no doubt that the federal age discrimination statute furthers important policy interests and surely a plaintiff pursing such a claim could present

a plethora of evidence regarding the ADEA's benefits to society and the workplace. Yet, the Court still refused to find inconsistency based only on the importance of the statute at the basis of the claim:

> We do not perceive any inherent inconsistency between those policies and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies but claims under those statutes are appropriate for arbitration.

Id. In *Epic*, the party seeking to escape an all-inclusive arbitration clause, similar to the one in this case, also emphasized certain provisions of the NLRA, which guaranteed workers the right to organize unions and bargain collectively. 138 S. Ct. at. 1624. However, the Court held that "the policy of the NLRA . . . does not conflict with Congress' statutory directions favoring arbitration." *Id*. at 1627. Therefore, it is unreasonable to assume that any substantive right afforded by the automatic stay is somehow more important than every other right advanced by parties in past cases who, like Respondent, were attempting to evade their contractual obligations. There is also no reason to conclude that arbitration of the dispute somehow diminishes those important social polices advanced by statutes like the NLRA, ADEA, and the automatic stay.

Finally, no irreconcilable conflict exists because agreeing to arbitration does not result in a waiver of the substantive rights provided by Section 362. So long as the prospective litigant may effectively "vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. 20 at 27. In *14 Penn Plaza LLC v. Pyett*, the party attempting to avoid arbitration argued that the federal statute at issue provided a substantive right to proceed in court based on a provision providing that "an individual may not waive any right or claim under this chapter." 556 U.S. 247, 129 (2009). The Court

disagreed, explaining that an agreement to arbitrate is not a waiver of substantive rights under a particular statute, and criticized a lower court for "confusing an agreement to arbitrate those statutory claims with a prospective waiver of the substantive rights." *Id*.

Furthermore, "it is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including relief available in the context of a court suit." *CompuCredit Corp.*, 565 U.S. at 96. Thus, if the mere formulation of the cause of action were sufficient to establish the contrary Congressional command overriding the FAA, "valid arbitration agreements covering federal causes of action would be rare indeed." *Id*. A jury trial is not itself a "right or remedy" under a federal statute. *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575, 580 (5th Cir. 2020). Therefore, the substantive rights afforded to Respondent by the automatic stay are not jeopardized by arbitration. If the opposite were true, no federal cause of action would ever be deemed harmonious with the FAA, which would surely render the FAA virtually meaningless.

B. Even if the FAA and Section 362 cannot be read harmoniously, the FAA should be given priority.

The Thirteenth Circuit erroneously held that an inherent conflict exists between Section 362 and the FAA because the automatic stay is a "core proceeding." R. at 11. Bankruptcy courts grappling with whether to enforce a compulsory arbitration provision often apply this judicially created test despite the fact that it has never been recognized or utilized by the Supreme Court. Lichtenstein & Michaloski, *supra*. Thus, the distinction between a core and non-core proceeding is considered a threshold matter intended to determine whether the bankruptcy court has the discretion to deny enforcement of a valid pre-petition arbitration clause. *In re U.S. Lines*, 197 F.3d 631, 640 (2d Cir. 1999). However, even if the automatic stay is considered a core proceeding, the

FAA should be given priority because any perceived conflicts between the two Acts would not seriously jeopardize the objectives of bankruptcy law.

1. Even if the Core/Non-Core framework utilized by the lower court is applicable, the arbitration clause at issue is still enforceable under the FAA.

A core proceeding is said to involve a claim that invokes substantive rights created by federal bankruptcy law under chapter 11 or is a claim that could only arise in the context of a bankruptcy case while a non-core proceeding is a proceeding that is otherwise related to a case under chapter 11, such as one that arises under state law. Lichtenstein & Michaloski, *supra*. The rationale for the core/non-core distinction is that non-core proceedings "are unlikely to present a conflict sufficient to override by implication the presumption of arbitration," whereas, core proceedings "implicate more pressing bankruptcy concerns." *In re U.S. Lines*, 197 F.3d at 640. Accordingly, in non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid pre-petition arbitration agreement. *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 166 (2d Cir.2000).

Here, even if the automatic stay is considered a core proceeding, there is no evidence that it presents a conflict sufficient to override the FAA. To start, the Court would have to first determine definitively that Section 362 is a core proceeding. In order to evaluate whether a claim is core, a court might look to the illustrative list of core proceedings found in 28 U.S.C. 157(b)(2). *In re Affirmative Ins. Holdings, Inc.*, 565 B.R. 566, 581 (Bankr. D. Del. 2017). While the Thirteenth Circuit held "with absolute certainty" that the automatic certainty is a core proceeding, it is notable that 28 U.S.C. § 157(b) does not specifically account for claims alleging a violation of the automatic stay. Of course, it is true that 28 U.S.C. § 157(b), by its own terms, is a non-

inclusive list of core proceedings.[3] Even if this threshold question is satisfied, "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 bankruptcy proceedings. *In re Nat'l Gypsum*, 118 F.3d 1056, 1067 (5th Cir.1997). Thus, even if Section 362 cannot be read harmoniously with the FAA because it is a core proceeding central to bankruptcy law, that simple fact alone is not dispositive.

2. Any conflicts between the Bankruptcy Code and the FAA would not "seriously jeopardize" the objectives of bankruptcy law.

Even if the Court, for the first time, applies the Core/Non-Core test, Respondent should still be bound by the pre-petition arbitration agreement. A determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration." *In re U.S. Lines,* 197 F.3d at 640. Moreover, even in a core proceeding, the *McMahon* standard must be met – that is, a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision "only if arbitration would conflict with the underlying purpose of the Bankruptcy Code." *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012). A bankruptcy court has discretion to override an arbitration agreement due to an inherent conflict if the claim would "seriously jeopardize" the objectives of the Code. *MBNA Am. Bank, N.A.* v. Hill, 436 F.3d 104, 108 (2d Cir. 2006). Such a determination requires an inquiry into the nature of the claim and asks a court to access "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

[3] Notably, a determination that the automatic stay is a core proceeding might even be futile because the distinction between core and non-core is trivial since 28 U.S.C. § 157 states, "a bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under the Code." Under this language, even if the bankruptcy judge determines that a proceeding is not a core issue, he or she may maintain jurisdiction over the proceeding as long as it relates to the case filed under the Bankruptcy Code. Thus, a bankruptcy court has broad discretion in determining what is or is not a core proceeding. Matthew Dameron, *Stop the Stay: Interrupting Bankruptcy to Conduct Arbitration,* 2 Journal of Dispute Resolution 5 (2001).

bankruptcy court to enforce its own orders." *In re Nat'l Gypsum Co.*, 118 F.3d at 1069. If a severe conflict is found, then the court can properly conclude that, "with respect to the *particular Code provision at issue*", Congress intended to override the FAA's policy favoring arbitration. *MBNA Am. Bank*, 436 F.3d at 108 (emphasis added). With respect to the automatic stay, however, Congress clearly did not intend to override the FAA.

Regarding the goal of a centralized resolution of bankruptcy issues and the need to protect parties from piecemeal litigation, the Thirteenth Circuit highlighted the fact that Wildflowers and Respondent anticipated a two-party dispute, thus, "because creditors and other parties in interest cannot be compelled to arbitrate, the collective nature of bankruptcy inherently conflicts with the FAA." R. at 12. However, in *Moses H. Cone Hospital v. Mercury Construction Corp.*, the Court evaluated a lower court's decision to stay a federal suit out of deference to parallel litigation and stated that "under the [FAA] an arbitration agreement must be enforced notwithstanding the presence of other persons" who are not parties to the arbitration agreement. 460 U.S. 1, 20 (1983). Hence, the mere existence of other parties in a core proceeding who might be indirectly affected by arbitration does not require the denial of a pre-petition agreement to arbitrate.

Additionally, arbitration of the automatic stay does not interfere with a bankruptcy court's power to enforce its own orders. In *MBNA Am. Bank*, the Second Circuit held that, although a claim alleging willful violations of the automatic stay was a core proceeding, arbitration would not seriously jeopardize the objectives of the automatic stay. 436 F.3d at 108. The court reasoned that the important objectives of the automatic stay, providing debtors with a fresh start and protecting the assets of an estate, are goals that may still be accomplished through arbitration of a dispute. *Id*. Most importantly, the Second Circuit distinguished the automatic stay from other claims that might arise under the Code, such as an injunction, which arises by operation of an affirmative order of

the bankruptcy court, rather than by operation of statutory law. *Id*. at 110. An arbitrator of a claim involving Section 362, the court explained, "would be asked to interpret and enforce a statute, not an order of the bankruptcy court," which is exactly why arbitration is a presumptively appropriate forum for the automatic stay. *Id*. The Second Circuit also noted that Congress has specifically authorized the litigation of automatic stay claims outside of bankruptcy courts and so there is no reason that actions brought under 362 should be categorically exempt from arbitration. *Id*. at 111.

Furthermore, a discharge injunction is different from the automatic stay because violations of the discharge injunction "are enforceable only by the bankruptcy court and only by a contempt citation." *In re Golden*, 587 B.R. 414, 427 (Bankr. E.D.N.Y. 2018). Therefore, there is no need for a bankruptcy court to retain jurisdiction of an automatic stay dispute because the automatic stay does not interfere with a bankruptcy court's power to enforce its own orders. This is clearly distinguishable from other sections of the Code such as the injunction found within Section 524. As a result, it would be difficult to contend that the FAA seriously jeopardizes the objectives of bankruptcy law with respect to the automatic stay.

C. Allowing arbitration of Section 362 claims preserves separation of power principles and underlines the importance of the FAA.

What is key to the Court's jurisprudence regarding challenges to the FAA is a consistent acknowledgment of the important separation of power principles at play. "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be." *Epic*, 138 S. Ct. at 1624. Moreover, rules aiming for harmony over conflict in statutory interpretations "grow from an appreciation that it is the job of Congress by legislation, not the Court by supposition, both to write the laws and to repeal them." *Id*. The Court has often observed the importance of the freedom to contract by acknowledging that

the FAA requires courts to rigorously enforce arbitration agreements "according to their terms." *Epic*, 138 S. Ct. at 1621. A dispute concerning Section 362 of the Code should be no exception.

Without a clear and manifest Congressional command, there is no compelling reason why the parties should not be bound by the terms of the arbitration agreement. Allowing the parties to proceed in the exact manner that they contracted for pre-petition ultimately preserves important separation of power principals and aligns with the liberal federal policy favoring arbitration. In contrast, allowing Respondent to evade his contractual obligation will force the FAA to take a back seat to bankruptcy law and discourage creditors, like Wildflowers, from contracting with parties who might end up in bankruptcy court. Such a result is clearly at odds with Congressional intent in enacting the FAA to end judicial hostility toward arbitration agreements.

II. Section 362(c)(3)(A) of the Bankruptcy code mandates the termination of the automatic stay with respect to property of the estate.

Upon the filing of a petition to begin bankruptcy under chapters 7, 11, or 13, Bankruptcy Code Section 362(a) is triggered and automatically stays particular actions in three categories: actions against the debtor, actions against the debtor's property, and actions against the property of the bankruptcy estate. 11 U.S.C. § 362(a). The automatic stay created by the filing of a petition to begin bankruptcy is a "fundamental . . . protection provided by the bankruptcy laws," serving as a method by which debtors are afforded "breathing room" during the period of financial reorganization. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protc.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, at 54 (1978); H. R. Rep. No. 95-595, at 340 (1977)); *Soares v. Brockton Credit Union (In re Soares)*, 107 F. 3d 969, 975 (1st Cir. 1997).

Despite the fundamental nature of the automatic stay, fears surrounding potential abuses of the stay culminated in the enactment by Congress of the Bankruptcy Abuse Prevention and

Consumer Protection Act of 2005 ("BAPCPA"). The enactment of BAPCPA amended Section 362(c) by adding section 362(c)(3)(A), which reads:

> (3) if a single or joint case is filed by or against a debtor . . . and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, . . . (A) the stay under subsection (a) with respect to any action taken with respect to a debtor 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). Though the purpose of this addition was "to provide for termination of the automatic stay in certain situations of successive bankruptcy filings," the drafting of the language of Section 362(c)(3)(A) has led to inconsistent applications and, ultimately, a split in authority surrounding the termination of the automatic stay. *In re Daniel*, 404 B.R. 318, 320 (N.D. Ill. 2009). There are two competing schools of interpretation of Section 362(c)(3)(A): the "majority" view, which reads the provision to terminate the stay as to actions against the debtor and the debtor's property but not as to actions against property of the bankruptcy estate; and the "minority" view, which reads the provision to terminate the stay in its entirety. *See In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008).

The Thirteenth Circuit erroneously adopted the majority view by reasoning that the phrase "with respect to the debtor" is plain and unambiguous. R. 16. This decision conflicts with the internal text of Section 362(c)(3)(A), ignores the context of Section 362(c)(3) as a whole, and, most egregiously, flies in the face of the purpose and policy behind the enactment of the BAPCPA. Because the minority view is the correct interpretation of Section 362(c)(3)(A) and is the most consistent with the statutory scheme, the Thirteenth Circuit's decision should be reversed, and the automatic stay should be terminated with respect to property of the estate.

A. The text of Section 362(c)(3)(A) supports reversal of the Thirteenth Circuit because the phrase "with respect to the debtor" distinguishes between persons rather than property.

By analyzing the text of Section 362(c)(3)(A) it becomes clear that the phrase "with respect to the debtor" was included by Congress to draw a line between individual persons rather than distinguishing between different types of property. Looking to the prefatory language of Section 362(c)(3) it becomes clear that "the most plausible and least troublesome reading of 'with respect to the debtor' places its meaning in the context of joint cases filed by a married couple." *In re Reswick*, 446 B.R. at 369 (citing *In re Daniel*, 404 B.R. at 326). Section 362(c)(3) begins by stating, "if a single or joint case is filed by or against a debtor who is an individual . . .". 11 U.S.C. § 362(c)(3). The phrases "single or joint debtor" and "single or joint case" contained within this introductory provision act as definitional, shedding light on the meaning of "with respect to the debtor" that appears in the subsection immediately following it. The distinction between a "single" and "joint" debtor and a "single" and "joint" case in 362(c)(3), and the subsequent clarification of "with respect to the debtor" in 362(c)(3)(A), serves as a distinction as *to whom* the automatic stay terminates rather than *to which property* the automatic stay terminates.

This meaning of "with respect to the debtor" most closely comports with the overall purpose of Section 362(c)(3) as a whole and allows subsection (A) to operate practically – since the intended purpose of Section 362(c)(3) is to deter debtors from filing a second or third bankruptcy case within a one-year period of a previous filing solely for the benefit of the automatic stay, drawing distinctions between types of property covered by the automatic stay would essentially do nothing to serve this purpose. *St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 145 (D. Mass. 2013). Reading Section 362(c)(3)(A) and the phrase "with respect to the debtor" to mean that the automatic not terminated with respect to the property of the estate moves away from this, as "[t]he practical effect of such a narrow reading of the provision is likely to be so small Congress

might as well have saved the ink." *Id*. Repeat filers of bankruptcy petitions would likely not be deterred from if the automatic stay remained in place for the bankruptcy estate, as the automatic stay would cover a large portion of the property in question. Upon the filing of a bankruptcy petition, "the vast majority of the debtor's property becomes estate property," causing only a small fraction of the debtor's property to remain personal to the debtor and leaving crumbs of estate property to be secured by creditors upon termination of the automatic stay. *In re Smith*, 910 F.3d 576, 587 (1st Cir. 2018) (citing 11 U.S.C. § 541(a); *Taylor v. Freeland & Krontz*, 503 U.S. 638, 642 (1992)). The repeat filer would have an incentive to file a second bankruptcy petition within one year of a previous filing, as a large portion of his property would therefore become indefinitely protected by the automatic stay of Section 362(c)(3)(A). On the other hand, distinguishing between individuals, such as jointly filing spouses, causes the deterrent effect of the provision remains untouched.

The "spousal exclusion" interpretation of the phrase "with respect to the debtor" in Section 362(c)(3)(A) most closely comports with the prefatory language of the provision while simultaneously avoiding the impractical effects of the "estate-property" exclusion advanced by the majority view. *In re Daniel* at 326. By distinguishing between persons rather than types of property, the termination of the automatic stay with respect to the serially-filing spouse alone gives the newly-filing spouse the protections intended by Section 362(c)(3) while also discouraging a serially-filing spouse from successive bankruptcy filings within a one-year period. Viewing the phrase "with respect to the debtor" as a phrase of clarification between persons "makes the stay protection end as to the debtor and the debtor's property (in addition to the ending of stay protection against the . . . property of the estate" while also "defin[ing] the debtor affected by [Section 362(c)(3)(A)]." *In re Curry*, 362 B.R. 394, 400-01 (Bankr. N.D. Ill. 2007).

B. The text of Section 362(c)(3)(A), when read in the context of the statutory scheme as a whole, supports the termination of the automatic stay in its entirety.

Statutory interpretation begins where all such inquiries are to begin: with the language of the statute itself. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011). Words and phrases of a particular statute, however, are not to be read in isolation; rather, "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). While the sole function of the courts is to enforce a statute's language to its terms when the language of the statute is plain, "[t]he 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).

1. Traditional canons of statutory interpretation support reading the phrase "with respect to the debtor" within the context of Section 362(c)(3).

When examining particular language of a statute, "a reviewing court should not confine itself to examining a particular statutory provision in isolation . . . [t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). While it is understood that the mere fact that courts disagree on the meaning of a provision does not automatically render a provision ambiguous, where the two methods of interpreting a particular provision of a statute are "so distinct" and where, as here, a "plain meaning" approach to discern the meaning of a provision has the effect of "reading out language written elsewhere in the provision while reading in new qualifications that are written nowhere," it can be said that the provision in question is ambiguous. *In re Reswick,* 446 B.R. 362, 370 (B.A.P. 9th Cir. 2011).

Though courts adopting the majority view would categorize the phrase "with respect to the debtor" as a clear example of a plain meaning – and thus holding the automatic stay to remain in place as it pertains to the property of the estate – he admits the issue with the phrase "with respect to the debtor" when considering the phrase within the context of the Section as a whole: "Section 362(c)(3)(A) *as a whole is not free from ambiguity*." *Id*. (emphasis added). By viewing the phrase "with respect to the debtor" in isolation, the majority wholly ignores other key pieces of text in the surrounding statute that act as breadcrumbs leading to the meaning of Section 362(c)(3)(A). "The meaning of section 362(c)(3)(A) does not hinge upon one phrase alone; it is instead illuminated by the text of the statute in its entirety, by the text of surrounding statutes, and by the practical implications of any given interpretation." *In re Smith*, 573 B.R. 298, 303 (Bankr. D. Me. 2017). Admittedly, the phrase "with respect to the debtor" when read in isolation seems, on its face, unambiguous. *In re Reswick* at 367. This hyper-focused analysis of this phrase by the majority, however, goes outside the bounds of traditional statutory interpretation and leads to a closeted view of Section 362(c)(3)(A) that moves sharply away from the purpose of the BAPCPA amendment. By placing 362(c)(3)(A) within the context of 362(c)(3), it becomes clear that the automatic stay should be terminated with respect to the property of the estate.

Additionally, the Supreme Court is no stranger to interpreting phrases such as "with respect to" and "relating to" as phrases of expansion. In *Lamar, Archer & Cofrin, LLP v. Appling*, the Supreme Court was tasked with interpreting the phrase "respecting the debtor's financial condition" as found in Section 523(a)(2)(B). 138 S. Ct. 1752, 1757 (2018). In interpreting this phrase, the Court began by looking to the language of the statute itself, noting that since the Bankruptcy Code did not, through its own language, define the words "statement," "financial condition," or "respecting," the ordinary meanings of the words were to be consulted to glean

meaning of the phrase in question. *Id*. at 1759. The Court determined that "respecting" means "in view of: considering; with regard or relation to[,];" however, noting that the definitions of these words were "overlapping and circular," the Court next turned to the use of the word "respecting" in the bankruptcy context. *Id*. at 1759-60. In this context, the Court concluded that "the word 'respecting' . . . generally has a broadening effect, ensuring the scope of a provision covers not only its subject but also matters relating to that subject." *Id*. at 1760.

Where, as here, Section 362(c)(3)(A) is read to exclude property of the estate, the Supreme Court's reasoning that "respect[ing]" is an expansive term is thrown out the window. In fact, it is difficult to reconcile this understanding of the phrase "with respect to" with the narrow view of the meaning given to the phrase by the majority view. As the First Circuit observed in *In re Smith,* this argument "misfires," as the bankruptcy estate of a debtor is "as much a 'matter[ ] relating to th[e] subject' of the debtor as is the debtor's property . . . [there is] no explanation for why the expander 'with respect to' *would not* include estate property if it includes debtor property." 910 F.3d at 582-83 (citing *Appling* 138 S. Ct. at 1760).

Even if, however, the phrase "with respect to" is not given this expansive meaning as articulated by the Supreme Court, the context of Section 362(c)(3) still supports termination of the automatic stay in its entirety. When read as a cohesive unit rather than in the cherry-picked manner advocated for by the majority, the Thirteenth Circuit, and Respondent, it becomes clear that the minority's view and interpretation of Section 362(c)(3)(A) is the correct one.

2. The entirety of the automatic stay should be terminated because it is consistent with the context of Section 362(c)(3) as a whole.

By understanding the way that the automatic stay is created and enforced for repeat-filers in bankruptcy makes it clear that Section 362(c)(3) and, consequently, termination of the stay in subsection (A), is meant to cover the debtor, the debtor's property, and the property of the

bankruptcy estate. The automatic stay afforded to debtors is created and described by Section 362(a) of the Bankruptcy Code. 11 U.S.C. § 362(a). This stay, however, is imposed differently for different types of filers. At the top of the totem pole of filers under Section 362(a), first-time filers enjoy the benefits of an automatic and permanent stay, which remains in place until the bankruptcy case closes or the stay is modified by an act of a court. See 11 U.S.C. §§ 362(a)(1)-(2); § 362(d). Conversely, the bottom of the totem pole represents filers that have pending in one year three or more petitions for bankruptcy – these filers fall into Section 362(c)(4), which provides that "the stay under subsection (a) shall not go into effect upon the filing of the [third or subsequent] case." *Id*. § 362(c)(4). Section 362(c)(3) encompasses filers that fall between first-time filers and third-time filers, placing their protections "[i]n the middle." *In re Smith* at 586 (citing *In re Smith*, 573 B.R. at 305). Upon the filing of a second single or joint case by or against a debtor, Section 362(c)(3) is activated and, therefore, subsections (A), (B), and (C) are implicated. 11 U.S.C. §§ 362(c)(3)(A), (B), (C). By reading Section 362(c)(3)(A) alongside subsections (B) and (C), the context of Section 362(c)(3) becomes apparent and the meaning of subsection (A) becomes clear – that the automatic stay is to be terminated with respect to property of the estate.

Section 362(c)(3)(B) outlines the process by which a "party in interest" may move to extend the duration of the automatic stay. 11 U.S.C. 362(c)(3)(B). Specifically, by motion of a "party in interest," whether that be the debtor or the creditor, and upon notice and a hearing, a court my choose to extend the duration of the automatic stay "as to any and all creditors." *Id*. This process operates on a stringent timeframe: the motion, notice, and hearing requirements found within this subsection must "be completed before the expiration of the 30-day period." *Id*. Finally, the party in interest must demonstrate that the filing of the second bankruptcy case "is in good faith as to the creditors to be stayed." *Id*. This subsection supports the view that Section

362(c)(3)(A) terminates the stay in its entirety as it "gives meaning to the universe of 'part[ies] in interest' entitled to seek stay extension under Section 362(c)(3)(B)." *In re Smith*, 573 B.R. at 305. This provision allowing an extension of the automatic stay is not limited to debtors but extends to creditors alike, and "[u]nless [Section] 362(c)(3)(A) effects a termination of the automatic stay for the property of the estate, there would not appear to be a need to provide parties in interest with the right to move to extend the stay or a need to extend the stay to all creditors." *In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006). In other words, judicial efficiency and resources would be wasted by attempting to determine whether an automatic stay's lifespan should be extended when, if the automatic stay remains in effect as to property of the estate, "only the debtor would be interested in extending the stay." *In re Jones*, 339 B.R. at 364. The only way to reconcile the use of the phrase "party in interest" found in Section 362(c)(3)(B) is by termination of the automatic stay with respect to property of the estate, thus making both debtors *and* creditors attracted to the notion of extension of the automatic stay.

Similarly, the burden of proof standard set out in Section 362(c)(3)(C) is only given weight if the automatic stay is terminated with respect to property of the estate. Section 362(c)(3)(C) and its subsections explain the process by which a court may examine whether a second filing was done in good faith and is therefore connected to subsection (B): "for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) – . . ." 11 U.S.C. § 362(c)(3)(C). This high burden of proof further supports the termination of the automatic stay in its entirety. The court in *In re Jupiter* expounded on this contextual interpretation, noting that it is not likely that Congress enacted 362(c)(3)(C), "which both requires an extraordinary amount of work on the part of the moving parties and courts" to only render the section meaningless and have no penalty if the stay is not

extended. 344 B.R. at 760. For both Sections 362(c)(3)(B) and (C), a reading of Section 362(c)(3)(A) that is consistent with the majority's view and leaves in place the automatic stay with respect to property of the estate renders subsections (B) and (C) virtually meaningless and impractical. Therefore, viewing Section 362(c)(3)(A) in the context of 362(c)(3) as a whole supports the termination of the automatic stay in its entirety with respect to Respondent's bankruptcy estate.

3. A plain meaning approach to the phrase "with respect to the debtor" as articulated by the majority view both adds to and ignores text of Section 362(c)(3)(A).

Finding no ambiguity in the language of Section 362(c)(3)(A), proponents of and courts that have adopted the majority view in interpreting the provision focus solely on the phrase "with respect to the debtor," giving it axiomatic importance while simultaneously adding to and ignoring the accompanying text of the provision where it is found. Though Section 362(c)(3) "has been subject to much confusion . . . and has raised many issues," courts within the majority – as well as the Thirteenth Circuit below – continue to erroneously maintain that the language of the statute is unambiguous and, therefore, results in the termination of the automatic stay only with respect to the debtor and the debtor's property. *In re Moon*, 339 B.R. 668, 672 (Bankr. N. D. Ohio 2006). The issue with the majority view is thus one of inconsistency and contradiction. The courts adopting this view maintain that "with respect to the debtor" is plain on its face and scold the minority for "adding" the word "estate" to Section 362(c)(3)(A) before executing an about-face and adding *their own* words to the same Section in a puzzling move that can be described as nothing short of legal whiplash. *See Rose v. Select Portfolio Servicing, Inc.*, 945 F. 3d 226, 230 (5th Cir. 2019) (stating that "there is no mention of the bankruptcy estate [in Section 362(c)(3)(A)], and we decline to read in such language.")

Indeed, the interpretation of the phrase "with respect to the debtor" to mean that the automatic stay is not terminated with respect to property of the estate clashes with the notion that the phrase is plain. When looking at the phrase "with respect to the debtor" through the microscopic lens of the majority, the most obvious reading would be that the automatic stay terminates with respect to the debtor personally, leaving the stay in place with respect to the debtor's property and the estate property. *Smith v. Maine Bureau of Revenue Servs.*, 509 B.R. 1, 11-12 (D. Me. 2018). This is not the view of the majority, nor is it an interpretation of the phrase adopted by any court. *In re Daniel*, 404 B.R. at 402. Most importantly, when considering the three categories covered by the automatic stay in Section 362(a), it is reaching to affirmatively state that the only one referenced in Section 362(c)(3)(A) – termination of the stay with respect to actions with respect to the debtor – can be expanded to reach only two of the three applications of the stay. *In re Daniel,* 404 B.R. at 323. This skewed understanding of the plain meaning interpretation Section 362(c)(3)(A) demonstrates the weakness with this approach – "it does not simply find that the stay terminates with respect to the debtor personally, even though a 'plain language' interpretation of 'with respect to the debtor' might dictate such a result[.]" *In re Reswick*, 446 B.R. at 369. The majority view thus commits the very sin that the minority view is scolded for: adding language to the text of Section 362(c)(3)(A) that does not exist.

Not only does the majority view add words to Section 362(c)(3)(A), but it also ignores an important phrase found at the beginning of the provision: "debt or property securing such debt." 11 U.S.C. 362(c)(3)(A). The First Circuit pointed out this flaw, explaining that this phrase's location "after 'the stay under subsection (a)' and the combination of the phrase with 'with respect to a debt' and 'with respect to any lease' indicate that the clause summarizes the actions stayed in 'subsection (a).'" *In re Smith*, 910 F.3d at 582. The summarization of the actions stayed in

subsection (a) therefore "cannot establish that [Section] 362(c)(3)(A) terminates the stay for actions against debtor property but not for actions against estate property. *Indeed, it suggests the opposite*. *Id*. (emphasis added). The majority's attempt at reading the phrase "with respect to the debtor" in a vacuum backfires when considering the phrase "debt or property securing such debt," as the effect of the majority view cannot be reconciled with the explicit reference to the "debt or property." This interpretation would cause Section 362(c)(3)(A) to terminate the automatic stay with respect to any "debt or property securing such debt" (a phrase that encapsulates *both* the debtor's property and the property of the estate) while simultaneously keeping the automatic stay in place for the property of the estate. Again, this is an example of a fatal flaw of the majority's interpretation of Section 362(c)(3)(A): the narrow reading of "with respect to the debtor" renders Section 362(c)(3)(A) "oxymoronic," and only works when the phrase "debt or property securing such debt" is wholly ignored. *In re Daniel*, 404 B.R. at 322.

The Thirteenth Circuit attempts to employ a plain meaning approach to Section 362(c)(3)(A) but simultaneously adds text to the provision that does not exist and ignores text of the provision that is in black and white. The minority view of Section 362(c)(3)(A) is the most appropriate to adopt when determining the meaning of Section 362(c)(3)(A). Since the minority view is therefore the most appropriate and consistent reading of Section 362(c)(3)(A), the Thirteenth Circuit's decision should be reversed, and the automatic stay should be terminated with respect to property of the estate.

C. The termination of the automatic stay with respect to property of the estate is consistent with the purpose of the Bankruptcy Code and Congressional intent.

As previously discussed, Section 362(c)(3), when read in its entirety, supports the view that the statute as a whole is ambiguous and, therefore, legislative history should not be disregarded when interpreting Section 362(c)(3)(A). The Supreme Court has noted that the enactment of the

BAPCPA was done with the intention "to correct abuses of the bankruptcy system," and, in fact, has sought to consult the Congressional intent behind a number of BAPCPA provisions – even when refusing to find that the provisions in question were ambiguous. *In re Goodrich,* 587 B.R. 829, 840 (noting that BAPCPA cases establish that the Court's will nonetheless defer to the ultimate Congressional purpose of the Act).

Consulting legislative history in the face of the ambiguity found in Section 362(c)(3) and Section 362(c)(3)(A) is therefore necessary in understanding the extent of the termination of the automatic stay, and doing so reveals that Congress clearly intended for the automatic stay to be terminated in its entirety. As the Supreme Court noted in *Milavetz, Gallop & Milavetz, P.A. v. U. S.*, the enactment of the BAPCPA was done so with the intention to "correct perceived abuses of the bankruptcy system," with one of the many purposes of the Act being to address the "proliferation of serial [bankruptcy] filings" and to ultimately "deter serial and abusive bankruptcy filings." 559 U.S. 229, 231-32 (2010); *In re Smith*, 910 F.3d at 589 (citing H.R. Rep. No. 109-31(I), at 2 (2005)). Congress explicitly stated its intention behind amending Section 362(c) of the Code: Congress aimed to "Discourage Bankruptcy Abuse" and "Discourage Bad Faith Repeat Filings" by creating a system through which Section 362(c) of the Bankruptcy Code "terminate[s] 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(I), at 137-38 (2005). Nowhere in the 597 pages of this House Committee Report does Congress describe the termination of the automatic stay as being "partial" or "only with respect to the debtor and the debtor's property," and thus "does not support the notion that termination of the automatic stay was only a partial and extremely limited termination as most opinions on this issue have found." *In re Curry* at 402.

Though the Thirteenth Circuit categorizes the legislative history accompanying the enactment of BAPCPA as "inconclusive," the "available legislative history . . . suggests that Congress intended that [S]ection 362(c)(3)(A) terminate all of the protections of the automatic stay." R. at 18., *In re Paschal*, 337 B.R. 274, 278 (Bankr. E.D.N.C. 2006). Based on a report written by the National Bankruptcy Review Commission Congress embarked on reforming the Bankruptcy Code, "including an amendment that was 'essentially identical' to [Section] 362(c)(3)(A)." Nat'l Bankr. Review Comm'n, *Report of the National Bankruptcy Review Commission*, § 1.5.5, 278-79 (Oct., 20, 1997). This 1994 amendment and its identical nature to Section 362(c)(3)(A), enacted eleven years later, evidences Congress's long-standing attempts and prioritization of discouraging serial filings of bankruptcy and abuses of the automatic stay of Section 362(a). The efforts of Congress and the language within the BAPCPA's House Committee Report support the only conclusion that is consistent with the Congressional purpose in creating Section 362(c)(3)(A): that the automatic stay terminates on the thirty-first day with respect to the debtor, the debtor's property *and* the property of the estate.

CONCLUSION

Ultimately, this case presents a textbook example of a serial filer seeking to evade a binding, pre-petition arbitration clause and exploit the protections set forth by the provisions of the automatic stay. Both the FAA and the BAPCPA exist to prevent such behavior. For the reasons stated herein, Petitioner respectfully asks this Court to reverse the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

Team P. 29
Counsel of Record for Petitioner

APPENDIX A

7 U.S.C. § 26(n)(1): The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.

9 U.S.C. § 2: A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3: 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: 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. 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.

10 U.S.C. § 987: (e) It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which—
(3) the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute;

11 U.S.C. § 362(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;

11 U.S.C. § 362(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;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)

(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) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) by terminating, conditioning, or limiting the stay as to such action of such creditor.

11 U.S.C. § 362(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;

11 U.S.C. § 523(a)(2)(B): A discharge under section 727, 1141, 1192 [1] 1228 (a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— (B) use of a statement in writing—

(i) that is materially false;
(ii)respecting the debtor's or an insider's financial condition;
(iii)on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
(iv)that the debtor caused to be made or published with intent to deceive; or

11 U.S.C. § 707(b): (1)After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

12 U.S.C. § 5567(d)(2): Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.

18 U.S.C. § 1514A(e): No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

28 U.S.C. § 157(b): 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.

28 U.S.C. 1334(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.